

Eight Mile Style, LLC et al. v. Apple Computer Inc., et al.
Case No. 2:07-CV-13164

EXHIBIT A

**Declaration of Kelly M. Klaus In Support of
Defendants' Opposition to Plaintiffs'
Motion to Exclude "Late Produced" Documents**

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

**DECLARATION OF KELLY M. KLAUS IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE "LATE PRODUCED"
DOCUMENTS**

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DECLARATION OF KELLY M. KLAUS

I, Kelly M. Klaus, declare as follows:

1. I am an attorney with the law firm of Munger, Tolles & Olson LLP, which represents Defendants Apple Inc. and Aftermath Records d/b/a Aftermath Entertainment (collectively “Defendants”) in this matter. I am familiar with the documents and the court filings in this litigation. Except as otherwise indicated, I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently to these matters.

2. Defendants produced the documents Plaintiffs complain about as being “late produced” pursuant to a Court Order entered on June 25, 2008. Attached as Exhibit 1 is a true and correct copy of that order, Docket No. 50 in this matter, Magistrate Judge Scheer’s Order Granting in Part and Denying in Part Plaintiffs’ Motion to Compel Discovery Responses. That Order required Defendants to “state in writing no later than July 3, 2008 as to whether Aftermath has in its possession, custody or control any license, contract or agreement with any third party that Aftermath may contend gives it the right (or the right to authorize others) to make available for permanent download sound recordings embodying the compositions at issue in this case,” and to produce any such documents “promptly” after the written disclosure. Ex. 1 at ¶ 2(b).

3. Plaintiffs did not ever raise an issue about Defendants serving a document entitled “Initial Disclosures”. It has been obvious throughout this litigation that Plaintiffs have been well aware of relevant witnesses from documents and other information Defendants have disclosed to them and from Plaintiffs’ own knowledge. Plaintiffs have deposed 13 current or former employees of Defendants in this matter, many of whose depositions, including those of several current and former employees from the copyright department of UMG Recordings, Inc. (part owner of Aftermath), Plaintiffs requested early on in the discovery process even though Plaintiffs did not (as discussed below) list them in Plaintiffs’ own document labeled “Initial Disclosures.”

Before the June 2, 2008 discovery cut-off, Defendants produced more than 57,000 pages of documents to Plaintiffs. As to Defendant Aftermath (whose production of documents are at issue on this motion), these documents were produced for possible use both in this litigation and Plaintiffs' simultaneously pending lawsuit (through their 100% owned affiliated LLCs) in the Central District of California.

4. Attached as Exhibit 2 is a true and correct copy of this Court's January 8, 2008 Scheduling Order. That Order did not set a date for an initial scheduling conference, or a Rule 26(f) conference of the parties. There never was a Rule 26(f) conference of counsel held in this matter, nor was there any initial scheduling conference held.

5. Attached as Exhibit 3 is a true and correct copy of Plaintiffs' "Initial Disclosures" in this case, which disclose only Joel Martin as a potentially relevant witness, and only two categories of documents: the copyright registration certificates that Plaintiffs had attached to their Complaint, and an August 26, 2005 Mastertone Agreement between Plaintiffs and UMG Recordings, Inc. Plaintiffs have never supplemented these "Initial Disclosures."

6. Attached as Exhibits 4 and 5 are a true and correct copies of Plaintiffs' Interrogatories and Requests for Production of Documents to Defendants in this case, respectively. Plaintiffs did not distinguish between Apple and Aftermath in the Interrogatories and Requests for Production of Documents, but rather served the same sets on both Defendants.

7. Attached as Exhibits 6 and 7 are true and correct copies of Defendant Aftermath's Responses and Objections to Plaintiffs' Interrogatories and Requests for Production of Documents.

8. Attached as Exhibits 8 and 9 are true and correct copies of Defendant Apple's Responses and Objections to Plaintiffs' Interrogatories and Requests for Production of Documents.

9. Attached as Exhibit 10 is a true and correct copy of a letter dated April 1, 2008 written by Plaintiffs' Counsel Richard Busch to me, and to Defendants' local counsel Daniel Quick.

10. Attached as Exhibit 11 is a true and correct copy of an e-mail from Mr. Busch to me.

11. On June 10, 2008, the parties conducted a meet and confer pursuant to this Court's local rules prior to the hearing on Plaintiffs' Motion to Compel. Attached as Exhibit 12 is a true and correct copy of the List of Unresolved Issues submitted pursuant to this Court's local rules. In that document, Defendants memorialized the fact that Plaintiffs had not previously indicated that their written requests sought agreements from third parties that may have authorized the uses of the compositions at issue in this case.

12. On June 12, 2008, the parties met and conferred on the outstanding requests in person, prior to the hearing on Plaintiffs' Motion to Compel. During that meet and confer, Plaintiffs and Aftermath agreed to a joint resolution on the disputes concerning Interrogatory No. 18 and Request for Production No. 6. Aftermath agreed to serve a supplemental interrogatory response stating whether it had any agreements from co-authors and, if it did, it would produce them promptly. I told Mr. Busch during that meet and confer that I did not know whether there were any such agreements, but that I would determine whether there were any and then provide the promised supplemental interrogatory response. This agreement was embodied in the Court's order on Plaintiffs' Motion to Compel, attached as Exhibit 1.

13. I told Mr. Busch during the meet and confer what I told the Court at the hearing on Plaintiffs' Motion to Compel: If there were any agreements with co-authors that Defendants were going to rely on, Defendants would provide that information and produce the agreements to Mr. Busch. Mr. Busch then clarified that his request included co-publishers, as well as co-

authors. Attached as Exhibit 13 are true and correct copies of pages 16-17 of the transcript of the hearing on Plaintiffs' Motion to Compel, which contains this exchange.

14. Aftermath complied with the Court's Order. On July 3, 2008, Aftermath served the required supplemental interrogatory response. Attached as Exhibit 14 is a true and correct copy of that supplemental interrogatory response. In that response, Aftermath stated that it would produce the agreements that it relied upon "on a rolling basis, as documents are collected, reviewed and processed." Defendants thereafter did so.

15. Plaintiffs have never asked for further information regarding the Co-Author Agreements, nor have they indicated that they had any interest in taking any deposition related to any of the Co-Author Agreements.

16. Plaintiffs have themselves made several productions of documents in this matter after the discovery cut-off date, amounting to more than 240 pages—almost 25% of their total production in this case. These late productions include (a) a collection of licenses produced on June 4, 2008; (b) a collection of agreements *produced on August 28, 2008, the same day* that Plaintiffs filed their Opposition to Defendants' Revised Motion for Summary Judgment relying upon them; and (c) a collection of copyright registrations produced *this week* disclosing Ensign Publishing for the first time as a copyright co-claimant of several of the compositions at issue in this case. Attached as Exhibit 15 is a true and correct copy of a chart summarizing Plaintiffs late-produced and previously undisclosed documents that were relied on in its Summary Judgment Opposition in this matter.

17. The first installment of these late-produced documents, produced on June 4, 2008 consisted of mechanical license requests and other relevant documents. From their face, it appears these documents had been in Plaintiffs' possession long before the discovery cut-off. In response to this late production, Defendants requested additional deposition time with Plaintiffs' main representative, Joel Martin. Plaintiffs made Mr. Martin available on June 25, 2008.

18. In response to Defendants' Interrogatories and Requests for Production, Plaintiffs had agreed to produce documents that relate to their claim of ownership. Attached as Exhibits 16-19 are true and correct copies of Plaintiffs' Responses to Defendants' First Set of Interrogatories and to Defendants' First Requests for Production of Documents, respectively.

19. On August 28, 2008, the day before this Motion was filed, Plaintiffs attached to their opposition to Defendant's motion for summary judgment numerous documents upon which Plaintiffs base their claims. These documents consist of agreements that either Plaintiff Eight Mile Style or Plaintiff Martin Affiliated are parties to, that are dated from 2000-2004. It thus appears from the face of these documents that they have long been in Plaintiffs' possession. Yet they were never before produced in this case until they were attached to Plaintiffs' summary judgment opposition. In addition to the many documents relied upon in Plaintiffs' opposition to Defendants' summary judgment motion, the documents produced on August 28, 2008 also included a co-publishing agreement between Plaintiff Eight Mile Style LLC and Ensign Music Corporation. A true and correct copy of that co-publishing agreement is attached as Exhibit 20.

20. On September 15, 2008, more than three months after the discovery cut-off date, Plaintiffs produced still more documents relating to Plaintiffs' claim of ownership. These documents included several copyright registrations for compositions at issue in this lawsuit in the name of Ensign Music Corporation. It is apparent that Plaintiffs knew about Ensign's interest in the compositions, since Plaintiffs themselves entered into the co-publishing agreement that is apparently the basis for Ensign's ownership interest. Despite this fact, Plaintiffs did not acknowledge the co-publishing agreement with Ensign until August 28, 2008, or acknowledge Ensign as a co-claimant with interests in the particular copyrights at issue in this lawsuit until September 15, 2008.

21. Attached as Exhibit 21 is a true and correct copy of several mechanical licenses granted by Ensign (or its affiliate company, Famous Music) for the compositions at issue in this

case. Had Plaintiffs acknowledged Ensign as a co-owner in these compositions within the discovery period, Defendants could have included in their summary judgment motion these additional mechanical licenses as additional bases of authority for the challenged uses of the compositions in this case.

22. Attached as Exhibit 22 is a true and correct copy of an audit report cover letter produced by Plaintiffs in this matter at FBT-00144. That document refers to the "First Look Agreement" between Interscope Records and Shady Records, Inc. Plaintiffs are now claiming, in this motion, that the "First Look Agreement" specifically referenced in a document produced by Plaintiffs is a document that Plaintiffs had no knowledge of and that they seek to exclude.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of September, 2008 at Los Angeles, California.

A handwritten signature in dark ink, appearing to read "Kelly Klaus", written over a horizontal line.

Kelly Klaus