

The Honorable James L. Robart

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

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA
MOBILITY LLC, and GENERAL
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

REPLY IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

**NOTED ON MOTION CALENDAR:
Wednesday, July 31, 2013 at 10:00 a.m.**

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1 **I. PRELIMINARY STATEMENT**

2 Microsoft's opposition to Motorola's motion for partial summary judgment (Dkt. 740)
 3 provides a surprising dearth of case law supporting Microsoft's positions and fails to present
 4 "significant and probative evidence to support its claim[s]." *Paramount Pictures Corp. v. N. Pac.*
 5 *Int'l Television, Inc.*, No. C04-2068JLR, 2005 WL 1111209, at *1 (W.D. Wash. May 9, 2005)
 6 (Robart, J.). As to its breach claims, Microsoft points to no decision banning a standard-essential-
 7 patent ("SEP") holder from seeking injunctive relief, no facts demonstrating that Motorola failed
 8 to negotiate with Marvell when Marvell requested a license, and no link between any alleged
 9 breach of contract by Motorola and the MPEG LA obligations of non-party Google, whom
 10 Microsoft has failed to join as a necessary party. As to its damages claims, Microsoft argues that a
 11 party may contract away *Noerr-Pennington* protection but fails to show that Motorola has done so,
 12 and cites no cases allowing attorney fees as consequential damages under Washington law absent
 13 exceptions inapplicable here. This Court should grant Motorola's motion.

14 **II. ARGUMENT**

15 **A. Summary Judgment Is Warranted on Three Of Microsoft's Breach of**
 16 **Contract Theories**

17 **1. The Injunctive-Relief Breach Theory**

18 Microsoft fails to overcome Motorola's argument that it is entitled to summary judgment
 19 that seeking injunctive relief on its SEPs cannot breach any contract with the ITU or IEEE. *First*,
 20 Microsoft fails to adduce any contractual language to support its assertion (Dkt. 740, 3) that
 21 Motorola's commitment not to seek injunctions against implementers is "within the four corners
 22 of the RAND licensing contracts, independent of the duty of good faith and fair dealing." Nor
 23 could it, for neither Motorola's declarations to the ITU or IEEE nor any similar language from
 24 ITU and IEEE policies contain any language prohibiting Motorola or any other SEP holder from
 25 seeking an injunction or exclusion order. (*See* Dkt. 721, Exs. Q-T.) Microsoft is similarly
 26 mistaken to assert (Dkt. 740, 3) that Motorola's declarations to the ITU and IEEE "surrendered"
 its statutory right to seek an injunction on its SEPs. While Motorola made a commitment to

1 license its SEPs on RAND terms, it did not give up all rights to seek injunctions. Contractual
2 waivers of rights must be expressly stated. *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693,
3 707-709 (1983); *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, 2012 WL 5416941, at
4 *15 (W.D. Wis. Oct. 29, 2012) (“[A]ny contract purportedly depriving a patent owner of that right
5 should clearly do so.”). Microsoft cites no case to the contrary, and there is no contractual waiver
6 here, express or otherwise. Microsoft also errs in arguing in the alternative (Dkt. 740, 1-3) that an
7 implied duty of good faith and fair dealing may bar a SEP holder from seeking injunctive relief
8 even in the absence of any specific contract term. The implied duty of good faith and fair dealing
9 cannot be “free floating” and must be tied to express contract terms; it cannot be created out of
10 thin air. *Badgett v. Sec. State Bank*, 16 Wn. 2d 563, 569 (1991); *Ringler v. Bishop White Marshall*
11 *& Weibel, PS*, C13-5020BHS, 2013 WL 1816265, at *2 (W.D. Wash. Apr. 29, 2013).

12 *Second*, Microsoft cites no final decision by any court or relevant administrative body that
13 makes SEP holders categorically ineligible for injunctive relief. To the contrary, every decision to
14 date on the issue has held that injunctions *may* be appropriate for SEP holders in certain situations,
15 and Microsoft fails in its efforts (Dkt. 740, 4-7) to distinguish those decisions. Judge Crabb’s
16 decision in *Apple v. Motorola* analyzed the terms of RAND declarations to the IEEE and ETSI
17 that are materially identical to those here and properly found that they do not bar SEP holders
18 from seeking injunctions. The fact that she did not have a full hearing about the purpose of SSOs
19 does not devalue her interpretation of the plain terms of the relevant documents and policies.
20 Microsoft similarly fails to explain away Judge Posner’s statement in *Motorola v. Apple* that SEP
21 holders might be entitled to injunctions against unwilling licensees, or the recognition by the DOJ
22 and USPTO that exclusion orders may be an appropriate remedy in some circumstances. (*See*
23 Dkt. 720, 11.) And *Realtek*, on which Microsoft relies (Dkt. 740 at 5-6), acknowledges that an
24 injunction may be warranted when “an accused infringer of a[n SEP] outright refuses to accept a
25 RAND license.” *Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-03451-RMW, 2013 WL
26 2181717, at *7 (N.D. Cal. May 20, 2013).

1 The ITC's recent exclusion order against certain Apple iPhones underscores why
2 Microsoft's proposed rule foreclosing all injunctive or exclusionary relief to SEP holders is
3 untenable: namely that, without injunctive or exclusionary relief, SEP holders will be subject to
4 the problem of reverse hold-up. *See In the Matter of Certain Electronic Devices*, No. 337-TA-794
5 (ITC 2013) (public version) (Dkt. 738). The decision explains that, "[i]n reverse patent hold-up,
6 an implementer utilizes declared-essential technology without compensation to the patent owner
7 under the guise that the patent owner's offers to license were not fair or reasonable. The patent
8 owner is therefore forced to defend its rights through expensive litigation. In the meantime, the
9 patent owner is deprived of the exclusionary remedy that should normally flow when a party
10 refuses to pay for the use of a patented invention." *Id.* at 63.

11 Unable to dispute this unbroken line of authority, Microsoft argues that it is not an
12 unwilling licensee. (Dkt. 740, 9.) But Microsoft first indicated it was willing to accept a RAND
13 license only *after* Motorola filed its actions for injunctive relief. Microsoft never stated as much
14 in its original or amended complaints (Dkt. 1, 53; *see also* Dkt. 318 at 16 fn. 12), as this Court
15 noted in its May 2012 order (Dkt. 318 at 16 n.12). Moreover, Microsoft disputes in this case that
16 Motorola's patents are essential (Dkt. 1, ¶ 7), further negating its argument that it is a willing
17 licensee. This Court should not allow Microsoft to argue at the outset that Motorola may not seek
18 an injunction because SEPs are involved and then argue that SEPs are not actually involved.

19 None of the cases cited by Microsoft supports its position that seeking an injunction is
20 categorically barred so as to constitute a breach of contract. Contrary to Microsoft's contention
21 (Dkt. 740, 4), the Ninth Circuit did *not* "recognize[] that Motorola's RAND licensing
22 commitments were not consistent with pursuing injunctions," but rather found only that agreeing
23 to license patents on RAND terms is "at least arguably" an agreement not to seek an injunction.
24 *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012). This is far from a clear
25 statement barring SEP holders from ever seeking injunctive relief. The same is true for this
26 Court's order denying injunctive relief, which states that it "is based on the specific circumstances

1 and rulings that have developed in this litigation. If, in the future . . . circumstances change in a
2 manner to warrant injunctive relief, Motorola *may at that time seek such relief.*” (Dkt. 607 at 15
3 (emphasis added).) While Microsoft relies (Dkt. 740 at 7-8) upon FTC and European Commission
4 statements, neither Motorola nor Google admitted to any wrongdoing in the January 2013
5 settlement agreement with the FTC, and the statements of the European Commission are
6 “preliminary” and do not constitute a binding decision. (*See* Dkt. 731 at 3-4.)

7 *Third*, Microsoft is unable to explain its own internally inconsistent positions regarding the
8 availability of injunctive or exclusionary relief to SEP holders. Microsoft stated in a letter to the
9 FTC in June 2011 that RAND commitments “*should not preclude a patent holder from seeking*
10 *preliminary injunctive relief* or commencing an action in the International Trade Commission.”
11 (Dkt. 721-5, Ex. W at 13 (emphasis added).) Now Microsoft argues that Motorola was precluded
12 in October 2010 from doing exactly what Microsoft itself argued was permissible in June 2011.
13 Microsoft fails to explain away this contradiction by responding (Dkt. 740, 10, n.4) that
14 “Microsoft’s June 2011 state of mind does not control” whether Motorola was barred from
15 seeking injunctions in October 2010.

16 Nor does Microsoft explain how Motorola could have violated its duty of good faith and
17 fair dealing in seeking injunctions when the scope of RAND commitments remained in dispute at
18 the time Motorola filed for injunctive relief (and does so to this day). Microsoft itself filed an
19 amicus brief in support of Apple against Motorola, arguing that no categorical rule against
20 injunctions exists but that the court was correct in denying an injunction in that case. *Br. of*
21 *Microsoft Corp. as Amicus Curiae in Support of Apple Inc.*, Dkt. 143, at 23-25, *Apple Inc. v.*
22 *Motorola, Inc.*, Nos. 2012-1548, 2012-1549 (Fed. Cir. Mar. 20, 2013). With respect to whether
23 injunctions are ever available for SEPs, Microsoft referred to that question as “interesting,” but
24 never identified any ban, thus undercutting its argument in this case that there is a contractual
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1 prohibition against injunctions. *Id.* at 24. If such a clear contractual prohibition existed, Microsoft
2 would have identified it.¹

3 *Fourth*, Microsoft fails to point to valid evidence that Motorola’s request for injunctive
4 relief proximately caused the attorney-fee damages Microsoft seeks to recover. Microsoft does
5 not explain how to segregate the attorney fees that it incurred defending against claims for
6 injunctive relief from those it would have incurred even if Motorola had sought only monetary
7 damages. Microsoft responds by saying that most of the work was done on the ITC action, where
8 only injunctive relief is available, but fails to identify which attorney fees were incurred working
9 on the ITC matter. Nor does Microsoft show that it can distinguish the amount of attorney-fee
10 damages incurred from Motorola’s claims on its IEEE 802.11 SEPs from those incurred from
11 Motorola’s claims on its ITU H.264 SEPs. Microsoft now claims (Dkt. 740,12) *for the first time*
12 that its witness David Killough “is fully capable of classifying individual time entries as being
13 associated with Motorola’s assertion of the 802.11 or H.264 patents in the ITC.” But Microsoft
14 did not offer this evidence in its interrogatory responses, documents, or expert testimony, and its
15 newly minted declaration from Mr. Killough purporting to be able to differentiate the time entries
16 by breach claim should not be accepted, for it is incomplete and an inappropriate end-run around
17 submitting an expert report.²

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20 ¹ The brief indicates that one of its authors is David Killough, an attorney for Microsoft who Microsoft proposes to
be a witness at this trial.

21 ² Microsoft initially identified Mr. Killough as an expert witness on May 29, 2013, but submitted no expert report
22 from him. (Ex. A.) Microsoft then withdrew Mr. Killough as an expert witness on June 12, 2013, two days before he
23 was scheduled to be deposed. (Ex. B.) In withdrawing Mr. Killough, Microsoft confirmed that he would not be
24 offering any expert testimony in this case. (Ex. C.) Yet Microsoft is necessarily attempting to offer expert testimony
25 through Mr. Killough, as Mr. Killough’s declaration cannot be based on personal knowledge. He admitted at his
26 deposition—where he was a 30(b)(6) designee regarding damages calculations—that he lacks personal knowledge
regarding how each time entry was allocated because Ellen Robbins actually performed all of the allocations. (Ex. D,
121:14-16.) When asked which Sidley team members worked primarily on Motorola’s 802.11 SEPs, Mr. Killough
could not identify any, and when asked the same question regarding the H.264 SEPs, he could identify only one. (*Id.*,
47:15-48:1.) Although Mr. Killough claims now that he is “generally aware that specific attorneys had primary
responsibility for issues relating to Motorola’s 802.11 patents and others to Motorola’s H.264 patents” (Dkt. 742, ¶ 6),
such a statement contradicts his earlier sworn deposition testimony and should be disregarded.

1 For all these reasons, summary judgment should be granted to Motorola on Microsoft's
2 injunctive-relief theory of breach.³

3 2. The Marvell And MPEG LA Breach Theories

4 In answer to Motorola's argument that this Court should also grant summary judgment on
5 Microsoft's Marvell and MPEG LA breach theories, Microsoft relies (Dkt. 740, 21) on the Court's
6 decision not to preclude these theories at the discovery stage despite their late disclosure. That
7 reliance is unavailing. To recap: On May 1, 2013, Motorola requested that the Court limit
8 Microsoft's damages theories to those disclosed prior to the supplemental interrogatory responses
9 Microsoft served on April 3, 2013, which included vague arguments regarding Motorola's conduct
10 vis-à-vis Marvell and MPEG LA. (Dkt. 682.) During the Court's telephonic conference,
11 Microsoft's counsel conceded that there was "no separate damages claim" associated with either
12 of these theories. (Dkt. 721-6, Ex. BB, 8:13-17.) While the Court acknowledged that these
13 theories were newly raised (*id.* at 6:2-14), it allowed the arguments to remain, as previously
14 discussed during the RAND rate bench trial (*id.* at 12:14-21). Accordingly, these allegations
15 survived a motion to preclude during a pretrial *discovery* dispute, *not* a summary judgment
16 determination. Now that discovery is closed, Microsoft cannot show that these theories of breach
17 should be presented to a jury without an individual showing as to each of duty, breach, or
18 damages.

19 With respect to the Marvell theory, the undisputed facts show that Marvell contacted
20 Motorola at Microsoft's request. And far from "rebuff[ing]" Marvell "with an intentionally
21 discriminatory and blatantly unreasonable offer" (Dkt. 740 at 21), Motorola told Marvell that it
22 did not need a license (Dkt. 720 at 15). Nevertheless, Marvell has been silent for over eight
23 months. (*Id.*) Marvell's decision to constructively abandon negotiations and half-heartedly
24

25 ³ Nor does Microsoft offer evidence sufficient to survive summary judgment that, even if injunctive relief is
26 sometimes permitted, Motorola's claims for injunctive relief were not in good faith in this case. To the contrary, the
undisputed evidence shows that Motorola resorted to seeking injunctive relief only *after* Microsoft refused to
counteroffer or negotiate and only *after* Microsoft sued Motorola in multiple forums.

1 pursue a license it did not need only at Microsoft's request cannot be construed as Motorola's
2 failure to uphold its RAND obligations. Microsoft's attempt to manufacture a dispute between
3 Marvell and Motorola has failed and Motorola's claim for summary judgment should be granted.

4 With respect to MPEG LA, Microsoft cannot escape the fact that this is a Google license,
5 and Google is not a party to this action. (See Dkt. 720 at 15.) Motorola is not a party to the
6 agreement. (See Dkt. 658 at 1.) Nevertheless, Microsoft asks this Court to rule upon the scope of
7 Google's license. Microsoft's latest argument, that the August 2012 MPEG LA-consistent
8 licensing offer was inadequate because "*Google* insisted on a right to pursue past damages" (Dkt.
9 740 at 24) (emphasis added)), underscores this important distinction. The court has no jurisdiction
10 to rule on Google's contractual obligations. Indeed, Microsoft chose strategically not to join
11 Google in order to preserve the trial date for the first phase. (See Dkt. 721-6, Ex. CC at 33:22-
12 34:5.) Having made that choice, Microsoft cannot now seek a ruling on Google's obligations
13 under the MPEG LA license.

14 Finally, with regard to damages, Microsoft suggests (Dkt. 740, 23), without providing any
15 legal support, that the failure of its expert to apportion damages specific to each of these breach
16 theories is not an issue. This argument ignores that damages are an essential element of
17 Microsoft's breach-of-contract claims. Motorola's conduct with respect to MPEG LA (H.264)
18 and Marvell (802.11) does not relate to the same SEPs, and yet Microsoft's purported expert did
19 not calculate the alleged damages associated with Motorola's claimed breach of its obligations to
20 each respectively. (See generally Dkt. 734, Ex. A; Dkt. 721-6, Ex. Z at 104:8-16, 179:25-180:5.)
21 If, as Microsoft alleges, Motorola breached its purported contracts with respect to its non-existent
22 MPEG LA obligations and its fully discharged Marvell obligations, then each constitutes a
23 separate breach and Microsoft's inability to identify the damages resulting from each breach
24 negates its ability to establish a necessary element. See *Stephen Haskell Law Offices, PLLC v.*
25 *Westport Ins. Corp.*, No. CV-10-437-JLQ, 2011 WL 1303376, at *6 (E.D. Wash. Apr. 5, 2011).
26 Summary judgment is thus warranted on both theories.

1 **B. Summary Judgment is Warranted on Microsoft’s Damages Claims.**

2 Microsoft cannot deny that the damages it seeks—attorney fees and the costs of moving
3 its EMEA facility—all stem from Motorola’s enforcement of its patents. Because the *Noerr-*
4 *Pennington* doctrine protects Motorola’s petitioning rights, and Motorola has never given up that
5 protection, the doctrine bars Microsoft from recovering such damages. If this Court rules the
6 *Noerr-Pennington* doctrine inapplicable, this Court still should grant Motorola summary judgment
7 as to the attorney-fee damages because Microsoft points to no exception permitting its recovery of
8 such fees as damages for breach of contract.

9 **1. The *Noerr-Pennington* Doctrine Bars The Specific Damages Microsoft
10 Seeks To Recover Here**

11 Microsoft’s argument that the *Noerr-Pennington* doctrine does not bar the breach of
12 contract damages Microsoft seeks here suffers from a fundamental flaw. Although courts have
13 held that parties “may waive or limit their petitioning rights by contract” (Dkt. 740 at 14),
14 Microsoft can point to no provision of the purported contracts at issue here in which Motorola
15 waived such rights. As the Ninth Circuit has held in this very case with regard to Motorola’s
16 German patents, “Motorola is free to continue litigating its German patent claims against
17 Microsoft as to damages or other non-injunctive remedies to which it may be entitled.” *Microsoft*
18 *v. Motorola*, 696 F.3d at 889. This principle applies equally to the non-German patents at issue
19 here. Thus, unlike the cases upon which Microsoft relies, Motorola has not ““bargained away any
20 protection *Noerr-Pennington* may have offered.”” (Dkt. 740 at 14 (quoting *Bores v. Domino’s*
21 *Pizza LLC*, No. 05-2498, 2008 WL 4755834 at *4 (D. Minn. Oct. 27, 2008))).

22 Although Microsoft correctly points out that Judge Crabb did not dismiss Motorola’s
23 contract claim, Apple sought through an antitrust claim the same type of damages that Microsoft
24 seeks here—namely, attorney fees for patent enforcement litigation—and Judge Crabb properly
25 found such damages barred by the *Noerr-Pennington* doctrine. *Apple, Inc. v. Motorola Mobility,*
26 *Inc.*, 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012) (“[T]he only injury Apple suffered as a result
of Motorola’s alleged antitrust violation was the attorney fees and costs that it has incurred

1 responding to the patent litigation initiated by Motorola. Apple’s damages expert identifies no
 2 other damages except litigation fees and expenses. Thus, Apple’s antitrust claim is premised on
 3 Motorola’s attempt to enforce its patents. Because Motorola’s enforcement of its patents is
 4 privileged conduct protected by the First Amendment, the *Noerr-Pennington* doctrine applies.”).
 5 Motorola has not suggested that *Noerr-Pennington* bars the contract claim in its entirety, but
 6 merely that the doctrine cannot be reconciled with the damages Microsoft claims for defending
 7 against patent infringement suits. These are the very same sort of damages to which Judge Crabb
 8 found the *Noerr-Pennington* doctrine applied.⁴

9 Although Microsoft argues (Dkt. 740 at 15) that “Motorola fails to show that no material
 10 dispute exists as to whether its conduct could be subject to the ‘sham litigation’ exception,” “[a]s
 11 the party asserting the sham exception, [Microsoft] has the burden of showing that it should
 12 apply.” *Id.* at 1077. Microsoft has pointed to no “significant and probative evidence to support
 13 its claim or defense,” *Paramount Pictures Corp.*, 2005 WL 1111209, at *1, that any one of the
 14 patent claims Motorola asserts is objectively baseless and certainly cannot show that *each* claim is
 15 objectively baseless. Such a showing would require that “no reasonable litigant could realistically
 16 expect success on the merits,” *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*,
 17 508 U.S. 49, 60 (1993). No such showing is possible here, where Motorola has succeeded on
 18 several issues. Accordingly, this court should grant summary judgment and find Microsoft’s
 19 damages claim barred by the *Noerr-Pennington* doctrine.⁵

20 **2. No Decision Supports Recovery of Attorney Fees As Damages For A** 21 **Breach Of Contract Claim In Circumstances Like Those Here**

22 Although Microsoft attempts to paint its claim for attorney fees as one for consequential
 23 damages, Microsoft cites no case permitting the recovery of attorney fees as consequential

24 ⁴ Microsoft’s footnote discussing abuse of process (Dkt. 740 at 15 n.5) is entirely irrelevant here as Microsoft has
 25 not brought such a claim.

26 ⁵ Microsoft’s citation to a brief in a dispute involving Innovatio (Dkt. 741-9) provides no support for Microsoft’s
 argument here because, in that case, Motorola Solutions argued that Innovatio’s conduct was objectively baseless
 because the end-users that were targeted were using products that were *already licensed*. (Dkt. 741-9, 15.)

1 damages absent some exception to the American rule. As Motorola explained (Dkt. 720, 22), it is
 2 well-established that “Washington courts traditionally follow the American rule in not awarding
 3 attorney fees as costs absent a contract, statute, or recognized equitable exception.” *City of Seattle*
 4 *v. McCready*, 131 Wn. 2d 266, 273-74 (1997).⁶ In fact, “a more accurate statement of
 5 Washington’s American rule is attorney fees are not available as costs *or damages* absent a
 6 contract, statute, or recognized ground in equity.” *Id.* at 275 (emphasis added). Microsoft cites no
 7 contractual or statutory basis for attorney fees and fails to meet the requirements for any equitable
 8 grounds on which it seeks to rely.

9 Contrary to Microsoft’s suggestion, “consequential damages” is not a recognized exception
 10 to this well-established doctrine of Washington law. Microsoft selectively quotes (Dkt. 740, 17)
 11 from *McCready*—in which the court did not award any attorney fees—by omitting the limits
 12 imposed at the beginning of the quoted sentence: “*The exceptions recognizing awards of attorney*
 13 *fees as damages* are based on a determination a wrongful act may leave another party with no
 14 choice but to litigate.” *McCready*, 131 Wn. 2d at 278 (emphasis added). In fact, Washington law
 15 directly contradicts Microsoft’s suggestion that attorney fees may be sought as consequential
 16 damages for breach of contract absent some exception. *Stephen Haskell Law Offices, PLLC*, 2011
 17 WL 1303376, at *6 (“This is a breach of contract action, and [plaintiff] would not be entitled to
 18 attorney’s fees under the ‘American rule’ absent some statutory, contractual, or other specified
 19 basis.”). As the Washington Supreme Court has explicitly recognized, it is only through some
 20 exception that Microsoft may recover attorney fees as damages.⁷ Thus, for instance, the equitable
 21

22 ⁶ Although Microsoft relies on the Restatement (Second) of Contracts, § 347 to define its damages as “loss,
 23 including incidental or consequential loss, caused by breach,” (at 16) as Judge Posner explained “it seems apparent
 24 that ‘loss’ does not include attorneys’ fees incurred in the litigation of a suit for breach of contract.” *Zapata*
 25 *Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002) (citing Restatement (Second)
 26 of Contracts § 347 (9181)).

⁷ Microsoft merely highlights the baseless nature of its claim for attorney fees as damages in arguing that the
 American rule provides that “attorneys’ fees incurred in an action are generally not awarded as costs or damages to a
 prevailing party *in that same action* in the absence of a contract, statute or equitable exception.” (Dkt. 740 at 17.)
 Such an argument ignores that it follows, *a fortiori*, that fees are not recoverable in a *separate* action and *McCready*
 makes clear that the American rule applies to claims for attorney fees as damages as well as costs.

1 indemnity exception specifically permits attorneys fees as consequential damages, *W. Cmty. Bank*
2 *v. Helmer*, 48 Wn. App. 694, 699-700 (1987), and thus it is the exception—and not the rule—that
3 allows recovery of attorney fees as consequential damages. As Motorola explained previously
4 (Dkt. 720, 23), this exception does not apply here because the litigation for which Microsoft seeks
5 attorney fees is not with a third party.

6 Motorola also previously explained (Dkt. 720, 23-24) that the exception to the rule for
7 recovery of fees for dissolving an injunction does not apply here. Even if Microsoft were correct
8 that it could seek fees on its motion for an anti-suit injunction against the German court's
9 injunction, one of the cases Microsoft cites would disallow any of the appellate fees because this
10 court granted the anti-suit injunction. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 144
11 (1997) (“[I]n prior cases we have allowed recovery for attorneys’ fees incurred at the appellate
12 level only when appeal was necessary to dissolve a currently effective temporary restraining
13 order.”). Further, Microsoft’s citation (Dkt. 740, 18) to the stated purpose for permitting a fee
14 award (“to deter ‘seeking relief prior to a trial on the merits’”), does not apply to the German
15 proceeding, as the German court issued its injunction after a full trial on the merits. And despite
16 Microsoft’s attempt to escape from the prerequisite that the party must seek to dissolve the
17 injunction, the cases Microsoft cites only serve to confirm that “such fees, in order to be allowable
18 as damages, must be those connected with the motion or other similar proceeding for the
19 dissolution of the injunction and not those covering the defense of the action on its merits.” *Cecil*
20 *v. Dominy*, 69 Wn. 2d 289, 292 (1966).⁸ Microsoft also is entirely incorrect in stating (Dkt.
21 740,19) that, “if Motorola had sought a preliminary injunction in the consolidated 343 patent
22 case, . . . this equitable exception would allow Microsoft to recover its fees in the 343 patent case.”
23 Not only are these not the facts present here, but Washington law provides an extremely narrow
24 exception that specifically does not permit recovery of any fees in cases involving injunction

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26 ⁸ *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn. App. 732 (2000) provides no support for Microsoft’s
argument that it may recover the costs of the anti-suit injunction as a separately filed action challenging the German
injunction, as there the court reversed the award of attorney fees. *Id.* at 742.

1 *except* for fees incurred in attempting to dissolve a wrongfully issued injunction. Microsoft's
2 attempt to fit into this exception fails as well.

3 Nor can Microsoft rely on any bad-faith equitable exception, as Microsoft itself concedes
4 that the bad-faith exception turns on conduct that "is unrelated to the merits of the case." (Dkt.
5 740 at 20 (quoting *Forbes v. Am. Bldg. Maint. Co. W.*, 198 P.3d 1042, 1057 (Wash. App. 2009))).
6 Microsoft here seeks attorney fees as *damages*, which is not only *related* to the merits of the case,
7 but an essential element of its breach of contract claim. *Muniz v. Microsoft Corp.*, No. C10-0717-
8 JCC, 2010 WL 4482107, at *3 (W.D. Wash. Oct. 29, 2010) ("A breach-of-contract claim under
9 Washington law requires a showing of (1) a contract that imposed a duty, (2) breach of that duty,
10 and (3) an economic loss as a result of that duty.") (quotation omitted). As Microsoft's own case
11 law demonstrates, the equitable exception for bad faith allows recovery of attorney fees as costs,
12 not damages, and thus Microsoft cannot shoehorn its damages into this exception.

13 Finally, Microsoft argues that it may recover attorney fees as damages because such relief
14 fits within an equitable exception for breaches of covenants not to sue. (Dkt. 740, 19-20.) But no
15 such covenant exists here and, in fact, as discussed *supra*, Motorola still retains its rights to bring
16 lawsuits seeking infringement. Holding that a RAND commitment constitutes a covenant not to
17 sue would lead to the absurd result that no infringer of a SEP could ever be sued and a SEP holder
18 could never enforce its right to receive a RAND rate.

19 **III. CONCLUSION**

20 For the foregoing reasons, Motorola's motion for summary judgment should be granted.
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1 DATED this 17th day of July, 2013.

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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