

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 00-B-272 (PAC)

LASER TECHNOLOGY, INC., a Delaware corporation,

Plaintiff,

v.

NIKON, INC., a New York corporation, and ASIA OPTICAL CO., INC.,
a Taiwanese Corporation,

Defendants.

**PLAINTIFF’S MOTION FOR JUDGMENT AS A MATTER OF LAW FOR
INFRINGEMENT (INCLUDING WILLFULNESS)**

Plaintiff Laser Technology, Inc. (“LTI”), by and through its undersigned counsel, hereby respectfully submits this Motion for Judgment as a Matter of Law asking the Court to find that Defendants Nikon, Inc. (“Nikon”) and Asia Optical Company, Inc. (“Asia Optical”) have infringed Claims 11-14 and 16 of the ‘779 Patent and Claim 8 of the ‘910 Patent, which is based, in large part, on the testimony of Asia Optical’s chief engineer, Dr. Peter Chien. LTI also respectfully requests that this Court find that Defendants’ infringement of these Claims is willful. In support of this Motion, LTI states as follows:

I. INTRODUCTION

This patent infringement case involves Asia Optical’s second-generation laser rangefinder, the Laser 800 (the “Accused Device”), which is sold in the United States by Nikon. The two key issues with respect to the above-listed Claims are (1) whether the Accused Device determines, assigns a value identifying and compares time-of-flight data, and (2) whether it

contains a precision timing section. Asia Optical's own chief engineer, Dr. Peter Chien, has admitted both of these issues in his trial testimony in favor of LTI. For example, Dr. Chien testified with respect to time-of-flight data:

- Q: "And to distinguish target signals from noise signals, the second generation device maps, assigns and stores both target and noise signals to an addressable memory device with a high frequency latching clock." A: "Yes." Tr. 212.
- Q: "You map the pulse signal to a memory location using information from a clock." A: "Yes." Tr. 214.
- Q: "Each bin, each bucket, each position on the conveyer represents a distinct point in time after firing of the laser pulse." A: "Yes." Tr. 275.
- Q: "Dr. Chien, how do you know what range to program in the system for each bin? In other words, how do you know that bin 1 should be ten yards?" A: "Every distance – every position distance marker – it has to do with the time when you receive the pulse." Tr. 276.
- Q: "Dr. Chien, your device uses time to calculate distance, does it not?" A: "Our distance marker was produced by high frequency oscillator. Distance marker has to do with time." Tr. 279.
- Q: "Dr. Chien are you testifying that you have found a way to determine round-trip distance without considering the time of flight?" A: "No, I have not." Tr. 279.

In addition, Dr. Chien testified that the Accused Device utilizes a 40 megahertz oscillator or clock to discriminate between target and noise pulses. The evidence at trial also reflects that this clock operates in increments of 24 nanoseconds (or billionths of a second) and that, by using a phase shifting technique, its accuracy is improved to increments of 12 nanoseconds. Moreover, the evidence shows the clock used in the Accused Device is "precise" enough for the application for which it is used (*e.g.*, sports and hunting), as it is able to determine range within plus or minus one meter (which is consistent with the accuracy level described in the '779 Patent). Thus, no reasonable juror could possibly conclude that the clock in the Accused Device is not a precision timing section.

Of course, the admissions of Dr. Chien are corroborated and bolstered by ample other documentary evidence (some of which comes from Asia Optical and its counsel) and the testimony of LTI's technical expert, Joseph McAlexander, and the patent inventor, Jeremy Dunne. As such, the evidence in this case demonstrates conclusively and "overwhelmingly" that the above-listed Claims of the '779 Patent and '910 Patent read upon the Accused Device either literally or the under the doctrine of equivalents.¹ For this reason, judgment in favor of LTI for infringement is warranted on these Claims as a matter of law. Moreover, the evidence is likewise "overwhelming" that Defendants engaged in willful infringement.

II. ARGUMENT

A. Standard for Judgment as a Matter of Law.

Federal Rule of Civil Procedure 50(a) provides that a court may determine an issue against a party where the "party has been fully heard on [that] issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). In cases where the movant bears the burden of proof on the issue, the court must conclude that "(1) the movant 'has established [its] case by evidence that the jury would not be at liberty to disbelieve' and (2) 'the only reasonable conclusion is in [the movant's] favor.'" *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1065 (Fed. Cir. 1998) (affirming directed verdict awarded to defendant on invalidity defense based on plaintiff's own testimony), *quoting Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984) (affirming directed verdict awarded to plaintiff on products liability claim where evidence was

¹ LTI has simultaneously submitted, and incorporates herein for purposes of Rule 50, a related "Motion to Reconsider *Markman* and Summary Judgment Ruling Re: Independent Claims 18 & 25 of '779 Patent and Claim 1 of '077 Patent and Related Dependent Claims," emphasizing the evidence adduced at trial regarding the significance, or lack thereof, attached to Diode 316 and respectfully requesting that the Diode not be read into these Claims as previously held. *See also, e.g., Eagle Comtronics, Inc. v. Arrow Communications Labs.*, 305 F.3d 1303 (Fed. Cir. 2002) (reading prosecution history in a manner that did not limit claims).

“overwhelming”). *See also Mycogen Plant Science, Inc. v. Monsanto Co.*, 243 F.3d 1316, 1324-25 (Fed. Cir. 2001) (affirming JNOV awarded to plaintiff on its claim of infringement of patents), *affirming* 61 F. Supp. 2d 199, 236-37, 242-51 (D. Del. 1999); *LNP Engineering Plastics, Inc. v. Miller Waste Mills, Inc.*, 275 F.3d 1347, 1356-57 (Fed. Cir. 2001) (same), *affirming* 77 F. Supp. 2d 514, 547-49 (D. Del. 1999); *Gavin v. Star Brite Corp.*, 1988 WL 136003, at *1 (Fed. Cir. 1988) (unpublished opinion) (affirming directed verdict awarded to plaintiff on its claim of infringement of patents).²

“In deciding whether to grant a directed verdict, the trial court must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences.” *Hurd*, 734 F.2d at 498. The court generally may not weigh the evidence or pass upon a witness’s credibility. *See id.* at 498. A court must accept as true testimony or evidence that is not incredible, which is capable of contradiction, but which stands “uncontradicted, unimpeached, or in no way discredited by cross examination.” *Chicago, Rock Island & Pac. Railway Co. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968). Conversely, a court must disregard testimony or evidence that is clearly incredible and that the jury would not be free to believe. *See Wylie v. Ford Motor Co.*, 502 F.2d 1292, 1294 (10th Cir. 1974); *Anderson v. Hudspeth Pine, Inc.*, 299 F.2d 874, 877 (10th Cir. 1962). “While normally the circumstance that a witness contradicts himself merely leaves an issue of fact for the jury, to permit this in some instances would result in a mockery of justice.” *Naumkeag Theatres Co. v. New England*

² The Tenth Circuit also has on numerous occasions affirmed (or awarded) judgment as a matter of law to a plaintiff on claims on which the plaintiff bore the burden of proof. *See, e.g., FDIC v. Staudinger*, 797 F.2d 908, 910-11 (10th Cir. 1986) (directed verdict); *Hurd*, 734 F.2d at 499 (directed verdict); *Smith Mach. Co. v. Jenkins*, 654 F.2d 693, 697 (10th Cir. 1981) (directed verdict); *Ford Motor Credit Co. v. Milburn*, 615 F.2d 892, 894-97 (10th Cir. 1980) (JNOV); *Continental Oil Co. v. Natrona Serv., Inc.*, 588 F.2d 792, 800 (10th Cir. 1978) (directed verdict); *Missouri-Kansas-Texas Railway Co. v. Hearson*, 422 F.2d 1037, 1041-43 (10th Cir. 1970) (directed verdict); *Weeks v. Latter-Day Saints Hospital*, 418 F.2d 1035, 1037-38 (10th Cir. 1969) (directed verdict).

Theatres, Inc., 345 F.2d 910, 912-13 (1st Cir. 1965) (affirming directed verdict for defendant where plaintiff's witness made "conclusory statement[s]" on ultimate issue in favor of his own claim but then "repeatedly testified to specific matters incompatible with that generalization").

B. Infringement of the Patents.

1. Standard for Finding Patent Infringement.

Patent law provides that "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a). The patent owner bears the burden of proof of infringement by the ordinary standard of proof in civil litigation, namely proof by a preponderance of the evidence. *See Braun, Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815, 819 (Fed. Cir. 1992). To establish infringement of a patent, the patent owner must prove either "literal infringement" or infringement under the "doctrine of equivalents." *See Under Sea Indus. Inc. v. Dacor Corp.*, 833 F.2d 1551, 1557 (Fed. Cir. 1987). For a claim to be infringed, every limitation set forth in a valid claim must be found in the accused device or method exactly or by a substantial equivalent. *See Zodiac Pool Care Inc. v. Hoffinger Industries, Inc.*, 206 F.3d 1408, 1415 (Fed Cir. 2000); *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed. Cir. 1989).

The starting point of an infringement analysis is therefore a limitation-by-limitation comparison to determine if all of the limitations defined in a particular claim are present in the accused device or method. *See Pennwalt Corp. v. Durand-Wyland, Inc.*, 833 F.2d 931, 935 (Fed. Cir. 1987) (en banc). If each limitation of a claim is not literally present in an accused device or method, then the issue of infringement under the doctrine of equivalents is analyzed. Under this doctrine, a product or process that does not literally infringe the express terms of a patent claim

may nonetheless be found to infringe if there is “equivalence” between the missing element(s) of the accused product or process and the claimed elements of the patented invention. *See Pennwalt Corp.*, 833 F.2d at 935. There is “equivalence” between an element in an accused product or process and a limitation of a claim where the differences between the two assessed objectively are “insubstantial.” *Warner-Jenkinson Co. Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 37 (1997).

2. Evidence of Patent Infringement.

As stated above, finding patent infringement requires an examination of each element of the claim to ascertain whether the element exists, literally or under the doctrine of equivalents, in the Accused Device. The discussion set forth below reflects that this is the case for each of the patent claims addressed in this Motion.

a. *Independent Claim 11 of the ‘779 Patent*

- i. (1) “transmitting a series of signal pulses to a target” and (2) “receiving a number of reflected signal pulse from said target, said reflected signal pulses including both noise and actual return-reflected signal pulses”

There is no factual dispute regarding these elements of Claim 11. Dr. Chien of Asia Optical and LTI’s expert Mr. McAlexander testified that the Accused Device transmits a series of laser pulses to a target. *See* Tr. 240, 273 (Chien); 800-01 (McAlexander). Likewise, Dr. Chien, Mr. McAlexander, and the patent inventor, Mr. Dunne, all testified that the Accused Device receives reflected laser pulses, which include both target and noise signal pulses. *See* Tr. 92 (Dunne); 237, 273-4 (Chien); 801 (McAlexander). Accordingly, the first two elements of the ‘779 Patent are met with respect to the Accused Device.³

³ Dr. Creusere also has testified that these elements are present in the Accused Device, however, no trial transcript is available at this time.

- ii. “assigning a pulse value for each of said reflected signal pulses with respect to said series of signal pulses transmitted to said target”

Following the *Markman* hearing in this case, the Court construed certain language in this Claim element as follows:

Pulse value means a value identifying time-of-flight data, including noise and signals reflected from the target, that provides information sufficient to permit correlation of the received signal with other received signals to determine which of the received signals represents the actual return or target-reflected signal, as opposed to random noise signals.

Laser Technology, Inc. v. Nikon, Inc., 215 F. Supp. 2d 1135, 1141 (D. Colo. 2002).

The testimony and documentary evidence in this case reflects that the Accused Device assigns a pulse value to reflected pulse signals by storing such signals in an addressable memory based on time-of-flight. For example, consider the following:

- Dr. Chien repeatedly admitted that the bins in which pulse signals are placed (and subsequently dumped into a memory location) are based on time-of-flight using a high frequency clock. *See* Tr. 212, 214, 224, 273-79.⁴
- Mr. McAlexander has specifically testified that the Accused Device meets this element of the Claim because the signal pulse that is placed into the data latch is associated with a time delay. *See* Tr. 780-81; 801-03.
- A circuit description created by Dr. Chien explains: “At each laser firing pulse, mapping the detected signal from optical receiver to an addressable memory device with a high frequency latching clock.” Pl. Ex. 61.
- Defendants’ own patent and trial counsel, Martin Pfeffer, states in his non-infringement opinions that “in the AOI Product, a T_{latch} timing signal is used to control the latching speed of a data latch section which receives both the noise pulses and the signal pulses which are outputted from a one shot circuit at a constant amplitude and pulse width. The number of pulses received for each T_{latch}

⁴ Dr. Chien made countless damaging admissions. As the alleged inventor/designer of the Accused Device, his admissions cannot be overcome merely by argument of counsel or conflicting opinions of Dr. Creusere. *See Rogers v. Gibson*, 173 F.3d 1278, 1288 n.9 (10th Cir. 1999) (“[T]he arguments of counsel during opening and closing statements are not evidence.”); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1065 (Fed. Cir. 1998) (“[I]n unusual cases, an admission made by a [defendant]’s witness can be sufficient to support entry of a JMOL in favor of a [plaintiff] after the close of the [defendant]’s case-in-chief.”).

is then stored in a memory address corresponding to the T_{latch} timing signal.” D. Exs. C13-C14.

- Defendants own technical expert, Dr. Charles Creusere, testified that in his report he said that “[t]he clocking of these latches is fixed in such a way that **pulses with a given round-trip flight time always end up in the same latch**, and there the latch acts as a range bin.” See Tr. page not yet available.

The above evidence therefore conclusively establishes that the Accused Device satisfies this Claim element.

- iii. (1) “comparing each of said assigned pulse values with other ones of said assigned pulse values”; (2) “continuing to perform said comparing step until a predetermined number of said assigned pulse values coincide within a specified precision”; and (3) “determining said actual return signal to be represented by said predetermined number of said assigned pulse values”

Following the *Markman* hearing in this case, the construed certain language in these Claim elements as follows:

Comparison of pulse values--both noise and target--continually until a large enough number of pulse values is gathered that falls within a specific, limited degree of variation. The comparison is not necessarily an immediate one. The actual target signal represents the distance from range finder to target. It corresponds to the pulse values within that specified, limited degree of variation. The target signal is associated with the "matching" pulse values that correspond within the specified limit.

Laser Technology, 215 F. Supp. 2d at 1140-41. The following evidence demonstrates that no reasonable juror could conclude that these three elements are not satisfied in this case:

- Dr. Chien testified about how the signal pulses are dumped into certain memory locations, and then the Accused Device determines the target signal by searching the memory device for a predetermined number of hits (*i.e.*, comparing the memory addresses to find the one that has the most matching pulse signals). See Tr. 214, 276-77.
- In a letter to LTI dated March 1999, Asia Optical wrote: “Time domain signal matching and correlation function. This is the operation principle of our new generation laser receiving circuit.” Pl. Ex. 22. See also Tr. 227 (confirming that name was accurate).

- Mr. McAlexander testified about how a routine in the Accused Device’s source code called “FindMax” “searches the memory array to determine which time denominated slot has the most information, which one had the most hits.” Tr. 785. He further explained how in order to determine the target signal, the Accused Device searches the memory array for a predetermined number of assigned pulse values. Tr. 795-97, 842. *See also* Pl. Exs. 71 & 73 (AOI’s source code for the Laser 800).
- Mr. McAlexander also testified that Asia Optical’s source code establishes a minimum number of coincidences that are required in order for the Accused Device to select the target signal. *See* Tr. 842-43.

Based on the foregoing discussion and evidence, each of the Claim elements of Claim 11 reads upon the Accused Device either literally or through the doctrine of equivalents. Therefore, Defendants have infringed this Claim of the ‘779 Patent.⁵

b. *Independent Claim 8 of the ‘910 Patent.*

- i. (1) “A laser transmit section for generating a number of laser pulses from transmission to a target”; (2) “a laser receive section for receiving reflected laser pulses from said target”; and (3) “a user selectable target”

As with the first two Claim elements of the ‘779 Patent, these three Claim elements are not disputed in this case. All of the evidence in this case reflects that the Accused Product generates a series of laser pulses from a laser transmitter. *See* Tr. 89-90 (Dunne); 237 (Chien); 809 (McAlexander). Likewise, it is uncontroverted that the Accused Device contains a laser receiver section that receives pulses from the target. *See* Tr. 82, 89-90 (Dunne); 237 (Chien);

⁵ Once infringement of Independent Claim 11 is found, infringement of the remaining Dependent Claims necessarily follows. As to Claim 12, the only additional element, “the method of claim 11 wherein said step of transmitting is carried out by a laser transmitter,” is undisputed for the same reasons discussed below in Part II.B.2.b.i. *See also* Tr. 808. The same is true for Claim 13, which requires “[t]he method of claim 11 wherein said step of receiving is carried out by a laser receiver.” *See* Part II.B.2.b.i, *infra*; *see also* Tr. 808. Claim 14’s sole additional element, “[t]he method of claim 11 wherein said step of assigning is carried out by measuring a receipt time of said reflected signal pulses with respect to transmission of at least one of said series of transmitted signal pulses,” is satisfied by the same evidence that is discussed in Part II.B.2.b.ii, *infra*. Finally, the evidence reflects that Claim 16, which requires “[t]he method of claim 11 wherein said comparing step and said continuing said comparing step are carried out by means of a microcomputer” is met because the Accused Device does contain a microcomputer to perform this function. *See* Part II.B.2.b.iii.; *see also* Tr. 808-09.

809-10 (McAlexander). Finally, the existence of the last element of Claim 8 regarding user modes is not only uncontroverted, it is, in fact, conceded. *See* Tr. 811-12. Accordingly, each of these three Claim elements are satisfied.

- ii. “a precision timing section coupled to said laser transmit section and said laser receive section for determining a flight time of said laser pulses to said target and said reflected laser pulses from said target”

Following the *Markman* hearing in this case, the construed certain language in this Claim element as follows:

A precision timer coupled to the transmitter and receiver that determines a flight time of laser pulses reflected from a target. A separate clock or timer is not required.

Laser Technology, 215 F. Supp. 2d at 1141. The following evidence reflects that the Accused Device determines time of flight of a laser pulse by means of a precision clock that is coupled with the transmitter and receiver:

- Mr. McAlexander testified “the claim limitation is that the precision timing section of the clock is coupled to the transmit and receiving section, and it is, and determines the flight time of the laser pulse to the target and the reflected laser pulses from the target. This is done by the utilization of the precision timing clock in conjunction with the shift register location for specifically time denominated return information into time slots.” Tr. 810-11; *see also* Tr. 819.
- Asia Optical’s own product description in its instruction manual and promotional materials state: “Sophisticated circuitry **and a high speed ‘clock’** are used to instantaneously (2 sec.) calculate distance ***by measuring the time it takes for each beam to travel from the rangefinder, to the target and back.***” Pl. Ex. 81 (emphasis added); *accord* Pl. Ex. 7 & 76 (using almost identical language).
- Mr. Pfeffer’s non-infringement opinion to Defendants states: “in the AOI Product, a gated counter is used to count the number of pulses received (both noise and signal return) ***at time intervals corresponding to distances to a target, that is, time intervals which correspond to the time it would take a firing pulse to reach a target, be reflected therefrom and return to the optical receiver.***” D. Exs. C13-C16.

- Dr. Chien admitted that the Accused Device uses a 40 megahertz clock that operates at intervals of 24 billionths of a second to discriminate between noise and target signal pulses. *See* Tr. 274-75, 278-79; *see also* Tr. 763-64, 773 (McAlexander).
 - Mr. Dunne and Mr. McAlexander also testified that by using a phase shifting technique, the accuracy of the high-speed clock in the Accused Device is doubled, thereby making it capable of rendering range readings within plus or minus one meter, which is consistent with the accuracy described in the '779 patent. *See* Tr. 93-94; 782-84; 810-11; Pl. Ex. 1 at PL 1-10.
- iii. “a central processor section coupled to said precision timing section for determining a range to said target derived from said flight time of said laser pulses to said target and said flight time of said reflected laser pulses from said target”

Following the *Markman* hearing in this case, the construed certain language in this Claim element as follows:

A processor compares time-of-flight information stored in memory to locate the times-of-flight that occur with the greatest frequency, and uses the most frequent times-of-flight to determine a range to the target. Neither a specific microcomputer nor anything that puts received laser pulses in a "stack" is required.

Laser Technology, 215 F. Supp. 2d at 1141. The following evidence reflects that the Accused Device contains a microprocessor that compares the time-of-flight information stored in memory to determine the target distance by locating the most frequently occurring time-of-flight data.

- Dr. Chien testified that after the bins (which are based on time-of-flight) are dumped into memory, the Accused Device searches for the memory location with the most coincidences and deems that the target signal. *See* Tr. 214, 276-77.
- Mr. McAlexander testified that “it’s the code that’s located in the central processor acts on information stored in that array that determines the range to the target that’s based upon the flight time of the pulses that was loaded based on the time denominated clocking of the information to the array.” Tr. 811. *See also* 785, 795-97, 819-20.

Based on the foregoing discussion and evidence, each of the claim elements of Claim 8 reads upon the Accused Device either literally or through the doctrine of equivalents. Therefore, Defendants have infringed this Claim of the '910 Patent.

C. Willful Infringement.

1. Standard for Finding Willful Infringement.

The Court has the power to “increase the damages up to three times the amount found or assessed.” 35 U.S.C. § 284. The increased damages part of Section 284 has been interpreted as requiring a two-step process: (1) the fact-finder must find by clear and convincing evidence willful or bad faith infringement; and (2) if such a finding is made, the Court must then determine in its discretion whether, and to what extent, to increase the damages award given the totality of the circumstances. *See Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1377-78 (Fed. Cir. 2002); *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996). The following factors are relevant to the jury’s analysis of willfulness and, therefore, equally relevant to the present Motion for Judgment as a Matter of Law (although some factors are more amenable to the Court’s second-step inquiry): (1) whether the infringer deliberately copied the patent; (2) whether the infringer had a good faith belief that the patent was either invalid, not infringed or both, including whether the infringer sought and obtained an objective and competent legal opinion to that effect;⁶ (3) the infringer’s conduct during the litigation; (4) the infringer’s size and financial condition; (5) the closeness of the case; (6) the duration of the

⁶ Among other things, the opinion must be premised upon the best information known to the defendant. “Whenever material information is intentionally withheld, or the best information is intentionally not made available to counsel during the preparation of the opinion, the opinion can no longer serve its prophylactic purpose of negating a finding of willful infringement.” *Comark Comms., Inc. v. Harris Corp.*, 156 F.3d 1182, 11192 (Fed. Cir. 1998). *See also Amsted Indus. Inc. v. National Castings Inc.*, 16 U.S.P.Q.2d 1737, 1742 (N.D. Ill. 1990) (“[The] cases firmly establish that a party which withholds material information from counsel in seeking an opinion as to potential infringement cannot subsequently claim good faith reliance upon that opinion in defense to a claim of willful infringement.”).

infringer's misconduct; (7) any remedial action taken by the infringer; (8) the infringer's motivation for the harm; and (9) whether the infringer concealed or attempted to conceal its misconduct. *See Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992) (citing all nine factors); *see also Transclean Corp.*, 290 F.3d at 1377-78; *Bott v. Four Star Corp.*, 807 F.2d 1567, 1572 (Fed. Cir. 1986).

2. Evidence of Willful Infringement.

The evidence of willful infringement in this case is both “overwhelming” and of the sort that the jury would not be at liberty to disbelieve. *Hurd*, 734 F.2d at 499. The pertinent evidence is as follows:⁷

- ***Defendants deliberately copied LTI's patents***, as demonstrated by: Jeremy Dunne's testimony that the receiver unit in Asia Optical's device was an exact copy of the receiver identified in his patents, *see* Tr. 82-87; Tim Carpenter's letter to Asia Optical in September 1999 advising it that its “receiver schematic [was] duplicated (all the way down to resistor values) from the Laser Tech receiver,” *see* Pl. Ex. 42; Joseph McAlexander's testimony that the “schematic that was provided by Asia Optical was in fact -- at least for purposes of practicing the inventions, was the same,” *see* Tr. 745; Peter Chien's testimony that Asia Optical's first-generation laser rangefinder used a rain mode button because the LTI/Bushnell device had such a mode, *see* Tr. 200-01; Asia Optical, in creating its own promotional materials for its second-generation laser rangefinder in 1997, copied verbatim large portions of an advertisement created by LTI/Bushnell in 1995 for its own laser rangefinder, *see* Pl. Exs. 7 & 130; and Mr. McAlexander's testimony that the mode button on the second-generation Asia Optical device, which was shown on the Asia Optical **and** Bushnell promotional materials, does not work as advertised in that several of the modes do not operate, *see* Tr. 765-66.
- ***Defendants had no good faith basis, be it based on a competent legal opinion or otherwise, to believe that LTI's patents were invalid or that they were not infringed***, as demonstrated by:
 - Dr. Chien's and Robert Lai's testimony that Asia Optical was aware of certain of LTI's patents as early as 1997, *see* Tr. 204-05 (Chien); Tr. 293-94 (Lai);

⁷ LTI intends to submit additional evidence to the Court as part of a motion for enhanced damages, should the jury or this Court find, as a matter of law, that Defendants willfully infringed LTI's patents.

- Tim Carpenter compared Asia Optical's device to certain of LTI's patents and informed Asia Optical in September 1999 that its device infringed, *see* Pl. Ex. 42; and yet Asia Optical never contacted Mr. Carpenter to request clarification or ask questions regarding his analysis, *see* Tr. 636;
- Defendants were urged by an attorney in mid-March 1999 to retain counsel for purposes of seeking a non-infringement opinion, *see* Pl. Ex. 25; but Asia Optical did not retain an attorney for such a purpose (Barton Showalter) until November 1999, *see* Pl. Ex. 44; Asia Optical then withheld relevant information from Mr. Showalter, namely the infringement report of Mr. Carpenter, *see* Tr. 506-07; D. Ex. C21 (BB0052-53), despite a request from Mr. Showalter that would have covered it, *see* Pl. Ex. 43; D. Ex. C21 (BB0316-17); and ultimately Mr. Showalter never delivered a final non-infringement opinion to Defendants, *see* Pl. Exs. 51, 57-58;
- Defendants then obtained a preliminary non-infringement opinion from Martin Pfeffer in late May 2000 and a purported "final" opinion in June 2000, *see* D. Exs. C14, C15, eight months after being told by Mr. Carpenter that the product infringed LTI's patents; neither Pfeffer opinion letter takes into account Mr. Carpenter's analysis (despite the fact they acknowledge its existence), *see* D. Exs. C14-C15, and neither letter is signed or printed on law firm letterhead, *see id.*; lastly, Defendants changed their theory on the "time of flight" issue over the course of the litigation, thereby demonstrating the fallacy of their position originally espoused by Mr. Pfeffer in his opinion letters, *see* D. Exs. C14-C15; Tr. *passim*.
- **Other factors.** As has been discussed *supra* at Part II.B.2, the infringement case is not a "close" one, but is instead "overwhelming"; although Doris Lin denied under oath at trial that Asia Optical copied an advertisement created by LTI/Bushnell for its own rangefinder, *see* Tr. 420-24, the evidence is clear that Asia Optical did copy those Bushnell materials and did so twice, *compare* Pl. Exs. 7 & 76 with Pl. Ex. 130; Defendants do not dispute that they took no remedial action to avoid infringing LTI's patents; and Defendants' misconduct has occurred over the course of nearly 7 years, beginning with Asia Optical's first-generation laser rangefinder (sold through Tasco and Blount) that arguably infringed LTI's '779 patent, *see* Tr. 75-76 (Dunne), 293-94 (Lai).

In light of the foregoing evidence, the only reasonable conclusion that the jury could reach is that Defendants have willfully infringed LTI's patents.

III. CONCLUSION

For the reasons stated above, LTI respectfully requests that the Court enter judgment as a matter of law in its favor and against Nikon and Asia Optical for infringement of Claims 11-14

and 16 of the '779 Patent and Claim 8 of the '910 Patent. LTI also asks that this Court adjudge as a matter of law that Defendants' infringement of these Claims was willful.

Dated: April __, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of April, 2003, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW FOR INFRINGEMENT (INCLUDING WILLFULNESS)** has been sent to the following:

via hand delivery

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