

**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.	§	
	§	

PARTIES’ PROPOSED TRIAL PLANS

This case is currently set for trial on April 8, 2013, with jury selection set for April 1, 2013. On February 15, 2013, the Court ordered the parties to submit a proposed trial plan. (Dkt. No. 314). Plaintiff Wi-LAN Inc. (“Wi-LAN”) and Defendants Alcatel-Lucent USA Inc. (“Alcatel-Lucent”); Telefonaktiebolaget LM Ericsson and Ericsson Inc. (“Ericsson”); Sony Mobile Communications AB and Sony Mobile Communications (USA) Inc. (“Sony Mobile”); and HTC Corporation, HTC America, Inc., and Exedea Inc. (“HTC”) submit their proposed trial plans.

I. PLAINTIFF’S PROPOSAL

1. Wi-LAN believes that this case can be most efficiently tried as a single trial involving the four Defendants. Wi-LAN believes that such a trial would last approximately 6-8 days, with trial time split evenly at fifteen hours per side.

2. A single trial is appropriate in this pre-AIA case because of the substantial overlap of issues of law and numerous issues of fact that will otherwise repeatedly be tried to

different juries. As further detailed in Wi-LAN's Response to HTC's Motion to Sever (Dkt. No. 319), numerous facts counsel trying this matter in a single trial:

- A single invalidity expert report by the same, shared expert was submitted on behalf of all Defendants.
- “All defendants . . . allegedly make, sell, or offer for sale wireless devices that implement certain releases of the 3GPP standard. Therefore, questions of fact involving the alleged infringement will be similar among these products.” (Court’s Memorandum Opinion and Order Denying HTC’s First Motion to Sever (Dkt. No. 128) at 3.)
- “While [base stations and handsets] are generally different product types, both are involved in wireless data transmission. . . . Both product types send and receive data via wireless communication protocols that comply with 3GPP standards.” (*Id.*)
- “Even though the product types have general differences, their accused properties—specific communication methods—are tightly interrelated.” (*Id.*)
- The patents asserted against the Defendants are related: “The ’211 patent is a continuation of the ’326 patent, and their specifications are nearly identical. . . . Thus, factual determinations regarding one patent are likely to be relevant to other patents.” (*Id.* at 4 (footnote and citations omitted).)
- The expert reports of the defendants on the infringement issues rely on several of the same arguments to try to establish non-infringement.
- The accused handset products of HTC and Sony Mobile both use Qualcomm chips with essentially the same software that provide some of the functionality that is pertinent in establishing infringement.
- Wi-LAN seeks a reasonable royalty measure of damages from each of the defendants.
- HTC and Alcatel-Lucent share the same expert on damages issues.
- Ericsson and Sony Mobile share the same expert on damages issues and the same expert on liability issues.
- The contract issues presented by Sony Mobile and Ericsson are largely the subject of pending cross-motions for summary judgment.

The most efficient trial plan is to have a single trial on all issues with all parties. This minimizes the cost to the parties, avoids the potential for conflicting results, and avoids undue use of the Court's resources. Given the substantial overlap of the facts, law, and evidence on invalidity, infringement, and even damages, no party will suffer unfair prejudice.

3. Wi-LAN prefers to proceed with one trial with all four Defendants, as outlined above. Should the Court conclude that an alternative is necessary, however, Wi-LAN has proposed an alternative trial plan with a first consolidated trial on invalidity, followed by a liability and damages trial for Sony Mobile and HTC, and a final liability and damages trial with Alcatel-Lucent and Ericsson:

Because multiple, duplicative trials on validity would waste the Court's resources, increase the inconvenience to third-party witnesses, prejudice Wi-LAN, and generally result in inefficiency, Wi-LAN will agree to a single trial on invalidity, with Wi-LAN's infringement and damages claims against Defendants severed for separate trials to follow immediately follow. Because common questions of fact and law will obviously be raised with regard to HTC and Sony Mobile, both handset manufacturers, those parties would remain together for a second trial on infringement and damages following the trial on validity. A final trial concerning infringement and damages would follow, if necessary, for Ericsson and Alcatel-Lucent, both of whom manufacture base stations.

(Dkt. 319, Exhibit B.)

4. Wi-LAN's alternative plan, which is in line with the Court's past approach in the recent *Fractus* and *Eolas* cases, also minimizes the risk of potentially conflicting results, the burden and costs of multiple trials (including a duplicative and wasteful repeated trial on invalidity), and the risk of jury confusion. Wi-LAN anticipates that an invalidity trial would require approximately two and one-half days, with each side permitted six hours of trial time. Wi-LAN anticipates that the remaining two liability/damages trials would last five days each, with twelve hours of trial time per side.

5. Finally, as noted above, Wi-LAN believes that all issues currently pending with regard to the contract dispute between Wi-LAN, Ericsson, and Sony Mobile are capable of resolution by the Court as a matter of law. Should a fact issue remain following resolution of all other legal issues related to the contracts at issue, however, Wi-LAN proposes that the parties by agreement try the remaining factual issue to the Court. Wi-LAN anticipates that such a separate bench trial would take no longer than one day, with three hours of trial time per side. If the parties are unable to reach agreement as to whether any remaining issue should be tried to the Court, Wi-LAN believes that such issues must be bifurcated for trial to avoid jury confusion and unfair prejudice.

II. DEFENDANTS' PROPOSAL

A. Alcatel-Lucent, Ericsson, and Sony Mobile's position

1. Defendants Alcatel-Lucent, Ericsson, and Sony Mobile are agreeable to Wi-LAN's original proposal of a single, combined trial covering all parties and issues.¹ While Defendants Alcatel-Lucent, Ericsson, and Sony Mobile generally agree with the time frame Wi-LAN has proposed, they believe trial time should be set at around twenty hours per side.²

2. Defendants Alcatel-Lucent, Ericsson, and Sony Mobile oppose Wi-LAN's alternative trial plan, outlined above in paragraphs I(3) - (4), that would split the defendants into several proceedings and separate intertwined issues into multiple trials. Wi-LAN's proposal is inefficient, unfairly prejudices Defendants, and would unnecessarily waste the Court's resources. First, such a proposal would take over four weeks of the Court's time, by Wi-LAN's own estimate, and necessitate that multiple juries repeatedly hear the same issues. Second, Wi-LAN's

¹ In addition to the issues to be tried to the jury, Alcatel-Lucent respectfully advises the Court that it has also raised the equitable defense of laches.

² Alcatel-Lucent, Ericsson and Sony Mobile also do not oppose HTC's request for severance and for a separate trial.

expert, Dr. Jonathan Wells, has taken conflicting positions on infringement and validity. Defendants must be able to explore these positions at trial and point out the inconsistencies before the jury. Likewise, Wi-LAN should not be permitted to present its validity arguments to one jury and its infringement arguments to another. Third, Wi-LAN's proposal would unfairly split up the two sets of defendants who share the same damages expert: Alcatel-Lucent and HTC, and Ericsson and Sony Mobile. Moreover, Ericsson and Sony Mobile have raised an identical breach-of-contract counterclaims that would be inefficiently split into multiple proceedings under Wi-LAN's alternative proposal. Indeed, it makes no sense for Ericsson to try its breach-of-contract claim in one proceeding and for Sony Mobile to do so in another. The contracts for between Wi-LAN and each of these defendants have identical terms, and thus, should be tried at the same time. Lastly, given that Ericsson and Sony Mobile share the same counsel, separating them for purposes of trial is counterproductive and would merely serve to increase inefficiency.

3. Ericsson and Sony Mobile dispute Wi-LAN's position regarding the breach-of-contract counterclaims. Ericsson and Sony Mobile agree that the interpretation of an unambiguous contract is a question of law for the Court. Ericsson and Sony Mobile filed a motion for summary judgment that the covenant-not-to-sue provision in the Patent and Conflict Resolution Agreements ("PCRAs") bars this action as a matter of law.³ However, to the extent that the Court finds that the PCRAs are not unambiguous, the interpretation of those agreements becomes a question of fact for the jury.⁴ Ericsson and Sony Mobile do not waive their

³ Wi-LAN opposed these motions by arguing, in part, that fact issues preclude summary judgment.

⁴ The damages for breach of a covenant not to sue correspond to the fees and expenses associated with defending the suit brought in violation of the breach. The parties have stipulated to having the issue of damages for breach of contract, if any, submitted to the Court following the jury trial on liability.

constitutional right to a jury trial on the issues associated with the PCRA's that are triable as of right to the jury. Further, Ericsson and Sony Mobile believe that the issues associated with the PCRA's should be included in the same trial with all of the other issues, as bifurcating these issues into a separate trial would be inefficient and a waste of resources, especially given that Wi-LAN's allegations of infringement in this action gave rise to Ericsson and Sony Mobile's breach-of-contract counterclaims.

4. In addition, Ericsson and Sony Mobile have filed a motion for leave to supplement their summary-judgment motions to add an alternative ground for relief, namely that if the Court does not find as a matter of law that the covenant-not-to-sue provision applies, Wi-LAN has breached the most-favored-licensee provision by refusing to grant to Ericsson and Sony Mobile a license at most-favored licensee status as compared to any other licensee of Wi-LAN. While Wi-LAN's current position is that this provision should be decided as a matter of law, that position has come about in just the past few weeks, as Wi-LAN previously argued vigorously against Ericsson and Sony Mobile supplementing their summary-judgment motions. At the same time, until just recently, Wi-LAN has refused to provide any discovery whatsoever with respect to the most-favored licensee provision. Here, too, if the Court finds any ambiguity in the agreement, the interpretation of the agreement becomes a question of fact for the jury.

B. HTC's position

1. HTC has requested, and the other remaining defendants Alcatel-Lucent, Ericsson, and "Sony" are agreeable (pending this Court's approval), to have its cases proceed in a separate trial involving both invalidity and infringement. To this end, HTC respectfully requests the Court to sever for trial Plaintiff, Wi-LAN, Inc.'s ("Wi-LAN"), claims of against HTC from Wi-LAN's claims against the other, unrelated defendants. HTC believes this proposal

is reasonable and just because it will allow HTC a fair opportunity to present its defenses against Wi-LAN's claims without confusion or prejudice. HTC's trial plan would also conserve judicial resource, minimize jury confusion, and simply put, makes more sense than Wi-LAN's proposed three trials.

2. Wi-LAN has accused HTC of infringing U.S. Patent No. 6,381,211 (the "211 patent") by selling cellular phones. Wi-LAN accuses Alcatel-Lucent and Ericsson of infringing *three different* patents, namely U.S. Patent Nos. 6,088,326 (the "326 patent"), 6,195,327 (the "327 patent"), and 6,222,819 (the "819 patent"), by selling *base stations*. Sony is the only other defendant that Wi-LAN is asserting the '211 patent against, but Sony has counter-claims and defenses, including a license defense and a breach of contract claim, that are entirely unrelated to those raised by HTC. Sony also shares counsel with Ericsson and has common issues with Ericsson relating to its license defense and breach of contract counter-claims. As set forth more fully in HTC's Motion to Sever (Dkt. No. 306) and Reply in Support (Dkt. No. 322), all of the following joinder/severance factors in *In re EMC Corp.*, 677 F.3d 1351, 1359-60 (Fed. Cir. 2012) that the Federal Circuit instructs courts to consider weigh heavily against joining HTC in the same trial:

- (1) whether the alleged acts of infringement occurred during the same time period,
- (2) the existence of some relationship among the defendants,
- (3) the use of identically sourced components,
- (4) licensing or technology agreements between the defendants,
- (5) overlap of the products' or processes' development and manufacture, and
- (6) whether the case involves a claim for lost profits.

3. Wi-LAN's alternative three trial proposal, including a separate invalidity trial for all the defendants, involving all of the patents-in-suit, would do nothing to alleviate HTC's legitimate concerns regarding prejudice and potential confusion of the jury. In this case, there is

significant difference between how the *base stations* (i.e., Alcatel-Lucent and Ericsson accused products) operate and encode data and how that data is handled by the *cellular phones* (i.e., HTC's accused products). A trial against HTC that includes substantial evidence of the operation of Alcatel-Lucent and Ericsson base stations would be fundamentally unfair and cause significant jury confusion as to the operation of HTC's accused cellular phones. At a minimum, Wi-LAN relies on evidence regarding the operation of Alcatel-Lucent and Ericsson base stations to prove infringement of those base stations. But, this evidence is not admissible against HTC and, indeed, Wi-LAN's infringement expert does not rely on Alcatel-Lucent and Ericsson technical documents to prove that HTC cellphones infringe. However, presenting this evidence simultaneously in the same trial will confuse the jury and lead it to believe that evidence submitted against Alcatel-Lucent and Ericsson supports infringement by HTC. Further it would require HTC to waste resources sitting through substantial portions of a trial it has absolutely no stake in.

4. In short, HTC does not have any link to any of the other defendants. HTC does not sell the same products as other defendants. HTC did not jointly develop its products with other defendants. HTC did not act in concert with the other defendants to allegedly infringe any of Wi-LAN's patents. HTC sells cellular telephones that it manufactures. In contrast, Alcatel-Lucent and Ericsson sell cellular base stations and Sony Mobile sells different cellular phones. Thus, there are no common products at issue between the defendants. Accordingly, HTC's proposal for a separate trial is both fair and appropriate. *See EMC Corp.*, 677 F.3d at 1359; *see also Frank's Casing Crew & Rental Tools, Inc. v. PMR Techs., Ltd.*, 292 F.3d 1363, 1372 n.6 (Fed. Cir. 2002); *Reid v. Gen. Motors Corp.*, 240 F.R.D. 260, 263 (E.D. Tex. 2007); *Pinpoint*,

Inc. v. Groupon, Inc., No. 11 C 5597, 2011 U.S. Dist. LEXIS 139183, 2011 WL 6097738, at *1 (N.D. Ill. Dec. 5, 2011).

5. Until such time as the Court sets jury selection and trial dates, the parties shall continue to follow applicable docket control orders. The parties will adjust any remaining, unfulfilled deadlines once the new dates are established.

Order of Trials

6. HTC proposes that the more comprehensive action, i.e., Wi-LAN's infringement claims against Alcatel-Lucent, Ericsson and Sony Mobile be tried first. HTC further proposes that Court proceed to set jury selection and trial dates as soon as reasonable after conclusion of the first Wi-LAN trial.

7. HTC is prepared to try its case whenever trial is set by the Court. In this regard, HTC also believes that holding a trial for the more comprehensive action against Alcatel-Lucent, Ericsson and Sony Mobile makes the most sense because it may result in eliminating the HTC trial altogether. More specifically, HTC is accused of infringing only the '211 patent. Therefore, if the Court adopts HTC's proposed trial plan and proceeds first the more comprehensive trial against Alcatel-Lucent, Ericsson and Sony Mobile, which includes the '211 patent asserted against Sony Mobile, it is possible that only a single trial would be necessary. On the other hand if Wi-LAN's claim against HTC is tried first, the Court is guaranteed that a second trial, involving at least Alcatel-Lucent and Ericsson, would be required.

Length of Trial

8. If the Court adopts HTC proposed trial plan, HTC believes that its trial, if necessary, on both invalidity and infringement could be completed within five (5) trial days.

Dated: February 25, 2013

Respectfully submitted,

/s/ Akshay Deoras (by permission)

Gregory S. Arovas (*pro hac vice*)
Robert A. Appleby (*pro hac vice*)
Jeanne M. Heffernan (*pro hac vice*)
Akshay S. Deoras (*pro hac vice*)
Ryan P. Kane (*pro hac vice*)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Tel: (212) 446-4800
Fax: (212) 446-4900
greg.arovas@kirkland.com
robert.appleby@kirkland.com
jeanne.heffernan@kirkland.com
akshay.deoras@kirkland.com
ryan.kane@kirkland.com
Alcatel-Lucent-Wi-LAN-Defense@kirkland.com

Local Counsel

Michael E. Jones (TX Bar 10929400)
Allen F. Gardner (TX Bar 24043679)
John F. Bufe (TX Bar 03316930)
POTTER MINTON PC
110 N. College, Suite 500
P.O. Box 359
Tyler, TX 75710-0359
Tel: (903) 597-8311
Fax: (903) 593-0846
mikejones@potterminton.com
allengardner@potterminton.com
johnbufe@potterminton.com

Attorneys for Defendant Alcatel-Lucent USA Inc.

/s/ Martin Bader (by permission)

Stephen S. Korniczky (*pro hac vice*)
Martin R. Bader (*pro hac vice*)
Daniel N. Yannuzzi (*pro hac vice*)
Lee Hsu (*pro hac vice*)

By: /s/ David B. Weaver

David B. Weaver (TX Bar 00798576)
Lead Attorney
Avelyn M. Ross (TX Bar 24027817)
Ajeet P. Pai (TX Bar 24060376)
Syed K. Fareed (TX Bar 24065216)
Jeffrey T. Han (TX Bar 24069870)
Seth A. Lindner (TX Bar 24078862)
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
Tel: (512) 542-8400
Fax: (512) 236-3476
dweaver@velaw.com
aross@velaw.com
apai@velaw.com
sfareed@velaw.com
jhan@velaw.com
slindner@velaw.com

Steve R. Borgman (TX Bar 02670300)
Gwendolyn Johnson Samora
(TX Bar 00784899)
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002-6760
Tel: (713) 758-2222
Fax: (713) 758-2346
sborgman@velaw.com
gsamora@velaw.com

Constance S. Huttner (NY Bar 1722024)
VINSON & ELKINS LLP
666 Fifth Avenue
26th Floor
New York, New York 10103
Tel: 212-237-0040
Fax: 917-846-5339
chuttner@velaw.com

Graham M. Buccigross (*pro hac vice*)
SHEPPARD MULLIN RICHTER & HAMPTON LLP
12275 El Camino Real, Suite 200
San Diego, CA 92130
Tel: (858) 720-8924
Fax: (858) 847-4892
skorniczky@sheppardmullin.com
mbader@sheppardmullin.com
dyannuzzi@sheppardmullin.com
lhsu@sheppardmullin.com
gbuccigross@sheppardmullin.com
LegalTm-Wi-LAN-Alcatel-@sheppardmullin.com

Local Counsel

Eric Hugh Findlay (TX Bar 00789886)
Brian Craft (TX Bar 04972020)
FINDLAY CRAFT
6760 Old Jacksonville Hwy, Suite 101
Tyler, TX 75703
Tel: (903) 534-1100
Fax: (903) 534-1137
efindlay@findlaycraft.com
bcraft@findlaycraft.com

***Attorneys for Defendants HTC Corporation,
HTC America, Inc., and Exede Inc.***

/s/ Richard L. Wynne, Jr. (by permission)
Bruce S. Sostek (TX Bar 18855700)
Lead Attorney
Richard L. Wynne, Jr. (TX Bar 24003214)
Adrienne E. Dominguez (TX Bar 00793630)
J. Michael Heinlen (TX Bar 24032287)
Timothy E. Hudson (TX Bar 24046120)
Justin S. Cohen (TX Bar 24078356)
THOMPSON KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, TX 75201
Tel: (214) 969-1700
Fax: (214) 969-1751
bruce.sostek@tklaw.com
richard.wynne@tklaw.com
adrienne.dominguez@tklaw.com
michael.heinlen@tklaw.com

Local Counsel

Johnny Ward (TX Bar 00794818)
Wesley Hill (TX Bar 24032294)
WARD & SMITH LAW FIRM
111 W. Tyler Street
Longview, TX 75601
Tel: (903) 757-6400
Fax: (903) 757-2323
jw@jwfirm.com
wh@jwfirm.com

Attorneys for Plaintiff Wi-LAN Inc.

tim.hudson@tklaw.com
justin.cohen@tklaw.com
Ericsson-WI-LAN-Defense@tklaw.com

Local Counsel

William J. Cornelius (TX Bar 04834700)
Jennifer Ainsworth (TX Bar 00784720)
Wilson Robertson & Cornelius PC
909 ESE Loop 323, Suite 400
P.O. Box 7339
Tyler, TX 75711-7339
Tel: (903) 509-5000
Fax: (903) 509-5092
wc@wilsonlawfirm.com
jainsworth@wilsonlawfirm.com

*Attorneys for Defendants Ericsson Inc.,
Telefonaktiebolaget LM Ericsson, Sony
Mobile Communications (USA) Inc., and Sony
Mobile Communications AB*

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 on this the 25th day of February, 2013.

/s/ David B. Weaver
David B. Weaver