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**UNITED STATES DISTRICT COURT  
for the District of Utah  
Central Division**

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Novell, Inc., Plaintiff,	*	NOVELL’S REPLY MEMORANDUM IN
	*	SUPPORT OF ITS MOTION TO OVERRULE
	*	MICROSOFT’S OBJECTIONS TO DOCUMENTS
v.	*	CONCERNING NOVELL’S
	*	COMMUNICATIONS WITH THE DOJ
Microsoft Corporation, Defendant.	*	ABOUT MICROSOFT’S CONDUCT
	*	Case No. 2:04-cv-01045-JFM
	*	Hon. J. Frederick Motz

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Microsoft's Opposition to Novell's Motion to Overrule Microsoft's Objections conflates different portions of Microsoft's opening statement, and omits a key sentence in this Court's curative jury instruction, in order to give a misleading impression of what the jury heard. Microsoft repeatedly quotes a single sentence in the opening, in which Microsoft asserted that "[w]e don't think there will be any evidence, no document from Novell, contemporaneous document written in 1994 or 1995, that will indicate that they complained to Microsoft about the decision." Opp'n at 1-2, 3, 8 (*quoting* Oct. 18, 2011 Tr. at 140). But on several other occasions during the opening statement, Microsoft stated that, in the face of Microsoft's decision to de-document the namespace extensions APIs, Novell "never complained," Oct. 18, 2011 at 90, "said nothing," *id.* at 91, "made no complaint," *id.* at 141, and "remained silent," *id.*, each time without limiting the assertion to a failure to complain to Microsoft. And each time Microsoft asserted that Novell did not complain, Microsoft linked this assertion to the fact that Novell did not file the lawsuit until ten years later. *Id.* at 90-91, 141. The obvious implication was that this case was a meritless suit concocted ten years after the fact, because until the lawsuit was filed in 2004 Novell supposedly never complained to anyone.

Moreover, while Microsoft quotes part of the Court's curative instruction, Opp. at 4 n.2, it omits the crucial sentence: "[i]t is fair game to say why didn't you comment earlier, why didn't you criticize it earlier, and this is a matter of evidence for you all to decide." Oct. 20, 2011 Tr. at 200.

Novell seeks to introduce the documents relating to Novell's communications with the Department of Justice ("DOJ") because they discuss the very issue that this Court stated was "fair game" – whether Novell "comment[ed] earlier" about Microsoft's actions. Microsoft repeatedly suggested to the jury that Novell did not complain to anyone until the lawsuit was

filed “ten years later.” Oct. 18, 2011 Tr. at 91, 141. The evidence Novell seeks to introduce shows that Novell did complain.

Microsoft argues that the documents regarding Novell’s complaints to the DOJ about Microsoft’s conduct are irrelevant because (1) the complaints were not made to Microsoft and (2) the documents supposedly were not contemporaneous with Microsoft’s decision to de-document the namespace extensions APIs. Microsoft’s first argument would be valid only if Microsoft had limited its opening statement to the assertion that Novell failed to complain to Microsoft; but, as noted above, Microsoft repeatedly suggested to the jury that Novell did not complain to anyone until this suit was filed “ten years later.” *Id.* Microsoft’s second argument is refuted by the fact that, in the portion of the opening statement that Microsoft itself repeatedly quotes, Microsoft refers to “contemporaneous documents” as documents “written in 1994 or 1995.” *Id.* at 140. All but one of the documents at issue in this motion were written during this time period, and are thus “contemporaneous,” in the sense that Microsoft used that term during its opening statement.

The fine distinctions that Microsoft seeks to draw between the assertions Microsoft made during its opening statement and the documents Novell seeks to introduce to refute them are unavailing. The Tenth Circuit has held that when a party raises a subject in an opening statement, the party opens the door to evidence regarding the same subject matter. *See United States v. Magallanez*, 408 F.3d 672, 678 (10th Cir. 2005). Here, Microsoft raised the subject of whether or not Novell complained, thus opening the door to evidence regarding that subject: that Novell did complain. Moreover, the Tenth Circuit has held that an opening statement which merely implies a particular proposition opens the door to evidence refuting that implication. *See United States v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006). Here, Microsoft did more than

merely imply that Novell never complained regarding Microsoft's conduct, it said so explicitly – and thereby opened the door to evidence refuting that assertion.

Microsoft's objections to these exhibits all depend on the false premise that the issue of whether Novell complained to anyone is irrelevant to the case. Even if this evidence were not otherwise relevant, the fact that Microsoft argued during its opening that Novell never complained about Microsoft's conduct until this lawsuit was filed in 2004 (and that therefore the suit lacks merit) is itself sufficient to make the evidence relevant, because it refutes Microsoft's assertions. Courts have repeatedly rejected objections based on relevance and unfair prejudice when a party has opened the door to that evidence by raising the subject in its opening statement. *See Magallanez*, 408 F.3d at 678; *United States v. Moore*, 98 F.3d 347, 350 (8th Cir. 1996).

Microsoft's hearsay objections also depend on the same false premise – that the fact that Novell complained about Microsoft's conduct to the DOJ is supposedly irrelevant. As explained above, that subject matter is relevant because Microsoft opened the door to it in its opening statement. And, as Novell explained in its original memorandum, because the evidence is being introduced only to show the fact that Novell complained, and not the truth or validity of Novell's complaint, it is not being offered for the truth of the matters asserted therein. Therefore, it is not hearsay. *United States v. Lewis*, 594 F.3d 1270, 1282 (10th Cir.), *cert. denied*, 130 S. Ct. 3441 (2010)

### **CONCLUSION**

For the foregoing reasons, and those stated in Novell's original memorandum, Microsoft's objections to documents concerning Novell's communications with the Department of Justice regarding Microsoft's conduct should be overruled.

Dated: October 26, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: /s/ Maralyn M. English