MAX D. WHEELER (3439)
MARALYN M. ENGLISH (8468)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone (801) 521-9000
Facsimile: (801) 363-0400

JEFFREY M. JOHNSON (*admitted pro hac vice*)
PAUL R. TASKIER (*admitted pro hac vice*)
JAMES R. MARTIN (*admitted pro hac vice*)
JASON D. WALLACH (*admitted pro hac vice*)
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

R. BRUCE HOLCOMB (*admitted pro hac vice*)
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 810
Washington, DC 20006-5403
Telephone: (202) 580-8820
Facsimile: (202) 580-8821

JOHN E. SCHMIDTLEIN (*admitted pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Telephone: (202) 434-5901
Facsimile: (202) 434-5029

Attorneys for Novell, Inc.

UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S MEMORANDUM IN SUPPORT
Plaintiff,	*	OF PROPOSED JURY INSTRUCTIONS AND IN
	*	OPPOSITION TO CERTAIN OF MICROSOFT'S
	*	PROPOSED JURY INSTRUCTIONS
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

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I. INTRODUCTION

Plaintiff Novell, Inc. ("Novell") developed its proposed instructions from the ABA's Model Jury Instructions in Civil Antitrust Cases ("Model Instructions")[1] and instructions given in several recent private monopoly cases (which, in large part, follow the Model Instructions). These sources provide concise, understandable, and neutral explanations of the correct law applicable to this case. Defendant Microsoft Corporation ("Microsoft"), by contrast, crafted dozens of instructions that deviate markedly from the Model Instructions or ignore them altogether. Microsoft's proposed custom instructions are too many, too complicated, rife with self-serving statements, and clearly erroneous on the substantive elements of a monopolization claim. Microsoft does not deny that its proposed instructions are unprecedented. Instead, it argues that this Court should reject accepted legal principles and standard instructions because Novell's theory of the case is supposedly "unique."

As Novell demonstrates more fully below, Novell's monopolization theory is neither unusual nor implausible. It is the same legal theory that the United States pursued in *United States v. Microsoft Corp.* (the "Government Case"),[2] premised on some of the same conduct,[3] and with similar results. Like the United States in the Government Case, Novell contends that Microsoft engaged in conduct to eliminate certain technologically advanced applications that Microsoft perceived as threats to its continued monopoly power, because those applications held the potential to reduce or eliminate the applications barrier to entry protecting Microsoft's

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[1] ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases, 2005 Edition* (2005).

[2] *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 308-09 (4th Cir. 2007).

[3] *Id.* at 314 n.22; *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 749 n.20 (D. Md. 2010), *rev'd on other grounds*, No. 10-1482, 2011 WL 1651225 (4th Cir. May 3, 2011) (unpublished).

monopoly power. Microsoft's own documents establish its motive, intent, and execution of its plan.[4]

None of these applications actually competed in the personal computer ("PC") operating systems market, but "[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes." *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001). To the contrary, monopoly claims exist in many different permutations and "the means of illicit exclusion . . . are myriad." *Id.* at 58; *Associated Gen. Contractors v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. 519, 536 (1983). "Section 2 prohibits a monopolist from engaging in anticompetitive practices that are designed to deter potential rivals from entering the market . . . ." *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1306 (D. Utah 1999). In markets characterized by network effects, where competition is ***for*** the market instead of within it, monopolists actually are more likely to seek to exclude "threats from outside the field instead of from within." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 319 (4th Cir. 2007).[5]

In a case where there is no dispute that the defendant possessed monopoly power in a validly defined antitrust market, standard jury instructions in private monopolization cases ask the jury to decide two fundamental and separate questions. First, whether the monopolist unlawfully acquired or maintained its monopoly power in the relevant market by engaging in

[4] *Novell*, 505 F3d at 317.

[5] *See id.* at 308 ("[F]irms compete to dominate the market, and once dominance is achieved, threats come largely from outside the dominated market, because the degree of dominance of such a market tends to become so extreme.").

anticompetitive conduct.[6] In making this determination, the jury should evaluate the monopolist's conduct in its entirety.[7]

If the jury answers the first question in the affirmative, then it has found that the monopolist violated Section 2 of the Sherman Act and the jury must then turn to the second question – whether that anticompetitive conduct caused the plaintiff antitrust injury.[8] This second question arises under Section 4 of the Clayton Act and requires the private plaintiff to show that the Sherman Act violation was a "material cause" of the plaintiff's injury and that the injury is of the type that the antitrust laws were intended to prevent.[9] This is an extension of the antitrust standing requirement, which ensures that the plaintiff is sufficiently connected to the "ripples of harm" caused by the asserted violation to justify seeking damages.[10] This Court and the Fourth Circuit have already concluded that Novell has antitrust standing. If the plaintiff establishes both a Sherman Act violation and injury/causation, then it has a right to seek damages to compensate it for that injury.[11] Nothing more is required.

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[6] Model Instruction 1, MONOPOLIZATION – GENERAL, *Elements*, at C-2 (referenced pages attached as Exhibit A).

[7] *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *Caldera*, 72 F. Supp. 2d at 1306-09; 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 244 (6th ed. 2007) (referenced pages attached as Exhibit B).

[8] Model Instruction 1, MONOPOLIZATION – GENERAL, *Elements*, at C-2 (Exhibit A).

[9] Model Instruction 1, CAUSATION AND DAMAGES, *Injury and Causation*, at F-2 (Exhibit A). Clayton Act Section 4 provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a) (2006).

[10] *Novell*, 505 F.3d at 310 (quoting *AGC*, 459 U.S. at 534).

[11] *Id.*; 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 657a (3d ed. 2011) (attached as Exhibit C, at 1).

Microsoft's hand-crafted instructions badly jumble these two discrete inquiries and their logical sequence, resulting in a highly prejudicial set of instructions that are redundant, confusing, and wrong. For example, Microsoft seeks to create a new element of proof never before seen in antitrust law that would require Novell to not only establish that Microsoft (1) maintained its monopoly power by engaging in anticompetitive conduct and (2) that the violation was a material cause of antitrust injury to Novell's office productivity applications, but to further show that (3) the specific conduct which injured Novell also harmed competition in the PC operating system market. As this Court knows, harm to competition is an integral component of the Section 2 inquiry.[12] Requiring a plaintiff to revert to a Section 2 analysis after having already proved a Section 2 violation and injury/causation resulting from that violation makes no sense. By rejecting the Model Instructions in favor of its one-sided custom instructions, Microsoft makes this and many other such fundamental errors.

This Memorandum focuses on the key disputed legal issues that will affect the manner in which the parties prepare their respective cases, in particular: (1) the basic elements that Novell must prove to establish its right to seek damages; (2) the substantive elements that Novell must prove to establish a Section 2 violation; and (3) the substantive elements that Novell must prove to establish injury/causation under Section 4 of the Clayton Act. These key issues permeate the bulk of the instructions, and Novell believes that the Court's guidance on these issues will encourage the parties to discuss and narrow their disputes on the remaining proposed instructions.

[12] *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 745; *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (To determine "whether [defendant]'s conduct may properly be characterized as exclusionary . . . it is relevant to consider . . . whether it has impaired competition in an unnecessarily restrictive way.").

Accordingly, Novell suggests that this Court defer ruling on all but the following instructions: Novell's Proposed Final Instructions Nos. 13-17 and Microsoft's Proposed Jury Instructions Nos. 20-27 and 30.[13]

II. STANDARD INSTRUCTIONS

The parties are not writing on a clean slate. A non-partisan group of prominent antitrust practitioners selected by the Antitrust Section of the American Bar Association spent two and a half years drafting the Model Instructions to accurately and clearly reflect antitrust law.[14] The Model Instructions are concise and understandable for jurors.[15]

Several courts have in recent years approved jury instructions that, in large part, follow the Model Instructions. In *Hynix Semiconductor, Inc. v. Rambus, Inc.*, United States District Judge Ronald M. Whyte of the Northern District of California approved instructions in a case involving allegations of monopolization and attempted monopolization of certain technology markets. In *ZF Meritor LLC v. Eaton Corp.*, United States District Judge Sue L. Robinson of the District of Delaware approved instructions in a case involving allegations of monopolization and exclusive dealing. And in *Comes v. Microsoft*, the Honorable Scott D. Rosenberg sitting in Iowa state court approved instructions in a class action against Microsoft.[16]

Novell used all of these sources as a template for its proposed instructions on the substantive Sherman and Clayton Act issues. In a few instances, Novell proposes to deviate

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[13] On the date of this filing, Microsoft provided revised versions of other instructions. Novell will meet and confer with Microsoft and report its progress to the Court at the hearing on these jury instruction issues.

[14] Model Instructions at xv, xvi, xix.

[15] *Id*. at xviii.

[16] Novell provides these pertinent instructions in Exhibits A (Model Instructions), D (*Hynix* instructions), E (*ZF Meritor* instructions), & F (*Comes* instructions).

from the Model Instructions to address discrete issues specific to this case. In those instances, Novell explains below why it believes a departure from the Model Instructions is appropriate.

III. THE PARTIES' RESPECTIVE INSTRUCTIONS

A. Elements Of A Claim For Unlawful Monopolization (Novell Final Instruction No. 13; Microsoft Instruction No. 20)

The jury instruction defining the fundamental elements of a private monopolization claim is among the most important instructions in any antitrust case. The Model Instruction identifies five elements. The parties do not dispute that three of them can be considered established as a matter of law (marked by an asterisk):

(1) the alleged market is a valid antitrust market;*

(2) the defendant possessed monopoly power in that market;*

(3) the defendant "willfully" acquired or maintained monopoly power in that market by engaging in anticompetitive conduct;

(4) the defendant's conduct occurred in or affected interstate commerce;* and

(5) the plaintiff was injured in its business or property because of the defendant's anticompetitive conduct.[17]

The courts in *Hynix*, *ZF Meritor*, and *Comes* approved instructions that follow the Model Instruction.[18] Similarly, Novell's Final Instruction No. 13 follows this accepted formula. Like Microsoft, Novell did not include the first and fourth elements in its list (valid antitrust market and interstate commerce) because those are not contested and they are not necessary to

[17] Model Instruction 1, MONOPOLIZATION – GENERAL, *Elements*, at C-2 (Exhibit A). As discussed below, the Model Instructions provide additional, more detailed, instructions for each of these elements.

[18] *See Hynix* Instruction No. 19 (Monopolization – Elements) (Exhibit D, at 23); *ZF Meritor* Instruction No. 23 (Elements) (Exhibit E, at 28); *Comes* Preliminary Instruction No. 5 (Monopolization) (Exhibit F, at A0010).

understand the remaining substantive instructions. Novell's Instruction 13 identifies the following elements:

> **First**, that Microsoft possessed monopoly power in the PC operating systems market. Monopoly power is the power to control prices or exclude competition;
>
> **Second**, that Microsoft unlawfully maintained monopoly power in that market by engaging in anticompetitive conduct; and
>
> **Third**, that Novell was injured in its business or property because of Microsoft's anticompetitive conduct.

Microsoft's Proposed Instruction No. 20, by contrast, deviates from the Model Instruction in several critical respects that cannot be reconciled with the law. Microsoft not only seeks to modify the three elements to misstate the law, but it seeks to create an additional unprecedented *new* element[19] of proof that would require Novell not only to establish that (1) Microsoft violated the Sherman Act and (2) that violation caused injury to Novell, but also (3) that the "same conduct which caused injury to WordPerfect and Quattro Pro contributed significantly to Microsoft's maintenance of a monopoly in the PC operating system market." Microsoft's proposed instruction should be rejected.

1. Microsoft Misstates the First Element of a Monopolization Claim

There are two differences between Novell's proposed first element and Microsoft's proposed first element. First, Novell uses the phrase that the Model uses, "monopoly power," and provides a definition: "Monopoly power is the power to control prices or exclude competition."[20] The jury needs to understand that term because there are references to it in subsequent instructions, and monopoly power is an important issue in this case. Microsoft does

[19] Microsoft's proposed instruction also misstates the law applicable to each of the specific elements and misstates Novell's contentions in this case. We address those issues in the context of the specific instructions on Unlawful Maintenance of Monopoly, Injury/Causation, and Introduction.

[20] *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

not dispute that it had "monopoly power," but its instructions state that the law only requires proof that Microsoft "possessed a monopoly." It is unclear why Microsoft deviated from the Model Instruction's language, but telling a jury only that Microsoft had "a monopoly" does not explain what that term means, nor does it help the jury view the evidence in context.

Second, Microsoft's proposed Instruction No. 20 adds that the "relevant period" is the time of Novell's ownership of its office productivity applications,[21] June 1994 to March 1, 1996. This addition to the Model template incorrectly tells the jury that events and conduct occurring outside of that narrow time period are irrelevant. In fact, throughout its proposed instructions, Microsoft seeks to cabin the evidence of its conduct into very narrow confines. As will be seen below, for example, Microsoft also asserts that the jury should only consider conduct "directed at" Novell. Microsoft's proposed limitations cannot be reconciled with the law. The jury may, and should, be instructed to evaluate Microsoft's conduct as a whole for purposes of determining whether Microsoft violated the Sherman Act.

The U.S. Supreme Court and the Tenth Circuit have long held that antitrust plaintiffs should be given the full benefit of their proof without "tightly compartmentalizing the various factual components." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), *quoted in Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984), *and Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1307 n.6 (D. Utah

[21] Throughout its proposed instructions, Microsoft inexplicably omits any reference to, PerfectOffice, the suite of applications that Novell developed, which included WordPerfect and Quattro Pro. This Court has already recognized PerfectOffice's place in this case. *Novell*, 505 F.3d at 305; *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 740-41. Novell objects to this omission. In the remainder of this Memorandum, Novell treats Microsoft's references to "WordPerfect and Quattro Pro" to include PerfectOffice.

1999).[22] Consistent with these authorities, in denying Microsoft's motion for summary judgment, this Court ruled that Novell had raised a triable issue of fact "whether Microsoft's behavior, taken as a whole, was anticompetitive" and took into account the "weakened state of other applications and ISVs." *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 745, 750 (D. Md. 2010), *rev'd on other grounds*, No. 10-1482, 2011 WL 1651225 (4th Cir. May 3, 2011) (unpublished).[23]

Even after Novell sold its office productivity applications, Microsoft engaged in conduct to limit the distribution, and the development, of applications that threatened to lower the applications barrier to entry protecting Microsoft's monopoly power. The D.C. Circuit confirmed in the Government Case that, among other things, Microsoft affirmatively misled Sun Java developers, entered into unlawful contracts with Apple to prevent Apple from distributing Netscape Navigator, and unlawfully coerced developers to refrain from writing applications for Navigator and Java.[24] Novell's economic expert concluded that exclusion of the synergistic potential of all these applications harmed competition in the market for PC operating systems.[25] The full potential for Novell's office product applications, but for Microsoft's misconduct, must therefore be evaluated in light of the market after Microsoft engaged in its conduct. This Court explained that it would be "contrary to the purpose of § 2 to immunize a monopolist for

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[22] *See also Antitrust Law Developments*, at 244 ("Effect may be assessed on an *aggregate* basis, as distinguished from examining the impact of its discrete component parts.") (Exhibit B).

[23] This Court also wrote that in the context of unilateral-refusal-to-deal cases, courts may consider "the entirety of the monopolist's pattern of conduct." *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 745. While Novell does not agree with Microsoft's view that this case presents a pure unilateral-refusal-to-deal case, the principle is the same. In fact, the rationale for considering the entirety of the monopolist's conduct applies with greater force to cases where, like this one, the monopolist engaged in a variety of different acts to exclude competition.

[24] *Microsoft*, 253 F.3d at 72-74, 76-78.

[25] *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 749.

anticompetitive conduct, which in fact significantly contributed to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, none of which could prove that the conduct directed at any single firm would have by itself significantly contributed to the defendant's monopoly if none of the other small firms had been similarly weakened." *Id*. at 749.[26] In the analogous context of the Rule-of-Reason cases brought under Sherman Act Section 1, juries are instructed that they may consider "the nature and structure of the market, both before and after the restraint was imposed[,]" and "the level of competition . . . both before and after the restraint was imposed." Model Instruction 3-B, SHERMAN ACT – GENERAL, *Rule of Reason – Proof of Competitive Harm*, at A-7 (Exhibit A).

Accordingly, Microsoft's efforts to prevent the jury from considering conduct outside the narrow limits of conduct directed at Novell from June 1994 to March 1, 1996 should be rejected.

2. Unlawful Maintenance of Monopoly Power, the Second Element of a Monopolization Claim

Novell follows the Model Instruction's formulation of the "second element" of an unlawful monopolization claim except that Novell substitutes the word "unlawfully" for "willfully": "Microsoft unlawfully maintained monopoly power in the PC operating system market by engaging in anticompetitive conduct." Novell prefers the term unlawfully because "willfully" connotes an element of specific intent and is imprecise.[27]

Section 2 is not a specific intent offense. "[N]o intent is relevant except that which is relevant to any liability, criminal or civil: i.e. an intent to bring about the forbidden act." *United*

[26] *See id.* at 749 n.20 (discussing the 1,000-firm example); *Caldera*, 72 F. Supp. 2d at 1309 ("Plaintiff's entire case is based on the synergy of all of this conduct to demonstrate anticompetitive intent and effect.").

[27] *See* 3 Areeda & Hovenkamp ¶ 651c1 (criticizing use of "willful" in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)) (attached as Exhibit G, at 5-8).

States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945) (Hand, J.).[28] While many cases use the word "willful," others do not.[29] Even courts that continue to use the word "willful" go one step further to explain that "willful" should not be given its ordinary meaning.[30] The Model Instruction implicitly recognizes the potential for confusion by putting the word "willfully" in quotes. For these reasons, Novell submits that "unlawfully" is preferable. In the event that this Court prefers to use the word "willfully," Novell would ask for an opportunity to properly define "willfully" to limit jury confusion and ensure that it does not seek to demand more than general intent.

Microsoft varies the Model Instruction language in the "second element" to require proof that Microsoft maintained its monopoly power by engaging in anticompetitive conduct "directed at" Novell's office productivity applications "during 1994 and 1995." As discussed above, Microsoft's efforts to cabin the evidence of Microsoft's anticompetitive conduct to a narrowly defined time period is both inappropriate and inconsistent with this Court's prior rulings.

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[28] *See Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 973 (10th Cir. 1990) ("While a 'specific intent' to monopolize is necessary to establish an attempt to monopolize claim, 'general intent is all that is required to support a monopolization claim.'") (citation omitted).

[29] *E.g., TV Commc'ns Network, Inc. v. Turner Network Television*, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992) ("unlawful acquisition or maintenance of monopoly power"); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1299 (9th Cir.1983) (same); *Drs. Steuer & Latham, P.A. v. Nat'l Med. Enters.*, 672 F. Supp. 1489, 1519 (D.S.C. 1987) (same), *aff'd*, 846 F.2d 70 (4th Cir. 1988); *Humboldt Bay Mun. Water Dist. v. Louisiana-Pac. Corp.*, 608 F. Supp. 562, 568 (N.D. Cal. 1985) (same), *aff'd*, 787 F.2d 597 (9th Cir. 1986); *see also Novell*, 505 F.3d at 315-16 (monopoly power maintained "by engaging in exclusionary conduct") (quoting *Microsoft*, 253 F.3d at 58).

[30] *Aspen Highlands Skiing Corp.*, 738 F.2d at 1521 n.16 ("'[W]illfully . . . means acting knowingly and deliberately, but it does not mean that [defendant] must have specifically intended to achieve or maintain monopoly power.'") (citation omitted).

The "directed at" language is equally flawed. Requiring Novell to prove that Microsoft directed its conduct at Novell is akin to imposing a specific intent requirement, which is inappropriate. Novell is unaware of any case that requires a victim-by-victim analysis of a monopolist's conduct to determine whether that conduct violated Section 2. Instead, as shown, courts evaluate the monopolist's conduct as a whole. The "directed at" language is more appropriately viewed in the context of antitrust standing.[31]

3. Injury/Causation, the Third Element of a Monopolization Claim

The "third element" in the Model Instructions instructs the jury that it must find that the monopolist's anticompetitive conduct caused the plaintiff's injury. This element is required to establish a plaintiff's right to pursue damages under Section 4 of the Clayton Act. It is ***not*** an element of a Section 2 violation.[32] As shown in the Model Instruction on Injury/Causation, to meet this element Novell must show that Microsoft's Sherman Act violation was a "material cause" of Novell's injuries, and that Novell's injuries are the type of injuries the antitrust laws were intended to prevent (sometimes referred to as "antitrust injury.") If Novell's injuries were caused by "a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers," then Novell's injuries are antitrust injuries. Novell Final

[31] *See, e.g.*, *Novell*, 505 F.3d at 319 (finding that Novell had antitrust standing under Clayton Act § 4 because, in part, Microsoft's conduct was "*directly* aimed at Novell").

[32] *See, e.g.*, *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1477-78 (10th Cir. 1985) ("[U]nder Section 4 of the Clayton Act, . . . a plaintiff must show 'a causal connection between the defendant's actions violative of the Sherman Act and the actual injury to the plaintiff's business.'" (citation omitted)); *Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 607 (11th Cir. 1984) ("The prerequisites to a private cause of action under section 4 of the Clayton Act are well established: the plaintiff must show (1) a violation of the antitrust laws, in this case sections 1 and 2 of the Sherman Act, (2) injury to its 'business or property,' and (3) a causal relationship between the antitrust violation and the injury.").

Instruction No. 17 (based on Model Instruction 1, CAUSATION AND DAMAGES, *Injury and Causation*, at F-3 (Exhibit A)).

Microsoft's proposed instruction generally follows the same format, except that it modifies "anticompetitive conduct" to "same anticompetitive conduct," which appears to incorporate Microsoft's incorrect attempt to cabin the scope of the "conduct" at issue in its misstatement of the prior elements.

This is where the elements of an unlawful monopoly claim end in the Model Instructions, in Novell's proposed instruction, and in the jury instructions from other monopolization cases. If the jury concludes both that Microsoft violated the Sherman Act and that Microsoft's violation caused Novell to suffer antitrust injury, then the jury should find for Novell and proceed to consider damages.[33]

4. Microsoft's Unprecedented New "Fourth Element" Should Be Rejected

Microsoft does not stop there, however, It seeks to impose an additional "fourth element" stating: "This same conduct which caused injury to WordPerfect and Quattro Pro contributed significantly to Microsoft's maintenance of a monopoly in the PC operating system market." Microsoft Instruction No. 20. Microsoft's lone authority for this additional element is a portion of this Court's opinion denying Microsoft's motion for summary judgment.[34] There is no such requirement in the law. No court has ever approved of an instruction containing this additional element and the Model Instructions do not include it as a separate fourth element because the issue – whether conduct harmed competition – is part and parcel of the "second

[33] *See In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 744 ("[P]laintiff must prove that defendant (1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury.") (citation omitted).

[34] *Id.* at 748-50.

element." If the jury finds that Microsoft unlawfully maintained its monopoly power "by engaging" in anticompetitive conduct, it will have already decided that there is a sufficient "causal link" between the asserted conduct and its effect on the competitive process.[35]

Microsoft has not cited a case (for none exists) that supports the illogical proposition that a jury, having found that (1) a monopolist unlawfully acquired or maintained monopoly power by engaging in anticompetitive conduct in violation of Section 2, and (2) the violation was a material cause of the plaintiff's antitrust injury, should revert to the Section 2 inquiry for any additional findings before proceeding to the question of damages. To the extent this Court's prior opinion can be read to endorse this additional element, Novell respectfully disagrees with it. In fact, this Court's decision relied on a Clayton Act Section 4 case, *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317 (4th Cir. 1995), as its basis for writing that "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*." *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 748.

Novell respectfully suggests that the language from this Court's decision upon which Microsoft relies to support its request for a new and unprecedented element of proof might be more easily reconciled with established precedent by restating it as follows: "Novell must prove

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[35] Model Instruction 10, MONOPOLIZATION – GENERAL, *Willful Acquisition or Maintenance of Monopoly Power*, at C-26 to C-30 (Exhibit A). *See also Microsoft*, 253 F.3d at 79 (holding causation can be inferred from the fact Microsoft engaged in anticompetitive conduct that reasonably appears capable of contributing significantly to maintaining its monopoly power).

Courts routinely describe Section 2 monopolization claims as involving three elements: proof that the defendant (1) possessed monopoly power in the relevant market; (2) unlawfully maintained that power *through exclusionary conduct*; and (3) caused antitrust injury. *E.g.*, *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004), *cited in In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 744. In effect, Microsoft is attempting to improperly break this second element into two separate inquiries and sandwich them around the injury/causation inquiry.

that Microsoft engaged in anticompetitive conduct in violation of Section 2 of the Sherman Act. If Novell makes that showing, then it must also prove that the violation was a material cause of Novell's antitrust injury." This formulation would be consistent with the result of this Court's decision, its acceptance of Dr. Noll's testimony, and other aspects of its analysis.[36] The injury/causation analysis mandated by Section 4 addresses the concerns underlying this Court's fear that Novell might "piggy-back" on harm caused to other victims of Microsoft's anticompetitive conduct.[37]

A recent filing by Microsoft provides further support. In its "Status Report" filed September 12, Microsoft relied on a Section 4 Clayton Act case to support its argument that Novell must show that conduct which injured Novell also harmed competition. The case Microsoft cites, *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216 (10th Cir. 2009), demonstrates that Microsoft has mistakenly reversed the analysis. *See* Microsoft's Status Report for the September 14, 2011 Pre-Trial Conference, at 4. In *Four Corners*, the Tenth Circuit found that a physician could not state a Section 2 claim against a local hospital, for a variety of reasons. The Tenth Circuit then wrote that "equally and ***independently*** problematic . . . is the question of antitrust injury." *Id*. at 1225 (emphasis added). The Tenth Circuit found that the physician could not show that he suffered an injury that the antitrust laws were intended to protect. *Id.* This ruling confirms that antitrust injury is an element of proof independent of the substantive Sherman Act violation. As shown, the "third element" of a monopolization claim squarely addresses antitrust injury.[38]

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[36] *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d at 745, 746-50.

[37] *Id.* at 750.

[38] Model Instruction 1, CAUSATION AND DAMAGES, *Injury and Causation*, at F-2 (Exhibit A); Novell's Final Instruction No. 17; *Hynix* Instruction No. 30 (Exhibit D, at 37); *ZF Meritor* Instruction No. 37 (Exhibit E, at 49).

The Court will recall that it upheld Novell's antitrust standing in 2007 and the Fourth Circuit affirmed that ruling. The Fourth Circuit's decision is particularly relevant to Microsoft's unprecedented request to rewrite standard jury instructions. The Fourth Circuit rigorously applied the five-factor *AGC* test to confirm that Novell's asserted injuries were causally linked to the Sherman Act violation.[39] The Fourth Circuit concluded that Novell's claim was little different from the claims that Netscape and Sun could have properly asserted.[40] The Fourth Circuit wrote that the first two *AGC* factors together encompass the concept of "antitrust injury," namely "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful,'" and concluded that Novell had properly alleged antitrust injury. *Novell*, 505 F.3d at 311 (alteration in original) (citation omitted).

As a matter of law, Microsoft's request to create a new element of proof is therefore unwarranted. Novell's proposed Final Instruction No.13 accurately and concisely identifies the elements that it must prove as a prerequisite to seeking damages and the elements are laid out in a clear and logical order.[41]

B. The "Second Element" – Unlawfully Maintaining Monopoly Power
(Novell Final Instruction Nos. 14-16; Microsoft Instruction Nos. 21-25, 27)

Novell proposes a package of three instructions addressing the "second element" of an unlawful monopolization claim – whether Microsoft violated Section 2 of the Sherman Act.

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[39] *Novell*, 505 F.3d at 314-19. The five factors are: "'(1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; (2) whether the harm was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws; (3) the directness of the alleged injury; (4) the existence of more direct victims of the alleged antitrust injury; and (5) problems of identifying damages and apportioning them among those directly and indirectly harmed.'" *Novell*, 505 F.3d at 311 (internal quotation and citation omitted); *see also AGC*, 459 U.S. at 537-45.

[40] *Id.* at 314 & n.22; *In re Microsoft Antitrust Litig.*, 699 F. Supp. 2d at 749 n.20.

[41] *See Tyler v. Dowell, Inc.*, 274 F.2d 890, 897 (10th Cir. 1960) (holding instructions ought to be "a fair and impartial statement" of the facts and applicable law, "stated in logical sequence and in the common speech of man").

The first of these instructs the jury what Novell must prove to make out a *prima facie* case that Microsoft unlawfully maintained its monopoly power through anticompetitive conduct. Novell Final Instruction No. 14. The second and third follow the burden-shifting approach adopted by the D.C. Circuit and instruct the jury that if Novell makes out a *prima facie* case, then Microsoft bears the burden of establishing a non-pretextual, pro-competitive justification for its conduct and, if Microsoft meets its burden in that regard, then the jury should balance the asserted competitive benefits against the competitive harm. Novell Final Instruction Nos. 15, 16. All of these instructions follow the Model Instructions. Microsoft, by contrast, hand-crafted six separate instructions (including its misplaced and improper instruction on its so-called Fourth Element of injury to competition in the PC operating system market) which are one-sided, and misstate the law.

1. Novell's Final Instruction No. 14, Unlawful Maintenance of Monopoly Power

Like the Model Instruction, Novell's proposed instruction defines anticompetitive conduct as "acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market." Model Instruction 10, MONOPOLIZATION – GENERAL, *Willful Acquisition or Maintenance of Monopoly Power*, at C-26 (Exhibit A). The instruction advises that "[h]arm to competition is to be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition" and instructs the jury that it should distinguish maintenance of monopoly power through anticompetitive acts from the maintenance of monopoly power "by supplying better products or services, possessing superior

business skills, or because of luck, which is not unlawful." *Id.* Other courts have adopted very similar instructions.[42]

Novell's proposed instruction, like the Model, includes examples to help the jury distinguish between conduct that harms competition and pro-competitive conduct. Consistent with established law, the proposed instruction explains that the jury should consider whether the conduct (1) is consistent with competition on the merits, (2) provides benefits to consumers, or (3) would make business sense apart from any effect it has on excluding competition or harming competitors. Novell Final Instruction No. 14.

Novell proposes four substantive changes to the Model Instruction, the first two of which are discussed above: (1) substituting the word "unlawful" for "willful"; (2) adding a sentence advising the jury to consider all of the characteristics of the relevant market and to evaluate Microsoft's conduct as a whole; (3) adding a paragraph to clarify that Novell need not establish that Microsoft's monopoly power is precisely attributable to its anticompetitive conduct; and (4) ensuring internal consistency in the instruction by replacing a sentence near the end of the instructions that could be read to state an incorrect standard for anticompetitive conduct with a sentence taken from the first paragraph of that instruction that properly states the standard. We explain the reasoning behind the last two changes below.

a. Novell need not present direct proof that Microsoft's monopoly power is precisely attributable to its anticompetitive conduct

Novell's Final Instruction No. 14 includes the following addition to the Model Instruction:

> Novell need not present direct proof that Microsoft's continued monopoly power is precisely attributable to its anticompetitive conduct nor must it show that its business applications would actually have developed into a

[42] *See Comes*, Preliminary Instruction No. 8 (Exhibit F, at A0013-14); *ZF Meritor*, Instruction No. 26 (Exhibit E, at 33-34); *Hynix*, Jury Instruction No. 25 (Exhibit D, at 31-32).

> viable threat to Microsoft's monopoly power in the Intel-based PC operating systems market. The law does not require that level of proof. Instead, as a general matter, conduct other than competition on the merits that excludes "nascent," or unproven, threats to a monopolist's market power is the type of conduct that could have the effect of excluding competition or frustrating the efforts of other companies to compete for customers within the Intel-based PC operating systems market.

The first two sentences of this language are drawn from this Court's summary judgment decision where the Court discussed the harm-to-competition standard, relying on the D.C. Circuit's opinion in the Government Case.[43] The final sentence is drawn from the D.C. Circuit decision itself.[44] This additional language is intended to help the jury better understand what types of conduct the Sherman Act prohibits and ensure that the jury does not mistakenly believe that Novell must prove that its office productivity applications would, by themselves, have actually developed into a viable platform substitute or inevitably led to the creation of a viable substitute. It is particularly important that the jury understand this aspect of the law given that Microsoft has said it will argue that Novell's office productivity applications did not threaten

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[43] This Court wrote: "Under this 'contributed significantly' standard, plaintiffs need *not* 'present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct.' To require such proof would 'require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct[,]' which 'would only encourage monopolists to take more and earlier anticompetitive action.' When a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm because '[t]o some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'" *In re Microsoft Corp. Antitrust Litig.*, 699 F.Supp.2d at 748 (alterations in original) (citations omitted) (quoting *Microsoft*, 253 F.3d at 79) (internal quotation marks omitted).

[44] The D.C. Circuit wrote: "[T]he question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) *whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power* and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue. As to the first, suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts." *Microsoft*, 253 F.3d at 79 (emphasis added).

Microsoft's dominant position and would not have "develop[ed] into a viable platform that would have competed with Windows." Microsoft Instruction No. 27.

Despite this Court's very clear statement, Microsoft will argue that Novell nevertheless must satisfy a stringent burden of "causation" (establishing a link between the conduct "directed at" Novell and its effect on competition under Section 2)[45] and prove that Novell's office productivity applications were "actual" threats, rather than just potential or nascent threats. *See* Microsoft's Memorandum in Support of its Motion *in Limine* to Exclude Evidence of Novell's New Middleware Theory, at 8 n.5 (Sept. 21, 2011). Microsoft premises its argument on (1) a flawed reading of the D.C. Circuit's decision in the Government case and (2) a misleading citation to Areeda's *Antitrust Law* treatise.

First, Microsoft argues that the D.C. Circuit decision was different because it was an action for injunctive relief, not treble damages. But other courts have applied the same "reasonably capable" standard in damages cases, including one of the cases cited by this Court in its most recent ruling.[46] Similarly, although the D.C. Circuit noted that the Government Case was an equitable enforcement action, it cited two damages cases for its "reasonably appears capable" standard. *Microsoft*, 253 F.3d at 79 (citing *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) and *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983)). Notably, the D.C. Circuit emphasized that it was only considering "§ 2 *liability*" (emphasis in original). It explained later that Microsoft's concerns over causation were more properly directed to the remedy issue, not liability. The D.C. Circuit's reasoning directly

[45] This is to be distinguished from causation under Section 4 of the Clayton Act. The two forms of causation can often be confused.

[46] *In re Microsoft Antitrust Litig.*, 699 F. Supp. 2d at 748 (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 n.2 (2010)).

supports the discussion above emphasizing the importance of addressing Section 2 liability independent of Section 4 Clayton Act antitrust injury. Notably, the Fourth Circuit indicated that it would have granted standing to Netscape and Sun to pursue damage claims.[47]

Second, as it did in 2001, Microsoft relies on a single quote taken from Areeda, this time a different one: "[I]t [is] critical that treble damage remedies be strictly limited to those aspects of a plaintiff's injury that were in fact caused by an unlawful exploitation of market power or an unlawful quest for such power in attempt cases." 3 Phillip E. Areeda & Herbert Hovenkamp ¶ 657a (3d ed. 2011) (Exhibit C, at 1). The quote is taken from a larger academic discussion of the potential that a monopolist might be held liable for damages for a "reasonable but mistaken judgment that it was doing nothing unlawful." In the same paragraph from which Microsoft takes its quote, Areeda continues: "[I]t is well established that the damage plaintiff must demonstrate not only that the defendant has violated the antitrust laws, but also that the plaintiff's business or property in fact suffered compensable injury as the result of that violation . . . . ***Proper adherence to that principle would moderate the treble damage consequences of finding 'exclusionary' conduct***." *Id.* (emphasis added). The emphasized language underscores one of the main points of this Memorandum, that the antitrust injury factors taken from the Clayton Act Section 4, not the substantive elements of Section 2, protect against "piggybacking." As the Fourth Circuit found, this case presents a much more compelling case of misconduct than a mere "reasonable but mistaken judgment."

Furthermore, Areeda provides the following general definition of unlawful monopolistic conduct: Acts that "are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and that either do not benefit

[47] *Novell*, 505 F.3d at 314 n.22.

consumers at all, or are unnecessary for the particular consumer benefits claimed for them, or produce harms disproportionate to any resulting benefits." Areeda & Hovenkamp ¶ 651a (internal numbering omitted) (Exhibit G, at 1). By explicitly recognizing a "reasonably capable" standard, Areeda effectively rejects Microsoft's assertion that Novell must meet a "stringent" test of harm to competition. As discussed below, Novell's proposed Sherman Act instructions are consistent with that general definition. Microsoft's are not.

b. Novell resolved an internal inconsistency in the Model Instruction

In its first paragraph, the Model Instruction states "anticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market." Model Instruction 10, MONOPOLIZATION – GENERAL, *Willful Acquisition or Maintenance of Monopoly Power*, at C-26 (Exhibit A). In the second to last paragraph, in explaining a set of examples offered to help the jury discern between anticompetitive and lawful conduct, the Model Instruction states that anticompetitive conduct "must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason." *Id.* at C-29. The latter quote does not accurately state the law (*see, e.g.*, *Microsoft*, 253 F.3d at 58-59) and cannot be reconciled with the first quote.[48] To resolve the problem, Novell simply used language from the first quote in both places.

[48] As the D.C. Circuit explained, the line between lawful and anticompetitive conduct can be "difficult to discern" due to the variety of exclusionary acts that could potentially violate Section 2. *Microsoft*, 253 F.3d at 58. To capture these many permutations, the definition of anticompetitive conduct is necessarily broad: "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *Id.*

2. Novell's Final Instruction No. 15, Evidence of a Valid Business Purpose, and No. 16, Balancing the Competitive Effects

The D.C. Circuit neatly laid out a burden-shifting approach to evaluate a monopolist's conduct in which, if a plaintiff successfully establishes a *prima facie* case under Section 2 by demonstrating anticompetitive effect, then the monopolist must proffer a "pro-competitive justification" for its conduct.[49] If the monopolist asserts a pro-competitive justification – a nonpretextual claim that its conduct is indeed a form of competition on the merits – then the burden shifts back to the plaintiff to rebut that claim.[50] If the monopolist's pro-competitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm outweighs the pro-competitive benefit asserted by the monopolist.[51] Cases arising under Section 1 of the Sherman Act routinely apply a similar balancing approach under the rubric of the Rule of Reason.[52]

Novell proposes two instructions to implement this burden-shifting analysis. Both instructions are based on the Model Instructions addressing the Rule of Reason and are consistent with instructions approved in *ZF Meritor*.[53] The first of these two instructions explains that if the jury finds that Microsoft engaged in conduct which harmed competition in the relevant market, then it must determine whether Microsoft has proved a pro-competitive justification for its conduct. If the jury finds that Microsoft's conduct resulted in competitive benefits, then it must consider whether the conduct was reasonably necessary to achieve those

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[49] *Microsoft*, 253 F.2d at 59; *see also Data Gen. Corp.*, 36 F.3d at 1182.

[50] *Microsoft*, 253 F.2d at 59.

[51] *Id.*

[52] *Id.*

[53] *See* Model Instruction 3C, SHERMAN ACT – GENERAL, *Rule of Reason – Evidence of Competitive Benefits*, at A-10 (Exhibit A); Model Instruction 3D, SHERMAN ACT – GENERAL, *Rule of Reason – Balancing the Competitive Effects*, at A-12 (Exhibit A); *ZF Meritor* Instructions Nos. 22, 22a (Exhibit E, at 26-27).

benefits.[54] If plaintiffs prove that the same benefits could have been readily achieved by other, reasonably available alternative means that created substantially less harm to competition, then those asserted benefits cannot be used to justify the conduct.

The next instruction explains that if the jury finds that Microsoft's anticompetitive conduct was reasonably necessary to achieve competitive benefits, then the jury must balance those competitive benefits against the competitive harm resulting from the same conduct. If the competitive harm substantially outweighs the competitive benefits, then the anticompetitive conduct is unreasonable. The proposed instruction reminds jurors that they must weigh the benefits and harms to competition and consumers, not a single competitor.

Taken together, Novell's Final Instructions Nos. 14-16 properly and fairly instruct the jury on the analysis in which it should engage to determine whether Microsoft violated Section 2 of the Sherman Act.

3. Microsoft's Proposed Section 2 Instructions Misstate the Law

Microsoft's proposed instructions depart from the Model Instructions in many important respects and reject the burden-shifting analysis approved by the D.C. Circuit. Microsoft proposes five instructions to establish the "second element" of proof in an unlawful monopolization claim. In addition, Microsoft proposes a stand-alone instruction on "harm to competition" under the guise of a "Fourth Element." Most are duplicative and unnecessary. All are wrong in some important aspect. To the extent that we have not addressed them already above, we discuss the key substantive problems with Microsoft's proposed instructions below.

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[54] *Microsoft*, 253 F.3d at 59; *see also Aspen Skiing Co.*, 472 U.S. at 605 (whether conduct is exclusionary under Section 2 depends on "whether it has impaired competition in an unnecessarily restrictive way"); *Multistate Legal Studies v. Harcourt Brace Jovanovich*, 63 F.3d 1540, 1550 (10th Cir. 1995) (conduct is unlawful under Section 2 if it is "more restrictive than reasonably necessary" for "competition on the merits" (quoting *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987)).

a. Microsoft's Instruction No. 21 fails to properly state the definition of anticompetitive conduct[55]

Microsoft's proposed instruction borrows snippets of language from the Model Instruction that it deems helpful to its defense and ignores any other language that might help explain to the jury how it should decide whether Microsoft's conduct was anticompetitive. Microsoft's proposed instruction does not accurately state the law or Novell's contentions.

For example, Microsoft rejects the correct definition of anticompetitive conduct contained in the first paragraph of the Model Instruction and adopts instead the incorrect definition in the second to last paragraph which would require Novell to show that Microsoft's conduct "made it very difficult or impossible for competitors to conduct their business" and was "undertaken for no legitimate business reason." Microsoft relies on a single case to support this incorrect statement of the law, *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009). A careful reading of *Christy Sports* reveals that it does not support Microsoft's wrong legal standard. *Christy Sports* was a pure unilateral-refusal-to-deal case in which the owner of a ski resort enforced restrictive covenants limiting who could rent skis on its property. The averment prevented the resort owner from renting space to a ski-rental company and the rental company sued under Sections 1 and 2 of the Sherman Act. A motion to dismiss was granted because the ski-rental company alleged an implausible product market and its allegations of anticompetitive conduct were also implausible. *Id.* at 1193-94 & n.2. Nowhere does the opinion even use the phrase "difficult or impossible," let alone rely on such a restrictive standard to decide the case.

[55] We demonstrated above that Microsoft incorrectly argues that Novell must rely only on conduct "directed at" Novell during the time period that Novell owned its office productivity applications.

b. Microsoft's proposed instruction on anticompetitive intent is unnecessary and one-sided

Microsoft's Instruction No. 22 seeks to instruct the jury that expressions of intent alone do not violate the Sherman Act. The instruction consists almost entirely of legal argument for Microsoft and omits any mention of the evidentiary value of expressions of intent, for example to evaluate the anticompetitive effect of a monopolist's conduct or decide whether a proffered business justifications is pretextual.[56] The Model Instructions do not have an analogous instruction nor is Novell aware of any court that has endorsed one.[57]

c. Microsoft Instruction No. 23, The Three Alleged Anticompetitive Acts and No. 24, Legitimate Business Purpose

These two instructions are unnecessary and incorrect. They do not have an analog in the Model Instructions. The first of these instructions improperly seeks to limit Novell's "contentions" to three specific acts, in violation of the rule requiring the jury to view the monopolist's conduct as a whole. The second instruction seeks to incorrectly define "a legitimate business purpose" for purposes of determining whether Microsoft's conduct was anticompetitive. The proposed instruction would erroneously tell the jury that it must find for Microsoft if it finds that Microsoft advances "any" legitimate purpose for its conduct. As explained above, the law is nowhere near as restrictive. The Model Instruction on Unlawful Monopolization used by Novell as a template already covers this territory in a neutral and balanced way, as do the instructions on burden shifting.

[56] *See Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").

[57] If this Court believes that an instruction on intent should be given, Novell would request an opportunity to modify the instruction so that it fairly explains to jurors how they would consider evidence of anticompetitive intent.

d. Microsoft's Instruction No. 25, No Obligation to Deal with or Assist Competitors

Based on the incorrect premise that Novell is pursuing a unilateral refusal to deal claim, Microsoft proposes an instruction purporting to inform the jury of the elements of a pure unilateral-refusal-to-deal claim. As this Court has recognized, this case is different.[58] A separate instruction, therefore, would be misleading and wrong.

e. Microsoft's "injury to competition in the PC operating system market" instruction is misplaced and wrong

Microsoft's "Fourth Element" should not be viewed as a separate element of a monopolization claim. Microsoft Instruction No. 27. As discussed above, harm to competition is inherently a part of the inquiry addressed by the second element that determines whether Microsoft unlawfully maintained its monopoly power in the operating system market through anticompetitive conduct. Novell's proposed instruction already incorporates the substance of this analysis in an evenhanded way.

In addition, the instruction proposed by Microsoft would tell the jury that Novell must prove that Microsoft's conduct "contributed significantly" to the maintenance of Microsoft's monopoly power without explaining what that phrase means. As discussed above, that standard is incorrect. It is also vague. The Model Instruction does not use that phrase nor do the instructions on unlawful monopolization in other cases.

[58] *In re Microsoft Corp.*, 699 F. Supp. 2d at 746; *see also Microsoft*, 253 F.3d at 74-75 (describing Microsoft's violation of Section 2 for deceiving of Java developers).

C. The "Third Element"– Establishing Injury and Causation
(Novell Instruction No. 17; Microsoft Instruction Nos. 26, 30)

1. Novell's Final Instruction No. 17, Injury and Causation

As with its other instructions, Novell's proposed instruction on Injury and Causation closely tracks the Model Instruction and instructions given by courts in other cases.[59] The proposed instruction advises the jury that it may consider injury and causation only ***if*** it finds that Microsoft violated Section 2 of the Sherman Act. It then explains that Novell is entitled to seek damages if it establishes, by a preponderance of the evidence, three elements of injury and causation:

(1) Novell was in fact injured as a result of Microsoft's anticompetitive conduct.

(2) Novell proved with a fair degree of certainty that Microsoft's anticompetitive conduct was a "material cause" of Novell's injury. The instruction explains that Novell must prove some damage to it as a result of Microsoft's antitrust violation and that if the jury finds that Novell's injuries were caused by something other than the antitrust violation then it should find for Microsoft.

(3) Novell's injury is an injury of the type that the antitrust laws were intended to prevent. The proposed instruction explains that if Novell's injuries were caused by a reduction in competition, conduct that would lead to a reduction in competition, or conduct that would otherwise harm consumers, then Novell's injuries are antitrust injuries but if its injuries were caused by heightened competition, the competitive process itself, or by conduct that would benefit consumers, then Novell's injuries are not antitrust injuries.

[59] Model Instruction 1, CAUSATION AND DAMAGES, *Injury and Causation*, F-2 to F-5 (Exhibit A); *see also ZF Meritor* Instruction No. 37 (Exhibit E, at 49-51).

By adhering to the Model Instruction, Novell's proposed instruction is balanced and understandable. As discussed above, this instruction also addresses the "piggybacking" issue that this Court raised in its summary judgment decision.

2. Microsoft's Proposed Instruction on Injury/Causation is Deficient

Microsoft's Instruction No. 26, Injury to Novell, is another one-sided customized instruction that largely rejects the Model Instruction and is flawed for reasons that have already been discussed. This proposed instruction does not even attempt to address the causation portions of the injury/causation analysis set forth in the Model Instruction.

Microsoft attempts to state the causation requirements in its Instruction No. 30, Damages – Material Cause of Novell's Alleged Injury. Unlike its other proposed instructions, this instruction more closely follows the causation portion of the Model Instruction and would leave it to the jury to decide whether Microsoft's anticompetitive conduct was a material cause of Novell's injury. Microsoft, however, cuts many portions of the Model Instruction. As between the Model Instruction and Microsoft's customized version of the Model Instruction, Novell submits that the Model Instruction is preferable.

IV. CONCLUSION

Novell respectfully requests that the court approve its proposed Final Instructions Nos. 14-17 and reject Microsoft's proposed Instruction Nos. 21-27 and 30. Novell submits that with this Court's ruling, the parties will be able to meaningfully meet and confer on the remaining proposed instructions to eliminate and/or narrow their disagreements.

Dated: September 23, 2011

SNOW, CHRISTENSEN & MARTINEAU

/s/ Maralyn M. English
Max D. Wheeler
Maralyn M. English

DICKSTEIN SHAPIRO LLP
Jeffrey M. Johnson
Paul R. Taskier
James R. Martin
Jason D. Wallach

ADAMS HOLCOMB LLP
R. Bruce Holcomb

WILLIAMS & CONNOLLY LLP
John E. Schmidtlein

Attorneys for Novell, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Maralyn M. English