

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DEPUY SYNTHES PRODUCTS, LLC, :

Plaintiff, :

v. :

GLOBUS MEDICAL, INC., :

Defendant. :

C.A. No. 11-652-LPS

REDACTED - PUBLIC VERSION

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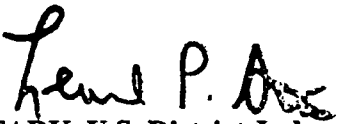
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MEMORANDUM OPINION

March 25, 2014
Wilmington, Delaware.


STARK, U.S. District Judge:

The Court held a ten-day jury trial in this patent infringement action in June 2013. At the conclusion of the trial, the jury returned a verdict for Plaintiff DePuy Synthes Products, LLC (“Synthes”), finding U.S. Patent Nos. 7,875,076 (“the ‘076 patent”), 7,862,616 (“the ‘616 patent”), and 7,846,207 (“the ‘207 patent”) valid and infringed by Defendant Globus Medical, Inc.’s (“Globus”) three accused products. (D.I. 322) Now pending before the Court is Globus’s Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial. (D.I. 371) For the reasons set forth below, the Court will deny this Motion.

I. BACKGROUND

Synthes filed this patent infringement action against Globus on July 22, 2011.¹ (D.I. 1) The patents-in-suit relate to medical devices called “inter-vertebral implants” and methods of implanting such devices between adjacent vertebrae in spinal fusion procedures. (*See id.* at 2-4)

The Court held a jury trial beginning on June 3, 2013.² The jury returned a verdict for Synthes, finding the patents-in-suit valid and infringed by Globus’s three accused products. (D.I. 322) Upon receiving the jury’s verdict in favor of Synthes on all claims of infringement, validity, and damages, the Court entered judgment on June 24, 2013. (D.I. 329) Thereafter, on August 1, 2013, Globus filed a Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial (the “Motion”). (D.I. 371) Briefing on the Motion was completed

¹The action was actually filed by Synthes USA, LLC; Synthes USA Products, LLC; and Synthes USA Sales, LLC. (*See* D.I. 1) However, on February 8, 2013, the parties executed a joint stipulation, later entered as an order, by which Synthes USA, LLC agreed to dismiss with prejudice all claims and defenses asserted by Synthes USA Products, LLC and Synthes USA Sales, LLC. (D.I. 130) Thereafter, on February 15, 2013, DePuy Synthes Products, LLC was substituted as plaintiff for the lone remaining plaintiff in the case, Synthes USA, LLC. (D.I. 157)

²Additional background can be found in the Court’s Memorandum Opinion addressing the parties’ other post-trial motions, issued this same date.

on August 29, 2013. (D.I. 395)

II. LEGAL STANDARDS

A. Motions for Judgment as a Matter of Law

Judgment as a matter of law is appropriate if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party” on an issue. Fed. R. Civ. P. 50(a)(1). “Entry of judgment as a matter of law is a sparingly invoked remedy,” one “granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.” *Marra v. Philadelphia Housing Auth.*, 497 F.3d 286, 300 (3d Cir. 2007) (internal quotation marks omitted).

To prevail on a renewed motion for judgment as a matter of law following a jury trial, the moving party “must show that the jury’s findings, presumed or express, are not supported by substantial evidence or, if they were, that the legal conclusion(s) implied [by] the jury’s verdict cannot in law be supported by those findings.” *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1348 (Fed. Cir. 1998) (internal quotation marks omitted). “‘Substantial’ evidence is such relevant evidence from the record taken as a whole as might be acceptable by a reasonable mind as adequate to support the finding under review.” *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984).

In assessing the sufficiency of the evidence, the court must give the non-moving party, “as [the] verdict winner, the benefit of all logical inferences that could be drawn from the evidence presented, resolve all conflicts in the evidence in his favor, and in general, view the record in the light most favorable to him.” *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344,

1348 (3d Cir. 1991); *Perkin-Elmer Corp.*, 732 F.2d at 893. The court may not determine the credibility of the witnesses nor “substitute its choice for that of the jury between conflicting elements in the evidence.” *Perkin-Elmer Corp.*, 732 F.2d at 893. Rather, the court must determine whether the evidence reasonably supports the jury’s verdict. *See Dawn Equip. Co. v. Ky. Farms Inc.*, 140 F.3d 1009, 1014 (Fed. Cir. 1998); *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1083 (3d Cir. 1995) (describing standard as “whether there is evidence upon which a reasonable jury could properly have found its verdict”); 9B Wright & Miller, *Federal Practice & Procedure* § 2524 (3d ed. 2008) (“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.”).

B. Motions for a New Trial

Federal Rule of Civil Procedure 59(a) provides, in pertinent part, that “[t]he court may, on motion, grant a new trial on all or some of the issues – and to any party . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court.” New trials are commonly granted in the following situations: (1) where the jury’s verdict is against the clear weight of the evidence, and a new trial must be granted to prevent a miscarriage of justice; (2) where newly-discovered evidence exists that would likely alter the outcome of the trial; (3) where improper conduct by an attorney or the court unfairly influenced the verdict; or (4) where the jury’s verdict was facially inconsistent. *See Zarow-Smith v. N.J. Transit Rail Operations*, 953 F. Supp. 581, 584-85 (D.N.J. 1997).

The decision to grant or deny a new trial is committed to the sound discretion of the district court. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Olefins Trading*,

Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3d Cir. 1993) (reviewing district court’s grant or denial of new trial motion under deferential “abuse of discretion” standard). However, where the ground for a new trial is that the jury’s verdict was against the great weight of the evidence, the court should proceed cautiously, because such a ruling would necessarily substitute the court’s judgment for that of the jury. See *Klein v. Hollings*, 992 F.2d 1285, 1290 (3d Cir. 1993).

Although the standard for grant of a new trial is less rigorous than the standard for grant of judgment as a matter of law – in that the court need not view the evidence in the light most favorable to the verdict winner – a new trial should only be granted where “a miscarriage of justice would result if the verdict were to stand,” the verdict “cries out to be overturned,” or where the verdict “shocks [the] conscience.” *Williamson*, 926 F.2d at 1352-53.

III. DISCUSSION

A. Globus’s Motion is Timely

Synthes first argues that the Court should deny the Motion in its entirety as untimely. (D.I. 389 at 5-6) Citing Federal Rules of Civil Procedure 50(b) and 59(b), Synthes contends that Globus had only 28 days after the Court entered the “Judgment Following Jury Verdict” (the “Judgment”) on June 24, 2013 (D.I. 329) to file a renewed motion for judgment as a matter of law or a motion for a new trial (D.I. 389 at 5). Globus did not file the Motion until August 1, 2013, thirty-seven days after the Judgment. (D.I. 371) Globus responds that at that point the Court had not yet entered *final* judgment – and, in fact, has still not done so. Thus, in Globus’ view, the Motion is not untimely. (D.I. 395 at 2-4)

The Judgment uses language jointly proposed by the parties (D.I. 328, ex. 1), providing, in relevant part: “This Judgment is subject to modification following the Court’s consideration of

the parties' post-trial motions." (D.I. 329) At the time the Court signed the jointly proposed Judgment, numerous issues remained unresolved, including Synthes' Motion for Temporary Restraining Order and Preliminary Injunction. (D.I. 333) As Globus notes, when a request for injunctive relief remains undecided, an appeal would be premature. (*See* D.I. 395 at 2 (citing 28 U.S.C. § 1292(c)(2) and *Cordance Corp. v. Amazon.com, Inc.*, 696 F. Supp. 2d 445, 447 (D. Del. 2010)); *see also* D.I. 1 at 5-6 (Synthes's Complaint seeking injunctive relief)) Because Rule 54(a) defines a "judgment" as "any order from which an appeal lies," and the Judgment here is not such an order, the 28-day clock on the filing of motions under Rule 50(b) and 59(b) was not started by entry of the Judgment.

The Court is similarly unpersuaded by Synthes' other arguments regarding timeliness. (*See* D.I. 389 at 5-6) This is particularly true in light of communications among the parties' counsel drafting the proposed judgment, during which Synthes agreed to delete language in the proposed judgment indicating that its entry would "trigger the time for filing post-trial motions," and even asked to add language making the proposed judgment "subject to modification." (*See* D.I. 395 at 3 & ex. 4-6) Moreover, when the parties submitted the proposed judgment, they also submitted a briefing schedule for post-trial briefs (*see* D.I. 328 at 1-2), and it is undisputed that Globus adhered to that schedule. Accordingly, Globus' motion is not untimely.

B. Globus' Motion Lacks Merit

1. The "Non-Metallic Material" Limitation ('616 Patent)

Globus contends that it is entitled to judgment as a matter of law that the accused products do not infringe Claim 1 of the '616 patent, a claim that requires a "three dimensional body . . . made from a biocompatible non-metallic material." (D.I. 372 at 3-7; D.I. 1, ex. B, '616

patent (Claim 1)) The Court disagrees.

The dispute here centers on the claim term “non-metallic material,” a term that the Court construed to mean “material with no metallic components.” (D.I. 253 at ¶ 23) At trial, Synthes presented evidence that [REDACTED]

[REDACTED] (Transcript of Jury Trial 6/3/13-6/14/13 (D.I. 346-355) (hereinafter, collectively, “Trial Tr.”) at 901-02, 1029) However, even Synthes acknowledged that [REDACTED]

(*Id.* at 1032) Globus points to [REDACTED] and from this concludes that there can be no literal infringement as a matter of law. (D.I. 372 at 3-4) While the parties dispute [REDACTED]

[REDACTED] (Trial Tr. at 685-86, 1032-36) Based on this and similar testimony, the Court agrees with Synthes that the jury “could reasonably have found as a matter of fact that [REDACTED]

[REDACTED] (D.I. 389 at 9) Accordingly, substantial evidence supports the finding of infringement as to this disputed limitation of the '616 patent.³

Globus also asserts that a new trial is warranted because Synthes “ambushed Globus with new expert opinions” by disclosing opinions “for the first time” during the trial. (D.I. 372 at 6)

³The Court need not address Globus’ arguments regarding infringement under the doctrine of equivalents (D.I. 372 at 4-6) because it finds that substantial evidence supports the jury’s verdict of literal infringement and because, as Globus acknowledges, “the verdict form shows that the jury did not find infringement under the doctrine of equivalents.” (*Id.* at 4 (citing D.I. 322 at 2-14)) In any event, the Court agrees with Synthes that a reasonable jury could find infringement under the doctrine of equivalents, as [REDACTED] would not be substantially different from the claimed device. (D.I. 389 at 11)

In support of this argument, Globus first points to language in the expert report of Synthes' expert on infringement, Dr. Hayes. (*Id.*) In his report, Dr. Hayes stated, [REDACTED]

[REDACTED]"
(Trial Tr. at 1031) Globus argues that this language "essentially agreed" with Globus' theory of non-infringement, but then at trial Dr. Hayes offered testimony that did not support Globus. (D.I. 372 at 6-7) For reasons already explained, the Court does not agree that even the passage in Dr. Hayes' report "essentially agreed" with Globus' theory of non-infringement. Also, Globus was permitted to emphasize the purported inconsistency between Dr. Hayes' report and trial testimony during cross-examination of Dr. Hayes, further reducing any justification for a new trial. (*See, e.g.*, Trial Tr. at 1029-37)

Globus further complains about the portion of Dr. Hayes' testimony in which he gave an "example" of a material that would not fit within the Court's construction of "non-metallic material," arguing that this example was improper because it was not disclosed in his expert report. (D.I. 372 at 6-7 (citing Trial Tr. at 902-03)) The Court disagrees. Dr. Hayes' example is a permissible "elaboration of the opinions contained in the expert's report." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008). Accordingly, the Court concludes that the testimony of Dr. Hayes on this point does not warrant a new trial.

2. The "Anchoring" of Bone Screws ('076 Patent)

Globus next argues that the Court committed legal error by construing the '076 patent as not requiring that the "bone screws be . . . rigidly connected to the front plate" of the implant. (D.I. 372 at 7-8) The Court adheres to its view of the claims and believes it correctly construed

the pertinent claim terms and appropriately resolved the related issues at trial.

On June 12, 2013, the day before closing arguments, Synthes submitted proposed jury instructions that, for the first time, contained the following paragraph:

“sized and configured to extend through the first/second borehole and into the upper/lower endplate,” as it appears in claim 1 of the '076 patent, is given its plain and ordinary meaning, and should not be read to require that the bone screws be locked, threaded, or otherwise “rigidly connected” to the front plate.

(D.I. 309 at ¶ 32) Synthes requested this instruction because Globus had “improperly attempt[ed] to limit the meaning of the phrase” during trial. (*See* D.I. 311 at 1; D.I. 389 at 15) Also on June 12, Globus responded to the new proposal with a letter to the Court, arguing that Synthes’ proposed construction was incorrect, and providing a detailed explanation as to why its own proposed claim construction was more appropriate. (*See* D.I. 314) The Court considered Globus’ arguments but ultimately sided with Synthes, “adopt[ing] language very similar to what the plaintiff proposed” for the jury instructions. (Trial Tr. at 1923-24)

In the Motion, Globus reiterates some of the same claim construction arguments it presented during trial when the Court was deciding how to construe the claim term. (*Compare* D.I. 314 *with* D.I. 372 at 10) As before, the Court is not persuaded by Globus.

Globus now adds that by construing this claim term on the day of closing arguments, the Court denied Globus an opportunity to present different noninfringement and invalidity defenses, thereby violating Globus’ right to “due process.” (D.I. 372 at 13-14) Again, the Court disagrees. Globus had notice and an opportunity to be heard on all claim construction disputes, including the one resolved by the Court at the end of trial, and it is settled that the Court may continue to

construe claim terms as necessary to ensure that the jury is properly instructed on the scope of the claims.⁴ In reviewing Globus' Motion, the Court has once again considered Globus' arguments, including its contention that the Court should not rely on its construction of a "somewhat similar phrase in the '207 patent" to arrive at its construction of the '076 patent's claim terms, because the two patents have "materially different specification[s]." (D.I. 372 at 8) Globus could have asked the Court to construe the relevant language of the '076 patent in the nearly two years prior to trial. Globus failed to do so. (*Id.*) In short, neither the new nor the renewed arguments by Globus are persuasive.

3. Height Limitations ('076 and '616 Patents)

Globus argues that Synthes failed to prove that the height of the bodies of the accused products are "substantially" and "generally equal" to the height of the plates, as required by claim 1 of both the '076 and '616 patents. (D.I. 372 at 14-23) Globus' primary argument is that Dr. Hayes answered questions regarding relative size from a "common sense" or layperson perspective, rather than from the perspective of a person of ordinary skill in the art. (*Id.* at 15-19)

⁴*See generally Pressure Products Medical Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1315 (Fed. Cir. 2010) ("While recognizing the potential for surprise and prejudice in a late adjustment to the meaning of claim terms, this court also acknowledges that the trial court is in the best position to prevent gamesmanship and unfair advantage during trial. Moreover, this court understands that a trial judge may learn more about the technology during the trial that necessitates some clarification of claim terms before the jury deliberates."); *id.* at 1322 ("Claim construction is a matter of law, and it is essential that the jury be correctly instructed on the law, lest the entire trial be tainted.") (Newman, J., concurring in part and dissenting in part); *Pfizer, Inc. v. Teva Pharms., USA, Inc.*, 429 F.3d 1364, 1377 (Fed. Cir. 2005) ("[D]istrict courts may engage in a rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves.") (internal quotation marks omitted); *AFG Indus., Inc. v. Cardinal IG Co., Inc.*, 239 F.3d 1239, 1247 (Fed. Cir. 2001) ("It is critical for courts to set forth an express construction of the material claim terms in dispute, in part because the claim construction becomes the basis of the jury instructions, should the case go to trial.").

While Dr. Hayes, at times, appeared to be answering questions on this topic from the perspective of a layperson (Trial Tr. at 889, 895), he later clarified that his responses were from the perspective of his understanding of a person of ordinary skill in the art (*id.* at 1069).⁵ Sufficient evidence was presented from which a reasonable jury could find the height limitations to be satisfied. (*See* D.I. 389 at 17-21) (summarizing evidence) Nor did Dr. Hayes provide improper new opinions impermissibly beyond the scope of what he had disclosed prior to trial. *See Power Integrations*, 585 F. Supp.2d at 581.

4. The “Securing Plate” Limitation of the '207 Patent

Globus next argues that judgment as a matter of law, or at least a new trial, is warranted as to the '207 patent. (D.I. 372 at 23-27) Its argument here relates essentially to two issues:

- (1) whether the head of a screw could be a “securing plate” as required by the claims; and
- (2) whether the jury instructions improperly invited the jury to find literal infringement, even if just a “component or feature” of a structure, rather than the whole structure, reads on the claim.

(*Id.*)

As to the first issue, Globus contends that “no reasonable jury could have concluded that

⁵Globus faults other aspects of Dr. Hayes’ testimony for failing to be from the perspective of a “person of ordinary skill in the art.” First, Globus argues that “overwhelming evidence revealed that, in the context of the invention, ‘constrained’ meant that when the bone screws were in the boreholes, they were prevented from backing out.” (D.I. 372 at 28) Globus acknowledges that Dr. Hayes testified to the contrary, and the Court disagrees with Globus’ contention that “the jury could not reasonably have credited Dr. Hayes’ testimony” because it did not come “from the perspective of a person of ordinary skill in the art.” (*Id.* at 28-29) Second, Globus argues that it is entitled to judgment as a matter of law under the doctrine of equivalents solely because Dr. Hayes purportedly “admi[tted] that he did not know the relevant definition of one of ordinary skill in the art.” (*Id.* at 29-30) Again, the Court disagrees. It is also worth noting that Dr. Hayes’ expert report and deposition testimony had similar references to the effect that his opinions take into account the perspective of a person of ordinary skill in the art. (*See* D.I. 389 at 19 (citing D.I. 390 at B0114-132))

the head of a screw – without regard to the screw’s shank or threads – performs the ‘securing’ function required by all claims.” (D.I. 372 at 23) Synthes, however, presented substantial evidence, primarily through Dr. Hayes, that the head of the blocking set screws performs the “securing” function. (*See, e.g.*, Trial Tr. at 936-37 (“Q: And do the heads of the blocking set screws in the Globus products block the fixation elements or secure the fixation elements? A: They do block or secure the fixation elements . . .”)⁶ While some of the language used at trial was not entirely precise – in that Dr. Hayes occasionally referred to the screw rather than simply the head of the screw (*see* D.I. 372 at 24-25) – the testimony, as a whole, was clear and consistent with Synthes’ position that the head of the blocking set screws performs the “securing” function.

The second issue, relating to a disputed jury instruction, centers on whether it was proper for the Court to instruct the jury to disregard “extra structure” in making its decision regarding infringement. Globus objects to one of the jury instructions⁷ as allowing for a finding of literal

⁶*See also* Trial Tr. at 942-43 (Q: And what is the function of the securing plate in claim 1 of the '207 patent? A: The function of the securing plate is to inhibit the falling out of the screws. Q: Do the heads of the blocking set screws in . . . Globus’ products perform that function? A: They do. Q: In what way does the securing plate perform its function in the patent? A: It does so by covering, by blocking . . . the screw heads and the screw holes. . . . Q: Do the heads of the blocking set screws in . . . Globus’ products perform the claimed function in the same way that it is performed in the patent? A: Yes.”))

⁷The disputed jury instruction reads as follows:

[A] component or feature of the Accused Products can be part of a larger integral structure (a single structure that has two or more connected parts) and still satisfy a claim requirement. In such a case, the remainder of the integral structure is considered extra structure and is irrelevant to whether the claim requirement is satisfied by the Accused Products. However, if Globus’ Accused Product omits a single requirement recited in one of the Asserted Claims, then that Globus product does not literally infringe that claim.

infringement based on “[a] component or feature of the Accused Products,” i.e., the head of the blocking set screw, rather than instructing the jury to consider what Globus considers the “unitary unit,” i.e., the screw as a whole. (D.I. 372 at 26-27) As Globus notes, Synthes cited to *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 797 (Fed. Cir. 1990), in support of the disputed jury instruction. (D.I. 372 at 26) In *Becton*, the Federal Circuit stated that “where the claim language reads directly on the accused device, additional structure present in such device may, in appropriate circumstances, be disregarded in an infringement analysis,” but not where doing so would disregard “*specific limitations . . . in the claim.*” 922 F.2d at 797 (emphasis in original). The Court’s construction of the claim term “plate” and Synthes’ evidence support a finding that the head of the blocking set screws may meet the “securing plate” limitation. The jury was free to agree with Synthes and Dr. Hayes and find the screw’s shaft irrelevant, as doing so does not disregard any specific limitations in the claim.⁸ Accordingly, the Court is not persuaded that the disputed jury instruction is based on a misreading of the law, and denies Globus’ request for a new trial on this basis.⁹

(D.I. 372 at 26 (citing D.I. 315 at 29))

⁸Relatedly, Globus also argues that the wording of the claim, in conjunction with the Court’s construction of “plate,” precludes an analysis in which the head of the screw is considered separately from the screw as a whole. (D.I. 372 at 26-27; *see also* Trial Tr. at 1355) In its claim construction Order, the Court construed “plate” to mean “a *structure* with a planar dimension greater than its thickness.” (D.I. 253 at ¶ 2 (emphasis added)) Nothing in the Court’s construction required such a “structure” to be a “freestanding structure.” (D.I. 389 at 23)

⁹The Court concludes that Globus is not entitled to relief with respect to its Large Coalition product, an issue to which the parties’ devote very little attention. (*See* D.I. 372 at 25-26; D.I. 389 at 23-24; D.I. 395 at 17) Globus did not raise this issue in its Rule 50(a) motion. Neither side, in any filing, has met its burden to provide the Court with a sufficient basis to award any relief with respect to the Large Coalition product.

5. Globus' Obviousness Defenses

In the Motion, Globus argues that judgment as a matter of law, or at least a new trial, is warranted on the legal question of obviousness of the asserted claims. (D.I. 372 at 30-38) As an initial matter, it appears that Globus may have waived these arguments by failing to assert them during trial as part of its original Rule 50(a) motions. Typically, when a party fails to move on specific grounds in its Rule 50(a) motion, no relief may be afforded to that party on those grounds through a Rule 50(b) motion. *See Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1107-08 (Fed. Cir. 2003); *Kutner Buick, Inc. v. Am. Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989).¹⁰ Assuming, without deciding, that Globus has not waived its right to press this portion of

¹⁰Globus responds to the waiver argument by asserting that "Synthes agreed to allow Globus to defer argument on further [R]ule 50(a) motions until after trial" (D.I. 395 at 20), citing to a portion of the Trial Transcript in which, immediately after Synthes made its Rule 50(a) oral motion – and the Court stated it intended to reserve judgment but offered Globus the opportunity to argue – Globus' counsel responded that he would "prefer to do what [Synthes] did, just give you something in writing in the next few days, *respond* in the next few days in writing." (Trial Tr. at 1961) (emphasis added) Following trial, Globus did file an Opposition to Synthes' Motion for Judgment as a Matter of Law (D.I. 331), but that filing's discussion of obviousness was, necessarily, solely in the context of seeking to avoid entry of final judgment of non-obviousness, it was a *response*, not a request for the affirmative relief of entry of final judgment of obviousness, an issue on which Globus bore the burden of proof. *See generally TruePosition v. Andrew Corp.*, 568 F. Supp. 2d 500, 512-13 (D. Del. 2008) ("Rule 50 plainly requires a party to specify the 'judgment sought' regardless of which party ultimately bore the burden of proof on the issue.").

Relatedly, it is not entirely clear whether Synthes intended, post-trial, to renew its Rule 50(a) motions. The Court reserved judgment on Synthes' motions prior to return of the jury verdict and entry of the Judgment. Subsequent to entry of the Judgment, the Court has not received briefing in support of any of Synthes' Rule 50(a) motions. Nonetheless, the Court has evaluated these motions (*see* Trial Tr. at 1956-62; D.I. 331 (Globus' opposition)) and finds no basis to award Synthes judgment as a matter of law. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (stating Rule 50(a) motion must be denied if there is a "legally sufficient evidentiary basis for a reasonable jury to find for [the nonmovant] on that issue"). Accordingly, to the extent they are still viewed as pending, Synthes' Rule 50(a) motions made during trial will be denied.

its Motion, the Court concludes that the jury could reasonably find that Globus failed to prove by clear and convincing evidence that the asserted claims were invalid due to obviousness. Both parties presented evidence, including expert testimony, on the prior art and how it would have been viewed by one of ordinary skill in the art at the time of the inventions, and the jury was free to credit Synthes' evidence on these issues. (See D.I. 389 at 28-36) The jury's findings with respect to validity were not against the clear weight of the evidence,¹¹ so neither judgment as a matter of law nor a new trial are warranted.

6. Jury Instructions

Finally, Globus seeks a new trial based on what it contends were the Court's flawed jury instructions. (D.I. 372 at 38-40) "In reviewing jury instructions, the full trial record and the jury instructions in their entirety must be examined because instructions take on meaning from the context of what happened at trial, including how the parties tried the case and their arguments to the jury." *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1331 (Fed. Cir. 2010) () (internal quotation marks omitted); see also *Limbach Co. v. Sheet Metal Workers Int'l Ass'n, AFL-CIO*, 949 F.2d 1241, 1259 n.15 (3d Cir. 1991). The jury instructions as a whole must fairly and adequately apprise the jury of the issues and the applicable law. See *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1123 (3d Cir. 1992). An otherwise proper jury verdict should not

¹¹Globus also argues that a new trial is warranted because the verdict form did not explicitly state that obviousness of the '076 patent could be found in view of a single prior art reference, although Globus acknowledges that the verdict form did allow for a finding of obviousness based on that single prior art reference combined with other prior art references. (D.I. 372 at 33-34) In finding that the inventions were not obvious in view of multiple prior art references, it would seem to follow logically that the jury also found that the inventions were not obvious in view of any one of those prior art references standing alone. (See D.I. 389 at 31) In any event, the Court finds no manifest injustice in allowing the verdicts of non-obviousness to stand and no basis for requiring obviousness to be tried again.

be disturbed based on an erroneous jury instruction that was harmless, that is, when “it is highly probable that the error did not affect the outcome of the case.” *Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005) (internal quotation marks omitted).

Applying these standards, the Court finds no basis to provide Globus a new trial. The Court is not persuaded that any of its instructions were erroneous. Additionally, taking the instructions as a whole, which the Court is required to do, the Court is satisfied that its instructions adequately conveyed the law to the jury. Furthermore, as an exercise of its discretion, the Court would not grant Globus a new trial even were some of the instructions shown to be less than fully appropriate.

IV. CONCLUSION

For the reasons discussed, the Court will deny Globus’ Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial. (D.I. 371) An appropriate Order will be entered.¹²

¹²The Court has carefully reviewed each aspect of Globus’ Motion, the extensive briefing the parties provided, and the other submissions relating to the Motion. To the extent there are arguments and issues raised in the Motion that are not expressly addressed in this Memorandum Opinion, the Court deemed them not worthy of further discussion.

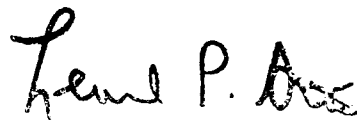
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DEPUY SYNTHES PRODUCTS, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 11-652-LPS
	:	
GLOBUS MEDICAL, INC.,	:	
	:	
Defendant.	:	

ORDER

At Wilmington, this 25th day of March, 2014, for the reasons set forth in the Memorandum Opinion issued this date, **IT IS HEREBY ORDERED** that:

- (1) Globus' Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial (D.I. 371) is **DENIED**.
- (2) Synthes' Rule 50(a) motions made during trial are **DENIED**.
- (3) Because the Memorandum Opinion has been filed under seal, the parties are to submit, no later than **March 27, 2014**, a jointly-proposed redacted version.
- (4) The parties shall meet and confer to determine the appropriate amount of interest and shall submit, no later than **April 2, 2014**, any proposed order they believe is necessary, consistent with the Orders entered this same date.



UNITED STATES DISTRICT JUDGE