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November 20, 2011

Via Electronic Filing

The Honorable J. Frederick Motz
United States District Judge
United States District Court of the District of Utah
U.S. Courthouse – Room 510
101 West Lombard Street
Baltimore, MD 21201

Re: Novell, Inc. v. Microsoft Corp., 2:04-cv-01045-JFM (D. Utah)

Dear Judge Motz:

I write regarding certain remarks made by the Court on November 18, 2011 at oral argument on Microsoft’s Motion for Judgment as a Matter of Law. The Court inquired as to the existence of certain letters between Bill Gates and Novell’s CEO, Bob Frankenberg, and specifically asked Novell to provide those letters, which Mr. Frankenberg referenced in testimony.¹ Additionally, the Court expressed the view – which I noted was mistaken – that the senior executives in Novell’s Business Applications Division were unaware of the issues related to the namespace extensions. As I explained, certain documents related to the Department of Justice’s (“DOJ”) inquiry to Novell, which Novell sought to have admitted and which this Court excluded, were either sent or received by the pertinent executives.

As the Court requested, Novell has enclosed several documents responsive to the Court’s concerns. To guide the Court’s analysis, below is a brief description of the relevant documents.

I. Correspondence Between Bob Frankenberg and Bill Gates

With respect to the correspondence between Bob Frankenberg and Bill Gates, Novell has enclosed the following documents: DX 215D, DX 215E, DX 215F, and DX 215G.²

¹ Specifically, Mr. Frankenberg testified that he complained about interfaces issues affecting the development of Novell’s suite for Windows 95 “in person and in writing.” Tr. at 1029:24-25 (B. Frankenberg).

² These documents are attached as Exhibits A, B, C, and D respectively.

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DX 215D. In this June 23, 1995 letter from Bob Frankenberg to Bill Gates, Mr. Frankenberg raises several issues, including a potential “Beta Exchange Agreement” and Microsoft’s request to include Novell’s Corsair and Ferret technologies in that agreement. As the Court will recall, these technologies were demonstrated in Mr. Frankenberg’s Agenda Conference speech in September 1994, which Mr. Gates attended and later described in an internal Microsoft email.

The second page of the letter fleshes out several issues that existed between Novell and Microsoft. In particular, Mr. Frankenberg notes in Roman numeral two that “Microsoft has leveraged its dominant OS position in the applications market. It is our view that **Microsoft’s OS’s contain undocumented calls, features, and other interfaces** that are made available to its own applications developers to give competitive advantages to its applications products.” DX 215D at 2 (emphasis added). During Mr. Frankenberg’s testimony, he explained that in his view, the phrase “undocumented calls or interfaces” meant “application interfaces to the operating systems that were not generally available to people outside of Microsoft, developers outside of Microsoft, but were available to those inside of Microsoft.” Tr. at 1027:25-1028:9 (B. Frankenberg). The letter corroborates Mr. Frankenberg’s testimony that he complained to Mr. Gates about undocumented interfaces, Tr. at 1029:12-25 (B. Frankenberg), and in fact that he understood the decision involving the namespace extensions related to the issue of undocumented APIs that were included in his complaints to Mr. Gates, Tr. at 1241:17-1242:9 (B. Frankenberg).

DX 215E. On July 20, 1995, Mr. Gates responded to Mr. Frankenberg’s letter. With respect to the concerns raised by Mr. Frankenberg about undocumented APIs and antitrust issues, Mr. Gates refused to discuss the issues. DX 215E at 3. Recalling an earlier meeting between the two, Mr. Gates told Mr. Frankenberg that “You will recall that in our meeting of last January 10, you stated that those issues were ‘behind us.’ That is as it should be.” *Id.* In testimony, however, Mr. Frankenberg unequivocally explained that his statement referred to things in the past and that “undocumented interfaces continued to be an issue, so they weren’t in the past.” Tr. at 1030:1-9 (B. Frankenberg).

DX 215F. On August 21, 1995, Mr. Frankenberg responded to Mr. Gates’ July letter, and again raised the equal access issue with respect to software applications. DX 215F at DB 0004117. In closing, Mr. Frankenberg requested a meeting “to discuss these issues in-depth.” *Id.*

The second page of DX 215F contains Mr. Gates’ responsive letter to Mr. Frankenberg, dated September 15, 1995. And again, Mr. Gates refused to address Novell’s concerns. In fact, Mr. Gates states that Novell and Microsoft “exhausted the discussion of antitrust during our January 10th meeting in Redmond.” *Id.* at 2.

DX 215G. Finally, Novell has attached DX 215G, Mr. Frankenberg’s letter of September 29, 1995 responding to Mr. Gates’ letter of two weeks earlier. In his letter, Mr. Frankenberg made

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clear that “Novell will not forsake the other issues simply because Microsoft refuses to acknowledge them” and stated in no uncertain terms that Novell never agreed to waive its issues with Microsoft.

Thus, it is plain that Mr. Frankenberg raised issues regarding Microsoft’s undocumented calls and interfaces in 1995, though Mr. Gates refused to address them.

II. DOJ Inquiry Documents Identifying Business Applications Executives

With respect to the Court’s concern regarding Novell’s “DOJ Inquiry” documents, Novell has enclosed PX 317 and PX 320³ as evidence that the most senior executives in Novell’s Business Applications Division knew of the issues plaguing the development of its Windows 95 suite.

PX 317. This July 13, 1995 e-mail provides a comprehensive discussion of the Microsoft conduct affecting the development of Novell’s suite for Windows 95. PX 317 was sent by Bruce Brereton, Novell’s Vice President of Development in the Business Applications Division and is addressed to Mark Calkins, the Vice President and General Manager of the Business Applications Division at Novell.⁴

A review of the document confirms that these executives knew that Microsoft de-documented the namespace extension APIs, that the de-documentation led to Novell’s issues with its file open dialog, and that a decision had been made to rebuild that dialog “from scratch.” *See* PX 317, at NOV 00516407. Indeed, the *first point* listed says “MS removed the ability to hook into the Explorer. That is why we are doing our Open Dialog/Name space browser from scratch. I also don’t know if MS apps are going under the covers and extending the explorer themselves.” *Id.* There is no criticism in PX 317 about the decision to rebuild the file open dialog “from scratch,” indicating that the most senior executives in Novell’s Business Applications Division approved of the decision.

PX 320. This July 20, 1995 e-mail between David Bradford and Ryan Richards (Novell’s in-house counsel) references a conversation among Mr. Bradford and several other individuals, including Mark Calkins, the Vice President and General Manager of the Business Applications Division. The group identified several acts that they felt would be most salient for the DOJ, including Microsoft’s de-documentation of the namespace extension APIs. The e-mail indicates that Novell “had been coding for some time” to the features that Microsoft removed.

³ Attached as Exhibits E and F, respectively.

⁴ PX 336, at NOV00279434 (Novell Organizational Chart, attached as Exhibit G).

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In light of Microsoft's repeated arguments to the Court and jury (1) that only "low-level developers" were involved in the issues surrounding the namespace extension APIs and the decision to develop a custom file open dialog,⁵ and (2) that the senior executives in Novell's Business Applications Division were unaware of these issues, Novell again moves for the admission of the "DOJ Inquiry" documents. In the alternative, Novell respectfully requests that the Court issue a curative instruction to the jury explaining that there are certain documents, which cannot be admitted for legal reasons, that indicate that the senior executives in Novell's Business Applications Division knew of the issues surrounding the namespace extension APIs and the decision to develop a custom file open dialog.

Very truly yours,

/s/ Jeffrey M. Johnson

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Encls.

cc: John Schmidlein, Esq.
David B. Tulchin, Esq.

⁵ See, e.g., Tr. at 401:9-404:23; 1147:15-1148:6; 2489:22-2490:20, 2491:21-2493:3.