Unites States of America v. Apple, Inc. et al Doc. 134

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CHAMBERS OF
DENISE COTE

VIA EMAIL DELIVERY

Honorable Denise L. Cote
United States District Judge
Daniel Patrick Moynihan United States Courthouse
New York, NY 10007-1312

Re: United States v. Apple Inc., et al.; Case No. 12-cv-2826

Dear Judge Cote:

The DOJ's September 21, 2012 letter seeking an order that Apple not "delay" its document production fails to acknowledge the following key facts establishing Apple's diligence: (1) Apple and the DOJ have essentially completed a challenging and thorough meet and confer process[1]; (2) Apple is making its first substantive document production today, before any other defendant or third party; (3) Apple has committed to a weekly rolling production sequenced by custodian as prioritized by the DOJ; and (4) DOJ's document demands will require Apple will review approximately one million documents, comprising millions of pages, on top of 450,000 documents previously reviewed. This massive review is expected to dwarf that of any other party or non-party. The DOJ does not question the large amount of resources Apple is devoting to its review; the timing of completion is limited only by quality control and privilege screening considerations. In any event, the rolling production and prioritization effectively allow the plaintiffs to proceed without delay.

[1] The DOJ"s complaint about the four month period ignores the extensive process required to complete an electronic production of this magnitude. It is not a simple matter of pulling hard copies from a file. Apple actively participated in a process that included many negotiations regarding more than 30 requested document custodians and hundreds of proposed search terms by DOJ (including irrelevant terms such as "Fiction," "Joaquin" and "The girl"), which took considerable time and discussion to resolve. Apple completed the process of harvesting electronic documents from numerous sources for those custodians, and, as part of the negotiations, ran a time consuming series of tests to determine the individual impact of each of hundreds of proposed search terms. The estimated 1 million documents being reviewed would have been considerably larger, and the production completion later, but for the negotiations and work done by Apple. There has been no delay – instead a burdensome process driven by the DOJ; to cite a few examples, DOJ took until the end of July to consent to Apple's proposal to collect documents from its employees; and it was not until mid-August that DOJ consented to any search terms such that Apple could identify documents to review.

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In light of these facts, the DOJ's effort to highlight a few resolved issues to give a misleading appearance of ongoing disputes and impose an arbitrary deadline is unfair and inexplicable. The parties conducted more than a dozen meet and confer sessions to resolve a number of difficult issues. Apple's good faith is evident in that all those issues, including those related to Apple's senior executives cited in the DOJ's letter, have been resolved or are being resolved without court intervention – and none is sought here. The claims that Apple was unreasonable are further belied by the record of extensive and regular communication concerning discovery issues not acknowledged in the DOJ's letter, nor put before the Court.

For example, the DOJ's focus in its letter on Apple's objections to the DOJ's proposed ESI specification as allegedly being in bad faith or material to the timing of document discovery is completely off point. The DOJ first sent around a second revised ESI specification on August 9, which included substantive changes in the production format that needed to be resolved before productions commenced. Apple cooperated in this process, but had issues that needed to be addressed. Through discussions, the parties resolved virtually every point of contention, with Apple standing on only a single issue (regarding hidden text) where it could not technically comply. The proposed language to which DOJ objected—"This document is not intended to impose any obligations on any party that are unduly burdensome, unavailable, or beyond the Federal Rules of Civil Procedure"—hardly matches the DOJ's characterization in its letter as language that "make[s] the production specifications suggested practices rather than mandatory obligations." Tellingly, the DOJ and the other plaintiffs provisionally agreed with Apple's suggestions, resolving the format issues without delaying any party's production.[2]

Even though Apple completed a comprehensive document production during the investigation, it is facing overbroad discovery that appears to be, at least in part, a strategic tactic to increase the burden on Apple to push it to settle. Apple simply wants a fair opportunity to have the case against it decided on the merits. To move the discovery process forward and prepare for the June trial date, Apple diligently worked in multiple meetings with plaintiffs to narrow the scope to something achievable (but still enormous), began reviewing documents at the earliest feasible stage, has produced documents before any other defendant or third party, and will complete its production in a prioritized manner and time frame that will fit within the litigation schedule. DOJ's selective complaints about a successful comprehensive meet and confer process to try and paint Apple in a bad light and have the Court impose an arbitrary deadline are unsupported and unfair. No party could responsibly individually review nearly a million documents for responsiveness, privilege and confidentiality in the space of twenty-five days, but Apple is committing to working as fast as it responsibly can, at very significant effort and expense. There is no cause for Court intervention at this time to set an arbitrary date for completion.

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[2] Many of the issues in the negotiations arose from the fact that Apple's document platform is not a Windows-based system, which was not an issue for other defendants.

Sincerely,

Daniel Floyd

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