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

Novell, Inc.,
Plaintiff,

v.

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NOVELL'S MEMORANDUM IN SUPPORT
OF ITS MOTION TO ADMIT EXHIBITS
TO WHICH THERE ARE OUTSTANDING
OBJECTIONS

Microsoft Corporation,
Defendant.

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Case No. 2:04-cv-01045-JFM
Hon. J. Frederick Motz

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INTRODUCTION

Plaintiff Novell, Inc. (“Novell”) submits this Memorandum in Support of its Motion to Admit Exhibits to Which There are Outstanding Objections. Despite efforts to do so, the parties have been unable to resolve numerous objections to certain potential exhibits. Because all of Microsoft’s remaining objections to the documents addressed in this motion are meritless, Novell respectfully requests that the Court overrule those objections and admit the particular documentary evidence identified below.

The documents to which Microsoft objects can be evaluated in several broad legal and factual categories. For example, Microsoft has maintained relevance objections to certain documents regarding Microsoft’s and IBM’s partnership related to the OS/2 operating system. Such documents are not irrelevant, however, as Microsoft has injected as a purported defense in this case the issue of WordPerfect’s decision to develop to OS/2 rather than Windows. Another category of documents to which Microsoft objects relates to platform threats to Microsoft (other than Novell’s office productivity applications), including threats posed by groupware and internet middleware applications. Because Novell’s theory centers on middleware products and the threat they posed, evidence of Microsoft’s conduct against other middleware is entirely relevant. Through the parties’ meet-and-confer process, Novell and Microsoft have eliminated many objections to certain documents leaving only a hearsay objection. The parties’ business records stipulation, however, resolves any basic hearsay objection to these particular documents that otherwise were kept in the ordinary course.¹

¹ There are other categories of documents which are described below.

ARGUMENT

I. Documents Pertaining to OS/2 and Microsoft's Head Fake

Novell seeks the admission of several documents related to Microsoft's "head fake." Within the industry, Microsoft's "head fake" refers to Microsoft's message to ISVs, while it was partnered with IBM, that ISVs should develop for OS/2 over Windows. *See, e.g.*, PX 6 (attached hereto as Exhibit 1) (hereinafter (Ex. __)); PX 10 (Ex. 2). Microsoft has objected to several such documents under Federal Rules of Evidence 402 and 403. These objections are baseless. Under Federal Rule of Evidence 402, relevant evidence is "evidence having any tendency to make the existence of the *any fact that is of consequence* to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added). Here, Microsoft itself has injected the issue of WordPerfect's lateness to developing for Windows and graphical user interface ("GUI") operating systems. In fact, Microsoft's counsel also raised this issue with Novell's antitrust economics expert, Professor Roger Noll. Nov. 15, 2011 Trial Tr., at 1877:7-20 (R. Noll). Thus, the reason for WordPerfect's lateness – especially as it relates to Microsoft's deception² – is certainly of consequence. In response, Novell should be permitted to present the jury with evidence about Microsoft's conduct and how that influenced WordPerfect's decision.

Furthermore, something does not run afoul of Federal Rule of Evidence 403 ("Rule 403") if it is merely prejudicial in the sense that it damages a parties' case. Instead, evidence must be *unfairly prejudicial*. *United States v. Schneider*, 594 F.3d 1219 (10th Cir. 2010).

² PX 5, to which Microsoft objects on embedded hearsay grounds, is the IBM/Microsoft Statement of Direction with respect to OS/2 and Windows. (Ex. 3). One of the points listed in the PX 5 notes that the "Majority of IBM and Microsoft application and systems development resources will be applied to OS/2 solutions" and that "OS/2 is the recommended operating system environment for new or existing 286/386 systems with 3Mb or more of memory." PX 5, at IBM 7510238910. The embedded hearsay issue – which is easily disposed of – is addressed later in this brief.

Unfairly prejudicial evidence presents ““a genuine risk that the emotions of the jury will be excited to irrational behavior”” and thus decide the case on an improper basis. *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998) (citation omitted).

Therefore, Novell respectfully requests that the Court overrule Microsoft’s relevance and Rule 403 objections to the following documents, and moves for their admission into evidence:

- PX 6, a January 20, 1990 internal e-mail among Microsoft executives discussing Microsoft’s OS/2 and Windows strategy. The document raises the question of how Microsoft can “back-off OS/2 as the successor to DOS? How do we beat a successful retreat path?” One Microsoft executive notes that “I don’t buy that we can hide behind this insipid claim that we’ve always pushed Windows and that its’ their own fault. It just isn’t true, we’ve told ISVs to developer for OS/2 and clearly put a lot more behind getting OS/2 apps than Windows apps.” PX 6, at X 194118 (Ex. 1).
- PX 10, a March 4, 1991 internal e-mail among Microsoft executives discussing the possibility of praising OS/2 to IBM in the hopes of “lull[ing] IBM to sleep for another year . . . while we steal more oil wells with Windows.” (Ex. 2).
- PX 386, an undated question and answer document from Microsoft’s files detailing Microsoft’s and IBM’s responses to their partnership to support and promote the OS/2 operating system. (Ex. 4).
- PX 463, an October 24, 1989 letter from a Microsoft executive to an IBM executive regarding the companies’ “joint goals” for promoting OS/2. (Ex. 5). The Microsoft executive acknowledges that he understands IBM will be relying on Microsoft to “Provide strong OS/2 message from Microsoft development activities and sales force” and to “Promote OS/2 effectively to both software developers and other hardware manufactures so that OS/2 will reach critical mass and meet our business goals.” PX 463, at M 00007219-20.

II. Documents Pertaining to Alternative Development Platforms Threatening Microsoft

Microsoft executives feared a number of different products that could have provided an alternative platform to Windows and could threaten Microsoft’s PC operating systems monopoly. The most notable products in this category (other than Novell’s products) are Lotus Notes, Netscape Navigator, and Sun Microsystems’ Java Technologies. Internally, Microsoft

considered how to defeat these products and often detailed the threat they posed to Microsoft. Now, Microsoft has objected to the admission of such documents under Federal Rules of Evidence 402 and Rule 403. Nonetheless, Microsoft has continued to argue before the jury that middleware platforms would only constitute a threat to its monopoly to the extent that “general purpose productivity applications” could be developed on top of such middleware. That is not only incorrect, but it was not the contemporaneous view held by Microsoft’s executives. Such evidence directly contradicts Microsoft’s arguments, and is relevant to these proceedings. Such evidence also illustrates Microsoft’s strategy to target emerging middleware platform threats, like Novell’s office productivity applications.

With respect to Lotus Notes for example, one Microsoft employee stated that “[i]t has become very apparent that Lotus Notes is a major threat to the continued success of Microsoft. It attacks our *systems business* by relegating Windows to the OS level and taking over the middleware and shell functionality – *Notes is the portable platform, not Windows.*” PX 30, at FL AG 0082465 (Ex. 6). WordPerfect and Novell’s office suite presented exactly the same threat to Microsoft’s “systems business.”

Regarding Netscape Navigator and Sun’s Java, Microsoft executives authored several documents detailing the threat posed by those products. In one e-mail, Bill Gates described Netscape Navigator as a competitor “‘born’” on the internet. PX 306, at MS-PCA 1120608 (Ex. 7). In another e-mail titled “Anti-Java Strategy Memo,” one Microsoft employee posited a strategy to “jump on the Java bandwagon and try to take control of the class libraries and runtime” and that he expected Microsoft’s competitors would “jump on Java as the way to beat Microsoft.” PX 342, at MS98 0164420 (Ex. 8).

These types of documents are undeniably relevant. They tend to illustrate the state of the market at the time, the threat Microsoft perceived to its monopoly, and a discussion of the strategies that Microsoft considered to quell such threats. Moreover, there is nothing unfairly prejudicial about these documents. For all of these reasons, Novell respectfully requests that the Court overrule Microsoft's relevance and Rule 403 objections with respect to the following documents and admit these documents into evidence:

- PX 30, a March 23, 1993 internal Microsoft memorandum on integrating Microsoft applications with Lotus Notes. (Ex. 6).
- PX 89, an October 1993 internal e-mail chain among Microsoft executives discussing the threat posed by Lotus Notes. (Ex. 9). In addition to the relevancy and Rule 403 objections, Microsoft has also objected to this document on embedded hearsay grounds because it contains an embedded article on Lotus Notes. Novell does not seek to offer the article for the truth of the matters asserted in it, but rather to provide context for Microsoft's admissions and to show the effect of the article on the listener, in this case, Microsoft.
- PX 112, a Microsoft memorandum regarding its "Vision for Workgroup Computing" and in particular, it discusses the threat of Notes to reduce the Windows shell "to a 'graphical C: prompt.'" (Ex. 10).
- PX 303, a May 15, 1995 internal Microsoft e-mail attaching a draft memorandum on Microsoft's Internet Direction and threats to Microsoft related to the Internet. (Ex. 11).
- PX 306, a May 26, 1995 internal memorandum from Bill Gates describing the "Internet Tidal Wave" and discussing its effect on Microsoft. (Ex. 7).
- PX 307, a May 27, 1994 internal Microsoft memorandum identifying the Internet as "the Next Platform." (Ex. 12).
- PX 342, a September 4, 1995 internal Microsoft e-mail detailing its anti-Java strategy, including a discussion of how to take control of the Java technologies. (Ex. 8).
- PX 393, an undated internal Microsoft presentation prepared by Microsoft executive detailing an eighteen month strategy to beat Lotus Notes and stating that "Notes threatens Windows." (Ex. 13).
- PX 459, an April 10, 1995 e-mail from Bill Gates acknowledging that the "Internet [is] destroying [Microsoft's] position as the setter of standards and APIs." (Ex. 14).

III. Documents Containing Embedded Hearsay

A. Embedded Hearsay Documents Containing Admissions by Microsoft Executives

Microsoft has objected to several documents authored by Microsoft executives that contain admissions on the grounds that the documents also contain embedded hearsay in the form of news articles or other quoted points. The embedded articles and statements provide context for the admissions, however, and those admissions would not make sense without the underlying material on which they are based. In any event, Novell does not offer the embedded statements or articles for the truth of the matters they assert, but rather for their effect on the reader, i.e., Microsoft executives.³

For example, in PX 190, Bill Gates compliments the announcement of Novell's PerfectOffice 3.0 suite and indicates that he is "impressed with several aspects of what they claim they will ship." (Ex. 15). Similarly, in PX 210, a Microsoft employee expresses concern over Novell's desire to integrate its applications with its network products based on a press release describing Novell's strategic direction. (Ex. 16). Again, the press releases in both PX 190 and PX 210 are required to provide context, but the substantive points of value involve the admissions by Microsoft's executives.

Therefore, Novell respectfully requests the Court overrule Microsoft's embedded hearsay objections to the following documents and admit those documents into evidence:

- PX 95, an October 13, 1993 e-mail from Microsoft executive Brad Silverberg detailing various competitive products to Windows, including AppWare. (Ex. 17).

³ Novell is not averse to the jury receiving a limiting instruction with respect to documents containing news articles that differentiate between the substance of the admissions contained within the documents and the articles themselves.

- PX 190, a June 30, 1994 internal Microsoft e-mail from Bill Gates responding to a Novell press release regarding PerfectOffice 3.0, indicating he was impressed with all of the things Novell planned to do for its release. (Ex. 15).
- PX 210, a September 10, 1994 internal e-mail among Microsoft employees in response an article outlining WordPerfect's strategic direction. In response, a Microsoft employee acknowledges the seriousness of the threat posed by Novell's desire to integrate its business applications with the network. (Ex. 16).
- PX 211, a September 15, 1994 internal e-mail from a Microsoft employee detailing Novell's Strategic direction after listening to a speech by Novell CEO Bob Frankenberg. (Ex. 18). The statements contained in the document provide a synopsis of Novell's strategy and recount the Microsoft employee's impression of that strategy.

B. Embedded Hearsay Documents That Novell Agrees to Redact

The following documents contain embedded articles to which Microsoft maintains embedded hearsay objections. For the documents below, Novell agrees to redact the embedded articles, which should cure any objection. Therefore, Novell seeks to admit into evidence – after redaction – the following documents:

- PX 5, the IBM/Microsoft Statement of Direction with respect to OS/2 and Windows. Novell agrees to redact the embedded articles on bates pages through IBM 7510238961-79. (Ex. 3).
- PX 413, an internal Microsoft slideshow presentation. Novell agrees to redact the embedded articles on bates page MX 6184276. (Ex. 19).

IV. Documents Covered by the Parties' Business Records Stipulation

Through the parties' meet-and-confer process, Novell and Microsoft were able to whittle down the number of objections for several documents so that only one objection remained: hearsay. All of the documents identified below were produced by either party during the course of this action and are covered by the parties' business records stipulation. As such, the documents presumptively satisfy Federal Rule of Evidence 803(6) as an exception to the hearsay rule. Microsoft has presented no basis for overcoming the presumption.

Therefore, Novell respectfully requests that the Court overrule Microsoft's remaining hearsay objections to the following documents and admit these documents into evidence:

- PX 73, an August 1993 draft WordPerfect registration statement to the SEC related to a potential initial public offering. (Ex. 20).
- PX 123, an inaccurately dated speech prepared by Bob Frankenberg for use at a Morgan Stanley Software Conference. (Ex. 21).
- PX 141, undated, handwritten notes produced by Microsoft reflecting various tasks for Microsoft personnel identified by their Microsoft e-mail aliases. (Ex. 22).
- PX 145, an undated Novell/WordPerfect position paper describing the company's vision of network computing. (Ex. 23).
- PX 157, a March 25, 1994 Novell/WordPerfect Merger Q&A document. (Ex. 24).
- PX 172, an April 15, 1994 chronology of WordPerfect's development on 32-bit Windows operating systems, which includes references to various Chicago milestone releases. (Ex. 25).
- PX 214, a September 20, 1994 speaker's notes for Bob Frankenberg's speech at the Agenda Conference, specifically related to his demonstration of the Corsair and Ferret technologies discussed in Mr. Frankenberg's testimony.⁴ (Ex. 26).
- PX 234, a November 15, 1994 prepared remarks for Bob Frankenberg's "Keynote Address" at the Fall COMDEX Conference. (Ex. 27).
- PX 358, a January 27, 1997 Novell 10-K filing with the SEC. (Ex. 28).
- PX 382, an undated, internal Microsoft design specification related to unifying user interface and tight integration among Microsoft's applications and operating system. (Ex. 29).

V. Documents Objected to on Relevance or Rule 403 Grounds

Microsoft has objected to a number of documents on the grounds of relevance and Rule 403. For the reasons identified below, the objections to these documents are without merit.

⁴ Mr. Frankenberg has already testified about his Agenda Conference speech and that testimony tends to corroborate the reliability of this document. Nov. 7, 2011 Trial Tr., at 1019:7-1026:9 (B. Frankenberg).

A. Documents Relevant Because they Relate to Competition with Novell/WordPerfect or Particular Bad Acts Alleged in this Action

The documents below contain information relevant to the claims and defenses in this case and none contain any unfairly prejudicial or misleading information under Rule 403.

- PX 9, a February 19, 1991 internal Microsoft memorandum from Bill Gates expressing concern over Microsoft's applications market share. (Ex. 30). In particular, Gates focuses on ways that Microsoft can capture more market share from its two main competitors, WordPerfect and Lotus. Microsoft's means of competing with WordPerfect are relevant to this action, and there is nothing unfairly prejudicial about admissions by Microsoft's CEO related to WordPerfect's market share.
- PX 103, a November 7, 1993 e-mail providing a "Competitive Snapshot" of Novell. (Ex. 31). The document contains admissions by Microsoft regarding how efficiently Novell runs its business and Novell's potential strategies related to AppWare and cross-platform applications development. That Microsoft tracked Novell and its competitive offerings is entirely relevant, as is any discussion of the cross-platform, AppWare middleware.
- PX 354, a June 15, 1996 article regarding Microsoft's "Athena" product. (Ex. 32). This document has received only a relevance objection. Athena's use of the namespace extension APIs has been discussed frequently during the course of this action, including in Novell's opening and in the testimony of Novell's technical expert, Mr. Ronald Alepin. *See, e.g.*, Oct. 18, 2011 Trial Tr., at 77:12-78:25; Nov. 9, 2011 Trial Tr., at 1426:23-1427-13 (R. Alepin). Other documents already in evidence also refer to Athena's use of the namespace extension APIs. *See, e.g.*, PX 324. (Ex. 33). Thus, it is incongruous for Microsoft to argue that the thorough description of the application found in PX 354 is irrelevant.
- PX 365, a February 1, 1999 document detailing Microsoft Internet Explorer's use of shell extensions and the namespace extensions APIs. (Ex. 34). Microsoft has repeatedly claimed that these APIs are "trivial and unimportant." This document refutes that argument, as it shows that Microsoft used those APIs in its own applications products.
- PX 405, an internal Microsoft memorandum to various executives discussing "Life in Wartime '95." (Ex. 35). The memorandum specifically discusses the effect of office suite competition, noting that Microsoft's "API, UI, and Object standards are being threatened" and that "Competitors are actively trying to split [Microsoft's] standard." PX 405, at MS 0072819. These statements illustrate that Microsoft understood the danger that suites, including PerfectOffice, presented to Microsoft's APIs and user interface.
- PX 408, an undated internal Microsoft presentation detailing several relevant facts, including that Microsoft perceived WordPerfect as the "market leader" in word processing and identifying one "Core Strategy" as "Driv[ing] Competitors into a death spiral." PX 408 at MS-PCA 1180334, 337. (Ex. 36).

- PX 454, a May 7, 1995 e-mail from Bill Gates to other Microsoft executives describing a “key imperative” as ensuring that Microsoft’s shell/desktop is the information browser of choice. (Ex. 37). Clearly, Novell set out to do the same thing with WordPerfect, although this document illustrates the importance to Bill Gates (as he admits) of information browsing with respect to the shell.
- PX 525, a January 13, 1993 e-mail from Microsoft executive Jim Allchin talking about Novell’s competitive approach to Microsoft. (Ex. 38). Mr. Allchin indicates that “Novell is hitting us hard from all sides” and that “Novell is a serious threat to our entire business.” PX 525, at MS 5041080. Allchin also believed that Microsoft “should strike back even harder than [sic] you suggest.” *Id.* Microsoft’s perception of Novell, even before Novell acquired the business applications, is entirely relevant to how Microsoft dealt with Novell after the acquisition, and provides relevant perspective for Microsoft’s motive and intent.

B. Documents Relevant to Actions Taken by Microsoft Against Other Office Productivity Applications

As found in the Government case, Microsoft took action against IBM upon IBM’s announcement that it would be bundling SmartSuite with its Intel-compatible PCs.⁵ *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 40-41 (D.D.C. 1999). This evidence shows Microsoft’s concern over office productivity applications and illustrates contemporaneous harm to competition. Therefore, these documents are entirely relevant to this action. Moreover, nothing in these documents is unfairly prejudicial – they merely illustrate Microsoft’s conduct towards other office productivity applications during the relevant time.

- PX 325,⁶ an August 9, 1995 internal IBM memorandum detailing a meeting with a Microsoft executive. (Ex. 39). The document memorializes discussions between IBM and Microsoft related to an audit of IBM’s payments to Microsoft for licensing, as well as a request from Microsoft that IBM not pre-install SmartSuite with its PCs. PX 325, at IBM 7510176321. This fact was considered in the Government case against Microsoft. *See Microsoft*, 84 F. Supp. 2d at 40-41.
- PX 326, an August 15, 1995 letter from Microsoft to IBM offering to decrease the amount of settlement IBM would be required to pay for certain “relationship-improving” measures. (Ex. 40). Within the letter, Microsoft threatens to withhold the Windows 95 code from IBM,

⁵ These findings were not granted collateral estoppel effect in this case.

⁶ Note that Microsoft does not object to PX 325 or PX 328, which Microsoft produced to Novell in this action and which were originally produced to Microsoft by Lotus, on hearsay grounds.

which would effectively prevent IBM from timely shipping its PCs with Windows 95 pre-installed. PX 326, at IBM 7510164959.

- PX 328, an August 21, 1995 letter from an IBM employee to Microsoft indicating that the parties are clearly cooperating to resolve the audit and requesting that Microsoft unlink delivery of the Windows 95 code from the settlement of Microsoft's audit of IBM's payments. (Ex. 41).

VI. Miscellaneous Documents with Objections

The documents referenced in this section are subject to various objections that cannot be easily categorized. Regardless, none of the objections to these documents have merit.

PX 46 is a May 1993 e-mail chain among Microsoft executives discussing a demonstration of Microsoft's Capone product's integration with an early development version of Windows 95. (Ex. 42). Microsoft maintains embedded hearsay and Rule 403 objections to this document. In the first instance, the e-mail was generated by Microsoft personnel, and the substance of their correspondence tends to corroborate the substance contained in the article embedded in PX 46. Even so, Novell does not offer the contents of the article for the truth of the matter asserted, but simply to provide needed context for the ensuing discussion among Microsoft personnel. Second, Microsoft's Rule 403 objection pertains to a statement by a Microsoft executive indicating that the article is "[t]he stuff future unfair competition articles will be made of." Microsoft's recognition of its own problematic practices, however, is not unfairly prejudicial. For these reasons, the Court should overrule Microsoft's embedded hearsay and Rule 403 objections with respect to PX 46 and should admit the document into evidence.

PX 244 is a December 1994 internal e-mail chain among Microsoft executives discussing the possibility of a Lotus merger with Oracle. (Ex. 43). Microsoft maintains relevance, Rule 403, and embedded hearsay objections. As to relevance and Rule 403, Microsoft's Dale Christensen's admission regarding the quality of integration work Novell had

done for PerfectOffice 3.0 in such a short time frame is certainly relevant. So is the fact that Mr. Christensen describes his “nightmare” scenario of Lotus spinning off its spreadsheet to Novell and the potential that such an action would create a “significant competitor to Office.” PX 244 at MX 2262110. As to the embedded hearsay point, Novell does not offer the article for the truth of the matters asserted in it (that Oracle was considering a takeover of Lotus), but rather to show the effect of the article on Microsoft and to provide context for Microsoft’s admissions. For these reasons, the Court should overrule Microsoft’s relevance, Rule 403, and embedded hearsay objections with respect to PX 244 and should admit the document into evidence.

PX 348 is a December 1995 internal Novell assessment of PerfectFit Technology for purposes of valuing the technology during Novell’s efforts to find a buyer for the business applications. Microsoft objects on the grounds of both improper opinion and on foundation. (Ex. 44). It is difficult to see any basis for either objection. Tom Creighton, the author of the document, prepared a summary of the technologies his group developed (including the File Open Dialog and QuickFinder) and the accompanying benefits of those technologies. Microsoft cannot reasonably object to Mr. Creighton’s views on technology developed by the group he led as an “improper opinion.” Moreover, foundation has been all but eliminated as a concern in this trial. Indeed, Microsoft’s attorneys have placed document after document before Novell’s witnesses, documents that those witnesses readily admitted they had not seen before. PX 348 was produced by Novell, and the author is an individual that is mentioned frequently in both testimony and other documents already admitted. For these reasons, the Court should overrule Microsoft’s improper opinion and foundation objections and admit PX 348 into evidence.

PX 366 is a February 10, 1999 document produced to Novell by Microsoft detailing the technical and release history of Microsoft Office. (Ex. 45). Specifically, PX 366 is a speech

prepared by long-time Microsoft executive Steven Sinofsky for a Harvard Business School lecture. Microsoft maintains relevance, Rule 403, hearsay, embedded hearsay, and foundation objections. As an initial matter, both the relevance and Rule 403 objections should be rejected. The history and alleged technical superiority of Office has been put in issue by Microsoft's argument that Novell was late to suites, and there is nothing unfairly prejudicial for the jury to see in this document. Moreover, this document contains the statements of a long-time top Microsoft executive, and thus, are admissions. Therefore, Microsoft's hearsay objection should be overruled as well. To the extent there is embedded hearsay, it also appears to be taken from other internal Microsoft documents which either constitute business records or admissions under the hearsay rules.

PX 370 is a PerfectOffice 3.0 product rollout document. (Ex. 46). Microsoft has objected to the document only on the grounds of embedded hearsay, though Microsoft has not identified the particular portion to which it objects. Novell cannot discern any embedded hearsay within PX 370, and therefore simply requests that the Court overrule Microsoft's objection and admit the document into evidence.

PX 418 is an analysis prepared by WordPerfect evaluating the acquisition offers made by Novell and Lotus. (Ex. 47). Microsoft maintains a foundation objection to this document, even though the Court has essentially wiped out foundation objections for documents produced by either party. On September 29, 2011, this Court overruled Novell's foundation objections with respect to documents produced by Novell and designated by Microsoft as exhibits. Sept. 29, 1011 Hearing Tr., at 131:14-18. Here, we have a goose-gander situation, in which Microsoft is maintaining a foundation objection against a document that Novell produced and designated. Thus, Microsoft has the same objection that Novell had – that it cannot identify

an author – and that objection merits the same response. For that reason, Microsoft’s foundation objection should be overruled and PX 418 should be admitted into evidence.

PX 443 is a January 1994 internal Microsoft e-mail chain discussing the allowance of outside entities to author books about documentation of Windows 95. (Ex. 48). Microsoft maintains relevance, Rule 403, embedded hearsay, and improper opinion objections. The document contains admissions by Microsoft executive Brad Silverberg about what is considered “documentation,” indicating that books prepared by persons external to Microsoft are not so considered. This position is contrary to arguments that Microsoft has offered while cross-examining Novell’s witnesses, specifically with respect to the availability of purported documentation of the namespace extension APIs in third party written materials.⁷ Moreover, as this Court held, the business records exception contemplates the inclusion of the opinions contained within the document (a point Microsoft argued). *See* Sept. 29, 2011 Hearing Tr., at 154:22-156:4. Therefore, Microsoft’s improper opinion objection – for which Microsoft has identified no particular opinion in the document – is groundless. Finally, as to Microsoft’s embedded hearsay objection, it appears to relate to a single point about third-party book publishers wanting to release their books at the same time as Microsoft Press. Novell does not offer that statement for the truth of the matter, but rather its effect on Microsoft, an effect that led to a Microsoft admission inconsistent with its arguments in this case. The embedded hearsay – a single statement – provides only context, and need not be redacted. For these reasons, the Court should overrule Microsoft’s objections to PX 443 and admit the document into evidence.

PX 457 represents e-mail correspondence between Novell and Microsoft in August 1995 that relates to the issue of bugs. (Ex. 49). Microsoft has objected on relevance, Rule 403,

⁷ Microsoft’s contentions are wrong in any event, though that is not relevant to this brief.

and embedded hearsay grounds. The first two of Microsoft's objections are absurd. Microsoft petitioned the Court to use its exhibit DX 6, which relates to bugs, with Novell's witnesses. Microsoft Mem. Concerning the Admissibility of DX 6 (Nov. 4, 2011). The Court granted Microsoft's motion; although during examination, it became clear that the bugs at issue related to PerfectOffice 3.0's (16-bit) ability to run on Windows 95 rather than the PerfectOffice suite Novell was developing specifically for Windows 95. PX 457 contains an e-mail from a Novell employee that details exactly this issue, and corroborates that the bugs related to the 16-bit, rather than the 32-bit, PerfectOffice. It is difficult to see how this document could be more relevant given Microsoft's arguments. As to Rule 403, there is nothing unfairly prejudicial about the document, even though it exposes Microsoft's faulty argument for what it is. Similarly, Microsoft maintains an embedded hearsay objection, though it has not identified the portions to which it objects. For these reasons, the Court should overrule Microsoft's relevancy, Rule 403, and embedded hearsay objections and admit this document into evidence.

PX 467 is an August 1, 1995 internal Novell e-mail raising issues with Microsoft's publication of bug issues between Novell and Microsoft that had been resolved. (Ex. 50). Microsoft maintains relevance, Rule 403, hearsay, and improper opinion objections. As to relevance and as described above, Microsoft has raised the issue of bugs in this case. This document simply corroborates Novell's position that the bugs in question relate to the 16-bit PerfectOffice 3.0 suite on Windows 95, rather than Novell's 32-bit suite then under development. As to Rule 403, given Microsoft's consistent statements about Novell's buggy products, there is nothing unfairly prejudicial about providing the jury evidence that Microsoft exacerbated the situation. This document is a business record created in the ordinary course at Novell. It easily satisfies the parties' business records stipulation, thereby mooting Microsoft's

hearsay objection. For the same reason, Microsoft's improper opinion objection cannot stand. As this Court held, the business records exception contemplates the inclusion of the opinions contained within the document (a point Microsoft argued). *See* Sept. 29, 2011 Hearing Tr., at 154:22-156:4. For these reasons, the Court should overrule Microsoft's objections to PX 467 and admit the document into evidence.

PX 512 is a September 1, 1993 internal memorandum from Bill Gates to other Microsoft executives. (Ex. 51). Microsoft objects because no author is identified for the handwritten notes on the last page. Novell agrees to redact the last page. This should eliminate any remaining objection to PX 512, which should therefore be admitted into evidence.

CONCLUSION

For the foregoing reasons, Novell respectfully requests the Court grant its Motion to Admit Exhibits to Which There are Outstanding Objections, overrule Microsoft's remaining objections to the documents identified above, and admit into evidence those same documents.

Dated: November 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 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