

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

WESTERNGECO L.L.C.,

Plaintiff,

v.

ION GEOPHYSICAL CORPORATION,

Defendant.

)
)
)
)
)
) Civil Action No. 4:09-CV-01827
)
) Judge Keith P. Ellison
)
) Jury Trial Demanded
)
)
)
)
)
)
)

**WESTERNGECO'S OPPOSITION TO ION'S MOTION FOR A NEW TRIAL
ON INVALIDITY UNDER 35 U.S.C. §§ 102 AND 103 (D.I. 550)**

Of Counsel:

Gregg F. LoCascio, P.C.
gregg.locascio@kirkland.com
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Tel.: (202) 879-5000
Fax: (202) 879-5200

Lee L. Kaplan
lkaplan@skv.com
SMYSER KAPLAN
& VESELKA, L.L.P.
Bank of America Center
700 Louisiana, Suite 2300
Houston, TX 77002
Tel: (713) 221-2323
Fax: (713) 221-2320

Timothy K. Gilman
timothy.gilman@kirkland.com
Simeon G. Papacostas
simeon.papacostas@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel.: (212) 446-4800
Fax: (212) 446-4900

*Attorneys for Plaintiff
WesternGeco L.L.C.*

Dated: October 26, 2012

majority of ION's other invalidity defenses were dismissed as a matter of law at trial. (D.I. 533) On August 16, 2012 the jury returned a verdict in WesternGeco's favor on all remaining issues, finding all of the asserted patent claims willfully infringed, not anticipated and not obvious, and awarding WesternGeco \$105.9 million in damages for ION's past infringement. (D.I. 536)

BACKGROUND

Marine seismic streamers are cables up to many miles in length that are towed behind ships. (Trial Tr. at 248:25–253:17) An acoustic source, such as an air gun, is used to generate an acoustic signal towards the ocean floor. *Id.* Seismic sensors, such as hydrophones, are spaced along the length of each streamer and are used to detect the reflected acoustic signal. *Id.* The resulting data can be used to map the subsurface geology for the purpose of exploring, exploiting, and managing natural resources of the seabed and subsoil. *Id.*

In 1992, Dr. Simon Bittleston began developing methods and systems for lateral streamer steering for Geco-Prakla, AS (“Geco”), a predecessor to WesternGeco. (Trial Tr. at 497:12-501:10, 518:13-519:22, 521:2-527:13) For example, Dr. Bittleston invented a streamer positioning device, or “bird,” to steer the streamer both laterally and in depth, as reflected in his December 20, 1996 patent application. (ION 18, the “’636 application”)

In order to implement a workable steering system, Dr. Bittleston also recognized the need for sophisticated control systems for steering across the miles-long streamer array. (Trial Tr. at 509:11-517:7, 532:19-534:3, 536:5-539:23) As Dr. Bittleston explained at trial, this was akin to trying to steer 200 separate airplanes on auto-pilot simultaneously, while dealing with the unpredictable forces of currents and waves in the deepwater ocean and in light of the many millions of dollars of equipment that could be destroyed or lost with any error. (*Id.* at 497:12-501:10, 507:11-508:3) Working with Oyvind Hillesund, another Geco engineer, Dr. Bittleston's research led to the International Patent Application WO 00/20895 (ION 19, the “’895

the Zajac '038 patent—ION's invalidity arguments were thoroughly vetted and dismissed by the PTO before granting the '038 patent.

A. Workman Does Not Teach or Enable Lateral Steering or the “Streamer Positioning Devices” Claimed in the Bittleston Patents

The Court construed “streamer positioning device” to mean “a device that controls the position of a streamer as it is towed (*e.g.*, a ‘bird’),” noting evidence that “each streamer-positioning device must be capable of steering horizontally.” (D.I. 120 at 14) Workman does not enable such laterally steerable streamer positioning devices—or any lateral steering technology—and therefore cannot anticipate any of the Bittleston patent claims. The Workman patent—now owned by WesternGeco—stems from the work of Rick Workman at Western Geophysical in the 1990s before it merged with Geco in 2000 to form WesternGeco. As confirmed by multiple co-workers of Mr. Workman from this time—including ION trial witness Kenneth Williamson—Western Geophysical in general, and Mr. Workman in particular, never worked on or invented any lateral steering technology. (*See, e.g.*, Trial Tr. at 289:20-291:12, 838:7-9, 4014:20-4015:6, 4110:15-23).

Rather, Workman focused on noise thresholds that affect the acoustic signals used to map subsurface formations. (ION 266 at 4:37-40 (“[T]he present invention controls the use of position correction by determining when the hydrophone noise level should prevent the repositioning of the streamer cable.”); *see also id.* at 4:61-5:31 (discussing noise thresholds)) ION's expert, Mr. Brune confirmed this fact. (*Id.* at 3949:23-24 (“Q. The key focus of the Workman patent is noise reduction? A. Correct.”)) As he admitted on cross-examination, Workman “basically *presupposes* that there is a working steering system” already in place. (Trial Tr. at 3950:15-19; *see also id.* at 3950:22-3951:5)¹ The mere reference to “lateral

¹ Unless otherwise indicated, all emphases are added.

steering” is insufficient to enable one of ordinary skill in the art to actually practice lateral steering. *Id.* at 3949:4-8 (“Q. You would agree, sir, that just mentioning lateral steering in a reference does not anticipate the claims in this case, correct? A. The mere mention of it, without some disclosure at some level of detail, certainly would not.”); *see also Impax Labs.*, 545 F.3d at 1314 (stating that an anticipatory reference must “enable one of ordinary skill in the art to make the invention without undue experimentation”).

Accordingly, Mr. Workman’s ’472 patent cannot anticipate WesternGeco’s lateral steering inventions, because Workman never invented or enabled such technology. *See Forest Labs., Inc. v. Ivax Pharms., Inc.*, 501 F.3d 1263, 1268 (Fed. Cir. 2007) (“A reference that is not enabling is not anticipating.”); *Elan Pharms., Inc. v. Mayo Found. for Med. Educ. & Research*, 346 F.3d 1051, 1055 (Fed. Cir. 2003) (“The disclosure in an assertedly anticipating reference must be adequate to enable possession of the desired subject matter); *Fiers v. Revel*, 984 F.2d 1164 (Fed. Cir. 1993) (“[O]ne cannot describe what one has not conceived.”).

Although Workman includes references to “streamer positioning devices,” the specification makes clear that the term largely refers to depth control devices whose noise can affect the seismic survey:

The use of streamer positioning devices comes at the price of introducing increased noise onto the seismic streamer and hence into the hydrophones. The areas of greatest noise are from those hydrophones which are adjacent to externally attached ***streamer positioning devices, such as depth controlling birds.***

(ION 266 at 1:62-67) Such depth birds do not satisfy the horizontal steering required by the term “streamer positioning devices” as used in the Bittleston patents. (D.I. 120 at 14)

At most, Workman discloses only two devices in its discussion of lateral positions—Waters ’278 and Owsley ’027, neither of which were ever built, or would work in the invention claimed in the ’520 patent. As Mr. Brune admitted, the Waters ’278 device was described in

distance between adjacent streamers. *Id.* at 3970:8-12 (“Q. But if the Court’s construction, set and maintain spacing, requires the streamers to each be equidistant from one another, both in a minimum and a maximum setting, then Workman doesn’t disclose that, agreed? A. That’s a different case, yes.”); *see also id.* at 3967:3-14. Significantly, Mr. Brune did not include any opinion that Workman infringed Claim 18 of the ’520 patent in his expert report during discovery, nor did ION include such a theory in its Preliminary or Final Invalidation Contentions. (D.I. 308 at 10-11). Workman was only raised after ION’s principal defenses failed as a matter of law.

Because Workman fails to disclose all of the limitations of WesternGeco’s claimed invention, ION’s invalidity defense fails as a matter of law. *Sanofi*, 550 F.3d at 1082. And to the extent ION attempts to cobble together evidence of anticipation with cherry-picked snippets of testimony, ION fails to address the entire evidentiary record—including the portions discussed above—or to credit the jury’s balancing of any conflicting evidence or evaluation of witness credibility. ION fails to apply the proper analysis in seeking a new trial post-verdict, under which ION’s motion must fail.

C. Workman Does Not Anticipate Claim 15 of the ’607 Patent

Claim 15 of the ’607 patent provides:

15. An array of seismic streamers towed by a towing vessel comprising:
(a) a plurality of streamer positioning devices on or inline with each streamer;
(b) a prediction unit adapted to predict positions of at least some of the streamer positioning devices; and
(c) a control unit adapted to use the predicted positions to calculate desired changes in positions of one or more of the streamer positioning devices.

(PTX 3). As Mr. Brune admitted, Claim 15 of the ’607 patent requires lateral steering. (*See, e.g.,* Trial Tr. at 3977:20-3978:3) And as explained above, Workman does not enable lateral steering or the claimed “streamer positioning devices” capable of steering a streamer

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.