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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAVO SOLUTIONS, LLC

Plaintiff,

v.

KINGSTON TECHNOLOGY COMPANY, INC.,

Defendant.

Case No. 8:14-cv-01352-JLS-KES
Honorable Josephine L. Staton

PAVO'S OPPOSITION TO KINGSTON'S JUDGMENT AS A MATTER OF LAW

Kingston's motion for judgment as a matter of law must be denied because Pavo has presented more than sufficient evidence for a jury to find that Kingston willfully infringes claims 1, 4 and 24, and that Pavo is due more than 1 cent per unit for Kingston's infringement.

I. KINGSTON IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO NON-INFRINGEMENT

Kingston advances five different bases for its argument that it is entitled to judgment as a matter of law as to non-infringement. All of Kingston's arguments are supported by little more than attorney argument that mischaracterizes the evidence in the record, or relies on arguments that improperly import limitations into the limitations of the claims.

A. Parallel Plate Members

Pavo has presented more than sufficient evidence supporting a jury finding of infringement of this claim element. As Kingston admits in its briefing, its own corporate representative, John Terpening, admitted at trial that the top and bottom arms of the cover are parallel when attached to the case. 3/9 PM Tr. at 111:7-9 (Mr. Terpening: "Q Once it's fully assembled, you agree that the cover is parallel, correct? A That's correct."). Kingston's own expert gave similar testimony. 3/9 PM Tr. at 111:7-9 (Mr. Terpening: "Q Once it's fully assembled, you agree that the cover is parallel, correct? A That's correct."); 3/10 PM Tr. at 53:1-4 ("Q. You agree when you look at the device fully assembled that the arm of that cover are closer to parallel; right professor Rake? A. That's true."). Prof. Visser also gave substantial testimony, including citing Kingston's own schematics. 3/5 PM Tr. at 16:5-23:10 (discussing his analysis of the actual DT101G2 device, Exs. 18, 19, 42, and admissions from Mr. Terpening in deposition); Ex. 13.

Kingston's primary argument is that this limitation must be judged from the cover only when it has been detached from the case. Kingston's argument is inconsistent, however, with the language of claims 1 and 24. For example, the last

clause of the "cover" paragraph is "whereby the USB terminal piece is received in an inner space of the cover or exposed outside the cover." The USB terminal piece is located on the flash memory main body, and the flash memory apparatus would only include such swivel action if the cover were attached to the body. This argument applies similarly to other limitations (such as a "hinge hole receiving the hinge protuberance on the case for pivoting the case" limitation from claim 1 and the "hinge element which cooperates with the hinge element on the case for pivoting" limitation from claim 24). Contrary to Kingston's argument, the claim language itself requires that the cover be evaluated when attached to the body, not separately.

Kingston also argues that Pavo's position is contrary to its infringement position regarding "open front end," which Kingston argues is based on the cover being detached from the DT101G2. As Kingston notes in footnote 2, however, the parties have stipulated to infringement of the "open front end" limitation. Doc. 307 at 5; 3/10 AM Tr. at 9:20-10:19. The stipulation is not limited to the cover being detached. Kingston's argument also fails because it is a violation of its stipulation that it would not argue the "open front end" limitation was not infringed when the cover was attached to the device. Furthermore, contrary to Kingston's argument, Prof. Visser never testified that the cover only had an open front end when detached from the body or lacked an open front end when attached.

B. "Pair Of"

As Kingston acknowledges, Kingston has been precluded from arguing that this claim limitation is not met. 3/9 AM Tr. at 8:9-16. Indeed, the Court is going to instruct the jury "disregard any evidence or argument suggesting that a single piece of metal cannot form a pair of parallel plate members."

Regardless of whether Kingston's argument is appropriate, Pavo has provided more than sufficient evidence that this claim element is met, including the testimony of Prof. Visser, the DT101G2 itself (which plainly shows two thin, flat sheets of metal connected by a rounded closed rear end), and schematics. 3/5 PM Tr. at 16:5-

23:10 (discussing his analysis of the actual DT101G2 device (Ex. 13), Exs. 18, 19, 42, and admissions from Mr. Terpening in deposition). Indeed, Prof. Visser even directly addressed Kingston's argument when he testified:

> The way in which the cover is formed is not specified in the claims of the '544 patent. Whether it's formed from one piece of metal that's been stamped and bent into that shape or whether it's made from plastic that's injection-molded or whether it's made by die cast metal, it doesn't specify how the cover is made. It's just that when it's in its final configuration, it has a pair of parallel plate members.

3/5 PM Tr. at 18:25-19:7.

C. Closed Rear End

Pavo submitted more than sufficient evidence to support a jury finding of infringement of the closed rear end limitation of claim 1. 3/5 PM Tr. at 23:11-26:19 (Prof. Visser testimony analyzing evidence including the DT101G2, the '544 patent, Exs. 18, 42, 169, 60, and testimony from Mr. Terpening). Kingston's argument that Pavo has not produced evidence showing that the cover of the DT101G2 "fulfills the functionality set out in the patent" imports limitations to this claim requirement. Indeed, Kingston's argument admits it is relying on "functionality set out ***in the patent***" rather than the claim language to support its position. It would be reasonable for a jury to reject Kingston's argument and instead rely on Prof. Visser's opinion and evidence that is consistent with the plain and ordinary meaning of "closed rear end."

D. USB Terminal Piece Is Received In An Inner Space Of The Cover Or Exposed Outside The Cover

Pavo produced more than sufficient evidence that this limitation is met, including the testimony of Prof. Visser, the DT101G2, Ex. 169 and the testimony of Mr. Terpening. 3/5 PM Tr. at 30:11-31:15. Indeed, other evidence in the record would also support a jury verdict. *E.g.*, Ex. 42 (showing the terminal end within the

inner space of the cover). Kingston's argument that this claim element is a "conditional" limitation that "requires that the USB terminal is not exposed when it is in the inner space of the cover" is contrary to the actual language of the claim; ***there is no such limitation in claim 24***. Instead, claims 1 and 24 require that the USB terminal end be received within the inner space of the cover (which Prof. Visser showed to be infringed when the cover is closed) or exposed when outside the cover (which Prof. Visser also demonstrated to be true).

E. "Electrically Connected" And "Operatively Connected"

Pavo has produced more than sufficient evidence to support a jury verdict that the DT101G2 infringes the "electrically connected" and "operatively connected" limitations. 3/9 AM Tr. at 20:23-33:10 (testifying as to two different ways these elements are satisfied by the DT101G2). Kingston specifically argues that "Pavo (and the documents it relies on) failed to show any such connection continuing on from the controller to the memory element." Kingston's argument is contrary to the actual evidence at trial. *Id.* at 25:3-17 ("And using the same matching of names from the – we can see that the -- that these signals traverse from the controller to the memory element."); Ex. 16 (showing traces labeled FDATA0-7 connecting the controller chip to the memory element consistent with Mr. Gomez's testimony).

II. KINGSTON IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO WILLFULNESS

Pavo has presented more than sufficient evidence to meet its burden of willful infringement. "'Willfulness' requires a jury to find no more than deliberate or intentional infringement." *Eko Brands, LLC v. Adrian Rivera Maynez Enterprises, Inc.*, 946 F.3d 1367, 1378 (Fed. Cir. 2020). To the extent Kingston argues that only direct, not circumstantial, evidence is relevant to willful infringement, this argument must fail. As the jurors are instructed, "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for [the jurors] to decide how much weight to give to any evidence." Doc. 357 at 19.

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