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December 15, 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 15, 2011 regarding Prof. Noll Testimony
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 15, 2011 regarding Professor Roger Noll’s testimony concerning middleware.

The definition of “middleware” is a subject of intense factual dispute between the parties. Microsoft continues to ask the Court to give its imprimatur to Microsoft’s side of the argument, and instruct the jury that Microsoft’s view is the correct one. The Court should reject Microsoft’s attempt to get the Court to weigh in on its side in this factual dispute between the parties.

Microsoft is incorrect to assert that “to be a threat to Windows, middleware must . . . be present on ‘all or nearly all’ PCs.” 12-15-2011 Microsoft Letter, at 3. First, Microsoft quotes Professor Noll out of context for the proposition that, to constitute middleware, the software must be present on “all or nearly all” PCs. *Id.* at 1 (citing Tr. at 1926). On the same page of the transcript as the excerpt cited by Microsoft, and in the context of the same line of questioning, Professor Noll makes very clear that this is not a requirement for software to be considered middleware, but is “a condition for *eliminating the applications barrier to entry*, commodifying the operating system. *It is not correct to say that something less than that couldn’t increase competition.*” Tr. at 1926:17-21 (emphasis added). As Professor Noll further testified, this last part is “crucial.” *Id.* at 1926:21. Thus, Microsoft’s letter is incorrect, as Novell has not alleged, and does not have to prove, that its applications and middleware would have single-handedly *eliminated* the applications barrier to entry.

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What Professor Noll testified was required was a “large install base.” Tr. at 1787:14-12-21. He explained that

the install base is the most important concept because that’s about the applications barrier to entry. At a given moment in time, there’s a bunch of people using WordPerfect, there’s a bunch of people using Word. If a new operating system is introduced, the ability to use that operating system depends on the size of the install base on the cross-platform software.

Tr. at 1762:8-14. Later in his testimony, Professor Noll clarifies how this installed base could be brought to bear. In comparing the similarities between Netscape Navigator, which he noted was “ubiquitous among a certain category of PC users” (Tr. at 1787:9-10), and Novell’s middleware products like AppWare, Professor Noll gave the following testimony:

A This finding of fact essentially puts into what I just said, that it is referring to the fact that on the one hand Navigator was popular and ubiquitous among a certain category of PC users and, secondly, it exposes APIs and therefore threatens the operating systems monopoly.

Q Did Novell’s middleware or other software products like AppWare have any of these attributes?

A Yes, they did. The key thing here is that they have a large install base and they run on different operating systems, which is sort of the underlying thing. They have the same characteristic. Netscape obviously is an extremely successful product, ***but having a large install base and running on different platforms is the characteristic that makes Netscape a threat. It’s the characteristic that makes Louts Notes and WordPerfect a threat.***

Tr. at 1787:7-21 (emphasis added). It is plain that the question of popularity is tied into the size of a product’s installed base.¹ As the evidence at trial has shown, WordPerfect’s installed base

¹ There is no qualification that the installed base must be on Windows alone, a fact further supported by Professor Noll’s testimony that the software must run on different platforms. Microsoft’s letter ignores this fact, though it is plain even from the testimony they cite. For example, the referenced testimony of Professor Noll on pages 1774 and 1780 reference the “operating system market” and “PC operating systems.” See 12-15-2011 Microsoft Letter (citing Tr. at 1774, 1780). Indeed, Microsoft even omits a portion of Professor Noll’s answer on page

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on both Windows and DOS exceeded Microsoft Word's installed based on Windows alone, and in 1995, as Professor Noll testified, "WordPerfect still has about half of the install base." Tr. at 1762:15-16. It is this characteristic that made Novell's applications and middleware a threat to Microsoft's PC operating system monopoly.

Furthermore, Microsoft mischaracterizes Professor Noll's testimony regarding the potential of PerfectFit and AppWare to reduce the applications barrier to entry. Contrary to what Microsoft suggests, Professor Noll testified that, to be successful, cross-platform middleware – like, *inter alia*, Java and Netscape – needed, in the short term, to be on Windows because Windows had a monopoly in the operating system market, and ISVs therefore had no choice but to write their cross-platform middleware to Windows because it was the dominant platform. After the cross-platform middleware had become popular, the middleware would then reduce the applications barrier to entry that protected Microsoft's operating system monopoly. As Professor Noll testified, "[i]f that software is cross-platform, then the next time someone buys a personal computer, they don't have to buy Windows." Tr. at 1777:13-15. In fact, because Windows was the dominant platform, the need to succeed on it is "exactly the same for anybody," including Novell. Tr. at 1777:24.

As the above discussion and prior discussions regarding middleware make clear, the definition of middleware that Microsoft espouses is incorrect and Novell has vigorously disputed it. There is no basis for the Court to tell the jury to accept Microsoft's incorrect definition of middleware.

Very truly yours,

/s/ Jeffrey M. Johnson

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cc: John Schmidlein, Esq.
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1781, which references Unix, Linux, and OS/2, as well as MS-DOS (which of course, held millions of WordPerfect users).