

**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
	§	Civil Action No. 6:13-cv-252-LED
v.	§	CASES CONSOLIDATED FOR
	§	TRIAL
ALCATEL-LUCENT USA INC.; <i>et al.</i> ,	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

**WI-LAN’S RESPONSE TO DEFENDANTS’ MOTION FOR JUDGMENT AS A
MATTER OF LAW THAT THE ASSERTED CLAIMS OF THE PATENTS IN SUIT
ARE NOT INFRINGED**

I. INTRODUCTION

Defendants' move for judgment as a matter of law (JMOL) on Wi-LAN's claim that Defendants infringe 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"). Defendants' conclusory motion ignores and mischaracterizes the substantial factual evidence in the record from which the jury could find that Defendants' accused products infringe, either literally or under the doctrine of equivalents – including the testimony of Dr. Wells. Their motion for JMOL of non-infringement should be denied in its entirety.

II. STANDARD FOR GRANTING JUDGMENT AS A MATTER OF LAW

Judgment as a matter of law is only appropriate when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). "The grant or denial of a motion for judgment as a matter of law is a procedural issue not unique to patent law, reviewed under the law of the regional circuit in which the appeal from the district court would usually lie." *Finisar Corp. v. DirectTV Group, Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). The Fifth Circuit "uses the same standard to review the verdict that the district court used in first passing on the motion." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995). Thus, judgment as a matter of law may not be granted, unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" in favor of the non-movant. *Id.* at 700. In ruling on a motion for judgment as a matter of law, this Court reviews all evidence in the record and must draw all reasonable inferences in favor of the nonmoving party (here, Wi-LAN); however, a court may not make credibility determinations or weigh the evidence, as those are solely functions of the jury. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

III. ARGUMENT

A. There Is Substantial Evidence of Literal Infringement.

To prove literal infringement, the plaintiff must show the presence of every element or its equivalent in the accused device. *Lemelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985). Determining infringement is a two-step process: “[f]irst, the claim must be properly construed, to determine the scope and meaning. Second, the claim, as properly construed must be compared to the accused device or process.” *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1129 (Fed. Cir. 2011) (citing *Carroll Touch, Inc. v. Electro Mech. Sys., Inc.*, 15 F.3d 1573, 1576 (Fed. Cir. 1993)). “A determination of infringement is a question of fact that is reviewed for substantial evidence when tried to a jury.” *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307, 1311 (Fed. Cir. 2007).

1. The Asserted Claims of the '211, '326, and '819 Patents.

With respect to the '211 Patent (asserted against the handset defendants HTC and Sony Mobile) and the '326 and '819 Patents (asserted against the base station defendants Alcatel-Lucent and Ericsson), the asserted claims require, in part, the following three elements:

- (i) a second code generator (to generate an overlay code)
- (ii) a second decoder ['211 Patent] or a second encoder [the '326 and '819 Patents] (to apply the overlay code); and
- (iii) a second code (i.e., the “overlay code”).

The Court has construed, the last element, the overlay code as an “an additional code that subdivides an orthogonal channel.”

Defendants say there is no evidence that their accused handsets or base stations literally infringe any of these elements, but they primarily focus on the last one, the overlay code element. The sum total of Defendants’ argument is as follows:

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.)

Defendants' conclusory argument should be summarily rejected. Dr. Wells' testimony provides more than substantial evidence that Defendants' accused products literally infringe the asserted claims of the patents in suit, and in particular that the accused base station products contain an "overlay code generator" and a "second encoder" for applying the overlay code to the data being transmitted, and the accused handset products contain an "overlay code generator" and a "second decoder" for applying the overlay code to the received signal.

Base station defendants. Dr. Wells' testimony contains extensive analysis regarding the presence of the "overlay code generator." *See* 7/8/13 Afternoon Session 113:9–119:11 (showing that the HSDPA Standard, Alcatel-Lucent, and Ericsson have the "overlay code generator"). Following Dr. Wells' explanation to the jury, he concluded that "the overlay code generator is required by the HSDPA standard, and both Alcatel-Lucent and Ericsson both meet this element, this overlay code generator elements." *Id.* at 121:20–23.

Dr. Wells further presented his analysis showing that the "second encoder" for applying the overlay code to data being transmitted. *Id.* at 123:6–126:18, 127:17–129:22 (showing that the HSDPA Standard, Alcatel-Lucent, and Ericsson have the "second encoder"). At the conclusion of this analysis, Dr. Wells told the jury that "the HSDPA standard requires this second encoder selectively operable instead of the TDM encoder and its limitations. And Alcatel-Lucent and Ericsson both meet the requirements of this claim, this claim element." *Id.* at 130:1–5.

Handset defendants. With regard to the '211 Patent and the accused handset products from HTC and Sony-Mobile, Dr. Wells conducted a similar, thorough analysis concerning the

“overlay code generator” and “second decoder” elements, concluding that both elements are satisfied. *See* 7/9/13 Morning Session 35:11–39:18.

2. The Asserted Claims of the '327 Patent.

With respect to the '327 Patent, the handset defendants argue as follows:

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.

Once again, however, Defendants ignore the pertinent testimony from Dr. Wells.

Dr. Wells testified and pointed to evidence that CQI is indicative of inter-cell interference. It is irrelevant that Dr. Wells did not investigate the proprietary method that each handset vendor uses to calculate CQI, because as Dr. Wells stated in discussing PX-25, CQI is calculated based on the signal-to-noise ratio, and inter-cell interference is the “dominating source of radio-link impairment.” 7/9/13 Morning Session 56:17–25. So as Dr. Wells testified, “CQI is indicative of intercell interference.” *Id.* at 56:2–3.

Indeed, during the 7/9/13 morning session, at 55:19–57:14, Mr. Wells expressly discussed how the CQI is indicative of inter-cell interference and referred to PX-25, testifying as follows:

19 Q. And what does HSDPA standard say about
20 parameters pertaining to wireless links and indicative
21 of intercell interference?
22 A. So there's this parameter within HSDPA called
23 CQI. It stands for channel quality indicator. And this
24 is an indicator that the UE reports back to the base

25 station every time. The UE is the handset.
1 So the handset will report this CQI value back
2 to the base station. And we know that this CQI is
3 indicative of intercell interference.
4 For example, this is a book. It's called 3G
5 Evolution. It's written by four engineers who are lead
6 engineers at Ericsson. And within this Ericsson book,
7 it explains to us a little bit about CQI and how it
8 relates to intercell interference.
9 Q. And how does it relate to intercell
10 interference?
11 A. Okay. So, for example, in the top block here,
12 it says about how this -- this CQI, the channel quality
13 indicator, and then it goes on to read -- I'm on the
14 second line -- which each UE -- which each handset --
15 feeds back to the Node B -- that's the base station --
16 at regular intervals.
17 And it says about how it's calculated at the
18 handset based on the signal-to-noise ratio of the
19 received common pilot. So it's based on signal-to-noise
20 ratio, but it also goes on -- the Ericsson book also
21 goes on to tell us that in a real-world scenario that
22 interference from transmission in neighboring cells --
23 that's this intercell interference -- also referred to
24 as intercell interference, is often the dominating
25 source of radio-link impairment more so than noise.
1 So in other words, this intercell interference
2 will come up in the CQI value. The CQI is indicative of
3 this intercell interference, which is this dominant form
4 of noise in the system.
5 Q. Now, is CQI the same as just a signal that
6 indicates general wireless quality?
7 A. No, it's not.
8 Q. And why do you say that?
9 A. Well, because it's much more than that,
10 because it's -- the CQI is within an HSDPA system. It
11 looks at the -- the -- the quality of the channel. It
12 also looks at the interference on the channel, and also
13 within the context of this claim, it's an analyzer for
14 comparing it against a predetermined value.

Thus, it is irrelevant that Dr. Wells did not investigate the proprietary method that each handset vendor uses to calculate CQI, because as described in PX-25, CQI is calculated based on the signal-to-noise ratio, and Dr. Wells testified and PX-25 supports that inter-cell interference is the “dominating course of radio-link impairment.” So as Dr. Wells testified, “CQI is indicative of intercell interference.”

B. There Is Substantial Evidence of Infringement Under the Doctrine of Equivalents.

To support a finding of infringement under the DOE, a patentee must either: (1) demonstrate an insubstantial difference between the claimed invention and the accused product or method; or (2) satisfy the function, way, result test. *Aquatex Industries, Inc. v. Techniche Solutions*, 479 F.3d 1320, 1326 (Fed. Cir. 2007) (citing *Graver Tank & Mfg. v. Linde Air Prods. Co.*, 339 U.S. 605, 608, 70 S.Ct. 854, 94 L.Ed. 1097 (1950)). A patentee must provide particularized testimony and linking argument as to the insubstantiality of the differences between the claimed invention and the accused device or process on a limitation-by-limitation basis. *Id.* at 1328 (quoting *Texas Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996)). A patentee should typically provide particularized testimony from a qualified expert describing the claim limitations and establishing that those skilled in the art would recognize the equivalents. *Id.* at 1329. However, the expert is not required to “re-start his testimony at square one when transitioning to a doctrine of equivalents analysis.” *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1305 (Fed. Cir. 2007). Instead, an expert may explicitly or implicitly incorporate his earlier testimony into the DOE analysis. *Id.*

Defendants summarily argue that Wi-LAN cannot rely on the doctrine of equivalents. Defendants claim, with no citation to the record, that Dr. Well’s application of the doctrine would vitiate an entire claim element, that the alleged equivalents were foreseeable, and that there was no particularized testimony on doctrine of equivalents, and that applying the doctrine of equivalents in the manner Wi-LAN has asserted would capture or ensnare some unnamed “prior art.” Once again, however, Dr. Wells’ actual testimony refutes Defendants’ contention.

Defendants’ motion entirely ignores Dr. Wells’ thorough and particularized testimony regarding how the accused products infringe under the doctrine of equivalents. Following his

explanation of how the accused base station products literally meet the “overlay code generator” element, Dr. Wells explained how this element was also satisfied by the doctrine of equivalents. *See* 7/8/13 Afternoon Session 119:18–121:11. Dr. Wells demonstrated that generating a single long code was equivalent to generating a shorter orthogonal code and overlay code. In fact, he showed how they were mathematically equal and proceeded through a function-way-result analysis, thus concluding that “one of ordinary skill in the art would view these differences as insubstantial.” *Id.* at 121:10–11. Likewise, Dr. Wells testified that the “second encoder” element was satisfied by the doctrine of equivalents. *Id.* at 126:25–127:16; 7/9/13 Morning Session 46:13–47:24.

As to the handset claims, Dr. Wells repeatedly testified how the receivers were “mirrors” of the base station transmitters. *See* 7/9/13 Morning Session 22:22–23:10; 23:15–20; 33:20–23; 35:14–20; 35:24–36:7; 37:22–38:5. Thus, the doctrine of equivalents is equally applicable to the mirrored elements of the handsets.

As to Defendants’ other arguments regarding vitiation, foreseeability, and ensnaring the prior art, there is nothing in Dr. Wells’ testimony that conclusively establishes those defenses as a matter of law. To the contrary, as to vitiation, Dr. Wells explained how the same hardware and/or software can satisfy both the orthogonal code generator and overlay code generator, or first encoder/decoder and second encoder/decoder, because that hardware and/or software performs the function of the claimed elements. *See* 7/8/13 Afternoon Session 122:8–123:5; *id.* at 126:1–24; 7/9/13 Morning Session 36:8–14; *id.* at 39:4–13.

Defendants’ motion for JMOL on infringement should be denied.

Dated: July 11, 2013

Respectfully submitted,

By: /s/ David B. Weaver

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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 on this the 11th day of July, 2013.

/s/ David B. Weaver
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