

David B. Tulchin
Steven L. Holley
Sharon L. Nelles
Adam S. Paris
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Steven J. Aeschbacher (A4527)
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 706-8080

James S. Jardine (A1647)
Justin T. Toth (A8434)
John W. Mackay (A6923)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
(801) 532-1500

Attorneys for Microsoft Corporation

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

NOVELL, INC.,

Plaintiff,

-v-

MICROSOFT CORPORATION,

Defendant.

MICROSOFT'S MEMORANDUM IN
RESPONSE TO NOVELL'S
PROPOSED FINAL JURY VERDICT
FORMS

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

December 6, 2011

Microsoft respectively submits this memorandum in response to Novell's December 5, 2011 proposed final verdict forms ("Novell Memo."). In addition, attached as Exhibit A to this memorandum is Microsoft's proposed final jury verdict form for the Court's consideration.

NOVELL'S PROPOSED VERDICT FORMS

Novell's proposed general and special verdict forms are flawed for several reasons.

First, in its proposed general verdict form, Novell requests that the Court refrain from asking the jury (a) whether the conduct at issue in this case—Microsoft's withdrawal of support for the namespace extension APIs in October 1994—was anticompetitive, or (b) whether that conduct caused harm in the market for PC operating systems. Instead, Novell proposes to ask the jury only whether Microsoft "engag[ed] in anticompetitive conduct," and whether "competitive harms associated with Microsoft's conduct monopoly power [sic] outweigh the competitive benefits proven by Microsoft." (Novell Memo. Ex. C, at ¶¶ 1-2.) Novell further requests that the Court ask the jury whether "Microsoft's unlawful maintenance of monopoly power caused Novell to suffer" injury to its business or property (Novell Memo Ex. C, at ¶ 3), but provides no requirement that the specific conduct alleged to be anticompetitive be the *cause* of Novell's alleged injury. In order to prevail in this action, Novell must prove that (a) it suffered harm to its business or property as a result of Microsoft's allegedly unlawful conduct in October 1994, and (b) that same conduct also caused harm to competition in the PC operating system market.

Second, Novell’s proposed General Verdict Form asks the jury to weigh “the competitive harms” of Microsoft’s conduct with the “competitive benefits,” which is incorrect as a matter of law. If the jury finds that Microsoft’s decision to withdraw support for the namespace extension APIs was made for any legitimate economic justification, the jury must find for Microsoft. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988); *see also Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009).

Third, Novell’s Proposed Special Verdict Form requests that the Court ask the jury whether “Microsoft deceived Novell with respect to publication of the namespace APIs,” and whether “the deception was outweighed by any procompetitive benefits proven by Microsoft.” (Novell Memo. Ex. D, at 1 ¶¶ 1-3.) Deception of one’s competitor does not give rise to a federal antitrust claim. (*See* Microsoft’s Dec. 5, 2011 Letter, Dkt. #331; Microsoft’s Nov. 21, 2011 Supplemental Memorandum Concerning Novell’s Deception Theory, Dkt. # 309.) Even if deception of Novell were a cognizable antitrust claim, Novell’s proposed question improperly places the burden on Microsoft to prove that its conduct was procompetitive and amounted to “competition on the merits.” (Novell Memo Ex. D, at 1 ¶¶ 2-3.) It is Novell’s burden to prove that Microsoft’s decision to withdraw support for the namespace extension APIs lacked any legitimate economic justification. *Four Corners*, 582 F.3d at 1225.

Fourth, Novell’s Proposed Special Verdict Form requests that the Court ask the jury whether “Microsoft unilaterally terminated a voluntary course of cooperative dealing with Novell when Microsoft decided to withdraw support for the namespace APIs.” (Novell Memo. Ex. D at 1-2 ¶¶ 4-6.) This is inconsistent with Tenth Circuit law,

which requires that Novell prove that Microsoft “terminated a profitable relationship” and did so “without any economic justification.” *Four Corners*, 582 F.3d at 1225.

Fifth, under the heading, “Maintenance of Monopoly,” Novell proposes asking the jury whether Microsoft’s conduct “substantially contributed to” or “was reasonably capable of substantially contributing to Microsoft’s maintenance of its monopoly in the operating system market by raising the applications barrier to entry or by reducing competition from middleware or other operating systems.” (Novell Memo. Ex. D at 1-2 ¶¶ 7-8.) This is a formulation of the “edentulous” causation test applicable to government enforcement actions, and the Court has already held that the proper question in this action is whether Microsoft’s allegedly anticompetitive act directed at WordPerfect and Quattro Pro “contribut[ed] significantly to [Microsoft’s] continued monopoly power,” *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 747-48 (D. Md. 2010).

Finally, Novell’s Proposed Special Verdict Form seeks to recover damages upon a showing that “Microsoft’s anticompetitive conduct caused injury to Novell either by delaying the shipping date [or reducing the functionality] of PerfectOffice.” (Novell Memo. Ex. D at 1-2 ¶ 9.) Novell’s own damages expert made clear that Novell’s alleged damages are based entirely on the delay in releasing PerfectOffice for Windows 95 (Warren-Boulton, Nov. 17, 2011 Trial Tr. at 2422-2423; *id.* at 2418.), not on some purported reduced functionality.

CONCLUSION

Microsoft requests that the Court adopt Microsoft's proposed jury verdict form.

Dated: December 6, 2011

Respectfully Submitted,

David B. Tulchin
Steven L. Holley
Sharon L. Nelles
Adam S. Paris
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Phone: (212) 558-4000
Facsimile: (212) 558-3588

/s/James S. Jardine
James S. Jardine (A1647)
Justin T. Toth (A8434)
John W. Mackay (A6923)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
Phone: (801) 532-1500
Facsimile: (801) 532-7543

Steven J. Aeschbacher (A4527)
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
Phone: (425) 706-8080
Facsimile: (425) 936-7329

Attorneys for Microsoft Corporation

EXHIBIT A

David B. Tulchin
Steven L. Holley
Sharon L. Nelles
Adam S. Paris
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Steven J. Aeschbacher (A4527)
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 706-8080

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MICROSOFT'S PROPOSED SPECIAL
VERDICT FORM

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

December 5, 2011

MICROSOFT'S PROPOSED SPECIAL VERDICT FORM

Microsoft respectfully submits this proposed special verdict form pursuant to Rule 49 of the Federal Rules of Civil Procedure. Microsoft requests an opportunity to amend or supplement its proposed special verdict form prior to the time that the Court charges the Jury.

Dated: December 5, 2011

Respectfully Submitted,

/s/ James S. Jardine
James S. Jardine (A1647)
Justin T. Toth (A8434)
John W. Mackay (A6923)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
Phone: (801) 532-1500
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Attorneys for Microsoft Corporation

SPECIAL VERDICT FORM

A. Anticompetitive Conduct

1. Has Novell proven by a preponderance of the evidence that Microsoft engaged in anticompetitive conduct by the decision to withdraw support for the namespace extension APIs?

_____ Yes _____ No

If you answered **NO** to Question #1, skip to the last page and have your foreperson date and sign this verdict form.

If you answered **YES** to Question #1, proceed to Question #2.

B. Injury to Novell's Applications

2. Has Novell proven by a preponderance of the evidence that Microsoft's decision to withdraw support for the namespace extension APIs caused Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice) to be late to the market?

_____ Yes _____ No

If you answered **NO** to Question #2, skip to the last page and have your foreperson date and sign this verdict form.

If you answered **YES** to Question #2, proceed to Question #3.

3. Has Novell proven by a preponderance of the evidence that, but for Microsoft's decision to withdraw support for the namespace extension APIs, Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice) would have been released to the market either about the time that Windows 95 was released (August 24, 1995), or within a substantially short time period thereafter to take advantage of that event?

_____ Yes _____ No

If you answered **NO** to Question #3, skip to the last page and have your foreperson date and sign this verdict form.

If you answered **YES** to Question #3, proceed to Question #4.

C. Harm to Competition in the PC Operating System Market

4. Has Novell proven by a preponderance of the evidence that the delay caused to Novell by Microsoft's decision to withdraw support for the namespace extension APIs also caused harm to competition in the market for PC operating systems and contributed significantly to the maintenance of Microsoft's monopoly in that market?

_____ Yes _____ No

If you answered **NO** to Question #4, skip to the last page and have your foreperson date and sign this verdict form.

If you answered **YES** to Question #4, proceed to Question #5.

D. Damages

You should answer the following questions **ONLY** if you answered **YES** to each of Questions #1, 2, 3 and 4.

5. What is the fair amount of damages, if any, caused to Novell by Microsoft's decision to withdraw support for the namespace extension APIs?

\$ _____

Please have your foreperson date and sign this verdict form.

Jury Foreperson

Dated: December ____, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2011, I filed true and correct copy of the foregoing Microsoft's Proposed Special Verdict Form using the CM/ECF system, which will send notification of such filing to the following:

Max D. Wheeler
Maralyn M. English
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145-5000

Jeffrey M. Johnson
Paul R. Taskier
Jason D. Wallach
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403

R. Bruce Holcomb
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 310
Washington, DC 20006-5403

/s/Jasmine Diamanti