

**E
X
H
I
B
I
T
A**

Schwentker, R. Andrew

From: Pepe, Steven
Sent: Thursday, July 07, 2011 7:50 AM
To: Florida (Motorola/Microsoft)
Subject: FW: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660

1211 Avenue of the Americas

New York, NY 10036-8704

steven.pepe@ropesgray.com

www.ropesgray.com

From: Pepe, Steven
Sent: Thursday, July 07, 2011 7:25 AM
To: 'Tripodi, Paul D.'
Cc: Spencer, Leslie M.; Jenner, Jesse J.; Project-MS/Moto_SDFL_24063; emullins@astidavis.com; curt@colson.com; Pepe, Steven
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

Thank you for your detailed email. We disagree, however, with your understanding of the scope of the parties' agreement. Our understanding is consistent with Tung's email -- neither party will use experts for claim construction. As I have repeatedly stated, Tung's email is clear and unambiguous. Other than statements you believe were made during the May 4, 2011 telecon, I note that you do not cite anything to sufficiently corroborate your belief that the agreement was limited only to submitting expert declarations in support of claim construction briefing.

We also disagree that is appropriate or necessary for some -- but not all -- of Microsoft's experts to opine on claim construction to establish "foundation" for their opinions. Regardless, we believe such opinions violate the parties' agreement.

Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660

1211 Avenue of the Americas

New York, NY 10036-8704

steven.pepe@ropesgray.com

www.ropesgray.com

From: Tripodi, Paul D. [mailto:PTripodi@Sidley.com]
Sent: Wednesday, July 06, 2011 3:38 PM
To: Pepe, Steven
Cc: Spencer, Leslie M.; Jenner, Jesse J.; Project-MS/Moto_SDFL_24063; emullins@astidavis.com; curt@colson.com
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Steve,

Your email includes unnecessary and inflammatory statements. Perhaps your misunderstanding results from the fact that you were not substantively involved in discussions relating to the schedule for claim construction or the role of experts in claim construction. In any event, I encourage you to avoid counterproductive, personal attacks and engage in a constructive dialogue based on a discussion of the facts. Since it does not appear that you are fully aware of the facts relating to this particular issue, I have summarized them below.

- The case schedule was originally set by the parties so that claim construction briefing would occur beginning on May 20 and conclude May 27, with a Hearing during the week of May 30, 2011.
 - Under the parties' agreed schedule, the claim construction Hearing was set to take place well in advance of expert discovery in an effort to give the Court an opportunity to issue a claim construction order prior to the exchange of expert reports on June 24, 2011.
- On April 10, 2011, the parties filed a Joint Motion to Include Pretrial Dates on Claim Construction and Expert Discovery (Dkt. 49) submitting the proposed schedule for claim construction and expert reports for approval by the Court.
- In early May, the parties were preparing for the exchange of Proposed Constructions and Supporting Evidence, which was due on May 6, 2011.
 - In a telephone call on the evening of May 4, 2011, your colleague Leslie Spencer suggested to Tung Nguyen that that neither party submit "expert declarations with their claim construction briefing."
 - As Tung indicated in his email on May 6, 2011, "Microsoft agrees with Motorola that neither party will use experts for claim construction."
- On May 17, 2011, shortly after the exchange of Proposed Constructions, Judge Moreno issued an Order denying the parties' requested schedule for claim construction briefing and an early claim construction Hearing (Dkt. 53). As a result, claim construction briefing will commence on July 21, 2011.

Thus, it is abundantly clear that the parties agreement was, *as your colleague Leslie Spencer suggested*, not to use expert testimony in connection with claim construction briefing. At your request, I confirmed over the weekend that "the parties have indeed agreed not to rely on expert testimony in connection with claim construction briefing." In my email, I also invited you to let me know if Motorola would like to discuss the matter further. Rather than accept my invitation, you engaged in an unnecessary attack, accusing Microsoft of "*blatant renegeing of the agreement*" and impugning our integrity by stating that there was "*considerable doubt that Microsoft can be considered trustworthy in connection with future issues and requests.*" Under the circumstances and in light of the facts, I believe that we are entitled an apology.

Turning now to your apparent concern about statements relating to claim construction in Microsoft's expert reports. As I also indicated in my email, certain Microsoft experts included varying amounts of discussion of claim construction issues as *foundation* for the opinions expressed in their reports. (I had also previously given an example of similar material in a Motorola expert report.) In other words, in light of the Court's Order denying the parties' proposed schedule for early claim construction proceedings, the experts have drafted there reports without the benefit of the parties' arguments in connection with claim construction briefing or the benefit of a ruling from the Court. Accordingly, certain Microsoft experts set forth a limited discussion of the basis for their understanding and application of the parties' proposed claim constructions as part of the *foundation* for their opinions.

It appears from your email that you are concerned that Motorola's experts chose not to provide any foundation for claim construction in their reports, and you are now attempting to create a dispute in an effort to give Motorola's experts the opportunity to provide this information as part of their rebuttal reports. If that is Motorola's concern, please let us know so that we can discuss ways to address it. If Motorola's intent is instead to renege on the parties agreement not to rely on expert testimony in connection with claim construction briefing, please let us know immediately so that we can take appropriate steps to address this issue in advance of the exchange of claim construction briefs on July 21, 2011.

I hope that this clarifies these matters for you. We look forward to hearing back from Motorola promptly.

Paul D. Tripodi II
Sidley Austin LLP
(213) 896-6115

From: Pepe, Steven [mailto:Steven.Pepe@ropesgray.com]
Sent: Wednesday, July 06, 2011 4:15 AM
To: Tripodi, Paul D.; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M.; Jenner, Jesse J.; Pepe, Steven
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

Your attempt to limit the parties' agreement to just claim construction briefing is irreconcilable with the agreement as set forth in Tung's email. As his email makes clear, the agreement was not limited to just claim construction briefing. If Microsoft does not withdraw these portions of the reports, Motorola reserve the right to address claim construction in our rebuttal reports and/or move to strike all portions of Microsoft's reports that address claim construction. Please let me know Microsoft's intentions.

Microsoft's blatant renegeing of the agreement is disappointing and creates considerable doubt as to whether Microsoft can be considered trustworthy in connection with future issues and requests.

Steve

Steven Pepe
ROPES & GRAY LLP
T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660
1211 Avenue of the Americas
New York, NY 10036-8704
steven.pepe@ropesgray.com
www.ropesgray.com

From: Tripodi, Paul D. [mailto:PTripodi@Sidley.com]
Sent: Monday, July 04, 2011 2:41 PM
To: Pepe, Steven; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M.; Jenner, Jesse J.
Subject: Re: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Steve,

I can confirm that the parties have indeed agreed not to rely on expert testimony in connection with claim construction briefing. Since we do not yet have any ruling or the benefit of the Court's reasoning for a construction, the portions of the reports cited in your email are foundational in order to explain the basis for the experts conclusions. Please let me know if Motorola would like to discuss the matter further.

Paul D. Tripodi II
Sidley Austin LLP

From: Pepe, Steven [mailto:Steven.Pepe@ropesgray.com]
Sent: Monday, July 04, 2011 08:09 AM
To: Tripodi, Paul D.; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M. <Leslie.Spencer@ropesgray.com>; Jenner, Jesse J. <Jesse.Jenner@ropesgray.com>; Pepe, Steven <Steven.Pepe@ropesgray.com>
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

You indicated you would respond on Saturday or Sunday. You have not. We await Microsoft's position.

I would appreciate the courtesy of a response given that rebuttal reports are due on 7/7.
Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660
1211 Avenue of the Americas
New York, NY 10036-8704
steven.pepe@ropesgray.com
www.ropesgray.com

From: Tripodi, Paul D. [<mailto:PTripodi@Sidley.com>]
Sent: Saturday, July 02, 2011 6:57 PM
To: Pepe, Steven; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M.; Jenner, Jesse J.
Subject: Re: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Steve,

I was traveling Friday and should have a chance to get back to you later today or tomorrow.

Paul D. Tripodi II
Sidley Austin LLP

From: Pepe, Steven [<mailto:Steven.Pepe@ropesgray.com>]
Sent: Saturday, July 02, 2011 08:11 AM
To: Pepe, Steven <Steven.Pepe@ropesgray.com>; Tripodi, Paul D.; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M. <Leslie.Spencer@ropesgray.com>; Jenner, Jesse J. <Jesse.Jenner@ropesgray.com>
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul
When can I expect a response?
Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660
1211 Avenue of the Americas
New York, NY 10036-8704
steven.pepe@ropesgray.com
www.ropesgray.com

From: Pepe, Steven
Sent: Friday, July 01, 2011 9:21 AM
To: 'Tripodi, Paul D.'; Project-MS/Moto_SDFL_24063
Cc: Spencer, Leslie M.; Jenner, Jesse J.; Pepe, Steven
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

Please provide you understanding of the agreement between the parties as reflected in Tung's email. His email is clear and unequivocal – the parties will not use experts for claim construction. I would appreciate your position by close of business.

In response to your question, here are the portions of Microsoft's expert reports at issue:

- Stubblebine '899 report, pages 28-35
- Stubblebine '001 report, pages 34-52 (paragraphs 64-105)
- Stevenson '536 report, pgs.16-17 (paragraphs 62-63)
Stevenson '853 report, pgs. 19-20 (paragraphs 64-67)
- Fagan '460 report , pages 35-36 (paragraphs 144-148)
- Zeidman '839 report, pages 45-50
- Terveen '904 report, Page 13, (paragraph 35)
- Geier '333 report, pages 31-50 (paragraphs 107-169)
- Knoblock '544 report, pages 22-26

By way of example, the Geier report includes a section titled "Claim Interpretation" and discusses why, in the expert's opinion, a person of ordinary skill would agree with Microsoft's proposed constructions. The other reports include a similar discussion.

Our experts did not include such sections in their reports, including in Motorola's '839 expert report at notes 9, 13, and 18. In these notes, the expert did not opine on how a person of ordinary skill in the art would interpret the claim language. Rather, the expert merely explained that he did not understand what was meant by Microsoft's construction. In order to opine on infringement issues, he had to explain his understanding of Microsoft's construction.

I am available to discuss

Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660
1211 Avenue of the Americas
New York, NY 10036-8704
steven.pepe@ropesgray.com
www.ropesgray.com

From: Tripodi, Paul D. [mailto:PTripodi@Sidley.com]

Sent: Thursday, June 30, 2011 3:37 PM

To: Pepe, Steven; Project-MS/Moto_SDFL_24063

Cc: Spencer, Leslie M.; Jenner, Jesse J.

Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Steve,

We are still looking into this issue. To the extent that Motorola has an objection to any discussion of claim construction in Microsoft's expert reports, it would be helpful to know exactly what sections of the reports are at issue. Moreover, to the extent that Motorola is concerned about discussions that implicate or discuss claim construction, we ask that Motorola scrutinize its own expert reports. (By way of example, notes 9, 13, and 18 of Motorola's '839 report, among others.) We are happy to consider the issue further and look forward to hearing back from you.

Paul D. Tripodi II
Sidley Austin LLP
(213) 896-6115

From: Pepe, Steven [mailto:Steven.Pepe@ropesgray.com]

Sent: Wednesday, June 29, 2011 3:18 PM

To: Tripodi, Paul D.; Project-MS/Moto_SDFL_24063
Cc: Pepe, Steven; Spencer, Leslie M.; Jenner, Jesse J.
Subject: RE: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

Any word on whether Microsoft will withdraw those portions of the reports that relate to claim construction? As I noted in my email, Tung's May 6 email to Leslie makes it clear that neither party will rely on experts for claim construction.

Thanks

Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660

1211 Avenue of the Americas

New York, NY 10036-8704

steven.pepe@ropesgray.com

www.ropesgray.com

From: Pepe, Steven [mailto:Steven.Pepe@ropesgray.com]

Sent: Tuesday, June 28, 2011 5:45 PM

To: Project - SidleyITC706

Cc: Pepe, Steven; Spencer, Leslie M.; Rowland, Mark D.; Jenner, Jesse J.; Post, Kevin

Subject: FW: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Paul

Despite the parties' agreement not to use experts for claim construction (See Tung's email below), a number of Microsoft's experts opined on issues of claim construction in their expert reports. Please confirm that Microsoft will withdraw those portions of the reports and will not rely on those portions for any purpose.

Steve

Steven Pepe

ROPES & GRAY LLP

T +1 212 596 9046 | M +1 631 559 2364 | F +1 646 728 2660

1211 Avenue of the Americas

New York, NY 10036-8704

steven.pepe@ropesgray.com

www.ropesgray.com

Circular 230 Disclosure (R&G): To ensure compliance with Treasury Department regulations, we inform you that any U.S. tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. tax-related penalties or promoting, marketing or recommending to another party any tax-related matters addressed herein.

This message (including attachments) is privileged and confidential. If you are not the intended recipient, please delete it without further distribution and reply to the sender that you have received the message in error.

From: Nguyen, Tung T. [mailto:TNguyen@Sidley.com]

Sent: Friday, May 06, 2011 1:39 PM

To: Spencer, Leslie M.; Edward Mullins; Hal Lucas; Pepe, Steven; Beamer, Norman H.;

Rowland, Mark D.; Higgins, Gabrielle E.; Jenner, Jesse J.; Post, Kevin; Raymond, Megan; Evelyn C. Davila; Douglas Giuliano; Hoang, Khue V.
Cc: curt@colson.com; bob@colson.com; Project-MS/Moto_SDFL_24063
Subject: Case 1:10-cv-24063-FAM (SDFL) Motorola Mobility, Inc. v. Microsoft Corporation

Leslie,

Microsoft agrees with Motorola that neither party will use experts for claim construction.

Regards,
Tung

Tung T. Nguyen
Sidley Austin LLP
717 N. Harwood, Suite 3400
Dallas, Texas 75201
tel: 214-981-3478
fax: 214-981-3400

IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

This e-mail is sent by a law firm and may contain information that is privileged or confidential.
If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

