

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE NEO WIRELESS, LLC
PATENT LITIG.

Case No. 2:22-md-03034-TGB
HON. TERRENCE G. BERG
JURY TRIAL DEMANDED

**PLAINTIFF NEO WIRELESS, LLC'S REPLY IN SUPPORT OF MOTION
TO STRIKE DEFENDANTS' UNTIMELY PRIOR ART ELECTIONS**

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I. ARGUMENT IN REPLY

A. **Prior to December 20, 2023, Defendants never disclosed an invalidity theory based on Project Angel, nor elected Project Angel as a prior art reference.**

Prior to Defendants' Second Supplemental Invalidity and Unenforceability Contentions, served on December 20, 2023, Defendants never disclosed a theory of invalidity based on Project Angel. In Response (ECF No. 215), Defendants focus on disclosures made regarding Defendants' unfounded unenforceability theories. *See* ECF No. 215, PageID.11986–11988. Yet Defendants readily recognize that this Motion is not aimed at Defendants' unenforceability theories. *Id.*, PageID.11989 n.2. Defendants' discussion is irrelevant, merely distracting from the reality that Defendants unequivocally did not disclose an invalidity theory based on Project Angel in their initial contentions. Despite listing Project Angel as one of hundreds of potential references, Defendants instead disclosed 63 invalidity charts containing hundreds of invalidity combinations. *Not a single one of them referenced Project Angel.* *See* ECF No. 209, PageID.11835–11836. In the hundreds of pages disclosing Defendants' alleged motivations to combine for their obviousness invalidity theories, *not a single combination* included Project Angel. Project Angel was simply not part of Defendants' invalidity case.¹

¹ This is also true of Defendants' First Supplemental invalidity contentions, served on May 1, 2023, despite Defendants' claim that they "maintained their assertions

This fact was confirmed by Defendants’ prior art election, in which they specifically did not elect to pursue an invalidity theory based on Project Angel. *See* ECF No. 209-3. This election (as is done in other patent cases) was meant to focus the discovery efforts related to Defendants’ invalidity case. *See Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc.*, No. 16-cv-13456, 2019 WL 2171262, at *3 (E.D. Mich. May 20, 2019) (stating that contentions in patent cases “act as forms of pleading that disclose the parties’ theories of their case and thereby shape discovery and the issues to be determined at trial” (quoting *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-03999, 2015 WL 3640694, at *2 (N.D. Cal. June 11, 2015))). If Defendants had intended to conduct further discovery on an invalidity theory based on Project Angel, they could have elected to do so. But they did not. Defendants’ decision to not elect Project Angel as one of their 48 references communicated the opposite intention to Neo.

Therefore, notwithstanding the opening of Defendants’ Response, Defendants’ invalidity theories including Project Angel are unequivocally new, and Defendants must demonstrate good cause to rely on these newly disclosed theories based on the unelected Project Angel reference. ECF No. 84, PageID.2599–2600; ECF No. 102, PageID.8172; *see also Webasto*, 2019 WL

that Project Angel rendered the asserted patent claims invalid[.]” ECF No. 215, PageID.11990.

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