

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**ALPS SOUTH, LLC, a Florida
Corporation,**

Plaintiff,

v.

Case No. 8:08-cv-1893-T-35-MAP

**THE OHIO WILLOW WOOD
COMPANY, an Ohio Corporation,**

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of The Ohio Willow Wood Company's ("OWW") Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, or for Remittur (Dkt. 356) and Alps South, LLC's ("ALPS") Response in Opposition. (Dkt. 364) For the reasons that follow, the Court finds that the jury's verdict in relation to infringement, willful infringement, damages and validity is supported by the evidence presented at trial and there is no basis to conclude, as OWW urges, that no reasonable jury could have reached the verdict rendered in this case. Accordingly, OWW's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, or for Remittur (Dkt. 356) should be and hereby is **DENIED**.

I. BACKGROUND

ALPS initiated this action alleging OWW infringed U.S. Patent Nos. 6,552,109 (the "109 Patent") and 6,867,253 (the "253 Patent") (collectively "patents-in-suit").

(Dkt. 35) OWW filed a two-count counterclaim seeking a declaratory judgment that (1) OWW did not infringe on the patents-in-suit; (2) the patents-in-suit are invalid and unenforceable; and (3) the patents-in-suit are unenforceable due to the inequitable conduct of the inventor, Mr. Chen. (Dkt. 39)

During the litigation, the patents-in-suit were submitted for re-examination and the patents-in-suit were reissued by the United States Patent and Trademark Office (“PTO”). A Re-examination Certificate was issued on the ‘253 Patent on June 7, 2011. (Dkt. 185-4) A Re-examination Certificate was issued on the ‘109 Patent on July 5, 2011. (Dkt. 175)

The jury trial began in this action on April 30, 2012. During the trial, all the asserted claims related to the ‘253 patent were dismissed. On May 10, 2012, the issues of whether OWW infringed the ‘109 Patent; whether OWW willfully infringed the ‘109 patent; and whether the ‘109 Patent was invalid due to anticipation or obviousness by prior art were presented to the jury for consideration. On May 11, 2012, the jury found that OWW did infringe Claims 1-3, 5, 6, 11 and 12 of the ‘109 Patent, OWW willfully infringed the ‘109 Patent, and the ‘109 Patent was valid.

II. LEGAL STANDARD

Rule 50 of the Federal Rules of Civil Procedure (“Rule 50”) allows the Court to grant a motion for judgment as a matter of law (“JMOL Motion”) if a party has been fully heard on an issue during a jury trial, and the Court finds that no reasonable jury would have had a legally sufficient evidentiary basis to find for the non-moving party on that issue. Fed. R. Civ. P. 50(a)(1). In considering a JMOL Motion, the court must “consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the

nonmoving party . . . [and] in this light, [determine whether] there was any legally sufficient basis for a jury to find in favor of the nonmoving party.” Powell v. Home Depot, U.S.A., Inc., 663 F.3d 1221, 1228 (Fed. Cir. 2011)(quoting Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc., 615 F.3d 1352, 1360 (11th Cir. 2010)). The Court does not “make credibility determinations or weigh the evidence.” Hubbard v. BankAtlantic Bancorp, Inc., 688 F.3d 713, 724 (11th Cir. 2012). However, “credence [is given] to evidence supporting the nonmoving party’s case, as well as ‘uncontradicted and unimpeached’ evidence supporting the moving party, ‘at least to the extent that that evidence comes from disinterested witnesses.” Id. (quoting Reeves v. Sanderson Plumbing Prods., Inc., 503 U.S. 133, 150-51 (2000)).

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, a court may grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). The Court has discretion to grant a new trial if the verdict appears to be against the weight of the evidence, the damages are excessive, there are substantial errors in admission or rejection of evidence or instructions to the jury, or that, for other reasons, the trial was not fair to the movant. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). Although a court may exercise its discretion in determining whether to grant a new trial, it cannot displace a jury’s verdict merely because it disagrees with it or because a contrary verdict may have been equally supportable. Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1310 (Fed. Cir. 2011).

III. DISCUSSION

A. Judgment as a Matter of Law

Against Rule 50's high standard, OWW asserts four grounds to overturn this verdict. First, it claims that the '109 Patent was not infringed because the '109 patent required a level of crystallinity (20%) of the challenged polymer component, which it claims was not proven by ALPS to have been met by OWW's infringing products. Second, it claims that no reasonable jury would have had a legally sufficient evidentiary basis to find for ALPS on the issue of whether the claims of the '109 patent were anticipated by the Hammond Reference (i.e. International Publication No. WO 93/23472), which incorporated by reference European Patent Application 0108518 to Debbaut or prior art of the inventor, Mr. Chen. Third, OWW argues that no reasonable jury would have had a legally sufficient evidentiary basis to find the '109 patent nonobvious. Fourth, OWW argues that it is entitled to a directed verdict on willfulness.

The Court, having considered each of these contentions at trial and on this renewed motion, again finds that OWW's motion should be **DENIED**. First, with regards to OWW's first contention, nowhere in the claims of the '109 patent is there a requirement for 20% crystallinity in the gel polymer used in the composite. Even though there was evidence regarding a crystallinity requirement of the gel polymer the jury was apparently not persuaded by the evidence or the arguments made by Defendant to determine that Defendant did not infringe the '109 Patent. Thus, any challenge grounded in the failure of ALPS to prove up the crystallinity of the OWW's offending product or the jury's failure to conclude that the '109 patent was not infringed in the absence of proof of 20% crystallinity in the infringing product must fail.

Second, there was record evidence from which the jury, like the PTO, could have concluded that the '109 patent was not anticipated by or rendered obvious by the Hammond Reference and any patent incorporated therein. Certainly, OWW has not shown on this motion that no reasonable jury could have found that OWW failed to meet its high burden of showing by clear and convincing evidence that the '109 Patent was either anticipated by or rendered obvious by the Hammond Reference or other prior art of Mr. Chen's inventions, specifically U.S. Patent No. 5,336,708. Particularly, as ALPS asserts: "Every piece of alleged prior art that OWW pointed to during trial for its obviousness defense was already considered by the PTO during prosecution and/or the reexamination. When the prior art has been considered by, and rejected, by the USPTO, it is even more difficult to overcome the presumption of nonobviousness." (Dkt. 364 at 10)(citing Hewlett-Packard Co. v. Bausch & Lomb, Inc., 909 F.2d 1464, 1467 (Fed. Cir. 1990)). Where, as here, the patent has also been upheld through a reexamination, OWW's burden of proving invalidity was more difficult to sustain. See PowerOasis, Inc. v. T-Mobile USA, Inc., 522 F.3d 1299, 1304 (11th Cir. 2008)("When no prior art other than that which was considered by the PTO examiner is relied on by the attacker, he has the added burden of overcoming the deference that is due to a qualified government agency presumed to have properly done its job.").

OWW's final contention is that the jury's willfulness findings essentially build upon its infringement findings that were unsupported. However, if the jury's finding of infringement is upheld, as it is here, the willfulness findings follow *a fortiori* on this record. The evidence at trial, as catalogued in ALPS' Response in Opposition (Dkt. 364 at 14-18), was more than adequate to demonstrate willful infringement. Evidence of

OWW's pattern of behavior and intent to infringe and of its admission that it continued to infringe even after reissuance of the '109 Patent and that its principal did nothing in response to demands to either purchase a license or stop infringing was more than sufficient to support a finding of willfulness. Certainly, the Court cannot find that no reasonable jury could have so concluded.

B. New Trial

In the alternative to its request for judgment as a matter of law OWW seeks a new trial. OWW's request for a new trial essentially reasserts its claims for judgment as a matter of law in that it is based largely on the contention that the '109 Patent is obvious and any contrary judgment would work a manifest injustice. Because the Court has already concluded that the evidence could reasonably support the jury's verdict on this issue and the other issues raised, this claim fails.

Likewise, OWW's assertion that the damages verdict is excessive and warrants a new trial on damages fails. ALPS offered factual evidence and expert testimony on this issue. Its expert witness, Mr. Oscher, whose credentials were largely unassailed, testified that in his opinion a reasonable royalty in this case should be in the range of 15% to 20%. (Dkt. 372 at 63) In determining what a reasonable royalty should be in this case, Mr. Oscher applied the 15 well established factors first set forth in Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), for determining a reasonable royalty in a hypothetical negotiation between a patent holder and infringer of his patent. In his testimony, Mr. Oscher addressed each of the factors and explained his opinion regarding its impact on the hypothetical negotiation between ALPS and OWW. Although Defendant OWW offered a different hypothesis through a different

expert, the jury apparently accepted Mr. Oscher as more credible. As noted, the Court's role here is not to reweigh the evidence or substitute its judgment for that of the jury's; but rather, the "court must draw all reasonable inferences in favor of the nonmoving party." Reeves, 530 U.S. at 150. If the Court, constrained to that level of review, determines the verdict to be supportable by the evidence, it must leave the verdict intact. Accordingly, the Court finds that no new damages determination or remittitur is appropriate against this verdict.

IV. Conclusion

Upon consideration of the foregoing, it is hereby **ORDERED** that The Ohio Willow Wood Company's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, or for Remittur (Dkt. 356) is **DENIED**.

DONE and **ORDERED** in Tampa, Florida this 13th day of November 2012.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All Counsel of Record
All *Pro Se* parties