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James J. Ficenec (SBN - 152172) 1 SELLAR HAZARD MANNING FICENEC & LAI 2 A Professional Law Corporation 1800 Sutter Street, Suite 460 3 Concord, CA 94520 Telephone: (925) 938-1430 (925) 256-7508 4 Facsimile: Email: ificenec@sellarlaw.com 5 Attorneys for: 6 Non-Party Exponent, Inc. 7 UNITED STATES DISTRICT COURT 8 NORTHERN DISTRICT OF CALIFORNIA 9 10 Case No.: CV 10 80078MISC ADVANCED INTERNET TECHNOLOGIES, 11 (Action pending in Eastern District of North INC., Carolina) 12 **EXPONENT, INC.'S RESPONSE TO** 13 Plaintiff, MOTION FOR CONTEMPT 14 v. Date: May 7, 2010 15 DELL, INC, and DELL FINANCIAL SERVICES, Time: INC. 16 17 Defendants. 18 19 20 I. INTRODUCTION 21 Non-party Exponent, Inc. ("Exponent") does not generally dispute its obligation to produce 22 documents or a witness in response to the subpoenas issued by counsel for Advanced Internet 23 Technologies, Inc. ("AIT"). While it was not possible for Exponent to comply with the very short time frame imposed by AIT's subpoenas, counsel for Exponent certainly could have been more 24 25 diligent in identifying the responsive materials, producing them to AIT, and conferring with AIT's 26 counsel to better define the scope of testimony sought from Exponent. 27 28 - 1 -EXPONENT, INC.'S RESPONSE TO MOTION FOR CONTEMPT

Case No. 5:07-CV-426-H

II. FACTS

Exponent is a science and engineering consulting firm with offices across the United States and in Europe and China. Declaration of James J. Ficenec in Support of Exponent's Response to Motion for Contempt ("Ficenec Decl."), ¶ 3. Exponent often provides services as an expert witness for litigation or as a consulting (non-testifying) expert during or in anticipation of litigation. (Ficenec Decl., ¶ 3. Exponent also provides services unrelated to litigation. Ficenec Decl., ¶ 3.

On January 11, 2010, AIT's counsel issued two subpoenas to Exponent and delivered them to Exponent's receptionist that day. One subpoena sought documents to be produced within a week, the other sought a deposition two weeks later. See Exhibits B and D to the Declaration of Darren Kaplan.

The first information received from Exponent was that the Exponent employee working on the Dell capacitor issue had just left on maternity leave. In light of the short deadlines sought to be imposed by the subpoenas, Exponent served its objections to preserve its client's right to protect its work product and to advise AIT's counsel that Exponent's witness was on maternity leave. See Exhibits E and F to the Declaration of Darren Kaplan.

After serving Exponent's objections, Exponent's counsel began working with Exponent to determine which projects might be responsive to AIT's document subpoena. Further, since Exponent is not a party to this litigation, it was not aware whether Dell would contend that Exponent's work was protected from discovery by the attorney work product doctrine. After reviewing files and speaking with various Exponent personnel, Exponent identified the appropriate project files and Exponent's counsel provided the files to Dell's counsel to review for any potential work product objection. Dell's counsel has not identified any documents reviewed so far fall within the work product doctrine and, concurrently with this response, Exponent is producing those records. Ficenec Decl., ¶ 5.

Exponent is aware of documents relating to Exponent's inspections of facilities of certain Dell vendors. Exponent believes that, as a condition of access to those facilities, Exponent signed nondisclosure agreements with the operators of those facilities. Ficenec Decl., ¶ 6.

¹ Exponent is <u>not</u> intending to imply that Dell's counsel is responsible for any delay in Exponent's response.

Once AIT's counsel has reviewed the records produced by Exponent, Exponent's counsel will work with AIT's counsel to ensure that an appropriate witness is produced for deposition if necessary. Ficenec Decl., ¶ 7.

III. DISCUSSION

Although Exponent does not agree that AIT's subpoenas were properly served, Exponent is willing to provide documents (except those protected from discovery) and provide a witness for deposition. The Federal Rules of Civil Procedure require personal service of subpoenas. Fed. R. Civ. Pro. 45(b)(1); FTC v. Compagnie De Sain-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1312-1313 (DC Cir. 1980). Substituted service is not permitted. Doe v. Hersemann, 155 FRD 630, 631 (ND Ind. 1994).

Also, as a non-party, Exponent is not required to incur the expense of a motion to quash in response to a subpoena. A non-party may, as Exponent did here, serve "a written objection to inspecting, copying, testing, or sampling any or all of the materials." Fed. R. Civ. Pro. 45(c)(2)(B). The case cited by AIT, *Shi v. Central Arizona College*, 2008 U.S. Dist. LEXIS 79084 (N.D. Cal. Aug. 27, 2008) does not stand for the proposition that a non-party may not protect itself by serving written objection. The *Shi* case did not involve the service of an objection and therefore cannot be read to abrogate Rule 45(c)(2)(B).

With respect to the work product doctrine, the nature of Exponent's work frequently involves work at the request of a party in anticipation of litigation. If the work product doctrine could be circumvented simply by subpoenaing a party's consultants, the doctrine would not provide much protection. Ultimately, Exponent must rely on its clients to advise Exponent as to whether work was performed in anticipation of litigation. In this case, Dell has advised Exponent that the documents located to date were not so protected and, therefore, Exponent has now produced the documents.

The outstanding issue is the existence of documents that Exponent may have obtained from third- parties pursuant to a non-disclosure agreement. Exponent has not located any case law discussing this issue and the parties from whom the information was obtained do not have notice of

this subpoena. Exponent requests that, at minimum, this court adopt the terms of the stipulated protective order entered in the underlying case to protect such information.

IV. **CONCLUSION**

DATED: April 16, 2010

Exponent is willing to produce documents in response to AIT's subpoena and produce a witness if AIT deems it necessary. Exponent could have responded more expeditiously, although certainly not within the very short time frame contemplated by AIT's subpoenas. Exponent anticipates that these issues will be resolved prior to the hearing date for AIT's motion, but asks that the Court use the opportunity presented by this motion enter an order adopting the stipulated protective order entered by the court in the Eastern District of North Carolina as expressly applicable to information produced by Exponent in response to AIT's subpoenas.

SELLAR HAZARD MANNING FICENEC & LAI

/s/ James J. Ficenec

JAMES J. FICENEC

Exponent, Inc.

Attorney For Non-Party

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