

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:10cv023580-Civ-RNS-TEB

MOTOROLA MOBILITY, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

JURY TRIAL DEMANDED

APPLE INC.,

Counterclaim Plaintiff,

v.

MOTOROLA, INC. and
MOTOROLA MOBILITY, INC.,

Counterclaim Defendants.

**APPLE'S RESPONSE TO
MOTOROLA'S MOTION TO ENFORCE ORDER COMPELLING RULE 30(b)(6)
DEPOSITION TESTIMONY FROM APPLE**

I. INTRODUCTION

On March 30, the Court ordered Apple to provide additional 30(b)(6) testimony within ten days or as otherwise agreed by the parties. Apple then offered to provide a witness on a date within the prescribed ten-day period. Motorola, however, rejected that date due to scheduling conflicts and agreed that the witnesses could be provided outside the ten-day period. Subsequently, Motorola separately took the position that claims from its second lawsuit in this Court should be consolidated with the claims at issue in this suit and that the discovery deadlines in this case should be extended accordingly.

On April 23, Judge Scola entered an order allowing Motorola to amend its infringement contentions in this case, effectively allowing Motorola to consolidate its claims from its second suit into this suit. Judge Scola simultaneously ordered the parties to meet and confer, within 20 days of April 23, regarding an amended schedule for this case, taking into account the new products that Motorola would be adding to the case in its amended infringement contentions. Although the Court ordered Motorola to provide its amended infringement contentions “forthwith,” Motorola has yet to provide Apple with those contentions, meaning that Apple is not yet aware of precisely which products Motorola intends to accuse in this suit. Under these circumstances, Apple is unable to provide Motorola with the deposition testimony that it seeks, as Apple does not know which accused products are to be covered by the testimony.

Despite this significant shift in the procedural landscape, Motorola insists that it must receive the compelled deposition testimony by May 4—a date that will be of no significance going forward, and a date by which Apple will have had no opportunity to take into account Motorola’s supplemental infringement contentions in the preparation of the witnesses.

Given the course of events since this Court’s March 30 Order, the reasonable and efficient time for those depositions is after Motorola provides its supplemental infringement contentions and the parties have agreed on an amended case schedule, as ordered by Judge Scola. Apple is not refusing to provide the deposition testimony that Motorola seeks; rather, Apple has been and remains committed to negotiating the timing of those depositions in good faith and on a

schedule that makes sense. Motorola's instant motion is therefore unnecessary and wasteful of the Court's and the parties' resources. The appropriate course here is for Motorola to provide its amended infringement contentions, as ordered by Judge Scola, for the parties to agree on a new case schedule, and for the parties to agree on deposition dates in the context of that schedule.

II. STATEMENT OF FACTS

A. This Court's March 30, 2012 Order

On March 30, 2012, this Court ordered Apple to produce Rule 30(b)(6) witnesses with knowledge of 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. Four days later, on April 3, 2012, Apple offered to schedule deposition testimony on April 9, 2012, on the source code for the webmail functionality of Apple's accused MobileMe product. Declaration of Christine Haskett in support of Apple's Response to Motorola's Motion to Enforce Order Compelling Deposition Testimony ("Haskett Decl."), Ex. 1 (Haskett 4/3/12 email). Motorola rejected Apple's offer, citing a scheduling conflict for one of its attorneys. *See, e.g.*, Motion at 3.

B. The Subsequent Discussions Between the Parties and the Court's April 23, 2012 Order

Subsequent to the Court's March 30 order, Motorola maintained that certain claims from the second lawsuit between these parties in this Court (*Motorola II*) should be consolidated with the claims in this case. In particular, the same six patents asserted by Motorola in this case are also asserted by Motorola in *Motorola II*, albeit against different Apple products. Motorola's position was that these claims, involving the same Motorola patents, should be consolidated into this case, with the effect of bringing the Apple products accused in *Motorola II* into this case. In taking this position, Motorola recognized that the close of fact discovery in this case (currently set for May 4, 2012) would need to be extended, in order to provide sufficient time for discovery on the new products. For example, on April 10, counsel for Motorola proposed adding several of

the parties' claims from *Motorola II* to this case, and moving the close of fact discovery to June 29, 2012. Haskett Decl., Ex. 2 (Searcy 4/10/12 email).

Apple has agreed that consolidation of the two cases makes sense but believes that the consolidation should involve all of the claims in both cases, in order to avoid duplicative discovery and promote judicial efficiency. Accordingly, on April 17, 2012, Apple filed a motion seeking full consolidation of the two cases pending before this Court. *See* D.E. 323.

On April 23, 2012, Judge Scola issued an Order effectively permitting Motorola to add the Apple products accused in *Motorola II* into this case and instructing the parties to agree on a new case schedule. *See* D. E. 327 (vacating Judge Ungaro's Order Striking Motorola's Supplemental Infringement Contentions and directing the parties "to meet-and-confer regarding an appropriate amended procedural schedule for this case, in light of this Order."). As Motorola admits in its Motion, "the Court ordered the parties to meet and confer on a new schedule, which presumably would move the discovery cut-off date." Motion at 2 n.1. Judge Scola also ordered the parties to meet and confer further on the consolidation issue. *See* D.E. 327.

C. The Instant Motion

Despite the significant and ongoing changes to the contours of this case, Motorola has insisted—and continues to insist—that it be provided with the deposition testimony that was the subject of the Court's March 30 order prior to the now-obsolete May 4 discovery deadline. *See, e.g.*, Haskett Decl., Exs. 3-4 (Bonifield 4/16/12 email; Bonifield 4/19/12 email). Apple has resisted Motorola's demands in this regard because the witnesses to be deposed are the same witnesses who are going to be subject to deposition—yet again—in connection with the claims from *Motorola II* that Judge Scola has just allowed to be brought into this case.

Indeed, because deposition testimony will need to be provided on the same types of issues in connection with both the *Motorola I* and *Motorola II* claims, and because Motorola has yet to provide Apple with its new infringement contentions (which Judge Scola ordered Motorola to do over a week ago), Apple does not currently know the precise scope of the witnesses' testimony and is therefore unable to prepare them properly to testify. Apparently,

under Motorola's view, the same witnesses who have already been deposed in this case should be deposed a second time prior to May 4, and then should be subject to deposition a *third* time in connection with the new products that Motorola is about to bring into this case. This is extraordinarily and unnecessarily burdensome for the witnesses. Nonetheless, Motorola has continued its intransigence regarding scheduling the depositions before May 4, even after Judge Scola issued the April 23 order drastically changing the contours of the case, and filed the instant motion one day after that order was entered.

III. ARGUMENT

Motorola's motion presents the classic example of a motion that should not have been brought. Apple has not refused to provide the deposition testimony that Motorola seeks. In fact, far from it: before it became evident that the contours of the case were going to change, Apple offered a date for one of the depositions sought, and Motorola rejected that date. Now that the case has changed, however, it makes sense for the parties to meet and confer regarding dates for the depositions that will make sense in light of the new schedule and the new claims that are being brought into the case.

Indeed, the first step that needs to take place before more depositions are taken is that Motorola must provide the amended infringement contentions that Judge Scola ordered be submitted "forthwith." All of the discovery of Apple's witnesses in this case has been based on Motorola's infringement contentions; Apple has agreed throughout discovery to provide Motorola with Rule 30(b)(6) deposition testimony that is related to Motorola's infringement allegations in this case. *See, e.g.,* Haskett Decl., Ex. 5 (Ho 12/7/11 email). Until Apple receives Motorola's new infringement contentions, therefore, Apple cannot know what the scope of further deposition testimony should be and cannot ensure that its witnesses are adequately prepared to testify. Otherwise, once Motorola serves its amended infringement contentions, it will inevitably request another set of depositions covering the newly accused products. Rather than provide Apple with its new infringement contentions, as ordered, and then engage with Apple regarding an appropriate deposition schedule, Motorola has chosen to waste the Court's

and the parties' time with a motion to compel testimony that Apple is willing to provide on a schedule that makes sense in the context of the case.

Motorola's insistence that it be provided with witnesses for deposition prior to the now-obsolete May 4 discovery cutoff appears to be motivated by a desire to take depositions of the same Apple witnesses, on the same issues, over and over again. Motorola has already taken the depositions of the witnesses that it now seeks, and Apple is planning to provide them for deposition a second time. These engineers are extremely busy, however, and if at all possible, Apple would prefer to avoid providing them for deposition yet a third time in this case. Given that it is foreseeable—in fact, almost a certainty—that these witnesses will need to be deposed in connection with the new products that Motorola is about to add into this case in its amended infringement contentions, the most efficient course would be for Apple to provide the witnesses on all of the products—those currently in the case and those about to be added—at the same time. By insisting that the witnesses be provided prior to the submission of Motorola's amended infringement contentions, however, Motorola appears to be trying to ensure that it will have yet another chance to depose these same witnesses after this round. Motorola's refusal to accept that these witnesses not be re-deposed multiple times is inefficient, extremely burdensome, unfair and highly disruptive to the witnesses, and smacks of gamesmanship. Such a result was not foreseeable nor contemplated at the time of this Court's March 30 order.¹

Apple has demonstrated its continued willingness to negotiate with Motorola in good faith regarding the overall procedural schedule, including an appropriate schedule for the deposition testimony at issue. It remains committed to doing so, and asks the Court not to

¹ Indeed, to guard against the scenario in which the same witnesses would be deposed multiple times, Apple sought an assurance that if the witnesses were to be provided by the now-obsolete May 4 deadline, Motorola would not then seek a second deposition on the same subjects in light of the anticipated revised schedule. Haskett Decl., Ex. 6 (Haskett 4/20/12 email). Rather than respond to that proposal by Apple, Motorola chose instead to occupy the Court's time with a pointless motion that is based on a discovery cutoff that Motorola itself acknowledges no longer applies.

countenance this motion by Motorola, which at best wastes the resources of the parties and the Court, and at worst attempts to use the Court to implement a scheme for the taking of inefficient and duplicative discovery.

IV. CONCLUSION

For the reasons discussed above, the Court should deny Motorola's Motion to Enforce.

Dated: May 1, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2012, I filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service via email.

/s/ Christopher R.J. Pace

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SERVICE LIST
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United States District Court, Southern District of Florida

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