

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

In re:)	
)	
NOVELL,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	2:04-CV-01045JFM
MICROSOFT,)	
)	
Defendant.)	
)	
_____)	

BEFORE THE HONORABLE J. FREDERICK MOTZ

October 17, 2011

Partial Transcript of Jury Trial

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1 Salt Lake City, Utah, October 17, 2011

2 (Partial Transcript)

3 THE COURT: Let me just make a few preliminary remarks
4 to you and then you are going to be free to go. I was just
5 telling the lawyers that they have been so efficient that
6 we'll start with the opening statements right away and then
7 they laugh because that would not be very fair since they
8 thought they had a day to prepare for them.

9 Let me -- number one, I know I have been cursed with a
10 very soft voice. So if any of you can't hear me at some
11 point, remind me to speak into the microphone and I will try
12 to do that. It has been a problem for me for a long, long
13 -- well, all my life.

14 Let me introduce myself again. My name is Fred Motz
15 and I am a Federal District Judge in Baltimore and I just
16 happen to be here because they're stuck with me because I
17 made some pretrials rulings in the case and it is easier for
18 me to come out here than to dump it on another judge and try
19 to get it on his or her docket. Everybody else will be
20 introduced to you during the course of the trial. The court
21 reporter here is obvious. I think some people will be
22 coming in to do daily copy, but the official transcript will
23 be done here. The courtroom deputy has lots of jobs. The
24 most important one is, as far as I'm concerned, is if you
25 have got any questions please ask her. I have already

1 learned in half a day she is delightful to work with and you
2 will see that as well.

3 As soon as I'm finished up, she is going to just sort
4 of orient you to the jury room and things of that nature to
5 get you to feel comfortable. Now, you will notice that
6 there are 12 of you and, of course, that is a little unusual
7 though. In a civil case in federal court we can actually
8 try a case with as few as six jurors. We pick six extra
9 people because of the length of the trial. But all of you
10 who are still here at the end will deliberate. Nobody has
11 been selected as an alternate. If all of you are here, you
12 will all be fully participating jurors when it comes time
13 for you to engage in deliberations. I hope you all 12 will
14 remain healthy and that things work out well and you'll be
15 here at the end. We certainly are planning that, but if
16 somebody -- but if you are here, you will deliberate. That
17 is not an issue.

18 Let me tell you a little bit about the schedule. I
19 think you all know already, but if I get it wrong, I forgot
20 to bring my calendar with me. We are going to try to get
21 started at 8:30 in the morning and finish by about 1:30. We
22 will not have any lunch break, is that right? Maybe a 20
23 minute break. I am bringing in a light lunch.

24 THE CLERK: We will have a light lunch.

25 THE COURT: You will have a light lunch break to keep

1 us all nourished, but then you all will be free to go. That
2 is not because the lawyers aren't working, they're working
3 very hard and I can assure you they are, there are issues in
4 the case I have to resolve them. We worked back in
5 Baltimore for three days getting the case ready and continue
6 to do that.

7 Once in a while, we're going to have what is called a
8 bench conference. And -- excuse me, I will tell you about
9 the schedule. The schedule is usually about 8:30 to 1:30
10 with one short break and a light lunch. We will be sitting
11 -- I'll tell you now when we will not be sitting. I will
12 sit Monday through Thursday just about every week except
13 one. We will not be sitting this Friday because I still
14 have a case back in Baltimore that I have to get back on
15 Friday to keep my docket going. Next week we will be
16 sitting Monday, Tuesday, Wednesday and Thursday but not
17 Friday. The following week I have a pretty -- I have a
18 conference I have to go to so we're not going to sit at all
19 that week. That is the week of what, October 31st.

20 MR. TULCHIN: October 31st, Your Honor.

21 THE COURT: You will not sit at all the week of
22 October 31. The following week we --

23 JUROR #5: Could we get a schedule?

24 THE COURT: Good question. We will not sit on the
25 11th. We will sit on the 18th. The other important thing

1 for to you to know without a schedule but you should have
2 one is that we will not sit on the week of Thanksgiving.
3 We're only going to sit on Monday and Tuesday. We're not
4 going to sit Wednesday, Thursday and Friday thinking it
5 would be an inconvenience to you.

6 If the case goes into December, we will sit the week
7 of the 2nd and the week of the 9th and the week of the 16th
8 although I hope we won't because I have got lots of
9 proceedings scheduled back in Baltimore. But if I have to
10 cancel, I will cancel them. So early on the most important
11 thing is this week we will not sit on Friday. Next week we
12 will not sit on Friday. And the following week we will not
13 sit at all the week of the 31st. And we will not sit on
14 Wednesday, Thursday or Friday of Thanksgiving.

15 Now, I was about to mention how hard the lawyers have
16 been working. They're going to continue to work hard. We
17 will have, from time to time, bench conferences when the
18 lawyers will come to the bench to discuss an issue which
19 comes up. We are going to try to do everything we can to
20 minimize the bench conferences. Counsel has gotten to know
21 me well enough to know I try to spot issues in advance and
22 when you all are here I would much rather have testimony
23 being taken rather than us having to discuss issues that we
24 could discuss outside of the presence of the jury for that
25 matter. Number one, it is a more efficient use of time; and

1 secondly, and more importantly, it is a courtesy to you all.
2 You all are doing this civic duty and it is a wonderful
3 thing you're doing and we want to make it as convenient for
4 you as possible. So we will try to minimize bench
5 conferences but inevitably we will have them from time to
6 time. We also will be getting started as soon as you all
7 are here in the morning. I'll be here, the lawyers will be
8 here, and we will resolve issues and counsel again going I
9 don't think I have disdain more than asking jurors to hurry
10 up and wait. When you all are here, I want to get started
11 and that is what we will plan to do.

12 You will see from time to time lawyers will object to
13 evidence which is introduced. We will try to work out
14 objections in advance. Sometimes that is a job. I want to
15 make you understand from the outset that when lawyers object
16 to evidence, it is not because they are trying to hide
17 something from you. It is important for you to understand
18 that. They're not trying to hide something if they object
19 to evidence. You all have a very important job. You are
20 judges just as much as I am a judge. I have to rule on
21 issues of law, you are the judges of the facts. But you can
22 base your verdict only upon evidence which is legally
23 admissible. And the only way that I have to rule upon that,
24 and the only way for lawyers to find out whether or not I
25 think something is legally admissible or not is to object.

1 When they object, they are not trying to hide something,
2 they're simply doing their job. They're serving their
3 clients but also serving the system of justice. You may see
4 the lawyers from time to time around the courthouse probably
5 that is inevitable and they won't talk to you. I am quite
6 confident the one thing I'm sure of is they would obviously
7 want to talk with you but they can't. They are under court
8 rule not to talk to you while the case is in progress. So
9 don't think they may be -- they may smile but they can't do
10 anything more than that. Also, please don't talk to anybody
11 connected with the case. A witness or anybody else. This
12 is very important. Back in Baltimore I can remember jurors
13 have good sense but I remember once that a juror was seen
14 talking to a witness who lived in York, Pennsylvania which
15 is about 45 minutes from Baltimore. And all she was asking
16 is do you know somebody who she knew who lived in York. But
17 we had to inconvenience the jury. We had to bring her in
18 and say what were you talking about. And it was nothing.
19 But I don't want you all to be inconvenienced by the fact
20 that you're talking to someone. You're seen -- I know you
21 all wouldn't talk about anything about the case to anybody,
22 but don't even talk to somebody connected to the case
23 because then somebody will see you and ask you what it is
24 all about.

25 Now, the next piece of advice is going to be very,

1 very difficult to follow but you have got to do it and it is
2 very important. This is a long case. You are going to be
3 with your family and friends day in and day out and you will
4 see people when you go out on weekends. But you can't talk
5 about the case with them. After the case is over, you can
6 certainly talk about the case, we hope you talk about the
7 case, we hope you talk about the experience and it is a
8 great experience, but you cannot talk about the case. Now
9 again, I'll tell you a story which is true. Unfortunately
10 my wife was selected on a jury in Baltimore, and when she
11 came home the first thing I did was oh, you get selected,
12 what is the case all about? And she looked at me with even
13 greater disdain than she usually does. Just saying that she
14 never did. So don't talk about the case and I know how hard
15 it is.

16 The next piece of advice is also important and I want
17 you to follow it. Don't talk about the case to one another
18 either. That may seem strange I mean you are all hearing
19 the same case. The reason -- the other is obvious you are
20 the only one hearing the evidence. We don't want extraneous
21 opinions about what the case is all about. Sometimes it is
22 a little less obvious why you can't talk about the case to
23 one another. And that is because as the lawyers and judges
24 often say, a trial is a jigsaw puzzle. You're not going to
25 know how it all fits together until you have heard all of

1 the evidence, until you have heard all of the arguments of
2 counsel, and until I have instructed you on the law. And
3 judges fear that if jurors start to talk to one other about
4 the case, all of a sudden they stake out a position from
5 which they find it hard to retract as other evidence comes
6 in. Frankly, I think it is more important that you
7 understand the reason for the rule. You have to obey the
8 rule but the only thing is don't sneak out and stake out a
9 position with a fellow juror until you have heard all of the
10 evidence. This is a real trial. I can assure you that.
11 Incidentally, if I, and I hope I never do, but during the
12 course of the trial if I indicate to any of you anything
13 related to a factual matter disregard any expression on my
14 face, I hope I don't have any, but they are real facts for
15 you to decide and it is there for you alone to decide. And
16 so it is an important job you all have.

17 The other thing is, and we never used to talk about
18 this, but you have to watch out now, don't use the internet.
19 We used to tell people if there was an auto accident or
20 something don't go out to the scene and see how the road
21 looks itself. It is much more complicated than that. You
22 all now, many of you, you know my grand kids are much more
23 -- they are under five, but they are better than I am on the
24 computer. I can use the computer, I can do internet
25 research but don't do it. You have got to base your verdict

1 entirely upon what you hear in this courtroom. Maybe
2 conscientiously you may think I'm just going to go find out
3 about this and don't do it. You have to base your verdict
4 upon what you hear in the courtroom and don't do any
5 internet research. Don't connect with one other by e-mail
6 or Facebook or anything like that. There are cases where
7 people have actually, jurors were communicating in
8 Baltimore, and communicated with each other with Facebook
9 and somebody found out later they have done that and that
10 has been considered to be a potentially inappropriate
11 conversation because we want you all only to talk to one
12 other when you're all present when you deliberate. Don't
13 try to do anything conscientious by researching something.
14 You can't do it. Don't read blogs or something. This case
15 may have some notoriety. Don't read anything about the case
16 on the internet. Don't read about it in the newspaper. If
17 there is something in the newspaper, just say I know about
18 that case because I hear about it every day and put the
19 paper down. If something comes on the radio or television,
20 same thing. Something on Novell or Microsoft, turn off the
21 radio. The reason is obvious, in fact, two reasons. Number
22 one, I may have ruled upon something which I don't think you
23 should hear so then you would hear it if you listen. But
24 secondly, even things you all hear about we want your views
25 of them not according to what a reporter says about it. So

1 that is -- make sure you don't read about the case.

2 I hope I am not violating local practice when I say
3 this, and I may retract it tomorrow, you may take notes if
4 you want to. Pads and papers will be provided.

5 Particularly in a long trial, I think it is important for
6 you to do that. I want to give you a couple of cautions
7 about taking notes if you take them. You don't have to take
8 notes, but if you do, most importantly don't become so
9 involved in taking the notes that you don't watch the
10 witnesses. We all know with every day experience that one
11 of your jobs is to determine who is telling the truth or
12 not. And we all know from every day experience that you
13 sort of sense what people are like by watching their body
14 language as well as by listening to what they have to say.

15 So if you take notes, don't be like the court reporter
16 taking everything down, make sure that you continue to watch
17 the witnesses. Secondly notes are only an aid to the person
18 who took them. They are helping you refresh your
19 recollection. Someone who took notes should not be listened
20 to when you begin to deliberate more than somebody who
21 didn't take notes. People's minds work differently and some
22 people may think I can do my job better by not taking notes.
23 Also, notes are not an official transcript and so what is
24 written down should not be considered to be verbatim. I
25 think we will try to have daily transcripts prepared as the

1 case goes along, but you all will not have the transcripts
2 with you in the jury room. I don't think so. So if you
3 need to hear testimony read back, we can do that, but we're
4 not going to send back piles and piles of transcripts. The
5 evidence, the exhibits that have been admitted into
6 evidence, we will let you have, but not the testimony.

7 The other thing I want to tell you about notes is we
8 will collect them at the end of every -- when you go out to
9 lunch or when you go home at night. But if by any chance
10 your mind has wandered and you doodled or something, don't
11 worry about it. Nobody reads your notes. They're your
12 private business. It is a long trial and nobody -- so
13 nobody is going to be looking over your notes when we have
14 them. We just have to keep them. Cell phones, I don't know
15 what the rules are here, but clearly when you come in the
16 courtroom, you have to have the cell phone turned off
17 because we don't want any disruption.

18 The only thing I have not mentioned is some judges
19 pick the foreperson at the beginning of the trial. I don't
20 do that. I actually let jurors do that themselves as their
21 first order of business when you begin to deliberate. So
22 none of you have been pre-selected as the foreperson or
23 forelady. That will be something for you all to do when you
24 begin your deliberations and I will just let you know that.

25 You may hear some terms during the -- in a civil case

1 like this it is very -- one of the reasons the trials can be
2 efficiently run is lawyers engage in what is called
3 discovery. They can find out what the other side -- what
4 the case is about. And there are various things, I won't
5 mention them all, you may hear a couple of terms during the
6 course of the trial just to let you know what they are.
7 Interrogatories. An interrogatory is a written question
8 that one side asks of the other and then the answer can
9 sometimes be read into evidence. But I don't know whether
10 that is going to be done in this case or not, but there will
11 be -- that is what an interrogatory is. It is a formal
12 question sent by one side to the other and the other side
13 answers it under oath and it can be read. The other one is
14 a deposition. You will hear about a deposition.
15 Depositions are basically a witness appears, there is no
16 judge present, there is a court reporter present and the
17 witness is under oath. And depositions can be used for a
18 lot of things during the course of a trial. If somebody
19 appears as a witness here, you can use a deposition if you
20 think that somehow the testimony is different than what the
21 witness testified to in deposition. You can ask the witness
22 about what you think the inconsistency is. Also, some
23 people's depositions depend on what the technical rule is
24 whether a party is within 100 miles of Salt Lake City. But
25 you can also read into evidence and some times by video

1 conference or sometimes just reading it in, you actually
2 will not have witness appear you will have his or her
3 testimony read to you or also see a videotape of the
4 deposition. I think that will happen from time to time.
5 That is what a deposition is. It is something taken before
6 trial, under oath, no judge is present, but the lawyers for
7 both sides are present.

8 Now, the next thing I want to tell you, and I may
9 change this a little bit tomorrow, obviously this is not a
10 simple automobile accident case. It is scheduled for six to
11 eight weeks and I think you know enough about it from the
12 questionnaire to know it is an -- it is an antitrust case is
13 what it is. Let me tell you a little bit about what it is
14 about.

15 Now the plaintiff is Novell, Inc. and the defendant is
16 Microsoft. Now, Novell and Microsoft both develop and
17 market products for computers, including computer software.
18 And during the trial you will hear a lot about software
19 applications and personal computer operating systems. As
20 you probably know, personal computers are commonly referred
21 to as PCs. That is something that people use the term PC.
22 Now, they can be categorized by the microprocessors that
23 they use. An Intel compatible PC is one designed to
24 function with a microprocessor manufactured by a company
25 known as Intel. Intel is not a party here, but that is --

1 that is what an Intel compatible PC is. And during the
2 period of time relevant to this case, and by the way the
3 period of time that is relevant to this case is 1994 to
4 1996. It is not present, it is looking back in history I
5 think specifically March of '94 to November -- no, I have
6 got that backwards. March or -- is it '94 to '96? We'll
7 tell you more, whether it is March of '94 to November '96,
8 or November '94 to March '96. Anyway but I think it is
9 November '94 to March '96 but it is -- it is old business.
10 But during that period of time, an operating system designed
11 to run on Intel compatible PC would not function on a
12 non-Intel compatible PC and vice-versa. For example, I
13 think you know Apple and Macintosh. Macintosh PC's would
14 not work on an Intel compatible PC and an operating system
15 written for an Intel compatible PC would not work on
16 Macintosh. When I use the term PC operating system and I
17 expect when the lawyers use the term during the course of
18 the trial, they will be referring to Intel compatible PCs,
19 PC operating systems. So that is what PC operating system
20 will mean.

21 Now it is undisputed during the period of time
22 relevant to this case Microsoft had a monopoly in the market
23 for PC operating systems, specifically Intel compatible PC
24 operating systems. Now, I want you to know at the outset a
25 mere possession of monopoly power, if lawfully acquired,

1 does not itself violate the antitrust rules. A monopoly's
2 conduct only becomes unlawful when it involves what are
3 called anti-competitive acts. And rather than get into all
4 of that now, we'll wait until the very end of the case to
5 describe more fully to you what an anti-competitive act is.
6 But that is basically what the case is, the claim here in
7 this case with Novell claims is that it is the -- Microsoft
8 is liable to Novell for damages under the federal antitrust
9 laws. And in order to prove its claim, Novell must
10 establish various things.

11 And again, I'm going give you a much more complete
12 instructions about this at the end of the case. This is
13 just to give you a very, very general guide. That Microsoft
14 willfully maintained its monopoly in a PC operating system
15 market by engaging in anti-competitive conduct, including
16 conduct to thwart development of Novell's WordPerfect and
17 its other office productivity systems. I think the evidence
18 will show that as Quattro Pro but basically WordPerfect and
19 another during the period of time relevant to this case
20 which again is '94 to '96. And there has got to be and I'll
21 tell you more about the causal connection, but you can tell
22 from the language it had to maintain its monopoly by
23 engaging in anti-competitive conduct. And I'll tell you at
24 the end of the case what anti-competitive conduct is and
25 also tell you a little bit more about engaging in the causal

1 nexus but that is got to be there. The other thing is that
2 Novell realizes it must show that Microsoft's
3 anti-competitive conduct, if you find any, engaged in during
4 the period and injured Novell in its business or profit
5 during the relevant period of time. So that is what the
6 case is generally all about. I realize that this is a very
7 general guide at this point, but to give you a general idea
8 of what the case is about that is what it is about.

9 And tomorrow you will be hearing opening statement
10 from counsel about why they think they -- Novell will go
11 first and they'll tell you why they think they can prove the
12 case. And Microsoft will make its opening statement about
13 why it thinks Novell is wrong and why Novell can't meet its
14 burden of proof.

15 As I said, I was beginning to threaten the lawyers
16 that they were so efficient picking the jury that I would
17 make them give their opening statements today but that would
18 be unfair to them. We're going break for the day. Just
19 keep all of these things in mind. Go home and say I did get
20 selected for this jury, I'm going to be in a long time and I
21 will talk to you but I'm not going to talk to you about the
22 case until it is all over and it will be very a interesting
23 discussion.

24 Counsel, anything I have forgotten or anything that I
25 ought to bring up?

1 MR. TULCHIN: No, Your Honor.

2 MR. JOHNSON: No, Your Honor.

3 THE COURT: Terrific. Have a wonderful afternoon.

4 See you at 8:30 in the morning and I am going to stay here
5 with counsel. Goodbye.

6 (Whereupon, the jury left the courtroom.)

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1 STATE OF UTAH)
2)ss
3 COUNTY OF SALT LAKE)
4

5 I, Laura W. Robinson, Certified Shorthand
6 Reporter, Registered Professional Reporter and Notary Public
7 within and for the County of Salt Lake, State of Utah, do
8 hereby certify:

9 That the foregoing proceedings were taken before
10 me at the time and place set forth herein and were taken
11 down by me in shorthand and thereafter transcribed into
12 typewriting under my direction and supervision;

13 That the foregoing pages contain a true and
14 correct transcription of my said shorthand notes so taken.

15 In witness whereof I have subscribed my name and
16 affixed my seal this 17th day of October, 2011.

17
18

19 _____
20 Laura W. Robinson, CSR, RPR, CP
21 and Notary Public

22 MY COMMISSION EXPIRES:
23 February 19, 2013
24
25