

# **Ex. PGS 1038**

**(EXCERPTED)**

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

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WESTERNGECO L.L.C.,

*Plaintiff,*

v.

ION GEOPHYSICAL CORPORATION,

*Defendant.*

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) Civil Action No. 4:09-CV-01827  
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) Judge Keith P. Ellison  
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) Jury Trial Demanded  
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**WESTERNGECO'S OPPOSITION TO ION'S MOTION FOR A NEW TRIAL  
ON INVALIDITY UNDER 35 U.S.C. §§ 102 AND 103 (D.I. 550)**

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horizontally. (*See* Argument § I.A, *supra*; D.I. 120 at 14) Workman does not teach and enable all of the claim limitations of Claim 15 of the '607 patent, and therefore cannot anticipate as a matter of law. *Sanofi*, 550 F.3d at 1082.

Notably, Mr. Brune also did not discuss whether or not Workman met the separate claim limitations of a “prediction unit” and “control unit” in his testimony. (Trial Tr. at 3979:21-3980:13 (“I didn’t talk about that in detail, no.”)<sup>2</sup>; *Id.* at 3982:23-3983:3 (“Q. [Y]ou never looked at or analyzed in your presentation the specific pieces of Claim 15, did you? A. **No, I did not.**”). If anything, ION’s failure to offer any evidence or testimony that Workman discloses all of the limitations of Claim 15 warrants judgment as a matter of law against ION’s defense. *Sanofi*, 550 F.3d at 1082. ION was unable to present sufficient evidence for a jury to properly find in its favor. On ION’s post-trial motion, where it seeks to reverse a jury verdict of validity, ION’s shortcomings doom its motion to failure.

#### **D. The '895 Application Does Not Anticipate Claim 14 of the '038 Patent**

The '895 application is the original application that led to the Bittleston patents-in-suit. As discussed above, the Zajac '038 patent built on this foundation and invented a system to repeat surveys over time to produce 4D images. It was undisputed at trial that the '895 application did not disclose the 4D inventions of the Zajac '038 patent. The jury’s verdict to that

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<sup>2</sup> ION argues that because the Bittleston patents recite “parallel method and apparatus claims,” Mr. Brune merely addressed the method claims and conclusorily imported those analyses for the apparatus claims. (D.I. 550 at 6 n.1) But for the '607 patent, the asserted apparatus Claim 15 recites a limitation—the prediction unit—absent from method Claim 1 and therefore never addressed by Mr. Brune. Additionally, Workman fails to disclose or enable the required “prediction unit” or “to use the predicted positions to calculate desired changes in positions.” Although ION points to Workman’s vague recitation of a “Kalman filter,” no disclosure exists as to what type of Kalman filter is intended, what measurements it receives, or what, if any, prediction it performs. And even if a predicted position had been disclosed, Workman fails to teach how that prediction would be used to calculate positioning commands as required by Claim 15 of the '607 patent.

effect is amply supported by this record, and ION's efforts to supplant record evidence and the testimony of its own expert with attorney argument belies the merits of its post-trial motion.

Claim 14 of the Zajac '038 patent provides:

14. A seismic streamer array tracking and positioning system comprising: a towing vessel for towing a seismic array; a seismic streamer array comprising a plurality of seismic streamers; an active streamer positioning device (ASPD) attached to each seismic streamer for positioning each seismic streamer; a master controller for issuing vertical and horizontal positioning commands to each ASPD for maintaining a specified array geometry; an environmental sensor for sensing environmental factors which influence the towed path of the towed array; a tracking system for tracking the streamer horizontal and vertical positions versus time during a seismic data acquisition run; an array geometry tracking system for tracking the array geometry versus time during a seismic data acquisition run, wherein the master controller compares the vertical and horizontal positions of the streamers versus time and the array geometry versus time to desired streamer positions and array geometry versus time and issues positioning commands to the ASPDs to maintain the desired streamer positions and array geometry versus time.

(PTX005). As Dr. Triantafyllou explained during WesternGeco's case-in-chief, Claim 14 is directed to 4D surveys. (*See, e.g.,* Trial Tr. at 1362:4-1363:9) Mr. Brune, ION's expert, likewise admitted that the claim is directed to 4D time lapse surveys where a master controller compares streamer positions and array geometry versus time to a desired position and geometry versus time. (Trial Tr. at 3986:3-7 ("Q. The Zajac patent claim that is asserted, only looking at one, Claim 14, is a tracking system and using that tracking system to repeat the position versus time essentially of [a] 4D survey, fair? A. Yeah. Yeah.")) Mr. Brune further admitted that the '895 application, in contrast, does not disclose 4D time-lapse surveys. (Trial Tr. at 3987:4-9 ("Q. You are not identifying in the ['895 application] disclosure of performing a 4D survey using the same positions as the reference survey, right? That's not in the Bittleston disclosure? A. No. *The Bittleston does not deal with 4D time lapse kind of concepts.*")) Based on the testimony of both parties' technical experts, it is undisputed that the '895 patent does not disclose

every limitation of Claim 14. Accordingly, not only is the jury's verdict amply supported by the record evidence, it is mandated as a matter of law. *Sanofi*, 550 F.3d at 1082.

Despite Mr. Brune's admission that the '895 application "does not deal with 4D time lapse kind of concepts" claimed by the Zajac '038 patent, ION contends that '895 application's disclosure of a "maintain[ing] a dynamic model of each of the seismic streamers" somehow relates to 4D surveys. (D.I. 550 at 26-28) Not so. The "dynamic model" referenced in the Bittleston application relates to the position prediction of the '607 patent, *i.e.*, "prediction" that estimates the current streamer positions. It bears no relation to repeating surveys over time to generate 4D data. And ION's vague assertion that "[t]he reference to 'dynamic' refers to a model that varies with time" is at odds with both Mr. Brune's admission that the '895 application does not involve time-lapse concepts, and with WesternGeco's experts' discussion of the "dynamic model" as being related to the predictive aspects of the Bittleston patents' invention rather than with any time-lapse concept. (*See, e.g.*, Trial Tr. at 1348:25-1349:5 (WesternGeco's technical expert Dr. Triantafyllou discussing the dynamic model" in the context of streamer behavior prediction), at 1519:16-1520:13 (WesternGeco's technical expert Dr. Leonard discussing the "dynamic model" in the context of predicting positions of the streamer positioning devices), at 1539:11-17 (same)). In fact, when asked at least six times in succession during cross-examination to point out a specific passage in the '895 application that discloses the 4D surveys claimed in the Zajac '038 patent, Mr. Brune was unable to even answer the question:

**Q. *Where is this maintaining the desired streamer position versus time? Where is that, sir, in this disclosure?***

A. Well, all of what we do in seismic operations is versus time.

Q. Everything we are all doing here has a time component.

A. Yes. In fact, literally operational time is logged in the recording of all the data and controlling systems.

Q. Sir, the Zajac patent -- we already talked about this -- is about time lapse. *Is there anything you can point the jury to in this passage we have looked at here that shows how a command to maintain the desired streamer positions and array geometry versus time is set forth in the Bittleston '895 publication?*

A. Am I understanding that you are saying that versus time there is the calendar time of time lapse for a 4D survey? That would be the typically six months or a year or two kind of time between surveys? Is that what you are meaning by 'versus time' in the lower highlighted section of the claim here?

Q. Sir, this is your slide. You highlighted the language at the bottom and then you picked what to show the jury and the language on the top. *Can you point me or the jury to where the language up top discloses the language of the Zajac patent at the bottom? Can you do that?*

A. *No.* There is not that exact wording, but it sounded like you had a different meaning for time from your question earlier in my response to an earlier question.

Q. Sir, it is not even that the exact language isn't there. *The concept of Zajac's '038 patent, Claim 14 that we are looking at right here on the bottom of the screen about positioning commands to maintain the desired streamer positions and array geometry versus time, that's not disclosed in the passage you called out here on Brune 80, is it?*

A. Those exact words are not there.

Q. *Not only that, sir, that concept isn't there?*

A. I would argue the concept is. I guess maybe ultimately that will be another question for the jury to decide, is whether throwing out streamers in the turn and moving streamers to different depths for adjacent streamers constitutes positioning commands to maintain positions and array geometry.

(Trial Tr. at 3992:14-3994:1; *see generally id.* at 3990:12-3994:1) The jury was free to note Mr. Brune's equivocation and inability to answer a straight question in evaluating his credibility, and his failure to identify any prior art teaching of the 4D requirements of the Zajac '038 patent. ION cannot displace the jury's role in weighing this evidence and evaluating these witnesses, especially where ION failed to adduce even a *prima facie* case of anticipation. ION's motion for a new trial on anticipation should accordingly be denied.