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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ADVANCED INTERNET TECHNOLOGIES, INC.,

Plaintiff,

v.

DELL, INC. and DELL FINANCIAL SERVICES, INC.,

Defendants.

Case No. CV-10-80078 MISC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO HOLD NON-PARTY EXPONENT, INC. IN CONTEMPT OF SUBPOENAS AND TO COMPEL COMPLIANCE

FRCP 45(e)

(Master Case Pending in the Eastern District of North Carolina, Case No. 5:07-CV-426-H)

Date: May 7, 2010
Time: 9:00 a.m.
Dept: Courtroom 10
Judge: Hon. Susan Illston

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Pursuant to Federal Rule of Civil Procedure 45(e), plaintiff Advanced Internet Technologies, Inc. ("AIT" or "Plaintiff") respectfully requests that this Court find non-party Exponent, Inc. ("Exponent") in contempt for failing to comply with two lawfully issued subpoenas, and requests that the Court compel production in compliance with the Subpoena *duces tecum*.

I. INTRODUCTION AND FACTUAL BACKGROUND

The litigation giving rise to this motion is a class action lawsuit pending in the United States District Court for the Eastern District of North Carolina, *Advanced Internet Technologies, Inc. v. Dell, Inc. and Dell Financial Services, Inc.*, 5:07-CV-426-H filed on November 11, 2007. The action's allegation in chief is that certain Dell-brand computers sold and leased to AIT by Dell, Inc. ("Dell") and Dell Financial Services, LLP[1] ("DFS") suffered from defective capacitors installed on the motherboards of the computers.

Documents produced by Dell in this litigation indicate that Exponent was retained by Dell to study the problem of the defective capacitors in Dell-brand computers. A copy of one such document is attached to the Declaration of Darren T. Kaplan ("Kaplan Decl.") as Exhibit A.

On January 11, 2010, pursuant to Federal Rule of Civil Procedure 45, Plaintiff properly served a subpoena *duces tecum* on Exponent ("Subpoena #1"). A copy of Subpoena #1 is attached to the Kaplan Decl. as Exhibit B. An Affidavit of Service for Subpoenas is attached to the Kaplan Decl. as Exhibit C.

Subpoena #1 requests that Exponent produce an extremely limited universe of documents:

> **Request No. 1**
>
> All documents and data relating to work performed on behalf of Dell Inc. relating to capacitors fabricated between January 1, 2003 and December 31, 2005 and installed on Dell motherboards.
>
> **Request No. 2**
>
> All Documents and data relating to work performed on behalf of Dell Inc. relating to motherboard failures in Dell OptiPlex

[1] Dell Financial Services LLP was misidentified in the original caption.

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computers manufactured between January 1, 2003 and December 31, 2005.

Pursuant to Federal Rule of Civil Procedure 45, Plaintiff properly served a subpoena *ad testificandum* on Exponent on January 11, 2010 ("Subpoena #2"). A copy of Subpoena #2 is attached to the Kaplan Decl. as Exhibit D. An Affidavit of Service for Subpoenas is attached to the Kaplan Decl. as Exhibit C.

Subpoena #2 sought testimony from Exponent with regard to the following extremely limited matters:

Matter No. 1

Work performed on behalf of Dell Inc. relating to capacitors fabricated between January 1, 2003 and December 31, 2005 and installed on Dell motherboards.

Matter No. 2

Work performed on behalf of Dell Inc. relating to motherboard failures in Dell OptiPlex computers manufactured between January 1, 2003 and December 31, 2005.

On January 15, 2010, Exponent's counsel responded to Subpoena #1 and Subpoena #2 with separate objections in writing, but did not indicate that Exponent would not comply with either subpoena. *See* Kaplan Decl., Exs. E and F. Instead, Exponent objected to the subpoena *duces tecum* on the grounds of: (1) lack of reasonable time for compliance; (2) undue burden; (3) a request that Exponent be compensated for the expense incurred in responding to the subpoena; and (4) that the materials sought were allegedly privileged as "attorney-work product" and were subject to a confidentiality agreement. *See* Kaplan Decl., Ex. E.

Exponent raised similar if not identical objections to the subpoena *ad testificandum*¸ and, in addition, claimed that the "most knowledgeable employee" was "on maternity leave." *See* Kaplan Decl., Ex. F.

In response, Plaintiff's counsel had several telephone conversations with Exponent's counsel and it was agreed that Exponent would produce documents in response to the subpoena and would attempt to identify another employee who could be produced for deposition in the place

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and stead of the employee who was on maternity leave. Despite this agreement, Exponent has failed to produce any documents in response to the subpoena, or to arrange for deposition of an employee. An e-mail chain reflecting these facts is attached to the Kaplan Decl. as Exhibit G.

To date, Exponent has never sought a protective order and has not produced so much as a single document in response to the subpoenas properly served upon it. Accordingly, Plaintiff now seeks an order holding Exponent in contempt of both subpoenas and compelling Exponent to comply.

II. ARGUMENT

A. Plaintiff Properly Served Valid Subpoenas On Exponent

Rule 45 of the Federal Rules of Civil Procedure provides that an attorney, as an officer of the court, may issue a subpoena on behalf of a court in which the attorney is authorized to practice, or for a court in a district in which a deposition is to be taken or document production is to be made. *See* Fed. R. Civ. P. 45(a)(3). Valid attorney-issued subpoenas under Rule 45(a)(3) operate as enforceable mandates of the district in which they were issued. *VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615 (N.D. Cal. 2002). The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. Fed. R. Civ. P. 45(e); *Todd v. Lamarque*, No. C 03-3995 SBA, 2008 WL 2095513, at *3 (N.D.Cal. May 16, 2008).

Service of the subpoenas was properly made and fees for one day's attendance at deposition were tendered by personal delivery at the time of service. *See* Affidavit of Service for Subpoenas attached to Kaplan Decl. as Exhibit C. Exponent has never contended that service of the subpoenas was somehow improper despite having raised other non-substantive objections to the subpoenas. *See, e.g., McCoy v. Sw. Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.Cal. 2002) ("We believe that Rule 45(c)(2)(B) does require the recipient of a subpoena to raise all objections at once, rather than in staggered batches, so that discovery does not become a 'game.'" (*quoting In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998))). Objections to improper service of subpoena are waived if not properly and timely asserted. *Id.; see also Creative Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570 (D.N.M. 1998).

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B. This Court Has Broad Discretion To Enforce the Subpoenas

Exponent has failed to respond and/or file a Motion to Quash Plaintiff's properly issued Subpoenas. The Federal Rules of Civil Procedure give district courts broad discretion to manage the manner in which discovery proceeds. *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai) Co., Ltd.*, No. C 07-5248 JW (PVT), 2008 WL 183520, at *1 (N.D. Cal. Jan. 18, 2008). The failure to obey a subpoena is subject to civil contempt if the subpoena has been served and the failure to obey is not adequately explained. *See* Fed. R. Civ. P. 45(e). Even though subpoenas are issued by attorneys, they are issued on behalf of the Court and should be treated as orders of the Court. *Bademyan v. Receivable Mgmt. Servs. Corp.*, No. CV 08-00519 MMM (RZx), 2009 WL 605789, at *1 (C.D. Cal. Mar. 9, 2009) (citing *Higginbotham v. KCS Int'l, Inc.*, 202 F.R.D. 444, 455 (D. Md. 2001)) ("Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act of defiance of a court order and exposes the defiant witness to contempt sanctions") (citing Advisory Comm. Notes to Rule 45(a)). Therefore, Plaintiff asks this Court to find Exponent in contempt for its failure to comply with its subpoena obligations.

A motion to compel is entrusted to the sound discretion of the district court, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) ("[b]road discretion is vested in the trial court to permit or deny discovery"); *Cal. Dept. of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1031 (9th Cir. 2008) ("discovery is ordinarily reviewed for abuse of discretion"). Further, a district court is considered to have abused its discretion only if its "decision is based on an erroneous conclusion of law or where the record contains no evidence on which [it] rationally could have based that decision." *Dart Indus. Co., Inc. v. Westwood Chemical Co., Inc.*, 649 F.2d 646, 648 (9th Cir. 1980). Because Exponent has failed to respond to lawful subpoenas and has likewise failed to seek a protective order, this court may properly exercise its discretion to both hold Exponent in contempt and compel Exponent to comply.

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C. The Requested Documents Are Relevant To Plaintiff's Claims And Dell's Defenses

The Federal Rules of Civil Procedure strongly favor full discovery whenever possible. *See Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir. 1994). Rule 45 of the Federal Rules of Civil Procedure provides for the service of a subpoena to produce and "permit inspection, copying, testing, or sampling" of "designated documents, electronically stored information, or tangible things in that person's possession, custody, or control." Fed. R. Civ. P. 45(a)(1). "Federal Rule of Civil Procedure 26(b)(1) authorizes discovery regarding any matter, not privileged, that is relevant to the claim or defense of a party." *Ramos v. U.S. Bank Nat'l Ass'n*, No. CV 08-1150-PK, 2009 WL 3854108, at *2 (D. Or. Nov. 17, 2009). Moreover, Rule 26(b)(1) "is to be construed broadly, and encompasses any matter that bears on, or that reasonably could lead to other matters that would bear on, any issue that is or may be in the case." *Id*. (quoting *Oppenheimer Fund., Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also Barta v. City and County of Honolulu*, 169 F.R.D. 132, 134 (D. Haw. 1996) ("[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…which appears reasonably calculated to lead to the discovery of admissible evidence").

In determining whether information sought is relevant, the court should consider the following:

> [A] variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

Houdini, Inc. v. Gabriel, No. CV 04-09574-GHK (SSx), 2005 WL 6070171, at *2 (C.D. Cal. Oct. 21, 2005) (quoting *Commentary to Rule Changes, Court Rules*, 192 F.R.D. 340, 389 (2000)). In addition, "relevant information need not be admissible at the trial if the discovery appears

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reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995).

In this case, AIT contends that certain Dell-brand computers sold and leased to AIT by Dell and DFS suffered from defective capacitors installed on the motherboards of the computers, which caused the computers to overheat and fail. Documents produced by Dell in this litigation indicate that Exponent was retained by Dell to study the problem of the defective capacitors in Dell-brand computers. *See, e.g.*, Kaplan Decl., Ex. A (DELL0075150) ("In the last week of July '05, Dell contracted a third party lab (Exponent) to perform a rigorous failure analysis of the capacitors…") (parenthetical in original). According to Dell, "the ensuing investigation through August and September generated findings which dramatically changed the original assumptions used to project failure rates on the affected Optiplex motherboards." *Id.* Therefore, discovery relating to the investigation conducted by Exponent into the defective capacitors in Dell-brand computers and the findings which, from Dell's own documents, "dramatically changed the original assumptions" about failure rates, are clearly relevant to AIT's claims, are relevant to countering Dell's defenses, and could lead to the discovery of other admissible evidence. The information in Exponent's possession is relevant to prove: (1) when Dell learned of the defective capacitors; (2) whether the defective capacitors in fact caused the motherboard failures on AIT's Dell-brand computers; (3) how wide-spread the capacitor problems were; (4) what steps Dell took to remedy the failures.

While Plaintiff has inarguably fulfilled its burden of demonstrating the documents it requested from Exponent are relevant, (s*ee, e.g.*, *Hill v. Eddie Bauer*, 242 F.R.D. 556, 561 (C.D. Cal. 2007) (documents pertaining to plaintiff's claims and defendant's defenses are relevant), even if relevance is in doubt, the district court is required to construe the question of relevance liberally. *See Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (the question of relevancy should be construed "liberally and with common sense" and discovery should be allowed unless the information sought has no conceivable bearing on the case). Furthermore, a district court "whose only connection with a case is supervision of discovery ancillary to an action in another district should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder." *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1211-12 (Fed. Cir. 1987); *accord*

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Compaq Computer Corp. v. Packard Bell Elecs., Inc., 163 F.R.D. 329, 335 (N.D. Cal.1995). Where Plaintiff has met his burden, by demonstrating the documents in Exponent's possession are relevant, this Court must compel Exponent to produce said documents.

D. The Period Of Time For Producing Documents and To Arrange For The Deposition Of An Employee Was Not Too Short For Compliance

Although Federal Rule of Civil Procedure 45 does not set forth a specific time period for compliance with a subpoena, a subpoena may be quashed if it fails to allow reasonable time for compliance. Fed. R. Civ. P. 45(c)(3)(A)(i). Rule 45(c)(3) required a court to quash a subpoena that does not provide reasonable time for the producing party to comply, but only after the producing party moves to quash. *See Shi v. Central Arizona College*, No. 08-80131-RMW (HRL), 2008 WL 4001795, at *1 (N.D. Cal. 2008) (court granted motion to compel because the producing party did not move to quash the subpoena on the grounds that it did not provide reasonable time to comply). It is in fact the party that moves to quash a subpoena that has the burden of persuasion under Rule 45(c)(3). *See Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005); *see also CSE Ins. Group v. Electrolux, Inc.*, No. CIV 04-2936 PHX RCB, 2007 WL 1097876, at *1 (D. Ariz. Apr. 6, 2007) (witness did not file a motion to quash or modify the subpoena, and the court ordered him to testify).

Here, Plaintiff allowed eight (8) calendar days from the date of the issuance of the subpoena for Exponent to produce responsive documents, and fourteen (14) calendar days to arrange for the deposition of an employee who was knowledgeable about Exponent's study of the defective capacitors in Dell-brand computers which is a reasonable time for production of such a limited universe of documents and deposition of an employee on such limited topics. In any event, Plaintiff's counsel met and conferred with counsel for Exponent and expressed a willingness to work with Exponent to find an alternate date by which Exponent could gather and provide responsive documents. During these several telephone conversations, counsel for Exponent told Plaintiff's counsel that it would produce responsive documents as soon as possible, and that it would identify another employee who could be produced for deposition in the place and stead of the employee who was on maternity leave. *See* Kaplan Decl., Ex. G.

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Despite this agreement, Exponent has failed to produce any documents in response to Subpoena # 1 or to arrange for the deposition of an employee who can testify to the matters identified in Subpoena # 2. In fact, Plaintiff's counsel was kind enough to wait until March 13, 2010, *i.e.* more than 50 days *after* the date called for in the Subpoena *duces tecum*, until seeking to enforce the subpoena.

E. Plaintiff's Requests Do Not Impose An Undue Burden

Rule 26(b)(2)(C) states that discovery shall be limited if the court determines that "the burden or expense of the proposed discovery outweigh its likely benefits, taking into account the needs of the case [and other factors]." *Columbia Pictures Indus., Inc. v. Bunnell,* No. CV 06-1093 FMC(JCx), 2007 WL 4916964, at *5 (C.D. Cal. May 7, 2007). Yet, courts in this Circuit have held that "boilerplate objections such as 'overly burdensome and harassing' are improper – especially when a party fails to submit any evidentiary declarations supporting such objections." *Id*. (quoting *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); *see also Sun Pacific Mktg. Co-op, Inc. v. DiMare Fresh, Inc.*, 2009 WL 4673900, at *12 (E.D. Cal. Dec. 4, 2009) (defendant failed to demonstrate that there was merit to its general and boilerplate objections, and therefore such objections were insufficient to meet defendant's burden). "[T]he "[f]ailure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." *CSE Ins. Group*, 2007 WL 1097876, at *1 (court granted motion to compel when fact witness failed to elaborate on circumstances from which the Court may find that his compliance with a timely served subpoena would subject him to undue burden). Exponent has not offered any explanation as to why it would be unable to produce the documents sought in short order. *See San Francisco Bay Area Rapid Transit Dist. v. Spencer*, No. C 04-04632 SI, 2006 WL 2734284, at *1 (N.D. Cal. Sept. 25, 2006) (court held that the City failed to demonstrate that it had been given insufficient time to comply with the subpoenas).

Exponent has failed similarly to explain why producing a witness for deposition will impose an undue burden. Plaintiff's counsel gave Exponent's counsel reasonable time to identify another employee, and Plaintiff's counsel noticed the deposition to take place in San Francisco,

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CA, within 100 miles of Exponent's principal place of business. See Fed. R. Civ. P. 45(c)(3)(A)(ii) ("the court by which a subpoena was issues shall squash or modify the subpoena is it requires a person who is not a party or an officer to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person").

Exponent has also failed to elaborate on why producing documents imposes an undue burden. "Whether a subpoena imposes an undue burden depends on the relevance of the information requested, the need for the production, the breadth, particularity and time period of the request, and the burden imposed." *Garner Constr., Inc. v. Int'l Union of Operating Eng'rs*, No. C07-775MJP, 2007 WL 4287292, at *2 (W.D. Wash. Dec. 4, 2007) (citing 9 James Wm. Moore, et al., Moore's Federal Practice § 45.32 (3d ed. 2006)). As shown above, the information requested is extremely relevant and necessary to AIT's claims and AIT's rebuttal of Dell's defenses, the only two requests are specific and particular, and the requests cover a finite two-year time period. Exponent has offered no reasoning as to why copying existing documents to a CD-ROM and mailing the CD-ROM to Plaintiff's counsel imposes an undue burden.

F. Plaintiff Should Not Have To Compensate Exponent For The Expenses Incurred

Courts should also consider whether a subpoena is directed towards a non-party witness, and if so, "[a] non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court." *Id.* (quoting Fed. R. Civ. P. 45, Advisory Committee Note of 1992, subdivision (c)). Based on documents produced by Dell, Plaintiff understands that the information requested is contained in an electronic database and Exponent, by using search terms, could obtain responsive documents with a few keystrokes. In addition, Plaintiff believes there are limited documents responsive to Plaintiff's document requests regarding work performed by Exponent on behalf of Dell relating to the faulty capacitors and motherboard failures. Exponent has not refuted Plaintiff's presumption that the production will not cause any significant expense. Plaintiff has advised Exponent that if this presumption is incorrect, Plaintiff will work with Exponent to devise a means for obtaining the requested information in the most expeditious and cost-effective method possible. However, to date, Exponent has not only

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refused to explain why producing the document is onerous, it has also simply refused to comply with Subpoena #1 in its entirety. As a result, this Court must order Exponent to comply with Plaintiff's subpoena *duces tecum*.

Similarly, Exponent has not provided any information concerning any supposed significant expense that it might incur in responding to Subpoena #2. Under Fed. R. Civ. P. 45(c)(3)(B)(iii), this Court can modify or quash the subpoena if it requires a person who is not a party to incur substantial expense to travel more than 100 miles. In this case, Plaintiff provided Exponent with a check in the amount of $52.37, which is the proper witness fee according to Fed. R. Civ. P. 45(b). *See* Kaplan Decl. Ex. C. However, to date, Exponent has refused to comply with the subpoena, and has failed to identify another employee who could be produced for deposition in the place and stead of the employee who was on maternity leave. As a result, this Court must order Exponent to comply with Plaintiff's subpoena *ad testificandum*.

G. The Material Sought Is Not Protected From Discovery by the Attorney-Work Product Doctrine, and if It Is, Plaintiff Has Agreed that Any Documents Produced by Exponent May Be Subject to a Protective Order

Exponent objected to Subpoena #1 on the grounds that the materials sought are protected from discovery by the attorney-work product doctrine, that the work that is the subject of Subpoena was performed pursuant to a confidentiality agreement and with respect to pending or threatened litigation. *See* Kaplan Decl. Ex. E. Similarly, Exponent objected to Subpoena #2 on the grounds that the testimony sought pertains to work performed pursuant to an agreement to maintain confidentiality and concerns matters that were the subject of pending or anticipated litigation. *See* Kaplan Decl. Ex. F. To qualify for protection against discovery under Rule 26(b)(3), documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative. *San Francisco Bay*, 2006 WL 2734284, at *2 (quoting Fed. R. Civ. P. 26(b)(3)). Thus, this Court has held that the rule "limits its protection to one who is a party (or a party's representative) to the litigation in which the discovery is sought." *San Francisco Bay*, 2006 WL 2734284, at *2 (quoting *In re Cal. Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989). Exponent is neither a party nor a party's representative in the present litigation in which the

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discovery is sought, and therefore the requested documents and testimony are not protected by the work product doctrine.

If this Court determines that the documents and testimony are indeed subject to work product protection, then "the party seeking discovery may compel such discovery upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable to obtain the substantial equivalent of the materials by other means." *Garcia v. City of El Centro*, 214 F.R.D. 587, 595 (S.D. Cal. 2003). Plaintiff has a substantial need for the documents and testimony requested from Exponent because those documents and testimony may provide the only means by which to prove when Dell and DFS learned that computers sold and leased to AIT by Dell and DFS suffered from defective capacitors installed on the motherboards of the computers. In addition, the documents and testimony may be crucial to countering Dell's defenses that the defective capacitors were not to blame for the almost 100% failure rate AIT's Dell-brand computers. Dell retained Exponent to study the exact problem experienced by AIT that is at the heart of this litigation. The documents and testimony AIT requests could not be more relevant.

Setting aside the issue of whether the requested information is protected under Fed. R. Civ. P. 26(b)(3), from the beginning, Plaintiff's counsel agreed that Exponent's production and testimony concerning this case may contain proprietary information that may be appropriate for a protective order. Plaintiff's counsel advised Exponent that Plaintiff and Dell have already stipulated to a protective order in the underlying action that governs documents produced by a nonparty. *See* Kaplan Decl. Ex. H, ¶¶ 2-3. Further, to the extent that Exponent is unsatisfied with the protective order in place in the underlying litigation, Plaintiff's counsel advised Exponent that Plaintiff was willing to enter into another protective order issued by this Court under Fed. R. Civ. P. 26(c) that more specifically addresses Exponent's concerns. Plaintiff's counsel has been waiting for a response from Exponent's counsel, and to date, Plaintiff's counsel has received nothing.

In any event, the protective order in place in the underlying litigation entered in the Eastern District of North Carolina on February 4, 2009 – is adequate to address Exponent's concerns

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regarding any alleged confidential or highly confidential information. *See In re McKesson Gov't'al Entities Average Wholesale Price Litig.*, No. C-09-80170 MISC MHP (JCS), 2009 WL 3706898, at *8 (N.D. Cal. Nov. 4, 2009) (finding that the protective order in place in the underlying litigation sufficiently protects the third-party's interests, and the third party may designate documents as "confidential" or "highly confidential" accordingly). Of course, Plaintiff does not intend to use Exponent's documents in any forum except the underlying litigation. Finally, as Dell has already produced certain information regarding its communications with Exponent, Exponent should have no objection to producing the requested documents subject to the protective order already in place.

H. Exponent Does Not Have An Adequate Excuse For Its Failure To Comply With The Subpoenas, And This Court Should Issue An Order For Contempt

Courts have inherent power to enforce their orders through civil contempt. *See Spallone v. U.S.*, 493 U.S. 265, 276 (1990) (citing *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966)). Absent an improperly issued subpoena or an "adequate excuse" by the non-party, failure to comply with a subpoena made under Rule 45 may be deemed in contempt of the court from which the subpoena issued. *See* Fed. R. Civ. P. 45(e); *see also Fremont Energy Corp. v. Seattle Post Intelligencer*, 688 F.2d 1285, 1286 (9th Cir. 1982). In addition, according to the Federal Rules of Civil Procedure, a written objection does not excuse compliance with a deposition subpoena. *In re Coan*, No. C 06-80350 MISC SI, 2007 WL 128010, at * 2 (N.D. Cal. Jan. 12, 2007) (citing Fed. R. Civ. P. 45(c)(2)(B)). Objections to a deposition subpoena must be voiced either by moving to quash or modify the subpoena pursuant to Fed. R. Civ. P. 45(c)(3)(A), or by moving for a protective order pursuant to Fed. R. Civ. P. 26(c). *Id*. In response to Plaintiff's subpoenas Exponent has done neither. Indeed, "the only sanctions available for such a failure to comply with a subpoena are a contempt order, or attorneys' fees and costs associated with bringing a motion to compel compliance." *Id*; *see also Bademyan*, 2009 WL 605789, at *1. Accordingly, because Exponent has failed to proffer a valid excuse for its failure to comply with the Subpoena, this Court should issue an order for contempt.

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III. CONCLUSION

As a result of the foregoing reasons and because Exponent will continue to deny Plaintiff's requests for production and request for deposition, Plaintiff respectfully requests that this Court order Exponent in contempt of this Court for failing to respond to the Subpoenas, and an order enforcing the Subpoenas and compelling the production of the documents requested in Subpoena #1, and the production of a witness for testimony requested in Subpoena #2.

Respectfully submitted this 1st day of April 2010.

SCHUBERT JONCKHEER & KOLBE LLP

By: /s/ Dustin L. Schubert

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