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February 18, 2010

The Honorable Jan Horbaly
Clerk of Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

BY HAND DELIVERY

Re: *i4i v. Microsoft*, No. 2009-1504

Dear Mr. Horbaly:

Despite Microsoft's assertion that *ResQNet.com, Inc. v. Lansa, Inc.*, No. 2009-1504, supports its petition for rehearing, *ResQNet* is fully consistent with this Court's decision in *i4i v. Microsoft*.

ResQNet involved the plaintiff's expert's reliance on seven licenses as the basis for his royalty calculation under the first *Georgia-Pacific* factor. Slip op. at 14-15. But while this factor requires considering licenses "of the *patent in suit*," the panel majority stated that none of the five licenses with high royalty rates "even mentioned the patents in suit or showed any other discernable link to the claimed technology." *Id.* And it recognized that while the other two licenses *did* relate to the technology, one involved a lump-sum stock payment that the expert "was unable to analogize to a running royalty" and "[t]he other was an ongoing rate averaging substantially less than" the 12.5% royalty rate the expert arrived at. *Id.* at 15. Accordingly, the majority went on to conclude that the expert had "used unrelated licenses on marketing and other services . . . to push the royalty up into double figures" (*id.* at 16) and it thus rejected the damages award that had been based on the expert's royalty (*id.* at 16-21).

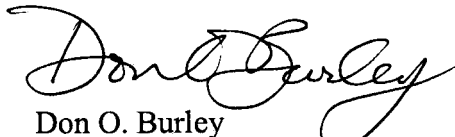
In stark contrast, *i4i*'s expert, Wagner, explained how the XMetaL benchmark related to the patented functionality and reasonably approximated the market's valuation of that functionality. A40; *i4i Br.* at 70-71. Additionally, the benchmark related to numerous *Georgia-Pacific* factors that consider more than just the licenses of the patent (as opposed to the single factor at issue in *ResQNet*). *See id.*

Further, Microsoft's position that the XMetaL benchmark was "unreliable" because it "did *not* practice the patented method" is unsupported by *any* authority—and certainly not supported by anything in *ResQNet*. Here, Wagner explained the links between the benchmark, *i4i*'s patent, and Microsoft's infringing software, which was more than sufficient. And the panel did not ask simply "whether *any* expert testimony supported the award," as Microsoft

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asserts. It conducted a thorough review of the evidence supporting the award, including Wagner's testimony, to ensure its reliability. *i4i* slip op. at 28-35.

Respectfully submitted,



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