

FILED

IN THE UNITED STATES DISTRICT COURT
Western District of Texas

2010 DEC -7 PM 2: 03

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

Affinity Labs of Texas, LLC)
Plaintiff,)
)
)
v.)
)
Apple Inc.)
Defendant,)

BY _____
DEPUTY

SUBPOENA IN A CIVIL CASE
CIVIL ACTION NO. 4:09-CV-04436-CW
Northern District of California

A10mc932 SS

**OPPOSED MOTION TO QUASH
THE INDIVIDUAL SUBPOENA OF TIMOTHY G. NEWMAN
AND BRIEF IN SUPPORT**

I. INTRODUCTION

Larson, Newman & Abel, LLP (Larson Newman) and Mr. Timothy G. Newman hereby move the Court to quash the deposition subpoena issued to Mr. Newman by Apple Inc. under Fed. R. Civ. P. 45(c)(3), or in the alternative, impose sanctions under Fed. R. Civ. P. 45 (c)(1).

On September 27, 2010, Apple Inc. served a Rule 30(b)(6) subpoena issued from this Court on the law firm Larson Newman. That subpoena commanded a representative of Larson Newman to appear for deposition on October 20, 2010. Larson Newman complied with the subpoena; however no one from Apple appeared to take the deposition. Four weeks later, Apple issued another subpoena for the individual deposition of Mr. Newman, a partner at Larson Newman. Larson Newman and Mr. Newman attempted to reach a compromise, but Apple insisted on moving forward with both subpoenas. The subpoena of Larson Newman has been satisfied. On December 7, the parties met and conferred on the matter. The parties are still at an impasse. For the reasons set forth below, Larson Newman and Mr. Newman move to quash Apple's subpoena of Mr. Newman.

II. FACTS

Apple has already taken up a substantial amount of Mr. Newman's and his partners' time. Apple has been unwilling to enter into the compromise solution proposed by Mr. Newman to

avoid additional burden. It is undisputed that the lawfirm and Mr. Newman are third parties to this action.

The following timeline sets forth the relevant events.

- September 27, 2010 – Apple served a third-party Rule 30(b)(6) subpoena on Larson Newman including 15 broad deposition topics. In addition, Apple commanded document production pursuant to 33 expansive document requests. *See Exhibit A.*
- October 11, 2010 – Larson Newman produced documents and served written objections. *See Exhibit B.*
- October 20, 2010 – Movant Timothy Newman and his partner Jeffrey Abel appeared for deposition on the date and at the location commanded in the Rule 30(b)(6) subpoena. No one from Apple appeared. No one from Apple contacted Larson Newman on or prior to this date to propose alternate plans. *See Declaration of Timothy G. Newman, Exhibit C.*
- November 18, 2010 – In response to Apple's inquires to reschedule, Mr. Newman indicated by letter that Larson Newman had fulfilled its obligations under the subpoena, and that Apple's continued demands were an unreasonable burden. In the interests of compromise, Mr. Newman offered to appear for a telephonic deposition. *See Letter from Newman to Apple counsel Ryan Yagura, Exhibit D.*
- November 18, 2010 – After that letter was dictated but before it was sent, Apple served Mr. Newman with a subpoena commanding his personal deposition on December 13, 2010. *See Exhibit D.*
- November 19, 2010 – In response to Mr. Newman's compromise offer, Apple indicated that it was proceeding under both subpoenas and insisted that Mr. Newman appear in person for deposition. *See Letter from Glasser to Newman, Exhibit E.*

Larson Newman fully satisfied its obligations under Apple's first subpoena. Failing to appear for the first deposition it subpoenaed, Apple's subsequent actions are a plain attempt to impose an unreasonable burden on a third party. Consequently, the Court should quash Apple's second subpoena of Mr. Newman.

III. RULE 45 PROTECTS THIRD PARTIES FROM UNDUE BURDEN OR EXPENSE

Mr. Newman is a third party to the action between Apple and Affinity Labs. Third parties are subject to special protections during discovery. Fed. R. Civ. P. 45(c)(1); *See, e.g., Bagwell v. Rival Consumer Sales Corp.*, 2006 WL 2883137 at *2 (W.D.Tex. September 19, 2006). That rule provides:

Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

Apple simply failed to adhere to its own schedule or even call to discuss arrangements for the first subpoena it issued to Larson Newman. In doing so, Apple now seeks to impose a multiple-day commitment, including time already expended, on Larson Newman. As an end-run around its error, Apple issued a second subpoena on Mr. Newman individually. Larson Newman already complied with Apple's Rule 30(b)(6) subpoena. Mr. Newman and Mr. Abel produced documents and appeared once already for deposition. *See* Declaration of Timothy G. Newman, Exhibit C. Apple's failure to show up for its first-subpoenaed deposition and issuance of a second subpoena constitutes an undue burden on Mr. Newman and Larson Newman. There is no dispute that Apple's failure to show is no fault of Mr. Newman's or Larson Newman. The Court may therefore impose an appropriate sanction on Apple. Rule 45(c)(1) specifies the minimum sanction – Mr. Newman and the firm's lost earning and attorney's fees – but quashing the subpoena entirely is more appropriate under the circumstances. Fed. R. Civ. P. 45(c)(3)(A) (providing for quashing or modifying a subpoena if it subjects a person to undue burden).

IV. CONCLUSION

Larson Newman satisfied its obligations under Apple's Rule 30(b)(6) subpoena. Apple failed to appear pursuant to its own subpoena to depose a third party in this district, and now attempts to avoid the consequences of its failure by issuing another subpoena. Serving both subpoenas constitutes a burden above and beyond what the firm and Mr. Newman's obligations should be under Rule 45. As a result, Larson Newman and Mr. Newman respectfully request that the Court quash the subpoena of Mr. Newman under Fed. R. Civ. P. 45(c)(3).

Dated: December 7, 2010

Respectfully submitted,

BY:




H. Kenneth Prol
Texas Bar No. 24027757
LARSON NEWMAN & ABEL, LLP

5914 West Courtyard Drive, Ste. 200
Austin, Texas 78730
(512) 439-7100 (Phone)
(512) 439-7199 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2010, the parties met and conferred and could not agree to resolve the issue over the subpoena of Mr. Newman. I further certify that on December 7, 2010, a true and correct copy of the foregoing document was served via courier on the following counsel of record as follows:



by: H. Kenneth Prol

Federal Express tracking no. 794189974728 to:
Darin Glasser
O'Melveny & Myers LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
Phone: (949) 823-6952
Fax: (949) 823-6994
Email: dglasser@omm.com

Federal Express tracking no. 794187700430 to:
Nicholas Whilt, Esq.
O'Melveny & Myers LLP
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Los Angeles, CA 90071
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Fax: (213) 430-6407
Email: nwhilt@omm.com

ATTORNEY FOR APPLE, INC.

**IN THE UNITED STATES DISTRICT COURT
Western District of Texas**

Affinity Labs of Texas, LLC)	
Plaintiff,)	
)	
)	SUBPOENA IN A CIVIL CASE
v.)	CIVIL ACTION NO. 4:09-CV-04436-CW
)	Northern District of California
Apple Inc.)	
Defendant,)	

PROPOSED ORDER

Having considered the facts and arguments in the OPPOSED MOTION TO QUASH THE INDIVIDUAL SUBPOENA OF TIMOTHY G. NEWMAN and considering the motion to be well-taken, the Court **HEREBY ORDERS** that:

The Motion to Quash the Individual Subpoena of Timothy G. Newman **IS GRANTED**;
and

FURTHER ORDERS that the deposition that is the subject of the subpoena shall not proceed.

SO ORDERED: _____

U.S. District Judge
for the Western District of Texas,
Austin Division.

DATED: _____

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

affinity Labs of Texas, LLC

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

DEFENDANTS

apple Inc.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DJWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:
Motion to Quash

VII. REQUESTED IN COMPLAINT:

- CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
- DEMAND \$ _____
- CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

DUPLICATE

Court Name: TEXAS WESTERN
Division: 1
Receipt Number: 100008586
Cashier ID: tkatzen
Transaction Date: 12/07/2010
Payer Name: H. KENNETH PROL

MISCELLANEOUS PAPERS
For: H. KENNETH PROL
Amount: \$39.00

CASH
Amt Tendered: \$39.00

Total Due: \$39.00
Total Tendered: \$39.00
Change Amt: \$0.00

1:10-MC-932 SS; AFFINITY LABS OF
TEXAS LLC V. APPLE INC.