

**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

***CORRECTED*¹ REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO RECOVER ATTORNEYS' FEES**

¹ This Corrected Reply Brief replaces in its entirety ECF No. 486 filed on August 26, 2013.

Wi-LAN falsely claims that Defendants base their motion for attorneys' fees on nothing more than the fact that they won at trial. ECF No. 484 at 1. But the motion itself refutes this claim. This is an exceptional case because it was baseless from the start. Wi-LAN's claims were frivolous, and its actions in bringing and litigating them were vexatious. Wi-LAN presents three arguments in opposition: (1) Defendants allegedly mischaracterize Wi-LAN's core licensing serial-litigation methodology; (2) the incredible testimony of Wi-LAN's experts is irrelevant because each was allowed to testify; and (3) Wi-LAN's litigation misconduct was not egregious enough to make this an exceptional case. None of these arguments has merit.

A. Wi-LAN's "Core Licensing Methodology" is to file serial lawsuits.

In opposing Defendants' motion, Wi-LAN contends that it was just protecting its patent rights in filing suit and that Defendants have mischaracterized Wi-LAN's self-described licensing policies. But Wi-LAN's own Corporate Overview belies this assertion. That presentation unmistakably describes Wi-LAN's "Core Licensing Methodology" as filing serial lawsuits until a target takes a license. [DX-435.] Now, in an attempt to backtrack, Wi-LAN seeks to obfuscate the difference between a legitimate practice of licensing and enforcing intellectual property and one that involves a corporate policy of serial litigation to induce licenses. Although Wi-LAN has a right to enforce its patents, it is not entitled to use vexatious litigation as a vehicle for extracting licenses. *See, e.g., Monolithic Power Systems v. O2 Micro Int'l*, 2013 WL 4055141, at *6-7 (Fed. Cir. Aug. 13, 2013) (affirming district court exceptional case finding).

While Wi-LAN tries to ignore the facts, this case falls squarely within its serial-litigation policy. Contrary to Wi-LAN's suggestion that it only resorts to litigation when a party has not "really engaged with [Wi-LAN]," Wi-LAN never attempted to have licensing discussions with any Defendant regarding the asserted patents prior to filing this lawsuit. Wi-LAN subsequently

filed other lawsuits against every Defendant except small-player Sony Mobile.²

Wi-LAN undoubtedly appreciated its lopsided litigation leverage and sought to capitalize from it when employing its serial-litigation policy against Defendants. Indeed, Wi-LAN had used the threat of litigation as leverage in multiple license negotiations prior to filing this lawsuit. *See, e.g.*, DX-56. In fact, the Federal Circuit has recognized that non-practicing entities like Wi-LAN may impose disproportionate costs and risk through frivolous litigation. *Eon-Net v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) It is exactly this type of vexatious litigation that Section 285 is intended to prevent.³

B. Wi-LAN’s experts’ opinions were repeatedly challenged by Defendants.

Wi-LAN makes no effort to explain how the testimony of its technical expert, Dr. Wells, regarding overlay codes and inter-cell interference was credible. As set forth in Defendants’ motion, Dr. Wells testified that a single code can be one discrete code and, at the same time, another *additional* code. Equally incredibly, he maintained that the Channel Quality Indicator (CQI) indicates intercell interference, even though it is affected by many things, including degradation from within a cell, such as that caused by entering an elevator. Plainly put, Dr. Wells’s opinions on infringement and validity were undeniably incredible.⁴ Recognizing this,

² Notably, and consistent with Wi-LAN’s self-described “Core Licensing Methodology,” the second lawsuit against Ericsson was filed almost two years to the day after the present lawsuit was filed. Specifically, this lawsuit was filed Oct. 5, 2010, and Wi-LAN sued Ericsson again on Oct. 1, 2012.

³ Chief Judge Rader has independently signaled approval of fee-shifting in cases involving “patent-licensing entities” in a recent op-ed in *The New York Times*. R. Rader et al., *Make Patent Trolls Pay in Court*, N.Y. Times, June 4, 2013 (attached as Exhibit A). There, Judge Rader publicly urged courts to award attorneys’ fees under Section 285, recognizing that companies like Wi-LAN have “huge advantages in cost and risk” and can therefore “afford to file patent-infringement lawsuits that have just a slim chance of success.” *Id.* Wi-LAN’s business model is based on extracting license fees through serial litigation, a strategy employed against Defendants, and the Court should follow the Federal Circuit’s and Chief Judge Rader’s lead in declaring this to be an exceptional case.

⁴ This Court recently denied a motion for attorneys’ fees based in part on a good-faith dispute over infringement. *See Adjustacam v. Amazon.com*, No. 6:10-cv-329, Order (ECF No. 761 Aug. 19, 2013).

Wi-LAN ignores the arguments regarding the “substance” of Dr. Wells’ testimony.

Rather, Wi-LAN argues there was nothing improper about Dr. Wells’s testimony because Defendants did not file a *Daubert* motion to strike his opinions. Defendants did, however, repeatedly challenge Dr. Wells’s opinions. For example, they filed a motion for clarification based on his unsupportable application of the Court’s construction of “TDM techniques.” ECF No. 305. In denying the motion, the Court exposed the flaws in Dr. Wells’s opinion: “[S]ince the Court’s construction relied on the specification in rejecting Defendants’ proposed construction, the Court clarifies that its construction of TDM techniques ***cannot be interpreted to exclude characteristics described in the specification.***” ECF No. 341 (emphasis added).⁵ Based on this clarification, Defendants moved for summary judgment of invalidity on certain claims of the ’326 and ’211 Patents. ECF No. 347.⁶

Wi-LAN also contends there was no litigation misconduct with respect to the opinions of Mr. Jarosz, its damages expert, because Mr. Jarosz allegedly modified his opinions after each successful *Daubert* challenge. Wi-LAN argues that, ultimately, “[t]he 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.***” ECF No. 484 at 11 (emphasis added). But this goes to the very heart of the damages in this case — if 92% of the value of Wi-LAN’s licenses cannot appropriately be attributed to Wi-LAN’s U.S. patents, then Mr. Jarosz’s opinions are wildly inflated. Yet Mr. Jarosz still presented to the jury the same ultimate numbers that the Court found to be unreliable using the same methodology with no recalculations. By doing so, Mr. Jarosz

Here, there was no good-faith infringement dispute. Defendants’ products could never meet the claim limitations. Wi-LAN’s only argument was that one code could equal the two codes in the claims.

⁵ The Court also held that its construction was not “exclusively limited to data size or type as a particular characteristic associated with the data item,” which contradicted Dr. Wells’ validity opinion. *Id.*

⁶ Wi-LAN ultimately dropped those claims, mooting the summary-judgment motion. ECF. 418.

defied the Court and merely changed the label on his numbers to “inputs,” rather than “opinions.” Mr. Jarosz’s testimony sheds a harsh and revealing light on Wi-LAN’s goal of extracting damages that bear no relationship to the value of the patents.

C. Wi-LAN engaged in vexatious litigation misconduct by multiplying litigation costs.

Wi-LAN’s alleged “narrowing” of its case and the privilege dispute provides additional evidence that this is an exceptional case. It is undisputed that Wi-LAN included nineteen claims of the ’819 Patent in its infringement contentions against Defendants, but only asked Dr. Wells, to evaluate a single claim of that patent. Wi-LAN falsely states there was no misconduct because Wi-LAN was “narrowing its claims in connection with the submission of its expert report.” ECF No. 484 at 12. Again, Wi-LAN ignores the substance of Defendants’ argument. That Wi-LAN dropped claims is not the issue; Wi-LAN’s decision to wait until the last possible moment to inform Defendants of its intention to drop them was itself a vexatious act. Wi-LAN had made the decision to eliminate the claims months earlier when Dr. Wells started his analysis, but it waited to notify Defendants so that their expert, Mr. Lanning, and counsel would have to spend tremendous time and effort analyzing prior art and preparing detailed claim charts spanning hundreds of pages related to claims Wi-LAN had no intention of asserting.

Wi-LAN also falsely claims that it engaged in a good-faith privilege dispute with Defendants. But Wi-LAN intentionally cloaked its non-privileged correspondence with the attorney-client privilege to create the very “privilege” dispute in issue.⁷ Significantly, after the Court conducted an *in camera* review of a sample set of documents, Wi-LAN was ordered to conduct a thorough review of ***all*** documents previously withheld as privileged and to produce ***all***

⁷ See, e.g., Ex. A to ECF No. 396 (internal Wi-LAN memorandum instructing Wi-LAN employees to copy attorneys on emails in an attempt to create privilege without regard to whether the communications contained or sought legal advice).

non-privileged documents. *See* ECF No. 362, at 6–7. In response, Wi-LAN produced **7,980** additional documents — almost one-third of those for which they originally claimed privilege.

Wi-LAN does not dispute this. Instead, it maintains that the privilege controversy was meaningless because Defendants did not present a smoking gun during trial: “Defendants have not . . . identified a single ‘critical’ document that Wi-LAN supposedly withheld on privilege grounds.” ECF No. 484 at 13–14. What Wi-LAN fails to address is that Wi-LAN clawed back one-third of the newly produced documents on a claim that these documents were “inadvertently produced.” This prevented Defendants from further use or review of many of the documents. *See* ECF No. 388. Moreover, Wi-LAN’s conduct caused substantial additional costs for Defendants just before trial. Simply put, Wi-LAN’s conduct with respect to its review and production obligations, and its unsupportable and overly broad use of the attorney-client privilege, further demonstrate its vexatious litigation practices and misconduct.

D. The Court would be justified in finding that this is an exceptional case.

Wi-LAN argues that none of its conduct taken in isolation justifies an award of attorneys’ fees. *See, e.g.*, ECF 484 at 4, 12. But even if no one incident is sanctionable on its own, Wi-LAN’s conduct, taken as a whole, justifies an award of attorneys’ fees. *See Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1311 (Fed. Cir. 2012) (holding that courts must “take into account the totality of the circumstances”). Wi-LAN’s overall business model is to “us[e] the threat of litigation cost, rather than the merits of a claim, to bully a defendant into settling,” a practice that has been soundly criticized. *See, e.g.*, Ex. A. Wi-LAN’s allegations, when considered as a whole in the context of its business strategy, are just bullying the Defendants and other would-be targets. Judge Rader noted that “[j]udges know the routine all too well, and the law gives them the authority to stop it. We urge them to do so.” Ex. A. Defendants urge this Court to find that this is an exceptional case and award their reasonable attorneys’ fees.

Dated: August 27, 2013

Respectfully submitted,

By: /s/ Martin Bader (w/permission)

Stephen S. Korniczky (pro hac vice)
Martin R. Bader (pro hac vice)
James Geriak (pro hac vice)
SHEPPARD, MULLIN, RICHTER & HAMPTON
12275 El Camino Real, Suite 200
San Diego, California 92130-2006
Tel: 858-720-8924
Fax: 858-847-4892
skorniczky@sheppardmullin.com
mbader@sheppardmullin.com
dyannuzzi@sheppardmullin.com
lhsu@sheppardmullin.com
gbuccigross@sheppardmullin.com

Eric Hugh Findlay (TX Bar 00789886)
Roger Brian Craft (TX Bar 04972020)
FINDLAY CRAFT
6760 Old Jacksonville Highway
Suite 101
Tyler, Texas 75703
Tel: 903-534-1100
Fax: 903-534-1137
efindlay@findlaycraft.com
bcraft@findlaycraft.com

ATTORNEYS FOR DEFENDANTS
HTC CORPORATION, HTC AMERICA, INC.
AND EXEDEA INC.

Dated: August 27, 2013

Respectfully submitted,

By: /s/Akshay S. Deoras (w/permission)

Gregory S. Arovas (pro hac vice)
Robert A. Appleby (pro hac vice)
Jeanne M. Heffernan (pro hac vice)
Akshay S. Deoras (pro hac vice)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Tel: (212) 446-4800
Fax: (212) 446-4900
Alcatel-Lucent-Wi-LAN-Defense@kirkland.com

Michael E. Jones
Allen F. Gardner
POTTER MINTON PC
110 N. College, Suite 500 (75702)
P.O. Box 359
Tyler, Texas 75710
(903) 597 8311
(903) 593 0846 (Facsimile)
mikejones@potterminton.com
allengardner@potterminton.com

ATTORNEYS FOR DEFENDANT
ALCATEL-LUCENT USA INC.

Dated: August 27, 2013

Respectfully submitted,

/s/ Richard L. Wynne, Jr.

Bruce S. Sostek (Lead Attorney)

State Bar No. 18855700

Bruce.Sostek@tklaw.com

Richard L. Wynne, Jr.

State Bar No. 24003214

Richard.Wynne@tklaw.com

THOMPSON & KNIGHT LLP

1722 Routh Street, Suite 1500

Dallas, Texas 75201

214.969.1700

214.969.1751 (facsimile)

ATTORNEYS FOR DEFENDANTS ERICSSON INC.,
TELEFONAKTIEBOLAGET LM ERICSSON, SONY
MOBILE COMMUNICATIONS AB, AND SONY MOBILE
COMMUNICATIONS (USA) INC.

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 27th day of August, 2013.

/s/ Richard L. Wynne, Jr.

Richard L. Wynne, Jr.