UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:10-cv-23580-SCOLA/BANDSTRA

MOTOROLA MOBILITY, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

JURY TRIAL DEMANDED

APPLE INC.,

Counterclaim Plaintiff,

v.

MOTOROLA, INC. and
MOTOROLA MOBILITY, INC.,

Counterclaim Defendants.

MOTOROLA'S MOTION TO ENFORCE ORDER COMPELLING RULE 30(b)(6) DEPOSITION TESTIMONY FROM APPLE AND ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 30(b)(6), 37(a) and S.D. Local Rules 7.1(e), 26.1, Plaintiff and Counterclaim Defendant Motorola Mobility, Inc. ("Motorola") respectfully submits this motion requesting that the Court enforce its Order entered March 30, 2012, which compelled Defendant and Counterclaim Plaintiff Apple Inc. (Apple") to provide Rule 30(b)(6) testimony relating to Rule 30(b)(6) First Notice Topics 59 and 60 regarding the email notification function for iOS 5 and the source code for the webmail functionality of Apple's accused MobileMe product.

This motion should be granted for the reasons set forth in the memorandum of law below.

MEMORANDUM OF LAW

I. PRELIMINARY STATEMENT

Motorola brings this motion because Apple refuses even to attempt to schedule Court-ordered 30(b)(6) testimony unless Motorola agrees to conditions imposed by Apple, none of which are required by the Court's order. Apple's refusal flagrantly disregards this Court's Order entered March 30, 2012, which directed that "Apple shall produce Rule 30(b)(6) witnesses with knowledge regarding the e-mail notification function for iOS 5 and the source code for the webmail functionality of Apple's accused MobileMe product within ten (10) days of the date of this Order or as otherwise agreed by the parties." (D.E. 289 at 1-2.) In addition, after Motorola filed its motion, but before the Court entered its Order, Apple agreed that it would also provide Rule 30(b)(6) testimony on text message notifications (analogous to the email notifications) if the Court compelled 30(b)(6) testimony for email notifications, which the Court so ordered. Thus, there can be no dispute—and Apple does not dispute—that Apple ***must*** provide the testimony that Motorola seeks.

Nonetheless, Apple has stonewalled Motorola. It first refused to provide the testimony until *after* the close of fact discovery currently, May 4.[1] When Motorola made clear that it would seek relief from the Court if Apple did not provide the testimony before May 4, Apple stated it would not even contact its engineers to schedule their testimony unless Motorola agreed that Motorola would not seek any depositions on the same topics in Motorola's other pending action against Apple. Apple's unilaterally imposed condition directly contradicts the Court's Order. Accordingly, Motorola requests that the Court enforce its Order and require Apple to provide the 30(b)(6) testimony that Motorola seeks without conditions.

II. STATEMENT OF FACTS

Motorola's Motion to Compel on E-Mail Notifications and the Source Code for Webmail for MobileMe and the Court's Order Granting that Motion. Motorola filed a motion to compel on March 9, 2012, seeking two sets of 30(b)(6) testimony, which Motorola had noticed but which Apple refused to provide. (D.E. 260) In particular, Motorola sought 30(b)(6) testimony on the email notification function for iOS 5 and the source code for the webmail functionality of Apple's accused MobileMe product. (*Id.*) On March 30, 2012, the Court entered an order granting Motorola's motion, giving Apple ten days to provide testimony on those two issues, unless otherwise agreed to by the parties. (D.E. 289.)

The Parties' Related Dispute over 30(b)(6) Testimony Regarding Text Message Notifications For iOS Devices. After Motorola filed its motion to compel, a discovery dispute arose concerning a third topic of 30(b)(6) testimony, testimony relating to text messaging notifications on Apple's Accused iOS devices with text messaging functionality. Text message notifications relate to the same infringement issues as the email notifications that Motorola

[1] On April 23, 2012, the Court ordered the parties to meet and confer on a new schedule, which presumably would move the discovery cut-off date. (DE 327).

addressed in its motion to compel. (Korhonen Email 4/17/12.)[2] Apple took the position that the question of whether Apple needed to provide a witness on text message notifications would be determined by the Court's ruling on Motorola's motion to compel testimony regarding email notifications. Motorola agreed to that arrangement. (*See Id.*) The Court granted Motorola's motion, and Apple has not disputed that it must provide testimony on both text message and email notifications.

Motorola's Efforts to Schedule the 30(b)(6) Depositions Required By the Court's Order. On March 30, 2012, this Court ordered that Apple provide further deposition testimony within 10 days. (D.E. 289.) Nonetheless, Apple so far has not provided a deposition on the topics of either email notifications or text message notifications. Apple did offer to provide a deposition of Phil Peterson on April 9 relating to the source code for the webmail functionality for MobileMe. (Haskett Email 4/3/12.) On April 4, Counsel for Motorola asked Apple to reschedule the deposition for a time during the weeks of April 16 or April 23 due to a scheduling conflict for Motorola's counsel. (Bonifield Email 4/16/12.) Apple has not provided any further deposition dates relating to the 30(b)(6) topics, however.

On April 16, Motorola emailed Apple noting that Apple had still not made any witness available for email notifications and had not provided an updated date for a deposition on source code for webmail, and requesting that Apple provide those deposition dates. (Bonifield Email 4/16/12.) On April 17, Motorola also emailed Apple affirming that Apple needed to provide a witness on text message notifications since the Court had granted Motorola's motion to compel. (Korhonen Email 4/17/12.) On April 18, having not heard from Apple in response to either the April 16 or April 17 emails, Motorola emailed Apple again requesting that Apple provide

[2] The emails referred herein are attached as Composite Exhibit A.

deposition dates prior to May 4, 2012, which is the current discovery cut off. (Bonifield Email 4/18/12.)

Apple's Refusal to Schedule Deposition Testimony. Apple responded that it would not provide any Court-ordered witness prior to May 4. (Haskett Email 4/18/12.)

Apple contended that it needed to schedule the depositions after May 4 because of "the schedules of the engineers, combined with the level of activity in the Illinois case [currently pending between Apple and Motorola]." (Haskett Email 4/18/12.) In response, Motorola pointed out that Apple's counsel should have time for the depositions—particularly given that Apple was scheduling multiple depositions that it wanted to take—and that it had ample time to schedule the depositions around any conflicts in its engineers' schedules. (Bonifield Email 4/19/12.) Motorola made clear that if Apple did not provide the witnesses immediately, Motorola would seek relief from the Court. (*Id.*)

Apple responded that it would only attempt to schedule its witnesses if Motorola agreed to waive its right to seek depositions on those topics in the second litigation (*Motorola Solutions, Inc. v. Apple, Inc.*, 1:12-cv-20271-RNS) ("Florida II") between the parties before this Court:

> Regardless, we will not provide witnesses for deposition twice on the same subjects. Therefore, if you insist on proceeding now with these depositions, we will not provide witnesses on these topics again, either in Florida I or Florida II. ***Please confirm that you nonetheless wish to proceed with the depositions now, and I will check into whether the engineers are available.***

(Haskett Email 4/20/12 (emphasis added).) Neither Motorola nor Apple have begun to take discovery in this second case, and indeed, four additional parties sued by Apple have not even appeared in the case as of yet.

III. ARGUMENT

A. Apple Must Provide The 30(b)(6) Testimony Motorola Seeks Without Conditions

The Court's Order entered March 30, 2012 directed Apple to provide Rule 30(b)(6) testimony on email notifications for iOS 5 and the source code for webmail for Apple's accused MobileMe product. (D.E. 289.) Apple must follow that order. Moreover, Apple must provide testimony on text message notifications, which it agreed to provide if the Court compelled testimony on email notifications.

Moreover, Apple must provide the 30(b)(6) testimony without conditions. Apple refuses to even check the availability of its witnesses unless Motorola agrees that it will not be able to seek additional testimony on the same subjects in the second litigation between the parties that is also pending before this Court. (Haskett Email 4/20/12 ("Therefore, if you insist on proceeding now with these depositions, we will not provide witnesses on these topics again, either in Florida I or Florida II. Please confirm that you nonetheless wish to proceed with the depositions now, and I will check into whether the engineers are available.").) Apple has no basis for withholding the depositions in order to force concessions out of Motorola. The Court ordered Apple to provide the testimony to Motorola and the Court did not attach any conditions to that Order. Apple must comply with the Court's instruction, and since it refuses to do so, the Court should enforce its Order and require Apple to provide the depositions without conditions in a timely manner.

B. Apple's Excuses For Not Providing Testimony Earlier Are Baseless

Apple has no reason for not providing the depositions in a timely manner. Apple's claim that it cannot because of "the schedules of the engineers" has no merit. (Haskett Email 4/18/12.)

Apple will have had more than a month since March 30 to schedule depositions on just three topics. Motorola is not seeking depositions of specific individuals; Apple may designate whom it chooses, so long as they are adequately prepared to testify. Certainly, Motorola has given Apple far more time than the ten days ordered by the Court. Motorola should not be punished for acting in good faith in not holding Apple to that 10-day deadline. Moreover, Apple apparently had not even checked with its engineers at the time it claimed that their schedules precluded depositions before May 4. After Motorola insisted on depositions before that date, Apple changed it argument. After claiming on April 18 that it was not possible to schedule depositions before May 4, Apple stated on April 20 that, if Motorola would agree to conditions imposed by Apple, Apple would "check into whether the engineers are available." (Haskett Email 4/20/12.) Apple evidently *still* has not checked the availability of its engineers to testify.

Apple's excuse that it does not have time to provide the depositions prior to May 4 because of "the level of activity in the Illinois case" is also not true. Apple suggests that, as a result of the Illinois litigation, Apple's counsel is too busy to handle depositions in the Florida litigation. That is not the case. Apple continues to aggressively pursue scheduling of depositions in this action that Apple wants to take of third-party witnesses. Just in the last week, Apple has scheduled depositions of at least 3 Motorola witnesses for April 26, May 2, and May 4, as well as a third-party deposition Apple intends to take on April 25, and the parties are finalizing deposition dates for multiple other witnesses Apple is seeking. (*See* Hadzimehmedovic Email 4/20/12; Arjun Email 4/19/12; Arjun Email 4/17/12.) Apple's claim that events in the Illinois case prevent it from scheduling depositions in the Florida case is therefore demonstrably false.

In sum, Apple's arguments that it should not have to provide the 30(b)(6) testimony Motorola seeks before May 4 as Motorola requested are all false. But even if Apple did have scheduling conflicts, it has been given more than enough time to schedule the depositions that it was ordered to schedule by the Court. Indeed, the Court's initial 10 day deadline reflects the fact that 10 days should be enough time for Apple to schedule the depositions. Motorola ended up giving Apple far more time—more than a month from the March 30 order to May 4. But Apple never suggested to Motorola at that time that it would not schedule the depositions before May 4, and Motorola never would have agreed to such a proposal. Apple should now be required to schedule the depositions in a timely manner.

Moreover, Apple should be required to schedule the depositions without any condition that Motorola would be waiving its right to take additional depositions on the same topics. The Court's March 30 Order did not impose any such restriction on Motorola. Motorola should not have to bargain away its rights to discovery—particularly for the Florida II case, where discovery has not even begun—in order to schedule depositions that Apple is required to provide under the Court's Order.

IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Motion to Enforce the Court's Order Entered March 30, 2012 be granted in its entirety.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), I hereby certify that counsel for Motorola has conferred with counsel for Apple in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

/s/ Edwrd M. Mullins
Edward M. Mullins (Fla. Bar No. 863920)

Dated: April 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or; in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Edward M. Mullins
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United States District Court, Southern District of Florida

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