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

NOVELL, INC., Plaintiff, -v- MICROSOFT CORPORATION, Defendant.	MICROSOFT'S REVISED PROPOSED FINAL JURY INSTRUCTIONS Civil No. 2:04 CV 1045 Honorable J. Frederick Motz

December 5, 2011

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MICROSOFT'S REVISED PROPOSED FINAL JURY INSTRUCTIONS

Microsoft Corp. ("Microsoft") respectfully submits the following revised Proposed Final Jury Instructions for the Court's consideration.

Attached as Exhibit A are Microsoft's proposed revisions to the Court's Proposed Final Jury Instructions, which the Court provided to counsel for review and comment on November 30, 2011. (Microsoft has not resubmitted any of the standard civil opening and closing instructions it previously submitted on September 26, 2011, which it does not believe are controversial.) Microsoft requests the opportunity to amend or supplement these proposed instructions prior to or at the charging conference.

Dated: December 5, 2011

Respectfully Submitted,

/s/

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Exhibit A

JURY INSTRUCTION NO. 1

GENERAL PURPOSE OF THE SHERMAN ACT

The basic purpose of the antitrust laws is to protect, encourage and foster competition. The premise of these laws is that the action of competitive forces will yield the best and most efficient allocation of all economic resources, the highest quality products, and the greatest material progress.

The antitrust laws were enacted to promote competition; they were not enacted to protect competitors. By this, I mean that the antitrust laws were not enacted to protect individual businesses from having to compete with one another, or to protect them from successful competition by others. The antitrust laws do not guarantee that every business will be profitable, or that it will survive. Competition, by its nature, is a contest that results in winners and losers. The antitrust laws are not concerned with who wins the competitive struggle, and do not penalize a successful competitor.

Similarly, the antitrust laws do not seek to equalize the differences between particular competitors, or to dilute the full rigor of the competitive process. One company may have advantages over a rival, but the antitrust laws do not prohibit such advantages. A company that becomes large and gains economic power as the result of its competitive vigor in the free enterprise system is not to be penalized because of its success and is entitled to continue to compete hard. Likewise, even a company with monopoly power is encouraged to keep competing vigorously in the marketplace.

The antitrust laws prohibit only anticompetitive conduct that prevents businesses from competing with each other on the merits of their products and that harms

competition.[1] This means that even if you find that Microsoft expressed an intent to harm Novell, this is not sufficient for you to find in favor of Novell on any of the elements of its claim against Microsoft. Thoughts or ideas or plans or proposals do not restrict competition. Only actual conduct or action can restrict competition.[2]

In addition, our antitrust laws do not make it unlawful to acquire or to maintain a monopoly.[3] In this case, Microsoft and Novell agree that Microsoft had a monopoly in the PC operating system market in the relevant period. Novell does not contend that Microsoft acquired its monopoly in the PC operating system market by means of anticompetitive conduct, but instead that Microsoft maintained its monopoly in that market by engaging in anticompetitive conduct directed at Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice). Microsoft disputes this.

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[1] Adapted from ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases* (2005) ("ABA Model Instructions"), at C-26; *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962); *Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009); *Christy Sports LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1198 (10th Cir. 2009); *United States* v. *AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 972 (10th Cir. 1994); *George Haug Co.* v. *Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998); *U.S. Football League* v. *Nat'l Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988).

[2] Adapted from *U.S. Football League* v. *Nat'l Football League*, 1986 WL 10620 (S.D.N.Y. July 31, 1986); *U.S. Football League*, 842 F.2d at 1358-60 ("Hopes and dreams alone cannot support a Section 2 claim of monopolization.").

[3] Adapted from ABA Model Instructions, at C-26 to C-30; *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

JURY INSTRUCTION NO. 2

NOVELL'S CLAIM

Novell has one claim against Microsoft in this case. Novell alleges that, in violation of Section 2 of the Sherman Act, Microsoft willfully maintained its monopoly in the market for PC operating systems by engaging in anticompetitive conduct against Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice) during the time Novell owned those products. Novell's claim is not that Microsoft attempted to monopolize the word processing and/or office suite applications market.

In order to prove its claim in this case, Novell must prove that (a) Microsoft's October 3, 1994 decision to withdraw support for the namespace extension application programming interfaces (APIs) was anticompetitive, (b) that this conduct harmed Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice) by delaying their release significantly beyond Microsoft's August 24, 1995 release of Windows 95, and (c) that this same conduct harmed competition by contributing significantly to Microsoft's maintenance of its monopoly in the market for PC operating systems.[4]

My next instructions will guide you in how to determine whether Novell has proven each of these elements. If you find that Novell has failed to prove, by a preponderance of the evidence, any one or more of these elements, then you must find for Microsoft and against Novell.

[4] Novell Compl. ¶ 153; *In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d 730, 743, 748-50 (D. Md. 2010); *see also* ABA Model Instructions, at C-2.

JURY INSTRUCTION NO. 3

FIRST ELEMENT—THE ALLEGED ANTICOMPETITIVE ACT

Novell alleges that Microsoft's decision on October 3, 1994 to withdraw support for the namespace extension APIs constituted anticompetitive conduct under the antitrust laws. As with the other elements of its claim, Novell must prove this allegation by a preponderance of the evidence.

Conduct is not "anticompetitive" simply because it may have harmed a competitor.[5] Indeed, the essence of competition is that companies compete vigorously against one another to get as much business as they can.[6]

To constitute "anticompetitive conduct" under the antitrust laws, the conduct must have (a) made it very difficult or impossible for competitors to conduct their business, and (b) been undertaken for no legitimate business reason.[7] In addition, conduct which is consistent with industry custom or practice is not "anticompetitive."[8]

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[5] *AMR Corp.*, 335 F.3d at 1116 ("[T]he antitrust laws were passed for the protection of *competition*, not *competitors*.") (citation omitted); *Four Corners*, 582 F.3d at 1223-25; *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . .").

[6] *Four Corners*, 582 F.3d at 1221-22 ("Allowing a business to reap the fruits of its investments 'is an important element of the free-market system': it is what 'induces risk taking that produces innovation and economic growth.'") (citing *Trinko*, 540 U.S. at 407).

[7] Adapted from ABA Model Instructions, at C-36, C-39; *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-09 (2004); *Christy Sports*, 555 F.3d at 1196-97.

[8] *Trace X Chemical, Inc.* v. *Canadian Indus. Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2.") (citing *Telex Corp.* v. *IBM*, 510 F.2d 894, 925-26 (10th Cir. 1975)).

To determine whether Novell has proven, by a preponderance of the evidence, that Microsoft's decision to withdraw support for the namespace extension APIs was anticompetitive, you should consider whether Microsoft's decision was consistent with competition on the merits and practice in the software industry; whether it provides benefits to consumers; and whether the decision would make business sense apart from any effect it has on excluding competition or harming competitors.

Novell contends that Microsoft's decision to withdraw support for the namespace extension APIs was the consummation of a plan conceived in June 1993 to deceive Novell and other ISVs by evangelizing the namespace extension APIs without ever intending to document them in the commercial release of Windows 95, in order to induce Novell and the other ISVs to rely upon these APIs when developing their software for Windows 95.

Microsoft contends that the decision to withdraw support for the namespace extension APIs was not anticompetitive, and was taken for valid business reasons. Microsoft contends, among other things, that (a) Novell understood that a Beta version of Windows 95 could be modified, consistent with industry practice; (b) third-party applications that called the namespace extension APIs could crash the Windows 95 shell; (c) the robustness problems with the namespace extension APIs made it difficult to support them on other Microsoft operating systems, including Windows NT; and (d) the namespace extension APIs, as implemented, did not achieve the functionality that Bill Gates hoped they would achieve.

If you find that Microsoft's decision was not inconsistent with software industry practice, or that there is at least one legitimate business reason for Microsoft's decision, then you cannot find that its decision was anticompetitive.[9]

[9] *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992); *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995); *High Tech. Careers* v. *San Jose Mercury News*, 996 F.2d 987, 991-92 (9th Cir. 1993); *City of Chanute, Kan* v. *Williams Natural Gas Co.*, 955 F.2d 641, 655 (10th Cir. 1992); *U.S. Football League*, 842 F.2d at 1360-61.

JURY INSTRUCTION NO. 4

FIRST ELEMENT—NO OBLIGATION TO ASSIST COMPETITORS

The antitrust laws impose no duty upon a company, even a monopolist, to help or to otherwise cooperate with its competitor. Similarly, the antitrust laws do not impose a general duty on a monopolist to share innovations or its intellectual property with a competitor, even if the innovations or intellectual property might be useful to the competitor in developing its own products.[10]

Given the absence of any duty to assist a competitor, Novell must prove by a preponderance of the evidence that Microsoft's decision was not only inconsistent with software industry practice and lacked any legitimate business reason, but also amounted to the termination of a profitable relationship between Microsoft and Novell that was not temporary and subject to Microsoft's business judgment.[11] Novell must further establish that Microsoft's decision to withdraw support for the namespace extension APIs was undertaken to terminate a profitable, short-term business relationship with Novell in order to deny it a benefit available to all other ISVs.[12]

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[10] *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 745 (D. Md. 2003) (Motz, J.); *Daisy Mountain Fire Dist.* v. *Microsoft Corp.*, 547 F. Supp. 2d 475, 489 (D. Md. 2008) (Motz, J.); *Christy Sports*, 555 F.3d at 1197; *Four Corners*, 582 F.3d at 1221 (a monopolist is allowed to "to reap the fruits of its investments" because "[w]ithout some confidence that they can control access to their own property, real or intellectual, how many firms would be deterred from undertaking the risks associated with . . . a significant new endeavor or facility?").

[11] *Christy Sports*, 555 F.3d at 1196-98; *Four Corners*, 582 F.3d at 1225; *Trace X Chemical, Inc.*, 738 F.2d at 266.

[12] *Four Corners*, 582 F.3d at 1225.

JURY INSTRUCTION NO. 5

SECOND ELEMENT—INJURY TO NOVELL

Even if you decide that Microsoft's decision to withdraw support for the namespace extension APIs was anticompetitive, that does not necessarily mean that the decision caused harm to Novell. Novell must also prove by a preponderance of the evidence that Microsoft's decision was the cause of its injury.

Novell contends that the sole reason it was delayed in releasing PerfectOffice, WordPerfect and Quattro Pro for Windows 95 in a timely fashion was because of Microsoft's decision to withdraw support for the namespace extension APIs.

Microsoft contends that there were a number of separate, independent reasons having nothing to do with Microsoft that explain why PerfectOffice, WordPerfect and Quattro Pro for Windows 95 were late to the market. According to Microsoft, these reasons include the fact that Novell was commonly late; that Novell's shared code team chose to create their own advanced file open dialog rather than using the Windows 95 common file open dialog; that Novell chose not to contact anyone in the Developer Relations Group at Microsoft to attempt to discuss this issue; that Novell's management chose not to give oversight to the PerfectOffice for Windows 95 development team in general and the shared code team in particular; that Novell chose not to develop applications for Windows 95 until early 1995; and, most importantly, because Quattro Pro was not ready until much later.

In order to succeed on its claim, Novell must prove by a preponderance of the evidence that Microsoft's decision to withdraw support for the namespace extension APIs harmed WordPerfect, Quattro Pro and PerfectOffice by causing the release of the

versions of these products for Windows 95 to be delayed significantly beyond the August 24, 1995 release of Windows 95. If you determine that a cause of the delay was due to some factor or factors other than Microsoft's decision to withdraw support for the namespace extension APIs, you must find for Microsoft.[13]

[13] Adapted from ABA Model Instructions, at C-2, F-2; *Microsoft*, 699 F. Supp. 2d at 748-50.

JURY INSTRUCTION NO. 6

THIRD ELEMENT—INJURY TO COMPETITION IN THE PC OPERATING SYSTEM MARKET

In addition to proving that Microsoft engaged in anticompetitive conduct that injured Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice), Novell must also prove by a preponderance of the evidence that the anticompetitive conduct that injured those products also contributed significantly to Microsoft's maintenance of its monopoly in the PC operating system market.[14] It is irrelevant for purposes of this element whether Microsoft's conduct harmed competition in the markets for word processing applications, or for spreadsheet applications, or for office productivity applications generally. That is not Novell's claim. The relevant inquiry is whether the Microsoft conduct that harmed Novell's productivity applications (WordPerfect, Quattro Pro and PerfectOffice) also harmed competition in the market for PC operating systems (the market in which Windows 95 competed).[15]

You should remember that 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.

Everyone agrees that neither PerfectOffice nor WordPerfect nor Quattro Pro was a PC operating system, and that these products did not compete in the PC operating system market. Instead, Novell has two arguments as to how its productivity

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[14] *Microsoft*, 699 F. Supp. 2d at 748-50.

[15] *Microsoft*, 699 F. Supp. 2d at 748 ("Novell's unique § 2 theory makes the inquiry more complicated: 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*.") (emphasis in original); *Brunswick Corp.*, 429 U.S. at 489.

applications (WordPerfect, Quattro Pro and PerfectOffice) could increase competition in the market for PC operating systems.

First, Novell contends that its 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 Perfect Office on non-Microsoft operating systems would substantially reduce 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 this purpose, 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).

Microsoft contends that neither PerfectOffice nor WordPerfect nor Quattro Pro (either alone or in combination) posed a threat to Microsoft's monopoly in the market for PC operating systems. Microsoft contends that those products were not popular enough, and would not have become popular enough, to spark demand for non-Microsoft operating systems. Microsoft also contends that PerfectOffice, WordPerfect and Quattro

Pro were not "middleware" that meet the three criteria stated above, and thus were not a viable alternative to Windows as a development platform for full-featured applications.

If you find that Novell has failed to prove by a preponderance of the evidence that Microsoft's decision to withdraw support for the namespace extension APIs harmed competition in the PC operating system market, then you must find in favor of Microsoft on Novell's claim.

JURY INSTRUCTION NO. 7

DAMAGES—OVERVIEW AND PURPOSE

I will now instruct you on issues concerning damages. 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 proper measure of damages are given only for your guidance in the event that you should find in favor of Novell in accordance with all of the previous 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 and harm to competition in the relevant market, 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 a likely consequence, of Microsoft's decision to withdraw support for the namespace extension APIs. The purpose of awarding damages in an antitrust action is to put an injured party as nearly as possible in the position it would have been if the alleged antitrust violation had not occurred. You are not permitted to award any damages to punish Microsoft or to deter Microsoft 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 damages to reimburse Novell for the costs it incurred in bringing 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 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 suffered by Novell. If you find that Novell has established with reasonable probability that it was damaged as a proximate result of Microsoft's decision to withdraw support for the namespace extension APIs, and that this decision also harmed competition in the PC operating systems market, then you are permitted to make a just and reasonable estimate of the damages to Novell attributable to that decision. 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, and Novell must have proven the reasonableness of each of the assumptions upon which its damages calculation is based. 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 to Novell.[16]

[16] Adapted from ABA Model Instructions, at F-15.

JURY INSTRUCTION NO. 8

DAMAGES—CALCULATION

You have heard conflicting testimony from experts for Novell and Microsoft concerning how to calculate Novell's alleged damages. You should remember that those experts rely on a series of assumptions concerning what Novell contends would have happened absent Microsoft's decision. In particular, Novell's damages calculations are predicated on the assumption that, but for Microsoft's decision to withdraw support for the namespace extension APIs, PerfectOffice for Windows 95 would have been released on August 24, 1995 or within a sufficiently short period of time thereafter to take advantage of that event.

It is Novell's burden to establish to your satisfaction that this, and any other, assumption is reasonable and is based on the evidence presented at trial; that it is consistent with your understanding of what was likely to have happened in the foreseeable future; and that it properly accounts for the effects of lawful competition and other factors not related to Microsoft's decision to withdraw support for the namespace extension APIs, including such things as Novell's own business conduct and developments in the marketplace. If you find that—had Microsoft not withdrawn support for the namespace extension APIs—Novell would not, even in those circumstances, have been able to release PerfectOffice for Windows 95 within a sufficiently short period of time following the August 24, 1995 release of Windows 95 to take advantage of that event, then you must return a verdict for Microsoft.

Finally, 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 injuries that were caused by Microsoft's conduct. Novell bears the burden of proving damages with reasonable certainty, including apportioning damages between injury to Novell that was caused by Microsoft's decision and any harm Novell may have suffered as a result other factors. If you find that there is no reasonable basis to make such an apportionment based on the evidence presented at trial, or that such apportionment can only be through speculation or guesswork, then you may not award any damages to Novell.[17]

[17] Adapted from ABA Model Instructions, at F-15, F-18, F-27.

JURY INSTRUCTION NO. 9

DAMAGES—AWARD NOT REQUIRED

Just because you may find that Novell suffered some damage resulting from Microsoft's decision to withdraw support for the namespace extension APIs does not mean that you are required to award a dollar amount of damages resulting from that decision. You may find, for example, that you are unable to compute the monetary damages resulting from Microsoft's decision to withdraw support for the namespace extension APIs because you cannot determine when Novell might have otherwise been able to bring its office productivity applications for Windows 95 to market. Or, you may find that Novell simply failed to prove an amount of damages.

You may decline to award any damages under such circumstances, or you may award a nominal amount, say $1.[18]

[18] Adapted from ABA Model Instructions, at F-15, F-18, F-27. *Wal-Mart Stores, Inc*. v. *Visa U.S.A., Inc*., 396 F.3d 96, 118 (2d Cir. 2005); *U.S. Football League*, 842 F.2d at 1376-77; *Rosebrough Monument Co*. v. *Mem'l Park Cemetery Ass'*n, 666 F.2d 1130, 1147 (8th Cir. 1981).

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2011, I filed true and correct copy of the foregoing Microsoft's Revised Proposed Final Jury Instructions using the CM/ECF system, which will send notification of such filing to the following:

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