IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FRESHUB, INC., FRESHUB, LTD., *Plaintiffs* -vs- AMAZON.COM INC., AMAZON DIGITAL SERVICES, LLC, PRIME NOW, LLC, WHOLE FOODS MARKET INC., WHOLE FOODS MARKET SERVICES, INC., AMAZON.COM SERVICES LLC, *Defendants*	§ § § § § § § § § §	6:21-CV-00511-ADA

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs Freshub, Inc. and Freshub, Ltd's (collectively "Freshub") Motion for Judgement as A Matter of Law under Fed. R. Civ. P. 50(b) and Motion for New Trial on Infringement and Damages under Fed. R. Civ. P. 59(a). Dkt. 277. The Court heard the parties' arguments on October 19, 2021. After careful considerations of the relevant facts, applicable law, and the parties' oral arguments, the Court **DENIES** both of Freshub's Motions.

I. BACKGROUND

Plaintiff Freshub initiated this patent infringement action on June 24, 2019, against Defendants Amazon.com Inc., Amazon.com Services, LLC, Prime Now LLC, (collectively, "Amazon") and Whole Foods Market Services, Inc. ("Whole Foods") (together, "Defendants"). Freshub accuses Defendants of infringing claims 1 and 6 of U.S. Patent No. 9,908,153 ("the '153 Patent"), claim 1 of U.S. Patent No. 10,213,810 ("the '810 Patent"), and claims 20 and 30 of U.S. Patent No. 10,232,408 ("the '408 Patent") (collectively, the "asserted patents").

Jury trial commenced on May 17, 2021. Dkt. 48. At the conclusion of a five-day trial, the jury returned a verdict finding that all asserted claims are valid, but none of the asserted claims

were infringed by Defendants. Dkt. 254 (Jury Verdict Form). On August 11, 2021, Freshub filed the instant motions (Dkt. 277), which were subsequently fully briefed (Dkt. 284, Opposition; Dkt. 291, Reply). The Court heard arguments regarding the motions on October 19, 2021 (Dkts. 295, 296).

II. MOTION FOR JUDGEMENT AS A MATTER OF LAW

A. Legal Standard

"Under Rule 50, a court should render judgment as a matter of law [(JMOL)] when . . . there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 149 (2000) (quoting Fed. R. Civ. P. 50(a)(1)). "In the Fifth Circuit, JMOL is appropriate if the facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded otherwise." *Mettler-Toledo, Inc. v. B-Tek Scales, LLC*, 671 F.3d 1291, 1294 (Fed. Cir. 2012) (citing *Armendariz v. Pinkerton Tobacco Co*., 58 F.3d 144, 148 (5th Cir.1995)). "There must be a conflict in substantial evidence to create a jury question," which means that "a jury's determination must be supported by substantial evidence." *Id*. (citations omitted). If "reasonable persons could differ in their interpretations of the evidence, then the motion should be denied." *EEOC v. EmCare, Inc*., 857 F.3d 678, 682 (5th Cir. 2017) (quoting *Bryant v. Compass Grp. USA Inc*., 413 F.3d 471, 475 (5th Cir. 2005)). A court must be "'especially deferential' to jury verdicts . . . unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'" *Id*. at 683 (quoting *EEOC v. Boh Bros. Constr. Co*., 731 F.3d 444, 451 (5th Cir. 2013)).

Similar to a motion for summary judgment, when considering a motion for a judgment as a matter of law a "court must draw all reasonable inferences in favor of the nonmoving party, and

it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id*. at 151. "That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached." *Id*. (quotation and citation omitted).

B. Discussion

Freshub moves for judgment as a matter of law under Fed. R. Civ. P. 50(b) that Defendants have infringed the asserted patents. As an initial matter, Freshub as the plaintiff bears the burden at trial to show that the accused devices practice every element of the asserted claims. 35 U.S.C. § 271(a); *see also Centillion Data Sys., LLC v. Qwest Commc'ns Int'l, Inc*., 631 F.3d 1279, 1284 (Fed. Cir. 2011). The absence of even a single limitation defeats a charge of infringement. *Gen. Am. Transp. Corp. v. Cryo-Trans, Inc*., 93 F.3d 766, 771 (Fed. Cir. 1996). "A determination of infringement is a question of fact that is reviewed for substantial evidence when tried to a jury." *ACCO Brands, Inc. v. ABA Locks Mfrs. Co*., 501 F.3d 1307, 1311 (Fed. Cir. 2007).

Freshub argues in its motion that the jury had substantial evidence of Defendants' infringement of the asserted patents. Dkt. 277 at 2–9. However, the correct standard is whether there is substantial evidence to support the jury's verdict of non-infringement. *Mettler-Toledo*, 671 F.3d at 1294 ("[A] jury's determination must be supported by substantial evidence."). The Court finds that Defendants presented substantial evidence during trial that at least some of the claim elements were not met by the accused products and therefore the jury's determination of non-infringement is supported by substantial evidence. Accordingly, the Court finds that Freshub's motion for judgment as a matter of law should be denied.

1. The "non-transitory memory" claim limitation ('153 cl. 1 and 6; '810 cl. 1; '408 cl.30)

Freshub asserts that Amazon's Echo, Fire TV, and Fire Tablet devices have infringed the asserted patents. Freshub's expert Dr. Medvidovic agreed that the claimed "non-transitory memory" is a physical structure, like a hard drive, and under his theory the server-side "non-transitory memory" is in those remote cloud servers that power the Alexa functionality. Dkt. 284 at 4. Defendants' expert Dr. Johnson testified at trial that the accused devices "do not include any parts of the server" and therefore do not infringe, but Freshub contends that it has always accused the consumer Alexa devices with the backend Alexa system of infringement. *Id*. at 4; Dkt. 291 at 3. The jury heard competing testimonies from experts from both sides, weighed their credibility, and eventually found for the Defendants. Drawing all reasonable inferences in favor of the Defendants, the nonmoving party, the Court finds that there is substantial evidence to support the jury's determination. *See Reeves*, 530 U.S. at 150 (When considering a motion for JMOL a "court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.").

Freshub contends that Defendants' first fact witness, Dr. Strom, admitted infringement of claim 1 of the '153 patent and produced a table comparing each element of that claim with Dr. Strom's testimony. Dkt. 277 at 5–6; Dkt. 291 at 1. However, when asked about the claim element "a first computer; non-transitory memory that stores instructions . . .," the evidence produced by Freshub only shows that Dr. Strom admitted that the Echo product "has memory" — he did not admit that the Echo product has "***non-transitory*** memory." *Id*. at 5. Similarly, regarding the claim element "a second computer; non-transitory memory that stores instructions . . .," the produced testimony only shows that Dr. Strom admitted that "they [the accused products] contain

memory"— not "non-transitory memory" as required by the claims. *Id*. at 6. Thus, the Court does not find that the evidence overwhelmingly favors Freshub.

2. The "identify an item corresponding to the text" claim limitation ('153 cl. 1, 6)

Claims 1 and 6 of the '153 patent require computer instructions to "identify an item corresponding to the text" translated from the "digitized order" and adding the item to a list. Defendants contend that the accused Alexa feature "does not infringe because users can only add ***words*** to their Alexa shopping list, not '***item[s]*** corresponding to' those words." Dkt. 284 at 7. Defendants point out that Dr. Medvidovic testified at trial that "if a user says: Alexa, add 'sad' to my shopping list, the word 'sad' will appear on the list," and John Love, Director of Alexa Shopping, testified that his six-year-old added the word "poopy poop" to their Alexa shopping list, but words "sad" and "poopy poop" are not an "item corresponding to the text" as the claims require. *Id*. Dr. Johnson also testified that the claims require the translated "text" and the "item corresponding to the text" to be separate. *Id*. at 7–8.

Freshub contends that Dr. Strom referred to the word "milk" on Alexa shopping list as an "item" on cross examination, and therefore admitted that the element was met. Dkt. 277 at 11. Defendants counter that Dr. Johnson testified that while it may be normal to say "milk is an item on my shopping list," the asserted patents use the word "item" to refer to what is identified from the translated text. Dkt. 284 at 8. Freshub asserts that Dr. Johnson applies a special meaning to the claim term "item" and his opinion was therefore "critically flawed because it was based on a legally improper construction." Dkt. 277 at 10. However, the Court did not provide any construction for the claim term "item" and Dr. Johnson applied the ordinary meaning of "item" based on his understanding of the term in view of its use in the patent. Thus, the Court does not see any critical

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