IN 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	§	
	§	

PLAINTIFF WI-LAN'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE TWO LETTER BRIEFS REQUESTING PERMISSION TO FILE CERTAIN MOTIONS

The Court's deadline to file letter briefs concerning motions for summary judgment was set in this case well over a year ago, and was later extended by an additional three weeks. Despite this long-standing deadline and extension of time, Defendants failed to timely file letter briefs *or even ask the Court for an extension of time to do so* until nearly *two months* after the relevant deadline had passed. Even at this late date—two months after the deadline for letter briefing, and three weeks after the deadline for dispositive motions itself—Defendants still have not filed one of the two letter briefs for which they seek leave to file. Defendants offer no excuse for their failure to adhere to the Court's Docket Control Order and Standing Order Regarding Letter Briefs. Defendants' unjustified attempt to resurrect a long-passed deadline unfairly prejudices Wi-LAN in the months before trial. Because Defendants have not met their burden to show good cause, Wi-LAN respectfully requests that Defendants' Motion for Leave to File Two Letter Briefs Requesting Permission to File Certain Motions (Dkt. No. 277) ("Motion") be denied.

I. STATEMENT OF FACTS

A. Both the Court and the parties recognized that the Standing Order governs this case.

On August 12, 2011, this Court entered its Standing Order Regarding Letter Briefs "[i]n order to increase the efficiency of cases proceeding to trial, decrease trial costs for the parties, save time for the Court and parties, and sharpen the Court's focus on the dispositive and most important issues." That familiar Order requires parties to file letter briefs sixty days before the deadline for filing motions for summary judgment or *Daubert* motions. Under the original Docket Control Order entered in this case, the deadline for motions requiring a hearing, including motions for summary judgment, was November 16, 2012. (Dkt. No. 99.) Letter briefs seeking permission to file summary judgment or *Daubert* motions were therefore due under the Standing Order no later than September 17, 2012.

The parties clearly understood that this case was not exempt from the Court's Standing Order. As Defendants concede in their Motion, "both sides in this case filed several letter briefs relating to motions for summary judgment" well before September 17, 2012. (Mot. at 3; *see* Dkt. Nos. 132, 133, 137, 138.) Indeed, in an Order issued more than a year ago, the Court granted permission to file certain motions for summary judgment. (Dkt. No. 143.) In doing so, the Court expressly confirmed that this case is subject to "a standing order requiring leave of the Court before any motion for summary judgment may be filed." (*Id.* at 1.)[1]

[1] Despite the fact the parties actually filed letter briefs under the Standing Order in this case long before the October 8, 2012 deadline, Defendants' Motion states that on December 7, 2012, "Wi-LAN, for the first time, asserted that the parties had been operating under the Standing Order Timing Deadline." (Mot. at 4–5.) Respectfully, a party is not required to "assert" that an Order of the Court governs the conduct of the parties. That much should be clear, especially where the Court has expressly stated that fact. (Dkt. No. 143.)

B. Although the September 17, 2012 deadline to file letter briefs was extended by three weeks to October 8, 2012, Defendants did not file letter briefs.

On August 2, 2012, with more than a month remaining before the deadline to file letter briefs, the parties jointly moved the Court to extend several deadlines set by the Docket Control Order. These deadlines included the deadline for Dispositive Motions. The Court extended that deadline by three weeks from November 16, 2012, to December 7, 2012. (Dkt. No. 214.[2]) Thus, the deadline for filing letter briefs was also extended by three weeks from September 17, 2012, to October 8, 2012. At no point did the dispositive motions deadline contained in the Docket Control Order change in a manner that would have placed the date for letter briefing in the past or otherwise created an impossible deadline.

Following the Court's Order on August 2, 2012, the parties proceeded to serve expert reports. Declaration of Syed Fareed ("Fareed Decl.") at ¶ 3. Wi-LAN timely served its opening expert report regarding infringement on September 21, 2012, and Defendants likewise served their opening report regarding invalidity on that day. Wi-LAN timely served its opening expert report regarding damages on October 3, 2012, and timely served a supplemental expert report regarding infringement on October 5, 2012. Thus, in advance of the Court's October 8, 2012 deadline for submitting letter briefs, Defendants were in receipt of all expert reports for issues upon which Wi-LAN bears the burden of proof, as well has having completed and served their own expert report concerning invalidity.

[2] Because one entry in the motion contained a typographic error and referred to 2012 instead of 2013, the Court issued a second order on August 8, 2012, correcting that date. (Dkt. No. 216.)

C. Long after the extended deadline to file letter briefs had passed, Defendants for the first time attempted to move the deadline.

Although opening expert reports had been served in advance of the October 8, 2012 deadline to file letter briefs set by the Docket Control Order and Standing Order, Defendants failed to file letter briefs. Moreover, as Defendants admit in their Motion, at no point did Defendants request that Wi-LAN agree to an extension of time to file letter briefs as the October 8 deadline approached. (Mot. at 4.) Nor did Defendants request that Wi-LAN agree to revive the passed deadline in the weeks and months that followed. (*Id*. at 4.) Indeed, despite the parties having agreed on at least seven occasions between October 8 and November 20th to seek the Court's leave to adjust other deadlines, at no point during that time did Defendants inform either Wi-LAN or the Court that they wished to move the deadline that they had failed to meet. (*See, e.g.*, Dkt. Nos. 224, 227, 229, 237, 243, 244, and 245.)

It was not until November 20, 2012, the Tuesday before Thanksgiving, at the end of a meet-and-confer concerning expert depositions—one and a half months after the extended letter briefing deadline had passed and just over two weeks before the dispositive motions deadline itself—that Defendants for the first time informed Wi-LAN that they intended to file letter briefs regarding summary judgment and *Daubert* motions. (Fareed Decl. at ¶ 4.) On November 26, 2012, Defendants sent Wi-LAN an extensively revised Docket Control Order, which proposed reviving the long-passed letter briefing deadline and moving the dispositive motion deadline. (Fareed Decl. at ¶ 5.) At a meet and confer on November 30, 2012, Wi-LAN explained that it was unable to accept Defendants' proposal because (among other reasons) it would unduly compress the pre-trial schedule and because Wi-LAN had relied upon the dispositive motion dates contained in the Court's Docket Control Order. (Fareed Decl. at ¶ 6.)

D. On the deadline to file dispositive motions themselves, Defendants sought leave of Court to file letter briefs—then failed to file letter briefs.

On December 7, 2012, sixty days after the deadline for filing letter briefs had passed, Defendants finally filed a Motion requesting leave of Court to submit two untimely letter briefs.[3] Despite the clear requirements of Local Rule CV-7(k), which requires that motions for leave to file a document be accompanied by the document sought to be filed, Defendants did not file the letter briefs themselves. Thus—despite having served their expert report regarding invalidity more than two months earlier—Defendants sought to start the letter briefing process itself even later than December 7, after the extended deadline for actually filing dispositive motions itself had expired. Defendants then waited until December 14th file an untimely letter brief regarding an invalidity summary judgment motion. (Dkt. No. 280.) Defendants *still* have not filed the second of their proposed letter briefs, which they themselves admit relates to an "as yet undetermined Daubert motion." Defendants' second letter brief is "as yet undetermined" despite the fact that Defendants have been in possession of Wi-LAN's expert reports for months and have completed the depositions of Wi-LAN's experts. (Mot. at 6.)

II. ARGUMENTS

Defendants have failed to show that good cause exists to excuse Defendants' failure to meet the deadline set forth in the Court's Docket Control Order. Moreover, Defendants' delay

[3] The Ericsson and Sony Mobile separately seek leave to file a new summary judgment motion concerning a contract issue, and appear to join Defendants' motion with regard to that issue. (*See* Mot. at 5–6 n.2; Dkt. Nos. 275, 276.) Wi-LAN opposes Ericsson and Sony Mobile's Motion for Leave for the reasons stated in this response as well as the reasons stated in Wi-LAN's separate response. (*See* Dkt. No. 283.)

prejudices Wi-LAN in the critical pre-trial period. Accordingly, Defendants' Motion should be denied.

A. Defendants fail to show good cause under FED. R. CIV. P. 16(b), which governs the modification of the deadline for letter briefs and FED. R. CIV. P. 6(b), which governs modifications of deadlines expired due to excusable neglect.

"The district court has broad discretion in controlling its own docket. This includes the ambit of scheduling orders and the like." *Edwards v. Cass County, Tex.*, 919 F.2d 273, 275 (5th Cir. 1990); *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 848 (E.D. Tex. 2004). Like the Patent Rules discussed in *STMicroelectronics,* this Court's Standing Order is effectively part of the Court's Docket Control Order. Accordingly, FED. R. CIV. P. 16(b) governs the modification of the deadline for letter briefs, and provides that "[a] schedule may be modified only for good cause and with the judge's consent."[4]

The good cause standard under FED. R. CIV. P. 16(b) requires the party seeking relief to show that, despite its exercise of diligence, it could not have reasonably meet the scheduling deadlines. *S & W Enters., L.L.C. v. Southtrust Bank of Alabama*, 315 F.3d 533, 535 (5th Cir. 2003); *Argo v. Woods*, 399 F. App'x 1, 2 (5th Cir. 2010) (finding that Rule 16's "fairly stringent 'good cause' standard . . . requires [a party] to give a persuasive reason why the dates originally set by the scheduling order for the filing of dispositive motions could not 'reasonably be met despite the diligence of the party seeking the extension.'"). The factors that the Court considers to determine whether the movant has shown good cause include: (1) the explanation for the party's failure to meet the deadline, (2) the importance of what the Court is excluding, (3) the

[4] Moreover, a party seeking to extend a deadline that has already expired must demonstrate that their neglect was excusable under FED. R. CIV. P. 6(b). Defendants have made no such showing.

potential prejudice if the Court allows the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice. *S & W Enters.*, 315 F.3d at 535.[5]

B. Defendants fail to meet their burden to provide any reasonable explanation for their failure to meet the deadline.

Notably absent from Defendants' Motion is any explanation, much less a reasonable one, for why Defendants failed to meet the deadline set by the Court's Orders. Instead, Defendants recite a list of deadlines that were moved by joint or unopposed motion and state that it would therefore have been "impossible" or "extremely impractical" to comply with the Court's deadline for letter briefs. (Mot. 5.) But Defendants' apparent belief that the Court's Orders are difficult to comply with is no justification for ignoring them, nor does it constitute "excusable neglect." "Where an order should be modified in light of case-specific facts, the parties must obtain the Court's leave to do so. Parties are not free to simply disregard the Court's deadlines." *STMicroelectronics*, 307 F. Supp. 2d at 852 n.8. Defendants here failed to seek leave and simply disregarded the Court's deadline.

Equally importantly, Defendants' conclusory statement of "impossibility" is not an explanation. At no point did the Docket Control Order change in a manner that made letter briefs due in the past; to the contrary; the parties' agreed Motion on August 2, 2012 actually extended the window to file letter briefs by three weeks until October 8, 2012. Despite this extended period for compliance, Defendants have offered no reason—because they cannot—why it would have been "impossible" or even "extremely impractical" to file a five-page letter brief at

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[5] *See also, e.g.*, *Argo*, 399 F. App'x at 3 ("Since Woods has failed to offer any reason why he could not have filed his motion before the deadline, we affirm the district court's denial of the motion."); *Arvie v. Dodeka, LLC*, No. H-09-1076, 2011 WL 1753489, *2 (S.D. Tex. May 6, 2011) (denying a party's motion for leave to file a motion for summary judgment after the deadline passed).

any point during the two weeks that followed service of Wi-LAN's opening expert report on infringement and Defendant's expert report on invalidity. Nor have they offered any explanation of why it would have been "impossible" or "extremely impractical" to file a letter brief regarding Wi-LAN's damages report, which was served in advance of the extended October 8 deadline. Tellingly, Defendants also fail to offer any reason for why they did not, *at the very least*, timely seek leave of Court to extend the deadline for letter briefs if they believed it would be "impossible" or "extremely impractical" to adhere to the Court's Orders. Instead, Defendants waited until six weeks after the deadline had passed to even raise the matter with Wi-LAN for the first time and *two months* after the deadline to finally seek leave of Court.

The sole example of a purportedly "impossible" deadline raised in Defendants' Motion is that "it would have been impossible to file a letter brief requesting permission to file a Daubert motion . . . since rebuttal expert reports were due on October 19, 2012, less than 60 days prior to the December 7, 2012 deadline for filing Dispositive Motions." (Mot. at 5.) But unless Defendants intended to file *Daubert* motions concerning their own rebuttal expert reports, that is no excuse. The only Wi-LAN rebuttal report due on October 19, 2012—and indeed the only Wi-LAN expert report not already served by that time—was Wi-LAN's rebuttal expert report concerning invalidity.[6] To the extent Defendants intend to take the surprising step of seeking permission to file a *Daubert* motion on an expert report concerning invalidity, an issue on which Defendants bear the burden of proof, their delay in doing so remains unexplained. Defendants

[6] Nor was that report necessary to allow Defendants to file a letter brief requesting permission to file a motion for summary judgment, which they finally did on December 14th, 2012. In advance of the extended October 8, 2012 letter brief deadline, defendants had *already* served their own expert report setting forth their theory of invalidity by the time of the letter brief deadline, and the Court's Claim Construction Order issued some five months before that. Yet Defendants waited over two months to file such a brief.

have had Wi-LAN's expert report in hand for over a month and have taken the deposition of Wi-LAN's validity expert—yet still have not filed their letter brief regarding a *Daubert* motion for that report.

And, in any case, Defendants failed to request that the deadline for letter briefing regarding Wi-LAN's rebuttal expert report on invalidity be extended. In fact, Wi-LAN specifically asked Defendants during a November 30, 2012 meet-and-confer whether that rebuttal report was the basis for their contention that their untimely letter briefs should be permitted, and offered to discuss that matter specifically if so. Defendants did not engage the issue. (Fareed Decl. at ¶ 7.) Having failed to seek relief at any point before the deadline passed, or even in the months that followed, Defendants should not be now heard to argue that the agreed date for rebuttal expert reports somehow kept them from meeting the long-standing deadline for filing letter briefs. *Cf. Ranzy v. Extra Cash of Texas, Inc.*, No. H-09-3334, 2012 WL 1015923, *5 (S.D. Tex. March 22, 2012) (denying motion to file a motion for summary judgment after the dispositive motion deadline and noting that "if Defendants needed an extension of time to respond to [the] motion for partial summary judgment, they needed to ask for one").

Lastly, Defendants appear to believe that Wi-LAN's reasonable reliance on the Court's Docket Control Order amounts to "litigation by 'gotcha.'" (Mot. at 5.) Respectfully, observing long-standing deadlines set by the Court and declining a prejudicial request to revive a deadline that passed *two months earlier* does not amount to litigation by "gotcha." Because Defendants have offered no explanation for their failure to comply with the Court's deadlines, no explanation of how their collective failure to comply with deadlines constitutes "excusable neglect," and no explanation for their failure to even seek extensions of those deadlines at any

point before December 7, 2012, Defendants' Motion fails to show good cause and should be denied.

C. The other factors that the Court may consider in determining whether the modification to the deadline is appropriate also weigh against Defendants.

Defendants' Motion further fails to make a showing of good cause as it fails to address any of the other factors that the Court might consider in determining whether the modification to the deadline is appropriate. These factors, too, weigh against granting leave.

i. Prejudice to Wi-LAN.

Defendants' request to start the letter briefing process more than two months after the date set by the Court is unfairly prejudicial to Wi-LAN. Importantly, Wi-LAN reasonably relied upon the schedule set by the Court's Orders; under that schedule, the letter briefing process (and the summary judgment and *Daubert* briefing process, if any) would have been completed well in advance of trial preparation. Now, Defendants seek to force Wi-LAN to respond to letter briefs (and potentially summary judgment briefs) in the months immediately before trial and as other pre-trial deadlines approach. This unnecessary expenditure of resources will necessarily distract from Wi-LAN's trial preparations during the critical months before the April 8, 2012 trial setting.

In addition, Wi-LAN reasonably relied on Defendants' decision not to file letter briefs (and hence forego summary judgment practice). Defendants' belated retraction of that decision will impose substantial monetary costs on Wi-LAN by requiring, at a minimum, letter briefing to be completed, as well as potentially imposing costs relating to summary judgment and *Daubert* briefing. Defendants have offered no explanation for their actions and no basis to impose such costs on Wi-LAN months after the relevant deadlines have passed.

Finally, with regard to the letter brief filed by Defendants on December 14, 2012, Wi-LAN would suffer particular prejudice. Though styled as a letter brief requesting permission to file a motion for summary judgment, Defendants' letter brief actually requests that the Court reconsider its May 16, 2012 Claim Construction Order. In that Brief, Defendants state that "the Court should clarify that the construction includes all time-division multiplexing techniques or, in the alternative, strike 'based on one or more characteristics associated with the data item' from its construction of 'TDM techniques.'" (Dkt. No. 280, Exhibit A at 3.) The time for Defendants to seek reconsideration of the Court's Claim Construction Order is not six months after that Order issues, and after all expert reports have been completed. Wi-LAN should not be forced by Defendants' delay to prejudicially divert its attention from trial preparations to address matters resolved by the Court long ago after full briefing by the parties.

ii. The Importance of the Letter Briefs.

Defendants have shown no reason why the briefing sought is particularly important in this case. The issues regarding invalidity raised by the letter brief filed on December 14, 2012 are fully capable of being decided in the normal course without requiring summary judgment practice shortly before trial. Indeed, not all Defendants even joined that letter brief. (Dkt. 280.) Moreover, the fact that Defendants are *still* not ready to actually start the letter brief process on the second of their two proposed motions—which they identify only as an "as yet undetermined Daubert motion"—suggests strongly that the letter brief and proposed motion are not of central importance to the case. Nor are the proposed motions of sufficient importance that Defendants, at any point between October 8 and December 7, sought leave of Court to extend the deadline to file them.

iii. A Continuance is not Warranted.

Finally, a continuance should not be granted. This case has been pending for over two years, and trial should not be delayed as a result of Defendants' unjustified failure to comply with the Court's Deadlines. In addition, a continuance would not cure the prejudice caused to Wi-LAN by the monetary costs of unnecessary summary judgment briefing.

III. CONCLUSION

Defendants failed to observe the deadlines set by the Court's Docket Control Order and Standing Order, and further failed to act for over two months once that deadline had passed. Because Defendants have not shown good cause for their failure to meet the Court's deadlines, Plaintiff Wi-LAN respectfully requests that the Court deny Defendants' motion for leave to file untimely letter briefs.

Dated: December 27, 2012

Respectfully submitted,

By: /s/ *Syed K. Fareed*

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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). 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). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 27th day of December, 2012.

/s/ Syed K. Fareed
Syed K. Fareed