CASE NO. 12-4143

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVELL, INC.,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
MICROSOFT CORPORATION,	)
	)
Defendant – Appellee.	)

On Appeal from the United States District Court
for the District of Utah
The Honorable Judge J. Frederick Motz
D.C. No. 2:04-CV-01045-JFM

APPELLANT'S REPLY BRIEF

Jeffrey M. Johnson
James R. Martin
Miriam R. Vishio
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

David Boies
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

(Additional counsel listed on inside cover)

Oral argument is requested

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Max D. Wheeler
Maralyn M. English
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Facsimile: (801) 363-0400

Stuart H. Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard
Fort Lauderdale, FL 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Samuel C. Kaplan
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

R. Bruce Holcomb
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 810
Washington, DC 20006
Telephone: (202) 580-8820
Facsimile: (202) 580-8821

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INTRODUCTION

As Novell's opening brief showed, the evidence at trial provided ample basis for a reasonable jury to conclude that Microsoft violated Section 2 of the Sherman Act. Microsoft destroyed the competitive viability of Novell's office productivity applications by inducing Novell's reliance on the namespace extension APIs, withdrawing support for no legitimate reason when it was too late to redesign a competitive product, and deceiving Novell and other ISVs about its reason for doing so. By eliminating the top application (WordPerfect) in the most important applications category (word processing) and middleware that Microsoft's executives identified as a threat to Windows, Microsoft unlawfully maintained its PC operating systems monopoly power at a critical "inflection point" when the "exponential growth of the Internet" was fueling new threats. JA-1627 (FOF ¶ 60).

The applicable standard of review required the District Court to view the evidence in the light most favorable to Novell. Microsoft's response, however, disregards most of Novell's evidence, including:

- Evidence that Microsoft knew Novell was using the namespace extension APIs, including an email to Bill Gates identifying WordPerfect as using them (*infra* pp. 8-11);
- The deceptive script that Microsoft used to provide Novell and other ISVs with false justifications for its decision to de-document the namespace extension APIs (*infra* pp. 10-13);
- Evidence that Microsoft's purpose in releasing betas of its operating system is to induce ISV reliance (*infra* pp. 5-8);

- Evidence that Microsoft's conduct harmed competition in the operating systems market, including binding Findings of Fact and the statements and testimony of Microsoft's executives (*infra* pp. 17-28); and
- Testimony that Microsoft's conduct left Novell without a competitively viable option (*infra* pp. 29-30).

Microsoft also repeatedly portrays the facts in the light most favorable to itself, ignores or obfuscates evidentiary conflicts that must be resolved in Novell's favor in the Rule 50 context, and even resorts to technological misstatements that lack evidentiary support. *See infra* pp. 6, 26, 27 & nn.2-3, 5-6.

Microsoft similarly disregards the applicable substantive law. A reasonable jury could find that Microsoft's conduct was anticompetitive because it harmed Novell, was not competition on the merits, and was reasonably capable of contributing significantly to maintaining Microsoft's monopoly power in the operating systems market. Like the District Court, Microsoft does not address the definition of anticompetitive conduct. It nowhere defends its conduct as competition on the merits and does not mention the District Court's conclusion that a reasonable jury could have found Microsoft's proffered justifications for its conduct to be pretextual. It also seeks (without justifying) a rule conferring antitrust immunity for deception of competitors regardless of the effect on competition. Further, in relying on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), Microsoft fails to distinguish between a refusal to deal

and its affirmative inducement of reliance and use of deception. It also misapplies *Aspen Skiing* by ignoring the "critical fact" in that case – "that there were no valid business reasons for the refusal," *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) – in favor of requirements that the decision does not support.

Microsoft advocates a similarly untenable standard for evaluating harm to competition that would immunize monopolists from monetary liability for exclusionary conduct directed at long-term competitive threats. Microsoft's proposed standard finds no support in any decision and contravenes *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), on which the District Court relied at summary judgment in finding a triable issue of fact on harm to competition. Microsoft's suggestion that the D.C. Circuit's standard applies only to claims for equitable relief contradicts the text of the Clayton Act and cases from this Circuit applying the "reasonably capable" standard in evaluating damages claims. Microsoft's proposed standard also is particularly ill-suited for the fast-moving computer software industry where, as the D.C. Circuit recognized, conduct-based injunctions can be especially ineffectual and damages are, in many cases, the only credible deterrent.

ARGUMENT

I. A REASONABLE JURY COULD CONCLUDE THAT MICROSOFT'S CONDUCT WAS ANTICOMPETITIVE

A. Microsoft's Conduct Was Not Competition On The Merits And Eliminated Novell As A Competitor

1. Microsoft Induced Novell's Reliance On The Namespace Extension APIs And Then Withdrew Support For No Legitimate Reason

Novell's opening brief outlined the evidence from which a reasonable jury could find that inducing Novell's reliance on, and then withdrawing support for, the namespace extension APIs harmed competition by eliminating Novell's key franchise applications and middleware as a competitive threat. Opening Br. 29-38.[1] Microsoft asserts that this case should be analyzed as a pure refusal to deal under *Aspen Skiing*, *see* Microsoft Br. 44-47, but addresses neither the definition of anticompetitive conduct nor Novell's showing that Microsoft's conduct caused "anticompetitive harm that would not have existed had Microsoft refrained from documenting the namespace extension APIs at the outset." Opening Br. 29-35.

[1] Without citation, Microsoft unjustifiably references supposed conversations with jurors that occurred outside the presence of Novell's counsel and the District Court and for which there is no record evidence. Microsoft Br. 7 n.4. This Court should disregard Microsoft's improper footnote. As the District Court recognized, it "appears undisputed that eleven of the twelve jurors would have returned a verdict in favor of Novell on the issue of liability." JA-198 n.4.

The harm to competition caused by Microsoft's inducement of reliance (together with Microsoft's deception, as discussed below) differentiates this case from the two cases Microsoft cites. In *Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango*, 582 F.3d 1216 (10th Cir. 2009), and *Christy Sports*, there was no assertion that competition was harmed more than if, respectively, the plaintiff doctor had never received hospital credentials or the restrictive covenant had been enforced from the outset. Instead, the Court recognized that the defendants' conduct benefited consumers and competition. *See Four Corners*, 582 F.3d at 1223-24; *Christy Sports*, 555 F.3d at 1195-96. Moreover, the Court recognized the distinction between such conduct and, as here, the disallowance of a previously invited investment that "imposed costs on a competitor that had the effect of injuring competition in a relevant market." *Christy Sports*, 555 F.3d at 1196. In response, Microsoft merely repeats the District Court's mistaken proposition that a decision not to document the namespace extension APIs is equivalent to a decision to withdraw support for them, *see* Microsoft Br. 44-45, thereby ignoring the independent harm to competition from the inducement of reliance.

Microsoft also heavily relies on a boilerplate disclaimer in the Windows 95 beta agreement, *id.* at 36-41, without addressing Novell's discussion of the issue,

Opening Br. 33-35. First, Microsoft cost Novell months of valuable product development time by inducing Novell's reliance on the namespace extension APIs six months *before* WordPerfect signed the beta disclaimer. *See* JA-2666; JA-7175-77. Microsoft misleadingly suggests that its November 1993 meeting with Novell referred only to shell extensibility generally, *see* Microsoft Br. 38, without addressing the testimony cited by Novell that at that meeting, "'half of the conversation concerned these NameSpace extension API's.'" Opening Br. 17 (quoting JA-11220 (Harral)).[2]

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[2] Additionally, Microsoft's internal report of the meeting referred to WordPerfect's desire to extend the shell in a way that indisputably required the namespace extension APIs. *See* JA-2666 ("Since they just aquired [sic] a document management system (I forget from who) I assume they will want to plug that in, plus WP mail and other part [sic] of WP office too."); *see also* JA-15375-76 (Belfiore).

Equally misleading, Microsoft points to an irrelevant warning that the namespace extension APIs were not to be used to "edit documents." Microsoft Br. 15, 38. As Microsoft is aware, Novell never claimed to need them for this purpose. Rather, Novell needed them to browse Windows 95's default namespace using its custom file open dialog and to install its custom namespaces in the Windows Explorer and common dialog. Opening Br. 15-16. Microsoft does not dispute that these uses were legitimate and intended. *See id.*; JA-6839 (1996 Microsoft documentation for the APIs stating that "anyone can provide either browser code that browses the system namespace, or a namespace extension that extends the system namespace that can be browsed using the Explorer"). Microsoft's suggestion that Novell could not have commenced work on the APIs until receipt of the M6 beta documentation, Microsoft Br. 38-39, is both untrue, *see* JA-11251-52, JA-11262, JA-11426 (Harral), and irrelevant given that Novell relied for months on the assumption that its product would have ready access to the namespace extension APIs, *see* above text and *infra* pp. 9-10 & n.4.

Second, Novell cited testimony that the purpose of distributing beta versions of an operating system and documenting APIs is to induce ISV reliance. Opening Br. 33-34. As one Microsoft executive testified regarding documenting an API, the "stake" upon which ISVs rely "is probably going into the ground when you're first being told about it and it's probably more firmly in the ground when there's a beta release." JA-604-05 (Raikes); *see also* Opening Br. 33-34. Novell established that Microsoft's business model depends on ISVs relying on betas to design compatible applications for release within a short time after the release of new versions of Windows. Opening Br. 33-34. Even Gates admitted in announcing his de-documentation decision on October 3, 1994 that it was "very late in the day" to be making such a change. JA-1967. Microsoft also cites no evidence to support an industry understanding that betas can be changed to disadvantage competitors. Far from it, Microsoft's need to deceive ISVs as to the reason for de-documenting the namespace extension APIs demonstrates that it was inconsistent with industry practice. Opening Br. 19-22. Microsoft ignores all of this evidence and does not address the rule that an exercise of contractual rights can be anticompetitive when taken, as here, for an anticompetitive purpose and with anticompetitive effect. *Id.* at 34.

In contrast, *Christy Sports* involved enforcement of a restrictive covenant after a period of non-enforcement, with no evidence of harm to competition in a relevant market. 555 F.3d at 1190-91. Further, whereas the boilerplate language of the beta agreement did not address the specific conduct at issue or reserve the right to make changes to disadvantage competitors, JA-7175-77; JA-7178-81, the covenant in *Christy Sports* authorized the precise restriction on competition that the plaintiff there challenged (preventing an independent ski rental business), thus negating any claim of reasonable reliance, 555 F.3d at 1190.

Novell also presented ample evidence for a reasonable jury to conclude that Microsoft knew how its conduct would impact Novell. Microsoft fails to address the email – sent to Gates two days after his October 3, 1994 email and a week before Microsoft informed ISVs of his decision to de-document the namespace extension APIs – stating that "'Other ISV's using the extensions are WordPerfect, Lotus, Symantec, and Oracle.'" Opening Br. 36-37 (quoting JA-3691); *see also* JA-6926. This email alone provided sufficient evidence that Microsoft knew Novell was using the APIs. Microsoft further recognized in 1993 that WordPerfect was "very happy about us deciding to document the shell extensions," JA-2666, and Gates' email announcing his decision to de-document the APIs specifically identified competition with "Lotus and Wordperfect/Novell" as the reason for

de-documentation, JA-1967. Novell also contacted Microsoft's Premiere Support team on multiple occasions regarding the APIs prior to de-documentation and complained to the team repeatedly after the decision. JA-11261-63, JA-11275-78, JA-11280-81, JA-11285-86 (Harral). Microsoft asserts that there are no "documents" reflecting complaints, Microsoft Br. 21 n.16, but a reasonable jury also may rely on sworn testimony. Moreover, emails to Microsoft demonstrated Novell's continued need for access to the namespace extension APIs. JA-3767-68; JA-3772.[3]

Microsoft also knew that (1) WordPerfect's custom file open dialog was superior to the Windows 95 common file open dialog (as well as Microsoft Word's custom dialog); (2) the file open dialog of any Windows 95 application had to be able to browse the system namespaces; (3) by de-documenting the namespace extension APIs, Microsoft was forcing Novell to reduce the competitive viability of its product or spend additional time developing its own custom namespace

[3] While Microsoft disputes that the November 1994 emails reflected a "complaint," it does not dispute that they reflected Microsoft's knowledge of Novell's continued attempts to use the namespace extension APIs. *See* Microsoft Br. 21 n.16 (citing JA-3767-68, JA 3772); Opening Br. 37. Microsoft also falsely states that when Novell complained about undocumented APIs generally, Novell really meant the "different topic" of APIs that had never been documented, Microsoft Br. 22, even though Novell's CEO testified to the contrary, JA-12178-79, JA-12181 (Frankenberg). Moreover, as discussed previously without response from Microsoft, any lack of more vehement complaints is readily attributable to Microsoft's deception. *See* Opening Br. 38, 58; *infra* p. 13.

browser, eleven months after telling Novell it was documenting the APIs that would have eliminated the need to do so; and (4) Microsoft's Marvel application would be late to market without access to the APIs. *See* Opening Br. 15-16, 22-25, 40, 42 n.7.[4] Microsoft accounts for none of these points.

Instead, Microsoft relies on testimony and emails from Microsoft witness Brad Struss that, at most, created a disputed issue of fact and had little to no probative value even apart from the standard of review and contrary evidence detailed above. The email stating that Novell was purportedly "OK" with Gates' decision followed Microsoft's use of the deceptive script, which was part of the same email chain. *See* Opening Br. 38 n.5. Struss' testimony also was inherently suspect because he could not say whether Novell was one of the ISVs he later identified in an email as "actively developing" using the namespace extension APIs. *See id.* at 38 (citing JA-14298 (Struss)).

[4] *See also* JA-15292-93 (Belfiore) & JA-5750-51 (Microsoft testimony and document stating that a custom file open dialog needed to be able to access the system namespace); JA-4287 (stating after re-publishing the APIs in 1996, "The goal of name space extensions is to eliminate the need to write a complete browser" and "Until now, developers wanting this level of integration had to implement their own custom browser (like EnumDesk) that handled their own data type information along with the standard name space"). Further, in focusing on the number of APIs at issue, Microsoft Br. 1-2, 15, 19, Microsoft ignores the considerable evidence of their importance, *see* Opening Br. 13-19.

Moreover, the September 22, 1994 email on which Microsoft relies, Microsoft Br. 20, supports Novell's claim because it reports that Novell was one of several ISVs whose use of the namespace extension APIs was in the "'plan to do so' stage." JA-3655. The critical fact about the de-documentation was not just that Novell had completed significant work by that point, JA-11253 (Harral), but that it disrupted Novell's expectation (created a year earlier by Microsoft) that it would be able to rely on the APIs for its custom file open dialog. *See supra* pp. 6, 9-10 & n.4. The same email chain further recognized that Novell may not have been forthcoming with Microsoft about the precise status of its work with the APIs. JA-3656, JA-3658 (stating that it was "Very Likely" work had begun but that "detailed info will be difficult to get"). It also reports Novell's reaction that there would "'be hell to pay in the press'" if the APIs were withdrawn. JA-3658. Further, the September 22 email was sent two weeks before the October 5 email to Gates that reported WordPerfect's use of the APIs. JA-3655; JA-3691.

2. Microsoft Relied On Deception To De-Document The Namespace Extension APIs

Novell's opening brief demonstrated that Microsoft's conduct also was anticompetitive because its success depended on deceiving Novell and other ISVs regarding the true reason for Microsoft's de-documentation of the namespace extension APIs and that Marvel continued to use them. Opening Br. 19-22, 35-38.

Microsoft never acknowledges the District Court's conclusion that a reasonable jury could have found its proffered reasons for the de-documentation to be pretextual.[5] Instead, Microsoft asserts that there was no deception, without mentioning the District Court's conclusion or the other evidence of deception, including the script that instructed Microsoft's employees to provide Novell and other ISVs with pretextual reasons for Gates' decision, to falsely state that "Info Center, Marvel, and MS apps will no longer use these interfaces" despite Marvel's continued use of the APIs, and to "NOT MENTION MARVEL UNLESS ASKED DIRECTLY." JA-3705; *see* Opening Br. 21.[6]

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[5] Microsoft asserts that the email announcing Gates' decision "refers only to a hoped-for advantage for Office from an expected, later, improved version of the NSEs." Microsoft Br. 19 n.14. This cryptic and unsupported assertion neither addresses the District Court's conclusion concerning pretext, nor provides a legitimate basis for de-documenting the namespace extension APIs. Gates' email confirms that the APIs were "a very nice piece of work." JA-1967. It does not refer to "an expected, later, improved version of the NSEs," Microsoft Br. 19 n.14, but instead echoes the earlier recognition of a Microsoft executive that documenting the APIs would force Microsoft to compete with Novell on "'even turf,'" Opening Br. 18-19 (quoting JA-2335). Microsoft also asserts that the email does not refer to harm to competition in the operating systems market, Microsoft Br. 19 n.14, thereby disregarding Microsoft's own recognition of the connection between its success in the applications market and its operating systems strength, and of the threat posed by Novell's middleware. *See* Opening Br. 43-54; *infra* pp. 17-28.

[6] Microsoft asserts that its statements about its applications' use of the APIs were not false because Marvel was an "online system utility" that "shipped as part of Windows and was not a separate product." Microsoft Br. 19 n.13. This is the precise obfuscation that Microsoft executive Brad Silverberg stated was an

Microsoft illogically asserts that there was no deception because of a supposed absence of complaints and the email stating that Novell was purportedly "OK" with Gates' decision. Microsoft Br. 46. But Microsoft ignores Novell's evidence that the "OK with this" report immediately followed Microsoft's use of its deceptive script and thus reflects the *success* of the deception, not its absence. Opening Br. 21-22, 38 & n.5. Nor could the beta agreement disclaimer establish an absence of deception, both for the reasons discussed, *supra* pp. 5-8, and because the disclaimer has no bearing on the deceptiveness of the misrepresentations Microsoft made to accomplish the de-documentation six months later.

Microsoft also falsely asserts that Novell does not explain how Microsoft's deception delayed the release of Novell's products. Microsoft Br. 46. To the contrary, Novell explained that Microsoft could never have de-documented the APIs had it revealed its true reason for doing so and that its own products were continuing to use them. *See* Opening Br. 19-22.

In the alternative, Microsoft argues that deception of a competitor can never give rise to a Section 2 claim. Microsoft Br. 47. It fails, however, to address the District Court's rejection of that argument, JA-216 n.16, or otherwise offer any

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"impossible sale" that "no one in the world outside of Microsoft" would believe. JA-3689; *see also* JA-556-57 (Silverberg). Microsoft also fails to explain why it concealed Marvel's use of the APIs.

basis for its proposed rule. Deception of a competitor meets the definition of anticompetitive conduct, when, as here, it is "'not competition on the merits'" and is "'reasonably capable of contributing significantly to creating or maintaining monopoly power.'" *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (citation omitted). Microsoft does not dispute that deception of non-competitors can violate the antitrust laws, Microsoft Br. 47 n.26, and offers no reason why a different rule should apply to competitors. The deception here is analogous to the deception of ISVs that hindered the development of cross-platform applications in *Microsoft*, 253 F.3d at 76-77. In contrast, the general statements cited by Microsoft that not every harsh business act violates the antitrust laws, Microsoft Br. 47, simply recognize that there must additionally be harm to competition, not just competitors; they do not confer the blanket antitrust immunity for deception of competitors that Microsoft seeks. *See, e.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993).

3. Microsoft Altered A Voluntary Course Of Dealing Without A Legitimate Competitive Reason

Novell established that Microsoft's conduct also was anticompetitive under *Aspen Skiing* because its withdrawal of support for the namespace extension APIs unilaterally altered a prior, voluntary course of dealing for no legitimate

competitive reason. Opening Br. 38-42. In failing to address the District Court's conclusion regarding pretext, or the absence of a legitimate competitive justification for its conduct, Microsoft ignores the critical question under *Aspen Skiing*. *Id.*

Instead, Microsoft argues that *Aspen Skiing* requires a complete termination of the relationship and a denial to the plaintiff of benefits that all others are afforded. Microsoft Br. 42-44. Neither is a requirement. When a unilateral alteration of a prior course of dealing lacks competitive justification, the defendant cannot evade liability by maintaining some form of relationship with the plaintiff or equally disadvantaging all competitors. *See* Opening Br. 41-42.[7] Specifically, Microsoft's willingness to help Novell produce a *non-competitive* product does not legitimize Microsoft's actions in preventing Novell from producing a competitive product. *See infra* pp. 29-30; Opening Br. 22-25, 54-56.

[7] Microsoft also reinforces evidence previously cited by Novell showing that Microsoft's alteration of its course of dealing demonstrated a willingness to forsake short-term profits for long-term anticompetitive gain. *See* Opening Br. 39-41; JA-12894 (Noll); Microsoft Br. 14 n.9 (admitting that "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."); *id.* at 49 (relying on testimony that "Microsoft's market share would have been higher, not lower, if Novell had not been delayed"). By contrast, Microsoft's cited cases involved conduct designed to produce short-term gains, not losses. *See Four Corners*, 582 F.3d at 1225; *Christy Sports*, 555 F.3d at 1197.

Instead, the "'critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal.'" Opening Br. 41 (quoting *Christy Sports*, 555 F.3d at 1197). The significance of the defendant's prior conduct was that it shed "light upon the motivation of its refusal to deal." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). The Court in *Four Corners* similarly viewed the critical question as whether there was a legitimate economic justification for the termination of the plaintiff's staff privileges, concluding that the defendant acted

> merely to keep its practice from becoming so unprofitable that it would exhaust more rapidly than anticipated the reserves the hospital and tribe had set aside and leave the town and tribe without the benefit of a local nephrologist. *Aspen Skiing* does not require more economic justification than this to avoid Section 2 liability.

582 F.3d at 1225. A total termination of the relationship, or discriminatory refusal to deal, is thus unnecessary when, as here, there is sufficient evidence for a reasonable jury to find that the proffered reasons for the refusal were pretextual.

Microsoft fails to address the quoted language from these cases and also fails to address meaningfully four cases identified by Novell that do not require a complete termination of the relationship as a prerequisite to liability under *Aspen Skiing*. Opening Br. 41-42. Microsoft irrelevantly asserts that these cases "recognized that in *Aspen*, defendant completely terminated the relationship,"

Microsoft Br. 43 n.24, but none of those cases found that fact to be necessary to a finding of liability. Microsoft similarly misconstrues the significance of conduct that denies "to a rival the retail prices available to *all* other consumers." *Four Corners*, 582 F.3d at 1225. *Four Corners* recognized that this fact was evidence in *Aspen Skiing* of the absence of economic justification, not that it was critical to a finding of liability, as Microsoft claims. Here, Gates' October 3, 1994 email, Novell's other cited evidence, and Microsoft's statements establish the absence of an economic justification. *See* Opening Br. 39-41; *supra* n.7.

B. Microsoft's Conduct Was Reasonably Capable Of Contributing Significantly To Maintaining Its Monopoly Power

1. Microsoft's Argument Depends On An Incorrect Legal Standard

Novell established that the proper standard for assessing harm to competition is whether the conduct was reasonably capable of contributing significantly to the maintenance of monopoly power. Opening Br. 43-45. Further, "as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power." *Microsoft*, 253 F.3d at 79.

Microsoft wrongly asserts that Novell must show that the timely release of its products, by itself and in 1995, would have eliminated the applications barrier

to entry protecting Microsoft's monopoly power. *See* Microsoft Br. 48-51.[8] It further relies on the very factors underlying its monopoly power in its attempt to evade liability for its exclusionary conduct. *Id*. This misguided reading of the Sherman Act would immunize monopolists from monetary liability for destroying nascent threats because, by definition, a nascent threat imperils monopoly power over the longer term.

The D.C. Circuit rejected this argument, holding that a court "may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes." *Microsoft*, 253 F.3d at 79. In finding Microsoft liable for conduct directed at technologies that were not established substitutes based on the same state of operating systems competition as existed in this case, the court explained that it would be improper to require the victim of exclusionary conduct to "reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct" and that "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in

[8] For example, Microsoft incorrectly asserts that "Novell's theories of harm to competition depend on the contemporaneous existence of a competing operating system that could gain market share." Microsoft Br. 50 n.29; *see also id*. at n.30 (relying on testimony that Linux "'became a full-fledged, commercial product' in 1996" (citation omitted)).

industries marked by rapid technological advance and frequent paradigm shifts." *Id*. The District Court applied this principle at summary judgment in finding a triable issue of fact on harm to competition. *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 748-50 (D. Md. 2010), *rev'd on other grounds*, 429 F. App'x 254 (4th Cir. 2011).

Exemplifying its disregard for these principles, Microsoft argues that by 1999, consumers had not turned to Linux, an open-source operating system of equal complexity to Windows. *See* JA-15859 (Murphy); Microsoft Br. 50 n.30. Microsoft's destruction of WordPerfect in 1995, however, had prevented Linux from offering by far the most popular competitive application in the most important applications category, as well as middleware that Microsoft viewed as a threat. *See* Opening Br. 8-12.[9] Microsoft thus impermissibly relies on the competitive harm its conduct created to immunize itself from liability.

Microsoft does not dispute that its proposed standard directly conflicts with the D.C. Circuit's or that it would immunize all monopolists from damage claims brought by nascent threats. Instead, it wrongly asserts that the D.C. Circuit standard applies only in cases seeking equitable relief. Microsoft Br. 51 n.31. Under this view, neither Netscape nor Sun could have brought damages claims

[9] WordPerfect had an equivalent installed base to Microsoft Word (36% compared to 37%), with the next closest competitor at 7%. Opening Br. 8-9.

despite the D.C. Circuit's findings. The plain language of the Clayton Act, however, provides a damages remedy to any victim "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).[10] Microsoft disregards the statutory text as well as cases from this Circuit applying the "reasonably capable" standard in evaluating damages claims. Opening Br. 31 n.4, 45. The D.C. Circuit, moreover, expressly recognized that the standard of liability did not vary based on the remedy sought, and thus limited the requirement of a stricter causal connection between the challenged conduct and maintenance of monopoly power to requests for "'extensive equitable relief, particularly remedies such as divestiture.'" *Microsoft*, 253 F.3d at 80 (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 653b, at 91-92 (3d ed. 2011)) (recognizing that "these queries go to questions of remedy, not liability").

The D.C. Circuit also specifically recognized the importance of damages in achieving deterrence where, as here, "Conduct remedies" (like those the Government secured against Microsoft) may be ineffective, "because innovation to

[10] Microsoft also confuses the burden of proof necessary to establish a Section 2 violation with proof of whether the violation caused the plaintiff's antitrust injury. It relies on a passage from the Areeda & Hovenkamp treatise that has nothing to do with harm to competition but instead stands for the proposition that damages in an antitrust case should be "strictly limited to those aspects of *a plaintiff's injury* that were in fact caused" by the defendant's antitrust violation. Microsoft Br. 51 n.31 (emphasis added) (citation omitted).

a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless)." *Id.* at 49. Under such circumstances, "the threat of private damage actions will remain to deter those firms inclined to test the limits of the law." *Id*. This case demonstrates the inadequacy of conduct-based injunctions. An injunction ordering Microsoft to document the namespace extension APIs would have come long after the critical 90-day window following the release of Windows 95, and thus far too late to avoid the harm to Novell and competition caused by Microsoft's conduct.

2. The Elimination Of Novell's Key Franchise Applications Was Reasonably Capable Of Contributing Significantly To Maintaining Microsoft's Monopoly Power

Novell's opening brief cited ample evidence that Microsoft's destruction of Novell's office productivity applications strengthened Microsoft's operating systems monopoly power. Opening Br. 45-49. Microsoft's response neither addresses this evidence nor disputes that the availability of a popular cross-platform word processor would have been a prerequisite for an operating system to compete with Windows. Instead, Microsoft asserts only that "two or three

applications" could not have impacted competition because the applications barrier to entry "cemented Microsoft's market position." Microsoft Br. 52.[11]

This assertion contradicts Microsoft's own recognition that "we dramatically widen the 'moat' that protects the operating system business" by owning "the key 'franchises'" – i.e., "office productivity applications." JA-4293; JA-609 (Raikes). Microsoft further admitted that WordPerfect's abandonment of development for OS/2 (a rival operating system) was "a great example how we kill OS/2." JA-2668. Microsoft thus recognized the importance of a popular word processor to the competitive viability of Windows' competitors. A reasonable jury would only have needed to credit these admissions – neither of which Microsoft addresses – to find that the destruction of Microsoft's top rival by far (WordPerfect) in the most important applications category (word processing) harmed competition in the operating systems market. Opening Br. 8-10. Linux, for example, was an open-source operating system of comparable capability to Windows that, notwithstanding its price advantages and the rapidly growing number of

[11] As discussed above, *see supra* n.7, Microsoft merely confirms its liability under *Aspen Skiing* by relying on testimony that its market share initially would have been higher if it had not destroyed Novell's products. Microsoft Br. 49. It does not undermine the evidence establishing the long-term harm to competition in the operating systems market from losing by far the most popular cross-platform word processor in the most important applications category.

applications that were supporting it, JA-15858-59 (Murphy), needed a popular, cross-platform word processor to compete.

Moreover, binding Findings of Fact and Microsoft's statements established that Microsoft's monopoly power was not "cemented" but rather vulnerable in light of the "inflection point" represented by the "exponential growth of the Internet" and the threats that it fostered, including Linux. *See* Opening Br. 7-8, 48; JA-1627 (FOF ¶ 60).[12] Microsoft also does not attempt to account for the benefits to competing platforms of the combined availability of WordPerfect, Sun's Java, and Netscape Navigator (a browser that Microsoft viewed with "dread," JA-1630 (FOF ¶ 77)), as well as the distribution agreement that, but for Microsoft's conduct, would have increased the distribution of Navigator by an additional seven million PCs. Opening Br. 53-54. Instead, Microsoft attempts to preclude this

[12] Microsoft recognized both the rise of the Internet as a competitive threat and that Novell's products were well poised to take advantage of the Internet. Opening Br. 7-8, 18 (citing JA-3696); *see also* JA-3696 (Gates' email stating that a Novell presentation two weeks before the decision to de-document the namespace extension APIs demonstrated WordPerfect's Internet capabilities, "the importance of our shell integration," and that "Novell is a lot more aware of how the world is changing than I thought they were"); JA-5720 (Gates stating after the WordPerfect-Novell merger that "Novell's WordPerfect Office is a highway product in the future" in "terms of the information superhighway").

Court's consideration of the issue by mischaracterizing its motion in limine. Microsoft Br. 55 n.34.[13]

A reasonable jury, moreover, could easily have rejected Microsoft's selective citation of market data concerning Novell's franchise applications, Microsoft Br. 53, in favor of reliance on WordPerfect's 36% share of the word-processing installed base (equivalent to Microsoft Word's, *see supra* n.9, and far higher than any other word processor's), the fact that 74% of the market had not yet chosen a suite, and the high praise Novell's products had consistently received in reviews and from Microsoft. Opening Br. 8-10; *see, e.g.*, JA-3973 (1995 Microsoft memorandum stating, "The current suite of applications in PerfectOffice are world class and there is reason for us to follow the progress of this suite very

[13] Microsoft asserts that the District Court prevented Novell from arguing that "PerfectOffice posed a threat to Microsoft's monopoly in combination with these other products." Microsoft Br. 55 n.34. As Microsoft's own description reflects, however, the motion in limine related only to a "theory that PerfectOffice could be a middleware threat 'in combination with' Netscape Navigator and Sun's Java." *Id*. Novell does not contend that the three products could have served as a combined middleware product, but rather points to the combined helpfulness of the three franchises in diminishing the applications barrier to entry, and the distribution agreement between Novell and Netscape. The District Court admitted the distribution agreement as evidence, and two witnesses testified about its importance. *See* JA-3858; JA-11942-43, JA-11962, JA-11974-75 (Frankenberg); JA-12765-69 (Noll).

carefully, especially given the strength of Novell's networking and sales force").[14] A reasonable jury additionally could have credited Gates' admission in support of his de-documentation decision that Microsoft "can't compete with Lotus and Wordperfect/Novell without" having "the Office team really think through the information intensive scenarios" required by "shell integration work." JA-1967.

Novell similarly presented ample evidence that its products would have been cross-platform. WordPerfect historically had been designed for multiple competing platforms, Novell continued to develop versions of WordPerfect for Windows competitors (including UNIX and Linux), and Novell intended to release PerfectOffice for non-Windows platforms. *See* Opening Br. 9; JA-9148; JA-11932, JA-12203-04 (Frankenberg); JA-11303-04 (Harral); JA-11721 (Gibb). A reasonable jury could easily have credited this testimony, and Microsoft offers no basis for concluding otherwise.

3. The Elimination Of Novell's Middleware Was Reasonably Capable Of Contributing Significantly To Maintaining Microsoft's Monopoly Power

Microsoft's discussion of Novell's middleware fails to account for the testimony of Microsoft's executives that Novell's middleware was one of

[14] Microsoft reiterates the District Court's irrelevant assertion that WordPerfect's past success had not displaced Windows. Microsoft Br. 53. Novell addressed this point, *see* Opening Br. 48, and Microsoft offers no response.

Windows' "most serious competitors" and threatened to "reduce Windows or anything underneath it to a commodity." Opening Br. 11; *see also* JA-2492 (Microsoft document describing AppWare as potentially the "first viable platform for commercial cross-platform development"). This evidence alone created a jury question on the harm to competition caused by the destruction of Novell's middleware. Microsoft and the District Court similarly fail to address various other evidence cited by Novell. *See* Opening Br. 49-54.

Instead of addressing this evidence, Microsoft repeats the District Court's mistake of requiring Novell's middleware to satisfy each of three criteria (i.e., cross-platform capability, ubiquity, and ability to support full-featured personal productivity applications). Microsoft Br. 54-55. As Novell explained, these criteria merely established what would be necessary for a single middleware product alone to *eliminate* the applications barrier to entry; a middleware product, however, could increase competition in the operating systems market by *weakening* the barrier. Opening Br. 51-52. Microsoft ignores this argument.

Microsoft asserts that the Findings of Fact from the Government case support application of these three criteria, Microsoft Br. 54-58, but the opposite is true with respect to the second and third. Nothing in those Findings states that Navigator or Java was ubiquitous, or that ubiquity was necessary for middleware to

weaken the applications barrier to entry. Similarly, the District Court in the Government case found that Navigator and Java could *not* support full-featured personal productivity applications. JA-1623 (FOF ¶ 28).[15] Moreover, Microsoft fails to acknowledge the binding Finding that "each type of middleware contributed to the threat posed by the entire category," and that Novell's middleware exposed more APIs than Navigator and Java combined. JA-1627-28 (FOF ¶ 68); Opening Br. 11-12.

As for the first requirement, Novell's history of designing cross-platform applications, and the testimony that it would have continued to do so, provided ample basis for a reasonable jury to conclude that PerfectOffice would have been cross-platform. Opening Br. 9. Ignoring this evidence, Microsoft repeats, without citation, the District Court's technological misconception that designing PerfectOffice to call the namespace extension APIs would have prevented the development of PerfectOffice for platforms without that feature. Microsoft Br. 56. Nothing supports this assertion, and it was specifically contradicted by Novell's technical expert. Opening Br. 50-51; JA-12421 (Alepin). Reliance on this

[15] Microsoft does not even suggest that Navigator could support full-featured personal productivity applications. It quotes Finding of Fact 74 with the evident intent of suggesting that Java could do so, Microsoft Br. 57-58, but the same Finding confirms that "the Java class libraries do not expose enough APIs to support the development of full-featured applications that will run well on multiple operating systems without the need for porting," JA-1629 (FOF ¶ 74).

unfounded supposition is still more unjustified when, as here, *Novell* is entitled to the benefit of all reasonable inferences.

II. NOVELL PRESENTED AMPLE EVIDENCE FOR A REASONABLE JURY TO FIND THAT MICROSOFT'S CONDUCT CAUSED NOVELL'S INJURY

A. Microsoft's Anticompetitive Conduct, Not Quattro Pro, Delayed PerfectOffice

Novell's opening brief demonstrated that the District Court's conclusion that Quattro Pro delayed the release of PerfectOffice improperly resolved a disputed question of fact. Two witnesses with personal knowledge of PerfectOffice's development – including Gary Gibb, who oversaw its development – testified that PerfectOffice would have shipped within 60-90 days of Windows 95's release had shared code (which was delayed by Microsoft's conduct) delivered on time. Opening Br. 60.

At most, Microsoft identifies potentially conflicting testimony for the jury to resolve. Moreover, Nolan Larsen, the witness on whom Microsoft primarily relies, testified (as did four other witnesses) that Gibb was best situated to know whether PerfectOffice would have shipped on time but for the delay of shared code (i.e., PerfectFit). Opening Br. 60-61.

Microsoft also has no substantive response to Novell's discussion of the documentary evidence, including DX 231, which reported an August 23, 1995

code completion date for Quattro Pro (more than two months before the October 31, 1995 code completion date for PerfectFit and PerfectOffice). JA-9147. Microsoft irrelevantly asserts only that "Novell failed to ask any witness about this document," Microsoft Br. 60 n.37, without explaining how a lack of Novell questions about an exhibit designated by Microsoft could justify a disregard for what it plainly says. Microsoft also repeats the District Court's misunderstanding of the Release to Manufacturing Date identified in DX 231, *id.*, without addressing Novell's discussion of how the District Court misread that document, *see* Opening Br. 61-62. Finally, Microsoft does not respond to Novell's discussion of DX 230 (JA-9145) or the other evidence on this issue. *See* Opening Br. 61-62.

B. Microsoft Left Novell With No Competitively Viable Options

Novell's opening brief established that the District Court's conclusion that Novell could have released its products using Microsoft's common file open dialog improperly resolved a disputed question of fact.[16] Novell's witnesses testified that

[16] Further disregarding the standard of review, Microsoft asserts that use of the de-documented APIs was a "real choice" and suggests that the only potential risk was that Microsoft might remove the APIs from Windows "in later years." Microsoft Br. 26. Microsoft thus ignores direct testimony that its refusal to provide any assistance prevented the use of the APIs, the testimony of its own expert that "it's a bad practice to call on undocumented APIs," and Microsoft's

the common file open dialog was not an option because it would have left Novell without a competitively viable product. *See* Opening Br. 23-25, 54-56.

Microsoft inaccurately characterizes Novell's decision as a choice between fatal delay and a sacrifice of "'cooler' functionality," Microsoft Br. 63 (citation omitted), but there was ample evidence that the choice was really between two fatal outcomes. *See, e.g.*, JA-11563 (Richardson) ("It was a huge step backwards for us. And we felt it simply wasn't an option. If we were to go with that option *we didn't really have a product*." (emphasis added)); *see also* Opening Br. 23-25, 54-56. Novell's cited evidence – which Microsoft ignores – disposes of any notion that the common file open dialog was "an obviously adequate alternative," Microsoft Br. 62, and provides ample basis for a reasonable jury to conclude that the common file open dialog was not a viable option for Novell.

CONCLUSION

Accordingly, the District Court's judgment should be reversed and the case remanded for trial.

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warning to ISVs that the APIs could stop working "even between interim beta builds." Opening Br. 23, 54.

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Respectfully submitted,

David Boies
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stuart H. Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard
Fort Lauderdale, FL 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Samuel C. Kaplan
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

/s/ Jeffrey M. Johnson
Jeffrey M. Johnson
James R. Martin
Miriam R. Vishio
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
johnsonj@dicksteinshapiro.com

Max D. Wheeler
Maralyn M. English
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Facsimile: (801) 363-0400

R. Bruce Holcomb
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 810
Washington, DC 20006
Telephone: (202) 580-8820
Facsimile: (202) 580-8821

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As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,965 words. I relied on my word processor, which is Microsoft Word 2010, to obtain the word count. I certify that this information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/ Jeffrey M. Johnson

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I certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF** as submitted in Digital Form via the Court's CM/ECF system is an exact copy of the written document filed with the Clerk and has been scanned for viruses. In addition, I certify that all required privacy redactions have been made.

/s/ Jeffrey M. Johnson

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I certify that on February 22, 2013, I caused the foregoing **APPELLANT'S REPLY BRIEF** to be served on all parties or their counsel of record through the Court's CM/ECF system.

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