

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

Case No. 1:10cv023580-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.

**DEFENDANT MOTOROLA MOBILITY'S OPPOSITION TO APPLE'S MOTION TO
STRIKE MOTOROLA'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS AND
ACCOMPANYING MEMORANDUM OF LAW**

TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	3
I. THE JUNE 1 INFRINGEMENT CONTENTION DEADLINE IS NOT “FINAL.”	3
A. The Court’s Order Does Not Indicate a Date for “Final Infringement Contentions.”	3
B. Apple’s Own Conduct in this Case Since June 1 Reveals That the Deadline Never Was Intended To Be Final.	3
1. Apple’s Own May 18 Infringement Contention Reserved the Right to Supplement After Claim Construction.	4
2. Apple’s June 20 Invalidity Contentions Were Similarly “Provisional.”	5
C. Apple’s Conduct in Parallel Wisconsin Litigation Shows That a Deadline For “Infringement Contentions” Was Not a Deadline For “Final Infringement Contentions.”	7
D. A “Final” June 1 Deadline Would Contradict the Logic of the Discovery Schedule.	10
II. APPLE SUFFERS NO PREJUDICE IF MOTOROLA’S SUPPLEMENTAL INFRINGEMENT CONTENTIONS ARE ALLOWED, BUT MOTOROLA WILL SUFFER SUBSTANTIAL PREJUDICE IF THEY ARE STRICKEN.....	12
III. APPLE’S “GOOD CAUSE” ARGUMENT IS WITHOUT MERIT.	14
IV. APPLE REFUSES TO PRODUCE DOCUMENTS AND PROVIDE WITNESSES ON THE NEW PRODUCTS NAMED IN MOTOROLA’S SUPPLEMENTAL INFRINGEMENT CONTENTIONS.	16
CONCLUSION.....	17

Apple's motion to strike (D.E. 178) Motorola's October 28 supplemental infringement contentions (D.E. 160) is a cynical act of litigation "gotcha." Ever since Apple and Motorola exchanged preliminary infringement contentions in mid-May, Apple has known that Motorola had reserved the right to supplement those contentions throughout discovery. Indeed, Apple reserved that same right, showing that both parties intended the contentions to be preliminary.

But now, after five months of tacit approval of each party's ability to supplement contentions, Apple suddenly complains. It points to the June 1 Court order requiring an exchange of "infringement contentions," and argues that this was a "final" deadline, past which no supplementation could occur. Apple's abrupt switch is purely tactical. Apple complains not because it has been prejudiced in some way—it has not—but because it believes it would gain a tactical advantage by avoiding having certain new versions of some of its products brought into this litigation.

Moreover, Apple itself is guilty of the same supposed sin—and further hypocrisy—in parallel litigation in the Western District of Wisconsin involving these same parties. In that case, the court likewise set an "infringement contentions" deadline of March 4, 2011. Yet, Apple in that case used its expert reports—served more than *six months* after the "infringement contentions" deadline, not to mention months after the claim construction hearing—to supplement its contentions and to accuse eight additional Motorola products of infringing its patents. Supplementation is a common procedure in a complex patent case absent special rules, since the opposing party has ample time to prepare to respond to the infringement contentions via its own expert reports or otherwise. *See, e.g., BIAx Corp. v. NVIDIA Corp.*, slip op., 2011 WL 441470 at *5 (D. Colo., Feb. 8, 2011) (declining to strike infringement contentions served

before discovery cutoff where Court's district lacked any local patent rules setting a different deadline).

Apple is in no way prejudiced by Motorola supplementing its contentions here, since ample time remains for a sophisticated party like Apple to investigate and craft responses to the supplemental contentions. Indeed, the parties are currently in the process of negotiating deposition schedules and supplements to both sides' interrogatory responses and document productions. And the parties have not yet even exchanged expert reports, which are not due for more than two months, and which will give Apple an opportunity to fully address Motorola's supplemental infringement contentions served a month ago. In contrast, Motorola would face significant prejudice if not allowed to supplement its infringement contentions, since it would be unable to use many later-produced documents in support of its infringement case or accuse products released after its initial infringement contentions (outside of filing a new lawsuit, which would be inefficient).

Finally, Apple's argument that Motorola has failed to show good cause for modifying a scheduling order is a red herring. It assumes that Motorola wants to modify the court's scheduling order—which Motorola does not. The scheduling order nowhere sets a "final" deadline for infringement contentions past which no supplements are allowed. However, to the extent that "good cause" need be shown, Motorola amply has satisfied the standard by showing the parties' intent and their conduct with respect to infringement contention, the lack of prejudice to Apple, and the efficiency savings of not having a separate lawsuit to address Apple's new infringing products.

Apple's motion to strike should be denied.

ARGUMENT

I. THE JUNE 1 INFRINGEMENT CONTENTION DEADLINE IS NOT “FINAL.”

A. The Court’s Order Does Not Indicate a Date for “Final Infringement Contentions.”

On April 25, 2011 the parties jointly filed a motion regarding procedure for claim construction related deadlines. D.E. 77. This motion proposed a deadline of June 1 for “infringement contentions.” *See id.* There was no mention that those infringement contentions would be final in the proposed order, nor was there any discussion to that effect between the parties in connection with the joint motion. On June 1, 2011 the Court entered the Joint Order submitted on April 25, with no change to the parties’ proposals, thus making official the parties’ proposed June 1 deadline. *See* D.E. 88.

Apple argues that the June 1 deadline for “infringement contentions” is “final” based on one reason: that the order, and the motion that led to it, lacks the word “preliminary” before “infringement contentions.” But this argument defeats itself as the Order does not say “Final Infringement Contentions,” either. It simply provides for “Infringement Contentions,” which both parties provided.

B. Apple’s Own Conduct in this Case Since June 1 Reveals That the Deadline Never Was Intended To Be Final.

Until first raising the argument in late October, Apple never acted as if the June 1 infringement contentions deadline was a “final” deadline, but acted just the opposite. Apple’s conduct is further proof that the June 1 deadline is not “final” and allows for supplementation.

1. Apple's Own May 18 Infringement Contention Reserved the Right to Supplement After Claim Construction.

On May 18, Apple served infringement contentions that Apple explicitly and repeatedly stated were “preliminary” and could be supplemented, like any other interrogatory response.

Apple raised its need for further discovery to as a basis why it reserved its right to supplement:

Apple also objects to this contention interrogatory as premature because, among other things, Counterclaim-Defendants have not yet produced documents or information about its products used to infringe the Apple Asserted Patents. Apple expressly reserves the right to amend, supplement, and/or correct its response to this interrogatory as additional information becomes available to Apple during the course of its discovery and investigation, in response to any claim construction by the Court, or in response to Counterclaim-Defendants' responses to Apple's interrogatories (or any supplement thereto).

See D.E. 160 Ex. 2 at 3 (emphasis added). Apple also stated that, due to this lack of discovery, its infringement contentions were “preliminary”:

These contentions are preliminary and based at least in part on publicly available information. Counterclaim-Defendants have not yet provided any discovery in this case and Apple's investigation of Defendants' infringement is ongoing. Accordingly, Apple may identify additional claims that are infringed and additional accused products, including products that Defendants may introduce in the future. Apple expressly reserves the right to amend its response to this Interrogatory to include such products. Also, these contentions are made based on information ascertained to date, and Apple expressly reserves the right 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 id. at 5 (emphasis added)).

Similarly, Motorola's May 18 infringement contentions were titled “Preliminary Infringement Contentions.” Like Apple, Motorola reserved its right to supplement because discovery was ongoing and claim construction was not complete:

Motorola's investigation is ongoing, and discovery and claim construction are not yet complete. Motorola reserves the right to amend or supplement the asserted claims, accused Apple products, and/or preliminary infringement contentions set forth below as additional information becomes available.

See D.E. 160 Ex. 3 at 1 (emphasis added). Apple raised no issue as to these statements in Motorola's response, which were consistent with the parties' intent and Apple's own "preliminary" infringement contentions.

Apple disingenuously argues that in its contention responses it merely intended to reserve the right to supplement its contentions only during the two weeks between May 18 and June 1. D.E. 178 (Apple's Motion to Strike) at 2; D.E. 162 (Apple's Response to Motorola's Notice of Filing Infringement Contentions) at 1 n.1. But in its interrogatory responses, Apple explicitly reserved the right to “modify or amend the contentions contained herein *based on the Court's claim constructions*”—which would not occur until long after June 1. In addition, Apple reserved the right to “modify or amend the contentions...*as discovery proceeds*,” a phrase not limited to the two-week period between May 18 and June 1. That no discovery was scheduled between May 18 and June 1, further shows Apple did not intend to reserve the right to supplement through June 1 only. Apple's attempt at revisionist history should be rejected.

2. Apple's June 20 Invalidation Contentions Were Similarly “Provisional.”

The same June 1 Order that provided the date for “Infringement Contentions” provided a June 20 date for “Invalidation Contentions.” Under Apple's logic, since the “Infringement Contentions” supposedly became “final” on June 1, Apple's invalidation contentions—which were served on June 20, the same day as the invalidation contentions deadline—would be “final” too. But, Apple's later-served invalidation contentions contained similar language regarding the “provisional” nature of the contentions and reserved the right to supplement and amend. For example, Apple's invalidation contentions state they are provisional and subject to revisions for numerous reasons including the fact that discovery is in its “early stages” and claim construction had not yet occurred:

Apple reserves the right to amend these Invalidity Contentions. The information herein and the accompanying documents that Apple produces are provisional and subject to further revision as follows: Apple expressly reserves the right to amend these disclosures and the associated document production should Motorola provide any information that it failed to provide in its Infringement Contentions or should Motorola amend its Infringement Contentions in any way. Further, because discovery is still in the early stages, including discovery directed to third parties, and because Apple has not yet completed its search for and analysis of relevant prior art, Apple reserves the right to amend and/or supplement the information provided herein, including identifying and relying upon additional references, should Apple's further search and its analysis yield additional information or references. Apple reserves the right to revise its ultimate contentions concerning the invalidity of the asserted claims, which may change depending upon the Court's construction of the asserted claims, any findings as to the priority date of the asserted claims, and/or positions that Motorola or its expert witness(es) may take concerning the level of ordinary skill in the art, claim construction, infringement, and/or invalidity issues. (Declaration of John Duchemin (Duchemin Decl.) Ex. 1 at 4)

See also id. at 2 ("Apple further reserves its right to amend or supplement these contentions in light of the Court's claim construction order(s) in this case or other proceedings involving the patents-in-suit."); *id.* at 5 (reserving the right to supplement its invalidity charts to include any prior art cited in the file history of the patents-in-suit or in the supplemental appendices accompanying the invalidity contentions).

The fact that Apple's invalidity contentions included these explicit reservations of rights when they were served the same day as the deadline further belies Apple's argument in its motion that the similar reservations of rights in Apple's infringement contentions were only meant to cover only the 13-day gap between May 18 and June 1. In addition, the fact that Apple specifically reserved the right to add additional pieces of prior art contradicts its position that Motorola cannot add subsequently discovered (or even later released) products or evidence to its infringement contentions.

C. Apple's Conduct in Parallel Wisconsin Litigation Shows That a Deadline For “Infringement Contentions” Was Not a Deadline For “Final Infringement Contentions.”

On October 29, 2010, Apple initiated an action in Wisconsin alleging several Motorola Android-based smartphones and tablets infringe three of its patents, and later filed an amended complaint alleging infringement of twelve additional patents. The court entered a pretrial scheduling order on December 21, 2010, that, as in this case, provided a date for “infringement contentions,” there for March 4, 2011. Duchemin Decl. Ex. 2 (Case No. 3:10-cv-00662-bbc, D.E. 27 (Preliminary Pretrial Conference Order) at 2. Just as here, the Wisconsin order does not use the word “final,” nor does use the word “preliminary.” It simply sets a deadline for “infringement contentions,” as in this case.

On March 4, according to the order as in this case, both parties served infringement contentions. Both parties' contentions included the same type of reservation of rights as in this case. For example, Apple stated that the contentions were “preliminary” and that Apple may add “additional accused products”:

These disclosures are preliminary and based only on publicly available information. Defendants Motorola, Inc. and Motorola Mobility, Inc. (collectively “Motorola”) have not yet provided discovery as to its accused products and Plaintiffs’ investigation of Motorola’s infringement is ongoing. Based on discovery and Plaintiffs’ continued investigations, Plaintiffs may identify additional claims that are infringed by Motorola and additional accused products, including products that Motorola may introduce in the future. Accordingly, Plaintiffs reserve their rights to amend these disclosures through interrogatory responses and expert reports as discovery and their investigation proceeds. Also, these disclosures are made based on information ascertained to date, and Plaintiffs expressly reserve the right to modify or amend the disclosures contained herein based on the Court’s claim constructions or to reflect additional information that becomes available to Plaintiffs.

Duchemin Decl. Ex. 3 at 2 (emphases added). Motorola made the same reservation of rights. As in this case, neither party objected to the other's reservation of the right to supplement its preliminary infringement contentions.

Consistent with its reservation of rights in Wisconsin, but inconsistent with its position as against Motorola in this case, Apple has sought to add new accused products in Wisconsin. For example, on May 24, 2011, two months after the court-set deadline for “infringement contentions,” Apple noted that it might supplement its contentions to add two additional smartphones, the Titanium and the XPRT. Duchemin Decl. Ex. 5 at 1 n.1 (“Apple reserves the right to supplement this analysis and this list of accused products as discovery into these newly announced products progresses.”).

Subsequently, on September 15, 2011, Apple submitted expert reports in the Wisconsin case. The expert reports spelled out Apple’s current infringement contentions and identified the accused products. Apple accused eight new products—the Droid 3, Droid X2, Milestone, Photon, Spice, Titanium, Triumph, and XPRT—none of which were in the contentions served on the March 4 “infringement contentions” deadline, meaning Apple effectively had supplemented its infringement contentions. Ex. 6 at 12-13.

Apple’s conduct makes clear that, throughout the course of this litigation, Apple has not treated the June 1 deadline as “final”—at least not before Apple would benefit tactically from suddenly treating the deadline as such. Apple cannot viably argue that it may supplement its infringement contentions against Motorola’s products in Wisconsin after an “infringement contentions” deadline, whereas Motorola may *not* supplement its infringement contentions against Apple’s products in Florida past an identical “infringement contentions” deadline, both of which were agreed to by the parties.

On November 10, counsel for Motorola asked Apple to explain its inconsistent position that the “infringement contentions” in Florida would be “final” while those in Wisconsin are not. In response, Apple’s counsel stated, “It is clear that, in Wisconsin, the practice is that the March

4, 2011 date for infringement contentions is for preliminary contentions and final contentions are contained in the expert reports,” whereas “[i]n contrast, the Court in Florida made clear that the infringement contentions deadline was final in nature.” Ex. 7 at 11/11/2011 e-mail from Apple counsel to Motorola counsel. Yet, neither order in either court said anything about the infringement contentions being “preliminary” or “final.” The orders are virtually identical on this issue. Motorola pointed this out to Apple and again asked for explanation of Apple’s position. *Id.* at 11/14/2011 e-mail from Motorola counsel to Apple counsel. Apple had no response.

In its November 11 email, Apple’s counsel also argued that it was not being inconsistent because the expert reports containing the eight new accused products were served “long before the close of fact discovery in Wisconsin.” *Id.* at Nov. 11 e-mail. Motorola pointed out to Apple that this was a red herring that only reinforces Motorola’s point. Motorola’s supplemental infringement contentions here, adding only two accused products, were served nearly three months before the close of fact discovery. *Id.* at Nov. 14 e-mail from Motorola counsel to Apple counsel. Apple ignored Motorola’s request for further explanation on this point as well. This is because there is no legitimate explanation for Apple’s inconsistent positions.

Apple’s actions in Wisconsin are entirely inconsistent with Apple’s arguments here that the “infringement contentions” deadline sets in stone both the contentions themselves and the list of accused products, and that any products not accused as of June 1 “do not belong in this case.” D.E. 178 at 6 n.2. Apple’s actions in Wisconsin are entirely *consistent*, however, with normal practice in patent litigation, absent some special rules. For example, in *BIAX* 2011 WL 441470, plaintiff added two accused products to its infringement contentions about one month before discovery cutoff, more than one year after filing its initial infringement contentions. Like Apple,

defendant moved to strike. The court noted, “This District does not include rules specific to patent cases in its Local Rules; thus, the Court analyzes the deadline for supplementation without the benefit of concrete rules governing disclosure of infringement contentions in patent cases.” 2011 WL 441470 at *5. The court held that, given the circumstances, supplementation related to such topics was reasonably due by “the close of fact discovery,” and declined to strike the contentions. *Id.*

There are no special patent rules in this Court and the normal practice in litigation here is to supplement discovery. The parties here clearly intended that the deadline not be final and acted accordingly.

D. A "Final" June 1 Deadline Would Contradict the Logic of the Discovery Schedule.

The discovery schedule in this case allows for fact discovery to continue until January 17, 2012. By that time, the parties will have had more than six months after the June 1, 2011 “infringement contentions” deadline to produce additional documents, send and respond to additional interrogatories, request additional documents, subpoena third parties, and depose witnesses. If the June 1 infringement contentions deadline were a “final” deadline, with no supplementation allowed, none of the fruits of this half-year of additional discovery could be used to bolster, refine, or otherwise improve the parties’ infringement theories. In essence, Apple would have the Court prevent Motorola from putting Apple on notice of additional evidence of infringement—much obtained from Apple itself—after the June 1 contentions deadline.

For instance, Motorola's supplemental infringement contentions rely in part on statements and admissions Apple made during its technology tutorial, and documents regarding the same products that were already included in the infringement contentions. *See, e.g.*, D.E. 160 Ex. 1-A

at 16, 33 (citing document referring to previously accused iPhone 4); *id.* Ex. 1-D at 9-10, 12-13 (citing document referring to previously accused functionality of previously accused products); *id.* Ex. 1-C at 11-13, 15-17, 30-32 (citing document referring to previously accused MobileMe); *id.* Ex. 1-D at 6-7, 15-19, 25-27, 35-37 (same). Yet, Apple seeks to strike this evidence from Motorola's infringement contentions.

Apple also argues that Motorola is "adding" iTunes as an accused product for U.S. Patent No. 6,008,737. D.E. 178 at 1. Not so: iTunes is not an accused product for the '737 patent. Rather, the way in which iTunes is used provides additional evidence that the accused products—such as the accused iPhone and iPad models—infringe certain Motorola patents. But in any event, Motorola has bolstered its infringement contentions by citing examples of iTunes functionality that show how the claims read on those products. *See, e.g.*, D.E. 160 Ex. 1-D at 9-11. Under Apple's logic, none of those admissions or documents could be added to Motorola's infringement contentions, and thus none of them could be used to prove Motorola's case at trial.

Likewise, Apple this month has served third-party deposition and document production subpoenas on entities including Comcast, AT&T, and others. According to the subpoena contents, Apple believes will have evidence relating to the structure and operation of Motorola's accused products. If the June 1 contentions are "final," then Apple's subpoenas to these parties are five months too late, meaning any evidence these parties could provide is now inadmissible for proving Apple's infringement case. Likewise, Apple has asked Motorola for additional information in response to Apple document requests and interrogatories that concern Apple's infringement theories, such as Apple Requests for Production Nos. 5-9 and 12. If the infringement contentions were final, then the additional information Apple seeks would be of no use, since it could not be used to support Apple's infringement theories.

Moreover, if the June 1 infringement deadline is “final,” then each party’s expert witnesses would be precluded from relying on any evidence developed by either party after the June 1 date—even though opening expert reports are not due until January 27, 10 days after the close of fact discovery.

In sum, the only logical interpretation is that the June 1 “infringement contentions” deadline is not “final,” but allows the parties to amend or supplement their contentions based on ensuing evidence. The parties and the Court never intended the deadline to be final. Apple has always acted as if the deadline was preliminary, and in parallel litigation with an identical deadline, Apple freely has supplemented its infringement contentions and added nine new accused products. And setting a “final” deadline so early in discovery would waste more than six months’ worth of fact investigation by both parties. For these reasons alone, the Court should deny Apple’s motion to strike Motorola’s supplemental infringement contentions.

II. APPLE SUFFERS NO PREJUDICE IF MOTOROLA'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS ARE ALLOWED, BUT MOTOROLA WILL SUFFER SUBSTANTIAL PREJUDICE IF THEY ARE STRICKEN.

Motions to strike are viewed with disfavor and generally only available if the moving party can show prejudice. *See, e.g., Rawson v. Sears Roebuck and Co.*, 585 F. Supp. 1393 (D. Colo. 1984); *Cherry v. Crow*, 845 F. Supp. 1520 (M.D. Fla. 1994); *Tektel, Inc. v. Maier*, 813 F. Supp. 1331 (N.D. Ill. 1992); *Oy Tilgmann, AB v. Sport Pub. Intern., Inc.*, 110 F.R.D. 68 (E.D. Pa. 1986); *F.D.I.C. v. Niblo*, 821 F. Supp. 441 (N.D. Tex. 1993). Apple cannot demonstrate prejudice here.

Apple argues that it will suffer prejudice because Motorola’s supplemental contentions “will require Apple to analyze these new positions and respond to them as necessary.” D.E. 178 at 11. That is not prejudice. Apple provides no evidence that it will, for example, suffer any

excessive costs or delays or other harm if it needs to respond to these relatively minor changes in Motorola's infringement contentions.

Indeed, Motorola's supplemental infringement contentions create neither delay nor any need to extend discovery. As Apple notes, the parties in this case are sophisticated multinational firms that already have produced millions of documents and conducted major discovery efforts. Two months remain until the discovery cutoff, and the parties even now have ramped up discovery efforts. Working two new accused products into this mix should be straightforward for a well-funded litigant like Apple--particularly since of the two newly accused products, the iCloud is the next generation of MobileMe, and the iPhone 4S is the next generation of the iPhone 4. Apple also acknowledges that it already has collected and reviewed, but not produced, an "enormous" amount of documentation relating to the iPhone 4S, iCloud, and iTunes. It would be simple for Apple to produce this information to Motorola.

In addition, Apple's experts will have had three months to review the October 28 supplemental infringement contentions and any relevant evidence by the time initial expert reports are due on January 27. Moreover, Apple's experts will have one extra month beyond that deadline to prepare rebuttal reports with non-infringement responses. Typically in patent cases, plaintiff's experts present infringement analyses in their opening reports, and defendant's experts present non-infringement analyses in their rebuttals. Thus, Apple's experts will have had four months to formulate their non-infringement analyses from the day that Motorola filed its supplemental infringement contentions on October 28.

Nor would there be any need for additional claim construction by virtue of the supplemental infringement contentions. Apple suggests that it would have sought to construe more or different terms had it known in advance that Motorola would add products to its

infringement contentions. Claim construction does not depend on the presence or absence of accused products—rather, whether a term must be construed depends on whether there is a “fundamental dispute regarding the scope of a claim term.” *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 798 (Fed. Cir. 2010); *see also* Duchemin Decl. Ex. 8 (Apple legal tutorial presentation from Markman hearing) at slides 49-50. Apple does not identify what terms it supposedly would have this Court construe or which ones it would not have had this Court construe in replacement to fall within the agreed-upon limit.

While Apple would suffer no prejudice if the Court were to deny Apple’s motion to strike, Motorola would suffer substantial prejudice if the Court were to grant that motion. If the motion to strike were granted, Motorola seemingly would have to file an entirely new case against Apple to claim that these products infringe exactly the same patents at issue here. But since the parties have spent substantial resources educating this Court on claim construction and technology issues, this Court would be able to apply the parties’ claim construction arguments, and the Court’s accumulated knowledge of the patents and products, to a few new products, each of which substantially resembles existing Apple products. Motorola would risk having its new case heard before a new Court lacking in familiarity with claim construction principles or the technology at hand—in other words, Motorola would have to present its case all over again, and risk an inconsistent verdict on claim construction and other legal and factual questions.¹

III. APPLE’S “GOOD CAUSE” ARGUMENT IS WITHOUT MERIT.

Apple argues at length that Motorola has failed to show “good cause” to “amend” this Court’s June 1 scheduling order. This argument is inapplicable to the present situation, since Motorola is not attempting to modify any scheduling order. The June 1 deadline does not need

¹ That collateral estoppel may apply does not, as Apple suggests (D.E. 170 at 6 n.4), eliminate the prejudice, cost, and inefficiency of an entirely different lawsuit.

to be modified in order for Motorola to supplement its infringement contentions, since the Order does not set a “final” infringement contentions deadline.

Regardless, Apple slings large quantities of mud at Motorola about its putative lack of diligence in discovery. To the contrary, Motorola has been at least as diligent as Apple in this case. Both parties have produced millions of documents to each other in this case via the cross-use agreement. Both parties have served dozens of document requests, multiple rounds of interrogatories, and 30(b)(6) notices with dozens of topics. Motorola has demanded that Apple produce additional documents relevant to this specific case. *See, e.g.*, Ex. 9 (8/17/2011 letter regarding deficiencies in Apple’s document production). Without such documents, Motorola cannot properly complete its infringement contentions and theories. The parties are now engaging in extensive meet and confer over these and other discovery issues. *See, e.g.*, Ex. 10 (11/1/2011 Motorola deficiency letter to Apple); Ex. 11 (meet and confer e-mail correspondence). It is also worth noting that the parties are litigating across multiple forums, and so the pace of discovery here necessarily has taken into account events occurring elsewhere.² Indeed, both parties have chosen to prioritize certain discovery in other forums, such as the International Trade Commission (where the parties are in the midst of pretrial preparations), with earlier deadlines. Even so, Motorola has diligently complied with its discovery obligations and is in process of again demanding the documents missing from Apple’s initial production and that Apple supplement its interrogatory responses to cure many deficiencies. *See, e.g.*, Ex. 10; Ex. 12 (November 9, 2011 letter demanding Apple supplement its interrogatory responses).

² In addition to this case and the multiple cases in Wisconsin, the parties are also litigating in one federal case in Delaware, multiple cases before the International Trade Commission, including one going to trial in December, and multiple cases in Germany.

Even assuming Motorola would need to move to modify the June 1 order, it would have good cause for doing so, since Apple announced new products after the June 1 deadline and Motorola long has lacked the basic facts necessary to complete its infringement contentions and theories.

Apple also accuses Motorola of failing to follow patent local rules from *other* forums. Apple's reference to these other courts' rules is irrelevant. No such special 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.³ *BIAX Corp. v. NVIDIA Corp.*, slip op., 2011 WL 441470 at *5 (D. Colo., Feb. 8, 2011) (declining to strike infringement contentions served before discovery cutoff where Court's district lacked any local patent rules setting a different deadline).

IV. APPLE REFUSES TO PRODUCE DOCUMENTS AND PROVIDE WITNESSES ON THE NEW PRODUCTS NAMED IN MOTOROLA'S SUPPLEMENTAL INFRINGEMENT CONTENTIONS.

Based on its Motion to Strike, Apple refuses to produce documents and deposition testimony regarding the iPhone 4S, iCloud, and iTunes. Although Apple admitted in its motion to strike to already collecting and reviewing an “enormous” amount of documentation relating to the iPhone 4S, iCloud, and iTunes, Apple nonetheless refuses to produce such documents responsive to Motorola's discovery requests, despite these documents' acknowledged relevance to Motorola's supplemental infringement contentions. Duchemin Decl. Ex. 13 (November 8, 2011 letter from Apple counsel to Motorola counsel). Apple also has refused to produce documents relating to FairPlay and the App Store, based on the rationale that these features—

³ If any set of rules from other courts is analogous, it would be the rules of the district court in Wisconsin where the parallel Motorola-Apple patent litigation proceeds apace with this case. Nonetheless, Apple contends that different rules apply to infringement contentions in Florida and Wisconsin. *See* Section I.C *infra*.

which Motorola uses, like iTunes, to support its infringement contentions—were not mentioned in Motorola's May 18 infringement contentions based on public information. Moreover, Apple refuses to commit to producing promptly these documents and witnesses even if its motion to strike is denied.

Apple has stated that it is not refusing to provide discovery on these products and features, but rather, promises to "be reasonable in negotiating" over whether or not to produce these documents and witnesses if the Court denies Apple's motion to strike. Duchemin Decl. Ex. 14 (11/28/11 e-mail from Apple counsel to Motorola counsel). These statements ring hollow, particularly in light of Apple's inconsistent positions in Wisconsin and Florida as to the propriety of supplementing infringement contentions in the first place. The basic fact is that Apple has refused to firmly commit to providing any or witnesses regarding the iPhone 4S, iCloud, iTunes, FairPlay and the App Store. As such, Motorola therefore plans to separately move to compel production of these documents and deposition witnesses.

CONCLUSION

Since the Court never set a "final" infringement contention deadline, and since Apple can demonstrate no prejudice, Motorola respectfully requests this Court deny Apple's motion to strike Motorola's supplemental infringement contentions.

Dated: November 28, 2011

Respectfully submitted,

MOTOROLA SOLUTIONS, INC. (f/k/a
MOTOROLA, INC.) AND MOTOROLA
MOBILITY, INC.

By: /s/ David Perlson

David Perlson

Charles K. Verhoeven

David Perlson

Anthony Pastor

QUINN EMANUEL URQUHART &

SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700
Email: charlesverhoeven@quinnemanuel.com
davidperlson@quinnemanuel.com
anthonypastor@quinnemanuel.com

Edward M. Mullins (863920)
Astigarraga Davis Mullins & Grossman, P.A.
701 Brickell Avenue, 16th Floor
Miami, Florida 33131
Phone: (305) 372-8282
Fax: (305) 372-8202
Email: emullins@astidavis.com

Edward J. DeFranco
Raymond Nimrod
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Phone: (212) 849-7000
Fax: (212) 849-7100
Email: eddefranco@quinnemanuel.com

David A. Nelson
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
500 West Madison St., Ste. 2450
Chicago, IL 60661
Telephone: (312) 705-7400
Facsimile: (312) 705-7401
Email: davenelson@quinnemanuel.com

*Attorneys for Plaintiff and Counterclaim-
Defendant Motorola Solutions, Inc. and
Motorola Mobility, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2011, I served the foregoing document via electronic mail on all counsel of record identified on the attached Service List.

/s/ John Duchemin

John Duchemin

SERVICE LIST
Motorola Mobility, Inc. versus Apple Inc.
Case No. 1:10cv023580-Civ-UU
United States District Court, Southern District of Florida

Christopher R.J. Pace
christopher.pace@weil.com
Weil, Gotshal & Manges LLP
1395 Brickell Avenue, Suite 1200
Miami, Florida 33131
Tel.: (305) 577-3100 / Fax: (305) 374-7159

Attorneys for Apple, Inc.
Electronically served via e-mail

Of Counsel:
Matthew D. Powers
matthew.powers.@weil.com
Steven S. Cherensky
steven.cherensky@weil.com
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3000
Facsimile: (650) 802-3100

Mark G. Davis
mark.davis@weil.com
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, N.W., Suite 900
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940

Robert T. Haslam
rhaslam@cov.com
COVINGTON & BURLING LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

Robert D. Fram
framrd@cov.com
Christine Saunders Haskett
chaskett@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for Apple, Inc.
Electronically served via e-mail