

EXHIBIT 6

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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

17 ELAN MICROELECTRONICS
CORPORATION,
18
19 Plaintiff,
20 vs.
21 PIXCIR MICROELECTRONICS CO. LTD.,
22 Defendant.

Case No.: 2:10-cv-00014-GMN-PAL

**ELAN MICROELECTRONICS
CORPORATION'S SURREPLY IN
OPPOSITION TO DEFENDANT
PIXCIR'S REPLY IN SUPPORT OF
MOTION TO DISMISS**

23
24 Plaintiff, Elan Microelectronics Corporation ("Elan"), by and through its counsel of
25 record, Robert J. Caldwell, Esq. and Matthew J. Christian, Esq. of Kolesar & Leatham, Chtd. and
26 Sean P. DeBruine, Esq. of Alston & Bird LLP, hereby submits this Surreply in Opposition to
27 Defendant Pixcir's Reply (Doc. No. 23) in Support of its Motion to Dismiss (Doc. No. 16).
28

1 This Surreply is made and based upon the papers and pleadings filed in this action, the
2 following memorandum of points and authorities, the attached declarations and exhibits, and any
3 oral argument which the Court may entertain on this matter.

4 DATED this 22nd day of November, 2010.

5 **KOLESAR & LEATHAM, CHTD.**

6
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pixcir moved to dismiss this matter based on an ostensible lack of personal jurisdiction. The brief in support of that motion totaled less than five full pages, and it was supported by a single cursory declaration. Elan opposed that perfunctory motion, pointing out the publicly available evidence showing that (1) Pixcir representatives have travelled to this district to do business in connection with the products Elan accuses of infringement; (2) Pixcir has directed its marketing activities associated with those products at this forum; and (3) Pixcir has sold those products into the U.S. and this district via an established distribution channel in the stream of commerce.

Only after Elan filed its response did Pixcir come forward with new legal arguments and detailed declarations attempting to refute that evidence. Tellingly, Pixcir’s Reply brief now covers sixteen pages, more than thrice the length of its original brief. Following leave of Court to do so, Elan provides this Surreply to address both the numerous legal issues raised for the first time in Pixcir’s Reply and the new “facts” alleged in the declarations submitted therewith.

Importantly, Pixcir does not deny its direct contacts with this judicial district, nor the United States, generally. Nor does Pixcir contest that it has sold products into the United States and this judicial district via established distribution channels. However, Pixcir does misapply the law when it attempts to argue that these purposeful actions do not support jurisdiction. Even in light of the new facts and arguments presented by Pixcir, there can be little doubt that Elan has made a prima facie showing of this district’s jurisdiction over Elan’s patent infringement claims against Pixcir, such that Pixcir’s Motion to Dismiss should be denied.

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1 **II. ARGUMENT**

2 **A. Pixcir Has Purposefully Sold Its Accused Products via an Established**
3 **Distribution Channel into the United States and This District.**

4 Pixcir would have this Court believe that the promotion and sale of its products into this
5 district are the result of “random, fortuitous, or attenuated contacts” completely beyond its
6 control. *See* Defendant’s Reply in Support of Motion to Dismiss (Docket No. 23) (“Reply
7 Br.”) at 8. To make that argument, Pixcir rests on selective declarations and a misapprehension
8 and/or misapplication of the law. In effect, Pixcir attempts to hide behind the unique nature of
9 the modern global supply chain for electronic products, even though it capitalizes on the same
10 supply chain to sell its products into the United States and this judicial district.

11 Pixcir supplies semiconductors and solutions to enable touchscreen electronic devices to
12 function. Those touchscreens are incorporated as user input devices in personal computers,
13 smart phones and other electronic devices. In the modern, globalized economy, such electronic
14 devices are almost exclusively manufactured in Asia, primarily in Taiwan and China, for U.S.
15 companies whose brands appear on the finished products. Declaration of Ian Chung in Support
16 of Plaintiff’s Opposition (“Chung Decl.”) at ¶ 3.

17 In particular, companies such as Dell and Hewlett-Packard (“HP”) have their own
18 branded products manufactured to their specifications by third party Original Equipment
19 Manufacturers (“OEM”). These OEM manufacturers purchase components for those products
20 from companies such as Elan and Pixcir, *id.*, although as Pixcir notes, subassembly suppliers
21 often exist between Elan or Pixcir alike and the OEM manufacturers, *see* Reply Br. at 7-8. The
22 subassemblies are not staple products; rather, they incorporate Pixcir’s touchscreen controllers
23 and are manufactured specifically for the next distributor down the supply chain, namely the
24 OEM manufacturers.

25 Importantly, it is the touchscreen *controller*, not the *subassembly*, that determines the
26 ultimate touchscreen functions in a finished product. Despite the multiple parties involved,
27 component suppliers such as Elan and Pixcir often do have knowledge of the OEM
28 manufacturers and brand companies that purchase their components. Chung Decl. at ¶ 4. In

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1 particular, if a component is not a relatively standard part, direct communication almost always
2 exists between the component supplier and the involved brand company to ensure that the
3 component meets the latter's specification and functions properly in the finished product. *Id.* at
4 ¶ 5. While those contacts may physically occur outside the United States, they still involve
5 contact and communication with U.S. companies. *Id.* Significantly, the contacts are purposeful
6 actions of selling products into the U.S. via an established distribution channel—a tight, global
7 supply chain in the modern economy. Indeed, Pixcir admits—actually touts—its own contacts
8 with the makers of several “leading brands” of computers. *See* Second Declaration of Kai Zhu
9 in Support of Opposition to Pixcir Microelectronics Co.’s Motion To Dismiss (“Zhu 2nd
10 Decl.”) at ¶ 4 and Exh. 1. Pixcir further admits that it has worked directly with those computer
11 makers to obtain Microsoft certifications for the very touchscreen solutions Elan here accuses
12 of patent infringement. *Id.* Microsoft, headquartered in Redmond, Washington, in the United
13 States, is as American as apple pie. To suggest that Pixcir has no ties to the U.S. or this judicial
14 district, simply disregards reality.

15 Pixcir repeatedly emphasizes the intermediate vendors between itself and the computer
16 makers who sell the accused Pixcir touchscreen solutions into this country, *see* Reply Br. at 7-
17 10, in an attempt to show a lack of “minimum contacts” required to establish jurisdiction under
18 the “stream of commerce” theory. However, Pixcir’s arguments are based on a misreading of
19 the relevant case law.

20 By its very definition, the *stream* of commerce cannot be blocked by intermediate
21 subassembly vendors. In fact, the Federal Circuit has specifically held that efforts to “serve,
22 directly or *indirectly*, [a] market” may give rise to jurisdiction. *See Beverly Hills Fan Co. v.*
23 *Royal Sovereign Corp.*, 21 F.3d 1558, 1566-68 (quoting *World-Wide Volkswagen Corp. v.*
24 *Woodson*, 444 U.S. 286, 297 (1980)) (emphasis added). The subassembly vendors who
25 implement Pixcir’s touchscreen solutions are merely one link in the global supply chain that
26 qualifies as the type of “established distribution channel” that was recognized by the *Beverly*
27 *Hills* court. *See id.* at 1565-66.

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1 Pixcir's sale of its products into the U.S. through this established distribution channel is
2 far from a "fortuitous circumstance" based entirely on the unforeseen actions of others. *See*
3 *World-Wide Volkswagen Corp*, 444 U.S. at 295-96. Rather, Pixcir purposefully directed its
4 products through the distribution channel and towards the U.S. *See* Zhu 2nd Decl. at ¶ 4 and
5 Exh. 1; Zhu 1st Decl. (Docket No. 18) at ¶ 12 and Exh. 10 (Docket No. 18-10). Further, as
6 Pixcir is no doubt aware, when Pixcir's accused touchscreen solutions are sold to those
7 companies that Pixcir touted as customers, *id.*, sales of those companies' products into the U.S.
8 as well as this judicial district are essentially inevitable, because Dell, Lenovo¹, and HP all have
9 significant market shares in the U.S. and in this district. Zhu 1st Decl. at ¶ 22 and Exh. 18
10 (Docket No. 18-18).

11 Pixcir also argues that Elan's claims do not "arise out of or relate to" its actions in
12 encouraging computer makers to adopt and sell its touchscreen solutions into the United States.
13 *See* Reply Br. at 8-9. Pixcir claims that inducement of infringement under § 271(b) excludes
14 extraterritorial activities. *Id.* at 7-8. That statement of the law is simply wrong. Rather, any
15 action that encourages and enables another's infringement in the United States is an inducement
16 of infringement, and there is no territorial requirement for this finding. *See* 35 U.S.C. § 271(b);
17 *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 2006 U.S. Dist. LEXIS
18 9353 at *22 (N.D. Cal. Feb. 24, 2006). Thus, the fact that the subassembly vendors are outside
19 the U.S. cannot frustrate Elan's § 271(b) infringement claim.

20 Also, the existence of those intermediate vendors, or the "twice removed from" theory
21 as advanced by Pixcir, *see* Reply Br. at 8, has no bearing on whether Pixcir has actively
22 induced others to infringe Elan's patent under § 271(b), and Pixcir has cited no authority to the
23 contrary. As Elan established in its Opposition, only jurisdictional questions are present here,
24 and Elan does not need to prove infringement on the pleadings to establish jurisdiction.
25 *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285, 1298-99
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27
28 ¹ Contrary to what Mr. Fuentes has believed, Lenovo is co-headquartered in Morrisville, North Carolina.

1 (Fed. Cir. 2009). Elan has alleged that Pixcir's promotion and sale of its products into this
2 district and the U.S. as a whole give rise to liability for inducing infringement. There is no
3 requirement to show that Pixcir's inducement acts took place in this district; nor is it required to
4 show that Pixcir itself directly infringed Elan's patent when being physically in this district. In
5 short, Elan's claims "arise out of and relate to" Pixcir's contacts with this forum.

6 **B. Pixcir Has Had Direct Contacts with This District and the United States as a**
7 **Whole to Promote Its Accused Touchscreen Controller Products.**

8 In his carefully crafted second declaration, Mr. Fuentes still does not disclose why he,
9 as the Chief Operating Officer of a Chinese startup company, flew from Switzerland to Las
10 Vegas to attend a prominent trade show that was not open to the public. Fuentes 2nd Decl.
11 (Docket No. 23-1) at ¶¶ 9-10. While Fuentes repeatedly discusses what he did *not* do—all in
12 the negative—at CES 2009, he does not deny that his trip to this district was for business
13 purposes. Although Elan cannot ascertain what Mr. Fuentes actually did at CES 2009 without
14 jurisdictional discovery, Pixcir fails to refute that Fuentes's business trip contributed to the
15 eventual sale of Pixcir's accused products into the U.S. and this district. Thus, Elan's
16 inducement infringement claim arises at least in part out of Pixcir's contacts with this district.
17 Pixcir's theory that its visit must have included some infringement acts to yield jurisdiction is
18 incorrect as a matter of law.

19 Nor does Mr. Hung deny the DigiTimes report concerning Pixcir's actions targeting the
20 U.S. market through the CES 2009 show. *Compare* Hung Decl. (Docket No. 23-2) at ¶¶ 2-4
21 *with* Zhu 1st Decl. at ¶ 6 and Exh. 4 (Docket No. 18-4). Fuentes and Hung's declarations really
22 say nothing more than that they are not aware of any Pixcir representatives who showed videos
23 promoting Pixcir products while being *physically* present at CES 2009. The Federal Circuit,
24 however, has long held that such physical presence is not required for jurisdictional minimum
25 contacts with the forum. *See Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1361-62 (Fed. Cir.
26 2001) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992)) ("[W]e have
27 consistently rejected the notion that an absence of physical contacts can defeat personal
28 jurisdiction.").

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1 Pixcir also alleges as inadmissible the blog articles that reported on the first day of CES
2 2009 and Pixcir’s YouTube-video marketing activities at the trade show, *see* Reply Br. at 6,
3 lines 16-18. Again, the Federal Circuit has rejected such a hearsay attack on circumstantial
4 jurisdictional evidence. *See Beverly Hills Fan Co.*, 21 F.3d at 1562.

5 Pixcir also somehow assumes that *uploading* CES-2009-targeted YouTube videos *onto*
6 *a web site based in California* is the same thing as hosting its own web pages in China. *See*
7 Reply Br. at 10-11. Based on that incorrect analogy, Pixcir cites *Trintec Indus. v. Pedre*
8 *Promotional Prods.* to argue that its use of YouTube does not support jurisdiction. *Id.* at 11.
9 The *Trintec Indus.* decision, however, does not support Pixcir’s argument, but rather supports
10 the opposite; the *Trintec* court reasoned that even web pages merely “directed at” a forum favor
11 establishing jurisdiction, *see Trintec Indus. v. Pedre Promotional Prods.*, 395 F.3d 1275, 1281
12 (Fed. Cir. 2005). Here, YouTube is not merely “directed at,” but actually based in California.
13 As such, Pixcir purposefully reached out to the United States and CES 2009 in order to further
14 its goal of selling its accused products into the United States. It is important to note that as a
15 prerequisite to opening a YouTube account, Pixcir must have executed binding agreements
16 online with YouTube and Google, under which Pixcir expressly agreed to jurisdiction in
17 California concerning any disputes arising from the use of those services. Zhu 2nd Decl. at ¶¶
18 5-7 and Exhs. 2-3. This is precisely the type of “purposeful availment” that supports personal
19 jurisdiction under either Fed. R. Civ. P. 4(k)(1) or 4(k)(2).

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1 **III. CONCLUSION**

2 Pixcir has not controverted Elan's complaint or evidence. The Court should accept
3 Elan's complaint as true, resolve any factual conflicts in the affidavits in Elan's favor, find
4 Elan's *prima facie* showing of this district's personal jurisdiction over Pixcir, and deny Pixcir's
5 motion to dismiss.

6 DATED this 22nd day of November, 2010.

7 **KOLESAR & LEATHAM, CHTD.**

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CERTIFICATE OF SERVICE

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I hereby certify that I am an Employee of Kolesar & Leatham, Chtd., and that on the 22nd day of November, 2010, I caused to be served a true and correct copy of foregoing **ELAN MICROELECTRONICS CORPORATION'S SURREPLY IN OPPOSITION TO DEFENDANT PIXCIR'S REPLY IN SUPPORT OF MOTION TO DISMISS** in the following manner:

(ELECTRONIC SERVICE) Pursuant to FRCP 5(b)(3) and LR 5-4, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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