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August 16, 2012

**VIA ECF**Molly C. Dwyer  
Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
James R. Browning Courthouse  
95 7th Street  
San Francisco, CA 94103Re: *Microsoft Corp. v. Motorola, Inc. et al.*, No. 12-35352  
Argument Scheduled for September 11, 2012

Dear Ms. Dwyer:

Defendants-Appellants ("Motorola") hereby respond to Microsoft's 28(j) letter of August 6, 2012, which quoted Motorola's motion for partial summary judgment below. Contrary to Microsoft's interpretation, Motorola did not there concede that the district court properly enjoined Motorola from enforcing its German patents in German courts. Motorola argued below, as here, that no injunction may issue absent a finding that Motorola breached its RAND licensing obligations. No such breach has been found, nor can one be found based simply on what Microsoft contends was too high a preliminary offer by Motorola. Motorola Br. 29-32; Reply Br. 9-12.

Moreover, nothing in the motion below concedes the district court's authority to enjoin the enforcement of a *foreign* patent infringement judgment, now or later. The German proceedings concern Microsoft's current and continuing patent infringement absent a license, a problem that will persist unless and until the proceedings below determine that Microsoft is entitled to a license.

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Motorola Br. 26-29; Reply Br. 12-14. And any permanent injunction would be limited to Motorola's U.S. patents, as foreign patents are subject exclusively to the laws and courts of the issuing country. Reply Br. 24-25. Motorola's position on this point is of record below. *See* Dist Ct. Dkt No. 248 at 16 (“[E]ven if the Court were to find for Microsoft on the merits and determine it was proper to issue an Order enjoining Motorola from refusing to license sales in the United States at particular rates[,] ... Microsoft points to nothing to rebut the strong presumption against courts projecting their authority extraterritorially ....”).

Finally, even if an injunction after trial might square with comity, the preliminary injunction here does not, for it bases its finding of irreparable harm to Microsoft on its denigration of Germany's *Orange Book* procedures. Motorola Br. 37-41; Reply Br. 18-19. Nor would this injunction be occasioned after trial: if Microsoft secures a license, that would itself constitute a complete defense before the German court. Motorola Br. 7-9.

For these reasons and consistent with its positions here, Motorola does not concede any basis for enjoining enforcement of the German patents.

Respectfully submitted,

Kathleen M. Sullivan

cc: Counsel for Microsoft Corp. via ECF