

CONTAINS CONFIDENTIAL BUSINESS INFORMATION  
SUBJECT TO PROTECTIVE ORDER

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 1:10-CIV-24063-MORENO**

_____		)
MOTOROLA MOBILITY, INC.,		)
		)
Plaintiff,		)
		)
vs.		)
		)
MICROSOFT CORPORATION,		)
		)
Defendant.		)
_____		)

**MICROSOFT CORP.'S MOTION TO STRIKE THE EXPERT REPORT OF  
CHRISTIAN TREGILLIS AND ACCOMPANYING MEMORANDUM OF LAW**

THIS MOTION IS BEING FILED IN REDACTED FORM. THE UNREDACTED  
VERSION OF THIS MOTION AND ATTACHMENTS THERETO ARE BEING FILE  
UNDER SEAL

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I. INTRODUCTION

Motorola alleges that a variety of Microsoft products, including Windows 7, Exchange Server 2010, Lync Server 2010, Lync 2010, Windows Phone 7, Windows Mobile 6.5, Windows Marketplace, Windows Live Messenger 2011, and Bing Maps / Bing Local, contain features that infringe certain of Motorola's patents and seeks to recover damages in the form of a reasonable royalty. In patent cases, one method that has been employed to establish a reasonable royalty is to determine the royalty that the patentee and the accused infringer would have agreed upon in a hypothetical negotiation conducted at the time the alleged infringement began. To support its reasonable royalty claim, Motorola has served an opening expert report of Christian Tregillis, purporting to follow this hypothetical negotiation approach. (*See* Expert Report of Christian Tregillis ("Tregillis Open. Rpt."), Ex. 2).<sup>1</sup> The opinions and analysis set forth in the Tregillis expert report, however, are inconsistent with the requirements for reasonable royalty opinions set forth by the Federal Circuit and are incomplete. In addition, Mr. Tregillis purports to offer opinions on technical topics as to which he is not qualified to opine and relies on facts that are legally irrelevant to a reasonable royalty analysis. For at least these reasons, Mr. Tregillis should be barred from offering an opinion at trial as to a reasonable royalty.

As explained more fully below, the Federal Circuit in a series of decisions over the last few years has spelled out exacting requirements for recovering a reasonable royalty in circumstances, like those presented in this case, where a patent claim is directed to a feature of a multi-faceted, complex product. *See, e.g., Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318-21 (Fed. Cir. 2011); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336-39 (Fed. Cir. 2009). Computer operating systems, such as Windows 7, contain thousands of features, and

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<sup>1</sup> All exhibits are attached to the Declaration of Curtis B. Miner in Support of Microsoft's Motion to Strike the Expert Report of Christian Tregillis attached hereto as Exhibit A.

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the courts have recognized that it would be improper for a patentee to be awarded a royalty based on the entire value of the software in circumstances where the patent's contribution relates at most to one or a small number of features. The Federal Circuit has thus insisted that the patentee demonstrate the incremental economic value of the patented feature and that a reasonable royalty be linked directly to that value.

The Tregillis report flies in the face of the governing Federal Circuit decisions. First it fails to analyze the value of the patented features and instead seeks to capture a royalty directed to the entire value of the Microsoft software. Because the analysis is inconsistent with the requirements of governing Federal Circuit law, the testimony should be barred. In addition, Tregillis has offered only incomplete opinions, inviting the jury to speculate its way to a conclusion. Instead of advancing an opinion as to what a reasonable royalty would be, Tregillis merely throws out a number characterized as a "starting point" for negotiations. This is an invitation to speculate – an approach in damages testimony long condemned by the courts. Finally, Tregillis tries to buttress portions of his opinions with statements about the relevant technology. But lacking any credentials or expertise on the technology, he should not be permitted to testify about these subjects.

Mr. Tregillis has also submitted a supplemental report, which was served late on July 20, 2011, but Microsoft has not yet had a chance to review it fully.<sup>2</sup>

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<sup>2</sup> Since Mr. Tregillis' supplemental report was served the night before this motion was filed, Microsoft reserves the right to file an additional motion to strike Mr. Tregillis' supplemental report.

## II. BACKGROUND

Motorola has asserted seven patents, each with limited scope, against an array of Microsoft's products.<sup>3</sup> While Motorola's selection of seven patents that cover different technologies explains the panoply of accused Microsoft products, it is noteworthy that none of Motorola's infringement allegations claim that any Motorola patent covers the entirety of any accused Microsoft product. Rather, Motorola's infringement contentions are directed to minor features of Microsoft's products.

### A. The '839 Patent

In general, the '839 Patent pertains to methods and systems for performing device-independent virtual input and virtual output, including the creation of "picture elements," which are device-independent data structures that are used on the screen to display images and text.

Motorola has asserted the '839 patent against Microsoft's (1) Windows 7 operating system when used with (a) Silverlight, (b) Windows Presentation Foundation ("WPF"), or (c) Direct2D, and (2) Windows Phone 7 operating system when used with Silverlight. Windows 7, which is a computer operating system, and Windows Phone 7, which is an operating system for use with mobile devices, are complex pieces of software that include thousands and thousands of features. Similarly, Silverlight, WPF and Direct2D have a variety of features and uses. Silverlight is a Microsoft development platform for creating interactive user applications. WPF is a Microsoft presentation system for building Windows client and browser applications with advanced graphical user interfaces. Direct2D is a Microsoft product that provides a 2D graphics API that renders 2-D geometry, bitmaps, and text.

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<sup>3</sup> Motorola is asserting the following seven patents: 1) U.S. Patent No. 5,502,839 ("the '839 patent"), 2) U.S. Patent No. 5,764,899 ("the '899 patent"), 3) U.S. Patent No. 5,784,001 ("the '001 patent"), 4) U.S. Patent No. 6,272,333 ("the '333 patent"), 5) U.S. Patent No. 6,408,176 ("the '176 patent"), 6) U.S. Patent No. 6,757,544 ("the '544 patent"), 7) U.S. Patent No. 6,983,370 ("the '370 patent").

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Motorola's particular infringement allegations appear to center on a particular use of Silverlight, WPF or Direct2D in conjunction with these operating systems, namely the creation of applications that use "picture elements." This is merely one minor aspect/feature of the accused Microsoft products.

**B. The '899 Patent**

In general, the '899 patent relates to limiting the amount of data that is transmitted in reply emails (with the intended purpose of optimizing bandwidth). When reply e-mails are sent, the technology sends the new part of the e-mail, as well as a reference to the original message, from the sender to the server. Since the previous e-mail already exists on the server, the server can form a replica reply using the reference to the original message.

Motorola asserts this patent against Microsoft's Exchange Server 2010 with Exchange ActiveSync. Microsoft Exchange Server is server-side software that provides support for e-mail, e-mail archiving, calendaring, contacts, and voice mail. Exchange ActiveSync is an XML-based protocol used for synchronizing e-mail, contacts, etc. from a server to a mobile device. Motorola's infringement allegations relate to one highly specific aspect of Microsoft Exchange Server 2010 with Exchange ActiveSync, namely the option to send a reply message that includes the most recent response, rather than the entire message history.

**C. The '001 Patent**

In general, the '001 patent relates to a pager device that supplements alphanumeric messages it receives with graphic images retrieved from its database that match key words in the alphanumeric message.

Motorola asserts this patent against Windows Live Messenger 2011, which is an instant messaging client that allows users to chat with one another. Motorola's infringement allegations



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relate to a particular use of emoticons, especially custom emoticons by users of Windows Live Messenger 2011.

**D. The '333 Patent**

In general, the '333 patent relates to a system that addresses data efficiency between a user's device, such as a pager, and a network (with the intended purpose of optimizing bandwidth by transmitting only information that can be supported by a user's device). In particular, the technology maintains an application registry such that only data that can be utilized or is compatible with an application on the device is sent to the device.

Motorola has asserted the '333 Patent against Windows Marketplace. Windows Marketplace contains a variety of features and uses as it is the online store where users can purchase Apps for Windows Mobile 6.5 and Windows Phone 7 smartphones. Motorola's infringement allegations relate to the feature of Windows Marketplace where copies of Apps are stored for each user.

**E. The '176 Patent**

In general, the '176 patent relates to technology that allows a user to initiate a phone call by clicking on caller-related information that is extracted from a converted voice-mail message. Specifically, the technology referred to in the patent relates to a particular way of extracting caller-related information from a voice mail and converting the caller-related information extracted from the voice mail from voice format to text.

Motorola asserts this patent against Windows Phone 7 and Microsoft's Exchange Server 2010 with Unified Messaging when used in conjunction with (1) Lync Server 2010, Lync 2010 and Outlook 2010, or (2) Communications Server 2007, Communicator 2007 and Outlook 2010, and Office 365 with Exchange Server 2010 or Exchange Online with Unified Messaging, Lync Server 2010, Lync Server 2010 Edge Server, and/or Lync Online, Lync 2010 and Outlook 2010.

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Just like Windows Phone 7 and Exchange Server 2010, Lync Server 2010, Lync 2010 and Outlook 2010 are complex pieces of software that have numerous features. For example, Microsoft Lync Server 2010 is server-side software that handles enterprise communications such as instant messaging, telephone calls, video conferences, and desktop sharing. It was formerly known as Microsoft Communications Server 2007 R2.

Motorola's infringement allegation only relates to one feature, Voicemail Preview, that comes with the Unified Messaging component of certain editions of Exchange Server 2010.

**F. The '544 Patent**

In general, the '544 patent relates to a system for providing location-specific information on points of interest that are relevant to the user of a mobile phone.

Motorola has accused Bing Maps and Bing Local for smartphones. Bing Maps is an online maps program that allows users to lookup directions, perform local searches (such as for nearby restaurants, ATMs, etc.), view traffic patterns, etc. Motorola's infringement allegations are limited to specific local searches based on a communication device's location.

**G. The '370 Patent**

In general, the '370 patent relates to seamlessly transferring and continuing a messaging session (such as an instant messaging session) when switching from a first messaging client to a second messaging client.

Motorola accuses Microsoft's Lync Server 2010 and Lync 2010 products, even though its infringement allegations are limited a specific feature, namely providing session continuity when switching between messaging clients.

**III. DAMAGES LEGAL STANDARDS**

Under 35 U.S.C. § 284, if a patent is found to be both valid and infringed, a patent holder is entitled to "damages adequate to compensate for the infringement but in no event less than a

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reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.” Two potential categories of infringement compensation include the patentee’s lost profits and /or a reasonable royalty through arms-length bargaining. The patentee has the burden of proving damages for patent infringement. In order to satisfy this burden, the patentee must sufficiently tie its methodologies for assessing and computing patent damages to the facts of the case. In other words, proof of damages must be tied to the “claimed invention’s footprint in the marketplace.” Sound economic proof of the nature of the relevant market is required in order to prevent proffered damages from being purely speculative. *Uniloc USA Inc.*, at 632 F.3d at 1318; *Lucent Techs., Inc.*, 580 F.3d at 1337.

The Supreme Court has long recognized that damages awards depend on the relative contribution that the patented invention makes to the accused product and that the patentee must apportion the value of the patented features from the unpatented features in an accused product. Stated another way, a patentee’s rights should only extend to the invention’s improvement over prior methods and cannot encompass any additional aspects of the accused products. *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 491, 14 L.Ed. 1024 (1853) (it would be “a very grave error to instruct a jury ‘that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine.’”); *Garretson v. Clark*, 111 U.S. 120, 121, 4 S.Ct. 291, 28 L.Ed. 371 (1884).

Under recent Federal Circuit law, where a patentee seeks to base its reasonable royalty determination on the entire market value of the accused products even though the accused features relate to one aspect of the products, as Mr. Tregillis does here, the patentee is required to establish that the patented features create the “basis for customer demand” of the accused products or “substantially create the value of the component parts.” *Uniloc USA Inc. v.*

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*Microsoft Corp.*, 632 F.3d 1292, 1329 (Fed. Cir. 2011); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009) (“In one sense, our law on the entire market value rule is quite clear. For the entire market value rule to apply, the patentee must prove that the patent-related feature is the basis for customer demand.”).

IV. MANY OF THE OPINIONS EXPRESSED IN MR. TREGILLIS’ INCOMPLETE  
OPENING REPORT SHOULD BE STRICKEN AS IMPROPER EXPERT  
TESTIMONY AND MR. TREGILLIS SHOULD BE PRECLUDED FROM  
EXPRESSING SUCH OPINIONS

A. Legal Standards

The Court is a gate-keeper for expert testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); accord, *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329 (11th Cir. 2010).

The Supreme Court held in *Daubert* that trial judges act as gate-keepers under Federal Rule of Evidence 702, and this includes the “task of ensuring that an expert’s testimony rests both on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597.

Expert testimony is relevant and admissible if “scientific, technical, or other specialized knowledge will assist the trier of fact.” Fed. R. Evid. 702. In other words, “expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person.” *Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1111 (11th Cir. 2005).

Testing the foundational reliability of expert testimony requires measuring both the opinions offered and the witness who offers them. The Court must assess whether the witness offering the testimony is “qualified as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. The testimony of a qualified expert is limited to the areas of that expert’s expertise. *U.S. v. Paul*, 175 F.3d 906, 911-12 (11th Cir. 1999).

Even for a qualified witness, the Court also has a duty to admit only testimony that (1) “is based upon sufficient facts or data,” (2) “is the product of reliable principles and methods,” and

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where (3) “the witness has applied the principles and methods reliably to the facts of the case.” *Id.* These requirements apply with equal force to both testimony of a scientific nature and to testimony in a non-scientific realm. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In assessing the reliability and relevance of expert testimony, the trial court must decide not only whether an expert’s methodology is reliable, but also whether it is a reliable way “to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.” *Kumho Tire Co.*, 526 U.S. at 154.

Importantly, the party proffering the expert has the burden to demonstrate that its expert witness satisfies these criteria. *See, e.g., Kilpatrick v. Breg, Inc.*, 613 F.3d at 1335.

**B. Mr. Tregillis Improperly Bases His Reasonable Royalty Analysis on the Entire Market Value of the Accused Products**

Mr. Tregillis, impermissibly, is basing his reasonable royalty “starting” calculation on the entire market value of the Microsoft accused product without satisfying the requirements of the entire market value rule. As this is a direct violation of established Federal Circuit law, under Rule 702, Mr. Tregillis should not be permitted to use the starting point of 2.25% of the net selling price of the accused products as part of his damages analysis.

**1. Mr. Tregillis offers no evidence that the accused features are the basis for consumer demand for the accused products.**

As to Motorola’s ‘839, ‘899, and ‘370 patents, Mr. Tregillis points only to supposed general benefits of the patents, but cites no evidence indicating that the accused features of Microsoft's accused products form any basis for consumer demand that could support his invocation of the entire market value rule. (Tregillis Open. Rpt., Ex. 2 at ¶ 139, 221-224, 248). For the ‘839 patent, Mr. Tregillis fails to even identify which features of the Microsoft accused products are allegedly covered by the patent claims and then makes a general statement that the patent allows Microsoft's products to achieve "benefits, including benefits to users" without

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citing to any evidence linking those supposed benefits to consumer demand. For the '899 patent, Mr. Tregillis notes alleged benefits of the patented feature in Microsoft's accused products, including "potentially lower data costs," but cites no evidence that the feature itself or its "potential" benefits forms any basis for demand for the accused products. For the '370 patent, Mr. Tregillis simply opines, citing no evidence, that the feature has benefits that "may prove to be valuable" to users of the accused products. Accordingly, Mr. Tregillis has no basis for using the entire market value of the accused products as a royalty base for damages alleged for infringement of the '839, '899, and '370 patents.

As to the '544 patent, Mr. Tregillis admits that only specific local searches based on a communication device's location allegedly infringe the '544 patent. (Tregillis Open. Rpt., Ex. 2 at ¶ 54). Mr. Tregillis cites no evidence that this specific feature forms the basis of any demand for Microsoft's accused products and again has no justification for using the entire market value of the accused products as a royalty base for damages for alleged infringement of the '544 patent.

With respect to the remaining three patents, the '333, '170 and '001 patents, Mr. Tregillis not only fails to provide any evidence supporting invocation of the entire market value rule, but he himself cites evidence showing that the accused patented features are *not* the basis for consumer demand for the accused products, confirming that invocation of the entire market rule is inappropriate. Mr. Tregillis admits that the technology of the '333 patent is but "one means" of maintaining information concerning which applications a consumer has downloaded onto a smartphone. (Tregillis Open. Rpt., Ex. 2 at ¶ 191). Mr. Tregillis cites no evidence suggesting that an infringing or non-infringing version of this feature (and moreover, the particular implementation of such a feature according to the '333 patent) is associated with any consumer demand. As for the '176 patent, Mr. Tregillis admits that the evidence concerning the feature

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allegedly covered by the patent, voice mail preview, shows "a lack of consumer demand," and Mr. Tregillis cites no evidence to the contrary. (Tregillis Open. Rpt., Ex. 2 at ¶ 242). As for the '001 patent, the evidence Mr. Tregillis cites suggests that the patented features are affirmatively *not* the basis for consumer demand for the accused products—Mr. Tregillis notes that the ability to create custom emoticons ranked [REDACTED] (Tregillis Open. Rpt., Ex. 2 at ¶ 298). Further, while Mr. Tregillis opines that the benefits of the patented technology include more efficient transmission of emoticons and custom emoticons, he cites no evidence that those benefits drive any consumer demand for the accused products. (Tregillis Open. Rpt., Ex. 2 at ¶ 301). Accordingly, Mr. Tregillis has no justification for invoking the entire market value of the accused products as a royalty base for damages for alleged infringement of the '333, '170, or '001 patents.

As Mr. Tregillis has offered no evidence that the accused features are the basis for customer demand of the accused products, Mr. Tregillis is not permitted to utilize the entire market value of the accused products, i.e. the net selling price of the accused products, as the basis for any reasonable royalty calculation, even if he only uses it as a starting point. As the Court in *Uniloc* noted, “[b]eginning from a fundamentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion.” *Uniloc USA Inc.*, 632 F.3d at 1317. Mr. Tregillis should be precluded from testifying about or offering any opinions that comprise or relate to Microsoft’s revenues on the accused products.

**C. Mr. Tregillis Is Not Qualified To Render opinions Regarding Industry Background And Market Assessments**

Mr. Tregillis’ report also contains numerous opinions on the background of the computing, software, and smartphone industries, as well as opinions regarding market

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assessments for Microsoft's software products. These sections of Mr. Tregillis' report should be stricken as Mr. Tregillis is not qualified to testify on these subjects under Fed. R. Evid. 702.

Mr. Tregillis has no technical or marketing expertise in the computing, software, and smartphone industries. (Tregillis Open. Rpt., Ex. 2 at pp. 187-193). Yet, Mr. Tregillis' report contains numerous opinions regarding these topics as well as opinions regarding market assessments for Microsoft's software products. These "opinions," which are largely just summaries of websites and publicly-available information, should be stricken as Mr. Tregillis is not qualified to provide such opinions and because such opinions will not be helpful to the jury.

Mr. Tregillis' improper opinions regarding the background of the computing, software, and smartphone industries and market assessments of Microsoft's software products are summarized as follows.

- The computer "platform battle" between Microsoft and its competitors. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 15-20).
- The smartphone "platform battle" between Microsoft, Apple, and Google. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 21-37).
- Strategic decisions made by Microsoft, Apple, and Google to generate revenue. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 38-41).
- Background information and market assessments regarding location-based services and advertising, without tying the discussion to any of Motorola's patents-in-suit, and going far beyond the accused Bing Maps/Bing Local products for mobile devices. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 62-65, 67-113).
- Background information and market assessments regarding operating systems and software development, without tying the discussion to any of Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 114-115, 121).
- Background information and market assessments regarding smartphones and mobile application stores, without tying the discussion to any of Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 140-143, 156-170, 184-189).
- Background information and market assessments regarding Microsoft's Exchange Server product, network bandwidth, and e-mail volume, without tying the discussion to any of Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶



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205-209, 211-216, 218-219).

- Background information and market assessments regarding Microsoft's "Unified Messaging" system architecture, without tying the discussion to any of Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 227-231, 234).
- Background information and market assessments regarding instant messaging and emoticons, without tying the discussion to any of Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 245, 261-67).

Mr. Tregillis' experience as an economist and accountant do not provide him with the requisite skill, training, and experience to testify about the background of the computing, smartphone, and software industries, or to provide market assessments for Microsoft's software products. Since Mr. Tregillis is not qualified to render opinions regarding these topics, the above-referenced paragraphs in Mr. Tregillis' report should all be stricken. *See, e.g., U.S. v. Paul*, 175 F.3d 906, 911-12 (11th Cir. 1999); *In re Transylol Prods. Liability Litig.*, Case No. 08-MD-01928-Middlebrooks/Johnson, 2010 U.S. Dist. LEXIS 142228, at \*178-79 (S.D. Fla. Feb. 22, 2010) (excluding opinions of an expert outside the expert's area of expertise); *Corporate Financial, Inc. v. Principal Life Ins. Co.*, Case No. 05-20595-Civ-Ungaro-Benages, 2006 U.S. Dist. LEXIS 84542, at \*2-3 (S.D. Fla. Nov. 20, 2006) (excluding opinion of a damages expert regarding whether the defendant would have underwritten certain group coverage because the damages expert lacked underwriting experience).

Furthermore, Mr. Tregillis' opinions are actually just summaries of publicly-available websites and documentation. This failure to provide any meaningful analysis is not surprising given Mr. Tregillis' lack of qualifications, further emphasizing why these sections should be stricken. *See, e.g., Arista Records LLC v. Lime Group LLC*, Case No. 06 CV 5936, 2011 U.S. Dist. LEXIS 47416 (S.D.N.Y. Apr. 29, 2011) (excluding testimony of a damages expert that merely summarized aspects of the music industry without applying any of his own expertise). Since Mr. Tregillis' opinions do not utilize any of his expertise, Mr. Tregillis' opinions add

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nothing that is outside of the understanding of a lay person and therefore should be stricken since such opinions are not helpful to the jury.<sup>4</sup>

Even further, many of the websites that Mr. Tregillis relies on are of questionable reliability<sup>5</sup>, which raises further issues regarding Mr. Tregillis' application of reliable principles and methods to this case. Indeed, in a past case, Mr. Tregillis has already had portions of his expert report stricken under *Daubert* for relying on unreliable websites. See *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, Case No. 04-20073-CIV, 2005 U.S. Dist. LEXIS 45883 (S.D. Fla. Aug. 16, 2005) (Ungaro-Banages, J.) (striking Mr. Tregillis' opinions related to a "star power index" as unreliable because it relied on an unreliable website).

**D. Mr. Tregillis' Reliance On Microsoft's Acquisitions As Comparable Licenses Is Improper And Should Be Stricken**

Mr. Tregillis' reasonable royalty opinions rely on several corporate acquisitions made by Microsoft under the guise that they are "comparable licenses" under *Georgia-Pacific* factor 2.<sup>6</sup> (Tregillis Open. Rpt., Ex. 2 at ¶¶ 84, 317-331, Schedule 1.2). *Georgia-Pacific* factor 2 "examines whether the licenses relied on by the patentee in proving damages are sufficiently comparable to the hypothetical license in suit." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009). As these acquisitions are clearly not "comparable licenses" under Federal Circuit law, these sections of Mr. Tregillis' report should be stricken. Indeed, Mr.

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<sup>4</sup> See, e.g., *Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1111 (11th Cir. 2005) (upholding the trial court's decision to exclude an expert's testimony that was within the understanding of the average lay person); *Moore v. Club at Orlando Condominium Ass'n, Inc.*, Case No. 6:09-cv-274-Orl-31KRS, 2009 U.S. Dist. LEXIS 106858, at \*5-6 (M.D. Fla. Nov. 2, 2009) (striking expert testimony that was within the "everyday understanding" of the jury); *Medina v. United Christian Evangelistic Ass'n*, Case No. 08-22111-Civ Cooke/Bandstra, 2009 U.S. Dist. LEXIS 113930, at \*7-8 (S.D. Fla. Nov. 19, 2009) (striking "stain pattern analysis" because the expert had no qualifications in the field and such analysis was "little more than a lay person's conjecture.")

<sup>5</sup> For example, Mr. Tregillis cites to blogs, which may not be a reliable source. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 156, n. 287-289 ).

<sup>6</sup> *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

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Tregillis himself realizes that acquisitions are not “comparable” licenses as he has disavowed this portion of his opening expert report in his supplemental expert report. *See* Supplemental Expert Report of Christian Tregillis (“Tregillis Supp. Rpt.”), Ex. 1 at ¶ 10).

Acquisitions of entire companies are completely different than the hypothetical license that the parties would hypothetically be negotiating for various reasons. First, with acquisitions, technology, software, employees, and other assets are also acquired in addition to any patents that may exist. Notably, Mr. Tregillis never mentions any particular acquired patents and instead only generally refers to acquired “technology.” (Tregillis Open. Rpt., Ex. 2 at ¶¶ 318-331).

Second, a party seeking to use a “comparable license” must demonstrate the value of the licensed patents, the technology underlying the license, and how they compare to the technology and patents-in-suit. *Lucent Techs.*, 580 F.3d at 1330-31. Here, not only has Mr. Tregillis failed to identify any patents that Microsoft has acquired, Mr. Tregillis has also failed to show how the acquired technology is sufficiently “comparable.” Mr. Tregillis’ failure to tie the acquired technology to the Motorola patents-in-suit is not surprising as Mr. Tregillis lacks the technical qualifications to perform such an analysis.

Lastly, there is a substantial difference between lump-sum and running royalties because with running royalties, a licensee may choose to stop using the patented feature and stop paying royalties. *Lucent Techs.*, 580 F.3d at 1328. An acquisition differs from a running royalty for the same reason. Yet, Mr. Tregillis opines that in a hypothetical negotiation, Motorola would have sought a 2.25% royalty based on net selling prices. (Tregillis Open. Rpt., Ex. 2 at ¶ 365).

Mr. Tregillis’ attempt to use acquisitions as a “comparable license” demonstrates how Mr. Tregillis has failed to apply principles and methods reliably to the facts of the case. As such,

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Mr. Tregillis' opinions regarding Microsoft's corporate acquisitions should be stricken.<sup>7</sup>

V. MR. TREGILLIS' INCOMPLETE OPENING REPORT SHOULD BE STRICKEN

Mr. Tregillis' opening expert report is, by his own admission, preliminary and incomplete. This type of sketchy, vague, and preliminary expert report must be stricken.

**A. Legal Standards**

Under Fed. R. Civ. P. 26(a)(2)(B) and S.D. Fla. L.R. 16.1(k), the disclosure of expert testimony requires a written report that contains a complete statement of all opinions that the expert will express and the bases and reasons for such opinions. *See Managed Care Solutions*, 2010 U.S. Dist. LEXIS 54148, at \*6 (citing *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2009)). "Expert reports must not be sketchy, vague or preliminary in nature and the disclosures must not be used as a means to extend a discovery deadline." *Zaki Kulaibee Establishment v. McFliker*, Case No. 08-60296-Civ-Cooke, 2011 U.S. Dist. LEXIS 37155, at &16-17 (S.D. Fla. Apr. 5, 2011) (citing *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 n.6 (7th Cir. 1998)) (internal quotations omitted).

Under Fed. R. Civ. P. 37(c)(1), a party is not allowed to use an expert witness' testimony at trial if the expert failed to submit a complete report under Rule 26(a). *See Managed Care Solutions*, U.S. Dist. LEXIS 54148, at \*9. "The sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Id.* (quoting *Dyett v. N. Broward Hospital District*, Case No. 03-60804-Civ-Ungaro-Benages, 2004 U.S. Dist. LEXIS 30473, at \*6 (S.D. Fla. Jan. 16, 2004)).

**B. Mr. Tregillis' Opening Report Was, By His Own Admission, Preliminary And Incomplete**

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<sup>7</sup> See *Powell v. Carey Int'l, Inc.*, Case No. 05-21395-Civ-Seitz/McAliley, 2007 U.S. Dist. LEXIS 26074, at \*11-13 (S.D. Fla. Apr. 9, 2007) (excluding damages expert's opinion because it was based on incorrect legal assumptions).

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In his opening report, Mr. Tregillis' states that he "expects" to "perform a conclusive reasonable royalty or damages calculation," which is an admission that his opening report was incomplete. (See Expert Report of Christian Tregillis ("Tregillis Open. Rpt."), Ex. 2 at ¶ 9). In particular, Mr. Tregillis admittedly fails to provide any opinions as to the final reasonable royalty that Microsoft and Motorola would agree to in a hypothetical negotiation regarding Motorola's patents-in-suit. (Tregillis Open. Rpt., Ex. 2 at ¶¶ 313, 365).

**C. Mr. Tregillis' Failure To Submit A Complete Opening Report Was Not Substantially Justified And Is Prejudicial To Microsoft**

Mr. Tregillis' failure to render a complete opinion in his opening report, despite having access to an embarrassment of riches regarding Microsoft's documentation, and after performing 148 pages of his own analysis, is illustrative of Motorola's gamesmanship and "sandbagging" tactics. *Plumley v. Mockett*, 2010 U.S. Dist. LEXIS 57254, at \*8. Such a failure cannot be substantially justified, particularly when the amount of documents and information that Mr. Tregillis reviewed takes 27 pages to even list. (Tregillis Open. Rpt., Ex. 2 at pp. 149-186). This information includes, among other things:

- Over 500 documents produced by Microsoft, including sales & marketing documents about the accused products that are frequently cited to by Mr. Tregillis throughout his report. (Tregillis Open. Rpt., Ex. 2 at pp. 149-60).
- Hundreds of public documents, including a substantial amount of documentation made publicly available by Microsoft. (Tregillis Open. Rpt., Ex. 2 at pp. 164-86).
- 38 Microsoft license agreements. (Tregillis Open. Rpt., Ex. 2 at ¶ 316).
- Financial information containing Microsoft's historical sales figures for the accused products. (Tregillis Open. Rpt., Ex. 2 at ¶ 4).
- Interviews with 3 Motorola employees and 4 technical expert witnesses. (Tregillis Open. Rpt., Ex. 2 at p. 164).

Throughout his opening report, Mr. Tregillis blamed Microsoft's document production in an attempt to excuse his failure to perform a complete damages analysis. (Tregillis Open. Rpt.,

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Ex. 2 at ¶ 9, 313, 314, 332, 346, 347, 349-51, 365). However, this excuse has already been rejected by at least one court in this district when a party has failed to timely file a motion to compel discovery, which Motorola has not done. *See, e.g., Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, Case No. 09-60351-CIV-Seitz/O'Sullivan, 2010 U.S. Dist. LEXIS 54148, at \*10-12 (S.D. Fla. May 3, 2010).

Mr. Tregillis' "'maybe I'll tell you someday' approach mocks the very purpose of Rule 26(a)(2)." *Sommers v. Hall*, Case No. CV408-257, 2010 U.S. Dist. LEXIS 90756, at \*8 (S.D. Ga. Sept. 1, 2010) (striking plaintiff's damages expert's report for failure to calculate the plaintiff's lost earnings, despite apparent promises to do so in the future). District courts in the Eleventh Circuit have consistently stricken expert reports and disclosures for incompleteness.<sup>8</sup> Thus, for the foregoing reasons, Microsoft respectfully requests that Mr. Tregillis' entire opening expert report be stricken for incompleteness.

## VI. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that its Motion be granted.

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<sup>8</sup> *See, e.g., Zaki Kulaibee*, 2011 U.S. Dist. LEXIS 37155, at 16-17 (striking incomplete and preliminary expert summary); *Managed Care Solutions*, U.S. Dist. LEXIS 54148, at \*1, 3 (striking "partial" and "incomplete" expert disclosures); *Surety Assocs., Inc. v. Fireman's Fund Ins. Co.*, Case No. 3:02-cv-223-J-16TEM, 2003 U.S. Dist. LEXIS 27559, at \*1-2, 6, 8 (M.D. Fla. Jan. 7, 2003) (granting motion *in limine* to exclude plaintiff's damages expert from testifying due to an incomplete expert report).

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Dated: July 21, 2011

Respectfully submitted,

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**CERTIFICATE OF GOOD FAITH COMPLIANCE**

As required by this Court's Local Rule 7.1(A)(3)(a), counsel for Defendant hereby certifies that on July 21, 2011, counsel for Defendant made reasonable efforts to confer in good faith with counsel for all parties who may be affected by the relief sought in the motion, and has been advised that Plaintiff will contest this motion.

/s/ \_\_\_\_\_

Curtis B. Miner, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted,

/s/ \_\_\_\_\_

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