

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Microsoft Corporation
Petitioner,

v.

SurfCast, Inc.
Patent Owner

Patent No. 6,724,403

Issued: April 20, 2004

Filed: October 30, 2000

Inventor: Ovid Santoro et al.

Title: SYSTEM AND METHOD FOR SIMULTANEOUS DISPLAY OF
INFORMATION SOURCES

Inter Partes Review Nos. IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

**PETITIONER MICROSOFT CORPORATION'S
MOTION TO EXCLUDE**

Table of Contents

I.	INTRODUCTION AND LEGAL STANDARD	1
II.	EVIDENCE TO BE EXCLUDED	1
A.	SurfCast’s Expert Did Not Use the Board’s Claim Construction.....	1
B.	Improper Objections and Redactions Due to Privilege.....	2
C.	Uncorroborated and Speculative Diligence Testimony	5
D.	Outside the Scope of a Proper Reply	7
E.	Additional Irrelevant Evidence	11
F.	Daubert	15
III.	CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010)	13
<i>Daubert v. Merrell Dow Pharmaceuticals</i> , 509 U.S. 579 (1993).....	15
<i>In re Seagate Technology, LLC</i> , 497 F.3d 1360 (Fed. Cir. 2007)	2
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	15
<i>Lacks Industries, Inc. v. McKechnie</i> , 322 F.3d 1335 (Fed. Cir. 2003)	5
<i>Lockwood v. American Airlines, Inc.</i> , 107 F.3d 1565 (Fed. Cir. 1997)	13
<i>Purdue Pharma L.P. v. Faulding, Inc.</i> , 230 F.3d 1320 (Fed. Cir. 2000)	14
IPR2012-00027, Paper No. 26	10
IPR2013-00033, Paper No. 122	7, 8, 9
OTHER AUTHORITIES	
37 C.F.R. § 42.62	1
37 C.F.R. § 42.64	1
37 C.F.R. § 42.121(b)	8
Fed. R. Evid. 106	5
Fed. R. Evid. 401	1, 5
Fed. R. Evid. 403	1

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Fed. R. Evid. 702	1, 15
Fed. R. Evid. 703	1, 5
Fed. R. Evid. 901	5
Fed. R. Evid. 1002	5
Fed. R. Evid. 1003	5

I. Introduction and Legal Standard

Pursuant to 37 C.F.R. §§ 42.62 and 42.64, Petitioner hereby moves to exclude certain evidence propounded by the Patent Owner. Because Petitioner has timely objected to Patent Owner's evidence that does not comport with the Federal Rules of Evidence ("FRE"), or the rules of the Board, the Board should grant this Motion and exclude the evidence identified below from consideration.

II. Evidence to be Excluded

A. SurfCast's Expert Did Not Use the Board's Claim Construction

Petitioner moves to exclude certain paragraphs of Exhibits 2004 (Declaration of Glenn Weadock) because they rely on a claim construction that is differ from and inconsistent with the Board's claim construction; therefore, those paragraphs are irrelevant under FRE 401, lack foundation (FRE 703), rely on facts not in evidence (FRE 702), contain improper legal conclusions, and mischaracterize evidence (FRE 403). For example, Mr. Weadock relies on a definition of "tile" that includes the requirement of "selectable to provide access to underlying information of the associated information source" (*see, e.g.*, Ex. 2004, ¶¶ 29, 44), whereas the Board has construed "tile" to mean, *inter alia*, "when selected, [it] provides access to an information source." *See* IPR2013-00292, Decision on Institution of *Inter Partes* Review (Paper No. 19), at 9. The Board has expressly rejected Mr. Weadock's phraseology in its institution decision, *see id.* at

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

9, 27-28, 32, 35. Accordingly, Petitioner moves to exclude Ex. 2004 at ¶¶ 29, 44, 54, 92, 103-104, 119-120, 136, 137.

Petitioner objected to this evidence. *See* Letter from Micallef to Bone, Jan. 29, 2014 (objecting to Ex. 2004) (attached hereto as Attachment A). Patent Owner relies on these objectionable paragraphs in its Patent Owner Response. *See* SurfCast Inc.'s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 4, 5, 7, 43, 44, and 50.

B. Improper Objections and Redactions Due to Privilege

Patent Owner has redacted its putative diligence documents and refused to permit its main diligence witness to testify about the redacted portions, even while asserting that those portions support Patent Owner's claim to diligently reducing the claimed inventions to practice. The redacted documents are Exhibits 2010, 2035, 2049, and 2050. During his deposition, Patent Owner's prosecution counsel was instructed not to answer numerous questions regarding alleged diligence supposedly evidenced by these documents based on an assertion that the redacted portions of the documents were protected by the attorney-client privilege. *See, e.g.,* Ex. 2073, Bone Dep. Tr. at 33:2-7; 34:3-35-5; 54:16-56:5; 62:6-13; 144:24-145:14; 170:15-171:6. Because Patent Owner through its redactions and privilege assertions has precluded Petitioner from fairly interrogating Mr. Bone or testing Patent Owner's evidence, Mr. Bone's testimony should be excluded. *See, e.g., In*

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

re Seagate Technology, LLC, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (“This broad scope is grounded in principles of fairness and serves to prevent a party from simultaneously using the privilege as both a sword and a shield; that is, it prevents the inequitable result of a party disclosing favorable communications while asserting the privilege as to less favorable ones.”)

Patent Owner relies on the testimony of Mr. Bone to support its assertion of diligence. *See* SurfCast Inc.’s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 33. Petitioner objected to Patent Owner’s assertion of privilege in this regard. *See* Ex. 2073, Bone Dep. Tr. at 172:17-23. Petitioner therefore moves to exclude all of this testimony and the related direct testimony relied on by Patent Owner. *See, e.g.*, Ex. 2008, Declaration of Richard Bone, ¶¶ 10-12, 16-20, 22-42.

Petitioner also moves to exclude Patent Owner’s redacted exhibits. *See* Attachment A (objecting to exhibits based on improper redactions). Patent Owner should not be allowed to rely on Mr. Bone’s log-book, which allegedly indicates that Mr. Bone discussed the features of the patent application on certain dates, to establish diligence and at the same time assert privilege over the actual conversations. Specifically, Petitioner moves to exclude the following improperly redacted exhibits that are relied upon to establish diligence: Exhibit 2009 (1999 Letter to Ovid Santoro, cited in Patent Owner’s Response, IPR2013-00292 (Paper No. 27), at 32), Exhibit 2010 (November 16 1999 Invoice), Exhibit 2011 (August

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

4, 1999 Email), Exhibit 2012 (August 11 1999 Email), Exhibit 2015 (September 19 1999 Email), Exhibit 2016 (September 20, 1999 Email), Exhibit 2018 (August 10 1999 Email), Exhibit 2019 (August 19 1999 Email), Exhibit 2020 (August 19 1999 Email), Exhibit 2021 (August 24 1999 Facsimile), Exhibit 2022 (August 24 1999 Email), Exhibit 2035 (Richard Bone 1999 Time Log, cited in Patent Owner's Response, IPR2013-00292 (Paper No. 27), at 33-34), Exhibit 2049 (August 14 1999 Invoice, cited in Patent Owner's Response, IPR2013-00292 (Paper No. 27), at 33-34, and Exhibit 2050 (November 1999 Invoice, cited in Patent Owner's Response, IPR2013-00292 (Paper No. 27), at 33-34). *See* SurfCast Inc.'s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 32-35.

In addition, Petitioner moves to exclude the following exhibits with redacted dates, which are nevertheless relied upon to establish the *date* of conception:

Exhibit 2023 (Santoro Notebook), Exhibit 2024 (Brainstorming Email), Exhibit 2025 (email), Exhibit 2026 (email), Exhibit 2027 (email), Exhibit 2028 (email), Exhibit 2029 (email), Exhibit 2034 (email), Exhibit 2036 (email), Exhibit 2037 (SurfCast Software Summary), Exhibit 2038 (SurfCast Software Summary), Exhibit 2067 (email), and Exhibit 2068 (email). *See* SurfCast Inc.'s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 30-32.

In their redacted states, especially documents offered to prove conception and diligence with dates partially or completely redacted, these documents are

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

irrelevant under FRE 401, lack foundation (FRE 703), lack authenticity (FRE 901) and violate the doctrine of completeness (FRE 106). Petitioner further objects to these Exhibits because Patent Owner failed to file and serve unredacted versions. Additionally, these Exhibits are neither originals nor duplicates as defined by FRE 1002 and 1003.

Patent Owner relies on these redacted documents, Patent Owner's Response, IPR2013-00292 (Paper No. 27), at 28-35, and Petitioner has timely objected to them, Attachment A.

C. Uncorroborated and Speculative Diligence Testimony

Petitioner also moves to exclude the testimony by Richard Bone because it is uncorroborated and speculative. Specifically, Mr. Bone has a direct financial interest in the outcome of Patent Owner's assertion of the '403 patent against Petitioner in parallel litigation. *See, e.g.*, Ex. 2073, Bone Dep. Tr. 10:10-12; 19:6-9; 64:19-65:22. Because of that financial interest, his testimony must be corroborated by evidence from someone other than himself. *See Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc.*, 322 F.3d 1335, 1350 (Fed. Cir. 2003) (“[U]ncorroborated oral testimony by interested parties is insufficient as a matter of law.”) (citation omitted). Patent Owner, however, provides no sufficient corroboration, pointing only to certain invoices from Mr. Bone's prior law firm (Exhibits 2010, 2049, and 2050) and to Mr. Bone's log book (Ex. 2035).

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

However, these exhibits are not sufficient for corroboration because they either come from Mr. Bone himself (the log-book) or are not sponsored by any witness with personal knowledge about them (the invoices). *See* Ex. 2073, Bone Dep. Tr. at 30:4-10 (no one saw Mr. Bone write his log-book entries); 42:1-44:4 (Mr. Bone has no knowledge regarding invoices). Mr. Bone's testimony must therefore be excluded. Petitioner objected to that testimony, *see* Attachment A (objecting to Exs. 2010, 2049, and 2050 *and* Ex. 2073, Bone Dep. Tr. at 172:17-23 (objecting to testimony), and Patent Owner relies on that testimony, *see, e.g.,* SurfCast Inc.'s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 33-35.

Petitioner also moves to exclude certain testimony of Mr. Bone's because Mr. Bone has admitted that such testimony is speculation, rendering that testimony inadmissible because it is irrelevant and because Mr. Bone lacks personal knowledge of the facts he asserts. *See, e.g.,* Bone Tr. at 31:18-21; 34:4-12; 50:14-52:22; 54:5-7; 62:15-24; 92:12-22; 104:3-11; 118:24-119:21; 127:24-128:4; 130:6-9; 130:24-132:5; 136:18-21; 138:9-13; 139:13-18; 146:10-17; 150:2-151:24; 152:23-153:3; 154:18-24; 155:23-156:9; 157:1-15; 159:1-6; 159:17-160:3; 160:16-161:2; 162:13-22; 163:12-164:4; 165:10-19; 167:8-18; 168:9-20; 169:6-13; 170:15-171:6; 171:18-23. Petitioner objected to that testimony, Ex. 2073, Bone Dep. Tr. at 172:17-23, and Patent Owner relies on that testimony, *see, e.g.,* SurfCast Inc.'s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 33-35.

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

D. Outside the Scope of a Proper Reply

Petitioner also moves to exclude portions of Patent Owner's Reply in support of its motion to amend, and related portions of its reply declarations and deposition testimony of Patent Owner's expert Mr. Weadock, because those portions are outside the scope of a proper reply. For example, Patent Owner had an obligation to sufficiently construe its proposed amended claims in its motion. *See, e.g.*, IPR2013-00033, Paper No. 122 at 50-51. With its reply, Patent Owner advances new interpretations and alleged support for the proposed amended language "said grid of tiles being persistent from session to session" under the guise of what would be understood by a person of ordinary skill in the art and bases those arguments on new testimony from its expert. *See, e.g.*, SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 1-2; *see also* Ex. 2081, at ¶¶ 7-49. But that language was a key element of Patent Owner's proposed amendments, so it should have provided that testimony and argument in its motion so that Petitioner could have responded with its own counter-arguments and expert testimony. Petitioner objected to the expert's new testimony, *see* Attachment B (objecting to Ex. 2081), and Patent Owner relies on that new testimony, *see, e.g.*, *See* SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 1-2. The testimony should be excluded.

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Patent Owner also had an obligation to identify support for its proposed amended claims in its motion. *See, e.g.*, IPR2013-00033, Paper No. 122 at 53, *citing* 37 C.F.R. § 42.121(b). With its reply, its expert improperly offers new testimony on that issue, Ex. 2081, at ¶¶ 55, 56, citing new portions of the specification, rather than simply replying to Petitioner's evidence and arguments. *See, e.g., See* SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 3-4. Petitioner objected to the expert's new testimony, *see* Attachment B (objecting to Ex. 2081), and Patent Owner relies on that new testimony, *see, e.g.*, SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 3-4. The new testimony should be excluded.

Patent Owner also had an obligation to demonstrate in its motion patentability over the prior art in general. *See, e.g.*, IPR2013-00033, Paper No. 122 at 54-55, 58. With its motion, however, Patent Owner and its expert never address at all at least one important prior art reference, Myers (Ex. 1066), even though both were aware of Myers at least since Myers was served on Patent Owner with Petitioner's petitions. *See* Ex. 1066. With its reply, Patent Owner advances new, detailed testimony from its expert about Myers, *see* Ex. 2081 at ¶¶ 96-105, and relies on that testimony in its reply, *see* SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No.

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

62), at 2-3. Patent Owner appears to argue that Myers is less relevant than the references it did treat, apparently because it views Myers solely as potentially invalidating for obviousness. Whether Myers renders the claims unpatentable because of anticipation or obviousness is irrelevant to Patent Owner's obligations. A claim that is rendered obvious over the prior art is no less unpatentable than a claim that is anticipated by the prior art. Moreover, Patent Owner's burden was to "demonstrat[e] patentability of the proposed substitute claims over the prior art in general," IPR2013-00033, Paper No. 122 at 54-55, 58, not just over those references Patent Owner deemed most relevant.

Petitioner has objected to this new testimony. *See* Attachment B (objecting to Ex. 2081); *see also* Ex. 2089, Weadock Dep. Tr. at 144:20-145:3. Patent Owner's evidence should be excluded as outside the scope of proper reply.

Similarly, with its reply in support of its motion to amend Patent Owner advances completely new theories and evidence concerning whether the prior art Kostas application (Ex. 1051) renders its proposed substitute claims unpatentable. Specifically, with its motion, Patent Owner advanced the testimony of its expert that Kostas did not render the proposed claims unpatentable for only two reasons: (1) Kostas supposedly did not disclose "tiles", and (2) Kostas supposedly did not disclose calling two different application programs. *See* Ex. 2063 at ¶¶ 165-173. However, with its reply Patent Owner advances new testimony from its expert that

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Kostes does not render the proposed claims unpatentable because it does not disclose “wherein selecting a tile calls an assigned application program,” and Patent Owner relies on that testimony in its brief. *See* Ex. 2081 at ¶¶ 40-43, 80-95; *see also* SurfCast Inc.’s Patent Owner’s Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 5. Petitioner objected to this new testimony. *See* Attachment B (objecting to Ex. 2081). Such testimony should be excluded as outside the proper scope of reply.

For each instance of new evidence related to Patent Owner’s motion to amend discussed above, Patent Owner had the burden to include such evidence in its motion so that Petitioner would have a fair and reasonable chance to respond, including with expert testimony. There was no mystery or ambiguity to Patent Owner’s burdens, since the Board had discussed those burdens in several decisions predating the filing of Patent Owner’s motion to amend. *See, e.g.*, IPR2012-00027, Paper No. 26, at 7. Nor is it any answer that Patent Owner was page limited, since it never requested additional pages for its motion. (On that point, Petitioner observes that the Board has granted several page extensions in these proceedings.) Moreover, in its motion Patent Owner included amendments to six dependent claims for which it has never advanced a separate argument. A Patent Owner that ignores its burdens and wastes its pages is hardly in a position to complain when the Board actually applies its rules to the Patent Owner’s motion.

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

E. Additional Irrelevant Evidence

Petitioner also moves to exclude other evidence that is irrelevant because it relates to no argument being advanced in these proceedings. Specifically, Petitioner moves to exclude Ex. 2004, ¶ 114, Ex. 2081, ¶ 65 because it is irrelevant that the actual Active Desktop software does not arrange tiles into a 3x2 grid by default. The functionality described in the printed publication Ex. 1007 (*Microsoft Internet Explorer Resource Kit*) is what at issue here, not the functionality included in whatever commercial embodiment of the described software Mr. Weadock possessed in the late 1990s. Petitioner objected to this evidence, *see* Attachment A (objecting to Ex. 2004) and Attachment B (objecting to Ex. 2081), and Patent Owner relies on that evidence, *see, e.g.*, SurfCast Inc.'s Patent Owner's Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 5.

Petitioner also moves to exclude Ex. 2004, ¶ 85, 93, 101, Ex. 2063, ¶ 57, Ex. 2081, ¶ 12, 15 because what is required by a desktop replacement is not relevant to any issue in these proceedings, since the claims do not require a desktop replacement. Petitioner objected to this evidence, *see* Attachment A (objecting to Ex. 2004 and Ex. 2063) and Attachment B (objecting to Ex. 2081), and Patent Owner relies on that evidence, *see, e.g.*, SurfCast Inc.'s Patent Owner's Response to Petition, IPR2013-00292 (Paper No. 27), at 38; SurfCast Inc.'s Patent Owner's

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292
(Paper No. 62), at 1-5.

Petitioner also moves to exclude Ex. 2081, ¶ 98-102 because that testimony is directed to whether an application “run[s],” even though “run” is not a requirement of the amended claims. Petitioner objected to this evidence, *see* Attachment B (objecting to Ex. 2081), and Patent Owner relies on that evidence, *see* SurfCast Inc.’s Patent Owner’s Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 3.

Petitioner also moves to exclude Ex. 2081, ¶ 68 because whether the use of certain functionality described in MSIE Kit, Ex. 1007, “would sacrifice many of the benefits of the invention” is irrelevant to whether the claims are rendered unpatentable by MSIE Kit. It is the requirements of the claims that determine patentability, not the putative benefits of the invention. Petitioner objected to this evidence, *see* Attachment B (objecting to Ex. 2081), and Patent Owner relies on that evidence, *see* SurfCast Inc.’s Patent Owner’s Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 5.

Petitioner also moves to exclude Exhibit 2088 (Redacted Belfiore Transcript, cited in SurfCast Inc.’s Patent Owner’s Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 4) as irrelevant and lacking foundation, since Mr. Belfiore’s cited testimony related to a

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

hypothetical question about an unknown commercial embodiment of the Active Desktop software and not to Ex. 1007, MSIE Kit, the reference at issue in these proceedings. *See* Ex. 2088, Redacted Belfiore Dep. Tr. at 172:7-173:4. The uncited portions of Ex. 2088 are not relied on by any party and are therefore also irrelevant to the issues herein. Petitioner objected to this evidence, *see* Attachment B (objecting to the use of Ex. 2088), and Patent Owner relies on that evidence, *see* SurfCast Inc.’s Patent Owner’s Reply to Opposition to Motion for Conditional Amendment, IPR2013-00292 (Paper No. 62), at 4.

Petitioner also moves to exclude the testimony of Mr. Weadock suggesting that the written description requirement can be satisfied by what the specification of the ’403 patent indicates or suggests. *See, e.g.*, Ex. 2081, ¶ 11 (“These references **indicate** persistence . . .”), ¶ 12 (“[O]ne of skill in the art would further understand the statement that the grid [of tiles] ‘...replaces the functionality of the computer ‘desktop’ (ex. 1001 at 11:32-333) to **indicate** that tiles are persistent.”). Such testimony goes solely to whether the claim element would have been obvious from the specification, which does not satisfy the written description requirement as a matter of law. *See Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1571-72, (Fed. Cir. 1997). Further, that a specification may “indicate” a particular feature is irrelevant to whether it “**clearly allow[s]** persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed,” *Ariad Pharmaceuticals*,

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1351 (Fed. Cir. 2010) (internal quotations omitted) (citation omitted) (emphasis added), or whether “one skilled in the art, reading the original disclosure, **[would] immediately discern the limitation at issue** in the claims,” *Purdue Pharma L.P. v. Faulding, Inc.*, 230 F.3d 1320, 1323 (Fed. Cir. 2000) (emphasis added). The mere statement that something might be “indicated” from the specification, which is all Mr. Weadock supplies, is therefore insufficient as a matter of law to show written description support and therefore irrelevant.

Finally, Petitioner moves to exclude Exhibit 2051 (Diligence Chart, cited in SurfCast Inc.’s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 33), Exhibit 2052 (Diligence Chart, cited in SurfCast Inc.’s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 35), Exhibit 2065 (Claim Chart, cited in SurfCast Inc.’s Patent Owner Response, IPR2013-00292 (Paper No. 27), at 32), because they were created by SurfCast counsel for purposes of this proceeding. *See, e.g.*, Ex. 2074, Santoro Dep. Tr. at 126:22-135:10. They are therefore not evidence but lawyer argument (Exhibit 2065) or cherry-picked summary (Exhibits 2051 and 2052) of heavily redacted exhibits (including Exhibit 2035), all of which should be excluded for other reasons set forth in Section B. They should be excluded as irrelevant, lacking foundation, hearsay and in violation of the Board’s page limits for Patent Owner’s response.

F. Daubert

Petitioner moves to exclude Mr. Weadock's testimony that does not meet the standard for expert testimony set by FRE 702. Mr. Weadock testified that he has not considered "the kinds of things an expert would consider when trying to determine whether asking a program to receive information from an input device is calling it." *See* Ex. 1115, Weadock May 14 Dep. Tr. at 92:21-93:11. This statement is relevant to Mr. Weadock's Reply Declaration (Ex. 2081) at ¶ 98 ("Sapphire icons are not selectable to run an application.") and to the admissibility of Mr. Weadock's testimony generally. For example, Mr. Weadock could not even identify the criteria that an expert would rely on, and further, was unable to give an example of *anything* an expert would rely on, to support a conclusion in his own declaration. This demonstrates that Mr. Weadock's testimony is not the result of "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," as required by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), and is therefore unreliable and inadmissible. *See id.* at 152, *see also Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); Fed. R. Evid. 702.

III. Conclusion

Based on the reasons provided above, the Board should grant Microsoft's Motion to Exclude the identified evidence.

IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Dated: May 23, 2014

Respectfully Submitted,

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IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2014, a copy of this Petitioner
Microsoft Corporation's Motion to Exclude has been served in its entirety by e-
mail on the following counsel of record for Patent Owner, per 37 C.F.R. §
42.6(e)(4)(ii):

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Dated: May 23, 2014

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ATTACHMENT A

Jan. 29, 2014 Letter from Micallef to Bone
re Objections



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January 29, 2014

By Email

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Re: Microsoft Corporation v. SurfCast, Inc., IPR2013-00292, IPR2013-00293, IPR2013-00294, IPR2013-00295, and IPR2014-00271

Richard,

I write regarding several issues relating to SurfCast's recently filed Patent Owner Response and our email correspondence several days ago.

1. Concerning SurfCast's opposition to our motion for joinder, the rule you cite sets forth default filing dates. It does not appear to speak to whether a party may file an opposition as a matter of right. Moreover, our research indicates that the practice before the Board has been to seek permission from the Board before filing an opposition to a motion for joinder. *See, e.g.*, IPR2013-00004, Paper 18; IPR2013-00326, Paper 7. We therefore believe we should ask the Board for guidance on this issue, including whether and when Petitioner should file a reply. Please let us know when you will be available for such a call.

2. Although trial was instituted more than two months ago, SurfCast has not yet served its mandatory initial disclosures. Since we are now in Microsoft's discovery period, that failure prejudices Microsoft's discovery efforts. Please provide SurfCast's mandatory initial disclosures by the end of business tomorrow.

3. As you know, the Board rules require that "a party must serve relevant information that is inconsistent with a position advanced by the party during the proceeding concurrent with the filing of the documents or things that contains the inconsistency." 37 CFR 42.51(b)(1)(iii). It is clear that SurfCast did not even consider this rule upon filing its Response. For example, pages 51 and 52 of SurfCast's Response assert that Active Desktop does not perform the step of "partitioning a visual display of the device into an array of tiles" because it supposedly does not perform the required "partitioning." However, Mr. Lagermann's non-confidential deposition testimony clearly states the opposite. *See, e.g.*, Lagermann Tr. 194 2-9 and 293:12-18. While

Richard Bone, Esq.
January 29, 2014
Page 2

this is just one example from the public portion of Lagermann's deposition transcript, we note that all information known to SurfCast that is inconsistent with the positions it has advanced must be produced in the IPR, regardless of whether SurfCast has designated such information confidential in another proceeding. Please confirm in a reply email that Surfcast will produce such information immediately, or we will include this issue in our call with the Board.

4. The Board's rules require that all documents shall be made available to the public, except as otherwise ordered by the Board. *See* 37 CFR 42.14. The only exception to this rule is when a party intending a document to be sealed files a motion to seal concurrent with the filing of the document to be sealed. *See id.* Rather than abiding by these rules, SurfCast filed its Response as confidential, but never filed a motion to seal. We suspect the Board will rule that SurfCast has waived any confidentiality by failing to file such a motion to seal. Nevertheless, as a courtesy, we will treat the documents as confidential under the standard protective order at least for a limited period of time. Please let us know immediately if you intend to approach the Board for permission to file a belated motion to seal, or if we may assume the documents are not confidential.

5. As you may recall, the Board ordered the parties to confer as to how to streamline the proceedings by having certain claims stand or fall together once SurfCast files its Response. *See* Paper No. 25 at 3. With the exception of dependent claims 3, 4, and 29-31, the arguments in SurfCast's Response and Motion to Amend as to every other dependent claim merely recites the features of the independent claims from which they depend. Accordingly, we suggest we jointly ask the Board to order that (1) dependent claims 2, 5-21 stand or fall together with independent claim 1; (2) dependent claims 23-28, 32-45 stand or fall together with independent claim 22; and (3) dependent claims 47-52 stand or fall together with independent claim 46 (or, if necessary, dependent claims 54-59 stand or fall together with independent claim 53). Please let us know if you agree.

6. This letter serves as a courtesy notice to SurfCast that Microsoft seeks the depositions of SurfCast witnesses in the following order and for the indicated times: (1) Mr. Santoro (two days); (2) Mr. Bone (two days); (3) Mr. Dechaene (two days); (4) Mr. Lagermann (two days); and (5) Mr. Weadock (four days). We would like to begin these depositions in mid-February and complete them no later than March 14, 2014. We will notice the depositions for the D.C. office of Sidley Austin LLP. Please also provide us with dates, consistent with the schedule above, when these individuals will be available.



Richard Bone, Esq.
January 29, 2014
Page 3

7. Pursuant to 37 CFR 42.64, Microsoft hereby serves its objections to SurfCast's exhibits. Those objections are included below in Attachment A.

Sincerely,

/s/ Joseph A. Micallef
Joseph A. Micallef

Richard Bone, Esq.
January 29, 2014
Page 4

Attachment A: Petitioner Objections To Patent Owner Exhibits

- Exhibit 2004 (Declaration of Glenn Weadock): Microsoft objects to this document as irrelevant, lacking foundation, assuming facts not in evidence, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2005 (Declaration of Ovid Santoro): Microsoft objects to this document as irrelevant, lacking foundation, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2006 (Declaration of Klaus Lagermann): Microsoft objects to this document as irrelevant, lacking foundation, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2007 (Declaration of Tom Dachaene): Microsoft objects to this document as lacking foundation and personal knowledge, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2008 (Declaration of Richard Bone): Microsoft objects to this document as lacking foundation, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2009 (1999 Letter to Ovid Santoro): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2010 (November 16 1999 Invoice): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2011 (August 4, 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2012 (August 11 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2013 (August 26, 1999 Email): Microsoft objects to this document as irrelevant and lacking foundation.
- Exhibit 2014 (September 7 1999 Email): Microsoft objects to this document as irrelevant, lacking authenticity, and lacking foundation.
- Exhibit 2015 (September 19 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also

Richard Bone, Esq.
January 29, 2014
Page 5

objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.

- Exhibit 2016 (September 20, 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2017 (October 19 1999 Email): Microsoft objects to this document as irrelevant, hearsay, and lacking foundation.
- Exhibit 2018 (August 10 1999 Email): Microsoft objects to this document as irrelevant, hearsay, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2019 (August 19 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2020 (August 19 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2021 (August 19 1999 Facsimile): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2022 (August 24 1999 Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2023 (Notebook): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.

Richard Bone, Esq.
January 29, 2014
Page 6

- Exhibit 2024 (Brainstorming Email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2025 (web epq email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2026 (web epq dynasite email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2027 (web epq dynasite email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2028 (web epq dynasite email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2029 (web epq dynasite email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2030 (July 11 1999 email): Microsoft objects to this document as irrelevant and lacking foundation.
- Exhibit 2031 (August 25, 1999 email): Microsoft objects to this document as irrelevant.
- Exhibit 2032 (September 9 1999 email): Microsoft objects to this document as irrelevant.
- Exhibit 2033 (April 21 1999 Facsimile): Microsoft objects to this document as irrelevant.
- Exhibit 2034 (August 22 1999 email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.

Richard Bone, Esq.
January 29, 2014
Page 7

- Exhibit 2035 (Richard Bone 1999 Time Log): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2036 (web epg email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2037 (SurfCast Software Summary): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2038 (SurfCast Software Summary): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2039 (September 1999 Stock Pitch): Microsoft objects to this document as irrelevant.
- Exhibit 2040 (Executive Summary 1999-2000): Microsoft objects to this document as irrelevant.
- Exhibit 2041 (Photo): Microsoft objects to this document as irrelevant and misleading.
- Exhibit 2042 (August 11 1999 email): Microsoft objects to this document as irrelevant.
- Exhibit 2043 (Product Development Schedule): Microsoft objects to this document as irrelevant and hearsay.
- Exhibit 2044 (Product Description): Microsoft objects to this document as irrelevant and lacking foundation.
- Exhibit 2045 (Business Plan 1999-2000): Microsoft objects to this document as irrelevant and hearsay.
- Exhibit 2046 (Executive Summary 1999-2000): Microsoft objects to this document as irrelevant and hearsay.
- Exhibit 2047 (Overview of Planning and Development Process): Microsoft objects to this document as irrelevant and hearsay.
- Exhibit 2048 (Date Structure for SurfCast Grid): Microsoft objects to this document as irrelevant and lacking foundation.
- Exhibit 2049 (August 14 1999 Invoice): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version.

Richard Bone, Esq.
January 29, 2014
Page 8

See Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.

- Exhibit 2050 (November 1999 Invoice): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2051 (Calendar): Microsoft objects to this document as irrelevant, hearsay, incomplete, lacking foundation, and mischaracterizing evidence.
- Exhibit 2052 (Calendar): Microsoft objects to this document as irrelevant, hearsay, incomplete, lacking foundation, and mischaracterizing evidence.
- Exhibit 2054 (IEEE Dictionary): Microsoft objects to this document as irrelevant.
- Exhibit 2055 (MSIE Kit 1998): Microsoft objects to this document as irrelevant and incomplete.
- Exhibit 2056 (Graphics File Formats): Microsoft objects to this document as irrelevant and incomplete.
- Exhibit 2057 (Pentikousis Comparative Study): Microsoft objects to this document as irrelevant.
- Exhibit 2058 (Pentikousis Comparative Study Abstract): Microsoft objects to this document as irrelevant.
- Exhibit 2059 (Set Pixel Function): Microsoft objects to this document as irrelevant.
- Exhibit 2060 (Wessels Web Caching): Microsoft objects to this document as irrelevant.
- Exhibit 2061 (Yeager - Web Server Technology): Microsoft objects to this document as irrelevant.
- Exhibit 2062 (Intel IPAD): Microsoft objects to this document as irrelevant.
- Exhibit 2063 (Declaration of Glenn Weadock ISO Conditional Amendment): Microsoft objects to this document as irrelevant, lacking foundation, assuming facts not in evidence, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2065 (Claim Chart): Microsoft objects to this document as irrelevant, lacking foundation, assuming facts not in evidence, calling for legal conclusion, and mischaracterizing evidence.
- Exhibit 2067 (SurfCast Software Summary email): Microsoft objects to this document as irrelevant, hearsay, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B). Microsoft further objects to this document because it is neither the original nor a duplicate.
- Exhibit 2068 (SurfCast Software Summary email): Microsoft objects to this document as irrelevant, lacking foundation, lacking authenticity and incomplete, due to redaction. Microsoft also objects to this document because SurfCast has failed to file and serve an

Richard Bone, Esq.
January 29, 2014
Page 9

unredacted version. *See* Standard Protective Order at 77 Fed. Reg. 48756 (Appendix B).

Microsoft further objects to this document because it is neither the original nor a duplicate.

- Exhibit 2069 (Overview of Partitioning in My SQL): Microsoft objects to this document as irrelevant.
- Exhibit 2070 (USNews - Lowest Acceptance Rates): Microsoft objects to this document as irrelevant.
- Exhibit 2071 (NY_NJ Toll Rate Table): Microsoft objects to this document as irrelevant.

ATTACHMENT B

May 16, 2014 Letter from Micallef to Bone
re Objections



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FOUNDED 1866

May 16, 2014

By Email

Richard Bone, Esq.
VLP Law Group LLP
555 Bryant Street, Suite 820
Palo Alto, CA 94301

Re: Microsoft Corporation v. SurfCast, Inc., IPR2013-00292, IPR2013-00293,
IPR2013-00294, and IPR2013-00295

Richard,

Pursuant to 37 CFR 42.64, Microsoft hereby serves its objections to SurfCast's exhibits filed, on May 9, 2014, in connection with Patent Owner Reply To Petitioner's Opposition to Motion to Conditionally Amend. Those objections are listed below:

Exhibit 2078 (Win 95 Installation Requirements) - Microsoft objects to this document as lacking foundation, lacking authenticity, and irrelevant.

Exhibit 2079 (Win 98 Installation Requirements) - Microsoft objects to this document as lacking foundation, lacking authenticity, and irrelevant.

Exhibit 2080 (Win XP Installation Requirements) - Microsoft objects to this document as lacking foundation, lacking authenticity, and irrelevant.

Exhibit 2081 (Weadock Declaration ISO Reply to Opp for Mot to Amend) - Microsoft objects to this document as irrelevant, lacking foundation, assuming facts not in evidence, calling for legal conclusion, inconsistent with evidence of record, misleading, mischaracterizing evidence, untimely, and outside the scope of proper reply, examples of which include:

- Lacking foundation and assumes facts not in evidence: Paragraphs 7, 15, 27, 28, 33, 35, 36, 41, 42, 43, 45, 46, 47, 48, 49, 55, 56, 59, 60, 61, 65, 67, 73, 77, 79, 80, 82, 83, 84, 86, 89, 90, 92, 93, 94, 95, 96, 98, 99, 100, 102, 105
- Irrelevant: Paragraphs 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 24, 25, 26, 30, 34, 35, 35, 36, 40, 41, 42, 46, 48, 49, 50, 51, 52, 53, 54, 59, 62, 63, 65, 66, 68, 73, 75, 77, 78, 85, 89, 90, 91, 94, 96, 98, 99, 100, 101, 102
- Mischaracterization of evidence and misleading: Paragraphs 13, 15, 16, 18, 20, 21, 23, 24, 25, 29, 30, 31, 34, 35, 36, 38, 41, 42, 45, 47, 50, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 97, 98, 99, 100, 102, 103, 104, 105

Richard Bone, Esq.
May 16, 2014
Page 2

- Calling for legal conclusion: Paragraphs 8, 9, 15, 28, 30, 31, 33, 35, 43, 45, 55, 56, 59, 64, 77, 79, 92, 97, 102, 104, 105
- Inconsistent: Paragraphs 29, 33, 35, 41, 45, 48, 49, 58, 59, 60, 61, 63, 66, 67, 68, 72, 77, 81, 87, 88, 91, 93
- Untimely and outside the scope of proper reply: Paragraphs 22, 30, 31, 33, 35, 36, 40, 41, 42, 55, 56

Exhibit 2082 (Maine Claim Construction Order) - Microsoft objects to this document as irrelevant.

Exhibit 2083 (MS Dictionary for Bookmark) - Microsoft objects to this document as irrelevant.

Exhibit 2084 (MS Dictionary for File System) - Microsoft objects to this document as irrelevant.

Exhibit 2085 (RE43119) - Microsoft objects to this document as irrelevant.

Exhibit 2086 (WO9601032) - Microsoft objects to this document as irrelevant.

Exhibit 2087 (US8601198) - Microsoft objects to this document as irrelevant.

Exhibit 2088 (Redacted Belfiore Transcript) - Microsoft objects to this document as irrelevant and outside the scope of proper reply.

Sincerely,

/s/ Joseph A. Micallef
Joseph A. Micallef