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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S MEMORANDUM REGARDING
Plaintiff,	*	PROPOSED FINAL JURY INSTRUCTIONS
	*	AND VERDICT FORMS
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

INTRODUCTION

On September 23, 2011, Novell submitted to the Court a full set of proposed jury instructions, addressing all claims and defenses in this case, as well as pertinent issues regarding the jury's deliberations and weighing of the evidence. Many of Novell's proposed instructions closely followed the Model Jury Instructions in Civil Antitrust Cases and instructions given in several other antitrust cases, and many were agreed to in whole or in part by Microsoft. However, the Court has indicated that it does not intend to give most of the instructions proposed by either party, in an effort to streamline the instructions given to the jury. Novell respectfully objects to the Court's intention not to give the instructions it has proposed, and reiterates its contention that Novell's proposed instructions should be given. Without waiving these objections and without waiving any rights on appeal, Novell provides modifications to the Court's proposed instructions.[1]

Novell also proposes a general verdict form with written interrogatories under Federal Rule of Civil Procedure 49(b), which seems preferable to a special verdict form under Rule 49(a) because the latter asks for findings but does not get a verdict on the ultimate question.[2] Having a general verdict form accompanied by answers to special interrogatories allows the court to submit to the jury "written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict," Fed. R. Civ. P. 49(b), which help guide the jury's deliberations and help form the bases for its decision, while also leaving it to the jury to determine which party

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[1] Attached as Exhibit A hereto is a "redlined" version of the Court's tentative instructions showing Novell's proposed modifications. Attached as Exhibit B hereto is a "clean" version of Novell's proposed modifications.

[2] Attached as Exhibit C hereto is a proposed form of general verdict with answers to written questions. In the event that the Court rejects Novell's proposal for a general verdict with answers to written questions, attached hereto as Exhibit D is a proposed special verdict form.

should prevail. Such forms aid appellate review and reduce the likelihood that the appellate court will vacate and remand the jury's verdict.

Novell is cognizant of the fact that the Court's draft instructions and verdict form were intended to be only tentative and provisional, and that the Court has welcomed suggestions from counsel as to how to improve the instructions. Novell's proposals and this Memorandum are offered in that spirit.

THE COURT'S TENTATIVE JURY INSTRUCTIONS

The Court's tentative jury instructions are divided into a series of consecutively numbered points, varying in length from a single sentence to several paragraphs. We address our objections to each point in turn.

I. The Court's "First" Tentative Instruction

In discussing the undisputed fact that Microsoft had a monopoly in the PC operating system market, the Court incorrectly states the years in which it is undisputed that Microsoft had a monopoly as 1994 to 1999. The collaterally estopped Findings of Fact indicate that Microsoft had a monopoly for the decade prior to 1999, *i.e.*, 1989 to 1999. *See* Finding of Fact 35. Therefore, to prevent confusion, the 1994 to 1999 time period should be deleted from this jury instruction.

Moreover, this instruction, while stating that Microsoft had a monopoly, fails to define the crucial concept of monopoly power. Because the jury will be asked whether Microsoft unlawfully maintained monopoly power, the jury must understand what monopoly power means. Novell's proposed instructions therefore add the statement that "[m]onopoly power is the power to control prices or exclude competition." The Supreme Court so held in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956). This language follows the ABA Model Jury Instructions for Antitrust Cases.

II. The Court's "Second" Tentative Instruction

While this instruction notes that Novell's claim in this case is that Microsoft unlawfully maintained monopoly power in the PC operating system market, not that Microsoft attempted to monopolize the word processing and/or office suite market, it fails to link this statement to Novell's allegations, thus potentially confusing the jury.

As this Court previously recognized, Novell contends that the technological connection between operating systems and applications gives rise to a significant barrier to entry into the operating systems market and thus protects Microsoft's Windows monopoly. Novell maintains that its office productivity applications such as WordPerfect and Quattro Pro could perform well on a variety of operating systems and that, during the relevant time period, they were the dominant office productivity applications in the market. The thrust of Novell's argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft's Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly. That is, Novell argues its products could provide a path onto the operating system playing field for an actual competitor of Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows. *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 743 (D. Md. 2010), quoting *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 308 (4th Cir. 2007).

Also, Novell alleges that Novell's middleware, including the PerfectFit shared code technologies contained in Novell's applications such as WordPerfect and the PerfectOffice suite (which also included AppWare), had the potential to form the center of an emerging middleware platform that could have helped erode the high applications barrier to entry that protects Microsoft's operating system monopoly. *See* Finding of Fact ¶ 68 (noting that "Microsoft was

concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category"). Microsoft acted to destroy this evolving middleware threat to its monopoly in operating systems by embarking on a predatory campaign against any actual or potential middleware threats to its monopoly.

III. The Court's "Third" Tentative Instruction

The statement that "antitrust law does not impose a general duty on a monopolist to cooperate with a competitor," without more, would be misleading to the jury. As the Supreme Court has held, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). The Supreme Court has further held that such circumstances include when a monopolist has ended a "voluntary *(and thus presumably profitable)* course of dealing," which shows "a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis in original) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-11 (1985)). "[E]ven if a firm has the right to refuse to do business with a competitor, it may not necessarily have the right to do so after establishing a business relationship." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009). Thus, informing the jury only that there is no "general duty" to cooperate with a competitor, without informing the jury of the exceptions to this general rule, gives the jury an incomplete and misleading view of this area of the law.

IV. The Court's "Fourth" Tentative Instruction

Similarly, the statement in the tentative jury instruction that "antitrust law does not impose a general duty on a monopolist to share its intellectual property with a competitor" only tells half the story. The other side of the story is that "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C.

Cir. 2001). Indeed, the D.C. Circuit rejected Microsoft's argument that "if intellectual property rights have been lawfully acquired, [then] their subsequent exercise cannot give rise to antitrust liability" as "border[ing] on frivolous," and noted that "it is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." *Id.* Thus, informing the jury only that "antitrust law does not impose a general duty on a monopolist to share its intellectual property with a competitor," without also informing the jury that "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws" would provide the jury with an incomplete and misleading view of the law. For example, Microsoft violated Section 2 by imposing certain licensing restrictions on Original Equipment Manufacturers ("OEMs") even though Microsoft had claimed that it had "an absolute and unfettered right to use its intellectual property as it wishes." *Id.* at 63.

V. The Court's "Fifth" Tentative Instruction

Similarly incomplete is the statement that "anticompetitive intent alone is not sufficient to establish a violation of the antitrust laws." While intent alone does not establish a violation, it is equally true that intent is neither a necessary element of a violation, nor irrelevant to whether a violation occurred. The intentions underlying a defendant's conduct have long played an important role in Section 2 cases. *Aspen Skiing*, 472 U.S. at 602. A jury may consider the monopolist's intent to understand the likely effect of the conduct. *Microsoft*, 253 F.3d at 59; *see also Telecor Commc'n, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002) (jury may properly consider the purpose or intent of an allegedly anticompetitive act in assessing its legality).

VI. The Court's "Sixth" Tentative Instruction

Also incomplete and therefore misleading is the statement that "it is not a violation of Section 2 of the Sherman Act for a monopolist to acquire or maintain (in this case, maintain) its

monopoly by introducing a superior product to the market." Novell's alternative instruction places this statement in context, by informing that jury that it "should 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 is not unlawful," and that it "should consider all the characteristics of the relevant market and evaluate Microsoft's conduct as a whole" in making this determination. There is abundant support in the case law for this proposition. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *Novell*, 699 F. Supp. 2d at 745; *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1308-09 (D. Utah 1999).

VII. The Court's "Seventh" Tentative Instruction

Novell has no objection to this instruction.

VIII. The Court's "Eighth" Tentative Instruction

This tentative jury instruction is incorrect in that it suggests that, in order to prevail on its Section 2 claim, Novell must prove both (1) that Microsoft "deceived Novell into believing that it would document the namespace API extensions when in fact, it had no intention of doing so" and (2) that Microsoft "withdrew the namespace extensions without substantial justification."

As to the first point, although there is evidence from which a reasonable jury could conclude that Microsoft intended from the beginning that it would de-document the namespace extension APIs, Novell need not prove this point to prevail. Novell's proposed instruction accurately informs the jury that Novell claims that Microsoft deceived Novell with respect to the publication of the namespace extension APIs and that Microsoft's conduct was not competition on the merits. Requiring Novell to prove specific intent or fraud to prevail in an antitrust action, where the focus should be on a monopolist's reasons for engaging in conduct that harms

competition would be reversible error. Section 2 is not a specific intent offense. *United States v. Aluminum Co. of Am.* ("*Alcoa*"), 148 F. 2d 416, 432 (2d Cir. 1945) (Hand, J.); *see also Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 973 (10th Cir. 1990).

Secondly, it is not Novell's burden to prove that Microsoft's conduct lacked a legitimate business justification. Rather, once Novell has established a *prima facie* case under Section 2 by demonstrating anticompetitive effect, the burden shifts to Microsoft to proffer a "pro-competitive justification" for its conduct. *Microsoft*, 253 F.3d at 58-59; *see also Data Gen Corp.*, 36 F.3d at 1182. Only if Microsoft proffers a pro-competitive justification – a non-pretextual claim that its conduct is indeed a form of competition on the merits –does the burden shift back to Novell to rebut that claim. *Microsoft*, 253 F.3d at 59.

IX. The Tentative Jury Instructions' Discussion Of Verdict Form

As discussed below, Novell objects to the Court's proposed verdict form in that it does not allow the jury to return a general verdict for Novell, or to make findings in Novell's favor as to every element of its claim, and therefore in effect only permits the jury to render a verdict in favor of Microsoft and not in favor of Novell. The Court's tentative instructions regarding the verdict form only compound this problem. For example, the jury is specifically invited to focus on question 3 first, and the jury is told that if they vote "no" on this question it would bring the case to an end with a verdict for Microsoft. This is highly prejudicial to Novell, and the later statement in the tentative instructions to the effect that the Court is not suggesting how the jury should answer the question does little to dissipate this prejudice. Novell's proposed verdict form includes all of the elements of the claim, and allows the jury to render a verdict for either party, without hinting to the jury which finding would end their deliberations more quickly.

X. The Tentative Damages Instruction

Novell has no objection to the Court's instruction with regard to damages.

XI. Additional Instructions

1. The Court's tentative instructions fail to inform the jury of the purpose of the antitrust laws. An understanding of the purpose of the antitrust laws is essential to guide the jury in its consideration of the facts at issue. Therefore, Novell's proposed instructions begin with a discussion of the purposes of the antitrust laws.

2. The Court's tentative instructions fail to inform the jury that Novell need not present direct proof that Microsoft's continued monopoly power is precisely attributable to its anticompetitive conduct nor must it show that its business applications would actually have developed into a viable threat to Microsoft's monopoly in the Intel-based PC operating systems market. This concept is crucial to the jury's consideration of the facts at issue. *See Microsoft*, 253 F.3d at 79; *Novell*, 699 F. Supp. 2d at 748. Therefore, Novell's proposed instructions inform the jury of this legal principle.

3. The Court's tentative instructions fail to inform the jury that Novell is entitled to recover damages for an injury to its business or property if it can establish, with a fair degree of certainty, that Microsoft's anticompetitive conduct was a material cause of Novell's injury. Novell's proposed instructions include this vital legal principle.

THE COURT'S TENTATIVE VERDICT FORM

The tentative verdict form proposed by the Court is fundamentally unfair in that it provides no means by which the jury could render either a general verdict for Novell, or a finding in Novell's favor as to every element of its claim. The jury is asked to render special verdicts on only a limited number of issues. As to each of these questions, a "no" finding would, in the Court's tentative view, require entry of a verdict in favor of Microsoft. But a "yes" finding

on all of the questions propounded on the tentative verdict form would not, in itself, require a verdict for Novell, because the jury is not asked about all of the elements of Novell's claims. Thus, in effect, the jury would be given several ways to render a verdict for Microsoft, but no way to render a verdict for Novell.

Novell respectfully requests that the jury be given a form for a general verdict together with written questions. But, assuming *arguendo* that the Court submits a special verdict form, Novell respectfully requests that the Court's questions be modified.

Typically, the written questions contained in a verdict form in an antitrust case ask the jury, in a non-argumentative manner, for its findings on each of the elements of a cause of action. For example, as to the Section 2 monopolization claim in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2001), the jury was only asked the following three questions:

1. Do you find that [plaintiff] has proven, by a preponderance of the evidence, th[e] the relevant market . . . ?;

2. Do you find that [plaintiff] has proven, by a preponderance of the evidence, that [defendant] unlawfully maintained monopoly power as defined under the instructions for [this] Count . . . ?; and

3. Do you find that [plaintiff] has proven, as a matter of fact and with a fair degree of certainty, that [defendant's] unlawful maintenance of monopoly power injured [plaintiff's] business or property as defined in these instructions?

The court in *ZF Meritor LLC v. Eaton Corp.*, Civ. No. 06-623-SLR (D. Del. 2009) used a similar verdict form for the Section 2 monopolization claims of plaintiffs in that case:

1. Did plaintiffs prove, by a preponderance of the evidence, that defendant unlawfully acquired or maintained monopoly power in the relevant market identified in Question 1, by engaging in anticompetitive conduct?

2. Did plaintiffs prove, by a preponderance of the evidence, that the competitive harms associated with defendant's monopoly power (as per [the previous question]) outweigh the competitive benefits proven by defendant? [and]

3. Did plaintiffs prove, by a preponderance of the evidence, that defendant's unlawful acquisition or maintenance of monopoly power caused plaintiffs to suffer antitrust injuries to their business or property at any time since March 28, 2002?

Thus, in addition to rendering a general verdict and assessing damages, the jury should be asked the following questions which, if all answered "yes," would warrant a verdict for Novell:

1. Did Novell prove, by a preponderance of the evidence, that Microsoft unlawfully maintained monopoly power in the PC operating system market by engaging in anticompetitive conduct?;

2. Did Novell prove, by a preponderance of the evidence, that the competitive harms associated with Microsoft's conduct monopoly power outweigh the competitive benefits proven by Microsoft?; and

3. Did Novell prove, by a preponderance of the evidence, that Microsoft's unlawful maintenance of monopoly power caused Novell to suffer antitrust injuries to their business or property?

Novell respectfully requests that the jury be permitted to render a general verdict with answers to written questions, as contemplated by Fed. R. Civ. P. 49(b). Novell further

respectfully requests that the written questions be limited to tracking the elements of a Section 2 claim, as set forth above.

Assuming that the Court is intent on asking the jury more detailed questions, Novell submits herewith a proposed verdict form which propounds questions to the jury regarding every element of the claim in this case such that, if the jury answers "yes" to each question, all of the elements of Novell's claim will have been established. *See Martinez v. Union Pacific R. Co.*, 714 F.2d 1028, 1032 (10th Cir. 1983) ("Once the court decides to submit forms of special verdict and special interrogatories, it must cover all material factual issues."). With this form, unlike the form proposed by the Court, the jury will be able to render a verdict for either party, and a reviewing court will be able to ascertain what the jury found as to each element of the claim.[3]

After seven years of litigation and eight weeks of trial, it would be both inefficient and fundamentally unjust not to allow the jury to render a verdict for either party in this case. The verdict form should allow this Court and a reviewing court to know what verdict the jury rendered and why. The verdict form proposed by Novell does this. Respectfully, the Court's tentative jury form does not.

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[3] An aspect of the Court's proposed jury form that is especially problematic is question 3 B, asking the month and year that Novell would have shipped PerfectOffice but for the delay caused by Microsoft. Because the jury's finding with respect to each interrogatory must be unanimous, asking the jury to agree on the specific month that shipping would have occurred in a but-for world could cause the jury to be unable to reach a verdict. Novell's proposed form avoids this problem by asking the jury a question regarding this issue that can be answered "yes" or "no" and does not require the jury to agree on a specific date.

Dated: December 5, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: */s/ Maralyn M. English*