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

ULTRAVISION TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	Case No. 2:18-cv-00100-JRG-RSP
v.	§	LEAD CASE
	§	
GOVISION LLC,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION

Before the Court is the Motion for Partial Summary Judgment that Ultravision's Claim to Pre-Notice Damages is Barred for Failure to Mark Under 35 U.S.C. § 287 ("Motion") filed by Defendants Shenzhen Absen Optoelectronic Co., Ltd. and Absen, Inc. (collectively, "Absen").[1] **Dkt. No. 436**. Absen's Motion seeks summary judgment barring Plaintiff Ultravision Technologies, LLC ("Ultravision") from claiming pre-suit damages for failure to mark.

I. BACKGROUND

On March 27, 2018, Ultravision filed its original complaint against Absen asserting several patents including U.S. Patent No. 9,916,782 (the "'782 Patent"). *Ultravision Technologies, LLC v. Shenzhen Absen Optoelectronic Co., Ltd. et al*, Case No. 2:18-cv-00112-JRG-RSP ("Absen Member Case"), Dkt. No. 1. On April 12, 2019, the Court consolidated the Absen Member Case along with several other member cases under the lead case against GoVision, LLC. Dkt. No. 17.

On June 6, 2019, Ultravision filed its First Amended Complaint asserting several more patents including U.S. Patent No. 9,990,869 (the "'869 Patent"), U.S. Patent No. 9,978,294 (the

[1] Former defendants Ledman Optoelectronic Co., Ltd. and Yaham Optoelectronics Co., Ltd. also are named as filing this motion.

"'294 Patent"), and U.S. Patent No. 9,207,904 (the "'904 Patent"). Following this First Amended Complaint, the case has narrowed significantly. Every defendant in the above-captioned matter has settled except for Absen, and the only remaining patents asserted against Absen are the '782 Patent, the '869 Patent, the '294 Patent, and the '904 Patent (collectively, the "Asserted Patents"). Dkt. No. 615 at 1–3.

In Absen's Answer to Ultravision's First Amended Complaint, Absen asserts lack of marking under § 287 as a limitation of damages. Dkt. No. 217 at 18. Absen's Answer does not identify "specific unmarked products which [Absen] believes practice the patent." *See Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 876 F.3d 1350, 1366 (Fed. Cir. 2017) (citation omitted).

Absen, along with former defendants, filed Absen's Motion on October 22, 2020. Dkt. No. 436. Absen's Motion argues that Ultravision's Master Plus Series and Brilliant Series products practice each of the Asserted Patents, that neither product is physically marked, that Ultravision has not adequately virtually marked these products, and that due to Ultravision's failure to mark these products Ultravision should be precluded from damages prior to June 6, 2019. *Id.* at 5, 8–9, 13.

II. LEGAL STANDARDS

A. Summary Judgment

Summary judgment should be granted "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). Any evidence must be viewed in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). Summary judgment is proper when there is no genuine dispute of material fact.

Celotex v. Catrett, 477 U.S. 317, 322 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine [dispute] of material fact." *Anderson*, 477 U.S. at 247–48. The substantive law identifies the material facts, and disputes over facts that are irrelevant or unnecessary will not defeat a motion for summary judgment. *Id.* at 248. A dispute about a material fact is "genuine" when the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party must identify the basis for granting summary judgment and evidence demonstrating the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. If the movant bears the burden of proof on an issue at trial, then the movant "must establish beyond peradventure all of the essential elements of the claim or defense to warrant [summary] judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

B. Marking

35 U.S.C. § 287(a) provides:

> Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent, or by fixing thereon the word "patent" or the abbreviation "pat." together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

35 U.S.C. § 287(a). Marking can be achieved by physically marking "by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent" or by virtually marking "by fixing thereon the word "patent" or the abbreviation "pat." together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent." *Id.*

"Compliance with § 287 is a question of fact." *Arctic Cat*, 876 F.3d at 1366 (citation omitted). "[A]n alleged infringer who challenges the patentee's compliance with § 287 bears an initial burden of production to articulate the products it believes are unmarked 'patented articles' subject to § 287." *Id.* at 1368. This is a "low bar" such that "[t]he alleged infringer need only put the patentee on notice that he or his authorized licensees sold specific unmarked products which the alleged infringer believes practice the patent." *Id.* "Once the alleged infringer meets its burden of production, however, the patentee bears the burden to prove the products identified do not practice the patented invention." *Id.*

III. ANALYSIS

A. Initial Burden Under *Arctic Cat*

Absen argues Ultravision has produced no evidence showing marking of the Master Plus and Brilliant Series products it contends practice the Asserted Patents. Dkt. No. 436 at 8. Absen notes that Ultravision's responses to Absen's marking interrogatories identify a product label directing customers to the webpage http://www.ultravisioninternational.com/patents but has not produced evidence regarding when this label was applied to the products or even images of this webpage. *Id.* Absen asserts the only production of a page on Ultravision's website providing product marking is a June 28, 2018 screenshot of a different webpage:

https://www.ultravisioninternational.com/our-company/digital-billboard-manufacturers-ultravision-international-patents/. *Id.*

Absen further argues this produced screenshot does not adequately mark the Master Plus Series and Brilliant Series with the Asserted Patents. Absen asserts "the Brilliant Series practicing all asserted patents does not at all appear on the June 28, 2018 screencapture" although Ultravision admits the Brilliant Series replaced the Master Series in 2018 and that "[f]urther, several asserted patents do not appear at all on the screencapture, namely U.S. Pat Nos. 9,978,294 [and] 9,990,869 . . . ." *Id.* at 8–9.

Ultravision argues Absen's Motion should be denied and Absen should be precluded from raising a marking defense at trial because it failed to meet its initial burden under *Arctic Cat* to notify Ultravision of allegedly unmarked products. Dkt. No. 496 at 4. Ultravision asserts that Absen did not articulate the products it believes are unmarked "patented articles" subject to 35 U.S.C. § 287 at any point prior to the filing of this motion. *Id.* at 10 (citing *Arctic Cat*, 876 F.3d at 1366). Ultravision continues, "[d]uring the entire 14-month discovery period . . . . Defendants did not articulate any products they believed to be unmarked . . . . Ultravision thus had no opportunity to respond to Defendants' new allegations . . . at any time prior to this opposition." *Id.* at 11.

Absen asserts that in its Answer to Ultravision's First Amended Complaint, Absen provided Ultravision notice that Ultravision's claimed damages were barred under 35 U.S.C. § 287 and Ultravision had not provided Absen notice of the asserted patents prior to the filing of its complaints. Dkt. No. 524 at 4. Absen argues that "[d]espite having notice of Defendants' defenses for at least a year, Ultravision has not produced sufficient evidence to prove marking of its two products under the marking statute." *Id.*

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