

Fed. Circ. Upholds ITC Infringement Finding On Milk Patent

By Adam Lidgett

Law360 (September 17, 2021, 6:30 PM EDT) -- The Federal Circuit on Friday upheld the U.S. International Trade Commission's finding that a pair of bacteria strains used by German-based Jennewein infringed a Glycosyn milk patent.

A three-judge appellate panel rejected challenges from Jennewein Biotechnologie GmbH, which is now part of Chr. Hansen Holding, against the ITC's claim construction and its finding that the strains infringed.

The panel found that there was enough evidence backing the ITC's finding that the two strains at issue met various limitations — or elements — laid out in the patent-at-issue: U.S. Patent No. 9,970,018.

The dispute started when Massachusetts-based Glycosyn claimed at the ITC that Jennewein was importing human milk oligosaccharides, or HMOs, that were infringing its patent, according to court documents. Those Jennewein HMOs used the two *E. coli* strains at issue, according to court documents.

The patent covers a way to produce purified HMOs — sugars found in breast milk — using *E. coli* bacteria. The panel noted that "these oligosaccharides 'serve critical roles in the establishment of a healthy gut microbiome, in the prevention of disease, and in immune function.'"

The ITC kicked off an investigation in June 2018 based on a complaint lodged by Glycosyn accusing Jennewein of importing certain HMOs that infringe the '018 patent.

Administrative Law Judge Cameron Elliot issued an initial determination in September 2019 that two strains, the ones at issue in the Federal Circuit appeal, infringed, according to court documents. However, Judge Elliot left open whether another strain infringed, according to court documents.

After that, the ITC agreed to partially review the judge's finding that Jennewein's imports infringe the Glycosyn patent.

The ITC affirmed the ALJ's findings regarding the two strains at issue, but found that another strain did not infringe, court records showed. The commission issued a limited exclusion order barring entry of the infringing products, according to court documents.

"We are pleased to see Glycosyn's position vindicated," Michael Newman, a Mintz Levin Cohn Ferris Glovsky and Popeo PC attorney who represented Glycosyn, said in a statement Friday. "Glycosyn has

dedicated itself to the research and development of breakthrough technologies in the field of HMOs. Glycosyn respects the intellectual property of others, and expects others to do the same."

The ITC declined to comment to Law360 on Friday.

Counsel for Jennewein did not immediately respond to requests for comment.

The patent-at-issue is U.S. Patent No. 9,970,018.

Circuit Judges Alan David Lourie, William Curtis Bryson and Raymond T. Chen sat on the panel for the Federal Circuit.

Jennewein is represented by Scott McMurry, Nicole A. Saharsky, Gary M. Hnath, Bryan C. Nese and Minh Nguyen-Dang of Mayer Brown LLP.

The ITC is represented by Houda Morad and Wayne W. Herrington of the commission's Office of the General Counsel.

Glycosyn is represented by Michael C. Newman, Thomas H. Wintner, Michael T. Renaud, James M. Wodarski, Matthew A. Karambelas and Courtney Herndon of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The case is Jennewein Biotechnologie GmbH v. ITC, case number 20-2220, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Kaitlyn Burton. Editing by Jill Coffey.