IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESTERNGECO L.L.C.,	§	
	§	
Plaintiff,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:09-cv-01827**
	§	
ION GEOPHYSICAL CORPORATION, FUGRO-GEOTEAM, INC., FUGRO-GEOTEAM AS, FUGRO NORWAY MARINE SERVICES AS, FUGRO, INC., FUGRO (USA), INC. and FUGRO GEOSERVICES, INC.,	§	**Judge Keith P. Ellison**
	§	**JURY TRIAL DEMANDED**
Defendants.	§	

ION GEOPHYSICAL CORPORATION'S TRIAL BRIEF ON MARKING

As a matter of law, Plaintiff WesternGeco L.L.C. ("WesternGeco") cannot recover damages for any alleged infringement occurring before the date of this lawsuit because WesternGeco failed to bring forth any evidence that it complied with the marking statute under 35 U.S.C.§ 278(a). Thus, if WesternGeco is entitled to recover damages at all, it is strictly limited to recovering damages for infringement occurring after June 12, 2009.

35 USC § 278(a): The Marking Statute

Under 35 U.S.C. § 278(a), patentees are required to give either actual or constructive notice to the public of their patented article. 35 U.S.C. § 287(a). This requirement "serves three related purposes: (1) helping to avoid innocent infringement; (2) encouraging patentees to give notice to the public that the article is patented; and (3) aiding the public to identify whether an article is patented." *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (1998) (internal citations omitted).

Actual notice under section 287(a) "demands notice of the patentee's identity as well as notice of infringement." *U.S. Phillips Corp. v. Iwasaki Elec. Co. Ltd.*, 505 F.3d 1371, 1375 (Fed. Cir. 2007) (citing *Lands v. Digital Equip. Corp.*, 252 F.3d 1320, 1327-28 Fed. Cir. 2001)). Moreover, it also requires "an affirmative act on the part of the patentee which informs the defendant of infringement." *Id.* Thus, if a party fails to present evidence that it took affirmative steps prior to filing suit to provide the infringer with actual notice, a court must conclude that the infringer "did not receive actual notice of infringement until the dates on which [the] suit with respect to each patent was filed." *Tesco Corp. v. Weatherford Intern., Inc.*, 722 F. Supp. 2d 755, 770 (S.D. Tex. 2010) (Ellison, J.).

A patentee can satisfy the constructive notice requirement by either: (1) "fixing thereon the word 'patent' or the abbreviation 'pat.', together with the number of the patent;" or (2) "fixing thereon the word 'patent' or the abbreviation 'pat.' together with an address of a posting on the Internet . . . that associates the patented article with the number of the patent." 35 U.S.C. § 287(a). However, in the event this cannot be done due to the character of the article, the patentee is required to "[fix] to [the patented article] or to the package wherein one or more of them is contained, a label containing a like notice." *Id.* "[T]he plain language of the statute requires marking when a product is made, sold, offered for sale, or imported." *WiAV Solutions LLC v. Motorola, Inc.*, 732 F. Supp. 2d 634, 641-43 (E.D. Va. 2010). In the present case, there is clearly an article to be marked, *i.e.*, the portions of the Q-Marine system falling under the patent claims.

Where the patent contains both apparatus and method claims and there is "a physical device produced by the claimed method that [is] capable of being marked," then the patentee must still comply with the marking requirements of Section 287(a). *Am. Med. Sys., Inc. v. Med.*

Eng'g Corp., 6 F.3d 1523, 1538-39 (Fed. Cir. 1993) (concluding the patentee "was required to mark its product pursuant to section 287(a) in order to recover damages under its method claims prior to actual or constructive notice being given to [the alleged infringer]"); *see also Tesco Corp.*, 722 F. Supp. 2d at 769 (finding that because the patentee had "asserted both product and method claims in [the] suit, the marking requirements of Section 287 [were] applicable.").

The patentee bears the burden of pleading and proving at trial by a preponderance of the evidence that the patentee fully complied with the statute. *Nike, Inc.*, 138 F.3d at 1446. To overcome this burden, the patentee may show by a preponderance of the evidence that "substantially all of its [patented articles] being [made, sold, offered for sale, or imported] were marked, and that once marking was begun, the marking was substantially consistent and continuous." *Id.* The patentee may also show compliance by demonstrating that it has never made, offered for sale, sold, or imported patented products within the United States. *See WiAV Solutions*, 732 F. Supp. 2d at 642-43 (placing the burden on the patentee to demonstrate that its patented products were not made, sold, or offered for sale in the United States); *see also PACT XPP Techs., AG v. Xilinx, Inc.*, No. 2:07-CV-563, 2012 WL 1029064, at *2-3 (E.D. Tex. Mar. 26, 2012) (holding that the patentee had the burden of proof at summary judgment and at trial that "it never made, offered for sale, sold, or imported patented product within the United States"); *cf. DR Sys., Inc. v. Eastman Kodak Co.*, No. 08-CV-0669, 2009 WL 2632685, at *4 (S.D. Cal. Aug. 24, 2009) (holding that the patentee has the burden to prove the nonexistence of patented articles made or sold in the United States).

When a patentee fails to meet this burden, the patentee is precluded from recovering damages for any infringement that occurs prior to the date the alleged infringer was notified of the infringement. *See* 35 U.S.C. § 287(a). For example, absent actual or constructive notice, a

patentee would be precluded from recovering damages for infringement that occurs prior to the filing of the original complaint. *Id*. ("Filing of an action for infringement shall constitute such notice.").

WesternGeco Failed to Meet it Burden of Proof

To recover damages for any infringement occurring before WesternGeco filed suit, WesternGeco had to prove one of the following: (1) ION received actual notice of infringement from WesternGeco; (2) ION received constructive notice of infringement because WesternGeco marked its patented system; or (3) WesternGeco complied with the marking statute because WesternGeco did not make, offer to sell, or sell within the United States the patented article. Here, no reasonable jury could find that WesternGeco made a sufficient showing of compliance. First, WesternGeco failed to introduce any evidence that ION received actual notice of infringement from WesternGeco before the lawsuit was filed. Second, there is no evidence that WesternGeco ever marked its patented Q-Marine system. And third, WesternGeco failed to demonstrate that it has never made its patented Q-Marine system in the United States.

A claimed system is "made" at the place the system is assembled for operable use, *i.e.* the place where all of the claim elements are combined. *Cf. Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 529 (1972); *Centillion Data Sys., LLC v. Quest Commc'n Int'l Inc.*, 631 F.3d 1279, 1288 (Fed. Cir. 2011).[1] There is no evidence upon which a reasonable jury could conclude that WesternGeco never assembled its Q-Marine system for a 3D survey in the United States. In fact, the testimony of Mark Zajac indicates that WesternGeco's patented Q-Marine system may have been assembled in the United States. *See* Tr. Tran. 952:15—953:13.

[1] Contrary to WesternGeco's arguments at the charge conference, ION has not changed its position concerning what it takes to "make" a patented system.

Because WesternGeco failed to meet its burden of proof of compliance with the notice statute, WesternGeco cannot recover damages for infringement occurring prior to June 12, 2009—the date WesternGeco filed suit against ION. Consequently, the jury charge should include an affirmative statement to this effect.

Dated: August 13, 2012

Respectfully submitted,

/s/ David L. Burgert
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