

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 3

 A. Motorola’s Contractual RAND Licensing Commitments..... 3

 B. Motorola’s October 2010 Demand Letters. 5

 C. Motorola’s Pursuit of Lawsuits on its Standard-Essential Patents. 6

 D. The RAND Royalty For Motorola’s Standard-Essential Patents..... 8

III. LEGAL STANDARD 9

IV. ARGUMENT..... 12

 A. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In
 Commercially Unreasonable (And Blatantly Unreasonable) Conduct. 12

 B. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In
 Conduct That Frustrated The Purpose Of Its RAND Licensing Commitments. 18

 C. Microsoft Is Entitled To Summary Judgment On Motorola’s Third, Fourth, Fifth,
 Seventh, Eighth, and Ninth Affirmative Defenses And Second Counterclaim. 21

V. CONCLUSION 24

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page(s)

CASES

Badgett v. Sec. State Bank,
807 P.2d 356 (Wash. 1991)10

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....9

Craig v. Pillsbury Non-Qualified Pension Plan,
458 F.3d 748 (8th Cir. 2006)11

Edmonson v. Popchoi,
256 P.3d 1223 (Wash. 2011)10

Frank Coluccio Construction Co., Inc. v. King County,
150 P.3d 1147 (Wash. App. 2007).....10, 11

Galen v. County of L.A.,
477 F.3d 652 (9th Cir. 2007)9

Merrell v. Renier,
No. C06-404-JLR, 2006 WL 3337368 (W.D. Wash. Nov. 16, 2006).....10

N.W. Indep. Forest Mfrs v. Dep’t of Labor and Indust.,
899 P.2d 6 (Wash. App. 1995)9

Scribner v. Worldcom, Inc.,
249 F.3d 902 (9th Cir. 2001)11

OTHER AUTHORITIES

Fed. R. Civ. P. 56(a)9

Restatement (Second) of Contracts § 205.....11

1 **I. INTRODUCTION**

2 As a pretext for suing Microsoft for infringement of patents Motorola had committed to
3 license to all on RAND terms and conditions, Motorola sent two demand letters to Microsoft in
4 October 2010. Motorola's demands, made with 20-day ultimatums, were so over-reaching that
5 no rational company could ever have accepted them or even viewed them as legitimate offers.
6 Having dispensed with the formality of an "offer," once the 20 days were up Motorola filed
7 lawsuits against Microsoft on a subset of Motorola's declared standard-essential patents,
8 seeking injunctions aimed at giving Motorola enormous leverage in other patent disputes with
9 Microsoft. This is the essence of hold up, and a flagrant breach of the RAND licensing
10 commitments made by Motorola to the pertinent standard setting organizations.

11 As the Court's Findings of Fact and Conclusions of Law confirm, the demands
12 Motorola made in October 2010 were astronomically higher than an actual RAND royalty for
13 Motorola's standard-essential patents. Instead of granting a license on RAND terms, Motorola
14 breached its RAND licensing commitments. Motorola's conduct forced Microsoft to defend
15 itself against litigation that never should have been brought, and to incur legal fees and
16 significant business expenditures to protect Microsoft's standard-compliant products from
17 being improperly shut out of the market.

18 Motorola's conduct (the demand letters, suing and seeking injunctions on standard-
19 essential patents, discriminating against Microsoft's supplier Marvell) has breached its RAND
20 commitments on multiple grounds, but this motion is directed at two specific bases of breach
21 most appropriate for summary judgment:

- 22
- 23 • Motorola breached the duty of good faith and fair dealing by engaging in
24 commercially unreasonable conduct.
 - 25 • Motorola breached the duty of good faith and fair dealing by engaging in
26 conduct that frustrated the purpose of its RAND licensing commitments.

1 In March 2012, Microsoft moved for summary judgment that Motorola had breached
2 its RAND licensing commitments. (Dkt. No. 236.) The Court denied the motion because it
3 then lacked a true RAND royalty to compare to Motorola's demands. (Dkt. 335 at 25–26.)
4 Now that the Court, with the agreement of the parties, has determined the RAND royalties due
5 from Microsoft for a license to Motorola's declared standard essential patents, it is apparent
6 that Motorola's October 2010 demands were so unreasonable (certainly blatantly
7 unreasonable) as to breach the duty of good faith and fair dealing.

8 The remaining issues that caused the Court to hesitate to grant Microsoft summary
9 judgment previously have likewise been resolved. First, the Court found that “a determination
10 of the relevance of Motorola's prior license agreements” was “inherently fact intensive” (Dkt.
11 No. 335 at 26), but the Court completed that inquiry in the RAND royalty trial and found those
12 agreements irrelevant (Dkt. No. 673, April 19, 2013 Findings of Fact and Conclusions of Law
13 (“FFCL”) ¶¶ 420, 435, 443, 445, 454). Second, the Court perceived fact issues in “Microsoft's
14 assertion that Motorola's 802.11 and H.264 Standard essential patent portfolios cover only a
15 minimal part of the technology involved in the 802.11 and H.264 Standards” (Dkt. No. 335 at
16 27), but the Court made precisely that finding following the RAND royalty trial (FFCL
17 ¶¶ 289,299, 533, 575, 576).

18 Finally, the Court noted an open question as to whether Motorola's demand letters
19 “were sent in bad faith.” (Dkt. No. 335 at 27.) As explained in Microsoft's July 1 brief
20 concerning the duty of good faith and fair dealing, while a finding that Motorola acted in bad
21 faith is *sufficient* to establish a breach of the duty, it is not *necessary* to establish breach,
22 because either (1) objectively commercially unreasonable (or blatantly unreasonable) conduct,
23 or (2) conduct that frustrates the purposes of the contract, also gives rise to liability for breach.
24 (Dkt. No. 715 at 5–11.) These two grounds are the subject of Microsoft's present motion, and
25 no material issues of fact remain for trial as to either. Moreover, even if Motorola's lack of
26

1 good faith were relevant, Motorola could not oppose summary judgment by claiming that
 2 Motorola sent its demand letters in good faith, because Motorola repeatedly asserted privilege
 3 to block discovery into the basis for its offers to Microsoft.¹ Consistent with the Court’s prior
 4 ruling, given Motorola’s privilege objections, “[i]t would be unfair for Motorola to offer
 5 testimony of its choice” on the issue of any good faith basis for its demands, having “denied
 6 Microsoft the opportunity to examine the testimony in detail.” Wion Decl.² Ex. 4 (October 29,
 7 2012 Pretrial Conf. Tr.) 22:10–12.

8 Either of the two bases set forth above is sufficient to establish Motorola’s liability for
 9 breach of its RAND licensing commitments. Once the Court has granted summary judgment
 10 of liability, all that remains is to ascertain damages. If the parties cannot stipulate to the
 11 amount of damages, that issues can be resolved by a short jury trial.

12 **II. STATEMENT OF FACTS**

13 **A. Motorola’s Contractual RAND Licensing Commitments.**

14 The Court has already ruled that Motorola entered into contracts with the IEEE and
 15 ITU standard setting organizations (“SSOs”) through its RAND licensing commitments, and
 16 that Microsoft is a third party beneficiary of those contracts, entitled to enforce them. (FFCL
 17 at 5.) The terms of Motorola’s contractual commitments come from two sources—the letters
 18

19 ¹ For example, Motorola’s Kirk Dailey was asked, [REDACTED]
 20 [REDACTED] and was
 21 instructed by counsel not to answer on the basis of attorney-client privilege. Wion Decl. Ex. 1 (Dailey 7/12/2012
 22 Dep.) at 69. Dailey was also asked [REDACTED]
 23 [REDACTED] Dailey referenced [REDACTED]
 24 [REDACTED] but refused to state [REDACTED] again asserting privilege. *Id.* at 71–72. Brian
 25 Blasius, Motorola’s 30(b)(6) designee concerning its offers to Microsoft, refused to answer [REDACTED]
 26 [REDACTED] again asserting privilege. Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) at 39–41. Motorola’s privilege log for
 October 2010 also includes documents [REDACTED] See Wion Decl. Ex. 3,
 (Motorola’s Second Supplemental Log of Withheld Documents) (*e.g.*, entries 18240, 18248–18259, 18266,
 18270, 18273).

² Exhibits are attached to the Declaration of Christopher Wion in Support of Microsoft’s Motion for Partial
 Summary Judgment of Breach of Contract (“Wion Decl.”) filed concurrently with this motion. Exhibits
 previously admitted at trial are designed with “Trial Ex.”

1 of assurance and declarations that Motorola submitted to these SSOs; and relevant language
2 from the SSOs' policies (Dkt. No. 335, June 6, 2012 Summary Judgment Order at 13 n. 6)—
3 with their interpretation guided by the purpose of the RAND licensing commitment.

4 Motorola participated in the standardization process for the 802.11 wireless networking
5 standard, governed by the IEEE and its Intellectual Property Rights Policy. (FFCL ¶¶ 37–48.)
6 The IEEE policy provides that if the IEEE becomes aware of a potentially essential patent, it
7 will request the patent holder submit a Letter of Assurance committing either that (a) it will not
8 enforce the patent or (b) “a license for compliant implementation of the standard will be made
9 available to an unrestricted number of applicants on a worldwide basis without compensation
10 or under [RAND terms].” Trial Ex. 1568 § 6.2. In accordance with the IEEE's policy,
11 Motorola submitted numerous Letters of Assurance to the IEEE concerning any Motorola
12 patents essential to the 802.11 Standard. (FFCL ¶ 44.) Similarly, Motorola participated in the
13 standardization process for the H.264 video coding standard, governed by the ITU and its
14 Common Patent Policy. (FFCL ¶¶ 26–36.) In accordance with the ITU Patent Policy,
15 Motorola submitted numerous declarations to the ITU concerning any Motorola patents
16 essential to the H.264 Standard. (FFCL ¶ 36.)

17 The general terms of Motorola's ITU and IEEE contractual commitments are similar:
18 they require Motorola to grant licenses to its standard essential patents to any implementer on
19 reasonable and non-discriminatory terms. (FFCL ¶¶ 36, 44) The relevant policies of the
20 SSOs, and the specific language of Motorola's multiple declarations and letters of assurance
21 place additional contractual constraints on Motorola. At the time Motorola submitted its initial
22 Letters of Assurance, the IEEE required that Motorola submit “a draft of [its] license that
23 assures that the technology will be made available *at nominal competitive costs* to all who seek
24 to use it for compliance with” the 802.11 standard. Trial Ex. 1130 at MS-
25 MOTO_1823_00005246490 (emphasis added); FFCL ¶¶ 47–48. The “sole objective” of the
26

1 ITU's Patent Policy is to ensure that any patent essential to the H.264 standard "be accessible
2 to everybody without undue constraints." Trial Ex. 1575 at MOTM_WASH1823_0602815;
3 FFCL ¶ 27. Pursuant to this policy, Motorola declared that it was "prepared to grant a license
4 to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on
5 reasonable terms and conditions to make, use and sell implementations of the above
6 document." Trial Ex. 2838 at MOTOM_WASH1823_0000036.

7 A core purpose of the RAND licensing commitment is to address the problems of hold-
8 up and royalty stacking that would otherwise inhibit widespread adoption of the standard.
9 (FFCL ¶¶ 51, 57, 60, 66, 538.) See Wion Decl. Ex. 5 (Leonard Dep.) 20:19–21:18. As to
10 hold-up, Motorola's RAND licensing commitments limit any royalty it demands to the
11 economic value of any of Motorola's patented technology as present in the standard, not to any
12 of the value of the standard itself. (FFCL ¶¶ 55, 71, 74.) As to stacking, Motorola's RAND
13 licensing commitments limit any royalty it demands by requiring that the aggregate royalties
14 associated with a given standard remain reasonable. (FFCL ¶¶ 66, 72.)

15 **B. Motorola's October 2010 Demand Letters.**

16 In October 2010, Motorola sent two letters to Microsoft demanding billions of dollars
17 in annual royalties for two sets of patents Motorola claimed were essential to the 802.11 and
18 H.264 industry standards. Motorola's letters demanded a 2.25% royalty on the price of end
19 products—in the case of 802.11, on the sale price of Xbox and Windows phones, and in the
20 case of H.264, on the sale prices of Xbox and of laptops and PCs running Microsoft Windows.
21 Trial Exs. 1, 2. For Motorola's H.264 standard-essential patents, that demand translates into a
22 royalty ranging from \$11.25 to \$22.50 for Windows laptops (sold by Microsoft's
23 manufacturer-customers) for \$500 to \$1000, and from \$4.50 to \$9 for Xbox consoles priced
24 from \$200 to \$400. For Motorola's 802.11 standard-essential patents, that demand translates
25 to a royalty of \$4.50 to \$9 for Xbox consoles priced from \$200 to \$400. Based on publicly-
26

1 available projections of the number of Windows-based computers sold in 2010, Motorola was
 2 demanding roughly \$4 billion per year from Microsoft for a license to the H.264 patents alone.
 3 Wion Decl. Ex. 5 (Leonard Dep.) 191:1–199:22.

4 At the trial last November, Motorola advanced arguments that the 2.25% royalty
 5 demanded of Microsoft was somehow justified by prior license agreements relating to cellular
 6 essential patents and other portfolios. (FFCL at 130–31.) The Court rejected these claims.
 7 While Motorola had included some of its 802.11 or H.264 patents in other, broader license
 8 agreements that included Motorola’s cellular standard-essential patents, or other non-essential
 9 Motorola patents, the Court determined that those licenses are not comparable to a license to
 10 the H.264 or 802.11 patents alone, and *do not* provide support for a 2.25% royalty demand for
 11 such a license. (FFCL ¶¶ 420, 425, 440, 445, 451.) As Motorola’s latest economic expert,
 12 Gregory Leonard, concedes, Motorola had never licensed its portfolios of H.264 or 802.11
 13 standard-essential patents on a standalone basis, and [REDACTED]
 14 [REDACTED] Wion Decl. Ex. 6 (Leonard Opening
 15 Rpt.) ¶ 66); Wion Decl. Ex. 5 (Leonard Dep.) 155:15–20. Moreover, Motorola had never
 16 previously demanded [REDACTED]
 17 [REDACTED] as it did of Microsoft in its H.264 demand. Wion Decl. Ex. 2
 18 (Blasius 30(b)(6) Dep.) 130:23–131:6.

19 C. Motorola’s Pursuit of Lawsuits On Its Standard-Essential Patents.

20 Motorola’s letters were ultimatums: the offers were open for only 20 days, and
 21 Microsoft was asked only to confirm that it “accepted” Motorola’s terms. Trial Exs. 1, 2;
 22 Wion Decl. Ex. 7 (Dailey ITC Tr.) 2500:1–2501:7 (agreeing that [REDACTED]
 23 [REDACTED]
 24 [REDACTED]). As the letters were facially a prelude to lawsuits on Motorola’s standard-
 25 essential patents, Microsoft filed this suit on the twentieth day after the first letter was sent,
 26

1 alleging that that Motorola had breached its contractual commitments to license its standard-
2 essential patents on RAND terms. Microsoft's complaint sought a declaration that Microsoft
3 was entitled to a license on RAND terms, asked the Court to determine the RAND terms for
4 such a license, and requested an injunction barring Motorola from engaging in further conduct
5 inconsistent with its RAND licensing obligations. (See Dkt. No. 1, Complaint at ¶ 9, Prayer
6 for Relief.)

7 On the twenty-first day (November 10, 2010), consistent with the ultimatum in the
8 October 21 letter and obviously implementing a preexisting plan, Motorola filed two patent
9 infringement actions against Microsoft in the Western District of Wisconsin, Case No. 3:10-
10 CV-699 (the "699 Action") and Case No. 3:10-CV-700 (the "700 Action"). Less than two
11 weeks later, Motorola filed a complaint for patent infringement against Microsoft in the
12 International Trade Commission, leading to the investigation designated *In the Matter of*
13 *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*
14 (ITC Case No. 337-TA-752) (the "ITC Action"). In each of the 699 Action, the 700 Action,
15 and the ITC Action, Motorola alleged infringement of patents it asserted to be essential to the
16 802.11 and/or H.264 standards, and sought to enjoin Microsoft from implementing those
17 standards. (Dkt. No. 53, Amended Compl. ¶¶ 74–77; Dkt. No. 68, Ans. to Amended Compl.
18 ¶¶ 74–77.)

19 Microsoft amended its complaint on February 23, 2011, alleging that Motorola's filing
20 of lawsuits and pursuit of injunctions against Microsoft on standard-essential patents, including
21 in the 699, 700, and ITC Actions, further breached Motorola's RAND licensing obligations.
22 (Dkt. No. 53 ¶ 85.) Unfazed by this, and apparently unsatisfied with the pressure on Microsoft
23 imposed by the U.S. actions alone, on July 6 and 7, 2011, Motorola again sued Microsoft, this
24 time in Germany, asserting two of the declared standard-essential H.264 patents that were the
25 subject of its October 2010 letter. (Dkt. No. 318, May 14, 2012 Order at 18–19.) Motorola
26

1 sought an injunction that would exclude Microsoft's standard-compliant products (including
2 the Windows operating system and the Xbox video game console) from the German market.
3 (*Id.* at 21–22.)

4 Motorola pursued these legal actions, including injunctions, relentlessly, despite
5 knowing that it could secure a RAND royalty in the contract proceedings pending in this Court.
6 Nonetheless, Motorola proceeded with the ITC hearing in January 2012, and pressed forward
7 with its German infringement case. When the German court announced on February 7, 2012
8 that it would rule on April 17, 2012, Microsoft again sought to forestall an injunction that was
9 unnecessary to Motorola's obtaining a RAND royalty. Microsoft's counsel wrote to
10 Motorola's counsel on March 14, asking that Motorola agree not to enforce any German
11 injunction and offering to post a \$300 million bond (far in excess of any conceivable
12 compensation due on two German H.264 patents). (*See* Dkt. No. 211 Exs. 2, 3.) In the face of
13 this, Motorola still proceeded until enjoined from doing so by this Court.

14 **D. The RAND Royalty For Motorola's Standard-Essential Patents.**

15 In November 2012, the Court held a bench trial to determine a RAND royalty for
16 Motorola's H.264 and 802.11 standard-essential patents. The Court determined that the
17 RAND royalty for Motorola's H.264 patents is 0.555 cents per unit. (FFCL ¶ 537.) The Court
18 also determined a RAND range for H.264, with a lower bound of 0.555 cents per unit (FFCL at
19 8), and an upper bound of 16.389 cents per unit derived from the highest number floated for
20 discussion purposes during the formation of the MPEG LA AVC pool—a rate that no one
21 agreed to but that was merely a straw man used to prompt discussion (FFCL ¶ 543–45). The
22 Court determined that the RAND royalty for Motorola's 802.11 standard-essential patents is
23 3.471 cents per unit. (FFCL ¶ 621.) The Court also determined a RAND range for 802.11,
24 with a lower bound of 0.8 cents per unit, based on the evaluation that InteCap provided
25 Motorola (FFCL ¶¶ 625–27), and an upper bound of 19.5 cents per unit, derived as a multiple
26

1 of the high end of a RAND royalty for Motorola's 802.11 patents offered by Microsoft at trial
2 (FFCL ¶¶ 622–24).

3 **III. LEGAL STANDARD**

4 Summary judgment is appropriate if the evidence, when viewed in the light most
5 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any
6 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
7 *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of L.A.*, 477 F.3d 652,
8 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine
9 issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477
10 U.S. at 323.

11 A claim for breach of contract requires a valid contract, a breach of a duty arising under
12 that contract, and resulting harm. *N.W. Indep. Forest Mfrs v. Dep't of Labor and Indust.*, 899
13 P.2d 6, 9 (Wash. App. 1995). The Court has already repeatedly held that Motorola's RAND
14 licensing commitments are valid, enforceable contracts. The Court has also held that
15 “Motorola must grant Microsoft a RAND license” (Dkt. No. 465, Oct. 10, 2012 Order at 14),
16 yet Motorola to this day has refused to provide one—the lack of that license alone is sufficient
17 harm to establish breach. Moreover, the Court has also held that engaging in hold up in
18 violation of RAND commitments causes harm (FFCL ¶¶ 55–58), and as set out more fully
19 below, both Motorola's October 2010 letters and its lawsuits and pursuit of injunctions were
20 part of an impermissible hold-up strategy. Motorola's conduct placed Microsoft at substantial
21 risk of having its products enjoined in both the United States and Germany, forcing Microsoft
22 to incur significant legal expenses opposing Motorola's actions, which were brought in breach
23 of Motorola's RAND licensing commitments. If Motorola had enforced its German injunction,
24 Microsoft could not have distributed its H.264-compliant products (including Xbox and
25 Windows) from its German facility, meaning Motorola's pursuit of its German injunction left
26

1 Microsoft with no choice but to relocate its primary distribution facility for Europe, the Middle
 2 East, and Africa (“EMEA”), incurring significant additional costs. While Motorola may
 3 contest the amount of monetary damages Microsoft can recover, the harms outlined above are
 4 sufficient to establish liability for breach and trigger Microsoft’s right to relief. *See Merrell v.*
 5 *Renier*, No. C06-404-JLR, 2006 WL 3337368, at *5–6 (W.D. Wash. Nov. 16, 2006)
 6 (Washington law) (collecting cases and holding that “[a] plaintiff need not prove financial loss
 7 to prevail in a suit to obtain specific enforcement of a contract”).

8 Motorola’s conduct can be analyzed with reference to specific terms of its contractual
 9 RAND licensing commitments, but as with all contracts, Motorola’s RAND licensing
 10 commitments also include an inherent duty of good faith and fair dealing imposing additional
 11 constraints on Motorola. *See* Dkt. 335 at 25; *Badgett v. Sec. State Bank*, 807 P.2d 356, 360
 12 (Wash. 1991); *Frank Coluccio Construction Co., Inc. v. King County*, 150 P.3d 1147, 1154
 13 (Wash. App. 2007). As the Court already found, and as Motorola conceded, a blatantly
 14 unreasonable opening offer to license its standard-essential patents breaches its RAND
 15 licensing commitments. (Dkt. 335 at 25; Dkt. 188 at 15 (“To wit, during the February 13, 2012
 16 status conference, counsel for Motorola agreed that blatantly unreasonable offers would violate
 17 its RAND obligations under the policies.”).)³

18 Washington courts have looked to the definition of good faith and fair dealing set forth
 19 in the Restatement (Second) of Contracts § 205. *See Edmonson v. Popchoi*, 256 P.3d 1223,
 20 1227 (Wash. 2011). The Restatement provides:

21 Good faith performance or enforcement of a contract emphasizes faithfulness to
 22 an agreed common purpose and consistency with the justified expectations of

23 ³ Defendant Motorola Solutions agrees that an SEP holder breaches its RAND commitments by making
 24 blatantly unreasonable licensing demands: Motorola Solutions brought a breach of contract claim against a holder
 25 of patents allegedly essential to the 802.11 standard based, in part, on the patent holder’s pursuit of “a licensing
 26 program that is blatantly unreasonable on its face, including blatantly unreasonable offers and other conduct in
 violation of good faith and fair dealing inherent in all contracts.” Wion Decl. Ex. 8, Plaintiffs’ Amended
 Complaint, Dkt. No. 431, *In re Innovatio IP Ventures, LLC, Patent Litig.*, Case No. 1:11-cv-9308 (N.D. Ill. Oct.
 1, 2012) ¶ 312.

1 the other party; it excludes a variety of types of conduct characterized as
2 involving “bad faith” because they violate community standards of decency,
3 fairness or reasonableness.

4 § 205. Although no exhaustive catalogue of wrongful acts has been compiled, traditional
5 examples of prohibited conduct include “evasion of the spirit of the bargain, lack of diligence
6 and slacking off, willful rendering of imperfect performance, abuse of a power to specify
7 terms, and interference with or failure to cooperate in the other party’s performance.”

8 Restatement § 205 cmt. d.

9 In particular, the duty of good faith and fair dealing requires that a party given
10 discretion by a contract exercise that discretion reasonably. *See Craig v. Pillsbury Non-*
11 *Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) (Washington law); Dkt. No. 715 at
12 7–8. Even if a party acts in a way that might, in the abstract, seem commercially reasonable,
13 the party would still breach the duty of good faith and fair dealing if the action frustrates the
14 purpose of the contract. *See Frank Coluccio*, 150 P.3d at 1154–55 (affirming finding of breach
15 of duty of good faith and fair dealing where defendant’s conduct was contrary to the purpose of
16 the contract); Dkt. No. 715 at 8–11.

17 A showing of subjective bad faith is not required. *See Scribner v. Worldcom, Inc.*, 249
18 F.3d 902, 910 (9th Cir. 2001) (Washington law) (“That a party can breach the duty of good
19 faith and fair dealing by acting dishonestly or unlawfully does not mean that dishonesty or an
20 unlawful purpose is a necessary predicate to proving bad faith.”); Restatement § 205 cmt. d
21 (noting that “[s]ubterfuges and evasions violate the obligation of good faith in performance
22 even though the actor believes his conduct to be justified” and that “fair dealing may require
23 more than honesty.”); Dkt. No. 715 at 5–6.





24 As set forth in Microsoft’s July 1, 2013 brief concerning the legal standard for
25 determining a patent holder’s compliance with the duty of good faith and fair dealing in the
26 context of RAND licensing, the duty requires that Motorola engage in objectively
commercially reasonable (and not blatantly unreasonable) conduct with respect to the licensing

1 of its standard-essential patents. (*See* Dkt. 715 at 7–8.) The duty of good faith and fair dealing
 2 also bars Motorola from engaging in conduct that frustrates the purpose of the RAND licensing
 3 commitment. (*See id.* at 8–11.)

4 **IV. ARGUMENT**

5 **A. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In**
 6 **Commercially Unreasonable (And Blatantly Unreasonable) Conduct.**

7 Motorola’s H.264 royalty demand of 2.25% on the price of end products ranged from
 8 \$4.50 per unit for the cheapest Xbox, to \$11.25 per unit or higher for computers running
 9 Windows—but the RAND royalty is only 0.555 cents per unit, and the upper bound of the
 10 RAND royalty range determined by the Court is 16.389 cents. Motorola’s 802.11 royalty
 11 demand of 2.25% equates to \$4.50 per unit or higher for the Xbox, but the RAND royalty is
 12 only 3.471 cents per unit, with the upper bound of the RAND royalty range at 19.5 cents. If

	Motorola’s October 2010 Demands	Court-Determined RAND Royalty
H.264	 <p>\$11.25 per unit</p>	 <p>0.555 ¢ per unit</p>
802.11	 <p>\$4.50 per unit</p>	 <p>3.471 ¢ per unit</p>

24 these offers are not “blatantly unreasonable” (which would violate the RAND licensing
 25 commitment), it is difficult to conceive of any offer that could be so characterized.

1 Given the RAND royalty and royalty range, no reasonable juror could conclude that
 2 Motorola had made a commercially reasonable offer—Motorola’s demand was not just high, it
 3 was wildly excessive. While a seller may be willing to come down from an opening offer, that
 4 does *not* mean that any offer is commercially reasonable just because negotiation might follow.
 5 No reasonable juror could find a sticker price of \$54 million for a standard Ford Taurus
 6 commercially reasonable, or a real estate listing of \$800 million for an ordinary 3-bedroom
 7 house in Seattle commercially reasonable—and those demands exceed the true value of those
 8 goods⁴ by the same factor as Motorola’s H.264 demand did the actual RAND royalty.⁵

9 Even ignoring the yawning chasm that separates Motorola’s demands from the RAND
 10 royalty, the record evidence otherwise confirms Motorola’s demands were completely
 11 unfounded and commercially unreasonable. First, nothing in Motorola’s licensing history
 12 supports the scale of its demands. [REDACTED]

13 [REDACTED] (See FFCL
 14 ¶¶ 418–19, 425–434; Wion Ex. 2 (Blasius 30(b)(6) Dep. Tr.) 127:12–128:18.) After the
 15 November trial, the Court concluded that none of the agreements Motorola identified
 16 supported the royalty demanded of Microsoft for H.264 and 802.11 standard-essential patents
 17 (FFCL ¶¶ 420, 425, 440, 445, 451), and those licenses did “little to show an established royalty
 18 rate commensurate with the amount of royalties Motorola seeks” (FFCL ¶ 454).⁶ In a
 19

20 ⁴ A Ford Taurus has a suggested retail price of \$26,700. See <http://www.ford.com/cars/taurus/> (visited June 21,
 21 2013). Median home prices in Seattle are currently above \$400,000. See
 22 http://seattletimes.com/html/business/technology/2020711424_homesalesmarchxml.html (visited June 21, 2013).

23 ⁵ If only Motorola’s 802.11 offer were considered, the opening demand for the Taurus would be \$3.4 million,
 24 and the house would be listed at a mere \$51.8 million.

25 ⁶ The Court’s analysis was with reference to the royalty Motorola advocated at trial, but this was the same
 26 2.25% of end-product prices that Motorola demanded in its letters. (FFCL at 130–31.) The sole difference is that
 Motorola applied its H.264 royalty to Microsoft Windows at trial, rather than to computers running Windows—
 but the Court’s rejection of Motorola’s supposedly comparable licenses had nothing to do with this issue. (See
 FFCL ¶¶ 407–54.) In any event, because the agreements Motorola relied on could not support its marginally-
 reduced demand at trial, they certainly could not demonstrate that Motorola’s *higher* October 2010 demands were
 objectively commercially reasonable.

1 remarkable reversal of Motorola’s position at the RAND royalty trial, Motorola’s expert
2 Leonard now admits

3 As of October 2010, Motorola’s 802.11 and H.264 SEP portfolios had not been
4 separately licensed. [REDACTED]

5 [REDACTED] *It is difficult or impossible to break out a separate*
6 *royalty rate for the 802.11 and H.264 SEP portfolios in these agreements, and*
7 *they do not cover software. Accordingly, Motorola had no past experience on*
8 *which it could draw when it attempted to negotiate a RAND license with*
9 *Microsoft.*

10 Ex. 6 (Leonard Opening Rep.) ¶ 66 (emphasis added).⁷ Motorola has now conceded,
11 consistent with the Court’s findings, that nothing in its licensing history indicates that
12 demanding 2.25% on the price of end products for its 802.11 and H.264 patents would be
13 reasonable.

14 Second, the limited importance of Motorola’s 802.11 and H.264 patents confirms that
15 Motorola’s demands were commercially unreasonable. Each of the Motorola 802.11 patents
16 presented at the November 2012 trial “provides very minimal technical contribution to the
17 identified portions of the 802.11 Standard,” and as the Court observed “Motorola did not
18 provide the inventive technology in any area of the 802.11 Standard, but instead built upon
19 already existing technology.” (FFCL ¶ 575.) Motorola’s patents “constitute only a sliver of
20 the overall technology incorporated into the 802.11 Standard” (FFCL ¶ 576) and cannot
21 possibly justify a demand for a 2.25% royalty on the entire value of the Xbox, which does not

22 ⁷ Just six months ago, Motorola told the Court just the opposite in its Post-Trial Brief:

23 Microsoft’s experts argued that [REDACTED] licenses are not appropriate benchmarks because,
24 under Motorola’s “no stacking” policy, it is difficult to apportion the royalties among the various
25 licensed portfolios. But a closer examination of these agreements refutes that position. [REDACTED]

26 (Dkt. No. 620, Defs’ Post-Trial Br. at 7.)

1 even need to use the 802.11 standard (FFCL ¶ 349). Similarly, Motorola’s H.264 patents are
 2 largely directed toward interlaced video, a technology the Court found “not overly important”
 3 to current products (¶ 532), and overall Motorola’s portfolio is, at most, of “only minor
 4 importance” to products like Windows and Xbox (FFCL ¶¶ 289, 299). As with 802.11,
 5 Motorola’s H.264 patents “only constitute[] a sliver of the overall technology incorporated
 6 into the H.264 Standard.” (FFCL ¶ 533.) The marginal value of Motorola’s H.264 patents
 7 cannot possibly justify a demand for a 2.25% of the entire value of a computer running
 8 Windows.

9 The number of owners of 802.11 and H.264 essential patents who had submitted letters
 10 of assurance to the IEEE and ITU was publicly available [REDACTED]

11 [REDACTED] Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) 73:10–75:12, 83:12–
 12 84:2. [REDACTED]

13 [REDACTED] *Id.* at 81:3–
 14 16, 84:19–85:5. [REDACTED]

15 [REDACTED]
 16 [REDACTED] *Id.* at 82:7–12, 85:6–86:2.

17 [REDACTED]
 18 [REDACTED] *Id.* at 91:22–93:22.

19 Motorola had participated in the formation of the MPEG-LA H.264 pool and joined in press
 20 releases characterizing the pool rates as reasonable. (FFCL ¶¶ 470, 478–79, 481.) Whether the
 21 RAND royalty is ultimately the pool rate or slightly higher, as the Court found, the pool
 22 royalty (and Motorola’s prior endorsement of it) demonstrates that the Motorola offer was not
 23 commercially reasonable.

24 There are numerous additional indications that Motorola’s 802.11 demand was
 25 commercially unreasonable. The royalty Motorola demanded would exceed the cost of the
 26

1 chipset that provides the 802.11 functionality in Xbox, which costs only a few dollars. (FFCL
 2 ¶ 581.) The Court found that royalty rates of 1% of chip price (*not* end product price)
 3 represent a customary high ceiling for licensing in the semiconductor industry for products like
 4 Marvell's. (FFCL ¶¶ 585–90.) Motorola itself commissioned a study by InteCap to value its
 5 802.11 portfolio which suggested that even lower rates of 0.5% of chip price would be
 6 appropriate. (FFCL ¶¶ 591–607.) The Court found the InteCap study indicative of
 7 commercially reasonable conduct (evidence of what is “customary in the particular business”
 8 under a modified *Georgia-Pacific* factor 12), as it reflected “an effort by a company in the
 9 business of licensing (RAND) patents to fashion a RAND royalty rate.” (FFCL ¶¶ 589, 606.)
 10 Motorola's 802.11 demand on the Xbox was \$4.50; that the amount suggested by InteCap for
 11 the chip alone was 2 cents⁸ confirms Motorola's demand was commercially unreasonable.

12 As to Motorola's H.264 demand, by demanding royalties on the prices of its
 13 prospective licensees' *customers'* products, [REDACTED]
 14 [REDACTED] Motorola's H.264 letter
 15 explicitly demanded a 2.25% royalty “calculated based on the price of the end product . . .
 16 [e.g.] each PC/laptop, each smartphone . . . and not on component software.” Trial Ex. 2.

17 [REDACTED]
 18 [REDACTED] Wion Decl. Ex. 2
 19 (Blasius 30(b)(6) Dep.) 130:23–131:6, [REDACTED]
 20 [REDACTED] Wion Decl. Ex. 7 (Dailey ITC Tr.) 2552:8–10 [REDACTED]
 21 [REDACTED]; Wion Decl. Ex. 9 [REDACTED]
 22 [REDACTED] at MOTM_WASH1823_0019341 [REDACTED]

23 _____
 24 ⁸ InteCap also suggested a 0.1% royalty on devices like game consoles that included 802.11 capability. (FFCL
 25 ¶ 596.) While it would not be commercially reasonable to charge a higher royalty on an end user device than on
 26 the chip that provides the patented technology (as InteCap suggested), even assuming it could be, the 0.1% royalty
 on a \$200 Xbox would amount to 20 cents, which also would confirm that Motorola's \$4.50 demand is
 commercially unreasonable.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED] Wion Decl. Ex. 6 (Leonard Dep.) 70:21–72:23.

4 Motorola may argue that it did not know at the time the demand letters were sent that
5 the royalties demanded were exorbitant and unjustified and that knowledge of that could only
6 be acquired by examining the information that was before the Court at the November trial. But
7 this is hardly a cognizable defense. In the first place, a breach does not depend on Motorola’s
8 subjective intent and knowledge—as explained above, commercially unreasonable conduct, or
9 conduct that frustrates the purposes of the RAND licensing commitment, is sufficient. Second,
10 even based solely on what the Court already heard in the November trial, more than enough
11 information was within the corporate knowledge of Motorola to show that the demands were
12 blatantly unreasonable (including the Intecap study, the scope and nature of its own
13 contributions to the standards, the pool rates, [REDACTED] and more).

14 Motorola will also likely argue that it was reasonable to pick 2.25% because it lacked
15 complete information on how the patents were used in Microsoft products. This, too, is a red
16 herring. [REDACTED]

17 [REDACTED] Wion Decl. Ex. 10 (Taylor Dep.) 90:20–91:25
18 (“[REDACTED]”), 158:3–160:4 [REDACTED]
19 [REDACTED]).

20 Moreover, the use of the standards in Microsoft products was facially apparent: Xbox was
21 known to be a game console, with 802.11 needed only as an alternative means of connecting to
22 the Internet; and Windows is a computer operating system, with the ability to display H.264
23 video being only one of thousands of features. While more information about the Microsoft
24 products might have been needed to arrive at a precise RAND royalty, as set by the Court, that
25 was plainly not necessary to ascertain that the demanded royalties were not commercially
26

1 reasonable. Finally, the argument that all of the information adduced at trial was necessary for
 2 Motorola to understand that the demands were outrageous is demonstrably false—even when
 3 possessed of all of this information, Motorola continued to urge a 2.25% royalty at trial.

4 No finder of fact could reasonably conclude that Motorola’s demands as to either
 5 standard were anything but commercially unreasonable. Accordingly, Microsoft is entitled to
 6 summary judgment that Motorola’s October 21, 2010 802.11 letter and October 29, 2010
 7 H.264 letter breached the duty of good faith and fair dealing because Motorola’s demands were
 8 not objectively commercially reasonable (indeed, they were blatantly unreasonable).

9 **B. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In**
 10 **Conduct That Frustrated The Purpose Of Its RAND Licensing Commitments.**

11 The Court found that two key purposes of the RAND licensing commitment are
 12 prevention of hold up and avoidance of stacking problems. (FFCL ¶¶ 60, 66.) The undisputed
 13 facts show that Motorola’s demands violated the duty of good faith and fair dealing by
 14 frustrating both purposes.

15 First, Motorola’s demands created “significant stacking concerns,” as the Court has
 16 already recognized.⁹ (FFCL ¶¶ 456, 459.) At least 52 entities own H.264 SEPs (FFCL ¶ 459),
 17 and their making demands like Motorola’s (2.25% of the end price of standard-compliant
 18 products) would lead to an aggregate royalty to implement the H.264 standard exceeding the
 19 prices of standard-compliant products. At least 92 entities own 802.11 standard-essential
 20 patents (FFCL ¶ 456); if made by even half of those entities, demands like Motorola’s would
 21 lead to an aggregate royalty that exceeded the product price. Because Motorola’s 802.11
 22 patents provide “only minimal contribution to the 802.11 Standard” (FFCL ¶ 457), and because
 23 “Motorola’s H.264 SEP portfolio relates almost entirely to interlaced video—a functionality

24 ⁹ See note 6, *supra*. The stacking problem is even worse for Motorola’s October 2010 H.264 demand, because
 25 it sought to attach its royalty to computers running Windows—meaning that Motorola’s 2.25% demand of the
 26 price of the computer for its meager portion of H.264 alone is weighed against not only all of the rest of H.264,
 and all of the other the standards necessary for the operating system, but also all standards necessary for the entire
 computer.

1 not important to Microsoft’s H.264-compliant products” (FFCL ¶ 459) or even to Motorola’s
 2 parent company, Google (FFCL ¶ 264)—the aggregate royalty burden suggested by
 3 Motorola’s demands is even more unreasonable. If minimal contributions and outdated,
 4 unimportant aspects of the standard demand 2.25% of the end-product price, others claiming to
 5 hold more valuable patents would likely demand significantly more.¹⁰

6 Second, Motorola was engaged in hold up: Its royalty demands exceeded the value of
 7 its patented technology by such a margin that no rational company could accept them; it
 8 accompanied those demands with 20-day ultimatums; and backed them up by pursuing
 9 lawsuits and injunctions around the world. (FFCL ¶¶ 55–56.) The demands Motorola made in
 10 its October 2010 letters were merely a prelude to the barrage of lawsuits launched against
 11 Microsoft, consistent with a strategy of hold up, not with an attempt to enter into a RAND
 12 license. [REDACTED]

13 [REDACTED] See Wion Decl. Ex. 7
 14 (Dailey ITC Tr.) 2495:23–2497:6; Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) 49:2–50:5; Wion
 15 Decl. Ex. 11 (Google/MMI European Commission submission) § 4.1 [REDACTED]
 16 [REDACTED] Motorola cannot
 17 claim it only filed those actions as a necessary, but unexpected response to Microsoft having
 18 filed this suit, because Motorola filed the 699 and 700 Actions on November 10, 2010—the
 19 day after Microsoft filed here—and its ITC action followed only 12 days later. [REDACTED]

20 [REDACTED]
 21 [REDACTED] Wion Decl. Ex. 7 (Dailey ITC Tr.) at 2498:6–
 22 24.¹¹

23 ¹⁰ Stacking concerns are particularly heightened here, because products on which Motorola demanded royalties
 24 need to comply with many other standards besides H.264 and 802.11. (FFCL ¶ 63.)

25 ¹¹ Entries in Motorola’s privilege log for October 2010, [REDACTED] See
 26 Wion Decl. Ex. 3 (Motorola’s Second Supplemental Log of Withheld Documents) [REDACTED]

1 Motorola's immediate pursuit of injunctions confirms that its letters were only the first
2 step of an attempt to hold up Microsoft. If granted, the injunctions Motorola pursued would
3 have left Microsoft with a choice between pulling its standard-compliant products out of the
4 U.S. and German markets, or giving Motorola whatever it demanded in exchange for a license
5 to Motorola's 802.11 and H.264 patents. (*See* Dkt. No. 318 at 23–24.) As the Court has
6 recognized, injunctions are key leverage in forcing standard implementers to accept non-
7 RAND terms: “[T]he threat of an injunction looming over the negotiation table . . .
8 fundamentally places [the party seeking a RAND license] at a disadvantage,” and may lead to
9 distorted, harmful licensing arrangements that “may not easily be undone.” (Dkt. No. 318 at
10 24.) The European Commission, investigating potential antitrust abuses by Motorola in its
11 pursuit of injunctions, reached the same conclusion: “The Commission is concerned that the
12 threat of injunctions can distort licensing negotiations and lead to licensing terms that the
13 licensee of the SEP would not have accepted absent this threat.” *Wion Decl. Ex. 12 at MS-*
14 *MOTO_1823_00005258268.*

15 Motorola's economic expert Leonard testified that if a patent owner uses an injunction
16 “to try to get hold-up value,” that would be “potentially problematic” in light of the RAND
17 licensing commitment and the duty of good faith and fair dealing. *Wion Decl. Ex. 5 (Leonard*
18 *Dep.) 136:9–137:19.* Leonard defines RAND as “commensurate with the economic value of
19 the patented technology to the licensee relative to the next best alternative technology prior to
20 the standard being set,” and defines hold-up value as value above RAND that “derives simply
21 from the patented technology being incorporated into the standard.” *Id.* at 16:3–17:5. At the
22 November 2012 trial, Motorola still sought a 2.25% royalty that the Court has since found
23 included “an improper attempt by Motorola to capture the value of the H.264 Standard itself as
24
25
26

1 opposed to a royalty on the actual economic value of Motorola's patented technology." (FFCL
2 ¶ 269.) Motorola continued to seek an exclusion order on its H.264 standard-essential patents
3 in the ITC as late as January 2013. *See* Wion Decl. Ex. 13 (ITC Mot. to Terminate) at 1.

4 Under the view of its own expert, Motorola was trying to get hold-up value using injunctions.

5 Both Motorola's conduct in sending the October 21, 2010 and October 29, 2010 letters,
6 and Motorola's conduct in subsequently filing actions and seeking injunctions in U.S. district
7 court, the ITC, and Germany frustrated the purposes of the RAND licensing commitment.
8 Accordingly, Microsoft is entitled to summary judgment that each instance of conduct
9 breached Motorola's duty of good faith and fair dealing.

10 **C. Microsoft Is Entitled To Summary Judgment On Motorola's Third, Fourth,
11 Fifth, Seventh, Eighth, and Ninth Affirmative Defenses And Second
12 Counterclaim.**

13 Motorola's Answer to Microsoft's Amended Complaint includes, as an affirmative
14 defense, the claim that:

15 Microsoft's First and Second Causes of Action are barred because, by failing to
16 apply for a RAND license and to negotiate the terms of a RAND license and
17 instead filing the present action, Microsoft breached the contract to which it
18 claims to be a third party beneficiary, and failed to satisfy the conditions
19 precedent to any obligations that it was owed as an alleged third party
20 beneficiary, and thereby forfeited all benefits of any purported RAND statement
21 made by the Defendants.

22 (Dkt. No. 68, Fourth Affirmative Defense at 13–14.) Motorola subsequently explained in
23 interrogatory responses that its Third, Fifth, Seventh, Eighth, and Ninth Affirmative Defenses
24 are all based on the same theory that Microsoft should have negotiated first before filing this
25 suit. The basis of Motorola's Third Affirmative Defense ("Ripeness") is that Microsoft's
26 claims "are not ripe for adjudication because Microsoft has repudiated, or failed to satisfy any
condition precedent, any right to a RAND license pursuant to Motorola's RAND obligations."

Wion Decl. Ex. 14 (Motorola Interrogatory Responses) at 47–48. The basis of Motorola's
Fifth Affirmative Defense ("Waiver") is that "because Microsoft has neither applied for a

1 license, nor engaged in good-faith negotiations for a license, Microsoft has repudiated and
2 waived any benefit that it otherwise would have enjoyed based on Motorola’s RAND
3 assurances.” *Id.* at 49. The basis of Motorola’s Seventh Affirmative Defense (“Unclean
4 Hands”) is that Microsoft sued “Motorola for breach of contract, rather than negotiating the
5 terms of a RAND license in good faith, [which] demonstrate[s] Microsoft’s lack of good faith.”
6 *Id.* at 51. The basis of Motorola’s Eighth Affirmative Defense (“Failure to Mitigate”) is that
7 “Microsoft was required to mitigate its purported damages by applying for a RAND license
8 from Motorola and by negotiating the terms of such a license in a bilateral, good-faith
9 manner.” *Id.* at 52–53. Finally, the basis of Motorola’s Ninth Affirmative Defense (“Failure
10 to Satisfy a Condition Precedent”) is that “Microsoft failed to satisfy conditions precedent to
11 any duty arising on the part of Motorola – namely, application, and a willingness to negotiate
12 in good faith, for a RAND license.” *Id.* at 55–56.

13 Motorola also advanced a counterclaim predicated on the same theories. (*See id.* at 15–
14 33.) Motorola alleged Microsoft had repudiated its rights to RAND licenses by implementing
15 standard-compliant products without first applying for a license. (*See id.* at Counterclaim
16 ¶¶ 51, 56.) Motorola also alleged that Microsoft’s filing of this suit was a “refusal to negotiate
17 the terms of a RAND license in response” to Motorola’s letters, constituting a further
18 repudiation of Microsoft’s rights to RAND licenses. (*Id.* at Counterclaim ¶¶ 53, 58.) Motorola
19 alleged that it filed its injunctive actions “in light of Microsoft’s refusal to apply for a RAND
20 license,” Microsoft’s “refusal to negotiate a RAND license,” and Microsoft’s “bad faith filing
21 of suit in the present action.” (*Id.* at Counterclaim ¶ 60.)

22 On March 30, 2012, Motorola moved for summary judgment on these theories:

23 There is no genuine dispute that at the time Motorola sent its October 2010 offer
24 letters to Microsoft, Microsoft had not applied for a RAND license to
25 Motorola’s 802.11 and H.264 portfolios. *Because the SSO policies require an*
26 *applicant to seek a license from a licensor, Motorola seeks summary judgment*
that those October 2010 offer letters cannot form the basis of a breach of
contract or promissory estoppel claim. In addition, because Microsoft refused

1 *to negotiate in good faith with Motorola, but instead immediately brought this*
2 *action, Motorola is entitled to summary judgment that it had no further*
3 *contractual duty to negotiate a RAND license with Microsoft. Finally, this*
4 *Court should declare that Microsoft, by failing to satisfy the conditions of*
5 *applying for and negotiating for a RAND license, and instead commencing this*
6 *lawsuit, repudiated and forfeited any benefit it might otherwise have had under*
7 *Motorola’s RAND assurances, and Motorola is thereby relieved of any further*
8 *obligation to negotiate a license with Microsoft on RAND terms.*

9 (Dkt. No. 231 at 2 (emphasis added); *see id.* at 12–24.) Motorola’s briefs set out the argument
10 that Microsoft’s filing of this suit breached the duty of good faith and fair dealing. *See* Dkt.
11 No. 290 at 1 (“The undisputed facts establish unequivocally that Microsoft did not act in good
12 faith.”), 3 (“Under Washington law, every contract involves an implied duty of good faith and
13 fair dealing that obligates the parties ‘to cooperate with each other so that each may obtain the
14 full benefit of performance.’ . . . This obligation to act in good faith extends not just to
15 Motorola, but to Microsoft, as well.”).

16 In June 2012, the Court denied Motorola’s motion for summary judgment with
17 prejudice, rejecting all of the arguments advanced. (*See* Dkt. No. 335 at 16–21, 28.)
18 Nevertheless, Motorola apparently intends to press these arguments at trial. As set forth in
19 Microsoft’s contemporaneously-filed Rule 702 motion, Motorola’s experts offer opinions
20 inconsistent with the Court’s June 2012 order. Motorola’s July 1 brief advances the same
21 “failure to cooperate” argument Motorola pressed in its summary judgment briefing when it
22 argued Microsoft “failed to cooperate” by filing this suit. (*See* Dkt. No. 716 at 8–9.)
23 Motorola’s July 1 brief also argues that in some situations the “filing of a contract lawsuit”
24 might breach the duty of good faith and fair dealing (*see* Dkt. No. 716 at 6–7)—further
25 suggesting that Motorola still plans to argue it is absolved of any RAND obligations because
26 Microsoft filed this suit. Motorola presented these claims and arguments at the summary
judgment stage in March 2012, they have been rejected with prejudice, and they should play no
further part in this case.

1 **V. CONCLUSION**

2 For the foregoing reasons, Microsoft respectfully requests that the Court grant partial
3 summary judgment of breach of contract in Microsoft's favor, and that the Court grant
4 summary judgment in Microsoft's favor as to Motorola's Third, Fourth, Fifth, Seventh, Eighth,
5 and Ninth Affirmative Defenses and Second Counterclaim.

6 DATED this 3rd day of July, 2013.

7
8 CALFO HARRIGAN LEYH & EAKES LLP

9 By s/ Arthur W. Harrigan, Jr.
10 Arthur W. Harrigan, Jr., WSBA #1751
11 Christopher Wion, WSBA #33207
Shane P. Cramer, WSBA #35099

12 By s/ T. Andrew Culbert
13 T. Andrew Culbert
14 David E. Killough
MICROSOFT CORPORATION
15 1 Microsoft Way
Redmond, WA 98052
16 Phone: 425-882-8080
Fax: 425-869-1327

17 David T. Pritikin
18 Richard A. Cederoth
Constantine L. Trela, Jr.
19 William H. Baumgartner, Jr.
Ellen S. Robbins
20 Douglas I. Lewis
David C. Giardina
21 John W. McBride
Nathaniel C. Love

22
23 SIDLEY AUSTIN LLP
One South Dearborn
24 Chicago, IL 60603
Phone: 312-853-7000
25 Fax: 312-853-7036
26

Carter G. Phillips
Brian R. Nester

SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
Telephone: 202-736-8000
Fax: 202-736-8711

Counsel for Microsoft Corp.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I, Tim Murphy, 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 3rd day of July, 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.:

Ralph Palumbo, WSBA #04751
 Philip S. McCune, WSBA #21081 _____ Messenger
 Lynn M. Engel, WSBA #21934 _____ US Mail
 Summit Law Group _____ Facsimile
 315 Fifth Ave. South, Suite 1000 _____ X ECF
 Seattle, WA 98104-2682
 Telephone: 206-676-7000
 Email: Summit1823@summitlaw.com

Steven Pepe (*pro hac vice*) _____ Messenger
 Jesse J. Jenner (*pro hac vice*) _____ US Mail
 Ropes & Gray LLP _____ Facsimile
 1211 Avenue of the Americas _____ X ECF
 New York, NY 10036-8704
 Telephone: (212) 596-9046
 Email: steven.pepe@ropesgray.com
 Email: jesse.jenner@ropesgray.com

Norman H. Beamer (*pro hac vice*) _____ Messenger
 Ropes & Gray LLP _____ US Mail
 1900 University Avenue, 6th Floor _____ Facsimile
 East Palo Alto, CA 94303-2284 _____ X ECF
 Telephone: (650) 617-4030
 Email: norman.beamer@ropesgray.com

1 Paul M. Schoenhard (*pro hac vice*)
2 Ropes & Gray LLP
3 One Metro Center
4 700 12th Street NW, Suite 900
5 Washington, DC 20005-3948
6 Telephone: (202) 508-4693
7 Email: Paul.schoenhard@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

8 Andrea Pallios Roberts (*pro hac vice*)
9 Brian C. Cannon (*pro hac vice*)
10 Quinn Emanuel Urquhart & Sullivan, LLP
11 555 Twin Dolphin Drive, 5th Floor
12 Redwood Shores, CA 94065
13 Telephone: (650) 801-5000
14 Email: andreaproberts@quinnemanuel.com
15 Email: briancannon@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

16 Kathleen M. Sullivan (*pro hac vice*)
17 David Elihu (*pro hac vice*)
18 Quinn Emanuel Urquhart & Sullivan, LLP
19 51 Madison Ave., 22nd Floor
20 New York, NY 10010
21 Telephone: (212) 849-7000
22 Email: kathleensullivan@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

23 William Price (*pro hac vice*)
24 Quinn Emanuel Urquhart & Sullivan, LLP
25 865 S. Figuera St., 10th Floor
26 Los Angeles, CA 90017
Telephone: (212) 443-3000
Email: williamprice@quinnemanuel.com
MicrosoftvMotoBreachofRANDCase@quinnemanuel.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

DATED this 3rd day of July, 2013.

s/ Tim Murphy
TIM MURPHY