

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Wi-LAN INC.,

Plaintiff,

v.

ALCATEL-LUCENT USA INC., *et al.*,

Defendants.

CIVIL ACTION No. 6:10-CV-521-LED

**REPLY IN SUPPORT OF THE SONY MOBILE
DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

Wi-LAN's Response fails to address the issue at the heart of Sony Mobile's Motion: i.e., whether Wi-LAN is entitled to discovery related to products it cannot accuse. Instead, it attempts to cloud the issue by: (1) criticizing Sony Mobile for insisting that Wi-LAN seek leave to supplement its infringement contentions; and (2) alleging that Sony Mobile has not complied with its discovery obligations. The first lacks merit on its face — compliance with the Patent Rules is not a trivial matter that parties are free to disregard. And as to the second, Wi-LAN's allegations regarding Sony Mobile's discovery are baseless. They are also belied by the fact that Wi-LAN has never filed a motion to compel any of the discovery it says was withheld, notwithstanding Sony Mobile's stated objections to the breadth of Wi-LAN's discovery requests with respect to products not identified in Wi-LAN's infringement contentions.

More importantly, there is no dispute that Wi-LAN seeks leave to accuse the Additional Products based on information Sony Mobile produced months ago. So the question is not whether Sony Mobile refused to comply with its discovery obligations, but whether Wi-LAN diligently sought leave to accuse the Additional Products after it received the information. As explained in Sony Mobile's Motion — and in the Response to Wi-LAN's belated Motion for Leave to Supplement Infringement Contentions (ECF No. 219) — it did not.

Because it did not, Wi-LAN does not have good cause to accuse the Additional Products. And because it cannot accuse them, it is not entitled to discovery related to them.

ARGUMENTS

A. Wi-LAN cannot ignore the rule requiring leave to supplement simply because it is a “matter of procedure.”

The Patent Rules unambiguously require that accused products may be added to infringement contentions “only by order of the Court, which shall be entered only upon a showing of good cause.” P.R. 3–6(b). Wi-LAN, however, seems to believe the need to seek leave

to supplement is an insignificant procedural matter that can be ignored with little consequence. It certainly downplays Sony Mobile’s opposition to accusing the Additional Products, describing it as merely procedural: “Sony Mobile chose to dispute *as a matter of procedure* whether Wi-LAN could specifically name [the Additional Products] as part of its amendment without leave” Response at 7 (emphasis added); *see also id.* at 8 (describing Sony Mobile’s opposition as being based on the “timing and procedural correctness of Wi-LAN’s infringement accusations”).

Sony Mobile disagrees that the failure to timely seek leave to supplement is merely a “procedural matter,” as parties disregard it at their peril. As this Court has held: “The Court will not allow litigants to . . . ignore its orders. The Patent Rules, as a part of the Court’s docket control order, are an order of this Court that litigants are not free to ignore.” *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 852 (E.D. Tex. 2004); *id.* at 853 (“Parties are not free to disregard rules of procedure or orders of this Court that require leave to amend or supplement.”).

In short, whether Wi-LAN has good cause to supplement its infringement contentions is not a trivial issue. If Wi-LAN cannot explain its undisputed delay in seeking leave to supplement, it cannot show good cause, and the Court should grant Sony Mobile’s Motion. Sony Mobile has been asking Wi-LAN for three months now to explain its delay — Wi-LAN has yet to provide that explanation.

B. There is still no explanation for Wi-LAN’s delay in seeking leave to supplement.

In its Response, without providing an explanation for the delay, Wi-LAN attempts to blame Sony Mobile for its own failure to timely seek leave to supplement. According to Wi-LAN, Sony Mobile caused the delay by “refus[ing] to comply with its discovery obligations.” Response at 8. Specifically, Wi-LAN claims that Sony Mobile “failed to update its interrogatory responses with the names of the additional smartphones at issue or otherwise make clear to Wi-LAN that its

January 20th production contained technical information relating to those smartphones.” *Id.* This explanation fails for at least two reasons.

First, Wi-LAN’s own lack of diligence is not attributable to Sony Mobile. Put plainly, “[a] diligent party attempts to compel discovery through the presiding court after opposing counsel unjustly refuses to provide responses.” *Smith v. BCE Inc.*, 225 Fed. Appx. 212, 217 (5th Cir. Feb. 19, 2007) (rejecting plaintiff’s argument that defendant’s discovery tactics prevented it from timely seeking leave to amend). In the very interrogatory responses identified by Wi-LAN, Sony Mobile specifically objected to the breadth of Wi-LAN’s discovery, stating, “Sony Ericsson objects to the definition of ‘Accused Product(s)’ as being overly broad and including products for which Wi-LAN has not complied with its obligations under the Court’s patent rules.” Wi-LAN never filed a motion to compel or even complained about Sony Mobile’s objection to the scope of discovery.

In fact, Wi-LAN did not even suggest — until now — that Sony Mobile’s discovery responses prevented it from identifying allegedly infringing products. Wi-LAN’s silence is further proof of its lack of diligence. *See Davis-Lynch, Inc. v. Weatherford Int’l, Inc.*, No. 6:07-cv-559, 2009 WL 81874, at *4 (E.D. Tex. Jan. 12, 2009) (“[T]o the extent that Davis-Lynch has been hindered [in promptly seeking leave to amend infringement contentions] by a lack of discovery, it has failed to diligently raise these issues with the Court.”).¹

Second, Sony Mobile has not refused to comply with its discovery obligations. Wi-LAN’s argument on this issue is based on an unfounded assumption — that Sony Mobile was responsible for determining whether unnamed products are reasonably similar to the products

¹ *See also Global Sessions LP v. Travelocity.com LP*, No. 6:10-cv-671, 2012 WL 1903903, at *4 (E.D. Tex. May 25, 2012) (“To the extent that Global Sessions’ efforts to amend its infringement contentions was hindered due to lack of discovery, it has failed to diligently raise the issue with the Court”).

specifically identified in Wi-LAN's original infringement contentions. This is not the case. As the court held in *Global Sessions*, simply accusing unnamed "reasonably similar" products does not put a defendant on notice of the patentee's claims. *Global Sessions*, 2012 WL 1903903, at *4–5. Here, Wi-LAN did not even claim that the Additional Products were reasonably similar until several months after Sony Mobile had produced technical information relating to those products. Thus, any failure is attributable to Wi-LAN — not Sony Mobile. *E.g.*, *Advanced Tech. Incubator, Inc. v. Sharp Corp.*, No. 2:07-cv-468, 2008 WL 4663568, at *5 (E.D. Tex. Oct. 21, 2008) (refusing to compel discovery related to products the plaintiff had not shown were reasonably similar to those accused in the infringement contentions).

Further, without adequate claim charts, even naming allegedly reasonably similar products is not sufficient. *Global Sessions*, 2012 WL 1903903, at *7. *Global Sessions* is instructive on this point. In that case, *Global Sessions* accused several websites allegedly operated by Amazon. *Id.* Although it identified many of the websites in its original infringement contentions, it charted only one of them. *Id.* Later, it sought leave to supplement the contentions with details related to the uncharted sites. *Id.* The court, however, denied leave based on *Global Sessions*'s lack of diligence — even though Amazon had notice of the accusations and even though the uncharted sites were reasonably similar to the one that was charted. *Id.* As the court explained, "the failure to chart the Amended Amazon Websites, even if originally disclosed, left Amazon guessing as to which portions of these websites corresponds to which element of the asserted claims." *Id.*

Here, Wi-LAN's claim charts provide no notice as to which portions of any accused product corresponds to which elements of an asserted claim. Rather than chart accused products, Wi-LAN chose to chart specifications for implementing HSPA in the 3GPP standard. Courts in this district consistently hold that such contentions fail to satisfy the notice requirement of the

Patent Rules. *See, e.g., SmartPhone*, 2012 WL 1424173, at *4 (“[I]t is improper to simply chart to standards . . . to illustrate how representative products satisfy claim limitations.”); *Connectel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 528 (E.D. Tex. 2005) (holding that the plaintiff was “not in compliance with Patent Rule 3–1” because its claim charts did “not refer in their text to a single structure, process, algorithm, feature or function of any accused product”). Sony Mobile was therefore left to guess whether Wi-LAN might consider any additional products to be infringing, and it was not obligated to do so.² *Global Sessions*, 2012 WL 1903903, at *7.

In sum, Wi-LAN’s claim that Sony Mobile refused to comply with its discovery obligations not only fails to excuse its lack of diligence, it is also unfounded. Accordingly, there is no explanation for its delay in seeking leave to supplement.

C. Wi-LAN should not be allowed to obtain discovery related to products it cannot accuse.

Wi-LAN’s Response does not address, much less attempt to refute, Sony Mobile’s contention that a patentee is not entitled to discovery related to products that have not been, and cannot be, accused. Accordingly, it is undisputed that if the Court denies Wi-LAN leave to accuse the Additional Products, it should also bar Wi-LAN from obtaining discovery for them.

CONCLUSION

For the reasons set forth above and in its Motion, Sony Mobile respectfully renews its request that the Court prevent Wi-LAN from obtaining discovery related to products that Wi-LAN could have accused — but chose not to — based on information it received in September 2011 and January 2012.

² Wi-LAN’s contention that Sony Mobile knew the Additional Products were accused because it produced technical information about them is misguided. Sony Mobile produced such information about all of its smartphones in compliance with its duty to produce information “reasonably calculated to lead to the discovery of admissible evidence,” not because it assumed Wi-LAN believed all of those products were infringing. Fed. R. Civ. P. 26(b)(1).

Dated: August 20, 2012

Respectfully submitted,

/s/ Richard L. Wynne, Jr.

Bruce S. Sostek (Lead Attorney)

State Bar No. 18855700

Bruce.Sostek@tklaw.com

Richard L. Wynne, Jr.

State Bar No. 24003214

Richard.Wynne@tklaw.com

Matthew P. Harper

State Bar No. 24037777

Matt.Harper@tklaw.com

THOMPSON & KNIGHT LLP

1722 Routh Street, Suite 1500

Dallas, Texas 75201

214.969.1700

214.969.1751 (facsimile)

ATTORNEYS FOR DEFENDANTS

SONY MOBILE COMMUNICATIONS AB and

SONY MOBILE COMMUNICATIONS (USA), INC.

CERTIFICATE OF SERVICE

I certify that the foregoing document was served electronically on all counsel of record on August 20, 2012.

/s/ Richard L. Wynne, Jr.

Richard L. Wynne, Jr.

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