

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

WI-LAN, INC.,)	Civil Action No. 2:07-CV-473 TJW
)	
v.)	Consolidated Through Markman
)	With:
ACER INC., et al.)	Civil Action No. 2:07-CV-474 TJW
)	
WI-LAN, INC.,)	Jury Trial Requested
)	
v.)	
)	
WESTELL TECHNOLOGIES, INC., et al.)	

**DEFENDANTS' MOTION TO COMPEL COMPLIANCE WITH PATENT RULE 3-1
AND COMPEL DISCOVERY REGARDING INFRINGEMENT AND DAMAGES**

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I. INTRODUCTION

The Defendants in this action respectfully move to (1) compel Plaintiff Wi-LAN to provide Defendants with product-specific Infringement Contentions in accordance with P.R. 3-1, rather than Contentions based on technical standards; and (2) compel Wi-LAN to provide responses to Defendants' Interrogatory Nos. 16, 17, and 21.

In this action, Wi-LAN has asserted four patents against four computer chip suppliers ("Supplier Defendants") and 13 of their customers ("Customer Defendants"). Defendants bring this motion to compel Wi-LAN to provide basic information at the heart of its claims, including:

- **Infringement contentions based on the accused products as opposed to technical standards**
- **Whether each Defendant is alleged to directly or indirectly infringe the asserted claims and how**
- **The products comprising the sales base for each Defendant**
- **Whether Wi-LAN is seeking lost profits and, if so, its basis for that claim**

To date, after two years of litigation, the only information Wi-LAN has provided concerning its infringement theories are claim charts that compare each patent-in-suit to each accused standard and were provided in identical form to each of the Defendants. Wi-LAN's charts do not contain a single citation to the actual accused products or to any of the substantial technical documentation, source code, or other materials Defendants have produced over the course of the last year. Moreover, Wi-LAN has accused both the Supplier and Customer Defendants of directly "and/or" indirectly infringing, but refuses to provide any information clarifying these allegations, including by identifying which Defendants are allegedly responsible for practicing each claim element. This information is critical to rebutting Wi-LAN's

unsupported contention that both the Supplier and Customer Defendants must continue to litigate this case, when Wi-LAN has not identified where on the Supplier Defendants' chips (or, if anywhere, in the Customer Defendants' products incorporating those chips) the accused functionality is allegedly found.

With respect to Wi-LAN's requested remedies, Wi-LAN refuses to state whether it is pursuing lost profits and, if so, the basis for such a claim. Moreover, consistent with Wi-LAN's refusal to explain its direct and indirect infringement allegations, Wi-LAN refuses to identify the types of products it contends comprise the sales base for a reasonable royalty calculation – *i.e.*, the Supplier Defendants' chip products or the Customer Defendants' products incorporating them.

As a result of these deficiencies, Defendants are deprived of Wi-LAN's basic case theories and are substantially hampered in preparing their defenses for trial. During the meet and confer process, Wi-LAN did not dispute Defendants are entitled to this discovery, but instead insisted that it should be permitted to complete discovery of Defendants prior to providing the basic information sought by this motion. However, Wi-LAN may not withhold such fundamental information until the end of this case. Defendants have more than satisfied Wi-LAN's requests for discovery, and Wi-LAN has been reviewing and analyzing Defendants' technical and other materials for many months. As shown below, Wi-LAN's position is not borne out of a legitimate need for additional discovery and appears to simply be a delay tactic. As such, Defendants' motion should be granted, and Wi-LAN should be required to provide the requested supplementation within 14 days of the Court's ruling.

II. FACTUAL BACKGROUND

A. Wi-LAN Files Suit Against Supplier Defendants And Their Customers

On October 31, 2007, Wi-LAN initiated this action against numerous companies involved in supplying products with certain wireless functionality. These companies include the Supplier Defendants, who are suppliers of integrated circuit products having wireless functionality, and the Customer Defendants, who purchase these products and incorporate them into consumer devices, such as laptops or wireless access points. Wi-LAN accuses 17 Defendants of infringing U.S. Patent No. 5,282,222 and U.S. Reissue Patent No. RE37,802, 12 Defendants of infringing U.S. Patent No. 6,549,759, and 5 Defendants of infringing U.S. Patent No. 5,956,323. *See* D.I. 183, 192; 2:07-CV-474 D.I. 177. Wi-LAN filed its claims in two separate cases having overlapping parties and claims, and the Court consolidated these cases for discovery and claim construction in September 2008. *See* D.I. 165.

B. Wi-LAN Serves Identical Infringement Charts On Every Defendant Based Exclusively On Standards Documents

Wi-LAN served infringement contentions that accuse "products compliant with" numerous different technical standards related to WiFi (IEEE 802.11a, 802.11b, 802.11g, 802.11n), WiMAX (802.16e), Bluetooth (Bluetooth v2.0+EDR, Bluetooth v2.1+EDR), and DSL (ITU-T G.992.3 ADSL2, ITU-T G.993.2 VDSL2). *See* Exh. A (Infringement Contentions). However, none of Wi-LAN's infringement charts address operational details of Defendants' actual products or any of Defendants' product documentation or source code. Rather, Wi-LAN's charts cite exclusively to functional guidelines in public standards documents. *See id.*

Moreover, Wi-LAN served identical infringement charts on both the Supplier and Customer Defendants accused of infringing each standard. Wi-LAN's charts do not provide any

indication of which elements, if any, it contends the Customer Defendants infringe or why the Customer Defendants are accused of infringement – other than by virtue of purchasing chips that are incorporated into their products.

C. Defendants Produce Voluminous Discovery, Including Technical Documents and Source Code

In accordance with the Court's Discovery Order and in response to Wi-LAN's requests, Defendants produced substantial documentation regarding their products related to the nine standards at issue. To date, Defendants have collectively produced over *five terabytes of data* comprising well in excess of *36 million pages of documents* concerning their wireless products, including technical documents, source code, marketing and sales documents, licenses, financial documents, internal communications, communications with third parties, and other product-specific information requested by Wi-LAN. *See* Exh. B (chart summarizing each Defendants' production). Moreover, Defendants have approved at least 20 different Wi-LAN consultants who have been actively reviewing Defendants' source code and other highly-confidential materials since at least May 2009. *See, e.g.*, Exh. C (4/24/2009 Mitchell Letter to Ni). These consultants have spent thousands of hours reviewing the Supplier Defendants' source code and apparently concluded reviewing at least some Defendants' code more than 6 months ago. *See, e.g.*, Exhs. D (Atheros Source Code Access Log); E (Intel Source Code Access Log).

With respect to written discovery, most Defendants have provided multiple rounds of supplements to their interrogatory responses. And, nearly every Defendant has already provided at least one day of Fed. R. Civ. P. 30(b)(6) deposition testimony.

D. Wi-LAN Refuses To Supplement Its Infringement Contentions And Provide

Other Basic Information Until 45 Days After Discovery Is Completed

Nearly a year after commencing production of volumes of discovery regarding their products, Defendants requested that Wi-LAN update its Infringement Contentions to satisfy the requirements of P.R. 3-1 by identifying where the accused functionality is found in each of Defendants' accused products. Defendants also requested that Wi-LAN provide substantive responses to interrogatories concerning key facts underlying Wi-LAN's claims:

- Whether each defendant is alleged to directly or indirectly infringe the asserted claims and how (Interrogatory No. 21)
- The types of products comprising the sales base for each Defendant (Interrogatory No. 16)
- Whether Wi-LAN is seeking lost profits and, if so, its basis (Interrogatory No. 17)

See Exhs. F (11/30/2009 Schofield Letter to Cote); G (4/24/2009 and 8/6/2009 Wi-LAN's Responses to Defendants' Second Set of Joint Interrogatories (Nos. 3-20); H (11/5/2009 Wi-LAN's Responses Defendants' Third Set of Joint Interrogatories (Nos. 21-23)). In response, Wi-LAN did not dispute that Defendants are entitled to the requested information. *See* Exh. I (12/30/2009 Handley Letter to Schofield). Instead, Wi-LAN argued that it could not provide the requested information until it received additional discovery from Defendants, including additional document productions, supplemental interrogatory responses, further 30(b)(6) deposition testimony, and third party discovery:

Defendants will need to complete their production of the following outstanding discovery items: (i) all relevant source code and other Patent Rule 3-4 technical documents for each product; (ii) substantive responses to outstanding Wi-LAN interrogatories pertaining for example to the relatedness of the various accused products, the source code, product development, testing, standards certification and compliance and the operation distribution and marketing of the accused products; and (iii) corporate and individual deposition testimony. The Defendants must also produce third party information that is in their "control" such as, *e.g.*, information from third parties that Defendants utilize for product manufacturing

or testing. In some instances, third party discovery may be required to obtain relevant information that is not in Defendants' control.

See id. (citations omitted). In sum, Wi-LAN insisted that Defendants provide essentially all fact and expert discovery in this case before Wi-LAN provides any of the information sought by this Motion. Wi-LAN also insisted that its numerous experts be permitted an additional 45 days to review and analyze the discovery before responding to Defendants' requests - and, even then, on a rolling basis. *See id.* Wi-LAN repeated these demands for each of the basic discovery items requested by Defendants. *See id.*

Despite Wi-LAN's discovery demands, Wi-LAN has had nearly all of the requested information for months. *See* Exh. B. In view of the substantial discovery provided by Defendants, Wi-LAN's demands for additional discovery appear to simply be a tactic to indefinitely withhold critical case information. Wi-LAN's strategy was further revealed when it served second and third 30(b)(6) notices on the Supplier Defendants in November 2009, seeking testimony on various technical issues. *See* Exhs. J (11/17/2009 Brown Email to Counsel enclosing Second 30(b)(6) Notices); K (11/24/2009 Brown Email to Counsel enclosing Third 30(b)(6) Notices). When the Supplier Defendants promptly proposed dates for those depositions in January and early February 2010, Wi-LAN refused to proceed, choosing to put the depositions off for months. *See* Exhs. L (12/22/2009 Schofield Letter to Blackstone); M (1/13/2010 Schofield Letter to Handley); N (1/14/2010 Handley Letter to Schofield); O (2/1/2010 Handley Email to Mitchell); P (2/1/2010 Handley Email to Schofield). At the same time, Wi-LAN refuses to provide the discovery sought by Defendants until after the depositions occur, thereby further thwarting Defendants' efforts to prepare their defenses while Wi-LAN continues to demand more and more discovery. *See* Exh. I.

III. ARGUMENT

A. Wi-LAN's Standards-Based Infringement Contentions Do Not Comply With P.R. 3-1 And Must Be Supplemented With Product-Specific Information

1. Wi-LAN's Standards-Based Infringement Contentions Fail to Identify Where Each Claim Element is Allegedly Found in Each Accused Instrumentality

The Patent Rules were established to prevent precisely the situation presented here – a "hide the ball" approach where a patent holder avoids providing a full disclosure of its infringement theories until the end of the case. *See Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-CV-144, 2009 WL 2590101, at *5 (E.D. Tex. Aug. 18, 2009) ("[T]he Patent Rules require early disclosure of infringement contentions in order to allow defendants to discover the plaintiff's theories of infringement early in the case because, in practice, it has been difficult to attain such information through traditional discovery."); *Tantivy Comms., Inc. v. Lucent Techs. Inc.*, No. 2:04-CV-79 (TJW), 2005 WL 2860976, at *4 (E.D. Tex. Nov. 1, 2005) ("This Court will simply not allow lawyers or their clients to lay behind the log and disregard their discovery obligations."). Infringement contentions are intended to place Defendants on notice of a patentee's theories early in litigation, thereby focusing the issues in dispute and streamlining discovery. *See EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-CV-116, 2010 WL 346218, at *2 (E.D. Tex. Jan. 21, 2010); *Realtime Data*, 2009 WL 2590101, at *2 (P.R. 3-1 requires a patentee to "formulate, test, and crystallize" its infringement theories early in litigation); *ConnecTel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 527 (E.D. Tex. 2005) ("When parties accuse hundreds of products of infringing hundreds of claims, and only narrow those accusations after discovery, the case staggers for months without clear direction.").

Wi-LAN's infringement contentions fail to meet these standards in several important

ways. First, Wi-LAN's contentions are based exclusively on standards documents and make no reference to the underlying products, either by way of a pre-suit reverse engineering (or other) analysis or through the substantial documentation and source code provided by Defendants since the outset of this case. Mere reference to technical standards is not enough. *See Linex Tech., Inc. v. Belkin Int'l, Inc.*, 628 F. Supp. 2d 703, 708 (E.D. Tex. 2008) ("Plaintiff cannot rest its Infringement Contentions on this standard alone without specifically linking the 802.11n-standard configuration to the Accused Products."). Unlike product documentation and source code, technical standards – such as the 802.11 and other standards at issue here – merely provide functional guidelines for standardized products and do not delineate the operational details of the accused products themselves:

The 802.11n standard is not an exemplary product for the purposes of Infringement Contentions, as Plaintiff implies. The 802.11n standard is merely a functional guideline for compliant products, and as discussed above, the 802.11n standard does not delineate the hardware, firmware, or operational details of compliant devices.

Id. at 711. In *Linex Tech.*, as here, the patentee provided standards-based infringement contentions comprising a single claim chart for all defendants that mapped each element of the asserted claims to the IEEE 802.11n draft standard, rather than to any of the ten Defendants' approximately 70 products. *See id.* at 708. Judge Love granted Defendants' motion to compel more specific contentions, holding that standards-based infringement contentions are an inappropriate substitute for the product-level infringement contentions required by P.R. 3-1:

Plaintiff fails to take into account that the way in which each Accused Product is alleged to infringe the [asserted patent] will not necessarily be the same, even though all Accused Products are compliant with the 802.11n standard. Not only are there numerous different kinds of Accused Products - including wireless routers, wireless networking cards, and laptops - but the 802.11n standard does not outline specific implementation details for compliant devices.

Id. See generally *EON Corp.*, 2010 WL 346218, at *3 ("EON must put forward its position as to where it believes particular limitations are met by the accused instrumentalities.").

Second, by serving the same chart on each Defendant accused of infringement with respect to a particular standard, Wi-LAN also failed to satisfy P.R. 3-1's requirement that contentions be made "separately for each opposing party." *Linex Tech.*, 628 F. Supp. 2d at 707-08; P.R. 3-1. This requirement is particularly important here where there are numerous different types of accused instrumentalities relating to each standard: different chipsets provided by each Supplier Defendant, as well as the many different laptops, routers, networking cards, and other products incorporating those chipsets. See *EON Corp.*, 2010 WL 346218, at *3 ("EON's infringement contentions are deficient because they fail to identify each accused instrumentality in its 3-1(c) chart. The infringement contentions include one claim chart for each asserted claim....P.R. 3-1 requires EON to specifically explain how each accused instrumentality meets the asserted claim elements."); *Realtime Data*, 2009 WL 2590101, at *9 (requiring Plaintiff who had asserted nine patents and more than 100 claims against 12 defendants to provide "separate infringement contentions for each Defendant that spell out every patent and every claim that Plaintiff intends to assert against that particular Defendant" including a "chart identifying where each element of each asserted claim is found in each accused product"). Merely alleging that each accused instrumentality "complies" with the standards fails to account for the specific way in which each device is alleged to infringe and the differences between the devices. See, e.g., *Linex Tech.*, 628 F. Supp. 2d at 708; see also *ConnecTel*, 391 F. Supp. 2d at 527-28.

Third, in this case, it appears the accused functionality is found on the Supplier Defendants' chips and that the Customer Defendants are in this action merely because they

purchase those chips. Wi-LAN has not identified a single claim element that the Customer Defendants are responsible for allegedly meeting, other than by virtue of their purchase of the chips produced by others. It is, therefore, critical that Wi-LAN promptly provide individualized contentions showing how it contends each Defendant is alleged to infringe.

2. Wi-LAN May Not Indefinitely Delay Providing Updated Contentions

Contrary to its assertions, Wi-LAN may not continue to withhold product-level infringement contentions until it receives additional discovery from Defendants. Under both the Federal Rules and this Court's Discovery Order, a party's obligation to respond to discovery is not contingent on discovery from another party. *See* Fed. R. Civ. P. 26(d)(2)(B); D.I. 169 at 8. Moreover, Defendants have already provided substantial discovery to Wi-LAN, including more than five terabytes of data comprising well in excess of 36 million pages of relevant documentation, including technical documents and source code and multiple days of 30(b)(6) deposition testimony. *See* Exh. B. In sum, Defendants have bent over backwards to ensure that Wi-LAN's demands for additional discovery have been met, at great burden and expense. Additional discovery, such as further 30(b)(6) depositions concerning the accused products, is not required for Wi-LAN to provide product-level contentions. *See Realtime Data*, 2009 WL 2590101, at *5 (patentee not entitled to deposition testimony to prepare product-level infringement contentions). Nonetheless, in response to Wi-LAN's demands for additional deposition testimony regarding the technical operation of the accused instrumentalities, the Supplier Defendants proposed dates for such depositions in January and February 2010 - yet

*Wi-LAN chose to put off those depositions for months.*¹ See Exhs. L-P.

Defendants should not be forced to continue to wait to learn the basic theories behind Wi-LAN's infringement claims until Wi-LAN unilaterally decides it is ready to provide such critical information. See, e.g., *id.* at *2 (denying plaintiff's motion to amend its infringement contentions given plaintiff had access to defendants' technical documents and source code for approximately eight months before seeking leave to amend); *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 824 (E.D. Tex. 2007) (failure to diligently amend infringement contentions after receiving defendant's source code weighs in favor of striking plaintiff's contentions); *American Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560-61 (E.D. Tex. 2005) (ordering plaintiff to supplement its infringement contentions with 30 days of accessing defendants' source code).

Indeed, contrary to its suggestions during the parties' meet and confer, Wi-LAN may not rely on the number of Defendants or accused products to indefinitely delay providing proper infringement contentions. Having initiated this lawsuit, Wi-LAN cannot now rely on the complexity and size of this case to excuse compliance with P.R. 3-1. See *Realtime Data*, 2009 WL 2590101, at *6 ("When Plaintiff filed the instant lawsuit, it should have been prepared for aggressive discovery and trial schedule necessitated by filing a mutli-party, multi-patent case in this District.")² This case was filed in October 2007 and discovery closes later this year - the

¹ Even assuming deposition testimony was appropriate, Wi-LAN's failure to obtain this testimony is a product of its own delay. Wi-LAN did not serve these technical 30(b)(6) deposition notices until November 2009, despite having filed this case more than two years earlier. See *Realtime Data*, 2009 WL 2590101, at *5.

² Although Wi-LAN has suggested that it would like certain Defendants to identify a subset of products that act as representatives for the larger set, Wi-LAN has not yet identified the specific circuits and other functionality at issue in *any of* the accused products for each claim element. As such, Wi-LAN's request for identification of representative products is premature. Nevertheless, Defendants have been amenable to discussing approaches

time for Wi-LAN to provide this information is now, and further delay is unwarranted.

B. Wi-LAN's Refusal To Provide Basic Information In Response To Defendants' Interrogatories Is Improper And Highly Prejudicial

Although Defendants have requested that Wi-LAN supplement its responses to Joint Interrogatory Nos. 16, 17, and 21 to provide a key subset of information regarding its infringement and damages claims, Wi-LAN has refused to do so until receiving additional discovery from Defendants. *See* Exh. I. Wi-LAN's continuing refusal to provide this basic information is unwarranted and highly prejudicial to Defendants.

1. Identification of Direct and Indirect Infringers (Interrogatory No. 21)

Despite having accused both the Supplier and Customer Defendants of directly "and/or" indirectly infringing the patents-in-suit, Wi-LAN refuses to provide *any* information supporting those allegations in response to Interrogatory No. 21, including which Defendant is allegedly responsible for which elements of each claim. *See* Exh. H. This information is critical to enable Defendants to understand why Wi-LAN sued both Supplier and Customer Defendants, particularly given that it appears the accused functionality resides on the Supplier Defendants' chip products. It is also critical to understanding how Wi-LAN is applying the asserted claims and the alleged scope of those claims, factors highly relevant to Defendants' noninfringement and invalidity defenses.

Moreover, Wi-LAN should already be in possession of much of the requested information. During its pre-suit investigation, Wi-LAN was required to determine specifically how each element of each asserted claim is allegedly infringed by each accused instrumentality

to representative products, but Wi-LAN has not responded. *See, e.g.*, Exh. S (2/11/2010 Schofield Letter to Handley).

and should have disclosed this information in its original Infringement Contentions. *See, e.g., View Eng'g Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000); *Am. Video Graphics*, 359 F. Supp. 2d at 560 (the Patent Rules establish "high expectations" as to a plaintiff's preparedness before filing suit); Fed. R. Civ. P. 11. Moreover, in responding to Defendants' earlier motion concerning scheduling of Wi-LAN's claims against the Customer Defendants, Wi-LAN asserted that:

[T]he Laptop Computer Defendants and the Wireless Router Defendants are not mere customers who resell chips and circuit boards. They manufacture laptop computer and wireless router products alleged to be infringing, and *the Chip Defendants' integrated circuits are but one component of the infringing products*. A judgment against the Chip Defendants is thus not likely to resolve all allegations of direct and indirect infringement of the apparatus and method claims asserted against the Laptop Computer Defendants and the Wireless Router Defendants.

D.I. 146 (emphasis added). Now, a year and a half later, Wi-LAN still has not provided any basis for that assertion.

2. Types of Products Comprising the Sales Base (Interrogatory No. 16)

Consistent with Wi-LAN's refusal to explain its direct and indirect infringement allegations, Wi-LAN also refuses to identify in response to Interrogatory No. 16 the types of products it contends comprise the sales base: the Supplier Defendants' chip products or the Customer Defendants' products that incorporate those chips. *See* Exhs. G; Q (6/26/2009 Schofield Letter to Petrsoric); R (10/18/2009 Schofield Letter to Blackstone). This information should have been in Wi-LAN's possession when it initiated suit against all Defendants seeking damages.

Now, however, Wi-LAN claims it cannot identify which types of products comprise the sales base until after it receives additional documents and deposition testimony "pertaining to

damages, licensing, marketing and sales," as well as supplemental interrogatory responses regarding each Defendants' sales, licenses, negotiations, top 1000 customers (and their activities), top 100 investors, first knowledge of the technology-at-issue, first knowledge of the patents-in-suit, customer training, and reasons for developing the products at issue. *See* Exh. I. Defendants already have produced much of this information. Moreover, most of Wi-LAN's demands go to the specifics of calculating a reasonably royalty rate, not the identification of the sales base to which that rate applies. *See Alliantgroup, L.P. v. Axiom Custom Bus. Solutions, Inc.*, Civ. A. H-05-1084, 2006 WL 568363, at *2 (S.D. Tex. Mar. 6, 2006) ("While Alliantgroup may not be able to specify all damages it may be entitled to, that does not preclude specification of at least some of the components of those damages, as well as the calculations supporting the \$200,000.00 figure."); *Aristocrat Techs. v. Int'l Game Tech.*, No. C06-3717RMN, 2009 WL 3573327, at *2 (N.D. Cal. Oct. 30, 2009) (patentee must provide interrogatory response setting forth evidence regarding damages calculations prior to expert report and based on information currently within its possession).

Defendants have not asked Wi-LAN for a detailed explanation of its damages theories, nor have they asked Wi-LAN to provide a full-blown damages calculation at this juncture. Defendants ask only that Wi-LAN identify the *type(s) of products* that it contends comprise the applicable sales base and the factual bases for those contentions, so that Defendants may pursue discovery relating to this sales base. *See, e.g., Realtime Data*, 2009 WL 2590101, at *5. During the meet and confer, Wi-LAN provided no reason as to why it cannot provide this basic information after litigating this case for over two years.

3. Whether Wi-LAN is Seeking Lost Profits (Interrogatory No. 17)

The Court ordered Wi-LAN to disclose whether it is seeking lost profits 10 months ago. *See* D.I. 171 at 3. To date, Wi-LAN refuses to confirm whether or not it is seeking lost profits, and the basis for any such claim, as requested by Interrogatory No. 17. *See* Exh. G. This information is routinely provided by patentees early in patent cases. *See, e.g., Automed Techs. v. Knapp Logistics & Automation, Inc.*, 382 F. Supp. 2d 1368, 1370 (N.D. Ga. 2005) ("Defendant is entitled to a clear articulation of the damages Plaintiff alleges in this case.").

Although Wi-LAN contends that additional discovery is necessary to provide this information, Wi-LAN provides no explanation for its position. Lost profit claims are generally based on the *patent holder's* past sales (or inability to make sales in view of the allegedly infringing product). *See Cummins-Allison Corp. v. SBM Co., Ltd.*, No. 9:07-CV-196, 2009 WL 3855958, at *3 (E.D. Tex. Nov. 13, 2009) (citing *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1577 (Fed. Cir. 1989)) ("Calculations of lost profits are proper when a party proves that it had the capacity to make some or all of the infringing sales and there is a reasonable probability that, but for the infringement, it would have made those sales."). To the extent information exists concerning such a claim, it would most likely be in Wi-LAN's possession, not Defendants'. For that reason, Defendants need to know whether Wi-LAN intends to claim lost profits now, so that they have time to take discovery of Wi-LAN relating to such a claim.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to (1) compel Wi-LAN to provide product-specific Infringement Contentions; and (2) compel Wi-LAN's responses to Joint Interrogatory Nos. 16, 17, and 21. Defendants request that Wi-LAN be required to provide this supplementation within 14 days of the Court's order.

Dated: February 15, 2010

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 15th day of February 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Robert M. Parker
Robert M. Parker

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Defendants have complied with the meet and confer requirement in Local Rule CV-7(h). This motion is opposed. The personal conference required by Local Rule CV-7(h) was conducted via a meet and confer on November 24, 2009. Christopher Bunt and Adam Alper (for Defendants), Robert Cote (for Wi-LAN), and other counsel for the parties participated in the conference. There were also additional requests for a meet and confer by letter from Amy Schofield to Bob Cote dated November 30, 2009, with numerous emails and letters during the months of December 2009 and January and February 2010. A final meet and confer was held on February 15, 2010. During the conference, counsel for Defendants and Wi-LAN attempted to resolve all disputes before the filing of this motion. However, no agreement could be reached. Discussions have conclusively ended in an impasse, leaving an open issue for the Court to resolve.

/s/ Robert M. Parker
Robert M. Parker