

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

WI-LAN INC.,	§	
	§	
Plaintiff,	§	Civil Action No. 6:10-cv-521-LED
	§	Civil Action No. 6:13-cv-252-LED
v.	§	CASES CONSOLIDATED FOR
	§	TRIAL
ALCATEL-LUCENT USA INC.; <i>et al.</i> ,	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

**WI-LAN'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION
TO RECOVER ATTORNEY'S FEES**

A. Defendants’ Continued Mischaracterization of Wi-LAN’s Business Practices Is Not a Basis for Declaring This Case Exceptional.

Defendants’ Reply (Dkt. 488)—and essentially their motion—rests on the claim that Wi-LAN should be liable for fees because it is a non-practicing entity that has sued Defendants more than once. (Reply at 1–2.) Defendants’ position is both legally meritless and factually incorrect. Wi-LAN has spent over \$150 million since 1992 in research, product development, and technology development. That Wi-LAN also purchases third-party patents to complement its internally developed intellectual property is no basis to declare this case exceptional.¹ As this Court noted in *i4i Limited Partnership v Microsoft Corp.*, 670 F. Supp. 2d 568, 596 (E.D. Tex. 2009) (Davis, J.), the “law recognizes no distinction among types of patent owners.”

Defendants continue to mischaracterize DX-435 as supposedly establishing that Wi-LAN’s core business model involves filing serial lawsuits. But this exhibit actually shows that Wi-LAN seeks to *first negotiate* with parties who infringe Wi-LAN’s patents, and that Wi-LAN files suit, at the earliest, after at least a *year* of negotiation. (DX-435 at 13.) Defendants ignore Mr. Parolin’s testimony that Wi-LAN is flexible in dealing with those it believes may infringe one or more of Wi-LAN’s patents, and that the *vast majority* of the 270 companies who have taken licenses from Wi-LAN were not even sued once, let alone several times. Indeed, Defendants refuse to acknowledge the unavoidable fact that *90% of the licenses Wi-LAN has obtained* “were done without litigation.” (July 9 (pm) Tr. at 81:18–82:9, 90:2-14, 90:18-22, 127:5–128:2.) In addition to being irrelevant, Defendants’ continued assertion that Wi-LAN has a corporate policy of “serial litigation to induce licenses” is therefore untrue. (Reply at 1.) It is only in the rare case of the few recalcitrant infringers who have continued their activities for

¹ Indeed, HTC apparently believes that suing with third party patents is perfectly acceptable when it is a *plaintiff*, but not when it is a *defendant*. See Phil Milford & Susan Decker, “HTC Sues Apple Using Google Patents Bought Last Week as Battle Escalates,” Bloomberg (Sept. 7, 2011), attached as Exh. A.

years that Wi-LAN has had to file multiple lawsuits to protect its rights. (July 9 (pm) Tr. at 181:9–182:5.) Conveniently, Defendants fail to mention that before filing suit Wi-LAN spent *years* in licensing discussions with Defendants in the hope of reaching a reasonable business solution. (Dkt. 484 at 6 n.8.)

Defendants rely on *Monolithic Power Systems v. O2 Micro Int'l*, No. 2012-1221, 2013 WL 4055141 (Fed. Cir. Aug. 13, 2013), but fail to explain the unique (and extreme) facts of that case. In the lawsuit in which fees were actually imposed (the *fifth* such suit by O2 Micro against MPS on patents from the same family), O2 Micro essentially *fabricated the date of schematics* to establish a priority date for an invention. *Id.* at *1, *6-7. Moreover, the district court awarded sanctions only after presiding over a *decade* of unsuccessful litigation by O2 Micro against MPS or its customers involving numerous instances of either losing on the merits or O2 Micro withdrawing its claims (including after adverse rulings). *Id.* at *1, *3-4, *6. In contrast, this is the *first lawsuit* that Wi-LAN has tried to verdict against *any* defendant involving these or any other patents. There is no decade of unsuccessful attempts by Wi-LAN to sue these Defendants (much less their customers) on related patents, and certainly no proof of egregious misconduct such as the fabrication of evidence. *Monolithic Power* fails to support Defendants' request for fees.

Defendants suggest that *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011), supports the view that “non-practicing entities” should be viewed negatively, or as presumptively vexatious litigants. Reply at 2. It does not. In *Eon-Net*, fees were awarded after the district court *granted a summary judgment of no infringement for the defendant* and concluded, among other things, that the patent owner had destroyed documents, failed to engage in the claim construction process in good faith, displayed a “lack of regard for the judicial system,” and followed a pattern of suing huge numbers of defendants, followed by quick offers

for nominal sums (\$25,000 to \$75,000), giving the lawsuit “indicia of extortion.” 653 F.3d at 1324–27. But the evidence in this case, which Defendants choose to ignore, demonstrates that Wi-LAN’s conduct in no way resembles that of the *Eon-Net* plaintiff.² Wi-LAN has incurred and continues to incur millions of dollars in litigation expenses per quarter and has no “lopsided litigation leverage” against any of these Defendants. (Reply at 2.) And unlike the *Eon-Net* plaintiff, Wi-LAN prevailed on nearly every *Markman* position, received no adverse summary judgment ruling, and prevailed on summary judgment regarding two defendants’ counterclaims.

The Federal Circuit does not follow different rules for awarding fees based on whether the claimant is a practicing or non-practicing entity, and Defendants’ continued suggestions to that effect remain, to say the least, inaccurate.³ Defendants fail to address this Court’s *i4i* decision, or explain why Wi-LAN should be sanctioned for other lawsuits (involving different patents and no improper conduct)—especially given that most of those cases are unresolved. *See Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1319 (Fed. Cir. 2012).

B. Defendants’ Strained Attempt to Turn the Alleged “Credibility” of Expert Testimony Into Sanctionable Conduct Is Wholly Baseless.

Defendants next contend, with no legal authority, that a case can be declared “exceptional” based on *assertions* by the winner that the losing party’s experts were not “credible.” Defendants also complain that Wi-LAN did not respond point-by-point to their

² Indeed, it is *Defendants* who engaged here in a “reverse hold up”: demanding patent peace on Wi-LAN’s *entire portfolio*, not just patents involved in the lawsuit, for nominal amounts bearing no relation whatsoever to the scope of the proposed license.

³ To support their novel argument that non-practicing entities should be presumed to be vexatious, Defendants rely on an op-ed piece by Chief Judge Rader (speaking for himself and not for the Federal Circuit) and two professors. (*See* Reply at 2 n.3.) But an op-ed piece—while likely providing grounds for recusal of its author in cases involving non-practicing entities—is not law, and cannot provide a basis for ignoring the well-established law regarding attorneys’ fees. Indeed, as U.S. District Judge Lucy Koh recently commented, federal district courts “can’t cite a New York Times editorial as authority.” Vanessa Blum, *What’s So Special About Patent Law, Judge Asks?*, The Recorder (June 19, 2013).

motion regarding the credibility of Dr. Wells' infringement and invalidity opinions. (Reply at 2.) But Defendants' Reply simply misses the point. Under Federal Circuit authority, even "unreliable" expert testimony generally is not a basis for sanctions; to warrant sanctions expert testimony must be found to be *so lacking in reliability* that it fails to meet a good faith reliability threshold. *See Martec, LLC. v. Johnson & Johnson*, 664 F.3d 907, 920 (Fed. Cir. 2012). Here, of course, Defendants never even *challenged* Dr. Wells' testimony as being unreliable, and their assertion that Defendants "repeatedly challenge[d] Dr. Wells' opinions" is misleading at best.⁴

Nor can Defendants predicate sanctions on Mr. Jarosz's expert damages testimony. After two rounds of *Daubert* motions, this Court permitted Mr. Jarosz to offer opinions relating to damages. The Court allowed Mr. Jarosz to testify, despite exclusion of one specific part of his revised damages apportionment, because there was other evidence from which the jury could have made the apportionment (including the testimony of Mr. Parolin). This is simply not a case where Mr. Jarosz's opinions were ruled wholly unreliable, and the objections Defendants now make amount to nothing more than a rehash of objections that this Court overruled before permitting Mr. Jarosz to testify. Surely if Mr. Jarosz had "defied the Court," as Defendants claim (Reply at 4), this Court would have excluded his testimony. The Court did not.

C. Wi-LAN Did Not Engage in Litigation Misconduct.

Finally, Defendants complain that Wi-LAN acted improperly when it dropped some asserted claims of the '819 patent. Defendants make the blatantly false statement that "Wi-LAN had made the decision to eliminate the claims months earlier when Dr. Wells started his analysis,

⁴ Defendants suggest that their "motion for clarification" regarding the Court's construction of "TDM techniques" amounted to a successful challenge of Dr. Wells' opinions. (Reply at 3.) But this Court *denied* Defendants' motion. (Dkt. 341.) Indeed, this Court's order did not mention Dr. Wells, much less "expose[] the flaws in Dr. Wells's opinion." (*Compare* Reply at 3 *with* Dkt. 341.) Defendants did not move to exclude Dr. Wells' testimony, nor did they object to it during trial.

but it waited to notify Defendants” in order to drive up costs. (Reply at 4.) But Defendants cite *absolutely no evidence* to support this naked assertion. (Dkt. 484 at 12–13 n.13.) Moreover, Defendants cannot point to any order or rule requiring Wi-LAN to act earlier, because no such order or rule exists.⁵ Wi-LAN should not be penalized for narrowing its case for trial. *See* Dkt. 484 at 12–13; *see also Medtronic Navigation, Inc. v. Brainlab Medizinische ComputerSysteme GMBH*, 603 F.3d 943, 959 (Fed. Cir. 2010).

Finally, Defendants reiterate their contention that the privilege dispute that was resolved following the Court’s March 15, 2013 Order should warrant sanctions. But, as set forth in Wi-LAN’s Response, this Court already denied Defendants’ request for sanctions, and it long ago resolved their complaints regarding the claw back of documents.⁶ (*See, e.g.*, Dkt. 404.)

D. This Is Not an Exceptional Case.

Defendants end by arguing that Wi-LAN’s conduct, taken as a whole, justifies sanctions. But again, the basis of Defendants’ complaint is that Wi-LAN is a non-practicing entity that is somehow intimidating the big boys. That is simply not the case. This litigation involved meritorious claims and Wi-LAN expended significant funds in trying to protect its intellectual property. Where a case has “sufficient merit to get to trial”—as this case certainly did—it cannot be considered frivolous. *Medtronic Navigation*, 603 F.3d at 954 (quotation omitted). Even if this Court does not set aside the verdict or grant a new trial, there is no basis for declaring this an exceptional case. Defendants’ motion for fees should be denied.

⁵ Defendants’ own conduct makes that clear, and their silence regarding the facts laid out in Wi-LAN’s opposition is deafening. *See* Dkt. 484 at 12–13 & n.13.

⁶ For a second time, Defendants incorrectly state that Wi-LAN “intentionally cloaked its non-privileged correspondence” with privilege as if it were fact. (Reply at 4 n.7.) It is not. The 2007 email to which Defendants cite has nothing to do with this case. Defendants previously made this misleading argument, and Wi-LAN previously responded, in connection with Wi-LAN’s successful motion to clawback inadvertently produced privileged documents. (Dkt. 401.)

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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 9th day of September, 2013.

/s/ David B. Weaver

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