

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO: 1:10-CIV-24063-MORENO

MOTOROLA MOBILITY, INC.,)
)
)
 Plaintiff,)
)
 vs.)
)
 MICROSOFT CORPORATION,)
)
 Defendant.)

MICROSOFT CORPORATION'S MOTION FOR A SPECIALLY SET TRIAL DATE

INTRODUCTION

Defendant Microsoft Corporation (“Microsoft”) respectfully requests that this Court set a special trial date in this action. (*See* FCPC Judicial Survey, Honorable Frederico A. Moreno, U.S. District Court Judge) (attached as Exhibit A, p. 6.) This is a large and complex patent infringement case that involves 14 separate patents and more than 30 accused products. Due to the multitude of claims and products, 106 potential fact witnesses and more than 20 expert witnesses may be called to testify at trial in this action. Because of the length and complexity of the trial, as well as the inherent difficulties in coordinating the schedules of numerous out-of-state witnesses, Microsoft respectfully requests that the Court enter a specially set trial date. Granting this request will serve many purposes, including easing the administrative burden for the Court, the parties, and the witnesses. It will also ensure that the parties are able to present testimony and evidence to the jury in an orderly and logical fashion that avoids gaps or delays in testimony that may arise due to the unavailability of witnesses.

FACTUAL BACKGROUND

Motorola Mobility, Inc. (“Motorola”) filed its complaint in this action on November 10, 2010. D.E. 1. The complaint alleges that Microsoft has infringed seven of Motorola’s patents.¹ *Id.* at ¶¶ 1, 14-62. Motorola contends that almost a dozen of Microsoft’s products, including Windows Phone 7 with Silverlight, Windows Live Messenger 2011, Exchange Server 2010 with Unified Messaging, and Bing Maps and Bing Local for cellular smartphones infringe Motorola’s patents. On December 23, 2010, Microsoft answered Motorola’s complaint and filed a

¹ Motorola has accused Microsoft of infringing U.S. Patent Nos. 5,502,839 (“the ‘839 patent”), 5,764,899 (“the ‘899 patent”), 5,784,001 (“the ‘001 patent”), 6,272,333 (“the ‘333 patent”), 6,408,176 (“the ‘176 patent”), 6,757,544 (“the ‘544 patent”) and 6,983,370 (“the ‘370 patent”). D.E. 1 at ¶¶ 7-13.

counterclaim alleging that Motorola infringed seven of Microsoft's patents.² Microsoft's counterclaim contended that certain Motorola Android devices and digital video recorders ("DVRs") infringe those patents. Counterclaim, at ¶¶ 15-53 (D.E. 21).

On January 21, 2011, this Court *sua sponte* entered an Order Continuing Trial and Certain Pretrial Dates (D.E. 36), which set the trial in this action for a two-week period commencing on October 24, 2011 (the "two-week period"). The order also directed counsel to appear at a calendar call on October 18, 2011. Microsoft understands that, at this time, trial in this action is not definitively scheduled to begin on October 24, 2011. Rather, this Court will determine at the October 18 calendar call when the trial may begin during this two-week period. It is Microsoft's understanding that trials in pending criminal cases and other matters may be scheduled within the two-week period as well, and the ultimate scheduling of this trial will depend upon the number of other trials that may be set for the same two-week period and the progress and length of those trials.

During the course of discovery, Microsoft and Motorola identified 106 potential individual fact witnesses and retained 22 experts. *See* Rule 26(a)(1) Second Amended and Updated Disclosures of Microsoft Corporation, pp. 3-13 (attached hereto as Exhibit B) ("Microsoft's Second Amended Rule 26(a) Disclosures"); Motorola Mobility, Inc.'s Second Amended and Updated Rule 26(a)(1) Disclosures, pp. 2-10 (attached hereto as Exhibit C) ("Motorola's Second Amended Rule 26(a) Disclosures"). Thus, a total of 128 witnesses may

² Microsoft alleged that Motorola violated U.S. Patent Nos. 6,791,536 ("the '536 Patent"), 6,897,853 ("the '853 Patent"), 7,024,214 ("the '214 Patent"), 7,493,130 ("the '130 Patent"), 7,383,460 ("the '460 Patent"), 6,897,904 ("the '904 Patent"), and 6,785,901 ("the '901 Patent"). Counterclaim at ¶¶ 8-14 (collectively, "the Microsoft Patents").

testify at trial. Only fourteen of these individuals, at most, reside in Florida.³ The remaining 114 witnesses reside in Washington, Illinois, or in other locations across the United States and Canada.⁴ Without knowledge of a date certain on which the trial will begin, coordinating the order and presentation of testimony from these numerous witnesses in a logical manner, while also avoiding unnecessary gaps and delays in testimony, would be a nearly impossible task in this case.

ARGUMENT

This Court has indicated that a party may request a specially set trial date in writing to the Court. (*See* Exhibit A, p. 6.) As set forth below, the circumstances presented by this case make it an appropriate candidate for a specially-set trial date.

A. The Parties Have Identified More Than 120 Witnesses, the Substantial Majority of Whom Need to Travel from Numerous Locations Across the Country to Testify at Trial.

This is an extremely large case that could require testimony from as many as 106 individual fact witnesses and 22 experts. All but 14 of these witnesses – a total of 114 people – reside outside of Florida and will have to travel from all across the country and Canada to trial. Specifically, of the 92 individual fact witnesses who live out of state, 39 reside in the State of Washington, which is Microsoft’s headquarters and principal place of business,⁵ and 27 reside in

³ It is presently unclear whether two of Motorola’s witnesses, Senaka Balasuriya and Daniel Crilly, reside in Florida. The number of Florida witnesses referenced above includes these two individuals.

⁴ Although the parties may identify fewer witnesses closer to trial, the total number will remain very large and the vast majority of them will still need to travel long distances to attend trial.

⁵ Indeed, given this action’s strong connection to Washington, on May 19, 2011, Microsoft filed a motion to transfer this action to the Western District of Washington. D.E. 62 at 9-13, Ex. 1; D.E. 89 at 6-7. The motion to transfer was fully briefed as of June 14, 2011 and is currently pending.

Illinois, Motorola's principal place of business. The remaining 26 fact witnesses reside in Arizona (four witnesses), California (seven witnesses), Pennsylvania (five witnesses), Texas (three witnesses), Missouri, Massachusetts, Virginia, Washington, D.C., and Ontario, Canada (three witnesses).⁶ Moreover, because Microsoft's main research and development facilities are located in Redmond, Washington, nearly all of Microsoft's employees, in-house counsel and client representatives (totaling more than 35 in number) will need to travel from Washington to trial.⁷

In addition, the parties retained a total of 22 testifying experts (eleven per side). All of the parties' experts reside out of state and will be required to travel from numerous locations across the country to testify. Four of Microsoft's eleven experts will need to travel from California. Microsoft's remaining experts will be traveling from Colorado, Indiana, New York, Ohio, and Minnesota. Six of Motorola's experts reside in California. The rest of them live in Georgia, Massachusetts, Maryland, Connecticut, and Virginia. The witnesses will require, if not a definitive date upon which they will be called to testify, a close approximation of this date to avoid unnecessary travel and extended periods of time away from work and other obligations. *Cf. Broder v. Stroup & Martin, P.A. et al.*, No. 08-61641-CIV-MORENO (S.D. Fla.) (Moreno, J.) (D.E. 85; order dated July 22, 2009) (specially setting trial in class action lawsuit brought under Fair Labor Standards Act involving eleven live witnesses) (Group Exhibit D); *Abbott Laboratories v. Andrx Corp. et al.*, No. 03-60867-CIV-HIGHSMITH (S.D. Fla.) (D.E. 53, 61; order dated July 1, 2005) (Highsmith, J.) (granting joint motion for specially set trial in patent

⁶ Twenty-two of the fact witnesses identified by Motorola are non-parties, including former employees. (*See* Exhibit C). Microsoft has identified twelve non-party witnesses, all of whom live in Washington or elsewhere on the west coast. (*See* Exhibit B).

⁷ In addition, Microsoft's lead counsel is Sidley Austin LLP. Counsel of record from Sidley Austin are located in Chicago, Dallas, Los Angeles, and Washington, D.C.

infringement action involving seven out-of-town testifying witnesses as well as other counsel and client representatives; parties argued that the need for witnesses to travel and make special work arrangements should require a set trial date) (Group Exhibit D).⁸

B. Setting a Firm Trial Date Would Expedite the Completion of Trial and Alleviate Logistical Burdens for Jurors.

In addition, entering a specially set trial date would greatly expedite the completion of trial and alleviate logistical burdens for jurors. In light of the large number of witnesses and complexity of the issues, Microsoft reasonably anticipates the trial will last from two to four weeks.⁹ As noted above, Microsoft understands that the ultimate scheduling of this trial will depend upon the number of other trials that may be set for the same two-week period and the progress and length of those trials. If other trials scheduled within the period do not progress as anticipated, the start of the trial in this case would need to be delayed. Moreover, coordinating the testimony from more than 100 potential witnesses will be challenging, and there is a risk that if a witness is unable to travel to Florida on shorter notice, a party may not be in a position to present evidence in an orderly and logical fashion. This would create needless delays in the completion of the trial as well as undue confusion for the jury. By filing this motion, Microsoft

⁸ See also *Chow et al. v. Chau et al.*, No. 09-CV-21893-WMH (S.D. Fla.) (D.E. 241; order dated Mar. 30, 2011) (Hoeveler, J.) (setting special trial date in trademark infringement case involving dispute over name of restaurant) (minute order) (Group Exh. D); *Bonner v. Am. Offshore Marine, Inc.*, No. 08-CV-61486-AMS (S.D. Fla.) (D.E. 37) (Simonton, J.) (setting special trial date in employment discrimination case) (minute order) (Group Exh. D); *Commercial Jet, Inc. v. Wren Equip. Fin. Ltd.*, No. 05-20265-CIV-MARTINEZ-BANDSTRA (S.D. Fla.) (D.E. 63, 64; order dated Nov. 2, 2006) (Martinez, J.) (granting joint motion for special setting after parties appeared at the calendar call and were advised that the trial would need to be postponed in light of a previously-scheduled criminal trial) (Group Exh. D).

⁹ This is a conservative estimate, given that two weeks of trial would leave less than one day of testimony for each of the patents-in-suit. Thus, it is highly likely that the trial will last closer to four weeks than two weeks.

hopes to facilitate a special setting that enables this Court to reserve sufficient time on its calendar for this trial before trials in other cases are scheduled.

Furthermore, given the length of the trial, a large prospective jury pool will be necessary. Jurors will require a reasonable amount of advance notice of the trial's start date to make the requisite arrangements to be absent from work throughout the duration of the trial and deliberations. Setting a special date would facilitate an orderly jury selection process and help alleviate any logistical burdens associated with serving on a jury during a lengthy trial.

C. Coordinating the Presentation of Evidence and Testimony in this Action Presents Numerous Logistical Challenges that Warrant a Special Setting.

Coordinating the presentation of testimony for a large number of witnesses, the vast majority of whom have to travel long distances, presents numerous logistical challenges. In trying this case in the Southern District of Florida, Microsoft will be required to, *inter alia*, (a) make suitable arrangements for storing and accessing voluminous discovery materials, (b) arrange for the travel and lodging of numerous witnesses and members of the legal trial teams, and (c) reserve suitable conference rooms and work space. Satisfying these logistical needs will require significant coordination and expense and would be made substantially less burdensome if this Court sets a firm trial date that permits Microsoft to plan accordingly. Having a specially-set trial date would prevent Microsoft from incurring the unnecessary significant expense that would result if, after all of the witnesses, counsel and other client representatives traveled to Miami, the trial needed to be postponed because another action scheduled within the two-week period has not yet been completed.

In short, this is a paradigm case for utilization of the procedure that permits the setting of a firm trial date. A special setting will enable the trial to be completed as expeditiously as possible while at the same time preventing the creation of any undue imposition on the jurors,

testifying witnesses, or other trial participants. In the interest of judicial efficiency and economy, Microsoft respectfully requests this Court to grant its motion for a specially set date.

CONCLUSION

Accordingly, for all of the foregoing reasons, Microsoft respectfully requests that this Court enter an order setting forth a date certain upon which trial in this action is to begin. A proposed order is attached to this motion as Exhibit E.

CERTIFICATE OF GOOD FAITH COMPLIANCE

Pursuant to S.D. Fla. L.R. 7.1(a)(3), the undersigned counsel certifies that prior to the filing of the instant motion, the parties met and conferred in good faith regarding this motion. Motorola advised that it does not wish to join in this motion.

Dated: August 10, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August 2011, I caused the foregoing document to be served and filed by CM/ECF on all counsel of record, and caused it to be served by hand as well on the counsel identified on the below Service List.

s/ Curtis B. Miner
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Motorola Mobility, Inc. v. Microsoft Corp., Case No. 1:10-cv-24063-Moreno

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