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., ZTE (TX), INC.	§	
	§	
	§	**JURY TRIAL DEMANDED**
Defendants.	§	
	§	

PLAINTIFF FRACTUS' REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF THE EXPERT REPORTS OF CHRIS BARTONE AND VINCE THOMAS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

ZTE spends much of its Response arguing Fractus had an obligation to seek additional fact discovery after this case had been transferred to the Northern District of Texas in order to fill in the gaps of ZTE's deficient discovery responses. *See* Dkt. No. 205-1 ("Resp.") at 1, 6, 7, 7, 8, 9, 9, 12, 13, 14. This is nothing more than revisionist history. Both parties agreed that after transfer, fact discovery was unequivocally closed. Fractus and ZTE stated in a joint filing, "Fact discovery in this case is complete." Dkt. No. 175 at 2. ZTE reiterated its view in a follow-up communication. *See* App. at 158 ("Following transfer of the litigation to the Northern District, the Court did not enter an order reopening the discovery period or otherwise indicate that the Parties could issue new written discovery or deposition notices."). ZTE now criticizes Fractus for failing to seek additional discovery, even though neither party contemporaneously believed fact discovery was open. ZTE also argues there should be no consequences for its failure to respond to standard interrogatories. And while ZTE attempts to criticize the cases cited by Fractus, its fails to cite ***a single case*** affirmatively supporting its own positions.

Some factual background is helpful. On the final day of fact discovery in the Eastern District of Texas, Fractus filed a motion to compel ZTE to produce additional sales data, including the underlying documents ZTE used to generate its data. Dkt. No. 98. While the motion was pending, after expert reports had been served but prior to expert depositions, the case was transferred to the Northern District of Texas. After the transfer, Fractus re-urged its motion to compel in the transferee court. Dkt. No. 145-2 at 1. The Court granted the motion, holding that ZTE's production was "insufficient as a reliable, credible response." Dkt. No. 179 at 4. It further ordered ZTE to "produce all documents reflecting or indicating sales of the accused devices for the time periods for which Fractus has asserted the Defendants infringed the patents in suit." *Id*. at 7.

In a Joint Notice Regarding Scheduling Conference, the parties stated that fact discovery

was closed, but expert depositions had yet to occur. Dkt. No. 175 at 2-3. After that filing, the Court issued a scheduling order which stated, "By June 14, 2019, all discovery, including discovery concerning expert witnesses, shall be completed." Dkt. No. 176 at 2. Pursuant to the parties' joint understanding that fact discovery did not reopen and that the Court's passing reference to "discovery" meant expert depositions, Fractus served written discovery directed exclusively at the topics addressed in its motion to compel (which was still pending at that time). ZTE App. at 86-88. ZTE confirmed its understanding was consistent with Fractus' position, taking the position that the Court's scheduling order did not reopen fact discovery except for the topics identified in the Order granting the motion to compel. App. at 158 ("Following transfer of the litigation to the Northern District, the Court did not enter an order reopening the discovery period or other wise indicate that the Parties cold issue new written discovery or deposition notices, other than as provided in the Court's Order on Fractus's motion to compel."). ZTE refused to provide new discovery on topics it believed to be outside the scope of the Court's order. *Id*. at 161 (Supplemental RFP No. 4). ZTE did not amend or supplement its interrogatory answers at that time. ZTE now seeks to rewrite history by arguing Fractus should have sought additional discovery during this time period.

II. NON-INFRINGING ALTERNATIVES

a. ZTE Cannot use the Motion to Compel as a Shield and a Sword

ZTE is attempting to use the issue of whether fact discovery reopened as both a shield and a sword. ZTE used the Court's scheduling order as a shield to prevent Fractus from obtaining fact discovery outside the confines of the order granting the motion to compel. It now seeks to use the fact discovery issue as a sword, criticizing Fractus for failing to obtain additional discovery relating to its purported non-infringing alternatives during that period. But this argument cuts both ways. Either fact discovery did not reopen, and the arguments ZTE makes in its brief are meritless, or fact discovery did reopen, and ZTE failed to amend an interrogatory answer it knew was

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