

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CARUCEL INVESTMENTS, L.P., a Delaware limited partnership, <div style="text-align: right;">Plaintiff,</div> v. NOVATEL WIRELESS, INC., a Delaware corporation; VERIZON COMMUNICATIONS, INC., a Delaware corporation; and CELLCO PARTNERSHIP d/b/a/VERIZON WIRELESS, a Delaware general partnership, <div style="text-align: right;">Defendants.</div>	}	Case No.: 16-cv-118-H-KSC ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL [Doc. No. 348.]
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On May 8, 2017, Plaintiff Carucel Investments, L.P. filed a motion for judgment as a matter of law or, in the alternative, for a new trial. (Doc. No. 348.) On May 26, 2017, Defendants Novatel Wireless, Inc., Verizon Communications, Inc., and Cellco Partnership doing business as Verizon Wireless filed a response in opposition to Plaintiff's motion. (Doc. No. 353.) On June 5, 2017, Plaintiff filed its reply. (Doc. No. 354.)

1 The Court held a hearing on the matter on June 12, 2017. Robert F. Ruyak and
 2 Robert M. Harkins, Jr. appeared for Plaintiff. Amardeep L. Thakur, Joshua L. Sohn, and
 3 Bruce Zisser appeared for Defendants. For the reasons below, the Court denies Plaintiff's
 4 motion for judgment as a matter of law or, in the alternative, for a new trial.

5 **Background**

6 On May 27, 2015, Plaintiff Carucel Investments, L.P. filed a complaint for patent
 7 infringement in the United States District Court for the Southern District of Florida against
 8 Defendants Novatel Wireless, Inc., AT&T Mobility LLC, Verizon Communications, Inc.,
 9 and TigerDirect, Inc., alleging infringement of U.S. Patent No. 7,221,904, U.S. Patent No.
 10 7,848,701, U.S. Patent No. 7,979,023, U.S. Patent No. 8,463,177, U.S. Patent No.
 11 8,718,543, and U.S. Patent No. 8,849,191.¹ (Doc. No. 1, Compl.) Specifically, Plaintiff
 12 alleged that Defendants' mobile broadband hotspot devices, the MiFi devices, infringe the
 13 patents-in-suit. (*Id.* ¶¶ 28-29.)

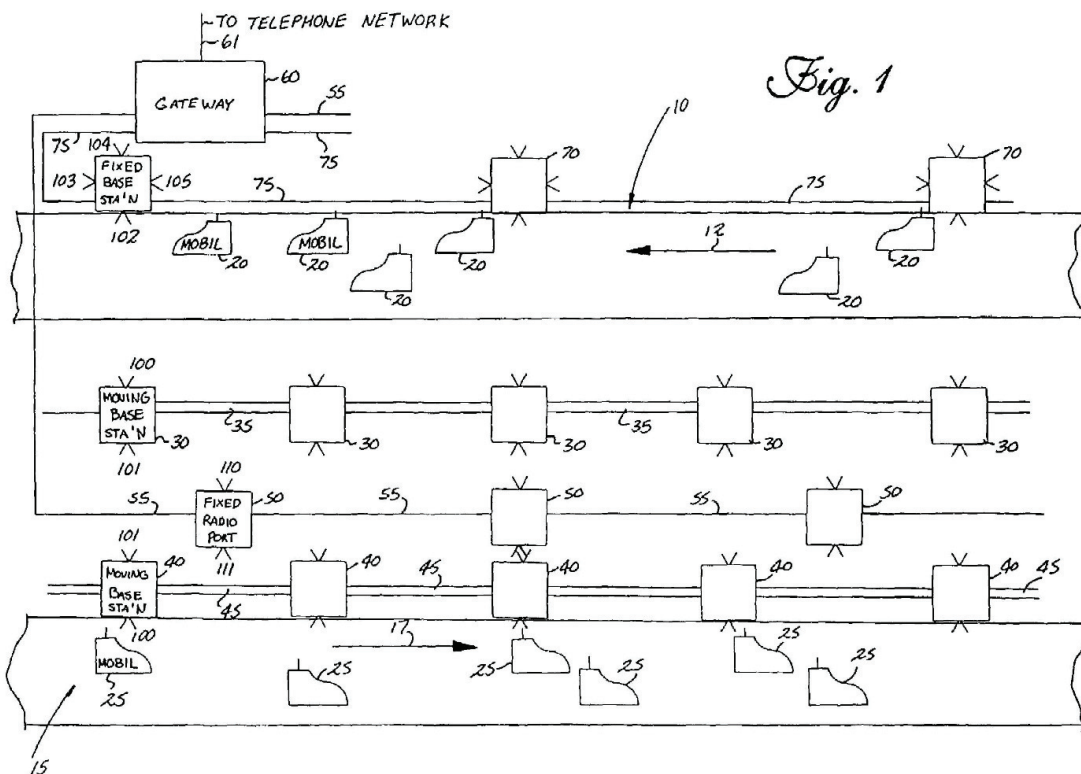
14 The patents-in-suit are all entitled "Mobile Communication System with Moving
 15 Base Station" and share an essentially identical specification. (*See* Doc. No. 1, Compl.
 16 Exs. A-C, E-F.) The invention disclosed in the patents-in-suit "relates to cellular telephone
 17 systems in which a mobile unit communicates by wireless communication to a base station
 18 connection to the wire telephone network and more particularly to cellular telephone
 19 systems adapted for use with fast-moving mobile units." '904 Patent at 1:16-19. The
 20 specification details the problems that prior art telecommunications systems had with fast-
 21 moving mobile units, particularly the problem of dealing with transfers of fast-moving
 22 mobile units between stationary cell sites as the mobile units move through the cellular
 23 network. *See id.* at 1:22-2:61. The specification provides the following summary of the
 24 invention:

25 These and other problems of the prior art are overcome in accordance with
 26 this invention by means of a moving base station which is interposed between

27
 28 ¹ The '177 and '191 patents are no longer asserted in this action. (Doc. No. 198; Doc. No. 277 at 3, 5.)

a moving mobile telephone unit and a fixed base station. In accordance with this invention, a movable base station moves with the traffic at a rate of speed which is comparable to the speed of the traffic and communicates with a moving mobile telephone unit via standard mobile radio transmission. The movable base station further communicates by radio signals with a plurality of fixed antennas spaced along the path of travel of the mobile base station. The several fixed antennas are connected to a telephone wire line network via a telephone gateway office in a standard fashion. In accordance with this invention, the fixed radio ports are synchronized and the interface between the moving base station and the fixed radio ports is a time division multiplexed (TDM)-direct-sequence, spread-spectrum CDMA.

Id. at 3:18-34. Figure 1 of the '904 patent displays an embodiment of the claimed system:



As an example of the claimed invention, Claim 22 of the '904 Patent provides:

An apparatus adapted to move in accordance with a movement of a mobile unit moving relative to a plurality of fixed radio ports, the apparatus

1 comprising:

2 a receiver adapted to receive a plurality of signals, each of the plurality of
3 signals transmitted from each of the plurality of fixed radio ports within a
4 frequency band having a lower limit greater than 300 megahertz;

5 a transmitter adapted to transmit, within the frequency band, a resultant signal
6 to the mobile unit in accordance with at least one of the plurality of signals;
7 and

8 a processor adapted to maximize an amount of transferred information to the
9 mobile unit by evaluating a quality of each of the plurality of signals
10 transmitted from the plurality of fixed radio ports.

11 Id. at 12:65-13:11.

12 On September 15, 2015, Carucel dismissed its claims against Defendant TigerDirect,
13 Inc. with prejudice. (Doc. No. 11.) On December 16, 2015, Carucel filed a first amended
14 complaint alleging infringement of the same six patents and adding as a new Defendant
15 Cellco Partnership d/b/a Verizon Wireless. (Doc. No. 58.)

16 On January 15, 2016, the action was transferred to the Southern District of
17 California. (Doc. Nos. 69-70.) On September 19, 2016, the Court issued a claim
18 construction order construing the disputed terms in the patents-in-suit. (Doc. No. 131.) On
19 December 9, 2016, the Court dismissed Defendant AT&T with prejudice. (Doc. No. 139.)

20 On March 2, 2017, the Court denied Defendants' motion for summary judgment.
21 (Doc. No. 226.) On April 3, 2017, the Court issued an order on the parties' Daubert
22 motions and motions in limine. (Doc. No. 305.)

23 The Court held a jury trial beginning on April 4, 2017. (Doc. No. 316.) On April
24 10, 2017, the jury returned a verdict finding that Plaintiff had failed to prove that any of
25 the accused products infringed any of the asserted patent claims.² (Doc. No. 335 at 2.) On

26
27 ² During the reading of the verdict in Court, an issue arose as to the jury's answers to Question No.
28 3 regarding "Validity – Obvious or Non-Obvious" in the verdict form. At the hearing, the parties agreed
that the jury's answers to Question No. 3 were moot in light of the jury's answers to Question No. 1
regarding "Infringement" in the verdict form. (Doc. No. 341, Trial Tr. Vol. V at 6-7.)

1 April 10, 2017, the Court entered judgment in favor of Defendants and against Plaintiff.
 2 (Doc. No. 336.) By the present motion, Plaintiff moves pursuant to Federal Rule of Civil
 3 Procedure 50(b) for judgment as a matter of law in its favor on the issue of infringement
 4 or, in the alternative, for a new trial under Rule 59. (Doc. No. 348-1.)

5 Discussion

6 **I. Legal Standards**

7 A. Rule 50 Motion for Judgment as a Matter of Law

8 In a patent case, a motion for judgment as a matter of law is governed by the law of
 9 the regional circuit, here the Ninth Circuit. InTouch Techs., Inc. v. VGO Commc'ns, Inc.,
 10 751 F.3d 1327, 1338 (Fed. Cir. 2014). Under Federal Rule of Civil Procedure 50, a court
 11 should render judgment as a matter of law (“JMOL”) only when “a party has been fully
 12 heard on an issue during a jury trial and the court finds that a reasonable jury would not
 13 have a legally sufficient evidentiary basis to find for the party on that issue” Fed. R.
 14 Civ. P. 50(a)(1); see Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 149 (2000). In
 15 other words, judgment as a matter of law is proper when “the evidence, construed in the
 16 light most favorable to the nonmoving party, permits only one reasonable conclusion, and
 17 that conclusion is contrary to the jury’s verdict.” Pavao v. Pagay, 307 F.3d 915, 918 (9th
 18 Cir. 2002); accord InTouch Techs., 751 F.3d at 1338; see also Hangarter v. Provident Life
 19 & Accident Ins. Co., 373 F.3d 998, 1005 (9th Cir. 2004) (“JMOL should be granted only
 20 if the verdict is ‘against the great weight of the evidence, or it is quite clear that the jury
 21 has reached a seriously erroneous result.’”); Reeves, 530 U.S. at 150 (“[T]he standard for
 22 granting summary judgment ‘mirrors’ the standard for judgment as a matter of law.”). In
 23 contrast, “[a] jury’s verdict must be upheld if it is supported by substantial evidence, which
 24 is evidence adequate to support the jury’s conclusion, even if it is also possible to draw a
 25 contrary conclusion.” Pavao, 307 F.3d at 918.

26 In deciding a motion for judgment as a matter of law, a court “must view all evidence
 27 in the light most favorable to the nonmoving party, draw all reasonable inferences in the
 28 favor of the non-mover, and disregard all evidence favorable to the moving party that the

1 jury is not required to believe.” Harper v. City of Los Angeles, 533 F.3d 1010, 1021 (9th
 2 Cir. 2008); see Reeves, 530 U.S. at 150-51. A district court “may not make credibility
 3 determinations or weigh the evidence.” Reeves, 530 U.S. at 150. “[T]he court must accept
 4 the jury’s credibility findings consistent with the verdict’ . . . [and] ‘may not substitute its
 5 view of the evidence for that of the jury.’” Winarto v. Toshiba Am. Elecs. Components,
 6 Inc., 274 F.3d 1276, 1283 (9th Cir. 2001).

7 B. Rule 59 Motion for New Trial

8 In a patent case, a motion for a new trial is also governed by the law of the regional
 9 circuit. InTouch Techs., 751 F.3d at 1338. Under Federal Rule of Civil Procedure 59(a),
 10 a district court “may, on motion, grant a new trial on all or some of the issues—and to any
 11 party— . . . after a jury trial, for any reason for which a new trial has heretofore been granted
 12 in an action at law in federal court.” “Rule 59 does not specify the grounds on which a
 13 motion for a new trial may be granted. Rather, the court is bound by those grounds that
 14 have been historically recognized.” Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir.
 15 2007) (internal citations and quotation marks omitted). In the Ninth Circuit, “[t]he trial
 16 court may grant a new trial only if the verdict is contrary to the clear weight of the evidence,
 17 is based upon false or perjurious evidence, or to prevent a miscarriage of justice.” Id.; see
 18 also Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1309 (Fed. Cir. 2009) (“[A]
 19 district court in the Ninth Circuit ‘may grant a new trial only if the verdict is against the
 20 clear weight of the evidence.’”). “Unlike with a Rule 50 determination, [a] district court,
 21 in considering a Rule 59 motion for new trial, is not required to view the trial evidence in
 22 the light most favorable to the verdict. Instead, the district court can weigh the evidence
 23 and assess the credibility of the witnesses.” Experience Hendrix L.L.C. v.
 24 Hendrixlicensing.com Ltd, 762 F.3d 829, 842 (9th Cir. 2014). “[A] district court may not
 25 grant a new trial simply because it would have arrived at a different verdict.” Wallace v.
 26 City of San Diego, 479 F.3d 616, 630 (9th Cir. 2007).

27 “The grant of a new trial is ‘confided almost entirely to the exercise of discretion on
 28 the part of the trial court.’” Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir.

1 1990) (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)). On appeal,
 2 the Ninth Circuit “afford[s] considerable deference to the district court’s new trial decision
 3 and will not overturn the district court’s decision to grant a new trial absent an abuse of
 4 discretion.” Experience Hendrix, 762 F.3d at 842. A district court’s “denial of a motion
 5 for a new trial is reversible ‘only if the record contains no evidence in support of the
 6 verdict’ or if the district court ‘made a mistake of law.’” E.E.O.C. v. Go Daddy Software,
 7 Inc., 581 F.3d 951, 962 (9th Cir. 2009).

8 C. Infringement

9 Under 35 U.S.C. § 271(a), “whoever without authority makes, uses, offers to sell, or
 10 sells any patented invention, within the United States . . . infringes the patent.” A patent
 11 infringement analysis proceeds in two steps. Markman v. Westview Instruments, Inc., 52
 12 F.3d 967, 976 (Fed. Cir. 1995), aff’d 517 U.S. 370. In the first step, the court construes
 13 the asserted claims as a matter of law. See id. In the second step, the factfinder compares
 14 the claimed invention to the accused device. Id.; see also Verizon Servs. Corp. v. Cox
 15 Fibernet Va., Inc., 602 F.3d 1325, 1340 (Fed. Cir. 2010) (“A determination of infringement
 16 is a question of fact . . .”).

17 The patentee bears the burden of proving infringement. Medtronic, Inc. v. Mirowski
 18 Family Ventures, LLC, 134 S. Ct. 843, 846, 849 (2014). “To prove literal infringement,
 19 the patentee must show that the accused device contains every limitation in the asserted
 20 claims. If even one limitation is missing or not met as claimed, there is no literal
 21 infringement.” Riles v. Shell Exploration & Prod. Co., 298 F.3d 1302, 1308 (Fed. Cir.
 22 2002); accord Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1301 (Fed. Cir. 2011).

23 **II. Analysis of Plaintiff’s Motion**

24 Each of the claims asserted at trial from the patents-in-suit contains language stating
 25 that the claimed apparatus/movable base station/transmitter is “adapted to” or “configured
 26 to” move. (See Doc. No. 348-1 at 5.) In the Court’s claim construction order, the Court
 27 construed “the terms ‘adapted to’ and ‘configured to’ as ‘constructed to move with the
 28 traffic at a rate of speed which is comparable to the speed of the traffic.’” (Doc. No. 131

1 at 16.) All of the arguments in Plaintiff’s motion center around the “adapted to/configured
2 to” claim limitation.

3 A. The Court’s Claim Construction

4 As an initial matter, in its motion, Plaintiff argues that the Court’s claim construction
5 for the term “adapted to/configured to” was erroneous. (Doc. No. 348-1 at 21-23.)
6 Specifically, Plaintiff argues that the Court erred in construing the term “adapted
7 to/configured to” by finding that the specification contained a disclaimer for that claim
8 term. (Id.) In response, Defendants argue that Plaintiff has waived any right to request a
9 revised claim construction for this claim term. (Doc. No. 353 at 7-8.) Defendants further
10 argue that the Court’s construction for this term was proper and that Plaintiff has failed to
11 provide a sufficient basis for reconsideration of the construction. (Id. at 17-21.)

12 The Court agrees with Defendants that Plaintiff waived its right to contest the
13 Court’s finding of a disclaimer with respect to the claim term “adapted to/configured to.”
14 See Cordis Corp. v. Boston Sci. Corp., 561 F.3d 1319, 1331 (Fed. Cir. 2009) (“[L]itigants
15 waive their right to present new claim construction disputes if they are raised for the first
16 time after trial.”). In their claim construction briefing, Plaintiff proposed that the term
17 “adapted to” be given its plain meaning and be construed as “adjusted to a specified use or
18 situation.” (Doc. No. 123 at 17.) In addition, Plaintiff proposed that the term “configured
19 to” be given its plain meaning and be construed as “shaped, fashioned, or constructed to.”
20 (Id. at 17.) Defendants argued that the terms “adapted to” and “configured to” should be
21 construed as “constructed to move by a conveying device to track the movement of a
22 mobile unit,” or at the very least be construed as “constructed to.” (Doc. No. 120 at 16.)

23 On September 14, 2016, the Court issued a tentative claim construction order
24 rejecting the parties’ proposed constructions and “tentatively constru[ing] the terms
25 ‘adapted to’ and ‘configured to’ as ‘constructed to move with the traffic at a rate of speed
26 which is comparable to the speed of the traffic.’” (Doc. No. 129 at 16.) In the tentative
27 order, the Court explained that its tentative construction was based on a disclaimer
28 contained in the specification describing the invention as a whole. (Id. at 14-15 (citing

1 Pacing Techs., LLC v. Garmin Int’l, Inc., 778 F.3d 1021, 1025 (Fed. Cir. 2015); Regents
 2 of Univ. of Minnesota v. AGA Med. Corp., 717 F.3d 929, 936 (Fed. Cir. 2013).) At the
 3 claim construction hearing, Plaintiff did not contest the Court’s tentative claim
 4 construction. At the beginning of the claim construction hearing, counsel for Plaintiff
 5 stated: “Your Honor, for Plaintiff, we’ll go ahead and submit on the tentative.” (Doc. No.
 6 352 at 1-2.) Following the hearing, the Court issued its claim construction order adopting
 7 the same construction and supporting analysis for the term “adapted to/configured to”
 8 contained in the Court’s tentative order. (Doc. No. 131 at 16.) Plaintiff never moved for
 9 reconsideration or clarification of the Court’s claim construction for the term “adapted
 10 to/configured to” prior to trial. By waiting until post-trial motions to contest the Court’s
 11 construction for the term “adapted to/configured to” and the Court’s disclaimer finding
 12 related to that term, Plaintiff waived the specific claim construction arguments that it now
 13 seeks to present. See Cordis, 561 F.3d at 1331 (“[L]itigants waive their right to present
 14 new claim construction disputes if they are raised for the first time after trial.”); GPNE
 15 Corp. v. Apple Inc., 108 F. Supp. 3d 839, 850 (N.D. Cal. 2015).

16 Further, even assuming Plaintiff did not waived its challenge to the Court’s claim
 17 construction for the term “adapted to/configured to,” Plaintiff has failed to present a
 18 sufficient basis for the Court to reconsider or alter its construction for that term. The
 19 specification for the patents-in-suit provides: “In accordance with this invention, a
 20 movable base station moves with the traffic at a rate of speed which is comparable to the
 21 speed of the traffic and communicates with a moving mobile telephone unit via standard
 22 mobile radio transmission.” ’904 Patent at 3:21-25. Here, the specification is clearly
 23 describing the invention as a whole and not merely a preferred embodiment of the
 24 invention. The Federal Circuit has explained: “When a patentee describes the features of
 25 the present invention as a whole, he alerts the reader that this description limits the scope
 26 of the invention.” Pacing Techs., 778 F.3d at 1025; accord Regents of Univ. of Minnesota,
 27 717 F.3d at 936.

28 The Court acknowledges that the Federal Circuit has also explained that “that use of

1 the phrase ‘present invention’ or ‘this invention’ is not always so limiting, such as where
 2 the references to a certain limitation as being the ‘invention’ are not uniform, or where
 3 other portions of the intrinsic evidence do not support applying the limitation to the entire
 4 patent.” Absolute Software, Inc. v. Stealth Signal, Inc., 659 F.3d 1121, 1136 (Fed. Cir.
 5 2011). But Plaintiff has failed to show that this is a situation where the references to the
 6 limitation as being part of the invention as a whole are not uniform or where other portions
 7 of the intrinsic record are to the contrary. In arguing that the specification does not support
 8 the Court’s claim construction, Plaintiff identifies the following language in the
 9 specification:

10 In operation, the moving base stations 30 may move in the direction of
 11 the flow of the traffic at a rate of, for example, 60 miles per hour, which may
 12 be faster than some traffic and slower than other traffic. The moving base
 13 station preferably handles telecommunications with mobile units which travel
 14 at a rate of not more than 30 miles per hour faster or slower than the moving
 15 base station. For example, the moving base stations 30, 40 may be traveling
 16 at the rate of 60 miles per hour to accommodate traffic moving in the range of
 17 30 to 90 miles per hour. In the arrangement of FIG. 1, fixed base stations 70
 18 would accommodate communications with mobile units traveling at a speed
 of less than 30 miles per hour including pedestrian traffic and stationary units.
 It will be readily apparent that instead of having fixed and moving base
 stations as depicted in FIG. 1, slowly moving and rapidly moving units may
 be used as well.

19 ‘904 Patent at 4:39-54. (Doc. No. 348-1 at 20, 22-23.) But this portion of the specification
 20 is consistent with the Court’s construction for the term “adapted to/configured to” as
 21 “constructed to move with the traffic at a rate of speed which is comparable to the speed
 22 of the traffic.” Here, the specification describes a system where the moving base station
 23 moves in the direction of the flow of traffic at a specific rate of speed, 60 miles per hour,
 24 that is comparable to the speed of the traffic at issue, which is traveling at 30 to 90 miles
 25 per hour. In the described system, any traffic moving slower than 30 miles per hour would
 26 utilize a different base station, either a fixed base station or a slower moving base station.
 27 Accordingly, the Court declines to reconsider its construction for the claim term “adapted
 28

1 to/configured to.” The Court’s construction for the term “adapted to/configured to”
 2 remains “constructed to move with the traffic at a rate of speed which is comparable to the
 3 speed of the traffic.”

4 B. Infringement

5 As the patentee, Plaintiff bore the burden of establishing at trial that the accused
 6 products contain every limitation in the asserted claims, including the “adapted
 7 to/configured to” limitation as construed by the Court.³ See Riles, 298 F.3d at 1308;
 8 Uniloc, 632 F.3d at 1301. Thus, Plaintiff held that burden of proving to the jury that the
 9 accused products were constructed to move with the traffic at a rate of speed which is
 10 comparable to the speed of the traffic. (See Doc. No. 131 at 16.)

11 The jury’s finding of non-infringement was supported by substantial evidence and
 12 was not against the clear weight of evidence. As an initial matter, the Court addresses
 13 Plaintiff’s contention that it proved infringement as a matter of law and that there is no
 14 legal basis for the jury’s non-infringement finding because the evidence at trial showed
 15 that the accused products are capable of being operated while in a moving in a car that is
 16 traveling in traffic. (See Doc. No. 348-1 at 11 (“[T]he evidentiary record is clear, based on
 17 Defendants’ own admission, that the accused devices were built to work in traffic and were
 18 tested extensively to work in various traffic conditions and speeds.”).) The Court agrees
 19 with Defendants that this argument by Plaintiff fails to give full meaning to the Court’s
 20 claim construction for the term “adapted to/configured to.” (See Doc. No. 353 at 9.) The
 21

22
 23 ³ The Court notes that Plaintiff appears to imply that Defendants bore the burden at trial of proving
 24 their non-infringement theory. (See, e.g., Doc. No. 348-1 at 11 (“[W]hether Carucel is entitled to
 25 judgment of infringement based on the evidence at trial is determined by whether Defendants presented
 26 sufficient evidence for a reasonable jury to conclude that its accused MiFi products did not meet the
 27 singular ‘constructed to move’ limitation.”).) Plaintiff, not Defendants, bears the burden of proof with
 28 respect to infringement. See Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843, 849
 (2014) (“It is well established that the burden of proving infringement generally rests upon the
 patentee.”); Creative Compounds, LLC v. Starmark Labs., 651 F.3d 1303, 1314 (Fed. Cir. 2011) (“The
 patentee bears the burden of proving infringement by a preponderance of the evidence.’ If the patentee
 fails to meet that burden, the patentee loses regardless of whether the accused comes forward with any
 evidence to the contrary.” (citation omitted)).

1 Court's claim construction for the term "adapted to/configured to" requires not only that
2 the moving base station is "constructed to move with the traffic" but that it is constructed
3 to move "at a rate of speed which is comparable to the speed of the traffic."

4 As shown at trial by Plaintiff's own infringement expert, this limitation is not met
5 by simply placing an operating base station in a moving vehicle that is traveling with traffic.
6 At trial, when discussing the prior art reference Uhlerz, Plaintiff's expert, Dr. Kiasaleh,
7 testified that the "adapted to/configured to" claim limitation is not satisfied by simply
8 placing a base station on a moving train that travels along a highway with moving cars.
9 (Doc. No. 340, Trial Tr. Vol. IV at 140; see also id. at 137-141.) Dr. Kiasaleh explained
10 that that particular example was insufficient to satisfy the claim limitation because the
11 speed of the train "is not comparable to [the] rate of traffic." (Doc. No. 340, Trial Tr. Vol.
12 IV at 140.) Thus, Plaintiff's own expert recognized that the Court's claim construction for
13 the term "adapted to/configured to" requires not only that the moving base station is
14 "constructed to move with the traffic" but that it is constructed to move "at a rate of speed
15 which is comparable to the speed of the traffic."

16 There was ample evidence presented at trial to allow a reasonable juror to conclude
17 that the accused MiFi devices do not infringe the patents-in-suit. At trial, Dr. Slim Souissi,
18 Novatel's former CTO, explained that the accused MiFi devices are portable "like a phone"
19 in that they "can work in any environment, mobile or static." (Doc. No. 337, Trial Tr. Vol.
20 I at 232.) He further explained that because they are portable, they can operate in a "train,
21 car, anything that moves." (Id. at 233.) He also testified that the devices were tested in
22 moving vehicles, but that during the testing, they did not "intentionally set [specific]
23 speeds" for the cars. (Id. at 235-36.) He testified that they only needed to ensure that the
24 devices could operate in normal vehicle conditions. (Id. at 236.) Mr. Tidke, Novatel's
25 Director of Software Engineering, further explained in regards to that testing that the MiFi
26 device has no knowledge of what speed it is traveling at, and it is not aware of any other
27 vehicles around it while it is traveling. (Doc. No. 339, Trial Tr. Vol. III at 32-33.)
28 Similarly, Defendants' expert, Dr. Kenney, testified that the MiFi devices have no way of

1 telling how fast they might be moving or if they are moving at all and that they have no
 2 cognition of any surrounding traffic.⁴ (Id. at 84, 102; see also id. at 79-85.) In addition,
 3 Charles Gavrilovich, Jr., a patent attorney and Carucel partner, testified that he qualified
 4 as a person of ordinary skill in the art, had written the claims of each of the patents-in-suit,
 5 and was very familiar with those claims. (Doc. No. 337, Trial Tr. Vol. I at 84, 87-90, 158-
 6 59.) Despite his knowledge, Mr. Gavrilovich testified that in 2011, he had an opportunity
 7 to use a MiFi device, but did not conclude at that time that the device infringed the patents-
 8 in-suit. (Id. at 140, 159.) This evidence along with the testimony from Plaintiff's expert
 9 Dr. Kiasaleh provided ample and substantial evidence for the jury to find that the accused
 10 products did not infringe the patents-in-suit in light of the "adapted to/configured to" claim
 11 limitation because the devices were not constructed to move with the traffic at a rate of
 12 speed which is comparable to the speed of the traffic. Whether the accused products
 13 satisfied the the "adapted to/configured to" claim limitation was a triable issue of fact, and
 14 the jury chose to resolve that factual dispute in favor of Defendants.

15 Further, the Court rejects Plaintiff's contention that the verdict runs contrary to the
 16 Court's claim construction order. (See Doc. No. 348-1 at 1-2, 23.) Specifically, the Court
 17 rejects Plaintiff's assertion that the Court is altering its prior claim construction. (See id.)
 18 As the patentee, Plaintiff bore the burden of proving infringement at trial, which included
 19 proving that the accused MiFi devices satisfy the "the "adapted to/configured to" claim
 20 limitation. See Riles, 298 F.3d at 1308; Uniloc, 632 F.3d at 1301. To do so, Plaintiff
 21 needed to prove not only that the accused products were "constructed to move with the
 22 traffic" but also that they were constructed to move "at a rate of speed which is comparable
 23 to the speed of the traffic" under the claim construction set forth in the Court's September
 24

25
 26 ⁴ The Court notes that Plaintiff did not object to this testimony from Dr. Kenney and Mr. Tidke.
 27 (See Doc. No. 339, Trial Tr. Vol. III at 79-85.) Plaintiff failed to object despite the Court explaining in
 28 its order on Plaintiff's Motion in Limine No. 4 that "any concerns about a party presenting argument or
 testimony that is contrary to the Court's claim constructions at trial" should be addressed through a
 contemporaneous objection at trial. (Doc. No. 305 at 32.)

1 19, 2016 claim construction order. (See Doc. No. 131 at 16.) There was ample evidence
 2 at trial to allow the jury to conclude that Plaintiff failed to meet its burden on that issue.

3 Similarly, the Court also rejects Plaintiff's contention that the jury's non-
 4 infringement verdict is contrary to the Court's summary judgment order. In the summary
 5 judgment order, the Court concluded that there was a triable issue of fact as to whether the
 6 accused products satisfied the "adapted to/configured to" claim limitation. (Doc. No. 226
 7 at 7-9.) Unfortunately for Plaintiff, and the jury resolved that dispute in Defendants'
 8 favor.⁵

9 Finally, the Court rejects Plaintiff's assertion that the jury failed to follow the Court's
 10 claim constructions and the Court's jury instructions. (Doc. No. 348 at 14-16.) Plaintiff's
 11 argument regarding the jury is based on its erroneous assumption that no reasonable jury
 12 could have found non-infringement based on the evidence presented at trial. (See id. at 15-
 13 16.) As explained above, there was ample evidence at trial that would permit a reasonable
 14 jury to find that the accused products do not infringe the patents-in-suit. In addition, the
 15 Court specifically notes that in presiding over the trial, the Court had ample opportunity to
 16 observe the jury, and the Court found the jury to be intelligent and attentive. "A jury is
 17 presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 234 (2000). And
 18 there is simply no evidence in the record showing that any of the jurors failed to follow the
 19 Court's instructions.

20 In sum, the jury's non-infringement verdict was supported by substantial evidence
 21 and was not against the clear weight of evidence.⁶ Accordingly, the Court denies Plaintiff's
 22

23 ⁵ Indeed, the Court notes that although Plaintiff now asserts that the evidence in the record
 24 conclusively shows that it satisfied the "adapted to/configured to" claim limitation as a matter of law,
 25 Plaintiff did not move for summary judgment on that issue. (See Doc. Nos. 202; 231.) Cf. Reeves, 530
 26 U.S. at 150 ("[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a
 matter of law."). Further, Plaintiff did not make a Rule 50(a) motion on infringement. Plaintiff's Rule
 50(a) motion only addressed the issue of invalidity. (See Doc. No. 340, Trial Tr. IV at 154-55.)

27 ⁶ Although the Court addresses the merits of Plaintiff's Rule 50(b) motion, the Court agrees with
 28 Defendants that Plaintiff waived its right to file a Rule 50(b) motion on the issue of infringement. "A
 Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed

1 motion for judgment as a matter of law and Plaintiff's motion for a new trial.⁷

2 _____

3 Rule 50(a) motion.” E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009). “Because

4 it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the

5 pre-deliberation Rule 50(a) motion. Thus, a party cannot properly ‘raise arguments in its post-trial

6 motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a)

7 motion.” Id.; accord Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098, 1105 (Fed. Cir. 2003) (“A

8 post-verdict JMOL motion may not be made on grounds not included in the earlier motion.”); see also

9 i4i Ltd. P’ship v. Microsoft Corp., 598 F.3d 831, 845 (Fed. Cir. 2010) (“[A] party must file a pre-verdict

10 JMOL motion on all theories, and with respect to all prior art references, that it wishes to challenge with

11 a post-verdict JMOL.”).

12 At trial, Plaintiff made a Rule 50(a) motion, but its Rule 50(a) motion only addressed the issue of

13 invalidity; it did not address the issue of infringement. (See Doc. No. 340, Trial Tr. Vol. IV at 154-55

14 (“Plaintiff, Carucel, moves under Rule 50 for judgment as a matter of law for the failure of Novatel and

15 Verizon to prove that the patents, any of the patent claims are invalid.”).) Plaintiff does not dispute this.

16 Instead, Plaintiff argues that the Court should construe one of its motions in limine as a Rule 50(a)

17 motion on the issue of infringement. (Doc. No. 354 at 6-7.) But Plaintiff fails to cite to any case

18 authority where a court has construed a motion in limine as a Rule 50(a) motion. To the contrary, courts

19 have held that pre-trial motions do not suffice for a Rule 50(a) motion. See Amor Ministries v. Century

20 Sur. Co., No. 313CV01441GPCBGs, 2016 WL 1388077, at *6 (S.D. Cal. Apr. 7, 2016) (“Nor can

21 motions made pre-trial suffice for a Rule 50(a) motion.”); Sophia & Chloe, Inc. v. Brighton

22 Collectibles, Inc., No. 12-CV-2472-AJB-KSC, 2016 WL 3211800, at *3 (S.D. Cal. Mar. 21, 2016); see,

23 e.g., Tortu v. Las Vegas Metro. Police Dep’t, 556 F.3d 1075, 1082 (9th Cir. 2009) (holding party’s

24 “motions made pre-trial and during trial . . . do not compensate for his failure to file a Rule 50(a)

25 motion”). Accordingly, Plaintiff waived the challenges to the jury’s finding of non-infringement

26 presented in its Rule 50(b) motion.

27 In addition, the Court does not find persuasive Plaintiff’s reliance on Padgett v. Wright, 516 F.

28 App’x 609, 611 (9th Cir. 2013). (Doc. No. 354 at 7.) In Padgett, the Ninth Circuit in an unpublished

decision held that judgment as a matter of law could be entered in favor of a defendant, despite his

failure to make a Rule 50(a) motion, “because there was not ‘any evidence to support’ a verdict against

him and a failure to enter judgment in his favor would result in ‘a manifest miscarriage of justice.’” 516

F. App’x at 611. But Padgett is easily distinguishable from the present case. Here, there was ample

evidence supporting the jury’s verdict of non-infringement. In addition, here, it is the Plaintiff – the

party bearing the burden of proof on the relevant issue – that failed to bring the Rule 50(a) motion,

unlike in Padgett where it was a defendant that failed to bring the Rule 50(a) motion.

⁷ In its motion, Plaintiff also argues that the Court should amend the judgment pursuant to Federal

Rule of Civil Procedure 60(b)(6). (Doc. No. 348-1 at 4, 13-14.) Plaintiff argues that allowing the

judgment to stand would result in a miscarriage of justice. (Id. at 14.) The Court rejects Plaintiff’s

argument. Because the jury’s finding of non-infringement was supported by substantial evidence and

was not against the clear weight of evidence, allowing the judgment to stand would not result in a

miscarriage of justice. See Lal v. California, 610 F.3d 518, 524 (9th Cir. 2010) (explaining that Rule

60(b)(6) is to be used “‘sparingly as an equitable remedy to prevent manifest injustice’”). In addition,

Plaintiff has failed to identify any extraordinary circumstances that would warrant relief under Rule

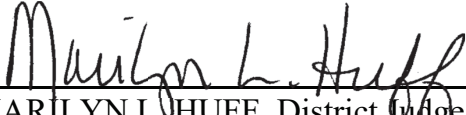
60(b)(6). See Lal, 610 F.3d at 524 (“To receive relief under Rule 60(b)(6), a party must demonstrate

Conclusion

For the reasons above, the Court denies Plaintiff's motion for judgment as a matter of law or, in the alternative, for a new trial.

IT IS SO ORDERED.

DATED: June 13, 2017


 MARILYN L. HUFF, District Judge
 UNITED STATES DISTRICT COURT

'extraordinary circumstances which prevented or rendered him unable to prosecute [his case].'); Wood v. Ryan, 759 F.3d 1117, 1120 (9th Cir. 2014) ("The party seeking relief under Rule 60(b)(6) must show "extraordinary circumstances" justifying the reopening of a final judgment.").

In addition, in its motion, Plaintiff requests that the Court should alter or amend the judgment pursuant to Rule 59(e). (Doc. No. 348-1 at 2-4.) But Plaintiff fails to support this request with any analysis other than a general statement that the Court should amend the judgment. (See id.) Accordingly, the Court also denies Plaintiff's motion to alter or amend the judgment under Rule 59(e). See Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) ("A Rule 59(e) motion is "an extraordinary remedy which should be used sparingly."); Exxon Shipping Co. v. Baker, 554 U.S. 471, 486 n.5 (2008) (A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").