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11 Attorneys for Defendant and Counterclaim Plaintiff
Apple Inc.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 ELAN MICROELECTRONICS
CORPORATION,
16
17 Plaintiff and Counterclaim
Defendant,

18 v.

19 APPLE INC.,
20 Defendant and Counterclaim
21 Plaintiff.
22

Case No. C-09-01531 RS (PVT)

**APPLE INC.'S NOTICE OF MOTION
AND MOTION TO COMPEL JAMES
EAKIN TO PRODUCE DOCUMENTS
PURSUANT TO SUBPOENA DUCES
TECUM**

JURY TRIAL DEMANDED

DATE: August 24, 2010
TIME: 10:00 a.m.
JUDGE: Patricia V. Trumbull
CTRM: 5, 4th Floor

1 2010, Apple served a subpoena on Mr. Eakin requesting documents related to prosecution of the
2 '352 patent. *See* Exh. B [May 5, 2010 Subpoena to The Law Offices of James E. Eakin].
3 Apple's subpoena complied with all of the requirements of Federal Rule 45, and Mr. Eakin
4 personally received and signed for the subpoena. *See* Exh. C [May 13, 2010 Proof of Service].
5 The subpoena requested production of documents by May 20, 2010, but that that date came and
6 went without any production of documents and without any objections to the subpoena by Mr.
7 Eakin. Greenblatt Decl. at ¶ 7.

8 After Mr. Eakin failed to respond or object to Apple's subpoena, counsel for Apple
9 attempted to resolve the matter without the Court's intervention. *Id.* at ¶ 8. Mr. Eakin's only
10 response was to advise counsel for Apple that "Perhaps you should review 28 USC §1821,"
11 without further explanation. Exh. D [June 7, 2010 Email chain between J. Eakin and N.
12 Greenblatt]. Counsel for Apple responded by explaining that the statute Mr. Eakin cited was
13 inapplicable, and by offering to work with Mr. Eakin to resolve any issue regarding the subpoena.
14 *Id.* Mr. Eakin did not respond. Greenblatt Decl. at ¶ 9. Despite Mr. Eakin's lack of valid
15 objections and lack of response, counsel for Apple continued efforts to resolve this matter
16 amicably without Court intervention.² *Id.* at ¶ 10.

17 Mr. Eakin has not stated any valid basis for his refusal to comply with Apple's
18 subpoena. The statute he cited to counsel for Apple, 28 U.S.C. § 1821, is inapplicable. That
19 statute deals with witness fees for attendance in court or at a deposition. Similarly, Federal Rule
20 45(b)(1) states that "if the subpoena requires that person's attendance, tendering the fees for 1
21 day's attendance and the mileage allowed by law." The subpoena to Mr. Eakin only requested
22 production of documents, not attendance in court or at a deposition. Therefore, neither 28 U.S.C.
23 § 1821 nor Federal Rule 45(b)(1) applies. *See, e.g., Halawani v. Wolfenbarger*, 2008 WL
24 5188813, at *5 (E.D. Mich. 2008) (Exh. E) (finding that "the tender requirement does not apply to

25 ² When counsel for Apple called Mr. Eakin most recently, he again stated that counsel for
26 Apple should review the statute he cited earlier, without further explanation about the relevance
27 of the statute, despite counsel for Apple's request that Mr. Eakin explain his objection. Mr. Eakin
28 also stated that he spoke to his own counsel, who agreed with his position. However, when
counsel for Apple asked Mr. Eakin whether he was represented by counsel or who his counsel
was, Mr. Eakin refused to answer. Mr. Eakin ended the conversation by wishing counsel for
Apple to have a nice day and then hung up. *Id.* at ¶ 10.

1 document production demands.”) (citing *Jackson v. Brinker*, 1992 U.S. Dist. LEXIS 19619, 1992
2 WL 404537 (S.D. Ind. 1992) (“Because a subpoena duces tecum does not command the
3 attendance of the subpoenaed person, Rule 45(b)(1) does not require a tender of attendance or
4 mileage fees in order to effect good service of such a subpoena”). Therefore, Mr. Eakin’s
5 objection to Apple’s subpoena is invalid, in addition to being untimely. Even if fees were
6 required (they are not), counsel for Apple offered to discuss that issue with Mr. Eakin to resolve
7 this matter amicably, but Mr. Eakin refused that offer. See Exh. D [June 7, 2010 Email chain
8 between J. Eakin and N. Greenblatt].

9 Having failed to timely object to the subpoena, having failed to state any valid
10 objections, and having failed to accept Apple’s offers to resolve this matter amicably without
11 Court intervention, Mr. Eakin should be compelled to produce all documents responsive to
12 Apple’s subpoena without further delay. Moreover, because Mr. Eakin did not timely serve any
13 objections to the subpoena, the Court should find that all objections to the subpoena have been
14 waived. See Fed. R. Civ. P. 45(c)(2)(B) (“A person commanded to produce documents or
15 tangible things or to permit inspection may serve on the party or attorney designated in the
16 subpoena a written objection . . . The objection must be served before the earlier of the time
17 specified for compliance or 14 days after the subpoena is served.”); see also *Halawani*, 2008 WL
18 5188813, at *4 (“The failure to serve written objections to a subpoena within the time specified
19 by Rule 45 typically constitutes a waiver of such objections.”).

20 III.

21 CONCLUSION

22 For the above reasons, Apple respectfully requests the Court to compel Mr. Eakin
23 to comply with Apple’s subpoena, and to hold that all objections to the subpoena have been
24 waived.

25 Dated: July 20, 2010

WEIL, GOTSHAL & MANGES LLP

26
27 By: /s/ Douglas E. Lumish
28 Douglas E. Lumish
Attorneys for Apple Inc.

1 **CERTIFICATE OF SERVICE**

2 I declare that I am employed with the law firm of Weil, Gotshal & Manges LLP,
3 whose address is 201 Redwood Shores Parkway, Redwood Shores, California 94065-1175. I am
4 not a party to the within cause, and I am over the age of eighteen years. I further declare that on
5 July 20, 2010, I served a copy of:

6 **APPLE INC.'S MOTION TO COMPEL JAMES EAKIN TO PRODUCE**
7 **DOCUMENTS PURSUANT TO SUBPOENA DUCES TECUM**

8 **BY U.S. MAIL** by placing a true copy thereof enclosed in a sealed
9 envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing in
10 accordance with the firm's ordinary business practices. I am readily familiar with the practice for
11 collection and processing of mail, and know that in the ordinary course of business practice that
the document(s) described above will be deposited with the U.S. Postal Service on the same date
as sworn to below.

12 **BY ELECTRONIC SERVICE** by electronically mailing a true and
correct copy through the electronic mail system to the email address(es) set forth in the service
list below.

13 **BY OVERNIGHT DELIVERY** by placing a true copy thereof enclosed
14 in a sealed envelope with overnight delivery fees provided for, addressed as follows, for
collection by Federal Express in accordance with ordinary business practices. I am readily
15 familiar with the practice for collection and processing of correspondence for overnight delivery
and know that in the ordinary course of business practice the document(s) described above will be
16 deposited by an employee or agent in a box or other facility regularly maintained by Federal
Express for collection on the same day that the document(s) are deposited.

17 **BY PERSONAL SERVICE** by placing a true copy thereof enclosed in a
18 sealed envelope to be delivered by messenger to the offices of the addressee(s) (and left with an
employee or person in charge of addressee's office), as stated below, during ordinary business
19 hours.

20 The Law Offices of James E. Eakin
21 855 Oak Grove Avenue
Suite 107
22 Menlo Park, CA 94025

23 I declare under penalty of perjury under the laws of the United States of America
24 that the foregoing is true and correct.

25 Executed on July 20, 2010, at Redwood Shores, California.

26
27 
28 Judi Tallett