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

NOVELL, INC., Plaintiff, -v.- MICROSOFT CORPORATION, Defendant.	MICROSOFT'S MEMORANDUM CONCERNING THE COURT'S TENTATIVE VIEWS ABOUT PRELIMINARY JURY INSTRUCTIONS Civil No. 2:04 CV 1045 Honorable J. Frederick Motz

October 13, 2011

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On October 11, 2011, the Court sent a letter to counsel for the parties setting forth the Court's "tentative" views on the topic of preliminary instructions (the "October 11 Letter"). The letter reiterated several key aspects of the Court's March 30, 2010 decision denying Microsoft's motion for summary judgment. *First*, Novell's claims in this action are "cabined" by, among other things, the June 24, 1994 through March 1, 1996 time period during which Novell owned WordPerfect and Quattro Pro. *Second*, Novell's Complaint (as well as bedrock principles of antitrust law) requires Novell to prove that Microsoft engaged in anticompetitive conduct directed at Novell's office productivity applications—*i.e.*, WordPerfect and Quattro Pro. *Third*, the Court "remain[s] of the view" that "the 'significant contribution' test applies in determining whether Microsoft's anticompetitive conduct during the relevant period enabled it to maintain its monopoly in the PC operating system" market. (October 11 Letter at 3.)

Despite this, the Court has tentatively decided to give the jury a preliminary instruction that fails to state clearly the necessary elements of the claim asserted in Count I of the Complaint. As the Court explained in the March 30, 2010 decision, "Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*." *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748 (D. Md. 2010) (emphasis in original). The Court further stated that Novell must prove "that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market." *Id.* at 750; *see also id*. at 748 ("To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue 'contribut[ed] significantly to a defendant's continued monopoly power.'") (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001)).

Just last week, the Court confirmed that its March 30, 2010 decision correctly set forth the law applicable to this action. The Court explained that "there is a third level of causation, that the anticompetitive conduct included conduct that was directed toward Novell, and that that conduct caused—what's the language, significantly contributed to— . . . [t]he monopoly in the operating systems market." (October 6, 2011 Hearing Tr. at 26-27.) Later that day, the Court repeated the importance of telling the jury that Microsoft's allegedly anticompetitive conduct must have been directed at Novell:

> The jury's focus has got to be on what Microsoft allegedly did to Novell. I think that is clear. . . . That clearly somewhere in the instructions I have to say, . . . otherwise, it's piggy backing as it were. But that aside, the fact of the matter is I think the focus has to be on . . . conduct directed towards Novell.

(October 6, 2011 Hearing Tr. at 82.)

Despite the clarity of these statements, the Court's tentative preliminary jury instruction does not inform the jury what Novell must prove at trial. Instead, it creates a significant risk that throughout this long trial, the jury will be confused or uninformed about the relevant legal standards. That is particularly problematic given that antitrust law is fraught with complexities and possible sources of confusion. If the jury hears weeks of evidence without the benefit of any guidance about these complex legal issues—which are outside the experience of lay jurors—there is significant potential for problems and confusion. Such confusion may be difficult to remedy in the Court's final jury instructions. To prevent such a situation, Microsoft respectfully submits a proposed preliminary jury instruction (attached hereto as Exhibit A) to replace the last paragraph of the preliminary jury instruction in the Court's October 11 letter.

ARGUMENT

There are four basic respects in which the Court's tentative preliminary jury instruction leaves the jury with insufficient guidance on the principles of antitrust law that apply to Novell's illegal monopoly maintenance claim.

First, the jury should get guidance on what constitutes "anticompetitive" conduct under the antitrust laws.[1] Without such guidance, the jury may get the wrong impression that any conduct that can be portrayed as mean-spirited[2] or unfair[3] can be found to violate the antitrust laws.

Second, the jury should be told at the outset that it is not illegal to have a monopoly. Microsoft does not dispute that it had a monopoly in the PC operating system market during the relevant time period, but the jury should not be allowed to believe that such a monopoly is in and of itself unlawful. Indeed, Novell has hinted that it intends to convey this exact misimpression. Moreover, the jury should be told that maintaining a monopoly by means

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[1] To constitute anticompetitive conduct, the conduct must have "made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason." ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, at C-27 (2005).

[2] *United States* v. *AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003) ("[T]he antitrust laws were passed for the protection of *competition*, not *competitors*.") (citation omitted); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.").

[3] The antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Group Ltd.*, 509 U.S. at 225 (quoting *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945)); *see also* 3A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 782a (3d ed. 2011) (noting that Section 2 should not be applied to "torts with insignificant market effects or even on the basis of rather marginal departures from perfect rectitude").

of good business decisions, the exercise of superior foresight or skill, development of a better product, or even good luck does not violate the antitrust laws.[4]

Third, the jury should be told that Novell must prove that Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro which both harmed those products and also contributed significantly to maintenance of Microsoft's monopoly in the PC operating system market.[5] The Court's tentative preliminary instruction may leave the jury with the impression that Novell can prevail if it can show that Microsoft engaged in anticompetitive conduct that harmed competition in the PC operating system market, even if the conduct that harmed WordPerfect and Quattro Pro was only a *de minimis* element of conduct predominately directed at other companies and other products. That is the sort of "piggy backing" that the Court has said should not be allowed.

Fourth, the jury should be told that the only two products allegedly harmed by Microsoft's anticompetitive conduct were WordPerfect and Quattro Pro. That point is blurred by the reference in the Court's contemplated preliminary jury instruction to "Novell's WordPerfect word processing application and its other office productivity applications." (October 11 Letter at

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[4] "[T]he mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system." *Verizon Comm. Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); *see also Novell, Inc.* v. *Microsoft Corp.*, 505 F.3d 302, 315 (4th Cir. 2007) (The antitrust laws "were enacted for the protection of *competition* not *competitors*. . . . Thus, the Sherman Act does not protect competitors from being destroyed through competition; on the contrary, such destruction can signal healthy functioning of the free-enterprise system.") (emphasis in original) (internal citations omitted); ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, at C-26 to C-30 (2005)).

[5] As this Court has already held, "Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*." *Novell*, 699 F. Supp. 2d at 748 (emphasis in original) and that same "conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market." *Id*. at 750.

2.) Novell's Complaint defines the term "office productivity applications" to include "[w]ord processing and spreadsheet applications" (Compl. ¶ 24), and in 2010 the Court rejected Novell's attempt to add GroupWise to the case. *Novell*, 699 F. Supp. 2d at 744. The Fourth Circuit affirmed that decision. *Novell, Inc.* v. *Microsoft Corp.*, 2011 WL 1651225, at *8 (4th Cir. May 3, 2011) (quoting Compl. ¶ 24). Thus, the jury should not be left with the misimpression that Novell can recover for harm to PerfectOffice or any Novell product other than WordPerfect and Quattro Pro.

CONCLUSION

The Court should adopt Exhibit A as part of its preliminary jury instruction.

Dated: October 13, 2011

Respectfully Submitted,

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EXHIBIT A

Our antitrust laws do not make it unlawful to acquire or maintain a monopoly. It is proper and lawful for a company to have a monopoly if the company's market position is a result of good business decisions, the exercise of superior foresight or skill, development of a better product, or even good luck. Similarly, a company that has a monopoly is not required to stop competing; our antitrust law encourages all companies to compete on the merits and to try to increase their profits and market share. However, if a company maintains a monopoly by means of anticompetitive conduct, such behavior is unlawful under the antitrust laws.[6]

The term "anticompetitive conduct" has a special meaning in antitrust law. To constitute anticompetitive conduct, the conduct must have (a) made it very difficult or impossible for competitors to conduct their business, and (b) been undertaken for no legitimate business reason.[7] Conduct is not "anticompetitive" simply because it harms one or more competitors.[8]

In order to prevail in this action, Novell has the burden to prove that Microsoft engaged in anticompetitive conduct directed at Novell's WordPerfect and Quattro Pro applications, that WordPerfect and Quattro Pro were injured as a result of that conduct, and that this same conduct contributed significantly to Microsoft's maintenance of its monopoly in the PC operating system market.[9]

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[6] Adapted from ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, at C-26 to C-30; *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[7] ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, at C-27.

[8] *United States* v. *AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003) ("[T]he antitrust laws were passed for the protection of *competition*, not *competitors*.") (emphasis in original) (citation omitted).

[9] *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748-50 (D. Md. 2010).

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2011, I filed true and correct copy of the foregoing Microsoft's Memorandum Concerning the Court's Tentative Views About Preliminary Jury Instructions using the CM/ECF system, which will send notification of such filing to the following:

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