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**UNITED STATES DISTRICT COURT
for the District of Utah
Central Division**

Novell, Inc.,	*	NOVELL'S MEMORANDUM REGARDING
Plaintiff,	*	THE COURT'S PROPOSED JURY
	*	INSTRUCTION NO 1
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

Plaintiff Novell, Inc. (“Novell”) submits this brief Memorandum to suggest one small modification to the Court’s proposed preliminary jury instruction. Novell proposes to add the underlined words to the following sentence: “It is undisputed that during the period of time relevant to this case, that is (as the evidence will show) June 1994 to March 1996 and afterward, Microsoft had a monopoly in the market for PC operating systems.”

Novell proposes this change because the jury should be allowed to look at events occurring after Novell sold its office productivity applications to evaluate (1) the effect of Microsoft’s conduct on competition and (2) whether that conduct played a role in Microsoft’s maintenance of its monopoly power. Novell must prove that Microsoft did, in fact, maintain its monopoly after the conduct occurred. In the Government Case, the D.C. Circuit acknowledged that the effects of Microsoft’s anticompetitive conduct might not fully be felt for years, but recognized that “Nothing in §2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.” *United States v. Microsoft*, 253 F.3d 34, 53-54 (D.C. Cir. 2001); *see also United States v. Microsoft*, 84 F.Supp.2d 9 at ¶¶ 18, 28, 32, 77 (tentatively given collateral estoppel effect).


Consistent with the Government case, Novell contends that Microsoft’s conduct harmed competition by eliminating a “key franchise”¹ that could lower the applications barrier to entry protecting Microsoft’s monopoly and thereby promote future competition in the Intel-compatible operating systems market.

We look forward to discussing this with the Court today.

¹ By “key franchise” we refer to the office productivity applications that Novell sold to Corel.

Dated: October 13, 2011

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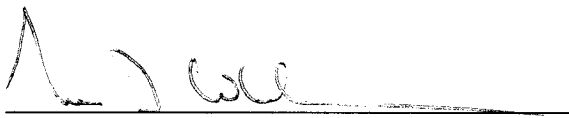
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOVELL'S MEMORANDUM REGARDING THE COURT'S PROPOSED JURY INSTRUCTION NO. 1** was served upon counsel for defendant via electronic mail, hand-delivery, and/or U.S. mail on the 13th day of October, 2011, as follows:

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