No. 12-4143

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

NOVELL, INCORPORATED,

Plaintiff-Appellant,

—v.—

MICROSOFT CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
THE HONORABLE J. FREDERICK MOTZ
CASE NO. 2:04-CV-1045-JFM

BRIEF OF DEFENDANT-APPELLEE MICROSOFT CORPORATION

STEVEN J. AESCHBACHER
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 882-8080

DAVID B. TULCHIN
STEVEN L. HOLLEY
SHARON L. NELLES
ADAM S. PARIS
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

JAMES S. JARDINE
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
(801) 532-1500

Attorneys for Defendant-Appellee Microsoft Corporation

January 23, 2013

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Microsoft Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: January 23, 2013

SULLIVAN & CROMWELL LLP

By: /s/ David B. Tulchin

David B. Tulchin
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorney for Defendant-Appellee Microsoft Corporation

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PRIOR AND RELATED APPEALS

In *Novell* v. *Microsoft*, 505 F.3d 302 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of Counts II through V of Novell's Complaint and affirmed the denial of Microsoft's motion to dismiss Counts I and VI. In *Novell* v. *Microsoft*, 429 F. App'x 254 (4th Cir. 2011), the Fourth Circuit reversed the entry of judgment for Microsoft on Count I of Novell's Complaint and noted that Novell did not challenge on appeal the entry of judgment for Microsoft on Count VI. The case was then remanded for trial on Count I.

GLOSSARY

API	Application Programming Interface
DOS	Disk Operating System
DRG	Developer Relations Group
FOD	File Open Dialog
GUI	Graphical User Interface
ISV	Independent Software Vendor
JPML	Judicial Panel on Multi-District Litigation
M6	Milestone 6
MDL	Multi-District Litigation
MS-DOS	Microsoft DOS
NSEs	Namespace Extension APIs
PC	Personal Computer
PC OS Market	PC Operating System Market
RTM	Release to Manufacturing
WPC	WordPerfect Corporation

INTRODUCTION

In 1994, Microsoft's market share in the personal computer ("PC") operating system market was above 90%, and Microsoft was then developing Windows 95—which all recognized was a major technological advance and would drive Microsoft's market share even higher. In June of that year, during the development of Windows 95, Microsoft distributed a pre-release or "beta" version of the new operating system to other software companies (sometimes called "ISVs," for independent software vendors) so they could begin to write applications that would be ready to come to market not long after Windows 95 was released. Microsoft's beta license agreement, signed by Novell, said that the beta of Windows 95 was subject to change, and Novell independently understood the same thing—betas can and do change.

On October 3, 1994, Microsoft decided that it would no longer support (meaning no longer provide technical documentation and assistance for) four application programming interfaces ("APIs") in the beta of Windows 95 (the "October 3 Decision"). APIs are interfaces that can be used by ISVs to allow their applications to take advantage of services provided by the operating system. The APIs in question—four out of thousands of APIs in Windows 95—were called the namespace extension APIs ("NSEs"). Before and after making the October 3 Decision, Microsoft surveyed major ISVs to find out if the decision would cause

them any difficulties, and Novell responded by saying that it was not using those four APIs and was "OK" with the change. Windows 95 was released on August 24, 1995 and was a huge success (as many, including Novell, had anticipated).

Novell claims that the October 3 Decision caused a delay in Novell's development of its PerfectOffice suite (composed primarily of WordPerfect, a word processor, and Quattro Pro, a spreadsheet), and that this delay harmed competition in the PC operating system market ("PC OS market"). This theory was outlandish from the outset. It was based on the contention that Microsoft's dominant share in the PC OS market would have declined because Novell's applications, had they come to market sooner, somehow would have sparked competition in the PC OS market in which Microsoft had lawfully acquired monopoly power.

After the trial resulted in a hung jury, the court ruled that Novell had failed to create a jury issue on any element of its claim. First, the court held that Microsoft's decision was not anticompetitive because, among other reasons, Novell knew that the beta of Windows 95 could change because of the license agreement and industry practice. Second, the court held that Novell's theories as to how its applications could have affected competition in the PC OS market

(a market in which those applications did not compete) were unsupported, and in fact contradicted, by the evidence. Indeed, Novell's CEO admitted that Microsoft's market share would have been higher (not lower) had Novell's applications been released in a timely manner. Third, the court held that the October 3 Decision did not delay Novell; instead, its inability to develop Quattro Pro was the cause of delay. Each of these three rulings is correct and is a separate and independent ground for affirmance. There is absolutely no merit to Novell's appeal.

STATEMENT OF THE ISSUES

Whether the trial court correctly ruled that:

I. the October 3 Decision was not anticompetitive conduct under Section 2 of the Sherman Act because, among other reasons, Novell was aware that the beta of Windows 95 was subject to change, and Microsoft continued to assist Novell in developing its applications for Windows 95;

II. Microsoft's withdrawal of support for the NSEs caused no harm to competition in the PC OS market because Novell's applications could not impact Microsoft's monopoly power in that market; and

III. the October 3 Decision did not delay the release of Novell's applications for Windows 95.

STATEMENT OF THE CASE

A. Novell's Claim at Trial

On November 10, 2004, Novell filed its Complaint in the District of Utah, asserting six counts under Sections 1 and 2 of the Sherman Act, all based on harm allegedly suffered by WordPerfect and Quattro Pro in the short period during which Novell owned those applications (June 24, 1994 to March 1, 1996).[1] In April 2005, the Judicial Panel on Multi-District Litigation ("JPML") transferred the action to the District of Maryland and assigned it to Hon. J. Frederick Motz.

In Count I, Novell alleged that Microsoft unlawfully maintained a monopoly in the PC OS market by withdrawing support for the NSEs in 1994, while Windows 95 was under development, thereby allegedly injuring Novell's applications and harming competition in the adjacent PC OS market. (JA-119-25, 135-38.) This claim was not barred by the applicable four-year statute of limitations (15 U.S.C. § 15b) because it was deemed sufficiently related to a 1998 equitable enforcement action brought by the U.S. Department of Justice (the

[1] Novell purchased WordPerfect Corporation and bought the Quattro Pro spreadsheet application from Borland International on June 24, 1994. (JA-118.) In March 1996, Novell sold both to Corel Corporation. (JA-163.)

"Government Case") relating to the PC OS market to fit within the Clayton Act's tolling provision (15 U.S.C. § 16(i)). Counts II through V, which alleged that the same conduct caused harm to competition in the word processing and spreadsheet applications markets—where WordPerfect and Quattro Pro actually competed—were dismissed as untimely because they were not eligible for tolling. *Novell* v. *Microsoft*, 2005 U.S. Dist. LEXIS 11520, at *9-14 (D. Md. June 10, 2005), *aff'd*, 505 F.3d 302 (4th Cir. 2007). Although the Complaint was filed ten years after the allegedly wrongful conduct had occurred, Count I was not time-barred only because it was "ingeniously designed" to recast Novell's claims as a unique cross-market claim for harm to the PC OS market. *Novell* v. *Microsoft*, 699 F. Supp. 2d 730, 736 (D. Md. 2010).[2]

Count I survived summary judgment, *Novell* v. *Microsoft*, 429 F. App'x 254, 260-62 (4th Cir. 2011). On June 30, 2011, the JPML returned the action to the District of Utah, and Judge Motz accepted an assignment to preside over the trial. By 2011, Judge Motz had been on the federal bench for more than 25 years and, as the Microsoft MDL judge since 2000, had handled more than 100 actions against Microsoft.

[2] Count VI—which alleged that Microsoft entered into exclusionary agreements to inhibit distribution of Novell's applications (JA-167-68)—was later abandoned by Novell. *Novell* v. *Microsoft*, 429 F. App'x 254, 258 n.7 (4th Cir. 2011).

Before trial, Novell sought and obtained collateral estoppel on 52 Findings of Fact ("FoF" or "Findings") entered in the Government Case, *United States* v. *Microsoft*, 84 F. Supp. 2d 9 (D.D.C. 1999).[3] Novell agrees that those Findings are "binding in this case." (Novell Br. 6 n.2.)

B. Trial

Trial commenced on October 17, 2011 and concluded on December 16, 2011. Novell called four live fact witnesses: Adam Harral and Greg Richardson, former Novell programmers, Gary Gibb, former director of PerfectOffice for Windows 95, and Robert Frankenberg, Novell's CEO during the relevant period. Novell also played or read deposition testimony of 11 additional witnesses, all of whom were current or former Microsoft employees, and called three experts: Ronald Alepin on technical issues, Dr. Roger Noll on competition issues, and Dr. Frederick Warren-Boulton on damages. Novell sought $4 billion in damages (after trebling).

Microsoft called 13 fact witnesses (only two by deposition), including Bill Gates, five other current or former Microsoft employees, and seven former WordPerfect/Novell employees. Microsoft also called three experts: Dr. John

[3] In the Government Case, the DOJ alleged that Microsoft unlawfully maintained a monopoly in the PC OS market, but did not allege that Microsoft had *acquired* its monopoly unlawfully. Novell also made no such allegation at trial.

Bennett on technical issues, Dr. Kevin Murphy on competition issues, and Dr. Glenn Hubbard on damages.

At trial, Novell's counsel read to the jury the collaterally estopped Findings (JA-11072-86, 12616-38), which Judge Motz instructed had "binding" effect (JA-11072).

At the close of Novell's case on November 17, Microsoft moved for judgment as a matter of law. Judge Motz said that he was either "denying the motion without prejudice" to its renewal "at the close of all the evidence" or was deferring any ruling "until all the evidence is in." (JA-13881-82.) He expressed doubt that Novell could "prove the case," but said "that as a practical matter" the case should go to the jury. (JA-13881-82.) At the close of all the evidence, Microsoft renewed its Rule 50 motion, and Judge Motz said that the case "is going to the jury and then I'll focus upon [the motion] after that." (JA-16059-60.)

The jury was unable to come to a verdict. On December 16, 2011, Judge Motz declared a mistrial.[4]

[4] With the court's permission, Microsoft contacted members of the jury and seven were willing to be interviewed. Five of the seven said that they would not have awarded Novell even one dollar in damages, and four or five would have found no liability if the outcome included an award of damages.

C. The Decision on Microsoft's Renewed Motion for Judgment as a Matter of Law

After trial, Judge Motz granted Microsoft's renewed Rule 50 motion on "three separate and independent" grounds (JA-211): (1) "Novell has not created a jury question on the issue of whether Microsoft's conduct was anticompetitive" (JA-215-18), (2) no reasonable jury could conclude that the October 3 Decision had an adverse effect on competition in the relevant market (JA-218-26) and (3) "the claim Novell asserts is a lawyers' construct and is not based on an underlying business reality" (JA-226-28).

STATEMENT OF FACTS

A. Microsoft

In 1981, Microsoft released MS-DOS, an operating system with a character-based interface that required specific user instructions to perform tasks such as launching applications. (JA-1622 (FoF ¶6)[5]; JA-13649-51 (Gates).) MS-DOS became the dominant operating system for Intel-compatible PCs. (JA-1622 (FoF ¶6); *see also* JA-13657 (Gates).)

Bill Gates was not content to rest on the success of MS-DOS (JA-13658 (Gates)) and decided in the early 1980s to develop an operating system with

[5] All Findings of Fact cited in this brief were given collateral estoppel effect in this action.

a graphical user interface ("GUI"), which would allow users to perform tasks by selecting icons on the screen using a mouse (JA-200 (Decision); JA-1622 (FoF ¶7); JA-13658-61 (Gates)). Microsoft tried to persuade ISVs, including WordPerfect Corporation ("WPC"), to write applications for this new operating system, called Windows. (JA-200 (Decision); JA-13663 (Gates); JA-15666 (Peterson).)

In May 1990, Microsoft released Windows 3.0, an operating system that Novell's expert Noll described as a "revolutionary technological leap." (JA-12853.) Windows 3.0 became immensely popular and quickly caused a "sea change" away from MS-DOS toward Windows. (JA-14540 (Larsen); *see also* JA-11977-79 (Frankenberg); JA-11755-57 (Gibb); JA-15047-48 (LeFevre); JA-15664-65 (Peterson).) In 1991, Microsoft began developing its next major operating system, Windows 95, a project that Mr. Gates described as "one of the toughest engineering tasks ever done." (JA-13704, 13709-10.)[6]

Meanwhile, Microsoft had also developed Word, a word processor, and Excel, a spreadsheet. (JA-199 (Decision).) In 1990, Microsoft was the first company to release a "suite" (a software package that combined a word processor, spreadsheet and other applications). (JA-199 (Decision).)

[6] To state the obvious, Windows 95 was Microsoft's creation, and Microsoft (not Novell or other ISVs) was entitled to make decisions about the design of the new operating system.

By anticipating (indeed, creating) these two major shifts in the PC software industry—from character-based to GUI operating systems, and from standalone applications to suites—Microsoft's success continued to grow. From 1990 to 1995, MS-DOS and Windows together had more than 90% of the PC OS market. (JA-1625 (FoF ¶35).) There is no dispute that by 1994 Microsoft had a lawfully acquired monopoly in the PC OS market.[7]

Microsoft also became very successful in applications because, by 1994, "customers were buying suites rather than individual products" (JA-12004 (Frankenberg)) and, as a Novell memorandum conceded, Microsoft Office had "the strongest combination [of applications] in the industry" (JA-7023 (DX7); *see also* JA-9295 (DX271)). As of 1994-95, Microsoft Office was so popular that standalone applications represented only about a quarter of total sales of applications—suites were the rest. (JA-15401-02 (Hubbard); JA-1650.) Microsoft had more than 80% of the suite segment in 1993-95 (JA-2893, 2895 (PX 138)), and by April 1995, Novell pegged Microsoft's share at 86%. (JA-9295, 9298 (DX271).)

[7] As shown below, *see* p. 49, *infra*, Novell's CEO testified that Microsoft's already huge market share would have gone up (not down) if Novell's products had been released in a timely fashion. This alone destroys Novell's assertion that the October 3 Decision adversely affected competition in the relevant market. According to Novell's CEO, Microsoft's market share would have been "even higher" had it not engaged in the challenged conduct. (JA-12164-65.)

B. WordPerfect Corporation

In the 1980s, WPC developed WordPerfect, a word processing application. (JA-199-200 (Decision).) WordPerfect was "the acknowledged 'king of the hill' on the DOS platform" throughout the 1980s. (JA-199-200 (Decision).) At trial, Pete Peterson, who ran WPC until 1992, testified that Bill Gates advised him in 1989 "to write for Windows," but that WPC resisted and decided instead to keep all its eggs in the old character-based basket. (JA-15628-29, 15666.) WPC released its first version of WordPerfect for Windows in November 1991, about 18 months after Windows 3.0 came out. (JA-200 (Decision).)

The quality of WordPerfect for Windows was not good: Peterson testified that the reviews were "lukewarm" and the product was "not as well received as we had hoped." (JA-15635.) WordPerfect 6.0 for Windows 3.1, the next version, was released in October 1993 and also was "perceived as a slow and buggy product" (JA-9298 (DX271)) that had "too many bugs to be considered sufficiently stable" (JA-9168 (DX259)). As a result, WordPerfect was never highly popular on Windows[8] and, by 1994, almost no one was buying MS-DOS

[8] WordPerfect's share of the word processing market on Windows peaked at about 30% in 1992, and declined to "the low 20s" by 1994. (JA-15709 (Murphy); JA-9396 (DX294); *see also* JA-7040 (DX9).)

(where WordPerfect had been king). (JA-15047-48, 15054-55 (LeFevre); JA-11755-56 (Gibb); JA-15398-15400, 15516 (Hubbard).)

Further, WPC failed to release any suite until May 1993—almost three years after Microsoft Office created the suite segment. (JA-11757 (Gibb); JA-14847 (Acheson).) Frankenberg, Novell's CEO in 1994-95, conceded that Microsoft had a "huge head start" in suites (JA-11997-99), and WPC/Novell estimated that its own suite product (originally called Borland Office) had about a 2% share in 1993-94 (JA-9025 (DX223); JA-5345 (PX448)).

C. Novell

On March 21, 1994, Novell—which had no history of developing office productivity applications (JA-11984-86 (Frankenberg))—announced that it would acquire WPC and a spreadsheet called Quattro Pro developed by Borland of Scotts Valley, California (JA-200 (Decision); JA-11973 (Frankenberg)). The deals closed in June 1994. (JA-200 (Decision).)

In the two days following Novell's announcement, Novell's stock price dropped by 20% (JA-11926 (Frankenberg))—a decline in Novell's market capitalization of about $1.5 billion. (JA-12031 (Frankenberg); JA-15395 (Hubbard).) This was almost exactly equal to Novell's $1.55 billion purchase price for WPC and Quattro Pro. (JA-12031 (Frankenberg); JA-15420 (Hubbard).)

At the time of the acquisitions, Frankenberg "recognized the need to improve" WPC's products for the Windows platform and to develop a first-class suite. (JA-201 (Decision); *see* JA-12003-04 (Frankenberg).) In December 1994, Novell released PerfectOffice 3.0 for Windows 3.1, its first suite that received positive reviews. (JA-11944, 11948 (Frankenberg); JA-4124-27 (PX297).) Nevertheless, PerfectOffice 3.0 "did not achieve a sizeable market share" of suites (JA-201 (Decision)), capturing at most 8% in early 1995 (JA-12858 (Noll)).

Novell sold WordPerfect and Quattro Pro to Corel in March 1996. (JA-209 (Decision).) Corel released PerfectOffice for Windows 95 in May 1996, nine months after Windows 95 came out. (JA-209 (Decision).)

D. Microsoft's "Evangelization" of Windows 95

During the development of Windows 95, Microsoft provided ISVs with advance information about planned features in the new operating system, code-named "Chicago." (JA-2337-52 (PX63); JA-2696-719 (PX113).) Novell's witnesses agreed that WPC/Novell was "excited about Windows 95," which was a "significant step forward," and that Novell wanted to "take[] advantage of the capabilities in" Windows 95. (JA-12162-63 (Frankenberg); JA-11184-87 (Harral); JA-11540 (Richardson); JA-11721-22, 11730 (Gibb).) Gary Gibb testified that Novell knew that Windows 95 would become highly popular "pretty quickly" after

its release, so Novell's "number one priority" was to come out "as soon as practicable" with a PerfectOffice suite for Windows 95. (JA-11730, 11773-76.)

Microsoft's Developer Relations Group ("DRG") encouraged WPC, Novell and other ISVs to develop applications for Windows 95. (JA-14197-98 (Struss).) Brad Struss, who was in charge of this effort and was DRG's primary contact with WPC/Novell, testified that his goal was to help WPC/Novell and other ISVs "ship[] great Windows 95 applications shortly after Windows 95 shipped." (JA-14202.) To this end, DRG provided ISVs (including WPC/Novell) with early access to betas and development tools. (JA-14202-07 (Struss).)[9]

In November 1993, Struss and others visited WPC to provide assistance and urge WPC to be ready to release its applications "close to the time Chicago shipped." (JA-2666 (PX105); JA-14213-14, 14216 (Struss).) Microsoft's representatives then gave WordPerfect programmers, including Adam Harral, information about plans for Chicago, including a new user interface that applications could modify, using new shell extension APIs, a small subset of which

[9] Indeed, Novell's entire case is illogical because it is in Microsoft's business interest to encourage ISVs to write their applications to Windows. Denying ISVs access to necessary APIs would make Windows *less* appealing. *In re Microsoft Antitrust Litigation*, 274 F. Supp. 2d 743, 746 (D. Md. 2003) (Microsoft's monopoly position "depends upon Microsoft encouraging ISVs to choose the Windows operating system" and it is not "logical" to allege that Microsoft would deprive ISVs of "access to the APIs" they need).

were the NSEs. (JA-2666 (PX105); JA-11218-19 (Harral); JA-14707 (Nakajima).) The NSEs were four APIs out of "thousands" in the new operating system. (JA-12397 (Alepin); *see also* JA-11266 (Harral).) The NSEs were meant to provide a means for ISVs to add their own custom namespaces to the Windows Explorer.[10] (JA-11227-29 (Harral); *see also* JA-11596-97 (Richardson); JA-12514 (Alepin).)[11] There were other mechanisms for adding folders to Windows Explorer to display word processing documents and spreadsheets, and those mechanisms did not rely on the NSEs. (JA-13714-15 (Gates); JA-14704-07 (Nakajima); JA-15200 (Belfiore); JA-12518 (Alepin).)

In December 1993, Microsoft specifically warned WPC and other ISVs in writing that the namespace extensions were "[n]ot for most applications!" and "should NOT [be used to] edit documents with an explorer extension!" (JA-2715 (PX113).) This 1993 document, which Novell had in its files, warned Novell not to use the NSEs to edit documents in a word processor like WordPerfect. (JA-11225 (Harral); JA-11539-40 (Richardson).)

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[10] Windows Explorer, not to be confused with Internet Explorer, is the operating system's integrated resource viewer, which allowed users to access a variety of resources such as files, devices and networked computers.

[11] It was undisputed at trial that Novell's applications did not need to use the NSEs to be compatible with Windows 95, and that without using the NSEs, Novell could launch its applications from the Start menu or from icons on the desktop. (*See, e.g.*, JA-12516-17 (Alepin).)

E. Microsoft's Beta Version of Windows 95

On June 10, 1994, Microsoft provided WPC, Novell and thousands of other ISVs with a beta version of Windows 95 called the Milestone 6 ("M6") Beta. (JA-201 (Decision); JA-11366-37 (Harral).) The M6 Beta was the first beta provided to Novell/WPC that contained the NSEs, and documentation for the NSEs was provided at the same time. (JA-3385-404 (PX181); JA-11234-35 (Harral); JA-11557-58 (Richardson).)[12]

The M6 Beta was provided pursuant to a Microsoft license agreement, which both WPC and Novell signed. (JA-7177 (DX18); JA-7181 (DX19).) The license agreement stated: (a) "This PRODUCT consists of pre-release code, documentation and specifications and is not at the level of performance and compatibility of the final, generally available product offering"; (b) the operating system "may be substantially modified prior to first commercial shipment"; and (c) the user "assumes the entire risk" of use of the beta. (JA-7175 (DX18); JA-7178 (DX19); *see also* JA-202 (Decision).) Likewise, the front cover of the "Chicago Reviewer's Guide," which came with the M6 Beta, stated that the

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[12] Novell's assertion that the documentation was merely "written guidance" that was insufficient to allow Novell to use the NSEs (Novell Br. 17) is refuted by its own programmer, Richardson. He testified that Novell was "able to make use of" the NSEs based on what Microsoft provided in June 1994. (JA-11667; *see also* JA-11673.)

"features and functionality present" in the beta did "not represent a commitment on the part of Microsoft for providing or shipping [those] features and functionality . . . in the final retail product offerings of Chicago." (JA-4696 (PX388).)

Novell's CEO, developers and other employees all testified that they understood in 1994-95 that Microsoft might modify, and was entitled to modify, beta versions of Windows 95. (JA-202 (Decision).) Frankenberg testified that Novell understood that betas "could change" and "might change" prior to commercial release of the final product. (JA-12138, JA-12146.) Nolan Larsen, Novell's Director of Human Factors, testified that "the definition of beta" is that "there can be and almost certainly will be changes." (JA-14557; *see also* JA-14608-12.) Dave LeFevre, Novell's Director of Marketing for PerfectOffice for Windows 95, agreed that a "[b]eta by definition is an early release or a prerelease of a product that is subject to change" and that "there is no promise that what is in an early beta or even a late beta will be in the final product." (JA-14986-87.) Novell's expert witnesses Noll and Alepin conceded this same point. (JA-12821; JA-12494-95; *see also* JA-14075-76 (Gates); JA-15194-95 (Belfiore); JA-14209 (Struss).) Novell's "deception" argument is eviscerated by these facts; Novell was

fully aware that Microsoft made no commitment to include the NSEs in the final product.

Novell's own practices reinforce the same point. An October 18, 1994 memorandum prepared by Novell's Corporate Development Group recognized that, for Novell's own software, "the product and features may change dramatically" during the beta phase, and that an "entire feature" might be "remov[ed]" from a beta version. (JA-10347, 10349 (DX612A).) Novell's "Software Developer's Kit" (distributed with beta versions of its software) expressly warned ISVs that "Novell does not guarantee that Beta Products will become generally available to the public or that associated products will be released" and that "[t]he entire risk arising out of your use of Beta Product remains with you." (JA-10352 (DX618).)

F. The October 3 Decision

Microsoft was concerned in 1994 about a flaw in the NSEs that made it possible for poorly designed third-party applications calling those APIs to crash Windows 95. (JA-13731-32 (Gates); JA-14339-40 (Muglia); JA-15225-27, JA-15235 (Belfiore).) As Judge Motz said, even "Novell's own technical expert, Ronald Alepin, conceded[] an ISV that wrote a bad program using the namespace extension APIs could cause Windows 95 to crash." (JA-202; JA-12540-41 (Alepin).)

As a result, on October 3, 1994, less than four months after release of the M6 Beta and more than ten months before the commercial release of Windows 95, Bill Gates decided to withdraw support for the NSEs, meaning that Microsoft would no longer publish documentation for those four APIs and would tell ISVs that Microsoft might change or remove the NSEs in future versions of Windows.[13] (JA-13761-62, 13972, 14020 (Gates).)[14] The NSEs were not removed; they remained, as Novell then understood, in Windows 95 and could be called by Novell's applications. (JA-11557-58 (Richardson); JA-11273, 11462 (Harral).)

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[13] Once Gates made the decision, Microsoft's applications also did not utilize the NSEs. (JA-13776 (Gates); JA-12580-82 (Alepin); JA-15236-37 (Belfiore); JA-15950-51 (Bennett).) Novell's brief (at 20-21) misleadingly refers to Marvel (an online system utility) that shipped as part of Windows and was not a separate product (JA-13765, 13767 (Gates)).

[14] Gates announced his October 3 Decision in a long e-mail that included his saying that "[w]e should wait until we have a way to do a high level of integration that will be harder for [the] likes of Notes, WordPerfect to achieve, and which will give Office a real advantage." (JA-1967 (PX1).) Even if, as Novell argues, this shows that Microsoft was concerned with competition from Novell (*see* Novell Br. 21 n.3), Gates' e-mail refers only to a hoped-for advantage for Office from an expected, later, improved version of the NSEs. Gates was not aware of any harm to Novell flowing from the October 3 Decision (JA-13761), and he never refers to any benefit to Windows in competition with any other operating system. Novell's only claim here is for harm to competition in the PC OS market.

G. The October 3 Decision Did Not Harm Novell

As Judge Motz stated, "Microsoft had no reason [in October 1994] to believe that Novell was relying upon" the NSEs. (JA-217.) Gates testified that when he made his decision, he had no information that Novell was planning to use the NSEs. (JA-13761.) There is no contrary evidence.

The contemporaneous documents further show that "shortly before the" October 3 Decision, "Struss of Microsoft was advised that Novell was not yet using the namespace extension APIs." (JA-217 (Decision).) In September 1994, Struss, who was in frequent contact with Tom Creighton, Director of Novell's shared code group (and Harral's boss) (JA-14204-05 (Struss)), surveyed major ISVs and reported on September 22 that the "specific feedback" from Novell/WordPerfect was that "[t]hey have not begun any work on IShellFolder, IShellView, etc."—*i.e.*, the NSEs. (JA-7167 (DX17); JA-14218-21 (Struss).)[15] Struss testified that Novell told him in September that it was "not using" the NSEs and was "not dependent upon" them. (JA-14222.) As Judge Motz noted, "Novell did not rebut this evidence in any way." (JA-217.)

[15] Novell's brief (at 37) misleadingly refers to an attachment to Struss' report (written before September 22 and by a different Microsoft employee) that says that "based on speculation," it was "[l]ikely" that WPC/Novell planned to use the NSEs (JA-3658 (PX215); JA-7170 (DX17)). Struss testified at trial that his September 22 report saying that Novell was "OK" was written later, and was based on "specific feedback" from Novell. (JA-14219-20.)

Microsoft promptly notified Novell of the October 3 Decision. On October 12, 1994, Struss reported in writing that Novell (he wrote "WP," for WordPerfect) appears "to be OK" with the decision. (JA-6926 (DX3); JA-14223-24 (Struss); *see also* JA-217 (Decision).) Struss testified that he personally informed Novell about the change. (JA-14225.) "Novell presented no witness to rebut this testimony or to contradict what was said in the October 12 email." (JA-206 (Decision).)

Additionally, "there is no evidence that anyone at Novell made any complaint to anyone at Microsoft who could have reversed the decision to withdraw support for the namespace extension APIs." (JA-227 (Decision).) Struss testified, and his contemporaneous written reports show, that Novell made no complaint. (JA-14228-30, 14233-34 (Struss); JA-6924-25 (DX2); JA-7637-38 DX92).)[16]

Likewise, Gates testified that he attended "lots of meetings with ISVs in late 94, early 95" but that neither Novell nor any other ISV said "that they were using" the NSEs or that the October 3 Decision was an "issue[]" for them. (JA-

[16] The only documents that Novell cites for the proposition that it "complained repeatedly about the de-documentation" are PX236 and PX238, e-mails written by Kelly Sonderegger of Novell in November 1994. (Novell Br. 37.) Neither document contains a word of complaint about the NSEs or the October 3 Decision. (JA-3767-68; JA-3772.)

13765-66.) During a January 10, 1995 meeting between the two CEOs, Frankenberg complained vociferously to Gates about other Microsoft conduct but, as Frankenberg testified—and the eight pages of meeting minutes (JA-10451-58 (DX636)) confirm—he never complained about the NSE decision (JA-12057-58).

Although Novell now says that Frankenberg "complained 'on a number of occasions' to Bill Gates in 1995 about the issue of undocumented APIs" (Novell Br. 58), Novell fails to mention that, as Frankenberg conceded, these complaints were about a different topic—"undocumented APIs as a general matter," meaning APIs that were never documented in the first place (JA-11963-64 (Frankenberg))—and that Frankenberg never specifically raised or complained about the NSEs or the October 3 Decision (JA-12054-55 (Frankenberg)). As Frankenberg admitted, he never told Gates that Novell had any "problem" with the decision that Novell's lawyers claimed at trial completely ruined Novell's applications business. (JA-12054-55.)[17]

[17] Novell points out (Novell Br. 37) that programmer Harral testified that he spoke with Microsoft's Premier Support telephone hotline three times about the NSEs. Harral was unable to provide even a month in which any such call took place (JA-11260-62), or the names of anyone with whom he spoke (JA-11329, 11331, 11346). There is no e-mail or other document that reflects that any such thing ever occurred. Moreover, Harral's boss Creighton was in frequent contact with Struss and never made any complaint. (JA-14211-12, 14214-15, 14225 (Struss).)

In sum, "[t]here is no evidence to support th[e] premise" that "Microsoft withdrew support for the namespace extension APIs because it knew that Novell was using those APIs in the development of its applications and that, by withdrawing support for those APIs, Microsoft knew that Novell would fall behind schedule." (JA-216 (Decision).) This is devastating to a plaintiff whose lawyers argue was "deceived" by Microsoft's decision to do what the license agreement (and industry practice) specifically permitted: make a change to a beta before releasing the final product.

H. Microsoft's Continued Cooperation with Novell

After October 1994, Microsoft continued to provide assistance to Novell in developing applications for Windows 95. Judge Motz, citing testimony of Frankenberg and other Novell employees, noted that even "after it withdrew support for the namespace extension APIs, Microsoft continued to provide assistance to Novell and never terminated their relationship." (JA-218 (citing JA-14205-06, 14211-21 (Struss), JA-6925 (DX2), and JA-12067 (Frankenberg)).) For example, on October 21, 1994, Struss wrote that he was "[w]orking with" Novell's "sr. management" to get them to place "more focus on their" Windows 95 product (rather than the old PerfectOffice for Windows 3.1 product). (JA-6925 (DX2).) Struss testified that every time he spoke to Creighton, Struss "would ask him how could we help them" to "move forward." (JA-14229.)

Frankenberg acknowledged that Microsoft "endeavored to be helpful to Novell" so that it could "produce a great application for Windows 95." (JA-12067, 12154.) LeFevre testified that in 1994-95 (when he worked at Novell), a Microsoft employee was assigned full-time "to support us [Novell] in this development effort." (JA-14984.) LeFevre and Creighton also "spent an entire day" at Microsoft's headquarters "meeting with the development team for Windows" who "answer[ed] some critical questions" for Novell. (JA-14984-85 (LeFevre).)

Similarly, in April 1995, Novell's Scott Nelson wrote to Novell executives that "the cooperation between Microsoft and Novell has been very good" and that "over the next couple of weeks our developers and testers will visit Redmond [Microsoft's headquarters] once again to make sure that we are making continued progress." (JA-8654 (DX172).)

I. Novell Had Three Options and Chose the Most Difficult

At trial, Novell claimed that Microsoft's October 3 Decision caused delay because Novell's shared code group[18] (including Harral and Richardson) spent a full year replicating the functionality of the NSEs inside Novell's custom

[18] The shared code team was responsible for writing the code for "file handling," which included open and save functions, in the PerfectOffice suite. (JA-11140 (Harral).)

file open dialog ("FOD")[19] and argued that the shared code group's slowness caused delay in the release of its applications. (*See* Novell Br. 25.) As Harral, Richardson and Gibb conceded, in October 1994, the shared code group had at least three development options: "(1) to continue to write its own programs using the namespace extension APIs that were no longer supported by Microsoft but were still accessible to ISVs in possession of the beta version" (Option 1); "(2) to use Microsoft's common file open dialog . . . which remained available to ISVs after the withdrawal of support for the namespace extension APIs" (Option 2)[20]; or "(3) to write its own customized file open dialog" (Option 3). (JA-204 (Decision) (citing JA-11273-75 (Harral); JA-11535-37, 11608 (Richardson), and JA-11781-83 (Gibb)).) Although Novell believed in 1994 that it needed to have a version of PerfectOffice released "within no more than a two to three months of Chicago's ship date" (JA-8853-54 (DX202)), Novell's programmers chose Option 3—the most difficult and time-consuming route by far (JA-204-05 (Decision)).

Novell's programmers, Harral and Richardson, both conceded that Novell could have used Option 1—that "calling these API's was simple" because

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[19] A FOD is a window that opens on the screen and allows users to select and open a file from the file system. (JA-11140, 11178-80 (Harral).)

[20] Microsoft provided all ISVs—free of charge—with a standard FOD (sometimes called the "common" FOD) in Windows 95 for opening and saving files. (JA-11202, 11566 (Harral).)

"[w]e had the documentation" and "[w]e knew how to call them." (JA-11273; JA-11608.) Both testified that by October 1994 Novell was nearly finished doing exactly that (writing a FOD that called the NSEs). (JA-11609-12, 11620-21; JA-11368-69.) Although Option 1 was not ideal (Novell Br. 23) because of the risk that in later years Microsoft might remove the NSEs from Windows, it was a real choice (JA-12069-70 (Frankenberg)).

As to Option 2, Gibb testified that it would have been "easy" for Novell to release its applications using the Windows 95 FOD, which Microsoft provided to all ISVs for free. (JA-11781-82.) According to Harral, Novell considered Option 2 "many times" because it was "an easier option than the third." (JA-11297-98.) As Judge Motz pointed out, "if, as Novell now argues, the 90-day period after the release of Windows 95 was critical to the success of WordPerfect, Quattro Pro, and Perfect Office, Novell could have released those products using Microsoft's common file open dialog." (JA-228.) Harral agreed that "Novell could have come out with a product in '95 that utilized the Windows common file open dialog." (JA-11434.)

Others at Novell also advocated for Option 2. (JA-228 (Decision).) Karl Ford, Lead Developer for the User Interface in WordPerfect for Windows 95, testified that in 1995 he told Gibb and Steve Weitzel, Director of WordPerfect for

Windows, that "the safest route" was to use "the common open dialog" in Windows 95 "if they were concerned about schedule." (JA-14664-65.) Novell even discussed using "the common open dialog right now" and including a custom FOD later, "in the next release." (JA-14664 (Ford).) Dave LeFevre similarly testified that during 1995 he "became an advocate" within Novell for Option 2. (JA-14996-97.)

Novell nevertheless decided to choose the riskiest path—the time-consuming third option of writing its own "customized" FOD. (JA-205 (Decision).) As Gibb testified, he chose this path because he wanted to "do something cooler" and "exceed what was the default stuff." (JA-11782-83.) In short, as Gibb recognized, Novell was "faced with the age old trade off" between "get[ting] out a product more quickly and sacrific[ing] features," or, on the other hand, "delay[ing] until 1996 and try[ing] to build a cooler product." (JA-11825-26.) Both Harral and Gibb conceded that Novell could have released PerfectOffice in time using Microsoft's common FOD. (JA-11434-36; JA-11781-82.)

Further, as Judge Motz stated, "there is no evidence that any top-level executive at Novell was involved in the decision-making process" concerning which option to choose. (JA-206.) Frankenberg testified that any action that could jeopardize the timely release of Novell's applications would have been referred to

some or all of four senior executives (JA-12076-78, 12116-17; *see* JA-206 (Decision)), but none of the four was involved in or even aware of this decision (JA-12118-19 (Frankenberg)). "Instead, Novell assigned responsibility for supervising the writing of code for a custom file open dialog . . . to Gibb, a middle manager, who, in turn, assigned the responsibility for writing the code to Harral and Richardson." (JA-206-07 (Decision).)[21]

Judge Motz also noted Frankenberg's testimony "that in any business or organization faced with an important decision, a formal memorandum would normally be presented to the senior executives" so they could choose. (JA-206 (Decision) (citing JA-12118 (Frankenberg)).) Strikingly, no such document exists. "Novell presented no evidence that any such memorandum was ever written, and Frankenberg testified that he knew of no evidence that [any senior executives] were presented with a decision about how to respond to Gates's decision to withdraw support for the namespace extension APIs." (JA-206 (Decision).) Had Microsoft's decision truly threatened to cause the immense injury claimed at trial, senior executives at Novell, including Frankenberg (who knew nothing of the three

[21] Novell criticizes the Court's use of "middle manager" to describe Gibb, but Gibb was one of ten people who reported to Bruce Brereton, VP of Business Applications Group (JA-4448-49 (PX372)); Brereton reported to a Senior VP (JA-10217 (DX380)), who in turn reported to an Executive VP (JA-10216 (DX380)), who reported to CEO Frankenberg (JA-10215 (DX380)).

Options (JA-12063, 12068-70 (Frankenberg))) would have been involved and would surely have protested to Microsoft. Judge Motz hit the nail on the head by calling the case a "lawyers' construct."

J. Quattro Pro Caused the Delay

The premise for Novell's claim is that, if not for Microsoft's conduct, it would have released PerfectOffice within 60-90 days of the release of Windows 95. (JA-10963-64 (Novell Opening Statement); JA-13364 (Warren-Boulton); Novell Br. 22.) The overwhelming evidence at trial established that Quattro Pro, a necessary component of PerfectOffice, was the real reason for delay. As Judge Motz stated, Quattro Pro "was not ready for release to manufacturing until 1996." (JA-228.)[22]

Even in late 1994, Novell recognized that a September 30, 1995 release date for PerfectOffice for Windows 95 (codenamed "Storm") was "barely achievable" and that the Quattro Pro team needed "an additional three months" (*i.e.*, until December 30) to be ready. (JA-8893 (DX211).) On March 1, 1995, a Novell VP wrote that the RTM date (release to manufacturing) for Storm was being pushed "back by one month (to December 30)" because "realistic[ally]" Quattro Pro could not be ready until then. (JA-8988 (DX221); JA-207 (Decision).)

[22] It is undisputed that Microsoft did nothing to cause any delay in Novell's development of Quattro Pro.

December 30 is more than four months after August 24 (the release date of Windows 95). Thus, as of March 1, 1995, Novell recognized that it could not release PerfectOffice for Windows 95 within what its lawyers say was the "critical" 60-90 day window because of Quattro Pro, not any delay attributable to Microsoft.

In March and May 1995, Novell prepared formal memoranda that listed "risks" to the PerfectOffice project. Those memos ranked "Quattro Pro delivering late" as the highest "OVERALL RISK" for PerfectOffice. (JA-9059 (DX223); JA-9116 (DX226); JA-208 (Decision).) Novell's LeFevre testified that "the product that was causing the biggest problem was Quattro Pro," and Ford said the same thing. (JA-208 (Decision) (quoting 15000-02 (LeFevre)); JA-14653-54 (Ford).)

As Judge Motz recognized, "[t]he problem of having Quattro Pro ready to be released to manufacturing became even more severe toward the end of 1995, when many developers left Quattro Pro for other employment in Silicon Valley, the area where Scotts Valley—home of Quattro Pro—was located." (JA-208 (citing JA-9145 (DX230)).) On December 23, 1995, Novell's VP Brereton wrote to Frankenberg to say that "this past Thursday/Friday, about 15 additional people submitted their resignations," leaving the Quattro Pro development team

with "just 2 people." (JA-9145 (DX230); JA-208 (Decision).) When Frankenberg was shown this e-mail on the witness stand, he quickly conceded that "clearly the product wasn't complete" even on December 23, 1995. (JA-12081.)

Novell sent Nolan Larsen to Scotts Valley in January-February 1996 to help get Quattro Pro ready. (JA-14573-75 (Larsen).) Larsen testified that when he arrived, the whole scene was "kind of a train wreck" and that he and others desperately tried to finalize Quattro Pro but were unable even to create an interim build. (JA-14573-78; JA-208 (Decision).) Quattro Pro was "[n]ot by any stretch of the imagination" ready to be released even in January 1996. (JA-14578 (Larsen).) Larsen's testimony was backed up by Novell's International Marketing Manager, Craig Bushman, who testified that the resignation of Quattro Pro developers just before Christmas was "stunning" and "a death blow," and that "there was still ongoing issues throughout that spring [of 1996] also." (JA-14144-45.)

Novell never released any applications for Windows 95. It sold them to Corel in March 1996 (JA-10246 (DX382)) and Corel released PerfectOffice for Windows 95 in May 1996 (JA-11541 (Richardson); JA-11738 (Gibb)).

SUMMARY OF ARGUMENT

The trial court was correct in granting judgment as a matter of law on each of "three separate and independent" grounds. (JA-211.)

First, as a matter of law, the October 3 Decision was not anticompetitive conduct under Section 2 of the Sherman Act. The only exception to the longstanding *Colgate* rule that a company, even a monopolist, is free to choose with whom it will deal, or who it will assist, is *Aspen Skiing* v. *Aspen Highlands Skiing*, 472 U.S. 585 (1985). Novell's claim is nowhere close to qualifying under *Aspen*. Indeed, this Court recently rejected two claims that were much closer to *Aspen* than Novell's, holding that (1) an *Aspen* claim fails where plaintiff was aware "that the relationship was temporary and subject to [the defendant's] business judgment," *Christy Sports* v. *Deer Valley Resort*, 555 F.3d 1188, 1197 (10th Cir. 2009), and (2) *Aspen* is available only to a plaintiff that proves, among other things, that the monopolist's conduct amounted to the "termination" of a profitable, long-term relationship, *Four Corners Nephrology Associates* v. *Mercy Medical Center of Durango*, 582 F.3d 1216, 1224-25 (10th Cir. 2009). It is undisputed that Novell was fully aware (as the license agreement stated) that the M6 Beta was subject to change. Further, Microsoft did not terminate its relationship with Novell because (i) Novell could have used Microsoft's common FOD to get its applications to market in a timely fashion, and

(ii) Microsoft continued to provide information and assistance to Novell after the October 3 Decision. Moreover, Novell cannot assert a Section 2 claim based on supposed "deception" because there was no deception and, in any event, deception of a competitor cannot give rise to an antitrust claim.

Second, no reasonable jury could conclude that any delay in the release of Novell's applications could have adversely affected competition in the PC OS market. Both of Novell's theories of cross-market harm lacked evidentiary support and were refuted by the binding Findings and by market realities. There was insufficient evidence that competition in the operating system market (where Microsoft had more than a 90% share) would have been enhanced had PerfectOffice or WordPerfect come to market in Fall 1995 rather than 1996.

Third, Novell's claim was a "lawyers' construct" (JA-227 (Decision)) because, among other reasons, Novell had satisfactory options for the timely release of its applications and Novell was late to market because of Quattro Pro, not any conduct by Microsoft.

STANDARD OF REVIEW

This Court "review[s] de novo the district court's decision on a Rule 50(b) motion for judgment as a matter of law." *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010). To survive a Rule 50 motion, a plaintiff must present

"substantial evidence" in support of its case. *Webco Industries* v. *Thermatool*, 278 F.3d 1120, 1128 (10th Cir. 2002). "Substantial evidence is something less than the weight of the evidence, and is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence." *Id*. at 1128. Under this standard, "the question is not whether there is literally no evidence supporting the nonmoving party but whether there is evidence upon which a jury could properly find for that party." *Specialty Beverages* v. *Pabst Brewing*, 537 F.3d 1165, 1175 (10th Cir. 2008). "For a jury to properly find for a party, the party must present more than a scintilla of evidence supporting its claim." *Herrera* v. *Lufkin Industries*, 474 F.3d 675, 685 (10th Cir. 2007).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE OCTOBER 3 DECISION WAS NOT ANTICOMPETITIVE CONDUCT.

The Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate*, 250 U.S. 300, 307 (1919). Even a company with monopoly power "has no antitrust duty to deal with its competitors" and "certainly has no duty to deal under terms and conditions that the rivals find commercially

advantageous." *Pacific Bell Telephone* v. *Linkline Communications*, 555 U.S. 438, 449-50 (2009). The sole exception to the *Colgate* doctrine, where a duty may be imposed on a firm to deal with its rival, is *Aspen Skiing* v. *Aspen Highlands Skiing*, 472 U.S. 585 (1985).

This Court has dealt with the proper parameters of an *Aspen* claim in *Christy Sports* v. *Deer Valley Resort*, 555 F.3d 1188 (10th Cir. 2009), and *Four Corners Nephrology Associates* v. *Mercy Medical Center of Durango*, 582 F.3d 1216 (10th Cir. 2009). These recent decisions establish that a company's refusal to deal with a competitor may expose it to Section 2 liability only where (a) defendant "terminated a profitable business relationship" with plaintiff, thereby denying it terms "available to *all* other consumers," *Four Corners*, 582 F.3d at 1225 (emphasis in original), and (b) the terminated relationship was not "temporary" or "subject to [defendant's] business judgment," *Christy*, 555 F.3d at 1197. Here, the evidence is undisputed that (a) even after the October 3 Decision, Microsoft did not terminate its relationship with Novell and continued to provide assistance to Novell in developing applications for Windows 95, (b) Novell knew from the license agreement and otherwise that the M6 Beta was subject to change, and (c) the October 3 Decision applied equally to all companies, not just Novell.

Remarkably, Novell fails even to cite *Four Corners*, and tries to avoid the result mandated by *Christy* by characterizing its claim as one for deception or inducement. This helps Novell not at all. The only allegedly anticompetitive act is Microsoft's decision to withdraw support for the NSEs that were included in the M6 Beta. If a claim for deceptively refusing to deal allowed an antitrust plaintiff to evade the *Aspen* requirements, there would be an entirely new exception to *Colgate* that has never before been recognized. On the contrary, the Supreme Court has been "very cautious in recognizing" any exceptions to the *Colgate* doctrine, and even the *Aspen* exception "is at or near the outer boundary of § 2 liability." *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408-09 (2004). In any event, Novell was not deceived and deception of a competitor cannot, as a matter of law, give rise to an antitrust claim.

A. Novell Was Aware from the Start that the Windows 95 Beta Could Change.

In *Christy*, plaintiff for many years had operated a ski rental business from premises it rented from defendant in the mid-mountain area of defendant's Deer Valley resort. 555 F.3d at 1190-91. Plaintiff's lease with defendant contained a restrictive covenant that forbade plaintiff from renting skis from the property unless defendant gave its consent every year. *Id*. at 1190, 1196. For almost 15 years, defendant allowed plaintiff to continue renting skis, but when

defendant opened its own ski rental store in the mid-mountain area, it decided that it did not want to face competition from plaintiff—it wanted 100% of the business—and enforced the restrictive covenant, terminating plaintiff's ability to compete. *Id.* at 1190-91.

This Court rejected plaintiff's *Aspen* claim because the restrictive covenant made clear to plaintiff "that the relationship could change at any time," and that plaintiff "should have been aware that the relationship was temporary and subject to [defendant's] business judgment." *Id.* at 1197. The Court stated that "an initial decision to adopt one business model" should not "lock" a defendant "into that approach and preclude adoption of the other at a later time." *Id.* at 1196. Even if a sudden "change" in approach (such as enforcing the covenant in *Christy*) might amount to a "business tort," it is not anticompetitive conduct under the Sherman Act. *Id.* at 1196-97; *accord Intergraph* v. *Intel*, 195 F.3d 1346, 1364, 1366 (Fed. Cir. 1999).

Novell's argument—that Microsoft "encourag[ed] Novell to develop software that depended upon" the NSEs "and then withdr[ew] support" for them (Novell Br. 32-33)—is far weaker than the claim in *Christy*, where defendant's sudden decision to enforce the restrictive covenant after 15 years of non-enforcement put plaintiff out of business. 555 F.3d at 1190-91. WPC/Novell

received the M6 Beta and its associated documentation in June 1994, less than four months before the October 3 Decision, pursuant to a license agreement which said that the beta was "pre-release code" that could "be substantially modified prior to first commercial shipment." (JA-7175 (DX18); JA-7178 (DX19).) Novell was also told in writing that the M6 Beta did "not represent a commitment on the part of Microsoft for providing or shipping the features and functionality" in the "final retail product." (JA-4696 (PX388).) Novell offered no evidence that Microsoft made some contrary promise.

Novell's current argument that Microsoft "induced Novell's reliance" on the NSEs when Struss and other Microsoft representatives visited WordPerfect in November 1993 (Novell Br. 32) also makes no sense. First, the meeting report on which Novell relies never refers specifically to NSEs, but only to "shell extensions" (JA-2666-67 (PX105)), which (aside from the NSEs) were unaffected by the October 3 Decision. The shell extensions as a whole provided much more functionality than the NSEs. (JA-7558-76 (DX72); JA-11556-57 (Richardson).) Second, the November meeting took place a month before Microsoft warned Novell in writing that the NSEs were "[n]ot for most applications!" and particularly not to be used to "edit documents" by a word processor. (JA-2715 (PX113).) *See* p. 15, *supra*. Third, Harral testified that Novell could not—and did

not—begin work on the NSEs until it received the M6 Beta in June 1994. (JA-11367.) By then, Novell and WPC had executed the license agreements (JA-7177 (DX18); JA-7181 (DX19)) and had received the written disclaimer accompanying the M6 Beta. *See* pp. 16-17, *supra*. This destroys Novell's inducement argument.

Given that the November 1993 visit to WPC was more than seven months before Microsoft provided the M6 Beta to Novell, it could not have been possible, let alone reasonable, for Novell to rely on this early presentation before it had the beta with the NSEs. Microsoft often told ISVs about possible new features even before any code was written but never committed that those features would be included in the final product. (JA-13707-08 (Gates).) As Struss testified, Microsoft was "careful" in its presentations "not to promise [ISVs] that something would be part of" Windows 95. (JA-14239.) Novell has no evidence of any promise.

Nor can Novell twist the facts into a claim for deception. As Frankenberg testified, Novell understood that Windows 95 "might change" and "could change" any time before final release. (JA-12138, 12146.) *See* pp. 17-18, *supra*. Novell itself contemporaneously warned its own ISVs that "[t]he entire risk arising out of your use of Beta Product remains with you." (JA-10352 (DX618).)

Novell argues that "the Court recognized [in *Christy*] the possibility that the change in prior practice 'could give rise to an antitrust claim' 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.'" (Novell Br. 32.) As an initial matter, Novell truncates the full quote from *Christy*, which merely stated that the Court would not "preclude the theoretical possibility" that such a claim could exist under different facts. 555 F.3d at 1196. Moreover, the very same paragraph of the opinion makes clear that where plaintiff "knew from the beginning" that the business relationship was subject to change and therefore could not "claim unfair surprise," *id*., no valid claim exists. Here, in light of the license agreement, the written guide accompanying the M6 Beta, and the concessions from Novell's CEO, Novell cannot possibly claim any "unfair surprise" or deception.

In addition, Microsoft's October 3 Decision to make changes in a beta was consistent with software industry practice and thus was not anticompetitive conduct. In *Telex* v. *IBM*, 510 F.2d 894, 925-26, 928 (10th Cir. 1975), this Court held that if defendant's practices are "typical of those used in a competitive market" and "prevalent throughout the industry," then no valid antitrust claim exists. *Accord United States* v. *Syufy Enterprises*, 903 F.2d 659, 668-69 (9th Cir.

1990); *Olympia Equipment Leasing* v. *Western Union Telegraph*, 797 F.2d 370, 375 (7th Cir. 1986).

As the trial court correctly concluded, "because of the undisputed industry practice, Microsoft had no reason to believe that Novell was relying upon the documentation for the namespace extension APIs contained in the beta version Microsoft released to ISVs." (JA-217.) Indeed, the overwhelming evidence was that the software industry—including Novell—widely recognized that a software developer might make changes to beta versions of products under development. Seven witnesses at trial, including two former Novell employees and two of Novell's own experts, so testified. (JA-14557, 14561 (Larsen); JA-14985-88 (LeFevre); JA-12494-95 (Alepin); JA-12821-23 (Noll); JA-14075-76 (Gates); JA-15194-95 (Belfiore); JA-14209 (Struss).) Notably, as Frankenberg acknowledged (JA-12139-42), Novell followed this same practice (JA-10349 (DX612A) ("features may still change dramatically during" the beta process)). *See* p. 18, *supra*. Under *Telex*, Novell cannot base a claim of anticompetitive conduct on a widespread industry practice.

B. Microsoft Never Terminated a Profitable Business Relationship with Novell.

As this Court noted in *Four Corners*, the "key fact" in *Aspen* was that "the monopolist was willing to jettison a profitable short-term business relationship." 582 F.3d at 1225; *accord Trinko*, 540 U.S. at 409.

Here, as Judge Motz stated, "after it withdrew support for the namespace extension APIs, Microsoft continued to provide assistance to Novell and never terminated their relationship." (JA-218.) Novell never challenges this point, and its CEO Frankenberg testified that he was "sure" that after October 1994 Microsoft continued to help Novell develop its applications for Windows 95. (JA-12067.) Moreover, Microsoft was "[w]orking with [Novell's] sr. management to see about getting more focus on their [Windows 95] release" (JA-6925 (DX2)), and in 1994-95 a Microsoft employee was assigned full-time to assist Novell in its development efforts (JA-14984 (LeFevre)). *See* pp. 23-24, *supra*.

Novell does not dispute that it could have released its applications at any time by choosing to use the Windows 95 common FOD, but merely argues that this option was not commercially desirable. (Novell Br. 22-25.) If a large software company[23] makes a conscious decision to reject an available option for

[23] In 1994, Novell's annual revenues were nearly $2 billion. (*See* JA-10230 (DX 381).)

getting its product to market and instead decides to risk everything on trying to build a "cooler" product, the resulting delay cannot logically give rise to an antitrust claim. In any event, rejecting the option to use Microsoft's technology means that Novell chose its own fate—Microsoft did not terminate the relationship.[24]

C. The October 3 Decision Did Not Treat Novell Differently.

As this Court pointed out in *Four Corners*, it was critical in *Aspen* that "the monopolist was willing to jettison a profitable short-term business relationship and deny to a rival the retail prices available to *all* other consumers." 582 F.3d at 1225 (emphasis in original). Similarly, in *MetroNet Services* v. *Qwest*, 383 F.3d 1124, 1134 (9th Cir. 2004), the Ninth Circuit held that plaintiff "d[id] not have an actionable antitrust claim" because, among other reasons, defendant "has not refused to deal with [plaintiff] on the same terms that it deals with direct consumers."

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[24] Novell is wrong that *Aspen* does not require "complete termination of a relationship." (Novell Br. 41-42.) Three of the four cases Novell cites recognized that in *Aspen*, defendant completely terminated the relationship. *MetroNet Services* v. *Qwest*, 383 F.3d 1124, 1132 (9th Cir. 2004); *Safeway* v. *Abbott Laboratories*, 761 F. Supp. 2d 874, 893 (N.D. Cal. 2011); *A.I.B. Express* v. *FedEx*, 358 F. Supp. 2d 239, 250-51 (S.D.N.Y. 2004). The fourth case, *Nobody in Particular Presents* v. *Clear Channel Communications*, 311 F. Supp. 2d 1048 (D. Colo. 2004), is inapposite. Plaintiff there did not allege that defendant altered or terminated its business relationship with plaintiff, but rather that defendant's conduct was unlawful from the start. *Id*. at 1105-06.

Here, Novell was treated the same as all other ISVs. It is undisputed that Microsoft (a) made the NSEs available to all third-party developers in June 1994 on the same terms as to Novell, and (b) withdrew support for the NSEs in October 1994 for all third-party developers. (JA-6924-25 (DX2); JA-6926, 6928 (DX3).) This is dispositive under *Four Corners*, which requires a plaintiff to establish that it was denied terms available to "all other[s]." 582 F.3d at 1219.

D. Novell Cannot Avoid the Requirements of *Aspen* by Recasting Its Claim as One for Affirmative Conduct or Deception.

Novell attempts to avoid the requirements of an *Aspen* claim by making two illogical and erroneous arguments.

First, Novell argues that it need not meet the *Aspen* requirements because Microsoft's conduct was "affirmative" rather than a refusal to deal. (Novell Br. 31-32.) This makes no sense. Withdrawal of support for the NSEs is no different than the "affirmative" decision to enforce the restrictive covenant in *Christy* or the "affirmative" decision to revoke plaintiff's hospital credentials in *Four Corners*.

Novell tries to maneuver around this problem by saying that the October 3 Decision "involved the intentional inducement of reliance." (Novell Br. 35.) As the trial court recognized in rejecting this argument, "[a] decision not to publish the namespace extension APIs in the first place is as 'intentional' as a

decision to withdraw support for" them later. (JA-215.) A monopolist generally has no duty to cooperate with or assist a competitor whether the decision is "intentional" or otherwise. Further, there is no evidence of any "intentional" decision to hurt Novell—as Judge Motz observed, "[t]here is no evidence" that "Microsoft . . . knew that Novell was using those APIs" or that the withdrawal of support for the NSEs would cause "Novell [to] fall behind schedule." (JA-216.)

Moreover, Novell's reliance on *Multistate Legal Studies* v. *Harcourt Brace Jovanovich*, 63 F.3d 1540 (10th Cir. 1995) (Novell Br. 31-32) is misplaced. There, defendant, without any history of cooperation with plaintiff, deliberately changed its products and created scheduling conflicts to prevent customers from using its rival's bar review course. *Id.* at 1544-45, 1550-54. Defendant did not refuse to deal with plaintiff, nor did the case involve a termination of an existing business relationship. *Id.*

Importantly, where a case involves a refusal to cooperate or deal with a rival, courts impose the *Aspen* requirements to protect from "forever lock[ing] [the parties] into a business decision," *Christy*, 555 F.3d at 1198, and to avoid invasive judicial review of voluntary dealings between rivals, *see MetroNet*, 383 F.3d at 1133. As the Supreme Court has stated, the limits of *Aspen* stem in part from the "uncertain virtue of forced sharing," and courts should be "very cautious"

in imposing any duty to deal under Section 2. *Trinko*, 540 U.S. at 408; *accord MetroNet*, 383 F.3d at 1133 ("[E]nforced sharing 'requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.'" (quoting *Trinko*, 540 U.S. at 408)).

Second, Novell's assertion that its claim is for deception (not for a refusal to deal) because Microsoft allegedly misled the "ISV community" when explaining its rationale for the October 3 Decision (Novell Br. 19-21, 35-36) is frivolous. Novell does not—and cannot—articulate how any purported deception in describing (after the fact) the *reasons* for the October 3 Decision could possibly have delayed the release of Novell's applications. In any event, Microsoft's communications with ISVs after the October 3 Decision refute Novell's argument; they show that Microsoft reached out to ISVs and assisted those ISVs who had planned to use the NSEs to adjust without any major difficulty. (*See* JA-13765-67 (Gates); JA-7608 (DX82).) There was no deception of the "ISV community," as shown by (1) the contemporaneous documentary evidence that Novell and others were "OK" with the decision (JA-6926 (DX3)) and "found ways not to use" the NSEs (JA-7608 (DX82)); (2) the fact that no ISV complained to Gates (JA-13765-66, 13771-73 (Gates)); and (3) the overwhelming evidence, *see* pp. 16-18, *supra*,

that Novell and others in the software industry understood that betas can and do change.

In any event, Novell's "deception" argument is wrong as a matter of law. Novell cites no case—and Microsoft is aware of none—in which deception of a competitor gave rise to a claim under Section 2 of the Sherman Act.[25] As the Supreme Court has made clear, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group* v. *Brown & Williamson Tobacco*, 509 U.S. 209, 225 (1993). Indeed, "the Sherman Act does not convert all harsh commercial actions into antitrust violations," *Intergraph*, 195 F.3d at 1354, and "[t]he Sherman Act is not a panacea for all evils that may infect business life," *Berkey Photo, Inc.* v. *Eastman Kodak*, 603 F.2d 263, 288 n.41 (2d Cir. 1979). Deception of a competitor (as opposed to consumers) has never been sufficient to give rise to a Section 2 claim.[26]

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[25] Novell cites only one case on this subject—*Rambus* v. *FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008). There, plaintiff alleged that defendant deceived a trade organization, and the court held that plaintiff failed to establish liability under Section 2 of the Sherman Act.

[26] The cases on which Novell relied in the district court all involved deception of customers and/or deceptive advertising. Even there, other courts have been highly reluctant to find liability. *See, e.g.*, *American Professional Testing Service* v. *Harcourt Brace Jovanovich*, 108 F.3d 1147, 1152 (9th Cir. 1997).

II. MICROSOFT'S CONDUCT DID NOT HARM COMPETITION IN THE PC OPERATING SYSTEM MARKET.

Novell offered the unusual theory that injury to products in one market (here, applications such as word processors) had the effect of harming competition in a different market (*i.e.*, PC operating systems). No private treble damages plaintiff has ever obtained a damages award on such a cross-market theory. Beyond that, the fundamental and undisputed facts about the market disprove the claim.

From 1990 to 1995, Microsoft's share of the PC OS market was above 90%. (JA-1625 (FoF ¶35).) The release of Windows 95 in August 1995 only enhanced Microsoft's market position. All agree that Windows 95 was a "'significant step' forward" from its predecessors. (JA-220-21 (Decision) (quoting JA-12162-63 (Frankenberg)); JA-11184-85 (Harral).) Windows 95 was the preeminent software platform of its time, exposing thousands of APIs that ISVs used to write tens of thousands of full-featured applications. (*See* JA-11387-88 (Harral); JA-12054 (Frankenberg); JA-12397-98, 12497 (Alepin); JA-14364 (Muglia).)

In other words, in 1994-95, Microsoft had a monopoly in PC operating systems, and its market share was about to go even higher because it was introducing Windows 95, which all agree was then the best product. Novell's

claim—that had its Windows 95 applications been released earlier, this would somehow have influenced consumers to buy other operating systems in much greater numbers—has no evidentiary support.[27]

First, Novell's CEO squarely admitted just the opposite—that Microsoft's market share would have been higher, not lower, if Novell had not been delayed. Frankenberg testified that if Novell's applications had been timely released, that "would have made Windows 95 more desirable in the marketplace" (JA-12163), would have "increase[d] the sales of Windows 95" (JA-12164) and thereby "would have made Windows 95's market share even higher than what it turned out to be" (JA-12164-65). This admission affirmatively disproves Novell's assertion that the allegedly wrongful act adversely affected competition in the PC OS market.[28]

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[27] The availability of more Windows applications obviously increases demand for Windows; it does not decrease it.

[28] Of course, when Gates made the October 3 Decision, he did not know that Novell was planning to use the NSEs and thus could not have made the same calculation. *See* p. 20, *supra*. Moreover, as Judge Motz stated, "there is no evidence that Microsoft sacrificed any short-term profits." (JA-219 (Decision).) Novell misleadingly attempts to convert Judge Motz's hypothetical following this statement into an affirmative judicial finding that short-term losses in the operating system market were offset by increased application sales. (Novell Br. 41 n.6 (citing JA-219 n.18).) There was no such finding, and, as the court said, "no evidence" to support Novell's argument.

Second, by the time Windows 95 was released (and even before), there were no effective PC operating system competitors.[29] (JA-15693-94, 15721 (Murphy).) Even Novell's expert Noll acknowledged that no other operating system was "really a competitor" to Windows 95 during the relevant period. (JA-12846, 12903-04; *see also* JA-14065-66 (Gates).)[30]

Third, Microsoft's PC operating system monopoly was protected by an "applications barrier to entry" created by a "positive feedback loop" of Windows users and the many thousands of Windows developers. (JA-1624

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[29] Novell does not dispute this, and instead argues that "in violation of the hypothetical marketplace principle, the District Court improperly required Novell to speculate about alternative operating systems." (Novell Br. 47.) To the contrary, no "speculation" is necessary. Novell's theories of harm to competition depend on the contemporaneous existence of a competing operating system that could gain market share. The evidence was that no such operating system existed. Moreover, *King & King Enterprises* v. *Champlin Petroleum*, 657 F.2d 1147 (10th Cir. 1981), stands for the unremarkable proposition that a plaintiff need not create a hypothetical market for the purposes of calculating "the *amount* of damages" suffered by plaintiff. *Id*. at 1162 n.1 (emphasis added). It does not give Novell license to dispense with evidence establishing that Microsoft's conduct actually harmed competition in the relevant market.

[30] Noll testified that by 1995, IBM's OS/2 was "not an effective competitor" to Windows (JA-12846) and that Linux also "wasn't really a competitor" because it only "became a full-fledged, commercial product" in 1996 (JA-12846, 12904). Indeed, Finding 60 (entered in November 1999) states that even by 1999 consumers had never turned to Linux as an alternative to Windows and were not "likely to do so in appreciable numbers any time in the next few years." (JA-1627.)

(FoF ¶31); JA-1626 (FoF ¶39).) This feedback loop arises because consumers choose only PC operating systems "for which there already exists a large and varied set of high-quality, full-featured applications" (JA-1624 (FoF ¶30); *see also* JA-1625 (FoF ¶37)), and "developers generally write applications first, and often exclusively, for the operating system that is already used by a dominant share of all PC users," *i.e.*, Windows. (JA-1624 (FoF ¶30); *see also* JA-1626 (FoF ¶38).) The resulting "large body of applications" further "reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetuating ISV incentives to write applications principally for Windows." (JA-1626 (FoF ¶39).) There was no other operating system—not a single one—to which ISVs had written so many applications during the relevant period. (JA-1625 (FoF ¶37.) As a result, the notion that if two additional Novell applications had been available in the market in 1995, some unidentified operating system would have taken market share away from Windows 95, is completely implausible.[31]

[31] There was no evidence at trial of any plausible manner in which WordPerfect or PerfectOffice could have altered the competitive landscape for operating systems. Instead of addressing this point, Novell argues (Novell Br. 29-31) that the standard for causation should not be the "contributes significantly" standard applicable to treble damages cases, but instead the "reasonably capable of contributing significantly" standard that was applied in *United States* v. *Microsoft*. As the D.C. Circuit expressly stated in the Government Case, it was applying an "edentulous test for causation" and thus, the DOJ was not required to show that

(*footnote continued*)

A. The Franchise Applications Theory

Novell's first theory of cross-market harm is the "franchise applications" theory (Novell Br. 45-49), which posits that WordPerfect and Quattro Pro were so popular that had they been available on rival operating systems, they would have threatened Microsoft's PC operating system monopoly by "offer[ing] competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly."[32]

It is inconceivable that two or three applications could have impacted competition in the PC OS market in this fashion. Findings 36-39 establish that a "vastly larger number of applications are written for Windows than for other PC operating systems" and the "positive feedback loop" cemented Microsoft's market position. (JA-1625-26.) Even ignoring those binding Findings and assuming that

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(*footnote continued*)

"Java or Navigator would actually have developed into viable platform substitutes." 253 F.3d at 79. In an equitable enforcement case, the DOJ is entitled to stamp out "nascent threats" to competition. *Id.* In contrast, in private treble damages cases, two-thirds of the amount sought is entirely "punitive," and it is therefore "critical" that remedies "be strictly limited to those aspects of a plaintiff's injury that were in fact caused by an unlawful exploitation of market power or unlawful quest for such power in attempt cases." 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶657a (2012). In any event, under either standard, Novell did not submit enough evidence to get to a jury.

[32] This quoted language is how Novell characterized the theory in its brief in support of proposed jury instructions. (Dkt. 336 at 4.)

a few highly popular applications could somehow make a difference, Novell's applications enjoyed nothing close to the level of popularity required to have any such effect. As Judge Motz found—and Novell does not dispute—WordPerfect had about 15% of the Windows-compatible word processing market, and PerfectOffice had about 5% of the suite segment. (JA-222; *see also* JA-6835 (PX599A); JA-12858 (Noll).)[33] Quattro Pro had an even smaller share of the spreadsheet market—about 2% in 1994-95. (JA-15713-14 (Murphy); JA-1656.) It is thus easy to conclude that a delay in the release of these products could not have affected competition in the PC OS market. (JA-221 (Decision).)

Novell's franchise applications theory is also contradicted by the fact that years earlier (late 1980s to early 1990s), there were versions of WordPerfect that ran on many non-Microsoft operating systems, yet the availability of WordPerfect on those other operating systems in no way diminished Microsoft's share of the PC OS market. (JA-1625 (FoF ¶35).) Novell argues about WordPerfect's "history" of being available on non-Microsoft operating systems (Novell Br. 9), but the evidence was that Novell's applications were not available

[33] There is no dispute that even considering Novell's installed base (the percentage of PCs with WordPerfect installed), which included earlier versions of WordPerfect for the DOS platform, WordPerfect's share did not exceed 36%. (JA-222-23 (Decision).)

on any competing platform during 1994-96. Frankenberg and Gibb conceded that during the period from December 1994 (when Novell released PerfectOffice 3.0) until March 1996 (when Novell sold to Corel), Novell was never even working on a version of PerfectOffice for any operating system other than Windows 95. (JA-12105-06 (Frankenberg); JA-11721 (Gibb).)

B. The Middleware Theory

Novell's second theory was that its applications were "middleware" that, as stated in the Findings, could have posed a threat to Microsoft's PC operating system monopoly because they "had the potential to weaken the applications barrier severely without the assistance of any other middleware." (JA-1627-28 (FoF ¶68); JA-123.) To pose such a threat, such applications had to support "full-featured applications that will run well on multiple operating systems without the need for porting," meaning without having to be adapted or re-written to run on multiple operating systems. (JA-1629 (FoF ¶74).) Strikingly, as of 1999, when the Findings were entered—let alone in 1995-96—no such cross-platform middleware existed. (JA-1623-24 (FoF ¶¶28, 29).)

Applying the binding Findings, the trial court said that "[f]or a middleware product to have an impact on competition in the PC operating system market, the product (1) must be cross-platformed to various operating systems; (2) must be ubiquitous on the 'dominant operating system'; and (3) must expose a

sufficient number of APIs of its own to entice ISVs to write applications to it rather than to the operating system on which it sits." (JA-221 (citing JA-12866-69 (Noll), and JA-1623 (FoF ¶28)).) Novell agrees that the first requirement applies (Novell Br. 7, 51), and the Findings and testimony of Novell's expert establish that Judge Motz was correct to apply the second and third as well. Novell came nowhere close to proving any of the three.[34]

First, Novell's applications were not cross-platform. (JA-221-22 (Decision).) As stated above, Novell designed its PerfectOffice suite (purportedly containing its middleware) exclusively for Windows, and Novell never wrote PerfectOffice for any other platform. (JA-12105-06 (Frankenberg); JA-11721 (Gibb).) As a result, any applications written to Novell's middleware would still need Windows because those applications could "not function" without an underlying "operating system to perform tasks such as managing hardware

[34] Novell now argues that its PerfectOffice suite, in conjunction with Java and Netscape—products that Novell never owned or developed—"posed a considerable threat to the applications barrier to entry and Microsoft's monopoly power." (Novell Br. 49; *see also id*. 53-54.) Before trial, Microsoft moved *in limine* to exclude evidence of any theory that PerfectOffice could be a middleware threat "in combination with" Netscape Navigator and Sun's Java (Dkt. 112) and Judge Motz granted Microsoft's motion. (JA-10689.) Novell does not challenge that ruling on appeal, and accordingly has waived any argument that PerfectOffice posed a threat to Microsoft's monopoly in combination with these other products. *See Mooring Capital Fund* v. *Knight*, 388 F. App'x 814, 818-19 (10th Cir. 2010) (challenges to evidentiary rulings not made in opening brief are waived).

resources and controlling peripheral devices." (JA-1623 (FoF ¶29).) For this reason alone, Novell's purported middleware could not have reduced the dominance of Windows.

Further, as Judge Motz said, Novell's use of the NSEs would have made PerfectOffice less cross-platform, because the NSEs were "'platform specific' to Windows." (JA-222 (quoting JA-12420-21 (Alepin), and citing JA-12471-72 (Alepin), JA-15741-42 (Murphy), and JA-15983 (Bennett)).) As Novell's expert conceded, not a single competing operating system implemented the functionality of the NSEs (JA-12471-72), and thus writing Novell's applications to the NSEs would have made it much more difficult for Novell to create a version of its purported middleware for non-Microsoft operating systems.

Second, as the trial court held, Novell's applications were not ubiquitous on Windows. (JA-222.) Novell's expert Noll agreed that ubiquity was a requirement for the "middleware" theory to make any sense. (JA-12866, 16868-69.) Notwithstanding Novell's disagreement as to the meaning of ubiquity, Novell does not challenge that its share of the Windows-compatible word processing market was 15% (and its share of the suite segment was 5%). (JA-222 (Decision).) This falls far short of ubiquity under any definition. Indeed, given its modest market share, Novell's purported middleware could not offer developers the

prospect of reaching the "dominant share of all PC users" (JA-1624 (FoF ¶30)), leaving developers no incentive to write for Novell's "middleware" rather than for Windows (which offered ISVs access to more than 90% of consumers).

Third, "Microsoft is [also] entitled to judgment as a matter of law because Novell did not present evidence to show that its software exposed sufficient APIs of its own to allow ISVs to write full-featured personal product[ivity] applications to it." (JA-224 (Decision).) Indeed, Novell conceded at trial that it could not meet this third element of the middleware theory. (JA-16399-400, 16402 (Novell's chief lawyer saying that the court "would be directing a verdict" for Microsoft if it applied the third requirement).)

Novell's argument that the third element should be altered to say that middleware need only "expose[] a wide range of APIs and sophisticated functionality to developers" (*see* JA-223-24 (Decision); *see also* Novell Br. 52) is contrary to the binding Findings.[35] Finding 74 explains that Sun's Java, to which Novell analogizes its purported middleware (Novell Br. 12, 49-50; JA-123), posed a threat only because it would allow "[a] program written in Java and relying *only*

[35] To the extent that Novell seeks to stray from the Findings and the definition of middleware used in the Government Case, its claim is barred by the applicable four-year statute of limitations (15 U.S.C. § 15b) because rather than being "based in whole or in part" on the Government Case, 15 U.S.C. § 16(i), it would instead run contrary to the Government Case. *See* pp. 4-5, *supra*.

on APIs exposed by the Java class libraries" to "run on any PC" on which Java technology could run.[36] (JA-1629 (FoF ¶74); *see also* JA-1627-28 (FoF ¶68).)

In sum, competition in the PC OS market was not harmed by the delay in the release of Novell's applications. As Frankenberg admitted, if Novell's products had been timely released, Microsoft's market share would have been "even higher than what it turned out to be." (JA-12164-65.)

III. THE OCTOBER 3 DECISION DID NOT CAUSE ANY DELAY.

PerfectOffice was delayed beyond the time that Novell says was critical to its success (60-90 days after August 24, 1995) because Novell could not finish Quattro Pro for reasons having nothing to do with Microsoft.

Novell's internal documents and the testimony of five Novell employees—including its CEO, who testified that "clearly" Quattro Pro "wasn't

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[36] Grasping at straws, Novell argues that it need not meet this requirement because PerfectOffice was "simultaneously middleware and a set of personal productivity applications." (Novell Br. 52.) This makes no sense; for middleware to threaten Windows, it must expose sufficient APIs so that *other* ISVs can write "full-featured personal productivity applications" to the middleware, instead of to Windows. (JA-1623-25 (FoF ¶¶28, 32).) Indeed, Novell's technical expert agreed that "there are literally thousands and thousands of software products that expose some APIs" but conceded that "[t]here's got to be more than" that for a product to be middleware of the sort that eliminates reliance on the underlying operating system. (JA-12399-400.) Novell fails to argue—and there is no evidence—that PerfectOffice exposed sufficient APIs to support full-featured personal productivity applications. (*See* JA-1623 (FoF ¶28).)

complete" as of December 23, 1995 (JA-12081)—wholly disprove Novell's claim about delay. Further, the facts that (a) Novell never complained to Microsoft about the October 3 Decision and (b) no senior Novell executive was contemporaneously told that any delay was caused by Microsoft, are added proof that the reason for delay lies elsewhere. As Judge Motz said, the entire case was a "lawyers' construct." (JA-227.)

A. Quattro Pro Caused Novell's Delay.

Novell's claim is that absent the October 3 Decision, Novell would have released PerfectOffice within "the critical window of opportunity that would close 90 days after" August 24, 1995. (Novell Br. 22.) It is undisputed that PerfectOffice could not be released without Quattro Pro. (*See* JA-12079 (Frankenberg); JA-8988 (DX221).) The overwhelming evidence shows, as Judge Motz stated, that "Quattro Pro was not ready for release to manufacturing until 1996." (JA-228.) This simple fact kills Novell's case.

Five former Novell employees, LeFevre (Product Marketing Director for Windows Product Management), Ford (Team Leader for WordPerfect for Windows 95), Larsen (Software Developer for Quattro Pro), Bushman (International Product Marketing Manager for PerfectOffice) and Frankenberg (CEO) all testified that Quattro Pro was not ready to be released by

Christmas 1995. The documentary evidence also eviscerates any contrary contention. *See* pp. 29-31, *supra*.

The standard on a Rule 50 motion is "not whether there is literally no evidence supporting the nonmoving party, but whether there is evidence upon which a jury could properly find for that party," which requires that the nonmoving party "present more than a scintilla of evidence supporting its claim." *Herrera*, 474 F.3d at 685; *accord Bankers Trust* v. *Lee Keeling & Associates*, 20 F.3d 1092, 1100-01 (10th Cir. 1994).

In the face of the mass of evidence that PerfectOffice was delayed because of Quattro Pro, Novell has only the vague testimony of Gary Gibb.[37] He testified that Quattro Pro was "basically code completed" as of December 23, 1995, when DX230 shows that almost all the Quattro Pro developers resigned. (JA-11742.) Even this fails to help Novell because Christmas 1995 was 120 days after the release of Windows 95, and Novell insisted at trial that its product was dead on arrival unless it could be released within 60-90 days of August 24, 1995. Indeed, all of Novell's damages (about $1.3 billion before trebling) were

[37] Novell also refers to DX231, which it argues shows that Quattro Pro was code complete in August 1995. (Novell Br. 61-62.) Novell failed to ask any witness about this document. In fact, DX231 shows that the date Quattro Pro was scheduled to be released to manufacturing was March 31, 1996 (JA-9147), thus showing again that Judge Motz got it right.

specifically conditioned by Novell's damages expert on a release of PerfectOffice "within 30 or 60 days" of the August 24, 1995 release of Windows 95. (JA-13364 (Warren-Boulton).)

Moreover, there was no evidence that Gibb ever went to Scotts Valley (where Quattro Pro for Windows 95 was being developed). Nolan Larsen did; he was there every week for two months beginning in January 1996 and testified that Quattro Pro was not then ready "by any stretch of the imagination." (JA-14575-78, 14618-19.) Gibb's testimony falls far short of the "substantial evidence" that a "reasonable mind might accept as adequate to support a conclusion" under Rule 50. *Webco Industries*, 278 F.3d at 1128. As Judge Motz said during trial, "there comes a point where somebody comes in and they say it's like saying the world is flat. There . . . could not be clearer evidence that Defendant's Exhibit 230 [JA-9145] says that as of January 1996 Quattro Pro is not ready yet." (JA-13875.)

B. Novell's Poor Business Choice Caused the Delay.

Even if, contrary to the evidence, Novell's work on a custom file open dialog caused any delay, Microsoft cannot be held liable for Novell's poor business choice. At trial, Novell's employees unanimously testified that Novell's shared code group could have completed its development of PerfectOffice for Windows 95 had it chosen Options 1 or 2 instead of writing its own custom FOD. *See* pp. 25-27, *supra*. As Judge Motz said, if "the 90-day period after the release

of Windows 95 was critical to the success of WordPerfect, Quattro Pro and PerfectOffice, Novell could have released PerfectOffice using Microsoft's common file open dialog." (JA-228.) Novell does not disagree, arguing instead that Options 1 and 2 were far from ideal. Yet—according to Novell—Option 3 destroyed its whole applications business.

When an antitrust plaintiff "bypasses an obviously adequate alternative," it "should not recover." *J.T. Gibbons* v. *Crawford Fitting*, 565 F. Supp. 167, 180 (E.D. La. 1981). In *Gibbons*, the district court directed a verdict for defendants in a Sherman Act action where plaintiff could have obtained from an alternative source the product that defendants refused to sell to it. *Id.* at 171, 181. The Fifth Circuit affirmed, noting that "[t]he *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product." 704 F.2d 787, 792 (5th Cir. 1983); *accord Union Cosmetic Castle* v. *Amorepacific Cosmetics USA*, 454 F. Supp. 2d 62, 71 (E.D.N.Y. 2006) (holding in a Sherman Act case that plaintiffs' "free choice to reject" an alternative solution "acts as an intervening cause of" the injury).

As Gibb acknowledged, Novell was "faced with the age old trade off" between "get[ting] out a product more quickly and sacrific[ing] features" or "delay[ing] until 1996 and try[ing] to build a cooler product." (JA-11825-26.)

Karl Ford testified that people at Novell discussed even yet another alternative, that Novell should "use the common open dialog right now" and include a custom dialog later, "in the next release." (JA-14664.) Novell's argument that these available options would have sacrificed "cooler" functionality does not give rise to an antitrust claim. *Gibbons*, 565 F. Supp. at 180.

Novell's own witnesses admitted that "Novell could have come out with a product in '95 that utilized the Windows common file open dialog" (JA-11434 (Harral)) and that it would have been "quite easy" for Novell to release its applications using Microsoft's FOD. (JA-11781-82 (Gibb).) This is another independent ground for affirmance.

CONCLUSION

This Court should affirm the Judgment.

Dated: January 23, 2013

Respectfully submitted,

/s/ David B. Tulchin

David B. Tulchin
Steven L. Holley
Sharon L. Nelles
Adam S. Paris
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Steven J. Aeschbacher
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 882-8080

James S. Jardine
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
(801) 532-1500

Attorneys for Microsoft Corporation

CERTIFICATE OF COMPLIANCE

I certify that this brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).

Dated: January 23, 2012

/s/ John Quinn

John Quinn
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

STATEMENT REGARDING ORAL ARGUMENT

Microsoft Corporation respectfully requests that this Court hold oral argument on this appeal. Microsoft believes that the decisional process would be aided by oral argument.

Dated: January 23, 2013

/s/ David B. Tulchin
David B. Tulchin
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorney for Microsoft Corporation

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I caused the foregoing Brief of Appellee Microsoft Corporation to be electronically filed with Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on January 23, 2013, I caused two hard copies of the foregoing Brief of Appellee Microsoft Corporation to be mailed by Federal Express for next day delivery to each of:

David Boies
BOIES SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022

Jeffrey M. Johnson
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006

/s/ John Quinn
John Quinn
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

CERTIFICATE OF DIGITAL SUBMISSION

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/s/ John Quinn

John Quinn
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000