

**CONFIDENTIAL BUSINESS INFORMATION  
SUBJECT TO PROTECTIVE ORDER**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 1:10-cv-24063-MORENO

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

**DEFENDANT MICROSOFT CORPORATION’S MOTION TO STRIKE SELECT  
MOTOROLA EXPERT REPORTS OF DR. MARTIN E. KALISKI**

Pursuant to the Court’s Scheduling Order (Dkt # 23) and Order Continuing Trial and Certain Pretrial Dates (Dkt #36), Defendant-Counterclaim Plaintiff Microsoft Corporation (“Microsoft”), hereby moves the Court to strike the “First Supplemental Report of Dr. Martin E. THIS MOTION IS BEING FILED IN REDACTED FORM. THE UNREDACTED VERSION OF THIS MOTION AND ATTACHMENTS THERETO ARE BEING FILE UNDER SEAL

Kaliski, PH.D. Regarding Whether Certain Claims of U.S. Patent No. 5,783,001 Are Practiced By Defendant Microsoft Corporation” (“’001 Supp. Report”), the “First Supplemental Report of Dr. Martin E. Kaliski, Ph.D. Regarding Whether Certain Claims of U.S. Patent No. 5,764,899 Are Practiced By Defendant Microsoft Corporation” (“’899 Supp. Report”), and excerpts of the “First Expert Report of Dr. Martin E. Kaliski, Ph.D. Regarding Whether Certain Claims of U.S. Patent No. 5,764,899 Are Practiced By Defendant Microsoft Corporation” (“Kaliski First Report”), collectively submitted by Dr. Martin E. Kaliski (“Dr. Kaliski”) on behalf of Plaintiff-Counterclaim Defendant Motorola Mobility, Inc. (“Motorola”).

### Argument

#### **I. The “Supplemental Reports” Submitted by Dr. Kaliski Should Be Excluded as Improper Rebuttal Reports.**

By filing “supplemental reports,” Dr. Kaliski is unfairly rebutting Microsoft’s experts. Indeed, at his deposition, Dr. Kaliski admitted that that the ‘899 report was prepared “having Dr.--Dr. Stubblebine’s response to my non-infringement report.” (Kaliski Dep., Exhibit A, p. 74, l. 18-20 (July 20, 2011).) This type of expert reply has not been agreed upon by the parties or provided for in the Court’s Scheduling Order (Dkt # 23) or Order Continuing Trial and Certain Pretrial Dates (Dkt #36). Failing to exclude Dr. Kaliski’s rebuttal reports would result in an unfair advantage for Motorola.

Although Dr. Kaliski attempted to justify the supplemental reports by stating that the reports were based on materials “unavailable” prior to his initial June 27 report, during the course of his deposition, Dr. Kaliski admitted that his failure to review source code regarding the ‘899 patent prior to filing his initial timely report was not because it was unavailable, but rather it was due to his own personal schedule. (Kaliski Dep., Ex. A, p. 159, l. 10-13) (“I was tied up with the trial in another case the last week in June, and we had to get – I had to get three reports out. It

was just a matter of time.”) Dr. Kaliski’s inability to review all materials before the relevant deadline based on his personal time constraints is not a justifiable basis for Motorola to sandbag Microsoft with additional opinions after having the opportunity to review the report of and take the deposition of Microsoft’s expert on the same patents. Accordingly, Dr. Kaliski’s supplemental reports should be stricken as improper rebuttal.

**II. Excerpts of the Kaliski First Report Should Be Excluded**

*A. Opinions Set Forth in Section V of the Kaliski First Report Are Predicated on Conclusory Opinions Regarding the Similarity of Microsoft Exchange Server 2003 and 2007 to Microsoft Exchange Server 2010.*

Dr. Kaliski has given improper conclusory opinions regarding the alleged infringement of the ‘899 patent by the 2003 and 2007 versions of Microsoft Exchange Server. In footnote 4 of the Kaliski First Report, Kaliski states that [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]” See

Kaliski First Report, Exhibit B, at p. 24, n. 4.

Dr. Kaliski offers no evidence that Microsoft Exchange Server 2003 and 2007 operate in the same way as Microsoft Exchange Server 2010. He has reviewed no source code or documents that support this conclusion or that could inform the conclusions he draws based upon this opinion. Because Dr. Kaliski relies on this conclusory opinion to form his conclusions, Section V of the Kaliski First Report (Ex. B) should be excluded.

*B. Opinions Set Forth in Paragraphs 84, 86, 94, 97, 98, 102, 105, 109, 112, 115, 118, and 121 of the Kaliski First Report Are Improperly Supported and Conclusory in Nature.*

Dr. Kaliski has given improper unsupported opinions regarding the alleged infringement of the '899 patent by Microsoft Exchange Server 2010 under the doctrine of equivalents in at least paragraphs 84, 86, 94, 97, 98, 102, 105, 109, 112, 115, 118, and 121 of the Kaliski First Report. Dr. Kaliski's opinions in those paragraphs are conclusory in nature, given that he provided no analysis or support which he used to develop those opinions. Because Dr. Kaliski fails to provide this foundational analysis, paragraphs 84, 86, 94, 97, 98, 102, 105, 109, 112, 115, 118, and 121 of the Kaliski First Report (Ex. B) should be excluded.

*C. Paragraph 88 of the Kaliski First Report Consists of Opinions Based on Improper Evidence*

Dr. Kaliski has relied upon improper evidence in forming his opinions, regarding alleged infringement of the '899 patent, [REDACTED]

[REDACTED] (Kaliski First Report, p. 26, ¶88.) Dr. Kaliski cited a Microsoft document that explained the functionality in the 2007 version of Exchange Server without showing that this previous version of Exchange Server functions in the same way as Microsoft Exchange Server 2010. Because Dr. Kaliski relies on this improper evidence to form his conclusion that Microsoft Exchange Server 2010 infringes Claim 1 of the '899 patent, Paragraph 88 of the Kaliski First Report (Ex. B) should be excluded.

**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.

DATED this 21st day of July 2011.

Respectfully submitted,

COLSON HICKS EIDSON  
Roberto Martinez, Esq.  
Curtis Miner, Esq.  
255 Alhambra Circle, Penthouse  
Coral Gables, Florida 33134  
Tel. (305) 476-7400  
Fax. (305) 476-7444

By: \_\_\_\_\_  
Curtis B. Miner  
(Fla. Bar No. 885681)  
E-mail: [curt@colson.com](mailto:curt@colson.com)

*Of Counsel:*

David T. Pritikin  
Richard A. Cederoth  
Douglas I. Lewis  
John W. McBride  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, IL 60603  
Tel. (312) 853-7000

Brian R. Nester  
SIDLEY AUSTIN LLP  
1501 K Street NW  
Washington, DC 20005  
Tel. (202) 736-8000

**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,

\_\_\_\_\_  
Curtis B. Miner, Esq.

**SERVICE LIST**

*Motorola Mobility, Inc. v. Microsoft Corp.*, Case No. 1:10-cv-24063-Moreno

Edward M. Mullins  
emullins@astidavis.com  
Hal M. Lucas  
hlucas@astidavis.com  
ASTIGARRAGA DAVIS  
701 Brickell Avenue, 16th Floor  
Miami, FL 33131  
Tel.: (305) 372-8282

Steven Pepe  
Steven.Pepe@ropesgray.com  
Jesse J. Jenner  
Jesse.Jenner@ropesgray.com  
Leslie M. Spencer  
Leslie.Spencer@ropesgray.com  
ROPES & GRAY LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704  
Tel.: (212) 596-9046

Norman H. Beamer  
Norman.Beamer@ropesgray.com  
Mark D. Rowland  
Mark.Rowland@ropesgray.com  
Gabrielle E. Higgins  
Gabrielle.Higgins@ropesgray.com  
ROPES & GRAY LLP  
1900 University Avenue, 6th Floor  
East Palo Alto, CA 94303-2284  
Tel.: (650) 617-4030

Kevin J. Post  
kevin.post@ropesgray.com  
Megan F. Raymond  
megan.raymond@ropesgray.com  
ROPES & GRAY LLP  
One Metro Center  
700 12th Street NW, Suite 900  
Washington, DC 20005-3948  
Tel.: (202) 508-4600

*Counsel for Plaintiff Motorola Mobility, Inc.*