

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 REPLY IN  
SUPPORT OF MOTION TO STRIKE MOTOROLA'S SUPPLEMENTAL  
INFRINGEMENT CONTENTIONS**

## I. INTRODUCTION

This Court ordered the parties to exchange infringement contentions by June 1, 2011. Like the other deadlines contained within this Court's scheduling order, that deadline was presumptively final. Motorola nonetheless attempted to supplement its infringement contentions, without leave of this Court, nearly five months after this Court's deadline had elapsed. To justify this untimely supplementation, Motorola argues that the Court-ordered deadline was not "final."

To support that argument, Motorola first argues that the deadline was not final because the deadline did not include the word "final" in the scheduling order. By this rationale, only one of the fourteen deadlines in the scheduling order would be "final," which was surely not the Court's intent. Motorola next attempts to justify its position regarding the Court-ordered deadline by looking not to the words or actions of the Court, but instead to the alleged words and actions of Apple. Apple's actions, however, are immaterial to Motorola's obligation to the Court to adhere to its discovery deadlines, and, in any event, there is no inconsistency between Apple's conduct and its motion to strike.

## II. ARGUMENT

### A. **The Court-Ordered Deadline for Submitting Infringement Contentions Was a Final Deadline.**

Motorola argues that the June 1 deadline was not final because the Court's order does not expressly state that it was "final." *See* Opp. at 3. Combined, the Court's two scheduling orders in this case contain fourteen deadlines, only one of which includes the word "final."<sup>1</sup> *See* D.E. 45, D.E. 88. Under Motorola's interpretation, the remaining thirteen deadlines are merely deadlines for placeholders. For example, according to Motorola's interpretation, the parties need only serve placeholder opening expert reports by the Court-ordered deadline, but are free to

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<sup>1</sup> The one deadline that includes the word "final" is the deadline for filing "final" Rule 26 disclosures. *See* D.E. 45.

serve their “final” opening reports later. This cannot be the intended meaning behind Court-ordered deadlines.

The parties should presume that the Court’s deadlines are final absent the Court’s explicit indication to the contrary. Here, there is no indication that the Court’s infringement contention deadline was anything other than final. For example, 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. Instead, it sets a deadline, to which the parties must adhere. If Motorola had any uncertainty regarding deadlines in the Court’s scheduling order, it should have sought clarification from the Court.<sup>2</sup>

**B. Apple’s Conduct in a Different Case in a Different Forum with Different Procedural Rules Is Immaterial and Creates No Inconsistency with Apple’s Position in this Case.**

Motorola argues that Apple’s addition of new accused products in a separate litigation between the parties in another jurisdiction is evidence that “Apple has not treated the June 1 deadline as ‘final.’” Opp. at 8. This is a non-sequitor; the parties’ actions in an entirely separate litigation, taking place in a different district court, located in a different circuit, with different local rules and orders, has no bearing on the deadlines set by this Court.

Moreover, there is nothing about the parties’ conduct in the Western District of Wisconsin case that is inconsistent with Apple’s position here. Specifically, the Western District of Wisconsin is different from this Court in that it does not use the term “infringement contentions” to describe the detailed, element-by-element analysis typically seen in patent

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<sup>2</sup> Motorola argues that treating the June 1 infringement contention deadline as “final” would “contradict the logic of the discovery schedule” because it would prevent the parties from using any discovery obtained after the deadline to support their infringement theories. *See* Opp. at 10-11. This argument is illogical; the parties may use discovery obtained at any point during the discovery period to support the infringement theories included in their infringement contentions exchanged prior to the June 1 deadline.

litigation (and exchanged by the parties in this case last May).<sup>3</sup> It instead uses the term “infringement contentions” to describe a much less substantive document that simply provides a preliminary list of the accused products by asserted claim. In accordance with this practice, the Wisconsin court ordered Apple and Motorola to provide, by March 4, 2011, nothing more than a list of products accused of infringing each asserted patent claim:

**Infringement Contentions: March 4, 2011[:]** By this date, a plaintiff must identify each claim in each patent being asserted against each accused device.

Ex. 2, Preliminary Pretrial Conference Order (emphasis in original).<sup>4</sup> Significantly, the Court *never* required the parties to exchange element-by-element infringement contentions of the kind typically seen in other jurisdictions with local patent rules, such as the Northern District of California. Although the parties separately agreed to exchange element-by-element contentions (i.e., typical “infringement contentions”) in the Wisconsin litigation, they did so only by agreement, and there was never a court order requiring such detailed contentions. *See* Ex. 4, 3/4/11 e-mail from Steven Cherenky to Edward DeFranco.

In this case, by contrast, there was a Court-ordered deadline for exchanging infringement contentions, without any instruction that such contentions should be limited to lists of accused products, as in Wisconsin. Accordingly, the parties interpreted “infringement contentions” in this Court’s scheduling order in the usual sense—as requiring element-by-element infringement contentions as opposed to merely the lists of accused products required in Wisconsin—as evidenced by the fact that, on May 18, 2011, the parties exchanged exactly such detailed, element-by-element contentions. Thus, whereas there was no court-ordered deadline for detailed

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<sup>3</sup> For example, a description of the type of element-by-element analysis typically called “infringement contentions” can be found in the Northern District of California Patent Local Rules. *See* Ex. 1, N.D. Cal. Pat. L. R. 3-1. (All exhibits cited are attached to the Declaration of Christine Haskett, filed in support of this brief, unless otherwise noted.)

<sup>4</sup> So that the Court may see how different the Court-ordered infringement contentions in Wisconsin are from the infringement contentions at issue in this case, Motorola’s March 4, 2011 infringement contentions from the Wisconsin litigation are attached as Exhibit 3.

infringement contentions in Wisconsin, the parties submitted such contentions in this case in compliance with the Court's deadline.

Ignoring the fact that the Wisconsin court never set a deadline for detailed infringement contentions, Motorola argues that "Apple's actions in Wisconsin are entirely consistent . . . with normal practice in patent litigation, absent some special rules." Opp. at 9. Motorola supports its argument with a single case, from the District Court of Colorado, in which the court declined to strike supplemental infringement contentions. *Id.* (citing *Biax Corp. v. Nvidia Corp.*, Case No. 09-cv-01257, 2011 WL 441470 (February 8, 2011, D. Colo.). In that case, however, *the court had not entered a deadline for infringement contentions* in its scheduling order. In declining to strike the supplemental contentions, the Court explained that it "analyzes the deadline for supplementation without the benefit of concrete rules governing disclosure of infringement contentions in patent cases." *Biax*, 2011 WL 441470 at \*5. In this manner, the Colorado court was very much like the Wisconsin court, in that neither were operating under a court-ordered deadline for detailed infringement contentions. In contrast, this Court set a June 1, 2011 deadline that both parties have always treated as being a deadline for detailed, element-by-element infringement contentions, thus giving the parties a "concrete rule[] governing the disclosure of infringement contentions."

**C. Apple's Use of "Reservations" Language in This Case Also Cannot Alter the Nature of the Court's Deadline.**

Finally, Motorola attempts to make much of Apple's use of language in its own contentions purporting to reserve the right to supplement those contentions. By using that language, Motorola argues, Apple gave "tacit approval" of Motorola's ability to supplement in an untimely manner. *See* Opp. at 1. As a sophisticated litigant, however, Motorola cannot reasonably have relied on Apple's "reservations" language—language of the type that parties frequently use in their documents, regardless of whether they have an actual right that can be reserved—as a basis for assuming that Motorola would be permitted to revise its infringement

contentions beyond a Court-ordered deadline. It is the language of the Court, not the parties, that controls a party's obligation to meet deadlines set by the Court.

Here, the Court gave no indication that untimely supplementation of infringement contentions was contemplated by the scheduling order or would be allowed. On the contrary, the Court has stated that if there were a deadline for providing infringement contentions in the scheduling order, "we are going to live with that cut-off." D.E. 178-2, *Markman* Hearing Tr. at 749:3-9. No language used by Apple in its contentions can change that.<sup>5</sup>

### III. CONCLUSION

Based on the foregoing, Apple respectfully requests that its motion to strike be granted and that Motorola's supplemental infringement contentions be stricken.

Dated: December 5, 2011

Respectfully submitted,

/s/ Christopher R. J. Pace

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<sup>5</sup> Moreover, unlike Motorola, Apple has not unilaterally attempted to amend its infringement contentions in this case without leave of Court.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 5, 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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