

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

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

WI-LAN’S SUR-REPLY OPPOSING HTC’S SECOND MOTION TO SEVER

Plaintiff Wi-LAN Inc. (“Wi-LAN”) submits this Sur-Reply in response to Defendant HTC’s Reply In Support of HTC’s Motion to Sever (“Reply”) (Dkt No. 322). For the reasons detailed below and in Wi-LAN’s Response Opposing HTC’s Second Motion to Sever (Dkt No. 319), Wi-LAN respectfully requests that the Court deny HTC’s Second Motion to Sever (“Second Motion”) (Dkt. 306).

1. HTC’s Reply Fails to Justify Severance.

As with HTC’s Second Motion itself, HTC’s Reply ignores the Court’s previous findings regarding the overlap of evidence and common fact issues among the Defendants in its Order denying HTC’s first motion for severance. HTC’s Reply also ignores the overlap of evidence and common fact issues detailed in Wi-LAN’s Response. Instead, HTC essentially argues (1) that it should be severed from Alcatel-Lucent and Ericsson because Wi-LAN asserts a different patent against HTC and (2) that it should be severed from Sony Mobile because HTC’s date of

the hypothetical negotiation for a reasonable royalty differs from that of Sony Mobile. (HTC Reply at 2.) Neither argument is persuasive.

HTC's first argument fails because it ignores the substantial overlap in the technology at issue, the substantial overlap of the terms used in the claims, the interoperability of the base stations and handsets (both as claimed and in fact), and the substantial overlap of evidence and fact issues in the invalidity case and also in the infringement case resulting from all Defendants' compliance with the 3GPP HSDPA standard. HTC also ignores the Defendants' shared expert on invalidity. Moreover, HTC's first argument ignores the substantial overlap of evidence and common fact issues it shares with Sony Mobile, which uses some of the same Qualcomm chips as HTC. As noted in Wi-LAN's Response, the *In re EMC* decision on which HTC relies expressly noted that this fact is a "pertinent factual consideration[]" that can weigh against severance. 677 F.3d 1351, 1359 (Fed. Cir. 2012). And, as noted in Wi-LAN's Response, HTC shares a single invalidity expert with all Defendants and also a damages expert with Alcatel-Lucent. HTC fails to address this substantial overlap in its Reply.

HTC's second argument fares no better. HTC ignores the extensive overlap of evidence and common fact issues identified in the Court's Order denying HTC's First Motion and in Wi-LAN's Response. HTC's silence essentially concedes the substantial overlap of evidence and fact issues with Sony Mobile on invalidity and infringement. Indeed, HTC points to only a few evidentiary differences on damages issues between it and Sony Mobile. HTC Reply at 2. In doing so, however, HTC fails to address the substantial evidentiary overlap resulting from HTC's sharing a damages expert with Alcatel-Lucent.

2. HTC Overstates Any Potential Prejudice to It.

HTC again asserts that it will somehow be prejudiced by a trial involving all four Defendants. (HTC Reply at 4-5.) Nonetheless, HTC essentially concedes that none of the other Defendants object to a single trial involving all parties, thus suggesting that they do not see any prejudice from such a trial. HTC also fails to note that, because HTC shares both an invalidity and a damages expert with other defendants, HTC and Wi-LAN will each have reduced expenses by trying all parties together.

HTC argues that the admission of documents involving base stations would somehow be prejudicial to it, but fails to explain how this is so. (HTC Reply at 4-5.) This argument seems curious indeed, since Sony Mobile has not made any argument of the sort. Moreover, Wi-LAN has dropped its claims of willful infringement against all Defendants, and HTC offers no suggestion of any other “bad behavior” by another Defendant that might somehow result in prejudice to HTC.

HTC concludes by arguing that “the Court would have to issue curative instructions to the jury every time an Alcatel-Lucent, Ericsson, or Sony Mobile document is introduced at trial.” (HTC Reply at 4.) HTC unsurprisingly fails to cite a single case holding that such an approach is even desirable, let alone required as HTC asserts. HTC apparently believes that a trial involving HTC and the other Defendants will be so unique and different from all other trials that it will require a constant stream of curative instructions. While one or more curative instructions may indeed be proper – and in fact, are included in the parties’ proposed jury instructions – HTC offers absolutely no support for its dire prediction.

3. HTC's Proposed Trial Plan Prejudices Wi-LAN.

HTC's Reply attempts to support the Second Motion as a proposed trial plan. But as detailed in Wi-LAN's Response, HTC's go-it-alone trial plan will result in prejudice to Wi-LAN, additional expense for the parties, and require additional Court time, while also running the risk of conflicting results.

As an initial matter, HTC's Reply essentially ignores the prejudice to Wi-LAN from HTC's proposal. HTC acknowledges that its proposal would require Wi-LAN to try the validity of the '211 patent twice. HTC Reply at 3. But HTC glosses over the substantial and unfair prejudice to Wi-LAN of having to try this issue twice, as well as the waste of the Court's resources resulting from HTC's proposal.

Moreover, HTC otherwise ignores the substantial overlap of evidence and fact issues involving invalidity. Indeed, HTC asserts that the '211 patent is different from the other asserted patents, HTC Reply at 1-2, suggesting that there is no such overlap of common facts and evidence. HTC is wrong.

As noted in Wi-LAN's Response, all of the Defendants share a single expert on invalidity. Mr. Lanning's expert report on invalidity devotes about 70 pages to a discussion of the prior art relevant to both the '326 and '211 patents. This 70-page discussion lumps the '211 and '326 patents together. Indeed, Mr. Lanning asserts the exact same eleven primary references against both the '211 and '326 patents and also the exact same ten combinations of references against both the '211 and '326 patents. For ease of reference, only the table of contents from Mr. Lanning's report is submitted as Exhibit 1 hereto. Contrary to HTC's suggestion, its own

expert's report shows a huge overlap of the invalidity issues and thus further demonstrates the prejudice to Wi-LAN of two separate invalidity trials.

4. Conclusion

For the reasons detailed in Wi-LAN's Response, Wi-LAN's proposed trial plan and its alternative trial plan are much better alternatives than two trials on all issues, one of which would involve just HTC. Wi-LAN respectfully requests that the Court deny HTC's Second Motion to Sever and proceed to try HTC together with the other Defendants.

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Respectfully submitted,

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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 25th day of February, 2013.

/s/ David B. Weaver

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