

**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

**THE SONY MOBILE AND HTC DEFENDANTS' SURREPLY TO WI-LAN INC.'S
MOTION FOR LEAVE TO SUPPLEMENT INFRINGEMENT CONTENTIONS**

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Wi-LAN's argument fails for three reasons. **First**, Wi-LAN cannot show good cause to supplement without first showing diligence. **Second**, merely identifying the Additional Products in May 2012, without seeking leave to supplement, is not proof of diligence. And **third**, Sony Mobile and HTC could not have known, as Wi-LAN presumes, that Wi-LAN would attempt to retroactively accuse the Additional Products before it first identified them in May 2012. Wi-LAN's Reply skips over Defendants' factual and legal arguments in favor of unfounded accusations and a final effort to shift the blame for its tardiness onto the Defendants — as if Defendants should have accused their own products — leaving no clear basis for finding good cause to supplement at this late stage of the case.

ARGUMENTS

A. **Wi-LAN's lack of diligence precludes a showing of good cause.**

Wi-LAN contends it can show good cause to supplement without diligence. Reply at 3. But neither of the two cases it cites on this issue supports such a contention. To the contrary, *Arbitron* held “[a] good cause analysis on a motion to amend **must** include a determination of diligence on the part of the movant.” *Arbitron, Inc. v. Int’l Demographics, Inc.*, No. 2:07-cv-434, 2009 WL 166555, at *1 (E.D. Tex. Jan. 16, 2009) (emphasis added). And in *MacLean-Fogg*, the court considered the issue of prejudice only after finding the plaintiff “demonstrated diligence” and “was diligent in requesting discovery in furtherance of its intention to supplement.” *McLean-Fogg Co. v. Eaton Corp.*, No. 2:07-cv-472, 2008 WL 4601476, at *2 (E.D. Tex. Oct. 6, 2008).

Further, Wi-LAN does not even address, much less distinguish, the cases cited in Defendants' Response holding that good cause to amend or supplement infringement contentions “**requires** a showing of diligence.” *O2 Micro Int’l, Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (emphasis added); *see also S&W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003) (“The good cause standard **requires** the party

seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.” (emphasis added)); *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 851 (E.D. Tex. 2004) (holding that “the good cause standard unambiguously centers on . . . diligence” and that a party seeking leave to amend “must show that ‘the deadlines cannot reasonably be met despite the diligence of the party needing the extension’”) (quoting *S&W Enters.*, 315 F.3d at 535). In light of this precedent, Wi-LAN’s delay of at least six months (and in many cases much longer) before seeking leave to supplement precludes a finding of diligence.

B. Wi-LAN is not entitled to supplement without leave.

Wi-LAN says that it acted diligently by naming the Additional Products in May and supplementing its infringement contentions, without leave to do so, in June. Reply at 3. But under Patent Rule 3–6(b), a party must seek leave to accuse additional instrumentalities. Nevertheless, Wi-LAN continues to insist that it properly served the supplemental contentions without leave. Reply at 3 (“Wi-LAN served what it believes are procedurally proper and operative infringement contentions adding those Additional Products in June.”). Of course, Wi-LAN provides no authority for that assertion, which is directly contrary to the express language of P.R. 3–6(a).

Accordingly, there is no basis for finding that Wi-LAN acted diligently.

C. Wi-LAN’s original infringement contentions do not accuse the Additional Products.

Finally, Wi-LAN tries to shift the blame for its delay onto Sony Mobile and HTC by asserting that they should have known that its original contentions suggested an intent to accuse the Additional Products with the catchall, “any Sony Mobile or HTC smartphone ‘complying with at least 3GPP rel. 5, et seq., HSDPA, HSUPA, or HSPA.’” Reply at 1. According to Wi-LAN, this broad language shifted the burden of identifying accused products to Sony Mobile and

HTC, and Wi-LAN now complains that their interrogatory responses should have filled in the blanks of Wi-LAN's infringement contentions. But the Additional Products were all publicly known before those interrogatories were answered — in fact, many were being marketed even before Wi-LAN filed its original infringement contentions. And in their interrogatory responses, both Sony Mobile and HTC objected to Wi-LAN's definition of “accused products” and specifically limited the scope of their responses to the products identified in Wi-LAN's infringement contentions. Wi-LAN did not seek to compel a broader response. Indeed, while those interrogatory responses were served in January 2012, Wi-LAN did not complain about them until now. Wi-LAN's argument thus boils down to an assertion that one unexplained delay — its delay in complaining about the interrogatory responses — justifies another unexplained delay — its delay in bringing the present motion. This is certainly not proof of diligence.

Wi-LAN's argument also fails because its original infringement contentions do not provide sufficient notice of Wi-LAN's infringement theories. Wi-LAN does not deny that it failed to “specifically explain how each accused instrumentality meets the asserted claim elements.” *Eon Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-cv-116, 2010 WL 346218, at *3 (E.D. Tex. Jan. 21, 2010). It cannot, because Wi-LAN's claim charts link the asserted claim elements to 3GPP standard specifications and general textbook materials, not to actual products.

Such charts do not meet the notice requirement of the Patent Rules, as Wi-LAN tacitly admits by not distinguishing the cases on this issue cited in Defendants' Response.¹ Under those

¹ *Global Sessions LP v. Travelocity.com LP*, No. 6:10-cv-671, 2012 WL 1903903, at *4 (E.D. Tex. May 25, 2012) (all accused products must be separately charted, even if they are reasonably similar to products that have already been charted); *id.* (merely stating that products are reasonably similar “does nothing to notify [the accused infringer] as to which functionality of each of the [accused products] correspond to which elements of the asserted claims.”); *SmartPhone Techs., LLC v. HTC Corp.*, No. 6:10-cv-580, 2012 WL 1424173, at *4 (E.D. Tex. Mar. 16, 2012) (“[T]he Court finds it troubling that SmartPhone's original infringement

cases, Sony Mobile and HTC had no notice that Wi-LAN contended the Additional Products might be implicated before Wi-LAN first identified them in May. *See, e.g., Global Sessions*, 2012 WL 1903903, at *5 (“[M]erely naming the accused websites gives Travelocity little to no notice of how each of the Amended Travelocity Websites infringe the patents-at-issue.”).

Wi-LAN, on the other hand, had the information it needed to accuse the Additional Products many months before it first identified them. And even after it finally identified these products in May, it refused to comply with the Court’s rules requiring a motion for leave to supplement until late July. Throughout this two-month break, Wi-LAN refused to explain its delay. That is, until it apparently realized that although this motion is — in its words — “not necessary,” it would be too risky to flout the Local Patent Rules so openly without at least asking for permission. Opening Br. 10.

CONCLUSION

Because Wi-LAN still offers no explanation for its delay in seeking leave to supplement its infringement contention, it has failed to make the necessary showing of good cause. Sony Mobile and HTC therefore respectfully renew their request that the Court deny its motion for leave to assert claims against the Additional Products.

contentions used representative devices to demonstrate the infringement theories to be applied to all accused products”); *id.* at *4 (“[I]t is improper to simply chart to standards . . . to illustrate how representative products satisfy claim limitations.”) (citing *Linex Tech., Inc. v. Belkin Int’l, Inc.*, 628 F. Supp. 2d 703, 708 (E.D. Tex. 2008)); *Linex*, 628 F. Supp. 2d at 708 (“While using [a] standard as the starting point for infringement is permissible,” a plaintiff must still link each accused product to the standard.); *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”).

Dated: September 4, 2012

Respectfully submitted,

/s/ Richard L. Wynne, Jr.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served electronically on all counsel of record on
September 4, 2012.

/s/ Richard L. Wynne, Jr.

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