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5 Attorneys for Defendant
WI-LAN, INC.
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 SONY COMPUTER ENTERTAINMENT
15 AMERICA INC., ET AL.

16 Plaintiffs,

17 v.

18 WI-LAN, INC.,

19 Defendant.
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Case No. C 08-CV-5742 MHP

**DECLARATION OF MICHAEL
G. MCMANUS IN SUPPORT OF
DEFENDANT'S MOTION TO
EXTEND TIME TO RESPOND
TO COMPLAINT
PURSUANT TO LOCAL
RULE 6-3**

1 I, Michael G. McManus, hereby declare as follows:

2 1. I am an attorney with the law firm McKool Smith, P.C., and have
3 been retained by Wi-LAN, Inc. (“Wi-LAN”). I am a member, in good standing, of
4 the bar of the District of Columbia and of the State of Georgia. I am registered to
5 practice before the United States Patent and Trademark Office. I have personal
6 knowledge of the facts contained in this declaration, unless otherwise indicated. If
7 called upon to testify regarding such facts I am competent to do so.

8 2. On October 31, 2007, Wi-LAN brought suit on two wireless
9 communications patents against several defendants in the Eastern District of Texas.
10 That case is styled *Wi-LAN Inc. v. Acer, et al.* 2:07-cv-00473-TJW (E.D.Tex.)
11 (hereafter, the “Texas litigation.”)

12 3. The Texas litigation, as filed, concerned wireless communication
13 devices employing a particular modulation scheme known as the IEEE 802.11
14 standard, or, alternatively, the “Wi-Fi” standard.

15 4. On September 30, 2008, Intel Corporation filed a complaint against
16 Wi-LAN Inc. for declaratory judgment of noninfringement, invalidity and
17 unenforceability of numerous patents including United States Patent No. 6,549,759
18 (“the ‘759 patent”). Case No. C 08-cv-4555 (JW).

19 5. On December 10, 2008, Broadcom Corporation and Atheros
20 Communications, Inc. filed a complaint against Wi-LAN Inc. for declaratory
21 judgment of noninfringement, invalidity and unenforceability of United States
22 Patent No. 6,549,759 (“the ‘759 patent”). Case No. C 08-cv-5543 (JW).

23 6. On December 10, 2008, Marvell Semiconductor Inc and Marvell Asia
24 Pte., Ltd. filed a declaratory judgment action against Wi-LAN Inc. alleging
25 noninfringement, invalidity and unenforceability of the ‘759 patent. Case No. C
26 08-cv-5544 JW.

27 7. On December 17, 2008, Acer America Corp., Apple Inc., Dell Inc.,
28 and Gateway, Inc. filed a declaratory judgment action against Wi-LAN Inc.

1 alleging noninfringement, invalidity and unenforceability of the '759 patent. Case
2 No. C 08-cv-5624 SI.

3 8. On December 23, 2008, Sony Computer Entertainment America, Inc.,
4 Sony Electronics, Inc., Toshiba America Information Systems, Inc., Hewlett-
5 Packard Company and Lenovo (United States) Inc. filed the instant declaratory
6 judgment action against Wi-LAN Inc. alleging noninfringement, invalidity and
7 unenforceability of the '759 patent. Case No. C 08-cv-5742 MHP.

8 9. I am aware that the Plaintiffs in this case as well as the Plaintiffs in
9 the *Acer America Corp., et al.* case both filed an executed proof of service
10 indicating a service date, in both cases, of January 12, 2009. Both proofs of
11 service were executed by the same process server: Mark Cogan.

12 10. I am informed that, although Wi-LAN did receive certain documents,
13 it was not served with a copy of the Complaint in this action.

14 11. On or about January 21, 2009, I informed Plaintiffs' counsel by
15 voicemail of the defect in service.

16 12. On January 23, 2009, I stated a willingness to accept service on behalf
17 of Wi-LAN. Plaintiffs promptly served me via electronic mail. In agreeing to
18 accept service, I believed that service issues would be resolved and all parties
19 agreed that January 23, 2009, was the effective date of service. I subsequently
20 learned that, despite service on January 23, 2009, Plaintiffs maintained that service
21 on January 12, 2009 was effective.

22 13. Counsel to Wi-LAN drafted a proposed stipulation that provided for a
23 response date of March 16, 2009. This represents a twenty day response time as
24 per Rule 12(a) and a thirty day extension as per the agreement between the parties
25 calculated from the date of effective service, January 23, 2009.

26 14. On January 29, 2009, I conveyed the proposed stipulation to
27 plaintiffs' counsel. Plaintiffs counsel did not substantively respond.

28

Exhibit 1

From: Adam Alper [AAlper@kirkland.com]
Sent: Thursday, January 29, 2009 11:36 PM
To: Robert Cote; Mike McManus
Cc: dtconrad@jonesday.com; mscarsi@milbank.com; Spillner, Michael; Gianni Cutri; mike.devries@lw.com; jmitchell@reedsmith.com
Subject: RE: Acer America, et al. v. Wi-LAN, Inc. - Service Documents
Attachments: [Acer] Stipulation and Joint Administrative Motion to Relate Case.DOC; [Sony] Stipulation & Joint Administrative Motion To Relate Case.DOC

Bob and Mike:

This responds on behalf of the plaintiffs in the pending declaratory judgment actions to your recent correspondence concerning the Acer and Sony actions. As you know, the declaratory judgment plaintiffs have made joint proposals to Wi-LAN to coordinate Wi-LAN's responses to the complaints in the five related actions in the Northern District of California.

Wi-LAN filed a motion to dismiss the Intel declaratory judgment action, and stated that it intends to file redundant motions to dismiss on overlapping issues in the remaining four cases. In an effort to manage the cases efficiently and reduce the burden on the Court, the plaintiffs offered to extend Wi-LAN's due date to respond to the complaints in the four remaining cases until 10 days after the court rules on Wi-LAN's motion to dismiss the Intel action, provided for the sake of efficiency that Wi-LAN agreed not to relitigate those issues if its motion is denied. Alternatively, the plaintiffs proposed that the hearing on Wi-LAN's overlapping motions be coordinated on a single date. We proposed March 30, with Wi-LAN's motions in the remaining four actions due on February 23. Wi-LAN rejected these proposals, and as such plaintiffs made their joint proposal to the Court in opposing Wi-LAN's motion to change time in the Broadcom/Atheros action.

Your e-mails (including the email below and Mike's email today to Mike Spillner) ignore this history and plaintiffs' joint proposal. Moreover, Wi-LAN's proposal in the Acer and Sony actions is different than its proposed approaches in the Broadcom/Atheros and Marvell actions (which themselves are different from each other). It is precisely this lack of coordination -- and any attendant side disputes related to scheduling -- that plaintiffs' joint proposal seeks to avoid.

With respect to service in the Acer and Sony actions, the proofs of service the plaintiffs in those actions previously provided confirm that Wi-LAN was properly served on January 12, making its response to the complaints due on February 2. You have not responded to our request for the date on which Wi-LAN first received a copy of those complaints, and do not explain why you believe service was not made on January 12. To the contrary, your correspondence confirms that Wi-LAN has been aware of those actions since that time.

With respect to your request that we honor our agreement to provide 30-day extensions, as an initial matter, the agreement concerning the 30-day extensions only related to Broadcom, Atheros and Marvell. That fact was confirmed by both sides in various correspondence. Nevertheless, the Acer and Sony plaintiffs wish to provide Wi-LAN with reasonable extensions to respond to their complaints. As noted above, plaintiffs' joint proposal provides Wi-LAN 42 days to respond to the complaints in the Acer and Sony actions (i.e., from January 12 to February 23). Your request -- i.e., that Wi-LAN's responses be due 50 days from January 23, i.e. on March 16 -- amounts to a nine week delay in its responses which is unjustified given Wi-LAN's intent to file admittedly redundant motions to dismiss on overlapping issues in response to the Acer and Sony complaints, and the need to coordinate all of Wi-LAN's forthcoming overlapping motions.

If your imminent concern is the February 2 deadline for Wi-LAN to respond to the complaint, we suggest the following to avoid burdening the Court with duplicative briefing on any motion to change time that overlaps with the briefing on the pending motion to change time in the Broadcom/Atheros action. We propose that the parties stipulate that Wi-LAN's response to the complaints in the Acer and Sony actions be due on the same date as its response to the complaint in the Broadcom/Atheros action, as dictated by the ruling on Wi-LAN's pending motion in that case. Please let me know if Wi-LAN would agree to such a stipulation.

Lastly, in accordance with Wi-LAN's stipulation that the Acer and Sony actions are related to the Intel, Broadcom/Atheros and Marvell actions, attached is a Stipulation and Joint Administrative Motion To Consider Whether Cases Should Be Related for both the Acer and Sony actions. The stipulations are the same in substance. Please let us know if these are OK to file. We plan to file them at noon PST on Friday, to assist the Court in its management of the pending actions. If you have comments, feel free to call me tomorrow and we can work through them together.

1/30/2009

Adam

Adam R. Alper
Kirkland & Ellis LLP
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San Francisco, CA 94104
Tel: (415) 439-1876
Fax: (415) 439-1500
www.kirkland.com

"Robert Cote" <rcote@McKoolSmith.com>

01/29/2009 07:47 AM

To "Spillner, Michael" <mspillner@orrick.com>, "Mike McManus" <mmcmanus@McKoolSmith.com>
cc <dtconrad@jonesday.com>, <mscarsi@milbank.com>, "Adam Alper" <AAlper@kirkland.com>
Subject RE: Acer America, et al. v. Wi-LAN, Inc. - Service Documents

Adam - We expect that Acer group (see email trial below) and the Sony group (to which there is a similar email trail below) will honor the agreement that was made between me and you for all defendants in Texas regarding an agreed 30 day extension for all declaratory judgment actions that are filed, in exchange for which we extended your time to respond to the motion to supplement.

I do not think it materially changes your arguments before the Court in California, but even if you and the Acer and Sony groups think it does, a deal is a deal and we expect that all will honor it as we have counted on that and are not in a position to act differently at this point.

I raise this issue because the below email exchange with the Acer group suggests that we may be going through the same type of back and forth we experienced with Marvell's counsel a couple of weeks ago in getting them to honor the agreement, so we would appreciate it if you could reach out to the Acer and Sony groups and remind them of the deal.

Thanks.

Bob

-----Original Message-----

From: Spillner, Michael [mailto:mspillner@orrick.com]
Sent: Thursday, January 29, 2009 3:15 AM
To: Mike McManus
Cc: Robert Cote; dtconrad@jonesday.com; mscarsi@milbank.com
Subject: RE: Acer America, et al. v. Wi-LAN, Inc. - Service Documents

Mike:

I would like to discuss your proposed stipulation, but I will be traveling to New York on Thursday. My plane takes off at 12:30 PM EST, and lands at 6:00 PM EST. If you are free to talk at 12:00 PM EST or 6:30 PM EST, please call my cell phone at (650) 533-4641.

Thanks,

1/30/2009

Mike

-----Original Message-----

From: Mike McManus [mailto:mmcmanus@McKoolSmith.com]
Sent: Wednesday, January 28, 2009 5:34 PM
To: Spillner, Michael; dtconrad@jonesday.com; mscarsi@milbank.com
Cc: R. Cote
Subject: RE: Acer America, et al. v. Wi-LAN, Inc. - Service Documents

Attached please find a draft unopposed motion for extension. Please let us know if we have your approval to file.

-----Original Message-----

From: Mike McManus
Sent: Wednesday, January 28, 2009 10:21 AM
To: 'Spillner, Michael'
Cc: dtconrad@jonesday.com; Scarsi, Mark
Subject: RE: Acer America, et al. v. Wi-LAN, Inc. - Service Documents

Michael,

This is further to my voice mail of yesterday. In December, a deal was struck between Wi-LAN and all defendants in the Texas litigation (Case No. 2:07-cv-00473) where Wi-LAN agreed to extend the time for the defendants to respond to its motion to supplement in exchange for each defendant granting a 30 day extension of Wi-LAN's time to answer its California DJ complaint. Please confirm that the Plaintiffs will abide by this deal.

In addition, as we have informed you, service upon Wi-LAN was defective on January 12th. As a courtesy, I agreed to accept service on behalf of Wi-LAN on January 23rd. In doing so, I believed that the parties had resolved service issues. In your e-mail of the 23rd, however, Plaintiffs appear to maintain that it achieved service on the 12th. In order to avoid pointless motion practice and attendant delays, we ask that you agree that January 23rd is the correct date of service.

Regards,

Michael G. McManus
Principal
McKool Smith, P.C.
1700 K Street, N.W.
Suite 740
Washington, D.C. 20006
(202) 370-8300

-----Original Message-----

From: Spillner, Michael [mailto:mspillner@orrick.com]
Sent: Friday, January 23, 2009 8:19 PM
To: Mike McManus
Cc: dtconrad@jonesday.com; Scarsi, Mark
Subject: Acer America, et al. v. Wi-LAN, Inc. - Service Documents

<<Welcome to U.S. District Court.pdf>> M <<Civil Cover Sheet.pdf>> i
<<Consenting to a Magistrate Judge's Jurisdiction.pdf>> k <<Docket 01
(Complaint).pdf>> e <<Docket 02 (Acer's Certification of Interested
Entities or Persons).pdf>> : <<Docket 03 (Apple's Certification of
Interested Entities or Persons).pdf>> <<Docket 04 (Dell's Certificate

of Interested Parties).pdf>> <<Docket 05 (Gateway's Certification of Interested Entities or Persons).pdf>> <<Docket 06 (Order Setting Initial CMC and ADR Deadlines) (Larson, J.).pdf>> <<Docket 07 (Report on Filing Patent Case).pdf>> <<Docket 08 and 09 (Order of Recusal).pdf>> A <<Docket 10 (Order Reassigning Case).pdf>> t <<Docket 11-2 (Case Management Conference Order, Standing Order for All Judges, Illston Standing Order).pdf>> t <<Docket 11 (Notice Setting Case Management Conference).pdf>> a <<Misc Forms and Documents.pdf>> c <<Summons.pdf>> hed are the service documents for the Acer America, et al. v. Wi-LAN action. We do not agree that the original service was improper, but appreciate your agreement to accept service on behalf of Wi-LAN.

Mike

Michael C. Spillner
Orrick, Herrington & Sutcliffe LLP
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Menlo Park, CA 94025
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e-mail mspillner@orrick.com
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"EMF <orrick.com>" made the following annotations.

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IRS Circular 230 disclosure:

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