MATTHEW D. POWERS (Bar No. 104795)
matthew.powers@tensegritylawgroup.com
201 Redwood Shores Parkway, Suite 401
Redwood Shores, CA 94065
Telephone: (650) 802-6000
Facsimile: (650) 802-6001

JARED BOBROW (Bar No. 133712)
jared.bobrow@weil.com
SONAL N. MEHTA (Bar No. 222086)
sonal.mehta@weil.com
DEREK C. WALTER (Bar. No. 246322)
derek.walter@weil.com
NATHAN GREENBLATT (Bar No. 262279)
nathan.greenblatt@weil.com
WEIL, GOTSHAL & MANGES LLP
Silicon Valley Office
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3000
Facsimile: (650) 802-3100

Attorneys for Defendant and Counterclaim Plaintiff
Apple Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ELAN MICROELECTRONICS CORPORATION, Plaintiff and Counterclaim Defendant, v. APPLE INC., Defendant and Counterclaim Plaintiff.	Case No. C-09-01531 RS (PSG) **APPLE'S OPPOSITION TO 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

Pursuant to Civil Local Rule 6-3(c), Apple opposes Elan's Motion to Shorten Time for Its Motion to Compel Discovery Related to Apple iOS Applications for the Accused Products ("Motion to Shorten Time"). This action has been pending since April 2009, yet Elan waited until April 12, 2011 to propound any discovery requests whatsoever related to iOS Apps. After Apple first objected and declined to provide discovery into this topic based on its objections on May 12, 2011, Elan then waited until June 10, 2011—roughly one month later—to make even an initial follow up. Elan's failure to promptly and diligently pursue discovery on Apple iOS Apps until the eve of the close of fact discovery cannot be squared with its last-minute request that both Apple and the Court now process its motion on an expedited basis. Indeed, to the extent Elan now feels prejudiced in its ability to pursue discovery into iOS Apps, it is a prejudice that is entirely of Elan's own making. Regardless, as set forth below, Elan will suffer no substantial harm or prejudice if its motion to compel—which is standard in every way—is heard according to a normal briefing schedule. Accordingly, Apple opposes Elan's motion to shorten time and requests that the Court hear Elan's motion on a normal 35 day briefing schedule.

I.

THERE IS NO GENUINE URGENCY ASSOCIATED WITH ELAN'S REQUEST FOR DISCOVERY INTO IOS APPS

It is clear that there is no genuine urgency associated with Elan's request for discovery related to iOS Apps. Although this action has been pending for over two years, it was not until April 12, 2011 that Elan first propounded any discovery requests related to iOS Apps. After Apple initially declined to provide discovery into this topic on May 12, 2011, Elan waited until June 10, 2011 to follow up on the issue in any way. *See* Dkt. No 342, Exhs. B-C. After this, it was not until June 22, 2011 that Elan articulated to Apple for the first time a strained theory as to why it believed discovery into iOS Apps might be relevant. *Id.*, Exh. D. Thus, after years of delay, Elan decided to pursue discovery into iOS Apps only within the last few months, wasting weeks of additional time in the process.[1] Elan's delay in pursuing discovery into Apple iOS Apps

[1] Notably, this is not the first instance of Elan delaying in its efforts to even make an initial effort to pursue discovery on an issue. Specifically, with regard to discovery related to Apple's testing tool, which this Court heard oral argument on in early June, it was also not until this case

cannot be squared with its instant request that Apple and the Court now process its motion to compel discovery on this issue on an expedited basis. This alone confirms that there is no basis for Elan's motion to shorten time.

In fact, as set forth below, it is unsurprising that Elan has delayed so long in even initiating efforts to seek discovery related to iOS Apps. Indeed, iOS Apps are not accused of infringement in this case, and they undisputedly do not carry out the accused functionality. Elan has even confirmed in meet and confer that it has no intention of accusing them of infringement or adding them to the case as accused products. *See* Declaration of Derek C. Walter In Support of Apple's Opposition Elan's Motion to Shorten Times for Its Motion to Compel Discovery Related to Apple iOS Applications ("Walter Decl.") ¶ 2. As Elan explained in its motion to compel, the only reason Elan seeks discovery related to iOS Apps is so that it can carry out some sort of analysis that it believes may shed light on the value of Apple's Multitouch™ software, which will be at most one small aspect of its damages expert report.[2] Simply put, Elan's motion to compel seeks discovery on a secondary issue, that was not even important enough for Elan to mention until two years into the case. These circumstances do not call for an expedited briefing schedule.

II.

ELAN WOULD SUFFER NO PREJUDICE IF ITS MOTION IS HEARD ON A NORMAL BRIEFING SCHEDULE

Civil Local Rule 6-3(a)(3) requires that Elan identify "substantial harm or prejudice that would occur if the Court" does not shorten the briefing schedule for its Motion to Stay. Elan identifies nothing remotely approaching substantial harm or prejudice. The only basis Elan identifies for shortening time is a concern that if its motion is heard on a regular briefing schedule

---

had been pending for roughly two years that Elan decided to pursue discovery in earnest. In that instance, Elan requested an emergency discovery hearing on a last minute basis, simply so that it could avoid having to purchase an additional airline ticket for its expert witness. There was plainly no emergency associated with that motion, and there is even less of an emergency associated with this motion.

[2] In fact, as Apple will explain in its opposition to Elan's motion to compel, Elan cannot reasonably hope to acquire any sort of meaningful information from the sort of analysis it describes in its motion to compel, and the information Elan seeks is ultimately irrelevant.

it may not receive discovery sufficiently in advance of opening expert reports as it would like.[3] However, as noted above, to the extent Elan now has concerns that it might be squeezed during the preparation of one aspect of its expert report, this is a situation that is entirely of Elan's own making, and the parties and the Court should not now be required to proceed on a hurried basis. This is particularly true because Elan's proposed schedule would have Apple respond to its motion on shortened time when the parties are already extremely busy trying to complete discovery by the August 12, 2011 fact discovery cutoff—efforts that have been substantially delayed by Elan's own discovery conduct as highlighted in other pending motions—and preparing for an August 4, 2011 summary judgment hearing before Judge Seeborg in this case.[4]

Furthermore, having Elan's motion heard on a normal briefing schedule will in no way prejudice Elan's other discovery efforts. As noted above, the issue of iOS Apps ostensibly relates only to one aspect of Elan's damages case; it is unrelated to the other discovery Elan is pursuing. Thus, to the extent this issue requires deposition testimony, it will involve different witnesses than for the other issues Elan is pursuing. Simply put, even putting aside Elan's delay in seeking discovery related to iOS Apps, there simply is no genuine need for a shortened briefing schedule here, and no possibility of meaningful efficiency gains that would otherwise justify a compressed briefing schedule.

[3] Interestingly, in the limited email meet and confer the parties engaged in before Elan filed its motion to shorten time, Elan did not even identify this as a reason for needing to proceed on an expedited basis. In fact, Elan's request for a shortened schedule was based strictly on the erroneous assumption that the Court needed to hear all discovery motions prior to the close of fact discovery. *See* Walter Decl., Exh. A [July 14, 2011 email correspondence between D. Walter and J. Bu]. In response, Apple explained to Elan that Local Rule 37-3 permits Elan to file a fully noticed motion to compel on a normal 35 day briefing schedule as much as seven days after the fact discovery cutoff. *See id.* Elan never responded with any concerns related to the expert report timeline; instead, it just moved to shorten time. Furthermore, during the meet and confer, Elan proposed an inequitable briefing schedule that would have reduced Apple's time for opposition by seven days, yet reduce Elan's time for a reply by just one day. *See id.* Although Elan ultimately proposed a more reasonable briefing schedule in its motion to shorten time, the foregoing leaves serious doubt as to whether Elan engaged in the meet and confer process in good faith.

[4] Furthermore, Elan has requested that the opening expert report deadline be moved to October 21, 2011. *See* Dkt No. 333 at 7. If Elan's request is granted, its motion to shorten time will be moot.

At bottom, Elan's motion is just a standard discovery motion, which Elan decided to bring at the last minute. These circumstances do not reflect the sort of "substantial harm or prejudice" that would justify a shortened briefing schedule.

III.

CONCLUSION

For the reasons stated above, Apple respectfully requests that the Court deny Elan's Motion to Shorten Time.

Dated: July 18, 2011

WEIL, GOTSHAL & MANGES LLP

By: */s/ Sonal N. Mehta*
Sonal N. Mehta
Attorneys for Defendant and Counterclaim Plaintiff
Apple Inc.