DICKSTEINSHAPIROLLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

November 20, 2011

Via Electronic Filing

The Honorable J. Frederick Motz
United States District Judge
United States District Court of the District of Utah
U.S. Courthouse – Room 510
101 West Lombard Street
Baltimore, MD 21201

Re: Assertion by counsel for Microsoft that "Deception cannot be an antitrust claim"
***Novell, Inc. v. Microsoft Corp.*, 2:04-cv-01045-JFM (D. Utah)**

Dear Judge Motz:

I write regarding the assertion made by counsel for Microsoft, in the closing moments of last Friday's hearing, that "Deception cannot be an antitrust claim." Trial Tr. at 2681. Counsel for Microsoft further asserted that "the law on this is clear," and cited as support *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493 (10th Cir. 1983). *Id.* Counsel for Microsoft suggested that there was also a Supreme Court case that supported this proposition, but that he had forgotten the name of it. *Id.* Counsel for Microsoft offered no further authority for this proposition. Counsel for Microsoft argued that because Novell's antitrust claim involved deception by Microsoft, and supposedly "the law . . . is clear" that "[d]eception cannot be an antitrust claim," Novell's claim should fail as a matter of law. *Id.*

Neither the single case that Microsoft cited, nor any other case of which we are aware, stands for the proposition that "[d]eception cannot be an antitrust claim," or that an antitrust claim predicated upon deception should fail as a matter of law. To the contrary, numerous successful antitrust claims have been predicated on the defendant's deceptive conduct.

Midwest Underground, the sole authority identified by Microsoft, does not hold, or even imply, that "[d]eception cannot be an antitrust claim." In *Midwest Underground*, plaintiff sought a jury instruction based on its contention that a "horizontal conspiracy to suppress competition through the elimination of a competitor by unfair means constitutes a *per se* violation" of Section 1 of the Sherman Act. *Midwest Underground*, 717 F.2d at 496. The Tenth Circuit ruled that a rule-of-reason analysis, not a *per se* rule, applied to the alleged conduct. The Court based its decision not to apply a *per se* rule on several considerations: the term "unfair means" is too vague to support a *per se* rule; the fact that conduct violates an unfair competition law does not necessarily establish that it violates the antitrust laws (because unfair competition may still be

competition); federal antitrust liability should not turn on the application of state unfair competition law; and unfair competition law is grounded in ethical considerations while antitrust laws are based on economic considerations. *Id.* at 497. Nothing in the Court's lengthy explanation of why it was not adopting a *per se* rule under Section 1 even remotely suggests that "[d]eception cannot be an antitrust claim," or that a claim in which the anticompetitive conduct involved deception should fail as a matter of law. Indeed, words like "deception," "misrepresentation" or "fraud" do not even appear in the opinion. Nor does the opinion have anything to do with whether particular types of anticompetitive conduct can support a Section 2 claim. The case only addresses whether the conduct at issue was a *per se* violation of Section 1 or whether instead a rule-of-reason analysis was required before Section 1 liability could be imposed.

Contrary to Microsoft's assertion, many successful antitrust claims have been predicated on the defendant's deceptive conduct. Perhaps the most pertinent is the Government Case against Microsoft. The D.C. Circuit's opinion carefully evaluated each instance of Microsoft's anticompetitive conduct, and devoted a section of its opinion to Microsoft's "Deception of Java Developers." *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001). "Microsoft's 'Java implementation' included, in addition to a JVM, a set of software development tools it created to assist ISVs in designing Java applications. The District Court found that, not only were these tools incompatible with Sun's cross-platform aspirations for Java – no violation, to be sure – but Microsoft deceived Java developers regarding the Windows-specific nature of the tools." *Id.* at 76. As a result of Microsoft's deception, "developers who relied upon Microsoft's public commitment to cooperate with Sun and who used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system." *Id.* The Court of Appeals further noted that Microsoft deceived a reporter for *PC Week* who asked about this issue, falsely claiming that Microsoft was only "adding rich platform support." *Id.* Internal Microsoft documents revealed that Microsoft was deliberately deceiving Java developers in order to "thwart Java's threat to Microsoft's monopoly in the market for operating systems." *Id.* The Court of Appeals held that Microsoft's deception of Java developers was "exclusionary, in violation of § 2 of the Sherman Act." *Id.* at 77.

A number of other cases support the proposition that an antitrust claim can be predicated on a defendant's deceptive conduct. For example, in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), the Court of Appeals held that an antitrust claim predicated on the defendant's misrepresentations could go forward. "'Anticompetitive conduct' can come in too many different forms, and is too dependent on context, for any court or commentator ever to have enumerated all the varieties. It is a fair inference from the case law, however, that the allegations made here – namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order

to protect their monopoly – bring the defendants' conduct well within that concept." *Id.* at 1087; *see also Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008) (allegations that defendant defrauded customers by misleading them as to contract extensions so as to shield its customers from competition stated claim under the Sherman Act); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (deceptive advertising campaign by monopolist, which was intended to prevent competitive threat, constituted antitrust violation under Sections 1 and 2); *W. Duplicating, Inc. v. Riso Kagaku Corp.*, No. Civ. S98-208 FCD GGH, 2000 WL 1780288, at *7 (E.D. Cal. Nov. 21, 2000) (allegations that defendant engaged in deceptive conduct, including misleading "FUD" marketing campaign, to eliminate competition, stated claim under the Sherman Act); *In re Warfarin Sodium Antitrust Litig.*, No. MDL 98-1232-SLR, 1998 WL 883469, at *9-11 (D. Del. Dec. 7, 1998) (allegations that defendant made false and misleading statements to the public regarding lower-cost competitor stated claim under Section 2 of the Sherman Act), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000).

Microsoft is incorrect in suggesting that a particular category of conduct, such as conduct involving deception, cannot give rise to antitrust liability as a matter of law. Whether a defendant's conduct is anticompetitive is a fact-intensive inquiry.[1]

[1] Anticompetitive conduct is "'conduct constituting an abnormal response to market opportunities. Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition,' if the conduct 'appears reasonably capable of contributing significantly to creating or maintaining monopoly power.'" *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (citations omitted). Juries are typically instructed to consider whether the conduct was consistent with competition on the merits, whether it provided benefits to consumers, and whether the conduct made business sense apart from any effect it had on excluding competition or harming potential competitors. *See* ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, at C-26 to C-30 (2005). If Novell has established its prima facie case, then Microsoft bears the burden of providing a "procompetitive justification" for its conduct, namely a "nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Microsoft*, 253 F.3d at 59. If Microsoft makes that showing, then the burden shifts back to Novell to rebut the claim or show "that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* In making its determination as to whether Microsoft's conduct was anticompetitive, the jury should evaluate Microsoft's conduct in its entirety. *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).

DICKSTEINSHAPIROLLP

The fact that conduct may be independently tortious or otherwise illegal does not prevent such conduct from also violating the antitrust laws. For example, the conduct at issue in *Newcal* was held to state a claim under RICO and the Lanham Act as well as the Sherman Act. Similarly, the conduct in *Warfarin* was held to state a claim under the Lanham Act and common law trade disparagement as well as the Sherman Act. The conduct in *Western Duplicating* was held to state a claim under the Lanham Act and state statutory and common law tort claims, as well as a claim under the Sherman Act.

In sum, there is no support for Microsoft's assertion that "[d]eception cannot be an antitrust claim." The law is to the contrary.

Very truly yours,

/s/ Jeffrey M. Johnson

Jeffrey M. Johnson
Direct Dial: (202) 420-4726
johnsonj@dicksteinshapiro.com

cc: John Schmidtlein, Esq.
David B. Tulchin, Esq.