

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

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October 11, 2011

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

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

Dear Counsel:

The primary purpose of this letter is to let you know what I have tentatively concluded should be the preliminary jury instructions I will give. I also mention one question I have about what Microsoft has characterized as Novell's "new" middleware theory in the last paragraph of this letter. If your schedules permit, I suggest that we move up the time of our telephone conference call scheduled for this Thursday, October 13, 2011 (at which we will discuss proposed strikes for cause) to 4:00 p.m. so that we can go over the issues raised by this letter.

Jury Instructions

Proposed Jury Instruction No. 1

I have tentatively concluded that at the outset of the trial I should tell the jury a little bit about the case by giving a single preliminary instruction which will read as follows:

Jury Instruction No. 1

Now that you have been sworn in, I am going to give you some initial instructions about this case and about your duties as jurors. As members of the jury, you will determine the facts from the evidence that is presented. You will hear the evidence, decide what the facts are and then apply those facts to the law that I will give to you.

You should not take anything I may say or do during the trial as an indication of what I think the evidence shows or of what I think your

verdict should be. You are the sole judges of the facts. My role is to be the judge of the law. I will decide all questions of law that arise during the trial. However, at the outset let me tell you a little bit about the case and certain general principles that apply in all cases.

The plaintiff here is Novell and the defendant is Microsoft. Novell and Microsoft both develop and market products for computers, including computer software. During the trial, you will hear a lot about software applications and personal computer operating systems. As you probably know, personal computers are commonly referred to as PCs.

PCs can be categorized by the microprocessors that they use. An "Intel-compatible" PC is one designed to function with a family of microprocessors manufactured by a company known as Intel. During the time period relevant to this case, an operating system designed to run on an Intel-compatible PC would not function on a non-Intel-compatible PC, and *vice versa*. For example, an operating system written for Apple's Macintosh PCs would not work on an Intel-compatible PC and an operating system written for an Intel-compatible PC would not work on a Macintosh PC. Whenever I used the term "PC operating systems," I am referring to Intel-compatible PC operating systems.

It is undisputed that during the period of time relevant to this case, that is (as the evidence will show) June 1994 to March 1996, Microsoft had a monopoly in the market for PC operating systems.

In this case Novell claims that Microsoft is liable to Novell for damages under the federal antitrust laws. In order to prove its claim Novell must establish that (1) Microsoft willfully maintained its monopoly in the PC operating system market by engaging in anticompetitive conduct, including conduct to thwart development of Novell's WordPerfect word processing application and its other office productivity applications, during the period of time relevant to this case and (2) Microsoft's anticompetitive conduct engaged in from June 1994 to March 1996, injured Novell in its business or property during that period of time.

The following comments may help you understand why I have concluded to give this instruction.

First, the instruction is "cabined," to use a term that seems to be a favorite in antitrust law, not so much by antitrust doctrine but what I understand the evidence in the case will be. In that connection I note that the evidence may be limited by virtue of three decisions that Novell made over the years: (1) its asset purchase agreement with Caldera, (2) its sale of Word Perfect

and Quattro Pro in 1996, and (3) its decision not to bring this action until after its claims against Microsoft for monopolization and attempted monopolization in the applications market were time-barred.

Second, I understand that you may be in disagreement as to whether the second element of my instruction that Microsoft's anticompetitive conduct included conduct to thwart Word Perfect and Novell's other office productivity application is required by antitrust doctrine. In any event, the element appears to me to be required by Novell's own allegation made in ¶153 of the Complaint.

Third, although I remain of the view that the "significant contribution" test applies in determining whether Microsoft's anticompetitive conduct during the relevant period enabled it to maintain its monopoly in the PC operating system, my preliminary instruction does not address the issue. I would prefer to postpone final decision on the issue until a later stage of this litigation.

Fourth, although I will, of course, give more detailed instructions at the conclusion of the case, my present plan is to wait until then to address such issues as the duty (or not) of a monopolist to cooperate with its competitors.

Other Preliminary Instructions

If you want me to, I will also give the jury the proposed preliminary instructions upon which you agree. It is not usually in my practice, however, to instruct jurors at the outset on such things as their duties, the court's role, witness credibility, and the like. Instead, I usually cover the following matters in very informal preliminary instructions: (1) introductions; (2) my practice of not designating a foreperson; (3) the anticipated daily and weekly schedule; (4) lawyers involved in the case will not talk to jurors; (5) jurors should not talk to anyone connected with the case, including witnesses; (6) the fact that lawyers' objections do not reflect that the lawyers are trying to hide something from the jury; (7) a short explanation of the terms "discovery, interrogatories, and depositions;" (8) jurors may take notes but (a) notes are only an aid to the person who takes them, (b) persons who took notes should not be listened to more during the course of deliberations than persons who did not take notes, (c) they should not become so involved in taking notes that they do not watch the witnesses since body language can be important to evaluating credibility; and (d) notes will be collected at the end of each day but no one will read them; (9) we will try to minimize bench conferences but inevitably there will be some; (10) we will get started on time; (11) they should not talk about the case to anyone, either at home or with one another until the case is over; (12) they should not use the internet to conduct independent research or to communicate with one another during the course of the case; and (13) jurors may bring cell phones with them to the courthouse but they must turn them off during the course of the proceedings.

Novell's "New" Middleware Theory

This also is to advise you that one question I am likely to ask during our telephone

call is whether there is any evidence that prior to Novell's sale of Word Perfect and Quattro Pro, Novell and Netscape and/or Sun had a deal (that was cancelled before the products were sold) about combining Novell's products and Netscape and/or Java to create middleware to which developers might write.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge