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November 29, 2011

By ECF Filing

The Honorable J. Frederick Motz,  
United States District Court for the District of Utah,  
Frank E. Moss United States Courthouse,  
350 S. Main Street,  
Salt Lake City, Utah 84101.

Re: Novell, Inc. v. Microsoft Corp.

Your Honor:

As the Court is well aware, there is a serious issue regarding Novell's spoliation of documents. Before trial commenced, Microsoft sought a spoliation instruction, based in part on additional documents that had been located by Craig Bushman in September of this year. (*See* Microsoft's Motion to (a) Strike Novell's "Foundation" Objections with Respect to Documents Produced by Novell from Its Files and (b) For a Spoliation Instruction, filed September 27, 2011.) The Court declined to give a spoliation instruction at the time, but ruled that it would "simply let [Microsoft] have that argument and let the jury determine its relevance." Oct. 7, 2011 Hearing Tr. at 29.

Mr. Bushman's testimony at trial highlights the need for a spoliation instruction, and demonstrates that the extent of Novell's spoliation goes well beyond the handful of documents that Mr. Bushman located prior to trial. For instance, Mr. Bushman testified yesterday about attending bi-weekly development meetings that may have included 30 to 35 people in the final seven or eight months before the release of PerfectOffice for Windows 95. Nov. 8 Trial Tr. at 3177:3-3178:5. No notes or minutes from these regular meetings were, it seems, produced by Novell during discovery. Mr. Bushman also testified yesterday about having located the documents raised in Microsoft's spoliation motion, and testified that "when I disclosed what—that I had found documents, I was told [by Novell's lawyers in a private meeting] that I didn't need to go find any more." *Id.* at 3151:11-13.

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Yesterday morning, just moments before he took the stand to testify in Court, Mr. Bushman handed Microsoft's counsel a 3.5 inch diskette he had discovered the night before on an old personal computer he had at his home. Microsoft is providing a copy of the disk to Novell's counsel concurrently with the filing of this letter. Microsoft was able to recover some of the documents on the disk yesterday afternoon and discovered a number of documents that are highly relevant to the case. Of course, given the timing of receipt of the disk, Microsoft had no opportunity to question Mr. Bushman about the documents on the disk. And it also had no opportunity to examine other witnesses at trial, including Novell's former CEO, about these highly important documents.

Among the documents recovered from the disk is a September 19, 1995 e-mail from Mark Calkins, Manager of the Business Applications Division, to Mary Burnside, Novell's Chief Operating Officer, with a copy to Bob Frankenberg, bearing the subject line "Localization." Mr. Calkins states that "there are still MAJOR PROBLEMS that exist RIGHT NOW with localization. The number one problem is the lack of localization tools for Storm. Within the next week or two, THIS MAY BECOME THE CRITICAL PATH for localized versions of Storm. Your team is aware of the situation and is trying to fix the problem, but I wonder if they will." (Upper case letters in original.) This document, which is copied to Mr. Frankenberg, shows that Quattro Pro localization—not anything to do with the namespace extension APIs—threatened to become "critical path" as late as September 1995. Microsoft has marked this document as Defendant's Exhibit 640, and respectfully requests that DX 640 be admitted into evidence. A copy of the document is attached to this letter as Exhibit A.

In light of the mounting pile of evidence of Novell's blatant spoliation of documents that are critical to this case, Microsoft renews its request for a spoliation instruction. Microsoft's requested instruction (the same as what Microsoft proposed in September) is attached to this letter as Exhibit B.

Microsoft further requests that Mr. Frankenberg's examination be resumed for the sole purpose of questioning him about DX 640 and the circumstances surrounding Novell's failure to produce it. Both sides would be limited strictly to an examination about DX 640. Mr. Frankenberg should, of course, still be bound by the Court's sequestration rules, which prohibit Novell's counsel—directly or indirectly—from advising Mr. Frankenberg about the testimony of other witnesses or from any substantive consultation. D. Md. Local Rules 107.7 and 107.14. In the alternative, Microsoft requests that the Court instead instruct the jury during trial (not just in the charge) as follows:

"Novell had an obligation imposed by law to produce relevant documents that Microsoft requested during the course of discovery in this case. Novell failed to produce certain relevant documents in violation of its obligation.

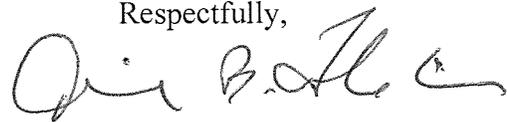
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Several new documents have just been discovered by a witness in the case, who gave them to Microsoft's counsel earlier this week. Because these documents were not provided by Novell to Microsoft during discovery and Microsoft just received them, Microsoft had no ability to use them on cross examination of Mr. Frankenberg or any other witness, and as a result, Microsoft's counsel will now be permitted to display the document to you and to read the document in the absence of a witness."

The latest discovery of relevant documents, including the September 1995 memo (DX 640), again shows the extent of spoliation by Novell. The document attached hereto as Exhibit A helps to establish that the cause of any delay in 1995 was not anything attributable to Microsoft. Microsoft requests that the Court take steps to make sure that Novell's spoliation does not advantage it. At a minimum, this requires that the Court give the jury the attached spoliation instruction, permit a limited resumption of the cross of Mr. Frankenberg (in accordance with the above), and instruct the jury about DX 640 as soon as feasible and allow Microsoft's counsel to read it to the jury.

Respectfully,

A handwritten signature in black ink, appearing to read "David B. Tulchin", with a stylized flourish at the end.

David B. Tulchin

(Enclosures)

cc: Jeffrey M. Johnson, Esq.  
(w/enclosures)