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December 12, 2011

Via Electronic Filing

The Honorable J. Frederick Motz
United States District Judge
United States District Court of the District of Utah
U.S. Courthouse – Room 510
101 West Lombard Street
Baltimore, MD 21201

**Re: Response to Microsoft's letter of December 9, 2011 regarding jury instructions
Novell, Inc. v. Microsoft Corp., 2:04-cv-01045-JFM (D. Utah)**

Dear Judge Motz:

I write in response to Microsoft's letter of December 9, 2011 regarding the Court's tentative jury instructions and verdict form.

Special Verdict Regarding Causation Standard

As Novell has amply demonstrated, the correct causation standard, according to the Tenth Circuit in *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995), the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001), and more that a dozen reported private antitrust actions in other Circuits, is the "reasonably capable" standard proposed by Novell, not the alternative standard proposed by Microsoft.

But assuming *arguendo* that the Court is not satisfied that the "reasonably capable" standard is correct, the Court's proposal of obtaining answers from the jury to special interrogatories under the alternative standards is entirely appropriate. Novell suggests two small but important changes to the Court's tentative questions 4 and 5. First, because the purpose of the two questions is to determine the jury's findings under two alternative standards, the conduct alleged to have harmed competition should be described identically in both questions. As the questions now stand, question 4 asks about "the delay caused to Novell by Microsoft's decision to withdraw support for the namespace extension APIs," and question 5 asks about "Microsoft's withdrawal of support for the namespace extension APIs." The Court should use the same phrase in both questions. Novell suggests the formulation in question 5 should be used in both questions.

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Second, the jury should not be told that if their answer to question 4 is “yes” they do not need to answer question 5. Because the point of using the special interrogatory device is to obtain the jury’s findings under the two alternative standards, the jury should be asked to answer both questions, regardless of its answers to either one. Moreover, it would be extremely confusing to have a response of “no” lead to the next question with respect to question 4, when a response of “no” with respect to all the other questions causes the jury to stop and not answer the remaining questions.

On December 8, 2011, the Court asked Microsoft to provide any Tenth Circuit authority bearing on the Court’s proposal. Trial Tr. at 4940. Microsoft’s December 8, 2011 letter provided the Court with no Tenth Circuit authority on this issue. Moreover, as Novell has demonstrated, the cases from other Circuits cited in Microsoft’s December 8, 2011 letter actually supported the Court’s proposal, as did the two leading treatises (which in turn cited additional case law that supported the Court’s proposal).

In its new letter, Microsoft shifts ground. Microsoft now implicitly concedes that a court may use the device of special interrogatories with respect to alternative legal “theories,” but claims that it is improper to use special interrogatories with respect to alternative legal “standards.” Microsoft offers no authority for this purported distinction. In fact, courts do use special interrogatories to obtain the jury’s findings under alternative legal standards. For example, in *Vera v. Roldan*, No. 91 C 6711, 1993 WL 326684 (N.D. Ill. Aug. 17, 1993), the district court was faced with unsettled law in the Seventh Circuit as to whether the appropriate legal standard for the jury to apply to a particular claim was “preponderance of the evidence” or “clear and convincing evidence.” Rather than risking a new trial if its determination of the correct legal standard was later found by the Seventh Circuit to be incorrect, the district court instructed the jury as to the two alternative standards, and propounded special interrogatories to the jury to obtain their findings under the two alternative standards. The district court explained its approach as follows:

In light of the ambiguity surrounding the appropriate standard of proof, this court will utilize the following procedure established by Judge Shadur in *Forgarty v. Greenwood*, 724 F.Supp. 545 (N.D.Ill.1989):

1. In addition to the general verdict form, the jury will be provided with interrogatories requiring that it answer separately whether the substantive conduct that would be a prerequisite to any possible award of punitive damages has been proved as to each defendant (a) by a preponderance of the evidence or (b) by clear and convincing evidence.
2. The jury will also be instructed that it should not go on to consider the award of punitive damages unless it answers “Yes” to one or both of those interrogatories.

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3. In the instruction dealing with what is meant by burden of proof, the jury will be instructed as to the definition and meaning of both “preponderance of the evidence” and “clear and convincing evidence.”

4. To avoid jurors’ confusion, the jury shall be told as part of the instructions that the law is not yet settled on the standard of proof for purposes of awarding punitive damages.

Id. at *3.

This use of special interrogatories is, of course, the same procedure the Court proposes here. Indeed, both Moore’s Federal Practice § 49.11[1][a] and Wright & Miller, Federal Practice & Procedure § 2505 endorse the use of special interrogatories where, as here, the law is uncertain, in order to eliminate the necessity for a retrial if the district court’s view of the law is rejected by the court of appeals. Thus, the Court should adhere to its proposal in this regard.

Proposed Jury Instruction Regarding Nominal Damages

Microsoft concedes that there is no authority in the Tenth Circuit for the nominal damages instruction it has proposed: “If you find there is no reasonable basis to make such an apportionment based on the evidence presented at trial, you should not award any damages to Novell or, alternatively, award only a nominal amount, say \$1.00.” The only court that Microsoft cites as having ever given such an instruction is in the Second Circuit. The proposed jury instruction is an unwarranted departure from the ABA model instructions. The instruction incorrectly, and prejudicially, invites the jury to award \$1 if there is no reasonable basis for “apportionment” of damages. However, the apportionment issue only arises when a plaintiff has alleged multiple acts, only some of which are found by the jury to be anticompetitive. See *MCI Commc’ns Corp. v. Am. Tel. and Tel. Co.*, 708 F.2d 1081, 1163 (7th Cir. 1983) (disaggregation of damages necessary when only 7 of 22 acts on which damage calculation was based were found to be anticompetitive). Here, Novell has alleged that its damages were caused by a single anticompetitive act. Under these circumstances, no apportionment among different causes is necessary. See *LePage’s v. 3M (Minn. Mining & Mfg. Co.)*, 324 F.3d 141, 166 (3d Cir. 2003) (*en banc*). “Once a jury has found that the unlawful activity caused the antitrust injury, the damages may be determined without strict proof of what act caused the injury, as long as the damages are not based on speculation or guesswork.” *Id.* The tentative jury instructions already inform the jury that it cannot award damages “based on guesswork or speculation.” Also inviting the jury to award \$1 unless Novell can reasonably apportion damages is incorrect and prejudicial.

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The Court should therefore give the original damage instruction the Court proposed on November 30, 2011, which contained no nominal damage instruction, or, in the alternative, should delete the references to nominal damages in its most recent tentative instructions.

Question 6

Both Microsoft and Novell have proposed revisions to the Court's tentative question 6 regarding Novell's contentions with respect to its franchise applications theory. Novell's proposal accurately describes Novell's contention; Microsoft's does not. This Court should use Novell's accurate description of its own contentions in the instructions, not Microsoft's mischaracterization of Novell's contentions.¹

Microsoft disingenuously argues that its proposed jury instruction language regarding Novell's contentions is proper because it was taken "verbatim" from a brief Novell filed on December 5, 2011 regarding jury instructions, and therefore Novell cannot "walk away from that language now." Contrary to what Microsoft implies, Novell never proposed that this language be included in the jury instructions or the verdict form. Instead, Microsoft takes the language out of context from a lengthy passage in which Novell described its argument regarding harm to competition. By Microsoft's logic, Microsoft's statement in its December 9, 2011 letter that Novell supposedly has not proven that its office productivity applications "had any prospect of reducing the applications barrier to entry" should be deemed a concession by Microsoft that the jury instruction should state that Novell prevails on this element if it shows that its applications "had any prospect of reducing the applications barrier to entry." Rather than indulging in Microsoft's word games, the Court should adopt Novell's language accurately describing Novell's own contentions, and modify tentative question 6 as follows:

6. If your answer to questions 4 or 5 is "yes," is your answer based upon Novell's claim that its popular applications, WordPerfect, Quattro Pro, and/or PerfectOffice, offered competing operating systems the prospect of lowering the applications barrier to entry because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows?

¹ Microsoft's December 9, 2011 letter also attempts to relitigate Microsoft's argument, in its Motion for a Judgment as a Matter of Law, that Novell failed as a matter of law to demonstrate harm to competition with respect to its franchise applications theory. Novell respectfully directs the Court's attention to its Opposition to Microsoft's Motion for Judgment as a Matter of Law at 71-79, which addresses Microsoft's arguments in this regard.

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Anticompetitive Conduct

Novell has proposed the addition of a single sentence regarding the element of anticompetitive conduct: “In determining whether Microsoft’s conduct was anticompetitive, the jury may consider whether Microsoft sacrificed short-term profits in an effort to destroy a competitor.” Microsoft does not dispute that this statement of the law was taken from this Court’s summary judgment opinion, *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 745 (D. Md. 2010). Indeed, similar sentences appear twice in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-11 (1985) (“The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor. . . . Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”). Microsoft protests that “forsaking short term profits is but one factor” in determining anticompetitive conduct, but the language Novell proposes is entirely consistent with this: the proposed sentence states only that the jury “may consider” this evidence “[i]n determining whether Microsoft’s conduct was anticompetitive,” and nowhere implies that this factor is dispositive, or is the only factor to be considered. In sum, Microsoft has offered no valid basis for rejecting Novell’s proposal.

Microsoft also “renews its request” to add the following instructions, which this Court has previously declined to include:

Given the absence of any duty to assist a competitor, Novell must prove by a preponderance of the evidence that Microsoft’s decision was not only inconsistent with software industry practice and lacked any legitimate business reason, but also amounted to the termination of a profitable relationship between Microsoft and Novell that was not temporary and subject to Microsoft’s business judgment. Novell must further establish that Microsoft’s decision to withdraw support for the namespace extension APIs was undertaken to terminate a profitable, short-term relationship with Novell in order to deny it a benefit available to all other ISVs.

Microsoft’s proposal is replete with errors of law and misleading assertions. First, while the proposed instruction states categorically that there is an “absence of any duty” for a monopolist to assist a competitor, it is well settled that there are exceptions to this general rule. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Microsoft’s proposal misleadingly implies that there is never a duty for a monopolist to cooperate under any circumstances, which is clearly incorrect.

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Second, Microsoft's assertion that Novell must prove that Microsoft's conduct was "inconsistent with software industry practice" is incorrect. Microsoft's citation for this principle is *Trace X Chemical, Inc. v. Canadian Indus. Ltd.*, 738 F.2d 261 (8th Cir. 1984), which states that "[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." *Id.* at 266 (emphasis added). Microsoft's formulation equates the "software industry" with "a competitive market," despite the fact that it is undisputed that Microsoft had a monopoly in the PC operating system market. Moreover, the Tenth Circuit in *Instructional Sys. Dev. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 649 (10th Cir. 1987), rejected an argument similar to the one Microsoft now makes, clarifying that although "ordinary business practices d[o] not become 'predatory' simply because [defendant] may have possessed monopoly power," it is equally true that anticompetitive conduct is not immunized from antitrust liability simply because the same conduct could occur without the use of monopoly power. Indeed, contrary to what Microsoft suggests, it is well settled that actions that would otherwise be lawful can be anticompetitive if undertaken by a monopolist. *See, e.g., Microsoft*, 253 F.3d at 69-71; *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 498 (9th Cir. 1977); *City of Mishawaka v. Am. Elec. Power, Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in relevant part, vacated in part on other grounds*, 616 F.2d 976 (7th Cir. 1980).

Third, Microsoft's proposed instruction incorrectly states that Novell must prove that Microsoft's conduct also "amounted to the termination of a profitable relationship between Microsoft and Novell that was not temporary and subject to Microsoft's business judgment" and that it "was undertaken to terminate a profitable, short-term business relationship with Novell in order to deny it a benefit available to all other ISVs." The two cases Microsoft cites for these propositions – *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1196-98 (10th Cir. 2009) and *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. Of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009) – nowhere state that a plaintiff must prove these facts to establish liability, nor is there any other authority for the purported new elements of a Section 2 claim that Microsoft proposes. Contrary to what Microsoft implies, both *Christy Sports* and *Four Corners Nephrology* recognized that the crucial factor which demonstrated that the conduct in *Aspen Skiing* was anticompetitive was that it demonstrated "a willingness to forsake short-term profits to achieve an anticompetitive end." *Christy Sports*, 555 F.3d at 1197; *Four Corners Nephrology*, 582 F.3d at 1224-25. It is this very factor – a willingness to forsake short term profits in order to destroy a competitor – that Novell wishes to inform the jury about, and that Microsoft opposes.

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In sum, this Court should include in the instructions the single sentence proposed by Novell, which accurately states the law, and again reject Microsoft's proposal, which is filled with incorrect and misleading statements.

Very truly yours,

/s/ Jeffrey M. Johnson

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