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15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 CISCO SYSTEMS, INC.,
20 Plaintiff,
21 v.
22 ARISTA NETWORKS, INC.,
23 Defendant.

Case No. 5:14-cv-05344-BLF (PSG)

**ARISTA NETWORKS, INC.'S MOTION
FOR LEAVE TO AMEND RESPONSE TO
ADD COUNTERCLAIMS**

Hearing Date: May 26, 2016
9:00 a.m.
Judge: Hon. Beth Labson Freeman
Date Filed: December 5, 2014
Trial Date: November 21, 2016

**REDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

NOTICE OF MOTION AND MOTION

1
2 Notice is hereby given to Plaintiff Cisco Systems, Inc. that Defendant Arista Networks,
3 Inc. (“Arista”) moves the Court pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to
4 amend Arista’s Response to Cisco’s Second Amended Complaint in this matter to add
5 counterclaims, attached hereto as Exhibit 1. This motion is noticed for May 26, 2016, at
6 9:00 a.m., in Courtroom 3, 5th Floor, 280 South 1st Street, San Jose, California.¹

7 **I. INTRODUCTION**

8 Based on information it has identified in discovery, Arista seeks leave to amend its answer
9 to add counterclaims against Cisco for violating the Sherman Act and California’s Unfair
10 Competition Law. In Cisco’s own words, [REDACTED]
11 [REDACTED]. But discovery has revealed that Cisco has embarked
12 on a deliberate scheme to use its monopoly power illegally to suppress competition. [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 Cisco attempted to limit competition in the Ethernet switch market by reversing a long-standing
16 policy of encouraging industry standard usage of CLI commands, and instead claiming copyright
17 over those commands after competitors and customers relied upon Cisco’s industry standard
18 treatment for over a decade. Cisco also imposed illegal penalties on customers who did not
19 exclusively buy switches from Cisco.

20 Discovery into Arista’s antitrust claims will overlap to some extent with discovery into
21 Cisco’s copyright infringement claims, but the antitrust claims will also involve independent
22 discovery into Cisco’s monopolistic conduct. Arista does not request that the Court modify the
23 current trial calendar to accommodate its counterclaims; if it is necessary to try Arista’s claims on
24 a different schedule, Arista is amenable to the Court setting a separate case calendar for these
25 counterclaims. Consequently, Arista’s motion will not prejudice Cisco, nor delay the trial of this

26
27 ¹ Counsel for Arista hereby attests, pursuant to Civil Local Rule 16-2(d)(2), that Arista has
28 conferred with counsel for Cisco in an effort to reach agreement about the matter and that Cisco
opposes Arista’s motion.

1 action. Alternatively, if the Court prefers, Arista is amenable to filing its antitrust claims as a
2 separate action and relating them to the instant case pursuant to Civil Local Rule 3-12.

3 **II. BACKGROUND**

4 Cisco enjoys thirteen times the market share of its closest rival in the North American
5 Ethernet switch market, and six times the market share of its closest rival in the high-speed
6 Ethernet switch market. Arista was founded to provide Ethernet switch customers with the option
7 of a faster, more efficient, more affordable networking solution. Soon after its founding, Arista
8 began to grow market share.

9 As discussed more fully in Arista’s proposed counterclaims, filed concurrently herewith,
10 after Cisco continued to lose market share to Arista despite spending nearly a billion dollars on an
11 internal “Arista killer” team, it decided to adopt an [REDACTED]
12 [REDACTED]. Acknowledging the additional competitive threat it
13 would face from a growing Arista, Cisco [REDACTED]
14 [REDACTED]. That effort failed, but Cisco
15 embarked on another anticompetitive strategy.

16 For years, Cisco characterized the command-line interface (CLI) commands found in its
17 IOS operating system as industry standards. Cisco made similar representations to standard-
18 setting bodies. Network engineers spend time and money learning those commands, and,
19 [REDACTED]
20 [REDACTED]. Cisco also knew for years that its
21 competitors, including Arista and others, used those commands as well, such that network
22 engineers could easily choose between competing switches without having to learn new
23 commands. Yet after encouraging customers and competitors for years to use commands
24 incorporated into Cisco’s IOS CLI—leading the industry to believe the commands were in the
25 public domain—after facing a competitive threat from Arista, Cisco changed position. Cisco
26 claimed copyright in those commands to attempt to use the settled expectations it had nurtured in
27 the industry generally and particularly among customers as a barrier to competition with Cisco.

28 In addition, Cisco has been charging its customers penalties on its SMARTnet

1 maintenance and service contracts if the customers choose to use competitors' hardware. These
2 penalties far exceed any additional cost for Cisco and are so onerous that they render associated
3 price of equipment sales below cost. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883
4 (9th Cir. 2008).

5 Taken together, Cisco's conduct harms consumers and stifles more innovative and
6 efficient technology, and recently discovered Cisco documents demonstrate that its conduct was
7 part of a deliberate scheme to harm competition. Arista's investigation into Cisco's
8 anticompetitive conduct revealed material information underlying its counterclaims after the
9 pleading amendment deadline of September 7, 2015. Santacana Decl. ¶ 4. Arista now seeks
10 leave to amend its answer to add counterclaims for violation of federal and state antitrust law.

11 **III. LEGAL STANDARD**

12 Arista's motion is governed by Federal Rule of Civil Procedure 16(b)(4) relating to
13 modification of a case schedule because it is made after the September 7, 2015 deadline for
14 amending pleadings set by the Court in its Scheduling Order. *See* Dkt. No. 51 (Scheduling
15 Order); *Clear-View Techs., Inc. v. Rasnick*, No. 13-CV-02744-BLF, 2014 WL 4370809, at *2
16 (N.D. Cal. Sept. 3, 2014). The good cause standard "primarily considers the diligence of the
17 party seeking the amendment." *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2014
18 WL 6626227, at *1 (N.D. Cal. Nov. 20, 2014) (internal quotation marks omitted) (granting leave
19 to amend answer after pleading amendment deadline where defendant discovered relevant facts
20 during discovery). A party seeking amendment demonstrates good cause by showing that (1) it
21 diligently assisted the Court in creating a workable Rule 16 order, (2) modification of the
22 scheduling order is necessary notwithstanding its diligence "because of the development of
23 matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16
24 scheduling conference," and (3) it was diligent in seeking amendment "once it became apparent
25 that it could not comply with the order." *Clear-View*, 2014 WL 4370809, at *2 (internal
26 quotation marks omitted).

27 The Court should also consider Rule 15(a)(2)'s standard for amendment of pleadings in
28 determining whether to amend the Scheduling Order, as it must in deciding whether to allow

1 Arista’s proposed amendment. Rule 15(a)(2) provides that a “court should freely give leave when
2 justice so requires.” Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) “should be interpreted with extreme
3 liberality.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (internal quotation
4 marks omitted). Indeed, the goal of Rule 15 in particular, and the Federal Rules in general, is to
5 ensure that cases are decided on the merits, not on “mere technicalities.” *See Foman v. Davis*,
6 371 U.S. 178, 181 (1962). The Court considers five factors in determining whether to grant leave
7 to amend: bad faith, undue delay, undue prejudice, futility of amendment, and whether the
8 pleading was previously amended. *Tenerelli v. Lockheed Martin Space Sys. Co.*, No. 15-CV-
9 00012-BLF, 2015 WL 5610011, at *2 (N.D. Cal. Sept. 24, 2015) (citing *In re Western States*
10 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (granting leave to amend
11 to add counterclaims where defendant learned relevant facts during discovery)).

12 **IV. ARGUMENT**

13 The Rule 15 and 16 standards for amendment of pleadings lead to the same result in this
14 case. Arista has diligently investigated the facts underlying its claims, but it was only after the
15 amendment deadline that Arista became aware of certain evidence in support of the antitrust and
16 unfair competition allegations in the proposed counterclaims. The liberal amendment policy of
17 Rule 15 and the goal of ensuring cases are decided on the merits weigh in favor of permitting
18 Arista’s proposed amendment. And Cisco cannot claim any undue prejudice or delay, since
19 amendment will not affect the trial of Cisco’s claims in this case.

20 **A. Arista’s counterclaims are premised on recently revealed information 21 produced by Cisco in discovery.**

22 Arista has good cause for moving for leave to amend outside the pleading amendment
23 window. Arista could not have known at the time of the Rule 16 scheduling conference that
24 documents would be uncovered through discovery that would confirm these counterclaims. *See*
25 *Clear-View*, 2014 WL 4370809, at *2 (granting defendant leave to amend answer after pleading
26 amendment deadline due to change in plaintiff’s claims). Arista diligently pursued an
27 investigation of the facts underlying its counterclaims. Cisco began producing documents in this
28

1 case on July 21, 2015, and in total has thus far produced over 350,000 documents.² Santacana
2 Decl. ¶ 3. Counsel for Arista began reviewing that large volume of information promptly, as well
3 as investigating Cisco’s conduct generally, and first discovered the documents cited in the
4 proposed counterclaims in November, *after* the close of the pleading amendment deadline.
5 *Id.* ¶ 4. Indeed, some of the documents upon which Arista’s proposed counterclaims rely were
6 produced for the first time after that September 7 deadline. *Id.* ¶ 5.

7 Counsel for Arista then promptly consulted with antitrust counsel regarding potential
8 antitrust claims against Cisco and began preparing a counterclaim. *Id.* ¶ 6; *see* Dkt. Nos. 104,
9 105. Arista now seeks leave to file its counterclaims promptly after discovering material
10 information underlying Arista’s counterclaims during its investigation of Cisco’s conduct. Courts
11 in this district have found good cause for extending the pleading amendment deadline in similar
12 circumstances. *See Finjan*, 2014 WL 6626227, at *2 (granting leave to amend answer under Rule
13 16 “good cause” standard due to disclosure of new facts during discovery); *LifeScan Scotland,*
14 *Ltd. v. Shasta Techs., LLC*, No. 11-CV-04494-WHO, 2013 WL 4777179, at *2 (N.D. Cal.
15 Sept. 6, 2013) (granting defendants leave to add counterclaims under Rule 16 “good cause”
16 standard due to disclosure of new facts during discovery, even though defendants had
17 “suspicions” of misconduct).

18 Arista’s request is particularly reasonable here because Arista does not seek a change to
19 the case schedule to accommodate these counterclaims; instead, Arista is amenable to the Court
20 setting its antitrust claims on a separate case schedule and for separate trial so as to allow both
21 parties adequate time to prepare the case. The Ninth Circuit has affirmed a “good cause” grant of
22 leave to amend after the pleading amendment deadline where the moving party’s request “created
23 no meaningful case management issues and did not infringe on the efficient adjudication of the

24
25 ² Many of those same documents had been produced by Cisco to Arista in the parallel ITC
26 investigations, but documents produced in the ITC investigation cannot be used in any other
27 action. Moreover, counsel for Arista did not discover or identify the significance of the
28 documents relied upon here until after their production in this case because the ITC investigations
relate to patent infringement, not copyright, and do not relate to CLI commands. As such, Arista’s
counsel had no cause to find the needles in the haystack (Cisco produced over 180,000 documents
totaling over 2 million pages in the ITC cases) while preparing the ITC defense.

1 litigation.” *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir.
2 2011) (internal quotation marks and alterations omitted).

3 For the same reasons, Arista also satisfies the standard under Rule 15 for leave to amend
4 the pleadings. In *Tenerelli*, for example, this Court granted a defendant leave to add
5 counterclaims after relevant facts underlying the defendant’s counterclaims came to light during
6 discovery. 2015 WL 5610011, at *3. The plaintiff argued that the defendant unduly delayed four
7 months from the discovery of the relevant facts to move for leave to amend. The Court rejected
8 that argument, reasoning that delay alone is an insufficient ground for denial of leave to amend;
9 only delay combined with other factors, such as bad faith or an “inability to sufficiently explain”
10 a delay merit a finding of *undue* delay. *Id.* Because the defendant moved within a reasonable
11 time after discovery of the relevant facts and “sufficiently explained the duration between its
12 learning of the potential counterclaims and its seeking leave to amend,” the defendant’s motion
13 was timely. *Id.* at *4.

14 **B. Cisco will suffer no prejudice—much less undue prejudice—from Arista’s**
15 **amendment.**

16 Arista’s motion causes no prejudice to Cisco. Arista seeks to add its counterclaims in this
17 case because there is some overlap in evidence between its antitrust claims and the claims Cisco
18 asserts in this litigation, achieving judicial efficiency. Arista’s counterclaims will, however,
19 require new discovery into Cisco’s anticompetitive conduct. For that reason, Arista is amenable
20 to trying the counterclaims separately and setting the counterclaims on a separate case schedule
21 with separate discovery limits; that will allow both parties adequate time to investigate Arista’s
22 claims. This obviates any claim by Cisco that adding the counterclaims will cause it any
23 prejudice, much less undue prejudice, since amendment will not affect Cisco’s claims any more
24 than if Arista had filed its counterclaims as a separate action.

25 Indeed, “[n]either delay resulting from the proposed amendment nor the prospect of
26 additional discovery needed by the non-moving party in itself constitutes a sufficient showing of
27 prejudice.” *Tenerelli* 2015 WL 5610011, at *3 (internal quotation marks omitted). For example,
28 in *Tenerelli*, this Court granted leave to amend to add counterclaims based on facts that came to

1 light during discovery, even though the discovery period was ending only eight days later. The
2 Court reasoned that the discovery period could be extended, if necessary, to accommodate the
3 added claims. 2015 WL 5610011, at *3. The Court also noted the judicial inefficiency of
4 requiring the defendant to file its counterclaim as a separate action, resulting in nothing more than
5 relation to the original case. *Id.*

6 Here, Arista would be entitled to the additional discovery in a separate action anyway, and
7 it does not seek to delay the proceedings to pursue it if the Court allows amendment here. Cisco
8 has no claim either of undue prejudice or undue delay, especially because the period for
9 amending the pleadings expired very recently.

10 **V. CONCLUSION**

11 Because Arista recently discovered Cisco's anticompetitive campaign, and because
12 Arista's proposed amendment will cause Cisco no prejudice, Arista has shown good cause for
13 moving for leave to amend its answer to add counterclaims, and granting such leave is in the
14 interests of justice.

15
16 Dated: January 25, 2016

Respectfully submitted,

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20
21 By: /s/ Robert A. Van Nest
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22
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24 ARISTA NETWORKS, INC.