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 ELAN MICROELECTRONICS CORPORATION

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

16 ELAN MICROELECTRONICS CORPORATION,

17 Plaintiff,

18 v.

19 APPLE, INC.,

20 Defendant.

) Case No. C-09-01531 RS

)
) **DECLARATION OF SEAN P. DEBRUINE**
) **IN SUPPORT OF ELAN CORPORATION'S**
) **MOTION TO SHORTEN TIME FOR**
) **HEARING ON ELAN'S MOTION TO**
) **COMPEL PRODUCTION OF SOURCE**
) **CODE PURSUANT TO PATENT L.R. 3-**
) **4(A)**

) [Civil L.R. 6-3(a)]

22 APPLE, INC.,

23 Counterclaimant,

24 v.

25 ELAN MICROELECTRONICS CORPORATION,

26 Counterdefendant.

1 I, Sean P. DeBruine, declare as follows:

2 1. I am a partner in the law firm of Alston & Bird LLP, counsel to Plaintiff Elan
3 Corporation (“Elan”). As required by Civil Local Rule 6-3(a), I make this declaration in support of
4 Elan’s Motion to Compel to Shorten Time for Hearing On Elan’s Motion to Compel Production of
5 Source Code Pursuant to Patent L.R. 3-4(a) (“Motion to Shorten Time”). I have personal knowledge of
6 the following facts, except those facts stated on information and belief, which facts I believe to be true.
7 If called to testify I could and would testify competently to the matters stated herein.

8 **Civil L.R. 6-3(a)(1) Reason for requested shortening of time**

9 2. Elan requests an expedited hearing on its Motion to compel production of source code
10 Apple was required to produce December 7, 2009 under Patent L.R. 3-4(a). The source code for
11 Apple’s accused products is critical in order for Elan to prepare for fast-approaching deadlines for
12 claim construction, discovery and settlement conference. If the motion is heard according to the
13 normal schedule, on February 17, 2010, several of these key deadlines will arrive before the hearing is
14 held. Others will be too close for Elan to prepare for adequately. For example, the parties are currently
15 scheduled to file a Joint Claim Construction Statement on February 5, 2010, conduct a settlement
16 conference on February 11, 2010, and complete claim construction discovery by March 8, 2010. Even
17 if Apple were to produced the source code immediately after the hearing, Elan would not have time to
18 bring even a single motion before the close of claim construction discovery on March 8, 2010.

19 **(a)(2) Efforts to obtain stipulation to time change**

20 3. On January 12, 2010, my colleague Augie Rakow asked Apple by telephone to stipulate
21 to an expedited hearing on the Motion to Compel. Apple immediately refused.

22 **(a)(3) Substantial harm and prejudice if heard at normal time**

23 4. Elan will suffer substantial prejudice if the Court hears Elan’s Motion to Compel
24 according to the regular briefing schedule on February 17, 2010. Apple’s source code is relevant and
25 central evidence to Elan’s case. Apple’s failure to make the source code available for inspection
26 prejudices Elan incalculably, and the prejudice to Elan grows as the deadlines described above
27 approach. For these reasons, Elan will suffer substantial prejudice if the Court hears Elan’s Motion to
28 Compel on an unexpedited hearing schedule.

(a)(4) Compliance with Civil L.R. 37-1(a) and underlying dispute and positions taken

5. I attempted to confer with Apple both before and after Apple was required to produce the source code on December 7, 2009, including at least a discussion on September 30, 2009 when we agreed to produce source code on December 7, 2009, a discussion on November 17, 2009 when we agreed to the production and inspection protocol requested by Apple, a discussion on December 7, 2009 when Apple failed to produce other documents required by Patent L.R. 3-4(a), a discussion on December 11, 2009 when Apple's counsel stated Apple would not likely produce the source code before the holidays, a discussion on December 16, 2009 when Apple reiterated its position that Apple would "do its best" to make source code available "once a protective order is entered" and where Elan indicated its intent to file a motion to compel, a discussion on January 6, 2010 wherein Elan reiterated its intent to file the motion to compel, and a discussion on January 12, 2010 wherein Apple's counsel confirmed Apple's attorneys still cannot identify even a date when Apple will produce the source code.

(a)(5) Previous time modifications

6. The litigation schedule in this matter was previously modified in order to continue the Initial Case Management Conference by two weeks (Dkt. 11) and to continue the settlement conference with Magistrate Judge Spero by one month (Dkt. 46), both by stipulation. The settlement conference is currently scheduled for February 11, 2010.

(a)(6) Effect of requested time modification on litigation schedule

7. An expedited hearing will not adversely affect the remaining deadlines in this case. Rather, it would allow Elan to review Apple's documents and prepare for the fast-approaching deadlines as Patent Local Rule 3-4(a) contemplates.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on January 13, 2010 in Palo Alto, California.

/s/ Sean P. DeBruine

SEAN P. DEBRUINE