



## **Burden Shifted to Accused Infringer to Show Accused Product Not Made by Patented Process**

Apr 6, 2017

Reading Time : **1 min**

By: Jonathan James Underwood, Rubén H. Muñoz

The court first considered the “substantial likelihood” prong, stating that the test was met by a “persuasive showing,” i.e., “less than . . . a preponderance of the evidence, but more than a slight possibility”. On balance, the court found the patentee’s evidence persuasive. The catalyst was shown to be present in the final product, and the accused infringer offered no explanation for this evidence. Furthermore, although less persuasive, the patentee adduced expert evidence stating that there was no commercially reasonable alternative processes by which to prepare the product. Finally, the alleged infringer’s evidence about the manufacturing process (conducted by a foreign corporation in a foreign country) suffered from “credibility issues,” and the alleged infringer also did not provide batch records.

Turning to the “reasonable effort” prong, the court stated that the test was met if the patentee followed “all of the avenues of discovery likely to uncover the [accused] process, including written discovery requests, facility inspections, first-hand observation of the process, independent testing of process samples, the use of experts, and depositions of the [appropriate] officials.” The court found that the patentee had made reasonable efforts by submitting several interrogatories and requests for production, following up on discovery responses to seek clarifications and further documentation, and taking the deposition of the appropriate corporate officer from the foreign manufacturing company. Given the “extremely difficult” circumstances that the patentee faced in trying to get evidence from the foreign manufacturer, not least because the alleged infringer did not fully cooperate in the discovery process, the court determined that the patentee’s efforts were reasonable.

Ultimately, the court denied the competing summary judgment motions on infringement because the quantity of catalyst used was still factually disputed. Nevertheless, the court shifted the burden to the alleged infringer to show at trial that the product was made by a non infringing process.

*Syngenta Crop Protection, LLC v. Willowood, LLC*, 1-15-cv-00274, 2017 WL 1133378 (M.D.N.C. Mar. 24, 2017, Order) (Eagles, J.)

## Categories

District Court

Non-Infringement

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