

**United States District Court  
Central District of California  
Eastern Division**

G David Jang MD,  
  
Plaintiff,  
  
v.  
  
Boston Scientific Corporation, et  
al.,  
  
Defendants.

EDCV 05-426-VAP (MRWx)

**Order Denying Motion for  
Judgment as a Matter of Law  
and New Trial (Doc. No. 726);  
Denying Motion to Strike (Doc.  
No. 733)**

On November 25, 2015, Plaintiff Dr. G. David Jang, M.D. ("Dr. Jang") filed a motion for Judgment as a Matter of Law and New Trial. (Doc. No. 726 ("Mot.")) On December 10, 2015, Defendants Boston Scientific Corporation and Scimed Life Systems, Inc. (collectively, "BSC") filed an opposition. (Doc. No. 730 ("Opp.")) Dr. Jang filed a reply on January 15, 2016. (Doc. No. 738.) BSC filed a Motion to Strike Dr. Jang's post-trial motions on December 23, 2015. (Doc. No. 733.)<sup>1</sup> On February 1, 2016, the court held a hearing and the parties submitted on their filings. After considering the papers filed in support of, and in opposition to, the Motion, the Court DENIES the Motion.

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<sup>1</sup> The Court considered the papers filed in support of, and in opposition to, Defendants' Motion to Strike Plaintiff's Post-Trial Motions for Failure to Comply with Local Rule 7-3. The Court finds that Dr. Jang satisfied the spirit of the "meet and confer" requirement and that BSC was not prejudiced by any technical violation of the Rule. Thus, the Court DENIES the Motion.

## I. BACKGROUND

Dr. Jang is the inventor of certain coronary stents. The United States Patent and Trademark Office issued U.S. Patent No. 5,922,021 (the "'021 Patent") to Dr. Jang on July 19, 1999. Dr. Jang and BSC entered into an agreement whereby Dr. Jang assigned his rights to the '021 Patent to BSC for monetary compensation if BSC used the '021 Patent to produce products commercially. Dr. Jang alleges BSC breached the agreement by failing to compensate him for products it sold that were "covered by" the '021 Patent and instead paid him only a non-commercialization payment.

On July 8, 2015, a duly-empaneled jury in this case delivered its special verdict. The jury found in favor of BSC and against Dr. Jang on the interrogatories inquiring whether Defendant's Express stent literally infringed claims 1 and 8 of the '021 Patent. The jury found in favor of Dr. Jang and against BSC on interrogatories inquiring whether the Express stent infringed claims 1 and 8 of the '021 Patent under the doctrine of equivalents. (See Doc. No. 661.)

Following the jury's findings in favor of Dr. Jang under the doctrine of equivalents, the Court conducted an evidentiary hearing concerning the ensnarement defense, pursuant to DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 567 F.3d 1314 (Fed. Cir. 2009).

On September 29, 2015, the Court found that BSC was entitled to entry of judgment in its favor and against Dr. Jang on the claims that the Express stent infringed claims 1 and 8 of the '021 Patent under the doctrine

of equivalents. (See Doc. No. 712.) The jury having rendered its verdict on the special interrogatories on the theory of liability for literal infringement in favor of BSC, BSC therefore was entitled to a final judgment in its favor on all claims. On October 30, 2015, final judgment was entered in favor of BSC. (Doc. No. 720.)

## II. DISCUSSION

### A. Judgment as a Matter of Law

#### 1. Legal Standard

Federal Rule of Civil Procedure 50 governs motions for judgment as a matter of law. Subsection (a) of the Rule states:

If, during a trial by jury, a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. Pro. 50(a)(1).

The standard for granting judgment as a matter of law is analogous to the standard for summary judgment. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). In reviewing all of the evidence in the record, "[t]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Id. The court "must disregard all evidence favorable to the

moving party that the jury is not required to believe." Id. at 151. In addition, "the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses." Id. (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

"JMOL in favor of a party is properly granted in the context of literal infringement if no reasonable jury could determine that every limitation recited in the properly construed claim is not, or is, found in the accused device." Karlin Tech., Inc. v. Surgical Dynamics, Inc., 177 F.3d 968, 974 (Fed. Cir. 1999).

**2. Could a reasonable jury find that the Express stent's macro and micro elements did not literally infringe the required limitations of the '021 Patent?**

Dr. Jang claims that the Express stent's macro and micro elements literally infringe the expansion and connecting column limitations in the '021 Patent. In order for the Court to grant Dr. Jang's motion for JMOL, it must find that there was no legally sufficient evidentiary basis for a reasonable jury to find that the Express stent did not literally infringe every limitation in the asserted claims of the '021 Patent. Southwall Tech., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1575 (Fed. Cir. 1995). Accordingly, the Court reviews the evidence presented at trial related to the asserted claims of infringement.

**a. Macroelements and Expansion Strut Columns**

At trial, Dr. Jang presented expert testimony that the macroelements in the accused Express stent infringe the expansion column requirements and all related requirements of claim 1 and claim 8 of the '021 Patent. Mr. Lee, one of Dr. Jang's expert witnesses, testified that the Express stent's first macroelement includes a plurality of first expansion strut pairs forming a first expansion column, and similarly, that the Express stent's second macroelement meets the second expansion column requirement of the '021 Patent. (See, e.g., June 25, 2015, PM Session, Trial Tr. at 32:2-3 (Lee); id. at 32:23-33:6 (Lee); id. at 34:18-23 (Lee); id. at 36:22-25 (Lee); id. at 37:2-22 (Lee); id. at 38:9-16 (Lee).)

At trial, Dr. Moore, BSC's expert witness, acknowledged that the Express stent's macroelement meets all the limitations in the '021 Patent. (See, e.g., June 30, 2015, PM Session, Trial Tr. at 7:3-21 ("Before we broke for lunch, I talked about the macroelement of the Express stents and how those form expansion columns, and, again, no one disagrees with that."); June 26, 2015, Trial Tr. at 169:3-12 (Chronos) ("[Dr. Moore] doesn't dispute anything about the macroelements. He agrees there are macroelements there. He doesn't agree that the microelements are connecting struts. . . . Dr. Moore suggests that the macroelements and microelements are all expansion struts, and he seems to agree with the rest of the features of the claims.")) BSC does not dispute in its opposition that the Express stent's macroelement meets the expansion strut, expansion column, and related limitations of claim 1 and claim 8 of the '021 Patent.

**b. Microelements and Connecting Strut Columns**

Dr. Jang and BSC dispute whether the Express stent's microelement infringes the connecting column requirement of the '021 Patent. Dr. Jang argues that the evidence presented at trial conclusively demonstrated that the Express stent's microelement infringes the '021 Patent. (Mot. at 5.) BSC argues that it presented substantial evidence at trial to support the jury's verdict of no literal infringement, and that Jang's evidence was conclusively rebutted by Dr. Moore, who explained that the microelement of the Express stent, like the macroelement, met the Court's definition of an expansion column, rather than a connecting column. (Opp. at 2.)

At trial, both of Dr. Jang's experts, Dr. Chronos and Mr. Lee, testified that the Express stent literally includes all connecting strut, connecting strut column, and related requirements of claim 1 of the '021 Patent. (See, e.g., June 25, 2015, PM Session, Trial Tr. at 39:10-18 (Lee) ("So, 'a first connecting strut including a first connecting strut proximal section,' . . . [t]hose items are all there. We see in the right picture, again, in the Express stent, again, yellow, green, and pink for those three sections."); June 26, 2015, Trial Tr. at 169:13-23 (Chronos) ("it is very clear that the connecting strut – oh, that the micro-element, as outlined in all the materials that Boston Scientific provides us, both its clinicians and in this case, are basically – those micro-element characteristics are the three-part connector with the offset and the proximal, mid, and distal piece.").)

While Mr. Lee repeatedly testified that he believed the microelement infringed the connecting column requirement in the '021 Patent, he did,

during cross-examination, acknowledge that there was a possibility that the Express stent's microelement could be defined and identified as an expansion strut pair. (June 16, 2015, AM Session, Trial Tr. At 32-33 (Lee) ("The answer is, maybe it [microelement] could be an expansion strut pair. In the right context, it could be an expansion strut pair.").) Similarly, Dr. Chronos testified that the Express stent's macro and micro elements expand in the same way, and that the jury could find that the microelement is an expansion column and not a connecting column. (June 30, 2015, AM Session, Trial Tr. At 38-39 (Chronos) ("They [microelements] probably open up in length and then expand, yes."); id. at 56 ("Q: If the jury were to find that the image on the upper left is an expansion strut pair, then the microelements would be an expansion column under the Court's construction; isn't that right? A: If the jury were to find that way and ignore all the evidence about connecting struts, then you're right.").)

BSC presented evidence through Dr. Moore's testimony that, like the macroelements, each microelement formed an expansion column made by expansion strut pairs joined at one end and open at the other. (See June 30, 2015, AM Session, Trial Tr. at 112-16 (Moore).) Though Mr. Lee and Dr. Chronos tried to distinguish the macroelements and microelements by focusing on their different respective sizes, widths, number of cycles, and relative flexibility, Dr. Moore explained that such differences were irrelevant to the plain language of the claim and to the Court's constructions. Mr. Lee agreed. (See, e.g., June 30, 2015, AM Session, Trial Tr. At 114-16 (Moore) ("There is nothing in the claim language about dimensions or size or thicknesses, or anything. And there is nothing in the Court's construction

about thickness or size, or any sorts of dimensions on what limits an expansion column."); id. at 27, 29, 31 (Lee) ("No. Size is not in there... There is nothing that says it is about relative thickness, but there is [a] description of what a stent is.".)

Furthermore, BSC presented evidence at trial showing that the Express stent could not literally infringe the '021 Patent because the Express stent's macroelement (first expansion column) connects to the microelement (second expansion column) by a straight connector, which means that two claim requirements of the '021 Patent—(1) connecting strut columns and (2) a peak-to-peak formations— are not found in the Express stent design. (Opp. at 7.)

The '021 Patent requires that the expansion strut pairs of the first and second expansion columns be connected in a peak-to-peak configuration; however, in the Express stent they are connected in a peak-to-valley configuration. (See June 30, 2015, AM Session, Trial Tr. at 116-20 (Moore); id., PM Session Trial Tr. at 7, 19-20.) This is sufficient evidence for a reasonable jury to have found that the Express stent did not contain a required limitation of the '021 Patent. Similarly, if the jury believed that the microelement is an expansion column, then the jury could have reasonably found that the connecting strut joining it to the macroelement does not possess the non-parallel intermediate section required by the '021 Patent. (See Id.) Mr. Lee admitted as much:

Q. So that [non-parallel] element wouldn't be met, either, if the green straight connector is a connecting strut?



A. Yes. As I would do my analysis, if I made that assumption, I would say that would not meet it...

Q. But if...Boston Scientific's understanding is correct and the blue portions of the microelements are an expansion column, then what we have is a peak-to-valley connection, correct?

A. That's assuming you agree that the blue section is exactly the same as the red sections.

(June 26, 2015, AM Session, Trial Tr. at 23-24, 26, 28 (Lee).) Dr. Chronos made a similar admission. (See, e.g., June 30, 2015, AM Session, Trial Tr. at 62-63.)

In reviewing the evidence in the record related to whether the Express stent's microelements literally infringe the connecting strut columns of the '021 Patent, the Court must draw all reasonable inferences in favor of BSC, the nonmoving party. Reeves, 530 U.S. at 150. The Court will not make credibility determinations or weigh the evidence. Id. Despite Dr. Jang's contention that his evidence of literal infringement was "unrebutted" (Mot. at 1, 2), the jury did hear substantial evidence from BSC's expert that the Express stent's microelement did not literally infringe the connecting strut column requirement of the '021 Patent. Moreover, during cross-examination of Dr. Jang's experts, BSC elicited testimony that a reasonable jury could have used to support a finding of no literal infringement. In short, the jury's verdict in favor of BSC is supported by substantial evidence.

**3. Were BSC's non-infringement arguments legally sufficient to overcome Dr. Jang's evidence of literal infringement?**

In his motion, Dr. Jang argues that BSC presented a number of misleading arguments at trial, including (a) that the Express stent's microelement could not infringe the connecting strut column because it contained "additional parts" to those required in the claims of the '021 Patent, despite the claims' use of the word "comprising"; (b) that relabeling the microelements as expansion strut columns instead of connecting strut columns avoids infringement; (c) that the '021 Patent covers only closed-cell designs; and (d) that the Express stent could not infringe because it practiced prior art.

**a. Did the Court erroneously instruct the jury on claim 1's use of "comprising"?**

Dr. Jang argues that BSC misled the jury by arguing that the "extra metal" connecting the Express stent's macro and micro elements refuted Dr. Jang's infringement proof. Dr. Jang claims that this "theory of non-infringement" is wrong as a matter of law. Citing a number of cases, Dr. Jang argues if all the elements of a "comprising" claim are present in an accused device, the presence of additional elements does not preclude a finding of infringement. (Mot. at 10.) While BSC agrees that the cases cited stand for this proposition, it disagrees with Dr. Jang's application of it in this case. (Opp. at 12.)

The Court's jury instruction is consistent with the cited case law: "A patent claim that uses the term 'comprising' is infringed as long as every

element of the claim is present in the accused Express stent. One cannot avoid infringement merely by adding elements if each element recited in the claim is found in the accused device.” (July 7, 2015, Trial Tr. at 36.)

BSC argues that claim 1's use of “comprising” does not allow Dr. Jang to substitute the requirement that expansion strut columns connect in a peak-to-peak configuration for a peak-to-valley configuration. (Opp. at 13.) BSC presented substantial evidence at trial showing that the Express stent's microelement met the Court's definition of an expansion column. Thus, the jury could reasonably conclude that the straight connector joining the macroelement and the microelement rendered the stent non-infringing, regardless of the claim's “comprising” language, because the peak-to-peak and non-parallel connector requirements were not met.

**b. Did BSC erroneously argue that portions of the Express stent could be relabeled to avoid infringement?**

Dr. Jang argues that BSC misled the jury into believing that only the Express stent's straight connectors could be connecting struts columns, and that this erroneous "theory of non-infringement" was the basis for the jury's finding of no literal infringement. (Mot. at 16.)

Dr. Jang mischaracterizes BSC's arguments. BSC did not claim that the "extra metal" in the Express stent constituted a separate defense of non-infringement, but rather that Dr. Jang's characterization of the Express stent ignored significant structural features of the microelement. (Opp. at 11.)

The Court previously discussed Dr. Jang's and BSC's arguments for and against literal infringement as it relates to the Express stent's microelements, supra Part II.A.2.b.

**c. Did BSC argue at trial that the Express stent's open-cell design was a defense to literal infringement?**

BSC agrees with Dr. Jang that the open-cell design of the Express stent is not a defense to literal infringement. (Opp. at 14.) The parties disagree, however, about how the open-cell design argument was advanced at trial. Dr. Jang claims that BSC tried to confuse the jury by discussing the Express stent's open-cell design when there is nothing in the claim construction that refers to open-cell design. (Mot. at 17.) BSC claims that evidence of the Express stent's open-cell design was relevant to Dr. Jang's doctrine of equivalents theory of infringement.

BSC did not argue that the Express stent could not literally infringe any of the claims in the '021 Patent because of its open-cell design. (See June 30, 2015, PM Session, Trial Tr. at 55 (Moore) ("Q. Is ...there anything in the literal language of Claim 1 that precludes an open-cell stent from infringing? A. No.... I don't believe that would be excluded by Claim 1.")) Dr. Moore discussed open- cell design only in the context of the doctrine of equivalents. Specifically, he explained that the Express stent achieves flexibility in a different way than Dr. Jang's stent design in the '021 Patent. (See June 30, 2015, PM Session, Trial Tr. at 15-17 (Moore).) Thus, BSC did not improperly argue to the jury that the Express stent's open-cell design was a defense to literal infringement.

**d. Did BSC argue at trial that the Express stent practiced prior art as defense to literal infringement?**

BSC referenced the Lau and Brown patents at trial for reasons unrelated to Dr. Jang's infringement claims. First, BSC discussed the prior art to clarify its position that it did not need Dr. Jang to teach it how to design stents. Second, BSC discussed the prior art to refute Dr. Jang's claim that he was the first to develop a strong yet flexible stent design. Dr. Jang made these issues relevant by claiming that only he could teach BSC how to design a strong, flexible stent.

**4. Conclusion**

In ruling on a motion for JMOL, the Court may not make credibility determinations or weigh the evidence for or against an infringement finding. Accordingly, the Court finds that the jury verdict of no literal infringement was supported by substantial evidence at trial.

## **B. New Trial**

### **1. Legal Standard**

A movant for judgment as a matter of law under Rule 50(b) “may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.” Fed. R. Civ. P. 50(b). A trial court may grant a motion for new trial “only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.” Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007); see Wordtech Sys. v. Integrated Networks Solutions, Inc., 609 F.3d 1308, 1313 (Fed. Cir. 2010). “Unlike with a Rule 50 determination, the district court, in considering a Rule 59 motion for new trial, is not required to view the trial evidence in the light most favorable to the verdict. Instead, the district court can weigh the evidence and assess the credibility of the witnesses.” Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829, 842 (9th Cir. 2014).

### **2. Did the Court properly allow Dr. Moore to respond to Mr. Lee’s And Dr. Chronos’s doctrine of equivalents analysis?**

Dr. Jang argues that a new trial would allow him to present responses to arguments made by BSC and its expert Dr. Moore that were not disclosed before trial, including that the Express stent could not infringe the '021 Patent because its microelements are not connecting strut columns and that the '021 Patent only covers closed-cell design. (Mot. at 22.)

In his report, Mr. Lee did not address the doctrine of equivalents analysis of Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605

(1950), and Dr. Chronos's report contained blanket assertions that each claim in the '021 Patent performed substantially the same function, in substantially the same way, to achieve substantially the same result in the Express stent. (See Doc. No. 726-1 at 19-20) Thus, there was no doctrine of equivalents analysis to which Dr. Moore could respond. Dr. Jang, as the plaintiff, bears the burden of proving his theories of liability. Nevertheless, the Court allowed both Mr. Lee and Dr. Chronos to offer their opinions on the doctrine of equivalents at trial. (See June 30, 2015, AM Session, Trial. Tr. at 86, 126-128.) Thus, Dr. Moore's testimony on the doctrine of equivalents did not prejudice Dr. Jang.

### **3. Did the Court properly allow BSC to raise ensnarement?**

Dr. Jang argues that the Court erred in granting judgment in favor of Defendants on their ensnarement defense (Doc. No. 712 ("Ensnarement Order")) because Dr. Jang clearly showed that there were "insubstantial differences" between the asserted claims and the Express stent. (Mot. at 24.) Dr. Jang argues also that he was prejudiced because Dr. Moore's ensnarement arguments were not revealed before trial. (Id. at 20.)

First, the Court addressed Dr. Jang's waiver arguments in its Ensnarement Order. (See Doc. No. 712 at 4-7.) Second, neither party's experts submitted an ensnarement analysis before the trial. Thus, Dr. Jang was not prejudiced by not hearing Dr. Moore's testimony before trial.

#### **4. Is Dr. Jang entitled to a new trial to assert different claims?**

Dr. Jang argues that had he known of the "new arguments" BSC would present at trial, he would have presented different claims, and thus, he is entitled to a new trial to present these different claims. (Mot. at 21.) This argument fails. A party is not entitled to a new trial so that it can present new arguments that it could have advanced at the first trial. United States v. Mullins, 992 F.2d 1472, 1477 (9th Cir. 1993) (“[A]dvancement of a new legal theory does not constitute newly discovered evidence warranting a new trial.”); United States v. Hamling, 525 F.2d 758, 759 (9th Cir. 1975) (“[A] party who desires to present his case under a different theory in which facts available at the original trial now first become important, will not be granted a new trial.”) Moreover, the Court disagrees with Dr. Jang, for the reasons stated above, that BSC was allowed to present "new arguments" at trial.

#### **5. Conclusion**

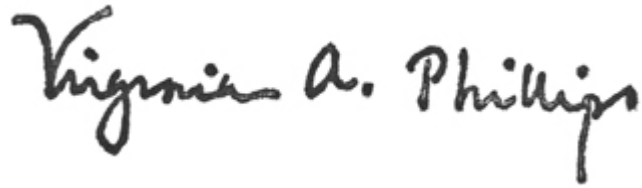
Accordingly, Dr. Jang is not entitled to a new trial because the jury's verdict was not contrary to the clear weight of the evidence, was not based upon false or perjurious evidence, and was not a miscarriage of justice. Thus, the alternative forms of relief Dr. Jang seeks are MOOT.

### **III. CONCLUSION**

For the reasons stated above, the Court DENIES Dr. Jang's motion for judgment as a matter of law and for new trial.



**IT IS SO ORDERED.**

A handwritten signature in black ink that reads "Virginia A. Phillips". The signature is written in a cursive, flowing style.

Dated: 2/3/16

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Virginia A. Phillips  
United States District Judge