

**UNITED STATES DISTRICT COURT
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.

**MOTOROLA’S OPPOSITION TO APPLE’S MOTION TO COMPEL RESPONSES TO
INTERROGATORIES REGARDING SET-TOP BOX PATENTS (NOS. 19-22)**

I. INTRODUCTION

Apple asks this Court to compel Motorola to supplement its responses to Apple's Interrogatories regarding Apple's set-top box patents (Nos. 19-22). (DE 224). However, Apple's Interrogatories are vague and overbroad—seeking, for example, a “narrative description” of the relationship between Motorola and every cable company with which Motorola ever has had an agreement, where the number of agreements with such companies is in the tens of thousands. Moreover, the information purportedly sought by Apple is best provided in documents that Motorola already has produced or agreed to produce. Given that Motorola is cooperating with such production, particularly in light of the remaining time for fact discovery, Apple's claim that “Motorola's tactics are severely prejudicing Apple” (DE 224 at 10) rings hollow.

In fact, rather than focus on any legitimate need for the discovery it seeks to compel or substantively rebut Motorola's objections, Apple's central argument is that Motorola made an “express promise to substantively supplement” its responses, “specifically including its responses to Apple's Interrogatory Nos. 19-22.” (DE 224 at 2-3) But, the documents submitted in support of Apple's motion do not bear out this misleading account. Instead, the parties agreed to supplement their responses to those interrogatories that needed supplementation by mid-January; however, neither party supplemented their responses where their initial answers were appropriate, as Motorola's responses were here.

Now, in an effort to obtain discovery to which it is still not entitled, Apple instead attempts to rely on “promises” of supplementation that Motorola never made. In short, Apple's Motion should not have been brought at all, and should be denied.

II. STATEMENT OF FACTS

On November 14, 2011, Apple served its Third Set of Interrogatories, Nos. 16-22. (Ho Decl.¹ ¶ 3, Ex. B.) Apple's Interrogatory Nos. 19-22, at issue here, seek information about every cable service provider that has had an agreement with Motorola, as well as "a narrative description of the relationship between Motorola and each such cable service provider," and asks for the identification of, and information about, every Motorola set-top box manufactured, used, distributed, sold, offered for sale, or imported with an interactive program guide. (*Id.*)

On a telephone conference three days following the service of its Third Set of Interrogatories, Apple proposed supplementing certain interrogatory responses by December 16. (*Id.* ¶¶ 9-10, Ex. G.) In a November 21 letter referencing this discussion, listed among the interrogatories were Apple's Interrogatory Nos. 20 and 22, responses to which were not even due until December 19—several days *after* the proposed date for supplementation. (*Id.*) Further, no mention was made of Interrogatory Nos. 19 and 21. (*Id.*)

Motorola subsequently served its initial responses to Apple's Third Set of Interrogatories on December 19, objecting to each of Apple's Interrogatories on numerous grounds, and responding to the extent it understood each Interrogatory. (*Id.* ¶¶ 4-5, Exs. C, D.) With regard to Interrogatory Nos. 20, 21 and 22, Motorola understood those interrogatories to ask for various information with respect to set-top boxes that Motorola manufactured, imported, used, sold, offered for sale, or distributed "with an interactive programming guide." Motorola answered that it has "has not manufactured, used, distributed, sold, offered for sale, or imported" any infringing systems, and, specifically, "has not sold in the United States set top boxes that include a program guide of any type."

¹ "Ho Decl." refers to the Declaration of Jill J. Ho in Support of Apple's Motion to Compel Responses to Interrogatories Regarding Set-Top Box Patents (Nos. 19-22) (Dkt. No. 224-1).

Besides requesting discovery from Motorola, Apple also subpoenaed various cable companies that are Motorola clients, seeking overlapping information, for instance regarding agreements, and relating to testing. Not surprisingly, cable companies quickly objected to the breadth of these subpoenas as overbroad, burdensome, and impossible to comply with. (*See* Elihu Decl.² Ex. 1; Ho Decl. Ex. I.) In an effort to streamline discovery and reduce the burden on those companies, Motorola in discussions memorialized in correspondence dated November 14 and 21 explained that it believed that certain of the discovery requests “can be addressed by Motorola.” (Ho Decl. Exs. F, G.) Apple subsequently on November 21 issued amended subpoenas to the third-party cable companies that removed or revised many of the topics to which those companies had objected in the original November 10 subpoenas. (*See* Elihu Decl. Ex. 2.)

On December 14, 2011, the parties agreed to extend the date for mutual supplementation an additional five days, from December 16 to December 21. (Ho Decl. ¶ 12, Ex. L.) By email on that date, Apple also sought confirmation that Motorola would be supplementing, among other interrogatories, Nos. 20 and 22. Again, no mention was made of either Nos. 19 or 21. (*Id.*)

On December 16, 2011, the parties jointly moved to amend the scheduling order, seeking in part to extend the deadline for completion of fact discovery by three weeks, from January 17 to February 10. (DE 203.) On December 20, the Court entered an Amended Scheduling Order, extending the deadline for fact discovery to March 16, 2012, five additional weeks beyond that requested by the parties, for a total extension of eight weeks. (DE 206 at 2.)

On December 21, Motorola wrote Apple to explain that while it would be providing certain supplemental responses as listed by Apple, it was “continuing to work on [its] responses”

² “Elihu Decl.” refers to the Declaration of David Elihu in Support of Motorola’s Opposition to Apple’s Motion to Compel Responses to Interrogatories Regarding Set-Top Box Patents (Nos. 19-22), filed herewith.

and therefore suggested “in view of the new case schedule” an extension for the remaining supplementation for both parties. (Ho Decl. Ex. M.) Specifically in response to Apple’s query whether Motorola would be “supplementing” Interrogatory Nos. 20 and 22, Motorola explained that it had already “responded to Interrogatory Nos. 20 and 22 on Monday.” (*Id.*)

As the parties continued to meet and confer and exchange correspondence regarding supplementation, on December 26 and 29, Apple again sought confirmation that Motorola would still be supplementing its responses to Apple’s Third Set of Interrogatories, and in the December 29 communication, Apple for the first time explained that it sought supplementation of “all of the rogs in Apple’s third set (Nos. 16-22), not just Nos. 20 & 22.” (Ho. Decl. Ex. Q.) In that email, Apple also specifically complained that Motorola’s responses to Interrogatories in the Third Set regarding source code (i.e., Nos. 16-18) failed to provide a narrative explanation or identify file names. (*Id.*) In response, Motorola explained on January 3 that, to the extent it had supplemental responses to provide, “our supplementation will include any supplemental responses for the third set.”³ (Ho Decl. Ex. P.)

On the agreed upon date for supplementation, January 17, the parties exchanged supplemental interrogatory responses. (Ho Decl. ¶ 18.) Motorola served supplemental responses to numerous of Apple’s First, Second, Third, and Fifth Sets of Interrogatories. As part of its supplementation on Apple’s Third Set of Interrogatories, Motorola provided supplemental responses to Interrogatory Nos. 16 and 17, specifically to respond to the complaints raised in Apple’s December 29 letter, by identifying for each accused product the specific file names for Motorola source code. (Elihu Decl. Ex. 4.) When the parties met and conferred regarding

³ In fact, Apple was on notice that Motorola would *not* be providing supplemental answers to at least one interrogatory from the third set. (*See* Elihu Decl. Ex. 3.)

supplementation, Motorola therefore stated that it believed its supplementation to have been complete. (Ho Decl. ¶ 20.)

III. ARGUMENT

Apple asserts that Motorola should be compelled to supplement its responses because “Motorola refuses to provide the very information it promised.” (DE 224 at 1.) However, Motorola made no such promises and Apple’s Interrogatories are improper and objectionable.

A. Motorola’s Responses and Objections to Interrogatory Nos. 19-22 Are Proper

1. *Interrogatories No. 20-22*

Interrogatory Nos. 20-22 all seek information regarding “each and every Motorola set-top box manufactured, used, distributed, sold, offered for sale, or imported with an interactive program guide, by or on behalf of Motorola.” The vague and undefined language of Apple’s Interrogatories invites Motorola to inaccurately state that its set-top boxes are manufactured, distributed, offered for sale, or imported with an interactive program guide. However, Motorola’s set-top boxes are *not* manufactured, distributed, offered for sale, or imported *with* an interactive program guide. Indeed, this is one of Motorola’s central noninfringement positions on the set-top box patents upon which Apple sues in its counterclaim.

Motorola therefore objected to the terms “set-top box . . . *with* an interactive program guide” as undefined, vague and ambiguous, and further objected on grounds that Apple sought, without having provided a definition, the identification of each and every Motorola “set-top box . . . *with* an interactive program guide.” (Ho Decl. Ex. D (emphasis added).) Motorola also responded that, to the extent it understood these Interrogatories in view of Apple’s set-top box patents, Motorola “has not manufactured, used, distributed, sold, offered for sale, or imported” any infringing systems, and “has not sold in the United States set top boxes that include a program guide of any type.” (*Id.*)

Although Apple contends that Motorola is simply “playing word games in an attempt to avoid answering” these Interrogatories (DE 224 at 7), asking Motorola to respond otherwise, based on the vague and undefined language of Interrogatories, is thus tantamount to inviting Motorola to provide a misleading statement on a primary issue. As such, Motorola’s objections and responses are proper, and any purported delay in obtaining additional information therefore stems instead from Apple’s failure to properly clarify the scope of its Interrogatories.⁴

Moreover, these Interrogatories are overbroad and unduly burdensome, and seek information far outside the scope of the claims at issue in this action. Motorola therefore also objected “to the extent that Apple seeks to add theories and evidence in a manner inconsistent with the relief it sought and was granted in connection with its Motion to Strike Motorola’s Supplemental Infringement Contentions.” (*Id.* (citing DE 178, 198.)) In Apple’s Motion to Strike, Apple asserted that products that were not accused in the parties’ infringement contentions “are not relevant to this case,” and argued that “injecting” such “new products into the case” “would lead to a never-ending discovery process.” (DE 178 at 11 n.8, 12.). Nevertheless, by seeking information about “*each and every* Motorola set-top box”—i.e., not only the specific Motorola accused products—Apple seeks *precisely* the same information that Apple itself stated was not relevant after successfully narrowing the case to prior-identified

⁴ Apple never sought to meet and confer to discuss or narrow the language of its Interrogatories, but only met and conferred on whether or not Motorola would supplement generally. (*See, e.g.*, Ho Decl. Exs. O–P.) Apple’s arguments at this stage regarding Motorola’s purported “word games” thus fall flat. *Horowitch v. Diamond Aircraft Indus., Inc.*, 2007 WL 1192401, at *4 (M.D. Fla. April 23, 2007) (denying motion to compel “a better answer” to an interrogatory objected to as vague, and admonishing that “Counsel should be talking to each other to clarify any confusion” rather than bringing a motion to compel). Indeed, Apple’s failure to meet and confer on “*the issues* to be raised in the motion” violates Local Rule 7.1(a)(3), and is itself cause for the Court to deny Apple relief. *Id.*; *see also Marler v. U-Store-It Mini Warehouse Co.*, No. 09-cv-60613, 2011 WL 1430262 (S.D. Fla. April 14, 2011).

products.⁵ In its Motion to Compel, Apple provides no basis for why that same information from Motorola now would be relevant, and indeed it is not. *See United States v. Eichholz*, Civ. No. CR409-166, 2009 WL 3754201, at *1 n.2 (S.D. Ga. Nov. 9, 2009) (noting that, in discovery, “what is sauce for the goose . . . is sauce for the gander”).

2. *Interrogatory No. 19*

Interrogatory No. 19 seeks the identification “of each cable service provider that is or has been a party to a license, service, or other agreement with Motorola” along with a “narrative description of the relationship” with each such provider. This Interrogatory is extremely broad: as Motorola has discussed with Apple, Motorola has tens of thousands of agreements with cable service providers. (*See Elihu Decl.*, Ex. 6 at 1; Ex. 7 at 1.) Nonetheless, Motorola is in the process of compiling, reviewing and analyzing these documents, and is producing them on a rolling basis. These agreements—far more than any “narrative description” of relationships—will provide Apple with the information it purports to be seeking and is a proper manner to respond to an interrogatory on these circumstances as the burden would be the same for both parties. *See Fed. R. Civ. P. 33(d)*. Accordingly, a Motion to Compel on this Interrogatory should not have been brought, and should not be granted.

B. Motorola Never Represented to Apple that it Would Provide Additional Information Beyond What it Has Already Provided, and Continues to Provide, in the Course of Discovery

Rather than focus on Motorola’s objections to Apple’s improper Interrogatories, Apple instead asserts that the Court should compel Motorola to immediately provide additional interrogatory responses because Motorola supposedly has refused to comply with its “express promise to substantively supplement” all of its responses to Interrogatory Nos. 19-22 (DE 224 at

⁵ *See Elihu Decl.* Ex. 5 (arguing that there can be no obligation to respond to discovery related to non-accused products, programs, or applications because “they are not in the case”).

2-3), as well as its “representations that it would provide information responsive to Apple’s third-party discovery” (*id.* at 1). But both of these allegations are untrue.

1. *Motorola Never Made an “Express Promise” to Supplement All of its Responses to Apple’s Third Set of Interrogatories*

Motorola never made an “express promise to substantively supplement” all of its responses, “specifically including its responses to Apple’s Interrogatory Nos. 19-22,” as Apple asserts. (DE 224 at 2-3.) Rather, as the letter memorializing those discussions makes clear, Apple “**proposed** that the parties mutually agree to supplement their responses.” (*Id.*, Ex. G. at 2 (emphasis added).) Indeed, that letter explains that Motorola “look[s] forward to discussing this matter” at the next meet and confer, making plain that an agreement as to those specific interrogatories was *not* yet reached. (*Id.* at 3.) As to Interrogatories from the Third Set, an agreement to supplement was not reached for good reason—Motorola’s *initial* responses were not due to be served until three days after the date Apple proposed for supplementation. Plainly, there could not have been any basis for agreeing to “supplement” responses which had not yet been served, and would not even be served by the proposed date for supplementation.

Accordingly, when Apple subsequently sought to determine whether Motorola would be supplementing those Interrogatories, after the previously agreed-upon date for supplementation was pushed back, Motorola specifically explained that it had *already* “responded to Interrogatory Nos. 20 and 22 on Monday,” i.e., it had *just served* its initial responses two days prior. (Ho Decl. Ex. M at 1.) This in no way suggested that Motorola intended to supplement its responses to those interrogatories.

Further, after Apple later clarified that it sought supplemental responses to all of the Interrogatories in its Third Set (and not just for 19 and 22, as it initially requested), Motorola merely said that any supplemental responses would be served together with its other

supplemental responses on the date the parties agreed upon for a mutual exchange. And on that date Motorola did provide supplemental responses for the Third Set, for Interrogatory Nos. 16 and 17, responding to specific purported deficiencies raised by Apple. But in light of its objections (as discussed further below), Motorola did not (and continues to not) believe that further supplementation of Interrogatory Nos. 19-22 was necessary.

2. *Motorola is Producing Information Responsive to Apple's Third-Party Discovery, and Has Not Prejudiced Apple's Ability to Separately Obtain Such Discovery from Third Parties*

Apple's further assertion that Motorola has "refused" to comply with "representations that it would provide information responsive to Apple's third-party discovery" (DE 224 at 1) is also untrue. Motorola already has produced, and continues to produce, documents responsive to Apple's third-party requests, including numerous documents of the very sort Apple specifically asserts that Motorola has refused to provide. For example, Apple claims that Motorola "refuses to provide any information regarding" relationships between Motorola and "cable providers with which it has agreements." (DE 224 at 4-5.) Despite the overbreadth of such a request (as Motorola has literally tens of thousands of such agreements), Motorola has produced and is producing such documents on a rolling basis. (*See* Elihu Decl. Ex. 7 at 1.) Motorola has produced, and continues to collect, review, and produce in the course of discovery, numerous other categories of documents responsive to Apple's third-party requests—the same information which Apple in its Motion accuses Motorola of refusing to provide. (*Id.*) For instance, on February 1, 2012, Motorola produced hundreds of documents to Apple, including documents relating to Motorola's relationship with and product testing arrangements involving third-party cable providers. (*See* Elihu Decl. Ex. 8.)

Moreover, although Motorola agreed to assist Apple by addressing relevant third-party discovery requests, Motorola never agreed to respond to any specific interrogatories addressed to

it—and in particular not Nos. 19-22—in lieu of third party discovery. Motorola simply noted that it could help to address topics and document requests from third party subpoenas for which it also has responsive information. (Ho Decl. Ex. G at 2.) The correspondence relied upon by Apple does not show otherwise. (*See id.*, Exs. F, G.)

In any event, Apple has not been prejudiced by any of Motorola’s purported discovery deficiencies. There are still six weeks before the end of fact discovery, and as Apple notes, Apple “is continuing to meet and confer with Motorola regarding its production of all relevant third-party agreements and other core documents,” and has “reserved its rights” to pursue third-party discovery if it does not obtain what it wishes from Motorola. (DE 224 at 3, n.4.) Indeed, the fact that Apple subsequently issued amended subpoenas to these third parties, removing or revising many of the topics in the original subpoenas, would suggest that Apple either recognized the objectionable nature of its original requests, or already has obtained the discovery it sought.

Any alleged failure of Motorola to assist Apple with third-party discovery—which, as Apple noted, was limited by Motorola to documents (DE 224 at 3)—thus offers no basis on which to compel responses from Motorola to Apple’s Interrogatory Nos. 19-22.

IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that Apple’s Motion to Compel be denied in its entirety.

Dated: February 6, 2012

Respectfully submitted,

MOTOROLA SOLUTIONS, INC. (f/k/a
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2012, I served the foregoing document via electronic mail on all counsel of record identified on the attached Service List.

/s/ Annette C. Escobar

Annette C. Escobar