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December 13, 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: Response to Microsoft's letter of December 13, 2011 regarding closing argument
***Novell, Inc. v. Microsoft Corp.*, 2:04-cv-01045-JFM (D. Utah)**

Dear Judge Motz:

I write in response to Microsoft's letter of December 13, 2011 regarding Novell's closing argument.[1]

Microsoft accuses Novell of "misleading" the jury by "obliterating" and "hid[ing] from the jury" a portion of an exhibit, DX 231, during closing argument. Microsoft's accusation against Novell is without merit.

DX 231 was a document that Microsoft, not Novell, successfully moved to admit into evidence. DX 231 memorializes that the 32-bit version of Quattro Pro was "Code Complete" on August 23, 1995. Microsoft chose not to elicit any testimony about this exhibit, or make any argument about it – but that certainly did not preclude Novell from making an argument based on that admitted evidence in its closing. DX 231 was used in Novell's rebuttal closing because it effectively rebutted the arguments that Microsoft made in *its* closing – Microsoft's arguments that Quattro Pro was the component of the 32-bit PerfectOffice 7 suite (codenamed "Storm") that delayed its release on Windows 95, and that Mr. Gibb was not telling the truth when he testified that Quattro Pro was code complete before certain Quattro Pro developers resigned in December 1995.

[1] A copy of the slide that is the subject of Microsoft's letter is attached as Exhibit A hereto. (The slide incorrectly cites DX 271; it should say DX 231.) A copy of DX 231 is attached as Exhibit B hereto.

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The fact that Novell drew the jury's attention to the relevant portion of DX 231 regarding Quattro Pro, and did not scroll through or read the entire document to the jury in its closing, is not the least bit improper –it is exactly what Microsoft has done throughout the entire trial in bringing to the jury's attention a particular portion of a trial exhibit admitted into evidence. Indeed, during its closing argument, Microsoft showed the jury only a portion of numerous trial exhibits. Presumably, Microsoft did not believe that by doing so it was improperly "obliterating" or "hiding" the remainder of the document – it knew full well that the entire document would be given to the jury. The same is true with respect to Novell's use of DX 231.

Microsoft also suggests that DX 231 is somehow inconsistent with Novell's theory because it states that PerfectFit (FIGS) was code complete on 10/31/95. Mr. Gibb explained during trial in the context of discussing PX 322 that Novell planned to go to beta using Microsoft's common file open dialog as a placeholder because of the difficulties and delays being experienced by shared code in completing its custom file open dialog. Trial Tr. 907:5-908:10. That developers continued working on PerfectFit, knowing that the custom file open dialog was far from complete, hardly undercuts Novell's argument as to what the but for world would have looked like had shared code been completed in late 1994. Moreover, the fact that the document lists a projected 3/31/96 RTM date is entirely consistent with Novell's argument that the entire suite was delayed getting to market until the spring of 1996.

Microsoft's suggestion that it was unfairly surprised by Novell's use of DX 231 rings hollow. Not only was the document entered into evidence by Microsoft, but it was used by Novell during argument on Microsoft's Motion for Judgment as a Matter of Law prior to the commencement of Microsoft's case. Trial Tr. at 2617.

Moreover, the "relief" that Microsoft seeks is literally unprecedented – Microsoft does not cite a single authority that supports it – and would be highly prejudicial. Microsoft asks the Court both to tell the jury that Novell tried to mislead it, and to adopt Microsoft's false interpretation of DX 231. As explained above, Novell did nothing improper, and Microsoft's interpretation of DX 231 is incorrect. Therefore, the Court should not give the requested instruction.

Very truly yours,

/s/ Jeffrey M. Johnson

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