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WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|----------------------------|---|--------------------|
| TASER INTERNATIONAL, INC., |) | No. 07-042-PHX-MHM |
| Plaintiff, |) | ORDER |
| vs. |) | |
| STINGER SYSTEMS, INC., |) | |
| Defendant. |) | |

Currently before the Court is Defendant Stinger Systems, Inc.’s (“Stinger”) Motion for Summary Judgment of Patent Invalidity or Noninfringement, (Dkt. #160), and Plaintiff TASER International, Inc.’s (“TASER”) Motion for Partial Summary Judgment of Literal Infringement. (Dkt. #184). Having considered all the evidence and heard oral argument on March 23, 2010, the Court issues the following Order:

I. Background

A. Procedural History

On January 5, 2007, TASER filed an action against Stinger alleging infringement of U.S. Patent 7,145,762 (filed Feb. 11, 2003) (“the ‘762 patent”) under 35 U.S.C. § 271, false advertising under 15 U.S.C. § 1051 *et seq.*, and false marketing under 35 U.S.C. § 292. (Dkt. #1). TASER amended its complaint on July 9, 2007 to add infringement claims for two additional patents, U.S. Patent 6,999,295 (filed Feb. 5, 2005) (“the ‘295 patent”) and U.S. Patent 7,102,870 (filed May 29, 2003) (“the ‘870 patent”). (Dkt. #32). Thereafter, on

1 October 10, 2007, TASER filed a second amended complaint in which TASER dropped all
2 claims related to the '762 patent and added claims pertaining to a fourth patent, U.S. Patent
3 7,234,262 (Dec. 2, 2005) ("the '262 patent").

4 On November 6, 2007, Stinger filed an Answer to TASER's second amended
5 complaint and counterclaim for false advertising under 15 U.S.C. § 1125(a) to TASER's
6 second amended complaint. (Dkt. #54). Stinger asserts a number of affirmative defenses,
7 including statute of limitations, laches, waiver, estoppel, unclean hands, patent misuse, and
8 inequitable conduct. (Dkt. #54, pp. 4-5).

9 On May 7, 2008, the Court held a hearing in accordance with Markman v. Westview
10 Instruments, Inc., 517 U.S. 370 (1996), to construe disputed claims of the '262, '295, and
11 '870 patents. This Court issued its Markman Order construing the disputed claims on
12 February 2, 2009. (Dkt. #146). In that Order, the Court construed disputed claim language
13 as follows: for the '295 patent (1) "to ionize the air within the air gap" refers to the formation
14 of ions within the air gap as a result of the high voltage, short duration output across the first
15 and second electrodes during the first mode/time period; and (2) "to maintain the current
16 flow" is self-explanatory, and refers to the maintenance of the current flow that is driven
17 across the air gap by the low voltage output in the second mode/time period and is not limited
18 to a continuous or uninterrupted current flow to the extent that the current flow is able to
19 maintain a state of low impedance throughout the second mode/time period; for the 870
20 patent a "grounded user of the weapon" refers to a user coupled to a common reference
21 conductor in the weapon; and for the '262 patent (1) "track date and time" means the tracking
22 of date and time, in a program, in a microprocessor, through whatever means available to a
23 person of skill in the art at the time of the invention; (2) "period of time" means the
24 predefined period recited in Claim 9. (Id.).

25 On, May 18, 2009, Stinger filed a Motion for Summary judgment of Patent Invalidity
26 or Noninfringement. (Dkt. #160). On August 14, 2009 TASER filed its Motion for Partial
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1 Summary Judgment of Literal Infringement. (Dkt. #184). The Court held oral argument on
2 these motions on March 23, 2010.

3 **B. General Description of the Technology**

4 TASER and Stinger develop, manufacture, and sell electronic control devices
5 (“ECD”), commonly known as “stun guns,” which are used to temporarily incapacitate a
6 single person from a distance. While ECDs are intended to be non-lethal, they are somewhat
7 similar to pistols: handheld devices that are activated by a trigger mechanism. Once
8 activated, two dart electrodes, each of which are tethered to a wire connected to the internal
9 circuitry of the weapon, are ejected out of the end of the weapon. The darts are intended to
10 establish contact points with a living target, enabling a power supply circuit in the weapon
11 to deliver current through the electrodes and the target in order to cause involuntary muscle
12 contractions and temporarily immobilize the target.

13 At issue in this case are three of TASER’s patents that relate to technology for
14 reducing the size and weight of ECDs while increasing their efficiency, effectiveness, and
15 traceability in deployment. TASER’s ‘295 patent is entitled “Dual Operating Mode
16 Electronic Disabling Device for Generating a Time-Sequenced, Shaped Voltage Output
17 Waveform.” As the title suggests, the ‘295 patent claims a dual operating mode designed to
18 address the challenge of establishing electrical contact with a target and efficiently deliver
19 electric current flow to temporarily immobilize the target. In addition, the ‘870 patent is
20 entitled “Systems and Methods for Managing Battery Power in an Electronic Disabling
21 Device.” Likewise, as the title suggests, the ‘870 patent claims systems and methods for
22 managing battery power. The two patents share a common specification.

23 Apparently, an ECD’s darts may often lodge in a target’s clothing, which results in
24 an air gap between the electrodes and the target, preventing the electrodes from establishing
25 direct contact with the target’s skin. The air gap impedes the flow of electricity due to the
26 high impedance of air, which is generally defined as the absence of charged particles, or the
27 ratio of the voltage of the electrical potential between two points and the current passing
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1 there. High impedance exists when there is a large voltage potential and only a small amount
2 of current; low impedance is the opposite. The application of voltage across an air gap,
3 which can be administered by the functioning of ECD capacitors and transformers,
4 accelerates the available electrons in the air and causes them to pick up speed and crash into
5 each other, thus freeing additional electrons and creating ions. This process is known as
6 ionization, which breaks down high impedance and enables a smaller voltage application
7 over a larger current flow. Once voltage is removed, the air gradually returns to its original
8 state and high impedance returns. In addition, during the process of ionization, electrons can
9 recombine with ions to recreate stable molecules, and in doing so they release energy by
10 emitting photons, the particles responsible for light energy. In some instances, the
11 recombination process results in the creation of visible electrical arcs.

12 Importantly, the common specification of the '295 and '870 patents reveal that
13 although conventional ECDs were designed to have the capability of causing voltage
14 breakdown across a very high impedance air gap by administering a fifty to sixty thousand
15 volt output, once the air gap has been ionized and the impedance reduced to a low level, the
16 stun guns continued to operate in the same mode, resulting in a high power, high voltage stun
17 gun circuit operating relatively inefficiently and yielding low electro-muscular efficiency
18 with high battery power requirements. To overcome this inefficiency, the '295 patent
19 provides for the operation of an ECD in a second mode. Once the air gap is ionized and the
20 air impedance is reduced to a low level, current is able to flow across the air gap at a lower
21 voltage level. At that point, a second lower voltage, longer duration output is generated to
22 maintain an immobilizing current flow through the target. In addition, the '870 patent makes
23 additional claims for, among other things, safety enhancements with respect to the operation
24 of ECDs.

25 Finally, the '262 patent is entitled "Electrical Weapon Having Controller for Timed
26 Current Through Target and Date/Time Recording." As the title suggests, the patent claims
27 an apparatus that includes a microprocessor programmed to track date and time, to initiate
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1 and maintain an electrical current for a period, and to record tracked date and time for each
2 initiation of the current.

3 **C. The Claims at Issue**

4 The independent claims currently at issue are as follows¹:

5 **1. The '295 Patent.**

6 **Claim 2:**

7 A dual operating mode electronic disabling device for immobilizing a target
8 comprising:

9 a. first and second electrodes positionable to establish first and second spaced apart
10 contact points on the target wherein a high impedance air gap may exist between at
11 least one of the electrodes and the target; and

12 b. a power supply for operating in a first mode to generate a first high voltage, short
13 duration output across the first and second electrodes during a first time interval to
14 ionize the air within the air gap to thereby reduce the high impedance across the air
15 gap to a lower impedance to enable current flow across the air gap at a lower voltage
16 level and for subsequently operating in a second mode to generate a second lower
17 voltage output across the first and second electrodes during a second time interval to
18 maintain the current flow across the first and second electrodes and between the first
19 and second contact points on the target to enable the current flow through the target
20 to cause involuntary muscle contractions to thereby immobilize the target.

21 **Claim 40**

22 A method for immobilizing the muscles of a target, comprising the steps of:
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26 ¹There are also dependent claims at issue regarding the '262 patent. For ease of
27 reference, however, only the independent claims are expressly quoted herein.

- 1 a. providing first and second electrodes positionable to establish first and second
2 spaced apart contact points on the target wherein a high impedance air gap may exist
3 between at least one of the electrodes and the target;
- 4 b. applying a first high voltage, short duration output across the first and second
5 electrodes during a first time interval to ionize the air within the air gap to thereby
6 reduce the high impedance across the air gap to a lower impedance to enable current
7 to flow across the air gap at a lower voltage level; and
- 8 c. subsequently applying a second lower voltage output across the first and second
9 electrodes during a second time interval to maintain the current flow across the first
10 and second electrodes and between the first and second contact points on the target
11 to enable the current flow through the target to cause involuntary muscle contractions
12 to thereby immobilize the target.

13 **2. The '870 Patent**

14 **Claim 1**

15 An electronic disabling device for immobilizing a target comprising:

- 16 a. first and second electrodes positionable to establish first and second spaced apart
17 contact points on the target;
- 18 b. high voltage power supply for generating an output voltage delivered in a series of
19 electrical pulses to the target;
- 20 c. a battery system including: (I) a battery; (ii) a digital memory device for storing
21 battery capacity data indicating the amount of battery capacity consumed or
22 remaining; (iii) a data interface for communicating between the battery system and
23 the memory device to adjust the battery capacity data stored in the memory device;
24 and
- 25 d. a display for indicating to a user the battery capacity.

26 **Claim 2**

27 An electronic disabling device for immobilizing a target comprising:

- 1 a. first and second electrodes positionable to establish first and second spaced apart
2 contact points on the target;
- 3 b. a high voltage power supply for generating an output voltage delivered in a pre-
4 timed series of electrical pulses to the target; and
- 5 c. a display for indicating to the user the amount of time remaining in each pulse
6 sequence.

7 **Claim 3**

8 An electronic disabling device for immobilizing a target comprising:

- 9 a. first and second electrodes positionable to establish first and second spaced apart
10 contact points on the target;
- 11 b. a high voltage of power supply for generating an output voltage delivered in a
12 pre-timed series of electrical pulses to the target;
- 13 c. a trigger mechanism to initiate the pre-timed series of electrical pulse; and
- 14 d. a mechanism for allowing the user to extend the duration of the pre-timed series of
15 electrical pulses.

16 **Claim 4**

17 An electronic disabling device for immobilizing target comprising:

- 18 a. first and second electrodes positionable to establish first and second spaced apart
19 contact points on the target; and
- 20 b. a high voltage power supply for generating an output voltage delivered across the
21 first and second contact points on the target to generate a positive voltage potential
22 at one electrode and a negative voltage potential at the other electrode, thereby
23 increasing the total voltage drop across a target while deceasing the maximum voltage
24 potential between either electrode and a grounded user of the weapon.

25 **3. The '262 Patent**

26 **Claim 1**

1 A dart weapon for interfering with locomotion by a human being or animal target, the
2 weapon for use with each of a plurality of replaceable cartridges, each cartridge having at
3 least one wire-tethered dart and a propellant that propels the dart, the weapon comprising:
4 a receiver that receives a particular cartridge of the plurality of cartridges;
5 a power supply coupled to the receiver for conducting a high voltage pulsed current
6 from the power supply through the wire-tethered dart of the particular cartridge;
7 a microprocessor programmed
8 (1) to track date and time,
9 (2) to activate via the power supply the propellant of the particular cartridge,
10 (3) to maintain for a period the current from the power supply, and
11 (4) to record tracked date and time in accordance with activation of the
12 propellant of the particular cartridge and in accordance with respective
13 activation of each other cartridge of the plurality received by the receiver,
14 wherein the current through the target interferes with use by the target of the
15 skeletal muscles of the target during the period

16 **Claim 6**

17 A dart weapon for interfering with use by a human being or animal target of skeletal
18 muscles of the target, the weapon operative with a provided cartridge, the device comprising:
19 a trigger that provides a first signal responsive to operation of the trigger; and
20 a circuit, comprising a memory, that
21 (1) keeps track of current time of day,
22 (2) keeps track of current date,
23 (3) receives the first signal to determine a first time, and
24 (4) responds to the first signal by recording current date and current time of day in the
25 memory by applying power to a signal generator, by keeping track of a period of time
26 from the first time, and by disabling the signal generator upon lapse of the period,
27 wherein;

1 the signal generator activates the cartridge to propel a wire-tethered dart of the
2 cartridge toward the target: and

3 a current from the signal generator via the wire-tethered dart and through the target
4 interferes with use by the target of the skeletal muscles of the target during the period.

5 **Claim 9**

6 A dart weapon for interfering with locomotion by a human being or animal target, the
7 apparatus comprising:

8 means for providing a high voltage pulsed current through the target via a provided
9 wire-tethered dart launched from the weapon;

10 means for recording date and time of day for each occasion that the weapon was
11 operated to provide the current; and

12 means for discontinuing provision of the current in accordance with lapse of a
13 predefined period.

14 **Claim 13**

15 An apparatus for causing involuntary contractions of skeletal muscles of a human or
16 animal target, the apparatus comprising:

17 a circuit having a microprocessor that is

18 (1) programed to track date and time,

19 (2) programmed to initiate a high voltage pulsed current from the circuit, and

20 (3) programmed to record tracked date and time in accordance with each

21 initiation of the current, wherein the current launches a provided wire-tethered

22 dart toward the target to conduct the current through the target and when

23 passing through the target, causes involuntary contractions of skeletal muscles

24 of the target.

25 **II. Standard of Review**

26 A motion for summary judgment may be granted only if the evidence shows “that
27 there is no genuine issue as to any material fact and that the moving party is entitled to

1 judgment as a matter of law.” FED. R. CIV. P. 56(c). To defeat the motion, the non-moving
2 party must show that there are genuine factual issues “that properly can be resolved only by
3 a finder of fact because they may reasonably be resolved in favor of either party.” Anderson
4 v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The party opposing summary judgment
5 “may not rest upon the mere allegations or denials of [the party’s] pleadings, but ... must set
6 forth specific facts showing that there is a genuine issue for trial.” Rule 56(e). See
7 Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The
8 evidence must be viewed in the light most favorable to the nonmoving party. Devereaux v.
9 Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

10 **III. STINGER’S Motion for Summary Judgment**

11 In its summary judgment motion, Stinger has set forth numerous grounds upon which
12 relief should be granted. It argues that the various claims of the ‘295, ‘262, and ‘870 patents
13 are invalid, either as anticipated, obvious, or both. Stinger also alleges inequitable conduct
14 as to the ‘762, ‘295, and ‘870 patents. Finally, as to almost all of the patent claims at issues,
15 Stinger denies that the S-200 infringes. The Court will consider Stinger’s invalidity
16 arguments before moving onto the question of infringement.

17 **1. Anticipation**

18 **A. Legal Standard**

19 A party seeking to establish that patent claims are invalid must overcome statutory
20 presumption of validity set forth in 35 U.S.C. § 282 by clear and convincing evidence.
21 Impax Labs., Inc. v. Aventis Pharms., Inc., 545 F.3d 1312, 1314 (Fed. Cir. 2008). This
22 presumption of validity exists at every stage of the litigation. Cannon Comp. Sys., Inc. v.
23 Nu-Kote Int’l, Inc., 134 F.3d 1985, 1088 (Fed. Cir. 1998), and “is never annihilated,
24 destroyed or even weakened regardless of what facts are of record.” ACS Hosp. Sys., Inc.
25 v. Montefiore Hosp., 732 F.2d 1472, 1574-75 (Fed. Cir. 1984). Where the Patent and
26 Trademark Office (“PTO”) considered the prior art that is the basis of the validity challenge
27 during patent prosecution, a defendant’s burden concerning proof of invalidity is particularly
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1 heavy. Id.; Glaxo Group Ltd. v. Apotex, Inc., 376 F.3d 1339, 1348 (Fed. Cir. 2004) (“This
2 burden is ‘especially difficult’ when, as is the present case, the infringer attempts to rely on
3 prior art that was before the patent examiner during prosecution.”).

4 “A patent is invalid for anticipation if a single prior art reference discloses each and
5 every limitation of the claimed invention.” Schering Corp. v. Geneva Pharm., 339 F.3d
6 1373, 1377 (Fed Cir. 2003). “[A] prior art reference may anticipate without disclosing a
7 feature of the claimed invention if that missing characteristic is necessarily present, or
8 inherent, in the single anticipating reference.” Id. Additionally, such disclosure must be
9 “enabling.” SmithKline v. Beecham Corp v. Apotex Corp., 403 F.3d 1331, 1432 (Fed. Cir.
10 2005). In other words, it must allow a person of ordinary skill in the art to practice or make
11 the invention without resort to undue experimentation. Impax Labs., 545 F.3d at 1314. The
12 enabling component of the anticipation test “presents a question of law based upon
13 underlying factual findings.” Id. at 1315. On the whole, however, anticipation is a question
14 of fact. SmithKline, 403 F.3d at 1343. Where there are no “genuine factual disputes
15 underlying the anticipation inquiry, the issue is ripe for judgment as a matter of law.” Id.

16 **B. The ‘295 Patent**

17 **i. Claims 2 & 40**

18 For the purposes of its motion, Stinger groups claims 2 and 40 of the ‘295 patent
19 together, making two arguments: (1) two prior art ECDs—the U34000 Air Taser (“U34000”)
20 and the Taser Public Defender (“TPD”) embody every element of claims 2 and 40; and (2)
21 TASER’s X26 ECD anticipates claims 2 and 40 because the PTO wrongly granted the ‘295
22 patent a priority date of 2003.

23 **a. The U34000 and TPD**

24 The U34000 and TPD are prior art ECDs. The Parties do not dispute that the U34000
25 and TPD were sold in the United States before 1995 and 1976 respectively, well before the
26 2003 priority date of the ‘295 patent. (Defendant’s Statement of Facts (“DSOF”) ¶1) In its
27 papers, Stinger argues, that when operated, these two prior art ECDs embody every element
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1 of claims 2 and 40, an assertion that TASER denies. The Parties disagreement, however,
2 is narrow, focusing only on one element of claims 2 and 40; the so-called dual operating
3 mode, which teaches a power supply for operating in a first mode to generate a high voltage
4 output, then in a second mode to generate a second lower voltage output.

5 In support of its argument, Stinger relies primarily on the conclusions of its expert,
6 Mr. Tachner. Having analyzed the wave forms of the U34000 and TPD with an
7 oscilloscope, Mr. Tachner found they each demonstrated a damped sinusoid wave form, then
8 concluded that such a wave form demonstrates the utilization of a dual operating mode. (Id.
9 ¶2). TASER contests Mr. Tachner’s conclusions, citing this Court to the Rebuttal Report of
10 its expert, Dr. Rodriguez, who found that a damped sinusoid wave is not indicative of a dual
11 operating mode, as ECDs known to operate in only one mode also produce damped sinusoid
12 waves. (Plaintiff’s Statement of Facts (“PSOF”) ¶2). For instance, TASER cites to evidence
13 showing that the prior art TASER M26 ECD, which operates in only one mode, outputs a
14 damped sinusoid wave. (Id. ¶109). Additionally, TASER has cited to evidence showing
15 that the M34000 utilizes the same single mode blunt-pulse approach as the M26, and points
16 out that the M26 is not alleged to have anticipated claims 2 and 40. Given the dispute over
17 the significance of a damped sinusoid wave form, whether or not the U34000 and TPD
18 operate in two modes is a material fact about which there is clearly a dispute, precluding a
19 finding of anticipation.

20 **b. The priority date argument**

21 Next, Stinger argues that claims 2 and 40 are anticipated by TASER’s X26 ECG²
22 (“X26”) because TASER is not entitled to the 2003 priority date currently enjoyed by its ‘295
23 patent. Pursuant to 35 U.S.C. § 120, an application for a patent based on a previously
24 disclosed invention “shall have the same effect, as to such invention, as though filed on the
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26 ²The TASER X26 ECG is the product that embodies the technological innovations
27 represented by the patents at issue in this case.

1 date of the prior application” when certain conditions are met. These conditions are as
2 follows:

3 (1) the invention claimed in the application must have been properly disclosed
4 in a prior-filed application; (2) the application must have been filed by
5 inventor(s) named on the prior-filed application; (3) the application must have
6 been “filed before the patenting or abandonment of or termination of
7 proceedings on the first application or on an application similarly entitled to
8 the benefit of the filing date of the first application”; and (4) the application
9 must contain or be amended to contain a specific reference to the prior-filed
10 application.

11 Tafas v. Doll, 559 F.3d 1345, 1361 (Fed. Cir. 2009) (quoting 35 U.S.C. § 120).

12 As a preliminary matter, it is undisputed that TASER began selling the X26 in or
13 about May, 2003, and that the ‘295 patent is a continuation of an application U.S. Patent
14 10/447,447 (filed May 29, 2003) (PSOF ¶112). Accordingly, absent a showing by Stinger
15 that the ‘295 patent is not a continuation of the ‘447 patent, the X26 cannot have anticipated
16 the ‘295 patent. 35 U.S.C. § 102(b) (stating that a person shall be entitled to a patent unless
17 the invention was described, in use, or on sale “one year prior to the date of the application
18 for patent in the United States.”).

19 The Court must determine, then, whether Stinger has proven that the ‘295 patent
20 application did not satisfy the four-part test set forth in Tafas. The answer to that question
21 is clearly, no. TASER has introduced evidence showing that the ‘295 patent satisfies all four
22 elements of that test, including the written description requirement, which only requires that
23 the disclosure statement convey “with reasonable clarity to those skilled in the art that, as of
24 the filing date sought, [the inventor] was in possession of the invention.” Revolution
25 Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358, 1366 (Fed. Cir. 2009); (PSOF
26 ¶114–17). Stinger, on the other hand, does not explain how the ‘295 Patent fails to satisfy
27 the Tafas test—i.e. meet the requirements of 35 U.S.C. § 120—let alone explain how it does
28 not satisfy the written description element. Instead, Stinger argues that the prosecution of
the ‘762 patent somehow deems the ‘295 patent unworthy of continuation. Although it is
somewhat unclear, Stinger appears to contend that the ‘762 patent disclosed the invention

1 taught in the '295 patent and, as a result, the '295 patent cannot be a continuation of the '447
2 patent. Stinger, however, has cited no authority for its proposition that the file history of a
3 different patent application can cancel an otherwise valid continuation application. This
4 Court, as a result, will not grant summary judgment.

5 **c. The Rhoads Patent**

6 In its reply brief, Stinger's anticipation argument relies heavily on the prior art patent,
7 Rhoads, U.S. Patent No. 4,120,305 (filed Sept. 10, 1976) ("Rhoads"). In its initial motion,
8 however, Stinger's only mentions Rhoads twice. One reference to Rhoads is found in the
9 section of its brief arguing that claims 2 and 40 of the '295 patent a law of nature. The other
10 reference is located under the heading "Stinger Practices the Prior Art." Both citations make
11 reference to Figure 3A of Rhoads, but neither explains its meaning or content. Additionally,
12 neither reference is supported by citation to Stinger's statement of facts. In fact, Rhoads is
13 not cited in the statement of facts at all. By failing to adequately explain its reliance on
14 Rhoads or cite to it in its statement of facts, Stinger has denied TASER an opportunity to
15 properly respond to the more specific anticipation arguments made in its reply brief. See
16 Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990) (noting that legal arguments
17 raised for the first time in the reply brief are deemed waived). While Stinger's behavior may
18 fall short of waiver, the Court finds it would be inequitable to rely on Rhoads to invalidate
19 TASER's '295 patent, as doing so would entail relying on arguments to which TASER did
20 not have a proper opportunity to respond³. See United States v. Romm, 455 F.3d 990, 997
21 (noting that even if the argument has merit, this Court cannot appropriately consider it, since
22 Plaintiffs did not have the opportunity to respond.).

23 **C. The '870 Patent**

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25 ³At oral argument, Stinger explained that it relied so heavily on Rhoads in its reply
26 brief because it was merely responding to arguments concerning Rhoads raised in TASER's
27 response. The Court is not persuaded by this line of reasoning, as it does not appear that
28 TASER mentioned Rhoads even one time in its response.

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i. Claim 1

Stinger’s anticipation argument concerning claim 1 of the ‘870 patent is predicated on the prior art patent Kaufman, U.S. Patent No. 5,193,048 (filed April 27, 1990) (“Kaufman”). Kaufman patents an “electronic [stun-gun] device designed to incapacitate a person by means of a non-lethal electric shock.” Stinger contends that Kauffman discloses every limitation of claim 1 of the ‘870 patent. Claim 1 teaches (1) two separate electrodes that allow for two contact points on the target; (2) a high voltage power supply capable of delivering a series of electrical pulses to the target, a battery system including a battery; (3) a digital memory device for storing battery capacity data indicating the amount of battery capacity consumed or remaining, and a data interface that allows the battery system and the digital memory device to communicate; (4) and a display for indicating to the battery capacity. TASER does not appear to dispute that Kaufman embodies the first, second, and fourth elements of claim 1. Instead, TASER’s responds to Stinger’s accusation of anticipation by arguing that the third element of claim 1—the digital memory and data interface—is not found in Kaufman. (PSOF ¶144).

As an initial matter, the PTO considered Kaufman when making its determination concerning TASER’s ‘870 patent application. Accordingly, Stinger bares a even heavier burden than would otherwise apply in an anticipation challenge. Impax Labs., 545 F.3d at 1314. In support of its position that the Kaufman patent satisfies claim 1’s “digital memory” and “data” limitation, Stinger points to Kaufman’s utilization of a “14 stage ripple carry counter.” In explaining the significance of the 14 stage ripple carry counter, however, Stinger merely quotes Kaufman, which states that “anytime the power switch SW1 [of the weapon taught in Kaufman] is held closed, the 14 state ripple carry counter U2 continues to increment its count stored therein.” TASER counters by noting that its expert concluded that the 14 stage ripple carry counter is not, in fact, a digital memory device. TASER also argues that the 14 stage ripple carry counter does not track battery capacity (PSOF ¶144). Instead, it functions as more of a timer, keeping track of how long a battery has been in use and

1 triggering a low battery light indicator after the battery has been used for a certain amount
2 of time. (Id. ¶146). When a new battery is inserted, the 14 stage ripple carry counter is
3 “unaware of the quality of the replacement battery” and will begin counting time again from
4 zero, regardless of how much charge is in the replacement battery. (Id.). Accordingly,
5 TASER argues, that the invention taught in Kauffman only monitors the time a battery has
6 been used, not its capacity

7 In light of the Parties disagreement concerning the function of the 14 stage ripple
8 carry counter, summary judgment is inappropriate. There is very clearly a disputed issue of
9 fact concerning whether Kaufman teaches “a digital memory device for storing battery
10 capacity data indicating the amount of battery capacity consumed or remaining, and a data
11 interface that allows the battery system and the digital memory device to communicate.”
12 The Court finds, therefore, that Stinger has not met its heavy burden and its motion is denied.

13 **ii. Claim 2**

14 As with claim 1 of the ‘870 patent, the Parties only disagree about one element of the
15 patent claim at issue; the element of claim 2 that teaches “a display for indicating to the user
16 the amount of time remaining in each pulse sequence.” Stinger’s argument is predicated on
17 a prior art device, the U34000, but only indirectly, and can only be understood by reference
18 to TASER’s allegation of infringement against Stinger. TASER alleges that the S-200
19 infringes claim 2 of the ‘870 patent because it utilizes a display consisting of four light
20 emitting diodes (“LEDs”), which light or energize sequentially as 25% increments of the
21 pulse charge are consumed. TASER asserts that because each of the S-200's LEDs activate
22 at approximately one second intervals, users are able to measure the time remaining in each
23 pulse sequence. Stinger argues that if the S-200 infringes claim 2, which it denies, then the
24 U34000 must also infringe because it’s battery indicator display can be similarly used to
25 calculate the time remaining in a given pulse sequence. And, if the U34000 infringes, then
26 TASER’s patent is anticipated because the U34000 was in public use prior to 1995, well
27 before the 2003 date of the ‘870 patent.

1 than would otherwise apply in an anticipation challenge. Impax Labs., 545 F.3d at 1314.
2 It has not met that burden. In opposition to Stinger’s motion, TASER also relies on Stinger’s
3 expert, Mr. Tachner, pointing to deposition testimony in which Mr. Tachner admitted
4 Darrell’s transistor switch, which connects the transformer center tap to the positive battery
5 terminal, may be open during the half cycle relied upon by Stinger, preventing a positive
6 voltage from appearing at one electrode and a negative voltage at the other, with respect to
7 the ground. (PSOF ¶160). In light of the contradictory nature of Mr. Tachner’s testimony
8 and the heavy presumption in favor of validity, summary judgment cannot be granted. The
9 Court finds there is a genuine issue of material of fact concerning whether or not the
10 contested element of claim 4 is present in Darrell.

11 **D. The ‘262 Patent**

12 As with the ‘295 patent, Stinger asserts that TASER’s ‘262 patent is not entitled to
13 its 1999 priority date and, therefore, is anticipated by TASER’s own X26 ECD. (See DSOF
14 ¶39). Specifically, Stinger claims that the invention claimed in the ‘262 patent was not
15 disclosed until a December 12, 2005 amendment to the September 17, 1999, application.
16 (DSOF ¶37). As TASER rightly points out, Stinger’s argument, then, is that the
17 amendments made to the 1999 application by the 2005 amendment constitute previously
18 undisclosed “new matter.” See, e.g., Pfizer, Inc. v. Teva Pharm. USA, Inc., 518 F.3d 1353,
19 1362 (Fed. Cir. 2008) (noting that as a general rule “new matter is not entitled to the priority
20 date of the original application.”). “Whether particular technological information is ‘new
21 matter’ depends on the facts of the case: the nature of the disclosure, the state of the art, and
22 the nature of the added matter.” Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d
23 1555, 1575 (Fed. Cir. 1992). Additionally, “in the context of a validity challenge based on
24 new matter, the fact that the [PTO] has allowed an amendment without objection is entitled
25 to an especially weighty presumption of correctness in a subsequent validity challenge based
26 on the alleged introduction of new matter.” Commonwealth Scientific and Indus. Research
27 Org. v. Buffalo Tech. (USA), Inc., 542 F.3d 1363, 1380 (Fed. Cir. 2008).

1 The '262 patent appears to warrant a heavy presumption of validity. TASER has cited
2 this Court to the Notice of Allowability, dated March 7, 2006, in which the patent examiner
3 concluded the 2005 application was entitled to a September 1999 priority date. (PSOF ¶169).
4 In attempting to satisfy its very heavy burden, Stinger argues that the 2005 amendment is
5 new matter because it includes, for the first time, references to a “circuit,” “signal generator,”
6 “disabling the signal generator,” apparatus that “keeps track of current time of day, keeps
7 track of current date,” or “keeping track of a period of time.” (See DSOF ¶39). TASER
8 concedes that the 1999 application does not contain these exact phrases, but argues instead
9 that Stinger cannot invalidate its patent merely by pointing out that certain terms and phrases
10 do not appear verbatim in the 1999 application. TASER’s position is accurate, “as the prior
11 application need not describe the claimed subject matter in exactly the same terms as used
12 in the claims; it must simply indicate to persons skilled in the art that as of the earlier date
13 the applicant had invented what is now claimed.” Eiselstein v. Frank, 52 F.3d 1035, 1039
14 (Fed. Cir. 1995). Accordingly, the Court must consider what was disclosed in the 1999
15 patent application.

16 It appears that the 1999 application discloses an ECD controlled by a microprocessor
17 that, among other things, “retains a record of the date and time the weapon was fired.”
18 TASER argues that ‘262 merely claims a method to accomplish this task. Stinger makes
19 much of the fact that the ‘262 patent does not detail the specific operation of the
20 microprocessor, such as how the microprocessor is programmed to keep track of date and
21 time. Stinger has not put forth evidence, however, explaining how this lack of information
22 does not disclose to a person reasonably skilled in the art what TASER had invented. On the
23 contrary, in another part of its brief, Stinger cites to the Declaration of Rodriguez, in which
24 Dr. Rodriguez stated that “[o]ne of ordinary skill in the art would know there are many ways
25 to track date and time” and explained many viable methods to accomplish that task (DSOF
26 ¶40). Accordingly, the Court finds that Stinger has not overcome the presumption of validity
27 to which the ‘262 patent is entitled, and a material issue of fact exists concerning whether the
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1 disclosures made in the 2005 application are new matter and not, therefore, entitled to the
2 1999 priority date.

3 **2. Obviousness**

4 5 **A. Legal Standard**

6 As this Court has already explained, a party seeking to establish that patent claims are
7 invalid must overcome statutory presumption of validity set forth in 35 U.S.C. § 282 by clear
8 and convincing evidence. Impax Labs., Inc. v. Aventis Pharms., Inc., 545 F.3d 1312, 1314
9 (Fed. Cir. 2008). This presumption of validity exists at every stage of the litigation. Cannon
10 Computer Sys., Inc. v. Nu-Kote Int'l, Inc., 134 F.3d 1985, 1088 (Fed. Cir. 1998), and “is
11 never annihilated, destroyed or even weakened regardless of what facts are of record.” ACS
12 Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1472, 1574-75 (Fed. Cir. 1984). Where the
13 Patent and Trademark Office (“PTO”) considered the prior art that is the basis of the validity
14 challenge during patent prosecution, defendant’s burden to prove invalidity is particularly
15 heavy. Glaxo Group Ltd. v. Apotex, Inc., 376 F.3d 1339, 1348 (Fed. Cir. 2004) (“This
16 burden is ‘especially difficult’ when, as is the present case, the infringer attempts to rely on
17 prior art that was before the patent examiner during prosecution.”).

18 A patent claim is invalid for obviousness if the invention recited in the claim would
19 have been obvious to a person of ordinary skill in the field of the invention at the time it was
20 made. Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1116
21 (Fed Cir. 2004). In this case, the Parties have agreed that a person of ordinary skill in the art
22 is a university educated electronics engineer with a bachelor’s degree in electronic
23 engineering. To determine obviousness, the Court must examine: (1) the scope and content
24 of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level
25 of ordinary skill in the pertinent art; and (4) the objective evidence of nonobviousness. Iron
26 Grip Barbell Co., Inc. v. USA Sports, Inc., 392 F.3d 1317, 1320 (Fed Cir. 2004) (citing
27 Graham v. John Deere Co., 383 U.S. 1 (1966)). Obviousness is a question of law predicated
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1 on underlying facts. McGinley v. Franklin Sports, Inc., 262 F.3d 1339, 1349 (Fed. Cir.
2 2001). And, as with anticipation, a defendant must show invalidity due to obviousness by
3 clear and convincing evidence. Id. Ultimately, where “the content of the prior art, the scope
4 of the patent claim, and the level of ordinary skill in the art are not in material dispute, and
5 the obviousness of the claim is apparent in light of these factors, summary judgment is
6 appropriate.” KSR International. Co. v. Teleflex Inc., 550 U.S. 398, 427 (2007)

7 In its papers, Stinger argues that the Supreme Court’s decision in KSR radically
8 altered the obviousness standard. This Court, however, disagrees. Contrary to Stinger’s
9 assertions, the KSR Court did not overturn the Federal Circuit’s teaching, suggestion, or
10 motivation (“TSM”) test, “under which a patent claim is only proved obvious if the prior art,
11 the problem's nature, or the knowledge of a person having ordinary skill in the art reveals
12 some motivation or suggestion to combine the prior art teachings.” Id. at 407. To the
13 contrary, the Court specifically noted that “[t]here is no necessary inconsistency between the
14 [TSM] test and the Graham analysis.” Id. at 419. Instead, it merely held that the TSM test
15 should not be rigidly applied; instead courts should utilize a more “expansive and flexible
16 approach.” Id. at 415. Accordingly, “[i]n determining whether the subject matter of a patent
17 claim is obvious, neither the particular motivation nor the avowed purpose of the patentee
18 controls. What matters is the objective reach of the claim.” Id. at 419. Additionally, KSR,
19 did not, however, alter courts’ duty to consider secondary factors which mitigate against a
20 finding of obviousness. These include: (1) the commercial success of a product due to the
21 merits of the claimed invention; (2) a long felt need for the solution provided by the claimed
22 invention; (3) unsuccessful attempts by others to find the solution provided by the claimed
23 invention; (4) copying of the claimed invention by others; (5) unexpected and superior results
24 from the claimed invention; (6) acceptance by others of the claimed invention as shown by
25 praise from others in the field or from the licensing of the claimed invention; (7) other
26 evidence tending to show nonobviousness; (8) independent invention of the claimed
27 invention by others before or at about the same time as the named inventor thought of it; and
28

1 (9) other evidence tending to show obviousness. Id. at 406 (citing Graham, 383 U.S. at 17-
2 18).

3 Predicated on its beliefs concerning the transformative nature of KSR, Stinger argues
4 this Court should not apply the presumption of validity to TASER’s patents, as the PTO
5 awarded TASER’s patents under the pre-KSR standard for obviousness. This argument,
6 however, is not supported by KSR. As part of its analysis the Supreme Court specifically
7 noted that it did not doubt the Federal Circuit, in many case, had conducted the obviousness
8 inquiry pursuant to the standard it articulated in KSR Id. at 419 (“In the years since the
9 Court of Customs and Patent Appeals set forth the essence of the TSM test, the Court of
10 Appeals no doubt has applied the test in accord with these principles in many cases.”).
11 Likewise, this Court does not doubt that patent examiners have likewise conducted many of
12 their patent examinations in accord with KSR. Accordingly, it does not accept Stinger’s
13 position, that in light of KSR, this Court must not give TASER’s patents the statutory
14 presumption of validity to which they are otherwise entitled. In so doing, this Court notes
15 that its holding comports with the majority of other district courts that have addressed this
16 question. See, e.g., Church & Dwight Co., Inc. v. Abbott Labs., 2008 WL 2566193, at *6
17 (D.N.J., June 24, 2008) (“KSR does not appear to have altered the statutory presumption of
18 validity.”); Power Integrations, Inc. v. Fairchild Semiconductor Int’l, 2007 WL 2893391, at
19 *1 (D. Del. Sept. 20, 2007) (concluding that KSR “does not alter the statutory presumption
20 of validity”).

21 **B. The 295' Patent**

22 **i. Claims 2 & 40**

23 Stinger makes three arguments concerning the obviousness of claims 2 and 40 of
24 TASER’s ‘295 patent: (1) claims 2 and 40 impermissibly patent a law of nature; (2) claims
25 2 and 40 are obvious in light of the prior art patent Gowan, U.S. Patent No. 5,471,362 (filed
26 February 26, 1993) (“Gowan”); and (3) the prior art Taser Public Defender ECD uses a two
27 capacitor.

1 explained in the '295 patent application , after ionization of the air gap, a single-mode ECD
2 must “continue operating in the same mode while delivering current flow or charge across
3 the skin of a now very low impedance target. The resulting high power, high voltage stun gun
4 circuit operates relatively inefficiently yielding low electro-muscular efficiency and with
5 high battery power requirements.” U.S. Patent 6,999,295 (filed Feb. 5, 2005). To address
6 this problem, claims 2 and 40 teach the use of a power supply which operates in a second
7 mode to generate a more efficient low voltage, high current output. (See PSOF ¶89–91).
8 Because the second-mode’s voltage output is not merely the result of the law of nature
9 described by Dr. Rodriguez, TASER denies it has patented a law of nature. Instead, TASER
10 argues it has patented a process that takes advantage of that law of nature to send high
11 amounts of current over the ionized air-gap using very little voltage.

12 In determining whether the moving party has met its burden, the Court views the
13 evidence in the light most favorable to the nonmovant. Allen v. City of Los Angeles, 66 F.3d
14 1052, 1056 (9th Cir. 1995). If the ECD patented by claims 2 and 40 operates as TASER has
15 described, than a reasonable juror could conclude that TASER has patented a process, not
16 a law of nature. Accordingly, summary judgement on this issue is denied.

17 **b. Gowan does not render claims 2 and 40 obvious**

18 Stinger argues that the dual operating mode taught by claims 2 and 40 apply well
19 understood electrical principles and, as a result, are obvious in light of the Gowan, U.S.
20 Patent No. 5,471,362 (filed February 26, 1993) (“Gowan”). TASER, on the other hand,
21 maintains that the dual-operating mode was not obvious in light of Gowan. At the outset, the
22 Court notes that the patent examiner considered Gowan when evaluating TASER’s
23 application for the '295 patent. As this Court has already explained, KSR did not alter the
24 presumption of validity or burden that a party challenging a patent must carry. Accordingly,
25 Stinger bares a particularly heavy burden to demonstrate claims 2 and 40's invalidity. Glaxo
26 Group Ltd. v. Apotex, Inc., 376 F.3d 1339, 1348 (Fed. Cir. 2004). In its motion, Stinger has
27 not attacked the substance of the patent examiner’s reasons for allowance, other than to
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1 suggest it is wrong in light of KSR. Because Stinger does not argue that the examiner’s
2 decision was incorrect under the pre-KSR standard, this Court need only determine whether
3 Stinger has proven by clear and convincing evidence that KSR dictates a different conclusion
4 than the one reached by the patent examiner.

5 In considering TASER’s patent application, “Gowan . . . teaches an arc generating
6 circuit that has a first transformer 1 to create an arc and a second transformer 21 with a
7 different output voltage to flow current across the arc.” (DSOF, ¶4). In deciding that claims
8 2 and 40 were not obvious, the patent examiner distinguished Gowan, stating:

9 The teachings of Gowan differ from the claims by not using the current flow
10 across the arc to disable a subject (person or other living being). The arc in the
11 Gowan teaching is used to fire a spark plug in an automotive internal
12 combustion engine. The prior art record in this application (which includes
Gowan) fails to teach or fairly suggest the use of a stun gun type device that
uses a second transformer with a lower output voltage to flow current across
an arc to disable a subject.

13 (Id.) Because the patent examiner distinguished Gowan from claims 2 and 40 by noting the
14 dissimilarity between the arts, Stinger’s argument for obviousness based on KSR is
15 presumably grounded in KSR’s teaching that “if a technique has been used to improve one
16 device, and a person of ordinary skill in the art would recognize that it would improve similar
17 devices in the same way, using the technique is obvious.” 550 U.S. at 417.

18 TASER does not appear to dispute that claims 2 and 40 use the same or, at least, a
19 similar technique to the one utilized in Gowan. KSR suggests, however, that the mere fact
20 a technique exists in the prior art does not render any subsequent use of that technique
21 obvious. Instead, KSR teaches that the prior art device that employed the technique and the
22 device currently utilizing the technique must be “similar devices.” Id. In awarding claims
23 2 and 40 of the ‘295 patent, the examiner noted that “an arc . . . used to fire a spark plug for
24 an automotive engine . . . is highly unrelated to the stun gun art.” (emphasis added).
25 Additionally, TASER’s expert, Dr. Rodriguez, has testified to other major differences in
26 design, operation, and purpose between Gowan. (See PSOF ¶131–32). Because Stinger has
27 relied solely on KSR as a reason to contravene the patent examiner’s findings concerning
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1 Gowan with respect to claims 2 and 40, and KSR does not appear to mandate a finding of
2 obviousness in this situation, the Court cannot conclude that Stinger has met its very heavy
3 burden. Whether there is sufficient similarity between the Gowan device and the ECD
4 claimed in the '295 patent will be for a jury to decide.

5 **c. Police Model Taser does not render claims 2 and 40**
6 **obvious**

7 Stinger also contends that an ECD called the Police Model Taser (“PMT”), which was
8 manufactured by Tasertron, Inc. prior to its purchase by TASER in 2003, renders the '295
9 patent obvious. According to Stinger, the PMT employed two capacitors in parallel to
10 discharge an arching shock, with one capacitor discharging after the other, the later of the
11 two at a lower energy level and voltage than the first. (DSOF ¶ 5). Stinger appears, then,
12 to argue the PMT’s two capacitor system makes obvious the dual-mode operating system
13 taught in the '295 patent.

14 As an initial matter, Stinger’s claims concerning the workings of the PMT are
15 supported by the uncorroborated declaration of Stinger’s lawyer, Mr. McNulty. (See Id.).
16 Uncorroborated testimony is insufficient to invalidate a patent. Finnigan Corp. v. Int’l Trade
17 Comm’n, 180 F.3d 1354, 1369 (Fed Cir. 1999) (“[C]orroboation is required of any witness
18 whose testimony alone is asserted to invalidate a patent, regardless of his or her level of
19 interest.”). Additionally, TASER has produced evidence contradicting Stinger’s
20 characterization of the prior art PMT’s operation. TASER cites to the deposition of Stinger’s
21 expert, Mr. Tachner, who testified that when two capacitors are connected in parallel, they
22 do not operate separately, but work in tandem as a single larger capacitor, discharging
23 simultaneously. (PSOF ¶ 136). In his deposition, Mr. Tachner also admitted that a circuit
24 using two parallel capacitors could be identical to the prior art circuit shown in Figure 1 of
25 the '295 patent. (Id.). In light of the lack of corroboration, the presumption of validity, and
26 the dispute concerning the workings of a parallel circuit—i.e. the scope of the prior art
27
28

1 PMT—this Court finds that Stinger has not demonstrated obviousness by clear and
2 convincing evidence.

3 **C. The ‘870 Patent**

4 **i. Claim 1**

5 Claim 1 of the ‘870 patent teaches (1) two separate electrodes that allow for two
6 contact points on the target; (2) a high voltage power supply capable of delivering a series
7 of electrical pulses to the target, a battery system including a battery; (3) a digital memory
8 device for storing battery capacity data indicating the amount of battery capacity consumed
9 or remaining, and a data interface that allows the battery system and the digital memory
10 device to communicate; (4) and a display for indicating the battery capacity. In arguing that
11 Claim 1 is obvious, Stinger cites this Court to four prior art patents (Kaufman; Poole, U.S.
12 Patent No. 6,237,461 (filed May 28, 1999); Harthcock, U.S. Patent No. 5,303,495 (filed Dec.
13 9, 1992); and Horne, 5,005,307 (filed Dec. 29, 1989)) and two prior art devices (the M26 and
14 the U34000). (DSOF ¶15). Stinger asserts that all elements of claim 1 are present in the
15 prior art devices, except the digital memory device and data interface. As for the fourth
16 element of claim 1—a display for indicating battery capacity—Stinger notes that it accepted
17 TASER’s construction that “a display with any indication of battery capacity is sufficient,”
18 then directs the Court to Kaufman and Poole, each of which teach a low-battery indicator
19 light. (*Id.*). Finally, Stinger cites to Harthcock and Horne, as teaching the use of a
20 microprocessor to control a firearm, which, presumably, covers claim 1’s digital memory
21 device and data interface limitation.

22 Stinger has set forth prior-art patents and devices that are relevant to an obviousness
23 inquiry. What it has not done, however, is explain to this Court why this prior art render’s
24 claim 1 obvious. In the section of its brief pertaining to the alleged obviousness of claim
25 1—which weighs in at a mere seven sentences—Stinger makes only one argumentative
26 statement: “The use of the microprocessor’s memory instead of a separate circuit to monitor
27 the battery is obvious.” Given that it must overcome the presumption of validity and prove
28

1 obviousness by clear and convincing evidence, Stinger’s lack of application of facts to law
2 is puzzling. As the Supreme Court has explained, “a patent composed of several elements
3 is not proved obvious merely by demonstrating that each of its elements was, independently,
4 known in the prior art.” KSR, 550 U.S. at 418. Rather, the question is really whether “a
5 person of ordinary skill can implement a predictable variation.” Id. at 417. Stinger clearly
6 believes a college educated engineer could have implemented claim 1, but does not bother
7 to explain why, let alone support its claim with expert testimony or other evidence.⁵ In
8 essence, Stinger merely asserts that its obviousness claim is obvious. In so doing, Stinger
9 has not met its burden, and this Court will not invalidate claim 1.

10 **ii. Claim 3**

11 Stinger’s obviousness argument as to claim 3 of the ‘870 patent focuses on a single
12 limitation of that claim; “a mechanism for allowing the user to extend the duration of the
13 pre-timed series of electrical pulses.”⁶ The parties do no dispute that the “mechanism” is a
14 trigger. Stinger contends that the use of a trigger in this manner is obvious, citing the
15 deposition admission by claim 3’s inventor, Mr. Nerheim, that both prior art automatic
16 weapons and the prior art M26 ECD will continue to fire if their trigger is held down.
17 (DSOF ¶26). Similarly, Stinger cites to Kaufman and Dunning, U.S. Patent No. 4,872,084
18 (filed Sept. 6, 1988). Kaufman teaches an activator switch used for firing an ECD that when
19

20 ⁵Indeed, the Court notes that Stinger only explained the type of knowledge and skill
21 it believes a college educated engineer possesses in its reply brief. By completely neglecting
22 this important step in its motion, Stinger deprived TASER of a chance to respond and has
23 failed to adequately guide this Court’s consideration of the issue, making it difficult to grant
summary judgment.

24 ⁶The Court understands that “the determination of obviousness is made with respect
25 to the subject matter as a whole, not separate pieces of the claim.” Sanofi-Synthelabo v.
26 Apotex, Inc., 550 F.3d 1075, 1086 (Fed. Cir. 2008). The disputed element, however, fairly
27 captures the whole of claim 3’s subject matter as the other parts of the claim merely teach
28 essential elements of the ECD device to which the purported invention, the trigger
mechanism for extending a pre-timed series of electrical pulses, is attached.

1 “pressed continually for 15 seconds . . . automatically disable [the ECD] for a predetermined
2 time,” while Dunning teaches an ECD that fires as long as its trigger switch is operated.
3 (DSOF ¶26).

4 In response, TASER notes that both Kaufman and Dunning were before the patent
5 examiner. TASER also argues that Kaufman teaches away from the concept of using a
6 trigger to extend a devices’ output, as the ECD taught in Kaufman stops firing after 15
7 seconds, no matter how long its activator switch is held. See McGinley v. Franklin Sports,
8 Inc. 262 F.3d 1339, 1354 (Fed Cir. 2001)(“[R]eferences that teach away cannot serve to
9 create a prima facie case of obviousness.”). TASER, however, primarily combats Stinger’s
10 allegation of obviousness by distinguishing the prior art devices and weapons relied upon by
11 Stinger, arguing that their firing output continues as long as the trigger is held down, not for
12 a pre-defined period of time. In other words, TASER argues that no one had ever before
13 used a trigger to extend a pre-timed series of electrical pulses. This fact, however, is not
14 determinative under KSR.

15 As this Court has already explained, “if a technique has been used to improve one
16 device, and a person of ordinary skill in the art would recognize that it would improve similar
17 devices in the same way, using the technique is obvious unless its actual application is
18 beyond his or her skill.” KSR, 550 U.S. at 417. There is no question that an ECD that fires
19 a pre-timed series of pulses is similar art to an ECD that fires non-pre-timed pulses.
20 Additionally, TASER does not dispute that the M26 and the device taught in Dunning both
21 use triggers to extend their firing duration. Accordingly, Stinger’s evidence shows that a
22 trigger is a well known option for extending the firing duration of ECDs. The question, then
23 becomes, would a reasonably skilled engineer have recognized that a trigger could be used
24 to extend a pre-timed series of electrical pulses? Without relying on Kaufman, which teaches
25 away from using extending a pre-timed series of electrical pulses with a trigger, this Court
26 answers this question in the affirmative.

1 “When there is a design need or market pressure to solve a problem and there are a
2 finite number of identified, predictable solutions, a person of ordinary skill has good reason
3 to pursue the known options within his or her technical grasp.” *Id.* at 421. The use of a
4 trigger to extend the firing duration of an ECD was clearly a known option at the time of
5 claim 3's invention. Given this fact, the Court finds that applying the same technique to an
6 ECD using pre-timed electrical pulses appears to be a predictable solution that a reasonably
7 skilled college educated engineer would have had good reason to pursue. Accordingly, the
8 Court finds that Stinger has met its heavy burden, overcoming the presumption of validity,
9 and summary judgment should be granted as to the invalidity of claim 3 of the ‘870 patent.
10 The Court will not consider secondary factors that might mitigate against a finding of
11 obviousness, as TASER has not argued that they are applicable concerning claim 3.

12 **iii. Claim 4**

13 Stinger argues that it was obvious to combine the transformer configuration taught in
14 claim 4 of the ‘870 patent with an ECD. In pertinent part, Claim 4 recites:

15 a high voltage power supply for generating an output voltage delivered across
16 the first and second contact points on the target to generate a positive voltage
17 potential at one electrode and a negative voltage potential at the other electrode
18 thereby increasing the total voltage drop across a target while decreasing the
19 maximum voltage potential between either electrode and a grounded user of
the weapon

20 In support of its argument, Stinger cites this Court to the Parker, U.S. Patent 5,892,646 (filed
21 May 5, 1995) (“Parker”). Parker teaches the use of transformers with grounded secondary
22 wire center taps (“GSWCT”) in gas-discharge display lamps (i.e. neon signs), the purpose
23 of which is to reduce the severity of shock to users of electronic devices that contact the
24 ground and a lead of the secondary transformer. (DSOF ¶31). Stinger claims that the ECD
25 described in claim 4 utilizes the transformer with grounded secondary wire center taps found
26 in Parker, installs it in the same fashion, and uses it for the same purpose. TASER does not
27 appear to contest Stinger’s factual contentions concerning Parker and its relationship to claim
28

1 4. In lieu of challenging the factual underpinnings of Stinger’s obviousness argument,
2 TASER asserts legal defenses, arguing that only analogous prior art is relevant to a question
3 of obviousness and that claim 4 cannot be invalidated as obvious without engaging in
4 impermissible hindsight-based analysis.

5 The Federal Circuit has held that non-analogous art has no bearing on an obviousness
6 claim. See Jurgens v. McKasy, 927 F.2d 1552, 1559 (Fed. Cir. 1991) (“And if we presume
7 that the Dacian windsock is not analogous art, it has no bearing on the obviousness of the
8 patent claim.”). As this Court has already explained, KSR does not appear to have
9 completely destroyed this principle. Instead, it appears to have expanded the range of prior
10 art that is relevant to an obviousness inquiry, substituting the word analogous for similar.
11 KSR, 550 U.S. at 417 (“[I]f a technique has been used to improve one device, and a person
12 of ordinary skill in the art would recognize that it would improve similar devices in the same
13 way, using the technique is obvious.” (emphasis added)). KSR also points out, however,
14 that “[w]hen there is a design need or market pressure to solve a problem and there are a
15 finite number of identified, predictable solutions, a person of ordinary skill has good reason
16 to pursue the known options within his or her technical grasp.” Id. at 421. It stands to
17 reason, then, that identified and predictable solutions are those which have been employed
18 in similar or analogous arts. Were it otherwise, a reasonably skilled inventor would be
19 responsible for techniques and invention he would have no reason about which to know.
20 Courts, in turn, would be forced to engage in the type of hind-sight based analysis which
21 KSR confirmed is forbidden when evaluating obviousness. Id. (“A factfinder should be
22 aware, of course, of the distortion caused by hindsight bias and must be cautious of
23 arguments reliant upon ex post reasoning.”).

24 The question, then, is whether Parker and the claim 4 can be said to practice similar
25 arts or are similar devices. If the answer is yes, then claim 4 is likely invalid as obvious.
26 Id. at 421 (noting that “if [pursuing known options] leads to the anticipated success, it is
27 likely the product not of innovation but of ordinary skill and common sense.”). On the one
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1 hand, neon signs and stun guns are very different devices. On the other hand, both are within
2 the more general art of electronics and might therefore be considered similar under KSR.
3 Given this ambiguity, the Court finds that there is a material issue of fact concerning whether
4 Parker is sufficiently similar to claim 4 and, therefore, applicable to an obviousness analysis.
5 Therefore, summary judgment on this claim is no appropriate.

6 **D. The ‘262 Patent**

7 **i. Independent claims 1,6,9, and 13**

8 In its brief Stinger makes a generalized attack on independent claims 1,6,9, and 13 of
9 the ‘262 patent, arguing these claims are obvious because all of their individual claim
10 elements are found in the prior art and are well known applications of microprocessor
11 technology. In other words, Stinger claims that it was obvious to combine a dart weapon with
12 technology taught in three prior art patents—Morris, U.S. Patent No. 4,541,191 (filed April
13 6, 1984); O’Dwyer, U.S. Patent No. 6,477,801 (filed Dec. 03, 1999); and Poole., (DSOF
14 ¶32)—because doing so was nothing more than combining familiar elements using known
15 methods. See KSR, 550 U.S. at 416. (“The combination of familiar elements according to
16 known methods is likely to be obvious when it does no more than yield predictable results.”).

17 As an initial matter, all three of the prior art patents relied on by Stinger were before
18 the patent examiner when it considered the ‘262 patent. Stinger, therefore, again enjoys an
19 especially heavy burden in proving invalidity. Glaxo Group Ltd. v. Apotex, Inc., 376 F.3d
20 1339, 1348 (Fed. Cir. 2004) (“This burden is ‘especially difficult’ when, as is the present
21 case, the infringer attempts to rely on prior art that was before the patent examiner during
22 prosecution.”). Once again, Stinger has not attempted to explain why the patent examiner’s
23 decision to allow the claim it challenges was incorrect. Instead, it relies exclusively on the
24 Supreme Court’s decision in KSR, seemingly believing that it so changed the applicable
25 patent law that invalidation is mandatory. As this Court has already explained, Stinger’s
26 reading of the KSR decision is over broad and tends to exaggerate KSR’s impact on the
27 obviousness standard.

1 Having said that, Stinger contends that all four independent claims are obvious
2 because [1]all elements are present in the prior art and [2] are well known applications of
3 microprocessor technology. As to the former claim, assuming, without deciding, that it is
4 true, the fact that all elements of claims 1,6,9, and 13 are present in the prior art is not
5 determinative. KSR, 550 U.S. at 418 (“[A] patent composed of several elements is not
6 proved obvious merely by demonstrating that each of its elements was, independently,
7 known in the prior art.”). Regarding the latter claim, Stinger has not supported its assertion
8 that all elements of the independent claims are well known applications of microprocessor
9 technology with any evidence directed towards specific claim elements. Additionally, this
10 assertion seems to run contrary to Stinger’s own suggestion that accommodating prior art
11 mechanical devices to electronics would be reasonably obvious to a college educated
12 engineer. See Leapfrog Enters., Inc. v. Fisher-Price, Inc., 485 F.3d 1157, 1161 (Fed Cir.
13 2007) (“Accommodating a prior art mechanical device that accomplishes that goal to modern
14 electronics would have been reasonably obvious to one of ordinary skill in designing
15 children's learning devices.”). Either claims 1,6,9,13 apply well know applications of
16 microprocessor technology, or they merely accommodated prior mechanical inventions to
17 an electrical device. This ambiguity concerning the nature of the independent claims does
18 not weigh in Stinger’s favor and is indicative of the lack of clarity and over generalized
19 nature of Stinger’s assertions throughout its motion.

20 Stinger also asserts that the independent claims of the ‘262 patent are common sense
21 inventions in light of the prior art its identified. Mere common sense inventions are obvious.
22 Leapfrog Enters., Inc. v. Fisher-Price, Inc., 485 F.3d 1157, 1161 (Fed Cir. 2007) (“[T]he
23 common sense of those skilled in the art demonstrates why some combinations would have
24 been obvious where others would not.” (citing KSR, 550 U.S. 416 (“The combination of
25 familiar elements according to known methods is likely to be obvious when it does no more
26 than yield predictable results.”))). To determine if the combination of the prior art identified
27 by Stinger was obvious, the Court must first examine that art, which the Court notes, Stinger
28

1 has barely explained. Morris teaches a weapon capable of recording the time it is fired, as
2 well as measuring the elapsed time of the firing sequence. (See DSOF ¶32). Similarly,
3 O’Dwyer teaches a security device which may be installed on weapons so that the weapon
4 can only be activated by the use of a code. More pertinent to the instant case, the device
5 taught in O’Dwyer contains a memory which can record the time, place, date, and direction
6 of a firing of the weapon. (Id.) Finally, Poole teaches a non-lethal personal defense device
7 that can be equipped with a wireless communication system capable of transmitting date and
8 time to a monitoring station. (Id.) Of these devices, only Poole involves the use of a
9 microprocessor, but the microprocessor does not appear to be used to either track or store
10 information pertaining to date and time. Additionally, Stinger notes that dart weapons were
11 known in the prior art; TASER does not dispute this claim.

12 Generally speaking, the Court agrees with Stinger that the prior art in questions
13 teaches similar inventions to the ones found in claims 1,6,9,and 13; methods for tracking
14 when and where a weapon is fired. What distinguishes TASER’s claims from the prior art,
15 however, appears to be the manner in which date and time are tracked; namely, the use of a
16 microprocessor and a circuit. The question, then, is whether it was obvious to combine the
17 date-tracking prior art with the use of a microprocessor or circuit. There is clearly
18 disagreement between the parties concerning the answer to this question. The burden,
19 however, is on Stinger to explain why the patented invention is invalid and it simply has not
20 done so. Stinger has not stated in its papers, let alone cited this Court to expert testimony or
21 other evidence, why the specific inventions set forth in claims 1,6,9, and 13 should have been
22 obvious to a person of reasonable skill. Nor has it explained the scope of the prior art in any
23 sort of detail, such that this Court might more accurately compare it to the challenged claims.
24 Accordingly, this Court is left without guidance concerning whether or not the challenged
25 claims would be obvious to a college educated engineer. In light of the deficiencies in
26 Stinger’s papers, this Court will not overturn the decision of the only expert that considered
27 the contested claims in light of prior art; the patent examiner. Having so decided, the Court
28

1 need not consider Stinger’s arguments regarding the dependent claims of the ‘262 patent.
2 See In re Fine, 837 F.2d 1071, 1076 (Fed. Cir. 1988) (“Dependent claims are nonobvious
3 under section 103 if the independent claims from which they depend are nonobvious.”).

4 **3. Non-Infringement**

5 In addition to their invalidity arguments, Stinger also argues that its S-200 ECD does
6 not infringe many of the claims upon which TASER has rested its lawsuit. Specifically,
7 Stinger asks this Court to grant summary judgment on claims 1,2, and 4 of the ‘870 patent and
8 claims 1,6,9, and 13 of the ‘262 patent.⁷ Infringement is a question of fact. Kemo Sales,
9 Inc. v. Control Papers Co., Inc., 208 F.3d 1352, 1359-60 (Fed. Cir. 2000). “Literal
10 infringement requires that each and every claim limitation be present in the accused product.”
11 Abraxis Bioscience, Inc. v. Mayne Pharma (USA) Inc., 467 F.3d 1370, 1378 (Fed Cir. 2006).
12 Similarly, “[i]n order to literally infringe a method claim, the accused device must literally
13 meet each and every one of the claim limitations.” Desper Products, Inc. v. QSound Labs,
14 Inc., 157 F.3d 1325, 1337 (Fed. Cir. 1998). In considering Stinger’s request, the Court
15 applies same legal standard it does to all motions for summary judgement. CollegeNet, Inc.
16 v. ApplyYourself, Inc., 418 F.3d 1225, 1230 (Fed Cir. 2005). “Summary judgment is
17 appropriate if, drawing all factual inferences in favor of the non-movant, there is no genuine
18 issue of material fact and the movant is entitled to judgment as a matter of law.” Combined
19 Sys., Inc. v. Def. Tech. Corp., 350 F.3d 1207, 1209 (Fed. Cir.2003). Accordingly, Stinger
20 must demonstrate the absence of a disputed issue of material fact as to the non-presence in
21 the S-200 of at least one element in any of the patent claims of which TASER has alleged
22 infringement.

23
24 ⁷Stinger argues that the S-200 does not infringe the ‘295 patent because it merely
25 practices the prior art. The Court need not consider this argument, however, as practicing
26 the prior art is not a defense to literal infringement. Tate Access Floors, Inc. v. Interface
27 Architectural Res., Inc., 279 F.3d 1357, 1366 (Fed Cir. 2002) (“This court [has] made
28 unequivocally clear . . . that there is no practicing the prior art defense to literal
infringement.”).

1 Accordingly, it is clear that S-200 display battery voltage. It is less clear whether the
2 phrase battery capacity encompasses a measure of battery life based on voltage. In
3 concluding that the S-200 infringes claim 1 of the '870 patent, Dr. Rodriguez's report clearly
4 treats "battery capacity" as encompassing a measure of battery voltage. On the other, hand,
5 Gruder seems to distinguish between a measure of capacity and a measure of voltage,
6 asserting: "[W]e do not store battery capacity in our gun. We just take a voltage reading to
7 indicate that." (DSOF ¶14). Still, a reasonable juror could plausibly understand Gruder's
8 statement as drawing an equivalence between battery capacity and battery voltage, as it
9 suggests that the S-200 measuring voltage is equivalent to measuring battery capacity, a
10 finding which would comport with Dr. Rodriguez's expert report. And, at oral argument,
11 Stinger's counsel seemed to concede that battery voltage is a method by which to measure
12 battery capacity. In light of this ambiguity, the Court concludes that there is a disputed issue
13 of material fact concerning whether the S-200's display measures battery capacity which
14 must be decided at trial.

15 Additionally, Stinger appears to argue the S-200 does not infringe because its display
16 is not connected to a memory system which stores battery capacity data. In other words,
17 Stinger argues that the words "battery capacity" found in the "display" element must be read
18 as referring to the battery capacity stored in the "memory" and "data interface" element.
19 First, the Court notes that Stinger agreed to TASER's construction of "a display with any
20 indication of battery capacity is sufficient." Yet, Stinger now appears to be extending this
21 construction to read "a display with any indication of battery capacity stored in the memory
22 described in the third claim ." The Court cannot, however, consider Stinger's proposed
23 construction. At this stage in the proceedings the Court's task is to determine if any element,
24 as construed during the claim construction phase, is not present in the S-200. See
25 TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1371 (Fed. Cir. 2002) ("To establish literal
26 infringement, all elements of the claim, as correctly construed, must be present in the accused
27 system."). Because the Court has already determined that a disputed issue of material fact
28

1 exists as to the S-200's infringement of the "display" element as defined by the Parties agreed
2 upon construction, there is nothing else left to decide. Having so decided, the Court notes
3 that even if it were to accept Stinger's construction, Stinger's motion does not cite to any
4 evidence supporting its assertion that the S-200's battery display is not connected to its
5 memory.

6 **ii. Claim 2**

7 Stinger argues that summary judgment is appropriate as to claim 2 of the '870 patent
8 because the S-200 does not contain the claim element: "a display for indicating to the user
9 the amount of time remaining in each pulse sequence." Instead, Stinger asserts that the S-200
10 utilizes four LED lamps which light in sequence as 25% increments of the pulse charge are
11 consumed during operation of the ECD. (DSOF ¶21). In other words, the LED display on
12 the S-200 indicates the amount of charge delivered to the target, not the time remaining in
13 the pulse sequence. TASER, on the other hand, cites to Dr. Rodriguez's expert report, which
14 concludes that the four LED lights represent one second each of the S-200's four second
15 pulse sequence and, therefore, indicate the amount of time remaining in the pulse sequence.
16 TASER also cites to the S-200's training manual, which describes the LED Lights as
17 measuring time remaining in the pulse sequence. (PSOF ¶155)

18 In support of its position, Stinger points to Mr. Tachner's expert statement, in which
19 he explains that the discharge rate of the S-200 is not fixed, but varies depending on a
20 number of factors, including "internal body resistance, possible skin resistance, and/or
21 atmospheric impedance." (DSOF ¶ 14). Stinger also directs this Court to Dr. Rodriguez's
22 expert report, noting Dr. Rodriguez concludes that the pulse sequence of the S-200 is
23 "approximately" four seconds, that there are several steps of the firing loop (i.e. the entire
24 pulse sequence), and the duration of each step is only "approximately fixed." (Id.). Based
25 on Dr. Rodriguez's description of the S-200 pulse sequence as being variable in time, Stinger
26 contends that the LED display does not actually track time remaining in the pulse sequence.
27 It reasons that because different quarters of the sequence vary in time, even if only slightly,
28

1 the LCD light display cannot be used to measure time, just the percentage of the firing
2 sequence completed.

3 Stinger’s characterization of the S-200, however, is disputed by the S-200’s training
4 manual, which characterizes the device’s display as a “four red lamp bar-graph display [that]
5 indicates seconds [sic] trigger is pulled.” (PSOF ¶156). At oral argument, Stinger stated that
6 the training manual is incorrect. Still, the court finds that a reasonable juror might conclude
7 such an explanation is self-serving, giving it little weight. In sum, given the stated purpose
8 of the LED display and the differing conclusions that parties draw from the Rodriguez
9 Report, this Court cannot conclude as a matter of law that the S-200 does not, in fact, indicate
10 to a user the amount of time remaining in the pulse sequence. While it may be true that the
11 LED display only offers an approximation of the time remaining, the Court finds that a
12 reasonable juror could include that the display does give an indication of the amount of time
13 remaining, even if that indication is not exact down to the microsecond.

14 **iii. Claim 4**

15 Stinger’s non-infringement argument focuses on claim 4’s element requiring “a high
16 voltage power supply for generating an output voltage delivered across the first and second
17 contact points on the target to generate a positive voltage potential at one electrode and a
18 negative voltage potential at the other electrode.” Stinger claims that the S-200 does not
19 produce the required negative voltage at one electrode and positive voltage at the other.
20 TASER disputes this claim.

21 Before beginning its analysis, the Court notes that only certain early version of the S-
22 200 are accused of infringing claim 4, and both Parties concede that those versions utilize
23 center-tapped transformers. In its papers, Stinger also concedes that the center-tapped
24 transformers in the accused version of the S-200 produced a positive voltage at one winding
25 and a negative voltage at the other. (DSOF ¶27) In support of its non-infringement
26 argument, however, Stinger points to evidence showing that the center-tapped transformer
27 windings are not connected directly to the electrodes, but coupled to them through rectifying
28

1 diodes. In its motion, however, Stinger does not explain to the Court the significance of the
2 rectifying diodes; it merely notes their presence. Instead, Stinger argues only that Dr.
3 Rodriguez's expert report concluded that the S-200 utilizes a bridge rectifier circuit, which
4 reverses any negative polarity for the transistor windings, causing polarity at the electrodes
5 to remain positive. (Id. ¶30). In support of its position, Stinger also points to Exhibit C of
6 the Rodriguez Report, which demonstrates output wave form tracings from an S-200 showing
7 only positive polarity flowing from the S-200's electrodes. (Id.).

8 TASER responds by noting that the accused versions of the S-200 did not utilize
9 bridge rectifier or coupling diode bridge. (PSOF ¶162). Additionally, TASER claims that
10 Exhibit C is irrelevant, because (1) the data was procured using a newer version of the S-200
11 which is not alleged of infringing claim 4, and (2) the data only shows polarity between two
12 electrodes without any reference to a primary weapon ground, which is significant because
13 claim 4's reference to negative and positive voltages refers to the relationship between an
14 electrode and the ground. (Id. ¶164). Finally, TASER also argues that in his deposition, Mr.
15 Tachner admitted that the configuration of the diodes used in the accused version of the S-
16 200 produced a positive voltage at one electrode and a negative voltage at the other. (Id.
17 ¶163).

18 In its reply, Stinger did not challenge or deny TASER's assertions concerning the
19 relevance of exhibit C or the non-presence of a bridge rectifier circuit in the accused S-200
20 ECDs. Instead, it pivots, electing to emphasize the role of previously unexplained rectifying
21 diodes, arguing that a center-tapped transformer was never installed in an S-200 without
22 rectifying diodes and that the use of rectifying diodes would necessarily generate only
23 positive voltage potential at the electrons. In making this argument, Stinger cites the Court
24 to the Declaration of Saliga which it attached only as part of its reply brief. By changing its
25 argument and relying on new evidence, Stinger has deprived TASER of an opportunity to
26 properly respond. Accordingly, the Court will not consider Stinger's arguments concerning
27 the significance of the rectifier diodes. See Eberle v. City of Anaheim, 901 F.2d 814, 818

1 (9th Cir. 1990) (noting that legal arguments raised for the first time in the reply brief are
2 deemed waived). Having so decided, this Court cannot find that Stinger has met its burden
3 of establishing the absence of a genuine issue of material fact concerning claim 4. Celotex
4 Corp. v. Catrett, 477 U.S. 317, 323 (1986) (holding that the moving party bears the initial
5 burden of establishing the absence of any genuine issue of material fact). TASER completely
6 refuted Stinger’s original argument, leaving a disputed issue of material fact concerning the
7 polarity of the electrodes on the accused version of the Stinger S-200.

8 **B. The ‘262 Patent**

9 **i. Claims 1 and 13**

10 In pertinent parts, claims 1 and 13 of the ‘262 patent both teach a dart weapon
11 comprising a microprocessor programmed to track date and time of the dart weapon’s firing.
12 Based on the Court’s construction of “track date and time,” Stinger argues that the S-200’s
13 microprocessor is not programmed to track date and time. In its Markman order, this Court
14 construed “track date and time” to mean “the tracking of date and time in a program in a
15 microprocessor through whatever means available to a person of skill in the art at the time
16 of the invention.” (Dkt. #146, p. 25). In reaching its conclusion, this Court also noted that
17 it agreed with TASER’s expert that “tracking date and time means that you, through one way
18 or another, have the ability to keep track of the date of the time. And that could be done
19 directly or indirectly.” (Id. at 22–23). Finally, the Markman order also stated, that “the
20 process necessary to ‘track date and time’ must be internal to the microprocessor.” (Id. at
21 23).

22 Stinger admits that the S-200’s microprocessor utilizes a seconds counter, which
23 tracks how many seconds the S-200 has been activated, and that this data can be used to
24 derive date and time, but only by using a separate external computer containing a separate
25 tracking program. (DSOF ¶41). Stinger asserts it is entitled to summary judgement because
26 the S-200’s microprocessor is not itself programmed to derive a date and time. In other
27 words, Stinger argues that claims 1 and 13 require the microprocessor to operate like a clock
28

1 or calendar, i.e. contain a calendar program or program for tracking to a specific date or day.
2 (Id.). TASER’s disputes this characterization, noting that the claim construction states that
3 date and time can be tracked utilizing “whatever means available to a person of skill in the
4 art at the time of the invention.” (Dkt. #146, p. 25). It also emphasizes this Court’s Markman
5 Order finding that time and date could be tracked directly or indirectly. (Id. at 22–23).

6 It is clear that data from the S-200's microprocessor can be utilized to determine the
7 date and time of its activation. By arguing “track date and time” means that the
8 microprocessor must utilize “a calendar or program for tracking a specific date or time of a
9 specific day,” Stinger appears to disregard the Court decision not to place any such limitation
10 on its construction of “track date and time”. In the Markman Order the Court explained that
11 “[a]lthough there are many ways to track date and time in a microprocessor-based circuit, one
12 of which is to independently track current absolute date and time . . . there is nothing in the
13 claims or specification of the ‘262 patent that lead the Court to impose limitations on the
14 disputed phrase.” (Dkt. #146, p. 22). Stinger has not explained how its current argument
15 concerning “specific” date and time is different than the “absolute” date and time
16 construction already rejected by this Court. (Id.) (“[The Court finds no reason to adopt
17 Stinger’s proposed construction and impose the limitations “absolute” or “current” on the
18 phrase “track date and time,” as used in Claims 1 and 13.”)). At a bare minimum, then, there
19 is a disputed issue of material fact concerning whether the S-200 tracks date and time.⁸

20
21 ⁸At oral argument, Stinger, for the first time, drew the Court’s attention to the PTO’s
22 examination of the ‘262 patent. (Dkt. #175, exb. 22). Stinger argued that this document
23 makes clear that “tracks date and time” should have been more narrowly constructed to
24 require that the microprocessor track date and time as, for lack of a better phrase, date and
time, not as a form of data—like seconds counter data—that can later be converted to date

25 First, the Court notes that this argument is extremely untimely. Second., the Court
26 does not agree with Stinger’s analysis of the patent examiner’s report. In the passage in
27 question, the patent examiner stated that “[o]ne having ordinary skill in the art, or even a
28 layperson with no skill in the art, would have interpreted the concept of recording date and
time as presented in the '770 and '412 Patents as recording a "current" date and time. Any

1 activates upon the activation of the weapon, and from which date and time can only be
2 determined by reference to an external source. (DSOF ¶41).

3 The evidence to which Stinger cites does not specifically address whether the S-200,
4 in any manner, keeps track of current day and time prior to its activation by a user. One
5 might be able to infer from the evidence Stinger adduced that time and date are only tracked
6 after the S-200 is activated. Stinger has not, however, cited to any evidence specifically
7 drawing such a conclusion. And, a reasonable juror might infer that the S-200 must track
8 current date and time in some form or fashion, or else it would have no way to track date and
9 time after activation. Accordingly, to the extent Stinger argues that the S-200 does not track
10 current date and time prior to its activation, it has not met its burden.

11 The Court turns next to the claim limitation that teaches an ECD which “record[s]
12 current date and current time of day” after its activation. Stinger does not dispute that the S-
13 200 records data which can be used, by means of an external computer, to ascertain the date
14 and time the weapon it fired. Accordingly, there does appear to be a dispute concerning the
15 “records” part of the claim limitation. In discussing claims 1 and 13, the Court has already
16 stated that there is a disputed issue of material fact concerning whether the S-200 records
17 date and time upon its activation by a user. In its motion, Stinger has not explained how the
18 word “current” alters the meaning of “track date and time,” other than to offer a definition—
19 “maintain a record of a specified day or date,”— that seems to rehash its argument
20 concerning the meaning of “tracks date and time” made in service of its non-infringement
21 arguments concerning claims 1 and 13; arguments this Court already found insufficient.
22 Accordingly, Stinger has not met its burden and this Court will not grant Stinger summary
23 judgment as to claim 6 on non-infringement grounds.

24 **iii. Claim 9**

25 Claim 9 teaches a “means for recording date and time of day for each occasion that
26 the weapon was operated to provide the current.” The Parties agree that the “means” in
27 question are a microprocessor and memory, and there is no dispute that the S-200 contains
28

1 a microprocessor and memory for maintaining a record of operation. Stinger argues the S-
2 200 does not infringe because the “means” do not include a second computer and program,
3 something both parties agree is necessary to convert the data recorded by the S-200 into date
4 and time. The question, then, is whether the necessity of utilizing an external computer and
5 program to convert the S-200's data into date and time format means that the S-200 does not
6 have the necessary means for recording the date and time described in claim 9.

7 This Court finds that Stinger’s argument is nothing more than a variation on the other
8 arguments it has made concerning the meaning of track date and time. This Court has
9 already concluded that Stinger has not sufficiently shown that the S-200 does not on its own
10 track date and time through the use of a process internal to the microprocessor. In so doing,
11 the Court found that there is also a disputed issue of material fact concerning whether data
12 in non-date-and-time format constitutes the tracking of date and time. Assuming, without
13 deciding that it does, a juror could reasonably conclude that the microprocessor and memory
14 are the means for tracking date and time, even though an external computer and program are
15 necessary to convert that data into a recognizable form.

16 Additionally, Stinger also argues that it should prevail because the parties have
17 agreed, which TASER does not dispute, that the means for providing a high pulse current
18 requires two transformers. (DSOF ¶43). In support of this claim, Stinger cites to the
19 Statement of Tachner, in which Mr. Tachner asserts that the S-200 uses only one
20 transformer. (*Id.*). TASER contests Mr. Tachner’s conclusion, citing to Mr. Tachner’s
21 deposition, in which he appears to testify that the S-200 uses two transformers. (PSOF
22 ¶177). The Court will not attempt to resolve the discrepancy between Mr. Tachner’s
23 statement and his deposition; the jury will. The Court, therefore, finds there is a disputed
24 issue of material fact concerning whether or not the S-200 satisfies the disputed limitations
25 of claim 9.

26 **iv. Doctrine of Equivalents**

1 One of ordinary skill in the art would know that there are many ways to track
2 date and time. Examples include, but are not limited to, a real time clock, a
3 counter, a timer circuit, or even a circuit using capacitive relays. Date and time
4 may be measured and tracked as absolute quantities or, alternatively, they may
be measured and tracked relative to a reference date and time. In addition, the
date and time can be determined from a running count of seconds instead of
tracking date and time separately or independently from one another.

5 (DSOF ¶40). Stinger then goes on to cite Dr. Rodriguez’s admission that “the ‘262 patent
6 never mentions using ‘absolute’ date and time, never mentions a ‘real time clock,’ and never
7 discusses the use of a specific time system such as GMT.” (Id.).

8 TASER does not dispute any of the testimony on which Stinger relies. Instead it
9 asserts a contrary interpretation, arguing Dr. Rodriguez’s statement that “[o]ne of ordinary
10 skill in the art would know that there are many ways to track date and time” proves that an
11 inventor of ordinary skill could implement the invention of ‘262 without undue
12 experimentation. In other words, Stinger claims that because ‘262 does not require the use
13 of absolute date and time, but merely any method to track date and time, Dr. Rodriguez’s
14 testimony actually weighs towards a finding of enablement. Viewing the facts in the light
15 most favorable to TASER, as it must, the Court finds that a reasonable juror could reach the
16 same conclusion as TASER. Accordingly, summary judgment on enablement is denied.

17 **5. Best Mode Defense**

18 Stinger also argues that TASER did not disclose the required best mode of the ‘262
19 patent. A patent specification must layout the best mode known to the inventor for the
20 implementation of the claimed invention. High Concrete Structures, Inc. v. New Enter.
21 Stone And Lime Co., Inc., 377 F.3d 1379, 1382 (Fed. Cir. 2004). “Invalidation for failure
22 to set forth the best mode requires (1) the inventor knew of a better mode than was disclosed,
23 and (2) the inventor concealed that better mode.” Id. The Court agrees with TASER that
24 Stinger has not provided sufficient evidence demonstrating that Patrick Smith, the inventor
25 of the ‘262 patent, either knew of or concealed a better mode than the one disclosed on the
26 ‘262 patent. Stinger’s entire best mode defense motion is predicated on a single reference
27 to a different TASER patent application, U.S. Patent No. 09/398,388 (filed Sep. 17, 1999),
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1 which it alleges also uses an internal clock. Stinger has not, however asserted that Patrick
2 Smith knew of this patent or concealed the allegedly better mode contained therein.
3 Accordingly, summary judgment is denied.

4 **6. Inequitable Conduct.**

5 **A. Legal Standard**

6 Stated generally, patent applicants and their patent attorneys have a duty of candor,
7 good faith and honesty in their dealings with the PTO. 37 C.F.R. § 1.56(a) (1989). The duty
8 of candor, good faith and honesty includes the duty to submit truthful information and the
9 duty to disclose to the PTO information known to the patent applicants or their attorneys
10 which is material to the examination of the patent application. Elk Corp. of Dallas v. GAF
11 Bldg. Materials Corp., 168 F.3d 28, 30 (Fed. Cir. 1999); 37 C.F.R. § 1.56(a) (1989). The duty
12 of candor extends throughout the patent's entire prosecution history. Fox Indus. v. Structural
13 Preservation Sys., Inc., 922 F.2d 801, 803 (Fed. Cir. 1991). Breach of the duty of candor,
14 good faith and honesty may constitute inequitable conduct. *Id.* If it is established that a patent
15 applicant engaged in inequitable conduct before the PTO, the entire patent application so
16 procured is rendered unenforceable. Kingsdown Med. Consultants, Ltd. v. Hollister Inc., 863
17 F.2d 867, 877 (Fed. Cir. 1988).

18 “To prove that a patent is unenforceable due to inequitable conduct, the [] infringer
19 must provide clear and convincing evidence of (1) affirmative misrepresentations of a
20 material fact, failure to disclose material information, or submission of false material
21 information, and (2) and intent to deceive.” Impax Labs., Inc. v. Aventis Pharms., Inc., 468
22 F.3d 1366, 1374 (Fed. Cir. 2006). Information is deemed material if there is a substantial
23 likelihood that a reasonable examiner would have considered the material important in
24 deciding whether to issue the application as a patent. *See Elk Corp.*, 168 F.3d at 31; 37
25 C.F.R. § 1.56(a). Accordingly, a reference does not have to be prior art to be material
26 information that must be disclosed to the PTO. *See* 37 C.F.R. § 1.56(a) (1989). “The
27 [information] need only be within a reasonable examiner's realm of consideration.” Merck
28

1 & Co., Inc. v. Danbury Pharmacal, Inc., 873 F.2d 1418, 1421 (Fed. Cir. 1989). “An
2 otherwise material reference need not be disclosed if it is merely cumulative of or less
3 material than other references already disclosed.” Elk Corp., 168 F.3d at 31.

4 While “[m]ateriality does not presume intent, which is a separate and essential
5 component of inequitable conduct,” Allen Eng'g Corp. v. Bartell Indus., Inc., 299 F.3d 1336,
6 1352 (Fed. Cir. 2002) (internal quotes and citation omitted), the materiality of a reference
7 may lead to an inference of intent. Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs.,
8 394 F.3d 1348 (Fed. Cir. 2005) (“in the absence of a credible explanation, intent to deceive
9 is generally inferred from the facts and circumstances surrounding a knowing failure to
10 disclose material information”). Intent to deceive is rarely established by direct evidence,
11 and therefore, may be inferred from the facts and circumstances surrounding the applicant's
12 overall conduct. Molins PLC v. Textron, Inc., 48 F.3d 1172, 1180 (Fed. Cir. 1995) (intent
13 to deceive is most often proven "by a showing of acts, the most natural consequence of which
14 are presumably intended by the actor"). For example, "intent may be inferred where a patent
15 applicant knew, or should have known, that withheld information would be material to the
16 PTO's consideration of the patent application." Critikon, Inc. v. Becton Dickinson Vascular
17 Access, Inc., 120 F.3d 1253, 1256 (Fed. Cir. 1997).

18 “Intent to deceive, however, cannot be 'inferred solely from the fact that information
19 was not disclosed;' there must be a factual basis for a finding of deceptive intent.” Purdue
20 Pharma L.P. v. Endo Pharms., 438 F.3d 1123, 1133-34 (Fed. Cir. 2006). Moreover, if the
21 failure to disclose or misrepresentation occurred due to "[s]imple negligence, oversight, or
22 an erroneous judgment made in good faith," the intent element is not satisfied. Specialty
23 Composites v. Cabot Corp., 845 F.2d 981, 982 (Fed. Cir. 1988). A finding of “gross
24 negligence,” likewise, “does not itself justify an inference of intent to deceive.” Kingsdown,
25 863 F.2d at 876. However, a patent applicant cannot “cultivate ignorance, or disregard
26 numerous warnings that material information or prior art may exist, merely to avoid actual
27 knowledge of that information or prior art.” FMC Corp. v. Hennessy Indus., Inc., 836 F.2d

1 521, 526 n.6 (Fed. Cir. 1987). In determining whether the applicant's overall conduct
2 evidences an intent to deceive the PTO, the Federal Circuit has emphasized that “the
3 involved conduct, viewed in light of all the evidence, including evidence indicative of good
4 faith, must indicate sufficient culpability to require a finding of intent to deceive.” Paragon
5 Podiatry Lab, Inc. v. KLM Labs, Inc., 984 F.2d 1182, 1189 (Fed. Cir. 1993) (internal
6 quotations and citation omitted).

7 Once materiality and intent have been established, the Court must conduct a balancing
8 test to determine “whether the scales tilt to a conclusion that 'inequitable conduct' occurred.”
9 Critikon, 120 F.3d at 1256. Generally, “when the misrepresentation or withheld information
10 is highly material, a lesser quantum of proof is needed to establish the requisite intent, ... In
11 contrast, the less material the information, the greater the proof must be.” Purdue Pharma
12 L.P., 438 F.3d at 1128-29 (internal citations omitted). Ultimately, the question of whether
13 inequitable conduct occurred is equitable in nature. The court must make the “equitable
14 judgment concerning whether the applicant's conduct is so culpable that the patent should not
15 be enforced.” Life Techns., Inc. v. Clontech Labs., Inc., 224 F.3d 1320, 1324 (Fed. Cir.
16 2000). During this step of the analysis, the court determines “whether the material
17 misrepresentations or omissions in question are sufficiently serious in light of the evidence
18 of intent to deceive, under all the circumstances, to warrant the severe sanction of holding
19 the patent unenforceable.” Hoffmann-La Roche, Inc. v. Promega Corp., 323 F.3d 1354, 1372
20 (Fed. Cir. 2003).

21 **B. Discussion**

22 Stinger’s arguments concerning inequitable conduct are directed towards two of
23 TASER’s patents: ‘870 and ‘295. As part of its efforts to invalidate these patents, Stinger
24 also attacks TASER’s ‘762 patent—which is not asserted in this case—because it claims
25 priority to the same patent application as the ‘870 and ‘295 patents, arguing that inequitable
26 conduct with respect to one patent in a family can infect related applications. See Nilssen
27 v. Osram Sylvania, Inc., 504 F.3d 1223, 1230 (Fed. Cir. 2007) (“[I]nequitable conduct with
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1 respect to one or more patents in a family can infect related applications.”). The Court will
2 consider the materiality of the alleged inequitable conduct before moving on to intent, if
3 necessary.

4 **i. The ‘762 Patent**

5 In its ‘762 patent application, TASER claimed that it had solved a problem not
6 addressed in the prior art: “switching capacitors without interrupting ionization in the air
7 gap.” (DSOF ¶6). Stinger claims that TASER acted inequitably when it failed to disclose
8 two prior art devices: the Police Special Model (“PSM”)⁹ and M26. As for the M26, Stinger
9 does not explain the materiality of TASER’s failure to disclose, noting only that TASER did
10 not initially disclose the M26, but did so in a subsequent Response to Office Action, which
11 the PTO received a month before the ‘762 patent was allowed. (Id. ¶45). Given that the
12 M26 was in the PTO’s possession prior to its notification of allowance, the Court cannot find
13 that Stinger has shown substantial likelihood of materiality.

14 As for the PSM, Stinger begins by stating that the patent examiner allowed ‘762
15 because a “second capacitant . . .discharges to provide energy for the current through the
16 established arc.” (Id. ¶6). Stinger also notes that in its response to the PTO’s allowance,
17 TASER acknowledged that “the output signal of the present invention is formed by
18 combining the energy from two sources at different voltages.” (Id.). From this foundation,
19 Stinger alleges TASER’s failure to disclose the PSM was material because the PSM utilized
20 two capacitors in parallel to discharge an arching shock with one of the capacitors operating
21 at a lower voltage.

22 TASER responds that Stinger’s focus on the number of capacitors is misguided,
23 arguing the more pertinent question is the manner in which those capacitors operate. In
24 support of this argument, TASER notes that Stinger has conceded, as was already discussed

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26 ⁹Although Stinger refers to it as the Police Special Model Taser in this section of its
27 briefing, it appears to the Court and to TASER that the PSM is the same ECD Stinger has
28 previously referred to as the Police Model Taser.

1 in this order, that the PSM capacitors are coupled, causing them to function as a single
2 capacitor. (PSOF ¶47, 179). It then points out that the ‘762 patent claims non-coupled,
3 individually configured capacitors, each with their own energy-releasing switch. (See PSOF
4 ¶183). This distinction is enough to preclude summary judgement on materiality in this
5 case, as a reasonable juror could conclude that single capacitor prior art, of which the PSM
6 may be viewed as a functional equivalent, is simply not relevant to a patent application
7 claiming two individual capacitors. Accordingly, Stinger has not shown there is a substantial
8 likelihood that a reasonable examiner would have considered the PSM important in deciding
9 whether to issue the application as a patent.

10 **ii. The ‘870 Patent**

11 Stinger argues that in its application for the ‘870 patent, TASER claimed to have
12 invented a dual-transformer system—with the first transformer creating an arc, and the
13 second producing a lower voltage to flow current in the arc—but failed to disclose that this
14 invention could be implemented with a single transformer. (DSOF ¶49). This statement is
15 correct; inventor Magne H. Nerheim, admitted in his deposition that the invention claimed
16 in ‘870 could be implemented with one transformer. (*Id.*). Stinger, however, has neither
17 explained the significance of this admission regarding materiality, nor has it specifically
18 identified the prior art or other reference TASER failed to produce, except for one reference
19 to the PSM. Instead, it only has noted that the claim of the ‘870 patent relating to dual
20 transformers was later withdrawn because it was duplicative of a claim in the ‘295 patent;
21 an assertion TASER does not deny. (DSOF ¶50–51). Stinger cannot expect this Court to
22 find a material non-disclosure without even explaining what material reference was omitted
23 and why it was important. As to the non-disclosure of the PSM, the Court can only assume
24 Stinger brings it up for the same reasons it did concerning the ‘762 patent; reasons this Court
25 has already deemed insufficient.

26 Stinger’s second argument is directed towards the patent’s claimed battery indicator
27 display. Stinger argues that both the M26 and U34000 should have been disclosed, as they
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1 each embodied a battery indicator display. (DSOF ¶52). TASER responds by noting that
2 the claim in '870 is "very different" than the battery light indicators found on the M26 and
3 U34000, pointing to evidence showing the M26 and U34000 utilize single lights to indicate
4 when the batteries are low. (PSOF ¶186–84). Conversely, the '870 patent claimed a digital
5 memory to store battery capacity information and an interface that allowed this information
6 to be digitally displayed. Viewing the facts in the light most favorable to TASER, as it must,
7 the difference between these types of battery displays is enough to preclude summary
8 judgement. The Court need not merely rest on that, however, as TASER also notes that the
9 '870 patent disclosed Kaufman, which taught a battery light indicator similar to the ones
10 found on the M26 and U34000. (DSOF ¶15). In light of Kaufman, it is possible that a jury
11 could conclude that the addition of the M26 and U34000 patents would have been
12 cumulative, and therefore not material omissions. See Larson Mfg. Co. of S.D., Inc. v.
13 Aluminart Prods. Ltd., 559 F.3d 1317, 1327 (Fed Cir. 2009) (“[A] withheld otherwise
14 material reference is not material if it is merely cumulative to, or less relevant than,
15 information already considered by the examiner.”).

16 **iii. The '295 Patent**

17 Finally, Stinger alleges material non-disclosures of the U34000 and M26 during the
18 prosecution of the '295 patent. Stinger argues that these disclosures were material because
19 the '295 patent teaches a two transformer system to create ionization within an air gap and
20 allow current to flow at a lower voltage level, and the U34000 and M26 utilize two
21 transformers to achieve the same effect. TASER's response is two-fold. It first notes that
22 the M26's transformers are connected in a series, whereas the transformers in the '295 patent
23 are not, rendering the M26 irrelevant to the TPO's examination. (PSOF ¶182). Secondly,
24 TASER asserts that including the M26 would have been cumulative, as other prior art
25 reference before the patent examiner utilized the same circuit configuration. As to the latter
26 point, the record shows that TASER disclosed both Cover, U.S. Patent No. 3,803,463 (filed
27 July, 10, 1972), and Kaufman during the prosecution of the '295 patent, and that Stinger's
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1 expert, Mr. Tachner, admits that Cover and Kaufman include two transformers connected in
2 a series, as does Figure 1 of the ‘295 patent application (PSOF ¶183). Based on this
3 evidence of cumulateness, this Court cannot find that Stinger has met its burden. See
4 Larson Mfg. Co. of S.D., 559 F.3d at 1327.

5 Having determined that summary judgment is not appropriate as to materiality, this
6 Court need not consider intent. Stinger’s motion for summary judgement concerning
7 inequitable conduct is denied.

8 7. Damages

9 Stinger argues that TASER is not eligible to begin recovering damages on the ‘295,
10 ‘870, and ‘262 patents until the day Stinger received actual notice of the alleged
11 infringement, i.e. the day TASER amended its complaint to include the aforementioned
12 patent claims. This argument is only correct, however, if TASER failed to properly label its
13 ECD products with the word “patent” or “pat.” and the applicable patent numbers. See 35
14 U.S.C. §287(a) (noting that actual notice is only required in the event of a party’s failure to
15 mark properly mark their products). Stinger has not put forth evidence showing that TASER
16 failed to properly mark its products. TASER, on the other hand, has cited to evidence
17 showing that it promptly added markings to its products as each patent issued. (DSOF
18 ¶191–92). Accordingly, the Court will not at this time limit the period of recovery for
19 damages caused by Stinger’s alleged infringement.

20 IV. TASER’S MOTION FOR PARTIAL SUMMARY JUDGEMENT

21 TASER has moved for partial summary judgement as to literal infringement on claims
22 2 and 40 of the ‘295 patent.

23 A. Legal Standard

24 The Court once again notes that infringement is a question of fact. Kemo Sales, Inc.
25 v. Control Papers Co., Inc., 208 F.3d 1352, 1359-60 (Fed. Cir. 2000). “Literal infringement
26 requires that each and every claim limitation be present in the accused product.” Abraxis
27 Bioscience, Inc. v. Mayne Pharma (USA) Inc., 467 F.3d 1370, 1378 (Fed Cir. 2006). “In
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1 order to literally infringe a method claim, the accused device must literally meet each and
2 every one of the claim limitations.” Desper Prods., Inc. v. QSound Labs, Inc., 157 F.3d
3 1325, 1337 (Fed. Cir. 1998). “Summary judgment is appropriate if, drawing all factual
4 inferences in favor of the non-movant, there is no genuine issue of material fact and the
5 movant is entitled to judgment as a matter of law.” Combined Sys., Inc. v. Def. Tech. Corp.,
6 350 F.3d 1207, 1209 (Fed. Cir. 2003). Accordingly, TASER must demonstrate the absence
7 of a disputed issue of material fact concerning its allegation that the S-200 satisfies all of
8 claims 2 and 40's limitations.

9 Before beginning its analysis, the Court notes Stinger’s argument that claim 40 is a
10 method claim, TASER did not sue for inducing infringement, and, therefore, Stinger is
11 precluded from being held liable for infringing claim 40. Stinger’s assertion, however, is
12 factually incorrect. TASER’s second amended complaint at ¶35 includes a charge of
13 inducing infringement. (Dkt. #51). A party is liable for inducing infringement on a method
14 claim “if it sells infringing devices to customers who use them in a way that directly infringes
15 the method claim.” AquaTex Indus., Inc. v. Techniche Solutions, 419 F.3d 1374, 1380 (Fed
16 Cir. 2005). A finding of inducement is dependent on a finding of direct infringement. Joy
17 Techs., Inc. v. Flakt, Inc., 6 F.3d 770, 774 (Fed. Cir. 1993) (“Liability for either active
18 inducement of infringement or for contributory infringement is dependent upon the existence
19 of direct infringement.”). In this case, there is no question that Stinger sold the S-200 to
20 customers who, if this Court finds direct infringement, would necessarily have used the S-
21 200 in an infringing matter. Accordingly, a finding of direct infringement as to claim 40 is
22 sufficient to prove inducement.

23 **B. Discussion**

24 At the outset, the Court notes that the scope of the Parties dispute concerning this
25 motion is really quite narrow. Stinger, in its statement of facts and responsive brief,
26 concedes that the S-200 embodies every elements of claim 2 and 40, with one exception; it
27 disputes that the S-200 utilizes a dual-mode power supply. (DSOF ¶1–6 (stating that the S-
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1 200 is made and sold in the United states, is an ECD, includes first and second positionable
2 electrodes, in operation may encounter a high impedance air gap, exhibits high or low
3 voltage depending on the impedance of the circuit, and when the air gap is ionized the
4 voltage in the circuit is reduced)). Stinger maintains that the S-200 does not infringe because
5 it operates in only one mode. Returning to the language of the claims themselves, claim 2,
6 in pertinent part, teaches “a power supply for operating in a first mode to generate a first high
7 voltage . . . to ionize the air within the air gap to thereby reduce the high impedance across
8 the air gap to a lower impedance to enable current flow across the air gap at a lower voltage
9 level and for subsequently operating in a second mode to generate a second lower voltage
10 output across the first and second electrodes.” Likewise, Claim 40 teaches a method of “a
11 first high voltage, short duration output across the first and second electrodes during a first
12 time interval to ionize the air within the air gap,” followed by a subsequent “second lower
13 voltage output across the first and second electrodes during a second time interval to
14 maintain the current flow across the first and second electrodes.” The sole issue in the instant
15 motion, then, is whether TASER has proven the absence of a genuine issue of material fact
16 concerning its allegation that the S-200's utilizes a dual-mode power supply.

17 In their papers, the Parties appear to agree that the word “mode” refers to a distinct
18 manner of circuit operation. At oral argument, however, Stinger’s counsel suggested that
19 manner of circuit operation is irrelevant, asserting that claims 2 and 40 require only a first
20 high voltage output, followed by a low voltage output. He then went on to argue that the
21 majority of prior art stun guns operate in this manner—a high initial voltage, followed by
22 a low voltage output—so the S-200 does nothing more than practice the prior art and claims
23 2 and 40 are obvious or anticipated. There is, however, no practicing the prior art defense
24 to infringement. Tate Access Floors, Inc. v. Interface Architectural Res., Inc., 279 F.3d
25 1357, 1366 (Fed Cir. 2002) (“This court [has] made unequivocally clear . . . that there is no
26 practicing the prior art defense to literal infringement.”). Additionally, the Federal Circuit
27 has made it perfectly clear that “that patent infringement and patent validity are treated as
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1 separate issues.” Pandrol USA, LP v. Airboss Ry. Prods., Inc., 320 F.3d 1354, 1365 (Fed
2 Cir. 2003); see id. (“Though an invalid claim cannot give rise to liability for infringement,
3 whether it is infringed is an entirely separate question capable of determination without
4 regard to its validity.” (Quoting Medtronic, Inc. v. Cardiac Pacemakers, Inc., 721 F.2d 1563,
5 1583 (Fed. Cir. 1983))). Courts routinely enter summary judgment concerning infringement,
6 saving questions of validity for trial. See e.g., Gemtron Corp. v. Saint-Gobain Corp., 572
7 F.3d 1371 (Fed. Cir. 2009). Accordingly, this Court may not consider Stinger’s invalidity
8 or practicing the prior art arguments when deciding TASER’s instant motion.

9 More importantly, Stinger’s position is not supported by the ‘295 patent itself. First,
10 contrary to Stinger’s assertions, the ‘295 patent does not merely teach the output of high
11 voltage followed by a low voltage. Instead, it very explicitly references a power supply
12 capable of operating in two distinct modes, the first *generating* a high voltage output and the
13 second *generating* a lower voltage output. Furthermore, the patented modes of operation
14 do not merely describe the rapid voltage drop phenomenon present in single-mode ECDs,
15 whereby voltage drops significantly after the ionization of an air gap. As explained in the
16 patent itself, even after that voltage drop, a single-mode “stun gun, which has by necessity
17 been designed to have the capability of ionizing an air gap, must now continue operating in
18 the same mode while delivering current flow or charge across the skin of a now very low
19 impedance target. The resulting high power, high voltage stun gun circuit operates relatively
20 inefficiently yielding low electro-muscular efficiency and with high battery power
21 requirements.” U.S. Patent 6,999,295 (filed Feb. 5, 2005). The claimed invention is not
22 merely a low voltage output, but a distinct manner of circuit operation which generates the
23 low voltage output more efficiently, thereby alleviating the inefficiencies present during the
24 low voltage output phase of single-mode guns.

25 Stinger does not dispute that it uses a first power-supply mode to generate a voltage
26 sufficient to ionize an air gap. Consequently, Court must determine whether the S-200
27 utilizes a second mode of circuit operation that generates the low-voltage output it produces
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1 after ionization an air gap. TASER argues that it does. In support of this position, TASER
2 relies on a number of different pieces of evidence. First, it cites to Dr. Rodriguez's expert
3 report. In his report, Dr. Rodriguez concludes that the S-200's operates in two modes, a first
4 high voltage output mode which generates a voltage sufficient to ionize an air-gap, and a
5 second mode which generates a lower voltage to maintain the flow of current across the
6 ionized gap. (PSOF ¶44). Dr. Rodriguez' conclusion is supported by his analysis of the S-
7 200's circuitry, which he explains operates differently in each of the two modes he identified.

8 In the first, high-voltage mode:

9 the S-200's capacitor bank is charged up to approximately 115V. Next, the
10 S-200's microprocessor causes a signal called pQFSW1 to transition from 0
11 to 1. That, in turn, causes the S-200's IGBT switch to turn on. When the IGBT
12 switch turns on, the charge stored on the capacitor bank begins to flow through
13 the primary of the S-200 output transformer, T2. During that time, the T2
14 secondary voltage reaches several thousand volts (with positive polarity), but
15 not a high enough voltage to ionize the air gap. Next, after approximately 9
16 microseconds, the S-200's microprocessor causes the pQFSW1 signal to
17 transition from 1 to 0, which switches the IGBT off. When the IGBT switches
18 off, the current in the primary of T2 rapidly decreases, which induces a voltage
19 on the secondary that is high enough to ionize the air gap. That voltage is not
20 limited to the voltage on the capacitor bank times the transformer turns ratio.
21 This allows the secondary voltage to exceed the primary voltage times the
22 turns ratio.

23 (PSOF ¶44) (internal citations omitted)). Dr. Rodriguez' report then identifies a second
24 mode which is utilized to flow current at a low voltage through an ionized air gap:

25 After the air gap has been ionized and is in a low impedance state, the
26 microprocessor continues to toggle signal pQFSW1, which switches the IGBT
27 on and off. Each time the IGBT switches on, current flows from the capacitor
28 bank through the primary of T2, causing a corresponding current and voltage
to appear on the secondary. The voltage on the secondary is directly related
to the voltage on the primary by the turns ratio of the transformer. Each time
the IGBT switches off, it induces a negative voltage on the secondary, but,
because there is now a conducting load in the circuit (and because the
capacitor bank has partially discharged), the induced negative voltage is not
as large as it was in the first mode.

29 (Id.).

30 TASER also cites the Court to Stinger's patent application for the S-200. In that
31 application, Stinger described the circuitry of the S-200, noting that it "may be recognized
32 as a flyback circuit that, when operated in pulsed mode, provides two drastically different
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1 sets of output depending on the impedance across the output.” (PSOF ¶45). TASER argues
2 that the patent applications’s description of how these “drastically different sets of outputs”
3 operate indicates the existence of two distinct modes of circuit operation, the second of which
4 generates a significantly lower output voltage than the first. (PSOF ¶45–46). Finally,
5 TASER cites to the deposition testimony of the inventor of the S-200, Mr. Saliga, where Mr.
6 Saliga describes the S-200's transformer as operating in two modes; first as a flyback spark
7 coil, and then, after ionization occurs, as a direct-drive power pulse transformer. In that same
8 testimony, Mr. Saliga also articulates the difference between the flyback spark coil and
9 direct-drive operations, noting that in its direct-drive capacity, the transformer is “not having
10 to kick the voltage up.”

11 In addition to its scientific evidence, TASER draws the Court’s attention to Stinger’s
12 own descriptions of the S-200. In a technical white paper prepared by Mr. Saliga, the S-200
13 is described as operating like a “two-speed gear shift automobile—one gear gets you going
14 from a dead stop and the other does the fast moving. Guns which can “switch gears” is a big
15 factor which separates the men from the boys in effectiveness.” (PSOF ¶27). That same
16 white paper goes on to state:

17 The design of an effective stun gun electrical waveform requires that the fired
18 darts manage to arc and spark through the target’s outer clothes and then, once
19 an ionized-air and highly conductive plasma arc is established, the gun must
20 somehow automatically shift gears, so to speak, and drive home (to the target
21 body) a much larger electrical current but with lower voltage to cause effective
22 involuntary muscle contraction.

21 (Id.). Similarly, in a presentation to potential investors Stinger explained:

22 Through the use of Quantum Flyback Technology or QFT™ the electrodes of
23 the S-200 stun gun deliver high-voltage energy in a precisely controlled series
24 of energy packets or “Quanta”. The electronics delivers these energy quanta
25 from a so called “Flyback” transformer circuit. Hence the name, Quantum
26 Flyback Technology.

25 When in use, each energy packet has a dual personality: if the gun’s electrodes
26 have not yet hit a target, the energy quantum “flies back” to over 56,000 volts
27 creating a commanding electrical spark - one which penetrates clothing easily.
28 Yet once the “target” is contacted, the energy quantum delivers NMIW voltage
and current very efficiently.

1 Series of quantum pulses are delivered first as ionizing spark energy and then
2 as a more immobilizing, lower-voltage, higher-current energy quanta once on
target.

3 (PSOF ¶28). Finally, TASER has introduced evidence showing that Stinger’s website
4 describes the S-200 as “the most state of the art stun technology available in the world,”
5 “radically different than any previous versions,” and having achieved the “most radical
6 change to stun gun technology in years.” (*Id.*) TASER argues that Stinger’s various public
7 proclamations, especially the claims of having invented a radically new ECD, undercut
8 Stinger’s assertion that the S-200 merely practices the prior-art, i.e. operates in one-mode as
9 a blunt pulse weapon.

10 Based on the foregoing evidence, this Court concludes that TASER has met its initial
11 burden of establishing the absence of any genuine issue of material fact. See Celotex Corp.
12 v. Catrett, 477 U.S. 317, 323 (1986) (holding that the moving party bears the initial burden
13 of establishing the absence of any genuine issue of material fact; the moving party must
14 present the basis for its summary judgment motion and identify those portions of the record
15 that it believes demonstrate the absence of a genuine issue of material fact). The key question
16 becomes, then, whether Stinger has raised a disputed issue of material fact. This Court finds
17 that it has not.

18 In its response, Stinger makes arguments directed towards the claims of invalidity
19 contained in its summary judgment motion.¹⁰ As a result, Stinger spends very little of its
20 seventeen-page response actually contesting the infringement arguments and evidence raised
21 in TASER’s motion. It argues only that there is no evidence in the record that the S-200’s
22 circuit generates a second lower voltage and that the S-200’s low-voltage output is caused

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24
25 ¹⁰The Court acknowledges TASER’s concern that Stinger has attempted to use the
26 instant motion to buttress the arguments it made concerning invalidity in its summary
27 judgment motion. The Court has not considered those arguments in deciding Stinger’s
28 motions, and will not consider them in the instant motion, except to the extent they concern
literal infringement.

1 by external factors, namely the level of impedance. In support of the latter assertion, Stinger
2 cites exclusively to the testimony of TASER’s expert, Dr. Rodriguez, in which Dr. Rodriguez
3 admitted that the S-200 exhibits high voltage or low voltage depending on the impedance of
4 the circuit. (DSOF ¶7). Based on this admission alone, Stinger summarily concludes that,
5 “a reasonable trier of fact could conclude that the S-200 is constantly generating a single
6 mode first high voltage output that is being externally reduced by passage through a load or
7 loads in the circuit.” (Dkt. #192, p.4). Additionally, Stinger relies on Ohm’s law to explain
8 away statements in its literature that appear to suggest the S-200 utilizes dual modes. Ohm’s
9 law is a well known scientific law, which teaches that voltage drop relates to an increase in
10 current flow. Based on Ohm’s law, Stinger describes the boasts made in its advertisements
11 as mere tautologies. In other words, Stinger was using mere puffery to describe the normal
12 operation of an electrical circuit or single- mode ECD.

13 The testimony of Dr. Rodriguez on which Stinger relies, is not enough to raise a
14 disputed issue of material fact concerning a second operating mode. Dr. Rodriguez’s
15 testimony explains what *triggers* the S-200 ‘s drop in voltage; lack of impedance in the air
16 gap. It does not, however, explain what actually *causes* that drop in voltage. In single-mode
17 ECDs, the ionization of the air gap is the sole cause of the ECD’s decrease in output voltage.
18 The ‘295 patent, however, teaches a system whereby the ionization of the air gap triggers the
19 circuit to generate the lower voltage. In other words, the difference between the prior art and
20 the ‘295 patent is not the triggering event, but how the ECD reacts to that event. Thus, the
21 mere fact that Dr. Rodriguez has identified impedance, or lack thereof, as triggering the S-
22 200's lower voltage output is not determinative, as it does not explain what is actually
23 responsible for the lower voltage output; natural forces or the circuit operation.

24 Additionally, Stinger’s claims that there is no evidence of dual-modes of operation
25 is clearly not true. Dr. Rodriguez’ expert report clearly identifies two distinct modes of
26 circuit operation, the second of which produces a lower voltage than the first. The report
27 explains how in the first mode the S-200's output voltage is quite large and not limited to
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1 Accordingly, TASER has demonstrated that the S-200 embodies every element of claims 2
2 and 40 and summary judgement concerning infringement of '295 patent is warranted.

3 **Accordingly,**

4 **IT IS HEREBY ORDERED** denying in part and granting in part Stinger's Motion
5 for Summary Judgment of Patent Invalidity or Noninfringement. (Dkt. #160). Summary
6 judgment is **GRANTED** as to claim 3 of the '870 patent, finding it invalid as obvious.
7 Summary judgment is **DENIED** as to the rest of the grounds for relief set forth in Stinger's
8 motion.

9 **IT IS FURTHER ORDERED** granting TASER's Motion for Partial Summary
10 Judgment of Literal Infringement. (Dkt. #184).

11 **IT IS FURTHER ORDERED** denying as moot Stinger's request for consolidated
12 oral argument. A consolidated oral argument was held on March 23, 2010. (Dkt. #194).

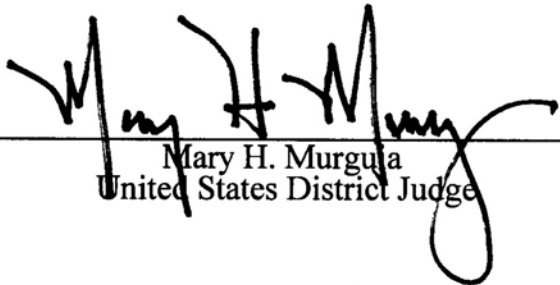
13 **IT IS FURTHER ORDERED** denying TASER's Motion for Leave to File
14 Supplemental Counsel Declaration in Support of TASER's Reply in Support of its Motion
15 for Partial Summary Judgment of Literal Infringement. (Dkt. #197).

16 **IT IS FURTHER ORDERED** denying TASER's Motion for Leave to File Surreply
17 or in the Alternative to Strike Stinger Systems, Inc.'s Improper and Oversized Reply in
18 Support of Motion for Summary Judgment. (Dkt. #199).

19 **IT IS FURTHER ORDERED** setting this matter for Status Hearing on April 19,
20 2010 at 4:30 p.m.

21 DATED this 31st day of March, 2010.

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Mary H. Murgula
United States District Judge