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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER, DISTRICT JUDGE PRESIDING

GENSCI ORTHOBIOLOGICS, INC.,

PLAINTIFF,

VS.

OSTEOTECH, INC.,

DEFENDANT.

CASE NO. CV 99-10111-MRP

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTIONS CALENDAR

LOS ANGELES, CALIFORNIA
MONDAY, MARCH 12, 2001

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APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

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ON BEHALF OF THE DEFENDANT:

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LET THEM SAY SOMETHING.

MR. BROWN: YOUR HONOR, RONALD BROWN APPEARING FOR OSTEOTECH.

IT'S OUR POSITION, OBVIOUSLY, THAT GENSCI IS NOT ENTITLED TO WITHDRAW ITS ADMISSIONS.

THE PURPORTED BASIS FOR GENSCI'S WITHDRAWAL OF ADMISSIONS ARE THE TWO THIRD-PARTY STUDIES ABOUT WHICH WE KNOW VERY LITTLE BECAUSE THEY HAVE NOT BEEN THE SUBJECT OF DISCOVERY.

GENSCI WAITED MORE THAN THREE MONTHS AFTER THOSE STUDIES WERE PRESENTED AND TWO MONTHS AFTER THE COURT'S ADVERSE MARKMAN RULING BEFORE IT FILED ITS MOTIONS -- ITS MOTION TO WITHDRAW ITS ADMISSIONS.

IT WASN'T UNTIL AFTER WE FILED OUR MOTION FOR SUMMARY JUDGMENT, THAT IT THEN FILED ITS MOTION TO WITHDRAW ITS ADMISSIONS.

IT REALIZED THAT GIVEN THE COURT'S ADVERSE MARKMAN RULING AND THE PENDENCY OF THE SUMMARY JUDGMENT --

THE COURT: WELL, YOU SAY ADVERSE. AND YOU ARE CHARACTERIZING IT FOR YOUR POSITION IN THE LITIGATION.

WHEN YOU MAKE A MARKMAN RULING, YOU DON'T MAKE AN ADVERSE ONE. YOU JUST MAKE ONE.

MR. BROWN: I AM NOT SUGGESTING THAT THE COURT WAS TAKING SIDES. I AM SUGGESTING THAT THE CONSEQUENCES OF THAT RULING WERE ADVERSE TO GENSCI.

SO, IT REALIZED THAT IT NEEDED TO GENERATE AN ISSUE TO DEFEAT THE SUMMARY JUDGMENT MOTION.

NOW, WE DON'T THINK THAT GENSCI SHOULD BE ALLOWED TO WITHDRAW ANY OF ITS ADMISSIONS FOR THE FOLLOWING REASONS.

REQUESTS FOR ADMISSIONS ARE MEANT TO HIGHLIGHT AND REMOVE FROM THE CASE THOSE MATTERS FOR WHICH THERE IS A REAL CONTROVERSY BETWEEN THE PARTIES.

ABSENT A DISPUTE BETWEEN THE PARTIES ON A MATTER THAT HAS BEEN ADMITTED, THERE IS NO BASIS FOR WITHDRAWING AN ADMISSION.

THE COURT: SO, LET ME ASK YOU THIS QUESTION.

LET US ASSUME, AS IN THIS CASE, THAT YOU -- THAT YOU IN GOOD FAITH BASED ON YOUR BELIEF AND WHAT YOU HAVE LEARNED ABOUT YOUR PRODUCT IN PUTTING IT OUT IN THE MARKET AND WHAT YOU'VE SAID ABOUT IT, THAT YOU AGREE. YOU GOT SOME -- YOU ACTUALLY ADMIT AFTER YOU HAVE ALL TALKED IT OVER A PARTICULAR FACT.

AND THEN AFTER THAT, YOU GET TWO INDEPENDENT STUDIES. AND YOU READ THEM. AND YOU SAY, HMM, NOW, THAT IS GOING TO HURT THE PRODUCT. AND IT'S GOING TO HURT THE MARKETABILITY OF THE PRODUCT. AND WE BETTER GET GOING ON DISPROVING THOSE STUDIES. BUT WE CAN'T DO IT BEFORE THE TRIAL.

AND WHAT WE'D LIKE TO SAY IS WHEN WE GET INTO THE COURTROOM, WELL, IT LOOKS LIKE OUR PRODUCT IS NO GOOD. BUT

WE DON'T ADMIT THAT. WE ARE VERY UNCERTAIN. AND WE HAVEN'T HAD A CHANCE TO LOOK INTO THESE TWO STUDIES TO DECIDE WHETHER THEY ARE ANY GOOD OR NOT. AND THE MARKETPLACE IS NOW LOOKING AT THE PRODUCT AS BEING UNWORKABLE. IT ISN'T -- IT HASN'T ANY VALUE. WE CONTINUE TO BELIEVE IN IT, BUT WE CAN'T SAY ONE WAY OR THE OTHER.

NOW, THAT'S A -- THAT IS A PERFECTLY MARVELOUS LITIGATING POSITION. PERFECTLY MARVELOUS. THAT'S THOUGHT OUT TO THE POINT WHERE IT'S -- IT'S BREATHTAKING IT'S SO CLEVER IN ITS -- IN THE WAY IT'S BEING USED. BECAUSE IT LEAVES THEM OPEN TO LEAVING THE COURTROOM AND GOING OUT AND HAVING ANOTHER COUPLE OF STUDIES. AND THEY CAN SAY, AHA, WE WERE RIGHT ALL ALONG.

MR. BROWN: OR REJECT THE STUDIES THAT IT CHOOSES --

THE COURT: THAT'S RIGHT.

MR. BROWN: -- THAT ARE ADVERSE.

THE COURT: YES.

I MEAN, WE'VE JUST ALREADY SHOWN HERE --

MR. BROWN: AND THAT'S WHAT I'M TRYING TO GET IT.

I THINK THE FATAL FLAW IN THEIR TRIAL TACTICS IS THE ARGUMENT THAT SOMEHOW THEY ARE ENTITLED TO WITHDRAW AN ADMISSION WITHOUT A CHANGE IN THE BELIEF ON GENSCI'S PART.

REMEMBER, MR. MC DERMOTT SAID -- AND GENSCI SAID IN ITS OWN MOTION PAPERS, THAT IT MADE ITS ADMISSIONS BECAUSE

WHEN THEY WERE MADE, QUOTE, IT BELIEVED THAT DYNAGRAFT PRODUCTS WERE OSTEOGENIC, OSTEOINDUCTIVE, END QUOTE.

ITS BELIEF HAS NOT CHANGED. OBVIOUSLY, ITS BELIEF HAS NOT CHANGED BECAUSE IT WANTS TO CONTINUE TO TELL THE MEDICAL COMMUNITY THAT IT HAS AN OSTEOINDUCTIVE PRODUCT.

THE COURT: NOW, LET'S LOOK AT IT.

MR. BROWN: BUT THE PROBLEM --

THE COURT: LET'S LOOK AT IT FROM YOUR STANDPOINT.

IF THEY WERE TO TRY TO SAY THAT THESE TWO STUDIES HAD MADE THEM UNCERTAIN, YOU WOULD OBJECT TO THAT EVIDENCE.

WOULDN'T YOU?

MR. BROWN: AT THIS POINT, WE WOULD OBJECT ON THE GROUNDS OF RULE 36(B), PRIMARILY, THE PREJUDICE COMPONENT.

BUT WHAT I AM SUGGESTING IS --

THE COURT: WELL, YOU WOULD OBJECT ON THAT RULE ALSO IF I WERE TO LET THEM WITHDRAW THE ADMISSION.

MR. BROWN: YES. THAT'S CORRECT.

THE COURT: YOU ARE GOING TO BE PREJUDICED EITHER WAY.

MR. BROWN: THAT'S CORRECT.

THE COURT: WELL, YOU KNOW, YOU HAVE TO LET THEM OFF THE GROUND A LITTLE BIT.

DON'T YOU?

MR. BROWN: WELL, THIS WAS NOT OF OUR CHOOSING, YOUR HONOR. THEY CHOSE TO TAKE THE POSITION, NOTWITHSTANDING

ALL OF THESE MASSIVE STUDIES THAT WERE DONE PRIOR TO THEIR ADMISSION, THAT THEIR PRODUCT WAS OSTEOGENIC.

THEY HAVE TAKEN ADVANTAGE OF THAT IN THE MARKETPLACE FOR THE LAST TWO YEARS. AND, NOW, ON THE EVE OF TRIAL, THEY WANT TO CHANGE THEIR TUNE. BUT THEY DON'T WANT TO CHANGE IT ALL THE WAY. THEY ARE NOT PREPARED TO COME TO COURT AND SAY, OUR PRODUCT IS NOT OSTEOGENIC.

GENSCI CONTINUES TO SAY TO THIS DAY THAT ITS PRODUCT IS OSTEOGENIC NOTWITHSTANDING THESE THIRD-PARTY STUDIES.

AND I CAN --

THE COURT: I KNOW THAT.

MR. BROWN: SO, GIVEN THAT, AND GIVEN THE RULES ON REQUEST FOR ADMISSIONS, IT SEEMS TO ME THAT THERE IS NO BASIS FOR THEM EVEN GETTING TO RULE 36 BECAUSE THEIR BELIEF HAS NOT CHANGED. ABSENT A CHANGE IN BELIEF, THERE IS NO DISPUTE BETWEEN THE PARTIES. AND THEY'RE NOT ENTITLED TO WITHDRAW THAT ADMISSION.

THE COURT: THEY WILL SAY TO YOU IN A MINUTE, WE STILL BELIEVE IN OUR PRODUCT.

MR. BROWN: AND THAT --

THE COURT: BUT WE'RE NOT SO SURE NOW. WE THINK IT MAY NOT WORK.

MR. BROWN: BUT THE POINT IS THAT GENSCI ITSELF IS SAYING IN ITS PAPERS AND IN THE PUBLIC, EVEN AFTER THE

STUDIES, DYNAGRAFT IS OSTEOGENIC. SO, ITS POSITION HAS NOT CHANGED ONE IOTA. THE ONLY POSITION THAT'S CHANGED IS THAT BEFORE THIS COURT.

AND WHAT I AM SUGGESTING IS THAT IT OUGHT NOT ALLOW THEM TO WITHDRAW AN ADMISSION WHEN OSTEOTECH -- WHEN GENSCI ITSELF IS NOT PREPARED TO STAND UP AND SAY, OUR PRODUCT IS NOT OSTEOGENIC. THERE'S SIMPLY NO BASIS FOR WITHDRAWING AN ADMISSION ABSENT THEIR CONFESSION THAT IT IS NOT OSTEOGENIC.

WE'VE RESEARCHED THIS, YOUR HONOR. WE'VE LOOKED AT ALL OF THE WITHDRAWAL OF ADMISSION CASES. AND WE HAVEN'T FOUND A SINGLE CASE WHERE A PARTY HAS SUCCEEDED OR EVEN TRIED TO WITHDRAW AN ADMISSION WITHOUT A CHANGE IN THE BELIEF THAT FORMED THE BASIS FOR THE ADMISSION. THE ONLY EXCEPTION IS THE DEFAULT CASES. AND THOSE REALLY AREN'T APPOSITE.

SO, HERE, WE HAVE A UNIQUE SITUATION. THIS IS A TACTIC THAT I'VE NEVER SEEN BEFORE. AND AS FAR AS I CAN TELL, IT'S NEVER BEEN TRIED IN THE COURTS.

THE COURT: WELL, CREATIVITY IS EVERYTHING.

IT'S AN INTERESTING POSITION TO TAKE.

MR. BROWN: LET ME -- WHAT I WANT TO SUGGEST IS THAT IT'S CLEAR THAT GENSCI ACKNOWLEDGES THAT ITS INITIAL ADMISSION WAS BASED ON ITS BELIEF.

THE COURT: YES.

MR. BROWN: IT STILL BELIEVES THAT THE PRODUCT IS OSTEOGENIC. AND IT DOES SO DESPITE THESE THIRD-PARTY STUDIES

--

THE COURT: WELL, NO. IT GOES MORE LIKE THIS.

WE THINK -- OF COURSE, WE WOULDN'T HAVE OFFERED IT IN THE MARKET AS OSTEOGENIC IF WE HADN'T THOUGHT IN OUR HEART OF HEARTS THAT IT WAS. BUT WE'VE GOT THESE TWO STUDIES NOW. AND WE'RE JUST NOT SURE.

MR. BROWN: IT SEEMS TO ME, YOUR HONOR, THAT THE QUESTION BEFORE THE COURT WOULD BE MORE DIFFICULT WERE GENSCI TO ADMIT THAT IT NOW BELIEVES DYNAGRAFT IS NOT OSTEOGENIC. THERE WOULD, AT LEAST, BE A DISPUTE BETWEEN THE PARTIES, WHICH COULD FORM THE PREDICATE FOR GETTING TO RULE 36(B).

BUT WITHOUT STANDING BEFORE THE COURT AND ADMITTING THAT DYNAGRAFT IS NOT OSTEOGENIC, THERE IS NO BASIS FOR THE COURT GETTING TO RULE 36(B) OR WITHDRAWING ITS ADMISSIONS.

I'D LIKE TO ADDRESS, WITH THE COURT'S PERMISSION, THE ISSUE OF PREJUDICE BECAUSE I THINK IT'S REAL IN THIS CASE. AND COUNSEL HAS SUGGESTED THAT --

THE COURT: WELL, CERTAINLY.

GO AHEAD.

MR. BROWN: -- THERE ISN'T A SUFFICIENT BASIS FOR CLAIMING PREJUDICE. AND IT TAKES ME TO TASK FOR NOT BEING MORE SPECIFIC AS TO THE NATURE OF THE PREJUDICE. SO, I'LL TRY TO BE MORE SPECIFIC.

IT SAYS -- LET ME TURN TO THE SPECIFIC NATURE OF THAT PREJUDICE. THE FACT IS -- AND I AM REPRESENTING TO THE

COURT THIS TO BE THE CASE. I WAS RESPONSIBLE FOR DOING MUCH OF THE DISCOVERY IN THIS CASE WITH MR. LEVITT. SO, I HAVE A PRETTY GOOD IDEA OF WHAT WE DID AND DIDN'T DO AND WHY WE DID AND DIDN'T DO IT.

WE DID NOT ATTEMPT TO CONDUCT EXTENSIVE DISCOVERY ON GENSCI'S STUDIES OR OTHER SO-CALLED INDEPENDENT STUDIES ON OSTEOINDUCTIVITY BECAUSE THEY WERE NOT NEEDED.

WE DIDN'T START TAKING DEPOSITIONS IN THIS CASE UNTIL AFTER GENSCI MADE ITS ADMISSIONS THAT DYNAGRAFT GEL AND PUTTY WERE OSTEOINDUCTIVE.

NOW, I HAVE A DOCUMENT. IT'S NOT FORMALLY PART OF THE RECORD. BUT IT WAS PRODUCED IN DISCOVERY. AND IN SUBSTANCE, IT LISTS 24 STUDIES THAT GENSCI HAD DONE OR HAD UNDERWAY AS OF MARCH 1998. THOSE ARE OSTEOINDUCTIVITY STUDIES.

THIRTEEN OF THEM, AS OF MARCH 19, 1998, HAD EITHER NOT BEEN STARTED, OR IT HAD NOT BEEN COMPLETED. OF THE 24 STUDIES, WE HAVE ABOUT 3 OR 4 OF THOSE STUDIES IN OUR POSSESSION.

SO, AS OF THE CLOSE OF DISCOVERY, THERE WERE NUMEROUS STUDIES RELATED TO OSTEOINDUCTIVITY OF DYNAGRAFT THAT WERE UNDERWAY OR HAD CONCLUDED.

GENSCI HAS NOT PRODUCED THOSE DOCUMENTS -- THOSE STUDIES OR ANY OTHER STUDIES THAT HAVE BEEN COMMENCED OR COMPLETED OVER MORE THAN THE LAST YEAR.

WE WOULD HAVE GONE AFTER THOSE STUDIES -- AND I'M NOT SUGGESTING THAT THEY IMPROPERLY WITHHELD THEM. BUT THAT WE MADE A CONSCIOUS DECISION NOT TO GO AFTER THOSE STUDIES BECAUSE THERE WAS NO NEED TO GO AFTER THOSE STUDIES. WE HAD THE ADMISSIONS WE NEEDED ON OSTEOINDUCTIVITY. WHY DELVE INTO ANOTHER 20 OR 30 OR MORE OSTEOINDUCTIVITY STUDIES WHEN IT DIDN'T AID IN OUR POSITION.

TO THE LIMITED EXTENT THAT GENSCI DID PRODUCE ITS STUDIES AND OTHER INDEPENDENT STUDIES THAT REPORTED ON THE OSTEOINDUCTIVITY OF DYNAGRAFT, WE DID NOT ATTEMPT TO EVALUATE THEIR RELIABILITY BECAUSE THEY WEREN'T NEEDED.

WE MADE NO ATTEMPT TO RECONCILE THE RESULTS OF OSTEOTECH STUDIES OR DR. AUFDEMORTE'S STUDIES WITH THOSE OF GENSCI ON EACH LOT OF DYNAGRAFT DBM BECAUSE IT WASN'T NEEDED, NOR DID WE HAVE OUR EXPERTS OPINE ON WHETHER DYNAGRAFT IS OSTEOGENIC FOR THE SAME REASON. IT WASN'T NEEDED.

NOW, HOW CAN GENSCI ARGUE THAT OSTEOTECH WILL NOT BE PREJUDICED AT TRIAL WHEN WE TRY TO PROVE THAT DYNAGRAFT IS OSTEOGENIC. WE'VE HAD NO OPPORTUNITY TO INVESTIGATE THESE THIRD-PARTY STUDIES. GENSCI SAYS THERE CAN BE NO PREJUDICE ARISING FROM THESE CHANGED CIRCUMSTANCES. BUT THE CASES IT'S CITED DON'T SUPPORT ITS POSITION.

I THINK IT'S CLEAR THAT THE COURT CAN TAKE INTO ACCOUNT PREJUDICE TO THE OTHER PARTY IN DECIDING WHETHER THOSE STUDIES ARE ADMISSIBLE.

WE DID NOT PURSUE DISCOVERY FROM GENSCI OF WHAT FURTHER STUDIES IT HAS DONE OR THAT HAVE BEEN REPORTED TO IT. AND THERE MAY BE MANY. WE KNOW THAT THERE'S AT LEAST 20.

ITS WITNESSES, ALL OF WHOM PREVIOUSLY SAID DYNAGRAFT WAS OSTEOGENIC BASED ON THE EXISTING STUDIES, NOW ARE FREE TO SAY THAT IN LIGHT OF THE MOST RECENT EVIDENCE, IT'S UNCLEAR. THAT LEAVES US WITH ONLY WITH THE FEW STUDIES PRODUCED BY GENSCI -- STUDIES THAT IT'S NOW FREE TO QUESTION BECAUSE WE DIDN'T INVESTIGATE THE VALIDITY OF THOSE STUDIES DURING DISCOVERY.

AND THE TAYLOR DEPOSITION AND THIS IN VITRO TESTING IS A PRIME EXAMPLE. I INTERROGATED MS. TAYLOR ON WHAT THE IN VITRO TESTING WAS IN ORDER TO UNDERSTAND IT. BUT I MADE NO ATTEMPT, AND THERE WAS NO DISCOVERY TO DETERMINE WHETHER, IN FACT, THE IN VITRO TESTING WAS RELIABLE OR A SURROGATE FOR IN VIVO TESTING, WHICH IS THE CLAIM THAT IS MADE BY GENSCI.

SO, WITHOUT THE OPPORTUNITY TO DO ANY DISCOVERY ON THESE THIRD-PARTY STUDIES OR TO FORCE GENSCI TO COMMIT TO THE VALIDITY OF ITS OWN STUDIES OR OTHER INDEPENDENT STUDIES OR TO DISCOVER WHAT ELSE GENSCI KNOWS ABOUT THE OSTEOINDUCTIVITY OF DYNAGRAFT OR TO RELY ON THE OPINIONS FROM OUR OWN EXPERTS, WE CAN'T HELP BUT BE PREJUDICED.

MR. BROWN: YOUR HONOR, WE ARE SEEKING A SUMMARY JUDGMENT UNDER RULE 56(D) ON DYNAGRAFT GEL AND PUTTY INFRINGING FOR CLAIMS 4 AND 10 OF THE '558 PATENT.

IT'S CLEAR FROM THE MOTION PAPERS THAT CERTAIN FACTS AND LEGAL CONCLUSIONS ARE NOT IN DISPUTE. LET ME START WITH THOSE AND GET THOSE OUT OF THE WAY.

FIRST, IT'S NOT IN --

THE COURT: I READ IT.

MR. BROWN: OKAY. I WILL MOVE ON THEN.

THE ONLY THING LEFT IN DISPUTE, IT SEEMS TO ME, ARE, FIRST, WHETHER THE PREAMBLE IMPOSES A CLAIM LIMITATION IN SOMETHING BEYOND THAT OF OSTEOGENICITY.

AND, SECOND, WHETHER THE PLURONIC AND WATER SOLUTION USED IN DYNAGRAFT IS A LIQUID SOLUTION.

WE'VE ALREADY ADDRESSED THE OSTEOGENICITY ELEMENT AS PART OF THE MOTION TO WITHDRAW THE ADMISSIONS. SO, LET ME MOVE TO THE PREAMBLE. AND THIS IS REALLY GENSCI'S ARGUMENT.

IT ARGUES THAT THE PHRASE, TO PROMOTE NEW BONE GROWTH AT THE SITE IMPOSES A REQUIREMENT OF SOMETHING MORE THAN OSTEOGENICITY. BUT THE COURT IS WELL FAMILIAR WITH THE LAW ON PREAMBLES.

THE COURT: I AM.

MR. BROWN: AND IF ONE LOOKS AT THE CLAIM IN THIS CASE, ONE SEES THAT ALL OF THE ELEMENTS OF THE RECIPE ARE FOUND IN THE BODY OF THE CLAIM. THAT PORTION OF THE PREAMBLE RELIED ON BY GENSCI IS NOT NECESSARY TO GIVE MEANING TO THE CLAIM, BUT MERELY SETS FORTH AN INTENDED PURPOSE.

NOW, GENSCI GOES FURTHER. AND IT WANTS TO LIMIT THE PREAMBLE. IT WANTS TO MAKE THE PREAMBLE A LIMITATION AND CONSTRUE IT TO IMPOSE A PERFORMANCE REQUIREMENT ON A COMPOSITION.

IT SAYS, FIRST, THAT THERE CAN BE NO INFRINGEMENT UNLESS THE COMPOSITION HAS BEEN USED BY A SURGEON. IT SAYS THAT UNLESS THE SURGICAL PROCEDURE ACTUALLY RESULTS IN BONE GROWTH, THERE IS NO INFRINGEMENT.

BUT BECAUSE THESE ARE PLAINLY COMPOSITION CLAIMS, AND THE CLAIM ITSELF SAYS IT'S DIRECTED TO A COMPOSITION, IT'S IMPROPER TO IMPOSE PROCESS REQUIREMENTS ON A COMPOSITION CLAIM.

THE COURT: I BELIEVE I AGREE WITH THAT.

MR. BROWN: I CITE THE TRANSMATIC CASE FOR THAT PROPOSITION.

SO, INFRINGEMENT OF COMPOSITION CLAIMS DOESN'T DEPEND ON EITHER THE USE OF THE COMPOSITION OR ITS SUCCESS IN ACHIEVING THE INTENDED PURPOSE OF THE INVENTION.

LET ME MOVE ON TO THE NEXT ISSUE, REMAINING ISSUE. AND THAT IS WHETHER THE PLURONIC SOLUTION IS A LIQUID SOLUTION WITHIN THE MEANING OF THE CLAIMS.

WHAT'S THE EVIDENCE THAT PLURONIC SOLUTION IS USED AS A CARRIER IN DYNAGRAFT AS A LIQUID SOLUTION. WELL, WE HAVE THE COURT'S RULING, WHICH, I BELIEVE, IN THIS CASE, IS DISPOSITIVE.

THE COURT SAID THAT SOLUTIONS INCLUDE COLLOIDAL SUSPENSIONS. IT FURTHER SAID THAT, QUOTE, CONSISTENCY IS NOT RELEVANT TO DETERMINING WHETHER A MIXTURE CAN BE CLASSIFIED AS A SOLUTION, END QUOTE.

WHAT KIND OF SOLUTIONS WAS THE COURT TALKING ABOUT IF IT WASN'T TALKING ABOUT LIQUID SOLUTIONS. IT FOLLOWS THAT A CARRIER CONSISTING OF A COLLOIDAL SUSPENSION IS A LIQUID SOLUTION.

THE COURT HAS FURTHER FOUND, AND GENSCI ACKNOWLEDGES, THAT PLURONIC IN WATER IS A COLLOIDAL SUSPENSION. IT, THEREFORE, FOLLOWS THAT PLURONIC IN WATER, THE CARRIER USED IN DYNAGRAFT, IS A LIQUID SOLUTION WITHIN

THE MEANING OF THE CLAIM. PLAIN AND SIMPLE.