

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

**APPLE INC.'S OPPOSITION TO MOTION TO AMEND THE PROCEDURAL
SCHEDULE TO SERVE SUPPLEMENTAL INVALIDITY CONTENTIONS**

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Defendant and Counterclaim Plaintiff Apple Inc. (“Apple”) respectfully submits its opposition to Motorola’s motion to amend the procedural schedule to serve supplemental invalidity contentions. Because Motorola fails to demonstrate that it meets the good cause standard under Federal Rule of Civil Procedure 16(b), as discussed in detail below, the Court should deny Motorola’s motion.

I. INTRODUCTION AND PROCEDURAL HISTORY

Prior to reassignment of this case to this Court, Judge Ungaro’s June 1 scheduling order, which adopted the schedule jointly proposed by the parties, set a June 20, 2011 deadline for invalidity contentions. Although Motorola attempts to characterize this deadline as “preliminary,” its same argument regarding the deadline for infringement contentions was explicitly rejected by Judge Ungaro when Motorola attempted to serve amended infringement contentions several months ago. *See* Declaration of Jill J. Ho in support of Apple’s Opposition to Motion to Amend the Procedural Schedule to Serve Supplemental Invalidity Contentions, Ex. A [Dec. 6, 2011 Order Granting Motion to Strike].¹ Indeed, in granting Apple’s motion to strike Motorola’s amended infringement contentions, Judge Ungaro noted that “Motorola rested on a false presumption—namely that court-issued deadlines are ‘preliminary’ unless otherwise indicated. The opposite is the case.” *Id.* at 1-2. Moreover, Judge Ungaro observed that Motorola did not even attempt to show “good cause” for amending the scheduling order. *Id.* at 3.

Meanwhile, on November 30, 2011, Motorola served amended invalidity contentions more than five months after the June 20 deadline and without seeking leave of Court or meeting and conferring with Apple, asserting two new alleged prior art references against Apple patent-in-suit, U.S. Patent No. 7,657,849 (“the ’849 patent”)—(1) International Publication Number WO 01/77792 A2 (“Juels”) and (2) the Neonode N1 mobile phone (“Neonode”)—as well as two additional references against both U.S. Patent No. 6,282,646 and

¹ Subsequent citations to “Ex. ____” in this opposition brief refer to exhibits to the Ho declaration.

7,380,116 (“the ’646 and ’116 patents,” respectively)—(1) a computer system running Windows 95 (“Windows 95”) and (2) Microsoft Windows 95 Resource Kit (Microsoft Press, 1995) (“Resource Kit”). After Judge Ungaro granted Apple’s motion to strike on December 6, Apple requested that Motorola withdraw its amended contentions. *See* Ex. B [Dec. 6, 2011 email from Jill Ho to Cathleen Garrigan]. On December 8, Motorola indicated that it intended to file the instant motion seeking leave to amend the scheduling order. Ex. C [Dec. 8, 2011 email from Cathleen Garrigan to Jill Ho]. Motorola’s stated basis for asserting additional references against the ’849 patent was that Apple had failed to produce copies of Juels and Neonode. *Id.* Motorola’s stated basis for adding Windows 95 and Resource Kit as prior art references against the ’646 and ’116 patents was an alleged change in Apple’s positions, relying on out-of-context statements from the October 6, 2011 technology tutorial. *Id.* On December 9, 2011, after meeting and conferring with Motorola, Apple stated that it would oppose Motorola’s motion.

Despite all of the above, only on December 19, 2011 did Motorola file a Motion to Amend the Procedural Schedule to Serve Supplemental Invalidity Contentions, D.E. 205, seeking leave to add the four aforementioned references plus U.S. Patent No. 7,100,185, which Motorola alleged it had “recently learned” was prior art to Apple patents-in-suit, U.S. Patent Nos. 5,583,560, 5,621,456 and 5,594,509 (collectively “the Set-Top Box Patents”). *See* D.E. 205 at 6. This prior art reference was not in the November 30, 2011 amended contentions Motorola served on Apple nor did Motorola meet and confer before filing that motion, Ho Decl. ¶ 15, so it was the first time Apple became aware of this additional prior art reference.

Before Apple had a chance to object to the amended contentions, however, the Court issued an order on December 20, 2011, denying Motorola’s motion for failing to include a certificate of good faith conference. *See* D.E. 210. Later that same day, the parties met and conferred in satisfaction of the local rules. Ho Decl. ¶ 16. During this meeting, Apple indicated that it may be willing to consent to the additional prior art references asserted against the ’849 patent, but needed to investigate when Apple first became aware of the Juels and Neonode references asserted by Samsung in the Netherlands proceeding. *Id.* On December 23, 2011, the

parties again met and conferred, at which time Apple confirmed that it would continue to oppose Motorola's motion in its entirety because there was no evidence that Apple had been in possession of Juels or Neonode prior to the June 20, 2011 deadline for invalidity contentions; on the contrary, it was our understanding that Apple did not receive copies of at least some of the supporting documents for Juels and Neonode from Samsung until on or after August 3, 2011.² *Id.* at ¶ 17. On December 28, 2011, Motorola re-filed its Motion to Amend the Procedural Schedule to Serve Supplemental Invalidity Contentions. *See* D.E. 211.

II. ARGUMENT AND AUTHORITIES

A. Legal Standards For Amending Procedural Schedule

Under Federal Rule of Civil Procedure 16(b), a procedural schedule “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “Good cause” exists only if the procedural schedule could not be met despite the diligence of the party seeking the extension. Fed. R. Civ. P. 16, advisory committee’s note (1983); *see Southern Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1241 (11th Cir. 2009) (citing *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418-19 (11th Cir. 1998)). Accordingly, a lack of good cause may be found either (1) where the moving party did not diligently move to amend after obtaining new information giving rise to that amendment or (2) where the moving party did not diligently seek out such information. *See Southern Grouts & Mortars, Inc.*, 575 F.3d at 1241 n.3.

As pointed out in Motorola’s motion to amend, the Southern District of Florida has considered local patent rules of other jurisdictions to resolve discovery issues. *See Suncast Techs., LLC v. Patrician Prods., Inc.*, 2008 U.S. Dist. LEXIS 5072 *27-28 (S.D. Fla. Jan. 17, 2008) (finding the local patent rules of other courts instructive for suggesting the correct

² Motorola does not and cannot point to any evidence that Apple had copies of Juels or documents relating to Neonode prior to June 20, 2011. Indeed, while most of the prior art produced by Samsung is undated, the pages printed from various websites about Neonode are all dated August 3, 2011. *See* Ex. D [FL-Apple0100822]; Ex. E [FL-Apple0100823-25]; Ex. F [FL-Apple0100907-10]; and Ex. G [FL-Apple0100958-60].

sequencing of discovery unique to a patent suit). In the Northern District of California, Local Patent Rule 3-6 deals explicitly with amendments to contentions. It provides that contentions may be amended upon a showing of good cause, which requires a showing of diligence.³ *See O2 Micro Int'l, Ltd. v. Mono-Lithic Power Sys., Inc.*, 457 F.3d 1355, 1366 (Fed. Cir. 2006). Furthermore, “[t]he burden is on the movant to establish diligence rather than on the opposing party to establish a lack of diligence.” *Id.* (citations omitted). After making this prejudice determination, a court may then assess other factors, such as prejudice to the non-moving party, to determine whether good cause exists to allow an amendment.” *See id.* at 1368.

B. No Good Cause Exists For Motorola To Supplement Its Invalidity Contentions With Respect To The '849 Patent

Motorola should not be permitted to supplement its invalidity contentions against the '849 patent to include Juels or Neonode because Motorola's motion fails to explain why it was unable to locate its own copies of these references prior to the June 20, 2011 deadline for invalidity contentions. Instead, Motorola attempts to shift the focus to *Apple's* conduct, by accusing Apple of failing to meet its discovery obligations by not producing the prior art asserted by Samsung in a concurrent litigation in the Netherlands until the materials were requested by Motorola. As discussed below, and as conceded by Motorola, Apple promptly produced the prior art asserted by Samsung after Motorola's request. Moreover, Motorola points to no evidence that anyone at Apple was aware of those references during the relevant time frame. Regardless, any actions by *Apple* are insufficient to demonstrate diligence by *Motorola*.

³ Other district courts with local patent rules apply substantially the same rules in a similar fashion. *See, e.g., Hoffman-La Roche, Inc. v. Orchid Chems. & Pharms. Ltd.*, 2011 U.S. Dist. LEXIS 130133, *7 (D.N.J. Nov. 7, 2011) (applying the Federal Circuit's analysis of the Northern District of California's "very similar local patent rules"), *Alexsam, Inc. v. IDT Corp.*, 2011 U.S. Dist. LEXIS 2916, *4-5 (E.D. Tex. Jan. 12, 2011) ("The good cause standard requires the party seeking relief to show that, despite its exercise of diligence, it cannot reasonably meet the scheduling deadlines.").

1. Neonode Is Not Prior Art To The '849 Patent

Neonode is a Swedish company. Although Motorola asserts Neonode to be prior art, at least one of the documents Samsung produced to Apple suggests that Neonode did not sell any products in the United States more than one year prior to the December 2005 filing date of the '849 patent. *See* 35 U.S.C. § 102 (b) (providing that prior art must be “in public use or on sale *in this country*, more than one year prior to the date of the application for patent in the United States”) (emphasis added). Rather, “[a] launch in the USA was *expected* some time in 2008” and may not have ever occurred. *See* Ex. E (emphasis added). Similarly, Motorola does not point to any evidence that Neonode was known or used by anyone in the United States prior to 2005. *See* 35 U.S.C. § 102(a) (providing that prior art must be “known or used by others *in this country* . . . before the invention”) (emphasis added). Thus, Neonode likely does not even qualify as prior art to the '849 patent.

2. Apple Fully Complied With Its Discovery Obligations And Would Be Prejudiced If Motorola Were Allowed To Supplement Its Contentions

On September 1, 2011, Motorola requested copies of the prior art cited by Samsung during the proceedings before the Netherlands court. As Motorola concedes, on September 13, 2011, *less than two weeks later*, Apple produced the requested references from the Samsung litigation.⁴ Yet, Motorola waited until November 30, 2011—over two months—to serve its amended invalidity contentions.⁵

Meanwhile, Judge Ungaro held a technology tutorial on October 6 and a *Markman* hearing from October 17-19. Because the parties relied on the already served infringement and invalidity contentions when formulating their respective claim construction

⁴ As noted above, *supra* fn. 2, at least some of the prior art references produced by Samsung was dated August 3, 2011 and therefore likely produced to Apple on or after that date. Even at the earliest, documents were not produced by Samsung in the Netherlands proceedings until on or after July 20, 2011, when Samsung served its initial response.

⁵ Motorola's amended invalidity contentions have been withdrawn, pending the Court's ruling on the instant motion.

positions and arguments regarding the effect and relevancy of their proposed constructions, Apple would be severely prejudiced if Motorola were allowed to supplement its invalidity contentions at this late stage of the case.

Moreover, pursuant to this Court's December 20, 2011 order, the deadline to complete all fact discovery is March 16, 2012. With only roughly two months of the discovery period remaining, Apple would be forced to pursue last-minute discovery relating to the Juels reference as well as discovery regarding first sales (if any) in the United States by Neonode, which is a Swedish company. This would unjustly reward Motorola for failing to supplement its invalidity contentions prior to the claim construction stage of this case.

3. Motorola Fails To Offer Any Evidence That It Was Diligent

In any event, it is important to note that both Juels and Neonode are public. There is no dispute that Juels is a publicly available international patent application. As such, Motorola could easily have located Juels itself, prior to June 20, 2011, if it had searched diligently. Likewise, the Neonode N1 phone was, as evidenced by the materials Samsung produced to Apple, described in a publicly available user guide and on multiple publicly available websites. Again, had Motorola searched diligently, it could have located these materials itself. Nowhere in Motorola's brief is there any explanation of Motorola's efforts to locate relevant prior art prior to June 20, 2011 or why it did not locate Juels or Neonode.⁶

C. No Good Cause Exists For Motorola To Supplement Its Invalidity Contentions With Respect To The '646 And '116 Patents

Motorola's invalidity contentions filed on June 20, 2011, several months *prior to* Apple's alleged change in position at the technical tutorial, already included references directed at Microsoft's Plug and Play architecture, demonstrating that Motorola already deemed Microsoft's Plug and Play architecture to be relevant prior art to the '646 and '116 patents. Thus, even if Apple had changed its position at the technical tutorial, which it did not, Motorola

⁶ Having failed to proffer any such explanation in its opening brief, Motorola should not be permitted to provide evidence of its alleged diligence in its reply brief.

itself was already on notice months prior by virtue of its own invalidity contentions that Microsoft's Plug and Play architecture was at issue. Motorola should not be permitted to introduce new references now, which it already determined were relevant. For this reason alone, no good cause exists for Motorola to supplement its invalidity contentions. Additionally, and contrary to Motorola's assertions, Apple has not changed its position with respect to the scope of the '646 and '116 patents. As explained below, Apple's comments at the technical tutorial are consistent with the language of the patents, Apple's prior and current position regarding the scope of the patents, and the Court's claim constructions for the patents.

1. Motorola Fails To Demonstrate That It Was Diligent

Motorola's own invalidity contentions demonstrate that it was Motorola, not Apple, that attempted to broaden the scope of the '646 and '116 patents to encompass Microsoft's Plug and Play architecture.⁷ On June 20, 2011, when invalidity contentions were due and more than three months prior to the technical tutorial, Motorola served contentions for the '646 and '116 patents citing, *inter alia*, a Plug and Play BIOS Specification published by Compaq, Phoenix Technologies, and Intel. *See, e.g.*, Ex. H [Exhibit D to Motorola's Invalidity Contentions] at 3, 297-307. In addition to itself being a document about implementing Microsoft's Plug and Play architecture, the Plug and Play BIOS Specification also cites a Plug and Play ISA Specification published by Microsoft. *See* Ex. I [Plug and Play Bios Specification] at 4. Thus, Motorola should have known in June, 2011—based on its own invalidity contentions—that Plug and Play would be relevant under Motorola's interpretation of the '646 and '116 patents at that time. Motorola has offered no good cause for why it waited another six months to add additional Plug and Play references to its invalidity contentions when its contentions filed in June demonstrate that it thought Plug and Play technology was relevant to the asserted claims. For this reason alone, Motorola's motion should be denied.

⁷ Motorola's motion fails to distinguish between a colloquial and commonly-understood use of the term "plug and play" (as used by counsel for Apple at the technical tutorial to describe the outcome, in the context of display devices, of practicing the '646 and '116 patents) and the Plug and Play architecture developed and implemented by Microsoft, which is the subject of Motorola's invalidity references.

2. Apple Has Not Changed Its Position On The '646 and '116 Patents

In an effort to fabricate “good cause,” Motorola divorces a single sentence of Apple’s tutorial presentation from its context and misconstrues that sound bite, claiming that Apple sought to “vastly expand” the scope of the '646 and '116 patents to cover the broad concept of “computer devices that can be configured with no user intervention.” Motorola’s Motion at 10. In focusing on the words “plug and play” to the exclusion of the preceding colloquy with the Court, however, Motorola neglects six pages of the tutorial transcript which plainly show that Apple’s description of the patented invention was entirely consistent with both the language of the patents themselves and Apple’s prior position with respect to these two patents.

The '646 and '116 patents clearly describe in their specifications that the patented invention allows a user to “add a second monitor or other hardware component to a computer and begin to use the monitor as soon as it has been connected, without the need to reboot the computer or otherwise interrupt its current operating state.” *See* Ex. J [’646 Patent] at 2:45-49; Ex. K [’116 Patent] at 2:52-56. Similarly, asserted Claim 10 of the '646 patent describes the claimed invention as providing “hot-plugging capabilities for display devices,” which the specification defines as an environment in which “a display becomes immediately available for use as soon as it is plugged into the computer system.” Ex. J [’646 Patent] at 9:36-37 (Claim 10), 2:18-20.

Apple’s description of the '646 and '116 patents at the technical tutorial is consistent with these disclosures and distinct from the previously known Plug and Play technology. Counsel for Apple began his presentation on these patents by explaining that the patents relate to “an additional monitor connected to a device” and provided an example of using an iPad connected to an external monitor to make a presentation. *See* Ex. L [Hrg. Tr.] at 103:12-13, 103:16-23. Counsel then explained the problem addressed by the '646 and '116 patents: computer systems at the time required a sleep or restart cycle before recognizing a newly-added display device. *Id.* at 107:16-108:19. Only after laying this foundation did counsel conclude

with a colloquial summary of the invention of the '646 and '116 patents, that one would not need to wait for a reboot when adding a new display. *Id.* at 108:20-24. When viewed in its proper context, it is clear that Apple's description of the '646 and '116 patents adheres to what is actually disclosed in the patents: systems and methods for allowing a computer system to recognize and utilize a newly-added display, such as a monitor, without rebooting or restarting.⁸

This position is also completely consistent with Apple's infringement contentions, which Apple served on June 20, 2011. Apple did not take the position, as Motorola insinuates, that the '646 and '116 patents cover any computer device that can be configured without user intervention, regardless of how such an outcome is achieved.

Finally, and importantly, whether one colloquially characterizes the *outcome*, as viewed by an end-user, of practicing the '646 and '116 patents as "plug and play" is entirely irrelevant to any determination of the actual scope of the asserted claims, which are directed to particular methods, systems, and apparatuses for achieving that outcome. *See, e.g.*, Ex. J ['646 Patent] at 8:54-55 ("1. A method for reconfiguring a computer system to accommodate changes in a display environment, comprising..."), 9:36-37 ("10. A system which provides hot-plugging capabilities for display devices, comprising..."). As the Federal Circuit has clearly instructed, we look to the words of the claims themselves to define the scope of the patented invention. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). As discussed above, Apple's presentation to the Court at the technical tutorial was entirely consistent with the words of the asserted claims. Motorola's efforts to manufacture "good cause" and excuse its lack of diligence by dissecting a single sentence in a vacuum, isolated from its context and the asserted claim language, should be rejected.

⁸ In Footnote 7 of its brief, Motorola misleadingly suggests that Apple's infringement claims are baseless because the claims are directed to a global coordinate space and not a "Plug and Play" monitor. Motorola's Motion at 10, n7. While Motorola is correct that a global coordinate space is one disclosed embodiment, it is clear from the language of the claims that the '646 and '116 patents are directed to methods and systems for implementing hot-plugging of display devices.

D. No Good Cause Exists For Motorola To Supplement Its Invalidity Contentions With Respect To The Set-Top Box Patents

While Motorola alleges that “[g]ood cause exists because Motorola has been diligent in seeking pertinent discovery and notifying Apple of its invalidity contentions”—Motorola fails to offer *any* explanation of: (1) when it discovered the new prior art reference (’185 patent); (2) its efforts in discovering that the ’185 patent may have an earlier priority date than its filing date after learning of the ’185 patent and (3) its efforts in promptly notifying Apple of this new information after discovery of the ’185 patent. Motorola’s Motion at 1. “The burden is on the movant to establish diligence rather than on the opposing party to establish a lack of diligence.” *O2 Micro Int’l Ltd. v. Mono-Lithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006). Motorola cannot satisfy this burden because it did not offer any evidence of its diligence and should not be permitted to do so in its reply brief.

Motorola also fails to address why it is justified in adding the ’185 patent at this late juncture when it would severely prejudice Apple because the apparent priority dispute would require Apple to pursue completely new third-party discovery with only two months left before the close of discovery.

1. **Motorola Fails To Offer Any Evidence That Its “Further Investigation” That Purportedly Led To The Discovery Of The Priority Issue Was Diligent**

Motorola claims that “further investigation” led to the discovery of a sworn declaration that indicates that the ’185 patent may have a priority date before its filing date and that this discovery justifies the ’185 patent’s untimely addition to its invalidity contentions. *See* Motorola’s Motion at 7, 11. As an initial matter, Motorola tacitly concedes that it was aware of the ’185 patent before filing its original invalidity contentions. *See* Motorola’s Motion at 7, 11. Yet, Motorola conveniently fails to inform this Court when it first became aware of the ’185 patent and, importantly, whether it was aware of the reference before the June disclosure date. This omission is critical because Motorola has the burden to establish diligence from this untold

date through when it first sought to include the '185 patent in its contentions. *See, e.g., O2 Micro Int'l Ltd.* at 1366-67. In other words, Motorola must show that after learning of the '185 reference, it was diligent in discovering the declaration and in informing Apple thereof. This burden involves Motorola showing that its actions during this time period were diligent. *See id.* at 1367. Notably, Motorola did not even include the '185 patent in its supplemental contentions on November 30, 2011 and secretly added it to its December 19 motion without meeting and conferring with Apple. *See Ho Decl.* ¶ 15.

Rather than explaining its actions that apparently comprise its “further investigation,” Motorola simply states that “during its investigation of this case, Motorola learned that the prosecution history of the '185 patent contains a [sworn declaration].”⁹ Motorola’s Motion at 7; *see also id.* at 11 (noting that “further investigation revealed a sworn declaration”). Motorola then cites to Exhibit K as this sworn declaration. *Id.* at 7. Exhibit K, however, is not even a sworn declaration and its citation appears to be in error.¹⁰ In any event, not only does Motorola fail to properly identify the sworn declaration, it has made no attempt to explain to this Court what actions it took to discover the declaration or why it was prevented from doing so earlier—no less why its actions were diligent. Accordingly, Motorola cannot have met its burden of showing diligence.

While the burden is not on Apple to establish lack of diligence, at least two objective factors suggest that Motorola could not have been diligent. First, Motorola cites to the sworn declaration, Exhibit K, as justification for its untimely identification of the '185 patent. But Exhibit K and the rest of the file history of the '185 patent is publicly available on the USPTO’s website and readily accessible.¹¹ Motorola offers no explanation of why it did not

⁹ It would be improper for Motorola to provide the factual circumstances of its “further investigation” in its reply brief for the first time.

¹⁰ While Motorola’s citation to Exhibit K appears to be a mistake, presumably Motorola is attempting to cite to the declaration in the file history of the '185 patent. Exhibit K is actually a submission by the Applicant of the '185 patent that discloses to the Patent Office a portion from the file history of one of Apple’s STB Patents. Apple cannot discern how this submission shows that the '185 patent is entitled to an earlier priority date than the STB Patents.

¹¹ <http://portal.uspto.gov/external/portal/pair>.

discover this declaration or its alleged relevance before the invalidity contentions were due. *Cf. Brilliant Instruments, Inc. v. Guidetech, Inc., et al.*, 2011 U.S. Dist. LEXIS 48865, at *5 (N.D. Cal. Apr. 29, 2011) (in denying a motion for leave to amend invalidity contentions, noting that movant “should have investigated this prior art”). Second, Motorola is well aware that the filing date of a patent is not always its priority date, and thus naturally had reason to investigate the publicly available file history to determine the proper priority date. In fact, Motorola itself—in this very case—is alleging that some of its own patents (*e.g.*, the ’531 and ’006 patents) are entitled to earlier priority dates than their respective filing dates.

Apple should not be prejudiced due to Motorola’s lack of diligence or appreciation of references it uncovered earlier in the case without a showing of good cause, which is not the case here.

2. Motorola Ignores The Prejudice That Would Result From Requiring Apple To Conduct New Third-Party Discovery At This Late Stage

Motorola ignores the specific circumstances regarding the ’185 patent when it alleges that “Apple has ample time to take any additional discovery it might claim it now request as fact discovery does not close until March 16, 2012.” Motorola’s Motion at 12. This is not simply the case of allowing the addition of a prior art reference to invalidity contentions because the 185 Patent is not prior art on its face. Although Motorola’s brief does not adequately disclose the relevant facts it is relying on, Motorola appears to seek to rely upon a declaration to establish an earlier priority date for the third-party ’185 Patent. However, to do this would require that Motorola not only establish corroborated evidence of what existed at an early date and that what existed supports the disclosure in the ’185 patent, but also establish the applicant’s diligent reduction to practice during the relevant time frame. Motorola does not allege that all of the information is present in the record to show that the ’185 patent is prior art. Further, the ’185 patent names seven inventors. Accordingly, to properly assess and possibly challenge this declaration, Apple would need to investigate and assess any basis allegedly supporting the earlier

priority date and may need to initiate new third-party discovery of the seven inventors or other witnesses that Motorola may use to support its new allegations. Given that fact discovery closes in roughly two months and the inherent delays in seeking third-party discovery and any discovery Motorola would need to even show that the '185 patent is prior art, this would prejudice Apple as there might not be adequate time to properly rebut this late disclosed and alleged prior art. *See, e.g., Boney and Boney v. Carnival Corp., et al.* 2009 U.S. Dist. LEXIS 113879, at *6 (denying leave to amend complaint because non-movant would have less than a month to conduct additional discovery before the discovery cut-off).

III. CONCLUSION

For the aforementioned reasons, Apple respectfully requests that the Court deny Motorola's motion to amend the procedural schedule.

Dated: January 17, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Case No. 1:10cv023580-Civ-RNS
United States District Court, Southern District of Florida

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