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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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TASER INTERNATIONAL, INC.,

No. CV 07-00042-PHX-MHM

10

Plaintiff,

ORDER

11

vs.

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STINGER SYSTEMS, INC.,

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Defendant.

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Currently pending before this Court is Defendant Stinger Systems, Inc.’s Motion for Reconsideration. (Dkt. #220). Having reviewed the Parties’ briefs and determined that oral argument is unnecessary, the Court issues the following Order.

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I. BACKGROUND

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

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1 On May 7, 2008, the Court held a hearing in accordance with Markman v. Westview
2 Instruments, Inc., 517 U.S. 370 (1996), to construe disputed claims of the ‘262, ‘295, and
3 ‘870 patents. This Court issued its Markman Order construing the disputed claims on
4 February 2, 2009. (Dkt. #146). On, May 18, 2009, Stinger filed a Motion for Summary
5 judgment of Patent Invalidity or Noninfringement. (Dkt. #160). On August 14, 2009 TASER
6 filed its Motion for Partial Summary Judgment of Literal Infringement. (Dkt. #184). The
7 Court held oral argument concerning these motions on March 23, 2010. (Dkt. #210).

8 The Court issued its summary judgment Order on March 31, 2010. The Court granted
9 in part and denied in part Stinger’s Motion for Summary Judgment, granting the motion as
10 to claim 3 of the ‘870 patent, finding it invalid as obvious. (Id.). In the same Order, the
11 Court granted TASER’s Motion for Partial Summary Judgment, finding that Stinger’s S-200
12 Electronic Control Device (“ECD”) literally infringed claims 2 and 40 of TASER’s ‘295
13 patent. (Id.). On April 14, 2010, Stinger filed a Motion for Extension of Time to File Motion
14 for Reconsideration, (Dkt. #212), which this Court granted on April 15, 2010. (Dkt. #215).
15 In its April 15 Order, the Court directed TASER to file a response brief to any
16 reconsideration motion filed by Stinger. (Id.). On April 28, 2010, Stinger filed the instant
17 Motion for Reconsideration. (Dkt. #220). TASER filed its response on May 10, 2010. (Dkt.
18 #221).

19 II. LEGAL STANDARD

20 A district court may alter or amend its decision pursuant to Rule 59(e) of the Federal
21 Rules of Civil Procedure. However, “[t]he granting of a motion for reconsideration is ‘an
22 extraordinary remedy which should be used sparingly.’” Palmer v. Champion Mortg., 465
23 F.3d 24, 30 (1st Cir. 2006) (quoting 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER,
24 FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995)). Relief under Rule 59(e) is
25 appropriate only if: (1) “the motion is ‘necessary to correct manifest errors of law or fact
26 upon which the judgment is based’; (2) the moving party presents ‘newly discovered or
27 previously unavailable evidence’; (3) the motion is necessary to ‘prevent manifest injustice’;
28 (4) there is an ‘intervening change in controlling law.’” Turner v. Burlington Northern Santa

1 Fe R. Co., 228 F.3d 1058, 1063 (9th Cir. 2003) (quoting McDowell v. Calderon, 197 F.3d
2 1253, 1254 n.1 (9th Cir. 1999)). “Rule 59(e) . . . ‘may not be used to relitigate old matters,
3 or to raise arguments or present evidence that could have been raised prior to the entry of
4 judgment.’” Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2617 n.5 (2008) (quoting 11
5 WRIGHT & MILLER, supra, at 127-128); see Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir.
6 2003) (“A Rule 59(e) motion may not be used to raise arguments or present evidence for the
7 first time when they could reasonably have been raised earlier in the litigation.”); see also
8 LRCiv 7.2(g) (“Any . . . motion [for reconsideration] shall point out with specificity . . . any
9 new matters being brought to the Court’s attention for the first time and the reasons they
10 were not presented earlier . . .”).

11 The prohibition against raising new arguments that could have been raised earlier
12 applies equally to patent cases. See, e.g., Transonic Sys., Inc. v. Non-Invasive Med. Techs.
13 Corp., 75 Fed. Appx. 765, 783-84 (Fed. Cir. 2003) (affirming denial of reconsideration of
14 summary judgment of invalidity and claim construction based on new arguments and
15 evidence); Minton v. Nat’l Ass’n of Sec. Dealers, Inc., 336 F.3d 1373, 1379-80 (Fed. Cir.
16 2003) (affirming denial of reconsideration of summary judgment on patent validity where
17 district court “declin[ed] to entertain [movant’s] new argument,” finding movant’s “shifting
18 tactics” prejudiced nonmoving party); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 663-64,
19 668 (Fed. Cir. 1986) (“[A] motion for reconsideration is not a chance for a second bite, and
20 . . . a grant of such a motion not based on newly found, previously unknown facts, would
21 enable the movant to ‘sandbag’ an adversary.”).

22 III. DISCUSSION

23 In its Motion for Reconsideration, Stinger argues that “The Summary Judgment Order
24 was based upon the legally erroneous holding: ‘The ‘295 patent, however, teaches a system
25 whereby the ionization of the air gap triggers the circuit to generate the lower voltage.’”
26 Stinger’s accusation of error is based on its contention that this Court improperly constructed
27 claims 2 and 40 of the ‘295 patent. Claim 2 teaches:

28 a power supply for operating in a first mode to generate a first high voltage,

1 short duration output across the first and second electrodes *during a first time*
2 *interval* to ionize the air within the air gap to thereby reduce the high
3 impedance across the air gap to a lower impedance to enable current flow
4 across the air gap at a lower voltage level and for subsequently operating in a
5 second mode to generate a second lower voltage output across the first and
6 second electrodes *during a second time interval* to maintain the current flow
7 across the first and second electrodes and between the first and second contact
8 points on the target to enable the current flow through the target to cause
9 involuntary muscle contractions to thereby immobilize the target.

6 (emphasis added). Relatedly, claim 4 recites:

7 A method for immobilizing the muscles of a target, comprising the steps of:
8 a. providing first and second electrodes positionable to establish first
9 and second spaced apart contact points on the target wherein a high
10 impedance air gap may exist between at least one of the electrodes and
11 the target;
12 b. applying a first high voltage, short duration output across the first
13 and second electrodes during a *first time interval* to ionize the air within
14 the air gap to thereby reduce the high impedance across the air gap to
15 a lower impedance to enable current to flow across the air gap at a
16 lower voltage level; and
17 c. subsequently applying a second lower voltage output across the first
18 and second electrodes during a *second time interval* to maintain the
19 current flow across the first and second electrodes and between the first
20 and second contact points on the target to enable the current flow
21 through the target to cause involuntary muscle contractions to thereby
22 immobilize the target.

16 (emphasis added). The meaning of the phrases “first time interval” and “second time
17 interval” were not disputed by the Parties during the Markman phase of this action. Now,
18 however, Stinger seizes on these two phrases to contest the Court’s summary judgment
19 Order, arguing they should have been constructed to mean that the circuit discussed in ‘295
20 is time-based and, as a result, the drop in voltage from the first to the second mode of
21 operation is due to the passage of time and not the level impedance in an air-gap. From this
22 proposition, Stinger goes on to argue that the S-200 does not infringe claims 2 and 40 of the
23 ‘295 patent because its drop in voltage is controlled entirely by the level of impedance in the
24 air gap, not pre-timed intervals.

25 Whatever merit this new argument might have¹, it is too late for this Court to give it

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27 ¹The Court notes that Stinger’s current argument is premised on a faulty assumption;
28 that there is only one plausible construction of the phrases “first time interval” and “second
time interval.” TASER’s responsive briefing in this action, and its arguments against

1 consideration. During the summary-judgment phase of this action, Stinger attacked claims
2 2 and 40 as invalid under a completely different legal theory than is currently advanced. In
3 Stinger’s Motion for Summary Judgment, it argued that claims 2 and 40 were invalid because
4 they patented a mere law of nature, namely Ohm’s law, which teaches that voltage naturally
5 decreases as impedance decreases. In other words, Stinger asserted that the voltage drop
6 from the first to the second mode of operation was caused naturally by the reduction of
7 impedance in the air gap, not by internal circuit operation. Likewise, Stinger primarily
8 defended against TASER’s Motion for Partial Summary Judgment by repeating the same
9 argument.² In short, until now, Stinger has advanced an “impedance-based” reading of
10 claims 2 and 40, arguing the voltage differential between modes one and two was caused
11 merely by a decrease in impedance in an air gap, not internal circuitry. In the instant motion,
12 however, Stinger reverses course, seemingly acknowledging that the drop in voltage output
13 between modes one and two of the ECD taught in claims 2 and 40 is not caused merely by
14 a law of nature and is unrelated to impedance. Instead, Stinger argues that the voltage drop
15 is solely the product of circuit operation, asserting that claims 2 and 40 teach two modes of
16 circuit operation each set to output a precise level of voltage for a precise time interval
17 regardless of external circumstances, i.e. impedance in an air gap.

18 Given its new “time-based” reading of claims 2 and 40, Stinger now emphasizes the
19 meaning of “first time interval” and “second time interval,” two phrases it previously did not
20 deem important enough to dispute during the claim construction phase or even mention in
21 defending against TASER’s partial summary judgment motion. That these phrases were not
22 mentioned is understandable, however, as doing so would have contradicted Stinger’s

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24 Stinger’s proposed construction, demonstrate that the plain meaning of these phrases is far
25 from settled. Additionally, even if Stinger’s proposed limitation was adopted, TASER still
26 maintains the S-200 infringes claims 2 and 40 of the ‘295 patent.

27 ²Indeed, in its summary judgment Order, this Court noted that Stinger’s response to
28 TASER’s Motion for Partial Summary Judgment was devoted almost entirely to repeating
the invalidity arguments Stinger made in its own Motion for Summary Judgment.

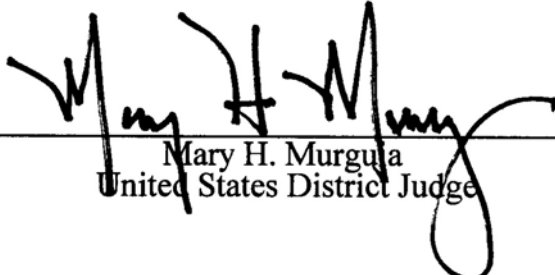
1 “impedance-based” theory of claims 2 and 40, forcing it to admit that the drop in voltage
2 output from mode one to mode two was not merely the product of a law of nature, but instead
3 the result of a distinct manner of circuit operation. As this Court already noted, “[a] Rule
4 59(e) motion may not be used to raise arguments or present evidence for the first time when
5 they could reasonably have been raised earlier in the litigation.” Carroll, 342 F.3d at 945.
6 The Court finds that Stinger could have asserted its time-based reading of claims 2 and 40
7 earlier, but chose not to, electing instead to rely on its “impedance-based” theory.
8 Accordingly, Stinger’s about face is not predicated on the discovery of new evidence or other
9 information which was not previously available. Instead, it appears to this Court that Stinger
10 has hired a new attorney whom has constructed a new theory of this case and now seeks to
11 undo or alter portions of this action which proceeded under the previous theory. Granting
12 the instant motion, then, would be akin to allowing Stinger an impermissible second bite at
13 the apple. See Senza-Gel Corp., 803 F.2d at 664 (Fed. Cir. 1986) (“[A] motion for
14 reconsideration is not a chance for a second bite, and . . . a grant of such a motion not based
15 on newly found, previously unknown facts, would enable the movant to ‘sandbag’ an
16 adversary.”).

17 **Accordingly,**

18 **IT IS HEREBY ORDERED** denying Stinger’s Motion for Reconsideration. (Dkt.
19 #220).

20 DATED this 2nd day of June, 2010.

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Mary H. Murgula
United States District Judge