

**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.

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APPLE INC.,

Counterclaim Plaintiff,

v.

MOTOROLA, INC. and  
MOTOROLA MOBILITY, INC.,

Counterclaim Defendants.

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**JURY TRIAL REQUESTED**

**APPLE INC.'S MOTION TO AMEND THE PROCEDURAL SCHEDULE**

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## I. INTRODUCTION

Apple Inc. (“Apple”) and Motorola Solutions, Inc. and Motorola Mobility, Inc. (“Motorola”) are currently engaged in a number of patent litigations, two of which are currently pending before this Court.<sup>1</sup> Motorola filed the second action, *Motorola Mobility, Inc. v. Apple, Inc.* (“*Motorola II*”), Case No. 12-cv-20271, after Judge Ungaro denied Motorola’s attempt to add newly released products to the current litigation. D.E. 198. In response, Apple filed counterclaims in *Motorola II* on March 12, 2012, adding additional patent infringement claims against Motorola as well as HTC Corporation, HTC America, Inc., One & Company Design, Inc., and HTC America Innovation, Inc. (collectively “HTC”). HTC’s response is due on May 11, 2012. In addition, on April 13, 2012, Motorola filed a motion for leave to amend its *Motorola II* complaint to add additional patent infringement claims against Apple.

After Judge Ungaro granted Apple’s Motion to Strike Motorola’s Supplemental Infringement Contentions, however, the case was transferred. On March 9, 2012, this Court issued its Order Allowing Motorola to Supplement Invalidity Contentions, D.E. 259, allowing new invalidity references to be added and inviting the parties to adjust the procedural schedule as needed. Pursuant to that order, the parties met and conferred regarding alterations to the procedural schedule but were unable to agree on the most efficient way to try the claims in the two cases pending before this Court or the amount of additional time required to try those claims. On March 23, 2012, the Parties filed a Joint Motion to Amend the Scheduling Order, seeking an agreed-upon extension, but noting that Apple would separately move for a further extension that Apple believed was needed for discover regarding the new invalidity contentions and the state of discovery in general. D.E. 277. The Court granted this Joint Motion. D.E. 283. Since then, the

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<sup>1</sup> Apple and Motorola will be in trial for six weeks in June and July for another litigation pending in the Northern District of Illinois.

parties have continued to meet and confer regarding the schedules in both cases, most recently including counsel for HTC in their discussions. While all are in agreement that the current procedural schedules must be modified, the parties have not been able to agree on a proposed extension. Indeed, HTC has indicated that it will not be able to substantively evaluate any proposed amendments to the schedule until after it files its responsive pleading on May 11. Based upon these new circumstances, Apple respectfully files the instant motion seeking an extension in the form of consolidation of the two cases pending before this Court and a consolidated schedule as set forth below:

<b>Event</b>	<b>Current Schedule for <i>Motorola I</i></b>	<b>Current Schedule for <i>Motorola II</i></b>	<b>Proposed Consolidated Schedule</b>
Infringement contentions	--	--	7/13/12
Invalidity contentions	--	--	8/10/12
<i>Markman</i> Hearing	--	--	11/2/12
Close of fact discovery	5/4/12	6/8/12	80 days after <i>Markman</i> order issues
Opening expert reports	5/11/12	6/8/12	90 days after <i>Markman</i> order issues
Rebuttal expert reports	6/8/12	7/9/12	120 days after <i>Markman</i> order issues
Close of expert discovery	7/3/12	7/30/12	150 days after <i>Markman</i> order issues
Deadline to file dispositive motions	7/13/12	8/13/12	160 days after <i>Markman</i> order issues
Deadline to file pretrial motions	7/20/12	10/29/12	180 days after <i>Markman</i> order issues
Deadline to file joint pretrial stipulations / jury instructions	9/13/12	1/11/13	220 days after <i>Markman</i> order issues
Calendar call	10/16/12	1/22/13	250 days after <i>Markman</i> order issues
Trial	10/22/12	1/28/13	260 days after <i>Markman</i> order issues

Apple believes that under the current circumstances, consolidation of the two cases pending before this Court would best serve the interests of judicial efficiency and economy. Moreover, good cause exists to grant the requested modifications to the procedural schedules, which are necessary to allow sufficient time for discovery and for the parties to serve contentions regarding the newly-asserted patents.

## I. BACKGROUND

Motorola initiated the above-captioned patent-infringement action on October 6, 2010. *See* D.E. 1. Apple filed its Answer, Affirmative Defenses, and Counterclaims on November 18, 2010 and its Amended Answer on March 18, 2011. *See* D.E. 17 and D.E. 68. Motorola filed its second patent-infringement action in this district on January 24, 2012, asserting the same six patents-in-suit against newly released Apple products. *See Motorola II*, D.E. 1. On March 12, 2012, Apple filed its Answer, Affirmative Defenses, and Counterclaims, asserting infringement of four patents also asserted in this action by newly released Motorola products, plus infringement of six additional patents by Motorola and HTC. *Motorola II*, D.E. 27. At Motorola's insistence, however, the parties jointly submitted a proposed schedule for *Motorola II* on March 2, 2012, before Apple filed its answer. *Motorola II*, D.E. 24. The parties explicitly noted that the agreed-upon schedule would likely need to be modified if additional patents were asserted. *Id.*

On December 19, 2011, Motorola filed a Motion to Amend the Procedural Schedule To Serve Supplemental Invalidity Contentions. D.E. 205. Oral argument on that motion was held on March 9, 2012. *See* Davis Exh. A. During that hearing, counsel for Apple explained that allowing Motorola to add the alleged prior art references to its invalidity contentions would require additional, time-intensive discovery. *Id.* at 22:10-24:2, 24:13-27:2. Later that same day, the Court issued an order granting Motorola's motion, but also explained:

The Court ... does not take lightly Apple's concerns regarding adequate time for discovery, preparation of dispositive motions, and preparation for trial under the current schedule. Therefore, in order to ensure fairness to both parties, the Court is willing to adjust case deadlines, including the trial date, as may be necessary.... If the parties are unable to agree [upon alterations to the schedule], they are of course free to motion the Court independently. The Court will grant the relief requested, if

reasonable, and adjust the schedule as required. This is not one of those Courts that is wedded to its schedule above all else.

D.E. 259 at 2 (emphasis added).

Pursuant to the Court's order, the parties met and conferred on March 19, 2012 to discuss an appropriate extension to the current procedural schedule. *See* Davis Decl. at ¶ 3. Motorola rejected Apple's proposed schedule, arguing that a one-month extension was sufficient. *See* Davis Exh. B at 3. On March 21, 2012, Apple explained that, even if none of the claims from *Motorola I* and *Motorola II* were consolidated, additional discovery was needed and such discovery would require much longer than one month to complete. *See* Davis Exh. B at 1-2. On March 22, 2012, the parties met and conferred again, but were still unable to reach an agreement. *See* Davis Decl. at ¶ 5. Nonetheless, the parties agreed to jointly move to amend the procedural schedule to the extent agreed upon, with the understanding that Apple would separately move for a further extension to the schedule, which it believed was necessary. *Id.* That joint motion was filed on March 23, 2012 and granted on March 26, 2012. *See* D.E. 277 and 283.

Subsequently, the parties continued to meet and confer regarding the most efficient way to try the claims pending before this Court. Specifically, on April 9, 2012, Apple sent Motorola a proposed schedule for consolidating the two actions currently pending before this Court. *See* Davis Exh. C at 2-3. On April 10, 2012, Motorola responded that it did not agree to full consolidation of the two actions and proposed an alternate schedule for a partial consolidation of the issues. *See* Davis Exh. C at 1-2. Motorola's proposed schedule was the same as Apple's proposed extension for *Motorola I* without any consolidation of issues. *Compare* Davis Exh. C at 1-2 with Davis Exh. B at 4. On April 13, 2012, Apple responded that it was willing to consider Motorola's proposal for partial consolidation, but explained that Motorola's proposed timeline did not allow sufficient time for discovery on the new issues that would be included in

this action. *See* Davis Exh. D at 3. Although stating that a fully consolidated schedule was most appropriate, Apple sent Motorola and HTC proposed schedules for both this action and *Motorola II* to facilitate discussions amongst the parties. *See* Davis Exh. E. Later that day, the parties met and conferred again, but while the parties agreed the current schedules were unworkable and needed to be further extended, the parties were unable to reach agreement on a procedural schedule for either case. *See* Davis Decl. at ¶ 9. Moreover, during the April 13, 2012 meet and confer, counsel for HTC indicated that the HTC entities would be in no position to substantively evaluate proposed amendments to the procedural schedule until after HTC filed its responsive pleading on May 11. *See* Davis Exh. D at 2. Motorola indicated it was willing to continue discussions on the procedural schedule for *Motorola II*, but did not believe that the parties could reach agreement without HTC’s input. *Id.* With the parties at an impasse, Apple informed Motorola that it intended to file a motion to amend the procedural schedule to seek the Court’s guidance. *Id.* at 1-2.

### **III. ARGUMENT**

There is no dispute by any of the parties that the current schedules in both cases need to be extended. District courts have “broad discretion” to manage their dockets as they see fit. *Young v. City of Palm Bay, Fla.*, 358 F.3d 859, 864 (11th Cir. 2004). Here, good cause exists to grant Apple’s proposed consolidation and amendment to the procedural schedule. *See* Fed. R. Civ. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”); *Sosa v. Airprint, Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (quoting 1983 Advisory Comm. Notes, subdivision (b)) (“This good cause standard precludes modification unless the schedule cannot ‘be met despite the diligence of the party seeking the extension.’”). As described in further detail below, Apple’s proposed extension of the current procedural



schedule by combining this case with *Motorola II* is not only reasonable, it is necessary because of Motorola's consistent attempts to thwart Apple's diligent efforts at obtaining discovery needed to prove its case.

**A. Apple's Proposed Consolidation Best Serves Judicial Economy**

The parties do not dispute that the schedules for the current case and *Motorola II* need to be extended. The questions to be resolved by the Court, however, are: (1) the appropriate length of the extension and (2) whether this case should be consolidated with *Motorola II*. As set forth below, because of the overlapping issues and the fact that there are several circumstances that require the current procedural schedule in this action to be extended significantly, judicial economy weighs in favor of combining this case with *Motorola II*.

First, the rationale underlying Motorola's filing of the second action no longer applies. Judge Ungaro denied Motorola's attempt to amend its infringement contentions to maintain the then-applicable procedural schedule. That schedule has since been extended and the parties agree that it needs to be further extended.<sup>2</sup> Given the extensive overlap between the two cases and the agreement in principle that the schedule must be adjusted, it now makes sense to combine the two cases. All of the patents-in-suit in this action have been asserted—against newly released Apple and Motorola products—in *Motorola II*. In addition, there is overlap in patent families. Apple's '721 patent in *Motorola II* is a continuation of Apple's '849 patent in this action and therefore has the same specification and inventors. The '721 patent is asserted against both Motorola and HTC, so any additional discovery regarding this patent should be

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<sup>2</sup> As a result of the agreed-upon extensions, the schedules in both cases are now overlapping with another litigation between Apple and Motorola pending in the Northern District of Illinois, which is set for a six-week trial before Judge Posner in June and July. Apple respectfully requests that the schedule in this case and *Motorola II* take into account this conflict.

coordinated with both of these parties, which cannot occur until after HTC files its responsive pleading on May 11.

Further, Motorola seeks discovery in this case about Apple products that are only accused of infringement in *Motorola II*. See Davis Exh. F (requesting 30(b)(6) testimony on Apple's App Store, which is not being accused in *Motorola I*). Motorola's attempt to blur the lines between *Motorola I* and *Motorola II* discovery in this fashion presents yet another reason why consolidation of the two cases makes sense and will be most efficient. Moreover, on April 13, 2012, Motorola moved for leave to amend its complaint in *Motorola II*, adding infringement claims for six additional patents. *Motorola II*, D.E. 64. Most of those new Motorola patents appear to be aimed at the same products that are accused of infringing Motorola's patents in this action, e.g., Apple's iPhone, iPad, Mac, and MacBook products. In addition, the new accused set-top box ("STB") products in *Motorola II* are likely to implicate some of the same witnesses that Motorola has yet to schedule in *Motorola I* (e.g., someone who will testify about hardware design for the accused STBs). Indeed, it would be more efficient for Motorola to address the deficiencies in its discovery responses with respect to all of the accused STB products. This is even more true for the third-party cable providers and IPG makers that Apple subpoenaed. If the two cases are consolidated, Apple will not have to go back to those third parties to seek additional information about the newly accused STBs in *Motorola II* after those parties have finalized their document productions, declarations, and deposition testimony.

Given the overlap, consolidating the two actions will best serve the interests of judicial economy and efficiency for the parties. Motorola argues that consolidation of the two cases will delay a decision on its claims in this case, see Davis Exh. C at 3-4, but Motorola has no room to

complain. It was Motorola that chose to file a second action and Motorola has been pushing to include the claims in *Motorola II* in this case despite the impact it would have on the schedule.

In any event, Motorola's self-serving proposal that only some of the pending claims in *Motorola II* be consolidated with this case is unworkable under Motorola's proposed schedule. Motorola's proposed extension is too short and would not allow adequate time for the parties to coordinate overlapping discovery between the two cases. Thus, multiple depositions of Apple engineers would likely be required for any products, *e.g.*, Apple's iPhone or iPad products, that are accused of infringing Motorola's (and possibly HTC's) patents in *Motorola II*. Further, by excluding HTC from its proposed consolidation of Apple's claims regarding '721 patent, any discovery relating to the '721 patent would be duplicated in *Motorola II*, which is extremely inefficient. Even coordinating discovery with HTC would be difficult under Motorola's proposed schedule. Likewise, Motorola's proposed schedule does not allow enough time for Apple to obtain all of the discovery it needs from third parties for the newly accused STBs given that those third parties have resisted providing discovery in the current case for months.

**B. Additional Time Is Needed For Discovery Relating To Motorola's Amended Invalidity Contentions**

Good cause exists to amend the procedural schedule in light of the Court's order allowing Motorola to amend its invalidity contentions. D.E. 259. As explained during the March 9th hearing, discovery regarding the additional references asserted to be prior art will be extensive and time-consuming. *See* Davis Exh. A at 22:10-24:2, 24:13-27:2. Apple must conduct considerable third-party discovery that includes the depositions and document collections from both domestic and foreign entities, even though it is Motorola's burden to prove that the references are invalidating prior art. Although Apple has begun this process, it has faced significant resistance from third parties who have been subpoenaed thus far.

For example, one of the references asserted to be prior art to Apple's set-top box patents is the '185 patent, which on its face does not qualify as prior art. Motorola's invalidity responses were insufficient, so Apple has sought more detailed responses from Motorola, but Motorola has yet to respond to this request. *See* Davis Exh. G. Also, as explained at the hearing, Apple has begun seeking discovery by serving subpoenas on the inventors. Once Motorola supplements its invalidity contentions, Apple must examine the alleged conception date for that patent and whether the inventors were diligent in reducing the subject matter of the '185 patent to actual or constructive practice. *See* D.E. 211 at 7-8 (explaining that Motorola intends to rely on the inventors' earlier conception and reduction to practice instead of the filing date for the '185 patent); *see also* Davis Exh. A at 22:10-24:2. Further, given Motorola's lack of details in its invalidity contentions for the '185 Patent, Apple may also need to seek additional discovery after it receives Motorola's invalidity expert reports.

Apple also needs to seek and review documents concerning the Neonode phone alleged to be prior art to Apple's '849 patent. For example, whether the Neonode phone was offered for sale in the United States before Apple's inventions disclosed in the '849 patent requires review of foreign documents. Moreover, neither of Neonode's Rule 30(b)(6) designees was able to state definitively when the first US sales of the device occurred or which unlocking functionalities were included on that device. Thus, further discovery on this issue may be necessary.

### **C. Additional Time Is Needed To Complete Already-Served Discovery**

The inadequate duration of the current discovery period is further compounded by the fact that Motorola continues to supplement its production of documents on a rolling basis and still has not produced many of the relevant and responsive documents that Apple has requested. Apple has had unjustifiably protracted and repeat exchanges with Motorola to obtain just a

portion of these relevant documents in a timely manner, while some requests go ignored. *See, e.g.,* Davis Exhs. H-L. Indeed, Apple has already been forced to file two motions to compel Motorola to produce some of this requested discovery. D.E. 281; D.E. 282. As of the filing of this motion, however, several categories of these documents still have not been produced. Based on Motorola track record of delay and unfulfilled promises, it is highly unlikely that the parties will resolve their outstanding discovery disputes and Motorola will complete its responses and document productions before May 4.

In addition, Apple asked Motorola to prioritize its designation and provision of witnesses related to Apple's set-top box patents back in December of 2011, but Motorola did not make its first witnesses available until late February. Only after Apple filed a motion to compel did Motorola agree to provide three additional technical witnesses. However, because those witnesses were not adequately prepared to address certain topics and because new information not previously provided by Motorola was learned from those depositions, additional depositions are required. Furthermore, with less than three weeks left before the current discovery deadline, Apple is still waiting for Motorola to provide deposition dates for key individual witnesses and additional Rule 30(b)(6) designees. *Id.*; *see also* Davis Exh. M; Davis Decl. at ¶ 17.

Apple is also still in negotiations with many third party IPG makers and cable providers to produce relevant documents and provide knowledgeable witnesses despite subpoenaing these parties months ago. *See* Davis Decl. at ¶ 18. Thus far, Apple has received very little in the way of substantive responses. Many of these third parties have been withholding documents on the basis that production is unduly burdensome, particularly since they believe Motorola is likely to have the same or similar information. For instance, Rovi Corporation—the leading IPG maker for the accused Motorola STBs—only recently agreed to produce certain license agreements and

present witnesses for deposition. *See* Davis Exh. N. As for other third parties, in the hope of avoiding motion practice, Apple has agreed to pursue declarations in lieu of deposition testimony. If Apple cannot reach agreeable declarations with the third parties (and Motorola continues to ignore Apple's request that Motorola stipulate to the use of third-party materials), however, Apple may be forced to turn to motion practice to obtain the needed discovery Motorola has thus far failed to deliver despite promises to produce documentation on behalf of the subpoenaed parties. Obtaining a decision on any motions and scheduling any subsequently ordered discovery could take months and certainly more time than the current schedule permits.

In short, despite Apple's diligent efforts to complete discovery in a timely manner, there is still much discovery remaining in *Motorola I* as a result of Motorola's amended invalidity contentions and uncooperative discovery practices to date. In addition, Motorola continues to request depositions of Apple witnesses, yet has rejected dates offered by Apple. Given the busy schedules of Apple's engineers, Motorola's unwillingness to proceed when these witnesses are available may mean that certain depositions will need to be taken after the current close of discovery. The proposed extensions are therefore reasonable and, additionally, should limit the parties from burdening the Court with further motions to amend the procedural schedule.

**D. Additional Time Is Needed To Complete Discovery For *Motorola II***

The fact discovery deadline in *Motorola II* that was set before Apple answered Motorola's complaint is June 8, 2012. By agreement of the parties and by order of the Court, however, the HTC entities have until May 11, 2012 to respond to Apple's counterclaims, leaving less than a month to complete discovery. *Motorola II*, D.E. 55 and 56. The parties are unlikely to reach agreement on modifications to the *Motorola II* schedule in the near term, as HTC's counsel stated that HTC will not be in a position to substantively evaluate proposed amendments

to the procedural schedule until after that date. *See* Davis Exh. D at 2. Moreover, given Motorola's recent motion to amend its complaint to add six new patents and the likelihood that HTC will add its own patents to the case, additional time will be necessary to address these new patents. Thus, there exists good cause for Apple's proposed consolidation and amendments to the procedural schedule.

#### **IV. CONCLUSION**

Given the circumstances presented above, the scheduling extensions proposed by this motion are reasonable and supported by good cause. Despite Apple's diligent efforts, substantial discovery remains which cannot be completed within the timeframe of the current procedural schedule for this action. Moreover, it has become apparent that all parties cannot begin to discuss amendments to the procedural schedule for *Motorola II* until HTC files its responsive pleading on May 11. So the parties have a reasonable opportunity to obtain all of the facts necessary to defend themselves against claims of infringement and fairly try their own claims, Apple respectfully asks this Court to consolidate the two pending actions and amend the procedural schedule as proposed herein.

#### **CERTIFICATE OF GOOD FAITH CONFERENCE**

Pursuant to Local Rule 7.1(a)(3), 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: April 17, 2012

Respectfully submitted,

/s/ Christopher R. J. Pace

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 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.

*/s/ Christopher R. J. Pace*  
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**SERVICE LIST**  
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**Case No. 1:10cv023580-Civ-RNS**  
**United States District Court, Southern District of Florida**

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