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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S MEMORANDUM REGARDING
Plaintiff,	*	ADDITIONAL AUTHORITIES IN SUPPORT
	*	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

Plaintiff Novell, Inc. ("Novell") submits this brief Memorandum[1] to bring to the Court's attention an additional case authority, *Angelico, M.D. v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (3d Cir. 1998), to which Novell intends to refer at oral argument regarding the appropriate jury instructions in this case and to provide jury instructions from a case tried in the Eastern District of Pennsylvania in which the plaintiff recovered damages for injuries it suffered as a result of conduct which harmed competition in an adjacent market, *LePage's, Inc. v. 3M (Minnesota Mining & Manufacturing Co.)*, 324 F.3d 141 (3d Cir. 2003) (en banc). Plaintiff 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.[2]

A. *Angelico*

Angelico stands for the proposition that confusing the proof required to establish antitrust injury under Section 4 of the Clayton Act with the proof required to establish anticompetitive effects as an element of a substantive claim under the Sherman Act is clear error. In *Angelico*, a cardiothoracic surgeon alleged that a consortium of hospitals conspired to exclude him from the market for surgical services and monopolized the market for such services. *Id.* at 272-73. The hospitals moved for summary judgment on the ground that the plaintiff could not establish that he suffered "antitrust injury" and therefore lacked antitrust standing to sue under Section 4 of the Clayton Act. *Id.* at 273. The trial court agreed, ruling that the surgeon could not

[1] Because Microsoft missed the Court's September 23 deadline for simultaneous filings, it effectively converted its Memorandum into an Opposition to Novell's timely filing. Novell submits this Memorandum in reply to Microsoft's Opposition.

[2] The 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.

show any anticompetitive effect caused by his injury, namely his exclusion from the relevant market.[3] *Id.*

The Third Circuit reversed because the trial court "erred by incorporating the issue of anticompetitive effect into its standing analysis, confusing antitrust injury with an element of a claim under Section 1 of the Sherman Act." *Id.* at 275 n.2. The Third Circuit explained that courts must distinguish antitrust injury, which arises from Section 4 of the Clayton Act, from the anticompetitive market effect element of a Sherman Act claim. *Id.* at 273. The Third Circuit further ruled that the surgeon had antitrust standing because the injury he suffered – being shut out of the marketplace – is the type of injury that the antitrust laws were meant to redress. *Id.* at 274. The Third Circuit also ruled that the substantive requirement of anticompetitive effects under the Rule of Reason constituted a different analysis.[4] *Id.* at 275-76.

Novell contends 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. Like the defendant in *Angelico*, Microsoft erroneously seeks to require Novell to show that its injury caused harm to competition.

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[3] The trial court wrote: "[A]n injury to [the plaintiff surgeon] Dr. Angelico personally does not confer standing upon him without a showing that his absence from the relevant product and geographic markets injured competition and/or the consumers of cardiothoracic surgical services in these markets." *Angelico v. Lehigh Valley Hosp., Inc.*, 984 F. Supp. 308, 313 (E.D. Pa. 1997).

[4] The appellate court observed that, unlike a Rule of Reason case brought under Section 1, injury to competition is *not* an element of a Section 2 claim. *Angelico*, 184 F.3d at 276 n.5. That is because injury to competition is presumed to follow from the conduct proscribed by Section 2. *See, e.g., Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997); *Walker v. U-Haul Co. of Miss.*, 747 F.2d 1011, 1016 (5th Cir.1984).

B. *LePage's*

Microsoft boldly asserts that "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 1-2 (Sept. 26, 2011). By this careful wording, Microsoft excludes, at least, (1) the bench trial in *United States v. Microsoft* and (2) the jury trial in *Hynix*, where a group of computer memory chip manufacturers sought invalidation of patents that the defendant obtained allegedly to protect its monopoly in certain technology markets in which the manufacturers did not compete. *See, e.g.*, *Hynix Semiconductor, Inc. v. Rambus, Inc.*, Nos. C-00-20905 RMW, C-05-00334 RMW, C-06-00244 RMW, 2008 WL 2951341, at *1-3 (N.D. Cal. July 24, 2008) (unpublished); Exhibit D to Novell's Memorandum in Support of Proposed Jury Instructions and in Opposition to Certain of Microsoft's Proposed Jury Instructions (Instruction 9).

Microsoft's proclamation also conflicts with the jury trial in *LePage's*. In that case, 3M monopolized the market for transparent tape. *LePage's*, 324 F.3d at 144. Its product, Scotch Tape, dominated the market for "branded" tape and it also sold "private label" tape, which is a cheaper version sold under a retailer's name rather than the manufacturer's name. *Id*. at 144. Of the two, Scotch Tape was a far more profitable product for 3M. *Id*. at 162. Two companies, LePage's and Tesa Tuck, entered the market for private label tape and those companies began to increase sales at the expense of both 3M's branded and private label tapes. *Id*. at 144. Neither company sold "branded" tape. *Id.* 3M thereafter engaged in a pattern of conduct, including exclusive dealing contracts and bundled rebate programs, to eliminate LePage's and Tesa Tuck

and, ultimately, minimize all sales in the private-label market to "kill it" and channel consumers to the higher-priced Scotch brand. *Id*. at 154-64. 3M's campaign successfully eliminated Tesa Tuck and seriously injured LePage's. *Id.* at 160, 164-66.

While the jury was instructed that the "relevant market" was for transparent tape, the Third Circuit's opinion and the jury instructions that were given emphasize the distinction between the separate sub-markets for "branded" and "private-label" tape (*see, e.g.*, *id.* at 166-169) and it is clear that LePage's obtained damages for conduct that harmed its private-label product, but the harm to competition occurred in the adjacent market for "branded" tape as well as in the private-label market. 3M's goal, in fact, was to eliminate the private-label market to strengthen its monopoly in the branded market, just as Microsoft's goal was to eliminate threats to the applications barrier to entry to strengthen its monopoly power in the PC operating systems market. The appellate court, in ruling, observed: "When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general." *Id*. at 159.

The jury returned a verdict for LePage's and the appellate court rejected 3M's challenge to the jury instructions, which were modeled on the ABA model instructions.[5] *Id.* at 166-69. Just as the jury here should be allowed to consider Microsoft's conduct as a whole, the jury in *LePage's* was permitted to consider 3Ms conduct as a whole, including its efforts to control, reduce, or eliminate private label tape. *Id.* at 167. The jury was not prevented from considering conduct that harmed and eliminated Tesa Tuck, just as the jury here should not be

[5] The appellate court quotes the relevant jury instructions. For the Court's convenience, we are attaching a copy of the pertinent instructions that were given as Exhibit A.

prevented from considering conduct that harmed Netscape and Sun. *Id.* at 160-62. It may also be observed it was unnecessary to ask the jury to "disaggregate" damages because the jury found 3M's actions, taken as a whole, violated Section 2. *Id.* at 166.

Dated: September 27, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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