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19 UNITED STATES DISTRICT COURT
20 FOR THE NORTHERN DISTRICT OF CALIFORNIA
21 SAN FRANCISCO DIVISION

22 CALIX NETWORKS, INC., a Delaware
Corporation,

23 Plaintiff,

24 v.

25 WI-LAN INC., a Canadian Corporation,

26 Defendant.
27

Case No. CV 09-6038 CRB (DMR)

**DEFENDANT WI-LAN INC.'S
RESPONSE IN OPPOSITION TO CALIX
NETWORKS, INC.'S MOTION TO
COMPEL JURISDICTIONAL
DISCOVERY**

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COMPEL JURISDICTIONAL DISCOVERY
CASE NO. CV 09-6038 CRB (DMR)

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1 Defendant Wi-LAN Inc. (“Wi-LAN”) respectfully submits this response in opposition to
2 Calix Networks, Inc.’s (“Calix”) Motion to Compel Jurisdictional Discovery.

3 **I. INTRODUCTION**

4 On December 28, 2009, Calix filed the complaint in the instant action seeking a declaration
5 that two Wi-LAN patents, Unites States Patent No. 5,956,323 (“the ’323 patent”) and United States
6 Patent No. 6,763,019 (“the ’019 patent”) are not infringed and are invalid. Calix further alleges a
7 cause of action for breach of contract and related equitable claims.

8 On March 22, 2010, Wi-LAN filed a motion to dismiss this action for lack of personal
9 jurisdiction. Calix requested jurisdictional discovery in an attempt to find evidence that Wi-LAN
10 had ties to California. Wi-LAN engaged in such discovery in good faith without order of the Court.
11 Wi-LAN answered interrogatories and produced in excess of twenty thousand pages of documents
12 concerning its activities in 2008 (when the first contact between Wi-LAN and Calix occurred) and
13 2009 (when Calix filed the present suit). Calix does not challenge the sufficiency of WI-LAN’s
14 production; Calix does, however, seek a broader temporal scope than that supplied by Wi-LAN.

15 Calix’s motion is ill-founded. Personal jurisdiction must either be *specific*, that is,
16 predicated upon the events that give rise to the dispute, or *general*, that is, predicated upon the
17 defendants’ systematic and continuous contacts with the forum state. A patent-based declaratory
18 judgment action arises from the course of communication between the patentee (Wi-LAN) and the
19 declaratory plaintiff (Calix). Thus, any inquiry into whether Wi-LAN is subject to the *specific*
20 jurisdiction of this court looks to the specific contacts between Wi-LAN and Calix. This, and more,
21 has been produced.

22 Calix’s argument for discovery to show that Wi-LAN was subject to general jurisdiction in
23 California as of December 28, 2009 (the date of filing) is equally unavailing. First, Wi-LAN has
24 already supplied full and complete discovery for a period *two years* prior to the filing date. Second,
25 Calix has not established a basis for the notion that WI-LAN had a systematic and continuous
26 presence in California at any relevant time. Given the high standard predicate to a finding of
27 general jurisdiction, further Calix discovery into the distant past is futile.

1 Even if one were to make the (mistaken) assumption that all representations in Calix's brief
2 are accurate¹, the motion, as written, still makes an inadequate showing to justify the expense of
3 further discovery. We must note, however, that certain of Calix's statements are simply inaccurate.
4 Calix states, in several places, that WI-LAN purchased the patents in suit from Nokia High Speed
5 Access Products, a California subsidiary of Nokia Corporation of Finland. This is inaccurate (as
6 shown by Calix's own exhibits). WI-LAN entered into a patent transfer agreement with Nokia
7 Corporation of Finland. Indeed, Nokia High Speed Access Products Inc. ceased to exist in 2001.
8 This is readily ascertainable from public corporate records and from assignments maintained by the
9 Patent and Trademark Office. Nor has Wi-LAN maintained a California office since early 2003.
10 Nor does California counsel maintain the '323 patent.

11 When Calix's inaccurate or misleading statements are stripped away, it is apparent that it has
12 no factual basis for seeking further discovery. It merely wishes to pursue a "hunch" that there may
13 be relevant evidence in support of its jurisdictional arguments.

14 **II. LEGAL STANDARD**

15 The party seeking jurisdictional discovery bears the burden of showing that such discovery
16 would reveal facts necessary to prove personal jurisdiction. *See Autogenomics, Inc. v. Oxford Gene*
17 *Tech. Ltd.*, 566 F.3d 1012, 1023 (Fed. Cir. 2009) ("Autogenomics did not make, either in its
18 opposition brief or at the motion hearing, a showing that further discovery would elucidate the facts
19 necessary to prove that the court had personal jurisdiction.")

20 **III. ARGUMENT AND AUTHORITIES**

21 Plaintiff Calix filed the present action December 28, 2009. Wi-LAN produced ample
22 discovery concerning the time from the first contact between the two parties in January 2008 until
23 the end of 2009. Calix, however, seeks discovery going back to 2003. The scope of discovery
24 sought by Calix is not reasonable. "[A] claim of personal jurisdiction that appears to be both
25 'attenuated and based on bare allegations in the face of specific denials made by defendants' will
26 not suffice to support an order of jurisdictional discovery." *Autogenomics, Inc. v. Oxford Gene*

27 ¹ Wi-LAN does not contest the accuracy of any exhibit to the Daire Declaration; rather, it contests the
28 characterization of such matters in the Calix Motion.

1 *Tech. Ltd.*, 566 F.3d 1012, 1023 (Fed. Cir. 2009). Similarly, the Ninth Circuit has held that “[t]he
 2 denial of [a] request for discovery, which was based on little more than a hunch that it might yield
 3 jurisdictionally relevant facts, was not an abuse of discretion.” *Boschetto v. Hansing*, 539 F.3d
 4 1011, 1020 (9th Cir 2008); *see also Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535,
 5 540 (9th Cir.1986) (holding that district court did not abuse its discretion by refusing jurisdictional
 6 discovery where the plaintiffs “state only that they ‘believe’ discovery will enable them to
 7 demonstrate sufficient California business contacts to establish the court’s personal jurisdiction”).

8 **A. General and Specific Jurisdiction**

9 **1. The Standard for General Jurisdiction is “Quite High” and Calix Has 10 Not Shown That It Will Discover Evidence of General Jurisdiction**

11 A court may exercise general jurisdiction over a defendant where the defendant’s contacts
 12 with the forum state “are so substantial, continuous, and systematic that the defendant can be
 13 deemed to be ‘present’ in that forum for all purposes.” *Yahoo! Inc. v. La Ligue Contre Le Racisme
 14 et L’antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).

15 The Ninth Circuit has stated that “the level of contact with the forum state necessary to
 16 establish general jurisdiction is quite high.” *Rose v. MISS PACIFIC, LLC*, No. C08-5768, 2009 WL
 17 596578 (W.D.Wash. March 9, 2009) (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th
 18 Cir.1990)); *see also Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 (9th Cir.
 19 1993) (“[we] regularly have declined to find general jurisdiction even where the contacts were quite
 20 extensive.”). For example, a California state court declined to find general jurisdiction over a truck
 21 driver who hauled loads into California at least 20 times and was licensed by California.
 22 *Cornelison v. Chaney*, 16 Cal. 3d 143 , 148 , 127 Cal. Rptr. 352 , 545 P.2d 264 (1976).

23 Further authority similarly provides that it is difficult for a plaintiff to show general
 24 jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U .S. 408, 408 (1984) (no
 25 jurisdiction over foreign corporation that sent officer to forum for one negotiating session, accepted
 26 checks drawn on a forum bank, purchased equipment from the forum, and sent personnel to the
 27 forum to be trained); *Cabbage v. Merchant*, 744 F.2d 665, 667-68 (9th Cir.1984) (no jurisdiction
 28 over doctors despite significant numbers of patients in forum, use of forum’s state medical

1 insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*,
 2 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no jurisdiction over defendants despite several visits and
 3 purchases in forum, solicitation of contract in forum that included choice of law provision favoring
 4 forum, and extensive communication with forum); *see also Rocawear Licensing, LLC v. Pacesetter*
 5 *Apparel Group*, No. CV06-3093, 2007 U.S. Dist. LEXIS 98894 (C.D. Cal. Sept. 12, 2007) (finding
 6 no general jurisdiction where “A&E sends buyers to California several times a year to visit the
 7 garment district in Los Angeles. The A&E buyers order approximately \$ 10,000,000 worth of
 8 garments per year from California”)

9 Here, Calix has not made any allegation that would even approach this high standard.
 10 Accordingly, the extensive jurisdictional discovery that Calix seeks should be denied.

11 2. Specific Jurisdiction

12 “Absent general jurisdiction, a forum may only exercise specific jurisdiction based on the
 13 relationship between a defendant’s forum contacts and the plaintiff’s claim.” *Yahoo! Inc. v. La*
 14 *Ligue Contre Le Racisme et L’antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). In regard to
 15 specific jurisdiction in patent based declaratory judgment actions, the Federal Circuit has stated as
 16 follows:

17 in the context of an action for declaratory judgment of non-
 18 infringement, invalidity, and/or unenforceability, the patentee is the
 19 defendant, and the claim asserted by the plaintiff relates to the
 20 “wrongful restraint [by the patentee] on the free exploitation of non-
 21 infringing goods ... [such as] the threat of an infringement suit.” [*Red*
 22 *Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360
 23 (Fed.Cir.1998)]. Thus, the nature of the claim in a declaratory
 24 judgment action is “to clear the air of infringement charges.” *Id.* Such
 a claim ...arises out of or relates to the activities of the defendant
 patentee in enforcing the patent or patents in suit. The relevant inquiry
 for specific personal jurisdiction purposes then becomes to what
 extent has the defendant patentee “purposefully directed [such
 enforcement activities] at residents of the forum,” and the extent to
 which the declaratory judgment claim “arises out of or relates to those
 activities.”

25 *Avocent Huntsville Corp. v. Aten Intern. Co., Ltd.*, 552 F.3d 1324, 1332 (Fed. Cir. 2008).

26 Thus, the appropriate focus of the present specific jurisdiction inquiry is Wi-LAN activity that gave
 27 rise to the present declaratory claim.

1 **B. The Calix Allegations Are Poorly Founded**

2 Here, Calix cites four points that it argues suggest minimum contacts with California and
3 which weigh in favor of jurisdictional discovery. The four points that Calix relies upon are as
4 follows:

- 5 1) Wi-LAN acquired the '323 patent from a California company;
6 2) Wi-LAN maintained a sales office in California;
7 3) the '323 patent is maintained by California patent attorney Rober Hulse; and
8 4) Wi-LAN filed a 2004 breach of contract action in California.

9 The first three of these are misleading. The fourth is accurate but irrelevant due to its predating the
10 filing of the instant action by more than five years. *Johnson v. Woodcock*, 444 F.3d 953, 955-56
11 (8th Cir. 2006) (“Minimum contacts must exist either at the time the cause of action arose, the time
12 the suit was filed, or within a reasonable period of time immediately prior to the filing of the
13 lawsuit.”). Calix’s four allegations will be discussed in turn.

14 **1. WI-LAN Did Not Acquire The '323 Patent From A California Company**

15 At several points in its memorandum, Calix alleges that Wi-LAN acquired the '323 patent
16 from a California Company, Nokia High Speed Access Products. *See* Calix Mot. at 2:12, 6:8-9,
17 11:18-20. This is simply inaccurate.² Wi-LAN entered into a Patent Licensing and Transfer
18 Agreement with Nokia Corporation of Finland in December 2006. Pursuant to such agreement,
19 Nokia Corporation’s U.S. subsidiary, Nokia Inc., assigned the '323 patent to Wi-LAN. Indeed,
20 Exhibit L to the Daire Declaration (Dkt. No. 44-12 at 3) shows that Wi-LAN obtained the '323
21 patent from Nokia Inc. rather than Nokia High Speed Access. Further, public records show that
22 Nokia High Speed Access has not existed since late 2000. Ex. 1 to the Declaration of Michael G.
23 McManus.³ Rather, it was merged into Nokia Inc., a Delaware Corporation which had its principal
24 place of business in Irving, Texas. *Id.* More recent corporate records suggest that Nokia Inc. now
25 maintains its principal place of business in White Plains, New York. Ex. 2.

26 ² It is worthy of note that Calix’s own declaration does not support this allegation. Rather, Exhibit N to
27 the Daire Declaration indicates that Wi-LAN entered into an agreement with “Nokia Corporation of
28 Finland.” Thus, there is no conflict in the actual evidence.

³ Hereafter, exhibits to the McManus Declaration will simply be referred to by exhibit number.

1 Thus, Calix's assertion that WI-LAN acquired the '323 patent from a California company is
2 wholly unfounded. Such line of inquiry will never support Calix's claim of jurisdiction. No
3 discovery into such fruitless inquiry is justified.

4 **2. Wi-LAN Has Not Maintained a Sales Office in California Since 2003**

5 Calix's next allegation, that Wi-LAN maintained a sales office in California "[b]efore 2006"
6 is misleading. *See* Calix Mot. at 2:25-26. Wi-LAN has not maintained a sales office in California
7 since early 2003.

8 In June 2003, WI-LAN filed its "Annual Information Report" with Canadian securities
9 regulators. That document provides that

10 In the first quarter of 2003 Wi-LAN decided to consolidate the
11 California operations into its lower cost Calgary head office to
12 improve operational efficiency and reduce the company's quarterly
13 expenses by approximately \$0.6 million. This reduced Wi-LAN's
14 headcount by 12 people. Wi-LAN is managing a seamless transfer of
15 sales channels and technologies to the Calgary head office and no
16 adverse effects are anticipated from the consolidation. WTI remains
17 as a U.S. subsidiary (incorporated under Delaware law).

18 Ex. 3 (Annual Information Form) at 4. In a subsequent Annual Report, Wi-LAN stated as follows:

19 On January 31, 2003, the Company adopted a plan to transfer the Wi-
20 LAN Technologies Inc. (WTI) office in Santa Barbara, California into
21 its lower-cost Calgary, Canada head office to improve operational
22 efficiency and reduce expenses. The company accrued \$934,000 at
23 January 31, 2003, that was reduced to \$770,000 based on actual costs
24 on October 31, 2003, to cover the cost of consolidating the WTI
25 operations which consists mainly of workforce reduction severance
26 expenses. As at October 31, 2003, \$709,000 has been paid against the
27 accrual. The transition from California to Calgary was completed by
28 March 31, 2003.

Ex. 4 (Annual Report 2003) at page 37. Thus, evidence in the public record indicates that there was
no Wi-LAN sales office in California subsequent to early 2003. *See also*, Ex. 5.

Further, the evidence of record indicates that the sales office was operated by a Wi-LAN
U.S. subsidiary. Activities of subsidiaries "may not be considered" absent a showing that the
subsidiary is an "alter ego" of the foreign parent. *Halo Elec. Inc. v. Bel Fuse Inc.*, No. C-07-06222
2010 U.S. Dist. LEXIS 64025 at * 19 (N.D. Cal. June 14, 2010) ("Unless Halo is able to establish
that E&E USA is E&E Magnetic's alter ego, the court may not consider E&E USA's contacts with

1 California in determining whether the court has personal jurisdiction over E&E Magnetic.” (citing
2 *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003).

3 Even if the Court were to grant Calix the full temporal scope it requests (six years prior to
4 filing), this would reach back only to December of 2003 and not result in discovery of any Wi-LAN
5 California sales office. Nor does an office closed in early 2003 by a Wi-LAN subsidiary suggest
6 “continuous” contacts in late 2009.

7 3. Wi-LAN Briefly Retained California Counsel to Maintain the '323 8 Patent

9 Calix next argues that inquiry into Wi-LAN’s patent prosecution counsel for the '323 patent
10 will yield relevant evidence. Such inquiry is futile.

11 The effective date of the agreement between Nokia Corporation (of Finland) and Wi-LAN
12 was December 4, 2006. Subsequently, on February 20, 2007, Nokia Inc. (a Delaware corporation
13 with its principal place of business in Irving, Texas) assigned the '323 patent, inter alia, to Wi-LAN
14 Inc. Ex. 6.

15 For a period subsequent to the February 2007 assignment, patent attorney Robert Hulse of
16 Fenwick & West’s Mountain View office maintained the '323 patent. Such relationship was
17 terminated, however, no later than November 2008. At that time Wi-LAN, represented by current
18 counsel Kramer & Amado of Alexandria, Virginia, filed a request for a Certificate of Correction of
19 the '323 patent. Ex. 7. Thus, Mr. Hulse’s retention was brief and limited in nature. In addition to
20 Calix’s argument being factually unsupported, it is also legally unsupported.

21 Calix relies on *Electronics for Imaging v. Coyle* for the notion that the existence of a patent
22 prosecution attorney in the state conveys personal jurisdiction. *Electronics for Imaging, Inc. v.*
23 *Coyle*, 340 F.3d 1344, 1351 (Fed. Cir. 2003). That is not the import of *Electronics for Imaging, Inc.*
24 *v. Coyle*. Rather, there, the patent attorney engaged in enforcement activities:

25 First, while the '746 patent was being prosecuted on Coyle’s behalf,
26 Coyle hired a California attorney, Newton Lee, who contacted EFI at
27 various times to report on the progress of the pending application.
28 Second, Coyle telephoned EFI in California at various times between
approximately late 1999 (or early 2000) and fall of 2001 regarding the
subject matter of the technology covered by the patent application.

Electronics for Imaging at 1351.

1 Here, Mr. Hulse did not engage in any enforcement activity. In *Avocent* and *Autogenomics*,
 2 the Federal Circuit clarified past precedent regarding what contacts with a forum state are relevant
 3 to the jurisdictional analysis. In this regard, the *Autogenomics* Court offered as follows:

4 The district court's decision and the principal briefing on appeal
 5 occurred before our decision in *Avocent*. In that case, we endeavored
 6 to reconcile our decisions regarding personal jurisdiction in
 7 declaratory judgment actions....

8 * * *

9 *Avocent* explained that the contacts material to the specific
 10 jurisdiction analysis in a declaratory judgment action are not just any
 11 activities related to the patent-at-issue. Rather, the relevant activities
 12 are those that the defendant "purposefully directs ... at the forum
 13 which relate in some material way to the enforcement or the defense
 14 of the patent."

15 *Autogenomics* at 1019-1020 (citing *Avocent* at 1336) (emphasis added).

16 Mr. Hulse's brief retention to act as patent prosecution counsel (not litigation counsel) for a
 17 limited time period is not a worthwhile subject of inquiry and does not justify further discovery.

18 **4. The Ensemble Contract Litigation Occurred in 2004**

19 Calix's final "fact[]" indicating continuous and systematic contacts between Wi-LAN and
 20 California" is Wi-LAN's filing of a breach of contract action in California state court in 2004. It is
 21 correct that Wi-LAN filed such action in 2004. Such action, filed five and one-half years prior to
 22 the present action, however, is not relevant to the present inquiry.⁴ Rather, it concerned a contract
 23 for purchase of certain unrelated intellectual property.

24 Thus, of the four specific points that Calix cites to, none are worthy of further inquiry. Calix
 25 is not entitled to an inference that any of these four areas suggest personal jurisdiction.
 26 *Autogenomics* at 1018 ("Although we must resolve factual conflicts in *Autogenomics*'s favor, it is
 27 entitled to only those inferences that are reasonable."). Further, Calix's vague allegations regarding
 28 Wi-LAN's "agreements and/or commercial activities with California entities" are just the sort of
 undefined "hunch" that appellate courts have rejected.

⁴ "Minimum contacts must exist either at the time the cause of action arose, the time the suit was filed, or within a reasonable period of time immediately prior to the filing of the lawsuit." *Pecoraro v. Sky Ranch For Boys, Inc.*, 340 F.3d 558, 562 (8th Cir. 2003).

1 **C. Calix Mischaracterizes the Wi-LAN Document Production**

2 Calix further states that, as a result of its own investigation, “even without the benefit of Wi-
3 LAN’s complete discovery responses,” it learned of a 2004 action filed by Wi-LAN in California
4 state court and of a past WI-LAN sales office. Calix Mot. at 2:24. This is inaccurate. Wi-LAN
5 included such documents in its production. *See* CALIX 020585 (Ex. 8) and CALIX 020602 (Ex. 9).

6 **D. Any Discovery Should Be Limited Both In Subject Matter and Time and the
7 Expense Should be Borne by Calix**

8 Calix seeks discovery that is broad both in scope and time. It should not be permitted to
9 engage in an unbounded search for any document that may relate to the State of California. Rather,
10 to the extent that the Court determines that discovery is appropriate, it should be restricted in time
11 and scope to areas that Calix has demonstrated are likely to prove fruitful. Fed. R. Civ. P.
12 26(b)(2)(C)(iii).

13 In addition, WI-LAN has already borne a significant financial burden associated with the
14 document production made thus far. The cost for document collection, searching and bates labeling
15 paid to a document management vendor in connection with Wi-LAN’s document production
16 exceeded \$20,000. In addition, Wi-LAN paid over \$67,000 to conduct a privilege review prior to
17 production. The preceding costs concerned a production relating to documents in a two year time
18 period. It is reasonable to infer that a collection for a six year period would be three times as great.
19 The cumulative cost of Calix’s discovery remands is not justified.

20 The cost of any further discovery should be borne by Calix as the party who seeks broad
21 discovery. Fed. R. Civ. P. 26(b)(2)(B). This will impose necessary discipline on the discovery
22 process.

23 **IV. CONCLUSION**

24 In view of WI-LAN having produced relevant documents and interrogatory responses for a
25 period two years prior to filing, in view of the futility of efforts to show general jurisdiction by
26 sporadic contacts years prior to the filing date, in view of the narrow time frame relevant to specific
27 jurisdiction, and in view of the significant financial burden associated with discovery, Wi-LAN
28 respectfully moves the Court to deny Calix’s motion to compel discovery.

