

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

WI-LAN INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
ALCATEL-LUCENT USA INC.;	§	
TELEFONAKTIEBOLAGET LM	§	Civil Action No. 6:10-cv-521-LED
ERICSSON; ERICSSON INC.; SONY	§	
MOBILE COMMUNICATIONS AB; SONY	§	JURY TRIAL DEMANDED
MOBILE COMMUNICATIONS (USA) INC.;	§	
HTC CORPORATION; HTC AMERICA,	§	
INC.; EXEDEA INC.; LG ELECTRONICS,	§	
INC.; LG ELECTRONICS MOBILECOMM	§	
U.S.A., INC.; LG ELECTRONICS U.S.A.,	§	
INC.	§	
	§	
Defendants.	§	

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**WI-LAN INC.’S REPLY IN SUPPORT OF  
MOTION FOR LEAVE TO SUPPLEMENT INFRINGEMENT CONTENTIONS**

**I. Good Cause Exists for Wi-LAN’s Supplementation.**

Wi-LAN Inc. (“Wi-LAN”) demonstrated good cause in its motion for leave (ECF No. 209, (“Pl.’s Mot.”)) to supplement its infringement contentions with the names of the specific Sony Mobile and HTC smartphones identified in the motion. Sony Mobile’s and HTC’s (“defendants”) arguments in response do not contest the undisputed facts:

1. Wi-LAN’s Original Infringement Contentions categorically accused any Sony Mobile or HTC smartphone “complying with at least 3GPP rel. 5, et seq., HSDPA, HSUPA, or HSPA” and specifically named smartphones Wi-LAN knew of at the time from the review of publicly available documents. (Pl.’s Mot., Ex. 1 at 4).

2. Neither Sony Mobile nor HTC identified the “Additional Products” now at issue in response to Wi-LAN’s December 2011 interrogatories asking that each defendant “state all names You have used to refer to the Accused Products,” where “Accused Products” was clearly defined to include not only the smartphones accused in the Original Infringement Contentions but also “all other products which are reasonably similar in structure and/or operation.” (Pl.’s Mot., Ex. 6 at 18-19; Ex. 7 at 11-12).
3. Despite defendants’ failure to properly respond to Wi-LAN’s interrogatories, Wi-LAN was able to specifically identify the Additional Products by name from its continuing review of public documents and productions of defendants’ documents occurring as late as January 20, 2012. Wi-LAN identified the Additional Products to defendants in writing on May 10, 2012. (Pl.’s Mot., Ex. 2 at 14, 16). Thus, since at least May 10, 2012, both Sony Mobile and HTC have known the specific product names of each of the Additional Products Wi-LAN accuses of infringement. (*Id.*; ECF. No. 219 (“Defs.’ Resp.”), Ex. E).
4. Wi-LAN served amended infringement contentions specifically naming the Additional Products on June 14, 2012 (Pl.’s Mot., Ex. 3 at 4-5), having informed the defendants on May 31, 2012, that Wi-LAN believed such an amendment permissible without leave pursuant to PR 3-6(a) because the additional smartphones were already within the accused products described in Wi-LAN’s Original Infringement Contentions. (Defs.’ Resp., Ex. F).
5. Rather than acknowledge then that the Additional Products were and had been properly part of this case, defendants chose to spend from May to July arguing whether Wi-LAN’s May 10th identification was quick enough, and whether Wi-

LAN's addition of specific names for products that had been accused all along was procedurally acceptable as part of amendments without leave per PR 3-6(a) following claim construction. (Pl.'s Mot., Ex. 4).

After their past and continuing discovery obfuscation and months of delay, Sony Mobile and HTC now claim it is Wi-LAN that has not been diligent. The above facts belie that assertion. Wi-LAN timely identified the names of the additional smartphones in May, despite defendants' deficient discovery responses. Wi-LAN served what it believes are procedurally proper and operative infringement contentions adding those Additional Products in June. Having watched defendants drag out a procedural debate and refuse proper discovery necessary for complete depositions and expert reports for months, Wi-LAN filed its motion for leave to put the issue to rest. As described in its Motion, Wi-LAN has been diligent and demonstrated good cause for the inclusion of the Additional Products in its June 14th Amended Infringement Contentions. Wi-LAN's motion should be granted.

**A. Wi-LAN Has Been Diligent.**

First, contrary to defendants' assertions, diligence is only *one* of the four factors the Court considers in assessing whether leave to amend contentions should be granted; no single factor is dispositive. *See, e.g., MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-cv-472-LED, 2008 U.S. Dist. LEXIS 78301, \*6-7 (E.D. Tex. Oct. 6, 2008); *Arbitron, Inc. v. Int'l Demographics, Inc.*, No. 2:06-CV-434, 2009 U.S. Dist. LEXIS 3191, at \*5-6 (E.D. Tex. Jan. 16, 2009). Second, Wi-LAN acted diligently, specifically naming the Additional Products no later than May 10<sup>th</sup> and serving amended contentions on June 14<sup>th</sup>, despite defendants' failure to provide adequate responses to early interrogatories that would have allowed Wi-LAN to accuse the Additional Products more quickly. Thus, defendants' complaint that Wi-LAN's May 10th identification—

only months after Sony Mobile's late January production—was not fast enough rests largely on their own shoulders.<sup>1</sup> This factor supports the grant of leave.

**B. Unlike Wi-LAN, Defendants Face No Prejudice.**

Having known, by description, since the case started, and by name, since May 10th that Wi-LAN accused the Additional Products, defendants weakly argue that they are unfairly prejudiced by being forced to litigate this case on the merits, rather than by being allowed to manipulate the discovery process to exempt similar smartphones from judgment at this time. Defendants no doubt will argue in any subsequent case that Wi-LAN's claims against the Additional Products under the patents-in-suit were merged into the judgment in this case and barred, preventing any redress for the infringement. *See Orion IP, LLC v. Home Depot USA, Inc.*, No. 2:05-CV-603-LED, ECF No. 42 (E.D. Tex. Oct. 7, 2005). Thus, Wi-LAN potentially faces severe prejudice for any claims under the patents-in-suit against the Additional Products if not redressed in this suit.

Recognizing they face no prejudice, defendants argue in a response to a motion for leave to supplement contentions with additional products that Wi-LAN's infringement contentions provide insufficient notice of its infringement theory. Notably, defendants have never moved the Court for any relief regarding the sufficiency of Wi-LAN's contentions. Indeed, those same contentions were sufficient for Sony Mobile to determine that documents regarding its Additional Products were responsive when it produced some such documents in late January of

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<sup>1</sup> HTC's assertion that some of its Additional Products were publicly available prior to service of the original contentions still does not excuse HTC's failure to properly respond to the early interrogatories designed to identify any accused and reasonably similar products that might have been missed by Wi-LAN's investigation of public documents. No plaintiff can reasonably be expected to identify all possible infringing products solely upon a review of the near infinite space of the public domain. Non-evasive responses to proper discovery requests should be a reliable solution for this inherent limitation. Here, defendants chose evasive responses to frustrate fulsome and timely discovery, yet now complain about the delay they caused.

this year. And those same contentions have allowed this case to develop through claim construction and presumably will remain operative for the originally-named products for the remainder of the case and trial.<sup>2</sup> Accordingly, the late timing of defendants' complaint, as well as the fact that the case has progressed according to schedule, belies any argument that defendants lack notice of Wi-LAN's infringement theories. Requiring defendants to respond regarding the Additional Products, which have been known to them for many months, on the same infringement theory as the other smartphones that defendants agree are part of the case presents no prejudice. Accordingly, this factor also supports the grant of leave.

**C. No Continuance Is Necessary.**

This case is more than eight months away from its April 2013 trial setting. The naming of the additional smartphones, which defendants must have known were part of this case long before Wi-LAN specifically identified them by name on May 10th, creates no cause for a continuance and only minimally affects the issues that will be tried. Accordingly, this factor also supports the grant of leave.

**II. Wi-LAN's Motion for Leave To Add The Additional Products Should Be Granted.**

Wi-LAN has diligently prosecuted this case and has shown ample time remains to allow inclusion of the Additional Products in this case. For the reasons stated in Wi-LAN's motion and in this reply, the motion for leave to supplement infringement contentions should be granted.

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<sup>2</sup> As for defendants' complaint that Wi-LAN identified the Additional Products post-claim construction, this Court has properly recognized that, "A claim is construed in light of the claim language, the other claims, the prior art, the prosecution history, and the specification, not in light of the accused device." *Eon Corp. IP Holdings, LLC v. Sensus USA, Inc.*, 741 F. Supp. 2d 783, 796 (E.D. Tex. 2010). The Additional Products stand accused of based on the same infringement theory as the smartphones named and charted in Wi-LAN's Original Infringement Contentions. Inclusion of these smartphones does not change the asserted claims against Sony Mobile or HTC or any issues of invalidity or enforceability.

Dated: August 24, 2012

Respectfully submitted,

By: /s/ Ajeet Pai

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing "REPLY IN SUPPORT OF MOTION FOR LEAVE TO SUPPLEMENT INFRINGEMENT CONTENTIONS" was filed electronically in compliance with Local Rule CV-5(a) on August 24, 2012. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Ajeet Pai