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 14 APPLE INC.

15 UNITED STATES DISTRICT COURT
 16 SOUTHERN DISTRICT OF CALIFORNIA

17 WI-LAN, INC.,
 18 Plaintiff,
 19 v.
 20 APPLE INC.,
 21 Defendant.

CASE NO. 3:14-cv-1507-DMS-BLM
 (consolidated);
 CASE NO. 3:14-cv-02235-DMS-BLM
 (lead case)

**APPLE INC.'S OBJECTIONS TO
 EVIDENCE SUBMITTED BY WI-LAN
 IN OPPOSING APPLE'S MOTION
 FOR SUMMARY JUDGMENT**

Date: June 15, 2018
 Time: 1:30 p.m.
 Dept.: 13A
 Judge: Hon. Dana M. Sabraw
 Magistrate Judge: Hon. Barbara L. Major

26 AND RELATED
 27 COUNTERCLAIMS

28

1 Apple Inc. (“Apple”) respectfully submits the following objections to
2 evidence submitted by Wi-LAN, Inc. (“Wi-LAN”) with its opposition to Apple’s
3 summary judgment motion (Dkt. No. 358). Specifically, Apple objects to the
4 untimely new expert opinions offered by Wi-LAN’s infringement expert, Dr. Vijay
5 Madiseti, in a 14-page declaration filed in support of Wi-LAN’s opposition.

6 Federal Rule of Civil Procedure 26(a)(2)(B) requires expert reports to contain
7 a “complete statement of all opinions the witness will express and the basis and
8 reasons for them” and “the facts or data considered by the witness in forming
9 them.” “If a party fails to provide information or identify a witness as required by
10 Rule 26(a) or (e), the party is not allowed to use that information or witness to
11 supply evidence on a motion, at a hearing, or at a trial, unless the failure was
12 substantially justified or is harmless.” Fed. R. Civ. Pro. 37(c). Courts should not
13 consider expert declarations submitted in response to a summary judgment motion
14 that attempt to supplement the expert’s submission. *O2 Micro Int’l Ltd. v.*
15 *Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1368-69 (Fed. Cir. 2006); *Shaba v.*
16 *United States*, No. 07cv738-WQH-CAB, 2009 WL 482350, at *4-5 (S.D. Cal. Feb.
17 23, 2009) (exclusion is the proper remedy for an expert declaration submitted with
18 summary judgment briefing).

19 Here, the majority of Dr. Madiseti’s declaration consists of new opinions
20 that were not disclosed in his expert reports or at his deposition. Attached as
21 Exhibit A is an annotated version of Dr. Madiseti’s declaration that identifies in
22 red brackets the portions of Dr. Madiseti’s declaration that are new (*see* Ex. A at
23 ¶¶ 5, 8-18, 20-27, 29-31, 35-36) and therefore should not be considered by the
24 Court. *See O2 Micro Int’l Ltd.*, 467 F.3d at 1368-69. Dr. Madiseti offered all of
25 these new opinions well after the Court’s deadline for expert discovery. In some
26 instances Wi-LAN’s opposition cites Dr. Madiseti’s expert report (*see, e.g.*, Opp.
27 at 6), in some instances Wi-LAN cites Dr. Madiseti’s report and his new
28 declaration (*see, e.g.*, Opp. at 4), and in other instances Wi-LAN cites only Dr.

1 Madisetti's new declaration (*see, e.g.*, Opp. at 5). Apple does not object to the
2 portions of Dr. Madisetti's declaration that restate opinions in his expert report, but
3 does object to opinions not disclosed in Dr. Madisetti's reports as violating Federal
4 Rule of Civil Procedure 26(a)(2)(B). Apple respectfully requests that the Court
5 sustain Apple's objections to these new opinions.

6 Dated: May 31, 2018

DLA PIPER LLP (US)

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8 By /s/ Sean C. Cunningham

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2018, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ Sean C. Cunningham
Sean C. Cunningham