

DICKSTEINSHAPIRO_{LLP}

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

September 13, 2011

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable J. Frederick Motz
United States District Judge
United States District Court for the District of Maryland
U.S. Courthouse - Room 510
101 West Lombard Street
Baltimore, MD 21201

Re: *Novell, Inc. v. Microsoft Corp.*, 2:04-cv-01045-JFM (D. Utah)

Dear Judge Motz:

After the close of business yesterday, Microsoft filed and served us with a 38-page memorandum purporting to object to Novell's preliminary jury instructions and a "status report" that was neither requested by the Court nor discussed with Novell. In fact, when we received these filings late last night, we were just hours away from hosting Microsoft's counsel for the first face-to-face meet-and-confer on many of the same issues raised in the filings. We respectfully request that this Court strike both the Memorandum and Status Report as premature and unwarranted. Specifically:

1. The "proposed preliminary jury instructions" that Microsoft attacks are a draft set that we provided to Microsoft as part of what we understood would be a meet-and-confer process. The purpose behind exchanging draft instructions prior to the submission of final proposed instructions to the Court was to allow the parties an opportunity to narrow the scope of potential disputes. The pretrial schedule ordered by this Court calls for submission of final proposed instructions next Monday, September 19, to be followed on September 26 by briefs from each side addressing the disputed issues. Microsoft never once suggested modifying the schedule nor did it give any indication that it considered the meet-and-confer process to be completed. In fact, we understood the process to be ongoing and had already internally revised our draft instructions in response to Microsoft's comments. To be sure, there will still be disputed issues after the parties are done talking, but the preliminary jury instructions will largely mirror the final jury instructions on the key substantive issues (elements of the claim, injury, damages) and we see no reason to burden the Court with two rounds of briefing on the same issues.
2. We are scheduled to meet-and-confer today with Microsoft on the issues addressed in both the "status report" and the jury instructions. Today's scheduled meet-and-confer was the culmination of weeks of effort on Novell's part. As early as August 4, Novell attempted to

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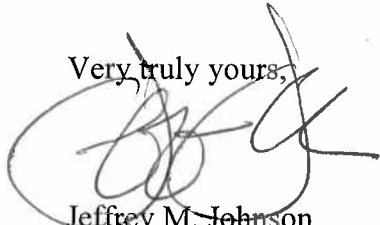
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schedule a meet-and-confer session with Microsoft to discuss the parties' preliminary jury instructions that were exchanged on August 1, 2011. To facilitate discussions, Novell edited its initial proposed instructions to try to reconcile them with Microsoft's proposed preliminary instructions. Novell provided the revised instructions to Microsoft and renewed its requests to meet. On August 15, Microsoft sent a letter to Novell proposing additional edits to the draft instructions. On August 29, Microsoft proposed that the parties meet and confer regarding the parties' evidentiary objections (exhibits and deposition designations). The next day, Novell agreed and again requested that, in addition to discussing the parties' evidentiary objections, the parties also discuss the draft preliminary jury instructions. On September 2, the parties agreed to schedule that meet-and-confer session for today. It now appears that Microsoft delayed the meeting solely to gain an unfair advantage and file its memoranda at a time when Novell could not fairly respond before Wednesday's pretrial conference with the Court.

3. Microsoft's "status report" consists entirely of an explication of its positions on Novell's exhibits and deposition designations while re-arguing its motion for summary judgment on issues that have already been decided -- all without so much as a single meet and confer with Novell that would likely have resulted in narrowing the issues before Your Honor.

Circumventing the meet-and-confer process as Microsoft has done is entirely inappropriate, and we ask that Microsoft's filings be stricken. We will be prepared to discuss at tomorrow's pretrial conference the issues that cannot be resolved during the parties' meet and confer today.

Very truly yours,



Jeffrey M. Johnson
(202) 420-4726 direct dial
(202) 379-9312 direct fax
johnsonj@dicksteinshapiro.com

JMJ/njc

cc: David B. Tulchin, Esq. (Via Email)
Steven L. Holley, Esq. (Via Email)