

THE HONORABLE JAMES L. ROBERT

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
  
Plaintiff,  
  
vs.  
  
MOTOROLA, INC., et al.,  
  
Defendants.

Case No. C10-1823-JLR

MICROSOFT’S MOTION TO SEAL  
TRIAL EXHIBITS THAT DISCLOSE  
MICROSOFT’S TRADE SECRETS

Noted: Friday, November 9, 2012

---

MOTOROLA MOBILITY LLC, et al.,  
  
Plaintiffs,  
  
vs.  
  
MICROSOFT CORPORATION,  
  
Defendants.

ORAL ARGUMENT REQUESTED

MICROSOFT’S MOTION TO SEAL TRIAL  
EXHIBITS THAT DISCLOSE MICROSOFT’S  
TRADE SECRETS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND .....	1
III. LEGAL AUTHORITY & ARGUMENT .....	3
A. Legal Standard .....	3
B. Compelling Reasons Exist To Seal Trial Exhibits That Disclose Microsoft’s Trade Secrets .....	4
1. Microsoft’s Confidential Patent License Agreements Should Be Publicly Disclosed only in Redacted Form, If at All.....	4
2. Microsoft’s Strategic Product Planning Documents Should Be Sealed .....	6
3. Microsoft Source Code Documents Should be Sealed .....	8
4. Technical Xbox-related Product Specifications Should Be Sealed .....	8
5. Microsoft’s Confidential Product-Specific Financial Information, Including Past and Projected Sales and Revenue Data, Should be Sealed .....	10
6. Motorola’s Summary Document Disclosing the Parties’ Settlement Negotiations Should be Sealed .....	11
IV. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

*Abaxis, Inc. v. Cepheid*,  
2011 WL 6002522 (N.D. Cal. Nov. 30, 2011) .....4

*Agency Solutions.Com, LLC v. TriZetto Group, Inc.*,  
819 F. Supp. 2d 1001 (E.D. Cal. 2011) .....8, 10

*Apple, Inc. v. Samsung Elecs. Co.*,  
2012 WL 3283478 (N.D. Cal. Aug. 9, 2012) .....4, 5, 8

*Bauer Bros. LLC v. Nike, Inc.*,  
2012 WL 1899838 (S.D. Cal. May 24, 2012) .....8, 11

*Bean v. John Wiley & Sons, Inc.*,  
2012 WL 1078662 (D. Ariz. Mar. 30, 2012).....10

*Clark v. Bunker*,  
453 F.2d 1006 (9th Cir. 1972) .....3, 4, 9, 11, 12

*DISH Network, L.L.C. v. Sonicview USA, Inc.*,  
2009 WL 2579052 (S.D. Cal. Aug. 20, 2009).....7

*In re Electronic Arts*,  
298 Fed. App'x 568 (9<sup>th</sup> Cir. 2008) .....4

*F.D.I.C. v. Tarkanian*,  
2012 WL 1327856 (S.D. Cal. Apr. 17, 2012).....11

*Kamakana v. City and Cnty. Of Honolulu*,  
447 F.3d 1172 (9<sup>th</sup> Cir. 2006) .....3

*Krieger v. Atheros Communications, Inc.*,  
2011 WL 2550831 (N.D. Cal. June 25, 2011) .....8

*Network Appliance, Inc. v. Sun Microsystems Inc.*,  
2010 WL 841274 (N.D. Cal. Mar. 10, 2010).....3, 5, 8

*Nixon v. Warner Commc'ns, Inc.*,  
435 U.S. 589 (1978).....3

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

*Powertech Tech., Inc. v. Tessera, Inc.*,  
2012 WL 3283420 (N.D. Cal. Aug. 10, 2012) .....4

*TriQuint Semiconductor, Inc. v. Avago Technologies Ltd.*,  
2011 WL 6182346 (D. Ariz. Dec. 13, 2011) .....4, 8, 11

*Ultimate Timing, L.L.C. v. Simms*,  
2010 WL 786021 (W.D. Wash. Mar. 4, 2010) .....3

*Wacom Co., Ltd. v. Hanvon Corp.*,  
2007 WL 3026889 (W.D. Wash. Oct. 16, 2007) .....8

**Other Authorities**

*Restatement of Torts § 757, cmt. b* .....10, 11, 12

1 **I. INTRODUCTION**

2 Pursuant to Western District of Washington Local Civil Rule 5(g)(2), Microsoft  
3 respectfully moves for leave to file under seal certain exhibits that disclose confidential trade  
4 secret information and that may be introduced into evidence at trial. Microsoft does *not*  
5 anticipate that the introduction of sealed documents at trial will require closure of the  
6 courtroom, as the sealed documents need not be publicly displayed to be viewed by the Court,  
7 parties or witnesses. Microsoft is requesting only that 63 documents be sealed, 58 of them in  
8 their entirety and 5 of them only in part. As further detailed below, each document fits within  
9 at least one of the following categories of confidential and proprietary documents:

- 10 1. Microsoft Confidential Patent License Agreements;  
11 2. Microsoft Strategic Product Planning Documents;  
12 3. Microsoft Source Code;  
13 4. Proprietary Technical Product Specifications;  
14 5. Confidential Product-Specific Financial Information; and  
15 6. Confidential Settlement Negotiations.

16 Attached as Appendix A<sup>1</sup> is a spreadsheet that (a) identifies each of the 63 documents  
17 at issue by trial exhibit number, (b) provides a short description of the document, and (c)  
18 categorizes each document within one of the above-listed categories. As further explained  
19 below, there are compelling reasons to seal each of the exhibits listed on Appendix A.

20 **II. FACTUAL BACKGROUND**

21 Throughout this litigation, the parties have produced many confidential and highly  
22 sensitive documents regarding their business and licensing practices, business strategies,  
23 financial information, and technical developments, as well as documents that contain the

24 \_\_\_\_\_  
25 <sup>1</sup> Each of the potential trial exhibits listed on Appendix A are also listed among the 3,000 trial exhibits on the Joint  
Trial Exhibit List. (Dkt. No. 493, Ex. 1). As the parties will be providing the Court with hard copies of all  
potential trial exhibits on the Joint Trial Exhibit List prior to the noting date of this motion, Microsoft does not  
plan to separately submit an additional hard copy of the specific exhibits listed on Appendix A. However, for the  
Court’s convenience, Microsoft will be providing chambers with a DVD containing electronic copies of each  
document listed on Appendix A, as well as proposed redactions for certain of those documents, as further  
explained below. Microsoft is providing Motorola with a courtesy copy of the DVD as well.

1 highly confidential information of third parties. To protect such material, the parties entered  
2 into a stipulated Protective Order, approved by the Court on July 21, 2011. (Dkt. No. 72.)<sup>2</sup>

3 The Protective Order outlines categories of material that should be treated as  
4 confidential, along with procedures for sealing such confidential material when filed with the  
5 Court or introduced at trial. Since entry of the Protective Order, Microsoft, Motorola and  
6 subpoenaed third parties have produced hundreds of thousands of pages designated as  
7 “Confidential” or “Attorneys’ Eyes Only” material under the Protective Order, in reliance on  
8 the protections offered by that Order and with the expectation that properly designated  
9 materials would be protected from public disclosure. In cases where Microsoft has  
10 confidential licensing or other commercially sensitive financial information of a third party in  
11 its files, before producing such information it has notified the third party prior to producing  
12 such information under the terms of the Protective Order.

13 As the Court is aware, over the course of this litigation, the parties have filed numerous  
14 motions to seal in connection with various dispositive motions, which required a showing that  
15 “compelling reasons” exist for sealing the supporting documents. (*See, e.g.*, Dkt. Nos. 227,  
16 234, 271, 282, 287, 361, and 372). The Court granted several such motions. (*See, e.g.*, Dkt.  
17 Nos. 294, 336, 337, 338, 384, and 385). In addition to granting motions as to highly  
18 confidential business information and the parties’ historic licensing practices, the Court found  
19 “compelling reasons” to seal Microsoft’s proprietary source code, “descriptions of Microsoft’s  
20 licensing negotiations and agreements with third parties”, and copies of the parties’ license  
21 agreements with third parties. (*See* Dkt. No. 292 at 2-4; Dkt. No. 384). Applying the same  
22 legal standard, Microsoft believes that the 63 documents listed on Appendix A similarly should  
23 be sealed, to the extent any such documents are admitted into evidence at trial.

24 \_\_\_\_\_  
25 <sup>2</sup> On October 3, 2012, the Court amended the Protective Order to permit the parties’ in-house counsel to have expanded access to confidential materials. (*See* Dkt. No. 447.)

1 **III. LEGAL AUTHORITY & ARGUMENT**

2 **A. Legal Standard.**

3 A party seeking to seal a judicial record attached to a dispositive motion or presented at  
4 trial must articulate “compelling reasons” that outweigh the public policies favoring disclosure.  
5 *Kamakana v. City and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Under LCR  
6 5(g)(2), the presumption of public access to evidence supporting dispositive motions “may be  
7 overcome only on a compelling showing that the public’s right of access is outweighed by the  
8 interests of the public and the parties in protecting the court’s files from public review.”  
9 However, “the public interest in understanding the judicial system would appear to be less  
10 where ... the documents in question are irrelevant to the Court’s decision.” *Network*  
11 *Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at \*2 (N.D. Cal. Mar. 10, 2010)  
12 (citing *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing  
13 on the resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-  
14 dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

15 “In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a  
16 vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.”  
17 *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598  
18 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*  
19 *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at \*1-2 (W.D. Wash. Mar. 4, 2010)  
20 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade  
21 secret may consist of any formula, pattern, device or compilation of information which is used  
22 in one’s business, and which gives him an opportunity to obtain an advantage over competitors  
23 who do not know or use it.” *Id.*, 2010 WL 786021, at \*2 (quotations omitted).

1 **B. Compelling Reasons Exist To Seal Trial Exhibits that Disclose Microsoft’s Trade**  
2 **Secrets.**

3 1. Microsoft’s Confidential Patent License Agreements Should Be Publicly  
4 Disclosed only in Redacted Form, if at All.

5 Motorola has identified as potential trial exhibits five licenses between Microsoft and  
6 third parties. Four of these licenses are between Microsoft and third party licensees covering  
7 Microsoft’s patents applicable to various aspects of the Android operating system. (Exs. 2813;  
8 2828; 3076; 3077). The fifth is a confidential settlement and license agreement between third  
9 party Commonwealth Scientific and Industrial Research Organisation (CSIRO) and Microsoft  
10 covering CSIRO’s declared 802.11 standard essential patents. (Ex. 3352). These licenses  
11 include sensitive, non-public trade secret information such as royalty rates and payment terms  
12 that courts in the Ninth Circuit regularly order sealed under the “compelling reasons” standard.  
13 *In re Electronic Arts*, 298 Fed. App’x 568, 569 (9th Cir. 2008) (finding that “pricing terms,  
14 royalty rates, and guaranteed minimum payment terms” in license agreements “plainly fall[]  
15 within the definition of ‘trade secrets’”); *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, 2012 WL  
16 3283478, at \*4 (N.D. Cal. Aug. 9, 2012) (same).<sup>3</sup>

17 Within Microsoft, confidential information regarding licensing terms and conditions is  
18 restricted. Declaration of Tanya Moore in Support of Microsoft’s Motion to Seal Trial  
19 Exhibits (hereinafter “Moore Decl.”) ¶¶ 5-6. The employees in Microsoft’s licensing  
20 department understand the extremely sensitive nature of such information, and understand their  
21 duty to not disclose the terms of these agreements. *Id.* at ¶ 8. Prior to entering into each of the  
22 licenses at issue here, as part of its standard practice, Microsoft required its licensing partners

---

23 <sup>3</sup> See also *Clark*, 453 F.2d at 1009 (“[A] detailed plan for the creation, promotion, financing, and sale of  
24 contracts” constitutes a trade secret); *TriQuint Semiconductor, Inc. v. Avago Techs., Ltd.*, 2011 WL 6182346, at  
25 \*3-7 (D. Ariz. Dec. 13, 2011) (sealing documents containing sensitive financial information and licensing  
information); *Powertech Tech., Inc. v. Tessera, Inc.*, 2012 WL 3283420, at \*9 (N.D. Cal. Aug. 10, 2012) (sealing  
details of license agreement); *Abaxis, Inc. v. Cepheid*, 2011 WL 6002522, at \*1 n.1 (N.D. Cal. Nov. 30, 2011)  
(granting motion to seal exhibit to dispositive motion containing term sheet of licensing negotiations).



1 to agree to maintain the confidentiality of the licensing terms. *Id.* at ¶ 9. This commitment  
2 also is expressly included as part of each executed license agreement.

3 The licenses at issue here were produced as “Confidential Business Information” under  
4 the terms of the Protective Order entered in this case. *Id.* at ¶ 7. This is consistent with  
5 Microsoft’s efforts to ensure that such confidential information is not disseminated more  
6 widely than necessary or required by law. *Id.*

7 Public disclosure of such confidential licenses, settlements, and acquisitions would  
8 have a profound impact on Microsoft and the third parties in future licensing negotiations and  
9 settlements with others by creating an asymmetry of information. *Id.* at ¶¶ 3, 4. This  
10 asymmetry of information would result in additional leverage and bargaining power that could  
11 be used against Microsoft by its competitors and/or potential licensing partners. *Id.* at ¶ 10. In  
12 particular, by learning the financial details of these license agreements, competitors and  
13 potential counterparties to licensing and settlement agreements with Microsoft would gain an  
14 unfair insight into Microsoft’s business strategies, licensing strategies, prior royalty grants,  
15 negotiation tactics, and cost/benefit analyses. *See id.*

16 Here, Microsoft is not requesting that the Court seal the Microsoft licenses in their  
17 entirety. Microsoft seeks only to have the Court seal those portions of its third party patent  
18 license agreements that disclose the licensing parties’ trade secret information.<sup>4</sup> This includes  
19 the financial terms of the licenses, such as pricing, royalty and payment terms.<sup>5</sup> Permitting  
20 redaction of this information will minimize the harm to Microsoft and third-parties while also  
21 giving due consideration to the public policies favoring disclosure. *See Apple*, 2012 WL

---

22  
23 <sup>4</sup> Redacted versions of the five licenses are included on the DVDs being provided to the Court and Motorola.

24 <sup>5</sup> One Licensee, Quanta, has also requested that the definition of “Unlicensed Products” at page 4 of its license  
25 (Ex. 3077) be redacted to avoid disclosure of certain Quanta customers and their products, which Quanta believes  
should be maintained as confidential. Quanta is not a party to this suit and the identities of its clients and their  
products are irrelevant to the issues before the Court. Compelling reasons exist to redact this information from the  
Quanta license. *Network Appliance, Inc.*, 2010 WL 841274, at \*2.

1 3283478, at \*10.<sup>6</sup> The Court should permit Microsoft to redact the portions of each license  
2 that contain confidential “trade secret” information.

3 2. Microsoft’s Strategic Product Planning Documents Should Be Sealed.

4 Motorola has identified a number of potential trial exhibits that disclose Microsoft trade  
5 secrets relating to its confidential business practices, product development plans, and its  
6 marketing strategies with respect to both current and future products and services.<sup>7</sup> These trial  
7 exhibits relate to Microsoft’s (1) Xbox line of products and accessories (the “Confidential  
8 Xbox Strategic Planning Documents”) and (2) Windows operating system software products  
9 and services (the “Confidential Windows Strategic Planning Documents”). Compelling  
10 reasons exist to maintain these exhibits under seal, in the event they are admitted at trial.

11 The Confidential Xbox Strategic Planning Documents<sup>8</sup> contain detailed and highly  
12 sensitive product development and marketing plans for current Xbox products and accessories  
13 as well as the yet-to-be-released next generation Xbox game console. Declaration of Leo Del  
14 Castillo in Support of Microsoft’s Motion to Seal Trial Exhibits (hereinafter “Del Castillo  
15 Decl.”), ¶¶ 3-4. Similarly, the Confidential Windows Strategic Planning Documents<sup>9</sup> contain  
16 detailed and highly sensitive product development and marketing plans for Microsoft Windows  
17 products and services, including but not limited to the Windows 7 operating system software,  
18 the recently released Windows 8 operating system software, and key Cloud services such as  
19 Windows Update. Declaration of Erich Andersen in Support of Microsoft’s Motion to Seal  
20 Trial Exhibits (hereinafter “Andersen Decl.”), ¶ 3.

21  
22  
23 <sup>6</sup> Further, the four Microsoft licenses listed as Exs. 2813, 2828, 3076 and 3077 cover patents that are not relevant  
24 to determining the RAND royalty for Motorola’s 802.11 and/or H.264 standard essential patents. The public’s  
25 interest in having access to this licensing information is especially slight. *Id.*

<sup>7</sup> These potential trial exhibits are identified on Appendix A within the “Product Planning” category.

<sup>8</sup> Exs. 2125, 2138, 2353, 2366, 2385, 2584, 2585, 2687, 2688, 2689, 2727, 2730, 2908, and 3180.

<sup>9</sup> Exs. 2371, 2372, 2376, 2377, 2378, 2737, and 3179.

1           These materials disclose Microsoft’s strategic objectives, feature descriptions and  
2 analysis relating to significant products and services, technical product specifications,  
3 development and marketing timelines, competitive market analyses, and cost information. Del  
4 Castillo Decl., ¶¶ 3-4; Andersen Decl., ¶¶ 3-4. These are proprietary materials that consist of  
5 trade secrets not known to the public or Microsoft’s competitors. *Id.* Microsoft takes pains to  
6 ensure that such information remains confidential and protected against unauthorized  
7 disclosure, including producing such materials only under appropriate non-disclosure  
8 agreements and/or the terms of a Protective Order and even restricting internal access to such  
9 materials. *Id.*

10           Public disclosure of the trade secrets pervading Microsoft’s strategic product planning  
11 and marketing documents would cause competitive harm to Microsoft. Del Castillo Decl., ¶ 5;  
12 Andersen Decl., ¶ 5. Microsoft seeks to differentiate its Xbox and Windows products and  
13 services from those of its competitors, providing its customers with a higher quality product,  
14 exclusive features and a superior user experience. *Id.* Microsoft invests heavily in its efforts to  
15 achieve these goals, and expends significant time, effort and resources developing its product  
16 and marketing plans to reach these objectives and maintain or increase market share. *Id.*  
17 Disclosure of these materials would reveal Microsoft’s proprietary plans to its competitors,  
18 exposing Microsoft’s strategic objectives and providing to its competitors at no cost the  
19 comprehensive roadmaps that Microsoft has developed at substantial cost over many years. *Id.*  
20 Microsoft’s competitors should not be afforded such an unfair advantage.

21           “Compelling reasons” exist to seal the type of strategic Microsoft planning documents  
22 that Motorola intends to introduce at trial. *See, e.g., DISH Network, L.L.C. v. Sonicview USA,*  
23 *Inc.*, 2009 WL 2579052, at \*1 (S.D. Cal. Aug. 20, 2009) (sealing documents containing  
24 “descriptions of Defendants’ products [that] could serve as a blueprint for others to design  
25

1 similar products to circumvent DISH Network’s security system enabling more individuals to  
2 steal DISH Network programming”).<sup>10</sup>

3 3. Microsoft’s Source Code Documents Should Be Sealed.

4 Microsoft also anticipates that exhibits may be introduced at trial containing its  
5 confidential source code.<sup>11</sup> “[S]ource code is undoubtedly[sic] a trade secret . . . .” *Agency*  
6 *Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011)).  
7 District courts in the Ninth Circuit routinely hold that nonpublic, proprietary source code is  
8 properly sealed under the “compelling reasons” standard. *See, e.g., Apple*, 2012 WL 3283478  
9 at \*14; *Network Appliance*, 2010 WL 841274, at \*4-5; *Wacom Co., Ltd. v. Hanvon Corp.*,  
10 2007 WL 3026889, \*3 (W.D. Wash. Oct. 16, 2007). Here, any potential public interest in  
11 access to judicial records is outweighed by Microsoft’s significant interest in protecting its  
12 proprietary source code from disclosure to its competitors. The public disclosure of the source  
13 code would cause significant competitive harm to Microsoft because its competitors would be  
14 able to use Microsoft’s confidential and proprietary source code to Microsoft’s competitive  
15 disadvantage. Moreover, Microsoft’s source code has little relevance to the issues to be  
16 determined at the November trial in this case.

17 4. Technical Xbox-related Product Specifications Should Be Sealed.

18 At trial the parties may seek to introduce exhibits that include confidential technical  
19 information relating to the Xbox 360. This includes Microsoft’s Technical Publisher’s Guide

---

20  
21 <sup>10</sup> *See also, TriQuint Semiconductor*, 2011 WL 6182346, at \*3 (finding “compelling reasons” to seal where  
22 competitive standing would be harmed if competitors obtain information regarding business strategies, including  
23 “development spending, budgets, and development processes” because disclosure would significantly harm  
24 competitive standing by allowing “competitors to tailor their own capital expenditures, budgets, and business  
25 strategies to compete against TriQuint more effectively”); *Krieger v. Atheros Communications, Inc.*, 2011 WL  
2550831, \*1 (N.D. Cal. June 25, 2011) (sealing document containing “long-term financial projections, discussions  
of business strategy, and competitive analyses.”); *Bauer Bros. LLC v. Nike, Inc.*, 2012 WL 1899838, \*3 (S.D. Cal.  
May 24, 2012) (sealing documents containing confidential sales and advertising data and including a detailed  
discussion of “sales, merchandise costs, costs of goods sold, royalty costs, promotional costs, and personnel  
costs.”).

<sup>11</sup> Such potential trial exhibits are identified in Appendix A within the “Source Code” category.

1 (Ex. 288) and third-party Marvell Semiconductor's technical data sheets for certain of its  
2 802.11-enabled chips (Exs. 84 and 524).

3 Microsoft's Technical Publisher's Guide contains detailed technical information  
4 necessary for third party publishers to develop applications for Xbox Live and Xbox 360. Del  
5 Castillo Decl., ¶ 6. The Xbox Technical Publisher's Guide details the set of guidelines and  
6 requirements Microsoft has developed, through investment of significant time, effort, and  
7 resources, as a means to guarantee a level of quality in the product that Microsoft deems a  
8 differentiating advantage. *Id.* This information is proprietary, and is shared only with third  
9 party publishers under a non-disclosure agreement. *Id.* Public disclosure of these materials  
10 would provide Microsoft's competitors with an unfair and unearned competitive advantage  
11 conferring the benefits of Microsoft's work without a commensurate level of investment. *Id.*

12 Marvell supplies Microsoft with the semiconductor chips that provide the 802.11  
13 wireless networking capabilities in Microsoft's Xbox 360 game consoles. As explained in the  
14 accompanying declaration of Jennifer Ochs, Marvell's Director of IP Licensing, these data  
15 sheets disclose the design and operation of Marvell's chips. Declaration of Jennifer Ochs in  
16 Support of Microsoft's Motion to Seal Trial Exhibits (hereinafter "Ochs Decl."), ¶¶ 5-7.  
17 Marvell considers this to be confidential and proprietary trade secret information, which  
18 Marvell supplies to its customers only subject to a non-disclosure agreement. *Id.* Marvell  
19 would suffer a significant competitive disadvantage if its competitors were provided access to  
20 Marvell's confidential, proprietary design and operations information, which could facilitate  
21 development of competing chipsets. *Id.*

22 In light of the potential competitive harm resulting from disclosure of the proprietary  
23 information contained in Exhibits 84, 288, and 524 and the reasonable efforts to maintain the  
24 confidentiality of these documents, these exhibits – like proprietary source code – qualify as  
25 trade secrets. *See Clark*, 453 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *see*

1 also *In re Elec. Arts*, 298 Fed. App'x at 569-70; cf. *Agency Solutions.com*, 819 F. Supp. 2d at  
2 1017. The competitive harm resulting from disclosure of these materials outweighs any  
3 interest in public access to these records. These exhibits should therefore be sealed.

4 5. Microsoft's Confidential Product-Specific Financial Information, Including Past  
5 and Projected Sales and Revenue Data, Should be Sealed.

6 The parties may seek to introduce evidence regarding Microsoft's highly confidential  
7 past sales and revenue data, as well as Microsoft's highly confidential future sales and revenue  
8 projections for its products and services.<sup>12</sup> Disclosure of this evidence, and in particular  
9 disclosure of Microsoft's sales and revenue projections, would have the potential to lead to  
10 competitive harm by creating an asymmetry of information between Microsoft and  
11 competitors, whose sales and revenue results and projections are not public. Moore Decl. at ¶  
12 12, Del Castillo Decl., ¶ 9, Andersen Decl., ¶ 7. More importantly, Microsoft's competitors  
13 would be able to use this information to discern and anticipate Microsoft's past and future  
14 confidential business and marketing strategies, and to evaluate the success of those confidential  
15 strategies. For example, competitors might target Microsoft through advertising, or might  
16 adjust their own marketing strategies in order to undercut the parties' anticipated revenues and  
17 sales. This would provide Microsoft's competitors with an unfair and undeserved competitive  
18 advantage. *Id.*

19 Past and future sales and revenue data of this type constitute protectable trade secrets.  
20 *Bean v. John Wiley & Sons, Inc.*, 2012 WL 1078662, at \*5-6 (D. Ariz. Mar. 30, 2012) (sealing  
21 "precise revenue results" and "exact sales and production numbers," in charts summarizing  
22 defendant's sales and revenue figures broken out by product). The competitive harm that  
23 would result from disclosure of this information outweighs the public's interest in access to

---

24 <sup>12</sup> Microsoft's confidential and proprietary financial information is contained in the trial exhibits listed on  
25 Appendix A within the "Financial Information" category as well as in many of the documents within the "Product  
Planning" category including, but not limited to, Ex. 3179.

1 this information. Further, these sales and revenue figures for Microsoft’s products are not  
2 related to the central issues to be decided at the November trial – the appropriate RAND  
3 royalty and RAND range for Motorola’s 802.11 and H.264 standard essential patents.  
4 Accordingly, any exhibits that reveal this proprietary and confidential information should be  
5 sealed. *See, e.g., Clark*, 453 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *In re*  
6 *Elec. Arts*, 298 F. App’x at 569-70.<sup>13</sup>

7 6. Motorola’s Summary Document Disclosing the Parties’ Settlement Negotiations  
8 Should Be Sealed.

9 Motorola has indicated that it intends to submit a summary exhibit of its settlement  
10 negotiations with Microsoft (Ex. 3335). Motorola’s summary exhibit references confidential  
11 negotiations that took place under the terms of the parties’ November 12, 2010 Non-Disclosure  
12 Agreement, pursuant to which the parties agreed to keep their negotiations confidential. (*See*  
13 *Dkt. No 452.*) Both parties are requesting that such exhibit be sealed – if the exhibit is  
14 admitted into evidence at trial. If Motorola is *not* barred from introducing such information  
15 either by Fed. R. Evid. 408 or the terms of the parties’ Non-Disclosure Agreement, it should be  
16 maintained under seal. Public disclosure of such negotiations would negatively affect  
17 Microsoft in future settlement negotiations by permitting competitors and potential  
18 counterparties to such negotiations to enter those negotiations with unfair insight into  
19 Microsoft’s and Motorola’s business and licensing strategies, proposed licensing terms, and  
20 cost/benefit analyses. Moore Decl. at ¶ 13. Because public disclosure of these documents  
21 would thus have the potential to lead to an unfair business advantage and competitive harm,

---

22 <sup>13</sup> *See also Bauer Bros.*, 2012 WL 1899838, at \*3 (sealing documents containing confidential sales and  
23 advertising data and including a detailed discussion of “sales, merchandise costs, costs of goods sold, royalty  
24 costs, promotional costs, and personnel costs”); *F.D.I.C. v. Tarkanian*, 2012 WL 1327856, \* 2 (S.D. Cal. Apr. 17,  
25 2012) (sealing documents containing financial information); *TriQuint Semiconductor*, 2011 WL 6182346, at \*6  
(permitting redaction of information of “product-specific pricing, target prices, price proposals, and price  
forecasts” under “compelling reasons” standard because disclosure will harm bargaining position and give  
competitors the ability to undercut prices).

1 these documents qualify as trade secrets that should be sealed. *See, e.g., Clark*, 453 F.2d at  
2 1009 (quoting *Restatement of Torts* § 757, cmt. b); *In re Elec. Arts*, 298 F. App'x at 569-70.

3 Moreover, the parties' settlement negotiations are irrelevant to the determination of a  
4 RAND royalty and range for Motorola's patents. Microsoft's compelling interest in  
5 maintaining the confidentiality of settlement negotiations outweighs any slight interest the  
6 public may have in access to that information.

#### 7 **IV. CONCLUSION**

8 For the foregoing reasons, Microsoft respectfully requests an order directing that each  
9 of the potential trial exhibits listed in Appendix A be sealed, if admitted into evidence at trial.

10 In addition, because it is not possible to reliably predict which exhibits the parties will  
11 choose to introduce at trial (and which of those exhibits ultimately will be admitted into  
12 evidence), Microsoft requests the opportunity to submit a supplemental – and potentially  
13 superseding – motion to seal by no later than five (5) business days after conclusion of trial.  
14 The purpose of the proposed supplemental/superseding motion to seal would be to allow an  
15 opportunity for the parties to identify:

- 16 (a) any additional admitted exhibits that should be sealed, along with the basis for  
17 such request; and  
18 (b) any exhibits listed on Appendix A that were not admitted at trial, and which  
19 therefore would not be made publicly available even in the absence of a  
20 successful motion to seal.

21 Microsoft believes that this process, if acceptable to the Court, would streamline and  
22 facilitate consideration of the various pending motions to seal.  
23  
24  
25



1 DATED this 1<sup>st</sup> day of November, 2012.

2 CALFO HARRIGAN LEYH & EAKES LLP

3 By s/ Arthur W. Harrigan, Jr.

4 Arthur W. Harrigan, Jr., WSBA #1751  
5 Christopher Wion, WSBA #33207  
6 Shane P. Cramer, WSBA #35099

7 By s/ T. Andrew Culbert

8 T. Andrew Culbert  
9 David E. Killough  
10 MICROSOFT CORPORATION  
11 1 Microsoft Way  
12 Redmond, WA 98052  
13 Phone: 425-882-8080  
14 Fax: 425-869-1327

15 David T. Pritikin  
16 Richard A. Cederoth  
17 Constantine L. Trela, Jr.  
18 William H. Baumgartner, Jr.  
19 Ellen S. Robbins  
20 Douglas I. Lewis  
21 David C. Giardina  
22 John W. McBride  
23 David Greenfield

24 SIDLEY AUSTIN LLP  
25 One South Dearborn  
Chicago, IL 60603  
Phone: 312-853-7000  
Fax: 312-853-7036

Carter G. Phillips  
Brian R. Nester

SIDLEY AUSTIN LLP  
1501 K Street NW  
Washington, DC 20005  
Telephone: 202-736-8000  
Fax: 202-736-8711

Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

- 1. I am over the age of 21 and not a party to this action.
2. On the 1st day of November, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
Philip S. McCune, WSBA #21081
Lynn M. Engel, WSBA #21934
Summit Law Group
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104-2682
Telephone: 206-676-7000
Email: Summit1823@summitlaw.com

Messenger
US Mail
Facsimile
X ECF

Steven Pepe (pro hac vice)
Jesse J. Jenner (pro hac vice)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9046
Email: steven.pepe@ropesgray.com
Email: jesse.jenner@ropesgray.com

Messenger
US Mail
Facsimile
X ECF

Norman H. Beamer (pro hac vice)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4030
Email: norman.beamer@ropesgray.com

Messenger
US Mail
Facsimile
X ECF

1 Paul M. Schoenhard (*pro hac vice*)  
2 Ropes & Gray LLP  
3 One Metro Center  
4 700 12<sup>th</sup> Street NW, Suite 900  
5 Washington, DC 20005-3948  
6 Telephone: (202) 508-4693  
7 Email: [Paul.schoenhard@ropesgray.com](mailto:Paul.schoenhard@ropesgray.com)

\_\_\_\_ Messenger  
\_\_\_\_ US Mail  
\_\_\_\_ Facsimile  
 X  ECF

8 DATED this 1<sup>st</sup> day of November, 2012.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  

s/ Linda Bledsoe  
LINDA BLEDSOE