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 REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER (D.I. 228)

Notwithstanding the unique challenges presented by COVID-19, Apple has diligently scheduled, prepared, and offered the depositions of 17 fact witnesses regarding more than 50 of the 84 topics in Maxell's Rule 30(b)(6) notice. Despite the problems with the topics in this motion, Maxell's rapidly diminishing deposition time, the impending date of opening expert reports, and the further depositions that these topics would necessitate, Maxell refuses to drop the remaining topics in dispute. And its suggestion that the proper time to resolve these disputes is only after depositions have concluded, D.I. 242 at 2, ignores relevant case law and all but ensures untimely motion practice that threatens the schedule. A protective order remains warranted.

I. Maxell Admits That the Information It Seeks From Topics 1, 3, and 8 Is Not Self-Evident, But Refuses To Clarify

Maxell does not dispute that Topics 1, 3, and 8 seek corporate testimony about the same information that Apple already provided in its interrogatory responses: [redacted]. While Maxell asserts it is not asking witnesses to "memorize" that information, it nonetheless demands witnesses so it can "clarify and follow-up on" information that is "not self-evident" from Apple's interrogatory responses. D.I. 242 at 1. In the run-up to this motion, Apple sought clarification from Maxell: tell us what you want to clarify / follow-up on about these responses so we can investigate and consider preparing a witness, but Maxell refused. If what Maxell wants to clarify is "not self-evident" from the responses, and Maxell refuses to say, Apple cannot be expected to read minds.

Recognizing the absurd breadth of these topics as written, Maxell *now* purports to seek testimony about a "[redacted]." D.I. 242 at 2.

[redacted] Maxell refuses to identify more than just a single example of the information it might seek. D.I. 242 at 1. Its suggestion that the parties take up the issue only after deposition are over make evident that Maxell is more interested in generating post-deposition motion practice rather than genuinely seeking clarity. Because Maxell is unwilling to identify the "not self-evident" subject matter of its inquiry, a protective order is warranted.

II. Topics 4, 7, 29, and 58 Still Lack Reasonable Particularity

Through these topics Maxell seeks Apple's testimony as to [redacted] Maxell does not dispute it has not identified any specific components for which it seeks this information, [redacted] Maxell further claims it has narrowed the topic to communications concerning "[redacted]." D.I. 242 at 3. [redacted]

Topic 7 seeks [redacted]. Maxell says it wants testimony on "[redacted]s," D.I. 242 at 3, but omits that Apple has already agreed to provide such testimony in response to Topic 6. [redacted]

[redacted]. Thus, to the extent Maxell has narrowed the topic, Apple is already providing responsive information within the scope of Topic 7 in response to Topic 6 and no additional information is needed.

III. Topics 38 and 41 Improperly Seek Discovery About Discovery and Maxell's Response Attacks a Strawman

Maxell does not dispute that numerous courts have rejected Maxell's open-ended topics seeking discovery-on-discovery. D.I. 228 at 4-5. Rather, Maxell strikes at a strawman. [redacted] Given the volume of Apple's productions—[redacted]—Maxell's demand that Apple make additional witnesses available for the sole purpose of testifying about Apple's extensive efforts to address Maxell's myriad, unreasonable discovery demands has no bearing on any substantive issues in this case and exemplifies Maxell's strategy of manufacturing discovery disputes over obtaining substantive discovery. *Id.* at 5. Maxell already filed a now-largely-denied motion to compel, and its "meandering attempt to prove defendant's noncompliance with its discovery obligations" at this time should be rejected. *Id.*

IV. Topics 39 and 56 Seek Common Interest Privileged Communications

Common interest privilege shields communications between a defendant like Apple and its potential-co-defendant suppliers where there is a palpable fear of litigation. D.I. 228 at 5-6. A "palpable threat" of litigation does not require each third party to "contemplate a specific

product that could infringe." *Power-One, Inc. v. Artesyn Techs., Inc.*, No. CIV A 205CV463, 2007 WL 1170733, at *2 (E.D. Tex. Apr. 18, 2007) (explaining that a "joint effort to develop a shared protocol for the facilitation of product development" justifies common interest privilege).

[redacted] And Maxell does not refute that the dispute about the scope of licenses to Apple's suppliers gives rise to a common interest privilege. D.I. 228 at 6.

Lastly, Maxell's suggestion that it needs this discovery to police its third-party subpoenas (now after the close of fact discovery) does not justify invading this privilege. Maxell's own exhibits show that such disputes have been resolved as "part of the general discovery meet-and-confer process without the need for formal 'discovery-on-discovery' requests." D.I. 228 at 4-5.

V. Topic 63 Improperly Seeks Apple's Legal Contention and Maxell's Response Attacks a Strawman

Topic 63 seeks testimony concerning "[redacted]." Maxell once again attacks a strawman. [redacted] But Apple objected to Maxell's demand that its fact witnesses respond to hypothetical, ***opinion*** questions about

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