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(MICROSOFT'S MOTION FOR FURTHER
SANCTIONS AGAINST HON HAI)

1 S. Michael Song (State Bar No. 198656)
michael.song@dechert.com
2 Ryan T. Banks (State Bar No. 318171)
ryan.banks@dechert.com
3 DECHERT LLP
3000 El Camino Real
4 Five Palo Alto Square, Suite 650
Palo Alto, CA 94306
5 Telephone: +1 650 813 4930
Facsimile: +1 650 813 4848
6

Martin J. Black (*pro hac vice*)
7 martin.black@dechert.com
DECHERT LLP
8 Cira Centre, 2929 Arch Street
Philadelphia, PA 19104
9 Telephone: + 1 215 994 4000
Facsimile: + 1 215 994 2222
10

Paul Curran Kingsbery (*pro hac vice*)
11 paul.kingsbery@dechert.com
DECHERT LLP
12 1095 Avenue of the Americas
New York, NY 10036
13 Telephone: + 1 212 698 3500
Facsimile: + 1 212 698 3599
14

*Attorneys for Plaintiffs Microsoft Corporation
and Microsoft Licensing GP*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION
19

20 MICROSOFT CORPORATION and
21 MICROSOFT LICENSING, GP,

22 Plaintiffs,

23 v.

24 HON HAI PRECISION INDUSTRY CO.,
LTD., trading as FOXCONN
25 TECHNOLOGY GROUP,

26 Defendant.
27

Case No. 5:19-cv-01279-LHK-NMC

**MICROSOFT'S MOTION FOR FURTHER
SANCTIONS AGAINST HON HAI**

Hearing Date: April 22, 2020
Hearing Time: 1:00 p.m.
Courtroom: 5, 4th Floor
Judge: Hon. Nathanael Cousins

JURY TRIAL DEMANDED

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NOTICE OF MOTION FOR SANCTIONS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 22, 2020, at 1:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5, Fourth Floor, Plaintiffs Microsoft Corporation and Microsoft Licensing, GP (“Microsoft”) will, and hereby do, move under Rule 37 of the Federal Rules of Civil Procedure and Rule 37-4 of the Civil Local Rules of this Court for an order:

- (1) entering a default judgment against Hon Hai on Microsoft’s claim that Hon Hai breached the Confidential Patent License Agreement dated as of January 1, 2013 (the “PLA”);
- (2) deeming certain facts relating to Hon Hai’s royalty obligations under the PLA as established for purposes of this action; and
- (3) requiring Hon Hai to pay Microsoft’s reasonable expenses, including attorneys’ fees, caused by Hon Hai’s failure to comply with this Court’s prior discovery orders.

This motion is based on this notice of motion, the memorandum of points and authorities set forth below, the accompanying Declaration of S. Michael Song in Support of Microsoft’s Motion for Further Sanctions Against Hon Hai (“Song Decl.”), any reply or supplementary material submitted on behalf of Microsoft under Civil Local Rule 7-3, the pleadings and papers on file in this action, and such other written or oral argument as may be presented before the motion is taken under submission by the Court.

STATEMENT OF RELIEF SOUGHT

Hon Hai’s failure to comply with the clear terms of this Court’s previous discovery orders has crossed the line from obstructionist delay to outright contempt of court. With just two weeks left in the discovery period for Microsoft’s breach of contract claim, Hon Hai persists in its failure to produce basic sales information necessary to calculate its royalty obligations under the PLA. Having been warned on numerous occasions by both Your Honor and Judge Koh, the only fair and just relief that would remedy the prejudice to Microsoft is to enter a default judgment against Hon Hai pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vi). Microsoft also seeks an order pursuant to Fed. R. Civ. P. 37(b)(2)(A)(i) directing that, for purposes of a default damages hearing, or trial if there is no default ordered, certain facts relating to the number of units of Covered Products sold

1 during the term of the PLA and the Device Fees for each unit, be deemed established as detailed
2 below. In addition to the foregoing relief, Microsoft requests an order pursuant to Fed. R. Civ. P.
3 37(b)(2)(C) requiring Hon Hai to pay for Microsoft's reasonable expenses, including attorneys'
4 fees, incurred to secure compliance with this Court's prior discovery orders as a result of Hon
5 Hai's persistent and flagrant failure to comply with this Court's prior discovery orders.

6 **STATEMENT OF ISSUES**

7 (Civil Local Rule 7-4)

8 1. Whether the Court should enter a default judgment against Hon Hai based on its persistent
9 disregard for its discovery obligations under the Federal Rules of Civil Procedure and this Court's
10 prior discovery orders?

11 2. Whether for purposes of a default damages hearing, or for trial if terminating sanctions are
12 not granted, certain facts relating to the calculation of Hon Hai's royalty obligations under the
13 PLA should be established for purposes of this action, including the total number of royalty-
14 bearing units sold by Hon Hai during the term of the PLA and the Device Fees used to calculate
15 Hon Hai's royalty obligation?

16 3. Whether the Court should award reasonable expenses, including attorneys' fees, under
17 Fed. R. Civ. P. 37(a)(5)(A) resulting from Hon Hai's failure to comply with this Court's prior
18 discovery orders?

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TABLE OF CONTENTS

	Page
NOTICE OF MOTION FOR SANCTIONS.....	I
STATEMENT OF RELIEF SOUGHT	I
STATEMENT OF ISSUES	II
INTRODUCTION	1
STATEMENT OF RELEVANT FACTS	1
I. The PLA and Hon Hai’s Failure to Submit Required Royalty Reports.....	1
A. Operation of the PLA.....	1
B. Hon Hai’s Failure to Comply with its Reporting Obligations	2
II. Hon Hai’s Refusal to Provide the Royalty Report Information Through Discovery	3
A. Microsoft’s Discovery Requests	3
B. Microsoft’s First Motion to Compel	4
C. Hon Hai’s Violation of the First Discovery Order.....	6
D. Judge Koh’s Warning to Hon Hai.....	7
E. Hon Hai’s Continuing Violations	8
F. The March 4 Hearings.....	10
G. The Current Status.....	11
MEMORANDUM OF POINTS AND AUTHORITIES	12
I. LEGAL STANDARDS.....	12
II. ARGUMENT	12
A. <i>First Proposed Sanction:</i> The Court Should Enter a Default Judgment Against Hon Hai.	13
B. <i>Second Proposed Sanction:</i> The Court Should Enter An Order Directing That Certain Facts Are Established for Purposes of this Action.....	18
C. <i>Third Proposed Sanction:</i> The Court Should Order Hon Hai to Pay Microsoft’s Reasonable Fees and Expenses Incurred to Secure Hon Hai’s Compliance with the Court’s Prior Discovery Orders.	22
CONCLUSION	22

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No. 15-cv-00798-HSG, 2017 WL 934599 (N.D. Cal. Mar. 9, 2017)15

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1 **INTRODUCTION**

2 For nearly nine months, Microsoft has been trying to obtain critical information from Hon
 3 Hai that bears directly on the central issue in this litigation: the amount of royalties Hon Hai was
 4 obligated to pay pursuant to the PLA. In fact, Microsoft's efforts to secure this information goes
 5 back to at least March 2017, when it exercised its contractual right to audit Hon Hai's sales records.
 6 Hon Hai refused to comply with the audit, and despite two Court orders and several admonitions
 7 from the Court, it has refused to produce the information in discovery. With no alternative left,
 8 Microsoft asks the Court to award Rule 37 sanctions to remedy the manifest prejudice to Microsoft
 9 caused by Hon Hai's refusal to participate in the discovery process. Microsoft respectfully submits
 10 that terminating sanctions, as well as orders deeming certain facts as established for purposes of
 11 this action and requiring Hon Hai to pay Microsoft's expenses, are warranted in view of Hon Hai's
 12 misleading and obstructive conduct.

13 **STATEMENT OF RELEVANT FACTS**

14 **I. The PLA and Hon Hai's Failure to Submit Required Royalty Reports**

15 **A. Operation of the PLA**

16 Microsoft and Hon Hai executed the PLA in April 2013, effective as of January 1, 2013.
 17 (*See* Compl. Ex. 1, ECF No. 49.) Pursuant to the PLA, Microsoft agreed to grant Hon Hai a license
 18 for all of its patents covering certain products that include the "Android/Chrome Platform." (*See*
 19 *id.* § 3.1, at 8.)

20 In exchange, Hon Hai agreed to pay a royalty for each unit of a "Covered Product" sold
 21 during the term of the PLA and to periodically report all sales of such devices and any claimed
 22 exemptions. (*See id.* § 4.2, at 9.) There are three types of Covered Products: Smartphones, Smart
 23 TVs, and General Purpose Consumer Devices. (*See id.* § 1, at 3.) The per-unit Device Fee is
 24 determined based on the type of Covered Product and the Transfer Price. (*See id.* § 1, at 3–4.)
 25 Notably, smartphones with a screen size of over 5.5 inches are not categorized as "Smartphones"
 26 under the PLA, but rather are treated as General Purpose Consumer Device Devices and subject to
 27 the higher royalties due for this class of device. (*Id.* § 1, at 3–4.)

28

1 Under the PLA, Hon Hai undertook to provide quarterly royalty reports, identifying for each
 2 Covered Product: the model number; the number of units sold; the contractually determined
 3 “Device Fee,” data relating to units not subject to royalty; and the total royalty due. (*Id.* § 4.2.2(a),
 4 at 9, Exs. A, B.) The table below, taken from Exhibit A to the PLA, identifies the necessary
 5 information:

6 Category of Covered Products	7 Brand & Model No.	8 Units Sold this Royalty Period (per Brand/Model No.)	9 Transfer Price Ranges	10 Device Fee (Based on Device Fee Table)	11 Designated Units	12 Disputed Units	13 CO Unit (Y/N)	14 Exempt CO Unit (Y/N)	15 Royalty Due (Units x Device Fee)
Smart-phones									
Smart TVs									
General Purpose Consumer Devices									

15 The “Brand & Model No.” column is self-explanatory, as is the “Units Sold this Royalty
 16 Period (per Brand/Model No.)” column. The Transfer Price is determined based on a formula in
 17 the agreement. (*Id.* § 1, at 6.) The “Device Fee” is calculated from a table in the PLA, which sets
 18 the royalty based on the device type and Transfer Price, with four separate “Transfer Price” tiers
 19 for each device type. (*Id.* § 1, at 3–4.) It is undisputed that the PLA required Hon Hai to retain
 20 documents sufficient to support the numbers in each royalty report. (*Id.* § 4.2.3, at 10.)

21 **B. Hon Hai’s Failure to Comply with its Reporting Obligations**

22 Following the execution of the PLA, Hon Hai submitted royalty reports for 2013 and 2014.
 23 (*See* ECF No. 116-5.) Hon Hai collected and reported the unit volume and model numbers for each
 24 device, as well as the Transfer Price. According to a declaration filed by Hon Hai in this case, the
 25 information necessary to fill out the royalty reports was and still is contained in Hon Hai’s SAP
 26 system. (ECF No. 152 ¶ 6.)

1 Hon Hai submitted its last royalty report on April 30, 2015. (Song Decl. ¶ 3, Ex. 1
2 (MSFT_HONH_00009572).) Hon Hai refused to submit any reports for the subsequent royalty
3 periods. (Compl. ¶ 24; Answer ¶ 24; Song Decl. Ex. 2 (Hon Hai Responses to Microsoft’s Requests
4 for Admissions) at 10.) Notably, while Hon Hai has taken the position that it owes nothing to
5 Microsoft, Hon Hai surreptitiously collected payments from at least one customer as compensation
6 for royalty payments Hon Hai told that customer it was obligated to pay under the PLA. (See ECF
7 No. 159-3 at 14.) Hon Hai did not even report these royalties to Microsoft, pocketing the monies
8 instead.

9 Based on Hon Hai’s continuing failure to submit royalty reports as required by the PLA,
10 Microsoft invoked its audit rights under the agreement by written notice issued on March 31, 2017.
11 (Compl. ¶ 25, Ex. 1 § 4.2.4 at 10; Answer ¶ 25.) Over the months that followed, Hon Hai refused
12 to allow Microsoft’s designated auditor, Deloitte & Touche, to conduct the audit and declined to
13 provide any information in response to Deloitte’s requests. (Compl. ¶ 25; Answer ¶ 25.)

14 Because Hon Hai failed to submit royalty reports and to comply with Deloitte’s audit,
15 Microsoft was forced to commence this action in March 2019.

16 **II. Hon Hai’s Refusal to Provide the Royalty Report Information Through Discovery**

17 **A. Microsoft’s Discovery Requests**

18 Microsoft served its First Request for Production of Documents (the “First RFPs”) on
19 June 17, 2019, seeking the information necessary to fill out the royalty reports. (See ECF
20 No. 104-3 at 14–17.) Hon Hai refused to produce the documents, objecting to each of Requests
21 No. 1–3, 10, and 28–30 as outside the scope of relevant discovery. (See ECF No. 140-4 at 7, 10,
22 13, 24, 53, 55, 57.) Hon Hai further objected that these requests “may call for the production of
23 business information that is subject to disclosure restrictions imposed by applicable laws, rules,
24 regulations, or other legally binding authorities of a foreign jurisdiction, such as Taiwan or Hong
25 Kong . . . [and] confidential business information and trade secrets of third parties that Hon Hai is
26 prohibited from producing pursuant to agreement.” (*Id.* at 8, 11, 14, 24–25, 54, 56, 57.)

27 Following Judge Koh’s denial of Hon Hai’s motion to dismiss, *Microsoft Corp. v. Hon*
28 *Hai Precision Indu Co.*, No. 19-cv-01279-LHK, 2019 WL 3859035, at *7 (N.D. Cal. Aug. 16,

1 2019), Microsoft informed Hon Hai that its responses to the First RFPs were deficient by letter
2 dated September 3, 2019. (ECF No. 104-5.) Over the course of the meet-and-confer discussions
3 that followed, Hon Hai expressly withdrew its objections based on relevance and foreign law, but
4 maintained its objection on the basis of its purported contractual confidentiality agreements to
5 third parties. (ECF No. 104-6; Song Decl. Ex. 3 (G. Gregg Email Correspondence dated Oct. 7,
6 2019) at 1.)

7 By October, it had become clear that Hon Hai was stonewalling. To break the logjam,
8 Microsoft served interrogatories seeking the information required to fill out the royalty reports on
9 October 8, 2019. (*See* Song Decl. Ex. 4 at 6–7 (Interrogs. Nos. 1–2, 5.)) Hon Hai continued to
10 delay and obfuscate, claiming on October 16, 2019, that even though there was a protective order
11 in place, Hon Hai would not produce the data on its own sales figures without the permission of
12 third parties. (*See* ECF No. 104-9 at 2, 4–5.)

13 **B. Microsoft’s First Motion to Compel**

14 Facing a settlement conference scheduled before this Court on December 3, 2019,
15 Microsoft sought this Court’s intervention in early November 2019. The parties filed a joint letter
16 brief regarding Hon Hai’s failure to produce documents responsive to the RFPs on November 1,
17 2019. (ECF No. 73.) Principally, Hon Hai attempted to justify its refusal to produce documents
18 based on (i) a claim that the PLA was not valid; (ii) its supposed need for additional time to
19 “notify relevant customers and give them an opportunity to protect their confidentiality interests”;
20 and (iii) the burden that producing the requested information entailed. (*Id.* at 4–5.) Notably, Hon
21 Hai did not assert that there was any sort of trade secret or “state secrets” issue. By then, Hon
22 Hai’s replacement counsel¹ was already working on the case and had discussed these arguments
23 with Hon Hai. (ECF No. 151 ¶ 2–3.) Apparently, a decision was made not to assert a trade secret
24 or state secret claim at the time—no doubt because the arguments were frivolous.

25 _____
26 ¹ Hon Hai’s former counsel, Rimon, P.C., filed its motion to withdraw as counsel on
27 December 18, 2019—just two days after the Court granted Microsoft leave to file a full brief in
28 support of its motion for sanctions. (*See* ECF Nos. 99–101.) Hon Hai’s current counsel first
appeared in this action on October 31, 2019. (ECF No. 71.)

1 On November 6, 2019, this Court held a hearing on Microsoft’s motion to compel.
 2 During the hearing, Hon Hai never raised any foreign law objection or any objection relating to
 3 its purported confidentiality obligations. Rather, Hon Hai’s (then-current and since-withdrawn)
 4 co-counsel focused on the supposed difficulty of obtaining the requested information from its
 5 client. Microsoft’s counsel informed the Court that the information was very likely in an
 6 electronic SAP database: “the way these businesses are set up is they have an electronic system,
 7 usually SAP” that stores the necessary information about Hon Hai’s device sales for internal
 8 reporting to Hon Hai management. (ECF No. 133 at 8:8–9.) Hon Hai’s counsel disagreed,
 9 stating that “it’s not appropriate for the Court to consider essentially expert witness testimony
 10 regarding Mr. Black’s apparent knowledge as to Hon Hai’s systems [W]e simply disagree
 11 that the obtaining of documents sought even on this first level, high level—so called high level is
 12 as simple as counsel represents.” (ECF No. 133 at 12:14–16, 12:21–23.)

13 The Court directed the parties to continue negotiations and, absent a resolution, directed
 14 Hon Hai to submit a competing proposed order. (*Id.* at 27:16–28:2.)

15 Following the submission of the parties’ proposed orders (ECF Nos. 80, 81, 82), the Court
 16 entered an order generally consistent with Microsoft’s proposed order on November 8. (ECF No.
 17 83 (the “First Discovery Order”).) The First Discovery Order required Hon Hai to produce, in
 18 sum and substance, documents containing the information that it would have been required to
 19 include in its royalty reports. Paragraph 1 of the Discovery Order directed Hon Hai to produce,
 20 for “each six-month royalty period” since January 1, 2013, documents sufficient to establish:

- 21 (a) the number of units of Smartphones, General Purpose Consumer Devices and
 22 Smart TVs that include the Android/Chrome Platform sold, leased, exported, or
 23 imported, (“Sold”) by Hon Hai or its subsidiaries; and
 24 (b) for each such device, documents sufficient to establish the customer name, brand
 25 name, model name and number, invoice price to the customer, and country of sale.

(First Discovery Order ¶ 1.) Paragraph 2 of the Discovery Order directed Hon Hai to produce:

- 26 (a) for each device identified in Paragraph 1, other than for Excluded Units,
 27 documents sufficient to show the cost of hardware and software components, and
 28 labor cost charged for assembling the hardware and software components into the
 completed device (i.e., determination of Transfer Price range), see Microsoft RFPs
 Nos. 18–20, 28–30; see also Form of Royalty Report attached to this order,

1 column labeled “Transfer Price Ranges” (originally Exhibit A to the License
2 Agreement);

- 3 (b) to the extent that Hon Hai claims any exemptions from a royalty for any
4 Android/Chrome Platform Sold by Hon Hai since January 1, 2013, documents
5 sufficient to support the exemption, including the number of units Sold by Hon
6 Hai or its subsidiaries:
- 7 (i) to one of the third parties listed in sections (ii)(a)–(d) of the definition of
8 “Unlicensed Devices” in the Agreement;
 - 9 (ii) to the third party identified in section (iii) of the definition of “Unlicensed
10 Devices” in the Agreement prior to January 1, 2014;
 - 11 (iii) to one of the third parties listed as a “CO Entity” in the Agreement as a
12 “China Destined Device” within the meaning of the Agreement; or
 - 13 (iv) to a third-party qualifying as a “Designated Entity” under the Agreement.

14 (First Discovery Order ¶ 2.) The First Discovery Order required Hon Hai to produce the
15 documents responsive to Paragraph 1 by November 22, and the documents responsive to
16 Paragraph 2 by December 13. (*Id.* ¶¶ 1, 2.)² The Court warned Hon Hai that failure to comply
17 with the First Discovery Order could result in sanctions under Fed. R. Civ. P. 37. (*Id.* ¶ 7.)

18 **C. Hon Hai’s Violation of the First Discovery Order**

19 Hon Hai made a limited, partial production by the November 22 deadline for the
20 production of basic sales information required by Paragraph 1 of the First Discovery Order. Hon
21 Hai excluded numerous customers and products from the production and what it did produce did
22 not include the information required by Paragraph 1, such as brand name, model name, and
23 country of sale. Importantly, the production did not include sales information on five of Hon
24 Hai’s largest customers: Huawei, Xiaomi, Oppo, Meizu and Nokia-HMD. (ECF No. 97 at 1.)

25 Hon Hai also provided evasive answers to Microsoft’s interrogatories requesting the sales
26 information. Instead of taking this Court’s rulings in relation to the parallel document requests to
27 heart, Hon Hai served numerous obstructive objections to the interrogatories. (ECF No. 104–11.)
28 Hon Hai’s response to Interrogatory No. 1 referred Microsoft to Hon Hai’s 2013 and 2014 royalty

² Hon Hai objected to the First Discovery Order, but Judge Koh overruled Hon Hai’s objections by order dated December 2, 2019. (ECF No. 91.)

1 reports pursuant to Fed. R. Civ. P. 33(d), but provided no response at all for 2015 through 2019.
2 (*See id.* at 5.)

3 When Microsoft complained during a meet-and-confer call on December 9, 2019, Hon
4 Hai's counsel resurrected its foreign law objection—now cast in terms of the trade secret law of
5 China—and refused to identify what documents remained to be produced. Hon Hai refused to
6 provide a full customer list, and while Hon Hai's counsel said they would attempt to provide a
7 customer list by January 7, 2020, they refused to guarantee that the list would be
8 “comprehensive.” (ECF No. 104-12 at 3.)

9 Microsoft returned to Court. The parties submitted a joint letter brief for Microsoft's
10 motion for sanctions and to compel interrogatory responses on December 13, 2019. The Court
11 then ordered Microsoft to submit a brief in support of its motion on December 20, 2019.

12 On January 8, 2020, Microsoft and Hon Hai appeared for a hearing on Microsoft's motion
13 for sanctions. Hon Hai did not contest that it had failed to comply with the November 8 Order,
14 and suggested that some of the information necessary to calculate the royalties owed by Hon Hai
15 may have been destroyed. (ECF No. 126 at 11:11–12:19.) At the conclusion of the hearing, the
16 Court granted Microsoft's motion for sanctions in the form of attorneys' fees. (*Id.* at 29:13–15.)
17 In a written order entered on February 12 to reflect the Court's January 8 ruling (the “Second
18 Discovery Order”), the Court noted that it had previously warned Hon Hai that failure to comply
19 with its November 8 order may result in sanctions under Rule 37. (ECF No. 144 at 3.) The Court
20 held that Hon Hai's failure to answer Microsoft's Interrogatories 1, 2, and 5 was not
21 “substantially justified,” and directed Hon Hai to serve complete verified responses to
22 Interrogatory Nos. 1, 2, and 5 by February 26, 2020, without relying on Fed. R. Civ. P. 33(d).
23 (*Id.* at 6.) The Court ordered Hon Hai to pay Microsoft's expenses caused by its failure to
24 comply with the November 8 order. (*Id.* at 8.) The Court warned Hon Hai a second time that
25 further Rule 37 sanctions might be awarded for noncompliance. (*Id.* at 9.)

26 **D. Judge Koh's Warning to Hon Hai**

27 The parties appeared for a case management conference before Judge Koh on February
28 12, 2020. Prior to the conference, Microsoft informed the Court that Hon Hai had not complied

1 with the Court’s November 8 and January 8 discovery orders. Hon Hai attempted to justify its
2 misconduct by pointing to the outbreak of coronavirus in China as well as an entirely new
3 objection based on foreign law—a supposed requirement that Chinese law obligated Hon Hai to
4 conduct a “state secrets” review of documents prior to production. (ECF No. 128 at 1–2.) During
5 the conference, the Court dismissed Hon Hai’s novel and belated “state secrets” review objection
6 and ordered Hon Hai’s counsel to submit declarations concerning: (i) Hon Hai’s total sales
7 numbers from 2013 to 2019 (by February 17); (ii) Hon Hai’s preservation of financial records (by
8 February 24); and (iii) when Hon Hai’s counsel first advised Hon Hai that Chinese trade secret
9 law would provide a valid basis to withhold documents and information from production (by
10 February 24). (ECF No. 145 at 12:18–14:6, 20:22–25.)

11 Judge Koh made clear that Hon Hai’s discovery obstruction must stop. (*Id.* at 32:1–6,
12 32:19–23 (“Now, I hope, when Judge Cousins issues his order today, that there is full compliance
13 by whatever deadline he sets. If it turns out that I find there are continuing games being played,
14 then I will order you to come in every single week in person, no telephonic appearances
15 permitted. . . . I don’t want another history of judge’s orders being issued on November 8th and
16 still not being complied with as of February 12th. Not acceptable. If I have to sanction parties, if
17 I have to sanction individual lawyers, I will do it.”).) She explicitly mentioned the possibility of
18 further sanctions.

19 **E. Hon Hai’s Continuing Violations**

20 On February 17, Hon Hai sent Microsoft a declaration from its counsel concerning Hon
21 Hai’s total sales from 2013 to 2019. That declaration only provided information from Hon Hai’s
22 public filings with the Taiwan Stock Exchange and none of the information from Hon Hai’s SAP
23 system. (Song Decl. Ex. 5.) Rather than move the ball forward as Judge Koh directed Hon Hai to
24 do during the February 12 conference, the declaration provided no useful information whatsoever.

25 On February 24, Hon Hai produced a declaration from its counsel concerning its
26 preservation of financial records. (ECF No. 152.) Facing Judge Koh’s pointed questions about
27 spoliation, Hon Hai now took the position that “the information necessary to complete the royalty
28 reports specified in the [PLA] in dispute is stored and maintained in [Hon Hai’s] SAP database,”

1 and that Hon Hai’s subsidiary responsible for manufacturing cell phones “does not delete any
2 data from its SAP database.” (*Id.* ¶ 6.) That declaration directly contradicted Hon Hai’s prior
3 representations concerning the difficulty of obtaining financial data and the existence of the SAP
4 system. The declaration further stated that Hon Hai’s other relevant subsidiaries “produced their
5 documents and things responsive to Microsoft’s discovery requests through Hon Hai’s Chinese
6 legal counsel, ScienBizIP, and they are not aware that there are any complaints from Microsoft
7 regarding any deficiency on their behalf.” (*Id.* ¶ 7.)

8 In the February 24 declaration on preservation of records, Hon Hai’s counsel was vague
9 about when litigation hold memoranda were circulated within Hon Hai and whether documents
10 might have been destroyed prior to the circulation of those memoranda. Accordingly, on
11 February 27, Judge Koh directed Hon Hai’s counsel to “file a supplemental declaration that
12 clarifies the dates that Hon Hai circulate the litigation hold memoranda to its different business
13 groups.” (ECF No. 154.)

14 Hon Hai’s counsel filed a supplemental declaration on March 3, in which it claimed that
15 litigation hold memoranda were circulated within various Hon Hai subsidiaries between May 30
16 and June 3, 2019—long after the dispute began. (ECF No. 165 ¶ 5.) The declaration also stated
17 that the relevant subsidiaries “separately maintain all of the data necessary for the purposes of
18 conducting an audit pursuant to the PLA in separate Enterprise Resource Planning systems,” and
19 that the data in those systems had been maintained consistently from 2013 to the present. (*Id.*
20 ¶ 7.)

21 Despite representing that it had all the necessary data going all the way back to 2013, on
22 February 26, Hon Hai provided its supplemental interrogatory responses and willfully failed to
23 provide the information. Indeed, despite the explicit requirement in the Second Discovery Order
24 that the response had to be verified, Hon Hai failed to serve a verification. (ECF No. 155-4 at 4.)
25 The interrogatory responses were facially deficient with respect to Interrogatory No. 2: Hon Hai
26 included total sales figures by time period and customer, but did not provide any information
27 about what the units were comprised of, instead, stating that the numbers reflected both “Covered
28 Products” and “services.” (ECF No. 159-3 at 8.) Hon Hai intentionally refused to provide the

1 identification of model numbers, which would have allowed Microsoft to determine how the
2 totals were derived, whether the units were above the 5.5 inch screen size limit and therefore fell
3 into the General Purpose Consumer Device Table rates, and other information necessary to fill
4 out the royalty report table. Nor did Hon Hai provide the Transfer Price information by model
5 number so that Microsoft could calculate the appropriate Transfer Price and take discovery on
6 Hon Hai's representations. Indeed, there were many oddities in the data, including that labor and
7 material totals for one customer were provided for certain periods but omitted for others, which
8 strongly suggests that the data is missing or has been destroyed. (*See* ECF No. 159-3 at 10.)

9 **F. The March 4 Hearings**

10 The parties appeared before Judge Koh and this Court on March 4. Judge Koh had
11 scheduled a case management conference for that date at the conclusion of the February 12 case
12 management conference. (ECF No. 141.) In a joint discovery status update dated February 28,
13 2020, Microsoft informed the Court that Hon Hai was in violation of the First and Second
14 Discovery Orders. (ECF No. 156). The following business day, the Court scheduled a hearing on
15 the status of discovery for March 4. (ECF No. 157.)

16 During the discovery hearing before this Court, Microsoft outlined the continuing
17 deficiencies with Hon Hai's interrogatory responses and noted that, although Hon Hai had told
18 Judge Koh that it had preserved all relevant information, it nonetheless failed to provide that
19 information in the form of complete interrogatory responses. (ECF No. 175 at 4:17–5:1; 8:1–11.)
20 Hon Hai's counsel argued that Hon Hai was acting in good faith and had produced "1.2 million
21 transaction records," but also admitted that the interrogatory responses it had provided did not "fit
22 the PLA. There's no question about that." (*Id.* at 5:19–22.) But as Microsoft's counsel
23 countered, the Second Discovery Order expressly directed Hon Hai to provide interrogatory
24 responses without referring to documents in reliance on Fed. R. Civ. P. 33(d). (*Id.* at 8:13–19.)
25 With Hon Hai unable to offer a coherent explanation for its continued delay, the Court held that
26 Hon Hai's "responses are not sufficient. I find that Hon Hai continues to be in violation of [a]
27 prior court order that they provide the response, not documents under Rule 33, but answered
28 interrogatories [and their] answers—while they provided some information, are still not

1 sufficient.” (*Id.* at 20:7–20.) Based on this finding of a continuing violation by Hon Hai, the
2 Court granted Microsoft leave to file the instant motion for further sanctions. (*Id.* at 20:17–18.)

3 That afternoon, the parties went before Judge Koh for a second case management
4 conference. Judge Koh was deeply disturbed by Hon Hai’s behavior. She noted that Hon Hai is a
5 sophisticated company and that its conduct of discovery in this case had been “baffling.” (*See*
6 ECF No. 177 at 18:24–19:7 (“I am just bewildered about a major company being so disorganized
7 with its sales numbers. I’ve never heard it before. I’ve never seen it before. You’re not the sort
8 of fly-by-night company that, you know, gets set up and then disappears and doesn’t pay off
9 [creditors]. You’re a real, established company. So I have found your allegations about inability
10 to determine sales numbers to be baffling. Baffling.”).)

11 **G. The Current Status**

12 With two weeks to go in the discovery period, Hon Hai still has not received the message.
13 On March 6, 2020, Hon Hai served amended supplemental interrogatory responses. While Hon
14 Hai included a verification with the amended responses, the response to Interrogatory No. 2
15 remains deficient. This amended response purports to include sales data for Covered Products
16 only, but still aggregates these numbers for each customer and does not provide device-specific
17 model numbers or Transfer Price information. It is impossible to take this high level, aggregate
18 data and fill in the royalty reports.

19 The position is no better in relation to the document production. Microsoft had planned to
20 take the model numbers of identified products and cross-reference them to specifications and
21 contracts to check Hon Hai’s representations, to evaluate screen size (screens over 5.5 inches fall
22 in the General Purpose Consumer Device category), to check the Transfer Price and do the other
23 things typically required to prepare a damages case. But Hon Hai has not produced any of the
24 product specifications or materials necessary to do so. This failure is an independent violation of
25 the First Discovery Order. As a result, Microsoft finds itself at the beginning stages of damages
26 discovery, with an incomplete document production, evasive interrogatory answers, no
27
28

1 depositions taken, no Fed. R. Civ. P. 30(b)(6) witness identified and discovery closing in two
2 weeks.³

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 I. LEGAL STANDARDS

5 A district court may issue sanctions against a party for failure to comply with discovery
6 orders pursuant to Fed. R. Civ. P. 37(b)(2). “When choosing among possible sanctions, the Court
7 should consider a sanction designed to: (1) penalize those whose conduct may be deemed to
8 warrant such a sanction;” (2) deter parties from engaging in the sanctioned conduct; (3) place the
9 risk of an erroneous judgment on the party who wrongfully created the risk; and (4) restore a
10 prejudiced party to the same position he or she would have been in absent the wrongdoing.”

11 *Operating Engineers' Health & Welfare Tr. Fund for N. California v. Cent. Valley Constr.*, No.
12 4:17-CV-02365-KAW, 2019 WL 6700093, at *3 (N.D. Cal. Dec. 9, 2019) (citing *Nat'l Hockey*
13 *League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). When considering case-
14 dispositive sanctions in particular, a district court must consider “whether it [has tried less
15 dramatic sanctions], and whether it warned the recalcitrant party about the possibility of case-
16 dispositive sanctions.” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091,
17 1096 (9th Cir. 2007) (citing *Valley Eng'rs v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir.
18 1998)). Finally, when deciding whether to grant a motion for sanctions, a district court may
19 “properly consider all of a party’s discovery misconduct . . . , including conduct which has been
20 the subject of earlier sanctions.” *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir.1997).

21 II. ARGUMENT

22 Hon Hai remains in violation of this Court’s prior discovery orders. The Court required
23 Hon Hai to submit “full and complete” responses to Microsoft Interrogatory No. 2 by no later
24 than February 26, 2020. During a hearing on March 4, 2020, the Court held that Hon Hai was in

25 _____
26 ³ Judge Koh bifurcated trial and discovery in connection with Microsoft’s breach of
27 contract claim against Hon Hai and Hon Hai’s answer, affirmative defenses, and counterclaims.
28 (ECF No. 169.) The discovery requested in connection with this motion relates to Microsoft’s
affirmative breach of contract claim, for which the close of fact discovery remains March 31,
2020.

1 violation of the Second Discovery Order as of that date. Hon Hai's amended interrogatory
 2 responses have not cured the violation. Regrettably, the prior sanction granted by this Court has
 3 not accomplished its intended goal of securing Hon Hai's compliance with this Court's orders.
 4 Accordingly, more drastic sanctions are now necessary.

5 **A. First Proposed Sanction: The Court Should Enter a Default Judgment**
 6 **Against Hon Hai.**

7 Given the short time remaining in the relevant discovery period and Hon Hai's continued
 8 refusal to produce basic sales data, entry of a default judgment against Hon Hai is necessary to
 9 prevent prejudice to Microsoft. Hon Hai's conduct has been intentional and in violation of
 10 multiple court orders, satisfying the requirement for "willfulness, bad faith, and fault." *Conn.*
 11 *Gen.*, 482 F.3d at 1096 (citing *Jorgensen*, 320 F.3d at 912). While the decision to enter a
 12 terminating sanction is one of sound discretion for the district court, the Ninth Circuit has
 13 developed a five-part test to assist whether such a sanction is appropriate:

14 We have constructed a five-part test, with three subparts to the fifth part, to
 15 determine whether a case-dispositive sanction under Rule 37(b)(2) is just: '(1) the
 16 public's interest in expeditious resolution of litigation; (2) the court's need to
 17 manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the
 18 public policy favoring disposition of cases on their merits; and (5) the availability
 of less drastic sanctions.' The sub-parts of the fifth factor are whether the court
 has considered lesser sanctions, whether it tried them, and whether it warned the
 recalcitrant party about the possibility of case-dispositive sanctions.

19 *Id.* Each of those elements is satisfied here.

20 **1. Factors 1 and 2: The Public Interest and the Court's Need to Manage**
 21 **Its Dockets Strongly Support Terminating Sanctions.**

22 The first two factors are related: (1) the public's interest in expeditious resolution of
 23 litigation; and (2) the court's need to manage its docket. Here, Hon Hai's obstructive conduct has
 24 resulted in substantial expense, as well as unnecessary motion practice and hearings. It is
 25 shocking that, even after four hearings before two judges, Hon Hai has refused to produce its
 26 basic sales information in sufficient detail to allow Microsoft to calculate the royalties Hon Hai
 27 owes and test the veracity of its data. The Court's docket has been distorted by the need to
 28 bifurcate and hold two separate trials, putting further strain on an already overburdened court.

1 And two juries will now have to be empaneled to resolve this dispute. Judge Koh noted the
2 importance of expediting this matter, as Microsoft has been waiting for over six years for the
3 royalty reports and payments. (ECF No. 145 at 36:16–23 (“I’m inclined to [order bifurcation]. I
4 feel like if someone has been waiting six years to get this resolved and there’s a dispute resolution
5 mechanism in the contract and that has been blown off, then I feel like they’re entitled to get their
6 day in court as soon as possible.”).) The only way to obtain an expeditious resolution and to
7 avoid contorting the Court’s docket is to enter terminating sanctions.

8 **2. Factor 3: Microsoft Has Been Prejudiced**

9 The third factor that the Court must consider is whether terminating sanctions are
10 warranted to avoid prejudice to the requesting party. *Nat’l Hockey League*, 427 U.S. at 643.
11 Specifically, the Court must consider “whether [the responding party’s] actions impaired
12 Plaintiff’s ability to go to trial or threatened to interfere with the rightful decision of the case”.
13 *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (internal quotations omitted). Such
14 prejudice has been found where the responding party has, through noncompliance with its
15 discovery obligations, forced the requesting party “to rely on incomplete and spotty evidence” at
16 trial. *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 354 (9th Cir. 1995); *see also*
17 *Choudhuri v. Wells Fargo Bank, N.A.*, No. 15-CV-03608-VC (KAW), 2017 WL 5598685, at *7
18 (N.D. Cal. Nov. 21, 2017) (finding prejudice where plaintiff failed to comply with court order,
19 despite plaintiff’s argument that she already provided “extensive information”). Terminating
20 sanctions, such as a default judgment, are warranted where “there is a clear record of delay or
21 contumacious conduct, where other less drastic sanctions have proved unavailing.” *Domanus v.*
22 *Lewicki*, 742 F.3d 290 (7th Cir. 2014).

23 As outlined above, the record of delay and contumacious conduct is manifest. Microsoft
24 has done everything in its power to ensure that we would not reach this point: a discovery cut-off
25 in two weeks and inadequate damages discovery to prepare for trial. Microsoft has not had an
26 opportunity to review written discovery responses, take follow up discovery and otherwise
27 prepare its damages case. To proceed to trial now would require Microsoft to use partial data or
28 public IDC data, all of which Hon Hai would question and criticize before the jury. Microsoft

1 would be severely prejudiced were it forced to proceed to trial on the incomplete, self-serving
 2 evidence produced by Hon Hai in the litigation. Hon Hai has had numerous opportunities to
 3 comply but instead has opted for delay and contempt of the discovery process.

4 3. Factor 4: Policy of Disposition on the Merits

5 Courts exist to decide cases on the merits, but there is a predicate to that principle: the
 6 parties must participate fairly in the litigation process. When a party charged with responsibility
 7 to move the case forward towards a disposition on the merits “impedes progress in that direction,”
 8 courts have recognized that the public policy in favor of a disposition on the merits “offers little
 9 support” to any argument against case-dispositive sanctions. *In re PPA Prod. Liability Litig.*, 460
 10 F.3d 1217, 1228 (9th Cir. 2006); *Rio Properties, Inc. v. Int’l Interlink*, 284 F.3d 1007, 1022 (9th
 11 Cir. 2002) (“While the public policy favoring disposition of cases on their merits weighs against
 12 default judgment, that single factor is not enough to preclude imposition of this sanction when the
 13 other four factors weigh in its favor.”). Accordingly, federal courts have imposed case-
 14 dispositive sanctions, despite the general preference for disposing of cases on their merits, where
 15 a litigant’s conduct has threatened such a disposition. *Anheuser-Busch*, 69 F.3d at 354 (“[I]t is
 16 appropriate to presume that where documents relevant to the merits of the litigation have been
 17 concealed the deception casts doubt on the concealing party’s case.”); *N. Am. Watch Corp. v.*
 18 *Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (affirming terminating sanctions
 19 where appellants failed to comply “in a timely manner with the magistrate’s discovery order
 20 compelling disclosure of certain invoices and financial statements, items relevant to adjudicating
 21 the merits of the controversy”).

22 Hon Hai has thwarted the core judicial function to adjudicate disputes by refusing to
 23 produce the information necessary to allow the jury to decide the case on the merits. Moreover,
 24 this is not a case where Hon Hai’s evasive tactics concern a “peripheral” matter. *See Phocene*
 25 *Sous-Marine v. US Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982) (reversing entry of
 26 default based on defendant executive’s deception concerning availability for trial). Rather, the
 27 First and Second Discovery Orders concerned information of core relevance to Microsoft’s
 28 breach of contract claim against Hon Hai—the amount and quantity of damages. *Loop AI Labs*

1 *Inc. v. Gatti*, No. 15-cv-00798-HSG, 2017 WL 934599, at *11 (N.D. Cal. Mar. 9, 2017) (“Despite
 2 the Court’s significant efforts to enable resolution of this case on the merits, Plaintiff has
 3 persistently undercut those efforts through repeated refusal to comply with the Court’s orders and
 4 a chronic and utter disregard for its obligations in this matter. In circumstances such as these, the
 5 public policy favoring resolution on the merits does not outweigh Plaintiff’s bold refusal to
 6 comply with multiple discovery orders.”). Under these unusual circumstances, Factor 4 weighs
 7 heavily in favor of the entry of terminating sanctions.

8 **4. Factor 5: Availability of Lesser Sanctions**

9 The final factor is the availability of lesser sanctions, which is tested by reference to three
 10 subparts: (1) whether the court has tried such sanctions, (2) whether it warned the offending party
 11 and (3) whether it warned the party of the potential for case dispositive sanctions. *Computer Task*
 12 *Grp., Inc. v. Brotby*, 364 F.3d 1112, 1116 (9th Cir. 2004). All of those conditions have been met
 13 here. The lesser sanctions imposed in the Second Discovery Order have not resulted in the
 14 production of the necessary evidence in a timely fashion, and Hon Hai’s excuses have not been
 15 credible. Moreover, Hon Hai was clearly on notice that a default judgment might result if it failed
 16 to conform its conduct to the Court’s directives. There is a long record of obstruction punctuated
 17 by clear oral and written warnings by both Your Honor and Judge Koh:

- 18 • During the November 6, 2019 hearing on Microsoft’s motion to compel, the Court
 19 permitted Hon Hai to make a supplemental brief, but warned Hon Hai’s counsel
 20 that “if you use that brief and proposed order to make unreasonable positions, then
 I may impose fees and costs on this motion if that’s my conclusion.” (ECF No.
 133 at 37:22–25.)
- 21 • In the First Discovery Order, the Court stated, “Hon Hai is cautioned that any of
 22 the sanctions listed in Fed. R. Civ. P. 37 may be awarded against it if it does not
 timely comply with this order.” (ECF No. 83 at 4.)
- 23 • In the Second Discovery Order, the Court stated, “Both parties and their counsel
 24 are cautioned that any of the sanctions listed in Fed. R. Civ. P. 37 may be awarded
 against it if they do not timely comply with this order.” (ECF No. 144 at 9.)
- 25 • During the case management conference on February 12, Judge Koh stated that
 26 she did not “want to see another 24-page joint case management statement that
 27 looks like this. I don’t want another history of Judge’s orders being issued on
 November 8 and still not being complied with as of February 12th. Not
 28 acceptable. If I have to sanction parties, if I have to sanction individual lawyers, I
 will do it.” (ECF No. 145 at 32:18–23.)

1 Here, the sanction of a default judgment is warranted because Hon Hai has repeatedly
2 flaunted this Court's orders, has offered shifting and false excuses in an attempt to justify its non-
3 compliance, and severely prejudiced Microsoft's ability to prove its case by withholding critical
4 documents and information. From the beginning of fact discovery in this case, Hon Hai raised
5 frivolous "confidentiality" objections, despite the fact that the parties had a protective order in
6 place and made bogus and waived foreign law arguments. But worse than that, Hon Hai misled
7 the Court. While arguing all along that it was just too difficult to find the information, a position
8 that was not credible in the slightest, the truth began to come out when Your Honor and Judge
9 Koh questioned Hon Hai about possible spoliation. Hon Hai was forced to admit what Microsoft
10 has been saying all along, which is that the necessary information is in Hon Hai's SAP accounting
11 system. (ECF No. 133 at 8:8–21; ECF No. 145 at 29:19–25.) Indeed, even before Hon Hai
12 finally admitted that its accounting systems contain all necessary data, Judge Koh found Hon
13 Hai's position that it was difficult to locate basic sales information to lack credibility: "I don't
14 think [Hon Hai's position is] credible and I am disappointed to hear it. I'm just very disappointed
15 to hear it. I mean, I've worked with Taiwanese companies as well, both as a lawyer and certainly
16 see a lot of the litigation over ten years, and to say that they have no idea [about] the number of
17 units they've sold to a single customer just lacks credibility." (ECF No. 145 at 30:1–7.)

18 While all of these evasive tactics are blameworthy and may independently warrant severe
19 sanctions, considered together they suggest that only the most severe sanctions available will
20 remedy Hon Hai's misconduct. Courts in this Circuit have entered terminating sanctions based
21 on similar misconduct intended to thwart the ultimate resolution of litigation on the merits. *See*
22 *Computer Task Group*, 364 F.3d at 1116 (affirming dismissal of counterclaims and entry of
23 default on plaintiff's claims where defendant violated court orders by failing to provide clear
24 answers to interrogatories, made frivolous objections, and failed to provide information plaintiff
25 sought); *Jorgensen v. Cassidy*, 320 F.3d 906 (9th Cir. 2003) (affirming district court order
26 striking defendants' answer and entry of default in favor of plaintiff where defendants relied on
27 unsupported claim that discovery was unobtainable); *Shearson Loeb Rhoades, Inc. v. Quinard*,
28 751 F.2d 1102 (9th Cir. 1985) (affirming entry of default judgment where defendants engaged in

1 willful and deliberate disobedience of discovery order, willful concealment of evidence, and
 2 attempted fabrication of false evidence). Hon Hai should not be rewarded for its evasive and
 3 misleading tactics.

4 **B. *Second Proposed Sanction: The Court Should Enter An Order Directing That***
 5 ***Certain Facts Are Established for Purposes of this Action.***

6 The Court should also impose the sanction of an order deeming certain facts as established
 7 for purposes of this litigation. Fed. R. Civ. P. 37(b)(2)(A)(i). Federal courts may grant such
 8 evidentiary sanctions where a party has willfully failed to comply with court orders compelling
 9 production of relevant documents or information to the prejudice of the requesting party. *Apple*
 10 *Inc. v. Samsung Electronics Co., Ltd.*, No. C 11-1846 LHK (PSG), 2012 WL 1595784, at *2–3
 11 (N.D. Cal. May 4, 2012) (precluding Samsung from “offering any evidence of its design-around
 12 efforts for [certain] patents” or from raising related arguments, where it failed to produce such
 13 information as required by court order). While ultimately within the discretion of the Court,
 14 evidentiary sanctions are warranted when the fact to be deemed established has a “substantial
 15 relationship” to the responding party’s discovery violations and the imposition of that sanction
 16 serves Fed. R. Civ. P. 37’s goals of punishment and deterrence. *Alexsam, Inc. v. IDT Corp.*, 715
 17 F.3d 1336 (Fed. Cir. 2013). Here, an order establishing the facts necessary to fill in the royalty
 18 reports would be relevant both to an assessment of damages hearing following a default or trial if
 19 the Court declines to grant terminating sanctions.

20 Specifically, the Court should order the following as established facts:

21 1. The royalty-bearing units disclosed for each period in Hon Hai’s First Supplemental
 22 Response to Interrogatory No. 2 are Covered Products within the meaning of the PLA on which
 23 royalties are due. (*i.e.*, [REDACTED] Smartphones, [REDACTED] Smart TVs, and [REDACTED] General
 24 Purpose Consumer Devices).⁴

25 _____
 26 ⁴ These numbers comprise the totals derived from adding all disclosed customers together
 27 with the exception of [REDACTED]
 28 [REDACTED] and others who are expressly exempted under the agreement. A
 summary table including the calculation is attached as Exhibit 6.

1 2. The Device Fee for each unit shall be the highest potentially applicable Device Fee
2 (i.e., no less than [REDACTED] for each Smartphone, [REDACTED] for each General Purpose Consumer Device,
3 and [REDACTED] for each Smart TV).

4 Such a sanction is justified by Hon Hai's willful failure to comply with the Court's prior
5 discovery orders and the resulting prejudice to Microsoft's ability fairly to litigate its claims. *See*
6 *Karimi v. Golden Gate School of Law*, 361 F. Supp. 3d 956, 970–71 (N.D. Cal. 2019) ("The
7 Court is aware of no sanction—short of the evidence preclusion ordered here—that would
8 effectively compensate Defendants for" prejudice resulting from plaintiff's failure to appear for
9 deposition.); *see also Apple*, 2012 WL 1595784, at *3.

10 **1. The Number of "Covered Products" Sold by Hon Hai During The**
11 **Term of the PLA Shall Be the Number of Units Hon Hai Identified in**
12 **Response to Interrogatory No. 2.**

13 To avoid disputes over the meaning of Hon Hai documents, Microsoft specifically
14 requested that the Court require Hon Hai to provide a complete response to Interrogatory No. 2
15 without a reference to Fed. R. Civ. P. 33(d). Hon Hai failed to comply, refusing to provide model
16 number or Transfer Price information by model, thwarting Microsoft's ability to use Interrogatory
17 No. 2 to fill in the royalty reports.

18 The Court has already ruled that Hon Hai failed to comply with the Court's order to fully
19 and completely answer Interrogatory No. 2. The supplemental responses provided on March 6
20 share the same deficiencies. Hon Hai has not provided any per-Covered Product data, instead
21 aggregating the data for each customer by royalty period. These high level totals prevent
22 Microsoft from performing the Device Fee calculation required under the PLA with the precision
23 that a jury would demand. Moreover, at this late date, Microsoft will not be able to probe the
24 veracity of Hon Hai's reported numbers by verifying them against the primary source records or
25 third-party data. Hon Hai has thwarted Microsoft's ability to prepare and prove its case.

26 Microsoft will never know what the true number of units is or where Hon Hai may have
27 been dissembling and hiding information. Indeed, the First Supplemental Response indicated that
28 Hon Hai sold over [REDACTED] units for the five main customers (Huawei, Xiaomi, Oppo, Meizu
and Nokia-HMD), while the amended response says the number is [REDACTED] units. Microsoft

1 cannot probe this discrepancy or the many others on the face of the documents due to Hon Hai's
2 contumacious conduct.

3 Accordingly, it would be fair and just to hold Hon Hai, at a minimum, to the number of
4 units it has disclosed. The Court should enter an order determining that the number of royalty-
5 bearing Covered Products sold during the Term is the number of devices in the First
6 Supplemental Response to Interrogatories Nos. 1, 2, and 5 from unlicensed customers (*i.e.*,
7 [REDACTED] Smartphones, [REDACTED] Smart TVs, and [REDACTED] General Purpose Consumer
8 Devices). The detail for this calculation is attached as Exhibit 6.

9 **2. The Court Should Enter An Order Establishing That For Each**
10 **Covered Product, the "Device Fee" Shall Be the Highest Applicable**
11 **"Device Fee" for the Device Under the PLA.**

11 Hon Hai's response to Interrogatory No. 2 is also deficient because it fails to provide
12 adequate Transfer Price information on a per-device model basis—the only basis for determining
13 the applicable Device Fee under the PLA. Based on Hon Hai's failure to provide this basic but
14 essential sales data, the Court should deem the "Device Fee" for each Covered Product unit as
15 established to be the highest permissible tier provided in the PLA.

16 The interrogatory responses Hon Hai has provided to date have been inconsistent in their
17 reported Transfer Price numbers. In its February 26 amended interrogatory responses, which
18 were not verified, Hon Hai provided "Sum of Material Cost" and "Sum of Labor Cost"
19 information for certain of its Smartphone and General Purpose Consumer Device customers, but
20 no such information at all for SmartTV customers. (ECF No. 159-3 at 11–12.) In that version of
21 its responses, Hon Hai did not provide material cost and labor cost information for all of its
22 customers and all applicable royalty periods; it reported no material costs for certain time periods
23 and no data at all for certain customers. Moreover, while the PLA states that the Transfer Price
24 for a particular unit shall be determined "twenty percent (20%) more than the average BOM +
25 Labor Cost for a given Royalty Period for such Covered Product," Hon Hai provided the
26 "BOM+Labor Cost" on a customer-specific basis and did not separately break out the applicable
27 inputs for each Covered Product. (Compl. Ex. 1 § 1, at 6; ECF No. 159-3 at 9–12.)
28

1 In its amended supplemental interrogatory responses, the situation is no better. Hon Hai
2 has still failed to provide the model number information, which would allow Microsoft to
3 determine whether the screen size exceeds the 5.5 inch limit for Smartphones or whether royalties
4 are payable at the higher level required for General Purpose Consumer Devices. In addition, for
5 certain Smartphone customers, Hon Hai provided purported “Average Transfer Price”
6 information, but only for limited royalty periods. (Song Decl. Ex. 7, at 9–13.) Hon Hai’s
7 amended interrogatory response does not include Transfer Price information for Smart TVs, and,
8 for the reasons stated above, the “average” transfer price or BOM+Labor Cost information
9 actually provided does not shed any light on the applicable Transfer Price tier that should be
10 applied to particular Covered Product. Without accurate Transfer Price information, Microsoft
11 cannot accurately calculate the appropriate “Device Fee” for each Covered Product.

12 In light of these deficiencies, Microsoft submits that for all Covered Products, the Device
13 Fee should be the highest applicable fee allowed under the PLA. For Smartphones, the Court
14 should make a finding that the minimum Device Fee due is [REDACTED] per unit. Based on the table in
15 page 4 of the PLA, the rate for Smartphones (5.5 inches or less) ranges from [REDACTED] to [REDACTED]
16 depending on the Transfer Price. The applicable price for smartphones over 5.5 inches, which are
17 classified as General Purpose Consumer Devices, would range from [REDACTED] to [REDACTED]. Thus, the
18 smartphones manufactured by Hon Hai might incur a royalty of anywhere between [REDACTED] and
19 [REDACTED]. The crossover rate of [REDACTED], which comprises the highest Smartphone rate and lowest
20 General Purpose Consumer Device rate, is a conservative and reasonable number to use under the
21 circumstances.⁵ For SmartTVs and General Purpose Consumer Devices, the highest applicable
22 Device Fee should be applied because Hon Hai has willfully obscured Transfer Price information.
23 Accordingly, applying the highest potentially applicable Device Fee is necessary to prevent unfair
24 prejudice to Microsoft.

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27 ⁵ Hon Hai has not produced any information on exemptions, which is Hon Hai’s burden of
28 proof to establish under the PLA.

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Respectfully submitted,

DECHERT LLP

By: /s/ S. Michael Song

S. Michael Song (State Bar No. 198656)
michael.song@dechert.com
Ryan T. Banks (State Bar No. 318171)
ryan.banks@dechert.com
DECHERT LLP
3000 El Camino Real, Suite 650
Palo Alto, CA 94306
Telephone: +1 650 813 4800
Facsimile: +1 650 813 4848

Martin J. Black (*pro hac vice*)
martin.black@dechert.com
DECHERT LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19104
Telephone: +1 215 994 4000
Facsimile: +1 215 994 2222

Paul Curran Kingsbery (*pro hac vice*)
paul.kingsbery@dechert.com
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
Telephone: +1 212 698 3500
Facsimile: +1 212 698 3599

Attorneys for Plaintiffs
MICROSOFT CORPORATION
and MICROSOFT LICENSING, GP