

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GODO KAISHA IP BRIDGE 1,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 15-634-SLR-SRF
)	
TCL COMMUNICATION TECHNOLOGY))	
HOLDINGS LIMITED, a Chinese)	REDACTED VERSION
Corporation, TCT MOBILE LIMITED, a)	
Hong Kong Corporation, TCT MOBILE)	
(US), INC., a Delaware Corporation, and)	
TCT MOBILE, INC., a Delaware)	
Corporation,)	
)	
Defendants.)	

MEMORANDUM ORDER

At Wilmington this 14th day of December, 2017, the court having considered the letter briefs, supplemental briefing, and arguments presented by the parties regarding plaintiff Godo Kaisha IP Bridge 1's ("IP Bridge") motion to compel the production of certain financial discovery by defendants TCL Communication Technology Holdings Ltd. ("TCL Holdings"), TCT Mobile Limited ("TCT Hong Kong"), TCT Mobile (US), Inc., and TCT Mobile Inc. (collectively, "defendants") (D.I. 281; D.I. 282; D.I. 285; D.I. 286; D.I. 295; D.I. 307; D.I. 311; 8/23/17 Tr.), IT IS HEREBY ORDERED that IP Bridge's motion is granted for the reasons set forth below.

1. Background. IP Bridge commenced this patent infringement action on July 24, 2015 against defendants TCL Holdings, TCT Hong Kong, and TCT Mobile (US), Inc. (D.I. 1) On July 11, 2016, the parties entered into a joint stipulation to amend the pleadings to add TCT Mobile, Inc. as a defendant. (D.I. 62) The amended complaint asserts causes of action for

infringement of U.S. Patent Nos. 7,373,295 (“the ‘295 patent”), 8,351,538 (“the ‘538 patent”), and 8,385,239 (“the ‘239 patent”), which are directed to technology declared essential to one or more of the W-CDMA and LTE telecommunication standards. (D.I. 63 at ¶¶ 27-48)

2. The discovery dispute presently before the court concerns IP Bridge’s request to compel defendants to produce financial documents relevant to IP Bridge’s calculation of damages. (D.I. 295 at 1) During a discovery dispute hearing on September 22, 2016, IP Bridge sought damages information related to sales projections, apportionment, licensing, and royalty history, as well as marketing materials for TCT US’s mobile devices. (D.I. 83) The court reserved ruling on IP Bridge’s requests, and issued a Memorandum Order on February 27, 2017 granting-in-part IP Bridge’s requests. (D.I. 192) In pertinent part, the court granted the motion with respect to profit, loss, and cost data for accused devices sold in the United States, concluding that, “[f]or purposes of fact discovery, TCT US’s effort to limit the disclosure of information to the price paid for the chips is unduly restrictive.”¹ (*Id.* at 7)

3. In response to the court’s February 27, 2017 Memorandum Order, defendants produced an attorney-generated spreadsheet² which identified the model name and number, unit price, quantity sold, gross revenue, standard cost per unit, and gross profit (or loss) on a per transaction basis for the years 2011 to 2015 for each accused product sold in the United States. (D.I. 281, Ex. 4) The underlying documents from which the spreadsheet data was sourced were not produced.

¹ The February 27, 2017 Memorandum Order also denied IP Bridge’s motion to compel production of post-negotiation sales projections and documents extraneous to the licensing agreements, and granted the motion with respect to the production of press releases for the accused products. On March 13, 2017, IP Bridge filed objections to the February 27 Memorandum Order. (D.I. 213) On May 16, 2017, Judge Robinson affirmed the February 27 ruling. (D.I. 251)

² The parties dispute whether this spreadsheet was produced on April 19, 2017 or May 26, 2017. (D.I. 295 at 3; D.I. 307 at 2 n.2)

4. On June 22, 2017, IP Bridge took the deposition of James Wodach, who was designated to testify regarding revenues from sales of the accused products. (D.I. 281, Ex. 10; D.I. 307, Ex. 2) The deposition lasted less than three hours, and counsel for IP Bridge indicated on the transcript an intention to hold the deposition open, “pending the production of updated sales data to include the period from the time of these spreadsheets.” (D.I. 307, Ex. 2 at 85:24-86:2) Following the deposition, in August 2017, defendants produced an updated spreadsheet with sales data through June 2017. (D.I. 281, Ex. 1)

5. On August 23, 2017, the court held a discovery dispute teleconference, during which IP Bridge challenged the adequacy of defendants’ production of financial documents under the February 27, 2017 Memorandum Order. At the conclusion of the teleconference, the court reserved decision on the motion to compel the production of financial documents. (8/23/17 Tr. at 28:1-54:12)

6. Legal Standard. Pursuant to Rule 26,

[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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). A party may move for an order compelling discovery pursuant to Rule 37. Generally, a party moving to compel discovery bears the burden of demonstrating the relevance of the requested information. *See Del. Display Grp. LLC v. Lenovo Grp. Ltd.*, Civil Action Nos. 13-2108-RGA, 13-2109-RGA, 13-2122-RGA, 2016 WL 720977, at *2 (D. Del. Feb. 23, 2016) (citing *Inventio AG v. ThyssenKrupp Elevator Am. Corp.*, 662 F. Supp. 2d 375, 381 (D. Del. 2009)). However, “[t]he parties and the court have a collective responsibility to

consider the proportionality of all discovery and consider it in resolving discovery disputes.”

Fed. R. Civ. P. 26 advisory committee’s note to 2015 amendment.

7. Analysis. IP Bridge’s first request is granted with respect to the production of documents and a witness on sales data. Specifically, within seven (7) days of the date of this Memorandum Order, defendants are ordered to produce the underlying Invoicing Reports supporting defendants’ spreadsheets on the sales, profit, and loss data for the period between July 2015 and the date of this Memorandum Order. IP Bridge has represented that its request is limited to U.S. sales of only the accused devices, and does not extend to unaccused devices. (8/23/17 Tr. at 35) Moreover, IP Bridge anticipates that the production will generate less than thirty documents which are kept in the ordinary course of business in Irvine, California. (D.I. 307, Ex. 2 at 45:9-15) Consequently, the request does not pose an undue burden.

8. The Invoicing Reports constitute reliable evidence of defendants’ United States sales of the accused devices, as confirmed by the testimony of defendants’ U.S. Vice President of Finance, James Wodach. (D.I. 307, Ex. 2 at 41:3-46:19) Mr. Wodach testified that, to verify the data in the spreadsheets, he would need to review the Invoicing Reports, which encompass every invoice submitted to a customer from the entities selling products in this region. (*Id.* at 41:3-20) According to Mr. Wodach, the Invoicing Reports “provide a summary of all the items that were invoiced to customers, along with the related contractual obligations for sale of the products” in the form of an Excel spreadsheet. (*Id.* at 43:24-44:5)

9. The four attorney-generated spreadsheets produced in the instant matter contain data which appears to be inconsistent across the spreadsheets and does not match up with the witness testimony provided by Steven Cistulli. (8/23/17 Tr. at 33; D.I. 295, Ex. A) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Defendants have indicated that these discrepancies are the result of either the inclusion or exclusion of Canadian sales, and Mr. Wodach attempted to standardize the August 2017 spreadsheet by removing the Canadian sales. (8/23/17 Tr. at 40-41) However, the August 2017 spreadsheet contains the highest 2014 total sales figure of all of the spreadsheets despite the alleged removal of Canadian sales. (D.I. 281, Ex. 1) In the supplemental briefing following the August 23, 2017 hearing, defendants offer another explanation for the discrepancy for the first time, indicating that the August 2017 spreadsheet also includes products not clearly accused of infringement, whereas the third spreadsheet did not, causing the sales figure to be higher despite the removal of Canadian sales. (D.I. 307 at 7-8; D.I. 308 at ¶ 4) Defendants' evolving explanations of these discrepancies illustrate the need for the underlying, verifiable data.

10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] During the August 23, 2017 hearing, defendants represented that the difference is explained by the spreadsheet's exclusion of data on 2GPP devices, and Mr. Cistulli's inclusion of such data. (8/23/17 Tr. at 44-45) In defendants' supplemental submission, they expanded this explanation by noting that "IP Bridge has not accused all non-2G devices and . . . many of the originally accused products are no longer at issue in this case because one of the three accused patents is invalid." (D.I. 307 at 8 n.9) However, the amended complaint establishes that all 3G and LTE devices sold in the U.S.

by defendants are at issue in this case. (D.I. 63 at ¶ 30) (“TCL’s mobile phones and tablets that implement [the W-CDMA and LTE] standards infringe the IP Bridge Patents at issue in this case.”) According to IP Bridge, the August 2017 spreadsheet excludes eighteen accused devices identified in a January 5, 2017 letter between the parties, as well as other LTE devices brought to the U.S. market in 2017. (D.I. 311, Ex. 1; D.I. 281, Ex. 1) The incomplete nature of the data included in the fourth revised spreadsheet, as well as defendants’ various evolving explanations of that data, justify IP Bridge’s request to produce the underlying data in the form of the Invoicing Reports.

11. Although defendants argue that the Invoicing Reports contain additional data which is irrelevant to IP Bridge’s inquiry, such as customer, quantity, identity of goods, and other contractual obligations (D.I. 307, Ex. 2 at 44:11-22; 55:2-8), defendants do not articulate a specific confidentiality concern, and IP Bridge has indicated that it will designate the information as Highly Confidential (D.I. 295 at 5). To the extent that the Invoicing Reports also contain data on unaccused products (8/23/17 Tr. at 41-42), defendants have also admittedly included data on unaccused products in their attorney-generated spreadsheets (D.I. 308 at ¶ 4).

12. This ruling is limited to the specific facts of this case, and is not intended to create an overarching rule that attorney-generated spreadsheets of financial data are inadequate under Rule 26 in all cases. In other cases distinguishable from the circumstances presently before the court, attorney-generated summary spreadsheets of financial information have been permitted. For example, in *Whitserve LLC v. Computer Patent Annuities North America, LLC*, the court ordered the defendant to inspect its own financial data and compile a spreadsheet summarizing the data in lieu of requiring the plaintiff to travel to the defendant’s headquarters to inspect tens of millions of financial documents responsive to the discovery requests. 2006 WL 6654877, at *1-2

(D. Conn. Aug. 11, 2006). Unlike the circumstances in *Whitserve*, the issue of burden is not present in this case, in which the requested production is estimated to be less than thirty documents.

13. Likewise, in *In re Certain Compact Fluorescent Reflector Lamps, Products Containing Same & Components Thereof*, the administrative law judge rejected a request to compel production of underlying financial documents, such as invoices and receipts, after deeming the request overly burdensome. USITC Inv. No. 337-TA-872, Order No. 22, 2013 WL 3361882, at *2 (U.S.I.T.C. July 2, 2013). Although the respondent sought the underlying data to corroborate the summary data provided, the respondent did not identify anything in the data provided to question its accuracy. *Id.* In contrast, defendants have failed to identify an undue burden in the present case, and IP Bridge has identified apparent discrepancies in the summary data provided. Moreover, the underlying data requested in the present case consists of Invoicing Reports, which are summary reports themselves, as opposed to the individual invoices and receipts requested in the ITC proceeding. (D.I. 307, Ex. 2 at 43:24-44:5; 8/23/17 Tr. at 30-31)

14. Additional witness testimony to authenticate and explain the Invoicing Reports and the August 2017 spreadsheet is reasonable in the present matter. (8/23/17 Tr. at 43-44) During the August 23, 2017 discovery dispute hearing, defendants' counsel represented that Mr. Wodach was not asked a single question at his deposition regarding clarification of the attorney-generated spreadsheets. (8/23/17 Tr. at 39) According to defendants, Mr. Wodach was prepared to clarify the perceived discrepancies in the spreadsheet data by specifying that Mr. Cistulli's testimony encompassed the sale of non-3GPP devices in addition to the accused devices.³ (*Id.*)

³ Defendants emphasized that "[a] large portion of TCL's historical phones have been flip phones, like the phones we all used ten years ago," and "that was the majority of its sales for 2009, 2010, 2011. Mr. Wodak [sic] was prepared to talk about that." (8/23/17 Tr. at 40) Defendants made no similar representations about sales of its older devices for the time period at

However, as explained previously at ¶¶ 9-10, *supra*, this explanation is inadequate to reconcile the data among the spreadsheets. Production of the Invoicing Reports, followed by additional witness testimony, appears proportional and reasonable under Rule 26.

15. Counsel for IP Bridge concluded Mr. Wodach's June 22, 2017 deposition after less than three hours, expressly reserving its right on the record to complete the deposition after the relevant sales data was produced. (D.I. 307, Ex. 2 at 85:24-86:13) During the August 23, 2017 discovery dispute hearing, the court indicated that it was inclined to compel Mr. Wodach to provide further deposition testimony. (8/23/17 Tr. at 43-44, 52) Consequently, defendants are ordered to produce Mr. Wodach for additional testimony following the production of the Invoicing Reports. Alternatively, the parties can meet and confer on the designation of an alternate witness to testify subsequent to the production of the Invoicing Reports.

16. IP Bridge's motion to compel is granted with respect to the requested cost information. Defendants must produce particularized cost information in accordance with the court's February 27, 2017 Memorandum Order, which determined that limiting the disclosure of information to the price paid for the chips was unduly restrictive. (D.I. 192 at 6-7) Specifically, defendants shall produce data regarding: (1) the cost of the baseband chip, (2) the royalties paid to baseband chip manufacturers apart from the purchase price of the chip, (3) any other payments or accruals made by defendants for intellectual property rights ("IPR") relevant to the 3GPP standards, and (4) any profit to any entity included in the standard cost at which the U.S. defendants acquire the accused devices.

17. With regard to the cost of the baseband chips, defendants have produced limited data on the standard cost of the chips, as well as a spreadsheet identifying the average price paid for

issue in this dispute, from 2015 to the present. Mr. Wodach's testimony regarding sales of non-3GPP phones from 2009 to 2011 would not advance the issue.

baseband processors used in the accused products. (D.I. 307 at 5) However, additional data has not been produced since the September 22, 2016 hearing in accordance with the February 27, 2017 Memorandum Order. Defendants must make a supplemental production establishing an accurate reflection of the baseband chip price. In their supplemental submission, defendants indicate that they are in the process of updating the spreadsheet identifying the average price paid for baseband processors for products sold between 2015 and the present. (D.I. 307 at 5) Defendants are to provide an updated version of the spreadsheet within seven (7) days of the date of this Memorandum Order.

18. With respect to royalty and IPR payments, IP Bridge has established that similar documentation was produced in the *Ericsson* litigation to prove the cost and profit margin of individual units. (D.I. 281, Ex. 13 at ¶¶ 274-81; 8/23/17 Tr. at 48) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. Data regarding the profits to Chinese TCL entities incorporated into the price of the device when it is sold to the U.S. entities is also necessary to establish an accurate picture of the cost of the baseband chips. Mr. Wodach's testimony establishes that the U.S. entities buy devices from Hong Kong at a price that is not the same as the cost to produce the goods, and this price overstates the profitability in the U.S. (D.I. 307, Ex. 2 at 33:21-35:19) Any profits

reserved for the Chinese TCL entities must be accounted for in calculating the cost of the baseband chips.

20. IP Bridge may also seek deposition testimony from a knowledgeable 30(b)(6) witness familiar with the financial operations in China, as Mr. Wodach and Mr. Cistulli have testified that full knowledge of this information is not known to members of the U.S. team. (D.I. 281, Ex. 10 at 61:7-13; Ex. 6 at 90:8-12) As the corporate parent, TCL Holdings may be compelled to produce corporate representatives to testify regarding subsidiaries under its control. *See Ethypharm SA France v. Abbott Labs.*, 271 F.R.D. 82, 94 (D. Del. 2010) (concluding that a parent corporation may be compelled to provide a witness with knowledge of the subsidiary to testify regarding documents at issue).


21. The parties dispute whether defendants have produced the relevant supply and license agreements with MediaTek. (D.I. 307 at 5 n.6; D.I. 311 at 2) To the extent that these agreements have not yet been produced, defendants are ordered to produce them within seven (7) days of the date of this Memorandum Order.

22. **Conclusion.** In view of the foregoing analysis, IP Bridge's motion to compel the production of financial documents is granted.

23. 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 **December 28, 2017**. The court will subsequently issue a publicly available version of its Memorandum Order.

24. 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.

25. 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