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7 **Attorneys for:**
 8 Non-Party Exponent, Inc.

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

11 ADVANCED INTERNET TECHNOLOGIES,
 12 INC.,
 13 Plaintiff,
 14 v.
 15 DELL, INC, and DELL FINANCIAL SERVICES,
 16 INC.
 17 Defendants.

Case No.: CV 10 80078MISC
 (Action pending in Eastern District of North
 Carolina)

**EXPONENT, INC.'S RESPONSE TO
 MOTION FOR CONTEMPT**

Date: May 7, 2010
Time:

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 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
 24 time frame imposed by AIT's subpoenas, counsel for Exponent certainly could have been more
 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.

1 **II. FACTS**

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

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

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

15 After serving Exponent's objections, Exponent's counsel began working with Exponent to
16 determine which projects might be responsive to AIT's document subpoena. Further, since Exponent
17 is not a party to this litigation, it was not aware whether Dell would contend that Exponent's work was
18 protected from discovery by the attorney work product doctrine. After reviewing files and speaking
19 with various Exponent personnel, Exponent identified the appropriate project files and Exponent's
20 counsel provided the files to Dell's counsel to review for any potential work product objection.¹ Dell's
21 counsel has not identified any documents reviewed so far fall within the work product doctrine and,
22 concurrently with this response, Exponent is producing those records. Ficenech Decl., ¶ 5.

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

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28 ¹ Exponent is not intending to imply that Dell's counsel is responsible for any delay in Exponent's response.

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

3 **IV. CONCLUSION**

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

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13 DATED: April 16, 2010

14 SELLAR HAZARD MANNING FICENEC & LAI

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16
17 /s/ James J. Ficene
18 JAMES J. FICENEC
19 Attorney For Non-Party
20 Exponent, Inc.
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