Ex. PGS 1011

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

WESTERNGECO L.L.C., *Plaintiff*, v. ION GEOPHYSICAL CORPORATION, *Defendant*.	Civil Action No. 4:09-CV-01827 Judge Keith P. Ellison Jury Trial Demanded

WESTERNGECO'S SUR-REPLY TO ION'S MOTION FOR A NEW TRIAL ON INVALIDITY UNDER 35 U.S.C. §§ 102 AND 103

Of Counsel:

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

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

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

Attorneys for Plaintiff
WesternGeco L.L.C.

Dated: November 15, 2012

ARGUMENT

I. WesternGeco's Patents Are Not Anticipated

A. Workman Does Not Teach Lateral Steering (All Bittleston Patents)

No one at Western Geophysical—including either of the inventors of the Workman patent—worked on or invented lateral steering technology. (D.I. 574 at 6) Therefore, the Workman patent could not have taught this technology as a matter of law. *Fiers v. Revel*, 984 F.2d 1164, 1171 (Fed. Cir. 1993) ("[O]ne cannot describe what one has not conceived."). ION notes that the standard for enablement under § 102 differs slightly from § 112. (*See* D.I. 583 at 3) But even under the enablement standard of § 102, the prior art must enable at least one embodiment of the invention to anticipate. *See, e.g., Novo Nordisk Pharms., Inc. v. Bio-Technology General Corp.*, 424 F.3d 1347, 1355 (Fed. Cir. 2005) ("In order to anticipate, a prior art disclosure must also be enabling, such that one of ordinary skill in the art could practice the invention without undue experimentation."); *see also* D.I. 365 at 27 ("Defendants fail to address, [] whether the Workman Reference's disclosure is enabling with respect to claim 18."). Workman fails to enable lateral steering technology—as ION's own expert testified, Workman "basically presupposes that there is a working steering system." (Trial Tr. at 3950:8-3951:5)

This is consistent with the PTO's decision to issue the '520 and '607 patents over the Workman prior art, making ION's burden of proving invalidity by clear and convincing evidence "particularly heavy" and "especially difficult." *See Impax Labs. Inc. v. Aventis Pharms., Inc.*, 545 F.3d 1312, 1314 (Fed. Cir. 2008); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1467 (Fed. Cir. 1990). Far from being a "meritless" point as ION argues (D.I. 583 at 1), ION's own cases confirm that "the fact that references were previously before the PTO goes to the weight the court or jury might assign to the proffered evidence." *Sciele Pharma, Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1260 (Fed. Cir. 2012). ION's attempt to somehow flip the burden

onto WesternGeco is also without merit—anticipation is an affirmative defense. (D.I. 583 at 2) But in any event, WesternGeco adduced ample evidence, including factual testimony about Workman's inventors and expert testimony about its lack of disclosure. (*See* D.I. 574 at 6-9)

ION's vague attempt to rehabilitate its expert, eliciting testimony that Workman "gives some level of detail," fails to carry ION's clear and convincing burden. (D.I. 583 at 4) Mr. Brune never elaborated on the "detail." And in any event, the jury was entitled to evaluate Mr. Brune's credibility—including his use of self-described "hedge phrases" (Trial Tr. at 3951:3-5)—in resolving any ambiguity. *See id.* at 3897:9-11 ("[The jury] will decide on responsiveness and ambiguity. It is for you, not for me."); *see also Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992) ("[T]he verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable persons could not arrive at a contrary conclusion."); *United States v. Loe*, 262 F.3d 427, 432 (5th Cir. 2001) (noting that the jury "retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses").

ION alleges that Workman "teaches at least three different streamer positioning devices – the steerable tail buoys, hydrofoils, and wings/paravane." (D.I. 583 at 2-3) But neither Workman nor Mr. Brune explained how any of these prior art devices would be combined into the Bittleston inventions. Mr. Brune testified that tail buoys "were not the invention of any of the [Bittleston] patents." (Trial Tr. 3952:18-21). He admitted on cross that the Owsley device is "a wing that is permanently attached to a streamer at a set angle," *i.e.*, not steerable, and reiterated on direct that it was a "fixed-wing." (*See id.* at 3956:2-9; 4008:14-4009:2). Again, ION's vague, allegedly rehabilitating testimony ("Typically, but not necessarily") fails to remove Mr. Brune's concessions from the record and—at most—provides ambiguity that the jury was

free to resolve as it saw fit. *Loe*, 262 F.3d at 432. ION's allegation that "WG completely misrepresents Mr. Brune's testimony" regarding Waters is similarly contradicted by the record. (*See, e.g.*, D.I. 574 at 8-9) The jury was entitled to consider comments—which Mr. Brune agreed with—that the Waters device was "unsuited for selectively positioning individual lateral positioning devices." (Trial Tr. at 3962:20-3963:1) This is what others skilled in the art gleaned from "literally reading the words on the [Waters] patent[]," and there would be "little reason to believe they knew more than just literally what was written." (*See id.* at 3963:2-25) Moreover, ION's recourse to Waters and Owlsey to fill in the shortcomings of Workman prove that ION's anticipation defenses had to fail as a matter of law—let alone were properly rejected by the jury—no "single prior art reference" disclosed any of the Bittleston inventions. *Sanofi-Synthelabo v. Apotex, Inc.*, 550 F.3d 1075, 1082 (Fed. Cir. 2008).

B. Workman Does Not Disclose a "Streamer Separation Mode" ('520 Claim 18)

Even if Workman did teach lateral steering technology, it is undisputed that Workman fails to disclose setting and maintaining any specific separation between streamers. ION alleges that Workman's minimal "threshold parameter," *e.g.*, "at least 100 meters" would somehow be a "separation mode." (D.I. 583 at 5) But this "threshold parameter" would lead to uncontrolled streamer separations and fail to set or maintain any spacing—streamers could range from 100 meters apart to 100 miles. ION does not dispute this fact. (*Id.*) Workman's "threshold parameter" does not "set and maintain the spacing" as required by the Court's claim construction—not only was the jury's verdict supported, it was required as a matter of law.

C. Workman Does Not Disclose Predicting Positions ('607 Claim 15)

While Workman vaguely discloses a "Kalman filter," it gives no detail on if it "predicts position." (ION 266 at 3:46-48) While Kalman filters generally use predictions of some sort, as WesternGeco's expert Dr. Leonard testified, "for particular systems, one has to sort of choose

the right way to implement it, which is–varies greatly system by system." (Trial Tr. at 1513:3-8) Dr. Triantafyllou also confirmed that "what the equations are in order to work, that is specific to each system." (*See id.* at 1353:20-1354:1) Whether any position is "predicted" is not disclosed in the "network solution" of Workman. (*See* ION 266 at 3: 49-51) Mr. Brune's conclusory testimony about how Workman ***might be*** implemented fails to remedy the shortcomings of the reference. *See ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1327, 1330-31 (Fed. Cir. 2012) (affirming denial of JMOL of invalidity where defendants' expert's testimony was "conclusory and factually unsupported").

D. The '895 Application Does Not Disclose 4D Surveys ('038 Claim 14)

ION alleges that WesternGeco's "sole argument that the '895 Publication fails to anticipate Claim 14 is that it does not teach the array geometry tracking system limitation." (D.I. 583 at 6) This is not true. Rather, Mr. Brune agreed that Claim 14 covers "repeat[ing] the position versus time essentially of [a] 4D survey" whereas the '895 application "does not deal with 4D time lapse kind of concepts." (*See* D.I. 574 at 13-14) While ION insists that "Mr. Brune did not make that admission," D.I. 583 at 6, mere obstinance does not rewrite the trial record. ION's purported citation to rehabilitating testimony again fails to prove that the jury erred in taking Mr. Brune at his word. The jury, not ION was to "decide on responsiveness and ambiguity." (Trial Tr. at 3897:9-11) The jury was free to accept Mr. Brune's admission and conclude, as the PTO had, that the '895 application failed to teach every limitation of Claim 14.

II. The Asserted Patents Are Not Obvious

Workman's failure to teach lateral steering technology is as relevant to obviousness as it is to anticipation. ION's arguments that "when addressing obviousness, the prior art references need not be enabled" and that "enablement [is] inapplicable under § 103" are incorrect. (D.I. 583 at 7) While ION's cited case stands for the proposition that suggestions or motivations for

modifying the prior art might be gleaned from non-enabled references, the prior art as a whole must still enable the claimed invention. *In re Kumar*, 418 F.3d 1361, 1369 (Fed. Cir. 2005) ("To render a later invention unpatentable for obviousness, the prior art must enable a person of ordinary skill in the field to make and use the later invention.") Far from being "inapplicable" as ION argues, D.I. 583 at 7, Workman's shortcomings are dispositive for obviousness as well as anticipation.

In seeking to combine references to prove invalidity, ION had to "articulate the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious." *Sanofi*, 470 F.3d at 1379. Far from doing so, ION's expert admitted that the prior art taught away from WesternGeco's inventions. (D.I. 574 at 19) Mr. Brune's inability to articulate ***any*** specific motivation—other than the "moderate" number of people working in the field (Trial Tr. at 3820:5-15)—fails to carry ION's burden. *Pozen Inc. v. Par Pharm., Inc.*, 696 F.2d 1151, 1165 (Fed. Cir. 2012) ("The burden falls on the challenger of the patent to show by clear and convincing evidence that a skilled artisan would have been motivated to combine the teachings of the prior art references . . . ."). "Significantly, whether there is a reason to combine prior art references is a question of fact," and the jury was free to conclude that ION failed to meet this burden. *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1367 (Fed. Cir. 2012).

CONCLUSION

ION must do more than show that some evidence supports its defenses—it must show that the great weight of the evidence contradicts the jury's conclusions and that the verdict must be vacated "to prevent an injustice." ION cannot satisfy this standard merely by disregarding the substantial evidence supporting the jury's verdict. The jury's rejection of ION's affirmative defenses was amply supported throughout the record, and ION's motion is properly denied.

Dated: November 15, 2012

Respectfully submitted,

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

Attorneys for Plaintiff
WesternGeco L.L.C.

Of Counsel:

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record pursuant to Federal Rules of Civil Procedure on this the 15th day of November, 2012.

Timothy K. Gilman