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REPLY BRIEF

04-1609, 05-1141, -1202

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GOLDEN BLOUNT, INC.

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS IN CASE NO. 3:01-CV-127-R
SENIOR JUDGE JERRY BUCHMEYER

REPLY BRIEF OF
DEFENDANT-APPELLANT ROBERT H. PETERSON CO.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

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June 20, 2005

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1. The full name of every party of amicus represented by this counsel is:

Robert H. Peterson Co.

2. The name of the real party in interest (if the party names in the caption is not the real party in interest) represented by this counsel:

Not Applicable

3. All parent companies and any publicly held companies that own 10 percent of more of the stock the party or amicus represented by this counsel are:

Not applicable

4. The names of all firms and the partners or associated that appeared for the party or amicus now represented by this counsel in the trial or agency or are expected to appear in this court are:

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ARGUMENT¹

INTRODUCTION.

Patent infringement claims are an area of the law in which specific details matter. A careful application of the law to precisely defined facts is required. Plaintiff-appellee Golden Blount, Inc. (“Blount”), however, has provided this Court with 60 pages of generalities and conclusions which ignores both controlling law² and key facts³.

Crucially, Blount ignores the lack of any substantial evidence supporting the crucial Findings. For most of its argument, Blount relies solely on deference to the district court’s credibility determinations without detailing evidence. The district court, however, may not “insulate his findings from review” by casting them as being grounded on credibility determinations. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

¹ For purposes of this brief, Peterson refers to its opening brief as “Peterson’s Br.” and refers to Blount’s response brief as “Blount’s Br.”

² For instance, Blount mistakenly argues that because Defendant-appellant Robert H. Peterson Company (“Peterson”) did not file a Rule 52(b) motion after the untimely September 2 Findings, “Peterson has waived” any appeal. (Blount Br. at 17, n. 6.) Not so. F.R.Civ.P 52(b) (“the evidence supporting the findings may be later questioned whether or not ... the party raising the question objected.”)

³ As it has from the beginning, Blount ignores both the “raised level” limitation of U.S. Patent No. 5,988,159 (the “Patent”) and the fact that Peterson sold all but 10 of its accused EMBs as separately packaged single-burner accessories. (JT-1231-32.)

A Finding is clearly erroneous if, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Jimenez v. Mary Washington College*, 57 F.3d 369, 379 (4th Cir. 1995) (Identifying four categories of mistake: improper legal standard, no substantial evidence, disregard of substantial contrary evidence and finding contrary to clear weight). Given these tests, the Findings entered below will not withstand scrutiny. They must be reversed.

I. BLOUNT FAILED TO PROVE DIRECT INFRINGEMENT BY PETERSON.

It is beyond dispute that Peterson manufactured and sold the G4 and G5 primary burners and EMB secondary burners as separate, stand-alone products. (JT-1231-32) Even Mr. Blount admitted that he knew that Peterson’s products were sold separately. (JT-1070.) Peterson’s components must be assembled such that the top of the G4 or G5 primary burner is above the top of the EMB secondary burner for any infringement to occur. *See Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1059 (Fed. Cir. 2004) (“*Blount I*”; “raised level” claim limitation).

Peterson only ever assembled 11 two burner devices: (1) a single showroom demonstration unit and (2) approximately ten special order G5-EMBs. These are the only devices as to which Peterson was capable of direct infringement. Blount,

however, cites no evidence showing that any of these devices satisfied the “raised level” claim limitation. (*See* Blount Br. at 11.)

Thus, Blount misstates the record when it claims that “[t]he District court first compared the construed claims *against Peterson’s device.*” (Blount Br. at 35, emphasis added.) The court could have done no such thing. None of the devices that Peterson assembled were in court, nor were any of the demonstrative exhibits shown to fairly represent them.

Comforting itself in generalities and misdirection, Blount merely claims that DX30 and DX43—which on their face pertain only to the G4—also show how the EMB was fitted to the G5, a different product. (JT-1656.) This is sheer speculation, not any sort of permissible evidentiary inference.

Blount erroneously relies upon *Intel Corp. v. Int’l. Trade Comm.*, 946 F.2d 821 (Fed. Cir. 1991) and *Hilgraeve Corp. v. Symantec Corp.*, 265 F.3d 1336 (Fed. Cir. 2001) for the proposition that “a device may infringe if it has the present capability of functioning in the same manner described by the claim.” (Blount Br. at 44.) The controlling rule, however, is that the accused device does not infringe if it does not infringe in its normal configuration, even if it can be altered to infringe. *Hilgraeve*, 265 F.3d at 1343, *citing High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556 (Fed. Cir. 1995). Blount’s claim

fails because it offered no evidence concerning the normal configuration for a G5-EMB combination.

Blount also cites no evidence concerning when or how the one demonstration unit in Peterson's showroom was assembled. Nothing was proved about its normal configuration.

The remainder of Peterson's EMBs were sold as separately packaged accessories. (JT-1231-32 These products are non-infringing *components* of a possibly infringing two-burner apparatus. *Intel* and *Hilgreave* do not establish direct infringement by Peterson under such circumstances. Direct infringement cannot occur until all claim limitations are satisfied in a single device. *See Intel*, 946 F.2d at 832 (operation of accused EPROM met all claim limitations).

Blount argues that the court below properly relied on Mr. Blount's "extensive and unrebutted testimony" comparing the claim elements of the Patent to "Peterson's device" and on certain demonstrative exhibits (PX4A, DX31 and DX32.) (Blount Br. at 11, 34-35.) None of this "evidence," however, was shown to be relevant to any device that Peterson ever assembled.

Critically, Blount now admits that the “raised level” limitation was the only real dispute at trial.⁴ (Blount Br. at 11.) Yet, Mr. Blount offered no evidence on that issue.

First, Blount was asked to read the key limitation of Claim 1 to himself and to comment. (JT-980.) Mr. Blount limited his answer to *horizontal* positioning: “The secondary coal burner elongated tube positioned forwardly on the primary burner tube. It’s the same in both cases.” (*Id.*) He did not affirmatively testify about *vertical* positioning.⁵

Next, Mr. Blount was asked if “there is a certain amount of vertical separation that’s present in some of your claims.” (JT-985.) When Mr. Blount answered affirmatively, his counsel stated: “We’ll come back to that.” (*Id.*)

When Blount’s counsel returned for the final time to vertical positioning, he admitted that he might have “passed over it too quickly in view of” Peterson’s vertical limitation defense. (JT-989.) But, counsel then only asked Mr. Blount

⁴ As Blount necessarily recognizes, the parties did not stipulate about the “raised level” claim element. (JT-295-96.) Thus, the Court could not have properly relied upon the stipulation to determine the “raised level” limitation. (*But see* Blount Br. at 35: “the District Court relied on a stipulation between the parties” in finding direct infringement).

⁵ The next question was “What makes you say that?” to which the witness replied: “Well, look at it yourself.” (JT-979-80.) The witness was referring to PX9. (*See* JT-978; JT-1502.) Critically, although the depictions of “Defendant’s Sold Device” in PX9 clearly show the horizontal orientation of the burners, they do not show vertical positioning.

whether vertical separation was “actually utilized” in the invention. (JT-990.) Incredibly, Counsel failed to ask Mr. Blount anything about the vertical positioning of the burners in any Peterson product(s). Thus, Mr. Blount offered no affirmative testimony relating the key “raised level” limitation to any accused device.⁶ It was clear error to rely on Mr. Blount for proof of direct infringement by Peterson.

Blount next cites PX4A, a demonstrative exhibit that, like PX9, was never authenticated by anyone. (Blount Br. at 11, 36.) As Peterson has argued, an unauthenticated demonstrative exhibit is evidence of nothing. (Peterson Br. at 36-37.) Ignoring most of Peterson’s authorities, Blount mistakenly relies on dicta in *United States v. Papi*, 910 F.2d 1357, 1366 (7th Cir. 1990), a case in which, unlike this one, there was substantial authentication evidence. *Id.*

Blount, however, misses the point. Even if PX4A was properly admitted, it cannot be relevant unless other evidence shows it to be representative of “Peterson’s Sold Product,” as Blount claims. (Peterson Br. at 35-37, citing *United States v. Blaylock*, 20 F.3d 1458, 1463 (9th Cir. 1994), *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991) and *Renfro Hosiery Mills Co. v. National Cash Register Co.*, 552 F.2d 1061, 1065 (4th Cir. 1977).) Thus, even if

⁶ Nor could he have properly done so. Mr. Blount admitted that he was “not really” familiar with Peterson’s G4 product and had observed “zero” EMB installations. (JT-1054, JT-1062.) Thus, he was incapable of establishing the key vertical limitation.

Blount is correct that Peterson's trial counsel waived objection *to the admission* of PX4A (or any other demonstrative exhibit), that waiver does not also make any such exhibit relevant to any issue.

No evidence affirmatively shows that either demonstrative exhibit was assembled in "normal configuration." Absent an affirmative showing of relevance, neither PX4A nor any other demonstrative exhibit can be "substantial evidence" capable of sustaining any Finding. Blount does not argue otherwise.

Moreover, it is obvious that the district court erred in relying on PX4A. Finding 42 specifically recites a carpenter's level demonstration at trial showing the relative levels of the burner tubes using PX4A. (JT-59.) Of course, no such test was ever run *at trial* on PX4A. (See JT-1173-74, demonstration using DX31 and DX32, not PX4A.)

It was at the August 18, 2004 post-trial motion hearing that Blount's counsel caused PX4A to reappear in open court and used a level to remind the court of the trial demonstration. (JT-3131.) Except, of course, that counsel's representation about PX4A being used at trial was totally false. It is likely, given Finding 42, that the trial court was confused by this argument.

In an attempt to avoid this issue, Blount claims that "Peterson's D31 and D32 [are] substantially identical to [PX]4A." (Blount Br. at 11, 35). No evidence supports this contention, however. No testimony compared the two exhibits, even

generally.⁷ Critically, there is no evidence that the vertical positioning of their burners in these two demonstrative exhibits is in any way comparable or that either exhibit is a fair representation of how Peterson or a customer normally assembled a two-burner device. Mr. McLaughlin verified at trial, using a carpenter's level on DX31 and DX32, that those burners can easily be configured such that the top of the front or secondary burner was above the top of the secondary burner. (JT-1181-82.)

If Blount's direct infringement arguments were correct, it would have easily prevailed in *Blount I*. Its arguments, however, remain unavailing. The direct infringement Findings are clear error for lack of any substantial evidence and must be reversed.

II. BLOUNT HAS ADMITTED THE ABSENCE OF CONTRIBUTORY INFRINGEMENT.

Because it fails to distinguish between proof of direct and indirect infringement, Blount erroneously relies on *Intel* and *Hilgraeve* for its contributory infringement argument. (Blount Br. at 44.) It is well established, however, that contributory infringement is negated by proof that the accused component is

⁷ Blount cites two transcript passages as showing that the judge "came down from the bench and closely viewed" these demonstrative exhibits. (Blount Br. at 37-38.) The passage at JT-975, however, records the court's statement that "I can see it from where I am sitting." Nothing in the other cited passage or elsewhere affirmatively reflects the judge leaving the bench. (JT-1173-76.)

capable of substantial non-infringing uses. *See Blount I*, 365 F.3d at 1061 (“Blount must show that Peterson’s components have no substantial non-infringing uses.”).⁸

As Blount judicially admitted on remand and again admits in its appeal brief, Peterson’s EMB can be installed with its top level with or above the top of the primary burner, clearly a non-infringing use. (Blount Br. at 45: “Even though Peterson’s device could be arranged in a non-infringing configuration...” *See also* JT-1181-82: showing secondary burner above top of primary burner on DX31-32.) Those judicial admissions negate Blount’s contributory infringement claim.

Critically, the rule for which Blount cites *Intel* and *Hilgraeve* applies only to proving direct infringement. As the Court noted in *Intel*, the standards for proving direct and indirect infringement are different:

GI/M argues that an alleged infringer must intend its parts to be used in an infringing fashion and cites *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 415, 137 U.S.P.Q. 84, 89 (5th Cir. 1963), in support of its argument. As noted by Intel, there is no intent element to *direct* infringement. *See* 35 U.S.C., § 271(b) and (c). *Fromberg* deals with induced and contributory infringement and is therefore inapposite.

Intel, 946 F.2d at 132 (emphasis in original). For the same reasons, *Intel* and *Hilgraeve* are inapposite here.

Blount’s contributory infringement argument flies in the face of established law, including the law of this case. Because Blount has judicially admitted that

⁸ This ruling is the law of this case and is not subject to challenge on this appeal.

Peterson's EMB can easily be installed in a non-infringing configuration, it has failed to establish the absence of substantial non-infringing uses for the EMB.⁹ The Findings of contributory infringement are clearly erroneous because they ignore Blount's judicial admission and rely on testimony about whether the EMB was a "staple article of commerce" which was both based on an incorrect explanation of the legal test and rejected by this Court in *Blount I*. (See JT-0066: Finding 64 relying on Bortz' "staple article" testimony; *Blount I*, 365 F.3d at 1061) They must be reversed.

III. BLOUNT FAILED TO PROVE INDUCED INFRINGEMENT.

In order to prove induced infringement, Blount had to prove both that: (i) following Peterson's assembly instructions would lead to infringement and (ii) Peterson intended to cause customers to directly infringe. *Alloc, Inc. v. ITC*, 342 F.3d 1361, 1374 (Fed. Cir. 2003) ("a patentee must show that an alleged infringer knowingly induced another to commit an infringing act to establish induced infringement"). Blount failed to prove either prong of this test.

⁹Nor is it Peterson's burden to show that customers used EMBs in a non-infringing manner. See *Blount I*, 365 F.3d at 1061 ("*Blount must show that Peterson's components have no substantial non-infringing uses.*") (emphasis added). *Electro Scientific Indus., Inc. v. General Scanning, Inc.*, 247 F.3d 1341 (Fed. Cir. 2001) did not consider contributory infringement and does not reverse the burden for proving contributory infringement recognized in *Blount I*. 247 F.3d at 1350 (argument that patentee failed to show infringing use by customers waived). Blount's burden shifting argument is, again, just plain wrong.

Blount's factual argument about the outcome of following Peterson's instructions is supported solely by the demonstrative exhibits, PX4A and DX31-32. (*See* Blount Br. at 47.) As argued above, however, absent affirmative evidence showing that these exhibits demonstrate the normal configuration achieved by following Peterson's instructions, they are probative of nothing. *See* Section I, *supra*, pp, 6-7.)

Blount also failed to prove the second prong of the induced infringement test because it offered no evidence of Peterson's intent to cause infringement. As this Court recently explained, "there is a lack of clarity concerning whether the required intent must be merely to induce the specific acts or additionally to cause an infringement." *Insituform Technologies, Inc. v. Cat Contracting, Inc.*, 385 F.3d 1360, 1378 (Fed. Cir. 2004). That issue, however, is not before this Court. Judge Buchmeyer adopted the stricter standard. (JT-0079: "Further, Blount must show that Peterson knew or should have known that such actions would induce direct infringement.") Blount did not appeal this ruling, nor does it now argue against its application. Thus, Blount must show that Peterson knew or should have known that it was causing customers to infringe. It did not do so.

Blount does cite any direct evidence that Peterson knew its recommended installation was infringing. Blount argues only that circumstantial evidence¹⁰ proves that Peterson “should have known” it was causing infringement. (Blount Br. at 48.) Blount’s “should have known” argument, however, boils down to its assertion that Peterson should have anticipated the court’s ultimate claim construction ruling. *See Blount I*, 365 F.3d at 1063 (“As is so often the case in trials involving ‘Markman hearings,’ the question of infringement was essentially decided as a matter of claim construction.”) The “should have known” test for intent, however, does not reach that far.

Prior to verdict, Peterson believed in good faith that if the gas ports of the secondary burner were level with or above the gas ports of the primary burner, no infringement occurred. Peterson created and offered DX30 at trial to prove that point.¹¹ No evidence shows Peterson’s belief to be unreasonable. The term “‘should have known’ imparts a test of reasonableness.” *Shultz v. Dep’t of the Army*, 886 F.2d 1157, 1160 (9th Cir. 1989). Blount does not claim that any

¹⁰ “[I]ndirect or circumstantial evidence [is] the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts.” Fifth Circuit Pattern Jury Instructions, Civil, No. 3.1.

¹¹ That Blount also believed that DX30 showed the absence of infringement is shown by its vicious attack in its appeal brief in *Blount I* where it labeled DX30 a “Johnny come lately” exhibit appropriately given no weight by the trial court. (*See* JT-3422.)

evidence shows that Peterson's belief in its claim construction was either not honestly held or was unreasonable at any time. *See Schultz*, 886 F.2d at 1160 (reasonable alternative interpretation of events negated "should have known" inference).

Here, DX30 and DX34 are just as likely to show Peterson's belief that it was not inducing infringement under its claim construction as the contrary inference that Blount asserts. "Where circumstantial evidence is used to establish a fact ... it must be sufficient to establish that fact and no other." *Nelson v. United States*, 821 F.Supp. 1496, 1503 (M.D. Ga. 1993). *See also Dep't. of Economic Development v. Arthur Andersen & Co.*, 924 F.Supp. 449, 474 (S.D.N.Y. 1996) ("Circumstantial evidence ... is not merely evidence that is as consistent with the fact sought to be proved as with its opposite.") As such, these exhibits are not circumstantial evidence of Peterson's intent to cause infringement.

This case clearly lacks the type of circumstantial evidence capable of proving intent to induce that was described in *Fuji Photo Film Co., Ltd. v. Jazz Photo Corp.*, 394 F.3d 1368 (Fed. Cir. 2005). The *Fuji* court cited evidence that "Mr. Benun twice sought a license from Fuji" and "under Mr. Benun's leadership, Jazz continued to sell refurbished LFFP's even after the ITC found infringement." *Id.*, 394 F.3d at 1377-78. Unlike Jazz, Peterson never considered a license. (JT-1207-08.) Peterson never thought it needed one.

Moreover, Blount's claim that Peterson "had notice" of its infringement contentions from the first pre-suit letter is also incorrect. (Blount Br. at 46.) The "should have known" test necessarily deals with imputed knowledge. *See Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980). Constructive notice, however, must pertain to the determinative facts. None of Blount's pre-suit letters disclose its contention that infringement is shown by the positions of the tops of the burners. (*See* JT-1513; JT-1516; JT-1518.)

In fact, none of Blount's pre-suit letters even claim induced infringement. These letters state, without further explanation, that "your EMB ... [is] clearly within the scope of at least some of the claims of the subject patent." (JT-1516.) That statement, of course, is demonstrably false. Every claim of the Patent recites an apparatus with a vertical separation between two burners. Peterson's EMB, as manufactured and sold, clearly does not satisfy the "raised level" claim limitation.

Blount's complaint also accuses Peterson only of direct infringement by making and selling the EMB. (JT-0111, ¶ 5: *see* reference to 35 U.S.C., § 271(a).) Blount's direct infringement claim did not place Peterson "on notice" of Blount's vertical limitation contentions. Because Blount's claim was so obviously

incorrect, Peterson acted reasonably in concluding that Blount had wrongly accused it of infringement.¹²

Intent to induce infringement is difficult to prove while both parties are reasonably asserting plausible claim constructions. In both *Fuji* and *Insituform Technologies*, the key evidence showing intent included continued sales in the face of an infringement finding. *Fuji*, 394 F.3d at 1378 (ITC finding); *Insituform Technologies*, 385 F.3d at 1378 (1991 first trial finding). See also *Imonex Services, Inc. v. W.H. Munzprufer Dietmar Trenner GMBH*, Nos. 04-1262, 04-1290, 2005 WL 1204855, *3 (Fed. Cir. May 23, 2005) (willful infringement sustained because “[t]he first verdict certainly placed defendants on notice” of likely infringement). No such evidence was presented here.

This Court recently made an analogous intent ruling in *Clontech Laboratories, Inc. v. Invitrogen Corp.*, 406 F.3d 1347 (Fed. Cir. 2005). Although *Clontech* determined intent to deceive for purposes of mismarking, the intent test adopted is relevant here: “in order to establish knowledge of falsity, the plaintiff must show . . . that the party accused of false marking did not have a reasonable

¹² Although Blount never amended its complaint, it did preserve its induced infringement claim in its final pretrial submissions. (See JT-0290.) Blount, however, did not file its claim construction brief explaining its contentions until May 20, 2002, on the eve of trial. (JT-0372.) Blount cannot truthfully claim that Peterson was “on notice” of the true nature of its infringement claims at any earlier time. The record does not disclose how many, if any, EMBs were sold by Peterson after such notice was received.

belief” that the marking was proper. 406 F.3d at 1352-53. By analogy, the requisite intent to induce infringement cannot be shown from a recommended installation that the defendant honestly believes, based on a reasonable claim construction, does not infringe, even if a different construction resulting in infringement eventually prevails:

[I]nterpreting claims is not an exact science, and that consequently where one “has an honest, though mistaken, belief that upon a proper construction of the patent it covers the article which he marks,” the requisite intent to deceive the public would not be shown.

406 F.3d at 1352 (*quoting London v. Everett H. Dunbar Corp.*, 179 F.2d 506, 510 (1st Cir. 1910)). *See Ferguson Beauregard/Logic Controls v. Mega Systems, LLC*, 350 F.3d 1327, 1342 (Fed. Cir. 2003) (equating “knew or should have known” test for intent to induce infringement with being “aware that his activities amounted to infringement”).

Peterson honestly believed its claim construction until trial (and did not sell an accused product thereafter). Documents like DX30, specifically created and offered by Peterson in its case in chief to show non-infringement under Peterson’s claim construction do not raise any inference of Peterson’s *intent* to induce infringement just because a different claim construction, in hindsight, rendered that configuration infringing. Blount’s intent argument is the classic *post hoc, ergo propter hoc* logical fallacy. The induced infringement Findings below are clearly

erroneous for lack of any substantial evidence (direct or circumstantial) of at least Peterson's intent and must be reversed.

IV. BLOUNT FAILED TO PROVE THE DAMAGES THAT WERE AWARDED.

A. NO DIRECT INFRINGEMENT CAUSED ANY LOST PROFITS.

Blount offered no evidence that it was part of a two-supplier market for Peterson's G5 product. The G5 is a special type of AGA certified primary burner. (JT-1656.) Peterson sold this more expensive product where local building codes required an AGA certified product. (JT-1657.) The damages Finding expressly relies on Blount and Peterson participating in a two-supplier market. (JT-0069-70; JT-0996-98.) No evidence, however, shows that Blount ever offered an AGA certified product or that any buyer of a Peterson G5 could have bought and installed any Blount product under local building codes.

Lost profits may only be awarded when the patent owner proves that it would have made a sale of its own product "but for" the sale of the infringing product. *Rite-Hite Corp. v. Kelly Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (*en banc*). To obtain lost profit damages, the patentee must reconstruct the market to show likely outcomes absent infringement. *Schockley v. Arcan, Inc.*, 248 F.3d 1349, 1362 (Fed. Cir. 2001) ("Such market reconstruction, though hypothetical, requires 'sound economic proof of the nature of the market.'").

No substantial evidence shows that sales of any Blount product would have been made but for the sales of Peterson's G5-EMB product. The Findings awarding lost profit damages for Peterson's alleged direct infringement with the G5-EMB combination are clearly erroneous for lack of any substantial evidence that Blount lost any sales.

Obviously, Blount also may not obtain lost profits with regard to the single demonstration unit that was never sold. Peterson's use of that unit cannot have displaced any Blount sale. Blount does not contend otherwise.

B. NO INDIRECT INFRINGEMENT CAUSED ANY LOST PROFITS.

There is also no substantial evidence showing: (i) when any induced infringement may have begun occurring, (ii) the quantum of such infringements or (iii) that Blount was a participant in a two-supplier market for Peterson's EMB retrofit products sold to existing G4 owners. As such, the lost profits Findings are clear error.

To obtain lost profits, the patentee bears the burden of proving both causation and the amount of lost sales. *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1370 (Fed. Cir. 2002) ("the patent owner bears the burden of proving . . . the quantum of damages"); *Minco, Inc. v. Combustion Engineering, Inc.*, 95 F.3d 1109, 1118 (Fed. Cir. 1996). The patentee must reconstruct the market absent infringement using "sound economic proof." *Shockley*, 248 F.3d at

1362. Blount never offered any such proof. It called no expert. Its only two witnesses (Mr. Hanft and Mr. Blount) admitted having no knowledge of the market in general or how Peterson's products were sold.

The first step in the required reconstruction is to identify when the infringement began occurring. *See Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 870 (Fed. Cir. 2003), *rev'd on other grounds*, ___ U.S. ___, No. 03-1237, 2005 WL 1383624 (June 13, 2005). Induced infringement cannot have commenced prior to the time when Peterson is found to have intended that its actions cause third parties to infringe. (*See* Section III, *supra*). Blount failed to prove the quantity of sales after Peterson learned of its claim construction contentions.

The next step is to show that Blount was a supplier in the relevant market where its sales were allegedly displaced. On this issue, Blount seriously misrepresents the record. (*See* Blount Br. at 54.)

First, Blount claims that Mr. Blount established that it and Peterson controlled 95% of the market. His conclusory statement, however, was offered complete with his explanation that he lacked the personal knowledge required to answer the question.¹³

¹³ Mr. Blount's testimony reads:

Second, Blount falsely claims that “[t]he record establishes that 97½ percent of the time an EMB is sold, it is sold with a standard ember pan (G-4 or G-5).” (Blount Br. at 54.) The record establishes no such thing. Mr. Hanft only testified about how *Blount’s* products were sold. (See Blount Br. at 14.)

Blount also purports to rely on Hanft’s opinion that his sales patterns are “typical” of other retailers. (See JT-1098-99.) Because Hanft was never designated as an expert, he could only opine as to matters rationally based on his own perception that are also helpful to the trier of fact. F.R.EVID. 701. Before giving the answer which Blount cites, Hanft had admitted that he had no personal knowledge of how Peterson sold its products, rendering the denial of Peterson’s objection to his typicality opinion clear error. (JT-1097: Q. “You don’t have any knowledge with regard to how distributors market the Peterson product, do you?”

Q. Between you and Peterson, can you tell me what you believe your percent of the market is?

A. I don’t know what their sales are. He wouldn’t tell me.

Q. I’m sorry?

A. We probably do 95 percent ...

* * *

A. [W]e have by far the lion’s share of the business, but Peterson has manufactured a copy of our product and they sold a lot of them. How many, we don’t know.

(JT-0996-97 and 0998.)

A. No . . .” *See also* JT-1071: Mr. Blount admits no knowledge of how Peterson sells its product other than that it uses dealers.)

The uncontradicted evidence is that many of Peterson’s EMBs were sold to Peterson G4 owners who retrofit their existing installations. (JT-1321.) No evidence shows that Blount was ever a supplier in this segment of Peterson’s market. Absent such proof, Blount is not entitled to lost profits on those sales. *See Minco*, 95 F.3d at 1119 (“A segment of the infringer’s sales may not warrant a lost profits award because the patentee cannot establish causation as to that segment.”). The district court’s refusal to accord any weight to the uncontradicted testimony that many of Peterson’s EMBs were sold as retrofit devices to existing G4 owners was clear error. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991) (“If a finding is directly contrary to the only testimony presented, it is properly considered to be clearly erroneous.”).

Because it remains Blount’s burden to show both causation (*i.e.*, that it was a viable alternative supplier for Peterson’s retrofit or AGA certified sales) and the quantum of lost sales (*i.e.*, how many, if any, Peterson sales were not retrofits), the Findings awarding lost profits damages which assume that Blount could have made every Peterson EMB sale are clearly erroneous for want of substantial evidence. *Transclean*, 290 F.3d at 1370; *Shockley*, 248 F.3d at 1362; *Minco*, 95 F.3d at 1118.

C. **BLOUNT OFFERED NO PROOF OF A REASONABLE ROYALTY.**

Blount, of course, would still be entitled to a reasonable royalty on any infringements. Yet, Blount elected to offer no proof from which a reasonable royalty could be calculated. It was Blount's burden to do so. *Golight, Inc. v. Wal-Mart Stores, Inc.*, 216 F.Supp.2d 1175, 1182 (D. Colo. 2002) ("a patent holder failing to prove an entitlement to lost profits has the burden of establishing compensatory damages in the form of a reasonable royalty"). It did not offer any proof of a reasonable royalty rate.

Moreover, Blount's entire market value claim fails as to Peterson's retrofit sales. Blount's claim simply makes no sense when the customer already owned a primary burner and only bought a secondary burner for retrofit. Under such circumstances, Blount could not have anticipated selling the unpatented components, which the customer had earlier purchased. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 656 (Fed. Cir. 1985) ("The ultimate determining factor is whether the patentee or its licensee can normally anticipate the sale of the unpatented components together with the patented components.") *See also Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964) (patent damages "constitute 'the difference between [the patentee's] pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred'") (quoting *Yale Lock Mfg.*

Co. v. Sargent, 117 U.S. 536, 552 (1886)); *Imonex Services*, 2005 WL 1204855, *3 (entire market rule rejected as to aftermarket sales).

Infringement or no, neither Blount nor Peterson would ever have sold more than just a secondary burner to Peterson's retrofit customers. Their prior separate non-infringing primary burner purchases are simply beyond the reach of the entire market value rule. *See Rite-Hite*, 56 F.3d 1538, 1549 (entire market value rule can apply "when a patentee seeks damages on unpatented components *sold with* a patented apparatus." (Emphasis added)).

Because Blount failed to prove how many, if any, Peterson EMBs were sold as part of a new fireplace installation as opposed to as retrofits, it failed to sustain its burden of proving the quantum of sales as to which the entire market value rule might be applicable. The district court erred as a matter of law in awarding Blount full "entire market value" damages on every Peterson EMB sale without segregating out the retrofit sales to which the rule is inapplicable.

D. IN ANY EVENT, THE RETURNED EMBs DID NOT INFRINGE.

Blount's damage claim for the 802 EMBs that were recovered unsold from dealers post-trial illustrates Blount's failure to distinguish between proof of direct and indirect infringement. Blount frivolously argues that: "Peterson mistakenly thinks it can 'uninfringe' 802 instances of contributory and induced infringement" by recovering unsold EMBs before they were installed. (Blount Br. at 57.)

Because of the raised level claim limitation, no infringement of any kind could occur with respect to any EMB until it was *installed* by someone onto a primary burner in an infringing configuration. *See Blount I*, 356 F.3d at 1059 (“raised level” limitation). The 802 returned EMBs were never removed from their boxes. They were never installed by anyone. No infringement of any kind ever occurred as to these 802 EMBs because they never consummated a union with a primary burner. Moreover, no contributory or induced infringement could have occurred without the actions of a third-party customer. *See Blount I*, 365 F.3d at 1061 (“There can be no inducement of infringement without direct infringement by some party,” *quoting Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986)). No third party ever touched these EMB’s. It was clear error to base a damage award on these non-infringing products.

V. BLOUNT FAILED TO PROVE WILLFUL INFRINGEMENT.

In order to sustain the Findings of willful infringement, there must be evidence which establishes, based on the totality of the circumstances, that the defendant voluntarily, deliberately or intentionally infringed the patent in suit. *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH, v. Dana Corp.*, 383 F.3d 1337, 1342-43 (Fed. Cir. 2004). Such evidence, however, may not include an adverse inference arising from “the failure to obtain an exculpatory opinion of counsel.” *Knorr*, 383 F.3d at 1346. *See also Insituform Technologies*, 385 F.3d at 1377

(willfulness finding vacated because based in part on failure to obtain opinion of counsel).

Here, the trial court certainly did draw an adverse inference against Peterson based on the manner in which its counsel formed and provided his opinions:

[T]he Court concludes that Peterson’s minimal attempt to attain a competent opinion is permeated by a lack of due care and was willful, which leads this Court to find that the case is exceptional.

(JT-0072: Finding 104.) In light of this Finding, Blount’s claim that the district court drew no adverse inference is simply ludicrous. (Blount Br. at 50.)

So is Blount’s argument that Peterson “opened the door” by offering its counsel’s opinion. (*Id.*) This is not an issue of privilege waiver. *Knorr* decided “whether there is a legal duty upon a potential infringer to consult with counsel” as part of its duty of care to avoid infringement. 838 F.3d at 1345. *Knorr* barred adverse inferences from the failure to consult with counsel only because the Court found no duty to seek legal advice. *Id.* Blount is wrong to argue otherwise. If no adverse inference can now arise from the failure to seek any legal advice, certainly none can arise from obtaining less than competent legal advice.¹⁴

¹⁴ After *Knorr*, Peterson suggests that a defendant who obtains incompetent or unpersuasive legal advice may be barred *in limine* from offering it as a defense, but the inadequate nature of the advice still cannot be affirmative evidence of willful infringement. See *Imonex Services*, 2005 WL 1204855, *3 (“while early receipt of legal advice would have strengthened the defendants’ argument that they had not willfully infringed, failure to have solicited such advice does not give rise to an inference of willfulness”); *Software AG v. BEA Systems, Inc.*, No.Civ.A. 03-739,

Peterson seeks reversal rather than remand because there is simply no competent evidence of willfulness once the manner in which counsel rendered his opinion must be disregarded. There is no evidence of deliberate copying¹⁵ or concealment or of any motivation to harm Blount. *See Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-27 (Fed. Cir. 1992), *abrogated in part on other grounds by Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). Peterson did investigate the scope of the patent and had a reasonable belief that it did not directly infringe and, under Peterson's claim construction, that its customers also did not infringe.

For the same reasons that Peterson did not intend to induce infringement, it also did not act unreasonably in concluding that it was respecting Blount's rights prior to the trial court's claim construction ruling. (*See* Section III, *infra*, pp, 11-16.) Willful infringement may not be found where the case is sufficiently close on the evidence. *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 244 F.3d 1365, 1380 (Fed. Cir.2001). The "close evidence" rule is merely another way of saying

2005 WL 859266, *2 (D.Del. April 8, 2005) (precluding mention of legal advice as prejudicial to plaintiff where privilege not waived).

¹⁵ The district court found "striking similarity" between the two devices, but did not expressly find copying, nor is there any evidence that Peterson was even aware of Blount's product in 1996 when the EMB was introduced, much less that Peterson copied it. (JT-0055; JT-1812-13: Peterson aware of Blount's product "a year or two" prior to November 23, 1999, at least a year after EMB sales began.)

that an infringer who is acting reasonably, although mistakenly about claim construction, is not willfully infringing. *See Hoechst Celanese Corp. v. BP Chemicals, Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996) (“Willful infringement is thus a measure of reasonable commercial behavior”).

The only affirmative evidence¹⁶ that Blount points to as showing willful disregard of the Patent is Peterson’s concern for having to pay attorneys’ fees if willful infringement was found. Blount cites no case holding that such a belief shows intent to willfully infringe. In fact, it shows the opposite. Attorneys’ fees and treble damages can be avoided by avoiding infringement. An accused infringer concerned about paying attorneys’ fees will take steps to avoid infringement. Doing so is the proper exercise of due care for the patent holder’s rights.

Moreover, a concern with avoiding the attorneys’ fees sanction is entirely consistent with reasonable commercial conduct in the face of an infringement claim. Here, the concern prompted Peterson to seek McLaughlin’s advice. Again, a perfectly reasonable thing to do. *Imonex Services*, 2005 WL 1204855, *3. Nothing McLaughlin told Peterson suggests that Peterson was then on notice that it

¹⁶ Blount’s claim that Peterson ignored its pre-suit letters shows that Peterson did not think that it needed a license because it believed that it did not infringe. (JT-1207-08.) *See Arthur Andersen*, 924 F.Supp. at 474 (“Circumstantial evidence . . . is not merely evidence that is as consistent with the fact sought to be proved as with its opposite.”)

was infringing or inducing infringement. After *Knorr*, the lack of McLaughlin's competence that the district court found decisive may only preclude Peterson from disproving willful infringement using his opinions. It cannot affirmatively show Peterson's intent to infringe. *Imonex Services*, 2005 WL 1204855, *3.

Below, Blount convinced the district court that Peterson's legal opinion defense was a ruse designed to avoid an attorneys' fees judgment. (*See* JT-0072: Peterson obtained "an incompetent, conclusory opinion to be used only as an illusory shield") That Finding, however, cannot stand after *Knorr* because it is based solely on an adverse inference arising from the degree of care in which Peterson's attorney, McLaughlin, rendered his opinions.

The Findings of Willful infringement must be reversed because there is no competent evidence of Peterson's wrongful intent.

VI. THE DISTRICT COURT LACKED JURISDICTION TO AMEND ITS AUGUST 18 ORDER.

Under Rule 58(a)(1)(B) and (b)(1), "judgment" is deemed entered when the "order disposing of" a Rule 52(b) motion is entered in the civil docket without a separate document also being entered.¹⁷ The clock for seeking further amendments to Findings started running immediately.

¹⁷ Blount's claim that a minute order cannot constitute a separate document is irrelevant: no separate document was required. (Blount Br. at 31-32.)

Thus, Blount had only 10 days after August 18, 2004, to seek further amended Findings by filing another Rule 52(b) motion. *See* F.R.Civ.P. 6(b) (court may not extend 10 day period).¹⁸ The documents Blount filed on August 31 were not a Rule 52(b) motion. *See* F.R.Civ.P. 7(b)(1) (motions must be written and state particular grounds). Thus, the district court lost jurisdiction to further amend the Findings before it did so on September 2.

Blount quite simply misses the point in arguing that the Court retained jurisdiction based on its Rule 59 motion. A pending Rule 59 motion cannot extend the 10 day limit for seeking further amendments under Rule 52(b). Rule 58(a)(1)(B) determines when judgment is deemed entered. Were a decision on Blount's Rule 59 motion even relevant, it was completely mooted by the August 18 Order. (*See* Peterson Br. at 28-29.)

Blount's reliance on Rule 60 is nothing more than a *post hoc* attempt to fabricate jurisdiction. Blount's August 31 filing was not a Rule 60 motion. Nor did the court below ever mention Rule 60 as a basis for its September 2 actions. Blount admits relying on Rules 50, 59 and 52(b) for the post-judgment relief it sought – not Rule 60. (Blount Br. at 27.)

¹⁸ Blount's argument that it was merely doing what Judge Buchmeyer instructed is also unavailing. (Blount Br. at 32-33.) The court had no power to extend the 10 day period prescribe by Rule 52(b) nor to alter the operation of Rule 58 about when "judgment" is deemed "entered."

Even Blount's cited cases recognize that the ability of courts to act *sua sponte* is limited to those situations enumerated in the rule, including "unusual and extreme situations where principles of equity mandate relief." See *U.S. v. Certain Land*, 178 F. Supp. 2d 792, 800 (E.D. Mich. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir.1990)). Blount has never suggested any mistake, inadvertence, excusable neglect, newly discovered evidence or fraud in the August 18 Order. Nor is there any "unusual and extreme situation." Rather, Blount obtained in the district court's August 18 Order everything it had asked for.

The district court plainly lacked jurisdiction to enter the September 2 Findings.

CONCLUSION

For the reasons stated above, the judgment of the district court must be ***Reversed.***

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

The undersigned, Counsel of Record for Defendant-Appellant, Robert H. Peterson Co (“Peterson”), hereby certifies that Peterson’s Reply Brief complies with the type-volume limitations provided in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. In preparing this Certificate, I relied on the word-count program of Microsoft Office Word 2003. Peterson’s Reply Brief contains 6,953 words.



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Dated June 20, 2005

CERTIFICATE OF SERVICE


The undersigned attorney of record in the above-captioned case certifies that he caused the foregoing **Reply Brief of Appellant-Defendant Robert H. Peterson Co.** to be dispatched to a Federal Express carrier for delivery to the Clerk of the Court for the United States Court of Appeals for the Federal Circuit, at the below address, within 3 days, on June 20, 2005.

Clerk of the Court
United States Court of Appeals for the Federal Circuit
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The undersigned attorney of record in the above-captioned case also certifies that he caused the foregoing **Reply Brief of Appellant-Defendant Robert H. Peterson Co.** to be served on the attorneys of record listed below via Federal Express delivery on June 20, 2005.

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