

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

WI-LAN INC., <p style="text-align: right;">Plaintiff,</p> v. ALCATEL-LUCENT USA INC., <i>et al.</i> , <p style="text-align: right;">Defendants.</p>	CIVIL ACTION NO. 6:10-CV-521-LED
<hr/> WI-LAN INC., <p style="text-align: right;">Plaintiff,</p> v. HTC CORPORATION ET AL., <p style="text-align: right;">Defendants.</p>	CIVIL ACTION NO. 6:13-CV-252-LED

**DEFENDANTS' OPPOSED MOTION FOR EXPEDITED BRIEFING SCHEDULE ON MOTION TO ENFORCE COMPLIANCE WITH THE COURT'S ORDER OF MARCH 14, 2013**

On April 16, 2013, Defendants filed a Motion to Enforce Compliance with the Court's Order of March 14, 2013. [ECF No. 388]. The basis of Defendants' motion is Wi-LAN's clawback of 2,446 documents that it had produced on March 18, 2013, in response to the Court's Order of March 14, 2013 [ECF No. 362]. Defendants believe that Wi-LAN's clawback of these documents is improper and impermissibly limits their ability to complete discovery of relevant information by the May 17, 2013, deadline imposed by the Court. [ECF No. 384] (imposing a May 17th deadline for "Supplemental Fact Discovery, if any, in light of Wi-LAN's recently produced documents"). Because this deadline is just a month away, Defendants respectfully request that the Court order an expedited briefing schedule on Defendants' Motion to Enforce.

## BACKGROUND

It its March 14th Order, the Court directed Wi-LAN to undertake three specific actions: (1) “to conduct a full and thorough review, in light of [the] order, of the documents [Wi-LAN] previously withheld as privileged”; (2) “to produce the documents it deems non-privileged by March 18, 2013 at noon”; and (3) “to submit an amended privilege log to Defendant HTC and to the Court” by that same time. [ECF No. 362] In response to the Order, Wi-LAN produced 7,980 documents that it deemed to be not privileged and submitted a notice to the Court stating that it had “complied with the requirements of the Court’s order by conducting a thorough review of its documents withheld as privileged and producing any documents deemed non-privileged.” [ECF No. 365, at 1].

On March 25, 2013, the Court issued an Order granting HTC’s Emergency Motion for Continuance, ordering the parties to meet and confer regarding, among other things, whether additional discovery was necessary in light of Wi-LAN’s document production of March 18th. [ECF No. 382]. After the Court’s March 25th Order continuing the trial date and requiring the parties to discuss discovery relating to the documents produced on March 18th, Wi-LAN began attempting to claw back documents that it had produced on March 18th. As described in Defendants’ Motion to Enforce, in doing so, it is apparent that Wi-LAN is now applying a different standard for evaluating privilege than it used for the production on March 18th. But Wi-LAN had previously certified to the Court that the production on March 18th had been conducted in accordance with the March 14th Order, which set forth the proper standard for differentiating privileged information from non-privileged business or factual information.

Incredibly, on April 10th, Wi-LAN sent a letter clawing back 2,446 documents comprising 24,302 pages of information — nearly one-third of the 7,980 documents Wi-LAN produced on

March 18th — claiming that these documents were “inadvertently produced.” Defendants dispute Wi-LAN’s claims of privilege, and regardless, assert that Wi-LAN has waived any privilege that might have been attached to the documents. These issues are addressed in Defendants’ Motion to Enforce.

#### POINTS AND AUTHORITIES

**A. Wi-LAN’s clawback inhibits Defendants’ ability to conduct discovery as authorized by the Court.**

On April 9th, the Court entered an Order modifying the Docket Control Order. The Court set a deadline of May 17, 2013 for “Supplemental Fact Discovery, if any, in light of Wi-LAN’s recently produced documents.” [ECF No. 384]. Because this deadline is just a month away, Defendants respectfully request an expedited briefing schedule on their Motion to Enforce Compliance with the March 14th Order.

Many of the documents Wi-LAN has clawed back are highly relevant to the issues in this case and are directly contrary to the positions Wi-LAN has taken in the litigation. As such, Defendants should be entitled to use these documents in depositions of current and former Wi-LAN employees. Wi-LAN’s clawback improperly inhibits Defendants’ discovery efforts by preventing Defendants from using these documents in depositions Defendants requested from Wi-LAN based on their detailed review of the documents produced on March 18th.

**B. The parties have been unable to agree on an expedited briefing schedule.**

During the meet-and-confer on April 15th, Wi-LAN initially stated that it was opposed to Defendants’ motion for an expedited briefing schedule. It did, however, agree to *consider* a

possible accelerated briefing schedule for the motion. Shortly after the meet and confer, on April 15th, Defendants proposed the following expedited briefing schedule to Wi-LAN:<sup>1</sup>

- Defendants' Motion: April 16th
- Wi-LAN Response: April 23rd
- Defendants' Reply: April 26th
- Wi-LAN Sur-Reply: April 30th (or May 1st)<sup>2</sup>

Wi-LAN rejected Defendants' proposal. Instead, Wi-LAN offered only one possible expedited briefing schedule — one in which Defendants would not be permitted to file a reply brief. Specifically, Wi-LAN's schedule would have Defendants file their motion on April 16th and Wi-LAN file its response on April 26th, with no further briefing permitted.<sup>3</sup>

Defendants explained to Wi-LAN that such a schedule was inappropriate here, as Wi-LAN, not Defendants, bears the burden of proving that the clawed-back documents are privileged *and* that Wi-LAN did not waive the privilege. *See First Am. CoreLogic, Inc. v. Fiserv, Inc.*, No. 2:10–CV–132, 2010 WL 4975566, at \*3 (E.D. Tex. Dec. 2, 2010). Thus, under Wi-LAN's only proposed schedule, Defendants would be precluded from providing any response to Wi-LAN's proof.

Defendants suggested a compromise schedule having Wi-LAN's response due on April 26th with Defendants' reply due on May 1st.<sup>4</sup> Wi-LAN refused to agree to this proposal.<sup>5</sup>

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<sup>1</sup> Defendants' proposed briefing schedule sought to have the briefing completed in advance of May 3rd to afford the Court an opportunity to address any questions it might have regarding this issue during the previously scheduled hearing on the pending summary-judgment motions relating to the Ericsson and Sony Mobile Defendants' contract defenses and counterclaims.

<sup>2</sup> Exhibit A — April 15, 2013, email from R. Wynne to D. Weaver.

<sup>3</sup> Exhibit B — April 16, 2013, email from A. Pai to R. Wynne.

<sup>4</sup> Exhibit C — April 16, 2013, email from R. Wynne to A. Pai.

<sup>5</sup> Exhibit D — April 17, 2013, email from A. Pai to R. Wynne.

Regrettably, therefore, this motion is submitted as an opposed motion, as the parties are at an impasse on an agreed briefing schedule.

#### **CONCLUSION**

For the reasons stated, Defendants respectfully request that the Court enter an Order expediting the briefing schedule on Defendants' Motion to Enforce Compliance with the Court's Order of March 14, 2013 [ECF No. 388], as follows:

- Wi-LAN's Response: April 23rd
- Defendants' Reply: April 26th
- Wi-LAN's Sur-Reply: April 30th

Dated: April 17, 2013

Respectfully submitted,

/s/ William Cornelius

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### **CERTIFICATE OF CONFERENCE**

As required by Local Rule CV-7(h), counsel for Plaintiff (David Weaver, Ajeet Pai, and Wes Hill) and counsel for Defendants (Bruce Sostek, Richard Wynne, and William Cornelius for Ericsson and Sony Mobile; Stephen Korniczky, Martin Bader, and Eric Findlay for HTC; Akshay Deoras and Allen Gardner for Alcatel-Lucent) participated in a meet and confer by telephone on April 15, 2013, and discussed the subject motion. At that time, Plaintiff stated that it was opposed to the motion but that it would considered a proposed expedited briefing schedule. Defendants proposed a schedule, which Plaintiff rejected. Plaintiff proposed a schedule that Defendants found unacceptable because it did not permit a reply brief. Defendants proposed a compromise schedule, which Plaintiff rejected. As such, the parties are at impasse, and this motion is submitted to the Court for determination.

/s/ William Cornelius  
William Cornelius

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically on the 17th day of April, 2013, in compliance with Local Rule CV-5(a) and has been served on all counsel who have consented to electronic service and all other counsel by facsimile and regular mail.

/s/ William Cornelius  
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