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December 9, 2011

By Hand and ECF Filing

The Honorable J. Frederick Motz,
United States District Court for the District of Utah,
Frank E. Moss United States Courthouse,
350 S. Main Street,
Salt Lake City, Utah 84101.

Re: *Novell, Inc.* v. *Microsoft Corp.*

Your Honor:

We write to respond briefly to the points raised in Novell's December 9 letter concerning the Court's proposed jury instructions.

First, the Court should adhere to the correct statement of the law in its April 2010 decision on Microsoft's motion for summary judgment and instruct the jury that it is Novell's burden to prove that Microsoft's decision to withdraw support for the namespace extension APIs "contributed significantly" to the maintenance of Microsoft's monopoly in the PC operating system market. Novell's oft-repeated arguments to the contrary are wrong, for the reasons Microsoft has explained in the past, most recently in Microsoft's December 5, 2011 letter to the Court.

There also is no merit to Novell's claim that the inclusion of questions 4 and 5 in the verdict form is appropriate because "[s]pecial verdicts are especially helpful in cases involving multiple, alternative theories of recovery because they eliminate the uncertainty as to whether the verdict was based wholly on an improper theory requiring a retrial of the case." (Novell's Dec. 9 Letter at 1.) Here, the Court is not proposing the

use of special interrogatories on alternative legal theories that can be isolated from one another. Rather, the Court is asking the jury to apply two different causation standards ("significantly contributing" versus "reasonably capable of significantly contributing") to the same element (harm to competition in the PC operating system market) of a single claim.

Novell has failed to identify a single case adopting such an approach, which conflicts with the principles set forth in the cases cited in Microsoft's December 8 letter. *See, e.g., Aero International, Inc.* v. *U.S. Fire Insurance Co.*, 713 F.2d 1106, 1112-13 (5th Cir. 1983) (holding that defendant "was entitled to have the critical issues bearing upon its liability submitted to and answered by the jury upon a clear and proper charge" and ordering a new trial). Similarly, including two different causation standards that Novell must meet in order to prevail on its sole remaining claim generates a serious risk of jury confusion and potential prejudice to Microsoft.

Second, the question that the Court asked yesterday was "[i]s there an authority for the nominal damages?" (Dec. 8 Trial Tr. at 4944.) The answer to that question is yes. Novell does not deny that the court in *United States Football League* v. *National Football League*, 644 F. Supp. 1040, 1051 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335, 1376-77 (2d Cir. 1988), gave precisely the sort of instruction on nominal damages that Microsoft has requested.

Third, Novell's proposed revision to question 6 on the verdict form not only fails to describe accurately Novell's franchise applications theory, it would be highly prejudicial to Microsoft. As an initial matter, Novell's proposed revision to question 6 seeks to sidestep Novell's failure to prove that WordPerfect, Quattro Pro and PerfectOffice were highly popular applications.

> If your answer to questions 4 or 5 is "yes," is your answer based upon **Novell's claim that its popular applications, WordPerfect, Quattro Pro, and/or PerfectOffic**e, offered competing operating systems the prospect of lowering the applications barrier to entry because a competing operating

> system, **running the popular Novell software applications**, would offer consumers an attractive alternative to Windows?

(Novell's Dec. 9 Letter at 5 (emphasis added).) What Novell claims is irrelevant. Novell completed its case without proving that its office productivity applications had anything close to the level of popularity that would be required under Novell's franchise applications theory, even if that theory were not foreclosed by the Findings of Fact to which the Court has given collateral estoppel effect. The record is replete with evidence that the share of Novell's office productivity applications was very low as of the release of Windows 95 and had been dropping over the prior three years.

More fundamentally, Novell seeks to water down its own formulation of its franchise applications theory to the point that it would become meaningless. Instead of requiring that Novell prove that its office productivity applications were sufficiently popular to give non-Microsoft "operating systems the prospect of surmounting the applications barrier to entry and breaking Microsoft's operating system monopoly," which is what Microsoft proposed, Novell asks the Court to instruct the jury that all it needs to prove is that "a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows." Microsoft's proposed language was copied verbatim from Novell's December 5, 2011 Memorandum Regarding Proposed Final Jury Instructions. Novell cannot walk away from that language now just because it has no chance of proving that WordPerfect, Quattro Pro and PerfectOffice alone had any prospect of reducing the applications barrier to entry protecting Microsoft's PC operating system monopoly.

Finally, the Court should reject Novell's request to add the following language to the jury instructions: "In determining whether Microsoft's conduct was anticompetitive, the jury may consider whether Microsoft sacrificed short-term profits in

an effort to destroy a competitor." (Novell's Dec. 9 Letter at 5.)[1] Even if Microsoft could be said to have sacrificed short-term profits in deciding to withdraw support for the namespace extension APIs, a hypothesis the Court has expressly rejected (Nov. 18, 2011 Trial Tr. at 2645), that does not mean that such conduct was anticompetitive. Lots of conduct engaged in by monopolists that has an adverse impact on competitors—such as developing new products, providing discounts to customers, or investing in new plant and equipment—is not profit maximizing in the short term, but that does not mean such conduct violates Section 2 of the Sherman Act. Certainly the ABA Model Jury Instructions in Civil Antitrust Cases do not define anticompetitive conduct in the way Novell suggests.

Rather, forsaking short term profits is but one factor that courts look at in determining whether a Section 2 claim fails within the narrow confines of the *Aspen Skiing* exception to the right of a monopolist to refuse to cooperate with its competitors. *See, e.g., Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). If Novell now agrees that the jury should be instructed about what Novell must prove to fall within the narrow *Aspen Skiing* exception as it has been applied by the Tenth Circuit, then Microsoft renews its request that the Court include the following two sentences in the jury instructions:

> 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

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[1] Novell claims that such language is necessary "in light of Dr. Murphy's testimony over the past two days in which he emphasized that Novell's applications would have helped make Windows better—a point he never raised in his expert report—and his repeated references to Mr. Frankenberg's testimony on this point." (Novell's Dec. 9 Letter at 5.) That claim is baseless. The Court itself has remarked on the significance of Mr. Frankenberg's admission that Novell wanted to improve Windows in ways that would increase Microsoft's share of the PC operating system market. (*See, e.g.*, Nov. 18, 2011 Trial Tr. at 2650.)

> profitable relationship between Microsoft and Novell that was not temporary and subject to Microsoft's business judgment.[2] 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.[3]

Absent such a showing, Novell can have no Section 2 claim based on Microsoft's decision to withdraw support for the namespace extension APIs.

Respectfully,

Steven L. Holley

cc: Jeffrey M. Johnson, Esq.

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2 *Christy Sports LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1196-98 (10th Cir. 2009); *Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009); *Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984).

3 *Four Corners*, 582 F.3d at 1225.