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10 Attorneys for Defendants
11 TIDE INTERNATIONAL (USA), INC., et al.
12 [*Additional attorneys listed on signature page.*]

13
14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
16

17 UPL NA INC.,
18 Plaintiff,
19 v.
20 TIDE INTERNATIONAL (USA), INC.,
ZHEJIANG TIDE CROPSCIENCE CO.,
21 LTD., and NINGBO TIDE IMP. & EXP.
CO., LTD.,
22 Defendants.
23

Case No. 8:19-CV-01201-RSWL-KS

**DEFENDANTS' PRELIMINARY
INVALIDITY CONTENTIONS**

District Judge: Ronald S.W. Lew
Magistrate Judge: Karen L. Stevenson

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DEFENDANTS' PRELIMINARY INVALIDITY CONTENTIONS
Case No. 8:19-cv-01201-RSWL-KS

1 Pursuant to the Court’s Scheduling Order (Dkt. 49) and the Standing Patent
2 Rules (“S.P.R.”) established by Judge Andrew J. Guilford, as agreed to by the parties
3 (Dkt. 37 at 4), Defendants Tide International (USA), Inc., Zhejiang Tide CropScience
4 Co., Ltd., and Ningbo Tide Imp. & Exp. Co., Ltd. (collectively, “Tide”) hereby
5 disclose their Preliminary Invalidity Contentions regarding U.S. Patent No. 7,473,685
6 (“Patent-in-Suit”). According to Plaintiff UPL NA, Inc. (“UPL”), the Asserted
7 Claims are claims 1 and 4 (collectively, “Asserted Claims”). Tide contends that the
8 patent claims asserted UPL are invalid under at least 35 U.S.C. §§ 102, 103, and 112.

9 **I. RESERVATIONS**

10 **A. General Reservation of Right**

11 UPL has prejudiced Tide’s ability to proffer these Preliminary Invalidity
12 Contentions due to UPL’s improper Infringement Contentions which lack the
13 information required by the Federal Rules of Civil Procedure, the Court’s Local Rules,
14 the Standing Patent Rules, this Court’s Orders, and Tide’s discovery requests and
15 interrogatories. The Preliminary Invalidity Contentions asserted herein are based on
16 the apparent claim constructions advanced in UPL’s November 25, 2019 Infringement
17 Contentions, and to the extent that those constructions can be understood in light of
18 the positions taken during prosecution of the Patent-in-Suit. These Preliminary
19 Invalidity Contentions are not, and nothing in these disclosures should be seen as, an
20 endorsement, acquiescence, and/or acceptance of any of UPL’s apparent claim
21 constructions, nor as an assertion of particular constructions by Tide. Tide expressly
22 reserves the right to propose alternative constructions to those advocated by UPL and
23 to challenge and contest UPL’s claim construction positions.

24 Prior art not included in these disclosures, whether or not now known to Tide,
25 may become relevant depending on the positions UPL asserts and/or the claim
26 constructions the Court adopts. Tide’s ongoing investigations may also uncover
27 additional prior art. Tide reserves the right to modify these disclosures, including
28 without limitation, by adding or withdrawing prior art to or from these disclosures

1 and/or modifying the charts herein in light of the Court's claim construction ruling,
2 any revised or supplemented infringement contentions by UPL, and/or positions taken
3 by UPL in this or related litigation, post-grant proceeding, reexamination or other
4 prosecution, and/or as otherwise appropriate. To the extent that Tide obtains
5 additional or further information, it reserves the right to amend and/or supplement
6 these Preliminary Invalidity Contentions.

7 Additional obviousness combinations of the references identified in these
8 disclosures are also possible, and Tide reserves the right to use any such
9 combination(s) in this litigation. For example, Tide is currently unaware of the extent,
10 if any, to which UPL will contend that limitations of the claims at issue are not
11 disclosed in the art identified by Tide as anticipatory, and the extent to which UPL
12 will contend that elements not disclosed in the asserted patent specification and related
13 applications would have been known to persons of ordinary skill in the art at the
14 relevant time. To the extent that an issue arises with any such limitations, Tide
15 reserves the right to identify other references that would have made such limitations
16 obvious in view of the relevant disclosures.

17 Accordingly, Tide reserves the right to supplement or modify these Preliminary
18 Invalidity Contentions based on further discovery and in a manner consistent with the
19 Federal Rules of Civil Procedure and the Court's rules, including the agreed-upon
20 S.P.R.

21 Tide's discovery and investigation in connection with this litigation are
22 continuing, and thus, these disclosures are based on information obtained to date.
23 Tide expects that further discovery will reveal additional prior art, including related
24 disclosures and corresponding evidence for many of the prior art references identified
25 below.

26 These Preliminary Invalidity Contentions are based on the Asserted Claims for
27 which UPL provided claim charts in its November 25, 2019 Infringement
28 Contentions. In other words, for purposes of these disclosures, Tide views an

1 “Asserted Claim” to be one for which UPL has provided a claim chart in its
2 Infringement Contentions. To the extent UPL is ordered to and/or seeks to modify
3 and/or amend its infringement contentions to assert and/or provide claim charts for
4 any additional claims (or for any other reason), and is permitted to do so by the Court,
5 Tide reserves the right to amend and/or supplement these disclosures.

6 These disclosures, including the accompanying claim charts, were prepared
7 prior to the Court’s claim construction ruling. Tide’s positions on the invalidity of
8 particular claims will depend on how those claims are construed by the Court. In the
9 absence of a claim construction ruling, these preliminary contentions are made in the
10 alternative and are not necessarily intended to be consistent with each other and other
11 preliminary invalidity contentions herein. These contentions are made out of an
12 abundance of caution to reflect the potential scope of the claims that UPL appears to
13 be advocating or could advocate. Tide’s contentions herein should not be seen as a
14 suggestion that UPL’s reading of the patent claims is correct. Tide reserves the right
15 to amend these contentions upon receipt of the Court’s claim construction order.

16 Tide also reserves the right to amend these contentions upon the Court’s
17 determination of the priority date(s) of any properly asserted claims.

18 **B. UPL’s Infringement Contentions**

19 UPL’s disclosures under S.P.R. 2.1 and 2.2 are deficient in numerous respects,
20 including, without limitation: lack of any basis to support the anti-foaming element;
21 lack of any basis to support the stabilizer element; lack of any basis to support
22 assertion of claim 4; and lack of any basis to support satisfaction of the “consisting
23 of” language.

24 Because such deficiencies may lead to further grounds for invalidity, Tide
25 specifically reserves the right to modify, amend, or supplement its contentions as
26 UPL, to the extent permitted by the governing rules, modifies, amends, or
27 supplements its disclosures and/or produces documents in discovery.

28

1 Additionally, UPL has presented no contentions of any alleged infringement
2 under the doctrine of equivalents in its infringement contentions. As a result, UPL has
3 waived any doctrine of equivalents theory. If UPL is permitted to provide this and
4 other information relating to infringement under the doctrine of equivalents, albeit
5 over Tide’s objections, Tide may amend and supplement these Preliminary Invalidity
6 Contentions as appropriate.

7 **C. The Intrinsic Record**

8 Tide further reserves the right to rely on applicable industry standards and prior
9 art cited in the file histories of the Patent-in-Suit and any related U.S. and foreign
10 patent applications as invalidating references or to show the state of the art. Tide
11 further reserves the right to rely on the patent applicants’ admissions concerning the
12 scope of the prior art relevant to the Patent-in-Suit found in, inter alia: the patent
13 prosecution history for the Patent-in-Suit and any related patents and/or patent
14 applications or reexaminations (or inter partes proceedings); any deposition testimony
15 of the named patent applicants on the Patent-in-Suit; and the papers filed and any
16 evidence submitted by UPL in connection with this litigation.

17 **D. Rebuttal Evidence**

18 Prior art not included in these Preliminary Invalidity Contentions, whether
19 known or not known to Tide, may become relevant. In particular, Tide is currently
20 unaware of the extent, if any, to which UPL will contend that limitations of the
21 Asserted Claims of the Patent-in-Suit are not disclosed in the prior art identified
22 herein. To the extent that such an issue arises, Tide reserves the right to identify
23 other references that would render obvious the allegedly missing limitation(s) or the
24 disclosed device or method, or otherwise rebut UPL’s argument.

25 **E. Contextual Evidence**

26 Tide’s claim charts cite particular teachings and disclosures of the prior art as
27 applied to the limitations of each of the Asserted Claims. However, persons having
28 ordinary skill in the art generally may view an item of prior art in the context of his

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