IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICROWAVE VISION, S.A., MVG INDUSTRIES, SAS, and MVG, INC.,	:	
Plaintiffs,	:	
	:	CIVIL ACTION FILE
v.	:	NO. 1:14-CV-1153-SCJ
ETS-LINDGREN, INC.,	:	
Defendant.	:	

ORDER

Before the Court in this patent infringement action are defendant ETS-Lindgren, Inc.'s (ETS) motion for summary judgment of non-infringement (doc. 96),[1] and Plaintiffs' (also referred to as MVG) motion for summary judgment that their patent is not invalid. Doc. 93.

I. BACKGROUND

As related twice before:

> Plaintiff Microwave Vision, S.A. and its wholly owned subsidiaries MVG Industries, SAS, and MVG, Inc. (collectively, the "Plaintiffs"), and Defendant [ ] . . . ETS-Lindgren Inc. . . . are competitors in the field of over-the-air measurement systems, including multi-probe systems. See

[1] All citations are to the electronic docket and all page numbers are those imprinted by the Court's docketing software.

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> Doc. No. [19], p. 2. Among other things, such systems can be used to measure various parameters relating to antennas used in wireless devices, including wireless cellular communication devices. See id. Plaintiff Microwave Vision owns the rights to U.S. Patent No. 7,443,170 (the "170 Patent"), which issued on October 28, 2008, and is entitled "Device and Method for Determining at Least One Variable Associated With the Electromagnetic Radiation of an Object Being Tested." See Doc. No. [1], ¶ 17; Doc. No. [1-1]. Plaintiffs believe that Defendants' . . . multi-probe array measurement system utilizes technology claimed by the 170 Patent. Accordingly, Plaintiffs have filed the present action accusing Defendants of patent infringement. See Doc. No. [1]. . . . Defendants [then] filed counterclaims seeking declarations that (1) [they] have not infringed the '170 Patent, and (2) the '170 Patent is invalid. See Doc. Nos. [17]-[19].

Microwave Vision, S.A. v. ETS-Lindgren Inc., ___ F. Supp. 3d ___, No. 1:14-CV-1153-SCJ, 2016 WL 5092462, at *1 (N.D. Ga. Sept. 20, 2016).

As during claim construction and a previous round of summary judgment (ETS pressed its patent invalidity arguments there), Claim 12 of the 170 Patent and its structural components lie at the heart of the present motions:

> **"means for pivoting one or more of the network of probes and the support about a point located in the plane formed by the network of probes or about a point located in the plane parallel to the plane formed by the network of probes to vary, between successive ones of the plurality of measurements, an angle formed between the given one of the network of probes and the main axis of the support by a fraction of the angular pitch of the network of probes so that a total number of measurements in the plurality of measurements is greater than a total number of probes in the network of probes" is construed as follows:**
>
> **Function:**

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> "pivoting the network of probes, the support, or both about a point located in the plane formed by the network of probes, or in a parallel plane"
>
> * * *
>
> **Structure (for Pivoting the Support):**
>
> "an electric motor, an actuator that extends more or less horizontally in the plane of the arc and is hinged to one end of the base, and a convex bottom surface on the base of a mast, which rests, by means of one or more rollers, on a complementary concave surface."

Id. at *2.

After previously urging (unsuccessfully) that Claim 12 suffers fatal indefiniteness, ETS now moves for summary judgment again, this time contending that its accused device—specifically, its means for pivoting the support—is not structurally equivalent to MVG's. Doc. 101 at 13. MVG, of course, opposes, contending that fact issues mandate a jury's involvement. It also insists that ETS' invalidity affirmative defenses—that the 170 Patent is anticipated and obvious in light of prior art, and that Claim 12 is inoperable—fail as a matter of law. See doc. 100.

II. STANDARD OF REVIEW

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> Summary judgment is appropriate when the moving party establishes that, based upon the evidence presented, "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). "[T]he requirement that a dispute be 'genuine' means simply that there must be more than some metaphysical doubt as to the material facts." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) (citations and internal quotation marks omitted). The court views the record and draws all factual inferences in the light most favorable to the non-movant[, in this case, MVG]. Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313, 1317 (11th Cir. 2015). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." Id. at 1318 (quoting Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997)).

Dean–Mitchell v. Reese, ___ F.3d ___, 2016 WL 4756942, at *2 (11th Cir. Sept. 13, 2016).

III. ANALYSIS

A. Non-Dispositive Motions

Before turning to the substance of summary judgment, the Court must first address several preliminary matters: ETS' request to file a supplemental brief in support of its motion (doc. 133); ETS' motion to exclude John Estrada's (CEO of MVG) declaration (doc. 120); MVG's motion to strike ETS' expert's declaration (doc. 113); and *nine* motions to seal (docs. 94, 97, 108, 111, 112, 116, 119, 128, 136).

1. *Supplemental Brief Motion*

On June 13, 2016 Halo Electronics, Inc. v. Pulse Electronics, Inc., ___ U.S.

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___, 136 S. Ct. 1923 (2016), abrogated the existing rule for determining when 35 U.S.C. § 285 permits enhanced damages for patent infringement. ETS' pre-Halo summary judgment motion applied the old rule in resisting MVG's damages claims (see doc. 101 at 20), hence its current request to file a supplemental brief. Doc. 133. Observing that Halo only partially altered the old rule, MVG opposes another brief because ETS failed to address the surviving portion even before Halo. Doc. 134 at 3. To allow briefing on such an issue would, in essence, permit ETS an unjustified second bite at an apple three months after its first. Id.

Regardless, says MVG, any argument against enhanced damages is futile and thus additional briefing unnecessary. Doc. 134 at 3. In particular, MVG contends that ETS "does not have *any* admissible evidence" "on whether [it] *actually did* have a reasonable noninfringement position in mind," and thus whether enhanced damages are appropriate, "when it made the decision to continue selling the accused systems." Id. at 4 (emphasis in original).

Pragmatism counsels denial of ETS' motion. The Court has before it extensive argument on enhanced damages, both under the old rule, and, thanks to the briefing on the supplement motion (which strayed quite far into the merits of the parties' respective damages positions), under Halo. It also has a

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