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July 28, 2010

VIA ELECTRONIC MAIL

Steven L. Holley
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-3498

Re: *Novell, Inc. v. Microsoft Corp.* (10-1482)

Dear Steve:

We are in receipt of your letter dated July 26, 2010 regarding the joint appendix.

We disagree with your first point, as we believe that the four documents attached to Novell's Surreply are a part of the record on appeal. Judge Motz's opinion indicates that he not only considered the Surreply, but affirmatively responded to an argument raised therein. *See In re Microsoft Antitrust Litig.*, No. 05-1087, --- F. Supp. 2d ----, 2010 WL 1223604, at *3 n.8 (D. Md. Mar. 30, 2010). Moreover, in responding to Novell's argument, Judge Motz cited one of the cases used by Novell, right down to the page reference. *Id.* (citing *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993)). With the exception of the Surreply, neither party had cited *Lerman* in its moving papers.[1]

Moreover, we have spoken with an Appeals Clerk at the United States District Court for the District of Maryland who informed us that the entire record will be forwarded to the Fourth Circuit upon its request, including Docket entry 114 (Novell's Motion for Leave, Surreply, and Exhibits). You make a fair point, however, with respect to the fifth document referenced in your letter and we will remove it. It is not a part of the record on appeal.

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[1] The cases cited in your letter are distinguishable. In *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1127 n.5 (9th Cir. 2009), the lower court explicitly rejected plaintiff's proposed surreply, and the Ninth Circuit refused to permit the inclusion of documents attached to that surreply in the record. The Ninth Circuit refused to allow the mere fact of the clerk's filing stamp to override the district judge's decision rejecting the surreply. *Id.* In contrast, Judge Motz accepted *and* considered Novell's Surreply. Similarly, in *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 973 (4th Cir. 1990), the Fourth Circuit barred the inclusion of several documents that the plaintiff put before the district court after its decision on summary judgment. Here, the distinction is obvious.

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As to your second point, both parties have a duty to ensure that the joint appendix does not contain unnecessary materials. As you know, Federal Rule of Appellate Procedure 30(b)(1) mandates that "[t]he parties must not engage in unnecessary designation of the parts of the record," and Fourth Circuit Local Rules 30(a) and (b) echo this mandate. Novell intends to comply with its obligations under these rules, and will, prior to filing, revise the joint appendix where necessary to do so. We will apprise Microsoft of any such changes as soon as practicable.

If your concern is that we will remove documents that Microsoft deems necessary to its brief, I should note that Mr. Hassid's e-mail invited you to provide us a list of those documents that should not be removed. We have yet to receive a listing identifying any such documents.

Finally, as to your third point, we understand the length of time the Federal Rules grant to Microsoft in preparing its designations. Our aim in requesting Microsoft's responses by Thursday, July 29th, was not to contravene these rules, but rather to facilitate the completion of the joint appendix by accounting for practical considerations. To that end, we still hope to receive, at the very least, Microsoft's preliminary list of designations some time this week.

As always, please feel free to contact me by phone if you have any further concerns.

Very truly yours,

Jeffrey M. Johnson

cc: R. Bruce Holcomb, Esq.
Charles J. Cooper, Esq.