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December 8, 2011

Via Electronic Filing and Hand Delivery

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: *Novell, Inc. v. Microsoft Corp.*, 2:04-cv-01045-JFM (D. Utah)

Dear Judge Motz:

Novell writes in response to Microsoft's letter of yesterday regarding the Court's Proposed Final Jury Instructions and collaterally estopped issues. In those instructions, the Court accurately summarized the binding and preclusive legal conclusions of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") in the Government Case. Microsoft, however, now asserts that none of the D.C. courts ever concluded that "Microsoft's conduct directed against Netscape Navigator and Sun's Java technology unlawfully maintained Microsoft's monopoly in the PC operating system market."

As an initial matter, Microsoft itself admitted almost five years ago that, as the D.C. courts determined, Microsoft violated "the antitrust laws" "for the period July '95 to June 24, '99." In opening arguments in the *Comes* case, Mr. Tulchin told the jury: "Microsoft violated the law. And we do not – we do not say otherwise. And, of course, you've been instructed that that's so, and Microsoft long ago accepted that result." *Comes v. Microsoft Corp.*, Tr. at 4352, 4354-55 (Dec. 12, 2006). Significantly, the claim in the Government Case that the D.C. Circuit affirmed was for Microsoft's unlawful maintenance of its monopoly in the PC operating system market and, therefore, that is the only claim to which Mr. Tulchin could have been referring when he admitted that Microsoft had violated the antitrust laws.

Moreover, the D.C. Circuit's opinion itself refutes Microsoft's current argument. To establish liability under Section 2 of the Sherman Act "in a case brought by the Government, ***[the Government] must demonstrate that the monopolist's conduct harmed competition***." *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (emphasis added). Applying this principle, the D.C. Circuit concluded, in no uncertain terms, that Microsoft engaged in

anticompetitive conduct ***that harmed competition*** and, therefore, violated Section 2 of the Sherman Act:

> "In sum, we hold that with the exception of the one restriction prohibiting automatically launched alternative interfaces, all the OEM license restrictions at issue ***represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification.*** The restrictions therefore violate § 2 of the Sherman Act." *Id.* at 64 (emphasis added).
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> "Microsoft's actions increased its browser usage share and thus ***protected its operating system monopoly from a middleware threat*** and, for its part, Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its operating system monopoly. Accordingly, we hold that Microsoft's exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct, in violation of § 2." *Id.* at 67.
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> "***Plaintiffs having demonstrated a harm to competition***, the burden falls upon Microsoft to defend its exclusive dealing contracts with [Internet Access Providers] by providing a procompetitive justification for them." *Id.* at 71 (emphasis added) (citation omitted).
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> "Because, by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), ***the deals have a substantial effect in preserving Microsoft's monopoly***, we hold that ***plaintiffs have made a prima facie showing that the deals have an anticompetitive effect.***" *Id.* at 72 (emphasis added).
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> "Microsoft offers no procompetitive justification for the exclusive dealing arrangement [it had with Apple]. . . . Accordingly, we hold that the exclusive deal with Apple is exclusionary, in violation of § 2 of the Sherman Act." *Id.* at 74.
>
> "Because the cumulative effect of the deals is anticompetitive and because Microsoft has no procompetitive justification for them, we hold that the provisions in the First Wave Agreements requiring use of Microsoft's [Java Virtual Machine] as the default are exclusionary, in violation of the Sherman Act." *Id.* at 75.

> "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, ***Microsoft offers no procompetitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of § 2*** of the Sherman Act." *Id.* at 77 (emphasis added).

> "Microsoft does not deny the facts found by the District Court, nor does it offer any procompetitive justification for pressuring Intel not to support cross-platform Java. Microsoft lamely characterizes its threat to Intel as 'advice.' The District Court, however, found that Microsoft's 'advice' to Intel to stop aiding cross-platform Java was backed by the threat of retaliation, and this conclusion is supported by the evidence cited above. Therefore we affirm the conclusion that Microsoft's threats to Intel were exclusionary, in violation of § 2 of the Sherman Act." *Id.* at 77-78.

In its letter, Microsoft also asserts that the D.C. Circuit "confirmed" that "none of Microsoft's conduct directed at Netscape Navigator or Sun's Java technology had an actual . . . impact on Microsoft's monopoly in the PC operating system market." As demonstrated above, the D.C. Circuit "confirmed" no such thing; throughout its opinion, the D.C. Circuit notes that plaintiffs in the Government Case proved harm to competition, that Microsoft engaged in conduct that had an anticompetitive effect, and that Microsoft violated Section 2 of the Sherman Act. *See, e.g.*, 253 F.3d at 61, 67, 71.[1] The error in Microsoft's argument is evident from the words of the D.C. Circuit itself, which stated that its 2001 ruling "upheld the district court's ruling that Microsoft violated § 2 of the Sherman Act ***by the ways in which it maintained its monopoly***." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1205 (D.C. Cir. 2004) (emphasis added).[2]

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[1] Microsoft mischaracterizes the D.C. Circuit's opinion in several respects. For example, Microsoft's letter suggests that a plaintiff must prove that "Microsoft would have lost its position in the OS [operating system] market" to establish causation. The D.C. Circuit, however, used this language only in addressing why requiring Microsoft to divest itself of certain assets might not be the appropriate remedy for Microsoft's anticompetitive conduct: "[T]he District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior. . . . If the court on remand is unconvinced of the causal connection between Microsoft's exclusionary conduct and the company's position in the OS market, *it may well conclude that divestiture is not an appropriate remedy*." *Id.* at 107.

[2] *See also id.* at 1213 (recognizing that the 2001 decision held Microsoft's conduct in deceiving Java developers to be "exclusionary, in violation of § 2 of the Sherman Act," "[b]ecause

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In its October 4, 2011 ruling on Novell's Renewed Motion Seeking Collateral Estoppel, the Court stated that it did "not want the jury in this case to revisit critical findings that were made against Microsoft in the government case." (Docket #163). The Court suggested that it could avoid "this from happening by stating in [its] jury instructions that certain elements of plaintiff's claims . . . are uncontested in this litigation, e.g., that Microsoft had monopoly power in the operating system market and that it engaged in anticompetitive conduct to maintain that monopoly." Novell agrees that the Court's intended process for addressing the collateral estoppel issue is an appropriate means of addressing the preclusive effect of the D.C. Circuit's findings of liability in the Government Case, and the Court should not now, two months after it issued its ruling, entertain Microsoft's baseless argument that there were no such anticompetitive findings in the Government Case.

Very truly yours,

/s/ Jeffrey M. Johnson

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cc: John Schmidtlein, Esq.
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Microsoft ***failed to provide a procompetitive explanation for its deception of software developers – indeed, there appears to be no purpose at all for the practice that would not itself be anticompetitive***" (emphasis added)).