

# **EXHIBIT A**



1 authority to decide, and then you're all going to be sorry  
2 because I'm going to do what I think is right.

3 THE COURT: To open the door to the skeleton in that  
4 closet is you all have asked for a jury. I'm just going to  
5 sit up here and watch six good citizens of the Pacific  
6 Northwest decide what the royalty is. So, if you don't want  
7 that to happen, you want to start discussing that question,  
8 because that's where you're headed right now.

9 MR. JENNER: Your Honor, let me take you quickly to  
10 slide 48. Because I anticipate Microsoft feels that they got  
11 some good things out of Judge Shaw and the ITC. And I don't  
12 want you to think that we agree necessarily with that. I've  
13 quoted three of the judge's conclusions from pages 300 to 303  
14 where the judge focused on RAND.

15 THE COURT: Before do you that, Judge Shaw is an  
16 administrative law judge?

17 MR. JENNER: Yes.

18 THE COURT: And there's an appeal process?

19 MR. JENNER: There's a petition for review by the  
20 full commission. The petitions are actually getting filed  
21 today. I think they are getting filed today. That will  
22 result in a determination by the commission of what it wishes  
23 to review, probably further briefing. And they will issue a  
24 final determination sometime in late August.

25 THE COURT: So, would it be correct to characterize

1           So the suggestion the court made that, tell us whether you  
2 accept within 20 days, sounds like an ultimatum, is  
3 consistent with the fact that Motorola wasn't going to back  
4 off its 2.25 percent, no matter what counteroffers Microsoft  
5 made.

6           THE COURT: How do you know that?

7           MR. HARRIGAN: Because they say so, in their brief.  
8 They say they always get 2.25 percent.

9           THE COURT: You didn't know that at the time.

10          MR. HARRIGAN: Well, what Microsoft knew at the time,  
11 Your Honor, was the demand was 2.25 percent for the standard  
12 essential patents on the price of a laptop, among other  
13 things -- which is kind of important, which I'll also get to  
14 in a second -- and you give us your standard essential  
15 patents also. That was what Microsoft knew.

16          And what Microsoft didn't know, I presume they didn't know  
17 this, was that Motorola was never backing off the  
18 2.25 percent. But what matters for this case is, was the  
19 letter a breach? Because the breach has to be measured based  
20 upon what Motorola was saying when it said it, not what it  
21 says now about what it really meant.

22          THE COURT: Well, this takes me to one of my favorite  
23 aspects of this case, which is how am I going to determine if  
24 it was unreasonable until I know what RAND terms are? And  
25 I'm not going to know what RAND terms are until November 26th

1 when the jury comes back.

2 MR. HARRIGAN: Well, Your Honor, I think that -- if  
3 we take the example of the laptop, I believe that as a matter  
4 of law it's unreasonable. And that's apart from some of the  
5 other evidence with regard to the total amount of royalties  
6 and how they relate to essentially being 20 percent of  
7 Microsoft's annual profits for a tiny little piece of the  
8 operating system.

9 The fact is that Motorola's technology that contributes to  
10 the operating system is a tiny little part of Microsoft's  
11 operating system. And as a matter of law, the only way that  
12 Motorola could get a percentage of the price of the operating  
13 system, would be to demonstrate that its little contribution  
14 to that operating system is the basis for customer demand for  
15 the operating system. But it's not asking for a percentage  
16 of the operating system, it's asking for a percentage of the  
17 laptop price.

18 There is no way that Motorola's standards essential  
19 patents on this, for the operating system, are on the basis  
20 of customer demand for it, much less the customer demand for  
21 the laptop, which is the requirement under the entire Market  
22 Value Rule, if you are going to get a royalty based on a  
23 percent of the product price. And under those cases the  
24 burden is on the Patent Holder to demonstrate that its  
25 technology is the basis of customer demand.

1 breach that, in fact, there is no way to get there by reading  
2 those two letters. They asked for 2.2 -- there were two  
3 standards. They sent two letters. They asked for  
4 2.25 percent in each letter. They listed the products they  
5 wanted it on. If you read those two letters you would  
6 immediately conclude that you're paying four and a half  
7 percent total; or at least that they were separate royalties  
8 for 2.25 percent, for each standard.

9 And Motorola has come forward with no evidence to suggest  
10 that that level of royalty would be reasonable. And so if  
11 we're going to measure their conduct in those letters it  
12 should be measured in the way that -- it should be measured  
13 according to the way that the letters were written. And you  
14 just can't get to the position that they now say is their  
15 normal approach.

16 Let me just see if I have left off anything terribly  
17 important. Oh, one other thought I did want to express, Your  
18 Honor, you alluded to the jury setting the RAND rate, or  
19 determining the terms. And we believe the court can decide  
20 that without a jury. We're not here to debate that today.  
21 But I just want to let you know that that's something that  
22 would probably be debated when the appropriate time comes.  
23 Thank you.

24 MR. JENNER: Your Honor, at the risk of wearing out  
25 my welcome, will you take four points in reply?

1 policy for the federal court.

2 In other words, federal courts should permit and even  
3 encourage the parties to continue negotiations in good faith  
4 until it's clear that both have negotiated in good faith, and  
5 they have a genuine good-faith disagreement on the RAND  
6 terms, and the dispute will not be resolved without the  
7 court's intervention to resolve the dispute. Proceeding in  
8 that manner does not require any change in the case schedule  
9 in this case. Motorola and Microsoft have something less  
10 than seven months between now and November 19th to reach an  
11 agreement on all the RAND terms.

12 So what are the possibilities? First possibility, you  
13 could determine on November 19th that one or the other party  
14 had not negotiated in good faith, and you could think about  
15 remedies for that. Second possibility, the parties could  
16 reach an agreement on some but not all RAND license terms.  
17 And if the court then determined that it was going to submit  
18 those terms to the court's determination, you'd have less to  
19 deal with. Or, the parties could agree upon all terms. And  
20 proceeding in that manner is, we think, consistent with the  
21 law, we think it's good policy for the federal court, and we  
22 think it makes a great deal of sense.

23 THE COURT: Does that mean you're joining Microsoft  
24 in taking this issue away from the jury?

25 MR. PALUMBO: We have to think about that, Your

1 Honor. We certainly considered whether this is simply a  
2 matter of equity that would be for your determination only.  
3 But I'd like to talk with the clients and talk with the other  
4 lawyers before we weigh in. But if there is a disagreement  
5 between us and Microsoft on that point, I'm sure you're going  
6 to hear about it and the basis for it.

7 So the issues before the court are the two issues that I  
8 have on the screen. Do the RAND Letters of Assurance and our  
9 offer to Microsoft categorically bar Motorola for seeking  
10 injunctive relief for the three H.264 patents? It's only the  
11 H.264 patents that are at issue in this motion. And the  
12 second issue is whether you should refrain from determining  
13 whether Motorola could meet its burden of proving the  
14 four-part test.

15 This motion comes to you in a manner that is somewhat  
16 unprecedented. In all the cases cited in both the parties'  
17 briefs, the Patent Holder makes a motion for injunctive  
18 relief, supported by evidence that the Patent Holder has  
19 offered to satisfy the four-part test for granting injunctive  
20 relief. Some of those cases are preliminary injunction  
21 cases, some are permanent injunction cases where there had  
22 been a finding at trial of patent validity and infringement.  
23 Motorola has not made and does not intend to make a  
24 preliminary injunction motion.

25 If Motorola's patents are judged valid and Microsoft's

# **EXHIBIT B**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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MOTOROLA INC., et al,	)	
	)	
Plaintiffs,	)	11-1408-JLR
	)	
v.	)	SEATTLE, WASHINGTON
	)	
MICROSOFT CORPORATION,	)	June 14, 2012
	)	
Defendant.	)	Markman Tutorial
	)	and Status Conf.

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES L. ROBERT  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Jesse Jenner, Ralph Palumbo,  
Steve Pepe, Stuart Yothers, Khue  
Hoang and Mark Rowland

For the Defendants: Arthur Harrigan, Theodore  
Chandler, Shubham Mukherjee, John  
McBride, Christopher Wion, Rick  
Cederoth, Andy Culbert and David  
Pritikin

1 can pick a jury in a morning. My procedure is to ask the  
2 bench-book questions, take stuff out of your proposed voir  
3 dire, which is usually loaded up with things that you don't  
4 want to ask, and it's easier for the court to ask, and then  
5 give counsel the opportunity to do their own voir dire.

6 It is not unusual to have a couple, sometimes more than  
7 that, of the jury pool be Microsoft employees, because  
8 Microsoft has a very gracious policy in regards to jury  
9 service, which the court appreciates immensely. I'm not sure  
10 the criminals do.

11 As a result, your jury selection may be slightly more  
12 difficult, and therefore it's going to vary a little bit on  
13 how much remaining trial time you have. And that's why we'll  
14 get to your third topic.

15 MR. HARRIGAN: In a nutshell, Your Honor, the parties  
16 agree there is no jury involved -- there's no jury  
17 requirement with respect to the court's determination of what  
18 is RAND, and the contract, and so forth; and disagree with  
19 respect to whether a jury would be required to deal with the  
20 breach of contract part of the case.

21 THE COURT: All right.

22 MR. HARRIGAN: And we will continue to see if we can  
23 reach agreement, otherwise we're probably going to be  
24 briefing this issue for the court.

25 MR. PALUMBO: That's right, Your Honor. Our

1 agreement is that the court would decide all the material  
2 terms of the RAND license. And we currently have a  
3 disagreement with respect to whether the breach of contract  
4 action would be tried by the court or by a jury.

5 And since -- if we can't reach agreement on that, it will  
6 require briefing. We're just going to put it off and submit  
7 briefs on that issue if it becomes a question.

8 And in requesting ten days, I had assumed in our  
9 calculation that we would take a half a day to select the  
10 jury. So I think our request for ten days is not dependent  
11 on whether there is or is not a jury.

12 MR. HARRIGAN: Just one qualification, Your Honor.  
13 We don't mean, in the way Mr. Palumbo expressed the first  
14 part of that, to be defining what the court is deciding.  
15 We're just saying that the RAND determination part of the  
16 case doesn't require a jury, whatever that may be.

17 THE COURT: All right.

18 MR. PALUMBO: And our position, as stated again, if  
19 we have a disagreement on whether you're deciding all the  
20 RAND terms, or what those terms are, that is going to be  
21 subject to briefing. So we're simply putting that over. So  
22 that's our understanding of what the issues at trial would  
23 be.

24 MR. HARRIGAN: So the issue No. 2 is a question  
25 relating to a stay of the issues in this case that do not

# **EXHIBIT C**

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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3  
4 Microsoft Corporation, et al.,  
5 Plaintiffs, NO. C10-1823JLR  
6 v. TELEPHONE CONFERENCE  
7 Motorola, Inc., et al., SEATTLE, WASHINGTON  
8 Defendants. July 9, 2012

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10 VERBATIM REPORT OF PROCEEDINGS  
11 BEFORE THE HONORABLE JAMES L. ROBART  
12 UNITED STATES DISTRICT JUDGE

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13  
14 APPEARANCES:

15 For the Plaintiffs: Arthur Harrigan

16  
17 For the Defendants: Ralph Palumbo  
18 Jesse Jenner

19  
20 Reported by: Denae Hovland, RPR, RMR, CRR  
21 Federal Court Reporter  
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23 denae\_hovland@wawd.uscourts.gov

24 Proceedings recorded by mechanical stenography, transcript  
25 produced by Reporter on computer.

1 since that is what is covered in your letters.

2 At one point Mr. Jenner said something about, "Oh, but,  
3 Judge, you know, these agreements are 70 pages long," of which I  
4 expect 69 pages and 24 lines to be boilerplate, and what you  
5 really care about are the royalty rates. And, therefore, I am  
6 going to have you submit an agreed agreement, or if you are  
7 unable to do so, to submit contested boilerplates and we may  
8 develop one.

9 In regards to the breach of contract claim, that will not be  
10 tried in the November trial date. As I have explained to you  
11 previously, my reason for that is the breach of contract, as  
12 Motorola has admitted, exists in relation to the RAND Rate. I  
13 think Mr. Jenner's example was a million dollars Royalty Rate for  
14 one patent and the RAND Rate turns out to be 15 cents. Since I  
15 don't know what the RAND terms are yet, it seems to me I can't  
16 deal with breach of contract until RAND is determined.

17 Finally, I have waited patiently for Motorola to advise me  
18 if breach of contract is a court trial or a jury trial. I am now  
19 setting a deadline of 4:30 this Friday for that election to be  
20 made.

21 Mr. Palumbo, I believe you initiated the call so I'll hear  
22 from you first.

23 MR. PALUMBO: Thank you, Your Honor. As we said in our  
24 partial summary judgment briefing and during argument on the  
25 partial summary judgment motions, we have been unable to find any

1 the Court and Microsoft. We understand the urgency of resolving  
2 this issue, so despite the fact that there is a lot going on,  
3 including the close of fact discovery and expert reports fast  
4 approaching, we would be prepared to file a brief on that issue  
5 nine days from now on Wednesday, July 18th.

6 In answer to your other question, we have decided not to  
7 waive the jury trial on the breach of the duty of good faith  
8 issue, and with respect to that issue, we think — we do agree  
9 that that is a triable issue that the jury can determine. In  
10 other words, did Motorola accord to its obligation to negotiate  
11 the contract in good faith? We may have issues with respect to  
12 whether the court can instruct the jury as to the proper RAND  
13 rate, but we agree that it is a jury question as to whether  
14 Motorola has conformed to its obligation to negotiate a RAND  
15 license in good faith.

16 THE COURT: Mr. Palumbo, isn't it rather late in the  
17 game for Motorola to repudiate concessions made during oral  
18 argument and announce another new theory of the case? You know,  
19 frankly, this — I am sitting here in disbelief that you are  
20 going to try this.

21 MR. PALUMBO: Your Honor, I expected that you would be  
22 sitting there in disbelief, and the only explanation I have is if  
23 you recall, Microsoft's theory in this case has evolved since  
24 they filed the complaint from asking -- to the point where they  
25 said, we're committed to take a license and we want the court to

# **EXHIBIT D**



1 negotiation." And on the last line it provides that the  
2 agreement shall be construed in accordance with its terms,  
3 without favor to any party. So this entire subject is  
4 superseded by the document, by the agreement, which Motorola  
5 did not address.

6 Secondly, the issue of construction against the drafter in  
7 this case needs to be considered in light of the fact that  
8 Motorola itself was part of the drafting process, got all the  
9 e-mails, understood, had every reason to understand why this  
10 provision was in there, and that its scope was as stated in  
11 the e-mails, and as effected by the interpretation that we  
12 are advancing.

13 Finally, I would just say if you look at the New York  
14 cases cited by Motorola -- in fact, two things. One is that  
15 in New York construction against the drafter is a last-resort  
16 rule that applies when all other efforts to construe the  
17 document have failed. And secondly, it is generally not  
18 applied to sophisticated parties.

19 THE COURT: Mr. Harrigan, when did Google acquire  
20 Motorola?

21 MR. HARRIGAN: It was in, I believe, mid-2012.

22 THE COURT: Why wasn't this issue brought up to the  
23 court sooner?

24 MR. HARRIGAN: Well, Your Honor, the basic reason was  
25 the concern about maintaining the trial date. The process --

1 there were various reasons. The process of getting Google  
2 into this case would have been complicated. And we were  
3 concerned if we undertook that, that we would end up  
4 potentially with a continuance. That was the primary  
5 concern.

6 THE COURT: But you inserted the issue into the  
7 trial. I'm at a loss why it wasn't raised sooner so that we  
8 could have had a fuller record.

9 MR. HARRIGAN: Well, Your Honor, I believe what we  
10 did was to argue that the acquisition and the agreement  
11 created a very clear comparable, number one. And number two,  
12 as a matter of law this will determine what Motorola's  
13 royalty rate is. And that is a legal issue that we believe  
14 the court can decide without Google being in the case. It's  
15 a legal issue that bears on the RAND rate as between  
16 Microsoft and Motorola, because at the end of the day it will  
17 determine that. And it wouldn't make much sense to adopt a  
18 rate that's different from the one that the contract is going  
19 to compel.

20 So, I'm frankly not -- I don't have memorized exactly what  
21 the procedural sequence was. But we did argue it soon after  
22 it came up. We wrote a letter to Google and asked for them  
23 to honor the agreement. And I apologize if we didn't act as  
24 promptly as we might have. But our main concern was, do we  
25 need to bring Google in? And we concluded that whether we