IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

LUXPRO CORPORATION, a Taiwanese Corporation,	)	
Plaintiff,	)	**Civil Action No. 4:08cv04092-HFB**
vs.	)	
APPLE, INC. f/k/a Apple Computer, Inc.,	)	
Defendant.	)	

REPLY OF LUXPRO CORPORATION IN SUPPORT OF MOTION FOR ENTRY OF SCHEDULING ORDER UNDER FRCP 16

Apple's opposition to the entry of a standard scheduling order in this case rests on the erroneous argument that this Court has not sustained Luxpro's Complaint. This is simply not true. On September 28, 2009, the Court sustained the majority of Luxpro's Complaint, and directed Luxpro to file an amended complaint to clarify some of the claims asserted. On the same day, the Court also denied Apple's motion to transfer venue under the doctrine of forum non-conveniens.

Apple's other argument that it is premature to enter a scheduling order because Luxpro has no right or standing to assert these claims is likewise erroneous, and thus, the cases cited by Apple are inapplicable. Specifically, this is not a case where either the Court's subject matter or personal jurisdiction over the parties has been challenged. *See*, *Canadian Trophy Quest, Ltd. V. Cabela's Inc.*, No. 07-CV-4099, 2008 U.S. Dist. LEXIS 68099, *15 (W.D.Ark). Sept. 8, 2008). Furthermore, No party to these proceedings has made a claim for dismissal under the doctrine sovereign immunity. *See, Cedric Glaze*,

No. 132460 v Bobby May, et al, No. 2:09-CV-00113 HLJ, 2009 U. S. Dist. LEXIS 97885, *2-3 (E.D. Ark. Oct. 6, 2009). Indeed, this Court has already denied Apple's claim of immunity under the Noerr-Pennington doctrine at this stage of the litigation. Finally, this is not a case involving a pending motion for summary judgment, where evidence has already been submitted to the Court for adjudication of a dispositive motion. *See, Virgil Roach v Sherriff Dale Madden,* 728 F. Supp. 537, 538 n.1 (E. D. Ark. 1989).[1]

As such, Apple has no legitimate basis under the Federal Rules to refuse to cooperate with discovery or to object to the entry of this Court's ***standard*** scheduling order.[2] Luxpro is not asking for extraordinary relief or preferential treatment, Luxpro is simply requesting that this case be treated like any other case filed in Federal Court, one that is governed by FRCP 16(b)(2).

Under this rule, a scheduling order is to be issued within the earlier of one hundred twenty (120) days after a defendant has been served with the Complaint or ninety (90) days after a defendant has appeared. Under either of these scenarios, this matter is ripe for an entry of a scheduling order.

[1] What is clear is Apple's desire to not have this case on the Court's docket, and has resorted to extraordinary measures to accomplish its goal—including filing a Petition for Extraordinary Relief with the Eight Circuit alleging (premised on more erroneous arguments) that the Court abused its discretion in denying Apple's motion to transfer the case to the Northern District of California under 28 USCA § 1404. This effort to seek an interlocutory appeal of the trial court's venue ruling is very unusual given Apple's failure to allege that venue is improper in this Court under 12(b)(3).

[2] Apple has gone so far as to actually refuse to participate in a Rule 26(f) discovery conference or to agree on any scheduling deadlines

Again, Luxpro is asking for no special treatment, or extraordinary relief. It is simply asking that a standard scheduling order be entered.[3] In spite of Apple's refusal to accept any responsibility for the delays that have been imposed upon these proceedings, the fact remains that this case has been pending for seventeen (17) months without a scheduling order. Regardless of which party bears the most blame for this inordinate delay, the facts reflected on the court's docket support the entry of the standard scheduling order requested by Luxpro:

a. Luxpro filed its Original Complaint in this cause on October 10, 2008;

b. Apple responded by filing its ***first*** Motion to Dismiss under Rule 12(b)(6), FRCP, on December 19, 2008;

c. Apple did not allege venue as improper in the Western District of Arkansas under FRCP 12(b)(3);

d. After the Court ruled on Apple's ***first*** motions, and pursuant to the Court's directive, Luxpro submitted a Second Amended Complaint with a Motion for Leave on December 7, 2009;

e. Apple did not file a timely response to the Motion for Leave;

f. Apple filed a Petition with Eighth Circuit on November 20, 2009 challenging the Court's venue ruling;

g. The Court granted Luxpro's Motion for Leave on December 22, 2009;

h. Luxpro's Second Amended Complaint was filed on December 29, 2009;

[3] Local Rule 16.1 provides that the Court should enter a scheduling order setting forth: (1) a date by which the parties must hold their Rule 26(f) discovery conference; (2) the date by which the parties must submit their Rule 26(f) Report; (3) a date for a Rule 16(b) scheduling conference; and (4) a proposed trial date.

i. After obtaining an extension of time from the Court, Apple filed its response on February 26, 2010, in the form of a ***second*** Motion to Dismiss under Rule 12(b)(6);

j. In its ***second*** Motion to Dismiss, Apple asked the Court to revisit the same issues it raised in the ***first*** Motion to Dismiss, which this Honorable Court has already overruled; and

k. As a result, almost seventeen (17) months have passed since this case was filed and served on Apple, without any discovery by either party.

2. In its Motion for Entry of the Scheduling Order in these proceedings, Luxpro explained to the Court that Apple's ***multiple*** procedural motions were clearly "calculated to further delay Luxpro's ability to pursue discovery and other actions necessary to prepare this case for trial in an orderly manner". Apple has reinforced Luxpro's position by opposing the entry of a scheduling order that would customarily be entered.

Therefore, Luxpro respectfully requests that the Court enter a scheduling order in the format typically used by the Courts in this District (a copy of is attached to Plaintiff's Motion for Entry of Scheduling Order). Plaintiff also requests such other and further relief to which it may show itself justly entitled.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFF LUXPRO CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system, this 8th day of March, 2010.

/s/ Phillip N. Cockrell