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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NOVELL, INC. Plaintiff, v. MICROSOFT CORPORATION, Defendant.	**MICROSOFT'S MEMORANDUM OBJECTING TO NOVELL'S PROPOSED PRELIMINARY JURY INSTRUCTIONS AND IN SUPPORT OF MICROSOFT'S PROPOSED PRELIMINARY JURY INSTRUCTIONS** Case No. 2:04-cv-01045 JFM Honorable J. Frederick Motz

September 12, 2011

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INTRODUCTION

In preparation for trial, plaintiff Novell, Inc. ("Novell") and defendant Microsoft

Corporation ("Microsoft") have exchanged proposed preliminary jury instructions and have

attempted to agree upon a combined set of proposed preliminary jury instructions. Although the

parties agree with respect to several of the proposed instructions, fundamental differences remain

with respect to many others.[1]

As explained more fully below, Novell's Proposed Instructions 1, 12, 13, 14, 15 and 16

(collectively, the "Disputed Instructions") misstate well-established principles of antitrust law

and are not neutral recitations of the law applicable to this case. For example, Novell asks this

Court to instruct the jury that during the period relevant to this case, Microsoft had monopoly

power in the PC operating system market, that "monopolies are bad," and that "intentionally

acquiring or maintaining monopoly power is illegal." This is a blatant misstatement of the law

and would be highly prejudicial to Microsoft if provided to the jury. There is nothing unlawful

about the acquisition or maintenance of a monopoly. *Verizon Comm. Inc. v. Law Offices of*

Curtis V. Trinko, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power . . . is not

only not unlawful; it is an important element of the free-market system.")

The Disputed Instructions even fail to identify the three allegedly anticompetitive acts

that form the basis for Novell's only remaining claim against Microsoft. Novell does not

mention these three acts and instead states that it "need only" prove that Microsoft engaged in

some undefined "anticompetitive behavior" and that the jury should "consider Microsoft's

conduct as a whole." This is a transparent effort by Novell to obtain a judgment based on the

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[1] Attached hereto as Exhibit A is a copy of Microsoft Corporation's August 15, 2011 Proposed Combined
Preliminary Jury Instructions ("Microsoft's Proposed Instructions"). Attached hereto as Exhibit B is a
copy of Novell, Inc.'s August 4, 2011 Proposed Combined Preliminary Jury Instructions ("Novell's
Proposed Instructions").

conduct at issue in *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of

Fact); 87 F. Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law), *aff'd in part and rev'd in part*,

253 F.3d 34 (D.C. Cir. 2001), (the "Government Case").

Indeed, it is apparent from the Disputed Instructions (as well as from Novell's Renewed

Motion Seeking Collateral Estoppel), that Novell seeks to shift the focus of this case to

Microsoft's allegedly anticompetitive conduct directed against other companies (*i.e.*, Sun

Microsystems and Netscape), involving different products and different time periods. Under this

Court's March 30, 2010 summary judgment decision, however, Novell is not entitled to an award

of damages unless it can prove that Microsoft (a) engaged in anticompetitive conduct directed at

Novell's products, and (b) that the same conduct (i) caused injury to WordPerfect and Quattro

Pro, and (ii) contributed significantly to Microsoft's maintenance of a monopoly in the PC

operating systems market. Consistent with these principles, this Court has already ruled that

Novell cannot "piggy-back" on anticompetitive harm allegedly caused by Microsoft's conduct

directed at third parties.

The Disputed Instructions also attempt to muddy the water on causation. To recover on

its sole remaining claim in this case, Novell must prove that the alleged anticompetitive conduct

directed at WordPerfect and Quattro Pro injured those applications *and* contributed significantly

to Microsoft's maintenance of a monopoly in the PC operating systems market. The Disputed

Instructions apply an incorrect standard of causation already rejected by this Court, i.e., they

instruct the jury that Novell need only prove that Microsoft's conduct was "reasonably capable"

of contributing significantly to the maintenance of a monopoly in the relevant market.

The Disputed Instructions also fail to instruct the jury adequately about the meaning of

"anticompetitive conduct" under the antitrust laws. To prevail, Novell must prove that

Microsoft's three allegedly anticompetitive acts were taken for no legitimate business reason.

Moreover, the jury should be instructed that a company, even one having monopoly power, has

no duty to aid its competitors by, for example, sharing information about its product innovations

still under development. Novell's omission of these bedrock principles of antitrust law from the

Disputed Instructions would prejudice Microsoft because the jury could be left with the mistaken

impression that legitimate competitive conduct by a company with monopoly power violates the

antitrust laws.

Finally, Microsoft objects in several instances to Novell's proposed use of generic model

instructions rather than custom instructions modified to fit the unique circumstances of Novell's

claim in this case. In most cases brought under Section 2 of the Sherman Act, a plaintiff must

prove that defendant's alleged anticompetitive conduct harmed competition in the market in

which plaintiff was competing with defendant. Here, by contrast, Novell has pled a "unique"

claim, "ingeniously designed to survive Microsoft's [statute of] limitations defense," *In re*

Microsoft Corp. Antitrust Litig, 699 F. Supp. 2d 730, 736, 748 (D. Md. 2010), in which it has

alleged and must now prove that Microsoft's conduct in the market where Novell's products

compete (word processing and spreadsheet software) was intended to and did cause significant

injury to competition in a different market (PC operating systems), where WordPerfect and

Quattro Pro (the only two products allegedly harmed by Microsoft) did not compete. In the

context of this "unique" case, Novell's overreliance on generic model instructions results in

Proposed Instructions that completely fail to explain the elements of Novell's claim.

Microsoft's Proposed Instructions, on the other hand, fairly and fully set forth the specific

elements that Novell must prove in order to prevail consistent with this Court's prior rulings.

Microsoft's Proposed Instructions are neutral, concise, and tailored to the facts and claims of this case.[2]

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[2] Attached hereto as Exhibit C for the Court's reference is a table that compares the parties' proposed instructions at issue and summarizes Microsoft's objections to the Disputed Instructions.

ARGUMENT

I.   Summary of Novell's Claim

Novell's Proposed Instructions ignore rather than explain the specifics of the claim

asserted in Count I of the Complaint. Preliminary jury instructions should be customized to fit

the specifics of the claim the jury will decide. Novell has one remaining claim against Microsoft

under Section 2 of the Sherman Act, which this Court has described as "unique." In short,

Novell claims that WordPerfect and Quattro Pro, which did not compete with Microsoft's

Windows 95 operating system, offered competing operating systems the prospect of surmounting

the "applications barrier to entry" and thereby breaking the Windows monopoly. *In re*

Microsoft, 699 F. Supp. 2d at 743. Novell alleges that as a result of this threat that Novell's

applications posed to Microsoft's monopoly in the PC operating systems market, Microsoft

engaged in the following anticompetitive conduct directed at WordPerfect and Quattro Pro:

> "(1) withdrawing access to information about and changing course
> and otherwise refusing to cooperate regarding the Windows 95
> namespace extensions, thereby delaying and impairing Novell's
> development of the Perfect Office suite that was designed to run on
> Windows 95" (August 8, 2011 Memorandum of Law in Support of
> Novell's Renewed Motion Seeking Collateral Estoppel ("Novell's
> Collateral Estoppel Mem.") at 3; *see also* Compl. ¶¶ 75-78);
>
> "(2) refusing to grant a Windows 95 logo certification for Novell's
> Perfect Office suite." (Novell's Collateral Estoppel Mem. at 3; *see
> also* Compl. ¶ 89.) and
>
> "(3) misleading Novell about Windows 95 print functionality,
> thereby increasing WordPerfect's costs and decreasing its
> functionality" (Novell's Collateral Estoppel Mem. at 3).[3]

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[3] This third allegation is improper and should not be part of this case because it was never mentioned in
Novell's lengthy and detailed complaint. Instead, the allegation was first asserted in the reports submitted
by Novell's experts in May 2009.

These three allegedly anticompetitive acts occurred in 1994 and 1995.[4] (Novell's Nov. 13, 2009

Opp. to Microsoft's Motion for Summary Judgment (D. Md. Docket #106) at 11-12, 16-18.)

More specifically, Novell first alleges that in October 1994, Microsoft withdrew support

for four namespace extension APIs in a beta release of Windows 95. According to Novell,

because these four APIs were not documented formally, the versions of WordPerfect and Quattro

Pro designed for use with Windows 95 were both late to market and of lower quality than they

otherwise would have been.

Second, Novell alleges that in April 1995 Microsoft refused to grant Novell an exemption

from a requirement of Microsoft's Windows 95 logo licensing program – requiring that

applications "degrade gracefully" on Windows NT – so that Novell could obtain a license to use

Microsoft's registered trademark on packaging for Novell's products. Microsoft licensed the

Windows 95 logo to ISVs as an optional way of indicating to consumers that applications

worked well with the new Windows 95 operating system.

Third, Novell alleges that it was injured because Windows 95 did not contain extra

"custom print processor" functionality in addition to the standard print processor functionality

made available to all software developers. It is undisputed that the "custom print processor"

functionality was not necessary for applications running on Windows 95 to print documents. In

fact, because it was not included in Windows 95, no application – including Microsoft's own –

had access to such custom print processor functionality.

These three acts are the only allegedly anticompetitive acts at issue in this case. In fact,

this Court has previously rejected Novell's attempt to allege additional anticompetitive acts by

Microsoft in order to broaden the scope of this case. *See In re Microsoft Corp.,* 699 F. Supp. 2d

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[4] Novell owned the WordPerfect and Quattro Pro applications beginning in June 1994. (Compl. ¶ 37.) It announced in October 1995 that it would sell these products and the sale closed on March 1, 1996. (Compl. ¶ 150.)

at 743 (dismissing Novell's claim based on Microsoft's alleged treatment of GroupWise because such allegations were not pled in Novell's Complaint and Microsoft was not provided with fair notice of such a claim), *affirmed*, *Novell, Inc. v. Microsoft Corp.,* 2011 WL 1651225, at *8 (4th Cir. May 3, 2011).

Indeed, the sole remaining claim in this case is *not* about whether Microsoft engaged in anticompetitive conduct that harmed markets for word processing software or spreadsheet software. Novell had alleged in Counts II through V of its Complaint that Microsoft unlawfully monopolized or attempted to monopolize purported markets for word processor software and spreadsheet software – the markets in which WordPerfect and Quattro Pro actually competed – but those four Counts were dismissed as barred by the applicable four-year statute of limitations and not tolled by the Government Case. *Novell, Inc. v. Microsoft Corp.*, 2005 WL 1398643 (D. Md. June 10, 2005), *aff'd,* 505 F.3d 302, 321-23 (4th Cir. 2007). Novell's remaining claim, Count I, was able to benefit from the Clayton Act's tolling provision only because it alleged harm to competition in the PC operating systems market. (*See* Compl. ¶ 153.) Therefore, to prevail, Novell must prove that Microsoft engaged in anticompetitive conduct directed against WordPerfect and Quattro Pro and that such anticompetitive conduct both (a) caused injury to Novell's business productivity applications, and (b) "contributed significantly to Microsoft's maintenance of a monopoly in the PC operating system market." *In re Microsoft,* 699 F. Supp. 2d at 743, 747-50. That will be difficult for Novell to do, but Novell should not be allowed to dodge the problem.

Furthermore, this case is *not* about the purported "weakened state" of "middleware" threats to Windows in 1996-1998, which was at issue in the Government Case. Novell has stated its intention "to present evidence at trial demonstrating the weakened state of the middleware applications of Netscape, Sun and other ISVs, why those products were weakened, and the harm

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to competition in the PC operating systems market resulting from Microsoft's anticompetitive acts against Novell in light of the state of those ISVs and applications." (Novell's Collateral Estoppel Mem. at 14.) However, such evidence pertains to a later time period (i.e., 1996-1998) than the period of Microsoft's alleged anticompetitive conduct toward Novell in this case, during 1994 and 1995, and therefore is irrelevant to Novell's claim – even if Novell could establish that its products posed the same sort of "middleware" threat to Windows as Netscape Navigator and Sun's Java technology. References to irrelevant third-party products should not be included in preliminary jury instructions. (*See* Microsoft's Memorandum in Opposition to Novell's Renewed Motion Seeking Collateral Estoppel, at 8-11, 15-17, incorporated herein.)

As this Court has previously explained, "[t]o be sure, Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well." *In re Microsoft*, 699 F. Supp. 2d at 750. In order to prevail in this action, Novell must prove that Microsoft's three allegedly anticompetitive acts were directed at WordPerfect and Quattro Pro, that those three acts injured those products, and that the same acts also contributed significantly to Microsoft's maintenance of a monopoly in the PC operating systems market. *Id*. at 748. Ignoring these specific elements, the Disputed Instructions would improperly tell the jury that Novell can recover if Microsoft injured other companies' products in other time periods and in other markets.

II.   Summary of the Law

In the Disputed Instructions, Novell has either misstated basic principles of antitrust law or omitted specific elements of its claim. The law of Novell's claim is summarized below and also referenced in Microsoft's specific objections to the Disputed Instructions.

A.   Elements of Section 2 Claim

To violate Section 2 of the Sherman Act, a defendant must (1) have monopoly power in

the relevant market and (2) engage in unlawful monopolizing conduct – that is, "willful

acquisition or maintenance of that power as distinguished from growth or development as a

consequence of a superior product, business acumen, or historical accident." *In re Microsoft*,

699 F. Supp. 2d at 744 (quoting *Trinko*, 540 U.S. at 407). To prove the second element, a

plaintiff must show that defendant (a) engaged in anticompetitive conduct that (b) caused injury

to plaintiff's products, and (c) caused anticompetitive harm in the relevant market. *Id*. at 744,

748. Novell's Disputed Instructions do not correctly state these legal requirements.

**B.   Novell's Burden to Prove Conduct That is Considered Anticompetitive
           Under the Antitrust Laws**

The conduct at issue in this case is Microsoft's alleged failure to (1) provide formal

documentation of the namespace extension APIs; (2) grant Novell an exemption to requirements

for obtaining a license to use the "Designed for Windows 95" logo; and (3) provide custom print

processor functionality in Windows 95. To determine whether this alleged conduct violates the

antitrust laws, the jury should be sufficiently instructed about how the law defines

anticompetitive conduct.

Under our antitrust laws, successful companies – including monopolists – are permitted

and even encouraged to compete vigorously. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*,

703 F.2d 534, 544 (9th Cir. 1983), *overruled on other grounds,* ("A monopolist, no less than any

other competitor, is permitted and indeed encouraged to compete aggressively on the merits.").

To be anticompetitive, the conduct at issue must be without legitimate business justification.

Eastman Kodak Co. v. Image Technical Service, Inc., 504 U.S. 451, 483 (1992) ("Liability turns

on whether 'valid business reasons' can explain [defendant's] actions."); *Multistate Legal

Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d

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1540, 1550 (10th Cir. 1995) ("A defendant may avoid liability by showing a legitimate business justification for the conduct."). "The fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient." *T.O. Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988) (emphasis in original).

Moreover, the antitrust laws ordinarily impose no duty on a company to aid or otherwise cooperate with its competitors. *Trinko*, 540 U.S. at 407-08 ("[A]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."); *Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1221 (10th Cir. 2009) ("The Supreme Court has recently emphasized the general rule that a business, even a putative monopolist, has 'no antitrust duty to deal with its rivals at all.'") (quoting *Pac. Bell Tel. Co.* v. *Linkline Commc'ns*, Inc., 129 S. Ct. 1109, 1115 (2009); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1194 (10th Cir. 2009) ("Deer Valley is not required to invite competitors onto its property to rent skis to its patrons, even if a failure to do so would mean it is the sole supplier of rental skis at the ski area."); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) ("A firm with lawful monopoly power has no general duty to help its competitors.").

In *Four Corners,* a doctor sued Mercy hospital for violating Section 2 of the Sherman Act after another doctor was granted the exclusive right to provide nephrology services at the hospital. 582 F.3d 1216. The court affirmed summary judgment in favor of the hospital, holding that the hospital's refusal to deal with the plaintiff doctor did not constitute anticompetitive conduct within the meaning of Section 2. *Id.* at 1221. The court distinguished *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), on the grounds that "*Aspen Skiing* controls only where the monopolist's 'unilateral termination of a voluntary (and thus presumably

profitable) course of dealing suggests a willingness to forsake short-term profits to achieve an

anticompetitive end.'" *Id*. at 1224-25 (quoting *Trinko,* 540 U.S. at 409) (emphasis omitted).[5]

The court noted that in the case before it, like in *Trinko* and *Christy Sports*, "there is no

allegation that Mercy was motivated by anything other than a desire to make more money for

itself." *Id*. at 1225. The case was "analytically parallel to *Trinko* and *Christy Sports*" for the

additional reason that in both those cases, the courts rejected plaintiff's argument that a "putative

monopolist engaged in anticompetitive conduct by failing to provide a rival access to certain of

its facilities." *Id.* at 1224.

Indeed, this Court has previously recognized that Microsoft is not required to disclose

information to its competitors about new Windows operating systems under development. *In re

Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 745 (D. Md. 2003) (Motz, J.); *Daisy

Mountain Fire Dist. v. Microsoft Corp.*, 547 F. Supp. 2d 475, 489 (D. Md. 2008) (Motz, J.). In

In re Microsoft Corp., this Court rejected allegations that Microsoft violated the antitrust laws

because it refused to disclose to potential competitors certain information about its APIs

"because the software development industry is dynamic and involves continuous innovation, a

requirement that Microsoft disclose significant information to its competitors would be

unworkable . . . ." *In re Microsoft*, 274 F. Supp. at 745; *see also Daisy Mountain*, 547 F. Supp.

2d at 489 (same holding). Microsoft is permitted to use its "superior knowledge of its own APIs

to obtain a 'first mover advantage' in the applications market" because "even an alleged

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[5] In *Aspen Skiing*, the Supreme Court held that defendant Ski Co., which owned and managed three Aspen ski resorts, violated Section 2 when it refused to continue offering a joint ski pass including access to a fourth resort (Highlands Corp.). Ski Co. refused to sell lift tickets to Highlands Corp. even at the retail rates available to consumers. The Court held that Ski Co.'s conduct was anticompetitive because it had disclaimed "short-term benefits and consumer goodwill in exchange for a perceived long-run monopoly" by driving Highlands Corp. from the market. 472 U.S. at 610-11. The Court in *Trinko* observed that *Aspen Skiing* is "at or near the outer boundary of § 2 liability" and presents a "limited exception" to the "high value . . . placed on the right to refuse to deal with other firms." *Trinko*, 540 U.S. at 408-09.

monopolist has the right to gain temporary benefits from innovations to its own products." *In re Microsoft*, 274 F. Supp. 2d at 746.

Other courts have likewise held that a company, even one with monopoly power, has a right to use its innovations exclusively for its own benefit. *See California Computer Prods. v. IBM*, 613 F.2d 727, 744 (9th Cir. 1979) (IBM had no duty to disclose information about design change in interface between peripheral equipment and CPUs that rendered plaintiff's peripheral equipment obsolete); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 755-56 (S.D. Tex. 1998) ("Because Microsoft could lawfully decline to reveal advances in technology, it did not offend the antitrust laws by failing to distribute design information about Windows 95 to Aldridge . . . ."); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1229 (S.D.N.Y. 1981) (Kodak had no duty to disclose technical information to competitor regarding new Kodacolor film and related development process); *see also Four Corners*, 582 F.3d at 1221 (a monopolist is allowed to "to reap the fruits of its investments" because "[w]ithout some confidence that they can control access to their own property, real or intellectual, how many firms would be deterred from undertaking the risks associated with . . . a significant new endeavor or facility").

These are the fundamental principles that pertain to Novell's unusual claim in this case. The jury will be asked to consider whether, for example, Microsoft's decision not to provide Novell with formal documentation for the namespace extension APIs – which plainly was Microsoft's own proprietary technical information – violates the Sherman Act. The Disputed Instructions fail to instruct the jury on these relevant principles of antitrust law.

C. Novell's Burden to Show that Microsoft's Anticompetitive Conduct "Contributed Significantly" to Microsoft's Continued Monopoly Power.

Unlike most Section 2 cases, where the plaintiff must prove that defendant's anticompetitive conduct harmed competition in the same market in which plaintiff's relevant products compete, Novell's "unique § 2 theory makes the inquiry more complicated: Novell

<div align="center">8</div>

must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*." *In re Microsoft Corp.*, 699 F. Supp. 2d at 748 (emphasis in original). "To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue 'contributed significantly to a defendant's continued monopoly power.'" *Id.* (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001)). Novell ignores this Court's holding and repeatedly misstates the applicable legal standard for causation in its proposed instructions by stating that "Novell needs to show that the conduct at issue was reasonably capable of making a significant contribution to Microsoft's continued monopoly power." (*E.g.*, Novell's Proposed Instruction 14.)

Indeed, this Court has noted the distinction between the more lenient "reasonably capable" standard of causation, which applies in an equitable enforcement action brought by the U.S. Department of Justice, and the causation requirement that applies in a private action for money damages, in which the plaintiff must prove the alleged anticompetitive conduct "contributed significantly to a defendant's continued monopoly power." *In re Microsoft*, 699 F. Supp. 2d at 748 (citing *U.S.* v. *Microsoft*, 253 F.3d at 80). In *United States* v. *Microsoft Corp.*, the government sought only the equitable remedy of an injunction. The D.C. Circuit noted that in light of the remedies sought, the government needed only to meet an "edentulous test for causation." *U. S.* v. *Microsoft*, 253 F.3d at 79. Specifically, the government was not required to show that "Java or Navigator would actually have developed into viable platform substitutes," but instead whether "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power," and that Java and Netscape were such "nascent threats at the time Microsoft engaged in the anticompetitive conduct" alleged. *Id.*

As the district court observed on remand in the Government Case, "the appellate court appears to have identified a proportionality between the severity of the remedy and the strength of the evidence of the causal connection." *United States* v. *Microsoft Corp.*, 231 F. Supp. 2d 144, 164 (D.D.C. 2002). Thus, absent a "significant causal connection," drastic remedies such as structural relief are inappropriate and the court should instead impose "an injunction against continuation of that conduct." 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2011) ("AREEDA") ¶¶ 650a, 653b. Unlike treble damages in a private antitrust case, injunctive relief may be appropriate in a government enforcement case upon a lesser showing of causation because "[l]ittle is lost from enjoining questionable conduct, provided that the conduct clearly makes no contribution to competition or efficiency," and there is generally "no unfairness or disincentive to meritorious competition in simply preventing the conduct at the outset or ordering the monopolist to stop." *Id.* ¶ 653a.

In contrast, where a plaintiff, such as Novell in this case, seeks treble damages in a private action, the standard is much higher: a plaintiff must show that "anticompetitive behavior has contributed significantly to the . . . maintenance of the monopoly." *See Id.* ¶¶ 650a, 650c, 650e, 657(e). When damages are sought, "it is critical that treble damage remedies be strictly limited to those aspects of a plaintiff's injury that were in fact caused by an unlawful exploitation of market power, or an unlawful quest for such power in attempt cases." *Id.* This standard is especially appropriate considering the unique facts of this case, where the market in question is one in which the relevant Novell products did not compete.

Novell must therefore prove that Microsoft's three allegedly anticompetitive acts were intended to and did cause harm to WordPerfect and Quattro Pro and that these same acts also

"contributed significantly" to Microsoft's maintenance of a monopoly in the PC operating system market. *In re Microsoft*, 699 F. Supp. at 743, 747-50.[6]

III. Microsoft's Objections to the Disputed Instructions

Novell's Proposed Preliminary Jury Instructions 1 and 12-16 are entirely contrary to the aforementioned legal principles. Microsoft's Proposed Preliminary Jury Instructions 1 and 12-16 in contrast, should be accepted because they accurately set forth the controlling principles of antitrust law.

A. Novell's Proposed Preliminary Instruction No. 1: "Statement of the Case"

Microsoft asserts the following objections to Novell's Proposed "Statement of the Case": 1) it is too long, complex and potentially confusing; 2) it incorrectly informs the jury that Microsoft's conduct was "designed" to "ensure the dominance of Microsoft Office over Novell's PerfectOffice suite—when no such claim is in this case;" 3) it mischaracterizes Judge Jackson's Findings of Fact in the Government Case (which are cited by Novell as support for the proposed instruction); and 4) it improperly and prematurely asks the jury to consider an award of damages to Novell.

1. Novell's Proposed "Statement of the Case" is Confusing and Unclear.

Novell's proposed "Statement of the Case" runs more than four pages in length and provides background information on the history of the parties' dispute; definitions of terms, such

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[6] Several cases in the 10th Circuit cite *Instructional Systems Dev. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987) for the proposition that "[i]n order to rise to a section 2 violation . . . the exclusionary conduct must appear reasonably capable of contributing significantly to creating or maintaining monopoly power." *See, e.g., Multistate*, 63 F.3d at 1550. As its sole authority for that stated requirement, the court in *Instructional Systems* cites III P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 626c, g (1978). As set forth above, however, subsequent editions of AREEDA clarify that the more lenient causation standard applies only in equitable enforcement actions, and that a higher causation requirement applies in private actions for money damages. The D.C. Circuit's 2001 opinion in *U.S. v. Microsoft*, which post-dates the 10th Circuit decisions in *Instructional* and *Multistate*, makes the same distinction, relying in part on AREEDA. Moreover, the analysis applied by the D.C. Circuit in *U.S. v. Microsoft* regarding the different causation standard applied in government enforcement actions, has not yet been addressed in the Tenth Circuit.

as operating systems, application programming interfaces, and middleware; Novell's theories of

the case; and portions of Microsoft's position in response. The proposed preliminary instruction

is unnecessarily complicated and will overwhelm the jury with information on several different

topics that it cannot properly comprehend or utilize at the outset of the trial. Novell has

unclearly and unsuccessfully attempted to define technical terms (such as APIs and middleware)

and to explain complex antitrust concepts (such as the "applications barrier to entry"). Without

appropriate foundation and background concerning the potential relevance of these terms, this

will serve only to confuse the jury.

It is well-established that jury instructions should be clear, short, and concise. *See, e.g.,*

Chums, Ltd. v. Snugz/USA, Inc., 1995 WL 503975, *2 (10th Cir. Aug. 25, 1995), *cert. denied,*

516 U.S. 1114 (1996) (affirming district court's refusal of instruction that was "long, convoluted,

and confusing," noting requirement that "[a]ll instructions should be short, concise,

understandable, and neutral statements of the law.") (emphasis omitted). Courts have explained

that in conducting jury trials, federal court judges:

> have the inescapable duty to fully and correctly instruct the jury on
> the applicable law of the case, and to guide, direct and assist them
> toward an intelligent understanding of the legal and factual issues
> involved in their search for the truth. This duty is not fulfilled by
> mere abstract statements or legal definitions, but rather by a fair
> and impartial statement of the factual issues and the law applicable
> thereto. The instructions ought to be stated in logical sequence and
> in the common speech of man if they are to serve their traditional
> and constitutional purpose in our system of jurisprudence.

Tyler v. Dowell, Inc., 274 F.2d 890, 897 (10th Cir. 1960) (internal citations omitted); *see also*

Leprino Foods Co. v. Factory Mut. Ins. Co., 2011 WL 3134625 at *6 (10th Cir. 2011) (finding

district court did not err by describing issue in more "easily understandable terms" than

suggested by defendant); *Girden v. Sandals Intern.*, 262 F.3d 195, 203 (2nd Cir. 2001) ("'The

purpose of jury instructions is to give the jury a clear and concise statement of the law applicable

to the facts of the case.'" (quoting *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1195 (11th Cir. 1995)).

While this case will necessarily require the jury to learn and understand technical terms and complicated fact patterns, the preliminary jury instructions should introduce the case in a way that is as simple, concise and easy to understand as possible. In contrast to Novell's proposed "Statement of the Case," Microsoft's Proposed Instruction No. 1 is shorter, simpler, and much easier to comprehend. It provides the jury with a brief introduction to the case, including an identification of the parties, simple explanations of the products at issue, and a concise and accurate description of Novell's one claim in the case. That description is as follows:

> Novell claims that in the period from June 1994 through March 1996, Microsoft engaged in anticompetitive conduct against Novell's WordPerfect word processing application and its Quattro Pro spreadsheet application, and that this conduct not only caused injury to WordPerfect and Quattro Pro but also contributed significantly to Microsoft's unlawful maintenance of a monopoly in a different market – the market for PC operating systems. Microsoft denies that claim.

Microsoft's Proposed Instructions succeed in accurately setting forth the elements of Novell's Section 2 claim.

2. It is Improper for Novell to Claim that its Applications Were Harmed by Microsoft Word and Excel.

As part of its proposed Instruction No. 1, Novell seeks to inform the jury that Microsoft's allegedly anticompetitive conduct "was designed to protect the Microsoft Windows' monopoly and ensure the dominance of Microsoft Office over Novell's PerfectOffice suite." This proposed instruction is both highly partial and completely improper; this case is not about whether Microsoft improperly maintained a monopoly in markets for suites or for individual office productivity applications. Counts II through V of Novell's amended complaint, which asserted monopolization claims in purported markets for word processing software and spreadsheet

software, were dismissed by this Court on June 10, 2005, because they were barred by the statute

of limitations. *In re Microsoft Corp.*, 2005 WL 1398643, *5 (D. Md. June 10, 1995). The

Fourth Circuit affirmed that dismissal on October 15, 2007. *Novell, Inc. v. Microsoft Corp.,* 505

F.3d 302 (4th Cir. 2007). Novell may not – as it seeks to do in its Proposed Instruction No. 1 –

argue to the jury that Microsoft engaged in conduct to "ensure [its] dominance" over Novell's

suites or individual office productivity applications.

3. Novell's Proposed Instruction Mischaracterizes the Factual Findings from the Government Case.

Novell's Proposed Instruction No. 1 includes a description of "middleware" as that term

was used in the Government Case, claims that its products served as "middleware," then

proceeds to exaggerate the supposed threat that "middleware" posed to "Window's valuable

platform functions." As support for its proposed instruction, Novell cites certain Findings of

Fact in the Government Case. Novell's assertions are in reality not supported by the Findings of

Fact, but instead are exceedingly one-sided and inaccurate and differ in several crucial respects

from the Findings of Fact on which this Instruction is purportedly based.

Specifically, Novell proposes to instruct the jury in relevant part as follows:

> "Middleware" is a phrase used to refer to software products that
> rely on the APIs provided by an underlying operating system,
> while simultaneously exposing their own alternative APIs to
> software developers. Because of this, a middleware product
> written for Windows could take over some or all of Window's
> valuable platform functions – that is, developers might begin to
> rely upon APIs exposed by middleware for basic routines rather
> than relying upon the API set in Windows. If middleware were
> written for multiple operating systems, its impact could be even
> greater. The more developers could rely upon APIs exposed by
> such middleware, the less expensive porting to different operating
> systems would be. Ultimately, if developers could write
> applications relying exclusively on APIs exposed by middleware,
> their applications would run on any operating system on which
> middleware was also present, breaking down the applications
> barrier to entry for competing operating systems.

As support for its proposed instruction, Novell cites Findings of Fact 2 and 28-30.[7]

However, those Findings of Fact do not support Novell's characterization of the potential threat

to Windows posed by "middleware" and, in fact, Number 28 of the Findings of Fact states that

the opposite is true: "Currently [i.e., as of November 1999] no middleware product exposes

enough APIs to allow independent software vendors ("ISVs") profitably to write full-featured

personal productivity applications that rely solely on those APIs." *United States v. Microsoft*

Corp., 84 F. Supp. 2d 9 (D.D.C. 1999). Furthermore, the Findings of Fact state that:

> it remains to be seen, though, whether there will ever be a
> sustained stream of full-featured applications written solely to
> middleware APIs. In any event, it would take several years for
> middleware and the applications it supports to evolve from the
> status quo to a point at which the cost to the average consumer of
> choosing a non-Intel compatible PC operating system over an
> Intel-compatible one falls so low as to constrain the pricing of the
> latter systems.

Id., at 18; Findings of Fact No. 29.

Thus, these Findings of Fact provide no support for Novell's supposedly neutral

instruction that "if developers could write applications relying exclusively on APIs exposed by

middleware, their applications would run on any operating system on which middleware was

also present" and that "[i]f middleware were written for multiple operating systems, its impact

could be even greater." On the contrary, Judge Jackson specifically found that, as of the time of

his November 1999 decision (*i.e*., four to five years after the alleged conduct at issue in this

case), there was no "middleware" product capable of exposing enough APIs to allow ISVs to

profitably write full-featured personal productivity applications that relied solely on those APIs,

and "it remains to be seen" whether any such "middleware" product would ever materialize with

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[7] Novell cites Findings of Fact 28-30, but Novell did not even seek collateral estoppel effect on Findings
of Fact 28 and 29. Apparently because Novell does not want the jury to be read Findings of Fact 28 and
29, Novell decided not to seek preclusion on these Findings of Fact and instead has attempted to alter and
distort the meaning of those factual findings in its Proposed Instruction No. 1.

"a sustained stream of full-featured applications written solely to middleware APIs." Moreover, the nascent "middleware" threats at issue in the Government Case involved different companies and products in a later time period. Novell *could* have sought collateral estoppel effect on these Findings of Fact, but chose not to. Novell should not be permitted to distort the Findings of Fact and ask the Court in a preliminary jury instruction to adopt its unproved and unprovable theory that its products had "middleware" capability that posed any sort of threat to Microsoft's monopoly in the PC operating systems market.

In addition, Novell's discussion about "middleware" in its proposed Statement of the Case falsely implies that the parties agree that Novell's products at issue, WordPerfect and Quattro Pro, had "middleware" capability and, moreover, attempts to give the jury the erroneous impression that the alleged "middleware" capability of Novell's products was at issue in the Government Case. Novell's proposed instruction states the following:

> In addition, Novell claims that its PerfectOffice suite could serve as "middleware" that threatened to reduce the reliance of developers on the Windows API set. The more developers could rely upon APIs exposed by such middleware, the less they would need to rely on Windows' APIs.

In fact, Microsoft disputes Novell's contention that WordPerfect or Quattro Pro or PerfectOffice had or could have any "middleware" capability.[8] Yet Novell's Proposed Instruction No. 1 does not even mention Microsoft's position on the alleged "middleware" threat posed by Novell's products and seeks to instruct the jury that a Novell product has already been adjudicated to constitute "middleware" as that terms was used in the Government Case. This is an outrageous effort to have the Court adopt a theory that Novell must prove at trial in order to prevail.

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[8] There is not even any claim in the Complaint that PerfectOffice was or could have been middleware.

4.   Novell's Proposed Instruction Regarding Calculation of Damages is Improper.

Novell's proposed "Statement of the Case" includes the following contentions:

> Novell contends that Microsoft's conduct caused harm to
> competition in the Intel-compatible PC operating systems market
> and caused Novell financial harm in the form of lost profits and
> lost value of its office productivity applications. As compensation
> for these claimed losses, Novell will ask you to award it money
> damages.

This proposed "instruction" is both premature and highly misleading.

It is inappropriate to raise the issue of damages in preliminary jury instructions, let alone

before the jury has even heard instructions about the required elements of Novell's claim.

Indeed, the Model Jury Instructions in Civil Antitrust Cases (2005) ("Model Antitrust

Instructions") does not mention damages once in its instructions concerning the elements of a

claim under Section 2 of the Sherman Act. The first mention of damages is in the damages

section of the Model Antitrust Instructions, which states: "You should only consider calculating

damages if you first find that defendant violated the antitrust laws and that this violation caused

injury to plaintiff." Model Antitrust Instructions, F-11. Novell's inclusion of damages in its

Proposed Instruction No. 1 fundamentally distorts Novell's burden to prove all elements of its

claim before damages can be considered by the jury and thus is prejudicial to Microsoft.

B.   <u>Novell's Proposed Preliminary Instruction No. 12: "Brief Summary of Antitrust Law"</u>

Novell's proposed "Brief Summary of Antitrust Law" is patently inaccurate and highly

misleading. First, it states that all monopolies are "bad for commerce" and that "acquiring or

maintaining monopoly power is illegal." These statements misstate the law and attempt to

unfairly prejudice the jury against Microsoft.

Contrary to Novell's proposed instruction, it is not "illegal" or "bad" to acquire or

maintain a monopoly. Antitrust laws "were enacted for the protection of *competition* not

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competitors. . . . Thus, the Sherman Act does not protect competitors from being destroyed

through competition; on the contrary, such destruction can signal healthy functioning of the free-

enterprise system." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 315 (4th Cir. 2007) (emphasis

in original). "To safeguard the incentive to innovate, the possession of monopoly power will not

be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Trinko*,

540 U.S. at 407 (emphasis in original).

Novell cites Instruction No. 1 of the Model Antitrust Instructions as support for its

Proposed Instruction No. 12. However, that instruction merely states:

> The purpose of the Sherman Act is to preserve free and unfettered
> competition in the marketplace. The Sherman Act rests on the
> central premise that competition produces the best allocation of our
> economic resources, the lower prices, the highest quality, and the
> greatest material progress.

Id., A-2. Novell's proposed modifications to this model instruction are unsupported by anything

contained in the Model Antitrust Instructions and conflict with bedrock principles of antitrust

law.

"[T]he court is not required to give an instruction that misstates the law or that is already

covered by other instructions." *U.S. v. Hollis*, 971 F.2d 1441, 1452 (10th Cir. 1992); *see also*

United States v. Mata, 491 F.3d 237, 241 (5th Cir. 2007), *cert. denied*, 552 U.S. 1189 (2008)

("'[A] trial judge is under no obligation to give a requested jury instruction that misstates the

law, is argumentative, or has been covered adequately by other instructions.'") (quoting *United*

States v. Asibor, 109 F.3d 1023, 1035 (5th Cir. 1997)). By using the words "bad" and "illegal" to

describe all monopolies, Novell has fundamentally misstated the law.[9]

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[9] Strangely enough, Novell's Proposed Instruction No. 14 states the opposite: "Mere possession of
monopoly power, if lawfully acquired, does not violate the antitrust laws. A monopolist may compete
aggressively without violating the antitrust laws."

Furthermore, Novell's Proposed Instruction No. 12 concludes with the following

assertion: "Whether or not Microsoft actually exercised this monopoly power is not important.

Novell need only prove that Microsoft maintained monopoly power through anticompetitive

behavior." This is entirely wrong and implies that Novell could recover damages based on

Microsoft's conduct directed at any competitor or product. On the contrary, Novell must prove

(a) that Microsoft engaged in the three allegedly anticompetitive acts directed at WordPerfect

and Quattro Pro, (b) that those acts caused injury to Novell's business productivity applications,

and (c) that those very same acts "contributed significantly to Microsoft's maintenance of a

monopoly in the PC operating system market." *In re Microsoft,* 699 F. Supp. 2d at 743, 747-50.

Novell's Proposed Instruction No. 12 glosses over the required elements of its claim for violation

of Section 2, and wrongly implies that Novell "need only" prove some unspecified

"anticompetitive behavior."

C. **Novell's Proposed Preliminary Instruction No. 13: "Monopolization"**

Novell's Proposed Instruction No. 13 purports to set forth the elements of Novell's

unlawful monopolization claim, yet fails to inform the jury about the three specific allegedly

anticompetitive acts at issue in this case. In addition, Proposed Instruction No. 13 unnecessarily

instructs the jury about elements and facts that are not at issue (e.g., "the Intel-compatible PC

operating systems market is a valid antitrust market"). Microsoft therefore objects to Proposed

Instruction No. 13 on the grounds that it is overly general, vague, confusing, and not tailored to

Novell's specific claim in this case.

1. **Novell is Required to Prove that Microsoft Engaged in the Three Anticompetitive Acts Directed at Novell's Applications**.

Again, it is Novell's burden to prove at trial that Microsoft engaged in the three allegedly

anticompetitive acts (and of equal importance), that those three acts both (a) caused injury to

Novell's applications and (b) contributed significantly to Microsoft's maintenance of a

monopoly in the PC operating system market. *See In re Microsoft Corp.*, 699 F. Supp. 2d at

743-50. Yet Novell's proposed instructions do not even mention these three alleged acts. To be

fair, accurate and complete, the jury instructions must include an explanation of Novell's burden

with respect to these three allegedly anticompetitive acts. *See Decker v. Korth*, 219 F.2d 732,

738 (10th Cir. 1955) ("Instructions must be predicated on the evidence. They may not deal with

general or abstract propositions not immediately connected with and applicable to the facts

before the jury."); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13, (9th Cir. 1964) (it is

appropriate to frame jury instructions in terms of the specific facts of the case "where, as here,

the abstract legal principles are not self-explanatory to a lay jury, and the facts to which they

must be applied are complex"), *abrogated on other grounds, Spectrum Sports* v. *McQuillan*, 506

U.S. 447.

2. Novell is Required to Prove that Microsoft's Allegedly Anticompetitive Conduct Contributed Significantly to Microsoft's Maintenance of a Monopoly in the PC Operating System Market.

This Court has been clear about Novell's burden to show that Microsoft's allegedly

anticompetitive conduct "contributed significantly to Microsoft's maintenance of a monopoly in

the PC operating system market." *In re Microsoft Corp.*, 699 F. Supp. 2d at 743, 747-50. The

jury instructions should be clear from the outset that Novell must prove as much in order to

prevail on the claim asserted in Count I of the Complaint.

Instead of proposing an instruction that is tailored to the specific elements of proof in this

case, Novell's Proposed Instruction No. 13 merely repeats a proposed instruction from the Model

Antitrust Instructions stating, *inter alia*, that the jury's "job will be to determine . . . whether

Microsoft willfully maintained monopoly power in the market for Intel-compatible PC operating

systems by engaging in anticompetitive conduct." The Model Antitrust Instructions are not

suitable as preliminary jury instructions because preliminary instructions are so "fact-specific."

Model Antitrust Instructions, at xix. This is especially true here in light of Novell's unique

claim, which requires Novell to prove that Microsoft's conduct directed at WordPerfect and

Quattro Pro injured competition in a different market in which those same Novell products did

not compete – the market for PC operating systems.

As the Tenth Circuit has noted, "[j]ury instructions must be tailored to the peculiar facts

of each case. While pattern instructions provide valuable guidance to the trial courts, over-

reliance may produce instructions unsuited to the particular case." *United States v. Lofton*, 776

F.2d 918, 922 (10th Cir. 1985); *see also Wright v. Marzo*, 427 F.2d 907, 911 (10th Cir. 1970)

(proposed jury instruction taken from model jury instructions was properly rejected where it was

not "properly applicable to the factual situation posed by [the] case"); *United States v. Cisneros,*

169 F.3d 763, 768 (D.C. Cir. 1999) ("Jury instructions 'must be specifically tailored to the

pleadings and evidence of the particular case.'" (quoting Edward J. Devitt et al., 1 Federal Jury

Practice and Instructions at III (4th ed. 1992)); *Phillips v. People of the Virgin Islands*, 2009 WL

707182, at *5 n.6 (V.I. March 12, 2009) ("[n]otwithstanding that standard jury instructions may

reflect legally correct statements of the law, courts should always strive to tailor jury instructions

to the facts and circumstances presented at trial rather than rely on model instructions that

contain general or stock language."). Novell's Proposed Instruction No. 13 is anything but

tailored to the specific facts and circumstances of this case.

Microsoft's Proposed Instruction No. 12, by contrast, clearly and accurately describes

Novell's allegations of unlawful monopolization against Microsoft, the elements Novell must

prove in order to prevail, as previously held by this Court, and sets forth the three specific

allegedly anticompetitive acts relied on by Novell. The proposed instruction also properly and

briefly explains Microsoft's position that the "conduct at issue was not anticompetitive but was

taken for valid business reasons, and that Microsoft was not required (1) to provide its final

documentation to Novell concerning the namespace extension, (2) to include a custom print

processor in Windows 95, and (3) to license its trademarked Windows 95 logo to Novell."

(Microsoft's Proposed Instruction No. 12.) Microsoft's Proposed Instruction should be used by

the Court.

> **D.** **Novell's Proposed Preliminary Instruction No. 14: "Willful Maintenance of Monopoly Power"**

Microsoft objects to Novell's Proposed Instruction No. 14 on the following grounds:

> 1) it improperly instructs the jury to consider Microsoft's "conduct as a whole" and the condition of "other applications and potential competitors";
>
> 2) it neglects to mention the three specific alleged acts of "anticompetitive conduct" that form the basis for Novell's claim and instead defines anticompetitive conduct in a broad and open-ended manner that is likely to be highly misleading to the jury;
>
> 3) it impermissibly incorporates the "reasonably capable" standard for causation that is inapplicable to this case;
>
> 4) it improperly omits those parts of the model instruction that explain that acts taken for legitimate business reasons are not anticompetitive; and
>
> 5) it contains unnecessary and confusing descriptions of what Novell need *not* prove (e.g., that Microsoft's conduct would have contributed to anticompetitive harm in a hypothetical marketplace).

Each of these objections is addressed below *seriatim*.

> **1.** **Novell Improperly Asks the Court to Instruct the Jury to Consider the Condition of Other Applications and Potential Competitors**.

Novell's Proposed Instruction No. 14 states the following:

> . . . Novell need only prove that the conduct that harmed its software applications was reasonably capable of contributing significantly to Microsoft's monopoly in the Intel-compatible PC operating systems market considering all of the characteristics of that market at the time, including the condition of other applications and potential competitors.

This language employs an incorrect "reasonably capable" legal standard, is predicated on the introduction of irrelevant evidence, and is premature as part of the preliminary jury instructions. *See Kent*, 404 F.2d at 244.

As Novell has explained in its renewed motion seeking collateral estoppel, it intends "to present evidence at trial demonstrating the weakened state of the middleware applications of Netscape, Sun and other ISVs, why those products were weakened, and the harm to competition in the PC operating systems market resulting from Microsoft's anticompetitive acts against Novell in light of the state of those ISVs and applications." (Novell's Collateral Estoppel Mem. Collateral Estoppel, at 14.) This makes no sense under the circumstances here.

First, evidence of Microsoft's allegedly anticompetitive conduct against Netscape, Sun, and other ISVs, which was necessary to the judgment in the Government Case, pertains to a different time period (i.e., 1996-1998) than Microsoft's allegedly anticompetitive conduct toward Novell in this case (i.e., 1994 and 1995). (*See* Microsoft's Memorandum in Opposition to Novell's Renewed Motion Seeking Collateral Estoppel, at 8-11, 15-17, incorporated herein.) As a result, such evidence is irrelevant to Novell's sole remaining claim.

Second, Novell is attempting to use evidence of Microsoft's allegedly anticompetitive conduct against other competitors to improperly persuade the jury that Microsoft is a "bad actor" and therefore must have done something unlawful to Novell. Under the Federal Rules of Evidence, such "character evidence" is inadmissible because of its unduly prejudicial effect. Fed. R. Evid. 404(b); *see Unit Drilling Co. v. Enron Oil & Gas Co.,* 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence that Enron breached a contract with another contractor in order to prove that "Enron typically breached contracts and, therefore, that Enron breach[ed] its contract with" plaintiff).

As this Court has previously explained, "[t]o be sure, Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well." *In re Microsoft,* 699 F. Supp. 2d at 750. Microsoft will object to Novell's attempt to introduce certain evidence of harm to third parties, and it is incorrect (and premature) to issue a preliminary instruction to the jury on this point.

2. Novell's Instruction Fails to Mention the Three Alleged Acts.

Novell's Proposed Instruction No. 14 implies that the jury may consider a broad spectrum of alleged anticompetitive conduct directed at third parties to determine whether Microsoft has unlawfully maintained a monopoly in this case. This is a highly inappropriate instruction. As explained above, Novell must prove that Microsoft engaged in specific conduct that harmed competition in the PC operating system market, i.e., the three allegedly anticompetitive acts identified above. Novell's Proposed Instruction No. 14 is not tailored to the factual allegations of this case and, therefore, would be confusing and unhelpful to the jury. *Decker*, 219 F.2d at 738; *Lessig*, 327 F.2d at 466 n. 13. The instructions should specifically identify the allegedly anticompetitive acts upon which Novell's claim is based – the only acts for which Novell could recover damages in this action.

3. Novell's Instruction Improperly Refers to a "Reasonably Capable" Standard.

Novell improperly seeks to instruct the jury that "Novell needs to show that the conduct at issue was *reasonably capable* of making a significant contribution to Microsoft's continued monopoly power." (Emphasis added.) As explained above, this is not the correct standard for proving causation in a private case seeking monetary damages under Section 2 of the Sherman Act. *In re Microsoft Corp.*, 699 F. Supp. 2d at 748. This Court has specifically held that in this case:

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Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*.

To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue "contributed significantly to a defendant's continued monopoly power." *See Microsoft*, 253 F.3d at 80 (at least in an equitable enforcement action as opposed to an action for money damages, holding that to prove causation plaintiff must prove the conduct was "reasonably capable contributing significantly to a defendant's continued monopoly power") . . . .

Id. (emphasis in original).

As recognized by this Court and explained in Section II(C) above, the more lenient "reasonably capable" standard applies in government enforcement actions, not to private actions for monetary damages. *United States* v. *Microsoft Corp.*, 253 F.3d at 79; *see also* AREEDA ¶ 650c ("While proving anticompetitive behavior 'capable' of contributing to a monopoly may be sufficient in a government equity suit seeking a prohibitory injunction, more may be required for structural relief or for all private suitors."); and *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1275 (11th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991) (noting the distinction between a private antitrust suit for damages and a government enforcement action and stating that private plaintiffs must meet a higher causation requirement). Novell's proposed "reasonably capable" standard of causation should be rejected.

4. The Jury Should Be Instructed That Competitive Conduct is Not Unlawful if Taken for Legitimate Business Reasons.

Novell's Proposed Instruction No. 14 ignores the requirement that to be unlawful, the conduct in question must have no legitimate business justification. *Eastman Kodak*, 504 U.S. at 483 (1992); *Multistate*, 63 F.3d at 1550; *Lantec*, 146 F. Supp. 2d at 1145. Indeed, Novell omitted the following highlighted language from the Model Antitrust Instructions:

Harm to competition is to be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition. In addition, you should distinguish

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the 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 is not unlawful.

. . . .

[T]he acts or practices that result in the maintenance of monopoly
power must represent something more than the conduct of business
that is part of the normal competitive process or commercial
success. **They must represent conduct that has made it very
difficult or impossible for competitors to compete and that was
taken for no legitimate business reason.** You may not find that a
company willfully maintained monopoly power if it has
maintained that power solely through the exercise of superior
foresight and skill; . . .

Model Antitrust Instructions, C-27 – C-29 (emphasis added).

The omission of this language results in a one-sided proposed instruction that fails to

sufficiently inform the jury about the need to distinguish between anticompetitive conduct that is

unlawful and competitive conduct (such as conduct designed to increase a company's market

share). *See Aspen Skiing,* 472 U.S. at 597 (Court approved the district judge's jury instruction,

which said, in pertinent part: "if there were legitimate business reasons for the refusal [to deal],

then the defendant, even if he is found to possess monopoly power in a relevant market, has not

violated the law.")

Further, the jury should be informed that antitrust laws do not require a company to aid or

otherwise cooperate with its competitors. *Trinko*, 540 U.S. at 407-08; *Four Corners*, 582 F.3d at

1221; *Christy Sports*, 555 F.3d at 1194; *In re Microsoft*, 274 F. Supp. 2d at 745; *Daisy Mountain*,

547 F. Supp. 2d at 489. Similarly, a company has a lawful right to use its innovations

exclusively for its own benefit. *See California Computer*, 613 F.2d at 744 (IBM had no duty to

disclose information about design change in interface between peripheral equipment and CPUs

that rendered plaintiff's peripheral equipment obsolete); *GAF Corp.*, 519 F. Supp. at 1229

(Kodak had no duty to disclose technical information to competitor regarding new Kodacolor

film and related development process); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423,

437 (N.D. Cal. 1978 (IBM had no duty to disclose computer interface information to competing suppliers of peripheral equipment), *aff'd*, 636 F.2d 1188 (9th Cir. 1980).

In light of these established principles of antitrust law, any preliminary instruction regarding the meaning of "anticompetitive conduct" should explain the type of competitive conduct that is lawful, including conduct taken for legitimate business reasons. Without such instructions, Microsoft will be prejudiced from the outset because conduct that is both competitive and legal may otherwise be viewed by the jury as unfair or "anticompetitive" based on the mistaken impression Novell seeks to provide to the jury. Microsoft's Proposed Instruction No. 13, by contrast, properly includes these balanced instructions and should be adopted by this Court.

5.   Novell's Instructions Regarding a "Hypothetical Marketplace" and "Conduct as a Whole" are Unclear and Confusing for the Jury.

The following "instructions" proposed by Novell are confusing and unnecessary:

> Novell need not present direct proof that Microsoft's continued monopoly power is precisely attributable to its anticompetitive conduct nor must it show that PerfectOffice would actually have developed into a viable platform threat to Windows. To require such proof would require that liability for monopolization turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct, which would only encourage monopolists to take more and earlier anticompetitive action. In such situations, a monopolist must suffer the consequences of its own undesirable conduct.

> You should consider Microsoft's conduct as a whole. Novell has no obligation to create some hypothetical marketplace in which none of the other potential competitors or applications had been weakened by anticompetitive conduct, and then prove that the conduct at issue would still have significantly contributed to anticompetitive harm in the hypothetical market. It would be contrary to the purpose of the United States antitrust laws to immunize a monopolist for anticompetitive conduct, which in fact was reasonably capable of significantly contributing to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, even if none of the asserted conduct directed at any single firm would have, by itself,

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be reasonably capable of contributing significantly to the defendant's monopoly if none of the other small firms had been similarly weakened.

(Novell's Proposed Instruction No. 14, at 26-27.)

These purported "instructions" will confuse the jury. The language quoted above is an altered and reworked excerpt from this Court's opinion on the parties' cross-motions for summary judgment, and is not well-suited for use in a jury instruction. This Court's opinion is complex, sophisticated and requires a deep understanding of antitrust law and economic theory. The language cited above was used by the Court in the context of motions for summary judgment and, specifically, in response to a particular argument raised by Microsoft concerning whether admissions made by Novell's expert, Dr. Roger Noll, during his deposition testimony eliminated any triable issue of fact in support of Novell's case. *In re Microsoft*, 699 F. Supp. 2d at 749-50. This excerpt from the Court's opinion was not addressing the elements of Novell's claim – let alone was it written to guide the parties as to how the jury should be instructed – the and thus would not be helpful to the jury even if the Instruction *had* accurately reflected what the Court actually stated. *See, e.g., Kent v. Smith*, 404 F.2d 241, 244 (2d Cir. 1968) (explaining that it is "generally not helpful" to use quotations from court opinions in jury instructions); *Justice v. Dennis*, 793 F.2d 573 (4th Cir. 1986) (rejecting proposed jury instruction that was patterned very closely after the court's language in a previous decision); *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995), *overruled on other grounds,* 539 U.S. 90 (2003) ("Simple instructions are normally to be preferred in order not to inject needless complexity and potential confusion where simplicity is far more appropriate.").

Moreover, Novell's Proposed Instruction No. 14 mischaracterizes the Court's ruling in several ways. First, Novell twice replaced the term "significantly contributed" with "reasonably capable" or "reasonably capable of contributing significantly"—and, in a bit of sharp practice,

never even discloses that Novell altered the Court's phrase with one that Novell prefers. These improper "edits" to the Court's ruling give the erroneous impression that this Court rejected the "significantly contributed" standard and adopted the "reasonably capable" standard, when the Court did no such thing.

In a similar – and also undisclosed – alteration, at the end of Proposed Instruction 14, Novell amended the Court's phrase "including the condition of other ISVs and applications" (699 F. Supp. 2d at 750), to now read "including the condition of other applications and potential competitors." Likewise, the Court's language – "Novell has no obligation to create some 'hypothetical market place,' in which none of the other ISVs or application had been weakened by anticompetitive conduct" (699 F. Supp. 2d at 749), has been altered by Novell to now read: "in which none of the other potential competitors or applications had been weakened by anticompetitive conduct . . ." Apparently, Novell would like the jury to consider the impact of Microsoft's alleged anticompetitive conduct on "potential competitors" and how they somehow became "weakened" before they were actual competitors.[10] Novell's attempted edits of this Court's ruling constitute an improper attempt by Novell to lessen its burden at trial and broaden the scope of this case.

Finally, it is unclear what Novell means by the instruction to "consider Microsoft's conduct as a whole." Such an instruction is not included in the Model Antitrust Instructions, nor is it supported by any of the authorities cited by Novell. This Court and the Fourth Circuit have

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[10] Indeed, Novell's attempted revision of the Court's holding is a tacit admission that, absent amending the Court's prior decision, Microsoft's conduct challenged in the Government Case that occurred after the conduct allegedly directed by Microsoft at Novell that is at issue in this case, and after March 1, 1996 – when Novell sold both WordPerfect and Quattro Pro – is neither relevant to this action nor appropriate matters on which Novell could seek collateral estoppel effect. *See In re Microsoft,* 699 F. Supp. 2d at 750 (holding that Novell must prove that the "conduct that harmed [Novell's] software applications contributed significantly to Microsoft's monopoly in the PC operating system market considering all the characteristics of that market *at the time*, including the condition *of other ISVs and applications*") (emphasis added).

already narrowed this case to three specific allegedly anticompetitive acts. *In re Microsoft Corp.,* 699 F. Supp. 2d at 743, 751-52; *Novell*, 2011 WL 1651225, at *8. Those are the only acts that can properly be considered by the jury in determining whether Novell has proven that Microsoft engaged in anticompetitive conduct directed at Novell's applications. *Dunne v. Libbra*, 448 F.3d 1024 (8th Cir. 2006) (court properly refused to instruct the jury on an unpleaded claim which was first advanced by the party at the jury instruction conference); *see also* Section D(1) above and Microsoft's objections to the admission of evidence concerning its allegedly anticompetitive conduct aimed at other competitors and applications. In fact, these are the only three acts to which Novell pointed when opposing Microsoft's October 7, 2009 motion for summary judgment. (*See* Novell's November 13, 2009 Memorandum of Law in Opposition to Microsoft's Motion for Summary Judgment, pp. 9-18; *see also* Novell's Collateral Estoppel Mem. at 3 (discussing these three alleged acts and none other).

In contrast to Novell's Proposed Instructions No. 12 and 14, Microsoft's Proposed Instruction No. 13 accurately informs the jury that "[o]ur antitrust laws do not make it unlawful to obtain or maintain a monopoly. It is entirely lawful for a company to obtain and maintain a monopoly if that company has done so through good business decisions, the exercise or superior foresight or skill, development of a better product, or even good luck." Model Antitrust Instructions, at C-26 to C-30; *Trinko*, 540 U.S. at 407. In addition, Microsoft's Proposed Instruction No. 13 properly and fairly explains the meaning of the term "anticompetitive conduct" and informs the jury that for conduct to be anticompetitive, it must have been undertaken for no legitimate business reason. Microsoft further proposes to instruct the jury about the established principle of antitrust law that a company has no duty to aid or otherwise cooperate with its competitors. *Aspen Skiing,* 472 U.S. at 600-01, 610-11; *Four Corners*, 582 F.3d at 1221; *Christy Sports*, 555 F.3d at 1196-97. *See* discussion in Section D(1) above.

E. Novell's Proposed Preliminary Instruction No. 15: "Injury and Causation"

Microsoft objects to Novell's Proposed Instruction No. 15 on the following grounds:

1) any instruction regarding damages is premature and should not be given as part of the

preliminary instructions; and 2) the proposed instruction is not tailored to Novell's claims in this

case and is, therefore, overly general and misleading.

Novell cannot establish liability on the part of Microsoft and ask the jury to award

damages until and unless Novell has proven all of the elements of its claim, including injury, by

a preponderance of the evidence. *In re Microsoft Corp.*, 699 F. Supp. 2d at 744, 747-48; *Aspen*

Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1522-23 (10th Cir. 1984) ("[I]njury

is an essential element that plaintiff must prove to recover under antitrust laws."); *World of*

Sleep, Inc. v. Stearns & Foster Co., 525 F.2d 40, 43 (10th Cir. 1975) ("It is well established that

an essential element for recovery under antitrust laws is that the claimant be injured or damages,

and a violation of the Act without resultant injury is not enough."). Novell's Proposed

Instruction No. 15 is potentially confusing and misleading to the jury because it discusses injury

in the context of determining damages and prematurely informs the jury about consideration of

damages before any liability has been determined.

Moreover, any instructions regarding the injury elements of Novell's claim should be

modified in light of Novell's "unique § 2 theory." *In re Microsoft Corp.*, 699 F. Supp. 2d at 748.

For that reason, Microsoft has proposed its own Instruction Numbers 14 ("Injury to Novell") and

15 ("Injury to the PC Operating System Market"). Microsoft's Proposed Instructions 14 and 15

clarify and instruct the jury about the two distinct types of injury that Novell must prove in this

case. *Id*. at 743-750.

F.   Novell's Proposed Preliminary Instruction No. 16: "Damages"

Microsoft objects to the use of Novell's Proposed Instruction No. 16 because, as stated above, any preliminary instruction regarding damages is premature. Moreover, although this proposed instruction is taken verbatim from the Model Antitrust Instructions, the model instructions regarding damages are general and need to be modified to suit the facts and theories of this case. As explained in the Notes to Model Antitrust Instruction 2 (F-12), "these model instructions should function as rough guides only. The instructions should be drawn to reflect plaintiff's damage theory . . . . The measure of damages depends on the type of injury. . . . Therefore, these instructions should be modified to fit the specific damage theories at issue in each case." *Id*. at F-13.

Novell's Proposed Instruction No. 16 generally and vaguely instructs the jury that "[i]f you find that Microsoft violated the antitrust laws and that this violation caused injury to Novell, then you must determine the amount of damages, if any, Novell is entitled to recover." Of course, this proposed instruction oversimplifies and misstates Novell's burden of proof in this case. As discussed above, the preliminary jury instructions should be tailored to the specific elements of Novell's claim. Because Novell has failed to do so, its proposed instruction on damages is improper and inappropriate. In addition, Novell's Proposed Instruction No. 16 fails to provide additional instructions covered in the Model Antitrust Instruction concerning important issues relating to damages, including that Novell bears the burden to prove the amount of its damages, that the jury cannot award any damages based on speculation, that Novell bears the burden to disaggregate any losses suffered by Novell's products not attributable to Microsoft's allegedly anticompetitive conduct and that no inference regarding liability should be drawn from the damages instructions.[11]

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[11] These instructions will be covered in Microsoft's proposed final jury instructions.

G. **The Preliminary Instructions Should Include Microsoft's Proposed Instruction No. 16 Regarding the Government Case.**

To the extent that Novell obtains collateral estoppel effect on any Findings of Fact from the Government Case, a preliminary instruction is necessary to put that case into proper context and provide guidance on how to apply or consider the Findings of Fact when considering Novell's claim in this case. Microsoft's Proposed Instruction No. 16 seeks to do just that.

Without adequate instruction, the jury may attribute undue significance to the Findings of Fact. The Tenth Circuit has cautioned that "[j]uries are likely to give disproportionate weight to such findings of fact because of the imprimatur that has been stamped upon them by the judicial system." *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002) (*citing Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993). In *Personnel Dept., Inc. v. Professional Staff Leasing Corp.*, 297 Fed. Appx. 773, 2008 WL 4698479, *13 (10th Cir. Dec. 10, 2008), the court held that the district court's admission of prior judicial opinions was not an abuse of discretion where the district court also gave a jury instruction that provided guidance on how to consider the judicial opinions and underscored that they did not control the jury's resolution of a key factual issue in the case.

Likewise, Microsoft's Proposed Instruction 16 would help the jury understand the background and context for the Findings of Fact, as well as the purposes and limitations of such Findings. Specifically, Microsoft's Proposed Instruction 16 properly informs the jury about the following important points:

1) the findings in the government case do not include any findings that Microsoft obtained its monopoly in the PC operating system market by means of anticompetitive conduct;

2) the government never contended that Microsoft engaged in any anticompetitive action against Novell, WordPerfect or Quattro Pro or that Microsoft engaged in any anticompetitive conduct in the markets for word processing software or spreadsheet software; and

3) the government did not allege that Microsoft's conduct directed at WordPerfect or Quattro Pro contributed in any way to Microsoft's maintenance of its monopoly in the market for PC operating systems.

These instructions are neutral, accurate and fair. Without such instructions, the jury may be confused about what significance the Findings of Fact should have for the decisions they need to make in this case. For example, the jury may mistakenly conclude that Judge Jackson's findings mean that Microsoft engaged in unlawful, monopolistic behavior toward Novell's products when, in fact, the Government Case was not based on any conduct allegedly directed at Novell or its products, but rather pertained to conduct in other markets directed at different companies and products in a later time period. It is critical, therefore, that the jury be instructed regarding the proper context and limitations of Judge Jackson's findings.

CONCLUSION

For all of the foregoing reasons, Microsoft requests that the Court use Microsoft's Proposed Instructions, and reject Novell's Proposed Instructions.

Dated: September 12, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2011, I caused and true and correct copy of the

foregoing **MICROSOFT'S MEMORANDUM OBJECTING TO NOVELL'S PROPOSED**

PRELIMINARY JURY INSTRUCTIONS AND IN SUPPORT OF MICROSOFT'S

PROPOSED PRELIMINARY JURY INSTRUCTIONS to be filed with the Clerk of Court

using the CM/ECF system, which will send notification of such filing to the following:

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