

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

Case No. 1:10cv023580-Civ-RNS

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 MOTION TO AMEND THE PROCEDURAL SCHEDULE
TO SERVE SUPPLEMENTAL INVALIDITY CONTENTIONS
AND ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT**

Plaintiff and Counterclaim Defendants Motorola Mobility, Inc. and Motorola Solutions, Inc. (f/k/a/ Motorola, Inc.) (collectively "Motorola") request that the Court grant Motorola leave to serve supplemental invalidity contentions with respect to certain of the patents asserted in the Counterclaim brought by Defendant and Counterclaim Plaintiff Apple, Inc. ("Apple"). Good cause exists because Motorola has been diligent in seeking pertinent discovery and notifying Apple of its invalidity contentions. Supplementation is also necessary because of Apple's late

production of documents and Apple's new positions with respect to the scope of its asserted patents in its Counterclaim.

Apple seeks to prevent Motorola from supplementing its invalidity contentions despite the fact that Apple failed to timely produce highly relevant "prior art" (that is, products or publications available prior to the claimed "invention" in Apple's patents which could invalidate those patents). In Netherlands litigation involving Apple, the court found that the prior art asserted in that case potentially invalidates the European equivalent of one of the patents Apple is asserting in this suit, U.S. Patent No. 7,657,849 B2 ("the '849 patent"). *See* Ex. A ¶¶ 4.45-4.48 (Netherlands court order discussing invalidity of the European counterpart to Apple's asserted '849 patent in light of the Neonode reference that was prior to the invention).¹ Yet, Apple did not produce this prior art until after Motorola demanded it by letter and now Apple seeks to prevent Motorola from using this highly relevant prior art in its invalidity contentions. Apple cannot possibly claim prejudice from prior art it was already aware of from another litigation, but which it did not produce prior to the parties' exchange of invalidity contentions.²

Motorola also has good cause for supplementation in response to Apple's new and expansive interpretation of Apple's U.S. Patent Nos. 6,282,646 B1 ("the '646 patent") and 7,380,116 B2 ("the '116 patent"). At the technical tutorial in this matter, Apple asserted for the first time that its '646 and '116 patents claim "Plug and Play," which refers to computer devices that can be configured with no user intervention (the technical tutorial was held in October 2011,

¹ "Ex. ___" refers to the exhibits attached to the declaration of Cathleen Garrigan filed concurrently with this motion.

² Apple stated during the December 23, 2011 meet and confer that it was unaware of the Netherlands prior art until August 3, 2011. Garrigan Decl. ¶ 18. Regardless of when Apple first became aware of the prior art, it was not produced until after the exchange of invalidity contentions, pursuant to Motorola's demand letter, and therefore good cause exists to allow supplementation.

after the June 2011 exchange of invalidity contentions). Apple did not invent Plug and Play, which was, for example, present in the Windows[®] 95 operating system. The Windows[®] 95 operating system was released three years before the priority date of the '646 and '116 patents and thus constitutes potential invalidating prior art to Apple's patents. In any event, Apple improperly seeks to expand the scope of its '646 and '116 patents beyond the language of the claims, and Motorola should be granted leave to respond to that expansion with supplemental invalidity contentions.

If supplementation is not permitted in these circumstances, a party like Apple that withholds theories until after the contention deadline passes will be rewarded by its tactics, as the other party will be precluded from responding. Such gamesmanship should not be encouraged. This is especially true for an issue such as the validity of patents, which has ramifications beyond this litigation.

I. BACKGROUND

A. Procedural History

On April 25, 2011, the parties submitted a joint proposal to the Court requesting entry of a scheduling order detailing the deadlines for preliminary contentions. (D.E. 77.) That proposal included a June 20, 2011 deadline for preliminary invalidity contentions. (*Id.* at 1.) On June 1, 2011, the Court entered the parties' proposed scheduling order. (D.E. 88.)

In accordance with the scheduling order, the parties exchanged preliminary invalidity contentions on June 20, 2011. Motorola served nearly two thousand pages of charts detailing element-by-element the invalidity of Apple's six asserted patents. Both parties' preliminary invalidity contentions explicitly stated that they were preliminary and reserved the right to supplement in light of continued discovery. *See, e.g.* Ex. B at 7 (Apple's Invalidity Contentions stating, "Discovery is ongoing, and Apple's prior art investigation and third party discovery are

therefore not yet complete. Apple reserves the right to present additional items of prior art under 35 U.S.C. § 102(a), (b), (e), and/or (g), and/or § 103 located during the course of discovery or further investigation."); Ex. C at 1 (Motorola's Invalidity Contentions stating, "These invalidity contentions are preliminary and are based on Motorola's current knowledge, understanding, and belief as to the facts and information available as of the date of these contentions. Motorola has not yet completed its investigation, discovery, or analysis of information related to this action, and additional discovery may require Motorola to supplement or amend its invalidity contentions.").³

B. Apple's Production of '849 Prior Art After the Deadline for Invalidity Contentions

Apple is engaged in litigation across the globe with various technology companies that use the Android platform in their smartphones and tablet computers. Knowing that Apple is engaged in many litigations involving the same or related patents, Motorola requested prior art produced or identified in other litigations in the document requests it served on Apple. *See e.g.* Ex. D at 7, Request for Production No. 18. Specifically, on December 29, 2010, Motorola served a written request for the production of, "All documents and things concerning any Prior Art relating to the Apple Asserted Patents, including any document or thing identified as potential Prior Art to Apple by any third party." *Id.*

³ Apple has taken the position that the June 20 invalidity contentions were "final" based upon the fact that the word "preliminary" was not included in the deadline. Apple previously took a similar position before Judge Ungaro with respect to infringement contentions. (D.E. 197 at 1-2.) Ultimately, Apple was successful in arguing before Judge Ungaro that the infringement contentions deadline was meant to be a final deadline. (D.E. 198.) While Motorola believes that Apple's positions are inconsistent with the parties' intentions when submitting the agreed scheduling order (as evidenced by both parties' reservation of rights in their exchanged infringement and invalidity contentions (D.E. 185 at 4-5) and Apple's position in the parties' co-pending litigation in Illinois (formerly Wisconsin) (D.E. 185 at 7-10)), Motorola seeks leave to serve supplemental invalidity contentions given Judge Ungaro's prior order.

On August 24, 2011, a Netherlands court issued an order in Apple's litigation against Samsung Electronics denying Apple's requested relief with respect to EP 1 964 022 ("EP 022") because "there is a reasonable chance that EP 022 . . . will be considered invalid" after a full trial on the merits. Ex. A at ¶¶ 4.45-4.48. EP 022 is the European counterpart to Apple's '849 patent that it is asserting against Motorola in this litigation. This ruling, of course, was entered months after the "deadline" for invalidity contentions in this matter.

On September 1, 2011, Motorola sent a letter to Apple demanding the production of prior art cited by Samsung in the Netherlands litigation along with litigation documents concerning EP 022. Ex. E. In its letter, Motorola noted that the requested prior art and other documents were responsive to Motorola's discovery requests served nearly nine months earlier and should have been produced in accordance with Apple's ongoing discovery obligations. Apple produced the documents from the Netherlands litigation on September 13, 2011. Ex. F.

Upon reviewing the documents, Motorola discovered that they contained prior art that had never been produced by Apple. Garrigan Decl. at ¶ 15. Accordingly, Motorola began supplementing its invalidity contentions and pursuing third-party discovery related to the recently-produced prior art.

C. Apple's Change in Position Regarding the Scope of the '646 and '116 Patents

On October 6, 2011, the Court held a technical tutorial hearing. (*See* D.E. 135.) At that hearing, Apple made a presentation with respect to the technology allegedly embodied in its patents. With respect to the '646 and '116 patents, Apple represented to the Court:

Now, the invention is – a colloquial expression that's often used is "plug and play," which just means exactly what it sounds like. You don't have to wait for it to be rebooted. The system will recognize it automatically without being rebooted or restarted.

Ex. G (Oct. 6, 2011, Hrg. Tr. 108:20-24 (emphasis added)). The technical tutorial was the first time in this litigation that Apple contended that the '646 or '116 patent claimed "Plug and Play." Apple made this assertion months after the "deadline" for invalidity contentions.

However, "Plug and Play" was well-known in the art years before the May 8, 1998 priority date of the '646 and '116 patents. *See e.g.* Ex. H at 593 ("The Plug and Play capabilities in Windows 95 have been widely described as key benefits to moving to Windows 95, because of the related reduction in hardware and software support costs."). Thus, if the inventions embodied in the '646 and '116 patents are "Plug and Play," the patents are invalid.

D. Motorola's Supplemental Invalidity Contentions

Motorola served its supplemental invalidity contentions on Apple on November 30, 2011. The amendments to the invalidity contentions fall into three main categories: (1) the late-produced prior art from Netherlands litigation; (2) supplementation of previously-disclosed references in response to Apple's representation that the '646 and '116 patents claim "Plug and Play"; and (3) new references asserted in response to Apple's representation that the '646 and '116 patents claim "Plug and Play."

On November 30, 2011, Apple stated its position that the deadline for preliminary invalidity contentions was the deadline for final invalidity contentions and demanded that Motorola withdraw its supplemental invalidity contentions. Ex. I. On December 2, 2011, the parties met and conferred regarding Motorola's supplemental invalidity contentions, but no agreement was reached. Garrigan Decl. at ¶ 16.

On December 6, 2011, the Court granted Apple's motion to strike Motorola's supplemental *infringement* contentions, holding that Federal Rule of Civil Procedure 16 applied and good cause must be shown. (D.E. 198.) In light of the Court's order, Motorola withdrew its

supplemental invalidity contentions and is now seeking leave of court to serve supplemental invalidity contentions after the June 20 deadline.

On December 19, 2011, Motorola filed its motion for leave to serve supplemental invalidity contentions, inadvertently omitting its certificate of good faith conference. (D.E. 205.) The Court denied Motorola's motion based on the failure to attach the certificate of good faith conference. (D.E. 210.) On December 20, the parties met and conferred for a second time regarding Motorola's supplemental invalidity contentions. Garrigan Decl. ¶ 17. During that meet and confer Apple indicated it might be willing not to oppose Motorola's motion with respect to the prior art produced from the Netherlands litigation. *Id.* On December 23, 2011, the parties conferred again. *Id.* at ¶ 18. During this meeting, Apple stated it would oppose Motorola's motion in its entirety. *Id.*

E. Motorola's Recent Discovery of Prior Art Patent 7,100,185

Motorola recently learned that U.S. Patent No. 7,100,185 ("the '185 patent") is prior art to three of Apple's asserted patents: U.S. Patent Nos. 5,583,560; 5,621,456 and 5,594,509 (collectively "the Florin patents").⁴ The priority date of the face of the '560, '456 and '509 patents is June 22, 1993. (*See* D.E. 17 at Exs. F-H.) The priority date on the face of the '185 patent is September 9, 1993. Ex. J. Thus, facially, the '185 patent did not purport to be prior art to the Florin patents. However, during its investigation of this case, Motorola learned that the prosecution history of the '185 patent contains a reference to an inventor declaration swearing that the priority date of the '185 patent is earlier than the priority date of Apple's '560 patent. Ex. K. Accordingly, the '185 patent and any system embodying the '185 patent are prior art to the

⁴ The '185 patent was not contained in the supplemental invalidity contentions that Motorola served on Apple and later withdrew. However, if the Court grants leave, Motorola will include the '185 patent in its supplemental invalidity contentions.

Florin patents. Despite its diligence investigating these multi-patent facts, Motorola did not uncover the true priority date of the '185 patent until after the exchange of invalidity contentions.

II. ARGUMENT

The district court has broad discretion in managing pretrial discovery matters. *Klay v. All Defendants*, 425 F.3d 977, 982 (11th Cir. 2005) (citing *Perez v. Miami-Dade Cty*, 297 F.3d 1255, 1263 (11th Cir. 2002)). Although this Court has not adopted patent local rules, it has found other courts' rules instructive for purposes of discovery. *See Suncast Techs., LLC v. Patrician Prods., Inc.*, 2008 WL 179648 *13-14 (S.D. Fla. Jan. 17, 2008) (considering the local patent rules of other courts in determining the sequence of discovery).⁵ Many patent local rules permit the amendment of invalidity contentions for good cause. *See e.g.* Ex. L (Northern District of California Local Patent Rule 3-6); Ex. M (Eastern District of Texas Local Patent Rule 3-6(b)). In particular, Northern District of California Patent Local Rule 3-6(b) provides that good cause for amending invalidity contentions includes "Recent discovery of material, prior art despite earlier diligent search."

Good cause exists to permit Motorola to serve supplemental invalidity contentions because, despite its diligence, Motorola only learned of the withheld, relevant prior art and Apple's Plug and Play theory after the deadline for contentions. Additionally, Apple will not be prejudiced because it was aware of the prior art in the Netherlands litigation, aware of the art disclosed but not charted in Motorola's invalidity contentions, and no-doubt aware of its improper Plug and Play interpretation of the '646 and '116 patents.

A. Apple's Production of Prior Art After the Deadline for Invalidity Contentions Provides Good Cause for Motorola to Supplement its Invalidity Contentions

⁵ For its part, Apple too relied on other courts' patent local rules in its successful motion to strike Motorola's supplemental infringement contentions. (D.E. 178 at 7.)

Good cause exists to allow Motorola to serve its supplemental invalidity contentions because through diligent discovery, Motorola learned of the Netherlands prior art and demanded its production from Apple. Here, the court order in the Netherlands litigation did not issue until August 2011, after the June 20, 2011 "deadline" for invalidity contentions.

Moreover, nearly a year ago, Motorola served document requests on Apple. Ex. D at 7, Request for Production No. 18. In accordance with its ongoing discovery obligations, Apple should have produced documents from the Netherlands litigation—but failed to do so. Nonetheless, when Motorola became aware of the Netherlands court's order, it requested production of documents from that litigation. Motorola's request, and Apple's belated production, revealed prior art that had never previously been produced or disclosed by Apple despite its ongoing discovery obligations. Thereafter, Motorola began analyzing the prior art and supplemented its '849 invalidity contentions.

Because the evidence supporting Motorola's '849 supplemental invalidity contentions was not produced until after the June 20, 2011 deadline, good cause exists to permit Motorola to serve its supplemental invalidity contentions. *See Poole v. City of Plantation, Fla.*, 2010 WL 1791905 at *33 (S.D. Fla. 2010) ("Good cause exists when evidence supporting the proposed amendment would not have been discovered in the exercise of reasonable diligence until after the amendment deadline had passed."). Indeed, despite Motorola's diligent conduct, it could not have supplemented its invalidity contentions with respect to the '849 patent before the June 20 because the Netherlands order was not even issued until two months after the deadline.

B. Apple's New Position That the '646 and '116 Patents Claim "Plug and Play" Provides Good Cause for Motorola to Supplement its Invalidity Contentions

On October 6, 2011, for the first time in this litigation and after the exchange of invalidity contentions, Apple represented to the Court at the technical tutorial that the '646 and '116 patents

claim "Plug and Play."⁶ Ex. G. "Plug and Play" is a concept that refers to computer devices that can be configured with no user intervention, *see* Ex. H at 592, and was a concept well known by at least by 1995. For example, "Plug and Play [was] one of the key ways in which Windows 95 enhanced[d] ease of use." Ex. N at 6. Additionally, the concept of a "Plug and Play" monitor was known in 1995. *See e.g.* Ex. H at 593 ("Add a new monitor by plugging it in and turning it on.").

Apple's new assertion seeks to vastly expand the scope of the purported invention of the '646 and '116 patents and provides good cause to allow Motorola to serve its supplemental invalidity contentions. In response to this expanded scope, Motorola has supplemented its '646 and '116 invalidity contentions in two ways. First, Motorola supplemented references that were previously disclosed as providing background information. Second, Motorola added references specifically directed at "Plug and Play".⁷

Because Apple only disclosed its new, expansive interpretation of the '646 and '116 patents on October 6, 2011, good cause exists to permit Motorola's supplemental invalidity contentions.

⁶ For its part, Apple expressly reserved the right to supplement its own invalidity contentions in precisely this situation. *See* Ex. B at 5 ("Apple is currently unaware of the extent, if any, to which Motorola will contend that limitations of the asserted claims are not disclosed in the prior art identified by Apple. To the extent that such an issue arises, Apple reserves the right to identify additional teachings in the same references or in other references that anticipate or would have made the addition of the allegedly missing limitation to the disclosed device or method obvious.".)

⁷ The Court's claim construction order further demonstrates that Apple's "Plug and Play" assertion is wrong. For example, the Court construed "modifying the allocation of the display space" as "changing the allotment of the global coordinate space available for use by display devices." (D.E. 194 at 48-51.) The Court's construction for the '116 patent similarly construed display space as global coordinate space. (*Id.* at 51-52.) Accordingly, the claims are directed to one global coordinate space that is modified, not a "Plug and Play" monitor. (*Id.* at 51.) Nonetheless, Apple continues to pursue its baseless infringement claims against Motorola.

C. Motorola Only Learned Through Diligent Discovery that the '185 Patent is Prior Art to the Florin Patents

Motorola has been diligent with respect to its invalidity contentions. Despite its diligence, Motorola only recently learned that the '185 patent is prior art to the Florin patents and could not have disclosed this reference earlier. Because the face of the '185 patent indicates that the earliest date to which it can claim priority is September 9, 1993, it was not apparent that this patent was prior art to the Florin patents, which were filed in June 1993. However, further investigation revealed a sworn declaration that the invention claimed in the '185 patent was invented before the alleged inventions claimed in the Florin patents. Because Motorola only recently learned of the '185 patent's status as prior art, it could not have disclosed this reference earlier.

D. Apple will not be Prejudiced by Allowing Service of Motorola's Supplemental Invalidity Contentions

Allowing Motorola to supplement its invalidity contentions will not prejudice Apple. Not only has Apple long been aware of the prior art from the Netherlands litigation, but it has already been defending against it. Accordingly, Apple cannot credibly claim prejudice from the assertion of the Netherlands prior art in this litigation.

Additionally, prohibiting Motorola from supplementing its invalidity contentions will unfairly prejudice Motorola's ability to defend itself and exclude highly relevant information from this litigation. *See Graphic Packaging Int'l, Inc. v. C.W. Zumbiel Co.*, 2011 WL 5357833 at *5 (M.D. Fla. Nov. 3, 2011) (allowing prior art disclosed for first time in expert report because "exclusion of evidence is an extreme sanction, and that all cases, but especially patent cases, are best decided on their merits."). The exclusion of evidence is generally an extreme sanction for failing to obey a court order. *See e.g.* Fed. R. Civ. Pro. 37(b)(2)(ii). In this case, prohibiting Motorola's supplemental invalidity contentions will punish Motorola for diligent

discovery and Apple's belated production of documents. Motorola has not violated any court order.

Nor, can Apple claim prejudice from the '646 and '116 supplemental invalidity contentions. Many of these references were disclosed in the initial invalidity contentions and merely expanded upon in the supplemental contentions. Such supplementation in light of continued discovery is appropriate. Indeed, Apple itself previously asserted that supplementation under these circumstances is proper. (D.E. 197 at 2 n.2 ("[T]he 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.").) Moreover, when Apple claimed for the first time at the technical tutorial that it invented "Plug and Play," it should reasonably have expected Motorola to respond by asserting "Plug and Play" references as potential prior art to these patents. If Apple is permitted to assert its new and expansive interpretation of the '646 and '116 patents after the deadline for invalidity contentions, Motorola will be prejudiced unless it is able to assert concomitant prior art.

Finally, Apple will not be prejudiced by the supplemental invalidity contentions related to the '185 patent. Apple has ample time to take any additional discovery it might claim it now requires as fact discovery does not close until March 16, 2012. Moreover, it is Motorola, not Apple, that bears the burden of establishing these references as prior art, and Apple will have more than two months to respond in any invalidity rebuttal expert report that Apple wishes to serve, which is due under the current schedule on April 16, 2012.

III. CONCLUSION

For all of the above reasons and good cause shown, Motorola respectfully requests the court grant Motorola leave to serve its supplemental invalidity contentions.

CERTIFICATE OF GOOD FAITH CONFERENCE

The undersigned certifies that the parties have met and conferred on several occasions in a good faith to attempt to resolve their disputes regarding Motorola's supplemental invalidity contentions. Those efforts have been unsuccessful, and the parties are at impasse. Motorola, therefore, seeks the Court's leave to serve its supplemental invalidity contentions.

/s/ Cathleen Garrigan

Cathleen Garrigan

Dated: December 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 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 attached Service List 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.

/s/ Douglas J. Giuliano

Douglas J. Giuliano

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