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September 6, 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 94103

Re: *Microsoft Corp. v. Motorola, Inc. et al.*, No. 12-35352
Argument Scheduled for September 11, 2012 (Wallace, Thomas, Berzon)

Dear Ms. Dwyer:

Defendants-Appellants ("Motorola") hereby respond to Microsoft's 28(j) letter of August 13, 2012, submitting for this Court's consideration the decision in *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11–cv–178–bbc, 2012 WL 3289835 (W.D. Wis. Aug. 10, 2012) ("*Apple*" or "Ex. A"). The Wisconsin district court's decision supports Motorola's position on appeal and belies Microsoft's account of why the court below should be proceeding as it has.

In *Apple*, the RAND breach alleged was based *not* simply on an opening offer, standing alone, but also on *three years of ensuing negotiations*. Ex. A at 12 ("Motorola continued to engage in license negotiations with Apple for approximately three years."). Motorola has explained that, in this case, no such negotiations were attempted before Microsoft filed suit in immediate response to Motorola's offer letter. Motorola Br. 6-7; Reply Br. 9-10.

Moreover, the Wisconsin district court's decision does not contemplate conferring any actual RAND license, much less doing so globally. Ex. A at 46. Rather, the district court in Wisconsin plans to determine at trial whether Motorola has breached any obligation, *id.*, thereby sharply contrasting with Microsoft's request that the Seattle district court draft a global RAND license from scratch that the parties must accept, without any prior determination whether Motorola breached any RAND commitments, *see* Dist Ct. Dkt No. 362, at 4-5 (July 18, 2012).

Finally, the *Apple* decision confirms the impropriety of the anti-suit injunction under appeal. When *Apple* sought to enjoin, *inter alia*, portions of Motorola's case before the International Trade Commission concerning domestic infringement of Motorola's U.S. patents, the Wisconsin court *denied* that relief. Ex. A at 13, 15. Far from reflecting like restraint, the preliminary injunction under appeal reaches into Germany to prevent German courts from enjoining infringement of German patents. *See, e.g.*, Motorola Br. 1, 19, 26-29; Reply Br. 3, 12-14, 16.

In each of these respects, the *Apple* decision points to reversal, both by highlighting the predicate for RAND adjudication that is absent here and by demonstrating restraint relative to the preliminary relief that has been ordered here.

Respectfully submitted,

Kathleen M. Sullivan

cc: Counsel for Microsoft Corp. via ECF