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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their motion for fees, Defendants argue that this is an exceptional case under 35 U.S.C. § 285 because the jury found, after a week-long-trial, that the asserted claims of the patents in suit were not infringed and invalid and that “Wi-LAN was entitled to no damages.” (Dkt. 475 (10-cv-521) (“Mtn.”) at 1; Dkt. 433 (13-cv-252) at 1.<sup>1</sup>) Defendants thus argue that the jury’s verdict establishes “this case should never have been brought.” *Id.* Even assuming the jury’s verdict could be sustained (and Wi-LAN contends it cannot),<sup>2</sup> Defendants cite no case for the proposition that an adverse jury verdict is enough to support an award of attorneys’ fees. To the contrary, the Federal Circuit has made clear that “[d]efeasit of a litigation position, even on summary judgment, does not warrant an automatic finding that the suit was objectively baseless.” *Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1315 (Fed. Cir. 2010). A party who prevails only after a full jury trial on the merits cannot credibly argue, retrospectively and based on the jury’s verdict, that the suit was frivolous; such a rule would turn the “exceptional case” statute on its head. Yet that is the overarching thrust of Defendants’ motion.

Nor can Defendants reasonably argue that this is an exceptional case merely because Wi-LAN lawfully resorts to litigation to enforce its patents. Defendants’ references to other lawsuits filed against some of the defendants in this case, especially lawsuits that are ongoing and that have not been resolved, is not a basis for holding that Wi-LAN engaged in vexatious conduct *in*

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<sup>1</sup> Hereinafter, unless otherwise indicated, citations to docket numbers will be from Case No. 6:10-CV-521-LED.

<sup>2</sup> For the reasons explained in Wi-LAN’s Rule 50(b) Motion for Judgment as a Matter of Law and Wi-LAN’s Motion for New Trial (Dkts. 481, 482), the jury’s findings of no infringement and invalidity are not supported by legally sufficient evidence and are contrary to the Court’s charge and the great weight and preponderance of the evidence. At a minimum, a new trial on all issues, including damages, is warranted.

*this case* (or any other).<sup>3</sup> Equally meritless is Defendants' suggestion that Wi-LAN can be sanctioned for offering expert testimony that (a) in the case of Dr. Wells, *was never even challenged as unreliable or inadmissible*, or (b) in the case of Mr. Jarosz, was revised in response to the Court's rulings on Defendants' *Daubert* motions and ultimately admitted into evidence as revised. Nor can Defendants even come close to proving vexatious conduct by relying on Wi-LAN's narrowing of its claims (an event that occurs in virtually every patent case, and that is actively encouraged by courts), or on a privilege dispute that resulted in Wi-LAN producing additional redacted documents (many of which were duplicates of documents already produced) that in no way proved critical to Defendants' ability to defend against the claims asserted by Wi-LAN. This is especially so where the core of the privilege dispute involved the establishment of new precedent in the District regarding the production of redacted e-mail.

This is *not* a case where the patentee lost as a matter of law at the *Markman*, stage based on an obviously unreasonable claim construction. To the contrary, Wi-LAN's claim construction positions were largely adopted by this Court. (*See* Dkt. 200.) Nor is this a case where Defendants prevailed on summary judgment with respect to the asserted claims.<sup>4</sup> Neither did Defendants move to exclude (much less successfully exclude) the technical opinions proffered by Wi-LAN's expert, who explained in detail why the asserted claims are valid and infringed. And there simply is no evidence, let alone clear and convincing evidence, that Wi-LAN acted with subjective bad faith, or that this litigation was objectively baseless. Wi-LAN firmly believed that it would

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<sup>3</sup> Wi-LAN has licensed its patents to hundreds of licensees without litigation. But when companies Wi-LAN believes infringe ignore good faith efforts to reach business agreements, Wi-LAN is left with no recourse but litigation to protect its intellectual property.

<sup>4</sup> Indeed, the only patent summary judgment motion was filed by two Defendants (HTC and Alcatel-Lucent) and was directed at invalidity of a small number of claims. That motion was denied as moot as the case was narrowed for trial. (Dkt. 419.) In contrast, Wi-LAN prevailed on a summary judgment regarding Ericsson and Sony Mobile's contract claims, eliminating a complex issue from the case and avoiding the need for a jury trial on that matter. (Dkt. 410.)

prevail on the infringement, validity, and damages issued that were to be tried.

Defendants' motion for fees should be denied.

## **II. STANDARD FOR ATTORNEYS' FEES UNDER 35 U.S.C. § 285.**

Section 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. As the Federal Circuit has recognized, "sanctions imposed under § 285 carry serious economic and reputational consequences for both litigants and counsel," and implicate a patent owner's fundamental Constitutional right to bring litigation to enforce its patent rights. *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1376 (Fed. Cir. 2011). Thus, "[t]here is a presumption that the assertion of infringement of a duly granted patent is made in good faith." *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1382 (Fed. Cir. 2005). To overcome this presumption, an accused infringer who prevails must show that the case is "exceptional" by clear and convincing evidence. *Id.* "A case may be deemed exceptional when there has been some material inappropriate conduct *related to the matter in litigation*, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions." *Id.* at 1381 (emphasis added). But "[a]bsent misconduct in conduct of the litigation or in securing the patent, sanctions may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless." *Id.* Again, clear and convincing evidence is required. *Id.* at 1382.

As Judge Rader has observed, a case must be "truly unusual" to justify an award of attorney fees. *IP Innovation L.L.C. v. Red Hat, Inc. et al.*, No. 2:07-cv-447-RRR, Dkt. 273 at 2 (E.D. Tex. Oct. 13, 2010) (denying motion for fees and noting § 285 serves to "provide discretion where it would be *grossly unjust* that the winner be left to bear the burden of his own counsel which prevailing litigants normally bear" (quoting *Badalamenti v. Dunham's*, 896 F.2d

1359, 1364 (Fed. Cir. 1990)).<sup>5</sup> Even in the rare times where a court finds clear and convincing evidence that a case is exceptional, “the decision to award attorney fees and the amount thereof are within the district court’s sound discretion.” *Brooks Furniture*, 393 F.3d at 1382.

### **III. ARGUMENT**

Defendants contend that this case is exceptional on two grounds. First, Defendants argue that Wi-LAN engaged in vexatious litigation misconduct. But the instances of “vexatious litigation conduct” alleged by Defendants, even if proved, would fall woefully short of the sort of the egregious misconduct necessary for an award of fees. Second, Defendants argue, without support, that Wi-LAN’s lawsuit was frivolous. However, Defendants’ “evidence” of frivolity amounts to little more than conclusory assertions that because the jury found in Defendants’ favor, “this case should never have been brought.” Mtn. at 1, 12–15. A favorable verdict for one party after a hard-fought trial, however, is hardly a basis for sanctions, much less clear and convincing evidence supporting the same. *See IP Innovation*, Dkt. 273, slip op. at 2–3.

#### **A. Wi-LAN Did Not Engage in Vexatious Litigation Misconduct.**

Defendants spend the bulk of their motion accusing Wi-LAN of litigation misconduct, which the Federal Circuit defines as generally involving “unethical or unprofessional conduct by a party or his attorneys during the course of adjudicative proceedings,” including “advancing frivolous arguments during the course of the litigation or otherwise prolonging litigation in bad faith.” *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1315–16 (Fed. Cir. 2012). Defendants cannot demonstrate any such litigation misconduct here.

#### **1. Defendants cannot rely on mischaracterizations about Wi-LAN’s licensing business model to obtain fees in this case.**

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<sup>5</sup> The *IP Innovation* court denied the motion for fees where, as here, the jury returned a verdict of non-infringement and invalidity following exclusion of certain of plaintiff’s damages theories. *See* No. 2:07-cv-447-RRR, Dkt. 273 at 3; *see also* No. 2:07-cv-447-RRR, Dkt. 225.

Continuing their assault on Wi-LAN's licensing business, Defendants first argue that because Wi-LAN is a non-practicing entity, and because Wi-LAN was forced, in the case of these particular Defendants, to file one or more lawsuits in an effort to protect its patent rights, Wi-LAN should be declared a vexatious litigant who is automatically subject to an award of attorneys' fees in this case. There is no legal or factual basis for such a finding.

Defendants cannot obtain sanctions against Wi-LAN for being in the business of licensing intellectual property—or for being a patent owner that files suit against a much larger manufacturer to protect its rights and obtain reasonable damages for infringement.<sup>6</sup> The law does not relegate some patent owners to second-class citizenship, and Defendants' attempts to do so are improper. Indeed, in *i4i Limited Partnership v Microsoft Corp.*, 670 F. Supp.2d 568 (E.D. Tex. 2009) (Davis, J.), this Court chastised counsel for Microsoft for repeatedly suggesting that it was somehow improper for a non-practicing patent owner to sue a defendant “not to protect a valuable product” but “to try to get money out of them.” *Id.* at 595. The Court explained in *i4i* that the “law recognizes no distinction among types of patent owners,” and that the “characterization of a patent lawsuit as good or bad or as misuse of the patent laws based upon the status of the patent owner is inappropriate.” *Id.* at 596. In view of established law, Defendants cannot credibly argue that because Wi-LAN does not practice the patents in suit, Wi-LAN's decision to sue was somehow inappropriate, let alone vexatious.<sup>7</sup>

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<sup>6</sup> Defendants also mischaracterize Wi-LAN's overall business. While Wi-LAN does not practice the patents-in-suit, it develops and licenses technology for wireless systems in addition to intellectual property. (Ex. A, July 9 PM Tr. 81:13–17.)

<sup>7</sup> Indeed, the evidence shows that both Alcatel-Lucent and Ericsson participate in patent licensing businesses that are really no different from the business for which they now attack Wi-LAN. Ericsson has provided 2,000 patents to a non-practicing entity called “Unwired Planet” for purposes of obtaining licensing revenue. (*See, e.g.*, Ex. A, July 9 PM Tr. 182:12–183:22.) And Alcatel-Lucent is the beneficiary of the Multimedia Patent Trust, which has repeatedly filed lawsuits against practicing companies. (*See, e.g., id.* at 184:2–185:13.)

Defendants' related and equally misguided attempt to argue that this Court should sanction Wi-LAN for filing *other lawsuits on different patents* against some of these Defendants likewise fails. In *Highmark, Inc. v. Allcare Health Management Systems, Inc.*, 687 F.3d 1300 (Fed. Cir. 2012), one of the cases cited in Defendants' motion, the Federal Circuit held that a district court generally cannot sanction a party for conduct that occurs before another tribunal, unless the party at issue "engages in bad-faith conduct which is in direct defiance of the sanctioning court." *Id.* at 1319 (quoting *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 591 (5th Cir. 2008)); *see also Brooks Furniture*, 393 F.3d at 1384 (fact that patent holder had sued others was not indicative of bad faith). Defendants here offer no authority for the issuance of sanctions for alleged conduct that occurs solely before another tribunal, much less for a party's good-faith efforts to enforce its patent rights in such other tribunal. Nor is there any evidence, only the bare assertions of Defendants, that the other lawsuits filed by Wi-LAN are somehow baseless.<sup>8</sup> The fact that Wi-LAN has sued some of the Defendants *on different patents than the ones involved here* between October 2012 and June 2013 is not grounds for holding that Wi-LAN has engaged in vexatious litigation conduct *in this case*.<sup>9</sup>

Defendants continue to mischaracterize Wi-LAN's core "licensing" policy as being based

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<sup>8</sup> Defendants complain that Wi-LAN did not put them on notice before filing suit. (Mtn. at 3.) Leaving aside that there is no requirement that a patentee provide notice, Defendants fail to mention that Wi-LAN had attempted to engage with Alcatel-Lucent and HTC for *years* regarding other patents and its patent portfolio. (Ex. A, July 9 PM Tr. 157:7–20.) Having been subject to several declaratory judgment actions, Wi-LAN chose to file suit to protect its rights. (*Id.* at 179:5–181:8.) And as the Court is aware, Wi-LAN was required to file suit against Ericsson and Sony Mobile under the PCR Agreement to begin the accrual of damages.

<sup>9</sup> Although Defendants note that a Florida district court granted summary judgment in favor of Ericsson on June 20, 2013, Defendants carefully fail to mention that the Florida court's ruling was based on the meaning of the PCR Agreement ***and is directly contrary to the ruling made by this Court on the same issue as a matter of law.*** (Dkt. 410.) And, astonishingly, Defendants argue that Wi-LAN has acted vexatiously by engaging in a Canadian arbitration hearing with Ericsson, while failing to note that the parties *agree* that under the contract at issue there *the only forum available to address Ericsson's claim is arbitration in Canada.* (Dkt. 422.)

on serial patent lawsuits designed to extract license fees that bear no relation to actual damages. But this allegation has no basis in fact. Mr. Parolin explained in detail how Wi-LAN's licensing business operates and noted repeatedly that Wi-LAN is flexible in dealing with those it believes may be selling products that infringe Wi-LAN's patents. (Ex. A, July 9 PM Tr. 81:18–82:9, 90:18–22.) Mr. Parolin also explained that many sophisticated smart phone manufacturers and members of the 3GPP standards-setting body, including Nokia, Samsung, Motorola, Panasonic, LG, Fujitsu, RIM, and Sharp, have taken licenses to Wi-LAN's wireless portfolio, including the patents in suit in this case. (*Id.* at 82:22–85:22.) In all, some seventy companies have entered into licenses that include rights to the patents in suit. (*Id.* at 85:6–10, 23–25.)

Moreover, contrary to Defendants' baseless assertion, the vast majority of the more than 270 companies who have taken licenses from Wi-LAN for one or more of its patents were not the result of litigation at all (much less "serial" litigation). Mr. Parolin testified that *90% of the licenses Wi-LAN has obtained* were voluntary and "were done without litigation." (*Id.* at 90:2–14, 127:6–128:2.) Mr. Parolin testified that Wi-LAN does not file many lawsuits, or seek to abuse the system, but only files suit when "we have to." *Id.* at 86:12–14. He correctly observed that, if Wi-LAN believes that a third party is "infringing our property rights," and the third party continues to disagree, then the only way Wi-LAN can enforce its rights is to file suit because there are no "patent enforcement police" that can protect Wi-LAN's patent rights. (*Id.* at 86:17–24, 87:21–89:1.) And although Wi-LAN did, in past negotiations years ago, discuss with some potential licensees (such as Airspan) the potential cost of litigation as one of *many factors* in the negotiation (*id.* at 86:25–87:20, 140:1–141:20), Mr. Parolin explained that Wi-LAN stopped including such costs in its presentations because "people already understood" how the cost of litigation could affect a licensing decision. *Id.* at 143:13–24. In addition, Defendants fail to note

that Wi-LAN is not a special-purpose entity with no risk in litigation; to the contrary, it is a publicly traded company that incurs substantial litigation expenses, including millions of dollars in attorneys' fees to pursue a case and substantial discovery expenses. In this case, for example, such expenses included production of tens of thousands of Wi-LAN documents and costs associated with taking Defendants' depositions in foreign locations (including, for example, England, Taiwan, and Sweden). For Defendants to suggest that Wi-LAN somehow relies upon some imaginary asymmetry in litigation to induce meritless settlements is simply false.<sup>10</sup>

In their motion, Defendants seek to make much about a Wi-LAN document (DX-434) that provided an illustrative example of how a timeline that leads to litigation might play out—with Wi-LAN first seeking to negotiate with an accused infringer, then filing one or more lawsuits if necessary. Ex. A, July 9 PM Tr. 153:17–155:14. However, Mr. Parolin explained that if Wi-LAN believes a company “is infringing our property rights” for years and “they haven’t really engaged with us and we feel strongly about it . . . our only recourse is to . . . put our money where our mouth is and litigate on those patents.” *Id.* at 156:1–6. And it is rare that Wi-LAN has had to file multiple lawsuits against one company. Mr. Parolin explained that the number of accused infringers that Wi-LAN has had to sue more than once is very small—“maybe four or five companies”—*three of which were defendants in this case. Id.* at 181:9–182:5. Thus, that Wi-LAN has had to file multiple suits to enforce its various patent rights is no basis to conclude that Wi-LAN somehow engaged in vexatious litigation conduct.

This case bears no resemblance to *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314 (Fed. Cir. 2011), where the Federal Circuit affirmed an award of attorneys' fees after the district court

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<sup>10</sup> Defendants' position basically amounts to the untenable argument that unless potential damages are greater than the cost of litigation—a cost that *Wi-LAN* must also bear in attempting to secure a recovery—then Wi-LAN must permit the infringement to continue, despite the estoppel and laches issues that Defendants no doubt would argue could result.

*granted a summary judgment of no infringement for the defendant* and concluded, among other things, that the patent owner had (a) destroyed relevant documents prior to filing suit, (b) failed to engage in the claim construction process in good faith, and (c) displayed a “lack of regard for the judicial system” and the litigation process as a whole, including by responding in a snide fashion to an interrogatory answer that “the skill in the art required is that sufficient to converse meaningfully with [the named inventor].” *Id.* at 1324–26. The court in *Eon* went on to cite, as evidence of subjective bad faith, settlement offers indicating that the patent owner’s case had “indicia of extortion”—namely, that it had filed “nearly identical patent infringement complaints against a plethora of diverse defendants, [and] . . . followed each filing with a demand for a quick settlement at a price [ranging from \$25,000 to \$75,000] far lower than the cost to defend the litigation.” *Id.* at 1326–27. But there is no evidence (much less *clear and convincing* evidence) that Wi-LAN followed any such pattern in filing this lawsuit—or any other—against these Defendants. The damages that Wi-LAN sought against these Defendants, which were orders of magnitude above the “nuisance value” settlements at issue in *Eon*, were directly tied to the extent of each defendant’s use of the patents-in-suit. Indeed, Wi-LAN’s conduct is directly contrary to Defendants’ attempt to suggest that Wi-LAN is in any way similar to the *Eon* plaintiff.

**2. Defendants cannot prove litigation misconduct by pointing to the expert testimony of Dr. Wells or Mr. Jarosz.**

Remarkably, Defendants further argue that this Court should award fees because, in their view, “Wi-LAN relied on the untenable testimony of experts who were not credible.” (Mtn. at 5.) But Defendants cite no authority for their novel theory: namely, that after a full trial, in the face of competing expert testimony, a court can sanction a litigant—plaintiff or defendant—for testimony that the prevailing party claims, in hindsight, was “unbelievable.” (*Id.* at 10.)

In *MarcTec, LLC. v. Johnson & Johnson*, 664 F.3d 907 (Fed. Cir. 2012), the Federal

Circuit affirmed an award of attorneys' fees, based in part on litigation misconduct in which the plaintiff "introduced and relied on expert testimony that failed to meet even minimal standards of reliability." *Id.* at 920.<sup>11</sup> But there, the Federal Circuit found that the testimony was "sufficiently egregious" to rise to the level of litigation misconduct because of extreme facts showing *unreliability* of the opinion. *Id.*<sup>12</sup> The Federal Circuit recognized, however, that "exclusion of expert testimony under *Daubert* does not automatically trigger a finding of litigation misconduct, *and in most cases likely would not do so.*" *Id.* (emphasis added).

In this case, Defendants *never challenged Dr. Wells' opinions*—either on infringement or on validity—on the grounds that they were unreliable or irrelevant under *Daubert*. Having not even challenged the reliability of Dr. Wells' opinions, there is no basis for Defendants to now argue, in essence, that because the jury allegedly believed the testimony from their technical experts (which, in fact, was contrary to the Court's claim construction), this case is exceptional. Such "logic" would turn every patent infringement case that is tried to verdict with competing experts into an exceptional case. And contrary to Defendants' baseless assertions, Dr. Wells did not attempt to circumvent the Court's claim constructions. Rather, just the opposite occurred. As explained in Wi-LAN's post-verdict motions for JMOL and for new trial, it was Defendants' technical experts who changed the Court's claim construction to require a completely separate overlay code and a completely separate orthogonal code, when this Court rejected that

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<sup>11</sup> The misconduct at issue in *MarcTec* also included "misrepresent[ing] both the law of claim construction and the constructions ultimately adopted by the court." 664 F.3d at 920. The Federal Circuit held that the plaintiff's misrepresentation of the law, "when coupled with [the plaintiff's] decision to advance frivolous and unsupported allegations of infringement premised on mischaracterizations of the claim constructions adopted by the trial court" was sufficient to support the district court's finding of litigation misconduct. *Id.*

<sup>12</sup> For example, the plaintiff's expert's theory was so farfetched that it relied on spraying droplets "at an unrealistic speed, approaching the speed of sound (and unrelated to anything that happens in the [defendant's] coating process)" to "increase the temperature of the droplets—in ways that cannot be measured—for 5 millionths of a second." *Id.* at 913.

interpretation in its *Markman* ruling. (See Dkt. 481 at 2–5; Dkt. 200 at 13–14.) Defendants cannot transform Dr. Wells’ unchallenged expert opinions into litigation misconduct.

Defendants fare no better in their attack on Mr. Jarosz. Although Defendants were successful in challenging, *in part*, the expert testimony of Mr. Jarosz, the Court at no point struck or excluded Mr. Jarosz’s damages opinions *in toto*. In its first *Daubert* ruling, the Court had two criticisms of Mr. Jarosz’s damages opinions that are relevant for present purposes. First, the Court held that Mr. Jarosz could not, under the EMVR, use running royalty license agreements in which royalties were computed as a percentage of base station revenues to compute implied lump sum royalties for the base station defendants. (Dkt. 421 at 6.) In his supplemental report, Mr. Jarosz eliminated that part of his analysis. Second, the Court held that Mr. Jarosz needed to perform an explicit apportionment of licenses he considered “to account for the difference between the worldwide portfolio licenses and a license to the patents-in-suit for U.S. sales of Defendants’ accused products.” (Dkt. 421 at 7.) In his supplemental report, Mr. Jarosz sought to make the apportionment through two quantitative calculations.

Despite Mr. Jarosz’s scrupulous attempt to respond to the Court’s criticism, and his careful testimony at trial to avoid matters ruled upon, Defendants baselessly claim that Mr. Jarosz “[f]lout[ed]” the Court’s instructions. (Mtn. at 5.) He did no such thing. He attempted to make all of the adjustments called for by the Court’s first *Daubert* ruling. The *only part* of Mr. Jarosz’s supplemental opinion excluded by the Court was his 92% adjustment to account for the U.S. versus worldwide nature of the licenses. But “[l]osing on an evidentiary ruling is not a basis for finding a case exceptional.” *Soverain Software LLC v. J.C. Penney Corp.*, 899 F. Supp. 2d 574, 586 (E.D. Tex. 2012) (Davis, J.). Moreover, even though the Court excluded this one aspect of Mr. Jarosz’s opinion, the Court permitted him to testify at trial. Mr. Jarosz properly testified

about the contours for the hypothetical negotiations, the licenses and data he considered, and about the adjustments he made for the specific circumstances of each defendant. (*See* Ex. C, July 10 AM Tr. 19:24–109:2.) Consistent with the Court’s ruling, the only adjustment that Mr. Jarosz did not make to his figures at trial was the final adjustment to account for the U.S. versus worldwide apportionment. (*Id.* at 108:10–109:2.) However, since there was other record evidence from which the jury could have made the necessary apportionment (including Mr. Parolin’s testimony), Mr. Jarosz’s testimony was not even *improper*, let alone the sort of egregious misconduct that would warrant a finding that this is an exceptional case.

### **3. Wi-LAN did not unnecessarily multiply the costs of this lawsuit.**

Defendants next complain that Wi-LAN engaged in litigation misconduct by *narrowing* its claims in connection with the submission of its expert report. Mtn. at 10. Again, however, Defendants cite no authority for the remarkable argument that a party who narrows its claims (or defenses) is guilty of misconduct; indeed, such a rule would encourage parties to wastefully maintain every claim. In fact, a “decision by a party to narrow its case for presentation to a jury does not generally suggest manipulation of the litigation process.” *Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 959 (Fed. Cir. 2010). As this Court well knows, parties are encouraged to narrow their claims and defenses, and in *VirnetX Inc. v. Apple Inc.*, No. 6:10-CV-417, 2013 WL 692652 (E.D. Tex. Feb. 26, 2013), this Court declined to award fees to a prevailing plaintiff even where the defendant allegedly “concealed its primary infringement defense until *the eve of trial*.” *Id.* at \*24 (emphasis added). Defendants cannot seriously argue that Wi-LAN engaged in misconduct by narrowing the asserted claims *at the expert report deadline*—more than six months before trial was then set to begin.<sup>13</sup>

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<sup>13</sup> Defendants complain that Wi-LAN narrowed its asserted claims at the expert report deadline, but fail to mention that it was not until *two days before the pre-trial conference* that

Defendants also suggest, as a last ditch effort, that the privilege dispute resulting from HTC's motion to compel warrants sanctions against Wi-LAN. Of course, this Court *declined to award sanctions* sought by HTC at the time the privilege dispute was ongoing, and recognized in its March 15, 2013 Order that it was resolving an open question concerning privilege redactions. (Dkt. 362 at 5 & n.1 (collecting conflicting authorities and stating that “[t]here is no real consensus in the case law on how to treat e-mail strings that contain both privileged and non-privileged communications”)); *see also Leviton Mfg. Co. v. Universal Sec. Instruments, Inc.*, 606 F.3d 1353, 1365 (Fed. Cir. 2010) (clear error in finding vexatious litigation where litigant's objections were not frivolous). At HTC's request (from a motion also not joined by the other Defendants), however, the Court granted a three month continuance to guard against any possible prejudice to Defendants. (Dkt. 382.)

Because of the cumulative nature of the materials in dispute, Defendants have not in their motion for fees identified a single “critical” document that Wi-LAN supposedly withheld on

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Defendants agreed to narrow their prior art for the asserted claims from 16 references in nearly 40 configurations, to 8 references in 18 configurations. *Compare* Ex. D (Lanning Expert Rpt. 143–162 (listing prior art)), *with* Ex. E (8 references). Defendants then presented only *four* references at trial. (*See* Ex. F, July 12 AM Tr. 14:15–75:22.) Defendants' own eve-of-trial narrowing belies their contention that Wi-LAN's much earlier narrowing constitutes misconduct.

Likewise, HTC and Sony Mobile's strained attempt to suggest misconduct because Wi-LAN's infringement expert offered an opinion on only the claims that Wi-LAN was still asserting borders on the absurd. (Mtn. at 10.) Obviously, its expert had no reason to discuss or opine on claims *no longer in the litigation* when he later served his report. In addition, HTC and Sony Mobile's complaint of prejudice from Wi-LAN's narrowing of claims as to them does not withstand scrutiny. First, because the elements of the claims of the '819 patent that were dropped as to HTC and Sony Mobile are largely similar (and in many cases identical) to those found in the asserted claims of '211 patent, HTC and Sony Mobile's validity expert—who was shared by *all* Defendants—was required to conduct his basic analysis *regardless* of Wi-LAN's narrowed '819 claims. Second, as evidenced by the nearly identical invalidity charts attached to Defendants' invalidity report, the bulk of the analysis in that report was performed much earlier, at the time of Defendants' PR 3-3 invalidity contentions. That analysis clearly was not affected by Wi-LAN's later narrowing of claims. HTC and Sony Mobile's complaint thus rings hollow.

privilege grounds.<sup>14</sup> Thousands of pages of the approximately 8,000 documents produced were cumulative of, or duplicates of, previously produced documents. (*See* Ex. B at 17–18.) Moreover, Defendants cannot credibly dispute that Wi-LAN worked diligently and cooperatively to advance the case to trial, including promptly attempting to schedule any additional discovery Defendants felt they required following the Court’s ruling. That the whole dispute was collateral is evidenced by the fact that, despite their demands for additional depositions, *Defendants never even responded* to Wi-LAN’s offers of its witness for additional discovery, and in fact, took no discovery following Wi-LAN’s production. Moreover, from the documents produced pursuant to the March 15 Order, Defendants listed fewer than 20 potential trial exhibits—out of a list containing over 430 exhibits—and actually introduced only 2 such exhibits at trial.

In addition, the expenses that were incurred as a result of the privilege dispute fell overwhelmingly on Wi-LAN, not Defendants. When the Court granted HTC’s motion to compel, Wi-LAN effectively had fewer than 72 hours to re-review an entire privilege log, redact thousands of documents, export documents for production, and prepare a new privilege log. (*See* Dkt. 395 at 3, 8–10.) Thirty attorneys amassed more than 500 hours complying with the Court’s order. (*See* Dkt. 385, Ex. J, at 1.) When Wi-LAN recognized shortly thereafter that some clearly privileged documents had been inadvertently produced, it sent a letter seeking to claw back the documents and laying out a reasonable solution to proceed to trial in an orderly manner. (*See, e.g.,* Dkt. 395, Ex. F.) But because Defendants refused to honor the Court’s discovery order and return the inadvertently produced documents, it was Wi-LAN that had to incur substantial

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<sup>14</sup> As just one clear example to the contrary, the April 2009 accounting memo prominently featured in HTC’s Motion for Continuance (No. 6:13-CV-252, Dkt. 373 at 5) as a supposed “smoking gun” *had been previously produced multiple times* and, in fact, had already been considered and relied upon by Defendants’ experts. (*See* Dkt. 395 at 13 & n.7.) Yet HTC has never corrected its misrepresentation to the Court that this document was not produced.

expenses in its successful effort to claw them back. (*See* Dkt. 404.)

For all of the reasons explained above, Defendants are not entitled to recover any fees for any so-called litigation misconduct.<sup>15</sup>

**B. Wi-LAN's Claims Are Not Frivolous.**

Finally, Defendants argue in passing that they are entitled to fees on the ground that Wi-LAN's claims were "frivolous" (Mtn. at 12–15), which requires *clear and convincing evidence* that the litigation was (1) not only brought in subjective bad faith, but also (2) objectively baseless. *Brooks Furniture*, 393 F.3d at 1381–82. As supposed "proof" of these elements however, Defendants merely point to the same alleged misconduct and expert testimony cited above. (Mtn. at 13.) But for the same reasons that the conduct was not improper and does not rise to the level of sanctionable misconduct, it simply does not constitute clear and convincing evidence that this litigation was brought in subjective bad faith, nor objectively baseless.

The Federal Circuit has explained that a party is entitled to rely on the course of proceedings leading up to trial and verdict, including rulings on motions that test the legal sufficiency of a party's claims, "as an indication that the party's claims were objectively reasonable and suitable for resolution at trial." *Medtronic Navigation*, 603 F.3d at 954. In other words, if a case has "sufficient merit to get to trial"—as this case clearly did—it cannot fairly be considered frivolous. *Id.* (quoting *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991)).

Defendants' motion for attorneys' fees should be denied.

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<sup>15</sup> In any event, it bears noting that a "finding of exceptionality based on litigation misconduct . . . usually does not support a full award of attorneys' fees," as Defendants seek here. *Highmark*, 687 F.3d at 1316. Instead, any fee awarded for litigation misconduct "must bear some relation to the extent of the misconduct." *Id.* Defendants do not even attempt to point to what portion of their alleged fees incurred in a two-and-a-half year litigation would be attributable to any particular alleged litigation misconduct by Wi-LAN.

Dated: August 16, 2013

Respectfully submitted,

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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 16th day of August, 2013.

*/s/ David B. Weaver*

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David B. Weaver