

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 1:12-cv-20271-RNS**

MOTOROLA MOBILITY, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

JURY TRIAL DEMANDED

Consolidated Cases:

Case No. 1:10-cv-23580-RNS

Case No. 1:12-cv-20271-RNS

APPLE INC.,

Counterclaim Plaintiff,

v.

MOTOROLA MOBILITY, INC.

Counterclaim Defendant.

**APPLE'S MEMORANDUM OF LAW AND MOTION
TO AMEND THE PROCEDURAL SCHEDULE**

A. Deadline for Rebuttal Contentions and *Markman* Briefing

Pursuant to the Court's September 5, 2012 Order Granting Joint Motion To Amend Scheduling Order, D.E. 130, Apple Inc. and Motorola Mobility, Inc. are scheduled to exchange infringement contentions on November 7, 2012 and invalidity contentions on December 5, 2012. The parties believe that additional deadlines should be added to the Court's May 14, 2012 Amended Scheduling Order, D.E. 84, for exchanging additional contentions and for facilitating

claim construction for the new patents asserted in Case No. 1:12-cv-20271.¹ The parties have met and conferred and have agreed on the following additional deadlines:

Case Event	Deadline
Exchange Non-infringement, Validity, & Secondary Consideration Contentions	Jan. 24, 2013
Exchange Proposed Constructions (including extrinsic and intrinsic evidence)	Feb. 12, 2013
File Proposed Joint Claim Constructions	Mar. 2, 2013
Opening <i>Markman</i> Brief	Mar. 5, 2013
Reply <i>Markman</i> Brief	Mar. 26, 2013

Accordingly, Apple respectfully requests that the Court amend its scheduling order to add these additional deadlines. No other deadlines set forth in the Court's May 14, 2012 Amended Scheduling Order would be affected by this change.

Additionally, both Apple and Motorola agree that the procedural schedule should be amended to add a deadline for exchanging claim terms for construction, but the parties have been unable to reach an agreement on such a date. Motorola initially proposed February 12, 2013 as the deadline, but Apple counter-proposed February 4, such that the exchange of terms would precede the exchange of constructions. Inexplicably, Motorola responded by proposing January 11, which is one month earlier than its original proposal and on a date prior to the parties' exchange of rebuttal and secondary considerations contentions. Apple thus requested that Motorola reconsider and accept Apple's proposed February 4 deadline, but the parties were unable to reach agreement as of the time of Apple's motion. Apple thus respectfully requests that the Court further modify the procedural schedule to add February 4 as the deadline for exchanging terms for construction.

¹ Claim construction for the patents asserted in Case No. 1:10-cv-23580 has already occurred.

B. Deadline for Accusing Newly Released Products

In addition to the schedule set forth above, Apple respectfully requests that the Court set the November 7, 2012 infringement contentions deadline as the deadline for accusing newly released products in this case. As indicated in the parties' Joint Motion to Amend the Procedural Schedule, D.E. 129, Apple had proposed to Motorola a framework for limiting the addition of new products. Unfortunately, despite repeated attempts by Apple for an agreement on a possible cutoff date earlier than trial, Motorola refused to agree to any such deadline, maintaining that the parties should be permitted to add new products through the close of fact discovery and even through the beginning of trial. *See* Exhibit 1 (Sept. 17, 2012 E-Mail from R. Vlasits to M. Searcy) (providing Motorola a deadline for a counterproposal for limiting new products); Exhibit 2 (Sept. 5, 2012 Letter from R. Vlasits to M. Searcy) (requesting a meet-and-confer with Motorola concerning a deadline for adding new products); Exhibit 3 (Aug. 31, 2012 E-Mail from J. Schmidt to M. Searcy with attachments) (Apple memorializing that the parties had agreed to extend the contentions deadline in exchange for Motorola's agreement to negotiate a framework for adding new products); Exhibit 4 (Aug. 27, 2012 E-Mail from R. Vlasits to M. Searcy) (concerning unreasonableness of Motorola's position on adding new products); Exhibit 5 (Aug. 21, 2012 E-mail from M. Searcy to M. Davis) (Motorola stating that no deadline is necessary); Exhibit 6 (Aug. 15, 2012 E-Mail from R. Vlasits to M. Searcy) (Apple proposing a deadline for adding new products); Exhibit 7 (Aug. 6, 2012 E-Mail from J. Schmidt to M. Searcy) (Apple proposing language for a stipulation for adding new products); Exhibit 8 (Aug. 2, 2012 E-Mail from J. Schmidt to M. Searcy) (Apple memorializing the parties' discussion of a deadline for adding new products).

1. Motorola's Position Would Severely Disrupt the Proceedings

Motorola's position is unfeasible—both parties need a cutoff early enough in the case so that fact discovery, expert discovery, and pre-trial preparations can proceed in an orderly fashion. First, expanding the case by allowing Motorola to add new products through the trial would severely disrupt fact discovery. The addition of a new product to this case requires, at a minimum:

- preparation of supplemental infringement and rebuttal contentions;
- collection, review, and production of documents concerning the new product;
- identification, review, and production of source code concerning the product;
- identification and deposition of technical witnesses concerning the product (which can require deposing people who have already been deposed at least once);
- supplementation of technical expert reports, along with re-deposition of such experts on the subject matter of such supplementation; and
- revisions to damages reports and associated re-deposition of related experts.

None of these exercises is trivial. The ongoing litigation between Apple and Motorola has already involved the collection, review, and production of millions—if not tens of millions—of pages of documents. The document collection and production exercise is highly burdensome on Apple and its employees, and restarting the exercise for each new product added requires countless hours of work by numerous employees.

Having no limit on adding new products would also likely require re-deposing numerous witnesses and identifying and deposing new witnesses with knowledge of the new products. To date, the parties have taken well over 100 depositions across their various litigations; Motorola's position would further compound this discovery. Having no deadline for adding new products

would also likely involve further motion practice, as the parties would no doubt seek judicial relief over supplemental discovery disputes. In short, the discovery process would begin anew with each new product added, requiring countless new document collections and productions, new document reviews, and new depositions, as well as supplemental responses to interrogatories and document requests. The discovery process is highly disruptive to Apple's business, is enormously expensive, and must be limited in some fashion to avoid continual disruption.

Motorola's proposal would also spawn endless supplementation of expert reports and repeated deposing of experts to address their new opinions. To end this process, Judge Richard Posner recently stated in another litigation between Apple and Motorola that "[t]he parties have not shown that such supplementation is necessary (or that it could be done in such a way as to avoid spawning further supplementation requests—a supplementation death spiral). . . ." *Apple v. Motorola*, No. 1:11-cv-08540, Slip Op. at 1 (N.D. Ill. Apr. 16, 2012), attached as Exhibit 9 (denying motions for leave to supplement expert reports). Absent intervention by Judge Posner, as here, this "death spiral" would inevitably lead to further disagreements and motion practice about whether a party may supplement and whether such supplementation was limited to new products or inappropriately revisited earlier opinions on existing products.

Finally, unfettered supplementation would also disrupt pretrial preparation and would likely result in distracting supplemental fact and expert discovery at a time when the parties need to be focusing on trial preparation. Indeed, many of the pretrial submissions would undoubtedly need to be supplemented. Similarly, there is an increased chance of last-minute pretrial motion practice regarding the new products because, for example, new grounds for motions *in limine*

may arise, and the parties may need to seek judicial relief regarding which new issues may be tried. Finally, permitting a limitless addition of new products could potentially result in a party asserting new claims, which not only would involve all of the further supplementation and disruption outlined above, but would also require new invalidity contentions and *Markman* proceedings, compounding the proceedings even further.

2. *District Courts Have Rejected Motorola's Position*

For all of these reasons—and in particular for judicial economy—courts have rejected supplementation of infringement contentions for new products. For example, in *Avocent Redmond Corp. v. Rose Electronics*, the district court denied the plaintiff's motion to add new products that the defendant had released during a four-year stay of the proceedings and granted the defendant's motion to strike related contentions from the plaintiff's expert report, even though the close of discovery was still over a month away. 2012 U.S. Dist. LEXIS 102386 at *1, *7 (W.D. Was. July 6, 2012). The court found unreasonable delay in the plaintiff's motion but also reasoned:

Because plaintiff could file a separate action asserting the new infringement contentions, the Court has also considered issues of judicial efficiency and economy under Fed. R. Civ. P. 1. This action has been pending for six years, and ***the expansion of the case to cover more products than can possibly be tried efficiently is counterproductive. . . . There is . . . no need to multiply and disrupt these proceedings at the very end of discovery simply to avoid the possibility of a new lawsuit.***

Id. at *10 (emphasis added). Equally applicable here, “[a] party alleging patent infringement has a relatively short time in which to set forth infringement contentions: the short deadline is designed ‘to streamline the pre-trial and claim construction process, and generally to reduce the cost of patent litigation.’” *Id.* at *5; *see also Lake Cherokee Hard Drive Techs., LLC v. Bass*

Computers, Inc., 2012 U.S. Dist. LEXIS 91364 at *10 (E.D. Tex. June 29, 2012) (allowing plaintiff to supplement contentions for additional products but ordering that infringement contentions could not be supplemented thereafter even though the trial was over a year away); *Eon Corp. IP Holdings, LLC v. T-Mobile USA, Inc.*, 2012 U.S. Dist. LEXIS 92450 at *22 (E.D. Tex. Jan. 24, 2012) (ordering plaintiff to remove references to new products in amended infringement contentions that were not previously identified in infringement contentions).

3. *Motorola Offers No Credible Reason for Its Position*

While Apple agrees that the parties should be permitted to accuse new products released after the parties filed their respective complaints, Apple respectfully submits that such supplemental contentions must have a reasonable boundary to ensure that this case proceeds as efficiently as possible. In this regard, though Apple attempted repeatedly to encourage Motorola to make a counterproposal on the deadline for adding new products, Motorola declined, stating that adding a deadline for accusing new products would lead to an undesirable “multiplicity of suits” between Apple and Motorola. *See* Exhibit 5. Not only has this position been recently rejected by the district court in *Avocent Redmond*, but just four days prior to providing that position, Motorola’s attorneys filed two additional lawsuits against Apple in the District of Delaware and at the U.S. International Trade Commission, alleging infringement of seven additional Motorola patents and further expanding the vast and prolonged litigation between Apple and Motorola.^{2,3} *See* Exhibits 10-11 (Motorola’s August 17, 2012 Complaint in the U.S.

² In addition to the instant case, Motorola and Apple have other litigations pending before the Federal Circuit, the ITC, and the Western District of Wisconsin, as well as in Germany.

District of Delaware; Motorola's August 17, 2012 Complaint in the U.S.I.T.C.). Thus, Motorola's refusal to cooperate with Apple in setting a deadline for adding new products based on the desire to limit the litigation between the parties is unfounded.

Motorola has provided no other reason for refusing to set a deadline, other than stating that both parties are scheduled to release products this fall. *See* Exhibit 5. In this regard, Apple's requested November 7, 2012 deadline is after Apple's release of its latest generation iPhone, iPod, and iOS products; Motorola's concern about adding these products to the case is therefore moot. Apple thus respectfully requests that the Court set November 7, 2012 as the deadline for accusing new products in this case.

C. Rule 7.1(a)(3) Certification

Counsel for Apple has conferred with counsel for Motorola in a good faith effort to resolve the issues raised in this motion. Apple and Motorola have reached agreement for adding various dates to the procedural schedule, as set forth in the table in Section A of this motion. But Apple and Motorola were unable to reach agreement concerning a deadline for exchanging terms for construction and for adding new products to this case.

³ On October 1, 2012, Motorola filed an unopposed motion to terminate the new ITC investigation, dismissing all claims against Apple.

Dated: October 11, 2012

Respectfully submitted,

/s/ Christopher R. J. Pace
Christopher R. J. Pace
christopher.pace@weil.com
Weil, Gotshal & Manges LLP
1395 Brickell Avenue, Suite 1200
Miami, Florida 33131
Tel: (305) 577-3100 / Fax: (305) 374-7159

Of Counsel:
Mark G. Davis
mark.davis@weil.com
Weil, Gotshal & Manges LLP
1300 Eye Street, N.W., Suite 900
Washington, DC 20005
(202) 682-7000

Anne M. Cappella
anne.cappella@weil.com
Weil, Gotshal & Manges LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Kenneth H. Bridges
kbridges@bridgesmav.com
Michael T. Pieja
mpieja@bridgesmav.com
3000 El Camino Real, 2nd Floor
Palo Alto, CA 94306
(650) 804-7800

Matthew D. Powers
Matthew.Powers@tensegritylawgroup.com
Steven Cherensky
Steven.Cherensky@tensegritylawgroup.com
Tensegrity Law Group LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-6000

Attorneys for Apple Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Service List via transmission of Notices of Electronic Filing.

/s/ Christopher R. J. Pace

Christopher R. J. Pace (Fla. Bar No. 0721166)

SERVICE LIST
Motorola Mobility, Inc. versus Apple Inc.
Consolidated Case Nos. 1:12cv020271-Civ-RNS & 1:10cv235800Civ-RNS
United States District Court, Southern District of Florida

Edward M. Mullins
Fla. Bar No. 863920
emullins@astidavis.com
ASTIGARRAGA DAVIS MULLINS & GROSSMAN, P.A.
701 Brickell Avenue, 16th Floor
Miami, FL 33131
Telephone: (305) 372-8282
Facsimile: (305) 372-8202

Of Counsel:
Charles K. Verhoeven
David A. Perlson
QUINN EMANUEL URQUHART & SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, CA 93111
(415) 875-6600

Raymond N. Nimrod
Edward J. DeFranco
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

David A. Nelson
QUINN EMANUEL URQUHART & SULLIVAN, LLP
500 West Madison Street, Suite 2450
Chicago, IL 60661
(312) 705-7400
Moto-Apple-SDFL@quinnemanuel.com

Attorneys for Motorola Mobility, Inc.
Electronically served via CM/ECF and next day Hand-Delivery