

**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.

**APPLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO
INTERROGATORIES REGARDING SET-TOP BOX PATENTS (NOS. 19-22)**

I. INTRODUCTION

The most striking thing about Motorola's opposition brief is the absence of any attempt to deny that Apple's Interrogatory Nos. 19-22 seek core information needed to prove its infringement allegations with respect to U.S. Patent Nos. 5,583,560, 5,594,509, and 5,621,456 (collectively, "set-top box patents" or "STB patents") or that Motorola is in possession of the information sought by those interrogatories. Instead, Motorola's brief argues that not only did it have relevant information in its possession, but it had *so much* relevant information that it found Apple's interrogatories overly burdensome and chose to withhold all responsive documents. Moreover, it appears that Motorola never intended to supplement its responses to Interrogatory Nos. 19-22, despite misleading representations made to the contrary. Motorola now resorts to excuses and objections that were raised for the first time in its opposition. Had those objections been raised during the prolonged meet and confer process, however, Apple would have been more than willing to clarify the scope of its interrogatories.

II. ARGUMENT

A. Whether Motorola Promised to Supplement its Responses

Motorola's account of the meet and confer history is telling. Motorola devotes three full pages in its opposition brief detailing how its email correspondence was carefully crafted to avoid specifically promising that it would supplement its responses to Interrogatory Nos. 19-22. In essence, the crux of Motorola's argument appears to be that Apple's counsel misunderstood and wrongly assumed that Motorola was planning to supplement its interrogatory responses, even though Motorola never actually agreed to do so. Motorola, however, has a duty to produce relevant documents and respond to Apple's interrogatories independent of whether its counsel makes any promises to do so.

Even assuming for the sake of argument that the inclusion of Interrogatory Nos. 20 & 22 in Mr. Quarmby's November 21, 2011 letter was not intended to reflect an agreement to provide substantive responses to those interrogatories, Motorola does not and cannot dispute that Apple complained that Motorola's responses to Apple's third set of interrogatories were deficient

on December 21, 2011 (two days after they were served) and repeatedly requested supplementation. Ho Decl. ¶ 15 & Exs. N, O, and Q.¹ Nor does Motorola dispute that it was unprepared to exchange supplemental interrogatory responses on the December 16 deadline Motorola itself proposed and sought additional time, *see* Ho Decl. ¶ 14 & Ex. M, or that Apple's agreement to Motorola's proposed extension to January 16 was conditioned on Motorola's representation that its supplemental responses to the interrogatories raised during meet and confer would be substantive in nature. Ho Decl. ¶ 16 & Ex. P. Notably, Motorola declined to submit declarations in support of its opposition brief from any of the individuals who participated in the relevant meet and confers. Instead, Motorola openly admits that it promised Apple that "our supplementation will include any supplemental responses for the third set," *see* Opp. Br. at 4; Ho Decl. Ex. P, but argues that this did not mean Motorola was actually promising to supplement anything. Opp Br. at 8-9. Had Apple shared this understanding, it never would have agreed to the extension requested by Motorola, nor would additional time have been necessary. In fact, if Motorola had been forthcoming that it was not planning to supplement its responses to Interrogatory Nos. 19-22, Apple would have insisted on an earlier exchange and perhaps filed this motion weeks ago. Even viewed in the light most favorable to Motorola, the facts suggest that Motorola deliberately misled Apple into believing that it would supplement these interrogatories to gain additional time to respond to other interrogatories.

B. Whether Apple Properly Met and Conferred

Motorola's allegation that Apple did not properly meet and confer is disingenuous. Motorola alleges that "Apple never sought to meet and confer to discuss or narrow the language of its Interrogatories" and attempts to justify its failure to respond by arguing that Apple's interrogatories are vague and overbroad. Opp. Br. at 6, n.4. Yet, during the meet and confer process, not once did Motorola state that the reason it was refusing to supplement its answers to Interrogatories Nos. 19-22 was that it believed those interrogatories to

¹ References to "Ho Decl." refer to the Declaration of Jill J. Ho in Support of Apple Inc.'s Motion to Compel Responses to Interrogatories Regarding Set-Top Box Patents (Nos. 19-22).

be vague or overly broad. Ho Decl. ¶¶ 20-21; Lang Decl. ¶¶ 2-3.² Motorola states that “Apple’s failure to meet and confer on ‘*the issues*’ to be raised in the motion’ violates Local Rule 7.1(a)(3).” Opp. Br. at 6, n.4. But this argument ignores the fact that meeting and conferring is a two-way street. If Motorola had anticipated that its vagueness or overbreadth objections were going to be among “the issues” in this motion, it should have raised those points during meet and confer, not for the first time in its opposition brief. Instead, counsel for Motorola merely stated that Motorola believed no supplementation was necessary, even going so far as to suggest that Apple’s counsel was misinterpreting Motorola’s documents and improperly drawing the conclusion that Motorola had the requested information in its possession. Lang Decl. ¶ 2. At no point did Motorola ask Apple to clarify or narrow the scope of its interrogatories. *Id.* Thus, Motorola’s argument that Apple failed to properly meet and confer should be rejected.

C. Whether Motorola Properly Objected to Apple’s Interrogatories

As shown in Apple’s opening brief, Motorola’s responses to its interrogatories include a laundry list of boilerplate objections. For example, Motorola’s response to Interrogatory 20 includes the following objections: (1) attorney-client privilege; (2) attorney work-product doctrine; (3) joint defense privilege; (4) the common interest doctrine; (5) any other applicable privilege or immunity; (6) calls for legal conclusion or presents a question of law; (7) calls for expert testimony or opinion; (8) is premature in light of the Court’s scheduling order; (9) overly broad; (10) unduly burdensome; (11); not relevant to the claims or defenses of any party to the extent it is not limited to the asserted claims; (12) lacks limit as to temporal scope; (13) lacks limit as to geographic scope; (14) vague and ambiguous; (15) comprises multiple interrogatories; and (16) seeks to add theories contrary to the relief sought and granted by Apple’s Motion to Strike Motorola’s Supplemental Infringement Contentions.

Had Motorola raised during meet and confer what it now claims are its true objections, *i.e.*, vagueness and overbreadth, Apple would have been and is willing to clarify the

² References to “Lang Decl.” refer to the Declaration of J. Jason Lang in Support of Apple Inc.’s Motion to Compel Responses to Interrogatories Regarding Set-Top Box Patents (Nos. 19-22).

scope of its interrogatories. First, with regard to Motorola's objection that the phrase "set-top box ... with an interactive program guide" is vague, Apple has pointed to numerous documents in Motorola's own production that refer to interactive programming guide ("IPG") or electronic programming guide ("EPG") software. *See, e.g.*, Ho Decl. Exs. U, X, Y, Z, CC, and DD. As for Motorola's contention that Apple's interrogatories seek information about Motorola set-top boxes (STBs) that are not accused, had Motorola raised this issue, Apple would have clarified that its interrogatories are limited to the Motorola STBs identified in its Infringement Contentions. Finally, to address Motorola's overbreadth objection, Apple is willing to narrow the scope of its interrogatories with reasonable temporal limits as well as a reasonable limit on the number of cable providers (*e.g.*, providers that sell, lease, or otherwise provide the Motorola accused STBs to end-users). Yet, Motorola did not raise these issues or propose a compromise; thus, its eleventh-hour attempt to hide behind these objections should be rejected.

D. Whether Motorola Possesses the Requested Information

Motorola never denies that it is in possession of the information requested by Apple's Interrogatory Nos. 19-22. On the contrary, with respect to Interrogatory No. 19, Motorola's primary objection appears to be that it has *too much* information to provide a response. Putting aside the fact that Motorola openly admits that it is still "in the process" of producing relevant documents with only five weeks left in the fact discovery period, *see* Opp. Br. at 7, the very rule Motorola cites in its brief *requires* it to supplement its interrogatory response with the Bates ranges of documents it believes to be relevant.³ When pressed to supplement its responses, Motorola repeatedly stated that it believed its responses to be complete and had no intention of supplementing. Lang Decl. ¶¶ 2-3. Given Motorola's "rolling production" of admittedly responsive documents, however, its interrogatory response cannot be complete.

³ Even if the information sought by Apple could more easily be gleaned from Motorola's documents than from a narrative description, Federal Rule of Civil Procedure 33(d)(1) expressly provides that the responding party may answer by "*specifying the records that must be reviewed*, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could."

As for Interrogatory Nos. 20-22, Motorola's responses remain woefully deficient. For example, Motorola merely responded to Interrogatory No. 20 that: "Mobility has not sold in the United States set top boxes that include a program guide of any type." This fails to provide information about Motorola set-top boxes "manufactured, used, distributed, sold, offered for sale, or imported with an interactive program guide, by or on behalf of Motorola," which would include information regarding Motorola's own use of its STBs in conjunction with an IPG—*e.g.* during testing—and information regarding STBs distributed to end-users on behalf of Motorola, not just STBs *sold by Motorola* to cable companies. The true meaning of Motorola's carefully chosen phrasing has only recently come to light. After weeks of hiding the ball, on February 7, 2012, Motorola finally explained its view that it does not sell any STBs "with IPGs" because "[t]he installation of IPGs occurs post-sale, after the accused set-top boxes are received by Motorola's customers." *See* Lang Decl. ¶ 5 & Ex. B. Even if true, the fact that IPGs are installed post-sale does not excuse Motorola from liability under Apple's theory of indirect infringement or from its obligation to fully respond to Apple's interrogatories.

There is no dispute that Motorola possesses the information requested by Interrogatory Nos. 20-22. In the wake of Apple filing the instant motion, Motorola has finally admitted that it possesses (and failed to previously produce) responsive documents as well as executable IPG code. Lang Exs. B & C. In a February 8, 2012 email, Motorola's counsel even acknowledges that Motorola is only "now" producing documents that it knew about "since mid-November 2011, immediately after Apple sent its subpoenas to Motorola's customers." Lang Decl. ¶ 6 & Ex. C. That Apple has been and continues to be prejudiced by Motorola's delay tactics is only underscored by the fact that three months later, subpoenaed third parties continue to insist that Apple obtain the requested information from Motorola. Lang Decl. ¶ 4 & Ex. A.

III. CONCLUSION

For the reasons described herein and in Apple's opening brief, the Court should compel Motorola to provide complete responses to Interrogatory Nos. 19-22.

Dated: February 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to received electronically Notices of Electronic Filing.

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SERVICE LIST
Motorola Mobility, Inc. versus Apple Inc.
Case No. 1:10cv023580-Civ-RNS
United States District Court, Southern District of Florida

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