

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

WI-LAN INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
ALCATEL-LUCENT USA INC.;	§	
TELEFONAKTIEBOLAGET LM	§	Civil Action No. 6:10-cv-521-LED
ERICSSON; ERICSSON INC.; SONY	§	
ERICSSON MOBILE COMMUNICATIONS	§	JURY TRIAL DEMANDED
AB; SONY ERICSSON MOBILE	§	
COMMUNICATIONS (USA) INC.; HTC	§	
CORPORATION; HTC AMERICA, INC.;	§	
EXEDEA INC.; LG ELECTRONICS, INC.;	§	
LG ELECTRONICS MOBILECOMM U.S.A.,	§	
INC.; LG ELECTRONICS U.S.A., INC.	§	
	§	
Defendants.	§	

**WI-LAN INC.'S SURREPLY IN OPPOSITION TO
HTC CORPORATION, HTC AMERICA, INC. AND EXEDEA INC.'S
REPLY IN SUPPORT OF ITS MOTION TO SEVER PURSUANT TO FRCP 20(a)(2)**

Plaintiff Wi-LAN Inc. (“Wi-LAN”) files this sur-reply opposing HTC’s Motion to Sever under Fed. R. Civ. P. 20(a)(2) (Dkt. No. 72 (“HTC Mot.”)) and responding to HTC’s Reply in support of the same (Dkt No. 84 (“HTC Reply”)).

I. INTRODUCTION

HTC’s Reply is notably different from its original Motion to Sever. HTC’s original brief argued for severance based on *WiAV*, *Verve*, and the Federal Circuit’s collateral estoppel law, but HTC’s Reply makes no reference to any of these arguments, impliedly acknowledging that this law is inapplicable. Also, where HTC originally attempted to call *MyMail* into question (*see* HTC Mot. at 7-9), HTC now concedes that *MyMail* is good law (*see* HTC Reply at 1-2, 5).¹ Despite HTC’s midstream correction, the new arguments presented by HTC are still no better than its old ones. HTC’s motion ultimately fails for one simple reason—HTC failed to show that its products are “dramatically different” from the other defendants’ products vis-à-vis the claims of the patents-in-suit.

II. ARGUMENT

HTC’s motion to sever should be denied because “[s]everance would not promote judicial economy,” because “the record before the Court does not show that the products ... at issue are so different that determining infringement in one case is less proper or efficient than determining infringement in multiple cases,” and because there is no evidence “that any defendant will be so prejudiced by joinder that severance is necessary to prevent an inequitable process or result.” *Eolas Tech. Inc. v. Adobe Sys., Inc.*, 2010 WL 3835762, *2 (E.D. Tex. 2010),

¹ Although HTC now relies on *MyMail*, HTC apparently misunderstands the holding of that case as it improperly equates “separate” and “dramatically different.” (*See, e.g.*, HTC Reply at 2 (“Wi-LAN Asserts Separate Categories of Claims Against Separate Groups of Defendants with Separate Categories of Products” (emphasis added)); *id.* at 3 (arguing that handsets and base stations are “separate and distinct” because they will have separate infringement theories)). Compare *MyMail Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 457 (E.D. Tex. 2004) (distinguishing “separate” acts of infringement from “different” acts of infringement).

aff'd In re Google Inc., Misc. Dkt. No. 968, slip op. at 4 (Fed. Cir. March 4, 2011) (denying mandamus petition and finding no abuse of discretion in refusal to sever petitioners' claims); *see MyMail Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 457-58 (E.D. Tex. 2004).

HTC's current arguments for severance are easily summarized—and easily dismissed. HTC contends that the claims against it should be severed from the claims against the other three defendant groups² because: (1) handsets are different from base stations; (2) not all of the patents-in-suit are asserted against each defendant group; and (3) there is allegedly no collaboration between HTC and the other three defendant groups. These arguments fail to establish that HTC should be severed from this action.

A. The Handsets of HTC and Sony Ericsson are Similar to the Base Stations of Ericsson and Alcatel-Lucent Vis-à-Vis the Patents-in-Suit

Each of the Defendants infringe Wi-LAN's patents by making, using, selling, importing, or offering for sale handsets or base stations that, among other things, implement certain releases of the 3GPP standard. (*See* Compl. at ¶¶ 18, 22, 26, 27, 34, 38, 42, 46, 50, 57, 61, 65). All of the accused products comply with the 3GPP standard, and compliance with that standard is central to infringing the asserted patents. Thus, the accused handsets and the accused base stations are necessarily similar vis-à-vis the claims of the patents-in-suit.

HTC places great weight on the fact that a handset is “indisputabl[y]” different than a base station. (HTC Reply at 4). While it is true that 3GPP compliant handsets differ from 3GPP compliant base stations, those differences are beside the point. The fact of the matter is that both types of products must be able to transmit and receive 3GPP-compliant wireless transmissions. The claims of the patents-in-suit are directed to the particular way of receiving and transmitting data that was ultimately incorporated into the 3GPP standard. So, proving infringement for

² HTC does not dispute Wi-LAN's division of the defendants into four defendant groups: HTC, Sony Ericsson, Ericsson, and Alcatel-Lucent. (HTC's Reply at 1).

either product necessarily entails understanding how 3GPP requires such transmission and reception to occur.

HTC's analysis omits this crucial step. HTC fails to show that the products are dissimilar vis-à-vis the claims of the patents-in-suit. For example, HTC fails to: (1) identify any specific differences between its accused handsets and the accused base stations, and (2) demonstrate why those differences are relevant to the patents-in-suit. Because HTC has failed to show that its products are "dramatically different," HTC's motion fails. *See MyMail*, 223 F.R.D. at 457 (denying motion to sever because no showing of dissimilarity).

In an attempt to cover its failure to provide facts to support its motion, HTC tries to point the finger at Wi-LAN, asserting that "Wi-LAN does not present any evidence to support its conclusory statement that the accused products are 'quite similar,' other than self-serving allegations from the Complaint." (HTC Reply at 4). However, Wi-LAN showed that the Complaint itself establishes that all accused products are similar because all accused products are 3GPP compliant. (Wi-LAN's Opposition to HTC's Motion to Sever, Dkt No. 80 ("Wi-LAN Opp.") at 5-7, 10).³ HTC cites no case suggesting that Wi-LAN needs to provide more evidence (*e.g.*, Infringement Contentions) in response to an unsupported motion to sever. To the contrary, *MyMail*, denied a motion to sever because the record did not show that the products were sufficiently different. 223 F.R.D. at 457.

Finally, and most importantly, HTC does not contend that its handsets are different than Sony Ericsson's handsets. Both HTC and Sony Ericsson are accused of infringing the same patents via their 3GPP compliant handsets, and thus, there is no basis to sever the claims against HTC from the claims against Sony Ericsson. Although HTC argues that Sony Ericsson's

³ Wi-LAN inadvertently omitted page numbers in this filing and, accordingly, Wi-LAN refers herein to the page number of the filing (*e.g.*, page 1-18) rather than the page number of the brief.

involvement in the lawsuit should not impact HTC's Motion to Sever (*see* HTC Reply at 4-5), it is undisputed that the instant case will address the infringement and validity of all four patents-in-suit, whether or not HTC is severed. For this reason, it would be judicially inefficient to sever HTC and require two courts to address the exact same issues in two different lawsuits.⁴

B. The Four Patents-in-Suit Are Related, and it is Irrelevant that HTC is Not Accused of Infringing Each

As Wi-LAN explained, the four patents-in-suit are very similar and claim related inventions. (Wi-LAN Opp. at 5.) All of the patents are "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." (*Id.* at 4.) Moreover, "[t]he specifications of the asserted patents share similar disclosures, identical drawings, common priority dates and two common inventors." (*Id.*)⁵ Indeed, one of the patents, the '211 patent, is a direct continuation of another one of the patents, the '326 patent. (*Id.*)

HTC does not dispute any of these facts, and HTC fails to identify any dissimilarity between the four patents-in-suit. Rather, HTC simply advocates a rigid rule that would, apparently, require a defendant to be severed anytime it is accused of infringing less than every patent-in-suit. In other words, HTC argues that it should be severed because it infringes a continuation patent (the '211) but not the parent patent (the '326), when both of those patents are at issue. Such a rule would be absurd, and HTC cites no case to support its contention that, for joinder to be proper, each defendant must be accused of infringing every patent-in-suit.

⁴ "Courts have consistently held that judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective." *In re Google*, Misc. Dkt. No. 968, slip op. at 4 (affirming denial of motion to sever in *Eolas Tech*, 2010 WL 3835762 (E.D. Tex. 2010)).

⁵ Without basis, HTC asserts that "Wi-LAN admits that the '326 and '327 patents are relevant to base stations and not to handsets." (HTC's Reply at 3). While Wi-LAN has asserted these patents against base stations only, it does not agree these patents are not relevant to handsets.

C. HTC's Collaboration Argument Misses the Point

HTC would have the Court believe that *MyMail* requires the defendants to collaborate in order for them to be properly joined. (*See* HTC Reply at 5). Not so. *MyMail* requires that there must be a “connection or logical relationship between the various transactions or occurrences.” 223 F.R.D. at 456. In *MyMail*, this connection or logical relationship existed because the defendants were accused of infringing a single patent and utilizing shared resources. *Id.* at 456-57. Here, this connection and logical relationship exists because the defendants infringe related patents by utilizing a common standard. No more is required.

In addition, HTC has not provided any evidence to show that it does not collaborate with the other defendants. (*See* HTC Reply at 4-5). Although HTC includes a declaration with its Motion to Sever, the declarant simply asserts that the cell phones identified in the Complaint “were developed by HTC and were developed independent of the other defendants in this litigation.” (HTC Mot., Maron Decl. at ¶ 4). Independent development is not the same as no collaboration on any points. Moreover, even if HTC's cell phones (i.e., handsets) were developed independently, there is nothing to show that HTC does not test its handsets with Ericsson's and Alcatel-Lucent's base stations. (It is axiomatic that a handset must communicate with a base station in order for a user to place or receive a phone call.) Finally, although HTC's Motion to Transfer relies heavily on the alleged involvement and necessity of Qualcomm, HTC's collaboration argument makes no mention of Qualcomm, its chips, or its involvement with the other defendants in this case.

III. CONCLUSION

For these reasons and for the reasons explained in Wi-LAN's Opposition to HTC's Motion to Sever (Dkt No. 80), the Court should deny HTC's Motion to Sever (Dkt No. 72).

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Respectfully submitted,

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

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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. 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 7th day of March, 2011.

/s/ Wesley Hill

Wesley Hill