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

TELEFONAKTIEBOLAGET LM ERICSSON AND ERICSSON INC., Plaintiffs, v. APPLE, INC., Defendant.	Civil Action No. 2:21-cv-00376-JRG
APPLE INC., Plaintiff, v. TELEFONAKTIEBOLAGET LM ERICSSON AND ERICSSON INC., Defendants.	Civil Action No. 2:21-cv-00460-JRG

ERICSSON'S MOTION TO COMPEL DISCOVERY NEEDED FROM APPLE IN ORDER TO MEET APPLE'S REQUESTED TRIAL SCHEDULE

Plaintiffs Telefonaktiebolaget LM Ericsson and Ericsson Inc. ("Ericsson") respectfully ask the Court to compel Defendant Apple, Inc. ("Apple") to produce relevant documents needed from Apple within seven days from an order on this motion to meet the expedited trial date Apple requested in this case. Back in March, Apple wanted this FRAND case to move quickly. Apple cited concerns about the parties' ongoing infringement proceedings in other courts, said it was "ready to go" to a December 2022 trial in this case, and asked the Court to advance the schedule by a full six months in a purported attempt to quickly conclude a license in this case and resolve the parties' disputes. After condensing the schedule, Apple changed course, refused to be bound by Ericsson's offer even if that offer is found to satisfy FRAND, delayed threshold discovery, drug out the meet and confer process, and refused to produce relevant documents as this Court requires. Apple's motivations aside, the parties must now prepare their FRAND cases for a December trial date. There is significant fact discovery to complete in the five weeks remaining before the July 15 close of discovery. Dkt. 87.[1] Yet, following multiple meet and confers, Apple refuses to timely provide the following documents that are central to Ericsson's claims and defenses in this case.

1. Revenue Information for Downloads From Apple's App Store

Apple generates *substantial* revenue by charging fees for all downloads and in-app purchases made from or through its App Store. By some estimates, App Store revenue exceeded $75 billion in 2021, alone.[2] Because App Store downloads are routinely made from cellular devices that utilize technology covered by Ericsson's SEPs, Ericsson asked Apple to produce

[1] That includes email discovery, which Apple has also hampered by refusing to timely provide complete information on potential custodians. *See* Dkt. 95.

[2] *See, e.g.*, https://www.cnbc.com/2022/01/10/apple-implies-it-generated-record-revenue-from-app-store-during-2021-.html#:~:text=Apple%20said%20Monday%20that%20it,signal%20for%20investors%20and%20analysts. ("Apple said [] it paid developers $60 billion in 2021 . . . Apple's payments to developers account for between 70% and 85% of Apple's total gross from its App Store, which takes between 15% and 30% of sales from digital purchases made in apps.").

documents showing "Apple's revenue, expense, and profit related to the App Store platform" [Request 27]; "the percentage of Apple's App Store sales or traffic [that] occurs on Apple's devices with wireless capabilities" [Request 28]; the "way that Apple does, has considered, or plans to . . . derive revenue or profit from the App Store" including with downloads on cellular technology [Request 29]; "the fees or royalties that Apple charges in connection with the App Store" and "analyses that Apple considered in deriving [] its 30% fee" [Request 30]; and "the downloads and/or in-app purchases made through the App Store" over time and any "statistics for each individual app (or game)" or category of apps that Apple tracks [Request 96].

Apple objected on April 6 that the discovery "appears irrelevant" and again on May 20, arguing any such discovery is irrelevant and "a burdensome fishing expedition only designed to delay the case." For more than two months, Apple has refused to commit to producing any App Store revenue information, including during the parties' meet and confers. But Apple's relevancy objection is wrong. The App Store is a primary way that Apple monetizes cellular devices. Apple profits not only from the sale of devices themselves, but also from the downloads on the App Store that are driven by the devices' cellular functionality (similar to how cellular providers historically provided cell phones *for free* and generated revenue exclusively by providing cellular service for the "free" devices). In fact, the 5G technology at issue has been credited with revolutionizing apps such as gaming which, in turn, have driven a significant surge in Apple's App Store revenue.[3] Ericsson is entitled to discovery into *all* the revenue and value that Apple generates from its cellular

[3] *See, e.g.*, https://www.verizon.com/about/news/how-5g-ultra-wideband-can-revolutionize-gaming ("How 5G Ultra Wideband can revolutionize gaming."); https://www.verizon.com/business/en-au/resources/articles/s/what-can-we-expect-from-a-5g-network-for-gaming/ ("Mobile gaming is growing and 5G could help speed up that growth. In 2020, [it] accounted for 36% of all mobile app downloads, and users spent 296 billion hours playing these titles on their devices—a 35% increase over 2019.").

devices, including its decision of how to monetize the cellular activity on the App Store.

2. Apple's 5G Launch and Promotional Material

When Apple launched its first 5G device, Apple CEO Tim Cook personally described 5G as ushering in a "new era for iPhone" and the "most exciting step yet" to improve privacy and security, provide "a new level of performance for downloads and uploads," create "more responsive gaming," and "so much more."[4] Now that Apple is being asked to *pay* for the 5G technology it is selling to its customers, Apple has done an about-face. It has taken the position that adding 5G technology to a SEP license would not justify a rate increase over 4G because 5G is not valuable at the "device level." Ericsson is entitled to discovery into Apple's evaluation of 5G's benefits and development of marketing material—for devices *and* for Apple's App Store users and developers—discussing the value of 5G.

To that end, Ericsson requested documents, including drafts, speeches, videos, talking points, and scripts related to "the launch of or Apple's launch strategy for the 5G standard" and "marketing strategies" for all 5G iPhones and the 5G rollout [Request 11]; "Apple's 5G promotional material, including internal and external discussions and drafts" [Request 12]; "Apple's potential or expected revenue from devices as a result of the 5G launch" [Request13]; "Apple's assessment of the value of the 5G standard" [Request 14]; internal or external "recommendations on how to leverage 5G to boost Apple's sales or revenue" or value [Request 15]; and "Apple or Apple executive or representative presentations, statements, or speeches"

[4] *See* https://www.youtube.com/watch?v=oZzFaVetoTo. And Tim Cook was not the only Apple employee to speak publicly about the benefits of 5G. *See, e.g.*, https://abcnews.go.com/Technology/apple-expected-unveil-5g-iphone/story?id=73562142 (Apple's "Arun Mathias speaks about 5G" at an "Apple event" to "unveil" the 5G iPhone 12); https://www.youtube.com/watch?v=TR7fP-2qSPg (Apple's Francesca Sweet discussing the benefits of 5G in Apple's new 5G products); https://www.youtube.com/watch?v=CQu3hoZU3EE (Apple's Kaiann Drance discussing the benefits of 5G in Apple's new 5G products).

including drafts and any "internal or external fact-checking" of such material [Request 17].

Ericsson made clear on multiple occasions that this material is core to the case and should be expedited. Astonishingly, in a June 6 letter—nearly three months after receiving Ericsson's requests—Apple identified only *three* "documents responsive to Ericsson's requests related to Apple's 5G launch." And, on the parties' June 9 meet and confer, Apple said it expected to produce "five to 10 additional documents" within the coming weeks. Apple's production of eight to 13 total documents promoting the launch of its 5G products is woefully inadequate even from a cursory Google search of publicly available material. Ericsson is entitled to all relevant material, including drafts and internal marketing and promotional strategies, analyses, and directives.

3. Documents Related to Devaluing SEPs or Licensing as Adjudicated

This is a FRAND dispute and FRAND commitments contractually require qualifying parties to negotiate in good faith toward a license at a fair and reasonable rate. However, Ericsson is aware of multiple Apple documents that *expressly* address Apple's policies and practices of "Deval[uing] SEPs" and "Licens[ing] as Adjudicated"—concepts that are fundamentally at odds with FRAND.[5] Given the obvious relevance, Ericsson sought on March 21, 2022 ***all*** documents, including drafts, related to the "concept[s] of 'Deval[uing] SEPs' and 'licens[ing] as adjudicated'" [Request 54]; "the notion of reducing royalties for standard essential patents" or reshaping FRAND [Request 52] and "the pros and cons of different licensing strategies, including the concept of 'license as adjudicated' or anything equivalent" [Request 53].

[5] The documents are publicly referenced, but not publicly available, in prior Apple litigation. *See, e.g., Apple Inc. v. Qualcomm Inc.*, 3:17-cv-00108-GPC-MDD (S.D. Cal.) (Qualcomm's Opening Slides cite Apple document DTX09313, which set out a strategy to "Reduce Apple's Net Royalty," "Reshap[e] FRAND," and "Devalue SEPs"); *see also Optis Wireless Technology, LLC et al v. Apple Inc.*, 2:19-cv-00066-JRG (E.D. Tex.), Dkt. No. 490, pp. 53-54 (referencing Apple documents that reference "Devalu[ing] SEPs" and stating that "one of the approaches [Apple] likes to use is called 'license as adjudicated'").

After multiple conferrals on this topic, Apple has taken the position that Ericsson can obtain *only the specific exhibits* from Apple's prior litigation (via the parties' prior agreement to produce certain sealed material from prior litigations) and that all related material is privileged. But Ericsson is not seeking "litigation" documents. Rather, Ericsson seeks *all Apple documents* referencing Apple's efforts to "Devalue SEPs," "Reshap[e] FRAND," and "license as adjudicated." They are clearly relevant. Furthermore, concepts of driving down the value of SEPs and holding out during licensing negotiations are *business* decisions that are not subject to privilege. Ericsson is entitled to all Apple documents related to devaluing SEPs, reshaping FRAND, and licensing as adjudicated and not just the documents produced in prior litigation.

4. Intel Portfolio and Business Case Analyses

In an effort to drive down its net royalty obligation in this litigation, Apple has taken the position that its "share [of declared 5G patents] has increased by approximately 500%" since the parties negotiated the financial component of their prior cross-license in 2015. Dkt. 68 at ¶ 74. But that purported growth is little more than Apple's acquisition of patents from entities including Intel. Consequently, Ericsson sought to test Apple's own valuation of the Intel technology it acquired by asking for documents containing "internal or external valuations . . . of Intel's [patent] portfolio or business" that Apple acquired [Request 60] and "license presentations, business cases, or offers to acquire or license Intel patents" [Request 61]. But Apple agreed to produce only "documents sufficient to show the [final] terms of Apple's transaction with Intel regarding Intel's baseband business," indicated only that it would "investigate whether there are any non-privileged 'business cases' or 'analyses' in its possession" without committing to a date certain for *any* production on these topics because of the need to clear third-party confidentiality obligations.

Apple's position is untenable. Apple has touted its Intel acquisition throughout this litigation, yet it was able to obtain third-party permission to produce "nearly all" of its SEP licenses (equally sensitive documents) before it purports to be able to clear a single production of any kind with Intel. Moreover, Apple's "business cases" and monetary valuations of Intel's portfolio—a massive commercial transaction that Apple surely vetted in *commercial* terms—are not privileged and are clearly relevant. Ericsson requested this material back in March, nearly three months ago, and there are now only five weeks remain in discovery. Ericsson is entitled to documents containing Apple's evaluation of Intel's portfolio and the related business cases or analyses, and that information must be promptly produced.

5. Payments to Apple's Component Suppliers That Also License SEPs to Apple

Apple has suggested that certain SEP licenses that it has entered are potentially "comparable" for purposes of determining a FRAND rate even though the other parties to those licenses entered into their respective licenses while trying to maintain supplier relationships with Apple worth hundreds of millions of dollars outside of the SEP licenses. To explore that issue, Ericsson requested documents "sufficient to identify any payments made to or received from [the subset of licensors] that both (a) supplies Apple with any parts or components for Apple products, and (b) is or has been party to a license agreement with Apple involving SEPs, regardless of whether the payment [was] made under an SEP license, in connection with payment for parts or components, or otherwise" [Request 90]. However, Apple took the position on June 9 that the request is not "relevant and proportional to this case" and would not commit during to produce evidence of payments to its suppliers *even if those suppliers are also SEP licensors to Apple*.

Apple's objection is baseless. Ericsson is entitled to explore Apple's financial relationship with SEP licensors as a whole. That relationship often consists of two separate components: (a)

the financial terms negotiated in the SEP license agreements *and* (b) any separate payments made for supplying physical components under completely separate supply contracts or agreements. Rational Apple suppliers value their supplier relationship with Apple (potentially worth hundreds of millions of dollars) as part of their overall financial relationship that is not reflected in the explicit terms of their separate SEP license agreements. The result could be that suppliers enter into what appear to be sub-FRAND SEP licensing rates if one looks exclusively to the SEP license and ignores the other financial benefits flowing to those licensors from their separate, often very lucrative component-supplier relationship with Apple. These factors must be considered when "unpacking" SEP licenses to understand the full value being obtained by the licensors. Thus, any payments that Apple has made to suppliers that were also SEP licensors are relevant and Ericsson is entitled to discovery on these topics.

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Given the looming December trial date, Ericsson went to great lengths to identify many of the relevant, high-priority documents in March. But even after the passage of nearly three months, and despite Ericsson's attempts to facilitate orderly discovery and move this litigation efficiently toward trial, Apple has refused to produce relevant documents and failed to commit to producing material in a timely fashion. Because the discovery identified in this motion is central to Ericsson's claims and defenses, and because much of the discovery will form the foundation for forthcoming expert discovery work (work that is already under way), Ericsson respectfully asks the Court to order Apple to produce the categories of documents identified in this motion no later than seven (7) days after the Court enters an order compelling their production.

Dated: June 10, 2022

Respectfully Submitted,

/s/ *Nicholas Mathews*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on June 10, 2022.

/s/ *Andy Tuck*
Andy Tuck

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7(i), I hereby certify that counsel for Ericsson met and conferred on June 9, 2022, to discuss the issues presented in this motion. Although lead counsel for Apple could not attend because of a trial in another matter, Apple was represented by local counsel and multiple national counsel on the call. Despite an extensive conferral, Apple was unable to commit to producing the requested material. Ericsson therefore brings this motion,

/s/ *Nicholas Mathews*
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