UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

REALTIME DATA, LLC,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:17-cv-11279-IT
	*	
ACRONIS, INC. LTD,	*	
	*	
Defendant.	*	
---		
	*	
REALTIME DATA, LLC,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:17-cv-12499-IT
	*	
CARBONITE, INC.,	*	
	*	
Defendant.	*	

CONSOLIDATED SCHEDULING ORDER

May 29, 2018

TALWANI, D.J.

This Consolidated Scheduling Order supplements paragraphs (I)(1)(a) – (3)(c) of the Amended Scheduling Order [#40] in Realtime Data, LLC v. Acronis, Inc. Ltd., 17-cv-11279, supersedes the remainder of that order, and sets further deadlines in this consolidated action. It is intended to provide a reasonable timetable for discovery and motion practice in order to help ensure a fair and just resolution of this consolidated matter without undue expense or delay.

Timetable for Discovery and Motion Practice

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure and Local Rules 16.1(f) and 16.6, it is hereby ORDERED that:

I.   **Preliminary Disclosures in Realtime Data, LLC v. Carbonite, Inc., 17-cv-12499**

   A.   **Exchange of Email Custodians.** Plaintiff and Defendant Carbonite, Inc. ("Carbonite")

B. **Initial Disclosures.** Initial disclosures required by Fed. R. Civ. P. 26(a)(1) between Plaintiff and Carbonite must be completed by June 13, 2018.

C. **Automatic Patent-Related Disclosures.** In addition to the automatic required disclosures required by Federal Rules of Civil Procedure 26(a), Plaintiff and Carbonite shall make the following additional disclosures. Such disclosures shall be made to all parties, but should not be filed with the court.

   1. **Plaintiff's Preliminary Disclosures in 17-cv-12499.** Not later than June 13, 2018, Plaintiff shall make the following disclosures:

      a. **Infringement Claim Charts.** Infringement claim charts identifying, with as much specificity as reasonably possible from publicly available information or other information then within Plaintiff's possession, custody, or control:

         i.   each accused product and/or method;

         ii. the patent(s) and the claim(s) each product or method allegedly infringes;

         iii. an element-by-element description of where and how each element of each asserted claim is found in each accused product or method;

         iv. as to each element that Plaintiff contends is a means-plus function term under 35 U.S.C. § 112, the identity of the structures, acts, or materials in the accused product(s) or method(s) that perform the claimed function;

         v.   whether each element of each asserted claim is asserted to be present literally or under the doctrine of equivalents;

         vi. which subsections of 35 U.S.C. § 271 apply; and

         vii. if any alleged infringement is based on the acts of multiple parties, the role of each such party in the infringement.

      b. **Prosecution History.** Copies of the prosecution histories for each asserted patent, including any parent applications and provisional applications from which the asserted patents descend and to which each asserted patent claims priority. Plaintiff shall also produce any non-privileged documents in its possession, custody, or control concerning the conception and reduction to practice of the invention claimed in the asserted patents, including but not limited to lab notebooks (electronic or otherwise).

c. **Ownership Evidence.** Documents (including, without limitation, any licenses or assignments) sufficient to establish that Plaintiff owns the asserted patent(s) or has the authority to assert the patent(s).

d. **Real Parties in Interest.** The identity of all real parties in interest as to Plaintiff and the asserted patent(s).

e. **Conference Concerning Preliminary Patent Disclosures.** Not later than 21 days after Plaintiff's preliminary disclosures, Plaintiff and Carbonite shall meet and confer about the following issues:

   i. the sufficiency of Plaintiff's disclosures under subsection (I)(C)(1); provided, however, that those disclosures, as well as Defendant's disclosures in subsection (I)(C)(2), are preliminary and may be amended with leave of court during the discovery period; and

   ii. a plan for Carbonite's compliance with the disclosure requirements of subsection (I)(C)(2), including the feasibility of, and procedures for, production or inspection of exemplary samples of the accused products and methods, technical documents, and/or source code.

f. **Effect of Incomplete or Disputed Disclosures.** The parties' failure to agree on the sufficiency of Plaintiff's disclosures or a plan for Carbonite, compliance with its disclosure obligations shall not entitle Carbonite to avoid or delay its disclosure obligations in subsection (I)(C)(2).

2. **Carbonite's Preliminary Production of Technical Documents, Source Code, and Samples of Accused Products to Plaintiff in 17-cv-12499.** Not later than 42 days after service of Plaintiff's Preliminary Patent-Related Disclosures and subject to any agreement of the parties as to the contours of production or inspection, Defendant shall make the following disclosures:

   a. **Technical Documents.** Documents sufficient to show the composition, operation, construction, and performance of the accused components, elements or functionality identified in Plaintiff's infringement claim charts under subsection (I)(C)(1)(a). Such documents may include, for example, source code, specifications, schematics, flow charts, artwork, and formulas.

   b. **Samples.** Sufficient samples of the accused products (or products that perform or were produced by the accused methods). When production is not practicable, Defendant shall permit inspection of the accused product(s) or method(s), provided that Carbonite is only required to permit inspection of a method that continues to be practiced in the ordinary course of business.

c. **Source Code.** Source code, if relevant, subject to any protective order or procedures on which the parties may agree.

d. **Noninfringement Claim Charts.** Noninfringement charts identifying specifcally which elements of the asserted claims each accused product or method fails to practice.

e. **Invalidity Claim Charts − Anticipation or Obviousness.** Invalidity claim charts identifying all prior art that such party contends anticipates or renders obvious the patent claims identified by Plaintiff.

    i. For each such prior-art reference, Carbonite shall specify whether it anticipates or renders the asserted claim obvious and shall also identify specifically where in each alleged reference each element of each asserted claim can be found. For each element that Defendant contends is a means-plus-function term under 35 U.S.C. § 112, the chart shall include the identity of the structures, acts, or materials in each prior-art reference that perform the claimed function.

    ii. If Carbonite asserts that a combination of prior-art references renders a claim obvious, then Carbonite shall identify each such combination and the reason to combine the references. For each combination, Carbonite shall identify specifically where in the combination of references each element of each asserted claim can be found. For each element that Carbonite contends is a means-plus-function term under 35 U.S.C. § 112, the chart shall include the identity of the structures, acts, or materials in each combination that performs the claimed function. If applicable, Carbonite shall also identify the primary and secondary references in each such combination.

f. **Other Grounds for Invalidity.** Any asserted grounds of invalidity based on patentability under 35 U.S.C. § 101, indefiniteness under 35 U.S.C. 5 § 112, or lack of enablement or written description under 35 U.S.C. § 112 of any of the asserted claims.

g. **Supporting Evidence for Invalidity Defense.** Documents sufficient to support any asserted invalidity defense.

h. **Identity of Real Parties in Interest.** Documents sufficient to establish the identity of all real parties in interest as to the patentee and the asserted patent(s).

II.   **Preliminary Disclosure Obligations Generally**

    A. **Amendments of Preliminary Patent-Related Disclosures.**

1. The preliminary patent-related disclosures required by the Amended Scheduling Order and this Order may be amended and supplemented only by leave of court upon a timely showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to the non-moving party, support a finding of good cause include:

    a. a claim construction by the court that is different from that proposed by the party seeking amendment within 28 days of the court's claim-construction ruling;

    b. discovery of material prior art that was not located, despite diligent efforts, before the service of the invalidity contentions; and

    c. discovery of nonpublic information about the asserted infringement that was not discovered or located, despite diligent efforts, before the service of the infringement claim charts.

2. The duty to supplement discovery responses does not excuse the need to obtain leave of court to amend disclosures. If one party is allowed to amend its disclosures, the opposing party may, within 28 days after service of the amended disclosure, serve responsive amended disclosures.

B. **Resolution of Disputes.** Any party seeking to file a motion to resolve a dispute arising out of disclosure obligations must follow the procedures applicable to discovery disputes set forth in L.R. 37.1.

III. **Amendments to Pleadings in <u>Realtime Data, LLC v. Carbonite, Inc.</u>, 17-cv-12499.**

A. Except for good cause shown, no motions seeking leave to add new parties or to amend the pleadings to assert new claims or defenses may be filed after August 10, 2018.

IV. **Claim Construction Proceedings.**

A. **Potential Bifurcation**

1. Plaintiff and Defendant Acronis ("Acronis") shall promptly provide Carbonite with their constructions of the claim terms at issue in Acronis' <u>Statement of Bifurcation of Claim Construction</u> in 17-cv-11279, ECF No. 49.

2. Not later than June 22, 2018, Carbonite shall provide its construction of claims terms at issue in Acronis' <u>Statement of Bifurcation of Claim Construction</u> in 17-cv-11279, ECF No. 49, and shall submit its statement (limited to 5 pages) on bifurcation of claim construction briefing.

3. If the court orders bifurcation, no later than 2 weeks after the court decides on the bifurcation of claim construction, the parties shall simultaneously exchange and file preliminary opening claim construction briefs. If two parties agree as to the construction of the claim terms at issue in the first phase of the bifurcated

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