

1 and trial on April 8, 2013. On February 15, 2013 the Court ordered the parties to submit a proposed trial plan, and on February 25, 2013 the parties complied.

In that plan, Wi-Lan proposed one trial with all four defendants or alternatively, an invalidity trial first followed by a liability and damages trial against Sony and HTC, and then a liability and damages trial against Alcatel and Ericsson. Docket No. 327 at 3. Alcatel, Ericsson, and Sony agreed to a single trial, but requested more time for that trial than Wi-Lan proposed. *Id.* at 4. HTC pointed to its Motion to Sever and requested a separate trial from the remaining defendants.⁴ *Id.* at 6. On February 26, 2013, the Court heard arguments on both HTC's Motion to Sever and the parties' proposed trial plans. At the hearing, the Court offered HTC the option of a separate trial on infringement and damages if it would agree to try the issue of invalidity along with the other defendants in the first trial. HTC did not accept the Court's proposal, stating that under *EMC* and its progeny, it is entitled to a separate trial on all issues.

APPLICABLE LAW

In any complex litigation involving multiple parties and various common and individualized issues of fact, a court's greatest tools for maximizing efficiency are consolidation and bifurcation. *See* FED. R. CIV. P. 42; *see also Intellectual Prop. Dev. Corp. v. UA-Columbia Cablevision of Westchester, Inc.*, 34 U.S.P.Q.2d 1605, 1606 (S.D.N.Y. 1995). As the Federal Circuit noted in *In re EMC*, Courts have considerable discretion to consolidate cases for trial under Federal Rule of Civil Procedure 42. 677 F.3d at 1360 ("In exercising its discretion, the district court should keep in mind that even if joinder is not permitted under Rule 20, the district court has considerable discretion to consolidate cases for discovery and for trial under Rule 42

³ Including Sony Mobile Communications AB and Sony Mobile Communications (USA), Inc.

⁴ In a separate order, the Court addressed HTC's Motion to Sever for Improper Joinder (Docket No. 306). The Court granted the motion. Thus, this order contemplates the trial plan for both cases.

where venue is proper and there is only a ‘common question of law or fact.’”). Specifically, the rule states:

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

FED. R. CIV. P. 42(a). Thus, even if joinder is improper under Rule 20, the Court has discretion to consolidate cases for trial where—as here—it is an appropriate use of judicial resources and would not unduly prejudice a party.

ANALYSIS

The Court has handled numerous multi-defendant patent cases over the years and always strives to balance the interests of all parties involved when fashioning a trial plan.⁵ If separate

⁵ Some examples include:

- *CEATS v. Continental Airlines, et. al.*: at the time the Court fashioned a trial plan, eighteen defendants remained. These defendants fell into two groups: airline defendants and ticketing defendants. After a thorough analysis of the factors outlined in this opinion, the Court ordered a single trial. However, the Court bifurcated the issue of willfulness as plaintiff only alleged pre-suit knowledge against some defendants. CEATS proceeded to trial against the 14 defendants remaining at the time of trial. The jury found the patents infringed but also invalid as anticipated and obvious. 6:10cv120, Docket No. 888.
- The *CSIRO* cases: five separate actions in these standards cases proceeded on a similar docket control order. Ultimately, the Court consolidated four of the five cases into a single trial regarding all liability issues (infringement, invalidity, willfulness, and all other defenses). However, because Defendants occupied distinct portions of the marketplace, e.g. chip manufacturers and their customers, and also occupied distinct commercial spaces, the Court found it proper to bifurcate damages into separate trials. All parties settled prior to a final resolution. *See* 6:07cv204, Docket No. 167.
- *Fractus, S.A. v. Samsung Electronics, Co. Ltd., et. al.*: the case started with approximately ten defendant groups, but only six defendant groups remained as the case approached trial. Given the extremely complex nature of the technology and the sheer number of patents and claims involved, the Court bifurcated the case into four trials beginning with a common trial regarding invalidity and inequitable conduct, followed by, if necessary, three trials regarding infringement and damages (two defendant groups in each). As the case progressed, all but one defendant settled. Therefore, the need for separate trials dissolved and the parties proceeded to a single trial on all claims and defenses. The plaintiff prevailed. 6:09cv203, Docket No. 590.
- *Bedrock Technologies, LLC v. Softlayer Technologies, Inc., et. al.*: Plaintiff sued ten defendants. Given that Plaintiff's damages model for Google far exceeded the damages model against the other defendants, the Court bifurcated the case into two trials, the first involving only Google, the second involving the

trials are the best way to handle a case, the Court will set multiple trials. The Court has previously articulated a number of factors it considers when deciding whether multiple trials are appropriate. *CEATS, Inc. v. Continental Airlines, Inc., et al*, 6:10cv120, Docket No. 888. (“the *CEATS* factors”). While no single factor is dispositive, the following factors are considered in balancing the equities to all parties involved:

- (1) number of defendants;
- (2) number of patents;
- (3) number of asserted claims;
- (4) complexity of the technology involved;
- (5) similarity of functionality of accused instrumentalities;
- (6) consistency of plaintiff’s damages model against distinct defendants, *e.g.*, single expert report as to all defendants, how distinct is the theory of infringement and damages in the expert report as to individual defendants, etc.;
- (7) consistency of defendants’ non-infringement, validity, and damages positions, as exemplified by, among other things, expert reports, *e.g.*, single or multiple experts on non-infringement; single or multiple experts on validity, single or multiple experts on damages, etc.;
- (8) collaboration by defendants, *e.g.* joint defense groups, one firm representing multiple defendants, etc.;
- (9) risk of inconsistent results on common issues of fact or law;
- (10) risk of jury confusion;
- (11) cost of multiple trials to the parties;
- (12) the Court’s schedule and resources; and
- (13) other individualized issues specific to a particular case.

Id. As always, the overall consideration is finding an equitable and fair trial plan for all parties—which inevitably requires compromise.

Here, the balance of the *CEATS* factors favors a single trial. First, regarding the “similarity and functionality of accused instrumentalities,” this is a standards case. The accused products interoperate with each other via the 3GPP standard. Wi-LAN argues that with regard to

remaining defendants. Google proceeded to trial in the first phase. The only remaining defendant, Yahoo!, proceeded to trial in the second phase. Plaintiff prevailed in the first phase, while Defendant prevailed in the second phase. 6:09cv269, Docket No. 540.

- *Eolas Technologies, Inc. v. Adobe Systems Inc., et. al.*: approximately twenty-three defendants began the case, nine remained at trial. Plaintiff agreed to a single invalidity trial including all defendants followed by three separate infringement and damages trials, if necessary. The three separate infringement trials involved different numbers of remaining defendants. The defendants prevailed in the invalidity trial; therefore, separate infringement trials were not necessary. 6:09cv446, Docket No. 1264.

the handset manufacturers—HTC and Sony—there is no difference in its infringement theory. 6:10cv521, Transcript of Hearing on 2/26/2013, at 53:1 (hereafter “Tr. at”). Both manufacturers use Qualcomm chips that include software that provides some of the functionality that is pertinent in establishing infringement. *Id.* Wi-LAN states that its infringement case will consist of looking at the source code and presenting the standard as to these defendants. Wi-LAN asserts that the same is true on the base station side of the case. *Id.* The case will be very similar and have overlapping issues. These products are tightly interwoven in the way that they communicate, which is at the heart of the patents-in-suit. Therefore, presenting a case with two general groups of defendants with similar technology should not be so overwhelming as to confuse a jury. Indeed, it would helpful for the jury to understand how the products interact with each other via the standard.

Regarding the number of patents-in-suit, there are four: U.S. Patent Nos. 6,088,326 (the ‘326 Patent); 6,381,211 (the ‘211 Patent); 6,195,327 (the ‘327 Patent); and 6,222,819 (the ‘819 Patent). HTC argues that only one of the four patents is asserted against it, so it should not have to litigate in a trial where there are three patents asserted against only the other defendants. While it is true that Wi-LAN accuses HTC of infringing only the ‘211 patent, Wi-LAN argues that adopting a “count the number of patents and then say the [defendant] is only going to be there for 25 percent” approach does not tell an accurate story. *Id.* at 52:1. The ‘211 patent is a continuation of the ‘326 patent, and their specifications are nearly identical. Indeed, regarding invalidity, Defendants’ common invalidity expert’s report addresses both patents together. Docket No. 324, Ex. 1 at (Excerpt of Mark Lanning’s expert report with a section entitled “Invalidity Analysis For the ‘326 and ‘211 patents.”). Mr. Lanning’s analysis shows how the exact same references and combinations of references, in his opinion, invalidate the two patents.

See id.; *see also* Tr. at 52:8. Mr. Lanning then moves on to the ‘819 patent and argues that the majority of those identical references, in his opinion, invalidate the patent. *Id.* Thus, even though the patents contain both base station claims and handset claims that are connected by a wireless link, Defendants’ common expert uses the same prior art references across multiple patents. *Id.*

As just discussed, all defendants have a common invalidity expert because the issue of invalidity is common to all defendants. By trying the issue of invalidity to a single jury, there is no risk of inconsistent results. In addition to a common invalidity expert, Wi-LAN noted at the hearing that, HTC and Alcatel Lucent have a common damages expert, Mr. Bakewell, who asserts the same basic damages theory as to both Defendants. Bakewell looks at the same licenses and the same particular Georgia-Pacific factors. *Id.* He reaches the same basic conclusion with respect to HTC and Alcatel. *Id.* at 54:3. Ericsson and Sony also share an expert on damages. HTC counters that each Defendant has its own non-infringement expert. Though this is true, Wi-LAN argues that those experts reach essentially the same set of non-infringement arguments/opinions. *Id.*; *see also* Docket No. 319, Ex. A.

Regarding the “other individualized issues specific to a particular case,” HTC argues that the remaining defendants have a contracts issue that does not implicate HTC. This issue is before the Court on cross motions for summary judgment and may be dealt with prior to the time of trial. However, assuming this issue is part of the trial, this slightly favors a separate trial for HTC.

Finally, the judicial economy factors—the cost of multiple trials to the parties, and the Court’s schedule and resources—favor a single trial. By conducting a single trial, the costs of overlapping experts will be shared. Also by conducting a single trial, the Court will have

additional time to take up at least one more of the three cases on its April docket that are trailing this case.

On balance, the factors favor a single trial. The case involves two related groups of defendants with similar and interrelated products, common asserted patents, and overlapping experts with similar theories as to infringement, invalidity, and damages. If the Court adopts HTC's proposal, the jury in trial one will hear from all of Wi-LAN's witnesses, Mr. Lanning, two damages experts, and three separate infringement experts who will all give similar opinions.⁶ Then the jury in trial two will hear from all of Wi-LAN's witnesses (who would have to be presented a second time), Mr. Lanning again, Mr. Bakewell again, and another infringement expert who echoes the opinions offered in trial one. Tr. at 54:19–20.

At the hearing, the Court asked HTC to articulate the prejudice it would suffer from a combined trial. Essentially, HTC's argument was that much of the trial would be inapplicable to HTC. After reviewing the common issues and witnesses, this argument is not compelling. Additionally though, HTC did not articulate one of the real prejudices the Court sometimes sees in a multiple defendant trial. For example, HTC is not in a position where it is lumped into a trial with other defendants who are accused of willful infringement when it is not. Willfulness is not an issue in the case. Nor does HTC point to significantly different damage amounts, where one defendant is accused of a dramatically larger damages number, which might prejudice the other smaller defendants.

Despite the Court's belief that a single trial is justified, the Court offered HTC the following option:

THE COURT: Well, then in which case let me make this proposal to you:
What if I were to give HTC the option of you can either go in the first trial

⁶ The remaining defendants do not oppose a single trial. Thus, even if HTC has its own trial, the remaining trial will include both a handset manufacturer (Sony) and the base station manufacturers.

with the other three defendants as to both infringement and invalidity, or you can go in a second trial as to infringement; but you will agree to be bound by the invalidity finding in the first trial?

Tr. 48:15–20. HTC refused to be bound by the first invalidity finding, even if it were allowed to participate in the first trial as to invalidity. It seems then, that HTC wants Defendants to have multiple bites at the invalidity apple. That is a waste of judicial resources and risks inconsistent verdicts.

CONCLUSION

For these reasons, the Court exercises its considerable discretion in consolidating cases for trial under Rule 42 and **ORDERS** that HTC is consolidated with the remaining defendants for trial. These cases will proceed to the jury as a single trial on all issues and as to all parties.

So ORDERED and SIGNED this 18th day of March, 2013.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**