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November 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: Exhibits discussed with Novell’s Technical Expert, Ronald Alepin, on Nov. 9, 2011
Novell, Inc. v. Microsoft Corp., 2:04-cv-01045-JFM (D. Utah)**

Dear Judge Motz:

Per the Court’s statement at the end of the trial day on November 9, 2011, Novell submits this short letter to the Court to request the admission of several documents related to the examination of its technical expert, Mr. Ronald Alepin. Specifically, Novell respectfully requests that the Court admit documents related to Microsoft’s conduct surrounding the Messaging Application Programming Interface (“MAPI”).

The relevant documents include those marked as PX 16, PX 22, PX 275, and PX 353.¹ These documents relate to Lotus Notes, another major middleware competitor to Microsoft during the relevant period and all of the documents fall within that period. Nonetheless, Microsoft has objected to the admission of all four exhibits on the grounds of relevancy and Federal Rule of Evidence 403. Additionally, Microsoft objects to PX 275 and PX 353 on hearsay grounds, and PX 16 on embedded hearsay grounds. The substance of these documents is briefly described below.

- PX 16, produced by Microsoft, is an internal Microsoft email from February 1992 reviewing the events that occurred at the NetWorld Conference. Within the email, Microsoft employees describe the standards battle between the MAPI specification and a competing specification, Vendor Independent Messaging (“VIM”), that was sponsored by Lotus and other companies. Within the document, Microsoft states that a key message to deliver to ISVs who are deciding what standard to support is that MAPI is “truly open.” PX 16, at MS 5033638.

¹ PX 16, PX 22, PX 275, and PX 353 are attached as Exhibits A, B, C, and D respectively.

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- PX 22, produced by Microsoft, is a Microsoft evangelism document describing the purpose and technology of the MAPI specification. The document provides an in-depth review of what the standard does and contains Microsoft's core messages about MAPI, including that it was open. PX 22, at MS7058545-46.
- PX 275, produced by Microsoft, is an e-mail from a Lotus executive to Microsoft executives complaining about Microsoft's conduct with respect to MAPI. In particular, the document shows that Lotus chose to adopt MAPI based on Microsoft's evangelism of how the specification would be handled and specifically that it would be an open standard. PX 275, at IBM 7510341168.
- PX 353, produced by Microsoft, is an e-mail among Lotus employees explaining the requirement that Microsoft's e-mail application and Inbox icon were installed before MAPI could be accessed in Windows 95. PX 353, at IBM 7510295373.

On October 6, 2011, this Court indicated that it was inclined to admit evidence related to Novell's claims regarding MAPI. Oct. 6, 2011 Hearing Tr., at 108:3-9. In keeping with that ruling, the Court permitted Novell's technical expert, Ronald Alepin, to testify regarding Microsoft's handling of MAPI, focusing on Microsoft's evangelism of the specification as an open standard and Microsoft's conduct forcing competing ISVs to install Microsoft's e-mail application to access MAPI. Nov. 9, 2011 Trial Tr., at 1447-1454 (R. Alepin). In addition, Professor Noll testified on the same subject Nov. 14, 2011 Trial Tr., at 122:18-126:14 (R. Noll).

Based on the Court's October 6th ruling, and in allowing Mr. Alepin's subsequent testimony, Microsoft's relevancy objections have been effectively overruled. Moreover, any objection under Federal Rule of Evidence 403 has been cured, given the Court's repeated limiting instruction to the jury indicating that the MAPI-related conduct does not pertain to any Novell-owned product at issue in this case. Nov. 9, 2011 Trial Tr., at 1443:14-21; 1445:12-14; 1454:15-1455:2. Thus, the probative value of PX 16, PX 22, PX 275, and PX 353 clearly outweighs any danger of unfair prejudice.

In addition, Microsoft has maintained a hearsay objection to PX 275 and PX 353. Based on the parties' business records stipulation, however, these documents are excepted from the hearsay rule.² The parties' stipulation provides that "Documents *produced* by either party to this action are presumed, and shall be deemed, to be records of regularly conducted business activity within the meaning of Rule 803(6) of the Federal Rules of Evidence, unless the party opposing admission of such a document into evidence shows that it does not satisfy the criteria of Rule

² The parties' business records stipulation is attached as Exhibit E.

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803(6).”³ Microsoft produced both PX 275 and PX 353 (as well as PX 16 and PX 22) in this action, and has not made any showing to dispute the presumption that these documents qualify as business records under the parties’ stipulation. Therefore, PX 275 and PX 353 satisfy the business records exception to the hearsay rule.

Finally, Microsoft maintains an “embedded hearsay” objection to PX 16, although the entirety of the e-mail is an admission by a Microsoft executive, and is therefore not hearsay. Moreover, Lotus’ purported statements – which are relayed and adopted by a Microsoft executive – are not hearsay, because Novell does not offer the statements for the truth of the matters asserted, but rather for their effect on Microsoft. Lotus’ anti-MAPI comments effectively caused Microsoft to evangelize MAPI as a “truly open” standard, thereby inducing ISVs to rely on the specification. PX 16, at MS 5033637-38. Thus, PX 16 contains no objectionable material.

Because Microsoft’s objections to PX 16, PX 22, PX 275, and PX 353 lack merit, Novell respectfully requests that the Court overrule Microsoft’s remaining objections to the above documents and admit the documents into evidence.

Very truly yours,

/s/ Jeffrey M. Johnson

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Encls.

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

³ Note that PX 275 and PX 353 were first produced by IBM/Lotus to Microsoft in an earlier action, but those documents were produced to Novell by Microsoft in this action. The parties’ business records stipulation does not contain an exception that would exempt PX 275 or PX 353 from coverage.