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 11 ELAN MICROELECTRONICS CORPORATION

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

16 ELAN MICROELECTRONICS CORPORATION,
 17 Plaintiff,
 18 v.
 19 APPLE, INC.,
 20 Defendant.

Case No. 09-cv-01531 RS

DECLARATION OF SEAN P. DEBRUINE IN SUPPORT OF ELAN MICROELECTRONICS CORPORATON'S MOTION PURSUANT TO CIV. L.R. 6-3 TO ENLARGE CLAIM CONSTRUCTION BRIEFING DEADLINES

22 AND RELATED COUNTERCLAIMS
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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”). I have personal knowledge of the following facts, except as otherwise
4 stated. If called to testify I could and would testify competently to the matters stated herein.

5 2. There have been several previous time modifications in this action. The schedule
6 was previously modified by stipulation to extend Apple’s time to Respond to the Complaint
7 (Docket No. 7); to continue the Initial Case Management Conference by two weeks (Docket No.
8 11), and to continue the settlement conference with Magistrate Judge Spero by one month (Docket
9 No 46). The Court’s October 1, 2009 Case Management Order (Docket No. 42) provided for
10 Opening Claim Construction briefs to be served on March 23, 2010. On March 18, 2010, the
11 Court held a Case Management Conference to discuss the timing and format of the claim
12 construction hearing. At this conference, the Court accepted Apple’s proposal for two-stage claim
13 construction briefing and modified the claim construction schedule, resetting the *Markman* hearing
14 for June 23, 2010 with a tutorial on June 21, 2010. Opening Claim Construction Briefs are
15 currently due on Friday, April 16, 2010 and Replies are due on April 30, 2010.

16 3. When the current schedule was adopted, this action included claims based on all
17 five U.S. Patents they asserted.

18 4. Elan filed a Complaint against Apple under Section 337 of the Tariff Act of 1930 as
19 amended, in the International Trade Commission (ITC), styled In the Matter of Certain Electronic
20 Devices with Multi-Touch Enabled Touchpads and Touchscreens.

21 5. Under its rules, the ITC will determine whether to institute the investigation Elan
22 has requested no later than April 29, 2010.

23 6. On March 31, 2010, I received an e-mail from Apple’s counsel proposing to file a
24 “Corrected Joint Claim Construction Statement” changing certain proposed constructions for terms
25 in the ’352 and ’659 patents. A true and correct copy is attached as Exhibit A.

26 7. On April 8, 2010 I responded setting forth a change Elan proposed for another
27 claim term. My e-mail response is attached as Exhibit B. I have had no response from Apple’s
28 counsel to that e-mail.

1 8. On April 7, 2010, I received an e-mail from Apple's counsel stating that, in an
2 effort to streamline the case, Apple has decided not to pursue the '929 patent and intends to drop
3 its counterclaim for infringement of the patent. The same e-mail stated that Apple intends to
4 amend its pleading to add an allegation that Elan's infringement of the '218 and '659 patent is and
5 has been willful, asked whether Elan would oppose Apple's motion to amend and asked Elan to
6 confirm that it will drop its declaratory judgment claim on the '929 patent. Apple's counsel's e-
7 mail is attached as Exhibit C. On April 8, 2010, I responded to that e-mail, asking for clarification
8 from Apple regarding the terms under which it would dismiss its infringement claims. To date I
9 have had no response to that request.

10 9. On April 8, 2010, I left a voicemail message for Apple's counsel Edward Reines,
11 seeking to discuss Apple's position with respect to staying all or part of the district court action in
12 light of the soon-to-be-pending ITC action.

13 10. On the afternoon of April 9, 2010, after the deposition of Dr. Robert Dezmelyk, I
14 was informed by Jared Bobrow, another of Apple's counsel, that Apple was still considering
15 whether Apple intended to stay the district court action in light of the ITC action. In response I
16 proposed that, at a minimum, the parties should continue the approaching claim construction
17 briefing deadlines while this issue was considered. Mr. Bobrow indicated that Apple would
18 consider that proposal.

19 11. Today I sent an e-mail to Apple's counsel, again noting that Apple has not decided
20 whether it will seek to stay the district court case in light of Elan's ITC complaint and noting that
21 the period for the ITC to institute an investigation based on that complaint runs on April 29. I
22 proposed that the current briefing schedule, with opening briefs are due this Friday, April 16 and
23 Reply briefs on April 30, does not make sense when there is a likelihood that all or part of the case
24 will be stayed and there is still some uncertainty regarding what *Markman* issues will be briefed. I
25 advised that Elan intends to move today for an order continuing the briefing until May 7 and May
26 28 respectively to allow time to resolve the status of the case after the ITC institutes the
27 investigation. I asked if Apple would stipulate to such a continuance. A true and correct copy of
28 this e-mail is attached as Exhibit D.

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12. At 8:11 p.m. this evening, I received a reply from Apple’s counsel refusing to agree. A true and correct copy of that e-mail is attached as Exhibit E.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Palo Alto, California.

DATED: April 13, 2010

/s/ Sean P. DeBruine

Sean P. DeBruine

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