

UNITED STATES DISTRICT COURT
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.

**MOTOROLA'S REPLY IN SUPPORT OF ITS MOTION TO ENFORCE ORDER
COMPELLING RULE 30(b)(6) DEPOSITION TESTIMONY FROM APPLE**

I. PRELIMINARY STATEMENT

Apple cannot and does not dispute the relevant facts at issue here. Motorola has sought Rule 30(b)(6) testimony, pursuant to a Rule 30(b)(6) notice, on issues relating to Motorola's infringement case, and the Court issued an Order on April 30 compelling Apple to provide that testimony within ten days. Apple acknowledges that it must provide the testimony to Motorola. But Apple still refuses to do so—it insists that it should be able to negotiate the dates for the depositions along with the other negotiations between the parties. As such, Apple will not schedule the depositions until some undetermined time in the future that is convenient to Apple. That is not Apple's prerogative; it should provide the depositions now in a timely manner.

None of Apple's excuses justify its continued refusal to provide the Court-ordered testimony to Motorola. Apple contends that it "is unable to provide Motorola with the deposition testimony it seeks" because Motorola had not provided Apple with its supplemental infringement contentions. (Apple Resp. at 1.) That is simply false. Motorola's supplemental contentions, which Apple has now had since May 2, have nothing to do with the depositions Motorola seeks, and which the Court ordered. The Court's Order compels Apple to provide Rule 30(b)(6) testimony on specific issues relating to Motorola's original infringement contentions. Indeed, Motorola filed its motion and the Court issued its Order before the Court had even allowed Motorola to supplement those contentions. The Court's Order compelling Apple to provide the testimony was not contingent on Motorola's supplemental contentions, and Apple did not need those contentions to schedule the Court-ordered depositions.

Nor does it matter that May 4 is no longer the date for the close of fact discovery. Motorola's motion did not ask for the depositions by May 4, despite Apple's repeated claims to the contrary. Motorola requested the depositions in a "timely manner." Apple has no

explanation for why it cannot comply with that request; it simply refuses to provide the witnesses and refuses to even provide a date in the future when it will comply with the Court's Order.

Moreover, Apple completely ignores the other aspect of Motorola's motion, its request that the Court compel Apple to provide the depositions without the conditions that Apple had sought to impose.

Thus, the issue here is straightforward. Apple refuses to comply with a clear Order from the Court. Motorola therefore respectfully requests that the Court step in and require Apple to provide the Court-ordered depositions now in a timely manner and without conditions.

II. ARGUMENT

A. Apple Must Provide The 30(b)(6) Testimony That the Court Ordered In A Timely Manner Without Further Delay

Apple does not dispute that it must provide the Court-ordered testimony. But it insists that it should be able to wait until it can "negotiate" with Motorola on when to provide the depositions as part of "an overall procedural schedule." (Apple Opp. at 5). There is nothing to negotiate, with respect to the depositions ordered by the Court. The Court ordered Apple to provide those depositions within ten days of April 30, which has long since passed. (D.E. 289). Motorola allowed Apple to schedule the depositions after the deadline, but only with the understanding that the depositions would take place in April. (D.E. 331-1 at 5 (Bonifield Email 4/16/12)). Motorola now simply seeks the depositions in a timely manner and without conditions, but Apple still refuses.

Apple should provide the depositions now, consistent with the Court's Order; the parties can negotiate the rest of the schedule separately. Otherwise, Apple clearly intends to use the Court-ordered depositions as a bargaining chip in those negotiations. That would allow Apple to

gain an unfair advantage from its improper refusal to provide the depositions when it was ordered to do so.

B. Apple Has No Justification For Its Continued Refusal To Schedule The Depositions The Court Ordered

Apple offers at least four excuses for not providing the depositions earlier. None of those have any basis, and they certainly do not justify pushing the Court-ordered testimony off even further to an undetermined date in the future. Motorola addresses each of Apple's excuses below:

Motorola's Supplemental Infringement Contentions – Apple's latest excuse for not providing the depositions that the Court ordered is that it had to wait until after Motorola served its supplemental infringement contentions. Apple claims that “the first step that needs to take place before more depositions are taken is that Motorola must provide the amended infringement contentions.” (Apple Opp. at 4.) That is a remarkable demand for Apple to make under the circumstances. The depositions that the Court ordered relate to Motorola's *original* infringement contentions, not its *supplemental* ones. The Court ordered those depositions before Motorola had even been allowed to supplement. Apple argued during the first round of briefing on the depositions that they were not related to Motorola's original infringement contentions. (D.E. 270 at 3-4). The Court rejected that argument and ordered Apple to provide the depositions. (D.E. 289 at 1).

Those depositions can and must take place now. There is no need for Apple to “know what the scope of further deposition testimony” should be on the supplemental contentions, as Apple claims (Apple Opp. at 4), before providing the depositions relating to Motorola's initial set of infringement contentions.

The Schedules of Apple's Engineers – Apple indicates that it is waiting to provide the depositions so that it can designate the same engineers to testify at the same time on multiple topics. Apple states that its “engineers are extremely busy” and that it “would prefer to avoid providing them for a third time.” (Apple Opp. at 5). Apple is correct that there will likely be additional depositions in this case relating to Motorola’s supplemental infringement contentions. But Apple is not required to have the same engineers testify twice more. The Court did not order depositions of particular individuals; it ordered 30(b)(6) depositions on certain topics. If Apple is concerned about having its engineers testify too often, it can designate different engineers for different depositions.

Indeed, Apple—not Motorola—is responsible for the fact that all of the depositions could not have been handled at the same time. If Apple had adequately prepared its witnesses and provided Motorola with the source code it requested, the depositions ordered by the Court would not be necessary. Indeed, if Apple had not insisted on striking Motorola’s supplemental contentions in December and forcing Motorola to file a second litigation, discovery on all of Motorola’s contentions could have gone forward at the same time.

In any case, if Apple designates the same engineers for multiple 30(b)(6) depositions going forward, that is Apple’s choice, and it should not delay discovery for Motorola. The depositions relating to Motorola’s 30(b)(6) witnesses will take place at a time to be determined in the future. Motorola should not have to wait that long to take the depositions that the Court ordered. Apple should provide those depositions now in a timely manner.

Apple’s Earlier Scheduling of a Deposition – Apple relies on the fact that it “offered a date for one of the depositions,” which Motorola sought to reschedule. (Apple Opp. at 4). That does not give Apple a free pass to wait as long as it likes before rescheduling that deposition.

When Motorola gave Apple more than the ten days ordered by the Court to provide the depositions, the understanding was that Apple would provide the depositions in April. (D.E. 331-1 at 5 (Bonifield Email 4/16/12)). Apple never indicated at that time that it would wait until May, much less until a later date. Also, Apple never offered witnesses for the other depositions it is obligated to provide as a result of the Court's Order. The fact that Motorola sought to reschedule one deposition in early April does not allow Apple to now refuse to provide any of the witnesses in May.

The Rescheduling of the May 4 Close of Fact Discovery – Apple contends that Motorola is being “intransigen[t]” in insisting on depositions before May 4 “even after Judge Scola issued the April 23 order” allowing Motorola to supplement its infringement contentions. (Apple Opp. at 4). But Motorola is not seeking depositions before May 4. Apple relies on emails from Motorola prior to the April 23 Order when May 4 was still the close of fact discovery. (Apple Opp. at 3). At that time, Motorola did insist on having the depositions before May 4, because that was the close of discovery. But Motorola adapted its request to the changing schedule in the case. After the Court allowed the supplemental infringement contentions, Motorola made it clear in its motion that it was seeking the depositions “in a timely manner,” not by May 4. (D.E. 333 at 5).

Far from intransigent, Motorola has been very flexible regarding the dates for the Court-Ordered depositions. But more than a month has now passed since the Court's March 30 Order, and Apple still will not even tell Motorola how much more time it thinks should pass before it finally provides the depositions. Motorola is entitled to those depositions now. Waiting will only increase the number of issues that Motorola must handle at depositions later in the discovery process. Motorola should be able to spread out its discovery in an efficient way and

complete the Court-ordered depositions now so it can focus more on discovery relating to its supplemental contentions in later depositions.

C. Apple Offers No Explanation For The Conditions It Improperly Sought To Impose On The Court Ordered Depositions

Motorola's present motion seeks not only to force Apple to schedule the Court-ordered Depositions, it also requests that Apple provide those depositions without conditions. Prior to the filing of Motorola's motion, Apple took the position that it would only schedule the depositions if Motorola agreed to forego possible additional discovery in both the Florida I and Florida II litigations. (D.E. 331-1 at 21 (Haskett Email 4/20/12)). Apple's response brief does not contest this aspect of Motorola's motion. Indeed, Apple has no argument that it should be able to withhold depositions that were ordered by the Court in an effort to extract concessions out of Motorola. Thus, Motorola respectfully requests that the Court make clear that Apple must provide the depositions without conditions.

III. CONCLUSION

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

Dated: May 4, 2012

Respectfully submitted,

/s/Sujey S. Herrera

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 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/ Sujev S. Herrera

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Case No.: 1:10-23580-Civ-UU

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