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

REALTIME DATA, LLC D/B/A IXO,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION No. 6:08cv144**
	§	
PACKETEER, INC., et al.,	§	
	§	
Defendants.	§	
	§	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Before the Court is Defendants Blue Coat Systems, Inc., ("Blue Coat"); Packeteer, Inc. ("Packeteer"); 7-Eleven, Inc. ("7-Eleven"); ABM Industries, Inc. ("ABM"); ABM Janitorial Services–South Central, Inc. ("ABMJ"); Build-A-Bear Workshop, Inc. ("BAB"); Citrix Systems, Inc. ("Citrix"); F5 Networks, Inc. ("F5"); Averitt Express, Inc. ("Averitt"); DHL Express (USA), Inc. ("DHL"); Expand Networks, Inc. ("Expand"); Interstate Battery System of America, Inc. ("IBSA"); and O'Reilly Automotive, Inc.'s ("O'Reilly") (collectively, "Defendants") Joint Defendants' Motion for Partial Summary Judgment of Invalidity of U.S. Patent Nos. 6,601,104, 6,604,158, and 7,321,937 for Indefiniteness ("Motion") (Doc. No. 247). Plaintiff Realtime Data, LLC d/b/a IXO's ("Realtime") filed an Opposition to Joint Defendants' Motion for Partial Summary Judgment of Invalidity of U.S. Patent Nos. 6,601,104, 6,604,158, and 7,321,937 for Indefiniteness ("Response."). Defendants also filed a Reply ("Reply") (Doc. No. 272). The Court held a hearing on the Motion on April 9, 2009. (Doc. No. 283). For the reasons stated herein, the Court **RECOMMENDS** that Defendants' Motion be **GRANTED-IN-PART** and **DENIED-IN-PART**.

BACKGROUND

On April 18, 2008, Plaintiff filed the instant action against Defendants (Doc. No. 1), alleging infringement of the nine asserted patents:[1] 1) U.S. Patent No. 6,601,104 ("the '104 patent"); 2) U.S. Patent No. 6,604, 158 ("the '158 patent"); 3) U.S. Patent No. 7,321,937 ("the '937 patent"); 4) U.S. Patent No. 6,624,761 ("the '761 patent"); 5) U.S. Patent No. 7,161,506 ("the '506 patent"); 6) U.S. Patent No. 7,378,992 ("the '992 patent"); 7) U.S. Patent No. 7,352,300 ("the '300 patent"); 8) U.S. Patent No. 6,748,457 ("the '457 patent"); and 9) U.S. Patent No. 7,376,772 ("the '772 patent").

The asserted patents can be viewed as three patent families: 1) the data acceleration patent family; 2) the data compression patent family; and 3) the hardware patent family. The data acceleration patent family is comprised of the '104 patent, the '158 patent, and the '937 patent. This patent family teaches systems and methods for providing accelerated data storage and transmission. The data compression patent family is comprised of the '761 patent, the '506 patent, the '992 patent, and the '300 patent. This patent family teaches methods for performing data compression. The hardware patent family is comprised of the '457 patent and the '772 patent. This patent family teaches apparatus designs associated with data compression and accelerated data storage and retrieval. Plaintiff asserts over ninety claims of the nine asserted patents. *See* NOTICE OF FILING OF JOINT CLAIM CONSTRUCTION CHART, EXH. A ("Claim Chart") (Doc. No. 274).

Representative claims are provided below with the terms Defendants argue are indefinite set forth in bold. Claim 1 of the '104 patent provides:

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[1]Defendant Blue Coat Systems, Inc. ("Blue Coat") was added as a Defendant when Plaintiff filed its First Amended Complaint. (Doc. No. 58).

> 1. A program storage device readable by machine, tangibly embodying a program of instructions executable by the machine to perform method steps for providing accelerated data storage and retrieval, said method steps comprising:
>
> ŕeceiving a data stream at an input data transmission rate which is greater than a data storage rate of a target storage device;
>
> compressing the data stream at a **compression rate** that increases the effective data storage rate of the data storage device; and
>
> storing the compressed data stream in the target storage device.

'104 patent at 18:41. Claim 17 of the '937 patent provides:

> 17. A method comprising:
>
> receiving a data stream over an input having a first bandwidth;
>
> compressing, in at least real-time, said received data stream using a plurality of encoders to provide a compressed data stream;
>
> transmitting said compressed data stream over an output having a second bandwidth, wherein said first bandwidth is **substantially greater** than said second bandwidth and said transmitting said compressed data stream effectively increases said second bandwidth;
>
> and wherein said compressing and said transmitting of said compressed data stream over said output occurs faster than a transmission of said data stream in uncompressed form over said output.

'937 patent at 20:9–24. Finally, claim 20, which depends from claim 17 of the '937 patent, provides:

> 20. The method of claim 17, wherein said compressing said received data stream comprises compressing said received data stream using **a plurality of Lempel-Ziv encoders**.

'937 patent at 20:35–38.

Defendants filed the instant Motion on March, 16, 2009, arguing that the asserted claims of the '104, '158, and '937 patents are invalid as a matter of law because the claims fail to meet the definiteness requirement of 35 U.S.C. section 112, paragraph 2. MOTION at 1.

LEGAL STANDARD

I. Summary Judgment

Summary judgment is appropriate when the record, as a whole, together with the affidavits, if any, show that 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(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). A "genuine issue" of material fact exists when a fact requires resolution by the trier of fact and a reasonable jury could resolve a factual matter in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

The moving party bears the initial burden of showing absence of a material fact issue, and doubt is resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (the court should draw all reasonable inferences in favor of the non-moving party). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the non-movant's response." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*). If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1046-47 (5th Cir. 1996).

When ruling on a motion for summary judgment, the Court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party.

Matsushita, 475 U.S. at 587; *Adickes*, 398 U.S. at 158-59; *Merritt-Campbell, Inc.*, 164 F.3d at 961. However, the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *as modified*, 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 249-51; *Texas Instruments*, 100 F.3d at 1179.

II. Indefiniteness

A claim is invalid as indefinite under 35 U.S.C. section 112, paragraph 2 if it fails to particularly point out and distinctly claim the subject matter that the applicant regards as the invention. The party seeking to invalidate a claim as indefinite must show by clear and convincing evidence that one skilled in the art would not understand the scope of the claim when read in light of the specification. *Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc.*, 336 F.3d 1308, 1319 (Fed. Cir. 2003). Further, indefiniteness is an issue of claim construction and therefore a question of law. *Cordis Corp. v. Boston Scientific Corp.*, 561 F.3d 1319, 1331 (Fed. Cir. 2009). The test for indefiniteness is stringent—a claim is invalid as indefinite if it is not "amenable to construction." *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). The definiteness requirement of section 112, paragraph 2 "focuses on whether the claims, as interpreted in view of the written description, adequately perform their function of notifying the public of the [scope of the] patentee's right to exclude." *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1371-72 (Fed. Cir. 2001) (citing *Solomon*, 216 F.3d at 1379). Section 112, paragraph two also requires "that the claims be amenable to construction, however difficult that task may be."

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