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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 WI-LAN USA, INC. and WI-LAN, INC.,
11 Plaintiffs,
12 vs.
13 APPLE INC.,
14 Defendant.

CASE NO. 13cv0798 DMS (BLM)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR CLARIFICATION AND
RECONSIDERATION**

[Docket No. 108]

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16 On December 23, 2013, this Court issued its Order Construing Patent Claims. In that Order,
17 the Court construed the term “node” in the ‘040 Patent as “a module between a base station and an
18 end user that directs transmission of data over a communications link.” The Court also construed the
19 terms “wireless subscriber radio unit/wireless communication radio unit” in the ‘640 Patent as a
20 “module that receives UL bandwidth from a base station, and allocates the bandwidth across its user
21 connections.” Another term at issue was “packing sub-header,” which the Court construed as “a
22 header located in a PDU payload.”

23 On January 21, 2014, Wi-Lan filed the present motion for clarification and reconsideration of
24 the Court’s Claim Construction Order, seeking clarification of the Court’s constructions of “node” and
25 “wireless subscriber radio unit/wireless communication radio unit,” and reconsideration of the Court’s
26 construction of “packing sub-header.”¹ On the former, the parties disagree whether the Court’s
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28 ¹ The Court notes that Wi-Lan substituted new counsel after the Court’s *Markman* Order and before filing the present motion.

1 constructions of the terms “node” and “wireless subscriber radio unit/wireless communication radio
2 unit” preclude Wi-Lan from arguing that these aspects of the invention can be “a component part of
3 a user device.” (Mem. of P. & A. in Supp. of Mot. at 3.) Wi-Lan argues the Court’s construction does
4 not preclude it from making this argument, while Apple argues Wi-Lan is so precluded. On the latter,
5 Wi-Lan requests the Court reconsider its construction of the term “packing sub-header.” The motion
6 came on for hearing on April 2, 2014. Dirk Thomas and Seth Hasenour appeared for Wi-Lan and
7 Mark Scarsi and Miguel Ruiz appeared for Apple. After thoroughly reviewing the parties’ briefs and
8 the record on file herein, and hearing oral argument from counsel, the Court grants Wi-Lan’s motion.

9 Clarification of the Court’s constructions of “node” and “wireless subscriber radio
10 unit/wireless communication radio unit” is appropriate and necessary. Obviously, the parties disagree
11 about the effect of the Court’s claim construction, and the Court needs to resolve that disagreement.
12 Furthermore, “[d]istrict courts may engage in a rolling claim construction, in which the court revisits
13 and alters its interpretation of the claim terms as its understanding of the technology evolves.” *Jack*
14 *Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002) (citing *Sofamor*
15 *Danek Group, Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996)).

16 Wi-Lan argues the Court’s claim construction does not preclude it from arguing that the
17 “node” and “wireless subscriber radio unit/wireless communication radio unit” are components of a
18 user device, such as a cellular phone or tablet computer. Wi-Lan asserts there is nothing inherent in
19 the Court’s constructions that prevents it from making this argument, and the intrinsic evidence
20 supports Wi-Lan’s position. Apple argues Wi-Lan made this argument during the claim construction
21 process, the Court rejected it then and should reject it now.

22 The Court agrees with Apple that Wi-Lan made this same argument during the claim
23 construction process, *i.e.*, that the “node” and “wireless subscriber radio unit/wireless subscriber
24 communication unit” could be a component of a cellular phone or tablet computer. The Court also
25 agrees that it rejected that argument when it adopted Apple’s proposed constructions of these terms.
26 However, Wi-Lan has presented evidence that was not presented during the claim construction
27 process. Specifically, Wi-Lan points to portions of the prosecution history for the ‘640 Patent that

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1 reflect the Examiner was reading prior art concerning a mobile unit on the “wireless subscriber radio
2 unit” in the ‘640 Patent.

3 The Court has reviewed this evidence, and finds it supports Wi-Lan’s position that the
4 “wireless subscriber radio unit/wireless communication radio unit” could be a component of a cellular
5 phone or tablet computer. Throughout the prosecution history, the Examiner compared the “wireless
6 subscriber radio unit/wireless communication radio unit” to prior art containing a mobile device. (*See*
7 *Ex. E in Supp. of Mot.* at 18-22, 37-38, 40, 42-43, 65-70, 99, 103, 105-06, 117-20, 122, 124-27.)

8 Apple did not address this evidence in its brief, but did address the evidence at oral argument.
9 Specifically, Apple argued that the Examiner focused on a prior art reference, namely United States
10 Patent Number 6,016,311 to Gilbert, that contained an intermediary device. However, as Wi-Lan
11 pointed out at oral argument, the Gilbert patent referred to in the prosecution history is not the ‘311
12 Patent. Rather, it is Gilbert’s United States Patent Number 5,297,144, (*see id.* at 65), which does not
13 require an intermediary device. Apple’s argument does not refute Wi-Lan’s interpretation of the
14 prosecution history. Rather, the evidence supports Wi-Lan’s position that it should be allowed to
15 argue that the “wireless subscriber radio unit/wireless communication radio unit” could be a
16 component part of a user device. The Court so finds, and thus clarifies its construction of these terms.²

17 Turning to the term “packing sub-header,” the parties’ arguments are of the same nature. Wi-
18 Lan makes the same argument it made during the claim construction process, but relies on different
19 evidence, and Apple argues the Court has already rejected Wi-Lan’s argument once and should do so
20 again.

21 Here, again, the Court agrees with Wi-Lan, and finds reconsideration of the Court’s claim
22 construction is in order. *See School Dist. No. 1J v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)
23 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)) (stating reconsideration is
24 appropriate “when ‘the reviewing court on the entire record is left with the definite and firm

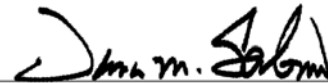
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26 ² Throughout the claim construction proceedings, Wi-Lan has treated the terms “wireless
27 subscriber radio unit/wireless communication radio unit” in the ‘640 Patent the same as the term
28 “node” in the ‘040 Patent. It continues that approach in the present motion, asserting that the term
“node” should be interpreted consistently with the terms “wireless subscriber radio unit/wireless
communication radio unit.” The Court agrees these terms should be construed consistently, and thus
clarifies the term “node” is interpreted in accordance with the terms “wireless subscriber radio
unit/wireless communication radio unit.”

1 conviction that a mistake has been committed.”) Although the argument is the same, Wi-Lan points
2 to portions of the specification that were not called out during the claim construction process.
3 Specifically, it relies on Figure 8 of the ‘040 Patent, combined with the dependent claims, which show
4 the “packing sub-header” in the PDU header but not in the PDU payload.³

5 Apple did not address this evidence in its brief, but did address it at oral argument. There,
6 Apple argued Figure 8 did not include a packing sub-header. However, the Court disagrees with that
7 argument. Dependent claims 4, 5, 11 and 12 state a packing sub-header may comprise a fragment
8 sequence number (“FSN”) or a fragmentation control (“FC”) field. Figure 8 clearly shows both a FSN
9 and FC field in the PDU header, not in the PDU payload. In light of this evidence, the Court grants
10 Wi-Lan’s motion for reconsideration of this issue, and amends the claim construction to remove the
11 limitation that the “packing sub-header” is located in the PDU payload.

12 **IT IS SO ORDERED.**

13 DATED: April 10, 2014



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15 HON. DANA M. SABRAW
16 United States District Judge
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27 ³ At oral argument, Wi-Lan raised additional arguments and evidence that were not included
28 in its briefs. The Court finds consideration of those arguments and evidence is unnecessary to the
present motion. Thus, Wi-Lan need not file that additional paperwork with the Court, nor does Apple
need to file a response.