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13 Attorneys for Defendant and
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 14 MICROSOFT CORPORATION

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

19 DATEL HOLDINGS LTD. and DATEL
 DESIGN & DEVELOPMENT, INC.,
 20
 21 Plaintiffs and Counterclaim-
 Defendants,
 22
 v.
 23 MICROSOFT CORPORATION,
 24
 25 Defendant and
 Counterclaimant.

No. 09-CV-05535 EDL
 Action Filed: November 20, 2009
~~PROPOSED~~ STIPULATED
 AMENDMENT TO CASE
 MANAGEMENT AND PRETRIAL
 ORDER FOR JURY TRIAL

1 WHEREAS, on September 22, 2010, the Court entered a Case Management and
2 Pretrial Order for Jury Trial;

3 WHEREAS, on May 6, 2011, the Court granted leave to Microsoft Corporation to file
4 its Second Amended Answer and Counterclaims;

5 WHEREAS, at the hearing on May 6, 2011, the Court tentatively set a new trial date of
6 January 31, 2012;

7 WHEREAS, at the hearing on May 6, 2011, the Court ordered the parties to meet and
8 confer and to submit to the extent possible an agreed-upon Amendment to Case
9 Management and Pretrial Order for Jury Trial;

10 WHEREAS, on May 23, 2011, the parties jointly submitted a [Proposed] Amendment
11 to Case Management and Pretrial Order for Jury Trial;

12 WHEREAS, in submitting the [Proposed] Amendment the parties contemplated that
13 trial would either begin on April 10, 2012, or April 17, 2012;

14 WHEREAS, the Court's Amendment to Case Management and Pretrial Order for Jury
15 Trial was entered on June 6, 2011, and set a trial date of May 7, 2012;

16 WHEREAS, pursuant to Court order, the parties have met and conferred in good faith
17 concerning fact discovery limits, expert witness discovery deadlines, and dispositive motion
18 filing and briefing schedules;

19 WHEREAS, the parties have since reached agreement concerning deposition fact
20 discovery limits;

21 WHEREAS, the parties have also reached agreement concerning expert witness
22 discovery deadlines;

23 WHEREAS, the parties have also reached agreement that adjusted dispositive motion
24 filing and briefing schedules will be conducive to more orderly fact and expert discovery
25 without impacting the Court's pretrial deadlines or trial date; and

26 WHEREAS, the parties have been unable to reach agreement concerning whether
27 additional written discovery is appropriate in light of the newly-added counterclaims:
28

1 **STIPULATION**

2 Pursuant to Local Rules 6-1(b) and 6-2, Datel and Microsoft, by and through their
3 respective counsel of record, hereby make this [Proposed] Stipulated Amendment To Case
4 Management And Pretrial Order For Jury Trial. Specifically, the parties stipulate to the
5 following:

6 1. Datel shall be allowed to take the depositions of the six Microsoft fact witnesses
7 it has requested to date, as well as up to three additional witnesses, to be identified to
8 Microsoft no later than July 29, 2011, provided that no individual deposition shall exceed the
9 seven hours of deposition time allowed under the Federal Rules of Civil Procedure.
10 Microsoft reserves all objections to the depositions of its fact witnesses including the up-to-
11 three additional witnesses once they are identified other than an objection based on the
12 number of deponents or hours of depositions requested by Datel. Microsoft shall be allowed
13 to take the depositions of the Datel fact witnesses in accordance with the limits set forth in
14 the Court’s September 22, 2010 Case Management Order [Dkt. No. 67]. Datel reserves all
15 objections to the depositions of its fact witnesses other than an objection based on the
16 number of deponents or hours of depositions requested by Microsoft. Such depositions shall
17 be completed no later than September 9, 2011. In all other respects, non-expert discovery
18 shall be completed no later than August 19, 2011, as per the existing scheduling order.

19 2. Concerning written discovery, namely, Datel’s Fifth Set of Interrogatories, served
20 July 20, 2011,

21 Datel’s Position & Proposal. Pursuant to the Court’s order that the parties meet
22 and confer over discovery limits for the new counterclaims, on July 7, Datel’s counsel
23 proposed that, inter alia, the parties be allotted 25 interrogatories in connection with the
24 new counterclaims. On July 20, Microsoft’s counsel responded that it was Microsoft’s
25 view that no additional written discovery was appropriate. Datel contends that it is fair
26 and appropriate for it to be afforded interrogatories related to Microsoft’s new
27 counterclaims. On July 20, 2011, Datel served its Fifth Set of Interrogatories, containing
28 23 interrogatories related solely to Microsoft’s copyright and trade secrets claims. While

1 Microsoft has taken the position that Datel used all of its interrogatories allowed under
2 the Court's September 22, 2010 Case Management Order [Dkt. No. 67], this order was
3 entered six months before Microsoft sought leave to amend, and fact discovery under
4 such order had already closed by the time Microsoft added the copyright and trade secret
5 claims. It was not possible for Datel to anticipate that Microsoft would later add new
6 claims and that Datel should keep interrogatories in reserve. The 23 carefully crafted
7 interrogatories Datel served on July 20, 2011 are essential to understanding Microsoft's
8 new claims. Datel believes it will be prejudiced if it is denied answers concerning the
9 new and factually complex claims. Datel does not believe that Rule 30(b)(6) depositions
10 will obviate the need for written interrogatories. To date, Microsoft has only served
11 objections to such topics and failed to designate a single deponent. Also, statements of
12 any 30(b)(6) witnesses at deposition will be a poor substitute for identification and
13 contention interrogatories.

14 Moreover, Datel disagrees that Microsoft should be entitled to additional
15 interrogatories or requests for admissions merely because Datel timely served written
16 discovery. Microsoft failed to serve discovery in the time allowed under the case
17 schedule, and has shown no need to do so concerning its own newly added claims.

18 Regarding Datel's requests for admissions, under the Court's September 22, 2010
19 Case Management Order [Dkt. No. 67 at 2:6], each party is allowed to propound a total
20 of 100 requests for admissions. Prior to serving its Third Set of Requests For
21 Admissions on July 20, 2011, Datel had propounded a total of sixty-four (64) requests.
22 Therefore, it did not need leave to file the requests.

23 Microsoft's Position & Proposal. Datel has already served 43 broad requests for
24 documents, with which Microsoft is trying to comply on this accelerated schedule, as
25 well as a Rule 30(b)(6) notice with 36 topics. But Microsoft submits that 23
26 interrogatories and 27 requests for admission on top of all this will add little, if any, value
27 to the discovery process beyond information that can be obtained in depositions and
28 expert discovery. Additional written discovery will only serve to burden and harass

1 Microsoft at a time it must defend and take numerous depositions (many in London),
2 continue to meet and confer over and try to comply with Datel's broad and burdensome
3 document requests, and prepare summary judgment motions.

4 Datel served its Fifth Set of Interrogatories after close of business on July 20,
5 2011, the last possible day for serving written discovery under the case schedule if
6 further written discovery had been permitted under the June 6 scheduling order. This set
7 contains 23 separately numbered interrogatories, many of which have numerous
8 subparts: for example, many interrogatories request Microsoft provide discrete
9 information for "each" trade secret Microsoft identified in response to one interrogatory.
10 Datel also served 27 substantive requests for admission at the same time. The
11 interrogatories and RFAs overlap almost entirely with the topics noticed in Datel's Rule
12 30(b)(6) notice. The deposition notice comprises 36 topics, and Microsoft will produce
13 witnesses to address most every topic, subject to meet and confer to determine the
14 precise scope and meaning of the topics. The information sought in the interrogatories
15 will be provided in deposition testimony. Moreover, virtually all of the interrogatories,
16 in combination with the RFA's, seek information that is more appropriately sought
17 through expert discovery, such as what portion of Datel code is substantially similar or
18 identical to Microsoft code and whether Datel's copying of the Microsoft network
19 adaptor code is functionally necessary. Microsoft also notes that these interrogatories are
20 likely to lead to motion practice that is unlikely to be resolved in time for the current
21 expert deadlines.

22 Finally, should the Court permits interrogatories and requests for admission to be
23 served, Microsoft respectfully requests (1) that the Court not address in the abstract
24 whether Datel's specific discovery requests are appropriate or objectionable; and (2) the
25 Court give Microsoft leave to serve an equal number of interrogatories and requests for
26 admission within five days of the Court's ruling. Datel's argument regarding timeliness
27 is without merit. Microsoft did not serve written discovery to date because the Court's
28 June 6, 2011 scheduling order contemplates that further written discovery would be

1 permitted only pursuant to the parties' meet and confer and the Court's resolution of any
2 disagreements. See Dkt. No. 222 at 3, 2.g. Thus, currently neither party has any right to
3 serve any interrogatories or RFAs, and Datel has no interrogatories left to serve based on
4 the limits previously set by the Court. It is only after the Court determines whether
5 further written discovery should be permitted that the discovery, if any, becomes proper
6 to serve.

7 3. Expert reports regarding the newly-asserted claims and defenses and defenses
8 thereto, including expert reports concerning damages for such claims, shall be served no
9 later than September 23, 2011. Rebuttal expert reports regarding the newly-asserted claims
10 and defenses and defenses thereto, as well as expert rebuttal reports concerning damages for
11 all claims, shall be served no later than October 19, 2011. All expert discovery on the
12 newly-asserted claims and defenses and defenses thereto, and on damages, shall be
13 completed no later than November 4, 2011.

14 4. The second round of dispositive motions shall be served and filed no later than
15 September 2, 2011. Any oppositions to these motions shall be served and filed no later than
16 September 23, 2011. Any replies to the oppositions shall be served and filed no later than
17 October 7, 2011. The parties request that the hearing on the second round of dispositive
18 motions be set for Friday, October 28, 2011, or such other date as is convenient for the
19 Court.

20 5. The third round of dispositive motions shall be served and filed no later than
21 November 9, 2011. Any oppositions to these motions shall be served and filed no later than
22 December 5, 2011. Any replies to the oppositions shall be served and filed no later than
23 December 23, 2011. The parties request that the hearing on the third round of dispositive
24 motions be set for Friday, January 13, 2012, or such other date as is convenient for the
25 Court.

26 6. In all other respects, the Amendment To Case Management And Pretrial Order
27 For Jury Trial, entered on June 6, 2011, remains in effect.

28 The prior time modifications in this case include the following: an extension of time

1 for Microsoft to respond to the complaint; an extension of time for the parties to file their
2 joint case management statement; an extension of time for Datel to respond to Microsoft's
3 counterclaims; an expedited hearing and briefing schedule for Microsoft's Motion to
4 Compel Appropriate Length and Location of Depositions; an expedited hearing and briefing
5 schedule for Microsoft's Motion to Compel Datel's Production of Documents Regarding Its
6 Reverse Engineering of Video Game Security Systems; an expedited hearing and briefing
7 schedule on Datel's Motion to Compel the Production of Six Documents Improperly
8 Withheld, and All Similar Documents; an expedited hearing and briefing schedule on
9 Microsoft's Motion for Relief from Case Management Statement; an extension of time for
10 Datel to move to compel documents withheld by Microsoft on grounds of privilege or work
11 product protection; and the Court's Amendment To Case Management And Pretrial Order
12 For Jury Trial.

13
14 PURSUANT TO STIPULATION, AS TO NOS. 1, 3, 4, 5 and 6, ABOVE, IT IS SO
15 ORDERED.

16 AS TO NO. 2, ABOVE, CONCERNING DATEL'S WRITTEN DISCOVERY,

17 ~~**[Datel's proposed resolution:]**~~

18 IT IS HEREBY ORDERED THAT Microsoft shall provide responses to Datel's Fifth Set
19 Of Interrogatories pursuant to the time limits set forth in the Federal Rules of Civil
20 Procedure.

21 ~~**[Microsoft's proposed resolution:]**~~

22 ~~*If the Court denies permission for further interrogatories:*~~

23 ~~IT IS HEREBY ORDERED THAT no further interrogatories are permitted in this case—~~

24 ~~*If the Court permits additional interrogatories:*~~

25 ~~IT IS HEREBY ORDERED THAT each party may serve 23 interrogatories and 27~~
26 ~~requests for admission. Microsoft's discovery must be served within five days of this~~
27 ~~order.~~

