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

15 ELAN MICROELECTRONICS
 CORPORATION,
 16
 Plaintiff and Counterclaim
 17 Defendant,
 18 v.
 19 APPLE INC.,
 20 Defendant and Counterclaim
 21 Plaintiff.
 22

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

**APPLE'S OPPOSITION TO ELAN'S
 MOTION TO EXCLUDE
 DOCUMENTS OR, IN THE
 ALTERNATIVE, FOR COSTS**

Hon. Patricia V. Trumbull

Date: August 24, 2010
 Time: 10:00 a.m.
 Courtroom 5, 4th Floor

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1 I.

2 INTRODUCTION

3 In a case in which no discovery cut-off or trial has been set, Elan seeks
4 exclusionary sanctions against Apple for the alleged untimely disclosure of newly-discovered
5 documents. However, within hours of learning that one of its inventors, Jay Hamlin, appeared to
6 have located relevant and non-duplicative documents in his personal possession, Apple alerted
7 Elan, proposed postponing Mr. Hamlin’s deposition, and began the process for obtaining the
8 documents and producing them to Elan. The documents include, among other things, early
9 development notes and source code for the invention covered by Apple’s U.S. Patent No.
10 5,764,218 (“the ‘218 Patent”), and establish a conception date in 1993. Unfortunately, despite
11 extensive document collection efforts including an earlier document collection meeting with Mr.
12 Hamlin, Mr. Hamlin and Apple did not locate these documents until late in the evening prior to
13 his deposition. This is not surprising given that the documents were generated 17 years ago when
14 the inventor was a third-party consultant to Apple (before he became an Apple employee), and
15 stored on CD-ROMs and hard drives that Mr. Hamlin had not looked at for years and which were
16 found at Mr. Hamlin’s barn and not at Apple’s facilities. Apple has been diligent in getting these
17 documents to Elan. Apple promptly reviewed and produced all of Mr. Hamlin’s relevant
18 documents that it could access, and the few documents remaining for production—those from
19 older hard drives that must be forensically restored by an electronic discovery vendor—will be
20 reviewed for relevant information before the hearing on this motion and long before the close of
21 discovery in this case. Indeed, no discovery cut-off has even been set yet in this action.

22 Given these facts, it is apparent that Elan’s motion is nothing more than a baseless
23 attempt to avoid the impact these documents have on its case, because Elan knows the documents
24 will gut the cornerstone of its invalidity and inequitable conduct defenses. Specifically, because
25 these documents establish that Mr. Hamlin had conceived of the invention of the ‘218 patent in
26 1993, Elan’s chief invalidity argument—alleging that a product called “Glidepoint” is
27 invalidating prior art and the basis for inequitable conduct—can no longer be pursued credibly.
28 Instead of conceding, as it should, that its Glidepoint argument is not tenable, Elan instead asks

1 the Court to exclude the damaging evidence and to have the ‘218 patent adjudicated against a
2 truncated record that would permit Elan to mischaracterize the relevant timeline. There is simply
3 no basis for sanctioning Apple in this case, nor for imposing the extreme sanction of precluding
4 key evidence that refutes Elan’s invalidity and inequitable conduct theories.

5 Elan also asks the Court to compel approximately \$900 in costs from Apple. But,
6 these costs are not justified either. As explained in more detail below these costs result from
7 Elan’s counsel’s choice to have a Washington D.C.-based attorney that had not even appeared in
8 the case fly from Helsinki, Finland to take a deposition in Palo Alto instead of having one of its
9 Palo Alto-based attorneys (including the attorney that had just deposed the other two inventors of
10 the ‘218 patent) take the deposition locally. Moreover, Elan’s request for costs ignores the fact
11 that Apple informed Elan that it was prepared to present Mr. Hamlin for deposition at the
12 scheduled time and even appeared at the deposition, only to learn that Elan had already sent the
13 court reporter and videographer home.

14 Because Elan falls far short of shouldering its heavy burden to justify any
15 sanctions in this case, and because the real relief it seeks—exclusion of evidence that hobbles its
16 invalidity case—finds no support in the law or facts, Elan’s motion should be denied.

17 II.

18 **THERE IS NO BASIS TO EXCLUDE MR. HAMLIN’S DOCUMENTS**

19 The preclusion of evidence “is among the most severe” sanctions a court can
20 impose. *See Qualcomm Inc. v. Broadcom Corp.*, 2007 WL 935617, at *2 (S.D. Cal. Mar. 13,
21 2007). “Exclusion sanctions based on alleged discovery violations are generally improper absent
22 undue prejudice to the opposing side.” *Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer*
23 *Corp.*, 190 F.R.D. 644, 648 (N.D. Cal. 2000) (citing *Wendt v. Host Intern., Inc.*, 125 F.3d 806,
24 814 (9th Cir. 1997)); *see also* Moore, Federal Practice and Procedure (3d Ed.1998), ¶ 16.92[6][b]
25 (“Preclusion of evidence or testimony is a grave step, and is by no means an automatic response
26 to a delayed disclosure.”). The Ninth Circuit has found that improper exclusion of evidence can
27 constitute reversible error. *See Wendt*, 125 F.3d at 814. No sanction should be imposed lightly,
28 and if any is imposed, the Court must impose the least drastic sanction available. *Id.*

1 There are no facts in this case to support any sanctions, not to mention the “most
2 severe,” “grave” form of exclusion sanctions.

3 **A. Apple Acted Diligently in Locating And Producing Documents**

4 Apple’s efforts to locate responsive documents in this case have been exemplary.
5 To date, Apple has produced over a million pages to Elan. *See* Declaration of Sonal N. Mehta in
6 Support of Apple’s Opposition to Elan’s Motion to Exclude Documents (“Mehta Decl.”) at ¶ 1.
7 The production and collection of these documents has involved searches of numerous employees
8 and servers, as well as extensive searches of archived hard-copy documents. *Id.*

9 Apple’s ‘218 patent was conceived over 17 years ago, in 1993, making the
10 location of documents relevant to its conception and reduction to practice difficult. Despite its
11 age, Apple was still able to locate documents evidencing its conception, including documents
12 authored by Mr. Hamlin, which it produced to Elan in conjunction with its October 22, 2009
13 Patent Local Rule 3-2(b) disclosures. *See* Exh. A [October 22, 2009 Apple Patent L.R. 3-1 and 3-
14 2 Disclosures] at 7.¹

15 To locate and produce documents relevant to the conception of the ‘218 patent,
16 Apple’s counsel also conducted searches of offsite document archives and interviewed a number
17 of individuals including Mr. Hamlin.² Mehta Decl. ¶ 1. In particular, counsel met with Mr.
18 Hamlin on February 19, 2010. *Id.* at ¶ 2; *see also* Declaration of Jay Hamlin in Support of
19 Apple’s Opposition to Elan’s Motion to Exclude Documents (“Hamlin Decl.”) at ¶ 1. Although
20 the specific details of the discussion are privileged, the topic of relevant documents in Mr.
21 Hamlin’s possession, custody and control was raised in that meeting. Mehta Decl. ¶ 2; Hamlin
22 Decl. ¶ 1. Because he had worked on the inventions that led to the ‘218 patent as a consultant
23 (and later worked on the patent application as an Apple employee) but had subsequently left
24 Apple for six years to form his own company, Mr. Hamlin did not believe he would have relevant
25 files when he returned to Apple years later and thus believed he would not have documents

26 ¹ As used herein, “Exh. ___” refers to exhibits to the Mehta Decl. unless otherwise stated.

27 ² Apple also interviewed Mr. Hamlin’s co-inventors on the ‘218 patent, Mark Della Bona
28 and Jonathan Dorfman. Mehta Decl. ¶ 1. Neither Mr. Della Bona nor Dr. Dorfman were Apple
employees when this case began.

1 relevant to the '218 patent. *Id.* In particular, he did not recall having any relevant documents in
2 his personal possession, custody or control at the time. *Id.* However, he worked to identify and
3 provide any documents that he recalled that might be relevant to the '218 patent. *Id.* Subject to
4 it's objections, all of the documents that Apple could find related to the '218 patent—including
5 those identified by Mr. Hamlin—were collected, reviewed, and produced to Elan. The documents
6 Elan now seeks to exclude were not located at that time.

7 On June 14, 2010, Mr. Hamlin met with outside and in-house counsel again to
8 prepare for his deposition. Hamlin Decl. ¶ 2; Declaration of Douglas E. Lumish in Support of
9 Apple's Opposition to Elan's Motion to Exclude Documents ("Lumish Decl.") at ¶ 1. In that
10 meeting, the topic of documents in his possession, custody or control was raised again. Lumish
11 Decl. ¶ 1; Hamlin Decl. ¶ 2. In the course of that meeting or on his way home that night, Mr.
12 Hamlin recalled that there was one location—his barn at his house—where he might have
13 personal records that he could check to see if he had documents from the 1993-1994 time period
14 when he was a consultant to Apple. Hamlin Decl. ¶ 2. He had not looked at any materials in that
15 location in many (more than a dozen) years and did not expect to find relevant documents. *Id.*
16 Nonetheless, that night, Mr. Hamlin searched his personal archives stored in his barn, and
17 realized that he did have possession of documents relevant to the case. *Id.* In addition to a folder
18 of hardcopy documents, he also found CD-ROMs and hard disk drives with archived computer
19 files related to the touchpad work he did for Apple. *Id.* Mr. Hamlin provided a number of those
20 files to counsel the next morning and the hard disk drives the following day. *Id.*; Lumish Decl.
21 ¶ 2.

22 On July 2, 2010, Apple produced many of Mr. Hamlin's documents to Elan, as
23 Elan confirms in its motion. Mehta Decl. ¶ 3; Elan Mot. at 2. Other documents, unreadable by
24 current computers due to their age and outdated formats, have been sent to a vendor for
25 processing and, if discoverable documents are recovered, will be produced to Elan as soon as
26 possible. *See* Mehta Decl. ¶ 3. Apple expects to complete its production of whatever relevant
27 documents are recovered before the hearing on this motion. No discovery cut-off has yet been set
28 for the case, and there is no legitimate dispute that the production will be complete with ample

1 time to depose Mr. Hamlin before any such cut-off.

2 In sum, Apple did everything it could to locate Mr. Hamlin’s documents early in
3 the case, and seasonably supplemented its production as required by the Federal Rules. Fed. R.
4 Civ. P. 26(e) (“(1) A party...who has responded to [a]... request for production... must
5 supplement or correct its disclosure or response: (A) in a timely manner if the party learns that
6 the response is incomplete or incorrect, and if the additional or corrective information has not
7 otherwise been made known to the other parties during the discovery process or in writing.”).
8 There is no basis for sanctions based on these indisputable facts. Fed. R. Civ. P. 37 (authorizing
9 sanctions only upon the *failure* to supplement).

10 **B. Apple’s Document Production Met or Exceeded the Federal Rules And the**
11 **Court’s Patent Local Rules**

12 Elan’s motion alleges that Apple’s discovery and production of additional
13 documents from Mr. Hamlin’s personal archives somehow violates Federal Rule of Civil
14 Procedure 26(a) and Patent Local Rule 3-2(b), and that exclusion is proper under Federal Rule of
15 Civil Procedure 37(c). These arguments cannot be sustained.

16 First, Elan argues that Apple violated Rule 26(a) by failing to specify in its initial
17 disclosures that Mr. Hamlin had archived files of documents on his personal computer equipment
18 in the barn at his house and which were made before he was an employee. That argument is
19 meritless. Rule 26(a) by its terms requires only that a party “make its initial disclosures based on
20 the information then reasonably available to it.” Fed. R. Civ. P. 26(a)(1)(E). There is no basis to
21 find that these documents—which Mr. Hamlin did not even remember in his earlier interviews—
22 was “reasonably available” to Apple. Of course, there is no obligation for a party to disclose
23 information it does not know to exist, and Elan fails to provide any legal authority to the contrary.
24 And, as noted above, Apple promptly supplemented its document production and continues to do
25 so in compliance with Fed. R. Civ. P. 26(e)(1)(A). Under these circumstances, Elan’s request for
26 exclusionary sanctions while discovery remains open is untenable. *See Avago Techs. U.S., Inc. v.*
27 *Emcore Corp.*, 2009 WL 5108386, at *3 (N.D. Cal. Dec. 18, 2009) (denying request for exclusion
28 of evidence based on alleged failure to comply with initial disclosure requirements, stating that

1 “[s]uch an order is a remedy reserved for ‘extreme situations’ not present here. Discovery is
2 underway and remains open for approximately eight more months.”³

3 Elan also contends that Apple violated the Court’s Patent Local Rule 3-2(b) which
4 requires disclosure of documents evidencing conception of the claimed invention. *See* Elan Mot.
5 at 7. This argument also fails. In compliance with the rule, Apple timely identified several
6 documents evidencing conception in its 3-2(b) disclosures, including documents authored by Mr.
7 Hamlin. Nothing in the patent local rules prevents supplementation of those documents. *See*
8 *Integrated Circuit Systems, Inc. v. Realtek Semiconductor Co., Ltd.*, 308 F. Supp. 2d 1106, 1107
9 n.1 (N.D. Cal. Mar. 11, 2004) (denying motion for sanctions, and noting that “[t]here may well be
10 cases where supplementation would be appropriate, such as where a party locates documents
11 which should have been produced as part of a previously made initial disclosure under Patent
12 Local Rule 3-2.”). Indeed, Elan cites no authority at all for its extreme interpretation of Rule 3-
13 2(b), and there is no basis to read that Rule somehow to preclude supplementation. Elan’s
14 extreme interpretation of Rule 3-2(b) here is also inconsistent with its own reading of the rule
15 when applied to its own patents-in-suit. Specifically, as recently as June 24, 2010 and months
16 after serving its Patent Local Rule 3-2(b) disclosures, Elan continues to hedge as to the
17 conception date for one of its patents-in-suit by stating “Elan’s investigation and discovery is
18 ongoing, and *Elan reserves its right to supplement this response.*” *See, e.g.*, Exh. B [June 24,
19 2010 Elan Second Supplemental Response to Apple’s First Set of Interrogatories Nos. 1-17].⁴

20 Rule 37(c) serves Elan no better, and applies *only* if there is a “*failure* to disclose
21 *or supplement*,” such that “a party *fails* to provide information or identify a witness as required
22 by Rule 26(a) or 26(e).” Fed. R. Civ. P. 37(c)(1). Here, Apple *did* supplement and *did* disclose
23 the newly-discovered documents (within hours of their discovery), and so complied with the
24

25 ³ *Yeti by Molly, Ltd. v. Deckers Outdoor*, 259 F.3d 1101 (9th Cir. 2001), upon which Elan
26 relies, does not support Elan’s motion. In that case, the Ninth Circuit found exclusion of evidence
27 justified based on Rule 37(c) where the defendant “failed to provide his expert report for two and
28 a half years” until disclosing it “just 28 days prior to trial,” well after the close of discovery. *Id.*
at 1105. The facts here are radically different, having nothing to do with expert reports and given
that discovery is still open.

⁴ Emphasis added and internal citations omitted throughout, unless otherwise noted.

1 supplementation requirements of Rule 26(e). This unassailable fact—conveniently ignored in
2 Elan’s motion—defeats any claim for sanctions under Rule 37, and Elan’s position to the contrary
3 misstates the law.

4 **C. Elan Fails To Establish Any Legitimate Prejudice Justifying Exclusion**
5 **Sanctions**

6 “Exclusion sanctions based on alleged discovery violations are generally improper
7 absent undue prejudice to the opposing side.” *Amersham*, 190 F.R.D. at 648. Elan cannot meet
8 this prejudice threshold here.

9 Mr. Hamlin is an Apple employee, and so no subpoena is required for his
10 deposition. Elan’s counsel and Mr. Hamlin are both located in the Silicon Valley, and Apple
11 already pledged to cooperate with Elan to schedule Mr. Hamlin’s deposition at a mutually
12 available date after the document production is complete. *See DeBruine Decl. in Support of*
13 *Elan’s Motion to Exclude*, Exh. 9 at 1. Given the lack of a discovery cut-off and the imminence
14 of the completion of the production, there is no risk that Elan will be unable to depose Mr.
15 Hamlin during the discovery period.

16 Elan does not deny these facts. Instead, the only argument Elan makes is that it
17 “could have used the Hamlin documents in the deposition of the other named inventors of the
18 ‘218 patent.” *See Elan Mot.* at 8. As an initial matter, there is no basis to accept this as true—
19 there is no evidence to suggest that the other inventors of the ‘218 patent were aware of or could
20 testify with any foundation concerning these documents which, again, were generated by Mr.
21 Hamlin before he was an Apple employee and which appear to have remained in his personal
22 possession ever since. Moreover, Elan has not identified any particular information it would
23 attempt to glean from the other inventors that it could not get from Mr. Hamlin. In any event,
24 even accepting Elan’s position *arguendo*, the proper resolution to this complaint would be to
25 permit limited depositions of the other inventors on the recent document production, not to
26 exclude important evidence of conception from the case. To the extent Elan truly believed it
27 needed to examine witnesses already deposed regarding the documents, Apple would be willing
28 to meet and confer with Elan to discuss such depositions and resolve the issue, hopefully without

1 Court intervention. Elan, however, has not pursued that approach to date.

2 This is not surprising. Elan does not really want depositions about the documents.
3 Rather, it wants to rewrite history and pretend the documents do not exist because they are fatal to
4 its principal ground for its invalidity and inequitable conduct defenses. Specifically, among the
5 documents already produced to Elan are documents evidencing a mid-1993 conception date for
6 the '218 patent. Elan's invalidity and inequitable conduct theories in this case depend upon art
7 dated, at the earliest, May 1994. *See* D.I. 118 ¶81 [Elan Answer to Apple Counterclaims]
8 (pleading inequitable conduct defense based on GlidePoint® product purportedly sold in May
9 1994). There is no doubt that Mr. Hamlin's documents expose the lack of merit in Elan's
10 theories. This, however, does not constitute the kind of "prejudice" that justifies exclusion
11 sanctions and Elan can offer no authority to the contrary.

12 III.

13 ELAN'S REQUEST FOR COSTS IS UNJUSTIFIED

14 Elan's motion asks for the alternative relief of costs in the amount of \$903.48.
15 This fall-back request is a red herring and should be rejected for several reasons.

16 As an initial matter, in meet and confer, Apple asked Elan if it would withdraw the
17 instant motion if Apple agreed to pay the requested \$903.48. *See* Lumish Decl. ¶ 4. Elan
18 declined. *Id.* Elan's rejection of Apple's offer eliminates any doubt that the real motive for
19 Elan's motion is to evade the documents establishing Apple's early conception of the invention of
20 the '218 patent. This underscores the lack of merit to Elan's requests for sanctions in general, and
21 for monetary sanctions in particular.

22 Moreover, Elan and not Apple ultimately cancelled Mr. Hamlin's deposition.
23 Apple's counsel initially proposed postponing the deposition but, after Elan's counsel insisted
24 that Apple pay for the costs associated with the deposition and agreement could not be reached on
25 this point, Mr. Hamlin and Apple's counsel appeared at Elan's counsel's offices on time and
26 ready for the deposition, but were told that the court reporter and videographer had already been
27 sent home. *See* Lumish Decl. ¶ 3; DeBruine Decl., Exh. 9 at 2. The additional documents being
28 produced by Apple relate only to a small part of the deposition. If Elan believed that

1 rescheduling the deposition was prejudicial, it could have proceeded and the parties could have
2 continued to meet and confer regarding additional deposition time or discovery in light of the
3 newly-discovered documents. Elan therefore has not demonstrated that a request for costs as a
4 result of *its* cancellation of the deposition is justified.⁵

5 Finally, Elan has not established a reasonable basis for the costs of \$903.48. *See*
6 *McConnell*, 2008 WL 4279682, at *3 (stating that “[t]he defendant as the moving party ‘bears the
7 burden of demonstrating the reasonableness of its fees and hours.’”). In its moving papers and in
8 meet-and-confer, Elan contended that its costs result from having an Alston and Bird attorney,
9 Adam Swain, change a return flight from Helsinki, Finland to California to take Mr. Hamlin’s
10 deposition. This is curious to say the least. Mr. Swain is a second-year associate from Alston’s
11 Washington D.C. office who had not yet appeared in this action at the time of Mr. Hamlin’s
12 deposition. Three days earlier, Sean DeBruine, an Alston partner resident in the Palo Alto office,
13 traveled to New York to depose ‘218 patent co-inventor Jonathan Dorfman. Lumish Decl. ¶ 5.
14 Mr. DeBruine also deposed the third ‘218 patent inventor, Mark Della Bona, when his deposition
15 was taken in Palo Alto on May 25, 2010. *Id.* Elan has offered no explanation for its choice to
16 have Mr. Swain come to Palo Alto on his way home from Helsinki to take the deposition rather
17 than have Mr. DeBruine or any other local Alston attorneys depose Mr. Hamlin, nor should the
18 costs associated with that choice be imposed on Apple.

19 In sum, there is no basis for awarding any sanctions in this case, and Elan cannot
20 justify its demand for \$900 in costs incurred from its own election to have a D.C.-based attorney
21 fly to Palo Alto from Finland for the deposition instead of having a Palo Alto-based attorney take
22 the deposition.

23
24 ⁵ Elan’s reliance on *McConnell v. PacifiCorp. Inc.*, 2008 WL 4279682 (N.D. Cal. Sept. 12,
25 2009) is misplaced. In that case, the plaintiffs violated an express order of the Court to begin
26 taking depositions and produce documents in advance of the depositions. The “order was
prompted by seemingly interminable delays and squabbles among counsel in moving this case to
the completion of discovery.” *Id.* at *1. Apple has not violated any discovery orders in this case,
and none have been entered. The situations are not analogous.

27 *Sanders v. City of Fresno*, 2007 WL 2345001 (E.D. Cal. Aug. 16, 2007), is also not on
28 point. In *Sanders*, costs were awarded where a party twice cancelled a deposition with no
explanation shortly before it was to have occurred. *Id.* at *1-2.

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IV.
CONCLUSION

For the foregoing reasons, Elan’s motion should be denied.

Dated: August 3, 2010

WEIL, GOTSHAL & MANGES LLP

By: /s/ Douglas E. Lumish
Douglas E. Lumish
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