Exhibit 13

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

REALTIME DATA, LLC,	§	
	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO. 6:15-CV-463**
	§	**RWS-JDL**
V.	§	
	§	**LEAD CASE**
	§	
ACTIAN CORPORATION ET AL.,	§	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	

SEALED MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Riverbed Technology, Inc.'s ("Riverbed") Sealed Motion for Partial Summary Judgement Barring Pre-Suit Damages. (Doc. No. 438.) Plaintiff Realtime Data, LLC ("Realtime") has filed a Sealed Response (Doc. No. 453), Riverbed has filed a Reply (Doc. No. 465), and Realtime has filed a Sealed Sur-Reply (Doc. No. 475).[1]

For the reasons stated herein, the Court **DENIES** Riverbed's Motion. (Doc. No. 438.)

I. BACKGROUND

Realtime alleges that Riverbed infringes certain claims of U.S. Patent No. 7,415,530 ("the '530 Patent"), U.S. Patent No. 9,116,908 ("the '908 Patent"), and U.S. Patent No. 8,643,513 ("the '513 Patent"). The Asserted Patents generally relate to different systems and methods of data compression. Specifically, Realtime alleges that certain SteelHead WAN optimization products infringe the Asserted Claims of the Asserted Patents.

[1] Riverbed's Motion originally raised arguments related to marking and laches. (*See* Doc. No. 438.) However, on March 21, 2017, Riverbed filed a Notice withdrawing its laches arguments in light of the Supreme Court's opinion in *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, No. 15-927, 2017 WL 1050978 (U.S. Mar. 21, 2017). (*See* Doc. No. 480.) Accordingly, the Court only addresses Riverbed's marking arguments in this Order.

The following facts are undisputed: In previous lawsuits, Realtime alleged that products owned by F5 Networks, Inc. ("F5") and Blue Coat Systems, Inc. ("Blue Coat") infringed certain other Realtime patents not asserted in the above-captioned litigation. Realtime settled its claims against F5 and Blue Coat by entering into settlement agreements whereby F5 and Blue Coat would pay license fees in exchange for licensing most of Realtime's patent portfolio, including the '530 and '513 Patents. (Doc. No. 444-3, Appx. No. 21, 695-707 ("F5 Agreement"), at 2; Doc. No. 444-3, Appx. No. 22, 709-724 ("Blue Coat Agreement"), at 2.) Both the F5 and Blue Coat Agreements state that "the issues in the Action are disputed." (F5 Agreement, at 2; Blue Coat Agreement, at 2.) Neither Agreement includes any explicit statements indicating that an F5 or Blue Coat product practices any specific claim of the licensed patents. (*See generally* F5 Agreement, Blue Coat Agreement.) F5 has continuously sold its WANJet and BIG-IP products and Blue Coat has continuously sold its ProxySG product since the time these parties entered into settlement agreements with Realtime in October 2009 and January 2010, respectively. Neither F5 nor Blue Coat have ever marked their products with Realtime's patent numbers.

Realtime filed the above-captioned lawsuit on May 8, 2015. In preparing its defenses, Riverbed employed Dr. Clifford Reader to opine regarding whether Realtime's Asserted Patents are invalid. Dr. Reader has also opined that Realtime failed to direct its licensees to mark products covered by the Asserted Patents. (Doc. No. 444-2, Appx. No. 7, 439-520 ("Reader Marking Rep.").) Specifically, Dr. Reader asserts that F5 and Blue Coat's products infringe the claims of the '530 and '513 Patents and should have been marked with the '530 and '513 Patent Numbers. (*See generally*, *id.*)

II. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must consider the evidence in the light most favorable to the non-moving party. *Thorson v. Epps*, 701 F.3d 444, 445 (5th Cir. 2012).

Under 35 U.S.C. § 287(a), "[p]atentees, and persons making, offering for sale, or selling within the United States any patented article for or under them . . . may give notice to the public that the same is patented" by marking each patented article with the appropriate patent number. A failure to mark precludes a patentee from collecting damages for infringement prior to the date it gave the alleged infringer actual notice of infringement. *Id.*

III. DISCUSSION

The Federal Circuit has "yet to resolve competing views as to which party bears the burden of establishing that there was a product that practiced the patent." *Arctic Cat Inc. v. Bombardier Recreational Prod., Inc.*, No. 0:14-cv-62369-BB, 2016 WL 3948052, at *6 (S.D. Fla. May 31, 2016) ("*Arctic Cat II*") (citing *Sealant Sys. Int'l, Inc. v. TEK Glob. S.R.L.*, No. 5:11-CV-00774-PSG, 2014 WL 1008183, at *31 (N.D. Cal. Mar. 7, 2014), *rev'd in part on other grounds*, 616 F. App'x 987 (Fed. Cir. 2015)); *see also Arctic Cat Inc. v. Bombardier Recreational Prod., Inc.*, No. 0:14-cv-62369-BB, Doc. No. 119, at *58-59 (S.D. Fla. May 2, 2016) ("*Arctic Cat I*") (denying defendant's motion for summary judgment seeking to bar

recovery of pre-suit damages for failure to mark); *Blitzsafe Texas, LLC v. Honda Motor Co., Ltd.*, No. 2:15-cv-01274-JRG-RSP, Doc. No. 403, at *3 (E.D. Tex. Jan. 26, 2017) (same). Although other courts in this district have stated that "[t]he patentee bears the burden of compliance with the marking statute," those courts did not specifically address the question of whether a particular product is a "patented article." *See PACT XPP Tech., AG v. Xilinx, Inc.*, No. 2:07-cv-563-RSP, 2012 WL 1029064, *2 (E.D. Tex. March 26, 2012) (denying patentee's motion for summary judgment on defendants' affirmative defense of failure to mark because question of fact existed as to whether any of patentee's activities involved offers for sale of patented products); *Soverain Software LLC v. Amazon.com, Inc.*, 383 F. Supp. 2d 904, 908 (E.D. Tex. 2005) (no dispute as to whether software sold by licensees constituted a patented product); *see also Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1112-13 (Fed. Cir. 1996); *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998). Having reviewed the case law, the Court concludes that "defendant bears the threshold burden of showing that an unmarked patented product exists." *Blitzsafe*, No. 2:15-cv-01274-JRG-RSP, Doc. No. 403, at *3; *see also Oracle Am., Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA, 2011 WL 5576228, at *2 (N.D. Cal. Nov. 15, 2011); *Sealant Sys.*, 2014 WL 1008183, at *31; *Arctic Cat I*, No. 0:14-cv-62369-BB, Doc. No. 119, at *58-59; *accord Fortinet, Inc. v. Sophos, Inc.*, No. 13-cv-05831-EMC, 2015 WL 5971585, at *4-5 (N.D. Cal. Oct. 14, 2015); *MobileMedia Ideas, LLC v. Apple Inc.*, No. 10-258-SLR, 2016 WL 3958723, at *5 (D. Del. July 21, 2016; *but see Adrea, LLC v. Barnes & Noble, Inc.*, No. 13-cv-4137 (JSR), 2015 WL 4610465, at *2 (S.D.N.Y. July 24, 2015); *DR Sys., Inc. v. Eastman Kodak Co.*, No. 08-cv-0669 H(BLM), 2009 WL 2632685, *4 (S.D. Cal. August 24, 2009). Consistent with the usual burden of proof for affirmative defenses, *see Dixon v. U.S.*, 548 U.S. 1, 8 (2006), it is the defendant's responsibility to affirmatively identify and prove that a

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