

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MILLER PRODUCTS CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 01-35-KAJ
)	
VELTEK ASSOCIATES, INC. and)	
ARTHUR L. VELLUTATO,)	
)	
Defendants.)	

MEMORANDUM ORDER

I. INTRODUCTION

This is a patent infringement case, currently set for a jury trial beginning on March 10, 2004. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1338. Presently before me are two Motions for Summary Judgment (Docket Items ["D.I."] 162, 165) filed by plaintiff Miller Products Co. Inc. ("Miller") and two Motions for Summary Judgment (D.I. 168, 170) filed by defendants Veltek Associates, Inc. and Arthur L. Vellutato, Sr. (collectively, "Veltek"). On November 13, 2003, Miller filed a Motion for Summary Judgment that U.S. Patent No. 6,123,900 (the "'900 patent") is invalid based on prior sales (D.I. 162) and a Motion for Summary Judgment that the '900 patent is unenforceable due to inequitable conduct and for attorney's fees (D.I. 165). On November 17, 2003, Veltek filed a Motion for Summary Judgment of validity of claims 1-5 and 9 of the '900 patent (D.I. 168) and a Motion for Summary Judgment of literal infringement of claims 1-5 and 9 of the '900 patent (D.I. 170). For the following reasons, all of the Motions will be denied.

II. BACKGROUND

Because the procedural and factual history of this case is familiar to the court and to the parties¹, I will set forth only those facts that are pertinent to the Motions under consideration.

Miller instituted this action on January 17, 2001, seeking a declaratory judgment of invalidity and noninfringement of claims 1-5 and 9 of the '900 patent. The application for the '900 patent was filed on October 28, 1993, and the patent issued on September 26, 2000. (See '900 patent, attached to D.I. 1 as Ex. A.) The patent claims a method of sterilizing alcohol contained in an aerosol container and a method of storing the sterilized alcohol composition. See *id.*, claims 1, 6, 9. All of the claims of the '900 patent are process or method claims. Claim 1 is representative of those involved in this suit and recites the claimed method of sterilization:

1. A method of sterilizing alcohol contained in an aerosol container comprising the steps of:
providing an aerosol container having an internal volume;
charging the internal volume of the aerosol container with a quantity of alcohol;
pressurizing the internal volume of the aerosol container with an inert gas and sealing the aerosol container;
hermetically sealing the aerosol container in a first sealing layer to form a first hermetically sealed container enclosure;
hermetically sealing said first hermetically sealed container enclosure in a second sealing layer to form a second hermetically sealed container enclosure;

¹See *Miller Products Co., Inc. v. Veltek Assocs., Inc.*, 2003 U.S. Dist. LEXIS 18673 (D. Del. Oct. 9, 2003) (denying Miller's motion for summary judgment of invalidity due to obviousness); *Miller Products Co., Inc. v. Veltek Assocs., Inc.*, 2003 U.S. Dist. LEXIS 18675 (D. Del. Oct. 17, 2003) (denying Miller's motion for summary judgment of invalidity based on *res judicata*); *Miller Products Co., Inc. v. Veltek Assocs., Inc.*, 218 F.R.D. 425 (D. Del. 2003) (denying Veltek's motions for leave to file an answer with first and second amended counterclaims).

inserting at least one second hermetically sealed container enclosure into a third sealing layer;
closing said third sealing layer to enclose said at least one second hermetically sealed container enclosure and form a third container enclosure;
enclosing said third container enclosure in a carton member to form a closed shipping package; and
externally irradiating said closed shipping package at a predetermined radiation level for a predetermined time interval to simultaneously sterilize said alcohol, said aerosol container, said first and second hermetically sealed container enclosures and said third container enclosure.

See '900 patent, col. 6, Ins. 44-67 to col. 7, Ins. 1-6. Veltek sells and markets the product sterilized according to the method disclosed in the '900 patent under the DECON-AHOL trademark. (D.I. 164, Ex. 3 ¶ 3.)

Veltek has filed a Declaration of Arthur L. Vellutato, Sr., wherein he stated that “[t]he first order of alcohol-pressurized aerosol containers packaged and sterilized according to my invention [the '900 patent] was shipped to the United States by CCL [Industries Limited, located in England] in about August 1992.” (D.I. 164, Ex. 3 ¶ 6.) During the course of discovery, Veltek produced several documents that support this statement by Mr. Vellutato, including an invoice from CCL to Veltek for the containers that were shipped to the United States in August 1992 (*id.*, Ex. 5) and an invoice from the shipping company that accepted the shipment from CCL to Veltek at a customs checkpoint in Baltimore, Maryland on September 14, 1992 (*id.*, Ex. 6).

Currently, Miller sells a product called XTRACLEAN, which it advertises as “12 ounce aerosol spray cans” of “sterile isopropyl alcohol.” (D.I. 170, Ex. 5.) The XTRACLEAN product is manufactured and produced by Applied Laboratories, Inc. (D.I. 185 at 7.) Miller describes its XTRACLEAN product as a “bag in a can” system, meaning that alcohol is encapsulated within a bladder inserted into a can, and then

nitrogen gas is used to pressurize the can, surrounding the bladder and forcing liquid to be expelled through the nozzle. (D.I. 170, Ex. 6.)

III. STANDARD OF REVIEW

Summary judgment is proper only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will “view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.” *Pa. Coal Ass’n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

If the nonmoving party fails to make a sufficient showing on an essential element

of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Miller's Motion for Summary Judgment That the '900 Patent is Invalid Based on Prior Sales

Section 102 of Title 35 of the United States Code provides, in pertinent part, that “[a] person shall be entitled to a patent unless...the invention was...in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States...” 35 U.S.C. § 102(b) (2003). This statutory provision is known as the “on-sale bar.” *Brasseler, U.S.A.I, L.P. v. Stryker Sales Corp.*, 182 F.3d 888, 889 (Fed. Cir. 1999). The ultimate determination of whether an invention was on sale within the meaning of § 102(b) is a question of law. *Id.* (citation omitted). Courts employ a two-part test to determine if the on-sale bar applies. *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 67 (1998). First, the product must be the subject of a commercial offer for sale and, second, the invention must be ready for patenting. *Id.*

Because the application for the '900 patent was filed on October 28, 1993, the critical date that triggers the on-sale bar in this case is October 28, 1992. Miller argues that, because the product produced according to the method disclosed in the '900 patent was on sale in the United States prior to the critical date, the '900 patent is invalid under 35 U.S.C. § 102.² (D.I. 162 at 8.) By Veltek's own admission, it “placed

²As is discussed more fully *infra*, Miller's argument fails to recognize that the on-sale bar applies differently to product patents than it does to process patents, such as the '900 patent. See, e.g., *Minton v. NASD, Inc.*, 336 F.3d 1373, 1378 (Fed. Cir. 2003) (Gajarsa, J., concurring); see also *Torpharm, Inc. v. Ranbaxy Pharmaceuticals, Inc.*, 336 F.3d 1322, 1327 (Fed. Cir. 2003) (when supplier sells product manufactured

orders with CCL to supply Veltek with commercial quantities of alcohol-charged pressurized alcohol containers packaged and sterilized according to [the] invention” of the ‘900 patent prior to the critical date. (D.I. 164, Ex. 3 ¶ 5.) Because CCL’s offer to sell was made from England and directed to Veltek at its place of business in the United States, the containers were on sale in the United States for purposes of 35 U.S.C. § 102. See *In re Caveney*, 761 F.2d 671, 676-77 (Fed. Cir. 1985) (even though company made its offer to sell from England, offer was directed to a company in the United States, making on-sale bar applicable). It is also undisputed that CCL shipped these containers to Veltek and that they arrived in the United States on September 14, 1992. (D.I. 164, Ex. 6.) It is clear, then, that the containers were the subject of a commercial offer for sale by CCL to Veltek prior to the critical date. See *Special Devices, Inc. v. OEA, Inc.*, 270 F.3d 1353, 1355 (Fed. Cir. 2001) (“[I]t does not matter who places the invention ‘on sale’; it only matters that someone - inventor, supplier or other third party - placed it on sale.”).

To determine whether the invention was ready for patenting under the second prong of *Pfaff*, there must be proof of reduction to practice before the critical date. 525 U.S. at 67. “A process is reduced to practice when it is successfully performed.” *Id.* at 57 n.2 (citation omitted). On the basis of Mr. Vellutato’s declaration, it appears that the process claimed by the ‘900 patent was successfully performed sometime in August 1992. (D.I. 164, Ex. 3 ¶ 6 (“The first order of alcohol-charged pressurized aerosol

according to patented process but process remains secret, “the sale of the product [does] not pose a statutory bar to a claim on the process”) (citation omitted).

containers packaged and sterilized according to my invention was shipped to the United States by CCL in about August 1992.”).³ Therefore, Miller argues, under the two-prong test articulated in *Pfaff*, the on-sale bar should apply in this case.

However, an exception to the general rule of *Pfaff* “exists where a patented method is kept secret and remains secret after a sale of the unpatented product of the method. Such a sale prior to the critical date is a bar if engaged in by the patentee or patent applicant, but not if engaged by another.” *Caveney*, 761 F.2d at 675 (citing *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984)); *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1147-48 (Fed. Cir. 1983).

In this case, the ‘900 patent claims a method of sterilization. While it is true that CCL sold, prior to the critical date, aerosol containers to Veltek that were packaged and sterilized according to the method claimed in the ‘900 patent, “[n]either party contends, and there [is] no evidence, that the public could learn the claimed process by examining” the aerosol containers. *W.L. Gore*, 721 F.2d at 1550. Furthermore, if CCL, the supplier, (and not Veltek, the patentee) sold the aerosol containers and the process of making them remained unknown, “the sale of the product [does] not pose a statutory bar to a claim on the process.” *Torpharm, Inc. v. Ranbaxy Pharmaceuticals, Inc.*, 336 F.3d 1322, 1327 (Fed. Cir. 2003) (citing *W.L. Gore*, 721 F.2d at 1550).

³In Veltek’s brief in opposition to Miller’s Motion for Summary Judgment based on prior sales (filed on December 15, 2003), Veltek, for the first time, asserts that the CCL transaction was experimental. (D.I. 179 at 22.) That argument is undermined by Mr. Vellutato’s earlier declaration, filed on November 2, 2001, which makes no mention of experimental use or trial runs conducted by CCL.

At oral argument, Miller's counsel took the position that whether the '900 patent claimed a product or a process was immaterial and that the on-sale bar was triggered when CCL sold and shipped to Veltek in the United States the aerosol containers created according the method of the '900 patent prior to the critical date. However, the Federal Circuit recently confirmed that

while [35 U.S.C. § 102] indeed makes no distinction between various types of inventions in setting out the statutory bar, there are different types of sales and different types of inventions. It is not correct that "nothing in § 102(b) compels different treatment between an invention that is a tangible item and an invention that describes a series of steps in a process." The very nature of the invention may compel a difference. The sale of a tangible item is usually a straightforward event; the item is transferred from the seller to the buyer, who normally owns it outright. In contrast, a process is a series of acts, and the concept of sale as applied to those acts is ambiguous.

Minton v. NASD, Inc., 336 F.3d 1373, 1378 (Fed. Cir. 2003) (Gajarsa, J., concurring).

Thus, Miller's position is not an accurate interpretation of the law relating to process or method patents and the on-sale bar.

Miller has offered no evidence to prove that the process or method of sterilization claimed in the '900 patent was not kept secret by CCL prior to the critical date. Indeed, on March 9, 1992, CCL sent Veltek a partially executed confidentiality agreement wherein CCL agreed to keep Veltek's "product formulations" secret and confidential for a period of five years from the date of the agreement. (D.I. 181, Ex. E.) In addition, Robert Calabro, the East Coast sales manager of CCL from 1989 to 1993, submitted a declaration wherein he stated that, to the best of his knowledge and belief, "CCL never disclosed anything regarding the DECON-AHOL product to any third party and never sold any product similar to the DECON-AHOL product to any third party." (D.I. 180 ¶ 4.) Because Miller has offered no evidence to prove that the method claimed in the '900

patent was not maintained in secret prior to the critical date, its Motion for Summary Judgment based on prior sales will be denied.⁴

B. Miller's Motion for Summary Judgment That The '900 Patent is Unenforceable Due to Inequitable Conduct and for an Award of Attorney's Fees

Miller argues that, because Veltek never informed the patent examiner of the "invalidating prior sales" just discussed, Veltek fraudulently obtained the '900 patent. (D.I. 166 at 1.) As further evidence of Veltek's alleged fraud, Miller asserts that Veltek's trademark application for DECON-AHOL stated that the mark was used in interstate commerce for sterile isopropyl alcohol at least as early as January 1987, and that Veltek intentionally concealed the application from the patent examiner. (*Id.* at 20.) Finally, Miller argues that this case is "clearly exceptional" and it is entitled to attorney's fees under 28 U.S.C. § 285. (*Id.* at 3.) Veltek, of course, vigorously disputes all of Miller's assertions.⁵ As the Federal Circuit wisely counsels, "[a] summary judgment that a reputable attorney has been guilty of inequitable conduct, over his denials, ought to be, and can properly be, rare indeed." *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988). The record before me is inadequate to support a summary

⁴However, genuine issues of material fact remain as to whether the method disclosed in the '900 patent remained a secret prior to the critical date, as there is no evidence that the confidentiality agreement signed by CCL was ever executed by Veltek, or, even if executed, that it was complied with.

⁵Veltek also argues that it is entitled to attorney's fees due to Miller's unreasonable and vexatious conduct in bringing multiple summary judgment motions for inequitable conduct. (D.I. 178 at 28.) Miller's allegations are not entirely baseless. On the present record, therefore, I am not prepared to say that sanctions are appropriate. See 28 U.S.C. § 1927 (sanctions are appropriate against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously").

judgment that Veltek obtained the '900 patent through fraudulent or inequitable conduct before the U.S. Patent and Trademark Office. Miller's Motion for Summary Judgment that the '900 patent is unenforceable due to inequitable conduct and for attorney's fees will be denied.

C. Veltek's Motion for Summary Judgment of Validity of Claims 1-5 and 9 of the '900 Patent

Veltek argues that summary judgment of validity is appropriate because Miller's expert, Mr. Charles Berndt, "fails to set forth a *prima facie* case of obviousness under 35 U.S.C. § 103 based on either of his alternative grounds of invalidity" and, because his testimony at trial is limited to his expert report, see Fed. R. Civ. P. 26(a)(2)(B), Miller will be unable to prove that the '900 is invalid by clear and convincing evidence. (D.I. 169 at 10.) In response, Miller points to various pieces of evidence, apart from Mr. Berndt's testimony, that it intends to use at trial to rebut the presumption that the '900 patent is valid. (D.I. 185 at 5.) For example, Miller intends to call Anthony Moravec, the founder and president of Applied Laboratories, Inc.,⁶ to testify that Applied Laboratories manufactured and commercially sold containers of saline solution contained in an aerosol container sterilized by gamma radiation in the mid-1980s. (D.I. 185 at 7.) Miller also intends to argue that the method claimed in the '900 patent was disclosed in a 1992 reader service card insert in *CleanRooms* magazine in March 1992, and that the reader service card therefore constitutes an anticipatory reference which invalidates the

⁶Applied Laboratories, Inc. is the company that manufactures Miller's XTRACLEAN product. (D.I. 185 at 7.)

'900 patent.⁷ (*Id.*)

While it goes without saying that the '900 patent enjoys the statutory presumption of validity unless and until Miller rebuts that presumption with clear and convincing evidence at trial, the foregoing items of potential evidence raise genuine issues of material fact regarding validity and it is therefore inappropriate to grant summary judgment. Veltek's Motion for Summary Judgment of validity of claims 1-5 and 9 of the '900 patent will therefore be denied.

D. Veltek's Motion for Summary Judgment of Literal Infringement of Claims 1-5 and 9 of the '900 Patent

A patent infringement analysis involves two steps: claim construction and application of the construed claim to the accused process or product. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). Before I address Veltek's Motion for Summary Judgment of literal infringement (D.I. 170) on its merits, the parties agree that I must first construe the claim term "aerosol" as it appears in claims 1-5 and 9 of the '900 patent.

1. Claim Construction

Patent claims are construed as a matter of law. *Markman*, 52 F.3d at 979. A court's objective is to determine the plain meaning, if any, that those of ordinary skill in the art would apply to the language used in the patent claims. *Warner v. Ford Motor Co.*, 331 F.3d 851, 854 (Fed. Cir. 2003) (citing *Rexnord v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001)). While the court may look to pertinent art dictionaries,

⁷For a full description and discussion of the *CleanRooms* reader service card, see *Miller v. Veltek*, 2003 U.S. Dist. LEXIS 18673 at *2-*4 (D. Del. Oct. 9, 2003).

treatises and encyclopedias for assistance, *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202-03 (Fed. Cir. 2002), the intrinsic record is the best source of the meaning of claim language, *Vitronics Corp. v. Conceptronics, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Unless the inventor has manifested an express intent to depart from the ordinary and accustomed meaning that patent claim language has in the art, there is a heavy presumption that the inventor intended the ordinary meaning to apply. See *Teleflex Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002) (en banc) (citation omitted); *Bell Atlantic Network Servs., Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1268 (Fed. Cir. 2001) (citation omitted). The use of extrinsic evidence in the claim construction process is “proper only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence.” *Interactive Gift Express, Inc. v. Compuserve Incorp.*, 256 F.3d 1323, 1332 (Fed. Cir. 2001).

Veltek proposes that I construe the claim term “aerosol” according to its dictionary definition. (D.I. 171 at 5.) “Aerosol” is defined as “a suspension of fine solid or liquid particles in gas (smoke, fog and mist are aerosols)” or “a substance (as an insecticide or cosmetic) dispensed from a pressurized container esp. as an aerosol; *also*: the container for this.” Merriam-Webster’s Collegiate Dictionary at 19 (10th Ed. 2002). Miller agrees that I should adopt this common, dictionary definition of aerosol (D.I. 184 at 6) but argues that “a suspension of liquid particles...is obviously a commingling of the alcohol and gas (*id.* at 4)” within the container.

I disagree with Miller’s proposed claim construction. The dictionary definition of aerosol does not require a substance, such as alcohol, that is dispensed from a pressurized container to be mixed or commingled with gas inside a can in order to

constitute an aerosol. Further, nothing in the claims, specification, or the intrinsic record of the '900 patent indicates that the patentee intended to deviate from the ordinary and accustomed meaning of aerosol. See '900 patent, col. 4, lns. 12-16 ("When using isopropyl alcohol as the chemical composition, such is generally inserted under pressure with an inert element such as nitrogen or another chemical formulation acting as the propellant into an aerosol can type chemical composition container."). Miller would have me read the "commingling" limitation into the claims of the '900 patent based solely on Miller's interpretation of the dictionary definition of aerosol. I decline to do so.

Therefore, I construe "aerosol" to mean a substance dispensed from a pressurized container as a suspension of fine liquid particles in gas. This construction is consistent with the plain language of the claim and the specification. The claim language itself does not refer to commingling or mixing the alcohol and a gas within an aerosol container; rather, it refers only to "charging the internal volume of the aerosol container with a quantity of alcohol" and then "pressurizing the internal volume of the aerosol container with an inert gas." See '900 patent, col. 6, lns. 50-54. Similarly, the specification states that "isopropyl alcohol" is "inserted under pressure with an inert element such as nitrogen" into an aerosol can. *Id.*, col. 4., lns. 13-16. Miller has not overcome the "heavy presumption that the inventor intended the ordinary meaning to apply" to the claim term aerosol, *Bell Atlantic*, 262 F.3d at 1268, and it is apparent that the '900 patent discloses an aerosol as it is commonly defined.

2. Literal Infringement

The second step in a patent infringement analysis, application of the claim to the accused process or product, is a question of fact. *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 264 F.3d 1326, 1332 (Fed. Cir. 2001). Summary judgment in patent suits is appropriate when it is apparent that only one conclusion regarding infringement could be reached by a reasonable jury. See *Telemac Cellular Corp. v. Topp Telecon, Inc.*, 247 F.3d 1316, 1323 (Fed. Cir. 2001).

Veltek argues that, by Miller's own admission, its accused product infringes claims 1-5 and 9 of the '900 patent. (D.I. 171 at 10.) Specifically, Veltek points to Miller's responses to Veltek's Second Set of Request for Admissions, wherein Miller contends that its accused XTRACLEAN product does not infringe claims 1-5 and 9 because it is not an aerosol container. (*Id.*, Ex. 2.)

In support of its argument, Miller cites the deposition testimony of Mr. Moravec, the president of the company that manufactures XTRACLEAN. He testified that filling a bag with alcohol within a container is not, by definition, an aerosol, and is more accurately described as a "barrier packaging system." (D.I. 184, Ex. A at 29.) However, Veltek states that Miller refers to its accused XTRACLEAN product as an "aerosol," a "fully evacuating aerosol spray," and an "isopropyl alcohol aerosol" in advertising, on its website, and on each container of the accused product itself. (D.I. 171, Exs. 3-6.) Veltek also notes that its expert, Dr. Fitzgerald, concluded that "an aerosol container...generates an aerosol," as does Miller's accused product. (D.I. 192 at 6.) Finally, Veltek cites several prior art references disclosing what it characterizes as similar "barrier packaging technology" to that used in the accused product, wherein the

container is described as an aerosol container. (*Id.*, Exs. 9-16.)

While Mr. Moravec's testimony may be viewed as self-serving, given his position with the company that manufactures the accused XTRACLEAN product, there is enough evidence on the record that would allow a reasonable jury to reach more than one conclusion regarding literal infringement, particularly on the question of whether Miller's XTRACLEAN product constitutes an aerosol, as I have construed that claim term. Therefore, Veltek's Motion for Summary Judgment of literal infringement must be denied.

V. CONCLUSION

For the reasons set forth, it is hereby ordered that Miller's Motion for Summary Judgment that the '900 patent is invalid based on prior offers for sale (D.I. 162) is DENIED; Miller's Motion for Summary Judgment that the '900 is unenforceable due to inequitable conduct and for attorney's fees (D.I. 165) is DENIED; Veltek's Motion for Summary Judgment of validity of claims 1-5 and 9 of the '900 patent (D.I. 168) is DENIED; and Veltek's Motion for Summary Judgment of literal infringement of claims 1-5 and 9 of the '900 patent (D.I. 170) is DENIED. The disputed claim term "aerosol" is construed to mean "a substance dispensed from a pressurized container as a suspension of fine liquid particles in gas."

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
February 10, 2004