

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

NOVELL, INC.,)	
)	
Plaintiff – Appellant,)	
)	Case No. 12-4143
v.)	
)	
MICROSOFT CORPORATION,)	
)	
Defendant – Appellee.)	

On appeal from the United States District Court
For the District of Utah, Central Division

The Honorable Judge J. Frederick Motz
D.C. No. 2:04-CV-01045-JFM

**APPELLANT’S RENEWED MOTION FOR LEAVE TO FILE
OVERLENGTH PRINCIPAL BRIEF**

Appellant Novell, Inc., respectfully submits this renewed motion for leave to file an overlength brief under Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 28.3.¹ Novell’s initial motion sought an enlargement to 26,500 words, explaining that this case presents “complicated legal issues pertaining to antitrust law and complex factual issues of a highly technical nature.” Novell further

¹ Microsoft does not oppose Novell’s renewed motion.

described the length and complexity of the record, including a trial transcript and designated deposition transcripts spanning more than 5,500 pages as well as hundreds of documentary exhibits. On November 6, 2012, the Court denied the requested enlargement. This renewed motion seeks an enlargement of the limitation to 21,500 words and provides additional detail explaining the nature of Novell's claim, the issues presented, the District Court's ruling, and why the appeal of the District Court's ruling necessitates the requested enlargement.

Preliminarily, and as an initial reflection of the complexity of the issues presented by this appeal, Novell's opposition to Microsoft's renewed motion for judgment as a matter of law was well over 40,000 words. Excluding sections and arguments that are not present in Novell's appeal, the opposition was approximately 35,000 words, 8,500 more than the amount requested in Novell's initial motion. Novell's opposition, moreover, was written for the benefit of the court that had presided over the trial, whereas this appeal will of course be heard by a panel with no prior familiarity with the facts of the case and the interplay between those complex technological issues and antitrust law. Novell's initial request for a page enlargement itself thus reflected a considerable narrowing of the issues and arguments for appeal in light of the rules of this Court and its desire to present as focused an appeal as possible.

Novell's brief will assert that the District Court erred both in the legal tests that it applied and as to its conclusion that there was insufficient evidence in the record for a reasonable jury to conclude that Microsoft's conduct was anti-competitive and caused harm to Novell and to competition in the operating systems market. Novell's claim is that Microsoft's anti-competitive conduct willfully maintained its monopoly in the operating systems market in violation of section 2 of the Sherman Act by destroying Novell's office productivity applications, including the WordPerfect word processor, as a viable competitive threat. Microsoft did so by (1) affirmatively inducing Novell's reliance on a technology that was part of Microsoft's Windows 95 operating system known as namespace extension Application Programming Interfaces ("APIs") in developing its applications for that operating system, (2) withdrawing support and documentation for these APIs nearly one year later for no legitimate competitive reason to disadvantage Novell and competing applications, and (3) deceiving Novell and the Independent Software Vendor community as to its reasons for doing so as an essential part of its strategy.

As the foregoing explanation reflects, this appeal requires the Court to apply a notably technical area of the law to a complicated set of technological and economic facts. Proper explanation of why Microsoft's conduct was anti-

competitive and caused harm to Novell requires Novell to explain, among other things:

- the nature of this technology,
- its role in the Windows 95 operating system,
- how Microsoft induced Novell's reliance on the technology,
- how it was to be used by Novell's products,
- the absence of any competitive justification for Microsoft's withdrawal of support for the technology,
- why the withdrawal of support for the technology and its timing left Novell with no viable competitive options, and
- the basis for Novell's claim that Microsoft deceived Novell and the independent software vendor community as to the reasons for the withdrawal.

Subsidiary issues that also must be addressed in light of the District Court's opinion include, but are not limited to, evidence as to Microsoft's knowledge of Novell's activities, and the reasons why there was no basis for concluding that a reasonable jury could only have found that a separate product (known as Quattro Pro) was responsible for the critical delay that eliminated Novell's ability to compete.

Novell's brief further must address the District Court's conclusions as to the harm to competition in the operating systems market caused by Microsoft's conduct. To address this issue fully, Novell must explain:

- the interaction between the two different markets (the operating systems and applications markets),
- the harm to competition from the elimination of Novell's products, both as a franchise and as middleware (a technological concept that itself requires significant explanation), to competition in the operating systems market,
- the relevance of other products discussed in findings of fact from the United States' case against Microsoft that have collateral estoppel effect in this case, and
- the importance of the time period at issue in evaluating the harm to competition caused by Microsoft's conduct.

In addition to the foregoing factual issues presented by the District Court decision to grant Microsoft's renewed motion for judgment as a matter of law, the District Court's opinion additionally presents legal issues as to the tests that it applied in assessing whether Microsoft's conduct was anti-competitive and caused harm to competition in the operating systems market. Novell contends that Microsoft's conduct was anti-competitive for several reasons, that the District Court erroneously addressed only two of those reasons, and that the District Court misapplied the tests that it addressed. Each of the bases for asserting that Microsoft's conduct was anti-competitive requires significant explanation.

Novell additionally contends that the District Court's test for determining harm to competition in the operating systems market departed markedly (and erroneously) from the test applied by the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), the law of the case as set forth in the District

Court's summary judgment opinion and the Fourth Circuit's affirmance of the relevant portions of that opinion, *see Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730 (D. Md. 2010), *aff'd in part, rev'd in part*, 429 Fed. App'x 254 (4th Cir. 2011), and the Tenth Circuit's decision in *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995). Proper treatment of these legal issues requires an explanation of the tests, how the District Court departed from them, and why those departures were erroneous as a matter of law.

In sum, Novell respectfully submits that the number and complexity of the factual and legal issues, together with the size of the record, presents extraordinary and compelling circumstances that justify the requested enlargement. Novell continues to believe that a brief of the length initially requested would be helpful to the Court in evaluating Novell's claims, but in deference to the Court's original decision has reduced its requested enlargement to 21,500 words, a level below which, it has reasonably determined, would significantly harm its ability to present its case. In the event that the Court denies this request – which again reflects Novell's considered and good faith judgment as to what it believes is necessary to present its argument – Novell requests, in the alternative, that the Court grant an enlargement of as close to that amount as possible.

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CERTIFICATE OF SERVICE

I certify that on November 7, 2012, I caused the foregoing **APPELLANT'S RENEWED MOTION FOR LEAVE TO FILE OVERLENGTH PRINCIPAL BRIEF** to be served on all parties or their counsel of record through the Court's CM/ECF system.

/s/ Jeffrey M. Johnson _____