

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC 20436**

**Before the Honorable Theodore R. Essex
Administrative Law Judge**

In the Matter of

**CERTAIN HANDHELD ELECTRONIC
COMPUTING DEVICES, RELATED
SOFTWARE AND COMPONENTS
THEREOF**

Investigation No. 337-TA-769

**COMPLAINANT MICROSOFT CORPORATION'S RESPONSES
TO COMMISSION STAFF'S HIGH PRIORITY OBJECTIONS TO
COMPLAINANT'S AND RESPONDENT'S PROPOSED DIRECT EXHIBITS**

Pursuant to Ground Rule 8.2, Complainant Microsoft Corporation hereby responds to the Commission Investigative Staff's High Priority Objections to Complainant's and Respondents' Proposed Direct Exhibits. The Staff has not submitted a separate listing of objections to direct exhibits, but relies upon its High Priority Objections as both its objections and high priority objections to direct exhibits. (*See* 1/18/12 Staff High Priority Objections to Complainant's and Respondents' Proposed Exhibits ("Staff Objections") at 1, n.9). By these responses, Microsoft responds to all of the Staff's objections.

I. WRITTEN TESTIMONY

The Staff objects that Microsoft has designated written testimony including declarations, expert reports, and deposition transcripts from non-adverse witnesses as direct exhibits. The objections should be denied.

A. Declarations

The Staff argues that several of Microsoft's direct exhibits containing declarations (CX-31C, CX-4676C, and CX-4705C) should not be admitted into evidence because they allegedly constitute direct testimony in a form other than a written witness statement. (Staff Objections at 1-2). Microsoft respectfully disagrees.

Exhibit CX-31C is a declaration that was submitted as an exhibit to Microsoft's Complaint in this matter. Pursuant to Ground Rule 9.6, "[c]omplaints and responses to the complaint, *as well as exhibits thereto*, may be offered as evidence if marked as exhibits." (emphasis added). The Ground Rules further specify that "[w]hether [such exhibits] [are] received into evidence is discretionary with the Administrative Law Judge." (Ground Rule 9.6.) Microsoft respectfully submits that, consistent with Ground Rule 9.6, the Complaint in this matter and exhibits thereto, including exhibit CX-31C, should be received into evidence so that the complete record relating to the Complaint is preserved.

Exhibits CX-4676C and CX-4705C are declarations that were attached as exhibits (A and B, respectively) to Microsoft's Motion for Summary Determination on the Economic Prong of the Domestic Industry Requirement. Admittedly, Ground Rule 9.4.1 specifies that all direct witness testimony shall be made by witness statements in lieu of live testimony. Microsoft had identified the declarations of CX-4676 and CX-4705 as exhibits so that the complete record would be available for use at trial. Microsoft does not intend to rely upon either declaration as direct witness testimony.

B. Expert Reports

Microsoft has designated the reports of its own experts as well as Respondents' experts as direct exhibits. (*See, e.g.*, CX-372C through CX-376, CX-386, CX-389C through CX-391C, CX-441C, CX-442C, CX-337C, CX-448C, CX-456C through CX-461, CX-4746 through CX-4755.) The Staff objects to the admission of expert reports into the record as such reports allegedly constitute direct testimony in a form other than written direct testimony. (Staff Objections at 2.) The Staff does not object to the use of expert reports for impeachment. (*Id.*)

Ground Rule 9.5.1 provides that “[w]hile the Administrative Law Judge does not normally admit expert reports in to the record as substantive evidence, he will consider such a request on a case by case basis.” The rules clarify that “[e]xhibits and/or attachments to the expert report *may be admitted* to the extent they are discussed during the expert’s testimony.” (Ground Rule 9.5.1, n.9) (Order No. 28) (emphasis added).

Microsoft and Respondents have conferred and agreed to remove many of the *actual* expert reports from the direct exhibits. However, Microsoft maintains that the *exhibits to those expert reports* should be admitted as direct exhibits so that they may be “discussed during the expert’s testimony.” (Ground Rule 9.5.1, n.9). For example, curriculum vitae and other material that were attached to the expert reports (*see e.g.*, CX-373, CX-390, CX-459, CX-4752, CX-4749, CX-4749, and 4750) and identified as direct exhibits should be admitted so as to be available for discussion by the expert during his/her testimony.

C. Deposition Designations

The Staff has identified several Microsoft exhibits as comprising deposition transcripts. (Staff Objections at 2 (citing Microsoft exhibits CX-486C through CX-505C, and CX-563C).) The Staff objects to entire deposition transcripts being entered into evidence, but acknowledges

that portions of depositions transcripts may be entered into evidence in lieu of direct testimony. (Staff Objections at 2.)

Microsoft proposes to withdraw exhibits CX-486C through CX-505C.

With respect to exhibit CX-563C, consistent with the limitations proposed by the Staff, Microsoft's exhibit comprises portions of the deposition transcript as specified by Microsoft's transcript designations. Microsoft does not propose introducing the entirety of the deposition transcripts as direct evidence. Accordingly, direct exhibit CX-563C should be admitted into evidence.

II. PLEADINGS, MOTIONS AND OTHER FILINGS, DISCOVERY REQUESTS AND RESPONSES, AND PRIVILEGE LOGS

The Staff objects that Microsoft has designated as exhibits various materials that were generated by counsel in this matter. The objection should be denied.

A. Complaint and Accompanying Exhibits

Microsoft has identified the Complaint with exhibits as well as Respondents' responses to the Complaint as exhibits. (Staff Objections at 3.) The Staff does not object to the designation of the Complaint and responses as exhibits, but objects to various charts that are attached as exhibits to the Complaint. In particular, the Staff objects to direct exhibits CX-32 through CX-45. (Staff Objections at 3.) The Staff notes that it would not object to the re-designation of these charts as demonstrative exhibits.

Under Ground Rule 9.6, "Complaints and responses to the complaint, *as well as exhibits thereto*, may be offered as evidence if marked as exhibits." (emphasis added).

Here, because direct exhibits CX-32 through CX-45 are exhibits to the Complaint as specified in the Ground Rules, the exhibits may be offered as evidence. The Ground Rules do not distinguish between exhibits to the Complaint that comprise a chart as opposed to other data

formats. Rather, the Ground Rules specify only that “Complains and . . . exhibits thereto” may be offered as evidence. Furthermore, allowing exhibits CX-32 through CX-45 to be entered as direct exhibits would allow for continuity in that the exhibits that are part of the Complaint would be arranged in proximity to the Complaint. Accordingly, exhibits CX-32 through CX-45 should be admitted into evidence.

B. Pleadings, Motions and Other Filings

Microsoft has identified a motion that was previously filed in this matter as a direct exhibit. In particular, the Staff references exhibit CX-71 which is Foxconn’s Unopposed Motion for Leave to Further Amend Their Response.

Under Ground Rule 9.6, “Complaints *and responses to the complaint* . . . may be offered as evidence if marked as exhibits.” (emphasis added).

Microsoft respectfully submits that Foxconn’s Unopposed Motion for Leave to Further Amend Their Response is a “response to the complaint.” Accordingly, pursuant to Ground Rule 9.6, Foxconn’s paper “may be offered as evidence if marked as [an] exhibit[.]”

C. Discovery Requests and Responses

Microsoft’s exhibits include several of Microsoft’s responses to Respondents’ interrogatories (*see* CX-462C through CX-467C). (Staff Objections at 4.) The Staff argues that Microsoft should not be allowed to rely on its own interrogatory responses as evidence. Microsoft has also identified a few of its discovery requests (*see* CX-516C) as exhibits. The Staff argues that the requests do not contain direct evidence. (Staff Objections at 5.)

Microsoft had included discovery responses and discovery requests as exhibits so that the entire record is available for use at trial. Microsoft is not aware of any rule, and the Staff does not cite to any, that precludes such items from being marked as exhibits. Accordingly, the

exhibits should be allowed into evidence. At a minimum, such discovery materials should be of record so as to be available for use during examination of witnesses.

D. Orders

In contrast to Respondents, Microsoft has not identified the procedural scheduling orders of this matter as direct exhibits. Accordingly, the Staff does not object to Microsoft's exhibits with respect to such orders.

E. Privilege Logs

Microsoft has not identified its privilege log as a direct exhibit in this matter. Accordingly, the Staff does not object to Microsoft's exhibits with respect to such logs.

III. OBJECTIONS TO LEGAL PRECEDENT AND STATUTES

Microsoft has not identified any Commission opinions as direct exhibits. Accordingly, the Staff does not object to Microsoft's exhibits with respect to inclusion of such opinions.

IV. COMMUNICATIONS BETWEEN COUNSEL OR WRITTEN BY COUNSEL

The Staff notes that Microsoft has marked several communications from counsel in this investigation as exhibits. (Staff Objections at 6.) The Staff argues that such letters are attorney argument and not substantive and therefore should not be admitted as evidence.

Microsoft respectfully submits that the identified correspondence is relevant to issues before the Commission. For example, CX-393 is correspondence between counsel for the parties relating to the issue of claim construction, which is an issue before the Commission. Microsoft submits that the entire record relating to that issue, as well as all others, should be available as evidence.

Regarding the Staff's argument that such correspondence is attorney argument, Microsoft submits that any correspondence from counsel that has been identified as an exhibit is not

intended to be offered for any attorney argument that is made therein, but for the factual background that such correspondence provides.

V. DOCUMENTS NOT PRODUCED DURING THE INVESTIGATION

The Staff notes that Microsoft's direct exhibit list does not include production numbers for several exhibits including exhibits CX-401, CX-402, CX-431, CX-432, CX-433, CX-437, CX-438, CX-440, CX-648, CX-695 through CX-699, CX-4729 through CX-4744, CX-4759, CX-4760. (Staff Objections at 6.) The Staff objects to these exhibits to the extent that they have not been produced.

The vast majority of these documents are print outs of publicly available web pages that were identified through URL's in Microsoft's opening expert reports. These exhibits are not production documents that require Bates numbers pursuant to Ground Rule 4.7. Accordingly, while these exhibits do not have production Bates numbers, the documents were identified during discovery and are proper exhibits.

Specifically, Microsoft made CX-401 and CX-402 available through provision of the URL in Dr. Adam Porter's opening expert report regarding infringement of the '522 patent; Microsoft made exhibits CX-431 through CX-433, and CX-695 through CX-699 available through provision of the URL in Dr. Porter's opening expert report regarding infringement of the '372 patent; Microsoft made exhibits CX-4759 and CX-4760 available through provision of the URL in Dr. Porter's opening expert report regarding infringement of the '522 patent, and supplemental expert report regarding infringement of the '522 patent, respectively; and finally, Microsoft made CX-4729 through CX-4744 available through provision of the URL in Dr. Seth Kaplan's opening expert report regarding Domestic Industry and Bond.

The two remaining exhibits that Staff objects to, Exhibits CX-437 and CX-438, are copies of physical exhibit CPX-31. Accordingly, Microsoft made these exhibits available when it made CPX-31 available for inspection.

VI. DEMONSTRATIVE AND PHYSICAL EXHIBITS

As explained above in section II.A, Microsoft has designated several charts relating to infringement, domestic industry, and invalidity as exhibits. (Staff Objections at 7.) In particular, the Staff refers to exhibits CX-32 through CX-45. The Staff argues that the charts are summaries of other evidence, but not evidence themselves. For the reasons discussed above, the Staff's objections should be denied.

Under Ground Rule 9.6, "Complaints and responses to the complaint, *as well as exhibits thereto*, may be offered as evidence if marked as exhibits." (emphasis added).

Here, because direct exhibits CX-32 through CX-45 are exhibits to the Complaint as specified in the Ground Rules, the exhibits may be offered as evidence. The Ground Rules do not distinguish between exhibits to the Complaint that comprise a chart as opposed to other data formats. Rather, the Ground Rules specify only that "Complaints and . . . exhibits thereto" may be offered as evidence.

VII. DUPLICATE EXHIBITS

The Staff has noted that there are duplicates between Microsoft's and Respondents' direct exhibit lists. Microsoft and Respondents are working together to remove such duplicates before the hearing.

Dated: January 24, 2012

Respectfully submitted,

/s/ Thomas R. Burns, Jr.
V. James Adduci II
Andrew F. Pratt
David H. Hollander, Jr.
Thomas R. Burns, Jr.
Rowan E. Morris
ADDUCI, MASTRIANI & SCHAUMBERG, LLP
1200 Seventeenth Street, NW, Fifth Floor
Washington, D.C. 20036
Telephone: (202) 467-6300

Dale M. Heist
Daniel J. Goettle
Aleksander J. Goranin
WOODCOCK WASHBURN LLP
Cira Centre, 12th Floor
2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 568-3100

Robert A. Rosenfeld
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5700

John A. Jurata, Jr.
Jonathan A. Drenfeld
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 Fifteenth Street, NW
Washington, DC 20005
Telephone: (202) 339-8400

Brian R. Nester
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000

Richard A. Cederoth
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: (312) 853-7000

Counsel for Complainant Microsoft Corporation

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMPLAINANT MICROSOFT CORPORATION'S RESPONSES TO COMMISSION STAFF'S HIGH PRIORITY OBJECTIONS TO COMPLAINANT'S AND RESPONDENT'S PROPOSED DIRECT EXHIBITS** was served to the parties, in the manner indicated below, this 24th day of January 2012:

The Honorable James R. Holbein
Secretary
U.S. INTERNATIONAL TRADE COMMISSION
500 E Street, S.W., Room 112A
Washington, DC 20436

- VIA ELECTRONIC FILING
 VIA HAND DELIVERY

The Honorable Theodore R. Essex
Administrative Law Judge
U.S. INTERNATIONAL TRADE COMMISSION
500 E Street, S.W., Room 317N
Washington, DC 20436

- VIA HAND DELIVERY

Jeffrey Hsu
Office of Unfair Import Investigations
U.S. INTERNATIONAL TRADE COMMISSION
500 E Street, S.W., Room 404-J
Washington, DC 20436

- VIA HAND DELIVERY
 VIA ELECTRONIC MAIL

**Counsel for Respondents Barnes & Noble, Inc.
and barnesandnoble.com LLC and
Inventec Corporation**

Marcia H. Sundeen
Jeffrey S. Gerchick
Aimee N. Souci
KENYON & KENYON LLP
1500 K Street, N.W.
Washington, DC 20005

- VIA HAND DELIVERY
 VIA ELECTRONIC MAIL
 VIA FIRST CLASS MAIL
 VIA OVERNIGHT DELIVERY

/s/ Sara J. Ferguson
Paralegal
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
1200 Seventeenth St., N.W., Fifth Floor
Washington, DC 20036