IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESTERNGECO L.L.C.,	§	
	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO. 4:09-cv-01827**
v.	§	
	§	**JURY TRIAL DEMANDED**
ION GEOPHYSICAL CORPORATION,	§	
	§	
Defendant.	§	
	§	

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL DUE TO INCORRECT CLAIM CONSTRUCTION

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ION Geophysical Corporation ("ION") submits its Reply in Support of Motion for Judgment as a Matter of Law and for a New Trial (D.I. 561).

I. SUMMARY OF THE ARGUMENT

ION's motion is both procedurally proper and substantively establishes that a reasonable jury would not have found for WesternGeco LLC ("WG") had the jury been given the correct construction for a streamer positioning device ("SPD") and an active streamer positioning device ("ASPD"), as there is neither infringement nor intent required for 271(f) liability. ION is entitled to a verdict of non-infringement on all asserted claims or a new trial.

II. ARGUMENT

A. ION's Motion Is Procedurally Proper.

It is axiomatic that judgment as a matter of law ("JMOL") is appropriate if the court finds that a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). Such a "legally sufficient evidentiary basis" cannot exist if the jury did not interpret the evidence under the correct claim construction which was

never submitted to the jury.

Chief Judge Rader of the Federal Circuit specifically stressed the key role of claim construction and the resulting right to challenge it throughout the case up to a JMOL: "the procedural law of patents as administered by the Federal Circuit entitles litigants to challenge an objectionable claim construction throughout the proceedings [including] with a motion for JMOL... Thus, this court is permitted to, and indeed must, consider [Defendant's] claim construction arguments on JMOL." *Cornell v. Hewlett-Packard*, 654 F. Supp. 2d 119, 128 (N.D.N.Y. 2009) (Rader, R. Ch. J. Fed. Cir., sitting by designation). Judge Rader's mandate follows the long-established precedent that "[d]istrict courts may engage in a rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves." *Jack Guttman v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002). And it definitely encompasses the raising of it on JMOL, as the Chief Judge wrote when he was writing for the Federal Circuit as Judge Rader in *Moba v Diamond*, 325 F.3d 1306 (Fed. Cir. 2003) .

It is not surprising that WG fails to cite a single case prohibiting consideration of claim construction issues on a JMOL, since the law of the Federal Circuit is directly to the contrary. At most, the caselaw cited by WG acknowledges that the parties should not *reserve* claim construction issues ***until*** the JMOL. *See* D.I. 570, WG's Opp. at 3 (citing *Hewlett-Packard Co. v. Mustek Systems, Inc.*, 340 F.3d 1314, 1319 (Fed. Cir. 2003)). In contrast, ION diligently litigated the claim construction issues throughout the case, as was the case in *Moba, supra,* and now, at its last opportunity to do so before this Court, once again urges this Court to adopt ION's construction. Resolving this issue on a JMOL or through a new trial now instead of forcing ION to appeal will save both the Court and the parties substantial time and resources.

At the close of its case, ION moved for JMOL of non-infringement on each of the patents, including on Claims 19 and 23 of the '520 patent under the doctrine of equivalents. [D.I. 510-521.] Infringement on claim 18 was decided on summary judgment. ION now properly renews its non-infringement JMOL and timely seeks a new trial under Rule 59. *See* Fed. R. Civ. P. 50(b), 59(b), (e).

To the extent that ION's motion may be interpreted as a motion for reconsideration, the standard of review is the same as under Rule 59. Such motion may be granted even where the Court ***has already considered*** all the recited claim language and expert testimony. *See Lighting Ballast Control*, 2010 WL 4946343, at *10 (granting a motion for reconsideration of claim construction because "[t]he Court's prior ruling unduly discounted the unchallenged expert testimony, in light of Federal Circuit precedent on the issue, offered by Bobel and Dr. Roberts regarding the knowledge of one of ordinary skill in the electronic ballast field").

The Court has diligently reviewed, analyzed, and ruled on many complex issues, including claim construction. Now, however, is the first time the Court has the benefit of the full trial record to consider the practical impact and the legal propriety of its past claim construction. Here, the grounds for reconsideration are even more compelling than in *Lighting Ballast,* because in addition to the evidence that the Court reviewed at claim construction, the Court recently heard evidence supporting ION's construction of ASPD in claim 14 of the '038 patent at trial—*e.g.*, that a DigiFIN is used for lateral movement while ION sells a different device to move a streamer vertically, *i.e.*, the DigiBIRD. Ex. A, Tr. 3499:21-3500:2. DigiFIN does not have the components that are sources for data for lateral and depth manipulation and control of the streamer by the system (*id.* at 3312:7-13 & 3313:9-14). This is key not only to the correct interpretation of claim 14 of the'038 patent, but also to the lack of intent required by 271(f)—

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