

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

CELLULAR	COMMUNICATIONS	§	
EQUIPMENT LLC		§	
		§	CIVIL NO. 6:16-CV-363-KNM
v.		§	
		§	
HTC CORPORATION, et al.		§	

ORDER

Before the Court is Plaintiff Cellular Communications Equipment LLC’s (“CCE”) Motion for Summary Judgment Against ZTE’s FRAND-Related Defenses (Doc. No. 94). The Court held a hearing on this Motion on July 18, 2018. Plaintiff’s Motion for Summary Judgment is **DENIED**.

BACKGROUND

Plaintiff Cellular Communications Equipment LLC (“CCE”) alleges that ZTE Corporation, ZTE (USA), Inc., and ZTE Solutions Inc. (collectively, “ZTE” or “Defendants”) infringe the two asserted patents, United States Patent Nos. 7,941,174 (“the ‘174 Patent”) and 7,218,923 (“the ‘8,923 Patent”) (collectively, the “patents-in-suit”). Nokia Siemens Network (“NSN”) assigned the patents-in-suit to Plaintiff.

On August 12, 2010, NSN declared that the ‘174 Patent Application was potentially essential to 3GPP TS 25.133 to the European Telecommunications Standards Institute (“ETSI”). Doc. No. 94-2. NSN also declared that it was prepared to license the ‘174 Patent Application at a fair, reasonable, and non-discriminatory (“FRAND”) rate to the extent that the ‘174 Patent Application is or becomes, and remains, essential in light of 3GPP TS 25.133. *Id.*; Doc. No. 94-4.

The ETSI policy requires the predecessor-in-interest to ensure that its FRAND commitment is binding on assignees and thus Plaintiff is bound by any FRAND commitments made by NSN. Doc. No. 105-2.

APPLICABLE LAW

Summary Judgment

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the moving party demonstrates that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A genuine dispute as to a material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A “material fact” is one that might affect the outcome of the suit under governing law. *Id.* The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The moving party, however, “need not negate the elements of the nonmovant’s case.” *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant’s burden is only to point out the absence of evidence supporting the nonmoving party’s case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996). Once the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Id.* All facts and inferences are viewed “in the light most favorable to the nonmoving party.” *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012). “Summary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence.” *Id.*

DISCUSSION

Plaintiff argues that there is no genuine issue of material fact with respect to Defendants' FRAND defenses and counterclaims because Plaintiff does not have a FRAND commitment. Doc. No. 94 at 3. Plaintiff notes that the ETSI's IPR Declaration only requires patentees to grant licenses on FRAND terms "[t]o the extent that the IPR(s) disclosed in the attached *IPR Information Statement Annex* are or become, and remain ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION." Doc. No. 94-2. Plaintiff emphasizes that the ETSI Rules of Procedure define "essential" to mean "that it is not possible on technical (but not commercial) grounds . . . to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR." Doc. No. 94-4.

Plaintiff asserts that declared essential patents are not necessarily essential. Plaintiff argues that there is no evidence that the patents-in-suit are standards essential, and thus there is no FRAND commitment. Doc. No. 94 at 6. Plaintiff notes that its technical expert—Nigel Jones—did not find that it was impossible to comply with the standard without infringing the '174 Patent. Doc. No. 94 at 6. Plaintiff contends that ZTE's technical expert—Dr. Chris Heegard—concludes that the '174 Patent is not essential. *Id.* Plaintiff argues that since no expert does an element-by-element analysis of any claim of the '174 Patent with an ETSI standard, the '174 Patent is not essential to the ETSI standard and thus there is no FRAND commitment.

Defendants argue that Plaintiff created a genuine issue of material fact with respect to its FRAND commitment when it declared to the Court that the '174 Patent was essential to the ETSI standard in Plaintiff's First Amended Statement Regarding Which of the Asserted Patents It Considers Standards Essential ("FRAND Statement"). Doc. No. 94-10. Defendants note that

Plaintiff's FRAND Statement was made "in response to a court order mandating identification of standard-essential patents" and should not be easily dismissed. Doc. No. 105 at 5.

Defendants also argue that CCE's infringement contentions and expert reports effectively equate infringement of the '174 Patent with implementation of the relevant ETSI standard, thus implicating the essentiality of the '174 Patent. Doc. No. 105 at 6.

Plaintiff replies that "effectively equating infringement of the '174 Patent with implementation of certain standards does not demonstrate the test for Essentiality." Doc. No. 116 at 2. Plaintiff argues that the test for essentiality requires a stringent technical analysis that compliance with TS 25.133 necessarily infringes the '174 Patent. Plaintiff contends that its infringement contentions and expert reports do not meet that essentiality test because they rely on an analysis of source code rather than just implementation of TS 25.133. *Id.*

Plaintiff also points to its response to Defendants' RFA No. 7, where it stated:

CCE has not undertaken any analysis to determine whether the claims of the '174 Patent are essential, as that term is defined in the ETSI IPR policy. Consequently, CCE does not contend that the '174 Patent is essential to practicing any standard.

Doc. No. 116-2. Plaintiff argues that its RFA indicates that its FRAND statement did not declare the '174 Patent to be essential under the terms of the ETSI IPR Policy, but rather used the generic phrase "standards essential" to indicate that the patent covers some aspect of certain standards. Doc. No. 116 at 2.

Plaintiff's argument that its use of the phrase "standards essential" in its FRAND Statement did not trigger a FRAND commitment is unpersuasive. Plaintiff's FRAND Statement lists the '174 Patent as one of the "patents that have been declared essential to practicing a standard" and that it "considers each of the above-listed patents to be standards essential, and CCE is prepared to grant irrevocable licenses to the above-listed patents on fair, reasonable, and non-discriminatory terms." Doc. No. 94-10. Plaintiff's FRAND Statement to the Court clearly indicates that it considered the

'174 Patent to be standards essential and that it was prepared to license the '174 Patent at a FRAND rate.

Further, Jones's expert report states that:

I have never come across a single incidence where the Qualcomm code did not encompass the 3GPP standards. As such, it is my opinion that the '174 Accused Devices are designed to comply with the 3GPP standards.

Doc. No. 94-6 at ¶ 125. Jones's statement equates Defendants' infringement of the '174 Patent with compliance of the 3GPP standards, thus implicating the essentiality of the '174 Patent.

When viewing the light most favorable to the nonmoving party, Defendants have raised genuine issues of material fact as to whether Plaintiff has a FRAND commitment with respect to the '174 Patent.

CONCLUSION

The Court **DENIES** Plaintiff's Motion for Summary Judgment Against Defendant's FRAND Defenses and Counterclaims.

The parties must approach the bench before mentioning FRAND at trial. If Plaintiff does not argue that '174 Patent is essential to TS 25.133, then FRAND will not be an issue before the jury.

So ORDERED and SIGNED this 9th day of August, 2018.



K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE