Motorola Mobility, Inc. v. Apple, Inc.
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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 10-23580-CV-SCOLA

MOTOROLA MOBILITY, INC.,

Plaintiff,
vs.

APPLE INC.,

Defendant.

Friday, March 9th, 2012
9:47 a.m.
Miami, Florida

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APPLE INC.,

Counterclaim Plaintiff,
vs.

MOTOROLA MOBILITY, INC.,

Counterclaim Defendant.

TRANSCRIPT OF TECHNOLOGY/LEGAL TUTORIALS
BEFORE THE HONORABLE ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

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(Court was called to order.)

THE COURT: Good morning, everybody. Welcome, be seated. I know we're early, but is everybody here?

MR. POWERS: We are, Your Honor.

THE COURT: All right, so this is Motorola versus Apple.

Do you need their appearances, again, Judy?

MR. MULLINS: Edward Mullins of Astigarrage Davis --

THE COURT: No, we don't need them. That will save us 15 minutes right there.

Okay. So we're -- well, first of all, have you resolved the issue relating to the emergency motion to compel?

MR. POWERS: Not fully, Your Honor, the parties have met and conferred. Our suggestion to the Court is that we allow that process to continue over the next few days. We expect it to be productive. Our hope, obviously, is that we will be able to withdraw the motion if the witnesses are made available and that process is continuing, we think in a productive way.

THE COURT: Okay. So just hold off on that for now?

MR. POWERS: Correct.

THE COURT: Okay. All right. So the next one is Motorola's motion to amend the procedural schedule to serve supplemental invalidity contentions.

MR. POWERS: Before we begin that, Your Honor, one

quick housekeeping matter related to yesterday, if we could.

THE COURT: Yes.

MR. POWERS: We have a flash drive that has -- there was numerous binders that were given to you yesterday that are bulky, but useful obviously, in hard copy. Some of those that were presented were videos or animations. We have a flash drive that has all of the information presented to you yesterday, including the animation and videos that don't appear obviously, in the hard copy. Could we hand that up?

THE COURT: Sure.

Do you want the opportunity to do the same thing, Mr. Verhoeven?

MR. VERHOEVEN: We could do that as well, Your Honor, I don't have it right here but we could deliver that to the court, we'd also request a copy of whatever it is that Mr. Powers has on that flash drive for our records as well.

MR. POWERS: Of course.

THE COURT: Okay. All right. So let me hear -- yes?

MR. POWERS: Who do you wish to go first, Your Honor?

THE COURT: Well, it's their motion so I assume they're going to go first. Unless you're going to tell me that I agree and don't need to say anything.

MR. POWERS: In that case, they should go first.

THE COURT: Okay.

MR. SEARCY: Good morning, Your Honor. Marshall

Searcy for Motorola, let me give you a roadmap of what I'll be covering during my oral argument today.

First, I'll begin with the issue of prejudice. Namely, the fact that there is a lack of prejudice. No prejudice to Apple if our motion is granted. And there will be extreme prejudice to Motorola and the process, the Court and the jury, if Motorola isn't allowed to supplement its references in this case, the prior art invalidity contention.

Next, I'll discuss efficiency. Amending the procedural schedule is the most efficient way to deal with the issues that are raised by these new prior art references.

Third, I'll get into Motorola's diligence. Specifically I'll contrast Motorola's diligence in trying to supplement its invalidity contentions with Apple's own claim, carefully-worded statement about its lack of knowledge that it didn't know anything about the references involved here.

And before I begin with that, though, there is a housekeeping issue that relates directly to this motion.

Apple has dropped its '646 and '116 patents. Those are the display space patents so we didn't hear a tutorial about them yesterday and the issues that are raised in the motion to amend the procedural schedule are now mooted about that, those are the issues that related to plug and play and the representations made at the prior tutorial. Those are now moot in light of them dropping the patents.

So what we're down to now, Your Honor, are two sets of references. One is the Neonode reference, the publication, and the phone. And those are items that Mr. Verhoeven showed you yesterday during the tutorial. And the other is the '185 patent, that goes to set-top box issues. And that's a patent owned by a company called Rovi.

So Your Honor, now turning to the issue of prejudice, and we are talking about these two sets of references, Apple isn't prejudiced by us supplementing our invalidity contentions to include those two references.

A deposition of Neonode is currently, tentatively scheduled for March 19. So Apple will have the opportunity to ask questions about that reference. To get discovery. And to seek the information that they claim to be looking for.

Apple subpoenaed the company Rovi on January 23, 2012. That was attached as Exhibit R to the reply in this case. And in that subpoena, Apple specifically asks Rovi about the '185 patent that we're seeking to supplement our invalidity contentions with.

So they've had the opportunity and will have --

THE COURT: The subpoena or they actually spoke to them?

MR. SEARCY: They've subpoenaed them. It's my understanding --

THE COURT: They took a deposition or they -- I mean,

--

MR. SEARCY: That they are currently in negotiations for a deposition with Rovi.

THE COURT: Okay.

MR. SEARCY: That they have been meeting and conferring with counsel for Rovi on that.

THE COURT: Okay.

MR. SEARCY: And I believe that they are currently seeking to take a deposition of Rovi pursuant to that subpoena.

THE COURT: Okay.

MR. SEARCY: Okay. So Apple has had and will have the opportunity to take discovery with regard to these supplemental references. And that opportunity to take discovery will be even more present now that the Court has agreed to extend the discovery schedule and the parties have agreed to that.

So they'll have the opportunity to get the discovery that they say they couldn't otherwise get on these references.

So they can't show prejudice.

On the other hand, as we saw yesterday during the tutorial, these are very important references, very important pieces of prior art that go to the validity of the patents that Apple has raised here.

And certainly the video, the Neonode phone that we

showed you yesterday, that's something that a jury should be allowed to see. That's something that the Court should be allowed to consider in determining the issues in this case. So there will be a prejudice to Motorola, prejudice to the jury and even to the Court in not being able to consider all of the prior art that is critical to the patents that are being considered in this case.

On balance, the prejudice falls far in favor of Motorola. Motorola would be extremely prejudiced if the schedule is not amended.

Now I want to talk to you about efficiency, because that's another reason why these references, the Neonode and the '185 patent references that I've been describing, shouldn't be excluded.

These references raises issues -- they raise issues that will have to be tried. That will have to be considered by a court. They might be considered in the second litigation, should Apple decide to raise these same patents in the second litigation that's currently before the Court.

It might be considered in a separate action for declaratory relief that might be necessary if these references are excluded. But somehow, these prior art issues, these important issues that relate to these patents have to be decided.

The most efficient place to decide that, Your Honor,

is here, in front of this Court, where these issues will be tried to a jury, and where they can all be considered and where they'll, as we've discussed, will have been complete discovery on that.

So it makes sense to get rid of these issues, to resolve these issues now.

Now turning to the issue of diligence. In their opposition, Apple says two things. First they say that we should have known about these Neonode references. Yet at the same time they say, in very carefully worded statements, turn to page 3, turn to page 4 of their opposition, they make statements like, there was no evidence that Apple had been in possession of Juels or Neonode prior to the June 20, 2011 deadline for invalidity contentions.

They say on page 4, Motorola points to no evidence that anyone at Apple was aware of those references during the relevant time frame.

THE COURT: What does that mean? They're not saying nobody at Apple knew about it, they're saying you haven't produced any evidence yet that anybody at Apple knew about it.

MR. SEARCY: It's very carefully worded, Your Honor. And the reason why it's carefully worded is because it flies in the face of a lot of things we know. We know that they were in litigation with Samsung in the Dutch Court and that's where the Neonode reference appeared and that's where the

Dutch court held that this Neonode reference may invalidate the slide-to-unlock patent.

We know from discovery that was taken recently that Apple submitted what's called an "information disclosure statement." That was submitted in connection with the '849 slide-to-unlock patent application. And in it, Robert Beyer, who is an attorney for Apple, included a reference to a Neonode manual and included that, with that a citation to a website, ebookspdf.com, gadget/2818/neonode N1m manual.

So all of this is to show that if there's a -- sort of harkening back to the point of prejudice, if there's prejudice here, it's because Apple didn't produce something that they knew or should have known about and that was, in fact, requested for production.

But it also goes, Your Honor, to the issue of Motorola's own prejudice. You know, even assuming, even taking Apple's statements in their brief at face value, that there's no evidence that they knew about it. Trying to indicate to the Court that they didn't know about it, it certainly wouldn't be fair to expect that Motorola would somehow know about it.

And that goes to one of the issues, one of the points that's raised in the *Amerson* case. When you're talking about a search for prior art, Your Honor, you're talking about a worldwide search, looking for prior art, the references to

patents that are brought up in patent litigation.

And certainly if you look to the disclosures that were provided in this case, Your Honor, they're diligently provided. They contain analysis, they contain claim charts, they're extensive, and in light of that with Apple saying they don't know about this Neonode reference, they certainly can't claim that we weren't diligent, considering our position, in us not knowing about it.

As to the issue of the '185 patent, that's the Rovi patent that goes to set-top box issues, if you look to the face of the Rovi patent, that patent actually was filed after the three Apple interactive programming guide patents that are at issue in this case. And part, earlier I described the '185 patent, it's the set-top box that's actually an interactive programming like that.

So someone looking at that information, the face of the patent, and we saw the -- how the face of patents looked yesterday at the tutorial, with the filing date on it. You wouldn't know from the face of it that that was prior art.

It's only afterwards when we actually dug into the file history, that's all the documents that went back and forth between the PTO, you know, a file about that thick, that we found this declaration from the inventors claiming that they had invented the inventions in the Rovi patent first. And thus should have priority over these Apple patents.

So we were diligent in locating it. Diligent in finding it and now we've brought it to the Court's attention so that it can be tried in this case. So that all of the issues can be decided, as they should be on these patents.

So in sum, Your Honor, there's no prejudice to Apple. We've acted diligently. The most efficient way to deal with this prior art, to deal with these issues is to deal with them before this Court and have a full and fair hearing on these issues in front of the jury.

THE COURT: And the only disruption, if any, would be that one deposition is already scheduled for the 19th and the other one is in the works and there's no other delays that this would cause.

MR. SEARCY: That's correct, Your Honor, because the subpoena, the other one that I referenced, that subpoena was issued back in January. So that is in the works.

THE COURT: Okay.

MR. SEARCY: Thank you, Your Honor.

THE COURT: All right. Who's going to make the preparation on behalf of Apple?

MR. POWERS: I will, Your Honor.

THE COURT: All right. Mr. Powers.

MR. POWERS: The starting place obviously, in any motion, is to consider who has the burden of proof and what it is. The burden of proof in this case, under all the case law

is clear. It is on Motorola. And the initial burden is to establish diligence -- not generally, but specifically with respect to the items that Motorola seeks to add.

So let's --

THE COURT: Let me go back to the beginning, because in their first motion in front of Judge Ungaro, they suggest that when the validity contentions were first scheduled, that there was an understanding that those were preliminary. And it seems -- they seem to, in the motion, that all the parties had kind of moved forward with that assumption until Judge Ungaro said no, I didn't say that they were preliminary and I'm not extending my deadline.

So were there any discussions between or among the lawyers concerning whether these were preliminary or final invalidity contentions?

MR. POWERS: I don't believe so, Your Honor. And I think what Motorola said was a slightly different version of what you said.

THE COURT: Okay.

MR. POWERS: I think what Motorola said was not that the parties had an explicit understanding which they shared with each other that they were preliminary, but that both sides put caveats into their contentions saying the word "preliminary" and saying we hope to have the right to amend them.

THE COURT: Okay.

MR. POWERS: So, and that difference, I think is an important difference. It's not as if both of us were operating under that assumption. I'm not aware of any communications of the sort that you described.

THE COURT: Okay.

MR. POWERS: And the fact, the mere fact that a lawyer puts into, whether it's us or them, a statement that it's preliminary, we have the right to add, doesn't change the fact that it is or is not preliminary based on the Court's rules.

And in this case, Judge Ungaro's rule, I think in fairness, was fairly clear it was not preliminary and Judge Ungaro thought there was no ambiguity about that question.

To the extent that there's an argument that the parties had explicitly or sub silentio interpreted that order in a way and operated under that understanding, I don't think that's fair.

Back to the burden of proof, the *Southern Grout* case in the Eleventh Circuit and all the other cases in other courts that have similar rules and similar processes make quite clear it is Motorola that bears the burden of proof on this issue.

That's not an accidental thing. The reason for this sequence of events that is laid out in patent cases is that

every statement -- and I was one of the people who wrote the local rules for the Northern District of California. There's a very conscious sequence of events that take place because subsequent events use prior events. And everything -- and the parties make decisions based on what happens previously.

And that sequence, if upset, goes directly to the prejudice question. There is, in fact -- I don't want to jump to the prejudice issue yet because that's a separate question of burden of proof -- but the prejudice is inherent in the sequence. The logic of the sequence of the events that take place in terms of contentions and then *Markman* hearings and expert reports and all of that is because people rely on what's said in those positions in making decisions for subsequent actions.

So the prejudice isn't just that we have to go take another deposition. We're all big boys and girls, we can go take another deposition. That's not the prejudice. The prejudice is the logic inherent in the way the system is set up by which everyone does rely on what's said before. That's really the prejudice issue.

But let's move back to the burden of proof. The burden of proof under all the case law is that Motorola has to show it was diligent. Let's start with Neonode. Neonode is the prime reference that they wanted to show you and it's one they showed you yesterday.

Let's talk a little bit about what Neonode is first so we know what we're talking about, and then I want to talk about the lack of diligence.

They showed you a video. What they didn't show you is that video was dated 2007. Two years after the application. The video's irrelevant. It's not prior art. What they showed you was a 2007 video. Meaningless.

Now, what they also say they want to get into evidence is a device, a physical Neonode device. If that device was not sold in the United States prior to --

THE COURT: What is the date of --

MR. POWERS: December 2005 is the prior date --

THE COURT: Is the Apple --

MR. POWERS: Is the Apple date.

THE COURT: 12/05.

MR. POWERS: The filing date of the '849 patent.

THE COURT: When did Neonode get their patent? Wasn't it like in 2002?

MR. POWERS: Well, no, no, no. We don't know the answer to that question but there is -- what we know is the video that they showed you, is 2007, two years later. What we know is that the --

MS. HO: Isn't Neonode suing Apple now?

MR. POWERS: No. Not that I'm aware of.

THE COURT: Okay.

MR. POWERS: There's three things they're trying to get into evidence. Let's talk about this specifically because Neonode isn't just a thing in the air. There's three specific things. One's the video. That's 2007, two years late, doesn't matter.

Second is a physical device, a physical Neonode phone. Now, a physical Neonode phone under the rules is prior art only if it was sold in the United States more than a year before 2005.

Well, there's zero evidence of that and I, based on what I've seen, I don't think it was. Now, maybe they have evidence of that. If so, they haven't showed it to us. But the physical device is not prior art either. Obviously, it's undated. We don't know what the date of that device is. But there are very specific rules under Section 102 about what constitutes prior art.

If you sell something in Finland, that may very well not be prior art in the United States. And there's highly specific rules that they have not even attempted to satisfy as to whether any of this is prior art.

The third reference, the third piece of Neonode is a user's guide. The user's guide that they submitted with their request is completely undated. So we have no idea whether that's prior art.

So at the moment they've submitted to you three

things which they seek to add as prior art, as to which there is zero foundation that any of it is prior art at all. Which sort of sends the prejudice argument out the window until they can actually prove its prior art. And showing you a 2007 video doesn't even come close.

But the diligence argument is worse than that. The diligence argument in this case is -- is amazing. The first thing you do, when you're a defendant on a patent, and a patent is asserted against you, the very first thing you do after reading the patent, is you read its file history. Any patent litigator knows that.

You read the file history and you read the file history for a variety of reasons. One of which is to look for prior art.

In the file history of the '849 patent in suit in this case, our patent lawyer disclosed a Neonode user guide. So their idea or their argument that they couldn't have found it assumes they didn't do the first thing that any competent patent litigator does, which is read the file history of the very patent that's asserted against you.

Had they read that, they would have said, oh, Neonode, all right, let's go find out what we know about Neonode. That's what diligent patent litigators do.

If you see something cited as prior art or potential prior art, you go find out more about it.

They obviously didn't do that. So whatever else they did in ginning up these thousands of pages of things that they gave to the Court, that's not diligence as to Neonode. As to Neonode, all they had to do was read the very file history of the patent that was asserted against them. Now, to say that that satisfies a diligence requirement means there is no diligence requirement. Yet that is the requirement jurisdictionally on this motion.

And I completely understand the pragmatism that underlies the Court's comments yesterday and today.

But at some point, at some point a line has to be drawn. We can't just keep throwing things in over the transom at the very end of the case after all sorts of decisions have been made, after all sorts of processes occurred on something so basic. This isn't something where they had to go search in an obscure database that wasn't available until recently. All they had to do was do the first thing that any competent patent litigator does.

And they didn't. And that isn't diligence. That doesn't justify upsetting a carefully crafted schedule that would prejudice Apple because of the carefully crafted schedule.

THE COURT: So I'm going to grant or deny their motion, and in the United States or at least in the Southern District of Florida, you're going to, let's say, go for it,

you're going to win, okay. And there's this litigation in other countries, okay. And they're going to win because they're going to show that Neonode had its patent in 19 -- 2002 and it's prior art and the lawyers raise it in that case, so now you're going to have inconsistent verdicts in different countries. You know, I mean, isn't --

MR. POWERS: I understand Your Honor's point.

THE COURT: I mean a trial, like the -- ultimately a search for the truth about what really happened here? Why --

MR. POWERS: A trial is certainly a search for the truth.

There's two strands to the point Your Honor's asking. One strand is that the rules are different in different countries. What is prior art in the United States and what is not prior art in the United States, the rules are different in other jurisdictions.

So you heard yesterday a reference to Neonode being the basis for a preliminary possible recommendation in validity, Neonode is a European company.

So perhaps things that aren't prior art in the United States which has territorial limits on certain aspects of prior art don't apply in a European court based on a European product. I don't know the rules there for that particular jurisdiction on that particular issue. But the fact of inconsistent results, was resulting from inconsistent or

different rules --

THE COURT: Yeah, but I don't have any control to change the rules of Sweden or Germany or the Netherlands, okay.

MR. POWERS: Understood.

THE COURT: I do have control to make sure that whatever decision is made in our courts is based upon all the facts that are available within reason, so that we don't have inconsistent -- I mean, our world is getting smaller and I can't imagine Apple wants to, you know, win in one country and lose in another -- I don't know why they want to be going around the world -- I don't know, maybe the lawyers do, but I can't imagine Apple and Motorola want to have a hundred litigations.

I'm sure at some point they want to know who's right about this and who's wrong and let's move on. And to have, you know, some procedural issue that doesn't really resolve who's right and wrong, okay, I just don't know that that serves anybody's interest.

MR. POWERS: I hear your point, Your Honor, and that is the pragmatism I was referring to earlier. And certainly there is a lot of common sense appeal to a pragmatic approach.

My point was that as -- as you noted in your last comment, within reason. There is a point at which pragmatism has to bend to process.

THE COURT: Right.

MR. POWERS: Process does matter.

THE COURT: So what are you going to have to do if I grant their motion, that you wouldn't have had to do if I deny it?

MR. POWERS: If you grant their motion, the discovery is going to be far beyond what was just discussed in terms of a deposition or two.

THE COURT: Okay.

MR. POWERS: So for example, if the '185 patent comes in, we'll have to go depose those inventors. There's a -- the amount of discovery required -- let's be clear what the issue was that they're now going to claim.

On the '185 patent as he admitted, the '185 patent on its face isn't prior art. They're going to have to try to prove based on what those inventors actually did. That, in fact, the '185 invention was made sufficiently earlier, and there's a whole body of law about burdens of proof and corroboration, that type of analysis is an incredibly fact-intensive analysis.

We're talking many depositions, we're talking many -- extensive document reviews. Probably another expert to deal with that issue because it's a separate question.

So all of that hasn't been done because no one knew it needed to be done.

And that's not just a single deposition of somebody, to ask them what they did. That's a very intensive analysis. When you're swearing behind a date, the procedural rules on corroborating an attempt to get behind your effective filing date require a very exacting analysis of the evidence and a very exacting analysis -- not just depositions of the inventors because the inventors can't corroborate the earlier invention.

The rule is, and it makes sense, the rule is that if an inventor is trying to say I actually get an earlier date than that effective date that's shown on the patent, that requires corroboration by someone other than an inventor. Because otherwise the inventor could just say it. And there's --

THE COURT: Is that when the inventor is one of the parties, though?

MR. POWERS: No, no --

THE COURT: Even when he's not the party.

MR. POWERS: On '185, all inventors are going to be third parties. So we're talking about depositions of all the inventors and anybody that gets put up as a third party corroborator and anybody that even -- that isn't put up as a third party corroborator because they may put up person one who will attempt to corroborate but persons two, three and four were also working with that team and their testimony may

be quite different.

So that is just a mare's nest of stuff. Not a single deposition. Not even --

THE COURT: What's a "mare's nest"?

MR. POWERS: It's a mess.

THE COURT: I looked up genericize. That is a word. So you're one for one. So what is that, M-A-R-E?

MR. POWERS: M-A-R-E.

THE COURT: Like a horse's nest.

MR. POWERS: Exactly. It's a mess.

THE COURT: A mare's nest. Never heard of that. I'm going to look that up. Go ahead.

MR. POWERS: So the amount of discovery and -- it's not just one round of discovery. That is a big complicated question. That is not resolvable by going to talk to one person.

Now, Neonode, all sorts of discovery has to happen about whether something was sold or not sold. I mean, you can't just walk into a court with a physical device and say here it is. Section 102 says there's elaborate specific rules about whether that thing is prior art or not. That thing is prior art only under very specific conditions so we have to go establish that.

THE COURT: Tell me what -- wasn't the Neonode brought up in some other litigation involving Apple?

MR. POWERS: My understanding is that the Neonode reference --

THE COURT: Right.

MR. POWERS: Was raised in a European litigation.

THE COURT: Involving Apple.

MR. POWERS: Involving Apple.

THE COURT: Okay. I know you're not there, but Apple was there.

MR. POWERS: Apple was there.

THE COURT: So wouldn't they be doing, the same things you say have to be done, wouldn't that have been done in that case?

MR. POWERS: Well, I don't know but probably not because that's in Europe. And the rules are different. You don't have to show sales in the United States in Europe to make it prior art. I'm fairly confident of that.

THE COURT: Do they have depositions in Europe?

MR. POWERS: I don't know -- I believe that litigation was in the Hague, and the Hague, there typically are no depositions. So the rules are quite different. You don't really get discovery. That -- it's based on a paper record, typically. I've done two trials in the Hague and we had no discovery at all.

And so the idea that this has all been done and we can wrap it up in a bow and move it over here, that is not

true.

THE COURT: Okay.

MR. POWERS: Not only because they don't really have discovery there, but also because the issues are different. What's prior art there isn't prior art here. And so different things have to be proved.

And so all of that becomes a substantial -- and we're talking about -- we have a summary judgment date in this case of May 18 and an October trial date and we're talking about opening up two large, new questions that aren't going to get resolved with a single deposition sometime in the next --

THE COURT: How long do you think that's going to take?

MR. POWERS: I don't know. The short answer is, I don't know, because you have to do the first wave of discovery and see what that produces. I do know that the '185 discovery alone, even if it's third parties and third parties scattered all over who knows where, that's at least a month just to go find them and do it. And third parties are obviously harder to arrange in a very prompt time.

And sometimes they're hard to find. So we have no idea. That process has just started.

There's initial discussions about the Rovi deposition, that's true. That's not in connection with this case. That was in connection with case number two, as I

understand it.

But, that's just the first step.

And then the question is all of that -- and I do appreciate Your Honor's point that there's a tension between process and substance and merit. I appreciate that completely. I get that.

We're up against the very end of a schedule. I mean, literally, summary judgment's in May. Expert reports being created as we speak. All of that would be thrown out if we go down this path. All of it, because there's no way we can complete this process under that schedule. Zero chance.

And then the question is, why would we turn that completely upside down when the requester was so obviously not satisfying the diligence requirement the cases impose? All they had to do was read the file history. That's it.

And so obviously it's Your Honor's decision, but if we were six months from trial, I would see the point. Six months from summary judgment, rather. Or something where there was --

THE COURT: I think we are six months from trial.

MR. POWERS: Yes, we are six months from trial.

THE COURT: Seven months from trial. Your vocabulary is better than your math.

MR. POWERS: Okay. Okay. But we are in the midst of right now doing all the expert reports, having the SJ process.

None of that would then be able to go forward.

THE COURT: Okay.

MR. POWERS: And it just -- it doesn't make sense to me, obviously it's your decision, it doesn't make sense to me to break all of that in a situation where the diligence requirement that is required is so obviously blatantly not met.

THE COURT: Okay. All right. Thank you.

I'll give you a chance for a brief response.

MR. SEARCY: Thank you, Your Honor.

So, Your Honor, first of all we heard a discussion from Mr. Powers about how you have to rely on what's been said before. And here, we're relying on Apple to provide us with discovery on things that they knew about. We're relying on what they said to us and they didn't provide us with the discovery that they were supposed to provide.

So when you talk about the burden of proof and you talk about diligence, that's where you start. When you talk about reliance on what's been said before, Apple didn't provide what they were supposed to provide.

In discussing the Neonode reference, his second point, what Mr. Powers did is he actually attacked the merits of the reference. He claimed that the phone wasn't sold in the U.S. He ignored the fact that the Neonode reference itself is a prior publication, which is prior art. And then

he said well, there's no evidence that the phone is sold in the U.S.

Well, these are infringement -- or these are invalidity contentions, Your Honor. That's why you have discovery. You go, you ask the questions of the folks at Neonode and you find out what attempts they made to sell that phone in the U.S. You find out what happened with the reference. That's why you have the discovery, that's why you have the contentions, to get these things out there so that everybody can do it. That's the process that's taking place right now.

As to his third point, and this one was maybe the most interesting, he admitted to you that Apple knew about a Neonode reference and submitted it in its file history on the application for the slide-to-unlock patent. And obviously if Apple's attorney knew about this, and knew about -- in the file history and Apple knew about it, then they should have submitted this reference to us in discovery, they didn't do that until we asked for it once we found out about the Dutch litigation.

And obviously, if Apple knew about this Neonode reference, Your Honor, they can't really be prejudiced now by having to litigate it. So what he's admitted to you, it basically takes away any of their arguments of prejudice. But he raised some other issues and we'll get to that in a second.

Your Honor, you raised the issue of inconsistent judgments and Apple doesn't have an answer for that. In fact, we know that Apple is seeking right now a preliminary injunction on this slide-to-unlock patent against another party, Samsung, in the Northern District of California.

So these issues are going to be out there. And there needs to be a chance for consistent judgments and for the opportunity for the Court in this case, for the jury in this case to hear all the facts. To get to the bottom of the issues. And that's what we're seeking to do here.

With the issue of discovery, Your Honor, first of all, Mr. Powers told you something that was incorrect. I think it was a mistake on his part. He told you that Rovi had been subpoenaed in a different case. Again, Exhibit R to our reply brief is a subpoena that was issued by Apple on January 23, by Weil Gotshal, the Weil Gotshal firm, and included on the service list is Mr. Powers, that's on page 2 of Exhibit R, if the Court wishes to look at that.

THE COURT: And that was in a 2010 case, not the 2012 case.

MR. SEARCY: No, Your Honor, that was in this case.

THE COURT: The 2010 case.

MR. SEARCY: That's right.

THE COURT: Okay.

MR. SEARCY: And Your Honor, with regard to the

discovery that Apple claims that they need, we didn't hear any specifics. We heard a lot of -- of a parade of horribles and other things that might potential -- that the expert schedule will have to change. There might have to be a new expert. But we didn't hear any specifics because what we're talking about here are two depositions that are scheduled to take place and where they'll have the opportunity ask these questions concerning the prior art.

And if from that Apple decides that they need to take additional depositions, they'll have the opportunity to do that. That certainly doesn't require changing the expert's schedule.

But in addition to that, maybe even more importantly, Mr. Powers was talking about the '185 patent, and with that patent, that's the patent to Rovi, he said that they'd have to show that the inventors came up with the idea first, that there would be intensive documents that would have to be reviewed for that.

Well, Your Honor, that's all our problem. We're the ones, as Motorola, who have to show that this is prior art. Who would have to show that this '185 patent which has a filing date after these three Apple patents, should actually be considered to be prior art.

So we'd have to make that showing. The burden is on us. Not on Apple. That's a burden that, if we choose to, we

can take on and we'll get it done within the discovery period. So the burden again, is on us. There's no prejudice to Apple here. There's extreme prejudice to Motorola and to getting all the facts of the case decided.

Your Honor, in the end, the procedural schedule should be amended and these few references should be allowed to be supplemented in Motorola's invalidity contentions.

Thank you.

THE COURT: All right. Thank you. All right, I'll take this matter under advisement, I'll get the order out in the next couple of days.

Yes?

MR. POWERS: Your Honor, may I have just 30 seconds to respond to one new point that he had made?

THE COURT: Okay.

MR. POWERS: Just 30 seconds. First, counsel is right that Rovi was served in this case, I was wrong about that.

THE COURT: Okay.

MR. POWERS: But counsel said twice that we didn't give them the discovery on these references. And that's just not true. Because he's insinuating and this is part of his argument about we had carefully worded declarations, et cetera, they put in two declarations which could have satisfied their diligence requirement. They spoke to none of

it. They had two. An original and a reply.

Our point in our declaration was the prior art in the Netherlands, the Hague case, which is now what they're seeking to add, was not cited, as we understand it, until an August 3 prior art filing.

So their argument was, we should have produced it to them before June 20 which is the deadline for the prior art contentions. Our point is, we didn't have it before June 20 because it wasn't cited in the Netherlands until August 3.

The one thing we did have which was what we submitted in the patent office, we did produce to them. So they could have either read that as part of reading the file history which every patent litigator does, or reading what we produced to them. Apparently they did neither.

Thank you.

THE COURT: All right. Thank you.

So I'm going to take this matter under advisement, I'll get the order out in the next couple days. You all are going to let me know in the next couple of days if the other emergency motion to compel needs my attention.

Are there any other matters we can take up this morning?

MR. POWERS: Not from us, Your Honor.

MR. VERHOEVEN: No, Your Honor.

THE COURT: Okay. Thank you. We'll be in recess on

this case, then. All right.

(Court recessed at 10:29 a.m.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: Thursday, March 15th, 2012

s/ JUDITH M. WOLFF, CERTIFIED REALTIME REPORTER
Signature of Court Reporter