

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHILIPS ELECTRONICS NORTH)
AMERICA CORPORATION and)
U.S. PHILIPS CORPORATION,)

Plaintiffs,)

v.)

Civil Action No. 02-123-KAJ

CONTEC CORPORATION, COMPO)
MICRO TECH, INC., SEOBY)
ELECTRONICS CO., LTD., REMOTE)
SOLUTION CO., LTD., F/K/A HANGO)
ELECTRONICS CO., LTD., HANGO)
REMOTE SOLUTION, INC.,)

Defendants.)

MEMORANDUM OPINION

Richard L. Horwitz, Esq. and David E. Moore, Esq., Potter Anderson & Corroon LLP, Hercules Plaza, 6th Floor, 1313 N. Market Street, P.O. Box 951, Wilmington, Delaware 19801, counsel for plaintiffs.

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David L. Finger, Esq., One Commerce Center, 1201 Orange Street, Suite 725, Wilmington, Delaware 19801, counsel for defendants Remote Solution Co., Ltd. f/k/a Hango Electronics Co., Ltd. and Hango Remote Solution, Inc.

Wilmington, Delaware
March 8, 2005



JORDAN, District Judge

I. INTRODUCTION

Presently before me are two motions, a Motion for Judgment as a Matter of Law (Docket Item ["D.I."] 459) filed by defendant Comp Micro Tech, Inc. ("CMT") and a Motion for Attorneys' Fees and Expenses (D.I. 458) filed by plaintiffs Philips Electronics North America Corporation and U.S. Philips Corporation (collectively "Philips"). For the following reasons, I will deny CMT's Motion for Judgment as a Matter of Law and grant Philips' Motion for Attorneys' Fees and Expenses.

II. BACKGROUND

The factual and procedural background and a discussion of the technology disclosed in the patent-in-suit may be found in several prior opinions and orders issued in this case.¹ For purposes of these motions, the relevant background information is as follows. On April 12, 2004 Philips and CMT conducted a trial which was limited to Philips' claims for willful infringement and damages in the form of a reasonable royalty and CMT's counterclaim of invalidity of Philips' U.S. Patent No. 4,703,359 (the "359

¹ See D.I. 351 (denying Remote Solution's motion to dismiss for lack of personal jurisdiction); D.I. 352, 353 (granting CMT's motion to sever and for separate trials); D.I. 376, 377 (claim construction); D.I. 388, 389 (granting in part Plaintiffs' motion for summary judgment on infringement, and denying in part defendants' motion for summary judgment of noninfringement); D.I. 390 (denying motion for summary judgment of invalidity); D.I. 394, 395 (granting motion for summary judgment on defendants' affirmative defense of equitable estoppel); D.I. 400, 401 (granting in part, and denying in part, motion for partial summary judgment limiting Philips' damages); D.I. 446 (issuing judgment and permanent injunction against Compo Micro Tech); D.I. 465 (denying motion to stay injunction); D.I. 484 (denying various motions made by Hango); D.I. 486 (denying without prejudice motion for judgment as a matter of law on damages).

patent”). On April 19, 2004, the jury upheld the validity of the ‘359 patent, awarded Philips \$1 in damages for each infringing universal remote control device (“URCD”) sold by CMT, and found that CMT’s infringement was not willful. On May 14, 2004, Philips and CMT both submitted letter briefs asking, *inter alia*, for costs as the prevailing party. (D.I. 431, 432.) On July 12, 2004, I granted Philips’ request. (D.I. 441 at 11-12.) On July 26, 2004, I entered judgment and a permanent injunction against CMT. (D.I. 446.) Philips now moves pursuant to 35 U.S.C. § 285, as the prevailing party, for an award of attorneys’ fees and nontaxable costs. (D.I. 464 at 3.)

At the end of Philips’ case and again at the close of all of the evidence, CMT moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). After trial, CMT renewed its motions for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), arguing that: “(i) the asserted claims of the ‘359 patent are invalid as anticipated and/or obvious in light of the relevant prior art references, and (ii) if the ‘359 patent is not invalid, then Philips is not entitled to any damages because it failed to offer any proof that the accused infringing CMT URCDs were used to perform the method taught in that patent or how many instances of such infringement took place.” (D.I. 462 at 1-2.) In the alternative, CMT has moved pursuant to Fed. R. Civ. P. 54(b) for an order directing that the Judgment and Permanent Injunction be deemed a final judgment as to CMT. (*Id.* at 2.)²

² No order directing a final judgment is necessary because a “severed claim [pursuant to Fed. R. Civ. P. 21] proceeds as a discrete suit and results in its own final judgment from which appeal may be taken.” *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 231 n.3 (3d Cir. 1998). Thus, as Philips has recognized, CMT is entitled to appeal the decisions in its case without having to wait for the conclusion of the case between Philips and Remote Solution Co.,

III. STANDARD OF REVIEW

A. Judgment as a Matter of Law

Pursuant to Fed. R. Civ. P. 50, judgment as a matter of law may be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000). In assessing the sufficiency of the evidence, the court must review all of the evidence in the record in the light most favorable to the non-moving party, giving the non-moving party the benefit of all fair and reasonable inferences that could be drawn from the evidence presented. *Reeves*, 530 U.S. at 150; *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*). In addition, the court may not weigh the evidence, make credibility determinations or substitute its version of the facts for the jury's version. *Reeves*, 530 U.S. at 150; *McDaniels v. Flick*, 59 F.3d 446, 453 (3d Cir. 1995).

"Motions for judgment as a matter of law are granted 'sparingly' and only in those circumstances in which 'the record is critically deficient of the minimum quantum of evidence in support of the verdict.'" *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 346 (D. Del. 2004) (quoting *Johnson v. Campbell*, 332 F.3d 199, 204 (3d Cir. 2003)). Although the plaintiff must produce more than a "mere scintilla of evidence" to sustain the jury's verdict, "the court should only overturn the verdict if it is 'so unreasonable' that the movant is entitled to judgment as a matter of law." *Lafate v. Chase Manhattan Bank (USA)*, 123 F. Supp. 2d 773, 777 (D. Del. 2000) (internal citations omitted). "Stated

Ltd. f/k/a Hango Electronics Co., Ltd. and Hango Remote Solution, Inc. (See D.I. 469 at n.1.)

another way, the question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury properly could find a verdict for that party." *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 346-47 (D. Del. 2004) (internal quotation omitted).

B. Exceptional Cases and Attorneys' Fee Awards for Prevailing Parties

A district court may award attorneys' fees in a patent infringement action. 35 U.S.C. § 285. Such an award is not limited to the patent owner but extends to the "prevailing party" in the lawsuit. *Interspiro USA, Inc. v. Figgie Int'l Inc.*, 18 F.3d 927, 933-34 (Fed. Cir. 1994) (awarding attorneys' fees to a non-patent owner in a breach of contract action arising under the patent laws). To receive attorneys' fees, however, the party must demonstrate that the case is exceptional and warrants such an award. *E.g.*, *Beckman Instr., Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989). Even in an exceptional case, however, the court is not bound to award attorneys' fees. See *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201 (Fed. Cir. 1986). "Many factors could affect this result[] ... such as the closeness of the case, the tactics of counsel, the conduct of the parties, and any other factors that may contribute to a fair allocation of the burden of litigation as between winner and loser." *Id.* It is well settled, however, that a finding of willfulness is not necessary for the award of attorneys' fees. See, *e.g.*, *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1574-75 (Fed. Cir. 1996); *Beckman Instr., Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1553 (Fed. Cir. 1989).

IV. DISCUSSION

A. Judgment as a Matter of Law

CMT makes two general arguments in its motion for judgment as a matter of law. The first is that the jury's finding that the claims of the '359 patent are not invalid was not supported by substantial evidence. (D.I. 462 at 4-13.) Second, CMT argues that Philips is not entitled to any damages because it failed to prove that the accused CMT URCDs were used to perform the claimed method. (*Id.* at 13-18.)

1. Issues of Invalidity

CMT makes three arguments as to why the jury's finding on validity was not supported by substantial evidence. First, CMT asserts that claim 1 of the '359 patent is anticipated by Japanese patent No. 59-140792 (the "JP '792 patent"). CMT's argument relies on the disclosures in the JP '792 patent and Mr. McAlexander's, CMT's expert, testimony to establish that each and every element of claim 1 of the '359 patent is present in the JP '792 patent.

Philips argues that the jury concluded that CMT failed to come forward with clear and convincing evidence that claim 1 was anticipated by the '359 patent. (D.I. 469 at 14-15.) Because this case involved the typical "battle of the experts," Philips asserts that the jury simply found Mr. Bristow, its expert, more credible than Mr. McAlexander. (*Id.* at 18.) In support, Philips notes several instances where Mr. McAlexander's credibility was undercut, including when he acknowledged that his opinions about the JP '792 patent, as set forth in contention interrogatories, were written by CMT lawyers without his involvement (*id.*, Ex. I at 1041-47) and when another court expressed doubt

about his opinions rendered in a previous case (*id.*, Ex. I at 1051-53). Philips also points out that Mr. Bristow testified that the JP '792 patent did not disclose each and every element of claim 1 in the '359 patent, so the jury could justifiably accept Mr. Bristow's testimony over Mr. McAlexander's. (*Id.* at 19, App. A.)

Based on the testimony presented by Mr. Bristow and the jury's apparent decision to accept his testimony as more credible than Mr. McAlexander's, I cannot say that the jury's finding on the question of anticipation was not supported by substantial evidence. Therefore, I will not disturb the jury's finding in this respect.

CMT's second and third arguments are related to obviousness. CMT argues that substantial evidence does not support the jury's findings that claim 3 was not rendered obvious by the JP '792 patent in combination with either U.S. Patent No. 4,623,887 (the "'887 patent") or German Patent No. 33 13 493 (the "'493 patent")³ and that claim 4 was not rendered obvious by the '792 patent in combination with either the '887 patent, the '493 patent, or U.S. Patent No. 4,482,947 (the "'947 patent"). (D.I. 462 at 10-13.) Again, CMT's arguments rely on Mr. McAlexander's testimony that these references contain all of the elements of claim 3 or claim 4 of the '359 patent and that a person of ordinary skill in the art would be motivated to combine them. (*Id.* at 11-13.)

Philips asserts that CMT's arguments about obviousness fail for the same reason as CMT's argument related to anticipation, namely, that a reasonably jury could find that CMT did not establish by clear and convincing evidence that these references

³ CMT's Opening Brief in Support of its Motion for Judgment as a Matter of Law incorrectly refers to the German patent as the "'443" patent when in fact it meant the "'493" patent. (D.I. 462 at 11-13.)

supply each and every element of claims 3 and 4. (D.I. 469 at 19-20.) Specifically, Philips points out that Mr. McAlexander's testimony on obviousness was premised on his opinion that the '792 patent provided each and every element of claim 1 of the '359 patent (*id.* at 20), as shown in the following testimony:

Q. If it's missing in Claim 1, then Claim 3 couldn't be obvious?

A. Yes, that's correct. ...

Q. Okay. The same thing for Claim 4; correct?

A. That is correct.

(*Id.*, Ex. I at 1074:3-9, Trial Transcript.) Philips also notes that Mr. Bristow testified that Mr. McAlexander's opinion that the '792 patent anticipates claim 1 of the '359 patent "is a foundation" for Mr. McAlexander's opinions about claims 3 and 4. (*Id.* at 20 (citing Ex. I at 1297.))

Based on the testimony presented by Mr. McAlexander and Mr. Bristow and the jury's finding that the '792 patent does not anticipate claim 1 of the '359 patent, it was quite reasonable for the jury to reject Mr. McAlexander's testimony on the obviousness of claims 3 and 4, which he admitted to be based on his opinion regarding claim 1. Because the jury was entitled to accept Mr. Bristow's testimony over Mr. McAlexander's, I cannot say that the jury's finding was not supported by substantial evidence. Therefore, I will not disturb the jury's finding with regard to obviousness.

2. Damages

CMT makes two arguments directed to whether Philips should be entitled to any damages. First, CMT argues that Philips may only recover damages for infringing uses of the claimed invention. (D.I. 462 at 13.) CMT asserts that because the only claims found to be infringed, claims 1, 3, and 4 of the '359 patent, are method claims, they can

only be directly infringed by one who actually practices the claimed method. (*Id.* at 14 (citing *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 775 (Fed. Cir. 1993); see also *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 2001 WL 21304, at *2 (Fed. Cir. 2002)).) Thus, CMT asserts that “[a] damages analysis that seeks a [reasonable] royalty on all products capable of infringing, rather than on those actually used in an infringing manner, is incorrect as a matter of law.” (*Id.* at 15 (citing *Oak Indus., Inc. v. Zenith Elecs. Corp.*, 726 F. Supp. 1525, 1543 (N.D. Ill. 1989)).) Second, in a similar, if not identical, vein, CMT argues that “because Philips has failed to show a correlation between CMT’s sales of universal remotes that use the scan method ... [found to] be covered by the ‘359 patent and CMT’s total sales,” Philips is not entitled to damages.⁴ (D.I. 462 at 15.)

Philips makes several arguments in response. First, Philips asserts that during the jury instruction conference, I rejected CMT’s argument that damages must be calculated based on units that actually infringe and not those merely capable of infringement, and that CMT cannot seek judgment as a matter of law by rearguing an issue which I have already ruled on. (D.I. 469 at 22.) Second, and most significantly, Philips argues that throughout this litigation CMT never presented its theory on the limitation of damages until the jury instruction conference, and, therefore, that “CMT’s failure to assert that position precludes it from doing so now.” (*Id.* at 10, 23-24.)

⁴ Although CMT appears to assert that Philips is not entitled to any damages, CMT also asserts that Philips is not entitled to damages for all of CMT’s sales, rather damages should only be granted for those products which are actually used in the infringing manner. (See D.I. 462 at 15.)

Finally, Philips says that CMT's argument is wrong as a matter of law and thus, even if not waived, fails on the merits. (*Id.* at 24-29.)

Although CMT's arguments have some support in the case law, as noted above, CMT has waived its opportunity to raise those arguments in this case. Rule 16(e) of the Federal Rules of Civil Procedure provides that a pretrial order "shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice." Pursuant to this rule, courts have repeatedly held that the pretrial order limits the evidence that may be presented at trial. See, e.g., *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987) (noting that "[t]he finality of the pretrial order contributes substantially to the orderly and efficient trial of a case"); *Metal Processing, Inc. v. Humm*, 56 F. Supp. 2d 455, 471 (D.N.J. 1999) (if party "wished to preserve the issue ... for trial, it should have raised the issue in the Pretrial Order"); *Colli v. Wirth*, No. 94 Civ. 3234(LBS), 1996 WL 442835, at *1 (S.D.N.Y. Aug. 6, 1996) ("It is an established procedural principle that a party's failure to include a legal theory or defense in the pretrial order results in its subsequent abandonment or waiver.").

The case law is clear that the issues presented in the pretrial order control the issues to be addressed during trial. In the Joint Proposed Pretrial Order (D.I. 261), CMT did not assert the defense, now offered, that Philips could only recover royalties for those remotes used in an infringing manner, as opposed to those remotes sold by CMT that included the infringing technology. In the Joint Pretrial Order, however, Philips made clear that, "[w]ith respect to damages, because the parties have agreed to

stipulate to the amount of sales, the testimony and evidence will focus on the determination of a reasonable royalty rate and will not involve a lengthy review of sales invoices.” (D.I. 361 at 46.) CMT stated that the issue of fact on damages is “[t]he *amount* of a reasonable royalty,” not the number of units sold to customers who actually used the patented method of programming. (*Id.* at 17 (emphasis added).)

In fact, CMT represented on numerous occasions that the only damages issues to be addressed at trial were the reasonable royalty rate and CMT’s sales figures of all remotes containing the infringing technology. Most clearly, in CMT’s responsive damages expert report from David Haas, CMT and Mr. Haas made clear that they agreed with the opinion of Philips’ damages expert, Ms. Ruoff, that damages should be calculated by applying a reasonable royalty rate to all of CMT’s sales of accused universal remote controls. (D.I. 283 at 4.) CMT later served a supplemental expert report from Mr. Haas in which Mr. Haas again agreed that a reasonable royalty should be applied to all of CMT’s sales of accused devices and used the total number of CMT’s sales in his damages calculation. (D.I. 469, Ex. G at 2.) At the prayer conference, CMT agreed that its damages expert and Philips’ damages expert had both used the total number of CMT’s sales of remotes in their damages calculations. (D.I. 412 at 597:23-598:15, Trial Transcript, Apr. 14, 2004.) Additionally, CMT conceded during the *Markman* and summary judgment hearing that if Philips’ proposed claim construction were accepted, then CMT “would be liable for infringement.” (D.I. 338 at 50:23-24, Transcript of hearing on Nov. 25, 2003.) Furthermore, in its opposition to Philips’ motion for summary judgment on infringement, CMT did not assert that Philips

must show direct infringement of each unit by the millions of customers who used remotes sold by CMT. (See D.I. 320.)

Under these circumstances, CMT has waived any right it might otherwise have had to assert these arguments at this stage of the litigation. CMT argues in its Reply Brief that its expert reports were submitted before my ruling on infringement. It was CMT's obligation, however, to supplement its expert report if its view of the damages issue was somehow changed by my ruling. See Fed. R. Civ. P. 26(e)(1). CMT offered no such supplementation. Moreover, CMT was not entitled to wait until the middle of the trial to present its arguments on damages. In the cases cited by CMT for its assertion that damages should be limited to those devices actually shown to be used in an infringing manner, the party asserting this position did not wait until the jury instruction conference to raise the issue. In fact, the issue arose in *Oak Industries*, as part of a summary judgment motion. *Oak Industries*, 726 F. Supp. at 1528. The case law cited by CMT, although supportive of its position, does not obviate CMT's failure to raise these arguments in a timely manner. Furthermore, it is clear that Philips reasonably relied on the representations made by CMT in preparing for trial and that it would be terribly unfair to allow CMT to raise these issues now, after having failed to raise them before trial. Thus, I hold that CMT has waived any right to assert these arguments on Philips' entitlement to damages.

3. Attorneys' Fees

Philips argues that an award of attorneys' fees is appropriate in this case pursuant to 35 U.S.C. § 285 because CMT's infringement of the '359 patent was not a

close call, CMT's proposed royalty rate was rejected by the jury, and CMT's conduct and general approach to the case were so exceptional that it would be "grossly unfair for the prevailing party to bear the costs of litigation." (D.I. 464 at 28 (quoting *Interspiro USA, Inc. v. Figgie Int'l, Inc.*, 815 F. Supp. 1488, 1521 (D. Del. 1993)).)

Specifically, Philips asserts that CMT has "treated this litigation as a game to be manipulated." (D.I. 464 at 28.) Philips alleges that CMT's delay during discovery prejudiced their case and unnecessarily drove up the costs associated with discovery. (*Id.* at 4-5.) For example, Philips says that CMT produced documents after the close of factual discovery and repeatedly stated that its counsel or Mr. Park, CMT's President, had forgotten them. (*Id.* at 7.) Philips asserts that CMT's attempted reliance upon these documents led to Philips filing a motion *in limine*, which was subsequently granted, to prevent CMT from relying on them during trial. Additionally, Philips asserts that CMT's position on the date of its first sale of an infringing device changed several times through the course of the litigation, from 1996 to 1995 to 1993 to 1994. (*See id.* at 9-10 (noting Mr. Park's inconsistent statements regarding the date of first sale.)) Finally, CMT failed to produce sales figures and revenues that had been requested by Philips. (*Id.* at 12-13.) Although CMT denied that it actually kept such records, this contention was cast into serious doubt during Mr. Park's testimony, wherein he stated that he took business school courses in accounting and finance and learned about the importance of good recordkeeping in business. (*Id.* at 14 (citing Mr. Park's testimony, Trial Transcript at 503).)

Philips also alleges that CMT engaged in trial misconduct (D.I. 464 at 15-22), most notably in the inconsistent statements made by Mr. Park. Philips describes Mr. Park's testimony as "evolving" as he described the extent of his knowledge regarding CMT's interactions with Ohsung, Inc., the supplier of the URCDs marketed by CMT. (*Id.* at 17.) Also, Mr. Park allegedly was "shocked" by the presentation of a translation of a letter he wrote in Korean to Ohsung advising it to "pretend ignorance and buy some time." (*Id.* at 18 (citing Trial Transcript at 645-47.) His supposed surprise was itself surprising, given that the accuracy of the translation had been agreed to in advance of trial by both parties. (*Id.* at 18.)

CMT asserts, however, that these examples of discovery and trial misconduct were either honest, innocent mistakes, or that Philips has taken testimony out of context to make it look like CMT was playing games. (See D.I. 470.) Furthermore, CMT argues that its conduct did not rise to the level of "exceptional" because in the cases cited by Philips, the acts committed by the parties were far more offensive than those allegedly committed by CMT in this case. (D.I. 470 at 29-32.)

Upon consideration of Philips' arguments and CMT's response, I conclude that Philips is entitled to an award of attorneys' fees. Specifically, I find that CMT's assertion regarding its keeping of financial records was incredible. I said as much in the July 12, 2004 Memorandum Opinion (requiring that CMT maintain books and records), when I noted that "I [found] it hard to believe that a company like CMT, which generates \$25 million in gross sales annually, does not maintain a set of books and records from which it calculates profits and other financial data." (D.I. 441 at 10.) Also,

CMT's delay tactics during discovery, as discussed above, warrant the award of attorneys' fees. Further, I do not believe that Philips took the representations made by Mr. Park at trial out of context and therefore find that some of CMT's conduct during trial also entitles Philips to attorneys' fees. Therefore, I will grant Philips' Motion for Attorneys' Fees and Expenses (D.I. 464). Philips must submit documentation in support of its request within 14 days, with CMT having 14 days to comment thereon, and I will then determine whether the fees requested are reasonable and to what extent they should be awarded.

V. CONCLUSION

Accordingly, for the reasons stated, I will deny CMT's Motion for Judgment as a Matter of Law (D.I. 459) and grant Philips' Motion for Attorneys' Fees and Expenses (D.I. 458).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHILIPS ELECTRONICS NORTH)
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U.S. PHILIPS CORPORATION,)

Plaintiffs,)

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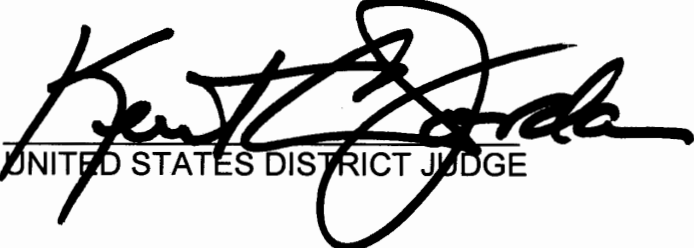
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Defendants.)

ORDER

For the reasons stated in the Memorandum Opinion issued in this matter today,
IT IS HEREBY ORDERED that CMT's Motion for Judgment as a Matter of Law (D.I.
459) is DENIED and Philips' Motion for Attorneys' Fees and Expenses (D.I. 458) is
GRANTED.


UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
March 8, 2005