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Eastern District of TEXAS [LIVE]

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Case Number:	2:24-cv-00721-JRG-RSP
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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 CELERITY IP LLC, ET AL.,)(

5 PLAINTIFFS,)(CIVIL ACTION NO.

6)(2:24-CV-721-JRG-RSP

7 VS.)(MARSHALL, TEXAS

8)(

9 AT&T CORP, ET AL.,)(NOVEMBER 19, 2024

10 DEFENDANTS.)(2:01 P.M.

11 CASE MANAGEMENT CONFERENCE

12 BEFORE THE HONORABLE ROY S. PAYNE

13 UNITED STATES MAGISTRATE JUDGE

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25 system.)

1 COURT SECURITY OFFICER: All rise.
2 THE COURT: For the record, which for your
3 information, we are keeping by way of recording, so I'll
4 need everybody to speak from the podium.
5 We're here for the scheduling hearing in Celerity
6 IP, et al., versus AT&T Corp, et al., which is our Case No.
7 2:24-721.
8 Would counsel state their appearances for the
9 record?
10 MR. BUNT: Good afternoon, Your Honor. Chris Bunt
11 here on behalf of the Plaintiffs. With me today is
12 Mr. Jason Sheasby, and we're ready to proceed.
13 THE COURT: All right. Thank you, Mr. Bunt.
14 MR. DACUS: Good afternoon, Your Honor. Deron
15 Dacus on behalf of AT&T, Verizon, and Ericsson. Here with
16 me are Nick Mathews, Jennifer Truelove, McKool Smith, on
17 behalf of Verizon and Ericsson, and also Tim Durst with
18 O'Melveny on behalf of AT&T. And we're ready to proceed,
19 Your Honor.
20 THE COURT: Thank you, Mr. Dacus.
21 MR. GILLAM: Good afternoon, Your Honor.
22 Gil Gilliam and Elsbeth Bennett for T-Mobile, and also Nick
23 Mathews for T-Mobile. Ready to proceed, as well.
24 THE COURT: All right. Thank you, Mr. Gillam.
25 There are a variety of issues that we need to take

1 up today, but the first one I'd like to start with is the
2 question about how to proceed simultaneously or not between
3 this case with the antitrust claims and the pending related
4 infringement cases.
5 And I'd like to hear from the Plaintiffs first on
6 that.
7 And, Mr. Sheasby, let me tell you what my concern
8 is so that you can address it more clearly.
9 In this case, from outward appearances, what the
10 Defendants are doing is a fairly natural response to an
11 infringement case or a series of infringement cases. And I
12 understand that there is a licensing negotiation going on
13 in the background, and certainly I'm not nearly as familiar
14 with how those ordinarily proceed as I am with how
15 infringement litigation proceeds. But I haven't seen
16 anything in the infringement cases that seems out of the
17 ordinary.
18 I also understand from the briefing the Defendants
19 have filed that the presence of the antitrust claims and
20 the way in which they're being framed has a chilling effect
21 on the way the Defendants would go about their joint
22 defense in the infringement case.
23 And what I'd like to hear is how you think that
24 they should be able to proceed with the defense of the
25 infringement action without concern that they would be

1 creating additional evidence or additional causes of action
2 in the antitrust case.
3 MR. SHEASBY: Yes, Your Honor. So I think the
4 first issue to keep in mind is that their position is that
5 the antitrust case encompasses the patent infringement
6 case, as well, because they think that the federal question
7 of infringement drives whether there's antitrust liability.
8 So there's no distinction between the two.
9 But I think -- I want to be very clear, it is not
10 our -- the joint defense is legal. It is not an antitrust
11 violation. Anything they do that is advancing the joint
12 defense is privileged and legal. There's only one issue,
13 which is that are the entities, AT&T, T-Mobile, Verizon,
14 and Ericsson, separate from their counsel, separate from
15 the joint defense coordinating their outward licensing
16 negotiation positions.
17 And so there is no liability -- I don't know -- I
18 tried to make this as clear as I can. There is no
19 liability that we are seeking from them being joint
20 Defendants. We have no interest in their communications
21 regarding validity, infringement, or internal FRAND.
22 The only thing that these antitrust, unfair
23 competition claims deal -- deals with is that nexus as to
24 whether these three outside entities are coordinating their
25 positions on ongoing negotiations. That's it.

1 And so whatever needs to be done, whatever
2 stipulation I need to give to -- for them to know that the
3 ongoing defense of this action is not getting them into
4 additional causes of action, I'm happy to give. This is
5 purely because what we see from T-Mobile, Verizon, and --
6 and AT&T is this very suspicious coordination and position.
7 Now, that -- that suspicion may be completely --
8 it's -- we may turn out that that was just absolute
9 coincidence. But I don't think it was absolute -- absolute
10 coincidence. And so the only thing that needs to happen is
11 it's a relatively narrow question, which is are those three
12 folks coordinating their external licensing positions with
13 us and external negotiations?
14 They've gone on -- they've gone on. Since the
15 case has been filed, they've been affirmatively writing us
16 letters. They've been trying to create a record of a
17 further negotiation. And so I want to be absolutely clear,
18 there is nothing that joint defense does that creates
19 liability at all.
20 THE COURT: How separate are the licensing
21 negotiations and the persons involved in those
22 negotiations, both at the companies and counsel --
23 MR. SHEASBY: Yeah.
24 THE COURT: -- from the groups involved in the
25 infringement litigation?

1 MR. SHEASBY: So we have had no interactions with
2 any litigation counsel or any outside attorney regarding
3 negotiations at all. Negotiations have all been Ericsson,
4 Nokia, T-Mobile, Verizon, AT&T, in-house counsel speak to
5 either ASUS's general counsel or to Celerity's CEO and
6 president.
7 This is nothing about our interactions with
8 litigation counsel. We're not involved in the negotiation,
9 and litigation counsel is not involved in the litigation as
10 far as we know.
11 THE COURT: So you're saying that you have not
12 yourself or your team been involved in the licensing
13 negotiations either?
14 MR. SHEASBY: No, we have not. We haven't
15 exchanged -- we haven't exchanged communications with
16 anyone externally or anything like that.
17 THE COURT: You are obviously developing your
18 factual understanding of the licensing negotiations by some
19 kind of communications.
20 MR. SHEASBY: Well, I'm looking at the
21 communications, for sure, absolutely. I do see them.
22 THE COURT: Okay.
23 MR. SHEASBY: But I'm not a witness to them as it
24 were, right? They're going out from third parties to third
25 parties.

1 I think the more important issue is that -- recall
2 that this was brought in -- in Dallas County court because
3 it was brought consciously as a state law claim to be as
4 separate as possible as it can from the infringement case.
5 We have -- we -- we will do whatever is necessary
6 and take whatever steps this -- the Court instructs to
7 ensure that the infringement case, which I think will
8 ultimately decide the issues, will ultimately resolve the
9 dispute between the parties, does not get delayed and does
10 not get pulled off track.
11 And if that involves dismissing the antitrust
12 claims, if the Court is that concerned about it, we will
13 take that step. Our first priority is to try the
14 infringement case and to get that tried. And I think that
15 will resolve everything.
16 I will say, though, that the infringement is sort
17 of the tail wagging the dog, Your Honor -- sorry, the
18 antitrust is the tail wagging the dog because they have
19 these FRAND claims, which are invariably going to implicate
20 the same licensing behavior we're talking about.
21 And so this idea -- they -- they plead their FRAND
22 claims as ongoing as being not just from the time of the
23 lawsuit backwards but from the time of the lawsuit
24 forwards. And so all these same issues that are tied up
25 with the antitrust claims, whether you call them Sherman

1 Act claims or you call them predicates for violation of
2 FRAND -- in other words, we would believe that -- like we
3 would maintain that coordinating negotiations between
4 three service providers is not FRAND behavior in and of
5 itself.
6 And so it's never going to go away. If they're
7 coordinating behavior, that's a violation of either FRAND
8 or antitrust or -- or unfair competition, it's just there.
9 The anti --
10 THE COURT: The big difference that I see between
11 those two issues has to do with the effect on privilege,
12 and any communications that may go on between lawyer and
13 client in connection with the FRAND negotiations are not
14 even arguably unprivileged. Whereas, I understand there is
15 a claim that if they are evidence of the -- an antitrust
16 conspiracy, that there could be an issue about whether the
17 attorney-client privilege covers those.
18 MR. SHEASBY: We would not -- we would not seek to
19 pierce privilege if the Court believes that that raises
20 such a sufficient concern that it would justify delaying
21 the infringement case.
22 THE COURT: Let -- let me interrupt you at this
23 point, Mr. Sheasby.
24 What I'd like to hear now from the Defendants,
25 what you've said has been helpful to me. I want to hear

1 if -- if they have issues about how the line is drawn
2 between the licensing and the -- the infringement action
3 and give you a chance to respond to those concerns --
4 MR. SHEASBY: Sure.
5 THE COURT: -- as well.
6 Good afternoon, Mr. Mathews.
7 MR. MATHEWS: Good afternoon, Your Honor. Nick
8 Mathews representing various Defendants and parties in
9 these different cases.
10 THE COURT: I -- I would like you -- even though
11 I'm sure you have a presentation that would be all
12 encompassing, I would really like you at this point to
13 focus on the workability or any issues you see with what
14 Mr. Sheasby just presented.
15 MR. MATHEWS: Yes. So there are significant
16 issues with what has been raised across this antitrust
17 case, and what we've seen are the goalpost kind of moving
18 on what they may or may not ask for.
19 At the last hearing, what we heard is, well, I
20 won't depose trial counsel, but he didn't say -- and then
21 he said, but I am going to depose the in-house folks.
22 Logically, what I think would then happen is he
23 would ask the in-house folks, well, what did y'all talk
24 about with Mr. Mathews?
25 Now what we hear is, well, if the judge is

1 concerned about the antitrust claims, we won't seek any
2 privileged communications whatsoever. It's very unclear to
3 me where the line is.
4 I would like to refer Your Honor to our joint
5 notice. This is Docket 72 in this case at Page 13. We
6 refer to discovery that was sought by the Plaintiffs in a
7 letter that seek the production of communications from
8 outside counsel of one Defendant intervenor to another
9 Defendant intervenor or their counsel and attorney
10 communications in which outside counsel performs the role
11 of a hub and a hub-and-spoke communication process. That
12 was what was on the table. That's what he most recently
13 asked for.
14 We got that request at the exact same time
15 Mr. Sheasby asked to take the depositions of the people who
16 were writing the letters back and forth with Celerity.
17 Our fundamental position, Your Honor, is that
18 given the nature of these antitrust claims, it is extremely
19 difficult, if not impossible, to defend against the patent
20 infringement and licensing claims that Celerity filed in
21 this case.
22 All of the evidence that they're going to point
23 to, whether they seek it as privileged or not, they're
24 going to say it's reflective in these communications, is
25 coextensive with legal advice that I have to provide to do

1 my job to defend against the claims that they brought.
2 And so, Your Honor, they may say, hey, we're not
3 going to seek privileged communications, but they're going
4 to try to draw these inferences from letters that they get
5 from various employees, and say, ah-ha, this is indicative
6 of an antitrust conspiracy. And what they're pointing to,
7 those legal positions, are fundamental. They're
8 categorical. I'm not going to waive privilege or get into
9 the specifics. But one of the things that they point to in
10 their motion to dismiss opposition as evidence of an
11 antitrust conspiracy is that two of the three carriers in
12 this case rejected an offer to perform negotiations under
13 Rule 408 to shield those from the jury.
14 What Celerity is saying, what Mr. Sheasby said is
15 because there's that commonality of position, that's
16 evidence of an antitrust conspiracy. That shows this
17 alleged concerted behavior.
18 What do I do, Your Honor, when the third entity
19 comes to me and says, what do we do? Should we agree to
20 this 408 provision? I now have to make a decision under a
21 cloud of significant potential antitrust liability, under a
22 cloud of significant potential discovery on something that
23 is my job to perform as a lawyer. And that is precisely
24 what he's called into question with this antitrust claim,
25 and it's pervasive.

1 Another issue fundamentally that I have to advise
2 upon on the nature of the claims he filed, this isn't just
3 patent infringement, Your Honor, it's patent infringement
4 on FRAND-encumbered patents, contractually encumbered
5 patents, he has declaratory judgment claims for bad faith,
6 FRAND claims. I have to provide advice to my clients on
7 their rights and obligations under the ETSI IPR policy.
8 And what will he do if my clients take that
9 advice, if they decide it's in their best interest to
10 advance those positions in a letter, Mr. Sheasby will say,
11 well, that's evidence of an antitrust conspiracy.
12 And so now what I'm doing is I'm litigating one
13 hand tied behind my back in a patent case that Mr. Sheasby
14 has said is his priority. I think it's telling, Your
15 Honor, that he already has said he's willing to dismiss the
16 entire antitrust claim if it's going to impact his patent
17 schedule.
18 I'll note, a side note, there hasn't been a single
19 pricing term identified by Celerity. No financial terms
20 have been offered at all. They won't even give us an
21 offer. The carriers have made an offer back. This is a
22 thin antitrust case. So it's not surprising to hear that
23 he's willing to jettison it to save his patent case.
24 And I think what's happening here is we're seeing
25 what's really going on. This has been a tactic. It's been

1 a ploy to chill our defense of the patent case. It got
2 filed in state court under dubious grounds. It got removed
3 here, and already we're hearing that he's willing to walk
4 away from it.
5 So I appreciate what I'm hearing on privilege.
6 I've heard different things about privilege. I don't know
7 where that line is going to be. But we have significant
8 concerns, setting aside whatever privilege representation
9 he will make that somehow he'll grab something from a
10 letter and say that's evidence from a conspiracy. It's
11 not, but that's what he's doing.
12 And so I have serious concerns, Your Honor, about
13 these cases proceeding in parallel.
14 THE COURT: Tell me about instances that you
15 believe the Plaintiff has taken from actions in the common
16 defense of the infringement cases and alleged those as
17 elements of the antitrust claim.
18 MR. MATHEWS: Yes, certainly, Your Honor.
19 So one of the issues concerns essentiality, rights
20 under the IPR policy.
21 Celerity's positions pre-suit, patents were
22 essential. Post-suit, they're saying they're not
23 essential.
24 Now they have a new doctrine called commercial
25 essentiality. This isn't basic infringement/validity-type

1 stuff. This is nuanced essentiality views under the IPR
2 policy. We're providing advice to our clients about their
3 rights under the IPR policy. He's now pointing to
4 positions and questions asked in letters on essentiality as
5 evidence of the conspiracy. They are part and parcel,
6 coextensive.
7 THE COURT: And where is that pointing taking
8 place?
9 MR. MATHEWS: The pointing is taking place in the
10 antitrust complaint, and more specifically in the
11 opposition to the motion to dismiss that's Docket 64 in
12 this case, No. 721, where Mr. Sheasby, in response to our
13 arguments that there were not -- there's no evidence of
14 conspiracy -- this is on Page 14. It says -- the first
15 full paragraph, he complains that in pre-suit
16 discussions -- and this will go to a cross-license issue,
17 not an essentiality issue, but it has to do with
18 reciprocity under the IPR policy.
19 What he says is in pre-suit discussions, AT&T said
20 any deal must include a cross-license. Verizon did not.
21 After initiation of the suit, Verizon suddenly insisted on
22 a cross-license.
23 Reciprocity, Your Honor, is something that is
24 inherent in the IPR policy. They have rights to this. I
25 have to provide advice to my clients about these sorts of

1 topics, again, without risking waiver or getting into the
2 specifics.
3 Further down on that page, Rule 408, I think this
4 is incredibly telling, Your Honor, similarly, both Verizon
5 and T-Mobile rejected Celerity's proposal that licensing
6 discussions be protected under Federal Rule of Evidence 408
7 using the exact same rationale.
8 That is what he's pointing to. I'm defending
9 against a willfulness claim in this case. We've all done
10 enough of these patent trials. We know these letters are
11 going to be shown in front of the jury. And he wants them
12 hidden under Rule 408. My clients are entitled to advice
13 on whether they should or should not be, and that shouldn't
14 be something that gives rise to potential antitrust
15 liability. I mean, this is very significant, Your Honor.
16 The other thing I'll say is it's not just
17 significant for our case, I think it's significant for the
18 operation of this Court. I saw a stat, 80 percent of the
19 patent cases in this district are handled on a joint
20 defense basis.
21 There is an expectation that on these common
22 issues, beyond just claim charts, beyond just infringement
23 and validity, there's an expectation that Defendants
24 cooperate to reduce the burden on the Court. The Court
25 doesn't want five motions for summary judgment on French

1 law. It doesn't want five motions under the interpretation
2 of the ETSI IPR policy. There's are necessarily inherent
3 things to defending one of these patent cases, and that's
4 exactly what's been called into question.
5 THE COURT: Is there something alleged in the
6 antitrust complaint that you can point out that relates to
7 the defense of the infringement actions as opposed to the
8 negotiations?
9 MR. MATHEWS: Yes, there is.
10 So the allegations as I understand it in the
11 complaint is that the communications, the alleged
12 conspiracy is facilitated through the joint defense. That
13 is how this happens. And they point to McKool Smith by
14 name in their complaint, and they say that after McKool
15 Smith was retained, there's this alleged commonality. And
16 so what they do is they say a joint defense group has been
17 formed, we now have these letters that we can see after the
18 suit, we think that they're too similar, and, therefore,
19 there must be evidence of a conspiracy here. That is the
20 crux of their allegation.
21 So it isn't just the letters. They're alleging
22 that it's a conspiracy, an agreement between these entities
23 facilitated by the defense of the patent case. That is
24 what they're saying.
25 And then their examples of it, Your Honor, because

1 they didn't put the meat on the bone at the complaint, are
2 provided on Page 14 of their opposition to the motion to
3 dismiss. Again, that's Docket 64.
4 Your Honor, if I may, Paragraph 24 of Plaintiffs'
5 amended complaint recites: In furtherance of the
6 conspiracy, the service providers have agreed to limit
7 their individual freedom of action in dealing with the
8 Plaintiffs even against their private economic interests.
9 They have shared information through their common counsel
10 concerning Plaintiffs, its patents, and licensing
11 positions. That is the crux of his allegation, perhaps
12 that these entities are denying liability, stuff like that.
13 That is what forms the crux of this antitrust case which
14 he's now saying that he's potentially willing to walk away
15 from.
16 THE COURT: All right.
17 MR. MATHEWS: It's a significant problem from our
18 perspective, Your Honor. Thank you.
19 THE COURT: Thank you, Mr. Mathews.
20 MR. SHEASBY: So just some -- Jason Sheasby for
21 the Plaintiff.
22 This is the -- the complaint actually does not
23 name the McKool -- McKool firm, nor does it say that the
24 McKool firm is part of the conspiracy. I would never
25 allege either of those things.

1 What we notice is at the time of common -- common
2 national counsel was hired, we started seeing the
3 negotiation positions coalesce.
4 Now, the issue, it seems to me, is a deeply
5 practical one. If the Court is concerned about the
6 violation of privilege or the exploration of privilege, I
7 don't believe that's necessary to make out the antitrust
8 claims. I don't believe that it's necessary for us to
9 pierce of the veil, and I don't believe that anything
10 they've done in terms of common defense of the claims is a
11 basis for the liability.
12 I think what the basis for the liability is, is
13 that T-Mobile's lawyer is reading AT&T's lawyer -- letter,
14 T-Mobile -- AT&T is reading Verizon's letter, and they're
15 all just deciding to do the same thing because the letters
16 are all public.
17 And so it's not that there's some dramatic hub --
18 it's not saying that -- that McKool Smith is passing
19 confidential information to them or that O'Melveny or
20 Cleary or any of these law firms are passing confidential
21 information to each other, and it's -- to be clear, I'm not
22 saying I'm prepared to dismiss the antitrust claim because
23 it's not meritorious. These -- these companies have a
24 monopoly. They are monopsonists in the very essence of it.
25 And different rules, whether people like it or not, apply

1 in the concept of a monopsony. And, no, they should not be
2 coordinating their licensing positions.
3 And that's pretty clear under Department of
4 Justice guidelines and the guidelines of other -- of other
5 agencies, as well as in the Fifth Circuit.
6 But under no circumstances can that be, I think,
7 or should be used to delay the patent case or the
8 resolution of the patent case. The patent case is going to
9 ultimately resolve everything, and if that -- whatever we
10 need to do to make sure that happens, we will do so.
11 THE COURT: Well, I don't want you to feel that
12 the Court is forcing you to take some action, but -- so
13 I'll say that I'm willing to simply delay the patent case
14 long enough to take up the Defendants' motions to dismiss
15 the antitrust claim so that I can form an opinion about
16 whether or not I think that's proper.
17 But -- or obviously, if you decide that you want
18 to moot that --
19 MR. SHEASBY: I'll moot it.
20 THE COURT: Okay. Well, that was easier than I
21 expected.
22 All right. Then -- so just amplify what you mean.
23 MR. SHEASBY: Well, we'll dismiss it without
24 prejudice, Your Honor.
25 THE COURT: All right. I guess there has been no

1 answer or motion for summary judgment filed; is that right?
2 MR. SHEASBY: That's correct.
3 THE COURT: Mr. Mathews or Mr. Durst, whoever
4 wants to speak to that.
5 MR. MATHEWS: So I may need some help on docket
6 cites, but there have been answers subject to the motion to
7 dismiss. There's been a motion to dismiss that's been
8 filed, and there's been answers subject to the motion to
9 dismiss.
10 The other thing I'll note, Your Honor, is a
11 dismissal without prejudice puts us in exactly the same
12 position that we're concerned about. The cloud is still
13 there. It's almost the worst of all worlds. We want to
14 get this resolved. We think we're entitled to having it
15 resolved. And dismiss it with prejudice, and we can move
16 on. It's as simple as that.
17 THE COURT: If the -- if, in fact, the Defendants
18 have filed answers, then there is no right to dismiss
19 without prejudice, and that would be an issue that would
20 have to be resolved.
21 Mr. Sheasby, what is your position on the with or
22 without prejudice?
23 MR. SHEASBY: I think we have to brief it, Your
24 Honor. The reason being is I don't think Your Honor, as a
25 judicial matter, can wipe out what is a potentially

1 meritorious antitrust action if the behavior continues in
2 the future. And so I don't think that that dismissal with
3 prejudice is appropriate under any measure just as a matter
4 of jurisprudence.
5 THE COURT: I understand that. I think it -- to
6 do it -- I don't think the Court would dismiss with
7 prejudice. I think it would be a question of whether the
8 Court will dismiss without prejudice. And if the Court
9 won't dismiss without prejudice because of the positions
10 taken by the Defendant and the fact that they filed
11 answers, then that puts us back in --
12 MR. SHEASBY: Right.
13 THE COURT: -- the position of what do we do.
14 MR. SHEASBY: And I think, then, we should -- we
15 can cross that bridge when we come to it, Your Honor.
16 THE COURT: All right.
17 MR. SHEASBY: I mean, we're not going to do
18 anything that delays the patent infringement case, and so
19 if Your Honor thinks a dismissal with prejudice is
20 necessary on the antitrust claims, then it will be a
21 dismissal with prejudice, if the Court's going to use that
22 as a basis to delay the patent infringement case.
23 THE COURT: Well, I don't -- I am going to delay
24 the patent infringement case unless there is some
25 resolution of the concerns about the antitrust case and the

1 effects of that on their ability to defend the patent
2 infringement case unhindered.
3 And I don't see another way to allow that to
4 happen other than resolving the antitrust case either by
5 motion practice, summary judgment, trial, whatever it
6 takes, or --
7 MR. SHEASBY: Well, Your Honor, you know, the
8 trial of the antitrust case will try the patent claims. So
9 why don't we just have a trial on the antitrust case then?
10 THE COURT: I don't have a problem with that.
11 MR. SHEASBY: But that's just trying the patent
12 case then, and they're back in the same position they were
13 previously.
14 THE COURT: Well, the -- you know, I guess -- I
15 don't know that those two things -- I understand the theory
16 that antitrust injury would require a showing of
17 infringement, but I don't see why that couldn't be done as
18 an element of the antitrust case and like any other
19 antitrust injury.
20 MR. SHEASBY: I think that's right. And the
21 patent case would be an element of the antitrust case.
22 THE COURT: Well, the patent infringement would
23 be.
24 MR. SHEASBY: Yes.
25 THE COURT: It might not look like a free-standing

1 patent --
2 MR. SHEASBY: Right. But it --
3 THE COURT: -- infringement case.
4 MR. SHEASBY: But it would be issue preclusive as
5 to that issue in subsequent cases.
6 THE COURT: That -- that may well be.
7 MR. SHEASBY: Your Honor, I understand the
8 concern. It seems to me that we do believe there's a
9 coordination. We believe that's going to come out through
10 the FRAND claims if they're even part of the case. But if
11 the antitrust creates some additional level of concern, I
12 thought that saying we wouldn't invade privilege and we
13 wouldn't say that any privileged communication would be
14 sufficient to -- to allay the Court's concern.
15 But if that's not sufficient, my expectation is
16 the client will just dismiss it with prejudice.
17 THE COURT: I can tell you why it's not
18 sufficient, and that is that regardless of the
19 communications that go on if you are relying upon the
20 actions taken as also constituting evidence of conspiracy,
21 and by that I mean the actions taken in the defense of the
22 infringement action, then I think that is chilling in and
23 of itself.
24 MR. SHEASBY: Well, we're not.
25 THE COURT: Well, there were some that were

1 referred to in -- both in the amended complaint and in your
2 opposition to the motion to dismiss that I've seen.
3 Now, I'm relying upon what I heard as to those. I
4 have not read that briefing yet.
5 MR. SHEASBY: Well, I can tell Your Honor that
6 nothing that happens in the litigation is a predicate for
7 the antitrust behavior. We are prepared to make that
8 stipulation.
9 THE COURT: Why was there commentary, then, about
10 the refusal to negotiate without the Rule 408?
11 MR. SHEASBY: Yes, Rule 408. Well, that was a
12 proposal -- that was a discussion between -- first off,
13 there's litigations going on across the world between these
14 parties. That's the first issue. Nokia sued us in --
15 in -- in Spain, I believe, Portugal. And so there is
16 just -- there's -- there's a number of elements that are
17 floating around -- sorry, I meant -- I said Nokia, but I
18 meant Ericsson.
19 So it's -- the idea would be let's just do it
20 under settlement communications, not specifically to this
21 case. And so if the proposal of FRE 408 is -- is going to
22 be a barrier, I don't think -- then if Your Honor thinks
23 that anything that is squarely within the realm of the
24 litigation defense can't be a predicate, Your Honor should
25 just make that ruling, and we'll -- we -- I mean, it

1 doesn't need to be a ruling, we will stipulate to that.
2 THE COURT: Well, then we'll have to get into
3 assessing actions taken and determining whether that action
4 was squarely within the infringement defense or was outside
5 of it and therefore part of a conspiracy.
6 MR. SHEASBY: Well, I mean, I think that's always
7 what you have to do when you have a joint defense coupled
8 with an antitrust claim.
9 THE COURT: I understand that. And that's why
10 my -- my instincts tell me to uncouple them.
11 MR. SHEASBY: I agree. They should -- they should
12 be uncoupled.
13 THE COURT: Well, that happens by addressing the
14 antitrust claim first.
15 MR. SHEASBY: But the antitrust claim has the
16 patents as the predicate.
17 THE COURT: Well, at some point late in the
18 antitrust case, there will be a need to show that. But we
19 could certainly have determined by that stage the viability
20 of the antitrust claim.
21 And that's my concern, because this is the first
22 time I've seen claims like this made, and this is not the
23 first time I have seen infringement cases like this that
24 involve similar FRAND issues and licensing concerns, it has
25 the appearance that it's a tactical decision and --

1 MR. SHEASBY: Well, if that's what Your Honor
2 thinks, then it should be dismissed with prejudice. If
3 that's -- if Your Honor thinks that that's what I'm doing,
4 then -- then I'll have to get my client's permission, but
5 we can write you a letter about it this week.
6 THE COURT: All right. Well, that -- obviously --
7 I shouldn't say obviously. I would be assuming. I am
8 assuming that that would be the end of that concern.
9 I don't want you to do something that doesn't
10 accomplish what you're after. So that's why I'm asking.
11 MR. MATHEWS: So, Your Honor, I'll have to talk
12 with my clients. There's a lot of them. Not all of them
13 are here. I tend to think so. Once there's a full
14 dismissal with prejudice of these claims, they are gone, at
15 that point in time, we should be in a position to pick up
16 the patent case. It sounds like that's a bit of an open
17 question, and so what we would suggest is let's put a pause
18 in place while we figure out how we get from here to there
19 and iron out the specifics. But in concept, that sounds
20 about right.
21 THE COURT: I don't need for there to be a pause.
22 I think this should be something that can be decided very
23 quickly, and if it doesn't do it, then I'll have to
24 consider other options.
25 But, Mr. Sheasby, tell me when you will have

1 accomplished your consultation with your client and can
2 give the Defendants a positive offer.
3 MR. SHEASBY: 24 hours.
4 THE COURT: All right.
5 MR. SHEASBY: There is a separate issue, though,
6 in addition to the antitrust claim that involves T-Mobile,
7 Verizon, AT&T, there's also an unfair competition claim
8 against Ericsson. That claim doesn't sound in any of the
9 litigation defense issues that are at play here. And so we
10 haven't been talking about that, but I'm assuming that
11 would not be -- need to be dismissed.
12 THE COURT: Well, that would be my assumption, as
13 well.
14 MR. SHEASBY: Okay.
15 THE COURT: I have not seen an analysis of the
16 unfair competition claim that would give me those concerns,
17 and I've also seen plenty of unfair competition claims
18 going on at the same time as patent cases.
19 But I'll give the Defendants an opportunity to
20 weigh in on that.
21 MR. MATHEWS: So, Your Honor, I do think that the
22 issues still apply somewhat to the unfair competition
23 claims against Ericsson. They've been alleged to be a
24 co-conspirator with respect to these issues.
25 I will say this, I don't hold myself out to be an

1 expert in antitrust and unfair competition law. I do have
2 my colleague, James Smith, here who has appeared in the
3 antitrust case from McKool Smith if -- with your Court's --
4 the Court's indulgence, I could give him the podium for a
5 minute or two to speak to that issue.
6 THE COURT: I am fine with that.
7 MR. MATHEWS: Thank you, Your Honor.
8 MR. SMITH: Good afternoon, Your Honor. James
9 Smith on behalf of Verizon, Ericsson, and T-Mobile.
10 I'll be brief. The notion that Ericsson is not
11 alleged to be part of this antitrust conspiracy is false.
12 There are three claims brought against them, two for
13 tortious interference, one for tortious interference of a
14 contract, the other for tortious interference of a
15 prospective business relationship. That would be
16 Plaintiffs' prospective licenses with the carriers. And
17 another for unfair competition, unfair competition that is
18 predicated on violation of the Texas Free Enterprise Act,
19 which is a duplicate of the Sherman Act.
20 So the notion that they are not part of the
21 conspiracy allegations is not true.
22 When you look at their complaint, they reference
23 the same types of offers, the same types of licensing
24 communications that are going on in parallel with the
25 patent infringement action now that Ericsson is a part of

1 that case.
2 So, I mean, without a conspiracy, there's nothing
3 to aid and abet. There's no interference that's going on.
4 So I don't think it's sufficient to hold them off to the
5 side or to cleave those from the conspiracy claims.
6 So in order to not have it interfere with the
7 patent case, all of the claims -- all of the claims brought
8 in the -721 case should be dismissed with prejudice.
9 THE COURT: All right, Mr. Smith.
10 MR. SMITH: Thank you.
11 THE COURT: Mr. Sheasby?
12 MR. SHEASBY: Your Honor, I actually think this is
13 pretty easy. There has been a motion to dismiss the
14 Ericsson -- the claim against Ericsson, and to the extent
15 there's anything that relates to the joint defense of the
16 case, it would be encompassed by the dismissal with
17 prejudice based on the -- that conspiracy.
18 But there are factual predicates that go beyond
19 that that have to do with the commercial extorsion and
20 behavior outside of the United States. And so that
21 obviously has nothing to do with the issues relating to the
22 joint defense.
23 THE COURT: So you're talking about Ericsson's
24 motion to dismiss?
25 MR. SHEASBY: Yes.

1 THE COURT: And that you would propose that that
2 motion just be granted?
3 MR. SHEASBY: No, that motion is -- is live. That
4 doesn't have to do --
5 THE COURT: Okay.
6 MR. SHEASBY: If you read that motion, it doesn't
7 have the overhang of the joint defense. That's what I'm
8 trying to say.
9 THE COURT: Oh, all right.
10 Well, I -- Ericsson's role in this is as an
11 intervenor?
12 MR. SHEASBY: That's correct, Your Honor, but not
13 in this case. I mean, in this current case, it's purely
14 just as a Defendant and then a Counterclaim Plaintiff on
15 four additional patents.
16 THE COURT: Okay. Well --
17 MR. SHEASBY: And, Your Honor, I should just say,
18 there's clearly in my mind a bit of coordination between
19 these three parties and the licensing negotiation that's
20 not an accident.
21 Mr. -- Mr. -- counsel just essentially admitted
22 it, that he's giving all of them identical advice. And so
23 I'm dismissing this with prejudice because I can't have it
24 be used to delay the patent case, but I am convinced that
25 there is a coordination of licensing behavior between these

1 three companies.
2 THE COURT: You know, the fact that they get
3 similar advice from their lawyer, perhaps identical advice
4 from their lawyer, can account for actions being taken.
5 MR. SHEASBY: I agree.
6 THE COURT: And --
7 MR. SHEASBY: I agree with that.
8 THE COURT: -- I don't know that sharing a lawyer
9 is necessarily anticompetitive.
10 MR. SHEASBY: I don't think it is. I think it
11 depends on if they are reading each other's letters, which
12 will come out in fact discovery, right, because that's not
13 privilege if they're reading each other's letters. And we
14 have the FRAND claims. If those claims even survive, we
15 have to decide what to do with them.
16 But I certainly don't want any privileged
17 information, nor do I want to have anything having to do
18 with privilege to be a basis for any claim that -- that
19 exists.
20 THE COURT: You know, Mr. Smith indicated that
21 Ericsson has a claim against them in this case based on the
22 Texas statute that is the counterpart to the Sherman Act;
23 is that right?
24 MR. SHEASBY: Yeah, but it's not -- the Sherman
25 Act predicate is not the -- the conspiracy with these three

1 parties.
2 THE COURT: All right.
3 MR. SHEASBY: It's not -- it has nothing to do
4 with -- with the defense of the litigation.
5 THE COURT: Well, what I'll do on this point is
6 just say that, Mr. Sheasby, I'd ask you to find out whether
7 or not your client gives you authority for the offer that
8 has been discussed of dismissing with privilege the
9 antitrust claims, and I will then set a date now for
10 Mr. Mathews to do same thing with his clients.
11 In the meantime, I'll look at the Ericsson claims
12 and see if I have the same concerns about those --
13 MR. SHEASBY: I'd appreciate that, Your Honor.
14 THE COURT: -- and if so, communicate those to
15 you.
16 And it'll be with the understanding that you don't
17 need to take any of this action unless it would result in
18 the Court not staying the infringement case. So I will
19 make sure that that position is decided before you have to
20 actually come through on this.
21 Mr. Mathews, how much time do you need to consult
22 with your clients and determine whether or not they have
23 something else to raise, even if Mr. Sheasby gets authority
24 to do what he's discussed?
25 MR. MATHEWS: Yeah, I think the devil will be in

1 the details when we see -- when we see his proposal in 24
2 hours.
3 We have Thanksgiving holiday, but I would think by
4 next Wednesday before Thanksgiving, we could probably get
5 back to the Court and Mr. Sheasby if that works.
6 THE COURT: All right. I am not proposing to stay
7 the infringement action in the meantime.
8 MR. MATHEWS: I understand, Your Honor.
9 THE COURT: But -- all right. Then we'll say
10 that.
11 I would like to hear from the parties on a couple
12 of other things that aren't directly related to the
13 schedule but are related to the issues in the case.
14 And one of them has to do with the essentiality
15 issue that everyone has been discussing. And I am
16 undecided about what is the basis for the FRAND obligation,
17 whether the parties are saying and can support that the
18 essentiality, in fact, of a patent is either necessary
19 and/or sufficient for a FRAND obligation, or is it -- is a
20 FRAND obligation only a consequence of the patent having
21 been tendered in effect to ETSI with a declaration that it
22 will be subject to FRAND?
23 My concern is that everybody is talking about
24 there being an issue in the case about the essentiality, in
25 fact, of these patents, and I'm trying to understand how

1 that relates to the FRAND issue as a matter of law.
2 MR. MATHEWS: Certainly, Your Honor.
3 So I'll give you my perspective on how I see this
4 issue. I'll start by noting that when Celerity filed its
5 case, it accompanied its infringement claims with the
6 declaratory judgment that it complied with its ETSI
7 obligations and FRAND.
8 As I see it, the process goes as follows, when you
9 have a patent that you believe is or may become essential
10 to the IPR policy, you declare it. That's Step 1. The
11 FRAND obligation, the obligation to license on FRAND terms,
12 comes down to whether the patent is, in fact, essential. I
13 believe that that is my understanding of how this works.
14 THE COURT: So you're saying that if the patent
15 owner tenders the patent to ETSI and signs a contractual
16 obligation to ETSI to have the patent FRAND-encumbered,
17 that there is no FRAND encumbrance unless the patent is
18 proven to be essential?
19 MR. MATHEWS: So the -- the trigger, as I --
20 largely correct. The trigger, as I understand it, Your
21 Honor, is when the patent is, in fact, essential, that is
22 when the FRAND obligation, the obligation to provide FRAND
23 licenses kicks in.
24 Now, that can be shown multiple ways. We, as the
25 Defendant, could admit it and say we think it is essential.

1 It could be shown by what the Plaintiff has said.
2 THE COURT: How -- you call it an admission.
3 MR. MATHEWS: Sure.
4 THE COURT: If the Defendant -- I mean, if the
5 Plaintiff, the patent owner, is not saying it's essential,
6 how can you just admit that it's essential?
7 MR. MATHEWS: So -- so here are the issues. So
8 admission may have been the wrong word. I could have said
9 contention. We could contend that it is essential.
10 THE COURT: And prove it?
11 MR. MATHEWS: And prove it.
12 THE COURT: Okay.
13 MR. MATHEWS: We could do that.
14 We also -- and we dealt with this in some cases
15 before Judge Gilstrap. I'm misplacing the name. It may
16 have been IP Bridge, but don't hold me to do that. But it
17 can also be shown -- in fact, it was KPN. It can also be
18 shown, we can carry our burden, to the extent we have the
19 burden, that's an open question, to the extent we have the
20 burden, we can carry our burden by pointing to the
21 Plaintiffs' conduct.
22 The Plaintiffs can take steps to evidence their
23 own belief of essentiality, and that is precisely what
24 happened here.
25 THE COURT: What does the belief of essentiality

1 have to do with it?
2 MR. MATHEWS: The belief of essentiality from the
3 patent holder is evidence of essentiality.
4 Our position in this case, just to be very clear,
5 Your Honor, is the patents are not essential just because
6 they're not infringed. By definition, if a patent is not
7 infringed, it cannot be essential. That's the definition
8 under the policy. Because the definition of essentiality
9 is it's a patent that you must practice, right? You cannot
10 operate the standard without practicing the patent. We
11 operate the standard, so do we infringe the patent, yes or
12 no? If we don't infringe the patent, it's not essential.
13 Our position in this case, however, is if we're
14 wrong, if instead the patent is essential or is infringed,
15 then it is essential. And the evidence of that, as set
16 forth in KPN, includes the statements and positions that
17 were made by the Plaintiff.
18 In this case, that includes a couple things,
19 direct statements saying we think these patents are
20 essential. It includes claim mappings where they actually
21 mapped every element of these asserted patents to the
22 standard, again, evidence of essentiality.
23 So I'm familiar with Your Honor's ruling in
24 Wireless Alliance, and some of these other cases. Here we
25 have the situation where we don't think we infringed.

1 That's our position. By definition, it can't be essential.
2 However, if infringed, then it is essential.
3 I'll also note that we have FRAND claims that
4 cover a variety of other patents.
5 THE COURT: So are you contemplating a bifurcated
6 trial?
7 MR. MATHEWS: No, Your Honor.
8 THE COURT: How -- how is this if we infringe -- I
9 mean, the jury's going to decide whether you infringe as
10 the last thing they do.
11 MR. MATHEWS: Yes.
12 THE COURT: And so what happens with your FRAND
13 claims?
14 MR. MATHEWS: Yeah, so one way to do it could be
15 with a damages expert. Say, Madam Expert, what do you --
16 what do you think the proper damages are here?
17 Well, I have to presume that the patents are
18 infringed and valid. Here's some evidence that if they're
19 infringed and valid, they're essential. They're,
20 therefore, governed by the IPR policy, and I need to
21 evaluate these under the context of FRAND.
22 And so all the time in these courtrooms we make
23 conditional decisions and decide things in the alternative,
24 and this is just one of them. Again, we don't think we
25 infringe. That should be the end of the story. But if we

1 do infringe, we absolutely have a FRAND defense.
2 And there's evidence of it, Your Honor. It's --
3 it's in KPN. It doesn't just need to be our own
4 contention. That case made I think very clear that the
5 Plaintiffs' own statements can be sufficient to carry the
6 burden if it is our burden on essentiality.
7 THE COURT: And were the Plaintiffs' own
8 statements the only evidence of it in KPN?
9 MR. MATHEWS: That's a case I lost, so I'm trying
10 to remember through all of it all. But I -- the crux of
11 what we argued pretrial were the statements -- the
12 statements of the Plaintiff. I think there was also
13 potentially some expert discovery where the experts may
14 have said on our side, we don't think these things are
15 infringed, but the way these patent claims are written, if
16 they are infringed, they necessarily are essential because
17 they read on the standard.
18 And I guess, Your Honor, my point on this is
19 there's lot of facts to be developed on this issue. We're
20 still in a very early stage of the case, and I think as we
21 develop these facts, as we take these positions, I think it
22 will crystallize for the Court what we have in terms of
23 essentiality or not.
24 THE COURT: And isn't it a predicate to everything
25 you've said that the patentee must have tendered that

1 patent to ETSI?
2 MR. MATHEWS: Yes. So a declaration is what
3 attaches the contractual commitment. And you declare
4 patent that are or may become essential. In this case, all
5 the patents have been declared. So that factual predicate
6 is -- is met in this case.
7 THE COURT: And in the course of that, is there
8 some document whereby the patent owner agrees to FRAND?
9 MR. MATHEWS: No -- well, yes. You definitely
10 agree to FRAND when you sign the declaration. You agree
11 that you're going to comply with the IPR policy for that
12 patent if essential.
13 Now, you declare when it is or may become
14 essential, but you absolutely agree to abide by contracts
15 if essential. That's what the policy says.
16 THE COURT: Uh-huh.
17 MR. MATHEWS: Now, there's no arbiter of
18 essentiality at the standards body. There's no referee
19 who's deciding whether patents are essential or not, and
20 that's a problem, right? I mean, we deal with that in
21 every case.
22 And so what you have are these declarations, and
23 it's left to the Courts and the legal process to later
24 figure out whether or not these patents are essential.
25 THE COURT: And so your understanding is that the

1 ETSI IPR conditions the FRAND obligation on essentiality?
2 MR. MATHEWS: So the IPR policy requires you to
3 timely declare patents that are or may become essential to
4 FRAND.
5 The IPR policy also says that the FRAND obligation
6 attaches to defined term "essential patents." So it's a
7 two-step process. First you declare, that attaches the
8 contract. The contract then attaches to patents that are,
9 in fact, essential.
10 THE COURT: Uh-huh. So if there is not evidence
11 of essentiality, then even a patent that was declared to
12 ETSI is not going to be FRAND-encumbered?
13 MR. MATHEWS: It would not meet -- if it doesn't
14 meet the definition of essential under the IPR policy, that
15 has ramifications under the policy that pertain to your
16 obligations to license that patent or not. It attaches to
17 patents that are, quote, unquote, essential. That is
18 when -- when the issue attaches.
19 THE COURT: All right. Thank you for that.
20 MR. MATHEWS: Thank you, Your Honor.
21 THE COURT: Mr. Sheasby, I'd like to hear your
22 thoughts on the same issue.
23 MR. SHEASBY: So I'll show you two things, Your
24 Honor. The first is, this is the actual ETSI policy, and
25 what it says is that -- let me try to make it bigger.

1 There we go. That's slightly better.
2 So this is the declaration we make. It's when
3 essential IPR exists, it's FRAND-encumbered. The
4 definition -- let me know when to scroll up, Your Honor. I
5 don't want to delay -- I don't want to scroll up before
6 you're finished reading it.
7 THE COURT: No, go ahead. I'm sorry.
8 MR. SHEASBY: The definition of essential IPR
9 draws the distinction between is not possible on technical
10 but not commercial grounds. And so it's got to be
11 technically impossible to practice the standard without
12 infringing the patent.
13 Okay. So there's two issues that we have to deal
14 with. The first is that our claim charts do not chart
15 against the standard, and we are not taking the position
16 that the patents are standard essential.
17 The second is that the Defendants have submitted
18 requests for -- responses to requests for admission but
19 deny that the patents are essential. They haven't
20 contingently denied it. They haven't said if infringed,
21 then essential, or anything like that. They've just denied
22 it.
23 And so I would -- it seems to me that at the end
24 of the day, there's unlike to be any FRAND claims pending
25 against Plaintiffs. There may be FRAND claims still

1 pending against Defendants for the -- there may be some
2 residua because other patents that are not part of this
3 case may have essentiality.
4 We don't know, but that would not be part of this
5 case because this case, as I think they've admitted in
6 their submissions to the Court, this case is just about the
7 11 -- the patent -- the claims in this case are only
8 concerned with eight patents, and for those eight patents,
9 it's pretty definitive that they are not essential. The
10 Defendants have admitted that. And so they're not -- they
11 have a breach of FRAND claim on which they carry the burden
12 of proof on all elements, and the claim has no legs as soon
13 as the patents are not essential.
14 And so it strikes me that this will all play
15 itself out as we get closer to the ultimate trial in July.
16 I don't know that there's anything dramatic that needs to
17 be done right now, Your Honor. In other words, I think
18 that Defendants often say what counsel has just said. At
19 the end of the day, they realize it's untenable to in front
20 of a jury say the patents are not infringed. Oh, but if
21 they're infringed, they're essential, and we get a better
22 deal.
23 My expectation is this is all going to shake out
24 at the end of the day, and so --
25 THE COURT: But you -- you are in the agreement

1 that the owner did declare these patents to ETSI. So if
2 there was proof of essentiality in accordance with the
3 definition in the --
4 MR. SHEASBY: Yes, sir.
5 THE COURT: -- IPR --
6 MR. SHEASBY: Yes, sir. Yeah, uh-huh.
7 THE COURT: -- that FRAND would be --
8 MR. SHEASBY: Well, it's actually two things.
9 One, there would be proof of essentiality. And the second
10 issue would be whether Defendants have waived their right
11 to rely on FRAND because of bad faith conduct, et cetera,
12 et cetera, et cetera, which obviously would be a central
13 part of the defense in this case.
14 THE COURT: All right. And I agree with you that
15 this is not an issue that is immediate for the Court, but I
16 have all this wisdom gathered in the courtroom, and I
17 couldn't resist the opportunity to take advantage of it.
18 MR. SHEASBY: My guess is -- is it will all be --
19 dissipate.
20 And I did want to just flag for the -- for
21 Your Honor about the -- the litigation tactic reference to
22 these antitrust claims. I want -- it's important for
23 Your Honor to know I believe there has been coordination,
24 and I believe even without privilege, that's what will come
25 out, the pierce of privilege thus will come out when we

1 litigate the FRAND claims.
2 THE COURT: To me, there's a difference between
3 whether there's been coordination and whether that's
4 actionable under the antitrust laws.
5 MR. SHEASBY: I agree with that. I agree with
6 that, Your Honor.
7 THE COURT: Well, I -- I think that counsel have
8 addressed the issues that I had.
9 And, Mr. Dacus, I'll give you a chance in a
10 moment.
11 But -- so I'm going to expect the Plaintiff to
12 communicate to the Defendant on whether or not the
13 Plaintiff is willing to dismiss with prejudice if that
14 resolves the issues. And the Defendant then, or
15 Defendants, through Mr. Mathews, will communicate to the
16 Court the result of that. And in the meantime, I will look
17 at the issues Mr. Smith raised on behalf of Ericsson.
18 And, Mr. Dacus, what can I do for you?
19 MR. DACUS: Well, Your Honor, you said something
20 about wisdom, so that usually excludes me from standing up,
21 but I stood up -- I stood up anyway.
22 THE COURT: I -- you know, I just assumed that
23 Mr. Mathews's wisdom was being spread across you, as well.
24 MR. DACUS: I certainly hope so. I could use a
25 little.

1 But I wanted to say for the Court's reference,
2 because you brought up this issue of the appropriateness of
3 a Defendant saying we don't infringe, but if we do, then
4 these patents are essential and FRAND-encumbered. And I
5 know that Mr. Sheasby said that's an untenable position,
6 but I'll tell the Court that it's a position that I took in
7 the TQ Delta versus CommScope case, one or two years ago
8 with Judge Gilstrap.
9 We went to a verdict, and Judge Gilstrap actually
10 wrote on this issue in the post-trial briefing and endorsed
11 the fact that it is appropriate for a Defendant to take the
12 position that they do not infringe, but if they do so, then
13 the patents are essential and can be FRAND-encumbered.
14 So I just -- I know -- my interpretation was
15 that -- that's a question the Court had as to whether or
16 not that's an appropriate legal position, and at least
17 Judge Gilstrap, at least my reading of his opinion, says it
18 is.
19 THE COURT: You know, Mr. Dacus, I have observed
20 many times that the fact that you can do something doesn't
21 mean a mere mortal could. So...
22 MR. DACUS: I'm not as bright. I try a lot of
23 things, Your Honor, that are untenable to most. So thank
24 you, Your Honor.
25 MR. SHEASBY: I have some -- this is Jason

1 Sheasby.
2 Mr. Dacus is right that there are scenarios in
3 which it does occur. I freely agree with that.
4 Unfortunately, those are not scenarios in which Defendants,
5 for reasons that are unclear to me, admitted in RFAs that
6 the patents are not essential, full stop, without hedge.
7 THE COURT: I understand that's an issue, as well.
8 But in any event, I'm going to withhold further
9 scheduling on this case until we have accomplished what was
10 set out.
11 And I appreciate very much the appearance of
12 counsel and the arguments.
13 And we adjourned. Thank you.
14 COURT SECURITY OFFICER: All rise.
15 (Hearing concluded 3:06 p.m.)
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1 CERTIFICATION

2

3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

7

8

9 /S/ Shelly Holmes 11/21/2024
SHELLY HOLMES, CSR, TCRR Date
10 CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
11 Expiration Date: 10/31/2025

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