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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 SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS PROPOSED JURY INSTRUCTIONS AND IN OPPOSITION TO NOVELL'S PROPOSED JURY INSTRUCTIONS Civil No. 2:04 CV 1045 Honorable J. Frederick Motz

September 28, 2011

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Microsoft submits this supplemental memorandum to respond to the many incorrect assertions in Novell's September 27, 2011 "Memorandum Regarding Aditional Authorities in Support of Proposed Jury Instructions and in Opposition to Certain of Microsoft's Proposed Jury Instructions" ("Reply").

As an intial matter, Novell asserts that "Microsoft missed the Court's September 23 deadline for simultaneous filings" and thus "effectively converted its Memorandum into an Opposition to Novell's timely filing." (Reply at 1 n.1.) Novell is wrong. On July 28, 2011, the Court ordered that "[t]he briefing schedule proposed in Mr. Johnson's letter of July 20, 2011 . . . is approved." (Docket #56 at 2.) That letter stated that the parties will "file briefs regarding disputed elements of Proposed Final Jury Instructions" on September 26, 2011. Microsoft's filing was timely.[1]

ARGUMENT

First, Novell relies on *Angelico, M.D.* v. *Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (3d Cir. 1998), to contend that, "like *Angelico*, Microsoft's proposed jury instructions improperly commingle the proof required to show anticompetitive effects to establish a substantive Sherman Act violation with the proof required to show that the Sherman Act violation caused antitrust injury to Novell." (Reply at 2.) This is not correct. *Angelico* does not bear on whether Novell must show harm to competition in the relevant market (here, the PC operating system market) in order to prevail on its Section 2 claim at trial. Rather, *Angelico* held

[1] Novell also "renews its request to limit the scope of the argument on September 29, 2011 to issues that need to be decided now, namely the elements that Novell must prove to establish its claim," because "[t]he parties' disputes regarding preliminary instructions and damages instructions can be narrowed through a meet-and-confer process after obtaining guidance from this Court on the fundamental issues." (Reply at 1 & n.2.) Novell's request to defer decision on a significant number of jury instructions makes no sense. With less than three weeks before the start of trial, these issues are best decided now.

only that the plaintiff had sufficiently alleged antitrust injury as part of the standing inquiry without proving harm to competition. *Id.* at 275 (holding that "the District Court erred by incorporating the issue of anticompetitive market effect into its standing analysis"). The Third Circuit remanded without reaching the issue of whether plaintiff needed to show harm to competition in order to prevail on the merits at trial. *Id.* at 276.[2]

In any event, the law of the Tenth Circuit, as well as of the Third Circuit, cannot be more clear that harm to competition in the relevant market is an essential element of a Section 2 claim. "To succeed in a claim for monopolization or its attempt, [plaintiff] must show not only that he was harmed by [defendant's] conduct, but that the injury he suffered involved harm to competition." *Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009); *see also LePage's, Inc.* v. *3M*, 324 F.3d 141, 162 (3d Cir. 2003) ("3M's exclusionary conduct not only impeded LePage's ability to compete, but also it harmed competition itself, a *sine qua non* for a § 2 violation.")[3] This rule is also entirely consistent with this Court's previous ruling that "Novell must prove that the specific Microsoft conduct which

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[2] The other two cases Novell cites for the proposition "that injury to competition is not an element of a Section 2 claim . . . because injury to competition is presumed to follow from the conduct proscribed by Section 2" (Reply at 2 n.4) also say no such thing. These cases address the question of antitrust injury only for purposes of assessing standing. *Walker* v. *U-Haul Co. of Mississippi*, for example, held that an antitrust plaintiff need not "establish a marketwide injury to competition as an element of *standing*." 747 F.2d 1011, 1016 (5th Cir. 1984) (emphasis added). *Doctor's Hosp.* v. *Southeast Medical Alliance* likewise held that "antitrust injury *for standing purposes* should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." 123 F.3d 301, 305 (5th Cir. 1997) (emphasis added). These cases do not excuse Novell from having to prove at trial that the harm allegedly sustained by WordPerfect and Quattro Pro also harmed competition in the PC operating system market. *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748 (D. Md. 2010).

[3] Thus, the *LePage's* decision that is the centerpiece of Novell's Reply not only fails to support the points for which it is cited (*see* pp. 3-4, *infra*), but also refutes Novell's argument that it can prevail on its claim without proving harm to competition in the PC operating system market.

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); *see also id*. at 750 (Novell must "show[] [that] the conduct which injured [Novell's] applications had an anticompetitive impact as well"). Novell's effort to convince the Court to eliminate this element of Novell's claim is misguided and should be rejected.

Second, Novell cites *LePage's* as "conflicting" with "Microsoft's proclamation" (Reply at 3) that "[t]o Microsoft's knowledge, there has never been a jury trial in the 120 years since enactment of the Sherman Act in which a private plaintiff seeks damages for conduct that allegedly harmed its product but where the purported harm to competition took place in a market in which those products did not compete." (Memorandum in Support of Microsoft's Proposed Jury Instructions and in Opposition to Novell's Proposed Jury Instructions at 1-2.) *LePage's* does not "conflict" with Microsoft's point but rather firmly establishes it. The Third Circuit made clear that plaintiff LePage's and defendant 3M were both competitors in the market for transparent tape. *Id.* at 146. LePage's alleged that 3M used its monopoly in the transparent tape market to corner a "segment" of that market in which 3M directly competed with Lepage. That segment involved the sale of "branded tape," a product that allowed purchasers, such as office supply stores, to sell transparent tape under their own brand names. *Id.* at 144. Indeed, the Third Circuit in *LePage's* explicitly stated that "the parties agreed that the relevant product market is transparent tape." *Id.* at 146. In contrast, Novell's claim asserts that WordPerfect and Quattro Pro were harmed by Microsoft in order for Microsoft to unlawfully maintain its monopoly in the market for PC operating systems. Word processing software and spreadsheet software—the purported markets in which WordPerfect and Quattro Pro competed—are not a "segment" of the

PC operating system market. Novell has no example of a jury trial involving a cross-market theory like the one Novell is pursuing in this case.

Novell also argues that the "jury in *LePage's* was permitted to consider 3M's conduct as a whole," including "conduct that harmed and eliminated Tesa Tuck" (another competitor of 3M's in the transparent tape market), and that this in turn means that the jury in this action should be able to consider unrelated "conduct that harmed Netscape and Sun." (Reply at 4-5.) *LePage's* stands for no such proposition. In *LePage's*, the jury was instructed about the effect of specific conduct on competition in the transparent tape market. The jury instructions required the jury to determine whether the following conduct was exclusionary: "3M's rebate program, [3M's] market development fund, its efforts to control, reduce or eliminate private-label tape, and its efforts to raise the price consumers pay for Scotch tape." *LePage's*, 324 F.3d at 167. The jury was allowed to consider the effect that this specific conduct had on LePage's as well as its effect on Tesa Tuck. *Id.* at 162.

What Novell seeks to do here, however, is radically different. Novell does not seek to demonstrate that the Microsoft conduct that allegedly harmed WordPerfect and Quattro Pro—conduct concerning the namespace extension APIs, custom print processor functionality in Windows 95, and the Windows 95 logo licensing program—also harmed Sun's Java technology, Netscape Navigator or any other product. Rather, Novell seeks to present the jury with conduct entirely unrelated to its specific allegations—conduct that took place after Novell sold WordPerfect and Quattro Pro and thus cannot have harmed those products at any time for which Novell is entitled to complain. *LePage's* consideration of specific "conduct taken as a whole" does not give Novell license to "piggy-back" on entirely unrelated allegations, directed at different parties, in a later time period, to recover in this action. *Novell*, 699 F. Supp. 2d at 750.

Tellingly, Novell's Final Jury Instructions (unlike *Lepage's*) do not even mention the three allegedly anticompetitive acts upon which Novell is proceeding to trial, nor utter the words WordPerfect and Quattro Pro—the only products that, according to the Complaint, were harmed by Microsoft's conduct. The reason for this is that Novell hopes to recover for conduct at issue in the Government Case that could not have hurt WordPerfect and Quattro Pro at the time Novell owned those products.

At bottom, *Angelico* and *LePage's* reinforce that Novell's cross-market theory is unique and apparently unprecedented in the annals of U.S. antitrust law. Those cases further establish that Novell must prove at trial, among other things, that (a) Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro and (b) the specific conduct that Novell alleges harmed its office productivity applications also contributed significantly to the maintenance of Microsoft's monopoly in the PC operating system market.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Memorandum in Support of Microsoft's Proposed Jury Instructions and in Opposition to Novell's Proposed Jury Instructions, Microsoft requests that the Court adopt Microsoft's proposed jury instructions and reject Novell's proposed jury instructions.

Dated: September 28, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2011, I filed true and correct copy of the foregoing Supplemental Memorandum in Support of Microsoft's Proposed Jury Instructions and in Opposition to Novell's Proposed Jury Instructions using the CM/ECF system, which will send notification of such filing to the following:

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