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December 5, 2011

By Hand and ECF Filing

The Honorable J. Frederick Motz,
United States District Court for the District of Utah,
Frank E. Moss United States Courthouse,
350 S. Main Street,
Salt Lake City, Utah 84101.

Re: *Novell, Inc. v. Microsoft Corp.*

Your Honor:

Microsoft respectfully submits Revised Proposed Final Jury Instructions (Microsoft's "Proposed Instructions") for the Court's consideration, which are being filed concurrently. These Proposed Instructions are in response to the Court's Proposed Final Jury Instructions (the "Court's Proposed Instructions"), which the Court provided to counsel for review and comment on November 30, 2011. Microsoft respectfully asks the Court to consider the following points while finalizing its jury instructions.

First, the Court's Proposed Instructions ask the jury to evaluate whether "Microsoft deceived Novell into believing that it would document the namespace extension APIs when, in fact, it had no intention of doing so." (Court's Proposed Instructions, at 3.) By proposing to tell the jury that "[t]he first series of questions relate to Microsoft's alleged deceit" (Court's Proposed Instructions, at 3), the proposed instruction leads the jury away from the fundamental question of whether Microsoft's

conduct was anticompetitive under the antitrust laws to the very different question of whether the jury believes that Microsoft behaved badly.[1]

As lead counsel for Novell has correctly stated, "[t]his is not a tort case." (Nov. 14, 2011 Trial Tr. at 1750.) Deception of a competitor is not a cognizable claim under Section 2 of the Sherman Act. Microsoft is not aware of any decided case in which liability was imposed under the antitrust laws based on a single act of deception directed at a competitor. For example, in *Conwood* v. *U.S. Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002), the Sixth Circuit affirmed a finding of Section 2 liability based on the defendant's pervasive abuse of imperfect information through misrepresentations made not to its competitors, but to retailers. Similarly, the other decided cases involving deception concern false advertising or conduct directed at third parties—such as distributors or consumers—and the standard for imposing antitrust liability even in such cases is very high. *See American Professional Testing Service, Inc.* v. *Harcourt Brace Jovanovich Legal & Prof. Publications, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997) ("While the disparagement of a rival . . . may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act."); *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255, 1260-63 (8th Cir. 1980); *In re Warfarin Sodium Antitrust Litig.*, 1998 WL 883469, at *8-9 (D. Del. Dec. 7, 1998), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000); *see also* 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 782d (3d ed. 2011) ("We would go further and suggest that such claims should presumptively be ignored.").

Not only would imposing antitrust liability based on deception of a competitor be unprecedented, Novell did not predicate its claims in this case on deception. Indeed, the word "deception" appears exactly once in Novell's 68-page Complaint (and there, in a wholly different context unrelated to the namespace extension APIs), and "deceit" does not appear at all. Count I of Novell's Complaint is based on the assertion that Microsoft's October 3, 1994 decision to withdraw support for the namespace extension APIs delayed the release of new versions of WordPerfect and Quattro Pro for Windows 95, and that such delay both injured those office productivity

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[1] This problem is exacerbated by the Court's definition of the "relevant time period" as "the period from 1994 to 1999." (Court's Proposed Instructions, at 1.) Microsoft objects to this proposed definition because the Microsoft conduct at issue is the October 3, 1994 decision to withdraw support for the namespace extension APIs. The Court's proposed instruction invites the jury to permit Novell to "piggyback" its claim on conduct allegedly directed by Microsoft to other parties in violation of the Court's admonition that Novell may not do so. (Nov. 14, 2011 Trial Tr. at 1793 ("THE COURT: No. No. You can't, absolutely. You cannot piggyback.").) Under Microsoft's reformulation of the Court's Proposed Instructions, the Court does not need to instruct the jury on the "relevant time period."

applications and harmed competition in the PC operating system market. There is no way to shorthand that convoluted theory into the idea that Novell's claim is predicated on "deception" of Novell by Microsoft.

It would be clear error for the Court to instruct the jury that it may hold Microsoft liable under the antitrust laws for "deceiving" Novell about Microsoft's intention to support the namespace extension APIs. "Even an act of pure malice" by one competitor against another is not necessarily anticompetitive, and the Supreme Court has observed that the federal 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.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (internal quotations and citations omitted); *see also Midwest Underground Storage, Inc.* v. *Porter*, 717 F.2d 493, 496-97 (10th Cir. 1983). It is very important for the jury to be instructed that the relevant inquiry is much more carefully circumscribed than whether the jury believes that Microsoft did something mean to Novell.

The Court's Proposed Instructions also focus on whether Novell was subjectively deceived by Microsoft "into believing that [Microsoft] would document the namespace extension APIs," and asks the jury to focus on Microsoft's subjective intent by asking whether Microsoft "had no intention" of documenting the namespace extension APIs. (Court's Proposed Instructions, at 2, 3.) This, again, would have the jury focus on the wrong issue. As the Court correctly observed in its Proposed Instructions, "anticompetitive intent is not alone sufficient to establish a violation of the antitrust laws." (*Id.*, at 1.) Instructing the jury to focus on Microsoft's subjective intent, or Novell's subjective belief about what Microsoft intended to do, does not comport with the Supreme Court's decision in *Brooke Group* or the Tenth Circuit's holdings in *Midwest Underground Storage* and *Christy Sports, LLC* v. *Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1197 (10th Cir. 2009). On these matters, Microsoft's Proposed Instruction Nos. 1, 3 and 5 offer a formulation of what constitutes anticompetitive conduct that is consistent with governing caselaw.

Second, the final instructions should give the jury clear guidance about how to determine whether Novell has met its burden of proof on the third element of its claim (*see* Microsoft's Proposed Instruction No. 2)—namely, whether Microsoft's allegedly anticompetitive decision to withdraw support for the namespace extension APIs also caused harm to the market for PC operating systems by contributing significantly to the unlawful maintenance of Microsoft's monopoly in that market. *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748-50 (D. Md. 2010); *see also Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009). Counsel for Novell agreed that, "if Novell is to recover, it must show that that act [by Microsoft] harmed Novell and also that that act caused harm to the competitive process here in the operating systems market" (Nov. 14, 2011 Trial Tr. at 1792), and Novell's counsel stated that the "larger question" is whether "Microsoft's conduct in the

market contributed significantly to harm the competition in the operating systems market." (Nov. 14, 2011 Trial Tr. at 1793.)[2] Those statements are correct and they should be reflected in the final instructions provided to the jury.

The Court's Proposed Instructions are altogether silent on how the jury is to approach this crucial question. This Court has recognized in the past that Novell's claim is "more complicated" than a traditional Section 2 claim due to its "unique § 2 theory." *Microsoft*, 699 F. Supp. 2d at 748. The Court's Proposed Instructions do not even mention the two theories of harm to competition that Novell has advanced at trial—Novell's "franchise applications" theory and its "cross-platform middleware" theory. Novell may only establish harm to competition in the PC operating system market by proving one of these two theories by a preponderance of the trial evidence. Microsoft's Proposed Instruction No. 6 expressly sets forth that requirement.

Third, Novell cannot prevail if the jury finds that Microsoft's decision to withdraw support for the namespace extension APIs that were documented in the M6 "beta" version of Windows 95 was consistent with software industry practices concerning beta versions of software products. As the Eighth Circuit held in *Trace X Chemical, Inc.* v. *Canadian Indus. Ltd.*, "[a]cts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2." 738 F.2d 261, 266 (8th Cir. 1984) (citing *Telex Corp.* v. *IBM*, 510 F.2d 894, 925-26 (10th Cir. 1975). Under controlling Tenth Circuit law a monopolist is free to engage in "ordinary business practices typical of those used in a competitive market" and cannot violate Section 2 by engaging in "the type of competition prevalent throughout the industry." *Telex Corp.*, 510 F.2d at 925-26, 928. Microsoft's Proposed Instruction No. 3 addresses this point.

Fourth, and closely related to the previous point, although Novell's counsel has conceded that Microsoft has "no duty to cooperate" with Novell (Nov. 18, 2011 Trial Tr. at 2636), and although the Court's Proposed Instructions properly include this important concept (Court's Proposed Instructions, at 1), the final instructions should state expressly that Microsoft's decision to withdraw support for the namespace extension APIs cannot serve as a predicate for a claim under Section 2 if the jury finds that Microsoft provided Novell with the M6 beta version of Windows 95 on a temporary basis "that could change at any time" subject to Microsoft's business judgment. *Christy Sports, LLC*, 555 F.3d at 1197. As the Tenth Circuit held in *Christy Sports*, there is no

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[2] As Novell's counsel implicitly conceded, the Court's alternative formulation of the relevant causation standard—whether Microsoft's decision was "reasonably capable of contributing significantly" to Microsoft's alleged maintenance of its monopoly in the PC operating systems market (Court's Proposed Instructions, at 3)—is not supported either by the Court's prior decision, *Microsoft*, 699 F. Supp. 2d at 748, or by other Section 2 caselaw addressing private treble damages actions.

Section 2 claim where a party is "aware that the relationship was temporary and subject to [the counterparty's] business judgment." *Id.* Such a claim "does not reach the 'outer boundary of § 2 liability.'" *Id.* (quoting *Verizon Communications., Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)). There is no dispute that Novell had the M6 beta version of Windows 95 for only four months before being informed that Microsoft was withdrawing support for the namespace extension APIs, which is a small fraction of the 10-year course of dealing held to be temporary in *Christy Sports*. Microsoft's Proposed Instruction No. 4 addresses this point.

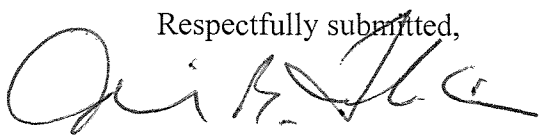
Fifth, for Novell to prevail the jury must find that Microsoft's withdrawal of support for the namespace extension APIs was "without any economic justification." *Four Corners*, 582 F.3d at 1225 (quotation omitted). The Court's Proposed Instructions employ a more restrictive formulation, requiring the jury to find Microsoft had a "substantial justification" for its decision to withdraw support for the namespace extension APIs. (Court's Proposed Instructions, at 3.) An economic justification need be based on no more than an attempt to "protect and maximize . . . chances of profitability in the short-term." *Four Corners*, 582 F.3d at 1225. The law "does not require more economic justification than [that] to avoid Section 2 liability." *Id.* Under Section 2, once a defendant has shown an economic justification for its conduct, the inquiry is over. *See Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 605 (1985); *Multistate Legal Studies* v. *Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540, 1550 (10th Cir. 1995). The jury is not supposed to weigh the sufficiency of that justification against the impact of the decision on competitors.

By contrast, the Court's proposed "substantial justification" formulation would improperly allow the jury to replace Microsoft's business judgment with its own, directing the jury to weigh the merits of Microsoft's reasons for deciding to withdraw support for the namespace extension APIs against the purported harm to Novell (and other competitors) in order to determine whether Microsoft's reasons were "substantial." That is not the province of the jury. *See* 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 772c.2 (3d ed. 2011) ("[T]he Court [in *Aspen Skiing*] did not call for any balancing of social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal. Rather, the Court classified conduct or intention as either lawful or not on the basis of the presence or absence of legitimate business purposes.").

As the Fifth Circuit held in *Bell* v. *Dow Chemical Co.*, a jury cannot "weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal." 847 F.2d 1179, 1186 (5th Cir. 1988). "The fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, not whether that reason is sufficient." *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597); *see also Four Corners*, 582 F.3d at 1225 ("*Aspen*

Skiing does not require more economic justification than this to avoid Section 2 liability."). Microsoft's Proposed Instruction Nos. 3 and 4 address these issues.[3]

Respectfully submitted,



David B. Tulchin

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[3] Microsoft also proposes certain modifications to the Court's damages instructions, which are included in Microsoft's Proposed Instructions Nos. 7, 8 and 9.