UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

APPLE INC., Plaintiff, vs. WI-LAN, INC., Defendant. AND ALL RELATED COUNTERCLAIMS.	CASE NO. 14cv2235 DMS (BLM) **ORDER CONSTRUING CLAIMS**

This matter came before the Court for a claim construction hearing on October 30, 2017. John Allcock and Sean Cunningham appeared and argued on behalf of Apple and Allison Goddard, Kevin Schubert, Robert Cote and Seth Hasenour appeared and argued on behalf of Wi-LAN. After the matter was submitted, Apple filed a Notice of Supplemental Evidence Regarding Claim Construction, to which Wi-LAN filed a response. After a thorough review of the parties' claim construction briefs and all other material submitted in connection with the hearing, the Court issues the following order construing the disputed terms of the patents at issue in this case.

I.

BACKGROUND

This case is related to another case, involving the same parties, which was previously adjudicated by this Court, *Wi-LAN v. Apple*, Case Number 13cv0798. That

case involved two Wi-LAN Patents, United States Patents Numbers 8,311,040 ("the '040 Patent") and 8,315,640 ("the '640 Patent"). The Court construed the claims of the '040 Patent and the '640 Patent and then granted summary judgment of noninfringement to Apple. After that ruling, the parties stipulated to entry of final judgment so that Wi-LAN could appeal. On appeal, Wi-LAN challenged this Court's claim construction ruling, specifically the Court's constructions of the term "specified connection" in the '040 Patent and the term "UL connections" in the '640 Patent. The Federal Circuit affirmed the Court's constructions and the grant of summary judgment of noninfringement to Apple.

After the Court's claim construction ruling but before Apple filed its motion for summary judgment in the prior case, Apple filed the present case against Wi-LAN in the United States District Court for the Northern District of California alleging declaratory judgment claims for noninfringement and invalidity of five other Wi-LAN Patents, United States Patents Numbers 8,462,723 ("the '723 Patent"), 8,615,020 ("the '020 Patent"), 8,457,145 ("the '145 Patent"), 8,462,761 ("the '761 Patent") and 8,537,757 ("the '757 Patent"). Apple later filed an amended complaint adding the '040 Patent to the case. Shortly before this Court issued its summary judgment ruling in the prior case, the Northern District of California transferred this case to this Court. After Wi-LAN filed its appeal, Apple moved to stay this case pending that appeal, which the Court granted. After the appeal was decided, the stay was lifted and this case was put back on the Court's calendar.

Pursuant to Patent Local Rule 4.2.a, the parties have identified eight terms or groups of terms for construction in this case:

(1) "wireless subscriber unit"/ "subscriber unit"/ "subscriber station," which terms appear in the '145 Patent, '723 Patent, '020 Patent, '761 Patent and '757 Patent;

(2) "connections"/ "uplink connections"/ "a plurality of connections served by the subscriber unit/connections established at a [or the] subscriber unit [or

subscriber station]," which terms appear in the '145 Patent, '723 Patent, '020 Patent, '761 Patent and '757 Patent;

(3) "queue," which term appears in the '145 Patent, the '723 Patent, the '761 Patent and the '020 Patent;

(4) "packing sub-header," which term appears in the '040 Patent;

(5) "frame map"/ "sub-frame map," which terms appears in the '723 Patent, '020 Patent and the '757 Patent;

(6) "poll-me bit"/ "poll-me message," which terms appear in the '020 Patent;

(7) "fairness algorithm," which appears in the '145 Patent; and

(8) whether the preamble in Claim 26 of the '145 Patent is limiting.[1]

II.
DISCUSSION

The first four terms and groups of terms were at issue, or are similar to terms that were at issue, in the prior case. For that reason, Wi-LAN argues relitigation of these terms is barred by the doctrine of issue preclusion. The Court addresses that argument first, then turns to the construction of the claim terms and groups of terms.

A. Issue Preclusion

The term "issue preclusion" encompasses the doctrine once known as "collateral estoppel." *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008). "Issue preclusion ... bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment ... ." *Id*. at 893 (internal quotation marks and citations omitted).

Issue preclusion, of course, is not unique to patent cases. *Aspex Eyewear, Inc. v. Zenni Optical Inc.*, 713 F.3d 1377, 1380 (Fed. Cir. 2013). Accordingly, the Federal Circuit is "guided by the precedent of the regional circuit. However, for any aspects

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[1] The parties initially requested that the Court also construe the term "QoS," but they have since agreed on the construction of that term.

that may have special or unique application to patent cases, Federal Circuit precedent is applicable." *Id*.

In the Ninth Circuit, issue preclusion applies when:

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom issue preclusion is asserted was a party or in privity with a party at the first proceeding.

Paulo v. Holder, 669 F.3d 911, 917 (9th Cir. 2011) (internal quotation marks, citation and brackets omitted). The party asserting issue preclusion bears the burden of showing these elements are met. *Offshore Sportswear v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997).

Wi-LAN has not met that burden here. First, for the first two terms, Wi-LAN has not shown the terms at issue here are identical to the terms at issue in the prior case. In the prior case, the Court construed the terms "wireless subscriber radio unit," "wireless communication radio unit" and "UL connections." The terms at issue here are similar, "subscriber unit," "wireless subscriber unit," "subscriber station," "connections," "uplink connections," "a plurality of connections served by the subscriber unit" and "connections established at a subscriber unit," but they are not identical to the terms construed in the prior case. Thus, issue preclusion does not apply to the first two groups of terms.

The term "queue" is identical to a term that was at issue in the prior case, but Wi-LAN has not shown the parties actually litigated that term. Rather, the parties stipulated to the construction of that term in the prior case. Thus, Wi-LAN has not shown this term is subject to issue preclusion.

The final term, "packing sub-header," was at issue in the prior case and was actually litigated. However, Wi-LAN has not shown that term was "necessarily decided" in the prior case. Indeed, the term played no part in the Court's summary judgment ruling, judgment thereon and subsequent appeal. Accordingly, "packing sub-header" is not subject to issue preclusion either.

For these reasons, the Court declines to apply issue preclusion to the above terms.

B. Claim Construction

Claim construction is an issue of law, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996), and it begins "with the words of the claim." *Nystrom v. TREX Co., Inc.*, 424 F.3d 1136, 1142 (Fed. Cir. 2005) (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Generally, those words are "given their ordinary and customary meaning." *Id.* (citing *Vitronics*, 90 F.3d at 1582). This "'is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.'" *Id.* (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005)). "The person of ordinary skill in the art views the claim term in the light of the entire intrinsic record." *Id.* Accordingly, the Court must read the claims "'in view of the specification, of which they are a part.'" *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995)). In addition, "'the prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.'" *Id.* (quoting *Phillips*, 415 F.3d at 1318).

1. "Subscriber" Terms

The first group of terms at issue here are the "subscriber" terms, "wireless subscriber unit," "subscriber unit" and "subscriber station," which terms appear in the '145 Patent, '723 Patent, '020 Patent, '761 Patent and '757 Patent. In each of the Patents, the "subscriber" terms are described as part of a method or system of allocating, requesting or obtaining bandwidth from a base station. The parties agree these terms should be construed consistently across the Patents. Apple proposes they be construed as "fixed or portable customer premises equipment that wirelessly receives UL bandwidth from a base station, and allocates the bandwidth across connected user devices." Wi-LAN proposes that the terms be construed as a "module that receives UL

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