

**The AIPLA's  
2020-2021 Giles Sutherland Rich Memorial  
Moot Court Competition**

*GOJI Industries Corp. v. Veejay, Inc.*, Case No. 2020-GSR

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**Problem Materials:**

This year's problem materials include:

- (1) This problem prompt
- (2) The Joint Appendix. The Joint Appendix includes pages Appx1-Appx25.

**Patent-in-Suit:**

The Patent-in-Suit is United States Patent GSR,835,913 to Greg Lawson and Andrea Brodsky (“the ’913 patent”). The ’913 patent is directed to hand sanitizers. Claims 1-7 of the ’913 patent (“the product claims”) recite a hand sanitizer having certain ingredients in certain concentrations, and claims 8-13 (“the method claims”) recite a method of making said hand sanitizer.

**Issues on Appeal:**

Two issues are on appeal to the United States Court of Appeals for the Federal Circuit:

- (1) Whether the appellant's failure to mark practicing products in accordance with 35 U.S.C. § 287(a) precludes pre-suit damages.
- (2) Whether the district court erred in declining to construe a claim term.

**Trial Counsel:**

The appellant was represented at trial by the law firm of Smith & Smith LLP. The appellee was represented at trial by the law firm of Jones & Jones LLP. The competitors are engaged as counsel only for the purposes of this appeal.

**Background:**

GOJI Industries Corp. (“Goji”) was founded in 1946 by Amber Lippstein. Before founding Goji, Amber was a supervisor in a rubber factory that made life rafts and rubber products for the war effort. At the end of each shift, Amber and her co-workers would dip their hands in a mixture of kerosene and benzene to remove stuck-on graphite and carbon black. Though effective cleaning agents, these chemicals left the workers’ hands rough and cracked. Amber was tough and did not mind the physical discomfort, but many of the people she managed frequently complained. So Amber set out to find a solution. Because she lacked a formal education in chemistry, Amber teamed up with Professor Thomas Baker from the University of Gilesead. Together, Amber and Thomas invented what became the world’s first hand cleaner that was effective against graphite and carbon black but also gentle on skin. Amber named the product “Rosie’s Rinse,” a nod to Rosie the Riveter. Rosie’s Rinse was a spectacular success. Initially marketed to factory workers in heavy industry, Rosie’s Rinse soon gained traction in other industries as well, including healthcare, foodservice, auto repair, and construction. As a result, Goji soon became the world’s largest manufacturer of hand cleaners, a position it still holds to this day.

In the early 1980s, spurred by the growing AIDS epidemic, Goji began researching rinseless hand cleaners not for removing dirt and grime, but rather killing germs. Goji’s research efforts paid off in 1988, when the company’s scientists invented a gel that kills germs on contact and

evaporates quickly without leaving residue, thus obviating the need to rinse after use. Marketed as “Cleanell,” it quickly became Goji’s best-selling product. It was so popular, in fact, that many people began using the word “Cleanell” to refer to similar products sold by Goji’s competitors, much like Kleenex and Band-Aid are used to refer to competing facial tissues and adhesive bandages. Fearing genericide of its trademark, Goji coined the term “hand sanitizer” to describe Cleanell and similar products. Goji also brought a trademark infringement lawsuit against a competitor, Veejay, Inc. (“Veejay”), which had been selling a competing hand sanitizer under the name “Veejay Cleanell.” The court agreed with Goji that despite early signs of genericism, “Cleanell” was still a distinctive trademark. Accordingly, the court granted Goji a permanent injunction prohibiting Veejay from calling its product “Cleanell.”

In 2006, Goji scientists Greg Lawson and Andrea Brodsky invented a new type of hand sanitizer. Dubbed “Cleanell Plus,” this new hand sanitizer was more effective at killing viruses than Cleanell, and it was less irritating to skin. For their work, Lawson and Brodsky were awarded the ’913 patent, which they assigned to Goji. The ’913 patent claims both the physical product and a method of making it. Claim 1 is representative of the product claims, and claim 8 is representative of the method claims:

1. A hand sanitizing composition, comprising:
  - a. a linear or branched antimicrobial solution;
  - b. a medium spreading emollient;
  - c. a high spreading emollient;
  - d. one or more skin conditioners;
  - e. a thickener; and
  - f. water;

wherein the weight ratio of said high spreading emollient to said medium spreading emollient is from about 3:1 to about 1:3 and by weight the total emollient mixture comprises no more than 3 wt. % of said sanitizing composition;

wherein the total skin conditioner component comprises no more than 1 wt. % of said sanitizing composition; and

wherein the linear or branched antimicrobial solution is made with alcohol.

8. A method of making a hand sanitizer composition comprising the steps of:

- a. mixing together in a vessel a high spreading emollient and a medium spreading emollient in a ratio of from about 3:1 to about 1:3 by weight, wherein the resulting emollient mixture will be about 1 to about 3 wt. % of said final composition;
- b. mixing in an antimicrobial solution that will be between about 60 wt. % and about 95 wt. % of said final composition, wherein the antimicrobial solution is made with alcohol;
- c. mixing in a skin conditioner with the emollients and antimicrobial solution, wherein the conditioner totals no more than about 1 wt. % of said final composition;
- d. homogenizing the mixture of emollient, antimicrobial solution, and skin conditioner;
- e. mixing in a thickening agent; and
- f. homogenizing the mixture of emollient, antimicrobial solution, skin conditioner, and thickening agent.

At the time of Lawson and Brodsky's invention, the CEO of Goji was Chad Lippstein, Amber Lippstein's grandson. Chad was relatively new to the family business, having graduated with his MBA from Gilesead State University only four years prior. Chad so strongly believed in Cleanell Plus's market potential that in 2007 he built a \$400 million factory dedicated to making the product using the method recited in claim 8 above. To finance construction, Goji went public with an initial offering of 100,000 shares for 40% equity. The remaining 60% of Goji's equity was split evenly between Amber's four children.

Sadly, sales of Cleanell Plus did not live up to expectations. It turned out that consumers did not value the product's additional effectiveness and gentleness enough to pay its much higher price. As a result, Goji's new factory often operated at only 10% capacity. Once the public caught

wind, Goji's stock price plummeted. Then the 2008 financial crisis hit, pushing Goji's stock price even lower. Goji was forced to lay off half its work force, including some top executives. Chad's uncle, Ronny Lippstein, was among those laid off from Goji. Chad had wanted to fire Ronny since before the financial crisis because he often challenged Chad's authority during board meetings. Ronny was also an outspoken critic of Chad's decision to build the new Cleanell Plus factory, rather than simply retool the company's existing factories to make Cleanell Plus. In Ronny's opinion, which he openly shared with anyone who would listen, Chad was too inexperienced and fiscally reckless to lead the family company.

Furious about his termination, Ronny sold his 15% stake in Goji to a private equity firm, Monroe Clark Partners ("MCP"). Unbeknownst to Ronny, however, MCP had also snatched up almost all the stock that Goji sold to the public in 2007. MCP consequently wound up owning 51% of Goji. In its first act as majority shareholder, MCP voted to remove Chad as CEO, citing his disastrous investment in Cleanell Plus. MCP then sold the Cleanell Plus factory and licensed the '913 patent to Beckitt Renckiser, a UK company, in exchange for a \$200 million one-time payment plus a 15% running royalty. Beckitt Renckiser continued producing Cleanell Plus under its own brand name, "Brettol," using the same method as Goji. The terms of the license did not require Beckitt Renckiser to mark Brettol with the number of the '913 patent, and Beckitt Renckiser did not do so.

Sales of Brettol remained modest for about a decade. Then, in early 2020, as COVID-19 was spreading rapidly around the globe, scientists at the U.S. Centers for Disease Control and Prevention (CDC) discovered that Brettol is 50% more effective against the virus than most other hand sanitizers. Brettol began flying off the shelves. In an attempt to prevent shortages, stores

instituted limits on the amount of Brettol that customers could purchase at one time. Still, Beckett Renckiser could not keep up with demand.

Meanwhile, CDC scientists also found that VireX, a competing hand sanitizer made by Veejay, is just as effective as Brettol and Cleanell Plus at killing COVID-19. VireX, too, began selling like hotcakes. By March 2020, VireX revenues for the year surpassed \$50 million. VireX is similar to Brettol and Cleanell Plus in many respects, but unlike those products it uses benzalkonium chloride instead of alcohol as the antimicrobial agent. Alcohol is, however, an intermediate ingredient of VireX's antimicrobial agent. That is, Veejay's manufacturing process uses alcohol as a reagent to make benzalkonium chloride. The alcohol reacts with other ingredients in VireX and is completely consumed in the process.

#### **The Case Below:**

On April 6, 2020, Goji sued Veejay in the United States District Court for the District of Gilesead, which is part of the First Circuit. The complaint accused Veejay of infringing only the method claims of the '913 patent. Goji did not accuse Veejay of infringing the patent's product claims.

Before trial, both parties moved for summary judgment under Fed. R. Civ. P. 56, Goji on the issue of infringement and Veejay on the issue of pre-suit damages. Regarding infringement, Goji argued there was no genuine dispute that Veejay practices every limitation of the asserted method claims in its manufacture of VireX. For support, Goji cited Veejay's technical documents showing how VireX is made. In response, Veejay argued that summary judgment of infringement would be improper because the parties had a genuine dispute of material fact as to whether VireX's antimicrobial solution is "made with alcohol." Goji replied that the dispute over the "made with

alcohol” limitation was purely a claim construction issue for the court to decide as a matter of law. The district court denied the motion and declined to construe the “made with alcohol” limitation.

As for pre-suit damages, Veejay argued that Goji was not entitled to such damages because it had failed to comply with the marking statute, 35 U.S.C. § 287(a). Goji responded that the marking requirement does not apply in this case because only method claims were asserted, citing *Crown Packaging Technology, Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308 (Fed. Cir. 2009). In reply, Veejay argued that “[w]here the patent contains both apparatus and method claims [and] there is a tangible item to mark by which notice of the asserted method claims can be given, a party is obliged to do so if it intends to avail itself of the constructive notice provisions of section 287(a.” *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1538-39 (Fed. Cir. 1993). The district court agreed with Veejay and therefore granted summary judgment of no pre-suit damages.

Trial was held remotely over Whoosh in January 2021. Veejay’s sole non-infringement argument was that it does not practice the “made with alcohol” limitation because VireX does not contain any alcohol. Veejay did not dispute that it practices every other limitation of the claims, nor did it dispute that it uses alcohol as a reagent to make benzalkonium chloride. Before deliberations, Goji moved for judgment as a matter of law that Veejay infringes the ’913 patent under a proper construction of “made with alcohol.” The district court denied the motion for the same reasons it had denied summary judgment of infringement. The jury then returned a verdict of non-infringement. Under Fed. R. Civ. P. 50(b), Goji renewed its motion for judgment as a matter of law. The district court denied the motion and entered a final judgment under Fed. R. Civ. P. 58.

**The Appeal:**

Goji timely appeals the district court's summary judgment of no pre-suit damages and its denial of judgment as a matter of law that Veejay infringes. Regarding the former, Goji argues the district court erred in holding that the marking requirement applies in this case. Regarding the latter, Goji argues that the district court's denial of judgment as a matter of law was based solely on an improper refusal to construe the "made with alcohol" term.