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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: Objections to the Admission of DX 131A
Novell, Inc. v. Microsoft Corp., 2:04-cv-01045-JFM (D. Utah)**

Dear Judge Motz:

I write in regard to Defendant’s Exhibit 131A, which Microsoft sought to have admitted today. The document, pulled from the internet, reflects an e-mail exchange between Microsoft’s Joe Belfiore and an individual named Andrew Schulman. Mr. Schulman is an author of various books which discuss, among other things, Microsoft’s undocumented APIs. Novell maintains its objection to the admission of DX 131A on hearsay grounds for several reasons, and as shown below, the document should be excluded.

First, DX 131A is a classic example of inadmissible hearsay. Under Federal Rule of Evidence 801(c), hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Specifically, Microsoft offers DX 131A, an e-mail from Microsoft employee Joe Belfiore, to prove the truth of Mr. Belfiore’s statements regarding the namespace extension APIs. Moreover, because the e-mail contains statements by a Microsoft employee, the document does not satisfy either of the hearsay exemptions listed in Rule 801, which cover prior statements by a witness on cross examination or admissions by a party opponent.

Nor does DX 131A satisfy any of the hearsay exceptions under Rule 803. In particular, DX 131A does not qualify as a business record under Federal Rule of Evidence 803(6) and it is not covered by the parties’ business records stipulation for several reasons.¹ First, the document

¹ The business records stipulation entered in this case allows the party opposing admission of a document to show that the particular document “does not satisfy the criteria of Rule 803(6).” Stip. Regarding Bus. Records Exception to the Hearsay Rule (July 22, 2011) (Dkt. # 54).

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is not marked with any bates number.² Next, the only identifying mark on the document indicates that it was retrieved from an internet website. Additionally, the document has no hallmarks of something kept by Microsoft in the ordinary course of business. A simple review of other e-mails produced by Microsoft in this action reveal the obvious differences. Finally, due to its point of origin – the internet – DX 131A’s reliability is unknown.

As an equitable matter, Microsoft has objected to several similar documents on hearsay grounds for which Novell has sought admission. For example, Novell designated a number of CompuServe forum posts detailing conversations between software developers and Microsoft employees.³ Notably, where Novell has sought to admit such documents, they have contained statements by *Microsoft* employees, and therefore qualify as admissions of a party opponent under Federal Rule of Evidence 801(d). Furthermore, those documents were extracted from Novell’s back-up tapes and bear bates stamps. Conversely, Microsoft now seeks the admission of a similar document in DX 131A, even though it bears no bates stamp and contains statements of *Microsoft’s own* employee (rather than Novell’s).

Because DX 131A is inadmissible hearsay, Novell respectfully requests that the Court exclude the document. Should the Court choose to admit DX 131A, Novell requests that other similar documents to which Microsoft has objected be admitted on the same grounds.

Very truly yours,

/s/ Jeffrey M. Johnson

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Encls.

cc: John Schmidlein, Esq.
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² The only identifying marking at the bottom of the page indicates that the document was retrieved on March 21, 2002 from a website with the domain <http://www.compware.demon.co.uk.huey/w95vfd.txt>. See DX 131A (attached as Ex. A).

³ See, e.g., PX 252, PX 280, PX 301, PX 309, PX 313, and PX 551. These documents are too long to attach to this letter. We will have them available in Court tomorrow.