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

NOVELL, INC.,

Plaintiff,

-v-

MICROSOFT CORPORATION,

Defendant.

MICROSOFT'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
JUDGMENT AS A MATTER OF LAW

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

November 17, 2011

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF FACTS	10
A. What Novell Was Required to Prove In Its Case-In-Chief	10
B. The Evidence Novell Presented at Trial	12
1. <i>Custom Print Processor and Logo Licensing Program</i>	12
2. <i>Namespace Extension APIs</i>	14
(a) The Development of Windows 95	14
(b) The M6 Beta and License Agreement	17
(c) Novell’s Plan to Use the Namespace Extension APIs	19
(d) Microsoft’s Decision to Withdraw Support for the Namespace Extension APIs	22
(e) Novell Decides to Build Its Own Advanced File Open Dialog	25
ARGUMENT	34
I. Novell Failed To Introduce Evidence that Would Permit a Reasonable Jury To Find that Microsoft Harmed Competition in the PC Operating System Market	35
A. The Evidence at Trial Shows that the Timely Release of WordPerfect and Quattro Pro Would Have Enhanced Microsoft’s Monopoly in the PC Operating System Market	35
B. The Evidence at Trial Refutes Both of Novell’s Theories of Harm to Competition in the PC Operating System Market	40
II. Novell Failed To Introduce Evidence that Would Permit a Reasonable Jury To Find that Microsoft Engaged in Anticompetitive Conduct	48
A. Novell Must Prove that Microsoft’s Decision to Withdraw Support for the Namespace Extension APIs Falls Within the Limited <i>Aspen Skiing</i> Exception	48
B. The Withdrawal of Support for the Namespace Extension APIs Did Not “Terminate” the Relationship with Novell	52
C. The Practice in the Software Industry and the Terms of the Beta License Agreement Permitted Microsoft to Withdraw Support for APIs that Novell Received as Part of a Beta Version of Windows 95	58

D.	The Evidence at Trial Establishes that Microsoft Had Several Legitimate Business Justifications for Its Withdrawal of Support for the Namespace Extension APIs	62
CONCLUSION		68

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585 (1985)	<i>passim</i>
<i>Bell v. Dow Chemical Co.</i> , 847 F.2d 1179 (5th Cir. 1988)	10, 66
<i>Boellstorff v. State Farm Mutual Automobile Ins. Co.</i> , 2009 U.S. Dist. LEXIS 21748 (D. Colo. March 18, 2009)	35
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993)	35, 52, 57
<i>Christy Sports, LLC v. Deer Valley Resort Co.</i> , 555 F.3d 1188 (10th Cir. 2009)	<i>passim</i>
<i>Compliance Marketing, Inc. v. Drugtest, Inc.</i> , 2010 U.S. Dist. LEXIS 34315 (D. Colo. April 7, 2010)	49
<i>Daisy Mountain Fire District v. Microsoft Corp.</i> , 547 F. Supp. 2d 475 (D. Md. 2008)	50
<i>Forsgren v. Hydraulics Int'l, Inc.</i> , 2011 U.S. Dist. LEXIS 35641 (D. Utah March 31, 2011)	35
<i>Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango</i> , 582 F.3d 1216 (10th Cir. 2009)	<i>passim</i>
<i>In2 Networks, Inc. v. Honeywell International</i> , 2011 U.S. Dist. LEXIS 117589 (D. Utah Oct. 12, 2011)	50-51
<i>In re Microsoft Corp. Antitrust Litigation</i> , 274 F. Supp. 2d 743 (D. Md. 2003)	50
<i>Intergraph Corp. v. Intel Corp.</i> , 195 F.3d 1346 (Fed. Cir. 1999)	52, 56-57, 60
<i>Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications</i> , 63 F.3d 1540 (10th Cir. 1995)	66
<i>Novell, Inc. v. Microsoft Corp.</i> , 699 F. Supp. 2d 730 (D. Md. 2010)	<i>passim</i>

Olympia Equipment Leasing Co. v. Western Union Telegraph Co.,
797 F.2d 370 (7th Cir. 1986)59

Telex Corp. v. International Business Machines Corp.,
510 F.2d 894 (10th Cir. 1975)9, 58, 61

Trace X Chemical, Inc. v. Canadian Industries, Ltd.,
738 F.2d 261 (8th Cir. 1984)61

United States v. Syufy Enters.,
903 F.2d 659 (9th Cir. 1990)59

Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004)49, 50

Welding v. Bios Corp.,
353 F.3d 1214 (10th Cir. 2004)34

RULE

FED. R. CIV. P. 50(a)34

OTHER AUTHORITY

3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772c2 (3d ed. 2011)66

Microsoft Corporation (“Microsoft”) respectfully submits this Memorandum in Support of its Motion for Judgment as a Matter of Law on Novell, Inc.’s (“Novell”) claim under Section 2 of the Sherman Act for unlawful monopolization of the PC operating system market. Based on the evidence at trial, no reasonable jury could find in Novell’s favor. The Court should therefore enter judgment as a matter of law in favor of Microsoft.

To prevail at trial, Novell must prove (a) that Microsoft engaged in anticompetitive conduct by withdrawing support for the namespace extension APIs; (b) that this conduct “thereby delay[ed] and impair[ed] Novell’s development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95;” and (c) that the delay caused by Microsoft’s conduct also “caused anticompetitive harm in the PC operating system market.” *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 743 (D. Md. 2010). In order to prove that the alleged harm to WordPerfect and Quattro Pro (*i.e.*, the delay) reduced competition in the PC operating system market, Novell has advanced two theories: (a) that WordPerfect, either alone or in combination with AppWare and OpenDoc, was cross-platform “middleware” that exposed a broad enough set of application programming interfaces (“APIs”) that Independent Software Vendors (“ISVs”) could use to profitably develop general-purpose personal productivity applications, and (b) that WordPerfect and Quattro Pro were such popular franchise applications that, if available on rival operating systems, they would have popularized those operating systems and thereby substantially reduced the dominance of Microsoft Windows. *Id.*; *see also* October 18 Trial Tr. at 40-41 (describing Novell’s “middleware” theory); Compl. ¶¶ 47-52 (describing Novell’s franchise applications theory).

In view of the evidence Novell presented at trial, Novell’s claim fails as a matter of law for several independent reasons.

First, Novell has failed to present evidence that the withdrawal of support for the namespace extension APIs enabled Microsoft to unlawfully maintain its monopoly in the market for PC operating systems. The evidence shows that, absent Microsoft’s allegedly anticompetitive conduct, Novell would have taken steps to enhance Windows 95, thereby contributing to Microsoft’s dominance in the PC operating system market. Novell’s then-CEO, Robert Frankenberg, testified that if Novell had released versions of WordPerfect and Quattro Pro at or about the time that Microsoft released Windows 95 in August 1995, “[i]t would have made Windows 95 more desirable in the marketplace” and “would have made Windows 95 market share even higher than what it turned out to be.” (Testimony of Robert Frankenberg (“Frankenberg”), Nov. 8 Trial Tr. at 1226-27.) As the Court observed, Microsoft’s withdrawal of support for the namespace extension APIs “did not maintain the monopoly” because Novell’s witnesses were “clear that [Novell] wanted to marry the two products, the operating system and WordPerfect . . . both through 1996 and the foreseeable future.” (Oct. 27 Trial Tr. at 928-29; *see also* pp. 17, 20-21, *infra* (quoting trial testimony of Novell’s witnesses).)

The evidence at trial further demonstrates that Novell sought to use the namespace extension APIs in order to “augment” Windows 95—and thereby “make Windows the best version of Windows that it could be.” (Testimony of Adam Harral (“Harral”), Oct. 24 Trial Tr. at 372-74, 515.) “It was our intent to make the user’s experience on Windows better because they had WordPerfect installed.” (Testimony of Greg Richardson (“Richardson”), Oct. 25 Trial Tr. at 613.) Evidence that Novell intended to use the namespace extension APIs to make Windows a better and more popular operating system refutes Novell’s theory that Microsoft’s withdrawal of support for the namespace extension APIs in October 1994 adversely affected competition in the PC operating system market. Novell introduced no evidence at trial

that it had any intention of mounting a challenge to Microsoft's leading position in the PC operating system market or even that it intended to assist another actor to mount any such challenge.

Second, Novell cannot prove harm to competition in the PC operating system market because both its franchise applications theory and its "middleware" theory are entirely inconsistent with the evidence presented at trial.

Novell's franchise applications theory fails in light of the evidence that, in the early 1990s, versions of WordPerfect ran on many non-Microsoft operating systems, including IBM OS/2, Apple Macintosh, Digital VMS, UNIX, and NeXT (Harral, Oct. 20 Trial Tr. at 216; Testimony of Gary Gibb ("Gibb"), Oct. 26 Trial Tr. at 776; Frankenberg, Nov. 7 Trial Tr. at 996), none of which diminished the popularity of Windows. (*See* Finding of Fact 35 (throughout the 1990s "Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent"), read to the jury on Oct. 18.) As the Court observed, the idea that the availability of WordPerfect and Quattro Pro on non-Microsoft operating systems would have allowed a rival operating system to challenge Windows therefore "is counterfactual." (Nov. 9 Trial Tr. at 1501.) Novell's franchise applications theory is further refuted by the collaterally estopped Findings of Fact, which establish that even an operating system that ran several thousand applications could not surmount the applications barrier to entry protecting Microsoft's monopoly in the PC operating system market. (Finding of Fact 37-39, read to the jury on Oct. 18.) The notion that just two applications, no matter how popular, could surmount the applications barrier to entry flies in the face of a central tenet of the District of Columbia Case (a tenet incorporated into Novell's Complaint).

Novell's "middleware" theory likewise fails in view of the evidence introduced at trial. According to the Findings of Fact, the only form of "middleware" that could conceivably erode Microsoft's monopoly in the PC operating system market had to (a) be cross-platform, and (b) expose a sufficient number of APIs to allow for the development of general-purpose personal productivity applications that relied solely on those APIs as opposed to APIs exposed by Windows. (*See, e.g.*, Findings of Fact 68, 74, read to the jury on Nov. 14.) Novell's antitrust economist, Professor Roger Noll, added an additional requirement. Noll testified that in order to "threaten[]" Microsoft's "operating systems monopoly," middleware had to be not only cross-platform but "ubiquitous," meaning that it had to be "an extremely successful product . . . having a large install[ed] base and running on different platforms." (Testimony of Roger Noll ("Noll"), Nov. 14 Trial Tr. at 1787.) Indeed, Professor Noll agreed "that to be middleware in the sense of some product or platform that could imperil the applications barrier to entry, the middleware program has to be present on all or nearly all of the PCs that use the operating system to which the application otherwise would be written." (Noll, Nov. 15 Trial Tr. at 1923.)

Novell's applications lacked all three characteristics. By 1994 and 1995, WordPerfect and Quattro Pro were not "cross-platform" or ubiquitous. As Novell's shared code group software developer Adam Harral explained, "whatever [WordPerfect] exposed in terms of its own APIs or everything else, it was going to be operating on the Windows 95 operating system." (Harral, Oct. 24 Trial Tr. at 559-60.) Further, Novell's technical expert, Ronald Alepin, testified that software developers did not, and would not, write general-purpose personal productivity applications to run on top of WordPerfect. (Testimony of Ronald Alepin ("Alepin"), Nov. 9 Trial Tr. at 1480.) Indeed, Alepin testified that software developers could not write general-purpose personal productivity applications such as Corel Draw to run on top of any

Novell application. (Alepin, Nov. 10 Trial Tr. at 1533, 1538-40; *see also* Alepin, Nov. 9 Trial Tr. at 1489-90.)

Novell's antitrust economist, Professor Roger Noll, also acknowledged that even "as of 1999, there had never been any middleware that could imperil the applications barrier to entry." (Noll, Nov. 15 Trial Tr. at 1920.) Indeed, according to the binding Findings of Fact, there was no software product as of 1999—four years after the events at issue in this lawsuit—that served as the type of "cross-platform middleware" that could threaten Microsoft's PC operating system monopoly, and there was no prospect of such a software product emerging in the foreseeable future. (*See, e.g.*, Findings of Fact 28-29, 32, read to the jury on Oct. 18.)

Third, Novell's claim fails because the evidence establishes that Microsoft's withdrawal of support for the namespace extension APIs was not anticompetitive conduct under the antitrust laws. Under Tenth Circuit law applying *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the only circumstance in which a monopolist may be liable for refusing to cooperate with a competitor (even in cases *not* involving intellectual property) is where the monopolist (a) "terminated a profitable relationship" and (b) did so "without any economic justification." *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009) (citation omitted). The trial evidence establishes that Microsoft's withdrawal of support for the namespace extension APIs does not come anywhere close to fitting within this limited exception, for several independent reasons. First, Microsoft's decision to withdraw support for the namespace extension APIs was not the termination of a profitable relationship with Novell. Further, Novell's ability to release its products was not affected by that decision. Rather, the evidence establishes that WordPerfect and Quattro Pro did not need to call the namespace extension APIs in order to be compatible

with Windows 95, or to enable Novell to release those applications in a timely manner. As Adam Harral testified, “I don’t know anything that WordPerfect [the] word processor needed to do for a NameSpace extension.” (Harral, Oct. 20 Trial Tr. at 327; *see also* Harral, Oct. 24 Trial Tr. at 476.) This admission completely undermines Novell’s allegations that, as a result of Microsoft’s conduct, “in many instances, a user literally could not open a document he previously created and saved,” or that “Novell was suddenly unable to provide basic file management functions in WordPerfect.” (Compl. ¶ 75.)

To the contrary, the evidence shows that Novell sought to use the namespace extension APIs to “augment” Windows, by embedding Novell’s QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery, and FTP/HTTP browser directly in the Windows shell. (Harral, Oct. 20 Trial Tr. at 268-69, 285, 292, 309-10; Richardson, Oct. 25 Trial Tr. at 635-38, 691-92.) Novell’s goal was to make these different Novell products available in the tree view of the Windows Explorer and the Windows 95 common file open dialog, regardless of whether a user was running WordPerfect and QuattroPro. (Harral, Oct. 20 Trial Tr. at 269-70; Richardson, Oct. 25 Trial Tr. at 613.) Novell introduced no evidence at trial that adding these five products to the Windows 95 shell was important to the functioning of WordPerfect or Quattro Pro.

Novell’s witnesses testified that Novell had three options to release WordPerfect and Quattro Pro for Windows 95 after learning in October 1994 that Microsoft had withdrawn support for the namespace extension APIs: (1) Novell could call the namespace extension APIs using the documentation it received in June 1994; (2) Novell could use the Windows 95 common file open dialog that Microsoft made available for free to ISVs; and (3) Novell could write its own custom file open dialog. (Harral, Oct. 20 Trial Tr. at 342-43; Richardson, Oct. 25 Trial Tr.

at 628-30.) Novell chose the third option (Harral, Oct. 20 Trial Tr. at 342-43, 346-47; Richardson, Oct. 25 Trial Tr. at 625, 630)—and this risky business decision implicates the antitrust laws not at all. In fact, in writing its own custom file open dialog, Novell could have used common controls in Windows 95 to display the Windows 95 namespace, including virtual folders like My Computer and Network Neighborhood, and add folders for Novell products such as Quickfinder. (Richardson, Oct. 25 Trial Tr. at 607, 624-25; Alepin, Nov. 10 Trial Tr. at 1602-04.) Instead of using common controls in Windows 95 that Microsoft made available for free to ISVs, Novell chose to do something much more complex: attempting to replicate the functionality of the Windows Explorer. (Harral, Oct. 24 Trial Tr. at 366-67; Richardson, Oct. 25 Trial Tr. at 625, 630; Gibb, Oct. 26 Trial Tr. at 848-49.) Novell was aware that its decision would require a significant investment of time and resources, whereas simply calling the namespace extension APIs or using the Windows 95 common file open dialog would not have caused any delay in the release of WordPerfect and Quattro Pro for Windows 95. (Harral, Oct. 24 Trial Tr. at 366-67, 485-86, 504; Gibb, Oct. 26 Trial Tr. at 847-48.)

It was Novell's choice to try to create an advanced file open dialog based on its belief that such a file open dialog would provide WordPerfect and Quattro Pro with a competitive advantage—even if it meant that their release was substantially delayed. Microsoft did not terminate its relationship with Novell, did not foreclose Novell from releasing applications that were compatible with Windows 95, and did not treat Novell differently from other software developers creating applications to run on Windows 95, including Microsoft's own software developers working on Microsoft Office. (DX 3, e-mail from Brad Struss, dated

Oct. 12, 1994 at 2, Holley Decl. Ex. A.)¹ Accordingly, Novell cannot show that Microsoft's conduct was anticompetitive under the relevant legal standard. *Four Corners Nephrology*, 582 F.3d at 1225.

Next, the evidence further establishes that Microsoft's conduct was not anticompetitive as a matter of law because Novell received documentation for the namespace extension APIs as part of a "beta" version of Windows 95 while the new operating system was still under development. (DX 18, Microsoft Corporation Non-Disclosure Agreement (Pre-release Product) with WordPerfect Corporation, executed May 24, 1994 at 1, ¶ 2, Holley Decl. Ex. B.) At trial, Bob Frankenberg acknowledged that companies who obtained prerelease versions of software products pursuant to beta license agreements, including Novell, understood that these products "might change" and "could change," and that this was "something that was widely understood in the software industry." (Frankenberg, Nov. 8 Trial Tr. at 1201, 1204-05, 1209.) Because Novell was "aware that the relationship was temporary and subject to [Microsoft's] business judgment," Microsoft's decision to withdraw support for the namespace extension APIs does not constitute anticompetitive conduct as a matter of law. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1196 (10th Cir. 2009). Moreover, an "ordinary business practice[] typical of those used in a competitive market"—here, the decision by a software developer to modify a product under development prior to final release—is not

¹ All documents cited in this memorandum have been admitted into evidence, except for demonstrative exhibits 93, 95, 96 and 102 to which reference is made on pages 19, 20 and 34.

anticompetitive conduct. *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, at 925-26, 928 (10th Cir. 1975).²

Novell's claim also fails because the evidence at trial establishes that Microsoft had legitimate business justifications for its decision to withdraw support for the namespace extension APIs, which, as a matter of law, precludes a finding that Microsoft engaged in anticompetitive behavior. *Four Corners Nephrology*, 582 F.3d at 1225. Support was withdrawn because the namespace extension APIs (a) posed a risk to the stability and reliability of Windows 95; and (b) failed to achieve the level of integration that Bill Gates anticipated they would. (*See* pp. 22-24, *infra.*) There is no evidence to the contrary or that Microsoft's contemporaneous reasons were pretextual.

Indeed, Novell's experts confirm that Microsoft's decision to withdraw support for the namespace extension APIs was supported by legitimate justifications. Ronald Alepin testified that an application calling the namespace extension APIs would run in the same process as the Windows 95 shell and "had the potential to make the system unresponsive" if it crashed. (Alepin, Nov. 10 Trial Tr. at 1588-89.) Roger Noll confirmed that if "APIs are unstable," then that would be a "valid reason not to document[]" them. (Noll, Nov. 15 Trial Tr. at 1872.) Although Alepin and Noll challenged the *sufficiency* of Microsoft's justifications (*i.e.*, whether the benefits to Microsoft of withdrawing support for the namespace extension APIs outweigh the

² Although Novell often has attempted to mischaracterize the significance of the evidence concerning the license agreements and the industry understanding, Microsoft does not contend that the beta license agreement with Novell immunizes it from liability under the antitrust laws. Rather, the express terms of the contract, consistent with the evidence of the common practice in the software industry that a beta release is subject to change, establish that Microsoft's withdrawal of support for the namespace extension APIs was not anticompetitive. *See* pp. 58-61, *infra.*

purported cost of that decision to Novell), their opinions as to the sufficiency of Microsoft's justifications are irrelevant as a matter of law (*see pp. 65-67, infra*); once Microsoft has shown a legitimate justification for its conduct, the inquiry ends. A jury would not be permitted to weigh the merits of Microsoft's proffered justifications and could not accordingly find in Novell's favor. *See Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988) (stating that a jury cannot "weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal" and that "[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" (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597)); *see also Four Corners Nephrology*, 582 F.3d at 1225 ("*Aspen Skiing* does not require more economic justification than [that] to avoid Section 2 liability.").

For all of these reasons and the others mentioned below and in open court, the Court should grant Microsoft's motion for judgment as a matter of law.

STATEMENT OF FACTS

A. What Novell Was Required to Prove In Its Case-In-Chief

In opposing Microsoft's summary judgment motion, Novell asserted that Microsoft engaged in three allegedly anticompetitive acts: "(1) Withdrawing access to information about, and otherwise changing course regarding, the Windows 95 namespace extensions, thereby delaying and impairing Novell's development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95"; (2) "Misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect's costs and decreasing its functionality"; and (3) "Refusing to grant a Windows 95 logo license for certain Novell software applications." *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 743 (D. Md. 2010).

In its March 30, 2010 decision on Microsoft's motion for summary judgment, the Court explained that in order to succeed on an unlawful monopolization claim under Section 2 of the Sherman Act, a plaintiff "must prove not only that the defendant's conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market." *Novell*, 699 F. Supp. 2d at 747-48. The Court held that "Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*." *Id.* at 748 (emphasis in original). The Court further held that, in order to prevail, Novell must establish "that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market."³ *Id.* at 750.

Finally, the Court recognized that "a monopolist generally has a right to refuse to cooperate with a competitor," but held that a jury may decide whether the three allegedly anticompetitive acts directed at WordPerfect and Quattro Pro fall within the limited exception provided in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to this general rule. *Novell*, 699 F. Supp. 2d at 745-47. Under the narrow *Aspen Skiing* exception, Novell was required to prove at trial (a) that Microsoft's allegedly anticompetitive conduct

³ The Court's October 11, 2011 letter concerning preliminary jury instructions explained that, "although I remain of the view that the 'significant contribution' test applies in determining whether Microsoft's anticompetitive conduct during the relevant period enabled it to maintain its monopoly in the PC operating system, my preliminary instruction does not address the issue. I would prefer to postpone final decision on the issue until a later stage of this litigation." (Docket No. 206, at 3.) For the purposes of this motion, the Court need not resolve Novell's objections to the causation standard set forth in the Court's March 2010 decision. As demonstrated below, *see* p. 35-48, *infra*, Novell's trial evidence demonstrates that Novell has failed to prove harm to competition in the PC operating system market under either causation standard.

constituted the termination of a pre-existing and profitable relationship between the parties, and (b) this conduct lacked any legitimate business justification.

The Court's decision on Microsoft's summary judgment motion created the framework for assessing the proof adduced by Novell at trial. Novell failed at every step of the analysis to prove its claim.

B. The Evidence Novell Presented at Trial

Novell called four fact witnesses to the stand and introduced the deposition testimony of eleven additional Microsoft witnesses. Novell also called three expert witnesses: Mr. Ronald Alepin on technical issues, Dr. Roger Noll on competition issues, and Dr. Frederick Warren-Boulton on damages.

In his opening statement, Novell's lawyer stated that while the jury might "hear about other acts taken by Microsoft against Novell that were also anticompetitive, . . . none of those had the impact of these namespace extensions." (Oct. 18 Trial Tr. at 85.) Novell's lawyer did not mention the lack of support for custom print processors in Windows 95 or the requirements of the Windows 95 logo licensing program in his opening statement, and the evidence at trial failed to create an issue of fact for the jury on either score.

1. Custom Print Processor and Logo Licensing Program

Novell introduced no evidence whatsoever in support of its custom print processor claim. As a result, that claim has been abandoned. With respect to the Windows 95 logo licensing allegation, Novell offered the testimony of two witnesses, Bob Frankenberg and Greg Richardson, each of whom addressed the subject on direct in only a perfunctory way. Bob Frankenberg testified that in March 1995 Novell requested an exemption from the requirement that an application displaying the Windows 95 logo either run or "degrade gracefully" on Windows NT because achieving such compatibility purportedly would be difficult for Novell to

achieve. (Frankenberg, Nov. 8 Trial Tr. at 1170-1171, 1183.) Microsoft responded in April 1995 that the issues raised by Novell did not warrant an exemption from the requirement that WordPerfect and Quattro Pro run or “degrade gracefully” on Windows NT and Brad Chase, the General Manager of the Personal Systems Division at Microsoft, told Novell in an April 3, 1995 e-mail that he “would be glad to have a conference call” to discuss the matter further. (DX 22 at 13, Holley Decl. Ex. C.) This offer to confer further was never accepted; Novell never even responded to it. (Frankenberg, Nov. 8 Trial Tr. at 1171-72.) Bob Frankenberg testified that Novell chose not to participate in the Windows 95 logo licensing program and did not recall Novell pursuing the matter any further with Microsoft. (Frankenberg, Nov. 8 Trial Tr. at 1172, 1186.)

The contemporaneous documentary evidence confirms that Novell made a voluntary choice not to participate in the logo program. (See DX 157, e-mail from Todd Titensor, dated February 2, 1995, Holley Decl. Ex. D (“Bob F. has stated (in a meeting with the QP team, Mark, Glen, Bruce) that he does not accept the NT requirement and if it is not removed from the logo requirements list we will simply not support the logo.”).) Novell’s executives were concerned that if Novell publicly challenged Microsoft’s Windows 95 logo licensing requirements, other ISVs might challenge Novell’s YES logo program. A January 12, 1995 internal Novell memo “noted the similarities” between Microsoft’s logo program and Novell’s YES logo program, which “similarly require[d]” compatibility with other operating systems, and concluded, “if we push this with Microsoft, our ISVs will have increased standing to challenge the YES program.” (DX 155 at 1, Holley Decl. Ex. E.) Therefore, Novell concluded that it was “not willing at this time to satisfy the Windows NT compatibility requirements.” (*Id.*)

Greg Richardson, Novell's other witness to discuss the Windows 95 logo licensing program, testified that he had no first-hand knowledge of discussions between Novell and Microsoft on the issue. (Richardson, Oct. 25 Trial Tr. at 721-31.) Richardson also acknowledged that the office productivity applications ultimately released by Corel as part of WordPerfect Office 7 in May 1996 ran on Windows NT (Richardson, Oct. 25 Trial Tr. at 727-28), undermining the notion that it was not feasible for Novell to meet the Windows NT compatibility requirement of the Windows 95 logo licensing program. In short, Novell made a business decision not to participate in the Windows 95 logo licensing program.

2. *Namespace Extension APIs*

Novell's remaining allegation is that Microsoft's withdrawal of support for the namespace extension APIs in October 1994 was anticompetitive, caused harm to Novell because it delayed Novell in releasing WordPerfect and Quattro Pro for Windows 95, and that such delay harmed competition in the PC operating system market.

(a) *The Development of Windows 95*

In May 1990, Microsoft released Windows 3.0, an operating system described by Professor Noll as a "revolutionary technological event." (Noll, Nov. 15 Trial Tr. at 1910.) This new operating system, and its successor (Windows 3.1, released in 1991 (Frankenberg, Nov. 7 Trial Tr. at 1043)) became immensely popular and caused a dramatic shift in the market from the old character-based operating systems to new graphical-user interface operating systems. (See Frankenberg, Nov. 7 Trial Tr. at 1040-43; see also Noll, Nov. 15 Trial Tr. at 1910.)

In about 1993, Microsoft began developing its next PC operating system, codenamed "Chicago," and gave ISVs information about user interface features Microsoft was planning to include in Chicago. (See, e.g., PX 113, New Windows "Chicago" UI: What It Means for Your Application, at NOV-00734380, Holley Decl. Ex. F.) In July 1993,

WordPerfect developers attended Microsoft's Chicago User Interface Design Preview. (PX 63, Trip Report: Chicago User Interface Design Preview, July 8-9, 1993, Holley Decl. Ex.G.) At the Interface Design Preview, Microsoft provided WordPerfect and other ISVs with preliminary information about Chicago's new user interface, including common dialogs and various common controls supplied by the operating system. (*Id.* at NOV-B06507480, 87.)

In September 1993, WordPerfect employees created a "Trip Report" about a Win32 Developers Workshop they attended on September 9 and 10, 1993. (PX 78, Holley Decl. Ex. H.) According to the WordPerfect employees, Microsoft stated that the "[m]ail client [in Chicago] will tie into the shell as just another folder." (*Id.* at NOV-00721981.) Microsoft told WordPerfect that it did not want to document the APIs used to integrate Microsoft's e-mail client into the Chicago shell because Microsoft did not "want to force" another Microsoft operating system then under development "to support them." (*Id.*)

At a December 1993 conference, Microsoft made another presentation to ISVs describing the planned user interface of Chicago. (PX 113 at NOV-00734380, Holley Decl. Ex. F.) On December 10, 1993, shortly before the conference, Novell executed a license agreement with Microsoft, which stated that any information Novell employees were given at the conference "may be substantially modified prior to first commercial shipment" of Windows 95. (DX 19, Microsoft Corporation Non-Disclosure Agreement (Pre-release Product) with Novell, Inc., executed December 10, 1993 at 1 ¶ 2, Holley Decl. Ex. I.) Among the features that Microsoft described at the conference were common dialogs that ISVs could use as well as various "Shell Extensibility" features of Windows 95. (PX 113 at NOV 00734380, 89, Holley Decl. Ex. F.) According to the presentation, the extensible shell in Chicago would allow software developers to take advantage of features such as "Drag-and-Drop," "Property Sheet

Extensibility” and “Explorer UI Integration.” (*Id.* at NOV 00734389.) The presentation described the ability to add “custom container[s]” to the Windows Explorer (*Id.* at NOV 00734389-90), which was a new general purpose viewer included in Windows 95.

Two former Novell software developers, Adam Harral and Greg Richardson, testified at trial that certain of the functionality described in the December 1993 presentation was the functionality ultimately provided by the namespace extension APIs. (Harral, Oct. 20 Trial Tr. at 296-300; Richardson, Oct. 25 Trial Tr. at 590-91.) Although Adam Harral did not attend the December 1993 presentation, he testified that the presentation slides were “distributed amongst developers and evangelists and managers at WordPerfect.” (Harral, Oct. 20 Trial Tr. at 294.) The presentation warned that the namespace extension mechanism was “[n]ot for most applications!” and that integration with the Windows Explorer “[o]nly should be used if your application displays a pseudo folder: electronic mail, document management, etc.” (PX 113 at NOV 00734390, Holley Decl. Ex. F.) The presentation stated that “[u]sers should NOT edit documents with an explorer extension!” (*Id.*) Of course, editing documents is a central function of word processing and spreadsheet applications.

On May 10, 1994, Microsoft’s Kyle Marsh wrote an article in the Microsoft Developer Network, entitled “Extending the Chicago Shell,” which provided software developers with information regarding several categories of shell extensions in Chicago. (DX 72, Holley Decl. Ex. J.) The article noted that one “type of shell extension” called a “namespace browser, which allows users to browse the contents of objects using the shell’s familiar explorer view,” would be discussed in a later article. (*Id.* at NOV-B03687515.) The May 1994 article did not provide any information about the namespace extension APIs, but rather discussed the much larger set of shell extension APIs in Windows 95. (*Id.*)

Novell software developers testified that they were “excited about [Microsoft’s impending release] of Windows 95” and eager to take advantage of many of its new features. (Harral, Oct. 20 Trial Tr. at 256; Richardson, Oct. 25 Trial Tr. at 587-88.) Harral characterized Windows 95 as a “technological breakthrough” for the PC. (Harral, Oct. 24 Trial Tr. at 313; *see also* Noll, Nov. 15, Trial Tr. at 1911 (Windows 95 was a “substantial step forward”).) The evidence at trial showed that Novell was devoting its efforts to creating versions of WordPerfect and Quattro Pro for Windows 95 from the time that PerfectOffice 3.0 was released in December 1994 through the sale of WordPerfect and Quattro Pro to Corel in March 1996. (Frankenberg, Nov. 8 Trial Tr. at 1168-69; Gibb, Oct. 26 Trial Tr. at 787.)

(b) *The M6 Beta and License Agreement*

Novell’s former CEO, Robert Frankenberg, agreed that “Windows 95 was a significant step forward.” (Frankenberg, November 8 Trial Tr. at 1225-26.) Although Novell planned to develop versions of WordPerfect and Quattro Pro for Windows 95, there were “very few resources” on that effort as of August 1994 because Novell was focused on creating improved versions of its applications for the Windows 3.1 platform. (DX 4, Novell/WP/QP Integration Plan, submitted by Ad Rietveld, dated Aug. 3, 1994, at NOV-25-006573, Holley Decl. Ex. K; *see also* Gibb, Oct. 26 Trial Tr. at 845-46; Frankenberg, Nov. 7 Trial Tr. at 1071.)⁴

On June 10, 1994, Microsoft provided Novell with the Milestone 6 (“M6”) beta version of Windows 95—the first beta version of the new operating system provided to ISVs in

⁴ An October 21, 1994 internal Microsoft e-mail authored by Brad Struss reported that, according to Novell, it was “focus[ing] on 16-bit product revision this fall” and, as a result, “there are limited resources working on next years 32-bit release.” (DX 2 at 2, Holley Decl. Ex. L.) The e-mail further explains that Microsoft was “[w]orking with [Novell’s] senior management to see about getting more focus on their 32-bit release.” (*Id.*)

general and to Novell in particular. (Harral, October 24 Trial Tr. at 434-35; PX 388, Microsoft Windows “Chicago” Reviewer’s Guide at MSC 00762731, Holley Decl. Ex. M.)

Microsoft provided the beta version of Windows 95 to Novell pursuant to a license agreement, which provided that such beta versions “may not operate correctly and may be substantially modified prior to first commercial shipment,” and that Novell “assumes the entire risk with respect to the use of the” beta. (DX 18 at ¶ 2, Holley Decl. Ex. B; *see also* DX 19 at ¶ 2, Holley Decl. Ex. I.) Further, the M6 beta version of Windows 95 was accompanied by documentation that expressly cautioned software developers that it did “not represent a commitment on the part of Microsoft for providing or shipping the features and functionality in the final retail product offerings of Chicago [Windows 95].” (PX 388 at MSC 00762731, Holley Decl. Ex. M.)

At trial, Frankenberg testified that Novell understood that beta versions of Windows 95 both “could change” and “might change” prior to commercial release of the new operating system. (Frankenberg, Nov. 8 Trial Tr. at 1201, 1209.) Importantly, Frankenberg testified that it “was widely understood in the software industry” that beta versions of software products may change, that such software products may never be released at all, and that the entire risk arising from use of a beta version of a software product is borne by the beta tester. (Frankenberg, Nov. 8 Trial Tr. at 1204-1205.) Professor Noll also testified that “all beta versions of all software are provisional, and they are not guarantees of what the program will contain upon final release.” (Noll, Nov. 15 Trial Tr. at 1878.) Bob Frankenberg also acknowledged that Novell’s own license agreements for beta versions of its Netware server operating system software included provisions that were “certainly pretty much similar” to those found in

Microsoft's license agreement with Novell for beta versions of Windows 95. (Frankenberg, Nov. 8 Trial Tr. at 1208-09.)

(c) *Novell's Plan to Use the Namespace Extension APIs*

Novell received documentation for the namespace extension APIs as part of the M6 beta release of Windows 95. (PX 181, Header File, dated June 9, 1994, Holley Decl. Ex. N.) The namespace extension APIs were intended to allow software developers to add custom containers to the "tree view" in the scope pane of the Windows Explorer and to the Windows common file open dialog. (Harral, Oct. 24 Trial Tr. at 509-10.)⁵

Importantly, Adam Harral testified that Novell did not need the namespace extension APIs to release either WordPerfect or Quattro Pro for Windows 95. Adam Harral explained, "I don't know anything that WordPerfect [the] word processor needed to do for a Namespace extension. They did have shell extensions, but I don't recall a NameSpace extension that they needed to do." (Harral, Oct. 20 Trial Tr. at 327; *see also* Harral, Oct. 20 Trial Tr. at 281; Harral, Oct. 24 Trial Tr. at 476-77; Richardson, Oct. 25 Trial Tr. at 650-55.)

There is no dispute that the namespace extension APIs were not needed to provide various mechanisms to launch Novell's applications. Novell could place icons for WordPerfect and Quattro Pro directly on the Windows desktop and include those applications in the Windows Start menu, either of which would have allowed users to "get to those products very easily." (Harral, Oct. 24 Trial Tr. at 504-08; *see also* Richardson, Oct. 25 Trial Tr. at 651-52; Alepin, Nov. 10 Trial Tr. at 1577-78.) Novell could also associate WordPerfect and Quattro Pro with particular file types so that when the user clicked on an icon for one of those files, the associated

⁵ *See* Appendix A, Microsoft's Demonstrative 102, shown at trial on Nov. 10, Trial Tr. at 1631.

application would launch and the file would open. (Alepin, Nov. 10 Trial Tr. at 1578-79.) Moreover, Novell did not need the namespace extension APIs to access the Windows 95 system namespace, including the Network Neighborhood virtual folder that gave users easy access to network servers. (Harral, Oct. 24 Trial Tr. at 485-86; *see also* Richardson, Oct. 25 Trial Tr. at 631, 633-34; Alepin, Nov. 10 Trial Tr. at 1604.) The namespace extension APIs also were not needed to add a folder to the Windows 95 file system that was the default location for storing WordPerfect documents and Quattro Pro spreadsheets. (Alepin, Nov. 10 Trial Tr. at 1578; Richardson, Oct. 25 Trial Tr. at 608-09.) Novell did that by adding a folder called “MyFiles” to the Windows 95 file system that showed up both in the tree view of Windows Explorer and in the Windows 95 common file open dialog. (Alepin, Nov. 10 Trial Tr. at 1578; Richardson, Oct. 25 Trial Tr. at 608-09).⁶

The evidence at trial also conclusively establishes that Novell sought to use the namespace extension APIs for something altogether different than improving WordPerfect and Quattro Pro, the two products at issue in this action: Novell intended to use the namespace extension APIs in order to *augment Windows 95*, by embedding Novell’s QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery and FTP/HTTP browser directly in the Windows shell. (Harral, Oct. 20 Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 372-74; Richardson, Oct. 25 Trial Tr. at 628-30, 691-92.)⁷ Novell intended to display these products in the tree view of the Windows Explorer and Windows 95

⁶ See Appendix B, Microsoft’s Demonstrative 93, shown at trial on Nov. 10, Trial Tr. at 1578.

⁷ See Appendix C, Microsoft’s Demonstrative 96, shown at trial on Nov. 10, Trial Tr. at 1665.

common file open dialog, even when WordPerfect and Quattro Pro were not running. (Harral, Oct. 20 Trial Tr. at 268-70; Richardson, Oct. 25 Trial Tr. at 636-38, 691-97.) This meant that these five Novell products would be displayed in the Windows 95 common file open dialog inside applications created by other software developers. (Richardson, Oct. 25 Trial Tr. at 636-37, 641-42.)

Adam Harral testified that Novell intended to exploit the functionality exposed by the namespace extension APIs not to create an alternative to Windows 95, but to “make Windows [95] the best version of Windows that it could be.” (Harral, Oct. 24 Trial Tr. at 372-74.) Greg Richardson agreed that “[i]t was our intent to make the user’s experience on Windows better because they had WordPerfect installed.” (Richardson, Oct. 25 Trial Tr. at 613.)

According to Bob Frankenberg, if the versions of WordPerfect and Quattro Pro for Windows 95 had been released at or about the time Microsoft released Windows 95, “[i]t would have made Windows 95 more desirable in the marketplace” and “would have made Windows 95’s market share even higher than what it turned out to be.” (Frankenberg, Nov. 8 Trial Tr. at 1226-28.)

Finally, when questioned by the Court outside the presence of the jury, Adam Harral explained that “no matter what happened,” Novell was going to “connect” WordPerfect to Windows 95. (Harral, Oct. 24 Trial Tr. at 559-60.)

No witness has testified—and there is no evidence—that in the period from December 1994 (when Novell released PerfectOffice 3.0 for Windows 3.1) to March 1996 (when Novell sold its applications to Corel), Novell was developing versions of WordPerfect or Quattro Pro for any operating system other than Windows 95.

(d) *Microsoft's Decision to Withdraw Support for the Namespace Extension APIs*

On September 22, 1994, Brad Struss, who led the Windows 95 team in Microsoft's Developer Relations Group ("DRG") (Jan. 8, 2009 Deposition of Douglas Henrich, Nov. 8 Trial Tr. at 1382), reported on the results of a survey conducted to determine the extent to which ISVs were using the namespace extension APIs in their development of applications for Windows 95. (DX 17, e-mail from Brad Struss, Holley Decl. Ex. O.) Struss reported that WordPerfect had "not begun any work on IShellFolder, IShellView, etc." (*i.e.*, the namespace extension APIs). (*Id.*) Struss further reported that WordPerfect had said that if Microsoft's e-mail client used the namespace extension APIs, WordPerfect would "figure it out" even if the APIs were "not documented." (*Id.*) This document also notes that WordPerfect's "current plan" was to use the "common dialogs" in Windows 95. (*Id.*)

On October 3, 1994, Bill Gates decided that Microsoft would withdraw support for the namespace extension APIs. (PX 1, e-mail from Bill Gates, Holley Decl. Ex. P.) In an e-mail stating his decision, Mr. Gates stated that "[t]he shell group did a good job defining extensibility interfaces," but that Microsoft should "wait until we have a way to do a high level of integration that will be harder for likes of Notes, Wordperfect to achieve, and which will give Office a real advantage." (*Id.*) Gates explained that the namespace extension APIs did not achieve the "level of integration" with the Windows Explorer that he had envisioned. (May 19, 2009 Deposition of Bill Gates ("Gates Dep.") at 253-55, used at trial on Oct. 19, Holley Decl. Ex. Q.) Gates testified that as written, the namespace extension APIs did not allow software developers to "invoke applications" in the view pane on the right-hand side of the Windows Explorer, as Gates had conceived. (Gates Dep. at 249-50.) In Gates' view, the functionality of the namespace extension APIs as implemented was "so trivial" that the APIs were not "worth the

trouble” of supporting. (Gates Dep. at 255.) There is no evidence that Bill Gates was aware of Novell’s plans to use the namespace extension APIs before his October 3, 1994 decision.

The evidence at trial shows that because the namespace extension APIs were “design[ed] to [be] part of the system,” these APIs would “run in the explorer’s process space” and, as a result, “[b]adly written name space extension[s] could cause the reliability of Windows 95 to be less th[a]n what it should.” (DX 3 at MX 6055843, Holley Decl. Ex. A.)

Paul Maritz, the Microsoft executive in charge of all operating systems, testified that a program written by an ISV that called the namespace extension APIs “could bring down the shell.” (Jan. 9, 2009 Deposition of Paul Maritz (“Maritz Dep.”) at 129, used at trial on Oct. 27, Holley Decl. Ex. R.) James Allchin, the Microsoft executive in charge of Windows NT, testified that, because of the way the namespace extension APIs were implemented in Chicago, “if an application had an error in it, it could take down or corrupt the user experience overall.” (Jan. 8, 2009 Deposition of James Allchin (“Allchin Dep.”), Nov. 8 Trial Tr. at 1297.) Even Ronald Alepin testified that the namespace extension APIs ran in the same process as the remainder of the Windows 95 shell, so an error in an application calling the namespace extension APIs “had the potential to make the system unresponsive.” (Alepin, Nov. 10 Trial Tr. at 1589.) Indeed, Professor Noll testified that “one valid reason for not documenting an API” is “where those APIs are unstable.” (Noll, Nov. 15 Trial Tr. at 1872.) Thus, even Novell’s experts in effect agreed that Microsoft had a valid reason for withdrawing support for the namespace extension APIs. Alepin’s testimony, at its heart, was merely that he disagreed with the decision, not that it lacked technical justification.

The day after Bill Gates decided to withdraw support for the namespace extension APIs, Robert Muglia, the lead program manager for Windows NT (Alepin, Nov. 10, 2011 Trial

Tr. at 1606), wrote that the decision was “very good news for BSD [Business Systems Division]” (DX 21, e-mail from Robert Muglia, dated Oct. 4, 1994, Holley Decl. Ex. S), because “these interfaces introduce significant robustness issues,” and “[s]ince Bill has decided these interfaces won’t be published, NT development does not have to expend precious energy on implementing these for NT.” (*Id.*)

The namespace extension APIs—although no longer supported by Microsoft—remained part of the Windows 95 operating system. (Frankenberg, Nov. 7 Trial Tr. at 1133-34; Richardson, Oct. 25 Trial Tr. at 624; Harral, Oct. 24 Trial Tr. at 530.) Software developers were permitted to keep the documentation they had received as part of the M6 beta, *i.e.*, the documentation was not taken away from ISVs. (Richardson, Oct. 25 Trial Tr. at 624-25.) However, ISVs were advised by Microsoft not to rely upon the namespace extension APIs because it was possible they would change in the future. (DX 3 at MX 6055844, Holley Decl. Ex. A.) Microsoft told ISVs that it would not change the namespace extension APIs just for the sake of doing so, and thus that ISVs could choose to take a calculated risk of using the namespace extension APIs. (*Id.*)

Alepin testified that no commercially released version of Microsoft Word, Microsoft Excel, Microsoft PowerPoint, Microsoft Access, or Microsoft Office used the namespace extension APIs during the 1994 through 1996 time period. (Alepin, Nov. 10 Trial Tr. at 1641-43.) In fact, Alepin could not say whether any of those applications *ever* called the namespace extension APIs at any time. (*Id.*) Frankenberg testified that he was unaware of “any information at all, one way or another . . . as to whether or not Microsoft Office, the version of Microsoft Office released in 1995 to run with Windows 95 or any subsequent version of

Microsoft Office, utilized or called the namespace extension APIs.” (Frankenberg, Nov. 7 Trial Tr. at 1115.) Novell is simply wrong to argue that Microsoft “tilted” the playing field.

On October 12, 1994, Brad Struss reported that “we’re now in the process of proactively notifying ISVs about the namespace extension api changes.” (DX 3 at MX 6055844, Holley Decl. Ex. A.) Struss reported that “[s]o far Stac, Lotus, WP [WordPerfect], Oracle, SCC appear to be OK with this.” (*Id.*) There is no evidence that anyone at Novell contacted any Microsoft executive, anyone in the Microsoft DRG, or anyone in the operating systems group at Microsoft to complain in any fashion or to explain that the decision to withdraw support for the namespace extension APIs had or might have an adverse impact on Novell’s development efforts.⁸

(e) Novell Decides to Build Its Own Advanced File Open Dialog

Novell’s witnesses testified that upon learning of Microsoft’s decision to withdraw support for the namespace extension APIs, Novell had three choices: (1) to continue relying on the namespace extension APIs; (2) to use the Windows 95 common file dialog that Microsoft provided to ISVs for free; or (3) to build a custom file open dialog that sought to replicate the functionality of the Windows Explorer. (Harral, Oct. 20 Trial Tr. at 342-43; Richardson, Oct. 25 Trial Tr. at 602-04.)

⁸ Bob Frankenberg offered vague testimony on direct examination about later contact with Bill Gates (Frankenberg, Nov. 7 Trial Tr. at 1029-30), but when asked on cross examination whether he ever raised with Bill Gates concerns about Microsoft’s decision to withdraw support for the namespace extension APIs between October 1994 and June 1995, Frankenberg answered that he did not recall ever “sa[ying] to Mr. Gates the problem is the namespace extension APIs,” and that he did not recall ever sending or seeing any such letter or e-mail to Mr. Gates that mentioned the namespace extension APIs. (Frankenberg, Nov. 7 Trial Tr. at 1118-19.)

Novell's witnesses testified that PerfectOffice for Windows 95 could have been released without any delay by choosing option 1 or option 2. (Harral, Oct. 24 Trial Tr. at 502-04; Gibb, Oct. 26 Trial Tr. at 847-48.) With respect to the first option, Harral explained that "[o]ne option would be to continue to use the documentation that we had for the APIs and be relied upon our ability to ferret out all of the issues we would have had help from their support to do. So basically we could do it on our own with something that we were told we shouldn't be using. That was one option." (Harral, Oct. 20 Trial Tr. at 342.) Frankenberg confirmed that one of the choices available to Novell was to use the namespace extension APIs at Novell's risk: "That was the nature of undocumented APIs, yes." (Frankenberg, Nov. 7 Trial Tr. at 1133.) Richardson testified that Novell's shared code group had already created a file open dialog that called the namespace extension APIs by October 1994, but chose not to use it in WordPerfect and Quattro Pro because "as we were trying to optimize and work through the final issues, we discovered performance issues that were unacceptable." (Richardson, Oct. 25 Trial Tr. at 677-78.)

With respect to the second option, Gary Gibb, who headed development of PerfectOffice for Windows 95, testified that Novell was testing its Windows 95 applications using the Windows 95 common file open dialog, and that it would have been "quite easy" for Novell to release WordPerfect and Quattro Pro using that Windows 95 common file open dialog. (Gibb, Oct. 26 Trial Tr. at 847-48; *see also* Harral, October 24 Trial Tr. at 502.) A July 11, 1995 internal Novell document confirms that Novell's applications could "support Common Open Dialog functionality" and that Novell was planning on giving users the choice of using the Windows 95 common file open dialog rather than the custom file open dialog that Novell was attempting to create. (DX 114, PerfectFit 95: Open File Dialog—Function and Issues, at 10,

Holley Decl. Ex. T.) However, Gibb explained that Novell 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.)

Harral and other software developers in Novell’s shared code group chose option three. (Harral, Oct. 20 Trial Tr. at 342-43.) Harral testified that he knew by late 1994 that option three—attempting to build an advanced file open dialog—“would be a significant commitment in resources.” (*Id.* at 342.) The decision to create a custom file open dialog was made despite the fact that Novell was fully aware that Microsoft was no longer supporting the namespace extension APIs after October 3, 1994. (Harral, Oct. 20 Trial Tr. at 332, 345; Harral, October 24 Trial Tr. at 363-65; Richardson, Oct. 25 Trial Tr. at 702-03.) It was a business choice freely made by Novell. There has never been a successful antitrust suit based on facts anywhere close to these.

Harral testified at trial that Microsoft’s Premier Support group was “starting to give us less and less information about the shell in general.” (Harral, Oct. 20 Trial Tr. at 345.) On direct examination, Harral testified that he spoke with Premier Support three times, although he was unable to provide even a month in which any such call took place. (Harral, Oct. 20 Trial Tr. at 329-31). On cross examination, when asked to provide the names of any people in Microsoft’s Premier Support group with whom he spoke, Harral was entirely unable to do so. (Harral, Oct. 24 Trial Tr. at 397, 399, 414.)⁹ Novell introduced no evidence at trial of any e-mail sent to Microsoft referring to any such call; no internal Novell e-mail or memorandum indicating

⁹ Although Greg Richardson testified that he recalled that Microsoft “tightened . . . down” Novell’s access to the Premier Support group (Richardson, October 25 Trial Tr. at 702), Richardson acknowledged that he never personally participated in any call with Microsoft’s Premier Support group, explaining that doing so “wasn’t normally my responsibility.” (*Id.*)

that such a call took place or complaining about Microsoft's lack of cooperation; and no document of any kind that could in any way confirm or even imply that there was ever any such contact between the two companies.¹⁰ Other than Harral's testimony, Novell introduced no evidence at trial—documentary or testimonial—reflecting communications between anyone at Novell and anyone in Microsoft's Premier Support group.¹¹

Harral and the other developers in Novell's shared code group spent "almost a year" trying to write Novell's own custom file open dialog. (Richardson, Oct. 25 Trial Tr. at 605, 630; *see also* Harral, Oct. 24 Trial Tr. at 366-67.) Novell did not prove at trial that the time it took for Novell's shared code group to create a file open dialog was the result of Microsoft's withdrawal of support for the namespace extension APIs. As Professor Noll testified, "to an antitrust economist, that there can't be any harm to competition under the facts here if the conduct at issue, the decision to withdraw support for the namespace extension APIs did not cause any delay." (Noll, Nov. 15 Trial Tr. at 1880-81.) Frankenberg explained that it was "common in the software industry for companies to experience delay in developing new software products." (Frankenberg, Nov. 7 Trial Tr. at 1072-73.) Alepin agreed that in the software industry projects "tend to be late and they don't meet their deadlines, their announced deadlines," that "some organizations" are "overly optimistic" and "frequently miss release dates." (Alepin,

¹⁰ As the Court is aware, despite its anticipation of litigation against Microsoft since the early 1990s, Novell did not retain documents evidencing any of Mr. Harral's purported communications with Microsoft's Premier Support group. Indeed, Novell's preservation of relevant evidence has been entirely selective; Novell retained evidence concerning Microsoft's alleged "bad acts," but took no steps to preserve all evidence relevant to the claims asserted in the Complaint.

¹¹ As shown below (pp. 52-58, *infra*), whether these alleged phone calls occurred, and what may have transpired on these phone calls, makes no difference to the outcome.

Nov. 10 Trial Tr. at 1544-45; *see also* Noll, Nov. 15 Trial Tr. at 1881 (acknowledging that “[d]elays happen” in software development, and “there are occasions when they release software late”).) Finally, Novell’s own filings with the SEC make the same point, stating that delays are “common in the computer software industry” and that Novell “has experienced delays in its product development and ‘debugging’ efforts, and the Company can be expected to experience similar delays from time to time in the future.” (*E.g.*, DX 380, Novell Form 10-K for Fiscal Year ending Oct. 29, 1994, filed Jan. 25, 1995, at 10, Holley Decl. Ex. U.)

There are reams of Novell documents showing that the delay until May 1996 in the release of PerfectOffice was caused by other issues, particularly the fact that the Quattro Pro group was far behind schedule in releasing a program for Windows 95 (*e.g.*, DX 211, Project Proposals for “Storm,”¹² at NOV-B01491217, Holley Decl. Ex. V (as of December 1994, a September 30, 1995 release date for Quattro Pro for Windows 95 was “barely achievable with all their resources and with no additional functionality”); DX 219 at NOV-B06655277, Holley Decl. Ex. W (February 2, 1995 notes from a “Storm Coordination Meeting” stating that “Quattro Pro folks [were] still working on International versions of QP 6.0,” and that they “[e]xpect[ed] to finish that by end of March and then will *begin* on next version of QP” for Windows 95) (emphasis added); DX 227 at NOV-B00642501, Holley Decl. Ex. X (a 1995 document noting that in 1994 “[w]e all determined that after we ship PerfectOffice 3.0, our #1 goal is to get PerfectOffice on Windows 95 ASAP. We initially targeted October 95, but due to Quattro Pro localization delays we moved the date back to December 95.”) These documents never say that

¹² “Storm” was the codename for “the suite for Windows 95.” (Gibb, Oct. 26 Trial Tr. at 790.)

the delay was caused by Microsoft's withdrawal of support for the namespace extension APIs. The testimony of Harral and Richardson to the contrary cannot create a jury issue, for their memory of these events of 16-17 years ago is refuted at every turn by the documentary record of the reasons for the delay. (*E.g.*, DX 226 at NOV-B01425535, Holley Decl. Ex. Y (May 26, 1995 Project Development Plan for Storm noting that schedule was already "modified" because of "delays in the QP development effort" and that the likelihood of "Quattro Pro delivering late" was the highest overall risk of the PerfectOffice for Windows 95 project).

The record conclusively establishes that no senior executive at Novell was ever asked to, or did, approve the decision for Novell's shared code group to try to write Novell's own custom file open dialog. CEO Frankenberg testified that he believed "[i]t was vitally important" to release versions of Novell's applications for Windows 95 on time because "the moment a new operating system environment is announced . . . previous products drop dramatically, and customers begin making decisions about which products they'll use in this newly released operating system." (Frankenberg, Nov. 7 Trial Tr. at 998-99.)¹³ Frankenberg testified that any decision that could jeopardize the timely release of WordPerfect or Quattro Pro—which "had some real important consequences for Novell"—would have been made by senior executives, including Ad Rietveld, the Executive Vice President of the Novell Applications Group, Dave Moon, Vice President and General Manager of the Business Applications Group, Mark Calkins, the Vice President and General Manager of the Business

¹³ Indeed, as Novell's experts testified, in the software industry "[t]here is always a decision about whether to release something or to continue to work on it to make it better. . . . That is a trade-off." (Noll, Nov. 15 Trial Tr. at 1871; *see also* Alepin, Nov. 10 Trial Tr. at 1629 ("These are types of conversations that occur frequently in software development projects. It's the practical and pragmatic against the utopian and elegant.").)

Applications Group, and Glen Mella, the Vice President of Marketing. (Frankenberg, Nov. 7 Trial Tr. at 1140-42; Nov. 8 Trial Tr. at 1179-80.) Frankenberg also agreed that “[i]n any business organization faced with an important decision,” such as Novell, a formal memorandum would normally be presented to the senior executives “laying out the concerns and the issues and the considerations facing that business in making some strategic or tactical choice.” (*Id.* at 1181.)

Notably, the evidence at trial includes a January 12, 1995 internal Novell memorandum directed to Messrs. Rietveld, Moon, Calkins, and Mella, which lays out the issues to be considered about whether to participate in the Windows 95 logo licensing program. (DX 155, Holley Decl. Ex. E.) By contrast, there is no evidence of any similar memorandum concerning the decision to create an advanced file open dialog instead of choosing option 1 (continuing to call the namespace extension APIs) or choosing option 2 (using the Windows file open dialog).

Moreover, when Frankenberg was asked whether he knew of “any evidence whatsoever that any of the four people we mentioned, Calkins, Mella, Moon or Rietveld ever were presented with a decision about how to respond to Mr. Gates’ decision to withdraw support for the namespace extension APIs,” he answered “[n]one.” (Frankenberg, Nov. 8 Trial Tr. at 1181-82.) Frankenberg acknowledged that during the 1994-1995 time period he did not even know what the namespace extension APIs were. (Frankenberg, Nov. 7 Trial Tr. at 1127.) Frankenberg testified that he had never seen any memoranda regarding Microsoft’s decision to withdraw support for the namespace extension APIs, and that he was never consulted by anyone before the software developers in Novell’s shared code group spent almost a year attempting to

write an advanced file open dialog. (Frankenberg, Nov. 7, Trial Tr. at 1132; Frankenberg, Nov. 8 Trial Tr. at 1180-81.)

Novell introduced no formal memorandum, or any other document, in which Frankenberg or the four senior executives he identified were presented with options or issues or strategic choices, although Frankenberg testified that Messrs. Calkins, Mella, Moon and Rietveld would have been involved in any important business decision involving WordPerfect and Quattro Pro. (Frankenberg, Nov. 8 Trial Tr. at 1180-81.) There is no evidence that any of them ever got involved. Similarly, each of Harral, Richardson and Gibb testified that they never spoke with any Novell senior executive regarding what Novell should do in light of Microsoft's decision to withdraw support for the namespace extension APIs. (Harral, Oct. 24 Trial Tr. at 401-02; Richardson, Oct. 25 Trial Tr. at 703; Gibb, Oct. 26 Trial Tr. at 869.)¹⁴ This also completely undermines the weak testimony of Novell's low-level software. No reasonable jury could conclude that Novell chose a "suicidal" business path based solely on such software developers' vision of a really "cool" new file open dialog. Novell did not call any of the four former senior executives to testify at trial or take their depositions.

The evidence at trial also shows both that Microsoft personnel were available to—and did—help Novell with issues it encountered in developing applications to run on Windows

¹⁴ According to a February 1995 organization chart for Novell's Business Applications Development division, the PerfectFit Technology group was comprised of 45 people. (PX 372, Business Applications Development Organization, dated February 16, 1995, Holley Decl. Ex. Z.) This included Greg Richardson, who reported to Adam Harral, who reported to Jim Johnson, who reported to Tom Creighton, the Director of PerfectFit Technology. Creighton and Gary Gibb, the Director of PerfectOffice for Windows 95, were two of ten people who reported to Bruce Brereton, the Vice President of the Business Applications business unit. (*Id.*) Mr. Brereton reported to Dave Moon, the Senior Vice President of Development for the Applications Group. (DX 380 at 14.) Mr. Moon reported to Ad Rietveld, the Executive Vice President for the Novell Applications Group. (DX 380.) Mr. Rietveld reported to Mr. Frankenberg. (DX 380 at 13.)

95. (Frankenberg, Nov. 7 Trial Tr. at 1130-31; Nov. 8 Trial Tr. at 1217.) Frankenberg said that he is “sure” that “people in the [operating] systems group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95.” (Frankenberg, Nov. 7 Trial Tr. at 1131; Nov. 8 Trial Tr. at 1217.) In other words, Microsoft never terminated any relationship; it instead continued to assist Novell. Nevertheless, while there is ample record evidence that executives at Novell dealt with and knew Brad Struss, Bob Kruger, David Cole, Doug Henrich, Brad Silverberg and Bill Gates—and also knew how to contact them (and often did)—there is no evidence that anyone at Novell ever contacted or attempted to contact any of these Microsoft officers and employees concerning any issue raised by the decision to withdraw support for the namespace extension APIs. (Frankenberg, Nov. 7 Trial Tr. at 1027-29, 1125 (Gates, Struss, Kruger); Frankenberg, Nov. 8 Trial Tr. at 1172, 1174-76 (Silverberg, Chase); DX 22 (Struss, Chase); DX 161 Holley Decl. Ex. AA, e-mail from Brad Silverberg, dated November 18, 1993 (Struss, Cole); DX 155, Holley Decl. Ex. E (Silverberg); Nov. 8 Trial Tr. at 1307-09 (Henrich).) Both Harral and Richardson testified that they never even tried to speak to anyone at Microsoft’s Developer Relations Group or operating systems about the namespace extension APIs. (Harral, Oct. 24 Trial Tr. at 413-14, 418; *see* Richardson, Oct. 25 Trial Tr. at 702-03.) And six months after Microsoft’s decision to withdraw support for the namespace extensions, an April 7, 1995 internal Novell e-mail stated that “the cooperation between Microsoft and Novell has been very good.” (DX 172, e-mail from Scott Nelson, Holley Decl. Ex. BB.) Microsoft did not stop cooperating with Novell.

In the end, according to Ronald Alepin, the file open dialog included in Corel WordPerfect Suite 7 for Windows 95, released in June 1996, had functionality that was substantially similar to the functionality in the file open dialog included in PerfectOffice 3.0 for

Windows 3.1, released in December 1994. (Alepin, Nov. 10 Trial Tr. at 1579-86.)¹⁵ Alepin acknowledged that both file open dialogs gave users access to QuickFinder; the ability to preview documents without launching an application; and a list of recently accessed information stores. (Alepin, Nov. 10, 2011 Trial Tr at 1586-88.) Comparing the two file open dialogs, Alepin concluded that “the top level functionality” is “the same.” (Alepin, Nov. 10 Trial Tr. at 1587.) The efforts of Novell’s shared code group resulted in a file open dialog that was little different than the one Novell had already created for the Windows 3.1 version of PerfectOffice, a product that also ran on Windows 95. *Id.*

On November 17, 2011, Novell rested.

ARGUMENT

Under Rule 50 of the Federal Rules of Civil Procedure, a motion for judgment as a matter of law should be granted “[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” Fed. R. Civ. P. 50(a)(1). “The inquiry for summary judgment and [judgment as a matter of law] are essentially the same: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). Judgment as a matter of law may be entered “when the evidence and all the inferences to be drawn therefrom, viewed in the light most favorable to the nonmoving party, is ‘so patently in favor of the moving party that

¹⁵ See Appendix D, Microsoft’s Demonstrative 95, shown at trial on Nov. 10, Trial Tr. at 1585.

a jury verdict in favor of the opposing party would be improper and would have to be set aside by the trial judge.” *Forsgren v. Hydraulics Int’l, Inc.*, 2011 U.S. Dist. LEXIS 35641, at *2-3 (D. Utah March 31, 2011) (quoting *Taylor v. Cooper Tire & Rubber Co.*, 130 F.3d 1395, 1399 (10th Cir. 1997)).

Under this standard, a defendant is entitled to judgment as a matter of law where the evidence presented at trial cannot be reconciled with plaintiff’s theory of the case. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237-38 (1993) (affirming judgment as a matter of law in oligopolistic pricing case where the testimony of plaintiff’s fact witnesses “contradicted [plaintiff’s] theory” of the case); *Boellstorff v. State Farm Mutual Automobile Ins. Co.*, 2009 U.S. Dist. LEXIS 21748, at *20 (D. Colo. March 18, 2009) (defendant entitled to judgment as a matter of law where testimony of only witness with personal knowledge of issue in dispute “directly refuted” plaintiff’s theory).

Novell has failed to provide any basis for a reasonable jury to find in its favor on its claim. Judgment should therefore be entered in Microsoft’s favor as a matter of law.

I. Novell Failed To Introduce Evidence that Would Permit a Reasonable Jury To Find that Microsoft Harmed Competition in the PC Operating System Market.

A. The Evidence at Trial Shows that the Timely Release of WordPerfect and Quattro Pro Would Have Enhanced Microsoft’s Monopoly in the PC Operating System Market.

Novell claims that Microsoft unlawfully maintained its monopoly in the PC operating system market by conduct—namely, withdrawal of support for the namespace extension APIs—that harmed Novell’s applications. Novell must prove, among other things, that “the specific Microsoft conduct which caused injury to Novell’s applications also caused anticompetitive harm in the *PC operating system market.*” *Novell v. Microsoft Corp.*, 699 F. Supp. 2d 730, 748 (D. Md. 2010) (emphasis in original). Yet all of Novell’s fact witnesses

testified that, had there been no delay in the released of versions of WordPerfect and Quattro Pro for Windows 95, Windows 95 would only have become stronger. Indeed, Frankenberg testified that had Novell's applications for Windows 95 been more successful, the market share of Windows 95 would have *increased*:

Q. Was it your view at the time, in 1994 and 1995, that if PerfectOffice, the new version of PerfectOffice for Windows 95 had been released by Novell, that that would have made Windows 95 even more desirable in the marketplace than it otherwise would have been?

A. Definitely. It would have made Windows 95 more desirable in the marketplace.

Q. It was your view at the time that if PerfectOffice for Windows 95 had been released by Novell, that would have been a benefit to Microsoft for exactly the reason you just said, it would have made Windows 95 even more desirable for consumers?

A. That is true.

Q. If --

A. Especially those who use WordPerfect products. They would be able to use Windows 95, and they wouldn't otherwise have been able to do that if they wanted to continue using WordPerfect.

Q. If anything, that would increase the sales of Windows 95; correct?

A. Yes.

Q. Having a good PerfectOffice product out there would make Windows 95 even more popular than it turned out to be; true?

A. True.

Q. If PerfectOffice had been released in 1995 by Novell and had been successful, and had gained a reasonably good share of the market how, if at all, would that have effected [sic] sales of Windows?

A. Presumably [sic] it would have increased sales of Windows 95.

Q. And would have made Windows 95's market share *even higher than what it turned out to be, correct?*

A. *Yes.*

(Frankenberg, Nov. 8 Trial Tr. at 1226-1228 (emphasis supplied); *see also* Noll, Nov. 15 Trial Tr. at 1949 (completely agree[ing]" with Frankenberg's testimony).) This testimony by Novell's former CEO at the time that Novell intended to make Windows 95 "more desirable" to consumers and that, had Microsoft not withdrawn support for the namespace extension APIs, the purportedly earlier release of Novell's applications for Windows 95 would have "increased sales of Windows 95" is fatal to Novell's claim.¹⁶ It affirmatively disproves the assertion that the alleged anticompetitive conduct had some adverse effect on competition in the market for PC operating systems.¹⁷

The evidence at trial also establishes that, far from pursuing a cross-platform strategy, Novell recognized that Windows 95 was a huge step forward technologically, and Novell chose to take advantage of the new features that Windows 95 offered. Frankenberg testified that Windows 95 was a "significant step forward" and that Novell was "very excited and very interested" in Windows 95. (Frankenberg, Nov. 8 Trial Tr. at 1225-26.) Frankenberg also

¹⁶ According to Professor Noll, Microsoft's share of the PC operating system market in 1995 was 83.4%, in 1996 was 91.6% and in 1997 was 93.6%. (Noll, Nov. 15 Trial Tr. at 1929-30.) Accordingly, in a case about competition in that market, those shares would have gone up if Microsoft had not withdrawn support for the namespace extension APIs. Accordingly, in a case about competition in that market, those shares would have gone up if Microsoft had not withdrawn support for the namespace extension APIs.

¹⁷ Although Professor Noll speculated that the timely release of PerfectOffice for Windows 95 may have—in a "but-for" world—resulted in a price decrease for the Windows 95 operating system at some unknown future time (Noll, Nov. 15 Trial Tr. at 1930-31), he conducted no analysis, and Novell has presented no evidence, regarding the pricing of Windows 95 (or of any other operating system or application), and how such a price decrease would have had any impact on Novell is entirely unclear. Novell is not championing the interests of consumers—it is seeking to recover treble damages for harm allegedly inflicted on WordPerfect and Quattro Pro.

explained that Novell's business strategy was to "take[] advantage of the capabilities in Windows 95" in order to give Novell's PerfectOffice suite "an advantage in the marketplace." (Frankenberg, Nov. 8 Trial Tr. at 1226.) Harral likewise testified that "Windows 95 was in my view a significant step forward for the P.C. and for Microsoft," and Novell was "excited about Windows 95" and the "wonderful evolution" in technology it provided. (Harral, Oct. 20 Trial Tr. at 253-54, 256-57; *see also* Gibb, Oct. 26 Trial Tr. at 788) ("Well, from a technology standpoint, Windows 95 was a huge step forward."); Richardson, Oct. 25 Trial Tr. at 607 ("There were many features in Windows 95 that we were very excited about.") Of course, the more features of Windows 95 that Novell's applications relied on, the more tied they were to Windows 95, and the more difficult it would be for Novell to port WordPerfect and Quattro Pro to other PC operating systems.¹⁸

Harral and Richardson explained that Novell wanted to use the namespace extension APIs not to improve WordPerfect and Quattro Pro—the products at issue in this action—but to enhance Windows 95 itself. According to Harral and Richardson, they planned to use the namespace extension APIs to put five other Novell products in the tree view of the Windows Explorer and the Windows 95 common file open dialog. (Harral, Oct. 20, 2011 Trial Tr. at 268-70; Harral, Oct. 24 Trial Tr. at 373-74; Richardson, Oct. 25, 2011 Trial Tr. at 629-30, 638.) Had Harral and Richardson done what they wanted to do, Novell's QuickFinder search engine, Soft Solutions document management system, e-mail client, Presentations clip-art gallery and FTP/HTTP browser would have appeared in the Windows 95 shell once a user had installed

¹⁸ Ronald Alepin testified that no operating system other than Windows 95 exposed the same functionality as the namespace extension APIs 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.)

Novell's applications. (Harral, Oct. 24 Trial Tr. at 515; Richardson, Oct. 25 Trial Tr. at 593, 612, 638, 691-92.) The purpose of adding these five Novell products to the Windows 95 shell was, according to Novell, to "make Windows [95] the best version of Windows that it could be." (Harral, Oct. 24 Trial Tr. at 372-74; *see also* Richardson, Oct. 25 Trial Tr. at 613 ("It was our intent to make the user's experience on Windows better because they had WordPerfect installed.")) In other words, Novell did not care about how wide the moat was around Microsoft's PC operating system monopoly, because Novell had decided it was happy to be inside the Windows 95 castle.

No reasonable jury could conclude that Novell has proven its theory of harm to competition in the PC operating system market because, as the Court has emphasized, Novell's own witnesses testified that Novell "wanted to marry the two products, the operating system and WordPerfect . . . both through 1996 and the foreseeable future." (Oct. 27 Trial Tr. at 928-29.) Because the unanimous testimony is that Novell's business strategy was to exploit fully the new features of Windows 95 and hoped thereby to enhance—not supplant—Windows as a development platform for full-featured personal productivity applications, no reasonable jury could conclude that "the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*," *Novell*, 699 F. Supp 2d. at 748 (emphasis in original), let alone "that the conduct that harmed [Novell's] software applications contributed significantly to Microsoft's monopoly in the PC operating system market." *Id.* at 750.

B. The Evidence at Trial Refutes Both of Novell's Theories of Harm to Competition in the PC Operating System Market.

Novell's claim fails for the separate and independent reason that both of Novell's alleged theories of harm to competition in the PC operating system market, its franchise applications theory and its "middleware" theory, are refuted by the evidence presented at trial.

Novell's Franchise Applications Theory: Novell offered no evidence that WordPerfect and Quattro Pro were so popular such that, if available on rival operating systems, they would have popularized those non-Microsoft operating systems and thereby reduced the dominance of Windows. Indeed, the evidence refutes this theory.

First, Novell's own witnesses admit that, in the early 1990s, there were versions of WordPerfect that ran on many non-Microsoft operating systems—including IBM's OS/2, Apple Macintosh, Digital VMS, UNIX, and NeXT.¹⁹ Yet, the availability of WordPerfect on these other operating systems in no way diminished Microsoft's large share of the PC operating system market. Microsoft maintained at least a 90 percent share of that market throughout the 1990s. (*E.g.*, Finding of Fact 35, read to the jury on Oct. 18 ("Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent.")). As the Court observed, in light of the trial record, the idea that the availability of WordPerfect and Quattro Pro on non-Microsoft operating systems would spark competition in the PC operating system market "is counterfactual," because WordPerfect and Quattro Pro were available "on other operating systems since time immemorial." (Nov. 9 Trial Tr. at 1501.)

¹⁹ See Harral, Oct. 20 Trial Tr. at 216:3-18 (WordPerfect ran on Apple Macintosh, Amiga, OS/2 and NeXT operating systems); Gibb, Oct. 26 Trial Tr. at 776:2-11 (WordPerfect ran on Apple Macintosh, Digital VMS, UNIX, OS/2 and NeXT operating systems).

Second, Novell's franchise applications theory is refuted by collaterally estopped Findings of Fact that Novell introduced into evidence. Those Findings of Fact conclusively establish that even if several thousand applications had been available for a particular non-Microsoft operating system, that would not have been enough to surmount the applications barrier to entry. Novell's theory that having just its two applications—WordPerfect and Quattro Pro—available on a non-Microsoft operating system would be enough to erode the applications barrier to entry and increase competition in the PC operating system market is flatly inconsistent with the Findings of Fact that are binding in this action.

Novell sought and obtained issue preclusion on Findings of Fact 37 through 39 (*see* Court's October 4, 2011 Memo to Counsel (Docket #163)), which explain that the applications barrier protecting Microsoft's PC operating system monopoly arises from a "positive feedback loop" created by the tens of thousands of applications written to run on Windows. (Findings of Fact 37-39, read to jury on Oct. 18, 2011.) Finding of Fact 37 explains that "[t]he fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts consumers to Windows, because it reassures them that their interests will be met as long as they use Microsoft's product." (Finding of Fact 37.) Finding of Fact 39 establishes that "[t]he large body of applications thus reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetuating ISV incentives to write applications principally for Windows." (Finding of Fact 39.)

Accordingly, the theory that WordPerfect and Quattro Pro standing alone could increase competition in the PC operating system market if, at some indeterminate future time, Novell decided to develop versions of those applications for a non-Microsoft operating system cannot be reconciled with the Findings of Fact. The relevant Findings of Fact have "binding

effect here” (Oct. 18 Trial Tr. at 143), so no reasonable jury could find that the availability of WordPerfect and Quattro Pro on non-Microsoft operating systems posed a threat to Microsoft’s PC operating system monopoly.

Novell’s “Middleware” Theory:

Novell presented no evidence that WordPerfect, either alone or in combination with AppWare and OpenDoc, was a species of “middleware” that could erode Microsoft’s dominance in the PC operating system market. According to the collaterally estopped Findings of Fact, which are binding on Novell, a software product could pose a “middleware” threat to Microsoft’s PC operating systems monopoly only if that software product (a) runs on multiple operating systems, and (b) exposes a sufficient number of APIs to allow ISVs profitably to develop general-purpose personal productivity applications that call upon APIs exposed by the software product, rather than on APIs exposed by the underlying operating system. (Findings of Fact 28, 29, 32.) Novell is bound to this definition of “middleware” because, as Novell alleged in the Complaint (Compl. ¶ 48), the “middleware” threat posed by Novell is the same middleware threat as was at issue in the District of Columbia Case. If it is anything different, Novell’s claim is time-barred because Novell escaped the statute of limitations only by arguing that its claim was substantially related to the claims asserted in the District of Columbia Case. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007) (“[A]ll of Novell’s claims asserted in its November 2004 complaint are time-barred unless the statute of limitations is tolled by the filing of the DOJ complaint in May 1998.”).

In addition to the requirement that “middleware” be cross-platform, Novell’s antitrust economics expert, Roger Noll, testified that in order to pose a threat to the applications barrier to entry, the cross-platform “middleware” must also be ubiquitous—that is, must run on

“most” operating systems and “on all or nearly all of the PCs that use the operating system to which the application otherwise would be written.” (Noll, Nov. 15 Trial Tr. at 1923; *see also* Noll, Nov. 14 Trial Tr. at 1717-18 (acknowledging that a “middleware” product “provid[es] the opportunity to run that particular application or middleware product on numerous operating systems.”); Noll Nov. 15 Trial Tr. 1925-26 (“for middleware to become a threat to the applications barrier to entry,” it “has to be available on a number of alternative operating systems.”).)

Novell’s supposed “middleware” lacks all three of the key characteristics. The evidence at trial establishes that the versions of WordPerfect, Quattro Pro and Novell’s PerfectFit technology that purportedly posed a “middleware” threat to Microsoft’s PC operating system monopoly were neither cross platform nor ubiquitous because they were developed to run solely on Windows 95. During the period from December 1994—when Novell released PerfectOffice 3.0 for Windows 3.1—until March 1996—when WordPerfect and Quattro Pro were sold to Corel—Novell was not developing a version of PerfectOffice for any operating system other than Windows 95. (Frankenberg, Nov. 8 Trial Tr. at 1168-69; Gibb, Oct. 26 Trial Tr. at 787.) Frankenberg also testified that, to his knowledge, after Corel purchased WordPerfect and Quattro Pro from Novell in March 1996, “Corel never released any version of PerfectOffice for any other platform except Windows.” (Frankenberg, Nov. 8 Trial Tr. at 1169.) Upon questioning by the Court, Harral agreed that, regardless of whether WordPerfect could be characterized as “middleware,” Novell’s word processing application was going to run only on Windows 95:

Q. In fact, no matter what happened, you were trying to connect WordPerfect and whatever it exposed in terms of its own APIs or everything else, it was going to be operating on the Windows 95 operating system?

A: Yes.

Q: No matter what happened. And if somebody could use what it exposed in terms of APIs and use them eventually as whatever, it was still going to be operating on the basis of the Windows 95?

A: Yes.

(Harral, Oct. 24 Trial Tr. at 559-60; *see also* Frankenberg, Nov. 8 Trial Tr. at 1168-69; Gibb, Oct. 26 Trial Tr. at 787.) Dr. Noll testified that in 1994 and 1995 Novell was “devoting virtually all of their energy to being on Windows 95,” and that Novell “had plans to develop it for other platforms” at some unspecified point in the future. (Noll, Nov. 14 Trial Tr. at 1844-46.)

Therefore, even if Novell’s applications had exposed enough APIs that other software developers could use to create general-purpose personal productivity applications, those Novell applications would not be cross-platform “middleware” because they were running only on Windows 95. Moreover, having been developed for one platform, Novell cannot show that its products were ubiquitous enough to threaten the applications barrier to entry surrounding Microsoft’s PC operating system monopoly. Indeed, Novell has not introduced any evidence at trial of the market share of WordPerfect, Quattro Pro or PerfectOffice on non-Windows operating systems.²⁰

Moreover, Novell’s “middleware” theory is contradicted by the collaterally estopped Findings of Fact that Novell read to the jury. The Findings of Fact make clear that the threat posed by “middleware” in the District of Columbia case was that applications written

²⁰ Although Dr. Noll testified that a version of WordPerfect was released for the Linux operating system, Dr. Noll testified that Linux “was actually introduced in ‘93, but ‘96 is when it became a full-fledged commercial product”—after Novell sold its applications to Corel. (Noll, Nov. 15, 2011 Trial Tr. at 1961; *see also id.* at 1903 (“[I]n the time period of ‘94 to ‘96 Linux wasn’t really a competitor at the beginning of that period. It had been introduced by the end.”))

solely to APIs exposed by “middleware” would run on any operating system on which the “middleware” itself would run. For example, the Findings of Fact explain that the nascent threat that Sun’s Java technology posed to Microsoft’s PC operating system monopoly stemmed from its intended availability on non-Microsoft operating systems:

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

(Finding of Fact 74, read to the jury on Nov. 14; Finding of Fact 68 (“The applications relying exclusively on middleware APIs would run as written on any operating system hosting the requisite middleware.”), read to the jury on Nov. 14.) Novell’s applications—with or without AppWare and OpenDoc—lack this defining characteristic—namely, availability on non-Microsoft operating systems.

Indeed, fully four years after the events at issue in this action, even Sun’s Java technology—which was designed to run on non-Windows operating systems—was not yet more than a theoretical threat to Windows as a platform for developing full-featured personal productivity applications. Finding of Fact 28 states that “[c]urrently [November 1999] no middleware product exposes enough APIs to allow independent software vendors (‘ISVs’) profitably to write full-featured personal productivity applications that rely solely on those APIs.” (Finding of Fact 28, read to the jury on Oct. 18.)

Finding of Fact 32 emphasizes that it still “remains to be seen whether server- or middleware-based development will flourish at all. Even if such development were already flourishing, it would still be several years before the applications barrier eroded enough to clear the way for the relatively rapid emergence of a viable alternative to incumbent Intel-compatible

PC operating systems.” (Finding of Fact 32, read to the jury on Oct. 18; *see also* Finding of Fact 29 (“It remains to be seen, though, whether there will ever be a sustained stream of full-featured applications written solely to middleware APIs.”), read to jury on Oct. 18, 2011.) In short, “these middleware technologies have a long way to go before they might imperil the applications barrier to entry.” (Finding of Fact 77, read to the jury on Nov. 14.) Consistent with these binding Findings of Fact, Dr. Noll testified that in “the period of this case plus the government case” there “never was” a middleware product that “ran on various operating systems.” (Noll, Nov. 15 Trial Tr. at 1929; *see also id.* at 1920 (agreeing that “as of 1999, there had never been any middleware that could imperil the applications barrier to entry”). Thus, Novell’s effort to establish that WordPerfect—alone or in combination with AppWare and OpenDoc—was “middleware” capable of decreasing the market share of Windows 95 during the time Novell owned WordPerfect flies in the face of the relevant Findings of Fact and the testimony of its own expert.

Novell’s cross-platform “middleware” theory is further undermined by the fact that the namespace extension APIs were unique to Windows 95. Novell’s lawyer “agree[d]” there is no evidence that Novell’s PerfectFit technology “could have been easily ported to another platform.” (Nov. 15 Trial Tr. at 2060.) Moreover, Alepin conceded that no operating system other than Windows 95 exposed the same functionality as the namespace extension APIs, 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.) As a result, if Novell used the namespace extension APIs in WordPerfect and QuattroPro, those applications would only have become more tightly tied to Windows, and thus more difficult to port to non-Microsoft operating systems. WordPerfect could therefore not rely on the namespace extension APIs (as Harral and

Richardson said they wanted to do) and, at the same time, pose a “middleware” threat to Microsoft’s PC operating systems.

Finally, the evidence is undisputed that software developers could not write general-purpose personal productivity applications that would run on top of Novell’s products. On cross examination, Alepin conceded that Novell’s purported “middleware” (including WordPerfect, Appware, OpenDoc and PerfectOffice, or some combination of those products) did not expose a sufficiently broad set of APIs to enable development of general-purpose personal productivity applications. (Alepin, Nov. 9 Trial Tr. at 1489-90; *see also* Alepin, Nov. 10 Trial Tr. at 1533-35, 1538-40.) The APIs exposed by Novell’s products could only support applications “that worked with and were complimentary to the WordPerfect system,” such as a thesaurus application or a spell-checker application. (Alepin, Nov. 9 Trial Tr. at 1479.) Alepin admitted that no ISV would bother to attempt to write a general-purpose personal productivity application on top of WordPerfect—this “would not be the best use of [an ISV’s] time.” (Alepin, Nov. 9 Trial Tr. at 1480.) Dr. Noll agreed with Alepin’s concession, explaining that there were no third party applications “that would threaten the applications barrier to entry that were written to this platform, PerfectFit and/or appware.” (Noll, Nov. 15 Trial Tr. at 1922-23.)

As the collaterally estopped Findings of Fact make plain, the only “middleware” that could pose a threat to Microsoft’s PC operating systems monopoly is one that “exposes enough APIs to allow independent software vendors (‘ISVs’) profitably to write full-featured personal productivity applications that rely solely on those APIs.” (Finding of Fact 28, read to jury on Oct. 18, 2011.) Novell introduced no evidence that any such product ever emerged, much less that any of Novell’s products qualified during the time period relevant to this case, *i.e.*, before March 1996.

It did not matter—and could not matter—whether WordPerfect and Quattro Pro were released at or about the time that Microsoft released Windows 95 or nine months later because whenever they were released they had no potential to displace Windows as a platform for developing full-featured personal productivity applications. Accordingly, Novell failed to present evidence that would permit a reasonable jury to conclude that Microsoft’s withdrawal of support for the namespace extension APIs in October 1994 caused harm to competition in the PC operating system market.

II. Novell Failed To Introduce Evidence that Would Permit a Reasonable Jury To Find that Microsoft Engaged in Anticompetitive Conduct.

A. Novell Must Prove that Microsoft’s Decision to Withdraw Support for the Namespace Extension APIs Falls Within the Limited *Aspen Skiing* Exception.

Novell contends that once Microsoft made the namespace extension APIs available to ISVs in the M6 beta version of Windows 95, Microsoft had no right to withdraw support for those APIs. According to Novell, Microsoft was obligated to continue supporting the namespace extension APIs because Novell planned to use them, not to improve WordPerfect and Quattro Pro, but to embed *other* Novell products, such as its QuickFinder search engine, into the Windows 95 shell. Novell further contends that Microsoft’s Premier Support group should have helped Novell’s software developers use the namespace extension APIs even after Microsoft withdrew support for them.

At the heart of Novell’s claim is the meritless argument that Microsoft was obligated to provide its intellectual property to help a competitor add its own products (such as QuickFinder) to the Windows 95 shell, even if Microsoft had determined that it did not want to commit to supporting the namespace extension mechanism in future versions of Windows. As the Court explained in its March 2010 decision on Microsoft’s motion for summary judgment, to

prevail on its Section 2 claim, Novell is required to prove at trial that Microsoft's withdrawal of support for the namespace extension APIs fell within the limited exception provided in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to the general rule that "a monopolist has a right to refuse to cooperate with a competitor." *Novell*, 699 F. Supp. 2d at 745-47.

Novell's proof at trial falls far outside the limited *Aspen Skiing* exception. "[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (second alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). This rule applies with equal force to a monopolist. *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1221 (10th Cir. 2009) ("The Supreme Court has recently emphasized the general rule that a business, even a putative monopolist, has 'no antitrust duty to deal with its rivals at all.'" (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 444 (2009))). Novell's claim does not come close to falling within the narrow confines of the *Aspen Skiing* exception.

"[T]he Supreme Court has found a duty to deal in only one limited circumstance: where a monopolist terminates a pre-existing profitable relationship with a competitor without a lawful business purpose if that termination has an anticompetitive effect." *Compliance Marketing, Inc. v. Drugtest, Inc.*, 2010 U.S. Dist. LEXIS 34315, at *53 (D. Colo. April 7, 2010) (emphasis added) (citing *Trinko*, 540 U.S. at 409); *see also Four Corners Nephrology*, 582 F.3d at 1224-25 (quotation omitted). This is the so-called *Aspen Skiing* exception. The *Aspen Skiing* exception is narrow "because of the uncertain virtue of forced sharing and the difficulty of

identifying and remedying anticompetitive conduct by a single firm.” *Christy Sports*, 555 F.3d at 1194 (quoting *Trinko*, 540 U.S. at 408).

Novell’s claim is that Microsoft was required to continue to provide support for the namespace extension APIs because it initially supported those features in the June 10, 1994 beta version of Windows 95. It is undisputed that Windows 95 was Microsoft’s intellectual property. Indeed, Ronald Alepin stated that the namespace extension APIs were invented by Satoshi Nakajima, a Microsoft employee, and were patented. (Alepin, Nov. 10 Trial Tr. at 1625-26.) As the Court has recognized in the past, “to require one company to provide its intellectual property to a competitor would significantly chill innovation.” *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 743, 745 (D. Md. 2003) (Motz. J.) (citations omitted); *see also Daisy Mountain Fire District v. Microsoft Corp.*, 547 F. Supp. 2d 475, 489-90 (D. Md. 2008) (Motz. J.). The Court has also recognized that, in light of the fact that “the software development industry is dynamic and involves continuous innovation,” Microsoft has no duty to “disclose significant information to its competitors.” *In re Microsoft*, 274 F. Supp. 2d at 745; *see also Four Corners Nephrology*, 582 F.3d at 1221 (“Allowing a business to reap the fruits of its investments is an important element of the free-market system: it is what induces risk taking that produces innovation and economic growth.” (quotation and citation omitted)).

Further, courts have refused to extend *Aspen Skiing* to require a technological innovator to provide its intellectual property to its rivals. *See In re Independent Service Organizations Antitrust Litigation*, 989 F. Supp. 1131, 1139 (D. Kan. 1997) (distinguishing *Aspen Skiing* on the ground that “*Aspen Skiing* did not involve intellectual property rights” and explaining that extending *Aspen Skiing* to require the disclosure of intellectual property would “seriously undermin[e] the intellectual property laws”); *see also In2 Networks, Inc. v. Honeywell*

International, 2011 U.S. Dist. LEXIS 117589, at *16 (D. Utah Oct. 12, 2011) (stating *in dicta* that, under *Christy Sports*, there is no duty “to allow [a rival] to use [one’s intellectual] property, like Deer Valley was not required to invite competitors onto its property to rent skis”).

Even if Novell’s claim could be twisted to come within the limited *Aspen Skiing* exception, it would fail as a matter of law. Under Tenth Circuit law, a plaintiff relying on the *Aspen Skiing* exception must prove that a monopolist (a) “terminat[ed] a profitable business relationship” with the plaintiff, and (b) did so “without any economic justification.” *Four Corners*, 582 F.3d at 1225. As the Tenth Circuit stated, the “key fact” in an *Aspen Skiing* claim is that a “monopolist was willing to jettison a profitable short-term business relationship and deny to a rival the retail prices available to *all* other consumers.” *Id.* (emphasis in original). In addition, for a business relationship to serve as the predicate of a claim under *Aspen Skiing*, it must not be “temporary” or “subject to [the defendant’s] business judgment” because termination of such a relationship “does not reach the outer boundary of § 2 liability, at which *Aspen Skiing* lies.” *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (internal citation and quotation omitted).

No reasonable jury could find that Microsoft’s withdrawal of support for the namespace extension APIs was anticompetitive under these standards. *First*, there was no “termination” of a profitable business relationship. The very opposite is true; the relationship continued and Microsoft continued to assist Novell (which never even informed Microsoft that it was supposedly struggling to cope with the withdrawal of support for the namespace extension APIs. *Second*, it is well understood in the software industry that a beta version of a product under development “might change” and “could” change, and indeed the beta license agreement pursuant to which Microsoft provided Novell with documentation for the namespace extension

APIs made clear that the M6 beta version of Windows 95 was subject to change. *Third*, the trial evidence shows that Microsoft’s decision to withdraw support for the namespace extension APIs was supported by legitimate business justifications.²¹

B. The Withdrawal of Support for the Namespace Extension APIs Did Not “Terminate” the Relationship with Novell.

Microsoft’s October 3, 1994 decision to withdraw support for the namespace extension APIs did not “terminate a business relationship” between Microsoft and Novell. *Four Corners Nephrology*, 582 F.3d at 1225 (citation omitted). Even after Microsoft’s withdrawal of support for the namespace extension APIs, WordPerfect and Quattro Pro remained compatible with Windows 95, and Novell could have used the Windows 95 common file open dialog or built its own file open dialog using common controls supplied by Windows 95. There is no dispute that such functionality was free to all ISVs and was easy to use. What the evidence shows is that Novell chose not to use functionality supplied by Windows 95, but delayed the release of WordPerfect and Quattro Pro for Windows so that it could try to develop a “cooler” file open dialog that Novell thought would give it a competitive advantage. (Gibb, Oct. 26 Trial Tr. at 848-49.) Frankenberg added that he is “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* Nov. 8 Trial Tr. at 1217) and, in fact, six months

²¹ Top the extent Novell bases its claim on some purported “bait and switch” (*see* Novell Opening Statement, Oct. 18 Trial Tr. at 29), such a business tort claim falls outside the narrow *Aspen Skiing* exception and is not cognizable under the federal antitrust laws in any event. “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); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1354-55 (Fed. Cir. 1999) (“[T]he Sherman Act does not convert all harsh commercial actions into antitrust violations”). In any event, there is no evidence that Microsoft provided the M6 beta release to ISVs in June 1994 with the intent to later on withdraw support for the namespace extension APIs.

after Gates' October 3, 1994 decision, Scott Nelson of Novell reported in an e-mail that "the cooperation between Microsoft and Novell has been very good." (DX 172.)

Harral and Richardson both testified that, after Microsoft's decision to withdraw support for the namespace extension APIs, they believed Novell had three options. *First*, if the namespace extension APIs were as important as Novell contends, Novell could have continued to call those APIs, just as Richardson said Novell's shared code group had done between June 1994 and October 1994. (Richardson, Oct. 25 Trial Tr. at 667, 677-78.) Richardson and Harral testified that the namespace extension APIs remained in Windows 95, and that Novell could "continue to use the documentation" it had received from Microsoft in June 1994. (Harral, Oct. 20, 2011 Trial Tr. at 342; Richardson, Oct. 25, 2011 Trial Tr. at 624.) Novell rejected this option, not because it was impossible but because (according to Richardson) Novell "discovered performance issues" with the namespace extension APIs "that were unacceptable." (Richardson, Oct. 25 Trial Tr. at 677-78.)

Second, Novell could have used the Windows 95 common file open dialog, which Microsoft made available for free to all ISVs. Gary Gibb testified that Novell was testing its Windows 95 applications using the Windows 95 common file open dialog, and that it would have been "quite easy" for Novell to release WordPerfect and Quattro Pro using that Windows 95 common file open dialog. (Gibb, Oct. 26 Trial Tr. at 847-48; *see also* Harral, Oct. 24 Trial Tr. at 502.) Gibb explained that Novell decided not to "use the Windows 95 common file open dialog that Microsoft provided for free to developers in the Windows 95 operating system" because Novell thought it "could do something cooler." (Gibb, Oct. 26 Trial Tr. at 848-49.)

Third, Novell could write its own file open dialog without relying on the namespace extension APIs, either using common controls supplied by Windows 95 or writing a

file open dialog from scratch, which would be more difficult and time-consuming. (Harral, Oct. 20 Trial Tr. at 342-43.) Harral and Richardson both testified that they rejected options one and two, and instead chose option three. (Harral, Oct. 20 Trial Tr. at 344-47; Harral, Oct. 24 Trial Tr. at 502-04; Richardson, Oct. 25 Trial Tr. at 628-30.) There was no evidence that Novell executives made that strategy choice—only low-level software developers. Option three posed the greatest risk of delaying the release of WordPerfect and Quattro Pro for Windows 95, which Harral understood when he embarked on the project of creating an advanced file open dialog that sought to replicate the functionality of the Windows Explorer in Windows 95. (Harral, Oct. 20 Trial Tr. at 342-43.)

This evidence does not support a claim under Section 2 of the Sherman Act because (a) WordPerfect and Quattro Pro remained compatible with Windows 95 after Microsoft's withdrawal of support for the namespace extension APIs, (b) the namespace extension APIs remained in Windows 95 and Novell's developers had the same access to those APIs that all other developers had, (c) Novell could have used the Windows 95 common file open dialog to release versions of WordPerfect and Quattro Pro for Windows 95 without delay, and (d) Novell could have used common controls supplied by Windows 95 to create its own file open dialog that both provided access to the Windows 95 system namespace as well as Novell products such as QuickFinder. Novell chose to develop a very complex file open dialog, one that delayed the release of WordPerfect and Quattro Pro for Windows 95, because Novell believed such a file open dialog would provide Novell with a competitive advantage. In light of this evidence, no reasonable jury could find that Microsoft "jettison[ed]" or "terminated a business relationship" between the parties. *Four Corners Nephrology*, 582 F.3d at 1225. The relationship continued; it was Novell that chose to try to get a competitive advantage by adding functionality

to Windows 95 that Microsoft itself never used in its own personal productivity applications. This is similar to the plaintiff in *Aspen Skiing* being offered several arrangements for continuing the four-mountain pass (albeit arrangements that were all somewhat different from the prior one) and then choosing an option that wound up being unsuccessful as a business matter. It is inconceivable that this could give rise to an antitrust claim.

Novell also failed to prove that Microsoft “den[ie]d to [its] rival the [APIs] available to all other” ISVs. *Four Corners Nephrology*, 582 F.3d at 1225. Microsoft’s decision to withdraw support for the namespace extension APIs applied to all ISVs creating personal productivity applications for Windows 95—as well as to the Microsoft Office team. (*See, e.g.*, DX 3 at MX 6055841, Holley Decl. Ex. A (“All applications within Microsoft which were originally implementing these interfaces have been required to stop.”).) Microsoft provided Novell with the same access to Windows technology such as the Windows 95 common file open dialog and common controls on the same terms it provided this technology to all others. (*Id.*) And, there is no evidence, as Alepin testified, that Microsoft Office or Microsoft Word or Microsoft Excel ever called the namespace extension APIs. (Alepin, Nov. 10 Trial Tr. at 1643.) Because Novell was still able to utilize the thousands of APIs exposed by Windows 95 to build versions of WordPerfect and Quattro Pro for Microsoft’s new operating system (Harral, Oct. 24 Trial Tr. at 455-56, 462), Novell cannot prove that Microsoft’s decision to withdraw support for the namespace extension APIs amounted to the “terminat[ion] of a profitable relationship” with Novell. *Four Corners Nephrology*, 582 F.3d at 1225 (quotation omitted). This, again, places Novell’s claim well outside the limited exception recognized in *Aspen Skiing*.

Finally, the Court asked counsel several times whether there is a case in which the failure of a company with monopoly power to “share[] technological information provided any

basis for an antitrust action.” (Oct. 27 Trial Tr. at 926-28; *see also* Oct. 25 Trial Tr. at 574-77.) There is no such case. In fact, the case most directly on point—which Novell has never brought to the Court’s attention—demonstrates that a monopolist has no duty to share technological information with rivals.

In *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), the defendant, a monopolist in the manufacture of microprocessors, provided the plaintiff “with various special benefits, including proprietary information and products.” *Id.* at 1350. After a disagreement arose between the parties as to intellectual property licensing issues, defendant reduced the “technical assistance and other special benefits” it previously had provided to the plaintiff. *Id.*²² Specifically, defendant “refus[ed] to authorize help to Intergraph for removal of a ‘bug’ or defect in a product,” which “requir[ed] Intergraph to spend substantial time and resources to solve the problem and delay[ed] Intergraph’s product entry into the market.” *Id.* at 1365-66 (quotation omitted). After the district court granted a preliminary injunction in favor of plaintiff requiring defendant to restore the assistance it had provided to plaintiff in the past, defendant appealed, “arguing that no law requires it to give such special benefits” to plaintiff. *Id.* at 1351.

The Federal Circuit agreed with defendant and vacated the injunction. The Court squarely held that “[t]he withdrawal of technical service is not a violation of the antitrust laws.” *Id.* at 1366 (Fed. Cir. 1999). The Court further explained that “[t]he federal antitrust laws do not

²² Because the evidence at trial demonstrates that Microsoft’s withdrawal of support for the namespace extension APIs did not constitute anticompetitive conduct under well-settled antitrust law, Novell’s case now hinges on the unsubstantiated testimony of one Novell developer that he received less than satisfactory technical support from unnamed members of Microsoft’s Premier Support group at some unspecified time. (*See* pp. 27-28 & nn. 9, 10, *supra*.) The notion that the provision of allegedly imperfect technical support by some unnamed premier support employee is an antitrust violation that generates more than a billion dollars of damages demonstrates the ludicrous nature of Novell’s claim.

create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce,” *id.* at 1364, *quoted with approval in Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1205 (10th Cir. 2006), and that even “an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.” *Id.* at 1366 (quoting *Brooke Group*, 509 U.S. at 225).

Likewise, Microsoft’s withdrawal of support for the namespace extension APIs during the beta testing of Windows 95—even if that withdrawal forced Novell “to spend substantial time and resources to solve the problem and delay[ed] [Novell’s] product entry into the market”—does not give rise to a cognizable claim under Section 2 of the Sherman Act. Seeking to compare Novell’s claim with the facts of *Aspen Skiing*, the Court offered a hypothetical in which the owner of three ski resorts “decided to build a tram line—a tram line to connect all three slopes, which improved its competitive position.” (Nov. 10 Trial Tr. at 1670.) “The plaintiff, the owner of the fourth slope, was asking for a perpetual easement to tie the tram line built by the defendant to a tram line that the plaintiff wanted to build, and part of the easement was to connect into the power source that was used by the defendant’s tram line.” (*Id.* at 1670-71.)

Plaintiff in the Court’s hypothetical could not possibly prevail under *Aspen Skiing*, and Novell’s claim is materially weaker than the hypothetical. Microsoft allowed Novell to connect its “tram line” to Microsoft’s “tram line,” because Microsoft not only allowed Novell to create versions of WordPerfect and Quattro Pro that ran Windows 95, but affirmatively assisted Novell in that enterprise. Microsoft provided several “power source[s]” to Novell, including the Windows 95 common file open dialog and various common controls, in addition to more than 2,500 APIs in Windows 95 that exposed a wide range of functionality. Novell’s

complaint is not that Microsoft denied Novell access to Windows 95—the “tram line”—or that Microsoft denied Novell access to a “power source” used by Microsoft’s “tram line.” It is undisputed that none of Microsoft’s personal productivity applications used the namespace extension APIs during the time Novell owned WordPerfect and Quattro Pro. Novell was not denied access to Windows 95. At bottom, Novell’s complaint is that, after Microsoft first contemplated (while the tram line was being built) that it would include heated seats on its tram cars, Microsoft later decided to withdraw support for the heated seats after coming to believe that the heated seats could start an electrical fire that would crash the whole tram system.

C. The Practice in the Software Industry and the Terms of the Beta License Agreement Permitted Microsoft to Withdraw Support for APIs that Novell Received as Part of a Beta Version of Windows 95.

The trial evidence establishes that, in the software industry, a beta version of a product under development might change before its commercial release. Here, Novell received documentation for the namespace extension APIs pursuant to a written license agreement with Microsoft in connection with Novell’s testing of a beta version of Windows 95 that made explicitly clear, consistent with the software industry practice, that the beta version might change before the commercial release of Windows 95. This fact alone defeats Novell’s claim, for two reasons.

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

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

CEO Frankenberg testified that Novell understood that the commercial release of Windows 95 “might change” and “could change” from the M6 beta version before the new operating system was commercially released. (Frankenberg, Nov. 8 Trial Tr. at 1201, 1204-05, 1209.) Frankenberg further acknowledged that Novell’s own license agreements for beta versions of its Netware products included substantially similar provisions to the Microsoft license agreement covering beta versions of Windows 95. (*Id.* at 1209.)²³ Finally, Frankenberg agreed that it “was widely understood in the software industry” that beta versions of software products can and do change. (*Id.* at 1204-1205.)

Second, as the Tenth Circuit held in *Christy Sports*, temporary business relationships that are subject to change cannot, as a matter of law, form the predicate of an *Aspen Skiing* claim. 555 F.3d at 1190-91. In *Christy Sports*, plaintiff brought suit under Section 2 of the Sherman Act alleging that defendant’s revocation of permission for plaintiff to operate a ski rental facility under the terms of a restrictive covenant in a lease was anticompetitive conduct under *Aspen Skiing*. *Id.* at 1197. The court held that the restrictive covenant, which prohibited plaintiff from operating a ski rental facility without defendant’s consent, made clear to plaintiff

²³ Novell’s license agreement stated, in relevant part: “Beta Products are of pre-release quality, have not been fully tested, and may contain errors and omissions. Novell does not guarantee that the Beta Products will become generally available to the public or that associated products will be released. The entire risk arising out of your use of Beta Product remains with you.” (DX 618, Novell Software Developer’s Kit License and Limited Warranty, at NOV-B07520261, Holley Decl. Ex. CC.)

“that the relationship could change at any time,” and that plaintiff “should have been aware that the relationship was temporary and subject to [the defendant’s] business judgment.” *Id.* at 1196. The court further observed that it did “not see why an initial decision to adopt one business model would lock [defendant] into that approach and preclude adoption of the other at a later time.” The court concluded that even though “[c]onceivably, such a change might lead to a claim under contract law or as a business tort,” enforcing the restrictive covenant in the lease did not amount to anticompetitive conduct under the Sherman Act. *Christy Sports*, 555 F.3d at 1197; *see also Intergraph Corp.*, 195 F.3d at 1364-66 (holding that withdrawal of technical information did not violate Section 2 of Sherman Act because “proprietary information and pre-release products” were provided under “non-disclosure agreements,” which provided that “both parties may ‘cease giving Confidential Information to the other party without liability,’ and that either party can ‘terminate [the] Agreement at any time without cause upon notice to the other party’”).

Novell’s claim regarding Microsoft’s withdrawal of support for the namespace extension APIs fails for the same reason that the claims in *Christy Sports* and *Intergraph* failed. Novell received a beta version of Windows 95 pursuant to a license agreement with Microsoft that expressly provided notice to Novell that the product was still under development and was subject to change:

2. PRE-RELEASE CODE. This PRODUCT consists of pre-release code, documentation and specifications and is not at the level of performance and compatibility of the final, generally available product offering. The PRODUCT may not operate correctly and may be substantially modified prior to first commercial shipment. COMPANY assumes the entire risk with respect to the use of the PRODUCT.

(DX 18, Microsoft Corporation Non-Disclosure Agreement (Pre-release Product) with WordPerfect Corporation, executed May 24, 1994, at 1, ¶ 2, Holley Decl. Ex. B.) Moreover, the

documentation provided with the M6 beta version of Windows 95 in June 1994 (Harral, Oct. 24 Trial Tr. at 434-35), which included documentation for the namespace extension APIs, included clear warnings that the documentation 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 [Windows 95].” (PX 388, Microsoft Windows “Chicago” Reviewer’s Guide, at MSC 00762731, Holley Decl. Ex. M.)

In light of the “temporary” nature of Novell’s rights to use the M6 beta version of Windows 95, and the evidence that Novell knew that Windows 95 was still under development and could change in accordance with Microsoft’s own “business judgment,” Novell cannot make a Section 2 claim based on the fact that Microsoft provided documentation for the namespace extension APIs with the M6 beta release of Windows 95. *Christy Sports*, 555 F.3d at 1197. To allow Novell to do so would “lock” Microsoft into a design of a pre-release version of a product in contradiction to the parties’ understanding that the beta was subject to change—a result the Tenth Circuit has rejected. *Id.*

Thus, the evidence establishes that Microsoft’s allegedly anticompetitive conduct—the withdrawal of support for the namespace extension APIs—was not only authorized by the agreement pursuant to which Novell obtained access to beta versions of Windows 95, but was consistent with the “ordinary business practices typical of those used in” the software industry. *Telex*, 510 F.2d at 925-26. As a result, that conduct is not actionable under the antitrust laws. *Id.* at 925-26, 928; *see also Trace X Chemical, Inc. v. Canadian Industries, Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984).

D. The Evidence at Trial Establishes that Microsoft Had Several Legitimate Business Justifications for Its Withdrawal of Support for the Namespace Extension APIs.

Finally, Novell's claim fails because Novell failed to present evidence that Microsoft's withdrawal of support for the namespace extension APIs was "without any economic justification." *Four Corners Nephrology*, 582 F.3d at 1225 (quotation omitted). In *Four Corners*, defendant hospital terminated the credentials of unaffiliated nephrologists in order to protect the hospital's budding nephrology practice. *Four Corners*, 582 F.3d at 1217-19. The Tenth Circuit held that "the evidence suggest[ed] that [defendant] refused to deal with [the plaintiff] to avoid an unprofitable relationship, and that the [defendant] pursued the course it did to protect and maximize its chances of profitability in the short-term." *Four Corners Nephrology*, 582 F.3d at 1225. The Court held that "*Aspen Skiing* does not require more economic justification than [that] to avoid Section 2 liability." *Id.*

Here, Novell failed to establish that Microsoft's decision to withdraw support for the namespace extension APIs lacked any legitimate business justification. Rather, the evidence at trial showed that there were ample justifications for Microsoft's decision.

Third-party applications that called the namespace extension APIs ran in the same process as the Windows shell and, as a result, if the third-party application crashed, the Windows shell would also crash. Novell's technical expert, Ronald Alepin, agreed that the namespace extension APIs posed a risk to the stability of Windows 95, noting that the crash of a third-party application running the namespace extension APIs "had the potential to make the system unresponsive." (Alepin, Nov. 10 Trial Tr. at 1589.) Professor Noll testified that "the developer of an operating system[] is free not to document APIs . . . where those APIs might crash the whole system" (Noll, Nov. 15 Trial Tr. at 1872-73), and further testified that an operating system developer is justified in choosing "not to document APIs . . . where those APIs are unstable."

(Noll, Nov. 15 Trial Tr. at 1872-73.) This testimony completely blows away the contention of Novell's lawyers that Microsoft's justifications for the withdrawal of support for the namespace extension APIs were a pretext.

The testimony quoted above is also consistent with the rest of the evidence at trial. Paul Maritz, the Microsoft executive in charge of all operating systems, testified that the namespace extension APIs had the "downside[]" of running "in the same context as the shell" and thus that an ISV's "application code could bring down the shell." (Maritz Dep. at 129, used at trial on Oct. 27, Holley Decl. Ex. R.) Maritz further testified that as a result, Microsoft had important concerns about "robustness and reliability" (*id.* at 124-125), and that the namespace extension APIs "expos[ed] a potential weakness[] in the system." (*Id.* at 130; *see also* Noll, Nov. 15 Trial Tr. at 1872.) James Allchin, the Microsoft executive in charge of Windows NT, expressed the same concern, testifying that if an ISV wrote an application that called the namespace extension APIs that "had an error in it, it could take down or corrupt the user experience overall" and "wipe out a little part of the [operating] system." (Allchin Dep., used at trial on Nov. 8, Trial Tr. at 1297; *see also id.* ("In other words, the application could impact more than just it. So that's bad.")) Indeed, the contemporaneous evidence shows that Microsoft was concerned that the namespace extension APIs could crash the Windows 95 shell: In an October 12, 1994 e-mail, Brad Struss of Microsoft explained that "Names space extensions were design[ed] to [be] part of the system. As such they run in the explorer's process space. Badly written name space extension[s] could cause the reliability of Windows 95 to be less th[a]n what it should." (DX 3 at MX 6055843, Holley Decl. Ex. A.) Robert Muglia, the lead program manager in charge of Windows NT, observed on October 4, 1994—the day after Bill Gates made the decision to withdraw support for the namespace extension APIs—that the decision "is very

good news for BSD Division. Since Bill has decided these interfaces won't be published, NT development does not have to expend precious energy on implementing these for NT." (DX 21, E-mail from Bob Muglia, dated October 4, 1994, Holley Decl. Ex. S.) Muglia further stated that because the namespace extension APIs "introduce significant robustness issues, we don't have to spend time on building a robust implementation of IShellBrowser." (*Id.*)

Despite this evidence, Mr. Alepin testified that he did not believe that the risk to the stability of Windows was a sufficient justification for the withdrawal of support for the namespace extension APIs because "there were lots of ways to get Windows 95 to crash," and ISVs "take on" the "burden" of "writing good quality tested software that does not cause the system to fail." (Alepin, Nov. 9 Trial Tr. at 1393-94, 1428.) Neither point, however, negates the fact—acknowledged by Alepin—that the namespace extension APIs posed a risk to the stability of Windows 95. (Alepin, Nov. 10 Trial Tr. at 1589.) The existence of other ways to crash Windows 95 does not mean Microsoft was not justified in eliminating one such source of instability. Moreover, Alepin testified that Microsoft had no ability to impose quality control requirements on third-party applications that called the namespace extension APIs (Alepin, Nov. 10 Trial Tr. at 1593-94), so Alepin's blithe assertion that the market would discipline ISVs who wrote applications that caused Windows 95 to crash does not mean that Microsoft was not justified in taking steps on its own to protect users of Windows 95 from such badly behaved applications. Under *Four Corners*, 582 F.3d at 1225, Microsoft's justifications are sufficient as a matter of law.

The limited functionality of the namespace extension APIs was another reason that Microsoft decided to withdraw support for those APIs. Bill Gates, whose deposition Novell played at trial, testified that he decided to withdraw support for the namespace extension APIs

because they did not enable the level of integration with the Windows 95 shell that Gates had hoped to achieve. Specifically, Gates testified that the namespace extension APIs did not allow users to “invoke the application” in the view pane of the Windows Explorer, and thus that the functionality supplied by the namespace extension APIs was “just not interesting enough to us or anyone else” to justify Microsoft’s continued support of those APIs. (Gates Dep. at 253-55, used at trial on Oct. 19, Holley Decl. Ex. Q.) Gates concluded that the namespace extension APIs were “so trivial” that they were not “worth the trouble” of publishing and supporting. (*Id.* at 255; *see also* March 5, 2009 Deposition of Russell Siegelman, Nov. 15 Trial Tr. at 2042 (agreeing that even if “applications could have been browsed through the Explorer folder tree” it would not “have been an important feature”).) Novell offered no evidence that Microsoft Office or any Microsoft personal productivity application could ever be invoked in the view pane of Windows Explorer.²⁴

The existence of these business justifications for Microsoft’s decision to withdraw support for the namespace extension APIs is another separate and independent reason why Novell’s claim fails as a matter of law. *Four Corners Nephrology*, 582 F.3d at 1225; *Christy Sports*, 555 F.3d at 1197. At bottom, Novell’s only attempt to counter Microsoft’s business justifications for withdrawing support for the namespace extension APIs is Alepin’s opinion that the purported costs of that decision to Novell outweighed the benefits of the decision to

²⁴ Alepin implied that a basic e-mail client called Athena which was not released until 1996 used the namespace extension APIs to run in the view pane of Windows Explorer. (Alepin, Nov. 9 Trial Tr. at 1426-27; Alepin, Nov. 10 Trial Tr. at 1643-44.) He acknowledged, however, that he did not remember doing any analysis to confirm what APIs were relied on by Athena and had no answer when confronted with the output of a software disassembly program called PE Explorer, which showed that Athena did not call any of the namespace extension APIs. (Alepin, Nov. 10 Trial Tr. at 1644-47.)

Microsoft. That opinion is legally irrelevant. Once Microsoft has shown that legitimate business justifications exist for the decision to withdraw support for the namespace extension APIs, the inquiry is at an end. *See Aspen Skiing*, 472 U.S. at 597, 605; *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540, 1550 (10th Cir. 1995). The sort of balancing of costs and benefits engaged in by Alepin and Noll is impermissible.

As the Fifth Circuit held in *Bell v. Dow Chemical Co.*, a jury cannot “weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal.” 847 F.2d 1179, 1186 (5th Cir. 1988). Indeed, “[t]he fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient.” *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 597); *see also* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772c2 (3d ed. 2011) (“[T]he Court [in *Aspen Skiing*] did not call for any balancing of social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal. Rather, the Court classified conduct or intention as either lawful or not on the basis of the presence or absence of legitimate business purposes.”). Opinions offered by Novell’s experts that the benefits to Microsoft of withdrawing support for the namespace extension APIs are outweighed by the purported costs of that decision to Novell would not entitle a jury to ignore those justifications. Thus, the admission by Novell’s technical expert that applications calling the namespace extension APIs could cause Windows 95 to crash (Alepin, Nov. 10 Trial Tr. at 1589) is all that is legally required to take this case outside the limited exception of *Aspen Skiing*.

Even if, contrary to the evidence at trial, Novell could establish that its claim falls within the narrow exception of *Aspen Skiing*, no reasonable jury could conclude that Novell has

met the requirement that Novell prove that Microsoft's withdrawal of support for the namespace extension APIs is what caused the delay in the release of WordPerfect and Quattro Pro for Windows 95—much less than such a delay had any impact on competition in the PC operating system market. *Novell, Inc.*, 694 F. Supp. 2d at 748-50. Given the uncontroverted evidence that there were other reasons why Novell's applications were not released at or about the time Microsoft released Windows 95 (*see* pp. 25-30, *supra*), Novell has failed to prove the requisite causal connection between withdrawal of support for the namespace extension APIs and the purported harm to WordPerfect and Quattro Pro.

CONCLUSION

Microsoft respectfully requests that the Court enter judgment in Microsoft's favor on Novell's claim.

Dated: November 17, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2011, I caused a true and correct copy of the foregoing MICROSOFT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW to be filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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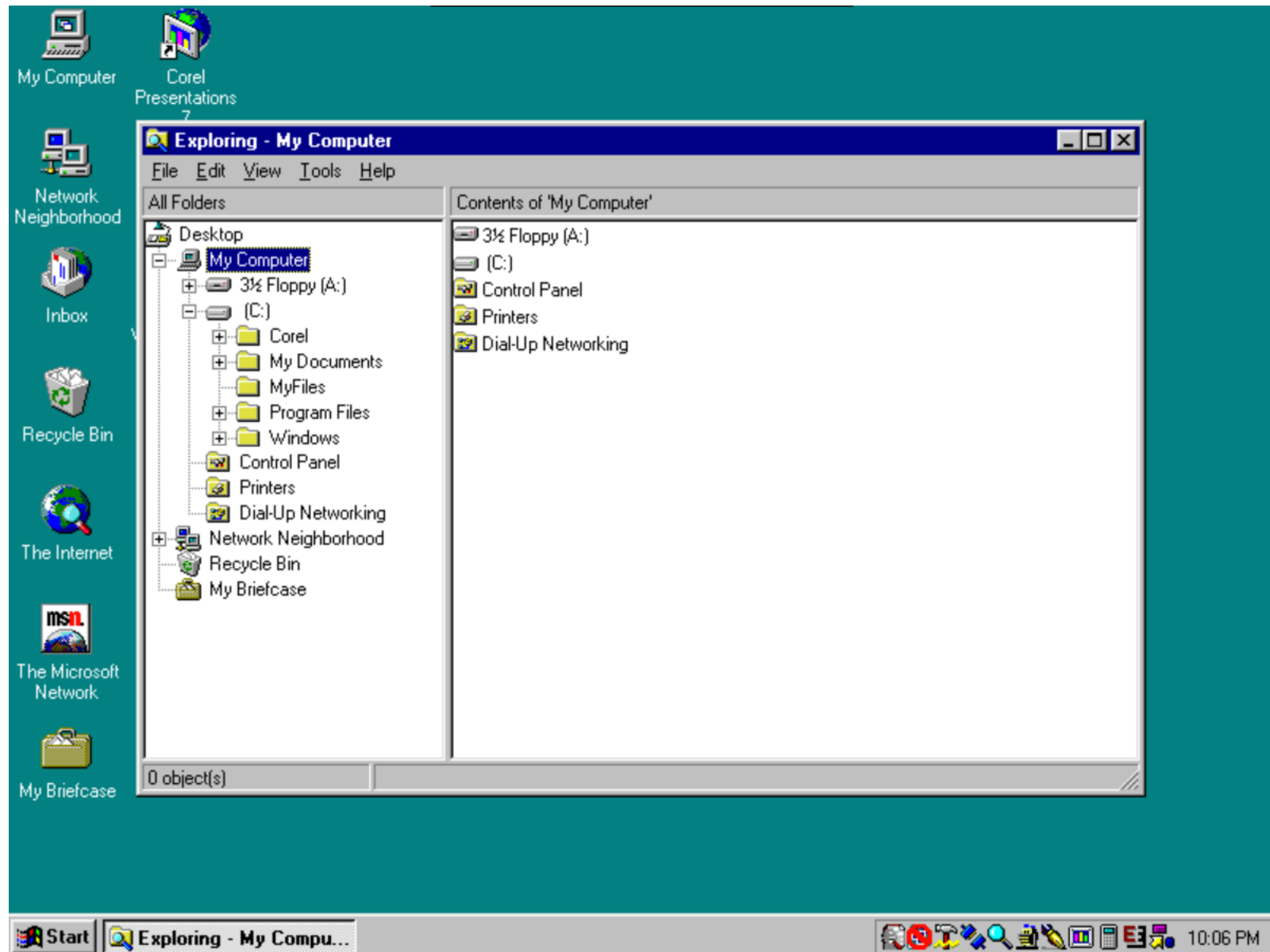
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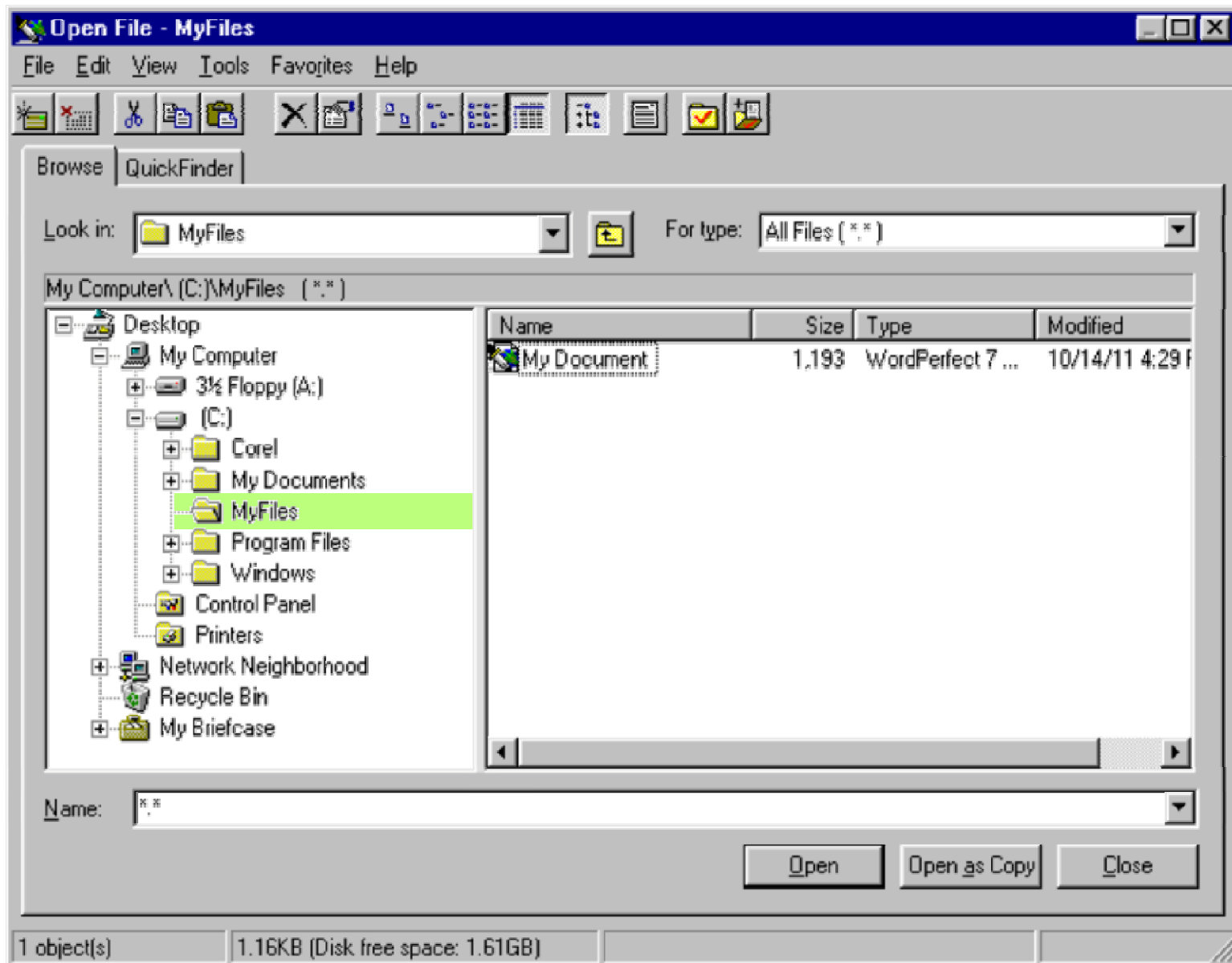
APPENDIX A

Windows 95 User Interface



APPENDIX B

PerfectFit File Open Dialog



APPENDIX C

Novell. Relevant Products

WordPerfect®



Word processing application

Quattro Pro®



Spreadsheet application

Soft Solutions

Document
management system

**Presentations
Clip Art Gallery**

Picture viewer

QuickFinder

Search engine

**WordPerfect
Email**

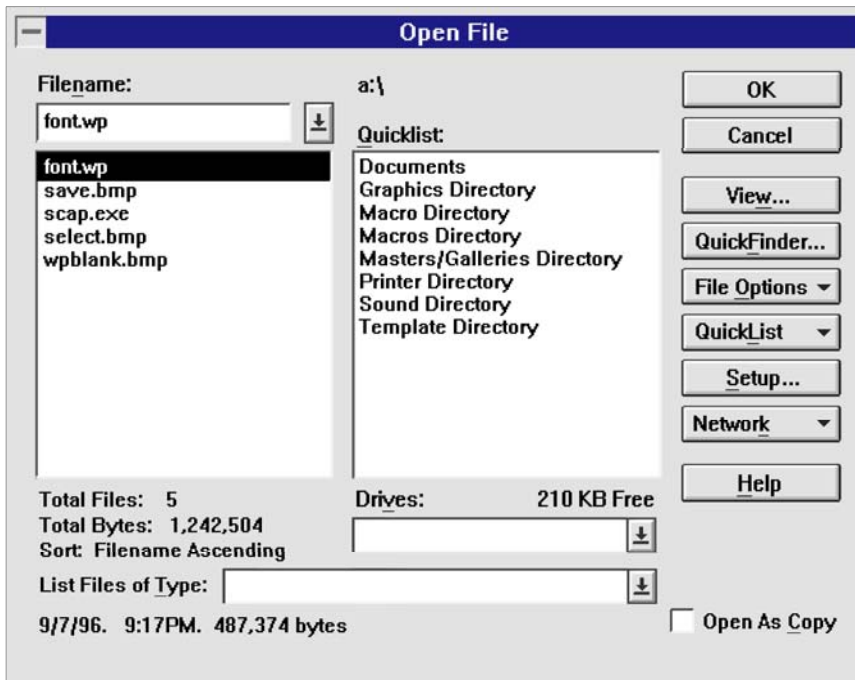
Email client

FTP/HTTP

Internet browser

APPENDIX D

PerfectFit 2.3 File Open Dialog for Windows 3.1



PerfectFit 3.0 File Open Dialog for Windows 95

