Big-Name Litigators Signing on to Apple's Patent Wars

Zusha Elinson The Recorder April 21, 2010



W eil Gotshal's Matt Powers Image: Jason Doiy/The Rec or der

Steve Jobs doesn't skimp on lawyers.

Apple Inc. just added another big, expensive name to the growing list of lawyers engaged in the company's latest round of patent wars.

Matthew Powers, head of litigation at **Weil, Gotshal & Manges** in Redwood City, Calif., filed a countersuit for Apple against Kodak last week. In its dispute with Nokia, Apple has already hired Boston's William Lee, co-managing partner of **Wilmer Cutler Pickering Hale and Dorr**. And in its patent offensive against HTC Corp.'s Google phones, Apple is using **Kirkland & Ellis** top patent lawyer Robert Krupka, from Los Angeles.

Although Powers and Lee have suffered some **notable** defeats at trial in Texas in recent years, they are seen as the cream of the country's patent bar. All three of the firms are ranked No. 1 in IP litigation by Chambers. And all three partners have billing rates close to \$1,000 an hour, according to people familiar with those rates.

Their assignments aren't the typical disputes. Apple faces dozens of patent infringement lawsuits, but many of them are filed by patent trolls willing to settle for the cost of litigation.

In contrast, the cases against Nokia, Kodak and HTC are fights with real companies that **all want a piece** of the smartphone market. The companies can pay top dollar for lawyers, and have stockpiles of patents to lob at each other.

Both the Kodak and Nokia cases got started when those companies sued Apple, accusing the iPhone of infringing on their patents. Nokia sued Apple in October, claiming the iPhone infringes on 10 of its patents related to WiFi and 3G network technologies. Kodak sued Apple in January, alleging that the iPhone infringes on two of its digital camera patents.

Apple lawyers looked through its patent portfolio. They found 13 patents that they claim Nokia infringes on with its own phones and countersued in December. They found two that they believe Kodak infringes on with its cameras and countersued in the Northern District of California on April 15.

The countersuit is a common ploy in patent lawsuits among competitors. Companies like Apple stockpile patents whether they need them for products or not, to use as ammunition in countersuits -- something they can't do in troll cases.

The HTC fight is different, because Apple fired the first shot when it sued the Taiwanese maker of smartphones that use Google's Android operating system. Interestingly, Apple chose a Google phone maker that has a relatively small patent portfolio of its own, compared to other Google phone makers like Motorola.

Apple has long used Weil Gotshal for IP lawsuits. The firm is defending the company in another case brought by Taiwan-based Elan Microelectronics over touchscreen patents.

Kirkland & Ellis, too, has worked on Apple patent cases before, including its knockdown fight with Creative Labs a few years back. WilmerHale has also done patent work for Apple in the past.

Between 1990-2000 Weil Gotshal & Manges filed the patents Apple copied from in 2003 to create the iPhone, iPod Touch, and iPad. WG&M and Apple have deliberately concealed this fact from the courts and from the USITC in order prevent the origin of the iPhone from being discovered. They are committing obstruction of justice: a very serious criminal offense!

18 USC Sec. 371 01/05/2009

-EXPCITE-

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE PART I - CRIMES
CHAPTER 19 - CONSPIRACY

-HEAD-

Sec. 371. Conspiracy to commit offense or to defraud United States

-STATUTE-

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

-SOURCE-

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103-322, title XXXIII, Sec. 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 USC Sec. 1956 01/05/2009

-EXPCITE-

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE PART I - CRIMES CHAPTER 95 - RACKETEERING

-HEAD-

Sec. 1956. Laundering of monetary instruments

-STATUTE-

- (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -
- (A)(i) with the intent to promote the carrying on of specified
 unlawful activity; or
 - (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or(B) knowing that the transaction is designed in whole or in
 - part (i) to conceal or disguise the nature, the location, the
 source, the ownership, or the control of the proceeds of
 specified unlawful activity; or
 - (ii) to avoid a transaction reporting requirement under State or Federal law,

Case5:09-cv-01531-RS Document43 Filed10/05/09 Page1 of 15 1 MATTHEW D. POWERS (Bar No. 104795) matthew.powers@weil.com 2 EDWARD R. REINES (Bar No. 135960) edward.reines@weil.com 3 SONAL N. MEHTA (Bar No. 222086) sonal.mehta@weil.com 4 WEIL, GOTSHAL & MANGES LLP Silicon Valley Office 5 201 Redwood Shores Parkway Redwood Shores, CA 94065 Telephone: (650) 802-3000 6 Facsimile: (650) 802-3100 7 Attorneys for Apple, Inc. 8 9 UNITED STATES DISTRICT COURT 10 NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION 11 12 ELAN MICROELECTRONICS Case No. C-09-01531 RS CORPORATION. 13 APPLE, INC.'S SECOND AMENDED Plaintiff and Counterclaim ANSWER, AFFIRMATIVE DEFENSES, 14 Defendant. AND COUNTERCLAIMS TO ELAN **MICROELECTRONICS** 15 CORPORATION'S COMPLAINT FOR v. PATENT INFRINGEMENT 16 APPLE, INC., Hon. Richard Seeborg 17 Defendant and Counterclaim Plaintiff. Demand for Jury Trial 18 19 20 Defendant Apple, Inc. ("Apple") by and through its undersigned counsel, hereby 21 responds to Plaintiff Elan Microelectronics Corporation's ("Elan") Complaint for Patent 22 Infringement ("Complaint") as follows: 23 I. 24 ANSWER 25 **PARTIES** 26 Apple is without knowledge or information sufficient to form a belief as to 1. 27 the truth of the statements in Paragraph 1 of the Complaint, and, on that basis, denies those

APPLE'S SECOND AMENDED ANSWER, DEFENSES AND COUNTERCLAIMS

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allegations.

- 2. Apple admits that U.S. Patent No. 5,825,352 ("the '352 patent") states on its face that it is entitled "Multiple Finger Contact Sending Method for Emulating Mouse Buttons and Mouse Operations on a Touch Sensor Pad." Apple is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Elan's purported ownership of all right and title to the '352 patent and, therefore, denies those allegations. Except as so expressly admitted herein, Apple denies the allegations in Paragraph 2 of the Complaint.
- 3. Apple admits that U.S. Patent No. 7,274,353 ("the '353 patent") states on its face that it is entitled "Capacitive Touchpad Integrated with Key and Handwriting Functions." Apple is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Elan's purported ownership of all right and title to the '353 patent and, therefore, denies those allegations. Except as so expressly admitted herein, Apple denies the allegations in Paragraph 3 of the Complaint.
 - 4. Apple admits the allegations in Paragraph 4 of the Complaint.

JURISDICTION AND VENUE

- 5. Apple admits that Elan's Complaint purports to be an action that arises under the patent laws of the United States, 35 U.S.C. § 1 *et seq.*, but denies any wrongdoing or liability on its own behalf for the reasons stated herein. Apple admits that this Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). Except as so expressly admitted herein, Apple denies the allegations in Paragraph 5 of the Complaint.
- 6. Apple admits that it resides in this district and has a regular place of business in this district. Apple denies that it has committed any acts of infringement within this district and specifically denies any wrongdoing, infringement, inducement of infringement or contribution to infringement. Apple admits that venue is proper as to Apple in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(b). Except as so expressly admitted herein, Apple denies the allegations in Paragraph 6 of the Complaint.

THE DISPUTE

- 7. Apple denies the allegations in Paragraph 7 of the Complaint.
- 8. Apple denies the allegations in Paragraph 8 of the Complaint.

1	9. Apple admits that it designs, markets and sells computer and consumer
2	electronics products including touch-sensitive input devices. Apple admits that it does or has
3	designed, marketed, and sold the Apple iBook, PowerBook and MacBook portable computers,
4	iPhone mobile phones and iPod Touch digital medial player devices, which do or have included
5	touch-sensitive input devices. Except as so expressly admitted herein, Apple denies the
6	allegations in Paragraph 9 of the Complaint.
7	FIRST CLAIM
8	10. Apple refers to and incorporates herein its answers as provided in
9	Paragraphs 1-9 above.
10	11. Apple denies the allegations in Paragraph 11 of the Complaint.
11	12. Apple denies the allegations in Paragraph 12 of the Complaint.
12	13. Apple denies the allegations in Paragraph 13 of the Complaint.
13	14. Apple denies the allegations in Paragraph 14 of the Complaint.
14	15. Apple denies the allegations in Paragraph 15 of the Complaint.
15	SECOND CLAIM
16	16. Apple refers to and incorporates herein its answers as provided in
17	Paragraphs 1-15 above.
18	17. Apple denies the allegations in Paragraph 17 of the Complaint.
19	18. Apple denies the allegations in Paragraph 18 of the Complaint.
20	19. Apple denies the allegations in Paragraph 19 of the Complaint.
21	20. Apple denies the allegations in Paragraph 20 of the Complaint.
22	21. Apple denies the allegations in Paragraph 21 of the Complaint.
23	PRAYER FOR RELIEF
24	22. Apple denies that Elan is entitled to any of the relief sought in its prayer for
25	relief. Apple has not directly or indirectly infringed the '352 and '353 patents, either literally or
26	by the doctrine of equivalents, willfully or otherwise. Elan is not entitled to recover statutory
27	damages, compensatory damages, enhanced damages, an accounting, injunctive relief, costs, fees,
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1	interest, or any other type of recovery from Apple. Elan's prayer should, therefore, be denied in	
2	its entirety and with prejudice, and Elan should take nothing.	
3	DEMAND FOR JURY TRIAL	
4	23. Apple does not object to a trial by jury on all issues so triable.	
5	II.	
6	DEFENSES	
7	As and for its affirmative defenses, Apple alleges as follows:	
8	FIRST DEFENSE – NON-INFRINGEMENT	
9	24. Apple does not infringe and has not directly or indirectly infringed any	
10	claims of the '352 and '353 patents, either literally or under the doctrine of equivalents, willfully	
11	or otherwise.	
12	SECOND DEFENSE – INVALIDITY	
13	25. Elan's alleged claims for infringement of the '352 and '353 patents are	
14	barred because each and every claim of the '352 and '353 patents is invalid for failure to comply	
15	with the requirements of Title 35 of the United States Code, including but not limited to	
16	Sections 101, 102, 103, and/or 112.	
17	THIRD DEFENSE – LACHES	
18	26. Elan's claims for relief are barred in whole or in part by the doctrine of	
19	laches.	
20	FOURTH DEFENSE – ESTOPPEL	
21	27. Elan's claims for relief are barred in whole or in part by the doctrine of	
22	equitable estoppel.	
23	FIFTH DEFENSE – STATUTE OF LIMITATIONS	
24	28. To the extent Elan seeks damages for alleged infringement more than six	
25	years prior to filing of this action, the relief sought by Elan is barred by 35 U.S.C. § 286.	
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	APPLE'S SECOND AMENDED ANSWER, DEFENSES AND Case No. C-09-01531 RS	

1	SIXTH DEFENSE – NOTICE
2	29. To the extent Elan seeks damages for alleged infringement prior to its
3	giving actual or constructive notice of the '352 and '353 patents to Apple, the relief sought by
4	Elan is barred by 35 U.S.C. § 287.
5	SEVENTH DEFENSE – NO INJUNCTIVE RELIEF
6	30. To the extent Elan seeks injunctive relief for alleged infringement, the
7	relief sought by Elan is unavailable because any alleged injury to Elan is not immediate or
8	irreparable and because Elan has an adequate remedy at law for any alleged injury.
9	III.
10	COUNTERCLAIMS
11	Counterclaim-Plaintiff Apple counterclaims against Counterclaim-Defendant Elan
12	as follows:
13	PARTIES
14	31. Apple is a corporation organized under the laws of the State of California
15	and having a principal place of business at 1 Infinite Loop, Cupertino, CA 95014.
16	32. Elan alleges that it is a corporation organized under the laws of Taiwan
17	R.O.C. with a principal place of business at No. 12, Innovation 1st Road, Science Based
18	Industrial Park, Hsinchu Taiwan R.O.C.
19	JURISDICTION AND VENUE
20	33. These counterclaims arise under Title 35 of the United States Code. The
21	Court has subject matter jurisdiction over these counterclaims pursuant to 28 U.S.C. §§ 1331,
22	1338(a), 2201, and 2202.
23	34. Elan is subject to personal jurisdiction in this district arising out of its
24	systematic and continuous contacts with this district and its purposeful acts and/or transactions
25	directed toward this district. Such contacts include without limitation Elan's past and ongoing
26	infringing conduct in this district, Elan's bringing of this lawsuit in this district, and, on
27	information and belief, Elan's presence and conduct of business in this district through ELAN
28	Information Technology Group, operating in Cupertino, California 95015.

35. Venue is proper in this judicial district under 28 U.S.C. § 1391.

THE DISPUTE

- 36. Elan designs, markets, manufactures and sells touch-sensitive input devices or touchpads and related components, including but not limited to the Smart-Pad product. These products are incorporated into products that are sold in the United States and are used by consumers in the United States, including for example, as part of laptop computers.
- 37. Laptop computers including Elan touchpads and related components are available for purchase throughout the United States, including in this judicial district. These products are available for purchase in this judicial district from retailers, distributors and middlemen, including for example, at retail outlets (e.g., Best Buy) and on the internet (e.g., www.amazon.com).
- 38. Upon information and belief, Elan touchpads and related components are used by consumers and users of the laptop computers including such touchpads and components throughout the United States, including in this judicial district.
- 39. Upon information and belief, Elan markets, sells and supports its touchsensitive input devices or touchpads and related components in the United States directly and
 through its agent Elan Information Technology Group ("EITG"). EITG is Elan's wholly-owned
 subsidiary, with its principle place of business in this judicial district. See Order Denying
 Defendant Elan Microelectronics' Motion to Dismiss in Agilent Technologies, Inc. v. Elan
 Microelectronics Corp., Case No. 04-5385-JW (N.D. Cal. Nov. 29, 2005). Elan maintains a
 "worldwide network of sales channels and technical support," including in North America. Id.
 EITG is the North American hub for that network. Id. Elan's co-founder, chief-engineer and
 head of R&D served as President and registered agent of EITG. Id. EITG directly purchases
 products from Elan and turns around to sell them to California companies. Id. Elan has caused
 its products to be imported into the United States, specifically to the Northern District of
 California. Id. Elan maintains a continuous business relationship with the United States through
 its EITG office. Id. Elan directs its customers in North America to contact EITG for products
 and services. Id.

1	FIRST COUNTERCLAIM – DECLARATORY JUDGMENT	
2	'352 PATENT	
3	40. Apple incorporates herein by reference the allegations of paragraphs 1 - 39	
4	of this Answer, Affirmative Defenses and Counterclaims ("Answer").	
5	41. Apple counterclaims against Elan pursuant to the patent laws of the United	
6	States, Title 35 of the United States Code, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201	
7	and 2202.	
8	42. In its Complaint, Elan alleges that Apple is now and has been directly	
9	and/or indirectly infringing the '352 patent by the sale of at least its iBook, PowerBook,	
10	MacBook, iPhone and iPod Touch products.	
11	43. An actual controversy exists between Elan and Apple by virtue of the	
12	allegations of Elan's Complaint and Apple's Answer as to the validity and infringement of the	
13	'352 patent.	
14	44. The '352 patent is invalid and not infringed, as set forth in paragraphs 24	
15	through 30 above.	
16	45. Apple is entitled to judgment that the '352 patent is invalid and not	
17	infringed.	
18	SECOND COUNTERCLAIM – DECLARATORY JUDGMENT	
19	'353 PATENT	
20	46. Apple incorporates herein by reference the allegations of paragraphs 1 - 45	
21	of this Answer.	
22	47. Apple counterclaims against Elan pursuant to the patent laws of the United	
23	States, Title 35 of the United States Code, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201	
24	and 2202.	
25	48. In its Complaint, Elan alleges that Apple is now and has been directly	
26	and/or indirectly infringing the '353 patent by the sale of its iPhone and iPod Touch products.	
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	APPLE'S SECOND AMENDED ANSWER, DEFENSES AND Case No. C-09-01531 RS	

- 49. An actual controversy exists between Elan and Apple by virtue of the allegations of Elan's Complaint and Apple's Answer as to the validity and infringement of the '353 patent.
- 50. The '353 patent is invalid and not infringed, as set forth in paragraphs 24 through 30 above.
- 51. Apple is entitled to judgment that the '353 patent is invalid and not infringed.

THIRD COUNTERCLAIM – PATENT INFRINGEMENT '218 PATENT

- 52. Apple incorporates herein by reference the allegations of paragraphs 1 51 of this Answer.
- 53. Apple is the owner of the entire right, title and interest in and to U.S. Patent No. 5,764,218 ("the '218 patent") entitled "Method And Apparatus For Contacting A Touch-Sensitive Cursor-Controlling Input Device To Generate Button Values," which was duly and legally issued on June 9, 1998 in the name of inventors Mark A. Della Bona, Jonathan Dorfman and Jay F. Hamlin. A copy of the '218 patent is attached as Exhibit A hereto.
- 54. The '218 patent claims methods and apparatuses for a touch-sensitive cursor-controlling input device that detects contact intervals when the user contacts the touch-sensitive input device, detects gap intervals between subsequent contact intervals, and moves the cursor on the display screen and enables an operator to perform with a single touch-sensitive input device numerous control operations, such as cursor manipulation, click, multi-click, drag, click-and-drag, and multi-click-and-drag operations based on the duration of the contact and gap intervals.
- 55. Upon information and belief, Elan's touch-sensitive input devices or touchpads and related components employ the methods and/or apparatuses claimed in the '218 patent, including but not limited to the Smart-Pad product, employ the methods and/or apparatuses claimed in the '218 patent by detecting contact intervals for touches on the touchpad, detecting gap intervals between such contact intervals, and based on the duration of those APPLE'S SECOND AMENDED ANSWER, DEFENSES AND

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intervals, distinguishing between three or more gestures (e.g., "vertical scroll," "tapping," "magnifier") and reporting the gesture that has been identified to the host device (e.g., laptop computer). In addition, driver software for Elan's touch-sensitive input devices such as the Smart-Pad allows a user to enable one-finger, two-finger, and three-finger tapping and to select which laptop control operations correlate to different gestures.

- 56. Laptop computers employing Elan's touch-sensitive input devices or touchpads and related components employing the methods and/or apparatuses claimed in the '218 patent, including but not limited to the Smart-Pad product, are imported into, offered for sale, sold and used in the United States.
- 57. Upon information and belief, Elan has been and is currently directly infringing, in violation of 35 U.S.C. § 271, the '218 patent through its use, importation, offer for sale and/or sale of touch-sensitive input devices or touchpads and related components employing the methods and/or apparatuses claimed in the '218 patent, including but not limited to the Smart-Pad product, in the United States, including through its agent EITG.
- 58. Elan has had actual knowledge of the '218 patent since at least July 1, 2009.
- 59. Upon information and belief, Elan has been and is currently indirectly infringing, in violation of 35 U.S.C. § 271, the '218 patent. Upon information and belief, the '218 patent is directly infringed by, without limitation, manufacturers and others in the distribution channel of laptop computers, using, selling, offering for sale and/or importing in the United States, Elan's touch-sensitive input devices or touchpads employing the methods and apparatuses claimed in the '218 patent through their processing of gestures, including but not limited to the Smart-Pad product. Upon information and belief, Elan induces that infringement through its intentional marketing, sale and/or support, including technical support, of such devices in the United States, including through EITG, and through the intentional design, marketing, manufacture, sale and/or support, including technical support, of such devices abroad to induce direct infringement in the United States. Upon information and belief, Elan's inducement includes, without limitation, active encouragement of the use, sale, offer for sale and/or

importation in the United States, of such devices to enable gestures that infringe the '218 patent on such devices, including through the promotion and provision of software drivers and marketing literature that induces direct infringement. Upon information and belief, Elan has known or should have known that these actions would cause direct infringement of the '218 patent and did so with specific intent to encourage direct infringement.

- 60. Apple has suffered, and will continue to suffer, irreparable injury as a result of Elan's infringement. Pursuant to 35 U.S.C. §§ 283 and 284, Apple is entitled to damages for infringement and to a permanent injunction against further infringement.
- 61. This case is exceptional, and therefore, Apple is entitled to attorneys' fees pursuant to 35 U.S.C. § 285.

FOURTH COUNTERCLAIM – PATENT INFRINGEMENT **'659 PATENT**

- 62. Apple incorporates herein by reference the allegations of paragraphs 1 - 61 of this Answer.
- 63. Apple is the owner of the entire right, title and interest in and to U.S. Patent No. 7,495,659 ("the '659 patent") entitled "Touch Pad For Handheld Device," which was duly and legally issued on February 24, 2009 in the name of inventors Greg Marriott, Guy Bar-Nahum, and Steven Bollinger. A copy of the '659 patent is attached as Exhibit B hereto.
- 64. The '659 patent claims methods and apparatuses for a touchpad system that maps the touchpad into native sensor coordinates and produces native values of the native sensor coordinates when events occur on the touchpad. The system further includes filtering the native values of the native sensor coordinates based on the type of events that occur on the touchpad. The system additionally includes generating a control signal based on the native values of the native sensor coordinates when a desired event occurs on the touch pad.
- 65. Upon information and belief, Elan's touch-sensitive input devices or touchpads and related components employ the methods and/or apparatuses claimed in the '659 patent, including but not limited to the Smart-Pad product, employ the methods and/or apparatuses claimed in the '659 patent by including a touchpad and controller that defines a

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logical device unit associated with the surface of a touchpad, receives native values associated with native sensor coordinates based on touches to the touchpad, filters those values, adjusts the native values to a new value associated with the logical device unit, and reports the new, filtered values to the host processor on the laptop such that the amount of data sent based on values associated with the logical device unit is less than the native values associated with sensor coordinates on the touchpad.

- 66. Laptop computers employing Elan's touch-sensitive input devices or touchpads and related components employing the methods and/or apparatuses claimed in the '218 patent, including but not limited to the Smart-Pad product, are imported into, offered for sale, sold and used in the United States.
- 67. Upon information and belief, Elan has been and is currently directly infringing, in violation of 35 U.S.C. § 271, the '659 patent through its use, importation, offer for sale and/or sale of touch-sensitive input devices or touchpads employing the methods and/or apparatuses claimed in the '659 patent, including but not limited to the Smart-Pad product, in the United States, including through its agent EITG.
- 68. Elan has had actual knowledge of the '659 patent since at least July 1, 2009.
- 69. Upon information and belief, Elan has been and is currently indirectly infringing, in violation of 35 U.S.C. § 271, the '659 patent. Upon information and belief, the '659 patent is directly infringed by, without limitation, manufacturers and others in the distribution channel of laptop computers, using, selling, offering for sale and/or importing in the United States, Elan's touch-sensitive input devices or touchpads employing the methods and apparatuses claimed in the '659 patent through their processing of touches, including but not limited to the Smart-Pad product. Upon information and belief, Elan induces that infringement through its intentional marketing, sale and/or support, including technical support, of such devices in the United States, including through EITG, and through the intentional design, marketing, manufacture, sale and/or support, including technical support, of such devices abroad to induce direct infringement in the United States. Upon information and belief, Elan's inducement APPLE'S SECOND AMENDED ANSWER, DEFENSES AND

includes, without limitation, active encouragement of the use, sale, offer for sale and/or importation in the United States of such devices to enable processing of touches that infringe the '659 patent on such devices, including through the promotion and provision of touchpads and related controllers and marketing literature that induces direct infringement. Upon information and belief, Elan has known or should have known that these actions would cause direct infringement of the '659 patent and did so with specific intent to encourage direct infringement.

- 70. Apple has suffered, and will continue to suffer, irreparable injury as a result of Elan's infringement. Pursuant to 35 U.S.C. §§ 283 and 284, Apple is entitled to damages for infringement and to a permanent injunction against further infringement.
- 71. This case is exceptional, and therefore, Apple is entitled to attorneys' fees pursuant to 35 U.S.C. § 285.

FIFTH COUNTERCLAIM – PATENT INFRINGEMENT '929 PATENT

- 72. Apple incorporates herein by reference the allegations of paragraphs 1 71 of this Answer.
- 73. Apple is the owner of the entire right, title and interest in and to U.S. Patent No. 6,933,929 ("the '929 patent") entitled "Housing For A Computing Device," which was duly and legally issued on August 23, 2005 in the name of inventor Chris J. Novak. A copy of the '929 patent is attached as Exhibit C hereto.
- 74. The '929 patent claims an improved housing for a computing device, including a touchpad system.
- Touchpads in touchpad systems and touchpad housing assemblies, including but not limited to the Smart-Pad assembly employed in laptop computers, employ the apparatus claimed in the '929 patent because they comprise a touchpad housing with a recess, a touchpad that sits in the recess and a touchpad label (covering) over the touchpad and housing that is substantially permanently attached to the housing to secure the touchpad within the cavity formed by the recess. The recess in the Smart-Pad assembly coincides with the shape of the touchpad and has substantially the

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same depth as the thickness of the touchpad. The recess also surrounds an opening that allows wires from the touchpad to be provided internal to the touchpad housing.

- 76. Laptop computers employing Elan's touch-sensitive input devices or touchpads and related components employing the methods and/or apparatuses claimed in the '218 patent, including but not limited to the Smart-Pad assembly are imported into, offered for sale, sold and used in the United States.
- 77. Elan has had actual knowledge of the '929 patent since at least July 1, 2009.
- 78. Upon information and belief, Elan has been and is currently indirectly infringing, in violation of 35 U.S.C. § 271, the '929 patent. Upon information and belief, the '929 patent is directly infringed by, without limitation, manufacturers and others in the distribution channel of laptop computers, using, selling, offering for sale and/or importing in the United States, Elan's touch-sensitive input devices or touchpads in touchpad systems and touchpad housing assemblies claimed in the '929 patent, including but not limited to the Smart-Pad assembly. Pursuant to Rule 11(b)(3), it is likely that reasonable opportunity for further investigation or discovery will confirm that Elan induces that infringement through its intentional marketing, sale and support of such devices in the United States, including through EITG, and through the intentional design, marketing, manufacture, sale and support of such devices abroad to induce direct infringement in the United States. Pursuant to Rule 11(b)(3), it likely that reasonable opportunity for further investigation or discovery will confirm that Elan's inducement includes active encouragement, participation and/or assistance in the design and manufacture of touchpad systems or housing assemblies that infringe the '929 patent as part of its activities in conjunction with the manufacture, marketing, sale and support of touchpads employed in such systems or housing assemblies in laptop computers. Pursuant to Rule 11(b)(3), it likely that reasonable opportunity for further investigation or discovery will confirm that Elan has known or should have known that these actions would cause direct infringement of the '929 patent and did so with specific intent to encourage direct infringement.

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Apple has suffered, and will continue to suffer, irreparable injury as a

2	result of Elan's infr	ingement. Pursuant to 35 U.S.C. §§ 283 and 284, Apple is entitled to
3	damages for infringer	ment and to a permanent injunction against further infringement.
4	80.	This case is exceptional, and therefore, Apple is entitled to attorneys' fees
5	pursuant to 35 U.S.C.	§ 285.
6		DEMAND FOR JURY TRIAL
7	81.	Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Apple hereby
8	demands a trial by jun	ry on all issues so triable.
9		PRAYER FOR RELIEF
10	WHEI	REFORE, Apple prays for judgment as follows on Elan's Complaint and on
11	Apple's Answer, Aff	irmative Defenses and Counterclaims:
12	A.	That Elan's Complaint be dismissed with prejudice and that Elan take
13		nothing;
14	В.	That judgment be entered in favor of Apple against Elan on Elan's
15		Complaint;
16	C.	For entry of an Order declaring each and every claim of the '352 and '353
17		patents invalid and not infringed by Apple;
18	D.	For entry of an Order declaring that Elan has infringed, directly or
19		indirectly, the '218, '659 and '929 patents under 35 U.S.C. § 271;
20	E.	That Elan, its officers, agents, servants, employees, attorneys and those
21		persons in active concert or participation with any of them, be preliminarily
22		and permanently restrained and enjoined from directly and indirectly
23		infringing the '218, '659 and '929 patents;
24	F.	That Elan be required to pay damages to compensate Apple for Elan's
25		infringement pursuant to 35 U.S.C. § 284;
26	G.	An assessment of pre-judgment and post-judgment interest and costs
27		against Elan, together with an award of such interest and costs;
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1	H. That pursuant to 35 U.S.C. § 285 and/or other applicable laws, Elan's
2	conduct be found to render this an exceptional case and that Apple be
3	awarded its attorneys' fees incurred in connection with this action;
4	I. That Elan be required to pay Apple's costs of suit;
5	J. That Apple be awarded such other and further relief as the court may deem
6	just and proper.
7	
8	Dated: October 5, 2009 WEIL, GOTSHAL & MANGES LLP
9	
10	By: /s/ Edward R. Reines
11	EDWARD R. REINES edward.reines@weil.com
12	Attorneys for Defendant and Counterclaim Plaintiff Apple, Inc.
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APPLE'S SECOND AMENDED ANSWER, DEFENSES AND COUNTERCLAIMS