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17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN JOSE DIVISION**

20 BROADCOM CORPORATION and
21 ATHEROS COMMUNICATIONS, INC.,

22 Plaintiffs,

23 v.

24 WI-LAN, INC.,

25 Defendant.
26
27
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Case No. C 08-cv-5543 (JW)

Hon. James Ware

**PLAINTIFFS' RESPONSE TO DEFENDANT
WI-LAN, INC.'S MOTION PURSUANT TO
CIVIL LOCAL RULE 6-3 TO CHANGE THE
TIME FOR WI-LAN'S RESPONSE TO THE
COMPLAINT UNTIL TEN DAYS AFTER
THIS COURT'S RULING IN A RELATED
CASE**

1 **I. INTRODUCTION**

2 Wi-LAN, Inc.'s ("Wi-LAN") proposed extension of time to respond to the complaint in
 3 this action is one of a series of proposals it is making in four other related declaratory judgment
 4 actions pending in this District concerning substantially similar motions to dismiss it has either
 5 filed or is intending to file on the same grounds in each action.¹ The declaratory judgment
 6 plaintiffs to these pending actions ("Plaintiffs") desire to globally coordinate Wi-LAN's motions
 7 to dismiss, in order to streamline the issues and reduce any burden on the Court. To avoid
 8 piecemeal filings of redundant motions to dismiss in the pending actions, and multiple,
 9 individual side disputes in each action over the deadlines for filing such motions, Plaintiffs
 10 provide a consolidated response to Wi-LAN's motion to change time ("Motion") here, with a
 11 joint proposal for coordinating the pending actions and Wi-LAN's motions to dismiss.²

12 Wi-LAN filed its motion to dismiss in the Intel action on January 15, 2009 for (1) lack of
 13 personal jurisdiction; (2) lack of declaratory judgment jurisdiction; or, in the alternative (3) to
 14 transfer the action to the Eastern District of Texas. Wi-LAN has since confirmed its intent to file
 15 "substantially similar motions" in each of the four related declaratory judgment actions that will
 16 have "substantial overlap" in terms of the facts and issues, such that each motion will be
 17 "redundant" of the others. (Mtn. at 3.) In view of these facts, Plaintiffs propose that each Wi-

18 ¹ This declaratory judgment action, which concerns United States Patent No. 6,549,759 ("the
 19 '759 patent"), is related to a declaratory judgment action involving the same patent along
 20 with seventeen other related patents which has been pending before this Court for nearly four
 21 months, *Intel Corp. v. Wi-LAN, Inc., et al.*, 5:08-cv-4555 (N.D. Cal.) (filed September 30,
 22 2008) ("the Intel action"), and three other declaratory judgment actions concerning the same
 23 patent filed in December 2008, *Marvell Semiconductor, Inc. et al v. Wi-LAN, Inc.*, 5:08-cv-
 24 5544 (N.D. Cal.) ("the Marvell action"); *Acer America Corp. et al v. Wi-LAN, Inc.*, 3:08-cv-
 5624 (N.D. Cal.) ("the Acer action"); and *Sony Computer Entertainment America, Inc. et al*
v. Wi-LAN, Inc., 3:08-cv-5742 (N.D. Cal.) ("the Sony action"). The Marvell action was
 determined to be related to the Intel action and this action on January 16, 2009. Wi-LAN has
 agreed that the Acer and Sony actions should also be related to the other pending actions and
 it is anticipated that stipulations to relate those actions will be filed shortly. (De Vries Dec. ¶
 3 & Ex. A.)

25 ² Wi-LAN's Motion spends little time explaining why it believes its proposal is the most
 26 efficient method for resolving its motions to dismiss. Instead, Wi-LAN's Motion focuses
 27 primarily on attempting to argue the merits of its motions to dismiss. Plaintiffs will defer
 responding to those arguments until they file their response to Wi-LAN's motions to dismiss,
 except to state their disagreement with Plaintiffs' contentions and version of the facts.

28

1 LAN motion to dismiss be briefed and heard simultaneously, so that the allegedly overlapping
2 issues can be considered at once, thereby avoiding piecemeal filings of Wi-LAN's redundant
3 motions to dismiss. In the interests of further streamlining, Plaintiffs propose that Wi-LAN file a
4 consolidated motion to dismiss in the four remaining actions, and that the plaintiffs in those
5 actions file a consolidated opposition brief, thus substantially reducing the amount of duplicative
6 paper filed. Moreover, as an accommodation to Wi-LAN, Plaintiffs propose that the single
7 hearing take place on March 30, 2009 (a two-week extension from the currently scheduled
8 March 16 hearing date in the Intel action), providing Wi-LAN plenty of time to file its remaining
9 motions to dismiss (especially considering Wi-LAN has already filed a "substantially similar
10 motion" in the Intel action and has had months to prepare its responses to the four other actions).

11 In contrast, although Wi-LAN concedes its motions to dismiss will be "redundant," Wi-
12 LAN asks the Court to delay its obligation to file the remaining motions in the other pending
13 actions until ten days *after* the Court rules on Wi-LAN's motion to dismiss/transfer the Intel
14 action. Although this proposal might make sense if Wi-LAN agreed to be bound by the Court's
15 decision in the Intel action, Wi-LAN has refused such an agreement, expressly reserving its
16 rights to file individual motions in each of the actions no matter how the Court resolves its
17 motion in the Intel action. (De Vries Dec. ¶ 8 & Ex. C.) As such, Wi-LAN's proposal will
18 necessarily lead to a series of seriatim, "substantially similar" motions to dismiss, separately
19 filed and sequentially determined (presumably over the course of several months) in the Intel
20 action, later in this action, and, after that, in each of the other pending actions. Such a result
21 would serve to unnecessarily delay this matter and waste the Court's time and resources, while
22 increasing, rather than decreasing, the complexity of the issues to be resolved.

23 **II. BACKGROUND**

24 **A. Brief Procedural Summary**

25 There are five declaratory judgment actions concerning the '759 patent pending in this
26 District. The Intel action, this action and the Marvell action have been related and Wi-LAN has
27 agreed the Acer and Sony actions should also be related. (De Vries Dec. ¶ 3 & Ex. A.) The Intel
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1 action was filed September 30, 2008. Wi-LAN requested and received over 100 days to respond
2 to Intel's complaint, during which time Wi-LAN filed a motion to add claims first filed by Intel
3 here regarding the '759 patent to another pending action in the Eastern District of Texas. Wi-
4 LAN then filed a motion to dismiss/transfer the Intel action, arguing that the Texas action was
5 somehow "first-filed" with respect to the '759 patent and that the Intel action should be
6 dismissed or transferred. Contrary to Wi-LAN's assertions, the first action to address the '759
7 patent or the accused WiMAX products was the Intel action, which was filed in this Court two
8 months *before* Wi-LAN attempted to add the same claims to the Texas case and which for
9 efficiency purposes the remaining Plaintiffs subsequently joined with their own declaratory
10 judgment actions.

11 Plaintiffs in this action have already provided Wi-LAN with a 30-day extension to
12 respond to the Complaint, making Wi-LAN's current response deadline February 2, 2009. Wi-
13 LAN's responses to the complaints filed in the other '759 patent declaratory judgment actions
14 are likewise due shortly.³ On January 21, 2009, without adequately meeting and conferring with
15 Plaintiffs, Wi-LAN filed its Motion requesting that its deadline to respond to Plaintiffs'
16 Complaint in this action be extended from February 2, 2009 to ten days after the Court's ruling
17 on Wi-LAN's motion to dismiss/transfer the Intel action. In its Motion, Wi-LAN indicates it
18 intends to file motions to dismiss/transfer this action and each of the other '759 patent
19 declaratory judgment actions which Wi-LAN states will be "redundant" and "substantially
20 similar" to its motion to dismiss/transfer the Intel action. (Mtn. at 3.)

21 **B. Plaintiffs' Proposals To Efficiently Resolve Wi-LAN's Motions**

22 In an effort to arrive at a consolidated, streamlined, and efficient procedure for resolving
23

24 ³ Wi-LAN was served in the Marvell action on January 6, 2009, making its response originally
25 due January 26, 2009, and Wi-LAN was served in the Acer and Sony actions on January 12,
26 2009, making its responses due February 2, 2009. Wi-LAN has claimed that the original
27 service in the Acer and Sony actions was "defective," but has not explained why or provided
28 any evidence that would rebut the presumption of valid service created by the sworn proofs
of service. Wi-LAN later backed off its position on service and agreed to drop its service
challenge, on January 23, 2009.

1 Wi-LAN's motions to dismiss/transfer the five pending '759 patent declaratory judgment
2 actions, the plaintiffs in those actions made several joint proposals to Wi-LAN for resolving its
3 motions in a manner that would make most efficient use of the Court's time and resources.

4 Plaintiffs' first proposal was that they would agree to extend Wi-LAN's deadlines to
5 respond to each of the pending declaratory judgment actions other than the Intel action to ten
6 days after this Court's ruling on Wi-LAN's motion to dismiss/transfer the Intel action, provided
7 that Wi-LAN would agree not to re-raise any arguments that this Court rejects in ruling on Wi-
8 LAN's motion to dismiss/transfer the Intel action (i.e., personal jurisdiction, subject matter
9 jurisdiction, or transfer) in Wi-LAN's subsequent motions to dismiss/transfer the other '759
10 patent declaratory judgment actions. (De Vries Dec. ¶ 6 & Ex. B.) If Wi-LAN would not agree
11 to the first proposal, Plaintiffs alternatively proposed that all of Wi-LAN's motions to
12 dismiss/transfer the '759 patent declaratory judgment actions be consolidated for a single hearing
13 on March 16, 2009, when Wi-LAN's pending motion to dismiss/transfer the Intel Action is
14 already scheduled to be heard, so that Wi-LAN's motions could be resolved all at once rather
15 than in a series of redundant hearings. (*Id.* at ¶ 7 & Ex. B.) Wi-LAN rejected both of these
16 proposals. Specifically, Wi-LAN both (1) refused to agree to be bound by a decision in the Intel
17 action; but (2) also refused to agree to brief the motions at the same time, expressly reserving the
18 right to bring seriatim motions on "redundant" issues. (*Id.* at ¶ 8 & Ex. C.) Plaintiffs made an
19 additional attempt to resolve the issues raised herein, proposing the same consolidated hearing on
20 each of the motions to dismiss, but offering to extend Wi-LAN's deadline to respond to the
21 complaints to February 23, 2009 and to extend the hearing date from March 16, 2009 to March
22 30, 2009. (*Id.* at ¶ 9 & Ex. D.) Under this approach, Wi-LAN will have had over 60 days to
23 respond to this action and over 40 days to respond to the Marvell, Acer, and Sony actions.
24 Again, Wi-LAN refused, forcing Plaintiffs to proceed with this response. (*Id.* at ¶ 9 & Ex. A.)

25 **III. ARGUMENT**

26 A motion to change time pursuant to Civil Local Rule 6-3 should be granted only where
27 the movant has shown good cause. *Whitney v. Wurtz*, No. C04-05232 PVT, 2006 WL 3201035,
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1 at *1 (N.D. Cal. Nov. 6, 2006). Wi-LAN has admitted it intends to file “redundant,”
 2 “substantially similar” motions to dismiss/transfer each of the ‘759 patent declaratory judgment
 3 actions, but proposes filing these motions separately and in a series, without being bound to the
 4 outcome of the earlier-decided motions in the series. Under Wi-LAN’s proposal, the Court could
 5 reject Wi-LAN’s personal jurisdiction, subject matter jurisdiction, and transfer arguments in Wi-
 6 LAN’s motion to dismiss/transfer the Intel action, but Wi-LAN would nevertheless be free to file
 7 motions to dismiss/transfer the other ‘759 patent declaratory judgment actions based on those
 8 same three arguments. In addition to creating a substantial and avoidable waste of judicial
 9 resources, such a result would unnecessarily delay the progress of these actions. Because Wi-
 10 LAN’s proposal would directly contravene its stated purpose of avoiding “redundant motion
 11 practice” and “piecemeal litigation,” and would result in an unnecessary waste of time and
 12 resources, Wi-LAN has failed to show good cause and its Motion should be denied.

13 In contrast, Plaintiffs’ proposal would conserve judicial and litigant resources and
 14 provides the most streamlined and efficient method of resolving the issues to be raised in Wi-
 15 LAN’s motions to dismiss/transfer. Accordingly, Plaintiffs respectfully request that the Court set
 16 each of Wi-LAN’s motions to dismiss/transfer the five pending declaratory judgment actions for
 17 hearing on **March 30, 2009** (with a resulting two-week continuance of the current hearing date
 18 on Wi-LAN’s motion to dismiss/transfer the Intel action) and set the deadline for Wi-LAN to
 19 respond to the complaints in each of the declaratory judgment actions other than the Intel action
 20 as **February 23, 2009**.⁴

21 Dated: January 27, 2009

LATHAM & WATKINS LLP

22 By: /S/

23 Michael W. De Vries
 Attorneys for Plaintiff Broadcom⁵

24 ⁴ This deadline will provide Wi-LAN more than sufficient time to respond to those complaints,
 25 particularly given Wi-LAN’s contentions that its motions to dismiss those complaints are
 26 “substantially similar” to its motion to dismiss the Intel action. This filing deadline will also
 provide Wi-LAN with the 35-day notice period provided by Civil Local Rule 7-2(a).

27 ⁵ Plaintiffs in this action understand that the plaintiffs in the Intel action, the Marvell action,
 28 the Acer action, and the Sony action all concur with the proposal made herein.

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Dated: January 27, 2009

REED SMITH LLP

By: /S/
Jonah Mitchell
Attorneys for Plaintiff Atheros

CERTIFICATE OF SERVICE

The undersigned certifies that on this 27th day of January, 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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