UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

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October 4, 2011

Memo To Counsel Re: Microsoft Corp. Antitrust Litigation
MDL 1332

Novell, Inc. v. Microsoft Corp.
Civil No. JFM-04-1045

Dear Counsel:

In order to assist you in preparing for trial, I thought I should advise you of my tentative conclusions about the findings as to which I am inclined to give collateral estoppel effect (and about the findings as to which I am not inclined to give collateral estoppel effect). If we have time, we can discuss my tentative conclusions when we meet later this week if any of my tentative conclusions cause particular concern to any of you.

At first, a few preliminary observations and comments.

First, in reaching my tentative conclusions, I have considered both collateral estoppel law and Rule 403.

Second, my tentative conclusions include my preliminary views as to whether particular facts will be admissible at trial. For example, I have included facts relating to conduct Microsoft directed toward Netscape and Java, that I believe will be admissible to show motive, intent, preparation, plan, and knowledge under Rule 404. However, I will not make any final decision about admissibility of particular facts until I have reached conclusions about the jury instructions that should be given.

Third, I have concluded not to give any collateral estoppel effect to any conclusory statements made either by the D.C. Circuit Court in the government case or by the Fourth Circuit in any appeals it decided. Although undoubtedly any such statements were subjected to the disciplining process of judicial thought and comment, they did not have to withstand the crucible of the portion of the litigation process in which Microsoft had the right to be heard.

Fourth, although I am inclined not to give collateral estoppel effect to the legal rulings made by the D.C. Circuit Court, I do not want the jury in this case to revisit critical findings that were made against Microsoft in the government case. Perhaps I can avoid this from happening by stating in my jury instructions that certain elements of plaintiff's claims that are uncontested in this litigation, e.g., that Microsoft had monopoly power in the operating system market and

that it engaged in anticompetitive conduct to maintain that monopoly. Of course, I am not now deciding that by satisfying these elements plus damage causation, Novell would meet its burden of proof. It may well be that Novell must also prove that Microsoft engaged in anticompetitive conduct directed toward Novell that at least was reasonably capable of significantly contributing to Microsoft's maintenance of its monopoly in the operating system market. I will decide that issue prior to trial but after hearing further from you.

Fifth, I am somewhat concerned that because some of the findings as to which I am inclined to give collateral estoppel effect use the word "currently" or the like, it is not clear what time frame the findings related to. We can discuss this further.

Sixth, I am not presently inclined to have the findings as to which collateral estoppel effect is being given written down on a paper that the jury will have with it during its deliberations. In effect, the findings are a substitute for testimony and although I anticipate you may order daily transcript, I also anticipate that you do not envision the jury having a transcript of all of the testimony with it during it deliberations. That would seem to me to be unmanageable.

Seventh, to avoid the possible prejudice about which Microsoft has expressed a concern, i.e., that a jury may give too much weight to findings that seem to bear the imprimatur of a federal court, I suggest that before the findings are read to the jury, a short prefatory statement be read saying something like the following. "In previous litigation, certain factual findings were made that, under a legal doctrine known as 'collateral estoppel,' are binding in this case. These findings are somewhat lengthy, and they will now be read to you."

Now, here are my tentative conclusions about which findings should be given collateral estoppel effect and which findings should not be given collateral estoppel effect.

Give Collateral Estoppel Effect:
17, 18, 20, 28, 29, 32, 44, 59, 60, 68–76, 77, 143, 158, 160, 161, 164, 203, 213, 214, 227, 339, 340, 394
Given Collateral Estoppel Effect in December 2008 order: 2, 4, 6–10, 30, 31, 33–39, 144, 145, 148, 159, 239

Deny Collateral Estoppel Effect:
42, 55, 56, 66, 67, 78, 80, 84, 90–95, 99–102, 115, 116, 119–125, 132, 141, 142, 156, 157, 166, 204–206, 208, 215, 221, 222, 241, 337, 377, 386, 395, 407, 409–412

I look forward to seeing you later this week.

Very truly yours,

/s/
J. Frederick Motz
United States District Judge