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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

18 ADVANCED INTERNET TECHNOLOGIES,  
19 INC.,  
20  
21 Plaintiff,  
22  
23 v.  
24  
25 DELL, INC. and DELL FINANCIAL  
26 SERVICES, INC.,  
27  
28 Defendants.

**Case No. CV-10-80078 MISC**  
**DECLARATION OF DARREN T. KAPLAN**  
**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

DECLARATION OF DARREN T. KAPLAN IN SUPPORT OF MOTION TO HOLD NON-PARTY EXPONENT,  
INC. IN CONTEMPT OF SUBPOENAS AND TO COMPEL COMPLIANCE (Fed. R. Civ. P. 45(e))

1 I, DARREN T. KAPLAN declare as follows:

2 1. I am over the age of 18 and a resident of New York. I make this declaration of my  
3 personal and first-hand knowledge, and if called and sworn as a witness, I would and could testify  
4 competently thereto.

5 2. I am a partner with the law firm Chitwood Harley Harnes LLP, and I am admitted  
6 to practice law in the states of New York, Connecticut and Georgia.

7 3. I represent Plaintiff Advanced Internet Technologies, Inc. (“AIT”), and I have been  
8 admitted *pro hac vice* in master case pending in the Eastern District of North Carolina.

9 4. I respectfully submit this Declaration in support of Plaintiff’s Motion to Hold Non-  
10 Party Exponent Inc. (“Exponent”) in Contempt of Subpoenas validly served upon it (“Plaintiff’s  
11 Motion for Contempt”), filed concurrently herewith.

12 5. The action’s allegation in chief is that certain Dell-brand computers sold and leased  
13 to AIT by Dell, Inc. (“Dell”) and Dell Financial Services, LLP<sup>1</sup> (“DFS”) suffered from defective  
14 capacitors installed on the motherboards of the computers.

15 6. My colleagues and I reviewed documents produced by Dell in connection with this  
16 action, and certain of the documents indicate that Exponent was retained by Dell to study the  
17 problem of the defective capacitors in Dell-brand computers. A copy of one such document is  
18 attached hereto as Exhibit A.

19 7. By order of the United States District Court for the Eastern District of North  
20 Carolina, the date for discovery to be completed in this action was February 5, 2010.

21 8. On January 11, 2010, pursuant to Federal Rule of Civil Procedure 45, AIT properly  
22 served a subpoena *duces tecum* on Exponent (“Subpoena #1”). See Exhibit B (Subpoena #1), and  
23 Exhibit C (Affidavit of Service for Subpoenas), attached hereto.

24 9. On January 11, 2010, pursuant to Federal Rule of Civil Procedure 45, AIT properly  
25 served a subpoena *ad testificandum* on Exponent (“Subpoena #2”). See Exhibit D (Subpoena #2),  
26 and Exhibit C (Affidavit of Service for Subpoenas), attached hereto.

27 \_\_\_\_\_  
28 <sup>1</sup> Dell Financial Services LLP was misidentified in the original caption.

1           10.     On January 15, 2010, counsel for Exponent responded to Subpoena #1 and  
2 Subpoena #2 with separate objections in writing. *See* Exhibits E and F, attached hereto.

3           11.     I spoke by telephone with counsel for Exponent several times after receiving the  
4 objections. Without conceding my agreement to the objection that the Subpoenas did not permit  
5 adequate time for compliance, I offered to work with counsel for Exponent to find an alternate date  
6 by which Exponent could gather and provide responsive documents. During these several  
7 telephone conversations, counsel for Exponent told me that it would produce responsive  
8 documents as soon as possible, and that it would identify another employee who could be produced  
9 for deposition in the place and stead of the employee who was on maternity leave.

10          12.     Despite this agreement, Exponent has failed to produce any documents in response  
11 to Subpoena #1, or to arrange for deposition of an employee in response to Subpoena #2. An email  
12 chain reflecting these facts is attached hereto as Exhibit G.

13          13.     Without conceding my agreement to the privilege or protection, I addressed another  
14 of Exponent's objections to both subpoenas, that the materials were privileged as "attorney-work  
15 product" and were subject to a confidentiality agreement, by informing counsel for Exponent that  
16 AIT and Dell have already stipulated to a protective order in the underlying action that governs  
17 documents produced by a nonparty. The stipulated protective order in the underlying action is  
18 attached hereto as Exhibit H.

19          14.     Further, I informed counsel for Exponent that to the extent Exponent is unsatisfied  
20 with the protective order in place in the underlying litigation, AIT was willing to enter into another  
21 protective order that more specifically addresses Exponent's concerns. I also informed counsel for  
22 Exponent that AIT does not intend to use Exponent's documents in any forum except the  
23 underlying litigation.


24          15.     Exponent has never sought a protective order, has not produced a single document,  
25 and has not produced a deponent, in response to the Subpoenas.

26          16.     To date, Exponent has not complied with AIT's Subpoenas. Absent an improperly  
27 issued subpoena or an "adequate excuse" by the non-party, failure to comply with a  
28

1 subpoena made under Rule 45 may be deemed in contempt of the court from which the subpoena  
2 was issued under Fed. R. Div. P. 45(e).

3 WHEREFORE, I respectfully request that the Motion to Hold Non-Party Exponent In  
4 Contempt of Subpoenas be granted in all respects.

5 I declare under penalty of perjury that the foregoing is true and correct. Executed this  
6 30th day of March, 2010, in Great Neck, New York.

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10 Darren T. Kaplan