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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

NOVELL, INC.,)
Plaintiff,)
vs.) CASE NO. 2:04-CV-1045 JFM
MICROSOFT CORPORATION,)
Defendant.)
_____)

BEFORE THE HONORABLE J. FREDERICK MOTZ

October 27, 2011

Jury Trial

A P P E A R A N C E S

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I N D E X

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Witness	Examination By	Page
Video Deposition of Paul Maritz		
Video Deposition of Jeff Raikes		
Video Deposition of Scott Raedeke		
Video Deposition of Paul Maritz		

Exhibit	Received
(No exhibits received.)	

1 October 27, 2011

8:00 a.m.

2 P R O C E E D I N G S

3
4 THE COURT: Good morning, everybody.

5 Please be seated.

6 I should have asked Mr. Gibb yesterday, and
7 perhaps it may not be a good question, but maybe one Novell
8 will answer, a witness can answer the question. It seems to
9 me that there was a fourth option that Novell could have
10 pursued, which was to use the exposed API that was exposed
11 to the beta group while it was a shared group and the code
12 was being written. I don't get that. If it was all that
13 important, why didn't they use the exposed API which they
14 already had while this critical path problem developed?
15 That is a question I have.

16 Let's get the jury.

17 MR. JOHNSON: Listen carefully to the deposition
18 of Mr. Paul Maritz today, Your Honor.

19 THE COURT: I will.

20 (WHEREUPON, the jury enters the proceedings.)

21 THE COURT: Thank you.

22 Good morning. It is a little spooky in here
23 today.

24 What happens next, Mr. Johnson?

25 MR. JOHNSON: Thank you, Your Honor. Good

1 morning.

2 Good morning, ladies and gentlemen of the jury.

3 In honor of Halloween it is movie day. We're
4 going to show you some portions of video depositions that
5 were taken in this case. We're also going to do a little
6 reenactment. One deposition we actually don't have
7 videotaped. It is very short, just two questions, if you
8 can believe it, which we are actually going to reenact by
9 bringing someone up to play the witness and I'll ask the
10 questions. That will be a little later.

11 We're going to start with the deposition of
12 Mr. Paul Maritz. This deposition was taken January 9th of
13 2009. It is portions of the deposition and this runs one
14 hour and 20 minutes. Thank you.

15 THE COURT: Thank you.

16 Again, I just want to explain, videotaped
17 depositions are not the best thing for you all, but I can
18 tell you they are a lot better than they used to be when all
19 the depositions had to be read. At least you get to see the
20 witness this way, and counsel have done an awful lot of work
21 in editing the depositions down. They have really done a
22 good job.

23 (WHEREUPON, the video deposition of Paul Maritz
24 was played.)

25 THE COURT: Should we take a break now?

1 MR. JOHNSON: Sure, a little break.

2 THE COURT: Counsel stay here for just one second.
3 You can all go back and we will take a short break
4 for 10 or 15 minutes. Thank you.

5 (WHEREUPON, the jury leaves the proceedings.)

6 THE COURT: I still don't know the significance,
7 but I will say that I did listen carefully to the testimony
8 of Mr. Maritz and it still did not answer my question,
9 because what clearly was being talked about was in the long
10 term the API may or will be not broken but it said nothing
11 about the short term. My question is, as I understand the
12 evidence, there is noing to indicate that during the brief
13 period, brief in terms of time, not in terms of marketing,
14 that it took shared code, or whatever it is called, to write
15 its own application to do what it wanted to do, and in that
16 brief period of time that the API in question could be -- I
17 don't understand why Novell did not consider that as a
18 fourth option to temporarily use the exposed API, and if
19 this is such a critical point, and I don't know how this
20 plays out, and it may be a jury question, but I don't
21 understand how Novell as a good business didn't consider --
22 I don't have an MBA, but I have listened to the evidence and
23 clearly a fourth option was to use -- there were lots of
24 options. They could have used Microsoft's common dialogue,
25 but for a brief short term they could have used the exposed

1 API while shared code caught up. That is a fact that I see
2 which may or may not be releveant.

3 MR. JOHNSON: Your Honor, may I? Please. Please.

4 THE COURT: Please do.

5 MR. JOHNSON: This is important.

6 THE COURT: It is important.

7 MR. JOHNSON: And I recognize that it is important
8 to you.

9 THE COURT: I don't know how important --

10 MR. JOHNSON: Mr. Harral and Mr. Richardson
11 testified at length here that that was the first idea they
12 had, to try to continue to use these APIs.

13 THE COURT: Well, that --

14 MR. JOHNSON: And do you remember that between the
15 period of October through December that that was the plan.
16 That was option one.

17 THE COURT: I don't remember that.

18 MR. JOHNSON: Well, it is in the testimony.

19 THE COURT: All right.

20 MR. JOHNSON: Further, that when they contacted
21 Microsoft to get help to do option one, that information on
22 the shell was literally cut off.

23 THE COURT: But they didn't --

24 MR. JOHNSON: I understand that it is not simply
25 about the APIs themselves. It is the infrastrucutre behind

1 the APIs.

2 THE COURT: Well, this seriously will go to the
3 legal issue of the duty of a competitor to cooperate.

4 MR. TULCHIN: Your Honor, in fact --

5 MR. JOHNSON: It is a factual issue, Your Honor.

6 THE COURT: Well, it could be a legal issue, and
7 the general question I have is there any place else where
8 shared technological information provided any basis for an
9 antitrust action against Microsoft? It seemed to me it was
10 external business practices dealing with the OEMs and what
11 they did in terms of threatening people, and I know of no
12 case, and I could be wrong, and one of the questions I have
13 is, is this is a case about you want Microsoft to provide
14 its enhanced technology so that you can use it. And,
15 granted, you say it is to maintain the status quo, because
16 simply to use the word processing application on top did not
17 re-create it somehow, which I still don't fully understand,
18 but I guess I understand, to access all of the information
19 and data that was available within the shell, but you
20 essentially want Microsoft to enhance your product. I
21 understand that enhancement from your perspective is simply
22 to maintain the status quo, but this is a far different case
23 than I envisioned when I made --

24 MR. JOHNSON: Your Honor, that is not what
25 we asked for. What we asked for was them not to evangelize

1 and tell us to use these, give us documentation, and then to
2 turn around with the bait and switch --

3 THE COURT: I understand. That is a different
4 issue. That is a deception issue which I will take up, but
5 there is no evidence that they came out to Utah to take back
6 the documentation.

7 MR. TULCHIN: Correct, Your Honor.

8 The decision that you rendered, Your Honor, in
9 that prior case several years ago addresses one of the
10 points that he just made. I should also say, Your Honor,
11 that I agree in part with something Mr. Johnson said. He
12 put up on a slide for Mr. Harral a couple of days ago the
13 three options that Novell was facing in 1994 and that it had
14 available to it. The first option was to continue to use
15 the APIs that were documented in July of 1994. So you're
16 correct, Your Honor, that Mr. Harral said that was a choice
17 that they had.

18 Yesterday Mr. Gibb said that in fact they were
19 using those APIs.

20 THE COURT: Well, fortunately the testimony has
21 been transcribed and I can read it. I was just confused and
22 maybe I don't recall Mr. Harral's testimony correctly, or he
23 didn't hone in on this issue, but clearly Mr. Gibb was more
24 of the software business kind of guy, and I thought that he
25 said he can't use Microsoft common dialogue or whatever it

1 was called because it does not -- I can't remember, but it
2 seemed to me that of the three options, I didn't think an
3 option was to continue to use the documented APIs for the
4 short term -- that I don't remember, but I will take a look
5 at that.

6 MR. JOHNSON: That is precisely the option they
7 pursued, Your Honor, and Microsoft shut them down.

8 THE COURT: Well, that is a question of the duty
9 to cooperate, why Microsoft has to tell -- also, what was
10 perfectly clear from Mr. Gibb was that what he was worried
11 about were the claims that you're not asserting. He was
12 upset that Jay Leno was selling Word. That may impact it
13 indirectly, because by selling Word it widens the mote, and
14 that is something which I have a totally open mind on, and I
15 still have a tough problem with your theory where the facts
16 don't comply with the theory.

17 MR. JOHNSON: Your Honor, if I may, the same
18 facts -- you may recall that we had a claim for
19 monopolization of the application --

20 THE COURT: I sure do. I understand --

21 MR. JOHNSON: The same facts prove both and that
22 is why we pled both. So when you're talking about the facts
23 that would have proved monopolization of the application --

24 THE COURT: Maybe it does and maybe it does not,
25 because there is no question that at least through 1996 -- I

1 think maybe your theory is that they embarked in this time
2 period upon something because they were concerned about
3 Novell in the long term. Clearly in the short term what was
4 done did not maintain the monopoly, because Mr. Harral could
5 not have been more clear and everybody has been clear that
6 you wanted to marry the two products, the operating system
7 and WordPerfect, which is --

8 MR. JOHNSON: But --

9 THE COURT: And both through 1996 and the
10 foreseeable future. I don't necessarily agree with you that
11 the same facts prove the same thing. I have told you about
12 1,000 times that the better plan may have been, and I don't
13 know what the market share was and I don't know -- I frankly
14 am not sure whether Office ever used these APIs, and that is
15 something which I am not --

16 MR. JOHNSON: Did not.

17 THE COURT: There may have been a problem, and
18 that is something which I will find out in the course of the
19 case, but that is a different question. But it seems to me
20 that there has always been a much clearer claim that they
21 attempted -- that they, Microsoft, attempted to monopolize
22 the application business and you cannot assert that claim.

23 MR. JOHNSON: Your Honor --

24 THE COURT: Mr. Shmidtlein.

25 MR. SCHMIDTLEIN: In the short run, Your Honor, I

1 mean, it is established they are a monopoly. We didn't have
2 any choice but to work with them.

3 THE COURT: Wait a minute, Mr. Schmidtlein, your
4 client, Mr. Harral, your witness testified that this was a
5 technological breakthrough and --

6 MR. SCHMIDTLEIN: Right.

7 THE COURT: -- that it was a better product.

8 MR. SCHMIDTLEIN: Right.

9 THE COURT: He clearly does not have a duty not to
10 produce a better product?

11 MR. TULCHIN: Mr. Gibb and Mr. Harral both said --

12 MR. SCHMIDTLEIN: Excuse me.

13 THE COURT: Let Mr. Schmidtlein --

14 MR. SCHMIDTLEIN: Excuse me, Mr. Tulchin.

15 In the short run the notion that our client wanted
16 to work with or develop an application for this product, and
17 the fact that we say they took steps to harm them, to widen
18 the mote, does not mean that we don't have a claim that we
19 wanted to work --

20 THE COURT: Wait a minute. When all of the
21 evidence is in, and we'll hear it, but I'm telling you I am
22 not at all sure that I agree with you on your theory about
23 widening the mote is inconsistent with what I have heard
24 about what WordPerfect and Novell wanted to do with this
25 product. I am just telling you that I did not accept

1 Mr. Johnson's point that proof of one proves the other. I
2 have often said you have got to view your claim through the
3 prism of the operating system market, and that makes it
4 very, very conceptually complex. I think you have a
5 problem.

6 I will take a recess.

7 MR. JOHNSON: Your Honor, I would suggest that you
8 read the Fourth Circuit again, because the Fourth Circuit
9 thought that we had a claim.

10 THE COURT: Well, I am going to make my own
11 decisions in this case, and whatever the Fourth Circuit
12 said, they didn't have the evidence that is now before me.

13 MR. TULCHIN: Thank you, Your Honor.

14 (Recess)

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