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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

NOVELL, INC.,

Plaintiff,

-v-

MICROSOFT CORPORATION,

Defendant.

MEMORANDUM IN SUPPORT OF
MICROSOFT'S PROPOSED JURY
INSTRUCTIONS AND IN OPPOSITION
TO NOVELL'S PROPOSED JURY
INSTRUCTIONS

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

REDACTED VERSION

September 26, 2011

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Novell, Inc. (“Novell”) has submitted proposed jury instructions that would (i) eviscerate this Court’s 2010 decision about the elements Novell must prove in order to prevail on its sole remaining claim in this action, (ii) strip away the causation requirement (*i.e.*, that Novell prove that Microsoft’s allegedly anticompetitive conduct caused injury to WordPerfect and Quattro Pro and also “contributed significantly” to maintenance of Microsoft’s monopoly in the PC operating system market), and (iii) enable Novell to recover damages if the jury finds that Microsoft violated the antitrust laws in the Government Case and that Novell was injured as a result of that violation.¹ Novell claims that it should be able to accomplish all of these things because it supposedly is adhering to the American Bar Association Section of Antitrust Law, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES (2005) (“ABA Model Instructions”), which were prepared for use in the usual antitrust case, where a plaintiff seeks to recover for anticompetitive conduct in the market in which its products competed. To Microsoft’s knowledge, there has never been a jury trial in the 120 years since enactment of the Sherman Act in which a private plaintiff seeks damages for conduct that allegedly harmed its products but

¹ The parties have reached agreement on Instructions 2-8 of Microsoft’s September 23, 2011 Proposed Preliminary Jury Instructions (“Microsoft’s Preliminary Jury Instructions”), attached as Exhibit A to the September 26, 2011 Declaration of Steven Holley (“Holley Declaration”) filed herewith.) Instructions 1 and 9-14 of Novell’s September 19, 2011 Proposed Preliminary Jury Instructions (“Novell’s Preliminary Jury Instructions”), attached as Exhibit B to the Holley Declaration, are incorrect in fundamental respects. For the reasons explained in this memorandum, the Court should instead adopt Instructions 1 and 9-13 of Microsoft’s Preliminary Jury Instructions. In addition, Instructions 12-20 of Novell’s September 19, 2011 Proposed Final Jury Instructions (“Novell’s Final Jury Instructions”), also attached as Exhibit B to the Holley Declaration, are likewise incorrect in fundamental respects. For the reasons explained in this memorandum, the Court should instead adopt Instructions 19-37 of Microsoft’s September 19, 2011 Proposed Final Jury Instructions (“Microsoft’s Final Jury Instructions”), attached as Exhibit C to the Holley Declaration. The parties have not yet reached agreement on the remainder of the proposed final jury instructions, which address less controversial issues, but Microsoft remains hopeful that such agreement will be possible.

where the purported harm to competition took place in a market in which those products did not compete.

Microsoft's proposed jury instructions accurately describe the elements Novell must prove in order to prevail on its sole remaining claim in this action, which this Court has stated is "unique." These instructions address Novell's burden of establishing that (i) Microsoft engaged in anticompetitive conduct that harmed Novell's WordPerfect word processing application and Quattro Pro spreadsheet application, and (ii) that the very same conduct also contributed significantly to Microsoft's maintenance of its monopoly in the PC operating system market. Indeed, Microsoft's proposed instructions adhere closely to this Court's March 3, 2010 decision on Microsoft's motion for summary judgment, which set forth clearly what Novell must prove in order to prevail on the claim asserted in Count I of the Complaint. It would be clear error to fail to instruct the jury that Novell cannot prevail unless it shows that the three allegedly anticompetitive acts *caused* harm to WordPerfect and Quattro Pro and to competition in the PC operating system market.

Novell's proposed instructions would strip away the important causation requirement. Novell's proposed instructions also ignore well-established principles of antitrust law concerning the right of one company (even a "monopolist") to refuse to cooperate with or assist its competitors that this Court has identified. All three of the alleged anticompetitive acts survived summary judgment only because this Court ruled that they fit within a narrow exception to the usual rule. That exception applies, if at all, only if Novell proves the facts necessary to fit within its boundaries. Novell completely ignores all of this.

First, Novell asks the Court to instruct the jury that if "Microsoft unlawfully maintained monopoly power in [the PC operating system] market by engaging in anticompetitive

conduct”—directed at *any* competitor —then Novell can recover treble damages so long as Novell can show that it “was injured in its business or property because of Microsoft’s anticompetitive conduct.” (Novell’s Preliminary Jury Instruction 10; Novell’s Final Jury Instruction 13.) This completely disconnects the alleged injury to Novell from the specific conduct at issue in the case, and would allow Novell to get damages on account of other conduct in other markets directed at other competitors. This is not only wrong as a matter of law and logic, but seeks to overrule this Court’s decision last year that “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*.” *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 748 (D. Md. 2010) (emphasis in original).

Second, Novell’s proposed jury instructions entirely ignore the limited nature of the exception provided in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to the general principle that one company—even a monopolist—has no duty to cooperate with its competitors. In order to fall within the narrow *Aspen Skiing* exception, Novell must prove (i) that each of Microsoft’s three allegedly anticompetitive acts constituted the termination of a pre-existing and profitable relationship between the parties, and (ii) that each of those acts lacked any valid business justification. Instead, Novell asks the Court to instruct the jury to assess each allegedly anticompetitive act and balance Microsoft’s business justifications for the acts against Novell’s allegations that the acts caused anticompetitive harm. Such an instruction turns the law on its head, essentially creating a presumption of illegality whenever a monopolist refuses to cooperate with a competitor. The law is firmly to the contrary. If the jury finds that Microsoft had a legitimate justification for its decision to withdraw support for the namespace extension application programming interfaces (“APIs”), its decision not to grant Novell an

exemption from the requirements of the Windows 95 logo licensing program, and its alleged decision not to include custom print processor functionality in Windows 95, then the inquiry is over and Novell cannot prevail as a matter of well-established law.

Third, Novell’s proposed jury instructions seek to dilute substantially its burden to prove a causal connection between Microsoft’s allegedly anticompetitive conduct toward WordPerfect and Quattro Pro and maintenance of Microsoft’s monopoly in the PC operating system market. To recover on its sole remaining claim in this action, Novell must prove—as this Court has plainly stated—that the three allegedly anticompetitive acts directed at WordPerfect and Quattro Pro (i) harmed those office productivity applications and also (ii) contributed significantly to the maintenance of Microsoft’s monopoly in the PC operating system market. *Novell*, 699 F. Supp. 2d at 748-50. Novell’s proposed jury instructions apply the wrong causation standard, asking the Court to 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—not that such conduct actually had any significant impact. (Novell’s Final Jury Instruction 14.) This is the “edentulous test for causation” reserved for government equitable enforcement actions.

As this Court has already held, that “edentulous test for causation” *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001), applies in “an equitable enforcement action” brought by the U.S. Department of Justice, and not in “an action for [treble] money damages” by a private party such as Novell. *Novell*, 699 F. Supp. 2d at 748. Rather than relying on purely theoretical effects that might materialize at some indefinite point in the future, Novell

must establish—under one of the two theories set out in its Complaint²—that Microsoft’s allegedly anticompetitive conduct towards WordPerfect and Quattro Pro contributed significantly to Microsoft’s maintenance of its monopoly in the PC operating system market. Microsoft’s proposed jury instructions accurately describe the causation standard Novell must meet, consistent with this Court’s prior rulings and well-established antitrust law.

Novell’s proposed jury instructions on damages are similarly flawed. Novell asks the Court to instruct the jury that it can “make reasonable estimates in calculating damages” (Novell’s Final Jury Instruction 20), but fails to instruct the jury that Novell bears the burden to establish, among other things, that (i) Microsoft’s allegedly anticompetitive conduct was a material cause of Novell’s alleged injury, (ii) damages may not be awarded in an antitrust case based on speculation, (iii) Novell must disaggregate any factors unrelated to Microsoft’s allegedly anticompetitive acts that caused the harm for which Novell seeks damages, including Novell’s many business mistakes, and (iv) the reliability of the opinions of its damages expert, including the reasonableness of the assumptions in the models that underlie his damages analysis.

Finally, as to any matters on which Microsoft is collaterally estopped, Novell asks the Court to instruct the jury that it can rely on the conduct at issue in the Government Case “for all purposes in this case” and that “it is up to [the jury] to determine whether [or] not any of these facts have any significance for any aspect of this case.” (Novell’s Preliminary Jury Instruction 14.) That is a blatant invitation for the jury to engage in lawless behavior, awarding treble

² As further shown below (pp. 30-31, *infra*), Novell’s proposed jury instructions make no mention of either of Novell’s theories of harm to competition in the PC operating system market. Novell may have lost enthusiasm for these theories, but it cannot walk away from them. Indeed, Novell cannot amend its Complaint because Novell released any claim other than the precise ones set forth in the Complaint in 2004. *See* p. 33, *infra*.

damages based on conduct that had nothing to do with (i) the three allegedly anticompetitive acts at issue in this case, and (ii) WordPerfect and Quattro Pro. In contrast, Microsoft's proposed jury instruction about the Government Case properly tells the jury, among other things, that (i) the Government Case pertained to conduct in other markets, directed at different companies and products, in a later time period than the time period at issue in this action; and (ii) the Government Case did not involve Novell, WordPerfect or Quattro Pro or any claim that suites of office productivity applications constituted a "middleware" threat to Microsoft's monopoly in the PC operating system market. Such a limiting instruction is necessary to prevent Novell from piggy-backing on harm allegedly inflicted by Microsoft on other companies and other products—precisely what the Court has said Novell may not do.³ Without Microsoft's proposed instructions, the jury could come to believe that it is free to award Novell billions of dollars in damages based on Microsoft's conduct at issue in the Government Case.

BACKGROUND

On November 12, 2004, Novell filed its Complaint asserting six counts under Sections 1 and 2 of the Sherman Act, all of which were based on harm allegedly suffered by Novell's WordPerfect word processing application and Quattro Pro spreadsheet application in the period June 1994 to March 1, 1996 (the latter date being the date when Novell sold those

³ In a motion to be filed later this week, Microsoft will also propose an instruction on spoliation that should be included in the final jury instructions to address Novell's deficient document preservation efforts and its spoliation of evidence. As will be detailed in Microsoft's motion, the need for an instruction on spoliation became particularly evident recently when Novell lodged meritless "authenticity" and "foundation" objections to hundreds of documents that Novell produced from its own files during discovery. Novell asserts these baseless objections even though it had already agreed in two court-ordered stipulations that the documents were presumptively authentic under Federal Rule of Evidence 901 and qualify as business records under Federal Rule of Evidence 803(6).

applications). Count I alleges that Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro in order to maintain its monopoly in the PC operating system market. (Compl. ¶¶ 151-55.) The Complaint contends that there is an “applications barrier to entry” protecting Microsoft’s PC operating system monopoly, and that Microsoft “willfully and wrongfully” maintained that monopoly “by engaging in anticompetitive conduct to thwart the development of products that threatened to weaken the applications barrier to entry, including Novell’s WordPerfect word processing application and its other office productivity applications.” (Compl. ¶ 153.)

Count I is not a typical Section 2 claim. Instead, Novell “assert[s] claims for damage inflicted upon Novell’s software applications through the prism of the operating system market.” *Novell*, 699 F. Supp. 2d at 736. This Court has observed that Count I is “[h]ybrid in nature . . . , ingeniously designed to survive Microsoft’s anticipated limitations defense by permitting Novell to argue that the pendency of the government case against Microsoft—which was based upon Microsoft’s antitrust violations in the operating system market—tolled” the statute of limitations. *Id.*

The Complaint sets forth two theories as to how Microsoft sought to harm WordPerfect and Quattro Pro in order to protect its PC operating system monopoly. First, Novell alleges that its AppWare and OpenDoc technologies, when integrated with Novell’s WordPerfect word processing software, were a “middleware” threat to Windows because they exposed APIs that would enable software developers to write general-purpose applications using WordPerfect as a platform. (Compl. ¶¶ 46-51.) Second, Novell alleges that WordPerfect and Quattro Pro were so popular that their availability on other operating systems would provide a bridge across the “applications barrier to entry.” (Compl. ¶ 52.) Of course, Novell cannot

identify a single general-purpose application that was ever written using WordPerfect as a platform, nor can Novell explain why the fact that WordPerfect was already available on operating systems such as UNIX, OS/2 and Mac OS did not cause users to migrate to those other operating systems. That may explain why these two theories are not mentioned anywhere in Novell's proposed jury instructions.

In 2009, when opposing Microsoft's motion for summary judgment, Novell identified three and only three allegedly anticompetitive acts by Microsoft that survived for trial: "(1) Withdrawing access to information about, and otherwise changing course regarding, the Windows 95 namespace extensions, thereby delaying and impairing Novell's development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95"; (2) "Misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect's costs and decreasing its functionality";⁴ and (3) "Refusing to grant a Windows 95 logo license for certain Novell software applications." *Novell*, 699 F. Supp. 2d at 743. Based on those three allegedly anticompetitive acts, the Court permitted Novell to proceed to trial under the limited exception created by the U.S. Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to a monopolist's right to refuse to cooperate with its rivals. *Novell*, 699 F. Supp. 2d at 745-46. In its August 8, 2011 motion for collateral estoppel, Novell again affirmed that the claim asserted in Count I of the Complaint was based on the same three allegedly anticompetitive acts. (August 8, 2011 Memorandum of Law in Support of Novell's Renewed Motion Seeking Collateral Estoppel (Docket #61) ("Novell's Collateral Estoppel Mem.") at 3.) In an unexplained change of course, in its September 19 proposed jury instructions, Novell

⁴ Novell's allegations regarding the lack of custom print processor functionality in Windows 95 appear nowhere in the Complaint. They are not properly part of this case.

asserts four types of allegedly anticompetitive conduct, including the allegation that Microsoft “entered into agreements with computer manufacturers that made it harder for Novell to sell its business productivity applications directly to those computer manufacturers.” (Novell’s Preliminary Jury Instruction 1, at p.3.) Of course, that was the claim asserted in Count VI of the Complaint, which was dismissed by the Court long ago.⁵

Novell has been equally erratic in terms of articulating the theory of how Microsoft’s allegedly anticompetitive acts directed at WordPerfect and Quattro Pro substantially contributed to maintenance of Microsoft’s PC operating system monopoly. In its August 8, 2011 memorandum in support of its renewed collateral estoppel motion, Novell sought to discard the two theories of harm to competition in the PC operating system market alleged in the Complaint, arguing instead that “PerfectOffice, developed by Novell, constituted (or nearly constituted) ‘middleware,’ which could have been effectively used with any operating system and that therefore would have ‘commoditized’ Windows 95 and undermined the monopoly Microsoft enjoyed in the operating system market.” (Novell’s Collateral Estoppel Mem. at 3.)⁶

There are several problems with Novell’s last-minute attempt to switch theories of competitive harm in the PC operating system market. First, the Complaint does not include PerfectOffice in its definition of “office productivity applications.” That term is used to refer only to word processing applications and spreadsheet applications. (Compl. ¶ 24.) Second, the Complaint does not seek to define a market for suites of office productivity applications.

⁵ The dismissal was affirmed by the Fourth Circuit.

⁶ This effort to switch horses is doubtlessly motivated by the fact that Novell’s antitrust expert, Roger Noll, rejected the notion that WordPerfect was “middleware” at his deposition. (Deposition of Roger Noll, taken September 10, 2009, at pp. 135-36, attached as Exhibit D to the Holley Declaration.)

Instead, it says that the only three markets relevant to this action are PC operating systems, word processing applications and spreadsheet applications. (Compl. ¶¶ 25-28.) Third, despite being 68 pages long, the Complaint never identifies PerfectOffice as any sort of “middleware” threat to Windows. Novell cannot make PerfectOffice, a product that is mentioned only in passing in the Complaint, the centerpiece of its case on the eve of trial. In fact, as explained below (pp. 32-33, *infra*), Novell released Microsoft from any claim involving PerfectOffice in a 2004 settlement agreement with Microsoft.

ARGUMENT

I. Novell’s Jury Instructions Misstate Well-Established Principles of Antitrust Law and Mischaracterize Novell’s Claim in this Action.

Novell’s Preliminary Jury Instructions 1 and 9-13 and its Final Jury Instructions 12-17 conflict with well-established principles of antitrust law and this Court’s prior decisions.

A. Novell’s Jury Instructions Fail to Instruct the Jury that the Conduct that Allegedly Harmed WordPerfect and Quattro Pro Must Also Have Harmed Competition in the PC Operating System Market.

Novell’s proposed jury instructions distort the elements of Novell’s claim that Microsoft illegally maintained its monopoly in the PC operating system market. To prevail on a claim under Section 2 of the Sherman Act, a plaintiff must prove that defendant possessed monopoly power in the relevant market and must also “prove not only that the defendant’s conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market.” *Novell*, 699 F. Supp. 2d at 748. To do so, plaintiff “must establish that it suffered injury caused by conduct which damaged the competitive process itself.” *Id.* In most cases, this is not controversial because plaintiff is a consumer or competitor in the market in which trade was allegedly restrained.

Novell's claim, however, is unique—as this Court has recognized.⁷ Novell alleges that Microsoft engaged in three allegedly anticompetitive acts that harmed WordPerfect and Quattro Pro: (i) Microsoft's October 1994 decision to withdraw support for the namespace extension APIs in Windows 95, (ii) Microsoft's April 1995 decision not to grant Novell an exemption to the requirements of the Windows 95 logo licensing program, and (iii) Microsoft's alleged decision in June 1995 not to include support for custom print processors in Windows 95.⁸ Novell does not contend that these three allegedly anticompetitive acts allowed Microsoft to monopolize purported markets for word processing applications and spreadsheet applications because such a claim would be barred by the statute of limitations (as Counts II-V were). Instead, Novell must prove that Microsoft engaged in this specific conduct in order to maintain its monopoly in the PC operating system market—a market in which neither WordPerfect nor Quattro Pro competed. Novell must therefore prove at trial the existence of some nexus between acts that allegedly harmed WordPerfect and Quattro Pro and harm to competition in the PC operating system market.

⁷ Novell argues that Microsoft “crafted dozens of instructions that deviate markedly from the [ABA] Model Instructions” (Novell’s Memorandum in Support of Its Jury Instructions (“Novell Br.”) at 1), and that Microsoft’s “hand-crafted instructions badly jumble” the elements of harm to competition and harm to Novell (Novell Br. at 4). The unique nature of the claim asserted in Count I of the Complaint necessitates departures from the ABA Model Instructions, and slavish adherence to the ABA Model Instructions would be error because it would take no account of the peculiar circumstances of this case.

⁸ Novell’s Preliminary Jury Instruction 1 lists four categories of allegedly anticompetitive conduct, rather than the three allegedly anticompetitive acts at issue in this action, including that Microsoft “entered into agreements with computer manufacturers that made it harder for Novell to sell its business productivity applications directly to those computer manufacturers.” (Novell’s Preliminary Jury Instruction 1, at p.3.) Even if Novell could add new allegedly anticompetitive acts at this late date (and it cannot), Novell cannot rely on allegations encompassed by Count VI of the Complaint (*see* Compl. ¶ 175), which has been dismissed. *Novell*, 699 F. Supp. 2d at 750-53.

This Court has recognized that Novell's remaining claim is "more complicated" than the traditional Section 2 claim by virtue of its "unique § 2 theory," which is why the Court explicitly held that "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" by "contributing significantly to Microsoft's monopoly" in that market. *Novell*, 699 F. Supp. 2d at 748-50; see also *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009) ("To succeed in a claim for monopolization or its attempt, [plaintiff] must show not only that he was harmed by [defendant's] conduct, but that the injury he suffered involved harm to competition."). As a matter of logic, this is unquestionably correct.

Novell nevertheless argues for a complete reversal of this Court's prior decision. Novell asserts that requiring it to prove that the same conduct that allegedly harmed WordPerfect and Quattro Pro also harmed competition in the PC operating system market is an "additional element" that is "unprecedented." (Novell Br. at 14.) Novell contends that "[i]f the jury finds that Microsoft unlawfully maintained its monopoly power 'by engaging' in anticompetitive conduct, it will have already decided that there is a sufficient 'causal link' between the asserted conduct and its effect on the competitive process." (Novell Br. at 14.) That is simply wrong and would eliminate any requirement that Novell prove causation. Even if Novell proves that the conduct at issue harmed WordPerfect and Quattro Pro, that would not establish any "causal link" with harm to competition in the PC operating system market. That is why "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*." *Novell*, 699 F. Supp. 2d at 748 (emphasis in original).

In fact, what Novell is suggesting is quite radical: Novell seeks to disconnect entirely the question of whether Microsoft illegally maintained its monopoly in the PC operating system market from the question of whether the allegedly anticompetitive acts directed at WordPerfect and Quattro Pro made a contribution—substantial or otherwise—to such monopoly maintenance. Thus, Novell asks the Court to instruct the jury that its “job will be to determine . . . whether Microsoft unlawfully maintained monopoly power in the market for PC operating systems by engaging in anticompetitive conduct and, if so, whether that anticompetitive conduct was a material cause of injury to Novell’s office productivity applications.” (Novell’s Preliminary Jury Instruction 10; Novell’s Final Jury Instruction 13.) This instruction would allow the jury to find for Novell based on conduct in the Government Case so long as the jury also finds that such conduct hurt Novell’s office productivity applications.⁹ According to Novell, it could recover for anticompetitive conduct directed entirely at other competitors, so long as it shows that such anticompetitive conduct somehow also injured WordPerfect and Quattro Pro. That is 180-degrees wrong, and Novell’s approach would entail exactly the sort of piggy-backing this Court has already ruled to be impermissible. *Novell*, 699 F. Supp. 2d at 750.

The requirement that Novell show that the Microsoft conduct that allegedly harmed WordPerfect and Quattro Pro also harmed competition in the PC operating system market is not only the law of the case, it is predicated on the fact that the harm alleged by a plaintiff in a Section 2 case must “flow[] from that which makes defendant[’s] acts unlawful.”

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). If the three allegedly

⁹ PerfectOffice is not part of this case for several reasons. See pp. 32-33, *infra*. Further, in its Complaint, Novell carefully defined “office productivity applications” to include “[w]ord processing and spreadsheet applications.” (Compl. ¶ 24.) The definition omits any mention of suites such as PerfectOffice.

anticompetitive acts directed at WordPerfect and Quattro Pro did not substantially contribute to the maintenance of Microsoft's monopoly in the PC operating system market, *i.e.*, that which would make the acts unlawful, then Novell has no cognizable antitrust claim.

Novell tries to escape this conclusion by arguing that "antitrust injury is an element of proof independent of the substantive Sherman Act violation." (Novell Br. at 15.) That argument has no basis in law. In *Brunswick*, for example, plaintiffs claimed that defendant's acquisition of failing bowling alleys deprived them of profits they would have realized had those bowling alleys been allowed to fail. The U.S. Supreme Court held that defendants were not liable under the antitrust laws because plaintiffs' alleged injuries did not "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489. It is clear from *Brunswick* that without antitrust injury, there is no cognizable claim under the antitrust laws. *See id.* at 488-89. As a result, if Novell cannot prove that the Microsoft conduct that allegedly harmed WordPerfect and Quattro Pro also harmed competition in the PC operating system market, then there can be no liability under Section 2 of the Sherman Act.¹⁰

Were there any doubt about Novell's design, it is eliminated by the complete lack of specificity in Novell's proposed jury instructions about the Microsoft conduct that Novell alleges to be anticompetitive. For example, Novell asks the Court to instruct the jury as follows:

¹⁰ Novell contends that the Tenth Circuit decision in *Four Corners Nephrology* "confirms that antitrust injury is an element of proof independent of the substantive Sherman Act violation" because the Court observed that it found the question of antitrust injury "equally and independently problematic." (Novell Br. at 15.) Novell's argument makes no sense. While the Court may also have had concerns about antitrust injury, there is no doubt that it adopted precisely the test for imposing Section 2 liability that Microsoft advocates: "To succeed in a claim for monopolization or its attempt, [plaintiff] must show not only that he was harmed by [defendant's] conduct, but that the injury he suffered involved harm to competition." *Four Corners Nephrology*, 582 F.3d at 1225.

“If you find that Microsoft engaged in anticompetitive conduct, then you will be asked to decide if Novell was injured because of that anticompetitive conduct.” (Novell’s Preliminary Jury Instruction 12; Novell’s Final Jury Instruction 17.) Novell conspicuously avoids identifying any specific conduct, referring abstractly to whether “Microsoft engaged in anticompetitive conduct,” without regard to whether such conduct (i) had any effect on competition in the PC operating system market, and (ii) is even the same conduct that Microsoft supposedly directed at WordPerfect and Quattro Pro. Such intentionally vague instructions should not be allowed to obscure the fact that Novell cannot recover unless it can prove that Microsoft engaged in anticompetitive conduct that not only injured WordPerfect and Quattro Pro but also substantially contributed to maintenance of Microsoft’s monopoly in the PC operating system market.

It is nothing short of remarkable that there is no mention in Novell’s proposed jury instructions of WordPerfect and Quattro Pro—the only products that, according to the Complaint, were harmed by Microsoft’s conduct. This demonstrates, once again, that Novell’s goal is to avoid instructing the jury about the “specific Microsoft conduct” that not only harmed WordPerfect and Quattro Pro but also “caused anticompetitive harm in the PC operating system market.” *Novell*, 699 F. Supp. 2d at 748. In contrast, Microsoft’s proposed jury instructions properly summarize the three allegedly anticompetitive acts upon which Novell is proceeding to trial. (*Compare* Microsoft’s Preliminary Jury Instruction 9 and Microsoft’s Final Jury Instruction 23, *with Novell*, 699 F. Supp. 2d at 743 (listing the anticompetitive acts alleged by Novell).) It is only by looking at the specifics of Novell’s claim that the jury can determine whether Novell has met its burden of proving that the allegedly anticompetitive acts both harmed WordPerfect and Quattro Pro and substantially contributed to the maintenance of Microsoft’s monopoly in the PC operating system market.

Novell's jury instructions also fail to apprise the jury of the time period that is relevant to the claim asserted in Count I. Novell argues that the jury should not be bound to any particular time period because "[e]ven after Novell sold its office productivity applications, Microsoft engaged in conduct to limit the distribution, and the development, of applications that threatened to lower the applications barrier to entry protecting Microsoft's monopoly power." (Novell Br. at 9.) That argument is emblematic of the problems with Novell's approach, which seeks to enable Novell to recover for "anticompetitive harm caused by conduct directed at third parties"—precisely what this Court has said Novell cannot do. *Novell*, 699 F. Supp. 2d at 750. Once Novell sold WordPerfect and Quattro Pro, it could no longer be harmed by anything Microsoft allegedly did to harm those applications. Indeed, Novell's own expert on damages confirms that the relevant period for this case spans from 1994 to 1996—the period during which Novell owned WordPerfect and Quattro Pro. (Expert Report of Frederick R. Warren-Boulton, dated May 1, 2009 at p.5 ("Most importantly, for this proceeding, as described by Mr. Alepin and Dr. Noll, Microsoft engaged in various anticompetitive acts during the 1994 to 1996 time period.") (relevant excerpts attached as Ex. E. to the Holley Declaration)).

B. Novell's Jury Instructions Incorrectly Define "Exclusionary Conduct."

Novell bears the burden to prove that specific Microsoft conduct directed at WordPerfect and Quattro Pro was exclusionary, meaning that the conduct was predicated "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605. The three allegedly anticompetitive acts relied on by Novell (concerning the namespace extension APIs in Windows 95, the Windows 95 logo licensing program, and custom print processing functionality in Windows 95) are all predicated on the argument that Microsoft was required to share its intellectual property and/or product design specifications with Novell.

Novell's jury instructions conflict with well-established antitrust law concerning whether one company has a duty to cooperate with its rivals. It is well established that "as 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.'" *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). This rule applies with equal force to monopolists. *Four Corners Nephrology*, 582 F.3d at 1221 ("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)); *High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) ("As a general rule, a monopolist has no duty to deal with its competitors.").

As the U.S. Supreme Court observed in *Trinko*, it has "been very cautious in recognizing" exceptions to the rule that companies have no duty to assist their competitors "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* at 408. The U.S. Supreme Court has also recognized that the leading case "based on refusal to cooperate with a rival," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, "is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 408-09.

In *Aspen Skiing*, the Supreme Court held that the defendant, which owned and managed three Aspen ski resorts, violated Section 2 when it refused to continue offering a joint ski pass that included access to the plaintiff's resort and even refused to sell lift tickets to the plaintiff at the retail rates available to all other customers. The Court held that the defendant's

conduct was anticompetitive because plaintiff had foregone “short-run benefits and consumer goodwill in exchange for a perceived long-run” monopoly by discontinuing a profitable relationship with the defendant without any valid business justification. *Aspen Skiing*, 472 U.S. at 610-11.

In its decision on Microsoft’s motion for summary judgment, this Court held that Novell’s case could proceed to trial based on the limited exception articulated in *Aspen Skiing* to a monopolist’s right to refuse to cooperate with its rivals. *Novell*, 699 F. Supp. 2d at 745-47. To fit its case within the narrow confines of *Aspen Skiing*, however, Novell will have to establish, among other things, that each of the three allegedly anticompetitive acts (i) constituted the termination of a pre-existing, profitable relationship between Microsoft and Novell and (ii) lacked any valid business justification.

Novell’s proposed jury instructions do not mention Novell’s burden under *Aspen Skiing* to show that each of the three allegedly anticompetitive acts constitutes the termination of a pre-existing, profitable relationship between Novell and Microsoft. As the Tenth Circuit explained two years ago, “[i]n *Aspen Skiing*, the monopolist was willing to jettison a profitable short-term business relationship and deny to a rival the retail prices available to all other consumers” by refusing to sell lift tickets at full price. *Four Corners*, 582 F.3d at 1225. As the Court pointed out in *Four Corners*, “the key fact” permitting liability in *Aspen Skiing* “‘was that the defendant terminated a profitable relationship without any economic justification’ other than an anticompetitive one.” *Id.* By ignoring this requirement, Novell’s proposed jury instructions wrongly suggest that once a monopolist starts cooperating with a competitor, it can never stop. That is not the law.

Novell's proposed jury instructions also fail to instruct the jury that Novell bears the burden of proving that absence of any valid business justification for the three acts at issue. *See Norcen Energy Resource v. Pacific Gas & Elec. Co.*, 1994 U.S. Dist. LEXIS 21347, at *39-40 (N.D. Cal. Sept. 19, 1994) ("Plaintiff's complaint fails to allege defendants' conduct harmed competition and was not justified by legitimate business reasons."). The existence of any valid business justification requires the jury to find in Microsoft's favor with regard to the allegedly anticompetitive act in question. (*See pp. 21-24, infra.*) As a matter of law, Novell cannot prevail if the jury finds that Microsoft had any valid business justification for (i) withdrawing the namespace extension APIs, (ii) not granting Novell an exemption from the requirements of its logo licensing program, or (iii) not including custom print processor functionality in Windows 95.

In an apparent effort to dodge the requirements of *Aspen Skiing*, Novell argues that this case does not involve a "pure unilateral-refusal-to-deal." (Novell Br. at 9 n.23; *see also* Novell Br. at 27.) If what Novell is saying that its claim is similar to the one asserted in *Aspen Skiing*, then Novell must prove its entitlement to rely on the exception stated in that case. If Novell is instead saying that is asserting some sort of business tort claim based on "bait-and-switch" tactics allegedly engaged in by Microsoft, then that claim is not cognizable under the antitrust laws. As the U.S. Supreme Court has held, the antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)); *see also* 3A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 782a (3d ed. 2011) (noting that Section 2 should not be applied to "torts with insignificant market effects or even on

the basis of rather marginal departures from perfect rectitude”).¹¹ Thus, unless Novell can prove that the three allegedly anticompetitive acts fall with the *Aspen Skiing* exception, those acts cannot provide a basis for imposing Section 2 liability, even if the jury concludes the acts were somehow unfair. That is so because “[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.” *Brooke Group*, 509 U.S. at 225; *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1354-55 (Fed. Cir. 1999) (“the Sherman Act does not convert all harsh commercial actions into antitrust violations”).

Microsoft’s Final Jury Instruction 25 properly instructs the jury concerning the general rule that a monopolist has no obligation to cooperate with its competitors. That instruction also instructs the jury about what Novell must prove to fit within the narrow exception to that rule provided by *Aspen Skiing*. (Microsoft’s Final Jury Instruction 25.)

In an attempt to conflate distinct bodies of antitrust law (unreasonable restraint on trade versus unlawful monopoly maintenance), Novell argues that the Court should instruct the jury to adopt a burden-shifting approach in determining whether Microsoft’s conduct was exclusionary. According to Novell, the Court should “instruct the jury that if Novell makes out a *prima facie* case, then Microsoft bears the burden of establishing a non-pretextual, pro-competitive justification for its conduct and, if Microsoft meets its burden in that regard, then the jury should balance the asserted competitive benefits against the competitive harm.” (Novell Br. at 17; Novell’s Final Jury Instructions 15-16.) Novell’s proffered approach is drawn from the

¹¹ Relevant excerpts of the Areeda treatise are attached as Exhibit F to the Holley Declaration.

rule of reason applied in cases under Section 1 of the Sherman Act (Novell Br. at 10, 23),¹² and according to Novell, would require the jury to consider whether Microsoft’s alleged conduct could have “readily achieved [its objectives] by other, reasonably available alternative means that created substantially less harm to competition” and whether Microsoft’s “asserted benefits cannot be used to justify the conduct.” (Novell Br. at 23-34.) This is wrong for at least three reasons.

First, the Tenth Circuit has not adopted such a burden-shifting approach to determine whether a monopolist’s challenged conduct has a valid business justification. In *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540, 1550 (10th Cir. 1995), the Tenth Circuit instead made clear that a “defendant may avoid liability by showing a legitimate business justification for the conduct.” The Tenth Circuit did not then balance the procompetitive benefits and anticompetitive effects of the challenged conduct and attempt to ascertain whether the monopolist could have achieved its objectives through other means less harmful to competition.

Moreover, the two most recent Tenth Circuit cases that address *Aspen Skiing* do not apply a burden-shifting approach of the sort Novell advocates. In *Four Corners Nephrology*, the Tenth Circuit held that plaintiff’s claims failed under *Aspen Skiing* after observing that

¹² Novell’s Final Jury Instruction 15 (Evidence of a Valid Business Purpose) and Novell’s Final Jury Instruction 16 (Balancing the Competitive Effects) rely on Sections A-10, A-11 and A-12 of the ABA Model Instructions, which apply the rule of reason to restraint of trade claims under Section 1 of the Sherman Act. Since Novell’s sole remaining claim, Count I, was brought under Section 2 of the Sherman Act. Microsoft’s Final Jury Instruction 24 (Legitimate Business Purpose) and Microsoft’s Final Jury Instruction 25 (No Obligation to Deal with or Assist Competitors) properly rely on Sections C-36 and C-39 of the ABA Model Instructions, which apply *Aspen Skiing* and its progeny to monopolization claims under Section 2. (Relevant excerpts of Section C of the ABA Model Instructions are attached as Exhibit G to the Holley Declaration.)

defendant “acted as it did merely to keep its practice from becoming so unprofitable that it would exhaust more rapidly than anticipated” and to avoid being left “without the benefit of a local nephrologist.” 582 F.3d at 1225. As the Tenth Circuit stated, “*Aspen Skiing* does not require more economic justification than this to avoid Section 2 liability.” *Id.* No “balancing test” was employed. Likewise, in *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009), the Court held that plaintiff’s allegations did not state a claim under *Aspen Skiing* because there was “no indication that [defendant was] terminating a profitable business relationship” or that the defendant “was motivated by anything other than a desire to make more money for itself.” The Court did not balance the procompetitive benefits and anticompetitive effects of the defendant’s conduct, nor did it require the defendant to demonstrate that its objectives could have been achieved through other means less harmful to competition. *See id.*

Second, courts and commentators have expressly held that in Section 2 cases, a jury is not to balance the procompetitive benefits and anticompetitive effects of a defendant’s conduct once it finds a valid business justification for that conduct. That is, once the jury finds that Microsoft’s allegedly anticompetitive acts were supported by a valid business justification, the inquiry ends there. *See Aspen Skiing*, 472 U.S. at 597, 605; *Multistate Legal Studies*, 63 F.3d at 1550. As the Fifth Circuit held in *Bell v. Dow Chemical Co.*, a jury cannot “weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal.” 847 F.2d 1179, 1186 (5th Cir. 1988). “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.” *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597); *see also* 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772c2 (3d ed. 2011) (“[T]he Court [in *Aspen Skiing*] did not call for any balancing of the social gains from refusing to deal or cooperate

with rivals based on legitimate business purposes against the losses resulting from that refusal. Rather, the Court classified conduct or intention as either lawful or not on the basis of the presence or absence of legitimate business purposes.”). Novell’s proffered burden-shifting approach runs afoul of this precedent.

Third, Novell’s attempt to apply the rule of reason applicable to certain Section 1 claims to a monopolist’s refusal to cooperate with its competitors under Section 2 would be inimical to the purposes of the antitrust laws.¹³ As the U.S. Supreme Court noted in *National Society of Professional Engineers v. United States*, the rule of reason addresses “a problem presented by the language of § 1 of the Sherman Act,” which “says that ‘every’ contract that restrains trade is unlawful.” 435 U.S. 679, 687 (1978). As the Court also noted, the statute “cannot mean what it says,” because if it did, it would outlaw virtually every contract. *Id.* To

¹³ Novell also seeks to instruct the jury that the “Purpose of the Antitrust Laws” 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 lowest prices, the highest quality, and the greatest material progress.” (Novell’s Preliminary Jury Instruction 9; Novell’s Final Jury Instruction 12.) These instructions bear little or no relation to the issues in this action, nor to the elements of Novell’s claim. 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))).

Microsoft’s Final Jury Instruction 19, by contrast, provides a broad overview of the “General Purpose of the Sherman Act,” which covers not only that the “basic purpose of the antitrust laws is to protect, encourage and foster competition,” but also bedrock principles of antitrust law at issue in this action, including (i) that the antitrust laws are intended to protect competition, not competitors, (ii) that all companies, including those with monopoly power, are encouraged to compete vigorously, and (iii) that the antitrust laws prohibit only anticompetitive conduct that prevents businesses from competing with each other on the merits and that harms competition. Unlike Novell’s proposed jury instructions, Microsoft’s Final Jury Instruction 19 provides appropriate context for the jury.

address this problem, the rule of reason was developed in Section 1 cases to determine which restraints of trade are truly anticompetitive. *Id.* at 688.

Novell's claim was brought under Section 2 of the Sherman Act, not Section 1. Importantly, allowing a jury to second-guess the validity of a monopolist's business justifications would chill a monopolist from making changes to its business that may have a collateral adverse impact on its competitors. As the Tenth Circuit observed in *Christy Sports*, "[t]he antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path." 555 F.3d at 1198. At bottom, Novell seeks to turn the rule that a monopolist has no duty to cooperate with its rivals on its head, requiring Microsoft to prove that there was nothing it could have done to achieve its business objectives that would have been less objectionable to Novell. That is exactly contrary to the law.

Indeed, this Court has previously recognized that Microsoft is not required to disclose information to its competitors about an operating system (*e.g.*, Windows 95) under development because to do so would stifle innovation. *Sun Microsystems v. Microsoft Corp.*, 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 *Sun Microsystems*, 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" *Sun Microsystems*, 274 F. Supp. 2d at 745; *see also Daisy Mountain*, 547 F. Supp. 2d at 489 (same). It is lawful for Microsoft to use its "superior knowledge of its own APIs to obtain a 'first mover advantage' in the applications market" because even an alleged monopolist "has the right to gain temporary

benefits from innovations to its own products.” *Sun Microsystems*, 274 F. Supp. 2d at 746; *see also Four Corners*, 582 F.3d at 1221 (holding that 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?”).

C. Novell’s Jury Instructions Misstate the Applicable Causation Standard.

Novell’s proposed jury instructions misstate the causation standard that applies to the claim asserted in Count I of the Complaint. Specifically, Novell asks the Court to instruct the jury that conduct that “excludes ‘nascent,’ or unproven, threats to a monopolist’s market power is the type of conduct that is reasonably capable of contributing significantly to the defendant’s continued monopoly power.” (Novell’s Final Jury Instruction 14.) This instruction is fatally flawed.

To begin with, Novell seeks to subvert this Court’s previous ruling that Novell must prove that Microsoft’s allegedly anticompetitive acts directed at WordPerfect and Quattro Pro “contribut[ed] significantly to [Microsoft’s] continued monopoly power.” *Novell*, 699 F. Supp. 2d at 747-48. Ignoring that ruling, Novell asks the Court to instruct the jury that it need merely show that Microsoft’s allegedly anticompetitive conduct was “reasonably capable of contributing significantly” to Microsoft’s monopoly power. (Novell’s Final Jury Instruction 14; Novell Br. at 20-22.) Microsoft’s proposed jury instructions, on the other hand, adhere closely to the Court’s causation standard: “[t]he relevant inquiry . . . is whether Microsoft’s allegedly anticompetitive conduct caused harm to competition and contributed significantly to Microsoft’s continued monopoly in the market for PC operating systems.” (Microsoft’s Final Jury Instruction 27 (citing *Novell*, 699 F. Supp. 2d at 748); Microsoft’s Preliminary Jury Instruction 12 (same).)

The causation standard proposed by Novell applies to claims for injunctive relief in enforcement actions brought by the Government, not in private actions seeking treble damages. In the Government Case, the D.C. Circuit expressly recognized that it was applying an “edentulous test for causation” and held that, as a result, the Government was not required to show that “Java or Navigator would actually have developed into viable platform substitutes.” *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001). There, the Government only needed to show that “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.* The D.C. Circuit “found a causal connection between Microsoft’s exclusionary conduct and its continuing position in the operating systems market only through inference,” and “expressly did not adopt the position that Microsoft would have lost its position in the [PC operating system] market but for its anticompetitive behavior.” *Microsoft*, 253 F.3d at 79 (citing Findings of Fact, *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 111-12 ¶ 411 (D.D.C. 1999)). This is not, to state the obvious, a government equitable enforcement action.

Where a party seeks treble damages, two-thirds of the damages sought are entirely punitive, and accordingly, no such inference of causation is permitted. 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a. As the district court in the Government Case observed on remand, there must be “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). In a case such as this, it is thus “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.”

3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a. Consequently, it is not enough for Novell to prove that WordPerfect and Quattro Pro were some sort of nascent threat to Microsoft's PC operating system monopoly under a toothless causation standard. To prevail at trial, Novell must meet the more stringent causation test applicable in private treble damages cases.

Novell contends that this argument is based on “a flawed reading of the D.C. Circuit's decision in the Government case” and “a misleading citation to Areeda's *Antitrust Law* treatise.” (Novell Br. at 20.) Neither contention has any merit.

First, Novell attributes great significance to the fact that the D.C. Circuit cited to two older private treble damages cases in discussing its “edentulous” causation standard, *Morgan v. Ponder*, 892 F.2d 1355 (8th Cir. 1989) and *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983). Both of those cases quote a 1978 edition of the Areeda treatise for the proposition that anticompetitive conduct need only “reasonably appear[] capable of making a significant contribution to creating or maintaining monopoly power.” *Morgan*, 892 F.2d at 1363; *Barry*, 724 F.2d at 231. As noted above, subsequent editions of the Areeda treatise clarify that such a lenient causation standard applies only in equitable enforcement actions. *See* 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 650a (“The causal connection between conduct and power can be relatively modest when the only remedy sought is an injunction against continuation of that conduct.”). Indeed, the D.C. Circuit itself explained that it was applying a weaker causation standard than the one generally applicable to Section 2 claims. *Microsoft Corp.*, 253 F.3d at 79.

Second, Novell contends that Microsoft relies on “a misleading citation to Areeda's *Antitrust Law* treatise” to support its argument about the proper causation standard.

(Novell Br. at 21.) Specifically, Novell takes issue with Microsoft’s citation to the Areeda treatise for the proposition that “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.” 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a. Novell argues that this language “is taken from a larger academic discussion of the potential that a monopolist might be held liable for damages for a ‘reasonable but mistaken judgment that it was doing nothing unlawful,’” and reflects the view that “concerns over causation were more properly directed to the remedy issue, not liability.” (Novell Br. at 20-21.) Novell misses the point entirely.

The Areeda treatise makes clear that the reason a more stringent causation requirement applies to actions for treble damages is that “antitrust’s mandatory treble damage provision often awards damages that are ‘excessive,’ in that the punitive two-thirds is assessed even to actions that are not criminal in character, or where the defendant had made a reasonable but mistaken judgment that it was doing nothing unlawful.” 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a. This, when coupled with the fact that “the line between aggressive competitiveness and a § 2 violation is indistinct,” makes “judicial judgments and particularly juries prone to error.” *Id.* Use of a heightened causation standard is therefore necessary to “moderate the treble damage consequences of finding ‘exclusionary’ conduct.” *Id.* As the Areeda treatise concludes, “[t]he resulting potential for excess makes it 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” *Id.* The edentulous causation standard advocated by Novell provides no such assurance.

It is Novell that misleadingly cites to the Areeda treatise. Novell argues that the Areeda treatise adopts Novell's "reasonably capable" causation standard, not the "contributes significantly" causation standard adopted by this Court. (Novell Br. at 21-22.) In support of that argument, Novell quotes a section of the Areeda treatise that addresses the definition of exclusionary conduct under Section 2, not the causation standard applicable to private treble damage cases. Elsewhere, the Areeda treatise makes clear that "[t]he *plaintiff has the burden* of pleading, introducing evidence, and presumably proving by a preponderance of the evidence that reprehensible behavior has *contributed significantly* to the achievement or maintenance of the monopoly." 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 650c (emphasis added); *see also Covad Commc'ns Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123, 131-32 (D.D.C. 2002) ("the conduct must make a significant contribution to maintenance of its monopoly power"). This Court's 2010 ruling is exactly in accord with the Areeda treatise in this respect.

Under the causation standard applicable to private treble damage actions, Novell must prove that WordPerfect and Quattro Pro were actual, not nascent, threats to Microsoft's PC operating system monopoly, and that the allegedly anticompetitive acts that harmed those applications also "contributed significantly" to maintenance of Microsoft's PC operating system monopoly. *Novell*, 699 F. Supp. 2d at 747-48. Novell's proposed jury instructions fail to apprise the jury of this requirement.

Novell's proposed jury instructions are also silent as to how WordPerfect and Quattro Pro allegedly posed a threat to Microsoft's PC operating system monopoly. That is the critical link between harm to those applications and harm to competition in the PC operating system market. Both harms must be proven and the connection between them must be proven as well. The jury cannot be allowed to speculate about this crucial point.

As noted above, the Complaint contains two theories about how Novell's office productivity applications posed a threat to Microsoft's PC operating system monopoly. Novell's first theory is that its AppWare and OpenDoc technologies, when integrated with WordPerfect word processing software, exposed a sufficient number of APIs to become an alternative to Windows for developing general purpose applications. (Compl. ¶ 51.) The Complaint alleges that Microsoft sought to destroy WordPerfect in order to eliminate the "middleware" threat it posed to Windows. (Compl. ¶ 51.) Novell's second theory is that "[b]ecause WordPerfect historically was the most popular word processing application, a new operating system could attract a significant number of users upon entering the market if WordPerfect was available to run on it." (Compl. ¶ 52.) By targeting WordPerfect, Microsoft allegedly reduced the number of users who would be attracted to a new operating system, thereby strengthening the "applications barrier to entry" and preventing "viable alternative[s] to Windows" from entering the PC operating system market. (Compl. ¶ 52.)¹⁴

Neither of these theories appears in Novell's proposed jury instructions. Indeed, the words "middleware," "applications barrier to entry," and even "AppWare" and "OpenDoc" are entirely absent from Novell's proposed jury instructions. As a result, Novell's proposed jury instructions provide no conceivable nexus between the alleged harm to WordPerfect and QuattroPro resulting from Microsoft's allegedly anticompetitive acts and any alleged harm to competition in the PC operating system market. That, however, is one of the most important questions that the jury has to answer, and the jury cannot be left with no guidance on the issue.

¹⁴ As shown below (p. 33, *infra*), any claim based on a theory not set forth in the Complaint has been released by Novell.

Microsoft's Final Jury Instruction 27 and Preliminary Jury Instruction 12 properly instruct the jury about both of the theories in Novell's Complaint. Those instructions faithfully relay Novell's contentions in its Complaint that (i) "WordPerfect and Quattro Pro were 'cross-platform software' of such importance that their ability to run on other, non-Microsoft operating systems posed a threat to Microsoft's monopoly in PC operating systems," and (ii) "WordPerfect and Quattro Pro, either alone or in combination with other Novell products, represented a form of" middleware, which the instructions define as "a software layer that runs on top of an operating system (such as Windows 95) and provides various services to software applications that they otherwise would obtain from the underlying operating system." If Novell does not prove that one of its two theories actually came to fruition, it cannot recover in this action. Accordingly, the Court should adopt Microsoft's proposed jury instructions.

D. Novell's Preliminary Jury Instruction 1 is Confusing, Overly Complicated, and Previews Novell's Mischaracterization of Its Claim.

Novell's Preliminary Jury Instruction 1 is misleading and potentially confusing to the jury, and it sets forth the factual and legal issues in this action in an inaccurate and prejudicial fashion.

First, Novell sets out its incorrect theory about the elements of its claim, asserting that "Novell contends that Microsoft unlawfully maintained its PC operating systems monopoly by engaging in anticompetitive conduct to exclude products that Microsoft perceived as threats," including but not limited to "Novell's office productivity applications." (Novell's Preliminary Jury Instruction 1, at pp. 2-3.) As an initial matter, it is not enough for Novell to show merely that Microsoft "perceived" Novell's office productivity applications as threats. Microsoft's "perception" does not demonstrate any actual harm to competition. Instead, Novell must prove that WordPerfect and Quattro Pro were viable alternative platforms to Microsoft's Windows

operating system such that any harm allegedly inflicted on those products would have substantially contributed to maintenance of Microsoft’s monopoly in the PC operating system market. Moreover, having defined office productivity applications in the Complaint as word processing applications and spreadsheet applications, the only allegedly anticompetitive conduct for which Novell could recover in this action is conduct that harmed WordPerfect and Quattro Pro. Novell cannot recover for anticompetitive conduct directed at other products or other companies.

Second, Novell seeks to lump its PerfectOffice suite together with the WordPerfect and Quattro Pro applications—Novell’s Preliminary Jury Instruction 1 (at page 1) states that “WordPerfect and Quattro Pro are ‘office productivity applications,’ which Novell marketed together as an office productivity suite called PerfectOffice”—in an effort to assert a claim relating to PerfectOffice that was not asserted in the Complaint. (Novell Br. at 8 n.21.) Novell cannot do that. As the Fourth Circuit held in affirming this Court’s dismissal of Novell’s GroupWise claim, Novell’s “pleading expressly characterized” the products for which it sought to recover damages, and the Complaint “intended to encompass” only “[w]ord processing and spreadsheet applications.” *Novell, Inc. v. Microsoft Corp.*, 2011 U.S. App. LEXIS 9062, at *24 (4th Cir. May 3, 2011); (*see also* Compl. ¶¶ 24, 45). PerfectOffice is neither a word processing application nor a spreadsheet application, and thus it is not properly part of this action. Indeed, Novell did not even attempt to include suites in the market definitions it carefully set out in its Complaint. (Compl. ¶¶ 25-28.)

Moreover, on November 8, 2004, Novell entered into a settlement agreement with Microsoft in which

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It cannot be added now.

Third, rather than accurately describing the three allegedly anticompetitive acts at issue in this action (indeed, Novell does not even mention the namespace extension APIs), Novell’s proposed jury instructions are vague and argumentative, stating for example that Microsoft “intentionally designed Windows 95 to make it more difficult, expensive, and time-consuming for Novell’s office productivity applications to function on Windows 95.” (Novell’s Preliminary Jury Instruction 1, at p. 3.) The jury should not be allowed to run wild with speculation about what Microsoft conduct is at issue or could result in an award of damages to Novell.

Moreover, Novell’s proposed jury instructions make reference to four categories of allegedly anticompetitive conduct, rather than the three allegedly anticompetitive acts identified by the Court in its decision on Microsoft’s motion for summary judgment. *Novell*, 699 F. Supp. 2d at 743. All of the categories are impermissibly vague, but two of the four are completely improper. First, Novell alleges that Microsoft entered into “agreements with computer manufacturers that made it harder for Novell to sell its business productivity applications directly to those computer manufacturers.” (Novell’s Preliminary Jury Instruction

1, at p. 3.) That allegation is encompassed by Count VI of Novell's Complaint, which this Court dismissed in 2010.¹⁵ Second, Novell alleges that Microsoft "engaged in conduct to exclude perceived threats to Microsoft's monopoly power which would have worked in combination with Novell's office productivity applications to reduce Microsoft's monopoly power." (Novell's Preliminary Jury Instruction 1, at p. 3.) Such a generalized reference to Microsoft conduct directed at other companies and products (much of it presumably at a later period in time) is a transparent effort to "piggyback on the anticompetitive harm caused by conduct directed at third parties" that this Court has already held cannot provide a basis for Novell's claim. *Novell*, 699 F. Supp. 2d at 750.

Fourth, Novell's Preliminary Jury Instruction 1 contains (i) snippets of background information on the history of the dispute between Novell and Microsoft, (ii) an incomplete list of products licensed by the parties, (iii) definitions of important terms such as "operating system," and (iv) Novell's incomplete and incorrect summary of the parties' contentions. As a result, the proposed instruction is massively complicated and will lead inevitably to jury confusion.

While this case will necessarily require the jury to learn about 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 Preliminary Jury Instruction 1, Microsoft's Preliminary Jury Instruction 1 is shorter, simpler, and much easier to comprehend. It provides the jury with a brief introduction to the case, including an

¹⁵ The dismissal was affirmed by the Fourth Circuit. *Novell*, 2011 U.S. App. LEXIS 9062, at *10 n.7.

identification of the parties, simple explanations of the products at issue, and a concise and accurate description of Novell's remaining claim.

II. Microsoft's Jury Instructions Properly Instruct the Jury About the Burden Novell Must Meet in Order to Recover Any Damages in this Action, Whereas Novell's Jury Instructions Do Not.

The jury must be told that even if Novell proves every element of its Section 2 monopoly maintenance claim, Novell can only recover damages if it also proves actual injury to its business as a direct result of Microsoft's anticompetitive conduct toward WordPerfect and Quattro Pro during the period of time in which Novell owned those two applications. *See generally* ABA Model Instructions at F-2 through F-18 (citing cases) (relevant excerpts of Section F of the ABA Model Instructions are attached as Exhibit I to the Holley Declaration); *see also Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1151 (10th Cir. 2002) ("an antitrust plaintiff has the burden of proof and damages cannot be speculative"). In keeping with that requirement, Microsoft's Final Jury Instructions 29-37 properly instruct the jury, among other things, that (i) Microsoft's allegedly anticompetitive conduct must be a material cause of Novell's injury, (ii) damages may not be awarded in an antitrust case based on speculation, (iii) Novell must disaggregate the impact of factors unrelated to Microsoft's anticompetitive conduct, such as Novell's own business mistakes, from the damages it seeks, (iv) the jury is not required to award any damages, and (v) Novell cannot recover the full amount of damages it seeks if it failed to mitigate those damages.

In contrast, Novell's instruction concerning the requirements for an award of damages—entitled "Quantification of Damages"—reads as follows:

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by Novell. If Novell has established with reasonable probability the existence of injury proximately

caused by Microsoft's antitrust violation, then you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable basis in the evidence for a damages award, Novell should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates supported by the evidence. Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages.

(Novell's Final Jury Instruction 20 (citing ABA Model Instruction F-15).) This instruction conveniently ignores a large portion of the ABA Model Instruction on which it is purportedly based (entitled "Speculation not Permitted"), as well as several other ABA Model Instructions that are pertinent. As a result, Novell's Final Jury Instruction 20 improperly seeks to reduce substantially the burden on Novell in recovering any damages in this action in at least the following three respects.

First, as a sentence in the ABA Model Instruction that Novell chose to omit makes plain: "If you find that plaintiff has failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for defendant." ABA Model Instruction F-15; *see also MCI Commc'ns Corp. v. Am. Tel. and Tel. Co.*, 708 F.2d 1081, 1162 (7th Cir. 1983) ("When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of 'speculation or guesswork' not permitted for antitrust jury verdicts.") (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946)). Microsoft intends to demonstrate at trial that the steep decline in the popularity of WordPerfect and Quattro during the short time Novell owned those applications was not the result of any allegedly anticompetitive conduct by Microsoft, but

rather because of a number of strategic blunders and tactical mistakes made by Novell and its predecessor, WordPerfect Corporation. Novell's Final Jury Instruction 20 fails to inform the jury that Novell bears the burden of proving that its claimed damages are not the result of its own mismanagement. Accordingly, the Court should adopt Microsoft's Final Jury Instructions 30 and 31.

Second, it is well established that an antitrust plaintiff seeking damages bears the burden to disaggregate from the damages it seeks (i) any harm to the plaintiff attributable to lawful conduct engaged in by the defendant and (ii) any harm to the plaintiff caused by factors other than the defendant's anticompetitive conduct, including plaintiff's own business mistakes and the impact of market forces.

[A]ny part of the plaintiff's loss that is due to the lawful business practices of the defendant should not be part of the damage award. In addition, some of the defendant's conduct may be unlawful but not anticompetitive. The damages attributable to unlawful, albeit competitively neutral, conduct must be isolated because those damages would not flow from an antitrust violation and therefore should not be trebled. . . . [T]he plaintiff's damage calculations must [also] control for exogenous factors that also have an adverse impact on the plaintiff's economic condition[,] . . . [such as] the plaintiff's own mismanagement, a recessionary economy, competition from other rivals, and other things unrelated to any antitrust violation.

2A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 391g (footnotes and citations omitted). Indeed, "antitrust plaintiffs must segregate damages attributable to lawful competition from damages attributable to . . . monopolizing conduct," and a "failure to do so contravenes the command of the Clayton Act." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997) (citation omitted); *see also Insignia Sys., Inc. v. News Am. Marketing In-Store, Inc.*, 661 F. Supp. 2d 1039, 1054 (D. Minn. 2009) ("a plaintiff must disaggregate losses caused by the defendant's unlawful conduct from losses caused by other factors").

Despite this, Novell (amazingly) omits the ABA Model Instruction entitled “Causation and Disaggregation” from its proposed jury instructions, which states that the “[p]laintiff bears the burden of showing that its injuries were caused by defendant’s alleged antitrust violation—as opposed to any other factors If you find that plaintiff’s alleged injuries were caused in part by defendant’s alleged antitrust violation and in part by other factors, then you may award damages only for that portion of plaintiff’s alleged injuries that were caused by defendant’s alleged antitrust violation.” ABA Model Instruction F-18. The ABA Model Instruction further explains that the instructions given to the jury on disaggregation “should be tailored to the facts of the case, describing the factors in the particular circumstances that are claimed by defendant to impact the damages calculation.” ABA Model Instruction F-18; *see also Addamax Corp. v. Open Software Found.*, 152 F.3d 48, 54-55 (1st Cir. 1998) (affirming decision not to award any damages in antitrust case because plaintiff “bore the burden of proof at trial” that its “inability to succeed in its efforts to sell” its products “was materially caused by the defendants’ conduct,” but evidence adduced at trial showed that plaintiff made numerous business mistakes).

Microsoft’s Final Jury Instruction 31 tracks the ABA Model Instruction and properly informs the jury that “[i]f you find that Novell has proven with reasonable certainty an amount of damages caused by Microsoft’s alleged anticompetitive conduct, then you must award that amount to Novell.” In addition, Microsoft’s proposed instruction is tailored to the facts of this action, describing the particular factors Microsoft believes are relevant to disaggregation of damages. As a result, Microsoft’s proposed instruction instructs the jury that it “may not award damages for Novell’s monetary losses caused by its own mistakes or its business decisions, or the mistakes or business decisions of the previous owners of WordPerfect and Quattro Pro,” nor

for “losses caused by changes in conditions or consumer preference, independent business decisions of third parties, or any other factors that were not caused by Microsoft’s allegedly anticompetitive conduct.” Accordingly, the Court should adopt Microsoft’s Final Jury Instruction 31.

Third, in cases where a plaintiff relies on expert testimony to prove the lost profits it allegedly suffered as a result of the defendant’s conduct—and especially where plaintiff relies on hypothetical damages studies performed by an expert—the law requires plaintiff to establish the reliability of its expert’s opinions. The plaintiff must further establish that any damages studies upon which the expert’s opinion is predicated took into consideration and disaggregated the impact of factors that caused harm to the plaintiff other than the anticompetitive conduct at issue.

The courts have also required experts to produce damage evidence that ‘disaggregates’ injuries caused by lawful acts from injuries caused by unlawful ones. Thus, for example, if an antitrust defendant both innovates a new product that steals business from the plaintiff and also engages in predatory pricing, the first of these acts is lawful while the second is not, but both have injured the plaintiff. The expert must sort out and establish the amount of damage caused by the unlawful act, which, needless to say, often involves him or her in unwarranted speculation. Several otherwise successful antitrust claims have foundered on the expert’s inability to show what portion of a plaintiff’s loss resulted from unlawful conduct.

2 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 309c (footnotes and citations omitted); *see also Godix Equip. Export Corp. v. Caterpillar, Inc.*, 948 F. Supp. 1570, 1583 (S.D. Fla. 1996) (“a plaintiff in an antitrust case must disaggregate the lost profits suffered by the plaintiff to eliminate the loss caused by the legal competitive action of the defendant, even if the result of this disaggregation is a nominal jury award”).

In accordance with these principles, Microsoft’s Final Jury Instructions 33-34, in keeping with the ABA Model Instructions, instruct the jury as to the meaning of “lost profits,” and further inform the jury that Novell has introduced damages studies. The instructions explain how the jury should evaluate Novell’s damages studies to determine whether the damages studies and the assumptions that underlie them are reasonable.

Novell, on the other hand, fails to address any of these issues. Novell’s proposed jury instructions make no mention of lost profits, damages studies or Novell’s burden to establish the reliability of such damages studies. Novell instead asks the Court to instruct the jury as follows: “You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by Novell. If Novell has established with reasonable probability the existence of injury proximately caused by Microsoft’s antitrust violation, then you are permitted to make a just and reasonable estimate of the damages.” (Novell’s Final Jury Instruction 20.) Such a bare-bones instruction is entirely inappropriate, especially in a large and complex case. Novell’s damages expert, Frederick R. Warren-Boulton, has proposed three methods for the jury to use in calculating Novell’s purported lost profits—all of which rely on damages studies, and which result in radically different estimates of damages—ranging from “at least \$378 million as of March 1, 1996,” to “at least \$1,192.5 million as of March 1, 1996.”¹⁶ (May 1, 2009 Expert Report of Frederick R. Warren-Boulton at pp. 2-3 (summary of opinions), attached as Exhibit J to the Holley Declaration.) For all of these reasons, the Court should adopt use Microsoft’s Final Jury Instructions 29-37 rather than Novell’s Final Jury Instructions 18-20.

¹⁶ With interest, according to Warren-Boulton, this amount comes to \$2,674.5 million—before trebling.

Novell's Preliminary Jury Instruction 13 on damages is also seriously flawed.

That instruction (i) prematurely instructs the jury concerning damages at the outset of the case and (ii) oversimplifies and misstates Novell's burden of proof in this action—both as to the elements of its claim and its ability to recover damages. Specifically, Novell's Preliminary Jury Instruction 16 states 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.” This instruction is improper for at least two reasons.

First, as demonstrated above (*see pp. 11-15, supra*), Novell must establish not that Microsoft violated the antitrust laws by harming some unidentified company during an unspecified time period, but that Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro that not only harmed those products but also harmed competition in the PC operating system market. *Second*, Novell's Preliminary Jury Instruction 16 fails to instruct the jury concerning many issues relating to damages, including (i) that Novell bears the burden to prove its entitlement to damages and the amount of any such damages, (ii) that the jury cannot award damages based on speculation, (iii) that Novell bears the burden of disaggregating the impact of Microsoft's lawful conduct and other factors that caused harm to WordPerfect and Quattro Pro, and (iv) that no inference regarding liability should be drawn from the damages instructions.

III. The Court Should Adopt Microsoft's Proposed Limiting Instructions Concerning the Government Case.

To the extent Novell obtains collateral estoppel on any Findings of Fact or purported Legal Rulings from the Government Case,¹⁷ a preliminary jury instruction and final jury instruction are both necessary to ensure that the jury understands to what the Government Case did and did not pertain. As the Tenth Circuit has cautioned, without adequate instructions, “[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)); see also *Personnel Dept., Inc. v. Professional Staff Leasing Corp.*, 297 Fed. Appx. 773, 2008 WL 4698479, at *13 (10th Cir. Dec. 10, 2008) (holding that district court’s admission of prior judicial opinions was not abuse of discretion where jury was instructed on how to consider judicial opinions and told clearly that such judicial opinions did not control jury’s resolution of key factual issue in case). Novell agrees. In its September 1, 2011 reply memorandum in support of its renewed motion seeking collateral estoppel (Docket #78 at 15), Novell conceded that, to the extent it obtains preclusion on any Findings of Fact or purported Legal Rulings, the Court should issue “a limiting instruction.”

¹⁷ Novell’s August 8, 2011 renewed motion seeking collateral estoppel seeks preclusion on 101 Findings of Fact made in the Government Case and 16 purported Legal Rulings excerpted from judicial decisions in the Government Case and an unrelated case. As Microsoft demonstrated in its August 22, 2011 memorandum in opposition (Docket #72) (“Microsoft’s Collateral Estoppel Opposition”) and its September 9, 2011 sur-reply memorandum (Docket #80-1), the vast majority of the requested Findings of Fact and Legal Rulings were not “critical and necessary” to the judgment affirmed in the Government Case, see *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 329 (4th Cir. 2004), or are not material to the claim asserted in Count I of the Complaint, or both. Given Novell’s transparent effort to seek recovery based on the Government Case, Microsoft should be estopped on none of the Findings of Fact or so called Legal Rulings. The risk of a jury awarding damages for the wrong reasons is too high to allow Novell to misuse the Government Case in the way it has now revealed it seeks to do.

Microsoft's Preliminary Jury Instruction 13 and Final Jury Instruction 28 put the Findings of Fact and Legal Rulings from the Government Case into proper context and provide guidance to the jury about how it must consider those Findings of Fact and Legal Rulings when deliberating about Novell's claim in this action. These instructions point out, among other things, the uncontroverted facts that (i) the Findings of Fact in the Government Case did not involve Novell, WordPerfect or Quattro Pro or the notion that they constituted any sort of "middleware" threat to Microsoft's monopoly in PC operating systems; (ii) the U.S. Department of Justice made no claims relating to Microsoft's conduct in purported markets for word processing applications or spreadsheet applications; and (iii) the Findings of Fact in the Government Case upon which liability was affirmed all occurred between the spring of 1996 and 1998, whereas the three allegedly anticompetitive acts relied on by Novell in this action occurred in 1994 and 1995.

By contrast, Novell has one proposed preliminary jury instruction—and no proposed final jury instruction—concerning the Government Case, and that one instruction is improper. Novell asks the Court to instruct the jury "to accept all of these facts as true for all purposes in this case. Except as I otherwise instruct you, it is up to you to determine whether [or] not any of these facts have any significance for any aspect of this case after considering all of the other evidence you will hear in this case and after hearing my final instructions to you." (Novell's Preliminary Jury Instruction 14.) Novell's intention is apparently to obscure the true nature of the Government Case in the hopes of recovering damages in this action for Microsoft conduct in other markets directed at different companies and products in a later time period. That intention is telegraphed in Novell's proposed jury instructions, the briefs Novell filed on its renewed collateral estoppel motion and, most recently, in Novell's September 22, 2011 Motion

in Limine Regarding Prior Proceedings, in which Novell seeks to preclude Microsoft from informing the jury that the Government Case did not involve allegations of anticompetitive conduct directed at Novell (*see* Docket #111 at 6-8). This underscores why Microsoft's proposed jury instructions regarding the Government Case are a necessity. As this Court has emphasized "Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing [that] the conduct which injured [Novell's] applications had an anticompetitive impact as well." *Novell*, 699 F. Supp. 2d at 750. Accordingly, the Court should adopt Microsoft's Preliminary Jury Instruction 13 and Final Jury Instruction 28, and reject Novell's Preliminary Jury Instruction 13.

Novell's Preliminary Jury Instruction 14 also instructs the jury that "[t]he lawyers may use [the Findings of Fact and Legal Rulings] in their opening and closing statements and with witnesses and they may read them to you during the trial. You can look at these facts whenever you wish during trial." Ironically, when Microsoft asserted that Novell should be precluded from introducing evidence about issues that are addressed in Findings of Fact or Legal Rulings that are given collateral estoppel effect (Microsoft's Collateral Estoppel Opposition at 52-55), Novell responded as follows: "To the extent that Microsoft feels at trial that Novell is presenting unnecessarily cumulative evidence, the Court can of course address that issue when Microsoft objects. It would be premature, however, for the Court to make rulings on the admissibility of specific testimony and exhibits related to the issues in the Government Case without knowing the purpose for which such testimony and exhibits are being offered." (Novell's Collateral Estoppel Reply at 14.) Novell has now reversed its position, asking the Court to instruct the jury that Novell's counsel may use the Findings of Fact and Legal Rulings given collateral estoppel effect without any limitation. This is plainly improper.

CONCLUSION

Microsoft requests that the Court adopt Microsoft's proposed jury instructions and reject Novell's proposed jury instructions.

Dated: September 26, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2011, I filed true and correct copy of the foregoing redacted version of the Memorandum in Support of Microsoft's Proposed Jury Instructions and in Opposition to Novell's Proposed Jury Instructions using the CM/ECF system, which will send notification of such filing to the following:

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