

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 1:10-CV-23580-UU

_____)
MOTOROLA MOBILITY, INC.,)
)
Plaintiff,)
)
v.)
)
APPLE INC.,)
)
Defendant.)
_____)
APPLE INC.,)
)
Counterclaim-Plaintiff,)
)
v.)
)
MOTOROLA, INC. and)
MOTOROLA MOBILITY, INC.,)
)
Counterclaim-Defendants.)
_____)

**DEFENDANT AND COUNTERCLAIM-PLAINTIFF APPLE INC.'S MOTION TO
STRIKE MOTOROLA'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS**

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I. INTRODUCTION

At the parties' joint request, this Court set a June 1, 2011 deadline for infringement contentions in this case. Now, however, after the parties and the Court have engaged in months of claim construction briefing and a claim construction hearing, and only eleven weeks before the discovery cutoff in this case, Motorola Mobility, Inc. ("Motorola"), on October 28, 2011, has unilaterally attempted to supplement its infringement contentions. Motorola did so without seeking leave of the Court, and indeed, in direct contravention of the Court's recent admonition that if there was a cut-off in the scheduling order, "we are going to live with that cut-off." Ex. 1, *Markman* Hearing Tr. at 749:3-9.¹

Motorola's brand new infringement contentions seek to bring three new products into this case—iTunes, the iPhone 4S, and iCloud—that have had no part in this litigation until now. Further, Motorola's contentions attempt to add new theories of infringement that bear no relationship to the theories that Motorola previously asserted. As such, if permitted, the new contentions will require Apple Inc. ("Apple") to rely on an entirely new set of defenses, involving further claim construction disputes and further discovery.

Notwithstanding its protestations, Motorola cannot credibly argue that it did not have the ability to formulate its infringement contentions in a timely manner. Motorola's discovery efforts prior to the June 1, 2011, deadline were practically nonexistent. Despite having months prior to that date to take discovery, Motorola failed to notice a single deposition in this case. And although Motorola did serve one set of document requests on Apple, it is now apparent that Motorola did not look at the documents that Apple had produced until after the June 1 infringement contention cutoff.

As the Court recognized at the conclusion of the *Markman* hearing, this case is already complicated. Ex. 1, *Markman* Hearing Tr. at 749:20-23. Allowing Motorola's late

¹ All "Ex." cites refer to the exhibits attached to the Declaration of Christine Saunders Haskett in Support of Apple Inc.'s Motion to Strike Motorola's Supplemental Infringement Contentions, unless otherwise noted.

supplementation of infringement contentions would only further complicate this case, would undermine the purpose behind having a deadline for infringement contentions in the first place, would violate the good cause requirement of Rule 16 of the Federal Rules, and would be contrary to the entire spirit of the Federal Rules, which are designed to “secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. Accordingly, Apple respectfully requests that the Court strike Motorola’s October 28, 2011, supplemental infringement contentions.

II. BACKGROUND

The June 1, 2011 Deadline for Infringement Contentions

The June 1 infringement contention deadline was set by the Court pursuant to an agreement between the parties. Specifically, on April 25, 2011, the parties submitted a joint proposal to the Court, requesting the Court to set a number of specific deadlines “[t]o streamline the claim construction process in this case.” See D.E. 77, Joint Motion for Setting of Contention Deadlines and for Extending Claim Construction Briefing Deadlines. That proposal included the infringement contention deadline.

On May 18, 2011, the parties exchanged their infringement contentions, pursuant to an agreement reached between the parties in case the Court were to deny the motion to extend the claim construction briefing deadlines. See Ex. 2, May 3, 2011 email from Christine Haskett to Richard Erwine. Shortly thereafter, on June 1, 2011, the Court entered the parties’ proposed scheduling order, submitted on April 25. See D.E. 88, Order on Motion to Modify Scheduling Order and Modified Scheduling Order. Both parties chose to stand on their May 18 infringement contentions and did not supplement them on the June 1 deadline.²

² On August 17, 2011, Motorola served a “revised” set of infringement contentions to specifically address issues of indirect infringement. See Haskett Decl., ¶ 4. Motorola’s May 18 infringement contentions provided no detail regarding Motorola’s indirect infringement allegations, leaving Apple unable to evaluate those assertions. Motorola’s revised its contentions to address the deficiencies without impacting the ongoing claim construction disputes because (continued...)

Motorola's Failure to Pursue Discovery

This suit was filed on October 6, 2010, and on December 29, 2010, Motorola served Apple with a set of document requests and set of interrogatories. Motorola then followed up with a second set of interrogatories on April 28, 2011. *See* Haskett Decl., ¶ 5. These three sets of discovery requests constituted the only discovery efforts made by Motorola in this case between the filing of this action and the infringement contention deadline. During that time, Motorola failed to notice a single deposition, nor did Motorola make a single complaint to Apple about Apple's responses to Motorola's discovery. *Id.*

Despite Motorola's failure to make anything more than minimal efforts to pursue discovery, by the June 1 infringement contention deadline, Motorola had an enormous amount of discovery from Apple in its possession. As the Court is aware, this case is one of a number of cases currently pending in various jurisdictions between Motorola and Apple. Accordingly, on April 6, 2011, the parties entered into a cross-use agreement, whereby documents produced in any action currently pending between Apple and Motorola could be used as if the documents had been exchanged in this proceeding. *See* Ex. 3, Cross-Use Agreement. The parties agreed that allowing cross-use between cases would be the most efficient use of resources, given the overlap of accused products and technical issues between the various litigations. *Id.* By the time of Motorola's May 18, 2011 infringement contentions, Apple had already produced over 8 million pages of documents to Motorola that were available to Motorola for use in this case. *See* Haskett Decl., ¶ 7.

Motorola's Belated Attempt to Supplement Its Infringement Contentions

The *Markman* hearing in this case was held on October 17, 18, and 19, 2011. During that hearing, the Court stated that it would not allow the parties to supplement their infringement contentions beyond any Court-ordered deadlines. *See, e.g.,* Ex. 1, *Markman* Hearing Tr. at

Apple was at least on notice of Motorola's general assertions of indirect infringement prior to the June 1 deadline.

749:3-9 (“If there was a cutoff for infringement contentions, then we are going to live with that cutoff.”). On October 25, 2011, the Court confirmed that “the deadline for Infringement contentions was June 1, 2011,” and requested that the parties file a copy of their respective infringement contentions by October 28, 2011. *See* D.E. 157.

Despite the Court’s statement that it would not allow supplementation of the parties’ infringement contentions, Motorola unilaterally submitted a significantly revised version of its infringement contentions on October 28, 2011. *See* D.E. 160. These new contentions introduce into the case three new accused Apple products that have had no part in this litigation until now: iTunes, the iPhone 4S, and iCloud. *See, e.g., id.* at Exhibit B at 1. Additionally, Motorola’s new contentions allege several new theories of infringement that bear no relationship to the theories of infringement previously asserted. For example, until now, Motorola’s infringement contentions for the ‘006 patent have focused entirely on the “Load Remote Images” option on the iPhone, but in its new contentions, Motorola appears to try to accuse other, completely separate functionalities, such as the user’s option to select how many emails are downloaded to the iPhone. *See, e.g., id.* at Exhibit C at 8. Likewise, whereas Motorola’s original infringement contentions for the ‘737 focused entirely on Apple’s Enterprise Application Distribution System—a system under which third-party companies can develop software for use by their employees on Apple devices—Motorola’s new contentions now try to sweep in iTunes, which is a completely separate product and service, directed at consumers, with entirely different functionality. *See, e.g., id.* at Exhibit D at 1. Finally, Motorola’s new contentions identify nine “new” Apple-produced documents in support of Motorola’s infringement theories.³ *See, e.g., id.* at Exhibit D at 9.

³ These “new” documents include: 745Apple11543563, 745Apple0783686-786, 745Apple4699474-89, 745Apple4857865-99, 745Apple10360097-98, 745Apple5374978-81, 745Apple10362501-32, 745Apple8563808-27, and 745Apple5375102-04.

III. ARGUMENT

A. Motorola Must Abide by the Court-Ordered Deadline for Submitting Infringement Contentions.

The deadline for infringement contentions was June 1, 2011. *See* D.E. 88, Order on Motion to Modify Scheduling Order and Modified Scheduling Order. The scheduling order does not state or suggest that the June 1 infringement contentions were merely “preliminary,” nor does it provide for supplementation of infringement contentions at a later date.

Motorola argues that it should be permitted to supplement its infringement contentions because “Apple failed for more than five months to notify Motorola that Apple considered its or Motorola’s infringement contentions to be final.” *See* D.E. 165, Motorola’s Reply to Apple’s Response to Motorola’s Infringement Contentions at 2. Motorola has it backwards. It is not Apple’s burden to ensure that Motorola is aware of Court-ordered deadlines and complies with them. Nor does Apple have an obligation to share its interpretation of the scheduling order with Motorola. If Motorola had a question about the scheduling order it should have asked for clarification from the Court, but in any event, Motorola cannot reasonably have had such a question because the scheduling order unambiguously set a deadline for infringement contentions without providing for supplementation or amendment of those contentions. Motorola therefore ignored the scheduling order deadline at its own peril.

Motorola attempts to shift blame by suggesting that Apple misled Motorola by designating its own infringement contentions as “preliminary” and indicating that Apple would supplement its contentions as additional discovery became available. *See* D.E. 165 at 1-2. Motorola cannot reasonably have relied, however, on Apple’s reservations as a basis for the assumption that Motorola could revise its infringement contentions after the deadline, in the absence of any statement by the Court that Motorola would be permitted to do so. Rather, if Motorola required assurance that it could supplement its contentions after June 1, it should have sought clarification from the Court, and as discussed below, given the prejudice that would result, it is now too late for Motorola to do so.

Judicial scheduling orders are necessary in order to ensure the orderly progress of complex litigation and to keep cases moving forward towards a resolution, rather than allowing parties endlessly to supplement their contentions with additional products and theories. Both parties have released new products since the Court-ordered deadline for infringement contentions, but allowing the parties to add newly-released products to infringement contentions would become a never-ending process, requiring yet more discovery, and the case would never proceed to trial.⁴ This Court's scheduling order was designed to prevent this scenario, and the Court re-affirmed the intent of that order on October 25, 2011. *See* D.E. 157, Order Requesting Response. Accordingly, when the parties did not supplement their May 18, 2011, infringement contentions by the Court-ordered deadline of June 1, those contentions became final.

B. Motorola Cannot Show the Requisite Good Cause to Modify the Court's Scheduling Order.

Rule 16 of the Federal Rules of Civil Procedure requires district courts to issue a scheduling order "as soon as practicable." Fed. R. Civ. P. 16(b)(1)-(2). Pursuant to Federal Rule of Civil Procedure 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

To show good cause, a party seeking modification must demonstrate diligence. *Kernal Records Oy v. Mosley*, Case No. 09-21597, 2011 U.S. Dist. LEXIS 60666 at *36 (June 7, 2011, S.D. Fla.); *see also Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1232 (11th Cir. 2008) (finding that the "good cause" standard precludes modifying the scheduling order unless the schedule cannot be met despite the diligence of the party seeking the extension). A party's diligence is evaluated using the following factors: (1) whether the plaintiff failed to ascertain facts prior to filing the complaint and to acquire information during the discovery period; (2) whether the information supporting the proposed amendment was available to the plaintiff; and

⁴ If new products are released that are truly the same as the products already at issue in the case, then principles of collateral estoppel should prevent re-litigation of the same issues. If the new products are different from the products already at issue, then they do not belong in this case.

(3) whether even after acquiring the information the plaintiff delayed in seeking the amendment. *Kernal Records*, 2011 U.S. Dist. LEXIS 60666 at *36.

The Patent Local Rules of various jurisdictions are also instructive, as they apply the Rule 16 standard to a party requesting leave to supplement infringement contentions. These jurisdictions similarly require a showing of “good cause,” which the Federal Circuit has stated requires a showing that the party was diligent in amending its contentions. *See O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006).⁵ Otherwise, as one court cautioned, “[p]arties would be encouraged to adopt a ‘rolling’ approach to infringement and invalidity contentions in the hope of hiding their true intentions until late in a case.” *Nike, Inc. v. Adidas Am. Inc.*, 479 F. Supp. 2d 664, 669-70 (E.D. Tex. 2007). The burden of showing of good cause rests with the amending party. *O2 Micro*, 467 F.3d at 1366.

Motorola cannot meet any of the requirements for showing diligence and therefore cannot demonstrate that it has good cause to supplement its infringement contentions at this late date.

1. Motorola Did Not Diligently Pursue Discovery Prior to the June 1 Infringement Contention Deadline.

The first factor to be assessed under the *Kernal* case is whether the party seeking amendment failed to ascertain facts prior to filing the complaint and to acquire information during the discovery period. In this case, Motorola did not take a single deposition relating to its patents or the Apple accused products before the Court’s June 1, 2011 deadline, and it did not serve its Rule 30(b)(6) deposition notice until the end of July, two months after the deadline to serve infringement contentions had passed. *See Haskett Decl.*, ¶ 5. Motorola now attempts to blame Apple for its failure to take discovery from Apple witnesses: “Apple’s own lack of

⁵ The court in *O2 Micro* analyzed the patent local rules for the Northern District of California. 467 F.3d at 1362. Although the Southern District of Florida has not adopted patent local rules, this Court has found “the local patent rules of these other districts to provide instructive insight into identifying proper topics of discovery unique to a patent suit, and suggesting the correct sequencing of such discovery.” *Suncast Techs., LLC v. Patrician Prods., Inc.*, Case No. 07-80414-CIV, 2008 U.S. Dist. LEXIS 5072 at *27-28 (S.D. Fla. Jan. 17, 2008).

diligence in producing its documents and witnesses has contributed to Motorola's inability to complete its infringement contentions." *See* D.E. 165, Motorola's Reply to Apple's Response to Motorola's Infringement Contentions at 4. To the contrary, Motorola's alleged inability to complete its infringement contentions is the result of its own failure to notice depositions in the many months between the commencement of this lawsuit in October, 2010, and the Court's deadline for infringement contentions.

Furthermore, Motorola failed to be diligent in reviewing and analyzing the information from Apple that it did have in its possession prior to the June 1 deadline. By that point, as noted above, Apple had already produced over 8 million pages of documents to Motorola. This volume of documents is not atypical for a case of this magnitude, and Motorola is a sophisticated litigant represented by a very large law firm. There is therefore no justification for Motorola's failure to familiarize itself with the Apple documents in its possession prior to the June 1 deadline, but the evidence shows that Motorola failed to do exactly that. In particular, of the nine Apple documents that Motorola added to its infringement contentions for the first time on October 28, 2011, six of them were produced by Apple to Motorola before the June 1 deadline. *See* Haskett Decl., ¶ 8. There is no excuse for Motorola's failure to review and analyze these documents in time to include them in its June 1 infringement contentions, and Motorola's failure to complete even this basic task precludes a finding that Motorola has been diligent in its discovery efforts, as required by Rule 16.

Finally, Motorola's recent statements to the Court also demonstrate that Motorola has failed to be diligent in its discovery efforts. Motorola explicitly concedes that it would have been more diligent in taking discovery if it had known that Apple considered June 1, 2011, to be the deadline to serve "final" infringement contentions. *See* D.E. 165, Motorola's Reply to Apple's Response to Motorola's Infringement Contentions at 2-3 ("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.”). Accordingly, there can be no dispute that Motorola has failed to be diligent in seeking discovery and cannot meet the first requirement of *Kernal* to demonstrate good cause for modifying the Court’s schedule.

2. The Information Upon Which Motorola Now Seeks to Rely in Its Revised Infringement Contentions Was Previously Available to Motorola.

The second factor under *Kernal* is whether the information supporting the proposed amendment was previously available to the party seeking amendment. As noted above, of the nine new documents that Motorola seeks now to add to its infringement contentions, six of them were produced to Motorola before June 1. The remaining three documents were produced no later than July 11, 2011—before any of the claim construction briefing in this case and three and a half months before Motorola sought to add them to its infringement contentions. *See* Haskett Decl., ¶ 8.⁶ Accordingly, there is no justification for Motorola’s behavior in waiting until the parties and the Court had completed a time- and effort-intensive claim construction process before attempting to use these documents as a basis to change its infringement contentions.

Similarly, Motorola has waited until now to add iTunes to its infringement contentions, despite the fact that iTunes is a well-known product that has existed for years. And Motorola bases its new infringement contentions related to iCloud on public information that was available to Motorola at or soon after the announcement of its release in June 2011. Finally, Apple announced the iPhone 4S on October 4, 2011—two weeks before the start of the *Markman* hearing in this case. Yet Motorola did not announce its intention to accuse the iPhone 4S of infringement either before or during the *Markman* hearing.

⁶ Moreover, all nine of the documents that Motorola seeks to add to its contentions were produced under the parties’ cross-use agreement, directly controverting Motorola’s assertion that “cross-produced documents do not relate to the present case.” *See* D.E. 165, Motorola’s Reply to Apple’s Response to Motorola’s Infringement Contentions at 3.

Given the dates on which Motorola obtained all of the allegedly “new” information upon which it now attempts to rely, Motorola’s argument that it could not have updated its infringement contentions prior to now—and particularly before the Court and the parties undertook the *Markman* hearing—is specious.

3. Motorola Delayed in Seeking Leave to Revise its Infringement Contentions.

The final factor under *Kernal* is whether, even after acquiring new information, the party delayed in seeking amendment. Here, as noted in the previous section, Motorola had in its possession almost all of the information upon which it now seeks to rely for many months, and it had every piece of it well before the *Markman* hearing. Motorola therefore cannot show diligence in proffering its supplemental infringement contentions, nor has it offered any reasonable justification for its delay. Motorola’s belated attempt to amend the Court’s scheduling order must fail on this ground also.

C. Motorola’s Proposed Revision of Infringement Contentions would Prejudice Apple and Create Inefficiencies for the Court.

Even if Motorola could demonstrate the requisite diligence—which it cannot—supplementation of Motorola’s infringement contentions at this late date would prejudice Apple and create great inefficiencies for the Court. The parties jointly proposed that the Court enter a deadline for infringement contentions “[t]o streamline the claim construction process in this case.” *See* D.E. 77, Joint Motion for Setting of Contention Deadlines and for Extending Claim Construction Briefing Deadlines. The *Markman* process in this case is now nearly complete, awaiting only the Court’s ruling. And throughout that process, the parties’ positions and the issues presented to the Court were shaped against the backdrop of the infringement and validity contentions exchanged by the parties. Motorola’s introduction of new products and theories of infringement into the case after the *Markman* process would mean that much of this work would need to be re-done.

First, Apple selected seven proposed claim terms for the Court to construe based specifically on the allegations set forth in Motorola’s infringement contentions. *See* Haskett Decl., ¶ 9. Had Apple known of Motorola’s revised infringement contentions at that point, it may well have chosen a different seven terms to present. For example, Apple chose not to request a construction of the term “authorization element” in the ‘737 patent, given that non-infringement of the ‘737 patent by the Enterprise Application Distribution System (the only system accused in Motorola’s May 18 infringement contentions) can be clearly demonstrated without a construction of that term. *Id.* Had Apple known that Motorola was going to accuse iTunes, however, Apple may have asked the Court to construe “authorization element” instead of the “address” term from the ‘737 patent that was presented to the Court for construction.⁷

Second, injecting new products and new theories of infringement into the case at this late date will require Apple to analyze these new positions and respond to them as necessary.⁸ The addition of these new products and theories will add further complication to the case, will require the Court to address new issues that it would not otherwise have had to face, and will almost certainly require corresponding extensions of the case schedule. And as discussed above, allowing parties to supplement their infringement contentions every time a new product is

⁷ Based on the parties’ original infringement contentions, Apple prioritized for the *Markman* phase the terms that it believed would be most useful to resolving the issues in this case. Even under those original contentions, given the number of patents at issue in this litigation, it is likely that the parties will need to ask to the Court to construe additional terms from the patents, for example, in the context of summary judgment motions. *See, e.g., Competitive Technologies, Inc. v. Fujitsu Ltd.*, 333 F. Supp. 2d 858, 869 (N.D. Cal. 2004) (on summary judgment, the court construed additional terms not construed in the claim construction order). If Motorola is allowed to change its contentions and add new products post-*Markman*, however, the number of additional terms the Court will need to construe can only increase.

⁸ For example, Apple has already reviewed enormous numbers of documents for production and has not been producing those related to iCloud, iTunes, or the iPhone 4S, as those products are not relevant to this case. Injecting these new products into the case at this late stage will force Apple to re-review these same documents, as well as collect, review, and produce more documents, with little more than two months left in the discovery period.

released during the course of litigation would lead to a never-ending discovery process, and the case would never proceed to trial.

IV. CONCLUSION

Motorola cannot show good cause to modify the deadline for infringement contentions in the Court's scheduling order and has not demonstrated the requisite diligence in pursuing discovery and moving to supplement its infringement contentions, despite having access to abundant information with which to do so. Accordingly, there is no reason to permit Motorola to supplement its infringement contentions at this late date, and Apple respectfully asks that the Court grant its motion to strike Motorola's October 28, 2011 supplemental infringement contentions.

Dated: November 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011, I filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via email and CM/ECF.

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