

HONORABLE JAMES L. ROBERT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

No. C10-1823-JLR

MICROSOFT'S MOTION FOR
JUDGMENT AS A MATTER OF LAW

MOTOROLA MOBILITY, LLC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

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1 Pursuant to Fed. R. Civ. P. 50(a), Microsoft respectfully requests that the Court enter
2 judgment as a matter of law on the following grounds because “there is no legally sufficient
3 basis for a reasonable jury to find for” Motorola on those grounds. *Jorgensen v. Cassidy*, 320
4 F.3d 906, 917 (9th Cir. 2003).

5 **I. Motorola Breached The Duty Of Good Faith And Fair Dealing.**

6 Whether the finder of fact considers the factors outlined by the Court in Instruction No.
7 16 individually and independently, or collectively, there is no legally sufficient evidentiary
8 basis for a reasonable juror to find for Motorola on the question of its breach of the duty of
9 good faith and fair dealing.

10 **A. Motorola’s Actions Were Contrary To The Reasonable And Justified
11 Expectations Of The Parties.**

12 Microsoft’s Horacio Gutierrez’s testimony establishes that while companies like
13 Microsoft recognize the possibility of assertions and counter-assertions of patents, 8/28/13 Tr.
14 (Gutierrez) 183:24–184:16, Microsoft’s reasonable and justified expectations were that no
15 company that had made RAND commitments would use its SEPs in the manner in which
16 Motorola did. 8/28/13 Tr. (Gutierrez) 149:13–150:5. Microsoft’s product developers
17 explained why that reasonable and justified expectation was important for product design
18 decisions. 8/27/13 Tr. (DeVaen) 17:10–18:1, 8/27/13 Tr. (Treadwell) 40:15–22. Motorola
19 itself knew as much, and its 30(b)(6) witness confirmed that Motorola knew it could not use
20 the threat of injunctions on SEPs to force concessions on non-SEPs. 8/29/13 Tr. (Blasius)
21 111:14–112:6. Motorola also knew it was not allowed to ask implementers for unreasonably
22 high royalties. 8/29/13 Tr. (Blasius) 108:7–9. Finally, by June 2012 Motorola knew its
23 conduct was the subject of FTC scrutiny and by that date (at a minimum) Motorola could not
24 have had a reasonable and justified expectation that pursuing injunctions on SEPs was
25 acceptable. 8/30/13 Tr. (Heiner) 150:23–153:6.
26

1 **B. Motorola Engaged In Commercially Unreasonable Conduct.**

2 The evidence is overwhelming and essentially uncontradicted that Motorola engaged in
3 commercially unreasonable conduct. Motorola’s H.264 royalty demand of 2.25% on the price
4 of end products ranged from \$4.50 per unit for the cheapest Xbox, to \$11.25 per unit or higher
5 for computers running Windows—but the RAND royalty is only 0.555 cents per unit, and the
6 upper bound of the RAND range determined by the Court is 16.389 cents. Motorola’s 802.11
7 royalty demand of 2.25% equates to \$4.50 per unit or higher for the Xbox, but the RAND
8 royalty is only 3.471 cents per unit, with the upper bound of the RAND range at 19.5 cents. If
9 these offers are not commercially unreasonable, it is difficult to conceive of any offer that
10 would be commercially unreasonable. 8/29/13 Tr. (Murphy) 139:12–140:2, 142:6–19.

11 Given the RAND royalty and royalty range, no reasonable juror could conclude that
12 Motorola had made a commercially reasonable offer—Motorola’s demand was not just high, it
13 was wildly excessive. Testimony from Microsoft’s Horacio Gutierrez was categorical and
14 uncontested on this point. 8/28/13 Tr. (Gutierrez) 128:22–25, 131:12–14. While a seller may
15 be willing to come down from an opening offer, that does *not* mean that any offer is
16 commercially reasonable just because negotiation might follow. Beyond the yawning chasm
17 that separates Motorola’s demands from the RAND royalty, the evidence otherwise confirms
18 that Motorola’s demands were completely unfounded and commercially unreasonable.

19 First, nothing in Motorola’s licensing history supports the scale of its demands.
20 Motorola had never received royalties of the kind demanded from Microsoft for Motorola’s
21 H.264 or 802.11 standard-essential patents alone. 8/27/13 Tr. (Dailey) 79:7–13. While
22 Motorola offered testimony that 2.25% was a standard opening offer for its cellular SEPs, the
23 rates it sought for its cellular patents shed no light on what royalty is appropriate for its 802.11
24 or H.264 patents. 9/3/2013 Tr. (Leonard) 154:14–19; 8/29/13 Tr. (Murphy) 166:20–168:3,
25 168:23–169:8. It is difficult or impossible to break out a separate royalty rate for the 802.11
26 and H.264 SEP portfolios in Motorola’s prior agreements. 8/27/13 Tr. (Dailey) 78:11–18.

1 Nothing in Motorola's licensing history indicates that demanding 2.25% on the price of end
2 products for its 802.11 and H.264 patents would be reasonable.

3 Second, the limited importance of Motorola's 802.11 and H.264 patents confirms that
4 Motorola's demands were commercially unreasonable. Motorola's 802.11 SEPs provide only
5 minimal technical contribution to the 802.11 Standard. It is an undisputed fact for these
6 proceedings that Motorola's 802.11 portfolio provides only minimal contribution to the 802.11
7 standard, and Motorola's relevant 802.11 SEPs constitute only a sliver of the overall
8 technology incorporated in the standard. 8/28/13 Tr. (Murphy) 158:10–17. This set of patents
9 cannot possibly justify a demand for a 2.25% royalty on the entire value of the Xbox.
10 Likewise, as with 802.11, Motorola's H.264 patents constitute only a sliver of the overall
11 technology incorporated into the H.264 Standard, and Motorola contributed no inventive
12 technology to the H.264 standard, but instead built upon already existing technology. 8/29/13
13 Tr. (Murphy) 155:13–19. The marginal value of Motorola's H.264 patents cannot possibly
14 justify a demand for a 2.25% of the entire value of a computer running Windows.

15 The number of owners of 802.11 and H.264 essential patents who had submitted letters
16 of assurance to the IEEE and ITU could easily have been investigated by Motorola. 8/27/13
17 Tr. (Dailey) 92:11–14; 9/3/13 Tr. (Taylor) 79:11–18. Motorola's corporate representative
18 admitted that if each of those companies charged a 2.25% royalty on the end product, this
19 would not be viable for the implementer. 8/29/13 Tr. (Blasius) 108:1–110:1. This conduct is
20 especially egregious where there is no basis for believing that the Motorola patents were any
21 more valuable than the patents of the other companies that submitted letters of assurance.
22 8/27/13 Tr. (Dailey) 90:4–8, 91:13–19.

23 Motorola was also well aware of the royalties charged by the H.264 and 802.11 pools,
24 and knew the rates in its October offer letters were out of line with those benchmarks. 8/27/13
25 Tr. (Dailey) 115:9–18, 116:3-10; *see also* 8/29/13 Tr. (Blasius) 109:7–110:12. Motorola had
26

1 participated in the formation of the MPEG-LA H.264 pool and joined in press releases
2 characterizing the pool rates as reasonable. 8/28/13 Tr. (Glanz) 65:4–17; Tr. Ex. 1179.
3 Whether the RAND royalty is ultimately the pool rate or somewhat higher, as the Court found,
4 the pool royalty (and Motorola’s prior endorsement of it) demonstrates that the Motorola
5 offer—which was orders of magnitude greater, 8/29/13 Tr. (Murphy) 162:8–17—was not
6 commercially reasonable.

7 The evidence provides no legally sufficient basis to conclude that Motorola’s 802.11
8 demand was anything but commercially unreasonable. The royalty Motorola demanded would
9 exceed the cost of the chipset that provides the 802.11 functionality in Xbox, which costs only
10 a few dollars. 8/28/13 Tr. (Ochs) 87:1–3. Royalty rates of 1% of chip price (*not* end product
11 price) represent a customary high ceiling for licensing in the semiconductor industry for
12 products like Marvell’s. 8/28/13 Tr. (Ochs) 95:6–21. Motorola itself commissioned a study by
13 InteCap to value its 802.11 portfolio which suggested that even lower rates of 0.5% of chip
14 price would be appropriate. 8/29/13 Tr. (Murphy) 164:2–12. Once its 25x overestimate of
15 Motorola’s patent value is corrected for, the InteCap study is indicative of commercially
16 reasonable conduct because it reflected an effort by a company in the business of licensing
17 (RAND) patents to fashion a RAND royalty rate. 8/29/13 Tr. (Murphy) 166:4–13. Motorola’s
18 802.11 demand on the Xbox was \$4.50; that the amount suggested by InteCap, its own paid
19 licensing consultant, for the chip alone was 2 cents confirms that Motorola’s demand was
20 commercially unreasonable.

21 As to Motorola’s H.264 demand, by demanding royalties on the prices of its
22 prospective licensees’ *customers’* products, Motorola violated its own claimed practice of
23 licensing its standard-essential patents only at the end-product level. 9/3/13 Tr. (Leonard)
24 151:3–9. Motorola’s H.264 letter explicitly demanded a 2.25% royalty “calculated based on
25 the price of the end product . . . [e.g.] each PC/laptop, each smartphone . . . and not on
26

1 component software.” Trial Ex. 2. No prior Motorola license agreement based a royalty on
2 the price of products sold by the licensee’s customers, and in fact doing so was contrary to
3 Motorola’s claimed practice. 8/27/13 Tr. (Dailey) 69:25–70:9; 9/3/13 Tr. (Leonard) 151:3–9.

4 There is no legally sufficient evidentiary basis to conclude that Motorola’s demands as
5 to either standard were anything but commercially unreasonable. Accordingly, Microsoft is
6 entitled to judgment as a matter of law that Motorola’s October 21, 2010 802.11 letter and
7 October 29, 2010 H.264 letter breached the duty of good faith and fair dealing because
8 Motorola’s demands were not objectively commercially reasonable.

9 **C. Motorola Engaged In Conduct That Frustrated The Purpose Of Its RAND**
10 **Licensing Commitments.**

11 Two key purposes of the RAND licensing commitment are prevention of hold up and
12 avoidance of stacking problems. 8/29/13 Tr. (Murphy) 132:11–15. The record establishes that
13 Motorola violated the duty of good faith and fair dealing by frustrating both purposes.

14 First, Motorola’s Kirk Dailey acknowledged that in formulating Motorola’s October
15 2010 demand letters, he did not consider the effects of royalty stacking among multiple
16 standard essential patent holders. 8/28/13 Tr. (Dailey) 60:13–15. But the considerable
17 stacking implications of Motorola’s demands are readily apparent. 8/29/13 Tr. (Murphy)
18 160:9–20, 161:3–11. At least 52 entities own H.264 SEPs, 8/29/13 Tr. (Murphy) 154:22–25,
19 and if each of them made demands like Motorola’s (2.25% of the end price of standard-
20 compliant products) the aggregate royalty to implement the H.264 standard would exceed the
21 prices of standard-compliant products. 8/29/13 Tr. (Murphy) 160:12–20. At least 92 entities
22 own 802.11 standard-essential patents. 8/29/2013 Tr. (Murphy) 158:6–8. If made by each of
23 the other entities, demands like Motorola’s would lead to an aggregate royalty more than
24 double the product price. 8/29/13 Tr. (Murphy) 161:5–11. Because Motorola’s 802.11 and
25 H.264 patents provide only minimal contributions to the respective standards, 8/29/13 Tr.
26 (Murphy) 158:10–17, 156:14–19, the aggregate royalty burden suggested by Motorola’s

1 demands is even more unreasonable. Motorola is only one of many standard-essential patent
2 holders who may seek RAND royalties from implementers of the standard—and Motorola is
3 only entitled to its share, corresponding to the contribution of its patents to the standard. It
4 cannot demand more than its share.¹ Motorola knew that these other patents were out there,
5 9/3/13 Tr. (Taylor) 79:4–18, but did not take that fact into account in starting with a 2.25%
6 demand. 8/29/12 Tr. (Blasius) 107:10–24. Motorola’s initial offer did not account for patent
7 stacking, *id.*; 8/28/13 Tr. (Dailey) 60:13–15, which means that Motorola’s offer necessarily
8 breached the duty of good faith and fair dealing by frustrating the anti-stacking purpose of the
9 RAND commitment.

10 Second, Motorola was engaged in hold up: Its royalty demands exceeded the value of
11 its patented technology by such a large margin that no rational company could accept them; it
12 accompanied those demands with 20-day ultimatums; and backed them up by pursuing
13 lawsuits and injunctions around the world. 8/29/13 Tr. (Murphy) 125:11–127:2. The
14 demands Motorola made were merely a prelude to the barrage of lawsuits launched against
15 Microsoft, consistent with a strategy of hold up, not with an attempt to enter into a RAND
16 license. 8/28/13 Tr. (Gutierrez) 154:24–155:23, 156:9–16. Motorola has confirmed that it was
17 its policy to make an offer before seeking injunctions for alleged infringement of its standard-
18 essential patents. 8/27/13 Tr. (Dailey) 125:23–126:11; 8/29/13 Tr. (Blasius) 107:16–19.
19 Motorola cannot claim it filed those actions only as a necessary, and unanticipated, response to
20 Microsoft having filed this suit, because Motorola filed the 699 and 700 Actions on November
21 10, 2010—the day after Microsoft filed here—and its ITC action followed only 12 days later.
22 Motorola’s complaints for suits seeking injunctions on SEPs were being prepared at the same
23 time Motorola sent its demand letters to Microsoft. 8/27/13 Tr. (Dailey) 124:15–125:7.

25 ¹ Stacking concerns are particularly heightened here, because products on which Motorola demanded royalties
26 need to comply with many other standards besides H.264 and 802.11. 8/28/13 Tr. (Gutierrez) 128:3-21.

1 Motorola's immediate pursuit of injunctions confirms that its letters were the first step
2 of an attempt to hold up Microsoft. If granted, the injunctions Motorola pursued would have
3 left Microsoft with a choice between pulling its standard-compliant products out of the U.S.
4 and German markets, or removing standard-compliant functionality that had little or nothing to
5 do with Motorola's technology, but was critical to customer demand for products that were
6 standard-compliant. 8/28/13 Tr. (Gutierrez) 151:1–152:10. The threat of injunctions is key
7 leverage in forcing standard implementers to accept non-RAND terms. 8/29/13 Tr. (Murphy)
8 125:11–126:12.

9 A RAND royalty must reflect the economic value of the patented technology to the
10 licensee relative to the next best alternative technology prior to the standard being set, and
11 hold-up value is value above RAND that derives simply from the patented technology being
12 incorporated into the standard. 8/29/13 Tr. (Murphy) 157:14–25. At the November 2012 trial,
13 and afterwards, Motorola still sought a 2.25% royalty. 8/30/13 Tr. (Murphy) 72:12–15;
14 8/28/13 Tr. (Gutierrez) 161:1–6. Motorola continued to seek an exclusion order on its H.264
15 standard-essential patents in the ITC as late as January 2013. 9/3/13 Tr. (Killough) 17:19–21.
16 There is no explanation other than hold-up for Motorola's continued demands for exorbitant
17 royalties while pursuing injunctions.

18 Both Motorola's conduct in sending the October 21, 2010 and October 29, 2010 letters,
19 and Motorola's conduct in subsequently filing actions and seeking injunctions in U.S. district
20 court, the ITC, and Germany frustrated the purposes of the RAND licensing commitment.
21 There is no legally sufficient basis for a reasonable jury to conclude otherwise, and Microsoft
22 is entitled to judgment as a matter of law that Motorola breached its duty of good faith and fair
23 dealing by engaging in this conduct.

1 **D. Motorola’s Conduct Failed To Conform To Ordinary Custom And Practice In**
2 **the Industry.**

3 No reasonable juror would have a legally sufficient evidentiary basis to conclude that
4 Motorola’s conduct conformed to ordinary custom and practice in the industry. Microsoft’s
5 witnesses in unrebutted testimony established that the terms of the letters were entirely outside
6 any customary bounds. 8/27/13 Tr. (Devaan) 18:13–15; 8/27/13 Tr. (Treadwell) 41:12–15;
7 8/28/13 Tr. (Gutierrez) 123:13–18, 121:18–23, 8/30/13 Tr. (Heiner) 160:7–161:3. Marvell’s
8 Jennifer Ochs’ testimony established that 1% of chip price is a customary high ceiling for
9 royalties in the semiconductor industry, but Motorola’s 2.25% of end product price (applied to
10 the Xbox)—which it sought from both Marvell and Microsoft—amounted to over 100% of
11 chip price. 8/28/13 Tr. (Ochs) 92:15–93:9. Motorola had engaged in hold up before with
12 RIM, and had been accused of violating its RAND obligations in a lawsuit RIM filed, signaling
13 that using injunctive leverage to extract excessive royalties on SEPs is not accepted custom and
14 practice. Even if such activities were considered acceptable before 2012 (and there is no
15 evidence that they were), the FTC’s public interest statement in the ITC 752 Investigation,
16 8/30/13 Tr. (Heiner) 150:23–151:17, establishes that regulators viewed that conduct as
17 contrary to the public interest, and as a “custom and practice” that, if it ever existed, should be
18 abandoned. Even further, the FTC opened an investigation into Motorola’s conduct with
19 respect to its standard-essential patents in late spring of 2012. 8/30/13 Tr. (Heiner) 149:20–25.
20 The subject matter of that investigation was whether “Motorola reneged on a licensing
21 commitment made to several standard-setting bodies to license its standards-essential patents
22 relating to smartphones, tablet computers and video game systems on FRAND terms by
23 seeking injunctions against willing licensees of those SEPs.” 8/30/13 Tr. (Heiner) 153:2–6.
24 The FTC clearly took the position that Motorola’s conduct was so far from “ordinary custom
25 and practice” as to merit regulatory oversight.
26

1 Motorola's conduct did not even conform to its own prior custom and practice.
2 Motorola's October 29, 2010 H.264 letter violated Motorola's own policy of licensing its SEPs
3 to producers of end products. 9/3/13 Tr. (Leonard) 151:3–9. Motorola's head of licensing
4 Kirk Dailey was unaware of a single Motorola licensee that was paying a royalty based on the
5 selling price of a product sold by the licensee's customer. 8/27/13 Tr. (Dailey) 69:25–70:4.
6 Motorola had enlisted Intecap to value Motorola's 802.11 SEP portfolio in an attempt to
7 determine an appropriate RAND royalty, but did not consider the results of that patent
8 valuation analysis when making its demands of Microsoft. 8/27/13 Tr. (Dailey) 114:10–22.
9 The Intecap study proposed royalties far lower than Motorola's demand, it was available to
10 Motorola personnel, and it should have been considered by a company that sought to comply
11 with its RAND obligations. 8/29/13 Tr. (Murphy) 164:15–165:14, 166:4–13.

12 In subsequent negotiations with Microsoft, Motorola conditioned a license to its SEPs
13 on a grantback of a license to Microsoft patents that were unrelated to the standards in
14 question. 8/28/13 Tr. (Gutierrez) 162:17–163:15. This was wrong, and Motorola knew it,
15 because it had always been its own practice not to do so. 8/29/13 Tr. (Blasius) 110:6–111:6;
16 8/27/13 Tr. (Dailey) 67:1-5. Motorola's conduct cannot be excused on the grounds that
17 defensive suspension clauses are customary, because Motorola admitted that defensive
18 suspension cannot amount to conditioning the SEP license on concessions on patents that are
19 not essential to those standards. 8/27/13 Tr. (Dailey) 67:1–5; 8/29/13 Tr. (Blasius) 110:6–
20 111:6. Motorola's offer to Marvell of a non-RAND license that openly discriminated against
21 Microsoft violated that policy and was not consistent with any accepted industry notion of
22 defensive suspension.

23 **E. Motorola Exercised Its Discretion Under Its Contractual Commitments**
24 **Unreasonably.**

25 Based on the Court's instructions that Motorola did not need to make offers on RAND
26 terms, the contracts vested Motorola with discretion in formulating its offers to Microsoft, and

1 Motorola breached the duty of good faith and fair dealing by exercising that discretion
2 unreasonably. Motorola knew about the royalty rates offered by pools, even blessing them as
3 reasonable, 8/28/13 Tr. (Glanz) 65:4–16; Tr. Ex. 1179, yet ignored them in drafting the letters.
4 Motorola knew about the results of the Intecap valuation and ignored it when making its
5 demands. 8/27/13 Tr. (Dailey) 114:10–22. Dailey acknowledged it was easy to go on the
6 Internet and find out that 2.25% of the Windows-based PC market amounted to around \$4
7 billion, knew that there were billions of dollars of Xbox consoles sold every year, and was
8 generally aware of Xbox and Windows revenues. 8/27/13 Tr. (Dailey) at 72:17–73:3. Yet he
9 still put 2.25% into the letter without having any reasonable basis for it. Further, as to PCs and
10 smartphones, Motorola knew that Microsoft made component software, and that Microsoft’s
11 customers sold the end products, 8/27/13 Tr. (Dailey) 68:22–69:1; 75:9–12, yet Motorola
12 deviated from the offer it described as “standard” in situations in which the licensee was a
13 component supplier, rather than the manufacturer of the end product. *Id.* at 191:9–14; 212:5–9.
14 Using the end product as the royalty base, while knowing that Microsoft supplied component
15 software, was an unreasonable exercise of discretion. For these reasons, as well as those
16 outlined for the four factors above, no reasonable juror would have a legally-sufficient
17 evidentiary basis to find Motorola’s exercise of discretion in formulating its offers reasonable.

18 **F. Subjective Factors Confirm Motorola Breached Its Duty Of Good Faith And**
19 **Fair Dealing.**

20 Motorola may argue that it did not know at the time the demand letters were sent that
21 the royalties demanded were exorbitant and unjustified and that knowledge of that could only
22 be acquired by examining the information that was before the Court at the November trial. But
23 the record establishes that facts (including the Intecap study, the scope and nature of its own
24 contributions to the standards, the pool rates, the number of other licensees, and more) within
25 the corporate knowledge of Motorola prior to that trial confirmed the demands were
26 commercially unreasonable.

1 Moreover, the manner in which the standards were used in Microsoft products was
2 facially apparent: Xbox was known to be a game console, with 802.11 needed only as an
3 alternative means of connecting to the Internet; and Windows is a computer operating system,
4 with the ability to display H.264 video being only one of thousands of features. 8/27/13 Tr.
5 (DeVaen) 13:21–15:10. While more information about the Microsoft products might have
6 been interesting, it was not necessary to ascertain that the demanded royalties were not even in
7 the ballpark of commercially reasonable. The argument information adduced at trial was
8 necessary for Motorola to understand that its demands were outrageous is demonstrably
9 false—even when possessed of all of this information, Motorola continued to urge a 2.25%
10 royalty at trial and beyond. 8/29/13 Tr. (Murphy) 171:1–5; 8/28/13 Tr. (Gutierrez) 161:1–6.

11 **II. Motorola Breached Its RAND Commitments By Seeking Injunctions After**
12 **Microsoft Filed This Lawsuit And Committed To Take A License On RAND**
13 **Terms.**

14 The undisputed evidence shows that Microsoft’s licensing personnel expressed to
15 Motorola’s licensing personnel Microsoft’s willingness to take a reasonable license to
16 Motorola’s patents in October 2010. 8/28/13 Tr. (Gutierrez) 167:21–168:7. Microsoft
17 confirmed this willingness in its complaint in this case, which sought a judicial accounting of
18 RAND terms for Motorola’s SEPs. 8/29/13 Tr. (Gutierrez) 59:11–17; 8/30/13 Tr. (Killough)
19 228:1–14. To the extent not firmly established by Microsoft’s discussions with Motorola or its
20 Complaint, Microsoft committed in September 2011 to take a license to Motorola’s patents on
21 RAND terms. The conclusion that pursuing injunctions breaches the RAND commitment is
22 clear when the SEP owner seeks injunctions *after* the commencement of litigation that will
23 determine the RAND rate.

24 Any concern that the threat of injunctive relief could be justified by a need to bring
25 implementers to the negotiating table was never present in this case because the RAND
26 determination was already underway, and was underway on Microsoft’s initiative. From

1 November 2010 on, and certainly from September 2011 on, it is indisputable that the only
2 purpose to seeking an injunction was to put improper pressure on Microsoft to settle on supra-
3 RAND terms. Microsoft’s complaint made clear that despite uncertainties over the validity
4 and essentiality of Motorola’s patents, Microsoft would accept a portfolio license to resolve the
5 issue. 8/29/13 Tr. (Gutierrez) 57:15–58:9; 9/3/13 Tr. (Killough) 45:15–23. If Motorola or any
6 other SEP owner wants a RAND royalty, it can attempt to obtain one in such a lawsuit and
7 need not seek an injunction. 8/27/13 Tr. (Dailey) 132:8–16; 9/3/13 Tr. (Leonard) 135:2–3
8 (“[F]rom an economic point of view, you don’t really need an injunction, you just award a
9 money amount of damages.”)

10 In its exceptions to jury instructions, Motorola contended for the first time that its
11 continued pursuit of injunctions falls outside the scope of this case because Microsoft’s claim
12 is limited in time to the moment when Motorola initially filed for injunctions, apparently based
13 on a linguistic contortion of terms like “seeking.” Discovery and pleadings confirm that
14 Motorola’s new theory is incorrect. Microsoft’s interrogatory responses plainly contended that
15 Motorola’s pursuit of or attempts to secure injunctions were improper, not just the initial act of
16 filing for injunctions. Wion Decl. Ex. 1 (Microsoft’s May 21, 2013 Supplemental Response to
17 Interrogatory No. 3) at 10 (“Repeated judicial and administrative rulings specific to Motorola
18 have confirmed that its *pursuit* of injunctive relief was improper”) (emphasis added); *id.* at 11
19 (“Motorola’s objective from the beginning was to *secure* crippling injunctive relief in some
20 forum) (emphasis added); *id.* at 13 (“The *ultimate goal* of Motorola’s conduct was to pressure
21 Microsoft into relinquishing its rights under non-standard essential patents by threatening *or*
22 *securing* injunctions on Motorola’s standard essential patents with devastating consequences”)
23 (emphasis added).

24 Moreover, the pretrial order frames Microsoft’s contention as “[w]hether Motorola
25 breached its contractual obligations to the IEEE, ITU, and/or Microsoft by filing lawsuits and
26

1 seeking injunctive relief.” (Dkt. 803 at 2); *see also id.* at 2–4. “Seeking” is in no way time-
2 limited to the act of filing the lawsuits, as other language in the pretrial order makes clear. *E.g.*
3 *id.* at 3 (referring to “Motorola’s ongoing efforts to enjoin Microsoft’s H.264 compliant
4 products”); *id.* at 9 (“The pursuit of those injunctions wrongfully inflicted substantial harm on
5 Microsoft.”). And Microsoft’s amended complaint alleged that “Defendants are not entitled to
6 enjoin or exclude Microsoft from implementing the technology of the SDO Litigated Patents”
7 (Dkt. 53 at ¶ 85), a claim clearly not time-limited to the filing of a patent infringement suit.
8 The plain meaning of this allegation encompasses any and all actions targeted to “enjoin or
9 exclude” Microsoft’s products from the market—it is not limited to the act of filing for an
10 injunction. Finally, although it failed to carry its burden at trial, Motorola itself has argued that
11 it has a mitigation defense against Microsoft’s claim that the pursuit of the German injunction
12 was a breach. (Dkt. No. 803, Pretrial Order at 14.) Motorola clearly understood and attempted
13 to rebut Microsoft’s claim that “seeking” or “pursuing” injunctions extended beyond the filing
14 of an infringement complaint, and throughout a progressing infringement case.

15 No reasonable juror would have a legally sufficient evidentiary basis to conclude that
16 Motorola’s pursuit of injunctions after this RAND determination was underway and after
17 Microsoft had committed to accept a RAND license was consistent with Motorola’s
18 contractual RAND obligations.

19 **III. Motorola Breached Its Contracts With The ITU And IEEE By Seeking**
20 **Injunctions On Its Standard Essential Patents Before Attempting to Offer a**
21 **License on RAND Terms.**

22 It is a breach of the RAND commitment to seek injunctive relief before even attempting
23 to offer a license, on “RAND” terms or otherwise. *Realtek Semiconductor Corp. v. LSI Corp.*,
24 -- F. Supp. 2d --, 2013 WL 2181717, at *7 (N.D. Cal. May 20, 2013). It is undisputed that
25 Motorola did not make an offer on RAND terms before seeking injunctive relief. 8/27/13 Tr.
26 (Dailey) 95:15–20, 8/28/13 Tr. (Gutierrez) 123:25–125:7, 130:4–9; 150:21–151:15. To rule

1 that the fact that Motorola made *some* offers distinguishes this case from the situation in
2 *Realtek* would elevate form over substance. *See WL Gore and Associates*, 529 F.2d 614, 623
3 (5th Cir. 1976) (“A royalty demand which is so high as to preclude acceptance of a license
4 offer is, after all, not appreciably different from a refusal of a license upon any terms.”).
5 Although Motorola sent letters before seeking injunctions, the demands were such that no
6 reasonable company could have accepted them. 8/28/13 Tr. (Gutierrez) 128:22-25, 131:12-14,
7 135:21-136:7. Motorola’s October 2010 offer letters asked Microsoft to confirm that it
8 accepted the offers. Tr. Exs. 1, 2. But Motorola’s principal witness and author of the letters
9 confirmed that Motorola never expected an acceptance. 8/27/13 Tr. (Dailey) 118:4-7 (“You
10 didn’t think that Microsoft would accept this offer in 20 days, did you, as stated?” A: “No. I
11 expected them to respond.”), 185:5-11; *see also* 9/3/2013 Tr. (Leonard) 151:22-152:3.

12 **IV. Motorola Breached Its RAND Obligations By Rejecting Microsoft’s Above-RAND** 13 **Orange Book Offer And Pursuing Injunctions.**

14 In December 2011, Microsoft made an offer to take a license to Motorola’s two
15 German H.264 patents at a rate of 1-2 euro cents per unit, at least four times higher than the
16 0.555 (US) cent per unit RAND rate for Motorola’s entire portfolio. *See* 8/30/13 Tr.
17 (Haedicke) 201:1-16, 211:18-212:5. The offer was clearly in excess of RAND, yet Motorola
18 rejected it, 8/30/13 Tr. (Haedicke) 201:17-18, and continued to pursue an injunction in
19 Germany until April 2012 when the Court ordered it to stop. 9/3/12 Tr. (Killough) 13:21-
20 14:11. Motorola was in breach of its contractual obligation to grant licenses on RAND terms,
21 and compounded that breach by pursuing an injunction in Germany, thereby forcing Microsoft
22 to relocate its distribution center. 8/29/13 Tr. (Davidson) 69:8-13, 71:18-20. Moreover, given
23 that suing for injunctions on SEPs constitutes a breach of the RAND commitment if no RAND
24 offer has been made, no reasonable juror would have a legally sufficient basis to find that
25 Motorola’s pursuit of injunctions after rejecting an above-RAND offer was consistent with its
26 RAND commitments. *See Realtek*, 2013 WL 2181717, at *6-7.

1 **V. Motorola Breached Its RAND Commitments By Seeking Injunctions On Its**
2 **Standard Essential Patents.**

3 Motorola’s RAND licensing commitments expressly require that it make available
4 RAND licenses to any standard implementer. Final Jury Instr. 15; 8/27/13 Tr. (Dailey) 63:3–6.
5 This means that Motorola will not pursue injunctions against implementers—that extends to all
6 implementers, and certainly to those implementers subject to a court’s jurisdiction, and those
7 able *and* willing to pay RAND royalties. That obligation is within the four corners of the
8 RAND licensing contracts, independent of the duty of good faith and fair dealing, and
9 necessarily follows from Motorola’s promise to grant licenses to anyone. Motorola
10 *surrendered* some of its statutorily-granted property rights in order to gain a foothold in the
11 standard. Had it not made the RAND licensing commitment, Motorola could have attempted
12 to exclude every party that allegedly used its patented technology. But when it participated in
13 the SSOs’ formation of these standards, and made its contractual RAND licensing
14 commitments, Motorola promised it would do just the opposite—it promised that *it would*
15 *exclude no one*, and would make licenses available to *every* standard implementer.

16 While a patent grant gives a patent holder “the right to exclude others from making,
17 using, . . . or selling the invention,” 35 U.S.C. § 154, the right to exclude can be waived by
18 contract. *See Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 703 (Fed. Cir. 1992) (“This
19 right to exclude may be waived in whole or in part. The conditions of such waiver are subject
20 to patent, contract, antitrust, and any other applicable law, as well as equitable considerations
21 such as are reflected in the law of patent misuse.”). *See also Morrow v. Microsoft Corp.*, 499
22 F.3d 1332, 1342 (Fed. Cir. 2007) (“[I]mplicit in the right to exclude is the right to waive that
23 right.”). A patent license is one example of such a waiver. *Morrow*, 499 F.3d at 1342. A
24 RAND licensing commitment is simply another example.² It is hard to imagine a clearer

25 ² A patent “contain[s] a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to
26 exclude others from making, using, offering for sale, or selling the invention throughout the United States or
importing the invention into the United States.” 35 U.S.C. § 154(a)(1). Patents are a “in effect, a bundle of rights
which may be divided and assigned, or retained in whole or part.” *Alfred E. Mann Foundation For Scientific*

1 waiver of the right to exclude than a contractual promise to grant licenses (*i.e.*, forego
2 exclusion) on reasonable and non-discriminatory terms to anyone who wants to make use of
3 the technology. *See* 9/3/13 Tr. (Leonard) 135:2–3 (“[Y]ou don’t really need an injunction, you
4 just award a money amount of damages.”)

5 The Ninth Circuit, in affirming the Court’s preliminary injunction, recognized that
6 Motorola’s RAND licensing commitments were not consistent with pursuing injunctions.
7 *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (“Implicit in such a
8 sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to
9 keep would-be users from using the patented material, such as seeking an injunction, but will
10 instead proffer licenses consistent with the commitment made.”). Where the patent holder has
11 demanded royalties far in excess of RAND, and then predicates a claim for injunctive relief on
12 the absence of a license, the “arguable” nature of this inconsistency vanishes and is replaced by
13 a certainty. *See id.* at 885 (“[I]t could well be that retrospective payment at the rate ultimately
14 determined and a determination of the future rate, not an injunction banning sales while that
15 rate is determined, is the only remedy consistent with the contractual commitment to license
16 users of [] standard-essential patents.”). Moreover, Microsoft’s ability to pay such a rate has
17 never been in question, and was affirmed by Microsoft’s posting of a \$100 million bond in this
18 case. (Dkt. No. 265.)³

19 Judge Posner agrees that RAND licensing commitments waive injunctive relief. *See*
20 *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913–14 (N.D. Ill. 2012) (endorsing the
21 FTC’s position that “injunctive relief is indeed unavailable for infringement of a patent
22 governed by FRAND” and holding “I don’t see how, given FRAND, I would be justified in

23 *Research v. Cochlear Corp.*, 604 F.3d 1354, 1360 (Fed. Cir. 2010) (citing *Vaupel Textilmaschinen KG v.*
24 *Meccanica Euro Italia SPA*, 944 F.2d 870 (Fed. Cir. 1991)).

25 ³ At a minimum, the RAND commitment bars pursuing injunctive relief against standard implementers who are
26 subject to jurisdiction and able to pay—*i.e.*, not judgment proof in an infringement action to recover RAND
royalties.

1 enjoining Apple . . . unless Apple refuses to pay a royalty that meets the FRAND
2 requirement.”).

3 The public interest supports this construction. “In choosing among the reasonable
4 meanings of a promise or agreement or a term thereof, a meaning that serves the public interest
5 is generally preferred.” Restatement (Second) of Contracts § 207. In Motorola’s 752 ITC
6 Investigation, the FTC explained “Simply put, we are concerned that a patentee can make a
7 RAND commitment as part of the standard-setting process and then seek an exclusion order for
8 infringement of the RAND-encumbered SEP as a way of securing royalties that may be
9 inconsistent with the RAND commitments.” 8/30/13 Tr. (Heiner) 151:13–17.

10 If Motorola’s view were accepted, as long as it simply asserted it was willing to
11 “negotiate,” it could file lawsuits seeking injunctions against *every* implementer of the 802.11
12 or H.264 standards; it could obtain those injunctions; it could *actually exclude* all implementers
13 from the market for standard-compliant products; and it could use the leverage of those
14 proceedings to extract non-RAND royalties or any other concessions it wished. Motorola’s
15 position that it can freely enjoin standard-implementers is impossible to reconcile with the
16 RAND licensing commitment—especially where it is clear that the licensing offers it made far
17 exceeded RAND—and must be rejected. No reasonable juror would have a legally sufficient
18 evidentiary basis to find that Motorola’s pursuit of injunctions was consistent with its RAND
19 commitments.

20 **VI. Motorola Breached Its Contract With The IEEE By Failing To Make A License**
21 **To Its 802.11 Essential Patents Available At Nominal Competitive Costs.**

22 Motorola breached its contract with the IEEE by failing to make its 802.11 standard
23 essential patents available at nominal competitive costs, and no legally sufficient evidentiary
24 basis exists for a reasonable juror to find otherwise. The Court has ruled that “the requirement
25 to license at nominal competitive costs was part of the RAND commitment at the time
26 Motorola and Symbol first committed to license their 802.11 SEPs on RAND terms.” (Dkt.

1 673 at ¶¶ 47-48); 9/3/13 Tr. (Holleman) 97:6–13. “Nominal competitive costs” requires that
2 the costs associated with the patented technology be both nominal and competitive.
3 Motorola’s licensing conduct fails on both grounds.

4 A “nominal” cost is a cost that is trifling. *See, e.g., Cummings v. Connell*, 402 F.3d
5 936, 943 (9th Cir. 2005). Unrebutted testimony establishes that for 802.11, a royalty of 1% of
6 chip price represents a customary high ceiling for royalty rates in the semiconductor industry,
7 8/28/13 Tr. (Ochs) 95:6–21; any nominal *competitive* cost must be below that amount. No
8 evidentiary basis exists for concluding that Motorola’s royalty demands were trifling.

9 Motorola demanded royalties of approximately \$100 million per year from Microsoft’s sales of
10 Xbox. 8/27/13 Tr. (Treadwell) 46:14-20. Its demand equated to up to \$9 per Xbox, an amount
11 that significantly exceeds the cost of the entire chip that provides the Xbox with 802.11
12 functionality, and vastly exceeds the customary 1% chip price ceiling. 8/28/13 Tr. (Gutierrez)
13 130:4–6, 130:10–23; 8/27/13 Tr. (Dailey) 74:23–25, 102:4–7. A charge for access to
14 technology that exceeds the cost of the component implementing that technology cannot be not
15 “nominal,” nor is a royalty that exceeds the customary industry ceiling by orders of magnitude.

16 Nor could any reasonable juror conclude that Motorola’s demands were competitive.
17 Unrefuted testimony confirms that Motorola’s offer was not commercially reasonable. 8/28/13
18 Tr. (Gutierrez) 131:12–14. The record establishes that it would have been commercially
19 impossible for Microsoft to pay the royalties that Motorola sought to all companies with
20 802.11 standard essential patents, 8/28/13 Tr. (Gutierrez) 131:3–1, a fact that went undisputed
21 by Motorola’s former corporate vice president of intellectual property. 8/27/13 Tr. (Dailey)
22 93:14-25. Marvell, Microsoft’s supplier for 802.11 chips, described Motorola’s demands as
23 commercially unreasonable and a “going-out-of-business” model. 8/28/13 Tr. (Ochs) 93:24-
24 94:6. Such commercially unreasonable and impractical rates cannot be considered
25 “competitive,” and no evidentiary basis exists for a reasonable juror to find otherwise.
26

1 **VII. Motorola Breached Its Contracts With The IEEE And ITU By Failing To Make**
2 **Licenses To Its 802.11 And H.264 Patents Available On RAND Terms.**

3 Both contracts require Motorola to make licenses to its SEPs available to Microsoft on
4 RAND terms. 8/27/13 Tr. (Dailey) 63:3–6; Final Jury Instr. No. 15. The RAND rate for
5 Motorola’s patents has been set: 0.555 cents per unit for its H.264 SEPs and 3.471 cents per
6 unit for its 802.11 SEPs. Final Jury Instr. No. 20; 8/29/2013 Tr. (Murphy) 138:22–139:3,
7 141:10–15. The record contains no evidence that Motorola has ever offered Microsoft a
8 license on these terms. To the contrary, the record establishes that as recently as December
9 2012, Motorola continued to demanded a supra-RAND royalty of 2.25% of the end product
10 price. 8/28/13 Tr. (Gutierrez) 160:23–161:6. Microsoft has been clear and unequivocal going
11 back at least two years that it is ready and willing to accept a license at the Court-determined
12 RAND rate. 8/29/13 Tr. (Murphy) 47:23–48:10; 9/3/13 Tr. (Killough) 10:20–11:14.
13 Microsoft has yet to receive an offer for a RAND license, and there is no evidentiary basis
14 from which a reasonable juror could conclude otherwise.

15 **VIII. Motorola’s Orange Book Argument Does Not Provide A Mitigation Or Causation**
16 **Defense.**

17 To establish that Microsoft failed to mitigate damages, Motorola must prove both that
18 Microsoft failed to use reasonable efforts to minimize its loss *and* the amount of damages that
19 Microsoft could have minimized or avoided. Final Jury Intr. 26. Motorola’s Orange Book
20 “Road B” fails as a mitigation argument for two reasons: First, the record contains no
21 evidence as to the amount of damages that could have been avoided by following that path.
22 Second, no reasonable juror would have a legally sufficient basis to conclude that the
23 procedure proposed was reasonable. Motorola’s witness explained that to be on the absolutely
24 safe side in following “Road B,” Microsoft would first have had to place into escrow the full
25 amount that Motorola had demanded. 8/30/13 Tr. (Haedicke) 208:2–13. There is no evidence
26 what that amount would have been. 8/30/13 Tr. (Haedicke) 216:1–3. Motorola’s witness
claimed that Microsoft—presumably, if it were willing to be less than absolutely safe--could

1 instead have escrowed “a reasonable amount,” but the witness could not identify what that
2 amount would have been either. 8/30/13 Tr. (Haedicke) 208:12–17. In either case, Microsoft
3 would then have had to file a separate lawsuit to challenge the rate and try to get its money
4 back. 8/30/13 Tr. (Haedicke) 207:4–208:1. Motorola’s witness admitted it was pure
5 speculation to guess how long that process would take in months or years, 8/30/13 Tr.
6 (Haedicke) 208:18–24, and that he could only speculate what evidence might be considered in
7 that type of proceeding. 8/30/13 Tr. (Haedicke) 209:19–210:11. Motorola’s witness could not
8 say what costs, legal or otherwise, Microsoft would incur by following the “Road B” path.
9 8/30/13 Tr. (Haedicke) 217:11–217:15. Motorola’s witness could not say what amount the
10 German court would set as the royalty, or even confirm it could not be as much as \$4 billion.
11 8/30/13 Tr. (Haedicke) 216:16–217:10. Motorola’s witness could only guess whether in total,
12 going down “Road B” would cost Microsoft more or less than the \$25 million Microsoft seeks
13 as damages for Motorola’s breaches in Germany. 8/30/13 Tr. (Haedicke) 217:16–20.

14 A procedure of unknowable costs that could result in a German court’s order to pay
15 some unknown amount up to \$4 billion in royalties for two patents, when a RAND royalty is
16 less than \$2 million annually for Motorola’s entire H.264 portfolio, cannot be a “reasonable
17 effort” Microsoft was obligated to take to minimize the damages caused by Motorola. *See,*
18 *e.g., Jaeger v. Cleaver Const., Inc.*, 201 P.3d 1028, 1037 (Wash. App. 2009) (“Courts allow a
19 wide latitude of discretion to the person who, by another’s wrong ... is faced with a probability
20 of injury or loss.”) (citing cases). Motorola cannot carry its burden of establishing the amount
21 of damages that could have been minimized or avoided by following “Road B” because it
22 offered no evidence of the costs of that option. There is no legally sufficient evidentiary basis
23 to find that Microsoft failed in its duty to minimize damages.

24 Further, there is no legally sufficient basis for evidence related to the Orange Book to
25 play any role in assessing Motorola’s liability or damages. The existence of the Orange Book
26

1 procedures does not affect the direct causal link between Motorola’s pursuit of injunctions and
2 Microsoft’s decision to relocate its distribution facility. 8/29/13 Tr. (Davidson) 70:7–15, 83:1–
3 4. Microsoft *did* take the “Road A” option of making an Orange Book offer which was both
4 higher than RAND and rejected by Motorola. And Road B provided no path to avoid the
5 necessity of moving the distribution facility for the same reasons outlined above—Motorola
6 produced no evidence of its costs, and indeed the record its expert created established that the
7 outcome under that path is purely speculative. An argument that Microsoft did not pursue one
8 of multiple options to avoid severe harm is a mitigation argument, not a causation argument.
9 Such “evidence” of other possible routes to avoid the harm Motorola’s injunction would have
10 caused cannot undermine the concrete evidence that Microsoft was forced by Motorola to take
11 some action.

12 **IX. Microsoft’s Defenses Of Invalidity And Noninfringement Are Irrelevant To**
13 **Motorola’s Liability For Breach Of Contract.**

14 Microsoft did not repudiate or forfeit any of its rights under the contracts by arguing
15 that Motorola’s SEPs were invalid or not infringed by Microsoft. Motorola’s suggestions that
16 Microsoft was not entitled to a RAND license because it did not concede the validity and
17 essentiality of Motorola’s SEPs are inconsistent with the conclusions reached by regulatory
18 agencies investigating Motorola’s conduct and otherwise are without legal basis.

19 Motorola argued in its opening statement that seeking injunctions does not breach the
20 RAND commitment if the implementer is not a “willing licensee,” and that Microsoft is not a
21 willing licensee because it presented noninfringement and invalidity defenses in Motorola’s
22 various infringement suits. 8/26/13 Tr. at 182:22–183:6 (“[R]emember, as of this time
23 Microsoft never said it was willing to pay or had said, we do, in fact, infringe your patents;
24 and, yes, they’re valid”); *id.* at 159:17–21 (arguing Microsoft is not a willing licensee); *id.* at
25 178:23–179:8 (same). But, as Motorola knows, the FTC disagrees—but the Court’s rulings at
26 trial, which were made at Motorola’s insistence that it would be severely prejudiced by

1 introduction of any FTC evidence, barred Microsoft from presenting this evidence. Ex. 6089
2 at MOTM_WASH1823_0620163, ¶¶ 25–27 (Microsoft was a willing licensee). Motorola
3 ultimately signed an agreement with the FTC stating that asserting such defenses does not
4 render an implementer an unwilling licensee. Ex. 6090 at MOTM_WASH1823_0620228.
5 Motorola fought vigorously to keep the existence of this investigation out of the record of this
6 trial, but the statements made by the FTC in the course of investigating Motorola’s conduct
7 contradict the position Motorola sought to advance at trial.⁴

8 Further, Microsoft’s witnesses testified that in spite of any defenses of invalidity or
9 noninfringement asserted in Motorola’s patent actions, Microsoft stated in its complaint in this
10 case that despite any concerns about invalidity and noninfringement: “Microsoft has to rely
11 upon Motorola’s and other similarly-situated patentholders’ representations that all patent
12 controversies may be avoided based on the offer of patent licenses on reasonable rates and
13 non-discriminatory terms.” 8/29/13 Tr. (Gutierrez) 56:20–24. Microsoft’s witness David
14 Killough also explained why such defenses must be asserted in patent infringement cases,
15 because otherwise the implementer would simply be conceding liability, 9/3/13 Tr. (Killough)
16 45:3–14, and Motorola sought injunctions in those actions. Microsoft sought a judicial
17 accounting in its complaint, and at least as of September 2011 cemented its commitment to
18 take a RAND license in this litigation. 9/2/13 Tr. (Killough) 228:4–14; 9/3/13 Tr. (Killough)
19 11:8–14. Microsoft’s patent defenses are simply irrelevant to Motorola’s contract liability.

20 **X. Motorola Breached Its Contracts With The IEEE And ITU By Making Blatantly**
21 **Unreasonable Offers For Licenses To Its Standard Essential Patents.**

22 The Court has already ruled, and the parties have never disputed, that blatantly
23 unreasonable offers always violate the duty of good faith and fair dealing. (Dkt. 335 at 25;

24 ⁴ Motorola also knows that European Commission disagrees. Ex. 6076 at MS-MOTO_1823_00005258273
25 (“[I]n the Commission’s preliminary view, the fact that the potential licensee challenges the validity, essentiality
26 or infringement of the SEP does not make it unwilling where it otherwise agrees to be bound by the determination
of FRAND terms by a third party.”).

1 Dkt. 188 at 15 (“To wit, during the February 13, 2012 status conference, counsel for Motorola
2 agreed that blatantly unreasonable offers would violate its RAND obligations under the
3 policies.”).) There is no legally sufficient evidentiary basis on which a reasonable juror could
4 conclude that Motorola’s offers were anything but blatantly unreasonable.

5 For its H.264 SEPs, Motorola sought royalties of \$11.25 for a \$500 laptop, with even
6 higher royalties attaching to more expensive laptops. 8/28/13 Tr. (Gutierrez) 123:25–124:11.
7 This is in contrast to a RAND rate of 0.555 cents per unit. Final Jury Instr. No. 20; 8/29/2013
8 Tr. (Murphy) 138:22–139:3. Motorola’s demand for its H.264 patents amounted to more than
9 \$4 billion per year where a RAND royalty would have amounted to less than \$2 million per
10 year. 8/28/13 Tr. (Gutierrez) 124:16–22, 125:4–7. As for its 802.11 patents, Motorola sought
11 royalties of up to \$9 per Xbox where a RAND rate was just 3.471 cents per unit. Final Jury
12 Instr. No. 20; 8/28/13 Tr. (Gutierrez) 130:4–6. In fact, Motorola’s demand for its 802.11 SEPs
13 exceeded the cost of the chip that provides Xbox with 802.11 functionality. 8/28/13 Tr.
14 (Gutierrez) 130:18–23. Dailey agreed that Motorola’s October 2010 offers were “orders of
15 magnitude” higher than the RAND rate. 8/27/13 Tr. (Dailey) 95:15–20. Motorola has
16 presented no evidence contradicting these facts, leaving a reasonable juror with no legally
17 sufficient evidentiary basis to conclude that Motorola’s offers were anything but blatantly
18 unreasonable.⁵

19 **XI. All Three Motorola Defendants Are Liable For Breach Of Contract.**

20 The evidence establishes that Kirk Dailey was acting on behalf of all involved
21 Motorola entities. The October 2010 letters were on Motorola, Inc., letterhead and purport to
22 offer licenses to patents held by a variety of Motorola entities. Exs. 1, 2. In the negotiations
23 through the period that was the subject of both Horacio Gutierrez’s and Kirk Dailey’s
24

25 ⁵ Consideration of the upper bound of the RAND range compels the same conclusion. 8/29/13 Tr. (Murphy)
26 139:12–140:2, 142:6–19

1 testimony, those patents, and patents subsequently owned by both Motorola Mobility, Inc.,
2 Motorola Solutions, Inc., and General Instrument Corporation have been the subject of the
3 parties' dispute. Dailey's initial conduct in sending the letters relates to all three entities
4 because their patents were the subject of the offers. Dailey's continued conduct and the pursuit
5 of injunctions—not only as leverage to back up Motorola's demands for its SEPs, but also for
6 concessions on non-standard-essential patents—is likewise attributable to all entities.

7 Any Motorola objection on this ground has been waived. Across the entire scope of
8 this litigation, through and including the November trial, Motorola has conducted this case as
9 "Motorola"—collectively as Motorola, Inc. (now Motorola Solutions, Inc.), Motorola
10 Mobility, Inc., and General Instrument. Motorola filed the Joint Pretrial Order as "Defendants
11 Motorola, Inc. (n/k/a Motorola Solutions, Inc.), Motorola Mobility LLC, and General
12 Instrument Corporation (collectively 'Motorola' or 'Defendants')." (Dkt. No. 803 at 1.)
13 Motorola stipulated to admitted facts that "Defendants sent Microsoft" the two October 2010
14 letters. (Dkt. No. 803 at 6.) Motorola repeatedly displayed its own demonstrative timeline to
15 the jury that shows that "Motorola files suit in WD WI," that "Motorola files suit in ITC," and
16 that "Motorola files in Germany." Wion Dec. Ex. 2 (Motorola Timeline Demonstrative); *see*
17 *also* 8/30/13 Tr. (Haedicke) 200:8–13. In other words, Motorola has affirmatively represented
18 to the jury that the key relevant conduct—the letters and the pursuit of injunctions—was
19 undertaken by "Motorola"—*i.e.*, all three entities. And Motorola stood by while the jury
20 received preliminary instructions defining Motorola collectively as the three entities. This
21 trial, like the last trial, has proceeded on that definition, and Motorola cannot change it now.

22 DATED this 4th day of September, 2013.

23 CALFO HARRIGAN LEYH & EAKES LLP

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26 Arthur W. Harrigan, Jr., WSBA #1751

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Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

- 1. I am over the age of 21 and not a party to this action.
2. On the 4th day of September, 2013, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

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16 DATED this 4th day of September, 2013.

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