

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD J. BAKER,  
Plaintiff,

v.

MICROSOFT CORPORATION, et al.,  
Defendant(s).

No. 2:16-cv-00396-RAJ

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OF NON-  
INFRINGEMENT**

NOTE ON MOTION CALENDAR:  
July 15, 2016

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## I. INTRODUCTION

Plaintiff Richard Baker's infringement theory in this case is directly contrary to the amendments and arguments that he made before the Patent Office in order to secure his patent. The patent relates generally to a video-based instructional aid where movements of the user are captured on video (as "image signals") and compared to a database of images (e.g., comparing a user's golf swing to the golf swing of a pro). During prosecution, Mr. Baker specifically amended his patent claims to require that image signals be captured at a "first location" and transmitted to, stored, and/or compared at a "**second location remote from** the first location." See Declaration of Sonal N. Mehta In Support Of Defendants' Motion For Summary Judgment Of Non-Infringement ("Mehta Decl."), Ex. 1 [November 15, 1994 Amendment] at 8-14. Mr. Baker added this "remote" requirement specifically to argue around a prior art patent (the Mann Reference) that expressly disclosed the capture, storage, and comparison of image signals at the **same location**. *Id.* at 15-17. In so doing, Mr. Baker expressly distinguished his invention from the Mann Reference: "the basic issue is the separation or remoteness of the two basic components of Applicant's system to form a more personalized instructional aid. **Nowhere in Mann** is there a teaching that the computer system is **located remotely** from the teaching station." *Id.* at 15. And in arguing that the claim amendment adding the "remote" requirement overcame this prior art, Mr. Baker stressed that "[t]ransmittance to a separate location for analysis and feedback is **critical** in Applicant's invention." *Id.* at 17.<sup>1</sup> On the basis of Mr. Baker's amendments, the Patent Office granted Mr. Baker the '001 Patent. Mehta Decl., Ex. 2 [January 18, 1995 Office Action] at 2.

Now, over twenty years later and nearly three years after the expiration of the patent, Mr. Baker is pursuing the precise infringement theory that he disavowed during prosecution—accusing systems that include a camera (accused of capturing image signals) and a video game console or computer (accused of storing image signals) that are in the **same location**. Mr. Baker concedes that there is no "remote" second location utilized in the accused systems, but instead

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<sup>1</sup> Emphasis supplied and internal citations omitted throughout, unless otherwise noted.

maintains that “plaintiff herein claims a computer remote at a second location can also be a local computer in the same vicinity, room as a person . . .” Dkt. No. 129 [Supp. Inf. Contentions] at 2.

There are no relevant factual disputes here. As a matter of law, Mr. Baker cannot pursue an infringement theory he disclaimed during prosecution and amended the patent claims to expressly avoid. To wit, these arguments and amendments provide independent grounds for a determination that Mr. Baker’s claims are barred in their entirety. The Court should grant summary judgment of non-infringement.

## **II. PROCEDURAL POSTURE**

On February 26, 2015, Mr. Baker sued Microsoft Corporation (“Microsoft”), Ubisoft Inc. (“Ubisoft”), Nintendo of America Inc. (“NOA”), Electronic Arts Inc. (“EA”), Harmonix Music Systems, Inc. (“Harmonix”), and Majesco Entertainment Company (“Majesco”) (collectively “Defendants”) in the Eastern District of Texas. Dkt. No. 1. Mr. Baker filed an Amended Complaint on May 13, 2015. Dkt. No. 44. His complaints alleged that Defendants infringe U.S. Patent No. 5,486,001 (“the ’001 Patent”).<sup>2</sup> *Id.* Microsoft, NOA, EA, Majesco, and Ubisoft responded to Mr. Baker’s Amended Complaint, and filed a motion to transfer venue to this district pursuant to 28 U.S.C. § 1404(a).<sup>3</sup> The Eastern District of Texas granted the motion to transfer, and this Court received the case on March 17, 2016. Dkt Nos. 98, 104.

The parties submitted a Joint Status Report to this Court on April 18, 2016. Dkt. No. 127. In their Joint Status Report, the parties jointly requested that the Court permit a narrowly-tailored early motion for summary judgment. *Id.* at 5. The parties “agree[d] that resolution of the issue in Defendants’ favor would be case dispositive, while a ruling in favor of Plaintiff would provide important guidance to both sides in preparing their cases and could facilitate narrowing of disputes or resolution without further action by the Court.” *Id.* at 6. On May 17,

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<sup>2</sup> Mr. Baker’s initial complaint explained that he filed the case *pro se* because he had conferred with a number of attorneys in an attempt to obtain counsel, but they told him his case “has difficulties.” Dkt. No. 1 at 2.

<sup>3</sup> Harmonix filed a Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 52), which was denied as moot.

2016, the Court entered its Scheduling Order, adopting the parties' proposal as to an early summary judgment motion. Dkt. No. 128.

### III. APPLICABLE LAW

#### A. Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A party opposing a motion for summary judgment on a claim for which it carries the burden of proof must present evidence sufficient to prove each element of that claim in order to avoid summary judgment. *Celotex*, 477 U.S. at 322-23. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

#### B. Literal Infringement

Literal infringement of a claim occurs only "when every limitation recited in the claim appears in the accused device, i.e., when 'the properly construed claim reads on the accused device exactly.'" *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1331 (Fed. Cir. 2001). A defendant seeking summary judgment of non-infringement need only point to the ways in which the accused products fail to meet the claim limitations. *Exigent Tech., Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1309 (Fed. Cir. 2006). The construction of the claims falls "exclusively within the province of the court." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 831, 837 (2015).

In determining the proper scope of a claim, it is well established that statements made during prosecution may affect the scope of the claims, such that "a patentee may limit the meaning of a claim term by making a clear and unmistakable disavowal of scope during prosecution." *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed. Cir. 2008) (affirming summary judgment of non-infringement in view of claim scope disavowal). A disavowal of claim scope occurs when the patentee "clearly characterize[s] the invention in a way to try to overcome rejections based on prior art." *Id.*; see also *ERBE Elektromedizin GmbH*

1 *v. Canady Tech. LLC*, 629 F.3d 1278, 1286 (Fed. Cir. 2010) (affirming summary judgment of  
 2 non-infringement based on claim scope disavowal). The doctrine of prosecution disclaimer  
 3 “protects the public’s reliance on definitive statements made during prosecution” by “precluding  
 4 patentees from recapturing through claim interpretation specific meanings disclaimed during  
 5 prosecution.” *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323-24 (Fed. Cir. 2003).  
 6 Claims should not be construed “one way in order to obtain their allowance and in a different  
 7 way against accused infringers.” *Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1384 (Fed. Cir.  
 8 2005).

### 9 **C. Infringement Under The Doctrine of Equivalents**

10 The doctrine of equivalents allows finding infringement when the accused product does  
 11 not literally meet a limitation but has an equivalent for that limitation. *Warner-Jenkinson Co. v.*  
 12 *Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997). The doctrine of equivalents analysis is  
 13 conducted on a limitation-by-limitation basis, and requires “special vigilance against allowing  
 14 the concept of equivalence to eliminate completely any such elements.” *Id.* at 40. “The doctrine  
 15 of equivalents, when applied broadly, conflicts with the definitional and public-notice functions  
 16 of the statutory claiming requirement.” *Id.* at 29; *see Sage Prods., Inc. v. Devon Indus., Inc.*, 126  
 17 F.3d 1420, 1425 (Fed. Cir. 1997) (“[B]etween the patentee who had a clear opportunity to  
 18 negotiate broader claims but did not do so, and the public at large, it is the patentee who must  
 19 bear the cost of its failure to seek protection for [a] foreseeable alteration of its claimed  
 20 structure.”).

21 An important limitation on the doctrine of equivalents is the doctrine of prosecution  
 22 history estoppel. “The doctrine of prosecution history estoppel prevents a patent owner from  
 23 recapturing with the doctrine of equivalents subject matter surrendered to acquire the patent.”  
 24 *Honeywell Int’l, Inc. v. Hamilton Sundstrand Corp.*, 523 F.3d 1304, 1312 (Fed. Cir. 2008) (citing  
 25 *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359, 1365 (Fed. Cir. 2003)  
 26 (“*Festo IX*”). Whether prosecution history estoppel applies to a particular doctrine of equivalents  
 27 argument, and thus whether the doctrine of equivalents is available for a particular claim  
 28 limitation, is a question of law. *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1354 (Fed. Cir.

1 1998); *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1460 (Fed. Cir. 1998), *abrogation on*  
2 *different grounds recognized by, Teva Pharms USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335 (Fed.  
3 Cir. 2015).

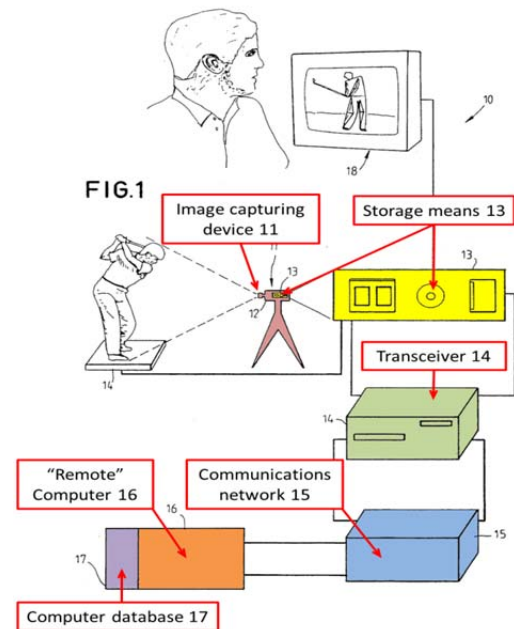
4 There are two distinct theories that fall within the penumbra  
5 of prosecution history estoppel: amendment-based estoppel and argument-based estoppel. *Elkay*  
6 *Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 979 (Fed. Cir. 1999) (holding that the scope of  
7 coverage of the claims may change if a patentee has “relinquished [a] potential claim  
8 construction in an amendment to the claim or in an argument to overcome or distinguish a  
9 reference”). Both are present in this case.

10 First, amendment-based prosecution history estoppel applies if an applicant amends a  
11 claim element during prosecution and thereby narrows the scope of the claim in order to comply  
12 with a provision of the Patent Act. *Festo IX*, 344 F.3d at 1365-66. In such a case, the  
13 amendment creates a rebuttable presumption of a “general disclaimer of the territory between the  
14 original claim and the amended claim.” *Felix v. American Honda Motor Co.*, 562 F.3d 1167,  
15 1182 (Fed. Cir. 2009). Whether the presumption has been rebutted is a question of law for the  
16 Court. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 493 F.3d 1368, 1375 (Fed. Cir.  
17 2007) (“*Festo X*”); *Festo IX*, 344 F.3d at 1367. To rebut the presumption, a patentee must show:  
18 “(1) that the equivalent was unforeseeable at the time of the patent application; (2) that the  
19 rationale underlying the amendment bore ‘no more than a tangential relation to the equivalent in  
20 question’; or (3) ‘some other reason suggesting that the patentee could not reasonably be  
21 expected to have described the insubstantial substitute in question.’” *Voda v. Cordis Corp.*, 536  
22 F.3d 1311, 1325 (Fed. Cir. 2008) (citing *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*,  
23 535 U.S. 722, 740-41 (2002) (“*Festo VIII*”)).

24 The first of these three exceptions “requires a patentee to show that an alleged equivalent  
25 would have been ‘unforeseeable at the time of the amendment and thus beyond a fair  
26 interpretation of what was surrendered.’” *Festo IX*, 344 F.3d at 1369 (quoting *Festo VIII*, 535  
27 U.S. at 738). “This criterion presents an objective inquiry, asking whether the alleged equivalent  
28 would have been unforeseeable to one of ordinary skill in the art at the time of the amendment.”

*Id.* The second exception, the “tangential relation” exception, “is very narrow.” *Honeywell*, 523 F.3d at 1315. This exception turns on whether the narrowing amendment was peripheral to the alleged equivalent. *Id.* The applicability of this exception must be determined from the prosecution history record without the introduction of additional evidence. *Festo IX*, 344 F.3d at 1370; *Festo X*, 493 F.3d at 1375. Although there is no hard-and-fast test for identifying a tangential relation, an amendment made to avoid prior art containing the alleged equivalent is not tangential. See *Pioneer Magnetics, Inc. v. Micro Linear Corp.*, 330 F.3d 1352, 1357 (Fed. Cir. 2003). The third exception, the “some other reason” exception, also “must be a narrow one” and should be determined based solely upon the prosecution history record. *Festo IX*, 344 F.3d at 1370; *Festo X*, 493 F.3d at 1375. If the patentee cannot rebut the presumption, prosecution history estoppel bars him from relying on the doctrine of equivalents for the pertinent element. *Festo IX*, 344 F.3d at 1367.

Second, argument-based estoppel is based on the principle that “[c]lear assertions made during prosecution in support of patentability, whether or not actually required to secure allowance of the claim, may also create an estoppel.” *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1583 (Fed. Cir. 1995). “To invoke argument-based estoppel, the prosecution history must evince a ‘clear and unmistakable surrender of subject matter.’” *Deering Precision Instruments, L.L.C. v. Vector Distrib. Sys., Inc.*, 347 F.3d 1314, 1326 (Fed. Cir. 2003). As with amendment-based estoppel, any argument-based estoppel affecting a limitation in one claim extends to all claims in which that limitation appears. *Southwall Techs.*, 54 F.3d at 1584 (“[O]nce an argument is made regarding a claim term so as to create an estoppel, the estoppel will apply to that term in other claims.”).



#### IV. UNDISPUTED FACTS

##### A. The Patent, Claims, And Prosecution History

The '001 Patent generally describes an instructional aid that uses a camera to capture images of a person's movements at a first location, and then sends those images to a "remote" computer at a second location to compare the person's movements to exemplary movements stored in a database. *See* Mehta Decl., Ex. 3 ['001 Patent] at Abstract. The remote computer can then send instructions for improvement to the user at the first location. *Id.* The preferred embodiments are systems for instructing the user on improving his or her golf swing. *See, e.g., id.* at 1:5-12, 1:29-64, Fig. 1.

As shown in the annotated version of Figure 1 to the right, an image capturing device 11 (shown in pink) captures an image of a person's movement, which is stored in a storage means 13 (yellow). *Id.* at 4:62-5:11. Then, a transceiver 14 (green) transmits the image data over a communications network 15 (blue) to a "remote" computer 16 (orange). *Id.* at 6:1-40. The remote computer analyzes the data relative to exemplary data stored in computer database 17 (purple). *Id.* at 6:1-31; 7:5-19.

Mr. Baker accuses Defendants of infringing claims 1, 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 18, 19, 20 of the '001 Patent. Dkt. No. 129 [Supp. Inf. Contentions] at 2. Of those, claims 1, 10, and 18 are independent claims.<sup>4</sup> *See* Mehta Decl, Ex. 3 ['001 Patent]. The '001 Patent expired on January 23, 2013. *Id.*

The asserted independent claims of the '001 Patent all require "capturing" visual signals a "first location," as shown below (collectively "the first location" limitations):

- "capturing and storing initial visual image signals representative of a particular movement at a first location" (claim 1);
- "means for capturing visual image signals of a particular movement at a first

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<sup>4</sup> If an independent claim is not infringed, then the dependent claims that depend upon it also are not infringed. *Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1316 n.1 (Fed. Cir. 2006). Thus, the Court need only consider Claims 1, 10, and 18 in resolving this motion.

location” (claim 10);

- “means for visually scanning, sensing and capturing visual and informational data signals representative of a particular target; means for storing said representative visual and informational data signals” (claim 18).

*Id.*

The asserted independent claims of the ’001 Patent all further require that the signals be “stor[ed]” at or transmitted to a “second location remote from the first location,” as shown in the following limitations (collectively the “second location remote from the first location” limitations):

- “storing preferred image signals representative of a selected preferred movement at a second location remote from said first location in a data base of a computer” (claim 1);
- “means for storing said captured visual image signals at a second location remote from said first location” (claim 10); and
- “means for transmitting said representative visual and informational data signals to a remote location” (claim 18).

*Id.*

During prosecution of the ’001 Patent, Mr. Baker originally proposed claims that did not include the “second location remote from the first location” limitations. Mehta Decl., Ex. 4 [November 12, 1993 Application]. The Patent Examiner responded by rejecting Mr. Baker’s proposed claims as anticipated by U.S. Patent No. 5,184,295 (the “Mann Reference”), and obvious under the combination of the Mann Reference and other prior art. Mehta Decl., Ex. 5 [August 3, 1994 Office Action] at 3-4. In the rejection, the Patent Examiner concluded that the Mann Reference discloses “the steps of capturing and storing visual image signals representative of a particular movement, comparing said captured image signals with stored image signals of a preferred movement, and generating further video image signals based on the original signals.”

*Id.* at 3.

1 In response, Baker amended the proposed claims of the '001 Patent to add the "first  
2 location" and a "second location remote from said first location" limitations, as shown for  
3 exemplary claim 1 below:

- 4 1. (Amended) A method for providing an instructional aid for  
5 assisting a person to emulate a preferred movement, [including the  
6 steps of] said method comprising:

7 capturing and storing initial visual image signals  
8 representative of a particular movement at a first location,

9 storing preferred image signals representative of a selected  
10 preferred movement at a second location remote from said first  
11 location in a data base of a computer,....

12 Mehta Decl., Ex. 1 [November 15, 1994 Amendment] at 8 (added claim language underlined,  
13 removed claim language in brackets).

14 In the remarks accompanying the proposed amendments, Mr. Baker argued that his  
15 claims were not anticipated by the Mann Reference because they had been amended to require  
16 that the claimed computer system is "located remotely," as "emphasized" in the specification and  
17 "critical" to the invention:

18 . . . The Examiner contends Mann's method and apparatus includes the  
19 procedural steps and apparatus means to capture and store visual signals  
20 representative of a specific physical movement, to compare the captured image  
21 signals with stored image signals of a preferred movement, and to generate  
22 further image signals based on the original signals.

23 Applicant disagrees with the Examiner's reading of Mann in that ***the basic issue***  
24 ***is the separation or remoteness of the two basic components*** of Applicant's  
25 system to form a more personalized instructional aid. ***Nowhere in Mann is there***  
26 ***a teaching that the computer system is located remotely from the teaching***  
27 ***station as is emphasized in Applicant's disclosure***, wherein the primary images  
28 are formed in one location for instruction such as a studio or an aircraft.  
***Transmittance to a separate location for analysis and feedback is critical in***  
***Applicant's invention***, because the programming can be efficiently performed at  
the remote computer station. Applicant respectfully submits that this  
modification is patentable in the absence of any prior art teachings to the  
contrary.

25 *Id.* at 16-17. Mr. Baker's argument clearly distinguished his invention, which required the  
26 computer system to be "located remotely from the teaching station," from the Mann Reference,  
27 "wherein the primary images are formed in ***one location*** for instruction ***such as a studio*** or an  
28 aircraft." *Id.* at 17. Mr. Baker's argument further confirmed that the "claims in this application

1 have been revised to more particularly define applicants' unique construction in view of the prior  
2 art of record." *Id.* at 16.

3 In response to Mr. Baker's amendments and argument, the Patent Office allowed the  
4 asserted claims. Mehta Decl., Ex. 2 [January 18, 1995 Office Action]. In allowing the claims of  
5 the '001 Patent, the Patent Office stated that "[t]he substantial amendments to the claims define  
6 over the prior rejection." *Id.* at 2.<sup>5</sup>

### 7 **B. The Accused Products and Mr. Baker's Infringement Contentions**

8 Mr. Baker accuses two groups of products of infringement: (1) Microsoft's Kinect sensor  
9 (a peripheral that can be used with the Xbox360 console) and games that can be played on the  
10 Xbox 360 with the Kinect; and (2) the Your Shape game and associated camera, as played on  
11 Nintendo's Wii console or a personal computer ("PC").<sup>6</sup> See Joint Statement Of Stipulated Facts  
12 Relevant To Summary Judgment Of Non-Infringement ("Stipulated Facts") at ¶ 3. In both  
13 systems the accused cameras (the Kinect sensor and the USB Camera) are connected to the video  
14 game console (or, in the case of the USB Camera for the Your Shape game, a PC) via a physical  
15 cable. Stipulated Facts at ¶¶ 7, 13, 17, 19; Mehta Decl., Ex. 8 [Kinect Setup]; *id.*, Exs. 9, 10 [Wii  
16 Setup].

17  
18 <sup>5</sup> Mr. Baker's subsequent attempts to patent a non-remote embodiment of his invention  
19 further confirm that the **remote** system is central to the invention. On January 6, 1996, Mr.  
20 Baker filed a continuation-in-part application to the '001 Patent in which he sought to patent  
21 performance of all of the steps of his claimed invention in the same location:

22 Whilst the image capture devices and computer containing the data base for  
23 comparison are normally located at remote locations requiring the use of  
24 transmitting means for transmitting the signals between the locations, the  
25 computer may also be at the same location as the image capturing device. It is  
26 envisaged also that the computer and associated data base may be incorporated  
27 into the image capturing means. Of course, the term "computer" as used herein  
28 includes any form of computing means.

25 Mehta Decl., Ex. 6 [CIP Application] at 21. On September 5, 1996, the Patent Office issued a  
26 Final Rejection on Mr. Baker's application, and he abandoned the application. Mehta Decl., Ex.  
27 7 [September 5, 1996 Final Rejection].

28 <sup>6</sup> Ubisoft's Your Shape for Wii and Your Shape for PC were sold bundled with a camera,  
referred to herein as the "USB Camera."

Mr. Baker's contentions with respect to the "second location remote from the first location" limitations are the same for all games that are accused of infringement, whether used in connection with the Kinect sensor and Microsoft console or with the USB Camera and Wii console or PC. Dkt. No. 129 [Supp. Inf. Contentions] at 15. Specifically, Mr. Baker asserts that the accused cameras (the Kinect sensor and the USB Camera) satisfy the requirements of "capturing and storing initial visual image signals . . . at a first location" as required by the claims. *Id.* at 14-15. Mr. Baker contends that the "first location" required by all asserted claims is the location where the "real world person is who wants personalised audio-visual advice or an object," as well as the "[m]otion sensing camera/s" are located. *Id.* at 15. Mr. Baker accuses the Xbox360 console, the Nintendo Wii console, and a PC of "storing preferred image signals representative of a selected preferred movement at a second location remote from said first location in a data base of a computer." *Id.* Mr. Baker contends that the "second location remote from the first location" is the location where the Xbox 360, Nintendo Wii or PC is located. *Id.* Accordingly, Mr. Baker contends that alleged images are formed by the accused cameras in the same physical location as the analysis and feedback allegedly performed by the accused consoles and computers. *Id.* at 15-16. In fact, it is **undisputed** that at all times prior to the expiration of the '001 Patent, the accused Microsoft Kinect sensor could be connected to the Xbox360 console only through a physical cable, necessitating that they be co-located in the same room. Stipulated Facts at ¶¶ 13-14. The same was true for the accused USB Camera. *Id.* at ¶¶ 17-20. Mr. Baker contends that the storage, transmission, and/or comparison of visual image signals at the same location satisfies the "second location remote from the first location" limitations. Dkt. No. 129 [Supp. Inf. Contentions] at 14-17.

Mr. Baker acknowledges that the accused consoles and computers are "local"—that is, in the same room as the accused cameras. Dkt. No. 129 [Supp. Inf. Contentions] at 2. Yet, Mr. Baker claims that, contrary to his statements during prosecution, a "**computer remote at a second location** can also be a local computer in the same vicinity, room":

Patent No. 5,486,001 (“the ‘001 Patent”), so as to produce their personalised audio-visual “fitness and dance” trainer, and where their maybe some dispute as to element/s used by the defendants compared to plaintiffs claims, such as defendants use of a “local” computer over plaintiffs ‘001 claims reading on use of a computer “remote” at a second location, the plaintiff herein claims a computer remote at a second location can also be a local computer in the same vicinity, room as a person, as per the accused Xbox 360, Nintendo Wii & PC used by the

*Id.* Further, Mr. Baker claims that the difference between Defendants’ accused products and the ‘001 Patent is that “Defendants have just moved the location of a computer mentioned plaintiffs ‘001 Patent from being remote to a local situation”:

**III. DIRECT, LITERAL INFRINGEMENT AND INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS, AFTER-ARISING TECHNOLOGY**

Richard J Baker presently contends that the Defendants Accused Instrumentalities software programs and hardware when combined either directly infringe, literally or under his pioneer inventor doctrine of equivalents, after arising technology rights the asserted claims of the ‘001 Patent by, without authority, making, using, importing, offering to sell, or selling the Accused Products that practice the invention of the ‘001 Patent within Washington State and throughout the United States of America. Because in regards, doctrine of equivalents test, *e.g.*, function way-result there is “insubstantial” differences between Plaintiff’s patent process protected by his ‘001 Patent and the way defendants accused interactive fitness and dance programs produce and display his personalised audio-visual instructional video presentation with associated Xbox 360, Nintendo Wii & PC. Defendants have just moved the location of a computer mentioned in plaintiffs ‘001 patent from being remote to a local situation with a person, and provided equivalent, after arising technology products to produce the plaintiff invention using his process described in ‘001 patent.

*Id.* at 5. These undisputed facts compel summary judgment of non-infringement.

**V. MR. BAKER’S INFRINGEMENT CLAIMS FAIL AS A MATTER OF LAW**

**A. To The Extent Mr. Baker Is Alleging Literal Infringement, His Allegations Fail As A Matter Of Law**

There can be no dispute that Defendants do not literally infringe the “remote” limitation.<sup>7</sup>

<sup>7</sup>

Based on the claim charts provided by Mr. Baker as part of his infringement contentions,

1 All of the asserted claims require that signals be captured at a “first location,” and stored at or  
2 transmitted to a “second location remote from the first location.” As explained in more detail in  
3 Section V.B *supra*, during prosecution of the ’001 Patent, Mr. Baker added this “second location  
4 remote from the first location” limitation to the claims to secure his patent. In doing so, he  
5 specified that the remote location was a “separate” location, and specifically distinguished his  
6 invention from the Mann Reference in which he claimed that “primary images are formed in **one**  
7 **location** for instruction such as a studio or an aircraft.” Mehta Decl., Ex. 1 [November 15, 1994  
8 Amendment] at 17.

9 Yet now, Mr. Baker concedes that the consoles and computers he accuses of storing the  
10 signals are in the **same** location—or **local to**—the accused cameras that he accuses of capturing  
11 the signals. It is undisputed that both the Kinect sensor and the USB Camera (the accused  
12 cameras) are connected through a hard-wired USB cable to the accused consoles and computers,  
13 and thus would be located in the same room, and in close proximity to, the accused consoles and  
14 computers. Stipulated Facts at ¶¶ 13-14, 17-20. Thus, it is undisputed that the accused consoles  
15 and computers are not in a “second location remote from the first location.”

16 In view of these undisputed facts, Mr. Baker’s literal infringement claim fails as a matter  
17 of law. None of Defendants’ accused products satisfy the “second location remote from the first  
18 location” limitation, and thus none can literally infringement. While Mr. Baker now argues that  
19 a “computer remote at a second location can also be a local computer in the same vicinity,  
20 room,” Dkt. No. 129 [Supp. Inf. Contentions] at 2, the claims all require a second computer at a  
21 “remote” location. There should be no dispute that the plain and ordinary meaning of “remote”  
22 does not literally include a local computer in the same room as the camera. Indeed, Mr. Baker’s  
23 infringement contentions confirm that “local” and “remote” are different: “Defendants have just

24 Defendants understand that Mr. Baker is not actually asserting literal infringement. Specifically,  
25 Mr. Baker has not alleged that the “remote location” limitation is literally present in Defendants’  
26 accused products, and, to the contrary, acknowledges that the accused functionality takes place in  
27 a single location. Nevertheless, because Mr. Baker has suggested during the parties’ meet and  
28 confer that he may be seeking to allege literal infringement, Defendants address the theory herein.

1 moved the location of a computer mentioned plaintiffs' '001 Patent from being remote to a local  
 2 situation." *Id.* at 5. Moreover, even if the plain meaning of "remote" were to include local (it  
 3 does not), Mr. Baker clearly disavowed any such claim scope during prosecution. *Computer*  
 4 *Docking Station Corp.*, 519 F.3d at 1374 (affirming summary judgment of non-infringement  
 5 based on disavowal, which occurs when the patentee "clearly characterize[s] the invention in a  
 6 way to try to overcome rejections based on prior art"). As explained above, Mr. Baker added the  
 7 requirement of a "second location remote to the first location" in order to obtain allowance of his  
 8 patent claims, and cannot now argue the opposite in litigation. *Chimie*, 402 F.3d at 1384 (claims  
 9 should not be construed "one way in order to obtain their allowance and in a different way  
 10 against accused infringers"). Defendants are entitled to summary judgment of non-infringement  
 11 with respect to any ostensible claim of literal infringement.

12 **B. Mr. Baker's Amendments Preclude Reliance On The Doctrine Of**  
 13 **Equivalents**

14 Prosecution history estoppel bars Mr. Baker from relying on the doctrine of equivalents.  
 15 It is beyond credible dispute that the "second location remote from the first location" limitations  
 16 (1) were added by amendment during prosecution; (2) narrowed the scope of the claim; and (3)  
 17 were added to overcome a prior art rejection of the claim over the Mann Reference. *See* Section  
 18 IV.A *supra*. As such, there is a presumption that there was a general disclaimer of any claim  
 19 scope between that of the original claim and the amended claim,<sup>8</sup> and that Mr. Baker is therefore

---

20 <sup>8</sup> This presumption applies to all claims containing the amended limitation. *Deering*  
 21 *Precision*, 347 F.3d at 1326; *see also Builders Concrete, Inc. v. Bremerton Concrete Prods. Co.*,  
 22 757 F.2d 255, 260 (Fed. Cir. 1985) (holding that prosecution history estoppel applies to a claim  
 23 containing a limitation that was allowed as originally filed based on the addition of the same  
 24 limitation in a separate claim). That claims 10 and 18 are drafted in means-plus-function format  
 25 does not change that analysis. Not only do Defendants not practice the claimed functions (which  
 26 require a remote location), but Mr. Baker cannot capture via means-plus-function equivalence  
 27 the structure that he disavowed during prosecution. *See, e.g., Ballard Med. Prods. v. Allegiance*  
 28 *Healthcare Corp.*, 268 F.3d 1352, 1359 (Fed. Cir. 2001) ("When a patentee advises the examiner  
 (and the public after patent issuance) that a particular structure is not within his invention, the  
 patentee is not permitted to assert in a subsequent infringement action that the same structure is  
 equivalent to the structure described in the patentee's specification for purposes of section 112  
 paragraph 6.")

1 precluded from relying upon the doctrine of equivalents to establish the existence of this claim  
2 limitation. *Felix*, 562 F.3d at 1182; *Voda*, 536 F.3d at 1325; *Festo IX*, 344 F.3d at 1367. The  
3 exceptions do not apply here.

4 First, Mr. Baker cannot establish that the alleged equivalent—performance of the claim  
5 steps at a single location rather than a first location and a second, remote limitation—was  
6 unforeseeable. Common sense dictates that performance of all claim limitations at a single  
7 location, instead of multiple, remote locations as claimed, was foreseeable. But the Court need  
8 not rely only on common sense. The Mann Reference—the prior art that Mr. Baker amended his  
9 claims to overcome—discloses that “the steps of capturing and storing visual image signals  
10 representative of a particular movement, comparing said captured image signals with stored  
11 image signals of a preferred movement, and generating further video image signals based on the  
12 original signals” take place at a single location. Mehta Decl., Ex. 5 [August 3, 1994 Office  
13 Action] at 3; *see also* Ex. 11 [Mann Reference] at Fig 1, 6:45-8:15. In other words, the alleged  
14 equivalent was not only foreseeable, it was prior art.

15 Second, the “very narrow” “tangential relation” exception cannot apply here. The  
16 prosecution history shows that Mr. Baker’s amendment adding the “second location remote from  
17 the first location” limitation was for the express purpose of narrowing the scope of the claim to  
18 overcome the prior art rejection over the Mann Reference. *See* Section IV.A *supra*. The  
19 amendments were thus directly relevant—and anything but “peripheral”—to the “second  
20 location remote from the first location” limitations and the legitimate scope of equivalents for  
21 those limitations. *Honeywell*, 523 F.3d at 1315; *Festo IX*, 344 F.3d at 1370; *Festo X*, 493 F.3d at  
22 1375.

23 Finally, there is nothing in the prosecution history to support application of the narrow  
24 “some other reason” exception. *Festo IX*, 344 F.3d at 1370; *Festo X*, 493 F.3d at 1375. “[T]he  
25 third criterion may be satisfied when there was some reason, such as the shortcomings of  
26 language, why the patentee was prevented from describing the alleged equivalent when it  
27 narrowed the claim.” *Festo IX*, 344 F.3d at 1370. No such reason exists here.

**C. Mr. Baker's Arguments Preclude Reliance On The Doctrine Of Equivalents**

Mr. Baker's claim amendments alone give rise to prosecution history estoppel. But his arguments in connection with those amendments make doubly clear that estoppel applies, and thus provide a second, independent basis to bar application of the doctrine of equivalents.

In arguing for issuance of the patent, Mr. Baker repeatedly emphasized that the claimed invention requires two separate locations and that this is the "critical" feature that he believed made it patentable:

- "Applicant disagrees with the Examiner's reading of Mann in that *the basic issue is the separation or remoteness of the two basic components of Applicant's system* to form a more personalized instructional aid."
- "*Nowhere in Mann is there a teaching that the computer system is located remotely from the teaching station as is emphasized in Applicant's disclosure*, wherein the primary images are formed in one location for instruction such as a studio or an aircraft."
- "*Transmittance to a separate location for analysis and feedback is critical in Applicant's invention*, because the programming can be efficiently performed at the remote computer station. Applicant respectfully submits that this modification is patentable in the absence of any prior art teachings to the contrary."

Mehta Decl., Ex. 1 [November 15, 1994 Amendment] at 17. These arguments confirm that Mr. Baker surrendered any claim he might have to a "local" system like the Mann patent. Mr. Baker's "clear and unmistakable surrender of subject matter" gives rise to argument estoppel and precludes his infringement theory under the doctrine of equivalents. *Deering Precision*, 347 F.3d at 1326.

**D. Mr. Baker's Reliance On "After-Arising Technologies" Is Misplaced**

Mr. Baker argues that the accused products employ "after-arising" technologies that, in his view, should allow for application of the doctrine of equivalents. Dkt. No. 129 [Supp. Inf. Contentions] at 15 (alleging that "Plaintiff envisaged the storage of these signals in 1992 being on a 'remote' computer, mainframe, server because this was the only computer capable of

1 making the invention in near real-time,” and that Defendants “still infringe” because “in 1992  
 2 accused PC/Games consoles could not produce his invention, there was no need for him to store  
 3 such preferred image signals on [a] local computer”) (emphasis in original). Mr. Baker’s  
 4 argument has no merit.

5 At bottom, Mr. Baker’s “after-arising” theory is disconnected from the claim limitation to  
 6 which he seeks to apply the doctrine of equivalents. The prosecution history estoppel analysis  
 7 turns on the specific claim limitations on which Mr. Baker is asserting equivalence—the second  
 8 location remote from the first location limitations. Those limitations do not specify the kind of  
 9 computer that would be located at the second, remote location, nor do they require that they  
 10 perform actions “in near real-time.” The relevant question is whether the scope of equivalence  
 11 Mr. Baker is asserting (i.e., that co-location at a first location is equivalent to practicing the claim  
 12 limitations at a first location and second, remote location) was after-arising. The Mann  
 13 Reference, which predates Mr. Baker’s patent and is therefore not after-arising, itself disclosed  
 14 performing the claimed actions at a single location.<sup>9</sup> Mr. Baker’s amendments and arguments to  
 15 the Patent Office confirm this. His attempt to recapture the exact subject matter he was forced to  
 16 disclaim in order to obtain his patent should be rejected.

## 17 VI. CONCLUSION

18 Mr. Baker’s infringement claims should be rejected based on his arguments and  
 19 amendments before the Patent Office during prosecution of the ’001 Patent. Because Mr. Baker  
 20 cannot establish as a matter of law any infringement by any Defendant as to any asserted claim,  
 21 Defendants respectfully request that the Court grant summary judgment of non-infringement.

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22 <sup>9</sup> Mr. Baker appears to acknowledge that computers existed at the time of the alleged  
 23 invention that could perform the claimed actions at a single location. But he contends that those  
 24 computers could not do so in “near real-time,” and that a mainframe server would be needed to  
 25 accomplish that speed. Dkt. No. 129 [Supp. Inf. Contentions] at 15. Similarly, Mr. Baker’s  
 26 infringement contentions acknowledge that at least one type of computer at the time (a  
 27 mainframe server) was “capable of making the invention in near real-time,” but he discounts that  
 28 type of computer presumably because modern computers are smaller or less expensive. *Id.* That  
 is all beside the point. The point is that technology for performing the claimed actions (which do  
 not require a computer of certain size or with “near real-time” speed) in a single location  
 undeniably existed at the time of the invention and thus cannot be “after-arising.”

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2016, I electronically filed DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT, JOINT STATEMENT OF STIPULATED FACTS, THE DECLARATION OF SONAL N. MEHTA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT, AND [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT, using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 17th day of June, 2016.

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