UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 14-0341 JVS (DFMx)	Date	August 9, 2016
Title	TCL Communications Technology Holdings, Ltd. v. Telefonaktienbolaget 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)** **Defendant's Motion for Partial Summary Judgment as to TCL's California Unfair Competition Law Claim (Fld 6-20-16, Dkt 876)**

Defendant Telefonaktienbolaget LM Ericsson and Defendant and Counter-claimant Ericsson, Inc. (collectively, "Ericsson") filed a motion under Federal Rule of Civil Procedure 56 for partial summary judgment of Plaintiffs and Counter-Defendants TCL Communication Technology Holdings, Ltd., TCT Mobile Limited, and TCT Mobile (US) Inc.'s (collectively, "TCL") claim under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"). (Ericsson's Mot., Dkt. Nos. 874, 876.) TCL opposes. (TCL's Opp'n, Dkt. Nos. 948, 949.) Ericsson has replied. (Reply, Dkt. Nos. 1000, 1001.)

For the following reasons, the Court grants Ericsson's motion for partial summary judgment.

I. Background

The general background of this dispute is well-known to the parties and to the Court. For further information, consult this Court's June 29, 2015 "Order re Motions." (Dkt. No. 279-1)

Briefly, TCL is a mobile telecommunications vendor that licenses patents from telecommunications companies like Ericsson. (Second Amended Complaint, Dkt. No. 31 ¶ 2.) Ericsson owns a portfolio of intellectual property rights, some of which are "essential" to the global 2G (second generation), 3G (third generation), and 4G (fourth generation) telecommunications standards set by the European Telecommunications Standards Institute ("ETSI"). (Id. ¶ 3.) ETSI is a standard-development organization that adopts globally-accepted technological standards to facilitate compatibility between products and services in the telecommunications industry. (Id. ¶¶ 38-40.) ETSI requires members who declare their patents "standard essential" ("standard essential patents") to license them on fair, reasonable, and nondiscriminatory ("FRAND") terms. (Id. ¶¶ 7-8.)

II. Legal Standard

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[1]

The moving party has the initial burden of establishing the absence of a material fact for trial. Anderson, 477 U.S. at 256. "If a party fails to properly support an assertion

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[1] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][2] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

III. Discussion

Ericsson raises three main arguments as to why it is entitled to summary judgment on TCL's UCL claim. First, Ericsson argues that TCL's UCL claim fails because TCL lacks standing under the UCL. (Ericsson's Mot. pp. 7–12.) Next, Ericsson argues that TCL has not submitted sufficient evidence to support the elements of a claim for unfair competition under the UCL. (Id. pp. 12–20.) Finally, Ericsson argues that the applicable statute of limitations bars TCL's UCL claim.

The Court discusses each argument in turn.

A. Standing

Ericsson argues that TCL has failed to establish standing to pursue a claim under the UCL.

Under the UCL, only a person who "has lost money or property as a result of the unfair competition" may bring a private action under the UCL. Cal. Bus. & Prof Code § 17204; Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 788 (2010). Ericsson argues that TCL is not a person who has lost money or property as a result of unfair competition. Ericsson argues there is "no evidence that TCL has experienced any loss of money or property

[2] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

from the business practices at issue."

TCL disagrees. TCL points to its "significant expense" incurred as a result of litigation in which Ericsson sought to enjoin TCL from practicing Ericsson's standard essential patents. (See Holder Decl. Supp. TCL's Opp'n ("Holder Decl.") Ex. 11 p. 11 ("TCL has incurred significant expense defending against actions by Ericsson seeking injunctions or exclusion orders."), Dkt. No. 948-14; id. Ex. 12 p. 112–13 (Ericsson's actions cost TCL millions of dollars).)

The Court agrees with Ericsson. Although there is evidence in the record that TCL spent millions of dollars defending against actions by Ericsson seeking injunctions or exclusion orders,[3] such injury cannot be the basis for TCL's "economic injury" due to the Noerr-Pennington doctrine.

The Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress. Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006). Under the doctrine, "[t]hose who petition government for redress are generally immune from antitrust liability." Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993). Petitioning the government includes using courts to advocate for one's business and economic interests. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972). In fact, the immunity extends "not only petitions sent directly to the court in the course of litigation, but also 'conduct incidental to the prosecution of the suit . . . .'" Sosa, 437 F.3d at 934 (quoting Columbia Pictures Indus., Inc. v. Prof'l Real Estate Inv'rs, Inc., 944 F.2d 1525, 1528–29 (9th Cir. 1991)

California district courts are split on whether economic injury resulting from litigation can confer standing. One set of cases has found injury-in-fact sufficient to

[3] This holding does not conflict with this Court's other holding in a related Order that Ericsson is entitled to summary judgment of no damages. That no reasonable fact-finder could reasonably calculate a reasonable approximation of damages based on evidence in the record is a separate inquiry from whether there is at least an "identifiable trifle" of actual economic injury. Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 324–25 (2011).

satisfy the UCL's standing provision based on costs of litigation.[4] In Koller v. West Bay Acquisitions, LLC, No. C 12-00117, 2012 WL 2862440 (N.D. Cal. July 11, 2012), and Janti v. Encore Capital Group, Inc., No. 09CV1969, 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010) the courts found economic injury in the form of the attorney fees and expenses. The Koller court found that a plaintiff had established injury in fact under the UCL by alleging "economic harm arising from the costs incurred to defend against Defendants' collection efforts." 2012 WL 2862440, at *8. The Court reasoned that "costs, expended to discover whether Plaintiff was required to pay . . . fees and defend himself . . . constitute economic injury as defined in Kwikset, as an expense that occurred that would have otherwise been unnecessary." Id. In Janti, the court found that a payment of $50.00 as a filing fee was sufficient injury in fact for purposes of UCL standing. 2010 WL 3058260, at *7. See also Khan v. K2 Pure Sols., LP, 981 F. Supp. 2d 860, 863 (N.D. Cal. 2013) ("attorney's fees accrued in past actions brought alleging violation of the UCL are sufficient to establish standing."), order vacated on reconsideration on other grounds, No. 12-CV-05526-WHO, 2013 WL 6235572 (N.D. Cal. Dec. 2, 2013) ("the Court remains persuaded that the attorney's fees the plaintiffs expended in defending against K2's lawsuits is sufficient to give them standing under the UCL").

One of the main features of the cases that have found UCL standing based on prior litigation costs is the absence of any discussion of the Noerr-Pennington doctrine. When courts have directly considered the doctrine, they have found that injury flowing solely from previous, protected litigation activity cannot be the basis of standing under the UCL. See James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc., No. SACV 11-1309-DOC ANX, 2013 WL 655314, at *13–14 (C.D. Cal. Feb. 21, 2013) ("[B]ecause Defendant's only attempt to establish economic injury rests on the allegation that Plaintiff's lawsuit caused it to lose business, the Court finds that the . . . Noerr–Pennington doctrine appl[ies]").

The court in Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012), dealt with almost precisely the same fact pattern as the present case:

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[4] Even these courts hold that there is a qualitative difference between attorneys fees incurred defending against litigation and attorneys fees spent prosecuting an affirmative claim. Koller, 2012 WL 2862440, at *8. The latter does not confer standing under the UCL. Hernandez v. Specialized Loan Servicing, LLC, No. CV 14-9404-GW, 2015 WL 350223, at *8 (C.D. Cal. Jan. 22, 2015).

economic injury premised on attorneys fees incurred in patent litigation. Id. at 1076 ("[T]he only injury Apple suffered as a result of Motorola's alleged antitrust violation was the attorney fees and costs that it has incurred responding to the patent litigation initiated by Motorola. . . . Thus, Apple's antitrust claim is premised on Motorola's attempt to enforce its patents.") In Apple, Inc., the Court found the defendant immune from unfair competition claims when the purported injury was caused by conduct protected under Noerr-Pennington. Id. at 1077.

TCL does not try to distinguish Apple, Inc. nor does TCL mention Noerr-Pennington. Instead, in one paragraph in TCL's opposition, TCL argues that it need not invoke the "sham litigation" exception to Noerr-Pennington[5] because Ericsson's litigation is "causally connected" to Ericsson's anticompetitive behavior. (See TCL Opp'n p. 15.) Even assuming that Ericsson's litigation is, in fact, "causally connected" to an anticompetitive scheme, that itself does not deprive the litigation of its First Amendment protection *unless* one of the Noerr-Pennington exceptions applies.

None of the exceptions apply here. TCL puts forth some evidence that Ericsson had a particular motive in filing its patent infringement lawsuits. (See TCL Opp'n p. 16.) But evidence of Ericsson's motive is insufficient to defeat summary judgment. Instead, TCL must also have proof that Ericsson's lawsuits were objectively baseless, or were started without regard to their merits, or involved making intentional misrepresentations to a Court. TCL has no evidence of any of those factors.

Ultimately, the Court concludes that the James R. Glidewell and Apple, Inc. courts represent the better view of the relationship between Noerr-Pennington and the UCL's standing requirement. The courts that have found attorneys fees sufficient to confer

[5] The Ninth Circuit has identified three circumstances when the so-called sham litigation exception applies: (1) the lawsuit is objectively baseless and the defendant's motive in bringing it is unlawful; (2) the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; or (3) if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy. Sosa, 437 F.3d at 938. See also Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1060 (9th Cir.1998)

standing under the UCL either did not consider the Noerr-Pennington doctrine or implicitly found that the sham litigation exception applied to debt collection lawsuits. See Janti, 2010 WL 3058260, at *9 (denying motion to dismiss UCL claims to the extent plaintiffs incurred litigation costs as a result of defendants' attempts to collect on time-barred debts).

For the foregoing reasons, the Court concludes that TCL cannot use its litigation expenses to show economic injury to satisfy the standing requirement of the UCL.

TCL further argues that there was "other economic injury" caused by Ericsson. However, TCL only points to hypothetical injury that TCL might have incurred if it had entered into a non-FRAND license. Because TCL never entered into a non-FRAND license, TCL cannot show this "other economic injury." Additionally, TCL's argues that Ericsson's conduct caused business uncertainty, but business uncertainty alone does not count as "economic injury" under the UCL because it is not "money or property." Cal. Bus. & Prof. Code § 17204.

For the foregoing reasons, the Court concludes that Ericsson is entitled to summary judgment on TCL's UCL claim on the grounds that TCL does not have standing to pursue the claim.

B. Elements of Unfair Competition UCL Claim

TCL has abandoned its UCL claim based on the fraudulent or unlawful prongs of the UCL. (See Dkt. No. 56 (concluding that the unlawful prong of the UCL was not met in TCL's complaint); Dkt. No. 838 (dismissing TCL's causes of action for fraudulent misrepresentation).) Rather, it is based solely on the "unfair" prong. When pursuing a claim under the unfair prong of the UCL, TCL must show:

> conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999).

In a prior order denying Ericsson's motion to dismiss TCL's UCL claim, this Court cited Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007), and Apple Inc. v. Samsung Electronics Co., No. 11-cv-1846, 2012 WL 1672493 (N.D. Cal. May 14, 2012), as examples of cases where the licensing practices of holders of standard essential patents were found to have had an anticompetitive effect.

In Broadcom, the Third Circuit held:

> (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with a[] [standard development organization's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.

501 F.3d at 314. Restating the test slightly, the Third Circuit said, "a firm's deceptive FRAND commitment to a[] [standard development organization] may constitute actionable anticompetitive conduct." Id.

Ericsson argues that TCL has failed to satisfy the second prong of Broadcom's test. Arguing that TCL failed to adduce evidence of intent, Ericsson claims that its witnesses "consistently testified that Ericsson takes its FRAND obligations seriously." (Ericsson's Mot. p. 20.) Ericsson is correct. TCL points to absolutely no evidence in the record from which a reasonable juror could conclude that Ericsson made an *intentionally* false promise.

In Broadcom, the Third Circuit looked at previous cases where there had been anticompetitive conduct based on a patentee's promises to standard setting organizations. The Third Circuit identified an intentionally false promise when a computer company "failed to disclose that it owned a patent for a key design feature" of a given standard, and "even certified to the [standard development organization] that the proposed standard did not infringe any of [it's] [intellectual property rights]." 501 F.3d at 310-11 (discussing In the Matter of Dell Computer Corp., 121 F.T.C. 616, 618 (May 20, 1996)). The Third Circuit also looked at a case where a developer of computer memory technologies was "found to have deceived a[] [standard development organization] by failing to disclose its [intellectual property rights] in technology that was essential . . . by misleading other members of the [standard development organization] into believing that [the developer of computer memory technologies] was not seeking any new patents relevant to the standard" even though it was. Id. at 311–12 (discussing In the Matter of Rambus, Inc., 2006 WL 2330117 (August 2, 2006)).

There is no like conduct here. Even after extensive discovery, TCL does not identify even innuendo of Ericsson making intentionally false promises to ETSI. TCL cites no evidence to controvert Ericsson's argument that TCL has not established evidence of an intentionally false statement. (See Ericsson's Reply to TCL's Response to Ericsson's Uncontroverted Facts re UCL ¶ 9, Dkt. No. 1000-2.)[6] Without any evidence of an intentionally false promise to a standard setting organization, TCL cannot satisfy Broadcom's test to show anticompetitive behavior by Ericsson with regard to its participation in the development of a standard.

Apple Inc. v. Samsung Electronics Co., Ltd. is of no greater help to TCL. That case turned on pleading standards, and the court permitted a counterclaim for anticompetitive behavior to survive a motion to dismiss only because the counterclaims alleged "specific facts about when the false FRAND declarations were made, by whom, and for which patents." 2012 WL 1672493, at *7. Here, TCL still fails to identify any false statements made regarding Ericsson's FRAND commitments. In this case, Ericsson may have breached FRAND, but TCL has submitted no evidence that Ericsson ever had an intent to do so.

The crux of TCL's argument seems to be that because TCL has evidence that Ericsson has breached FRAND, TCL has evidence that Ericsson has *necessarily* done so in an anticompetitive way. (See Opp'n pp. 20–21 (relying on the testimony of Dr. Leonard and Dr. Lynde, opining that Ericsson has not offered FRAND licenses, as TCL's sole evidence that Ericsson has engaged in anticompetitive behavior.).) The Court has not

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[6] There are two flaws to TCL's attempt to controvert this point. The first is that Dr. Leonard's analysis has nothing to do with Ericsson's "intent." The second is that Exhibit 16 to the Holder Declaration submitted in this case lacks the pages cited in TCL's response to Ericsson's Statement of Uncontroverted Facts. (See Holder Decl. Ex. 16, Dkt. No 948-18 (lacking pages 25–27.).)

been provided with any authority for this kind of bootstrapping[7] of a breach of contract case, without more, into a violation of the policy or spirit of antitrust laws. Instead, as the Broadcom court made the "intentionally false promise" and subsequent "breach of that promise" two separate elements, it is clear that there needs to be some other conduct by Ericsson than mere breach of its FRAND obligations. 501 F.3d at 314.

In short, TCL fails to satisfy the test under Broadcom and TCL's reliance on other pleading standards cases does not rescue its case. TCL has not shown, by any evidence, an intentionally false promise to license essential proprietary technology on FRAND terms.

Because the Court concludes that TCL has failed to satisfy the "intentionally false promise" element of Broadcom's five-part test, the Court need not decide whether TCL must sufficiently define a relevant market, or whether TCL's evidence, in fact, has defined a relevant market. (See Ericsson's Mot. pp. 15–17; TCL's Opp'n pp. 22–23.)

C. Statute of Limitations

UCL claims are governed by a four-year limitations period, and Ericsson bears the burden of proving that TCL's UCL claims are barred by that limitations period. Cal. Bus. & Prof. Code § 17208; Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1197.

Ericsson argues that the four-year limitations period applies to bar TCL's UCL claims because the parties' negotiations began in April 2008 and TCL has always viewed all of Ericssons' offers as "unreasonable," "excessive," and "extortionist" rates. (See Reply p. 15.) TCL counters that its claims survive based on the "continuing violation doctrine." (TCL Opp'n p. 24.)

Under the continuing violation doctrine, "[a]llegations of a pattern of reasonably frequent and similar acts may, in a given case, justify treating the acts as an indivisible

[7] TCL essentially admits that it is engaging in this kind of bootstrapping when it argues "TCL's evidence that Ericsson attempted to force TCL to license its [standard essential patents] at supracompetitive royalty rates is *sufficient* to establish 'unfair' acts pursuant to [the UCL]." (TCL Opp'n p. 19 (emphasis added).)

course of conduct actionable in its entirety, notwithstanding that the conduct occurred partially outside and partially inside the limitations period." Aryeh, 55 Cal. 4th at 1198. For the continuing violation doctrine to apply, the wrongs must not be "a series of discrete, independently actionably alleged wrongs," rather, the case must be one that "became apparent only through the accumulation of a series of harms." Id.

Here, the continuing violation doctrine does not apply. As TCL contends, "Each of Ericsson's discriminatory and unreasonable offers to TCL . . . constitutes actionable anticompetitive conduct." (TCL Opp'n p. 25 (emphasis added).) TCL therefore admits that each of Ericsson's offers, including the April 2008 offer, was actionable under the UCL. Because the continuing violation doctrine does not cover "discrete, independently actionable" wrongs, the continuing violation doctrine does not apply.

TCL may still argue that some of its claim survives under the "theory of continuous accrual." Aryeh, 55 Cal. 4th at 1198. Under that theory, separate, recurring invasions of the same right triggers each violation's own statute of limitations. Id. As stated in Aryeh:

> continuous accrual applies whenever there is a continuing or recurring obligation: "When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period."

Id. at 1199 (quoting Hogar Dulce Hogar v. Cmty Dev. Comm'n, 110 Cal. App. 4th 1288, 1295 (2003)). Here, Ericsson had a continuing obligation to license its standard essential patents on FRAND terms and a continuing obligation not to violate the unfair prong of the UCL. Each time Ericsson allegedly violated those obligations by offering only non-FRAND offers to TCL, there was the possibility of a new and separate violation. Cf. id. at 1201 (each monthly charge could be a new unfair act under the UCL with its own limitations period).

Consequently, under the theory of continuous accrual, the conduct of Ericsson taking place after March 2010 is not barred by the statute of limitations. This covers all but one of Ericsson's offers and all of Ericsson's conduct filing suit seeking injunctions in foreign countries. Thus, the only conduct that is not actionable due to the statute of limitations is Ericssons' April 2008 offer to TCL.

IV. Conclusion

For the foregoing reasons, TCL's UCL claim is (for the most part) not barred by the statute of limitations. However, TCL has not suffered economic injury sufficient to satisfy UCL standing and TCL fails to adduce evidence of conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws" because TCL fails to show an "intentionally false promise" to ETSI. Accordingly, Ericsson is entitled to summary judgment on TCL's UCL claim.

IT IS SO ORDERED.

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