ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W 52ND STREET
NEW YORK, NEW YORK 10019-6142

tel +1-212-506-5000
fax +1-212-506-5151
WWW.ORRICK.COM

E. Joshua Rosenkranz
(212) 506-5380
jrosenkranz@orrick.com

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Via CM/ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Notice of Supplemental Authority under Rule 28(j) in *In the Matter of a Warrant to Search a Certain E-Mail Account* (*Microsoft v. United States*), No. 14-2985

Dear Ms. O'Hagan Wolfe:

Microsoft submits this letter under Rule 28(j) to cite *RJR Nabisco, Inc. v. European Community*, No. 15-138 (U.S. June 20, 2016).

RJR reaffirmed *Morrison*'s "two-step" extraterritoriality analysis. Regarding the first step, the Court explained the inquiry is not whether Congress would have wanted a statute to apply abroad "if it had thought of the situation," but "whether Congress has affirmatively and unmistakably instructed that the statute will do so." Slip op. 7. *RJR* held Congress clearly intended RICO's substantive provisions to apply extraterritorially to the extent RICO predicates themselves do. *Id*. at 10-13. RICO's private right of action, in contrast, does not overcome the presumption, because Congress expressed no clear intent to permit suit for injuries suffered abroad, and doing so would "create[] a potential for international friction." *Id.* at 18-22. *RJR* reaffirmed that "[a]lthough 'a risk of conflict ... [with] foreign law' is not a prerequisite for applying the presumption against extraterritoriality, where

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such a risk is evident, the need to enforce the presumption is at its apex." *Id.* at 21; *see* Reply Br. 14-16.

Here, as the Government conceded in its brief (at 27) and at oral argument, Congress did not intend ECPA to apply extraterritorially. The "potential for international friction" and "evident" "risk of conflict" that would result from extending ECPA abroad only confirms the need for rigorous enforcement of the presumption here. *See* Reply Br. 13-17.

Moreover, under *RJR*, courts must evaluate "concerns about international friction" *not* "on a case-by-case" basis, but rather by adopting a single interpretation of a statute's sweep, and being mindful that parties "that are not so sensitive to foreign sovereigns' dignity," slip op. 22—like the local and state officials empowered under § 2703—may invoke the statute. *See* Opening Br. 23-24.

Finally, *RJR* clarifies that the presumption against extraterritoriality, not other "background legal principles," governs whether a statute may be applied extraterritorially. Slip op. 23-24. *Contra* Gov't Br. 27-28. Indeed, *RJR* calls into question cases decided before "we honed our extraterritoriality jurisprudence in *Morrison* and *Kiobel*." Slip op. 26; *see* Opening Br. 53-54 (noting *Marc Rich*'s tension with *Morrison*).

Respectfully submitted,

s/ E. Joshua Rosenkranz

E. Joshua Rosenkranz
Counsel for Microsoft

cc: Counsel of Record (via CM/ECF)