

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.  
ANTITRUST LITIGATION

This Document Relates to:  
*Novell, Inc. v. Microsoft Corporation*,  
Civil Action No. JFM-05-1087

MDL Docket No. 1332  
Hon. J. Frederick Motz

**LOCAL RULE 104.7 CERTIFICATE**

Defendant Microsoft Corporation (“Microsoft”), by its undersigned counsel, submits this certificate pursuant to Local Rule 104.7 in support of its Motion to Compel, which is being filed contemporaneously herewith. This certificate summarizes communications between counsel for Microsoft and counsel for plaintiff Novell, Inc. (“Novell”) in an attempt to resolve the present discovery dispute.

On June 20, 2005, Microsoft served its First Set of Requests for Production on Novell. Novell served its Objections and Responses to Microsoft’s First Set of Requests on August 16, 2005. In its Objections and Responses, Novell stated that it would not respond to the six document requests that are the subject of this motion, *i.e.*, Requests No. 4 through 9.<sup>1</sup> On February 4, 2008, Novell was served with

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<sup>1</sup> Three days after Novell’s Objections and Responses were served, discovery in this case was stayed pending resolution of an appeal of this Court’s decision on

Microsoft's Memorandum in Support of its Motion to Compel Production of Documents. Novell served its Opposition to Defendant Microsoft's Motion to Compel Production of Documents on February 19, 2008, and Microsoft's Reply Memorandum in Further Support of its Motion to Compel Production of Documents was served on March 3, 2008.

Following the completion of briefing on Microsoft's Motion to Compel, the parties engaged in telephonic discussions and written communications regarding the issues raised in the Motion, which are detailed below. The six document requests that are the subject of the Motion to Compel all remain in dispute. Only some documents responsive to Request No. 4, and no documents responsive to Requests No. 5 through 9, have been produced to Microsoft by Novell.

All six disputed document requests seek documents that are highly relevant to this case. They relate directly to Microsoft's defenses (i) that the PC operating system claims that Novell is asserting in this case are barred because such claims were sold by Novell to Caldera and (ii) that the doctrine of res judicata precludes Novell from asserting PC operating system claims that were already litigated in the Caldera case, a case in which Novell materially participated.

On March 14, 2008, Jeffrey M. Johnson of Dickstein Shapiro LLP, counsel for Novell, and Steven L. Holley of Sullivan & Cromwell LLP, counsel for Microsoft, spoke by telephone in an attempt to resolve the issues raised in Microsoft's

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Microsoft's Motion to Dismiss the Complaint. Discovery was resumed in early 2008, and Microsoft promptly served this Motion to Compel on Novell.

Motion to Compel and Novell's opposition thereto. This telephone conference did not resolve the issues between the parties, and the six document requests remained in dispute following the call. A follow-up telephone conference between Messrs. Johnson and Holley was held on March 21, 2008. During this call, Mr. Johnson indicated that Novell was in the process of obtaining court records and other documents relating to the case captioned *Novell, Inc. v. Canopy Group, Inc.* In that case, which was litigated in Utah state courts, Novell sued the successor in interest to Caldera, claiming that Novell had not received its proper share of the settlement proceeds in the antitrust case that Novell contractually obligated Caldera to bring against Microsoft. Court records and other documents relating to the *Canopy Group* case are the subject of Request No. 4 of Microsoft's First Set of Requests for Production. Microsoft is entitled to see such documents because they bear directly on Microsoft's contention that Novell's agreements with Caldera, pursuant to which Novell assigned to Caldera all claims or causes of action relating "directly or indirectly" to the DR DOS PC operating system, and Novell's subsequent involvement in the lawsuit that Novell required Caldera to bring against Microsoft alleging illegal monopolization of the PC operating system market, precludes Novell from pursuing the remaining claims in this case.

Mr. Johnson stated that court records and other documents from the *Canopy Group* case were being obtained from the files of Anderson & Karrenberg, P.C., a Salt Lake City law firm that served as counsel to Novell during the *Canopy Group* litigation. Mr. Holley stated that these documents might go some way toward satisfying

Request No. 4—one of six document requests that are the subject of Microsoft’s Motion to Compel. Mr. Holley noted, however, that Microsoft would not be in a position to assess the extent to which the files of documents from Anderson & Karrenberg responded to Request No. 4 until Microsoft had had an opportunity to review them. Mr. Holley observed that documents contained in the files of Anderson & Karrenberg would not be sufficient to satisfy all six disputed document requests, and that Novell had presumably maintained documents relevant to claims against Microsoft that Novell had planned to file for the last 15 years. As a result, Mr. Holley stated that Microsoft was reserving all rights to seek relief from the Court on the Motion to Compel.

On April 8, 2008, one DVD containing documents produced by Novell was received by Sullivan & Cromwell LLP. Novell represented that those documents had been obtained from the files of Anderson & Karrenberg, P.C. relating to the *Canopy Group* case. See Letter of April 7, 2008 (attached hereto as Ex. 1). Novell did not purport to produce documents from its own files relating to any of six document requests at issue in Microsoft’s Motion to Compel.

Having reviewed the documents produced by Novell on April 8, 2008, and having received no further documents from Novell in the intervening 60 days, Mr. Holley sent a letter to Mr. Johnson on June 10, 2008 inquiring whether the one DVD of documents was all Novell intended to produce in response to the six disputed document

requests. *See* Letter of June 10, 2008 (attached hereto as Ex. 2).<sup>2</sup> On June 19, 2008, Mr. Holley received a letter from Mr. Johnson stating that the documents already received by Microsoft were the full extent of documents Novell intended to produce in response to the six disputed document requests. *See* Letter of June 16, 2008, with attachments (attached hereto as Ex. 3). This exchange of letters was the last communication between counsel for Microsoft and counsel for Novell on matters at issue in the Motion to Compel. That exchange of letters makes clear that the dispute between Microsoft and Novell about the six document requests cannot be resolved without the intervention of the Court.

All six document requests that were the subject of Microsoft's Motion to Compel remain the subject of dispute. Novell's production of documents related to the *Canopy Group* case was partially responsive to Request No. 4 of Microsoft's First Set of Requests for Production. Novell's response to this document request remains incomplete, however. Microsoft does not believe it has received all documents produced

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<sup>2</sup> On June 2, 3 and 4, 2008, Novell made available approximately 485 boxes of documents for review at the offices of Dickstein Shapiro in Washington, D.C. These documents were produced in response to the other document requests in this case, not to the document requests that are the subject of Microsoft's Motion to Compel. On July 28, 2008, Novell informed Microsoft that a significant number of computer backup tapes had been discovered in a storage facility. These backup tapes are still in the process of being restored, and thus their contents are unknown. While it is conceivable that some documents responsive to the six disputed document requests are contained on the backup tapes, it will still be necessary for the Court to resolve the underlying dispute between the parties concerning Microsoft's entitlement to the documents sought in the six document requests that are at issue in the Motion to Compel.

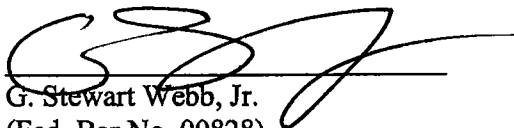
by the parties and any third parties during the *Canopy Group* case. Documents marked as exhibits at depositions or submitted in support of or in opposition to dispositive motions comprise a significant part of the documents produced, but such documents are presumably only a small subset of the documents produced in the *Canopy Group* litigation. Microsoft is entitled to see the entire universe of produced documents, especially given that the issues being litigated in the *Canopy Group* case—while directed to Novell's agreements with Caldera—are not the same as the issues being pursued by Microsoft in this case.

Moreover, as noted previously, Novell itself has not produced any documents from its own files in response to the six disputed document requests. As the plaintiff in this action, it was incumbent on Novell to preserve evidence relevant to the claims it planned for many years to assert against Microsoft. Having successfully evaded the four-year statute of limitations applicable to federal antitrust claims, Novell should not be heard to complain that Microsoft is seeking discovery of documents relating to events that occurred back in 1996. Novell should have retained those documents in anticipation of this litigation.

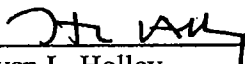
Microsoft served its Motion to Compel on Novell on February 4, 2008. Despite the passage of six months, Novell has produced only some of the documents responsive to Request No. 4 and none of the documents responsive to Requests No. 5 through 9. Consequently, Microsoft urges the Court to grant the Motion to Compel and require Novell to comply promptly with its discovery obligations.

Dated: August 7, 2008

Respectfully submitted,

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this <sup>8<sup>th</sup></sup> ~~7<sup>th</sup>~~ day of August, 2008, I caused a true and correct copy of the foregoing Local Rule 104.7 Certificate to be served by E-mail and <sup>ups</sup> ~~Federal~~ Express on:

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