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12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 VIASAT, INC.,

15 Plaintiff,

16 vs.

17 SPACE SYSTEMS/LORAL, INC.,
18 LORAL SPACE &
INC.,

19 Defendants.

CASE NO. 3:12-cv-00260-H-WVG

**PLAINTIFF VIASAT, INC.'S
OPPOSITION TO DEFENDANTS'
MOTION FOR JUDGMENT AS A
MATTER OF LAW (RENEWED),
OR A NEW TRIAL (10 OF 12),
REGARDING THE INVALIDITY OF
THE ASSERTED CLAIMS OF THE
'827 AND '875 PATENTS IN LIGHT
OF THE PRIOR ART**

Date: August 11, 2014
Time: 9:00 a.m.
Place: Courtroom 15A

Hon. Marilyn L. Huff

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1 **I. PRELIMINARY STATEMENT**

2 Defendants attempt to invalidate the asserted claims of the '875 and '827
3 patents by repeating arguments the jury rejected at trial having considered the ample
4 evidence adduced by ViaSat. Defendants also set forth *new arguments they have*
5 *waived* by failing to previously raise them. Under the JMOL standard, Defendants
6 simply cannot show that clear and convincing evidence adduced at trial, construed
7 in the light most favorable to ViaSat, permits only one reasonable conclusion—
8 invalidity—and that the jury clearly got it wrong when it found to the contrary.

9 With respect to the '875 patent, Defendants attempt to resuscitate arguments
10 they made at trial that certain references could be combined in a manner to
11 invalidate claim 12 of the patent. ViaSat provided substantial evidence rebutting
12 those alleged combinations and further demonstrated why the prior art actually
13 taught away from ViaSat's innovative approach to spatial separation and full color
14 reuse. Certainly the jury was entitled to credit the substantial evidence ViaSat
15 presented and come to the reasonable conclusion it did.

16 Defendants take a different tack with the '827 patent. First, they argue that a
17 specific reference anticipates claim 7 of the patent and that the jury could not have
18 properly found otherwise, despite the mountain of evidence ViaSat presented at trial
19 which demonstrated that the reference did not contain all of the elements of claim 7.
20 Second, they argue that claim 7 is invalid based on obviousness combinations they
21 *never raised* at trial. The time to raise such arguments has long passed, and they
22 are waived. At trial, ViaSat presented substantial evidence that the alleged
23 obviousness combinations which Defendants did present at trial failed to
24 demonstrate invalidity. Again, the jury was entitled to credit ViaSat's evidence and

1 conclude reasonably that claim 7 is valid. There is no substantial evidence to the
 2 contrary, and Defendants do not even argue otherwise now with respect to the
 3 combinations they actually presented at trial. A motion for JMOL should not be
 4 treated as a “do-over.”

5 Finally, Defendants failed to adequately qualify many of their key references as
 6 “printed publications”—and thus prior art—under 35 U.S.C. § 102. This includes
 7 each of the cited secondary combination references for the ’875 patent and the only
 8 cited allegedly anticipatory reference for the ’827 patent.

9 For these reasons, Defendants’ JMOL on invalidity of the ’875 and ’827
 10 patents (Dkt. 1051) must be denied.

11 **II. LEGAL STANDARD**

12 Under the JMOL standard, Defendants must meet the high standard of showing
 13 that—contrary to the jury’s verdict—the evidence only permits the reasonable
 14 conclusion that Defendants proved invalidity by clear and convincing evidence.
 15 *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1316 (Fed. Cir. 2009); *see also*
 16 *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2242 (2011); *InTouch Techs. Inc. v.*
 17 *VGO Commc’n*, 751 F.3d 1327, 1338 (Fed. Cir. 2014). The court draws “all
 18 reasonable inferences in favor of the jury’s verdict, and the evidence is viewed in the
 19 light most favorable to the non-moving party.” *Synthes USA, LLC v. Spinal Kinetics,*
 20 *Inc.*, 734 F.3d 1332, 1340-41 (Fed. Cir. 2013) (citing *First Nat’l Mortg. Co. v. Fed.*
 21 *Realty Inv. Trust*, 631 F.3d 1059, 1067 (9th Cir. 2011)). “The jury’s verdict will be
 22 upheld if it is supported by substantial evidence, even if it is also possible to draw a
 23 contrary conclusion.” *Id.* at 1341 (internal quotations omitted). The standard for
 24 “substantial evidence” requires only “such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion.” *Lucent Techs., Inc. v. Microsoft*
 2 *Corp.*, No. 06-CV-0678, 2008 WL 2872738, at *4 (S.D. Cal. Jul. 23, 2008) (Huff, J.)
 3 (quoting *Blanton v. Anzalone*, 813 F.2d 1574, 1576 (9th Cir. 1987)).

4 **III. ARGUMENT**

5 **A. Defendants Are Not Entitled To JMOL That Claim 12 Of The '875** 6 **Patent Is Obvious¹**

7 Defendants move for JMOL that claim 12 of the '875 patent is obvious, but not
 8 that it is anticipated. However, none of the alleged references, alone or in
 9 combination, disclose all of claim 12's elements. Moreover, a person of ordinary skill
 10 in the art would not have been motivated to combine the references. Finally, objective
 11 indicia confirm claim 12's nonobviousness. Backed by extensive trial testimony and
 12 evidence, each of these points independently support the verdict. *See, e.g., Compaer*
 13 *Corp. v. Antec, Inc.*, 539 Fed. App'x 1000, *1004 (Fed. Cir. 2013) (“The record shows
 14 again that the jury verdict of nonobviousness has ample support. Among other things,
 15 the verdict finds support in the clear differences between each claim and the prior art
 16 along with testimony about the lack of motivation to combine, the discovery of the
 17 specific problem, objective criteria, and other facts.”)

18 ViaSat notes that SS/L's arguments regarding the constructions of “feeder beam”
 19 and “service beam,” in particular, were already raised in Defendants' claim
 20 construction briefs, which the Court considered and rejected. The Court properly
 21 construed these claims for the reasons already discussed in its May 29, 2013 Claim
 22 Construction Order (Dkt. 206) and ViaSat's claim construction briefing (Dkts. 154

23 ¹ ViaSat notes that Defendants rely on 37 pages of claim charts to support their
 24 motion—itself 25 pages—in clear violation of the 25-page limit set by L.R. 7.1(h).
 ViaSat reserves the right to respond to any assertions in Defendants' charts, whether
 raised in this opposition or otherwise.

and 178).²

1. Defendants’ Obviousness Combinations Do Not Disclose All Claim Elements of Claim 12

- (a) Mitre combined with Sharon or Asato and the ITU Regulations do not disclose the asserted claim limitations

Defendants concede that Mitre does not anticipate claim 12. Accordingly, Defendants rely on secondary references Sharon, Asato, and the ITU Regulations in an attempt to find the missing limitations. Sharon, Asato, and the ITU Regulations, however, do not disclose every claim limitation for the reasons presented at trial. Further, because Mitre also fails to disclose limitations of independent claim 1—on which claim 12 depends—Defendants’ combinations still fall far short of acting as an invalidating combination, as the jury correctly found. *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1363 (Fed. Cir. 2012) (“whether the prior art discloses the limitations of a particular claim is a question of fact to be determined by the jury.”)

First, Sharon does not disclose claim 12’s limitations. Claim 12 requires, *inter alia*, that “at least one feeder beam is allocated ***all of the colors of the beam pattern.***” “[C]olors generally are defined by a unique combination of ***frequency and polarization.***” (’875 patent at 1:55-59 (emphasis added); *see also* claim 1 (“signals associated with different colors differ by a frequency band, a polarization, or both a frequency band and a polarization”).) However, Sharon fails to disclose ***any*** color

² To the extent Defendants request that their construction be reconsidered now, the Court has previously noted it is inappropriate to use a motion for judgment as a matter of law to seek reconsideration of prior claim constructions. *See, e.g., Lucent Techs., Inc. v. Gateway, Inc.*, 580 F. Supp. 2d 1016, 1048 (S.D. Cal. 2008) (Huff, J), *vacated in part on other grounds*, 580 F.3d 1301. Further, for the same reasons provided in ViaSat’s concurrently-filed opposition to Defendants’ JMOL on indefiniteness, Defendants do not satisfy the standard for reconsideration.

1 allocation. Sharon only discusses frequency ranges and makes no mention of
 2 polarization. Without that critical information, Sharon fails to disclose that the feeder
 3 beam “is allocated all of the colors of the beam pattern.” (S-1845 at 6:49-54, 7:55-64,
 4 8:9-14.) Defendants and their expert never offered any testimony or other evidence as
 5 to any colors that Sharon may have disclosed (which it did not), and instead limited
 6 their evidence to frequency ranges, which is insufficient to satisfy the claim
 7 requirements. (Tr. at 2269:18-2270:5.) This is not clear and convincing evidence, as
 8 the jury concluded.

9 The Asato reference similarly fails to disclose claim 12’s requirement that the
 10 feeder beam “is allocated ***all of the colors of the beam pattern.***” Defendants allege
 11 that Asato “expressly discloses that the remote ***feeder beam*** is allocated the 27.5 GHz
 12 to 31.0 GHz bands in two polarizations” (Mot. at 19), but Asato is silent as to whether
 13 those feeder beam colors account for “all the colors of the beam pattern.” (S-1180 at
 14 SSL0085066.) Additionally, Asato does not specify the frequency ranges or
 15 polarizations used by the ***service beams***, making it impossible to determine whether its
 16 feeder beams have been allocated all of the colors of the beam pattern. (S-1180.)

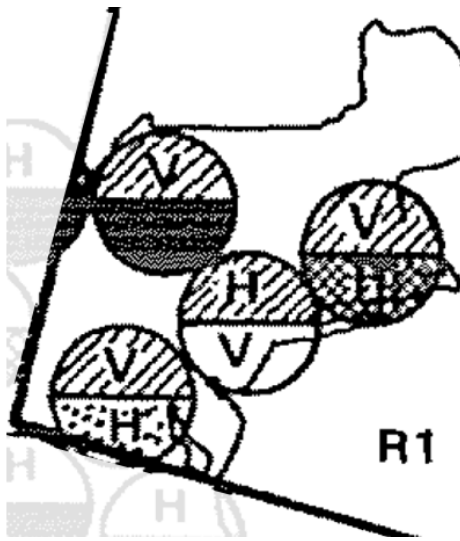
17 Faced with this reality, SS/L tries to “incorporate by reference” (see Mot. at 18-
 18 20) a separate reference—the ITU Regulations. But, as an initial matter, Defendants
 19 are wrong that that the ITU Regulations are incorporated by reference in Asato. “To
 20 incorporate [prior art] material by reference, the host document must identify with
 21 detailed particularity what specific material it incorporates and clearly indicate
 22 where that material is found in the various documents.” *See Apple Inc. v. Int’l*
 23 *Trade Comm’n*, 725 F.3d 1356, 1362 (Fed. Cir. 2013).

24 The jury also could have concluded reasonably that Asato neither specifies any

1 incorporated material from the ITU Regulations nor clearly indicates where any
2 material it relies on can be found in the reference. For example, Asato states that
3 “[f]or International Telecommunications Union ITU regions 1 through 3, 1.5 GHz has
4 been allocated for mobile satellite service (MSS) at 30-/20-GHz.” (S-1180 at
5 SSL0085064.) It then discloses that there are two 30-/20-GHZ frequency bands: a
6 commercial band and a military band. (*Id.*) However, Asato does not actually adopt
7 the ITU bands, says nothing about which specific regulation(s) it would adopt, and is
8 silent as to whether it would use the ITU’s commercial or military frequency bands
9 (which Asato itself states are different). (S-1180 at SSL0085064; Tr. at 2692:1-24
10 (Bartone).) Each of these deficiencies could have been the basis for the jury’s finding.
11 Additionally, Defendants’ “ITU Regulations” consist of three, untitled tables excerpted
12 from an ITU document with no guidance as to whether they are the same ITU
13 regulations referenced in Asato. Defendants’ observation (at 19) that both Asato and
14 the tables coincidentally include a “1.5 GHz of MSS bandwidth” is hardly clear and
15 convincing evidence that the colors disclosed in the ITU excerpts Defendants cite have
16 any bearing on Asato’s service beams as explained by Dr. Bartone. (*See also* Tr. at
17 2692:20-24 (Bartone) (“Doctor Schindall has not demonstrated and this reference
18 doesn’t teach how that bandwidth is distributed and whether it may or may not overlap
19 and whether or not it may or may not use all of the colors of the beam pattern.”).) The
20 jury was certainly free to credit Dr. Bartone’s testimony, over that of Dr. Schindall.

21 Even if the jury had determined that Sharon or Asato and the ITU Regulations
22 disclosed the unique elements of dependent claim 12, however, they still could have
23 found that the combination with Mitre would fail to render the claim obvious because
24 Mitre fails to disclose every limitation of independent claim 1, from which claim 12

1 depends. First, Mitre does not disclose proximate feeder and service beams. Rather,
 2 Defendants point to a **single** beam and argue that that one beam should be considered a
 3 beam that is “proximate to itself” (e.g., because the beam could be considered two
 4 completely overlapping beams). (Tr. at 2249:23-24 (Schindall); *see also id.* at 2343:3-
 5 8.) This makes no sense as reflected in the jury’s finding. Besides being tautological,
 6 Defendants’ argument contradicts the plain reading of claim 1, the Court’s



7 constructions, and Mitre itself. Mitre states, for
 8 example, that in the figure to the left, “region 1 [“R1”]
 9 is covered by **four beams**”—i.e., each circle is one
 10 beam. (S-1165 at SSL0083912.) Each “beam is
 11 generated by **a single horn**,” and not as two beams
 12 generated by separate feed horns in the satellite. (*Id.*)
 13 Defendants nevertheless argued at trial that each of

14 these circles actually represents two beams. (Tr. at 2249:14-2250:5 (Schindall).)
 15 Such credibility and factual inconsistencies are substantial evidence supporting the
 16 jury’s rejection of this prong of SS/L’s invalidity defense. *Kinetic Concepts, Inc. v.*
 17 *Smith & Nephew, Inc.*, 688 F.3d 1342, 1362 (Fed. Cir. 2012) (“In light of the jury’s
 18 determination that S & N failed to prove obviousness, we must infer that the jury found
 19 Wake Forest’s experts to be credible and persuasive on this point.”)

20 Second, Defendants did not provide any evidence at trial that, under the plain
 21 meaning of “each” from claim 1, Mitre discloses the “set of colors allocated to a service
 22 beam associated with **each** of the one or more service beam coverage areas not
 23 proximate to the feeder beam coverage area includes at least one same color allocated
 24 to the at least one feeder beam.” Indeed, Dr. Schindall admitted as much before the

1 jury. (Tr. at 2341:6-16.) Again, this failure alone would justify the jury’s finding of
2 nonobviousness.

3 Third, the Court construed “feeder beam” to require “communication of
4 information between the satellite and one or more **gateway terminals**.” Defendants
5 argue that Mitre’s “trunking” terminals are gateways, but this is incorrect. At trial,
6 Defendants’ expert admitted that, when Mitre was written, “there were no gateways.”
7 (Tr. at 2248:3-5.) This is not simply a matter of using “different nomenclature” from
8 claim 1. (See Mot. at 12.) As Mitre teaches, trunking terminals are essentially larger
9 versions of user or customer terminals. (S-1165 at SSL0083911 (“The size of the
10 terminals varies from small CPS terminals to quite large trunking terminals . . . the
11 largest CPS terminal supports 240 voice channels, 22 data channels, 1 video (6.3 Mb/s)
12 and 15 low-rate video channels. The smallest trunking terminal supports 12.6 Mb/s.”);
13 Tr. at 2696:19-21 (Bartone) (“It talks about different types of terminals, these CPS
14 terminals and trunking terminals, but they’re still all just terminals.”).) Under any
15 proposed construction, a beam that communicates between a satellite and a customer
16 terminal is a service beam, **not** a feeder beam. (See Dkt. 208-1 at 8-9, 13.) Mitre’s
17 trunking terminals therefore cannot read on claim 1 as gateways, as the jury properly
18 concluded.

19 Fourth, as the ’875 patent teaches—and the Court correctly construed—the
20 feeder beam communicates information “received from or relayed to subscriber
21 terminals located in one of the plurality of service beam coverage areas.” (Dkt. 208-1
22 at 13.) At trial, Dr. Schindall alleged that Mitre’s San Francisco beam and New York
23 city beam satisfied the claimed service and feeder beam, respectively. (Tr. at 2250:12-
24 51:3.) He failed to demonstrate, however, that the San Francisco beam and the New

1 York beam actually satisfy the Court's construction. (*Id.*) This is another of Mitre's
 2 failings as anticipatory or even relevant prior art, which is yet another basis for the
 3 jury's finding.

4 (b) AMC-17 combined with Sharon or Asato and the ITU
 5 Regulations do not disclose the asserted claim limitations

6 Similar to Mitre, Defendants attempt to combine AMC-17 with Sharon or Asato
 7 and the ITU Regulations to establish a supposed obviousness combination to claim 12.
 8 As discussed above, Sharon, Asato, and the ITU Regulations do not disclose every
 9 limitation of claim 12 and thus, do not cure AMC-17's deficiencies. Defendants'
 10 combinations fail for the additional reason that AMC-17, like Mitre, does not disclose
 11 all of the elements of independent claim 1, and thus all of the purported combinations
 12 involving AMC-17 suffer from the same deficiency.

13 AMC-17's primary failing is that it does not disclose a feeder beam that shares a
 14 color with each of its associated non-proximate service beams, as required by claim 1.
 15 (Tr. at 2695:3-24 (Bartone).) Defendants rehash the same arguments from their
 16 Motion to Strike (Dkt. 562-1) and argue for an interpretation of the Court's
 17 constructions that cuts any ties between the feeder and service beams. (Mot. at 15-
 18 16.)³ As the Court already held, however, its construction was intended to "reflect the
 19 relationship between the feeder beam, the gateways, the satellite and the subscriber
 20 terminals" and that its "construction reflects the patent's requirement that feeder beams
 21 connect the satellite to gateways, and that the information communicated is 'received
 22 from or relayed to subscriber terminals.'" (Dkt. 206 at 13.) Defendants' argument

23 ³ Under the Court's construction, a feeder beam communicates information
 24 "***received from or relayed to*** subscriber terminals located in one of the plurality of
 service beam coverage areas." (Dkt. 208-1 at 13 (emphasis added).)

1 thus fails now for the same reasons as before.

2 Faced with this reality, Defendants now apparently argue that “each” means “at
3 least one” such that claim 1 only requires that the feeder beam reuse **one color** from
4 **any** colors allocated to **any** non-proximate service beam in the system. (Mot. at 15.)
5 Claim 1, however, reads, “wherein a set of colors **allocated to a service beam**
6 **associated with each of the one or more service beam coverage areas not proximate**
7 **to the feeder beam coverage area** includes at least one same color allocated to the at
8 least one feeder beam.” (’875 patent at 24:10-14.) The “set of colors” refers to the
9 colors allocated to a non-proximate service beam and “each” of the non-proximate
10 service beams must share a color with the at least one feeder beam. (*Id.*) Defendants
11 failed at trial (and continue to fail) to provide any evidence that AMC-17 satisfies this
12 limitation under the plain meaning of “each.” (Tr. at 2695:3-24 (Bartone).)

13 Defendants therefore fail to demonstrate any basis to overturn the jury’s
14 finding that AMC-17, on its own or in combination with other references, render
15 claim 12 obvious.

16 2. A Person of Ordinary Skill In The Art Would Not Have Been 17 Motivated To Combine These References

18 Defendants also (and in any event) failed to provide evidence of motivation to
19 combine these disparate references.⁴ The sole, conclusory piece of testimony

20 ⁴ At trial, Defendants’ expert only testified as to four combinations: 1) Mitre
21 with Sharon, 2) Mitre with Asato, 3) AMC-17 with Sharon, and 4) AMC-17 with
22 Asato. In their motion, Defendants also add (at 19) that one of ordinary skill would
23 be motivated to combine Asato with the ITU references, which results in two
24 additional combinations, 5) Mitre with Asato and the ITU Regulations and 6) AMC-
17 with Asato and the ITU Regulations. Defendants’ expert never testified
regarding the motivation to combine Asato with the ITU Regulations, but to the
extent the Court finds otherwise, combinations 5 and 6 also fail for the same reasons

1 Defendants' expert provided at trial was:

2 Q And what would be the motivation of one of ordinary skill in the art
3 to combine either MITRE FDMA or SS/L ANC-17 [sic] with on the
4 other hand Sharon or Asato?

5 A One of ordinary skill in the art would be quite familiar with the full
6 frequency reuse described in Sharon and Asato. They're multi-beam
communication satellites doing the same thing. People are well aware
of this. So they would be motivated to combine them.

7 (Tr. at 2276:3-9.) The jury could have reasonably concluded that Dr. Schindall's
8 perfunctory allegation had no probative value as to whether one of skill would be
9 motivated to combine these particular references. *Innogenetics, N.V. v. Abbott Labs.*,
10 512 F.3d 1363, 1373 (Fed. Cir. 2008) ("[K]nowledge of a problem and motivation to
11 solve it are entirely different from motivation to combine particular references to reach
12 the particular claimed method."). Indeed, ViaSat offered evidence exactly to the
13 contrary through its own expert, Dr. Bartone. (Tr. at 2691:15-19, 2692:1-9 (Bartone).)

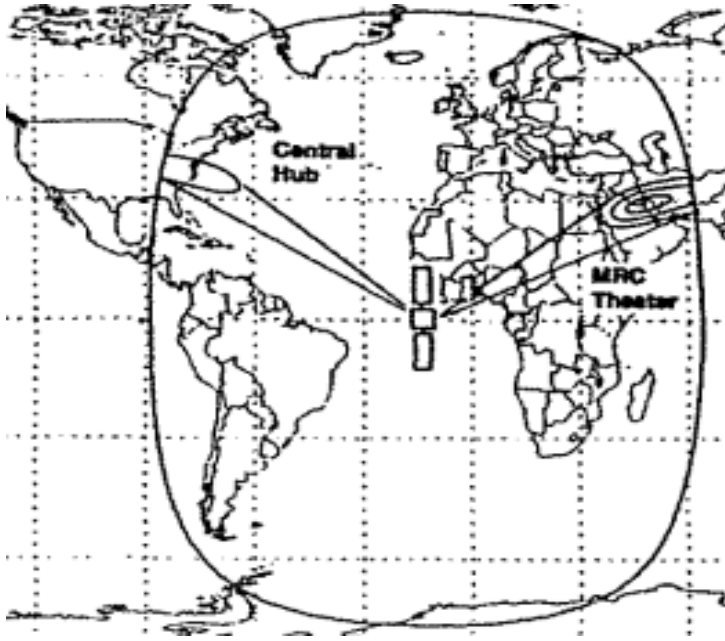
14 Moreover, conclusory statements such as those Dr. Schindall provided at trial
15 fall far short of the clear and convincing standard necessary to prove motivation to
16 combine. *See, e.g., InTouch Techs.*, 751 F.3d at 1348 (finding non-obviousness
17 because the expert failed to "identify sufficient reasons or motivations to combine the
18 asserted prior references" or "focus on the relevant time frame of 2001"); *ActiveVideo*
19 *Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1328 (Fed. Cir. 2012)
20 (rejecting testimony regarding a general desire for building something cheaper, more
21 efficient, better, and more attractive to customers); *Whitserve, LLC v. Computer*
22 *Packages, Inc.*, 694 F.3d 10, 24 (Fed. Cir. 2012) *cert. denied*, 133 S. Ct. 1291 (2013)
23 ("Because general and conclusory testimony is not enough to be even substantial
24 discussed in this section.

1 evidence in support of a verdict, it is certainly not enough to require us to overturn a
2 jury's finding of no invalidity.").

3 In any event, Sharon and Asato both teach away from combining with Mitre and
4 AMC-17, which supports the jury's finding of nonobviousness. *See Kinetic Concepts,*
5 *Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1362 (Fed. Cir. 2012) ("A reference may
6 be said to teach away when a person of ordinary skill, upon reading the reference,
7 would be discouraged from following the path set out in the reference, or would be led
8 in a direction divergent from the path that was taken by the applicant.")

9 To this point, Sharon was trying to address the "need in the art for a SATCOM
10 system which has **a hub in every spot beam**." (S-1845 at 3:56-37.) It therefore
11 taught that "[t]he notion of **a hub in every spot beam is also fundamental to the notion**
12 **of high capacity, local broadcast/data service**." (*Id.* at 6:27-30.) This shows a
13 person would not be motivated to rely on Sharon because, as ViaSat later showed
14 through its inventive work, Sharon was incorrect that a hub in every spot beam is
15 fundamental to the notion of high capacity. (Tr. at 2691:7-19 (Bartone).) Placing a
16 hub in every spot beam "is actually teaching away from the inventions of the '875
17 patent" because claim 12 requires proximate and **non**-proximate service and feeder
18 beams. (*Id.*)

19 Asato also expressly teaches away from combination with references like Mitre
20 and AMC-17, which allegedly have proximate service and feeder beams. Asato was a
21 military system concerned with "dispersing forces over wide area to minimize mass
22 casualties" using "Split-Based Operations." (S-1180 at SSL0085062, 63; Tr. at
23 2692:1-6 (Bartone).) Critically, Asato places its alleged gateways ("Central Hubs")
24



in “sanctuaries”—*e.g.*, the U.S.—away from conflict areas—*e.g.*, the Middle East—such that the gateways were in “a relatively benign environment.” (*Id.* at SSL0085063, 66.) Non-proximate gateway and service beams reduce the chances of hostile signal jamming (*id.* at

SSL0085067) and “deny signal exploitation of uplink traffic patterns to gain intelligence on sensitive military operations” (*id.* at SSL0085066). Combining Asato with AMC-17 or Mitre would eliminate the benefits extolled by Asato regarding “Split-Based Operations” while running straight into the disadvantages it cautions against. All of these factors support the jury’s finding.

3. Objective Indicia Demonstrate Claim 12’s Nonobviousness

Evidence of objective indicia of nonobviousness—such as commercial success, industry praise, skepticism, copying, and long-felt but unsolved need—“may often be the most probative and cogent evidence in the record” as it “may often establish that an invention appearing to have been obvious in light of the prior art was not.”

Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc., 699 F.3d 1340, 1349 (Fed. Cir. 2012); *see also Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1335 (Fed. Cir. 2013) (“Here the district court averted the trap of hindsight by considering the evidence of the objective indicia as part of the obviousness analysis, and not just as an afterthought.”) “Objective evidence of secondary considerations is a

1 factual dispute underlying obviousness” and court are “thus bound to assume that the
 2 jury resolved the evidence of secondary considerations” correctly. *Power*
 3 *Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1369 (Fed. Cir.
 4 2013) cert. denied, 134 S. Ct. 900 (U.S. 2014). ViaSat provided substantial evidence
 5 of these indicia during trial.

6 For example, the trial record demonstrates, both qualitatively and quantitatively,
 7 claim 12’s significant contribution to the capacity ViaSat-1 and Jupiter-1 achieved.
 8 (Tr. at 1544:5-23 (Bartone); Tr. at 1346:21-1351:22 (Miller); Tr. at 145:19-146:16
 9 (Dankberg).) ViaSat-1 received wide industry praise and commercial success in large
 10 part due to this leap in capacity. (Tr. at 188:9-189:4 (Dankberg); *id.* at 2686:23-
 11 2688:23 (Bartone); *id.* at 1795:7-13 (Slottje).) Indeed, the ’875 patent alone gave
 12 Jupiter-1 a **35 Gigabit per second capacity increase** (Tr. at 1544:5-45:2 (Bartone)),
 13 which is almost **three times greater** than the entire capacity of AMC-17 (*id.* at
 14 2694:15-23) and is far more than many have ever hoped to achieve. (Tr. at 2689:12-
 15 2690:1 (Bartone).)

16 The mountain of evidence addressed at trial further establishes that Hughes
 17 requested, and SS/L provided, a copycat of ViaSat-1. (*See, e.g.*, V-418 (“he did say he
 18 was hoping that the design is identical to ViaSat and build another satellite just like it”);
 19 V-623 (“I have told them that we are doing everything we can to give them the highest
 20 capacity. We are not doing anything new on ViaSat that we are not doing for them”).)
 21 In doing so, SS/L copied the beam map implementing claim 12 of the ’875 patent.
 22 (*Compare* V-803.24; *with* S-709 at SSL0071770.) Defendants’ single-minded focus
 23 on Mr. Burr’s copying (*see generally* Dkt. 1056 and ViaSat’s concurrently-filed
 24 opposition) ignores the elephant in the room: Defendants’ and Hughes’ copying of

1 claim 12 on the Jupiter-1 satellite.

2 Given Defendants' failure to offer clear and convincing evidence of the
3 obviousness of claim 12, and given the jury's role as the arbiter of witness credibility,
4 the jury's finding of validity should not be disturbed.

5 **B. Defendants Are Not Entitled To JMOL That Claim 7 Of The '827 Patent
Is Invalid**

6 **1. A Reasonable Jury Could Conclude That AtContact (2004) Did
7 Not Anticipate Claim 7**

8 Anticipation is a question of fact, which the jury in this case answers in the
9 negative after considering all of the evidence presented at trial. *ActiveVideo*, 694 F.3d
10 at 1327. To anticipate a patent claim, a prior art reference must describe "each and
11 every claim limitation." *Id.* As the jury correctly found, Defendants failed to
12 demonstrate that the AtContact March 2004 and July 2004 applications ("AtContact
13 (2004)"), separately or together, satisfy this requirement.⁵

14 Claim 7 of the '827 patent requires a GSO satellite that includes at least **one**
15 **receiver** "configured to receive from one or more ground stations signals in a GSO
16 frequency band **and** in an extended frequency spectrum." Claim 7 also requires at
17 least **one transmitter** configured to transmit in "one or more of the GSO frequency
18 band **and** the NGSO frequency spectrum." (Dkt. 209 at 8.) The inventive receiver
19 and transmitter enable the GSO satellite to "establish an activated frequency mode to
20 activate one of a GSO frequency band mode and an extended frequency spectrum
21 mode" in the event of an interference situation. ('827 patent at claim 7.)

22 ⁵ Defendants failed to demonstrate that the July 2004 supplement incorporated
23 by reference the March 2004 amendment. *See Apple Inc. v. Int'l Trade Comm'n*,
24 725 F.3d 1356, 1362 (Fed. Cir. 2013). The arguments in this brief apply equally to
whether these applications are treated as incorporated by reference or combined
under obviousness.

AtContact (2004) fails to disclose any receiver or transmitter configured to operate in both the GSO band and the GSO+NGSO band. Instead, AtContact (2004) discloses a satellite that includes an NGSO payload (which would have NGSO-only receivers and transmitters) in addition to a GSO payload (which would have GSO-only receivers and transmitters). (See, e.g., S-1160 at SSL0083571 (“Four GSO satellites will be located at 83W, 121W, 34E, and 130E. These satellites will also host the payloads of the four non-GSO satellites.”); *id.* at SSL0083537 (Table 1) (referring to an “NGSO-component” and a “GSO-component”); *id.* at SSL0083543 (“The four-satellite plane of geosynchronous spacecraft would not utilize the primary GSO FSS bands at Ka-band as part of the non-GSO component of @contact”).) As reflected in the trial exhibits admitted into evidence, AtContact even insisted that, because its satellites had separate NGSO and GSO payloads, it was “logical from a functional and system design point” to treat its satellites as “all non-GSO.” (S-1159 at SSL0083494.) The jury could have concluded that this evidence alone is fatal to SS/L’s arguments since the claims require a GSO satellite, not an NGSO satellite.

As explained by ViaSat’s expert, AtContact’s separate GSO and NGSO components means that it is missing both a single receiver and single transmitter configured to operate between GSO and NGSO+GSO modes. (See, e.g., Tr. at 2721:24-2722:2 (Sturza) (“When there would be interference, *the AtContact NGSO would turn off. There’s no disclosure of extended frequency mode or of NGSO blanking*⁶”).)

⁶ Defendants’ objection to the term “NGSO blanking” is simply a red herring. The term was not “concocted for purposes of trial.” (Mot. at 4.) ViaSat’s design documents that pre-date this litigation use the term (V-1270.155-56) and even Defendants’ own internal documents use it (Tr. at 2055:12-16). More importantly,

1 Defendants' own expert admitted that "[i]n the text of their filing it says it's
 2 for GSO satellites, but they will also host the payloads for NGSO satellites, meaning
 3 that it's **a combination of the GSO and an NGSO payload** that comprise the GSO
 4 synchronous circular orbit Plaintiff [sic] satellites." (Tr. at 2284:11-15 (emphasis
 5 added).) Tellingly, throughout his testimony, Dr. Schindall never identified the
 6 claimed receiver or transmitter in AtContact (2004). (See Tr. at 2283:25-2286:12.)
 7 This failing alone supports the jury's finding.

8 Defendants' attempt (at 3-4) to analogize the infringing Jupiter-1 satellite to
 9 AtContact (2004) is also a nonstarter. Defendants' own expert testified at trial that
 10 he did not dispute that Jupiter-1 practices claim elements 7(a) and (b), which cover
 11 the receiver and transmitter, respectively. (Tr. at 2039:3-14; *see also* Tr. at
 12 1677:20-1687:7 (Sturza); Tr. at 939:22-940:13 (Hoerber); S-2461 at SSL2229212;
 13 V-24 at HUGHES-272948; S-372.2-3.) For all of these reasons, Defendants failed
 14 to show that the clear and convincing evidence only permits the conclusion that the
 15 AtContact (2004) anticipates claim 7.

16 2. A Reasonable Jury Could Conclude that Claim 7 Is Not Obvious

17 (a) Defendants waived their right to assert the new obviousness
 18 combinations identified in the motion

19 The first major problem with Defendants' obviousness attack on the '827 patent
 20 is that they raise six obviousness arguments **never presented at trial**. These include
 21 combinations based on **each** of AtContact (2004), the FCC Rules, **or** SkyBridge,
 22 alone or in combination with Weideman (2000). (Mot. at 8.) The only obviousness

23 as Dr. Sturza testified, the real issue is that AtContact (2004) failed to disclose "the
 24 **concept** of NGSO blanking" and not just the term itself. (Tr. 2723:14-15 (emphasis
 added).)

1 combination Defendants’ expert presented at trial—which Defendants do **not** rely on in
2 their motion—was the specific combination of AtContact (2004), the FCC Rules, and
3 Weideman (2000). (Tr. at 2288:25-2289:18 (Schindall).) Having failed to
4 introduce any evidence at trial as to the combinations they raise now, Defendants
5 have ***waived these arguments***. *Allergan, Inc. v. Barr Labs., Inc.*, 808 F. Supp. 2d
6 715, 735 (D. Del. 2011) *aff’d on other grounds*, 501 F. App’x 965 (Fed. Cir. 2013).

7 Moreover, because they failed to present these combinations at trial,
8 Defendants fell far short of meeting the “clear and convincing” standard for each
9 specific combination. *ActiveVideo*, 694 F.3d at 1327 (“To invalidate a patent claim
10 based on obviousness, a challenger must demonstrate by clear and convincing
11 evidence that a skilled artisan would have been motivated to combine the teachings
12 of the prior art references to achieve the claimed invention, and that the skilled
13 artisan would have had a reasonable expectation of success in doing so.”). For the
14 same reason, ViaSat has not been “fully heard” on these six arguments—as required
15 by F.R.C.P. Rule. 50(a)—because it was not able to put up evidence against them at
16 trial due to SS/L’s silence.

17 Even if the Court decides to entertain these new combinations, Defendants’
18 motion still fails because (1) AtContact (2004), the FCC Rules, SkyBridge, and
19 Weideman (2000), alone or in combination with one another, fail to disclose all of
20 claim 7’s elements; (2) a person of ordinary skill in the art would not have been
21 motivated to combine these references; and (3) objective indicia of nonobviousness
22 confirm claim 7’s nonobviousness. Each of these reasons independently mandates
23 denial of JMOL.

24

1 (b) Defendants' obviousness combinations do not disclose all claim
2 elements of claim 7

3 As the jury found, AtContact (2004), the FCC Rules, and SkyBridge all share the
4 same fatal flaw: they all fail to disclose a geostationary orbit (GSO) satellite with a
5 receiver and transmitter configured to operate in both a GSO band or GSO+NGSO
6 extended band based on an interference situation. Instead, these references, at best,
7 only disclose discrete pieces of the invention, and none of the alleged combinations
8 exhibit all claim limitations.

9 For example, beginning in 1997, the FCC opened up the NGSO band to GSO
10 satellites, allowing satellite operators to apply for a license to operate GSO satellites in
11 the NGSO band. The FCC dictated that GSO satellites had to operate on a secondary,
12 non-interfering basis with other NGSO satellites—the problem was that the FCC did
13 not tell satellite operators how to do it. Instead, they asked the satellite operators to
14 present their own proof that they could operate on a non-interfering basis in the NGSO
15 band as a prerequisite for receiving a license. (S-1210 at SSL1531121; Tr. at 2281:2-
16 12 (Schindall).) AtContact (2004) was an example of such a technical demonstration,
17 although, as discussed above, it does not disclose claim 7's limitations.

18 For their part, the FCC Rules presented the problem, not the solution. The FCC
19 Rules do not disclose **any** limitation of claim 7, particularly the inventive receiver and
20 transmitter configured to enable the GSO satellite to “establish an activated frequency
21 mode to activate one of a GSO frequency band mode and an extended frequency
22 spectrum mode” in the event of an interference situation. (See, e.g., Tr. at 2724:16-21
23 (Sturza) ; *id.* at 2280:6-18 (Schindall); *compare also* '827 Patent at 9:33-39; *with* S-
24 1210 at SSL1531120-23.)

1 SkyBridge is not a GSO satellite at all, contrary to the claim language; it is a
 2 proposal for an **NGSO** satellite. As such, and as Defendants' expert admitted at trial,
 3 SkyBridge fails to disclose the concept of activating a GSO frequency mode and an
 4 extended, GSO+NGSO frequency mode. (*See, e.g.* Tr. at 2282:13-14 (Schindall)
 5 ("It's two NGSO satellites, not a GSO and an NGSO."); *id.* at 2282:3-5 ("SkyBridge is
 6 a company that proposed an **NGSO system** in 2002, and they needed to demonstrate to
 7 the FCC that they could avoid interference with **other NGSO systems**") (emphasis
 8 added).) Since SkyBridge is an NGSO-only satellite, designed to use only NGSO
 9 systems, it does not disclose any architecture for shifting between GSO and
 10 GSO+NGSO modes, as required by the claims.

11 Recognizing the above, Defendants assert that Weideman (2000) fills in the
 12 missing pieces of AtContact (2004), the FCC Rules, and SkyBridge. Weideman
 13 (2000), however, also fails to disclose the claimed receiver and transmitter of the '827
 14 patent. Specifically, Weideman (2000) merely discloses "a switch and a series of
 15 different filters in order to dynamically adjust the bandwidth of a system." (Tr. at
 16 2288:15-17 (Schindall).) "[I]t's not about sharing spectrum." (Tr. at 2724:17-18
 17 (Sturza); *see also* S-2271 at 2:52-54 ("The present invention [Weideman] seeks to
 18 provide an improved system and method to optimize the power utilization on
 19 satellite").) Defendants have thus failed to demonstrate that any combination of
 20 AtContact (2004), the FCC Rules, SkyBridge, and/or Weideman (2000) discloses each
 21 and every limitation of claim 7, as the jury reasonably found.

22 (c) A person of ordinary skill in the art would not have been
 23 motivated to combine the alleged '827 references

24 Similar to the '875 patent, Dr. Schindall provided a single sentence on

1 motivation to combine at trial. (Tr. at 2289:15-22.) As relevant to this motion,
 2 however, he only addressed the combination of AtContact (2004), the FCC Rules, and
 3 Weideman (2000), which Defendants have not asserted on JMOL and the jury correctly
 4 rejected. Since he did not address any of the other combinations, his testimony does
 5 not support the current motion.⁷ The absence of any evidence that a person of ordinary
 6 skill would have been motivated to combine AtContact (2004), the FCC Rules, or
 7 SkyBridge with Weideman (2000) precludes overturning the jury’s finding of non-
 8 obviousness.

9 Even if the Court applies Dr. Schindall’s testimony to the new combinations
 10 raised in Defendants’ motion, however, his single, conclusory statement does not even
 11 come close to supporting an obviousness finding. Dr. Schindall only stated at trial:

12 Well, all of them have to do with ways of getting the maximum
 13 spectrum that you can when you’re working with a geosynchronous
 multi-beam satellite.

14 (Tr. at 2289:20-22.) This is insufficient evidence, as the jury found for the one
 15 obviousness combination presented at trial. *See InTouch Techs.*, 751 F.3d at 1348
 16 (finding non-obviousness because the expert failed to “identify sufficient reasons or
 17 motivations to combine the asserted prior references” or “focus on the relevant time
 18 frame of 2001”).

19 Moreover, because Dr. Schindall testified that these references accomplish the
 20 same thing—*i.e.*, “getting the maximum spectrum”—this is evidence that a person of

21 ⁷ To the extent Defendants argue that Dr. Schindall’s testimony regarding the
 22 combination of AtContact (2004), the FCC Rules, and Weideman (2000) necessarily
 23 includes the motivation to combine only AtContact (2004) and Weideman (2000),
 24 ViaSat disagrees that generic statements regarding the motivation to combine
 multiple references provides evidence of specific motivations to combine a subset of
 those references.

1 ordinary skill would **not** have any reason to combine them. *See Kinetic Concepts, Inc.*
2 *v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1369 (Fed. Cir. 2012) (“both of these
3 references independently accomplish similar functions [A] person having ordinary
4 skill in the art, who was merely seeking to create a better device . . . would have no
5 reason to combine the features of both devices into a single device.”). Accordingly,
6 Dr. Schindall’s testimony “bears no relation to any specific combination of prior art
7 elements” and “fails to explain why a person of ordinary skill in the art would have
8 combined elements from specific references in the way the claimed invention does.”
9 *ActiveVideo*, 694 F.3d at 1328; *see also Whitserve*, 694 F.3d at 24.

10 In any event, the evidence points away from combining these references. For
11 example, “Weideman is about saving power on the satellite . . . it’s not about sharing
12 spectrum. It’s about saving power on the satellite. And there would be no motivation
13 to combine it with the other two.” (Tr. at 2724:16-21 (Sturza).) *AtContact* (2004)
14 claimed that its solution was “**the only way** that GSO satellites can make effective and
15 beneficial use of the 18.8-193 GHz and 28.6-29.1 GHz bands.” (S-1160 at
16 SSL0083542-43.) *SkyBridge* was concerned with “NGSO/NGSO Sharing” among
17 NGSO satellites and not GSO satellites operating in the NGSO band on a secondary
18 basis. (S-1170 at SSL0084639; Tr. at 2724:4-7 (Sturza); Tr. at 2282:13-22
19 (Schindall).) And, as previously noted, the FCC Rules provided no guidance at all on
20 how to achieve a permissible satellite. Thus, a reasonable jury would conclude that the
21 one of ordinary skill would not be motivated to combine any of these references.

22 (d) Objective indicia confirm claim 7’s nonobviousness

23 In the decade after the FCC opened up the NGSO band to GSO satellite
24 operators, several companies applied for licenses for the NGSO band and none

1 obtained approval except AtContact, which proposed a complex, two-payload, seven-
 2 satellite system. (*Supra* at III.B.1; *see also* V-1328 at VST03693699 (rejecting
 3 Echostar’s application “because EchoStar had failed to demonstrate that there would be
 4 a low potential for interference into any NGSO system”).) The failure of others in the
 5 satellite industry resulted in a ten-year (*i.e.*, long-felt) and unmet need. As of 2001,
 6 even the FCC was skeptical that a solution could be achieved. (*Id.* at VST03693698
 7 (“We find the record in this proceeding to be insufficient to determine whether and how
 8 GSO/FSS systems can operate on a secondary basis in NGSO/FSS bands.”).) In 2008,
 9 ViaSat applied for its license (V-1328) based on the invention of the ’827 patent. The
 10 license was granted in 2011. (V-524 at SSL0400220.) Within ***six months***, Hughes
 11 amended its own application for the infringing Jupiter-1 satellite, expressly citing
 12 ViaSat’s application and the invention of the ’827 patent. (V-524 at SSL0400220
 13 (“the authorization Hughes seeks here is ***regulatorily indistinguishable from the***
 14 ***authorization for a satellite license ViaSat, Inc obtained just last year for its ViaSat-1***
 15 ***satellite***”).) Such copying—combined with singular success by ViaSat and long-felt
 16 need by others—is all substantial objective evidence of nonobviousness.

17 Furthermore, as demonstrated at trial, claim 7 enabled both ViaSat-1 and Jupiter-
 18 1 to obtain a significant capacity increase. (Tr. at 1691:22-1692:2 (Sturza); Tr. at
 19 1352:8-14 (Miller); Tr. at 147:3-149:23 (Dankberg).)⁸ These huge capacity increases,
 20 in turn, generated industry-wide praise and commercial success for ViaSat-1. (Tr. at
 21 188:9-189:4 (Dankberg); Tr. at 2688:4-13 (Bartone); Tr. at 1795:7-13 (Slottje).)

22 Defendants’ only rebuttal is that the FCC license, not the claimed invention, was

23 ⁸ The ’827 patent, for example, increased Jupiter-1’s capacity by 30 Gbps (Tr. at
 24 1691:22-1692:2(Sturza)) and ViaSat-1’s capacity by 30 Gbps (Tr. at 149:9-18
 (Dankberg)).

1 responsible for the increased capacity. (Mot. at 9.) What this ignores, however, is
 2 that the '827 patent is the only reason those licenses were approved in the first place.
 3 (See S-1210 at SSL1531120-24; Tr. at 147:3-149:23 (Dankberg).) Without the '827
 4 patent's elegant, inventive concept for changing frequency modes based on an
 5 interference event (or lack thereof), neither ViaSat nor Hughes would have received the
 6 FCC license at all.

7 Given Defendants' failure to offer clear and convincing evidence of claim 7's
 8 invalidity, the jury's finding of validity should not be overturned.

9 **C. Defendants Fail To Establish that the AtContact (2004), SkyBridge,**
 10 **Mitre, and Asato are "Printed Publications" Under § 102**

11 Non-patent references qualify as "printed publications" under sections 102(a)
 12 and 102(b) only if they are publicly accessible. *In re Lister*, 583 F.3d 1307, 1311 (Fed.
 13 Cir. 2009); *Cordis Corp. v. Boston Scientific Corp.*, 561 F.3d 1319, 1333 (Fed. Cir.
 14 2009); *see also Ex parte Suozzi*, 125 U.S.P.Q. 445 (P.O. Bd. App. 1959). Federal
 15 Circuit law is clear that a defendant must show more than simply that an alleged prior-
 16 art reference existed as of the critical date. *See In re Lister*, 583 F.3d at 1317 (Fed. Cir.
 17 2009) (holding that document was not a "printed publication" despite certificate of
 18 registration from U.S. Copyright Office); *Norian Corp. v. Stryker Corp.*, 363 F.3d
 19 1321, 1330 (Fed. Cir. 2004) (holding that defendant failed to provide clear and
 20 convincing evidence that reference was "actually available"); *N. Telecom, Inc. v.*
 21 *Datapoint Corp.*, 908 F.2d 931, 936-37 (Fed. Cir. 1990) (holding references were not
 22 "printed publications" where there were "uncertainties of public access").

23 At trial, Defendants failed to present **any** evidence of public accessibility of
 24 AtContact (2004) and SkyBridge (asserted against the '827 patent) and Mitre and

Asato (asserted against the '875 patent), and thus the jury could have reasonably found against invalidity based on these references. Where, as here, the alleged infringer offers “no evidence” to support the prior-art status of a reference, the Federal Circuit has held that the finder of fact is justified in disregarding the reference entirely. *Carella v. Starlight Archery & Pro Line Co.*, 804 F.2d 135, 139 (Fed. Cir. 1986); *see also ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 866 (Fed. Cir. 2010) (finding that a copyright date was not evidence of public accessibility); *CNET Networks, Inc. v. Etilize, Inc.*, 584 F. Supp. 2d 1260, 1273-74 (N.D. Cal. 2008) (finding no public accessibility despite a copyright date and one declaration). For this additional reason, the jury verdict on validity should not be overturned.

D. Defendants Are Not Entitled To A New Trial.

Finally, Defendants advance two reasons for a new trial, both of which fail. First, Defendants allege claim construction issues limited to the '875 patent require a new trial. This request fails for all the reasons set forth above and in the Court's Claim Construction Order (Dkt. 206), ViaSat's claim construction briefing (Dkts. 154, 178), and ViaSat's opposition to Defendants' motion regarding the construction of “set of colors” and Dr. Bartone's opinions related to service beams (Dkt. 592).

Second, Defendants allege that the verdict is against the weight of the evidence, but offer no other reason for this claim beyond those already discussed above. For the reasons already discussed at length in this brief, the substantial evidence unequivocally supports the jury's verdict and Defendants are therefore not entitled to a new trial.

IV. CONCLUSION

For the foregoing reasons, ViaSat respectfully requests that the Court deny SS/L's motion for judgment as a matter of law and new trial.

1 DATED: July 11, 2014

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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3
4 By /s/ Sean S. Pak

Sean S. Pak

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6 Attorneys for Plaintiff ViaSat, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that, on July 11, 2014, I caused the foregoing **PLAINTIFF VIASAT, INC.’S OPPOSITION TO DEFENDANTS’ MOTION FOR JUDGMENT AS A MATTER OF LAW (RENEWED), OR A NEW TRIAL (10 OF 12), REGARDING THE INVALIDITY OF THE ASSERTED CLAIMS OF THE '827 AND '875 PATENTS IN LIGHT OF THE PRIOR ART** to be served on Defendants’ counsel via the Court’s ECF system and via e-mail.

DATED: July 11, 2014

By /s/ Sean S. Pak

Sean S. Pak