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Plaintiff Wi-LAN Corporation (“Wi-LAN”) opposes the Motion of Defendants HTC Corporation, HTC America, Inc. and Exedea, Inc. (collectively “HTC”) to sever HTC from the other three defendant groups for improper joinder under Fed. R. Civ. P. 20(a)(2). (Dkt. No. 72 (“Mot.”)). HTC’s motion depends on out-of-district case law because HTC’s underlying argument was expressly rejected by this Court in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004). According to *MyMail*, HTC’s motion should be denied.

I. SUMMARY OF FACTS

A. The Case Involves Only Four Defendant Groups and is in its Initial Stages

On October 5, 2010, Wi-LAN sued five defendant groups¹ for infringement of patents related to wireless data transmission (between handsets and base stations) using innovative multiplexing techniques that allow more devices to communicate using the same frequency spectrum. The asserted patents are U.S. Patent Nos. 6,088,326 (the “’326 patent”), 6,195,327 (the “’327 patent”), 6,222,819 (the “’819 patent”), and 6,381,211 (the “’211 patent”). The ’211 patent is a continuation of the ’326 patent. The specifications of the asserted patents share similar disclosures, identical drawings, common priority dates and two common inventors (namely, Martin Lysejko and Paul Struhsaker are named inventors on all four patents).

In December 2010, the claims against LG were dismissed with prejudice, leaving only four defendant groups—HTC, Sony Ericsson, Ericsson, and Alcatel-Lucent. Two of these four defendant groups are related: Sony Ericsson is partially owned by Ericsson. (Dirba Decl. at ¶ 2).

¹ The eleven individual defendant entities originally named in Wi-LAN’s Complaint are properly viewed in the following five defendant groups: HTC Corporation, HTC America, Inc. and Exedea, Inc. (collectively “HTC”), Alcatel-Lucent USA Inc. (“Alcatel-Lucent”), Telefonaktiebolaget LM Ericsson and Ericsson Inc. (collectively “Ericsson”), Sony Ericsson Mobile Communications AB and Sony Ericsson Mobile Communications (USA) Inc. (collectively “Sony Ericsson”), and LG Electronics, Inc., LG Electronics Mobilecomm U.S.A., Inc., and LG Electronics U.S.A., Inc. (collectively “LG”).

The Defendants have answered the Complaint, but no Case Management Conference has been set. Infringement Contentions have not yet been filed, and discovery has not begun.

B. The Four Patents-in-Suit Claim Related Inventions

The patents-in-suit describe the wireless transmission of data using innovative combinations of CDMA and TDM multiplexing techniques that allow more cell phone users to transmit data using a common frequency spectrum within a given geographic area.² The patents-in-suit are very similar. Two patents, the '326 and '211 patents, combine CDMA and TDM multiplexing to increase user density while also maintaining compatibility with previously-installed CDMA networks. *See, e.g.*, '326 patent at 2:61-67. The '819 patent similarly combines base CDMA codes with additional CDMA overlay codes to increase the number of channels available within a limited bandwidth. *See, e.g.*, '819 patent at 2:54-57. And, finally, the '327 patent provides the real-time interference control necessary to mitigate the interference coincident with using the wireless transmission protocols discussed above. *See, e.g.*, '327 patent at 2:16-28.

C. The Complaint's Allegations Focus on the 3GPP Standard

Each of the Defendants infringe Wi-LAN's patents by making, using, selling, importing, or offering for sale products that, among other things, implement certain releases of the 3GPP standard. The Complaint itself demonstrates that the 3GPP standard is central to Wi-LAN's infringement allegations:

² "CDMA," or code division multiple access, allows information to be transmitted at the same time over the same frequency by using different codes. *See, e.g.*, '326 patent at 1:31-33, 49-55. This is akin to people in a room speaking at the same time but in different languages. "TDM," or time division multiplexing, allows information to be transmitted at *essentially* the same time by interleaving the communications (i.e., sending data in alternating time slots). *See, e.g., id.* at 2:24-30. This is akin to people in a room taking turns to speak.

Upon information and belief, [Defendant] has been and is now infringing ... [the patent] by making, using, offering for sale, importing, and/or selling, without authority from Wi-LAN, products compliant with the 3GPP standard, including but not limited to [the accused Defendant products] ...

(Compl. at ¶¶ 18, 22, 26, 27, 34, 38, 42, 46, 50, 57, 61, 65 (emphasis added)).

The 3GPP standard sets forth the technical requirements necessary for transmitting and receiving data over a third-generation (“3G”) cellular network. 3G technology supports a large number of users and provides for high-speed data transfer between handsets and base stations. Handsets (i.e., cell phones) are used by the user to communicate voice and data information, and base stations provide the network infrastructure for transmission of this data. The use of this common and open transmission standard allows companies, such as Ericsson, to manufacture base stations that can communicate with handsets designed and sold by handset equipment providers, such as HTC. If manufacturers deviate from the standard, the handsets and base stations will not be able to talk to each other correctly. Thus, both handsets and base stations must conform to the 3GPP standard in use on a particular cellular network.

Wi-LAN is not asserting each patent against each Defendant. Alcatel-Lucent and Ericsson are infringing three of Wi-LAN’s patents via 3GPP compliant base stations—the ’326 patent, the ’327 patent, and the ’819 patent—and HTC and Sony Ericsson are infringing two of Wi-LAN’s patents via 3GPP compliant handsets—the ’819 patent and the ’211 patent (a continuation of the ’326 patent). This is summarized for clarity in the following table:

Pat. Family No.	Patent-in-Suit	Infringing Defendants	Infringing Products
1	’326 patent	Alcatel-Lucent Ericsson	3GPP Compliant Base Stations
	’211 patent (continuation of the ’326 patent)	Sony Ericsson HTC	3GPP Compliant Handsets

2	'327 patent	Alcatel-Lucent Ericsson	3GPP Compliant Base Stations
3	'819 patent	Alcatel-Lucent Ericsson Sony Ericsson HTC	3GPP Compliant Base Stations 3GPP Compliant Handsets

Each of the Defendants are accused of infringing the '819 patent³ and one of the patents in the '326/'211 family. Two of the Defendants infringe via base stations (Alcatel-Lucent and Ericsson), while the other two infringe via handsets (HTC and Sony Ericsson). All accused products are 3GPP compliant.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 20 permits a plaintiff to join defendants in one action if there is asserted against them “any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2). The Federal Rules of Civil Procedure strongly encourage joinder of claims, parties, and remedies. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) (“Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”). The Court also has the power to sever parties during any stage of the proceeding and on such terms as are just. Fed. R. Civ. P. 21. “Rulings on the joinder of parties are reviewed for abuse of discretion.” *Acevedo v. Allsup’s Convenience Stores, Inc.*, 600 F.3d 516, 520 (5th Cir. 2010).

³ HTC mistakenly states that “Wi-LAN does not allege that all of the remaining defendants infringe even the ‘819 and ‘211 patents of which it accuses HTC of infringement.” (Mot. at 2). However, as the Complaint demonstrates, every Defendant is accused of infringing the '819 patent. (Compl. at ¶¶ 31-53).

III. ARGUMENT

A. Joinder of HTC in this Case is Proper Under Rule 20(a)(2)

HTC acknowledges that there are common questions of law and fact sufficient to satisfy the joinder test specified by Rule 20(a)(2), but contends the rule's requirement for a common "transaction, occurrence, or series of transactions or occurrences" is not satisfied. In support, HTC relies exclusively on out-of-district decisions,⁴ while largely ignoring the standard that has been adopted in this district. The reason for this is clear: Joinder of HTC with three other defendants groups, whose similar and 3GPP-compliant products are accused of infringement, is entirely proper under the law of this District. *See MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004).

1. Under *MyMail*, HTC is properly joined because its products are not dramatically dissimilar from its co-defendants' products

a. *MyMail* rejected the very same argument presented by HTC

Like the defendants in *MyMail*, HTC argues that Rule 20(a)(2) prevents joinder of any two defendants that sell independently developed products. *See MyMail*, 223 F.R.D. at 457 ("In essence, the UOL Defendants advocate a rule that requires separate proceedings simply because unrelated defendants are alleged to have infringed the same patent."). The Court rejected this *per se* rule and instead decided to examine the facts and circumstances of each case. *Id.* The Court noted that the rule advocated by the defendants would be a "hypertechnical" interpretation of Rule 20 "that perhaps fails to recognize the realities of complex, and particularly patent,

⁴ HTC misstates the law by incorrectly asserting that a Federal Circuit case supports its position. (MTS at 5-6 (quoting *Acumed, LLC v. Stryker Corp.*, 525 F.3d 1319, 1324 (Fed. Cir. 2008))). HTC erroneously quotes this case as saying that when defendants "are separate companies that independently design, manufacture and sell different products in competition with each other ... [c]learly, the common transaction requirement has not been met..." (*Id.*) However, this quote is found nowhere in *Acumed*, which does not even address joinder. *See generally Acumed*, 525 F.3d 1319 (lacking any of quoted language; addressing claim preclusion).

litigation.” *Id.* The Court held that Rule 20 is satisfied if there is “some connection or logical relationship between the various transactions or occurrences,” or differently stated, “a nucleus of operative facts or law in the claims against all the defendants.” *Id.* at 456, 457. The Court noted, however, that “severance could be appropriate if the defendants’ methods or products were dramatically different.”⁵ *Id.* at 457.

b. HTC fails to make the required showing of dissimilarity among the accused products as related to the claimed inventions

One relevant inquiry is whether the accused products sold by the different defendant groups are dramatically different from each other with regard to their accused functionality. Imagine that an asserted patent claim recited “an automobile with an engine and at least four wheels.” While it is true that a Model-T Ford would be different in many respects from a Lamborghini Gallardo, both cars have an engine and at least four wheels. The proof of infringement for both cars would be very similar, despite their many non-patent related design and operational differences. The same analysis applies in this case.

HTC does not even attempt to show that the accused products are different with regard to how they are alleged to infringe, much less “dramatically different,” as *MyMail* requires. 223 F.R.D. at 457. Rather, HTC simply asserts that “many of the accused devices are likely to be substantially different from HTC’s.” (Mot. at 7) No factual support is provided⁶ and HTC fails

⁵ HTC asserts, without explanation, that *MyMail*’s interpretation of Rule 20(a) renders Rule 42(b) superfluous. (Mot. at 8). It appears, however, that HTC meant to argue that *MyMail*’s interpretation effectively reads Rule 20(a)(2)(A) out of the statute. This is belied by *MyMail*’s acknowledgement that severance may be appropriate in certain cases. 223 F.R.D. at 457.

⁶ The only evidence remotely relevant is a declaration stating that HTC’s accused products “were developed by HTC and were developed independent of the other defendants in this litigation.” (Mot. at Maron Decl. ¶ 4.) Even assuming this were true, independent development is not probative of whether the products are similar with regard to the claims of the asserted patents.

to provide any context for its use of the word “different.” HTC’s motion attaches no evidence comparing its products to those of the other Defendants and fails to explain how these products are allegedly different in a way relevant to the claims of the patents-in-suit. As a result, the Court simply has no basis for concluding that factual dissimilarity exists among the accused products.

The only information presently available shows that the accused products are quite similar vis-à-vis the claims of the patents-in-suit. The Complaint itself makes the 3GPP standard a central component of the infringement of the patents-in-suit—the Complaint alleges that a Defendant infringes a particular patent “by making, using, offering for sale, importing, and/or selling ... products compliant with the 3GPP standard,” such as the accused products. (Compl. at ¶¶ 18, 22, 26, 27, 34, 38, 42, 46, 50, 57, 61, 65). As explained above in the Summary of Facts, the 3GPP standard sets forth the way in which devices communicate in order to work within a 3G network. In other words, the devices—whether cell phones or base stations—use the same standardized method of wireless communication. (*See supra* Section I.C). Because each accused product is 3GPP compliant, the accused products are similar vis-à-vis the claims of the patents-in-suit.

HTC’s motion only addresses this crucial similarity in a short footnote. (Mot. at 2, n.1). HTC merely argues: (1) If compliance with a standard were sufficient, then “by that rationale all potential defendants with products allegedly practicing a standard could be joined irrespective of how unrelated the products, claims or patents may be” and (2) Compliance with a standard may be insufficient to prove infringement and, thus, compliance with the standard “should not be used

for a basis for relatedness.”⁷ (*Id.*) HTC’s abstract conjecture misses the point—it fails to address the facts of this case. HTC does not argue that compliance with 3GPP actually is insufficient to prove infringement of the claims of the patents-in-suit. HTC also does not argue that products implementing the 3GPP standard are, in fact, “dramatically different” vis-à-vis the claims. HTC does not even provide any evidence to show that its products are “dramatically different” despite compliance with the standard. At best, HTC’s improper attempt to shift the burden to Wi-LAN is untimely, as the Infringement Contentions will resolve all doubts as to the similarity of the accused products vis-à-vis the claims.

Because HTC fails to show that its accused products are “dramatically different”—in spite of the Complaint’s assertions to the contrary—HTC’s motion must fail.

c. HTC fails to distinguish *MyMail*

HTC’s half-hearted attempts to distinguish *MyMail* are based on either a misstatement of the law or a misstatement of fact. (Mot. at 9). First, HTC misreads *MyMail* to require “evidence or allegation that the defendants share resources, products, marketing or sales efforts for the allegedly infringing products.” (*Id.* at 9). Not so. The Court noted, to the contrary, that the similarity or dissimilarity between the defendants’ accused products was of primary concern. *MyMail*, 223 F.R.D. at 457 (“More significant to the court [in the New Jersey Machine Inc. case] than whether the parties are related or whether they share marketing and sales efforts is whether

⁷ To be specific, HTC misrepresents Federal Circuit law by implying that it holds that the practice of a standard always will be insufficient to prove infringement. (Mot at 2, n.1 (citing *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321 (Fed. Cir. 2010)). The decision not only refutes this suggestion but also disproves HTC’s underlying allegation. *See Fujitsu*, 620 F.3d 1327 (“We hold that a district court may rely on an industry standard in analyzing infringement. If a district court construes the claims and finds that the reach of the claims includes any device that practices a standard, then this can be sufficient for a finding of infringement.”) In that particular case, the Court concluded that evidence beyond the standard was required because the infringing functionality was optional and not required to practice the standard. *Id.* at 1328-29.

the plaintiff alleges any connection or substantial similarity between the machines at issue.”); *see New Jersey Machine, Inc. v. Alford Indus., Inc.*, 1991 U.S. Dist. LEXIS 20376, at *5 (D.N.J. 1991) (“More significantly, however, the plaintiff fails to adequately allege or support any connection or substantial similarity between the machines of the proposed defendants and those of the defendants Alford and Engraph.” (emphasis added)).

Second, HTC disingenuously claims that *MyMail* is distinguishable because the instant case involves “eleven” defendants, where *MyMail* involved only seven. (Mot. at 9). In fact, however, the present case currently involves only four defendant groups. HTC also misleadingly contends that “all the defendants have not been accused of infringing the same claims out of the 84 possible claims across the four patents.” HTC is correct insofar as Wi-LAN has yet to identify any asserted claims. (However, as the Infringement Contentions will demonstrate, the asserted claims will be largely consistent from patent to patent.)

Finally, HTC alleges that *MyMail* compels a finding of misjoinder because HTC’s handsets stand accused where “other defendants’ *base stations* allegedly infringe.” (*Id.* at 9-10 (emphasis original)). However, HTC fails to acknowledge that Sony Ericsson—just like HTC—is only accused of infringing via its handsets. Also, HTC fails to explain how this difference in product type is substantially relevant to the claims of the patents-in-suit—in particular, HTC fails to acknowledge that both the handsets and the base stations implement the 3GPP standard identified by the Complaint as a key component of the infringement allegations. Indeed, HTC’s argument is further undermined by the fact that the patents describe a method of and system for communicating between two types of wireless devices—e.g., a handset and a base station.

2. The cases discussed by HTC from other districts do not compel a different result

In an apparent attempt to escape the law of this District, HTC points primarily to two out-of-district cases: *Verve* and *WiAV*.⁸ Each of these cases are readily distinguishable.

In *Verve*, the Western District of Texas clearly granted severance based upon its discretion under Rule 21, not a finding that the parties were, in fact, misjoined. *Verve LLC v. Hypercom Corp.*, No. 04-CA-062-LY, slip op. at 4 (W.D. Tex. Dec. 29, 2004) (questioning whether “the parties were properly joined,” but refraining from finding misjoinder); *see Norwood v. Raytheon Co.*, 2007 U.S. Dist. LEXIS 61423, at *8 (W.D. Tex. 2007) (“Rule 21 is an appropriate vehicle to sever or dismiss the claims of even properly joined parties.”). While it did not conclude that joinder was necessarily improper, the Court noted that “[u]nder Rule 21, this Court retains the discretion to determine whether [the defendants] should be severed from the present suit ‘on terms as are just.’” *Verve*, No. 04-CA-062-LY, slip op. at 4 (*citing* Fed. R. Civ. P. 21 and *MyMail*, 223 F.R.D. at 457). In that case, the plaintiff had merely shown that the defendants’ products communicate with each other; the Court did not indicate that the defendants’ products had functional similarities. *Id.* Accordingly, the Court opted to “exercise its discretion and sever[ed] the Defendants.” *Id.* at slip op. 4-5.

WiAV is distinguishable because it applied different law to different facts. *WiAV Networks, LLC v. 3Com Corp.*, 2010 U.S. Dist. LEXIS 110957 (N.D. Cal. 2010). The court applied Ninth Circuit law to a case involving forty companies, the vast majority of whom were

⁸ HTC provides a long list of cases to support its position. (MTS at 4-5, n.3-4). However, many of these cases find that severance is appropriate because the defendants’ products are both “separate and distinct”—i.e., dissimilar. That is not the case here as all accused products are alleged to comply with the same standard. As for the remaining cases, this Court has declined to “follow a handful of district court cases that purportedly hold acts of infringement by separate defendants do not satisfy the same transaction requirement.” *MyMail*, 223 F.R.D. at 456.

“wholly unrelated companies with wholly unrelated products.” *Id.* at *15, *13. Indeed, based on the “monumental mess” created by the sheer number of different parties and the differences between the accused products, the Court appears to have severed the defendants after concluding that the “mass pit” of parties in that case was unjust. *Id.* at *23.

Neither of these cases requires this Court to depart from its *MyMail* precedent.

3. HTC improperly attempts to equate the standard for joinder and the much more restrictive standard for claim preclusion

HTC argues that Federal Circuit law should be applied to determine whether HTC is properly joined under Rule 20. (Mot. at 10). But, as HTC notes, “[t]he Federal Circuit has not directly addressed when patent infringement claims are transactionally related under Rule 20(a).” (*Id.*) HTC then turns to collateral estoppel, which, under Federal Circuit law, will only apply if a claim “arises from the same transactional facts as a prior action.” (*Id.* at 11 (citation omitted)). From this, HTC concludes that this Court should apply Federal Circuit law regarding collateral estoppel to determine whether HTC is properly joined under Rule 20. (*Id.*) Every step of this reasoning is flawed.

First, HTC cites no case for the proposition that Federal Circuit law applies to determine whether a portion of Rule 20 is satisfied, and even the district court cases cited by HTC are to the contrary. *See, e.g., WiAV Networks*, 2010 U.S. Dist. LEXIS 110957, at *15 (applying Ninth Circuit law to determine the meaning of the transactional requirement of Rule 20). Moreover, the Federal Circuit’s “practice has been to defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure,” unless there is an “essential relationship between [its] exclusive statutory mandate or [its] functions as an appellate court and the relevant procedural issue.” *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 857-58

(Fed. Cir. 1991). That requisite “essential relationship” does not exist here. Accordingly, it appears that Federal Circuit law should not apply.

But, even assuming *arguendo* that Federal Circuit law would apply, there is no Federal Circuit law on point. As a result, the Federal Circuit would first look to the relevant law of the regional circuits. *See, e.g., DDB Techs., L.L.C., v. MLB Adv. Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008) (turning first to regional circuit cases in deciding issue of first impression); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 476-77 (Fed. Cir. 1991) (agreeing with analysis of some regional circuits in deciding Federal Circuit law). Only then would the Court consider its law on a different topic. In short, the Federal Circuit would consider Fifth Circuit law on joinder before looking to its own collateral estoppel law.

Finally, HTC cites no case to support its proposition that claim preclusion and Rule 20 are coextensive. (See Mot. at 11). Claim preclusion applies only when the two products at issue are “essentially the same.” *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1324 (Fed. Cir. 2008). However, this narrow “essentially the same” test is incompatible with the fundamental purpose of the joinder rule. “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *See United Mine Workers*, 383 U.S. at 724 (emphasis added).

B. The Court Should Not Exercise its Discretion to Sever HTC under Rule 21

HTC also argues that this Court should exercise its discretion to sever HTC because failing to do so “would result in jury confusion, judicial inefficiency, and unfair prejudice.” (Mot. at 13). However, granting HTC’s request would result in judicial inefficiency. HTC acknowledges that there will be many overlapping issues of law and fact with respect to it and the other Defendants. For example, defenses of invalidity, unenforceability, and/or non-infringement are likely to be common among the Defendants. As a result, severing HTC would

require the Court to hold two claim constructions on the same terms, address some of the same discovery matters, and rule on substantially identical pretrial motions. If, however, HTC's request is denied, the Court may ensure that scarce judicial resources are conserved and that the claim construction is consistent. *See MyMail*, 223 F.R.D. at 458.

HTC cries unfair prejudice, but its argument amounts to solely concerns about jury confusion, the difficulties of trial when not all Defendants are accused of infringing each patent, and "this district's customary time constraints for trial generally limiting time for trial to ten days." (Mot. at 2, 12-14). However, the appropriate mechanism to address these trial-related concerns would be a motion for separate trials, under Fed. R. Civ. P. 42(b). To the degree that HTC requests this relief in its brief, its request is entirely premature, as the parties have not yet even begun discovery or served Infringement or Invalidity Contentions.

Because HTC's presence in this lawsuit is neither inefficient nor unjust, the Court should exercise its discretion to deny HTC's request for severance under Rule 21.

IV. CONCLUSION

For these reasons, the Court should deny HTC's motion to sever pursuant to Rule 20 and/or Rule 21.

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Respectfully submitted,

By: :/s/ David B. Weaver w/permission Wesley Hill

Johnny Ward
Texas Bar No. 00794818
Wesley Hill
Texas Bar No. 24032294
WARD & SMITH LAW FIRM
111 W. Tyler Street
Longview, TX 75601
Tel: (903) 757-6400
Fax: (903-757-2323
jw@wsfirm.com
wh@wsfirm.com

David B. Weaver
Texas Bar No. 00798576
Juliet M. Dirba
Texas Bar No. 20451063
David D. Hornberger
Texas Bar No. 24055686
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
Tel: (512) 542-8400
Fax: (512) 236-3476
dweaver@velaw.com
jdirba@velaw.com
dhornberger@velaw.com

Chuck P. Ebertin
California Bar No. 161374
VINSON & ELKINS LLP
525 University Avenue, Suite 410
Palo Alto, CA 94301-1918
Tel: (650) 687-8204
Fax: (650) 618-8508
cebertain@velaw.com

Attorneys for Plaintiff, Wi-LAN 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. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 14th day of February, 2011.

/s/ Wesley Hill

Wesley Hill