

United States District Court,
D. Maryland, Southern Division.

STAR SCIENTIFIC, INC,
Plaintiff.

v.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

March 31, 2004.

Richard Mcmillan, Jr., Jonathan H. Pittman, Kathryn D. Kirmayer, Mark Michael Supko, Crowell and Moring LLP, Washington, DC, Andrew Jay Graham, Kramon and Graham PA, Baltimore, MD, for Plaintiff.

Barry Jay Rosenthal, Bromberg Rosenthal LLP, Leonard Samuel Goodman, Venable LLP, Rockville, MD, Dominic P. Zanfardino, Howard S. Michael, Justin B. Rand, Richard A. Kaplan, Robert G. Pluta, Abby L. Lernek, Cynthia Ann Homan, Danielle Anne Phillip, Harold V. Johnson, Jeffrey M. Nichols, Jerold A. Jacover, K. Shannon Mrksich, Patricia Leahu, Ralph Joseph Gabric, Robert Mallin, Brinks Hofer Gilson and Lione, Chicago, IL, August J. Borschke, RJ Reynolds Tobacco Co, Senior Counsel, Winston Salem, NC, David B. Hamilton, Womble Carlyle Sandridge and Rice PLLC, Baltimore, MD, for Defendant.

ORDER

ALEXANDER WILLIAMS, JR., District Judge.

On December 4, 2003, the Court received a Report and Recommendation from Special Master Philip G. Hampton [Paper No. 392] regarding Plaintiff Star Scientific, Inc.'s ("Star Scientific") motion for summary judgment for claim construction and summary judgment that the claims of the patents-in-suit satisfy the definiteness requirement of 35 U.S.C. s. 112, second paragraph [Paper No. 270]. The Special Master recommended that the Court enter an order construing the claims of the patents-in-suit and denying Plaintiff's motion for summary judgment that the asserted claims of the patents-in-suit are indefinite under 35 U.S.C. s. 112, second paragraph.

After *de novo* review of the entire record, including the Special Master's Report and Recommendation, Star Scientific Inc.'s filed objection [Paper No. 394], R.J. Reynolds Tobacco Company's (R.J. Reynolds) filed objection [Paper No. 396], Star Scientific's response to R.J. Reynolds's filed objection [403], and R.J. Reynolds's response to Star Scientific's filed objections [406], the Court finds that the Special Master fully considered the pleadings and supporting documents and carefully applied the law to the relevant facts. The Court agrees with the Special Master that the term "anaerobic condition" should be construed to mean "an oxygen deficient condition (such as is created by an atmosphere of combustion gases or from the release of carbon dioxide by the plant during cure) which promotes microbial nitrate reductase activity." The Court further agrees that the term "air free of combustion exhaust gases" should be construed to mean "air that does not contain the combustion exhaust gases from a direct-fired heating environment." Third, the Court

agrees that the term "controlled environment" should be construed to mean "controlling one or more of humidity, temperature and airflow in the curing barn, in a manner different from conventional curing, in order to substantially prevent the formation of TSNAs." Fourth, the Court agrees that the term "substantially prevent the formation of ... at least one nitrosamine" be construed to mean that "the level of at least one of the nitrosamines falls within the following ranges: less than about 0.05 (mu)g/g for NNN, less than about 0.10 (mu)g/g for NAT plus NAG, and less than about 0.05 (mu)g/g for NNK." Finally, the Court agrees that a genuine issue of fact exists in connection with the limitation "anaerobic conditions," no genuine issue of fact remains regarding the definiteness of the term "air free of combustion exhaust bases," genuine issues of material fact exist regarding the definiteness of the term "controlled environment," and that there is no genuine issue of material fact regarding the definiteness of the term "substantially prevent the formation of ... at least one nitrosamine."

Therefore, IT IS this 31st day of March, 2004, by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That the Report and Recommendation dated December 4, 2003[392] BE, and the same hereby IS, **ADOPTED** *in toto*; AND;
2. Plaintiff Star Scientific's motion for summary judgment for claim construction and summary judgment that the claims of the patents-in-suit satisfy the definiteness requirement of 35 U.S.C. s. 112, second paragraph [Paper No. 270] BE, and the same hereby IS, **DENIED**; AND;
3. That the term "anaerobic condition" should be construed to mean "an oxygen deficient condition (such as is created by an atmosphere of combustion gases or from the release of carbon dioxide by the plant during cure) which promotes microbial nitrate reductase activity"; AND;
4. That the term "air free of combustion exhaust gases" should be construed to mean "air that does not contain the combustion exhaust gases from a direct-fired heating environment"; AND;
5. That the term "controlled environment" should be construed to mean "controlling one or more of humidity, temperature and airflow in the curing barn, in a manner different from conventional curing, in order to substantially prevent the formation of TSNAs"; AND;
6. That the term "substantially prevent the formation of ... at least one nitrosamine" be construed to mean that "the level of at least one of the nitrosamines falls within the following ranges: less than about 0.05 g/g for NNN, less than about 0.10 g/g for NAT plus NAG, and less than about 0.05 g/g for NNK"; AND;
7. That the Clerk of the Court transmit copies of this Order to all counsel of record.

D.Md.,2004.

Star Scientific Inc. v. R.J. Reynolds Tobacco Co.

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