

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

WI-LAN INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 6:10-cv-521-LED
v.	§	Civil Action No. 6:13-CV-00252-LED
	§	CONSOLIDATED CASES
ALCATEL-LUCENT USA INC.; <i>et al.</i>	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

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**DEFENDANTS’ SUPPLEMENTAL MOTION FOR JUDGMENT AS A MATTER OF  
LAW THAT CLAIMS 2 AND 5 OF U.S. PATENT NO. 6,381,211, CLAIMS 2, 5, AND 9  
OF U.S. PATENT NO. 6,088,326, CLAIM 11 OF U.S. PATENT NO. 6,222,819, AND  
CLAIMS 11 AND 12 OF U.S. PATENT NO. 6,195,327 ARE NOT INFRINGED**

**I. INTRODUCTION**

Wi-LAN asserts claims 2 and 5 of U.S. Patent No. 6,381,211 (“the ‘211 patent”), claims 2, 5, and 9 of U.S. Patent No. 6,088,326 (“the ‘326 patent”), claim 11 of U.S. Patent No. 6,222,819 (“the ‘819 patent”), and claims 11 and 12 of U.S. Patent No. 6,195,327 (“the ‘327 Patent”) (collectively “Asserted Patents”) against various Defendants. The asserted claims of the ‘211, ‘326 and ‘819 patents require (in part):

The ‘211 Patent:

- a first code generator (to generate an orthogonal code)
- a first decoder (to apply the orthogonal code)
- a TDM decoder
- a second code generator (to generate an orthogonal code)
- a second decoder (to apply the overlay code)

a second code (i.e., the “overlay code”)

a second decoder, selectively operable instead of the TDM decoder

The ‘326 and ‘819 Patents:

a first code generator (to generate an orthogonal code)

a first encoder (to encode the orthogonal code)

a TDM encoder

a second code generator (to generate an overlay code)

a second encoder (to apply the overlay code)

a second code (i.e., the “overlay code”)

a second decoder, selectively operable instead of the TDM decoder

storage arranged to store the set of orthogonal codes

The Court has construed the overlay code as an “an additional code that subdivides an orthogonal channel”, i.e., a second code. The overlay code is generated by the overlay code generator and applied by the second decoder or second encoder.

It is undisputed that the accused products use only a single code, the OVSF code, and do not contain an overlay code, the second code generator, or the second encoder/decoder required by the claims as per the testimony of Wi-LAN’s expert, Dr. Wells. (Tr. 102:13-17, 103:12-23, 134:6-136:18.)

The asserted claims of the ’327 patent require establishing a channel pool of CDMA code channels for establishing wireless links with subscriber terminals and then removing channels from the pool. When a channel is removed from the channel pool, it is no longer available to establish a wireless link with a subscriber terminal. The asserted claims of the ’327 patent also require the base station to receive “parameters pertaining to a wireless link within the cell

indicative of whether that wireless link is subject to interference from signals generated by said other cells.” There is no dispute that these parameters must be indicative of intercell interference. There is no dispute that 1) the CQI received by the accused Ericsson and Alcatel-Lucent base stations is just a number (0-30); 2) it is generated by the handset; and 3) how a handset calculates the CQI is proprietary. In fact, there is no evidence of how any handset actually calculates the CQI, let alone that it is indicative of intercell interference.

## II. LEGAL STANDARD

JMOL must be granted where “a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on that issue.” *Mirror Worlds, LLC v. Apple, Inc.*, 784 F. Supp. 2d 703, 710 (E.D. Tex. 2011) (quoting Fed. R. Civ. P. 50(a)), *aff’d*, 692 F.3d 1351 (Fed. Cir. 2012). “A court should render judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000); *see also*, Fed. R. Civ. P. 50(a) and (b). In deciding a motion for judgment as a matter of law, the proper inquiry is whether sufficient evidence exists to support non-movant’s claim when the evidence is viewed most favorably to the non-movant. *Id.* at 150. Importantly, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Id.* at 150-151. “The court will evaluate only whether the non-movant presented *sufficient* evidence; not whether he presented the most convincing evidence imaginable.” *Brochtrup v. Mercury Marine*, 426 F. App’x 335, 338 (5th Cir. 2011) (emphasis in original).

Defendants are entitled to JMOL because, based on the record, no reasonable jury could find Defendants infringe any of the Asserted Patents, either literally or under the doctrine of

equivalents because at least the elements of the claims of the Asserted Patents identified above are not found in any of the Defendants' accused products.

### **NO LITERAL INFRINGEMENT**

Literal infringement requires that each and every limitation in a patent claim be present in an accused device. *Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005); *Unique Concepts, Inc. v. Brown*, 939 F.3d 1558, 1562 (Fed. Cir. 1991).

As demonstrated above, several limitations in the asserted claims for each of the Asserted Patents are absent in the accused products. Thus, there is no literal infringement.

### **NO INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS**

Defendants bear the burden of proof of evidence of infringement under the doctrine of equivalents. *Miken Composites, L.L.C. v. Wilson Sporting Goods Co.*, 515 F.3d 1331, 1340-41 (Fed. Cir. 2008); *Universal Gym Equipment, Inc. v. ERWA Exercise Equipment, Inc.*, 827 F.2d 1542, 1548 (Fed. Cir. 1987). The Federal Circuit has “articulated distinct rules for the evidence showing infringement under the doctrine of equivalents.” *nCube*, 436 F.3d at 1326 (affirming JMOL of no infringement under the doctrine of equivalents). A plaintiff “must present *evidence* and *argument* concerning the doctrine and *each* of its *elements*,” and “[t]he evidence and argument on the doctrine of equivalents cannot merely be subsumed in [a] plaintiff’s case of literal infringement.” *Id.* at 1325 (original emphasis) (quoting *Lear Siegler, Inc. v. Sealy Mattress Co. of Mich., Inc.*, 873 F.2d 1422, 1425 (Fed. Cir. 1989)); *see also Tex. Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996).

As the Federal Circuit held in *Panduit Corp. v. Hellermannnyton Corp.*, 451 F.3d 819, 830

(Fed. Cir. 2006), the doctrine of equivalents cannot be relied upon if applying the doctrine would vitiate an entire claim element. Yet that is what Wi-LAN, through its expert Dr. Wells, attempts to do here by relying on the same element in the accused devices to satisfy both the first and second code generator elements of the asserted claims and both the first and second encoder/decoder elements of the claims. Finally, the alleged equivalents were foreseeable, there was no particularized testimony on doctrine of equivalents, and applying the doctrine of equivalents in the manner Wi-LAN has asserted would capture or ensnare the prior art. Thus, there is no infringement under the doctrine of equivalents.

In this case, despite having asserted infringement under the doctrine of equivalents, Plaintiff presented did not meet its burden on evidence or argument on this point. Defendants are thus entitled to judgment as a matter of law of non-infringement under the doctrine of equivalents.

### **CONCLUSION**

Wi-LAN has not presented evidence upon which the jury could reach a verdict of infringement. Judgment as a matter of law of non-infringement should be entered.

Dated: July 11, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served on all counsel of record on July 11, 2013, by electronic mail.

*/s/ Martin R. Bader*

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