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

WI-LAN INC.,	§	
	§	
Plaintiff,	§	Civil Action No. 6:10-cv-521-LED
	§	
v.	§	JURY TRIAL DEMANDED
	§	
ALCATEL-LUCENT USA INC.; *et al.*	§	
	§	
Defendants.	§	
	§	

WI-LAN INC.'S SUR-REPLY TO HTC'S MOTION TO COMPEL PRODUCTION OF INTERNAL DOCUMENTS WITHHELD BY WI-LAN INC. ON THE GROUND OF ATTORNEY-CLIENT PRIVILEGE

HTC has known for nearly a year that Wi-LAN takes the unsurprising position that communications with in-house counsel concerning legal matters are privileged. The time for HTC to seek discovery, if it disagreed, has long since passed. For the reasons set forth below, as well as those in Wi-LAN's Response (Dkt. No. 262), HTC's Motion should be denied.

I. HTC's Motion Should Be Denied As Untimely.

HTC's Reply (Dkt. No. 279) in support of its Motion (Dkt. No. 240) fails to dispute—because it cannot—that HTC has been in possession of Wi-LAN's original privilege log since January 6, 2012, and Wi-LAN's amended privilege log since August 1, 2012. The types of documents it challenges were undisputedly apparent on Wi-LAN's original privilege log in January 2012, yet HTC delayed filing a motion to compel until no possibility existed for the matter to be resolved before the close of fact discovery. As a result, HTC now belatedly asks the

Court to review *in camera* some 1,600 documents[1] or appoint a special master to do so *more than a month* after the close of fact discovery.

The request HTC makes for the first time in its Reply—that the Court take the extraordinary step of appointing a special master long after discovery has closed—would unfairly prejudice Wi-LAN by distracting from trial preparation in the months immediately before trial. Notably, HTC makes no effort to ameliorate this prejudice or demonstrate that appointment of a special master at this point in the case and under these circumstances is consistent with Fed. R. Civ. P. 53(a)(1). HTC also fails to justify the expense and accompanying delay that appointing a discovery master in these final pretrial stages poses to Wi-LAN's interest in seeing this case decided on the merits, as scheduled, and without unnecessary expense. *See* Fed. R. Civ. P. 53(a)(3).

More importantly, appointing a special master at this late date would unduly burden the Court by requiring selection of a master, completion of the special master's review, issuance of a report and recommendation by the master, time for party objections to the report and recommendation, and then review by the Court of any report and recommendation and party objections regarding 1,600 documents, all shortly before trial and long outside of the time contemplated by the Court's Discovery Order. This process risks backing up the Court's trial docket, all because HTC chose to delay raising privilege issues.

Finally, HTC makes its request despite there being no new facts, and no new circumstances, that would have prevented it from making such a request months ago. This case has been pending for over two years and trial is set for April 8, 2013, only four months away. Because granting the Motion at this late hour would "disrupt the Court's schedule, and

[1] HTC failed to identify these documents in its Motion, instead identifying them specifically for the first time in its Reply after the close of fact discovery.

communicate the unintended message to others that the Court's deadlines are not reliable," Wi-LAN respectfully requests that the Court deny HTC's Motion as untimely. *Taylor v. Turner Industries Group, LLC*, No. 2:11-cv-57-JRG, slip op. at 3 (E.D. Tex. Sept. 17, 2012).

II. HTC's Motion Remains Wrong On the Merits.

Should the Court choose to consider HTC's Motion, it should be denied on the merits. The primary argument made in its Motion—that a company that engages in patent licensing cannot claim attorney-client privilege over any legal advice provided by in-house counsel—is unsupported, and HTC's Reply fails to direct the Court to controlling precedent for that proposition. (*See* Wi-LAN's Response (Dkt. No. 262) at 6–7.) Nor does HTC attempt to distinguish *CEATS, Inc. v. Continental Airlines, Inc.*, No. 6:10-cv-120-MHS, slip op. at 9-10 (E.D. Tex. Jan. 27, 2012), where the Court squarely rejected a similar argument regarding work product immunity.

Instead, HTC simply reiterates its contention that because Wi-LAN's in-house counsel (like in-house counsel at many small companies) sometimes carry out business duties in addition to their legal roles, Wi-LAN's assertions of privilege over internal communications reflecting legal advice are *per se* improper. But Wi-LAN has not asserted a blanket privilege over documents and communications involving its in-house counsel. (*See* Response at 2, 8–10.) Rather, Wi-LAN has provided extensive document discovery, and extensive deposition testimony, concerning non-privileged matters—including production of settlement and licensing communications with third parties—while withholding internal communications reflecting the provision of legal advice. (*Id.*) HTC's suggestion that such legal advice is not privileged merely because it comes from in-house counsel or in support of licensing activities is without merit.

CONCLUSION

HTC's untimely motion seeks documents and communications reflecting privileged information. Accordingly, for the reasons stated above, as well as the reasons in Wi-LAN's Response (Dkt. No. 262), Wi-LAN respectfully requests that the Court deny HTC's Motion to Compel.

Dated: December 20, 2012

Respectfully submitted,

By: /s/ *Ajeet P. Pai*

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on this the 20th day of December, 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). All other counsel of record were served by e-mail on this day.

By: /s/ *Ajeet P. Pai*

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