IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RHODIA CHIMIE and RHODIA INC.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 01-389 (KAJ)
	)	
PPG INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

On January 22, 2004, Rhodia filed a Motion for Continuance and Request for Reconsideration of the Court's January 16, 2004 Order (the "Motion"). (Docket Item ["D.I."] 281.) Specifically, Rhodia asks me to reconsider my decision to exclude its late submissions of DIN test results and expert reports and to continue the February 23, 2004 trial date to allow it to conduct DIN testing. (*Id.*)

Rhodia argues that, prior to my October 9, 2003 claim construction, it had "no reason ... to expect that [the November 1969 DIN standard] would be read into the claims or that it was otherwise required to perform DIN testing ... ." (D.I. 282 at 8.) That assertion is contradicted by the record in this case. Even if one ignores that the DIN standard was cited in the patent by Rhodia itself to demonstrate the superior character of its invention with respect to dust formation (*see* '234 Patent, attached to D.I. 1, at col. 6, lines 65-67, and Tables I and II), and even if one ignores that in March of 2002 Rhodia received discovery responses from PPG specifically pointing to the DIN standard as a basis for construing the term "non-dusting" (*see* D.I. 109 at Tab 6, pg. 4), and even if one ignores that Rhodia was aware in May of 2002 of a report from one of PPG's experts regarding the DIN testing undertaken by PPG on certain of its accused

products (*see* D.I. 193 at Ex. H, ¶¶ 40-43, 58), there was still, in the summer of 2003, ample notice to Rhodia that the DIN standard cited in the patent was a matter to be addressed in the case.

On July 18, 2003, I sent the parties a letter in which I noted that I was engaged in claim construction, that the '234 patent made reference to a test performed according to the DIN standard, and that I wanted the parties to provide an English translation of the standard. (D.I. 177.) If that was not enough to put Rhodia on notice that the DIN 53 583 standard was a matter of significance in construing the patent claims and, consequently, in demonstrating infringement, I then held a teleconference with the parties the following month, on August 26, 2003, and explicitly invited their input on how I should construe the "dust-free and non-dusting" limitation, in light of the DIN 53 583 standard. (*See* D.I. 192, Transcript at, e.g., 5:2-7 (in which I stated, "the inventors attempted to describe or quantify in some fashion how they tested the particulates ... to indicate that this was, relatively speaking, dust-free and non-dusting. ... [O]ne of those tests was that DIN 53 583 percentage of weight measurement ... . "), and 6:17-24 (in which I stated, "here's the question I'm dealing with: It occurs to me that there's a fair point made by PPG here that without something more specific than very low or low dust formation, that we run into problems of indefiniteness and particularized and distinct claiming, and that these specific examples may be the best way for the Court to give some specificity to the terminology dust-free and low dusting.").) Therefore, Rhodia has been on notice since at least July 2003, or August 2003 at the latest, that the DIN 53 583 standard was likely to be involved in my construction of the "dust-free and non-dusting" limitation in the patent.

In light of the foregoing, why Rhodia chose to wait until October of 2003 to begin the process of attempting DIN testing and producing a related expert report is not a matter for my speculation. I do not doubt that the reasons were well-considered, since the parties and their attorneys enjoy excellent reputations and have been highly capable in advancing their positions in this case. It is my responsibility, however, to see that all parties before the Court operate within the rules of procedure, so that the administration of justice can be fair and even-handed. Patent cases are typically not nimble craft. The voyage to trial is arduous, involving many months, sometimes years, of labor and expense in the development of the record, in the resolution of myriad disputes, both procedural and substantive, and in the parties' preparations for trial. It would be the rare case indeed in which a party could credibly say at the last moment, when the period for expert disclosures was long past and the preparation of the final pretrial order was underway, that the ship must, in fairness, stop instantly while new information and expert reports are brought on board and a new schedule for trial is set.[1] This is not that rare case.

Because Rhodia has not shown that there has been an intervening change in the law, newly discovered evidence, or a legal or factual error which has resulted in a

[1] Remarkably, at oral argument less than two weeks ago, when confronted with the possibility that Rhodia's DIN data may be excluded from the record, Rhodia's counsel stated, "[t]here is no reason in the world to change our trial date." (1/12/04 Hearing Transcript ["Tr."] at 43:8-9.) The present motion appears to accept the reality that holding the trial date would be impossible were Rhodia's late submissions permitted to become part of the record.

manifest injustice, *see Max's Seafood Café by Lou-Ann, Inc. v. Quinteros*, 177 F.3d 669, 677 (3d Cir. 1999), it is hereby ORDERED that Rhodia's Motion (D.I. 281) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
January 23, 2004