

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

ELBIT SYSTEMS LAND AND C4I LTD.,	§	
ELBIT SYSTEMS OF AMERICA, LLC,	§	
	§	Case No. 2:15-CV-00037-RWS-RSP
<i>Plaintiffs,</i>	§	
	§	
v.	§	
	§	
HUGHES NETWORK SYSTEMS, LLC,	§	
BLUETIDE COMMUNICATIONS, INC.,	§	
COUNTRY HOME INVESTMENTS, INC.,	§	
	§	
<i>Defendants.</i>	§	

**MEMORANDUM OPINION AND ORDER AND  
REPORT AND RECOMMENDATION**

Before the Court are the following motions:

- (1) Plaintiffs’ Motion to Strike Expert Opinions Regarding Stricken Prior Art References And Undisclosed Invalidity Theories (**Dkt. 275**) (“Elbit’s Motion to Strike Invalidity Opinions”).
- (2) Defendant Hughes Network Systems, LLC’s Motion to Strike Elbit’s ’874 Patent Infringement Contentions (**Dkt. 276**) (“Hughes’ Motion to Strike Infringement Contentions”).
- (3) Defendant Hughes’s Motion to Exclude Elbit’s New Priority Date Contentions for the ’073 Patent (**Dkt. 277**) (“Hughes’ Priority Date Motion”).
- (4) Defendants’ Motion for Summary Judgment of Noninfringement of the Switching Means of United States Patent No. 6,240,073 (**Dkt. 291**) (“Defendants’ ‘Switching Means’ Motion”).
- (5) Defendants Motion for Summary Judgment of Non-Infringement of Claim 28 of the ’073 Patent for Lack of a “Means For Generating A Request” (**Dkt. 292**) (“Defendants’ ‘Means for Generating Request’ Motion”).
- (6) Defendants’ Motion for Partial Summary Judgment of Non-Infringement for Hughes’ GMR-1 Products (**Dkt. 293**) (“Defendants’ GMR-1 Products Motion”).
- (7) Defendants’ Motion for Partial Summary Judgment of No Damages With Respect to the ’874 Patent (**Dkt. 294**) (“Defendants’ Damages Motion”).

- (8) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Copying of U.S. Patent No. 6, 240,073 (**Dkt. 295**) ("Hughes' Copying Motion")
- (9) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Willfulness (**Dkt. 296**) ("Hughes' Willfulness Motion").
- (10) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Pre-Suit Damages Based on Plaintiffs' Failure to Comply with 35 U.S.C. § 287 (**Dkt. 297**) ("Hughes' Marking Motion").
- (11) Defendant Hughes Network Systems, LLC's Motion for Partial Summary Judgment of Non-Infringement of Claims 2-5, 7-9, 11, and 12 of U.S. Patent No. 7,245,874 (**Dkt. 298**) ("Motion for Summary Judgment of Noninfringement of the '874 Patent").
- (12) Plaintiffs' Motion to Exclude the Testimony of Dr. Stephen B. Wicker (**Dkt. 312**) ("Elbit's Infringement Expert Motion").
- (13) Defendant Hughes Network Systems, LLC's Motion to Exclude Expert Testimony of Stephen G. Kunin (**Dkt. 313**) ("Hughes' Motion to Exclude Patent Office Expert Testimony")
- (14) Defendants' *Daubert* Motion to Exclude the Opinions Offered by Christopher Martinez (**Dkt. 314**) ("Defendants' Motion to Exclude Damages Expert Testimony").
- (15) Plaintiffs' Motion to Strike Defendants' Experts Opinions Regarding Previously-Undisclosed Non-Infringing Alternatives (**Dkt. 315**) ("Plaintiffs' Motion to Strike Non-Infringing Alternatives")
- (16) Hughes' Motion to Strike Portions of Elbit's Expert Reports that Rely on Previously-Unidentified Infringement Theories (**Dkt. 316**) ("Hughes' Motion to Strike Infringement Opinions").
- (17) Plaintiffs' Motion to Exclude Certain Opinions of Defendants' Damages Expert, Mr. W. Christopher Bakewell (**Dkt. 319**) ("Elbit's Motion to Exclude Damages Expert Testimony").
- (18) Defendants Hughes Network Systems, LLC And BlueTide Communications, Inc.'s Motion to Transfer Under 28 U.S.C. § 1406 (**Dkt. 372**) ("Defendants' Motion to Transfer").
- (19) Defendants Hughes Network Systems, LLC And BlueTide Communications, Inc.'s Motion to Stay Proceedings Pending Resolution of Proper Venue (**Dkt. 373**) ("Defendants' Motion to Stay").

The Court resolves the nondispositive motions and provides recommendations for the pending motions for summary judgment as follows. *See* Fed. R. Civ. P. 72.

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## BACKGROUND

This is a patent infringement case brought by Elbit Systems Land and C4I Ltd and Elbit Systems of America LLC (collectively, “Elbit”). Elbit accuses Hughes Networks Systems, LLC (“Hughes”), BlueTide Communications, Inc. (“BlueTide”), and Country Home Investments, Inc. (“Country Home”) of infringing U.S. Patent Nos. 6,240,073 (“the ’073 patent”) and 7,245,874 (“the ’874 patent”), both of which relate generally to satellite communication systems.

## DISCUSSION

### A. Defendants’ Motions for Summary Judgment

Defendants move for summary judgment on various claims and issues underlying Elbit’s infringement and damages contentions. Summary judgment must be granted when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “A genuine issue of material fact exists ‘if the evidence is such that a reasonable jury could return a verdict for the non-moving party.’” *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must consider evidence in the record in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Thorson v. Epps*, 701 F.3d 444, 445 (5th Cir. 2012). The moving party must identify the portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once a party has made that showing, the non-moving party bears the burden of establishing otherwise. *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (citing *Celotex*, 477 U.S. at 323). The non-moving party cannot “rest upon mere allegations or denials” in the pleadings, but “must set forth specific facts showing there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at 248. Thus, summary judgment “is appropriate if the non-movant ‘fails

to make a showing sufficient to establish the existence of an element essential to that party's case.”  
*Bluebonnet Hotel Ventures, LLC v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 276 (5th Cir. 2014)  
(quoting *Celotex*, 477 U.S. at 322).

## **1. Motions for Summary Judgment of Noninfringement of the '073 Patent**

### **a) Defendants' "Switching Means" Motion (Dkt. 291)**

The asserted '073 patent claims recite a “switching means . . . for switching transmission between said first communication means and said second communication means in accordance with predefined criteria.” *See, e.g.*, '073 patent at 22:66-23:2. The Court construed the switching means limitation as a means-plus-function term governed by 35 U.S.C. § 112, ¶ 6. Dkt. 208, at 30. The Court defined the corresponding structure as “modem 160 or PC 150 including driver layer 158 performing the algorithms disclosed in the '073 Patent at 10:30-11:40 or Figure 8, and equivalents thereof.” *Id.* Hughes contends that “[i]n the '073 Patent, the modem 160 and the PC 150 are part of the terminal and not part of the hub.” *See* Dkt. 291 at 4 (citing '073 Patent, Fig. 7). According to Hughes, Elbit has failed to identify “switching means” structure at or within the terminal, but rather only identifies structure at the hub, and thus summary judgment of noninfringement should be granted *Id.* at 9.

Elbit's expert, Bruce Elbert, opines to the contrary. Mr. Elbert explains that the accused terminals begin transmitting in random access mode, and when a terminal receives user data, the terminal compares the size of the data to the amount of space in the Aloha transmission. *See* Dkt. 318-2 ¶¶ 301-19. Based on that comparison, Mr. Elbert opines that the terminal decides whether to switch to an allocated channel, depending on whether the user data fit within the Aloha transmission. *Id.* The terminal then allegedly waits for the hub to acknowledge that a specific channel has been assigned. *Id.* This algorithm, according to Mr. Elbert, is consistent with the one

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