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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

APPLE INC.,

Plaintiff,

vs.

WI-LAN INC.,

Defendant.

WI-LAN INC.,

Plaintiff,

vs.

APPLE INC.,

Defendant.

No. 3:14-cv-2235-DMS-BLM (Lead Case); Consolidated with 3:14-cv-01507-DMS-BLM
DEMAND FOR JURY TRIAL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT WI-LAN INC.'S MOTION TO STRIKE EXPERT OPINIONS REGARDING STRICKEN PRIOR ART REFERENCES AND UNDISCLOSED INVALIDITY THEORIES

Department: 13A
Judge: Hon. Dana M. Sabraw
Magistrate: Hon. Barbara L. Major

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I. INTRODUCTION

On March 2, 2018, this Court ordered Apple's amended invalidity contentions stricken because Apple's late addition of additional prior art references, obviousness combinations, claim charts, and Section 112 defenses would unduly prejudice Wi-LAN. (ECF No. 297 at 3.) Despite the Court's ruling, Apple continues to advance its stricken invalidity theories through the opinions in three of its expert reports. Wi-LAN immediately requested that Apple remove the portions of its expert reports that were subject to the Court's order so that Wi-LAN's experts could clearly respond to Apple's invalidity arguments that remained in the case. Ten days later (and three days before expert rebuttal reports were due), Apple agreed only to withdraw portions of one report addressing only one of the six patents-in-suit. After continued requests from Wi-LAN (and meeting and conferring), Apple eventually agreed to withdraw some additional expert testimony, but these withdrawals are insufficient. Apple's three expert reports still contain invalidity opinions not supported by Apple's June 29, 2017 Invalidity Contentions and which were stricken by the Court's order. Accordingly, Wi-LAN is forced to move the Court to strike the unsupported portions of the experts' opinions.

II. STATEMENT OF RELEVANT FACTS

On June 19, 2014, Apple filed this declaratory judgment action against Wi-LAN. The patents in suit are U.S. Patent No. 8,537,757 (the "'757 patent"), U.S. Patent No. 8,311,040 (the "'040 patent"), U.S. Patent No. 8,457,145 (the "'145 patent"), U.S. Patent No. 8,462,723 (the "'723 patent"), U.S. Patent No. 8,462,761 (the "'761 patent"), and U.S. Patent No. 8,615,020 (the "'020 patent"). On June 29, 2017, Apple served its Invalidity Contentions on Wi-LAN.

On January 2, 2018, ten days prior to the close of fact discovery and without asking the Court for leave to amend, Apple served Amended Invalidity Contentions on Wi-LAN, adding 29 newly alleged prior art references, plus new combinations and new Section 112 invalidity theories that were not disclosed in Apple's original invalidity contentions. On January 11, 2018, Wi-LAN moved to strike these amended contentions. Apple admitted that its Amended Invalidity Contentions contained new invalidity theories. (*See* ECF No. 266 at 1–2; ECF No. 293.)

On February 19, 2018, the parties exchanged expert reports. Apple's expert reports included the report of Dr. Bertrand Hochwald (alleging invalidity of the '040 Patent), the report of Dr. Thomas Fuja (alleging invalidity of the '757 Patent), and the report of Mr. Mark Lanning (alleging invalidity of the four other patents-in-suit, called the "Bandwidth Patents"). All three expert reports relied on prior art references, combinations, and/or Section 112 invalidity theories that were newly disclosed in Apple's improper Amended Invalidity Contentions.

In addition, the Lanning report relies on the "MAC Proposal" and "Fiberless" prior art references in its invalidity theories. These two references were not included in either Apple's original or amended contentions, and the Court denied Apple's motion for leave to amend its invalidity contentions to include these references. (ECF No. 302.)

On March 2, 2018, the Court granted Wi-LAN's motion to strike Apple's amended invalidity contentions, striking Apple's amended contentions in their entirety as unduly prejudicial to Wi-LAN. (ECF No. 297 at 3.) The Court's Order is clear that "Apple's amendments include[d] at least two new obviousness combinations (Chuah and Sau, Ericsson and Ericsson IP Traffic), twenty two new background references, two new claim charts (UMTS and Carvalho) and amendments to Apple's Section 112 defenses." (*Id.*)

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