DANIEL JOHNSON, JR. (SBN 57409)
RITA E. TAUTKUS (SBN 162090)
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Telephone: 415.442.1000
Facsimile: 415.442.1001
djjohnson@morganlewis.com
rtautkus@morganlewis.com

NATHAN W. McCUTCHEON (*pro hac vice*)
MARK W. TAYLOR (*pro hac vice*)
BRADFORD A. CANGRO (*pro hac vice*)
JACOB A. SNODGRASS (*pro hac vice*)
DAE GUNN JEI (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
Telephone: 202.739.3000
Facsimile: 202.739.3001
nmccutcheon@morganlewis.com
mark.taylor@morganlewis.com
bcangro@morganlewis.com
jsnodgrass@morganlewis.com
djei@morganlewis.com

Attorneys for Plaintiff
FUJIFILM CORPORATION

A. JAMES ISBESTER (SBN 129820)
BENJAMIN KLEINMAN-GREEN (SBN 261846)
KILPATRICK TOWNSEND & STOCKTON LLP
Two Embarcadero Center, Eighth Floor
San Francisco, CA 94111
Telephone 415.576.0200
Facsimile: 415.576.0300
jisbester@kilpatricktownsend.com
bkleinman-green@kilpatricktownsend.com

JORDAN TRENT JONES (SBN 166600)
KILPATRICK TOWNSEND & STOCKTON LLP
1080 Marsh Road
Menlo Park, CA 94025
Telephone: 650.326.2400
Facsimile: 650.326.2422
jtjones@kilpatricktownsend.com

Attorneys for Defendant
MOTOROLA MOBILITY LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FUJIFILM CORPORATION, a Japanese Corporation,

Plaintiff,

v.

MOTOROLA MOBILITY LLC, a Delaware Limited Liability Company,

Defendant.

Case No. C 12-03587 WHO

**JOINT STATEMENT ON FUJIFILM CORPORATION'S REQUEST TO DESIGNATE REPLACEMENT EXPERT WITNESS**



November 18, 2014

Hon. William H. Orrick
United States District Court for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Fujifilm Corp. v. Motorola Mobility LLC*, Case No. C 12-03587 WHO

Your Honor:

Plaintiff Fujifilm Corp. ("Fujifilm") and Defendant Motorola Mobility LLC ("Motorola") submit this Joint Statement pursuant to the Court's Standing Order. While submitted as a joint statement, each party's statement below is its own, and by signing this Statement, neither party intends to indicate its agreement with the other party's statement.

The parties are unable to certify that they have met the meet-and-confer requirement pursuant to the Court's Standing Order; however, for the following reasons, the parties respectfully request that they be excused from this requirement in this instance. The issue presented herein crystallized only within the past week and counsel for both Fujifilm and Motorola are taking expert depositions this week. Counsel for Fujifilm first learned on the afternoon of November 13, 2014, that its damages expert witness, Dr. Gordon Rausser, has had his credibility called into question in a separate lawsuit where Dr. Rausser serves as an expert witness. The details of that matter are discussed in the attached Law 360 article from Portfolio Media, Inc., entitled "Expert's Secret Links Scrutinized In Railroad Antitrust MDL."

In light of this development, Fujifilm asked Motorola to either agree to not raise at trial the credibility issues discussed in the Law 360 article, or to permit Fujifilm to submit a new damages expert report from a different damages expert by December 5, 2014. Motorola declined both proposed solutions, rejecting them even if Fujifilm were to cover Motorola's costs to rebut the substitute report. As such, in order to prevent undue prejudice to its case, Fujifilm now seeks relief to submit a substitute expert report related to damages. The following summarizes each party's position regarding this dispute.

**FUJIFILM'S STATEMENT**

The parties exchanged Initial Expert Reports on October 3, 2014, and Rebuttal Expert Reports on October 31, 2014. The parties are currently conducting expert depositions. Expert discovery is currently set to close on November 25, 2014, and dispositive motions are due December 9, 2014. Dr. Rausser's deposition is scheduled for November 21, and Motorola's damages expert deposition is scheduled for November 25. Trial is scheduled for April 20, 2015. Fujifilm does not believe that the present request to substitute its damages expert will affect the dispositive motion or trial date.

Fed. R. Civ. P. 16(b), provides that a scheduling order "may be modified only for good cause and with the judge's consent." Courts have held that Rule 16(b) governs a request to submit a replacement expert report after the deadline for expert discovery has expired. *See, e.g., Nat'l R.R. Passenger Corp. v. Expresstrak, LLC*, 2006 WL 2711533, at *2 (D.D.C. Sept. 21, 2006)

(applying Rule 16(b) in considering motion to substitute expert). The good cause standard requires the party seeking relief to show that the deadlines cannot "reasonably be met despite the diligence of the party seeking the extension." *Nat'l R.R. Passenger*, 2006 WL 2711533, at *2. In evaluating good cause, courts also consider "the potential prejudice faced by the movant" and the possible prejudice to the party opposing modification. *Id.* at *3-4 (permitting supplemental expert disclosures when it is discovered that an expert has provided inaccurate answers at a deposition, such that the expert's credibility is damaged); *see also Vincent v. Omniflight Helicopters*, 2009 WL 4262578, at *4 (E.D. Wis. Nov. 24, 2009) (permitting party to designate new expert after deadline, where expert's credibility was undermined at deposition by false statements set forth in his qualifications profile)..

In addition, Fed. R. Civ. P. 37(c)(1) contains an express provision under which a failure to timely disclose an expert may be excused where the failure was "substantially justified or harmless." *Id.*; *see also Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010) (finding that district court was within its discretion to allow expert testimony where party failed to timely disclose its expert's report). "Among the factors that may properly guide a district court in determining whether a violation of a discovery deadline is justified or harmless are: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Id.* (citation omitted).

The above factors justify substitution of Fujifilm's damages expert.

*First*, Motorola will not be unduly prejudiced or surprised because Fujifilm has already retained a new damages expert who can provide a substitute expert report by December 5, 2014, allowing Motorola sufficient time to serve a rebuttal report on December 19, 2014. This proposed schedule would give Motorola ample time to depose Fujifilm's substitute damages expert. Neither party has deposed the current damages experts. In addition, the damages expert testimony in this case is not likely to be the subject of any dispositive motions.

*Second*, Fujifilm will be significantly prejudiced if forced to proceed with Dr. Rausser as its damages expert witness. As shown by Motorola's refusal to agree to refrain from raising this issue at trial, the allegations in the Law 360 article call into question Dr. Rausser's credibility and pose a serious risk to Fujifilm's case. It would be extremely prejudicial to Fujifilm if it were forced to proceed with a damages expert embattled by allegations of untruthfulness that Motorola intends to exploit at trial when there is still ample opportunity to substitute experts. Moreover, if the court in the *In re Rail Freight Fuel Surcharge Antitrust Litigation*, No. 1:07-mc 00489 (D.C.) case were to conclude that Dr. Rausser's credibility has, in fact, been compromised, such an order may not come until closer to or on the eve of trial. At that point, Fujifilm will likely be unable to ameliorate the repercussions of any negative findings.

*Third*, substituting the damages expert will not disrupt the trial in any way. The trial date is not scheduled until April 20, 2015. Fujifilm is prepared to serve a replacement damages expert report by December 5, 2014 and to make the new expert available for deposition after Motorola serves its rebuttal report. Thus, the substitution will not affect the trial date.

*Fourth*, there was no bad faith or willfulness on the part of Fujifilm in failing to seek this substitution sooner. This issue only came to Fujifilm's attention a few days ago, on November 13, 2014. Counsel for Fujifilm alerted counsel for Motorola to this issue the next day and asked

whether Motorola would agree to not raise this issue at trial. Motorola responded yesterday, November 17, indicating that it would not agree to refrain from bringing this issue to the jury's attention. As soon as this issue came to light, Fujifilm took immediate steps to confirm with a substitute damages expert that it is in a position to serve a new report by December 5. To address any potential concerns of unfair advantage, Fujifilm will agree to not share Motorola's current damages expert report with Fujifilm's substitute damages expert. It is due to these rapidly unfolding and recent events that Fujifilm now seeks to substitute its damages expert, and is in no way a reflection of any purported bad faith.

For the foregoing reasons, Fujifilm respectfully requests that this Court permit Fujifilm to substitute its damages expert witness and to serve a new damages expert report on or before December 5, 2014.

**MOTOROLA'S STATEMENT**

Motorola opposes Fujifilm's request to substitute a new damages expert at this late stage in the case.

Fujifilm seeks a remedy that is both drastic and premature. Foremost, Fujifilm's "solution" would severely prejudice Motorola by forcing Motorola to rebut new substantive expert opinions and needlessly incur increased litigation costs. Fujifilm acknowledges that Dr. Rausser remains available to serve as an expert witness in this case. Thus, Fujifilm's only articulated concern is the potential prejudice created by issues relating to Dr. Rausser's credibility. A pretrial motion *in limine* is the most effective and fair way for the Court to consider this issue. In that context, the Court may appropriately address Fujifilm's concerns of prejudice without unfairly prejudicing Motorola. A substitute or replacement expert is unfair, unnecessary and impractical at this stage of the case.

Motorola Will be Prejudiced if Fujifilm is Permitted a New Expert

Courts considering motions to substitute expert testimony have routinely denied them where the non-moving party would be significantly prejudiced by a delay in the proceedings. *See, e.g., Smith v. Reynolds Transport Co.*, No. 3:11cv2728, 2012 U.S. Dist. LEXIS 147921, at *3 (D.S.C. Jan. 23, 2013) (denying motion to substitute because it would "entail significant prejudice both to Defendants and the administration of justice"); *See, e.g., Lopez v. I-Flow, Inc.*, No. 08-1063, 2011 U.S. Dist. LEXIS 155826, at *2 (D. Ariz. May 12, 2011) ("Courts regularly deny a request to late-disclose an expert witness where it would result in significant expense to the opposing side and delay proceedings.").

Motorola will be severely prejudiced if Fujifilm is permitted a new expert. Motorola has already spent hundreds of thousands of dollars opposing Dr. Rausser's report. Motorola rebutted Dr. Rausser's opinions not only in Motorola damages expert Nisha Mody's report, but also in Richard Eichmann's report. Mr. Eichmann's deposition took place on Tuesday, November 18. If Fujifilm were permitted to replace its damages expert, Motorola would not be given the two-week objection period to the expert required by the protective order, would have to re-draft two reports, Mr. Eichmann would need to be re-deposed, and deadlines for all summary judgment motions related to damages would need to be modified (extended). In order to modify these

deadlines, Fujifilm must demonstrate "good cause," which requires the party seeking relief to show that the deadlines cannot "reasonably be met despite the diligence of the party seeking the extension." *Nat'l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, 2006 WL 2711533, at *2 (D.D.C. 2006). If Dr. Rausser is not replaced, Fujifilm cannot demonstrate "good cause" to modify these deadlines because no deadlines will need to be modified. Because Fujifilm's concerns can be easily addressed with a motion *in limine*, no good cause exists.

Further, Motorola has consulted its experts Dr. Mody and Mr. Eichmann and their schedules prohibit the proposal made by Fujifilm. Due to preexisting scheduling and work conflicts, Mr. Eichmann is unable to provide a rebuttal report within the time suggested by Fujifilm. Dr. Mody is scheduled to be in trial for 7 of the 14 days Fujifilm has suggested be allotted to the rebuttal, and has preexisting work deadlines that prevent her from being able to commit to providing a rebuttal report in this matter during the 7 days remaining. Thus, if Fujifilm were to have its way, Motorola would be forced to find two new experts, get them up to speed on the case, and submit new rebuttal reports in two weeks' time, on late notice and over a holiday. Motorola has timely met all of its obligations and should not be forced to find new, replacement experts under the circumstances. The prejudice to Motorola in this situation is simply too great.

Fujifilm Should Not Be Permitted a Second "Bite at the Apple".

Courts considering motions to substitute expert testimony have also routinely denied them where the moving party seeks to benefit from broader or different testimony than the original expert. *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001) ("fairness does not require that a plaintiff…be afforded a second chance to marshal other expert opinions and shore up his case."); *see, e.g., Crandall v. Hartford Cas. Ins. Co.*, No. 10-00127, 2012 U.S. Dist. LEXIS 173995, at *3 (D. Idaho Dec. 6, 2012) (if an expert "is unavailable to testify at trial because of death…that is a legitimate and appropriate reason for allowing a new expert to be named," but holding that if a "party's relationship with an expert becomes difficult, and leads to some regret that someone else had not been hired instead, that is a problem of the party's own making, and not a proper basis to further delay the case").

Fujifilm would like the Court, and Motorola, to believe that the prejudice it may suffer if the jury is told at trial about Dr. Rausser's potential credibility issue is so severe as to justify an entirely new expert, and an entirely new expert report. Now that all expert reports have been exchanged, and now that Fujifilm has had the ability to review Motorola's damages expert Dr. Mody's report, it is clear that Dr. Rausser's report has fatal errors. The fact that Fujifilm does not offer as a solution that the Court could merely exclude or limit the credibility issues discussed in the Law360 article suggests that Fujifilm would prefer a second "bite at the apple."

It would be extraordinarily unfair to Motorola if now, after Fujifilm's counsel has viewed all of Dr. Mody's opinions, both her own regarding Fujifilm's damages and those rebutting Dr. Rausser's opinions, to allow Fujifilm a chance to write a new expert report, with new opinions, a new damages number, and relying on new evidence. Absent a scope of limitations, Fujifilm could solicit a new expert to offer more favorable opinions than Dr. Rausser. If the Court concludes it necessary to grant Fujifilm a substitution of its expert at this late stage, Fujifilm should be required to use an expert that will stand behind Dr. Rausser's current report and testify to the methodology, conclusions, and damages number put forth by Dr. Rausser. *Cardiac*

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