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17 **UNITED STATES DISTRICT COURT**

18 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

19
20 CISCO SYSTEMS, INC.,

21 Plaintiff,

22 vs.

23 ARISTA NETWORKS, INC.,

24 Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**JOINT MOTION FOR AN INDICATIVE
RULING TO VACATE JUDGMENT
PURSUANT TO FED. R. CIV. P. 62.1**

Dept: Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that plaintiff Cisco Systems, Inc. (“Cisco”) and defendant Arista
3 Networks, Inc. (“Arista”) shall and hereby do jointly move the Court to issue an indicative ruling
4 pursuant to Fed. R. Civ. P. 62.1 stating that the Court would grant a motion to vacate the judgment
5 entered in this action on December 19, 2016 (ECF 750) (the “Judgment”) if the Court of Appeals
6 for the Federal Circuit remands the action back to the Court for that purpose. This joint motion is
7 based on this notice of motion and memorandum, the record of this action, and such other argument
8 as was presented and may be presented before this motion is taken under submission by the Court.

9 **RELIEF REQUESTED**

10 The parties jointly and respectfully request, pursuant to Rule 62.1, that the Court issue an
11 indicative ruling stating that the Court would grant a motion to vacate the Judgment if the Federal
12 Circuit remands the action back to the Court for that purpose.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 As the Court knows from its recent order granting stipulated dismissal of Arista’s antitrust
15 suit against Cisco, *see Arista Networks, Inc. v. Cisco Systems, Inc.*, No. 5:16-cv-00923, ECF 422
16 (N.D. Cal. Aug. 27, 2018), the parties in that action, who are the same parties as in this action, have
17 reached a settlement of their multiple pending disputes in all fora. That agreement is evidenced by
18 the binding term sheet the parties executed. *See* Term Sheet attached hereto as Exhibit A (“Term
19 Sheet”).¹ As part of that binding agreement, the parties agreed to jointly approach the Court with
20 legal grounds for vacatur to attempt to persuade the Court to vacate the Judgment in this action.
21 Term Sheet at 11-12. Because the instant action is currently pending on appeal before the Federal
22 Circuit (No. 17-2145), this Court does not currently have jurisdiction of this matter, but Rule 62.1
23 provides an appropriate mechanism to allow the Court to consider the parties’ joint motion to vacate
24 the Judgment.

25 _____
26 ¹ The parties agree that the Term Sheet attached hereto as Exhibit A to this Joint Motion is a true
27 and accurate redacted copy of the Term Sheet executed by the parties. Arista has requested the
28 redactions presented in Exhibit A; Cisco does not agree that any redactions are necessary, but for
the purpose of expediting consideration of the instant motion, Cisco does not challenge the
redactions requested by Arista for the purpose of this joint motion only, and reserves all rights to
challenge any redactions to the Term Sheet in any future submissions.

1 Rule 62.1(a)(3) states that, “[i]f a timely motion is made for relief that the court lacks
2 authority to grant because of an appeal that has been docketed and is pending, the court may ... state
3 either that it would grant the motion if the court of appeals remands for that purpose or that the
4 motion raises a substantial issue.” At that point, the parties must promptly advise the court of appeals
5 of the indicative ruling (Rule 62.1(b)), after which “[t]he district court may decide the motion if the
6 court of appeals remands for that purpose” (Rule 62.1(c). “This new rule adopts for any motion that
7 the district court cannot grant because of a pending appeal the practice that most courts follow when
8 a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal.”). Committee
9 Notes on Rule 62.1—2009. The court of appeals then has the authority to remand the case for further
10 proceedings. *See* Fed. R. App. P. 12.1(b) (“[I]f the district court states that it would grant the motion
11 or that the motion raises a substantial issue, the court of appeals may remand for further proceedings
12 but retains jurisdiction unless it expressly dismisses the appeal.”).

13 The parties jointly request that such a mechanism be applied here. Upon the Court’s grant
14 of this motion, the parties will jointly seek limited remand from the Federal Circuit pursuant to Rule
15 12.1, and assuming that such remand is granted, the parties will jointly file a motion to vacate the
16 Judgment pursuant to Fed. R. Civ. P. 60(b). That Rule authorizes the court to “relieve a party ...
17 from a final judgment, order, or proceeding” in a number of enumerated circumstances and for “any
18 other reason that justifies relief.” Rule 60(b) “provides the basis for a district court[’s] vacation of
19 judgments when the equities so demand, but it does not establish what substantive standards should
20 be employed.” *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998). District
21 courts in this Circuit apply an “equitable balancing test” to determine whether a judgment should be
22 vacated under Rule 60(b). *Id.* “Under that equitable balancing test, the district court should consider
23 ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing
24 values of finality of judgment and right to relitigation of unreviewed disputes.’” *In re: TFT-LCD*
25 *(Flat Panel) Antitrust Litig.*, 2012 WL 12369590, at *4 (N.D. Cal. Oct. 15, 2012) (quoting *Am.*
26 *Games*, 142 F.3d at 1168) (quoting in turn *Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters*, 686
27 F.2d 720, 722 (9th Cir. 1982)). This standard applies to Rule 60(b) motions for vacatur whether a
28 judgment is mooted “by happenstance” or “by settlement,” *Am. Games*, 142 F.3d at 1169, including

1 when the judgment at issue was the result of a jury verdict after trial, *see, e.g., In re Apollo Grp. Inc.*
2 *Secs. Litig.*, 2012 WL 1378677, at *10 (D. Ariz. Apr. 20, 2012) (applying *American Games* and
3 vacating judgment after jury verdict); *In re TFT-LCD*, 2012 WL 12369590, at *4 (same).

4 Applying these standards to the facts of this case, the balance of equities supports vacatur of
5 the Judgment and thus an indicative ruling that the Court would grant a Rule 60(b) motion to vacate
6 the Judgment were the Federal Circuit to remand for that purpose.

7 *First*, the “consequences and attendant hardships of dismissal or refusal to dismiss” favor
8 vacatur. The parties have been engaged in a lengthy set of disputes conducted in multiple tribunals
9 on a number of intellectual property and related issues. The settlement agreement envisions
10 resolution of all of these cases, which spares the parties and the judicial system the burden of any
11 further litigation of these matters, including resolution of the pending appeal in the instant action
12 and any remand proceedings that may result therefrom. *See* Term Sheet at 2 (dismissals), *id.* at 2-3
13 (mutual releases), *id.* at 11-12 (instant action). This settlement thus promotes the public interest in
14 judicial economy and in the negotiated resolution of pending disputes. Accordingly, vacatur of the
15 Judgment here would have only beneficial consequences, would alleviate hardships by resolving the
16 parties’ disputes, and would create no countervailing burdens on any party, favoring relief. In
17 contrast, refusal to dismiss would create the hardship of limiting the effect of the parties’ settlement
18 agreement, and leaving in place a judgment that the parties agree is no longer warranted.

19 *Second*, vacatur of the Judgment would serve the “value of finality” in this litigation. Cisco’s
20 and Arista’s settlement agreement provides detailed mechanisms to address the CLI copyright
21 claims. *See* Term Sheet at 9-11. Nor would leaving the judgment in place serve any interest in
22 reducing future litigation, as the highly fact-specific nature of the dispute over the particular CLI
23 asserted here means would make it difficult for other parties to use the Judgment preclusively. *See,*
24 *e.g., Syverson v. Int’l Bus. Machs. Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (nonmutual issue
25 preclusion applies only where, *inter alia*, “the identical issue ... was actually litigated ... [and] was
26 decided in a final judgment”). Moreover, the parties here do not seek to vacate a judgment for their
27 own benefit and to third parties’ detriment. *Contra Protegrity USA, Inc. v. Netskope, Inc.*, 2016 WL
28 4761093, at *2 (N.D. Cal. Sept. 13, 2016) (denying request to vacate a determination that asserted

1 patent claims were invalid where “plaintiffs [sought] vacatur so that they may assert the 707 Patent
2 again against others”). Rather, vacatur of the Judgment would equitably assist Cisco and Arista
3 only.

4 *Third*, it is in the overall public interest for the Court to support parties in negotiating and
5 reaching settlement, including where vacatur is contemplated as part of a settlement, and especially
6 where such vacatur is part of a global settlement that will resolve multiple pending disputes. *See In*
7 *re Apollo Grp.*, 2012 WL 1378677, at *10 (quoting *Click Entm’t, Inc. v. JYP Entm’t Co.*, 2009 WL
8 3030212, at *2 (D. Haw. Sept. 22, 2009) (discussing public interest in supporting settlement)).
9 Indeed, the public interest in encouraging settlement is so strong that courts of appeals have found
10 district courts to have abused their discretion in declining to vacate a judgment as part of a global
11 settlement. *See, e.g., Mattel, Inc. v. Goldberger Doll Mfg. Co.*, No. 04-6432 (2d Cir. Nov. 20, 2006)
12 (reversing denial of vacatur of judgment that had been sought in order to facilitate a global settlement
13 entered into during the pendency of an appeal where “no significant public interests are affected by
14 the proposed vacatur”).

15 *Fourth*, the indicative ruling requested is likely to provide the parties with the ultimate relief
16 they seek, as the Federal Circuit has granted joint motions for limited remand under Rule 12.1 to
17 effectuate a requested motion for vacatur of a judgment in similar circumstances. *See, e.g., Ohio*
18 *Willow Wood Co. v. Thermo-Ply, Inc.*, 629 F.3d 1374, 1375 (Fed. Cir. 2011) (granting motion to
19 “remand for the limited purpose of the district court’s consideration of the parties’ motion for
20 vacatur”); *see also, e.g., Tempur-Pedic Mgmt., Inc. v. FKA Distrib. Co.*, 481 F. App’x 615, 615 (Fed.
21 Cir. 2012) (same, citing *Ohio Willow Wood*); *Duncan Kitchen Grips, Inc. v. Boston Warehouse*
22 *Trading Corp.*, 428 F. App’x 996, 996–97 (Fed. Cir. 2011) (same); *Miller v. Altadis U.S.A. Inc.*, 424
23 F. App’x 955, 955 (Fed. Cir. 2011) (same); *Dicam, Inc. v. Cellco P’ship*, 416 F. App’x 899, 899
24 (Fed. Cir. 2011) (similar). Thus, an indicative ruling from this Court stating that it would grant a
25 joint motion to vacate the Judgment would assist the Federal Circuit in considering the parties’
26 request.

27
28

1 In sum, as part of a global settlement of myriad pending legal claims in this Court and others,
2 Cisco and Arista seek to vacate a judgment that will alleviate litigation burdens on the parties without
3 prejudicing any other member of the public. The equities favor vacatur.

4 **CONCLUSION**

5 For the foregoing reasons, the Court should issue an indicative ruling pursuant to Rule 62.1
6 stating that the Court would grant a motion to vacate the Judgment pursuant to Rule 60(b) if the
7 Federal Circuit remands the action pursuant to Fed. R. App. P. 12.1 for that purpose.

8 Dated: September 4, 2018

Respectfully submitted,

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ATTORNEY ATTESTATION

I hereby attest, pursuant to Local Rule 5-1(i)(3), that the concurrence in the filing of this document has been obtained from the signatory indicated by the “conformed” signature (/s/) of Robert A. Van Nest within this e-filed document.

/s/ Kathleen Sullivan _____