

**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.

**MOTOROLA'S OPPOSITION TO APPLE'S MOTION TO COMPEL
FURTHER RESPONSES TO INTERROGATORY NOS. 19-22**

PUBLIC REDACTED VERSION

INTRODUCTION

Apple's motion to compel could and should have been avoided with a simple phone call to opposing counsel. Motorola promised to provide supplemental responses, and even kept Apple informed about its moving progress. Less than two business days after being so advised, however, Apple filed its motion. Had Apple simply contacted Motorola in advance of its motion, it would have learned that Motorola's Second Supplemental Responses to Interrogatory Nos. 19-22 ("Second Supplemental Responses") were well on their way to being served—and indeed were served within 24 hours of the motion's filing. Because those interrogatory responses now have been served, Apple's motion is moot.

In any event, Apple is wrong on the merits of its motion. Contrary to Apple's suggestion, the supplemental responses to Interrogatory Nos. 19-22 that Motorola served on Apple on March 9, 2012 ("First Supplemental Responses") were more than adequate to respond to those interrogatories. With Apple insisting on more details, however, Motorola attempted to accommodate Apple's demands. Motorola's newly served Second Supplemental Responses provide every piece of information that Apple sought from Motorola—and, indeed, every piece of additional information that Apple stated, during meet and confer, would be necessary for Apple to prosecute its indirect infringement theory.

For all of these reasons the Court should deny Apple's motion to compel additional responses to Interrogatory Nos. 19-22.

FACTUAL BACKGROUND

The Court's Narrowing of Apple's Interrogatories. On November 14, 2011, Apple served its Third Set of Interrogatories, including Nos. 19-22 at issue here. (Declaration of John Duchemin in Support of Opposition to Apple's Motion to Compel Further Supplemental Interrogatory Responses ("Duchemin Decl.") Ex. 1.) Interrogatory Nos. 19-22 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 ("IPG"). (*Id.*)

Motorola's initial response to these sweeping interrogatories was to object, citing in part their overbreadth, and to state that under Motorola's interpretation of the undefined terms of

interrogatories 20-22, Motorola “has not manufactured, used, distributed, sold, offered for sale, or imported any ... products or systems” with an IPG, and further that Motorola “has not sold in the United States set top boxes that include a programming guide of any type.” (Declaration of Jill Ho in Support of Apple’s Motion to Compel Further Responses to Interrogatory Nos. 19-22 (“Ho Decl.”) Ex. A.)

Apple, however, demanded further responses and, after a meet-and-confer telephone conference discussing the issues, moved to compel those responses. (D.E. 224.) Following briefing the Court ordered Motorola to supplement its responses—but agreed with Motorola that Apple’s Interrogatory Nos. 19-22, while they may seek relevant information, are “overbroad.” The Court therefore ordered them significantly narrowed, requiring Motorola only to provide “non-privileged information limited to its STBs [set-top boxes] identified in its infringement contentions and limited to cable providers that provide Motorola accused STBs to end users.” (D.E. 247.)

Motorola’s Supplemental Responses. Motorola duly served detailed supplemental interrogatory responses on March 9, 2012, providing responsive information sufficient to comply with the Court’s order. (Ho Decl. Ex. C.) In response to Interrogatory No. 19, which (per the Court’s narrowing) called for the identity of cable providers that provide Motorola accused set-top boxes to end users and “a narrative description of the relationship between Motorola and each such cable service provider,” Motorola provided a two separate lists, totaling 13 pages, of hundreds of cable providers, along with the narrative descriptions called for by the interrogatory. (*Id.*) In response to Interrogatory Nos. 20-22, Motorola supplemented by providing information and identifying in detail documents regarding certain testing programs in which Motorola participates and in which IPGs are downloaded onto set-tops eventually sold by cable providers to Motorola customers; and also providing information regarding a demonstration IPG that Motorola created and loaded onto a few accused set-top boxes for display at a small number of industry trade shows. (*Id.*)

Apple’s Demands for Additional Non-responsive Information. Despite these supplementations, Apple immediately demanded large quantities of additional information, going far beyond that called for by Interrogatory Nos. 19-22. For example, regarding Interrogatory No. 19 (which merely asks for a “narrative description of the relationship” between Motorola and certain cable providers), Apple asserted that Motorola’s interrogatory response

“should include the narrative description that describes whether that agreement [between Motorola and cable providers] includes installing the IPGs, any testing in connection thereto, and the timeframe of such installation and testing”—none of which is required by the text of the interrogatory. (Ho Decl. Ex. C at 2.) Apple similarly demanded additional information in response to each of Interrogatory Nos. 20-22. (*Id.*)¹

Although Motorola maintained (and still maintains) that its First Supplemental Responses were sufficient to meet the Court’s demands, Motorola agreed to meet and confer in order to discuss the issues raised by Apple and consider reasonable methods of accommodating Apple’s demands for information. (*Id.* Ex. D.) On March 14, 2012, the parties met and conferred regarding Apple’s demands. As a result of the meet-and-confer, Motorola and Apple agreed that Motorola would consider supplementing its First Supplemental Responses to provide certain information specified in that meet-and-confer. Apple laid out in a March 14 e-mail the information that it would deem sufficient to respond to its interrogatories. (*Id.* Ex. E at 2-3.) In response, in a March 15 e-mail, Motorola indicated that it would provide a second supplemental response containing the information that Apple sought.² (*Id.* Ex. E at 1.)

At the time Motorola estimated that it would be able to provide the additional information by early in the week of March 19, and so informed Apple. (*Id.*) Motorola worked diligently to compile the additional information demanded by Apple in that time frame, including gathering information from multiple employees in multiple departments; double-checking the information gathered; and ensuring that all necessary information was gathered for each of Motorola’s top customers. Duchemin Decl. at ¶7.) Since this was a large task, the supplemental information took slightly longer than expected to compile. Therefore Motorola on Thursday, March 22, informed Apple that it was still working on the Second Supplemental Responses and would be providing them shortly:

[Y]ou indicated that Apple’s demands for information about testing performed by

¹ In the meantime, Apple also contacted Motorola’s customers and demanded that they provide information similar to that sought by Motorola. Part of Motorola’s motivation in preparing and serving its Second Supplemental Responses was to prevent Apple from continuing to demand information from Motorola’s customers.

² The sole difference between what Apple, in its March 14 e-mail, stated it was seeking, and what Motorola agreed to provide in its March 15 e-mail, was in the extent of additional information Motorola would provide in response to Interrogatory No. 22. While Apple requested that Motorola “identify the hardware and firmware (e.g., APIs) that were designed at the request of IPG makers or specifically for IPG application,” Motorola stated that it may not be able to provide all of the requested information but would “identify APIs that a third-party [IPG] provider would use.” (Ho Decl. Ex. E at 1, 2-3.)

or in conjunction with IPG makers and/or customers, and agreements related to those, can be satisfied with additional supplementation of Motorola's responses to interrogatories Nos. 19-22. Motorola is working on those supplementations and will provide them shortly. (*Id.* Ex. F at 2.)

Apple did not respond to this communication, never asked for a date certain on which the Second Supplemental Responses would be served, and until filing the present motion to compel, never indicated it was dissatisfied with the pace or timing of Motorola's planned supplementation. (Duchemin Decl. at ¶8.)

Also, even while Motorola worked to compile the additional information sought by Apple, Apple continued to pressure Motorola's customers for similar information.

Apple's Motion to Compel and Its Stated Intention to Seek a Continuance of Trial. On that same day, March 22, Motorola and Apple separately agreed to extend the fact discovery period in this case by one month. (D.E. 277.) Nevertheless, Apple informed the Court that it still intends to seek an additional extension of the discovery deadlines and trial date. (*Id.* at 2.)

On Monday, March 26, Apple without any prior warning filed the present motion to compel. Apple followed the motion with a demand to meet and confer on the supplemental interrogatory responses and other issues. (Duchemin Decl. Ex. 2.) Less than 24 hours later, Motorola served its Second Supplemental Responses. (*Id.* Exs. 3, 4.) As Motorola had indicated it would provide, those responses included detailed information covering every additional area of information that Apple sought, and that Motorola had agreed to provide. Motorola also pointed out to Apple that (1) it had filed its motion without first meeting and conferring, and (2) that in any event, Motorola's Second Supplemental Responses, by providing Apple exactly the information it seeks, render the present motion to compel moot. (*Id.* Ex. 4.)

Apple, however, refused to agree to withdraw the present motion. (*Id.*) In an e-mail attempting to justify its failure to meet and confer before filing the motion to compel, Apple stated that Apple "could wait no longer" and that it was "disingenuous" for Motorola to expect Apple to believe Motorola's representation that the Second Supplemental Responses would be forthcoming shortly. (*Id.* Ex. 5.)

Apple's New Demands. Additionally, even after Motorola served its Second Supplemental Responses, Apple in a March 30 e-mail demanded that the responses be supplemented yet again, with information that goes far beyond any previously sought by Apple. (*Id.* Ex. 6.) For example, while Motorola's Second Supplemental Responses provided (as Apple

sought) 19 pages of detailed information on the “relationships” between Motorola and its top customers, and grouped the information into the exact categories that Apple sought in its March 14 e-mail, Apple now demands additional “details” including “historical information on IPGs used by each cable service provider and any ‘initial performance testing,’ integration testing, field trials and final pre-deployment testing, and other post-sale support of STBs performed or provided by Motorola for each cable service provider.” (*Id.*) Apple has not, however, asked for a meet-and-confer on these issues. (*Id.*)³

ARGUMENT

I. Apple’s motion to compel is moot because Motorola has supplemented its interrogatory responses with the information Apple demanded.

Purportedly, the only purpose of Apple’s motion to compel was because it could “no longer wait” for Motorola to provide additional information in response to Apple’s Interrogatory Nos. 19-22. (Mot. at 2-3.) Although Motorola did not believe these interrogatory responses needed to be supplemented further, Motorola worked with Apple to narrow and satisfy its additional discovery demands, and has now supplemented those interrogatories and provided Apple with the information that it sought. Because the purpose of the motion is now satisfied, it is moot, and for that reason should be denied.

II. The motion to compel is improper because Apple failed to meet and confer with Motorola before filing its motion.

Civil Local Rule 7.1(a)(3) is crystal clear: Before filing “any motion” (with exceptions not relevant here), “counsel for the movant

shall confer (orally or in writing), or make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues to be raised in the motion. Counsel conferring with movant’s counsel shall cooperate and act in good faith in attempting to resolve the dispute.”

(Civil L.R. 7.1(a)(3).) The rule further states that counsel for the moving party shall certify that the parties have conferred “in a good faith effort to resolve the issues raised in the motion,” or that counsel for movant has attempted to do so without success. *Id.* Local Rule 7.1(a)(3) helps

³ In an e-mail sent today, Apple continued to push for this additional information, and saying it is “irrational” for Motorola to “demand that Apple simply abandon seeking information it has sought for months”—even though last Friday, March 30, was the first time Apple requested the additional details sought in its e-mail of that day. Duchemin Decl. Ex. 7.

to prevent the waste of the Court's time and resources, not to mention those of the parties, by ensuring that the parties have a chance to work through any disputes before they are brought before the Court.

Here, Apple failed even to attempt to meet and confer on the principal issue raised in the present motion. That issue is that Motorola had not, by the time of the motion's filing, served its Second Supplemental Responses on Apple. Although Apple purports to raise issues regarding the sufficiency of the First Supplemental Responses, Apple knew full well that Motorola had agreed to provide its Second Supplemental Responses, and in the form Apple had requested. Apple also knew that Motorola, only two business days prior to Apple's motion, had stated that it shortly would serve those Second Supplemental Responses. (Ho Decl. Ex. F at 2.)⁴

Not once did Apple object to Motorola's proposed schedule for delivery of the Second Supplemental Responses, nor did Apple ever ask for a date certain on which those responses would be provided. Instead, it moved to file its motion without any consultation whatsoever with Motorola. Apple also falsely certified that Apple *had* met and conferred with Motorola in an attempt to resolve the dispute, when in fact Apple seems to have gone out of its way to file a motion on responses it knew were coming. (This is a pattern repeated in Apple's concurrently filed motion to compel production of documents and deposition testimony related to set-top box components.) The result of Apple's motion is wasteful arguments over a motion to compel that serves no purpose now that Motorola, as it had promised all along, has served its Second Supplemental Responses.

III. Motorola's current responses to the interrogatories satisfy Apple's demands.

Even were the present motion not moot, and even if Apple had not failed to meet and confer with Motorola, Motorola's Supplemental Responses to Interrogatory Nos. 19-22 are adequate and require no supplementation.

A. Motorola's Second Supplemental Response to Interrogatory No. 19.

As stated earlier, Interrogatory No. 19 demands, in extremely vague and broad language, that Motorola identify every relationship with any cable provider and provide a "narrative description" of those relationships. The Court has narrowed this interrogatory to providers of

⁴ As explained in the statement of facts above, the delay was due to having to compile and double-check large amounts of information from Motorola engineers; when it took longer than expected to do so, Motorola duly informed Apple that its interrogatory responses would be arriving shortly. (Duchemin Decl. at ¶7.)

accused set-tops to end users. (D.E. 247.)

In its First Supplemental Response to this interrogatory, Motorola provided the identity of several hundred cable providers with which Motorola has a commercial relationship, and furthermore provided a brief narrative description of that commercial relationship for each of two categories of those customers.

After the parties' discussions, Motorola served its Second Supplemental Responses, which covers 21 pages and provides even more information than the language of this interrogatory requires. (Duchemin Decl. Ex. 4.) For each of Motorola's most significant customers, which combine for more than 85 percent of Motorola's set-top revenues, Motorola listed out all the information Apple has demanded in response to this interrogatory:

[REDACTED]

This information is precisely what Apple claimed to be seeking.

B. Motorola's Second Supplemental Responses to Interrogatory Nos. 20-21.

As narrowed by the Court, Interrogatory No. 20 asks for the identity of any accused set-top box sold manufactured, used, distributed, sold, offered for sale, or imported with an IPG to a cable provider that then distributes that box to an end user. Interrogatory No. 21 asks for the identity of any entity involved "with the research, engineering, design, development, implementation, revision, support, or provision of any version of the IPGs running on such Motorola set-top boxes."

Motorola's Second Supplemental Response to Interrogatory No. 20 again provided information beyond the necessary response. In its First Supplemental Response, Motorola had indicated that while Motorola does not sell set-top boxes with IPGs, Motorola occasionally has

tested third-party IPGs on a small number of each of the accused set-top products except for the DTA100, which does not support an IPG. With its Second Supplemental Response, Motorola (in response to a specific Apple demand for further information) confirmed that each of the IPGs listed in a chart produced at Bates number MOTO-APPLE-0007423455 was used in the testing of one or more accused set-top platforms, explained the purpose of those tests, and explained who ordered the testing and deployment of those IPGs. (Duchemin Decl. Ex. 4.) Motorola also referred back to the comprehensive narrative answer to Interrogatory No. 19, which provided further specifics on the IPG testing procedures used by each of Motorola's top customers. (*Id.*) While Motorola does not believe that any of this information is necessary to adequately respond to Interrogatory No. 20, Motorola provided it to satisfy Apple's demands for additional information.

Likewise, in response to Interrogatory No. 21, Motorola had in its First Supplemental Responses provided information sufficient to identify the entities that are involved in the research, engineering, development, implementation, revision, support, or provision of any version of the IPGs running on such boxes, by pointing to Excel charts produced by Motorola with just that information. In its Second Supplemental Response, Motorola further responded by pointing to the specific, detailed information listed in the second supplemental response to Interrogatory No. 19. (*Id.*)

C. Motorola's Second Supplemental Response to Interrogatory No. 22.

As narrowed by the Court, Interrogatory No. 22 asks for Motorola to identify various hardware and software that "implements, supports, or provides interactive program guide functions" on the accused set-top boxes that cable providers purchase and ultimately provide to end users. Under Motorola's initial interpretation of these extremely broad and undefined terms, no hardware or software on Motorola's set-top box "implements, supports, or provides interactive program guide functions." Apple has clarified, however, that it seeks information on the APIs (application program interfaces) that would be called upon by third-party IPG software. (Ho Decl. Ex. E at 3.)

To respond to Apple's narrowed definition of "support," Motorola's Second Supplemental Responses included information regarding the specific Motorola APIs sufficient to identify the primary APIs that would be called upon by third-party IPG software. (Duchemin Decl. Ex. 4.)

D. Apple's claim that the Second Supplemental Responses are "insufficient" is without merit.

As detailed above, Motorola's Second Supplemental Responses provide the specific information that Apple sought, and in so doing went well beyond the level of detail necessary to respond to Interrogatory Nos. 19-22. Apple however, in a March 30 e-mail stated that Motorola's responses are "still insufficient and complete." Apple then reeled off a list of information that went beyond anything Apple had asked for in its earlier correspondence on the subject. For instance, regarding Interrogatory No. 19, Apple stated that "Motorola has not included in its response a description of the contents of the SDKs it provides to each customer or the information it makes available to each customer in the Compass portal," (Duchemin Decl. Ex. 6.), a request absurdly far afield from the interrogatory language (which merely requires a "narrative description" of the "relationship" between cable providers and Motorola).

Because Motorola has provided exhaustive supplemental responses to the Interrogatories, Apple's claim of "insufficiencies" in those responses is a thinly cloaked to excuse to keep its motion to compel on file. Evidently, for strategic reasons, it intends to point to its pending motion to support its motion to extend the trial schedule. The Court should see Apple's gamesmanship for what it is and deny its motion.

CONCLUSION

For the above reasons, Apple's motion to compel further responses to Interrogatory Nos. 19-22 is improper, moot, and without merit, and Motorola respectfully requests that it be denied.

Dated: April 2, 2012

Respectfully submitted,

MOTOROLA MOBILITY, INC.

By: /s/ Edward M. Mullins

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 2, 2012, I served the foregoing document via electronic mail on all counsel of record identified on the attached Service List.

/s/ Edward M. Mullins

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