

**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 REPLY IN SUPPORT OF ITS MOTION  
TO AMEND THE PROCEDURAL SCHEDULE**

**A. Deadline for Accusing Newly Released Products**

As set forth in Apple’s motion, an early deadline for accusing new products is critical to avoid the procedural uncertainties and unnecessary discovery complications that would arise late in the case were the parties permitted to add new products up through the 2014 trial. Both Apple and Motorola stand to benefit from having a clear deadline because Motorola introduces substantially more products at a more frequent pace than does Apple. For example, Apple typically releases only one smartphone per year, with only three versions currently on sale. *See*

Exhibit 1 ([http://store.apple.com/us/browse/home/shop\\_iphone/family/iphone](http://store.apple.com/us/browse/home/shop_iphone/family/iphone), Apple Store website showing three models for sale). In contrast, Motorola currently offers twenty-two models for sale. See Exhibit 2 ([http://www.motorola.com/us/consumers/Smartphones/smartphones.en\\_US.sc.html](http://www.motorola.com/us/consumers/Smartphones/smartphones.en_US.sc.html), Motorola website). The volume of products at issue is already substantial, and the infringement issues are complex; thus, the jury will already have a significant number of infringement allegations to decide. Increasing these issues by allowing the parties to continually add new products without limit will complicate the jury's role even further. As the district court recently noted in *Avocent*, a boundary should be set for adding new products not only to conserve the parties' resources but for judicial economy as well. *Avocent Redmond Corp. v. Rose Electronics*, 2012 U.S. Dist. LEXIS 102386 at \*10 (W.D. Was. July 6, 2012).

Motorola complains that Apple's requested cutoff for adding new products to the case is arbitrary and too early, but not once during the parties months of negotiations did Motorola make a counterproposal with a different deadline for adding new products, stating instead that no deadline was necessary at all. Motorola cannot dispute, however, that adding new products at the end of discovery or thereafter could be severely disruptive as set forth in Apple's motion. Motorola surmises that any new products "likely will be very similar to or identical to a previously accused product with respect to the functionality at issue for a particular patent-in-suit." Motorola's Response at 12. But neither party can present their infringement theories based on a hunch or suspicion and would no doubt request substantial additional documents, witnesses, and expert discovery at a time when the parties should be focusing on other matters.

Motorola also suggests that it was confused by Apple's motion because Motorola was expecting Apple to provide Motorola with a new proposal for limiting new products. See

Motorola's Response at 8 n.1. Motorola's confusion is misplaced. As Apple stated in its motion, Apple pushed Motorola for its position on multiple telephonic meet-and-confers, and in multiple exchanges of correspondence.<sup>1</sup> Indeed, Apple first proposed a deadline in August and met and conferred with Motorola in good faith for over a month. But Motorola would neither agree to Apple's proposal nor provide any counterproposal, instead stating: "Our position is simply that there is no need to set a firm date for parties to accuse products released before trial in this matter at this time. . . . Nor is there any reason to restrict appropriate and reasonable supplementation of infringement contentions after the parties' exchange initial contentions and before the beginning of trial in April 2014." Exhibit 3 (Aug. 21 E-Mail from M. Searcy to M. Davis). Motorola stated repeatedly in response to Apple's proposals that the parties should be permitted to add new products through trial; Motorola cannot now claim confusion over the timing of Apple's motion or whether Apple would be making further proposals for a potential deadline for adding new products.<sup>2</sup> Indeed, the parties were not progressing in their negotiations;

---

<sup>1</sup> Motorola incorrectly summarizes the negotiations between the parties when it states that Apple's request for a specific cutoff date is a "recent development" that came "[o]nly recently, when Apple decided to release new products this fall that it would like to insulate from this case. . . ." Motorola's Response at 13, n.2. In fact, Apple first proposed a specific cutoff date *over two months ago* on August 15, and Apple's proposed cutoff date was after the scheduled release of the iPhone 5, iOS 6, and the new iPod. See Exhibit 4 (Aug. 15, 2012 E-Mail from R. Vlasis to M. Searcy). In its motion, Apple pushed out the proposed cutoff date by a month based on Motorola's delay in providing Apple with a counterproposal. The new date that Apple has proposed, November 7, is likewise after the rumored release date of the new product identified in Motorola's response to Apple's motion.

<sup>2</sup> Apple waited nearly a month to file its motion after the parties reached an impasse on this issue because the parties were also negotiating a schedule for *Markman* briefing; Apple did not wish to

Apple thus needed to seek guidance from the Court and informed Motorola of Apple's intention to do so. Exhibit 5 (Sept. 17, 2012 E-Mail from R. Vlasis to M. Searcy, stating that "Apple intends to seek relief from Judge Scola on this issue").

Motorola next states that Apple's motion should be denied because Apple is scheduled to release new products this Fall, citing an October 23 release date reported by the *New York Times*. Apple's proposed deadline of November 7 is obviously after the rumored release date of the new Apple products; Motorola's concern is thus moot. Moreover, Apple was willing to negotiate a mutual deadline for adding new products to the case to accommodate Motorola's concerns, but Motorola refused to provide any counterproposal.

Motorola relies on *WebXchange* for its contention that "district courts regularly permit parties to accuse new products of infringement after initial infringement contentions are exchanged." Motorola's Response at 9. But in *WebXchange*, the court did not permit supplemental infringement contentions for new products. Instead, a dispute arose over whether the plaintiff's infringement contentions contained references to a certain class of products, and if not, whether those products could be accused. *WebXchange, Inc. v. FedEx Corp.*, 2010 U.S. Dist. LEXIS 4528 at \*2-\*3, \*6-\*7 (D. Del. Jan. 20, 2010). The court did not resolve the issue as to whether the class of products were initially accused, stating instead that there was "minimal prejudice and surprise . . . . The parties have discussed the issue extensively which eliminates any unfounded surprise." *Id.* at \*6-\*7. *WebXchange* is thus inapposite.

Motorola's reliance on *Atmel* is likewise misplaced. There, the defendant did not

---

bother the Court with two motions and had hoped to reach agreement with Motorola on at least some of the contested dates.

disclose products under development, believing that there could be no liability under the patent laws. *Atmel Corp. v. Authentec, Inc.*, 2008 WL 276392 at \*3 (N.D. Cal. Jan. 31, 2008). After a witness testified that samples of the product had already been developed, the judge allowed the plaintiff to amend its infringement contentions. *Id.* at \*3. But the defendant did not assert a defense that adding the additional products would cause the type of discovery problems that Apple has asserted, and in fact, the defendant represented that it had already provided full discovery on the new products at issue. *Id.* *Atmel* does not, therefore, support Motorola's position. Similarly, in *Network Appliance*, the court concluded without analysis that the defendant would suffer no prejudice by allowing the plaintiff to accuse new products; there is otherwise no indication that the addition of new products would disrupt the proceedings. *Network Appliance Inc. v. Sun Microsystems Inc.*, 2009 WL 2761924 (N.D. Cal. 2009). The same is true in *TiVo*, where extensive discovery of the new product had already taken place for a year leading up to the plaintiff's motion. *TiVo, Inc. v. Verizon Communications, Inc.* 2012 WL 2036313 at \*2 (E.D. Tex. June 6, 2012).

Finally, Motorola's concern that the parties would have to file new lawsuits against future products is an issue that exists in every litigation, absent some global settlement. Indeed, after resolution of this case, both parties would still be forced to file additional lawsuits to resolve infringement of newly released products.

## **B. Deadline for Claim Construction**

Motorola requests that the Court deny the portion of Apple's motion addressing the proposed claim construction schedule for allegedly being premature and for providing an inadequate amount of time to negotiate claim terms. Neither position has any merit.

First, Motorola fails to mention that the parties had been negotiating the schedule for over a month, but Motorola refused to respond to Apple for weeks at a time. *See* Exhibit 6, (Sept. 14 E-Mail from M. Searcy to R. Vlasis, memorializing that the parties began negotiations on Monday, September 10). Indeed, after Apple made its counterproposal on September 24, Motorola waited over two weeks to respond and only after Apple sent three follow-up emails on October 1, October 5, and October 8, requesting some form of a response from Motorola. *See* Exhibit 7 (Sept. 24 E-Mail from R. Vlasis to M. Searcy, providing counterproposal); Exhibit 8 (Oct. 1 E-Mail from R. Vlasis to M. Searcy, requesting a response from Motorola); Exhibit 9 (Oct. 5 E-Mail from R. Vlasis to M. Searcy, requesting again a response from Motorola); Exhibit 10 (Oct. 8 E-Mail from R. Vlasis to M. Searcy, stating that because Motorola had been silent on the issue for over 3 weeks, Apple would assume that Motorola was no longer willing to reach agreement); Exhibit 11 (Oct. 9 E-Mail from R. Davis to R. Vlasis, finally providing a response).

When Motorola finally did respond, Motorola surprised Apple by requesting an additional month to exchange claim terms, without explanation. *See* Exhibit 11 (Oct. 9 E-Mail from R. Davis to R. Vlasis, finally providing a response). Apple requested that Motorola reconsider its position, but Motorola vaguely stated only that it would respond when it was “able.”<sup>3</sup> *See* Exhibit 12 (Oct. 11 E-Mail from R. Vlasis to R. Davis); *See* Exhibit 13 (Oct. 11 E-Mail from R. Davis to R. Vlasis). Motorola’s continuous stalling of the parties’ negotiations left Apple with no choice but to seek relief from the Court; indeed, the 30-day deadline for Apple to

---

<sup>3</sup> In spite of Motorola’s allegation that “Apple insisted that Motorola indicate its consent to Apple’s proposal in less than 12 hours,” Motorola had over two weeks to consider Apple’s proposal. *See* Motorola’s Response at 5.

file a motion for a cutoff date for adding new products was quickly approaching, and Apple did not wish to bother the Court with two separate motions to amend the procedural schedule. And even after Apple filed its motion, Motorola sent Apple a letter on October 16 continuing to insist upon January 11 as the date for exchanging claim terms. *See* Exhibit 14 (Oct. 16 Letter from G. Bonifield to R. Vlasis). Motorola thus continued (and still continues) to take the same position it took before Apple filed its motion in spite of Apple's request that Motorola reconsider; there can thus be no dispute that the parties indeed reached an impasse on this issue.

Motorola's purported concerns about the merits of the schedule are equally baseless. Indeed, Motorola forgets that it never once raised any concern that Apple's schedule was inadequate; to the contrary, Apple's schedule provided the parties with *more* time than what Motorola had initially proposed. Specifically, Motorola initially proposed a February 12 deadline for the term exchange, which was a month later than the position Motorola takes now. *See* Exhibit 6, (Sept. 14 E-Mail from M. Searcy to R. Vlasis, proposing February 12 for the claim term exchange). It was not until Apple filed its motion that Motorola stated that the parties needed additional time to prepare their briefs and to reduce the number of terms. *See* Exhibit 14 (Oct. 16 Letter from G. Bonifield to R. Vlasis). Motorola could have raised these concerns during the parties' discussions, but Motorola chose not to do so.

Motorola's newly proposed January 11 deadline is unnecessarily early in the case, and the parties should not be burdened with identifying terms for construction before they have completed exchanging their contentions. In any event, Motorola is represented by experienced and sophisticated counsel; Apple has full confidence that its proposed schedule will provide the parties with ample time to prepare their briefs and narrow the claim terms. Apple therefore

respectfully requests that its motion to amend the procedural schedule be granted.

Dated: October 22, 2012

Respectfully submitted,

/s/ Christopher R. J. Pace  
Christopher R. J. Pace  
[christopher.pace@weil.com](mailto: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](mailto: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](mailto: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](mailto:kbridges@bridgesmav.com)  
Michael T. Pieja  
[mpieja@bridgesmav.com](mailto:mpieja@bridgesmav.com)  
3000 El Camino Real, 2<sup>nd</sup> Floor  
Palo Alto, CA 94306  
(650) 804-7800

Matthew D. Powers  
[Matthew.Powers@tensegritylawgroup.com](mailto:Matthew.Powers@tensegritylawgroup.com)  
Steven Cheren sky  
[Steven.Cheren sky@tensegritylawgroup.com](mailto:Steven.Cheren sky@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 22, 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](mailto: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](mailto:Moto-Apple-SDFL@quinnemanuel.com)

*Attorneys for Motorola Mobility, Inc.*  
Electronically served via CM/ECF