

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IMAGE PROCESSING TECHNOLOGIES, LLC,

Plaintiff,

REPORT AND  
RECOMMENDATION

-against-

CV 10-3867 (SJF) (ETB)

CANON INC.;;  
CANON U.S.A., INC.

Defendants.

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TO THE HONORABLE SANDRA J. FEUERSTEIN, United States District Judge:

Before the Court are the following motions for summary judgment with respect to the within patent infringement action: (1) defendants' motion for summary judgment of invalidity due to prior publication and prior public use; (2) defendants' motion for summary judgment of non-infringement; (3) plaintiff's motion for summary judgment of no invalidity due to anticipation; and (4) plaintiff's motion for summary judgment of no invalidity due to obviousness. In addition, there are also six motions to strike certain evidence introduced by both sides in support of and opposition to the motions for summary judgment, with five of them submitted by plaintiff and one by defendants. For the following reasons, I recommend that defendants' motion for summary judgment of non-infringement be granted and that all other motions - for summary judgment and to strike - be denied in their entirety.

FACTS<sup>1</sup>

Plaintiff, Image Processing Technologies, LLC (“Image Processing”) commenced this action against defendants, Canon Inc. and Canon U.S.A., Inc. (collectively “Canon”), on August 23, 2010, alleging infringement of United States Patent No. 7,190,725 (the “’725 Patent”). (Def. R. 56.1 Statement in Supp. of Mot. for Summ. J. of Invalidity (“Def. Invalidity 56.1”) ¶ 6.) Image Processing amended its Complaint on November 12, 2010 to further allege infringement of United States Patent No. 6,959,293 B2 (the “’293 Patent”). (Id. ¶ 7.) The ‘725 Patent was voluntarily dismissed from this action on February 3, 2012. (Id. ¶ 8.)

The ‘293 Patent issued from an application filed with the United States Patent and Trademark Office (“USPTO”) on February 23, 2011, which named Patrick Pirim (“Pirim”) as the inventor. (Id. ¶ 11.) The ‘293 Patent is entitled “Method and Device for Automatic Visual Perception” and claims visual perception devices and methods for automatically detecting an event occurring in a space with respect to at least one parameter. (Id. ¶ 13.)

Image Processing’s Amended Complaint alleges that certain models of Canon compact digital cameras infringe Claims 1, 2, 18, 19 and 22 of the ‘293 Patent (the “Asserted Claims”).<sup>2</sup> (Id. ¶ 9.) Specifically, Image Processing alleges infringement by four firmware functions developed by Canon - DefectDetect.c, CalcScene.c, ChaseTarget.c and ChaseTarget2.c - that are included in certain models of Canon compact digital cameras. (Id. ¶ 10.)

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<sup>1</sup> The facts are taken from the few statements of material facts contained in the parties’ Local Civil Rule 56.1 Statements that are not disputed. Facts specific to each motion will be discussed infra.

<sup>2</sup> Although the ‘293 Patent contains a total of 29 claims, Image Processing is only alleging infringement of five of those claims - Claims 1, 2, 18, 19 and 22. (Def. Invalidity 56.1 ¶¶ 9, 14.)

Both Image Processing and Canon now move for summary judgment as follows: Canon requests summary judgment of (1) invalidity due to prior publication and prior public use and (2) non-infringement by DefectDetect.c firmware that is not executed; Image Processing requests summary judgment of (1) no invalidity due to anticipation and (2) no invalidity of Claims 18 and 19 due to obviousness. The parties also filed six motions to strike between them - five by Image Processing and one by Canon - seeking to strike certain pieces of evidence offered in support of and opposition to the motions for summary judgment, all of which are discussed infra.

### DISCUSSION

#### I. Legal Standard for Summary Judgment

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the lack of any factual issues. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The very language of this standard reveals that an otherwise properly supported motion for summary judgment will not be defeated because of the mere existence of some alleged factual dispute between the parties. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Rather, the requirement is that there be no “genuine issue of material fact.” Id. at 248.

The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). When the moving party has carried its burden, the party opposing summary judgment must do more than simply show that “there is some metaphysical doubt as to

the material facts.” Id. at 586. In addition, the party opposing the motion “may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial.” Anderson, 477 U.S. at 248.

When considering a motion for summary judgment, the district court “must also be ‘mindful of the underlying standards and burdens of proof’ . . . because the evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions.” SEC v. Meltzer, 440 F. Supp. 2d 179, 187 (E.D.N.Y. 2006) (quoting Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988)) (internal citations omitted). “Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the burden on the moving party is satisfied if he can point to an absence of evidence to support an essential element of the non-movant’s claim.” Meltzer, 440 F. Supp. 2d at 187.

Summary judgment should not be regarded as a procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure, which are designed to “secure the just, speedy and inexpensive determination of every action.” Celotex, 477 U.S. at 327. Rule 56 must be “construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury,” but also for the rights of those persons “opposing such claims and defenses to demonstrate, . . . prior to trial, that the claims and defenses have no factual basis.” Id. By its terms, Rule 56 does not require that a trial judge make any findings of fact. See Anderson, 477 U.S. at 250. The only inquiry to be performed is the determination of whether there is a need for trial. See id. The court’s principal analysis on a motion for summary judgment is to ascertain whether there are any “genuine factual issues that properly can be resolved only by a finder of fact because they may

reasonably be resolved in favor of either party.” Id

## II. Summary Judgment Regarding the Validity of the '293 Patent

Canon moves for judgment as a matter of law that the '293 Patent is invalid due to prior publication and prior public use. In response, Image Processing seeks partial summary judgment of no invalidity due to either anticipation or obviousness.

Although the parties appear unable to agree on even the most basic facts of this lawsuit, it appears undisputed that Patrick Pirim - the inventor of the '293 Patent - also developed a visual perception technology, beginning in the 1980's, which he named Generic Visual Perception Processor (“GVPP”). (Def. Invalidity 56.1 ¶ 22.) The GVPP is a visual perception engine that uses histograms to detect certain events. (Def. Invalidity 56.1 ¶¶ 15, 22.) In 1996, Pirim, with an investor named Igor Marie, formed a company called Bureau d'Etudes Vision (“BEV”) and went on to develop various numbered incarnations of the GVPP products. (Id. ¶ 23.) One version, the GVPP-6, is at issue in this action.

Starting in April 1997, Nabeel Al-Adsani - who is now a member of Image Processing - began working with BEV to help set up meetings and demonstrations of the GVPP-6 in the United States. (Id. ¶ 27.) BEV's purpose in meeting with these companies was to test the market and gauge the reaction of companies to the GVPP-6. (Id. ¶ 28.) Pirim's role during these meetings was to demonstrate the GVPP-6 technology.<sup>3</sup> (Id. ¶ 29.) These demonstrations

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<sup>3</sup> Image Processing asserts that although this was Pirim's intended role during these demonstrations, Pirim refused to explain how the technology worked to those companies viewing the demonstrations. (Pl. Local Civ. R. 56.1 Statement in Opp'n to Def. Mot. for Summ. J. of Invalidity (“Pl. Invalidity 56.1”) ¶ 29.)

generated commercial interest from many companies who sought follow-up meetings. (Id. ¶ 30.)

In August 1997, the GVPP-6 was presented and demonstrated at the National Automated Highway System Consortium, a four-day conference held in San Diego, California. (Id. ¶ 32.)

BEV had a booth at the conference and Pirim demonstrated the GVPP-6 to numerous audiences, averaging one to two presentations per day to approximately ten to twenty people at a time. (Id. ¶

33.) Joseph Harbaugh - who is also now a member of Image Processing - attended

demonstrations of the GVPP-6 in 1997 in order to determine if he wanted to join BEV. (Id. ¶ 37.)

During 1997, BEV demonstrated the GVPP-6 technology to numerous employees and engineers at Ford Motor Corporation, General Motors Corporation and Boeing, under no obligation of confidentiality, in an effort to form a “relationship” with another company for a potential “technology transfer” or sale of the GVPP-6. (Id. ¶¶ 38-39; Pl. Invalidity 56.1 ¶ 39.)

After attending those demonstrations, Harbaugh signed a contract for the rendering of his services in assisting with a technology transfer of the GVPP to another company, in exchange for a one percent interest in the proceeds generated from that transfer. (Def. Invalidity 56.1 ¶ 40.) In a further effort to sell the GVPP-6 technology, Dr. Thomas Binford was hired in 1998 to work with Pirim to develop a specific application that used the GVPP-6 technology to detect drowsy drivers. (Id. ¶¶ 41-42.) However, no sale of the technology was ever achieved. (Id. ¶ 44.)

The failure to sell the GVPP-6 technology led to a lawsuit between Harbaugh and BEV. (Id. ¶ 45.) Harbaugh prevailed in the lawsuit and the court took control of BEV’s United States patents and patent applications, including the ’293 Patent, and held a judicial auction to satisfy the judgment against BEV. (Id. ¶ 46.) Harbaugh, through a trustee, purchased BEV’s United

States patents and patent applications for \$10,000. (Id.) In October 2009, Harbaugh, Al-Adsani and two other members - William Brown and Robert Harris - entered into an agreement with General Patent Corporation to form Image Processing, for the sole purpose of acquiring, enforcing and licensing the former BEV patents, including the '293 Patent. (Id. ¶ 49.)

In the within motions, Canon asserts that the '293 Patent is invalid as a result of the Pirim PCT Publication, which it contends is prior art, as well as the public demonstrations of the GVPP-6 technology. Not surprisingly, Image Processing disputes these assertions. In addition, Image Processing asserts that the '293 Patent should be deemed valid as not anticipated by any purported prior art reference, including: (1) the Pirim PCT Publication; (2) United States Patent No. 5,719,953 (the "Okabayaski Patent"); (3) United States Patent No. 5,521,843 (the "Hashima Patent"); (4) United States Patent No. 7,215,812 (the "Masaki Patent"); and (5) the GVPP-6 technology. Image Processing further requests that Claims 18 and 19 of the '293 Patent be deemed valid as not obvious in view of any of the purported prior art references, including: (1) the Pirim PCT Publication; (2) the Pirim PCT Publication in combination with an article by Canon's expert witness, Dr. Eli Saber, entitled "Automatic Image Annotation Using Adaptive Color Classification (the "Saber Article"); (3) the Okabayashi Patent; (4) the Hashima Patent; and (5) the GVPP-6 technology.

A. Legal Standard for Invalidity

Under the United States Patent Act, patents are presumed valid. See 35 U.S.C. § 282. Accordingly, a party challenging the validity of a patent must "prove the facts establishing invalidity by clear and convincing evidence." Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628, 631 (Fed. Cir. 1987) (citing Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350,

1360 (Fed. Cir. 1984)); see also Microsoft Corp. v. i4i Ltd. P'ship, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2238, 2242 (2011) (holding that the Patent Act “requires an invalidity defense to be proved by clear and convincing evidence”). “While the ultimate question of patent validity is one of law, . . . the same factual questions underlying the [Patent and Trademark Office]’s original examination of a patent application will also bear on an invalidity defense in an infringement action.” Microsoft, 131 S. Ct. at 2243 (citations and internal quotation marks omitted). There are two ways of invalidating a patent - anticipation and obviousness - both of which are at issue in the within motions.

B. Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” Verdegaal Bros., 814 F.2d at 631 (citing cases); see also Trimed, Inc. v. Stryker Corp., 608 F.3d 1333, 1343 (Fed. Cir. 2010) (“[I]nvalidity by anticipation requires that the four corners of a single[] prior art document describe every element of the claimed invention, either expressly or inherently.”) (alterations in original). However, “disclosure of each element is not quite enough.” Crown Packaging Tech., Inc. v. Ball Metal Beverage Container Corp., 635 F.3d 1373, 1383 (Fed. Cir. 2011). Rather, “[a]nticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim.” Id. (quoting Finisar Corp. v. DirecTV Group, Inc., 523 F.3d 1323, 1334-35 (Fed. Cir. 2008)) (additional citations omitted) (alteration in original). “Whether a prior art reference anticipates a patent claim is a question of fact.” Trimed, 608 F.3d at 1343 (citing Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1281 (Fed. Cir. 2000)); see also Ormco Corp. v. Align Tech., Inc., 498 F.3d 1307, 1319 (Fed. Cir.



2007) (“Anticipation is a question of fact.”).

1. The Pirim PCT Publication

The Pirim PCT Publication, which is entitled “Method and Apparatus for Detection of Drowsiness” and names Pirim and Dr. Binford as its inventors, was published on July 22, 1999, more than one year prior to the United States filing date of the ’293 Patent. (Id. ¶¶ 50, 52.) According to Canon, each element in Claims 1, 2, 18, 19 and 22 of the ’293 Patent is disclosed in the Pirim PCT Publication, either expressly or inherently. (Id. ¶ 57.)

Specifically, Canon argues that both the Pirim PCT Publication and the ’293 Patent contain “nearly identical figures that disclose the key elements of the underlying visual perception processor, the claimed subject matter of the ’293 patent.” (Def. Mem. of Law in Supp. of Mot. for Summ. J. of Invalidity 8.) According to Canon, Figure 14 of the Pirim PCT Publication is “virtually identical” to Figure 3 of the ’293 Patent. (Id.) Canon’s expert, Dr. Saber, opines that Figure 14 and Figure 3 “depict essentially the same elements, albeit sometimes with slightly different labels.” (Saber Decl. ¶¶ 43-44.)

Conversely, Image Processing argues that the Pirim PCT Publication does not disclose every limitation of the Asserted Claims.<sup>4</sup> Specifically, Image Processing asserts that the Pirim PCT Publication does not disclose the limitation of Claim 1 “at least two histogram calculation units for the treatment of the at least one parameter.” (Pl. Mem. of Law in Opp’n to Def. Mot.

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<sup>4</sup> Canon’s opposition only addresses the independent Asserted Claims - Claims 1, 18 and 22 - and does not explain how the Pirim PCT Publication fails to disclose the elements of the dependent Asserted Claims - Claims 2 and 19. However, as Canon points out, if an independent claim is not found to be invalid, then none of its dependent claims can be deemed invalid. See Comaper Corp. v. Antec, Inc., 596 F.3d 1343, 1350 (Fed. Cir. 2010). Accordingly, only the independent Asserted Claims require analysis.

for Summ. J. of Invalidity 17.) According to Image Processing's expert witness, Dr. Peggy Agouris, "each histogram unit disclosed by the Pirim PCT Publication treats a separate parameter."<sup>5</sup> (Agouris Decl. ¶ 11.)

Image Processing further argues that "the configuration of two histogram calculation units that each treat a separate parameter does not offer the level of flexibility made possible by the teaching of the '293 patent that is claimed in [C]laim 1, two histogram calculation units that treat the same parameter." (Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Invalidity 18; Agouris Rebuttal Report ¶ 90.) In reply, Canon asserts that Image Processing is incorrect in construing the disputed limitation to require there to be two histogram calculation units that treat the same parameter. (Def. Reply Mem. of Law in Support of Mot. for Summ. J. of Invalidity 19.) According to Canon, although Claim 1 does encompass such an embodiment, it "also encompasses having two histogram calculation units that treat two parameters, i.e., each histogram calculation unit treats only one parameter." (Id.)

Reviewing the declarations of both Image Processing and Canon's expert witnesses, as well as all of the other evidence offered by the parties, I recommend that there is a genuine issue of material fact with respect to whether the Pirim PCT Publication anticipates the '293 Patent.<sup>6</sup>

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<sup>5</sup> There is also a dispute between the parties concerning the use of term "histogram calculation unit," as set forth in the '293 Patent. According to Image Processing, the Pirim PCT Publication refers to "histogram formation blocks," not histogram calculation units. (Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Invalidity 17.) Canon's expert, Dr. Saber, treats the two terms the same in his declaration. (Saber Decl. ¶ 44.)

<sup>6</sup> Although the parties' motion papers also contain discussions concerning whether the Pirim PCT Publication discloses certain limitations of Claims 18 and 22, these issues are not addressed since there is a genuine issue of fact precluding summary judgment with respect to Claim 1.

The expert reports and declarations of Dr. Saber and Dr. Agouris differ dramatically with respect to this issue. “Where there is a material dispute as to the credibility and weight that should be afforded to conflicting expert reports, summary judgment is usually inappropriate.” Crown Packaging, 635 F.3d at 1384 (reversing issuance of summary judgment where there was a material dispute as to what the prior art inherently discloses) (citing Scripps Clinic & Research Found. v. Genentech, Inc., 927 F.2d 1565, 1578 (Fed. Cir. 1991)). Accordingly, Canon’s motion for summary judgment of invalidity and Image Processing’s motion for summary judgment of no invalidity with respect to whether the Pirim PCT Publication anticipates the ’293 Patent should both be denied.

2. Prior Public Demonstration of the GVPP-6 Technology

Under 35 U.S.C. Section 102(b), “[a] person shall be entitled to a patent unless . . . the invention was in public use . . . in this country, more than one year prior to the date of the application for patent in the United States . . . .” 35 U.S.C. § 102(b). “Whether a patent is invalid for a public use . . . is a question of law based on underlying facts.” Netscape Commc’ns Corp. v. Konrad, 295 F.3d 1315, 1320 (Fed. Cir. 2002) (citing Intel Corp. v. Int’l Trade Comm’n, 946 F.2d 821, 829 (Fed. Cir. 1991)). Clear and convincing evidence is required to invalidate a patent for public use. See Netscape, 295 F.3d at 1320 (citing Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 549 (Fed. Cir. 1990)).

“Public use includes ‘any use of [the claimed] invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor.’” Netscape, 295 F.3d at 1320 (quoting Petrolite Corp. v. Baker Hughes Inc., 96 F.3d 1423, 1425 (Fed. Cir. 1996)) (alteration in original). However, “what would otherwise appear to be a public

use is negated if the inventor was testing claimed features of his invention.” New Railhead Mfg. L.L.C. v. Vermeer Mfg. Co., 298 F.3d 1290, 1297 (Fed. Cir. 2002) (citing EZ Dock, Inc. v. Schafer Sys., Inc., 276 F.3d 1347, 1353 (Fed. Cir. 2002)). “The use of an invention by the inventor himself, or any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as [a public] use.” Netscape, 295 F.3d at 1320 (quoting City of Elizabeth v. Am. Nicholson Pavement Co., 97 U.S. 126, 134 (1877)).

When considering whether a patent is invalidated by a prior public use, courts look to the “totality of the circumstances,” which include, but are not limited to: “the nature of the activity that occurred in public; the public access to and knowledge of the public use; whether there was any confidentiality obligation imposed on persons who observed the use; whether persons other than the inventor performed the testing; the number of tests; the length of the test period in relation to tests of similar devices; and whether the inventor received payment for the testing.” Netscape, 295 F.3d at 1320 (citing cases). At the summary judgment stage, once Canon presents facts sufficient to establish an invalidating prior public use, the burden shifts to Image Processing to submit evidence that raises a genuine issue of material fact to the contrary. See Netscape, 295 F.3d at 1320 (citation omitted).

Here, the application for the '293 Patent was filed on February 23, 2011. Canon asserts that the patent is invalid based on Pirim's public demonstrations of the GVPP-6 Technology in 1997. According to Canon, and Pirim's deposition testimony, the GVPP-6 embodied all of the elements of the '293 Patent's Asserted Claims. As discussed supra at pages 5 to 6, Pirim demonstrated the GVPP-6 in the United States in August 1997 at the Automated Highway System Consortium in San Diego, California. Pirim further demonstrated the GVPP-6 in the fall

of 1997 for numerous companies in the United States, including Ford Motor Corporation, General Motors Corporation and Boeing. The demonstrations involved operating the GVPP-6 technology for the viewers, using a video camera and a screen to detect Pirim walking back and forth. No confidentiality requirements were imposed on those viewing Pirim's demonstrations and the demonstrations resulted in follow-up meetings with interested prospective buyers.

While Canon asserts that the "underlying facts concerning how the invention was publicly demonstrated are not in dispute," Image Processing offers a different version of events in their motion papers. (Def. Mem. of Law in Support of Mot. for Summ. J. of Invalidity 24.) First and foremost, Image Processing goes into great detail to explain how the GVPP-6 does not embody all of the limitations of the Asserted Claims, despite Canon's assertions to the contrary. Moreover, Image Processing asserts that although Pirim did conduct the public demonstrations detailed above, he demonstrated only "manually-programmed 'demonstration boards'" because the GVPP-6 was not functional on its own. (Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Invalidity 11; Coulson Decl., Ex. G.) According to Image Processing, the GVPP-6 "had to be mounted on a demonstration board with additional components in an effort to manually stimulate Mr. Pirim's technology." (Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Invalidity 11; Coulson Decl., Ex. K.) Finally, Image Processing argues that "[t]he demonstration boards did not work without manual set-up and programming by Mr. Pirim." (Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Invalidity 11; Coulson Decl., Ex. H-I.) According to Image Processing, the GVPP-6 demonstrated by Pirim cannot meet the standard for invalidating a patent for prior public use because it was not a complete and operative embodiment of the invention.

These conflicting renditions demonstrate that there are genuine issues of material fact concerning whether Pirim's public demonstrations of the GVPP-6 technology invalidates the '293 Patent. These issues preclude summary judgment from being granted to either party here. Accordingly, both Image Processing and Canon's motion for summary judgment with respect to this issue should be denied.

3. The Remaining Prior Art References

Image Processing also seeks summary judgment that the '293 Patent is not invalid due to anticipation by the Okabayashi Patent, the Hashima Patent or the Masaki Patent.

a. The Issues Raised

i. The Okabayashi Patent

Image Processing argues that the Okabayashi Patent cannot anticipate the '293 Patent because it does not disclose the limitation contained in Claim 1 of "at least two histogram calculation units for the treatment of the at least one parameter" (the "One-Parameter Limitation"). (Agouris Decl. ¶¶ 10-14; Coulson Decl., Ex. H.) According to Image Processing, although Canon's expert, Dr. Saber, presented a claim chart purportedly addressing Claim 1, the chart does not assert that the Okabayashi Patent discloses the One-Parameter Limitation of Claim 1. (Pl. Mem. of Law in Support of Mot. for Summ. J of No Invalidity Due to Anticipation 10.) Rather, Dr. Saber's claim chart states only that the Okabayashi Patent "discloses at least two histogram units for the treatment of at least one parameter." (Saber Expert Report, Ex. 13.) Image Processing asserts that a "histogram unit" is not the same as a "histogram

calculation unit” and therefore, the Okabayashi Patent cannot anticipate the ’293 Patent.<sup>7</sup>

In response, Canon argues that the Okabayashi Patent does indeed disclose the One-Parameter Limitation of Claim 1 of the ’293 Patent because it “discloses at least two histogram creating units . . . for the treatment of at least one parameter (a video signal).” (Def. Mem. of Law in Opp’n to Pl. Mot. for Summ. J. of No Invalidity Due to Anticipation 14; Saber Decl. ¶ 57.) According to Canon, a histogram creating unit calculates value in order to create a histogram. (Saber Decl. ¶ 57.)

ii. The Hashima Patent

Image Processing also asserts that the Hashima Patent does not disclose the One-Parameter Limitation of Claim 1, (Agouris Decl. ¶¶ 15-18; Coulson Decl., Ex. I), and argues that Canon has not presented any expert analysis comparing the Hashima Patent to the limitations of Claim 1 of the ’293 Patent. According to Image Processing, Dr. Saber’s expert report only contains one paragraph pertaining to the Hashima Patent, in which he makes the conclusory statement that “Claims 1, 2, and 18-29 of the ’293 Patent are invalid as being variously anticipated and/or obvious over [the Hashima Patent], either alone or in combination with other prior art.” (Saber Expert Report ¶ 288.) Moreover, Image Processing claims that Dr. Saber’s claim chart does not address Claim 1 of the ’293 Patent. (Saber Expert Report, Ex. 14.)

Conversely, Canon asserts that the Hashima Patent teaches the One-Parameter Limitation

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<sup>7</sup> According to Image Processing, “a histogram calculation unit includes not only a histogram memory, but also a classifier, which compares data to criterion, and a time coincidence unit, which determines whether there is a coincidence.” (Pl. Mem. of Law in Support of Mot. for Summ. J. of No Invalidity Due to Anticipation 9.) “By contrast, a histogram unit is, for example, a histogram memory.” (Id.)

by disclosing calculations by two projected histograms (X- and Y-) for the treatment of a target mark. (Saber Decl. ¶ 71.) According to Canon, however, the X and Y histograms are both for the treatment of the location parameter. (Id.)

iii. The Masaki Patent

Finally, Image Processing asserts that the Masaki Patent does not disclose the One-Parameter Limitation either. (Agouris Decl. ¶¶ 19-21; Coulson Decl., Ex. J.) As with the Hashima Patent, Image Processing asserts that Canon has failed to provide any expert analysis with respect to the Masaki Patent as it relates to Claim 1 of the '293 Patent. According to Image Processing, Dr. Saber's expert report devotes only two paragraphs to the Masaki Patent, offering the conclusory statement that "[i]f the claims of the '293 Patent are construed to encompass the CalcScene software routine, I believe that those claims would also encompass the Masaki patent and would therefore be invalid," without any accompanying explanation. (Saber Expert Report ¶¶ 296-97.)

In response, Canon asserts that the Masaki Patent discloses the One-Parameter Limitation because it discloses two histogram calculation units for the treatment of hue data H in steps 43 and 65. (Saber Decl. ¶ 76; Coulson Decl., Ex. J.)

There are genuine issues of material fact concerning whether the Okabayashi, Hashima and Masaki patents disclose Claim 1 of the '293 Patent.<sup>8</sup> The parties' experts present very different theories in their expert reports concerning this issue, which could lead a reasonable

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<sup>8</sup> Although the parties' motion papers also contain discussions concerning whether the Okabayashi, Hashima and Masaki patents disclose certain limitations of Claims 18 and 22, these issues are not addressed since there is a genuine issue of fact precluding summary judgment with respect to Claim 1.



factfinder to find for either side. As stated supra, material disputes concerning the credibility and weight to be afforded conflicting experts counsel against awarding summary judgment. See Crown Packaging, 635 F.3d at 1384. Accordingly, Image Processing's motion for summary judgment of no invalidity due to anticipation with respect to the Okabayashi, Hashima and Masaki patents should be denied.

C. Obviousness

Image Processing seeks summary judgment that none of the prior art references relied upon by Canon render Claims 18 and 19 of the '293 Patent obvious. Such prior art references include: (1) the Pirim PCT Publication; (2) the Pirim PCT Publication in combination with the Saber Article; (3) the Okabayashi Patent; (4) the Hashima Patent; and (5) the GVPP-6.

“A patent is invalid for obviousness ‘if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” Wyers v. Master Lock Co., 616 F.3d 1231, 1237 (Fed. Cir. 2010) (quoting 35 U.S.C. § 103(a)).

Obviousness is a question of law based on underlying findings of fact. See Wyers, 616 F.3d at 1237 (citing In re Kubin, 561 F.3d 1351, 1355 (Fed. Cir. 2009)). The underlying factual inquiries are as follows: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) any relevant secondary considerations, also known as objective indicia of nonobviousness. See Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966). “Obviousness requires more than a mere showing that the prior art includes separate references covering each separate limitation in a claim under examination.”

Unigene Labs., Inc. v. Apotex, Inc., 655 F.3d 1352, 1360 (Fed. Cir. 2011) (citing KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007)). Rather, a party seeking to invalidate a patent on the grounds of obviousness must demonstrate “that a person of ordinary skill at the time of the invention would have selected and combined those prior art elements in the normal course of research and development to yield the claimed invention.” Unigene Labs., 655 F.3d at 1360 (citing KSR, 550 U.S. at 421).

The parties’ arguments with respect to obviousness are substantially similar, if not the same, as those made with respect to anticipation. Not surprisingly, as with the issue of anticipation, the parties’ motion papers are replete with factual disputes concerning whether the purported prior art references render Claims 18 and 19 of the ’293 Patent obvious. The genuine dispute of material facts is further reflected in the parties’ Rule 56.1 Statements. The issue of obviousness does not lend itself to a finding of summary judgment in favor of either party. As with the issue of anticipation, a trial is needed to resolve the issues of fact present with respect to obviousness - vel non - of the prior art. Accordingly, for the reasons set forth above with respect to anticipation, Image Processing’s motion for summary judgment of no invalidity based on obviousness should be denied.

### III. Summary Judgment Regarding Infringement of the ’293 Patent

Image Processing alleges infringement of the ’293 Patent by four firmware functions developed by Canon and included in certain models of Canon compact digital cameras: (1) DefectDetect.c; (2) CalcScene.c; (3) ChaseTarget.c; and (4) ChaseTarget2.c. (Def. R. 56.1 Statement in Support of Mot. for Summ. J. of Non-Infringement (“Non-Infringement 56.1”) ¶¶

10.) Canon seeks summary judgment of non-infringement solely with respect to its DetectDefect.c firmware.

DetectDefect.c is firmware stored in certain Canon digital cameras that determines the location of defective pixels in a camera's image sensor. (Def. Non-Infringement 56.1 ¶ 15.) This firmware is used in Canon factories and, when necessary, in Canon service centers or authorized service facilities located in the United States. (Id. ¶ 16.) Specifically, the DetectDefect.c firmware calculates the severity of the defects in the image sensor, assigns grades to defects based on their severity, and stores the defect data so it can be utilized to correct for defective pixels. (Id. ¶ 24.) This detection of defective pixel data using DetectDefect.c is a calibration step that is performed for Canon's cameras at its manufacturing facilities, all of which are located outside of the United States. (Id. ¶¶ 25, 28-29.) Typically, the defective pixel data detection using DetectDefect.c is performed only once for a camera - at the time of manufacture. (Id. ¶ 26.) However, DetectDefect.c may also be used to detect defective pixel data at a United States service facility when certain types of repairs are made to a camera. (Id. ¶¶ 27, 37.)

The DetectDefect.c firmware is initiated using specific alphanumeric commands. (Id. ¶ 17.) As sold by Canon, a compact digital camera itself has no way of generating these specific alphanumeric commands. (Id. ¶ 22.)

A. Legal Standard for Patent Infringement

It is well-established that the determination of whether a patent has been infringed requires a two-step analysis. See Carroll Touch, Inc. v. Electro Mechanical Sys., Inc., 15 F.3d 1573, 1576 (Fed. Cir. 1993). First, the claims in the patent must be properly construed to determine the scope and meaning of the patent; second, the properly construed claims must be

compared to the accused device. See Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995), aff'd, 517 U.S. 370 (1996). While the first part of the inquiry is a legal question left to the resolution of the court, the second step in the analysis is generally reserved for the fact finder. See id. at 981. In order to prevail on a claim of patent infringement, “the plaintiff must show the presence of every element or its substantial equivalent in the accused device.”

Wolverine World Wide, Inc. v. Nike, Inc., 38 F.3d 1192, 1199 (Fed. Cir. 1994).

B. Canon’s Motion for Summary Judgment of Non-Infringement

Canon’s motion for summary judgment of non-infringement of the ’293 Patent is limited to the following two grounds: (1) that, as a matter of law, the use of the DefectDetect.c firmware in Canon’s manufacturing facilities located outside of the United States does not infringe the ’293 Patent; and (2) the use or sale of Canon’s digital cameras, containing the installed but unexecuted DefectDetect.c firmware, does not infringe the ’293 Patent. Canon’s motion papers specifically state that it is not seeking summary judgment with respect to whether the actual execution of the DefectDetect.c firmware infringes any of the claims of the ’293 Patent. (Canon Mem. of Law in Support of Mot. for Summ. J. of Non-Infringement 2 n.1; Canon Reply Mem. of Law in Support of Mot. for Summ. J. of Non-Infringement 2 n.2.)

1. The Manufacturing Facilities Outside of the United States

Canon argues that, under 35 U.S.C. § 271(a), patent infringement is limited to occurrences within the United States. See MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp., 420 F.3d 1369, 1375 (Fed. Cir. 2005) (“It is well-established that the reach of section 271(a) is limited to infringing activities that occur within the United States.”). According to Canon, the use of the DetectDefect.c firmware at its manufacturing facilities

located outside of the United States cannot therefore, as a matter of law, constitute infringement.

While Image Processing vigorously disputes whether infringement is limited to “use,” and vehemently argues that Canon is liable for infringement for importing cameras into the United States that allegedly contain Image Processing’s patented invention, it does not offer evidence to contest the limited issue on which Canon is moving for summary judgment - i.e., that the execution of the DetectDefect.c firmware at its manufacturing facilities outside of the United States cannot constitute infringement.

The law on this issue supports Canon’s position. See, e.g., Rotec Indus. Inc. v. Mitsubishi, 215 F.3d 1246, 1251 (Fed. Cir. 2000) (noting that defendants’ activities that “took place outside of the United States, in China and elsewhere,” were “irrelevant to the case . . . because the right conferred by a patent under our law is confined to the United States and its territories, and infringement of this right cannot be predicated o[n] acts wholly done in a foreign country”). Accordingly, Canon’s motion for summary judgment of non-infringement should be granted with respect to the limited issue of Canon’s use of the DefectDetect.c firmware at its manufacturing facilities located outside of the United States.

2. The Sale of Canon’s Cameras Containing the DefectDetect.c Firmware

Canon also moves for summary judgment of non-infringement on the grounds that it is only possible for the DefectDetect.c firmware to infringe the ’293 Patent when the firmware is actually executed, which, according to Canon, only occurs within the United States when the camera is connected to an external device at a service facility.<sup>9</sup> Canon asserts

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<sup>9</sup> According to Canon, “the only cameras for which the DefectDetect.c firmware is executed in the United States are a very small percentage of cameras that are sent to service centers and connected to an external device that allows that firmware to be executed.” (Def.

that the mere existence of the DefectDetect.c firmware on its cameras, that is installed but not executed, cannot infringe the '293 Patent. Both parties agree that claim construction is not necessary to determine this issue. (Def. Mem. of Law in Support of Mot. for Summ. J. of Non-Infringement 12-13; Pl. Mem. of Law in Opp'n to Def. Mot. for Summ. J. of Non-Infringement 17.)

In response, Image Processing maintains that regardless of whether the DefectDetect.c firmware is actually executed, Canon's importation into the United States of cameras containing the firmware, as well as its offer of sale and actual sale of cameras containing the firmware, infringes the '293 Patent. Image Processing devotes a significant portion of its opposition papers arguing how the execution of the DefectDetect.c firmware infringes its patent. However, that is not the issue before the Court on this motion. Canon has specifically stated that it is not moving for summary judgment with respect to whether the execution of the DefectDetect.c firmware infringes the '293 Patent because it believes issues of fact exist concerning that issue. Rather, Canon seeks summary judgment solely with respect to the limited issue of whether its cameras, as sold, containing the installed but unexecuted DefectDetect.c firmware, infringe the '293 Patent.

It is undisputed that Canon's cameras, as manufactured and sold, contain the DefectDetect.c firmware, which can be executed if and when directed to do so. However, Canon maintains that the camera needs to be connected to an external device to execute the DefectDetect.c firmware, which can only be activated using specially designed software available

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Mem. of Law in Support of Mot. for Summ. J. of Non-Infringement 11.) Canon estimates this number to be approximately one percent. (Def. Reply Mem. of Law in Support of Mot. for Summ. J. of Non-Infringement 2.)

to it but not available to the public. (Saber Decl. ¶ 39). According to Canon, because the cameras by themselves cannot execute the DefectDetect.c firmware, the cameras alone are incapable of infringing the '293 Patent.

Conversely, Image Processing asserts that no such external device is required because Canon users in the United States are able to access the features and functionality included within Canon cameras by using a publicly-available method created by the user community, known as the Canon Hack Development Kit (“CHDK”). (Zavadsky Decl. ¶ 23.) According to Image Processing, this kit can be installed on the memory card on which the camera stores images and be used to call functions that already exist on a Canon camera, such as DefectDetect.c, directly from a menu on the camera itself. (Zavadsky Decl. ¶¶ 20, 26-27, 47.) This results in the user being able to execute the DefectDetect.c firmware without connecting the camera to an external device. Image Processing asserts that Canon is aware of the CHDK and even monitors user activity of it within the United States. (Zavadsky Decl. ¶ 28; Coulson Decl., Ex. A.)

While Image Processing goes to great lengths to demonstrate how this hack software works, it is not enough to defeat summary judgment on this limited issue. Indeed, Image Processing does not appear to dispute that the DefectDetect.c firmware cannot be executed by camera customers operating their cameras in the intended manner. Rather, it speculates that were a Canon customer to install the hack software - which is neither sold or provided by Canon - then it could execute the DefectDetect.c firmware and infringe the '293 Patent. “[H]owever, that a device is capable of being modified to operate in an infringing manner is not sufficient, by itself, to support a finding of infringement.” Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1330 (Fed. Cir. 2001). Since Canon’s cameras are incapable of executing the

DefectDetect.c firmware without modification, it appears they are similarly incapable of infringing the '293 Patent.<sup>10</sup>

Accordingly, Canon's motion for summary judgment of non-infringement should be granted.

#### IV. The Motions to Strike

Between the two parties, there are six motions to strike pending before the Court - five by Image Processing and one by Canon. Collectively, the motions seek to strike the following documents submitted in connection with the motions for summary judgment: (1) portions of the declarations by Patrick Pirim (the "Pirim Declaration" and the "Second Pirim Declaration") submitted by Canon; (2) portions of the declaration by Dr. Eli Saber (the "Saber Declaration") submitted by Cannon; (3) the declaration by Dr. Thomas Binford (the "Binford Declaration") submitted by Canon (4) Appendix A to Canon's motion for summary judgment of invalidity, which contains Canon's arguments on claim construction; and (5) Attachment A to Image Processing's opposition to Canon's motion for summary judgment of invalidity, which contains Image Processing's arguments concerning claim construction. As discussed below, all of the motions to strike should be denied.

##### A. The Pirim Declarations

Image Processing seeks to strike portions of the Pirim Declaration and the Second Pirim Declaration, offered by Canon in support of its motion for summary judgment of invalidity

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<sup>10</sup> The Court is not expressing any opinion with respect to whether the DefectDetect.c firmware infringes the '293 Patent when it is actually executed since the moving party, Canon, has expressly exempted that issue from this motion.



as well as in opposition to Image Processing's motion for summary judgment of no invalidity due to anticipation, on the grounds that they consist of improper expert testimony by Pirim, who has neither been disclosed as an expert nor provided an expert report. Image Processing further asserts that the Court should strike the disputed portions of the Pirim Declarations because Canon did not identify Pirim as witness who would testify live at the trial in this action, but rather only through the use of deposition testimony. Finally, Image Processing argue that the Second Pirim Declaration should be struck as untimely because it includes new factual allegations presented by Canon for the first time in connection with its reply papers.

As Canon points out, it is undisputed that Pirim is the sole inventor of the '293 Patent, as well as the developer of the GVPP-6, the product that Canon asserts is prior art invalidating the '293 Patent. (Def. Opp'n to Pl. Mot. to Strike Portions of Canon's Mot. for Summ. J. of Invalidity 1.) As such, Canon asserts that Pirim's declarations present factual matters well within his personal knowledge.

I agree with Canon and find Pirim's Declarations to be proper factual testimony. Image Processing has had the opportunity to depose Pirim and should not be surprised by the factual testimony contained within his declarations. With respect to Image Processing's claim that Canon did not identify Pirim as a live witness, as Canon correctly asserts, no specific deadline has been set by the Court for the identification of trial witnesses. Accordingly, Federal Rule of Civil Procedure 26(a)(3)(B) sets that deadline at thirty (30) days prior to trial, which, in this case, is March 15, 2012.<sup>11</sup>

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<sup>11</sup> Initially, the trial in this action was scheduled for January 7, 2013. However, at the request of the parties, Judge Feuerstein recently adjourned the trial to April 15, 2013. (Order of Feuerstein, J., dated Nov. 28, 2012.)

Finally, Image Processing's argument that the Second Pirim Declaration should be struck as untimely should be rejected as well. As Canon points out, the Second Pirim Declaration responds to issues raised in Image Processing's opposition to Canon's motion for summary judgment of invalidity. As the Second Circuit has held, "reply papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party." Bayway Refining Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 226-27 (2d Cir. 2000) (quoting Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1235 (S.D.N.Y. 1991), rev'd on other grounds, 697 F.2d 742 (2d Cir. 1992)) (additional citations omitted). Accordingly, Image Processing's motions to strike portions of the Pirim Declaration and the Second Pirim Declaration should be denied.

B. The Saber Declaration

By three separate motions, Image Processing seeks to strike portions of the declaration of Dr. Eli Saber, offered by Canon in support of its motion for summary judgment of invalidity as well as in opposition to Image Processing's motions for summary judgment of no invalidity due to both anticipation and obviousness. All three motions to strike assert that Dr. Saber's declaration offers expert opinion beyond the scope of his expert report, in violation of Federal Rule of Civil Procedure 26. (Pl. Mot. to Strike Portions of Def. Mot. for Summ. J. of Invalidity 3; Pl. Mot. to Strike Portions of the Decl. of Dr. Eli Saber in Supp. of Def. Opp'n to Pl. Mot. for Summ. J. of No Invalidity Due to Anticipation 1; Pl. Mot. to Strike Portions of the Decl. of Dr. Eli Saber in Supp. of Def. Opp'n to Pl. Mot. for Summ. J. of No Invalidity Due to Obviousness 1.)

In response, Canon argues that the Saber Declaration does not present new opinion, but

rather merely provides further explanation of the opinions contained in his expert report as well as his opinions in response to the positions taken by Image Processing's expert. As Canon correctly points out, Rule 26(a)(2)(B) "does not limit an expert's testimony to simply reading his report . . . The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." Harkabi v. Sandisk Corp., No. 08 Civ. 8203, 2012 U.S. Dist. LEXIS 92674, at \*10 (S.D.N.Y. June 20, 2012) (citing In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 643 F. Supp. 2d 471, 482 (S.D.N.Y. 2009)). "The purpose of an expert's report is not to replicate every word that the expert might say on the stand, but to convey the substance of the expert's opinion . . . so that the opponent will be ready to rebut, cross-examine, and to offer a competing expert." Harkabi, 2012 U.S. Dist. LEXIS 92674, at \*10 (internal quotation marks and citation omitted). Accordingly, Image Processing's motions to strike portions of the Saber Declaration should be denied.

C. The Binford Declaration

Image Processing seeks to strike the entire declaration of Dr. Thomas Binford, submitted by Canon in opposition to Image Processing's motion for summary judgment of no invalidity due to anticipation, on the grounds that Dr. Binford was never identified as a witness by Canon. (Pl. Mot. to Strike Binford Decl. 1.) According to Image Processing, Canon is attempting to offer new expert opinion and fact testimony via the Binford Declaration without permission of the Court, in effect "sandbagging" Image Processing with new evidence. (Id. at 2.)

Conversely, Canon asserts that the Binford Declaration does not contain expert testimony, nor is it being offered as such. (Def. Opp'n to Pl. Mot. to Strike Binford Decl. 1.) Rather, Dr. Binford is the co-inventor, with Pirim, of the Pirim PCT Publication and worked with Pirim to

develop the GVPP-6, both of which Canon asserts are prior art that invalidate the '293 Patent.

(Id.) Due to his involvement with the Pirim PCT Publication and the GVPP-6, I find that Dr.

Binford's declaration is being offered solely as to factual matters within his personal knowledge.

(Id.)

Canon also asserts that Dr. Binford is not an "undisclosed witness," as Image Processing claims. Rather, Dr. Binford's identity was known to Image Processing since he worked with two members of Image Processing - Joseph Harbaugh and Nabeel Al-Adsani - on the GVPP-6, yet Image Processing did not identify Dr. Binford as a person possessing relevant information in its Rule 26 Initial Disclosures. (Id. at 2.) According to Canon, it only learned of the full extent of Dr. Binford's involvement with the GVPP-6 through the depositions of Harbaugh and Al-Adsani, which both took place well after the deadline for fact discovery passed. (Id.) Canon then had to locate Dr. Binford, who resides in India. (Id.)

Given the facts put forth by Canon concerning Image Processing's knowledge of Dr. Binford's involvement in the facts giving rise to this action, as well as its failure to disclose his identity, it is disingenuous for Image Processing to now claim they are being "sandbagged" by the submission of the Binford Declaration. Particularly since Dr. Binford is not being offered as an expert, but rather is testifying to factual matter that should already, in large part, be known to Image Processing. Accordingly, Image Processing's motion to strike the Binford Declaration should be denied.

D. The Parties Claim Construction Exhibits

Both Image Processing and Canon seek to strike the other's arguments on claim construction, contained in Appendix A to Canon's motion for summary judgment of invalidity

and Attachment A to Image Processing's memorandum in opposition to Canon's motion for summary judgment of invalidity on the grounds that both exhibits are improper attempts to circumvent the Court's twenty-five page limit for memoranda of law. (Pl. Mot. to Strike Portions of Canon's Mot. for Summ. J. of Invalidity 3; Def. Mot. to Strike Attachment A to Pl. Mem. in Opp'n to Def. Mot. for Summ. J. of Invalidity 1.) However, both Image Processing and Canon repeatedly state throughout their motion papers that claim construction is not relevant to the summary judgment motions pending before the Court. Moreover, it appears that the parties are correct and that the Court need not undertake any claim construction analysis to decide the pending motions. Accordingly, both Image Processing's and Canon's motions to strike the parties' claim construction exhibits (identified as Attachment A and Appendix A, respectively) should be denied as moot.

#### RECOMMENDATION

For the foregoing reasons, I recommend the following: (1) plaintiff's and defendant's motions for summary judgment with respect to the validity of the '293 Patent should be denied as there are genuine issues of material fact that need to be resolved by a trier of fact; (2) Canon's motion for summary judgment with respect to non-infringement should be granted in its entirety; and (3) the motions to strike should be denied in their entirety.

#### OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Any written objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within fourteen (14) days of service of this Report.

28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further appellate review. Thomas v. Arn, 474 U.S. 140, 145 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 299-300 (2d Cir. 1992).

**SO ORDERED:**

Dated: Central Islip, New York  
December 13, 2012

/s/ E. Thomas Boyle  
E. THOMAS BOYLE  
United States Magistrate Judge