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**UNITED STATES DISTRICT COURT**

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**NORTHERN DISTRICT OF CALIFORNIA**

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**SAN JOSE DIVISION**

11 BROADCOM CORPORATION and  
12 ATHEROS COMMUNICATIONS, INC.,

13 Plaintiffs,

14 v.

15 WI-LAN, INC.,

16 Defendant.

Case No. 5:08-cv-5543  
Case No. 5:08-cv-5544 (related action)  
Case No. 5:08-cv-5624 (related action)  
Case No. 5:08-cv-5742 (related action)

Hon. James Ware

**PARTIES' JOINT STATEMENT OF  
PROPOSALS FOR MOVING FORWARD  
PURSUANT TO MARCH 25, 2009 ORDER**

17 AND RELATED ACTIONS

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1 Plaintiffs Broadcom Corporation (“Broadcom”), Atheros Communications, Inc.  
2 (“Atheros”), Marvell Semiconductor, Inc., Marvell Asia Pte., Ltd. (together, “Marvell”), Apple,  
3 Inc. (“Apple”), Toshiba America Information Systems, Inc., Hewlett-Packard Company, Lenovo  
4 (United States), Inc., Dell, Inc., Sony Computer Entertainment America, Inc., Sony Electronics,  
5 Inc., and Acer America Corp., Gateway, Inc., and Defendant Wi-LAN, Inc. hereby jointly submit  
6 this statement of their respective positions for moving forward with the above-entitled actions  
7 pursuant to the Court’s March 25, 2009 Order Following Case Management Conference, which  
8 states in pertinent part that, “[t]en (10) days after the Court rules on Defendant’s Motion in the  
9 Intel action,<sup>1</sup> the parties shall inform the Court of their proposals for moving forward with  
10 litigation in all five related actions.”

11 Certain plaintiffs in the above-entitled related cases—Toshiba America Information  
12 Systems, Inc., Hewlett-Packard Company, Lenovo (United States), Inc., Dell, Inc., Sony  
13 Computer Entertainment America, Inc., Sony Electronics, Inc., Acer America Corp. and  
14 Gateway, Inc.—intend to voluntarily dismiss their respective causes of action without prejudice.  
15 The other plaintiffs in the above-entitled actions, Broadcom, Atheros, Marvell, and Apple  
16 (hereafter collectively, “Plaintiffs”) submit a statement of their position for moving forward with  
17 their respective actions below, following which Defendant Wi-LAN, Inc. submits a statement of  
18 its position for moving forward.

#### 19 **I. Plaintiffs’ Position**

20 On June 4, 2009, this Court ruled on Defendant Wi-LAN, Inc.’s (“Wi-LAN” or  
21 “Defendant”) motion to dismiss and/or transfer the Intel action.<sup>2</sup> The Court denied Wi-LAN’s  
22 motion to dismiss the Intel action while granting, in part, Wi-LAN’s motion to transfer. (*See*  
23 Intel action Dkt. No. 195.) In particular, the Court transferred Intel Corporation’s (“Intel”) declaratory judgment claim pertaining to Wi-LAN’s assertions of U.S. Patent No. 6,549,759  
24 (“759 Patent”) against Intel’s Wi-MAX products to the Eastern District of Texas. (*Id.*)

26 <sup>1</sup> *Intel Corporation v. Wi-LAN, Inc. et al.*, Case No. 5:08-cv-4555 JW (“Intel action”).

27 <sup>2</sup> Plaintiffs in the above-entitled actions are not parties to the Intel action.

1 Unlike the Intel action, which relates exclusively to WiMAX products, Plaintiffs' above-  
2 entitled actions include Wi-LAN's assertions of the '759 patent against Bluetooth products  
3 (which are *not* involved in the Intel action). As counsel for Broadcom noted to the Court at the  
4 May 4, 2009 hearing in the Intel action, the issues that would be involved in any motions to  
5 transfer or dismiss Plaintiffs' above-entitled actions are different than the issues involved in Wi-  
6 LAN's motion to dismiss or transfer the Intel action. (*See* Transcript of May 4, 2009 Hearing in  
7 Intel action, Dkt. No. 192 at 34-56.) For instance, there are material differences between  
8 WiMAX and Bluetooth products, including the technology involved in those products and the  
9 applications in which those products are used. Indeed, the circumstances involved in a "first-  
10 filed" analysis in Plaintiffs' actions are materially different than those involved in the Intel  
11 action. The Court's June 4, 2009 order entered in the Intel action does not address which action  
12 was the "first-filed" action with respect to Bluetooth products, nor does it address how these  
13 issues should be evaluated in the context of Plaintiffs' actions. The appropriate disposition of  
14 Plaintiffs' respective actions was not before the Court on Wi-LAN's motion to dismiss and/or  
15 transfer the Intel action, and was not determined by the Court's June 4, 2009 ruling.  
16 Accordingly, as Plaintiffs' counsel explained during the May 4, 2009 hearing, Plaintiffs believe  
17 it is important that they be provided an opportunity to brief any issues that Wi-LAN intends to  
18 raise by way of motion in Plaintiffs' above-entitled actions before a decision concerning any of  
19 those actions is rendered by the Court.

20 To that end, Plaintiffs propose that any motion that Wi-LAN intends to file in response to  
21 Plaintiffs' complaints in the above-entitled actions be filed and briefed according to the schedule  
22 detailed in Section III of this document which has been mutually agreed upon by the parties.<sup>3</sup>

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25 <sup>3</sup> Plaintiffs note that they were provided with Wi-LAN's portion of this joint statement in the  
26 afternoon on the day that this joint statement is required to be filed. Accordingly, Plaintiffs have  
27 not been provided a meaningful opportunity to respond to the arguments raised in Wi-LAN's  
28 portion of this document and reserve their rights to respond to Wi-LAN's arguments in  
responding to any motion that Wi-LAN may choose to file.

1 **II. Defendant Wi-LAN's Position**

2 As noted in the introductory paragraph above, the majority of the declaratory judgment  
3 Plaintiffs (8 of the 13 declaratory judgment plaintiffs) who sell Wi-MAX and Bluetooth laptops  
4 that Wi-LAN contends infringe the '759 patent have stated above that they intend to dismiss  
5 their declaratory judgment actions in view of the Court's June 4 Order finding the Texas Action  
6 first-filed as to the '759 patent. Thus, Wi-LAN's infringement claims regarding the '759 patent  
7 concerning both Wi-MAX and Bluetooth products will continue in the Texas Action as to a  
8 majority of the declaratory judgment Plaintiffs (who sell both Wi-MAX and Bluetooth products).  
9 In addition, the declaratory judgment claims of invalidity and unenforceability of the '759 patent  
10 will also continue in the Texas Action. Thus, the same issues would be litigated in both this  
11 Court and the Texas Action. If motion practice is required, notwithstanding these circumstances  
12 and those described below that make further motion practice unreasonable and vexatious as to  
13 Wi-LAN, Defendant Wi-LAN intends to file a motion to dismiss and/or transfer the remaining  
14 declaratory judgment Plaintiffs to the Texas court.

15 Such motion will be predicated on the first-to-file rule and judicial economy and this  
16 Court's ruling in the related *Intel* declaratory judgment action, in which the Court found the  
17 Texas Action to be the first-filed action regarding the '759 patent and transferred Intel's action  
18 (specifically its non-infringement, invalidity, and unenforceability declaratory judgment  
19 allegations as to the '759 patent) to the Texas court. *See* June 4, 2009 Order at 9 ("Accordingly,  
20 the Court finds that, with respect to the '759 patent, the Texas Action was first-filed. Although  
21 Plaintiff contends that convenience factors weigh in favor of retaining jurisdiction over this  
22 dispute in California, it is the prerogative of the first-filed court to conduct the convenience  
23 analysis."). Wi-LAN's motion would also be premised on the Texas court's February 3, 2009  
24 ruling that the Texas Action is first-filed. The remaining Plaintiffs (Broadcom, Atheros,  
25 Marvell, and Apple) make much of the fact that Intel's '759 patent claims for non-infringement  
26 involve Wi-MAX products and that their products are Bluetooth products. However, the  
27 remaining plaintiffs fail to inform the Court of a number of pertinent facts.

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1 The declaratory judgment Plaintiffs presented this same technical argument to Judge  
2 Ward in opposing Wi-LAN's motion to add the '759 patent to the Texas action based on the  
3 first-to-file rule in trying to draw distinctions between the subject matter of the Texas Action and  
4 the California declaratory judgment actions. See Ex. E to McManus Decl. in Support of Wi-  
5 LAN's Reply to Opposition to Wi-LAN's Motion to Dismiss or Transfer (D.I. 158) at 10-12.  
6 Defendants sought to argue that the technologies were distinct and, therefore, there was no  
7 substantial overlap between the cases for purposes of finding the Texas Action is the first-filed  
8 action. This argument was rejected. The Texas Court granted Wi-LAN's motion by order dated  
9 February 3, 2009 and, like this Court, found the Texas Action was first-filed.

10 Furthermore, proceeding with duplicative suits is wasteful of both judicial and private  
11 resources. The remaining declaratory judgment plaintiffs wish to proceed with the same lawsuit,  
12 involving the same parties, the same products incorporating the same Bluetooth technology, the  
13 same issues of claim construction, infringement, and validity, and the same '759 patent, in two  
14 jurisdictions at the same time. Wi-LAN regards this as wasteful, duplicative and unnecessary.  
15 *In re Volkswagen of America, Inc.*, --- F.3d ----, 2009 WL 1425475, at \*2 (Fed. Cir. 2009) ("the  
16 existence of multiple lawsuits involving the same issues is a paramount consideration when  
17 determining whether a transfer is in the interest of justice."); *Continental Grain Co. v. The FBL-*  
18 *585*, 364 U.S. 19, 26, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960) ("[t]o permit a situation in which  
19 two cases involving precisely the same issues are simultaneously pending in different District  
20 Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to  
21 prevent.")

22 The Texas Action already includes the same allegations of non-infringement, invalidity,  
23 and unenforceability as to the '759 patent that the remaining declaratory judgment Plaintiffs seek  
24 to maintain before this Court. While it is correct that, to Wi-LAN's knowledge (as to the non-  
25 infringement allegations regarding the '759 patent), the remaining declaratory judgment  
26 Plaintiffs sell Bluetooth products, not Wi-MAX products, the same non-infringement issues will  
27 be raised anyway because the declaratory judgment Plaintiffs who intend to dismiss their  
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1 California actions also sell Bluetooth products. In addition, discovery is already well underway  
2 in the Texas Action as to all declaratory judgment plaintiffs for both Wi-MAX and Bluetooth  
3 products. As mentioned above, Wi-LAN served its Wi-MAX and Bluetooth infringement  
4 contentions in December 2008, the Defendants (or declaratory judgment Plaintiffs) served their  
5 invalidity contentions in May 2009 as to the '759 patent, and document productions relating to  
6 both Wi-MAX and Bluetooth products were exchanged in April and May by all of the  
7 declaratory judgment plaintiffs.

8 Judicial economy also favors dismissal and/or transfer from this district for the further  
9 reason that the '759 patent claims are directed to "a wireless communication system" and "a  
10 method for determining a plurality of uplink modulation schemes and a plurality of downlink  
11 modulation schemes." Broadcom, Atheros, and Marvell sell Bluetooth chips, not the complete  
12 system required by the '759 patent. Rather, the other declaratory judgment plaintiffs (all of  
13 whom, with the exception of Apple, have agreed to dismiss their declaratory judgment claims in  
14 view of this Court's Order finding the Texas Action first-filed as to the '759 patent) are makers  
15 of laptops with Wi-MAX and Bluetooth capability and direct infringers of the '759 patent. Thus,  
16 under the circumstances and subject to discovery, Wi-LAN's claims against Broadcom, Atheros,  
17 and Marvell (the chip companies) are based on inducement and/or contributory infringement of  
18 the '759 patent. To resolve the liability issue of their indirect infringement of the '759 patent in  
19 any California action, Wi-LAN will need to develop evidence through discovery and at trial and  
20 present witness testimony from the laptop makers to establish the underlying direct infringement  
21 by the defendant laptop makers and end users. *See Microsoft Corp., et al. v. Commonwealth*  
22 *Scientific & Indus. Research Org., et al.*, No. 6:06-CV-549, 2007 U.S. Dist. LEXIS 91550, at \*  
23 8-10 (E.D. Tex. Dec. 13, 2007) ("It is a cardinal rule that in the absence of direct infringement,  
24 there can be no indirect infringement.") Likewise, to develop its claims of direct infringement of  
25 the '759 patent in the Texas Action by defendants' sales of Bluetooth products, Wi-LAN will  
26 need to develop evidence through discovery and at trial and present witness testimony from the  
27 chip companies who supply Bluetooth chips to the laptop makers. In addition, it is the laptop  
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1 defendants who market and sell directly to end users who likely possess much of the evidence  
2 concerning direct infringement of the method claims and the further indirect infringement by  
3 Broadcom, Atheros, and Marvell, for which the chip companies and the laptop defendants are  
4 joint and severally liable. *See Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1364 (Fed. Cir. 2001).  
5 Thus, it is nonsensical to be proceeding with indirect infringement claims regarding the ‘759  
6 patent against the chip companies in California and direct infringement claims (upon which the  
7 indirect infringement claims are based) in the Texas Action.<sup>4</sup>

8 For these reasons, and because both this Court and the Texas court have found that the  
9 Texas litigation is first-filed as to the ‘759 patent, insistence upon further motion practice in this  
10 regard is unreasonable and vexatious.

11 If Wi-LAN is forced to engage in motion practice to dismiss and/or transfer the  
12 remaining declaratory judgment Plaintiffs’ allegations of non-infringement, invalidity, and  
13 unenforceability of the ‘759 patent, Wi-LAN proposes the following schedule detailed in Section  
14 III of this document.

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19 <sup>4</sup> In addition, the declaratory judgment plaintiffs have not pointed out that in December 2008  
20 Wi-LAN initiated efforts to meet and confer with them in the Texas Action (in *Wi-LAN v.*  
21 *Acer et al.*, Case No. 2:07-cv-473 (E.D. Tex.)) concerning Wi-LAN’s intended motion to  
22 supplement its Texas complaint to add the ‘759 patent to the Texas Action against both Wi-  
23 MAX and Bluetooth products. Defendants (the declaratory judgment Plaintiffs in this Court)  
24 requested that Wi-LAN delay the filing of its motion so that they would have more time to  
25 consider whether they would oppose or not and scheduled a further meet and confer. During  
26 the time in which Wi-LAN had been asked to forbear from filing its motion, Broadcom,  
27 Atheros and Marvell filed the instant actions for declaratory judgment as to the ‘759 patent.  
28 They did so on December 10, 2008. Wi-LAN filed its motion to supplement its Texas  
complaint on December 12, 2008. Apple filed a similar declaratory judgment action on  
December 17, 2008. As to Broadcom, Atheros and Marvell, Wi-LAN should be considered  
first-filed for the additional reason that they engaged in a classic “race to the courthouse” that  
is disfavored by courts in response to Wi-LAN’s attempts to fulfill its meet and confer  
obligations before filing its motion. *Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 628  
(9th Cir. 1991) (“Anticipatory suits are disfavored because they are aspects of forum  
shopping.”).

1 **III. Parties' Mutually Agreed Upon Proposed Schedule**

2 June 24, 2009	Toshiba America Information Systems, Inc., Hewlett-Packard Company, Lenovo (United States), Inc., Sony Computer Entertainment America, Inc., Sony Electronics, Inc., Acer America Corp., Dell Inc., and Gateway, Inc. to file their intended notices of voluntary dismissal without prejudice in the above-entitled actions on or before this date.
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7 July 1, 2009	Wi-LAN's deadline to file Motion to Dismiss or Transfer as to the remaining declaratory judgment Plaintiffs, Broadcom, Atheros, Marvell, and Apple
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9 July 15, 2009	Plaintiffs' deadline to file Opposition to Motion to Dismiss or Transfer
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11 July 22, 2009	Wi-LAN's deadline to file Reply Brief in Support of Motion to Dismiss or Transfer
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16 Dated: June 18, 2009

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 18th day of June, 2009, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system. Any other counsel of record will be served by a facsimile transmission and/or first class mail.

/s/ Michael W. De Vries  
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