

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EVOLVED WIRELESS, LLC,)
)
Plaintiff,)
)
v.)
)
APPLE INC.,)
)
Defendant.)

Civil Action No. 15-542-SLR-SRF

EVOLVED WIRELESS, LLC,)
)
Plaintiff,)
)
v.)
)
HTC CORPORATION and)
HTC AMERICA, INC.,)
)
Defendants.)

Civil Action No. 15-543-SLR-SRF

EVOLVED WIRELESS, LLC,)
)
Plaintiff,)
)
v.)
)
LENOVO GROUP LTD., LENOVO)
(UNITED STATES) INC., and)
MOTOROLA MOBILITY,)
)
Defendants.)

Civil Action No. 15-544-SLR-SRF

EVOLVED WIRELESS, LLC,
Plaintiff,
v.
SAMSUNG ELECTRONICS CO., LTD.
and SAMSUNG ELECTRONICS
AMERICA, INC.
Defendants.

Civil Action No. 15-545-SLR-SRF

EVOLVED WIRELESS, LLC,
Plaintiff,
v.
ZTE (USA) INC.,
Defendant.

Civil Action No. 15-546-SLR-SRF

MEMORANDUM ORDER

At Wilmington this ~~26~~²⁶th day of July, 2017, the court having considered the parties' discovery dispute submissions and the arguments presented during the September 27, 2016 discovery dispute hearing (D.I. 82; D.I. 84; D.I. 101; D.I. 111; D.I. 112; D.I. 113; D.I. 116; D.I. 117; D.I. 118; 9/27/16 Tr.),¹ IT IS HEREBY ORDERED THAT plaintiff Evolved Wireless, LLC's ("Evolved") motion to compel the cross-production of defendants'² Long Term Evolution ("LTE") licenses across six related cases is DENIED.

¹ All citations to docket entries refer to Civil Action No. 15-542-SLR-SRF, unless otherwise noted.

² Defendants include Apple Inc. ("Apple"), HTC Corporation and HTC America, Inc. ("HTC"), Lenovo Group Ltd., Lenovo (United States) Inc., and Motorola Mobility ("Lenovo"), Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. ("Samsung"), and ZTE (USA) Inc. ("ZTE").

1. Background. On June 25, 2015, Evolved filed six related cases asserting infringement of United States Patent Nos. 7,746,916 (“the ‘916 patent”), 7,768,965 (“the ‘965 patent”), 7,809,373 (“the ‘373 patent”), 7,881,236 (“the ‘236 patent”), and 8,218,481 (“the ‘481 patent”) (collectively, the “patents-in-suit”)³ directed to LTE wireless communication systems. (D.I. 1) Evolved owns the patents-in-suit by assignment from LG Electronics, Inc. (“LG”). (*Id.* at ¶ 15) LG is a member of the European Telecommunications Standards Institute (“ETSI”), and participated extensively in the Third Generation Partnership Project (“3GPP”) Working Group meetings to develop the LTE standards. (*Id.* at ¶ 16) The patents-in-suit are essential to the 3GPP 36 Series technical specifications, which cover the LTE standards. (*Id.* at ¶ 15)

2. On March 21, 2016, the court entered the parties’ stipulated protective order across the six related cases. (D.I. 35) In pertinent part, the protective order permits Evolved to cross-produce confidential information among defendants only with the express prior written consent of the defendant that originally produced the confidential material. (*Id.* at ¶ 6(g)) Specifically, paragraph 6(g) of the protective order states:

Notwithstanding the provisions of this Protective Order, Plaintiff shall not disclose one Defendant’s Protected Material to any other Defendant or Defendants through Court filings, oral argument in Court, expert reports, deposition, discovery requests, discovery responses, or any other means, without the express prior written consent of the Defendant that produced the Protected Material. If Plaintiff seeks to disclose a Defendant’s Protected Material to any other Defendant or Defendants, then Plaintiff will seek consent from the Defendant who produced the Protected Material at issue. The Defendant will then have ten (10) business days to respond to the request. Defendant will not unreasonably withhold its consent. Defendant’s withholding of consent shall be deemed unreasonable if it has previously shared the Protected Material with any other Defendant or Defendants. If Plaintiff receives no response, then it may proceed with the requested disclosure. If objecting to the disclosure, Defendant

³ On July 14, 2017, a stipulation of dismissal was filed and entered with respect to the ‘916 patent, the ‘965 patent, and the ‘481 patent. (D.I. 164) These patents are no longer at issue in the litigation.

shall state the complete grounds for the objection. Thereafter, further dispute shall be resolved in accordance with the following procedures:

(i) The Plaintiff shall have the burden of conferring either in person, in writing, or by telephone with the objecting Defendant in a good faith effort to resolve the dispute. The Defendant shall have the burden of justifying the objection;

(ii) Failing agreement, the Plaintiff may bring a motion to the Court for a ruling that the Protected Material in question is entitled to disclosure to any other Defendant or Defendants. The Parties' entry into this Order shall not preclude or prejudice either Party from arguing for or against disclosure of a Defendant's Protected Material to any other Defendant or Defendants, establish any presumption that a particular objection is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information;

(iii) Notwithstanding any objection to disclosure, the Protected Material in question shall not be disclosed to any other Defendant or Defendants until one of the following occurs: (a) the Defendant who produced the Protected Material in question withdraws such objection in writing; or (b) the Court rules that the Protected Material in question may be disclosed to other Defendants.

(Id.)

3. On June 30, 2016, in accordance with paragraph 6(g) of the protective order, Evolved sought consent from defendants to cross-produce the LTE license agreements. (D.I. 82 at 1) Defendants objected to Evolved's request on confidentiality and relevance grounds. *(Id.)* The court held a discovery dispute hearing on September 27, 2016 and requested further briefing on the issue. For the foregoing reasons, the court denies Evolved's request to compel cross-production of the LTE license agreements.

4. Legal Standard. Pursuant to Rule 26 of the Federal Rules of Civil Procedure,

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

8. Cross-production of the LTE license agreements would also likely result in the expansion of the scope of discovery in a manner disproportionate to the needs of the case. *See Syngenta Crop Protection, LLC v. Willowood, LLC*, C.A. No. 16-171-RGA; 2016 WL 4925099, at *2 (D. Del. Sept. 14, 2016) (holding that the court must consider the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit, in assessing proportionality). The cross-production of the LTE license agreements could potentially result in satellite litigation in which witnesses are deposed to establish the factual underpinnings of the license agreements themselves. (9/27/16 Tr. at 26:1-20)

9. Defendants' confidentiality concerns outweigh the likely benefit derived from cross-producing the LTE license agreements. Evolved contends that the existing protective order provides adequate protection against the confidentiality concerns raised by defendants and third parties. (D.I. 101 at 13-15) However, defendants stress the highly sensitive and competitive nature of the information in the LTE license agreements, characterizing it as "the crown jewels of the company." (9/27/16 Tr. at 24:18-25:1) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] On balance, the risks of the disclosure of highly confidential information as a result of cross-production are not outweighed by the relevance of the information to the present litigation.

10. Conclusion. For the foregoing reasons, Evolved's motion to compel cross-production of licenses across the related cases is denied.

11. Given that the court has relied upon material that technically remains under seal, the court is releasing this Memorandum Order under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Memorandum Order should be redacted, the parties should jointly submit a proposed redacted version by no later than **August 7, 2017**. The court will subsequently issue a publicly available version of its Memorandum Order.

12. This Memorandum Order is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1(a)(2). The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Memorandum Order. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to ten (10) pages each.

13. The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, www.ded.uscourts.gov.


Sherry R. Fallon
United States Magistrate Judge