

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

CHAMBERS OF  
J. FREDERICK MOTZ  
UNITED STATES DISTRICT JUDGE

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June 2, 2009

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

Novell, Inc. v. Microsoft Corp.  
Civil No. JFM-05-1087

Dear Counsel:

I have reviewed the memoranda submitted in connection with Microsoft's Motion To Compel Production Of Document Bearing Production Number NOV-B07587565 And To Continue Two Depositions. The motion is granted.

The record establishes that the document in question was prepared for a dual purpose, one of which was not the anticipation of civil litigation against Microsoft: obtaining information to respond to DOJ's Civil Investigative Demands and request for information. Under Fourth Circuit law where "the driving force behind the preparation of . . . [a] requested document" is not the anticipation of litigation, the document is not entitled to work product immunity. *See National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). Further, I am satisfied from the record that it is as least ambiguous as to whether the conclusory statements focused upon by the parties reflect the opinion of the lawyers who prepared the document or the opinion of the persons whom they interviewed. Thus, I am also satisfied that this is not a case clearly involving attorney opinion work product. That being the case, I further find that the document should be disclosed because Novell has produced other documents falling within the same subject matter area and Microsoft has demonstrated a substantial need for obtaining the document in question.<sup>1</sup>

Finally, I am satisfied that the depositions of Mr. Hume and Mr. Frankenberg should be reopened for the limited purpose of asking the deponents questions based upon the document in question. As to Mr. Hume, Novell has already agreed to this course of conduct, and during the deposition of Mr. Frankenberg, Novell refused to permit Microsoft to inquire whether he was familiar with the document in question.

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<sup>1</sup>Of course, in ordering that the document be disclosed, I am not opining as to whether the conclusions expressed in the document will be admissible at trial.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

J. Frederick Motz  
United States District Judge