UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-10793-RWZ

GTE MOBILNET SERVICE CORP.

v.

CELLEXIS INTERNATIONAL, INC., et al.

ORDER CONCERNING JUDGMENT

April 20, 2004

ZOBEL, D.J.

The parties had entered into an agreement in 1996 ("Settlement Agreement") to settle an admittedly baseless lawsuit by Cellexis International, Inc. ("Cellexis"). The Settlement Agreement provided, among other things, that Cellexis and its president, Douglas Fougnier, "shall not now or at any time in the future bring any Claims against GTE. . . involving alleged Intellectual Property as defined in Paragraph 1.7." The term "GTE" is defined in Paragraph 1.3 as "GTE Corporation and its subsidiaries, joint venturers and affiliates."

Cellexis later sold the rights to its prepaid wireless technology to a company called Freedom Wireless which obtained patents therefor. It is agreed that Freedom Wireless is covered by the Settlement Agreement and that the patents are "Intellectual Property" as defined therein. In March 2000, Freedom Wireless commenced suit against a number of defendants alleging infringement of its patents. In July of that year, one of the defendants, Bell Atlantic Mobile, after a series of transactions and transformations, became Cellco Partnership ("Cellco") and an affiliate of GTE. The

parties then disagreed whether the reference to “affiliates” included only entities that were such at the time the Settlement Agreement was executed or whether it extended to future affiliates. GTE brought the instant action asserting breach of contract and other claims which were eventually pared down to a request for declaratory judgment stating that the Settlement Agreement included future affiliates. Since resolution of that issue depended on the parties’ intent, the matter was tried to a jury. The jury decided that: 1) the parties did intend to include future affiliates, and 2) Cellco is an affiliate. There remains for decision the form of the judgment.

1. Plaintiff has voluntarily dismissed Counts I, II, and III of its Supplemental Complaint against Cellexis and all claims against Douglas Fougnier. The judgment should reflect these dismissals and will do so. Pursuant to Rule 41(a), the dismissals will be without prejudice. Fed. R. Civ. P. 41(a).

2. Defendant counterclaimed for a declaration that is largely the mirror image of that sought by plaintiff. Since the jury determined the meaning of the Settlement Agreement as advocated by plaintiff, the judgment will reflect dismissal of the counterclaims.

3. As noted above, the patent infringement action that ultimately brought about this lawsuit began against an entity which was not then an affiliate of GTE. Defendant contends that it is entitled to maintain the action against that entity, even though it has since become an affiliate, to recover damages for the period before March 2001, when Cellco was first brought into the patent infringement action. It relies on statements by plaintiff’s counsel and characterizes them as admissions. I do not read counsel’s statements as either admissions or as calling for judicial estoppel. Furthermore, under

Section Seven of the Settlement Agreement, defendants in this action covenanted and agreed "that they shall not now or at any time in the future bring any Claims against GTE. . . ." which encompasses Cellco. Since defendant's undertaking was not to sue, it is difficult to understand how Cellco can be forced into a lawsuit, even to defend the claim for the damages allegedly payable by its predecessor, or by Cellco itself for damages before it became a defendant. Indeed, this was the precise scenario that defense counsel posited in the cross-examination of Mr. Stimson who had negotiated the Settlement Agreement on behalf of GTE. Although the intent of the question was to show the absurdity of the position, the witness accepted it as an accurate interpretation of the Settlement Agreement. Defendant then argued the absurdity of this result to the jury, which rejected the argument. Accordingly, defendant's proposed Paragraph 4 will not be included in the judgment.

4. Attorneys' fees are properly reserved until later.

_____ /s/ Rya W. Zobel
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE