

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

Wi-LAN INC.,

Plaintiff,

v.

ALCATEL-LUCENT USA INC., *et al.*,

Defendants.

CIVIL ACTION No. 6:10-CV-521-LED

Wi-LAN INC.,

Plaintiff,

v.

HTC CORPORATION, *et al.*,

Defendants.

CIVIL ACTION No. 6:13-CV-252-LED

DEFENDANTS' MOTION TO RECOVER ATTORNEYS' FEES

TABLE OF CONTENTS

| | |
|---|-----|
| Table of Authorities | iii |
| Preliminary Statement. | 1 |
| Legal Standard | 1 |
| Arguments. | 2 |
| A. Wi-LAN’s vexatious litigation conduct renders this an exceptional case. | 2 |
| 1. Wi-LAN’s business model is based on vexatious litigation practices. | 3 |
| 2. Wi-LAN relied on the untenable testimony of experts who were not credible. | 5 |
| a. John Jarosz | 5 |
| b. Jonathan Wells | 6 |
| i. “Overlay Code” Patents | 6 |
| ii. “Other Cell Interference” Patent | 8 |
| iii. Invalidity | 9 |
| 3. Wi-LAN unnecessarily multiplied the costs of defending the lawsuit. | 10 |
| a. Wi-LAN dropped eighteen claims of the ’819 Patent on the expert-report deadline, knowing that Defendants’ expert was preparing invalidity charts for all of those claims. | 10 |
| b. Wi-LAN withheld nonprivileged documents. | 11 |
| B. Wi-LAN’s claims were frivolous. | 12 |
| 1. Wi-LAN brought this action in subjective bad faith. | 13 |
| 2. Wi-LAN’s claims were objectively baseless. | 13 |
| Conclusion | 15 |
| Certificate of Conference | 19 |
| Certificate of Service | 19 |

TABLE OF AUTHORITIES

CASES

Automated Bus. Machs., Inc. v. NEC Am. Inc.,
202 F.3d 1353 (Fed. Cir. 2002) 2

Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs. Inc.,
670 F.3d 1171 (Fed. Cir. 2012) 2

Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.,
393 F.3d 1378 (Fed. Cir. 2005) 2

Eon-Net v. Flagstar Bancorp,
653 F.3d 1314 (Fed. Cir. 2011) 2, 5, 12, 13, 15

Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.,
687 F.3d 1300 (Fed. Cir. 2012) 2, 12, 13

Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993). 13

STATUTES

35 U.S.C. § 285 1, 2, 15

PRELIMINARY STATEMENT

On July 16, 2013, the Court entered final judgment in favor of Defendants Alcatel-Lucent USA Inc. (“Alcatel-Lucent”), Telefonaktiebolaget LM Ericsson and Ericsson Inc. (collectively, “Ericsson”), Sony Mobile Communications AB and Sony Mobile Communications (USA) Inc. (collectively, “Sony Mobile”), and HTC Corporation, HTC America Inc., and Exede Inc. (collectively, “HTC”) in a patent lawsuit filed by Wi-LAN Inc. ECF No. 470.¹

After less than an hour of deliberations, the jury determined: (1) Alcatel-Lucent and Ericsson have not infringed the asserted claims of U.S. Patent Nos. 6,088,326 (“the ’326 Patent”), 6,195,327 (“the ’327 Patent”); and 6,222,819 (“the ’819 Patent”); (2) Sony Mobile and HTC have not infringed the asserted claims of U.S. Patent No. 6,381,211 (“the ’211 Patent”); (3) all claims that Defendants alleged were invalid are invalid due to anticipation and/or obviousness; and (4) Wi-LAN was entitled to no damages. The Court entered final judgment on the jury’s verdict, denied all pending motions, and taxed Defendants’ costs against Wi-LAN the day after the jury verdict.

The jury verdict reflects a simple truth: this case should never have been brought. Wi-LAN’s claims were frivolous and its actions in bringing and litigating them were vexatious, being part of a business model that relies on the litigation process itself, rather than the merits, to extract license fees from Wi-LAN’s targets. Defendants therefore request that the Court declare this to be an exceptional case and award them their attorneys’ fees under 35 U.S.C. § 285.

LEGAL STANDARD

To deter patentees from bringing unwarranted infringement suits, a “court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285; *see Automated Bus. Machs., Inc. v. NEC Am. Inc.*, 202 F.3d 1353, 1355 (Fed. Cir. 2002). To be

¹ The Court later entered an Amended Final Judgment on July 22, 2013. ECF No. 471.

entitled to its attorneys' fees, a prevailing party must establish by clear and convincing evidence that the case is exceptional. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1308 (Fed. Cir. 2012). “[M]any varieties of misconduct can support a district court’s exceptional case finding, including lodging frivolous filings and engaging in vexatious or unjustified litigation. Indeed, litigation misconduct and unprofessional behavior may suffice, by themselves, to make a case exceptional under § 285.” *Eon-Net v. Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011) (internal quotations and citations omitted). In addition, sanctions under Section 285 also may be imposed for bringing a frivolous claim. *Id.* A claim is frivolous if: (1) the litigation was brought in subjective bad faith, and (2) the litigation was objectively baseless. *Id.* (citing *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005)).

If the Court determines that a case is exceptional, it must then decide whether an award of attorneys’ fees is appropriate and, based on the extent to which the case is exceptional, the amount of the award. *Id.* at 1322–23.

Arguments

A. Wi-LAN’s vexatious litigation conduct renders this an exceptional case.

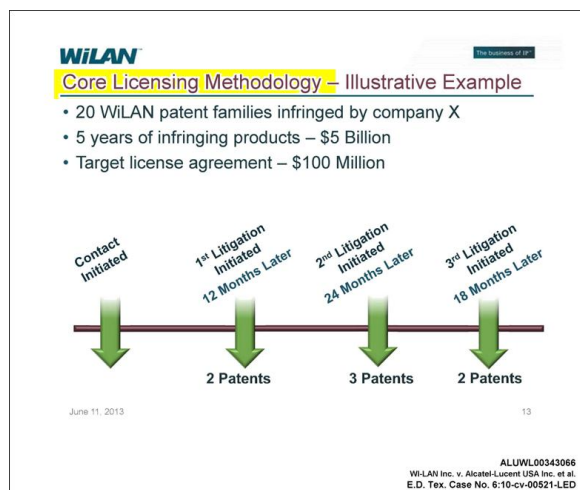
Wi-LAN displayed a pattern of misconduct and harassing litigation tactics. Indeed, Wi-LAN’s entire business model is built on the practice of beleaguering potential defendants with frustrating and annoying litigation to exact exorbitant “license” fees from their targets. Moreover, Wi-LAN unnecessarily multiplied the costs of defending the lawsuit. Its infringement contentions have been a moving target throughout the litigation, it presented expert testimony that was not credible, and it withheld thousands of non-privileged documents. Accordingly, the Court may deem this to be an exceptional case under Section 285. *See, e.g., Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs. Inc.*, 670 F.3d 1171, 1192 (Fed. Cir. 2012) (upholding judgment that a case was exceptional based, in part, on the plaintiff’s contradictory infringement

positions and reliance on testimony that was not credible) (overruled, in part, on other grounds).

1. Wi-LAN's business model is based on vexatious litigation practices.

Before bringing this lawsuit, Wi-LAN did not contact any of the defendants to put them on notice that Wi-LAN believed they infringed the '326, '327, '819 or '211 Patents. Trial Tr. July 9 PM at 156:13–16; 157:13–158:13; 174:15–175:16. Instead, Wi-LAN simply sued all four Defendants in an attempt to coerce them into taking a license, a tactic that illustrates Wi-LAN's normal course of business.

At trial, Defendants established that Wi-LAN's core "licensing" policy is based on filing serial patent lawsuits to institute expensive litigation. Wi-LAN's corporate policy is to "initiate contact" with a targeted defendant, then file a first lawsuit on two patents twelve months later, a second lawsuit on three patents two years after the first, and a third lawsuit on another two patents eighteen months after the second. Trial Tr. July 9 PM at 192:23–193:10; DX435.



DX435 (highlighting added)²

Further, to extract license fees that may bear no relation to actual damages, Wi-LAN's practice also involves arguing to potential defendants that it will cost more to try a case than to settle, even if the accused products are not infringing. Trial Tr. July 9 PM at 140:8–145:16;

² Before the trial of this action, this serial-litigation strategy was featured on Wi-LAN's Internet website. See DX435. Sometime after the trial, Wi-LAN apparently removed this document from its website.

DX432; DX56 (noting in a presentation to Airspan that the cost to take a license would be \$3 million, while the cost to successfully defend the litigation would be \$4.1 million).

| Scenario | Scenario Description | Expected Cost to Airspan over Term of License - NPV (\$M) |
|----------|--|---|
| 1 | Airspan accepts Wi-LAN proposed offer | \$3.0 |
| 2 | Airspan successful defense in Litigation | \$4.1 |
| 3 | Airspan unsuccessful defense in Litigation (2% Royalty) | \$14.8 |

DX56 (highlighting added)

In fact, Wi-LAN’s corporate representative readily admitted that when negotiating with potential targets, he has emphasized that the cost of defending an infringement suit based on a single patent would be \$5 million to \$8 million. Trial Tr. July 9 PM at 144:21–25.

Wi-LAN pursued its serial-litigation tactics against the defendants in this action: other than small-player Sony Mobile, Wi-LAN has sued each of the defendants on multiple occasions. Indeed, Wi-LAN’s behavior with respect to HTC presents the classic case of Wi-LAN’s practice, as Wi-LAN has sued HTC *five separate times* between October 2010 and June 2013, with the fifth being filed the Friday before *voir dire* in this case. Trial Tr. July 9 PM at 156:7–157:12. Two of those lawsuits involved the same patents, with Wi-LAN filing one case in Tyler and the other in Marshall. Trial Tr. July 9 PM at 198:5–11. Wi-LAN has also sued Alcatel-Lucent at least two other times—once in the Marshall Division and once in the Southern District of Florida. No. 2:11-cv-68 (E.D. Tex. (filed Feb. 2, 2011)); No. 1:12-cv-23568 (S.D. Fla. (filed Oct. 1, 2012)). And it has sued Ericsson in the Southern District of Florida and initiated an arbitration proceeding against Ericsson in Canada.³

In short, Wi-LAN’s very business model is based on vexatious litigation practices designed to extort license amounts that bear more relation to the potential cost of litigation than to the

³ The Court in the Florida action granted summary judgment in favor of Ericsson on June 20, 2013, dismissing all of Wi-LAN’s claims.

actual damages in a particular case. By bringing this lawsuit against these defendants in this Court, Wi-LAN misused the judicial resources of this Court as part of its plan to extort license fees. The Court would be justified in deeming this an exceptional case on this basis alone. *See Eon-Net*, 653 F.3d at 1326–27 (upholding district finding that the patentee “acted in bad faith by exploiting the high cost of litigation to extract a nuisance value settlement”).

2. Wi-LAN relied on the untenable testimony of experts who were not credible.

a. John Jarosz

Wi-LAN supported its flawed damages claims through the testimony of John C. Jarosz. Mr. Jarosz’s opinions, however, were based on a methodologically unsound damages analysis, and the Court struck those opinions twice.

The Court first struck Mr. Jarosz’s opinions based on his use of the entire market value rule and because he failed to properly apportion the value of the patents-in-suit relative to other patents covered by Wi-LAN’s portfolio- and world-wide licenses. ECF No. 421. Although the Court did not altogether bar Mr. Jarosz from testifying, it held that “[i]f Wi-Lan intends to rely upon Mr. Jarosz’s reasonable royalty analysis at trial, Mr. Jarosz must amend his report and *recalculate* his reasonable royalty in light of the Court’s ruling.” *Id.*

Flouting the Court’s instructions, Mr. Jarosz presented *the exact same conclusion and damages numbers* in a supplemental report. Indeed, at deposition, Mr. Jarosz testified that while his *presentation* may have changed, his *methodology remained the same* despite the Court’s order.⁴ The reason the numbers remained the same was that Mr. Jarosz continued to attribute the entire value of the worldwide licenses at issue to only the United States patents covered by those licenses, just as he had in his original report that the Court struck. Mr. Jarosz tried to justify his

⁴ **Ex. A:** Volume 3 of the Deposition of John C. Jarosz (July 5, 2013) (“Jarosz Dep. V3”), at 37:24–38:5; *see also* Trial Tr. July 8 AM at 9:13-10:2.

“apportionment” based on an untested and untestable litigation-expenditure theory. *See* ECF No. 435; *see also* Trial Tr. July 9 AM at 5:13–19:6.⁵

On the second day of trial, the Court struck Mr. Jarosz’s opinions that relied on that fantastical theory. Trial Tr. July 9 AM at 19:3–6. But rather than correct his mistakes, Mr. Jarosz at trial presented *the exact same damages numbers* to the jury, calling the numbers “inputs” that the jury could use to determine the amount of damages, thereby inviting the jury to accept the same flawed methodology that was struck by the Court the day before. *See* Trial Tr. July 11 AM at 146:20–23 (“Q. But you’re not advancing any of those numbers as reasonable royalty numbers for this jury to award, correct? A. I’m not advancing any reasonable royalty number. I’m providing inputs to what the jury could deem to be appropriate.”). Moreover, Mr. Jarosz readily testified to the jury that *he did not know how* to adjust his “inputs” for the geographic scope of the licenses on which he relied for his damages numbers. Trial Tr. July 10 AM at 108:10–14.

b. Jonathan Wells

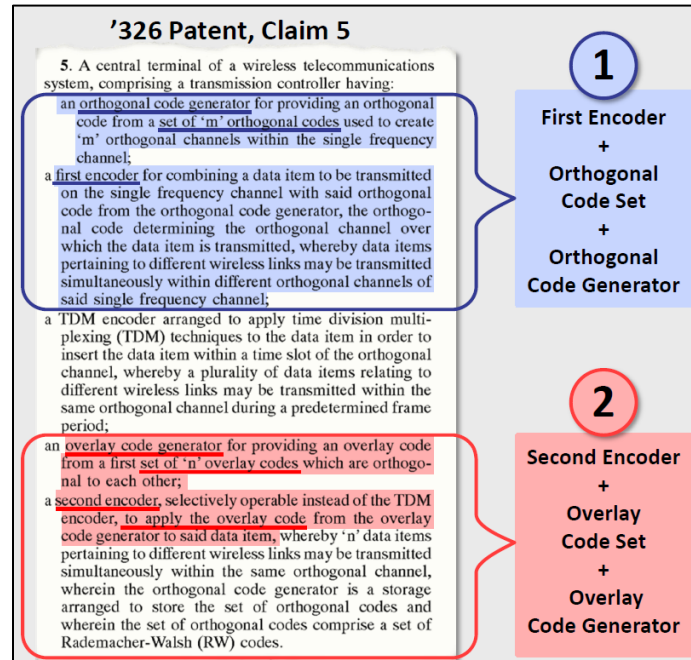
Wi-LAN’s infringement and validity expert, Jonathan Wells, provided equally incredible testimony.

i. “Overlay Code” Patents

At trial, Wi-LAN asserted Claims 2, 5, and 9 of the ’326 Patent, Claims 2 and 5 of the ’211 Patent, and Claim 11 of the ’819 Patent. Each of these claims requires, among other things, an “orthogonal code,” an “orthogonal code generator” for generating the orthogonal code, and a “first encoder” (or “first decoder”) for applying the orthogonal code. But each of the claims also requires an additional code known as an “overlay code,” an “overlay code generator,” and a “second encoder” (or “second decoder”) for applying the overlay code. Claim 5 of the ’326

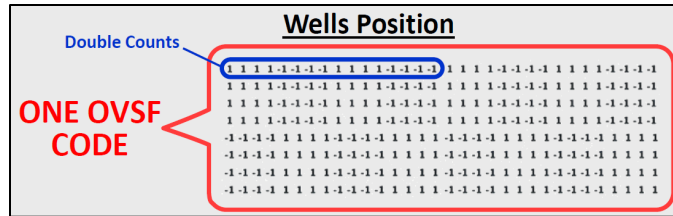
⁵ Significantly, Mr. Jarosz came up with his novel litigation-expense approach sometime between Friday, June 28, 2013, at 5:14 p.m. (when the Court issued its order on Defendants’ original *Daubert* motion) and Wednesday, July 3, 2013, at 12:00 p.m. (when his supplemental report was due). *See Ex. A: Jarosz Dep. V3 at 25:24–26:22.S*

Patent is typical:



In its claim-construction ruling, the Court construed “overlay code” as “an *additional* code that subdivides an orthogonal channel.” ECF No. 200, at 14 (emphasis added). Dr. Wells wholly ignored this construction, arguing that one equals two: that a *single* structure in the accused products that generates a *single* orthogonal variable spreading factor code, or “OVSF code,” and applies that code in a *single* spreading operation met both the orthogonal code and overlay code limitations. Trial Tr. July 9 AM, at 117:7–12.

Plainly put, Dr. Wells testified that the same OVSF code, same code generator, and same encoder/decoder satisfied both the “orthogonal code” and “overlay code” portions of the claims. In fact, he was forced to admit on cross examination that he was “double counting” certain bits of the single OVSF code for the two required codes. Trial Tr. July 9 AM at 126:10–15. The following demonstrative presented at trial illustrates Dr. Wells’s strained attempt to use a single code for both the orthogonal code and additional overlay code.



Not surprisingly, the jury rejected Dr. Wells’s testimony because it was not credible.

ii. “Other Cell Interference” Patent

Dr. Well’s testimony with respect to the ’327 Patent was no more credible. Each asserted claim in the ’327 Patent requires: “an analyzer for receiving *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.*” As shown by the plain claim language, the parameters received must indicate whether the wireless link is subject to interference from other cells (i.e., “inter-cell interference”).

Dr. Wells, testified that a parameter known as the Channel Quality Indicator or “CQI” was indicative of inter-cell interference. The sole basis for this bald assertion was a single sentence in a textbook, *3G Evolution*, which states that “interference from transmissions in neighbor cells, also known as inter-cell interference, is often the dominating source of radio-link impairment, more so than noise.” DX–283, at 33; *see* Trial Tr. July 9 AM at 56:19–25. This passage has nothing to do with CQI or whether CQI indicates the presence of inter-cell interference. Trial Tr. July 11 AM at 180:17–182:6.

Indeed, the *3G Evolution* book dedicates an entire section to CQI and its calculation. DX-283, at 174–77. It explains some of the things that can affect the CQI value, including the quality of the UE (i.e., mobile phone), such that different UEs in *identical environments* can report different CQI values. *Id.* at 174. The undisputed testimony at trial was that CQI is simply a number between 0 and 30. It provides no information to the base station about how or why the

number was chosen. Trial Tr. July 11 AM at 60:14–21; *id.* at 153:23–154:2. It certainly does not indicate whether a lower number is caused by inter-cell interference or by something obstructing the signal to the mobile phone, such as happens when a phone enters an elevator. Trial Tr. July 11 AM at 153:23–154:18.

Nevertheless, Dr. Wells doggedly maintained his “opinion” that any decrease in the CQI was due to interference from another cell. Amazingly, when faced with an example of interference—and therefore lower CQI—caused by movement into an elevator within a ten-mile-wide cell, where movement of two feet into an elevator could not possibly result in any appreciable change in inter-cell interference, Dr. Wells could only respond that “you don’t have many elevators out in a rural [area].” Trial Tr. July 9 AM at 146:6–146:25. At this point, it was clear that Dr. Wells was not testifying as an expert, but merely as an advocate for Wi-LAN’s baseless position.

iii. Invalidity

Dr. Wells’s opinions as to the validity of the patents-in-suit were equally implausible. When testifying regarding whether the Tiedemann reference identified by Defendants’ expert, Mark Lanning, disclosed overlay codes, Dr. Wells was shown Figure 4-3 from the reference, which is titled “Overlay Encoding.” Trial Tr. July 12 AM at 54:23–58:9. Dr. Wells’s response to questions about the figure was unbelievable: “And as I said, just because it says overlay encoding, doesn’t mean it’s an overlay encoder.” Trial Tr. July 12 AM at 56:23–57:1. His testimony regarding the spreading tree contained in the same reference was equally nonsensical. When shown Figure 4-3, a channel tree titled “1.23 MHz Spreading,” Dr. Wells testified that the figure did not depict a “spreading tree” because “[i]t doesn’t say spreading tree; it says spreading.” Trial Tr. July 12 AM at 63:3–15.

In sum, Wi-LAN’s theories for each of the relevant issues in this case—infringement,

validity, and damages—were based on blatantly unbelievable expert testimony.

3. Wi-LAN unnecessarily multiplied the costs of defending the lawsuit.

a. Wi-LAN dropped eighteen claims of the '819 Patent on the expert-report deadline, knowing that Defendants' expert was preparing invalidity charts for all of those claims.

In its infringement contentions, Wi-LAN asserted nineteen claims of the '819 Patent against Defendants. In particular, Wi-LAN asserted claims 12–17, 21, and 22 against HTC and Sony Mobile, and Claims 1–17 against Alcatel-Lucent and Ericsson. Wi-LAN continued asserting all of those claims when it amended its contentions and served additional claim charts on June 14, 2012. On September 21, 2012, however, the day on which infringement and invalidity expert reports were due, Wi-LAN informed Defendants that it was withdrawing all claims against HTC and Sony Mobile with respect to the '819 Patent, and was proceeding against Alcatel-Lucent and Ericsson only as to a single claim—claim 11—of the '819 Patent.⁶

The timing of this disclosure was made to force Defendants to incur unnecessary legal fees and expenses in preparing extensive reports on this patent. It is clear that Wi-LAN had planned to drop eighteen of the nineteen asserted claims in the '819 Patent well before the expert-report deadline. Indeed, in his expert report on alleged infringement, Wi-LAN's expert, Dr. Wells, stated that he “ha[d] been asked to analyze and opine whether certain products sold by Alcatel-Lucent and Ericsson infringe . . . claim 11 of [the '819 Patent],” *rather than all nineteen of the claims originally asserted.*⁷

Had Wi-LAN informed Defendants earlier that it intended to drop eighteen claims of the '819 Patent, Defendants' expert and counsel could have saved countless hours analyzing prior art and preparing invalidity claim charts spanning hundreds of pages for claims Wi-LAN knew it

⁶ See **Ex. B**: Correspondence from A. Pai to A. Deoras, B. Sostek and M. Bader, dated September 21, 2012.

⁷ **Ex. C**: Expert Report of Jonathan Wells Regarding Infringement of U.S. Patent Nos. 6,088,326, 6,195,327, 6,222,819, and 6,381,211, at 1.

would drop. But instead, Wi-LAN waited until 1:14 P.M. on the expert-report deadline to inform Defendants that it was dropping all of these claims. Such tactics served only to drive up Defendants' costs. This was especially harassing for HTC and Sony Mobile as they were forced to retain and pay an expert to prepare an unnecessary invalidity report for the '819 Patent.

b. Wi-LAN withheld nonprivileged documents.

Wi-LAN is run by a lawyer, Jim Skippen, who serves as its president and CEO, and Wi-LAN's in-house attorneys are actively involved in locating licensing targets in high-technology industries, negotiating license agreements, and valuing licensing royalties. These are all business—not legal—functions. Yet merely because these business people hold legal degrees, Wi-LAN cloaked their nonprivileged correspondence with the attorney-client privilege and withheld documents relating to its core business of licensing. In fact, Wi-LAN withheld 13,762 documents as privileged, which amounted to over 30% of all its responsive documents.

HTC filed a motion to compel production of these documents (ECF No. 240), followed by a Request for *In Camera* Review of Non-Privileged Documents on Wi-LAN's Privilege Log (ECF No. 330). In response, on March 14, 2013, barely two weeks before *voir dire* was scheduled, the Court found that Wi-LAN had not conducted a thorough and fair review of the documents and had asserted the attorney-client privilege too broadly. ECF No. 362, at 6. The Court ordered Wi-LAN to conduct the required full and thorough review of all documents previously withheld as privileged and to produce nonprivileged documents four days later, on March 18, 2013, which was three days before the scheduled pretrial conference. *Id.* at 7. Wi-LAN produced an additional 7,980 documents on that deadline, prompting an expensive three-month continuance of the original trial date. *See* ECF No. 373 (Case No. 613-cv-252); ECF No. 382.

Wi-LAN's conduct with respect to its review and production obligations, and its

unsupportable, overly broad use of the attorney-client privilege, further demonstrate its vexatious litigation practices and misconduct.

B. Wi-LAN's claims were frivolous.

The Federal Circuit has not hesitated to find cases exceptional where a plaintiff brings frivolous infringement claims hoping to achieve settlements. In *Eon-Net*, 653 F.3d 1314, that court examined the circumstances of the patent owner and its practice of filing litigation with the goal of extracting settlements for less than defense costs. In that case, the plaintiff had filed numerous complaints on the same patents, which were followed by a “demand for a quick settlement at a price far lower than the cost of litigation.” *Id.* at 1326. The Federal Circuit noted that by filing suit, the plaintiff “had the ability to impose disproportionate discovery costs on” the defendant because the rules “allow for liberal discovery, and it is not uncommon for an accused infringer to produce millions of pages of documents,” with the costs paid by the producing party. Also important was the plaintiff’s status as a non-practicing entity, as it was “generally immune to counterclaims for patent infringement, antitrust, or unfair competition because it did not engage in business activities that would potentially give rise to those claims.” *Id.* at 1327.

As noted above, whether a claim is frivolous depends upon a two-part test: (1) was the litigation brought in subjective bad faith, and (2) was the litigation objectively baseless. The objective prong is not applied only with respect to the initial filing of a claim, but, rather, is a retrospective inquiry into the reasonableness of the claims in light of the full record. *Highmark Inc.*, 687 F.3d at 1310–11 (citations omitted). “The question is whether, in light of that record, ‘no reasonable litigant could realistically expect success on the merits.’” *Id.* (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)). The subjective requirement, likewise, requires that the Court consider the record as a whole; a case initially brought in good faith may be continued in bad faith depending on developments during

discovery and otherwise. *Highmark*, 687 F.3d at 1311.

1. Wi-LAN brought this action in subjective bad faith.

In this case, the subjective portion of the test is supported by the similarity between the facts and the concerns recognized by the Federal Circuit in *Eon-Net*. As discussed above and established at trial, Wi-LAN is a non-practicing entity that had little to risk in filing suit. It has an established policy of serial litigation to force settlements and licenses to its patents. It relies on the liberal discovery permitted under the Federal Rules to demand massive document productions, and it uses the cost of defense as a tool to drive settlements. Coupled with these basic facts are Wi-LAN's actions in repeatedly suing the same Defendants to put pressure on them to enter into settlement agreements—in accordance with Wi-LAN's own core management strategy. Further, Wi-LAN vexatiously increased Defendants' costs by waiting until the last possible moment before informing Defendants of its shifting infringement theories and by improperly withholding thousands of non-privileged documents on an unsupportable claim of privilege.

2. Wi-LAN's claims were objectively baseless.

As discussed above, to make its infringement theory work, Wi-LAN was forced to read out all of the limitations in the “overlay code” patents directed to the “overlay code,” “overlay code generator,” and “second encoder”/“second decoder,” as it was undisputed that the accused products use a single OVSF code that is generated by a single code generator and applied by a single encoder or decoder in a single operation. This simply cannot be squared with the claim language or the Court's construction of “overlay code” as “an *additional* code that subdivides an orthogonal channel.” Wi-LAN's double-counting theory for the two required codes—and indeed its reliance on the *same generator* for the required “orthogonal code generator” and “overlay code generator” and on the *same encoder/decoder* for the required “first encoder”/“first decoder”

and “second encoder”/“second decoder”—clearly illustrates the objectively baseless nature of its infringement theory.

Wi-LAN’s validity position on the “overlay code” patents was equally baseless. As discussed above, Dr. Wells’s “opinion” of validity was premised on nothing more than willful blindness to the express disclosure of overlay coding and spreading trees in the Tiedemann reference. Trial Tr. July 12 PM at 56:23–57:1; 63:3–15. Dr. Wells’s only other contention—that the prior art did not disclose “TDM techniques”—was based on a meritless misapplication of the Court’s claim construction. *Compare* Trial Tr. July 12 AM at 43:18–44:8 with ECF No. 341 at 3.

Wi-LAN’s infringement position with respect to the ’327 Patent was also baseless. As discussed above, the asserted claims of the ’327 Patent require “an analyzer for receiving 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.” Once again, the relevant facts were undisputed: CQI—the allegedly infringing element of the accused products—is a number between 0 and 30 that represents the quality of a channel in terms of the data rate it can handle; it does not provide any information to the base station as to the reasons why it has the value it has. It certainly does not indicate whether a lower CQI value is caused by inter-cell interference or by something obstructing the signal to the mobile phone, such as happens when a phone enters an elevator. Trial Tr. July 11 AM at 153:23–154:18.

Further, it was also undisputed that during the prosecution of the ’327 Patent, the examiner rejected the pending claims as unpatentable in view of a prior-art reference to Vexler. DX-203, at WIL-0008057; Trial Tr. July 11 AM at 57:10–15. In response to that rejection, the patent applicants added the limitation that the parameters received must be indicative of interference from other cells. And they explained to the examiner: “Moreover, the analyzer of the Vexler, et

al. patent merely analyzes wireless signal quality and *does not determine whether channels in the pool are subject to interference from signals generated by other cells as required by the claimed invention.*” DX-203, at WIL-0008084–85 (emphasis added). Thus, Wi-LAN’s argument was not only inconsistent with the plain claim language requiring that the parameters received be “indicative of whether that wireless link is subject to interference from signals generated by said other cells,” it also contradicted the inventors’ statements to the PTO during prosecution.

Accordingly, the objective element of the frivolousness inquiry is satisfied, and the Court may deem this an exceptional case on this basis as well.

CONCLUSION

As the Federal Circuit held in *Eon-Net*, “the appetite for licensing revenue cannot overpower a litigant’s obligation to file cases reasonably based in law and fact and to litigate those cases in good faith.” *Eon-Net*, 653 F.3d at 1328. In this case, Wi-LAN was clearly overwhelmed by its appetite. It filed an objectively baseless infringement action against Defendants and brought that action in bad faith. Thus, for the reasons stated, Defendants respectfully request that the Court find this case to be exceptional under 35 U.S.C. § 285 and order Wi-LAN to pay Defendants’ reasonable attorneys’ fees as a result. A fair estimate of the amount of fees sought is as follows: for Alcatel-Lucent, \$6.3 million; for Ericsson and Sony Mobile, \$5.2 million, collectively; and for HTC, \$5 million. If the Court determines an attorneys’ fee award to be warranted, Defendants stand willing to work with Wi-LAN’s counsel in an attempt to reach agreement on the reasonable amount of such fees.

Dated: July 30, 2013

Respectfully submitted,

By: /s/ Eric H. Findlay

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Dated: July 30, 2013

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

As required by Local Rule CV-7(h), counsel for Defendants, including Richard Wynne, William Cornelius, Matthew Mueller, Eric Findlay, and Akshay Deoras, and counsel for Plaintiff, including Ajeet Pai and Claire Henry, participated in a meet and confer on July 29, 2013, and discussed the subject motion. Plaintiff is opposed to the motion and discussions have ended in impasse, leaving an open issue for the Court to resolve.

Richard L. Wynne, Jr.
Richard L. Wynne, Jr.

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of July, 2013, a copy of the foregoing document was served on counsel of record by electronic mail.

Richard L. Wynne, Jr.
Richard L. Wynne, Jr.