IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MAXELL, LTD.,

Plaintiff

v.

APPLE INC.,

Defendant.

Civil Action No. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED

[redacted]

APPLE INC.'S MOTION FOR PROTECTIVE ORDER
REGARDING CERTAIN MAXELL RULE 30(B)(6) DEPOSITION TOPICS

Maxell served Apple with an 84-topic Rule 30(b)(6) deposition notice that included overly-broad and (at best) marginally-relevant topics. Despite this, the parties are in agreement about the scope of testimony (if any) Apple will provide on the topics in Maxell's notice except for the 15 that are the subject of this motion.[1] Those 15 topics: (1) are redundant of Apple's written discovery responses, which are more comprehensive than any testimony that a corporate witness could provide; (2) fail to identify the testimony sought with the required "reasonable particularity" that would permit Apple to prepare a witness to testify; (3) seek plainly privileged information from Apple's in-house or outside counsel; and/or (4) seek discovery about discovery. Maxell agreed to a 60-hour limit on Apple depositions in this case. D.I. 42 at 4. But even a minimum inquiry into the full scope of the topics discussed below would exceed that limit, to say nothing of the time required to address Maxell's other Rule 30(b)(6) topics and numerous Rule 30(b)(1) deponents. A protective order is, therefore, warranted.

I. LEGAL STANDARD

"'Good cause' [for a protective order] exists when justice requires the protection of 'a party or person from [] oppression, or undue burden or expense.'" *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 133 (E.D. Tex. 2003). Rule 26, however, does not permit a "'scorched earth,' 'no stone unturned' (potentially numerous times) approach to discovery." *Finjan, Inc. v. ESET, LLC*, No. 17CV183 CAB (BGS), 2018 WL 4772124, at *5 (S.D. Cal. Oct. 3, 2018).

[1] The parties have worked together to narrow the disputes at issue. Apple is confining this motion to the disputes it understands, based on the parties' meet-and-confer history, to be live and contested. Should Maxell raise additional disputes not addressed in the parties' recent meet-and-confer, Apple will discuss them with Maxell as soon as possible, attempt to reach agreement, and raise with the Court if necessary.

II. ARGUMENT

A. Topics 1, 3, and 8 Are Redundant of Apple's Discovery Responses

Topic 1 seeks model numbers and code names for more than 120 Apple desktops, laptops, iPods, iPhones, iPads, and Watches. And Topic 8 seeks, for each of these Accused Products, "the preinstalled Version of iOS and all compatible Versions of iOS," totaling over 3,961 combinations of Accused Products and operating systems. Ex. A 2/7/20 Pensabene Ltr. at 1. But Apple has already provided the information requested by Topics 1 and 8 in its 27 page-long comprehensive response to Interrogatory No. 1. Topic 3 seeks, for each Accused Product, the supplier name, product name, internal model number, and supplier model number for all accused components. [redacted]

Given the minutiae called for by these topics, all already provided by Apple's interrogatory responses, these topics plainly warrant a protective order. Beyond being impossible, asking an Apple witness to memorize information that took months to compile, and has already been provided to Maxell, is a textbook invitation of undue burden and harassment not required by Rule 30(b)(6). *Bayer Healthcare Pharm., Inc. v. River's Edge Pharm.*, LLC, No. 1:11-CV-01634-RLV, 2013 WL 11901530, at *2 (N.D. Ga. Apr. 26, 2013) ("There is no requirement that a Rule 30(b)(6) witness memorize thousands of pages of documents and be able to recall in exacting detail the minutia of such voluminous records.").

Attempting to agree on the scope of these topics, and to understand whether it was possible to reasonably prepare an Apple witness or witnesses to testify, Apple invited Maxell to clarify the information it was seeking, for example, if there were any perceived discrepancies in the information that an Apple witness could explain. Maxell declined.

B. Topics 4, 7, 29, and 58 Are Irrelevant and Lack Reasonable Particularity

Apple is already producing witnesses in response to other topics to testify about the relevant technical operations of the accused functionality and components, as identified in Maxell's infringement contentions, including any technical requirements for such functionality. These topics, however, are essentially boundless and extend far beyond any specific issues, the subject of which ***might*** be relevant, and seek the impossible, *i.e.*, a witness to testify about ***every*** communication Apple has had with virtually every one of its suppliers. [redacted] Topic 7 seeks ***all*** communications concerning all of the source code Apple has produced in this case. Topic 29 seeks ***all*** facts concerning the negotiations and communications with third parties related to the research and development of the accused features. Maxell has not limited these topics to any particular time, components, or subjects of communication.

To avoid requiring court intervention, Apple asked that Maxell identify the specific components and the specific types communications in which it was interested so that Apple could consider whether it could designate any witness to address Maxell's inquiries. [redacted]

[redacted] This did not meaningfully limit the scope of the topics "with particularity." *DarbeeVision, Inc. v. C&A Mktg., Inc.*, No. CV 18-0725 AG (SSX), 2019 WL 2902697, at *8 (C.D. Cal. Jan. 28, 2019) (explaining that "[i]t is not realistic to expect a 30(b)(6) witness to be able to testify about every possible internal communication" and strongly encouraging the parties to "meet and confer . . . so that Defendant will know what specific information Plaintiff wants and can prepare the witness accordingly").

C. Topics 38 and 41 Improperly Seek Discovery About Discovery

Apple has already agreed that its witnesses will be prepared to discuss the identity and storage of documents (including source code) related to the substantive subject matter of their testimony (Ex. D, 2/14/20 Meet and Confer Tr. at 48:2-24), but Maxell's notice seeks far more and intrudes into attorney work product. Topics 38 and 41 inquire about "Defendant's efforts to preserve, identify, collect, and produce relevant and/or responsive information and Documents in the Litigation" and "Defendant's efforts to collect source code of the Accused Products."

"In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research," and an attorney's selection and review of those documents reflects "legal theories and thought processes, which are protected as work product." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986). Accordingly, "courts will not compel" disclosure based solely on Maxell's "mere suspicion" that Apple "has not produced adequate documents." *Alley v. MTD Prod., Inc.*, No. 3:17-CV-3, 2018 WL 4689112, at *2 (W.D. Pa. Sept. 28, 2018) (denying 30(b)(6) topics regarding Defendants' systems for creating, storing, retrieving, and retaining documents). Such requests are more properly resolved as "part of the general discovery meet-and-confer process without the need for formal 'discovery-on-discovery' requests." *United Ass'n of Journeyman & Apprentices of the Plumbing & Pipe Fitting Indus., Underground Util./landscape Local Union*

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