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December 8, 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:

Further to the argument this morning on the Court's proposed jury instructions, Microsoft respectfully requests that the Court (1) decide now the applicable causation standard the jury should apply in determining whether Novell has proven the elements of its sole remaining claim, (2) include in the proposed jury instructions a statement that the jury is entitled to award Novell nominal damages, and (3) modify question 6 of the proposed verdict form to more clearly set forth Novell's franchise applications theory.

First, for the reasons Microsoft stated during the argument yesterday afternoon and in Microsoft's December 5, 2011 letter to the Court (at pages 3-4), the Court should adhere to the correct statement of the law in its April 2010 decision on Microsoft's motion for summary judgment and instruct the jury that it is Novell's burden to prove that the decision to withdraw support for the namespace extension APIs "contributed significantly" to the maintenance of Microsoft's monopoly in the PC operating system market. *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748-50

(D. Md. 2010). The weaker "reasonably capable of significantly contributing" standard is not correct as a legal matter in a private treble damages action, and giving the jury the option of choosing one causation standard rather than the other is almost certain to engender confusion.

The role of jury instructions is to provide "the jury with the instructional equivalent of the mariner's compass and sea-lane map in order that the lay jurors might successfully complete their voyage." *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922, 934 (5th Cir. 1976).[1] Given the highly unusual nature of the claim asserted in this case—in which harm to Novell's office productivity applications is alleged to have caused harm to competition not in the market in which those products competed, *i.e.*, purported markets for word processing applications and spreadsheet applications, but rather in the PC operating system market—it is very important that the jury receive clear and consistent instructions about the causation standard Novell is required to meet in order to prevail on its claim. *See Mosher* v. *Speedstar Div. of AMCA*, 979 F.2d 823, 824 (11th Cir. 1992) ("Perhaps the most important duty of the trial judge is the careful, accurate instruction of the jury as to the law that they must apply to the facts that they find.").

In *Aero International, Inc.* v. *U.S. Fire Insurance Co.*, 713 F.2d 1106 (5th Cir. 1983), "conflicting instructions proposed by opposing counsel to reflect their differing views of the law appear simply to have been read to the jury *seriatim*." *Id.* at 1111 at 1112. The Fifth Circuit was troubled by the fact that "the jury was asked to follow absolutely contradictory statements of the central legal proposition in the case . . . ." *Id.* The Fifth Circuit held that the defendant "was entitled to have the critical issues bearing upon its liability submitted to and answered by the jury upon a clear and proper charge," and ordered a new trial. *Id.* at 1113. Similarly, in *King* v. *Allstate Ins. Co.*, 906 F.2d 1537 (11th Cir. 1990), the district court gave "mutually conflicting jury

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[1] For the Court's convenience, Microsoft is enclosing copies of the cases referred to in this letter.

instructions" as to the standard of liability and failed to inform the jury as to which of the two legal standards governed plaintiff's claim. *Id.* at 1543. The Eleventh Circuit stated that "for purposes of submitting instructions to the jury," the court "must decide what law governs." *Id.* at 1540.

Assuming the jury gets to questions 4 and 5 in the verdict form, there is a serious risk that disagreements among jurors will be resolved by an effort to "split the baby," with jurors leaning toward a finding of no liability being asked to compromise by agreeing that Novell had met the lower of the two causation standards provided to the jury. There would be no way to know whether that had happened from the answers that the jury provided to questions on the verdict form. This possibility demonstrates why giving the jury conflicting instructions on the central issue of causation in this case would be erroneous. Thus, while Microsoft fully understands the Court's desire to avoid a retrial in the event the Tenth Circuit disagrees with the Court about the appropriate causation standard to be applied in this case, declining to decide the issue may well increase the chances of such a reversal.

Second, it is entirely appropriate for the Court to instruct the jury that it is entitled to award damages nominal damages even if it determines that Microsoft violated Section 2 of the Sherman Act by withdrawing support for the namespace extension APIs. In *United States Football League* v. *National Football League*, 644 F. Supp. 1040, 1051 (S.D.N.Y. 1986), the district court instructed the jury as follows:

> Just because you have found the fact of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act. You may find, for example, that you are unable to compute the monetary damages resulting from the wrongful act, except by engaging in speculation or guessing, or you find that you cannot separate out the amount of the losses caused by the wrongful act from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the plaintiffs or the plaintiffs' own mismanagement. Or you may find that plaintiffs failed to prove an amount of damages.

> You may decline to award damages under such circumstances, or you may award a nominal amount, say $1.00.

The Second Circuit affirmed the jury's award of only nominal damages of one dollar pursuant to this instruction, despite the fact that the jury had concluded that defendants had willfully obtained or maintained a monopoly in the market for major league football in the United States. *United States Football League* v. *National Football League*, 842 F.2d 1335, 1376-77 (2d Cir. 1988).

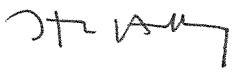
Microsoft's proposed instruction, which the Court included in its proposed jury instructions, was modeled on the instruction used in the *United States Football League* case. Such an instruction is appropriate given that "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages or only negligible damages, at trial, or on appeal." *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2nd Cir. 2005); *see also Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1147 (8th Cir. 1981) (remanding to district court "with directions to award appellant nominal damages in the amount of $3").

Third, with respect to question 6 on the special verdict form provided to counsel for the parties this morning, Microsoft respectfully suggests that it does not accurately reflect what has been referred to at trial as Novell's franchise applications theory. To prevail under this theory, Novell agrees that it must prove that the availability of its office productivity applications on non-Microsoft operating systems would increase the popularity of those non-Microsoft operating systems and thereby increase competition in the PC operating system market. The enclosed Exhibit A contains a proposed revision to question 6 that is fully consistent with how Novell itself described the franchise applications theory on page 4 of it December 5, 2011 Memorandum Regarding Proposed Final Jury Instructions.

With regard to question 7 on the special verdict form, Microsoft continues to believe that the jury should be required to find that the purported "middleware" relied

on by Novell, *i.e.*, the combination of WordPerfect, Quattro Pro and PerfectOffice together AppWare and OpenDoc technologies, meets the three requirements either agreed to by Novell's economic expert Roger Noll and/or required by the Findings of Fact to which the Court gave collateral estoppel effect at Novell's request. Only "middleware" that is (1) cross-platform in the sense that it runs on multiple PC operating systems, (2) is available on all or nearly all personal computers, and (3) exposes a sufficiently broad set of APIs to enable software developers profitably to develop full-features office productivity applications that rely solely on those APIs exposed by the middleware has any prospect of reducing the applications barrier to entry protecting Microsoft's position in the PC operating system market. Asking the jury whether Novell's office productivity applications constituted "middleware" with no guidance as to how that term should be defined for purposes of this case invites the jury to impose liability based solely on the fact that those applications expose some APIs, even if those applications have none of the characteristics of "middleware" with legal significance in this case.

Respectfully,



Steven L. Holley

(Enclosure)

cc: Jeffrey M. Johnson, Esq.

Exhibit A

6. If your answer to questions 4 or 5 is "yes," is your answer based upon Novell's claim that WordPerfect, Quattro Pro, and/or Perfect Office were such popular applications that if those applications were written to platforms other than Windows 95 they would have increased competition in the PC operating system market by offering competing operating systems the prospect of surmounting the applications barrier to entry and breaking Microsoft's operating system monopoly?

Yes. _____ No _____