

**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 INC.’S RESPONSE TO DEFENDANTS’ 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, AND
CLAIM 11 OF U.S. PATENT NO 6,222,819 ARE NOT INFRINGED AND INVALID,
AND CLAIMS 11 AND 12 OF U.S. PATENT NO. 6,195,327 ARE NOT INFRINGED**

Plaintiff Wi-LAN Inc. files this opposition to Defendants’ motion for judgment as a matter of law (JMOL) on Wi-LAN’s claim that Defendants infringe claims 2 and 5 of U.S. Pat. No. 6,381,211 (“the ’211 patent”); claims 2, 5, and 9 of U.S. Pat. No. 6,088,326 (“the ’326 patent”); claim 11 of U.S. Pat. No. 6,222,819 (“the ’819 patent”), and claims 11 and 12 of U.S. Pat. No. 6,195,327 (“the ’327 patent”) (collectively “Asserted Patents”) (Dkt. No. 459 (6:10-cv-521) and Dkt. No. 419 (6:13cv-252)). Defendants’ motion for JMOL should be denied in its entirety.

Defendants’ JMOL motion on infringement and validity issues misstates the evidence, the law, and Plaintiff Wi-LAN’s position. For example, Defendants’ JMOL motion badly asserts that it is “undisputed” that the Sony Mobile and HTC phones lack several claim elements of the ’211 patent. JMOL Motion at 3. Of course this is disputed. Similar misstatements are made throughout the JMOL motion and, for purposes of this Response, it should be understood that Wi-LAN disputes the assertions made by Defendants regardless of whether Defendants

incorrectly label them “undisputed” or not. Moreover, much of Defendants’ JMOL motion essentially seeks new claim constructions. The time for claim construction came and went many months ago. For the reasons detailed below, Defendants’ motion for JMOL should be denied.

I. 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). 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. *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995). 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).

II. 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).

III. Literal Infringement

During trial, Wi-LAN introduced more than enough evidence to support a finding of literal infringement of the asserted claims of the '326, '211, and '327 patents. (Dr. Wells expressly noted during his testimony, however, that claims 11 and 12 of the '819 patent were infringed only under the doctrine of equivalents.) Dr. Wells testified on direct examination for roughly three and a half hours. During that time, he explained in detail how Defendants' products infringed the asserted claims. *See* 7/8/13 Afternoon Session 39:1—157:14; 7/9/13 Morning Session 21:15—75:22; 7/9/13 Afternoon Session 5:15—11:5. Moreover, he referred to numerous exhibits which have been admitted into evidence, which further support findings of infringement. *See* PX-1-4, 25, 29, 31, 35, 38, 41, 43, 54, 55, 56, 92, 99, 100, 101, 102, 105, 106, 119, 130, 135, 141, 150, 189, 248, 249, 254, 256, 257, and DX-145, 203, 212.

A. The Court Should Deny the JMOL as to the '211 Patent.

1. The evidence shows that the accused handsets have overlay codes, a second code generator, and a second decoder.

As an initial matter, it should be noted that Defendants rely on the specification and tables in the '211 patent to support their position as to the issue of infringement. JMOL Motion at 3-6. But as even Defendants' experts acknowledged during trial, this is wrong. 7/11/13 Morning Session 77:2-10, 78:6-9, 88:23-89:1 (Wicker); *id.* at 167:4-23 (Olivier); 7/11/13 Afternoon Session 33:11-17 (Akl). Instead, it is the claims that matter.

Defendants' non-infringement experts agreed that the same hardware and software could provide the orthogonal code generator and the overlay code generator, and the first encoder/decoder and the second encoder/decoder. *See* 7/11/13 Morning Session 163:2-6, 164:13-22; 7/11/13 Afternoon Session 31:21-24. Dr. Wells agreed. *See* 7/8/13 Afternoon Session 126:1-24; 7/9/13 Morning Session 39:4-13. Thus, the parties' respective experts all

agree on this point. Moreover, the law clearly allows multiple claim elements to be found in an accused product when the same hardware or software in the accused product meets the claim elements. *E.g., Linear Tech. Corp. v. Int'l Trade Comm'n*, 566 F.3d 1049, 1055–56 (Fed. Cir. 2009). Thus, Defendants' JMOL Motion should be denied with respect to the orthogonal code generator/overlay code generator, first encoder/decoder, and second encoder/decoder claim elements.

Defendants' argument with respect to the overlay code hinges on Defendants' implicit request for a new claim construction: that an overlay code must be "separate" from the orthogonal code, not just an "additional" code. Defendants advanced this argument in their claim construction briefs and at the *Markman* hearing. There, Defendants argued that the overlay code should be a "separate" or "second" code. Ultimately, the Court concluded that the overlay code need only be an "additional" code.

At trial, Dr. Wells testified at length and explained how the use of OVSF codes in Defendants' products involved the use of both orthogonal and overlay codes. *See* 7/8/13 Afternoon Session 114:3–121:23. Dr. Wells provided a 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. In addition, Defendants' non-infringement experts agreed with Wi-LAN that the overlay and orthogonal codes could be generated and encoded/decoded simultaneously. *See* 7/11/13 Morning Session 165:24–166:12; 7/11/13 Afternoon Session 32:13–19. When done simultaneously, the result provides a code which includes both the overlay code and the orthogonal code, just as Dr. Wells testified. *See* 7/8/13 Afternoon Session 114:3–121:23.

Contrary to Defendants' assertions (JMOL Motion at 6), Wi-LAN does not concede that there is no literal infringement. Indeed, the record evidence supports findings of literal infringement of both asserted claims of the '211 patent and Defendants' motion for JMOL should therefore be denied.

2. The evidence shows “n” data items for different wireless links.

Defendants assert that the use of overlay codes to divide an orthogonal channel and create the control channels is not allowed by the claims. JMOL Motion at 6–7. Defendants' argument is again essentially an untimely claim construction argument.

Defendants argue that the construction of “wireless link” as a connection “between a central terminal and a particular subscriber terminal” compels a conclusion that control channels cannot transmit data items on a “wireless link.” *Id.* Defendants are incorrect. The Court's construction does not say that the connection is between a central terminal and “a particular subscriber terminal and no other.” Yet that is the basis for Defendants' non-infringement argument. Defendants concede that the control channels provide connections from each base station to all handsets that receive the control channels. *Id.* at 7. Because the control channels fall within the Court's construction of “wireless link,” Defendants' JMOL motion on this ground should be denied.

3. The TDM and second decoders need not act on the same channel.

Another belated claim construction argument made by Defendants is that the TDM decoder must be used on the same orthogonal channel as the second decoder. *See* JMOL Motion at 7. Here, Defendants taking conflicting positions.

The relevant claim wording allows for the decoding of a channel by either the TDM decoder or the second decoder, but does not require that they both be used on the same orthogonal channel. Indeed, this position reads the preferred embodiment shown in Fig. 15A of

the asserted patents out of the claims. Fig. 15A shows an embodiment in which TDM techniques are used on certain channels and overlay codes are applied to other channels. PX-4. A claim construction that reads a preferred embodiment out of the claims is almost always incorrect. *Vitronics Corp. v. Coceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996); *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1276 (Fed. Cir. 2008). Thus, Defendants' JMOL motion on this ground should be denied.

Moreover, Defendants' position here conflicts with their position on invalidity. Mr. Lanning's analysis hinges on his assertion that the Tiedemann article shows the use of TDM techniques on a control channel and the use of overlay codes on data channels. *See* 7/12/13 Morning Session 49:11–50:1. This approach conflicts with Dr. Wicker's testimony as to the "selectively operable" limitation. Defendants cannot have it both ways. Wi-LAN's position, on which Dr. Wells testified at length, *see* 7/8/13 Afternoon Session 123:6–126:18, and which is consistent with Mr. Lanning's position, is the only consistent position. Accordingly, Defendants' motion for JMOL on this ground should be denied.

4. No data items need be transmitted.

Defendants also argue that the claims of the '211 patent (which are apparatus claims, not method claims) somehow require the transmission of data items. JMOL Motion at 8. Here again, Defendants' position—one for which they cite no authority—essentially seeks a new claim construction.

A review of claim 1 of the '211 patent shows that the claim wording ("being transmitted") to which Defendants point simply adds additional details as to the TDM decoder. PX-4 col.28 l.57. That wording requires that the orthogonal channel to which TDM techniques are applied include a plurality of data items relating to different wireless links. *See* PX-4 col.28 ll.54–59. Dr. Wells testified in detail that the limitations of the asserted claims of the '211 patent

were met by the accused handsets. *See generally* 7/19/13 Morning Session 24:11–47:24. Hence, Defendants’ motion JMOL on this ground should be denied.

B. The Court Should Deny the JMOL Motion as to the ’326 and ’819 Patents.

1. The evidence shows the presence of the overlay codes, second code generator and second encoder in the accused base stations.

Defendants’ motion for JMOL makes essentially the same arguments on these base station claim elements as made by Defendants’ JMOL motion for the handsets. JMOL Motion at 8–9. For the same reasons as addressed above with respect to the handsets, the evidence demonstrates that the base stations do indeed have these claim elements.

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 and the Alcatel-Lucent and Ericsson base stations all 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 [base stations] both meet this element, this overlay code generator elements.” *Id.* at 121:20–23.

Dr. Wells also showed that the “second encoder” applies an overlay code to data being transmitted. *Id.* at 123:6–126:18, *id.* at 127:17–129:22 (showing that the HSDPA Standard and the Alcatel-Lucent, and Ericsson base stations 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. Accordingly, Defendants’ JMOL motion on this ground should be denied.

2. The TDM and second encoders need not be applied to the same data items.

Defendants also argue that the TDM and second encoders in the base stations must apply TDM techniques and overlay codes to the same data item. JMOL Motion at 9–10. This is essentially the same argument for the base stations as addressed above with respect to the handsets. *See* JMOL Motion at 7. For the same reasons as noted above with respect to this argument as to the handsets, Defendants’ arguments are misplaced and the JMOL motion as to this ground should be denied.

3. The central terminal need not include a subscriber terminal.

Defendants incorrectly argue that the apparatus claims of the ’326 and ’819 patents require the presence of a subscriber terminal. JMOL Motion at 10. This argument is yet another incorrect claim construction argument.

Claim 5 of the ’326 patent, for example, includes the reference to “wireless links” as follows: “whereby data items pertaining to different wireless links may be transmitted simultaneously within different orthogonal channels of said single frequency channel.” PX–1 col.29 ll.5–8. This wording, which describes the first encoder, simply explains the capabilities of the first encoder (and thus the central terminal). This whereby clause does not require or recite a subscriber terminal as a separate element or component of the first encoder or the central terminal. Hence, Defendants’ claim construction argument on this issue fails, and the JMOL motion on this ground should be denied.

4. The claims do not require storage of the sets of orthogonal and overlay codes at the same time.

The evidence showed the use of storage by the accused products to store both the orthogonal and overlay codes. *See* PX–130; DX–173; DX–205; 7/8/13 Afternoon Session 132:5–133:5; 7/12/13 Morning Session 56:10–57:11. Defendants’ motion for JMOL is based on

Defendants' position that the claims require that all codes be stored at the same time, but this requirement is not found in the claims. *See* PX-1 col.29 ll.23-24; PX-3 col.28 ll.41-42. Consequently, Defendants' JMOL motion on this ground should be denied.

5. Defendants' footnote 1 regarding TDM techniques fails to support a JMOL.

In footnote 1 on page 11 of the JMOL motion, Defendants assert that Wi-LAN argues an improperly narrow view of the Court's construction of TDM techniques. Defendants fail to say what that view was and also fail to cite to any testimony, exhibits or argument to support this assertion. Defendants have thus waived any such argument. Regardless, there is ample evidence showing that the accused products meet the TDM techniques limitations, including the allocation of time slots based on one or more characteristics of the data items. 7/8/13 Morning Session 107:3-109:21; *id.* at 110:10-111:1. Among other evidence, Dr. Wells testified as to the various types of "traffic classes" used in HSDPA and the accused products. *Id.* To the extent that Defendants' footnote is intended as any basis for a JMOL, the Court should deny the motion.

C. The Court Should Deny the JMOL as to the '327 Patent.

1. The claims allow removing channels from those allocated to a user.

Defendants improperly seek to limit the asserted claims to an embodiment described in the specification. Defendants assert that the "channel pool of code division multiplexed channels available for the establishment of . . . wireless links" must relate to a pool of channels available to the entire cell, but nothing in the asserted claims of the '327 Patent requires such a limitation. *See* PX-2 cl. 11. Indeed, Defendants sought to inject such a limitation into the construction of "channel pool" during the *Markman* proceedings, which the Court rejected. *See* Memorandum Opinion and Order, Dkt. No. 200 at 16-17.

Dr. Wells testified during trial, with explicit reference to the claim language, exactly how the accused channel pool—the set of channels allocated to a user by the base station—satisfies the requirement of the '327 Patent. *See* 7/9/13 Morning Session 53:20–54:14. He first explained how the complete set of HS-PDSCH channels—the data traffic channels in HSDPA—are the “code division multiplexed channels available for the establishment of . . . wireless links.” *See id.* at 53:25–54:5. Dr. Wells then selected a number of those HS-PDSCH channels and explained to the jury that those channels allocated to a user are a “channel pool of those code division multiplexed channel that are available for the establishment of wireless links.” *Id.* at 54:6–14. Dr. Wells therefore explained how Wi-LAN’s theory of infringement precisely meets the language of the claims.

Because Wi-LAN’s evidence allows a jury to find this element of the asserted claims of the '327 patent, the JMOL motion should be denied as to this ground.

2. The evidence shows that intercell interference is the dominant source of interference.

Defendants seek an overly narrow interpretation of the claim element requiring “parameters pertaining to a wireless link with the cell indicative of whether that wireless link is subject to interference from signals generated by . . . other cells.” In essence, Defendants seek to improperly inject the word “only” into the claim. But Wi-LAN presented substantial evidence that the Channel Quality Indicator (“CQI”) used by the HSDPA Standard, and the Ericsson and Alcatel-Lucent base station products, is a parameter indicative of interference generated by other cells, also known as intercell interference.

Dr. Wells testified and pointed to evidence that CQI is indicative of intercell 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 explained, and as stated in PX–25, CQI is calculated

based on the signal-to-noise ratio, and intercell interference is the “dominating source of radio-link impairment.” 7/9/13 Morning Session 56:17–25. Therefore, as Dr. Wells testified, “CQI is indicative of intercell interference.” *Id.* at 56:2–3.

Indeed, Dr. Wells expressly discussed how CQI is indicative of intercell 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.

7/9/13 Morning Session 55:19–57:14.

IV. 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 Indus., 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 (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. 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.*

A. Wi-LAN Does Not Seek to Remove Claim Limitations.

As to the doctrine of equivalents, Defendants’ motion for JMOL misstates Wi-LAN’s position with regard to the use of the same hardware and/or software to satisfy multiple claim elements. *See* JMOL Motion at 15–16. Dr. Wells testified that the same hardware and/or software can satisfy the “first encoder” and “second encoder” elements, and the “orthogonal code generator” and “overlay code generator” elements. *See id.* Under the *Linear Technology* case, the use of the same hardware and/or software does not remove any claim elements as long as the “first” and “second” encoders/decoders, and the “orthogonal” and “overlay” code generators

“perform their stated functions.” *See Linear Tech. Corp.*, 566 F.3d at 1055. Defendants, however, characterize this as a doctrine of equivalents issue, which it is not. Indeed, as discussed above, Defendants’ non-infringement experts agreed that the same hardware/software could satisfy multiple claim elements.

1. Wi-LAN does not eliminate the orthogonal code generator and orthogonal code generator.

Defendants’ motion for JMOL alleges in conclusory fashion that application of the doctrine of equivalents eliminates the orthogonal code generator and the overlay code generator. Wi-LAN does not seek to eliminate any elements. Each of the elements in the asserted claims is given effect under the doctrine of equivalents because Wi-LAN has shown that generating and encoding using, for example, a 256-bit code, is equivalent to generating and encoding using a 16-bit orthogonal code and a 16-bit overlay code. If either the orthogonal code generator or the overlay code generator were removed by Wi-LAN’s theory, then one of those 16-bit codes could not be combined with the data, and data would only be encoded with the remaining 16-bit code. Therefore, generating a 256-bit code is equivalent to generating and encoding *both* the orthogonal code *and* the overlay code.¹ Defendants’ JMOL motion should be denied.

2. Wi-LAN does not eliminate the first encoder/decoder and second encoder/decoder.

Defendants make the same argument for the first encoder/decoder and the second encoder/decoder elements. For the same reasons discussed above, Defendants’ JMOL motion

¹ Defendants’ JMOL motion inexplicably states that the “single” code used in Defendants’ products “speeds up data transmission” whereas the use of an overlay code slows down data transmission. This is contrary to the testimony of Defendants’ own experts and witnesses. *See, e.g.*, 7/10/13 Afternoon Session 114:5–7 (Dr. Said Tatesh, Director at Alcatel-Lucent) (agreeing that the more data is spread, the slower it goes); *id.* at 216:7–11 (Dr. Stephen Wicker, expert for Alcatel-Lucent) (explaining that the greater the spreading factor, the lower the data rate).

should be denied. If Defendants' were in fact correct and either the first encoder/decoder or the second encoder/decoder were eliminated, then the data would only be encoded/decoded using one 16-bit code—just the orthogonal code or just the overlay code. But because Defendants' products encode/decode data using a spreading factor of 256, this shows that both codes are used and both encoders/decoders are used.

B. Dr. Wells Testified in Detail Regarding Equivalent Elements and Presented a Function-Way-Result Analysis.

Defendants' JMOL 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, including with respect to the doctrine of equivalents. *See* 7/9/13 Morning Session 22:22–23:10; *id.* at 23:15–20; *id.* at 33:20–23; *id.* at 35:14–20; *id.* at 35:24–36:7; *id.* at 37:22–38:5. Thus, the doctrine of equivalents is equally applicable to the mirrored elements of the handsets. Defendants' JMOL motion should be denied.

C. Applying the Doctrine of Equivalents Does Not Ensnare the Prior Art.

Defendants allege that Wi-LAN's application of the doctrine of equivalents ensnares the prior art. Ensnarement is a question of law. *Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1324 (Fed. Cir. 2009). Under the framework established by *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677 (Fed. Cir. 1990), a hypothetical claim sufficient in scope to literally cover the accused products is created and then compared to the prior art. "The pertinent question then becomes whether that hypothetical claim could have been allowed by the PTO over the prior art." *Id.* at 684. "An accused infringer seeking to avoid infringement under the doctrine of equivalents on this basis bears the burden of 'presenting prior art which shows that the asserted range of equivalence would encompass the prior art,' but the patentee bears the ultimate burden of persuasion to show that its claims do not cover the prior art." *Energy Transp. Group, Inc. v. William Demant Holding A/S*, 697 F.3d 1342, 1354 (Fed. Cir. 2012) (quoting *Streamfeeder, LLC v. Sure-Feed Sys., Inc.*, 175 F.3d 974, 984 (Fed. Cir. 1999)). Defendants failed to meet their burden, but even if they did, Wi-LAN has clearly shown that the application of the doctrine of equivalents does not ensnare the prior art.

First, Defendants have not proposed any hypothetical claim that they allege ensnares the prior art. Second, beyond the references to the Gitlin patent and the Gilhousen application in Defendants' motion for JMOL, Defendants have failed to articulate any other prior art references or combination of references that they allege Wi-LAN would ensnare through the doctrine of equivalents. In their motion, Defendants do not allege that any single prior art reference would be ensnared. Rather, they cite Gitlin for the TDM techniques elements and "different length OVVSF codes" from Gilhousen, without explaining why these two references would be combined or how they disclose each element of either the asserted claims or any hypothetical claim. Indeed, Mr. Lanning failed to offer a complete opinion at trial regarding how the combination of

Gitlin and Gilhousen would render the asserted claims obvious. Therefore, Defendants have failed to meet their burden to “present[] prior art which shows that the asserted range of equivalence would encompass the prior art.”

Even assuming solely for argument that Defendants have met that burden, Wi-LAN presented testimony from Dr. Wells that definitively showed that the four prior art references Defendants presented at trial failed to disclose “TDM techniques” as construed by the Court. 7/12/13 Afternoon Session 16:8–17:1; *id.* at 28:17–30:19; *id.* at 12:11–14:18; *id.* at 36:20. Therefore, there is no combination of prior art references that discloses all of the elements of the asserted claims, and Wi-LAN’s theory of infringement under the doctrine of equivalents does not ensnare the prior art.

Finally, the Court should reject Defendants’ one-sentence allegation that the equivalent was foreseeable, as Defendants fail to present any argument or support that would allow the Court to grant Defendants’ JMOL motion on this issue.² Accordingly, the Court should deny Defendants’ JMOL motion on this issue.

V. Invalidity

Defendants have argued throughout the trial that the claims are anticipated under 35 U.S.C. § 102 and obvious under 35 U.S.C. § 103, but have failed to offer legally sufficient evidence to establish any of these defenses by clear and convincing evidence.

An issued patent is accorded a presumption of validity based on the presumption that the United States Patent & Trademark Office acted correctly in issuing a patent. From the issuance

² Under the Federal Circuit’s en banc decision in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1359 (Fed. Cir. 2003) (en banc), the foreseeability of an equivalent must be reviewed “in the context of the invention.” *Id.* at 1371. Furthermore, the claim elements that Wi-LAN asserts Defendants satisfy through the doctrine of equivalents were found in the original claims as submitted to the Patent Office.

of the patent, it is presumed that a claimed invention is novel, useful, not obvious, and satisfies the other legal requirements for a valid U.S. patent. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S.Ct. 2238, 2245 (2011). It is a bedrock principle of patent law that a party asserting invalidity bears the burden of proving invalidity by clear and convincing evidence. *ICU Med., Inc. v. Alaris Med. Sys., Inc.*, 558 F.3d 1368, 1376 (Fed. Cir. 2009).

A. Defendants Failed to Show Anticipation Under 35 U.S.C. § 102.

1. Legal standard for anticipation.

Anticipation under 35 U.S.C. § 102 requires that “each element of the claim in issue is found, either expressly or under principles of inherency, in a single prior art reference, or that the claimed invention was previously known or embodied in a single prior art device or practice.” *Amgen, Inc. v. Hoffman-La Roche Ltd.*, 580 F.3d 1340, 1366 (Fed. Cir. 1999); *Minn. Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1565 (Fed. Cir. 1992).

At trial, Defendants presented only four prior art references to demonstrate invalidity: the Tiedemann article (DX-124), the IS-95-A standard (DX-149), the Gitlin patent (DX-148), and the Gilhousen '652 application (DX-150). Despite having asserted that certain claims are invalid because they were anticipated, Defendants did not meet their burden to show anticipation under clear and convincing evidence. For example, the only allegedly anticipatory reference argued at trial by Defendants was Tiedemann. But Defendants failed to demonstrate legally sufficient evidence that Tiedemann anticipates any asserted claim. Thus Defendants' motion that the Asserted Claims are anticipated must be denied as a matter of law.

2. Tiedemann does not anticipate Claim 9 of the '326 patent or Claim 11 of the '819 patent.

Defendants have presented no evidence and do not even argue that that Tiedemann, the only allegedly anticipating reference argued, anticipates claim 9 of the '326 Patent or claim 11 of the '819 patent by teaching each and every limitation of those claims.

3. Tiedemann does not anticipate Claim 2 or 5 of the '326 patent, nor does Tiedemann anticipate Claim 2 or 5 of the '211 patent.

Defendants failed to produce legally sufficient evidence that the Tiedemann reference discloses, among other things, TDM techniques or overlay codes, as required by claims 2 and 5 of the '326 patent, and claims 2 and 5 of the '211 patent. As one example, each of the asserted claims of the '326, '819, and '211 patents require “time division multiplexing (TDM) techniques,” which the Court construed to require allocation “based on one or more characteristics associated with the data item.” Defendants’ expert Mr. Lanning identifies only the “actual identification of the cell phone,” 7/12/13 Morning Session 42:22–43:14, as a characteristic associated with the data item meeting the Court’s construction. However, as Dr. Wells testified, the mere identity of the handset receiving a data item is not a characteristic associated with the data item:

8 Q. Does Tiedemann disclose TDM techniques?

9 A. No. Tiedemann doesn't disclose TDM techniques
10 either.

11 Q. And why do you say that?

12 A. Because the -- the only reference within
13 Tiedemann, the reference that Mr. Lanning has pointed to
14 is -- is this paging channel. And I've pulled it up
15 here.

16 The paging channel is divided into slots of 80
17 milliseconds' duration, and it only listens on mobile --
18 only listens on its assigned slots.

19 Now, although it says that you've got slots,
20 that doesn't mean to say that it's TDM or TDM
21 techniques.

22 Q. And why do you say that?

23 A. Well, because the TDM techniques allocates
24 data, based on the characteristics associated with those
25 data items; and there's nothing in Tiedemann that talks

1 about how these -- these -- how data is even assigned.

7/12/13 Afternoon Session 16:8–17:1; *see also id.* at 30:1–5, *id.* at 30:21–31:10.

B. Defendants Failed to Prove Obviousness Under 35 U.S.C. § 103.

1. Legal standard for obviousness.

Obviousness under 35 U.S.C. § 103 requires some motivation to combine the prior art references. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). In particular, there must be a reason that a person of ordinary skill in the art would combine the different elements in the fashion claimed. *Id.* at 418. This requires “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006); *see also KSR*, 550 U.S. 418.

2. Defendants’ proof fails to establish obviousness.

At trial, Mr. Lanning discussed only a single combination of references: Tiedemann with Gitlin. Defendants failed to demonstrate legally sufficient evidence that would permit a jury to conclude by clear and convincing evidence that these two references, even when considered in the particular combination argued by Defendants, meet all claim elements. Defendants baldly state that all of the elements required were known in the prior art and that “the only dispute between the parties is whether it would have been obvious to combine the elements” into the arrangement required by Wi-LAN’s patents. JMOL Motion at 20. This is entirely untrue. In fact, none of the references discussed by Mr. Lanning disclose TDM techniques. Neither Tiedemann nor Gitlin discloses TDM techniques or overlay codes. 7/12/13 Afternoon Session 16:8–30:10; *id.* at 31:11–32:6.

Further, even if Defendants had presented an opinion regarding obviousness in light of other combinations of references, none of these references in any combination meets all the claim elements. For example, Defendants also failed to prove: that the IS-95-A reference teaches

overlay codes or TDM techniques (7/12/13 Morning Session 80:25–81:3 (admitting that IS-95-A does not disclose overlay codes)); that the Tiedemann reference contains overlay codes or discloses TDM techniques (7/12/13 Afternoon Session 16:8–19:1); that the Gitlin reference discloses orthogonal codes (7/12/13 Morning Session 84:22–85:1 (admitting failure to testify how the Gitlin reference disclosed orthogonal codes)); TDM techniques, or overlay codes (*Id.* at 66:9–12 (admitting that Gitlin does not disclose overlay codes)); or that Gilhousen '652 teaches TDM techniques (*Id.* at 83:10–14 (admitting that Gilhousen '652 does not anticipate)). In sum, no combination of these references discloses each and every claim limitation of any Asserted Claim.

Defendants also failed to present legally sufficient evidence of a “motivation to combine” the reference pairing argued by Defendants at trial, and instead simply rely on conclusory statements that a person of ordinary skill would be motivated to combine these references.

Dr. Wells explained his opinion that it would not have been obvious to combine Tiedemann with Gitlin:

6 Q. All right. Would Mr. Lanning's combination of
7 Tiedemann and the Gitlin reference have been obvious --
8 have rendered the claims at issue obvious?
9 A. No, it wouldn't.
10 Q. And why do you say that?
11 A. Because, first of all, Gitlin is talking about
12 this system with PN codes. It has a system with
13 non-orthogonal codes. And Gitlin chose PN codes for a
14 reason. He chose them because he's building a low-cost
15 system. PN codes are easy to generate. It's a very
16 different system to what's disclosed in Tiedemann.
17 So I don't think it would have been obvious to
18 combine the two together.

7/12/13 Afternoon Session 34:6–18; *see also id.* at 34:23–35:7 (explaining why Tiedemann could not be used as a single reference to show obviousness). Defendants' assertion that Dr.

Wells presented only a conclusory opinion that “it would not have been obvious”³ ignores Dr. Wells’ detailed explanation of the Tiedemann and Gitlin references—including their differences and missing claim elements—and therefore must fail. Defendants’ JMOL motion should be therefore be denied.

VI. Conclusion

Defendants’ motion for JMOL should be denied in its entirety for the reasons detailed above and in view of the evidence admitted at trial.

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Respectfully submitted,

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³ JMOL Motion at 21.

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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 15th day of July, 2013.

/s/ Steve R. Borgman
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