

EXHIBIT A

The Honorable Leonard Davis
United States District Court for the Eastern District of Texas
200 W. Ferguson, Third Floor
Tyler, TX 75702 Re: ***Wi-LAN, Inc. v. Alcatel-Lucent et al., C.A. No. 6:10-cv-521***

Dear Judge Davis:

Defendants respectfully submit this letter brief requesting permission to file a *Daubert* motion regarding Wi-LAN's damages expert, John Jarosz.[1]

I. Mr. Jarosz Misapplies the Hypothetical Negotiation and Book of Wisdom Constructs. Wi-LAN acquired the patents-in-suit in April 2009 from Airspan. Mr. Jarosz asserts that Airspan would negotiate at hypothetical negotiations with Alcatel-Lucent and Ericsson in 2005 and with HTC in 2008. (Jarosz Rep. at 43–44.) But throughout his report, Mr. Jarosz places ***Wi-LAN*** at the table instead of Airspan, and evaluates ***Wi-LAN*** licenses and events that post-date the hypothetical negotiation by several years. (Jarosz Rep. at 56–70, 94–95, 102–103, 113–114, Tabs 50–51.) At his deposition, Mr. Jarosz admitted giving little, if any, weight to who the licensor is at the hypothetical negotiation or the year in which the negotiation takes place. (Jarosz Dep. Tr. at 255:2–256:20, 408:12–409:4, 422:23–424:22.) Mr. Jarosz justifies his approach by appealing to the so-called "book of wisdom." (*Id.*) Mr. Jarosz claims that Airspan—a company that had never licensed or monetized the patents-in-suit prior to selling the patents to Wi-LAN—would have knowledge of Wi-LAN's subsequent license agreements and even of what Wi-LAN negotiators were thinking at the time. (*Id*. at 34:10–36:20, 256:21–257:10, 433:4–437:2.) On that basis, Mr. Jarosz uses information he obtained from conversations with current Wi-LAN employees to manipulate license data, claiming that the terms of the licenses do not reflect the value Wi-LAN actually attributed to the licenses. (*Id*. at 34:10–36:20, 114:15–115:8, 124:18–128:9, 162:13–163:21, 256:21–257:10, 433:4–437:2; Jarosz Rep. Tab 50.)

II. Mr. Jarosz Violates the Entire Market Value Rule. Mr. Jarosz undertakes two basic sets of calculations in his report, both of which misapply the entire market value rule ("EMVR"). The first set of calculations cherry-picks royalty rates from unrelated running royalty licenses between Wi-LAN and third parties and applies those rates to the entire market value of Defendants' accused products (WCDMA base stations and handsets).[2] (Jarosz Rep. Tab 51; *id*. at 66–69.) The second set of calculations does the same for select lump-sum royalty licenses. (*Id*. Tabs 49–50; *id*. at 66–69.) Critically, the accused technology resides in a software upgrade

[1] In this letter, Defendants set forth the primary grounds for their anticipated *Daubert* motion. Additional grounds exist for moving *in limine* to exclude other aspects of Mr. Jarosz's expert report and anticipated trial testimony.

[2] Mr. Jarosz's use of these licenses is not economically or technically comparable to this case, rendering his opinion unreliable. *See, e.g., Wordtech Sys., Inc v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870–71 (Fed. Cir. 2010). For instance, his misuse of selected licenses results in a stated "range" of damages for HTC of $0.5 million to $47 million. (Jarosz Rep. Tab 49.) This inflationary "range" is unhelpful to a jury.

for base stations and a portion of a chipset for handsets. (*See, e.g.*, Wicker Rep. at 83.) Instead of using these smallest salable units, Mr. Jarosz uses entire product revenue in his royalty base—inflating the value of the base by over 250% for handsets and including billions in revenue from unrelated hardware and software for base stations. Because he lacks evidence that the patented features drive consumer demand for the entire accused products, Mr. Jarosz's calculations run afoul of Federal Circuit law regarding EMVR and should be struck from his expert report. *See, e.g.*, *Mirror Worlds, LLC v. Apple, Inc.*, 784 F. Supp. 2d 703, 721, 724–27 (E.D. Tex. 2011).

"[I]t is generally required that royalties be based not on the entire product, but instead on the smallest salable patent-practicing unit." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (internal quotations omitted). "The entire market value rule is a narrow exception to this general rule," but it may only be invoked when "it can be shown that the patented feature drives the demand for an entire multi-component product." *Id*. It is not sufficient to show that the allegedly patented feature is "valuable, important, ***or even essential***" to the accused product. *Id*. at 68 (emphasis added). Nor is it enough to show that the absence of the feature would make the overall product commercially unviable. *Id*.

A. Mr. Jarosz's Running Royalty Analysis Violates EMVR. In his running royalty analysis, Mr. Jarosz applies certain royalty rates to Defendants' entire accused product revenue. (Jarosz Rep. at 68–69, Tab 51.) Mr. Jarosz includes in his royalty base non-accused Release 99 and HSUPA software as well as unrelated hardware components that make up a complete base station. (*Id*. Tabs 23–26, 51–53, 76.) Indeed, Mr. Jarosz includes in his royalty base miscellaneous items such as hardware cabinets, power supplies, ancillary equipment, and other components of the base stations that have nothing to do with the HSDPA software. (Jarosz Dep. Tr. at 208:8–13; Jarosz Rep. at 32 n.205; *id*. Tabs 23–26, 52–53, 76.) Moreover, the record evidence indicates that the patented features do ***not*** drive demand for the entire base station, given that WCDMA base stations have been sold ***without*** the HSDPA software upgrade. (*See, e.g.*, Jarosz Dep. Tr. at 144:24–145:6, 205:21–207:16.)

Recognizing that the Court might exclude his EMVR-based calculations, Mr. Jarosz provides alternate calculations that employ an allegedly "apportioned" base. But Mr. Jarosz did not use revenues from the HSDPA software upgrade to arrive at a properly apportioned base. Rather, his allegedly "apportioned" base includes non-accused software and hardware. (Jarosz Rep. Tabs 26, 51, 52; Jarosz Dep. Tr. at 139:3–8, 144:24–145:6, 205:21–207:16, 210:13–24.) In addition, even the HSDPA software component is broader than the patented inventions; Wi-LAN concedes that only 2 of 4 features of HSDPA relate to the patents-in-suit. (Jarosz Rep. at 112; Jarosz Dep. Tr. at 96:25–97:13, 100:17–19.) Thus, even his alternative calculation is flawed.

B. Mr. Jarosz's Lump-Sum Royalty Calculations Violate EMVR. Mr. Jarosz's second set of calculations also violates EMVR. Mr. Jarosz uses certain Wi-LAN lump-sum agreements, which he "adjusts" using various market share calculations to determine a lump-sum royalty allegedly applicable to Defendants. (Jarosz Rep. Tabs 49–50.) As a first step, Mr. Jarosz takes the lump-sum payments made by third parties and multiplies those amounts by a sizing factor. Next, Mr. Jarosz multiplies that amount by "the percentage of accused sales" for Defendants. (*Id*. Tabs 49–50, 79.) Mr. Jarosz calculates these amounts by taking the entire market value (*i.e.*, all revenue) for Defendants' accused products and dividing by Mr. Jarosz's estimate of Defendants' total product sales revenue (for base stations and handsets respectively) for all wireless technologies in North America. (*Id*. Tab 79.) Mr. Jarosz does this even though he has no proof that the patented features drive demand for the entire accused products.

III. Mr. Jarosz Values the Wireless Standard Rather than the Alleged Invention. Key to his opinion, Mr. Jarosz erroneously assumes that (i) the patents-in-suit are "essential" to practicing the HSDPA portion of the HSPA "standard" and (ii) Defendants could not sell non-HSDPA-compliant products because consumers demand compliance with the standard.[3] (Jarosz Dep. Tr. at 53:12–55:25, 103:21–104:18, 230:17–23, 246:16–247:8.)

A reasonable royalty must carefully tie proof of damages to "the claimed invention's footprint in the market place." *LaserDynamics*, 694 F.3d at 67 (internal citations omitted). Mr. Jarosz failed to do so because he valued a standard rather than the patents. According to Mr. Jarosz, in order to be HSDPA-compliant, one must infringe the patents-in-suit. (Jarosz Dep. Tr. at 53:12–55:25, 103:21–104:18, 246:16–247:8.) Mr. Jarosz holds this opinion even though no independent party has ever found the patents-in-suit to be standard-essential. (*Id*. at 153:2–154:6.) Indeed, neither Airspan nor Wi-LAN has ever declared the patents-in-suit to be essential to the relevant standard-setting body. (*Id*. at 154:7–15, 239:19–25.) Mr. Jarosz, with no empirical support, alleges that Defendants would suffer tens of millions of dollars of lost profits if their products did not include HSDPA functionality because consumers demand standards-compliance. (Jarosz Rep. at 74–78; Jarosz Dep. Tr. at 230:17–233:13.) But even if a consumer would not purchase a product without a particular feature, that fact does not show that the feature at issue drives demand for the end product. *LaserDynamics*, 694 F.3d at 68; *see also Mirror Worlds*, 784 F. Supp. 2d at 721, 724–27. Moreover, the HSDPA feature set was "frozen" in 2002. (Jarosz Rep. at 19.) Thus, Mr. Jarosz also improperly values the "lock-in" or "hold up" that Defendants would experience, having already committed resources to HSDPA years prior to the date of the hypothetical negotiation. Mr. Jarosz also fails to take into account the thousands of patents that read on the standard and the hundreds of thousands of patents that are embodied in a handset. (*Id*. at 50–51.)

IV. Mr. Jarosz's Opinion Contains Other Errors. Mr. Jarosz misapplies the hypothetical negotiation by asserting damages into the future. Future "damages" are an equitable determination to be made by a judge, not a jury. *See Suffolk Co. v. Hayden*, 70 U.S. 315, 320 (1865); *see also Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1316 (Fed. Cir. 2007). Moreover, future infringement calculations are speculative as such use may never occur. For example, Mr. Jarosz's future "damages" for HTC are twice as large as his calculation of past damages. (Jarosz Rep. Tab 3.)

Mr. Jarosz also claims that Wi-LAN is entitled to pre-filing damages despite lack of notice. Wi-LAN failed to prove that it satisfied the marking requirements of 35 U.S.C. § 287, thus making the start of the damages period October 2010, when Wi-LAN filed suit.

[3] Mr. Jarosz concludes that the amount of the reasonable royalty would not vary even if two of the three patents asserted against Alcatel-Lucent and Ericsson were found not infringed or invalid. This is so, according to Mr. Jarosz, because if a single patent is found infringed, that patent would still be essential to practicing the standard. (Jarosz Dep. Tr. at 250:21–252:8; Jarosz Rep. at 4.) This confirms that he values the standard, not the patents.

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Respectfully submitted,

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