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December 9, 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 8, 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 8, 2011 regarding the Court's tentative jury instructions.

Special Verdict Regarding Causation Standard

Microsoft's letter demonstrates a complete misunderstanding of the purpose of special verdicts, and the difference between special verdicts and general verdicts. A special verdict allows the jury to make findings on particular factual questions, or mixed questions of fact and law. *See* Fed. R. Civ. P. 49(a). "One important practical advantage that was discerned from the beginning of the Federal Rules era and that has been much emphasized is that the use of special verdicts may increase judicial efficiency by reducing the occasions on which new trials must be had. '[I]f the trial judge misapplies the law to the special verdict he may correct his error without the necessity of a new trial. And of outstanding importance is the fact that the definite factual findings furnish a practical, concrete basis for the appellate court's evaluation of the case on review. If the only error involves a point of law or a misapplication of law to the facts by the trial judge, the necessity for a new trial should be eliminated.'" Wright & Miller, Federal Practice § 2505 (citations and footnote omitted). "Special verdicts are especially helpful in cases involving multiple, alternative theories of recovery because they eliminate the uncertainty as to whether the verdict was based wholly on an improper theory requiring a retrial of the case. Additionally, special verdicts are useful in cases where the law is uncertain or in its early stages of development." Moore's Federal Practice § 49.11[1][a] (footnotes omitted).

As these principles make clear, it is perfectly appropriate to ask the jury, in the context of a special verdict, alternative renderings of the same factual question based on different legal

standards – particularly in cases where the law is uncertain. This practice eliminates the necessity for a new trial if a reviewing court disagrees with the district court's view of the law. So long as the special verdict covers all material factual issues, *see Martinez v. Union Pac. R. Co.*, 714 F.2d 1028, 1032 (10th Cir. 1983), such that the Court can base a judgment for either party on the jury's findings, there can be no harm in asking the jury questions that the district court or court of appeals later determine to be unnecessary or legally incorrect.

Here, Microsoft asks the Court to adopt a legal standard which, as Novell has repeatedly pointed out, is contrary to the law of the Tenth Circuit and the overwhelming weight of legal authority in other Circuits. The D.C. Circuit applied the correct standard in *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (citations omitted): that the conduct "'reasonably appears capable of making a significant contribution to . . . maintaining monopoly power.'" Microsoft has erroneously argued that this standard should be limited only to equitable enforcement actions, but there are more than a dozen private action cases that use the "reasonably capable" standard,[1] and Novell is not aware of any that apply a stricter test. Most importantly, the Tenth Circuit endorses the "reasonably capable" formulation. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995).

Therefore, if the Court is not prepared to instruct the jury that the "reasonably capable" standard is the correct one, at the very least it should use the special verdict device precisely in the way it

[1] *See, e.g.*, *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (cited in the Government Case); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (cited in the Government Case); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) (cited by this Court in its summary judgment decision); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987); *Hertz Corp. v. Enter. Rent-A-Car Co.*, 557 F. Supp. 2d 185, 193 (D. Mass. 2008); *Cytologix Corp. v. Ventana Med. Sys., Inc.*, Nos. 00-12231-RWZ, 01-10178-RWZ, 2006 WL 2042331, at *4 (D. Mass. July 20, 2006); *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1105 (D. Colo. 2004); *Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1145 (D. Utah 2001); *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F. Supp. 2d 189, 197 (D. Mass. 1999); *CTC Commc'ns Corp. v. Bell Atl. Corp.*, 77 F. Supp. 2d 124, 144 (D. Me. 1999); *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, No. 96-1336-JTM, 1997 WL 225966, at *7 (D. Kan. Apr. 8, 1997). Novell could supply the Court with additional decisions upon request.

was intended – to allow the jury to render findings under both alternative standards, so that if the Court is incorrect as to the applicable law, the need for a retrial will be eliminated.

The cases cited by Microsoft, purportedly for the proposition that it is improper to ask the jury to render special verdicts based on these alternative legal standards, are actually contrary to Microsoft's position. For example, in *Jamison Co. v. Wetvaco Corp.*, 526 F.2d 922, 934 (5th Cir. 1976), the Second Circuit criticized the district court for not obtaining special verdicts on particular issues that might have avoided a retrial. Because the district court had only obtained a general verdict, the Second Circuit noted, the district court's erroneous jury instruction required a "wasteful retrial of the entire controversy" that could have been avoided if the district court had obtained findings from the jury on specific issues. Thus, *Jamison* supports this Court's view that it should obtain the jury's findings under alternative legal standards so as to avoid the necessity of a retrial if the Tenth Circuit disagrees with the Court as to the correct standard.

Similarly, contrary to what Microsoft suggests, *King v. Allstate Ins. Co.*, 906 F.2d 1537 (11th Cir. 1990), demonstrates the problems that could ensue if this Court does not ask the jury for separate findings under alternative legal principles. In that case, the district court asked the jury only for a general verdict, and provided the jury with a confusing and conflicting instruction regarding two different legal theories. The Eleventh Circuit had no choice but to reverse and order a new trial. But in doing so, the Court of Appeals noted that a new trial might have been unnecessary if the appellee had asked for a special verdict on the two legal theories: "Had Allstate requested a special interrogatory upon which this court could determine the basis for the jury conclusion, this might well be a different case." *Id.* at 1543. With a special verdict, the Eleventh Circuit noted, the district court's erroneous instruction could have been found to be harmless; instead, the fact that the appellate court could not isolate the jury's findings with respect to particular issues required a retrial. *Id.* Similarly, in the present case, if the Court does not ask the jury for its findings under alternative legal standards, and the Tenth Circuit disagrees with the Court regarding the applicable standard, a wasteful retrial will be the result.

Aero International, Inc. v. United States Fire Insurance Co., 713 F.2d 1106, on which Microsoft also mistakenly relies, similarly involved an erroneous jury instruction, and a general verdict that made it impossible for the reviewing court to avoid ordering a new trial. In that case, the district court, rather than asking the jury for a special verdict on alternative legal theories, obtained a general verdict after erroneously giving the jury the conflicting instructions proposed by both parties. Because it was "impossible after verdict to ascertain which instruction the jury followed," a new trial was required. *Id.* at 1113. A retrial could have been avoided in *Aero*

International by applying exactly the device the Court has proposed in this case: obtaining answers to jury interrogatories based on the alternative views of the law proposed by the parties.[2]

In sum, the case law cited by Microsoft supports, rather than undermines, the Court's view that providing the jury with interrogatories allowing the jury to make findings under alternative standards will eliminate the necessity for a retrial if the Court's view of the applicable standard turns out to be incorrect. Such special interrogatories are especially useful where, as here, "the law is uncertain." Moore's Federal Practice § 49.11[1][a]. Therefore, the Court should adhere to its tentative instructions and verdict form as to this issue.

Proposed Jury Instruction Regarding Nominal Damages

Microsoft's letter asks the Court to instruct the jury regarding the availability of a nominal damages award. In support of its request, Microsoft asserts that 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 negligible damages at trial, or on appeal.'" Microsoft's Letter at 4 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005), and citing *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1146 (8th Cir. 1981)). The two cases that Microsoft cites in support of the appropriateness of such an instruction, however, *Wal-Mart Stores* and *Rosebrough Monument*, do not even involve juries, let alone jury instructions. *Wal-Mart Stores* involved a court approval of a class settlement in an antitrust action. The *Wal-Mart Stores* court simply cited to the language quoted in Microsoft's letter to justify the reasonableness of the settlement. 396 F.3d at 118. *Rosebrough Monument* involved a bench trial in which the district court determined that the antitrust plaintiff had proved the fact of damage, but not the appropriate amount. 666 F.2d at 1147.

Moreover, the instruction requested by Microsoft is a significant and unjustified departure from the ABA model jury instructions regarding damages. The sole case Microsoft was able to locate in which a "nominal damages" jury instruction was ever given in the antitrust context is *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). Microsoft has pointed to no cases in which a court in the Tenth Circuit has ever given a nominal damages jury instruction in an antitrust case. Giving such an instruction in this case will serve only to confuse the jury and suggest a compromise verdict.

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[2] The only other case cited by Microsoft with regard to this issue, *Mosher v. Speedstar Div. of AMCA*, 979 F.2d 823, 824 (11th Cir. 1992), is relied on by Microsoft for the unremarkable proposition that "[p]erhaps 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." To borrow a line from Microsoft's counsel, the parties are in "heated agreement" as to this proposition.

Questions 6 and 7

While Novell agrees with Microsoft that the Court's proposed question 6 on the special verdict form does not accurately reflect Novell's franchise applications theory, Microsoft's proposed revision to this question is not sufficient. Novell's theory is that its popular applications, though themselves not competitors or potential competitors to Microsoft's Windows, could perform well on a variety of operating systems and thus could provide a path onto the operating system playing field for an actual competitor to Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows. Accordingly, Novell respectfully suggests that question 6 be revised 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?

With respect to question 7, Novell agrees with the Court's proposal and continues to disagree with Microsoft's request that its definition of middleware be included as part of the question. Novell will not restate its argument here on this issue, but respectfully directs the Court to pages 3 and 4 of Novell's December 7, 2011 Objections and Suggestions Regarding the Court's Tentative Jury Instructions and Verdict Form, which sets forth Novell's position.

Anticompetitive Conduct

Additionally, in light of Dr. Murphy's testimony over the past two days in which he emphasized that Novell's applications would have helped make Windows better – a point he never raised in his expert report – and his repeated references to Mr. Frankenberg's testimony on this point, it is readily apparent that the jury will hear more about this issue in Microsoft's closing, and thus an instruction is necessary. Novell proposes that the Court add the following language (underlined below) to its discussion of what constitutes anticompetitive conduct:

> In determining whether Microsoft's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors. <u>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.</u> You should consider whether Microsoft had legitimate

> business reasons for withdrawing the namespace extension APIs. You should also distinguish maintenance of monopoly power through anticompetitive acts from the maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck, which are not unlawful. You should consider all the characteristics of the relevant market and evaluate Microsoft's conduct as a whole.

This language is taken from this Court's summary judgment opinion, *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 745 (D. Md. 2010).

Very truly yours,

/s/ Jeffrey M. Johnson

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