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

ULTRAVISION TECHNOLOGIES, LLC, Plaintiff, v. GOVISION LLC,	)	Case No. 2:18-cv-00100-JRG-RSP (LEAD CASE) **JURY TRIAL DEMANDED**
SHENZHEN ABSEN OPTOELECTRONIC CO., LTD. AND ABSEN, INC., Defendants.	)	Case No 2:18-cv-00112-JRG-RSP (CONSOLIDATED CASE) **JURY TRIAL DEMANDED**

SHENZHEN ABSEN OPTOELECTRONIC CO., LTD.'S AND ABSEN, INC.' S MOTION FOR RECONSIDERATION AND OBJECTION TO THE ORDER RECOMMENDING DENIAL OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (D.I. 654)

Pursuant to Federal Rule 72 and Local Rule CV-72(b), Defendants Shenzhen Absen Optoelectronic Co., Ltd. and Absen, Inc (together, "Absen") object to, and move for reconsideration of, the Court's decision recommending denial of their 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. *See* D.I. 654 (the "Order"). The Court held that Absen had failed to provide proper notice—for purposes of summary judgment—of the products it contends practice the patents-in-suit but are unmarked, because it first identified them in its opening summary judgment brief (although the Court went on to hold that this constituted sufficient notice under the circumstances for purposes of trial). Other courts, however, consistently have held or otherwise assumed that it is sufficient for an accused infringer to first provide notice of unmarked products in its opening summary judgment brief, or even at trial. Putting the sufficiency of notice aside, Ultravision has insufficient evidence to carry its burden of proving that it properly marked its products. The Court therefore should grant summary judgment to Absen as to pre-suit damages.

BACKGROUND

Ultravision sued Absen on March 27, 2018, asserting infringement of U.S. Patent No. 9,916,782 (the "'782 Patent"). *Ultravision Techs., LLC v. Shenzhen Absen Optoelectronic Co., Ltd. et al.*, Case No. 2:18-cv-00112-JRG-RSP. Ultravision then filed a First Amended Complaint on June 6, 2019, which asserted several more patents including U.S. Patent Nos. 9,207,904 ("'904 Patent"); 9,916,782 ("'782 patent"); 9,978,294 ("'294 Patent"); and 9,990,869 ("'869 Patent") (collectively, the "asserted patents"). *Ultravision Techs., LLC v. Shenzhen Absen Optoelectronic Co., Ltd.*, No. 2:18-cv-112-JRG-RSP, D.I. 73 (E.D. Tex. June 6, 2019).

Absen promptly asserted lack of marking under 35 U.S.C. § 287 as a limitation of damages in its Answer to Ultravision's First Amended Complaint. D.I. 217 at 18. Absen later identified

the Master Plus Series and the Brilliant Series as unmarked products that practice the asserted patents in its Motion for Partial Summary Judgment. D.I. 436 at 3.

Ultravision itself contends that its Master Plus Series and Brilliant Series products practice the asserted patents. D.I. 436, Ex. 1 [UV Infringement Contentions v. Ledman] at 11. Ultravision also asserts that the Brilliant Series "was first sold in 2018" and "replaced the Master Series," whose "last sale was in December 2017." D.I. 436, Ex. 4 [UV Resp. to Ledman Rogs 1–8] at 12. It is undisputed, moreover, that neither the Master Plus Series nor the Brilliant Series products are physically marked with the patent numbers of any asserted patents. Ultravision has argued that it virtually marks the products on its website, and points to a product label directing consumers to http://www.ultravisioninternational.com/patents. D.I. 436, Ex. 4 [UV Resp. to Ledman Rogs 1–8] at 10–12. Ultravision, however, did not produce any evidence as to whether or when this label was applied to products. The only marking webpage Ultravision produced, a June 28, 2018 screencapture (D.I. 436, Ex. 7), does not adequately mark the Master Plus Series and the Brilliant Series with each of the asserted patents—indeed, the Brilliant Series does not even appear in that screencapture. *See id.* Further, the screencapture shows that several of the asserted patents do not even appear at all, namely the '294 patent and the '869 patent. *Id.*

Based on these undisputed facts, Absen moved for summary judgment of no pre-suit damages. The Court, in relevant part, recommended denying Absen's summary judgment motion on procedural grounds (while leaving it open to Absen to prove Ultravision's failure to comply with § 287 at trial). *See* D.I. 654. The Court's sole basis for its recommendation was:

> the fact that Absen did not identify the products before filing its motion. Absen has not shown that it has identified 'specific unmarked products which the alleged infringer believes practice the patent' but rather merely identified its intent to assert a marking defense in its Answer. *See Arctic Cat*, 876 F.3d at 1368.

> Since Absen has not met its burden under *Arctic Cat*, the Absen's Motion must be denied.

D.I. 654 at 6.

ARGUMENT

To challenge a patentee's compliance with § 287, an alleged infringer "bears an initial burden of production to articulate the products it believes are unmarked 'patented articles.'" *Arctic Cat Inc. v. Bombardier Recreational Products, Inc.*, 876 F.3d. 1350, 1368 (Fed. Cir. 2017). The Federal Circuit held in *Arctic Cat* that this initial burden is a "low bar," as "the 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.* at 1368. "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.*

The Court recommended denying Absen's motion for partial summary judgment on the basis that Absen did not identify specific unmarked products before its opening brief on summary judgment motion. D.I. 654 at 6. The court in *Arctic Cat*, however, did not set forth any requirement as to *when* an alleged infringer must identify the allegedly unmarked products. Indeed, the court in *Arctic Cat* specifically held that the alleged infringer in that case had satisfied its "initial burden" by identifying the allegedly unmarked products *at trial.* As the Federal Circuit explained:

> We do not here determine the minimum showing needed to meet the initial burden of production, but we hold in this case it was satisfied by BRP. ***At trial*** BRP introduced the licensing agreement between Honda and Arctic Cat showing Honda's license to practice "Arctic Cat patents that patently cover Arctic Cat's Controlled Thrust Steering methods, systems and developments." J.A. 7830 § 1.01. BRP identified fourteen Honda PWCs from three versions of its Aquatrax series sold between 2002 and 2009. J.A. 3540–41 ¶ II. BRP's expert testified that he "review[ed] information regarding those models" and believed if BRP's OTAS system practiced the

> patents, so did Honda's throttle reapplication system in the Aquatrax PWCs. J.A. 2447–49; J.A. 2482. ***This*** was sufficient to satisfy BRP's initial burden of production.

Arctic Cat, 876 F.3d at 1368 (emphases added); *see also Infernal Tech., LLC v. Epic Games, Inc.,* 335 F.R.D. 94, 97 (E.D.N.C. 2020) ("*Arctic Cat* focused on the burden parties bear at trial for a § 287 defense.").[1]

Nothing in *Arctic Cat* requires an accused infringer to satisfy its initial burden of production sometime prior to summary judgment, in order for the defense to be considered at summary judgment. Recent cases applying *Arctic Cat* have held or otherwise assumed that accused infringers can meet their initial burden by identifying products in their opening summary judgment brief, which is the latest point Absen did so in this case. That is reasonable, because the facts concerning marking and the characteristics of a patentholder's products (its own products or licensed products) should be in the hands of the patentholder, who can readily either marshal them in its opposition brief, or request additional discovery under Rule 56(d). For example, in *Finjan, Inc. v. Juniper Networks, Inc.,* 387 F.Supp.3d 1004 (N.D. Cal. 2019), the parties cross-moved for summary judgment, including a motion for summary judgment of no pre-suit damages by defendant Juniper. Finjan challenged whether Juniper "gave adequate *Arctic Cat* notice," but the district court held that Juniper had, pointing specifically to Juniper's opening brief on summary judgment: "This order finds that Juniper met its burden of production when it notified Finjan of the following products it believed practiced the '780 patent (Dkt. No. 371-11 at 3)." *Id*. at 1016; *see also id*. at 1006 (identifying Dkt. No. 371 as Juniper's summary judgment motion). *See also Biedermann Tech. GmbH & Co. v. K2M, Inc*., 2021 WL 1143767, *10 (E.D. Va. Mar. 25, 2021)

[1] Indeed, in *Arctic Cat* the Defendant first asserted lack of marking as a limitation on damages in its Answer (*Arctic Cat v. Bombardier Recreational Products Inc.,* No. 14-cv-62369, Doc. 11 at 7-8 (S.D. Fla. Jan. 9, 2015), and then later identified the specific products it contended were unmarked during summary judgment briefing. *Arctic Cat,* No. 14-cv-62369, Doc. 119 at 59-60 (S.D. Fla. May 2, 2016).

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