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17 UNITED STATES DISTRICT COURT
 18 SOUTHERN DISTRICT OF CALIFORNIA

19 WI-LAN, INC.,
 20 Plaintiff,
 21 v.
 22 APPLE INC.,
 23 Defendant.

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

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

**APPLE INC.'S BENCH BRIEF
 REGARDING WI-LAN'S VIOLATION
 OF JULY 22, 2018 STIPULATION**

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

27 AND RELATED
 28 COUNTERCLAIMS

1 On the night before trial began (July 22, 2018), at Wi-LAN's urging, the
2 parties entered into a stipulation, which states in relevant part: "Wi-LAN will not
3 state or argue that Apple is the only or the rare mobile device manufacturer/
4 company which has not entered into a license agreement with Wi-LAN." Dkt. No.
5 449. It also states that "Wi-LAN will not argue that litigation with Wi-LAN
6 justifies an upward adjustment of any license or that litigation between the Parties
7 justifies an upward adjustment." *Id.* In exchange, Apple agreed it would not raise
8 the prior litigation history between the parties: "[t]he Parties will not argue or offer
9 evidence regarding the prior litigation history between Apple and Wi-LAN." *Id.*

10 During the testimony of Wi-LAN's CEO Jim Skippen, Wi-LAN repeatedly
11 violated the terms of the July 22 Stipulation:

12 The discount rate was the rate that we could go to very
13 quickly if we were negotiating just for a company that
14 was cooperative and working in good faith. And
15 respecting intellectual property, particularly ours. And
16 was willing to take a license. ... And some of the
17 factors that would go into discounting the rate would be
18 things like, you know, how cooperative and reasonable
19 and fair the company was that we were talking to. If they
20 respected intellectual property and clearly were working
21 in good faith with us we would immediately consider
22 discounts.

23 Ex. 1, Skippen Tr. at 13:7-19 (emphasis added).

24 Now, if a company just refused to talk to us or just
25 wouldn't – didn't show any respect for intellectual
26 property, or ours at least, these rates would not
27 necessarily apply.

28 *Id.* at 15:15-17 (emphasis added).

Well, I mean, all of those companies [Nokia, Blackberry,
LG, Samsung, HTC, Motorola, ZTE, Panasonic, Sanyo,
Vertu, Argos, Doro, NEC Mobile] have taken a license,
that is all I meant by that, that they take a license. And it
is very rare that companies don't take a license.

1 *Id.* at 17:10-13 (emphasis added); *see also* 8:15-20.

2 The vast majority of our licenses are arrived at just
3 through good faith discussion. You know, we are patent
4 experts, we have very strong technical and legal people,
5 they look at them. We do not assert patents unless we are
6 very sure they are being used. And usually there are
7 professionals on the other side, and we are able to just
8 discuss it and reach an agreement. And occasionally, like
9 I said, if someone presents good arguments, we will
10 withdraw the patents. We have I done that a number of
11 times. It is very rare that we just –

12 *Id.* at 17:14-23 (emphasis added). At that point, Apple’s counsel was forced to
13 object.

14 There is no question this testimony violated both the letter and the spirit of
15 the July 22 Stipulation, because the clear implication of this testimony is that Apple
16 did not negotiate in “good faith” with Wi-LAN, and that Apple is the “rare”
17 company that has not taken a license to Wi-LAN’s patents.

18 This testimony opens the door to Apple inquiring with Mr. Skippen and other
19 witnesses about the fact of and results of the prior lawsuits between Wi-LAN and
20 Apple. Otherwise, the jury will be left with precisely the impression that the
21 stipulation sought to eliminate—that Apple is an unwilling “holdout” to Wi-LAN’s
22 licensing approaches, that Apple has not acted in “good faith,” and that it should
23 pay more as a consequence. Permitting Apple to inquire about the prior litigation
24 history is the only fair way to put Apple back on equal footing in the eyes of the
25 jury, and to provide the true facts about why Apple has not taken a license.

26 Apple will be prepared to address this issue with the Court tomorrow.

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1 Dated: July 25, 2018

DLA PIPER LLP (US)

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3 By /s/ Sean C. Cunningham

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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