

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

---

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

---

**MICROSOFT CORPORATION’S OPPOSITION TO MOTOROLA MOBILITY, INC’S  
MOTION TO EXCLUDE CERTAIN TESTIMONY OF  
MICROSOFT’S EXPERT ROBERT ZEIDMAN**

Defendant/Counterclaim Plaintiff Microsoft Corporation (“Microsoft”) opposes Plaintiff/Counterclaim Defendant Motorola Mobility, Inc.’s (“Motorola”) Motion to Exclude Certain Testimony of Defendant’s Expert Robert Zeidman (the “Motion to Exclude”), which motion seeks to exclude the entire Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502,839 (the “Invalidity Report”) and portions of the Expert Report of Robert Zeidman Rebutting First Expert Report of Dr. John Sibert, PH.D. Regarding Whether Certain Claims of U.S. Patent No. 5,502,839 Are Practiced by Defendant Microsoft Corporation (the “Rebuttal Report”).

**I. INTRODUCTION**

In its Motion to Exclude, Motorola seeks to exclude Mr. Zeidman’s *entire* 73 page Invalidity Report – which includes an additional 476 pages of claim charts – based on nothing more than unsupported, conclusory assertions that Mr. Zeidman’s voluminous Invalidity Report is

Doc. 173

Motorola Mobility, Inc. v. Microsoft Corporation

DocereJustia.com

“unreliable” and on claims that, in certain discrete and limited passages, Mr. Zeidman misapplies the law. While Motorola does not and cannot contest that Mr. Zeidman is eminently qualified to offer this testimony, Motorola fails to provide any analysis as to how and in what way Mr. Zeidman’s methodology is unreliable. What Motorola has done instead is attempt to turn this Motion to Exclude into a disguised summary judgment motion, presumably to avoid the exacting standards required for summary judgment as well as the Court’s page limits imposed for summary judgment briefs. While such summary judgment arguments are misplaced in this Motion to Exclude – which relates only to whether Mr. Zeidman’s testimony is admissible under Rule 702 – they are also baseless: the record reflects a disagreement on the facts of what the references disclose, which precludes summary judgment.

Further, in arguing that Mr. Zeidman’s Invalidity Opinions will not assist the trier of fact, Motorola does nothing more than extract a small number of passages from the Invalidity Report, and suggests that, in these discrete passages, Mr. Zeidman has misapplied the law. Motorola, however, fails to provide any legal support for its contention that Mr. Zeidman’s entire report should be excluded because, in a handful of passages, Motorola believes Mr. Zeidman misapplied the law. Moreover, and as described in detail below, Mr. Zeidman has *not* misapplied the law even in these discrete instances. There is, therefore, no basis for excluding his Invalidity Report.

Motorola also argues that this Court should exclude the portion of Mr. Zeidman’s Rebuttal Report that relates to Silverlight accused products. As Motorola well knows, Mr. Zeidman’s Rebuttal Report accidentally omitted his Silverlight analysis when it was originally served on Motorola solely due to a clerical error. Mr. Zeidman’s report, however, made this error obvious, because it contained two exact copies of a different section. As soon as Microsoft and Mr.

Zeidman discovered this error, Motorola received a corrected report. Motorola articulates no basis for the exclusion of the Rebuttal Report.

## II. ARGUMENT

Expert testimony is admissible under Federal Rule of Evidence 702 if it “rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The admissibility standard is a liberal one, and “rejection of expert testimony is the *exception* rather than the rule”, *United States v. Frazier*, 387 F.3d 1244, 1294-95 (11th Cir. 2004), especially when a party is not challenging an expert’s qualifications. In moving to have an expert’s testimony excluded, the party moving for exclusion must offer more than vague and conclusory assertions of unreliability. *U.S. v. Scarpon*, No. 05-20419-CR, 2006 WL 5100541, at \*1 (S.D. Fla. Sept. 12, 2006) (denying defendant’s motion to exclude expert testimony where defendant’s arguments were “vague and conclusory”); *U.S. v. Easchief*, 363 Fed. Appx. 526, 528 (9th Cir. 2010) (affirming district court’s decision to deny defendant’s motion to hold a *Daubert* hearing where defendant “made nothing but conclusory assertions of unreliability in his motion”). Moreover, while the judge’s role is to keep unreliable and irrelevant information from the jury, it is not intended to supplant the adversary system or the role of the jury. *Frazier*, 387 F.3d at 1295; *see also Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (objections relating to the persuasiveness of testimony go to the weight of the evidence rather than its admissibility).

### A. MR. ZEIDMAN IS WELL-QUALIFIED TO PROVIDE OPINIONS ON THE INVALIDITY OF THE ‘839 PATENT.

Motorola does not and cannot contest that Mr. Zeidman is eminently qualified to serve as an expert witness to the topics in his Reports. Mr. Zeidman has extensive experience in the field of hardware and software design and analysis. He has a Master’s degree from Stanford University in Electrical Engineering and two Bachelor’s degrees from Cornell University, one in

Electrical Engineering and one in Physics. (See Ex. A, Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502839, at 4). Mr. Zeidman has been a computer software and hardware designer for over 25 years, and is currently an engineer and president of Zeidman Consulting, which provides engineering consulting services to high tech companies. *Id.* Mr. Zeidman has testified to invalidity on technical subject matter in other cases, and has even provided such testimony in this case on another patent – the ‘176 patent – to which Motorola has made no objection. Mr. Zeidman has experience developing technologies that are particularly relevant to the technology at issue in this case, including operating systems, user interfaces, graphics systems, and graphical operating systems. (*Id.* at 4; see also Ex. B, Deposition of Robert Zeidman, at 74-88. Mr. Zeidman is the named inventor on a number of patents, including two patents that are particularly relevant here: U.S. Patent No. 7,647,583 (“Method and apparatus for emulating a hardware/software system using a computer”) and U.S. Patent No. 7,900,187 (“Using Readily Available Driver and Application Source Code With A Synthesized Operating System”). (See Ex. A, at 6). Where, as here, an expert has extensive experience and specialized expertise, his qualifications “augment[] the reliability of the expert’s reasoning and methodology.” *Joiner v. General Elec. Co.*, 78 F.3d 524, 532 (11th Cir. 1996) (reversed on other grounds).

**B. MR. ZEIDMAN’S INVALIDITY REPORT IS RELIABLE**

Motorola argues that the Invalidity Report is based on an unreliable methodology, (Motion to Exclude, at 3-6, 13), but fails to provide support for its assertions. Motorola fails to employ any recognized framework for assessing the reliability of Mr. Zeidman’s methodology. (*Id.*). Motorola discusses the factors a court may consider in assessing the reliability of an expert’s methodology, and cites an Eleventh Circuit decision for the proposition that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert,” but then does

not analyze Mr. Zeidman's Invalidity Report pursuant to these factors, nor does Motorola suggest – nor could it – that Mr. Zeidman's opinion evidence is connected to data only by the *ipse dixit* of the expert. *Id.*

Rather, Motorola asserts, in conclusory fashion, that Mr. Zeidman's methodology is “highly suspect, and nowhere near reliable.” *Id.* at 13. Motorola, however, fails to provide a specific explanation as to the way or ways in which Mr. Zeidman's methodology is unreliable, relying instead on vague generalities that his Invalidity Report lacks detail and clarity. *U.S. v. Scarpon*, No. 05-20419-CR, 2006 WL 5100541, at \*1 (S.D. Fla. Sept. 12, 2006) (denying defendant's motion to exclude expert testimony where defendant's arguments were “vague and conclusory”). Motorola also substitutes the admissibility standard under Rule 702 with Microsoft's burden of proof on its invalidity defenses, turning this motion into a summary judgment motion outside of the page limits imposed on summary judgment briefs. Such arguments have no place in this motion to exclude, and, in any event, the record reflects a disagreement on the facts of what the references disclose, which precludes summary judgment.

**1. Motorola's Assertion That Mr. Zeidman's Anticipation Opinions Are Based on an Unreliable Methodology is Groundless.**

While Motorola concedes that Mr. Zeidman included with his Invalidity Report “volum[inous]” charts which “lay out the asserted claims by element,” Motorola asserts, in nothing more than vague generalities, that Mr. Zeidman has not identified “with any specificity or clarity” what, in each prior art publication, is identical to the claimed elements of the invention. (Motion to Exclude, p. 4).<sup>1</sup> Motorola states, in this same conclusory way, that Mr. Zeidman, next

---

<sup>1</sup> To the extent Motorola is arguing that Mr. Zeidman does not provide sufficient analysis in his Invalidity Report because much of his analysis is contained in the charts attached to his report, (Motion to Exclude, at 4), this is an argument that may be quickly disposed of, as it is clear that the charts are part of his Invalidity Report. Indeed, Mr. Zeidman states that his analysis is shown

to each element in his charts, “present[s] an opaque discussion about the element[s]” of each asserted claim, and “rambling excerpts from the prior art publications.” *Id.* Motorola, however, does not itself identify a *single* “discussion” it deems “opaque,” nor does it specify which excerpt or excerpts it deems “rambling.” Rather, in citing to Mr. Zeidman’s Invalidity Report for its assertion that it lacks clarity and specificity, Motorola merely cites “*generally*” to all 476 pages of the charts. (*See* Motion to Exclude, fn. 7, 9). These general, conclusory assertions of unreliability provide none of the analysis of Mr. Zeidman’s *methodology* that is necessary to determine the admissibility of his testimony under Rule 702.

Motorola’s conclusory assertions that Mr. Zeidman’s anticipation opinions lack clarity and specificity are belied by the Invalidity Report itself. As Motorola concedes, the invalidity claim charts in Mr. Zeidman’s Invalidity Report are “volum[inous]” and “lay out the asserted claims by element.” (Motion to Exclude, p. 4). Indeed, the claim charts are 476 pages long, and set forth, in painstaking detail, an analysis of each element of each claim. Because Motorola fails to identify a single excerpt from Mr. Zeidman’s Invalidity Report that it deems insufficiently clear or specific, and instead merely cites *generally* to the charts, Microsoft, and indeed, this Court, is left to guess which portion or portions of the Invalidity Report Motorola believes is deficient. But Motorola does not seek to have only a portion or portions of the Invalidity Report excluded, but seeks to have the entire report excluded, without identifying a *single instance* of Mr. Zeidman failing to provide sufficient detail in support of his opinions.

---

in the attached claim charts. *See Advanced Fiber Technologies Trust v. J&L Fiber Services, Inc.*, No. 07-CV-1191, 2010 WL 1930569, at \*5 (N.D.N.Y. May 11, 2010) (finding that the comparisons in a claim chart attached to an expert report “sufficiently announce[d] the scope and content of the referenced art”). Despite this, Motorola cites to the charts, yet has failed to include them among its exhibits to its Motion to Exclude. Mr. Zeidman’s charts are attached as part of Ex. A, Expert Report of Robert Zeidman. Further, Motorola’s expert, Dr. Sibert, similarly included his analysis in claim charts which he attached to his report.

Moreover, Motorola has confused the analysis that must be done to determine the admissibility of expert testimony under Rule 702 with Microsoft's burden of proof on its invalidity defenses, effectively turning this into a disguised summary judgment motion outside of the exacting standards for obtaining summary judgment and the related page limits imposed on summary judgment briefs. Motorola states that "The event itself must be proven by clear and convincing evidence" and that the "Invalidity Report does no such thing." (Motion to Exclude, at 5). Indeed, the cases Motorola cites in support of its arguments that an invalidity claim must be "proven" by "clear and convincing evidence" have nothing to do with the admissibility of an expert's testimony, and bear only on the burden of proof at trial. *See Id.*, at 3-4 (citing *Source Search Techs., LLC v. LendingTree, LLC*, 2009 WL 4546742, at \*3 (Fed. Cir. Dec. 7, 2009) and *Celeritas Techs., Inc. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1361 (Fed. Cir. 1998)). While, as stated above, Motorola is incorrect that Mr. Zeidman has not provided clear and convincing evidence of the event, such arguments about the persuasiveness of Mr. Zeidman's opinions are inappropriately raised in a *Daubert* motion, especially considering Motorola does not even dispute Mr. Zeidman's qualifications. *Quiet Technology*, 326 F.3d at 1341 (On a *Daubert* motion, "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence").

Motorola also fails to explain how Mr. Zeidman's deposition testimony affects this Court's determination of the admissibility of Mr. Zeidman's Invalidity Report. Motorola concedes that the Invalidity Report "points to the documents, and not underlying technology, as allegedly anticipating the asserted claims." *Id.* To the extent Motorola believes that Mr. Zeidman's deposition testimony contradicts any of the opinions in his Invalidity Report, such arguments are properly made at trial, not in a *Daubert* motion. *Advanced Fiber Technologies*

*Trust v. J&L Fiber Services, Inc.*, No. 07-CV-1191, 2010 WL 1930569, at \*6 (N.D.N.Y. May 11, 2010) (rejecting plaintiff's contention that defendant's expert report was inadmissible because plaintiff alleged that the expert's "report and later deposition testimony [were] inconsistent," and stating that "[a]ny perceived inconsistencies should be addressed through cross-examination"); *Quiet Technology*, 326 F.3d at 1342 (refusing to exclude expert report based on perceived inconsistencies).

**2. Motorola's Assertion That Mr. Zeidman's Obviousness Opinions Are Based on an Unreliable Methodology is Groundless.**

Motorola argues that Mr. Zeidman's obviousness opinions are unreliable, but, likewise, fails to explain how the methodology underlying Mr. Zeidman's obviousness opinions is deficient. (*See* Motion to Exclude, at 4). Rather than providing any sort of analysis of Mr. Zeidman's obviousness opinions, Motorola states in colorful, but meaningless language, that Mr. Zeidman has "wave[d] his hands generally over a collection of prior art items and on that basis argue[d] a claimed invention would have been known from various combinations of the prior art items." (*Id.*). Motorola does not quote any language from the Invalidity Report that would serve to illustrate and clarify its unclear accusation, and merely (yet again) cites *generally* to Mr. Zeidman's *entire* obviousness opinion. (*Id.* at n. 12). Motorola's unclear assertion does not in any way provide the sort of reasoned analysis of Mr. Zeidman's methodology that *Daubert* requires.

Moreover, Mr. Zeidman's obviousness opinion, which cites to the voluminous claim charts, provides an enormous amount of information on the scope and content of the prior art, the differences between the prior art and the challenged invention, and the reasons why the prior art is relevant, which all bear on an obviousness analysis. *See Advanced Fiber Technologies*, 2010 WL 1930569, at \*5 (denying motion to exclude based on plaintiff's argument that an expert report did not assert why a person skilled in the art would be motivated to make the combinations it asserted



as obvious and offered only “conclusory statements” as to the challenged patent’s obviousness, and finding that the report contained a detailed analysis of the prior art in claim charts that would be helpful to a jury’s determination as to whether the art was “truly analogous and pertinent”).

Motorola also argues that in the “Other Art” section of the Invalidity Report, Mr. Zeidman does not “explain how or why Lantz is anticipatory and/or obvious or what ‘other art’ he is referring to besides Lantz.” (Motion to Exclude, at 10). In fact, Mr. Zeidman does both. Mr. Zeidman explains that Lantz published a paper *Structured Graphics for Distributed Systems* which builds upon the SIGGRAPH Core and GKS standards to describe “*virtual graphics terminal service*.” (See Ex A., Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502839, at 60-61). Mr. Zeidman then proceeds to describe numerous “other art” references which, “in combination with one or more of the other references would render each of the asserted claims obvious.” (*Id.* at 61). Specifically, Mr. Zeidman identifies the following prior art references: “*The Virtual Graphics Terminal Service developed at Stanford University*”, “The Workstation Concept of GKS and the Resulting Conceptual to the GSPC Core System”, “*Design Document for The George Washington University Implementation of the 1979 GSPC Core System*”, “a 1968 paper by Newman”, a “series of articles by Cotton, Wallace and Foley, and Wallace” (internal citations omitted), and “*ARPA network graphics protocol*”. (*Id.* at 60-63). Motorola’s assertion that Mr. Zeidman does not explain Lantz or identify the “other art” he is referring to is baseless.

**C. MR. ZEIDMAN'S INVALIDITY TESTIMONY WILL ASSIST THE TRIER OF FACT**

Motorola also argues that Mr. Zeidman's Invalidity Report should be excluded because it does not assist the trier of fact. (Motion to Exclude, at 6-11, 13-14). Motorola states that "[t]estimony held to assist the trier of fact 'concerns matters that are beyond the understanding of the average lay person.'" *Id.* at 13 (citing *Guinn v. AstraZeneca Pharms. LP*, 602 F.3d 1245, 1252 (11<sup>th</sup> Cir. 2010)). Motorola, however, does not contest – nor could it – that the matters in the Invalidity Report are beyond the understanding of the average lay person. Moreover, Motorola does not question or dispute Mr. Zeidman's qualifications as an expert. Rather, Motorola contends that Mr. Zeidman misapplied the law for anticipation, obviousness and enablement. (Motion to Exclude, at 6-10). As an initial matter, Mr. Zeidman is not being offered as an expert on patent law. And Motorola does not contest that Mr. Zeidman articulated the correct standards for anticipation, obviousness and enablement. Motorola merely points to only a handful of discrete instances in which it believes Mr. Zeidman "misapplied" the law, and does not in any way suggest that Mr. Zeidman has "misapplied the law" throughout his Invalidity Report. As is described in detail below, Motorola is incorrect with respect to even these discrete instances. But Motorola also fails to explain how Mr. Zeidman's alleged misapplication of the law in the discrete instances could possibly justify exclusion of each and every one of Mr. Zeidman's Invalidity Opinions in the 500 plus pages of the Invalidity Report. The case law Motorola itself cites in support of its Motion does not support such a result. (*See id.*, at 14 (citing *Corwin v. Walt Disney World Co.*, 475 F.3d 1239, 1251 (11<sup>th</sup> Cir. 2007) (affirming exclusion of the "portions" of the expert reports which the Court found inadmissible)).

**1. Motorola Wrongly Asserts That Mr. Zeidman Misapplies the Law for Anticipation**

Motorola argues that Mr. Zeidman “misapplied the law” for anticipation, and that, therefore, his testimony would confuse the fact finder. (Motion to Exclude, pp. 6-8). Specifically, Motorola argues that Mr. Zeidman has misapplied the law for anticipation by: 1) stating, in several places in the 476 pages of claim charts, that various limitations would have been “obvious” to a person of ordinary skill, and 2) by citing several references for anticipation in his discussion of the Graphical Kernel System. *Id.*

It is well-established that a prior art reference can disclose the limitations of the claimed invention “either explicitly or *inherently*” to anticipate. *Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1328 (Fed. Cir. 2001) (emphasis added); *Atlas Powder Co. v. IRECO Inc.*, 190 F.3d 1342, 1346 (Fed. Cir. 1999). Under the principle of inherency, “if the prior art necessarily functions in accordance with, or includes, the claimed limitations, it anticipates.” *Id.* (quoting *MEHL/Biophile Int’l Corp. v. Milgaraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999)). “This modest flexibility in the rule that ‘anticipation’ requires that every element of the claims appear in a single reference accommodates situations where the common knowledge of technologists is not recorded in the reference; that is, where technological facts are known to those in the field of the invention, albeit not known to judge.” *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268 (Fed. Cir. 1991). It is also well-established that recourse to extrinsic evidence, including multiple references, “is proper to determine whether a feature, while not explicitly discussed,” is inherent in a reference. *Telemac*, 247 F.3d at 1328.; *Continental Can*, 948 F.2d at 1269 (same). Whether a claim limitation is inherent in a prior art reference is a question of fact. *Telemac*, 247 F.3d at 1328; *Continental Can*, 948 F.2d at 1269 (vacating grant of summary

judgment of anticipation under Section 102(a) where there was dispute as to whether a process was inherent in prior art reference).

Here, Motorola mistakenly argues that Mr. Zeidman must *explicitly* show that “each and every element of the claim, including all of their limitations, was present in the prior art,” and takes Mr. Zeidman to task for stating that certain limitations are *inherent* in the prior art. (Motion to Exclude, at 4, 6-8). Where Mr. Zeidman has indicated that certain structures and limitations are “obvious to a person of ordinary skill in the art,” (*See e.g.* Ex. A, Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502839, Exhibit B at p. 7), it is clear that he means that those structures and limitations are within “the common knowledge of technologists...that is, [the] technological facts are known to those in the field of the invention, albeit not known to judge.” *Continental Can*, 948 F.2d at 1269.

Mr. Zeidman’s testimony relating to means-plus-function that Motorola cites in support of its erroneous position that Mr. Zeidman has “confuse[d] the law of obviousness and the law of anticipation” shows that Mr. Zeidman has indicated that certain structures and functions are *inherent* in the references, not that he has “confused the law” of anticipation and obviousness. (*See* Motion to Exclude, at 7). Mr. Zeidman states that a reference “specifies that these operations and exact structure would be determined by a programmer following the primitive device semantics described.” *Id.* (citing Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502839, Exhibit B at p. 8). It is clear that Mr. Zeidman means that the operations and exact structure would be known or within the common knowledge of person in the field of the invention (an “operator”). While Motorola may dispute that these structures and limitations are in fact inherent in the references, this is an issue that is to be decided by the fact finder, and not by the Court on a motion to exclude. *Telemac*, 247 F.3d at 1328; *Continental Can*, 948 F.2d at 1269

(vacating grant of summary judgment of anticipation under Section 102(a) where there was dispute as to whether a process was inherent in prior art reference).

Motorola also argues that in Mr. Zeidman's Invalidity Report on the Graphical Kernel System, Mr. Zeidman "cit[es] several references for anticipation – seemingly to build a 'system' of sorts – where only one should be offered" under 35 U.S.C. §102. (Motion to Exclude, at 8). Motorola's employs only this highly nebulous language – that Mr. Zeidman "seemingly build[s] a system of sorts" – but fails to specify where in the 113 page claim chart relating to the Graphical Kernel System, Motorola believes that Mr. Zeidman does this. In fact, Mr. Zeidman provides additional references for certain elements to reinforce what was said by the primary reference, or to show that certain characteristics or limitations were inherent in the primary reference. *Telemac*, 247 F.3d at 1328.

**2. Motorola Wrongly Asserts That Mr. Zeidman Misapplies the Law for Obviousness.**

Motorola also argues that Mr. Zeidman has misapplied the law for obviousness, (Motion to Exclude, at 9), but fails to explain in what way Mr. Zeidman has done so. Rather, what Motorola argues is not that Mr. Zeidman has misapplied the law, but that he has provided an "incomplete obviousness analysis," and that his analysis will not permit Microsoft to carry its "burden to prove invalidity." *Id.* By so arguing, Motorola, again, confuses the standard for admitting Mr. Zeidman's testimony under Rule 702 and Microsoft's burden of proof on its invalidity defenses. Motorola does not dispute Mr. Zeidman's qualifications as an expert. Instead, Motorola is doing nothing more than making (erroneous) arguments about the persuasiveness of Mr. Zeidman's obviousness testimony – such arguments are inappropriately raised in a *Daubert* motion. *Quiet Technology*, 326 F.3d at 1341 ("[I]t is not the role of the

district court to make ultimate conclusions as to the persuasiveness of the proffered evidence” on a *Daubert* motion).

**3. Motorola’s Claim That Mr. Zeidman Misapplies the Law in the Section of the Invalidity Report on Enablement is Unfounded.**

Finally, Motorola extracts a single statement from Mr. Zeidman’s opinion on enablement and argues – based on that single statement – that Mr. Zeidman has misapplied the law for enablement. (Motion to Exclude, at 10). Motorola does not contest that Mr. Zeidman articulated the correct standard for enablement in his Invalidity Report. (*See* Ex. A, Expert Report of Robert Zeidman Regarding U.S. Patent No. 5,502839, at ¶¶ 90-92). Nor does Motorola suggest that Mr. Zeidman has misapplied the law he correctly articulates to each of his enablement opinions. Rather, Motorola isolates this discrete passage, and attempts to argue that the entire enablement section should be excluded based on what Motorola incorrectly perceives as a flaw in that discrete part. (Motion to Exclude, at 5, n. 15). Motorola fails to explain how any such instance or instances could possibly constitute an unreliable *methodology* (as opposed to a conclusion to which Motorola can object at trial) that would require exclusion of the entire section. Motorola does not – nor could it – provide any legal support for exclusion of the entire opinion on such a basis.

**D. MR. ZEIDMAN’S REBUTTAL REPORT IS RELIABLE AND ADMISSIBLE**

Motorola also seeks to exclude Mr. Zeidman’s testimony on the non-infringement by Windows 7 with Silverlight and Windows Phone 7 with Silverlight for Windows Phone in the Rebuttal Report. (Motion to Exclude, at 5, 10-11). Motorola incorrectly asserts that Mr. Zeidman “did not present any proper analysis for the alleged non-infringement.” *Id.* This is not true, as Motorola knows. What Motorola is alluding to is Microsoft’s submission of a corrected report

after it discovered that, as a result of a word processing error, the Silverlight opinions were omitted from Mr. Zeidman's report as it was originally submitted. (*See* Motion to Exclude, Greenfield Decl. Ex. C). In their place, was an exact copy of the WPF section which immediately proceeded the Silverlight section. (Motion to Exclude, Greenfield Decl. Ex., C; Motion to Exclude, at 10 ("Upon review, it is readily apparent that Mr. Zeidman's report contains no analysis of Silverlight at all but a verbatim copy and paste of the analysis he provided for WPF in the section before")). Microsoft discovered its word processing error on July 18 and immediately served on Motorola a corrected report. (Motion to Exclude, Greenfield Decl., Ex. C). As counsel for Microsoft explained, the only changes in the corrected report were "formatting (paragraph numbers) and the corrected Silverlight section." *Id.* Motorola argues that the corrected Silverlight testimony should be precluded because it was served "far too late for Motorola to address" the Silverlight opinions at Mr. Zeidman's deposition. *Id.* The corrected report, however, was submitted as soon as the clerical error was discovered, more than twenty-four hours before Mr. Zeidman was deposed on the '839 patent. Moreover, at Mr. Zeidman's deposition, Motorola declined Microsoft's offer to keep Mr. Zeidman's deposition open and to depose him the following day on his Silverlight opinion. (*See* Ex. B, Deposition of Robert Zeidman, at 164:21-165:4).

As Motorola is well aware, such clerical errors can and do happen in a case of this size. As the result of a "PDFing mistake," Motorola omitted parts of Chris Tregelis' June 27 expert report from the version it served on Microsoft and did not correct the clerical error until less than 48 hours before Mr. Tregelis' deposition. (*See* Ex. C, July 26, 2011 email from M. Raymond to D. Greenfield). Motorola identified and corrected this clerical error a month later. *Id.* Such clerical errors are no basis for the exclusion of expert testimony.


### III. CONCLUSION

Motorola seeks to exclude Mr. Zeidman's entire Invalidity Report – which includes 476 pages of detailed claim charts – and portions of his Rebuttal Report, based on nothing more than vague assertions of unreliability and unfounded arguments that Mr. Zeidman has misapplied the law in discrete portions of his Invalidity Report. There is no basis for exclusion on these grounds. For the foregoing reasons, Microsoft respectfully requests that this Court deny Motorola's Motion to Exclude Certain Testimony of Robert Zeidman.

DATED this 8th day of August, 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. Cederth  
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 the 8<sup>th</sup> day of August 2011, I filed the foregoing document by hand with the Clerk of the Court pursuant to Local Rule 5.4 of the Southern District of Florida, and caused the same to be served in the manner indicated below on all counsel of record on the below Service List.



\_\_\_\_\_  
Curtis B. Miner

**SERVICE LIST**

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

**By Hand**

Edward M. Mullins, Esq.  
ASTIGARRAGA DAVIS  
701 Brickell Avenue, 16<sup>th</sup> Floor  
Miami, FL 33131

**By Federal Express**

Steven Pepe  
Jesse J. Jenner  
Leslie M. Spencer  
ROPES & GRAY LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704

Norman H. Beamer  
Mark D. Rowland  
Gabrielle E. Higgins  
ROPES & GRAY LLP  
1900 University Avenue, 6th Floor  
East Palo Alto, CA 94303-2284

Kevin J. Post  
Megan F. Raymond  
ROPES & GRAY LLP  
One Metro Center  
700 12th Street NW, Suite 900  
Washington, DC 20005-3948