JOHN ALLCOCK (Bar No. 98895)
john.allcock@dlapiper.com
SEAN C. CUNNINGHAM (Bar No. 174931)
sean.cunningham@dlapiper.com
ERIN GIBSON (Bar No. 229305)
erin.gibson@dlapiper.com
ROBERT WILLIAMS (Bar No. 246990)
robert.williams@dlapiper.com
TIFFANY MILLER (Bar No. 246987)
tiffany.miller@dlapiper.com
JACOB ANDERSON (Bar No. 265768)
jacob.anderson@dlapiper.com
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, California 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

ROBERT BUERGI (Bar No. 242910)
robert.buergi@dlapiper.com
AMY WALTERS (Bar No. 286022)
amy.walters@dlapiper.com
DLA PIPER LLP (US)
2000 University Avenue
East Palo Alto, CA 94303-2215
Tel: 650.833.2000
Fax: 650.833.2001

Attorneys for
APPLE INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WI-LAN, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

AND RELATED
COUNTERCLAIMS

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

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

APPLE INC.'S OBJECTIONS TO CERTAIN EXHIBITS TO BE USED WITH JIM SKIPPEN AND RELATED TESTIMONY

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

In order to avoid disrupting the presentation of evidence at trial with multiple preservation objections, Apple Inc. ("Apple") respectfully submits for the record the following written objections to certain exhibits Wi-LAN plans to use with its witness James Skippen (PX-108, PX-118, PX-119 and PX-120) and expected testimony by Mr. Skippen. The exhibits at issue are unadjusted license agreements and unadjusted royalty rate sheets. Apple expects Wi-LAN to use these exhibits and testimony to support Wi-LAN's unapportioned and unadjusted damages claim, which is legally flawed. Therefore, these exhibits and expected testimony should not be admitted for the reasons stated in Apple's *Daubert* motion briefing and trial brief, and as more prejudicial than probative under Federal Rule of Evidence 403. Dkt. Nos. 333, 373, 433.

As stated in Apple's *Daubert* motion, Wi-LAN's unapportioned and unadjusted damages theories are contrary to Federal Circuit law. The exhibits and testimony at issue are expected to form the basis for Wi-LAN's damages claim, yet do not "allow the jury to weigh the economic value of the patented feature against the economic value of the features and services covered by the license agreement." *DataQuill Ltd. v. High Tech Comput. Corp.*, 887 F. Supp. 2d 999, 1021-25 (S.D. Cal. 2011); *Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011) (evidence for damages "must be tied to the relevant facts and circumstances of the particular case"); *Whitserve, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 30 (Fed. Cir. 2012); *AVM Techs., LLC v. Intel Corp.*, No. 10-610-RGA, 2013 WL 126233, at *3 (D. Del. Jan. 4, 2013) ("a patentee may not argue that prior licenses granting rights to entire portfolios of patents are comparable to a license that the parties would have negotiated for a single asserted patent.").

Wi-LAN cannot uses these exhibits and testimony to prop up royalty opinions without "tak[ing] into account the very types of apportionment principles contemplated in *Garretson*." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1228 (Fed. Cir. 2014). Without the required adjustments, these exhibits "serve[] no

purpose other than to increase the reasonable royalty rate above rates more clearly linked to the economic demand for the claimed technology." *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 80-81 (Fed. Cir. 2012).

Wi-LAN has failed to do what the Federal Circuit requires. Therefore, for the reasons stated above and as set forth in Apple's *Daubert* briefing (Dkt. Nos. 333, 373) and in Apple's trial brief (Dkt. No 433), Apple respectfully requests that the Court sustain Apple's objection to Wi-LAN's use of such unapportioned and unadjusted exhibits and testimony as violating the Federal Circuit's apportionment requirements and Federal Rule of Evidence 403.

Dated: July 25, 2018

DLA PIPER LLP (US)

By */s/ Sean C. Cunningham*
JOHN ALLCOCK
SEAN C. CUNNINGHAM
ERIN GIBSON
ROBERT BUERGI
ROBERT WILLIAMS
TIFFANY MILLER
JACOB ANDERSON
AMY WALTERS

Attorneys for
APPLE INC.

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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