

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 1:10-cv-24063-MORENO

MOTOROLA MOBILITY, INC.,

Plaintiff / Counterclaim Defendant,

v.

MICROSOFT CORPORATION,

Defendant / Counterclaim Plaintiff.

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**PLAINTIFF/COUNTERCLAIM DEFENDANT MOTOROLA  
MOBILITY, INC.'S MOTION FOR LEAVE TO FILE OUT OF TIME  
AND ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT**

Plaintiff/Counterclaim Defendant Motorola Mobility, Inc. (“Motorola”), moves, pursuant to Federal Rule of Civil Procedure 16, for leave to file its Motion to Exclude the Testimony of Michael Fagan Regarding Infringement and Accompanying Memorandum of Law (“Motion to Exclude Fagan”) ten business days from the time set forth in the Court’s scheduling order of July 21, 2011. (DE 36). (Motorola has moved to file its Motion to Exclude Fagan (under seal) simultaneously with this motion). Motorola respectfully requests that this Motion be granted for the reasons set forth in the accompanying memorandum of law.

**MEMORNDUM OF LAW**

A scheduling order may be modified for “good cause” shown. Fed. R. Civ. P. 16(b)(4). *See Perez v. Miami-Dade County*, 297 F.3d 1255, 1263 n.2 (11<sup>th</sup> Cir. 2002) (district court did not abuse discretion in allowing party to file pretrial motion 26 days after deadline for same when “good cause” was shown).

“[I]n the interest of justice and sound judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight.” *United States v. Varner*, 13 F.3d 1503, 1507 (11th Cir.1994) (quoting *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir.1972)). Further, the diligence of the moving party should be considered in determining whether there is good cause to extend a deadline. *See Sosa v. Airprint*

*Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir.1998) (“The good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension.”) (internal quotations omitted).

Here, Motorola has been diligent in obtaining the evidence it needed to file a substantiated Motion to Exclude Mr. Fagan. Mr. Fagan is Microsoft Corporation’s (“Microsoft”) only designated expert with respect to Microsoft’s U.S. Patent No. 7,383,460, which Microsoft accuses Motorola of infringing in its counter-claims. Despite Motorola’s request to depose Mr. Fagan on or before the Court’s July 21, 2011 deadline for the filing of *Daubert* motions (*see* Affidavit of Stuart Yothers, attached as Exhibit A), Microsoft informed Motorola that Mr. Fagan would not be available for deposition until July 22, 2011. *Id.* at ¶5. On July 20, 2011, Motorola received word from Microsoft that an issue had arisen concerning the health of Mr. Fagan’s wife; Microsoft sought to postpone the deposition until July 26, 2011. *Id.* at ¶7. Given the cause and nature of the request, Motorola consented. *Id.* at ¶8.

Mr. Fagan thus was deposed for a full day on July 26, 2011, five days after the deadline to file, *inter alia*, *Daubert* motions. (DE 36). Mr. Fagan’s testimony has brought to light numerous issues regarding his qualifications and methodologies that were not readily apparent from his Expert Report on Infringement, which was served on June 24, 2011. Motorola has required the past six business days to prepare its motion. Motorola does not believe that any prejudice will result to Microsoft from the brief delay in the filing of this motion and thus requests that it be allowed to file the Motion to Exclude Fagan out of time briefly. *Gevinson v. Unum Life Ins. of Am.*, No. 6:10-cv-3-Orl-19KRS, 2011 WL 767414 (M.D. Fla. Feb. 28, 2011) (extending discovery deadline for 10 weeks when no prejudice was shown and the parties had worked diligently to meet deadlines).

Finally, the requested extension will not affect the trial deadlines as the request is only ten business days from the original deadline and thus there should be no inconvenience to the Court. *Varner*, 13 F.3d at 1507.

### **CONCLUSION**

Motorola respectfully requests that the Court accept the filing of the Motion to Exclude Fagan.

### **CERTIFICATE OF GOOD FAITH CONFERENCE**

I hereby certify that in accordance with Local Rule 7.1(a)(3), counsel for Motorola has conferred with counsel for Microsoft in a good faith effort to resolve the issues raised in this motion, but that the parties were unable to reach an agreement on these issues.

Dated: August 4, 2011

Respectfully submitted,

*Of Counsel:*

Jesse J. Jenner  
(admitted *pro hac vice*)  
Steven Pepe  
(admitted *pro hac vice*)  
Khue Hoang  
(admitted *pro hac vice*)  
Ropes & Gray LLP  
1211 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 596-9000  
Facsimile: (212) 596-9090

Norman H. Beamer  
(admitted *pro hac vice*)  
Mark D. Rowland  
(admitted *pro hac vice*)  
Gabrielle E. Higgins  
(admitted *pro hac vice*)  
Ropes & Gray LLP  
1900 University Avenue, 6<sup>th</sup> Floor  
East Palo Alto, CA 94303  
Telephone: (650) 617-4000  
Facsimile: (650) 617-4090

*Lead Counsel for Plaintiff,*  
MOTOROLA MOBILITY, INC.

By: /s/ Douglas J. Giuliano  
Edward M. Mullins, Fla. Bar No. 863920  
emullins@astidavis.com  
Douglas J. Giuliano, Fla. Bar. No. 15282  
Astigarraga Davis Mullins  
& Grossman, P.A.  
701 Brickell Avenue, 16th Floor  
Miami, FL 33131  
Tel.: (305) 372-8282; Fax. (305) 372-8202

*Local Counsel for Plaintiff,*  
MOTOROLA MOBILITY, INC.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 4, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or; in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Edward M. Mullins  
Edward M. Mullins (Fla. Bar No. 863920)

## SERVICE LIST

*Motorola Mobility, Inc. v. Microsoft Corporation*  
Case No.: 1:10-CV-24063-MORENO/TORRES  
United States District Court, Southern District of Florida

Curtis B. Miner  
[curt@colson.com](mailto:curt@colson.com)  
Colson Hicks Eidson  
255 Alhambra Circle  
Penthouse  
Coral Gables, Florida 33134

Jim S. Zeng\*  
[jzeng@sidley.com](mailto:jzeng@sidley.com)  
Theodore W. Chandler\*  
[tchandler@sidley.com](mailto:tchandler@sidley.com)  
Sandra S. Fujiyama\*  
[sfujiyama@sidley.com](mailto:sfujiyama@sidley.com)  
Michael C. Lee  
[michael.lee@sidley.com](mailto:michael.lee@sidley.com)  
Paul D. Tripodi, II\*  
[ptripodi@sidley.com](mailto:ptripodi@sidley.com)  
Erik J. Carlson\*  
[ecarlson@sidley.com](mailto:ecarlson@sidley.com)  
Olivia M. Kim\*  
[okim@sidley.com](mailto:okim@sidley.com)  
Christopher G. Wilson\*  
[cgwilson@sidley.com](mailto:cgwilson@sidley.com)  
Yongdan Li\*  
[yongdan.li@sidley.com](mailto:yongdan.li@sidley.com)  
Sidley Austin LLP  
555 West Fifth Street  
Los Angeles, California 90013

Aseem S. Gupta\*  
[agupta@sidley.com](mailto:agupta@sidley.com)  
Sidley Austin LLP  
555 California Street, Suite 2000  
San Francisco, California 94104

David J. Wolfsohn\*  
[wolfsohn@woodcock.com](mailto:wolfsohn@woodcock.com)  
Woodcock Washburn LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, Pennsylvania 19104

John W. McBride\*  
[jwmcbride@sidley.com](mailto:jwmcbride@sidley.com)  
David T. Pritikin\*  
[dpritikin@sidley.com](mailto:dpritikin@sidley.com)  
Douglas I. Lewis\*  
[dilewis@sidley.com](mailto:dilewis@sidley.com)  
Richard A. Cederoth\*  
[rcederoth@sidley.com](mailto:rcederoth@sidley.com)  
Erin E. Kelly\*  
[ekelly@sidley.com](mailto:ekelly@sidley.com)  
Shubham Mukherjee\*  
[smukherjee@sidley.com](mailto:smukherjee@sidley.com)  
Sherry A. Knutson\*  
[sknutson@sidley.com](mailto:sknutson@sidley.com)  
Stephen C. Carlson\*  
[scarlson@sidley.com](mailto:scarlson@sidley.com)  
Elizabeth Curtin\*  
[ecurtin@sidley.com](mailto:ecurtin@sidley.com)  
Neil H. Wyland\*  
[nwyland@sidley.com](mailto:nwyland@sidley.com)  
William M. Chang\*  
[wchang@sidley.com](mailto:wchang@sidley.com)  
Michael L. Lisak\*  
[mlisak@sidley.com](mailto:mlisak@sidley.com)  
Gerald L. Angst\*  
[ganst@sidley.com](mailto:ganst@sidley.com)  
Frank J. Favia, Jr.\*  
[ffaviajr@sidley.com](mailto:ffaviajr@sidley.com)  
Anthony Balkissoon\*  
[abalkissoon@sidley.com](mailto:abalkissoon@sidley.com)  
Tamar B. Kelber\*  
[tbkelber@sidley.com](mailto:tbkelber@sidley.com)  
Kathleen L. Holthaus\*  
[kholthaus@sidley.com](mailto:kholthaus@sidley.com)  
Sidley Austin LLP  
One S. Dearborn  
Chicago, Illinois 60603

Brian R. Nester\*  
[bnester@sidley.com](mailto:bnester@sidley.com)  
Sidley Austin LLP  
1501 K Street, N.W.

Washington, DC 20005

Tung T. Nguyen\*

[tnguyen@sidley.com](mailto:tnguyen@sidley.com)

Nabeel U. Khan\*

[nkhan@sidley.com](mailto:nkhan@sidley.com)

Dale B. Nixon\*

[dnixon@sidley.com](mailto:dnixon@sidley.com)

Nicole D. Sims

[nsims@sidley.com](mailto:nsims@sidley.com)

Benjamin B. Kelly\*

[bbkelly@sidley.com](mailto:bbkelly@sidley.com)

Daniel J. Galligan\*

[dgalligan@sidley.com](mailto:dgalligan@sidley.com)

Sidley Austin LLP

717 North Harwood, Suite 3400

Dallas, Texas 75201

*Attorneys for Defendant*

Electronically served via CM/ECF

*\*Admitted pro hac vice*