United States District Court,
N.D. Ohio, Eastern Division.

Patrick HARGABUS,
Plaintiff.
v.
CEDAR FAIR, L.P., et al,
Defendants.

Sept. 14, 2005.

James Lindon, Lindon & Lindon, Rocky River, OH, for Plaintiff.

Andrew J. Gray, IV, David C. Bohrer, Nancy I. Sya, Morgan, Lewis & Bockius, Palo Alto, CA, James B. Niehaus, Frantz Ward, Cleveland, OH, James A. Vollins, Squire, Sanders & Dempsey, Cleveland, OH, John M. Delahanty, Joseph Vizcarrondo, Mintz Levin Cohn Ferris Glovsky & Popeo, New York, NY, for Defendants.

ORDER

OLIVER**, J.**

Plaintiff Patrick Hargabus ("Plaintiff" or "Hargabus") filed the above captioned case against Defendants Cedar Fair, L.P. ("Cedar Fair"), Konami Digital Entertainment, Inc. ("Konami"), Great Bear Lodge of Sandusky, LLC ("Lodge"), and Alpha-Bet Entertainment, LLC ("Alpha-Bet") (together, "Defendants") on August 27, 2004, alleging patent infringement. Now before the court are Konami's Motion for Summary Judgment (ECF No. 28), Konami's Motion to Strike the Declaration of Keith Hedenberg (ECF No. 37), Hargabus' Motions for Certification of Expert Witness Keith Hedenberg (ECF Nos. 49, 51), Konami's Motion to Strike Plaintiff's Motion to Certify (ECF No. 50), Konami's Motion for Leave to File Answer (ECF No. 45), and Hargabus' Motion to Strike Defendant Konami Document 52 (ECF No. 53.)

For the reasons stated below, Konami's Motion for Summary Judgment (ECF No. 28) is granted, its Motion to Strike the Declaration (ECF No. 37) is granted, its Motion for Leave to File Answer (ECF No. 45) is granted, and its Motion to Strike the Motion to Certify (ECF No. 50) is denied. Hargabus' Motion for Certification (ECF No. 50) is denied, and its Motion Strike a Document (ECF No. 53) is denied.

I. FACTS AND PROCEDURAL HISTORY

A. The Hargabus Patent

Plaintiff is the inventor and owner of United States Patent number 4,761,004 (" '004 patent") for an infinity mirror display, which he patented on August 2, 1988. The invention produces and displays multiple images of light, in which the light appears as continuous columns that diminish in size and intensity as they move

farther away from the viewer. (*See* '004 patent, ECF No. 1). The invention summary describes a device containing a fully reflecting mirror, a partially reflecting or transparent mirror, a light source, and a frame, positioned as follows:

A partially transparent, or two-way mirror is positioned in front of and spaced from a fully reflecting mirror. Holes passing through the fully reflecting mirror from its rear surface to its front surface provide a passage for light. This light may originate behind the fully reflecting minor and be passed through the passage as light rays, or conveyed through the passage using fiber optics, or be a light source such as an incandescent bulb positioned in or through the passage. In the preferred embodiment the light source will extend to the partially reflecting mirror so that the successive diminishing images appear as a continuous column

(*Id*. at 1:61-2:4.) With respect to the partially reflecting mirror, the patent claims:

1. An infinity mirror display comprising:

a frame having a front opening defining a viewing area;

first and second mirrors;

said first mirror being partially reflecting and mounted in said frame adjacent to said front opening and displayed in said viewing area;

(*Id*. at 3:7-14.) In the "Detailed Description of the Invention" section of the patent, Hargabus offers more characteristics of the first mirror:

With first mirror ... adjacent to an observer, [that] mirror will appear to be fully reflecting. If, however, a light source such as an incandescent light bulb ... is illuminated between first mirror ... and second mirror ..., the observer will see [the] light bulb ... (or at least the light therefrom).

(*Id*. at 2:13-19.)

When Hargabus initially submitted his patent application, the patent examiner rejected the patent "as being of improper dependent form for failing to further limit the subject matter of a previous claim." (Patent Examiner's Action, July 23, 1987, ECF No. 28, Ex. A .) Specifically, the Patent Examiner found that Hargabus' proposed patent was not sufficiently distinguishable from an existing 1951 patent for an illuminated license plate frame invented by J.W. Giboney ("Giboney patent"). (*Id*.) The Giboney patent, Number 2,579,230 called for fully reflecting mirrors on four sides of the frame, a light source mounted on the bottom fully reflecting mirror, and a transparent strip above the light source. (U.S. Patent No. 2,579,230.) The mirrors were part of a box that fit around and held a license plate to illuminate it.

Hargabus subsequently amended his patent application to provide more detail about his invention and to describe how his invention was different from the Giboney patent. (Dec. 23, 1987 Amend. to Patent Appl., ECF No. 28, Ex. C.) In his amendment, Hargabus first posited that his invention had a different function than the Giboney patent. The Giboney patent was to illuminate a license plate holder, while his invention was to produce a lighting effect for the viewer. As evidence of the different function, Hargabus noted that while the Giboney patent was classified as "illumination," his invention was classified as "card, picture, and

sign exhibiting." (*Id*. at 4.) Hargabus next argued that any infinity mirror effect from the Giboney patent was not intended or positioned to be displayed to a viewer, since the mirror and transparent strip were on the bottom of the frame, facing directly up, while the pair of mirrors on his invention directly faced the viewer. (*Id*. at 3.) Third, Hargabus noted that what the patent examiner referred to as a "partially reflective mirror" in the Giboney patent was actually a transparent strip or covering, that was not intended to serve the same function as the partially reflecting mirror in the new invention:

In fact, what the Examiner denotes a partially reflecting mirror is described in the patent as: " * * *a transparent covering which serves as a shield for the bulbs and prevents dust and dirt from accumulating to the lower bar as well as prevent (sic) snow and rain water from filling the bar and interfering with the proper functioning of the light bulbs."

(*Id*. at 3.) Hargabus went on to argue that "a transparent strip would be ineffective as a partially reflecting mirror for an infinity mirror display because the quantity of light reflected is de minimis." (*Id*. at 4.) In concluding his amendment and argument to the Patent Examiner, Hargabus summarized his position with respect to the Giboney patent as follows:

The positioning of a reflector behind a light source for directing the maximum light in a desired direction with the further provision of a transparent cover is clearly done for the purpose of enhanced illumination. The maximum transmission of light through the transparent cover is the goal in such structure.

The positioning of a reflector with a light source passing through a hole in the reflector and with a partially transparent mirror in front of the light source is done to produce multiple images of the light source. A transparent cover instead of a partially transparent mirror will not produce the desired multiple image effect.

(*Id*. at 6.) After receiving the amendments, the Patent Examiner issued the patent.

B. The Alleged Infringing Invention

Hargabus contends that part of a Konami video arcade game, Dance Dance Revolution ("DDR"), infringes on his '004 patent. DDR is a dance video game in which players dance on platforms in front of a video screen and speaker cabinets. In addition to holding speakers, the rear of each speaker cabinet contains a fully reflecting mirror with a hole containing a neon light source, and the front of the speaker cabinet is a transparent piece of plexiglass. This is "to create a discotheque atmosphere" for the game, and results in pink neon circles reflecting outward intermittently when the game is on. (Okada Aff. para. 3, ECF No. 28.) According to Konami, the function of the plexiglass is to protect the speaker and light source from damage while allowing light to show through, and to prevent dust and dirt from entering the cabinets. (Okada Aff. para. 4, ECF No. 28.)

C. Procedural History

Hargabus filed his complaint on August 27, 2004, and filed an amended complaint on January 4, 2005. In the amended complaint, Hargabus named as Defendants Cedar Fair, LP; Konami; Great Bear Lodge of Sandusky, LLC; and Alpha-Bet Entertainment, LLC. Although the amended complaint contains eight claims, many of the claims are not claims so much as requests for relief. Thus, the actual claims raised in the complaint are: (1) literal patent infringement (claims 1-5); (2) patent infringement under the doctrine of equivalents (claims 1-5); (3) unfair competition under the Lanham Act, 15 U.S.C. s. 1125 (claims 6-7); and (4) deceptive trade practices under Ohio law (claim 8).

On February 18, 2005, Konami filed its motion for summary judgment on literal infringement (claims 1-5). Konami contends that during Hargabus' patent application process, Hargabus' positions before the Patent Examiner made clear that the '004 patent did not cover infinity mirror devices with a transparent cover. Since Konami contends that its DDR machine has a transparent plexiglass cover, Konami believes it is entitled to summary judgment on the patent infringement claims. Konami also argues that since the Hargabus patent describes a partially reflective mirror that appears fully reflecting to an observer, and its plexiglass cover does not appear fully reflecting to an observer, it is entitled to summary judgment.

Hargabus filed several briefs in opposition to the summary judgment motion, and attached declarations from his proposed expert, Keith Hedenberg. Konami then filed a motion to strike Hedenberg's declaration, asserting that Hedenberg was unqualified to opine as an expert. After the parties filed several more briefs about Hedenberg and the summary judgment motion, the court held a teleconference and ordered an end to the briefing on these issues, permitting the moving party, Konami, the opportunity to file a final reply brief. (ECF No. 46.)

Approximately one month later, Hargabus filed a motion to certify Hedenberg as an expert. (ECF No. 49.) Konami, asserting that this motion circumvented the court's prior cut-off on briefing of the summary judgment-related issues, filed a motion to strike the motion to certify. (ECF No. 50.) Hargabus then filed another motion to certify Hedenberg as an expert, opposing Konami's motion to strike. (ECF No. 51.) After Konami filed a reply brief in support of its motion to strike (ECF No. 52), Hargabus filed a motion to strike document 52 (ECF No. 53), Konami's reply brief in support, construing the response as an improper filing. The parties then filed responsive briefing on Hargabus's motion to strike document 52.

The court heard oral argument on the summary judgment motions and the motions to certify / strike Hedenberg as an expert on August 19, 2005 at 10:30 a.m.

II. NON-DISPOSITIVE MOTIONS

A. Motion to Strike Plaintiff's Motion to Certify Keith Hedenberg (ECF No. 50)

Konami, believing Plaintiff was attempting to circumvent the court's Order limiting briefing by filing a motion to certify its expert witness, filed a motion to strike Plaintiff's expert certification motion. The court had previously cut off all briefing on issues related to the summary judgment motion, including the qualifications of Keith Hedenberg. Thus, additional filings related to the qualifications of Hedenberg did go to an issue pending on summary judgment. However, the court subsequently determined that it would consider all submissions by the parties regarding the qualifications of the expert in the context of the *Daubert* hearing. Accordingly, the Motion to Strike Plaintiff's Motion to Certify (ECF No. 50) is denied.

B. Plaintiff's Motion to Strike Defendant Konami Document 52

This motion is denied. Konami was within the local rules when it filed ECF No. 52. Konami filed its Motion to Strike Plaintiff's Motion to Certify. (ECF No. 50.) This document was not a brief on the merits opposing Plaintiff's Motion to Certify; it was a separate Motion to Strike the Motion to Certify. Thus, the non-moving party, Hargabus, was entitled to file its opposition to the motion to strike, which it did. (ECF No. 51.) The moving party, Konami, was then entitled to file a reply brief in support of its Motion to Strike the Motion to Certify, which it did. (ECF No. 52.) Hargabus is incorrect in construing these documents differently. Therefore, the document was properly filed and the Motion to Strike Defendant Konami

Document 52 (ECF No. 53) is denied.

C. Defendant Konami's Motion for Leave to File Answer

After Plaintiff filed its amended complaint, Defendant Konami moved for leave to file its answer, affirmative defenses, and counterclaims. Plaintiff has filed no opposition. The motion for leave to file answer (ECF No. 45) is granted.

D. Motion to Strike Declaration of Keith Hedenberg / Motion for Certification of Expert Witness Keith Hedenberg

These motions relate to the qualifications of Plaintiff's proposed expert, Keith Hedenberg ("Hedenberg"). During the briefing on Konami's summary judgment motion, Konami moved to strike Hedenberg's declarations, asserting Hedenberg was not qualified to render an expert opinion, and that his declaration did not satisfy the Federal Rules of Civil Procedure. Plaintiff responded by filing a motion to certify Hedenberg as an expert in "partially reflecting mirrors in arcade devices." (ECF No. 49.) The court held a *Daubert* hearing on these motions on August 19, 2005, at 10:30 a.m. By decision of Plaintiff's counsel, Hedenberg was not present or available to testify. For the reasons stated below, the court denies the motion to certify Hedenberg as an expert, and strikes his affidavit/declarations.

1. Expert Testimony Standard

The party offering expert testimony bears the burden of proving its admissibility by a preponderance of the evidence. Daubert v. Merrell Dow Pharm. Inc, 509 U.S. 579, 592 n. 10, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); 2000 Advisory Notes to Fed. R. Evid 702. Federal Rule of Evidence 702 outlines the basic standard for the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid 702. Furthermore, the "knowledge" of an expert must be more than personal or subjective belief or "unsupported speculation." *See* Daubert, 509 U.S. at 590. In analyzing any expert's proposed testimony under this rule, the judge performs a gatekeeping function by considering the relevance and reliability of the expert testimony. *E.g.,* Kumho Tire v. Carmichael, 526 U.S. 137, 147-48, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); Greenwell v. Boatwright, 184 F.3d 492, 496 (6th Cir.1999). The Sixth Circuit elaborated on this requirement as follows:

The relevance requirement ensures that there is a "fit" between the testimony and the issue to be resolved by the trial. *See* United States v. Bonds, 12 F.3d 540, 555 (6th Cir.1993). The reliability requirement is designed to focus on the methodology and principles underlying the testimony. *See* id. at 556.

Greenwell, 184 F.3d 496-97. To assure there is a fit, the court "must examine the facts known to the expert and the methodology used." Heller v. Shaw Indus., 167 F.3d 146, 153 (3d Cir.1999). Testimony that is mere personal belief as to the weight of the evidence is outside the province of the expert. *See* McGowan v. Cooper Indus., 863 F.2d 1266, 1273 (6th Cir.1988).

The court notes, however, that although "the rejection of expert testimony is the exception rather than the rule," trial courts do have broad discretion to decide whether or not to admit expert testimony. *See, e.g.,* 2000 Advisory Committee Notes to Fed.R.Evid. 702; Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

2. Challenges to Expert Testimony

Konami challenges Hedenberg's involvement in the case on several levels. First, Konami contends that Hedenberg's declarations fail to meet the specific requirements of Federal Rule of Civil Procedure 56(e). As part of this argument, Konami asserts that Hedenberg's opinions are conclusory and without support. Second, Konami contends that Hedenberg is not qualified to render opinions on optics or patent law. For the reasons stated below, the court agrees.

Federal Rule of Civil Procedure 56(e) governs affidavits submitted for summary judgment motions. Affidavits must "set forth such facts as would be admissible in evidence" and "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e). Konami contends that the declaration sets forth no admissible facts, and that Hedenberg is not competent regarding the matters he testifies on. Conclusory opinions or statements are not admissible facts for the purposes of Rule 56(e). *E.g.,* Hall v. Bodine Elec. Co., 276 F.3d 345, 354 (7th Cir.2002) ("conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact"). In his declaration, Hedenberg asserts that "Defendant Konami's DDR machine includes, among other things, an infinity mirror which has a partially reflecting mirror." (Hedenberg 2nd Aff. para. 3.) However, Hedenberg does not define a partially reflecting mirror, state why the DDR machine's plexiglass cover is a partially reflecting mirror, or state how he reached his conclusion. A central issue in this case is whether the DDR machine has a partially reflective mirror. A conclusory statement asserting an unsupported opinion about the issue is insufficient to create a genuine issue of material fact. Likewise, Hedenberg concludes "there is nothing in Plaintiff's patent or prosecution history that would disclaim subject matter sufficient to ... narrow the scope of Plaintiff's patent to the point of causing Defendant Konami's DDR machine to be considered non-infringing." (Hedenberg 2nd Aff. para. 6.) Hedenberg is again stating his conclusion without showing his work. There is nothing in the declaration discussing why the prosecution history does not disclaim subject matter or responding to Defendant's arguments regarding prosecution history. Plaintiff cannot establish a genuine issue of material fact by bringing in an expert who reaches legal conclusions about patent language without any substantiation or basis. Finally, Hedenberg concludes that the DDR machine reflects more light than the transparent strip in the Giboney patent. (Hedenberg 2nd Aff. para. 8.) However, there is no indication that Hedenberg examined the Giboney patent or did any measurement of the light reflecting off each. Nor is there any discussion of how light reflections are measured. Conclusory statements are not admissible under Rule 56(e). Paragraphs 3, 6, and 8 of the second declaration are stricken for failing to meet the requirements of Civil Rules 26(a)(2) and 56(e).

Even if the declarations met these requirements, the court finds Hedenberg is not qualified to be an expert in this case. Hedenberg is currently employed as the Internet Manager at Danny Vegh's Billiards & Recreation. (Hedenberg 2nd Aff. 3.) In his current job, he updates the Danny Vegh's website, maintains the office computers, and responds to customer complaints. He also maintains that he is an "Arcade Games Expert" who researches arcade game history and buys and sells new and used arcade game equipment at auction. Hedenberg previously served in the U.S. Marine Corps as a Precision Measuring Equipment Specialist,

where his job functions were to "repair and calibrate all Avionics support test equipment used to maintain the aircraft assigned to our squadron." (*Id.*) His selected skills include "HTML, Graphic Design, Computers & Networking, Electronic Repair (Digital, Analog and Microwave), Audio/Video Production, Digital Photography." (*Id.*) Defendant notes that Hedenberg does not possess a college degree.

Among the opinions Plaintiff seeks to have Hedenberg give are legal conclusions and opinions about the disclaimer of subject matter in a prosecution history and about whether the DDR machine infringes on the Hargabus patent. These are far beyond any expertise or experience held by Hedenberg. While an expert may be qualified through his experience, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), Hedenberg has no apparent experience in patent law. Hedenberg has never served as an expert in a patent case before. (Hrg. Tr. 22.) He has never been through the patent application process. (Hrg. Tr. 24.) Plaintiff's counsel admitted he was unsure if Hedenberg had ever looked at a patent or a prosecution history before, and that Hedenberg only knew what infringement meant because Plaintiff's counsel told him. (Hrg. Tr. 25.) Hedenberg is not a lawyer and has no legal training. He does not read patents and prosecution histories as part of his job. Plaintiff's argument is centered around his assertion that Hedenberg is a person of ordinary skill in the art. This does not render him an expert on patent law or make him qualified to opine about the meaning of patents or prosecution histories.

Plaintiff also seeks to have Hedenberg opine as an expert on mirrors and partially reflective mirrors. However, although Plaintiff seeks to have Hedenberg certified as an expert in "partially reflecting mirrors in arcade devices," the words "mirror" and "partially reflecting mirror" do not appear in any form on Hedenberg's resume. Nor is there any mention of "optics" or "reflective properties." At the *Daubert* hearing, Plaintiff's counsel argued that Hedenberg has extensive experience with mirrors and precision measurement of light. This is not at all apparent on the face of the resume, and the arguments of Plaintiff's counsel do not change this fact. Hedenberg sells arcade video games. Incidental to this job, he sees various lighting displays and mirrors in video games. However, there is no indication that Hedenberg has expertise in optics, in scientifically measuring light reflection from mirrors, or in how mirrors are categorized and classified. A court may exclude expert testimony if it goes beyond the expertise of a witness. *Smelser v. Norfolk S. Ry,* 105 F.3d 301, 305 (6th Cir.1997). In Ancho v. Pentek Corp., 157 F.3d 512 (7th Cir.1998), the Seventh Circuit upheld the exclusion of a mechanical engineer from testifying about the cause of a workplace injury, finding:

Just as a qualified and board certified heart surgeon does not possess sufficient knowledge of orthopaedic medicine to render an expert opinion on spine surgery, likewise we agree with the trial court's ruling that a mechanical engineer ... lacks qualifications to give expert testimony about plant configuration. Ancho should have retained a qualified plant engineer to testify at trial and his failure to do so was a mistake in judgment for which he has no one to blame but himself.

Id. at 519 (citations omitted). Hedenberg may be knowledgeable about video games, but there is no indication he is knowledgeable about mirrors. If Plaintiff had obtained an expert who had more experience in mirrors and studied mirrors, light, and reflective properties on a daily basis, the court would, assuming relevancy, be more inclined to permit such testimony. However, Hedenberg does not possess this experience.

For these reasons, Plaintiff's Motion to Certify Hedenberg as an expert (ECF No. 37) is denied, and Defendant's Motion to Strike Hedenberg's Declarations (ECF Nos. 49, 51) is granted.

III. KONAMI'S MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); White v. Turfway Park Racing Ass'n, Inc., 909 F.2d 941, 943-44 (6th Cir.1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir.1989) (citing Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C.Cir.1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. Sanders v. Freeman, 221 F.3d 846, 851 (6th Cir.2000). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. McLean v. 988011 Ontario, Ltd., 224 F.3d 797, 800 (6th Cir.2000).

In patent cases, summary judgment is appropriate when

it is apparent that only one conclusion as to infringement could be reached by a reasonable jury. ATD Corp. v. Lydall, Inc., 159 F.3d 534, 540, 48 USPQ2d 1321, 1324 (Fed.Cir.1998). Summary judgment of noninfringement is also appropriate where the patent owner's proof is deficient in meeting an essential part of the legal standard for infringement, because such failure will render all other facts immaterial. London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1537, 20 USPQ2d 1456, 1458 (Fed.Cir.1991).

TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1369 (Fed.Cir.2002). There are two steps to analyzing any patent infringement claim: "(1) claim construction; and (2) application of the properly construed claim to the accused product." Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995).

B. Patent Infringement Analysis

1. Claim Construction

The disputed claim in this case is the "first mirror being partially reflecting" as mentioned in claims one and seven. This mirror is referred to multiple times in the remainder of the patent by three different names: "partially transparent," "two-way mirror," and "partially reflecting." The mirror is also described as "appear[ing] to be fully reflecting" to an adjacent observer. Plaintiff interprets his claim broadly, to cover any surface made of any material that reflects more than a de minimis amount of light and is at all transparent. Defendant takes issue with this broad interpretation for two reasons. First, Defendant contends that the descriptions of the partially reflecting mirror in Plaintiff's actual patent show an intent to cover only partially reflecting mirrors that appear to be fully reflecting to an adjacent observer. Second, Defendant asserts that Plaintiff disavowed transparent covers in the patent prosecution process when he distinguished his patent from the Giboney patent. For the reasons stated below, the court finds the first argument dispositive, and therefore does not reach the prosecution history issues.

Defendant's argument regarding the language in the patent description is well taken. Plaintiff's broad interpretation of the term "partially reflecting mirror" runs counter to the patent description language. Plaintiff's position is that anything that reflects some light, but not all light, is a partially reflective mirror:

THE COURT: Because anything that reflects, I mean is a mirror anything that reflects?

MR. LINDON: Are you talking about a mirror or a partially reflective mirror?

THE COURT: Any mirror.

MR. LINDON: Yes. I mean as I'm standing here, I can see a reflection of that light in that window. It's reflecting it.

THE COURT: So anything that-

MR. LINDON: I can see my reflection in it. I can see the image that is reflecting off of it. That's a mirror. It doesn't even have to be a piece of glass. It could be a highly polished piece of metal. That's a mirror.

THE COURT: That's a partially reflecting mirror.

MR. LINDON: That window right there, yes, it is. You can turn the light off behind it and in front of it and vary the amount of light and you will get a completely different effect.

* * *

THE COURT: But you're saying almost anything can be a partially reflecting mirror under the right light and circumstance?

MR. LINDON: Well, it has to have at least some transparent property to it or it won't, you know, it's a functional consideration as you are pointing out. It's functional. Does this thing function as a mirror. If it does, it's what my client is going after, regardless of the methods or the materials, if it functions as a mirror and allows-reflects some of the light and allows the rest of the light to go through it, it's a partially reflective mirror. Okay?

(Hearing Tr. 64-66.) However, the patent language does not support such a broad interpretation. The patent claims a "partially reflective mirror," but there is no definition of the term in the actual claim. Rather, the description section regarding the patent clarifies that the "partially reflective mirror" must appear fully reflecting to an adjacent observer. This is inconsistent with Hargabus' current position that a partially reflective mirror is any mirror that reflects more than a de minimis amount of light.

In claim construction, "the specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." ' *Phillips v. AWH Corp.,* 2005 U.S.App. LEXIS 13954, (Fed.Cir. July 12, 2005) (quoting *Markman,* 90 F.3d at 1582). The Federal Circuit went on to clarify the proper use of patent specifications or descriptions:

[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs. In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor. In that instance as well, the inventor has dictated the correct claim scope, and the inventor's intention, as expressed in the specification, is regarded as dispositive.

Phillips, 2005 U.S.App. LEXIS 13954 at *33-34. In the instant case, Hargabus offers a specific description of what he means by "partially reflective mirror" in the "Detailed Description of the Invention." Under the applicable case law, this specification is highly relevant, usually dispositive, and evidence of the inventor's intent. Therefore, since Hargabus asserts that the "partially reflective mirror" should appear fully reflective to the adjacent observer, this court construes the claim as such. There is no literal infringement unless the partially reflective mirror appears fully reflective to an adjacent observer.

Having reached this conclusion, it is unnecessary for the court to further address the patent prosecution history and Defendant's position that there was prosecution history estoppel. FN1

FN1. The court notes that any alleged subject matter disclaimer is not as simple as Defendants contend. At a minimum, Plaintiff's argument that the Giboney patent had a different purpose and function than the Hargabus infinity mirror display, and that as such, there was no clear and unmistakable surrender of subject matter, is not frivolous.

2. Application of Claim to Accused Product

The next step in a patent infringement analysis is to apply the claim, as properly constructed, to the accused product. The Federal Circuit has noted that "to establish literal infringement, all of the elements of the claim, as correctly construed, must be present in the accused system." TechSearch L.L.C., 286 F.3d at 1371. Moreover, "the party opposing the motion for summary judgment of noninfringment must point to an evidentiary conflict created on the record, at least by a counter-statement of a fact set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient." Id. at 1372. There is no such evidentiary conflict in the current case. According to the patent claims as construed above, the infringing device must contain a partially reflecting mirror that appears fully reflecting to an adjacent observer. The alleged infringing device, the DDR machine, contains a transparent plexiglass cover. The court has examined the plexiglass cover, offered into evidence at the August 19, 2005 hearing. (Def.Hrg.Ex. 1.) While it does reflect some light, it does not appear fully reflective to an adjacent observer, nor could any reasonable person claim it appeared to be fully reflecting. Therefore, the DDR machine cannot as a matter of law literally infringe on all the elements of the claim.

Even if Hedenberg's declarations were admissible, a proposition this court rejected in Section II.D, *infra,* the court finds they do not create a genuine issue of material fact and are merely conclusory statements. Hedenberg asserts, without any analysis, reasoning, or basis, that the DDR machine has a partially reflecting mirror and infringes the '004 patent. (Hedenberg 2nd Aff. para.para. 3, 6, 8.) He does not define a partially reflecting mirror. A conclusory statement that an accused product is infringing, absent further explication, is insufficient to create a genuine issue of material fact. *E.g.,* Phillips Petroleum Co. v. Huntsman Polymers Corp., 157 F.3d 866, 876 (Fed.Cir.1998). In this case, Hedenberg's statements are unsupported and conclusory and do not preclude summary judgment, even if admissible. Defendant Konami's motion for summary judgment is granted.

IV. CONCLUSION

For the reasons stated above, the court finds that Konami's DDR video game does not literally infringe on Hargabus' infinity mirror patent, and grants Konami's motion for summary judgment on that issue. The court notes that Konami did not move for, and is not seeking, summary judgment on the doctrine of equivalents claim. (Def. Reply Br. 2, ECF No. 36.) While the parties have referred to the doctrine of equivalents claim in passing, it has not been thoroughly briefed. As such, the court declines to issue a ruling on the issue at this time. Additionally, the court finds it is unnecessary at this time to address the dispute over the patent prosecution history, as it was not necessary to the court's granting of summary judgment.

Accordingly, Konami's Motion for Summary Judgment (ECF No. 28) is granted, its Motion to Strike the Declaration (ECF No. 37) is granted, its Motion for Leave to File Answer (ECF No. 45) is granted, and its Motion to Strike the Motion to Certify (ECF No. 50) is denied. Hargabus' Motion for Certification (ECF No.'s 49, 50) is denied, and its Motion Strike a Document (ECF No. 53) is denied.

A settlement conference as to the remaining claims is set for October 6, 2005, at 10:00 a.m. before Magistrate Judge Hemann. All parties shall attend. If settlement cannot be achieved, the Magistrate Judge shall, after conferring with counsel, establish a realistic time frame for completing discovery as well as other deadlines.

IT IS SO ORDERED.

N.D.Ohio,2005.

Hargabus v. Cedar Fair, L.P.

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