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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S MODIFIED PROPOSED
Plaintiff,	*	FINAL JURY INSTRUCTION NO. 17
	*	
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

With the Court's permission, Plaintiff Novell respectfully submits the following

modified version of its Proposed Final Jury Instruction No. 17. For the Court's convenience,

Novell has redlined the proposed changes.

Dated: October 6, 2011   SNOW, CHRISTENSEN & MARTINEAU

                                                                 /s/ Maralyn M. English
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 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.

/s/ Maralyn M. English

17. INJURY AND CAUSATION

If you find that Microsoft engaged in anticompetitive conduct, then you will be asked to decide if Novell is entitled to recover damages from Microsoft.

Novell is entitled to recover damages for an injury to its business or property if it can establish, by a preponderance of the evidence, three elements of injury and causation:

First, that Novell was in fact injured as a result of Microsoft's anticompetitive conduct;

Second, that Microsoft's anticompetitive conduct was a material cause of Novell's injury; and

Third, that Novell's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as "injury in fact" or "fact of damage." For Novell to establish that it is entitled to recover damages, it must prove that it was injured as a result of Microsoft's violation of the antitrust laws. Proving the fact of damage does not require Novell to prove the dollar value of its injuries. It requires only that Novell prove that it was in fact injured by Microsoft's antitrust violation. If you find that Novell has established that it was in fact injured, you may then consider the amount of Novell's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that plaintiff has established that it was in fact injured.

Novell must also offer evidence that establishes as a matter of fact and with a fair degree of certainty that Microsoft's anticompetitive~~illegal~~ conduct, meaning conduct other than competition on the merits which caused harm to competition in the PC operating system market, was a material cause of Novell's injuries. This means that Novell must prove that it suffered

some damage as a result of Microsoft's antitrust violation. You may not find that anticompetitive conduct which harmed other applications alone was a material cause of Novell's injuries. Novell is not required to prove that Microsoft's antitrust violation was the sole cause of its injuries; nor must Novell eliminate all other possible causes of injury. It is enough if Novell has proven that the alleged antitrust violation was a material cause of its injuries. However, if you find that Novell's injuries were caused primarily by something other than the alleged antitrust violation, then you must find that Novell has failed to prove that it is entitled to recover damages from Microsoft.

Finally, Novell must establish that its injuries are the type of injuries that the antitrust laws were intended to prevent. This is sometimes referred to as "antitrust injury." If Novell's injuries were caused by a reduction inconduct that harmed competition, such as acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Novell's injuries are antitrust injuries. On the other hand, if Novell's injuries were caused by heightenedconduct that did not harm competition, such as the competitive process itself, or by acts that would benefit consumers, then Novell's injuries are not antitrust injuries and Novell may not recover damages for those injuries under the antitrust laws. You should bear in mind that businesses may incur losses for many reasons that the antitrust laws are not designed to prohibit or protect against – such as where a competitor offers better products or services or whether a competitor is more efficient and can charge lower prices and still earn a profit – and the antitrust laws do not permit Novell to recover damage for losses that were caused by the competitive process or conduct that benefits consumers.

However, if Novell can establish that it was in fact injured by Microsoft's conduct, that Microsoft's conduct was a material cause of Novell's injury, and that Novell's injury was

the type that the antitrust laws were intended to prevent, then Novell is entitled to recover damages for the injury to its business or property.

NOTES: ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases, 2005 Edition*, at F-2 to F-6 (2005) (modified); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114 n.9, 123-24 (1969); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-02 (1962); *Novell, Inc. v. Microsoft Corp.*, No. 10-1482, Slip Copy, 2011 WL 1651225, at *7 (4th Cir. May 3, 2011).