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

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

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

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

Attorneys for Novell, Inc.

UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S MEMORANDUM IN SUPPORT
Plaintiff,	*	OF MOTION TO REOPEN ITS CASE-IN-CHIEF
	*	AND SUPPLEMENT THE RECORD
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

Novell respectfully submits this Memorandum in support of its Motion to Reopen Its Case-In-Chief and Supplement the Record.

INTRODUCTION

During the hearing last Friday on Microsoft's Motion for Judgment as a Matter of Law, the Court raised concerns about what the Court perceived as a lack of evidence "that there was any alternative operating system to which WordPerfect could have written" but for Microsoft's conduct, which the Court suggested may be a crucial omission in Novell's proof. Tr. at 2615:13-24. Evidence that is highly probative regarding this issue is immediately available, and its introduction would take virtually no time. Specifically, Novell has identified portions of the written Direct Testimony of James Allchin and Paul Maritz given in the Government case that are highly probative with respect to the issue raised by the Court. The testimony of Messrs. Allchin and Maritz reveals Microsoft's belief that, in the 1994-96 time period and immediately thereafter, there were operating system alternatives to which WordPerfect could have written to but for Microsoft's conduct, and several products that competed with Windows. While Novell maintains that it does not have to prove that, but for Microsoft's conduct, "there was an alternative operating system to which WordPerfect could have written," and further contends that such evidence is in the record in any event, to the extent that the Court questions the sufficiency of this evidence Novell seeks leave to reopen its case-in-chief for the limited purpose of introducing this written testimony, and certain Microsoft 10-K filings which support that testimony, into the record to address the Court's concerns.

As discussed below, the law is clear that one of the key purposes of the Rule 50(a) procedure is to alert the non-moving party to defects in its proof so that the non-moving party can rectify these defects by seeking leave to reopen its case. In determining whether to grant

leave to reopen, courts consider a number of factors, such as whether the proffered evidence is merely cumulative or is highly probative regarding an issue of importance to the Court; whether the evidence had previously been withheld to gain a strategic advantage, or whether the failure to present the evidence earlier was due to efforts to streamline the case, and the later supplementation is sought to meet the Court's concerns about possible defects in proof; and whether reopening the case would cause the opposing party cognizable prejudice resulting from disruption or delay (rather than merely disappointment that it is less likely to prevail), or whether the supplementation could be accomplished immediately, before the opposing party begins presenting its case, without disrupting or materially delaying the trial. Here, all of these factors militate in favor of allowing Novell to reopen its case for the limited purpose of presenting this written testimony. Therefore, Novell's motion should be granted.

EVIDENCE SOUGHT TO BE INTRODUCED

A. The Written Direct Testimony of James Allchin[1]

At the time of his testimony, James Allchin was the Senior Vice President of Microsoft in charge of Microsoft's Personal and Business Systems Group. Allchin Testimony ¶ 1. His responsibilities included the "ongoing development of Microsoft's operating system software products, including Windows 98 and Windows NT." *Id.* Mr. Allchin's testimony provides insight into Microsoft's view of the operating systems market in the middle to late 1990s.

According to Mr. Allchin, during the relevant time Apple reported having more than 12,000 applications available for the MacOS while UNIX itself had thousands of available applications as well. *Id.* ¶ 20. Additionally, "many leading software publishers are creating

[1] The relevant portions of the written Direct Testimony of James Allchin is attached hereto as Exhibit A.

versions of their flagship products for Linux, an operating system that has shown strong popularity gains," including among well-known ISVs like Oracle, IBM, Corel, Netscape, and others.[2] *Id.*

Mr. Allchin discusses other operating systems competitive to Windows at great length. For example, Mr. Allchin identifies Apple's operating system, IBM's OS/2, Sun's Solaris operating system (which ran on Intel microprocessors *and* Sun's own "Sparc microprocessors"), Be, Inc.'s "BeOS" PC operating system, and the Santa Cruz Operation's ("SCO") UnixWare Personal Edition operating system and OpenServer Desktop System. *Id.* ¶¶ 262, 268-273, and 276. And even though it is not an Intel-compatible PC operating system, Novell's own "IntranetWare" and "NetWare" network operating system products provide the most obvious alternative,[3] as Novell had long planned the integration of its business productivity applications with its networking software.

In sum, Mr. Allchin identified several potential alternatives to Windows that might have gained in market share had Microsoft not eliminated products it viewed as nascent, cross-platform middleware threats. In the but-for world, Novell's office productivity applications could have catapulted these operating system alternatives to success.

Microsoft's fiercest competitors also were "eager to support non-Microsoft operating systems with applications development ***because they wish to promote their own alternatives to***

[2] Interestingly, Mr. Allchin's written testimony appears to define the term "middleware" differently than what Microsoft has argued before the Court here. Specifically, Mr. Allchin indicated that "[s]ome middleware provides platform functionality that is useful only to developing particular types of software programs; other middleware may provide platform functionality that would be generally useful in developing any kind of software program." *Id.* ¶ 35. Thus, Mr. Allchin does not appear to believe that support for "full featured general purpose productivity applications" is necessary to defining a piece of software as middleware. *See id.*

[3] Allchin's direct testimony identifies "IntranetWare" and "NetWare." *Id.* ¶ 275.

Windows, or alternatives offered by their allies." *Id.* ¶ 286 (emphasis added). Mr. Allchin pointed to Sun's Java as a "key platform technology," which in the late 1990s, "enjoy[ed] a great deal of developer support," and was touted by Sun as a "major computing environment." *Id.*

Likewise, "Linux is an operating system that has gained a lot of top-tier developer support," including a "wide range of leading applications" from Oracle, IBM, Corel, and Netscape that, at the time either already existed or were under development. *Id.* ¶ 289. Linux was available "for free" as were many of the applications built for Linux such as Corel's WordPerfect suite and the "StarOffice suite of business productivity applications," which Mr. Allchin described as a clone of Microsoft Office, was already made available for Linux for free by Caldera. *Id.* Most importantly, Mr. Allchin noted

> If Linux and the applications created for it work well, more customers will be attracted to Linux, leading to the development of more Linux applications, and so forth. ***Only a relatively small number of applications are needed to start the process off, because people generally don't need multiple word processors, multiple databases, and so forth*** (although, over time, variety is of course desirable). Already Linux is said to have between 5 million to 10 million users, and use of the operating system appears to be growing very rapidly.[4]

Id. ¶ 290 (emphasis added). As is plain from Mr. Allchin's testimony, during the relevant time there were several non-Windows operating systems available to users that Novell's business applications could have been ported to, and moreover, could have encroached on Microsoft's PC operating systems market share.

[4] This point also helps to illustrate the absurdity of Microsoft's position that PerfectOffice and WordPerfect needed to expose enough APIs to allow ISVs to develop "general purpose" office productivity applications *on top* of those applications. To assert that a word processing application, to be middleware, requires enough APIs so that *another* complete word processing application can be built on top of it makes little sense. Simply having PerfectOffice would provide the user with all of the full featured office productivity applications needed.

B. The Written Direct Testimony of Paul Maritz[5]

1. Competing Operating System Products

Paul Maritz was the Group Vice President for Platforms and Applications at Microsoft. Maritz Testimony ¶ 1. Mr. Maritz was responsible for "development and marketing of most desktop and server software at Microsoft, including all versions of Windows." *Id.* In 1992, Mr. Maritz took responsibility for "all of Microsoft's Windows operating system software and in 1995 also took on responsibility for Microsoft's developer tools and server applications products. Finally, [he] also assumed responsibility in late 1996 for Microsoft's desktop applications software, which include[d] Microsoft Office." *Id.* ¶ 3. By his own thinking, Mr. Maritz is "fully familiar" with the nature of competition in the software industry and the "serious competition faced by Windows" during the relevant time.[6] *Id.* ¶ 4; *see also id.* ¶ 9.

In his testimony, Mr. Maritz stated that Windows faced competition from several other operating systems, including Apple's MacOS, the family of UNIX operating systems from various vendors, Linux, and a host of other operating systems, as well as the internet.[7] *Id.* ¶¶ 29, 53-54, 207-233. He noted in particular that "Linux is an operating system that consists of several million lines of code – ***comparable in size, capability, and complexity to Microsoft's Windows 98 and Windows NT operating systems***." *Id.* ¶ 216 (emphasis added). In fact, many versions of

[5] The written Direct Testimony of Paul Maritz was submitted on January 20, 1999, and is attached hereto as Exhibit B.

[6] Mr. Maritz's testimony also includes a discussion of industry "inflection points," which, in the computer industry, represent dramatic shifts that can unseat market leaders and provide an opportunity for new entrants to take root. *Id.* ¶¶ 11-13, 15, 16, 18.

[7] Mr. Maritz's testimony that the PC operating systems market is competitive is bolstered by Microsoft's own 10-K filings from 1995, 1996, and 1997 (designated for the Court's convenience as PX 580, PX 581, and PX 582 respectively). These filings describe the software industry as "intensely competitive and subject to extremely rapid technological change." PX 580, at 27-30 (attached as Exhibit C); PX 581, at 30-33 (attached as Exhibit D); PX 582, at 27-31 (attached as Exhibit E).

Linux ran on Intel-compatible microprocessors and Mr. Maritz noted that "[a]pplications support for Linux is also growing rapidly." *Id.* ¶ 220. Perhaps most salient for purposes of this case is that, during the relevant time, "Corel offer[ed] a Linux version of its popular WordPerfect suite of business productivity applications, and it [was] free."[8] *Id.* ¶ 220.

2. Middleware Competes with Windows

Mr. Maritz also testified that "[a]nother important source of competition to Windows are 'middleware products.'" *Id.* ¶ 234; *see also Id.* ¶¶ 235-257. Mr. Maritz defined middleware very generally, calling it an additional software layer that sits between the operating system and application software that "can provide a broad set of services to other software programs via APIs and may also include its own user interface. In doing so, 'middleware' product serves as a platform for software development, subsuming functionality otherwise provided by the operating system, and thus plainly, competing directly with operating system software." *Id.* ¶ 235. He also identified three specific middleware threats to Microsoft Windows: Sun's Java, Netscape's web browsing software, and IBM's Lotus Notes. *Id.* ¶¶ 240-257.

Indeed, Mr. Maritz's testimony strongly supports Novell's theory of this case:

> If a middleware product provides a set of APIs to software developers that makes them more productive and enables them to create better software products, the value of any underlying operating system will, of course, be greatly reduced. ***Over time the developer of any successful middleware product could continue to add functionality to the point that the underlying operating system was rendered unnecessary or could be swapped out for another operating system***.

[8] Similarly, "Star Division of Germany offers its StarOffice, a full suite of business productivity applications," which was offered for free at the time. *Id.* ¶ 220. StarOffice also ran on Sun's Solaris operating system, IBM's OS/2, and the Apple Macintosh. *Id.* ¶ 225. Another ISV, Caldera, offered a Linux variant that included the DR DOS operating system, Netscape's Communicator, interoperability with Novell's NetWare, and StarOffice, and was priced at only $59. *Id.* ¶ 222. Another ISV, Red Hat, offered a low-priced version of Linux as well. *Id.* ¶ 224.

Id. ¶ 236 (emphasis added).[9] Thus, Microsoft's own top executive understood that middleware layered on top of an operating system can ***constitute a threat to the very operating system on which it sits***. *See id.* Moreover, there is not even a hint that Mr. Maritz believed that middleware, in order to constitute a threat to the operating system, must expose enough APIs to permit the development of full featured, general purpose productivity applications (as Microsoft now continually argues in this case). *See id.* Instead, according to Mr. Maritz, to constitute a threat, middleware only need provide enough APIs to enable software developers "to create better software products."[10] *Id.*

Thus, it is plain from the additional written testimony that Novell seeks to introduce that several other operating systems existed in the market to which WordPerfect could have been written during the relevant period absent Microsoft's conduct. There were several alternatives to which Novell could have ported its business applications (indeed, Corel did exactly that with Linux), and moreover, there were several middleware threats that simultaneously ran *on Windows* and threatened Microsoft's PC operating systems monopoly. Thus, these admissions by senior Microsoft executives provide the Court with exactly the evidence requested regarding the but-for world – the world without Microsoft's anticompetitive conduct – in which Novell's business applications might have flourished.

---

[9] Mr. Maritz even acknowledged the fact that middleware was layered on top of an operating system as a benefit, stating that "a middleware provider has the best of both worlds – competing with the underlying operating system while at the same time taking advantage of the system services provided by the operating system." *Id.* ¶ 237. Mr. Maritz identified Novell's AppWare as one example of middleware. *Id.* ¶ 238.

[10] Mr. Maritz also testified about the threat posed by "network computers," or "thin clients," *Id.* ¶ 260, which Mr. Frankenberg testified was part of Novell's "network applications" strategy. Tr. at 1004:1-16 (B. Frankenberg).

ARGUMENT

I. THIS COURT SHOULD GRANT NOVELL LEAVE TO REOPEN ITS CASE AND SUPPLEMENT THE RECORD

"One of the purposes of [Rule 50(a)] motions is to alert the opposing party (and the court) of any deficiencies in the case, 'thereby giving the party an opportunity to rectify any deficiencies prior to the case being submitted to the jury.'" *Miller v. Eby Realty Group LLC*, 396 F.3d 1105, 1114 (10th Cir. 2005). "Giving a party a chance to correct defects in proof is a primary purpose of the preverdict motion for JMOL under Rule 50(a), and in particular of the requirement that the motion specify the grounds for granting judgment." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1259-60 (10th Cir. 1999). Thus, a Rule 50(a) motion provides a party with an opportunity to "move[] for leave to reopen its case to provide additional evidence" in order to remedy defects in its proof. *Id.* at 1259; *accord Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 249 F. App'x 63, 82 (10th Cir. 2007). Indeed, as the Tenth Circuit has pointed out, the 1991 Advisory Committee Notes to Rule 50 state that the requirement that a JMOL be made prior to verdict is intended "'to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked.'" *Morrison Knudsen Corp..*, 175 F.3d at 1260 (quoting 1991 Advisory Committee Notes to Rule 50).

Furthermore, the drafters of the 1991 amendment to Rule 50 "emphasized . . . that 'in no event' should judgment be granted under Rule 50(a) unless the nonmoving party has 'been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any evidence bearing on that fact.' Relatedly, a party who has rested may move to reopen her case in order to cure an evidentiary deficiency identified in a Rule 50(a) motion." *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1149 (D.C. Cir. 2004) (citations omitted). The 2006 Advisory

Committee Notes to Rule 50 are even more explicit on this point, stating that a Rule 50(a) motion "informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available." 2006 Advisory Committee Notes to Rule 50 (emphasis added).

In *Davis v. Rodriguez*, 364 F.3d 424 (2d Cir. 2004), the plaintiff rested his case, and defendant moved for judgment as a matter of law, pointing out that the plaintiff had failed to present evidence with regard to an element of his claim. Plaintiff, although disputing the district court's view that he was required to present evidence on this point, nevertheless sought leave to reopen his case to present additional testimony to cure the omission. The district court denied plaintiff leave to reopen his case, and granted defendant's motion for judgment as a matter of law. The Court of Appeals reversed. "We have noted that a motion for JMOL pursuant to Rule 50 is designed 'to give the other party "an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury."'" *Id.* at 432 (citations omitted). Therefore, the Court of Appeals ruled, plaintiff "should have been given an opportunity to reopen his case." *Id.*

In *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148 (1st Cir. 1996), the plaintiff rested, and the defendant filed a Rule 50(a) motion. After hearing arguments on the motion, the district court granted plaintiff leave to reopen her case in order to offer additional testimony from two witnesses on the issue of causation. The defendant argued on appeal that the district court's decision to permit the plaintiff to reopen her case was error. The Court of Appeals affirmed the district court's decision. "A trial court's decision to reopen is premised upon criteria that are flexible and fact-specific, but fairness is the key criterion." *Id.* at 1160. "The specific factors to be assessed include the probative value of the evidence sought to be introduced, the proponent's

explanation for failing to offer the evidence earlier, and the likelihood of undue prejudice." *Id.* "If the evidence is immediately available or nearly so, the trial court will have a greater incentive to permit the case to be reopened. Conversely, if gathering the additional evidence portends a significant delay in the trial, the court ordinarily will have a greater reluctance to grant the motion." *Id.*

In *Blinzler*, the Court of Appeals found that the "probative value" factor militated in favor of reopening the case because the evidence sought to be introduced was "non-cumulative" and had "significant probative value on an essential element in the plaintiff's case." *Id.* The Court also found that the "explanation for failing to offer the evidence earlier" factor militated in favor of reopening because "[t]here is no sign that the plaintiff withheld the proof as a strategic matter. To the contrary, the record shows quite clearly that [plaintiff] attempted to streamline her case and offered the incremental evidence only after the judge expressed reservations about the state of the proof on the issue of causation." *Id.* As to the "undue prejudice" factor, the Court of Appeals noted that although defendant claimed substantial prejudice from the plaintiff's presentation of additional evidence "because the defense hoped all along that the plaintiff would fail to prove causation," this was not the sort of prejudice that was relevant to the analysis: plaintiff's ability to cure the fatal defect in her case caused defendant "disappointment rather than cognizable prejudice." *Id.* "Moreover, allowing the plaintiff to reopen did not perceptibly delay the trial and did not occasion any interruption of the defense case." *Id.*

Here, all of the relevant factors militate in favor of allowing Novell to reopen its case and supplement the record. The evidence that Novell seeks to introduce is not merely cumulative; it has significant probative value with respect to an issue that, based on the Court's remarks, may be found to be essential to Novell's claims. Moreover, Novell, like the plaintiff in *Blinzler*, did

not withhold this evidence for any strategic reason, but rather sought to streamline its case, and seeks to introduce this additional evidence after the Court expressed reservations about the state of the proof. Because the evidence is written testimony, and immediately available, and because Microsoft has not yet begun to present its evidence, Microsoft will suffer no cognizable prejudice as a result of the supplementation of the record; Microsoft's disappointment that Novell will cure a potential defect in its proof is not cognizable prejudice. The supplementation of the record will not materially delay the trial and will not interrupt the defense case.

Allowing Novell to reopen its case and supplement the record will promote fairness, and further the purpose of Rule 50(a) by giving Novell "'an opportunity to rectify any deficiencies prior to the case being submitted to the jury.'" *Miller*, 396 F.3d at 1114 (citation omitted). Therefore, Novell's motion should be granted.

CONCLUSION

For the foregoing reasons, Novell's Motion to Reopen Its Case-In-Chief and Supplement the Record should be granted and the Court should admit the cited portions of the written Direct Testimony of Messrs. James Allchin (¶¶ 1, 20, 35, 262, 268-273, 275, 276, 286, 289, 290) and Paul Maritz (¶¶ 1, 3, 4, 9, 11-13, 15, 16, 18, 29, 53, 54, 207-257), as well as the Microsoft 10-K filings from 1995, 1996, and 1997 (PX 580-PX 582) cited above.

Dated: November 20, 2011

SNOW, CHRISTENSEN & MARTINEAU

By: _____*/s/ Maralyn M. English*_____
Max D. Wheeler
Maralyn M. English

DICKSTEIN SHAPIRO LLP
Jeffrey M. Johnson
Paul R. Taskier
James R. Martin
Adam Proujansky

ADAMS HOLCOMB LLP
R. Bruce Holcomb

WILLIAMS & CONNOLLY LLP
John E. Schmidtlein

Attorneys for Novell, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: */s/ Maralyn M. English*
Maralyn M. English