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September 5, 2012

By Hand Delivery
Honorable Denise Cote
U.S. District Court, Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *J.T. Colby & Co., Inc., et al. v. Apple Inc.*, No. 11 CIV 4060 (KBF) (RLE)

Dear Judge Cote:

We write on behalf of Defendant Apple Inc. ("Apple") in response to Plaintiffs' August 30, 2012 letter to Your Honor requesting an extension of the expert disclosure deadlines. Apple opposes that request because Your Honor previously denied the parties' request for an extension and ordered that "the remaining dates in the May 1 scheduling order remain in force." *See* Endorsed Letter, dated July 24, 2012. Apple also opposes Plaintiffs' request because Plaintiffs have not been diligent in conducting discovery, including by declining an earlier opportunity to schedule the depositions of four Apple witnesses.

"A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b). "[A] finding of 'good cause' depends on the diligence of the moving party." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). Plaintiffs have not been diligent, and their request for an extension of the expert discovery deadlines in this case should be denied.[1] Plaintiffs make their request because the witnesses Plaintiffs will depose and Apple's counsel are available for depositions after the expert witness disclosure deadline, but before fact discovery closes in this case. The parties have known that depositions might take place after expert disclosures are made since July 25, 2012, when they received this Court's order on their request for an extension. As Your Honor is aware, the Court denied the parties' request for an extension of all deadlines, but extended the fact discovery deadline to October 2,

[1] The cases cited by Plaintiffs do not support their argument that the deadlines should be extended. In *Elliot Associates v. Republic of Peru,* No. 96 Civ. 7917 (RWS), 1997 WL 436493, at *3 (S.D.N.Y. Aug. 1, 1997), the court extended the fact discovery deadline by 30 days because there had been delays in document production. Plaintiffs do not claim that there have been any delays in Apple's document production, and indeed, there have been no such delays. *Curet-Velazquez v. ACEMLA de Puerto Rico, Inc.,* 656 F.3d 47, 55 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 1863, 182 L. Ed. 2d 644 (U.S. 2012), is inapposite, as that case involved a dispute about whether the parties should be required to submit their expert witness disclosures simultaneously.

2012. Plaintiffs nonetheless delayed scheduling depositions, and never indicated that they might be prejudiced if depositions were conducted after the expert disclosure deadline.

It is not necessary to get into the weeds and refute every element of Plaintiffs' seven-page submission. The key fact is that two months ago, on July 5, 2012, Apple proposed dates for the depositions of its witnesses on various dates in July and August, with the last deposition to take place on August 14, 2012. Plaintiffs chose not to take the depositions on those dates, however, and, opting instead to file their motion to compel production of financial documents and other materials before proceeding with any depositions. In so doing, Plaintiffs proceeded at their own risk. Furthermore, even after this Court denied Plaintiffs' motion to compel on August 1, Plaintiffs waited until August 13 before attempting to schedule any depositions, thereby exacerbating scheduling issues.

Finally, Plaintiffs' argument that Apple's opposition to their request is somehow made in bad faith is wholly without merit. It is not bad faith for Apple to oppose an extension that the Court has already denied, especially where, as here, there would be no need for an extension if Plaintiffs had scheduled depositions promptly. In fact, Apple has done its best to accommodate Plaintiffs by scheduling depositions in blocks of time in California and Philadelphia (where Apple's outside trademark prosecution attorneys who Plaintiffs wish to depose have offices), and Apple previously agreed to extend the deadlines in this case, including during the April 27, 2012 conference before Your Honor. Since that time, Apple has relied on the dates set forth in the current scheduling order, especially because on July 24, 2012, the Court denied the parties' request to extend the expert disclosure and other deadlines in this case.

For all the foregoing reasons, the Court should deny Plaintiffs' request.

Respectfully,

Dale M. Cendali

cc: All Counsel of Record

Plaintiffs are reminded that letters to the Court may not exceed three pages. The plaintiffs' request to extend the deadline for service of the expert disclosures is denied.

Denise Cote
Sept. 7, 2012