Microsoft does not believe the Court should include this sentence for the reasons stated in its December 7, 2011 letter to the Court. But if the Court decides to include the sentence, Microsoft believes it is imperative that the jury be told that it cannot find that Microsoft engaged in anticompetitive conduct in the PC operating system market based on conduct directed at companies other than Novell.

Let me now instruct you on the law specifically applicable to this case.

This case is brought under section 2 of the Sherman Act. The purpose of the Sherman Act is to preserve free and unfettered competition in the marketplace. The Sherman Act rests on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.

It is undisputed that during the period that Novell owned WordPerfect (and Quattro Pro) (1994 to 1996), Microsoft had a monopoly in the PC operating systems market. Monopoly power is the power to control prices or exclude competition. It was also found in the case instituted in the District of Columbia — a finding that is binding here — that in1999 and several preceding years, Microsoft unlawfully maintained its monopoly in the operating systems market by anticompetitive conduct directed against companies other than Novell.

Novell claims that Microsoft injured Novell by engaging in anticompetitive conduct directed against it. Specifically, Novell alleges that, in violation of section 2 of the Sherman Act, Microsoft damaged its office productivity applications (WordPerfect, Quattro Pro and PerfectOffice) by withdrawing support for the namespace extension application programming interfaces (APIs) to preserve Microsoft's monopoly in the PC operating systems market. Because neither PerfectOffice nor WordPerfect nor Quattro Pro was a PC operating system, this claim may require a little more explanation. Novell presents two theories that underlie it. First, Novell contends that its office productivity applications 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 the market for PC operating systems. Specifically, Novell says that the availability of WordPerfect, Quattro Pro, and PerfectOffice on non-Microsoft operating systems would have substantially reduce 2d the dominance of Microsoft's PC operating systems. Second, Novell contends that PerfectOffice, WordPerfect, and Quattro Pro, including technologies called AppWare and OpenDoc,

represented a form of "middleware" that threatened the applications barrier to entry that protected Microsoft's monopoly in the market for PC operating systems. For the purposes of this case, middleware is a software product that (a) runs on multiple operating systems, (b) is available on all or substantially all personal computers, and (c) exposes a sufficient number of APIs to allow independent software vendors (ISVs) profitably to develop general-purpose personal productivity applications that call upon APIs exposed by the software product, rather than on APIs exposed by the underlying operating system (such as Windows 95).

Therefore, according to Novell, Microsoft purposely destroyed office productivity applications in order to protect its monopoly in the operating system market.

Although, as I have just stated, Novell claims that Microsoft engaged in anticompetitive conduct against its office productivity applications in order to maintain its monopoly in the operating system market, Novell is not claiming that Microsoft attempted to monopolize the productivity applications market itself, i.e. the market in which Novell's PerfectOffice, WordPerfect, and Quattro Pro and Microsoft's Office, Word, and Excel were direct competitors.

In order to prevail, Novell must prove by a preponderance of the evidence that Microsoft unlawfully maintained its monopoly power through anticompetitive conduct. Anticompetitive conduct is conduct, other than competition on the merits, that has the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers in the relevant market. Harm to competition is to be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition.

Microsoft does not believe the Court should include this phrase for the reasons stated in its December 5, 2011 letter to the Court. Microsoft continues to believe that deception of a competitor is not a cognizable claim under Section 2 of the Sherman Act.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals — or the achievement of these goals — unlawful, as long as a company does not use anticompetitive means to achieve these goals.

In determining whether Microsoft's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors. You should consider whether Microsoft had legitimate business reasons for withdrawing support for the namespace extension APIs. You should also distinguish maintenance of monopoly power through anticompetitive acts from the maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck, which are not unlawful. You should consider all the characteristics of the relevant market and evaluate Microsoft's conduct as a whole.

Antitrust law does not impose a general duty upon a monopolist to cooperate with a competitor or to share its intellectual property with a competitor, even if the innovations or intellectual property might be useful to the competitor in developing its products. However, intellectual property rights do not confer a privilege to violate the antitrust laws, and, under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct, such as when a monopolist has ended a voluntary (and thus presumably profitable) course of dealing.

Anticompetitive intent is not alone sufficient to establish a violation of the antitrust laws. ~~However,~~ While intent is not necessary to prove a violation of section 2 of the Sherman Act, ~~nor is~~ is not it irrelevant to whether a violation occurred. You may consider Microsoft's intent in order to understand the likely

or when a monopolist has engaged in deceptive conduct that has the purpose and effect of preventing a competitor from developing a product that would enhance competition by threatening a monopolist's monopoly power [in the relevant market, here the PC operating system market].

Novell must also prove that the same conduct that damaged WordPerfect, Quattro Pro and Perfect Office also harmed competition in the PC operating system market.

effect of its conduct and to evaluate whether Microsoft's conduct was competition on the merits and whether the conduct harmed competition in the PC operating system market.

In order to prevail, Novell must also prove that the anticompetitive conduct it alleges was engaged in by Microsoft in fact caused the damage Novell claims it suffered.

Against the background of these rules and principles, you are being asked to answer certain questions. The questions are set forth on the special verdict form that Theresa will now hand to you.

The first two questions relate to the issue of causation about which I just instructed you. First, "has Novell proven by a preponderance of the evidence that Microsoft's decision to withdraw support for the namespace extension APIs caused Novell's productivity applications (WordPerfect, Quattro Pro, and PerfectOffice) to be late to market?" As indicated on the verdict form, if you answer this question "no," you should not answer the remaining questions on the form. If you answer question 1 "yes," the second question is "has Novell proven by a preponderance of the evidence that, but for Microsoft's decision to withdraw support for the namespace extension APIs, Novell's productivity applications (WordPerfect, Quattro Pro, and PerfectOffice), would have been released to the market either about the time that Windows 95 was released (August 24, 1995), or within a sufficiently short time period thereafter to take advantage of the release?" Again, as indicated on the verdict form, if your answer to this question is "no," you should not answer the remaining questions on the form.

Questions 3, 4, and 5 relate to the anticompetitive conduct that Novell alleges Microsoft engaged in. Question 3 is "has Novell proven by a preponderance of the evidence that Microsoft engaged in anticompetitive conduct by the decision to withdraw support for the namespace extension APIs?" If your answer to this question is "no," you should not answer the remaining questions on the verdict form.

By asking the question in two forms, I am not suggesting that your answers should be different — they may or may not be.

You are being asked questions 4 and 5 because of uncertainties I believe exist in antitrust law, and your answers to them may clarify the record and prevent a retrial of the case. You should, of course, answer them only if you have answered "yes" to questions 1, 2, and 3. Question 4 is "has Novell proven by a preponderance of the evidence that the delay caused to Novell by Microsoft's decision to withdraw support for the namespace extension APIs caused harm to competition in the market for PC operating systems and contributed significantly to the maintenance of Microsoft's monopoly in that market?" If your answer to question 4 is "yes," you should not answer question 5. Question 5 is based upon a slightly different legal standard. It is "has Novell proven by a preponderance of the evidence that Microsoft's withdrawal of support for the namespace extension APIs was reasonably capable of significantly contributing to the maintenance of Microsoft's monopoly in the market for PC operating systems?"

Question 6 relates to the question of damages. If you have answered "yes" to questions 1, 2, and 3, and "yes" to either question 4 or question 5, you should answer question 6. Therefore, I will now instruct you on issues concerning damages. However, the fact that I am doing so should not be considered as indicating any view of mine as to which party is entitled to your verdict. Instructions on the measure of damages are given only for your guidance in the event that you should find in favor of Novell on the questions I have outlined and in accordance with the other instructions I have given.

If you find by a preponderance of the evidence 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. The law provides that Novell should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. The purpose of awarding damages in an antitrust action is to put an injured party as nearly as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish a wrongdoer — what we

sometimes refer to as punitive damages — or to deter a monopolist from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award to Novell an amount for attorneys' fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are designed to compensate Novell for the particular injury it claims to have suffered as a result of the anticompetitive conduct engaged in by Microsoft.

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damages Novell suffered. If Novell has established with reasonable probability the existence of injury proximately caused by Microsoft's decision to withdraw support for the namespace extension APIs, 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.

If you find that Novell's alleged injury was caused in part by Microsoft's decision to withdraw support for the namespace extension APIs, then you may award damages only for that portion of Novell's alleged injury that was caused by Microsoft's conduct. Novell's burden of proving damages with reasonable certainty includes the burden of apportioning damages between the injury to Novell that was caused by Microsoft's decision to withdraw support for the namespace extension APIs, and any harm Novell may have suffered as a result of other factors. If you find there is no reasonable basis to make such an apportionment based on the evidence presented at trial, you should not award any damages to Novell or, alternatively, award only a nominal amount, say $1.00.

In sum, an award of 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 or, alternatively, you should award only a nominal amount.