

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

Case No. 1:10cv023580-Civ-RNS-TEB

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 AND COUNTERCLAIM PLAINTIFF APPLE INC.'S MOTION TO  
COMPEL RESPONSES TO INTERROGATORIES NOS. 7 AND 12 REGARDING  
PRODUCTS EMBODYING MOTOROLA'S ASSERTED PATENTS AND  
ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT**

## **MOTION**

Pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 26.1, Defendant and Counterclaim Plaintiff Apple Inc. (“Apple”) respectfully moves this Court to compel Plaintiff and Counterclaim Defendant Motorola Mobility, Inc. (“Motorola”) to supplement its responses to Apple’s Interrogatories 7 and 12.

### **I. INTRODUCTION**

In its Interrogatories 7 and 12, Apple seeks basic information vital to its defenses. Under the Patent Act, if a party sells products that practice its own patents without marking those products with the patent numbers, the party may be barred from seeking damages for patent infringement, at least during the time that it sold those products. Furthermore, if a party sells a product that practices its patent more than one year before applying for the patent, the patent is invalid. For these reasons, Apple has asked Motorola in discovery to identify its own products that have practiced the patents it asserted against Apple (embodying products), and to identify the first public use or sale of any such products. Motorola, however, has refused to provide this information.

Illustrating the basic nature of this discovery, Motorola posed nearly-identical requests seeking the same information about Apple’s products, and the patents that are asserted by Apple against Motorola. Unlike Motorola, Apple has provided this information in discovery. Apple now moves to compel the same type of discovery from Motorola that Apple has already provided regarding its own products.

### **I. RELEVANT LEGAL PRINCIPLES**

The relevance of the discovery sought by Apple flows from the marking requirement of the Patent Act. That statute provides that anyone “making, offering for sale, or selling” any patented articles within the United States may give notice that such articles practice particular patents by marking the products with the relevant patent numbers. 35 U.S.C. § 287(a). Marking is not mandatory, but the consequences of failing to mark are severe:

In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

*Id.* In other words, in the absence of either marking or actual notice to the accused infringer, a patentee may not recover damages for infringement.

However, if a patentee sells no products that practice the patent for which it claims infringement, a failure to mark cannot bar the recovery of damages. *See Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1220 (Fed. Cir. 2002) (“The recovery of damages is not limited where there is no failure to mark, i.e., . . . where there are no products to mark.”). Therefore, whether a patentee sold products that practice its patent is a crucially important issue.

In this case, Motorola has admitted that it has never marked any of its products with any patent numbers. Whether any of Motorola’s unmarked products practiced the Patents-in-Suit is therefore of paramount importance. If any of the products Motorola sold before it filed this suit practiced even a single claim of the Motorola patents, Section 287(a) could bar Motorola from seeking damages for any alleged infringement before Apple received actual notice of Motorola’s infringement allegations. To determine whether it may rely on Section 287(a) to limit damages, therefore, Apple must know whether any of Motorola’s products practiced the patents.

In addition, information on Motorola’s embodying products is relevant under several of the widely-used *Georgia-Pacific* factors used to assess “reasonable royalty” damages for patent infringement. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) (analyzing damages award under the *Georgia-Pacific* factors). Factor four directs the finder of fact to consider the “existing value of the invention to the licensor as a generator of sales of his non-patented items.” *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 11120 (S.D.N.Y. 1970). Factor eight focuses on “[t]he established profitability of the product made under the patent; its commercial success; and its current popularity.” *Id.* And factor ten evaluates “[t]he nature of the patented invention; the character of the commercial embodiment of

it as owned and produced by the licensor; and the benefits to those who have used the invention.” *Id.* Such evaluation would be impossible without a way to establish which of Motorola’s products embody its asserted patents.

Courts considering discovery requests like Apple’s have routinely ordered plaintiff patent holders to identify embodying products. In *Leader Techs. v. Facebook Inc.*, No. 08-862-JJF-LPS, 2009 WL 3021168 (D. Del. Sept. 4, 2009), the defendant had demanded that plaintiff identify all of the products or services that it contended practiced any claim of its Patent-in-Suit, and provide a chart identifying where each limitation of each claim can be found. *Id.* at \*1. While the court noted that the case was “fundamentally about whether Facebook infringes Leader’s patent, not about whether Leader practices its own patent,” it nonetheless found the “issue of whether Leader offers products that practice claims of the Patent-in-Suit relevant to evaluating Leader’s request for injunctive<sup>1</sup> relief.” *Id.* at \*2. Accordingly, the court concluded that “Facebook is entitled to know every Leader product or service that Leader contends practices any of the asserted claims of the Patent-in-Suit.” *Id.* Further, it ordered Leader to identify “which claims are practiced by which of Leader’s products and services.” *Id.*

In *Fresenius Medic. Care Holding Inc. v. Baxter Int’l, Inc.*, 224 F.R.D. 644 (N.D. Cal. 2004), the court likewise ordered a patent holder to comply with an interrogatory that sought identification of each product it had “ever researched, designed, developed, tested, used, sold or licensed embodying any invention claimed by the patents in suit.” *Id.* at 652. And in *Aristocrat Techs. v. Int’l Game Tech.*, No. C 06-03717 RMW (RS), 2009 WL 3573327 at \*2 (N.D. Cal. Oct. 30, 2009), the court compelled the plaintiff to respond to an interrogatory seeking a full explanation of whether ten of its products practiced the Patents-in-Suit. *Id.* at \*2. In so doing, the court noted that such requests are “standard discovery taken in every patent infringement suit.” *Id.* It also noted that the “patent holder . . . presumably is in the position to identify which of its own products make use of the patented technology.” *Id.*

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<sup>1</sup> Motorola likewise seeks an injunction against Apple. See Compl. at 10 (Dkt. No. 1).

Finally, information about the first public use, first offer for sale, and first sale of a product practicing a patent is required to determine the validity of a patent, because these activities can invalidate a patent if they occur more than one year before a patent application is filed. *See* 35 U.S.C. § 102(b) (“A person shall be entitled to a patent unless . . . (b) the invention was . . . 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.”). In addition, as discussed above, information about the sale of products embodying a patent is highly relevant to the damages the patentee can claim. If Motorola made sales of embodying products without marking, it could bar Motorola from claiming damages during the time period when those sales were made. “[A] party that does not mark a patented article is not entitled to damages for infringement prior to actual notice.” *Crown Packaging Tech., Inc. v. Crown Cork & Seal USA, Inc.*, 559 F.3d 1308, 1316 (Fed. Cir. 2009).

## **II. STATEMENT OF FACTS**

Motorola has accused Apple of infringing six of its patents, and Apple has counter-claimed, asserting six of its own patents. Compl. at 1 (Dkt. No. 1); Answer and Countercls. at 23-27 (Dkt. No. 17). Motorola seeks damages for allegedly infringing sales of Apple’s accused products made during the six years immediately preceding its filing of this suit. DiMuzio Decl., Ex. 13 (Nov. 22, 2011 E-mail from Williamson to DiMuzio). However, Motorola has admitted that none of its products are marked as embodying any of the Patents-in-Suit. *See* DiMuzio Decl. Ex. 1, Resp. to Apple’s Interrog. No. 13. Therefore, if any of Motorola’s products practiced any of the Patents-in-Suit during the six pre-suit years, the marking requirement of the Patent Act could bar Motorola from collecting damages.

In order to investigate this possibility, Apple requested that Motorola identify which of its products, if any, practice the Motorola Patents-in-Suit. *Id.*, Ex. 1, Resp. to Apple’s Interrog. No. 12. Motorola similarly requested that Apple identify all of its own products embodying Apple’s asserted patents. *See id.*, Ex. 2, Suppl. Resp. to Motorola’s Interrog. 8. In addition, the parties exchanged interrogatories about the first public use and sale of any product embodying the other party’s asserted patents, information required to determine the patents’ validity under 35 U.S.C.

§ 102(b). *See id.*, Ex. 3, Resp. to Apple’s Interrog. No. 7; Ex. 4, Second Suppl. Resp. to Motorola’s Interrog. No. 11.

In its initial responses to Interrogatories 7 and 12, Motorola did not identify any of its own products. It stated that it would “provide responses regarding its asserted claims at the time set by the Court” (Interrog. No. 7) and “supplement this response at the appropriate time” (Interrog. No. 12). In an October 31, 2011 letter, Apple asked when Motorola would supplement these responses. DiMuzio Decl., Ex. 5 at 3-4 (Oct. 31, 2011 letter from Ho to Perlson).

Motorola responded that it would supplement its responses to both Interrogatories 7 and 12. *Id.*, Ex. 6 at 2 (Nov. 8, 2011 Letter from Perlson to Ho). Motorola also claimed to already have “identified representative products that embody one or more of its patent claims.” *Id.* For proof, Motorola pointed to its slides submitted to the Court for the technology tutorial hearing. Here, Motorola stated that all of its products using the Android operating system or the Android Marketplace embodied two of its asserted patents. *Id.*, Ex. 7 (Excerpts from Motorola’s Technology Tutorial). Finally, it asserted that Apple owed Motorola responses to Motorola Interrogatories Nos. 8 and 11, which sought the same type of information on Apple patent embodiments and their first public use and sale. *Id.*, Ex. 6 at 2.

On November 15, 2011, Apple told Motorola that merely identifying “representative” embodying products in response to Interrogatory 12 would not suffice, because such selective identification would not necessarily demonstrate whether Motorola had complied with its obligation to mark embodying products. *Id.*, Ex. 8 at 1. For example, if the “representative” embodying products were not sold during the entire six years for which Motorola seeks damages, Apple would still not know if there were other periods during those six years during which Motorola was selling embodying products that were not marked with the patent numbers.

In an effort to resolve the parties’ dispute, and because Motorola had complained about the burden<sup>2</sup> of identifying all of its embodying products, Apple proposed limiting its

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<sup>2</sup> Motorola waived any objection to responding to Interrogatory 12 based on over-breadth or undue burden, as it did not raise either objection in its response. *See* Civ. L.R. 26.1(g)(3)(A)

Interrogatory No. 12 to accept identification of just one embodying product for each interval of time in the six years before Motorola filed this action, and during which Motorola sold any embodying products. *Id.*, Ex. 11 (Dec. 14, 2011 letter from DiMuzio to Perlson) at 1-2. Such a response would provide Apple with the information it needs because Apple would then be able to identify definitively the periods of time during which Motorola was selling embodying products and the periods of time during which it was not. In response, however, Motorola did not address Apple's proposal, but maintained that Motorola would identify embodying products only to the extent it would rely on them. DiMuzio Decl., Ex. 12 (Dec. 16, 2011 e-mail from Quarmby to DiMuzio). Motorola maintained this position during additional meet-and-confer efforts.<sup>3</sup>

Despite this dispute over the scope of Motorola's Interrogatory 12 supplementation, the parties agreed to supplement their responses to various requests, including Apple's Interrogatories 7 and 12, by January 17, 2012. *Id.*, Ex. 9 at 2-3 (Nov. 21, 2011 letter from Quarmby to Ho); Ex. 10 (E-mail thread moving exchange date to Jan. 17, 2012). On January 17, 2012, Apple served supplemental responses to Motorola's Interrogatories Nos. 8 and 11 (among others). *See* DiMuzio Decl. Exs. 2 and 4. Motorola's supplement did not update its responses to Interrogatories 7 or 12. Apple requested a meet-and-confer the next day, and Motorola stated that (contrary to its agreement) it did not intend to supplement its responses to either Interrogatory 7 or 12. *Id.*, ¶ 5.

## **STATEMENT OF DISPUTED DISCOVERY, RESPONSES, AND ARGUMENT**

### **A. Interrogatory No. 12**

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("Where an objection is made to any interrogatory or subpart thereof . . . the objection shall state with specificity all grounds. Any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, shall be waived.").

<sup>3</sup> The parties' meet and confer efforts concluded unsuccessfully on December 30, 2011. *See* DiMuzio Decl, ¶ 3; Ex. 15 (Dec. 21, 2011 e-mail from DiMuzio to Searcy); Ex. 16 (Dec. 23, 2011 e-mail from Searcy to DiMuzio); Ex. 17 (Dec. 26, 2011 e-mail from DiMuzio to Searcy); ¶ 4.

1. Verbatim Statement of Apple's Discovery Request

Separately for each asserted claim of each of the Motorola Mobility Patents-in-Suit, identify all devices manufactured, sold, or used by You or any non-party to this Action that You believe has embodied, practiced, fallen within the scope of, used, or been marked with the Motorola Mobility Patents-in-Suit.

2. Verbatim Statement of Motorola's Response

Mobility incorporates its Preliminary Statement and General Objections set forth above as though set forth fully herein. Mobility objects to this interrogatory to the extent that it seeks to elicit information subject to and protected by the attorney-client privilege, the attorney work-product doctrine, the joint defense privilege, the common interest doctrine, and/or any other applicable privilege or immunity. Mobility further objects to this interrogatory to the extent it calls for a legal conclusion or presents a question of law. Mobility further objects to this interrogatory to the extent it calls for information regarding the devices of "any non-party to this action." This request seeks information and/or documents that are outside of Mobility's possession, custody or control.

Mobility further objects to this interrogatory to the extent it calls for Mobility's contentions or expert opinion regarding which devices have "embodied, practiced, fallen within the scope of, used, or been marked with the Motorola Mobility Patents-in-Suit." This request is premature in light of the Court's February 2, 2011 Scheduling Order directing the parties to provide opening expert reports on November 4, 2011. Mobility is still investigating the claims and defenses at issue in this case. Mobility will provide responses regarding its contentions on the timeframe set by the Court, after it has had an opportunity to seek discovery regarding its contentions.

Subject to and without waiving its General Objections and the foregoing specific objections, Mobility states that it has accused third party products of infringing one or more claims of the following patents:

U.S. Patent No. 5,958,006: BlackBerry Pearl 8100, 8110, 8120, 8130, 8220, 8230; BlackBerry Storm 9500, 9530; BlackBerry Bold 9000; BlackBerry Curve 8900, 8300, 8310, 8320, 8330, 8350i; BlackBerry 8800, 8820, 8830.

U.S. Patent No. 6,101,531: BlackBerry Enterprise Solution including the BlackBerry Enterprise Server.

Mobility has not yet completed its discovery and investigation of the facts relating to this interrogatory. Mobility will supplement this response at the appropriate time and as its investigation continues, in accordance with Federal Rule of Civil Procedure 26(e) and the schedule ordered by the Court.

3. Reasons in Support of Motion

Because Motorola refuses to indicate whether any of its own products practice the Motorola Patents-in-Suit, Motorola's response is incomplete and constitutes a failure to respond under Federal Rule of Civil Procedure 37(a)(4). Although Motorola committed to supplement its



response by identifying “representative” embodying Motorola products by January 17, 2012, it served no updated response that day, and it subsequently confirmed that it will not supplement its response. DiMuzio Decl., ¶ 5.

Motorola has taken the position in documents filed with the Court that some of its products practice at least two of its asserted patents. *See* Ex. 7. Even if Motorola were to update its interrogatory response to include those products, however, the response would still be incomplete and inadequate because Apple would not know if there were periods of time during the six pre-suit years during which Motorola sold no embodying products. Motorola therefore should be compelled to produce information identifying *all* of its products that embody its asserted patents, just as Apple has done in response to Motorola’s similar request.

There can be no dispute that Apple requires information about Motorola’s embodying products for its defense. As in *Facebook*, in which the court found the defendant’s requests to identify embodying products relevant because they pertained to the availability of a remedy for infringement, 2009 WL 3021168, at \*2, Apple seeks the same precise information for the same precise purpose. In requesting damages for the six years prior to this lawsuit, Motorola implicitly asserts that none of its unmarked products practiced any of the Patents-in-Suit, and Apple is entitled to test that assertion by obtaining the requested discovery. Finally, identification of Motorola’s embodying products is required to evaluate *Georgia-Pacific* factors including “the character of the commercial embodiment . . . as owned and produced by the licensor,” and “the established profitability of the patented product.”

The fact that Motorola demanded and obtained similar embodying product information from Apple regarding Apple’s asserted patents underscores the unreasonable nature of Motorola’s refusal to produce reciprocal information. Motorola should be compelled to supplement its response to Interrogatory 12 by identifying all of its own products that embody or embodied any asserted claim of its asserted patents.

**B. Interrogatory No. 7**

1. Verbatim Statement of Apple's Discovery Request

For each asserted claim of each of the Motorola Mobility Patents-in-Suit, describe all facts and circumstances relating to the first manufacture of the claimed invention, the first use of the claimed invention, the first public use of the claimed invention, the first offer for sale of the claimed invention, the first sale of the claimed invention, or the first offer for sale of the claimed invention for inclusion in a product to be sold in the United States, including without limitation: the date on which each such event occurred; the identity of each person with knowledge of any of the foregoing; the price of any such offers for sale or sales; and an identification of each document, electronically stored information, thing, or person that Motorola Mobility relies on in support of its answer.

2. Verbatim Statement of Motorola's Response

Mobility incorporates its Preliminary Statement and General Objections set forth above as though set forth fully herein. Mobility objects to this interrogatory to the extent that it seeks to elicit information subject to and protected by the attorney-client privilege, the attorney work-product doctrine, the joint defense privilege, the common interest doctrine, and/or any other applicable privilege or immunity. Mobility further objects to this interrogatory to the extent it calls for a legal conclusion or presents a question of law. Additionally, Mobility objects to the extent that this interrogatory seeks information and/or documents that are outside of Mobility's possession, custody or control. To the extent this interrogatory calls for expert testimony or opinion, Mobility objects that this interrogatory is premature in light of the parties' December 29, 2010 Joint Planning and Scheduling Report in which the parties request that the Court set deadlines for expert disclosures. Similarly, to the extent this interrogatory calls for Mobility to identify asserted claims, Mobility objects that this interrogatory is premature because the parties have requested that the Court set dates for the exchange of such information in the December 29, 2010 Joint Planning and Scheduling Report. Mobility further objects that this interrogatory is overly broad, unduly burdensome and not relevant to the claims of defenses of any party to the extent it is not limited to asserted claims. Mobility also objects that this interrogatory is unduly burdensome because it comprises at least four distinct interrogatories.

Mobility is still investigating the claims and defenses at issue in this case and will provide responses regarding its asserted claims at the time set by the Court, pursuant to the parties' request in the December 29, 2010 Joint Planning and Scheduling Report. Pursuant to that request, Mobility is not yet required to identify the claims it asserts in this action or its infringement contentions regarding the Apple Accused Products, yet this interrogatory asks Mobility to reach legal conclusions regarding the practice of the Motorola Patents-in-Suit.

3. Reasons in Support of Motion

Motorola's most-recent response to this Interrogatory, dated January 31, 2011, objects that at that time, Motorola had not identified asserted claims and it was therefore unable to

respond. However, Motorola identified its asserted claims more than eight months ago, on May 18, 2011. Accordingly, Motorola promised to update its response to this Interrogatory (and Interrogatory No. 12, discussed above) as part of the parties' mutual agreement to supplement Interrogatory responses by January 17, 2012. DiMuzio Decl., Exs. 9, 10. Under this agreement, on January 17, 2012, Apple served updated responses, including a supplemental response identifying the date of first written description, manufacture, confidential disclosure, public demonstration, use, or disclosure, and sale or offer for sale of Apple products embodying its own asserted patents. *Id.*, Ex. 4. Apple's responses address each asserted Apple patent, and contain detailed information about the specific information covered in the Interrogatory, including citation to relevant documents, identification of relevant Apple employees and departments, and specific dates.

Contrary to its agreement, Motorola failed to supplement its response to Apple's Interrogatory 7. Motorola is withholding relevant information vital to Apple's defense, which relates directly to the validity of Motorola's asserted patents and the damages Motorola can claim in this case. Motorola's conduct is particularly surprising given that it demanded and obtained discovery of the same type information from Apple through a nearly-identical request, and induced Apple to respond by promising to update its own deficient response. Motorola should be compelled to keep its promise and to respond fully to Apple's Interrogatory 7 by identifying the first manufacture, use, public use, offer for sale, and sale of any embodiment of the asserted claims of any of Motorola's asserted patents, including identification of the dates when these events occurred, all persons having knowledge of these events, the price at which any offers for sale or sales were made, and an identification of relevant documents.

## **CERTIFICATE OF GOOD FAITH CONFERENCE**

Pursuant to Local Rule 7.1, I hereby certify that counsel for Apple has conferred with counsel for Motorola in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

Dated: January 30, 2012

WEIL, GOTSHAL & MANGES LLP

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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 2012, 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 via CM/ECF.

/s/ Christopher R. J. Pace  
Christopher R.J. Pace (Fla. Bar No. 0721166)

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

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