

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRACTUS, S.A.	§	
	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
	§	3:18-CV-2838-K
ZTE CORPORATION,	§	
ZTE (USA), INC., and	§	
ZTE (TX), INC.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are multiple motions filed by the parties related to the striking of expert reports and testimony. These motions are Plaintiff Fractus' Motion to Strike Portions of the Expert Reports of Chris Bartone and Vince Thomas (Doc. No. 184); Defendant, ZTE (USA), Inc. ("ZTE")'s Motion to Strike Plaintiff Fractus' Expert Reports of Dr. Stuart Long (Doc. No. 200), which was filed under seal as Doc. No. 200 and also filed unsealed in redacted form as Doc. No. 186; and Defendant ZTE (USA), Inc.'s Motion to Strike the Reports and Testimony of Robert Mills Pursuant to *Daubert* [Under Seal] (Doc. No. 194), which was filed under seal as Doc. No. 194 and filed in redacted unsealed form as Doc. No. 188. After consideration of the pleadings, the arguments of the parties, the evidence of record, and the applicable law, the Court **GRANTS** in part and **DENIES** in part Plaintiff Fractus' Motion to Strike Portions of the Expert Reports of Chris Bartone and Vince Thomas (Doc. No. 184) and **DENIES**

Defendant ZTE's Motion to Strike Plaintiff Fractus' Expert Reports of Dr. Stuart Long (Doc. Nos. 200 and 186) and Defendant ZTE's Motion to Strike the Reports and Testimony of Robert Mills Pursuant to *Daubert* [Under Seal] (Doc. Nos. 194 and 188).

A. Plaintiff Fractus' Motion to Strike Portions of The Expert Reports of Chris Bartone and Vince Thomas (Doc. No. 184).

The Plaintiff, Fractus, S.A. ("Fractus") has moved the Court to strike portions of the reports of two of ZTE's experts. The reports at issue are the rebuttal report of Chris Bartone, ZTE's non-infringement expert, and the report of Vince Thomas, ZTE's damages expert.

Fractus asserts that two portions of Mr. Bartone's report should be stricken. According to Fractus, the first portion of this report that should be stricken raises an infringement defense that was not previously disclosed and the second portion of this report relates to a non-infringing alternative that was also not previously disclosed. Fractus asserts that since ZTE had not previously disclosed the theory of non-infringement and the non-infringing alternative, ZTE should not be allowed to introduce either of these into this litigation at this point.

Regarding the report of Mr. Thomas, ZTE's damages expert, Fractus argues that a portion of this report should be stricken because this portion relies on the previously undisclosed non infringing alternative that is included in Mr. Bartone's report.

Regarding the non-infringing alternative issue, Fractus served on ZTE an interrogatory that specifically requested ZTE to identify any asserted non-infringing alternatives. This was Fractus' Interrogatory No. 5 which read as follows:

For each asserted claim identify any products you contend are acceptable non-infringing alternatives to the patented products, identifying with specificity which claim elements asserted in Fractus' infringement contentions you contend are absent from such non-infringing alternatives, and stating why those elements are missing and why the alternatives are acceptable to consumers.

Appendix in Support of Fractus' Motion to Strike at 9 (Doc. No. 184-2). ZTE failed to substantively respond to this interrogatory. In ZTE's response to this interrogatory, ZTE stated, "Defendant objects to this interrogatory to the extent that it seeks privileged information. Defendant further objects to this interrogatory as premature, given the stage of the case. Investigation continues." *Id.* Even though ZTE amended its interrogatory responses twice, it never amended or updated the response to this interrogatory.

In addition, Fractus, in a 30(b)(6) deposition notice, included the topic of:

Any products you contend are acceptable non-infringing alternatives to the patented products, including which claim elements you contend are absent from such non-infringing alternatives, why those elements are missing, why the alternatives are acceptable to consumers, and the cost of manufacturing the alternatives.

Id. at 15. ZTE failed to provide a witness for this topic. *Id.* Instead, ZTE asserted "ZTE incorporates its General Objections. ZTE objects to this Topic as calling for the expert testimony." *Id.*

Despite ZTE's failure to identify any alleged alternative non-infringing devices or to provide a deposition witness for this topic, Mr. Bartone, in his rebuttal report, offered an opinion on a non-infringing alternative. Fractus asserts that, since ZTE had not previously informed Fractus that ZTE would assert this non infringing alternative, it cannot now introduce this non infringing alternative at this late stage of this case.

ZTE responds that striking the portions of these expert reports is not warranted because Fractus was not harmed by any asserted failure to disclose non-infringing alternatives and if Fractus was harmed, this was due to Fractus' own failure to further pursue discovery on the issue. In support of these conclusions, ZTE asserts that ZTE made it clear to Fractus that it was ZTE's position that the subject of non-infringing alternatives is an area that requires expert testimony; Fractus failed to complain about this assertion; Fractus was aware of the issue when this Court reopened fact discovery after this case was transferred to this Court; and the expert's testimony was rebuttal testimony which addressed non-infringing alternatives in response to Fractus' infringement expert's report.

When a party fails to disclose information in response to a discovery request or fails to identify a witness, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

The Court agrees with Fractus that the portions of ZTE's expert reports that attempt to introduce evidence of non-infringing alternatives should be stricken because

ZTE's failure to identify non-infringing alternatives during fact discovery was neither substantially justified nor harmless. It is clear from the record that Fractus served proper discovery requests on ZTE. These requests asked ZTE to identify any devices that it contended were acceptable non-infringing alternatives. In response, ZTE did not assert that this was the subject of expert testimony. Instead, it asserted that this called for privileged information and was premature considering the status of the case. It also asserted that it was still investigating the issue. ZTE, however, completely failed to supplement this response in any way during the time period in which fact discovery was open. In regards to the deposition topic, ZTE asserted that this was the subject of expert testimony. ZTE, in its briefing on this issue, focuses on the assertion that the deposition topic was the subject of expert testimony. This argument fails to acknowledge that this objection was not raised in relation to the interrogatory.

Even if ZTE has properly asserted the expert testimony objection to the interrogatory, this does not relieve ZTE from the obligation to respond to the extent that the information requested is not the subject of expert testimony.

Both the interrogatory and the deposition topic are contention discovery requests. These are designed to discovery basic factual contentions of an opposing party which provides the benefit of clarifying what factual issues must be addressed in a case. In this specific discovery, Fractus asked ZTE to identify and provide information about any devices which ZTE contends are acceptable non-infringing devices. The identification of what ZTE contends are acceptable non-infringing devices would have

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