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ELAN MICROELECTRONICS
CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELAN MICROELECTRONICS CORPORATION,

Plaintiff and Counterdefendant,

v.

APPLE, INC.,

Defendant and Counterplaintiff.

AND RELATED COUNTERCLAIMS

Case No. 09-cv-01531 RS (PSG)

ELAN MICROELECTRONICS CORPORATION'S MOTION TO SHORTEN TIME FOR ITS MOTION TO COMPEL DISCOVERY RELATED TO APPLE iOS APPLICATIONS FOR THE ACCUSED PRODUCTS

JURY TRIAL DEMANDED

Hon. Paul Singh Grewal

Elan Microelectronics Corporation ("Elan") respectfully submits this motion to shorten time with respect to its Motion to Compel Apple Inc. ("Apple") to Produce iOS Application Related Discovery. Elan requests expedited briefing on its Motion to Compel so that the motion can be heard on **August 2, 2011.** Elan requests that Apple's file its Opposition on **July 25, 2011** (Monday) with Elan's reply due on **July 28, 2011** (Thursday).

The underlying discovery dispute is a very simple and straightforward issue. Elan requests limited financial, sales and marketing data relating to Apple's iOS applications ("iOS apps") that operate on the accused iOS products in this case.[1] In particular, Elan seeks Apple's financial data for iOS apps that will permit Elan to compare the financial performance of iOS applications that make use of the multifinger input features covered by Elan's asserted patent to those that do not. Elan is not requesting any technical discovery relating to the iOS applications themselves. Apple, has refused to produce *any* financial data related to the iOS applications on relevance grounds, because the iOS applications are not accused products in this case. As Elan has established in its Motion filed concurrently herewith, the Federal Circuit has made clear in recent cases that damages experts must provide "evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features." *Uniloc USA, Inc. v. Microsoft Corp*., 632 F.3d 1292, 1318 (Fed. Cir. 2011). Therefore, Elan requires the iOS app discovery in order to generate the comparative profit information for products that do not contain the accused functionality versus products that do.

Good cause exists for Elan's request to shorten time. Pursuant to the Stipulation and Order Modifying Case Management Order, all fact discovery must be completed by **August 12, 2011** and Elan's damages expert report must be disclosed on **September 9, 2011** (Dkt. No. 308). Elan served Document Request Nos. 82-85 and Interrogatory Nos. 20-21 on April 12, 2011. Bu Decl, Exs. A & B. On June 7, 2011, Elan served a 30(b)(6) deposition notice on Apple. Topic Nos. 17-21 of that notice relate to the same iOS application discovery. *Id*. Ex. E. Elan met and conferred

[1] As more fully discussed in the underlying Motion to Compel, "iOS" is Apple's mobile operating system, which is used on many of the accused products, including iPhones, iPod Touch, and iPads. "iOS applications" or "iOS apps" are software applications that run on products using the iOS operating system, and are typically available for purchase from Apple through its on-line "App Store."

with Apple several times and offered its explanation as to why discovery relating to the iOS applications is relevant, in an attempt to avoid the need to seek the Court's intervention. *Id*. Exhs. C, D, F. On June 23, 2011, Apple stated that it would consider Elan's position and respond promptly. On July 6, Elan reached out to Apple again, asking it to commit to a position on the requested discovery. Bu Decl. Exh. F. Two days ago, on July 13, during a second telephonic meet and confer, Apple finally made clear that it will not produce information responsive to these discovery requests. Elan has no choice but to seek the Court's assistance on this issue. Bu Decl. Exh. D. Thus, Apple has had plenty of notice of this dispute and should have little trouble responding to Elan's motion to compel.

Due to Apple's delay in telling Elan its final position until this week, there now remains insufficient time before the disclosure of opening expert reports on September 9, 2011 for a full 35-day briefing schedule. Elan's discovery requests, subject to the underlying motion to compel, also include Rule 30(b)(6) deposition topics relating to Apple's iOS application financial data. In accordance with the regular 35-day hearing schedule, the earliest date the motion could be heard is August 23, 2011, only three weeks before the deadline to disclose Elan's damages expert report. Even if the Court were to issue an order immediately after August 23 granting the motion, there would not be sufficient time for Apple to produce the requested discovery, for Elan to have an opportunity to meaningfully analyze it, and then to complete a deposition, all in time for Elan's damages expert to prepare her expert report. Therefore the hearing schedule must be shortened in order to provide a ***meaningful and realistic*** time frame for Apple to produce the discovery, for Elan to analyze the discovery and to take the fact witness deposition, and finally for Elan's expert to analyze the data and prepare her report. Further, Elan would have attempted to notice a hearing on either August 9 or even August 16 to reduce any *alleged* burden Apple may claim to file an opposition. However, according to the Court's calendar, Magistrate Judge Grewal will be unavailable for hearings on these days. Therefore, Elan could not have scheduled a hearing any other time in August before the 23rd, and August 2nd is the only available date for the Court to consider Elan's motion to compel for this issue.

Apple opposes the motion to shorten briefing time and points to Local Rule 37-3, which

permits a party to file a fully noticed motion to compel on a normal 35-day briefing schedule seven days after the fact discovery cutoff. As discussed above, however, if Elan notices a hearing on the usual 35-day briefing schedule, there will not be sufficient time to resolve this issue, and if Elan prevails, to complete the withheld discovery before Elan must serve its opening damages expert report.

Accordingly, Elan hereby requests an expedited briefing schedule on its Motion to Compel Apple iOS Application Discovery, wherein the motion will be heard on August 2, 2011 with Apple's opposition due on July 25, 2011 and Elan's reply due on July 28.

DATED: July 15, 2011

Respectfully submitted,

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