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

_____)	
NOVELL, INC.,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case 2:04-CV-1045 JFM
)	
MICROSOFT CORPORATION,)	
)	
Defendant.)	
_____)	

BEFORE THE HONORABLE J. FREDERICK MOTZ

DATE: DECEMBER 16, 2011

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Reported by: KELLY BROWN HICKEN, CSR, RPR, RMR

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SALT LAKE CITY, UTAH, FRIDAY, DECEMBER 16, 2011

* * * * *

THE COURT: Good morning, everybody.

Yes?

MR. JOHNSON: Sure.

MR. HOLLEY: Yes.

MR. SCHMIDTLEIN: Judge --

THE COURT: Okay.

MR. SCHMIDTLEIN: What we're going to do is, as we obviously did the other day, we will work with them to get a redacted version with bench conferences and all that stuff taken out, and we'll make it available.

THE COURT: The answer is yes, but it will take a while to prepare, Theresa.

Thank you all.

(Recess.)

MR. HASSID: The parties submitted the redacted testimony of Professor Roger Noll and Dr. Kevin Murphy. And we agreed with the redactions as they're made, and it's okay to go to the jury.

MS. BRADLEY: Agreed.

(Recess.)

THE COURT: Okay. I gather there's a typo in the verdict form in Question 5, the word --

MR. SCHMIDTLEIN: I think it's Question 7.

1 THE COURT: It's Question 7, and it's after 5, and
2 the word "or" is left out.

3 MR. SCHMIDTLEIN: Correct.

4 THE COURT: I think to highlight it at this
5 point -- I mean, you've all have 25 hours to look this over.
6 You've had -- we went over it. It's too late. The jury
7 obviously can read. They picked up the fact that there were
8 two parts of Question 4. If they have questions about it,
9 we'll take it. There is no reason to highlight it. Thank
10 you.

11 MR. TULCHIN: Thank you, Your Honor.

12 (Recess.)

13 THE COURT: Judge Benson may come in and hear this.
14 If I was Mitt Romney, maybe I would maybe put up \$10,000. I
15 think I know the answer to the question is from the respective
16 sides. But let's wait until Judge Benson comes in here.

17 MR. JOHNSON: I'll set a Quaker hearing, Your
18 Honor.

19 THE COURT: This is more like the Quaker verdict,
20 but I don't think that's a --

21 All right. I mentioned that you'd be coming in,
22 because I predicted which way who is going to say.

23 What does Novell say?

24 MR. JOHNSON: Obviously, Your Honor, if he wishes
25 to be excused, he can be excused.

1 THE COURT: So your answer is yes.

2 And Microsoft?

3 MR. JOHNSON: Yes.

4 MR. TULCHIN: The answer, I believe, Your Honor, is
5 no. It's Rule 47(c) of the Federal Rules of Civil Procedure.

6 THE COURT: That answer is no.

7 MR. TULCHIN: During jury trial deliberation, the
8 Court may excuse a juror for good cause.

9 THE COURT: I can't excuse for good cause. I
10 mean --

11 MR. TULCHIN: Correct.

12 THE COURT: They've deliberated this long, absent
13 me forcing on -- if they come back and say they're hung, then
14 I may go to the other option. But I can't do that until
15 they're hung. And the answer to this is no. I mean, I can't
16 just say, no, somebody not comfortable. And that's not the
17 way the system works. So the answer is no. And I win
18 \$10,000.

19 MR. TASKIER: From yourself, Judge?

20 THE COURT: I don't know if it was actually --
21 there wasn't any bet.

22 Today is the 15th?

23 THE CLERK: 16th.

24 THE COURT: What day is it, Friday?

25 THE CLERK: Friday. Thank you.

1 MR. HOLLEY: Thank you, Your Honor.

2 (Recess.)

3 THE COURT: They are prepared to deliberate 'til
4 5 o'clock today. They can't come back tomorrow. But Theresa
5 feels bad about this, but there's no way -- information was
6 volunteered to her, and I just wanted to share it with you
7 all. They're going to deliberate until around 4:30. The
8 foreman anticipates sending out a note saying it's hopeless.
9 I mean, apparently, I mean, Theresa didn't solicit this
10 information. But she didn't do anything wrong. But I just
11 thought you all should know that I don't think they are any
12 different today than they were yesterday, and it's hopeless.

13 So I'm just sharing that with you. I guess we
14 ought to wait until 4:30 for them to say that. I mean, if
15 they're willing to try, we ought to give them a chance to try.
16 But I just want to let you all know that because then we've
17 got to decide what to do.

18 I mean, my guess -- I guess if there are objections
19 to my Quaker verdict form, which I assume there are, I mean,
20 the advantage, I mean, I know of no precedent for it. You can
21 all be seated. The theoretical or advantage of it, as far as
22 I'm concerned, in a way it's a more honest verdict than one
23 where there's a jury compromise if, in fact, the jury is going
24 to rule in favor of the plaintiff in a case and somebody's
25 holding out, in a way you get a less principle verdict

1 potentially, a less principal verdict because you may have a
2 jury or jurors who are holding out on liability when it comes
3 to damages says, look, okay, I don't think they're liable, but
4 they're asking for \$100,000. I'm willing to give them \$25,000
5 or something like that.

6 So there's in a way what I'm suggesting is more
7 principle. I think we have more than the required jurors,
8 although I understand there's a local rule where it says there
9 has to be at least 10 jurors in a civil case. So maybe we
10 shouldn't go into that.

11 That said, it's unprecedented. Maybe the thing to
12 do, if one side or the other objects to it, maybe we
13 actually -- if both consent, that's great. But I don't
14 anticipate I'm going to get consent to what I call the Quaker
15 verdict.

16 MR. JOHNSON: Right. Your Honor, just a couple
17 thoughts. Obviously you spoke there about this maybe he's a
18 Quaker. And it really was in line with your suggestion, of
19 course. But I understand you can't do that without agreement.

20 THE COURT: Maybe I could. But I have to see. But
21 I don't see any point.

22 MR. JOHNSON: Two things come to mind possibly.
23 One is obviously the Allen charge you gave was a fairly mild
24 one. We've got a pattern one here from the 11th Circuit for
25 civil cases that we may suggest to you as a possibility. It

1 seemed to have some effect last time. They went back with
2 some renew vigor and apparently were making some progress on
3 some front. So it might help us again. So I would pass that
4 up.

5 THE COURT: Does anybody -- I just assume that the
6 one you all gave me yesterday was a 10th Circuit Allen charge.

7 MR. TULCHIN: It is, Your Honor. It was from a
8 District Court within the 10th Circuit.

9 MR. JOHNSON: There is no pattern jury instruction
10 in the 10th Circuit for the Allen charge except in criminal
11 cases.

12 THE COURT: Let me take a look at it.

13 MR. TULCHIN: Correct.

14 MR. JOHNSON: This is the pattern in the
15 11th Circuit.

16 MR. TULCHIN: I haven't seen it, Your Honor.

17 MR. JOHNSON: We'll get you a copy.

18 Can you print another copy, please?

19 THE COURT: There's no sense of me looking at it.
20 Why don't you make -- Theresa, make a couple copies, and I'll
21 read to it. If there's no objection, I'll give it. But if
22 there's objection --

23 MR. JOHNSON: And the other thing that occurred to
24 me, Your Honor --

25 THE COURT: By the way, I do assume that there's

1 not consent of me giving my proposed instruction about
2 stepping aside.

3 MR. JOHNSON: Oh, we obviously were prepared to
4 consider it. I assume Microsoft would not.

5 THE COURT: Microsoft does not.

6 MR. TULCHIN: No, we do not consent to it, Your
7 Honor. I don't think we should.

8 MR. JOHNSON: The other thing that occurred to me,
9 Your Honor --

10 THE COURT: You could be operating off a false
11 premiss, but I understand where you are.

12 MR. JOHNSON: The other thing that occurred to me,
13 Your Honor, is they appeared to be stuck for some time on
14 Number 4, and then they went back with some new plan and went
15 forward at least for a while. It might be worth asking
16 whether they are stuck on one or more issues only because if,
17 for instance, they were only stuck on 4 and obviously if they
18 had said no to 5 or done anyway, but if they're only stuck on
19 4 --

20 THE COURT: How can you answer -- how can you
21 answer --

22 MR. JOHNSON: 4 is the harder standard, Your Honor.

23 THE COURT: Oh, I had it backwards.

24 MR. JOHNSON: Yes. 4 is the harder standard. And
25 that's the one that they sent out the note that said, do you

1 have to have both clauses --

2 THE COURT: No. I'm with you. And, no, I
3 misunderstood you.

4 MR. JOHNSON: Okay. So if it was 4 and they've
5 actually been able to get home with the other ones, we could
6 take a verdict without 4 and just hang on 4. If they had
7 answered 5 -- obviously if they answered 5 no, we're done,
8 anyway, regardless whether they reached a conclusion on 4
9 because 5 is easier than 4. But presumably if they reach yes
10 on 5, we could take a verdict without 4. There may be some
11 confusion in their minds.

12 THE COURT: There's a typo there, too.

13 MR. JOHNSON: -- as to whether they have to get to
14 both 4 and 5. It just would be a simple inquiry as to whether
15 they were deadlocked on one or more issues.

16 THE COURT: I'm not sure there's anything
17 objectionable about that. What principle ground -- I
18 understand where you all are tactically, but why shouldn't I
19 ask if they're deadlocked on more than one issue?

20 MR. TULCHIN: I don't think, Your Honor, it's
21 appropriate to inquire as to the deliberations, at least I
22 don't know of any precedent for that. So, I mean, I don't
23 think -- I don't think we should be asking them what question
24 they're stuck on or whether they're stuck on a question.

25 THE COURT: No. But if they've answered -- if

1 they've answered 1, 2 and 3 yes, if they've answered 5 yes and
2 6 or 7 yes, then they should answer 8.

3 MR. JOHNSON: Correct, Your Honor. And that's all
4 I'm saying. There may be --

5 THE COURT: That's all we ask.

6 MR. JOHNSON: There may be some confusion as to
7 whether they have to reach agreement on say 4. And so it
8 would be really terrible if we were standing here --

9 MR. SCHMIDTLEIN: I think the way -- I mean, the
10 way it was appropriately set up we asked them to answer both,
11 and if they're hanging on 4.

12 THE COURT: I think it's either/or. But there is a
13 typo.

14 MR. SCHMIDTLEIN: You're right.

15 MR. JOHNSON: It's either/or or both.

16 THE COURT: It's either or both.

17 MR. TULCHIN: Well, the instructions are clear,
18 Your Honor. It says after 5, if your answer to either
19 Question 4 or Question 5 or both is yes, then proceed to
20 answer Question 6 and 7.

21 So the instruction is clear on the verdict form. I
22 believe you said that, as well, when you gave them the charge
23 on Wednesday morning. And again, I just don't think it's
24 appropriate to be inquiring into their deliberations.

25 MR. JOHNSON: Your Honor, I will say that confusion

1 would lie not in that instruction, but whether they actually
2 had to get to a yes or a no on 4. In other words, they could
3 be confused. In other words, they're in disagreement on it,
4 and so they weren't able to answer it. And it might be only a
5 simple question to find out.

6 MR. TULCHIN: It can't be confusion, Your Honor.
7 It says, if your answer to either 4 or 5 or both is yes --

8 THE COURT: Or is not there.

9 MR. TULCHIN: -- then proceed to 6. So it's very
10 clear. If you answer 4 or 5 yes.

11 THE COURT: I'm inclined to agree with you. But it
12 would be terrible -- I'll think about that. It's not an
13 outlandish request. I think probably I don't think it
14 happened. And, you know, as I say, one can draw two
15 inferences on this. I think I know which one I would draw.
16 But there are two inferences. One that there are two
17 inferences. The second inference being that they were looking
18 for some answer, they couldn't agree on everything else and
19 they look for some answer that would have the same result.
20 But --

21 MR. TULCHIN: We thought of that, Your Honor.

22 THE COURT: I understand. I think given this,
23 probably the best thing is to stay away from it. But I
24 understand it. I'll think about it. In the meantime Theresa
25 is going to make copies, a couple copies and give that back.

1 MR. JOHNSON: We've got them now.

2 THE COURT: You've got some extra, and I'll just
3 read it. Why don't I just read it right here. All right.

4 (Time lapse.)

5 THE COURT: The problem I have is -- I'm not sure
6 it is a problem. But the issue is I think a lot of other
7 circuits when you talk about the majority say that -- also has
8 language about the people in the minority, the majority ought
9 to consider them. I forget what it is. But I think that's
10 where this might be a little more aggressive than some
11 circuits allows. Is that right?

12 MR. JOHNSON: It is. It is a more aggressive one
13 than you read. The one you read was very vanilla. This one
14 is stronger and does have a substantial majority point.

15 THE COURT: But my recollection is that some of
16 them may be a little stronger, but they also refer to the
17 minority when they refer to the majority. It's not the same
18 as the one I gave, but it's a little more.

19 MR. JOHNSON: Yeah. It's a pattern jury
20 instruction from the 11th Circuit, Your Honor. I certainly
21 don't think you could go wrong with it.

22 THE COURT: Maybe I couldn't. Maybe I could. Do
23 you have any objection?

24 MR. TULCHIN: Maybe it is, Your Honor, I don't
25 know. But what this says at the bottom, it says, this

1 proposed instruction was derived largely from -- and then it
2 cites some volume of Federal Jury Practice Instructions. I
3 don't know exactly where it comes from.

4 In any event, I think the most at this point that
5 we're prepared to agree to is what we used yesterday, or maybe
6 it was the day before, the days are running together. I think
7 this jury has been very conscientious, Your Honor. I think
8 it's clear from the nature of the notes we've gotten, from the
9 fact that they were here until 7 o'clock last night. I don't
10 think it's necessary to give any further Allen charge.

11 THE COURT: What happens at 4:30 they come in and
12 say it's hopeless, what do I do?

13 MR. TULCHIN: If they say it's hopeless, given the
14 very conscientious nature of this jury, which we've all noted,
15 I would say then they should be discharged.

16 MR. JOHNSON: Your Honor, I mean, this was a
17 two-month trial. They've been at it three days. I certainly
18 think that -- I understand why Microsoft would like to hang
19 the jury at this point, at least from our point of view. But
20 clearly I think that they should be required to deliberate
21 some additional time, and I think a further Allen charge would
22 be appropriate. And it's certainly not something that has to
23 be agreed to by the parties.

24 THE COURT: Has the 10th Circuit addressed what the
25 components of the Allen charge in a civil case should be?

1 MR. JOHNSON: They have in the criminal context,
2 Your Honor, but obviously that's different.

3 THE COURT: And they -- it's basically they take a
4 more -- it is different, it's more of a vanilla approach I
5 would assume, than in the criminal context.

6 MR. JOHNSON: Yes.

7 THE COURT: But you're right. It is different.
8 You have a point.

9 MR. JOHNSON: It's different. It's an entirely
10 different thing.

11 THE COURT: Absolutely. All right. Let's just
12 wait until 4:30, and I'll decide what to do.

13 MR. JOHNSON: Thank you, Your Honor.

14 THE COURT: And I won't give another charge today,
15 but if I decide to give one it will be Monday morning. I'm
16 inclined to say that they ought to come back on Monday. But
17 Monday, I'll probably tell them to be in by Monday but not
18 past 3:30. And if they come in before that with a hung jury,
19 then that's it.

20 (Recess.)

21 THE COURT: I think the time has come to quit. The
22 note is:

23 I'm sorry, very sorry. We cannot come to one
24 accord. I've done the best I know how.

25 You know, there's just no point.

1 MR. JOHNSON: Your Honor, we've spent millions of
2 dollars on this case with all of the people, the jurors, you,
3 two months, one more day, will you give us one more day? They
4 might have a change of heart over the weekend.

5 THE COURT: I'm going to ask them if there is any
6 point in coming back on Monday. I'll say, and I'll come back.
7 One of them has got recitals or something. I've got to find
8 out. If they tell me there's no point, that's it. But I'm
9 going to ask them, because I agree with you.

10 MR. TULCHIN: I think that's the right thing to do,
11 Your Honor.

12 THE COURT: In fact, I'm going to them. But if
13 there's any hope at all. If there's no hope.

14 MR. JOHNSON: I mean, over the weekend people can
15 reflect. They can think about it. If they come back. If we
16 do an Allen charge.

17 THE COURT: I know.

18 MR. JOHNSON: It's an important case. They've been
19 at it three days.

20 THE COURT: I know. I know. But --

21 MR. TULCHIN: If we do an Allen charge, Your Honor.

22 THE COURT: All I can hope is whatever happened
23 back there you all -- I'll let them talk to you. If they want
24 to, you can all find out. Maybe there's a business solution.
25 Whatever happened there. We're speculating right now. I'm

1 going to ask them. I'm not going to come back for the sake of
2 coming back.

3 MR. TULCHIN: I think that's right, Your Honor.

4 THE COURT: There's no point in me doing it
5 subjecting myself to it. But that's not the point. The point
6 is -- let me ask them.

7 THE CLERK: Do you want them to come out?

8 THE COURT: Yeah. Let's get the jury. I
9 understand.

10 (Whereupon, the jury returned to the
11 court proceedings.)

12 THE COURT: Okay. I have your note, and we all
13 understand the situation. It looks like you're deadlocked at
14 this point.

15 Let me ask you first. We did notice, and I frankly
16 doubt that it makes any difference because I think it is
17 obvious what was meant and the instructions were clear.
18 That's a typo in Paragraph 7. If your answer to either
19 Question 4 or Question 5, and then it says both is yes,
20 obviously it should have been an "or" in there. I take it
21 that's not the source of the problem. The note is:

22 I'm sorry, very sorry we cannot come to one accord.
23 I've done the best I know how.

24 And that's from the foreman.

25 I mean, the question is whether it's worth coming

1 back on Monday. I've got to go back home, and I can fly back.
2 And I'm perfectly willing to do that. That's not an issue for
3 you all to consider. I know one of you lives a long ways
4 away, maybe four or five hours. I know one of you has
5 recitals on Monday. That would -- those two factors would cut
6 against coming back. On the other hand, cutting in favor of
7 coming back and trying one more time and if you're reflecting
8 over the weekend and resting, there's the fact as you all know
9 this is a very, very long and expensive case. I mean, the
10 lawyers are from out of town and have all been staying here.
11 And maybe I can give you a slightly stronger instruction than
12 I gave you yesterday to ask you to really search and make sure
13 that you can't reach an accord and have a verdict.

14 If you can't, though, there's no sense going
15 through all of that. And I know this is stressful. I know
16 you have all tried. You've all been conscientious. We know
17 that. Any point coming back?

18 (Whereupon, jurors shook heads.)

19 MR. TULCHIN: Your Honor, I'm not sure the court
20 reporter got any kind of --

21 THE COURT: The foreman said no. And I understand
22 the important -- this case is important. I don't like -- all
23 cases are important. But it's long and expensive. But if you
24 all don't think there's any point, and I know you've tried and
25 I know you know the importance of getting it in. And I assume

1 those of you, whatever the majority is, I assume those of you
2 who are not in the majority, maybe there isn't a majority. I
3 have no idea. But I assume every one of you has searched your
4 own conscience, reviewed the evidence, and really you are
5 where you are, and there's no point.

6 I will declare a mistrial, and I have no choice. I
7 would like the lawyers to be able to talk to those of you who
8 want to because knowing where you all stood I have no idea,
9 that's entirely up to them, not me. It may have some affect
10 upon how they -- whether they can reach a solution to this out
11 of court. So knowing where you all stood may or may not be
12 helpful in that respect.

13 You may also be asked by members of the press to
14 talk to you. Obviously this is a big case. I believe under
15 the local rules what judges ordinarily tell people and
16 certainly what I would tell you it's entirely up to you
17 whether you talk to people. I mean, if I were -- personally I
18 wouldn't want to talk to anybody, but that's -- that would be
19 a decision of my own. Obviously the more you talk, the more
20 you have problems. But you're free to talk to whoever you
21 want to.

22 I would like to talk to you all for a few minutes.
23 Would you all mind if the lawyers -- and you don't have to
24 talk to the lawyers, either. I'm not telling you all should.
25 You might want to leave. That's fine. At this point maybe

1 knowing where things were might help. It might help the
2 lawyers evaluate their own positions in the case. So if you
3 all -- so the trial is over.

4 And Mr. Tulchin?

5 MR. TULCHIN: Your Honor, I don't know if you have
6 discharged the jury or not. But could I just suggest that
7 given some of the faces in the jury that if we're going to
8 talk to them it be next week, because it looks like some of
9 them are emotionally sort of finished for the day.

10 THE COURT: No; because I'm going to be there, and
11 I'm not going to come back next week to talk to the jury.
12 That is reality. I'm just not -- I've got to be back. I've
13 got to be go back, and I'm just not going to fly 10 hours for
14 that.

15 So I say, I will do that, I will do that if -- I
16 will do that obviously for you all. You all have been
17 terrific. But if we can do it today, that's when my schedule
18 does come into the account.

19 THE CLERK: Do you want to go in the juryroom or do
20 you want to --

21 THE COURT: Let's go to the juryroom. Let me talk
22 to them first.

23 MR. SCHMIDTLEIN: Judge, obviously, they have been
24 through an enormous hardship. I mean. We have nothing but
25 our gratitude for everything they've put into this. We would

1 obviously love to get some insight from them. At the same
2 time, I can see these folks have been through an enormous
3 amount. I do not want --

4 THE COURT: Let me talk to them. Maybe I can talk
5 to them and maybe talk to you.

6 MR. TULCHIN: Could I --

7 THE COURT: I appreciate -- I appreciate
8 Mr. Schmidtlein wants to talk to you. And you don't have to
9 talk to me. I'm just actually trying to get something good
10 out of this.

11 MR. TULCHIN: Your Honor, just to be clear, I
12 think you said it, but I want just to be clear. The jury has
13 been discharged.

14 THE COURT: The jury is discharged. Thank you.

15 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on December 16, 2011, and thereat
8 reported in Stenotype all of the testimony and proceedings
9 had, and caused said notes to be transcribed into typewriting;
10 and the foregoing pages number from 5476 through 5496
11 constitute a full, true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2011.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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