UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 14-00341 JVS (ANx)	Date	July 25, 2016
Title	TCL Communications Technology Holdings Ltd v. Telefonaktenbologet LM Ericsson, et al.		

Present: The Honorable	James V. Selna

Ivette Gomez	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) **Order re: Defendants' Motion in Limine to Determine Timing (Fld 6-20-16, Dkt. 869)**

Defendant Telefonaktienbolaget LM Ericsson and Defendant and Counter-claimant Ericsson, Inc. (collectively, "Ericsson") move the Court for relief by way of a Motion in Limine. (Ericsson's Mot. in Limine, Docket Nos. 868, 869.) Plaintiffs and Counter-Defendants TCL Communication Technology Holdings, Ltd., TCT Mobile Limited, and TCT Mobile (US) Inc. (collectively, "TCL") oppose. (TCL Opp'n, Docket Nos. 931, 932.) Ericsson has replied (Reply, Docket Nos. 997, 998.)

First, Ericsson seeks an order to exclude evidence of events after the effective dates of the Option A & Option B Offers. (Ericsson's Mot. in Limine pp. 10–15.) TCL opposes. (TCL Opp'n pp. 9–18.) Ericsson has replied. (Reply pp. 6–10.)

Second, Ericsson seeks an order to exclude evidence of the Huawei arbitration opinion. (Ericsson's Mot. in Limine pp. 15–18.) TCL opposes. (TCL Opp'n pp. 18–25.) Ericsson has replied. (Reply pp. 10–25.)

Third, Ericsson opines at length as to case management. (Ericsson's Mot. in Limine pp. 3–10.) TCL responds. (TCL Opp'n pp. 2–7.) Ericsson has replied. (Reply pp. 1–6.)

I. Case Management

The many case-management issues raised in Ericsson's motion in limine—and TCL's

opposition—were also raised in contemporaneously filed related motions in this case. This Court's disposition regarding case management can be found in the Court's order responding to these motions.

II. Legal Standard

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

III. Motion in Limine re Timing

Ericsson argues that evidence of licenses arising after the effective date of the Option A and Option B offers is not relevant to determining whether Ericsson breached its obligation to offer fair, reasonable, and nondiscriminatory ("FRAND") license terms. Similarly, Ericsson argues that these later-arising licenses are not relevant to determining whether the Option A and Option B are FRAND offers. TCL responds that "comparable licenses are relevant evidence that may be presented to help the jury determine an appropriate royalty rate" and "the fact that a license was entered into after[,] . . . rather than prior to[,] . . . the parties' negotiation does not bar its introduction." (TCL Opp'n p. 12 (citing Lucent Tech. Inc. v. Gateway, Inc., 580 F.3d 1301, 1333–34 (Fed. Cir. 2009)) ("our case law affirms the availability of post-infringement evidence as probative in certain circumstances.")).

Importantly, Ericsson concedes that these later-executed licenses *are* relevant. (See Reply p. 8 ("Ericsson is not arguing that the new events are not probative at all.").) Moreover, the Court agrees with TCL that the evidence of licenses arising after some earlier "effective date" of Ericsson's Option A and Option B offers is relevant because the evidence has some tendency to make a fact more or less probable than it would without the evidence. In a hypothetical situation where a party is selling a used car, knowledge of the price it will

fetch six months from now is informative of the price it would fetch today, even if the price to be obtained six months from now is somewhat different than the actual price the car would be able to be sold for today. Similarly, if a patent licensor negotiates and enters into a license on certain economic terms, those economic terms have some bearing on what such a license would have been worth the day before, a week before, and even eight months before.

Ericsson's remedy is not exclusion on the basis of relevancy, but rather affirmative argument that the Option A and Option B offers—and the later-executed licenses—were products of situations unique to their timing. Ericsson can then argue that the later-executed licenses are entitled to less weight in evaluation of the Option A and Option B offers. See Ericsson, Inc. v. D-Link Sys. Inc., 773 F.3d 1201, 1227 (Fed. Cir. 2014) (citing Apple Inc. v. Morotola, Inc., 757 F.3d 1286, 1326 (Fed. Cir. 2014)) ("the fact that a license is not perfectly analogous generally goes to the weight of the evidence, not its admissibility.").

Ericsson next argues that the probative value of the evidence of the later-executed licenses is substantially outweighed by a risk of unfair prejudice, confusing the issues, and/or misleading the jury. (See Ericsson's Mot. in Limine pp. 13–15.) Essentially, Ericsson argues that the unfair prejudice is the possibility that the fact-finder will weigh Ericsson's 2014 and 2015 conduct in a 2016 climate.

The Court does not find that this is substantially unfairly prejudicial. Ericsson is not prevented from appropriately arguing to the jury that these later-executed agreements were formed in a climate very different from the one in which the Option A and Option B offers were made. Ericsson can even indicate that it made another offer in March 2016[1] to show that it changes its positions based on the changing licensing climate, a way of emphasizing to the jury that Options A and B should be judged as of the time they were made. Ericsson can even make the argument that it has been prevented from altering its FRAND contentions as a result of the schedule of this lawsuit. Ericsson and the Court have numerous ways to address potential prejudice, including possible limiting instructions (if appropriate), that does not result in the exclusion of the probative evidence of the licenses negotiated with similarly

[1] TCL concedes that it does not seek to exclude the March 2016 offer on the basis of timing. (See Memo. Supp. TCL's Mot. Enforce Ruling and Limit Testimony pp. 1–2, Docket No. 850-4.)

situated competitors.

For the foregoing reasons, Ericsson's motion in limine to exclude evidence on the basis of timing is denied.

IV. Motion in Limine re Huawei Arbitration

Regardless of the disposition of Ericsson's motion in limine regarding timing, Ericsson further asks the Court to exclude the Huawei arbitration opinion from the trial on the ground that the arbitration opinion is substantially more prejudicial than probative and that the arbitration opinion constitutes inadmissible hearsay.

"A trial court has the discretion to admit an arbitration decision into evidence and to accord it such weight as is deemed appropriate, but there is no requirement that the court must allow an arbitration decision to be admitted at all." Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974)). See also Costa v. Desert Palace, Inc., 299 F.3d 838, 863 (9th Cir. 2002) (not abuse of discretion for trial court to exclude arbitrator's decision under a hearsay objection).

Because the Court finds that the probative value of the arbitration opinion is substantially outweighed by a danger of unfair prejudice and misleading the jury, the Court need not determine whether the arbitration opinion constitutes inadmissible hearsay. See Kirouac v. Donohoe, 11-cv-0423, 2013 WL 5952055, at *8 (D. Me. Nov. 6, 2013) ("the Court notes the strong possibility that the arbitrator's decision might also constitute inadmissible hearsay. At first blush, the Defendant's business records exception . . . arguments . . . are unconvincing"). But see Knickmeyer v. Nevada ex rel Eighth Judicial District Court, --- F. Supp. 3d ----, 2016 WL 1171499 at *4 (D. Nev. March 24, 2016) (quoting Graef v. Chemical Leaman Corp., 106 F.3d 112, 118 (5th Cir. 1997)) (arbitration decisions are generally admissible under Federal Rule of Evidence 803(6) "unless the sources of information or other circumstances indicate a lack of trustworthiness.").

Exclusion of the Huawei arbitration award and opinion does not mean exclusion of the Huawei license. The license is probative of the price TCL's competitors pay for the right to

practice the Ericsson's standard essential patents. The terms of the license are highly probative evidence of the FRAND rate for a license to these standard essential patents. This evidence is not substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. It is simply another license which the jury may consider as a reference point.

The arbitration opinion and award present a different situation. The arbitration opinion reflects the thought process of three arbitrators employing a particular methodology to a particular (limited) record, without applying a burden of proof or other procedural safeguards of trial to their decision making. Simply put, the task that the Huawei arbitrators were engaged in is significantly different than the task posed to the fact-finder in this case.

First, when evaluating similarly situated handset manufacturers, the Huawei arbitrators and the fact-finder in this case are evaluating different companies. TCL is not Huawei. Allowing the arbitration opinion to come in is very likely to blur that distinction to the jury who may be tempted to think that the reasoning employed by the Huawei arbitrators in picking similarly situated licensees can be applied identically in this case.

Second, the jury will be unfairly tempted to presume that the arbitrators made correct assumptions when calculating effective royalty rates. Instead of listening with a fresh mind to the evidence and analysis of the experts in this case, the jury would be tempted to simply evaluate whether the arbitrators were correct in their analysis. Moreover, the jury could be tempted to *assume* that the arbitrators were correct and incorrectly place the burden of proof on Ericsson to show that the arbitrators were wrong in their decision. Finally, the jury could avoid its fact-finding task by simply abdicating its responsibility on the assumption that the arbitration panel did a good job. The Court finds the risk of these possibilities outweighs the probative value of the arbitration opinion.

Third, the probative value of the arbitration opinion is not particularly high. The Court finds it would not be a proper use of the arbitration opinion to simply copy the intermediate conclusions of the arbitrators into the reasoning in this case. Cf. U.S. v. Sine, 493 F.3d 1021, 1036 ("judicial findings of facts are hearsay, inadmissible to prove the truth of the findings unless a specific hearsay exception exists."). The arbitration opinion is not percipient

evidence of the rates paid by TCL's competitors, rather it is a three-arbitrator panel's *opinion* about those rates after those arbitrators analyzed the evidence. The role of presenting opinion on these rates is for the experts in this case, not for arbitrators who are not subject to cross-examination. As the Court already found: "even if it would simplify the jury's task, substituting the judgment of an arbitration panel for one part of the holistic determination which the jury must make is not warranted under the circumstances." (See Order Denying TCL's Motion for Partial Summary Judgment p. 9, Docket No. 768.) The jury can evaluate the evidence of the licenses of TCL's competitors, with the assistance of the testimony of the experts in this case, without the shortcut of the arbitration award. There is no need to have a trial about whether the arbitration award was correct.

At the hearing, TCL expressed its position that the Court should issue a narrower exclusionary order than a blanket rule preventing any discussion about the fact that the Huawei license resulted from an arbitration. TCL explicitly requested that the Court permit TCL to explain that the Huawei license resulted from an arbitration and that the arbitrator used three reference points to arrive at its FRAND determination. The Court finds the first request to be meritorious. TCL can explain that the Huawei license was the result of an adversarial arbitration proceeding. Without the explanation, the jury would likely speculate about why the Huawei license is as it is. However, the Court does not find the second request to be meritorious. TCL wants to be able to assert that the arbitrators used three reference points to arrive at the FRAND rate that Huawei was to pay. However, the Court's concerns regarding the jury abdicating their fact-finding responsibilities are at their apex with respect to intermediate findings such as these three rates. The jury should not be tempted to find that the three companies that the Huawei arbitration panel found to be most similarly situated to Huawei are necessarily the companies most similar to TCL. The jury should also not be tempted to find that the unpacking of those three reference prices was necessarily correctly accomplished by the arbitrators. As stated above, the unpacking in this case will be done by the jury with the assistance of the testimony of the parties' respective experts who are subject to cross-examination.

In this manner the Court finds that TCL will not be unduly prejudiced from explaining where the Huawei license came from and Ericsson will not be unduly prejudiced by having the intermediate findings of the Huawei arbitrators used against Ericsson in this case.

For the foregoing reasons, the Court concludes that the arbitration award and the arbitration opinion shall be excluded from trial except to the extent that the parties may explain that the rates paid under the Huawei license was the result of an arbitration proceeding.

V. Conclusion

For the foregoing reasons the Court grants in part and denies in part Ericsson's motion in limine. The Court denies the motion as to excluding evidence on the basis that it arises after the effective dates of Ericsson's Option A and Option B offers. The Court grants, in part, the motion to exclude the arbitration award and arbitration opinion.

IT IS SO ORDERED.

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