

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

FRACTUS, S.A.

Plaintiff,

v.

ZTE CORPORATION,
ZTE (USA), INC., and
ZTE (TX), INC.,

Defendants.

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CIVIL ACTION NO.
3:18-CV-2838-K

MEMORANDUM OPINION AND ORDER

Before the Court is the Defendants' Motion for Partial Summary Judgment (Doc. Nos. 190 & 197) (the "Motion") (The same motion was filed twice, once public and once under seal). After considering the briefs, the arguments of the parties, the evidence of record, and the applicable law, the Court **DENIES** the Motion. The Court also issues a clarification of a claim construction dispute implicated by the parties in their briefing of the Motion.

A. Background.

This is a patent infringement case in which the Plaintiff, Fractus, S.A. ("Fractus"), alleges that the Defendants, ZTE Corporation, ZTE (USA), Inc., and ZTE (TX), Inc. (collectively "ZTE"), have infringed a number of patents owned by Fractus. The patents in suit all relate to the invention of what the patents call "multilevel" antennas. The case originated in the Eastern District of Texas, Marshall Division and

was assigned to the Honorable Rodney Gilstrap. The Defendants moved that Court to transfer venue to the Northern District of Texas, which Judge Gilstrap granted. Before venue was transferred, the parties filed claim construction briefing in which the parties presented a number of patent claim phrases that the parties asserted required construction. Judge Gilstrap issued a Memorandum Opinion and Order (Doc. No. 93) which construed the disputed terms and phrases. This Court reviewed the claim constructions of Judge Gilstrap and adopted all agreed claim constructions and all but one disputed claim terms and phrases. Amended *Markman* Order (Doc. No. 159). The construction of the one disputed claim phrase that was not adopted by this Court was modified by the Court. *Id.* That construction is not relevant to the issues presented in the Motion.

B. The Motion.

In the Motion, ZTE raises several grounds as to why it is entitled to summary judgment of non-infringement for several accused devices. Three of the arguments assert that Fractus has not properly applied the construed terms of the patent claims correctly to the accused devices. According to ZTE, since Fractus' experts incorrectly applied these constructions, Fractus has no credible evidence to prove that certain accused devices meet these limitations. ZTE also argues that it is entitled to summary judgment on the issue of infringement under the doctrine of equivalents because Fractus has failed to present credible evidence to prove infringement on that ground.

Regarding ZTE's first asserted misapplication of a claim construction, ZTE asserts that it is entitled to summary judgment of non-infringement for 56 accused devices because these devices cannot be shown to meet the "multilevel structure," "structure for multi-band antenna," or "antenna element having a multi-band behavior" limitation of the asserted patent claims. Each asserted claim contains one of these limitations. The Court construed each of these phrases to mean:

A structure for an antenna useable at multiple frequency bands with at least two levels of detail, wherein one level of detail makes up another level. These levels of detail are composed of polygons (polyhedrons) of the same type with the same number of sides (faces) wherein most of the polygons (polyhedrons) are clearly visible and individually distinguishable and most of the polygons (polyhedrons) having an area of contact, intersection or interconnection with other elements (polygons or polyhedrons) that is less than 50% of the perimeter or area.

Amended *Markman* Order (Doc. No. 159). The dispute raised in the Motion is only over a portion of this construction, which is "polygons (polyhedrons) of the same type with the same number of sides (faces)."

ZTE argues that the "same type" requirement of this portion of the construction means that the polygons must all be triangles, squares, rectangles, rhombi, etc.. The Plaintiff and the Plaintiff's expert assign a different meaning to "same type," which essentially is that polygons having the same number of sides are of the same type regardless of whether or not they could otherwise be classified as different types. Under *Fractus*' understanding of "same type," a square and a rectangle would be the same type because they both have four sides. Under ZTE's understanding of "same type," a

square and rectangle would not be the same type. Even though they both have the same number of sides, they are different types of four-sided polygons.

When applied to the accused devices, these two different understandings of the meaning of “same type” result in very different conclusions on whether or not these accused devices meet this limitation. If they do not meet this limitation, they do not infringe the asserted claims. Fractus’ expert applied the understanding that same type means same number of sides to the accused devices. In this analysis, for 56 accused devices, Fractus’ expert identified a number of four-sided polygons in each antenna. But these four-sided polygons were not all squares, all rhombi, or all rectangles, etc. Instead they were combinations of different four-sided polygons.

According to the ZTE, this cannot be used to prove that these antennas infringe the asserted claims of the patents in suit because the polygons must all be squares, all rhombi, or all rectangles, etc.. For this reason, ZTE asserts that it is entitled to summary judgment on the issue of infringement for these 56 accused because there is no evidence to prove infringement.

In the Motion, ZTE also asserts that the Plaintiff’s expert also misapplied the constructions of “geometric element” and “polygon.” According to ZTE, this entitles ZTE to summary judgment on the issue of non-infringement because Fractus cannot prove that any of the accused devices meet these required limitations of the asserted claims. The Court construed “geometric element” and “polygon” to mean "a closed plane figure bounded by straight sides, further including circles and ellipses, where a

portion of a circle or ellipse is counted as one side." Amended *Markman* Order (Doc. No. 159). ZTE argues that Fractus' expert misapplied this construction when analyzing the accused devices because he identified polygons in antennas of the accused devices that were not "closed plane figures." Instead, the portions of the antennas identified contained curved surfaces, some of which are relatively sharp bends and some of which are slight or gradual bends. ZTE argues that since these are not flat, they are not "planer," as required by the claim construction. According ZTE, since they are not planer, they do not infringe the claims because they do not meet this claim limitation.

Fractus responds that this issue cannot be resolved on summary judgment because the issue raised by ZTE is an issue of fact and not an issue of law. According to Fractus, the issue is whether or not the identified polygons are sufficiently flat to be considered planer by a person of ordinary skill in the art. Fractus argues that its expert provided evidence as to how both the antennas with sharp bends and those with gradual curves could be considered to be planer by a person of ordinary skill in the art. For example, for the antennas having sharp bends, this portion of the antenna was divided into different polygons with each being planer and joined at the bent edge. For the antennas having gradual curves, the expert asserted that while these areas were not perfectly flat, they were not curved enough to not be considered planer and this curve did not affect the performance of the antenna. According to Fractus, this is a fact issue that prevents the Court from granting summary judgment on this issue.

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