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 WI-LAN, INC.

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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

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14 ACER AMERICA CORP., APPLE INC.,  
 DELL INC., and GATEWAY, INC.,

Case No. C 08-CV-5624 SI

15

Plaintiffs,

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v.

**DEFENDANT'S MOTION TO  
 EXTEND TIME TO RESPOND  
 TO COMPLAINT  
 PURSUANT TO LOCAL  
 RULE 6-3**

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WI-LAN, INC.,

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Defendant.

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1 Pursuant to Civil Local Rule 6-3, Defendant Wi-LAN Inc. (“Wi-LAN”)  
2 hereby submits this Motion to Extend Time to Respond to the Complaint. This  
3 Motion is supported by good cause, as detailed in the attached Declaration of  
4 Michael G. McManus (“McManus Declaration”).

5 The parties to the instant suit are also parties to certain patent litigation in  
6 the Eastern District of Texas styled *Wi-LAN Inc. v. Acer, et al.* 2:07-cv-00473-TJW  
7 (E.D.Tex.). Several other entities, including Intel Corporation, are also parties to  
8 that litigation.

9 On September 30, 2008, Intel Corp., filed a declaratory judgment action in  
10 this district on certain other patents owned by Wi-LAN (including the patent here  
11 at issue, United States Patent No. 6,549,759 (“the ‘759 Patent”)) which concern  
12 related technology. That case is styled *Intel Corp. v. Wi-LAN Inc. et al.*, 5:08-cv-  
13 04555 (JW) (N.D. Cal.).

14 In December of 2008, all of the remaining defendants in the Texas litigation  
15 also brought declaratory judgment actions in this district on United States Patent  
16 No. 6,549,759. As some of the Texas defendants joined as co-plaintiffs, there are a  
17 total of five declaratory judgment actions now pending that concern the ‘759  
18 patent.

19 On or about December 23, 2008, Wi-LAN lead counsel, Robert A. Cote, met  
20 and conferred with Intel counsel, Adam R. Alper, acting on behalf of all  
21 defendants. It was agreed that all defendants to the Texas action, including  
22 plaintiffs in this action, would have their time to respond to certain motion practice  
23 in Texas (specifically, Wi-LAN’s Motion for Leave to File a Supplemental  
24 Complaint) extended from December 28, 2008 until January 15, 2009. (Unopposed  
25 Motion For Extension Of Time To Respond To Wi-Lan Inc.'s Motion For Leave  
26 To File A Supplemental First Amended Complaint attached as Exhibit 1 to  
27 Declaration of Robert A. Cote). In exchange, Mr. Alper agreed, on behalf of all  
28 defendants, that Wi-LAN’s time to answer or otherwise plead in response to the

1 Texas defendants' declaratory judgment actions would be extended by thirty days.  
2 (Declaration of Robert A. Cote at ¶ 4). This deal has been honored by the  
3 declaratory judgment plaintiffs in *Intel Corp. v. Wi-LAN, Inc., et al.*, Case No.  
4 5:08-cv-04555-JW; *Marvell Semiconductor Inc et al v. Wi-Lan, Inc*, Case No.  
5 5:08-cv-5544; and *Broadcom Corporation et al. v. Wi-LAN, Inc.*, Case No. C 08-  
6 cv-5543 JW.

7 On January 14, 2009, Plaintiffs filed an executed Proof of Service in this  
8 case and also in *Sony Computer Entertainment America, Inc. et al. v. Wi-LAN, Inc.*  
9 Case No. C 08-05742 MHP (which also concerns the '759 patent and also arises  
10 from the Texas litigation). Both proofs of service indicate service by a Mark  
11 Cogan on Wi-LAN employee Tonia Morgan on January 12, 2009. Despite the  
12 filing of the proofs of service, service was not made. Wi-LAN did not receive any  
13 documents related to the present case. (McManus Declaration ¶ 10). It is likely  
14 that Mr. Cogan saw two similar packages of documents, one concerning this case  
15 and one concerning the Sony matter and inferred that one set was a duplicate.  
16 Regardless of what occurred, Wi-LAN was not served with any process of any  
17 nature from the plaintiffs in this case.<sup>1</sup>

18 In view of such events, Wi-LAN's counsel informed Plaintiffs' counsel of  
19 the defect in service and stated a willingness to accept service. (McManus  
20 Declaration at ¶ 12). Plaintiffs promptly served Wi-LAN's counsel by electronic  
21 mail on January 23, 2009. The plaintiffs, however, maintained their position that  
22 (nonexistent) service was effective as of January 12, 2009.

23 Subsequently, Defendant's counsel drafted a stipulation that provided for a  
24 response date of March 16, 2009. This represents a twenty day response time as  
25 per Rule 12(a) and a thirty day extension as per the agreement between the parties

26 \_\_\_\_\_  
27 <sup>1</sup> Although Wi-LAN regards service as defective, Wi-LAN specifically  
28 refrains from making any motion pursuant to Federal Rule of Civil Procedure 12 at  
the present time. Wi-LAN reserves its right to make such motion at the  
appropriate time.

1 calculated from the date of effective service, January 23, 2009. This stipulation  
2 was conveyed to Plaintiffs' counsel, who did not substantively respond.  
3 (McManus Declaration at ¶¶ 13-14). However, Mr. Alper of Kirkland & Ellis,  
4 apparently acting on behalf of all declaratory Plaintiffs, indicated that Plaintiffs  
5 would not honor the agreement for a thirty day extension. Instead, Mr. Alper  
6 proposed that Wi-LAN respond to all declaratory judgment complaints on January  
7 23, 2009. (Electronic Mail correspondence from Adam Alper attached as Exhibit 1  
8 to McManus Declaration). The proposal that Mr. Alper made would require that  
9 Wi-LAN respond to the complaint in another pending action (*Marvell*  
10 *Semiconductor Inc. et al. v. Wi-LAN*) prior to the current deadline (of February 25,  
11 2009). Mr. Alper's electronic mail was not conveyed to defendant's counsel until  
12 after business hours on January 29, 2009. This motion is, thus, filed promptly  
13 upon Wi-LAN's becoming aware of plaintiffs' change in position.

14 A motion to change time pursuant to Local Rule 6-3 should be granted  
15 where the movant shows good cause. *See e.g., Whitney v. Wurtz*, 2006 WL  
16 3201035 \*1 (N.D.Cal. 2006) ("Plaintiffs have shown good cause to continue the  
17 hearing.")

18 Here, there is good cause to extend the time to respond to the Complaint.  
19 Defendant and its counsel had a good faith belief that Plaintiffs would consent to  
20 an extension that did not require the waiver of rights in other cases. This did not  
21 occur. Moreover, Defendant has had difficulty in retaining local counsel due to the  
22 possibility of conflicts of interest arising from the large number of declaratory  
23 plaintiffs.

24 Defendant will suffer substantial harm if the time to respond to the  
25 declaratory judgment complaint is not extended. It will suffer material prejudice in  
26 the instant litigation if it is not permitted sufficient time to prepare its response to  
27 the complaint. This is particularly so in view of the waiver rules of Federal Rule of  
28 Civil Procedure 12(h).

1           There have been no extensions in the present action. Further, in view of the  
2 early stage of the present litigation, the requested modification would have little  
3 effect on the schedule of this case.

4           Accordingly, Defendant Wi-LAN respectfully moves the Court for an order  
5 setting the time for response to the Complaint until March 16, 2009, or such time  
6 as the Court regards as appropriate.

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DATED: January 30, 2009

Respectfully submitted,

MCKOOL SMITH, P.C.

By: /s/ Gayle Rosenstein Klein  
Gayle Rosenstein Klein

Attorneys for Defendant  
WI-LAN, INC.

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2009, a true and correct copy of the foregoing DEFENDANT’S MOTION TO EXTEND TIME TO RESPOND TO COMPLAINT PURSUANT TO LOCAL RULE 6-3 was filed electronically with the Clerk of the Court using CM/ECF System. Notice of this filing will be sent by operation of the Court’s electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court’s electronic filing system.

By:           /s/ Michael G. McManus          

Michael G. McManus

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Case No. C 08-CV-5624 SI

**[PROPOSED] ORDER ON  
DEFENDANT'S MOTION TO  
EXTEND TIME TO RESPOND  
TO COMPLAINT  
PURSUANT TO LOCAL  
RULE 6-3**

1 After review and consideration of defendants' Motion for Enlargement of  
2 Time to Answer Complaint pursuant to Local Rule 6.3, it is the decision of the  
3 Court that said motion is well taken and should be GRANTED.

4 It is hereby ORDERED that defendants must answer or otherwise plead to  
5 the plaintiff's Complaint on or before ~~March 16~~, 2009.

6 February 23,

7 DATED: 2/4/09



8 HONORABLE SUSAN ILLSTON

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