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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 SUPPLEMENTAL
MEMORANDUM CONCERNING
NOVELL'S DECEPTION THEORY

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

November 21, 2011

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During the November 18 argument on Microsoft's Motion for Judgment as a Matter of Law under Rule 50 of the Federal Rules of Civil Procedure, Novell's counsel conceded that Section 2 of the Sherman Act does not require Microsoft to share with Novell access to its intellectual property, specifically the namespace extension APIs found in Windows 95. (Nov. 18 Trial Tr. at 2587, 2599.) Novell's counsel also conceded that Microsoft has "no duty to cooperate" with Novell. (*Id.* at 2636.) Novell's counsel has now formulated a new theory that Microsoft had a duty not to "deceive" Novell. (*Id.* at 2587.) Novell contends that once Microsoft sent Novell the pre-release M6 beta documentation for Chicago (the project that later became Windows 95) in June 1994, Microsoft could make no changes. (*Id.* at 2661-62.)

As an initial matter, there is no claim under Section 2 of the Sherman Act for mere deception. Further, there is no evidence whatsoever that Microsoft deceived Novell in connection with Microsoft's October 1994 decision to withdraw support for the namespace extension APIs.

ARGUMENT

I. Novell's Purported Claim for Deception Is Not Cognizable Under the Antitrust Laws.

Deceiving a competitor does not give rise to an antitrust claim under Section 2 of the Sherman Act. The Supreme Court has stated that the federal antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (citation omitted); accord *New York v. Microsoft*, 224 F. Supp. 2d 76, 138-39 (D.D.C. 2002). "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd.*, 509 U.S. at 225. The Tenth Circuit has also recognized that "unfair" conduct

directed at a competitor does not in and of itself violate the Sherman Act. *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 496-97 (10th Cir. 1983).

Moreover, the Tenth Circuit has rejected antitrust claims against putative monopolists for withdrawing support to a competitor after initially agreeing to such support pursuant to an agreement. In *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188 (10th Cir. 2009), defendant owned a ski resort and was in the business of, among other things, renting skis to destination skiers at the Deer Valley ski resort. *Id.* at 1190-92. Defendant sold certain parcels of land within the ski resort village to third parties, including a parcel located mid-mountain that was sold with a restrictive covenant prohibiting any owner from using the property to rent skis without defendant's consent. *Id.* at 1190. Plaintiff leased a store from the purchaser of the land mid-mountain and operated a ski rental shop for more than ten years until defendant opened its own ski rental store in the same mid-mountain area. *Id.* at 1190-91. Defendant notified plaintiff that it would withdraw its consent and enforce the restrictive covenant—*i.e.*, that plaintiff would no longer be allowed to compete in the rental ski market mid-mountain. *Id.* at 1191. Plaintiff sued, claiming that defendant's decision to withdraw permission for plaintiff to compete for ski rental business constituted unlawful monopolization or attempted monopolization of the market for ski rentals in Deer Valley or in the alternative, the market for ski rentals in the mid-mountain village. *Id.* at 1191-92. Plaintiff asserted that having been allowed to compete in the ski rental business for years, defendant could not unilaterally withdraw its support by deciding to enforce the old restrictive covenant, thereby eliminating all competition to its own ski rental business. *Id.* at 1192-93.

The Tenth Circuit rejected this claim, holding that the presence of the restrictive covenant in the deed of sale meant that defendant “had explicitly informed its competitors from

the beginning that the relationship could change at any time.” *Id.* at 1197. The court observed that it did “not see why an initial decision to adopt one business model would lock [defendant] into that approach and preclude adoption of the other at a later time.” *Id.* at 1196. And the court concluded that even though “[c]onceivably, such a change might lead to a claim under contract law or as a business tort,” enforcing the restrictive covenant in the lease did not amount to anticompetitive conduct under the Sherman Act. *Id.* at 1196-98. As shown below, the facts here are very similar.

In addition, in *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), another case involving facts strikingly similar to this action, defendant Intel, a monopolist in the manufacture of microprocessors, provided plaintiff Intergraph, a manufacturer of computer workstations, with technical assistance and access to defendant’s pre-released products pursuant to a non-disclosure agreement that was terminable at will by either party. *Id.* at 1349-50, 1364. After a disagreement arose between the parties as to intellectual property licensing issues, Intel terminated its non-disclosure agreement with plaintiff, thereby reducing the “technical assistance and other special benefits” provided to Intergraph. *Id.* at 1350, 1354. Specifically, Intel “refus[ed] to authorize help to Intergraph for removal of a ‘bug’ or defect in a product,” which “requir[ed] Intergraph to spend substantial time and resources to solve the problem and delay[ed] Intergraph’s product entry into the market.” *Id.* at 1365-66 (quotation omitted).

Intergraph sued Intel, asserting violations of Sections 1 and 2 of the Sherman Act, among other claims. *Id.* at 1350. After the district court granted a preliminary injunction in favor of Intergraph requiring Intel to restore the assistance it had provided in the past, Intel appealed “arguing that no law requires it to give such special benefits” to Intergraph. *Id.* at 1350-51. The Federal Circuit agreed, and vacated the injunction, holding that “[t]he withdrawal

of technical service is not a violation of the antitrust laws.” *Id.* at 1366. In reaching its holding, the court reiterated that “the Sherman Act does not convert all harsh commercial actions into antitrust violations.” *Id.* at 1354.

Novell has pointed to no case in which a monopolist was held liable in a private action for treble damages under Section 2 of the Sherman Act for deceiving a competitor. The cases to which Novell makes reference in its November 20 letter are inapposite. Its reliance on *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) is also misplaced because the D.C. Circuit did not hold that deception of Java developers could form the basis for a private treble damages antitrust action by a competitor. The remaining cases on which Novell relies involve a putative monopolist allegedly deceiving consumers, not its competitor. *See Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 (9th Cir. 2008); *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1260-63 (8th Cir. 1980); *Western Duplicating, Inc. v. Riso Kagaku Corp.*, 2000 WL 1780288, at *2-3 (E.D. Cal. 2000); *In re Warfarin Sodium Antitrust Litig.*, 1998 WL 883469, at *8-9 (D. Del. Dec. 7, 1998), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000).

II. There Is No Evidence of Any Deception of Novell by Microsoft.

Novell argues that Microsoft deceived Novell because at the time Microsoft provided Novell with the pre-release M6 beta documentation for Chicago in June 1994, Microsoft intended to withdraw support for the namespace extension APIs later. Novell claims that Microsoft’s “deliberate deception [was] designed to lure WordPerfect down a path, and then spring a preexisting plan,” concocted as early as June 1993, to withhold extensibility from Chicago and to ship sometime thereafter an extensible shell with Microsoft Office. (Novell’s

Opposition to Judgment as a Matter of Law (“Novell’s Opp.”) at 38; Nov. 18 Trial Tr. at 2642-44.) There is no evidence to support any of this.

A. Novell’s Purported Claim for Deception Ignores the Evidence that Betas Are Subject to Change.

The premise behind Novell’s claim for deception is that at the time Microsoft made a “promise to WordPerfect” to include shell extensibility in Windows 95 and “partially documented the Namespace extensions in the M6 Beta released in June of 1994,” Microsoft had a duty to continue to support those APIs in the commercially released version of Windows 95. (Nov. 18 Trial Tr. at 2640.) This is contradicted by the evidence.

Microsoft’s beta license agreement, which governed the terms by which Novell obtained access to Microsoft’s prerelease versions of Windows 95, expressly stated that the final version of Windows 95 might be “substantially” different from the beta versions. (DX 18 ¶ 2; DX 19 ¶ 2.) The Beta License Agreements stated that Windows 95 “may be substantially modified prior to first commercial shipment.” (*Id.*) In addition, the Beta License Agreements stated that “[t]his PRODUCT consists of pre-release code, documentation and specifications and is not at the level of performance and compatibility of the final, generally available product offering.” (*Id.*)

Likewise, the Chicago Reviewer’s Guide, which was sent to ISVs prior to June 1994 (Testimony of Ronald Alepin (“Alepin”), Nov. 10 Trial Tr. at 1624-25), states on the cover that “[t]he information discussed in this guide is based on features and functionality present either in the Beta-1 release of Chicago, or planned for a future release. The discussion of Chicago herein, does not represent a commitment on the part of Microsoft for providing or shipping the features and functionality discussed in the final retail product offerings of Chicago.” (PX 388 at 1.)

At trial, Novell's former CEO Bob Frankenberg acknowledged that companies who obtained pre-release versions of software products pursuant to beta license agreements, including Novell, understood that these products "might change" and "could change" prior to commercial release. (Testimony of Robert Frankenberg, Nov. 8 Trial Tr. at 1201, 1209.) Frankenberg testified that it was "widely understood in the software industry" that beta versions of software products may change and that the entire risk arising from use of a beta version of a software product is borne by the beta tester. (*Id.* at 1204-05.) Novell's expert Roger Noll agreed that "all beta versions of all software are provisional, and they are not guarantees of what the program will contain upon final release." (Testimony of Roger Noll, Nov. 15 Trial Tr. at 1878.) Ronald Alepin testified that the purpose of beta testing is to "identify problems which need fixing," and thus one of the reasons why an operating system might change during the beta process is if testers report bugs or malfunctions. (Alepin, Nov. 10 Trial Tr. at 1556.) This testimony defeats the argument that once Microsoft delivers a beta, the final product may include no modifications from what was in the earlier pre-release version.

Novell's contention that Microsoft deceived Novell by withdrawing support for the namespace extension APIs after delivering a beta containing these APIs fails for the same reason that the claims in *Christy Sports* and *Intergraph* failed. In *Christy Sports*, the court held that a restrictive covenant in a lease, which prohibited plaintiff from operating a ski rental facility without defendant's consent, warned plaintiff "that the relationship could change at any time." 555 F.3d at 1197. Similarly, in *Intergraph Corp.*, the court held that Intel's withdrawal of technical information did not constitute anticompetitive conduct because "proprietary information and pre-release products" were provided under "non-disclosure agreements," which provided that "both parties may 'cease giving Confidential Information to the other party without

liability,’ and that either party can ‘terminate [the] Agreement at any time without cause upon notice to the other party.’” 195 F.3d at 1364-66.

If Novell were to prevail on its argument that Microsoft’s decision to change its pre-release betas after sending them out to ISVs is actionable under the antitrust laws pursuant a theory of deception, software beta testing would be crippled. Operating system developers such as Microsoft and beta testers mutually benefit from beta testing. Microsoft obtains information from ISVs about its prototype software and is able to make changes depending on the feedback it receives from beta testers. ISVs are able to begin work to develop applications compatible with the new software before it is released to the marketplace. If there were a legal requirement that locked a developer into a beta version of its software as soon as it was issued, this mutually beneficial process would not occur.

B. Novell’s Theory that Microsoft Devised a Scheme in June 1993 To Deceive Novell Is Unsupported by the Evidence.

Novell argues that Microsoft formulated a plan in June 1993 to withhold extensibility from Chicago and to ship an extensible shell with Microsoft Office. (Nov. 18 Trial Tr. at 2642; Novell Opp. at 38.) Novell’s counsel argued on November 18 that Mr. Gates’ decision in October 1994 to withdraw support for the namespace extension APIs “is based on the exact same considerations laid out in the Hood Canal retreat in June of 1993,” that “Chicago would not give ISVs the extensibility of the Namespace extension” and that “the purpose of the plan was to grant those benefits to Microsoft’s Office productivity applications in Office.” (Nov. 18 Trial Tr. at 2644.) There is no evidence to support Novell’s theory.

Novell points to a June 1993 PowerPoint presentation which discusses making the Chicago shell “non-extensible,” but nowhere in the document is there a single reference to the namespace extension APIs. (PX 51 at MS-PCA 2535292.) Nor has there been any testimony at

trial that that the June 1993 discussion involved the namespace extension APIs. As Novell's witnesses acknowledged, shell extensibility encompasses much broader functionality than the functionality provided by the four namespace extension APIs. (Harral, Oct. 24 Trial Tr. at 456-57; Testimony of Greg Richardson, Oct. 25 Trial Tr. at 591-92, 624.) Moreover, trial witnesses here testified that Microsoft shipped an extensible shell with Windows 95. (Harral, Oct. 24 Trial Tr. at 462; Richardson, Oct. 25 Trial Tr. at 591-92, 624; March 4, 2009 Deposition of Bill Gates at 39, 41-42, 51, used at trial on Oct. 19.) In addition, Ronald Alepin testified that Microsoft Office never called the namespace extension APIs. (Alepin, Nov. 10 Trial Tr. at 1641-43). There is no evidence of deception. The evidence is that Novell knew that a beta version of a product could change, and the governing contract said exactly that.

CONCLUSION

Novell's theory of deception is not a cognizable antitrust claim. Furthermore, Novell's contention that Microsoft deceived Novell by withdrawing support for the namespace extension APIs in October 1994 is contrary to the evidence.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2011, I caused a true and correct copy of the foregoing MICROSOFT'S SUPPLEMENTAL MEMORANDUM CONCERNING NOVELL'S DECEPTION THEORY to be filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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