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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S OBJECTIONS AND SUGGESTIONS
Plaintiff,	*	REGARDING THE COURT'S TENTATIVE
	*	JURY INSTRUCTIONS AND VERDICT FORM
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

Novell respectfully submits the following objections and suggestions regarding this Court's tentative jury instructions and verdict form issued December 6, 2011.[1] A redlined version of the Court's tentative instructions, indicating Novell's proposed changes, is attached hereto as Exhibit A. Novell's proposed verdict form is attached hereto as Exhibit B.

1. The Court's tentative instructions limit the jury's focus to the decision to withdraw support for the namespace extension application programming interfaces (APIs). Novell's proposed changes broaden the focus to include *Microsoft's conduct* related to the withdrawal of support for the namespace extension APIs. The U.S. Supreme Court and the Tenth Circuit have long held that antitrust plaintiffs should be given the full benefit of their proof without "tightly compartmentalizing the various factual components." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), *quoted in Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984), *and Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1307 n.6 (D. Utah 1999). Consistent with these authorities, this Court ruled that Novell had raised a triable issue of fact "whether Microsoft's behavior, taken as a whole, was anticompetitive" taking into account the "weakened state of other applications and ISVs." *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 745, 750 (D. Md. 2010) (emphasis added), *rev'd on other grounds*, No. 10-1482, 2011 WL 1651225 (4th Cir. May 3, 2011). The Court should therefore instruct the jury regarding the

[1] 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. 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. Novell also reiterates its objection to the Court's intention to obtain a special verdict, rather than a general verdict as Novell has requested.

elements of a Section 2 claim without improperly narrowing the jury's focus to a single aspect of the alleged anticompetitive conduct.

2. The definition of "middleware" is a subject of intense factual dispute between the parties. The Court's tentative instruction resolves this dispute and adopts Microsoft's definition of middleware. Rather than adopting one party's definition, Novell suggests that the Court delete any definition of middleware from the instructions.

That the definition is disputed is demonstrated by the fact that the definition included in the tentative instructions is entirely inconsistent with Finding of Fact ¶ 28, to which this Court granted collateral estoppel effect. That Finding states as follows (emphasis added):

> 28. Operating systems are not the only software programs that expose APIs to application developers. The Netscape Web browser and Sun Microsystems, Inc.'s Java class libraries are examples of non-operating system software that do likewise. *Such software is often called "middleware" because it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers. Currently no middleware product exposes enough APIs to allow independent software vendors ("ISVs") profitably to write full-featured personal productivity applications that rely solely on those APIs.*

Thus, according to the Finding given collateral estoppel effect by this Court – and contrary to the tentative instruction – for software to be middleware there is ***no*** requirement that it "expose 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)." The definition of middleware in Finding of Fact 28 merely requires that middleware rely "on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers."

In fact, Finding of Fact 28 explicitly states that "no middleware" – including Netscape and Java – exposes enough APIs to allow independent software vendors profitably to

write full-featured personal productivity applications that rely solely on those APIs. The Finding never states that software that does not support full-featured personal productivity applications is not middleware.[2]

Moreover, Finding of Fact 68, which has also been granted collateral estoppel effect by this Court, explicitly states that "Microsoft focused its antipathy on two incarnations of middleware" that were working together, Netscape's Web browser and Sun's implementation of Java technologies. Collaterally estopped Finding 74 further states that Java's class libraries "do not expose enough APIs to support the development of full-featured applications that will run well on multiple operating systems without the need for porting." Similarly, Finding of Fact 69 indicates that Netscape Navigator contained key "middleware attributes" but exposes only a limited set of APIs.

In sum, the definition of middleware in the tentative instructions is contrary to the Findings of Fact from the Government Case. Furthermore, in Microsoft's own Answer to the Complaint in this case, Microsoft admits that the term "middleware" can be used to refer to "software that calls upon functionality provided by an underlying operating system while simultaneously exposing its own APIs to software developers" – the exact definition outlined in Finding of Fact 28.

3. By stating that, in determining whether Novell has proved by a preponderance of the evidence that Microsoft engaged in anticompetitive conduct, the jury should "consider whether Microsoft had legitimate business reasons for withdrawing the namespace extension APIs," the Court's tentative instructions incorrectly suggest that the burden is on Novell to prove that Microsoft's conduct had no legitimate business purpose. However, Tenth Circuit law is

[2] Likewise, nowhere does the Finding state that software has to run on multiple operating systems or be available on all or substantially all personal computers to constitute middleware.

clear that the burden is on the defendant, not the plaintiff, to come forward with a "legitimate business justification for the conduct." *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540, 1550 (10th Cir. 1995). As the D.C. Circuit explained in the Government case, only if Microsoft proffers a non-pretextual claim that its conduct is a form of competition on the merits does the burden shift back to Novell to rebut that claim. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

4. The Fourth Circuit ruled that, "[a]s the district court explained," Dr. Noll's testimony "leaves ample room for 'a finding that Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market *in light of the weakened state of other applications and [independent software vendors]*.' That issue is appropriate for trial." *Novell, Inc. v. Microsoft Corp.*, 429 F. App'x 254, 262-63 (4th Cir. 2011) (citation omitted). This important concept was not included in the Court's tentative instructions. Novell's suggested modification adds this to the jury instructions.

5. In its most recent tentative damage instruction, the Court departs from both the ABA model instructions, and the Court's own tentative instructions issued last week, by adding the statement that "If you find there is no reasonable basis to make such an apportionment [of damages] 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," and ending with the statement that "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." The ABA model instructions, and this Court's tentative instructions of last week, would properly and fully inform the jury that its damage award cannot be based on guesswork or speculation, and must be based

on reasonable, non-speculative assumptions and estimates supported by the evidence, without repeatedly inviting the jury to award only nominal damages. We respectfully request that the Court issue its previous tentative damage instruction, which hewed more closely to the model instructions and did not suggest the award of nominal damages.

Dated: December 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th 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*