

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:10-23580-Civ-UU

MOTOROLA MOBILITY, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

JURY TRIAL DEMANDED

APPLE INC.,

Counterclaim Plaintiff,

v.

MOTOROLA, INC. and
MOTOROLA MOBILITY, INC.,

Counterclaim Defendants.

**MOTOROLA’S REPLY TO APPLE’S
RESPONSE TO MOTOROLA’S INFRINGEMENT CONTENTIONS**

In the late hours of Friday, October 28, 2011, Apple filed an unauthorized “response” to Motorola’s Court-ordered submission regarding infringement contentions. Apple’s response is replete with misrepresentations of the record and revisionist history. It warrants a brief reply.

First, as detailed in Motorola’s Notice, Apple’s own infringement contentions, served in advance of the June 1 deadline, were explicitly called “preliminary” and do not reflect any intent that the contentions would be “final” in any way. Rather, Apple explicitly (1) reserved the right

to amend, supplement, and correct them “as additional information becomes available to Apple during the course of its discovery and investigation,” (2) stated that “Apple may identify additional claims that are infringed and additional accused products,” and (3) “expressly reserve[d] the rights to modify or amend the contentions contained herein based on the Court’s claim constructions or to reflect additional information that becomes available to Apple as discovery proceeds.” *See* D.E. 160 Ex. 2 at 3, 5.

In a footnote, Apple suggests that the parties reserved the right to supplement the contentions solely so that they could modify them between May 18 and June 1. D.E. 162 at 1 n.1. But that does not comport with the record. Both parties specifically reserved the right to supplement these “preliminary” contentions throughout discovery and after claim construction, not just during the short period between May 18 and June 1. Indeed, no deposition or other meaningful discovery was scheduled for that two-week period. The fact that Apple did not supplement them to be “final” during that period signifies nothing beyond Apple’s acknowledgement, as shown in its contentions, that there was no need to do so.

Second, Apple failed for more than five months to notify Motorola that Apple considered its or Motorola’s infringement contentions to be final. If Apple after the June 1 order did consider these contentions to be final, the proper course would have been to notify Motorola of this position. But between May 18 and October 19—the third day of the claim construction hearing—Apple said nothing, despite the parties’ frequent meet-and-confer discussions concerning scheduling, deadlines, discovery, claim construction, or any other matter. Meanwhile, Motorola was operating under the assumption that Apple’s infringement contentions were preliminary and that Apple and Motorola each had the right to amend those contentions, a right expressly reserved in both parties’ May 18 contentions. Instead, Apple first raised its argument in classic “gotcha” fashion during the Markman hearing.

This delay was highly prejudicial to Motorola, since Motorola had been proceeding since May 18, 2011 under the assumption that both parties’ infringement contentions were preliminary as both said they were, and given there was no Order to the contrary. Needless to say, had

Motorola known of Apple's position as to the finality of the contentions, Motorola would have taken a different course of action—for instance, massively accelerating its discovery efforts in order to collect all evidence necessary to “finalize” its infringement contentions. Moreover, if the contentions were locked in on June 1, Motorola would be unable to pursue newly released products and services such as the iPhone 4s and iCloud, both released by Apple months after June 1, another fact Apple ignores in its Response. Apple, by contrast, suffers no prejudice if Motorola is allowed to supplement its infringement contentions, since Apple knew all along that Motorola had explicitly reserved the right to supplement its May 18, 2011 contentions through the course of discovery.

Third, Apple's argument that Motorola has not shown “good cause” to supplement its infringement contentions or change the schedule, is a *non sequitur* because the June 1 date was not a deadline for “final” infringement contentions in the first place. Thus, there was no date that Motorola needs to show good cause to change.¹ Apple's reference to local patent rules in other courts also is irrelevant. No such rules have been adopted in this district, nor are they taken into consideration in scheduling. It would be grossly unfair and prejudicial to hold Motorola to patent local rules in other courts with no notice, months into this litigation.

Fourth, Apple argues that Motorola has not been “diligent” in pursuing discovery in this case, suggesting that documents cross-produced from other litigation should be adequate for Motorola to finalize its infringement contentions in the present matter. To the contrary, the cross-produced documents do not relate to the present case, and Motorola has demanded that Apple produce additional documents relevant to this specific case. Without such documents, Motorola cannot properly complete its infringement contentions and theories. Nor has Apple

¹ Even if Apple were somehow correct and the June 1 deadline was for final contentions, then Motorola has “good cause” for supplementing its contentions by showing that it reasonably relied upon Apple's representations that its prior submissions were only preliminary and that is what the parties intended, and additionally through the addition of the iPhone 4s and iCloud as accused products and services, both of which were released months after June 1.

offered 30(b)(6) witnesses to testify on Apple's behalf, despite the fact that Motorola's 30(b)(6) deposition notice has been outstanding for several months. Despite complaining about Motorola's ostensible lack of diligence, Apple's own lack of diligence in producing its documents and witnesses has contributed to Motorola's inability to complete its infringement contentions. Apple now seeks to benefit from its own failure to produce documents and witnesses, and hold Motorola's contentions as "final" when no such deadline has ever been set by this Court, or intended by the parties.

Dated: October 31, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 31, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or; in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Motorola Mobility, Inc. v. Apple, Inc.

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