United States District Court,
C.D. California.

DSW INC. and DSW Shoe Warehouse, Inc,
Plaintiffs.
v.
SHOE PAVILION, INC,
Defendant.

No. 2:06-cv-06854-FMC-SHx

Sept. 25, 2007.

Richard M. Fannan, Burke Williams and Sorensen LLP, Los Angeles, CA, Theodore R. Remaklus, Andrew P. Blatt, Wood Herron & Evans, Cincinnati, OH, for Plaintiffs.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FLORENCE-MARIE COOPER**, District Judge.**

This matter is before the Court on Defendant Slide Pavilion's Motion for Summary Judgment (docket no. 41), filed on June 18, 2007. The Court has considered the moving, opposition and reply papers submitted in conjunction with the motion. The Court issued a tentative decision on this Motion on September 21, 2007. The parties submitted on the tentative decision and waived oral argument. The Court therefore issues the following Decision. For the reasons and in the manner set forth below, the Court GRANTS Defendant's Motion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff DSW Inc. operates a chain of retail stores that sell shoes and related accessories. (Decl. of William L. Jordan filed in support of DSW's Motion for Preliminary Injunction (hereinafter "Jordan PI Decl."), at para. 2). It has 214 locations nationwide, including the Los Angeles metropolitan area. *Id*. DSW has been installing in its new stores, and retrofitting its existing stores with, shoe displays that are the subject of United States Patent No. 6,948,622 (hereinafter "the '622 patent"), entitled "Modular Footwear Display and Storage System and Method." *Id*. para. 3. The '622 patent is owned by DSW Inc.'s whollyowned subsidiary, co-Plaintiff DSW Shoe Warehouse, Inc. *Id.,* Exhibit 1 to Declaration of P. Andrew Blatt (hereinafter "Blatt Decl.").

Plaintiffs (collectively "DSW") filed the instant lawsuit against Defendant Shoe Pavilion, Inc. ("Shoe Pavilion") on October 27, 2006. Like DSW, Shoe Pavilion is a "leading independent off-price branded footwear retailer in the Western United States." (Decl. of Robert Hall filed in support of Shoe Pavilion's Opposition to Motion for Preliminary Injunction (hereinafter "Hall PI Decl"), at para. 3). Plaintiffs allege that Shoe Pavilion has infringed and is currently infringing one or more of the claims of the '622 patent,

through the manufacture and use of certain footwear displays in one or more of its California stores.

In May of 2006, DSW notified Shoe Pavilion that its then-current design ("First Design") infringed on DSW's '622 and '172 patent. (Blatt Decl. Exhibit 5). Shoe Pavilion agreed to modify its First Design to avoid infringing on DSW's patents. However, DSW asserts that Shoe Pavilion's modified design ("New Design") still infringes method claims 4-6 of DSW's '622 patent. FN1 To date, Shoe Pavilion has retrofitted or converted the First Design to the New Design in the five Shoe Pavilion stores that had the First Design. In addition, Shoe Pavilion has installed the New Design in two newly opened stores. In total, Shoe Pavilion has seven stores that have the New Design. Shoe Pavilion no longer has any stores with the First Design.

FN1. The Complaint also alleges infringement of one or more claims of U.S. Patent No. D 495,172 ("the '172 patent"), entitled "Combined Product Display and Stacked Container Separator." However, DSW does not assert that Shoe Pavilion's New Design infringes the '172 design patent. (Plaintiff's Opposition ("Opp.") at 3:27-28, fn 1).

Shoe Pavilion now moves for summary judgment. Shoe Pavilion argues its New Design does not infringe on either patent. Shoe Pavilion also asserts that DSW is not entitled to damages as to Shoe Pavilion's First Design, because Shoe Pavilion ceased all alleged infringing activity according to DSW's demand.

STANDARD OF LAW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of " 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *See id.; see also* Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir.2000) ("In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its burden of persuasion at trial."). If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987); *see also* Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.2006) ("Material facts are those which may affect the outcome of the case.") (internal citations omitted). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence and draws all reasonable inferences in the light most favorable to the nonmoving party. T.W. Elec., Serv., 809 F.2d at 630-31; *see also* Brookside Assocs. v. Rifkin, 49 F.3d 490, 492-93 (9th Cir.1995). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir.1989).

DISCUSSION

In its Motion, Defendant Shoe Pavilion argues that its shoe displays do not infringe any of the asserted claims of the '622 patent, or in the alternative, that the patent is invalid *ab initio*.

A. Infringement

"An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing." Purdue Pharma L.P. v. Boehringer Ingelheim GmbH, 237 F.3d 1359, 1363 (Fed.Cir.2001); *see also* Wilson Sporting Goods Co. v. Hillerich & Bradsby Co., 442 F.3d 1322, 1326 (Fed.Cir.2006) ("[P]atent infringement analysis involves two steps: claim construction, and application of the construed claim to the accused process or product.") (citing Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996)). "To prove direct infringement, the plaintiff must establish by a preponderance of the evidence that one or more claims of the patent read on the accused device literally or under the doctrine of equivalents." Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc., 424 F.3d 1293, 1310 (Fed.Cir.2005) (citation omitted). FN2

FN2. "Literal infringement requires that each and every limitation set forth in a claim appear in an accused product." *Id*. (citing Frank's Casing Crew & Rental Tools, Inc. v. Weatherford Int'l, Inc., 389 F.3d 1370, 1378 (Fed.Cir.2004) (internal citation omitted). "Infringement may be found under the doctrine of equivalents if every limitation of the asserted claim, or its 'equivalent,' is found in the accused subject matter, where an 'equivalent' differs from the claimed limitation only insubstantially." Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp., 149 F.3d 1309, 1315 (Fed.Cir.1998).

1. Construction of the Relevant Claims

The '622 patent embraces "a modular footwear display and storage system that permits retailers to provide substantially an entire stock of shoes of varying style[s] to customers who may browse the styles and select a desired item of footwear for purchase without the assistance of a sales clerk. " '622 patent, col.1 ll. 66-7-col. 2 ll. 1-4. In an exemplary embodiment, the system includes "an open cabinet which is configured to receive a plurality of footwear display and divider modules that may be slidably mounted within the cabinet to display individual samples of footwear and to separate boxes of footwear respectively associated with each of the individual displayed samples." '662 patent, col. 3 11.52-59, fig. 1. Each "module" includes "a display having a horizontal display surface for supporting at least one item of footwear and a vertical divider extending generally perpendicular to the display surface such that when the module is slidably coupled to the cabinet, [the] divider operates to identify boxes associated with the item of footwear displayed on its respective surface and to separate those associated boxes from boxes of other footwear located adjacent thereto ...." '622 patent, cols. 3-4, ll.60-1. fig. 2.

DSW maintains that Shoe Pavilion's New Design infringes on claims 4-6 of the ' 622 patent. (Opp. at 3:20, 4:5-7). DSW argues that claims 4-6 should be given their ordinary meaning and constructed broadly. In support of its position, DSW offers the declaration of Dr. Arthur G. Erdman, an engineering professor at the University of Minnesota.

Shoe Pavilion counters that all of the claims of the '622 patent, including claims 4-6, require that the module

support member "comprise a track" and that the connection element include "at least one roller configured to engage the track." Shoe Pavilion argues that because its New Design does not include such a feature, summary judgment is appropriate as a matter of law.

a. Language of the Claims

Patent '622 issued with a total of 10 claims. Claims 1 and 3 are "apparatus" claims, claims 2, 9 and 10 are "system" claims, and claims 4-8 are "method" claims. Specifically, claim 1 claims rights to

A footwear display and stack divider module, adapted to be variably supportably positioned on a module support member which extends in a generally horizontal direction, comprising:

a footwear display configured to support at least one style of footwear and having a rear edge and a lateral edge;

a divider disposed adjacent said lateral edge of said display and extending downwardly from said display, said divider defining a vertical plane; and

at least one module connection element disposed adjacent said rear edge of said display, said module connection element configured to selectively engage the module support member at different horizontal positions therealong;

said vertical plane being generally perpendicular to the horizontal direction of the module support member when the module is supported thereby;

wherein the module support member comprises a track and said module connection element includes at least one roller configured to engage the track to thereby slidably suspend the module therefrom.

'622 patent col. 7 ll. 24-45.

Claim 2 claims rights to

A system for displaying and storing footwear, the system comprising:

at least one horizontally extending module support member; and

a plurality of display modules coupled to said module support member, each said module comprising:

a display configured to support at least one style of footwear and having a rear edge and a lateral edge;

a divider disposed adjacent said lateral edge of said display and extending in a generally vertical direction downwardly therefrom, and

at least one module connection element disposed adjacent said rear edge of said display, said module connection element configured to engage said horizontally extending module support member to thereby facilitate selective placement of said module at different horizontal locations along said module support member;

wherein said module support member comprises a horizontally extending elongated track and each said module connection element includes at least one roller configured to engage said track to thereby slidably suspend said module therefrom with said divider disposed in a generally vertical direction perpendicular to said track.

'622 patent col. 7 ll.46-67-col. 8 ll.1-3.

Claim 3 claims rights to

A cabinet for displaying and storing footwear, the cabinet comprising:

a base;

at least one vertical support member extending upwardly from said base;

at least one module support member coupled to said vertical support and spaced from said base; and

a plurality of display modules coupled to said module support member, each said module comprising:

a display configured to support at least one style of footwear and having a rear edge and a lateral edge;

a divider disposed adjacent said lateral edge of said display and extending in a generally vertical direction downwardly therefrom, and

at least one module connection element disposed adjacent said rear edge of said display, said module connection element configured to engage said horizontally extending support member to thereby facilitate selective placement of said module at different horizontal locations along said module support member;

wherein said module support member comprises a horizontally extending elongated track and each said module connection element includes at least one roller configured to engage said track to thereby slidably suspend a respective module therefrom, with said divider disposed in a generally vertical direction perpendicular to said track.

'622 patent col. 8 11. 4-32.

Claim 4 claims rights to

A method of displaying and storing footwear comprising:

stacking containers of footwear of a first style in at least one verticarstack, one on top of the other in direct physical contact;

stacking containers of footwear of a second style in at least one vertical stack, one on top of the other in direct physical contact, said stack of containers of footwear of said second style being located adjacent the stack of containers of footwear of the first style;

selectively positioning a generally vertically disposed, horizontally movably positionable stack divider between (i) the at least one stack of containers of the first style and (ii) the at least one stack of containers of the second style of footwear;

displaying a sample of footwear of the first style above the at least one stack of containers of the first style of footwear; and

displaying a sample of footwear of the second style above the at least one stack of containers of the second style of footwear.

'622 patent col. 8 ll. 33-53.

Claim 5 claims rights to

The method of claim 4, further comprising:

repositioning the divider to adjust the location of a boundary between the stacks of containers of the first and second styles of footwear.

'622 patent col. 8 ll. 54-57.

Claim 6 claims rights to

The method of claim 4, wherein selectively positioning the horizontally movably positionable divider between the stacks of said first and second styles of footwear comprises variably positionably supporting the divider from a horizontally disposed support arranged generally perpendicular to the divider.

'622 patent col. 8 ll. 58-63.

Claim 7 claims rights to

The method of claim 4, wherein displaying the samples of the first and second footwear styles comprises:

variably positionably supporting a first shelf and a second shelf from a horizontally disposed support arranged generally perpendicular to the divider, at locations above the at least one stack of the first footwear style and the at least one stack of the second footwear style, respectively; and

placing the samples of the first and second footwear styles on the first and secona shelves, respectively.

'622 patent col. 8 ll. 64-67-col. 9 ll. 1-6.

Claim 9 claims rights to

A system for displaying and storing footwear, comprising:

a horizontally disposed support;

a first shelf selectively variably positioned along said support and extending horizontally outwardly therefrom;

at least one vertical stack of stackable containers of footwear of a first style stacked one on top of the other in direct physical contact beneath said first shelf;

a second shelf selectively variably positioned along said support and extending horizontally outwardly therefrom;

at least one vertical stack of stackable containers of footwear of a second style stacked one on top of the other in direct physical contact beneath said second shelf;

a first vertically disposed divider selectively variably positioned along said support and extending outwardly therefrom in a substantially perpendicular direction relative to said horizontally disposed support, said first divider separating said at least one stack of containers of the first style of footwear from an adjacent stack of containers in the system which contain footwear of a second style; and

a second vertically disposed divider selectively variably positioned along said support and extending outwardly therefrom in a substantially perpendicular direction relative to said horizontally disposed divider, said second divider separating said at least one stack of containers of the second style of footwear from an adjacent stack of containers in the system which contain footwear of a style different that said first and second styles;

said vertical stacks of containers unobstructed along an outwardly facing side thereof, opposite said horizontally extending support, such that each container is selectively individually removable from said stacks without removing other containers from said stacks.

'622 patent col. 9 ll. 21-27-col. 10 ll. 1-24.

Finally, claim 10 claims rights to

The system of claim 9, wherein said dividers have generally vertical inner and outer edges defining respective planes, with said outer edges more remotely spaced from said horizontally disposed support than said inner edges, the system being free of structure that inhibits said containers from being withdrawn from said respective stacks in a horizontal direction which is both (i) parallel to said plane of said dividers associated with said stack from which said container is being withdrawn, and (ii) away from said outer edges of said associated dividers.

'622 patent col. 1011.24-34.

b. Whether Claims 4-6 Must Be Read According to Shoe Pavilion's Proposed "Narrowing Construction"

The essence of the parties' disagreement is whether claims 4-6 encompass only those methods of displaying and storing footwear whereby the different footwear styles are separated by "vertically disposed stack dividers" that are coextensive with the "stack divider modules" that are described in claims 1-3. Specifically, the parties dispute whether, in order to constitute infringing use of the patent, these "stack divider modules"

must be suspended from the horizontally disposed "support member" by rollers on a track. (Motion for Summary Judgment ("Mtn") at 7:18-21). Shoe Pavilion insists that such a narrowing construction must be employed, via application of the doctrines of prosecution disclaimer and/or prosecution history estoppel.

As the Federal Circuit has recognized, a patent's prosecution history "can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." Phillips v. AWH Corp., 415 F.3d 1303, 1317 (Fed.Cir.2005) (en banc) (internal citations omitted). Accordingly, "[w]hen the patentee makes clear and unmistakable prosecution arguments limiting the meaning of a claim term in order to overcome a rejection, the courts limit the relevant claim term to exclude the disclaimed matter." Sandisk Corp. v. Memorex Prods., 415 F.3d 1278, 1286 (Fed.Cir.2005) (citing Omega Eng'g, Inc. v. Raytek Corp., 334 F.3d 1314, 1324 (Fed.Cir.2003) ("Where the patentee has unequivocally disavowed a certain meaning to obtain his patent, the doctrine of prosecution disclaimer attaches and narrows the ordinary meaning of the claim congruent with the scope of the surrender."); Standard Oil Co. v. Am. Cyanamid Co., 774 F.2d 448, 452 (Fed.Cir.1985) ("The prosecution history (or file wrapper) limits the interpretation of claims so as to exclude any interpretation that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance.")). Concomitantly, a patentee may be "estopped" from arguing that the subject matter covered by rejected, broader claims "was nothing more than an equivalent" when "the patentee responds to the rejection by narrowing his claims." Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 731, 122 S.Ct. 1831, 152 L.Ed.2d 944 (2002).

The '622 patent application originally included 14 claims. Of the 14 original claims, original claims 1, 3, 4, 5, 7, 8, 10, 11 and 12 were rejected under 35 U.S.C. s. 103(a) by the Patent and Trademark Office ("PTO") as being unpatentable over prior art, specifically the "Hoffman" patent. Original claims 13 and 14 were also rejected on that basis, and also because "[t]he method recited is considered to have been obvious to one having ordinary skill in the art at the time of the invention." ('622 Patent prosecution history attached as Exhibit 3 to Declaration of Joanna M. Esty filed in support of Defendant's Motion for Summary Judgment ("Esty Decl."), at 90:12-14). The remaining claims, 2, 6, and 9, were objected to as being dependent upon a rejected base claim, but allowable if rewritten. (Esty Decl., Exhibit 3 at 90:15-18).FN3 The rejected claims were never amended. Instead, new claims 15-21 were accepted, and became new claims 4-10, respectively.

FN3. Specifically, the patent examiner wrote:

Claims 1, 3, 4, 5, 7, 8, 10, 11, 12 are rejected under 35 U.S.C. s. 103(a) as being unpatentable over Hoffman 6,471,080. Hoffman teaches a display including a module 17 having a rear edge and a lateral edge. Note vertical plane 79, rails 9A, 0B on which the module is supported.

Claims 13 and 14 are rejected under U.S.C. 103(a) as being unpatentable over Hoffman. The method recited is considered to have been obvious to one having ordinary skill in the art at the time of the invention.

Claims 2, 6, 9 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Esty Decl., Exhibit 3, at 90.
All of the *rejected* claims (1, 3-4, 5-7, 8, 10-14) included the use of display modules positioned on horizontally extending "module support members," but did not specify the particular means of attachment thereto. (Esty Decl., Exhibit 3, at 72-78). The *objected to* claims, in contrast, contained the limiting language that the "module support member" be comprised of a "track" and that the "module connection element" include "at least one roller configured to engage the track to thereby slidably suspend the module therefrom." Id.

In response to the PTO's rejections and objections, the '622 patent applicant submitted an amendment to the original application by which he cancelled all of the rejected claims and amended claims 2, 6, and 9 to include the limitations of the rejected base claims along with the prior limitations that the "module connection element" and "support member" be comprised of a "track" and "roller." The applicant also added new claims 15-21. (Esty Decl., Exhibit 3, at 121-141). The PTO allowed the all of the claims, such that amended claims 2, 6, and 9 issued as claims 1-3, and new claims 15-21 issued as claims 4-10. Defendant Shoe Pavilion maintains that it is clear from the prosecution history that the '622 patentee disclaimed from the scope of coverage any apparatus, method or system that does not include a track and roller configuration in the module support member and connection element. (Mtn. at 7:18-19). DSW counters by arguing that there is nothing in the prosecution history that supports reading the roller and track features into method claims 4-6 and asserts that a method claim is separately patentable from an apparatus claim even though directly similar to subject matter. (Opp. 15: 17-22)

However, in the instant case, it is clear from the Patent Examiner's Reasons for Allowance that method claims 4-6 were not patented as independent, separately patentable claims, but rather relied on apparatus claims 2, 6, and 9 (which ultimately became claims 1, 2, and 3). Specifically, the patent examiner wrote:

The prior art of record does not teach nor does any combination thereof fairly suggest a footwear display and stack divider having a module connection element engaging a module support member that comprises a track and wherein the module connection element has a roller that engages the track of the module support member as recited in independent claims 2, 6, and 9. The prior art *also* does not teach nor does any combination thereof fairly suggest a method of displaying 1st and 2nd footwear styles using the particular stacking of containers and stack dividers as recited in independent claim 15.

(Esty Decl., Exhibit 3, at 121) (emphasis added).

The language of the Reasons for Allowance reveals that method claim 15, which ultimately became claim 4, was patented to include the track and roller configuration in the module support member and connection element. The Patent Examiner's use of the word "also" in the sentence analyzing claim 15 refers to the sentence preceding it. The preceding sentence clearly denotes the module support member, track and roller system as the reasons for allowing patent ' 622. As such, patent '622 is limited to an apparatus, method or system with a track and roller mechanism to connect footwear display and stack divider modules to a module support member. Further, as set forth above, the specification explicitly and repeatedly describes the invention as a "*modular* footwear display and storage system," comprised of individual modules of the type set forth in claims 1-3, *slidably* mounted, via a roller track, in selectively variable positions on a module support member. *See, e.g.,* Phillips v. AWH Corp., 415 F.3d at 1315 ("[T]he 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.") (internal quotations and citation omitted). Moreover, the prosecution history, while not unequivocally indicative of an express disclaimer, clearly supports Shoe Pavilion's proposed

construction in that it suggests that the use of the track and roller in the module connection element is the seminal feature distinguishing the '622 patent from the prior art. *See* id. at 1317 ("Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent.").

Finally, the Court agrees with Shoe Pavilion that claims 4-6 would be invalid for indefiniteness if not construed to encompass the use of a plurality of display modules connected to a support member via a track and roller mechanism. As Shoe Pavilion points out, claim 4 (upon which claims 5 and 6 at issue are dependent) simply claim protection for selectively positioning a generally vertically disposed, horizontally movably positionable divider (on a support) between two vertical stacks of different styles of footwear. Unless the terms "divider" and "horizontally disposed support" are construed to mean the "footwear display and stack divider module" and "module support member" described in claims 1-3, the terms would be "insoluably ambiguous." *See* Datamize, LLC v. Plumtree Software, Inc., 417 F.3d 1342, 1347 (Fed.Cir.2005) (claims are indefinite if "not amenble to construction" or "insoluably ambiguous") (internal quotations omitted).

2. Shoe Pavilion's Allegedly Infringing Displays

Since the Court finds that the proper construction of claims 4-6 includes the limitation that the stacks of different styles of footwear be separated by vertically disposed dividers that are coextensive with the track and roller-based "display and stack divider modules" described in claims 1-3, the only task remaining for the Court is to examine Shoe Pavilion's store displays to determine if they incorporate that technology.

The New Design of Shoe Pavilion's displays depicted in photographs taken on August 4, 2006 at Shoe Pavilion's Redwood City, California location. (Exhibit 1 to Declaration of Robert Hall filed in support of Motion for Summary Judgment ("Hall Decl."). The photographs reflect, and Shoe Pavilion concedes, that the displays include vertically stacked boxes of footwear of different styles, separated by vertically disposed dividers. However, Plaintiff offers no evidence, via the photographs or otherwise, that the divider/module "support member" in *either* of the Shoe Pavilion displays "comprises a track" and/or that the divider/module connection element "includes at least one roller configured to engage the track." Thus, the Court grants summary judgment of non-infringement of the '622 Patent. Accordingly, the Court need not consider Shoe Pavilion's argument concerning the validity of the '622 patent.

B. Damages

Shoe Pavilion argues that DSW is not entitled to damages as a matter of law for the First Design because Shoe Pavilion ceased all alleged infringing activity according to DSW's demand. No damages for infringement are recoverable by a plaintiff, except on notice of the infringement with subsequent continued infringing activity. Wine Railways Appliance Co. v. Enterprise Railway Equipment, 297 U.S. 387, 396, 56 S.Ct. 528, 80 L.Ed. 736 (1936). DSW does not challenge Shoe Pavilion's contention that as soon as it notified Shoe Pavilion of the patents at issue in the instant case, Shoe Pavilion took reasonable steps to cease, and did cease all use of the First Design shoe displays. Accordingly, the Court grants summary judgment that Shoe Pavilion is not liable, as a matter of law, for any damages for infringement of the patents at issue in the instant action.

CONCLUSION

Based on the foregoing, the Court GRANTS Defendant's Motion for Summary Judgment (docket no. 41), Defendant is directed to provide a Judgment for the Court's signature.

IT IS SO ORDERED.

C.D.Cal.,2007.
DSW Inc. v. Shoe Pavilion, Inc.

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