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 (A4527)
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 706-8080

James S. Jardine (A1647)
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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

NOVELL, INC., Plaintiff, -v- MICROSOFT CORPORATION, Defendant.	MICROSOFT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW Civil No. 2:04 CV 1045 Honorable J. Frederick Motz

March 30, 2012

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POSITIONS OF SELECTED WORDPERFECT/NOVELL EMPLOYEES DURING THE RELEVANT TIME PERIOD

WORDPERFECT/NOVELL EMPLOYEES	
NAME	**POSITION**
David Acheson	Sales Manager, Professions Market
Bruce Brereton	Vice President of Development, Business Applications Group
Craig Bushman	International Product Marketing Manager, PerfectOffice Suite
Mark Calkins	Vice President and General Manager, Business Applications Group
Tom Creighton	Director, PerfectFit Technology
Karl Ford	Team Leader, WordPerfect for Windows 95
Bob Frankenberg	Chairman, President & Chief Executive Officer
Gary Gibb	Director, PerfectOffice for Windows 95
Adam Harral	Software Developer, Shared Code Group
Nolan Larsen	Director, Human Factors (until January 1996) Software Developer, Quattro Pro Team
Dave LeFevre	Product Marketing Director, Windows Product Management
Glen Mella	Vice President, Marketing
Chuck Middleton	Director, WordPerfect 5.1 for Windows
Dave Miller	Director, Strategic Relations
Dave Moon	Senior Vice President, Business Applications Group
Scott Nelson	Product Marketing Director, Business Applications Group
Pete Peterson	Executive Vice President and Member of Board of Directors (until 1992)
Greg Richardson	Software Developer, Shared Code Group
Ad Rietveld	Executive Vice President, Business Applications Group
Kelly Sonderegger	Developer
Todd Titensor	Marketing Manager, WordPerfect for Windows
Jeff Waxman	Executive Vice President, Business Applications Group
Steve Weitzel	Director, WordPerfect for Windows Development
Dorothy Wise	Director, Quattro Pro Team

POSITIONS OF SELECTED MICROSOFT EMPLOYEES
DURING THE RELEVANT TIME PERIOD

MICROSOFT EMPLOYEES	
NAME	**POSITION**
Jim Allchin	Vice President, Business Systems Software
Joe Belfiore	Program Manager, Windows 95 Shell
Paul Maritz	Vice President, Advanced Operating Systems Senior Vice President, Platform Products (beginning in late 1995) Group Vice President, Platform and Applications (beginning in late 1996)
Brad Chase	Vice President, Windows 95 Marketing
Bill Gates	Chairman & Chief Executive Officer
Doug Henrich	Director, Developer Relations Group
Scott Henson	Technical Evangelist, Developer Relations Group
Bob Muglia	Director of Program Management, Windows NT Team
David Cole	Group Program Manager, Chicago Team
Satoshi Nakajima	Software Engineer, Chicago Team
Brad Silverberg	Vice President, Personal Systems Software
Brad Struss	Manager, Developer Relations Group, Windows 95 Evangelism (primary point of contact for WordPerfect/Novell)

PRELIMINARY STATEMENT

In its brief in opposition to Microsoft's renewed motion for judgment as a matter of law, Novell ignores many of the most important facts in this case and "responds" to various assertions that Microsoft has never made. Novell's brief makes clear that it is time to dispose of this meritless action.

For example, Novell's argument is premised on the assertion that on some unstated date, Microsoft made a "commitment" or a "promise" to provide Novell with Microsoft's namespace extension technology. There is no citation to the record for this proposition, which is false. Indeed, the overwhelming evidence at trial was that it was common practice in the industry for a software developer to make changes to a beta version of an upcoming software release, that Novell itself understood that the beta version of Windows 95 was subject to change and that the governing contract said the same thing. This evidence eliminates the essential premise on which Novell's brief—and its case—depends.

Novell also fails to dispute in any meaningful way these additional facts, each of which is highly pertinent to the present motion:

- The October 3 Decision[1] was not made to harm Novell—in fact, Microsoft was not even aware at the time the decision was made that Novell had any plans to use the namespace extension APIs in Novell's products;
- There are no contemporaneous documents showing that Novell complained to Microsoft about the October 3 Decision, nor any Novell documents of any kind that state or even imply that Novell then believed that the October 3 Decision had hurt Novell or would slow down its development efforts—and, in fact, Novell told Microsoft in October 1994 that it was "OK" with the decision;

[1] Capitalized terms have the same meaning here as they did in Microsoft's Opening Memorandum.

- DX 230, a document that Novell fails to address (except in one footnote that studiously avoids acknowledging the document's importance), and other contemporaneous Novell documents show conclusively that PerfectOffice for Windows 95 was not ready to be released even in December 1995, for reasons having nothing to do with the October 3 Decision—thus establishing that the allegedly anticompetitive conduct did not cause injury to Novell's products based on Novell's own damages theory;

- Every witness at trial who addressed the subject testified that robustness concerns are a valid business justification for making changes to an operating system under development;

- Novell could have chosen less difficult and time-consuming paths toward creating products for the Windows 95 platform, but made a business decision to pursue the most difficult and risky path; and

- As Bob Frankenberg testified (and Noll agreed), in the but-for world (where Microsoft had never withdrawn support for the namespace extension APIs), Windows' market share would have been "even higher" than the approximately 95% that Microsoft actually achieved. In other words, there was no harm to competition caused by the October 3 Decision.

Likewise, Novell has little to say—other than its efforts to confuse the issues—about these legal points, each of which is entirely dispositive:

- Novell cannot show harm to competition in the PC operating system market under either of its two theories: There is no evidence supporting the franchise applications theory, and the evidence at trial established that Novell's software had none of the three elements of "middleware" necessary for that software to have any potential to impact competition in the PC operating system market;

- The evidence overwhelmingly established that Microsoft had legitimate business justifications for its October 3 Decision, meaning that decision was not anticompetitive as a matter of law. Under *Four Corners Nephrology Associates, P.C.* v. *Mercy Medical Center of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009), that is the end of the case;

- The namespace extension APIs were provided as part of a beta release of Windows 95 that Novell (and others in the software industry) understood was subject to change before commercial release of the product. Under *Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) and *Telex Corp.* v. *International Business Machines Corp.*, 510

F.2d 894, 928 (10th Cir. 1975), there can be no antitrust violation under such circumstances; and

- Microsoft's October 3 Decision was not the termination of a pre-existing, profitable relationship between the parties. The evidence at trial was overwhelming that Microsoft continued to cooperate with Novell after the October 3 Decision and did not foreclose Novell from releasing its products for Windows 95 on a timely basis.

In order to defeat Microsoft's motion for judgment as a matter of law, Novell was required to point to substantial trial evidence in support of each element of its claim. Despite its length, Novell's brief refers to precious little evidence and instead offers far-fetched arguments that cannot overcome the overwhelming showing made by Microsoft in support of its motion. Indeed, Novell goes so far as to make highly improper—and false—arguments about the jury deliberations and to rely on other material outside the trial record. These include: (i) nine documents never admitted into evidence, including a series of letters that Novell did not even offer into evidence,[2] and (ii) a so-called "proffer" consisting of assertions made by Novell's lawyers about what Gary Gibb might have said in rebuttal, which is not a proper "proffer" at all.[3]

It remains truly stunning that there are *no* contemporaneous documents showing that (a) anyone at Novell believed that the October 3 Decision caused harm to Novell's efforts to

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[2] The letters are DX 215A, 215B, 215C, 215D, 215E, 215F and 215G. The other two documents never admitted into evidence are PX 317 and PX 320. (*See* Novell Br. at 69.)

[3] Novell's brief also relies on 42 documents that were never used with a witness or even mentioned during Novell's summation. In *Petit* v. *City of Chicago*, 239 F. Supp. 2d 761, 781 (N.D. Ill. 2002), the court found on a Rule 50(b) motion that documents that were in evidence "but for which no or little related testimony was presented at trial" are "not information that can be considered to have been before the jury." The same should apply here, where Novell did not use or refer to any of the following 42 documents during the eight weeks of trial: PXs 31, 44, 50, 56, 77, 88, 90, 91, 102, 117, 125, 127, 140, 148, 168, 184, 193, 198, 207, 239, 241, 248, 317, 320, 368, 371, 391, 395, 400, 410, 414, 488, 489, 490, 492, 504, 515, 531 and 560, and DXs 168, 205 and 370. Many of these documents, like the documents in *Petit*, are technical in nature and require—or would at least benefit from—explanation by a trial witness. 239 F. Supp. 2d at 781.

develop applications for Windows 95, (b) anyone at the company complained to Microsoft about the October 3 Decision or (c) any Novell software developer (in the shared code group or elsewhere) told management that Microsoft's conduct had caused a problem or urged management to take any steps to address any such problem. Novell waited more than nine years (until 2004) to bring its suit—after it conveniently destroyed many relevant documents (while preserving the Microsoft "bad acts" file)—and then asserted a claim that is contradicted by the commonly-held industry understanding that a software developer can and often does make changes to a beta version of a product under development. The fact that there is not a single document showing that Novell believed at the time that the October 3 Decision was wrongful or had caused harm to Novell is powerful evidence about the lack of merit of the claim.

NOVELL'S ASSERTIONS ABOUT THE JURY'S DELIBERATIONS ARE INCORRECT AND IMPROPER

In its brief, Novell repeatedly refers to an incorrect account of the jury's deliberations (Novell Br. at 1, 20, 112), arguing that these deliberations show that the Rule 50 motion should be denied. In addition to being factually incorrect,[4] the references in Novell's brief to the supposed content of jury deliberations are entirely inappropriate in light of the well-established rule that "[t]he jury's deliberations are secret and not subject to outside examination." *Yeager* v. *United States*, 129 S. Ct. 2360, 2368 (2009); *United States* v. *Dempsey*, 830 F.2d 1084,

[4] Novell's representations (*see, e.g.*, Novell Br. at 20) that eleven jurors were prepared to find in Novell's favor is untrue. With the Court's permission, Microsoft, through a jury consultant, contacted members of the jury and seven indicated a willingness to speak. Interviews with these seven jurors revealed that five jurors would not have awarded Novell as much as one dollar in damages, and four or five would not have found liability at all if the outcome included an award of damages.

1089 (10th Cir. 1987) (noting the "cardinal principle that the deliberations of the jury shall remain private and secret" (quotation omitted)).

It is thus entirely improper for Novell to argue that a hung jury's deliberations imply that "a legally sufficient evidentiary basis exists for a reasonable jury to find that Microsoft's conduct was a material factor in causing Novell's injuries." (Novell Br. at 112.) No such inference is permitted: "[T]he jury's inability to reach a verdict does not necessarily indicate that reasonable minds could differ or that plaintiffs have introduced substantial evidence to support their claims." *Headwaters Forest Defense* v. *County of Humboldt*, 1998 U.S. Dist. LEXIS 16953, at *2 (N.D. Cal. Oct. 26, 1998), *rev'd on other grounds*, 240 F.3d 1185 (9th Cir. 2000); *accord Garrett* v. *Barnes*, 961 F.2d 629, 632 (7th Cir. 1992) (fact that two prior juries were unable to reach a verdict weighs neither in favor of nor against a directed verdict). As the Supreme Court said in *Yeager*, "[b]ecause a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." 129 S. Ct. at 2367. This rule was applied in *DeMaine* v. *Bank One, Akron, N.A.*, 904 F.2d 219, 221 (4th Cir. 1990), where the court "refuse[d] to hold that a jury's inability to reach a verdict, by itself, will operate to prevent the entry of a directed verdict under Rule 50." Instead, the Fourth Circuit determined that "the jury's deadlock appears to have been the product of unreasonable disagreement," and therefore affirmed entry of judgment for defendant under Rule 50(b). *Id.*[5]

[5] Federal courts have long adopted this approach. The Second Circuit ruled 40 years ago that the fact that a jury "reported itself deadlocked . . . does not mean that the actual disagreement was fair and reasonable." *Noonan* v. *Midland Capital Corp.*, 453 F.2d 459, 463 (2d Cir. 1972).

Even where a jury reaches a verdict, "[t]he jury's findings should be excluded from the decision-making calculus on a Rule 50(b) motion." *Chaney* v. *City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007). "The fact that Rule 50(b) uses the word 'renew[ed]' makes clear that a Rule 50(b) motion should be decided in the same way it would have been decided prior to the jury's verdict, and that the jury's particular findings are not germane to the legal analysis." *Id*. at 1228; *Eisenberry* v. *Shaw Brothers, L.L.C.*, 2010 U.S. Dist. LEXIS 81345, at *3-4 (M.D. Pa. Aug. 11, 2010) ("The standard for reviewing the grant or denial of pre-verdict and post-verdict motions for judgment as a matter of law is identical. As such, in ruling on a post-trial motion, the court should not base its conclusions, in whole or in part, on the jury's determinations or attempt to apply or refute particular findings of the jury."). Novell's arguments based on its false account of the jury's deliberations are entirely improper, and should be disregarded by this Court.

* * *

As explained in detail below, there are several independent bases for dismissing Novell's sole remaining claim. While Microsoft believes that each and every one of those bases is valid, any one of them is sufficient to put an end to this protracted litigation.

STATEMENT OF FACTS

A. It Was Common Practice in the Software Industry to Make Changes to a Beta and Novell Understood that the Windows 95 Beta Was Subject to Change.

Novell's brief is predicated on the notion that Microsoft made a "commitment" (Novell Br. at 7, 8, 9, 113) or "promise" (*id.* at 59, 69, 94, 124) to Novell to "document and support the namespace extension APIs" (*id.* at 7; *see also id*. 50, 58, 62). There is no evidence to support that contention. As was firmly established at trial, (a) it was common practice in the

industry for a software developer to make changes to a beta version of an upcoming software release, (b) Novell itself understood that the beta version of Windows 95 was subject to change and (c) the contract between Novell and Microsoft pursuant to which Novell obtained the beta version of Windows 95 expressly provided that the operating system was still under development and subject to change. There was no "commitment."

Bob Frankenberg testified that "it was widely understood in the software industry" that beta versions of software products may change, and that Novell itself understood that beta versions of Windows 95 "could change" and "might change" prior to commercial release. (Frankenberg, Nov. 8 Trial Tr. at 1201, 1209; *see also id.* at 1204-05.) Likewise, Nolan Larsen testified that "the definition of a beta" is that "there can be and almost certainly will be changes." (Larsen, Nov. 30 Trial Tr. at 3603; *see also id.* at 3607.) Dave LeFevre testified that it was his understanding that a "company that develops the beta software has the right to make any changes they deem necessary as a result of that testing period" because a "[b]eta by definition is an early release or a prerelease of a product that is subject to change." (LeFevre, Dec. 2 Trial Tr. at 4030-32.)

This testimony agrees entirely with DX 612A, an official memorandum prepared by the Novell Corporate Development Group just fifteen days after the decision to withdraw support for the namespace extension APIs.[6] That October 18, 1994 memorandum—to which Novell never refers in its lengthy brief—shows that Novell fully understood at the relevant time that a beta (pre-release) version of a software product was subject to change:

- During the beta phase of software development, "the product and features may change dramatically" (p. 4); and

[6] Exhibits cited herein that were not included in the Appendix to the Opening Memorandum are attached to the Appendix to this Reply Memorandum.

- "Based on Beta testing results, design concepts and implementation are further altered—which may include removal of [an] entire feature—until design criteria are successfully met" (p. 2).

Novell's own practices and experience were fully in accord. For example, LeFevre testified that when he "ran the beta program" for WordPerfect 5.1 for Windows, WordPerfect itself "cut a number of features in WordPerfect 5.1" during the beta process. (LeFevre, Dec. 2 Trial Tr. at 4033.) Larsen similarly recalled that when he was working on the Macintosh team at WordPerfect, WordPerfect "made changes in [the] beta software . . . that could have potential negative impacts on the customers" but made them anyway because "it was in the overall best interest of the product." (Larsen, Nov. 30 Trial Tr. at 3606-07.)

In response to this mountain of evidence (*see* Microsoft Br. at 18-24), Novell points only to vague testimony from Adam Harral that changes to a beta are "an extraordinary event" because the purpose of releasing a beta is to "hammer out problems" and not "change features," and to Alepin's testimony that "[i]t would be exceptional to change the interfaces that the operating system provides" after the release of a beta (Novell Br. at 101; *see* Harral, Oct. 20 Trial Tr. at 303, 336; Alepin, Nov. 9 Trial Tr. at 1389). As Microsoft has noted, Harral did not offer any explanation for how to distinguish in practice between "fix[ing]" a "problem" and "chang[ing]" a "feature." (Microsoft Br. at 23 & n.20.) Nor did Novell offer any explanation for the inconsistency between Harral's testimony and the directly contradictory—and contemporaneous—statement in the Novell Corporate Development Group memorandum that changes "may include removal of [an] entire feature" from a beta. (DX 612A at 2.) And Alepin himself acknowledged that ISVs "use [betas] at their own risk" and "shouldn't run their business critical applications on this software and expect what the results will be" because "[t]he

expectation" with a beta release "is that the software is being worked on." (Alepin, Nov. 10 Trial Tr. at 1555-56.)[7]

The evidence was equally clear that Novell understood that the beta version of Windows 95 it received in June 1994 was subject to change. The contract under which Novell received the beta provided that it "may be substantially modified prior to first commercial shipment." (DX 18 at 1 ¶ 2; DX 19 at 1 ¶ 2.) Novell has absolutely no answer to this key point, which not only disproves the contention that Microsoft made a "commitment" to provide the namespace extension APIs but also shows, *see* pp. 50-54, *infra*, that the conduct in question was not "deceitful" or anticompetitive in the first place. Likewise, Novell has no answer to—and fails even to mention—Frankenberg's testimony that DX 618, Novell's own "Software Developer's Kit" (distributed to ISVs with beta versions of Novell's software), contained "pretty much similar" language to Microsoft's license agreement. (Frankenberg, Nov. 8 Trial Tr. at 1208-09.) Novell expressly told software developers that "Novell does not guarantee that Beta Products will become generally available to the public or that associated products will be released" and that "[t]he entire risk arising out of your use of Beta Product remains with you." (DX 618 at NOV-B07520262.) Novell also ignores the warning on the front cover of the

[7] Novell also argues, citing the testimony of Satoshi Nakajima, that "while there may be circumstances where a beta version must be changed in order to address bugs identified during the testing process, there is no evidence that Microsoft received any negative feedback from ISVs regarding the namespace extension APIs after it released partial documentation in its M6 beta release." (Novell Br. at 110.) Contrary to the implication Novell attempts to convey, Nakajima did not testify that a beta version may be changed only when ISVs identify bugs in the testing process. In fact, Nakajima testified that "there's a little bit of a risk" with betas "because [developers of the product] make change for whatever the reason" and "everybody should be aware of that." (Nakajima, Dec. 1 Trial Tr. at 3859.) Nor, for that matter, did Nakajima testify that Microsoft received no negative feedback from ISVs about the namespace extension APIs. He said only that he remembered the good feedback and did not remember any bad, explaining that he "tend[s] to forget that kind of feedback." (*Id.* at 3826-27.)

Microsoft "Chicago Reviewer's Guide," which expressly stated that the "features and functionality present either in the Beta-1 release of Chicago, or planned for a future release" did "not represent a commitment on the part of Microsoft for providing or shipping the features and functionality . . . in the final retail product offerings of Chicago." (PX 388 at MSC 00762631.) An express warning of no commitment cannot possibly be twisted into some assertion that Microsoft made a commitment.

Finally, Novell's argument that Microsoft cannot rely on the beta license agreement to disclaim liability from the antitrust laws (Novell Br. at 109-10) is pure obfuscation. Microsoft has never contended that the beta license agreement is a basis for "disclaiming liability." (Novell Br. at 110.) The contract, along with the other overwhelming evidence that Novell understood that a beta can change, shows that there was no "commitment" and no "deception."

B. The October 3 Decision Was Not Made to Harm Novell Nor to Confer a Benefit on Microsoft Office.

The trial evidence was clear that (a) in September 1994, Novell told Microsoft that it had "not begun any work" using the namespace extension APIs, (b) in October 1994, Novell told Microsoft that it was "OK" with the decision to withdraw support for the namespace extension APIs, (c) throughout the remainder of 1994-95, Microsoft continued to offer assistance to Novell so that it could build applications for Windows 95 and (d) Microsoft's products that competed with Novell's applications never used the namespace extension APIs.

1. Prior to the October 3 Decision, Microsoft Was Unaware that Novell Was Using the Namespace Extension APIs

The only evidence Novell cites to support its assertion that Microsoft and Bill Gates knew that Novell was using the namespace extension APIs prior to October 3, 1994 is a September 22, 1994 e-mail from Brad Struss to multiple recipients (not including Gates),

forwarding a report from Scott Henson, which attributes to someone named "Tom" at WordPerfect/Novell a comment that "there would 'be hell to pay in the press' if [Microsoft] changed the interfaces from the initial release of Chicago to the next release." (Novell Br. at 62; DX 17 at MX 6109494.) While Novell ascribes great importance to this portion of the e-mail, it ignores entirely Struss' later message in DX 17—sent after Henson's report but before October 3—which says that, based on "more specific feedback we've gotten from Lotus & WordPerfect since Scott compiled his data," WordPerfect "ha[d] not begun any work on IShellFolder, IShellView, etc. [the namespace extension APIs]." (DX 17 at MX 6109491.)[8]

There is no evidence that Microsoft knew on October 3, 1994 that Novell was using the namespace extension APIs. (*See* Microsoft Br. at 30-31.) Both Struss and Gates testified to the contrary. As Struss testified, Novell told him in September 1994 that it was "not using" the namespace extension APIs and was not "dependent" upon them. (Struss, Nov. 28

[8] Novell also points to an October 5, 1994 e-mail from Brad Silverberg to Gates in which Silverberg stated that there would be a "firestorm of protest" from ISVs, including WordPerfect, that were using the shell extensions. (Novell Br. at 62 (citing PX 220).) As an initial matter, there is no evidence that Silverberg's prediction about a "protest" was based on any information he had received from Novell/WordPerfect. In fact, Silverberg testified that he did not know his source of information for this e-mail and was "not sure which extensions" his e-mail referred to, because as he pointed out, "[t]here were many different shell extensions." (Jan. 22, 2009 Silverberg Deposition at 125, filed Nov. 10, 2011, Dkt. #278, used at trial on Oct. 26.) Further, the e-mail itself is dated two days after the October 3 Decision, and thus does not support Novell's contention that Microsoft knew before October 3 that Novell was using the namespace extension APIs. As Gates noted when shown this e-mail, "there was a survey that gathered more specific facts" and so "we should look at the survey." (Gates, Nov. 22 Trial Tr. at 3088-89.) The survey is DX 17—the September 22, 1994 e-mail from Struss saying that WordPerfect "ha[d] not begun any work" on the namespace extension APIs. (DX 17.)

Trial Tr. at 3270.)[9] Gates testified that at the time he made the decision, he knew nothing "at all about the specifics of whether [Novell] was using them." (Gates, Nov. 21 Trial Tr. at 2811; *see also id*. at 2828.) Novell has nothing to impeach that unequivocal testimony.

2. Novell Told Microsoft that It Was "OK" with the October 3 Decision

Novell's 144-page brief fails even to mention Struss' October 12, 1994 e-mail saying that Microsoft was "notifying ISVs about the namespace api changes" and reporting that "WP . . . appear[s] to be OK with this." (DX 3 at MX 6055840.) Struss testified that he reached out to WordPerfect and other ISVs after the October 3 Decision so that "if there was going to be any issue or concern," he would be able "to communicate it to the senior executives" at Microsoft. (Struss, Nov. 28 Trial Tr. at 3272.) Consistent with DX 3, Struss also testified that he informed Tom Creighton at Novell of Microsoft's decision to withdraw support for the namespace extension APIs, and that neither Creighton nor anyone else at Novell ever complained about the decision. (*Id*. at 3273.) It is undisputed that shortly after October 3, Novell said it was "OK" with the decision, and raised no issues or concerns about it.

3. Even After The October 3 Decision, Microsoft Continued to Assist Novell in Its Development of Applications for Windows 95

All also agree that before October 1994, Microsoft consistently offered assistance to Novell so that it could build applications for Microsoft operating systems. As Novell's brief

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[9] Struss was asked this question and gave this answer:

> Q. What did you tell others at Microsoft about whether or not Novell WordPerfect planned to use the namespace extension APIs?
>
> A. I told them what I knew to be true or what had been communicated to me from WordPerfect, which is that they were not using it and they were not dependent upon it.

(Struss, Nov. 28 Trial Tr. at 3270.)

states, "Microsoft's cooperation with WordPerfect stretches back to the 1980s and MS-DOS, and continued into the mid-1990s with Microsoft's evangelism of Windows 3.1 and Windows 95." (Novell Br. at 52.)

Novell nevertheless argues that after the October 3 Decision, Microsoft "terminate[d] its course of dealing with respect to the namespace extension APIs"[10] and "also made it more difficult for Novell to deal with documented portions of Windows 95." (Novell Br. at 128; *see also id*. at 65-66, 129.) The evidence showed instead that the cooperation and assistance continued. As Frankenberg testified, even after October 1994, (a) "people in the [operating] systems group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95" (Frankenberg, Nov. 7 Trial Tr. at 1131), (b) Novell's software developers worked with Microsoft's operating system developers "on a regular basis" (Frankenberg, Nov. 8 Trial Tr. at 1217), and (c) Microsoft developers generally "endeavored to be helpful to Novell" (*id.*). Novell also ignores LeFevre, who testified that Microsoft continued to help Novell throughout 1994 and 1995 by, among other things, having Microsoft's developer relations group provide support to and answer questions from Novell, sending a Microsoft employee to Utah "whose job it was to support [Novell] in [the Windows 95] development effort," and even paying for LeFevre and Creighton's trip to Redmond to meet with Microsoft's Windows 95 development team. (LeFevre, Dec. 2 Trial Tr. at 4029-30.)

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[10] As shown below, *see* pp. 47-48 & n.36, *infra*, the correct legal test is whether the general course of dealing has been terminated, not whether Microsoft terminated its cooperation "with respect to the namespace extension APIs." If withdrawal of support for a few APIs were the test (as opposed to cooperation in assisting an ISV to write applications to the operating system in general), then by definition the developer of an operating system would always be prohibited from making any changes to it. There is no logic or precedent for such a conclusion.

The best Novell can do is point to a November 29, 1994 e-mail from Kelly Sonderegger to Dave Miller (Novell Br. at 65 n.32, 128), stating that a Novell employee named Rich Hume "tried to obtain this information concerning hierarchical extensions of the browser and was told the same thing—the APIs will be taken internal because they don't want to support them long-term" (PX 238). This does not contradict the testimony from Novell's CEO that Microsoft continued to offer a wide range of assistance to Novell after October 3, 1994; it merely confirms that declining to provide Novell with information about the namespace extension APIs is the necessary consequence of withdrawing support for them. Likewise, PX 236, a November 1994 e-mail exchange between Sonderegger and Struss, shows that Struss was still trying to help Novell; Struss there says to Novell that even without the namespace extensions, "much can still be done to integrate well with the Windows 95 shell" and to "achieve the equivalent visual functionality of the Windows 95 Explorer" using the CHICOAPP application. (PX 236 at 1.) Novell has no evidence to undermine Struss' testimony that he did his best to help Novell even after the October 3 Decision. (Struss, Nov. 28 Trial Tr. at 3275-76.)

Harral's vague testimony (Novell Br. at 65 n.32, 66, 128-29) does not show otherwise. Harral testified about three calls with members of Premier Support, though he could provide neither the names of the persons with whom he spoke or the dates (or even the months) of the conversations (and Novell produced not a single e-mail or other document that made any reference to the existence of the purported calls). (Harral, Oct. 20 Trial Tr. at 329-31; Harral, Oct. 24 Trial Tr. at 397, 399, 414.) Without providing any specifics, Harral said that the Premier Support personnel with whom he spoke "were starting to give us less and less information" about the Windows 95 shell. (Harral, Oct. 20 Trial Tr. at 345.) In contrast, on cross-examination, Harral conceded that he was "sure" that others at Novell were "getting very good cooperation

from Microsoft." (Harral, Oct. 24 Trial Tr. at 423-24.) Harral's testimony as a whole has to be viewed against the large quantity of evidence about continued cooperation and assistance from Microsoft, including:

- Frankenberg's testimony that Microsoft continued to support Novell's development efforts for Windows 95 and "endeavored to be helpful to Novell" (Frankenberg, Nov. 8 Trial Tr. at 1217; Frankenberg, Nov. 7 Trial Tr. at 1131);

- LeFevre's testimony that Microsoft's developer relations group answered Novell's questions and provided assistance, that Microsoft sent an employee to Novell's offices specifically to assist Novell developers with its Windows 95 development efforts and that Microsoft paid for LeFevre and Creighton to fly to Redmond and meet with the Windows 95 development team (LeFevre, Dec. 2 Trial Tr. at 4029-30);

- Struss' October 21, 1994 e-mail stating that Microsoft was "[w]orking with [Novell's] sr. management to see about getting more focus on their 32-bit release" (*i.e.*, Novell's applications for Windows 95) (DX 2 at MX 6062581);

- Struss' testimony that throughout 1994 and 1995 the "goal and mission" of Microsoft's developer relations group was to help WordPerfect/Novell and other ISVs "get onto Windows 95" and "to ship" applications for Windows 95 (Struss, Nov. 28 Trial Tr. at 3260); and

- An April 7, 1995 e-mail from Scott Nelson of Novell stating that "[t]he good news is that the cooperation between Microsoft and Novell has been very good. The problems are being addressed and fixed. In fact, over the next couple of weeks our developers and testers will visit Redmond once again to make sure that we are making continued progress." (DX 172.)

Scott Nelson's April 7, 1995 e-mail to "DaveL" (perhaps Dave LeFevre), Glen Mella (Novell's Vice President of Marketing), Todd Titensor (Marketing Manager for WordPerfect for Windows) is highly pertinent to this issue. April 1995 was just four months before the release of Windows 95, and is exactly at a time when—if Microsoft had stopped assisting Novell or if the October 3 Decision threatened to delay Novell's development of its products—Novell would have been voicing complaints to Microsoft or at least recording the dire circumstances (in memos to executives or in internal e-mails). There is no evidence that Novell

did any of those things. Instead, Scott Nelson wrote in April that Microsoft's "cooperation . . . has been very good" and that Novell's developers would soon return to Redmond (Microsoft's headquarters) to obtain additional assistance from Microsoft. (DX 172.)

4. The October 3 Decision Conferred No Benefit on Microsoft Office or Other Microsoft Products that Competed with Novell's Applications

Novell falsely asserts that Microsoft used the namespace extension APIs in Microsoft Office and Microsoft Access after the October 3 Decision. (Novell Br. at 104, 108.) This assertion has no evidentiary support. In fact, no commercially released version of Office or Access—or, for that matter, Word, Excel or PowerPoint—ever used the namespace extension APIs. (Gates, Nov. 21 Trial Tr. at 2826; Belfiore, Dec. 5 Trial Tr. at 4280-81.) Even Alepin had to agree; he looked as far as 1996, and found that none of the relevant Microsoft products used the namespace extension APIs. (Alepin, Nov. 10 Trial Tr. at 1641-43.)[11]

C. Novell Never Complained About the October 3 Decision.

In response to the evidence that Novell never complained to Microsoft about the October 3 Decision, Novell cites certain letters between Frankenberg and Gates that are *not* in evidence, and only one of which (DX 215D) Novell even sought to introduce at trial. (Novell

[11] Novell also continues to assert falsely that Microsoft used the namespace extension APIs in Athena (Microsoft's internet mail and news client) and Capone (Microsoft's e-mail client in Windows 95). (Novell Br. at 105, 108-09.) Although Alepin testified on direct examination that a *pre-release* version of Athena used the namespace extension APIs (Alepin, Nov. 9 Trial Tr. at 1435), he admitted on cross—when confronted with the technical analysis conducted by Professor Bennett showing that Athena did not call the namespace extension APIs—that he did not recall what analysis he had done to support his testimony (Alepin, Nov. 10 Trial Tr. at 1643-46). With respect to Capone, a contemporaneous e-mail dated November 7, 1994 from Paul Maritz to Bill Gates, which stated that Capone "ha[d] found ways not to use" the namespace extension APIs (DX 82), confirmed Gates' testimony that the Capone team "got Capone not to call any of these things, so it didn't" (Gates, Nov. 22 Trial Tr. at 3085). In any event, Capone was not a separate product that competed with Novell's; it was a simple e-mail client included in Windows itself, not a component of Office like Outlook. (Gates, Nov. 21 Trial Tr. at 2815; Alepin, Nov. 9 Trial Tr. at 1415.)

Br. at 68-69 n.33.) DX 215D (which was not admitted, *see* Nov. 22 Trial Tr. at 3095-3100), a June 23, 1995 letter from Frankenberg to Gates, is completely silent on the issue of the namespace extension APIs. Instead, in a long airing of grievances, Frankenberg there complained only generally that "Microsoft's OS's contain undocumented calls, features, and other interfaces that are made available to its own applications developers to give competitive advantages to its applications products." (DX 215D at 2.)

At trial, Frankenberg admitted that he "did not" "specify which APIs" he was "talking about." (Frankenberg, Nov. 7 Trial Tr. at 1117-18.) Indeed, in 1994-95, Frankenberg did not even know what the namespace extension APIs were. (*Id.* at 1127.) As Gates testified, the issue of "undocumented calls" discussed in Frankenberg's letter was completely distinct from the issue of the namespace extension APIs. (Gates, Nov. 22 Trial Tr. at 3093-94.) Gates explained that "undocumented calls" referred to instances where "one of our separately shipped applications is calling some API in the operating system that we haven't published." (*Id*. at 3094.) In instances where ISVs brought such "undocumented calls" to Microsoft's attention, Gates testified that "we remedied that by publishing that API or taking out the call." (*Id.*) Of course, at the time of the June 23 letter, Microsoft had yet to ship any applications for Windows 95, and so Frankenberg's complaint about undocumented calls could not possibly have been referring to the namespace extension APIs. In any event, Novell's reliance on a document not in evidence reflects exactly the point that Microsoft has long made: There is no evidence (as opposed to speculation and hypotheses) to support critical elements of Novell's claim.

If Novell had any concerns about the October 3 Decision—or if that decision might delay the release of Novell's applications for Windows 95—Novell had ample opportunity to say so. Frankenberg and Gates met face-to-face for hours on January 10, 1995 (three months

after the October 3 Decision) during which Frankenberg complained about a multitude of issues. (DX 636, Memo from Dave Miller to Frankenberg and others, Jan. 10, 1995.) Frankenberg testified, and the eight pages of detailed meeting minutes (*id*.) confirm, that the namespace extension APIs were never then mentioned (Frankenberg, Nov. 7 Trial Tr. at 1121-22). Frankenberg admitted that he "complained aggressively to Microsoft" about many issues (Frankenberg, Nov. 8 Trial Tr. at 1269-70), but never told Gates "the problem is the namespace extension APIs" or sent any letter to Gates mentioning the namespace extension APIs (Frankenberg, Nov. 7 Trial Tr. at 1118-19). There is no contrary evidence.

Further, Novell does not dispute that there is no writing of any kind indicating that any developer at Novell told senior executives of any problem caused by the October 3 Decision or urged management to complain to Microsoft about the withdrawal of support for the namespace extension APIs. Indeed, Frankenberg testified that he had never seen any internal memorandum regarding the October 3 Decision, and that he was never consulted about the shared code group's decision to spend almost a year attempting to write a custom file open dialog. (Frankenberg, Nov. 7 Trial Tr. at 1132-34; Frankenberg, Nov. 8 Trial Tr. at 1180-81.) Each of Harral, Richardson and Gibb testified that he never spoke with any Novell senior executive regarding what Novell should do in light of Microsoft's October 3 Decision. (Harral, Oct. 24 Trial Tr. at 401-02; Richardson, Oct. 25 Trial Tr. at 703; Gibb, Oct. 26 Trial Tr. at 869.)

* * *

There is no dispute that Novell told Microsoft in October 1994 that it was "OK" with the decision to withdraw support for the namespace extension APIs, and did not complain to Microsoft—or even note internally—that the October 3 Decision had hurt Novell or was causing any delay. This is devastating for Novell. It indicates, among other things, that Novell itself did

not then believe that the October 3 Decision was wrongful or threatened to harm or delay Novell's applications.

D. PerfectOffice for Windows 95 Was Late for Reasons Having Nothing to Do with Microsoft.

1. WordPerfect/Novell Was Consistently Late to Develop Products in the Early to Mid-1990s

As Microsoft has shown (Microsoft Br. at 38-45), WordPerfect/Novell was consistently late to develop products in the 1990s for reasons having nothing to do with allegedly wrongful conduct by Microsoft. These include WordPerfect's failures to anticipate and prepare for major shifts in the software industry, as well as Novell's struggles arising out of the acquisition of WordPerfect Corporation and Quattro Pro in June 1994. In fact, Novell's lawyer conceded in his summation that WordPerfect/Novell was always late: "Yes, we were late to Windows. Yes, we were late to suites." (Dec. 13 Trial Tr. at 5322.)[12] The fact that Novell was late to Windows 95 was par for the course.

Further, the evidence is overwhelming, including testimony from Frankenberg, that Microsoft was the first to create the concept of a suite, giving it a "huge head start" in the suite market and a tremendous advantage over Novell. (Frankenberg, Nov. 7 Trial Tr. at 1060-64, 1080; *see also* Gibb, Oct. 26 Trial Tr. at 823; Bushman, Nov. 28 Trial Tr. at 3153.) By 1994, Novell recognized "how rapidly suites [were] overtaking the stand alone Windows word

[12] Novell's only response in its brief to the overwhelming evidence of its history of tardiness is its contention—never seriously advanced at trial—that Microsoft "hatched a plan" to tell ISVs to develop for OS/2 "while simultaneously developing its own applications for Windows." (Novell Br. at 21 n.10.) This is contradicted most directly by Pete Peterson's testimony that Gates personally "stopped me [at a conference in 1989] and said you need to write for Windows," and that he (Peterson) chose not to heed Gates' advice because he did not want to help Microsoft. (Peterson, Dec. 7 Trial Tr. at 4708, 4670-71.)

processing market." (DX 9 at 6.)[13] DX 9, a WordPerfect for Windows Business Review Exercise, says that as of April 1994, 72.3% of word processors sold in North America for the Windows platform were sold as part of suites, and Frankenberg agreed that by 1994, "customers were buying suites rather than individual products" and "the market was moving quickly from stand-alone products to suites" (Frankenberg, Nov. 7 Trial Tr. at 1068).

Because all agree that the market had moved to suites and Novell did not produce a quality suite until the release of PerfectOffice 3.0 in December 1994 (Frankenberg, Nov. 7 Trial Tr. at 1068; Larsen, Nov. 30 Trial Tr. at 3643-46; *see also* Gibb, Oct. 26 Trial Tr. at 826-27; Bushman, Nov. 28 Trial Tr. at 3214), the popularity of its products was falling rapidly.[14]

2. Quattro Pro Was the Reason Novell Was Late to Release PerfectOffice for Windows 95

In arguing that delays with Quattro Pro were not the reason it was late to release PerfectOffice for Windows 95, Novell relies heavily on—and mischaracterizes—the testimony of Gary Gibb. (Novell Br. at 113-15.) Novell ignores the testimony of every other witness who testified on this subject and all of the contemporaneous documentary evidence.

The documentary evidence was unanimous that problems with Quattro Pro delayed the release of PerfectOffice for Windows 95. (Microsoft Br. at 48-53, 115-17.) Although in late 1994 Novell had been considering a September 30, 1995 release date for

[13] According to Novell's own estimates, sales in the suite market grew from "approximately 800,000 units" in 1992 (DX 267, Suite Marketing Team 1994 Business Plan, Aug. 1994, at 1) to more than "7 million units" in 1994 (DX 223, Market Requirements Document for Storm, at 11). By the time Microsoft made the October 3 Decision, sales of standalone word processors had declined to a very small portion of the total.

[14] This contradicts Novell's implausible theories that its products were so popular that—had they been released in a timely fashion in the second half of 1995—they would have increased competition in the PC operating system market.

PerfectOffice for Windows 95, the Quattro Pro team soon came to "believe[] this is barely achievable with all their resources and with no additional functionality." (DX 211, Project Proposals for "Storm," at 1; *see also* Gibb, Oct. 26 Trial Tr. at 867-68, 870.) By March 1, 1995, Bruce Brereton (Vice President of the Business Applications Group) wrote that because Quattro Pro believed that "December 30th [1995] is a more realistic date," Novell had decided to "move[] the Storm [PerfectOffice for Windows 95] RTM date back by one month (to December 30th)" and to put WordPerfect "on the same time-line as Storm." (DX 221 at NOV-B13528783.) Novell documents from the spring of 1995 listed "Quattro Pro delivering late" as the highest "overall risk" to the timely release of PerfectOffice for Windows 95. (DX 223 (March 23, 1995) at 41; DX 226 (May 26, 1995) at NOV-B01425535.) None of these documents attributed any anticipated delay to any Microsoft conduct.

Throughout 1995, LeFevre attended "daily" meetings with Gibb, Steve Weitzel (Director of WordPerfect for Windows) and Creighton during which they discussed "all the different product challenges" in releasing PerfectOffice for Windows 95 in a timely manner, and they recognized at those meetings that "the product that was causing the biggest problem was Quattro Pro." (LeFevre, Dec. 2 Trial Tr. at 4037, 4045-47.) Karl Ford also attended "regularly scheduled meetings every week or so" in 1995 and learned that "the schedule" for release of PerfectOffice was at risk because of Quattro Pro. (Ford, Nov. 30 Trial Tr. at 3691-92, 3699-70.)

Quattro Pro was not ready even by Christmas 1995. DX 230, a December 23, 1995 e-mail from Brereton to CEO Frankenberg and Executive Vice President Jeff Waxman,[15]

[15] Jeff Waxman was Executive Vice President of the Business Applications Group at Novell and had replaced Ad Rietveld in June 1995. (DX 621, Novell Form 10-K for Fiscal Year 1995, filed on Jan. 26, 1996, at 12.) DX 230 was also copied to Glen Mella, who was Novell's Vice President of Marketing. (PX 426, Novell Business Applications Division Organizational Chart, (*footnote continued*)

reported a mass resignation of Quattro Pro developers in Scotts Valley, leaving the team with "just 2 people." (DX 230.) Nolan Larsen, who went to Scotts Valley in January 1996, testified that the scene was "kind of a trainwreck" (Larsen, Nov. 30 Trial Tr. at 3620) and that Quattro Pro was not "by any stretch of the imagination" completed by that time (*id*. at 3624; *see also* LeFevre, Dec. 2 Trial Tr. at 4062-63; Bushman, Nov. 28 Trial Tr. at 3192-93). Even Frankenberg acknowledged after reviewing DX 230 on the witness stand that Quattro Pro "wasn't released to manufacturing" as of December 23, 1995 and testified that "clearly the product wasn't complete" as of that date. (Frankenberg, Dec. 7 Trial Tr. at 1145.)

Despite the significance of DX 230, which was acknowledged by every witness who saw it, the only mention Novell now makes of this critical document is in a footnote, in which Novell falsely states that Microsoft relies "on a single document, DX 230, and the testimony of Mr. Frankenberg," which "is insufficient to support judgment in Microsoft's favor as a matter of law." (Novell Br. at 114 n.64.) In fact, Microsoft cited eight documents and the testimony of five witnesses (Microsoft Br. at 48-53) to show that Quattro Pro was the cause of delay for PerfectOffice for Windows 95.[16] And clear testimony from the Chief Executive Officer is certainly sufficient—especially when Novell has nothing even remotely equivalent.

(*footnote continued*)
Oct. 16, 1995, at NOV00279434.) Novell produced no document addressed to senior executives that even implied that the delay in getting PerfectOffice out the door was attributable to anything Microsoft did.

[16] DX 230 is alone sufficient to show that Quattro Pro was not complete by the end of 1995. As the Court recognized and stated outside the presence of the jury, "there could not be clearer evidence that Defendant's Exhibit 230 says that as of January 1996 Quattro Pro is not ready yet." (Nov. 21 Trial Tr. at 2925.) DX 230 was sent by Brereton, who was then Vice President of the Novell Business Applications Group (PX 372), to Frankenberg, Novell's CEO. The reliability of such a report cannot be questioned, and Novell has not a single document, not even an e-mail from a low-level software developer, that contradicts the fact that Quattro Pro was not ready at Christmas 1995. The Court will recall Novell's assertion at trial that it was necessary to get its
(*footnote continued*)

Against this mass of evidence, Novell cites only the testimony of Gibb, and then exaggerates what he said. Novell contends that Gibb testified "that the resignation of Quattro Pro developers in December 1995 could not have affected the suite's development schedule, because Quattro Pro was already ***code complete*** by then" (Novell Br. at 113-14 (emphasis in original)), but Gibb actually testified that Quattro Pro was "***basically*** code completed" on December 23, 1995 (Gibb, Oct. 26 Trial Tr. at 808 (emphasis added)). Even this fails to help Novell, because December 23, 1995 was 120 days after the release of Windows 95, and additional time is necessary after coding is completed before a product is ready to be released to manufacturing. (*See* Frankenberg, Nov. 7 Trial Tr. at 1145.)

As a last resort, Novell relies on the "proffer" its lawyers made in a brief filed on December 13, 2011 about testimony Gibb supposedly would have offered in rebuttal. (Novell Br. at 114 n.63.) This is not evidence that the Court can or should consider on this Rule 50(b) motion. As the Court will recall, Novell informed the Court on December 12 that it intended to call Gibb "to provide some rebuttal with respect to" Nolan Larsen's testimony that "Quattro Pro was not finished" in December 1995. (Dec. 12 Trial Tr. at 5102-03.) The Court indicated that "testimony about Quattro Pro" was not a proper subject for rebuttal (*id*. at 5112-13), after which Novell's counsel stated that Novell wished to "withdraw" its request to put on a rebuttal case (*id*. at 5120). The Court subsequently told Novell's counsel that "if you have a specific proffer that you want . . . I'll be here at 7:45 tomorrow morning and I'll get a proffer." (*Id*. at 5122.)

(*footnote continued*)
products out the door within 90 days of August 24, 1995 (the release of Windows 95) if those products had any chance of gaining market share. (*See, e.g.*, Novell Br. at 7 (explaining the importance of "releas[ing] a marketable product within the critical 90-day window of opportunity for new applications"); *see also id*. at 66, 88, 120.) Ninety days from August 24 is November 24.

"A 'proffer' is the actual documentary evidence or sworn testimony that is presented in court. It does not include the attorney's unsworn statement explaining what he hopes the evidence will show which prefaces the proffer." *United States* v. *Ramirez-Rodriguez*, 2000 U.S. App. LEXIS 18118, at *5 (10th Cir. July 27, 2000) (unpublished); *accord United States* v. *Henry*, 2010 WL 5559207, at *8-9 (N.D. Ga. Dec. 7, 2010) (denying defendant's motion to reopen record in part because, although counsel represented what testimony would be, he failed to "present[] any affidavit in support of his motion"). Instead of making a true proffer, Novell filed on December 13 a memorandum—without any affidavit from Gibb—in which Novell's lawyers contended that, if called, Gibb would testify, but only "brief[ly]," about certain subject matters. (Novell's Proffer in Response to Microsoft's Motion to Preclude "Improper Rebuttal," filed Dec. 13, 2011, Dkt. #375, at 2.) In open court on the morning of December 13, counsel for Microsoft stated that "[i]f Mr. Gibb is here and they want to make a proffer of what he would say outside the presence of the jury, I suppose we should call him and see." (Dec. 13 Trial Tr. at 5154.) The Court then indicated a willingness to hear from Mr. Gibb, if he were present. (*Id*. at 5155.) Gibb was neither present in the courtroom nor, to Microsoft's knowledge, in the courthouse. In sum, Novell never made any true "proffer"—it never submitted evidence from Gibb or called him to testify outside the presence of the jury—and thus Novell's current assertions about what Gibb would have said in rebuttal cannot constitute evidence that may be considered on a Rule 50 motion. *Ramirez-Rodriguez*, 2000 U.S. App. LEXIS 18118, at *5 ("An attorney's unsworn statement regarding what he thinks a witness will say when he testifies is not evidence and has no legal effect." (citation omitted)).

Moreover, DX 217 and DX 231 do not, as Novell says, "corroborate[]" Novell's position. (Novell Br. at 114-15.) DX 217, an employee self-review by Dorothy Wise in

March 1995 (long before Novell contends that Quattro Pro for Windows 95 was "code complete"), discussed localization problems with Quattro Pro 6.0, a 16-bit product designed for Windows 3.1, and not Quattro Pro for Windows 95. (DX 217 at NOV B07466893.) In fact, DX 217 includes Wise's comment that localization problems with 16-bit versions of Quattro Pro "caused a later start on the Windows 95 project, potentially impacting our ability to ship Typhoon/Storm [Quattro Pro/PerfectOffice for Windows 95] in Q4FY95." (*Id.* at NOV B07466895.) DX 217 shows that problems with Quattro Pro delayed Novell throughout 1995.

Novell's continued reliance on DX 231 is nothing short of astonishing. As the Court will recall, Novell's lawyer used DX 231—for the very first time at the trial—in the rebuttal portion of his summation. But rather than show the jury the entire exhibit, Novell prepared a slide showing a page from DX 231 that had been redacted to remove the two right-hand columns. Novell used the unredacted portion of DX 231 (the piece it showed the jury) to argue that "Mr. Gibb was telling you the truth" and that Quattro Pro was just "fixing bugs" in December 1995 and that "[t]hey would have been ready to ship Quattro Pro . . . within the critical time to market." (Novell's Summation, Dec. 13 Trial Tr. at 5321-22.) The redacted portion of the relevant page (not shown to the jury) directly contradicted the argument from Novell's lawyer; it said that the "RTM" date for Quattro Pro—*i.e.*, the date Quattro Pro was scheduled to be released to manufacturing—was March 31, 1996. When Microsoft pointed this out in writing, the Court reacted in an entirely appropriate way, instructing the jury as follows:

> During his rebuttal argument yesterday Mr. Johnson argued that Quattro Pro was, quote, complete, unquote, by August 23, 1995 based upon DX-231, a January 11, 1996 Novell document entitled, quote, development project status. Although DX-231 is in evidence, no witness testified about it. Mr. Johnson put on the screen a slide showing a portion of the second page of DX-231 containing a column entitled, quote, code complete, unquote, in which the August 23, 1995 date referred to by Mr. Johnson in his

> argument is stated. The slide shown to you by Mr. Johnson omitted another column entitled, quote, RTM, which, according to the testimony of Mr. Frankenberg, means ready to manufacture. The date under that column indicates the ready to manufacture date for Quattro Pro was March 31, 1996.

(Dec. 14 Trial Tr. at 5337.) Despite this, Novell relies on the same portion of the document that improperly "omitted" the key information.

DX 231 confirms that Quattro Pro was not ready in 1995 at all. The Quattro Pro release to manufacturing date—March 31, 1996—makes the same point upon which Microsoft relies for its present motion: The delay in releasing PerfectOffice for Windows 95 was a function of Novell's failure (which all concede had nothing to do with the October 3 Decision) to have Quattro Pro ready in 1995.[17]

E. In Addition to Quattro Pro's Delay, Novell's Own Poor Business Choice Was Responsible for Any Delay.

Novell concedes that upon learning of the October 3 Decision, it had three development options: (1) to continue using and relying on the namespace extension APIs; (2) to use the Windows 95 common file open dialog (provided to ISVs at no cost); or (3) to build a custom file open dialog that would, in Novell's view, be superior to the Windows 95 common file open dialog. (Novell Br. at 66.)

With respect to Option 1, Novell claims that by October 1994 it was nearly finished developing a file open dialog that called the namespace extension APIs. (Novell Br. at 59.) Novell's former developers confirmed that because Novell was so far along in using these

[17] Novell failed to introduce into evidence any document corroborating its contention that the delay in releasing PerfectOffice was instead caused by the October 3 Decision. Whether that failure resulted from the absence of any such documentary evidence or from Novell's spoliation and/or breach of its duty to preserve documents, the outcome is the same—Novell is unable to provide a legally sufficient evidentiary basis for a reasonable jury to find that the October 3 Decision caused delay.

APIs, the shared code group could have completed its work quickly by calling these APIs after the October 3 Decision. Richardson testified that even after Microsoft withdrew support for the namespace extension APIs, "calling these API's was simple. We had the documentation. We knew how to call them." (Richardson, Oct. 25 Trial Tr. at 675.) Harral agreed. (Harral, Oct. 20 Trial Tr. at 342.)[18]

Instead, Novell argues weakly that "Microsoft had erected roadblocks that Novell could not surmount," pointing to Premier Support's supposed refusal (according to Harral) to provide assistance after the October 3 Decision. (Novell Br. at 66.) As an initial matter, Novell's argument disregards entirely Harral's more pertinent testimony—that Novell could have chosen Option 1 because it was close to completing work on a file open dialog that called the namespace extension APIs. (Harral, Oct. 24 Trial Tr. at 436-37; *see also* Richardson, Oct. 25 Trial Tr. at 675-77, 687.) Indeed, Richardson testified that Novell ultimately chose not to use the namespace extension APIs because "when we used the interfaces which had been published with the Microsoft NameSpaces it was very slow." (Richardson, Oct. 25 Trial Tr. at 631-32; *see also id*. at 601-02.) Moreover, as shown above, *see* p. 14, *supra*, Harral offered only vague testimony that he spoke with unnamed people on the Premier Support hotline on some unspecified dates and provided no detail about those purported conversations. There is not a single document that shows that such a conversation even took place.[19] In any event, as Richardson testified, Novell

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[18] Additionally, Novell has no answer to the Court's point that Novell could have "temporarily used the [namespace extension] API[s]" in order to get out a product right away, while continuing to work on its own custom file open dialog that could be utilized in a subsequent version of PerfectOffice. (Oct. 27 Trial Tr. at 924-25.)

[19] Of course, once support for the namespace extension APIs was withdrawn, Premier declined to provide assistance about (or "support for") those specific APIs.

had figured out how to call those APIs even before the October 3 Decision. (Richardson, Oct. 25 Trial Tr. at 675-77, 687.)

As for Option 2, Novell does not contest that it would have been "quite easy" for it to release its products using the Windows 95 common file open dialog that Microsoft provided for free. (Microsoft Br. at 54-55 (citing Gibb, Oct. 26 Trial Tr. at 847-48, and Harral, Oct. 24 Trial Tr. at 502 ("Novell could have come out with a product in '95 that utilized the Windows common file open dialog.")).) Novell's only response is that using the Windows 95 common file open dialog would "alienat[e] its installed base" because Novell's custom file open dialog was "different from Microsoft's common file open dialog in several ways," and thus Option 2 was supposedly unsatisfactory. (Novell Br. at 67.) This argument is contrary to Harral's testimony that the shared code group considered Option 2 "many times" and that "every time" Option 2 "came back on the table because it would have been an easier option than the third." (Harral, Oct. 24 Trial Tr. at 365-66.)

Others at Novell advocated for Option 2. Ford told Gibb and Weitzel in 1995 that the "safest route" was to use "the common open dialog" in Windows 95 if "they were concerned about schedule" and he recalled discussions in 1995 that Novell should "use the common open dialog right now" and include a custom file open dialog later, "in the next release." (Ford, Nov. 30 Trial Tr. at 3710-11.) Likewise, LeFevre testified that during 1995 he "became convinced" that Novell's best option was to abandon the custom file open dialog and use the Windows 95 common file open dialog because Option 2 could have been accomplished with "almost no work on our part." (LeFevre, Dec. 2 Trial Tr. at 4041-42.) But Novell rejected Option 2 because it wanted to "do something cooler" and "exceed what was the default stuff." (Gibb, Oct. 26 Trial Tr. at 848-49; *see also* Richardson, Oct. 25 Trial Tr. at 629-30.) The cause of delay—if not

Quattro Pro—was Novell's own poor decision to pursue the most difficult and most time-consuming alternative.[20]

Novell can point to no evidence of any deliberative process among senior management concerning whether to choose Options 1 or 2 instead of the time-consuming Option 3, in contrast to the existence of formal memoranda that addressed less important decisions.[21] (*See* Microsoft Br. at 36-38.) Novell also fails to acknowledge Frankenberg's testimony that any action that could jeopardize the timely release of WordPerfect would not have been left to the developers Novell called to the witness stand,[22] but rather would have been

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[20] Alepin explained that—even if Option 3 were the only choice—Novell could have "add[ed] whatever custom file locations . . . [it] wanted to add" to its own file open dialog "just using the common controls in Windows 95," which would have saved Novell time. (Alepin, Nov. 10 Trial Tr. at 1664; *see also id*. at 1603-04 ("It was possible to make a—to make use of these common controls to use them for many different application purposes, one of which could be to pretend to be like the Windows Explorer.").) Novell has no answer to this point. Finally, as Alepin acknowledged, Novell could have just ported the file open dialog from PerfectOffice 3.0 (its suite written to Windows 3.0 and 3.1) to its version for Windows 95, which would have offered its users the same "top level functionality." (Alepin, Nov. 10 Trial Tr. at 1580-81, 1587.) In sum, the efforts of Novell's shared code group resulted in a file open dialog that was little different from the one Novell had already created for the Windows 3.1 version of PerfectOffice, a product that also ran on Windows 95. (*Id*. at 1587.)

[21] The evidence at trial included three separate documents addressed to Novell executives discussing whether Novell would participate in the Windows 95 logo licensing program or on what terms: (a) a January 12, 1995 memorandum from Calkins to Frankenberg, Rietveld, Moon, Mella and others discussing possible Novell responses to Microsoft's logo requirements (DX 155), (b) a February 2, 1995 e-mail from Todd Titensor to Ryan Richards describing Frankenberg's decision to oppose one of the logo requirements or refuse to participate in the logo licensing program (DX 157), and (c) a March 6, 1995 e-mail from Calkins to Microsoft, copying Frankenberg, Mella and others, requesting an exemption from Microsoft's logo program requirements (DX 22). Frankenberg testified that the January 12, 1995 memo (DX 155) was the type of formal memorandum that would "normally" be written when Novell was faced with an important strategic or tactical decision (Frankenberg, Nov. 8 Trial Tr. at 1180-81). No such memo exists with respect to the supposedly critical choice facing Novell regarding which of the three options to choose after learning of the October 3 Decision.

[22] In February 1995, Richardson reported to Harral, who reported to Jim Johnson, who reported to Creighton. Creighton and Gibb were two of ten people who reported to Brereton, the

(*footnote continued*)

referred to some or all of four senior executives: Ad Rietveld, Executive Vice President of the Business Applications Group; Dave Moon, Senior Vice President of the same group; Mark Calkins, Vice President and General Manager of that group; and Glen Mella, Vice President of Marketing. (Frankenberg, Nov. 7 Trial Tr. at 1140-42; Frankenberg, Nov. 8 Trial Tr. at 1179-80.) Novell did not call any of these four former senior executives to testify, and has no document showing that any of them (or Frankenberg) ever considered any of these issues.

According to Novell, its "top priority was to release a marketable product within the critical window of opportunity after the Windows 95 release." (Novell Br. at 66.) By Novell's own admission, it could easily have done so. Microsoft cannot be blamed for the decision to choose a more difficult and risky path that Novell's engineers were unable to accomplish in a timely manner.

F. None of Novell's Products Achieved Sufficient Market Share to Threaten—or Even Affect—the Applications Barrier to Entry.

Novell does not dispute the market share numbers set forth in Microsoft's Opening Memorandum: WordPerfect's share on the Windows platform was about 20%—and declining—in 1994, and PerfectOffice 3.0 had a mere 8% of the suite market on Windows in 1995. (Microsoft Br. at 63-65; Novell Br. at 26.)[23] Not surprisingly, Novell omits any

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(*footnote continued*)
Vice President of the Business Applications Group. (PX 372 at 1-2.) Brereton reported to Dave Moon, Senior Vice President of Development for the Business Applications Group. (DX 380 at 14.) Moon reported to Ad Rietveld, Executive Vice President for the Business Applications Group. (*Id*. at 13.) Rietveld (later replaced by Waxman) reported to Frankenberg. (*Id*. at 12.) If the viability of PerfectOffice had been threatened by any Microsoft conduct, surely someone above Gibb's level would have spoken up. There is no evidence that any of them did.

[23] Novell also does not dispute that the low market share of PerfectOffice 3.0 for Windows 3.1 (the 16-bit product that was released in December 1994) cannot be blamed on the October 3 Decision (which could have affected only products written for Windows 95).

discussion of Quattro Pro's market share during any year, but as Microsoft proved, Quattro Pro's share of the spreadsheet market on Windows was even lower—peaking at 7% in 1993 and decreasing to 1.8% by 1995. (Microsoft Br. at 65 n.45.)

The theory on which Novell proceeded to trial was that its "popular applications might undermine Microsoft's monopoly power." (Sept. 27, 2011 Pretrial Order, Dkt. #151, at 3.) It is entirely untenable to contend that an 8% share made PerfectOffice popular enough to imperil or erode—or even affect—the applications barrier to entry.[24]

ARGUMENT

APPLICABLE STANDARD

In its Opening Memorandum, Microsoft clearly set forth the proper Tenth Circuit standard on this motion. "To survive a Rule 50 motion, a plaintiff must present 'substantial evidence' in support of its case." (Microsoft Br. at 59 (quoting *Webco Industries, Inc*. v. *Thermatool Corp*., 278 F.3d 1120, 1128 (10th Cir. 2002)).) Under Rule 50, "'[t]he question is not whether there is literally no evidence supporting the nonmoving party but whether there is evidence upon which a jury could properly find for that party.'" (Microsoft Br. at 59 (quoting *Herrera* v. *Lufkin Industries, Inc.*, 474 F.3d 675, 685 (10th Cir. 2007)).) This is governing Tenth Circuit law.[25]

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[24] As Frankenberg acknowledged, by 1994 "customers were buying suites rather than individual products." (Frankenberg, Nov. 7 Trial Tr. at 1068; *see also* DX 9, WordPerfect for Windows Business Review Exercise, at 6 (noting, in July 1994, "how rapidly suites [were] overtaking the stand alone Windows word processing market"); DX 267, Novell Suite Marketing Team's Business Review Exercise, at 1 (commenting that "[w]e are losing accounts to the suite").) Thus, it is only PerfectOffice's popularity—not WordPerfect's—that could possibly make a difference.

[25] In *Arnold Oil Properties L.L.C.* v. *Schlumberger Technology Corp*., 2012 WL 698891, at *5 (10th Cir. March 6, 2012)—the most recent Tenth Circuit case addressing this subject—the (*footnote continued*)

Novell criticizes Microsoft for failing to "acknowledge" the language in *Shaw* v. *AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 529 (10th Cir. 2000), which, according to Novell, stands for the proposition that "[a] Rule 50 motion may not be granted unless there is only one conclusion that a reasonable jury could have reached." (Novell Br. at 3.) Novell then argues that this means that judgment as a matter of law is appropriate only if "the evidence 'so overwhelmingly favors' Microsoft that no rational person could find for Novell." (Novell Br. at 3 (quoting *Shaw*, 213 F.3d at 529).) This is way off the mark. Novell itself misquotes the Court's statement in *Shaw*.[26] Moreover, the Tenth Circuit recently explained that the actual language in *Shaw* was meant to set forth the same standard that Microsoft states above and in its Opening Memorandum (at page 59). *Specialty Beverages, L.L.C.* v. *Pabst Brewing Co.*, 537 F.3d 1165, 1175 (10th Cir. 2008) ("In other words, the question is not whether there is literally no evidence supporting the nonmoving party but whether there is evidence upon which the jury could properly find for that party.") (quotation and alterations omitted).

* * *

Applying this standard, this motion should be granted on any one or more of these independent bases: (1) the withdrawal of support for the namespace extension APIs did not contribute to the maintenance of Microsoft's monopoly in the PC operating system market under

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(*footnote continued*)
Tenth Circuit set forth and applied the very same standard that Microsoft articulated in its Opening Memorandum. *See also Century 21 Real Estate Corp.* v. *Meraj International Investment Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003); *Godinet* v. *Management & Training Corp.*, 56 F. App'x 865, 869-70 (10th Cir. 2003); *United Phosphorous, Ltd.* v. *Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir. 2000); *Bankers Trust Co.* v. *Lee Keeling & Associates, Inc.*, 20 F.3d 1092, 1099-1100 (10th Cir. 1994).

[26] The Court in *Shaw* said that "[j]udgment as a matter of law is improper unless the evidence so overwhelmingly favors the moving party as to permit no other rational conclusion." 213 F.3d at 529.

either causation standard; (2) Microsoft's October 3 Decision did not constitute anticompetitive conduct under binding Tenth Circuit precedent; (3) the October 3 Decision was not the cause of any delay in the release of Novell's applications for Windows 95; (4) Novell is entitled to no damages because Novell's products could not have been ready within 60 days of the release of Windows 95; (5)-(8) and for the other reasons set forth at pages 69-76, *infra*.

I. MICROSOFT'S WITHDRAWAL OF SUPPORT FOR THE NAMESPACE EXTENSION APIs DID NOT HARM COMPETITION IN THE PC OPERATING SYSTEM MARKET.

A. There Was No Harm to Competition Under Either of Novell's Theories.

The evidence at trial failed to establish that Microsoft's allegedly wrongful conduct caused harm to competition in the PC operating system market. (Microsoft Br. at 59-90.) First, the evidence refutes Novell's franchise applications theory, which posits that Novell's Three Products were sufficiently popular that their availability on an alternative operating system would popularize that operating system and weaken Microsoft's PC operating system monopoly. Second, there was insufficient evidence that Novell's software possessed any of the characteristics of cross-platform "middleware" that could possibly threaten—or even weaken—the applications barrier to entry.

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

Under its franchise applications theory, Novell was required to prove that PerfectOffice, WordPerfect and Quattro Pro were so popular that their availability on rival operating systems would allow those operating systems to surmount the applications barrier to entry and threaten Microsoft's monopoly in the PC operating system market. (*E.g.*, Novell's Memorandum Regarding Proposed Final Jury Instructions and Verdict Forms, filed Dec. 5, 2011, Dkt. #336, at 4.) The evidence at trial refuted this theory.

To begin with, the Findings of Fact on which Novell obtained collateral estoppel contradict the entire premise of Novell's franchise applications theory. Finding 37 explains that the applications barrier to entry arises from the "vastly larger number" of applications that run on the Windows operating system. (Finding 37.) Indeed, Novell cites to Finding 30 (Novell Br. at 28, 43-44), which states that the applications barrier to entry arises from the tens of thousands of a "large and varied set of high-quality, full-featured applications." (Finding 30; *see also* Findings 37-39.) The claim that three of Novell's applications could allow a rival operating system to surmount the applications barrier to entry runs contrary to these binding Findings.[27]

Novell also agrees that under its franchise applications theory, its products had to be sufficiently popular to turn another operating system into an attractive alternative to Windows. (Novell Br. at 89, 143.) There was, however, no evidence that Novell's applications were sufficiently popular. As Microsoft has demonstrated, WordPerfect had 16% of the Windows market in 1995, PerfectOffice had 3.6% and Quattro Pro had 2%. (*See* Microsoft Br. at 63-66.) Even under the market share figures used by Novell (Novell Br. at 26), WordPerfect's market share on Windows was about 20% in 1994 and PerfectOffice 3.0 had 8% of the Windows suite market in 1995.[28] Those shares could not make Novell's Three Products sufficiently popular to attract users to non-Windows operating systems.

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[27] Microsoft's Opening Memorandum pointed out that the collaterally-estopped Findings are binding on both sides in this case. (Microsoft Br. at 60-61.) Novell says not a word to the contrary, thus conceding this point as well.

[28] As demonstrated in Microsoft's Opening Memorandum, the installed base of WordPerfect on all PCs (including on the DOS platform) is irrelevant to determine whether WordPerfect had sufficient popularity to impact the applications barrier to entry because (a) during the relevant time period, DOS was becoming increasingly obsolete, and (b) only a small percentage of WordPerfect for DOS users continued to use WordPerfect when they switched to Windows. (Microsoft Br. at 63-64 n.43.) Novell's brief failed to respond, thus conceding this point.

Novell does not dispute that in the late 1980s and early 1990s there were versions of WordPerfect that ran on many non-Microsoft operating systems, but the availability of WordPerfect on those other operating systems in no way caused them to become popular or diminished Microsoft's large share of the PC operating system market. (Microsoft Br. at 67-69.) Novell concedes this reality, stating that prior to Novell's acquisition of WordPerfect Corporation in 1994, "the company had written WordPerfect to over a dozen different operating systems, including DEC, NeXT, Macintosh, Amiga, DOS, Windows, and OS/2." (Novell Br. at 39.) Despite this, Microsoft's share of the PC operating system market was always above 90% in the relevant period. (Finding 35.) Novell challenges none of this. Additionally, by 1994, Novell had greatly diminished its development efforts on those other platforms and was focusing exclusively on developing WordPerfect for the Windows platform. (Microsoft Br. at 67-69.)

2. The Evidence Is Overwhelming that Novell's Software Lacked All Three Required Elements of Middleware

The trial evidence also established that PerfectOffice, WordPerfect and Quattro Pro were in no way a species of "middleware" that could affect competition in the PC operating system market. (Microsoft Br. at 69-80.) As Professor Noll testified and/or as set forth in the Findings, "middleware" has the potential to threaten the applications barrier to entry if it has three defining characteristics: The software must (1) be cross-platform in the sense that it runs on multiple PC operating systems (*e.g.*, Noll, Nov. 15 Trial Tr. at 1925-26); (2) be available on "all or nearly all of the PCs" running the "dominant operating system," *i.e.*, Microsoft Windows (*e.g.*, Noll, Nov. 15 Trial Tr. at 1923-26); and (3) expose a sufficiently broad set of APIs to enable ISVs profitably to develop full-featured personal productivity applications that rely solely on the APIs exposed by the "middleware" (*e.g.*, Findings 28, 68, 74).

First, Novell does not dispute that software must be cross-platform to be the sort of "middleware" described in the Government Case. (*See* Novell Br. at 29-31.) Indeed, Professor Noll acknowledged this, testifying that based on "the findings of fact," middleware "can have the effect of increasing competition in the operating system market by virtue of, first of all, gaining a substantial number of consumers, and then, secondly, providing the opportunity to run that particular application or middleware product on numerous operating systems." (Noll, Nov. 14 Trial Tr. at 1717-18; *see also id*. at 1768; Noll, Nov. 15 Trial Tr. at 1925-26.) Novell does not dispute—or even address—the evidence that during the entire period during which Novell owned these products (from December 1994 to March 1996) PerfectOffice was not cross-platform. Frankenberg, Gibb, Harral and Noll testified that Novell was not developing a version of PerfectOffice for any operating system other than Windows.[29] (Microsoft Br. at 71-72.)

Instead, Novell tries to confuse the issue by arguing that various versions of WordPerfect were written for non-Microsoft operating systems—such as the character-based DOS and the non-Intel compatible Apple Macintosh operating system. (Novell Br. at 39-44.) But under its own theory, Novell's supposed "middleware" was its PerfectFit technology, which Novell allegedly bundled with its PerfectOffice suite for Windows. (Novell's Summation, Dec. 13 Trial Tr. at 5224.) The availability of predecessor versions of WordPerfect for operating systems such as DOS is irrelevant because those versions did not contain the "middleware" elements that were purportedly part of PerfectOffice. (Microsoft Br. at 72 & n.53.) Indeed, a

[29] Novell speculates that PerfectOffice might have become cross-platform at some later—and unspecified—time in the future. Specifically, Novell argues that "Mr. Harral testified that Novell intended to make the entire PerfectOffice suite cross-platform after the initial release of PerfectOffice." (Novell Br. at 43; *see also id.* at 30.) Novell's supposed intent, however, is irrelevant. There was no evidence at trial that Novell had engaged in any development of PerfectOffice for operating systems other than Windows.

standalone application for a non-Windows operating system would have little or no use for shared code, which was the glue that held together the different applications in Novell's PerfectOffice suite for Windows.

Importantly, if Novell had used the namespace extension APIs as part of its shared code, that shared code could not have been cross-platform. This is because the namespace extension APIs were "platform specific" to Windows. (Alepin, Nov. 9 Trial Tr. at 1482-83; Alepin, Nov. 10 Trial Tr. at 1532-33; *see also* Bennett, Dec. 12 Trial Tr. at 5023 (the "NameSpace extension APIs . . . [were] a unique component of Windows 95"); Murphy, Dec. 7 Trial Tr. at 4783-84.) Indeed, the very nature of Novell's desired use of the namespace extension APIs would work only on Windows: Harral and Richardson testified that Novell wanted to embed its QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery and FTP/HTTP browser directly in the Windows 95 shell, thereby augmenting Windows 95. (Harral, Oct. 20 Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 372-74; Richardson, Oct. 25 Trial Tr. at 629-30, 638, 690-92.) Novell's argument that its PerfectFit technology could have been cross-platform "middleware" if it had used the namespace extension APIs thus makes no sense. As the Court noted, the evidence clearly showed that Novell was seeking to "marry the two products, the [Windows 95] operating system and WordPerfect . . . both through 1996 and the foreseeable future" (Oct. 27 Trial Tr. at 928-29), which is antithetical to the notion that PerfectOffice was a "middleware" alternative to Windows 95.

Second, as Noll acknowledged, Novell's software had to run on "all or nearly all" PCs running the "dominant operating system" (which Professor Noll defined as "the category of Microsoft or Microsoft compatible operating systems") in order to be "an attractive option" for

other ISVs to write to, rather than to the underlying operating system. (Noll, Nov. 15 Trial Tr. at 1923-26.) Noll further explained that "to be an individual threat all by yourself you have to be on most of the dominant operating system" and therefore Novell's software "has to have a large market share" and be present on "most" Windows PCs. (*Id.* at 1923.)[30]

The evidence is conclusive that Novell's Three Products were not by any stretch of the imagination present on "most" or "all or nearly all PCs." As shown above, by the time Windows 95 was released in August 1995, the market shares of Novell's Three Products was small and on a downward trajectory. In 1995, WordPerfect had 16% of the Windows market, PerfectOffice had 3.6% and Quattro Pro had 2%. *See* pp. 30-31, 34, *supra*. Moreover, for purposes of determining the percentage of Microsoft PCs on which Novell's software was present, Novell does not dispute that these low market share numbers must be cut in two because only about half of all PCs then had office suites or any of their component applications installed on them. (Murphy, Dec. 7 Trial Tr. at 4750, 4788-89.)[31]

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[30] Novell contends that "Noll has never imposed a requirement that middleware must be . . . 'available on all or nearly all PCs' before it could weaken the applications barrier to entry" and instead that "Dr. Noll testified that those characteristics were necessary to 'completely destroy' the applications barrier to entry,[] but it 'is not correct to say that something less than that couldn't increase competition' by weakening, though not eliminating, the applications barrier to entry." (Novell Br. at 90 (quoting Noll, Nov. 15 Trial Tr. at 1926).) Tellingly, Noll provided no testimony as to what lesser threshold would be necessary to "weaken" the applications barrier to entry, nor did he testify that Novell's software met that requirement. As shown below, no matter how low a threshold Novell seeks to manufacture, the evidence at trial established that Novell's products fall far short of this second requirement of "middleware."

[31] At trial, Professor Noll opined that the installed base of WordPerfect, rather than the market share of Novell's products, was the appropriate metric to determine whether Novell's "middleware" was sufficiently popular to become an attractive platform to which ISVs would be willing to write applications. (Noll, Nov. 14 Trial Tr. at 1762.) As Microsoft has explained, installed base is irrelevant for purposes of Novell's middleware theory, because (a) that installed base was on a character-based DOS platform, (b) WordPerfect for DOS had no middleware capability, and (c) Novell's internal documents confirmed that Novell's historic success on the DOS platform did not translate into success on Microsoft Windows. (Microsoft Br. at 74-75.)

(*footnote continued*)

None of this evidence at trial is challenged or even addressed in Novell's brief. Nor does Novell make any attempt to explain how products that had such low market shares could be an attractive platform for ISVs, especially given that a developer writing to Windows would gain access to more than 90% of the PC operating system market. (*Id*. at 4789-90.) Thus, the evidence is uncontroverted that Novell's software was not even close to being sufficiently popular to be a "middleware" threat that could affect competition in the relevant market.

Third, the evidence at trial showed that the claimed "middleware" was incapable of supporting full-featured personal productivity applications (something essential to having any ability to affect competition in the PC operating system market). Until trial, Novell had consistently stated that cross-platform "middleware" must expose sufficient APIs such that full-featured personal productivity applications could profitably be written solely to those APIs rather than the APIs exposed by Windows, thus allowing the applications to run on any operating system. (*See* Microsoft Br. at 79-80 & n.56.) Importantly, at Novell's urging in 2007, the Fourth Circuit defined "middleware" as "software products that have the capability to serve as platforms for software applications themselves. They expose, or make available, their own APIs, and theoretically, software developers could rely upon these APIs *rather than Windows's APIs . . . .*" *Novell, Inc.* v. *Microsoft Corp*., 505 F.3d 302, 308 n.14 (4th Cir. 2007) (citing *United States* v. *Microsoft*, 253 F.3d at 53) (emphasis added). Indeed, Novell quoted and adopted this exact same definition of "middleware" when it returned to the Fourth Circuit in

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(*footnote continued*)
Moreover, Novell now concedes that Noll's testimony at trial that "WordPerfect still ha[d] about half of the install[ed] base in 1995" if one includes DOS versions of WordPerfect (Noll, Nov. 14 Trial Tr. at 1762) was incorrect, and that WordPerfect's installed base for word processing in 1994 was only 36.4% (Novell Br. at 70 (citing PX 599A); *see also* Microsoft Br. at 74 & n.54 (explaining how the 36% amount is derived from PX 599A)). Even relying on this figure for WordPerfect's installed base, 36% falls far short of a viable "middleware" platform.

2010. (Novell Brief to the Fourth Circuit, Case No. 10-1482, filed Aug. 6, 2010, Dkt. #19, at 16 n.5; *see also* Compl. ¶¶ 44, 50.)

The binding Findings likewise show that in order to affect the applications barrier to entry, the software must expose sufficient APIs so that full-featured personal productivity applications can be written solely to those APIs. For example, Finding 28 states that only software that "exposes enough APIs to allow independent software vendors ('ISVs') profitably to write full-featured personal productivity applications that rely solely on those APIs" can pose a threat to Microsoft's monopoly position. Further, Finding 74 explains that the threat (there, merely a "nascent" threat) that Sun's Java technology posed to Microsoft's monopoly stemmed from the fact that applications could be written solely to APIs exposed by the Java class libraries: "A program written in Java and relying only on APIs exposed by the Java class libraries will run on any PC system containing a JVM that has itself been ported to the resident operating system." (*See also* Finding 68 (applications must be written "exclusively on middleware APIs" to be able to "run . . . on any operating system hosting the requisite middleware").)

Notably, the D.C. Circuit observed that "middleware" could theoretically compete with an operating system "if developers could write applications relying exclusively on APIs exposed by middleware, [because] their applications would run on any operating system on which the middleware was also present." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 53 (D.C. Cir. 2001). The D.C. Circuit excluded Java and Netscape from the relevant market because "neither Navigator, Java, nor any other middleware product could now, or would soon, expose enough APIs to serve as a platform for popular applications, much less take over all operating system functions." *Id.*

Despite this, Novell now seeks to relax the definition of "middleware" that it previously embraced (and cannot disavow without running afoul of the statute of limitations). Specifically, Novell contends that its software was still "middleware because it exposed its own APIs to software developers." (Novell Br. at 35.) According to Novell, this is sufficient to demonstrate harm to competition because the Findings stand for the proposition that "by taking over some of the platform functionality provided by Windows" a middleware product can "thereby 'weaken the applications barrier to entry.'" (Novell Br. at 29 (quoting Finding 68).)

This is wrong. The Findings make clear that "middleware," such as Netscape Navigator, could only have "the *potential* to *diminish* the applications barrier to entry" if "a developer writes an application that relies *solely on the APIs exposed by Navigator*." (Finding 69 (emphasis added).) Indeed, only then would an "application . . . , without any porting, run on many different operating systems." (*Id*.) It is undisputed that Novell's software lacked this crucial characteristic of "middleware." (Microsoft Br. at 75-82.)

As the Court noted on December 15, this third requirement of "middleware" is not only required by the binding Findings of Fact, but is also a matter of common sense:

> The simple fact is middleware is no threat to the operating system unless it exposes lots of APIs that people are going to write to instead of the operating system. It's as simple as that, as far as I'm concerned. . . . But the principle has got to be that . . . middleware constituted a threat to the operating system . . . [by] expos[ing] sufficient APIs to mirror closely or at least in some close approximation the functionality and operating system.

(Dec. 15 Trial Tr. at 5435.)

Moreover, Novell conceded at trial that ISVs could not write full-featured personal productivity applications that would run on top of Novell's software, and the trial evidence conclusively established that fact. Novell's lawyer told the Court that if the jury were instructed that Novell's software must "expose[] enough APIs to allow independent software

vendors ('ISVs') profitably to write full-featured personal productivity applications that rely solely on those APIs," as stated in Finding of Fact 28, it "would be directing a verdict on that portion of our theory." (Dec. 15 Trial Tr. at 5436-37, 5439.)[32] This is a concession that Novell's case fails if Microsoft is correct on this single point.

There is no dispute that no application could run on top of PerfectOffice without also utilizing the APIs exposed by Windows (*see* Alepin, Nov. 9 Trial Tr. at 1489-90; Alepin, Nov. 10 Trial Tr. at 1533-35, 1538-40), which means that an application written to PerfectOffice (a) could be used only on the few Windows PCs that had PerfectOffice installed, and (b) would not run on any other operating system. This could not conceivably lower the applications barrier to entry.

3. In Any Event, There Were No Effective Competitors to Windows

Both of Novell's theories of harm to competition in the PC operating system market assume—contrary to the evidence—that a viable alternative to Windows existed during the relevant period. (Microsoft Br. at 81-82.) Noll conceded that Linux "became a full-fledged commercial product" only in 1996 and, even then, "wasn't really a competitor" to Windows. (Noll, Nov. 15 Trial Tr. at 1903, 1961.)[33] Gates explained that OS/2 did not compete with Windows "in a significant way" (Gates, Nov. 22 Trial Tr. at 3112-15), and Noll agreed that OS/2

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[32] Further, Novell cannot depart from the Findings without running into the bar of the statute of limitations. (*See* Microsoft Br. at 80, 135-36.)

[33] Novell argues in response that Linux became an effective competitor "by 1998," relying solely on Murphy's testimony. (Novell Br. at 44.) Murphy explained, however, that "in the latter half of the 1990s" Linux was not attractive to "the vast majority of users," including "office or home users," but rather was attractive only to "power users and servers." (Murphy, Dec. 8 Trial Tr. at 4896-97.) Thus, "[i]n terms of overall share of users, it [Linux] was still very small." (*Id*. at 4897.) Gates added that Linux has never "taken significant share away from the Windows operating system." (Gates, Nov. 21 Trial Tr. at 2853.)

was "not an effective competitor" (Noll, Nov. 15 Trial Tr. at 1903). The lack of any meaningful competitor to Windows in the PC operating system market means that there were no operating systems that could have been the beneficiary of the purported "middleware" capabilities of Novell's Three Products.[34] (Microsoft Br. at 81-82.)

B. It Is Undisputed that the Timely Release of PerfectOffice Would Have Enhanced Microsoft's Monopoly.

The testimony at trial also established that if Novell had released PerfectOffice using the namespace extension APIs, competition would have been lessened, not enhanced, in the PC operating system market. Specifically, Novell's fact witnesses and Professor Noll all testified that Windows 95 would have become stronger and Microsoft's market share in that market would have been *higher* (not lower) if Novell had released its product using the namespace extension APIs in a timely fashion. (Microsoft Br. at 87-90.) Novell's CEO testified that Windows 95 would have been "more desirable" and that its sales and market share in the PC operating system market "would have increased" if Novell had been able to use the namespace extension APIs. (Frankenberg, Nov. 8 Trial Tr. at 1226-28; *see also* Noll, Nov. 15 Trial Tr. at 1949-50 ("completely agree" that Frankenberg was "exactly right" that a timely release of

[34] Novell's brief asserts in response that Gates testified that Microsoft also faced competition from "Apple's Mac OS, Be's BeOS, [and] various versions of UNIX." (Novell Br. at 44.) As an initial matter, Gates testified that these products were competitors to Windows only "[i]f you set the threshold low enough" and that BeOS "never got enough applications to be of broad interest." (Gates, Nov. 21 Trial Tr. at 2851-53.) More fundamentally, neither Apple's Mac OS nor the versions of UNIX identified by Novell's counsel were PC operating systems (Gates, Nov. 22 Trial Tr. at 3112-14) and therefore by definition could not have competed with Windows in that market. *See Novell*, 699 F. Supp. 2d at 748 (requiring Novell to prove that the October 3 Decision "caused anticompetitive harm in the *PC operating system market*" (emphasis in original)).

PerfectOffice would have increased Microsoft's share of the PC operating system market).)[35] Novell's other three fact witnesses confirmed that Novell viewed Windows 95 as a huge step forward technologically, and that Novell wanted to tie its products as closely as possible to, and even augment, Windows 95 for the foreseeable future. (*See* Microsoft Br. at 88-89 (quoting testimony of Frankenberg, Harral, Richardson, Gibb and Noll).) Novell thus failed to prove that "the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the PC operating system market." *Novell, Inc.* v. *Microsoft Corp.*, 699 F. Supp. 2d 730, 748 (D. Md. 2010).

Because Microsoft's monopoly would have been made only stronger by Novell's use of the namespace extension APIs, the allegedly wrongful conduct did not harm competition in the relevant market.

C. Novell Came Nowhere Close to Meeting the Applicable Causation Standard.

As a private plaintiff seeking treble damages, Novell was required to prove that Microsoft's October 3 Decision "contributed significantly" to the maintenance of its PC operating system monopoly—especially where the alleged harm to competition in the PC operating system market is based on an attenuated cross-market theory. (Microsoft Br. at 82-84.) This is the causation standard articulated by this Court in its 2010 summary judgment decision. 699 F. Supp. 2d at 747-48 (quoting *Microsoft*, 253 F.3d at 80).

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[35] Novell argues that Frankenberg's testimony shows that Microsoft decided to forego the short-term profit of higher market share for the long term gain of inflicting harm on Novell's applications and this "is viewed as strong evidence of anticompetitive conduct, not the opposite." (Novell Br. at 92.) This is an effort to sow confusion. The issue here is causation; by the admission of Novell's CEO and antitrust economist, the October 3 Decision did not cause any adverse impact on competition in the PC operating system market. Moreover, Novell is wrong on the facts. Microsoft's decision was driven by the short-term benefit of enhancing the value of Windows 95 by making it more stable and by the long-term benefit of enhancing the value of other operating systems under development at Microsoft. *See* pp. 55-60, *infra*.

Novell continues to advocate for the lower "reasonably capable of contributing significantly" standard that was applied in an enforcement action brought by the U.S. Department of Justice in the Government Case. However, the very page of the D.C. Circuit's opinion that Novell cites (Novell Br. at 69 (citing *Microsoft*, 253 F.3d at 79)) makes clear that the D.C. Circuit was adopting the lower standard only because that case was a government enforcement action "seeking injunctive relief." 253 F.3d at 79. In any event, as demonstrated above and in Microsoft's Opening Memorandum, Microsoft's October 3 Decision did not contribute to the maintenance of Microsoft's monopoly in the PC operating system market under either causation standard.

II. THE OCTOBER 3 DECISION WAS NOT ANTICOMPETITIVE CONDUCT.

As Novell's counsel rightly conceded, "Microsoft doesn't have a duty to provide us with anything." (Nov. 18 Trial Tr. at 2587.) Indeed, under the *Colgate* doctrine, Microsoft is free "to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)). The sole exception to this rule, set forth in *Aspen Skiing Co*. v. *Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), is that one company may incur liability for refusing to deal with its competitor where that company (1) "terminate[s] a profitable relationship" with the competitor, thereby denying its rival terms "available to *all* other consumers," and (2) does so "without any economic justification." *Four Corners*, 582 F.3d at 1225 (emphasis in original) (quotation omitted). (Microsoft Br. at 90-94.) Novell came nowhere close to proving any of these elements at trial, and—perhaps in recognition of that fact—now contends that its claim falls entirely outside that line of cases.

Specifically, Novell argues that its claim involves deception, and that this "takes Novell's claim out of the unilateral-refusal-to-deal paradigm." (Novell Br. at 123.) This is wrong and supported by no precedent. The only allegedly anticompetitive act is Microsoft's decision to make a change to a beta version of an operating system under development. If a claim of deception changed the *Aspen Skiing* analysis, there would be an entirely new exception to the *Colgate* doctrine that has never heretofore been recognized. On the contrary, the Supreme Court has "been very cautious in recognizing" any exceptions to the *Colgate* doctrine, and even the *Aspen Skiing* exception "is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 408-09. In any event, (a) deception of a competitor gives rise to no claim under Section 2 of the Sherman Act, and (b) there was no evidence at trial that Novell was deceived.

A. Microsoft's Decision to Withdraw Support for the Namespace Extension APIs Was Not Unlawful Under the *Aspen Skiing* Exception.

To qualify under the *Aspen Skiing* exception, Novell must prove that Microsoft (a) "terminated a profitable relationship" with Novell, thereby denying Novell access to information "available to *all* other consumers," and (b) did so "without any economic justification." *Four Corners*, 582 F.3d at 1225 (emphasis in original) (quotation omitted). Novell's brief points to no evidence that could prove either of these elements. Microsoft's withdrawal of support for the namespace extension APIs did not foreclose Novell from timely releasing its products for Windows 95, because Novell's Three Products remained compatible with Windows 95, and Novell could easily have released those products for Windows 95 on a timely basis. *See* pp. 26-30, *supra*. In addition, the evidence overwhelmingly established that Microsoft continued to cooperate with Novell and that Microsoft's October 3 Decision did not treat Novell differently than any other ISV. *See* pp. 12-15, *supra*. Finally, the evidence at trial established that Microsoft had several legitimate business justifications for its October 3

Decision. (Microsoft Br. at 105-11.) Any one of these points dooms Novell's claim under binding Tenth Circuit precedent.

1. Microsoft Did Not Terminate a Pre-Existing, Profitable Business Relationship

Microsoft never terminated its relationship with Novell but continued throughout 1994-95 to try to assist Novell in building applications for Windows 95. Novell acknowledges the "long history of cooperation," but then argues that because "Microsoft stopped working with Novell to implement the namespace extension APIs," the relationship was terminated. (Novell Br. at 129.) This is illogical and stretches beyond any recognition the meaning of "relationship" under the applicable case law. Indeed, Novell's position is another way of saying that a software developer may never change features of a beta before release of its product.

In any event, the relationship was not terminated simply because Microsoft withdrew support for one feature (out of thousands) in Windows 95. Novell continued to use the beta versions of Windows 95 to develop its Three Products after Microsoft's October 3 Decision, and Corel ultimately released those products in 1996. The evidence at trial was clear on this point. Dave LeFevre testified that a Microsoft employee worked at Novell's Orem campus to answer questions from developers throughout 1994 and 1995 (LeFevre, Dec. 2 Trial Tr. at 4029-30), and Bob Frankenberg was "sure" that "people in the systems group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95" (Frankenberg, Nov. 7 Trial Tr. at 1131; *see also* Frankenberg, Nov. 8 Trial Tr. at 1217). Indeed, six months after the October 3 Decision, Scott Nelson of Novell reported in an April 7, 1995 e-mail that "the cooperation between Microsoft and Novell has been very good." (DX 172.) Novell does not address, let alone refute, this evidence.

Even under Novell's illogical characterization—that the "profitable relationship" is confined to the namespace extension APIs alone—the evidence was that there was no "termination."[36] Novell admits that it was able to call the namespace extension APIs both before and after Microsoft's October 3 Decision (Novell Br. at 66) and Harral and Richardson both testified that Novell used them in both time periods (Harral, Oct. 20 Trial Tr. at 344-45; Richardson, Oct. 25 Trial Tr. at 601-02, 631-32). Nothing was removed from Windows 95; the APIs remained part of Windows, and Novell (like all other ISVs) kept the documentation for these APIs that Microsoft provided in June 1994. (Harral, Oct. 20 Trial Tr. at 342; Richardson, Oct. 25 Trial Tr. at 675.) As Richardson testified, "[s]imply calling these API's was simple. We had the documentation. We knew how to call them." (Richardson, Oct. 25 Trial Tr. at 675.)

Importantly, as is also undisputed, it would have been "easy" for Novell to use the Windows 95 common file open dialog (provided without charge by Microsoft) to ship its product on time. (Novell Br. at 67; *see also* Gibb, Oct. 26 Trial Tr. at 847-48.)[37] *See* pp. 28-29, *supra*. This also shows that no "termination" occurred. The withdrawal of support for the namespace extension APIs did not terminate the "relationship" and also did not prevent Novell from timely releasing its Three Products.

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[36] Of course, the parties' "relationship" concerning the namespace extension APIs—which had only been available to Novell since June 1994—was also not the kind of long term "relationship" that could give rise to any duty under *Aspen Skiing*. *See Christy Sports*, 555 F.3d at 1197.

[37] In addition, Novell was never denied the option of using common controls in Windows 95 to design its own custom file open dialog. As Alepin admitted, "[w]ithout using the namespace extensions, just using the common controls in Windows 95, Novell had the ability to create a file open dialog that would include not only elements of the Windows 95 system namespace, but also add whatever custom file locations that Novell wanted to add." (Alepin, Nov. 10 Trial Tr. at 1664.) Indeed, the Court noted that if Novell could have written its custom file open dialog without using the namespace extension APIs, then the "whole case falls apart." (Dec. 14 Trial Tr. at 5395-97.) *See* p. 29 n.20, *supra*.

2. Microsoft Did Not Treat Novell Differently than Other ISVs

Microsoft never "den[ied] to [its] rival the [APIs] available to *all* other" ISVs. *Four Corners*, 582 F.3d at 1225 (emphasis in original). (Microsoft Br. at 97-99.) Novell was not singled out; it is undisputed that the October 3 Decision applied to all equally. (*E.g.*, DX 3 at MX 6055842 (setting forth the impact of the October 3 Decision on many ISVs).)

Novell does not argue otherwise, but instead asserts that there is no requirement that Novell be treated disparately under *Aspen Skiing* and that Microsoft's Opening Memorandum "distort[ed] . . . a passage in *Four Corners*." (Novell Br. at 130.) Not so. The Tenth Circuit in *Four Corners* explained that this requirement is found in *Aspen Skiing* itself, where defendant refused to sell lift tickets to its rival even at full retail price. *Four Corners*, 582 F.3d at 1225. As the Tenth Circuit explained, "[i]n *Aspen Skiing*, 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." *Id.* (emphasis in original). This, according to the Tenth Circuit, was "the key fact in *Aspen Skiing*." *Christy Sports*, 555 F.3d at 1197. Absent that fact, there can be no *Aspen Skiing* claim. *Four Corners*, 582 F.3d at 1225; *Christy Sports*, 555 F.3d at 1197.

Novell cites *MetroNet Services Corp.* v. *Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004) (Novell Br. at 129), a decision that is in full accord with Microsoft's argument that treating plaintiff differently from all other competitors is an element of an *Aspen Skiing* claim. There, the Ninth Circuit expressly imposed the same disparate treatment requirement, holding that "because [defendant] has not refused to deal with [plaintiff] on the same terms that it deals with direct consumers," plaintiff "does not have an actionable antitrust claim under the Supreme Court's existing refusal to deal precedents as explained and limited by *Verizon*." *Id.* at 1334.

B. Novell Understood—and the Applicable Contract Provided—that the Windows 95 Beta Was Subject to Change.

Even accepting Novell's myopic view of its relationship with Microsoft as consisting only of the namespace extension APIs,[38] the October 3 Decision did not terminate the relationship because those APIs were provided on a temporary basis, and Novell knew that the M6 beta—as with other beta releases—was subject to change. (Microsoft Br. at 99-105.)

The evidence at trial was overwhelming on this point. Numerous witnesses, including Novell's CEO and developers, testified that it "was widely understood in the software industry" that beta versions of software products can and do change (Frankenberg, Nov. 8 Trial Tr. at 1204-05), that "the definition of a beta" is that "there can be and almost certainly will be changes" (Larsen, Nov. 30 Trial Tr. at 3603, 3607), and that a "company that develops the beta software has the right to make any changes they deem necessary as a result of that testing period" because a "[b]eta by definition is an early release or a prerelease of a product that is subject to change" (LeFevre, Dec. 2 Trial Tr. at 4030-32). Nakajima, Belfiore and Bennett all testified to the same effect, recounting instances where beta versions of operating systems were changed prior to their commercial release. (Nakajima, Dec. 1 Trial Tr. at 3735-37; Belfiore, Dec. 5 Trial Tr. at 4239; Bennett, Dec. 12 Trial Tr. at 4967.)

Moreover, Novell received the beta of Windows 95 pursuant to a license agreement that made clear that the product "may be substantially modified prior to first commercial shipment," and that Novell "assume[d] the entire risk with respect to the use of the

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[38] This assumes *arguendo* that Novell is correct to assert that the withdrawal of support for the namespace extension APIs can be characterized as terminating Novell's ability to use those APIs. In fact, however, the namespace extension APIs were never stripped away; they remained part of Windows, and the documentation for them remained in Novell's possession. *See* pp. 26-28, 48, *supra*.

product." (DX 18 at 1 ¶ 2.) The M6 beta also included an unequivocal warning that the documentation that came with the beta did "not represent a commitment on the part of Microsoft for providing or shipping the features . . . in the final retail product offerings of Chicago." (PX 388 at MSC 00762731.)[39]

Despite this overwhelming evidence, Novell argues repeatedly—each time without any citation to the record—that Microsoft made a "commitment" and a "promise" to Novell when it provided Novell with the beta of Windows 95 containing the namespace extension APIs. (Novell Br. at 7, 8, 9, 59, 69, 94, 113, 124.) As shown above, *see* pp. 6-10, *supra*, this is false. Because Novell was on notice that the namespace extension APIs "could change at any time" and was "aware that" the namespace extension APIs were provided on a temporary basis, Novell's claim fails under *Christy Sports*, 555 F.3d at 1197. (Microsoft Br. at 102-05.)[40] The same facts mean that Microsoft's conduct cannot be anticompetitive under Section 2 of the Sherman Act. *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d

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[39] As Frankenberg testified, Novell provided beta versions of its software under precisely the same conditions. (Frankenberg, Nov. 8 Trial Tr. at 1202-05, 1208-09.) An internal Novell document describing Novell's beta testing process even expressly acknowledged that "[f]eatures may . . . change dramatically" during the beta process. (DX 612A at 4.)

[40] Novell seizes upon language from *Christy Sports*—stating that "[w]e would not even preclude the theoretical possibility that such a change could give rise to an antitrust claim, for example, 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," 555 F.3d at 1196—to assert that Novell's claim should fall outside of the "unilateral-refusal-to-deal cases" where "the monopolist acts affirmatively to exclude potential competition." (Novell Br. at 84.) This misses the point. As *Christy Sports* explained in the very next sentence, there can be no plausible allegation of anticompetitive conduct where "Christy knew from the beginning that it could operate a ski rental business only by permission of DVRC, on a year-to-year basis" in light of the restrictive covenant in the lease agreement. 555 F.3d at 1196. Likewise here, Novell was well aware that based on the terms of the beta license agreement (and otherwise), changes could be made between the beta version and commercial release of Windows 95.

894, 925-26, 928 (10th Cir. 1975). (Microsoft Br. at 99-102.) Novell makes three arguments in response, all of which are without merit.

First, citing Harral's testimony that he believed that betas are generally used to "hammer out the problems" and that "removing a major feature from a published beta [would] be an extraordinary event" (Harral, Oct. 20 Trial Tr. at 303, 336), Novell argues that a developer may make changes to its own product based only on feedback from testers (Novell Br. at 101, 110). This does not follow from what Harral said, and makes no sense. There is no logical reason why a software developer should be prevented from making changes to products still under development based on issues it discovers on its own, as opposed to issues reported by beta testers. Novell's argument also responds not at all to the testimony of Novell's CEO and others that it was understood at Novell and throughout the software industry that betas were subject to change. *See* pp. 6-10, *supra*.

Second, Novell argues that a "monopolist may not avoid liability by relying on contractual provisions purporting to waive or disclaim future liability." (Novell Br. at 109.) This is a red herring. The licensing agreement (DX 18) makes clear that, consistent with widespread industry practice, Novell understood that the M6 beta and beta releases generally are subject to change. (Microsoft Br. at 99-105.) Indeed, in *Christy Sports*, the Court held that the existence of a restrictive covenant in a lease agreement put plaintiff on notice that its relationship with defendant—spanning over a decade—was temporary and subject to defendant's business judgment. *Christy Sports*, 555 F.3d at 1197. The facts in this case are far better for defendant than those in *Christy Sports*: When Novell received documentation for the namespace extension APIs in June 1994, just four months before Microsoft decided to withdraw support for those APIs, Novell understood that the APIs could be altered or removed prior to the commercial

release of Windows 95 and that by providing the beta, Microsoft was "not" making any "commitment" that the final product would be the same. (PX 388 at MSC 00762731.) *See* pp. 9-10, *supra*. Under *Christy Sports*, Novell's case fails entirely.[41]

Third, Novell attempts to distinguish *Telex*, arguing that "*Telex* held only that ordinary business practices did not become anticompetitive merely because they were undertaken by a monopolist." (Novell Br. at 100-01.) Novell reads *Telex* too narrowly. In *Telex*, the Tenth Circuit focused on IBM's "creation of 'task forces'" to study its competitors, including Telex, and IBM's "repricing and the pricing of new products upon competitors." *Telex*, 510 F.2d at 928. The Court expressly held that this conduct amounted to "no more than engaging in the type of competition prevalent throughout the industry" and accordingly did not violate Section 2 of the Sherman Act. *Id.*[42] Here, Microsoft's decision to make a change to a

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[41] Novell seeks to distinguish *Christy Sports* and *Four Corners* on the ground that these cases "involved situations in which the monopolist's conduct produced short-term gains, not losses." (Novell Br. at 94.) This is more obfuscation. The outcome in *Christy Sports* turned on the fact that defendant "had explicitly informed its competitors from the beginning that the relationship could change at any time" and that plaintiff therefore "should have been aware that the relationship was temporary and subject to [defendant's] business judgment." 555 F.3d at 1197. Similarly here, Microsoft informed ISVs that the M6 beta was subject to change, and Novell understood that point. *See* pp. 6-10, *supra*. In *Four Corners*, the Tenth Circuit affirmed summary judgment for defendant hospital because it acted "[t]o protect its investment" by making its new nephrology practice the exclusive provider of nephrology services at the hospital. 582 F.3d at 1217. Similarly here, Microsoft withdrew support for the namespace extension APIs to protect the stability of Windows 95, and in turn, the enormous investment it had made in that new operating system. *See* pp. 55-60, *infra*. *Christy Sports* and *Four Corners* each mandate the entry of judgment for Microsoft.

[42] Novell incorrectly claims that the Tenth Circuit "revisited" its holding in *Telex* in *Instructional Systems Development Corp.* v. *Aetna Casualty & Surety Co.*, 817 F.2d 639, 649 (10th Cir. 1987). (Novell Br. at 100-01.) Novell misreads *Instructional Systems*. There, defendant relied on *Telex* to argue that its conduct could not be anticompetitive because it did "not require the use of monopoly power." *Id.* at 649. The Tenth Circuit rejected this argument, holding that "the acts complained of need not involve the use of that power if they contribute to its acquisition or maintenance." *Id.* Microsoft makes no such argument here, and the Tenth Circuit in *Instructional Systems* in no way repudiated its holding in *Telex* that conduct that

(*footnote continued*)

beta version of its own software was in complete accord with industry norms—including Novell's own practice with respect to its beta software. (DX 618 at NOV-B07520262.) Under *Telex*, such conduct cannot be anticompetitive under Section 2 of the Sherman Act.

C. The Evidence Is Overwhelming that Microsoft's Decision Was Based on Legitimate Business Justifications.

Aspen Skiing requires Novell to prove that Microsoft's withdrawal of support for the namespace extension APIs was "without any economic justification." *Four Corners*, 582 F.3d at 1225 (quotation omitted). The unchallenged trial evidence established multiple justifications for Microsoft's decision—namely, that (1) third-party applications that used the namespace extension APIs could cause the Windows 95 operating system to crash; (2) the design of these APIs was not compatible with future versions of Microsoft Windows under development; and (3) the same APIs did not achieve the functionality that Gates had anticipated, and it was thus not worth locking Microsoft's other operating systems into their design. (Microsoft Br. at 105-11.) These justifications are the end of the inquiry, *Aspen Skiing*, 472 U.S. at 597, 604-05, and a jury is not permitted to "weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal." *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988).

Novell asserts that "[i]n the Tenth Circuit," once the plaintiff establishes a prima facie case, the burden shifts to the defendant to "show that it acted with a legitimate business justification." (Novell Br. at 81; *see also id.* at 3-4, 9.) This is incorrect. *Four Corners* and *Christy Sports* applied no such burden-shifting. 582 F.3d at 1223-25; 555 F.3d at 1196-98.

(*footnote continued*)
amounts to nothing more than "ordinary business practices" is not anticompetitive under Section 2 of the Sherman Act. *Telex*, 510 F.2d at 928.

Indeed, in *Four Corners*, the Tenth Circuit explained that plaintiff's case failed because it had not shown that defendant acted "without any economic justification." 582 F.3d at 1224-25.[43]

1. The Namespace Extension APIs Could Cause the Windows 95 Operating System to Crash

Novell's own experts conceded that an error in a third-party application calling the namespace extension APIs could crash the Windows shell and, in turn, the entire operating system.[44] Alepin agreed that an error in an application calling these APIs "had the potential to make the system unresponsive" (Alepin, Nov. 10 Trial Tr. at 1589), and Noll testified that "one valid reason for not documenting an API" is "where those APIs are unstable" (Noll, Nov. 15 Trial Tr. at 1872-73). As a matter of law, that is the end of the case. A jury cannot "weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal" and "[t]he fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient." *Bell*, 847 F.2d at 1186 (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597).

Novell argues illogically that the robustness justification is pretextual because "the [operating] system retained other extensions and mechanisms that suffered from the same

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[43] *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995), provides no support for Novell's argument. The single sentence upon which Novell relies—that "[a] defendant may avoid liability by showing a legitimate business justification for the conduct" (Novell Br. at 81)—does not show any burden shifting and the Court did not apply any such test. 63 F.3d at 1550-52. In any event, even if Microsoft has the burden to demonstrate a legitimate non-pretextual business justification, it easily met that burden at trial. *See* pp. 55-60, *infra*.

[44] Seven fact witnesses so testified. (Gates, Nov. 21 Trial Tr. at 2781-82; Muglia, Nov. 29 Trial Tr. at 3386-87, 3395-97; Nakajima, Dec. 1 Trial Tr. at 3758-61; Belfiore, Dec. 5 Trial Tr. at 4270-71; Jan. 9, 2009 Maritz Deposition at 129-30, filed Nov. 10, 2011, Dkt. #279, used at trial on Oct. 27; Jan. 8, 2009 Allchin Deposition, Nov. 8 Trial Tr. at 1297; Richardson, Oct. 25 Trial Tr. at 756-57.)

alleged shortcoming." (Novell Br. at 103 n.54.) This assumes that as a matter of law Microsoft cannot fix one problem during the development of its operating system unless it can also fix every other problem at the same time. Notwithstanding this logical fallacy, the evidence at trial clearly demonstrated that the namespace extension APIs were "more risky" than other shell extension mechanisms. (Nakajima, Dec. 1 Trial Tr. at 3766.) As Nakajima testified and other witnesses confirmed, there was "no limit" on the number of namespace extensions that could be running on Windows 95 at any one time and "no limit" on the size or complexity of applications calling the namespace extensions and thus running in the same process space as the Windows Explorer. (Nakajima, Dec. 1 Trial Tr. at 3761-63, 3766; *see also* Alepin, Nov. 10 Trial Tr. at 1593-94; Richardson, Oct. 25 Trial Tr. at 659.) Novell has no evidence to the contrary.

Novell next asserts that the robustness issue was "resolved" by a change made to the namespace extension APIs in November 1994. (Novell Br. at 64; *see also id*. at 104 n.56.) The change to which Novell refers was a "semantic" change and only offered ISVs the option of running "rooted"—*i.e*., that a third-party application could open a separate Windows Explorer window that would display only the custom containers created by that application and no other namespaces, such as the Windows 95 namespaces. (DX 84, E-mail from Brad Struss to Bill Gates, Nov. 12, 1994, at MX 9025187.) As Belfiore testified, this change did not eliminate the ability of third parties to run their namespace extensions as they did before November 1994, and thus did not reduce the risk that that a third-party application using the namespace extension APIs could crash the Windows 95 shell. (Belfiore, Dec. 5 Trial Tr. at 4296-98; DX 131A, E-mail from Joe Belfiore to Andrew Schulman, March 21, 1996, at 2-3.) Further, as Gates explained, the addition in November 1994 of the option of running rooted "doesn't solve the robustness issue," because it did not protect the operating system from crashes; it simply made

the user "more likely to understand" that the application was to blame for the crash because "you're in third-party code rather than in Windows operating system code because they have a window." (Gates, Nov. 21 Trial Tr. at 2823-24; *see also* Belfiore, Dec. 5 Trial Tr. at 4296 (explaining that even rooted namespace extension APIs ran within the Windows Explorer).)

Finally, Novell asserts that robustness concerns could not have been the reason for the October 3 Decision because Microsoft "fully document[ed] and publish[ed] the *same* APIs" in 1996. (Novell Br. at 103-04 (emphasis in original).) This ignores the evidence that in 1996, Microsoft "rearchitect[ed] the process slightly . . . to separate the Desktop/taskbar process from the rest of the explorer extensions that live in the shell namespace." (DX 131A at 2.) Belfiore explained that "[t]he benefit" of this change to the process space was that "if a shell extension in one of those [Explorer] windows crashes, only that window will disappear but the start menu and the task bar and desktop will stay there." (Belfiore, Dec. 5 Trial Tr. at 4292-93.) Thus, although the APIs remained the same, the underlying mechanism for implementing those APIs was changed substantially in 1996. (DX 131A at 2; *see also* Belfiore, Dec. 5 Trial Tr. at 4292-93.) Only after this change, which made the namespace extension APIs less problematic for the Windows NT group, did Microsoft publish and support the namespace extension APIs.[45]

[45] Novell also argues that, in September 1994, Microsoft decided that Windows NT would use the Windows 95 shell, and that because of that decision, the Windows NT team no longer opposed adoption of the namespace extension APIs. (Novell Br. at 107.) There is no support in the record for this assertion. The decision to use the Windows 95 shell did not end the Windows NT team's opposition to adopting the namespace extension APIs as part of Windows NT, but rather intensified its opposition. Muglia, who was program director of Windows NT, testified that "once we decided to use the Chicago shell, we had to try and salvage what we could and sort of make it as reliable as possible." (Muglia, Nov. 29 Trial Tr. at 3397-98.) Indeed, Muglia wrote in an October 4, 1994 e-mail that the October 3 Decision was "very good news for BSD [Business Systems Division]" because "these interfaces introduce significant robustness issues," and "[s]ince Bill has decided these interfaces won't be published, NT development does not have

(*footnote continued*)

2. The Namespace Extension APIs Were Not Compatible with Microsoft's Future Operating Systems

The trial evidence established that Microsoft was concerned about compatibility with other versions of Windows, and that the October 3 Decision was the culmination of an internal debate at Microsoft between teams developing Windows 95, Windows NT and Cairo.[46] Adopting the namespace extension APIs would have locked these operating systems into the design of the Windows 95 shell. (Muglia, Nov. 29 Trial Tr. at 3399.) Novell does not challenge Muglia's testimony that, once the Chicago team shipped its product, the Cairo team would be required "to support what they [Chicago] did" and would not be "able to go forward with the Cairo shell as [they] had planned." (Muglia, Nov. 29 Trial Tr. at 3399.) Novell asserts, however, that Gates decided in September 1994 to "scrap the Cairo project," which, according to Novell, "mooted any compatibility issues between the namespace extension APIs and Cairo." (Novell Br. at 107.) This is incorrect. As Gates testified, his September 1994 decision merely "took Cairo and transferred those people into a group which was called the REN group . . . [to] see if the managers there could do a better job making progress on it." (Gates, Nov. 21 Trial Tr. at 2782; *see also id*. at 2784 (testifying that Microsoft "let [Cairo] run for awhile in '95 and even into '96 to see if it could succeed").) Indeed, Novell itself asserts elsewhere in its brief that "the raging debate between the Chicago and Cairo teams regarding future support of the namespace

(*footnote continued*)
to expend precious energy on implementing these for NT." (DX 21.) Novell simply ignores this undisputed evidence.

[46] Gates, Nov. 21 Trial Tr. at 2792-93; Belfiore, Dec. 5 Trial Tr. at 4269-71, 4278-80; Nakajima, Dec. 1 Trial Tr. at 3763-64, 3768-73; Muglia, Nov. 29 Trial Tr. at 3385-90, 3397-3400.

extension APIs . . . end[ed] only when Mr. Gates made his decision on October 3, 1994 to withdraw support for the functionality." (Novell Br. at 62 (footnote and citations omitted).)[47]

3. The Namespace Extension APIs Did Not Achieve the Functionality that Gates Had Anticipated

Bill Gates testified that an additional reason for his October 3 Decision was that the namespace extension APIs did not provide the level of integration that he had anticipated. (Gates, Nov. 21 Trial Tr. at 2786-87, 2800-04.) Mr. Gates weighed the level of functionality provided by the namespace extension APIs against the burden of supporting those APIs in the future and decided to withdraw support for those APIs. (Microsoft Br. at 109-10.)

In response, Novell cites PX 134 as an "example" of a "[c]ontemporaneous document" that "reveal[s] that Mr. Gates viewed the namespace extension APIs as much more than trivial." (Novell Br. at 107.) This is simply false. PX 134, a March 31, 1994 e-mail from Gates to Silverberg, made no mention whatsoever of the namespace extension APIs—nor any other shell extension—but rather discussed the Windows Explorer generally, stating that the Windows Explorer "hierarchical view (scope pane) view is critical" and that "[t]he tree view is

[47] Novell asserts that because the namespace extension APIs used a "lighter weight OLE implementation" these APIs must have been compatible with Cairo and Windows NT. (Novell Br. at 106 (quotation omitted).) The evidence is entirely to the contrary. Nakajima testified that the fact that the Chicago shell extensions relied on the lightweight OLE mechanism did *not* mean that these extensions would be compatible with shell extension mechanisms designed by the Cairo team. (Nakajima, Dec. 1 Trial Tr. at 3862-63.) This was so because "if the Cairo team come up with different types of NameSpace mechanism, . . . it will not be compatible even though they use OLE." (*Id*.) Muglia testified that the OLE-compatibility of the namespace extension APIs "did not make [the Chicago] shell more compatible with Cairo by any means." (Muglia, Nov. 29 Trial Tr. at 3446-47.) Muglia explained that "OLE is a mechanism that allows you to do a series of things like object linking embedding and a specific set of interfaces. You can still define different interfaces, and the interfaces that were defined for Chicago were still different than the interfaces for Cairo." (*Id*. at 3447.)

central to our whole strategy." (PX 134.) As Gates testified, PX 134 addresses the namespace extension APIs "[n]ot at all." (Gates, Nov. 21 Trial Tr. at 2786-87.)[48]

D. Novell's Deception Theory Has No Basis in Law or Fact.

1. Deception Is Not Anticompetitive Under Section 2 of the Sherman Act

Deceiving a competitor does not give rise to an antitrust claim under Section 2 of the Sherman Act. (Microsoft Br. at 111-13.) "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Courts are clear that "the Sherman Act does not convert all harsh commercial actions into antitrust violations," *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1354 (Fed. Cir. 1999), and that "[t]he Sherman Act is not a panacea for all evils that may infect business life." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979).

Novell nevertheless argues that there are "numerous cases involving deceptive conduct by a monopolist that has been found to violate the antitrust laws." (Novell Br. at 97.) Not one of these cases, however, held that a monopolist is liable under Section 2 of the Sherman Act for deceiving its competitor. All of them involve deceptive advertising or deception of customers.[49] (Novell Br. at 97-98.) Indeed, Novell concedes that the cases it cites involve

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[48] Novell also argues that this justification is pretextual because "Microsoft sought and eventually received a patent for those APIs." (Novell Br. at 108.) This argument is frivolous. The existence of a patent on the full set of shell extensibility mechanisms in Windows 95 does not demonstrate that the namespace extension APIs lived up to Mr. Gates' expectations; indeed, the patent itself discloses the limited utility of the namespace extension APIs, stating that they "should not be used . . . to expose the contexts [sic] of a spreadsheet or word processing document in the shell." (PX 364, United States Patent No. 5,831,606, Nov. 3, 1998, issued to Nakajima *et al.*, at 54-55.)

[49] Even in cases involving the deception of customers and deceptive advertising, courts apply "a presumption that the effect on competition of such [practices] was de minimis." *Berkey*

(*footnote continued*)

conduct such as "defraud[ing] customers," "deceptive advertising campaign[s]," "misleading 'FUD' marketing campaigns," and "false and misleading statements to the public." (Novell Br. at 97-98.) Not one of the cases involves alleged deception of a competitor.

Moreover, contrary to Novell's assertion, *United States* v. *Microsoft*—a government enforcement action in which an edentulous causation standard was applied—does not stand for the proposition that deception of a competitor can give rise to a private antitrust claim under Section 2 of the Sherman Act. The D.C. Circuit did not there find Microsoft liable for deceiving Sun Microsystems, the company that created Java, but rather for representations made to Java developers—the customers of Microsoft's Java development tools. *United States* v. *Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001). The Court expressly held that "Microsoft's incompatibility with Sun's cross-platform aspirations for Java" was "no violation, to be sure," and that the only anticompetitive act was that "Microsoft deceived Java developers regarding the Windows-specific nature of the tools." *Id*. at 76.

2. There Was No Deception

In November 2011, when opposing Microsoft's Rule 50(a) motion at the close of Novell's case, Novell's lawyer asserted that Microsoft's deception was the "premeditated" act of "evangeliz[ing]" the namespace extension APIs while intending all along to pull them away later. (Nov. 18 Trial Tr. at 2640-42, 2660-62.) Novell's brief again mentions this theory (though only in passing), stating that "there is abundant evidence . . . that Mr. Gates always intended to

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(*footnote continued*)
Photo, Inc., 603 F.2d at 288 n.41. Indeed, in *American Professional Testing Serv.* v. *Harcourt Brace Jovanovich Legal & Professional Publications*, the Court held that such cases are subject to a "serious de minimis test," and that "such claims should presumptively be ignored." 108 F.3d 1147, 1152 (9th Cir. 1997); *see also* 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 782, at 327 ("the courts would be wise to regard misrepresentations as presumptively de minimis for § 2 purposes").

deny ISVs the namespace extension APIs." (Novell Br. at 98-99.) Novell cites no such evidence, and there is none. No witness said or implied that Microsoft intended to rip away its namespace extension APIs when it provided the M6 beta to Novell or when evangelizing those APIs to ISVs. Indeed, as shown above, *see* pp. 10-12, *supra*, Microsoft did not know in October 1994 that Novell was planning to use the namespace extension APIs. In September, Struss reported that WordPerfect had "not begun any work on IShellFolder, IShellView, etc." (DX 17 at MX 6109491), and Bill Gates had no information to the contrary (*see* Gates, Nov. 21 Trial Tr. at 2811; *see also id*. at 2828).

Novell also contends that there were three other alleged acts of deception: (1) the so-called "Hood Canal Plan"; (2) Microsoft's failure to disclose the "raging debate" between the Chicago and Cairo teams about the namespace extension APIs; and (3) Microsoft's supposed "cover-up" following the October 3 Decision. (Novell Br. at 59-64.)[50]

First, the "Hood Canal Plan" is another red herring. Novell's continued reliance on this conspiracy theory—whereby Microsoft supposedly decided in June 1993 to withhold all shell extensibility from Windows 95 and to ship an extensible shell with Microsoft Office after the release of Windows 95 (Novell Br. at 46-51)—is baffling. Not only did every witness who was asked about the so-called "Hood Canal Plan" testify that there was never such a plan in the first place and that no such "plan" was implemented (Gates, Nov. 21 Trial Tr. at 2770; Muglia,

[50] None of these allegations, including Novell's original theory of deception, appear anywhere in Novell's Complaint. (Microsoft Br. at 112-13.) Accordingly, Novell released any claim based on deception under the terms of its November 2004 settlement agreement with Microsoft. (*See* Microsoft Br. at 112-13 & n.64, 126-30.) Indeed, given the heightened pleading requirements for claims predicated on deception and the absence of any allegation of deception in the Complaint, Novell's Complaint would not have survived a motion to dismiss under the heightened pleading requirements of Rule 9 if Novell had provided Microsoft even a hint that its claim was one for deception. *See* FED. R. CIV. P. 9.

Nov. 29 Trial Tr. at 3401-03; Jan. 9, 2009 Maritz Deposition at 70, filed Nov. 10, 2011, Dkt. #279, used at trial on Oct. 27; Jan. 22, 2009 Silverberg Deposition at 15, filed Nov. 10, 2011, Dkt. #278, used at trial on Oct. 26), but Novell's counsel conceded in his closing argument that the Hood Canal plan "didn't go forward" (Dec. 13 Trial Tr. at 5324-25). A "plan" that was never adopted and that did not "go forward" cannot amount to anticompetitive conduct.

Second, Novell's contention that Microsoft "deceived" Novell by failing to disclose an internal debate at Microsoft between the Chicago and Cairo teams regarding the namespace extension APIs is even more far-fetched. Novell cites no case in support of its contention (made for the first time after trial) that the antitrust laws impose a duty on companies to disclose to their competitors internal debates about product design issues or that a deception claim can be made out from those facts. Microsoft is not aware of a single decision under any body of law that stands for this radical proposition.

Finally, Novell's new argument that Microsoft deceived Novell by "covering up" the true reasons for the October 3 Decision presupposes that Microsoft's technical justifications for the decision were pretextual. The evidence was overwhelmingly to the contrary. *See* pp. 55-60, *supra*. Further, Novell fails to explain how Microsoft's subsequent communications with ISVs about the reasons for the decision could be actionable anticompetitive conduct that caused harm to competition under the antitrust laws. In fact, those communications show that Symantec and Stac (two ISVs that had actually relied on the namespace extension APIs in the M6 beta) changed their products so as to avoid using those APIs after the October 3 Decision. (DX 82, E-mail from Paul Maritz to Bill Gates, Nov. 7, 1994 ("There were 4 groups using these interfaces (Capone, Marvel, Stac, Symantec). Capone, Stac, Symantec have found ways not to use them."); *see also* Gates, Nov. 21 Trial Tr. at 2815-16.) There was no deception.

III. THE OCTOBER 3 DECISION DID NOT CAUSE A DELAY IN THE RELEASE OF NOVELL'S PRODUCTS FOR WINDOWS 95.

The evidence at trial overwhelmingly established that the October 3 Decision was not the cause of any delay in the release of Novell's products for Windows 95. To the contrary, the evidence established that (1) PerfectOffice for Windows 95 could not have been released within 60 days (or even 90) of the release of Windows 95 because Quattro Pro—a critical component of the suite—was not ready; and (2) in the absence of the Quattro Pro problems, Novell could have released its products on time but for its own business decision chose a riskier and more time-consuming path.

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

Novell asserts that it was "critical" for it to release its products for Windows 95 within 90 days of August 24, 1995—the date on which Windows 95 was released. (Novell Br. at 7, 66, 88.) As shown above, five former Novell employees, including CEO Frankenberg, testified that Quattro Pro was not ready to be released by the end of 1995. *See* pp. 21-22, *supra*. (*See also* Microsoft Br. at 48-53, 115-17.) All of the documentary evidence—including DX 211, DX 221, DX 223 and DX 230, which, according to Frankenberg, showed "clearly" that Quattro Pro "wasn't complete" by December 23, 1995—was in full accord.

The two documents to which Novell points for the contrary proposition are, in fact, helpful to Microsoft. DX 231, the document not shown to the jury until the rebuttal portion of Novell's summation with the relevant columns redacted, says that the "release to manufacturing" date for Quattro Pro was "3/31/96." (DX 231 at NOV00161054.) And DX 217 confirmed that Novell was late to begin developing Quattro Pro for Windows 95 because of delays in completing the prior version of Quattro Pro. *See* pp. 24-26, *supra*.

Gibb's testimony (*see* p. 23, *supra*) is not supported by any document and does not come close to 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 (quotation omitted). The evidence was overwhelming that, because of the Quattro Pro delays, PerfectOffice was not ready to be released until 1996.

This fact is sufficient to entitle Microsoft to judgment as a matter of law. Indeed, in *Addamax Corp.* v. *Open Software Foundation, Inc.*, 152 F.3d 48, 51, 53-54 (1st Cir. 1998), a case alleging violations of Sections 1 and 2 of the Sherman Act, the First Circuit affirmed a district court's judgment that defendant's conduct was "not a material cause" of plaintiff's losses and that plaintiff was "entirely the cause of its own failure" in part because the evidence supported the district court's finding that the plaintiff "entered [the market] late" with an "overbuilt" product. Similarly here, Novell's claim fails because the October 3 Decision was "not a material cause" of any delay in the release of PerfectOffice for Windows 95; rather, Novell's inability to complete Quattro Pro on time was "entirely the cause of its own failure."

B. Novell's Poor Business Choice Caused Delay.

All witnesses agreed that Novell could have completed its work on the file open dialog for PerfectOffice for Windows 95 without any delay if it had chosen Option 1 or Option 2 instead of writing its own custom file open dialog. *See* pp. 26-30, *supra*. (*See also* Microsoft Br. at 53-57, 117-18.)

Where an antitrust plaintiff "bypasses an obviously adequate alternative," as Novell did here, it "should not recover." *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 565 F. Supp. 167, 180 (E.D. La. 1981) (quotation omitted). In *J.T. Gibbons*, the district court directed a verdict for defendants in a Sherman Act Section 1 action where plaintiff could have obtained from an alternative source the product that defendants refused to sell to it. *Id.* 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." *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 792 (5th Cir. 1983); *see also Union Cosmetic Castle, Inc.* v. *Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62, 71 (E.D.N.Y. 2006) (holding that plaintiffs in Sherman Act Sections 1 and 2 action lacked Article III standing because their "free choice to reject the [defendants' offer of an alternative], presumably made under the belief that doing so would best protect the plaintiffs' business interests, acts as an intervening cause of the plaintiffs' present commercial woes."). Novell acknowledges, *see* pp. 26-30, *supra*, that it would have been able to release its applications for Windows 95 had it chosen either to call the namespace extension APIs or to use the Windows 95 common file open dialog. With respect to this second option, Novell's witnesses admitted that it would have been "quite easy" for Novell to release its products using the Windows 95 common file open dialog that Microsoft provided for free. (Gibb, Oct. 26 Trial Tr. at 847-48; *see also* Harral, Oct. 24 Trial Tr. at 502-04.)

Novell now says that its "top priority [in 1995] was to release a marketable product within the critical window of opportunity after the Windows 95 release." (Novell Br. at 66.) By Novell's own admission, it could "easily" have done so. (Novell Br. at 66-67; Gibb, Oct. 26 Trial Tr. at 847-48; Harral, Oct. 24 Trial Tr. at 502-04.) Novell's own poor business decision to reject those options was an intervening cause of any delay.

IV. NOVELL IS ENTITLED TO NO DAMAGES.

Novell's damages expert, Dr. Warren-Boulton, testified unequivocally that, absent Microsoft's withdrawal of support for the namespace extension APIs, he assumed that Novell would have released WordPerfect, Quattro Pro and PerfectOffice "within 30 or 60 days [of Microsoft's August 24, 1995 release of Windows 95], and that is my but-for world." (Warren-

Boulton, Nov. 17 Trial Tr. at 2418.) Each of Warren-Boulton's four damages theories and models depended on this assumption. (*Id.* at 2422-23.) Because the overwhelming evidence showed that Novell's products could not have been ready within 60 days of the release of Windows 95 because of Quattro Pro, the jury was given no basis on which to calculate damages. This requires the entry of judgment for Microsoft. (Microsoft Br. at 119-23.)

Novell argues in response that Warren-Boulton did not mean what he said when he testified multiple times (Warren-Boulton, Nov. 17 Trial Tr. at 2418, 2419, 2420, 2421, 2422) that his damages calculations were based on the assumption that Novell would have released its products within 30 to 60 days (Novell Br. at 119-20). Novell argues instead that Warren-Boulton's damages calculations assumed Novell's products would have been released within 90 days. (Novell Br. at 119-20.) This is incorrect, but not important. Even if Warren-Boulton's but-for world assumed that the products would have been released within 90 days of Microsoft's release of Windows 95, that gets Novell to November 24, 1995. Quattro Pro was not ready even as of Christmas 1995. *See* pp. 20-26, *supra*.

As the Court recognized, the fact that Warren-Boulton's damages calculations do not account for the delay caused by Quattro Pro is a "huge issue," and Novell doesn't "have any damages claims" if Quattro Pro was not ready by late December.

> This is a huge issue because ***if, in fact, Quattro Pro was not ready by December 30th, you don't have any damages claims. It's as simple as that.*** Because that's more than 60 days after the release of Windows. It is a huge—and it wasn't one I focused on, but if, in fact—clearly the doctor yesterday testified—I think it was yesterday, maybe the day before, that his damage calculation was based upon the product coming out – the application product coming out. There was a lot of blowing whistles, but I think Mr. Tulchin is right, apparently it was 60 days after the release of Windows. That, and we'll get another 30 days. If, in fact, by December there is no product ready to be shipped, you don't have—***you have no expert testimony as to what the damages would be***.

(Nov. 18 Trial Tr. at 2605-06 (emphasis added).)

Warren-Boulton admitted at trial that any damages calculation that took into account Novell's own responsibility for delay beyond 60 days would be "sort of off the cuff," and that he would have to "adjust [his] damages calculations for a different but-for world." (Warren-Boulton, Nov. 17 Trial Tr. at 2418-19, 2422-23.) The only suggestion he gave was that the jury would "need to modify the damages because it is partial." (*Id*. at 2421.) But without any basis on which to "modify" the damages—to separate out the damages resulting from Novell's own delays from those damages (if any) resulting from delays caused by Microsoft's withdrawal of support for the namespace extension APIs—the jury had no basis (other than speculation) for an award. *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296, 304 (10th Cir. 1975) (in antitrust cases, "the rule persists that any damage estimate must be 'just and reasonable' and not based on 'speculation or guesswork'") (citations omitted).

Novell's argument that it need not "disaggregate" its damages because it "does not attribute any damages to the harm caused by Microsoft's exclusion of Navigator, Java, Lotus, and others" misses the point completely. (Novell Br. at 120-21.) Novell's damages calculation must account for *all* other factors, including "plaintiff's own mismanagement . . . and other things unrelated to any antitrust violation." 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 391g. While Novell purports to address the reasons why its "mismanagement" should not impact damages, it ignores the elephant in the room—the delay in development of Quattro Pro.

Novell's failure to provide the jury with any basis on which to determine the damages that resulted only from Microsoft's actions (and not from Novell's own delays) is fatal to Novell's case. As the ABA Model Jury Instructions explain, "[i]f you find that plaintiff has

failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for defendant." ABA Model Instruction F-16.[51]

V. NOVELL'S CLAIM SHOULD BE DISMISSED FOR OTHER REASONS AS WELL.

As Microsoft showed in its Opening Memorandum (*see* Microsoft Br. at 123-36), (1) Novell released any claim for harm to Novell products other than WordPerfect and Quattro Pro; (2) Novell's claim is barred by the statute of limitations; (3) Novell sold its claim to Caldera; and (4) Novell lacks standing because it suffered no cognizable antitrust injury.

As an initial matter, Novell is mistaken that Microsoft waived arguments 1 through 3 above because Microsoft did not raise them in its Rule 50(a) motion. (Novell Br. at 131-32.) In its Rule 50(a) motion, Microsoft expressly argued that Novell's claim is time-barred because "Novell is bound" by the definition of "middleware" set forth in the collaterally estopped Findings, and "[i]f it is anything different, Novell's claim is time-barred." (Microsoft's Memorandum in Support of Its Motion for Judgment as a Matter of Law, filed Nov. 17, 2011, Dkt. #298, at 42 (citation omitted).)

[51] Novell cites one unpublished decision for the proposition that "the method of computing damages is not suited for a Rule 50(b) motion where proximate causation and injury in fact have already been established." (Novell Br. at 118 (citing *Roth* v. *Naturally Vitamin Supplements, Inc.*, 2007 WL 2020114 (D. Ariz. July 6, 2007)).) First, Microsoft does not argue that Novell's "method of computing damages" is a basis for granting the present Motion. Rather, Microsoft challenges Novell's failure to separate out the harm caused by Novell's own failures from the harm caused by Microsoft's allegedly anticompetitive conduct, leaving the jury without an adequate basis to determine damages. Further, the *Roth* case does not support Novell's position in any event. The issue in that case was not whether plaintiff had provided the jury with a proper "method of computing damages," but rather whether the jury had returned an excessive verdict. *Roth*, 2007 WL 2020114, at *1-2. The court found that it had, and granted a *remittitur* in lieu of granting a Rule 50(b) motion. *Id.*

In any event, as Novell acknowledges, the purpose of the rule is to "'protect the Seventh Amendment right to trial by jury, and ensure that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting.'" (Novell Br. at 131 (citing *Marshall* v. *Columbia Lea Regional Hospital*, 474 F.3d 733, 739 (10th Cir. 2007)).) The Tenth Circuit has held that "[t]echnical precision is not necessary in stating grounds for the motion so long as the trial court is aware of the movant's position." *United States* v. *Fenix & Scisson, Inc.*, 360 F.2d 260, 266 (10th Cir. 1966). Indeed, "the rigid application of this requirement is inappropriate when the application serves neither of the rationales supporting it." 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 50.43[3][c] (3d ed. 2012). Novell does not dispute—nor could it—that it had sufficient notice of Microsoft's release and sale of claims arguments. Since the rationales for application of the waiver rule are not implicated here, it would be "inappropriate" to bar Microsoft from making these arguments again.[52]

A. Novell Released Any Claim for Harm to Novell Products Other Than WordPerfect and Quattro Pro.

Novell does not dispute that on November 8, 2004, four days before Novell filed the Complaint in this action, Novell released Microsoft from any claims not expressly set forth in the Complaint. (Novell Br. at 136-37.) Novell effectively concedes that it cannot collect damages for harm to any Novell product other than WordPerfect and Quattro Pro (*see* Novell Br.

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[52] Microsoft's positions with respect to the release and sale of claims arguments have long been clear to Novell and to the Court, having been set forth in the pretrial order, a motion *in limine* and other papers filed over the past several years. (*See*, *e.g.*, Microsoft's Proposed Pre-Trial Order, filed Sept. 27, 2011, Dkt. #152, at 12; Microsoft's Memorandum in Support of its Motion in Limine to Exclude Evidence of Novell's New Middleware Theory, filed Sept. 21, 2011, Dkt. #123, at 4-5, 15-16; Microsoft's Memorandum in Opposition to Novell's Renewed Motion for Summary Judgment on Microsoft's Affirmative Defenses and in Support of Microsoft's Cross-Motion for Summary Judgment, Case No. 1:05-cv-01087, filed Nov. 13, 2009, Dkt. #104, at 3-21, 23-37; *see also* 699 F. Supp. 2d at 735-39.)

at 136-38), admitting that harm to (a) PerfectOffice is relevant only insofar as it translated into "lost sales" of WordPerfect and Quattro Pro (*id*. at 137) and (b) Novell's QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery and FTP/HTTP browser is relevant only insofar as such evidence "relate[s] to the harm to WordPerfect and the integration of technologies into WordPerfect's file open dialog" (*id*. at 138). The Complaint contains no allegation of harm to PerfectOffice and these other five products, and thus any such claims were released.

According to Novell, the Complaint "necessarily encompass[es]" PerfectOffice because "PerfectOffice contains WordPerfect and Quattro Pro bundled together" and, additionally, because "Microsoft itself raised the issue of suites." (Novell Br. at 137-40.) Novell again misses the point entirely. There is no doubt that Novell never set forth a claim of harm to PerfectOffice in its Complaint. Indeed, while Novell relies upon the Fourth Circuit's recognition in its 2007 decision that "WordPerfect and Quattro Pro are 'office-productivity applications,' which Novell marketed together as an office-productivity package called 'PerfectOffice'" (Novell Br. at 137 (quoting *Novell*, 505 F.3d at 305)), Novell ignores the Fourth Circuit's holding in 2011 that Count I asserted a claim for harm only to Novell's "office productivity applications," and that the Complaint "expressly characterized" the term "office productivity applications" to include only WordPerfect and Quattro Pro. *Novell, Inc.* v. *Microsoft Corp.*, 429 F. App'x 254, 257, 264 (4th Cir. 2011).

With respect to the other five products, Novell's brief attempts to mislead by citing 12 paragraphs from the Complaint and asserting that "the Complaint extensively discusses how Microsoft's conduct harmed complementary technologies of WordPerfect, including . . . QuickFinder." (Novell Br. at 138.) Only two of the 12 paragraphs even mention QuickFinder,

and they allege that Microsoft used de facto industry standards to prevent Novell from placing QuickFinder *on the Windows desktop* (Compl. ¶¶ 94-95), which is completely unrelated to the harm Novell complains of now—Microsoft's alleged interference with Novell's integration of QuickFinder in its file open dialog.

The evidence at trial showed that Novell did not need the namespace extension APIs to integrate these five products into Novell's custom file open dialog. As Alepin and Richardson made clear, Novell could have integrated the five products into the WordPerfect custom file open dialog "[w]ithout using the namespace extensions, just using the common controls in Windows 95." (Alepin, Nov. 10 Trial Tr. at 1664-65; *see also id.* at 1584-85; Richardson, Oct. 25 Trial Tr. at 632-33.) More fundamentally, the shared code group intended to use the namespace extension APIs in order to embed these five other products directly into the Windows shell. (Harral, Oct. 20 Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 372-74; Richardson, Oct. 25 Trial Tr. at 613-14, 629-30, 638, 690-92.) The Complaint makes no allegation that the October 3 Decision harmed Novell's ability to embed these five products into the Windows 95 shell, and thus any such claim was released in the 2004 settlement agreement.[53]

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

As it was tried, Novell's claim did not bear a "real relation" to the Government Case, and thus the statute of limitations was not tolled. *First*, Novell effectively argued throughout the trial that what mattered was harm to competition in applications markets. (*See*

[53] Novell's contention that consideration of this argument is barred by the law of the case doctrine is strange. The Fourth Circuit did not "decide[] upon a rule of law" that resolves this argument. *Huffman* v. *Saul Holdings Limited Partnership*, 262 F.3d 1128, 1132 (10th Cir. 2001) (citation omitted). A passing reference to the existence of PerfectOffice (*see* Novell Br. at 137 (quoting *Novell*, 505 F.3d at 305)) does not constitute "a legal decision" that bars litigation on an issue that was never presented to the Fourth Circuit. *Capps* v. *Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (citation omitted).

Microsoft Br. at 134-35.) Novell's response—that its arguments were within the scope of the Government Case because Novell's counsel was "explain[ing] how Microsoft's plan was based on leveraging its operating systems technology for the benefit of its applications" (Novell Br. at 142-43 (emphasis omitted))—only corroborates Novell's reliance on harm to competition in the market for office productivity applications. As the Court noted: "Novell's apparent ideological position is to claim that they were attempting to monopolize the Office suite market translates into them trying—you know, that that makes it the same claim as trying to monopolize, maintain a monopoly in the operating system market. I don't see that." (Oct. 27 Trial Tr. at 939.)[54]

Second, as Microsoft showed in its Opening Memorandum (Microsoft Br. at 135-36), both of Novell's current theories of harm to competition in the PC operating system market are inconsistent with the Government Case. At trial, Novell sought to repudiate the Findings of Fact (for which it sought and obtained collateral estoppel) that establish that "the applications barrier to entry is comprised of thousands of applications" (*see* Novell Br. at 143-44), adopting instead a theory of harm to competition based on the notion that a mere three products could enable a rival operating system to surmount the applications barrier to entry. *See* pp. 33-43, *supra*. Novell's claim is, accordingly, time-barred.[55]

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[54] Moreover, Novell's assertion that "Novell's counsel was describing a way in which Microsoft planned to abuse its PC operating systems monopoly power to protect its key franchise applications, thereby widening the 'moat' surrounding its monopoly" (Novell Br. at 143) is flatly inconsistent with the record. In fact, Novell's lawyer began his summation by describing Microsoft's so-called "Hood Canal Plan," and asserting that Microsoft adopted such a plan to ensure that "Word and Excel would [not] be forced to battle against their competitors on even turf," which, according to Novell's lawyer, violated "what the antitrust laws are all about." (Dec. 13 Trial Tr. at 5162-64.) These contentions make plain that any similarity between Novell's claim and the Government Case that appeared on the face of Novell's Complaint was a "mere sham." *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965).

[55] The Fourth Circuit's determination that Novell adequately pled certain elements of its claim (*see* Novell Br. at 131-33) at the motion to dismiss stage—"[t]aking Novell's allegations

(*footnote continued*)

C. Novell Sold Its Claim to Caldera.

As Microsoft showed in its Opening Memorandum, Novell's claim at trial that its Three Products and "middleware" had the potential to impact competition in the PC operating system market relied on its assertions about the installed base of WordPerfect on the DOS platform, and is thus "associated directly or indirectly with" the claim that Novell sold Caldera in 1996. (Microsoft Br. at 130-33.) Novell does not deny that it relies upon evidence at trial of WordPerfect's installed base on the DOS platform. (*See* Novell Br. at 135-36.) Indeed, evidence of Novell/WordPerfect's historical success on the DOS platform is a reason why, according to Novell's witnesses at trial, its products might theoretically have threatened the applications barrier to entry (Frankenberg, Nov. 8 Trial Tr. at 1245-46 (WordPerfect's installed base on DOS provided Novell with a "significant opportunity"); *see also* Harral, Oct. 24 Trial Tr. at 534-35; Richardson, Oct. 25 Trial Tr. at 597-98), and thus threaten Microsoft's monopoly in the PC operating system market (Novell Br. at 20-23 ("By early 1994, WordPerfect faced a 'huge potential growth' opportunity converting its 'WPDOS user base as they transition to the Windows environment.'" (quotation omitted))).

Novell argues that references made by its witnesses and lawyers throughout the trial to WordPerfect's installed base on DOS referred only to MS-DOS, not DR DOS. (Novell Br. at 135.) But the only support that Novell can muster for this manufactured distinction is testimony from Noll on cross-examination, in which Microsoft's counsel asked Noll to set aside MS-DOS and address WordPerfect's market share only on Windows. (*See* Noll, Nov. 15 Trial

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(*footnote continued*)
as true," 505 F.3d at 316—bears not at all on the present inquiry. Indeed, "an appellate decision that a pleading is sufficient" does not bar a subsequent "judgment that finds a lack of fact support." 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4478.3 (2d ed. 2011).

Tr. at 1923-25.) In fact, an IDC market share chart that Novell introduced into evidence (Dec. 2 Trial Tr. at 4105) and upon which Novell relies in its brief (Novell Br. at 22, 30, 70) draws no such distinction and lists WordPerfect's installed base on all DOS platforms. (PX 599A.) Novell does not deny that DR DOS was a clone of MS-DOS, so references to DOS generally encompass both products.

D. Novell Suffered No Cognizable Antitrust Injury.

Novell fails to address the requirement that "the injury [it] suffered involved harm to competition." *Four Corners*, 582 F.3d at 1225; *see also Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (the antitrust injury requirement "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior" (emphasis in original)). This requirement is necessary because, as the Supreme Court has held, an antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Given Novell's unique cross-market theory of harm to competition, Novell must show that its "alleged injuries reflect the anticompetitive effect of the alleged violation"—here, harm to competition in the PC operating system market. (Microsoft Br. at 123-26.) The evidence at trial showed overwhelmingly that the October 3 Decision did not harm competition in the PC operating system market. Even if Novell suffered some injury as a result of the October 3 Decision—and the evidence is overwhelming that it did not, *see* pp. 16-30, *supra*—"economic loss" suffered by Novell, without any corresponding harm to competition, is insufficient as a matter of law to confer antitrust standing on a plaintiff. *Elliott Industries Ltd.* v. *BP America Production Co.*, 407 F.3d 1091, 1125 (10th Cir. 2005). Because the injuries that Novell claims to have suffered—a delay in the release of WordPerfect, Quattro Pro and

PerfectOffice for Windows 95—"ha[d] no adverse effect on competition or consumers" in the PC operating system market, Novell lacks standing to pursue this action. *Id.* at 1125.

Novell incorrectly asserts that *Elliott Industries* did not endorse the consumer-or-competitor rule, arguing that "[i]n *Elliott*, the plaintiff failed to allege any antitrust injury resulting from conduct that harmed competition." (Novell Br. at 118.) Plaintiff in *Elliott* failed to allege antitrust injury for the same reason that Novell has failed to prove antitrust injury here—it was neither "a consumer of [defendants'] products" nor "a competitor of [defendants]." 407 F.3d at 1125.

CONCLUSION

Count One of Novell's Complaint—the only claim remaining after many years of litigation in this action—made the unprecedented Section 2 claim that conduct in one market allowed Microsoft to maintain a monopoly in a different market. At trial, however, Novell failed to prove that the decision to withdraw support for the namespace extension APIs had any adverse effect on competition in the PC operating system market—or even that the decision caused any delay in the release of Novell's applications for Windows 95. Indeed, the evidence overwhelmingly confirmed what Novell's CEO, Bob Frankenberg, recognized when he saw DX 230 at trial: Quattro Pro was not completed even by Christmas 1995.

Further, there can be nothing anticompetitive or "deceitful" about a decision to change a pre-release version of an operating system when industry practice and the governing contract between the parties expressly permitted such changes. Novell understood that the beta version of Windows 95 might change and Novell's own practices (as reflected in DX 612A) were consistent with this industry practice. Importantly, the witnesses at trial unanimously agreed that it is perfectly legitimate for the developer of an operating system to make changes to

a beta in the interest of avoiding crashes. Beyond that, because Microsoft's October 3 Decision was not the termination of a pre-existing relationship between the parties, the Tenth Circuit's *Four Corners* and *Christy Sports* decisions are an independent ground for entering judgment for Microsoft.

Novell's case was always nothing more than a highly unconventional theory in search of facts. Those facts never materialized at trial, and it would not be a sensible use of limited judicial and public resources to allow Novell another try under these circumstances. Microsoft's motion for judgment as a matter of law relies on several overwhelmingly strong grounds—any one of which is sufficient to grant the motion. Judgment should now be entered for Microsoft.

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Respectfully Submitted,

/s/ James S. Jardine

James S. Jardine (A1647)
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145
Phone: (801) 532-1500
Facsimile: (801) 532-7543

David B. Tulchin
Steven L. Holley
Sharon L. Nelles
Adam S. Paris
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Phone: (212) 558-4000
Facsimile: (212) 558-3588

Steven J. Aeschbacher (A4527)
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
Phone: (425) 706-8080
Facsimile: (425) 936-7329

Attorneys for Microsoft Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2012, I caused a true and correct copy of the foregoing Microsoft's Reply Memorandum in Further Support of its Renewed Motion for Judgment as a Matter of Law to be filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Max D. Wheeler
Maralyn M. English
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145-5000

Jeffrey M. Johnson
Paul R. Taskier
Jason D. Wallach
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403

R. Bruce Holcomb
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 310
Washington, DC 20006-5403

John E. Schmidtlein
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005

/s/ M. David Possick