

EXHIBIT A

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

4 MOTOROLA MOBILITY, INC.,

5 Plaintiff,
6 vs.

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

7 APPLE INC.,

8 Defendant.

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9 APPLE INC.,

10 Counterclaim Plaintiff,
11 vs.

12 MOTOROLA MOBILITY, INC.,

13 Counterclaim Defendant.

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

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1 (Court was called to order.)

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

4 MR. POWERS: We are, Your Honor.

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

7 Do you need their appearances, again, Judy?

8 MR. MULLINS: Edward Mullins of Astigarrage Davis --

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

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

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

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

21 MR. POWERS: Correct.

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

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

1 quick housekeeping matter related to yesterday, if we could.

2 THE COURT: Yes.

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

10 THE COURT: Sure.

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

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

17 MR. POWERS: Of course.

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

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

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

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

24 THE COURT: Okay.

25 MR. SEARCY: Good morning, Your Honor. Marshall

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

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

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

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

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

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

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

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

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

15 Apple subpoenaed the company Rovi on January 23,
16 2012. That was attached as Exhibit R to the reply in this
17 case. And in that subpoena, Apple specifically asks Rovi
18 about the '185 patent that we're seeking to supplement our
19 invalidity contentions with.

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

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

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

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

1 --

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

4 THE COURT: Okay.

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

7 THE COURT: Okay.

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

11 THE COURT: Okay.

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

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

20 So they can't show prejudice.

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

25 And certainly the video, the Neonode phone that we

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

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

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

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

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

25 The most efficient place to decide that, Your Honor,

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

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

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

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

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

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

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

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

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

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

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

1 patents that are brought up in patent litigation.

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

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

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

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

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

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

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

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

17 THE COURT: Okay.

18 MR. SEARCY: Thank you, Your Honor.

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

21 MR. POWERS: I will, Your Honor.

22 THE COURT: All right. Mr. Powers.

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

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

4 So let's --

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

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

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

19 THE COURT: Okay.

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

1 THE COURT: Okay.

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

6 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

11 THE COURT: What is the date of --

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

13 THE COURT: Is the Apple --

14 MR. POWERS: Is the Apple date.

15 THE COURT: 12/05.

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

17 THE COURT: When did Neonode get their patent?

18 Wasn't it like in 2002?

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

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

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

25 THE COURT: Okay.

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

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

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

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

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

25 So at the moment they've submitted to you three

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

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

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

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

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

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

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

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

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

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

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

1 you're going to win, okay. And there's this litigation in
2 other countries, okay. And they're going to win because
3 they're going to show that Neonode had its patent in 19 --
4 2002 and it's prior art and the lawyers raise it in that case,
5 so now you're going to have inconsistent verdicts in different
6 countries. You know, I mean, isn't --

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

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

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

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

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

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

1 different rules --

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

5 MR. POWERS: Understood.

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

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

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

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

1 THE COURT: Right.

2 MR. POWERS: Process does matter.

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

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

9 THE COURT: Okay.

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

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

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

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

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

9 The rule is, and it makes sense, the rule is that if
10 an inventor is trying to say I actually get an earlier date
11 than that effective date that's shown on the patent, that
12 requires corroboration by someone other than an inventor.
13 Because otherwise the inventor could just say it. And there's
14 --

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

17 MR. POWERS: No, no --

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

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

1 be quite different.

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

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

5 MR. POWERS: It's a mess.

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

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

9 THE COURT: Like a horse's nest.

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

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

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

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

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

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

3 THE COURT: Right.

4 MR. POWERS: Was raised in a European litigation.

5 THE COURT: Involving Apple.

6 MR. POWERS: Involving Apple.

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

9 MR. POWERS: Apple was there.

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

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

17 THE COURT: Do they have depositions in Europe?

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

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

1 true.

2 THE COURT: Okay.

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

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

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

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

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

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

1 understand it.

2 But, that's just the first step.

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

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

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

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

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

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

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

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

1 None of that would then be able to go forward.

2 THE COURT: Okay.

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

8 THE COURT: Okay. All right. Thank you.

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

10 MR. SEARCY: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

11 With the issue of discovery, Your Honor, first of
12 all, Mr. Powers told you something that was incorrect. I
13 think it was a mistake on his part. He told you that Rovi had
14 been subpoenaed in a different case. Again, Exhibit R to our
15 reply brief is a subpoena that was issued by Apple on January
16 23, by Weil Gotshal, the Weil Gotshal firm, and included on
17 the service list is Mr. Powers, that's on page 2 of Exhibit R,
18 if the Court wishes to look at that.

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

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

22 THE COURT: The 2010 case.

23 MR. SEARCY: That's right.

24 THE COURT: Okay.

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

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

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

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

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

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

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

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

8 Thank you.

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

12 Yes?

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

15 THE COURT: Okay.

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

19 THE COURT: Okay.

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

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

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

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

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

15 Thank you.

16 THE COURT: All right. Thank you.

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

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

23 MR. POWERS: Not from us, Your Honor.

24 MR. VERHOEVEN: No, Your Honor.

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

1 this case, then. All right.

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

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

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Date: Thursday, March 15th, 2012

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

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