

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ANASCAPE, LTD.	§	
	§	
<i>Plaintiff,</i>	§	
	§	Civil Action No. 9:06-CV-158
v.	§	
	§	
NINTENDO OF AMERICA, INC.	§	JUDGE RON CLARK
	§	
<i>Defendant.</i>	§	
	§	

ORDER DENYING DEFENDANT’S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL

Before the court is Defendant’s Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial [Doc. #356]. Defendant argues that substantial evidence does not exist to support the jury verdicts of infringement, validity and damages. Alternatively, Nintendo requests a new trial because of allegedly erroneous claim constructions, jury instructions, admission of evidence and verdict form.

After more than a full day of deliberations, the jury returned a verdict that found Nintendo three of four accused products infringed the asserted claims of United States Patent No. 6,906,700 with three of four accused products. The trial record contains sufficient evidence to support the jury’s findings. For the reasons stated below and the reasons stated on the record at trial, Nintendo’s motion is denied.

I. Procedural History and Background

On July 31, 2006, Anascape filed suit against Nintendo alleging infringement of United States Patent No. 6,906,700 (“the ‘700 patent”). The ‘700 patent is a continuation of U.S. Patent No. 6,222,525 (“the ‘525 patent”).

Brad Armstrong is the named inventor of the '700 patent. The patent relates to "graphic image controllers," commonly seen as the controllers used for video games. These controllers convert the movement of the user's hand or finger into an electrical impulse that controls the image on a display, such as a screen. The patent focuses on the possibility of using the invention in controllers operable in six degrees of freedom (hereinafter "6 DOF"). Having 6 DOF means that movement can occur on three linear axes: 1) forward/backward, 2) up/down, 3) left/right, and on three rotational axes: 1) yaw, 2) pitch, and 3) roll.

On May 5, 2008 - May 14, 2008, Anascape tried the case to a jury, accusing: i) Nintendo's Wii Remote controller connected to the Wii Nunchuk controller of infringing claim 19, ii) Nintendo's Wii Classic controller connected to the Wii Remote of infringing claims 19, 22 and 23, iii) Nintendo's GameCube controller of infringing claims 14, 16, 19, 22 and 23, and iv) Nintendo's GameCube Wavebird wireless controller of infringing claim 14. After deliberating for about eight and a half hours over the course of two days, the jury returned a verdict finding the patents valid and infringed by Nintendo's GameCube controller, GameCube Wavebird wireless controller, and Wii Classic controller connected to the Wii Remote controller. The jury awarded Anascape damages in the amount of \$21 million.

Prior to verdict, on May 13, 2008, for the reasons stated on the record, the Court denied both Plaintiff's and Defendant's motions for judgment as a matter of law on infringement, invalidity and damages. After a separate bench trial, for the reasons stated on the record, the Court denied Defendant's claim of inequitable conduct. After the jury returned its verdict on May 14, 2008, the Court found that this was not an exceptional case that merited an award of attorney fees. On May 21, 2008, Nintendo moved for remittitur or, in the

alternative, a new trial on damages. [Doc. #337]. The court denied the motion in an Order signed June 26, 2008 [Doc. #354].

Defendant now makes substantially the same arguments ruled on previously by the court. The court has previously stated on the record and in prior orders the reasons for overruling these motions and will not repeat all such reasons in this order.

II. Standard of Review

A. Judgment as a Matter of Law

A party moving for judgment as a matter of law has a heavy burden. Fed. R. Civ.P. 50(a); see *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 486 (5th Cir. 2004). “[I]f reasonable persons could differ in their interpretations of the evidence, then the motion should be denied. A jury’s verdict is given great weight and all reasonable inferences are drawn in the light most favorable to the verdict. *Thomas v. Texas Dep’t of Criminal Justice*, 220 F.3d 389, 392 (5th Cir. 2000).

A party moving for a judgment as a matter of law must first do so at the close of all evidence, in order to renew such a motion after judgment has been rendered. *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 471 (5th Cir. 2000); Fed. R. Civ. P. 50(b). There are instances where “technical noncompliance” with Fed. R. Civ. P. 50(b) has been excused when purposes of the rule have been satisfied. See *Alcatel U.S.A., Inc. v. D.G.I. Techs., Inc.*, 166 F.3d 772, 780 (5th Cir.1999); but see *Delano-Pyle v. Victoria County*, 302 F.3d 567 (5th Cir. 2002) (finding that a motion not renewed at the close of evidence to be waived). Therefore, any arguments made which were not asserted at the close of the evidence are deemed waived. *Taylor Pub. Co.*, 216 F.3d at 471.

B. Motion for New Trial

There are no precise grounds for granting a new trial, except “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” Fed. R. Civ. P. 59(a). The courts have developed a number of theories for granting new trials, such as where the verdict is against the great weight of the evidence, the damages are excessive, the trial was unfair, or prejudicial error was committed. *Smith v. Transworld Drilling Co.*, 773F.2d 610, 613 (5th Cir. 1985). “A motion for a new trial should not be granted unless the verdict is against the great weight of the evidence, not merely against the preponderance of the evidence.” *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 838-39 (5th Cir. 2004). The court must not substitute its opinion for the collective wisdom of the jury. *Smith*, 773 F.2d at 613.

III. Analysis

A. Renewed Motion for Judgment as Matter of Law

1. Anticipation and Obviousness

Defendant alleges that, as a matter of law, all asserted claims of the ‘700 patent are invalid as anticipated and/or rendered obvious by the prior art, namely the Sony Dual Shock, Sony DualShock 2 and the Goto reference. It is undisputed that Defendant’s anticipation and obviousness case turned on whether the asserted claims of the ‘700 patent were entitled to a 1996 priority date based on Armstrong’s July 5, 1996 patent application. Tr. 159:9-24; DTX 12.1. All of the asserted prior art was invented after 1996. *See* Defendant’s Renewed JMOL, p. 6 [Doc. #356, p. 11].

The claims of a later application are only entitled to the benefit of an earlier filing date under 35 U.S.C. § 120 if the earlier application adequately describes those claims. Whether there is an adequate written description in the earlier application for the later filed claims is determined under the standard of 35 U.S.C. § 112, ¶ 1. *See Reiffin v. Microsoft*, 214 F.3d 1342, 1346 (Fed. Cir. 2000). To meet the written description requirement, the patent specification must demonstrate, to a person of ordinary skill in the art at the time the application was filed, that the inventor actually invented and possessed the full scope of the inventions recited in each asserted claim of the ‘700 patent. *See id.* at 1345; *Chiron Corp. v. Genentech, Inc.*, 363 F.3d 1247, 1255 (Fed. Cir. 2004). “Compliance with the written description requirement is a question of fact[.]” *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1307 (Fed. Cir. 2008).

Anascape, which only had to prove infringement by a preponderance of the evidence, presented testimony that supported the jury’s finding, so long as the jury believed that testimony. Dr. Robert Howe provided extensive testimony about how, to one of skill in the art, the 1996 Application provided adequate written description support for the asserted claims. Tr. 1412:16-20; 1425:17-1447:1; 1474:3-1475:7; 1509:15-1512:21; 1513:4-1514:22.

Although Dr. Howe’s testimony was controverted to some extent by Anascape’s expert, Mr. Robert Dezmelyk, Anascape attacked Mr. Dezmelyk’s credibility at trial. For example, Mr. Dezmelyk did not speak to any Nintendo engineer in forming his opinions and was unfamiliar with certain aspects of the 1996 application. *See* Tr. 1363:19-1364:4; 1314:20-1316:17. The jury was instructed to evaluate the credibility of the witnesses, and, in accordance with standard practice in this circuit, instructed on additional factors to consider in

evaluating the testimony of an expert. Tr. 1562:1-16; *See, also* Fifth Circuit Pattern Jury Instructions - Civil 2.16; 2.19 (2006). This case presented the classic “battle of the experts,” and the jury clearly chose to believe Anascape’s infringement expert.

Nintendo contends that the 1996 application only provides support for controllers with a single input member moveable in 6DOF relative to a reference member of the controller. At trial, Nintendo’s employee, Kazunori Koshiishi, an engineer at Nintendo Co., Ltd., who assisted in the development of the GameCube controller, recognized that a controller similar to the one at Figure 2 of the ‘525 patent could be constructed by using two trackballs, rather than a trackball combined with a collet. Tr. 841:24-847:16. Based on this testimony, a reasonable jury could find that the 1996 application would reasonably convey to a person skilled in the art that Mr. Armstrong had possession of controllers that did not use a single input member moveable in 6DOF.

For these reasons and the reasons stated on May 13, 2008, the court denies Defendant’s renewed motion as to anticipation and obviousness.

2. Written Description

Defendant argues that the evidence establishes by clear and convincing evidence that the asserted claims of the ‘700 patent are not adequately described by the specification of the ‘700 patent as required by 35 U.S.C. § 112, ¶ 1.

35 U.S.C. § 112, ¶ 1 requires that a patent application include “a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same.” 35 U.S.C. § 112, ¶ 1. In

deciding whether the patent satisfies this written description requirement, the description must be considered from the viewpoint of a person of ordinary skill in the field of technology of the patent. *Gentry Gallery, Inc.*, 134 F.3d at 1479. The written description requirement is satisfied if a person of ordinary skill reading the patent application as originally filed would recognize that it describes the invention as it is finally claimed in the issued patent. *Id.*

The written description requirement may be satisfied by the words, structures, figures, diagrams, formulas, etc., in the patent application, and any combination of them, as understood by one of ordinary skill in the field of the technology of the invention. *Space Systems/Loral, Inc. v. Lockheed Martin Corp.*, 405 F.3d 985, 987 (Fed. Cir. 2005). A requirement in a claim need not be expressly disclosed in the patent application as originally filed, provided persons of ordinary skill in the field of technology of the invention would have understood that the missing requirement is inherent in the written description in the patent application. *PowerOasis, Inc.*, 522 F.3d at 1306.

Nintendo had to prove invalidity by clear and convincing evidence. Dr. Howe testified that “the patent is simply not limited to single input 6 degree-of-freedom controllers; and the claims which do not concern those are -- find support in both the 1996 application and the '700 patent.” Tr. 1446:13-16. He concluded that the asserted claims are supported by the specification of the '700 patent. Tr. 1412:21-24; 1447:2-14. The court finds that there is substantial evidence in the record to support a jury’s verdict on written description.

For these reasons and the reasons stated on May 13, 2008, Defendant’s renewed motion for judgment as a matter of law on written description is denied.

3. Infringement

_____ Defendant asserts that the GameCube controller, the WaveBird Wireless controller and the Wii Classic connected to the Wii Remote are entitled to a finding of non-infringement as a matter of law for every asserted claim of the '700 patent.

As stated in the court's Order Denying Defendant's Motion for Remittitur or, in the Alternative, a New Trial on Damages, Nintendo essentially admitted Nintendo's infringement as to the three "old school" products. Tr. 457:16-21; Order Denying Defendant's Motion for Remittitur or, in the Alternative, a New Trial on Damages [Doc. #354, p. 3-4]. There was ample evidence to support a finding of infringement by Nintendo. For these reasons and the reasons stated on May 13, 2008, the court denies Defendant's renewed motion as to non-infringement.

4. Damages

_____ Nintendo argues that "no legally sufficient evidentiary basis exists for an award of damages as a matter of law" and that "Anascape does not offer and cannot establish an evidentiary basis to calculate a reasonable royalty."

Anascape provided testimony from its damages expert, Mr. Bratic, who employed the *Georgia-Pacific* factors and concluded that a reasonable royalty was at least 5% and that other licenses involving the technology of the '700 patent had rates between 3-7%. Tr. 729:5-10; 733:25-734:9; 753:19-754:8; 809:3-12; 826:12-17. For these reasons and the reasons stated in the court's Order Denying Defendant's Motion for Remittitur or, in the Alternative, a New Trial on Damages [Doc. #354], the court finds that the jury's damages award is supported by substantial evidence.

B. Motion for New Trial

Defendant moves for a new trial based on four grounds: 1) the court's claim construction was erroneous, 2) the court failed to permit the jury to consider and award lump sum damages, 3) the admission of the Sony license was erroneous, 4) the jury instructions on the written description requirement were erroneous.

1. Claim Constructions

_____ Nintendo argues that "the Court's construction of a number of claim terms, including (but not limited to) 'controller', '3-D,' 'movable on two axes,' 'movable on two mutually perpendicular axes,' 'detectable by the user,' 'navigating a viewpoint,' 'operable and 'tactile feedback means for providing vibration.'" Nintendo's Motion, p. 24 [Doc. #358, p. 29].

Nintendo points the court to "the record of this case," "which are incorporated herein by reference." Nintendo's Motion, p. 24-25 [Doc. #358, p. 29-30]. The record of this case consists of thousands of pages. To ask the court to sift through the entire record in search of an error simply constitutes inadequate briefing and waiver of the points of error. Courts have consistently held that inadequate briefing results in a waiver of a party's arguments. *See, e.g., United Fire and Cas. Co. v. Hixon Brothers, Inc.*, 453 F.3d 283, 285 n. 3 (5th Cir. 2006). The court denies Nintendo's motion for a new trial based on the court's claim construction.

2. Lump Sum

_____ Nintendo argues that the court erred by refusing to allow lump sum damages. Nintendo states that "the court, in essence, ruled that as a matter of law, a running royalty is the only appropriate measure of damages. . . ." Nintendo's Motion, p. 25 [Doc. #356, p. 30].

Nintendo provides no authority, and the court does not find any, which requires the jury to consider whether to award a lump sum royalty payment when there was no expert testimony that a lump sum payment would be appropriate in a hypothetical negotiation. Although Nintendo states that the Sony License (PTX 54) provided evidence from which the jury could conclude that a lump sum payment was appropriate, Nintendo also spent a substantial amount of time during trial to disparage the Sony License and encourage both the court and the jury to disregard it. *See infra*, III(B)(3) Admission of the Sony License. In any case, the jury heard no evidence as to how the cross-licensing provision of the Sony License would affect the lump sum.

For these reasons and the reasons stated on the record on May 13, 2008, the court denies Nintendo's argument that failure to place a lump sum line on the jury verdict form was error.

3. Admission of the Sony License

_____ Nintendo next argues that the admission of the Sony License was improper. Nintendo states that a) the license was negotiated and entered into as settlement of a dispute between Sony and Anascape, b) the license was irrelevant to the issues at trial because it explicitly stated that Sony paid \$10 million for an exclusive license, c) the agreement stated that no monies were being paid for that part of the licence, and d) the license was not probative of damages.

This issue has been ruled on and discussed in numerous orders and hearings. The Sony license was not negotiated in anticipation of litigation such that the license should be excluded under Fed. R. Evid. 408. The license was admissible to show that fact that Anascape seeks to

license its patents, industry respect for Anascape's inventions and Anascape's financial condition in 2005 when the hypothetical negotiation would have taken place.

For these reasons, the court denies Nintendo's motion on this issue.

4. Jury Instructions

_____ Nintendo argues that the jury instructions on the written description requirement was erroneous. The court's instruction on the written description requirement closely parallels Nintendo's proposed final jury instructions on the written description requirement. Moreover, the court's instructions were guided by *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1306 (Fed. Cir. 2008) and *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997). Nintendo's motion for a new trial based on the court's jury instructions is denied.

IT IS THEREFORE ORDERED that Nintendo's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial [Doc. #356] is **DENIED**.

So **ORDERED** and **SIGNED** this **18** day of **July, 2008**.



Ron Clark, United States District Judge