

Patentee Reproduction Of Accused Product Sufficient To Survive Summary Judgment Motion Of Non-Infringement (Farnan, J.)

In *Dow Chem. Co v. Nova Chem. Corp.*, 2010 U.S. Dist. LEXIS 50101 (D. Del. May 20, 2010), Nova moved for summary judgment of non-infringement. Dow's expert conducted tests on Dow's re-creation of Nova's accused infringing product and relied on those tests in opposition to Nova's motion. Nova contended that Dow's re-creation of the accused product was made using different polymerization conditions and a different catalyst than Nova uses.

In denying Nova's motion, the Court found that Dow produced sufficient evidence that the testing procedures its expert conducted were scientifically acceptable and based on the accused product. In addition, the Court found that the testing was done by a qualified expert in an appropriate setting. Moreover, the Court noted that the expert had provided substantial justifications for its action. As a result, genuine issues of material fact existed and summary judgment was denied.