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DISTRICT OF UTAH

BY: 
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NOVELL, INC.,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

**NOVELL'S RESPONSE TO
MICROSOFT'S MOTION FOR
LEAVE TO FILE AN OVERSIZED
MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS**

Judge Ted Stewart

Civil No. 2:04-CV-01045-TS

13

Plaintiff Novell, Inc. ("Novell") hereby responds briefly to Microsoft's Motion For Leave To File An Oversized Memorandum In Support Of Its Motion To Dismiss. Novell does not oppose the page limitations requested by the Defendant, and Novell is aware that the Court has granted Defendant's motion.¹ Nevertheless, certain arguments made by the Defendant merit this brief response.

First, Plaintiff does not agree that the Local Rules of the District of Maryland should supplant this District's Local Rules. Microsoft argues that because transfer to the District of Maryland is a "distinct possibility," this Court should defer to the District of Maryland Local Rules, which permit fifty-page memoranda. Microsoft ignores Rule 1.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation ("J.P.M.L. Rules") which provides that the pendency of proceedings before the Panel do not affect pretrial proceedings in the district court. While Defendant plainly prefers transfer to familiar surroundings before Judge Motz, Novell believes, and will so inform the Judicial Panel on Multidistrict Litigation ("the Panel"), that this Court is perfectly capable of handling this two-party litigation through pre-trial procedures and trial. Indeed, as this Court will ultimately be responsible for the trial, irrespective of any transfer for pre-trial procedures, it should have the benefit of understanding that comes from the disposition of pre-trial matters.

Second, Defendant erroneously suggests that Novell, with the act of simply filing a Notice of Potential Tag-Along, has advocated for transfer and then changed its position by filing a Notice of Opposition to the Conditional Transfer Order ("CTO"). As Defendant's counsel is no doubt aware, filing a Notice of Potential Tag-Along is not

¹ It should be noted that Microsoft waited until the 11th hour to file its motion, its response to Novell's complaint being due tomorrow. Obviously, the Defendant has been aware for some time that its motion to dismiss would exceed the page limitations of this Court.

a request for action or a statement of any position on transfer. The Notice is simply an alert to the Panel that there is a "civil case pending in a district court [] involving common questions of fact with actions previously transferred under Section 1407."

J.P.M.L. Rule 1.1. In addition to the fact that Novell has never stated or implied that transfer is appropriate or desired, the Notice itself prominently emphasized that it reserved "all rights with respect to any motion or Order concerning transfer." A copy of the Notice is attached as Exhibit A.

Third, while a transfer to Judge Motz is certainly a "possibility," it's "distinctness" has yet to be decided. 28 U.S.C. 1407(a) permits the Panel to transfer cases sharing common questions of fact only upon a finding that such transfer would be convenient and efficient. While the factual similarities among this case, the government suit, and the cases before Judge Motz are obvious, the Panel frequently denies the transfer of newly filed cases to a transferee court where proceedings in that court are far advanced. The consolidated cases (most of which are class actions) before Judge Motz have been steadily proceeding for over four and a half years, and this is a two-party case which has just been filed. Thus, it is also a distinct possibility that the Panel will grant the Plaintiff's Motion to Vacate the CTO, and pretrial proceedings will proceed in this Court.

Finally, by stating that briefing before the Panel will be complete before completion of briefing in this Court on Defendant's motion to dismiss, the Defendant seeks to imply that the resolution of the Panel proceedings will precede this Court's consideration of its motion to dismiss. Again, the Defendant omits well understood facts concerning Panel actions. The Panel will not rule on transfer in advance of a Hearing Session. *The next Panel Hearing Session is scheduled for January 27, 2005, and*

this case is not assigned to that hearing. The next Session has not been scheduled. Under J.P.M.L. Rule 16.1, the Panel has discretion to schedule such hearings "whenever and wherever desirable or necessary in the judgment of the Chairman." As such, while there is no way to predict precisely when a hearing will be scheduled for this matter, history shows that several months could elapse before the Panel considers the issue and makes its determination. In the meantime, there is no reason why this Court cannot advance this matter by considering and ruling on Defendant's effort to dismiss Novell's Complaint.

CONCLUSION

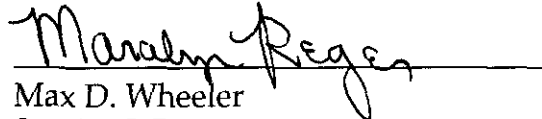
In sum, Novell does not oppose Defendant's request. Indeed, Novell anticipates that it will make a similar request in a more timely manner in connection with its opposition to Defendant's motion. The Plaintiff does not agree, however, that the mere "possibility" of transfer should compel this Court to defer to the Rules of the District of Maryland or that the Court should labor under the misapprehension that Novell ever supported transfer of this action from its chosen forum.

Dated: January 6, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of January 2005, I caused a true and correct copy of the foregoing Novell's Response To Microsoft's Motion For Leave To File An Oversized Memorandum In Support Of Its Motion To Dismiss to be served by first class mail, postage prepaid on the following:

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Exhibits/
Attachments
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Please see the
case file.