NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 15-3118 BLS 2

Notice sent
6/28/2016
to all parties.
(See PP#51)

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC. et al.[1]
Plaintiffs

(sc)

vs.

CLEARWIRE SPECTRUM HOLDINGS II LLC, CLEARWIRE LEGACY LLC and SPRINT SPECTRUM, L.P.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are non-profit entities that hold licenses from the Federal Communications Commission (FCC) to operate Educational Broadband Services (EBS) channels in certain geographic markets. The FCC permits EBS license holders like plaintiffs to grant access to a portion of their wireless communications spectrum to commercial wireless broadband providers. In 2006, plaintiffs granted this access to the defendants Clearwire Spectrum Holdings II, LLC and Clearwire Legacy, LLC (Clearwire) pursuant to certain written agreements. In 2013, the defendant Sprint Spectrum L.P. (Sprint), a shareholder in Clearwire's parent, acquired all the remaining stock in the parent, and began to use for its own commercial purposes those portions of the spectrum that plaintiffs had licensed to Clearwire.

[1] Chicago Instructional Technology Foundation, Inc., Denver Area Educational Telecommunications Consortium, Inc., Instructional Telecommunications Foundation, Inc., Portland Regional Educational Telecommunications Corporation, and Twin Cities Schools' Telecommunications Group, Inc.

On October 14, 2015, plaintiffs filed the instant action claiming that Clearwire had effectively sublicensed its use of the broadband spectrum to Sprint and that this was in breach of the agreements between Clearwire and plaintiffs, who had not given their written consent to such an arrangement as those agreements required. On November 9, 2015, this Court allowed plaintiffs' Motion for a Preliminary Injunction. In concluding that plaintiffs had demonstrated a substantial likelihood of prevailing on the merits, this Court agreed with the plaintiffs that the relevant agreements did indeed require plaintiffs' written consent and that such consent was not given. This case is now before the Court on plaintiffs' Motion for Partial Summary Judgment, which focuses on this single issue of consent. Defendants not only oppose that motion but have themselves moved for summary judgment. For the reasons that follow, this Court concludes that the plaintiffs' Motion must be **Allowed** and the defendants' Motion must be **Denied**.

BACKGROUND

The following facts are undisputed. Plaintiffs have provided access to commercial spectrum capacity of their broadband channels to Clearwire through two Master Royalty and Use Agreements ("MRUAs") dated July 31, 2006 and through various Individual Use Agreements ("IUAs"). The MRUAs govern the overall relationship among Clearwire and plaintiffs; the IUAs are the agreements that actually grant Clearwire access under specific spectrum licenses. In exchange for the use of this broadband capacity, plaintiffs receive economic royalties described in the agreements as "Access Rights Royalties." These royalties include access to Cost Free Education Accounts ("CFEAs"), which allow plaintiffs' end-users to receive wireless broadband service at no cost or low cost. The agreements protect plaintiffs' right to continue receiving these royalties by placing restrictions on Clearwire's ability to sublicense its right to use plaintiffs'

spectrum to other entities. Of particular relevance to the motions before the Court is Section 10 of the IUAs, discussed in more detail below.

In November 2008, the FCC approved Sprint's acquisition of approximately 51 percent of Clearwire's equity. Five years later, Sprint acquired the remaining equity in Clearwire -- a transfer of control that was approved by the FCC on July 5, 2013. In connection with the hearing before the FCC as to whether to approve the transfer of control from Clearwire to Sprint, plaintiffs expressed the hope that this could improve the services made available to their end users. Plaintiffs did not formally consent in writing to any sublicensing arrangement, however.

Following the FCC's approval, Sprint began to use Clearwire's spectrum (including that portion licensed from plaintiffs) pursuant to "spectrum lease agreements." [2] Sprint then announced its intention to transition from Clearwire's WiMAX network to an LTE network. Although this would represent an upgrade in service, there was at the same time a dispute among the parties as to the level of services that Sprint was required to provide -- a dispute which had a direct impact on the CFEAs described above. To allow the transition to move forward without an interruption of service, the parties entered into an "Interim Services Agreement" (the ISA). Exhibit 23 of Joint Appendix. By its terms, the ISA was temporary, and did not permanently modify the terms of the IUAs and MRUAs between Clearwire and the plaintiffs.

The transition to the LTE network was to be completed on November 6, 2015, at which time the old WiMAX-only sites would be closed. Closure of these sites would mean that the non-commercial customers of plaintiffs would no longer have internet access they had enjoyed through Clearwire. As the deadline approached, the parties remained at loggerheads over the

[2] The actual agreements are not part of the summary judgment record and are described only generally in Sprint's Form 10-K for 2013 filed with the Securities Exchange Commission in early 2014.

quality of services that Sprint was to provide, and Sprint indicated it would go ahead with the transition on its own terms. This lawsuit was filed and this Court has issued an order preventing the shutdown.

DISCUSSION

In support of their motion, plaintiffs argue that a) the plain language of the relevant contract -- specifically Section 10(b) of the IUAs -- requires Clearwire to obtain plaintiffs' written consent before it sublicenses spectrum rights, and b) such consent was not given. In opposition (and in support of their own motion), defendants argue among other things that Sprint's use of Clearwire's spectrum is not the type of arrangement that triggers Section 10(b). In the alternative, defendants assert that plaintiffs' words and actions over the years either amount to a waiver or the equivalent of consent even if Section 10(b) applied. This Court is persuaded that plaintiffs' position is the correct one.

Interpretation of the unambiguous terms of a written contract presents a question of law for this Court to decide. Royal-Globe Ins. Co. v. Craven, 411 Mass. 629, 632 (1992). The terms of the relevant agreements here are unambiguous. The starting point for this Court's analysis is Section 8 of the IUAs, which states that all third party rights to use plaintiffs' channel capacity (with certain exceptions not applicable here), "are to be handled in accordance with the assignment or sublicensing provisions" of the IUAs. It is undisputed that Clearwire has not assigned its rights to Sprint. Therefore, this Court looks to the sublicensing provisions, which are contained in Section 10(b).

Section 10(b) of the IUAs permits Clearwire to sublicense the use of Clearwire capacity only with the "advance written consent of Licensee" -- namely, the plaintiffs. Although it further states that such consent shall not be "unreasonably withheld," Section 10(b) specifically

permits the plaintiffs to withhold consent if Clearwire "does not covenant in writing in form and substance reasonably acceptable to Licensee to provide the same level of services, features and access to Licensee including without limitation all of the Access Rights Royalties...that it would have provided or been obligated to provide had such Clearwire capacity not been sublicensed." There is no claim that Clearwire has made any such covenant in writing, or any argument by the defendants that consent has been unreasonably withheld. There are only two exceptions to this consent requirement, neither of which is applicable here. Under Section 10(c), Clearwire may "sell, assign, sublease, delegate or transfer [the IUA] or any of its rights or obligations" to (1) "Clearwire Affiliates" or (2) "any entity that acquires all or substantially all of the assets of the Clearwire subsidiaries that hold the U.S. operating companies" if Clearwire provides prior notice. Neither exception applies here.

Clearly, Sprint is not a Clearwire "Affiliate," a term defined in Section 6(c) (i) of the IUAs. Defendants instead rely on the second exception, asserting that Sprint acquired Clearwire assets. This is precisely the same argument that the defendants made in opposing plaintiffs' request for injunctive relief and, for the same reasons, this Court concludes that it has no merit. Sprint purchased the equity in Clearwire so as to give it control over Clearwire's assets; it did not acquire the assets themselves. Thus, the spectrum lease rights at issue are still owned by Clearwire entities. The FCC Order approving the transaction makes that perfectly clear.

In an attempt to avoid this this result, defendants argue that the spectrum usage agreements between Clearwire and Sprint are not sublicenses at all. Specifically, they contend that Clearwire leased the plaintiffs' broadband capacity and that plaintiffs cannot therefore meet their burden of showing that the arrangement Clearwire has with Sprint to use this broadband capacity is a sublicense so as to trigger Section 10. But Section 8 of the IUAs expressly states

that any rights of a "third party" --which Sprint unquestionably is-- to use plaintiffs' channel capacity "are to be handled in accordance with the assignment or sublicensing provisions of this Agreement." Sprint clearly proposes to use plaintiffs' channel capacity. There being no assignment, the arrangement is necessarily viewed as a sublicense under the IUAs. To interpret it as the defendants suggest would render all of these provisions essentially meaningless.

Defendants argue in the alternative that plaintiffs have already given their consent, and in support, rely on the ISA and the written comments that plaintiffs submitted to the FCC. As noted above, however, the ISA was intended as a temporary stopgap measure to allow negotiations to continue between the parties without an interruption in service. See e.g. Preamble and Article II.A to ISA. It expressly states that it does not modify or amend either the MRUAs or the IUAs and does not constitute a waiver of any breach of such agreements. See Article V.B of ISA. As to the comments submitted to the FCC, they fall far short of constituting the kind of consent required by Section 10(b). Indeed, these comments were submitted before plaintiffs could have even known the details of how the defendants intended to proceed so as to allow Sprint to use plaintiffs' broadband capacity.

Finally, the defendants (as they did in opposing the plaintiffs' motion for a preliminary injunction) argues that the plaintiffs are essentially estopped or barred under the doctrine of laches from seeking to enforce a consent requirement because they did not object to a similar arrangement --referenced in the pleadings as an "MVNO" -- entered into between Sprint and Clearwire that began in 2008. That argument would appear to be a red herring; indeed, defendants do not make any real attempt to describe what the MVNO is or explain what it does. In any event, it is undisputed that the MVNO left untouched the "Access Rights Royalties" which are clearly the source of the parties' current dispute. Moreover, it is apparent that, in order

to be able to use plaintiffs' channel capacity, the defendants had to enter into a different arrangement -- described as "spectrum usage agreements." If the MVNO accomplished the same purpose, then such agreements would be entirely unnecessary.

For all the foregoing reasons, the Plaintiffs' Motion for Partial Summary Judgment is **ALLOWED** as to Count I of the Verified Complaint. The Preliminary Injunction remains in effect. The Defendant's Cross Motion for Summary Judgment is **DENIED**.

Janet L. Sanders
Justice of the Superior Court

Dated: June 24, 2016