MAX D. WHEELER (3439)
MARALYN M. ENGLISH (8468)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11ᵗʰ Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400

JEFFREY M. JOHNSON (*admitted pro hac vice*)
PAUL R. TASKIER (*admitted pro hac vice*)
ADAM PROUJANSKY (*admitted pro hac vice*)
JAMES R. MARTIN (*admitted pro hac vice*)
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

R. BRUCE HOLCOMB (*admitted pro hac vice*)
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 810
Washington, DC 20006-5403
Telephone: (202) 580-8820
Facsimile: (202) 580-8821

JOHN E. SCHMIDTLEIN (*admitted pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Telephone: (202) 434-5901
Facsimile: (202) 434-5029

Attorneys for Novell, Inc.

UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S OPPOSITION TO
Plaintiff,	*	MICROSOFT'S RENEWED MOTION
	*	FOR JUDGMENT AS A MATTER
v.	*	OF LAW
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

TABLE OF CONTENTS

ii

TABLE OF AUTHORITIES

v

x

INTRODUCTION

Contrary to the required standard under Federal Rule of Civil Procedure 50, Microsoft's

Renewed Motion for Judgment as a Matter of Law presents the evidence in the light most

favorable to Microsoft, indulges every inference in Microsoft's favor, ignores voluminous

contrary evidence, and resolves every evidentiary conflict in favor of Microsoft. The law is

clear, however, that this Court must consider the entire trial record, view the evidence in the light

most favorable to Novell, draw every reasonable inference in Novell's favor, resolve all

evidentiary conflicts in favor of Novell, and deny Microsoft's motion unless the evidence so

overwhelmingly favors Microsoft as to permit *no other rational conclusion*.

Applying the proper standard to the facts in the record, it is beyond debate that a

reasonable jury could find in Novell's favor. As the Court and the parties know, 11 out of 12

jurors who heard the evidence at trial were prepared to find in Novell's favor. All 12 jurors

agreed that Microsoft had engaged in anticompetitive conduct and that Novell had proved

causation (Questions 1 through 3 on the verdict form). There is certainly no basis to conclude

that these jurors were unreasonable. The Court correctly denied Microsoft's motion for

judgment as a matter of law at the close of Novell's case, and nothing has occurred since that

ruling that would justify granting Microsoft's renewed motion now. To the contrary, the jury

result only confirms the conclusion that a reasonable jury, considering all of the evidence, could

find in Novell's favor.

This is a straightforward case governed by the same antitrust principles that resulted in

liability in *United States v. Microsoft Corp.* (the "Government Case"). Novell presented facts

from which a reasonable jury could conclude that Microsoft, which indisputably possessed

monopoly power in the PC operating systems market, willfully maintained that power through

anticompetitive conduct (rather than competition on the merits), and that this conduct

proximately caused injury to Novell's business. No more is required. Although Microsoft

disputes much of the evidence Novell presented at trial, the law is clear that all such evidentiary

disputes must be resolved in Novell's favor on the present motion.[1] The Court should therefore

deny Microsoft's Renewed Motion for Judgment as a Matter of Law.

<div align="center">

SUMMARY OF THE ARGUMENT

</div>

During the development of Windows 95 (codenamed "Chicago"), Microsoft engaged in

anticompetitive conduct which severely delayed the release of Novell's office productivity

applications for Windows 95. Microsoft evangelized Windows 95 to independent software

vendors ("ISVs") like Novell by, among other things, promoting the enhanced functionality of

certain namespace extension application programming interfaces ("APIs") that were to be

included in the operating system. After Novell reasonably relied on the namespace extension

APIs in developing its applications and suite for Windows 95, Microsoft withdrew support for

those APIs, forcing Novell to spend considerable time, effort, and expense in re-engineering its

products. The delays caused by Microsoft's anticompetitive conduct irreparably harmed

Novell's office productivity applications and led Novell to sell those applications in March 1996

to Corel Corporation for approximately $146 million, at a loss of more than $1 billion.

Part I (Rule 50(b) Standard): In ruling on a motion for judgment as a matter of law, the

Court reviews all the evidence in the record, construing it and all inferences most favorably to

---

[1] Microsoft also argues that the Court should grant its motion so that the Tenth Circuit can
determine the correct causation standard to be applied in this case. As discussed below, the
Tenth Circuit has already resolved this question. *See infra* Argument Part II. Nevertheless, if
there is any doubt about the correct legal standard, the Court has already employed a perfectly
appropriate procedure by submitting questions to the jury under alternative causation standards.
See Fed. R. Civ. P. 49.

Novell, and should refrain from making credibility determinations or weighing the evidence. To

succeed on its Rule 50(b) motion, Microsoft must establish that the evidence "so

overwhelmingly favors" Microsoft that no rational person could find for Novell. *Shaw v. AAA*

Eng'g & Drafting, Inc., 213 F.3d 519, 529 (10th Cir. 2000). A Rule 50 motion may not be

granted unless there is only one conclusion that a reasonable jury could have reached. This is a

very heavy burden, one which Microsoft not only cannot meet, but does not even acknowledge

in its motion.

>   **Part II (Microsoft's Conduct Violated The Sherman Act)**: Because Microsoft is an

admitted monopolist and there is no dispute regarding the relevant market, this trial presented

only two overarching questions: (1) whether Microsoft's conduct violated Section 2 of the

Sherman Act and, if so, (2) whether that conduct proximately caused injury to Novell. The first

question focuses on the effects of Microsoft's conduct on competition; the second focuses on the

effects of that conduct on Novell. These two questions cannot be conflated. Part II of Novell's

argument addresses the first question; Part III addresses the second.

>   In the Tenth Circuit, as in the D.C. Circuit, conduct is deemed anticompetitive when it

harms the competitive process and the monopolist cannot show that it acted with a legitimate

business justification. A plaintiff makes a *prima facie* showing of harm to competition when it

introduces evidence of conduct that impaired the opportunities of rivals, was not competition on

the merits, or was more restrictive than reasonably necessary for competition on the merits, and

which appeared to be reasonably capable of contributing significantly to maintaining monopoly

power. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns,*

Inc., 63 F.3d 1540, 1550 (10th Cir. 1995). Once a plaintiff makes its *prima facie* case, the

burden shifts to the monopolist to establish a non-pretextual, pro-competitive justification for its

conduct. If the monopolist cannot meet that burden, then the conduct is found to be

anticompetitive. The D.C. Circuit used this same analytical framework in the Government Case

to find that Microsoft committed a dozen separate Section 2 violations on similar – indeed

related – facts.

Recognizing that the D.C. Circuit considered and rejected many of the same arguments

that Microsoft advances here, Microsoft attempts to distinguish the D.C. Circuit's decision in the

Government Case on the ground that the Government sought only injunctive relief, not damages.

A careful review of the federal antitrust statutory scheme, the D.C. Circuit's opinion, and the

district court's subsequent remedies decision, however, establishes that the law provides a single

set of standards to determine whether conduct violates the Sherman Act, regardless of whether

damages or injunctive relief is sought. Determining an appropriate equitable remedy presents an

entirely different question that lies within the discretion of the court, and courts exercise that

discretion to narrowly tailor the relief to fit the wrong. Thus, in the Government Case, the

D.C. Circuit ruled that the drastic remedy of divestiture should not be imposed without a stronger

causal connection between the illegal conduct and Microsoft's ongoing monopoly power than

was needed just to prove liability under Section 2. In confirming the district court's many

findings of fact establishing liability, the D.C. Circuit explained that "causation affords

Microsoft no defense to *liability* for its unlawful actions." *United States v. Microsoft Corp.*,

253 F.3d 34, 80 (D.C. Cir. 2001) (emphasis added). The same reasoning applies here.

Unlike equitable actions, courts do not have flexibility to determine the appropriate

remedy in private damages claims because Congress decided that treble damages are necessary

to deter anticompetitive conduct. Courts use antitrust standing analysis to determine which

plaintiffs are permitted to bring damages claims. Traditional concepts of proximate causation

4

further ensure that the antitrust violation materially caused the plaintiff's injuries. In fact, the only authority that Microsoft cites in its attempt to distinguish the Government Case is an excerpt from a treatise chapter that deals with proximate causation of the plaintiff's injury, ***not*** whether the challenged conduct caused the defendant's monopoly to be maintained. *See* Microsoft's Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law ("Microsoft Mem.") at 82-83.

In its 2007 decision, the Fourth Circuit noted that Novell's "claims echo the government's theory" in the Government Case. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 309 (4th Cir. 2007). This Court also has correctly observed that Microsoft's conduct to thwart Novell's office productivity applications was not significantly different from Microsoft's efforts to thwart Netscape's Navigator web browser and Sun's Java technologies. Novell introduced and proffered substantial evidence to show that all of Microsoft's conduct was part of a common plan.

Even if one looks only at the conduct "directed at" Novell, a rational juror could conclude that Novell made a *prima facie* showing that Microsoft's exclusion of Novell's office productivity applications strengthened and extended the applications barrier to entry. As explained in the Government Case and in trial testimony, the applications barrier to entry protected Microsoft's monopoly power and prevented potential operating systems from entering the market. "Key franchise" applications and middleware such as WordPerfect, however, could reduce the barrier and help enable consumers to consider non-Windows operating systems. By thwarting the development and distribution of Novell's office productivity applications (and related middleware, e.g., PerfectFit, AppWare, and OpenDoc), Microsoft maintained and extended that barrier to entry.

5

Microsoft incorrectly argues that Novell must show that its office productivity

applications would have completely eradicated the applications barrier to entry or would have

single-handedly "induced users to move to operating systems other than Windows." Microsoft

Mem. at 82. Microsoft is wrong in two respects. First, as a matter of law, conduct that helps

maintain an entry barrier harms competition and is capable of "contributing" to monopoly power.

Second, as the D.C. Circuit ruled, "neither plaintiffs nor the court can confidently reconstruct a

product's hypothetical technological development in a world absent the defendant's exclusionary

conduct" and requiring such proof would only encourage monopolists to take "more and earlier

anticompetitive action." *Microsoft*, 253 F.3d at 79. Tenth Circuit law is in accord. Microsoft

may mock the D.C. Circuit's "edentulous" causation test, but it makes perfect sense not to

immunize a monopolist from liability for conduct targeting "nascent" threats, if the monopolist

cannot justify that conduct as pro-competitive. At that point, the monopolist bears the uncertain

consequences of its own conduct.

Microsoft's myopic argument that its conduct could not have harmed competition –

because Windows 95's market share would have increased "but for" the de-documentation of the

namespace extension APIs – is actually a critical concession that Microsoft sacrificed short-run

profits for a long-term gain, consistent with its pattern of engaging in conduct that it could not

justify on any ground other than it "operated to reinforce [its] monopoly power." *United States

v. Microsoft Corp.*, 84 F. Supp. 2d 9, 28 at ¶ 67 (D.D.C. 1999) [hereinafter "Finding(s) of Fact"].

Antitrust law assumes that when monopolists forgo short-term profits, they do so only in

exchange for an offsetting benefit; otherwise, their conduct would be economically irrational.

Here, the evidence at trial showed that Microsoft planned to offset its short-term losses with

ownership of the key franchise applications and elimination of the middleware threats, all with

the effect of artificially maintaining and increasing barriers to entry in the PC operating systems

market, and without any legitimate pro-competitive justification.

Microsoft's inability to establish a legitimate pro-competitive justification is highly

significant because it proves that Microsoft was not competing on the merits. It was not trying to

design a better product or increase output. To the contrary, former Microsoft President and CEO

Bill Gates admitted that he acted to deter innovation solely because Microsoft was not ready to

compete on the merits with Novell. The evidence exposed Microsoft's "justifications" as

pretextual. At best, Microsoft's proffered justifications create a question of fact unsuitable for a

Rule 50 motion.

Part III (Causation And Damages): Novell had every right to rely on Microsoft's

commitment to document and support the namespace extension APIs. Novell reasonably based

its development plans on Microsoft's commitment given the long history of cooperation between

the two parties, and there was ample evidence that Novell would have released its Windows 95

applications within 90 days of the release of Windows 95 had Microsoft not decided to break its

commitment. Mr. Gates' decision to renege on Microsoft's commitment (without any non-

pretextual, pro-competitive justification) left Novell with no practical ability to release a

marketable product within the critical 90-day window of opportunity for new applications.

Microsoft's claim that Novell is responsible for those delays rests entirely on disputed facts.

Microsoft's assertion of a black letter rule that a plaintiff must either be a consumer or a

competitor to have antitrust standing relies on a misreading of a single case and ignores Tenth

Circuit and Supreme Court precedent. Microsoft's claim that Novell failed to cite a case in

which a private antitrust plaintiff obtained a money judgment based on a "cross-market" theory

of anticompetitive harm is equally unavailing. The Government Case was a "cross-market" case

and there is no reason to reject that decision simply because the United States sought equitable

relief. Moreover, Novell has repeatedly cited *Reazin v. Blue Cross & Blue Shield of Kansas,*

Inc., 899 F.2d 951 (10th Cir. 1990), a Tenth Circuit case in which a hospital obtained a money

judgment for an antitrust claim against Blue Cross. The evidence showed that Blue Cross

viewed the hospital's affiliation with a health maintenance organization as a potential threat to its

monopoly in the private healthcare financing market. The Tenth Circuit specifically affirmed the

hospital's standing even though the hospital did not compete in the market for private healthcare

financing. *Id.* at 962-63.

If the jury finds that Microsoft engaged in anticompetitive conduct that proximately

caused antitrust injury to Novell, it will have established Novell's right to recover damages.

Courts accept a degree of uncertainty in fixing the amount of damages and will not reject them

so long as the calculation is not based on "'speculation or guesswork.'" *Law v. NCAA*,

5 F. Supp. 2d 921, 929 (D. Kan. 1998) (citations omitted). Thus, the question of damages should

not be determined in a Rule 50(b) motion. In any event, Novell's damages expert properly

calculated damages under several different theories and provided the jury with a reasonable basis

to determine Novell's damages.

Part IV (Under *Aspen Skiing*, Judgment As A Matter Of Law Would Be Improper):

Although Novell's case is not a unilateral-refusal-to-deal case that would be governed by

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), and

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), applying the *Aspen*

Skiing framework reaches the same result – that Microsoft's conduct harmed competition and

Novell – through a very similar analysis. Microsoft's long-standing course of dealing with

Novell/WordPerfect, and its commitment to provide the namespace extension APIs, demonstrate

that Microsoft's course of dealing was profitable and therefore pro-competitive. Microsoft's

admission that it lost customers by reneging on its commitment is more than sufficient to

establish a *prima facie* case of harm to competition and shift to Microsoft the burden of

establishing a pro-competitive, non-pretextual justification for its conduct. The unilateral-

refusal-to-deal cases relied on by Microsoft all involve situations in which the monopolist

increased its short-term profits and the monopolist's conduct was therefore rational quite apart

from any potential effect on preserving monopoly power.

       Part V (Novell's Claim Is Properly Before The Court): Microsoft waived many of the

issues it now seeks to raise by failing to raise them in its Rule 50(a) motion. Specifically,

Microsoft has waived its arguments that (1) Novell sold its claim to Caldera in the Asset

Purchase Agreement, (2) Novell's claim is barred by the NetWare Settlement Agreement, and

(3) Novell's claim is barred by the statute of limitations. Furthermore, even if Microsoft had not

waived these issues, each has already been definitively ruled on by the Fourth Circuit, and

therefore Microsoft's arguments are barred by the law of the case doctrine. Microsoft has not

shown, nor can it show, any exceptional circumstances that would require the Fourth Circuit's

rulings on any of these issues to be revisited.

      In any event, even assuming that Microsoft had not waived these issues and that the law

of the case doctrine did not apply here, Microsoft's arguments still should be rejected because

they are substantively meritless. First, Novell did not, through the Asset Purchase Agreement,

sell its claim to Caldera. Microsoft's argument hinges on the same mistaken interpretation of

"association" that the Fourth Circuit found lacked logical limiting principles. More to the point,

a mere utterance of the term "DOS" during the trial – in reference to WordPerfect's installed

base – does not create an association to the products explicitly identified as the subject of

Novell's Asset Purchase Agreement with Caldera. Second, the NetWare Settlement Agreement

does not bar Novell's claim. That agreement expressly preserved Novell's right to introduce any

and all factual evidence in support of its claims, which is exactly what Novell has done. The

evidence adduced at trial supports the claim stated in Novell's Complaint and therefore

Microsoft's argument that Novell's claim was released under the NetWare Settlement

Agreement is without merit. Finally, the statute of limitations does not bar Novell's claim.

Microsoft's argument on this issue suffers from two fundamental flaws: first, Microsoft

mischaracterizes the arguments made by Novell's counsel during trial, and second, Microsoft

continues to misinterpret the findings in the Government Case. The portions of statements of

Novell's counsel relied on by Microsoft are taken out of context and do not support Microsoft's

statute of limitations argument. Moreover, Novell's middleware and key franchise applications

theories are perfectly consistent with the findings in the Government Case.

PROCEDURAL HISTORY

I.   NOVELL'S COMPLAINT

On November 12, 2004, Novell filed a Complaint alleging in Count I that Microsoft

unlawfully maintained its monopoly in the PC operating systems market through anticompetitive

conduct targeting Novell's office productivity applications. Compl. ¶¶ 151-155.[2] More

specifically, the Complaint alleges that Microsoft viewed Novell's office productivity

applications, including WordPerfect and Quattro Pro, as a threat to Microsoft's PC operating

systems monopoly power in two ways. First, Novell's office productivity applications contained

---

[2] Counts II through V alleged that Microsoft unlawfully monopolized or attempted to
monopolize the word processing and spreadsheet applications markets through the same acts
underlying Count I. Compl. ¶¶ 156-173. Count VI alleged that Microsoft's exclusionary
agreements unreasonably restrained trade. Compl. ¶¶ 174-177. These Counts are no longer part
of this case.

and acted as "middleware," a category of software that threatened Microsoft's monopoly power, as shown in the Government Case. Compl. ¶¶ 43-51; *Microsoft*, 253 F.3d at 53-54. Second, Novell's office productivity applications, as popular and important cross-platform applications available on operating systems other than Windows, could have helped reduce the applications barrier to entry protecting Microsoft's monopoly power. Compl. ¶ 52; *Microsoft*, 253 F.3d at 55.

The Complaint outlines the Government Case against Microsoft in detail, noting that "Microsoft's Windows monopoly was threatened by 'middleware' such as Netscape Navigator . . . and Sun Microsystems' implementation of the 'Java' technologies." Compl. ¶ 44. It also reiterates the courts' determination that "Microsoft engaged in anticompetitive conduct designed to exclude such middleware from installation on PCs using the dominant Windows operating system, on which any middleware would depend for survival until sufficient competing operating systems could emerge" and that Microsoft was found to have "violated Section 2 of the Sherman Act 'by preventing the effective distribution and use of products that might threaten [its] monopoly'" in a dozen ways. *Id.* (quoting *Microsoft*, 253 F.3d at 58).

The Complaint goes on to state that "[f]or related reasons, Novell's WordPerfect and other office productivity applications posed a significant threat to the applications barrier to entry that protected the Windows monopoly." Compl. ¶ 45. Specifically, the Complaint notes that Novell developed a "strategy to provide cross-platform functionality to applications (including its office productivity applications)," using cross-platform middleware technologies such as "OpenDoc" and "AppWare." Compl. ¶¶ 47, 51. The Complaint describes Novell's strategy of combining WordPerfect, AppWare, and OpenDoc as being nearly identical to Netscape's and Sun's strategy of coupling Navigator and Java to form a middleware platform with the potential to erode the applications barrier to entry protecting Microsoft's PC operating systems

11

dominance. Compl. ¶¶ 47, 48, 51. "Like the Netscape-Java combination, the combination of

WordPerfect, a popular application, with the system-neutral OpenDoc-protocol and AppWare

development environment, threatened Microsoft's operating systems monopoly." Compl. ¶ 51.

II.   MICROSOFT'S MOTION TO DISMISS

In January 2005, Microsoft moved to dismiss Novell's Complaint. On Count I, Microsoft

argued that Novell had sold its claim when it transferred its DR-DOS (a PC operating system)

business to Caldera. Microsoft also argued that Novell lacked antitrust standing to bring Count I

because Novell was neither a competitor nor a consumer in the PC operating systems market.[3]

On June 10, 2005, the Court held that Novell continued to own the claim set forth in

Count I because that claim is for damage to Novell's applications software rather than to

DR-DOS, and it would be a "far stretch" to infer otherwise. *Novell, Inc. v. Microsoft Corp.*

(In re Microsoft Corp. Antitrust Litig.), No. 1:05-cv-01087, 2005 WL 1398643, at *1 (D. Md.

June 10, 2005), *aff'd*, 505 F.3d 302 (4th Cir. 2007). The Court also confirmed that Novell had

antitrust standing to bring Count I, as the law does not require a plaintiff to be a competitor or a

consumer in the relevant market.[4] *Id.* at *2-3.

At Microsoft's request, the Court certified this case for interlocutory appeal. The Fourth

Circuit granted Microsoft's appeal request only as to the issue of standing.[5] *See* Fourth Circuit

Order (Jan. 31, 2006) (attached as Ex. A). The Fourth Circuit affirmed the District Court and

remanded the case for further proceedings. *Novell*, 505 F.3d at 305.

---

[3] In addition, Microsoft argued that Counts II through VI were barred by the statute of
limitations. *See* Microsoft Mem. in Supp. of Mot. to Dismiss at 1 (Jan. 7, 2005) (Dkt. # 19).

[4] Additionally, the Court found that the statute of limitations for Count VI was tolled, and
therefore, the claim was timely. *Novell*, 2005 WL 1398643, at *1. Counts II through V,
however, were deemed untimely and dismissed. *Id.* at *3-5.

[5] Novell cross-appealed the dismissal of Counts II through V.

III.   SUMMARY JUDGMENT PROCEEDINGS

On remand, the parties undertook a lengthy discovery process that included dozens of depositions and the exchange of millions of pages of documents. Fact discovery closed in the spring of 2009 and was immediately followed by expert discovery. The parties submitted nine expert reports, and experts were deposed in August and September 2009.

After the close of expert discovery, the parties briefed motions for summary judgment. Novell renewed an earlier motion for summary judgment on certain Microsoft affirmative defenses based on Microsoft's allegation that Novell had sold its Count I claim to Caldera. *See* Novell Mem. in Supp. of Renewed Mot. for Summ. J. at 1 (Oct. 7, 2009) (D. Md. Dkt. # 102-1). Novell argued, relying on the Court's earlier ruling, that nothing in its transaction with Caldera regarding DR-DOS transferred claims related to the office productivity applications. *Id.* Microsoft opposed Novell's motion and cross-moved for summary judgment, arguing that Novell had sold the claim set forth in Count I to Caldera. *See* Microsoft Mem. in Opp'n to Novell's Renewed Mot. for Summ. J. & in Supp. of Microsoft's Cross-Mot. for Summ. J. at 1-2 (Nov. 13, 2009) (D. Md. Dkt. # 104-2).

Microsoft also moved for summary judgment on the merits, arguing that no genuine issues of material fact existed and that Microsoft was entitled to a judgment in its favor as a matter of law. *See* Microsoft Mem. in Supp. of Mot. for Summ. J. (Oct. 7, 2009) ("Microsoft Summ. J. Mem.") (D. Md. Dkt. # 101-2). In particular, Microsoft argued that Novell could not substantiate a Section 2 claim because Novell's allegations fell outside of the construct set forth in *Aspen Skiing*, and instead more closely resembled the allegations deemed insufficient in *Trinko*. *See* Microsoft Summ. J. Mem. at 29-35. Microsoft also contended that Novell could not

13

provide facts sufficient for a jury to conclude that Microsoft's conduct harmed competition in the PC operating systems market. *Id.* at 23-29.

In March 2010, the Court entered summary judgment against Novell on Count I, holding that Novell had sold any claims associated with the PC operating systems market in its transaction with Caldera for DR-DOS. *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 735 (D. Md. 2010), *rev'd in part*, 429 F. App'x 254 (4th Cir. 2011). The Court also held, however, that but for the sale-of-claims issue, Count I set forth a triable claim that could not be resolved as a matter of law.[6] *Id.*

In holding that Count I presented a triable claim that could not be resolved as a matter of law, the Court noted that Novell's allegations of anticompetitive conduct go beyond a mere refusal to cooperate that would be barred by *Trinko* because "Novell has presented evidence that Microsoft affirmatively misled Novell about Windows 95." *Id.* at 746. Moreover, the Court held, even assuming Microsoft's conduct could properly be characterized as a refusal to cooperate, "there is a question of fact about whether it was anticompetitive under *Aspen* and *Trinko*." *Id.* The Court also held Novell had presented evidence of Microsoft's "predatory motives" and a fair inference could be drawn that Microsoft "'sacrifice[d] short-run benefits and consumer goodwill in exchange for a perceived long-run [anticompetitive impact].'" *Id.* (second brackets in original) (citation omitted).

The Court also found that Novell had raised a genuine issue of fact as to whether Microsoft's conduct "directed at" Novell significantly contributed to harming the PC operating systems market. *Id.* at 749. Specifically, the Court stated:

---

[6] The Court also dismissed Novell's GroupWise allegations due to lack of notice, and granted summary judgment against Novell on Count VI.

> Novell has no obligation to create some "hypothetical market place," in which none of the other ISVs or applications had been weakened by anticompetitive conduct, and then prove that the conduct at issue would still have significantly contributed to anticompetitive harm in that hypothetical market. It would be contrary to the purpose of § 2 to immunize a monopolist for anticompetitive conduct, which in fact significantly contributed to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, none of which could prove that the conduct directed at any single firm would have by itself significantly contributed to the defendant's monopoly if none of the other small firms had been similarly weakened. . . . Rather, Novell need only prove that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market considering all the characteristics of that market at the time, including the condition of other ISVs and applications.

Id. at 749-50 (citations omitted).

Novell appealed, arguing that it did not sell the claim set forth in Count I to Caldera. *See* Novell Appellant Br. at 2-3 (Sept. 7, 2010) (relevant portions attached as Ex. B). In opposition, Microsoft argued that the Court's judgment should be affirmed on the same grounds on which it had been decided, or on the alternative grounds that Count I was barred by res judicata and that Novell could not prove as a matter of law that Microsoft's conduct harmed competition in the PC operating systems market. *See* Microsoft Appellee Br. at 1-3 (Sept. 17, 2010) (relevant portions attached as Ex. C).

The Fourth Circuit reversed this Court's ruling regarding the sale-of-claims issue and remanded for further proceedings, holding that Novell did not sell the claim set forth in Count I. *Novell*, 429 F. App'x at 255. Additionally, the Fourth Circuit found that Microsoft's res judicata argument was meritless and rejected Microsoft's arguments that it was entitled to judgment as a matter of law on the ground that Novell could not prove harm to competition in the PC operating systems market, finding that Novell's Count I claim was "appropriate for trial." *Id.* at 261-63.

15

IV.   **COLLATERAL ESTOPPEL EFFECT OF THE GOVERNMENT CASE**

In the Government Case, the United States alleged that Microsoft had violated both

federal and state antitrust laws by engaging in anticompetitive conduct to protect its monopoly

power in the PC operating systems market. *See Microsoft*, 253 F.3d at 47. After a bench trial,

Judge Thomas Penfield Jackson issued 412 Findings of Fact. *See Microsoft*, 84 F. Supp. 2d 9.

Based on those Findings of Fact, Judge Jackson issued Conclusions of Law holding that

Microsoft (1) illegally maintained its monopoly in the PC operating systems market,

(2) unlawfully attempted to monopolize the web browser market, and (3) entered into an illegal

tying arrangement by bundling Internet Explorer with Windows. *See United States v. Microsoft*

Corp., 87 F. Supp. 2d 30, 35-56 (D.D.C. 2000), *aff'd in relevant part and rev'd in part*, 253 F.3d

34 (D.C. Cir. 2001). As a remedy for this conduct, Judge Jackson ordered that Microsoft be

separated into two companies, one with responsibility for the operating systems business and the

second with responsibility for the applications business. *Microsoft*, 253 F.3d at 45 (citing *United*

States v. Microsoft Corp., 97 F. Supp. 2d 59, 64-65 (D.D.C. 2000)).

Microsoft appealed Judge Jackson's decision and the United States Court of Appeals for

the District of Columbia Circuit affirmed Judge Jackson's determination that Microsoft had

illegally maintained its monopoly in the PC operating systems market through twelve types of

anticompetitive conduct. *See id.* at 51, 58-80. The D.C. Circuit, however, reversed Judge

Jackson's ruling with respect to the tying and attempted monopolization claims, as well as eight

other types of conduct he had determined were anticompetitive. *See id.* at 46, 64-97. In

addition, the D.C. Circuit reversed Judge Jackson's order of divestiture, in part because the

Government needed to prove more than just liability to justify such a drastic remedy – it had to

prove a clearer indication of a significant causal connection between the anticompetitive conduct

and maintenance of monopoly power. *Id*. at 80, 106-07. Nevertheless, the D.C. Circuit did not

set aside any of Judge Jackson's Findings of Fact, as Microsoft had requested. *See id.* at 116.

Some of those Findings of Fact have collateral estoppel effect in this case. *See, e.g.*, Holley Aff.,

Ex. B to Microsoft Mem. (Dkt. # 495-3).

V.   TRIAL

Trial began with jury selection on October 17, 2011 and then proceeded with Novell's

case-in-chief. Novell called four fact witnesses to testify live: (1) Adam Harral, the lead

software architect on the PerfectFit 95 team responsible for developing shared code for

PerfectOffice and Novell's office productivity applications; (2) Greg Richardson, a software

developer on the shared code/PerfectFit 95 team; (3) Gary Gibb, the Director for the

PerfectOffice 95 suite; and (4) Robert "Bob" Frankenberg, former CEO of Novell during the

period that Novell owned WordPerfect and the other office productivity applications. Novell

also designated and presented to the jury portions of eleven depositions of former Microsoft

executives and employees.[7] Finally, Novell presented the testimony of three expert witnesses:

(1) Dr. Roger Noll, an expert in antitrust economics who testified that, based on his analysis,

Microsoft's conduct against Novell harmed competition in the PC operating systems market;

(2) Ronald Alepin, an expert in computer software development and computer system design

who testified about the invalidity of Microsoft's purported technical justifications; and

(3) Dr. Frederick Warren-Boulton, an expert in antitrust economics who quantified the damages

attributable to Microsoft's anticompetitive conduct.

---

[7] Specifically, Novell presented the deposition testimony of Bill Gates, James Allchin, Doug
Henrich, John Ludwig, Cameron Myhrvold, Paul Maritz, Scott Raedeke, Jeff Raikes, Russell
Siegelman, Brad Silverberg, and Steven Sinofsky.

At the close of Novell's case-in-chief, Microsoft moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) on the grounds that (1) Novell allegedly failed to present evidence that the withdrawal of support for the namespace extension APIs enabled Microsoft to unlawfully maintain its monopoly in the PC operating systems market; (2) Novell allegedly could not prove harm to competition in the PC operating systems market because both its key franchise applications theory and its middleware theory of liability were inconsistent with the evidence presented at trial; and (3) Novell's claim purportedly failed because Microsoft's withdrawal of support for the namespace extension APIs was allegedly not anticompetitive conduct under the antitrust laws. *See* Microsoft's Mem. in Supp. of Its Mot. for J. as a Matter of Law at 2-10 (Nov. 17, 2011) (Dkt. # 298). The Court refused to grant Microsoft's motion.

Microsoft then presented its defense, calling fourteen witnesses to testify. Five of these witnesses were current or former Microsoft employees: (1) Bill Gates, the former President and CEO, and current Chairman of the Board of Directors, of Microsoft; (2) Brad Struss, the former Microsoft Developer Relations Group ("DRG") executive with responsibility for interacting with Novell; (3) Robert "Bob" Muglia, a former Microsoft Senior Vice President and Program Manager for Windows NT; (4) Satoshi Nakajima, a former Microsoft developer who created, developed, and helped implement the namespace extension APIs; and (5) Joseph Belfiore, a current Microsoft executive who was responsible for the Windows 95 shell development during the relevant period. Microsoft also called six former WordPerfect/Novell employees: (1) Craig Bushman, who was involved in international marketing; (2) Nolan Larsen, the Director of Human Factors at Novell during the relevant time; (3) Karl Ford, a developer on the user interface for WordPerfect for Windows 95; (4) David Acheson, a former salesman with a break in his employment during critical months in 1995 and 1996; (5) David LeFevre, a marketing

18

executive at Novell who later went to work for Microsoft on the Office team; and (6) Willard

"Pete" Peterson, a former Chief Operating Officer of WordPerfect who left the company in 1992,

well before Novell's acquisition.[8] Finally, Microsoft called three experts to testify:

(1) Dr. Kevin Murphy, Microsoft's antitrust economics expert; (2) Dr. John Bennett, Microsoft's

technical expert; and (3) Professor Glenn Hubbard, Microsoft's damages expert.

      After almost two months of trial, the Court instructed the jury on the morning of

December 14, 2011 and provided them with an eight-question verdict form. Questions 1 through

3 of the verdict form focused on whether Microsoft's withdrawal of support for the namespace

extension APIs caused injury to Novell's business and was anticompetitive.[9] Questions 4 and 5

provided the jurors with alternative standards for finding harm to competition in the PC

operating systems market, which the parties disputed. Questions 6 and 7 required the jurors to

identify on which Novell theory they would premise liability – whether Novell's applications

constituted a middleware threat to Microsoft's PC operating systems monopoly or a threat as key

franchise applications. Question 8 asked the jurors to decide on the amount of damages to which

Novell was entitled. After receiving these instructions and the verdict form, the jury began

deliberations.

      On December 15, 2011, after the jury indicated some difficulty in reaching agreement,

the Court issued a mild "*Allen* charge" to reinvigorate deliberations, a tactic that appeared to be

---

[8] Microsoft also played videotaped portions of the transcripts of two witnesses – a former
WordPerfect/Novell employee, Charles Middleton, and former Microsoft employee, Cameron
Myhrvold.

[9] Novell was not required to prove that Microsoft possessed monopoly power in the PC
operating systems market because that fact was established in the Government Case, *see, e.g.*,
Finding of Fact ¶ 33, and granted collateral estoppel effect prior to trial, Letter from Court
(Oct. 4, 2011) (Dkt. # 163).

successful. The next day, the parties were again confronted with juror notes indicating a

potential impasse. Novell's attorneys requested that, in light of the millions of dollars expended

by each party through two months of trial, the Court issue a stronger "*Allen* charge" and allow

the jury to return for one more day of deliberation after a weekend of reflection. The Court

decided instead to discharge the jury on the afternoon of December 16, 2011, the third day of

deliberations, and to declare a mistrial.

After discharging the jury, the Court spoke privately with the jurors about their

deliberations, and then permitted the jurors to speak to counsel for the parties. Eleven members

of the jury indicated that they would have found in favor of Novell. All twelve agreed that

Microsoft had engaged in anticompetitive conduct that caused injury to Novell (Questions 1

through 3 on the verdict form).

<div align="center"><u>STATEMENT OF FACTS</u></div>

**I.   NOVELL'S OFFICE PRODUCTIVITY APPLICATIONS AND SUITE
THREATENED MICROSOFT'S MONOPOLY POWER IN THE
PC OPERATING SYSTEMS MARKET**

A.   <u>WordPerfect's Success On The Windows Platform</u>

The WordPerfect word processor was one of the best-selling PC software applications

ever introduced. WordPerfect was available in 23 languages and resided on all of the most

widely used computer platforms and operating systems, including DOS, Windows, UNIX,

Apple/Macintosh, and DEC's VAX/VMS. PX 174 at NOV00364208. Microsoft's lengthy

historical discussion of WordPerfect sheds little light on the state of WordPerfect when Novell

purchased it in June 1994. Although WordPerfect was delayed in releasing a product for

Windows 3.0, by 1994 it was positioned to be very successful on Windows 95. Indeed,

<div align="center">20</div>

WordPerfect's sales on the Windows platform increased every year between 1991 and 1994. Tr. 4093:11-4094:23 (LeFevre).

WordPerfect began developing applications for Windows as soon as Windows 3.0 was released in 1990. Tr. 4183:3-7 (Middleton). WordPerfect "worked really hard" to release WordPerfect 5.1 for Windows 3.0 in 18 months and it was "a very successful release."[10] Tr. 4212:3-20 (Middleton). The delay in releasing WordPerfect 5.1 did not make it impossible for WordPerfect to succeed on the Windows platform. Tr. 4704:12-20 (Peterson). In 1991 and 1992, WordPerfect's installed base on Windows and DOS exceeded Microsoft Word's installed base by millions of users. Tr. 4705:3-24 (Peterson); *see also* PX 125 at NOV-B01491186 (noting IDC estimates showed that WordPerfect's DOS and Windows installed base at the end of 1992 was 3.8 million more users than Microsoft Word's installed base). In fact, by 1992 Mr. Peterson estimated that WordPerfect had garnered 40% market share on the Windows platform. Tr. 4677:6-11 (Peterson).

By the time WordPerfect released 5.2, in November 1992, "which was an improvement on [5.1]," WordPerfect "had done a lot of things right. We were behind, but we were catching up and we felt good about that." Tr. 4212:18-20 (Middleton). In 1993, WordPerfect's total

---

[10] While Microsoft claims WordPerfect was to blame for being late to Windows in the early 1990s, the contemporaneous evidence indicates that Microsoft hatched a plan to "giv[e] a competitive advantage to [its] own apps" by telling "ISVs to develop for OS/2" while simultaneously developing its own applications for Windows. PX 6A. Under Microsoft's direction, "[s]oftware developers, other than those with current Windows products under way, who are targeting both environments, [were] ***recommended to start with OS/2***." PX 4 at IBM 7510089982 (emphasis added); *see also* Tr. 4700:8-14 (Peterson). Internally, however, Microsoft understood that it had "an enormous, one-time opportunity to pre-empt [its] traditional applications competitors (Lotus, WordPerfect, Aldus)" on "the Windows platform, in terms of both creating sockets as well as taking possession of those sockets with our Windows applications." PX 7 at X 194848-49. Microsoft described this "headfake" as the "single largest opportunity for the company to exploit in FY91" – it was a "once in a lifetime opportunity." *Id.* at X 194848.

installed base on Windows and DOS exceeded Microsoft Word's installed base on Windows and DOS. PX 599A at NWP00044129. By June 1993, WordPerfect for Windows had sold 3.4 million units. PX 125 at NOV-B01491185-86.

When WordPerfect released version 6.0 for Windows in October 1993, both the industry and Microsoft quickly understood that the product would be a success. *PC Computing Magazine* named WordPerfect 6.0 the MVP for word processors in 1993, stating that it was "a computer user's garden of unearthly delights . . . adding functions available in its chief rival, Microsoft Word for Windows, and then some." PX 110 at 2; *see also* Tr. 542:2-21 (Harral) (discussing PX 110); Tr. 3990:3-17 (Acheson).

An internal Microsoft document titled "WordPerfect for Windows 6.0, competitive product analysis" took a "comprehensive look at WordPerfect for Windows 6.0 and how it compares to Word for Windows 6.0" and found that "[t]he industry generally lauded WordPerfect's robust and feature-filled Windows word processor, as it seems like WordPerfect finally created an application that exploited the Windows platform." PX 378 at MX 2175197. WordPerfect 6.0's success was due in part to its standout technology, "QuickFinder[,] and [its] ability to create a directory from the Open File dialog box." *Id.* at MX 2175202. Microsoft conceded that "users love both" and that while Microsoft's "file management and search capabilities were improved with Word 6.0, ***this is definitely an area of unmatched strength for WordPerfect***." *Id.* (emphasis added); *see also* Tr. 3990:6-12 (Acheson) (WordPerfect 6.0 was a "best of breed word processor application" and "was better than any other word processor out there including Microsoft Word.").

WordPerfect 6.0's success also was demonstrated by its sales. Microsoft acknowledged that "WordPerfect's word processing sales still rival those of Word," and that "WordPerfect for

Windows unit shipments increased by 60% while Word's increased only by 6%." PX 378 at

MX 2175197. In fact, WordPerfect word processor revenues exceeded $300 million in 1993.

Tr. 3992:9-11 (Acheson). Microsoft clearly understood that "WordPerfect's success up to now

shows it is making inroads in the Windows market and not just by converting their DOS installed

base," PX 378 at MX 2175197, and that by 1993, WordPerfect had "largely caught up," PX 62 at

FL AG 0019001. By 1994, WordPerfect had sold more than 15 million copies of WordPerfect

worldwide.[11] PX 125 at NOV-B01491186; PX 174 at NOV00364208.

WordPerfect continued to make improvements to its word processors with each

additional release. Tr. 1256:18-20 (Frankenberg). By early 1994, WordPerfect faced a "huge

potential growth" opportunity in converting its "WPDOS user base as they transition to the

Windows environment." PX 125 at NOV-B01491186. In April 1994, WordPerfect released

WordPerfect 6.0a for Windows, which also was well received in the marketplace.

PC Computing Magazine named WordPerfect 6.0a as the 1994 MVP award winner and chose

WordPerfect 6.0a over Microsoft Word for Windows as the best word processor of 1994.

Tr. 1257:19-1258:5 (Frankenberg). Even Mr. Gates was dumbfounded and frightened by

WordPerfect's technological advances in WordPerfect 6.0a: "I'm amazed at their

responsiveness. This is very scary and somewhat depressing. This is as much as we plan to do

for 1995. A lot of work in this release." PX 162A at MX 6009686.

---

[11]   Some documents indicate that the number was much higher. In fact, a WordPerfect for
Windows business review exercise written in July 1994 indicates that WordPerfect for DOS
alone had "one of the largest installed base of any application ever developed (approximately
17 million WPDOS installed customers worldwide)." PX 198 at NOV-25-006605.

B.   WordPerfect Posed An Even Greater Threat To Microsoft After The
        Merger With Novell

In June 1994, Novell merged with WordPerfect and acquired Quattro Pro from Borland.

Mr. Frankenberg, Novell's CEO at the time of the merger, estimated that in 1994, WordPerfect's

installed base was "in excess of 20 [m]illion users." Tr. 1011:4-20 (Frankenberg). As late as

January 1994, close to 75% of the market had yet to adopt a suite. PX 412 at NOV 00498191;

PX 395 at NWP00008283; Tr. 1009:6-20 (Frankenberg). "Traditionally, the word processor,

more than any other application, ha[d] played the largest role in influencing the purchasing

decision of a potential suite." PX 412 at NOV 00498191; *see also* Tr. 1009:21-1010:18

(Frankenberg). In the United States, 65% of the installed base for word processing in 1994 was

WordPerfect, in comparison to Microsoft Word, which accounted for only 22.6%. PX 125 at

NOV-B01491186. Thus, "[a]s the leading vendor of word processing software, WordPerfect

ha[d] direct access to the largest user base of potential suite customers in the industry." PX 412

at NOV 00498191. This gave WordPerfect a "distinct advantage . . . of being able to go to the

largest install[ed] base and with the most important application [to] convince them to use our

suite rather than Lotus's or Microsoft's." Tr. 1009:21-1010:18 (Frankenberg).

After the merger, Microsoft perceived Novell as even more of a threat. Mr. Gates feared

that "[t]he merger of Novell-WordPerfect and acquisition of Quattro Pro" would change

Microsoft's "competitive framework substantially" because "[t]he already intensely competitive

software business has become even more competitive." PX 154 at MX 9037683. Specifically,

Mr. Gates recognized that if "Novell executes well they will be able to turn their Office suite into

a serious contender which could force price and volume cuts in our Office business." *Id.* He

predicted that Novell would "be able to set more standards for workgroups, document

24

management, image systems, and all of the services they have been moving towards." *Id.* By

maximizing the penetration of its suite, Microsoft believed Novell could control operating

system standards. PX 156.

In December 1994 – less than six months after the merger – Microsoft's fears were

realized when the Novell/WordPerfect team successfully released the blockbuster suite

PerfectOffice 3.0. *InfoWorld*, whose reviews Mr. Gates testified were the "most watched and the

most important at the time," Tr. 2732:4-6 (Gates), reported that "PerfectOffice nearly lives up to

its name," and was "a terrific assortment of programs that offers more integration than we've

seen so far in any high-end office suite," and rated it higher than Microsoft Office. PX 297 at

NOV 00012602, 604. Microsoft's own evaluation of PerfectOffice was just as strong: "The

current suite of applications in PerfectOffice are world class and there is reason for us to follow

the progress of this suite very carefully, especially given the strength of Novell's networking and

sales force." PX 273 at FL AG 0047311. Microsoft was amazed that Novell could "do so much

in so little time." PX 193 at MS 5099114.

WordPerfect 6.1, which was part of PerfectOffice 3.0, also received stellar reviews.[12]

InfoWorld stated that WordPerfect 6.1 was an "excellent application that has an honest chance of

unseating Microsoft Word for the top spot among word processing packages." PX 241 at

MS-PCA 1421359. Even Microsoft noted that WordPerfect 6.1 had a number of "glitzy

features," PX 239 at FL AG 0100542, and an internal Microsoft evaluation of the product even

commented that the "discipline and focus of [WordPerfect 6.1] show that WordPerfect clearly

has its act together and will remain a formidable competitor to Word for years to come," PX 241

---

[12] Both Mr. Ford and Mr. LeFevre agreed with the reviews: WordPerfect was "the best word
processor." Tr. 3714:15-20 (Ford); Tr. 4110:12-19 (LeFevre).

at MS-PCA 1421358-59. Microsoft also correctly recognized that "'document management' is rapidly evolving into an important component in the office computing environment," and that office productivity applications depend on effective document management for their success. PX 273 at FL AG 0047302. Microsoft internally admitted that it was "behind in this category, only now responding to WordPerfect's Quick Finder technology" and WordPerfect's file open dialog, which was "winning rave reviews." *Id.*; PX 168 at MS 0171028. After observing a demo of the WordPerfect 6.1 product at COMDEX, Microsoft's Dale Christensen similarly noted in a memorandum to executives that WordPerfect 6.1 "guarantees that Wordperfect will be a significant competitor in word processing for the conceivable future." PX 239 at FL AG 0100542.

PerfectOffice 3.0's and WordPerfect 6.1's successes in the industry reviews were matched by their sales. WordPerfect's word processing market share on Windows from 1991 to 1994 had historically been between 20% and 30%. Tr. 4540:25-4541:16 (Hubbard). In 1994, Novell captured 25% of the suite market in just three months. Tr. 1018:25-1019:6 (Frankenberg); PX 492 at FL AG 0080063. While PerfectOffice's market share on Windows decreased in 1995 to 8%, Tr. 1915:16-22 (Noll), that decrease is reasonable given that the market stalled in anticipation of Windows 95, Tr. 1077:1-24 (Frankenberg); Tr. 4095:9-17 (LeFevre), and as a result of Microsoft's anticompetitive conduct, Novell was forced to sell its 16-bit suite product in a 32-bit marketplace. Nevertheless, in 1995, WordPerfect's word processor revenues exceeded $250 million. Tr. 1251:5-8 (Frankenberg).

C.   Microsoft's Monopoly Power In The PC Operating Systems Market Is
        Protected By An Applications Barrier To Entry

It is undisputed that Microsoft enjoyed monopoly power in the PC operating systems

market, meaning it had "the power to control prices or exclude competition." *United States v.

E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Barriers to entry are created by any

market condition that makes entry more costly or time-consuming. *S. Pac. Commc'ns Co. v. Am.

Tel. & Tel. Co.*, 740 F.2d 980, 1001 (D.C. Cir. 1984). Barriers to entry chiefly deter potential

competitors from entering the market in a serious way because rivals will only enter a market if

they believe that their expected profits will exceed the costs of entry. *See* Finding of Fact ¶ 36.

Without barriers to entry, the self-correcting forces of the marketplace will limit a monopolist's

power in the relevant market. *See Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d

1195, 1207-08 (9th Cir. 1997); 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 634b

(3d ed. 2011) ("If the law can prevent 'artificial' barriers to such new entry, then the self-

correcting forces of the marketplace will impede the attainment and maintenance of monopoly

except where the monopolist is beyond cavil because it was, and continues to be, so efficient and

progressive as to outcompete all actual and potential rivals."); *see also* Tr. 1770:9-13, 1959:20-

1960:10, 1930:23-1931:10 (Noll). Barriers to entry are therefore critical to maintaining

monopoly power. 2B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 420b (3d ed.

2011); *see also Reazin v. Blue Cross & Shield of Kan., Inc.*, 663 F. Supp. 1360, 1436 (D. Kan.

1987) ("'[T]he lower the barriers to entry, and the shorter the lags of new entry, the less power

existing firms have.'" (citation omitted)), *aff'd*, 899 F.2d 951 (10th Cir. 1990).

It also cannot be disputed that an "applications barrier to entry" protected Microsoft's

monopoly power at all relevant times in this case. Findings of Fact ¶¶ 36, 39. This barrier arose

from what is known as the "chicken-and-egg problem": consumers will only use operating

systems for which there is a large and varied set of high-quality, full featured applications

(including key franchise applications) that will be supported in the future. Software developers

write applications to the dominant platform first and will re-engineer their applications for other

platforms only if there is sufficient demand to offset the costs of re-engineering and supporting

their applications on other operating systems. While many firms were technologically and

financially capable of entering the operating systems market, their ability to meet demand was

useless because the applications barrier to entry thwarted demand for anything other than niche

systems. Finding of Fact ¶ 30.

> D.   Novell's Office Productivity Applications And Suite Were "Middleware" With The Potential To Weaken The Applications Barrier To Entry

WordPerfect and its shared code "PerfectFit," as well as AppWare and OpenDoc in the

PerfectOffice suite, were "middleware" because they relied on interfaces provided by the

underlying Windows operating system while simultaneously exposing their own APIs to

developers. *See* Finding of Fact ¶ 28. Novell's office productivity applications and shared code

technologies were popular, were cross-platform, and exposed a wide range of APIs and

sophisticated functionality to developers.

> 1.   *Middleware Could Reduce the Applications Barrier to Entry*

Microsoft argues that Novell has 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 systems market. Microsoft Mem. at 6. Microsoft's

definition of middleware, however, rests on a deeply flawed interpretation of the opinions in the

Government Case and of Dr. Noll's testimony in this case.

The Government sued Microsoft under the theory that middleware could reduce the "chicken-and-egg problem," Finding of Fact ¶ 39, by taking over some of the platform functionality provided by Windows and thereby "weaken the applications barrier to entry." Finding of Fact ¶ 68. Judge Jackson defined "middleware" as software that "relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers." Finding of Fact ¶ 28. The D.C. Circuit agreed, writing that middleware simply refers to "software products that expose their own APIs." *Microsoft*, 253 F.3d at 53 (citing Finding of Fact ¶ 28).

The Government focused its attention on two specific types of middleware software: Netscape's Navigator and Sun's Java technologies. *Id*. Judge Jackson and the D.C. Circuit found that both Navigator and Java *were* middleware products. *Id.* (citing Finding of Fact ¶ 28). In fact, Microsoft's counsel admitted that Navigator posed a potential threat to Windows before the D.C. Circuit. *Id.* at 79.

Judge Jackson found that Navigator had three attributes that gave it "the potential to diminish the applications barrier to entry." Finding of Fact ¶ 69. First, the Navigator browser was a complement to Windows and had the potential to gain widespread use. *Id*. Complementing Windows thus makes a middleware product *more* likely, not less likely, to diminish the applications barrier to entry. *Cf.* Microsoft Mem. at 87-90. Second, Navigator exposed "a set (albeit a limited one) of APIs" which provided platform capabilities. Finding of Fact ¶ 69. Third, Navigator was cross-platform. *Id*. Similarly, the Java technology exposed its own APIs and had the potential to reduce porting costs. *See* Findings of Fact ¶¶ 68, 77. Although a potential threat, neither Navigator nor Java exposed enough APIs to support the development of "full-featured applications that will run well on multiple operating systems

29

without the need for porting." Finding of Fact ¶ 74. In fact, both products were at least "several

years" away from evolving into a real threat to the applications barrier to entry, if at all.

Findings of Fact ¶¶ 28, 29.

Novell's software had all of the characteristics of middleware. Like Navigator and Java,

Novell's office productivity applications would complement Windows. *See* Tr. 265:25-267:8,

268:1-270:25 (Harral); Tr. 638:7-12 (Richardson); Tr. 1227:1-6, 1227:15-18 (Frankenberg);

Tr. 1664:23-1665:11, 1666:4-1667:23 (Alepin). Novell's office productivity applications were

also very popular and had the potential to gain widespread use on Windows 95 due to

WordPerfect's existing installed base. *See, e.g.*, PX 378; PX 412; PX 599A; Tr. 830:22-23,

831:9-11 (Gibb) (describing WordPerfect as "very popular" and agreeing that WordPerfect had a

"big loyal base of customers"); PX 414 at NOV-B00668860 (noting that with PerfectFit,

developers could develop programs for more than 18 million people who use WordPerfect and

other products in the PerfectOffice suite); Tr. 1009:6-1010:18, 1011:4-20 (Frankenberg)

(explaining that Novell had a large opportunity to gain market share in suites given its installed

base of millions of users); *see also* discussion *supra* Facts Part I.A-B.

Further, Novell's office productivity applications, and the PerfectFit and AppWare

technology integrated and bundled with them, exposed a large set of APIs to software

developers. *See, e.g.*, PX 371 at 6-8 (indicating PerfectFit Shared Code 2.3 had 1555 APIs, with

more to be added in PerfectFit 95); PX 368 at 15-17 (same); PX 191 at FL AG 0099045-47;

Tr. 1405:4-1406:16, 1408:8-1409:10, 1410:8-14 (Alepin). In addition, WordPerfect and

PerfectFit were cross-platform on a variety of operating systems, and Novell planned to make

PerfectOffice for Windows 95 cross-platform as well. Finally, Novell's AppWare and OpenDoc

technologies, when integrated and bundled with Novell's office productivity applications,

allowed developers to create their own cross-platform software applications. *See, e.g.*, PX 410 at

NOV-B00656847, 54-56; PX 90 at MS-PCA 2410390; PX 412 at NOV 00498197,

NOV 00498202-03; Tr. 1013:19-1015:11, 1016:9-1017:19 (Frankenberg); Tr. 1408:8-1409:10

(Alepin). In fact, unlike Navigator and Java, AppWare allowed for the development of fully

portable stand-alone programs. *See infra* Facts Part I.D.3. Even if developers only partially

relied on the APIs exposed by Novell's office productivity applications, these middleware

technologies, either alone or in combination with AppWare and OpenDoc, would reduce porting

costs and lessen the applications barrier to entry. *See, e.g.*, Finding of Fact ¶ 74 (even partial

reliance on Java APIs reduces porting costs and encourages cross-platform applications

development).

2.   *Microsoft Reasonably Feared Novell as a Middleware Vendor*

There is substantial contemporaneous evidence in the record that Microsoft viewed

Novell's middleware technologies as a potential threat to its continued monopoly power in the

PC operating systems market.

According to Microsoft, Novell was well positioned to threaten the Windows monopoly

even before Novell acquired WordPerfect because "they have an installed base; they have a[]

channel; they have marketing power, they have good products. AND they want our position.

They want to control the APIs, middleware, and as many desktops as they can in addition to the

server market they already own." PX 32 at MS7079459. Microsoft considered Novell "THE

competitor to fight against" because, in the words of senior Microsoft executive Jim Allchin,

"[t]hese guys are really good." *Id.*

Novell was "dangerous not only because of [its NetWare product] but because they are

intent on becoming a 'CROSS-PLATFORM' PLATFORM company." PX 33 at MS 5011635.

In contrast, Microsoft did not have sufficient "ability to differentiate its applications from the competition" and did not "have credible products to counter Notes and Novell." *Id.* at MS 5011640. In Microsoft's view, Novell's "strong cross-platform API push" was an "insidious" and ever-present threat to Microsoft's continued dominance, *see id.* at MS 5011648, and Microsoft executives continually voiced their fears that competitors would use middleware products to undercut Windows:

> What I see is that our competitors will try to turn windows into the new unix – in a bad way. [T]he unix that Frankenberg called the "[B]osnia [H]erzegovina of operating systems." [T]hat is, they will "adopt" windows and then split the windows standard. [T]hey will take the win 3.1 level of api as the standard and then build their own middleware layers on top . . . . [T]hey hope to create mass confusion about exactly what the windows api's are, and take them out of microsoft's ownership. . . . If they can freeze "windows" at 3.1 (or nt) level api, then they can be the provider of value added services. [I]t gives them more freedom to clone windows – the definition of "windows" is static. [F]or [N]ovell, it makes it easier for them to slip dr dos underneath. [I]t lets them position themselves as the supplier of connectivity services for windows to servers – the "middleware" which builds on windows and thus takes ownership away from us. [T]his effort to balkanize windows is a clear threat . . . .

PX 44 at MS7080466-67. Mr. Gates "totally agree[d]" with this view. *Id.* at MS7080466.

Similarly, in an internal Microsoft email thread dated June 15, 1993, senior Microsoft executive Brad Silverberg wrote "our competitors are going to do everything they can to fragment windows, they will build their own middleware to claim api ownership." PX 54 at MS 0185884. In response, Microsoft executive John Ludwig wrote to Brad Silverberg, David Cole, Paul Maritz, and others: "[O]ur worst nightmare is novell/lotus being successful at establishing their 'middleware' as a standard. [O]urs ought to be ubiquitously available to forestall this. [O]ur huge advantage vis-à-vis novell is our end-user franchise, we shouldn't cast aside this advantage." *Id.*

32

A few months later, Mr. Silverberg wrote that "Novell is coming at us from every direction possible and has a very concerted, multilayer attack strategy, including the political system. I would [also] include [as competitors] other companies who are intent on building 'middleware,' which is just system software by another name." PX 88 at MSC 090001843-44. Mr. Silverberg cautioned that Microsoft should not continue to "vastly underestimate the competitive situation for operating systems" that middleware represented because "[e]ach competitor can exploit a weakness, and they are getting better every day." *Id.*

> 3.   *Novell's Office Productivity Applications and Suite Were Middleware*

Shared code was a component of the WordPerfect word processor[13] that was shared among the word processor and other WordPerfect Corporation products for efficiency purposes. Tr. 206:3-207:5 (Harral). WordPerfect had been working on shared code since as early as 1991. Tr. 210:24-211:3 (Harral). Each product had an application "engine" that was built on top of the shared code layer, which could then move between any operating system platform where shared code resided. Tr. 206:3-207:5 (Harral). Because multiple product engines shared a common layer of code, their behaviors would be the same and they would all operate in a similarly integrated way. *Id.* Shared code eventually started to take on file handling and file management functionality, such as providing dialogs for opening and saving files. Tr. 209:15-210:22 (Harral).

WordPerfect had traditionally published or provided to third parties portions of the shared code. Tr. 218:21-219:16 (Harral). Over time, WordPerfect began to publish all of its shared code, and promoted it explicitly to ISVs as a resource that could be written to and that would

---

[13] Shared code amounted to around one-third of the WordPerfect word processor. Tr. 217:24-218:3 (Harral).

enable them to use the same code base across different operating systems. Tr. 218:21-219:16 (Harral). When Novell acquired WordPerfect, Novell branded the shared code as "PerfectFit." *Id.*; Tr. 786:16-787:2 (Gibb). PerfectFit became a part of the PerfectOffice suite and shipped with PerfectOffice. Tr. 212:16-19, 390:24-391:2 (Harral).

All the functionality that PerfectFit provided to WordPerfect, including file viewers, file converters, button bars, and menus, was available to third-party developers as well. Tr. 226:9-19 (Harral). WordPerfect offered "a PerfectFit Software Developers Kit (SDK) to [third parties] that include[d] a broad range of developer tools including PerfectScript, shared programming code, and APIs." *See* PX 207 at NOV 00498183. PerfectFit offered third-party developers a (1) common look and feel (menus, icons, toolbars); (2) common dialogues (File Open, Save, Save As); (3) common tools (Speller, Thesaurus, Grammar Checker, File Manager); (4) common automation (QuickCorrect, QuickHelp, QuickMenus); (5) common scripting language (record and play back across applications); and (6) common code (shared between applications). *See* PX 395 at NWP00008289.

The common scripting language in shared code, called PerfectScript, gave third-party developers the ability to call scriptable components and to capture and replay tasks performed in WordPerfect. Tr. 227:23-229:10 (Harral). WordPerfect also contained the WordPerfect Open API ("WOAPI"), which allowed developers to intercept certain commands and insert new code to customize WordPerfect functionality. Tr. 229:12-230:23 (Harral); *see also* PX 410 at NOV-B00656859. WOAPI was supported on the Windows, DOS, and UNIX versions of WordPerfect and other applications. *See* PX 192 at MX 9037665. WordPerfect also exposed Writing Tools APIs that were supported on the Windows and UNIX versions of WordPerfect. *Id.* PerfectFit, PerfectScript, and WOAPI were all technologies that were included in the

34

WordPerfect word processor. Tr. 230:24-231:3 (Harral). These technologies were also included within the PerfectOffice suite. Tr. 231:4-6 (Harral). In using these features, third-party developers would write their own applications with shared code using the shared code libraries, which contained the shared code APIs that could be called. Tr. 226:20-227:13 (Harral). Third parties would simply write their applications against the shared code layer and associated APIs, and then compile their programs using the shared code libraries for use in their products. *Id.* As a result of using shared code, application developers (at least for the functionality utilized) did not have to understand the underlying operating systems on which their programs ran. Tr. 1016:3-8 (Frankenberg).

Novell started a program called PerfectFit Partners to market shared code to developers outside the company who wished to license it. Tr. 225:6-17 (Harral); Tr. 784:9-24 (Gibb); PX 192 at MX 9037665. PerfectFit Partners included at least 1,000 member companies. *See* Tr. 887:17-25, 888:13-15 (Gibb); *see also* PX 333 at MS-PCA 1985716. Two teams within Novell, the shared code team and the documentation team, worked together to document the shared code so that third parties could use it. Tr. 225:18-226:8 (Harral); Tr. 784:9-24 (Gibb). Novell also provided support, similar to Microsoft's Premier Support, to developers utilizing shared code in their products. Tr. 225:18-226:8 (Harral).

WordPerfect and its shared code was indisputably middleware because it exposed its own APIs to software developers. Tr. 783:5-18 (Gibb); Tr. 1404:19-1406:16, 1408:8-1409:23, 1410:8-14 (Alepin); *see also* Tr. 236:2-6 (Harral); *Microsoft*, 253 F.3d at 53; Finding of Fact ¶ 28. It was software that sat "in the middle" between the application core and the operating system and provided features that would help programs work through problems and achieve needed functionality. Tr. 233:15-234:19 (Harral). Developers would purchase or license the

35

shared code as middleware so that they could use its features in their products instead of having

to incur the costs to develop these features themselves, which could in some cases take years. *Id.*

Microsoft recognized that PerfectOffice was an emerging middleware platform. For example,

Cameron Myhrvold wrote in 1994 that "[Microsoft] is in a platform war with Office just as we

are with Windows" because "Lotus and Novell/WP are building competing application

'platforms.'" *See* PX 201 at MX 6046625. Microsoft was particularly concerned about Novell

providing "PerfectFit Technology and WP 'SDKs' & WP 'Windows Open API'" to ISVs and

including "Visual App Builder [AppWare] in PerfectOffice." *See id.* at MX 6046634.

AppWare, which was part of the PerfectOffice suite, was both middleware – because it

provided APIs to developers – and an interface that allowed the use of these APIs.

Tr. 1406:11-16, 1408:8-1409:10, 1410:8-14 (Alepin); Tr. 236:2-8 (Harral). It was a graphical

and object-oriented application development tool (formerly known as Visual AppBuilder) that

allowed developers to build stand-alone programs. PX 410 at NOV-B00656854. Developers

could use AppWare in PerfectOffice to build applications that integrated with PerfectOffice or

were completely stand-alone programs independent of PerfectOffice. *Id.* Developers could

quickly build fully portable software by linking components called AppWare Loadable Modules

("ALMs").[14] PX 412 at NOV 00498203; *see also* Tr. 1408:8-1409:10 (Alepin) (noting that if a

programmer uses AppWare defined programming interfaces his "application will be portable

across multiple platforms"). As Dr. Noll explained, "anybody who writes a program using

---

[14] PerfectOffice Professional came with a library of PerfectOffice ALMs. *See* PX 412 at
NOV 00498203.

AppWare, therefore is writing a program that is cross-platform, and, by doing so, reducing the applications barrier to entry."[15] Tr. 1771:2-11 (Noll).

AppWare enabled cross-platform development by taking WordPerfect's shared code and other technologies and presenting them in a conceptual way that allowed non-programmers to write programs. Tr. 234:22-236:1 (Harral). In fact, using AppWare in PerfectOffice enabled users to build applications through a simple interface by combining and connecting different ALM icons. PX 412 at NOV 00498203. In total, the combination of WordPerfect and AppWare exposed more programming interfaces to third-party developers than Netscape Navigator exposed. Tr. 1410:8-14 (Alepin).

Senior Microsoft executive Paul Maritz thought of AppWare as an explicit attempt by Novell to develop a layer that would provide all of the services required by applications. Dep. of P. Maritz, May 24, 1994 (played Oct. 25, 2011) at 108:1-11 (Dkt. # 283). He claimed internally that Novell's goal with AppWare was for third-party software developers to know only about AppWare and obtain all the services that their applications needed from AppWare. *Id*. Microsoft viewed AppWare as one of its most serious long-term threats because AppWare held the potential to allow Novell to incrementally obtain what would amount to an operating system over time. *Id*. at 108:12-21. In fact, Mr. Silverberg believed that AppWare had already become the equivalent of an operating system by 1994:

> Q.   What is your understanding of AppWare?
>
> A.   *AppWare is an [operating] system*. AppWare contains all of the functions of an operating system and is a wonderful attempt by Novell to again reduce Windows or anything underneath it to a commodity so it could then

---

[15] Because AppWare enabled cross-platform development, it was a technology with the potential to enable users to select operating systems other than Windows when they made their next computer purchase. Tr. 1772:8-1773:18 (Noll).

> get applications completely dependent on AppWare, have no dependence
> on Microsoft or other pieces underneath it, so they can then supply their
> own pieces underneath it and thus eliminate – as Mr. Noorda has stated,
> his goal is a Windows-free world.

Tr. 932:18-933:1 (Silverberg) (emphasis added).

Similarly, Mr. Silverberg wrote that Novell's strategy with AppWare "will be an incremental, insidious one." *See* PX 127 at MS 5064010. Microsoft viewed AppWare as "dangerous," stating that AppWare "might be [the] first viable platform for commercial cross-platform development" and "could in the long run blur the o/s API line and [squeeze] us into the camp of BIOS builders." *See* PX 90 at MS-PCA 2410390. AppWare was "scary" because "it is just another windowing API, and a fairly complete one. ***This is direct competition to Windows***." PX 102 at MS7096165 (emphasis added).

Microsoft's Mr. Ludwig recognized in October 1993 that AppWare was a very real competitive threat, writing that "[t]he AppWare Foundation provides a 'common, cross-platform set of APIs . . . (which) allows developers to maintain a single-source base for all development platforms.' Basically, this layer virtualizes all services of the underlying OSes on which it is hosted, insulating the developer from differences in these platforms." *See* PX 531 at MS 0115590-91. According to Mr. Ludwig, "[t]he AppWare Foundation ***is an entirely new [operating system] API***. It offers virtually all the services of the OSes it is hosted upon, but with a brand new and different API set." *Id.* (emphasis added). Likewise, a February 22, 1994 email forwarded by Microsoft executive Steven Sinofsky to Mr. Gates states that "AppWare's cross-platform nature makes it total goodness in the eyes of the customer. We need to take it seriously, make sure we understand it, create a cohesive competitive statement, and distribute appropriate info to combat the threat." *See* PX 144 at MS 5036490.

38

In the spring of 1995, Novell outlined a comprehensive plan to provide OpenDoc

software development through AppWare. *See* PX 391 at NOV-B01192363. OpenDoc was an

industry-standard architecture for component software that was backed by numerous industry-

leading software and systems vendors. *Id*. It enabled developers to use interchangeable

components to construct applications that could be shared across hardware and operating system

platforms, including Macintosh, OS/2, Windows, and UNIX. *Id.*

Just as with WordPerfect, PerfectFit, and AppWare, Microsoft feared the threat posed by

OpenDoc. *See* Tr. 933:2-9 (Silverberg); Dep. of P. Maritz, May 24, 1994 (played Oct. 25, 2011)

at 104:10-106:6. For example, in an email dated December 29, 1993, Mr. Silverberg wrote,

"[Component Integration Laboratories] is a group consisting of IBM, Novell, Apple, Oracle,

WordPerfect, XSoft and Taligent intent on building a competitive OS's to ours. OpenDoc, for

example, is part of their effort." *See* PX 488 at MS-PCA 2608514. Microsoft was so concerned

with OpenDoc as a competitive operating system technology that it wanted to impose a non-

disclosure agreement so that OpenDoc developers within WordPerfect and other companies

would not receive Microsoft's operating system betas. *See, e.g.*, PX 489. Mr. Silverberg in

particular wanted to "exclude those people who are working on competitive os efforts, such as

opendoc and os/2, from access to chicago [Windows 95]." *See* PX 490 at MS-PCA 2618244.

        4.   *Novell's Cross-Platform Office Productivity Applications and Suite Could*
              Have Helped Alternative Operating Systems Compete with Microsoft

WordPerfect was a cross-platform application during the relevant time period. For

example, WordPerfect architect Adam Harral testified at trial that the company had written

WordPerfect to over a dozen different operating systems, including DEC, NeXT, Macintosh,

Amiga, DOS, Windows, and OS/2. Tr. 216:3-18 (Harral).

Gary Gibb also testified that WordPerfect Corporation's technology was specifically developed to run on many different operating systems and that the company had several platform-specific groups, including a Mac group, a VAX/VMS group, a UNIX group, an OS/2 group, and a NeXT group. Tr. 776:2-18, 777:17-778:8, 781:14-782:2 (Gibb). Mr. Gibb noted that when he worked in "engine" development, WordPerfect released versions of its word processing software for all the major operating systems available. Tr. 777:7-16 (Gibb). The whole point of the engine group itself, according to Mr. Gibb, was to create a core engine of software that could be leveraged across multiple operating systems in a functionally consistent way – allowing documents to be exchanged successfully, among other things. *Id.* Dr. Murphy admitted that, at least by design, once the shared code running under WordPerfect was made cross-platform, the other applications that relied on shared code would also be cross-platform. Tr. 4915:1-8 (Murphy).

In addition, Mr. Frankenberg testified that WordPerfect had a cross-platform presence:

Q.   To your knowledge, did WordPerfect have experience in working with 32-bit systems prior to Microsoft's development of Chicago?

A.   Yes. WordPerfect ran on a number of other 32-bit systems including digital equipment corporations, [VAX], operating [VAX] systems and several Unix[16] systems. So they were well acquainted with the 32-bit development.

* * *

Q.   And during your tenure with Novell, did WordPerfect continue to develop versions of WordPerfect for multiple operating systems?

A.   Yes, we did.

---

[16] Mr. Gates testified that Microsoft's operating system products competed against UNIX-based operating systems from a wide range of companies, including IBM, AT&T, Hewlett Packard, Sun Microsystems, Novell, and the Santa Cruz Operation, and that variants of UNIX were gaining increasing acceptance as desktop operating systems. Tr. 2845:16-2846:1 (Gates).

> Q.   And during your tenure, did Novell also develop a version of WordPerfect for the Linux[17] operating system?
>
> A.   Yes, we did.
>
> Q.   Given that Microsoft had a monopoly in PC operating systems using Intel Processors at this time, why did Novell continue to develop cross-platform versions of WordPerfect?
>
> A.   Well, there were two main reasons. One reason was that our customers, as I mentioned a moment ago, wanted to have one word processor that could work across their work station or their PCs or their larger systems. The other reason was to provide some *real competition in the operating system environment*.

Tr. 994:12-18, 995:24-997:5 (Frankenberg) (emphasis added).

Mr. Frankenberg also testified that, in 1994, Novell's "next generation" WordPerfect office productivity suite (codenamed "Tapestry") was already under development and also intended to be cross-platform. Tr. 997:24-998:10 (Frankenberg). Thus, during Mr. Frankenberg's entire tenure, from spring of 1994 to summer of 1996, Novell actively developed WordPerfect and shared code for non-Windows platforms – including Linux, an Intel-compatible PC operating system alternative to Windows.

In addition to the testimony outlined above, numerous exhibits admitted into evidence establish that WordPerfect was a cross-platform application during the relevant time period. For example, as of August 13, 1995, WordPerfect was running on DOS, Windows, Macintosh, OS/2, and UNIX. *See* DX 370 at NOV 00062681-82, 89-90. WordPerfect's goal was to "[b]e number #1 in market share in the DOS, Windows, UNIX, and OS/2 markets, and number #2 in market share in the Mac and VMS markets for shipments during 1994." *Id.* at NOV 00062687.

In 1994, a WordPerfect for Windows Marketing Business Plan noted that WordPerfect had deep experience with "OS/2, Unix, Mac, NT" and that WordPerfect should "[t]out engine

---

[17] Craig Bushman acknowledged that the Linux operating system was a competitor to Microsoft and competed directly with Windows. Tr. 3224:25-3225:4 (Bushman).

concept; we understand cross-platform." PX 125 at NOV-B01491192. WordPerfect's goal was to "leverage our years of developing WordPerfect in the multi user environments of UNIX, Data General, VAX and IBM Mainframe as a strength for our NT version of WordPerfect." *Id.* at NOV-B01491203.

Reflecting this strong cross-platform presence, WordPerfect's April 22, 1994 Registration Statement filed with the United States Securities and Exchange Commission states that "WordPerfect is now available in 23 languages and on ***all of the most widely used computing platforms and operating systems***, including DOS, MS Windows, UNIX, Apple/Macintosh and DEC's VAX/VMS." PX 174 at NOV00364208 (emphasis added). As of July 19, 1994, WordPerfect was developing new versions of WordPerfect, Quattro Pro, and Presentations for DOS, as well as new versions of WordPerfect for Macintosh, UNIX, and OpenVMS. PX 200 at NOV-25-006587-90.

Following the merger in 1994, a Novell/WP/QP Integration Plan noted under "Business Applications" that "[d]evelopment includes PerfectOffice, WordPerfect for Windows, DOS, Macintosh and UNIX, Presentations, Electronic Publishing tools, the PerfectOffice engine group and Tapestry." DX 4 at NOV-25-006572. By October 1994, WordPerfect had shipped WordPerfect Windows 5.2+ and WordPerfect UNIX 6.0 (SCO) and was moving ahead with other WordPerfect for UNIX, DOS, and VMS products as well. *See* DX 205 at NOV-B15912823-24. In fact, WordPerfect UNIX (SunOS, Solaris) was released to manufacturing on June 7, 1994, WordPerfect 6.0 UNIX (SCO, Intel) was released to manufacturing on October 6, 1994, and WordPerfect 6.1 DOS was released to manufacturing on August 10, 1995. *See* DX 231 at NOV00161055.

Similarly, WordPerfect's PerfectFit and WOAPI technologies were available for Windows, DOS, and UNIX. *See* PX 192 at MX 9037665. Novell also intended to make OpenDoc cross-platform and was "committed to deliver OpenDoc for Windows in 1995, which will provide users with a clear advantage for component software and distributed cross-platform object support, as well as cross-application integration." PX 395 at NOV 00019492; *see also* PX 412 at NOV 00498197.

Even Microsoft recognized that "WordPerfect Strengths" included "[c]ross-platform compatibility" and that "[a] consistent use of the cross-platform positioning could neutralize Word's Windows leadership." PX 554 at MS-PCA 1330664; *see also* PX 560 at MS7059705. Indeed, in assessing the competitive situation presented by WordPerfect for Windows 6.0, Microsoft noted that "WordPerfect is also available on UNIX and the Macintosh. They also have worked to make 6.0a run as well on OS/2 as its WordPerfect for OS/2 predecessor. ***No one else has the same breadth across platforms for word processors***." PX 378 at MX 2175209 (emphasis added).

Likewise, Novell intended to continue developing cross-platform office productivity applications well into the future. Mr. Harral testified that Novell intended to make the entire PerfectOffice suite cross-platform after the initial release of PerfectOffice 95 to make it available on DOS, OS/2, Macintosh, UNIX, and Linux platforms. Tr. 371:13-372:7 (Harral). Mr. Gibb testified that "we wanted to make everything cross-platform and go across the different operating systems." Tr. 787:11-15 (Gibb). Even Dr. Murphy acknowledged the testimony that Novell planned to release PerfectOffice across multiple platforms. Tr. 4912:13-18 (Murphy).

Microsoft cannot dispute the collaterally estopped finding that numerous companies existed with the technical and financial capability to easily expand their output to create

competition in the operating systems market if the applications barrier were sufficiently lowered.[18] Finding of Fact ¶ 30. As Judge Jackson noted, however, the ability to meet a large demand is useless if demand for the product is small and during the relevant time period signs indicated that demand for alternative operating systems was "severely constrained" by the applications barrier to entry. *Id.* Mr. Gates testified that from 1995 to 1999, he believed that Windows faced competition from Apple's Mac OS, Be's BeOS, various versions of UNIX, and IBM's OS/2 Warp, in addition to Linux. Tr. 2852:20-2853:2 (Gates); *see also* Tr. 4900:6-13 (Murphy) (acknowledging the existence of Windows competitors).

Dr. Murphy testified that by 1998, Linux had between five to ten million users and had become increasingly competitive with Microsoft Windows in particular segments and that Linux was comparable in size, capability, and complexity to Microsoft's Windows 98 and Windows NT. Tr. 4896:19-4897:8, 4900:14-21 (Murphy). Dr. Murphy accepted that consumers might reasonably choose a WordPerfect version written for Linux instead of Windows, because Linux was free. Tr. 4899:25-4900:5 (Murphy).

E.   Novell's Key Franchise Applications Had The Potential To Weaken The Applications Barrier To Entry

Microsoft cannot deny that it viewed ownership of the word processing and suite markets as critically important to maintaining the applications barrier to entry. In an email sent to investor Warren Buffett, senior Microsoft executive Jeff Raikes wrote:

---

[18] On November 20, 2011, just after the close of Novell's case-in-chief, but before the start of Microsoft's defense, Novell moved to reopen its case-in-chief to supplement the record with three Microsoft 10-K filings and the written testimony from the Government Case of two Microsoft witnesses. *See* Novell's Mot. to Reopen Its Case-in-Chief & Supplement the Record (Nov. 20, 20110) (Dkt. # 307). This evidence established that in the 1994-1996 time period, and immediately thereafter, there were alternative operating systems in the relevant market for which WordPerfect could have developed (and in many cases did develop) software, and that several of these alternatives competed with Windows. The Court denied Novell's motion. Tr. 5100:6-7.

44

> If we own the key "franchises" built on top of the operating system, we
> dramatically widen the "moat" that protects the operating system business . . . .
> We hope to make a lot of money off these franchises, ***but even more important is
> that they should protect our Windows royalty*** per PC.

PX 360 at MS-PCA 1301176 (emphasis added).

"The 'moat' refers to the applications barrier to entry." *Novell*, 505 F.3d at 317. Because

consumers buy computers to run applications, not to run operating systems, Microsoft could

keep consumer demand focused on Windows if Microsoft controlled the office suite, word

processing, and spreadsheet markets. Tr. 1387:1-1388:8 (Alepin); *see also* Tr. 290:5-19

(Harral); Tr. 1969:1-6 (C. Myhrvold); Finding of Fact ¶ 37; *cf*. Tr. 1718:21-1719:5 (Noll).

According to Mr. Gibb, word processing and spreadsheet applications amounted to 80 to 90

percent of everything people did on personal computers in the mid 1990s. Tr. 782:3-12 (Gibb).

Even if 70,000 applications were written for a rival operating system, if that rival could not offer

word processing, spreadsheets, or suites, then it would not be able to attract significant consumer

demand. *See, e.g.*, *Microsoft*, 253 F.3d at 55; Tr. 1969:1-6 (C. Myhrvold).

Other internal Microsoft documents confirm Mr. Raikes' admission that by owning key

franchises, Microsoft helps maintain the applications barrier to entry protecting its monopoly

power. For example, as early as 1989, Mr. Gates recognized that "a strong applications business

is ***extremely*** helpful to [Microsoft's operating] systems strength." PX 3 at X 159503 (emphasis

added). Similarly, Mr. Allchin admitted that "[a]pplications drive the world. Applications are

the reason that the VAX was so successful. Applications make people switch computer systems

and vendors." PX 524 at MS 0119615.

As discussed more fully below, Mr. Raikes' email does more than express a theory.

Microsoft actually used its control of the key franchise office suite market "'as a club'" to

control a potential operating systems competitor, Apple. *See Microsoft*, 253 F.3d at 73 (citation

omitted). At trial, Dr. Noll explained that the strength of the applications barrier to entry was

directly proportional to Microsoft's strength in the applications market, and "the more market

share [Microsoft] can gain in applications, the greater the barrier to entry of new operating

systems will be." Tr. 1740:20-1741:5 (Noll).

II.   MICROSOFT'S ANTICOMPETITIVE CONDUCT

A.   The Namespace Extension Functionality In Windows 95

In Windows 95, Microsoft combined the Windows 3.1 File Manager and Program

Manager into one application called the Windows Explorer. *See, e.g.*, Tr. 3748:4-21 (Nakajima);

PX 77 at IBM 7510172819. For the first time in Windows' history, users could access all of

their drives, folders, and files – regardless of whether their files existed on local or network

drives – from one location. *See, e.g.*, PX 388 at MSC 00762776. This hierarchy of drives,

folders, and files was called the system namespace and it was accessible to users from within the

Windows Explorer and from the Windows 95 common file open dialog. *See, e.g.*, PX 259 at

MX 5121912. The namespace extension APIs allowed developers to create custom folders to be

displayed within (1) the Windows 95 namespace accessible from the Windows Explorer, (2) the

Windows 95 common file open dialog, and (3) ISVs' custom file open dialogs. Tr. 259:24-

265:3, 272:1-4, 274:21-275:3 (Harral); Tr. 741:22-742:11 (Richardson); Tr. 3794:3-12

(Nakajima); PX 113.

B.   The Hood Canal Plan

As early as 1989, Bill Gates recognized that Microsoft's strength in the PC operating

systems market was dependent on its applications' strength. PX 3 at X 159503; Tr. 2992:5-9

(Gates). By 1993, it had become apparent to many Microsoft executives that it was "crucial" for

46

Microsoft's operating systems business and its applications business to "leverage" each other in order to "avoid 'commodization.'" PX 47 at MS7085723. In response, Microsoft held a high-level executive retreat in June 1993 at Mr. Gates' estate, called Hood Canal, which was focused on designing a plan to leverage Microsoft's operating systems technology for the benefit of its applications. This retreat was the genesis of Microsoft's scheme to withhold extensible interfaces within Chicago from its competitors. Tr. 3444:1-13 (Muglia).

The plan hatched at Hood Canal, called the "Radical Extreme" or "Office Shell Plan," was to ship Chicago with limited extensibility, withholding the extensible shell for Office. PX 51 at MS-PCA 2535292; PX 61 at MS 0097121; PX 55 ("A very interesting plan was developed and tentatively adopted to bundle the extensibility of Chicago shell and some of the shell sizzle with Office rather than release Chicago itself. This makes these features a compelling reason to buy Office rather than icing on the cake of an OS we can't make as much profit on."). Specifically, the Office Shell Plan called for Chicago's Explorer to be non-extensible, allowing Office to be first to take advantage of "Explorer extensions to browse into app document types: OLE Objects in Docfiles, Excel workbooks, ClipArt files, etc." PX 61 at MS 0097124. The excuse Microsoft planned to give its competitors for making Chicago non-extensible was that "we couldn't get it done in time." PX 51 at MS-PCA 2535292.

The purpose of the Office Shell Plan was to give Microsoft's applications "a very significant lead over [Microsoft's] competitors, and make [Microsoft's] competitors' products look 'old,'" which would allow Microsoft to "lock in users, lock out competition." PX 61 at MS 0097122-23. Conversely, Microsoft understood that making Chicago's extensibility available to its competitors would force Word and Excel to "battle against their competitors on even turf. Given that Lotus and WordPerfect have largely caught up, [Word and Excel] almost certainly

47

lose ground – if not in market share, then in margins." PX 62 at MX 1389851. Mr. Gates,

appreciating that Microsoft's applications had a unique opportunity to "fully exploit [their]

advantage" by integrating with the operating system, PX 50 at FL AG 0103212, personally

embraced the Office Shell Plan. PX 52 at MS7089441 ("Billg sez do it!").

Not everyone within Microsoft, however, agreed with Mr. Gates. For example, Tandy

Trower wrote to Bill Gates, Brad Silverberg, Paul Maritz, and others regarding the plan:

> This strategy signals a sign of weakness. This stinks of "proprietary-ness,"
> something that we have been critical of others for embracing . . . . It just doesn't
> appear to me to be a smart strategy. It seems contrived and the possible
> repercussions not worth the risk. In the twelve years I have been here, I've
> always taken pride in the fact that we excelled by doing things better than our
> competition, not by withholding some functionality that we might uniquely
> leverage.

PX 56 at MS7080520.

Microsoft makes much of the fact that the Office Shell Plan, as outlined at Hood Canal,

did not go forward. *See* Microsoft Mem. at 114-15. However, the plan ultimately advanced by

Mr. Gates in PX 1 – to withhold the namespace extension APIs for the purpose of using these

"critical interfaces" in an Office Explorer to advantage Office at the expense of Lotus and

WordPerfect – was substantially identical in scope and purpose to the Hood Canal scheme.

See PX 61. Thus, the Hood Canal scheme perfectly illustrates Mr. Gates' mindset and purpose

in ultimately denying Novell and other ISVs this important technology.

On July 8 and 9, 1993, Microsoft held a Chicago User Interface Design Preview for third-

party ISVs, including WordPerfect, where Joe Belfiore demonstrated the new Chicago shell.

PX 63 at NOV-B06507474, 80. A few days later, Mr. Silverberg recounted third-party ISVs

strenuously urging Microsoft to make the extensibility within the Chicago shell available:

> They *really* want extensibility. They continued to press for this in every way,
> whether cabinet extensibility so they could put their own right pane handler; add

48

properties to prop sheets; hook find file; etc. What's more, they were afraid and angry that Microsoft would use the hooks for its own purposes (apps, mail, etc) but not provide to isv's. This was a very hot button.

PX 64.

On September 9 and 10, 1993, Microsoft held a "Win32 Developers Workshop Featuring Chicago." *See, e.g.*, PX 78. During the workshop, Mr. Belfiore demonstrated how Microsoft's mail client (codenamed "Capone") could integrate into the Windows Explorer using the namespace extension APIs. *Id.* at NOV00721981. When Mr. Belfiore told WordPerfect that there were no plans to allow ISVs to extend the Explorer in the same way, WordPerfect complained that "this was an unacceptable situation." *Id.*

As a result of ISVs' complaints, a debate erupted within Microsoft in September 1993 over whether Microsoft should publish the namespace extension APIs because Capone was using them. The debate is understandable given Microsoft's strict rule that if Microsoft's applications use APIs, then the APIs must be published to ISVs. Tr. 3814:5-22 (Nakajima). Although Mr. Gates was "very aware" that many Microsoft executives believed they had "to publish whatever api's capone uses," *see, e.g.*, PX 84 at MS 5043513; PX 483 at MS 5033031 ("If we use them we have to publish them."), Mr. Gates maintained his position not to publish Chicago's extensibility to ISVs. PX 483 at MS 5033031 ("I went over this in some detail with Bill yesterday and he says 'no' since capone is part of Chicago.").

The head of the Developer Relations Group, Doug Henrich, immediately recognized that not publishing the namespace extension APIs would raise serious public relations concerns:

> I think this is problematic from a PR and ISV issue . . . . Several big and small email vendors will be upset, and this will play out as an unfair advantage issue with the press. I think we want to avoid this.

49

PX 84 at MS 5043512. In fact, Lotus' CEO, Jim Manzi, had already voiced concerns to

Mr. Gates. *Id.* at MS 5043511. Other Microsoft executives, including Jonathan Lazarus, VP of

Strategic Relations, were more blunt in responding to Mr. Gates' decision, stating "this is

D U M B!!!" PX 82 at MS 5042220.

By the end of September 1993, despite Mr. Gates' desire to deny ISVs the namespace

extension APIs, the decision was made to document them, as well as the other Chicago shell

extensions. The decision to publish the namespace extension APIs was not made lightly.

Microsoft took several different factors into consideration in making its decision, including:

(1) how beneficial the APIs would be to the end user; (2) how beneficial the APIs would be to

ISVs; (3) the degree to which the namespace extension APIs' functionality would work well with

ISVs' variable code; (4) Microsoft's technology road map; and (5) what Microsoft expected to

happen in the future. Tr. 4319:9-4321:14 (Belfiore). By September 27, 1993, Mr. Silverberg

reported that Microsoft had "decided [the APIs] were A-list," which meant the APIs would be

fully documented and fully supported, not only in the current version of Windows but in future

releases as well. PX 473; Tr. 4317:24-4318:1 (Belfiore); Tr. 3452:21-23 (Muglia);

Tr. 3803:13-18 (Nakajima).

Microsoft made the decision to fully document and fully support the namespace

extension APIs with full knowledge that ISVs would take advantage of them in their new

products for Windows 95. For example, Mr. Allchin, the head of Windows NT, recognized that

publishing the namespace extension APIs would "give[] competitors an advantage over

Microsoft Apps because Ray [Ozzie of Lotus] and everyone else will use the extensions before

our apps group (for sure Office). [P]retty damn discouraging." PX 87 at MS 7094469.

Mr. Gates was aware that the decision had been made to document the namespace extension

APIs and that they were subsequently partially documented in the M6 beta release of Windows

95. *See* PX 94 at MS 704891; PX 140 at MS 5036029.

C.   Microsoft Evangelizes The Namespace Extension APIs

Microsoft has a long-standing history of evangelizing its operating systems to ISVs,

including WordPerfect. That course of dealing was not only mutually profitable for Microsoft

and ISVs, but also necessary. As Cameron Myhrvold explained, Microsoft encouraged

WordPerfect and other ISVs to develop products for the Windows platform "[b]ecause that's the

way you sell operating systems. If you want a popular operating system, it is pretty much wholly

dependent on what applications run for it and how compelling those applications are."

Tr. 1969:1-6 (C. Myhrvold). Additionally, as found in the Government Case, "Microsoft

continually releases 'new and improved' versions of its PC operating system. Each time it does,

Microsoft must convince ISVs to write applications that take advantage of new APIs, so that

existing Windows users will have an incentive to buy an upgrade." Finding of Fact ¶ 44. As a

result, "Microsoft works closely with ISVs to help them adapt their applications to the newest

version of the operating system." *Id*.

Accordingly, it was in Microsoft's legitimate business interest to give ISVs early access

to Windows 95, including new interfaces, so that ISVs could release their applications with

Windows 95. Tr. 3488:19-3489:19 (Muglia). To ensure that a critical mass of quality

applications would be available on Windows, Microsoft formed the Developer Relations Group

("DRG"). *See, e.g.*, Tr. 3245:23-3246:5 (Struss). DRG was tasked with "evangelizing"

Microsoft's technologies, which meant that DRG would speak to other individuals or groups "to

get them excited" about Microsoft's products. *See* Tr. 3246:6-15 (Struss); *see also* Tr. 251:5-

253:2 (Harral) (defining evangelism). Brad Struss, a former technical evangelist and DRG

manager, testified that the group's objective was to get ISVs on board with Microsoft's

upcoming operating systems and involved in developing applications to support those new

operating systems.[19] Tr. 3245:23-3246:5, 3248:12-17, 3250:3-10 (Struss). As a means of

achieving its objective, DRG provided ISVs with a host of technical and marketing incentives.

See Tr. 3250:11-15 (Struss). Microsoft's cooperation with WordPerfect stretches back to the

1980s and MS-DOS, and continued into the mid-1990s with Microsoft's evangelism of Windows

3.1 and Windows 95.

Because of the significance of the release of Windows 95, DRG spearheaded a special

marketing program called the First Wave Program.[20] *See* Tr. 3251:5-15 (Struss). The program

launched in the first half of 1994, Tr. 3251:2-4 (Struss), and was designed by DRG to drum up a

critical mass of major applications supporting the key features necessary to make Windows 95

successful. *See* PX 148 at MS-PCA 2150196. Hence, Microsoft sought firm commitments from

the most important ISVs to ship their applications within 90 days of the release of Windows 95.

Id. at MS-PCA 2150197; PX 248 at MX 7155007-09; Tr. 282:17-283:13 (Harral); Tr. 3250:16-

24 (Struss). In fact, to become a First Wave member, *ISVs were required to ship within 90 days*

of the Windows 95 release. Tr. 3283:13-16 (Struss). Microsoft set the 90-day period because it

understood that having key applications available with the release of Windows 95 would

incentivize users to upgrade to the new operating system. Tr. 3251:16-3252:2 (Struss).

In return, Microsoft promised to provide the limited group of First Wave members with

special technical and marketing assistance aimed at improving members' applications for

---

[19] Former Microsoft executive Bob Muglia similarly acknowledged that Microsoft's systems
group wanted all developers writing to Windows to support the platform in the best possible way
even if those developers also competed with Microsoft's applications. Tr. 3477:3-8 (Muglia).

[20] Microsoft began promoting Windows 95 in 1993. Tr. 3258:1-8 (Struss).

Windows 95 and maximizing their chances of success. Tr. 3250:11-15 (Struss); *see also* PX 148

at MS-PCA 2150196, 198-201; Tr. 302:13-15 (Harral). Microsoft's technical assistance

included "early access to software development kits" and invitations to small conferences and

seminars highlighting the new operating system. Tr. 3252:3-10 (Struss). DRG also provided

ISVs with pre-release versions of Windows 95, which were "required" so that ISVs could

(1) understand the functionality available on Windows 95, (2) build applications that ran on

Windows 95, and (3) test those products. Tr. 3256:7-12 (Struss). On the marketing side,

Microsoft incentivized ISVs with participation in the Windows 95 logo program and trade

shows. Tr. 3252:15-18 (Struss).

Before the Novell acquisition, Microsoft specifically targeted WordPerfect as a "key"

ISV critical to the success of Windows 95, PX 131 at MS-PCA 1673787, and invited

WordPerfect into the First Wave Program, Tr. 3253:21-25 (Struss). *See also* PX 131 at MS-PCA

1673787; PX 515. By June 1994, WordPerfect had joined the First Wave Program and begun

receiving regular Chicago status updates from Microsoft. *See, e.g.*, PX 184; PX 248 at

MX 7155006. WordPerfect also attended multiple meetings, events, and conferences related to

the Windows 95 platform. *See* Tr. 3258:1-14 (Struss); PX 63; PX 78; PX 105; PX 515.

Additionally, Microsoft provided beta releases of Chicago to enable WordPerfect to build

software for the platform. Tr. 301:13-15, 303:23-304:18 (Harral); *see also* PX 181 (M6 beta

documentation that includes the namespace extension APIs). WordPerfect (and later Novell)

also paid for Microsoft's "Premier Support" service, which enabled ISVs to ask technical

questions of Microsoft's own developers during the development process. Tr. 328:2-329:12

(Harral).

In November 1993, shortly after Microsoft's decision to publish the namespace extension APIs, David Cole, the group manager for Chicago, and other Microsoft employees traveled to WordPerfect's campus to personally evangelize the namespace extension functionality. PX 105. Microsoft informed WordPerfect of its "deci[sion] to document the shell extensions" and WordPerfect was "very enthusiastic." *Id.* at MS 7086583; Tr. 289:14-22 (Harral). Microsoft promised to provide WordPerfect with information that would enable WordPerfect to integrate its own technologies into the Windows 95 Explorer. PX 105 at MS 7086583; Tr. 287:1-8, 290:25-291:9, 293:15-294:7 (Harral). WordPerfect talked at length with Microsoft about its plans to integrate its document management system, clip art libraries, and QuickFinder technologies into the Windows Explorer. PX 105; Tr. 284:12-287:8, 292:18-21 (Harral).

Microsoft's evangelism of the namespace extension functionality went beyond WordPerfect to the entire ISV community. In December 1993, Microsoft held a Professional Developers Conference where Mr. Belfiore presented a slideshow detailing to all ISVs, including WordPerfect, how they could create custom namespaces within the Windows 95 Explorer, as well as access Microsoft's new namespaces, such as Network Neighborhood, My Briefcase, and Recycle Bin.[21] PX 113; Tr. 294:8-17 (Harral) (the presentation was distributed among developers and managers at WordPerfect). Mr. Belfiore evangelized email and document management functionalities as good uses for the namespace extension APIs – two namespaces Mr. Belfiore knew WordPerfect wanted to create. PX 113 at 20; Tr. 4333:8-4335:6 (Belfiore) (discussing PX 113 and PX 105); Tr. 589:17-25, 590:22-591:21, 592:9-593:19 (Richardson).

---

[21] Later, in February 1994, Mr. Belfiore recommended that ISVs should "[c]onsider a major re-design of [their] user interface to take advantage of the new emphasis on . . . shell integration," including using the namespace extension APIs to integrate "special folder[s]" into the Windows 95 Explorer. PX 529 at MX 317130-31.

Mr. Belfiore also recommended that if ISVs created their own custom file open dialogs (as did

Microsoft Office), they should recreate the full Windows 95 namespace accurately, including

Network Neighborhood, My Briefcase, and Recycle Bin. PX 113 at 23; Tr. 4335:7-4336:8

(Belfiore) (discussing PX 113).

Microsoft believed that the namespace extension functionality was critical to the success

of Windows 95. For example, Mr. Gates stated that:

> [T]he hierarchical view (scope pane) view is critical. The ability to see the real
> name space of the system where we are putting everything only exists there – the
> ability to move things around easily only come from there. The tree view is
> central to our whole strategy – email, [document libraries], applications, file
> system . . . .

PX 134. Mr. Gates "loved hierarchy" and "was really enamored with the Windows Explorer and

its ability to browse information from any source, no matter where it was." Tr. 3519:7-17

(Muglia); *see also* Tr. 3532:19-3533:1 (Muglia); Tr. 3831:22-3832:8 (Nakajima).

In January 1994, Mr. Belfiore identified the namespace extension functionality as

important technology to a writer at *PC Magazine* writing an article on Chicago. PX 130 at

MX 7141158. In June 1994, Microsoft touted the ability of the Chicago Explorer to allow users

to browse the entire namespace and allow ISVs to integrate their own custom folders as one of

the reasons Chicago was so much more advanced than the Mac. PX 202 at MS-PCA 1982100;

Tr. 4357:9-4359:8 (Belfiore). In Microsoft's Chicago Reviewer's Guide, distributed to

thousands of ISVs, Microsoft described the Chicago Explorer as the "single view on a world of

information," the very eyes of Chicago. PX 388 at MSC 00762776.

WordPerfect understood that the namespace extension functionality was a "key element"

in developing new products for Windows 95. Tr. 265:25-266:3 (Harral). Shared code developer

Greg Richardson testified that WordPerfect "saw pretty quickly" that the namespace extension

functionality presented a "very powerful new paradigm" which would enable WordPerfect to

"present very useful functionality to our users [by] making their experience of using our products

better." Tr. 591:14-592:3 (Richardson). Using this powerful new technology, WordPerfect

planned to integrate its SoftSolutions document management system, QuickFinder technology,

graphical library, and Internet functionality into both the Windows 95 Explorer and

WordPerfect's custom file open dialog.[22] Tr. 268:19-269:17 (Harral); Tr. 593:9-11, 594:8-18

(Richardson). WordPerfect's planned uses for the namespace extension APIs were intended, and

indeed recommended, by Microsoft.[23]

     Novell's shared code group planned to tightly integrate the namespaces with WordPerfect

and the other applications within PerfectOffice. For example, WordPerfect's document

management system, SoftSolutions, was a key differentiation feature for the word processor

because it allowed users to manage different versions of documents both in the file system and in

WordPerfect itself. Tr. 242:4-244:6 (Harral). Similarly, WordPerfect's QuickFinder technology

had historically been "very tightly integrat[ed]" into the WordPerfect word processing

application. Tr. 612:23-613:21 (Richardson). Specifically, users used QuickFinder to open and

retrieve documents within WordPerfect. *Id.* Novell never intended to add new "products" to

Windows 95, but rather to integrate its key technologies into WordPerfect and Quattro Pro as

---

[22] While the shared code team primarily intended to provide services to WordPerfect via the file open dialog, and not to extend the Windows Explorer, Microsoft designed the namespace extension functionality to allow ISVs' new namespaces to also appear within the Windows 95 Explorer. Tr. 613:7-18, 697:3-16 (Richardson). Novell saw this additional way of accessing the Novell namespaces and their functionality as a desirable added benefit to consumers. Tr. 613:7-18 (Richardson).

[23] *See* Tr. 3846:4-3847:6, 3867:15-18 (Nakajima) (document management system); Tr. 3851:23-3852:1, 3867:24-3868:2 (Nakajima) (Internet browser); Tr. 3867:19-23 (Nakajima) (clip art).

namespaces within the file open dialog, thereby increasing the functionality of PerfectOffice as a whole.[24] *Id.*

Microsoft's argument that WordPerfect, as a standalone application, did not need the namespace extension APIs grossly mischaracterizes Mr. Harral's testimony and completely disregards Mr. Richardson's testimony. *See* Microsoft Mem. at 20 (citing Tr. 327:10-21 (Harral)). Contrary to Microsoft's mischaracterization, Mr. Harral simply testified that the WordPerfect word processing development group (which was separate from the shared code group) did not need to create any namespace extensions because it planned to rely on the namespace extensions being developed by the shared code team. Tr. 327:1-9 (Harral) (noting that the WordPerfect development group would be interested in doing shell extensions for property sheets, but that most of the extensions they needed to rely on for things like the document management system would be provided by the shared code team). Moreover, on cross-examination, Mr. Richardson disagreed with Microsoft's characterization of Mr. Harral's testimony, stating:

> I believe that what [Adam Harral] is saying is that there wasn't a Namespace that the WordPerfect development group was responsible for providing. That's how I would interpret his response, that the shared code group was providing all the NameSpace extensions that were required by the WordPerfect application, but the WordPerfect developers, themselves, were not responsible for providing a NameSpace.

Tr. 666:8-667:4 (Richardson).

---

[24] The shared code team's other planned namespaces (such as the spell checker and clip art library) are also part of the overall word processing application. These functionalities were also available as separate objects, which could be called by all the PerfectOffice applications. By separating the components of its suite in an object-oriented way, to then be integrated into Windows 95's object-oriented shell, WordPerfect was following exactly the new paradigm that Microsoft had evangelized. Tr. 1666:4-1667:24 (Alepin); Tr. 587:10-588:10, 589:1-11 (Richardson).

In June 1994, Microsoft published partial documentation for the namespace extension APIs in its Chicago M6 beta release, which it shipped to approximately 20,000 sites worldwide. PX 179 at MX 2217526; PX 181; Tr. 303:16-305:6, 317:6-12 (Harral); Tr. 1417:20-1418:4 (Alepin). The documentation was considered "preliminary" because it gave ISVs (including Novell/WordPerfect) the "means for commencing development on the NameSpace extensions," but was "insufficient" to complete development.[25] Tr. 1417:20-1418:20 (Alepin). Mr. Harral explained that the partial documentation for the namespace extension APIs contained in the M6 beta was "machine computer documentation" that generally provided only "what the machine needs to know," but that developers needed additional documentation to know how the "computer definitions are meant to be used." Tr. 304:19-305:6, 317:6-318:6 (Harral) (referencing PX 181).

The purpose of documenting APIs was "to put a stake in the ground" so that ISVs could rely on those APIs in developing quality products for Windows 95. Dep. of J. Raikes, Jan. 27, 2009 (played Oct. 27, 2011) at 161:5-25 (Dkt. # 281). WordPerfect indeed relied on these APIs in designing, developing, and coding its applications for Windows 95. WordPerfect's shared code engineers immediately started coding their applications to the namespace extension APIs using the M6 partial documentation and availed themselves of Microsoft's Premier Support when the partial documentation required supplementation. Tr. 320:1-321:21, 331:7-19 (Harral); Tr. 667:12-668:3 (Richardson). Mr. Harral in particular recalled having conversations with Premier Support specifically about the namespace extension APIs. Tr. 330:4-331:6 (Harral).

---

[25] Novell's technical expert explained that "documentation is built up over time in part" in response to questions developers are asking and particular problems that arise in the development process, and therefore, documentation "evolves through the beta process to the . . . final product." Tr. 1419:4-21 (Alepin).

Mr. Harral also testified that Premier Support informed him that the full documentation for the

namespace extension APIs would be forthcoming in the M7 beta release of Chicago. Tr. 318:7-

22 (Harral). By October 1994, WordPerfect's shared code team was 80% finished with "hooking

up the shared code into the Windows 95 system." Tr. 321:22-322:8 (Harral). If Microsoft had

published the full documentation for the namespace extension APIs in its M7 beta as promised,

the WordPerfect shared code team would have been completely finished by December 1994.

Tr. 318:7-22, 322:9-323:14 (Harral).

D.   Microsoft De-Documents The Namespace Extension APIs

On September 20, 1994, Mr. Gates watched Novell's CEO Bob Frankenberg give a

demonstration of Novell's new technology at the Agenda '95 conference in Scottsdale, Arizona.

Mr. Frankenberg demonstrated both Novell's new shell technology, Corsair, which exposed

cross-platform APIs on the Macintosh, UNIX, and Windows, and Novell's ability to launch the

Internet directly from a WordPerfect hyperlink. PX 222. Mr. Frankenberg's presentation

confirmed to Mr. Gates that "Novell [was] a lot more aware of how the world [was] changing

than I thought they were," and reinforced to Mr. Gates the importance of Microsoft's shell

integration. *Id.*

Two weeks later, on October 3, 1994, Mr. Gates made the decision to withdraw support

for the namespace extension APIs. There is no ambiguity in Mr. Gates' email about why he

made this decision:

> I have decided that we should not publish these extensions. We 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*.

PX 1 (emphasis added). Mr. Gates admitted that even though it was "very late in the day to [be]

making changes to Chicago" and that the APIs were "a very nice piece of work," Microsoft

59

could not "compete with Lotus and WordPerfect/Novell without this." *Id.* Implicit in Mr. Gates'

statements is that Microsoft could not compete ***on the merits*** with Lotus and

Novell/WordPerfect.

Mr. Gates' ultimate goal of "hav[ing] Office '96 sell better" because of "shell integration

work," *id.*, was understood and affirmed by others within Microsoft. One day later, Mr. Belfiore

forwarded Mr. Gates' email to the Windows 95 Program Management listserv, explaining that

the main reason for de-documenting the namespace extension APIs was "because it [would] add

work to the Ren group." PX 243 at MX 5066942. The Ren group's "goal will be to ship a

replacement explorer in office96." *Id.* The Ren group, which was the codename for the product

that became Outlook, was part of the Office group at that time. Tr. 4362:19-4363:3 (Belfiore).

Other evidence confirms that the Office group intended to use the de-documented

namespace extension APIs in order to achieve a higher level of integration that would be harder

for Lotus or Novell to achieve, and which would give Office a real advantage. The Office '96

Specification detailed that the Office '96 Explorer would "superset and replace the Chicago

explorer to become the single place where users can find and manipulate all of their information

irrespective of its type, including all documents and files; in addition to personal information

such as appointments, task lists and mail." PX 379 at MS-PCA 1566798. The "crucial

interfaces" needed for this work were the namespace extension APIs. *Id.*

On October 10, 1994, Mr. Nakajima confirmed that "[b]ased on the recent decision, we

are hiding one of [the] shell mechanisms . . . . I marked all those interfaces and definitions

';Internal' so that we don't put them in the SDK header files any more." PX 224. Mr. Nakajima

made the following changes to the Windows 95 interfaces: "IShellFolder" and "IEnumIDList"

became "read-only" and could not be implemented in a customized way, and the "name space

extension mechanism," which consisted of "IShellBrowser," "IShellView," "IPersistFolder," and

"ICommDlgBrowser," became private. *Id.* In Microsoft's next beta release (M7), the shlobj.h

SDK header file contained no documentation on the namespace extension APIs, and the APIs

were no longer supported by Microsoft.[26] *See generally* PX 227.

      The record is replete with evidence that Microsoft's conduct regarding the namespace

extension APIs involved intentionally deceiving ISVs, including Novell. First, the evidence

shows that Mr. Gates embraced the "Radical Extreme" Plan hatched at the Hood Canal retreat to

ship an extensible shell in Office (rather than in Chicago) in order to advantage Microsoft over

its competitors. In accord with the Radical Extreme Plan, Microsoft evangelized the namespace

extension APIs to ISVs and then withdrew them for the express purpose of giving Office '96 a

real advantage. The Radical Extreme Plan and Mr. Gates' ultimate decision were substantially

identical in scope and purpose.[27] Moreover, both relied on a completely fabricated excuse that

Microsoft was unable to complete the work on the namespace extension APIs.[28] Mr. Gates

hoped that his decision would help "Office '96 sell better because of the shell integration work."

PX 1. Indeed, within months of Mr. Gates' October 1994 decision, the Microsoft Office group

---

[26] As a result, developers, including Novell's, could no longer compile software source code calling the namespace extension APIs using M7 beta header files (and subsequent Windows 95 beta header files) because they no longer contained references to the namespace extension APIs. Tr. 1565:3-1567:8, 1569:25-1570:15, 1656:12-18 (Alepin).

[27] *Compare* PX 61 at MS 0097121 ("Chicago + 6 months – Office ships with optimized shell . . . Pros: Office gets a big jump on competitors in creating apps optimized for the new shell.") *with* PX 1 ("Our goal is to have Office '96 shell better because of the shell integration work."); *compare* PX 61 at MS 0097121 ("This should still give Microsoft apps a significant development lead.") *with* PX 1 ("We 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 . . . . We can't compete with Lotus and WordPerfect/Novell without this.").

[28] *Compare* PX 51 at MS-PCA25335292 ("we couldn't get it done in time") *with* PX 225 at MX 6055843 (too much development and testing time needed "to support these API's").

was using the namespace extension APIs to create an Office '96 Explorer. *See* PX 379 at MS-PCA 1566798.

Second, Microsoft deceived ISVs when it failed to reveal the raging debate between the Chicago and Cairo[29] teams regarding future support of the namespace extension APIs, while simultaneously evangelizing the APIs and inducing ISVs to rely on them. Mr. Muglia testified at length that the Chicago and Cairo teams "fought like cats and dogs" – beginning before Microsoft's initial evangelization of the namespace extension APIs in early 1993, continuing unabated through the M6 beta release, and ending only when Mr. Gates made his decision on October 3, 1994 to withdraw support for the functionality. *See, e.g.*, Tr. 3383:14-24, 3397:9-20, 3406:11-21, 3408:24-3409:4, 3414:2-10 (Muglia). Despite the internal turmoil, DRG – the public face of Microsoft – aggressively evangelized the namespace extension APIs without even a hint to ISVs that the internal debate could lead to those APIs being removed. Tr. 3287:5-3288:2, 3300:25-3304:23 (Struss); Tr. 4283:10-15 (Belfiore).

The third form of deception was Microsoft's cover-up following Mr. Gates' decision to de-document the namespace extension APIs. Novell told Microsoft prior to October 3, 1994 that there would be "hell to pay in the press" if Microsoft changed the namespace extension APIs. PX 215 at MX 6109494. And Mr. Silverberg informed Mr. Gates two days after his decision that there would be a "firestorm of protest" from ISVs who were using the namespace extension APIs, including WordPerfect, Lotus, Symantec, and Oracle: "These companies will not be bashful about expressing their displeasure." PX 220 at MX 5103185. Mr. Silverberg predicted

---

[29] Cairo was Microsoft's codename for a future version of the Windows operating system, but it was never released.

that Mr. Gates' decision would play out on "page one of the weeklies," and would "lead to calls

for the DOJ to investigate." *Id.*

DRG was tasked with avoiding these consequences at all costs. Telling ISVs the truth –

that Mr. Gates had de-documented the namespace extension APIs to give Office a real advantage

– was not an option. Fearing what would happen "if/when the press gets wind of this," DRG

carefully prepared a script designed to deceive ISVs and the press about why Microsoft was

withdrawing support for the namespace extension APIs:

> We are faced with the challenge of going to our ISVs and telling them about
> BillG's recent decision to return the namespace extensions to their original
> system-level status (notice the wording – Let's try not to use the word
> "undocumented" or private APIs. This has a negative connotation to most ISVs).

PX 225 at MX 6055840.[30]

DRG's script was designed to avoid an adverse press reaction. For example, Mr. Struss

emphasized that DRG should work on building a list of ISVs for press references in case the

press caught wind of Mr. Gates' decision. *Id.* Indeed, Microsoft hoped to forestall premature

press coverage by "stressing to ISVs the confidentiality of this" and emphasizing that their

conversations were "obviously covered by [a] mutual non-disclosure agreement." *Id*. at

MX 6055840-41. The script also instructed ISVs to keep Mr. Gates' decision "close to their

chests" and requested that they "not post any questions about this on Compuserve" in an effort to

keep the decision confidential. *Id.* at MX 6055842.

DRG's script was also designed to mislead ISVs about the real reasons for Mr. Gates'

decision. The script emphasized that "the number one question [from ISVs] will be: 'Why have

---

[30] Scott Henson was not shy in emphasizing the importance of this script to DRG: "THIS IS
IMPORTANT! PLEASE READ THIS ENTIRE DOCUMENT CAREFULLY BEFORE YOU
DO ANYTHING ELSE!" PX 225 at MX 6055840.

you decided to do this?' The answer is: Because they (the APIs) make it very difficult to

support long-term. We don't want to send ISVs down a dead-end path." *Id.* at MX 6055841.

DRG was instructed to "emphasize this part very strongly." *Id.* at MX 6055842. Contrary to

what ISVs were told, there was nothing "dead-end" about the namespace extension APIs: the

APIs were never changed and were never removed from Windows 95 or future versions of

Windows. *Id.* at MX 6055841. Similarly, ISVs were told that Microsoft's own applications

would be "required to stop" using the APIs. *Id.* Yet Microsoft continued to use the namespace

extension APIs in its applications and in Windows 95 itself. To avoid this issue, the script

instructed "PLEASE DO NOT MENTION MARVEL[31] IN ANY OF YOUR

CONVERSATIONS." *Id.* at MX 6055840.

Microsoft also misled ISVs with pretextual technical justifications. The first reason

Microsoft gave to ISVs for de-documenting the namespace extension APIs was "compatibility."

Id. at MX 6055843. However, the unrebutted evidence is that ***prior to*** Mr. Gates' decision, the

namespace extension APIs ran on Windows NT and "there was no remaining concern about

compatibility." Tr. 3825:4-7, 3826:12-18 (Nakajima); Tr. 3513:12-18 (Muglia). The second

reason given to ISVs was "system robustness." PX 225 at MX 6055843. Notwithstanding that

Mr. Gates did not mention robustness in his October 3, 1994 email, to the extent robustness was

an issue it was resolved within a month of Mr. Gates' decision and many months before the

release of Windows 95. Tr. 3837:16-24 (Nakajima); Tr. 3525:25-3626:5 (Muglia);

Tr. 4369:23-4370:2 (Belfiore). The third reason given to ISVs was "ship schedule," which was

reminiscent of the excuse conjured at the Hood Canal retreat: "we couldn't get it done in time."

PX 225 at MX 6055843; PX 51 at MS-PCA 2535292. In fact, the namespace extension APIs

---

[31] Marvel was the codename for Microsoft's MSN client.

were "essentially done" in early 1994 after "many months of tuning," and no changes were made

to them through their republication in 1996. PX 139; PX 142. Finally, Microsoft attempted to

persuade ISVs that Microsoft would provide "equivalent visual functionality" that would give

ISVs the "same look and feel" as the namespace extension functionality. PX 225 at

MX 6055843. In reality, all Microsoft provided was "window dressing," Tr. 348:12-349:18

(Harral), which Marvel did not use.

Microsoft's deception was a great success. There was no "firestorm of protest" or "hell

to pay in the press" for Microsoft. Instead, Novell and other ISVs reasonably believed Microsoft

when it warned ISVs that the namespace extension APIs may stop working "in future releases of

Windows 95 (or even between interim beta builds)," and that ISVs that chose to use the APIs

would "be completely at their own risk." PX 225 at MX 6055844. For a few months, Novell

continued to ask for more information about the namespace extension APIs,[32] but, as described

below, Microsoft effectively foreclosed Novell's ability to implement them.

---

[32] For example, in November 1994, Novell's Kelly Sonderegger pressed Brad Struss for more
documentation, *see* PX 236, and his answer admittedly "sidestepp[ed] the question," stating that
the functionality available in the M6 beta was "no longer available." PX 236 at NL2 0004273;
PX 259 at MX 5121911-12. By this time, of course, Microsoft had made semantic changes to
the functionality provided in M6 to avoid any robustness issues. Novell's Richard Hume also
sought additional information on the namespace extension APIs in November 1994 and was told
by Microsoft that the APIs were "internal because they don't want to support them long-term."
PX 238. Additionally, shared code developer Adam Harral continued to seek information about
the namespace extension APIs from Microsoft's Premier Support to no avail. Tr. 345:8-346:11
(Harral). And at the highest ranks, Mr. Frankenberg complained repeatedly to Mr. Gates about
undocumented APIs in 1995, and Mr. Gates refused to discuss the issue. *See infra* note 33.

III.   **MICROSOFT'S ANTICOMPETITIVE CONDUCT DELAYED NOVELL'S OFFICE PRODUCTIVITY APPLICATIONS AND SUITE FOR WINDOWS 95**

   A.   Microsoft's De-Documentation Of The Namespace Extension APIs Left Novell With No Real Choice

Faced with the de-documentation of the namespace extension APIs, Novell had three theoretical options. Tr. 342:6-344:7 (Harral). The first option was to continue using the now-unsupported APIs based on the partial documentation Microsoft provided in the M6 beta release of Chicago. *Id*. Novell's second option was to see if it could somehow fit within the common framework provided by Microsoft – that is, use the Microsoft-provided common file open dialog – even though doing so would result in significantly reduced functionality that could have negatively impacted WordPerfect's customers and Novell's relationship with them. *Id*. The third option was to try to recreate the functionality that was lost as a result of Microsoft's decision to de-document the namespace extension APIs. *Id*. Novell's top priority was to release a marketable product within the critical window of opportunity after the Windows 95 release. Tr. 796:10-18, 797:5-8 (Gibb). The evidence at trial showed that none of the three options would allow Novell to meet that priority.

Initially, Novell explored the first option by continuing to use the now-unsupported namespace extension APIs. Tr. 344:8-345:7 (Harral). In traveling down that road, however, Novell found that Microsoft had erected roadblocks that Novell could not surmount. For example, Microsoft's Premier Support refused to provide any assistance at all with respect to the Windows 95 shell, let alone assistance in using the now de-documented namespace extension APIs. Tr. 345:8-346:11 (Harral). Novell concluded that it was futile to continue using the unsupported APIs given the obstacles to doing so, and therefore, it reasonably determined that option one was not viable. *Id*.

Novell then considered trying to use the Windows 95 common file open dialog. In doing so, Novell needed to evaluate whether the features and functionality it would lose by using Microsoft's inferior dialog would have a serious impact on the quality of the product and the user experience, and ultimately, its marketability. While the common dialog might have been easier to develop with (because it was already created), it possessed significant limitations, including "impos[ing] the standards of the operating system" on developers. Tr. 271:17-25 (Harral).

WordPerfect's file open dialog was also different from Microsoft's common file open dialog in several ways. Tr. 247:10-251:4 (Harral). First, it was "very robust." Tr. 273:5-16 (Harral). For example, WordPerfect enabled users to name their files using more than eight characters. Tr. 249:15-20 (Harral). Its file open dialog also displayed a substantial amount of information about each file so users could search more easily and find what they were looking for. *See* Tr. 250:15-24 (Harral). Another compelling feature of WordPerfect's custom file open dialog was that it provided users with a list of "commonly visited" places that was populated based on the users' activities, as well as a file viewer that was built into the custom file open dialog. Tr. 249:21-250:7 (Harral).

Ultimately, WordPerfect needed to support the features that it had historically provided and which its users expected. Tr. 273:10-274:20 (Harral). Novell concluded that losing features that had been in use for ten years and alienating its installed base was not a real option at all. Tr. 346:12-347:4 (Harral). Customers bought WordPerfect in part because of its enhanced file management capabilities and were accustomed to "living" in WordPerfect. *See id.* Mr. Harral testified that choosing to use the common file open dialog was an unacceptable option because it "would have been a choice to have disenfranchised our customer base." Tr. 504:1-14 (Harral). Similarly, Mr. Richardson testified that:

> [T]he common dialog wouldn't even give [WordPerfect] the level of functionality
> we had in our last release in Windows or that we had on our DOS card. It was a
> huge step backwards for us. ***And we felt it simply wasn't an option. If we were
> to go with that option we didn't really have a product***.

Tr. 630:1-6 (Richardson) (emphasis added); *see also* Tr. 629:11-12 (Richardson) (PerfectOffice

"wouldn't be functional enough to be considered a reasonable product in Windows 95.").

Moreover, Novell could not have added any of its custom namespaces to the Windows 95

common file open dialog. Tr. 629:19-21 (Richardson). Mr. Gibb testified that using the

Windows common file open dialog would have been a "huge step back for [WordPerfect's]

customers." Tr. 847:25-848:7 (Gibb). Dr. Noll perhaps said it best when he described the

Hobson's choice that Novell faced between releasing late or using Microsoft's common dialog:

"[T]hey had two different ways to commit suicide." Tr. 1902:4-15 (Noll). Consequently, Novell

abandoned the second option (which was no option at all) and began to evaluate what it would

take to implement the third option, in which Novell would replicate the namespace extension

APIs' functionality inside of WordPerfect's custom file open dialog. Tr. 350:8-352:3 (Harral).

After the de-documentation of the namespace extension APIs, Novell's management

continued to seek the assistance of Microsoft's Premier Support to resolve the issue.

Tr. 349:19-350:7 (Harral). Mr. Harral personally complained about the de-documentation of the

namespace extension APIs to Premier Support, as that was the primary avenue of communication

open to him.[33] Tr. 354:9-14 (Harral).

---

[33] Microsoft contends that there is no evidence that Novell complained about Microsoft's
withdrawal of support for the namespace extension APIs. As the Court is aware, there is
substantial evidence to the contrary, although much of it was not permitted to be shown to the
jury. *See* Novell's Mot. to Overrule Microsoft Objs. to Docs. Concerning Commc'ns with DOJ
(Oct. 23, 2011) (Dkt. # 247); Novell's Letter to the Court regarding Frankenberg/Gates
Correspondence (Nov. 20, 2011) (Dkt. # 306).

By January 1995, however, Novell had moved to trying to reproduce the lost

functionality. Tr. 350:8-352:3 (Harral). In order to solve the problem, Novell efficiently

re-allocated resources so that the team could split up the problem and work as quickly as

possible. *Id.* The team worked around the clock, and 80-hour weeks were common. Tr. 354:1-5

(Harral). Even at this breakneck pace, it took the shared code team almost a year to complete a

new custom file open dialog that could mimic the interfaces and functionality that had been

promised and then taken away by Microsoft. Tr. 347:13-18 (Harral). This issue was the sole

---

First, Novell complained to the Department of Justice ("DOJ") about Microsoft's actions.
See, e.g., PX 317 (Ex. to Dkt. # 247); PX 320 (Ex. to Dkt. # 247). For example, a July 1995
email prepared by the head of development for Novell's Business Applications Division lists
several issues that Novell planned to raise with DOJ, including that "MS removed the ability to
hook into the Explorer. That is why we are doing our Open Dialog/Name space browser from
scratch." PX 317 at NOV 00516407. The same document also references Novell's difficulty in
tying QuickFinder into the Windows 95 shell subsequent to Microsoft's de-documentation of the
namespace extension APIs. *Id.* Similarly, another July 1995 email between Novell's in-house
lawyers described several issues, including de-documentation of the namespace extension APIs,
to be raised with DOJ during a conference call that same day. PX 320.

Mr. Frankenberg also complained directly to Mr. Gates about undocumented APIs, although
Mr. Gates rebuffed Mr. Frankenberg's entreaties for discussion. Tr. 1029:12-1030:3,
1241:17-1242:9 (Frankenberg). Documentary evidence – in the form of letters – corroborates
Mr. Frankenberg's testimony. Although these letters were not admitted at trial, they were raised
during oral argument on Microsoft's initial Rule 50 motion and provided to the Court at its
request. Tr. 2682:11-22; Novell's Letter to the Court regarding Frankenberg/Gates
Correspondence (Dkt. # 306). Microsoft subsequently withdrew its designation of those
documents as exhibits. *See* Microsoft Letter Withdrawing Defendant's Exhibits 215A Through
215G (Nov. 29, 2011) (attached as Ex. D). The first salient letter from Mr. Frankenberg to
Mr. Gates, dated June 23, 1995, noted that "It is [Novell's] view that Microsoft's OS's contain
undocumented calls, features, and other interfaces that are made available to its own applications
developers to give competitive advantages to its applications products." DX 215D at DB 0041
(Ex. to Dkt. # 306). Nonetheless, Mr. Gates refused to acknowledge the issue in his July 1995
response. *See* DX 215E at 3 (Ex. to Dkt. # 306). Mr. Frankenberg again raised the point in
August 1995, and again, Mr. Gates refused to address the issue in his response. DX 215F (Ex. to
Dkt. # 306). Knowing that such documents exist, it is disingenuous for Microsoft to argue that
Novell remained silent.

reason that Novell was unable to release its PerfectOffice suite (and WordPerfect) within 90 days

after the release of Windows 95.[34]   Tr. 804:20-805:7 (Gibb).

B.   Microsoft's Conduct Maintained And Extended The Applications Barrier To
        Entry Protecting Microsoft's Monopoly Power

Every additional sale of Microsoft's office productivity applications at the expense of

Novell's applications increased the applications barrier to entry protecting Microsoft's monopoly

power. Tr. 1759:15-1760:1, 1760:14-1761:2 (Noll). The trial evidence revealed that Microsoft

substantially increased its market share in those applications following its exclusion of Novell.

In 1994, Microsoft's market share for word processing software was around 65% and its

market share in spreadsheets was around 68%. Tr. 1761:12-16 (Noll). WordPerfect's installed

base for word processing in 1994 was virtually the same as Microsoft's, with Microsoft having

an aggregate 37% share and Novell having an aggregate 36.4% share. *See* PX 599A at

NWP00044129. Novell's installed base in 1994 on Windows was around 7 million users, and its

total installed base across all operating systems was around 15 million users. *Id*.

By 1997, Microsoft had dramatically increased its total share to about 90% of the office

productivity software market. PX 360 at MS-PCA 1301176. Microsoft had succeeded in

widening the "moat" protecting its PC operating systems monopoly.

---

[34] Corel finally shipped a suite for Windows 95 in 1996, after Novell sold WordPerfect to Corel.
Tr. 804:13-19 (Gibb). That product was still inferior to the one that Novell would have released
but for Microsoft's withdrawal of support for the namespace extension APIs. *See* Tr. 355:7-14
(Harral) (noting that because of Microsoft's anticompetitive conduct, it was not until Corel's
WordPerfect Suite 8 for Windows 98 that a WordPerfect product was released that contained all
the features and functionality that Novell originally envisioned for its Windows 95 product prior
to Microsoft's decision to withdraw support for the namespace extension APIs).

ARGUMENT

I.   THE COURT MAY GRANT MICROSOFT'S MOTION ONLY IF THE EVIDENCE SO OVERWHELMINGLY FAVORS MICROSOFT AS TO PERMIT NO OTHER RATIONAL CONCLUSION

When the district court declines to grant a party's motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before the case is submitted to the jury, that party may renew the motion under Rule 50(b) after trial. "The standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard for granting the pre-submission motion under Rule 50(a). Thus, the post-verdict motion for judgment can be granted only if the prior motion should have been granted." 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2537 (3d ed. 2011) (footnotes omitted). In ruling on the motion, the Court reviews all the evidence in the record. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1073 (10th Cir. 2002).

A party may not assert new grounds for relief in its post-trial Rule 50(b) motion that were not raised in its Rule 50(a) motion filed before the case was submitted to the jury. *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 738-39 (10th Cir. 2007); *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228-29 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001); *see also* Advisory Committee Notes to 2006 Amendment to Fed. R. Civ. P. 50. Any issues or grounds not present in the original motion for judgment as a matter of law are waived, and cannot be raised in the renewed motion after trial – even if the party raised the same issues in its answer to the complaint or motion for summary judgment. *Marshall*, 474 F.3d at 738.

"'[J]udgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's

71

position.' This is a difficult and high standard for the movant to satisfy." *Smith v. United States*,

555 F.3d 1158, 1162 (10th Cir. 2009) (citation omitted). "Judgment as a matter of law is

improper unless the evidence so overwhelmingly favors the moving party as to permit no other

rational conclusion." *Shaw*, 213 F.3d at 529; *see also Weese v. Schukman*, 98 F.3d 542, 547

(10th Cir. 1996) ("A motion for a judgment as a matter of law is cautiously and sparingly granted

and then only when the court is certain the evidence 'conclusively favors one party such that

reasonable men could not arrive at a contrary verdict.'" (citation omitted)).

Microsoft's discussion of the Rule 50 standard omits any mention of how the Court

should address conflicting evidence or inferences derived from the evidence. But the law is

clear: In ruling on a motion for judgment as a matter of law, the court "review[s] all the

evidence in the record, construing it and all inferences drawn therefrom most favorably to the

nonmoving party, and refrain[s] from making credibility determinations or weighing the

evidence." *Guides*, 295 F.3d at 1073. "'Credibility determinations, the weighing of the

evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of

a judge.'" *Reeves*, 530 U.S. at 150-51 (citation omitted). When faced with conflicting evidence

on a particular issue, the court must resolve all conflicts in favor of the nonmoving party and

disregard all evidence favorable to the moving party except evidence that "'is uncontradicted and

unimpeached.'" *Id.* at 151 (citation omitted).[35]

"The fundamental principle [in ruling on a Rule 50 motion] is that there must be a

minimum of judicial interference with the proper functioning and legitimate province of the

jury." 9B Wright & Miller, *Federal Practice and Procedure* § 2524. Thus, courts have long

---

[35] Even evidence in favor of the moving party that is "'uncontradicted and unimpeached'" may
be disregarded on a Rule 50 motion if it does not come from "'disinterested witnesses.'" *Reeves*,
530 U.S. at 151 (citation omitted).

been "in essential agreement" that the critical question in resolving a Rule 50 motion is

"'whether the evidence is such that, without weighing the credibility of the witnesses or

otherwise considering the weight of the evidence, there can be but one conclusion as to the

verdict that reasonable [persons] could have reached.'" *Id.* (alteration in original) (citation

omitted). Although Microsoft makes much of its argument that there must be "substantial"

evidence in support of the nonmoving party's position, "[i]t is very doubtful that the adjective

['substantial'] adds anything of value" to the "reasonable person" test set forth above,

particularly in light of case law defining "'substantial' evidence" as "evidence that would lead

reasonable people to different conclusions." *Id.*

"The legal standard for granting judgment as a matter of law is identical to the standard

for granting summary judgment under Fed. R. Civ. P. 56." *Brown v. Presbyterian Healthcare

Servs.*, 101 F.3d 1324, 1329 (10th Cir. 1996); *see also Reeves*, 530 U.S. at 150. Because the

standards under Rule 50 and Rule 56 are identical, the law of the case doctrine dictates:

> [W]hen the court of appeals has remanded a case for trial after ruling that
> summary judgment in favor of a given party was inappropriate because the
> evidence indicated the existence of genuine issues of material fact to be resolved
> by the jury, the district court cannot properly, on remand, grant judgment as a
> matter of law to that party on the basis of trial evidence that is not ***substantially
> different***.

Kerman v. City of New York, 374 F.3d 93, 110 (2d Cir. 2004) (emphasis added). Because the

evidence Novell presented at trial is not substantially different from the evidence Novell

presented during summary judgment proceedings, Microsoft's motion should be denied.

II.   A REASONABLE JURY COULD FIND THAT MICROSOFT'S CONDUCT VIOLATED SECTION 2 OF THE SHERMAN ACT

As it has throughout the case, Microsoft jumbles the accepted legal framework in

Sherman Act cases, making it far more complicated than necessary. Novell's theory of the case

is entirely in line with the Government Case and with Tenth Circuit precedent. There is no

reason to depart from established antitrust principles to evaluate the evidence.

Only two overarching questions must be answered. First, did Microsoft's conduct violate

Section 2 of the Sherman Act? Second, did that conduct proximately cause injury to Novell?

The first question focuses on the effects of the challenged conduct on competition; the second

focuses on the effects of the conduct on the plaintiff.

To answer the first question, Novell must show that (1) Microsoft possessed monopoly

power in the PC operating systems market and (2) willfully maintained that power through

anticompetitive conduct, rather than through development of a superior product, business

acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Several critical components of this test have already been established as a matter of law.

Microsoft does not, and cannot, contest that it had monopoly power at all relevant times,

meaning that Microsoft had the power to "control prices or exclude competition," *id.* at 571, at

the time it engaged in the challenged conduct and long thereafter. In addition, Microsoft does

not dispute that the relevant market consists of Intel-compatible PC operating systems. A

relevant market is defined by the barriers to entry that protect it because the relevant market

includes all products to which consumers could turn in response to an increase in price or

reduction in output. *Microsoft*, 253 F.3d at 51-52. Defining the relevant market is critical to

measuring a monopolist's ability to lessen or destroy competition. *Walker Process Equip., Inc.*

v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); *Reazin*, 663 F. Supp. at 1396 ("'[T]he

purpose of inquiries into market definition and market power is to determine whether an

arrangement has the potential for genuine adverse effects on competition . . . .'" (citation

omitted)). In most Section 2 cases, monopoly power and relevant market are hotly contested

74

issues. Here, however, the only question is whether Microsoft willfully maintained its monopoly

power through anticompetitive conduct.

In the Tenth Circuit, acts are anticompetitive when they "'impair opportunities of rivals

and are not competition on the merits or are more restrictive than reasonably necessary for such

competition,' if the conduct appears 'reasonably capable of contributing significantly to creating

or maintaining monopoly power.'" *Multistate Legal Studies*, 63 F.3d at 1550 (citation omitted);

see also 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651a (3d ed. 2011) (defining

"monopolistic conduct" as "acts that: (1) are reasonably capable of creating, enlarging or

prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do

not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed

for them, or (2c) produce harms disproportionate to any resulting benefits").

To answer the second question, Novell must show (1) that Microsoft's antitrust violation

proximately caused injury to Novell's business and (2) that the injury was the type of harm that

the antitrust laws were intended to prevent. *Novell*, 505 F.3d at 311; *Reazin*, 899 F.2d at 973.

These two overarching questions cannot be conflated. *See Angelico v. Lehigh Valley Hosp., Inc.*,

184 F.3d 268, 273, 275 n.2 (3d Cir. 1999) ("The District Court erred by incorporating the issue

of anticompetitive market effect into its standing analysis, confusing antitrust injury with an

element of a claim under section 1 of the Sherman Act . . . .").

A.   The Substantive Sherman Act Standards Do Not Depend On Whether Damages
        Or Injunctive Relief Is Sought

Contrary to Microsoft's assertion that the Government Case should be distinguished

because the United States sought equitable relief, a careful review of the federal antitrust

statutory scheme, the D.C. Circuit's opinion in the Government Case, and Judge Kollar-Kotelly's

subsequent remedies decision confirms that the law provides a single set of standards to

determine Sherman Act Section 2 liability whether damages or injunctive relief is sought.

Section 2 of the Sherman Act makes it illegal to monopolize trade or commerce.

15 U.S.C. § 2. Section 4 of the Sherman Act gives the United States the authority to "institute

proceedings in equity to prevent and restrain such violations," 15 U.S.C. § 4, and vests the

federal courts with authority to issue "'such orders and decrees as are necessary or appropriate'"

to accomplish the objectives of the antitrust laws, including injunctions forbidding repetition of

past violations and divestiture to restore competitive conditions. 1 ABA Section of Antitrust

Law, *Antitrust Law Developments* 703 (6th ed. 2007) (citation omitted).

The Sherman Act does not provide a private right of action. Instead, Section 4 of the

Clayton Act provides a treble damages claim to "any person who shall be injured in his business

or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).

Establishing a Section 2 violation is thus a condition precedent for ***both*** government equitable

enforcement and private treble damages actions. *See, e.g.*, *Full Draw Prods. v. Easton Sports,*

Inc., 182 F.3d 745, 750 (10th Cir. 1999). In government enforcement actions, equitable

principles determine the scope of relief. In private damages claims, treble damages are

mandatory, but courts use prudential rules of standing to decide whether a particular victim

should be allowed to maintain a private action. The Government Case confirms these principles.

In the Government Case, Microsoft argued (just as it does here) that the plaintiffs could

not prove a Section 2 violation because the district court did not find sufficient evidence that, but

for Microsoft's conduct, Navigator and Java would have "'ignited genuine competition'" in the

PC operating systems market. *Microsoft*, 253 F.3d at 78 (quoting Finding of Fact ¶ 411). The

D.C. Circuit rejected Microsoft's argument, emphasizing the distinction between establishing

liability and establishing the facts necessary to support the equitable remedy of divestiture. *Id.*

at 79-80. The D.C. Circuit wrote: "To require that § 2 liability turn on a plaintiff's ability or

inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive

conduct would only encourage monopolists to take more and earlier anticompetitive action." *Id.*

at 79. The D.C. Circuit explained (and this Court rightly agreed in its summary judgment

opinion) that "it would be inimical to the purpose of the Sherman Act to allow monopolists free

reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked

by rapid technological advance and frequent paradigm shifts." *Id.*; *see also Novell*, 699 F. Supp.

2d at 749.

After moving from the issue of Section 2 liability to the issue of the appropriate equitable

remedy, the D.C. Circuit held that courts should require "'a clear[] indication of a significant

causal connection between the conduct and creation or maintenance of the market power'"

before ordering "radical structural relief," such as divestiture. *Microsoft*, 253 F.3d at 80, 106

(quoting 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 653b, at 91-92 (1996)). As the D.C. Circuit

explained, "divestiture is a remedy that is imposed only with great caution, in part because its

long-term efficacy is rarely certain." *Id*. at 80. In addition, the goal of divestiture is to eliminate

monopoly power acquired in violation of the Sherman Act and therefore particularly strong proof

is required to establish the link between monopoly power and the unlawful conduct. *Microsoft*,

253 F.3d at 103, 106-07; *Grinnell*, 384 U.S. at 577.

To be clear, the D.C. Circuit wrote: "[T]hese queries [regarding Microsoft's request for a

stronger causal connection between the conduct and maintenance of monopoly power] go to

questions of remedy, not liability. In short, ***causation affords Microsoft no defense to liability***

for its unlawful actions undertaken to maintain its monopoly in the operating system market."

Microsoft, 253 F.3d at 80 (emphasis added). As a result, the D.C. Circuit affirmed that

Microsoft's conduct violated Section 2 of the Sherman Act, but vacated the remedies decree and

instructed the lower court to order divestiture only if the Government could prove a more

significant causal connection between the challenged conduct and maintenance of monopoly

power than required by Section 2. *Id.* at 106. As Judge Kollar-Kotelly wrote in *United States v.*

Microsoft Corp., the D.C. Circuit "appears to have identified a proportionality between the

severity of the remedy and the strength of the evidence of the causal connection. . . . [Therefore,]

the court crafting a remedy must assess the strength of the causation evidence that established

liability and 'tailor' the relief accordingly." 231 F. Supp. 2d 144, 164 (D.D.C. 2002) (citations

omitted), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

While Congress gave courts flexibility to determine the appropriate remedy for equitable

enforcement actions, it did not do so for private damages claims. Although Microsoft

characterizes treble damages as "punitive," Microsoft Mem. at 83, Congress determined that they

are the appropriate remedy to deter monopolists from "test[ing] the limits of the law."[36]

Microsoft, 253 F.3d at 49; *see also Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134,

139 (1968) (treble damages actions function as "an ever-present threat to deter anyone

contemplating business behavior in violation of the antitrust laws"), *overruled on other grounds*

by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

---

[36] Treble damages also serve a remedial purpose and act as an incentive for the private bar to
enforce the antitrust laws. *Novell*, 505 F.3d at 317 ("'[I]n enacting § 4[,] Congress sought to
create a private enforcement mechanism that would . . . deprive [violators] of the fruits of their
illegal actions, and would provide ample compensation to the victims of antitrust violations.'"
(second brackets in original) (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472
(1982))).

Indeed, damages are the only remedy sufficient to deter monopolists from taking "more and earlier anticompetitive action," *Microsoft*, 253 F.3d at 79, to eliminate potential and nascent threats. An injunction against continuation of the conduct would be virtually meaningless, because by that time the monopolist's goal has been accomplished. If Microsoft's argument were correct, then Netscape and Sun would be unable to pursue damages claims notwithstanding the considered decision of the D.C. Circuit. That is not the law. The Fourth Circuit, in fact, indicated that it would have granted standing to Netscape and Sun to pursue damages claims, just as it ruled that Novell has standing to pursue damages. *Novell*, 505 F.3d at 314 n.22.

Any concerns that private parties will flood the courts with tenuous damage claims are addressed by prudential standing rules. The courts grant standing only to those persons who can show a clear nexus between the substantive antitrust violation and the injury. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. 519, 529-35 (1983); *Novell*, 505 F.3d at 310-11; *Full Draw*, 182 F.3d at 750. This is consistent with Paragraph 657a of the *Antitrust Law* treatise (titled "Causation and Injury in § 2 Cases: 'Disaggregation' of Damages"), which is, ironically, the only authority that Microsoft cites in support of its incorrect argument that the standards of proof applied by the D.C. Circuit cannot be applied here. As it has consistently done throughout this case, Microsoft muddles two forms of very different "causation," (1) proximate causation in the conventional tort sense, linking the Sherman Act violation to the plaintiff's injury and (2) the much more limited concept of monopoly causation as discussed in the Government Case, linking the monopolist's conduct to the monopolist's maintenance of monopoly power. Paragraph 657a only addresses proximate cause in the conventional tort sense and makes clear that standing rules prevent unfair "piggybacking," stating:

79

> [T]he damage plaintiff must demonstrate not only that the defendant has violated
> the antitrust laws, but also that the plaintiff's business or property in fact suffered
> compensable injury as the result of that violation and that this injury is also injury
> to competition and "antitrust injury." ***Proper adherence to that principle would
> moderate the treble damage consequences of finding "exclusionary" conduct***.

3 Areeda & Hovenkamp, *Antitrust Law* ¶ 657a (emphasis added) (footnote omitted). Similarly,

the treatise states that where a government action is permissible, then "suit by private plaintiffs

must also be allowed unless they lack standing."' 2A Phillip E. Areeda et al. ¶ 335f (3d ed.

2011) (emphasis added).

Accordingly, Novell respectfully asks this Court to reject once and for all Microsoft's

argument that the Government Case's holding with respect to Section 2 liability applies only to

equitable enforcement actions. On all issues relating to liability, the Government Case's

holdings apply with equal force here, and should be deemed dispositive of the arguments raised

by Microsoft.

B.   A Reasonable Jury Could Find That Microsoft Engaged In
        "Anticompetitive Conduct"

"Whether any particular act of a monopolist is exclusionary, rather than merely a form of

vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of

legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58; *see also Caldera, Inc. v.

Microsoft Corp.*, 72 F. Supp. 2d 1295, 1306 (D. Utah 1999) ("Anticompetitive conduct describes

a wide variety of behavior including espionage, sabotage, predatory pricing, fraud, price

discrimination, price-fixing, bid-rigging, illegal tying arrangements, product disparagement and a

host of other activities that improperly stifle competition.");[37] *Caribbean Broad. Sys., Ltd. v.

---

[37]   Chief Judge Dee Benson of the District of Utah explained that the easiest way to define what
Section 2 prohibits may be by exclusion:

Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) ("'Anticompetitive conduct' can

come in too many different forms, and is too dependent upon context, for any court or

commentator ever to have enumerated all the varieties. It is a fair inference from the case law,

however, that the allegations made here – namely, that the defendants made fraudulent

misrepresentations to advertisers and sham objections to a government licensing agency in order

to protect their monopoly – bring the defendants' conduct well within that concept.").

In the Tenth Circuit, conduct is deemed "anticompetitive" when (1) it harms the

competitive process and (2) the monopolist cannot show that it acted with a legitimate business

justification. *See Microsoft*, 253 F.3d at 59 ("[I]f a plaintiff successfully establishes a *prima*

facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a

'procompetitive justification' for its conduct."); *Multistate Legal Studies*, 63 F.3d at 1550 ("A

defendant may avoid liability by showing a legitimate business justification for the conduct.").[38]

Actions that would be lawful in a competitive market can be deemed anticompetitive when

undertaken by a monopolist. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S.

451, 488 (1992) (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the

---

> [A] monopolist may engage in all of the same procompetitive activities that
> allowed it to become a legal monopolist in the first place. These would include
> building a better or less expensive product, engaging in better public relations,
> employing effective (and honest) advertising campaigns, and developing
> aggressive and effective marketing techniques. . . . Conversely, a monopolist may
> not engage in any activities other than those that are procompetitive . . . .

Caldera, 72 F. Supp. 2d at 1306.

[38]   *See also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187, 196-97 (3d Cir. 2005)
(applying burden-shifting approach); *In re Fresh Del Monte Pineapples Antitrust Litig.*,
No. 04-md-1628 (RMB)(MHD), 2009 WL 3241401, at *6 (S.D.N.Y. Sept. 30, 2009) (same),
aff'd sub nom. Am. Banana Co. v. J. Bonafede Co., 407 F. App'x 520 (2d Cir. 2010); *Brentwood
Acad. v. Tenn. Secondary Schs. Athletic Ass'n*, No. 3:97-1249, 2008 U.S. Dist. LEXIS 55312, at
*19 (M.D. Tenn. July 18, 2008) (same); *In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027,
1032-33 (N.D. Cal. 2008) (same).

81

antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist."); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist."); *Microsoft*, 253 F.3d at 69-71; *Multistate Legal Studies*, 63 F.3d at 1551.[39]

In its summary judgment opinion and jury instructions, this Court treated anticompetitive conduct and harm to competition as distinct inquiries. *Novell*, 699 F. Supp. 2d at 744; Jury Instructions Given by the Court at 10-11 (Dec. 19, 2011) (Dkt. # 388). Novell respectfully disagrees with that division. Conduct that harms the competitive process is, by definition, "anticompetitive" if the monopolist cannot demonstrate a legitimate business justification. *See, e.g.*, *Eastman Kodak*, 504 U.S. at 483-85 (if valid business reasons do not justify conduct that tends to impair the opportunities of rivals, it violates Section 2); *Multistate Legal Studies*, 63 F.3d at 1550.

---

[39] *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), on which Microsoft relies, is not to the contrary. That case held that a monopolist "'is permitted and indeed encouraged to compete aggressively on the merits.'" *Id.* at 375 (citation omitted). Anticompetitive conduct such as that at issue in this case is not competition on the merits. Moreover, *Olympia Equipment* recognized that, while monopolists generally "are not required to help their competitors," they must nevertheless "refrain from anticompetitive acts such as denial of access to essential facilities." *Id.* at 380.

Microsoft's reliance on *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), is also misplaced. The court in *Syufy Enterprises* merely rejected the argument that effective competition on the merits is an antitrust violation. *Id.* at 668-69. If a monopolist, rather than "provid[ing] lesser service at a higher price," instead acts consistently with a competitive market "out of fear perhaps that potential competitors are ready and able to step in," then "the purpose of the antitrust laws is amply served." *Id.* However, where – as here – a monopolist does not engage in competition on the merits, but instead engages in conduct to thwart potential competitors from stepping in, the monopolist is liable under the antitrust laws.

1.   *Novell Made a Prima Facie Showing of Harm to Competition*

A plaintiff makes out a *prima facie* case of harm to competition by adducing evidence

that the defendant's conduct would result in decreased output, higher prices, diminished quality,

reduced innovation, or increased entry barriers. *See generally* 2B Phillip E. Areeda & Herbert

Hovenkamp, *Antitrust Law* ¶ 403b (3d ed. 2011); *Fleischman v. Albany Med. Ctr.*,

728 F. Supp. 2d 130, 163 (N.D.N.Y. 2010). As discussed above, entry barriers "are factors . . .

that prevent new rivals from timely responding to an increase in price above the competitive

level." *Microsoft*, 253 F.3d at 51; *see also* Tr. 1721:21-1722:13 (Noll); Finding of Fact ¶ 36.

The effects of conduct should be viewed "over the long run." *Aspen Skiing*, 472 U.S. at

608.[40] Conduct that prevents rivals from effectively competing with a monopolist harms

competition because it prolongs consumers' exposure to the harmful effects of monopoly.

William F. Adkinson et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*

---

[40] *See also Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 931, 935-36 (6th Cir. 2005) (assessing defendant's conduct during the period after the predatory scheme had forced plaintiff from the market to ascertain whether the scheme had an anticompetitive effect); *Dentsply Int'l*, 399 F.3d at 191 (foreclosure of potential competition); *Microsoft*, 253 F.3d at 54, 72 (foreclosure of competition that was not an imminent threat); *Westwood Lumber Co. v. Weyerhaeuser Co.*, No. CV 03-551-PA, 2003 U.S. Dist. LEXIS 27213, at *13 (D. Or. Dec. 29, 2003) ("The Westwood Plaintiffs could offer evidence of Defendant's earlier conduct bearing upon the period at issue in this case . . . to show Defendant's intent to monopolize, its possession of monopoly power and ability to influence prices, the manner in which Defendant obtained and maintained its monopoly, and the harm to competition."), *aff'd sub nom. Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), *vacated and remanded on other grounds sub nom. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Zapata Gulf Marine Corp. v. Puerto Rico Mar. Shipping Auth.*, No. 86-2911, 1989 U.S. Dist. LEXIS 13650, at *8 (E.D. La. Nov. 14, 1989) (evidence postdating plaintiff's withdrawal from market of (1) demise of subsequent would-be competitors and (2) subsequent increase in defendants' prices was relevant to whether earlier conduct directed at plaintiff was anticompetitive).

at 2 (Working Paper for FTC and DOJ Hearings on Section 2 of the Sherman Act: Single-Firm

Conduct as Related to Competition Nov. 3, 2008).[41]

While Microsoft would like to pigeonhole this case into the category of unilateral-refusal-

to-deal cases arising from *Trinko* and *Aspen Skiing*, those cases do not apply where the

monopolist acts affirmatively to exclude potential competition. *Christy Sports, LLC v. Deer*

Valley Resort Co., 555 F.3d 1188, 1196-97 (10th Cir. 2009) (*Aspen Skiing* would not apply if

"by first inviting an investment and then disallowing the use of the investment the resort imposed

costs on a competitor that had the effect of injuring competition in a relevant market.");

Multistate Legal Studies, 63 F.3d at 1553 n.12 (rejecting *Aspen Skiing* analysis because

plaintiff's complaint went beyond merely alleging refusal to cooperate and included allegations

that monopolist deliberately acted to harm plaintiff).

    a. Microsoft's conduct as a whole harmed competition in the PC operating
        systems market

It is well established that, in determining whether the defendant's conduct is

anticompetitive, the defendant's conduct should be viewed as a whole. *LePage's, Inc. v. 3M*

(Minn. Mining & Mfg. Co.), 324 F.3d 141, 162 (3d Cir. 2003) (en banc) ("The relevant inquiry is

the anticompetitive effect of [the defendant's] exclusionary practices considered together. . . .

[T]he courts must look to the monopolist's conduct taken as a whole rather than considering each

aspect in isolation."); *see also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,

699 (1962); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18

(10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *Novell*, 699 F. Supp. 2d at 745, 750; *Caldera*, 72 F.

Supp. 2d at 1307 n.6. Thus, the effects of the conduct should be evaluated on "an *aggregate*

---

[41] This document is available at http://www.ftc.gov/os/sectiontwohearings/index.shtm.

basis." 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 244 (6th ed. 2007); *see also City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect. . . . We are dealing with what has been called the 'synergistic effect' of the mixture of the elements."); *City of Mishawaka, Ind. v. Am. Electric Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) ("It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor."), *overruled on other grounds by City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Caldera*, 72 F. Supp. 2d at 1313 ("Caldera's claim of unlawful predatory conduct is based on the aggregate effect of all of Microsoft's anticompetitive behavior.").

Accordingly, it is Novell's position that the jury should have been allowed to consider Microsoft's de-documentation of the namespace extension APIs as part of a larger scheme to eliminate threats to Microsoft's monopoly power, including its efforts to keep Navigator, Java, and other applications from achieving the critical mass necessary to reduce Microsoft's monopoly power in the operating systems market. *See, e.g.*, *Novell*, 699 F. Supp. 2d at 749 n.20 (rejecting Microsoft's argument that its conduct toward Novell was "fundamentally different than the anticompetitive conduct Microsoft directed against other ISVs and applications"); *Microsoft*, 87 F. Supp. 2d at 38 ("Microsoft strove over a period of approximately four years to prevent middleware technologies from fostering the development of enough full-featured, cross-platform applications to erode the applications barrier."). Under this view, the jury could find a Section 2 violation if it found that (1) Microsoft's withdrawal of support for the namespace extension APIs was part of the same scheme to eliminate applications that it believed could erode the applications barrier to entry as was Microsoft's conduct intended to eliminate

Navigator and Java and (2) Microsoft did not meet its burden of establishing a legitimate

business justification for its de-documentation of the APIs. *See, e.g.*, *Abbott Labs. v. Teva*

Pharm. USA, Inc., 432 F. Supp. 2d 408, 428 (D. Del. 2006) ("Plaintiffs are entitled to claim that

individual acts are antitrust violations, as well as claiming that those acts as a group have an

anticompetitive effect even if the acts taken separately do not."); *Washington Alder LLC v.*

Weyerhaeuser Co., No. CV 03-753-PA, 2004 WL 1068791, at *1 (D. Or. May 7, 2004)

(rejecting defendant's attempt to "compartmentaliz[e] each alleged anticompetitive act and

analyz[e] it in a vacuum instead of considering the cumulative impact of those acts" and holding

defendant's prior anticompetitive conduct in log market could be considered as part of "overall

scheme" to monopolize lumber market).[42] Moreover, the Government Case found that "each

type of middleware contributed to the threat posed by the entire category." Finding of Fact ¶ 68;

see also Finding of Fact ¶ 77 (Navigator's and Java's potential to "hasten the demise of the

applications barrier to entry" was a "combined effort[]" resulting from the "symbiosis" between

the two technologies, which exceeded the potential independently held by either one).

 As this Court recognized in its summary judgment opinion, the law will not permit a

monopolist to eliminate multiple small threats which, combined, would pose a threat to its

---

[42] *See also Rochester Drug Coop. v. Braintree Labs.*, 712 F. Supp. 2d 308, 318-19 (D. Del. 2010) (holding plaintiff sufficiently alleged anticompetitive conduct consisting of "multifaceted scheme" to unlawfully maintain monopoly by enforcing invalid patent and declining to "analyze whether each facet of this scheme constitutes a separate antitrust violation"); *In re Gabapentin Patent Litig.*, 649 F. Supp. 2d 340, 358-59 (D.N.J. 2009) ("If a plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability."); *SmithKline Beecham Corp. v. Apotex Corp.*, 383 F. Supp. 2d 686, 702 (E.D. Pa. 2004) (refusing to dismiss antitrust counterclaims based on "larger scheme to maintain [a] monopoly," because of court's obligation to "consider the anticompetitive effect of [the] acts as a whole," even though certain elements of the scheme did not independently produce an antitrust injury).

monopoly even if each would not do so independently. *Novell*, 699 F. Supp. 2d at 749 n.20

(noting economist's position that "'[i]n a 1000-firm market, the harm to any one competitor

would not cause harm to competition, but that is irrelevant to ascertaining whether the entire

pattern of conduct against all 1000 firms caused anticompetitive harm'" and Microsoft's

apparent concession that, "under some circumstances, the anticompetitive harm caused by a

defendant's anticompetitive conduct toward multiple small competitors could be aggregated to

reach a significant contribution finding in the relevant market" (citation omitted)).

The jury heard abundant evidence that Mr. Gates and other senior Microsoft executives

viewed Novell/WordPerfect as one of several threats to Microsoft's continued monopoly power

during the relevant time period. *See, e.g.*, PX 17 (Microsoft threatened by Lotus); PX 31

(Microsoft threatened by Lotus); PX 32 (Microsoft threatened by Novell and Lotus); PX 33

(Microsoft threatened by Novell, Lotus, and IBM); PX 54 (Microsoft threatened by Novell and

Lotus); PX 72 (Microsoft threatened by Novell and Lotus); PX 88 (Microsoft threatened by

IBM, Novell, Apple, Sun, HP (UNIX), Novell UNIX, and SCO); PX 91 (Microsoft threatened by

Novell and Lotus); PX 127 (Microsoft threatened by Novell, IBM, Sun, Lotus, and Apple);

PX 201 (Microsoft threatened by Novell/WordPerfect and Lotus). In his email de-documenting

the namespace extension APIs, Mr. Gates expressly linked WordPerfect and Lotus.[43] Mr. Gates

was also aware that Novell was integrating Internet and web browsing functionality into

---

[43]   *See* PX 1 ("We should wait until we have a way to do a high level of integration that will be
harder for the likes of [Lotus] Notes, WordPerfect to achieve, and which will give Office a real
advantage," and "We can't compete with Lotus and WordPerfect/Novell without this. Our goal
is to have Office '96 sell better because of the shell integration work.").

WordPerfect (this functionality would eventually be provided by Netscape Navigator, which was

bundled with PerfectOffice[44]). *See* PX 222.

> b. The conduct "directed at" Novell, in and of itself, harmed
> competition

Alternatively, even considering only Microsoft's conduct directed at Novell, the evidence

of harm to competition still overwhelmingly favors Novell. The jury had more than sufficient

evidence to conclude that (1) Microsoft's conduct caused Novell's applications to be late to

market during a critical window of opportunity and therefore WordPerfect lost substantial market

share and the ability to help attain the critical mass necessary to lower the applications barrier to

entry; and (2) WordPerfect's lost market share harmed competition by artificially widening the

applications barrier to entry.[45] Under this view, Microsoft's overall pattern of behavior gives

increased plausibility to Novell's claim. *See Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*,

331 F. Supp. 2d 513, 534 (E.D. Tex. 2004).

By eliminating WordPerfect, Microsoft manipulated the supply side and the demand side

dynamics of the industry. On the supply side, excluding WordPerfect harmed competition in the

same way that exclusion of Navigator and Java harmed competition: it prevented a middleware

---

[44] *See* Tr. 593:20-596:7 (Richardson) (explaining how WordPerfect integrated Netscape
Navigator functionality); *see also* PX 268 (a software license agreement between Novell and
Netscape which allowed Novell to reproduce, distribute, combine, and integrate Netscape into its
products); PX 374 at NOV-B13465526 (noting that PerfectOffice for Windows 95's
QuickFinder technology would work with Netscape so users could search for words or phrases
and go directly to the website where the words or phrases were found).

[45] In this regard, the Court's prior observation that there may be a third level of causation is
accurate. The chain of causation would be: (1) Did the conduct cause Novell's applications'
delay and loss of market share?; (2) Was the exclusion of WordPerfect reasonably capable of
contributing significantly to Microsoft's monopoly power?; and, if the jury answers these
affirmatively, (3) Did the conduct cause antitrust injury to Novell? *See*, *e.g.*, Ankur Kapoor,
What Is the Standard of Causation of Monopoly?, Antitrust Vol. 23 at 38 (Summer 2009).

technology from fostering the development of applications that could erode the applications

barrier to entry for potential operating system competitors.

On the demand side, it limited customer choice because consumers focus on applications,

not operating systems. A key franchise like WordPerfect constrained Microsoft's market power

in the PC operating systems market by providing a non-Microsoft word processor for potential

entrants, thus lowering the barrier to entry for companies considering entering the PC operating

systems market. Dr. Noll explained that the underlying operating system did not materially

influence the choice of consumers who used cross-platform word processors like WordPerfect or

Ami Pro. Tr. 1732:20-1733:17 (Noll). The evidence at trial showed that WordPerfect was an

extremely popular application in the mid-1990s, and Microsoft considered WordPerfect to be a

Tier "A" ISV. PX 517 at MS7045839.

Microsoft's motion is premised on the fundamentally wrong assertion that Novell must

prove that its business applications would have "induced PC users to move to operating systems

other than Windows" or changed the "competitive landscape in the PC operating system

market," or that "end-users would abandon Windows for other operating systems." Microsoft

Mem. at 62, 67. But the law does not impose any such burden on Novell. *Microsoft*, 253 F.3d at

79. It must only show that its business applications could have *diminished* or *weakened* the

applications barrier to entry. Findings of Fact ¶¶ 68-69. As a matter of law and logic, lower

barriers to entry decrease a monopolist's power to control prices or exclude competition, and

vice versa. Dr. Noll agreed, testifying that the substantial increase in Microsoft's market share

for office productivity applications between 1994 and 1997, and the corresponding decline in

sales of Novell's office productivity applications, "increased the applications barrier to entry and

89

necessarily contributed to Microsoft's continued power to control prices or exclude

competition." Tr. 1761:12-1762:22, 1763:2-13, 1831:5-1832:25 (Noll).

Contrary to Microsoft's assertions, Dr. Noll has never imposed a requirement that

middleware must be cross-platform and "available on all or nearly all PCs" before it could

weaken the applications barrier to entry. *See* Microsoft Mem. at 6. To the contrary, Dr. Noll

testified that those characteristics were necessary to "completely destroy" the applications barrier

to entry," but it "is not correct to say that something less than that couldn't increase competition"

by weakening, though not eliminating, the applications barrier to entry. Tr. 1926:17-22 (Noll);

cf. Finding of Fact ¶ 74 (acknowledging that the applications barrier to entry would

incrementally erode as Sun moved closer to its goal of "'write once, run anywhere'"). Dr. Noll

further explained:

> [I]t's a continuous relationship, that the higher the fraction of
> functions that can be accessed through the middleware, the more
> the porting costs have been reduced and, hence, the more the
> middleware affects competition. So that's why it's a continuous
> process. ***It's not an either/or process***. 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.

Tr. 1958:4-1959:5 (Noll) (emphasis added).

Even Dr. Murphy recognized that this process is a continuum: the more that applications

are written in whole or even in part to middleware, the more the applications barrier to entry is

reduced. Tr. 4922:22-4923:6 (Murphy). Dr. Murphy admitted that complete destruction of the

applications barrier to entry is not necessary because simply ***reducing*** the entry barrier is

sufficient to engender more competition in the PC operating systems market. *See* Tr. 4923:7-24

(Murphy).

Quantitatively, the elimination of WordPerfect unquestionably caused more harm to the competitive process than at least some of the acts directed against Navigator and Java that harmed competition in the Government Case.[46] For example, the D.C. Circuit found that conduct preventing the distribution of Navigator on some 5 million Macintosh computers harmed competition. By comparison, Microsoft's conduct here resulted in at least 7 million fewer WordPerfect licenses being sold. Tr. 1824:17-1926:22 (Noll).[47] As a matter of law, that evidence alone is more than sufficient for a reasonable jury to find harm to competition. Similarly, the D.C. Circuit found that Microsoft's threats to Intel to stop working with Sun on cross-platform software exerted the necessary effect on competition to impose liability even without quantifying its effect. *See Microsoft*, 253 F.3d at 77-78.

The Government Case, in fact, provides concrete evidence that Microsoft's exclusion of WordPerfect *did* preserve Microsoft's monopoly power.[48] In 1997, Apple's business was in decline and ISVs were questioning the wisdom of continuing to spend time and money developing applications for the Mac operating system. *Microsoft*, 253 F.3d at 73. By that time, with WordPerfect marginalized, some 90% of Mac users running a suite of office productivity applications used Microsoft's version of Office for the Mac operating system. *Id.* Had Microsoft announced that it was ceasing development of Mac Office, customers, developers, and investors would have viewed the announcement as Apple's death notice. *Id.* In other words, by seizing control of the office suite market, Microsoft furthered its ability to exclude potential

---

[46] Novell also argues that elimination of WordPerfect harmed competition in exactly the same way as in the Government Case, by eliminating a distribution channel for Navigator and Java.

[47] *See also* Novell's Proffer of Evidence Regarding the Testimony of Professor Roger G. Noll at 7 (Nov. 17, 2011) (Dkt. # 296) ("Noll Proffer").

[48] The jury was precluded from hearing this evidence. Novell proffered it on November 17, 2011. *See* Noll Proffer.

competition in the PC operating systems market – which is the touchstone of monopoly power. When Apple refused Microsoft's demand that it stop installing Navigator on the Mac operating system, one Microsoft executive wrote that it should use its control of the Office suite "'as a club'" to force Apple to exclude Netscape Navigator. *Id.* (citation omitted). Ultimately, Apple had to agree to Microsoft's demand because Apple had no viable alternative to Office. *Id.*; *see also* Tr. 1010:7-18 (Frankenberg) (word processors were the most frequently used applications). Just as Mr. Raikes wrote, Microsoft's ownership of a key franchise strengthened its monopoly power.

Microsoft incorrectly argues that its conduct could not harm competition because Windows' market share would have been higher had it fully documented and published the APIs. Microsoft Mem. at 87-90. Microsoft's argument should be rejected for a number of reasons.

First, when a monopolist engages in conduct that makes no economic sense apart from its harmful effect on competition, that fact is viewed as strong evidence of anticompetitive conduct, not the opposite. *See Multistate Legal Studies*, 63 F.3d at 1550 (conduct constituting an "'abnormal response to market opportunities'" is presumptively anticompetitive (citation omitted)); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987) (equating conduct "without legitimate business purpose" with conduct "that makes sense only because it eliminates competition"); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986) (conduct that would not be considered profit maximizing except for the expectation that actual rivals will be driven from the market or the entry of potential rivals blocked or delayed so that the monopolist will gain or retain market share or rivals will be chastened sufficiently to abandon competitive behavior the monopolists finds threatening to its monopoly power); *BanxCorp v. Bankrate Inc.*, No. 07-3398 (ES)(CLW), 2011 WL 6934836,

at *20 (D.N.J. Dec. 30, 2011); *Aventis Envtl. Sci. USA LP v. Scotts Co.*, 383 F. Supp. 2d 488, 516

(S.D.N.Y. 2005); *Transamerica Computer Co. v. IBM Corp. (In re IBM Peripheral EDP Devices*

Antitrust Litig.), 481 F. Supp. 965, 1007-08 (N.D. Cal. 1979) (Conduct is illegal where "[t]he

only purpose served and the only effect of the degradation was the preclusion of competition. . . .

The law need not tolerate deliberate acts where the only purpose and effect is to use monopoly

power to gain a competitive advantage."), *aff'd*, 698 F.2d 1377 (9th Cir. 1983); ABA Section of

Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases, 2005 Edition*, Instruction 10,

at C-27 (2005); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No*

Economic Sense" Test, 73 Antitrust L.J. 413, 421-23 (2006).

Antitrust law assumes that monopolists act rationally and that short-term losses will be

offset by long-term gains. Thus, there are many cases like this one in which liability is imposed

even though the monopolist's conduct caused a short-term loss in market share. *Ball Mem'l*

Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share reflects

current sales, but today's sales do not always indicate power over sales and price tomorrow.").

In *Reazin*, for example, the monopolist explicitly understood that its conduct would result in lost

sales and that it would not see any anticompetitive benefits for at least two or three years. *Reazin*

v. Blue Cross & Blue Shield of Kan., Inc., 635 F. Supp. 1287, 1309 (D. Kan. 1986), *aff'd*,

899 F.2d 951 (10th Cir. 1990); *see also Multistate Legal Studies*, 63 F.3d at 1553 & n.12 (bar

exam preparation company would have had more customers had it not created schedule

conflicts). Similarly, in *Aspen Skiing*, the resort owner would have had higher sales but for the

fact that it canceled the all-resort pass and refused the plaintiff's offer to buy all of the available

tickets at retail prices. *See infra* Argument Part IV.

As shown above, in the but-for world, Novell/WordPerfect, Netscape, Sun, Lotus, and Apple all (and each of them) could have diminished the applications barrier to entry and therefore constrained Microsoft's market power. Thus, while Microsoft might have been able to achieve the same market share had it not excluded WordPerfect (and Navigator and Java), it would have had to do so by competing on the merits – lowering prices or improving its product – instead of simply relying on the applications barrier to entry. *See, e.g.*, Tr. 1930:23-1931:10 (Noll).

The cases on which Microsoft relies for its contrary argument all involved situations in which the monopolist's conduct produced short-term gains, not losses. In *Christy Sports*, for example, the resort owner sought to recoup part of its investment in its resort by enforcing a covenant preventing another ski-rental business, which had not paid the resort owner anything for a decade, from operating on its property. 555 F.3d at 1197. And in *Four Corners Nephrology Assocs., P.C. v. Mercy Medical Center of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009), a hospital recouped part of its investment in a new medical practice – and arguably prevented the practice from going bankrupt – by giving exclusive privileges to its own practice. Therefore, Microsoft's admission that Windows 95 would have been a better and more desirable product had it fulfilled its promise to provide the APIs is reason enough to conclude that Microsoft's exclusion of WordPerfect was anticompetitive.

Second, the Tenth and D.C. Circuits have both rejected the argument that a plaintiff must show with precision that it would in fact have facilitated competition but for the challenged conduct. In *Multistate Legal Studies*, for example, the monopolist owned a bar exam review course and intentionally created scheduling conflicts with a rival to discourage students from taking the rival's workshop. 63 F.3d at 1552-53. The monopolist argued that the conflict only

made it more inconvenient for students to take both courses, but the Tenth Circuit said the

relevant inquiry is not whether the conduct would actually eliminate competition, but whether it

was "reasonably capable of contributing significantly" to a monopolization attempt. *Id*. at

1553.[49]

The Government Case is particularly compelling in this regard. As discussed above,

although the D.C. Circuit expressly recognized that the plaintiffs could never confidently

reconstruct the but-for world, it found that a monopolist that has harmed the competitive process

and engaged in conduct other than competition on the merits must "'suffer the uncertain

consequences of its own undesirable conduct.'" *Microsoft*, 253 F.3d at 79 (citation omitted).

Even though the United States did not present any testimony from other operating system

vendors that Navigator or Java had the potential to create greater competition among operating

systems, the D.C. Circuit affirmatively ruled that neither application would necessarily have

---

[49] In adopting and applying the "reasonably capable" test, the D.C. Circuit relied on two treble
damages cases: *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir.
1994) (cited by this Court in its summary judgment opinion), *abrogated on other grounds by
Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), and *Morgan v. Ponder*, 892 F.2d 1355,
1361-63 (8th Cir. 1989). There are many other cases using the same or similar standard. *See,
e.g.*, *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000); *PSI Repair Servs.,
Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997); *Town of Concord, Mass. v. Boston
Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur.
Co.*, 817 F.2d 639, 649 (10th Cir. 1987); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d
980, 999 n.19 (D.C. Cir. 1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230
(1st Cir. 1983) (Breyer, J.) (cited in the Government Case); *Hertz Corp. v. Enter. Rent-A-Car
Co.*, 557 F. Supp. 2d 185, 193 (D. Mass. 2008); *Cytologix Corp. v. Ventana Med. Sys., Inc.*,
Nos. 00-12231-RWZ, 01-10178-RWZ, 2006 WL 2042331, at *4 (D. Mass. July 20, 2006); *Z-Tel
Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004); *Nobody in
Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1105
(D. Colo. 2004); *Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1145 (D. Utah 2001), *aff'd*,
306 F.3d 1003 (10th Cir. 2002); *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F. Supp. 2d
189, 197 (D. Mass. 1999); *CTC Commc'ns Corp. v. Bell Atl. Corp.*, 77 F. Supp. 2d 124, 144
(D. Me. 1999); *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, No. 96-1336-JTM,
1997 WL 225966, at *7 (D. Kan. Apr. 8, 1997). Novell could supply the Court with additional
decisions upon request.

"'ignited genuine competition,'" agreed that the record contained sufficient evidence that

Navigator and Java "showed potential as middleware platform threats," and sustained liability.

Id. at 78-79 (citation omitted); *see also Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 830 (6th Cir.)

(The "'exclusion of nascent threats'" is "especially pernicious because of the emerging

competitive impact" those threats represent. (quoting *Microsoft*, 253 F.3d at 79)), *cert. denied*,

132 S. Ct. 400 (2011).

　　　Third, even if one applied a more stringent causation standard, there is still more than

enough evidence for the jury to rule against Microsoft. By definition, if conduct artificially

extends barriers to entry, then it contributes to the monopolist's continued market power because

monopoly power is defined, in part, by the presence of barriers to entry. *Reazin*, 899 F.2d at 968

("'[S]ubstantial market power can persist only if there are significant and continuing barriers to

entry'" (citation omitted)). One could simply ask: Would Microsoft's monopoly power be

enhanced or diminished by the exclusion of WordPerfect (and Navigator and Java)? The answer

is plain. It is the flip side of a finding that Microsoft's conduct prevented the development of

technologies that could lower barriers to entry into the PC operating systems market. *See*

Microsoft, 253 F.3d at 56 ("Because the applications barrier to entry protects a dominant

operating system irrespective of quality, it gives Microsoft power to stave off even superior new

rivals."); *see also LePage's*, 324 F.3d at 159 ("When a monopolist's actions are designed to

prevent one or more new or potential competitors from gaining a foothold in the market by

exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential

competitor but also to competition in general.").

　　　In addition, Microsoft's argument ignores its own documents and the statements by its

own executives which provide all the evidence necessary for a jury to conclude that the

exclusion of Novell/WordPerfect harmed competition and contributed to Microsoft's monopoly power. *See, e.g.*, PX 1; PX 361 at MS-PCA 1301180; *see also* PX 220; PX 324. Evidence of the monopolist's intent is relevant to predict the consequences of the challenged conduct. *Microsoft*, 253 F.3d at 59; *Aspen Skiing*, 472 U.S. at 603. Given the overwhelming evidence that Microsoft believed at the time that Novell posed a threat to its monopoly power, it cannot credibly argue the opposite now to escape liability. The contemporaneous perceptions of Microsoft's executives are the best evidence.

<div align="center">c.   Microsoft's defenses are without merit</div>

Microsoft also argues that monopolists may (1) deceive competitors without ever violating the Sherman Act; (2) use their intellectual property for anticompetitive purposes with impunity; (3) withdraw technical support for any reason, without regard to the effects on competition; and (4) engage in patently harmful conduct if it can be characterized as an "ordinary practice" for non-monopolists. As shown below, each of the cases that Microsoft cites for these unprecedented assertions was decided by applying the traditional Section 2 framework and failed because either the monopolist provided a legitimate business justification or the plaintiffs could not establish that the conduct harmed competition in the first instance.

"Deception": The idea that the antitrust laws would encourage monopolists to deceive competitors or third parties is inherently wrong. There are, in fact, numerous cases involving deceptive conduct by a monopolist that has been found to violate the antitrust laws, including cases like this where a monopolist induces reasonable reliance and then engages in affirmative conduct to sabotage a competitor for the purpose of protecting its monopoly power.

In the Government Case, for example, the D.C. Circuit found Microsoft liable for failing to fulfill a public commitment to cooperate with Sun and other developers to promote cross-

<div align="center">97</div>

platform applications when it voluntarily provided development tools to developers without disclosing that those tools would inevitably result in applications that worked only on Windows. The D.C. Circuit found that the conduct violated Section 2 because it harmed the competitive process in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, without ever discussing Microsoft's supposed duty to deal with Sun. *Microsoft*, 253 F.3d at 77; *see also Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044-52 (9th Cir. 2008) (defendant defrauded customers by misleading them as to contract extensions so as to shield its customers from competition); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002);[50] *Caribbean Broad. Sys.*, 148 F.3d 1080 (antitrust claim predicated on the monopolist's misrepresentations); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1260-73 (8th Cir. 1980) (deceptive advertising campaign by monopolist was intended to prevent competitive threat); *W. Duplicating, Inc. v. Riso Kagaku Corp.*, No. Civ. S98-208 FCD GGH, 2000 WL 1780288, at *7 (E.D. Cal. Nov. 21, 2000) (defendant engaged in deceptive conduct, including misleading "FUD" marketing campaign, to eliminate competition); *In re Warfarin Sodium Antitrust Litig.*, No. MDL 98-1232-SLR, 1998 U.S. Dist. LEXIS 19555, at *33-35 (D. Del. Dec. 7, 1998) (defendant made false and misleading statements to the public regarding lower-cost competitor), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000).

None of these cases require proof of an intentional plan (although there is abundant evidence in the record from which a jury could reasonably conclude that Mr. Gates always

---

[50] Microsoft admits – as it must – that a number of other cases have based antitrust liability on a monopolist's false or misleading statements or actions, but attempts to distinguish these on the ground that they involved deception ***about*** competitors rather than ***of*** competitors. Microsoft offers no logical reason why the antitrust laws should immunize anticompetitive conduct when a competitor is deceived, while imposing liability for anticompetitive conduct when a third party is deceived about a competitor – and none of the cases Microsoft cites make such a distinction.

intended to deny ISVs the namespace extension APIs). Instead, the focus of the inquiry is

always on the anticompetitive effect of the monopolists' conduct and the monopolists' proffered

justifications for it. Microsoft's cases stand for the unremarkable proposition that the Sherman

Act does not prohibit conduct which is otherwise deceptive, malicious, harsh, unfair, or

independently tortious unless it harms competition. Indeed, *every one* of Microsoft's cited cases

turned on the fact that the record failed to show harm to competition as opposed to harm to a

single competitor (except Microsoft cites *In re Warfarin Sodium Antitrust Litigation*, 1998 U.S.

Dist. LEXIS 19555, at *27-28, which found that supplying fraudulent information to agencies

supported a Section 2 claim).[51]

Intellectual property: Microsoft's argument that it cannot be found liable for violating

the Sherman Act because the namespace extension APIs were its "intellectual property" is

indistinguishable from the same argument it raised, and lost, in the Government Case. The

D.C. Circuit wrote that Microsoft's argument "border[ed] upon the frivolous" and "is no more

correct than the proposition that use of one's personal property, such as a baseball bat, cannot

give rise to tort liability." *Microsoft*, 253 F.3d at 63. As this Court properly instructed the jury,

"intellectual property rights do not confer a privilege to violate the antitrust laws."

---

[51] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("That
below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws
if competition is not injured . . . ."); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355, 1359,
1364 (Fed. Cir. 1999) (record contained no evidence of harm to competition); *Am. Prof'l Testing
Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151
(9th Cir. 1997) (Plaintiff must make a "'preliminary showing of significant and more-than-
temporary harmful effects on *competition* (and not merely upon a competitor or customer)'
before these practices can rise to the level of exclusionary conduct." (citation omitted)); *Midwest
Underground Storage, Inc. v. Porter*, 717 F.2d 493, 498 (10th Cir. 1983) (evidence failed to
show harm to competition); *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 139 (D.D.C.
2002) (Harm to competitors "is not condemned by the Sherman Act in the absence of harm to the
competitive process and thereby harm to consumers."), *aff'd sub nom. Massachusetts v.
Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

Tr. 5349:16-18; *see also Microsoft*, 253 F.3d at 63. While innovation is a form of competition

on the merits, a monopolist may maintain its monopoly power only through the pro-competitive

use of that innovation – for example, providing a better or less expensive product. *See Foremost*

Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983), *overruled on other*

grounds by Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987); *GAF Corp. v. Eastman*

Kodak Co., 519 F. Supp. 1203, 1227 (S.D.N.Y. 1981).

Withdrawal of technical support: Microsoft wrongly cites *Intergraph Corp. v. Intel*

Corp., 195 F.3d 1346 (Fed. Cir. 1999), for the proposition that "withdrawal of technical support

is not anticompetitive." Microsoft Mem. at 98. *Intergraph* does not stand for this proposition.

Instead, applying standard Section 2 analysis, the Federal Circuit found that (1) the defendant did

not have monopoly power in the relevant market, which had no significant barriers to entry, *id*. at

1355, 1364; (2) the plaintiff failed to show that the challenged conduct could harm competition,

id. at 1359, 1362, 1367; and (3) therefore the defendant did not need to establish a pro-

competitive business justification for its conduct as would otherwise be required, *id.* at 1359.

Nothing in that case suggests that monopolists can withdraw technical support for illegitimate

reasons if the conduct harms competition.

Ordinary industry practice: At trial, Microsoft sought a jury instruction that its

conduct could not be deemed anticompetitive if its conduct was "not inconsistent with software

industry practice." Microsoft's Proposed Final Jury Instructions, Ex. A at 7 (Dec. 5, 2011)

(Dkt. # 330). This Court correctly rejected it. Jury Instructions Given by the Court at 7-11

(Dec. 19, 2011). Microsoft tries to revive this argument by relying on *Telex Corp. v. IBM Corp.*,

510 F.2d 894, 925-26 (10th Cir. 1975), but fails to mention that the Tenth Circuit revisited *Telex*

in *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639,

649 (10th Cir. 1987), to clarify that *Telex* held only that ordinary business practices did not become anticompetitive **merely** because they were undertaken by a monopolist. In that case, the Tenth Circuit used standard Section 2 analysis to find that a monopolist's short-term price cutting may be unlawful when it is used to secure long-term monopoly profits, particularly when coupled with evidence of bribery, disparagement, and lawsuit abuse. 817 F.2d at 648-49.[52]

In fact, evidence at trial established that Microsoft's decision to withdraw functionality (as opposed to fixing bugs) was highly unusual. The purpose of releasing a beta version to ISVs is to identify bugs and "hammer out the problems; not at that point, to do new features or change features." Tr. 303:3-15, 336:6-12 (Harral); Tr. 1389:7-25 (Alepin). As Mr. Harral testified, in his 31 years of experience in the software industry, "an operating system vendor removing a major feature from a published beta [would] be an extraordinary event." Tr. 335:4-8, 336:6-12 (Harral). Mr. Alepin characterized the decision as "exceptional." Tr. 1389:7-17 (Alepin).

> 2.   *Microsoft Cannot Establish as a Matter of Law That Its Conduct Was Justified by a Non-Pretextual, Legitimate Business Justification*

After the plaintiff makes a *prima facie* showing of harm to competition, the burden shifts to the monopolist to prove a non-pretextual, legitimate business justification for its conduct. *Microsoft*, 253 F.3d at 59; *see also Multistate Legal Studies*, 63 F.3d at 1550. A monopolist may not, however, justify its conduct simply by asserting that it wanted to preserve its market power, *see Microsoft*, 253 F.3d at 72, or that it wanted to underwrite its short-term losses with monopoly profits in another market.[53]

---

[52] The Tenth Circuit confirmed that its ruling was based on the "reasonably capable of contributing significantly to creating or maintaining monopoly power" causation standard. *Instructional Sys. Dev.*, 817 F.2d at 649.

[53] Although Novell does not have an applications market claim as a legal matter, the effect of Microsoft's conduct on complementary markets cannot be ignored as a matter of antitrust

Microsoft has put forth what it claims are three legitimate business justifications for its decision to withdraw support for the namespace extension APIs: (1) a poorly designed application written to use the namespace extension APIs could crash the Windows 95 shell; (2) the namespace extension APIs were not compatible with future versions of Windows that were then being developed; and (3) the namespace extension APIs were trivial and did not achieve the functionality for which Bill Gates had hoped.

As an initial matter, whether Microsoft has met its burden of proving that its purported justifications are legitimate and non-pretextual is a question of fact to be determined by the jury and is not a proper basis for judgment as a matter of law. *See, e.g.*, *JamSports & Entm't LLC v. Paradama Prods., Inc.*, 336 F. Supp. 2d 824, 843 (N.D. Ill. 2004) (whether the defendant had "'valid business reasons'" for its conduct is a question of fact and jury can look to monopolist's intent to determine whether its conduct had a purpose other than excluding competition (citation omitted)).

The fact that Mr. Gates' email directing his subordinates to de-document the namespace extension APIs makes no mention of any of these three alleged justifications is, in and of itself, sufficient to create a question of fact. The trial record further refutes Microsoft's proffered justifications in all other respects.

---

economics because evaluating the total effect of that conduct on consumers, on balance, is the "right test." Tr. 1962:14-1965:25 (Noll). Therefore, even assuming that Microsoft made up for its sacrificed short-term profits in the operating systems market by increasing its short-term profits in the applications market, that result does not make Microsoft's conduct pro-competitive. As Dr. Noll explained, "the increased profitability in market share of Microsoft Office also has to be decomposed into that part, which is superior efficiency, and that part which is the result of anticompetitive conduct." Tr. 1963:12-17 (Noll). Here, it is clear that any increase in the sales of Office that Microsoft gained from disadvantaging its competitors by withdrawing support for the namespace extension APIs was not a result of any superior efficiency, but rather of Microsoft's anticompetitive intent to disadvantage middleware and key franchise applications threats to its operating systems monopoly.

a. Microsoft's claim that a poorly written program using the namespace extension APIs could crash the Windows 95 shell is pretextual

Microsoft claimed at trial that a poorly written program using the namespace extension APIs could crash the entire shell because those APIs run in the same process as the Windows 95 shell (sometimes described as running "in-process").[54] Mr. Gates, however, not only failed to mention this alleged issue in his email ordering de-documentation, but he admitted that there was nothing "wrong with the extensions" and that they were "a very nice piece of work."[55] *See* PX 1; *see also* Tr. 3079:23-3080:17 (Gates); Tr. 3329:15-20 (Struss). Satoshi Nakajima, the inventor of the namespace extension APIs, corroborated this when he testified about "the real reason" rather than the "surface reason" that Mr. Gates de-documented the namespace extension APIs. Tr. 3775:15-3776:19 (Nakajima).

The record further shows that this supposed robustness concern did not prevent Microsoft from fully documenting and publishing the *same* APIs after its conduct caused Novell to sell

---

[54] Microsoft also argues that Novell's witnesses agreed that Microsoft's robustness justification is legitimate. However, Microsoft distorts the relevant testimony by taking it out of context. For example, while Dr. Noll testified that operating system stability was one reason for "not documenting an API," his testimony analyzed the theory of refusing to document an API in the first instance, rather than withdrawing support for an API that had already been documented and evangelized to ISVs. *See* Tr. 1872:1-1873:23 (Noll). Similarly, Microsoft cites Mr. Richardson for his agreement that the namespace extension APIs ran in the shell's process, but Microsoft conveniently omits the continuation of that testimony, in which Mr. Richardson noted that the system retained other extensions and mechanisms that suffered from the same alleged shortcoming. *See* Tr. 756:23-758:3 (Richardson).

[55] While arguing the flaws of the namespace extension APIs, Microsoft mischaracterizes Mr. Nakajima's testimony regarding his decision not to defend the namespace extension APIs at a meeting in 1994. Microsoft Mem. at 28. Mr. Nakajima decided not to defend the APIs because he was busy preparing to ship Windows 95 and because he did not like the "kind of politics and meetings" the Cairo group created. Tr. 3772:14-3773:21 (Nakajima).

103

WordPerfect.[56] *See, e.g.*, PX 355 at 4-5; PX 604 at 2-3; DX 131A at 3. Microsoft's own expert

admitted this fact. Tr. 5061:4-5062:4 (Bennett).[57]

Microsoft also continued using the namespace extension APIs in its own products,

subjecting Windows 95 to the same alleged concerns it now claims justified de-documentation.[58]

For example, Microsoft allowed its MSN client (codenamed "Marvel") to continue to use the

namespace extension APIs even after the APIs were de-documented. Tr. 5071:3-13 (Bennett);

see also Tr. 3787:22-3788:20 (Nakajima); Tr. 4324:21-23 (Belfiore); PX 324 at MS98 0120900-

01; PX 530. Similarly, Microsoft's Office team continued to incorporate the namespace

extension APIs in its development plans for future versions of Office, including Office '96.[59]

---

[56] Assuming *arguendo* that Microsoft was initially concerned about the namespace extension APIs' robustness, that concern was remedied when Microsoft created the non-rooted option for namespace extensions *within a month after* Mr. Gates decided to withdraw support for the APIs. *See, e.g.*, DX 82; DX 84 at MX 9025187; Tr. 3837:2-24 (Nakajima); Tr. 3525:25-3526:24 (Muglia); Tr. 4369:14-4370:2 (Belfiore). Likewise, Microsoft was able to ensure that the namespace extension APIs ran robustly on Windows NT by March 1995, a full year in advance of the release of Windows NT 4.0. *See* PX 279 at MS-PCA 1405389 ("there shouldn't be any issues with shell extensions being run robustly on NT. The big ones (namespace extensions) end up in a separate process.").

[57] For the same reason, Microsoft's arguments about the unlimited number of third-party namespaces that could be added rings particularly hollow. After re-documenting the namespace extension APIs, Microsoft imposed no limits on the number of ISVs that could use the mechanism.

[58] Microsoft points to DX 3 (the same document as PX 225, referenced above) as evidence of a contemporaneous document raising robustness concerns, but DX 3 was authored *after* Mr. Gates decided to de-document the namespace extension APIs, and so does not prove that the concern arose *prior* to de-documentation. Moreover, the purported "robustness" concerns raised in DX 3 indicate only decreased reliability, and not the grave situation that Microsoft now claims required de-documentation. DX 3 at MX 6055843.

[59] One Microsoft Office planning document, revised in November and December 1994, *after* Mr. Gates' decision to de-document the namespace extension APIs, refers to IShellFolder and IShellView as "crucial interfaces." PX 379 at MS-PCA 1566800-01. This document also details Microsoft's plan to have Office "superset and replace the Chicago Explorer to become the single place where users can find and manipulate all their information irrespective of its type," *id*. at MS-PCA 1566798, which is consistent with Mr. Gates' goal of de-documenting the namespace extension APIs to "give Office a real advantage," PX 1.

PX 379 at MS-PCA 1566800-01, 804. In addition, the record shows that Microsoft continued to

use the namespace extension APIs in the development of Internet Explorer,[60] *see, e.g.*,

Tr. 3802:5-8, 3850:8-12 (Nakajima); PX 344 at MS-PCA 1085016, and Athena (Microsoft's

Internet Mail and News client), PX 344 at MS-PCA 1085016; *see also* Tr. 3852:18-3853:24

(Nakajima).

Internally, Microsoft's executives voiced concern over the continued use of the

namespace extension APIs by Microsoft after they were de-documented. In an August 1995

email, Microsoft's Scott Henson wrote to other top Microsoft executives to voice a "STRONG

concern" for the ISVs because "approximately a year ago [Microsoft] told ISVs that a set of

interfaces (known as namespace extensions) were no longer going to be a part of the standard

Win32 API set" and were instead moved to an unsupported status. *See* PX 324 at MS98

0120901. Upon finding out that Microsoft's Athena product used the namespace extension

APIs, Mr. Henson stated that:

> ***This is the EXACT thing we told ISVs they could (and should) not do!*** In short
> we have a product that will be sold in the very near future that will implement
> interfaces that we told ISVs they should not use because we would not be able to
> support them moving forward. In the meantime we were developing a product
> that did exactly that. ***I can't even express how BAD this is! We loose [sic]
> everything when we do this! Credibility, trust, leverage, the works!*** . . .
> Assuming that we are going to support these APIs as a part of the standard Win32
> API set we should document them – QUICK! Our ISVs are already months
> behind.

Id. (emphasis added).

---

[60]   One document drafted by Mr. Nakajima, entitled "Web-like Shell: Architecture," outlines
plans to integrate the namespace extension APIs with Internet Explorer in November 1995, more
than a year after Mr. Gates decided to de-document those interfaces. *See* PX 344 at
MS-PCA 1085016.

This evidence could lead a reasonable jury to believe that Microsoft's explanation is simply a pretext and undermines its credibility with regard to other explanations.

> b.   Microsoft's claim that the namespace extension APIs were not compatible with future versions of Windows under development is pretextual

The evidence rebuts Microsoft's assertion that it withdrew the namespace extension APIs due to supposed incompatibilities with future versions of Windows, specifically Windows NT and Cairo, in several respects.

First, the Windows 95 shell was developed with future operating systems in mind. *See, e.g.*, PX 324 at MS98 0120900. In late 1993, Paul Maritz (one of Microsoft's most senior executives) informed Bill Gates that the Windows 95 shell extensions, which included the namespace extension APIs, would use a "lighter weight OLE implementation" that would ensure their compatibility with Cairo. *See* PX 94 at MS7048981. To achieve this goal, Mr. Nakajima spent weeks re-architecting the namespace extension APIs to use a new lightweight OLE implementation that Cairo would support. *See* PX 114 at MS7083975. When Mr. Nakajima completed his work, Microsoft's Brad Silverberg (the executive in charge of Windows 95 development) wrote that he was "very proud of the way the team has architected the extension mechanism to use OLE interfaces but have a lightweight implementation underneath." PX 129 at MS 5064050. Mr. Silverberg was clear, in both contemporaneous documents and later testimony, that the Windows 95 shell and namespace extension APIs were developed with Windows NT in mind. *See, e.g.*, PX 324 at MS98 0120900; Dep. of B. Silverberg, Jan. 22, 2009 (played Oct. 25, 2009) at 134:11-135:8 (Dkt. # 278). In fact, Mr. Silverberg testified that the Windows 95 shell ported to Windows NT "super easily." Dep. of B. Silverberg, Jan. 22, 2009 (played Oct. 25, 2011) at 134:11-135:8.

Second, when Mr. Gates decided in September 1994 to simultaneously scrap the Cairo project and use the Windows 95 shell codebase as the codebase for Windows NT – two weeks prior to his decision to de-document the namespace extension APIs – he mooted any compatibility issues between the namespace extension APIs and Cairo or Windows NT, and thus any such issues could not have been the basis for the de-documentation. *See, e.g.*, PX 212; PX 216. Microsoft's witness Bob Muglia testified that upon cancellation of the Cairo shell in September 1994, "[t]here was no remaining concern about compatibility." Tr. 3513:12-18 (Muglia).

> c.   Microsoft's claim that the namespace extension APIs were "trivial" and did not achieve the functionality that Bill Gates had hoped for is pretextual

The evidence at trial also refuted Microsoft's assertion that the namespace extension APIs were "trivial and unimportant," *see* Dep. of B. Gates, May 19, 2009 (played on Oct. 19, 2011) at 259:15-260:4 (Dkt. # 277), and that the APIs did not achieve the functionality that Mr. Gates intended for them.

Contemporaneous documents and testimony adduced at trial reveal that Mr. Gates viewed the namespace extension APIs as much more than trivial. For example, in 1994, he referred to the hierarchical/tree view used by the namespace extension APIs as "critical" and "central to [Microsoft's] whole strategy." *See* PX 134 at MSC 00795586. Additionally, Mr. Muglia testified that he recalled that Mr. Gates viewed these APIs as important. *See* Tr. 3532:19-3533:1 (Muglia). Similarly, while working with the namespace extension APIs *after* de-documentation, the Office '96 team described IShellFolder and IShellView as "crucial interfaces" for their development of an Office Shell. *See* PX 400 at MS-PCA 1566793.

107

Similarly, several ISVs had a deep interest in using the namespace extension APIs. For

example, after the namespace extension APIs were demonstrated at a Microsoft design

conference (but before they were documented), ISVs requested that Microsoft publish them.

See, e.g., PX 64 at MS7093163; PX 84 at MS 5043511. After Microsoft partially documented

the namespace extension APIs in June 1994, a September 1994 report prepared by Microsoft's

Scott Henson indicates that a number of ISVs were using or planned to use them. *See* PX 215 at

MX 6109491-92. In addition, Novell's witnesses testified extensively regarding their planned

uses of the namespace extension APIs.

That the namespace extension APIs achieved significant functionality is further

demonstrated by the fact that Microsoft sought and eventually received a patent for those APIs.

See PX 364. Moreover, as shown above, Microsoft itself extensively used the namespace

extension APIs in its own products. For instance, Mr. Henson's September 1994 report details

the activities of several Microsoft groups that were actively using or planning to use the

namespace extension APIs, including Marvel, Access, Capone, and Ren.[61] *See* PX 215 at MX

6109491; *see also* PX 219 at MX 5117033. The Marvel team in particular described the de-

documentation of the namespace extension APIs as a "bombshell." PX 221 at MX 5103234.

Furthermore, Microsoft's Athena PIM also used the namespace extension APIs, a fact that

Messrs. Henson and Struss noted with great concern in an August 1995 email. PX 324 at MS98

0120900-01. That same email also demonstrates that the namespace extension APIs achieved

---

[61]   In addition, the namespace extension APIs, far from being "trivial and unimportant," were an
essential technology that Microsoft used to integrate numerous components into Windows 95.
For example, Mr. Nakajima noted with pride that he utilized the namespace extension APIs to
integrate the separate File Manager, Program Manager, and Control Panel functionality in
Windows 3.1 into a consolidated viewer called the Windows Explorer in Windows 95 and said
he later used the APIs to integrate Internet Explorer into Windows. Tr. 3747:24-3748:21,
3788:24-3789:9, 3801:23-3802:12 (Nakajima).

the functionality that Mr. Gates envisioned. *Id.* at MS98 0120901 (noting that Athena not only used "the namespace extensions but they are also displaying themselves in the scope (left) pane and view (right) pane").

                 3.   *Monopolists May Not Contract Their Way Out of Section 2 Violations*

Because the Sherman Act serves to protect the public interest, it is well settled that a monopolist may not avoid liability by relying on contractual provisions purporting to waive or disclaim future liability. *See, e.g.*, *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs.' Litig.)*, 634 F.3d 187, 197 (2d Cir. 2011) (noting the "firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy"); *Redel's Inc. v. Gen. Electric Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy. . . . Releases may not be executed which absolve a party from liability for future violations of our antitrust laws."); *Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955) ("Any contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy. Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract in restraint of trade."); *Flying J Inc. v. TA Operating Corp.*, No. 1:06-CV-30-TC, 2008 WL 4923041, at *4 (D. Utah Nov. 14, 2008) ("a prospective release of antitrust claims would be void as against public policy"); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (stating that if contractual clauses operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust

violations, we would have little hesitation in condemning the agreement as against public

policy").

Microsoft's reliance on language in the Beta Release Agreement disclaiming liability is

therefore flawed as a matter of law. *See supra* Argument Part II.B.1.c. Further, while there may

be circumstances where a beta version must be changed in order to address bugs identified

during the testing process, there is no evidence that Microsoft received any negative feedback

from ISVs regarding the namespace extension APIs after it released partial documentation in its

M6 beta release. Tr. 3826:23-3827:12 (Nakajima).

III.   A REASONABLE JURY COULD FIND THAT MICROSOFT'S ANTICOMPETITIVE CONDUCT CAUSED NOVELL INJURY AND AWARD DAMAGES ACCORDINGLY

A.   Microsoft's Conduct Caused Antitrust Injury To Novell

As discussed above, the United States is authorized to bring an equitable enforcement

action without showing that the monopolist proximately caused an injury. By contrast, a private

antitrust plaintiff must also prove (1) that the violation caused it injury in fact; (2) that the

violation was a material cause of its injury; and (3) that the injury is the kind of injury that the

antitrust laws were intended to prevent and "'flows from that which makes [the] defendants' acts

unlawful.'" *Novell*, 505 F.3d at 311 (alteration in original) (citation omitted); *see also Reazin*,

899 F.2d at 960-61.

In 2007, the Fourth Circuit ruled that Novell's allegations were sufficient to establish

antitrust standing – a doctrine that includes proximate causation and antitrust injury, and

prudential principles that ensure the plaintiff should be permitted to bring a private damages

claim for the challenged conduct. *Novell*, 505 F.3d at 310 n.16 (citing *AGC*, 459 U.S.

110

at 535 n.31).[62] Antitrust standing permits private lawsuits only for those plaintiffs that can

establish that they were direct, not remote, victims of the violation and will best fulfill the

public's interest in enforcing the antitrust laws. *AGC*, 459 U.S. at 542. The Fourth Circuit thus

confirmed that Novell's asserted injuries are "antitrust injuries" and that Novell's claim is little

different from the claims that Netscape and Sun could have properly asserted. *Novell*, 505 F.3d

at 314 & n.22.

1.   Novell Established Injury in Fact

Proving the fact of damage does not require Novell to prove the dollar value of its injury.

It requires only that Novell prove that it suffered some injury as a result of the antitrust violation.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) (The plaintiff's

"burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of

some damage flowing from the unlawful [conduct]; inquiry beyond this minimum point goes

only to the amount and not the fact of damage."). In this case, the question is whether

Microsoft's conduct caused any lost sales. As discussed in detail above, Novell established that

it lost sales when it could not timely release PerfectOffice and WordPerfect due to Microsoft's

withdrawal of support for the namespace extension APIs.

2.   Novell Established Material Causation

While Novell was required to show that Microsoft's conduct was a "material" cause of its

injury, Novell was not required to prove that the antitrust violation was the sole cause of its

injury, nor must Novell eliminate all other possible causes of injury. *Zenith Radio*, 395 U.S. at

114 n.9 ("[A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his

---

[62] Antitrust standing cannot be established without showing proximate cause and antitrust injury, but the existence of an antitrust injury does not automatically confer standing. *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir. 1992).

burden of proving compensable injury under [Clayton Act] § 4.”); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988) (“'An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to *some* degree resulted from defendants' violation.'” (citation omitted)); *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973) (There must be “a causal connection between an antitrust violation and an injury sufficient [for the trier of fact] to establish the violation as a substantial factor in the occurrence of damage.”).

The Fourth Circuit explained that the causal link between Microsoft's anticompetitive conduct and the loss in value of Novell's office productivity applications is straightforward. *Novell*, 505 F.3d at 316. Preventing Novell from timely releasing PerfectOffice and WordPerfect for Windows 95 “naturally tended to decrease Novell's market share and consequently decrease the value of its applications.” *Id.* In addition, de-documenting the namespace extension APIs “would have put Novell at a competitive disadvantage vis-à-vis Microsoft's office -productivity applications, leading naturally to a loss of market share for Novell.” *Id.*

Whether Microsoft's conduct was a material factor in causing the delay in WordPerfect's release is a question of fact for the jury that is not an appropriate basis for granting Microsoft's motion. As this Court is aware, the jury indicated ***unanimous*** agreement for Novell on Questions 1 through 3 of the jury verdict form regarding causation because the evidence plainly demonstrated that Microsoft's conduct was a material factor in causing Novell's injuries. Accordingly, a legally sufficient evidentiary basis exists for a reasonable jury to find that Microsoft's conduct was a material factor in causing Novell's injuries.

Nevertheless, Microsoft asserts that (1) the Non-Disclosure Agreement should have made Novell aware that Microsoft could modify Windows 95 at any time and (2) purported delays in

developing Quattro Pro were responsible for Novell's injuries. As discussed above, nothing in the Non-Disclosure Agreement warned Novell that Microsoft would change its product without legitimate justification. The evidence established, in fact, that Novell had a reasonable basis to expect Microsoft to follow through on its commitment because vendors rarely, if ever, remove functionality from a beta-version release.

With regard to Quattro Pro, the evidence is equally clear. Gary Gibb, the director for the PerfectOffice 95 suite (codenamed "Storm"), testified that he monitored the progress of all of the suite's components, Tr. 786:6-8, 795:2-13 (Gibb), held weekly meetings attended by all of the PerfectOffice 95 sub-teams (and their directors) including Quattro Pro, and tracked Quattro Pro's progress to ensure that it was on the same "critical path" as the suite's other components, Tr. 795:2-796:1, 807:1-13 (Gibb). While Novell initially was concerned that Quattro Pro might delay its suite for Windows 95, that concern never came to pass. Tr. 806:15-25 (Gibb). Mr. Gibb testified that the Quattro Pro team turned out to be "a pleasant surprise," given that they were "very conservative in their estimates" of completing the product but ultimately "over delivered." *Id.*

Mr. Gibb testified that the delays were the result of delays in the development of shared code – the group dealing with the namespace extension APIs – and that Quattro Pro was "absolutely" not responsible for the development delays, stating "every week, week after week it was shared code. Shared code. ***It was not Quattro Pro***." Tr. 904:5-10 (Gibb) (emphasis added). Mr. Gibb further testified that the resignation of Quattro Pro developers in December 1995 could

not have affected the suite's development schedule,[63] because Quattro Pro was already ***code complete*** by then. Tr. 808:8-809:8 (Gibb).[64]

Witnesses from both sides testified that Mr. Gibb was best situated to know if Quattro Pro delayed the release of PerfectOffice 95. *See* Tr. 550:15-23 (Harral); Tr. 1242:10-1243:14 (Frankenberg); Tr. 3715:19-24 (Ford); Tr. 3216:17-20 (Bushman); Tr. 3648:11-16, 3651:7-14 (Larsen). Microsoft argues that Mr. Gibb's testimony does not rise to the level of "substantial evidence" required to defeat a motion for judgment as a matter of law, Microsoft Mem. at 116-17, but its argument ignores the well-settled law that the Court must view the evidence in the light most favorable to the nonmoving party. *See, e.g.*, *Guides*, 295 F.3d at 1073.

While Mr. Gibb's testimony is enough to create an issue of fact, substantial additional record evidence corroborates him. For example, in her self-evaluation, Quattro Pro's lead developer and manager, Dorothy Wise, contemporaneously noted that her team completed its

---

[63] Had the Court permitted Novell to put on a rebuttal case, Mr. Gibb would have testified that: (1) he regularly interacted with Quattro Pro developers before, during, and after the December 1995 resignation incident; (2) the Quattro Pro code was complete and ready for beta testing months before the December 1995 resignations; (3) pre-release versions of Quattro Pro were sent to journalists to be reviewed in the fall of 1995 and Quattro Pro 7.0 was demonstrated at COMDEX in November 1995; (4) he traveled to Scotts Valley, California after the resignations in January 1996; (5) the Quattro Pro code was not missing in January 1996; (6) the work done in Scotts Valley in January 1996 involved bug fixes and not the development of new features for Quattro Pro; and (7) had the shared code team completed its work in late 1994 or early 1995, Novell would have shipped PerfectOffice 95 within 60 to 90 days of the release of Windows 95, even if that meant shipping English versions first and foreign language versions later. Novell's Proffer in Resp. to Microsoft Mem. to Preclude "Improper Rebuttal" at 4-5 (Dec. 13, 2011) (Dkt. # 375). This evidence would have further refuted the testimony of Microsoft's witnesses.

[64] Microsoft's reliance on a single document, DX 230, and the testimony of Mr. Frankenberg is insufficient to support judgment in Microsoft's favor as a matter of law. DX 230 discusses the resignation of developers but nowhere says that the Quattro Pro version planned for inclusion in PerfectOffice 95 was far from finished. And, as the Court knows, Mr. Frankenberg has no real knowledge of the Quattro Pro issues. *See* Tr. 1146:6-11, 2904:7-10, 1242:10-1243:14 (Frankenberg).

localization work a full month early on February 28, 1995.[65] *Compare* DX 217 at

NOV-B074668933 *with* DX 219 at NOV-B06655277; *see also* DX 231 at NOV00161054

(confirming that Quattro Pro was code complete in August 1995).[66] The record evidence shows

that by December 1995 and early 1996, the Quattro Pro team's work was limited to fixing bugs.

Tr. 809:17-23 (Gibb).

        B.   Novell's Injury Was Of A Type That The Antitrust Laws Were Intended To Prevent

The Fourth Circuit confirmed that the harm Novell alleged was "plainly an injury to

competition that the anti-trust laws were intended to forestall." *Novell*, 505 F.3d at 316.

Novell's injuries were, in fact, an integral aspect of the anticompetitive conduct. *See, e.g.*,

Reazin, 899 F.2d at 962 ("'Where the injury alleged is so integral an aspect of the [violation]

alleged, there can be no question but that the loss was precisely "the type of loss that the claimed

---

[65] DX 217 also disproves Microsoft's argument that problems localizing the 16-bit version of Quattro Pro led to delays in developing the version for Windows 95. While localization problems seem to have persisted beyond February 1995, those issues did not affect the main Quattro Pro development team, which had completed its work in late February 1995. *See* DX 217 at NOV-B07466893-94. The remaining localization issues did not involve the core Quattro Pro development team, but rather the logistical aspect of product localization that was handled elsewhere in Novell. Tr. 3178:18-3179:17 (Bushman) (testifying about translation efforts of the localization team, which was run by Mary Burnside).

[66] Microsoft has suggested that DX 231 is somehow inconsistent with Novell's position because the document contains a code-complete date for "PerfectFit (FIGS)" on October 31, 1995. *See* Microsoft Letter (Dec. 13, 2011) (citing DX 231 at NOV00161054). Mr. Gibb testified, however, that Novell planned to move to the beta testing phase with a placeholder for the custom file open dialog because of the difficulties Novell faced in completing that component of the suite. Tr. 907:5-908:10 (Gibb) (referring to PX 322 at NOV-B01491965-66). That Novell developers continued working on PerfectFit, knowing the custom file open dialog was far from complete, hardly undercuts Novell's arguments as to what the but-for world would have looked like had shared code been completed in late 1994. This point is equally applicable to the Quattro Pro team, which, while code complete, would not sit idly by waiting for the shared code team to deliver the file open dialog. Moreover, the fact that DX 231 lists an "RTM" (release to manufacturing) date of March 31, 1996 – which was only a projection at the time DX 231 was authored – is consistent with Novell's argument that the suite was delayed into the spring of 1996.

violations . . . would be likely to cause." '" (ellipsis in original) (citations omitted)). The Fourth

Circuit's ruling is, in and of itself, dispositive.

Microsoft seeks to avoid the Fourth Circuit's ruling by attempting to impose a consumer-

or-competitor rule of standing, asserting that Novell has cited no case where a private antitrust

plaintiff obtained money damages based on a "cross-market" theory of anticompetitive harm.

Microsoft is wrong in at least two respects. First, as discussed above, it incorrectly presumes

that the rules for proving harm to competition are different for private damage claims than for

government enforcement actions. The Government Case provides the most apt example of a

"cross-market" theory.

Second, Microsoft ignores *Reazin*, 899 F.2d 951. In that case, the defendant Blue Cross

was a traditional third-party medical insurer that, through special enabling legislation,

monopolized the market for private healthcare financing in the area. It perceived a threat to its

monopoly when a local health maintenance organization ("HMO") purchased the largest hospital

in the area, Wesley, and sought through that combination to offer a different type of healthcare

financing by combining the HMO concept with hospital ownership. *Id.* at 954-55. The plaintiffs

alleged that Blue Cross "determined to 'hurt' Wesley and thereby send a message to other

hospitals not to do business with entities Blue Cross believed were competitors." *Id.* at 954.

Blue Cross terminated its contract with Wesley and rewarded Wesley's competitor hospitals with

better payment terms, which increased Wesley's cost of doing business and caused a shift of

Blue Cross patients from Wesley to Wesley's competitors. *Id.* at 954-55. The jury found that

Blue Cross's conduct directed at Wesley restricted the access of healthcare consumers to

healthcare financing arrangements involving entities other than Blue Cross and deprived them of

116

benefits of competition in that market, "'thereby restraining competition in the health care

financing market'" and awarded damages. *Id.* at 965 (quoting 663 F. Supp. at 1413).

In its motion for judgment notwithstanding the verdict, Blue Cross argued that Wesley

could not establish antitrust standing and injury because it "'was not in the relevant market

selected by the court, health care financing, either as a consumer or as a competitor.'" *Id.* at 962

(citation omitted). The Tenth Circuit disagreed, noting that Blue Cross perceived Wesley's

affiliation with an HMO as a threat to its monopoly power and that was the precise reason that

Blue Cross targeted Wesley. *Id.* at 962-63. The Tenth Circuit found that the anticompetitive

conduct was an integral aspect of Blue Cross' plan to eliminate competitive threats in the

healthcare financing market, that Wesley was the direct victim of Blue Cross' actions, and that

there was evidence that Blue Cross specifically intended to harm Wesley. *Id.* at 963. The Tenth

Circuit further observed that the threat to Blue Cross's monopoly power did not come from

existing competitors, but from "'alternative delivery systems.'" *Id.* at 965 (quoting 663 F. Supp.

at 1413). The Tenth Circuit added that "an antitrust plaintiff need not necessarily be a

competitor or consumer," *id*. at 963, and that it was "aware that the Supreme Court may be

concerned about reading section 4 of the Clayton Act too broadly [but] [w]e do not believe we

have done so in this case," *id*. at 962 n.16 (citing *AGC*, 459 U.S. at 529-30 & n.19).

Reazin is directly on point. It involved a cross-market theory of anticompetitive harm

and resulted in damages. Here, as in *Reazin*, the monopolist reasonably perceived a threat from a

plaintiff outside of the relevant market and engaged in anticompetitive conduct specifically

targeting that plaintiff to prevent it from facilitating that threat. Just as in *Reazin*, the incumbent

monopolist had a greater incentive to "parry[] threats from outside the field instead of from

within." *Novell*, 505 F.3d at 319. Microsoft's argument that the Tenth Circuit in *Elliott*

Industries Ltd. Partnership v. BP America Production Co., 407 F.3d 1091 (10th Cir. 2005),

reversed *Reazin* and instead imposed a bright-line consumer-or-competitor rule cannot withstand

scrutiny, nor can it overturn the Supreme Court's precedent in *AGC*, 459 U.S. 519, and *Blue*

Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982), which explicitly declined to impose

such a rule. In *Elliott*, the plaintiff failed to allege any antitrust injury resulting from conduct

that harmed competition. 407 F.3d at 1125. Notably, the Tenth Circuit cited *Reazin* with

approval. *Id.* at 1124.

Accordingly, the Fourth Circuit's ruling in this case, Tenth Circuit precedent, the

Government Case, and the jury's agreement on causation all support a finding of proximate

causation and antitrust injury.

C.   A Reasonable Jury Would Have Ample Evidence From Which It Could
         Determine Novell's Damages

         1.   *Quantification of Damages*

The method of computing damages is not suited for a Rule 50(b) motion where proximate

causation and injury in fact have already been established. *See, e.g.*, *Roth v. Naturally Vitamin*

Supplements, Inc., No. CV-04-2135-PHX-FJM, 2007 WL 2020114, at *1 (D. Ariz. July 6, 2007).

By definition, if the jury concludes that Microsoft's conduct caused some injury to Novell, then

damages are appropriate. The only question is, how much? Even if this Court chooses to

consider the issue, the jury was provided with ample evidence to determine the amount of

damages.

When a plaintiff proves the existence of an injury, jurors are entitled to make a just and

reasonable estimate of damages. *Law*, 5 F. Supp. 2d at 929. Damages need not be determined

with mathematical certainty. *Id.* Once an antitrust violation has been established, a damages

118

award will not be questioned so long as it is not based on "'speculation or guesswork.'" *Id*. (citations omitted). Courts accept a degree of uncertainty in fixing the amount of damages because "'[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation'" and "'it does not come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* (citations omitted).

Dr. Warren-Boulton measured damages in several different ways, each of which is independently appropriate and which, cumulatively, reinforce each other. First, he calculated the loss in the value of the WordPerfect business attributable to the extensive delay caused by Microsoft's anticompetitive conduct. Tr. 2094:2-2098:19 (Warren-Boulton). Microsoft's expert, Professor Glenn Hubbard, used virtually the same methodologies. Tr. 4481:19-4482:16 (Hubbard). Second, Dr. Warren-Boulton analyzed the market's reaction to Novell's October 6, 1995 announcement that it would not release its Windows 95 suite until early 1996 to assess the financial effect of Microsoft's anticompetitive conduct. Tr. 2096:19-2098:19 (Warren-Boulton). Third, Dr. Warren-Boulton projected the market share that WordPerfect would have attained absent the anticompetitive activity, and then projected Novell's profits accordingly. Tr. 2196:13-2199:20, 2202:8-2203:7, 2431:3-19 (Warren-Boulton). Professor Hubbard used a very similar methodology. Tr. 4482:21-4487:5, 4493:1-3 (Hubbard).

Dr. Warren-Boulton constructed his damages estimates based on the assumption that Novell would have released PerfectOffice within "a sufficiently short time period" after Microsoft publicly released Windows 95, namely by the end of November 1995. Tr. 2421:12-2423:1, 2423:13-20 (Warren-Boulton). Dr. Warren-Boulton expressly relied on the testimony of Novell's developers in estimating when Novell would have released its products for Windows 95

119

but for the de-documentation of the namespace extension APIs. Tr. 2417:22-2418:21, 2420:16-
2421:1, 2423:8-12, 2425:10-16 (Warren-Boulton). The testimony of the Novell developers is
crystal clear that WordPerfect's goal was "to ship within 90 days of the release of Windows 95."
Tr. 282:20-21 (Harral); *see also* Tr. 797:9-12, 805:23-806:14 (Gibb). This goal was consistent
with Microsoft's First Wave Program, which was a program designed to get a "critical mass of…
key Chicago applications to ship within 90 days of Chicago's shipment." PX 148 at MS-
PCA 2150196; *see also* Tr. 282:17-283:16 (Harral); Tr. 3250:16-24 (Struss). As a member of
the First Wave Program, WordPerfect was "contractually committed" to release its Chicago
applications within 90 days of Windows 95's release. PX 117 at NOV-B00833356; *see also*
Tr. 3252:23-25, 3283:6-12 (Struss).

Contrary to Microsoft's suggestion, Novell's developers never testified that they planned,
or needed, to release their applications within 60 days of Windows 95's release (although the
jury reasonably could find that PerfectOffice would have been released within 60 days but for
Microsoft's conduct).[67]

2.   *Disaggregation of Damages*

Microsoft incorrectly argues that Dr. Warren-Boulton failed to "disaggregate," or account
for factors other than Microsoft's anticompetitive conduct, in estimating damages. As a matter
of both law and fact, Microsoft is wrong. Legally, disaggregation issues arise when a plaintiff

---

[67] Dr. Warren-Boulton's testimony mentioning a 60-day time period is clarified in the context of
his testimony regarding the First Wave Program: "It is my understanding that the relationship is
such that if you get it out within the prescribed time period, and I understand it is an agreement,
we agree to get an application out within 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." Tr. 2418:22-
2420:11 (Warren-Boulton) (emphasis added). The First Wave Program required ISVs to release
their products within 90 days, *not* within 60 days of Windows 95's release. *See, e.g.*, PX 148;
PX 248; PX 504; DX 168.

challenges more than one type of conduct and the jury can conclude that some, but not all, of the

challenged conduct was unlawful. *See, e.g.*, *ILC Peripherals Leasing Corp. v. IBM Corp.*,

458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d

1188 (9th Cir. 1980); M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L.J.

311, 311 (1997) ("[W]here an antitrust plaintiff challenges **multiple discrete acts or practices** as

unlawful, damages cannot be proved in the aggregate." (emphasis added)). In that situation, the

jury should be given a reasonable basis to estimate damages attributable to each type of unlawful

conduct, if practical. *See ILC Peripherals Leasing*, 458 F. Supp. at 434. That is not the case

here. There is substantial evidence showing that Novell's damages are attributable to the delay

caused by Microsoft's anticompetitive conduct. Novell, of course, does not attribute any

damages to the harm caused by Microsoft's exclusion of Navigator, Java, Lotus, and others.

Thus, any dispute that Microsoft has with Dr. Warren-Boulton's methodology goes to the

weight of his testimony, not to its admissibility. *In re High Pressure Laminates Antitrust Litig.*,

No. 00 MDL 1368(CLB), 2006 WL 931692, at *2 (S.D.N.Y. Apr. 7, 2006) (denying defendant's

motion to exclude expert testimony, stating: "'It is true that Dr. Rausser utilized numerous

factors to support his ultimate conclusions and that he did not disaggregate these factors or

potential lawful behavior of the Defendants. However, these issues concern the weight that the

jury may choose to give Dr. Rausser's testimony.'" (citation omitted)); *see also In re Sulfuric*

Acid Antitrust Litig., 446 F. Supp. 2d 910, 923 (N.D. Ill. 2006); *Aventis Envtl. Sci. USA LP*,

383 F. Supp. 2d at 514.[68]

---

[68] Microsoft appears to complain that Dr. Warren-Boulton failed to testify about the cause of the
PerfectOffice development delays. That is a fact question reserved for the jury. As a damages
expert, Dr. Warren-Boulton properly assumed that Microsoft's conduct caused the development
delays. Absent that finding, of course, the jury would never need to consider his testimony.

Factually, Dr. Warren-Boulton accounted for factors other than Microsoft's conduct. For example, Dr. Warren-Boulton determined that Novell overpaid for WordPerfect and Quattro Pro by about $421 million, or 27% of the total purchase price. Tr. 2115:8-10 (Warren-Boulton). Microsoft's expert, by contrast, asserted that Novell overpaid by nearly $1.35 billion, or more than 87% of the purchase price. Tr. 4466:1-16 (Hubbard); *see also* Tr. 2115:14-2116:1 (Warren-Boulton). Dr. Warren-Boulton also considered the effect of events occurring prior to the acquisition and Novell's alleged mismanagement of the business. First, Dr. Warren-Boulton concluded that Novell's dramatic drop in revenues on Windows 95 could not be attributed in any way to WordPerfect's transition from DOS to Windows 3.0. Tr. 2169:13-2170:20, 2173:6-2174:16 (Warren-Boulton). Specifically, Dr. Warren-Boulton determined that even though WordPerfect was late to Windows 3.0, it did "quite well" on that platform, and furthermore, even if WordPerfect had failed to transition well to Windows 3.0, the market's reaction was already factored into the purchase price Novell paid for WordPerfect. Tr. 2173:6-2174:16 (Warren-Boulton). Second, Dr. Warren-Boulton rejected Microsoft's argument that Novell's alleged poorly managed acquisition of UNIX Systems Laboratories caused the market to devalue WordPerfect in the hands of Novell, noting the lack of any contemporaneous evidence supporting Microsoft. Tr. 2176:1-15 (Warren-Boulton). Third, Dr. Warren-Boulton relied on the overwhelming evidence (detailed *supra* Facts Part I.A-B) in concluding that Novell's PerfectOffice suite was positioned very well to be successful on Windows 95. Tr. 2177:9-2179:23 (Warren-Boulton). Finally, Dr. Warren-Boulton determined that Novell's investments in research and development and Novell's reorganization post-merger, if anything, increased Novell's value. Tr. 2181:6-2184:1, 2186:2-2187:2 (Warren-Boulton). Thus, Dr. Warren-Boulton properly evaluated and accounted for Microsoft's alternative

122

explanations for the decline in the value of Novell's office productivity applications.

Tr. 2186:16-2187:2 (Warren-Boulton).

IV.   EVEN IF NOVELL'S CLAIM IS ANALYZED UNDER *ASPEN SKIING*, JUDGMENT AS A MATTER OF LAW WOULD BE IMPROPER

In this Court's summary judgment decision, the Court correctly recognized that

Microsoft's affirmative anticompetitive conduct takes Novell's claim out of the unilateral-

refusal-to-deal paradigm. But the Court further held, assuming *arguendo* that this case presented

only a unilateral-refusal-to-deal, that Novell's claim should still go to the jury. At trial, this

Court properly instructed the jury that "under certain circumstances the refusal to cooperate with

rivals can constitute anticompetitive conduct, such as when a monopolist has ended a voluntary,

and thus presumably profitable course of dealing." Tr. 5349:18-21. The evidence presented at

trial firmly established the facts necessary to prove unlawful monopolization under *Aspen Skiing*.

Microsoft nevertheless argues that the Supreme Court's decision in *Trinko* requires judgment to

be entered as a matter of law for Microsoft. Microsoft's argument cannot be sustained.

Trinko presented a unique factual scenario. The Telecommunications Act of 1996

imposed on Verizon an obligation to share its telephone network with competitors to promote

competition for telephone services. *Trinko*, 540 U.S. at 402. A putative class of telephone

customers alleged that Verizon breached the duty imposed by the Telecommunications Act to

share its network with rivals. *Id.* at 404. The Supreme Court ruled that, under the circumstances

and given the regulatory scheme created by the Act, Verizon did not owe any antitrust duty to

share its network. *Id.* at 411. *Trinko* is merely an application of the standard antitrust analysis.

Id. at 407. The Supreme Court observed that the opportunity to charge monopoly prices induces

risk-taking that produces innovation and economic growth, which is good for competition. *Id.*

123

To "safeguard the incentive to innovate," a plaintiff must show, in addition to possession of monopoly power, "an element of anticompetitive *conduct*" – in other words, that the monopolist's conduct harmed competition and that the harm outweighs the pro-competitive benefits. *Id.*

If Novell sought to impose liability on Microsoft for simply declining requests to make the namespace extension APIs available, then *Trinko* might be analogous (and Novell would have released its suite on time in any event because it would not have relied on Microsoft's promises). But in cases like *Aspen Skiing*, a preexisting, voluntary course of dealing is presumed to be profitable, and the unilateral cessation of that course of dealing demonstrates a monopolist's willingness to forsake short-term profits to increase its long-term monopoly power. *Id.* at 409. As discussed above, where conduct makes no economic sense except for the preservation of monopoly power, then it is fair to conclude that it harms competition.

The two Tenth Circuit cases cited by Microsoft, *Christy Sports*, 555 F.3d 1188, and *Four Corners Nephrology*, 582 F.3d 1216, are in accord. In *Christy Sports*, a ski-rental company alleged that a resort owner, Deer Valley, owed a duty to provide rental space on the resort owner's property. The Tenth Circuit disagreed. First, it found that the alleged product market – rental of skis at Deer Valley's mid-mountain village – was implausible because Deer Valley catered to "destination" skiers who chose their resort based on the total experience, not just the price of rental skis at a mid-mountain village. *Christy Sports*, 555 F.3d at 1193-94 ("Consumers do not travel to Deer Valley for rental skies, just as they do not attend Yale to live in an Eero Saarinen-designed dormitory."). Thus, there were no barriers to entry protecting Deer Valley's power in the market for destination ski resorts and no reason to believe that Deer Valley could behave like a monopolist in a highly competitive market. *Id.* at 1195. Alternatively, and by the

124

same reasoning, *id.* at 1196, the Tenth Circuit found that it could characterize its decision as a failure to show that the conduct harmed competition. The Tenth Circuit found that providing ski resorts the flexibility to determine how they will recoup their investments would benefit competition overall by inducing entrants into the ski resort business. *Id*. at 1195. The Tenth Circuit confirmed that it might reach a different result if the plaintiff had been able to prove that Deer Valley ended a profitable course of dealing, demonstrating "'a willingness to forsake short-term profits to achieve an anticompetitive end.'" *Id.* at 1197 (quoting *Trinko*, 540 U.S. at 409). The plaintiff, however, had not paid Deer Valley anything for 10 years before Deer Valley decided to enforce its contract rights. *See id.* at 1191.

In *Four Corners Nephrology*, the facts were even less favorable for the plaintiff. That case involved the provision of kidney dialysis and other outpatient nephrology services in the Four Corners area (where Colorado, Utah, New Mexico, and Arizona meet). *Four Corners Nephrology*, 582 F.3d at 1217. For years, the plaintiff, Dr. Bevan, operated the only practice in the area, requiring some patients to travel extensively to receive treatment (dialysis requires treatment three times per week). *Id.* at 1217-18. Due in part to the travel issues and the high prevalence of kidney disease in the area, a hospital in Durango, Colorado (Mercy Medical Center) and a local Indian tribe invested significant resources to establish and develop nephrology and kidney dialysis services in the area. *Id.* at 1218. Mercy tried repeatedly to hire Dr. Bevan but when unable to do so, hired someone else. *Id.* Mercy recognized that its new practice would likely be unprofitable for several years and set aside $2.5 million to protect its investment. *Id.*

Dr. Bevan then filed an application to join Mercy's active staff and twice lied about his residence to try to establish that he lived within 30 minutes of the hospital (as required by

Mercy's bylaws). *Id.* In response, Mercy designated its new practice as the sole provider of

nephrology services at Mercy, explaining that it needed to protect its investment and that it had

reason to believe that Dr. Bevan wanted to drive Mercy's nephrology services out of business to

eliminate competition. *Id.* at 1218-19. Dr. Bevan sued Mercy, arguing that it was attempting to

monopolize the market for nephrology services in the Durango area. *Id.* at 1219.

The trial court granted summary judgment for Mercy and the Tenth Circuit affirmed

because Dr. Bevan was unable to show any preexisting voluntary course of profitable dealing.

The Tenth Circuit agreed that Mercy had a right to recoup its considerable investment by being

the exclusive provider of such services at the hospital and that consumers benefited from the

investment. *Id.* at 1223-24 Under the circumstances, imposing a duty on the hospital to grant

access to a doctor who declined to work for the hospital would "deter future investments of the

sort the hospital and tribe made in this case – and thus to undermine, rather than promote,

investment, innovation, and consumer choice, as the Supreme Court feared in *Trinko*." *Id.* at

1224. As noted above, *Trinko* and *Christy Sports* both involved conduct that provided short-term

benefits, not losses.

Here, Microsoft essentially admits that it sacrificed short-term profits, *see* Microsoft

Mem. at 87-90, and there is abundant evidence that the decision to withdraw support for the

namespace extension APIs was driven by a desire to exclude competition, *see, e.g.*, PX 1;

PX 360. And unlike Mercy in *Four Corners Nephrology*, Microsoft has never argued that it

hoped to recover its investment in Windows 95 by withdrawing support for those APIs. In fact,

unless the jury believes Microsoft's pretextual justifications, Microsoft's conduct makes no

economic sense except insofar as it harmed competition. The antitrust laws prohibit such

conduct.

126

A.   Microsoft And Novell/WordPerfect Have A Long History Of Cooperation

Microsoft and WordPerfect had a preexisting, voluntary, and mutually profitable course

of dealing. Because "people buy computers to run applications not to run operating systems,"

Tr. 1387:2-1388:8 (Alepin); *see also* Tr. 1969:1-6 (C. Myhrvold), Microsoft initially wanted to

cooperate with ISVs such as WordPerfect to ensure Windows' success.[69] After establishing its

own word processing and suite products and gaining monopoly power in the operating systems

market, however, Microsoft's incentives changed because it no longer needed competing

applications to sell its operating systems. To the contrary, Microsoft viewed rival applications as

impediments to its long-run monopoly power.

As shown, Microsoft's argument that its business relationship with Novell was

"temporary" and "subject to change in accordance with [Microsoft's] 'business judgment,'"

Microsoft Mem. at 102, is factually incorrect. It is also legally insufficient and this Court

properly rejected it. *Compare* Microsoft's Proposed Final Jury Instructions, Ex. A at 8 (Dec. 5,

2011) (Dkt. # 330) *with* Jury Instructions Given by the Court at 7-11 (Dec. 19, 2011)

(Dkt. # 388) (denying Microsoft's request that the jury be instructed that in order to find for

Novell it must find that the business relationship between Microsoft and Novell "was not

temporary and subject to Microsoft's business judgment"). A "temporary" course of dealing,

even where it involves "business judgment" in the sense that Microsoft uses these terms, is

sufficient to support a finding of harm to competition. *Christy Sports* recognized that a

monopolist could be held liable for a single series of acts – inviting an investment and then

disallowing use of that investment. 555 F.3d at 1196. *Four Corners Nephrology* characterized

---

[69] *See* Tr. 1387:2-1388:8 (Alepin); Tr. 290:5-19 (Harral); Tr. 1969:1-6 (C. Myhrvold) ("[I]f you
want a popular operating system, it is pretty much wholly dependent on what applications run for
it and how compelling those applications are.").

the relationship in *Aspen Skiing* as a "short-term business relationship," 582 F.3d at 1225, and

Trinko characterized the course of dealing in *Aspen Skiing* as "voluntary," 540 U.S. at 409. The

fact that the relationship could change does not immunize Microsoft from liability for taking part

in conduct that is anticompetitive. And there is abundant evidence in the record that Microsoft's

decision to de-document the namespace extension APIs was done without a valid business

reason, which *Christy Sports* identified as the "critical fact" under *Aspen Skiing*. 555 F.3d at

1197.

B.   Microsoft Terminated Its Course Of Dealing With Novell When It
        De-Documented The Namespace Extension APIs

Mr. Gates' decision to withdraw support for the namespace extension APIs terminated

Microsoft's course of dealing with regard to those APIs. Moreover, Microsoft ceased to provide

other, related support. For example, in November 1994, Novell's Kelly Sonderegger pressed

Microsoft's Brad Struss for more documentation on the namespace extension APIs; Struss

provided little more than a boilerplate response that the functionality was "no longer available."

PX 236 at NL2 0004273; PX 259. Similarly, Novell's Rich Hume tried and failed to obtain

additional information about the namespace extension APIs. *See* PX 238. At trial, Mr. Harral

testified that he continued to seek information about the namespace extension APIs from

Microsoft's Premier Support to no avail. Tr. 345:8-346:11 (Harral). Mr. Harral testified that not

only did Premier Support refuse to provide information about the de-documented namespace

extension APIs, but it also steadily decreased the amount of information it provided about

documented portions of the Windows 95 shell. *Id.* Thus, not only did Microsoft terminate its

course of dealing with respect to the namespace extension APIs, but it also made it more difficult

for Novell to deal with documented portions of Windows 95.

Microsoft denies that it "terminated" its profitable business relationship with Novell, arguing that Microsoft "continued to provide information and assistance to Novell." Microsoft Mem. at 93. Microsoft's argument is unavailing. As shown, it is undisputed that Microsoft stopped working with Novell to implement the namespace extension APIs. That, alone, is sufficient. *See Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858, 866-67 (D. Conn. 2004) (holding claim of anticompetitive conduct could stand where parties agreed to deal with each other and actually did deal with each other for some time; defendant stopped dealing or made it difficult for plaintiff to deal with defendant by, among other things, delaying the shipment of parts, raising prices, and refusing to sell copiers to plaintiff's customers; and that cessation served no business purpose); *see also MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004) ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal [within the *Aspen Skiing* exception]."); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 250-51 & n.86 (S.D.N.Y. 2004) (holding plaintiff sufficiently alleged anticompetitive conduct where defendant did not refuse to deal with plaintiff entirely, but refused to deal on same terms as offered over prior five-year course of dealing); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1112-14 (D. Colo. 2004) (radio station deemed to have denied access to concert promoter even though station still permitted promoter to purchase ads and support). Further, the courts focus on the act of "termination" to determine whether the monopolist was discontinuing a practice that was presumably profitable, not to implement formalistic distinctions. Here, Microsoft's admission that its decision caused it short-term losses confirms that the preexisting arrangement was profitable.

C.   There Is No Requirement That Novell Must Prove Microsoft Denied Novell
Access To Information "Available To All Other Consumers"

Microsoft argues that Novell must be able to prove that Microsoft denied Novell access

to information that was available to all other consumers. This is not the law, as this Court

recognized in denying Microsoft's request for an instruction. *Compare* Microsoft's Proposed

Final Jury Instructions, Ex. A at 8 (Dec. 5, 2011) (Dkt. # 330) *with* Jury Instructions Given by

the Court at 7-11 (Dec. 19, 2011) (Dkt. # 388). A finding of anticompetitive conduct does not

require that a particular rival be singled out for disparate treatment; finding that Microsoft

engaged in anticompetitive conduct does not turn on whether Microsoft treated various

competitors differently or the same with respect to the namespace extension APIs even under the

unilateral-refusal-to-deal paradigm. *Aspen Skiing* does not require that a monopolist treat one

rival differently than others in order to impose antitrust liability.

Microsoft's incorrect assertion that disparate treatment is required is based on a distortion

of a passage in *Four Corner Nephrology*, in which the Tenth Circuit noted that a factor in the

Supreme Court's conclusion that the defendant in *Aspen Skiing* had no legitimate justification for

ending its course of dealing with the plaintiff was the fact that the defendant "even refused to sell

lift tickets to [the plaintiff] at the retail rates available to consumers," 582 F.3d at 1224. Thus,

the Tenth Circuit recognized that it was the absence of a legitimate business justification for

ending the voluntary course of dealing that resulted in liability in *Aspen Skiing* – not a failure to

treat all competitors the same way, as Microsoft erroneously argues.

V.   NOVELL'S CLAIM IS APPROPRIATELY BEFORE THE COURT

Microsoft also argues (1) that Novell sold its claim to Caldera in the Asset Purchase

Agreement, (2) that Novell's claim is barred by the NetWare settlement agreement, and (3) that

130

Novell's claim is barred by the statute of limitations. Microsoft waived these arguments because it did not raise them in its Rule 50(a) motion before the case was submitted to the jury. Moreover, consideration of these arguments is barred by the law of the case doctrine. Finally, even apart from these fatal flaws, Microsoft's arguments are without merit.

A.   <u>Microsoft Cannot Now Raise Any Grounds For Judgment As A Matter Of Law That Were Not Raised In Its Rule 50(a) Motion Before The Case Was Submitted To The Jury</u>

Microsoft is precluded from asserting any grounds for judgment as a matter of law in the present motion that were not raised in its Rule 50(a) motion before the case was submitted to the jury. The present motion is a renewal, pursuant to Fed. R. Civ. P. 50(b), of the motion for judgment as a matter of law filed by Microsoft pursuant to Fed. R. Civ. P. 50(a) before the submission of the case to the jury. "Because the Rule 50(b) motion is only a renewal of the preverdict [Rule 50(a)] motion, it can be granted only on grounds advanced in the preverdict motion." Advisory Committee Notes to 2006 Amendment to Fed. R. Civ. P. 50. "[A] renewed motion under Rule 50(b) cannot assert grounds for relief not asserted in the original [Rule 50(a)] motion." *Marshall*, 474 F.3d at 738-39. "'[A] posttrial motion for judgment as a matter of law can properly be made only if, and to the extent that, such a motion specifying the same grounds was made prior to the submission of the case to the jury.'" *Id.* at 739 (citation omitted). This rule "'"protect[s] the Seventh Amendment right to trial by jury, and ensur[es] that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting."'" *Id.* (citations omitted). Thus, the failure to raise an issue in a Rule 50(a) motion precludes the defendant from raising the issue in its Rule 50(b) motion, even if the same issue was raised in the defendant's answer, or in a summary judgment motion. Therefore, by not raising in its Rule 50(a) motion its current arguments that Novell sold its claim to Caldera in the Asset Purchase

Agreement, that Novell's claim (which includes allegations relating to PerfectOffice) is barred

by the NetWare settlement agreement, and that Novell's claim is barred by the statute of

limitations, Microsoft has waived these grounds and is barred from raising them in its renewed

motion for judgment as a matter of law pursuant to Rule 50(b).

B.   Issues Resolved By The Fourth Circuit Are Law Of The Case And Cannot Be
        Relitigated Before This Court After Remand

Microsoft seeks to relitigate issues that were previously resolved by the Fourth Circuit.

These arguments also are barred by the law of the case doctrine. "The law of the case 'doctrine

posits that when a court decides upon a rule of law, that decision should continue to govern the

same issues in subsequent stages in the same case.'" *Huffman v. Saul Holdings Ltd. P'ship*,

262 F.3d 1128, 1132 (10th Cir. 2001) (citation omitted). "The doctrine has particular relevance

following a remand order issued by an appellate court." *Id.* After remand, the court of appeals'

ruling "is not subject to further adjudication" in the district court because "'[w]hen a case is

appealed and remanded, the decision of the appellate court establishes the law of the case, which

must be followed by the trial court on remand.'" *Orient Mineral Co. v. Bank of China*,

No. 2:98-CV-238BSJ, 2010 WL 624868, at *14 (D. Utah Feb. 19, 2010) (citation omitted), *aff'd*,

416 F. App'x 721 (10th Cir.), *cert. denied*, 132 S. Ct. 250 (2011).

The rule that the court of appeals' decision is not subject to further adjudication "applies

to all 'issues previously decided, either explicitly or by necessary implication.'" *Rohrbaugh v.*

Celotex Corp., 53 F.3d 1181, 1183 (10th Cir. 1995) (citation omitted). "An argument is rejected

by necessary implication when the holding stated or result reached is inconsistent with the

argument." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("We did not address

that argument in so many words, or in any words for that matter, but we did reject it 'by

132

necessary implication,' which is enough under our decisions to bring the law of the case doctrine

to bear in this appeal." (citation omitted)).

A district court may only depart from the court of appeals' decision after remand "'under

exceptional circumstances,'" none of which are present here: "'(1) a dramatic change in

controlling legal authority; (2) significant new evidence that was not earlier obtainable through

due diligence but has since come to light; or (3) if blatant error from the prior . . . decision would

result in serious injustice if uncorrected.'" *Huffman*, 262 F.3d at 1133 (alteration in original)

(citation omitted).[70] In the MDL context, a remand to a transferee court in a different circuit

with a different interpretation of controlling law than the transferor court does not constitute the

sort of change in controlling law that would permit departure from the law of the case doctrine.

"There is no authority for the proposition that a circuit split qualifies as a change in controlling

law. Rather, 'federal law is presumed to be consistent and any inconsistency is to be resolved by

the Supreme Court.'" *United States ex rel. Staley v. Columbia/HCA Healthcare Corp.*, 587 F.

Supp. 2d 757, 762 (W.D. Va. 2008) (quoting *Bradley v. United States*, 161 F.3d 777, 782 n.4

(4th Cir. 1998)); *see also In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718 n.15

(D. Md. 2001) (Motz, J.) ("I further note that, as the parties have stated, I must apply Fourth

Circuit law as the transferee court in an MDL proceeding. If these cases are returned to

transferor courts, presumably the rulings I make in this opinion will be binding under the

doctrine of the law of the case, particularly if the Fourth Circuit reviews these rulings on

---

[70] The exception that permits a departure from the law of the case doctrine when the decision is
clearly erroneous and would work a manifest injustice is "rarely, if ever, invoke[d]." *United
States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). "In fact, in the only case we found in
which a panel used this exception, the en banc court subsequently reversed the panel." *Id.*
(citations omitted).

interlocutory appeal." (citations omitted)), *aff'd sub nom. Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006).

Moreover, "'a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'" *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (citation omitted). The reason for this rule is that "'[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Cnty. of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (citation omitted). In *Rohrbaugh*, the Tenth Circuit held that the plaintiffs had "waived their right to challenge the correctness of the holdings in [the prior court of appeals' decision] by failing to seek review of that decision when they had the opportunity to do so." 53 F.3d at 1184; *see also Klay v. All Defendants*, 389 F.3d 1191, 1199 (11th Cir. 2004) ("[Defendants'] failure to seek *en banc* review or *certiorari* with respect to these issues caused our previous ruling to become law of the case."). Similarly, in the present case, Microsoft did not seek review of the Fourth Circuit's decision in the Supreme Court, and thus waived any right to challenge the correctness of the Fourth Circuit's decision.

C.   Even If Microsoft's Arguments Were Not Barred By Waiver Or Law Of The Case, They Would Fail As A Matter Of Law

1.   *Novell Did Not Sell Its Claim in Count I to Caldera*

Microsoft's argument that Novell sold its claim to Caldera still "lacks a logical limiting principle," as the Fourth Circuit noted in rejecting that argument. *Novell*, 429 F. App'x at 260. The "association" on which Microsoft focuses – the reference to WordPerfect's large installed

134

base on the "DOS" platform – is simply a re-characterization of the same argument Microsoft

previously advanced and lost. Microsoft's new twist does nothing to alter the Fourth Circuit's

analysis.

In support of its argument, Microsoft cites a single snippet of testimony from Dr. Noll as

evidence that "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." *See* Microsoft Mem.

at 132. First, Microsoft's argument ignores the Fourth Circuit's holding that the term

"associated" in the Novell-Caldera Asset Purchase Agreement ("APA") is logically cabined by

the products that were the subject of the APA. *See Novell*, 429 F. App'x at 260. No version of

WordPerfect, regardless of whether that version ran on MS-DOS, DR DOS, or Windows, is

listed among the products explicitly defined in the APA as "DOS Products" or "Related

Technologies." APA §§ 2.6, 2.11 (Microsoft Mem. Ex. P). As before, Microsoft's "expansive

reading of the disputed provision is antithetical to the carefully limited 'circumstances, nature,

and purpose' of the [Asset Purchase] Agreement." *Novell*, 429 F. App'x at 260 (citations

omitted).

Second, the testimony from Dr. Noll on which Microsoft relies is focused on

WordPerfect's installed base on MS-DOS rather than DR DOS. *See* Tr. 1923:21-1925:7 (Noll).

Therefore, Microsoft essentially argues that a reference to the MS-DOS versions of WordPerfect

is sufficient to demonstrate an association with the DR DOS Products and Related Technologies

that Novell transferred in the APA. Such an argument goes too far and reflects precisely the

Fourth Circuit's concern that "it is difficult to imagine a piece of hardware or software that could

not be somehow 'associated' with Novell's DOS products under Microsoft's capacious theory."

Novell, 429 F. App'x at 260. Novell's reliance on evidence of WordPerfect's installed base,

135

which necessarily includes *all* of the operating systems for which Novell sold versions of the word processor, does not demonstrate any greater "association" than did Microsoft's original theory, which hinged on the prism of the PC operating systems market at issue in Novell's claim.[71]

In any event, the premise of Dr. Noll's testimony has not injected some new evidence into the case. To the contrary, WordPerfect's success in the early 1990s has always been based in part on the MS-DOS versions of the word processor. *See, e.g.*, Compl. ¶ 32. Novell has always relied on the popularity and cross-platform nature of WordPerfect. It is therefore unreasonable to assume the discussion of WordPerfect's cross-platform popularity would exclude reference to WordPerfect's DOS versions.

For all of these reasons, the Court should reject Microsoft's argument that Novell has transferred its claim to Caldera under the APA. Microsoft's expansive interpretation of the language in that agreement runs afoul of the Fourth Circuit's legal ruling on the subject.

2.   *Novell's Count I Claim Includes PerfectOffice*

   a.   Microsoft's attempt to limit Novell's case based on a prior
         Settlement Agreement and an overly restrictive interpretation of
         the Complaint is without merit

On November 8, 2004, four days before Novell filed its Complaint in the United States District Court for the District of Utah, Novell and Microsoft settled claims unrelated to this case dealing with Novell's network operating system business. *See generally* Nov. 8, 2004 Settlement Agreement ("Settlement Agreement") (Microsoft Mem. Ex. A). The Settlement Agreement preserved Novell's right to bring claims set forth in a draft complaint that matched

---

[71] Microsoft's broad reading of the APA would essentially mean that any reference to "DOS" on the part of a Novell lawyer or witness would demonstrate the requisite "association" showing that Novell's current claim was transferred. Such an approach is illogical.

the claims described in the filed Complaint. *Id.* ¶ 2(a). The Settlement Agreement also preserved Novell's ability to introduce any and all evidence relevant to these claims, expressly stating that: "Nothing herein shall limit Novell's right to present ***any facts*** relevant to" the claims in the draft complaint. *Id*. (emphasis added).

Microsoft argues that the Complaint alleged harm to Novell's WordPerfect and Quattro Pro products "and no other."[72] Microsoft Mem. at 12 n.7. Further, it argues that Novell cannot now "base its claim on harm to PerfectOffice, nor can Novell now base its claim on harm to products such as Soft Solutions document management system and QuickFinder search engine." *Id*. at 127. In the paragraphs outlining its claim for monopolization of the PC operating systems market, Novell broadly alleges, however, that "as a direct, foreseeable, and proximate result of Microsoft's misconduct, Novell was damaged by, without limitation, lost sales of office productivity applications and a diminution in the value of Novell's assets, reputation, and goodwill in amounts to be proven at trial." Compl. ¶ 155.

Because Paragraph 155 includes damages for lost sales of office productivity applications, it necessarily encompasses PerfectOffice because PerfectOffice contains WordPerfect and Quattro Pro bundled together. The Fourth Circuit recognized this in its 2007 decision, when it wrote that "WordPerfect and Quattro Pro are 'office-productivity applications,' which Novell marketed together as an office-productivity package called 'PerfectOffice.'" *Novell*, 505 F.3d at 305. Novell's claim for damages also seeks recovery for the "diminution in the value of Novell's assets." Compl. ¶ 155. PerfectOffice was one such asset whose value was diminished due to Microsoft's anticompetitive conduct.

---

[72] Microsoft never explicitly raised at summary judgment its argument that Novell released any claims related to PerfectOffice, waiting instead until the motions *in limine* stage to raise the issue.

The Complaint focuses broadly on how Microsoft's conduct had a negative effect on Novell's ability to distribute and sell office productivity applications, and how Microsoft's conduct caused financial harm to Novell. *See, e.g.*, Compl. ¶¶ 56, 64, 78, 79, 112, 149-150, 153, 155. PerfectOffice during the relevant time period was the primary way Novell distributed, marketed, and sold WordPerfect and Quattro Pro.

Microsoft also argues, in an attempt to limit the scope of Novell's evidence, that Novell is bringing "claims" for harm to what Microsoft asserts are two separate products, SoftSolutions and QuickFinder. Microsoft Mem. at 128-30. Both the document management software, SoftSolutions, and the search technology, QuickFinder, however, were integrated into WordPerfect's file open dialog. The Settlement Agreement in no way precludes Novell from presenting facts and evidence related to the harm caused by Microsoft in the development of WordPerfect's shared code and the integration of technologies into WordPerfect's file open dialog.

Additionally, Microsoft ignores the existence of OpenDoc and AppWare, even though the Complaint extensively discusses how Microsoft's conduct harmed complementary technologies of WordPerfect, including OpenDoc, AppWare, and QuickFinder. Compl. ¶¶ 45-47, 49-51, 84-85, 87-88, 94-95. Novell should be allowed to build a middleware theory related to WordPerfect, its shared code, AppWare, and OpenDoc, based on PerfectOffice, which was a combination of these technologies.

> b.   The Court has not excluded Novell's theory that PerfectOffice was a combination of Novell's middleware technologies

Microsoft's argument that this Court has excluded Novell's theory about PerfectOffice as middleware, "alone or in combination with Java and Netscape," Microsoft Mem. at 127-28, is a

blatant mischaracterization of the Court's rulings. Neither the Court's October 6, 2011 ruling

nor its handling of Mr. Alepin's testimony indicated that PerfectOffice, *by itself*, was excluded

from this case.

First, the Court's October 6, 2011 ruling limited Novell's middleware theory only "to

th[e] extent" that Novell's "claim now is that PerfectOffice combined, bundled with Netscape

and/or Java is . . . the middleware threat." Oct. 6, 2011 Hr'g Tr. 65:3-20. The Court did not

exclude "PerfectOffice, alone or in combination with Java and Netscape," as Microsoft now

posits.[73] Microsoft Mem. at 127. In fact, the Court explicitly stated, "if the only mistake in the

complaint was not to mention that Quattro Pro and WordPerfect, together known as Perfect

Office, that *seems to me to be nothing*." Oct. 6, 2011 Hr'g Tr. 65:6-8 (emphasis added).

Indeed, there is little more to it than that.

Moreover, although the Court limited Mr. Alepin's testimony while he was on the

witness stand, the Court declined to rule on Microsoft's more sweeping Motion to Strike

Alepin's Testimony (Nov. 10, 2011) (Dkt. # 274), a motion premised on the ground that Novell

was not permitted to pursue a claim for PerfectOffice as middleware. When Microsoft sought to

argue the motion before the Court, the Court asked:

> [W]hat is the big deal about this? I mean, I understand that there is a difference
> between bundling Netscape and PerfectOffice and I think I have ruled on that. I
> think I understand that PerfectOffice is all over this case, whether you want it or

---

[73] In contrast to its argument here, Microsoft acknowledged that the PerfectOffice middleware
theory this Court excluded was based on the combination of PerfectOffice, Java, and Navigator,
as opposed to PerfectOffice standing alone. *See* Supplemental Mem. in Supp. of Microsoft's
Mot. *in Limine* to Exclude Evid. of Novell's New Middleware Theory at 1 (Oct. 10, 2011)
(Dkt. # 200). Similarly, in another brief filed by Microsoft, it acknowledged that the Court
granted its motion "in part" in excluding Novell's middleware theory only to the extent it was
based on a combination of PerfectOffice, Java, and Navigator. Microsoft's Oct. 13, 2011 Mem.
at 1 (Dkt. # 228).

>   not. You [Microsoft] have put it in about whether to develop the suite or not, and
>   I think everybody understands what PerfectOffice is.

Tr. 1865:8-18. The Court's incredulity is understandable. Evidence about PerfectOffice was

frequently admitted at trial, and as the Court noted, Microsoft itself raised the issue of suites. In

particular, Microsoft raised the questions of whether Novell was late in developing suites and

whether Novell was able to integrate the products within a suite, questions that Novell needed to

answer for causation purposes. For that additional reason, facts relating to Novell's

PerfectOffice are properly in this case.

      When the parties finally did argue Microsoft's Motion to Strike Alepin's Testimony, the

Court decided to "reserve on this because there seems to be a dispute about what the state of the

evidence is." Tr. 2071:4-13. The Court went on to note its own view that "It's clear that the

state of the evidence is that PerfectFit, the shared code, was always in WordPerfect. This is

much ado about nothing."[74] *Id.* For Microsoft to imply that the Court somehow ruled on this

issue in the past or that this issue has been decided is not only disingenuous, but entirely

incorrect.

      In any event, the Court was correct in stating that "PerfectOffice is all over this case."

Tr. 1865:8-18. As discussed above, Novell alleged in its Complaint that the combination of

WordPerfect, AppWare, and OpenDoc posed a competitive threat to Microsoft's PC operating

systems monopoly.[75] *See* Compl. ¶¶ 50-51. Similarly, in opposing Microsoft's motion to

---

[74] The Court noted that Microsoft's lawyer disputed the state of the evidence and requested
clarification as to the dispute. Tr. 2071:4-13. Microsoft's motion was not raised again.

[75] Microsoft argues that, because the Complaint does not define or reference an office
productivity suite market, PerfectOffice cannot be contemplated by the allegations therein.
Microsoft Mem. at 127. This argument, however, proves only that Novell did not bring a claim
for harm in the office productivity suite market. This undisputed fact is irrelevant. The focus of
Novell's current claim is on Microsoft's conduct in *the PC operating systems market*, and

dismiss, Novell stated that it "bundled its WordPerfect and Quattro Pro applications into a 'suite' and engineered them to exploit the capabilities of Novell's existing cross-platform technologies, such as OpenDoc and AppWare." Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 5 (Feb. 22, 2005) (Dkt. # 24).

The Court also acknowledged in its summary judgment opinion that PerfectOffice has a place in this case. There, the Court described PerfectOffice as "a combination of WordPerfect and Quattro Pro" and noted that one aspect of Novell's theory was that Microsoft intentionally took action against Novell's applications because "'PerfectOffice,' developed by Novell, constituted (or nearly constituted) 'middleware,' which could have been effectively used with any operating system and that therefore would have 'commoditized' Windows 95 and undermined the monopoly Microsoft enjoyed in the operating system market." *Novell*, 699 F. Supp. 2d at 735-36. Novell also fully briefed this issue in response to Microsoft's motions *in limine* and supplemental briefs thereto.[76]

Finally, the record at trial has confirmed Novell's arguments. First, the record made clear that PerfectOffice included WordPerfect, Quattro Pro, and AppWare. *See, e.g.*, Tr. 1008:1-7 (Frankenberg). Additionally, a significant aspect of Novell's middleware threat, shared code – also known as PerfectFit – has long been a component of WordPerfect and was included in PerfectOffice. *See* Tr. 216:19-218:3, 218:21-219:14 (Harral). In fact, PerfectOffice shipped

---

Microsoft's targeting of competing middleware products such as Novell's WordPerfect and AppWare, both parts of the PerfectOffice suite. Moreover, Microsoft's reference to the NetWare settlement is unavailing, as that document states clearly that, despite Novell's release, "Nothing herein shall limit Novell's rights to present any facts relevant to its WordPerfect claims." Settlement Agreement at 2.

[76] *See, e.g.*, Pl.'s Mem. in Opp'n to Def.'s Mot. *in Limine* to Exclude Evid. of Novell's New Middleware Theory (Oct. 4, 2011) (Dkt. # 196) (filed under seal); Pl.'s Mem. in Resp. to Def.'s Supplemental Mem. in Supp. of Its Mot. *in Limine* to Exclude Evid. of Novell's New Middleware Theory (Oct. 11, 2011) (Dkt. # 205) (filed under seal).

with both PerfectFit/shared code and AppWare. Tr. 212:16-19, 230:24-231:6, 236:7-8 (Harral).

Other testimony acknowledged that both PerfectFit and AppWare were forms of middleware.

See Tr. 233:13-236:6 (Harral); Tr. 1015:8-1016:19 (Frankenberg).

In sum, there is no question that PerfectOffice is properly a part of this case and that

Novell has not released its claim in this regard.

3.   *Novell's Claim Is Not Time-Barred*

In what can only be described as grasping at straws, Microsoft asserts that based on the

evidence presented at trial, Novell's claim no longer bears any relation to the Government Case,

and is therefore time-barred. This assertion, however, is based on a mischaracterization of the

evidence and other fundamental flaws in Microsoft's arguments. Put simply, Novell's claim

continues to bear a strong relation to the Government Case and is not time-barred.

The first argument Microsoft offers in support of its position that Novell's case now

fundamentally differs from the Government Case relates to statements taken from 7 scattered

pages of transcript out of the 5,000 plus pages generated in two months of trial. Microsoft Mem.

at 134-35. In doing so, Microsoft ignores the thousands of pages of testimony elicited and

argument given by Novell's counsel throughout the trial demonstrating that Novell's claim is the

same as it has always been.

More to the point, the quoted statements of Novell's counsel on which Microsoft relies

are presented without any reference to the actual context in which they were offered during trial.

For example, although Microsoft quotes Novell's counsel's statement that Microsoft devised a

plan to "gain a very significant lead over Microsoft's applications competitors," Microsoft Mem.

at 134 (citing Tr. 5163-64), the quote ignores the preceding argument that explains how

Microsoft's plan was based ***on leveraging its operating systems technology*** for the benefit of its

applications, Tr. 5163:5-8. In other words, Novell's counsel was describing a way in which

Microsoft planned to abuse its PC operating systems monopoly power to protect its key franchise

applications, thereby widening the "moat" surrounding its monopoly.

In another example, Microsoft cites a statement made by Novell's counsel during

summation describing Mr. Gates' October 3, 1994 decision as a "purely predatory" one designed

to "give Office a real advantage." Microsoft Mem. at 134 (citing Tr. 5184). This has *always*

been a component of Novell's argument. It simply means that, again, Microsoft abused its PC

operating systems monopoly power to strengthen the key franchise applications that widened the

"moat" – i.e., increased the barriers to entry – surrounding Microsoft's PC operating systems

monopoly. That Microsoft's conduct affected applications as well as operating systems does not

transform Novell's claim from one based in the PC operating systems market to one based in an

applications market. Indeed, as previously noted, the same facts support Court I (monopoly

maintenance in the operating systems market) and Counts II and V (monopolization and

attempted monopolization of the applications markets). *See* Compl. ¶¶ 151-173.

Second, Microsoft argues that Novell's key franchise theory was somehow at odds with

the Government Case's description of the applications barrier to entry. Microsoft Mem. at 135.

Microsoft's argument suffers from a broken syllogism. That the applications barrier to entry is

comprised of thousands of applications does not militate the conclusion that a small number of

popular applications – like Novell's WordPerfect and PerfectOffice suite and accompanying

middleware – could not weaken or lessen that barrier. A wall may be made of thousands of

bricks, but putting a hole in that wall does not require every brick to be removed. And as stated

above, this is perfectly consistent with the evidence presented by Novell at trial as to how its key

franchise applications could weaken the applications barrier to entry protecting Microsoft's PC operating systems monopoly power. *See supra* Facts Part I.

Third, Microsoft asserts that Novell's case no longer bears any relation to the Government Case because Novell has supposedly refused to accept the definition of middleware as it is set forth in Finding of Fact ¶ 28 and embraced by Novell's Complaint. This argument is based on the faulty assumption that it is Microsoft's interpretation of that definition, rather than Novell's, that is accurate. As described above, Microsoft's interpretation of Finding of Fact ¶ 28 is wholly at odds with the outcome of the Government Case. *See supra* Facts Part I.D. Novell's definition of middleware comports with Finding of Fact ¶ 28 and the definition embraced in Novell's Complaint. Therefore, Novell's case continues to bear a strong relation to the Government Case and is not time-barred.

CONCLUSION

For the foregoing reasons, Microsoft's Renewed Motion for Judgment as a Matter of Law should be denied.

Dated: March 9, 2012   SNOW, CHRISTENSEN & MARTINEAU

                                                   By: */s/ Maralyn M. English*   __
                                                   Max D. Wheeler
                                                   Maralyn M. English

                                                   DICKSTEIN SHAPIRO LLP
                                                   Jeffrey M. Johnson
                                                   Paul R. Taskier
                                                   Adam Proujansky
                                                   James R. Martin

                                                   ADAMS HOLCOMB LLP
                                                   R. Bruce Holcomb

                                                   WILLIAMS & CONNOLLY LLP
                                                   John E. Schmidtlein

                                                   Attorneys for Novell, Inc.

144

CERTIFICATE OF SER VICE

I hereby certify that, on the 9th day of March, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: */s/ Maralyn M. English*
        Maralyn M. English