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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 MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW Civil No. 2:04 CV 1045 Honorable J. Frederick Motz

February 3, 2012

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Microsoft Corporation ("Microsoft") respectfully submits this Memorandum in Support of its Renewed Motion for Judgment as a Matter of Law on the claim asserted by Novell, Inc. ("Novell") under Section 2 of the Sherman Act for unlawful monopolization of the PC operating system market. Based on the evidence at trial, a reasonable jury would not have a legally sufficient evidentiary basis to find in Novell's favor. The Court therefore should enter judgment as a matter of law in favor of Microsoft.

To prevail at trial, Novell was required to prove (a) that Microsoft's decision to withdraw support for the namespace extension APIs was anticompetitive conduct prohibited by Section 2 of the Sherman Act; (b) that this conduct "delay[ed] . . . Novell's development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95," *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 743 (D. Md. 2010); and (c) that the delay caused by Microsoft's conduct "also caused anticompetitive harm in the *PC operating system market*." *Id.* at 748 (emphasis in original). As to the third element (harm to competition), Novell's theory at trial was based on the alternative assertions (a) that PerfectOffice, WordPerfect and Quattro Pro were so popular that, if they were available on other operating systems, competition in the PC operating system market would increase, and (b) that the same three Novell products were cross-platform middleware that exposed a sufficient number of application programming interfaces ("APIs") to enable independent software vendors ("ISVs") to write applications that called those APIs, rather than the APIs exposed by the Windows operating system, thereby also leading to increased competition in the PC operating system market. As shown below, Novell's evidence was entirely insufficient on all three elements.

PRELIMINARY STATEMENT

This is an unusual case in many ways. It took Novell ten years after the allegedly wrongful act occurred to file its Complaint, meaning that the sole claim that survived for trial is barred by the statute of limitations unless it is "based in whole or in part" on *United States* v. *Microsoft Corp.* (the "Government Case"). As a result, Novell can prevail only if its claim is based on the claims asserted by the U.S. Department of Justice in May 1998. In addition, Novell (a) released Microsoft from all antitrust claims except "the Claims set forth in" its 2004 Complaint, and (b) sold, and thus has no standing to prosecute, "any and all claims or causes of action" that were "associated directly or indirectly with" Novell's PC operating system called DR DOS. Novell is thus unable to prevail unless its trial proof conforms tightly to the theory and allegations set forth in the Complaint, and Novell has no standing to proceed if its claim is associated even indirectly with DR DOS. These limitations gave Novell a very narrow channel through which to navigate.

These are not by any means the only difficulties for Novell. Novell has cited no case, and we are aware of none, where a private antitrust plaintiff has obtained a money judgment based on a "cross-market" theory of anticompetitive harm such as the one that Novell advances—that conduct in one market injured competition in an entirely different market. Although the Court of Appeals for the Fourth Circuit permitted Novell to survive a motion to dismiss based on such a theory, a trial is about proof, not a lawyer's ability to articulate a clever hypothetical. At trial, there was no proof of harm to competition in the PC operating system market—the essence of any private antitrust action—especially in view of Bob Frankenberg's testimony (with which Novell's other fact witnesses implicitly agreed) that in the "but-for" world, Microsoft's market share in that market would have been *higher* (not lower) than it was in the actual world. The Novell theories about harm to competition never advanced beyond pure

theory—there was no data or real-world facts that made the theoretical into anything approaching a plausible scenario.

Novell failed in every respect to provide a legally sufficient evidentiary basis for a reasonable jury to find in its favor on any element of its claim. Rather, the evidence at trial established, among other things, that:

1. The sole act about which Novell complains—Microsoft's decision in October 1994 to withdraw support for the namespace extension APIs—did not harm competition in the PC operating system market under any causation standard;

2. Microsoft's October 1994 decision was not the cause of Novell's delay in releasing its products for Windows 95;

3. The decision to withdraw support for the namespace extension APIs was not anticompetitive—especially in light of the overwhelming evidence from more than a half dozen witnesses that it is common practice in the industry for a software developer to make changes to a beta version of an upcoming software release and in view of the license agreement between Novell and Microsoft.

There is no dispute that designing and developing any operating system—and particularly Windows 95, which was significantly more complex and advanced than its predecessors—involves significant tradeoffs, and that during the development process there are inevitably questions of how and to what extent to include or exclude features in view of deadlines and design goals. Against this backdrop, Novell's claim hinges on the notion that—despite the well-understood practice in the software industry that beta releases are subject to change and the explicit language in the license agreement—Microsoft could not modify its own operating system if doing so disadvantaged Novell (and even if Microsoft was unaware that Novell might be harmed by such a change). This cannot form the basis of a viable antitrust claim. Any rule that in effect prohibits a software developer from making changes to a beta would not only be entirely unworkable, but would stifle innovation in the software industry. Such a rule would also collide with black letter antitrust law that a company—even one with

monopoly power—"has no antitrust duty to deal with its competitors" and "certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438, 449-50 (2009). Novell's claim does not come close to fitting within the narrow exception to that rule, which requires a plaintiff to prove that the conduct (a) amounted to the termination of a profitable, long-term relationship and (b) was without any economic justification. *Four Corners Nephrology Associates, P.C.* v. *Mercy Medical Center of Durango*, 582 F.3d 1216 (10th Cir. 2009). *See also Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009).

The fact that the jury was unable to come to a unanimous verdict is not a reason to deny the present motion. For one thing, the Court expressed some uncertainty during trial as to the proper legal standard for the necessary effect on competition in the PC operating system market (*i.e.*, "reasonably capable" or "substantially contributing"). If the present motion for judgment as a matter of law is granted, the Court of Appeals for the Tenth Circuit may have occasion to clarify this issue. For another, as the Court indicated during the trial (but always outside the presence of the jury), Novell's case is very weak in several respects, and a lengthy second trial need not be conducted if the Court finds that no reasonable jury would have a legally sufficient evidentiary basis to find for Novell on the present trial record. A review of such a decision by the Tenth Circuit is likely to be the most efficient and sensible way toward a final resolution of the case.

SUMMARY OF THE ARGUMENT

Based on the trial evidence, a reasonable jury would not have a legally sufficient evidentiary basis to find, and as a matter of law there is no basis to find, that Novell met any of

the required elements of its claim. The Court should therefore enter judgment as a matter of law in favor of Microsoft for each of the following reasons.

Section I: Microsoft's conduct did not contribute significantly to the maintenance of Microsoft's monopoly in the PC operating system market and, in fact, could not have harmed competition in that market under any causation standard.

First, each of Novell's theories of harm to competition in the PC operating system market was entirely unsupported by the evidence at trial. The evidence established that the applications barrier to entry protecting Microsoft's monopoly was a function of the thousands of applications developed for Windows. As a result, Novell's theory that a mere three applications (PerfectOffice, WordPerfect and Quattro Pro) could possibly have had an impact on competition in the relevant market ("Novell's franchise applications theory") makes no sense.[1] In addition, PerfectOffice, WordPerfect and Quattro Pro ("Novell's Three Products") had market shares so low that a reasonable jury would not have a legally sufficient evidentiary basis to conclude that they were sufficiently popular to induce PC users to move to operating systems other than Windows. Further, the premise of Novell's franchise applications theory is refuted by the fact

[1] The Complaint alleged that the withdrawal of support for the namespace extension APIs caused harm to WordPerfect and Quattro Pro but made no such allegation as to PerfectOffice. (*E.g.*, Compl. ¶¶ 5, 75, 153.) The Complaint also asserted that "[t]hree markets are relevant to this action: the market for Intel-compatible PC operating systems, the market for word processing applications [in which WordPerfect competed], and the market for spreadsheet applications [in which Quattro Pro competed]." (Compl. ¶ 24.) Indeed, the Complaint defined the term "office productivity applications" to refer to "[w]ord processing and spreadsheet applications." (Compl. ¶ 24.) As a result, because Novell and Microsoft entered into a settlement agreement four days before the Complaint was filed that released Microsoft from "any and all Claims that Novell ever had or has as of the date of this Agreement . . . except for . . . the Claims set forth in the draft WordPerfect complaint" (Nov. 8, 2004 Settlement Agreement, at ¶ 2(a), attached as Exhibit A to the Declaration of Steven L. Holley, executed on February 3, 2012 ("Holley Decl.")), Novell released any claim for harm to PerfectOffice. *See* pp. 127-28, *infra*. Accordingly, Novell's only claim is for alleged harm to WordPerfect and Quattro Pro. Microsoft will nevertheless refer to all three products in portions of this memorandum so that there is no doubt about the lack of merit to Novell's claim.

that in the late 1980s and early 1990s—when WordPerfect *was* very successful and also was available on many non-Microsoft operating systems—WordPerfect's popularity did not lead to success for those non-Microsoft operating systems or hinder the success of Windows.

Novell also failed to establish that WordPerfect, AppWare, OpenDoc and PerfectFit (or some combination of them) were middleware that could have affected competition in the PC operating system market (the "Middleware Theory"). For Novell's software to have any potential impact on competition, they must have possessed three characteristics: the software must have (a) been cross-platform (*e.g.*, Noll, Nov. 15 Trial Tr. at 1925-26), (b) been available on all or nearly all PCs (*e.g.*, Noll, Nov. 15 Trial Tr. at 1923-26), and (c) exposed a sufficient number of APIs to allow for the development of general-purpose personal productivity applications that relied on those APIs as opposed to APIs exposed by Windows (*e.g.*, Findings of Fact 28, 68, 74).[2]

Novell's software had none of these three characteristics. At trial, perhaps as a means of tryng to confuse the jury, Novell elicited from some of its witnesses an entirely different definition of middleware—any software that sits between the operating system and an application and that exposes APIs (referred to hereinafter as "Middle Software"). (Harral, Oct. 20 Trial Tr. at 234; Gibb, Oct. 26 Trial Tr. at 782-83.) But as Alepin, Novell's technical expert, testified, Middle Software cannot "constitute any sort of threat to Windows" and thus could not affect competition in the relevant market—"[t]here's got to be more." (Alepin, Nov. 9 Trial Tr. at 1461-62.) Neither Professor Noll nor any other witness provided any plausible explanation or real-world data to show that Novell's products, had they been released in a more timely fashion,

[2] This third requirement was set forth in the binding Findings of Fact and incorporated explicitly into the Complaint. *See* pp. 75-81, *infra*. The Findings of Fact that were given collateral estoppel effect are attached as Exhibit B to the Holley Declaration.

could somehow have diminished Microsoft's 90% share of the market. Even taking Novell's theory at face value, the trial evidence comes nowhere close to supporting it.

First, the relevant versions of PerfectOffice,[3] WordPerfect and Quattro Pro were not cross-platform—they were written solely for Windows. Novell never released any version of PerfectOffice for any other operating system. *Second*, Novell's products were not available on all or nearly all PCs—their market share was very low. *Third*, all witnesses agreed that general-purpose personal productivity applications had not been and could not be written to the APIs exposed by Novell's products, and thus any application written to run on those products would necessarily be written to the APIs exposed by Windows. (Noll, Nov. 15 Trial Tr. at 1922-23; Alepin, Nov. 9 Trial Tr. at 1489-90; Alepin, Nov. 10 Trial Tr. at 1533-35, 1538-40.) In fact, Alepin explained that no ISV would even bother to attempt to write a general-purpose personal productivity application on top of WordPerfect because this "would not be the best use of [an ISV's] time." (Alepin, Nov. 9 Trial Tr. at 1480.)

Microsoft's withdrawal of support for the namespace extension APIs did not contribute at all, let alone significantly, to the maintenance of Microsoft's monopoly. As Novell's CEO admitted, had Novell utilized the namespace extension APIs and timely released its products for Windows 95, the position and market share of Windows in the PC operating system market would have been enhanced, not reduced. The allegedly wrongful act did not harm competition.

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[3] On October 6, 2011, the Court granted Microsoft's motion *in limine* seeking to exclude evidence of Novell's theory that PerfectOffice, alone or in combination with Netscape Navigator or Sun's Java, was a form of "middleware" that threatened Microsoft's monopoly in the PC operating system market. Moreover, any claim that PerfectOffice (alone or in combination with other products) was middleware of the sort that might affect competition in the PC operating system market was released. *See* p. 5 n.1, *supra*, and p. 14 n.12, *infra*.

Section II: As a matter of law, Microsoft's October 3, 1994 decision to withdraw support for the namespace extension APIs (which, for ease of reference, will often hereinafter be referred to as the "October 3 Decision") was not an anticompetitive act. All agree that Microsoft was not required to provide Novell with access to or any information about the namespace extension APIs or to cooperate with Novell at all. *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). As a result, Novell's claim is dependent upon its ability to fit within the narrow exception to the general rule laid out in *Aspen Skiing*.

The evidence at trial conclusively demonstrated that Novell's claim falls far outside the *Aspen Skiing* exception under the controlling Tenth Circuit standard. *First*, a reasonable jury would not have a legally sufficient evidentiary basis to find that Microsoft "terminated a profitable business relationship" with Novell and did so "without any economic justification." *Four Corners*, 582 F.3d at 1225. The evidence was overwhelming that Novell's Three Products remained compatible with Windows 95 and that Novell could have released versions of these products for Windows 95 on a timely basis. Former Novell developers testified that they could have used the Windows 95 common file open dialog, but that Novell made the conscious decision to continue to develop its own custom file open dialog for its own business reasons. Moreover, the evidence also established that, rather than seek to block Novell, Microsoft continued to assist Novell in its efforts to release its products for Windows 95. In addition, Microsoft did not "deny" to Novell any technology that was made "available to *all* other" ISVs. *Id.* (emphasis in original). Microsoft's October 3 Decision applied to all ISVs.

Beyond that, Microsoft's conduct was not anticompetitive because (a) it was widely understood in the software industry, including at Novell, that software developers can and

do modify beta versions before commercial release of the product, and (b) the applicable contract provided that the operating system was still under development and all features of Windows 95 were subject to change. (DX 18, Microsoft Corporation Non-Disclosure Agreement (Pre-release Product) with WordPerfect Corporation, May 24, 1994 at 1, ¶ 2.)[4] As an "ordinary business practice[] typical of those used in a competitive market," Microsoft's decision to modify the features of its Windows 95 operating system prior to its final release is not anticompetitive conduct. *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 925-26, 928 (10th Cir. 1975). Moreover, because Novell was "aware that the relationship was temporary and subject to [Microsoft's] business judgment," the October 3 Decision does not constitute anticompetitive conduct as a matter of law. *Christy Sports*, 555 F.3d at 1196.

The evidence at trial also established that Microsoft had legitimate business justifications for its October 3 Decision, which, as a matter of law, precludes a finding that it was anticompetitive behavior. *Four Corners*, 582 F.3d at 1225. Support was withdrawn because the namespace extension APIs (a) posed a risk to the stability and reliability of Windows 95; (b) raised compatibility concerns for future versions of Microsoft's operating systems; and (c) failed to achieve the level of integration that Bill Gates had hoped to achieve.

There is also no basis in fact or law for the assertion that the Section 2 antitrust claim here at issue can be premised on a "deception" theory. A competitor has no claim under the antitrust laws for deception and, in any event, the evidence at trial established that Novell was not and could not have been "deceived" because, among other reasons, it was well aware

[4] All trial exhibits cited in this memorandum were admitted into evidence at trial, except for Microsoft's Demonstrative Exhibits 218, 241, 301 and 307-311, to which reference is made on pages 45, 64-67 and 82. The documents cited in this memorandum that were admitted at trial are included in the accompanying Appendix. Other materials are attached to the Holley Declaration.

that the namespace extension APIs were subject to change based on the explicit language in the beta license agreement and common industry practice.

Section III: The evidence at trial overwhelmingly demonstrated that the October 3 Decision was not the cause of delay in the release of PerfectOffice, WordPerfect or Quattro Pro for Windows 95.[5] Even as of January 1996, Quattro Pro—"an essential element" of PerfectOffice without which Novell could not release the suite (Frankenberg, Nov. 7 Trial Tr. at 1143)—was "[n]ot by any stretch of the imagination" ready to go. (Larsen, Nov. 30 Trial Tr. at 3624; *accord* LeFevre, Dec. 2 Trial Tr. at 4062-63; Bushman, Nov. 28 Trial Tr. at 3192-93.) Further, it is undisputed that Novell could easily have released the relevant products on time if it had used the Windows 95 common file open dialog. Microsoft is not liable for Novell's decision to pick a far more difficult route.

Section IV: Novell's damages theories were all dependent on the assumption that but for Microsoft's withdrawal of support for the namespace extension APIs, Novell would have been able to release PerfectOffice for Windows 95 within 30 to 60 days of the August 24, 1995 release of Windows 95. This assumption was shown conculsively at trial to be false. As a result, Novell is not entitled to recover any damages as a matter of law.

In addition to these reasons, there are four additional independent legal issues that also compel the granting of Microsoft's motion. *First*, Novell has no standing to assert its claim because, even if Novell's Three Products had been harmed by the October 3 Decision, Novell

[5] Novell's definition of a delay that harmed its products was a delay of more than about 60 days after the August 24, 1995 release of Windows 95. (*E.g.*, Oct. 18 Trial Tr. at 34-35 (Novell's opening statement: "The evidence will show that one of Novell's primary objectives was to have PerfectOffice for Windows 95 on the store shelves within 30 to 60 days of the release of Windows 95."); Warren-Boulton, Nov. 17 Trial Tr. at 2418 ("Novell's goal, was to get it out within 30 or 60 days and that is my but-for world.").)

suffered no cognizable antitrust injury that had an "adverse effect on competition or consumers" in the PC operating system market. *Elliott Industries Ltd.* v. *BP America Production Co.*, 407 F.3d 1091, 1125 (10th Cir. 2005). *Second*, the evidence at trial established that Novell did not need the namespace extension APIs for WordPerfect and Quattro Pro (the only two products at issue in the Complaint), but rather for five other products (including Novell's QuickFinder search engine and Soft Solutions document management system). As a result, any purported claim based on harm to these products or to PerfectOffice was released in Novell's November 2004 settlement with Microsoft. *Third*, the claim Novell submitted to the jury was dependent on assertions about the installed base of WordPerfect on the DOS platform, and is thus "associated directly or indirectly with" the claim that Novell sold Caldera in 1996. *Fourth*, by disavowing a highly important element of the theory of the Government Case and proceeding on a different theory at trial, Novell's claim at trial bears no "real relation" to the matters "complained of in the government suit," *Leh* v. *General Petroleum Corp*., 382 U.S. 54, 59 (1965), and therefore is barred by 15 U.S.C. § 15b.

STATEMENT OF FACTS

A. The Complaint

On November 12, 2004, Novell filed its Complaint in this action, asserting six counts under Sections 1 and 2 of the Sherman Act, all based on harm allegedly suffered by Novell's WordPerfect word processing application and Quattro Pro spreadsheet application in the period in which Novell owned them (June 24, 1994 to March 1, 1996).

On November 8, 2004, four days before it filed the Complaint, Novell and Microsoft entered into a settlement agreement which released Microsoft from "any and all Claims that Novell ever had or has as of the date of this Agreement in law or in equity, known or

unknown, of any kind whatsoever (including without limitation any antitrust or similar Claims of any kind), except for . . . (iii) the Claims set forth in the draft WordPerfect complaint . . . ." (Nov. 8, 2004 Settlement Agreement, at ¶ 2(a), Holley Decl. Ex. A.) This exception referred to a draft complaint that was identical to the Complaint actually filed on November 12.[6]

Count I of the Complaint alleged that Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro[7] in order to maintain its monopoly in the PC operating system market.[8] (Compl. ¶¶ 151-55.) Novell alleged that Microsoft's withdrawal of support for the namespace extension APIs "forced Novell to expend an entire year" developing an alternative technology and thus prevented Novell from releasing WordPerfect and Quattro Pro for Windows 95 on a timely basis. (Compl. ¶¶ 72-78.)

According to the Complaint, Microsoft "evangelized the benefits of using the browsing extensions" before the release of Windows 95 but then "ripped out these programming interfaces without warning to Novell" only "a few months" before the final release of Windows 95. (Compl. ¶¶ 73, 75.) The Complaint also alleged that Microsoft's acts "degraded the functionality of Novell's applications"[9] in that "Novell was suddenly unable to provide basic

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[6] There is no dispute that the other two exceptions are inapplicable here.

[7] The Complaint alleged that Microsoft's conduct caused harm to those two products and no other. (Compl. ¶¶ 24, 72-78, 153.) It included no claim for any harm caused to PerfectOffice. *See* p. 5 n.1, *supra*, and pp. 127-28, *infra*.

[8] Novell also alleged in Count I that Microsoft "willfully and wrongfully obtained" its PC operating system monopoly (Compl. ¶ 153), but dropped this allegation before trial (*see* Proposed Pre-Trial Order, filed Sept. 27, 2011, Dkt. #152, at 2). The only issue at trial was whether Microsoft unlawfully *maintained* its monopoly in the PC operating system market. (*See* Verdict Form, Questions 4 and 5, provided to the jury on Dec. 14, Holley Decl. Ex. C.)

[9] Professor Noll testified that the anticompetitive harm caused by Microsoft's conduct was the delay in the release of its products for Windows 95—not degraded functionality. (Noll, Nov. 15 Trial Tr. at 1880-81 (agreeing that "there can't be any harm to competition under the facts

(*footnote continued*)

file management functions in WordPerfect; in many instances, a user literally could not open a document he previously created and saved."[10] (Compl. ¶¶ 75, 78.) The Complaint alleged that versions of WordPerfect written to run on Windows 3.0 and Windows 3.1 were incompatible with Windows 95,[11] and that "[a]s a consequence," it was imperative to release new versions of WordPerfect and Quattro Pro around the same time as Microsoft released Windows 95 because when consumers purchased Windows 95, they would "almost simultaneously switch to applications" that were compatible with the new operating system. (Compl. ¶ 70.)

The Complaint set forth two theories as to how the alleged harm to WordPerfect and Quattro Pro contributed to Microsoft's maintenance of its monopoly in the PC operating system market. *First*, Novell alleged that WordPerfect was so popular that its availability on other operating systems would popularize those non-Microsoft operating systems and thus provide a bridge across the applications barrier to entry that protected Microsoft's PC operating system monopoly. (Compl. ¶ 52.) *Second*, Novell alleged that its AppWare and OpenDoc technologies, when integrated with WordPerfect (not PerfectOffice), were a "middleware" threat

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(*footnote continued*)
here, if the conduct at issue, the decision to withdraw support for the namespace extension APIs, did not cause any delay"); *see also* Noll, Nov. 14 Trial Tr. at 1838-40.)

[10] It was undisputed at trial that WordPerfect and Quattro Pro did not need to use the namespace extension APIs to be compatible with Windows 95. Ronald Alepin testified that Novell could launch its applications from either the Start menu or icons on the desktop without use of the namespace extension APIs and that Novell's applications did not require the namespace extension APIs to create a folder in the Windows 95 file system that would be the default location for storing files created using WordPerfect and Quattro Pro or to place files on the desktop that would automatically open the Novell application when selected by the user. (Alepin, Nov. 10 Trial Tr. at 1577-79.) At argument on Microsoft's Rule 50(a) motion, Novell's counsel falsely stated that "We never suggested that we were never able to run WordPerfect on Windows 95." (Nov. 18 Trial Tr. at 2582-83.) The Complaint is to the contrary.

[11] This allegation about incompatibility was false. Alepin acknowledged that Windows 95 was backward compatible and that versions of WordPerfect and PerfectOffice written to Windows 3.0 and 3.1 would also run on Windows 95. (Alepin, Nov. 10 Trial Tr. at 1580-81; *see also* Gates, Nov. 21 Trial Tr. at 2754.) No witness testified (or even suggested) the contrary.

because they exposed APIs that would enable ISVs to write applications that called those APIs rather than the APIs exposed by Windows. (Compl. ¶¶ 46-51.) Novell alleged that the "portfolio of OpenDoc, AppWare, and WordPerfect software posed a competitive threat to Microsoft's operating systems monopoly similar to that described in the Government Suit." (Compl. ¶ 51.)[12]

Counts II through V of Novell's Complaint alleged that Microsoft unlawfully monopolized or attempted to monopolize markets for word processor software and spreadsheet software—the markets in which WordPerfect and Quattro Pro actually competed. (Compl. ¶¶ 156-73.) Count VI alleged that Microsoft entered into agreements with original equipment manufacturers ("OEMs") and others to exclude Novell's word processing and spreadsheet applications from important software distribution channels, in violation of Section 1 of the Sherman Act. (Compl. ¶ 175; *see also id.* ¶ 24.)

B. Pre-Trial Proceedings

On January 7, 2005, Microsoft moved to dismiss all six counts of Novell's Complaint. On June 10, 2005, the Court dismissed Counts II through V as barred by the applicable four-year statute of limitations under 15 U.S.C. § 15b, holding that the Government Case did not operate to toll the limitation period. *Novell, Inc.* v. *Microsoft Corp.*, 2005 U.S. Dist.

[12] On September 21, 2011, Microsoft filed a motion *in limine* seeking to exclude evidence of a middleware theory that Novell had advanced before trial—that PerfectOffice, alone or in combination with Netscape Navigator or Sun's Java, was a form of middleware that threatened Microsoft's monopoly in the PC operating system market. (Motion *in Limin*e to Exclude Evidence of Novell's New Middleware Theory, Dkt. #112.) Microsoft pointed out that Novell never set out this theory in its Complaint and that, in the November 2004 settlement agreement with Microsoft, Novell released all claims other than those set forth in the Complaint. On October 6, 2011, this Court granted Microsoft's motion, ruling that Novell's middleware theory concerning PerfectOffice is "a separate claim which I don't think can be asserted" because it "was released." (October 6, 2011 Hearing Tr. at 65; *see also* Nov. 9 Trial Tr. at 1409-10 (excluding evidence about PerfectOffice's middleware capability and instructing Novell "[d]on't talk about PerfectOffice at this point, in light of my prior ruling").

LEXIS 11520, at *9-14 (D. Md. June 10, 2005). The Fourth Circuit affirmed dismissal of Counts II through V in 2007. *Novell, Inc.* v. *Microsoft Corp.*, 505 F.3d 302, 320-23 (4th Cir. 2007).

With respect to Counts I and VI, Microsoft argued in its motion to dismiss that Novell (a) lacked standing because the Complaint failed to adequately allege antitrust injury, and (b) had sold those claims to Caldera in 1996. The Court denied the motion as to Counts I and VI, 2005 WL 1398643, at *1-3, but certified its rulings pursuant to 28 U.S.C. § 1292(b). The Fourth Circuit granted Microsoft's petition for leave to appeal only with respect to the first issue (antitrust standing), and subsequently affirmed the denial of Microsoft's motion to dismiss. 505 F.3d at 307, 319.

In 2009, after the completion of discovery, Microsoft moved for summary judgment on the merits of Counts I and VI and Novell moved for summary judgment seeking to eliminate certain affirmative defenses advanced by Microsoft. In response to Novell's motion, Microsoft filed a cross-motion for summary judgment asserting that Novell lacked standing to bring the claims asserted in Counts I and VI because it sold to Caldera all claims "associated directly or indirectly with" Novell's DR DOS operating system in 1996, and further that the doctrine of *res judicata* barred Novell from asserting those claims.

On March 30, 2010, the Court dismissed Counts I and VI on the ground that Novell had sold those claims to Caldera. 699 F. Supp. 2d at 739. The Court also held that "had Novell not assigned them to Caldera, Count I would have survived Microsoft's Motion for Summary Judgment and Count VI would not have." *Id*. at 740. On appeal, the Fourth Circuit reversed with respect to Count I, holding that Novell's sale to Caldera did not include the claim asserted in Count I. *Novell, Inc.* v. *Microsoft Corp.*, 429 F. App'x 254, 260-62 (4th Cir. 2011).

As to Count VI, the Fourth Circuit noted that "Novell's opening brief did not argue that the district court erred by granting summary judgment as to Count VI, and Novell confirmed in oral argument that it was not pursuing" Count VI on appeal. *Id*. at 258 n.7.

In its March 30, 2010 decision, this Court held that in order to succeed on Count I, Novell (a) "must prove not only that the defendant's conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market," 699 F. Supp. 2d at 747-48, and (b) "must [also] prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*." *Id*. at 748 (emphasis in original). The Court further held that Novell must prove "that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market." *Id*. at 750. The Court recognized that "a monopolist generally has a right to refuse to cooperate with a competitor," but ruled that whether the conduct at issue fell within the *Aspen Skiing* exception was an issue for trial. *Id*. at 745-47.[13]

Prior to trial, Novell sought collateral estoppel on certain Findings of Fact made by Judge Jackson and Legal Rulings made by the D.C. Circuit in the Government Case and by the Fourth Circuit in this action. In October 2011, the Court gave collateral estoppel effect to 52

[13] In opposing Microsoft's summary judgment motion, Novell asserted that Microsoft engaged in three allegedly anticompetitive acts: "(1) Withdrawing access to information about, and otherwise changing course regarding, the Windows 95 namespace extensions, thereby delaying and impairing Novell's development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95"; "(2) Misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect's costs and decreasing its functionality"; and "(3) Refusing to grant a Windows 95 logo license for certain Novell software applications." 699 F. Supp. 2d at 743. At trial, Novell limited its claim to Microsoft's "withdrawal of support for the namespace extension APIs" and made clear that it had abandoned its allegations with respect to other conduct. (Novell's Objections and Suggestions Regarding the Court's Tentative Jury Instructions and Verdict Form, filed Dec. 7, 2011, Dkt. #348, at 1; *see also* Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, filed Dec. 5, 2011, Dkt. #336, Ex. A at 4-5.)

Findings (Court's Oct. 4 Letter, Dkt. #163; *see also* D. Md. Dkt. #76), the majority of which concerned background information (Findings of Fact 2, 4, 6-10, 17), characteristics of the market (Findings of Fact 18, 20, 33-35, 59-60), and a description of the "applications barrier to entry" (Findings of Fact 28-32, 36-39, 68-70, 73-74).

At trial, on October 18 and November 14, counsel for Novell read to the jury the collaterally estopped Findings of Fact (Oct. 18 Trial Tr. at 143-57; Nov. 14 Trial Tr. at 1675-97), which the Court instructed had "binding" effect (Oct. 18 Trial Tr. at 143). Included among them were several Findings that have direct bearing on Novell's theories about harm to competition. Among these was "[t]he fact that a vastly larger number of applications are written for Windows than for other PC operating systems [which] attracts consumers to Windows, because it reassures them that their interests will be met as long as they use Microsoft's product" (Finding of Fact 37) and that, as a result, "[t]he large body of applications thus reinforces demand for Windows, augmenting Microsoft's domina[nt] position and thereby perpetuating ISV incentives to write applications principally for Windows" (Finding of Fact 39). The Findings also included statements that (a) "no middleware product exposes enough APIs [as of November 1999, when the Findings were issued] to allow independent software vendors, ISVs, profitably to write full-featured personal productivity applications that rely solely on those APIs" (Finding of Fact 28), and (b) "it remains to be seen [also as of 1999] whether server- or middleware-based development will flourish at all. Even if such development were already flourishing, it would still be several years before the applications barrier eroded enough to clear the way for the relatively rapid emergence of a viable alternative to . . . incumbent Intel-compatible PC operating systems" (Finding of Fact 32).

C. Trial

Trial commenced on October 17 and concluded on December 16. Novell called four fact witnesses to the stand and introduced the deposition testimony of eleven additional witnesses. Novell also called three experts: Mr. Ronald Alepin on technical issues, Professor Roger Noll on competition issues, and Dr. Frederick Warren-Boulton on damages.

Microsoft called eleven fact witnesses to the stand and introduced the deposition testimony of two others. Microsoft also called three experts: Professor John Bennett on technical issues, Professor Kevin Murphy on competition issues, and Professor Glenn Hubbard on damages. A total of 642 exhibits were admitted into evidence.

The evidence at trial established as follows:

1. The Development of Windows 95 and the M6 Beta

In 1991, Microsoft began developing a 32-bit PC operating system, codenamed "Chicago," that was eventually released as Windows 95. (Gates, Nov. 21 Trial Tr. at 2754.) Bill Gates testified that the development of Windows 95 was "one of the toughest engineering tasks ever done" and a "bigger challenge" than developing prior 16-bit operating systems, in part because of the "engineering complexity" of making Windows 95 compatible with the many software and hardware products that had entered the market after the 1992 release of Windows 3.1. (*Id*. at 2759-60.)[14]

In 1993, Microsoft began providing ISVs with information about user interface features that Microsoft was planning to include in Chicago. In July 1993, at a "Design Preview,"

[14] Windows 3.1, the version of Windows prior to Windows 95, was a 16-bit operating system. (Noll, Nov. 15 Trial Tr. at 1882.)

Microsoft provided WordPerfect Corporation[15] and other ISVs with preliminary information about Chicago's new user interface, including common dialogs and various common controls. (PX 63, Trip Report: Chicago User Interface Design Preview, July 8-9, 1993.) At a December 1993 conference, Joe Belfiore, the lead program manager for the Windows 95 shell (Belfiore, Dec. 5 Trial Tr. at 4227), gave a presentation to ISVs describing plans for the user interface of Chicago. (PX 113, New Windows "Chicago" UI: What It Means for Your Application, Dec. 1993.) Belfiore's presentation described various "Shell Extensibility" mechanisms (PX 113, at NOV 00734378, NOV 00734389), only a small subset of which depended on the namespace extension APIs (*see* Belfiore, Dec. 5 Trial Tr. at 4249-50). The presentation noted that the extensible shell in Chicago would allow ISVs to take advantage of features such as "Drag-and-Drop," "Property Sheet Extensibility" and "Explorer UI Integration." (PX 113, at NOV 00734389.) With regard to the last item, the presentation described the ability to add a "custom container" to the Windows Explorer (*id*. at NOV 00734389-90), which was a new general-purpose viewer included in Windows 95.

Two former software developers from Novell's shared code group,[16] Adam Harral and Greg Richardson, testified at trial that they received written slides from this presentation—although Harral did not attend the presentation and Richardson said he did not remember

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[15] WordPerfect Corporation was acquired by Novell on June 24, 1994. *See* p. 43, *infra*.

[16] The shared code group was headed by Tom Creighton. (PX 372, Business Application Development Organization, Feb. 16, 1995, at 2.) Neither Creighton nor Jim Johnson (who reported to Creighton during the relevant time) testified at trial. (*Id.*) Neither did Bruce Brereton, who was Creighton's boss. (*Id*. at 1-2.) The shared code team was responsible for writing features that would run across Novell's applications. (Harral, Oct. 20 Trial Tr. at 206, 209-10.) Harral explained that shared code allowed users to have the "same experience" when using different products so that "if [a user] learned one product [he or she] would know how to operate all of the other products in a similar way." (*Id.* at 206-07.) The shared code group was responsible for developing, among other features, "all of the file handling," which included "how you open a file in WordPerfect [and] how do you save it." (*Id*. at 209.)

attending (Harral, Oct. 24 Trial Tr. at 415; Richardson, Oct. 25 Trial Tr. at 606-07)—which described, in part, the functionality later provided by the namespace extension APIs. (Harral, Oct. 20 Trial Tr. at 296-99; Richardson, Oct. 25 Trial Tr. at 590-91.) Notably, Belfiore's written presentation warned that the namespace extensions were (a) "[n]ot for most applications!," (b) should be used "[o]nly . . . if your application displays a pseudo folder: electronic mail, document management, etc," and (c) "should NOT [be used to] edit documents with an explorer extension!" (PX 113, at NOV 00734390.)

Consistent with this warning, Harral testified that Novell did not need the namespace extension APIs in order to create a version of WordPerfect for Windows 95, stating: "I don't know anything that WordPerfect [the] word processor needed to do for a Namespace extension. They did have shell extensions, but I don't recall a NameSpace extension that they needed to do." (Harral, Oct. 20 Trial Tr. at 327.) Rather, Harral and Richardson explained that the shared code group intended to use the namespace extension APIs in order to augment Windows 95 by embedding Novell's QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery and FTP/HTTP browser directly in the Windows 95 shell.[17] (Harral, Oct. 20 Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 372-74; Richardson, Oct. 25 Trial Tr. at 629-30, 638, 690-92.)

[17] The Complaint made no mention of Novell's Soft Solutions document management system, e-mail client, Presentations clip-art gallery or FTP/HTTP browser, and the Complaint's two references to Novell's QuickFinder search engine gave no indication that the October 3 Decision harmed QuickFinder in any way. (*See* Compl. ¶¶ 94-95.) In any lawsuit, the complaint ordinarily defines the issues to be tried and the scope and nature of a plaintiff's claims. Here, the Complaint is of far greater significance than in the usual case because Novell released Microsoft from all claims other than those set forth in the Complaint. The Court has already dismissed any claims related to the e-mail client, GroupWise. *See* p. 127 n.69 & p. 130 n.72, *infra*.

As Novell was warned in 1993 (PX 113), the namespace extension APIs were not designed to be used by word processing or spreadsheet applications. Satoshi Nakajima, the inventor of this technology, testified that it never made sense for technical reasons for a word processor or spreadsheet to use those APIs. (Nakajima, Dec. 1 Trial Tr. at 3864-65.) Indeed, Nakajima's patent plainly stated that a "NameSpace extension should not be used . . . to expose the contents of a spreadsheet or word processing document in the shell." (PX 364, United States Patent No. 5,831,606, Nov. 3, 1998, issued to Nakajima *et al.*, at 54-55.) Gates also testified that the namespace extension APIs were designed to be called by "an e-mail client or some type of system utility, not [] a word processor [or] spreadsheet." (Gates, Nov. 21 Trial Tr. at 2796-97.)

In the spring of 1994, Microsoft sent to ISVs a "'Chicago' Reviewer's Guide" (Alepin, Nov. 10 Trial Tr. at 1624-25), which provided additional information about features then planned for Windows 95 (PX 388, Microsoft Windows "Chicago" Reviewer's Guide). The cover page of the Reviewer's Guide expressly cautioned ISVs that it did "not represent a commitment on the part of Microsoft for providing or shipping the features and functionality in the final retail product offerings of Chicago." (*Id.* at MSC 00762731.)

On June 10, 1994, Microsoft provided WordPerfect/Novell with the Milestone 6 ("M6") beta version of Windows 95—the first beta version of the new operating system provided to ISVs in general and to WordPerfect/Novell in particular.[18] (Harral, Oct. 24 Trial Tr. at 434-35.) The license agreements with WordPerfect and Novell provided that the beta "may be substantially modified prior to first commercial shipment," and that WordPerfect and Novell "assume[] the entire risk with respect to the use of the" beta. (DX 18, at 1 ¶ 2; DX 19, Microsoft

[18] Novell acquired WordPerfect Corporation on June 24, 1994. (Compl. ¶ 37.) Both Novell and WordPerfect received the M6 beta pursuant to a nearly identical license agreement. (DX 18; DX 19.)

Corporation Non-Disclosure Agreement (Pre-release Product) with Novell, Inc., executed Dec. 10, 1993, at 1 ¶ 2.)[19]

Novell's CEO, developers and other former employees testified that they understood that Microsoft was entitled to modify the beta version of Windows 95. At trial, Bob Frankenberg, Novell's CEO from 1994 to 1996, testified that Novell then understood that beta versions of Windows 95 both "could change" and "might change" prior to commercial release. (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, that such software products may never be released at all, and that the entire risk arising from use of a beta version is borne by the beta tester. (*Id*. at 1204-05.)

Likewise, Nolan Larsen, Novell's Director of Human Factors and later a Quattro Pro developer (Larsen, Nov. 30 Trial Tr. at 3567), testified that "the definition of a beta" is that "there can be and almost certainly will be changes" (*id.* at 3603; *see also id.* at 3654-58). Dave LeFevre, the Director of Marketing for PerfectOffice for Windows 95 at Novell from 1994 to 1996 (LeFevre, Dec. 2 Trial Tr. at 4017-18), agreed that a "[b]eta by definition is an early release or a prerelease of a product that is subject to change" and that "there is no promise that what is in an early beta or even a late beta will be in the final product (*Id.* at 4031). Novell's expert witnesses also conceded this same point. (Noll, Nov. 15 Trial Tr. at 1878 ("all beta versions of

[19] In his opening statement, Novell's counsel stated that the evidence would show that Microsoft adopted a plan in June 1993, referred to by Novell as the "Hood Canal plan," whereby Microsoft would withhold shell extensibility from Windows 95 and ship an extensible shell with Microsoft Office after the release of Windows 95 so as to give Office an advantage. (Oct. 18 Trial Tr. at 46-50.) With no evidence at trial to support that theory, *see* pp. 114-15, *infra*, Novell's counsel conceded in his closing rebuttal that the "[t]he [Hood Canal] plan didn't go forward because . . . what happened is the executives [in the] systems group said, no, no, no, we're not doing that . . . . [T]he Office plan set forth in the radical extreme didn't go forward." (Dec. 13 Trial Tr. at 5324-25.)

all software are provisional, and they are not guarantees of what the program will contain upon final release"); Alepin, Nov. 10 Trial Tr. at 1555-56 ("[t]he expectation" with a beta release "is that the software is being worked on").) Gates, Belfiore and Brad Struss had the same understanding—that it was common in the software industry for beta versions to change. (Gates, Nov. 22 Trial Tr. at 3124-25; Belfiore, Dec. 5 Trial Tr. at 4238-39; Struss, Nov. 28 Trial Tr. at 3257.) Indeed, the only witness who hedged this unqualified testimony about industry practice was Harral, who testified that "the Beta is to hammer out the problems; not, at that point, to do new features or change features." (Harral, Oct. 20 Trial Tr. at 303.)[20] Harral's testimony ignores the obvious—that "fixing" a "problem" could require change to a feature.

Novell's "Software Developer's Kit" (distributed to ISVs with beta versions of Novell's software) also warned ISVs that "Novell does not guarantee that Beta Products will become generally available to the public or that associated products will be released" and that "[t]he entire risk arising out of your use of Beta Product remains with you." (DX 618, Novell Software Developer's Kit License, copyrighted 1994 and 1995, at NOV-B07520262.) Frankenberg acknowledged that these provisions were "certainly pretty much similar" to those in Microsoft's license agreement. (Frankenberg, Nov. 8 Trial Tr. at 1208-09.) And LeFevre testified that when he "ran the beta program" for WordPerfect 5.1 for Windows, WordPerfect "cut a number of features in WordPerfect 5.1" during the beta testing process. (LeFevre, Dec. 2 Trial Tr. at 4033-34.)

Finally, a formal memorandum from the Novell Corporate Development Group dated October 18, 1994—just fifteen days after the October 3 Decision—set forth without

[20] Harral testified that "[t]he designation of beta in the software industry is that it is for ferreting out problems to be fixed, not for changes in the features." (Harral, Oct. 20 Trial Tr. at 336.) He did not offer further explanation for how this distinction could be drawn in practice.

equivocation Novell's understanding that during the beta phase "the product and features may still change dramatically." (DX 612A, Memo to Files from Steven W. Bentley, Novell Corporate Development Group, Oct. 18, 1994, at 4.) The Novell Corporate Development Group memorandum also stated that these changes "may include removal of [an] entire feature" from a beta. (*Id.* at 2.) This October 1994 memorandum completely refutes Harral's testimony that changes to a beta should not include "removal" of a "feature" cannot be reconciled with the Novell memorandum.

2. Microsoft's Decision to Withdraw Support for the Namespace Extension APIs

On October 3, 1994, Bill Gates decided to withdraw support for the namespace extension APIs. (Gates, Nov. 21 Trial Tr. at 2792.) Gates testified that "serious problems with robustness and compatibility . . . led to my decision" (Gates, Nov. 22 Trial Tr. at 3039), as well as concerns that the namespace extension APIs did not provide the level of functionality he had anticipated (Gates, Nov. 21 Trial Tr. at 2800-04).

The evidence at trial established that the namespace extension APIs presented significant robustness concerns. Nakajima testified that due to memory constraints with Windows 95, he designed the namespace extension APIs to allow a third-party application to run in the "same process" as the Windows 95 shell (the Windows 95 user interface). (Nakajima, Dec. 1 Trial Tr. at 3758-61, 3834; *see also* Belfiore, Dec. 5 Trial Tr. at 4270-71.) Although this approach was "efficient," Nakajima testified that "there is a risk that goes with" allowing third-party applications to run in the same process as the Windows 95 shell because if the third-party

application "crashes with a bug or virus or whatever the reason, then the whole system will crash." (Nakajima, Dec. 1 Trial Tr. at 3761.)[21]

There is no dispute that poorly behaved third-party applications calling the namespace extension APIs could crash the Windows 95 shell. Gates testified that "when the [Windows] Explorer would call these other applications [using the namespace extension APIs] . . . , if there was a problem in that piece of software . . . if it crashed or anything, it would crash the whole system because you were running in the shell." (Gates, Nov. 21 Trial Tr. at 2781-82.) Paul Maritz, the Microsoft executive in charge of all operating systems, testified that a program written by an ISV that called the namespace extension APIs "could bring down the shell." (Jan. 9, 2009 Maritz Deposition at 129, Dkt. #279, used at trial on Oct. 27.) James Allchin, the Microsoft executive in charge of Windows NT, testified that because of the way the namespace extension APIs were designed, "if an application had an error in it, it could take down or corrupt the user experience overall." (Jan. 8, 2009 Allchin Deposition, Nov. 8 Trial Tr. at 1297.) Bob Muglia, the group program manager for Windows NT, also testified that "if an application misbehaved, if it crashed or hung, it could bring the whole operating system down." (Muglia, Nov. 29 Trial Tr. at 3386-87; *see also id.* at 3395-97 ("[W]hen an ISV extended the shell, it did so in the same process that the shell actually ran in. What that means is that if that

[21] Nakajima explained that having the namespace extension APIs running in the same process as the Windows 95 shell was akin to having a pre-installed GPS device integrated into the dashboard computer of a car, which is "simpler" and "less bulky" than having a separate aftermarket GPS device sitting on the dashboard. (Nakajima, Dec. 1 Trial Tr. at 3754-56.) However, the fact that it is "fully integrated" is also a "risk," because if an aftermarket GPS malfunctions, the driver can still "operate the car," whereas if an integrated "GPS system crashes, [the driver] cannot do anything." (*Id.* at 3756.) Nakajima also compared the risk to permitting other chefs to come into a commercial kitchen, risking fires and contamination that impacts the restaurant's ability to serve any food at all. (*Id.* at 3759-61.)

application crashes, it can crash the shell and it can bring the system down from the end user perspective.").)

The namespace extension APIs were "more risky" than other shell extension mechanisms because, as Nakajima testified, there was "no limit" on the number of namespace extensions that could be running on Windows 95 at any one time and "no limit" on the size or complexity of applications that could run in the Windows Explorer process space. (Nakajima, Dec. 1 Trial Tr. at 3761-63, 3766.) Thus, it was possible for an unlimited number of ISVs each to add an unlimited number of custom containers that would then appear in the Windows Explorer tree view and in the Windows 95 common file open dialog. (*Id*. at 3764-65.) Alepin acknowledged that Microsoft had no ability to "impose quality control standards on third-party developers . . . whose products called the namespace extension APIs." (Alepin, Nov. 10 Trial Tr. at 1593-94; *see also* Richardson, Oct. 25 Trial Tr. at 659.) Microsoft's inability to control the number and complexity of the namespace extensions that could run on Windows 95 at one time further aggravated the robustness problem. (Nakajima, Dec. 1 Trial Tr. at 3766.)

Novell's witnesses did not dispute that an error in an application calling the namespace extension APIs could crash the Windows 95 shell and bring down the operating system. Richardson and Alepin testified that the namespace extension APIs could have crashed the Windows 95 shell "because at that time namespace extensions were running in the same process as Windows explorer and the rest of the shell" (Richardson, Oct. 25 Trial Tr. at 756-57), and thus an error in an application calling the namespace extension APIs "had the potential to make the system unresponsive." (Alepin, Nov. 10 Trial Tr. at 1589.) Indeed, Professor Noll opined that "one valid reason for not documenting an API" is "where those APIs are unstable." (Noll, Nov. 15 Trial Tr. at 1872-73.)

The evidence also showed that Microsoft was concerned about compatibility with other versions of Windows as well. Gates, Belfiore, Nakajima and Muglia all testified that the October 3 Decision was the culmination of an internal debate at Microsoft between teams developing Windows 95, Windows NT, and a future version of Windows code-named Cairo. (Gates, Nov. 21 Trial Tr. at 2792-93; Belfiore, Dec. 5 Trial Tr. at 4269-71, 4278-80; Nakajima, Dec. 1 Trial Tr. at 3763-64, 3768-71; Muglia, Nov. 29 Trial Tr. at 3385-90, 3397-3400.) In early 1994, these teams were working on "three different shell efforts" and each had differing design specifications for different types of customers. (Gates, Nov. 21 Trial Tr. at 2784.) Belfiore explained that "the Cairo team, because it was focused on higher end PCs and was more oriented around reliability and work station like behavior," believed "that the architecture of having a third-party application that can bring down the entire shell was unacceptable for their goals of reliability." (Belfiore, Dec. 5 Trial Tr. at 4269-71, 4279.) Likewise, the NT team, which was working on "a more powerful version" of Windows "that shipped particularly to business customers or scientific workstation type customers" (Gates, Nov. 21 Trial Tr. at 2780), was "very keen that there never be crashes, because their system was being used for things like stock exchange trading, or other things where you just wouldn't want the software to stop working at any time" (*Id*. at 2781; *see also* Alepin, Nov. 10 Trial Tr. at 1608 ("it was the goal to have Windows NT be more reliable than Windows 95")).

In early to mid-1994, the NT and Cairo teams were concerned that they would have to support the namespace extension APIs, which they viewed to be unreliable, in their shell development efforts and future versions of Windows. As Muglia testified, once the Chicago team shipped its product, the Cairo team would be required "to support what they [Chicago] did" and would not be "able to go forward with the Cairo shell as [they] had planned." (Muglia, Nov.

29 Trial Tr. at 3399.) Belfiore, a member of the Chicago team, agreed that a "critically important" issue in the debate over the namespace extension APIs was the "notion of compatibility," that is, ensuring that end-users who bought an application that ran on Windows 95 would also be able to run the same application on Cairo and other future Microsoft operating systems. (Belfiore, Dec. 5 Trial Tr. at 4278-79; *see also id*. at 4272-73 ("the Cairo team cared what—what our software did because the way we built it, in order to have compatibility, they would have to accept and run as well").) As Alepin explained, one reason for not documenting an API is because "you do not wish customers to attach to them, lest you be obligated to support them in the future." (Alepin, Nov. 10 Trial Tr. at 1560-61.)

Gates testified that prior to October 3, 1994, "NT was saying" that Microsoft should "either redesign these things to be right or don't do them," and "Cairo was just saying don't do them. They take things in the wrong direction and it is just going to be a mess." (Gates, Nov. 21 Trial Tr. at 2792-93.) As a result, Nakajima was asked "to defend" the APIs in a meeting in the "board room" with "Bill Gates and senior executives." (Nakajima, Dec. 1 Trial Tr. at 3771.) Prior to this meeting, the Cairo team sent Nakajima "100 pages of document[s] to prove . . . why Cairo's approach was better" and after reviewing these materials, Nakajima chose not to defend his technology in the boardroom meeting, concluding that the Cairo objections "were right." (*Id*. at 3772-73.)

In September 1994, in the midst of this debate, Gates transferred the members of the Cairo shell team to what was called the Ren group, a team within Microsoft Office, because the Cairo team had been unsuccessful in producing a prototype of its object-oriented shell and Gates wanted to see if the Ren group "could do a better job making progress on it." (Gates, Nov. 21 Trial Tr. at 2782.) Around the same time, the Windows NT shell effort was terminated when

Gates decided "to use a common s[h]ell across Windows 95 and Windows NT" (*id*. at 2784-85; *see also* Belfiore, Dec. 5 Trial Tr. at 4359), but before the design of a common shell could be finalized, Microsoft "needed to solve the problem" of robustness (Gates, Nov. 21 Trial Tr. at 2785). In addressing this issue, Gates and others "looked hard at the objections" from the NT and Cairo groups. (*Id*.)

Thus, on October 3, 1994, Gates decided to withdraw support for the namespace extension APIs (Gates, Nov. 22 Trial Tr. at 3057) and distributed an e-mail to others at Microsoft announcing his decision (PX 1). Contemporaneous evidence confirmed that the reasons for the October 3 Decision were robustness and compatibility. On October 4, 1994, one day later, Muglia wrote that the decision was "very good news for BSD [Business Systems Division]" because "these interfaces introduce significant robustness issues," and "[s]ince Bill has decided these interfaces won't be published, NT development does not have to expend precious energy on implementing these for NT." (DX 21, E-mail from Robert Muglia, Oct. 4, 1994.)

On October 12, 1994, Scott Henson of the Microsoft Developer Relations Group ("DRG") (Struss, Nov. 28 Trial Tr. at 3266) circulated a set of proposed answers to questions that ISVs might ask about the October 3 Decision (DX 3). The answers stated that because the namespace extension APIs were "design[ed] to [be] part of the system," these APIs would "run in the explorer's process space" and, as a result, "[b]adly written name space extension[s] could cause the reliability of Windows 95 to be less th[a]n what it should." (*Id*. at MX 6055843.) DX 3 also explained that Microsoft had "determined that it will be very difficult to support these API's for applications as we move forward with our operating systems," and that Microsoft "did not want to encourage ISV's to support interfaces that would go away in the future." (*Id*.)

An additional reason for the October 3 Decision was that the namespace extension APIs did not provide the level of integration Gates had anticipated. (Gates, Nov. 21 Trial Tr. at 2786-87, 2800-04.) Gates explained that his statement in PX 1 that "[w]e should wait until we have a way to do a high level of integration that will be harder for [the] likes of Notes, WordPerfect to achieve, and which will give Office a real advantage" was a reference to his desire to wait until the Cairo vision had been achieved. (*Id*. at 2803-04.)[22] As Gates told the jury, "the namespace extension APIs [we]re not rich enough to give you the ability to do this kind of information browser shell" that he had envisioned. (*Id*. at 2803.) As a result, Gates explained that it was not worth causing "problems for the NT and Cairo teams" by supporting this technology. (*Id*. at 2804.)

3. The October 3 Decision Was Not Made to Harm Novell

There was no evidence that the decision to withdraw support for the namespace extension APIs was made in order to harm Novell's development efforts, or that it even had anything to do with Novell. To the contrary, Gates testified that at the time he made the decision, he knew nothing "at all about the specifics of whether they [Novell] were using them [the namespace extension APIs] or not." (Gates, Nov. 21 Trial Tr. at 2811; *see also id*. at 2828.)

[22] Gates also explained that he made reference in PX 1 to Notes, which was Lotus' e-mail and workgroup collaboration product, because he thought that once the "Cairo level of integration" had been reached, Microsoft "would be able to reconceptualize how e-mail and WorkGroup was done." (Gates, Nov. 21 Trial Tr. at 2804.) This is because some of the functionality that Cairo was expected to provide was the ability to run queries across applications and file systems, which would only be useful for e-mail clients or "any type of WorkGroup thing where you're dealing with a rich set of information." (*Id*. at 2805.) Thus, he explained that his reference in PX 1 to WordPerfect, alongside Notes, was meant to be a reference to GroupWise, Novell's e-mail client, and not to the word processing application. (*Id.* at 2804.)

(a) Before October 3, Novell Said that It Was Not Using the Namespace Extension APIs

The contemporaneous documentary evidence is in full accord with Gates' testimony. On September 22, 1994, Brad Struss, who led the Windows 95 team for DRG and worked closely with Novell (Struss, Nov. 28 Trial Tr. at 3246-47, 3252-53), reported on the results of a survey conducted to determine the extent to which ISVs were using the namespace extension APIs (DX 17, E-mail from Brad Struss, at MX 6109491). Struss testified that DRG "did the initial overall survey of shell extensibility overall, which included the namespace extension APIs," and that DRG "reached out" to Novell "specifically to talk to them about those APIs to understand what they were using and what the implications of changing those [APIs] may be." (*Id.* at 3268.)[23] In DX 17, Struss reported that as of September 22, 1994, Novell "ha[d] not begun any work on IShellFolder, IShellView, etc." (*i.e.*, the namespace extension APIs). (DX 17, at MX 6109491.) In the same document, Struss put in quotation marks Novell's response upon hearing that Microsoft might withdraw support for this technology: "we'll figure it out if it's not documented." (*Id*; *see* Struss, Nov. 28 Trial Tr. at 3270.)

(b) After October 3, Novell Said It Was "OK" About the Decision to Withdraw Support

The evidence also showed without ambiguity or contradiction that, after October 3, Novell said that it was "OK" with the decision to withdraw support for the namespace extension APIs. On October 12, 1994, Struss reported in an e-mail that "we're now in the process of proactively notifying ISVs about the namespace api changes (will not document them and they'll go away/change)" and "[s]o far Stac, Lotus, WP, Oracle, SCC appear to be OK with

[23] This was, of course, during the time when Microsoft was debating internally about this issue. (Struss, Nov. 28 Trial Tr. at 3264.)

this." (DX 3, at MX 6055840.)[24] Not a single witness for either side ever testified that Novell complained that the October 3 Decision had harmed Novell's development efforts, and there is no document to that effect either.[25]

It is also undisputed that even after the October 3 Decision, Microsoft continued to offer assistance to Novell so that it could build applications for Windows 95. Struss testified that he and others in DRG worked "extra hard" to assist Novell because "WordPerfect was a major software application" and Microsoft believed it was "critical" to have WordPerfect's support for Windows 95. (Struss, Nov. 28 Trial Tr. at 3253-54.) On October 21, 1994, Struss reported in an e-mail that although WordPerfect was "focus[ing] on 16-bit product revision this fall," he was "[w]orking with their [Novell's] sr. management to see about getting more focus on their 32-bit release." (DX 2, at MX 6062581.)

Former Novell employees conceded that Microsoft assisted Novell's development of applications for Windows 95. Frankenberg testified that he was "sure" that "people in the [operating] systems group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95." (Frankenberg, Nov. 7 Trial Tr. at 1131.) Frankenberg added that Novell software developers worked with Microsoft's operating system developers "on a regular basis," and that Microsoft developers generally "endeavored to be helpful to Novell."

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[24] On November 7, 1994, Paul Maritz wrote to Gates saying that "4 groups [were] using these [namespace extension] interfaces," and listing them as "Capone, Marvel, Stac, Symantec." (DX 82.) Novell was not on the list.

[25] Nor is there any evidence of any intent on Microsoft's part to mislead Novell or anyone else by releasing the M6 beta with the namespace extension APIs and then later withdraw support for them.

(Frankenberg, Nov. 8 Trial Tr. at 1217.)[26] LeFevre, who was a Novell employee in 1994 and 1995, testified that "starting in 1994 all through 1995, we had an employee at Microsoft who lived in Utah County whose job it was to support us in this development effort," and that "[h]e was at our offices so frequently that we finally gave him an office with a telephone so he could come in and work when he needed to." (LeFevre, Dec. 2 Trial Tr. at 4029.) LeFevre added that he and Tom Creighton, who was the Director of PerfectFit Technology (PX 372, Business Applications Development Organization, Feb. 16, 1995, at 2), traveled to Redmond and "spent an entire day in building 22 of the Microsoft campus meeting with the development team for Windows answering some critical questions that Tom had about the product" (LeFevre, Dec. 2 Trial Tr. at 4029-30). LeFevre recalled that Microsoft was "very happy to do this" and "even paid for our flight and everything to get up to Redmond and spend the day." (*Id*. at 4030.)

The October 3 Decision conferred no benefit on Microsoft Office or the component applications of the Office suite. To the contrary, Gates testified that no commercially released version of Office, Excel, Word, PowerPoint or Access ever used the namespace extension APIs, and Alepin agreed (at least during the 1994 through 1996 time period, which was as far as he looked). (Gates, Nov. 21 Trial Tr. at 2826; Alepin, Nov. 10 Trial Tr. at 1641-43;

[26] Harral testified at trial that after the October 3 Decision, Microsoft's Premier Support group was "starting to give [Novell] less and less information about the shell in general." (Harral, Oct. 20 Trial Tr. at 345.) On direct examination, Harral testified that he spoke with Premier Support three times, although he was unable to provide a date—or even a month—in which any such call took place. (*Id*. at 329-31.) On cross examination, when asked to provide the names of any people in Microsoft's Premier Support group with whom he spoke, Harral was entirely unable to do so. (Harral, Oct. 24 Trial Tr. at 397, 399, 414.) Novell introduced no evidence at trial of any e-mail sent to Microsoft referring to any such call; no internal Novell e-mail or memorandum indicating that such a call took place or complaining about Microsoft's lack of cooperation; and no document of any kind that could in any way confirm or even imply that there was ever any such contact between the two companies about the namespace extension APIs. And, other than Harral's vague testimony, Novell introduced no evidence at trial—documentary or testimonial—reflecting communications between Novell and Microsoft's Premier Support group.

see also Belfiore, Dec. 5 at 4280-81 (testifying that Office 95 and Office 97 did not use the namespace extension APIs).) Professor Bennett testified that "Microsoft Office 95, Microsoft Office 97, and Microsoft Office 2000 did not use the NameSpace extension APIs." (Bennett, Dec. 12 Trial Tr. at 4990-91.) Not a single witness disagreed.[27]

Maritz's November 7, 1994 e-mail to Gates reported that the only Microsoft software that had planned to use the namespace extension APIs were two parts of Windows 95, Marvel (the MSN client) and Capone (the e-mail client), but that Capone "ha[d] found ways not to use them." (DX 82; *see also* Gates, Nov. 22 Trial Tr. at 3085-86.) Marvel and Capone were not separate products; they were technologies that were "only shipping with Windows 95." (Gates, Nov. 21 Trial Tr. at 2815, 2817; Alepin, Nov. 9 Trial Tr. at 1415.)

4. There Are No Novell Documents Showing that The October 3 Decision Hurt Novell

Novell introduced no evidence that anyone at Novell ever contacted anyone at Microsoft (other than Harral's vague testimony about a few calls to Premier Support) to complain about the October 3 Decision or to say that the decision had or might have an adverse impact on Novell's development efforts. Indeed, the evidence was to the contrary. As shown above, DX 3 shows that in October 1994, Struss was told "WP [WordPerfect] . . . appear[s] to be OK with this." (DX 3, at MX 6055840; *see* Struss, Nov. 28 Trial Tr. at 3272-73.) Struss testified that, despite regular contact between Novell and DRG (*see, e.g.*, DX 22, E-mail from

[27] Alepin testified that a pre-release version of a product code-named Athena, an internet mail and newsgroup reader, called the namespace extension APIs. (Alepin, Nov. 9 Trial Tr. at 1435.) When confronted with the technical analysis conducted by Bennett showing that Athena did not call the namespace extension APIs, Alepin admitted that he did not recall what analysis he had done to support his testimony. (Alepin, Nov. 10 Trial Tr. at 1646; *see also* Bennett, Dec. 12 Trial Tr. at 4990-91 (explaining that "Athena did not use the NameSpace extension APIs").)

Mark Calkins, March 6, 1995), Novell raised no complaints about the namespace extension APIs to anyone else at DRG (Struss, Nov. 28 Trial Tr. at 3276, 3281-82).[28]

Gates testified that he attended "lots of meetings with ISVs in late 94, early 95 and at none of those meetings did anyone come forward and say either that they were using them [the namespace extension APIs] or that they had any issues related to them whatsoever." (Gates, Nov. 21 Trial Tr. at 2815-16.) In fact, at a November 13, 1994 dinner hosted by Gates and attended by Ad Rietveld and Dave Moon of Novell, neither of them expressed any concerns about the namespace extension APIs. (*Id.* at 2821-23; DX 84, E-mail from Brad Struss to Bill Gates, Nov. 12, 1994, at MX 9025187.) Even Frankenberg, who met with Gates on January 10, 1995, testified that he did not recall any discussion about the namespace extension APIs. (Frankenberg, Nov. 7 Trial Tr. at 1121-22.) The detailed 8-page minutes taken by Dave Miller of Novell of this January 10, 1995 meeting—a meeting held in part so that Novell could complain to Microsoft about other issues—also contained no mention of the namespace extension APIs. (DX 636, Memo from Dave Miller to Frankenberg and others, Jan. 10, 1995.)

Thus, the contemporaneous evidence showed that Novell complained not at all and instead told Microsoft that it (Novell) was "OK" with the decision.[29] Frankenberg testified

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[28] Accordingly, Struss' status reports to Microsoft executives in the months after October 1994 reflected no Novell complaints on that subject. (DX 2, at MX 6062581; DX 92, E-mail from Brad Struss, Dec. 15, 1994, at 2.) Had Novell raised any complaints, Struss "absolutely" would have included them in his status reports. (Struss, Nov. 28 Trial Tr. at 3277-78.)

[29] There is ample record evidence that Novell employees frequently communicated with Gates and Microsoft executives such as Brad Silverberg (Vice President of Systems Division), Brad Chase (Vice President of Marketing), Bob Kruger (Systems Marketing and Standards Director), David Cole (Group Program Manager for the Chicago Team) and Doug Henrich (DRG Director). (Frankenberg, Nov. 7 Trial Tr. at 1027-29, 1125; Frankenberg, Nov. 8 Trial Tr. at 1172, 1174-76; DX 22; DX 161, E-mail from Brad Silverberg, Nov. 18, 1993; DX 155, Memorandum from Ryan Richards, Jan. 12, 1995; Jan. 8, 2009 Henrich Deposition, Nov. 8 Trial Tr. at 1307-09.)

that, although he "complained aggressively to Microsoft" about other issues, Novell made no complaint in writing to Microsoft about the namespace extension APIs. (Frankenberg, Nov. 8 Trial Tr. at 1269-70.)[30] If the October 3 Decision had in fact injured Novell, it is incomprehensible that Novell would have remained silent about it.

Moreover, Novell introduced no writing of any kind indicating that anyone at Novell urged management to complain to Microsoft about this issue. This is notable for two reasons. First, the internal silence contradicts Novell's claim at trial that the decision caused significant harm to the company or delayed its development efforts. Second, as Frankenberg testified, any action that could jeopardize the timely release of WordPerfect or Quattro Pro—which "had some real important consequences for Novell" (Frankenberg, Nov. 8 Trial Tr. at 1180)—would have been referred to some or all of four senior executives: Ad Rietveld, Executive Vice President of the Novell Applications Group; Dave Moon, Senior Vice President of the Business Applications Group; Mark Calkins, Vice President and General Manager of the Business Applications Group; and Glen Mella, Vice President of Marketing. (Frankenberg, Nov. 7 Trial Tr. at 1140-42; Frankenberg, Nov. 8 Trial Tr. at 1179-80.) Frankenberg also agreed that "[i]n any business organization faced with an important decision," a formal memorandum would normally be presented to the senior executives "laying out the concerns and the issues and the

[30] Frankenberg offered vague testimony on direct examination (Frankenberg, Nov. 7 Trial Tr. at 1029-30), but cross examination clarified that while Frankenberg discussed the general subject of "undocumented APIs," Frankenberg "never specif[ied] which APIs [he was] talking about" (*id*. at 1117-18). Indeed, Frankenberg testified that he did not recall ever "sa[ying] to Mr. Gates the problem is the namespace extension APIs," and that he also did not recall ever sending or seeing any letter or e-mail to Gates that mentioned the namespace extension APIs. (*Id.* at 1118-19.) That is unsurprising because Frankenberg did not even know at the time what the namespace extension APIs were. (*Id*. at 1127.)

considerations facing that business in making some strategic or tactical choice." (Frankenberg, Nov. 8 Trial Tr. at 1181.)

For example, the evidence at trial included three separate documents addressed to Novell executives discussing whether Novell would participate in the Windows 95 logo licensing program or on what terms: (a) a January 12, 1995 memorandum from Calkins to Frankenberg, Rietveld, Moon, Mella and others discussing possible Novell responses to Microsoft's logo requirements (DX 155), (b) a February 2, 1995 e-mail from Todd Titensor to Ryan Richards describing Frankenberg's decision to oppose one of the logo requirements or refuse to participate in the logo licensing program (DX 157), and (c) a March 6, 1995 e-mail from Calkins to Chase and Silverberg of Microsoft, copying Frankenberg, Mella and others, requesting an exemption from Microsoft's logo program requirements (DX 22). Frankenberg conceded that the January 12, 1995 memo (DX 155) was the type of formal memorandum that would "normally" be written when Novell was faced with an important strategic or tactical decision. (Frankenberg, Nov. 8 Trial Tr. at 1181.) Nevertheless, Novell introduced no such document referring to the important choices it faced after the October 3 Decision or how best to proceed in view of the "vital[] importan[ce]" of these issues. (Frankenberg, Nov. 7 Trial Tr. at 998-99.)[31]

[31] The absence of any such document is particularly remarkable because, as the Court is aware, despite its anticipation of litigation against Microsoft since the early 1990s, Novell's preservation of relevant evidence has been entirely selective. "[T]here [wa]s, and there has been maintained, a file of documents that has been referenced as Microsoft's bad acts," including documents "that go back to probably about the 1994 time period after I had joined Novell, which would have been the latter half of 1994." (Oct. 30, 2008 Rule 30(b)(6) Deposition of Novell, Inc. by James F. Lundberg at 51-53, Holley Decl. Ex. D; *see also* Affidavit of Ryan Richards, sworn on April 23, 2009, at p. 2 ¶ 5, Holley Decl. Ex. E ("Since at least 1992—when I was working for WordPerfect—I had been investigating Microsoft's unlawful conduct and had determined that litigation was the likely avenue to seek redress against Microsoft.").) Nevertheless, no document exists to support Novell's allegations concerning the purported impact of the October 3 Decision on Novell.

In fact, Frankenberg testified that he had never seen any memorandum regarding the October 3 Decision, and that he was never consulted about the shared code group's decision to spend almost a year attempting to write a custom file open dialog. (Frankenberg, Nov. 7, Trial Tr. at 1132-34; Frankenberg, Nov. 8 Trial Tr. at 1180-81.) Each of Harral, Richardson and Gary Gibb, the director of PerfectOffice, testified that he never spoke with any Novell senior executive regarding what Novell should do in light of Microsoft's October 3 Decision. (Harral, Oct. 24 Trial Tr. at 401-02; Richardson, Oct. 25 Trial Tr. at 703; Gibb, Oct. 26 Trial Tr. at 869.) Frankenberg also knew of no "evidence whatsoever that any of the four [executives], Calkins, Mella, Moon or Rietveld ever were presented with a decision about how to respond to Gates' decision to withdraw support for the namespace extension APIs." (Frankenberg, Nov. 8 Trial Tr. at 1181-82.) No such evidence was ever introduced at trial, and Novell called none of these four former senior executives to the witness stand.

5. WordPerfect Was Often Tardy and Novell Struggled to Catch Up After Its 1994 Acquisition of WordPerfect

Novell's claim that Microsoft is to blame for Novell's tardiness in releasing products for the Windows 95 platform must be evaluated in light of the uncontested evidence that WordPerfect/Novell had consistently been late to develop and release products. WordPerfect's failures to anticipate and prepare for the two major shifts in the software industry in the late 1980s and early 1990s—the shift from character-based to graphical user interface ("GUI") operating systems and the shift from sales of standalone applications to office productivity suites—caused WordPerfect to gain the well-deserved reputation of being behind the curve. Even after Novell acquired WordPerfect in June 1994, Novell struggled to catch up while simultaneously grappling with difficulties arising out of the acquisition.

In the mid-1980s and early 1990s, WordPerfect was the acknowledged "king of the hill on the [character-based] DOS platform." (Peterson, Dec. 7 Trial Tr. at 4667; *see also* Dec. 13, 2008 Middleton Deposition, Dec. 5 Trial Tr. at 4178.) WordPerfect enjoyed about 75% of the market for word processing software, and WordPerfect for DOS accounted for 80%-90% of the company's revenues. (Peterson, Dec. 7 Trial Tr. at 4665-66.) By contrast, Microsoft had as far back as 1984 concentrated on "building the operating system [t]hat became Windows 1.0," a GUI-based operating system (Gates, Nov. 21 Trial Tr. at 2709), and tried to persuade ISVs to write applications for Windows (*id.* at 2713). Pete Peterson recalled that in October or November of 1989, Gates personally "stopped me [at a conference] and said you need to write for Windows." (Peterson, Dec. 7 Trial Tr. at 4708.)

But WordPerfect Corporation failed to heed Gates' advice. WordPerfect resisted writing software for Windows because, as Peterson testified, the company "would rather have someone else besides Microsoft, our main competitor, own the operating system" market. (*Id*. at 4670-71.) Craig Bushman, WordPerfect International Product Marketing Manager, testified that Peterson's personal antipathy toward Microsoft and Gates partly motivated the decision not to devote sufficient resources to Windows development, because Peterson "was not going to put any effort into producing a product that would put another penny in Bill Gates' pocket." (Bushman, Nov. 28 Trial Tr. at 3152-53.)

Thus, when Microsoft released Windows 3.0 in May 1990—a product that Professor Noll called a "revolutionary technological leap" (Noll, Nov. 15 Trial Tr. at 1910)—WordPerfect was caught unprepared. Windows 3.0 became immensely popular and caused a major shift to GUI-based operating systems. (*See* Frankenberg, Nov. 7 Trial Tr. at 1040-43; *see also* Noll, Nov. 15 Trial Tr. at 1909-10.) WordPerfect did not come out with a product for

Windows 3.0 until November 1991, about 18 months later. (Dec. 13, 2008 Middleton Deposition, Dec. 5 Trial Tr. at 4187.) As Frankenberg acknowledged, such a delay in the software industry could prove to be a "big disadvantage." (Frankenberg, Nov. 7 Trial Tr. at 1059-63; *see also* Dec. 13, 2008 Middleton Deposition, Dec. 5 Trial Tr. at 4198.) Thus, by the time WordPerfect reacted, the company was "suddenly behind the curve a little bit and trying to play catchup," which "certainly changed the perception" of the company "as a technological leader." (Larsen, Nov. 30 Trial Tr. at 3587-88.)

In the early 1990s, there was a second major shift—also missed by WordPerfect—from sales of individual standalone applications to sales of office productivity suites. Microsoft created the concept of the office suite by releasing Microsoft Office 1.0 in 1990. (Frankenberg, Nov. 7 Trial Tr. at 1080; Gibb, Oct. 26 Trial Tr. at 823.) Frankenberg testified that this gave Microsoft a "huge head start" in the suite market. (Frankenberg, Nov. 7 Trial Tr. at 1060-64.) According to Bushman, Microsoft Office was "a stunning development" and a "brilliant move," which WordPerfect/Novell quickly realized would "put us in a very difficult position." (Bushman, Nov. 28 Trial Tr. at 3153.) Frankenberg acknowledged that by the mid-1990s, "customers were buying suites rather than individual products." (Frankenberg, Nov. 7 Trial Tr. at 1068.) *See also* pp. 45-46 n.32, *infra*.

Novell's own internal documents acknowledged that Microsoft Office was of very high quality, rating "Word and Excel" as "the strongest combination in the industry." (DX 7, PerfectOffice Business Review Exercise, July 15, 1994, at 3.) Peterson acknowledged that Microsoft Office was "tough competition" because Excel "looked like a really nice product" and WordPerfect had no spreadsheet. (Peterson, Dec. 7 Trial Tr. at 4679-80.) The high quality of Office and the fact that it was first to market gave Microsoft "enormous momentum," and by

April 1995, Novell estimated that Microsoft held 86% of the suite market. (DX 271, Novell Business Applications Business Plan, April 3, 1995, at 6, 9.) In the same document, Novell estimated that Lotus SmartSuite had 13% of the suite market. (*Id*. at 7.)

Indeed, WordPerfect's first two suite products, Borland Office 1.0, released in May 1993—nearly three years later than Microsoft Office—and Borland Office 2.0, released in January 1994, were "incomplete suite[s]" that were poorly received in the marketplace. (DX 267, 1994 Business Plan, Aug. 17, 1993, at 2.) The trial record unanimously established that Borland Office lacked integration and interface consistency, and functioned instead as "separate applications that were put together in a cardboard box." (Acheson, Dec. 1 Trial Tr. at 3892.) Larsen testified that "there really was no consistency to how [WordPerfect and Quattro Pro] behaved or how they looked," and that WordPerfect "had dropped the ball" in developing Borland Office. (Larsen, Nov. 30 Trial Tr. at 3590, 3595.) Gibb admitted that Borland Office was merely a "stopgap product." (Gibb, Oct. 26 Trial Tr. at 826-27.) In the face of "a very slick strategy from Microsoft," WordPerfect could only offer "some cobbled products together" in lieu of a true suite. (Bushman, Nov. 28 Trial Tr. at 3154.) According to David Acheson, WordPerfect's Sales Director of Enterprise Accounts, the introduction of Microsoft Office caused a dramatic decline in sales of WordPerfect. (Acheson, Dec. 1 Trial Tr. at 3891.)

The quality of WordPerfect's products for Windows, as a general matter, also was not good. Peterson testified that when WordPerfect Corporation finally released WordPerfect 5.1, its first product for Windows, in November 1991, "[t]he reviews were lukewarm" and the product was "not as well received as we had hoped." (Peterson, Dec. 7 Trial Tr. at 4677.) Charles Middleton, the director of WordPerfect 5.1 for Windows, testified that WordPerfect released the product "to get us to the market with something as quick as we could

because we were so far behind" and thus, even at the time of the release, WordPerfect had "a lot of things that we had discovered that we knew that we wanted to fix." (Dec. 13, 2008 Middleton Deposition, Dec. 5 Trial Tr. at 4198-99.)

The next major version of WordPerfect, WordPerfect 6.0 for Windows 3.1, released in October 1993, also was not well-received and was "perceived as a slow and buggy product." (DX 271, at 9.) WordPerfect acknowledged that 6.0 "was considered by the press and many users (in its initial release) as too slow for their current hardware and as compared to the competition and containing too many bugs to be considered sufficiently stable." (DX 259, WordPerfect for Windows "Eliot" Marketing Requirements Document, Dec. 21, 1993, at 2.) Gibb agreed that WordPerfect 6.0 was "reviewed as having some bugs and slow." (Gibb, Oct. 26 Trial Tr. at 895-96.) These "performance issues and quality issues" damaged WordPerfect's reputation and partly accounted for Novell's falling sales. (Frankenberg, Nov. 7 Trial Tr. at 1065, 1067-68.)

As a result, WordPerfect/Novell was forced to spend almost all of 1994 working on its products for Windows 3.1, rather than developing for Windows 95. Indeed, before the merger with Novell, WordPerfect recognized that it could not "afford to have Eliot [WordPerfect 6.1] go out in a similar state" as 6.0 and that "[e]very effort must be made" to fix the product. (DX 259, at 6-7.) Accordingly, Frankenberg's "objective for the last six months of 1994" was to create a suite compatible with Windows 3.1, and thus the company put "most" of its "resources . . . on what became . . . Perfect Office 3.0." (Frankenberg, Nov. 7 Trial Tr. at 1068.) Gibb agreed that "in 1994 WordPerfect had to work really hard and work really long hours to get out another version of WordPerfect for Windows 3.1 that ran faster and with fewer bugs." (Gibb, Oct. 26 Trial Tr. at 845; *see also* LeFevre, Dec. 2 Trial Tr. at 4038.) Indeed,

Steve Weitzel, Director of WordPerfect for Windows, tearfully told his software engineers in early 1994 that "this is basically our last chance to get this thing right." (Ford, Nov. 30 Trial Tr. at 3680.)

On March 21, 1994, Novell announced that it would acquire WordPerfect Corporation and Borland's Quattro Pro application. (Frankenberg, Nov. 7 Trial Tr. at 1037.) In the two days following Novell's announcement, Novell's stock price dropped by 20%. (Frankenberg, Nov. 7 Trial Tr. at 990.) The decline in Novell's market capitalization for the two days was about $1.5 billion, almost exactly equal to the $1.55 billion purchase price for WordPerfect and Quattro Pro. (*Id*. at 1095; Hubbard, Dec. 6 at 4463-64.) Novell offered no explanation for Novell's stock price drop other than the market's recognition that Novell had overpaid and that adding new product lines might cause Novell's management to lose focus on its core products. (Warren-Boulton, Nov. 16 Trial Tr. at 2229-31, 2235-36.)

On June 24, 1994, Novell completed its purchase of WordPerfect and Quattro Pro, hoping to combine these products into a well-integrated suite. (*See* Compl. ¶ 37.) But, instead of devoting resources toward development of new products for Windows 95, Novell spent most of 1994 working on versions of its products written for the old platform, Windows 3.1. Even in August 1994, Novell had "very few resources on Chicago." (DX 4, Novell/WordPerfect/Quattro Pro Unification Plan, Aug. 3, 1994, at 5.) In October 1994, Novell informed Microsoft that "[d]ue to focus on 16-bit product revision this fall [*i.e*., WordPerfect and PerfectOffice for Windows 3.1], there are limited resources working on next years 32-bit release." (DX 2 at MX 6062581.) WordPerfect 6.1 was finally released in November 1994 and PerfectOffice 3.0 was released in December 1994. (Frankenberg, Nov. 7 Trial Tr. at 1008,

1013.) By this point, Novell had about eight months to develop and test versions of its products for Windows 95.

This late start in developing products for Windows 95 was nothing new. Novell reported in a Form 10-K it filed in early 1995 that it "has experienced delays in its product development and 'debugging' efforts, and the Company can be expected to experience similar delays from time to time in the future" because such delays were "common in the computer software industry." (DX 380, Novell Form 10-K for Fiscal Year Ended Oct. 29, 1994, filed Jan. 25, 1995, at 10.) Frankenberg agreed that it was "common in the software industry for companies to experience delays in developing new software products." (Frankenberg, Nov. 7 Trial Tr. at 1073.) Alepin also testified that software projects "tend to be late and they don't meet their deadlines, their announced deadlines" and that "some organizations" are "overly optimistic" and "frequently miss their release dates." (Alepin, Nov. 10 Trial Tr. at 1544-45; *see also* Noll, Nov. 15 Trial Tr. at 1881 (acknowledging that "[d]elays happen" in software development).)

In this same 1994-95 period, Novell also encountered difficulties arising from the acquisition itself. For example, Novell's layoffs of legacy WordPerfect personnel were "particularly painful because they cut deeply into our development teams, into our testing team, and probably most significantly into our sales organization." (LeFevre, Dec. 2 Trial Tr. at 4022-23.) Historically, WordPerfect's legacy sales force "had very good customer relationships with these large accounts," which proved "critical to the sales ultimately." (LeFevre, Dec. 2 Trial Tr. at 4024-25.) According to LeFevre, Novell generated 85% of its revenue through these close customer relationships, and Novell "lost that when we lost the sales force." (*Id.* at 4024-26.) Novell instead imposed its own value added reseller ("VAR") sales distribution model, which

meant that "the customer face-to-face contact was reduced dramatically." (Acheson, Dec. 2 Trial Tr. at 3972.) The VAR model proved unsuccessful in replacing personal customer relationships, and sales of WordPerfect software applications "decreased dramatically after those lay-offs in 1994." (*Id.* at 4025-26; *see also id*. at 3972.)

The layoffs also had a significant impact on employee morale. About 93% of those laid off by Novell in August 1994 were legacy WordPerfect employees. (Frankenberg, Nov. 7 Trial Tr. at 1097-98; DX 15, Novell/WordPerfect Integration Memorandum from Joe Marengi to Frankenberg, Aug. 19, 1994.) Former Novell employees testified about the "significant lack of morale on the WordPerfect legacy employee side" (Bushman, Nov. 28 Trial Tr. at 3161-62) and the "total demoralization of the team" (Acheson, Dec. 2 Trial Tr. at 3968). A survey of Novell employees conducted in spring 1995 showed that "48% of Employees Originally Hired at WordPerfect Are Thinking About Quitting." (DX 16, Novell Employee Survey, May 3, 1995, at 40.) Even Frankenberg acknowledged that the layoffs "did have an impact on morale." (Frankenberg, Nov. 7 Trial Tr. at 1098.)

6. PerfectOffice 3.0, a Product Unaffected by The October 3 Decision, Was Not a Success in the Marketplace

The second shift, from standalone word processing and spreadsheet applications to office suites,[32] was a huge problem for Novell given the poor quality of the two earlier

[32] By 1994, Novell recognized "how rapidly suites [were] overtaking the stand alone Windows word processing market." (DX 9, WordPerfect for Windows Business Review Exercise, July 15, 1994, at 6.) Indeed, according to Novell's own estimates, unit sales in the suite market grew from "approximately 800,000 units" in 1992 (DX 267, at 1) to "exceeding 3 million" units in 1994 (DX 223, Storm Market Requirements Document, March 23, 1995, at 11). Meanwhile, Novell estimated that revenue in the standalone word processor market fell from $1.7 billion in 1993 (DX 5, Memorandum from Ad Rietveld to Bob Frankenberg, July 21, 1994, at NOV00542218) to $1.04 billion in 1994 (DX 224, Storm Market Requirements Document, April 14, 1995, at 47). According to a WordPerfect for Windows Business Review Exercise, as of April 1994, 72.3% of word processors sold in North America for the Windows platform were sold as part of suites. (DX 9, at 6.) Frankenberg agreed that "the market was moving quickly (*footnote continued*)

releases of Borland Office. *See* pp. 40-41, *supra*. As Frankenberg explained, the "major reason" for WordPerfect's decline in 1994 was that "we didn't have a suite to offer customers, and customers were buying suites rather than individual products." (Frankenberg, Nov. 7 Trial Tr. at 1068.) Professor Murphy agreed that Novell's low sales in the suite market had "particular significance because the market was moving more and more to buying things in suites." (Murphy, Dec. 7 Trial Tr. at 4760; *see also* Hubbard, Dec. 6 Trial Tr. at 4444-50.) Accordingly, in 1994, Novell put "most of its efforts" into PerfectOffice 3.0 (a product written for the old Windows 3.1 platform). (Frankenberg, Nov. 7 Trial Tr. at 1068.)

Novell released PerfectOffice 3.0 in December 1994. (Frankenberg, Nov. 7 Trial Tr. at 1008.) The product received favorable reviews in the trade press[33] and Frankenberg testified that he was pleased with PerfectOffice 3.0 and the "great integration" of its components. (Frankenberg, Nov. 7 Trial Tr. at 1012.) Nolan Larsen agreed that Novell had finally produced a quality suite product. (Larsen, Nov. 30 Trial Tr. at 3643-46; *see also* Bushman, Nov. 28 Trial Tr. at 3214.) Despite all this, sales of PerfectOffice 3.0 in the first seven months of 1995 (January 1 through July 31) were very small—according to Noll, it captured about 8% of the suite market. (Noll, Nov. 15 Trial Tr. at 1915.)[34]

(*footnote continued*)
from stand-alone products to suites" in 1994. (Frankenberg, Nov. 7 Trial Tr. at 1068.) Revenue in the suite market continued to grow from "nearly $1 billion" in 1994 (DX 223, at 11) to "about $3.8 billion" in 1996 (Hubbard, Dec. 6 Trial Tr. at 4484; *see also* Microsoft's Demonstrative 218, shown at trial on Dec. 6, Trial Tr. at 4444, Holley Decl. Ex. F (showing that, in 1995, industry-wide revenue from the sale of suites was $3.12 billion while revenue from the sale of word processors and spreadsheets sold as standalone products had dropped to $994 million)).

[33] *See, e.g.*, PX 297, InfoWorld Review, "PerfectOffice nearly lives up to its name," April 24, 1995, at NOV 00012602.

[34] Noll testified that PerfectOffice 3.0's market share in the first seven months of 1995 was "roughly" 8%. (Noll, Nov. 15 Trial Tr. at 1915.) Other data show even lower market share
(*footnote continued*)

Of course, the poor sales of PerfectOffice 3.0—which was written for the 16-bit Windows 3.1—cannot be blamed on the allegedly wrongful act (which could have affected only products written for Windows 95). In 1995, Novell attributed the low sales of PerfectOffice to, among other things, Novell's reputation for producing "slow and buggy" products, Microsoft's head start in the suite market, and Microsoft's superior products. A Novell business plan, dated April 3, 1995, stated that Novell was "[s]till recovering from WordPerfect 6.0 for Windows, which was perceived as a slow and buggy product" (DX 271, at 9; *see also id.* at 6), and Frankenberg testified that such a reputation can "stick around for a long time" and affect future sales (Frankenberg, Nov. 7 Trial Tr. at 1068, 1091).

Novell introduced no evidence whatsoever that PerfectOffice for Windows 95 would have fared any better in the "but-for" world than PerfectOffice 3.0. In fact, Noll testified that his "expectation" was that PerfectOffice for Windows 95 would have had about the same (low) market share as that of PerfectOffice for Windows 3.1. (Noll, Nov. 15 Trial Tr. at 1911-12.) Further, because Windows 95 was backward compatible, PerfectOffice 3.0—as well as WordPerfect 6.1—would run just fine on Windows 95. (Alepin, Nov. 10 Trial Tr. at 1581; Gates, Nov. 21 Trial Tr. at 2754.) But sales of PerfectOffice 3.0 dropped to 1.7% of the suite market by the third quarter of 1995. (Hubbard, Dec. 6 Trial Tr. at 4483.) Market forces, not any wrongful conduct, caused Novell to fail.

(*footnote continued*)
numbers: 6.9% in Q1 of 1995, 6.1% in Q2 and 1.7% in Q3. (Hubbard, Dec. 6 Trial Tr. at 4483 (using market data contained in an independent market research firm's report).)

7. Quattro Pro Delays Caused the Delay in Releasing PerfectOffice for Windows 95

Further, the overwhelming evidence at trial established that delays with Quattro Pro, the spreadsheet component of PerfectOffice, caused Novell to be late to release PerfectOffice for Windows 95. Quattro Pro "was an essential element" of PerfectOffice and "[i]n order to get PerfectOffice out to market, [Novell] needed to have Quattro Pro ready to go." (Frankenberg, Nov. 7 Trial Tr. at 1143.) As it turned out, Quattro Pro for Windows 95 was not ready until well into 1996. Because Novell could not release PerfectOffice for Windows 95 without Quattro Pro, the October 3 Decision—even assuming it delayed the work of the shared code group—did not harm Novell. The delays in developing a version of Quattro Pro for Windows 95, which had nothing to do with the October 3 Decision, meant that PerfectOffice was not ready to be released until 1996 in any event.[35]

Following Novell's acquisition of the Quattro Pro spreadsheet from Borland in June 1994, some Quattro Pro developers working on Quattro Pro resigned, and the others remained in Scotts Valley, California (where Borland had its headquarters), rather than moving to Utah. (Frankenberg, Nov. 7 Trial Tr. at 1070-71.) A Novell memorandum dated August 3, 1994 indicated that a "key issue" for Novell was "[g]etting company resources focused on supporting Quattro Pro." (DX 4, at 5.)

[35] The delay in releasing Quattro Pro also delayed WordPerfect. A Novell project proposal recognized that releasing WordPerfect before Quattro Pro would earn Novell a reputation as a "standalone provider only" and recommended that both products be released together, even if a simultaneous release would cause delay. (DX 211, Project Proposals for 'Storm,' at NOV-B01491220; *see also* DX 221, E-mail from Bruce Brereton, March 1, 1995, at NOV-B13528783 ("After further discussion, we feel it will be much better to have WP . . . on the same schedule as Storm [PerfectOffice]. . . . [W]e have moved the Storm RTM date back by one month (to December 30th) and have put WP on the same time-line as Storm.").)

After Novell released Quattro Pro 6.0 for Windows 3.1 in October 1994, the Quattro Pro team subsequently spent "many months" creating localized (foreign language) versions of Quattro Pro 6.0. (LeFevre, Dec. 2 Trial Tr. at 4046.) As Bushman explained, Quattro Pro had been written in such a way that creating localized versions was a "significant development effort." (Bushman, Nov. 28 Trial Tr. at 3181; *see also* Larsen, Nov. 30 Trial Tr. at 3614-15.) As a result, the Quattro Pro team "didn't get started on their Windows 95 efforts until well into 1995," and LeFevre realized "there was no chance they were going to hit" the release dates Novell was targeting. (LeFevre, Dec. 2 Trial Tr. at 4046.)[36]

Although in late 1994 Novell had been considering a September 30, 1995 release date for PerfectOffice for Windows 95, the Quattro Pro team then "believe[d] this is barely achievable with all their resources and with no additional functionality." (DX 211, Project Proposals for 'Storm,'[37] at NOV-B01491217; *see also* Noll, Nov. 15 Trial Tr. at 1885; Gibb, Oct. 26 Trial Tr. at 867-68.) As shown below, the target date was soon pushed back for reasons having nothing to do with the shared code group's work.

As of February 1995, the "Quattro Pro folks [were] still working on International versions of QP 6.0" and "[e]xpect[ed] to finish that [localization work] by end of March," and only then (after March) would they "begin on [the] next version of QP." (DX 219, Notes from

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[36] When Quattro Pro developers finally began work in 1995 on a version for Windows 95, they continued to struggle with localization issues, just as they had with Quattro Pro 6.0. (Bushman, Nov. 28 Trial Tr. at 3185-86.) Bushman testified that because of localization issues, "there were proposals put forth" to "ship[] the English Quattro Pro" and "get[] the localized version later," but Bushman explained, "this just would not work" because at the time, 60% of Novell's revenue came from international sales and many business customers wanted to buy fully-localized suites. (*Id*. at 3141-42, 3148-49, 3185-86.)

[37] "Storm" was the code name for PerfectOffice for Windows 95. (Gibb, Oct. 26 Trial Tr. at 790.)

Storm Coordination Meeting, Feb. 2, 1995, at NOV-B 6655277.) On March 1, 1995, Bruce Brereton (Vice President of the Business Applications Unit at Novell) stated in an e-mail that because Quattro Pro believed that "December 30th is a more realistic date," Novell had decided to "move[] the Storm RTM date back by one month (to December 30th) and have put WP on the same time-line as Storm." (DX 221, at NOV-B13528783.) Frankenberg explained that "RTM" means "release to manufacturing," and thus, he agreed that as of "March 1st of '95 the plan became to get PerfectOffice out, released to manufacturing, not even to the market," on December 30, 1995. (Frankenberg, Nov. 8 Trial Tr. at 1220-21.)

Despite pushing back the target RTM date to end-of-year 1995, Novell was concerned that Quattro Pro would cause PerfectOffice to be delayed even beyond that. A March 1995 "Market Requirements Document" prepared by the Applications Group, ranked "Quattro Pro delivering late" as the highest "overall risk" for the PerfectOffice development project:

Major Risks in Project

Identified Risk (1= high, 3 = low) TABLE IS ORDERED BY OVERALL RISK	Likelihood	Difficult Early Detection	Potential impact	Overall Risk
1. Quattro Pro delivering late	1	2	1	1
2. WIN95 operating system shipping later than Nov. 1, 1995	2	2	1	1
3. Lack of stability in the WIN95 operating system	2	2	1	1
4. Competition raises the bar[1]	1	2	2	1
5. Perfect Fit delivers late[2]	2	2	1	1
6. WordPerfect delivers late	3	2	1	1
7. GroupWise delivers late[3]	1	2	1	2
8. Paradox delivers late	2	2	2	2
9. Presentations delivers late	2	2	2	2
10. Envoy delivers late	2	2	2	2
11. Appware delivers late	2	2	2	2
12. Documentation is not ready	3	2	2	2

(DX 223, at 41.) On May 25, 1995, "Quattro Pro delivering late" was still ranked as the highest "overall risk" for the PerfectOffice development project. (DX 226, Project Development Plan for Storm, at NOV-B01425535.) LeFevre testified that he attended "daily" meetings in 1995 with Gibb, Weitzel and Creighton where they discussed "all the different product challenges" in releasing PerfectOffice for Windows 95 in a timely manner, and "the product that was causing the biggest problem was Quattro Pro." (LeFevre, Dec. 2 Trial Tr. at 4037, 4045-47.) Karl Ford, the Lead Developer for the User Interface in WordPerfect for Windows 95, attended "regularly scheduled meetings every week or so" in 1995 to discuss the "risks and features" of PerfectOffice for Windows 95 and learned that "the schedule" was at risk because of Quattro Pro. (Ford, Nov. 30 Trial Tr. at 3691-92, 3699-70.)

As the difficulties with Quattro Pro became increasingly apparent in 1995, Novell gave half-hearted consideration to the idea of shipping the PerfectOffice suite without Quattro Pro, and including instead a coupon that would allow the customer to obtain the Quattro Pro functionality later. (*See, e.g.*, DX 223, at 41.) LeFevre, who was responsible for marketing Windows products at Novell, testified that such a plan "wasn't a serious proposal," and that Novell "never seriously considered that." (LeFevre, Dec. 2 Trial Tr. at 4047.) Bushman agreed that a voucher plan was "simply not feasible." (Bushman, Nov. 28 Trial Tr. at 3186-87.) Even Gibb acknowledged that he was "being a little facetious" in describing a voucher program as a "contingency plan." (Gibb, Oct. 26 Trial Tr. at 866.)[38]

[38] Indeed, LeFevre made the obvious observation that "the challenge when you're shipping a suite of products" is that "they kind of all have to be done at the same time." (LeFevre, Dec. 2 Trial Tr. at 4046-47; *see also* Harral, Oct. 24 Trial Tr. at 444-45 (agreeing Quattro Pro "needed to be ready" for PerfectOffice to ship); *see also* Frankenberg, Nov. 7 Trial Tr. at 1143.)

By December 23, 1995, four months after the release of Windows 95, Quattro Pro was still not ready. On that day, Bruce Brereton wrote an e-mail to Frankenberg and others at Novell reporting that "this past Thursday/Friday, about 15 additional people submitted their resignations," leaving the Quattro Pro development team in Scotts Valley with "just 2 people." (DX 230, E-mail from Bruce Brereton, Dec. 23, 1995.) After reviewing DX 230, Frankenberg conceded that Quattro Pro "wasn't released to manufacturing" even as of December 23, 1995 and "clearly the product wasn't [yet] complete." (Frankenberg, Dec. 7 Trial Tr. at 1145.)

Contrary to this powerful evidence, Gibb testified that Quattro Pro was "basically code completed" in December 1995. (Gibb, Oct. 26 Trial Tr. at 808.) On direct examination, Gibb offered vague testimony that "early on" Novell thought "Quattro Pro might be Critical Path," but that "they were very conservative in their estimates and kind of over delivered." (*Id*. at 806.) Gibb offered this testimony with no dates, no explanation, and no reference to any document whatsoever. Even assuming that Quattro Pro was "basically code completed" in December 1995, it is clear that a product is not ready to ship merely because it is "code complete." For example, DX 231, a document used by Novell's counsel in closing rebuttal argument, showed that PerfectOffice 3.0 was code complete on July 22, 1994 (DX 231, Development Project Status, Jan. 11, 1996, at NOV00161055), but was not released to the market until December 1994 (Frankenberg, Nov. 7 Trial Tr. at 1008), five months later. And, although no witness addressed or explained DX 231, it states on its face that the "RTM" date for Quattro Pro was "3/31/96." (DX 231, at NOV00161055.)

In January 1996, shortly after the mass exodus of the Quattro Pro developers, Larsen traveled to Scotts Valley (Larsen, Nov. 30 Trial Tr. at 3619) and found that "it was kind of a train wreck" and that "[t]hose people who had not resigned were kind of walking around a

little bit shellshocked . . . [s]o it was – it was very chaotic" (*id*. at 3620). Larsen explained that Quattro Pro was not ready to be shipped in January 1996 "by any stretch of the imagination." (*Id*. at 3624.) Larsen testified that they could not even locate the source code in order to create an interim build of the product. (*Id.* at 3622-24.) As DX 231 also showed, Novell estimated in January 1996 that Quattro Pro would be ready to be released to manufacturing on March 31, 1996, more than seven months after the release of Windows 95. (DX 231, at NOV00161055.) Consistent with this, Larsen, LeFevre and Bushman testified that Quattro Pro was not ready to be shipped even in March 1996. (Larsen, Nov. 30 Trial Tr. at 3624-25; LeFevre, Dec. 2 Trial Tr. at 4062-63; Bushman, Nov. 28 Trial Tr. at 3192-93; *see also* Larsen, Nov. 30 Trial Tr. at 3664-65.) Ultimately, Quattro Pro and the PerfectOffice suite were released by Corel on May 29, 1996.[39]

8. Novell Chose the Most Difficult and Time-Consuming Path Toward Release of Its Products for the Windows 95 Platform

Harral and Richardson testified that in October 1994, upon learning of Microsoft's decision to withdraw support for the namespace extension APIs, Novell had three development options: (1) to continue using and relying on the namespace extension APIs; (2) to use the Windows 95 common file open dialog (provided to ISVs at no cost); or (3) to build a custom file open dialog that would, in Novell's view, be superior to the Windows 95 common file open dialog. (Harral, Oct. 20 Trial Tr. at 342-43; Richardson, Oct. 25 Trial Tr. at 602-04.) At trial, Novell claimed that its work on the file open dialog was delayed as a result of the October 3 Decision, and that this delay in turn delayed the release of PerfectOffice for Windows 95. However, setting aside the Quattro Pro problems, PerfectOffice for Windows 95

[39] Novell sold its Three Products to Corel on March 1, 1996. (DX 382, Novell Form 10-K for Fiscal Year Ended Oct. 26, 1996, filed Jan. 2, 1997, at 2.)

could have been released without any delay—according to Harral and Gibb—by choosing Option 1 or Option 2. (Harral, Oct. 24 Trial Tr. at 502-04; Gibb, Oct. 26 Trial Tr. at 847-48.)

Harral explained that Option 1 "would be to continue to use the documentation that we would have had for the APIs." (Harral, Oct. 20 Trial Tr. at 342.) Frankenberg confirmed that one of the choices available to Novell was to use the namespace extension APIs at Novell's risk: "That was the nature of undocumented APIs, yes." (Frankenberg, Nov. 7 Trial Tr. at 1133.)[40] Indeed, according to Novell's developers, by October 1994 Novell was already finished or nearly finished developing a file open dialog that called the namespace extension APIs. (Richardson, Oct. 25 Trial Tr. at 676-77, 687; Harral, Oct. 24 Trial Tr. at 436-37.)

As for the second option, Gibb testified that Novell had worked on developing PerfectOffice using the Windows 95 common file open dialog, and that it would have been "quite easy" for Novell to release its products using the file open dialog that Microsoft provided for free. (Gibb, Oct. 26 Trial Tr. at 847-48.) Indeed, on September 22, 1994, Struss reported that Novell had said that its "current plan [was] to use the MS [Microsoft] dialogs." (DX 17, at MX 6109491.) Harral agreed that "Novell could have come out with a product in '95 that utilized the Windows common file open dialog." (Harral, Oct. 24 Trial Tr. at 502.)

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[40] Of course, as Frankenberg recognized, there was some risk in using unsupported APIs, because those APIs might not be included in later versions of Windows. (Frankenberg, Nov. 7 Trial Tr. at 1133-34.) Microsoft advised ISVs not to use the namespace extension APIs for exactly this reason. (DX 3, at MX 6055840-41.) There is no evidence of any deliberative process at Novell concerning whether or not to choose Option 1, in contrast to the existence of formal memoranda that addressed less important decisions. *See* pp. 36-38, *supra*. Although there was risk in Option 1—the chance that one day in the future Microsoft might remove the namespace extension APIs from Windows—there was even more risk in choosing Option 3 (because of the foreseeable delays in Novell trying to write its own file open dialog). Moreover, choosing Option 1 would have been entirely rational, for as the Court noted, Novell could have "temporarily used the [namespace extension] API[s]" in order to get out a product right away, while continuing to work on its own file open dialog that could be utilized in a subsequent version of PerfectOffice. (Oct. 27 Trial Tr. at 924-25.) The delay of which Novell complains was of its own making.

Ford recalled discussions about whether Novell should "just use the common open dialog right now and use the new one in the next release." (Ford, Nov. 30 Trial Tr. at 3710.) Harral also testified that Novell considered the second option (using the file open dialog provided by Microsoft) "many times" and "every time we had to consider an option, this . . . came back on the table because it would have been an easier option than the third" and would have entailed "less work for us" and been "less risky." (Harral, Oct. 24 Trial Tr. at 365-66.) In July 1995—nine months after the October 3 Decision and one month before Windows 95 was released—there were still "differences of opinion of how this dialog would be implemented" and Novell was still considering using the Windows 95 common file open dialog. (DX 114, PerfectFit 95: Open File Dialog—Functions and Issues, last modified July 11, 1995, at 1.) Harral confirmed that, even in July 1995, "one of the decisions that Novell was facing was whether to use the common file open dialog." (Harral, Oct. 24 Trial Tr. at 488.) Ford said: "I remember in the summer . . . we had meetings discussing the open dialog, where they were at on their schedule, whether they should use it, if they should use the common open dialog that Microsoft provided in their APIs for Windows 95." (Ford, Nov. 30 Trial Tr. at 3709-10.)

Ford testified that he told Gibb and Weitzel in 1995 that the "safest route" was to use "the common open dialog" provided by Windows if "they were concerned about schedule" because of uncertainties of whether the project could "be completed on time" if Novell chose Option 3. (Ford, Nov. 30 Trial Tr. at 3710-11.) Ford testified that he also heard others recommend the same course: "let's just use the common open dialog right now and use the new one [Novell's custom file open dialog] in the next release." (*Id*. at 3710.) Likewise, LeFevre testified that he "became convinced that . . . what we needed to do was just abandon that entire effort [to create Novell's own file open dialog] and use the standard Windows dialog . . . . So

with almost no work on our part, we can take advantage of those things" and thus he "became an advocate for just going that route as opposed to trying to do all those customizations that seemed to be taking way too much time." (LeFevre, Dec. 2 Trial Tr. at 4041-42.)

But, as Gibb testified, Novell decided to try to "do something cooler" and "exceed what was the default stuff." (Gibb, Oct. 26 Trial Tr. at 848-49; *see also* Richardson, Oct. 25 Trial Tr. at 629-30.) Gibb agreed that Novell was "faced with the age old trade off" between, on the one hand, "get[ting] out a product more quickly and sacrific[ing] features," or, on the other hand, "delay[ing] until 1996 and try[ing] to build a cooler product." (Gibb, Oct. 26 Trial Tr. at 891-92.) Novell's shared code group therefore chose the most difficult and time-consuming path: writing its own custom file open dialog rather than utilizing the common file open dialog. (Harral, Oct. 20 Trial Tr. at 342-47.) By late 1994, Harral knew that attempting to build a custom file open dialog "would be a significant commitment in resources." (*Id*. at 342.)

Novell even chose to take the most difficult path possible to creating its own custom file open dialog. Alepin testified that Novell could have built its own custom file open dialog (Option 3) using common controls provided by Microsoft in Windows 95. (Alepin, Nov. 10 Trial Tr. at 1603-04, 1664.) By "just using the common controls in Windows 95," Novell could have "add[ed] whatever custom file locations . . . [it] wanted to add" to its file open dialog. (*Id*. at 1664.) Novell's developers could "make use of these common controls to use them for many different application purposes, one of which could be to pretend to be like the Windows Explorer." (*Id*. at 1604.) Ultimately, Novell elected to build its own custom file open dialog from scratch without using either the common file open dialog or the common controls (both of which Microsoft provided for free). Novell also could have just used the file open dialog ported from its Windows 3.1 products, with no loss in functionality. (*Id*. at 1579-81.)

It is clear that Novell could have released its products on time, but instead chose the riskier and more time-consuming path of trying to "do something cooler." Had Novell chosen to use the Windows 95 common file open dialog, the shared code group would have had its work completed in plenty of time.

D. The Rule 50(a) Motion

At the close of Novell's case on November 17, 2011, Microsoft filed its Motion for Judgment as a Matter of Law. (Dkt. #297; *see also* Nov. 18 Trial Tr. at 2565-66.) Among other things, Microsoft argued that Novell had failed to introduce evidence that would provide a legally sufficient evidentiary basis for a reasonable jury to find that Microsoft harmed competition in the PC operating system market, both because the evidence showed that the timely release of Novell's Three Products would have enhanced Microsoft's monopoly in the PC operating system market and because the evidence refuted Novell's theories of harm to competition. Microsoft also argued that Novell had failed to introduce evidence that would provide a legally sufficient evidentiary basis for a reasonable jury to conclude that Microsoft's withdrawal of support for the namespace extension APIs was anticompetitive conduct because Microsoft's decision (a) did not constitute the termination of Microsoft's relationship with Novell, (b) was consistent with industry practice and (c) had several legitimate business justifications. Microsoft also argued that Novell had failed to show that Microsoft's withdrawal of the support for the namespace extension APIs caused any delay in the release of Novell's Three Products; and that Novell was not entitled to any damages because Warren-Boulton's opinion on damages depended on the incorrect assumption that in the but-for world, Novell's products would have been released within 30 or 60 days of the release of Windows 95.

The Court heard oral argument on Microsoft's motion on November 18 and November 21, 2011. At the close of argument on November 21, the Court stated that it was

either "denying [Microsoft's Rule 50 motion] without prejudice of [its] being renewed at the close of all the evidence" or "reserv[ing] ruling upon the Rule 50 motion until all the evidence is in." (Nov. 21 Trial Tr. at 2931.) The Court stated that while "I think there are legitimate legal reasons why the plaintiff may not prove the case," "it seems to me we ought to have a jury verdict on that as a practical matter." (*Id*. at 2931-32.) At the close of all the evidence on December 12, 2011, Microsoft renewed its Rule 50 motion "for all of the same reasons set forth in our brief and oral argument of that motion." (Dec. 12 Trial Tr. at 5099.) The Court ruled that the "motion is denied with the same—again I'm not sure whether it is denied or whether it is deferred or whatever, it is going to the jury and then I'll focus upon it after that." (*Id*. at 5100.) Given the jury's inability to come to a verdict and the Court's familiarity with all the facts and circumstances, the Court should now give its fullest consideration to this motion.

ARGUMENT

Under Rule 50 of the Federal Rules of Civil Procedure, a motion for judgment as a matter of law may be granted "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Rule 50(b) authorizes a party to renew a motion for judgment as a matter of law after judgment or after the jury is discharged without reaching a verdict. The standard that applies to a motion for judgment as a matter of law is "the same whether it arises in the procedural context of a motion for judgment as a matter of law prior to the submission of the case to the jury under Rule 50(a) or in the context of a renewed motion for judgment as a matter of law" under Rule 50(b). 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2524 (3d ed. 2011); *see also Smith* v. *Aztec Well Servicing Co.*, 462 F.3d 1274, 1287 (10th Cir. 2006) ("[W]e review a judgment as a matter of

law under the same standard regardless of whether the judgment is rendered before or after the jury renders its verdict.") (alteration in original) (quotation omitted).

To survive a Rule 50 motion, a plaintiff must present "substantial evidence" in support of its case. *Webco Industries, Inc*. v. *Thermatool Corp*., 278 F.3d 1120, 1128 (10th Cir. 2002). "Substantial evidence is something less than the weight of the evidence, and is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence." *Id*. at 1128 (internal quotation omitted). Under this standard, "'[t]he question is not whether there is literally no evidence supporting the nonmoving party but whether there is evidence upon which a jury could properly find for that party.'" *Herrera* v. *Lufkin Industries, Inc*., 474 F.3d 675, 685 (10th Cir. 2007) (quoting *Century 21 Real Estate Corp*. v. *Meraj International Investment Corp*., 315 F.3d 1271, 1278 (10th Cir. 2003)) (affirming grant of Rule 50(a) motion); *see also Bankers Trust Co*. v. *Lee Keeling & Associates, Inc*., 20 F.3d 1092, 1099-1100 (10th Cir. 1994) (affirming grant of Rule 50(b) motion).

I. Microsoft's Withdrawal of Support for the Namespace Extension APIs Did Not Harm Competition.

A. No Reasonable Jury Would Have a Legally Sufficient Evidentiary Basis to Find that Microsoft Harmed Competition Under Either of Novell's Theories.

Judgment as a matter of law should be entered in Microsoft's favor because a reasonable jury would not have a legally sufficient evidentiary basis to find that, under either of Novell's theories, Microsoft's withdrawal of support for the namespace extension APIs harmed competition in the PC operating system market.

1. *Novell's Franchise Applications Theory Was Unsupported by, and Contrary to, the Evidence.*

Novell was required to prove at trial that WordPerfect and Quattro Pro were such popular applications that if available on rival operating systems, they would have increased competition in the PC operating system market by "offer[ing] competing operating systems the prospect of surmounting the applications barrier to entry and breaking Microsoft's operating system monopoly." (*E.g.*, Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, filed Dec. 5, 2011, Dkt. #336, at 4.) For this theory to work, Novell would need at the very least to introduce evidence that there was some plausible prospect that in the but-for world, WordPerfect would have been highly popular and that end-users would abandon Windows for other operating systems for some reason having to do with the availability of WordPerfect on those competing operating systems.[41] The evidence at trial disproved Novell's theory for several independent reasons.

First, the applications barrier to entry that protects Microsoft's monopoly arises from the very large and diverse population of applications developed for Windows. Indeed, the Findings of Fact on which Novell sought and obtained collateral estoppel—and which therefore have "binding effect here" (Oct. 18 Trial Tr. at 143)—demonstrated that the applications barrier to entry arises from a "positive feedback loop" created by the tens of thousands of applications written to run on Windows. (Findings of Fact 37-39.) Finding 37 explained that "[t]he fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts consumers to Windows, because it reassures them that their interests will be met

[41] The Complaint makes no claim in this regard about PerfectOffice and thus any such claim was released. *See* p. 5 n.1, *supra*, and pp. 127-28, *infra*.

as long as they use Microsoft's product." Finding 39 established that "[t]he large body of applications thus reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetuating ISV incentives to write applications principally for Windows." As the Court instructed the jury before they were read into evidence, these Findings of Fact have "binding effect" in "this case." (Oct. 18 Trial Tr. at 143.) Novell's counsel told the jury the same thing. (*E.g.*, Nov. 14 Trial Tr. at 1709 ("the Court, in this case, has decided that certain facts are binding in this case, and we actually read quite a few of them this morning").)

These Findings of Fact are fatal to Novell's franchise applications theory. As Professor Murphy explained, the applications barrier to entry is predicated on "not a few, but a vastly large number of applications [that] are written for Windows than for other PC operating systems, [which] attracts consumers to Windows because it reassures them that their interests will be met as long as they use Microsoft's product." (Murphy, Dec. 7 Trial Tr. at 4744.) Indeed, Novell's Complaint described the applications barrier in exactly this fashion, alleging that "[a]s found by the courts in the Government Suit, . . . Microsoft's monopoly share of the Intel-compatible PC operating systems market is protected by a barrier to entry arising out of *the much greater number of applications* that operate only with Windows personal computer operating systems." (Compl. ¶ 43 (emphasis added).)[42] In addition, this barrier is made stronger by the fact that these thousands of Windows applications were "in lots of categories . . . . Even within a category, having more than one choice is important. So [consumers] didn't want to go

[42] To the extent that Novell seeks to stray from the allegations in its Complaint with regard to the fundamental nature of the applications barrier to entry, its claim is barred for two reasons. First, Novell released any claim based on any theory not expressly set forth in the Complaint. *See* pp. 126-30, *infra*. Second, Novell's claim would also be barred by the applicable four-year statute of limitations set forth in 15 U.S.C. § 15b because rather than "based in whole or in part" on the Government Case, *see* 15 U.S.C. § 16(i), it would instead run contrary to the Government Case. *See* pp. 133-36, *infra*.

to an operating system where there is only one office productivity application, they liked having two, three, whatever it is. If they don't like one, they can move to the other." (Murphy, Dec. 7 Trial Tr. at 4744.)

Thus, a franchise applications theory that asserts that a small number of applications in a narrow category could affect competition in the PC operating system market is contrary to the premise on which Novell's claim is predicated. Indeed, in the Government Case, Microsoft contended "that software developers do write applications for other operating systems [and] point[ed] out that at its peak IBM's OS/2 supported approximately 2,500 applications." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001). Microsoft therefore argued that an operating system could be "competitive" even if it had far fewer than 70,000 applications (the number written to Windows, according to Finding 40). *Id*. The D.C. Circuit rejected this argument as "miss[ing] the point" because "[a]s the District Court explained [in Finding 37], . . . the applications barrier to entry gives consumers reason to prefer the dominant operating system even if they have no need to use all applications written for it." *Id*. Here, despite the conclusive nature of Finding 37, Novell argues that two or three applications nevertheless had the potential to surmount the applications barrier.

No reasonable jury would have a legally sufficient evidentiary basis to reject the Findings of Fact or permit Novell to depart from the applications barrier to entry underlying the Government Case and set forth in the Complaint. The availability of PerfectOffice, WordPerfect and Quattro Pro on non-Microsoft operating systems is insufficient as a matter of law to have induced users to move from Windows to some other operating system. For this reason alone, Novell's theory that its products could accomplish what, according to the D.C. Circuit, even the

existence of 2,500 diverse applications on a rival operating system could not, is alone sufficient to reject Novell's franchise applications theory.

Second, even assuming that two or three highly popular applications could possibly reduce the applications barrier to entry, no reasonable jury would have a legally sufficient evidentiary basis to find that Novell's Three Products had anything close to the necessary level of popularity. Novell had the burden to establish at trial that its products had sufficient popularity to induce users to switch operating systems and that, in the but-for world, competition in the PC operating system market would have been enhanced. Novell failed entirely to meet this burden and, indeed, introduced no evidence showing that its products had achieved a high market share or were highly "popular" under any meaning of the term. The only independent market share document introduced by Novell showed that WordPerfect's share of shipments of word processors in 1994 was 22%; and that even looking at installed base, WordPerfect had 29.4% of the installed base on all Windows platforms and 36% of the installed base on Windows and DOS platforms combined. (PX 599A, IDC Report, The Word Processing Software Market Review and Forecast 1994-1999: DOS, Windows, OS/2, and Macintosh, at Table 13.) There was no evidence that Novell's products for the Windows platform ever achieved a level of popularity high enough to affect the competition in the market in which Windows competed.

For example, WordPerfect's share of the word processing market on Windows peaked at around 30% in 1992 and subsequently declined to "the low 20s and going down" by 1994. (Murphy, Dec. 7 Trial Tr. at 4751.)[43] WordPerfect/Novell's own internal documents

[43] It makes no sense to contend that WordPerfect's installed base on all PCs—rather than WordPerfect's market share on Windows—is relevant to determine whether WordPerfect could (*footnote continued*)

showed that WordPerfect's worldwide market share by revenue on the Windows platform was 33.8% in 1993 and was projected, as of July 1994, to fall to 22% for 1994 and remain at 22% for 1995. (DX 294, WordPerfect Corp. Market Share Analysis Using Internal and SPA Data, undated, at NOV 00068402; DX 9, at 4; *see also* Microsoft's Demonstrative 307, shown at trial on Dec. 13, Trial Tr. at 4749, 4788, Holley Decl. Ex. G (showing data from IDC reports that WordPerfect's market share of sales on the Windows platform was 31% in 1992, 24% in 1994 and 16% in 1995).)[44] With respect to Quattro Pro, "Novell and Borland were never really large sellers of the spreadsheet software," and by 1994, Novell/Borland's spreadsheet product Quattro

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(*footnote continued*)
be a "franchise application." As Novell itself said at trial, "[t]he thrust of Novell's argument is that its popular applications . . . offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly" because "*during the relevant time period*, they were the dominant office productivity applications in the market." (Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, filed Dec. 5, 2011, Dkt. #336, at 4 (emphasis added).) WordPerfect's share of the total installed base share on all platforms (as compared to its low market share on Windows) was a result of WordPerfect's historic success on the character-based DOS platform, which was becoming irrelevant by 1995. (Noll, Nov. 15 Trial Tr. at 1923-24; Hubbard, Dec. 6 Trial Tr. at 4441-43.) Indeed, Novell's internal documents explain that "only 30% of this WordPerfect for DOS installed base is remaining with WordPerfect as they transition to a Windows word processor." (DX 224, at 20; *see also* Hubbard, Dec. 6 Trial Tr. at 4443 ("WordPerfect has a . . . very significant share of DOS, the older platform . . . [that] did not translate into similar market share success on the Windows platform."); Peterson, Dec. 7 Trial Tr. at 4706-07.) Thus, by no stretch of the imagination could the installed base of WordPerfect on the DOS platform be a reasonable proxy for how "popular" WordPerfect was during the "relevant time period." In any event, the market data Novell introduced into evidence established that, as of the end of 1994, even when including the DOS platform, WordPerfect was present only on about 36% of all PCs that had a word processor installed—including all versions on the Windows, DOS and OS/2 platforms. (PX 599A, at Table 13.)

[44] In fact, even including WordPerfect's market share on the character-based DOS platform, WordPerfect's market share was relatively small well before the release of Windows 95. During the early 1990s, the PC operating system market shifted from DOS to Windows, with Windows capturing 80% of the PC operating system market by 1993, and more than 90% by 1996. (Noll, Nov. 15 Trial Tr. at 1929-30.) As a result of the market shift from DOS to Windows, by 1994, WordPerfect had 35.9% of the installed base on Windows and DOS combined, and only 25.4% of "[n]ew [s]hipments" on those platforms. (PX 599A, at 26; *see also* Microsoft's Demonstrative 308, shown at trial on Dec. 13, Trial Tr. at 4752-54, Holley Decl. Ex. H (showing that WordPerfect's market share on Windows and DOS combined was 35% in 1994, declining to 27% in 1995).)

Pro possessed a "very, very small fraction" of the spreadsheet market for Windows. (Murphy, Dec. 7 Trial Tr. at 4756.)[45] Novell submitted no concrete evidence that in the but-for world, WordPerfect or Quattro Pro's market shares would have exceeded these low numbers.

PerfectOffice never had more than a miniscule portion of the suite market.[46] According to WordPerfect/Novell documents, Novell had a 2% share of the suite market as of August 1993 and a 2.5% share in 1994.[47] (DX 223, at 2; PX 448, IDC Report, PC and Consumer Software Office Suites Market Review and Forecast: Revised 1994 Market Sizing, at 3; *see also* Microsoft's Demonstrative 311, shown at trial on Dec. 13, Trial Tr. at 4759, 4788, Holley Decl. Ex. K (showing data from IDC reports that Novell's market share in the suite market was 2.2% in 1993, 2.6% in 1994 and 3.6% in 1995).) In fact, even after Novell released its first high quality suite product in December 1994, that product captured only 8% or less of the suite market. Noll testified that PerfectOffice 3.0's market share in the first seven months of 1995 was "roughly" 8%. (Noll, Nov. 15 Trial Tr. at 1915.) Other data show that PerfectOffice 3.0 had

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[45] Borland released Quattro Pro for Windows in 1992, and the product "pick[ed] up around five percent of the market." (Murphy, Dec. 7 Trial Tr. at 4756.) In 1993, Quattro Pro for Windows earned $59 million in revenue, which amounted to 6% of the standalone Windows spreadsheet market. (*See* DX 5, Quattro Pro Business Review Exercise, July 15, 1994, at NOV 00542227.) Going forward, Quattro Pro's market share in the standalone Windows spreadsheet market was "always relatively small." (Murphy, Dec. 7 Trial Tr. at 4756; *see also* Microsoft's Demonstrative 309, shown at trial on Dec. 13, Trial Tr. at 4755, Holley Decl. Ex. I (showing that Quattro Pro's market share of the standalone Windows spreadsheet market was 5.5% in 1992, 7.0% in 1993, 2.0% in 1994, and 1.8% in 1995).) Quattro Pro's market share of the spreadsheet market on the Windows and DOS platforms combined was similarly small, with only 6% in 1993. (*See* DX 5 at NOV 00542227, 30-31; *see also* Microsoft's Demonstrative 310, shown at trial on Dec. 13, Trial Tr. at 4758, Holley Decl. Ex. J (showing that Quattro Pro's market share on Windows and DOS was 2% in 1994 and 1995).)

[46] WordPerfect Corporation and Novell never released a suite product for the DOS platform. (Frankenberg, Nov. 8 Trial Tr. at 1169.)

[47] By 1994, the market had shifted from sales of standalone word processors and spreadsheets to office suites. For example, Novell's own documents estimated that in 1994, more than 70% of word processors sold in North America for the Windows platform were being sold as part of a suite. *See* pp. 45-46 n.32, *supra*.

only 4.5% of the suite market during the first three quarters of 1995 and that PerfectOffice's revenues and market share decreased throughout 1995. (Hubbard, Dec. 6 Trial Tr. at 4483; DX 213, WordPerfect, The Novell Applications Group, Quarterly Review Background, Q1 1995, at NOV 00725771 (PerfectOffice revenue in Q1 1995 was $38.4 million); DX 358, Novell Applications Group Year to Date/Quarterly Review Background Q3 1995, at 16 (PerfectOffice revenue in Q3 1995 was $20.2 million).)[48]

Professor Noll testified that had there been no delay in the release of PerfectOffice, that product would have achieved a similar market share on Windows 95 as the earlier version had achieved at the "end of the life of" Windows 3.1, which Noll defined as about two years preceding the release of Windows 95. (Noll, Nov. 15 Trial Tr. at 1911-12.) By this measure, PerfectOffice's market share on Windows 95 would have been (in the but-for world) in the range of 2% to 8%.

This makes the franchise applications theory completely unviable. Indeed, the notion that products with low market shares could "offer[] competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly" (Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, filed Dec. 5, 2011, Dkt. #336, at 4) is untenable. Because only a small percentage of end-users with Windows PCs used Novell's products, only that small percentage would have the option of switching to a different operating system even if the rest of Novell's theory had been proven (and it was not). (*See* Murphy, Dec. 7 Trial Tr. at 4750.) Even if Novell had decided after the release of Windows 95 to develop and release its products for competing operating systems, products

[48] *See also* Microsoft's Demonstrative 241, shown at trial on Dec. 6, Trial Tr. at 4483, Holley Decl. Ex. L (showing that PerfectOffice's market share just before the release of Windows 95 was 6.9% in Q1 of 1995, 6.1% in Q2 and 1.7% in Q3).

with a small share of the Windows market could not possibly change the competitive landscape in the PC operating system market.

Third, the entire premise of Novell's franchise applications theory is refuted by the fact that in the late 1980s and early 1990s there were versions of WordPerfect that ran on many non-Microsoft operating systems, yet the availability of WordPerfect at that time—when it was truly popular—on these other operating systems in no way caused them to become popular or diminished Microsoft's large share of the PC operating system market. Rather, Microsoft maintained at least a 90% share of the market throughout the relevant period. (*E.g.*, Finding of Fact 35 ("Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent."); *see also* Noll, Nov. 15 Trial Tr. at 1929-30 & Microsoft's Demonstrative 120, shown at trial on Nov. 15, Trial Tr. at 1930, Holley Decl. Ex. M; Murphy, Dec. 7 Trial Tr. at 4722-23 & Microsoft's Demonstrative 301, shown at trial on Dec. 7, Trial Tr. at 4722, Holley Decl. Ex. N.)

According to Harral, Gibb and Ford, in the early 1990s, WordPerfect wrote its word processing software for a number of operating systems, including DR DOS, Macintosh, OS/2, Unix, Amiga and VMS. (Harral, Oct. 20 Trial Tr. at 204; Gibb, Oct. 26 Trial Tr. at 775-76; Ford, Nov. 30 Trial Tr. at 3670.) By 1994, however, Novell began to focus development exclusively on Windows. This was because Novell was very late in developing for Windows, *see* pp. 39-40, *supra*, and because Novell fully understood by that time that the huge majority of end-users were choosing Windows over other operating systems. (*See, e.g.*, PX 599A, at Table 13 (showing that about 93% of all new shipments of word processors in 1994 in the PC operating system market were shipments of word processors for the Windows platform).)

A Novell business plan dated August 3, 1994 stated that "all resources need to be applied to Chicago" and that, as a result, Novell should "[r]educe resources on WordPerfect for Macintosh and WordPerfect for Unix," and "phas[e] out WordPerfect for VMS." (DX 4, at 2, 5.) Similarly, in July 1994, a formal business review by Novell recommended that Novell "reduc[e] the number of developers from 30 to approximately 10" on the Unix platform and "[t]hat these developers can be moved to Chicago and Tapestry to increase resources in these areas."[49] (DX 326, Business Applications Business Unit, Business Review Exercise Summary, at NOV-25-006589.) With respect to Novell's software development efforts for OpenVMS, the same document stated that "[t]he recommendation is to cancel 6.0 development immediately. This will free up developers to move to Chicago and Tapestry." (*Id.*)

As a result, development efforts for non-Microsoft platforms were significantly reduced or eliminated. A July 21, 1994 memorandum from Ad Rietveld (Executive Vice President of the Novell Applications Group) to Frankenberg urged that Novell should "[c]lose the VAX OpenVMS business; Evaluate Unix business based upon strategic importance to the greater Novell." (DX 5, at NOV 00542198.) A 1995 Novell memorandum to "Bob" showed that Frankenberg accepted these recommendations—it stated that in "August 94 . . . the feedback from you appeared to be loud and clear—*cut everything but Windows*. Based on that, we started outsourcing platforms—we outsourced WordPerfect for VMS totally and have WordPerfect for Unix development outsourced . . . ." (DX 227, at NOV-B00642501 (emphasis added).) In addition, notes from a Novell conference on June 13, 1995 state that "We've had to chop everything that was having any negative affect on shipping Storm [PerfectOffice for Windows

[49] Frankenberg testified that Tapestry was a code name for the "next generation" of Novell's office suite. (Frankenberg, Nov. 7 Trial Tr. at 997-98.)

95] ASAP. This caused us to stop the OS/2 integration disk work for 3.0." (DX 272, at 4.) As Ford explained, WordPerfect "discontinue[d] working on new development and shipping new products on [non-Microsoft] platforms" and focused its resources on Windows. (Ford, Nov. 30 Trial Tr. at 3671.)

In sum, as the Court observed at trial, the notion that the availability of Novell's applications on rival operating systems would have popularized those operating systems "is counterfactual," because WordPerfect had been available "on other operating systems since time immemorial," but failed to popularize them. (Nov. 9 Trial Tr. at 1501.) Novell's franchise applications theory is refuted by the historical evidence that WordPerfect's availability on other operating systems did nothing to diminish Microsoft's market share.

2. *Novell's Software Lacked All Three Required Elements of Middleware*.

The evidence also established that WordPerfect—even combined with the PerfectFit technology in PerfectOffice and AppWare (*see* Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, Dec. 5, 2011, Dkt. #336, at 4)[50]—was in no way a species of middleware that could possibly have had any impact on competition in the PC operating system market. As Noll agreed and/or as required by the binding Findings of Fact, only software that has all of the following three defining characteristics can even in theory impact competition in the PC operating system market: the software must (1) be cross-platform in the sense that it runs on multiple PC operating systems (*e.g.*, Noll, Nov. 15 Trial Tr. at 1925-26); (2) be available on "all or nearly all PCs" of the "dominant operating system,"

[50] As shown above, the Court excluded evidence of Novell's theory that PerfectOffice, alone or in combination with Netscape Navigator or Sun's Java, was a form of middleware that threatened Microsoft's monopoly in the PC operating system market. *See* p. 14 n.12, *supra*. As a result, Novell cannot claim that PerfectOffice (alone or with other products) was middleware of the sort that might affect competition in the PC operating system market.

i.e., Microsoft Windows (*e.g.*, Noll, Nov. 15 Trial Tr. at 1923-26); and (3) expose a sufficiently broad set of APIs to enable ISVs profitably to develop full-featured personal productivity applications that rely solely on those APIs exposed by the middleware (*e.g.*, Findings of Fact 28, 68, 74).[51]

(a) Novell's Software Was Not Cross-Platform.

It was undisputed at trial that to be middleware in the sense that it might impact competition in the PC operating system market, middleware must be cross-platform—it must expose the same set of APIs on different operating systems.[52] As Professor Noll acknowledged, in order to be able to serve as a vehicle for applications to run on multiple platforms and thus "become a threat to the applications barrier to entry," the software "has to be available on a number of alternative operating systems." (Noll, Nov. 15 Trial Tr. 1925-26; *see also* Noll, Nov. 14 Trial Tr. at 1717-18 (a "middleware" product "provid[es] the opportunity to run that particular application or middleware product on numerous operating systems"); Murphy, Dec. 7 Trial Tr. at 4775 ("if it's going to enhance competition, [middleware must] run on some other platform in the relevant market, some other operating system that's in the x86 marketplace").)

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[51] Professor Noll stated the third criterion differently, testifying that as long as an ISV relies on some of the APIs exposed by middleware, competition could have been enhanced. (*E.g.*, Noll, Nov. 15 Trial Tr. at 1919.) This is illogical and refuted by the binding Findings of Fact, which Novell's Complaint incorporated as the definition of middleware. *See* pp. 75-81, *infra*.

[52] Novell's fact witnesses sometimes used the word middleware to refer to software that sits between an operating system and applications and exposes APIs. Specifically, Novell's witnesses described Novell's software as "something that is produced that sits in the middle" between an operating system and applications (Harral, Oct. 20 Trial Tr. at 234), and as "a layer that [ISVs] use to build . . . applications" (Gibb, Oct. 26 Trial Tr. at 782-83). This effort to sow confusion should be rejected for, as Alepin acknowledged, "[t]here's got to be more than just the exposure of API's or the encapsulation of meaningful abstraction of API's. You need more" to have any potential impact on competition. (Alepin, Nov. 9 Trial Tr. at 1461-62.)

The versions of PerfectOffice, WordPerfect and Quattro Pro that purportedly posed a threat to Microsoft's monopoly were not cross-platform—they were developed to run solely on Windows 95. During the period from December 1994 (when Novell released PerfectOffice 3.0 for Windows 3.1) until March 1996—when Novell sold to Corel—Novell was not developing a version of PerfectOffice for any operating system other than Windows 95. (Frankenberg, Nov. 8 Trial Tr. at 1168-69; Gibb, Oct. 26 Trial Tr. at 787.) Frankenberg also acknowledged that, to his knowledge, after Corel purchased WordPerfect and Quattro Pro from Novell in March 1996, "Corel never released any version of PerfectOffice for any other platform except Windows." (Frankenberg, Nov. 8 Trial Tr. at 1169.) And, upon questioning by the Court, Harral agreed that WordPerfect was going to run only on Windows 95:

> Q. THE COURT: In fact, no matter what happened, you were trying to connect WordPerfect and whatever it exposed in terms of its own APIs or everything else, it was going to be operating on the Windows 95 operating system?
>
> A. Yes.
>
> Q. No matter what happened. And if somebody could use what it exposed in terms of APIs and use them eventually as whatever, it was still going to be operating on the basis of the Windows 95?
>
> A. Yes.

(Harral, Oct. 24 Trial Tr. at 559-60.) Professor Noll testified that in 1994 and 1995, Novell was "devoting virtually all of their energy to being on Windows 95," and offered his vague understanding (with no particulars) that Novell "had plans to develop it for other platforms" at some unspecified point in the future. (Noll, Nov. 14 Trial Tr. at 1845-46.) Because Novell's products were on Windows only, they did not expose "the same set of APIs on different

operating system platforms" and do not satisfy the first requirement of middleware. (Murphy, Dec. 7 Trial Tr. at 4779.)[53]

Moreover, Novell's software could not have been cross-platform in the but-for world (where PerfectOffice utilized the namespace extension APIs) because the namespace extension APIs were unique to Windows 95. Novell's counsel "agree[d]" there is no evidence that Novell's technology "could have been easily ported to another platform" if it had utilized the namespace extension APIs. (Nov. 15 Trial Tr. at 2060.) In addition, Alepin conceded that no operating system other than Windows 95 exposed the same functionality as the namespace extension APIs, because those APIs were "platform specific" to Windows. (Alepin, Nov. 9 Trial Tr. at 1482-83; Alepin, Nov. 10 Trial Tr. at 1532-33.) Microsoft's experts testified to the same effect. (Bennett, Dec. 12 Trial Tr. at 5023 (the "NameSpace extension APIs . . . [were] a unique component of Windows 95"); *see also* Murphy, Dec. 7 Trial Tr. at 4783-84.) As a result, had Novell utilized the namespace extension APIs to create its file open dialog, Novell's Three Products would have become even more tightly tied to Windows, and thus more difficult to port to non-Microsoft operating systems in the future. This destroys the entire Middleware Theory.

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[53] "[T]he middleware theory is about exposing the same APIs set on different platforms, not saying a word processor that runs on two different platforms. It's about can ISVs write to multiple platforms by writing once to the APIs set in the middleware." (Murphy, Dec. 7 Trial Tr. at 4779.) The version of the WordPerfect word processor written on the character-based DOS platform is irrelevant for Novell's Middleware Theory because "the DOS version wouldn't have supported Windows applications" and the "applications written to run on top of Windows wouldn't run on the DOS version of WordPerfect." (Murphy, Dec. 8 Trial Tr. at 4917; *see also* Noll, Nov. 15 Trial Tr. at 1946-47 (conceding that there was no evidence that Novell's purported middleware was available in WordPerfect for DOS).) Similarly, the version of WordPerfect for Linux that Corel released in the spring of 1996 (Noll, Nov. 14 Trial Tr. at 1850) was an older version of WordPerfect that did not contain the same shared code as the version of WordPerfect developed for Windows 95 and included in the PerfectOffice suite, and therefore WordPerfect on Linux could not have served as a middleware threat to Windows. (Murphy, Dec. 8 Trial Tr. at 4914-16.)

(b) Novell's Software Was Not Available on All or Nearly All PCs.

As Professor Noll explained, in order to "imperil" the applications barrier to entry protecting Microsoft's monopoly, Novell's software had to run on "all or nearly all" PCs of the "dominant operating system" (Noll, Nov. 15 Trial Tr. at 1923; *see also id.* at 1925-26), which Professor Noll defined as "the category of Microsoft or Microsoft compatible operating systems" (*id.* at 1924-26). Indeed, this requirement is a matter of logic because no software could possibly serve as an attractive middleware platform to which ISVs would choose to write unless by so doing, ISVs would reach all or nearly all of the end-users that could be reached by writing directly to Windows. (*See* Murphy, Dec. 7 Trial Tr. at 4786-87 (explaining that "being available on nearly all PCs is really important" in order to "provide[] a . . . good enough environment for ISVs to evolve and to start attracting developers away from Windows").)

As shown above, by the time Windows 95 was released in August 1995, the market share of Novell's products was small and on a downward trajectory. In 1995, WordPerfect had 16% of the Windows market, PerfectOffice had 3.6% and Quattro Pro had 2%. *See* pp. 63-66, *supra*. Moreover, for purposes of whether Novell's software was present on all or nearly all Microsoft PCs, these low market share numbers must be further reduced by about 50% because office suites or any of their component applications were installed on only half of all PCs. (Murphy, Dec. 7 Trial Tr. at 4750, 4788-89.)

Thus, because Novell's software was available on far fewer than all or nearly all PCs, an ISV "would be limiting his market enormously" by writing to the APIs exposed by Novell's products instead of the APIs exposed by Windows (because the number of end-users with Windows was several times the number of end-users with Novell's products). (Murphy, Dec. 7 Trial Tr. at 4789-90.) That makes it entirely illogical to posit a world where Novell's products become middleware in the sense that they could supplant Windows.

Even accepting Professor Noll's opinion that the relevant inquiry is the percentage of the installed base of all PCs with WordPerfect (including DOS versions of WordPerfect), the result is no different. According to Professor Noll, "WordPerfect still ha[d] about half of the install[ed] base in 1995" if one includes DOS versions of WordPerfect. (Noll, Nov. 14 Trial Tr. at 1762.) This does not help Novell's position.

First, Noll offered no data to support this 50%, and, as shown below, it is far too high. In any event, that proportion is far from "all or nearly all" PCs. Second, as Professor Murphy testified, only about half of all PCs then had an office suite or any of its component applications installed on them. (Murphy, Dec. 7 Trial Tr. at 4750, 4788-89.) This places Novell's installed base at 25% of all PCs. Third, Professor Noll's 50% estimate does not comport with the actual data Novell introduced at trial, which established that, as of the end of 1994, WordPerfect had about 36% of the installed base of all PCs with word processors when one includes WordPerfect's share of the DOS platform. (PX 599A, at Table 13;[54] *see also* Acheson, Dec. 2 Trial Tr. at 3993-94.) In other words, at the end of 1994, only about 18% of all PCs had a copy of WordPerfect installed on them. (Murphy, Dec. 7 Trial Tr. at 4788-89.) By any measure, this falls far short of the requirement that it be available on all or nearly all PCs.

In any event, WordPerfect's installed base on DOS is irrelevant for purposes of Novell's Middleware Theory.[55] Professor Noll conceded that his estimation of WordPerfect's

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[54] PX 599A shows that, as of the end of 1994, the total installed base of PCs with word processing applications installed was 40,980,000. Of that number, 14,760,000 PCs had WordPerfect installed. (PX 599A, at Table 13.) This is about 36%.

[55] Novell's attempt to use its DOS product to establish harm to competition in the PC operating system market makes it clear that its claim is "associated directly or indirectly with" the PC operating system claim it sold to Caldera in 1996 and is thus barred. *See* pp. 130-33, *infra*.

installed base was based on WordPerfect's historic success on the character-based DOS platform. (Noll, Nov. 15 Trial Tr. at 1923-25; *see also* Hubbard, Dec. 6 Trial Tr. at 4442-43 ("WordPerfect has a . . . very significant share of DOS, the older platform, but a smaller share, and actually declining share in the Windows 3.x and then subsequently Windows 95, 98.").) There was and is no dispute that Novell's historic success on the DOS platform would not and did not translate into success on Microsoft Windows. An internal Novell memorandum dated April 14, 1995 and titled "Market Requirements Document for 'Storm'" explained:

> WordPerfect for DOS possesses the single largest user installed base in the word processing market. WordPerfect currently claims that 10 Million users or 30% of the total word processor market are WordPerfect for DOS users. Currently, only 30% of this WordPerfect for DOS installed base is remaining with WordPerfect as they transition to a Windows word processor.

(DX 224, at 20.) For a Middleware Theory dependent on the notion that users would switch operating systems because of Novell's ubiquitous software, the presence of WordPerfect on DOS cannot logically make any difference.

Moreover, the version of the WordPerfect word processor written to DOS did not even include the Novell software that was purportedly middleware. (Murphy, Dec. 8 Trial Tr. at 4917-18; *see also* Noll, Nov. 15 Trial Tr. at 1946-47 (conceding that he was unaware of any evidence that any of the purported middleware capability in PerfectFit was available on WordPerfect for DOS).) As a result, Novell's installed base on DOS is irrelevant for purposes of Novell's Middleware Theory. (*See* Murphy, Dec. 7 Trial Tr. at 4788.)

(c) Novell's Software Did Not Expose Sufficient APIs to Allow ISVs to Write General-Purpose Personal Productivity Applications.

For software to affect competition in the PC operating system market, it must expose sufficient APIs such that general-purpose personal productivity applications could be written solely to those APIs rather than the APIs exposed by Windows. Finding of Fact 28

makes this clear: only software that "exposes enough APIs to allow independent software vendors ('ISVs') profitably to write full-featured personal productivity applications that rely solely on those APIs" can pose a threat to Microsoft. Indeed, Finding of Fact 74 explains that the threat (there, merely a "nascent" threat) that Sun's Java technology posed to Microsoft's PC operating system monopoly stemmed from Java's intended availability on non-Microsoft operating systems:

> The inventors of Java at Sun Microsystems intended the technology to enable applications written in the Java language to run on a variety of platforms with minimal porting. A program written in Java and relying only on APIs exposed by the Java class libraries will run on any PC system containing a JVM that has itself been ported to the resident operating system.

(*See also* Finding of Fact 68 (applications must be written "exclusively on middleware APIs" to be able to "run . . . on any operating system hosting the requisite middleware").) The Court instructed the jury that these Findings have "binding effect here" as the Court instructed the jury (Oct. 18 Trial Tr. at 143), and Novell conceded the same thing (*e.g.*, Nov. 14 Trial Tr. at 1709).

The evidence was undisputed that Novell's software lacked this defining characteristic because ISVs could not write general-purpose personal productivity applications that would run on top of Novell's software. Alepin conceded that Novell's purported middleware (including WordPerfect, AppWare, OpenDoc and PerfectFit or some combination of those products and technologies) did not expose a sufficiently broad set of APIs to enable development of general-purpose personal productivity applications. (Alepin, Nov. 9 Trial Tr. at 1489-90; *see also* Alepin, Nov. 10 Trial Tr. at 1533-35, 1538-40.) The APIs exposed by Novell's Three Products could only support applications "that worked with and were compl[e]mentary to the WordPerfect system," such as a thesaurus application or a spell-checker application. (Alepin, Nov. 9 Trial Tr. at 1479.) Alepin admitted that no ISV would even attempt

to write a general-purpose personal productivity application on top of WordPerfect—this "would not be the best use of [an ISV's] time." (*Id*. at 1480.) Professor Noll agreed, explaining that there were no third-party applications "that would threaten the applications barrier to entry that were written to this platform, PerfectFit and/or appware." (Noll, Nov. 15 Trial Tr. at 1922-23; *see also* Murphy, Dec. 7 Trial Tr. at 4729, 4789-90 (same).)

It is undisputed that ISVs could not write general-purpose personal productivity applications to the APIs exposed by Novell's products. Indeed, Novell conceded that, if the jury had been instructed that Novell's software must "expose[] enough APIs to allow independent software vendors (ISVs) profitably to write full-featured personal productivity applications that rely solely on those APIs," as stated in Finding of Fact 28, that "would be directing a verdict on that portion of our theory." (Dec. 15 Trial Tr. at 5436-37, 5439.)

Perhaps in recognition of the fact that Novell could not prevail if the criteria of Finding 28 is applied, Noll sought to water down the requirement at trial, contending that software need not meet the middleware definition of the Government Case to constitute a threat to the applications barrier to entry. Noll testified:

> [I]f the middleware is exposing a certain number of API's, you can write to those API's and be on—and access functions in multiple operating systems. You may have to write additional code separately for each operating system, but if the middleware reduces the amount of code you have to write to be cross-platform, then it makes being cross-platform more attractive. . . . Middleware can begin to have an effect on competition in the operating system market if it starts to be used because it's reducing porting costs and, therefore, increasing the number of applications that are cross-platform, and thereby reducing the applications barrier to entry.

(Noll, Nov. 15 Trial Tr. at 1958-59.) This fails for several reasons.

First, Professor Noll conceded, as he must, that "the whole point of middleware is to free the software vendor, the applications developer, from using any particular operating

system's set of API's" because the "middleware provider perform[s] the function of accessing the operating system and [the ISV] just us[es] the applications programming interfaces of the middleware product itself as a way to gain access to all operating systems." (Noll, Nov. 14 Trial Tr. at 1736.) Thus, Novell's watered-down version of middleware failed to comport with Professor Noll's own understanding of what middleware must accomplish in order to be able to impact competition in the PC operating system market—if applications must rely on even in part the Windows APIs, Windows remains essential and its monopoly position will not be eroded. Moreover, the notion underlying Professor Noll's testimony that reducing the incremental porting costs of applications would be sufficient to meet the API requirement is illogical: If an application relies on a large number of Windows APIs as well as some PerfectOffice APIs, it could only be used on the few Windows PCs that had PerfectOffice installed, and significant porting costs would be incurred for that software to run on other operating systems. This could not result in increased competition in the PC operating system market.

Rather, as Professor Murphy explained (consistent with the theory of the Government Case), the only middleware that could impact competition is middleware that allows an ISV "to write just to the APIs of middleware and not to the operating systems" and that also exists "on another operating system" because if an ISV is not using the APIs of the underlying operating system, then "more applications [may become] available for those other operating systems." (Murphy, Dec. 7 Trial Tr. at 4772-73.) Because the evidence at trial established that Novell's software did not expose sufficient APIs "to free the software vendor . . . from using any particular operating system's set of APIs" (Noll, Nov. 14 Trial Tr. at 1736), Novell's software had no ability to erode the applications barrier to entry.

Second, Paragraphs 44 and 48 of Novell's own Complaint adopted the definition of middleware used in the Government Case, and in Finding of Fact 28 in particular:

> 44. As the U.S. Court of Appeals for the District of Columbia Circuit held in affirming the district court's essential findings, Microsoft's Windows monopoly was threatened by "middleware" such as Netscape's Navigator, which is a browser application, and Sun Microsystems' implementation of the "Java" technologies, both of which *were not only able to function on multiple operating systems, but were potentially able to provide platforms for end-use applications, which made them a threat to replace Windows itself as such a platform*.
>
> 48. The District Court defined middleware as software that "relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers." Findings of Fact ¶ 28. *In the Government Suit, Netscape, when coupled with Java, is described as having "the potential" to become a middleware platform on which applications could be written to run on multiple operating systems. Such cross-platform functionality undermines the applications barrier to entry that helps protect Microsoft's operating system dominance*.

(Compl. ¶¶ 44, 48 (emphasis added).) In fact, the Complaint described the alleged middleware threat posed by AppWare as "a serious threat to Microsoft" specifically because "[p]rogrammers could write programs using these APIs that could function on any AppWare installation regardless of the operating system" and by "[w]riting to the AppWare APIs and *not to the Windows APIs* would enable applications to run not only on Windows, but also on Macintosh and other operating systems at no additional cost." (Compl. ¶ 50 (emphasis added).)[56] Because Novell's software did not possess the essential characteristic of exposing APIs that would permit

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[56] Novell's opening brief to the Fourth Circuit in 2010 made this same point:

> "'Middleware' is a term used to refer to software products that have the capability to serve as platforms for software applications themselves. They expose, or make available, their own APIs, and theoretically, software developers could rely upon these APIs *rather than Windows's APIs* . . . ." *Novell*, 505 F.3d at 308 n.14 (citations omitted).

(Novell Brief to the Fourth Circuit, Case No. 10-1482, Dkt. #19, Aug. 6, 2010, at 16 n.5 (emphasis added).)

ISVs to write full-featured personal productivity applications solely to the APIs exposed by that software, it could not have had any impact on competition in the PC operating system market.

Moreover, to the extent that Novell seeks to depart from the definition of middleware used in the Government Case and incorporated into the Complaint, Novell released any such claim in 2004. In the 2004 settlement agreement, Novell released Microsoft from "any and all Claims that Novell ever had or has as of the date of this Agreement in law or in equity, known or unknown, of any kind whatsoever (including without limitation any antitrust or similar Claims of any kind) except for . . . the Claims set forth in the draft WordPerfect complaint . . . ." (Nov. 8, 2004 Settlement Agreement, at ¶ 2(a), Holley Decl. Ex. A.) *See* pp. 126-30, *infra*.

Because Novell's software possessed none of the three characteristics of middleware required to have the potential to impact competition in the PC operating system market, Novell failed to show any impact on competition in that market.

To summarize this Section:

- *First*, it is elementary and undisputed that, in order for middleware to have any potential to increase competition to Windows, the software must be cross-platform. But Novell's PerfectOffice suite containing the Perfect Fit purported technology (the alleged middleware) was developed *only* for Windows. *See* pp. 70-72, *supra*.

- *Second*, it is also undisputed that, in order to have any potential to increase competition in the PC operating system market, the cross-platform middleware must be present on "all or nearly all" PCs of the dominant operating system. Otherwise, ISVs would have no incentive to write their applications to middleware (and limit their potential customer base) when they could write their applications to Windows and gain access to users of about 95% of all PCs. In 1995, WordPerfect had 16% of the Windows market, Quattro Pro had 2% and PerfectOffice 3.0 captured at most 8% of the suite market. Professor Noll testified that had PerfectOffice been released on time, it would have achieved a similar market share as the prior version achieved on Windows 3.1. *See* p. 66, *supra*. Moreover, even using WordPerfect's 36% installed base of PCs that had a word processor installed (as of the end of 1994), that low number does not come close to "all or nearly all" PCs (and is only 18% of all PCs because half of all PCs had no suite or word processor on them at all).

- *Third*, no software could pose a middleware threat to Windows unless it exposed enough APIs to enable ISVs to write general-purpose personal productivity applications to its APIs

> because, if ISVs must rely on the Windows APIs even in part, their applications would run only on Windows. If an application relies on APIs exposed by both Windows and PerfectOffice, then that application could be used only on the few Windows PCs that had PerfectOffice installed, and significant porting costs would be incurred for that software to be able to run on any other operating system. This could not conceivably reduce the applications barrier to entry protecting Windows' monopoly.

* * *

In addition, and independently, Novell's two theories about the potential impact on competition in the PC operating system market assume the existence of a viable alternative to Windows during the relevant period. This assumption is critical, for in the absence of such a viable alternative, Novell's products—no matter how popular or cross-platform and regardless of whether they were or could have been middleware as that term is used in the Government Case—could not have had the necessary impact on competition in the adjacent market for PC operating systems. "[I]n order to make [Novell's theories] work," there must be "other operating systems that [were] sufficiently attractive" to convince consumers in the "but for world to move from Windows to an alternative operating system." (Murphy, Dec. 7 Trial Tr. at 4735.)

There was no evidence, however, that effective operating system competitors existed in 1995. (Murphy, Dec. 7 Trial Tr. at 4735-36, 4763.) The evidence at trial was to the contrary. Professor Noll admitted that Linux "wasn't really a competitor" to Windows during the relevant period, because it only "became a full-fledged, commercial product" in 1996. (Noll, Nov. 15 Trial Tr. at 1903, 1961.) Similarly, the version of OS/2 that IBM released in 1995 was, according to Noll, "not an effective competitor" to Windows. (*Id*. at 1903.) In fact, during the time that Novell owned WordPerfect and Quattro Pro, "there were no real strong competitors out there to take the business away from Windows." (Murphy, Dec. 7 Trial Tr. at 4735; *see also* Gates, Nov. 22 Trial Tr. at 3114-15 (same).) Even the combined market share of Unix, Linux,

and OS/2 together was "very small relative to Windows." (Noll, Nov. 14 Trial Tr. at 1781.)[57] The lack of even a single meaningful competitor to Windows in the relevant time period is also fatal to Novell's theories of harm to competition.

B. The Applicable Causation Standard Is Whether Microsoft's Withdrawal of Support for the Namespace Extension APIs "Contributed Significantly" to Maintenance of Microsoft's Monopoly in the PC Operating System Market, and Novell Came Nowhere Close to Meeting that Standard.

As this Court held in 2010, to establish causation, Novell had to prove that Microsoft's October 3 Decision "contribut[ed] significantly to [Microsoft's] continued monopoly power." 699 F. Supp. 2d at 747-48. Despite this holding, Novell contended at trial that it only needed to show that the October 3 Decision was "reasonably capable of contributing significantly" to Microsoft's monopoly power.

The causation standard Novell sought, however, applies only to claims for injunctive relief in enforcement actions brought by the Government, not in private actions seeking treble damages. In the Government Case, the D.C. Circuit expressly recognized that it was applying an "edentulous test for causation" and held that, as a result, the Government was not required to show that "Java or Navigator would actually have developed into viable platform substitutes." *United States* v. *Microsoft Corp*., 253 F.3d at 79. There, the Government needed to show only that "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power," and that Java and Netscape were such "nascent threats at the time Microsoft engaged in the anticompetitive

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[57] Windows maintained at least a 90% share of that market throughout the 1990s. (*E.g.*, Finding of Fact 35 ("Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent."); *see also* Noll, Nov. 15 Trial Tr. at 1929-30 & Microsoft's Demonstrative 120, shown at trial on Nov. 15, Trial Tr. at 1930, Holley Decl. Ex. M; Murphy, Dec. 7 Trial Tr. at 4722-23 & Microsoft's Demonstrative 301, shown at trial on Dec. 7, Trial Tr. at 4722, Holley Decl. Ex. N.)

conduct" alleged. *Id*. The D.C. Circuit "found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating system market only through inference," and "expressly did not adopt the position that Microsoft would have lost its position in the [PC operating system] market but for its anticompetitive behavior." *Id*. at 106-07.

Where, as here, a party seeks treble damages, two-thirds of the amount sought is entirely punitive and, accordingly, no such inference of causation is permitted because it is "critical that treble damage remedies be strictly limited to those aspects of a plaintiff's injury that were in fact caused by an unlawful exploitation of market power or an unlawful quest for such power in attempt cases." 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a; *see also United States* v. *Microsoft Corp*., 231 F. Supp. 2d 144, 164 (D.D.C. 2002) (there must be "proportionality between the severity of the remedy and the strength of the evidence of the causal connection"). Indeed, as the Areeda treatise makes clear, a more stringent causation requirement applies to actions for treble damages because "antitrust's mandatory treble damage provision often awards damages that are 'excessive,' in that the punitive two-thirds is assessed even to actions that are not criminal in character, or where the defendant had made a reasonable but mistaken judgment that it was doing nothing unlawful." 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 657a. This, when coupled with the fact that "the line between aggressive competitiveness and a § 2 violation is indistinct," makes "judicial judgments and particularly juries prone to error." *Id*. Use of the "contributes significantly" standard—especially here, where the alleged harm to competition in the PC operating system market is based on an attenuated cross-market theory—is therefore necessary to "moderate the treble damage consequences of finding 'exclusionary' conduct" to "be strictly limited to those aspects

of a plaintiff's injury that were in fact caused by an unlawful exploitation of market power . . . ." *Id*. The edentulous causation standard provides no such assurance.

There was no basis for the jury to find that any delay of the release of Novell's Three Products contributed significantly to Microsoft's PC operating system monopoly. With respect to Novell's franchise applications theory, the evidence demonstrated that (a) the applications barrier to entry was due to the very large and diverse population of applications written to Windows, and (b) PerfectOffice, WordPerfect and Quattro Pro, which had low market shares on Windows, were not even close to being popular enough that—if and when Novell decided to develop and release a version of PerfectOffice for a rival operating system—users would migrate to that other operating system. *See* pp. 60-69, *supra*. Novell did not come anywhere close to establishing that the October 3 Decision contributed significantly to the maintenance of Microsoft's PC operating system monopoly.

Likewise, the evidence demonstrated that Novell's software possessed none of the three defining characteristics of middleware that could have had even the potential to impact competition in the PC operating system market, and therefore the supposed delay in the release of Novell's Three Products could not have "contributed significantly" to the maintenance of Microsoft's monopoly. *See* pp. 69-81, *supra*. Moreover, the binding Findings of Fact make clear that as of 1999—five years after Microsoft's decision to withdraw support for the namespace extension APIs—there was no product yet in existence of the sort that Novell hypothesized, *i.e.*, a middleware product that allowed ISVs to write applications to the APIs exposed by the middleware.[58]

[58] Finding of Fact 28 states that "[c]urrently [November 1999] no middleware product exposes enough APIs to allow independent software vendors ('ISVs') profitably to write full-
(*footnote continued*)

Indeed, Professor Noll never opined that the withdrawal of support for the namespace extension APIs had any substantial impact on competition in the PC operating system market. Instead, he testified that Novell was merely making an "attempt" to be cross-platform, which would at some later (and undetermined) point in the future give users "the ability to switch platforms" and which theoretically "can have the effect of increasing competition." (Noll, Nov. 14 Trial Tr. at 1717-18, 1765-66; *see also* Noll, Nov. 15 Trial Tr. at 1924-25 ("[I]f you can retain that install base, and then if you're the largest single entity in that install base you have a natural advantage, although there are switching costs, and you can, if you then become middleware, increase competition in the operating system market.").) Noll's vague and wholly theoretical testimony, which included no attempt to quantify any supposed impact on competition in the PC operating system market or to state when such an impact might occur, is not a legally sufficient evidentiary basis for a reasonable jury to find that the October 3 Decision had any impact on competition in the PC operating system market under any causation standard.

Professor Noll not only failed to opine that there was some measurable and non-trivial harm to competition in the PC operating system market caused by the October 3 Decision, but he also conceded that the withdrawal of support for the namespace extension APIs by itself "would *not* have affected competition in the operating system market." (Noll, Nov. 15 Trial Tr.

(*footnote continued*)
featured personal productivity applications that rely solely on those APIs." Finding of Fact 32 emphasizes that it still "remains to be seen whether server- or middleware-based development will flourish at all." *See also* Finding of Fact 29 ("It remains to be seen, though, whether there will ever be a sustained stream of full-featured applications written solely to middleware APIs."). In short, "these middleware technologies have a long way to go before they might imperil the applications barrier to entry." (Finding of Fact 77.) Consistent with these Findings of Fact, Professor Noll testified that in "the period of this case plus the government case," there "never was" a middleware product that "ran on various operating systems." (Noll, Nov. 15 Trial Tr. at 1929; *see also id.* at 1920 (agreeing that "as of 1999, there had never been any middleware that could imperil the applications barrier to entry").)

at 1905-06 (emphasis added).) Rather, Professor Noll testified that any harm to competition in the PC operating system market came about only in combination with a set of different Microsoft acts that harmed OS/2, Netscape and Java. (*See id*. at 1906-08.) Noll acknowledged, however, that "in a world in which all the other people are still operating and competing, then the loss of Novell would not have been a significant factor in effecting [sic] competition in the operating system market." (*Id*. at 1907.)

This testimony is fatal to Novell's claim. The Court has been consistent and clear that "Novell cannot piggyback on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well." 699 F. Supp. 2d at 750. (*See also* Nov. 14 Trial Tr. at 1815-16 ("THE COURT: . . . Obviously Novell's case rises and falls with conduct directed by Microsoft against Novell . . . .").) But this is precisely what Professor Noll's testimony requires—the combination of alleged harm to Novell with alleged harm to other competitors. (*See* Noll, Nov. 15 Trial Tr. at 1905-08.) Professor Noll's theory is thus nothing more than impermissible "piggybacking" and did not provide Novell with the evidence necessary to demonstrate that the sole act about which Novell complains—the October 3 Decision—"contributed significantly" to the maintenance of Microsoft's PC operating systems monopoly or satisfied even a lesser causation standard.[59]

[59] Although this Court and the Fourth Circuit rejected a similar argument at the summary judgment stage, the time for submission of evidence, rather than pure theory, was at trial. The evidence at trial, including Professor Noll's testimony, made clear that the October 3 Decision alone caused no harm to competition. Even accounting for harm to Java and Netscape, Professor Noll offered no specifics or data and merely waved his hand over the issue with generalized opinion.

C. The Allegedly Wrongful Conduct Could Not Have Harmed Competition in the PC Operating System Market Because the Evidence Showed that the Timely Release of PerfectOffice Would Have Enhanced Microsoft's Monopoly.

In addition to the defects shown above, a reasonable jury would not have a legally sufficient evidentiary basis to find that Microsoft's October 3 Decision harmed competition in the PC operating system market because in the but-for world Novell would have utilized the namespace extension APIs to enhance Windows 95 and thereby make it even more popular.

First, all of Novell's fact witnesses testified that, had there been no delay in the release of versions of Novell's products for Windows 95, Windows 95 would only have become stronger. Notably, Frankenberg testified that the market share of Windows 95 would have *increased* in that situation:

> Q. Was it your view at the time, in 1994 and 1995, that if PerfectOffice, the new version of PerfectOffice for Windows 95 had been released by Novell, that that would have made Windows 95 even more desirable in the marketplace than it otherwise would have been?
>
> A. Definitely. *It would have made Windows 95 more desirable in the marketplace.*
>
> Q. It was your view at the time that if PerfectOffice for Windows 95 had been released by Novell, that would have been a benefit to Microsoft for exactly the reason that you just said, it would have made Windows 95 even more desirable for consumers?
>
> A. That is true.
>
> Q. If --
>
> A. Especially those who used WordPerfect products. They would be able to use Windows 95, and they wouldn't otherwise have been able to do that if they wanted to continue using WordPerfect.
>
> Q. If anything, *that would increase the sales of Windows 95, correct*?
>
> A. *Yes.*

> Q. Having a good PerfectOffice product out there would make Windows 95 *even more popular than it turned out to be; true*?
>
> A. *True*.
>
> Q. If PerfectOffice had been released in 1995 by Novell and had been successful, and had gained a reasonably good share of the market how, if at all, would that have effected [sic] sales of Windows?
>
> A. Presumedly [sic] it would have increased sales of Windows 95.
>
> Q. And would have made Windows 95's market share *even higher than what it turned out to be, correct?*
>
> A. *Yes.*

(Frankenberg, Nov. 8 Trial Tr. at 1226-28 (emphasis added); *see also* Noll, Nov. 15 Trial Tr. at 1949-50 ("completely agree" that Frankenberg was "exactly right" that a timely release of PerfectOffice would have increased Microsoft's share of the PC operating system market).) This testimony by the CEO—that Windows 95 would have been "more desirable" and that its sales would have "increased" if Novell had been able to use the namespace extension APIs—is fatal to Novell's claim. It affirmatively disproves the assertion that the allegedly wrongful act had some adverse effect on competition in the relevant market. In the but-for world, Microsoft's monopoly power would have increased.

Novell's witnesses also established that Windows 95 was a huge step forward technologically, and that Novell wanted to tie its products as closely as possible to Windows 95. Frankenberg testified that Windows 95 was a "significant step forward" and that Novell was "very excited and very interested" in it. (Frankenberg, Nov. 8 Trial Tr. at 1225-26.) Frankenberg also explained that Novell's business strategy was to "take[] advantage of the capabilities in Windows 95." (*Id*. at 1226.) Harral likewise testified that "Windows 95 was in

my view a significant step forward for the P.C." and that Novell was "excited about Windows 95" and the "wonderful evolution" in technology it provided. (Harral, Oct. 20 Trial Tr. at 253-54, 256-57; *see also* Gibb, Oct. 26 Trial Tr. at 788 ("Well, from a technology standpoint, Windows 95 was a huge step forward."); Richardson, Oct. 25 Trial Tr. at 607 ("There were many features in Windows 95 that we were very excited about."); Noll, Nov. 15 Trial Tr. at 1911 (Windows 95 was a "substantial step forward.").)

Harral and Richardson both testified that Novell's use of the namespace extension APIs would have enhanced Windows 95. They planned to use the namespace extension APIs to put five other Novell products (Novell's QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery, and a primitive FTP/HTTP browser) in the tree view of the Windows Explorer so that these products would appear in the Windows 95 Explorer and common file open dialogs once a user had installed Novell's Three Products. (Harral, Oct. 20, Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 373-74, 515; Richardson, Oct. 25 Trial Tr. at 592-93, 612, 629-30, 638, 691-92.) Adding these five Novell products to the Windows 95 shell would have acted to "make Windows [95] the best version of Windows that it could be." (Harral, Oct. 24 Trial Tr. at 372-74*; see also* Richardson, Oct. 25 Trial Tr. at 613 ("It was our intent to make the user's experience on Windows better because they had WordPerfect installed.").)

Given that Windows 95 would have become a better and more desirable product had Novell used the namespace extension APIs, Windows' market share would have been even higher in the but-for world than it otherwise was. (Frankenberg, Nov. 8 Trial Tr. at 1226-28; Noll, Nov. 15 Trial Tr. at 1949; Murphy, Dec. 7 Trial Tr. at 4797-98.) As the Court has emphasized, the evidence showed that Novell "wanted to marry the two products, the operating

system and WordPerfect . . . both through 1996 and the foreseeable future." (Oct. 27 Trial Tr. at 928-29.) This disproves an element of Novell's claim—that "the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the PC operating system market," 699 F. Supp. 2d at 748, under any causation standard.

II. A Reasonable Jury Would Not Have a Legally Sufficient Evidentiary Basis to Find that Microsoft Engaged in Anticompetitive Conduct.

A. Microsoft's Decision to Withdraw Support for the Namespace Extension APIs Does Not Fall Within the Limited *Aspen Skiing* Exception.

Novell concedes, as it must, that "Microsoft doesn't have a duty to provide us with anything." (Nov. 18 Trial Tr. at 2587.) As Novell's counsel told the court, "I don't think under the antitrust laws, certainly as we have them today, that that [*i.e.*, refusing to provide Novell with the namespace extension APIs] would have been actionable." (*Id.* at 2597-98.) Nevertheless, according to Novell, having made the namespace extension APIs available to ISVs in the June 10, 1994 beta version of Windows 95, Microsoft was obligated to continue supporting them because once Microsoft "evangelize[d]" them "to us" and Novell supposedly planned to use those APIs, Microsoft was precluded from withdrawing support for the APIs. (*Id.* at 2599.) This claim is completely untenable as a matter of law.

As the Court explained in its March 2010 summary judgment decision, to prevail on its Section 2 claim, Novell was required to prove at trial that Microsoft's October 3 Decision fell within the limited exception provided in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) to the general rule that "a monopolist generally has a right to refuse to cooperate with a competitor." 699 F. Supp. 2d at 745.

Of course, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to

exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (second alteration in original) (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)). As the Supreme Court has recognized, "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Trinko*, 540 U.S. at 407-08. This rule applies with equal force to a monopolist. *Four Corners Nephrology Associates, P.C.* v. *Mercy Medical Center of Durango*, 582 F.3d 1216, 1221 (10th Cir. 2009) ("The Supreme Court has recently emphasized the general rule that a business, even a putative monopolist, has 'no antitrust duty to deal with its rivals at all.'") (quoting *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438, 444 (2009)).

"[T]he Supreme Court has found a duty to deal in only one limited circumstance," *Compliance Marketing, Inc.* v. *Drugtest, Inc.*, 2010 U.S. Dist. LEXIS 34315, at *53 (D. Colo. April 7, 2010) (citing *Trinko*, 540 U.S. at 409); *see also Four Corners*, 582 F.3d at 1224-25 (quotation omitted), where a defendant "terminates a profitable relationship" with the plaintiff and does so "without any economic justification," denying its rival terms "available to *all* other consumers." *Four Corners*, 582 F.3d at 1225 (emphasis in original).

This is the so-called *Aspen Skiing* exception. The *Aspen Skiing* exception is narrow "'because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.'" *Christy Sports*, 555 F.3d at 1194 (quoting *Trinko*, 540 U.S. at 408). Indeed, the Supreme Court has emphasized that "*Aspen Skiing* is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409. As a result, "courts should

impose a duty to deal under Section 2 only 'very cautious[ly].'" *Four Corners*, 582 F.3d at 1225 (quoting *Trinko*, 540 U.S. at 408).

As an initial matter, it is undisputed that Windows 95 was Microsoft's intellectual property. Indeed, as Alepin acknowledged, the namespace extension APIs were invented by Satoshi Nakajima who obtained a U.S. patent covering his invention. (PX 364; *see also* Alepin, Nov. 10 Trial Tr. at 1625-26; Nakajima, Dec. 1 Trial Tr. at 3793.) As this Court has recognized, "to require one company to provide its intellectual property to a competitor would significantly chill innovation." *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 743, 745 (D. Md. 2003) (Motz. J.) (citations omitted); *see also Daisy Mountain Fire District* v. *Microsoft Corp.*, 547 F. Supp. 2d 475, 489-90 (D. Md. 2008) (Motz. J.). The Court has also recognized that, in light of the fact that "the software development industry is dynamic and involves continuous innovation," it would be wrong to require Microsoft to "disclose significant information to its competitors." *In re Microsoft*, 274 F. Supp. 2d at 745; *see also Four Corners*, 582 F.3d at 1221 ("Allowing a business to reap the fruits of its investments is an important element of the free-market system: it is what induces risk taking that produces innovation and economic growth." (quotation and citation omitted)).

Courts have refused to extend the *Aspen Skiing* exception to require a technological innovator to provide its intellectual property to its rivals. *See In re Independent Service Organizations Antitrust Litigation*, 989 F. Supp. 1131, 1139 (D. Kan. 1997) (pointing out that "*Aspen Skiing* did not involve intellectual property rights" and explaining that extending *Aspen Skiing* to require the provision of intellectual property to competitors would "seriously undermin[e] the objectives of the intellectual property laws"); *see also In2 Networks, Inc.* v. *Honeywell International*, 2011 U.S. Dist. LEXIS 117589, at *16 (D. Utah Oct. 12, 2011) (under

Christy Sports, there is no duty "to allow [a rival] to use [one's intellectual] property, like Deer Valley was not required to invite competitors onto its property to rent skis") (dicta).

Under Tenth Circuit law, a plaintiff relying on the *Aspen Skiing* exception must prove that a monopolist (a) "terminat[ed] a profitable business relationship" with plaintiff, and (b) did so "without any economic justification." *Four Corners*, 582 F.3d at 1225. As the Tenth Circuit stated, the "key fact" is that a "monopolist was willing to jettison a profitable short-term business relationship and deny to a rival the retail prices available to *all* other consumers." *Id.* (emphasis in original). In addition, for a termination of a business relationship to serve as the predicate of an *Aspen Skiing* claim, it must not be "temporary" or "subject to [defendant's] business judgment" because termination in those circumstances "does not reach the outer boundary of § 2 liability, at which *Aspen Skiing* lies." *Christy Sports*, 555 F.3d at 1197 (internal citation and quotation omitted).

Microsoft's October 3 Decision was not anticompetitive under these strict standards, and no reasonable jury would have a legally sufficient evidentiary basis to find otherwise. *First*, Microsoft's October 3 Decision did not "terminate" any business relationship between Microsoft and Novell. *See Four Corners*, 582 F.3d at 1225 (citation omitted). The opposite is true. Microsoft continued providing Novell with beta versions of Windows 95, continued to provide information and assistance to Novell, and did nothing to prevent Novell from developing versions of its products for Windows 95. *See* pp. 32-33, *supra*. There is also no dispute that Novell could have used the Windows 95 common file open dialog to get its products released to market in a timely manner. (Gibb, Oct. 26 Trial Tr. at 847-49; Alepin, Nov. 10 Trial Tr. at 1604; Harral, Oct. 24 Trial Tr. at 502; Belfiore, Dec. 5 Trial Tr. at 4264-66; Bennett, Dec. 12 Trial Tr. at 5019.) No relationship was "terminated," and Novell's 1994

versions of PerfectOffice, WordPerfect and Quattro Pro remained compatible with Windows 95. *See* pp. 13 n.11 & p. 47, *supra*.

Second, Microsoft did not deny Novell access to any information "available to *all* other consumers." *Four Corners*, 582 F.3d at 1225 (emphasis in original). On the contrary, even assuming that Microsoft's decision could be deemed a "termination" at all, the evidence is clear that Microsoft's decision to withdraw support for the namespace extension APIs applied to all ISVs.[60] Novell was not singled out for disparate treatment.

1. *The Withdrawal of Support for the Namespace Extension APIs Did Not "Terminate" Microsoft's Relationship with Novell.*

Harral and Richardson both testified that, after Microsoft's decision to withdraw support for the namespace extension APIs, Novell had three options. *First*, if the namespace extension APIs were as important as Novell contends, Novell could have continued to call those APIs, just as Richardson said Novell's shared code group had done between June 1994 and October 1994. (Richardson, Oct. 25 Trial Tr. at 677-78.) Richardson and Harral agreed that the namespace extension APIs remained in Windows 95, and that Novell could "continue to use the documentation" it had received from Microsoft in June 1994 with the M6 beta. (Harral, Oct. 20 Trial Tr. at 342; Richardson, Oct. 25 Trial Tr. at 624.)

Second, Novell could have used the Windows 95 common file open dialog, which Microsoft made available to all ISVs. Gibb testified that it would have been "easy" for Novell to release WordPerfect and Quattro Pro using that Windows 95 common file open dialog. (Gibb, Oct. 26 Trial Tr. at 847-48; *see also* Harral, Oct. 24 Trial Tr. at 502.) He said that Novell

[60] Microsoft itself did not use the namespace extension APIs in any Microsoft applications that competed with Novell's Three Products. *See* pp. 33-34, *supra*.

decided against the easy route because he thought it "could do something cooler." (Gibb, Oct. 26 Trial Tr. at 848-49.)

Third, Novell could have written its own file open dialog without relying on the namespace extension APIs, either using common controls supplied by Windows 95 or writing a file open dialog from scratch, the latter being more time-consuming. (Harral, Oct. 20 Trial Tr. at 342-43.) Harral and Richardson both testified that they chose to pursue an onerous and difficult version of Option 3 by attempting to replicate functionality provided by the Windows Explorer in Novell's custom file open dialog. (Harral, Oct. 20 Trial Tr. at 344-47; Harral, Oct. 24 Trial Tr. at 502-04; Richardson, Oct. 25 Trial Tr. at 628-30.)

Harral testified that he knew that Option 3 posed the greatest risk of delaying the release of WordPerfect and Quattro Pro for Windows 95. (Harral, Oct. 20 Trial Tr. at 342-43.) In fact, when the developers in Novell's shared code group were working to write a custom file open dialog, others at Novell recommended in the interest of a timely release using the Windows 95 common file open dialog instead. Ford and LeFevre each testified that they advocated—in the interest of avoiding delay—use of the Windows 95 common file open dialog. *See* pp. 55-56, *supra*.

The evidence also shows that Microsoft continued to assist Novell and never terminated the relationship. Frankenberg testified that he was "sure" that "people in the systems group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95" (Frankenberg, Nov. 7 Trial Tr. at 1131; *see also* Frankenberg, Nov. 8 Trial Tr. at 1217), and, in fact, six months after Gates' October 3 Decision, Scott Nelson of Novell reported in an April 7, 1995 e-mail that "the cooperation between Microsoft and Novell has been very good" (DX 172). LeFevre—the Director of Marketing for PerfectOffice and one of four people

on the leadership team that was in charge of the development of PerfectOffice for Windows 95 (LeFevre, Dec. 2 Trial Tr. at 4034-35)—testified that throughout Novell's development efforts in 1994 and 1995, Microsoft provided assistance to Novell, including having a Microsoft employee working at Novell's Orem campus to answer questions from the developers:

> [S]tarting in 1994 all through 1995, we had an employee at Microsoft who lived in Utah County whose job it was to support us in this development effort. He was at our offices so frequently that we finally gave him an office with a telephone so he could come in and work when he needed to. And he was just down the hall in my building, and we saw him frequently. We also had direct support to Microsoft's developer relations group. So if we had questions, we could contact them on the phone or e-mail and they would answer our questions. We were very supported during this time.
>
> One example I remember distinctly is that Tom Creighton and I were able to fly to Redmond, and we spent an entire day in building 22 of the Microsoft campus meeting with the development team for Windows answering some critical questions that Tom had about the product. They were very happy to do this. They even paid for our flight and everything to get up to Redmond and spend the day.

(*Id*. at 4029-30.)

In light of this evidence, no reasonable jury would have a sufficient evidentiary basis to find that Microsoft "jettison[ed]" or "terminated a profitable relationship" between the parties, which is required under Tenth Circuit law in order to bring a claim under the *Aspen Skiing* exception. *Four Corners*, 582 F.3d at 1225. The relationship continued; it was Novell that chose to try to get a competitive advantage by adding functionality to Windows 95 when it could have used Microsoft technology without charge to release its products. This is far from the facts in *Aspen Skiing*, where defendant refused to sell lift tickets to its rival, even at full retail price. 472 U.S. at 592-93.

2. *The Withdrawal of Support for the Namespace Extension APIs Did Not Deny Novell Information or Support Available to All Other ISVs.*

Given the evidence at trial, no reasonable jury would have a sufficient evidentiary basis to find that Microsoft "den[ied] to [its] rival the [APIs] available to *all* other" ISVs. *Four Corners*, 582 F.3d at 1225 (emphasis added). Microsoft did not treat Novell differently from other ISVs creating applications to run on Windows 95. On the contrary, the October 3 Decision applied to all ISVs—including the Microsoft Office team. (*See, e.g.*, DX 3, at MX 6055841 ("All applications within Microsoft which were originally implementing these interfaces have been required to stop.").) *See also* pp. 33-34, *supra*.

Once Microsoft decided to withdraw support for the namespace extension APIs, it promptly informed Novell and other ISVs in the First Wave Program. On October 12, 1994, Struss reported that "we're now in the process of proactively notifying ISVs about the namespace extension api changes." (DX 3, at MX 6055844.) Struss wrote that "[s]o far Stac, Lotus, WP [WordPerfect], Oracle, SCC appear to be OK with this." (*Id*.) He testified that "DRG proactively notified the software developers that we were working with about this change . . . so that . . . they would know not to depend upon these interfaces moving forward." (Struss, Nov. 28 Trial Tr. at 3270-71.)

Novell, like all other ISVs, was still able to utilize the thousands of other APIs exposed by Windows 95 to build versions of WordPerfect and Quattro Pro for Microsoft's new operating system. The decision to withdraw support for the namespace extension APIs—four APIs out of thousands—is nothing close to the "terminat[ion] of a profitable relationship" on terms that differed from those applicable to "*all* other competitors." *Four Corners*, 582 F.3d at 1225 (quotation omitted and emphasis in original). Indeed, in *Christy Sports*, the Tenth Circuit held that defendant could terminate a 15-year business relationship, which put plaintiff out of

business, because plaintiff knew that the relationship was temporary and subject to change. 555 F.3d at 1196-97. Unlike the facts in *Christy Sports*, Novell was able to continue to develop its Windows 95 products after the October 3 Decision and knowingly turned down options to release its products on time.

In *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), the Federal Circuit held that the withdrawal of technical support is not anticompetitive under Section 2 of the Sherman Act. There, defendant, a monopolist in the manufacture and sale of microprocessors, provided plaintiff "with various special benefits, including proprietary information and products," including "pre-release products." *Id*. at 1350-51. After a disagreement arose as to licensing issues, defendant reduced the "technical assistance and other special benefits" it previously had provided to plaintiff. *Id*. at 1350. Specifically, defendant "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). The district court enjoined defendant from refusing to provide assistance to plaintiff, and defendant appealed, "arguing that no law requires it to give such special benefits" to plaintiff. *Id*. at 1351.

The Federal Circuit vacated the injunction, holding that "[t]he withdrawal of technical service is not a violation of the antitrust laws." *Id*. at 1366. The Court further explained that "[t]he 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," *id*. at 1364 (*quoted with approval in Gregory* v. *Fort Bridger Rendezvous Association*, 448 F.3d 1195, 1205 (10th Cir. 2006)), and that even "'an act of pure malice by one business competitor against another does not, without more, state a claim under the federal

antitrust laws.'" *Id*. at 1366 (quoting *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993)).

Likewise, Microsoft's withdrawal of support for the namespace extension APIs—even if that act forced Novell "to spend substantial time and resources to solve the problem and delay[ed] [Novell's] product entry into the market"—does not give rise to a cognizable claim under Section 2 of the Sherman Act. *Intergraph*, 195 F.3d at 1366. As the Supreme Court recently emphasized, a claim alleging "'insufficient assistance in the provision of service to rivals' d[oes] not violate the Sherman Act" because *Trinko* "makes clear that if a firm has no antitrust duty to deal with its competitors . . . , it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." *Pacific Bell*, 555 U.S. at 449-50 (quotation to *Trinko* omitted).

B. Common Practice in the Software Industry and the Terms of the Relevant License Agreements Permitted Microsoft to Withdraw Support for APIs in a Beta Version of Windows 95.

The very license agreement under which Novell received documentation for the namespace extension APIs expressly provided, consistent with software industry practice, that the beta version might change prior to the commercial release of Windows 95. This fact alone defeats Novell's claim, for two reasons.

First, the license agreement warning Novell that Microsoft might make changes to the beta version of Windows 95 was consistent with common software industry practice. Under Tenth Circuit law, a monopolist is free to engage in "ordinary business practices typical of those used in a competitive market," and cannot violate Section 2 for engaging in "the type of competition prevalent throughout the industry." *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 925-26, 928 (10th Cir. 1975). If a defendant's conduct is "consistent with a competitive market," then "the purpose of the antitrust laws is amply served." *United States* v.

Syufy Enterprises, 903 F.2d 659, 668-69 (9th Cir. 1990); *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors.").

The trial record established that it was the common understanding in the software industry (including at Novell and Microsoft) that a software developer might make changes to beta versions of products under development. Of most importance, Novell's CEO in 1994 and 1995, Frankenberg, testified that it "was widely understood in the software industry" that beta versions of software products can and do change. (Frankenberg, Nov. 8 Trial Tr. at 1204-05.)

Larsen similarly testified that, based on his experience in the software industry for more than 25 years (Larsen, Nov. 30 Trial Tr. at 3567, 3607), "the definition of a beta" is that "there can be and almost certainly will be changes" (*id*. at 3603).[61] LeFevre testified that, based on his 20 years in the software industry, it was his understanding that a "company that develops the beta software has the right to make any changes they deem necessary as a result of that testing period" because a "[b]eta by definition is an early release or a prerelease of a product that is subject to change." (LeFevre, Dec. 2 Trial Tr. at 4030-32.)

Alepin confirmed that when companies receive a beta version of a product under development "they use it at their own risk" and they fully "expect[] . . . that the [beta] software is being worked on." (Alepin, Nov. 10 Trial Tr. at 1555-56.) Noll agreed that "all beta versions of all software are provisional, and they are not guarantees of what the program will contain upon

[61] Larsen recounted on cross examination that while WordPerfect was working on a version of its software for the Macintosh operating system, Apple evangelized a particular feature of its operating system and then withdrew support for that feature without providing any explanation for its decision. (Larsen, Nov. 30 Trial Tr. at 3656-58.)

final release." (Noll, Nov. 15 Trial Tr. at 1878.) Gates likewise explained that the disclaimer language included in Microsoft's license agreement for its M6 beta release was not only "standard practice at Microsoft" but "I think everyone followed that practice." (Gates, Nov. 22 Trial Tr. at 3124-25.)

Novell's own practices were the same. As Frankenberg acknowledged, Novell's license agreements for beta versions of its NetWare products included substantially similar provisions to the Microsoft license agreement covering beta versions of Windows 95. (Frankenberg, Nov. 8 Trial Tr. at 1202-05, 1208-09.) In fact, an internal Novell Memorandum dated Oct. 18, 1994—a mere 15 days after Microsoft's October 3 Decision—explained that:

> As with the Alpha phase, the Beta process typically uncovers significant numbers of situations in which features do *not* meet the conceptual design or the design is faulty requiring further design, coding, and testing, or abandonment of the feature, which also results in a new round of testing. Despite the conceptual freeze, the product and features may still change dramatically during this phase as problems are discovered.

(DX 612A, at 4 (emphasis in original).) Thus, Novell itself recognized in 1994 that "[f]eatures may . . . change dramatically" during the beta process.

Novell and WordPerfect Corporation followed this practice themselves. Larsen recalled instances in which Novell "made changes in our beta software where we would even change the file formats and make other changes that could have potential negative impacts on the customers. But we made those changes because we felt like it was in the overall best interest of the product. So it's very common for changes to be made during the beta." (Larsen, Nov. 30 Trial Tr. at 3607.) LeFevre likewise testified that, during the beta testing process for WordPerfect 5.1 for Windows, WordPerfect Corporation eliminated a number of features that had been included in beta versions. (LeFevre, Dec. 2 Trial Tr. at 4033, 4080-81.)

In light of the evidence that the standard practice in the software industry was that changes to beta versions were common and expected—and that Novell's CEO and developers were familiar with this practice—a reasonable jury would not have a sufficient evidentiary basis to find that Microsoft's decision to withdraw support for the namespace extension APIs was anticompetitive. *Telex*, 510 F.2d at 925-26, 928; *see also Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984).

Second, as the Tenth Circuit held in *Christy Sports*, temporary business relationships that are subject to change in accordance with a defendant's "business judgment" cannot, as a matter of law, give rise to an antitrust claim. 555 F.3d at 1197. In *Christy Sports*, plaintiff brought suit under Section 2 of the Sherman Act alleging that defendant's revocation of permission for plaintiff to operate a ski rental facility under the terms of a restrictive covenant in a lease was anticompetitive conduct under *Aspen Skiing*. *Id*. at 1196. Like Novell—which concedes that Microsoft was not required to provide any information to ISVs about the namespace extension APIs in the first place (Nov. 18 Trial Tr. at 2587, 2598-99)—plaintiff in *Christy Sports* did "not seriously argue that it was impermissible for [defendant] to impose the restrictive covenant back in 1990, or that it would have been impermissible for [defendant] to use its ownership of the land to bar competition in the ski rental business from the beginning." *Id*. at 1196. Nevertheless, just like Novell—which contended at trial that Microsoft could not withdraw support for the namespace extension APIs once those APIs had been included in the M6 beta in June 1994 (Nov. 18 Trial Tr. at 2599)—plaintiff in *Christy Sports* argued that because defendant "allowed third parties to engage in the ski rental business for almost fifteen years, [defendant] violated § 2 of the Sherman Act when it revoked that permission and took

over the ski rental business for itself." *Id*. at 1196. The Tenth Circuit rejected the argument because the claim did not fall within the narrow *Aspen Skiing* exception.

The Court of Appeals held that the restrictive covenant, which prohibited plaintiff from operating a ski rental facility without defendant's consent, made clear to plaintiff "that the relationship could change at any time," and that plaintiff "should have been aware that the relationship was temporary and subject to [defendant's] business judgment." *Id*. at 1197. The Tenth Circuit further 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. The Court stressed that "[t]he Sherman Act does not force [defendant] to assist a competitor in eating away its own customer base," and 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 1196-97; *see also Intergraph*, 195 F.3d at 1364-66 (holding that withdrawal of technical information did not violate Section 2 of Sherman Act 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'").

Novell's claim regarding Microsoft's withdrawal of support for the namespace extension APIs is even weaker than the claims in *Christy Sports* and *Intergraph*. Novell received documentation for the namespace extension APIs less than four months before the October 3 Decision pursuant to a license agreement that expressly notified Novell that the product was still under development and was subject to change:

> 2. PRE-RELEASE CODE. This 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. The PRODUCT may not operate correctly and may be substantially modified prior to first commercial shipment. COMPANY assumes the entire risk with respect to the use of the PRODUCT.

(DX 18, at 1, ¶ 2.) Moreover, the M6 beta version of Windows 95 in June 1994 included clear warnings that the documentation did "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 [Windows 95]." (PX 388, Microsoft Windows "Chicago" Reviewer's Guide, at MSC 00762731.) In fact, Frankenberg acknowledged that Novell understood that Windows 95 "might change" and "could change" between the M6 beta version and the commercial release of the new operating system. (Frankenberg, Nov. 8 Trial Tr. at 1201, 1209.)[62]

Indeed, Nakajima, Belfiore and Bennett all recounted instances where companies, including Microsoft, withdrew support for a feature or interface in subsequent versions of software. Nakajima testified that Apple removed an interface in its iOS operating system after its release, and that Google also withdrew support for its Wave product after initially releasing it as a beta version. (Nakajima, Dec. 1 Trial Tr. at 3735-37.) Belfiore also testified that in addition to fixing bugs, beta releases of Windows reflected "lots of changes that [Microsoft] made to alter the user interface to make it easier to learn how to use" the operating system. (Belfiore, Dec. 5

[62] Struss testified that DRG "never made promises about what would be in a version of the operating system. For those people who have been in the technology industry, there is a good solid understanding that a beta release of a product may or may not be everything that is in that final release. It is really trying to meet the quality standards and the ship dates desired [that] impacts what is in a final release versus what is in a beta release." (Struss, Nov. 28 Trial Tr. at 3257.)

Trial Tr. at 4239.) Bennett testified that Sun Microsystems removed a communication protocol that it had released as part of a beta version of its software. (Bennett, Dec. 12 Trial Tr. at 4967.)

Christy Sports establishes that a company can change an existing business relationship—in that case, so as to put plaintiff out of business—without fear of incurring Section 2 liability. 555 F.3d at 1197-98. The facts here are even worse for Novell than they were for plaintiff in *Christy Sports*; not only did Novell know full well that features in the beta version of Windows 95 were subject to change, but here, unlike the 15-year course of conduct in *Christy Sports*, Novell first got documentation for the namespace extension APIs in the M6 beta release of Windows 95 a mere four months prior to Microsoft's decision to withdraw support for those APIs. And Novell had at least ten months (from October 1994 to August 1995) to release a product and then knew that it could do so without delay by using the Windows 95 common file open dialog that Microsoft provided for free.

C. Microsoft's Decision to Withdraw Support for the Namespace Extension APIs Was Based on Legitimate Business Justifications.

In order to fit within the narrow *Aspen Skiing* exception, Novell must prove that Microsoft's withdrawal of support for the namespace extension APIs was "without any economic justification." *Four Corners*, 582 F.3d at 1225 (quotation omitted). As the Tenth Circuit has emphasized, "[t]he critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal." *Christy Sports*, 555 F.3d at 1197.

Under controlling Tenth Circuit law, a legitimate business justification need be no more than a desire to protect the profitability of one's business. In *Four Corners*, for example, defendant hospital terminated the credentials of unaffiliated nephrologists in order to protect the hospital's budding nephrology practice. *Four Corners*, 582 F.3d at 1217-19. The Tenth Circuit held that "the evidence here suggests that [defendant] refused to deal with [the plaintiff] to avoid

an *unprofitable* relationship, and that [defendant] pursued the course it did to protect and maximize its chances of profitability in the short-term." *Id*. at 1225 (emphasis in original). The Court held that "*Aspen Skiing* does not require more economic justification than [that] to avoid Section 2 liability." *Id*.

Here, the trial evidence established that Microsoft had at least three justifications for withdrawing support for the namespace extension APIs—all of which served the purpose of enhancing the value of Microsoft's Windows 95 operating system: (1) third-party applications that used the namespace extension APIs could cause the Windows 95 operating system to crash; (2) the design of the namespace extension APIs was not compatible with future versions of Microsoft Windows under development; and (3) the namespace extension APIs did not achieve the functionality that Gates had anticipated.

1. *A Third-Party Application Using the Namespace Extension APIs Could Crash Windows*.

Third-party applications that called the namespace extension APIs ran in the same process as the Windows 95 shell and, as a result, if the third-party application crashed, the shell would also crash. *See* pp. 24-26, *supra*. Withdrawal of support for the namespace extension APIs increased the stability of the Windows 95 product and, in turn, the profitability of Microsoft's business.

The evidence at trial on that point was overwhelming and largely unchallenged. Nakajima, the inventor of the namespace extension mechanism in Windows 95, testified that a misbehaving application calling the namespace extension APIs could cause the Windows 95 operating system to crash. (Nakajima, Dec. 1 Trial Tr. at 3757.) Several of Microsoft's other witnesses, including Gates, agreed that the namespace extension mechanism in Windows 95 posed robustness problems. (Gates, Nov. 21 Trial Tr. at 2781-82; Jan. 9, 2009 Maritz Deposition

at 129, Dkt. #279, used at trial on Oct. 27; Jan. 8, 2009 Allchin Deposition, Nov. 8 Trial Tr. at 1297; Muglia, Nov. 29 Trial Tr. at 3394-97; Belfiore, Dec. 5 Trial Tr. at 4278-79; Struss, Nov. 28 Trial Tr. at 3329-30; Bennett, Dec. 12 Trial Tr. at 4993-94.) Moreover, the contemporaneous documentary evidence is consistent with this testimony and confirmed that Microsoft was concerned about robustness issues when it decided to withdraw support for the namespace extension APIs. (DX 3, at MX 6055843.) *See also* p. 29, *supra*.

Not only did Novell fail to present any evidence at trial to undermine this evidence, but Novell's own developers and expert witnesses aknowledged that the namespace extension APIs posed a risk to the stability of the Windows 95 operating system. Richardson agreed that "a namespace extension that was badly behaved . . . could have crashed the entire Windows 95 shell, circa October 1994, because at that time namespace extensions were running in the same process as Windows explorer and the rest of the shell." (Richardson, Oct. 25 Trial Tr. at 756-57.) Alepin testified that the namespace extension APIs "had the potential to make the system unresponsive." (Alepin, Nov. 10 Trial Tr. at 1589.) Noll agreed that a risk to the stability of the operating system was "one valid reason for not documenting an API." (Noll, Nov. 15 Trial Tr. at 1872-73.) This testimony eliminates any contention that Microsoft's justifications for the withdrawal of support for the namespace extension APIs were a pretext.

The evidence also showed that robustness problems with the namespace extension mechanism in Chicago posed significant problems for Windows NT, a high-end operating system used in situations where a "crash" of the system was completely unacceptable. (Gates, Nov. 21 Trial Tr. at 2781; *see also* Alepin, Nov. 10 Trial Tr. at 1607-08.) The Windows NT team's objections to the namespace extension APIs were compounded by Microsoft's decision "to use a common s[h]ell across Windows 95 and Windows NT." (Gates, Nov. 21 Trial Tr. at

2784-85; *see also* Alepin, Nov. 10 Trial Tr. at 1607.) Muglia testified that he "really work[ed] hard" to ensure that the namespace extension APIs would "not be shipped" with Windows 95 in order to avoid adopting the APIs as part of the Windows NT shell. (Muglia, Nov. 29 Trial Tr. at 3397; *see also id.* at 3386-87.) Indeed, a day after the October 3 Decision, Muglia applauded the decision, noting that Windows NT would no longer have to expend resources trying to create a robust implementation of the namespace extension APIs. (DX 21; Muglia, Nov. 29 Trial Tr. at 3420-21.)[63]

Alepin asserted that he did not believe that the risk to the stability of Windows 95 was a sufficient justification for the withdrawal of support for the namespace extension APIs because "there were lots of ways to get Windows 95 to crash," and it is an ISV's "burden" to write "good quality tested software that does not cause the system to fail." (Alepin, Nov. 9 Trial Tr. at 1427-28.) That critique makes no sense. The existence of other ways to crash Windows 95 does not mean Microsoft was not justified in eliminating one such source of instability. (Bennett, Dec. 12 Trial Tr. at 5006 ("[W]hether or not other . . . processes executing with the operating system might or might not expose reliability issues is no reason not to address . . . the one you know about.").) Moreover, Alepin acknowledged that Microsoft had no ability to impose quality control requirements on ISVs whose applications called the namespace extension APIs. (Alepin, Nov. 10 Trial Tr. at 1593-94). Microsoft clearly was justified for its own business reasons in seeking to protect users of Windows 95. (Bennett, Dec. 12 Trial Tr. at 5006.)

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[63] It was not until the spring of 1996 that a plan was in place at Microsoft to modify the design of the Chicago shell for use with Windows NT: this plan mitigated the robustness problems posed by the namespace extension mechanism in Windows 95 by "rearchitect[ing] the process slightly . . . to separate the Desktop/taskbar process from the rest of the explorer extensions that live in the shell namespace." (DX 131A, E-mail from Joe Belfiore to Andrew Schulman, March 21, 1996, at 2; *see also* Belfiore, Dec. 5 Trial Tr. at 4292-93.) In October 1994, however, no such solution existed for Windows NT.

2. *Supporting the Namespace Extension APIs Would Lock Future Microsoft Operating Systems Into the Design of the Windows 95 Shell.*

The Cairo team, which was developing an advanced version of Windows, objected to the namespace extension APIs because that team thought they were poorly designed and because use of those APIs by ISVs would force the Cairo shell team to be compatible with such applications. (Gates, Nov. 21 Trial Tr. at 2792-93, 2789-90; *see also* Muglia, Nov. 29 Trial Tr. at 3453, 3399-3400; Belfiore, Dec. 5 Trial Tr. at 4278-79.)

Nakajima testified that the Cairo team's objections to the design of the Chicago shell "were right." (Nakajima, Dec. 1 Trial Tr. at 3772-73.) Rather than force the Cairo team to be compatible with the design of the Chicago shell, Gates decided to withdraw support for the namespace extension APIs to address the Cairo team's objections. *See* pp. 24, 27-29, *supra.*

3. *The Namespace Extension APIs Did Not Provide the Functionality Bill Gates Had Contemplated.*

The limited functionality of the namespace extension APIs was another reason that Microsoft decided to withdraw support. Gates testified that he had hoped for an operating system shell that provided a "rich new view" (Gates, Nov. 21 Trial Tr. at 2786-87), and that Cairo was "trying" to develop "something very rich and flexible" (*id*. at 2788).

Gates wanted to "wait" until this Cairo-like "high level of integration" could be achieved (PX 1) and, as Gates explained, "the namespace extension APIs [were] not rich enough to give you the ability to do this kind of information browser shell" (Gates, Nov. 21 Trial Tr. at 2802-03). Indeed, several witnesses testified that the functionality provided by the namespace extension APIs were neither important nor necessary to the development of an application for Windows 95. (Belfiore, Dec. 5 Trial Tr. at 4263-64; Muglia, Nov. 29 Trial Tr. at 3389; Gates, Nov. 21 Trial Tr. at 2786-87.) Gates therefore "decided that until we got to the Cairo capability it really didn't change things enough to be worth the trouble to cause the problems for the NT

and Cairo teams, if I had gone the other way, would have caused." (Gates, Nov. 21 Trial Tr. at 2804.) Novell did not examine Gates about this reason for his decision, let alone offer any evidence challenging its legitimacy.

4. *Novell's Experts Failed to Rebut Microsoft's Justifications for Withdrawing Support for the Namespace Extension APIs.*

At bottom, Novell's only attempt to counter Microsoft's business justifications for withdrawing support for the namespace extension APIs is Alepin's opinion that the purported costs of that decision to Novell outweighed the benefits to Microsoft. (*See* Alepin, Nov. 9 Trial Tr. at 1426-30; *see also* Noll, Nov. 15 Trial Tr. at 1874 ("If in fact they were sufficiently unstable and the harms exceeded the benefits of documenting, then it would be perfectly valid to withdraw them.").) That opinion is irrelevant as a matter of law. Once Microsoft has shown that legitimate business justifications exist for the decision to withdraw support for the namespace extension APIs, the inquiry is at an end. *Aspen Skiing*, 472 U.S. at 597, 605; *Multistate Legal Studies* v. *Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540, 1550 (10th Cir. 1995). A jury is not permitted to engage in a weighing of costs and benefits.

As the Fifth Circuit held in *Bell* v. *Dow Chemical Co.*, a jury cannot "weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal." 847 F.2d 1179, 1186 (5th Cir. 1988). Indeed, "[t]he fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient." *Id*. (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597); *see also* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772c2 (3d ed. 2011) ("[T]he Court [in *Aspen Skiing*] did not call for any balancing of social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal. Rather, the Court classified conduct or intention as either lawful or not on the basis of

the presence or absence of legitimate business purposes."). Thus, the existence of any economic justification for withdrawal of support for the namespace extension APIs ends the inquiry.

D. Novell's Attempt to Base Its Claim on a "Deception" Theory Has No Basis in Law or in Fact.

During the November 18 argument on Microsoft's Rule 50(a) Motion for Judgment as a Matter of Law, Novell's counsel conceded that Section 2 of the Sherman Act does not require Microsoft to share its intellectual property—in this case, the namespace extension APIs—with Novell. (Nov. 18 Trial Tr. at 2587, 2599.) Novell's counsel also conceded that under *Aspen Skiing* and its progeny, Microsoft has "no duty to cooperate" with Novell. (*Id*. at 2636.) Instead, Novell's counsel articulated a new theory—that Microsoft had a duty not to "deceive" Novell. (*Id*. at 2587.) Novell contended that Microsoft's withdrawal of support for the namespace extension APIs after "evangeliz[ing]" them constituted deception in violation of the Sherman Act. (*Id*. at 2661-62.)

1. *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. Deception sounds in tort, and 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; *see also Intergraph.*, 195 F.3d at 1354-55 ("[T]he Sherman Act does not convert all harsh commercial actions into antitrust violations."). 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). A claim for deception is nothing more than a tort claim, and, as Novell's counsel has acknowledged, "[t]his is not a tort case." (Nov. 14 Trial Tr. at 1750.)

Indeed, Microsoft is not aware of any case in which liability was imposed under the antitrust laws based on deceiving one's competitor. In *Conwood* v. *U.S. Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002), the Sixth Circuit affirmed a finding of Section 2 liability based on the defendant's pervasive abuse of imperfect information through misrepresentations made not to its competitors, but to retailers. Similarly, the other decided cases involving deception concern false advertising or conduct directed at third parties—such as distributors or consumers—and the standard for imposing antitrust liability even in such cases is very high. *See American Professional Testing Service, Inc*. v. *Harcourt Brace Jovanovich Legal & Professional Publications, Inc*., 108 F.3d 1147, 1151 (9th Cir. 1997) ("While the disparagement of a rival . . . may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act."); *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255, 1260-63 (8th Cir. 1980); *In re Warfarin Sodium Antitrust Litigation*, 1998 U.S. Dist. LEXIS 19555, at *27-28 (D. Del. Dec. 7, 1998), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000); *see also* 3 PHILLIP E. AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 782d (3d ed. 2011) ("We would go further and suggest that such claims should presumptively be ignored.").

In any case, the Complaint makes no claim of deception.[64] The word "deception" appears exactly once in Novell's 68-page Complaint (and there, in a wholly different context

[64] Having failed to plead a claim of deception in its Complaint, any such claim was released by Novell's November 2004 settlement agreement with Microsoft. *See* pp. 126-30, *infra*.

unrelated to the namespace extension APIs), and "deceit" and "deceive" appear not at all. Moreover, under Tenth Circuit law, no such claim could lie. In C*hristy Sports*, defendant leased a parcel of land to plaintiff with a restrictive covenant prohibiting the operation of a ski rental business. For 15 years, plaintiff ran a ski rental business on the property without objection. When defendant finally sought to enforce the restrictive covenant, plaintiff brought suit under Section 2 of the Sherman Act. The Tenth Circuit held that there was no basis for imposing liability under Section 2 because defendant "had explicitly informed its competitor from the beginning that the relationship could change at any time" and thus the plaintiff "cannot claim unfair surprise." 555 F.3d at 1196-97. 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. While acknowledging that such a change in course "[c]onceivabl[y] . . . might lead to a claim under contract law or as a business tort," enforcing the restrictive covenant did not amount to anticompetitive conduct under the Sherman Act. *Id*. at 1196-98.

Likewise, no claim for deception can arise when Novell received the M6 beta under an express contractual provision that the operating system was still under development and subject to change. *See* pp. 21-22, *supra*. As Frankenberg acknowledged, Novell understood that the commercial version of Windows 95 "might change" and "could change" from the M6 beta version. (Frankenberg, Nov. 8 Trial Tr. at 1201, 1204-05, 1209.) This is the very opposite of deception.

2. *There Was No Evidence of Any Deception.*

Even if deception of a competitor could support an antitrust claim, Novell failed to present any evidence at trial that Microsoft deceived Novell. Novell argued in its opening statement and in response to Microsoft's Rule 50(a) motion that Gates' October 3 Decision "is

based on the exact same considerations laid out in the Hood Canal retreat in June 1993," that "Chicago would not give ISVs the extensibility of the Namespace extensions" 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; *see also* Oct. 18 Trial Tr. at 47-48.)

Faced with no evidence to support that theory, Novell's counsel conceded during summation that the Hood Canal plan "didn't go forward" (Dec. 13 Trial Tr. at 5324-25). Consistent with that concession, every Microsoft witness asked about the Hood Canal retreat testified that there was never a plan to make the Windows 95 shell non-extensible and to instead ship an extensible shell with Microsoft Office after the release of Windows 95.[65] Gates testified that "[t]here was no plan that I ever agreed with to make the Chicago shell non-extensible." (Gates, Nov. 22 Trial Tr. at 2999; *see also* Gates, Nov. 21 Trial Tr. at 2770 ("We did not ever decide to create a shell, an Office shell separate from the operating system."); *id*. at 2771 ("[W]e didn't even do any work related to that, not to mention not shipping any such thing.").) Muglia testified that such a proposal "was discussed in this brainstorming session" but "never went anywhere." (Muglia, Nov. 29 Trial Tr. at 3402.) Maritz testified that "it never got beyond talk" and "[t]here was never any . . . reality behind it." (Jan. 9, 2009 Maritz Deposition at 70, Dkt. #279, used at trial on Oct. 27; *see also id*. at 65.) Silverberg, the Microsoft executive in charge of Windows 95, testified that he "ha[d] a vague recollection that there was a discussion to also

[65] Novell conflates withdrawal of support for the namespace extension APIs, which were a small subset of the shell extensions in Chicago (Nakajima, Dec. 1 Trial Tr. at 3752), with the Hood Canal presentation, which called for shipping Windows 95 without *any* shell extensibility. (PX 61, Office Shell Ideas and Issues, dated July 3, 1993, at 1.) The evidence at trial was uncontroverted that Chicago was designed with full shell extensibility (Gates, Nov. 21 Trial Tr. at 2773; Muglia, Nov. 29 Trial Tr. at 3403-04), and that the Chicago shell remained fully extensible after the decision to withdraw support for the namespace extension APIs. (Gates, Nov. 21 Trial Tr. at 2773, 2776.)

ship another shell in Office, but . . . that never occurred." (Jan. 22, 2009 Silverberg Deposition at 15, Dkt. #278, used at trial on Oct. 26.)

In addition, and even more fundamentally, there is no evidence that Microsoft intended to withdraw support for the namespace extension at the time it evangelized them to Novell or at the time Microsoft provided the M6 beta to Novell and other ISVs in June 1994. Indeed, the evidence showed that Microsoft did not know that Novell was using the namespace extension APIs. In his September 22, 1994 e-mail, Struss reported that WordPerfect had "not begun any work on IShellFolder, IShellView, etc." (*i.e.*, the namespace extension APIs). (DX 17.) *See also* p. 31, *supra*. Gates testified that he did not have "any awareness at all about the specifics of whether [Novell developers] were using [the namespace extension APIs] or not" (Gates, Nov. 21 Trial Tr. at 2811; *see also* Gates, Nov. 21 Trial Tr. at 2828), and there is no evidence to the contrary.

III. Microsoft's Withdrawal of Support for the Namespace Extension APIs Did Not Cause a Delay in the Release of PerfectOffice for Windows 95.

All agree that, as Professor Noll testified, "there can't be any harm to competition under the facts here, if the conduct at issue, the decision to withdraw support for the namespace extension APIs, did not cause any delay" in Novell's release of its PerfectOffice suite for Windows 95. (Noll, Nov. 15 Trial Tr. at 1880-81; *see also* Noll, Nov. 14 Trial Tr. at 1839-40.) The evidence at trial overwhelmingly demonstrated that the delay was due to other factors and that Microsoft's withdrawal of support for the namespace extension APIs was not the cause of any delay in the release of Novell's products. *See* pp. 34-45, 48-57, *supra*.

A. Quattro Pro Caused the Delay in Releasing PerfectOffice for Windows 95.

The evidence at trial established that PerfectOffice could not have been released within 60 days (or even more) of the release of Windows 95 because Quattro Pro was not ready

until 1996. Because Novell could not have released PerfectOffice without Quattro Pro, the October 3 Decision did not harm Novell.

The trial testimony and exhibits showed clearly that Novell had to delay the release date of PerfectOffice several times as a result of problems with Quattro Pro, and that Quattro Pro was not ready until March 1996 or later. Novell introduced not a single exhibit that indicated that the delay was caused by the October 3 Decision.

Although Gibb testified that Quattro Pro "didn't turn out to be Critical Path" and was "basically code completed" as of December 1995 (Gibb, Oct. 26 Trial Tr. at 808-09), he nowhere testified that Quattro Pro was ready by October—or even November—1995 and, in any event, the overwhelming testimonial and documentary evidence was to the contrary. *See* p. 52, *supra*. Five former Novell employees, including Frankenberg, testified without ambiguity that Quattro Pro—not the shared code group—was the cause of the delay. *See* pp. 48-53, *supra*. Moreover, an e-mail from Brereton to Frankenberg clearly states that on December 23, 1995, four months after the release of Windows 95, the Quattro Pro development team was left with just two people and the product was not ready. (DX 230.) When shown DX 230 at trial, Frankenberg agreed that "clearly the product wasn't complete" as of the end of December 1995. (Frankenberg, Dec. 7 Trial Tr. at 1145.) Gibb's testimony cannot be reconciled with the mass of evidence that pinpoints Quattro Pro as the cause of delay in the release of PerfectOffice for Windows 95.

As the Court noted concerning Gibb's testimony, "there comes a point where somebody comes in and they say it's like saying the world is flat. There . . . could not be clearer evidence that Defendant's Exhibit 230 says that as of January 2006 Quattro Pro is not ready yet. I mean, it couldn't be clearer." (Nov. 21 Trial Tr. at 2925; *see also id*. at 2906-07.) Gibb's

testimony falls far short of the "substantial evidence" necessary to defeat a motion under Rule 50. *Webco Industries*, 278 F.3d at 1128 ("substantial evidence . . . is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence") (quotation omitted). The documentary evidence and the testimony of the other five former Novell employees—including Larsen who worked as a developer on Quattro Pro in early 1996 and testified as a result of first-hand experience based on his trip to Scotts Valley that the product was "[n]ot by any stretch of the imagination" ready by March 1996 (Larsen, Nov. 30 Trial Tr. at 3624), and Bushman, who testified that he recalled that the resignations on the Quattro Pro development team in December 1995 were a "death blow" to the product and its ship date (Bushman, Nov. 28 Trial Tr. at 3192-93)—far outweigh Gibb's unsupported testimony. *See* pp. 48-53, *supra*.

B. In Any Event, By Choosing the Most Time-Consuming and Difficult Option, Novell Cannot Blame Microsoft for the Delay.

Assuming that Quattro Pro had been ready on time, Novell's own witnesses acknowledge that Novell could have released PerfectOffice for Windows 95 without any delay by using the Windows common file open dialog, but chose instead the time-consuming and difficult option of writing its own custom file open dialog. The blame for this business choice cannot be laid at Microsoft's door.

As an initial matter, Novell was late to start its development efforts for Windows 95—for reasons entirely unrelated to Microsoft's decision to withdraw support for the namespace extension APIs. *See* pp. 38-45, *supra*. As Frankenberg said, Novell's "objective for the last six months of 1994" was to create a suite written for the Windows 3.1 platform—what became PerfectOffice 3.0, released in December 1994. (Frankenberg, Nov. 7 Trial Tr. at 1068.) As a result, "very few resources" were devoted to developing products for Windows 95 (*id.*;

DX 4, at 5); *see also* pp. 42-45, *supra*, during the months after Microsoft provided the M6 beta to Novell.

In any event, it would have been "easy" for Novell to have used the Windows 95 common file open dialog (Gibb, Oct. 26 Trial Tr. at 847-48), which would have been "less risky" and "less work" than the path Novell chose (Harral, Oct. 24 Trial Tr. at 365-66). *See also* pp. 54-56, *supra*. As Harral said, "Novell could have come out with a product in '95 that utilized the Windows common file open dialog." (Harral, Oct. 24 Trial Tr. at 502.) But Novell decided to take the risk of trying to "do something cooler" and "exceed what was the default stuff." (Gibb, Oct. 26 Trial Tr. at 848-49; *see also* Richardson, Oct. 25 Trial Tr. at 629-30.)

As Professor Noll testified, "to an antitrust economist, . . . there can't be any harm to competition under the facts here if the conduct at issue, the decision to withdraw support for the namespace extension APIs did not cause any delay." (Noll, Nov. 15 Trial Tr. at 1880-81.) Novell's poor choice caused the delay.

IV. Novell Is Not Entitled to Any Damages as a Matter of Law.

Novell's damages expert, Warren-Boulton, calculated that Microsoft's October 3 Decision caused damages to Novell of between $976 million and $1.3 billion. (Warren-Boulton, Nov. 16 Trial Tr. at 2103.) Each of the four damages theories presented by Warren-Boulton at trial depended on the assumption that, but for Microsoft's October 3 Decision, Novell would have been able to release PerfectOffice for Windows 95 within 30 to 60 days of the August 24, 1995 release of Windows 95 or "within a sufficiently short time period so that there would not have been a significant effect on its sales" (Warren-Boulton, Nov. 17 Trial Tr. at 2418), which neither Warren-Boulton or any other Novell witness ever put later than November 1995. That

assumption was demonstrated to be false by the evidence establishing that Quattro Pro was not ready to be released until well into 1996. *See* pp. 48-53, *supra*.

Warren-Boulton attempted to salvage his damages theories by suggesting that the jury could determine on its own the amount of "partial" damages if it found that PerfectOffice for Windows 95 would not have been ready within 30 to 60 days of the release of Windows 95. "This is precisely the type of 'speculation or guesswork' not permitted for antitrust jury verdicts." *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 1162 (7th Cir. 1983) (quoting *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946)). Further, Warren-Boulton's damages calculations were based largely on harm to PerfectOffice—an injury never alleged in the Complaint. *See* pp. 127-28 & n.70.

A. Novell's Damages Models Depended on the Assumption that PerfectOffice Would Have Been Released Within 60 Days of the Release of Windows 95.

Warren-Boulton testified that Microsoft's withdrawal of support for the namespace extension APIs "delayed the release of PerfectOffice until around May of 1996, far past the date of release of Windows 95 in August of 1995." (Warren-Boulton, Nov. 16 Trial Tr. at 2090.) To calculate damages resulting from the alleged delay, Warren-Boulton attempted to construct "a world in which Microsoft did not pull the—did not deduct the namespace extensions and therefore it would be a world in which Novell would have released PerfectOffice for 95 you know at or close to the release date of Windows 7—or Windows 95." (*Id*. at 2096.) He testified that "[i]t is my understanding also from that testimony that the expectation was that that was [Novell's] goal, was to get it out within 30 or 60 days and that is my but-for world." (Warren-Boulton, Nov. 17 Trial Tr. at 2418.)

Warren-Boulton also testified that a timely release was critical to the success of PerfectOffice, and that "everybody realized the really crucial importance of getting their suite out

or their product out . . . as soon as possible and certainly within some reasonable time period, you know, 30, 60 something days . . . ." (Warren-Boulton, Nov. 16 Trial Tr. at 2190.) He added that "[i]t is my understanding that . . . if you get it out within the prescribed time period . . . I think it is 60 days in order to be part of the whole hype of Windows 95, if you make it in that window you're in pretty good shape. It would [be] better to have it on August 23rd, but you're in pretty good shape after a couple months." (Warren-Boulton, Nov. 17 Trial Tr. at 2419-20.) According to Warren-Boulton, after the two month window of opportunity, "eventually, however, as you delay, delay, delay, you're pretty dead, so it does not make very much difference" if any additional delay occurs. (*Id*. at 2419.)

B. Because Warren-Boulton Failed to Account for Novell's Own Responsibility for the Delay, Novell Is Entitled to No Damages.

As shown above, Quattro Pro was not ready even at the end of December 1995, four months after the release of Windows 95. DX 230—the December 23, 1995 e-mail from Bruce Brereton, the Vice President of the Business Applications business unit, to Frankenberg—makes clear not only that Quattro Pro was not ready to be released, but also that the resignation of Quattro Pro developers in Scotts Valley meant that the Quattro Pro project for Windows 95 was in complete shambles. When shown DX 230, Frankenberg testified that "clearly the product [Quattro Pro] wasn't complete" as of December 23, 1995. (Frankenberg, Nov. 7 Trial Tr. at 1145.) Because the essential assumption underlying all of Warren-Boulton's damages theories is contrary to the evidence at trial, Novell is not entitled to any damages as a matter of law.

Asked how he would account for any delay beyond 60 days that was not the result of Microsoft's withdrawal of support for the namespace extension APIs, Warren-Boulton admitted that his damages theories did not deal with that case, testifying that "I have to think about this, and that is sort of off the cuff." (Warren-Boulton, Nov. 17 Trial Tr. at 2418-19.)

Warren-Boulton explained that "since my damage calculation basically assumes that in the but-for world they would have gotten this out within a reasonable time period, you know, if you somehow present me with the fact that says that are not out until, you know, January 1st in the but-for world I would say, yes, and I can do this if necessary, then I have to adjust my damages for a different but-for world." (*Id*. at 2422-23.) But Warren-Boulton did not provide the jury with any means to adjust any of his four damages theories for a different but-for world, instead testifying that "if in fact somebody factually determines that even absent the bad acts the products wouldn't have been out until January or February or March, then to that extent you [*i.e*., the jury] would need to modify the damages because it is partial." (*Id*. at 2421.)[66] Novell provided no basis for making such an adjustment.

This failure to provide the jury with any damages theory that took account of factors other than Microsoft's October 3 Decision precludes Novell from being awarded damages as a matter of law. As the ABA Model Jury Instructions explain, "[i]f you find that plaintiff has failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for defendant." ABA Model Instruction F-16, Holley Decl. Ex. O. In the antitrust context, providing the jury with a reasonable basis for determining damages requires that the plaintiff disaggregate from the damages it seeks (i) any harm to the plaintiff attributable to lawful conduct engaged in by the defendant and (ii) any harm to the plaintiff caused by factors

[66] At one point, Warren-Boulton argued that "the jury can say, well, these numbers assume that the product would have been out by, say November, it was actually out in May, six months, you know, and if you decide that it would in fact—as a factual matter if [PerfectOffice for] Windows 95 had come out in January, I guess the simplist [sic] thing to do is to take one-sixth off the damages." (Warren-Boulton, Nov. 17 Trial Tr. at 2424.) "This is precisely the type of 'speculation or guesswork' not permitted for antitrust jury verdicts." *MCI Communications*, 708 F.2d at 1162 (quoting *Bigelow*, 327 U.S. at 264). The Court recognized the impropriety of what Warren-Boulton was suggesting and struck the above-quoted testimony. (Warren-Boulton, Nov. 17 Trial Tr. at 2424.)

other than the defendant's anticompetitive conduct, including plaintiff's own business mistakes. A leading treatise makes this clear:

> [A]ny part of the plaintiff's loss that is due to the lawful business practices of the defendant should not be part of the damage award. In addition, some of the defendant's conduct may be unlawful but not anticompetitive. . . . [T]he plaintiff's damage calculations must [also] control for exogenous factors that also have an adverse impact on the plaintiff's economic condition[,] . . . [such as] the plaintiff's own mismanagement, a recessionary economy, competition from other rivals, and other things unrelated to any antitrust violation.

2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 391g (footnotes and citations omitted). "When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage." *MCI Communications*, 708 F.2d at 1162. Warren-Boulton did exactly this—attributing all losses to Microsoft's October 3 Decision despite the presence of significant other factors, including Novell's own delays in completing Quattro Pro for Windows 95. His failure to account for other factors leaves the jury unable to make a "reasonable and principled estimate" of Novell's damages, meaning that Novell cannot recover damages as a matter of law.

To be entitled to damages, an antitrust plaintiff "must segregate damages attributable to lawful competition from damages attributable to . . . monopolizing conduct," and a "failure to do so contravenes the commands of the Clayton Act." *Image Technical Services, Inc.* v. *Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997) (citation omitted); *see also Insignia Systems, Inc.* v. *News American Marketing In-Store, Inc.*, 661 F. Supp. 2d 1039, 1054 (D. Minn. 2009) ("a plaintiff must disaggregate losses caused by the defendant's unlawful conduct from losses caused by other factors."). Novell's failure to disaggregate the losses resulting from Microsoft's October 3 Decision from the losses resulting from other factors, including Novell's

own responsibility for the delay, is fatal to its claim. "Several otherwise successful antitrust claims have foundered on the expert's inability to show what portion of a plaintiff's loss resulted from unlawful conduct." 2 PHILLIP E. AREEDA & HERBERT HOVENKKAMP, ANTITRUST LAW ¶ 309c (footnotes and citations omitted).

In addition, Warren-Boulton's damages calculations were based in large part on harm to PerfectOffice. (Warren-Boulton Nov. 16 Trial Tr. at 2090, 2095-96.) As shown below (*see* pp. 127-28, *infra*), the Complaint makes no claim for harm to PerfectOffice and thus Novell released Microsoft from that claim. Warren-Boulton failed to disaggregate the harm to the products that are the subject of the Complaint (WordPerfect and Quattro Pro), and thus Novell is entitled to no damages for this reason as well. (*See* Warren-Boulton, Nov. 17 Trial Tr. at 2435-36.)

V. Novell Suffered No Cognizable Antitrust Injury.

Novell lacks standing to assert its claim because it suffered no cognizable antitrust injury.[67] A private plaintiff in a federal antitrust action must allege an "antitrust injury and must have standing to bring an antitrust claim." *Elliott Industries Ltd.* v. *BP America Production Co.*, 407 F.3d 1091, 1124 (10th Cir. 2005) (citing *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495

[67] The Fourth Circuit's determination that Novell adequately pled antitrust injury at the motion to dismiss stage—"[t]aking Novell's allegations as true," 505 F.3d at 316—bears not at all on the present inquiry. "[A]n appellate decision that a pleading is sufficient" does not bar a subsequent "judgment that finds a lack of fact support." 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4478.3 (3d ed. 2011); *see also Re/Max Int'l* v. *Realty One, Inc.*, 900 F. Supp. 132, 145 n.3 (N.D. Ohio 1995) ("At the summary judgment stage or at trial, the inquiry turns from the allegations to the evidence. At that time, proof of antitrust injury which is necessary to prove a party's standing to bring a private cause of action blurs with proof of the substantive elements of the underlying offense itself. Failure to prove either antitrust injury or standing would result in judgment for the defendant as a matter of law."); *Greater Rockford Energy & Tech. Corp.* v. *Shell Oil Co.*, 790 F. Supp. 804, 809, 827 (C.D. Ill. 1992) (granting summary judgment motion against plaintiffs for failure to establish standing following development of "voluminous" record and prior denial of motion to dismiss for lack of standing).

U.S. 328, 344 (1990)). The purpose of the antitrust injury requirement is to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield*, 495 U.S. at 342. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Accordingly, the antitrust injury requirement "ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield*, 495 U.S. at 344.

To establish antitrust injury in an unlawful monopolization claim, a plaintiff "must show not only that [it] was harmed by [defendant's] conduct, but that the injury [it] suffered involved harm to competition." *Four Corners*, 582 F.3d at 1225. In other words, antitrust "plaintiffs ha[ve] to show that their alleged injuries reflect the anticompetitive effect of the alleged violation." *Haynes Trane Service Agency, Inc.* v. *American Standard, Inc.*, 51 F. App'x 786, 803 (10th Cir. 2002). "Implicit in that requirement is the condition that they must first show an actual anticompetitive effect." *Id*. Novell failed to do so at trial.

The injury Novell claims to have suffered—a delay in the release of Novell's Three Products for Windows 95 (*see* Noll, Nov. 15 Trial Tr. at 1880-81; *see also id*. at 1839-40; Noll, Nov. 14 Trial Tr. at 1775-76)—does not constitute an antitrust injury "because it has no adverse effect on competition or consumers" in the PC operating system market. *Elliott*, 407 F.3d at 1125; *cf*. *Full Draw Productions* v. *Easton Sports, Inc.*, 82 F.3d 745, 754 (10th Cir. 1999) (finding antitrust injury where complaint alleged anticompetitive effect of boycott to be the loss of competition through the elimination of one of two competitors in the market). In *Elliott*, the Tenth Circuit upheld the district court's dismissal of a plaintiff's antitrust claims for failure to

allege antitrust injury where the only harm alleged was the "economic loss" allegedly suffered by plaintiff, not harm to competition or to consumers. 407 F.3d at 1125; *see also Four Corners*, 582 F.3d at 1225 (where relief sought by plaintiff was to share defendant's monopoly, the court held that "whatever injury [the plaintiff] may have suffered, . . . it is not one the antitrust laws protect"). For the reasons stated above, *see* pp. 59-90, *supra*, the evidence at trial established that a reasonable jury would not have a legally sufficient evidentiary basis to find that the allegedly anticompetitive act harmed competition in the PC operating system market. Absent such a showing, Novell cannot establish that it suffered antitrust injury and thus has no standing to assert an antitrust claim.

In addition, Novell suffered no antitrust injury because it was "neither a consumer nor a competitor" in the PC operating system market. *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 539 (1983). Although the Fourth Circuit did not follow the consumer-or-competitor rule, *Novell*, 505 F.3d at 311, courts in the Tenth Circuit are not bound by the Fourth Circuit's holding because the law of the case doctrine "'is discretionary rather than mandatory.'" *Daviscourt* v. *Columbia State Bank*, 2009 U.S. Dist. LEXIS 16815, at *6 (D. Colo. Feb. 20, 2009) (quoting *Homans* v. *City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004)); *see also Wessel* v. *City of Albuquerque*, 463 F.3d 1138, 1143 (10th Cir. 2006) ("'Unlike res judicata, the [law of the case doctrine] is not an inexorable command, but is to be applied with good sense.'") (citation omitted).

In *Reazin, M.D.* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir. 1990), the Tenth Circuit cited *Blue Shield* v. *McCready*, 457 U.S. 465 (1982) for the proposition that "an antitrust plaintiff need not necessarily be a competitor or consumer" to establish antitrust injury, but subsequently in *Elliott*, the Tenth Circuit endorsed the consumer-or-

competitor rule, stating that "'[t]he requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors.'" 407 F.3d at 1125 (citing *R.C. Dick Geothermal Corp.* v. *Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989) (en banc)). In *Elliott*, the Tenth Circuit upheld the district court's opinion that antitrust injury was not established where plaintiff was "neither a consumer of [defendant's] products, nor a competitor." *Id*. Under the consumer-or-competitor rule, Novell's claim is barred.

VI. Novell Released Any Claim for Harm to PerfectOffice.

Novell cannot base its claim on products not referred to in the Complaint because under the terms of its November 8, 2004 settlement agreement with Microsoft, any claims not pled in Novell's Complaint were released. That settlement agreement released Microsoft from "any and all Claims that Novell ever had or has as of the date of this Agreement in law or in equity, known or unknown, of any kind whatsoever (including without limitation any antitrust or similar Claims of any kind)" with the exception of the following: "(i) patent Claims, (ii) Revived Claims,[68] and (iii) the Claims set forth in the draft WordPerfect complaint . . . ." (November 8, 2004 Settlement Agreement, at ¶ 2(a), Holley Decl. Ex. A.) The third exception refers to a draft complaint that was provided to Microsoft shortly before execution of the settlement agreement, which turned out to be identical to the Complaint filed in this action on November 12, 2004. Thus, any claim not asserted in the Complaint was released.

[68] The term "Revived Claims" is defined in the Settlement Agreement as "any counterclaims, other than Claims arising out of the facts and circumstances described in Novell's draft NetWare complaint delivered to Microsoft on September 24, 2004, that would constitute compulsory counterclaims to the claim asserted by Microsoft." (Settlement Agreement ¶ 2(a), Holley Decl. Ex. A.)

Consequently, Novell cannot now base its claim on harm to PerfectOffice, nor can Novell now base its claim on harm to products such as its Soft Solutions document management system and QuickFinder search engine, which are mentioned nowhere in Novell's Complaint.

A. Novell Released Any Claim for Harm to PerfectOffice.

Novell cannot base its claim on harm to PerfectOffice because any such claim was released. Novell's Complaint alleged that the withdrawal of support for the namespace extension APIs caused harm to WordPerfect and Quattro Pro. (*E.g.*, Compl. ¶¶ 5, 75, 153.) Indeed, the Complaint never mentions PerfectOffice in reference to the namespace extension allegations and mentions PerfectOffice only twice in passing. (Compl. ¶¶ 81, 117.) In addition, in defining the markets relevant to its case, Novell pled that "[t]hree markets are relevant to this action: the market for Intel-compatible PC operating systems [in which Microsoft Windows had monopoly power], the market for word processing applications [in which WordPerfect competed], and the market for spreadsheet applications [in which Quattro Pro competed]." (Compl. ¶ 24.) No mention was ever made of any suite market—the market in which PerfectOffice competed. Moreover, the Complaint defined the term "office productivity applications" to refer to "[w]ord processing and spreadsheet applications."[69] (Compl. ¶ 24.)

Prior to trial, Microsoft moved *in limine* to exclude Novell's theory that PerfectOffice, alone or in combination with Java and Netscape, was a middleware threat to Microsoft's PC Operating system monopoly. On October 6, 2011, this Court granted

[69] The Fourth Circuit has already ruled that Novell's "office productivity applications" refers only to WordPerfect and Quattro Pro. 429 F. App'x at 263. (*See also* Compl. ¶¶ 24, 25.) In affirming the dismissal of Novell's GroupWise claim, the Fourth Circuit held that Novell's "pleading expressly characterized" the products for which it sought to recover damages, and the Complaint "intended to encompass" only "[w]ord processing and spreadsheet applications." 429 F. App'x at 263.

Microsoft's motion, ruling that any middleware theory based on PerfectOffice is "a separate claim which I don't think can be asserted" because it "was released." (October 6, 2011 Hearing Tr. at 65.) When Novell attempted to resurrect the theory at trial during the examination of Alepin, the Court instructed Novell, "Don't talk about PerfectOffice at this point, in light of my prior ruling." (Nov. 9 Trial Tr. at 1409-10.) By the same token, Novell released any claim for harm to PerfectOffice under the terms of the November 2004 settlement agreement.[70]

B. Novell Released Any Claims for Harm to Other Products Not Pled in Its Complaint.

The Complaint alleged that the October 3 Decision delayed the release of WordPerfect and Quattro Pro (*e.g.*, Compl. ¶¶ 5, 75, 153) and that "WordPerfect and Novell's other office productivity applications" were "the victims of [Microsoft's] anticompetitive conduct."[71] (Compl. ¶ 21; *see also* Compl. ¶¶ 45, 54, 56, 105-06.) With respect to the October 3 Decision, the Complaint alleged that Microsoft's conduct "forced Novell to develop a costly and difficult solution, delaying the shipment of WordPerfect for Windows." (Compl. ¶ 98; *see also* Compl. ¶¶ 74-75.) In other words, the Complaint alleged only that WordPerfect and Quattro Pro—and no other products—were harmed by the October 3 Decision.

At trial, however, Novell's first witness, Harral, refuted Novell's allegation entirely, testifying that "I don't know anything that WordPerfect word processor needed to do for

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[70] As a result, Novell's damages theories would not provide a reasonable jury with a legally sufficient evidentiary basis to award any damages because Warren-Boulton made no attempt to disaggregate the alleged harm to WordPerfect and Quattro Pro from the alleged harm to PerfectOffice, but instead constructed a damages model in which he combined the projections of revenue and profits of all three products. (*See* Warren-Boulton, Nov. 17 Trial Tr. at 2435-36.)

[71] As mentioned above, the Fourth Circuit has already held that Novell's "office productivity applications" refers only to WordPerfect and Quattro Pro. *Novell*, 429 F. App'x at 263.

a NameSpace extension." (Harral, Oct. 20 Trial Tr. at 327; *see also id*. at 270 (testifying that "[t]he question isn't about WordPerfect's products").) Harral further testified that WordPerfect "had no need for the namespace extension APIs" in order "[t]o ship their product." (Harral, Oct. 24 Trial Tr. at 476-77.) Novell also introduced no evidence at trial that Quattro Pro needed those APIs.[72] Indeed, Novell conceded in its summation that "WordPerfect understood that you don't edit documents within an explorer extension. That was not what Microsoft was selling and that was not what WordPerfect was planning." (Novell Summation, Dec. 13 Trial Tr. at 5172.)

Novell's witnesses further testified that, although Novell did not need the namespace extension APIs for WordPerfect and Quattro Pro, it wanted to use the namespace extension APIs to embed its QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery, and a primitive FTP/HTTP browser directly in the Windows 95 shell. (Harral, Oct. 24 Trial Tr. at 372-74; Richardson, Oct. 25 Trial Tr. at 613, 629-30, 638-42, 664.) Novell intended to display these products in the tree view of the Windows Explorer and Windows 95 common file open dialog, even when WordPerfect and Quattro Pro were not running. (Harral, Oct. 20 Trial Tr. at 268-70; Richardson, Oct. 25 Trial Tr. at 636-38, 691-97.) Consistent with this testimony, Novell's summation focused specifically on the use of the namespace extension APIs for its Soft Solutions document management product (not WordPerfect or Quattro Pro), describing "document management systems" as "the exact

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[72] Consistent with Harral's testimony, the evidence at trial showed that Microsoft clearly warned ISVs that "[u]sers should NOT edit documents with an explorer extension!" (*i.e.*, with a word processor) and that the namespace extension APIs instead "[o]nly should be used if your application displays a pseudo-folder: electronic mail, document management, etc." (PX 113, at NOV 00734390.) *See also* pp. 18-20, *supra*. Satoshi Nakajima testified that it "doesn't make sense to use [the namespace extension APIs] for word processing application or spreadsheet application" (Nakajima, Dec. 1 Trial Tr. at 3865), and Joe Belfiore testified that he explained to ISVs that the namespace extension APIs were not suitable for use by word processing or spreadsheet applications (Belfiore, Dec. 5 Trial Tr. at 4261-63).

use[]" that Novell planned for the namespace extension APIs. (Dec. 13 Trial Tr. at 5172; *see also id*. at 5175, 5183.)[73]

Four of the five products Novell now asserts to be the bases of its claim—including the Soft Solutions document management product that was the focus of Novell's summation—were mentioned nowhere in the Complaint, and not one of the five were mentioned in any way in relation to the namespace extension APIs.[74] Further, the Complaint never alleged (nor could it) that any of these five products competed in any of the three markets that the Complaint lists as relevant to this action. (Compl. ¶ 24.) Having failed to plead in its Complaint that any of these five products were harmed by Microsoft's conduct, Novell released any such claims in its settlement agreement with Microsoft on November 8, 2004.

VII. Novell Sold Its Claim to Caldera.

In 1996, Novell transferred to Caldera, Inc. "any and all claims or causes of action" that were "associated directly or indirectly" with DR DOS, Novell's PC operating system. (Asset Purchase Agreement between Novell, Inc. and Caldera, Inc., July 23, 1996

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[73] In the Court's summary judgment decision in 2010, the Court held that claims relating to Novell's GroupWise e-mail product were not pled in the Complaint and therefore are not part of this case. 699 F. Supp. 2d at 743-44, *aff'd*, *Novell, Inc.* v. *Microsoft Corp.*, 429 F. App'x 254, 263 (4th Cir. 2011). Novell's expert, Warren-Boulton, testified at trial that Novell's Soft Solutions document management system "is very, very similar to GroupWise and became part of GroupWise." (Warren-Boulton, Nov. 16 Trial Tr. at 2160.) Accordingly, any claim based on Novell's Soft Solutions product falls within the ambit of the Court's ruling excluding GroupWise, and consequentially, such a claim cannot be asserted in this action. *Novell*, 699 F. Supp. 2d at 743-44; *Novell*, 429 F. App'x at 263.

[74] The Complaint made no mention of Novell's Soft Solutions document management system, e-mail client, Presentations clip-art gallery, or FTP/HTTP browser, and the Complaint's two references to Novell's QuickFinder search engine gave no indication that those products were using the namespace extension APIs or that the withdrawal of support for the namespace extension APIs harmed those products in any way. (*See* Compl. ¶¶ 94-95 (alleging that "Microsoft made other inferior features de facto industry standards," which "prevented Novell from presenting QuickFinder on the desktop").)

("Asset Purchase Agreement") § 3.1, Holley Decl. Ex. P.) Caldera thereupon brought suit against Microsoft asserting antitrust claims pertaining to the PC operating system market and alleging that Microsoft had unlawfully monopolized that same market. The *Caldera* lawsuit settled in 2000, providing a substantial recovery to Caldera and to Novell. In return, Microsoft obtained a broad release covering "the Novell Claims and all claims asserted, or that could have been asserted in the Action." (Settlement Agreement between Microsoft Corporation and Caldera, Inc., January 7, 2000 ¶ 2, Holley Decl. Ex. Q.)[75]

In its November 13, 2009 cross-motion for summary judgment, Microsoft argued that the *Caldera* release and the language of the Asset Purchase Agreement encompassed Novell's present claim because the assignment to Caldera included all claims arising out of Microsoft's allegedly anticompetitive conduct in the market in which DR DOS competed (the PC operating system market), and the release covered "all claims asserted, or that could have been asserted" in the *Caldera* action.

This Court agreed in 2010 and dismissed Novell's claim. 699 F. Supp. 2d at 739. On appeal, Novell argued that its "DOS Products" were "entirely distinct" and in "different lines of business" from WordPerfect and Quattro Pro, and that "the antitrust claims for injury to the DOS Products were entirely distinct from those for injury to" WordPerfect and Quattro Pro. (Novell Brief to the Fourth Circuit, Case No. 10-1482, Dkt. #19, Aug. 6, 2010, at 39-40.) The Fourth Circuit accepted Novell's argument, and held that "[t]he mere existence of a possible

[75] The "Novell Claims" is defined to include "any and all claims or causes of action held by Novell as of July 23, 1996 'associated directly or indirectly with any of the DOS Products or Related Technology' . . . including without limitation all such claims formerly held by Digital Research, Inc." (Settlement Agreement between Microsoft Corporation and Caldera, Inc., January 7, 2000 at 1, Holley Decl. Ex. Q (quoting Asset Purchase Agreement).)

conceptual link between the DOS products and those applications does not mean that the Agreement divested Novell of the claims alleged in Count I." 429 F. App'x at 261.

At trial, however, Novell made clear that its claim was intertwined with the claims it sold to Caldera in 1996. Professor Noll repeatedly relied on and referred to the presence of WordPerfect on the DOS platform and included WordPerfect's installed base on DOS operating systems, saying that for his middleware theory the "relevant part is the installed base of existing, running personal computers that are using a Microsoft operating system, all right, or Microsoft compatible operating system" such as DR DOS. (Noll, Nov. 15 Trial Tr. at 1923-25.) In other words, Novell expressly relied on the success of its products on DOS operating systems in order to support its theories of harm to the PC operating system market.[76]

As a result, the law of the case doctrine does not apply because the "evidence in a subsequent trial is substantially different" than the evidence Novell presented at summary judgment. *Wessel*, 463 F.3d at 1143 (quotation and citation omitted). Indeed, the Fourth Circuit's interpretation of the Asset Purchase Agreement is no longer binding because "[w]hen the record changes, which is to say when the evidence and the inferences that may be drawn from it change, the issue presented changes as well." *Jackson* v. *State of Alabama State Tenure Commission*, 405 F.3d 1276, 1283 (11th Cir. 2005); *see also Haynes Trane Service Agency, Inc.* v. *American Standard, Inc.*, 573 F.3d 947, 956-57 (10th Cir. 2009).

Novell's present claim is "associated directly or indirectly" with the claims Novell sold to Caldera. Indeed, as this Court observed at trial, to the extent Novell "wanted to

[76] This is a far cry from Novell's argument to the Fourth Circuit that Novell's business applications and its DR DOS operating system "were two entirely distinct group of products in two different lines of business posing two different types of threats to two different Microsoft operating systems." (Novell's Brief to the Fourth Circuit at 39.)

back into the DOS system . . . then this claim is barred by . . . the asset purchase agreement." (Oct. 24 Trial Tr. at 561-62.)

VIII. Novell's Claim Is Barred by the Statute of Limitations.

"Any action to enforce any cause of action" arising under the Clayton Act "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. The conduct about which Novell complains occurred ten years before Novell filed its Complaint in 2004. There is no dispute that Count I is time-barred unless it was tolled by the Government Case pursuant to 15 U.S.C. § 16(i). (*E.g.*, Compl. ¶¶ 14-23.) Indeed, in dismissing Counts II through V, the Court explained that those counts alleged harm to competition in purported markets for word processing and spreadsheet software—"claims that were never asserted by the government." *Novell, Inc.* v. *Microsoft Corp.*, 2005 U.S. Dist. LEXIS 11520, at *11 (D. Md. June 10, 2005). The Fourth Circuit affirmed. *Novell*, 505 F.3d at 320-23.[77]

The test for determining the applicability of Section 16(i) is whether the matters complained of in a private antitrust claim "bear a real relation" to the matters "complained of in the government suit." *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965). As the Fourth Circuit held in affirming dismissal of Counts II through V, the tolling provision should not be construed "to permit private plaintiffs to 'sit on their rights' and to assert, years after the traditional statute of limitations has run, 'claims so much broader than those asserted by the government that they open entirely new vistas of litigation.'" *Novell*, 505 F.3d at 321-23

[77] Microsoft stated in its 2005 motion to dismiss that "[a] comparison of Count I to the DOJ Complaint reveals that Novell's claim involves different competitors, different products that allegedly were injured and differences in the anticompetitive conduct alleged" and because any apparent similarity between the Government Case and Novell's claim—which "Novell does not own and has no standing to assert"—was merely a sham. (Microsoft's Memorandum in Support of Its Motion to Dismiss Novell's Complaint, Civ. A. No. 04-1045, filed Jan. 7, 2005, at 15 n.9.)

(quoting *Novell*, 2005 WL 1398643, at *5). As a result, "care must be exercised to insure that reliance upon the government proceeding is not mere sham." *Leh*, 382 U.S. at 59.

Although Count I was "ingeniously designed to survive Microsoft's anticipated limitations defense" by virtue of the cross-market nature of this claim, *Novell*, 699 F. Supp. 2d at 736, the evidence at trial established that Novell's claim bears no "real relation" to the claims asserted in the Government Case. *Leh*, 382 U.S. at 59.

First, Novell repeatedly contended, both in summation and in oral argument on Microsoft's Rule 50(a) motion for judgment as a matter of law, that what mattered was harm to competition in applications markets. In summation, Novell's lawyer argued to the jury that Microsoft devised a plan as early as 1993 to "gain a very significant lead over Microsoft's applications competitors," supposedly recognizing that otherwise "Microsoft's Word and Excel would be forced to battle against their competitors on even turf." (Dec. 13 Trial Tr. at 5163-64.) Novell's counsel also told the jury that PX 1 showed that Microsoft's October 3 Decision was "purely predatory action unrelated to any pro-competitive purpose" because Gates made the decision to "give Office a real advantage." (*Id*. at 5184; *see also id*. (arguing that the Hood Canal plan and the withdrawal of support for the namespace extension APIs were "all for the purpose of disadvantaging Microsoft's application competitors").) Novell's counsel also argued in summation that the October 3 Decision was not "consistent with competition on the merits" because Gates "wanted to withhold this technology for Office 96, to deny Lotus the opportunity to compete on the merits" and to ensure that Word and Excel would not be "forced to compete on a level playing field." (*Id*. at 5216.) Novell even told the jury that "[y]ou won't find any benefits to consumers in this decision," because "[i]f Microsoft had acted in a pro-competitive

manner, consumers would have had a choice of office productivity suites when Windows 95 came out." (*Id*. at 5216-17.)

Similarly, in oral argument on Microsoft's Rule 50(a) motion, Novell's lawyer argued that Microsoft withdrew support for the namespace extension APIs "for the predatory purpose of assuring that WordPerfect and Notes would fall behind." (Nov. 18 Trial Tr. at 2571.) Throughout the trial, the Court expressed its "impatience" with Novell's theory, because "[t]his case is not about trying – about the dominance that Word might have obtained over WordPerfect. And it's not. That claim is time barred . . . ." (Oct. 24 Trial Tr. at 561; *see also* Oct. 27 Trial Tr. at 939 ("Novell's apparent ideological position is to claim that they were attempting to monopolize the Office suite market translates into them trying – you know, that that makes it the same claim as trying to monopolize, maintain a monopoly in the operating system market. I don't see that."); Oct 25 Trial Tr. at 575-76 ("It may be that Microsoft was using its knowledge of Windows 95 and restricting what it was giving to competitors, application competitors so that it could make Word and Office more dominate [sic] respectively in the word processing and Office suite market. I understand that. But that is not the claim here. The claim here is different. It has to work to the operating system.").) Although elsewhere Novell tried to wrap its claim in the PC operating system flag, it injected into the trial this separate argument about harm to competition in markets for word processing and spreadsheet software.

Second, the theory on which Novell tried the case differs significantly from (and bears no "real relation" to) the theory of the Government Case. With respect to Novell's franchise applications theory, although Novell's Complaint alleged that "[a]s found by the courts in the Government Suit, . . . Microsoft's monopoly share of the Intel-compatible PC operating systems market is protected by a barrier to entry arising out of the much greater number of

applications that operate only with Windows" (Compl. ¶ 43), Novell's theory at trial rested on the notion that a mere three products could enable a rival operating system to surmount the applications barrier to entry.

Although Novell's Complaint embraced the definition of middleware set out in Finding 28 of the Government Case (Compl. ¶ 48 (quoting Finding of Fact 28)), Novell opposed Microsoft's repeated requests that the Court instruct the jury that, in order to pose a threat to Microsoft's operating system monopoly, a middleware product had to "expose[] enough APIs to allow independent software vendors ('ISVs') profitably to write full-featured personal productivity applications that rely solely on those APIs"—language drawn directly from Finding of Fact 28. Novell went so far as to concede that giving such an instruction "would be directing a verdict on that portion of our theory." (Dec. 15 Trial Tr. at 5436-37, 5439.) By seeking at trial to vary from the definition of middleware used in the Government Case (and that was incorporated explicitly into the Complaint), the allegations that saved the Complaint from dismissal were thus discarded at trial. Because Novell's theory of harm to competition in the PC operating system market was not "based in whole or in part" on the Government Case, Count I is time-barred.

CONCLUSION

Microsoft respectfully requests that the Court enter judgment in Microsoft's favor as a matter of law.

Dated: February 3, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2012, I caused a true and correct copy of the foregoing Microsoft's Memorandum in Support of its Renewed Motion for Judgment as a Matter of Law 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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