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Attorneys for Plaintiff-Counterclaim Defendant EPL Holdings, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EPL HOLDINGS, LLC, a Delaware limited liability company, Plaintiff-Counterclaim Defendant, vs. APPLE INC., a California corporation, Defendant-Counterclaimant.	Case No. 3:12-CV-04306 (JST) **FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT** **DEMAND FOR JURY TRIAL**

Plaintiff EPL Holdings, LLC ("EPL") complains and alleges as follows against Defendant Apple, Inc. ("Apple"):

THE PARTIES AND THE NATURE OF THIS ACTION

1. EPL is a Delaware limited liability company having its principal place of business at 2666 E. Bayshore Road, Suite C, Palo Alto, California 94303-3211.

2. Apple is a California corporation having its principal place of business at 1 Infinite Loop, Cupertino, California 95014. Apple may be served via its registered agent, CT Corporation System, 818 W 7th St., Los Angeles, California 90017.

3. This action arises under the patent laws of the United States, Title 35 of the United States Code, and relates to U.S. Patent Nos. 5,175,769 and 7,683,903.

JURISDICTION

4. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

5. Personal jurisdiction of this Court over Apple is proper because Apple commits acts of infringement in violation of 35 U.S.C. § 271 and places infringing products into the stream of commerce, through an established distribution channel, with the knowledge and/or understanding that such products are sold in the State of California, including this District. Further, Apple designs and markets infringing products from its headquarters located in the State of California, including this District. These acts cause injury to EPL within the District. Upon information and belief, Apple derives substantial revenue from the sale of infringing products distributed within the District, and/or expects or should reasonably expect its actions to have consequences within the District, and derives substantial revenue from interstate and international commerce. In addition, Apple has knowingly induced, and continues to knowingly induce, infringement within this State and within this District by contracting with others to market and sell infringing products with the knowledge and intent to facilitate infringing sales of the products by others within this District, by creating and/or disseminating user manuals for the products with like mind and intent, and by warranting the products sold by Apple and others within the district.

VENUE AND INTRADISTRICT ASSIGNMENT

6. Plaintiff EPL realleges and incorporates by reference paragraphs 1- 5.

7. Venue is proper within this District under 28 U.S.C. §§ 1391(b), (c), and 1400(b).

FACTUAL BACKGROUND

8. Since before 1992, EPL and its predecessor in interest, Enounce, Inc. ("Enounce"), have developed and continue to develop important technologies that allow consumers to play back digital media content, including audio and video, at variable speeds, *i.e.*, slower or faster than normal speed. Variable speed control is becoming as popular as volume control on digital

media playback devices. Indeed, this technology has become increasingly prevalent in some of the most popular consumer electronic products currently on the market.

9. On or about January 28, 2002, Apple employee Tony Fadell requested a meeting with Enounce's founder, Donald J. Hejna, Jr., to discuss the playback technology.

10. In response to Apple's request, on or about February 5, 2002, Mr. Hejna and another Enounce employee, Howard Giles, met with Mr. Fadell and at least two other Apple employees at Apple's Cupertino, California offices and discussed Enounce's patented technology.

11. Apple and Enounce then entered into a non-disclosure agreement ("NDA") effective February 6, 2002, that expired on February 6, 2005.

12. On or about March 19, 2002, Apple employee Aram Lindahl met with Mr. Hejna and again discussed Enounce's patented technology. At that meeting, Mr. Hejna provided Mr. Lindahl with a copy of United States Patent No. 5,175,769 ("the '769 patent").

13. Within weeks of the March 19, 2002, meeting, Apple offered Enounce a *de minimis* $50,000 for a license to use Enounce's patented technology.

14. Because Mr. Hejna and his colleagues believed that the offer fell woefully short of the value of their technology, Enounce declined Apple's offer.

15. Thereafter, and unbeknownst to Enounce, Apple began extensively using Enounce's patented technologies by incorporating them into key Apple consumer electronics products, including but not limited to the iPhone and iPad, on which Apple makes billions of dollars in U.S. sales annually. Apple took these actions with blatant knowledge and disregard for the legal rights of Enounce.

16. Moreover, Apple began to advertise and tout the ability of its digital media players to play back media files at variable speeds, the precise technology found in the Enounce patents. For example, Apple describes its QuickTime product as a "sophisticated media player" and further states, "Want to speed through a movie or slow things down? A handy slider lets you set playback from 1/2x to 3x the normal speed." (http://www.apple.com/quicktime/what-is/).

17. Similarly, Apple instructs iPhone users to "Set the playback speed" to play back media files at variable speeds using the technology found in the Enounce patents:

> Tap 1X. Tap again to change the speed.
> 2X = Play at double speed.
> ½X = Play at half speed.
> 1X = Play at normal speed.

(iPhone User Guide For iOS 5.1 Software, at 77).

18. While Apple enjoyed billions of dollars of sales, Mr. Hejna and his company have suffered and continue to suffer due to the inability to realize the full and fair value of the patented inventions.

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 5,175,769

19. Plaintiff EPL realleges and incorporates by reference paragraphs 1-18 above, as if fully set forth herein.

20. EPL is the owner by assignment from Enounce, Inc., including the right to sue for past damages, of United States Patent No. 5,175,769, titled "Method for Time-Scale Modification of Signals." The '769 patent was duly and legally issued by the United States Patent and Trademark Office on December 29, 1992. A true and correct copy of the '769 patent is included as Exhibit A.

21. On information and belief, Apple infringed the '769 patent in the State of California, in this District, and elsewhere in the United States, by, among other things, making, using, selling, offering for sale, and/or importing into the United States products with variable speed playback capability. Such products include, by way of example and without limitation, Apple iPhone, iPod Touch, and iPad, the use of which were covered by one or more claims of the '769 patent, including but not limited to claim 1. By making, using, importing, offering for sale, and/or selling such products and services that are covered by one or more claims of the '769

patent, Apple injured EPL and is thus liable to EPL for infringement of the '769 patent pursuant to 35 U.S.C. § 271.

22. On information and belief, Apple induced others to infringe the '769 patent in violation of 35 U.S.C. § 271 by taking active steps to encourage and facilitate direct infringement by others of at least claim 1 of the '769 patent with knowledge of that infringement, such as, upon information and belief, by instructing users of the Apple iPhone, iPod Touch, and iPad to play back digital media at faster- and/or slower-than-normal rates using the methods claimed in the '769 patent. Apple's customers who played back digital media at faster- and/or slower-than-normal rates directly infringed the claims of the '769 patent, including but not limited to claim 1.

23. EPL's predecessor in interest, Enounce, Inc., put Apple on notice of the '769 patent during the meetings in 2002 between Mr. Hejna and members of Apple's engineering and design teams for the Apple iPod and other products, such members including at least Mr. Fadell and Mr. Lindahl.

24. Apple's infringement of the '769 patent was without regard to such prior knowledge and communications with Enounce and Mr. Hejna. Thus, Apple's infringement was willful.

25. As a result of Apple's acts of infringement, Plaintiff EPL has suffered substantial damages in an amount to be proven at trial, but in no event less than a reasonable royalty for the use made of the invention by Apple, together with interest and costs as fixed by the Court.

26. This case is "exceptional" within the meaning of 35 U.S.C. § 285, and EPL is entitled to an award of attorneys' fees.

COUNT II

INFRINGEMENT OF U.S. PATENT NO. 7,683,903

27. Plaintiff EPL realleges and incorporates by reference paragraphs 1-26 above, as if

fully set forth herein.

28. EPL is the owner by assignment from Enounce, Inc., including the right to sue for past damages, of United States Patent No. 7,683,903 ("the '903 patent") entitled "Management of Presentation Time in a Digital Media Presentation System with Variable Rate Presentation Capability." The '903 patent was duly and legally issued by the United States Patent and Trademark Office on March 23, 2010. A true and correct copy of the '903 patent is included as Exhibit B.

29. On information and belief, Apple has infringed and continues to infringe the '903 patent in the State of California, in this District, and elsewhere in the United States, by, among other things, making, using, importing, offering for sale, and/or selling products and services with variable speed playback capability. Such products and services include, by way of example and without limitation, Apple iPhone, iPad, iPod Touch, MacBook Air, MacBook Pro, Mac mini, iMac, and Mac Pro, which are covered by one or more claims of the '903 patent, including but not limited to claim 13. By making, using, importing, offering for sale, and/or selling such products and services that are covered by one or more claims of the '903 patent, Apple has injured EPL and is thus liable to EPL for infringement of the '903 patent pursuant to 35 U.S.C. § 271.

30. As a result of Apple's acts of infringement, Plaintiff EPL has suffered and will continue to suffer substantial damages in an amount to be proven at trial, but in no event less than a reasonable royalty for the use made of the invention by Apple, together with interest and costs as fixed by the Court.

31. Plaintiff EPL and its predecessor in interest Enounce have complied with the requirements of 35 U.S.C. § 287.

32. Plaintiff EPL has been irreparably harmed by Apple's act of infringement, and will

continue to be harmed unless an injunction is issued enjoining Apple and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '903 patent.

COUNT III

INFRINGEMENT OF U.S. PATENT NO. 8,345,050

33. Plaintiff EPL realleges and incorporates by reference paragraphs 1-32 above, as if fully set forth herein.

34. EPL is the owner by assignment from Enounce, Inc., including the right to sue for past damages, of United States Patent No. 8,345,050 ("the '050 patent") entitled "Management of Presentation Time in a Digital Media Presentation System with Variable Rate Presentation Capability." The '050 patent was duly and legally issued by the United States Patent and Trademark Office on January 1, 2013. A true and correct copy of the '050 patent is included as Exhibit C.

35. On information and belief, Apple has infringed and continues to infringe the '050 patent in the State of California, in this District, and elsewhere in the United States, by, among other things, making, using, importing, offering for sale, and/or selling products and services with variable speed playback capability. Such products and services include, by way of example and without limitation, Apple iPhone, iPad, iPod Touch, MacBook Air, MacBook Pro, Mac mini, iMac, and Mac Pro, which are covered by one or more claims of the '050 patent, including but not limited to claim 8. By making, using, importing, offering for sale, and/or selling such products and services that are covered by one or more claims of the '050 patent, Apple has injured EPL and is thus liable to EPL for infringement of the '050 patent pursuant to 35 U.S.C. § 271.

36. As a result of Apple's acts of infringement, Plaintiff EPL has suffered and will

continue to suffer substantial damages in an amount to be proven at trial, but in no event less than a reasonable royalty for the use made of the invention by Apple, together with interest and costs as fixed by the Court.

37. Plaintiff EPL and its predecessor in interest Enounce have complied with the requirements of 35 U.S.C. § 287.

38. Plaintiff EPL has been irreparably harmed by Apple's act of infringement, and will continue to be harmed unless an injunction is issued enjoining Apple and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '050 patent.

COUNT IV

INFRINGEMENT OF U.S. PATENT NO. 8,384,720

39. Plaintiff EPL realleges and incorporates by reference paragraphs 1-38 above, as if fully set forth herein.

40. EPL is the owner by assignment from Enounce, Inc., including the right to sue for past damages, of United States Patent No. 8,384,720 ("the '720 patent") entitled "Distinguishing Requests for Presentation Time from Requests for Data Time." The '720 patent was duly and legally issued by the United States Patent and Trademark Office on February 26, 2013. A true and correct copy of the '720 patent is included as Exhibit D.

41. On information and belief, Apple has infringed and continues to infringe the '720 patent in the State of California, in this District, and elsewhere in the United States, by, among other things, making, using, importing, offering for sale, and/or selling products and services with variable speed playback capability. Such products and services include, by way of example and without limitation, Apple iPhone, iPad, iPod Touch, MacBook Air, MacBook Pro, Mac mini, iMac, and Mac Pro, which are covered by one or more claims of the '720 patent, including but

not limited to claims 7 and 11. By making, using, importing, offering for sale, and/or selling such products and services that are covered by one or more claims of the '720 patent, Apple has injured EPL and is thus liable to EPL for infringement of the '720 patent pursuant to 35 U.S.C. § 271.

42. As a result of Apple's acts of infringement, Plaintiff EPL has suffered and will continue to suffer substantial damages in an amount to be proven at trial, but in no event less than a reasonable royalty for the use made of the invention by Apple, together with interest and costs as fixed by the Court.

43. Plaintiff EPL and its predecessor in interest Enounce have complied with the requirements of 35 U.S.C. § 287.

44. Plaintiff EPL has been irreparably harmed by Apple's act of infringement, and will continue to be harmed unless an injunction is issued enjoining Apple and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '720 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff EPL Holdings, LLC respectfully requests that this Court enter:

a. A judgment in favor of Plaintiff EPL that Apple has infringed, either literally and/or under the doctrine of equivalents, the '769 patent, the '903 patent, the '050 patent, and the '720 patent;

b. A judgment that Defendant Apple induced infringement of the '769 patent;

c. A judgment that Defendant Apple willfully infringed the '769 patent;

d. A permanent injunction enjoining Apple and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from infringement, inducing the infringement of, and/or contributing to the infringement of the '903 patent, the '050 patent, and the '720 patent;

e. A judgment and order requiring Defendant Apple to pay Plaintiff EPL its damages, costs, expenses, and prejudgment and post-judgment interest for Apple's infringement of the '769 patent, the '903 patent, the '050 patent, and the '720 patent as provided under 35 U.S.C. § 284;

f. A judgment and order that this case is exceptional and requiring Defendant Apple to pay Plaintiff EPL reasonable experts' fees and attorneys' fees pursuant to 35 U.S.C. § 285; and

g. Any and all other relief as the Court may deem appropriate and just under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff, under Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable by right.

Dated: April 8, 2013

By: */s/ Marc A. Fenster* _____

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CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on April 8, 2013 with a copy of this document via the Court's CM/ECF system per Civil L.R. 5-1(h)(1).

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: April 8, 2013

/s/Marc A. Fenster

Marc A. Fenster