CASE NO. 12-4143

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

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

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Oral Argument is requested

SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

November 21, 2012

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant Novell, Inc. makes the following disclosure:

Novell is owned by The Attachmate Group, Inc. and Attachmate Corporation. The Attachmate Group is wholly owned by Wizard Parent, LLC, which is in turn owned by Thoma Cressey Bravo, Inc. and Thoma Bravo, LLC. The Attachmate Group, Attachmate Corporation, Wizard Parent, Thoma Cressey Bravo, and Thoma Bravo are privately held corporations. No publicly held corporation owns 10 percent or more of the stock of Novell.

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ATTACHMENTS

[1] Please note that some documents in the Joint Appendix were produced with inaccurate dates because such documents, which were restored from back-up tapes, contain an auto-date feature.

TABLE OF AUTHORITIES

Statutes

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PRIOR OR RELATED APPEALS

Novell, Inc. v. Microsoft Corp., 429 F. App'x 254 (4th Cir. 2011)

Novell, Inc. v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007)

GLOSSARY

API: Application programming interface

Athena: Codename for Microsoft's Internet Mail and News client application

Chicago: Codename for Microsoft's Windows 95 operating system

DOJ: The United States Department of Justice

FOF: Finding of Fact from *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999)

ISVs: Independent software vendors

Marvel: Codename for the Microsoft Network ("MSN") client application

MS-DOS: Microsoft's Disk Operating System

PC: Personal computer

Win95: Microsoft's Windows 95 operating system

WPWin: WordPerfect for Windows

INTRODUCTION

Novell, Inc. appeals the District Court's entry of judgment as a matter of law in favor of Microsoft Corporation. Novell alleges that Microsoft unlawfully maintained its monopoly power in the Intel-compatible personal computer ("PC") operating systems market through anticompetitive conduct that destroyed the competitive viability of Novell's WordPerfect word processing application and PerfectOffice applications suite. There is no dispute that Microsoft was a monopolist and maintained its monopoly power in the operating systems market. The only questions for the jury were whether Microsoft unlawfully maintained its monopoly power through anticompetitive conduct and whether that conduct proximately caused Novell's injury.

As in the Government's case against Microsoft, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), Microsoft destroyed a competitive threat not by designing better products or lowering prices, but by impeding and deceiving competitors. Here, Microsoft induced Novell to design its applications to rely on a critical technology (called namespace extension APIs) in the Windows 95 operating system. Almost a year later, Microsoft withdrew support for those APIs when Novell could not timely redesign its applications. As a result, Microsoft left Novell with what economist Roger Noll characterized as "two different ways to commit suicide" – fail to release its product within the critical 90-day period

following Windows 95's release, or release a non-competitive product that sacrificed key functionality. JA-12845 (Noll).

Moreover, Microsoft accomplished the withdrawal of support for the namespace extension APIs by deceiving Novell and other competitors. The District Court concluded there was "sufficient evidence upon which a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual." JA-213.

Eliminating Novell's products harmed competition in the operating systems market. Microsoft had long recognized the "strategic synergy" between its applications and operating systems businesses and understood that by owning the "key 'franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating systems business." JA-4293. Word processing was the most important applications category, and Novell's WordPerfect was the best word processor, with an equivalent number of users to Microsoft Word and far more than any other word processor. By eliminating WordPerfect and Novell's PerfectOffice applications suite as competitive threats, Microsoft widened the moat protecting its monopoly power in the operating systems market. Further, Novell's applications offered powerful "middleware" that threatened to reduce the costs of writing applications for Microsoft's operating system competitors. Microsoft recognized the general threat to its monopoly power in the operating systems

market presented by middleware and the specific threat posed by Novell's middleware.

The District Court disregarded the governing legal standard, which provides that affirmative conduct is anticompetitive when, as here, it harmed rivals, was not "competition on the merits," and was reasonably capable of contributing significantly to maintaining monopoly power. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995). The District Court did not discuss the Tenth Circuit case law recognizing the applicable standard of liability on the grounds that the facts governing the District Court's ruling were so "case specific." JA-199 n.5. But that case law establishes that Microsoft's conduct was anticompetitive because the reasons Microsoft offered for disadvantaging a competitor were pretextual and the conduct disadvantaged competition and was reasonably capable of contributing significantly to maintaining Microsoft's monopoly power.

Furthermore, in evaluating the harm caused by Microsoft's conduct in the operating systems market, the District Court improperly required Novell to prove that its applications, by themselves, would have eliminated (rather than diminished) the applications barrier to entry protecting Microsoft's monopoly power. The availability of a popular competitive word processor alone, however, would have been important for any operating system to compete with Windows.

In addition, the District Court disregarded the ample evidence of the threats posed by Novell's franchise applications and middleware, and departed from the D.C. Circuit's opinion, the law of the case, and decades of precedent, by placing the burden on Novell to recreate the hypothetical marketplace that would have existed but for Microsoft's improper conduct.

Further, on each ground for its decision, the District Court disregarded the governing standard of review, which permits ruling in Microsoft's favor *only* if no reasonable jury could have found for Novell. The District Court repeatedly overlooked key evidence and resolved conflicting testimony in favor of Microsoft rather than Novell. Because a reasonable jury could have found for Novell on the evidence presented, the District Court's decision must be reversed and the case remanded for trial.

STATEMENT OF JURISDICTION

The District of Utah had jurisdiction over Novell's claims under 28 U.S.C. §§ 1331 and 1337. Following the entry of judgment against Novell on July 16, 2012 (JA-230), Novell filed a timely notice of appeal on August 10, 2012 (JA-232-34). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Novell presented sufficient evidence at trial from which a reasonable jury could find in Novell's favor on its claim that Microsoft illegally

maintained its monopoly in the operating systems market in violation of the Sherman Act, 15 U.S.C. § 2. *See* JA-197-231.

STATEMENT OF THE CASE

Count I of Novell's Complaint (filed November 12, 2004), the subject of this appeal, alleges that Microsoft unlawfully maintained its monopoly power in the operating systems market through anticompetitive conduct that caused injury to Novell's applications. JA-163-64.

In January 2005, Microsoft moved to dismiss Novell's Complaint. On June 10, 2005, the District Court denied Microsoft's motion, and the Fourth Circuit affirmed. *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, No. 1:05-cv-01087, 2005 WL 1398643 (D. Md. June 10, 2005), *aff'd*, 505 F.3d 302 (4th Cir. 2007).

After discovery, the parties submitted summary judgment motions. The District Court entered summary judgment against Novell, reversing its 12(b)(6) ruling by holding that Novell had sold any claims associated with the operating systems market. *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 735 (D. Md. 2010). The Fourth Circuit reversed the District Court on the sale-of-claims issue and remanded, finding that Novell's Count I claim was "appropriate for trial." *Novell, Inc. v. Microsoft Corp.*, 429 F. App'x 254, 255, 261-63 (4th Cir. 2011).

A nearly two-month trial began on October 17, 2011. At the close of Novell's case-in-chief, Microsoft moved for judgment as a matter of law. JA-666-741. The District Court declined to grant Microsoft's motion. JA-13878-82.

The District Court declared a mistrial on December 16, 2011, when the jury could not reach a verdict after only three days of deliberations. JA-16458. Based on its interviews with jurors, the District Court stated: "It appears undisputed that eleven of the twelve jurors would have returned a verdict in favor of Novell on the issue of liability." JA-198.

In February 2012, Microsoft renewed its Rule 50 motion. JA-1463-1614. On July 16, 2012, the District Court granted Microsoft's motion. JA-197-230. Novell now appeals.

STATEMENT OF FACTS

I. NOVELL THREATENED MICROSOFT'S MONOPOLY POWER IN THE OPERATING SYSTEMS MARKET

During the 1990s, Microsoft enjoyed monopoly power in the operating systems market. JA-1625 (FOF ¶¶ 33-35).[2] An operating system (also called a "platform") is software that performs the core functions of operating a computer.

[2] The District Court ruled that certain findings of fact from *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999), cited herein were binding in this case. *See* JA-380-81. Per the standard of review governing motions for judgment as a matter of law, *see infra* Argument Part I, Novell is entitled to the benefit of all reasonable inferences from these facts as well as all facts set forth herein.

JA-1622 (FOF ¶ 2).

Consumer demand for an operating system is driven primarily by its ability to run applications. JA-1625 (FOF ¶ 37). Applications perform user-oriented tasks (such as word processing) and rely upon the operating system to perform crucial functions. JA-1622 (FOF ¶ 2). "Application Programming Interfaces" ("APIs") in the operating system enable the application to invoke operating system code that performs a desired function. *Id*.

To threaten Microsoft's monopoly power in the operating systems market over the long term, an operating system had to run applications that satisfied user needs. JA-1625 (FOF ¶ 37); JA-12912 (C. Myhrvold). Novell threatened Microsoft's monopoly power in two mutually reinforcing ways. First, Novell offered the highest quality, most popular competitive application (WordPerfect) in the most valued applications category (word processing) on an array of Microsoft and non-Microsoft platforms. Second, it offered potent "middleware," a growing category of software that threatened to reduce the industry-wide development costs associated with writing cross-platform applications. These threats existed as the "rise of the Internet" was fueling "the growth of server-based computing, middleware, and open-source software development." JA-1627 (FOF ¶¶ 59-60); *see also* JA-4147 (Microsoft CEO Bill Gates stating, "The Internet is a tidal wave. It changes the rules."). The growth of the Internet represented an "inflection point"

in "which categories are redefined and leaders are superseded in the process." JA-1627 (FOF ¶¶ 59-60). "Working together, these nascent paradigms could oust the PC operating system from its position as the primary platform for applications development." JA-1627 (FOF ¶ 60).

A. WordPerfect's Popularity And Cross-Platform Capability Threatened Microsoft's Monopoly Power In The Operating Systems Market

Microsoft recognized the "strategic synergy between the operating system and the software that runs on it." JA-4293. In its view, if "we own the key 'franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating system business." *Id.* These key franchises included "office productivity software." *Id.*; *see also* JA-1976 (Gates stating, "I feel a strong applications business is extremely helpful to our systems strength."). Thus, "the more market share they can gain in applications, the greater the barrier to entry of new operating systems will be." JA-12682 (Noll).

In the mid-1990s, the word processor was the most frequently used application. *See* JA-2820; JA-11946 (Frankenberg); *see also* JA-11716 (Gibb) ("word processing and spreadsheets were 80, 90 percent of everything that people did"). Moreover, WordPerfect was by far the most significant threat to Microsoft in the word processing market. Its 1994 installed user base was equivalent to Microsoft Word's (36 percent to Microsoft's 37 percent), with the next closest

competitor at 7 percent. JA-6836. WordPerfect was PC Computing Magazine's 1994 word processing MVP. JA-12194 (Frankenberg). It was, in Microsoft's words, "an awesome foe in word processing." JA-4464.

In 1994, Novell merged with WordPerfect, acquired the Quattro Pro spreadsheet application, and packaged them with other applications to create the product suite called "PerfectOffice." JA-11928-29, JA-11944 (Frankenberg); JA-5041-42. PerfectOffice was rated as "the best of the high-end office suites." JA-4124. At that time, 74 percent of users had not yet adopted a suite. JA-5105; JA-9073. PerfectOffice thus had "a very good opportunity" to "capture a significant portion of the new users of office productivity application suites." JA-11947 (Frankenberg).

WordPerfect also had a history of writing for Microsoft's operating system competitors. JA-11147 (Harral) (WordPerfect had written to more than a dozen operating systems); JA-5701; JA-2827, JA-2838. WordPerfect would have continued to do so but for Microsoft's anticompetitive conduct. *See* JA-11931-33, JA-11969-70 (Frankenberg); JA-11721 (Gibb). Novell prioritized cross-platform development in part "to provide some real competition in the operating system environment." JA-11930-33 (Frankenberg).

Microsoft perceived the threat posed by Novell. Regarding WordPerfect's 1994 release for Windows 3.1, Bill Gates said: "I am amazed at their

responsiveness. This is very scary and somewhat depressing. This is as much as we plan to do for 1995!!" JA-2964; *see also* JA-2954 (Gates noting that, after the Novell-WordPerfect merger, "Initiatives to promote anti-Microsoft platforms/API's/object models become easier to coordinate."); JA-3973 (Microsoft analysis stating, "The current suite of applications in PerfectOffice are world class and there is a reason for us to follow the progress of this suite very carefully.").

B. Novell's Middleware Threatened Microsoft's Monopoly Power In The Operating Systems Market

In the 1990s, due to the expense of writing applications for multiple operating systems, ISVs often wrote applications exclusively for Windows to reach the greatest volume of users and offset development costs. JA-1626 (FOF ¶¶ 30, 38). This fact, combined with the importance of applications to a user's decision to purchase an operating system, is known as the "applications barrier to entry." JA-1624-26 (FOF ¶¶ 31, 36-39).

To lower the expense, some software developers created "middleware" – i.e., software programs that run on top of operating systems and that make their own APIs available to developers. JA-1622 (FOF ¶ 28); *see also* JA-11950-51 (Frankenberg); JA-11136-38, JA-11147-50, JA-11164-65 (Harral); JA-12342-44 (Alepin). Middleware promised to lower developer costs by enabling application developers to write to one set of middleware APIs rather than multiple sets of operating system APIs. *See* JA-1627-28 (FOF ¶¶ 68-69); JA-11136-38, JA-11147-

50 (Harral); JA-12336-38 (Alepin); JA-12676-78 (Noll).

"To the extent that developers begin writing attractive applications that rely solely on servers or middleware instead of PC operating systems, the applications barrier to entry could erode." JA-1624-25 (FOF ¶ 32). The "growth of middleware-based applications could lower the costs to users of choosing a non-Intel-compatible PC operating system like the Mac OS." JA-1623-24 (FOF ¶ 29). The "more popular middleware became and the more APIs it exposed, the more the positive feedback loop that sustains the applications barrier to entry would dissipate. Microsoft was concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category." JA-1627-28 (FOF ¶ 68).

PerfectOffice included middleware called AppWare. JA-12344, JA-12346-48 (Alepin); JA-11167 (Harral). AppWare allowed developers to build stand-alone, cross-platform applications that could also integrate with PerfectOffice applications. JA-5090; JA-5117; JA-12346-47 (Alepin). As Microsoft recognized, "AppWare contains all of the functions of an operating system," JA-11867 (Silverberg), and was one of its "most serious competitors," JA-645 (Maritz). *See* JA-2659 (AppWare was "direct competition to Windows"). AppWare threatened to "reduce Windows or anything underneath it to a commodity," JA-11867 (Silverberg), and "develop a layer that will provide all of the services required by

applications," JA-645 (Maritz). *See* JA-2492 (Microsoft analysis stating, AppWare "might be [sic] first viable platform for commercial cross-platform development.").

Novell additionally engineered its office productivity applications to utilize a single body of "shared code" called "PerfectFit." JA-11137-38, JA-11140-41, JA-11147-50 (Harral). PerfectFit was middleware. JA-11164-65 (Harral); JA-12343-44 (Alepin). PerfectFit provided Novell's office productivity applications with critical functions that those applications would have otherwise called upon Windows to perform, including WordPerfect's user interface, menus, icons, and toolbars. JA-5047; JA-11157-58 (Harral); JA-11952 (Frankenberg).

Novell also enabled third-party ISVs to use its PerfectFit middleware to develop applications that could be ported to any operating system where PerfectOffice was installed. JA-11148-50 (Harral). More than 1,000 of these ISVs became "PerfectFit Partners," who received dedicated Novell technical support. JA-11156-58 (Harral); JA-11718, JA-11821-22 (Gibb); JA-3437. PerfectFit made available more APIs than Netscape Navigator and Sun's Java combined. *Compare* JA-1629-30 (FOF ¶ 77) (stating that Navigator's and Java's combined APIs "totaled less than a thousand") *with* JA-4445-47 (indicating PerfectFit Shared Code 2.3 had 1555 APIs with more to be added in PerfectFit 95).

II. MICROSOFT INDUCED NOVELL TO RELY ON THE NAMESPACE EXTENSION APIS IN DESIGNING ITS WINDOWS 95 APPLICATIONS

Microsoft recognized it was important, both to ISVs and Microsoft, that ISVs ship their products within 90 days of the release of Windows 95. JA-5642 (Microsoft email stating that the message to ISVs should be "Windows 95 is going to be huge [sic] if they aren't shipping within 90 days they will be at a big disadvantage"); *see also* JA-14202-04, JA-14235 (Struss); JA-14433 (Muglia); JA-2929. Microsoft thus launched the First Wave Program "to get firm commitments from the most important applications' vendors" to "ship their application within 90 days of the shipment of Chicago" – the codename for Windows 95. JA-2929-30. Microsoft offered to provide documentation, development assistance, and access to early "beta" versions of Chicago. JA-14204-07 (Struss). WordPerfect joined the First Wave Program as one of the "Tier A" or "key" applications that "represent most application software sales." JA-2858, JA-2935. Microsoft invited WordPerfect to join because it "felt it was critical to have their support for Windows 95 and for Windows 95 to be successful." JA-14205 (Struss).

A. The Namespace Extension APIs Enabled Novell's Applications To Access The Windows 95 Namespaces And Integrate With The Windows Shell

As part of its promotional efforts, Microsoft counseled WordPerfect and

other ISVs regarding what operating system features "a good Chicago app" should seek to exploit. JA-2666; *see also* JA-2698 ("We're providing new controls you can (and should) use" and "We're making it possible for you to extend the shell"). One important feature was Chicago's new "shell" – i.e., the user interface. JA-14700 (Nakajima); *see, e.g.*, JA-2666-67; JA-2696-719. Windows 95's shell included the Windows Explorer – a new application that enabled users to browse the computer's "system resources," including but not limited to files, applications, hardware, and network drives. *See* JA-14702-04 (Nakajima). Through the Explorer, users could move files and folders, launch applications to view and edit documents, and access external hardware and network drives. JA-12937 (Ludwig); JA-12351-52 (Alepin); JA-14702-04 (Nakajima).

Windows 95 made various system resources accessible through new "namespaces," including:

- The Desktop, which contained all the Windows 95 namespaces and resources the user or ISVs placed on the default Windows 95 screen, JA-11568, JA-11587 (Richardson); JA-11187 (Harral);

- My Computer, which contained disk drives, JA-11240, JA-11442 (Harral);

- My Network Neighborhood, which linked to "network places" and drives, JA-11192 (Harral);

- My Briefcase, which enabled users to store regularly used documents, JA-11193 (Harral);

- The Recycle Bin, which contained deleted files, *id.*; and
- The Control Panel, which provided control over printers and sound and graphics cards, JA-13715 (Gates).

The Windows Explorer showed these namespaces in a hierarchical "tree" view in the left hand pane of the Explorer window. JA-11193-94 (Harral). By clicking on a namespace in the left pane, a user could display its contents in the right pane. JA-13713-14 (Gates). As Bill Gates stated, "the hierarchical view (scope pane) view [sic] is critical. The ability to see the real namespace of the system where we are putting everything exists only there – the ability to move things around easily only come [sic] from there. The tree view is central to our whole strategy." JA-2866.

To satisfy basic expectations of Windows 95 users, WordPerfect's file open dialog needed the capacity to browse the namespace hierarchy in the same fashion as the Windows Explorer. *See* JA-11562 (Richardson) (discussing the need to access the namespaces through the file open dialog and explaining Novell "wouldn't have a Windows 95 product if we didn't have access to those"). A "file open dialog" is the dialog window that an application or operating system presents to a user when the user selects the "Open" function from a File Menu. JA-11140 (Harral). Microsoft knew that if an ISV "was creating a custom file open," it was "one of the keys that they recreate the full name space." JA-15292 (Belfiore). At

the same time, WordPerfect needed to maintain key features of past versions of the file open dialog that users had come to expect. JA-11204-05, JA-11277-78 (Harral); *see infra* pp. 23-25, 54-56.

The namespace extension APIs were a set of Windows 95 APIs that helped applications exploit the namespace technology. *See* JA-11240-43; JA-11265-67 (Harral). These APIs enabled applications' file open dialogs to browse the namespaces. *See* JA-11264-67 (Harral). The namespace extension APIs also enabled Novell to extend the Windows 95 shell by creating and adding custom namespaces that would enable users to make effective use of various functions in Novell's software within the Windows 95 system. *See* JA-11220-23 (Harral); JA-11521-25, JA-11545-46 (Richardson). These functions included Novell's document management system, its QuickFinder search engine, its Internet browser, its email application, and its ClipArt library. JA-11199-200 (Harral); JA-11545-46 (Richardson). The inventor of the namespace extension APIs acknowledged that Novell's intended custom namespaces were the type of functionality for which those APIs were intended. *See* JA-14801-02, JA-14806-07, JA-14822-23 (Nakajima).

B. Microsoft Induced Novell To Rely On The Namespace Extension APIs In Designing Its Applications

Between November 1993 and October 1994, Microsoft actively promoted the Windows 95 shell and the namespace extension APIs to Novell. *See*

JA-11522-26, JA-11674-75 (Richardson) (based on Microsoft's promotions, Novell "felt we had a green light to create our own namespace browser as well as creating namespace extensions"); JA-5751 (recommending that custom file open dialogs support a "namespace hierarchy that's the same as the shell"), JA-5753-54; *see also* JA-15288-89 (Belfiore); JA-2666-67; JA-2696-719; JA-2855; JA-4741; JA-7558-76.

During a November 1993 meeting, in which "half of the conversation concerned these NameSpace extension APIs," JA-11220 (Harral), Microsoft informed WordPerfect of its decision to document the shell extensions. JA-2666. WordPerfect "talked at length with" Microsoft about its plans to use the namespace extension APIs. JA-11216 (Harral). From that meeting, Microsoft knew that WordPerfect was "very happy about us deciding to document the shell extentions [sic]." JA-2666 (stating that WordPerfect "just aquired [sic] a document management system" and "they will want to plug that in" the shell), JA-2667 (the "shell needs to allow extending the find command" – i.e., the QuickFinder).

Microsoft continued to promote the namespace extension APIs after the November 1993 meeting. *See, e.g.*, JA-2715, JA-2718; JA-2855. In June 1994, Microsoft partially documented – i.e., provided written guidance for development with and use of – those APIs in Chicago's M6 beta. JA-11234-35 (Harral); JA-3385-404. When asked by Novell, Microsoft stated it would release the full

documentation for the APIs in the next beta release. JA-11249 (Harral). By October 1994, Novell's shared code team had finished 80 percent of the coding to the namespace extension APIs. JA-11253 (Harral). Had Microsoft published the full documentation, as it represented it would to Novell, the shared code team would have completed its work by December 1994. JA-11253-54 (Harral).

III. MICROSOFT WITHDREW SUPPORT FOR THE NAMESPACE EXTENSION APIS TO DISADVANTAGE COMPETITORS

To Microsoft, affording access to the namespace extension APIs meant "Word and Excel are forced to battle against their competitors on even turf." JA-2335. On September 20, 1994, Bill Gates attended a software industry conference where he observed Novell demonstrate a prototype of its own cross-platform extensible shell. JA-3651-54; JA-3696; JA-11955-61 (Frankenberg). In an email about the demonstration, Gates discussed the threat posed by Novell: "Novell is a lot more aware of how the world is changing than I thought they were." JA-3696. For him, Novell's presentation emphasized "the importance of our shell integration." *Id*.

On October 3, 1994, just two weeks after Novell's demonstration, Gates announced a "bombshell" decision that even Microsoft's own employees "did not expect," JA-3694: Microsoft was withdrawing support for the namespace extension APIs, JA-1967. In an email to Microsoft's executives, Gates explained,

> I have decided that we should not publish these extensions. We 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 acknowledged it was "very late in the day to" be "making changes to Chicago" and the APIs were "a very nice piece of work." *Id.* He further acknowledged that Microsoft could not "compete with Lotus and Wordperfect/Novell without" having "the Office team really think through the information intensive scenarios" required by "shell integration work." *Id.*

Pursuant to Gates' edict, Microsoft de-documented the namespace extension APIs by marking them ";Internal," thereby "hiding" the interfaces, which were not documented at all in the subsequent M7 beta release. JA-3701; JA-12506-07 (Alepin); *see also* JA-3708-27. Subsequently, Microsoft refused to provide the remaining documentation for the namespace extension APIs that would have allowed Novell to complete its development or to provide any technical assistance for continued use of the APIs. JA-3767-68; JA-3772; JA-11276-77, JA-11296-97 (Harral).

IV. MICROSOFT DECEIVED NOVELL AND OTHER ISVS REGARDING THE TRUE REASONS FOR DE-DOCUMENTATION

Microsoft subsequently deceived the ISV community regarding the true reason for the decision to de-document and withdraw support for the namespace extension APIs. Brad Silverberg, the executive in charge of Windows 95

development, warned in recommending against the decision that Microsoft would face a "firestorm of protest" from ISVs using the APIs – a group he knew to include "WordPerfect, Lotus, Symantec, and Oracle." JA-3691. Protest by these ISVs would "play out" on "page one of the weeklies" and "lead to calls for the DOJ to investigate." *Id*.

Microsoft additionally needed to conceal that certain Microsoft applications continued to rely upon the namespace extension APIs. Marvel, Microsoft's online services application, *see generally* JA-5835-57, was so dependent on the APIs that there was "no way" it could "move off the current interfaces and still have" a "chance of shipping with Win '95." JA-5755. Thus, Marvel continued to use them. JA-14808 (Nakajima); JA-12959-60 (Siegelman).

Based on past experience, Microsoft knew that ISVs would find Microsoft's exclusive use of the namespace extension APIs unacceptable. *See* JA-2353 (ISVs "*really* want extensibility." "What's more, they were afraid and angry that Microsoft would use the hooks for its own purposes (apps, mail, etc) but not provide to isv's. This was a very hot button."); JA-2453 (WordPerfect complained to Microsoft that it "was an unacceptable situation" for Microsoft to "tie into the shell" if Microsoft would not also "allow ISVs to extend the explorer"); JA-2478 (referring to similar Lotus complaints to Bill Gates). Such conduct would violate a longstanding Microsoft rule against allowing its applications to exploit Windows

features that remained undisclosed to ISVs. JA-14768-69 (Nakajima).

Microsoft therefore devised a script employed by its ISV liaisons to deceive ISVs regarding the reasons for its decision to de-document the namespace extension APIs. *See* JA-3702-06. Echoing a 1993 plan to give false excuses for withholding shell extensibility (i.e., "we couldn't get it done in time"), JA-2238, Microsoft offered "Compatibility," "System Robustness," and "Ship Schedule" as excuses for the de-documentation, JA-3705, even though Gates did not mention these concerns in explaining his decision,[3] *see* JA-1967.

Moreover, even though Marvel continued to use the APIs, Microsoft falsely told ISVs, "All applications within Microsoft which were originally implementing these interfaces have been required to stop." JA-3703. Microsoft instructed its employees: "PLEASE DO NOT MENTION MARVEL IN ANY OF YOUR CONVERSATIONS" with ISVs. JA-3702. Microsoft also instructed its team to lie if asked directly about Marvel. JA-3705.

In August 1995, Microsoft employee Scott Henson realized that Athena, another Microsoft application under development, was "using the namespace extensions" – in other words, doing "the EXACT thing" that Microsoft "told ISVs

[3] The District Court found that "the text of Gates' email provides sufficient evidence upon which a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual." JA-213. The District Court further stated that it was "not unreasonable" to view an earlier 1993 plan as "casting light upon the reason for Gates' decision to withdraw support for the namespace extension APIs on October 3, 1994." JA-204 n.10.

they could (and should) not do." JA-4203. Henson could not "even express how BAD this is!" *Id*.

V. MICROSOFT'S ANTICOMPETITIVE CONDUCT DELAYED NOVELL'S PRODUCT RELEASES AND ELIMINATED THE COMPETITIVE THREAT THEY POSED TO MICROSOFT'S MONOPOLY POWER

Novell always planned to release a marketable product within the critical window of opportunity that would close 90 days after the release of Windows 95. *See* JA-8853-54 ("It is critical that WordPerfect Corp. have a version of WPWin that is coded for 32-bit Chicago release within no more than a [sic] two to three months of Chicago's ship date."); JA-2771 (same); JA-11213 (Harral). As described below, the de-documentation of the namespace extension APIs prevented Novell from timely constructing a file open dialog that both retained the functionality of past releases and could browse the namespaces.

For many years, WordPerfect had been an industry leader in providing a robust custom file open dialog for its users. JA-11732-33 (Gibb). Users frequently "lived in" the WordPerfect file open dialog because it enabled them to perform important tasks like renaming files, previewing files, and finding content using the QuickFinder search engine, among other things. JA-11732-35 (Gibb); JA-11204-05 (Harral). The file open dialog was a "core differentiator" for the WordPerfect product line. JA-11750 (Gibb).

The de-documentation of the namespace extension APIs left three options

for accessing the critical Windows 95 namespaces. JA-11273-75 (Harral). The first was to try to use the incomplete June 1994 documentation to call upon the now de-documented APIs. *Id.* The second was using the Windows 95 common file open dialog. *Id*. The third was to attempt to recreate the operating system-level functionality provided by the now de-documented APIs in Novell's custom file open dialog. *Id*. None of these options would have allowed Novell to release a competitive product within the critical 90-day window.

The first option proved unworkable because Microsoft refused to answer any questions about the de-documented APIs, *see, e.g.*, JA-3767-68; JA-3772; JA-11276-77, JA-11296-97 (Harral), and Novell and other ISVs reasonably relied on Microsoft's misrepresentations that the APIs could stop working "in future releases of Windows 95 (or even between interim beta builds)" and that ISVs would "be completely at their own risk" if they attempted to use those APIs. JA-3706; JA-11535-37 (Richardson); *see also* JA-5755; JA-4203. Novell concluded it was futile to continue using the unsupported APIs. JA-11276-77 (Harral); JA-11535 (Richardson); *see also* JA-16000 (Bennett) (Microsoft's expert agreeing that "it's a bad practice to call on undocumented APIs").

Novell thus had "two different ways to commit suicide": use Microsoft's common file open dialog or recreate the lost functionality in Novell's custom file open dialog. JA-12845 (Noll). The second option – using Microsoft's common

file open dialog – would have required a disastrous sacrifice of functionality:

> the common dialog wouldn't even give us the level of functionality we had in our last release in Windows or that we had on our DOS card. *It was a huge step backwards for us. And we felt it simply wasn't an option. If we were to go with that option we didn't really have a product.*

JA-11563 (Richardson) (emphasis added); *see also* JA-11782-83 (Gibb). The file open dialog was a "core differentiator" for WordPerfect. JA-11750 (Gibb); *see also* JA-11178-82 (Harral). Ultimately, choosing the common dialog "would have been a choice to have disenfranchised our customer base." JA-11436, JA-11204-05, JA-11277 (Harral).

Microsoft acknowledged the importance of the file open dialog function, as well as the high quality of WordPerfect's custom file open dialog, both generally and when compared with Windows 95's common file open dialog and Microsoft Office's custom file open dialog. *See* JA-3046 (stating that "File Open is the most frequently used dialog in all of Office" and that "every minor complexity or limitation in the dialog is greatly magnified by its frequent usage"). One 1994 analysis acknowledged that "WordPerfect has been winning rave reviews from the press for its new File Open dialog" and that WordPerfect's dialog addressed "most of the problems" with Microsoft Office's file open dialog that the analysis identified. JA-3046-47. The same analysis listed functions in WordPerfect's dialog that were not present in Windows 95's common dialog. JA-3059.

Novell's customers' expectations mandated that it continue to provide the longstanding services it had historically provided to avoid alienating its considerable installed base of users. JA-11204-05, JA-11277, JA-11436 (Harral). Novell therefore determined that using Microsoft's common file open dialog was not a viable alternative. JA-11177, JA-11436 (Harral); JA-11562-63 (Richardson).

Novell thus tried to timely replicate the operating system level of functionality provided by the de-documented APIs inside WordPerfect's custom file open dialog – a process that took a full year. JA-11273-74, JA-11278, JA-11281-83 (Harral). Novell developers worked around the clock, JA-11285 (Harral), but by July 1995 it was clear: "There is no conceivable way to have the NSB Code" – i.e., the code for the "Name Space Browser (aka FileOpen Dialog)" – "complete by August 22." JA-4200. Novell confronted the same delays that Microsoft knew Marvel would face if, like PerfectOffice, Marvel could not use the namespace extension APIs. JA-3694-95; JA-5755; *see also infra* p. 40.

Ultimately, Microsoft's de-documentation of the namespace extension APIs caused PerfectOffice and WordPerfect not to ship until well beyond the critical 90-day window after the August 1995 release of Windows 95, and caused Novell to miss the market. JA-11541 (Richardson); JA-11738-39 (Gibb); JA-11427 (Harral).

In 1994, 74 percent of users had not yet adopted a suite. JA-5105. By 1997,

however, Microsoft captured 90 percent of the market for office productivity software, JA-4293, thereby widening the moat protecting its monopoly power in the operating systems market, JA-4293.

SUMMARY OF THE ARGUMENT

The District Court's decision to forego the established legal framework for unlawful monopolization cases resulted in a decision that cannot be reconciled with the law of this Circuit. Under Tenth Circuit precedent, anticompetitive conduct is that which impairs the opportunities of rivals and is not competition on the merits, "if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power." *Multistate*, 63 F.3d at 1550 (citation and internal quotation marks omitted). A jury could reasonably conclude from the record below that Microsoft's affirmative conduct impaired the opportunities of actual and potential rivals and that Microsoft engaged in that conduct solely to disadvantage competitors, not to design a better product or otherwise compete on the merits. Indeed, the District Court's finding that a reasonable jury could have found Microsoft's proffered justifications to be pretextual provided sufficient grounds to conclude that its conduct was not "competition on the merits."

Additionally, the District Court improperly rejected deception as anticompetitive conduct by resolving an evidentiary conflict that properly was for the jury regarding whether Microsoft was aware of Novell's reliance on the APIs.

The District Court also wrongly held that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), required Novell to show that Microsoft terminated its entire relationship with Novell.

Further, the District Court wrongly concluded that eliminating Novell as a competitive threat did not cause harm to competition in the operating systems market. Novell presented ample evidence that established the legitimacy of the threat to Microsoft's monopoly power from Novell's applications and middleware. The District Court erred by disregarding this evidence and adopting a test that effectively would allow monopolists to crush nascent threats to their monopoly power seriatim. This test departed markedly from the legal standards applied by this Circuit, the D.C. Circuit in the Government's case against Microsoft, and even by the District Court and Fourth Circuit on summary judgment.

Finally, the District Court wrongly concluded that there was no "underlying business reality," JA-226-27, to the claim that Microsoft caused fatal delay in the release of Novell's product. Here, the District Court substituted its judgment for that of the factfinder, including disregarding the ample evidence that Microsoft left Novell with no viable options when Microsoft de-documented the namespace extension APIs.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the District Court's grant of judgment as a matter of law *de novo*. *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1228 (10th Cir. 2009). Under this standard, the Court sits in the same position as the trial court and must apply the correct legal standards as if deciding the question in the first instance. *Id.*; *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001).

"Judgment as a matter of law is improper unless the evidence so overwhelmingly favors the moving party as to permit no other rational conclusion." *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 529 (10th Cir. 2000). The Court must be "certain the evidence 'conclusively favors one party such that reasonable men could not arrive at a contrary verdict.'" *Weese v. Schukman*, 98 F.3d 542, 547 (10th Cir. 1996) (citation omitted). Such evidence must point "but one way" and be "'susceptible to no reasonable inferences which may support the opposing party's position.'" *Strickland*, 555 F.3d at 1228 (citation omitted).

The Court must review the entire evidentiary record, draw all inferences in Novell's favor, and refrain from making credibility determinations or weighing the evidence. *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1073 (10th Cir. 2002). When faced with conflicting evidence on a particular issue, the

Court must resolve all conflicts in Novell's favor and disregard all evidence favorable to Microsoft except evidence that "is uncontradicted and unimpeached" and "comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (citation and internal quotation marks omitted).

II. MICROSOFT'S CONDUCT WAS ANTICOMPETITIVE

The law governing monopolization cases is well established. To prove a violation of the Sherman Act, 15 U.S.C. § 2, Novell must show that Microsoft (1) possessed monopoly power in the operating systems market and (2) willfully maintained that power through anticompetitive conduct rather than through development of a superior product, business acumen, or historic accident. *Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *United States v. Grinnell Corp.*, 383 U.S. 563, 570-71 (1966). It is undisputed that the first element has been satisfied. JA-1625 (FOF ¶¶ 33-34); *see also Microsoft*, 253 F.3d at 51.

To satisfy the second element, Novell needed only to adduce sufficient evidence from which a reasonable jury could find that Microsoft maintained its monopoly power in the operating systems market "by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Aspen Skiing*, 472 U.S. at 595-96. A monopolist's actions are anticompetitive "if they impair opportunities of rivals and are not competition on the merits or are more

restrictive than reasonably necessary for such competition," and "if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power." *Multistate*, 63 F.3d at 1550 (citation and internal quotation marks omitted); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co*., 817 F.2d 639, 649 (10th Cir. 1987) (citing 3 P. Areeda & D. Turner, Antitrust Law ¶¶ 625b, 626c, g (1978)); *see also LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) ("As the Supreme Court recognized" in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation.").

The District Court failed to apply this standard, under which Microsoft's conduct was anticompetitive for three independently sufficient reasons. *See* Argument Parts II.A.1-A.3. Furthermore, while purporting not to resolve the parties' dispute over whether Novell must show that the anticompetitive conduct "contributed significantly" to maintaining Microsoft's monopoly power, or was reasonably capable of doing so, JA-225 n.22, the District Court adopted a causation standard that effectively was more stringent than either party's proposed test. *See infra* pp. 43-45. Should the Court choose to resolve this dispute, the reasonably capable standard is clearly the correct one. The Tenth Circuit adopted this standard in *Multistate*, 63 F.3d at 1550, 1553, as did the D.C. Circuit in *Microsoft*, 253 F.3d at 79. Moreover, whereas Microsoft has never cited a single

case in support of its position, Novell has cited numerous cases that use the same or similar standard, including three from courts in this Circuit.[4]

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

1. Microsoft Induced Novell's Reliance On The Namespace Extension APIs And Thereby Made Novell And Competition Worse Off Than If Microsoft Had Refused To Make Them Available From The Outset

Instead of asking whether Microsoft's conduct was not competition on the merits and impaired the opportunities of its rivals as *Multistate* requires, the District Court erroneously concluded that Novell either had to prove that Microsoft's conduct was deceptive or meet a total termination of relationship requirement that it purports to locate in *Aspen Skiing*. JA-216. The District Court erred in its analysis of these issues (*see* Argument Part II.A.2-3), but also erroneously overlooked the distinction between a mere refusal to deal akin to the defendant's conduct in *Aspen Skiing* and affirmative conduct that imposes costs on a competitor in a manner that harms competition and is not competition on the merits.

This Circuit has recognized the importance of this distinction. In *Christy*

[4] *See, e.g.*, *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, No. 96-1336-JTM, 1997 WL 225966, at *7 (D. Kan. Apr. 8, 1997); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1105 (D. Colo. 2004); *Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1145 (D. Utah 2001), *aff'd*, 306 F.3d 1003 (10th Cir. 2002); *see also* JA-1807 n.49.

Sports LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1190-91, 1194-98 (10th Cir. 2009), the Court found that a ski resort had no obligation to continue to allow the operation of an independent ski rental business on property it had sold with a restrictive covenant that allowed it to control the use of the property for that purpose. At the same time, the Court recognized the possibility that the change in prior practice "could give rise to an antitrust claim" if "by first inviting an investment and then disallowing the use of the investment the resort imposed costs on a competitor that had the effect of injuring competition in a relevant market." *Id*. at 1196; *see also Multistate*, 63 F.3d at 1553 n.12 (distinguishing between affirmative conduct and a refusal to deal governed by *Aspen Skiing*).

That is what happened here. Had Microsoft not induced Novell's reliance, Novell would have had two years from when Microsoft initially stated that it intended to document the namespace extension APIs in November 1993 (*see supra* pp. 16-18) to produce a competitive product within the critical 90-day window. Instead, as a result of Microsoft's conduct, Novell traveled for a full year on a path of detrimental reliance under the ultimately thwarted assumption that it would have ready access to the namespace extension APIs and that it would therefore only require a "small amount of work" to complete the file open dialog once Novell received the final documentation. JA-11367; *see supra* pp. 16-18, 22-25. By encouraging Novell to develop software that depended upon Microsoft's

documentation and support for the namespace extension APIs, and then withdrawing support for them nearly one year later, Microsoft "imposed costs on a competitor" in the form of fatal delay in the release of Novell's product that destroyed Novell as an effective competitor. *Christy Sports*, 555 F.3d at 1196.

The District Court did not address the language from *Christy Sports* or *Multistate* despite Novell's prior reliance on it. JA-1796. Microsoft has likened the restrictive covenant in *Christy Sports* with language in the Windows 95 beta agreement, and a purported industry practice that beta products can change. JA-1939 n.40. The two situations are materially different. The *Christy Sports* plaintiff "knew from the beginning that it could operate a ski rental business only by permission of" the defendant "on a year-to-year basis." 555 F.3d at 1196. Accordingly, there was not even an arguable invitation to investment, let alone a combined invitation and disallowance that harmed competition.

By contrast, as one Microsoft executive testified, "the purpose of documenting an API is in effect to put a stake in the ground and say this is something that you as an application developer can count on being available to you as an operating system service today and in the future." JA-604 (Raikes); *see also* JA-11730-31 (Gibb) (explaining that Microsoft released betas to give ISVs time to write compatible applications); JA-12254-55 (Henrich); JA-604-05 (Raikes); JA-14254-55 (Struss) (various Microsoft employees offering similar descriptions

of betas generally). Microsoft thus specifically intended that ISVs rely on the documentation to develop products for Windows 95, and also induced ISV reliance months prior to providing the preliminary documentation on the expectation that Microsoft would document the namespace extension APIs in the June 1994 beta. *See supra* pp. 16-18. Moreover, while there was conflicting testimony regarding the industry practice governing betas (that the District Court was required to resolve in Novell's favor), there was *no* evidence that the industry practice sanctioned the changing of betas to disadvantage competitors. Further, the test for whether conduct is anticompetitive is not whether it is contractually permissible but instead whether it causes anticompetitive harm and lacks a competitive justification. *See Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 468-69 (1962) (exercise of individual and legal contract rights violates the Sherman Act when "conceived in a purpose to restrain trade, control a market, or monopolize"); *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 555 (8th Cir. 1991) (same).

Further, in *Christy Sports*, there was no argument that competition was harmed in any relevant market. Far from it, the plaintiff failed even to identify a relevant market. 555 F.3d at 1193-94. By contrast, the de-documentation of the namespace extension APIs lacked a legitimate competitive justification, and the combined effect of Microsoft's invitation and disallowance – i.e., inducing Novell's reliance on these APIs and subsequently withdrawing support for them –

destroyed WordPerfect and PerfectOffice as a competitive force and harmed competition in the operating systems market. *See supra* pp. 22-26, *infra* pp. 45-54.

This distinction between affirmative inducement of reliance that harms competition and a refusal to deal also refutes the District Court's equation of the intentionality of "a decision not to publish the namespace extension APIs in the first place" with a "decision to withdraw support for the namespace extension APIs after they have been published." JA-215. The latter involved the intentional inducement of reliance, an intentional withdrawal of support for no legitimate reason, and anticompetitive harm that would not have existed had Microsoft refrained from documenting the namespace extension APIs at the outset.

2. Microsoft's Conduct Was Deceptive

When Microsoft de-documented the namespace extension APIs, it embarked on a campaign of deception that specifically instructed Microsoft employees to mislead Novell and other ISVs regarding the true reasons for the de-documentation and to conceal that certain Microsoft applications continued to use the APIs. *See supra* pp. 19-22. The District Court correctly held that "a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual." JA-213.

The District Court recognized that deception of a competitor may give rise to an antitrust claim when "the purpose of the deception is to mislead a competitor

into taking action (or not taking action) that would substantially change the competitive environment." JA-216 n.16. "'Cases that recognize deception as exclusionary hinge'" on "'whether the conduct impaired rivals in a manner tending to bring about or protect a defendant's monopoly power.'" *Id.* (quoting *Rambus, Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008)). Here, Microsoft's deception enabled it to de-document the APIs while concealing that its own applications continued to use them. *See supra* pp. 19-22.

Nonetheless, the District Court found that Microsoft's deception was not anticompetitive because, it concluded, there was "no evidence" that Microsoft "knew that Novell was using those APIs in the development of its applications and that, by withdrawing support for those APIs, Microsoft knew that Novell would fall behind schedule." JA-216.

The District Court offered no basis for concluding that knowledge of Novell's specific plans was required, given that Microsoft needed to deceive the entire ISV community. Moreover, in reaching its conclusion, the District Court impermissibly substituted its judgment for the jury's. Substantial evidence demonstrated that Microsoft knew Novell was relying upon the APIs and would be delayed or forced to release a non-competitive product if the APIs were de-documented. For example:

- Two days after Gates' decision to de-document the namespace extension APIs, Microsoft executive Brad Silverberg informed Gates that, "Other

ISV's using the extensions are WordPerfect, Lotus, Symantec, and Oracle." JA-3691. The District Court disregarded this language, which alone permitted a reasonable jury to conclude that Microsoft knew Novell was using the namespace extension APIs.

- Moreover, at the time of Gates' decision, Microsoft had known for nearly a year that Novell intended to use the namespace extension APIs. JA-2666-67. WordPerfect's shared code team also contacted Microsoft's Premier Support on multiple occasions for assistance concerning the namespace extension APIs before Gates' decision. JA-11262 (Harral).

- After the de-documentation, Novell alerted Microsoft on numerous occasions that it required access to the namespace extension APIs, and complained repeatedly about the de-documentation as well as the issue of undocumented APIs generally. *See* JA-11285-86, JA-11302-03 (Harral); JA-3767-68; JA-3772; JA-11965-66, JA-12181 (Frankenberg).

- Finally, the District Court relied on an email containing Microsoft's survey of ISVs taken before Gates' decision, but ignored Microsoft's assessment in that email that it was "very likely" Novell had started work with the namespace extension APIs and the response from Novell's Tom Creighton "that there would 'be hell to pay in the press' if" Microsoft "changed the interfaces." JA-3658. Microsoft also acknowledged in that email that Novell would not want to "tip their hand" regarding their development strategy. *Id.* The District Court had no basis for disregarding this evidence.

Against this evidence, the District Court relied on industry practice concerning betas as evidence that Microsoft would have lacked knowledge of Novell's reliance. This inference was untenable given that, among other things, the entire purpose of documenting an API specifically, and betas generally, is to induce reliance, and given the evidence that Microsoft knew of Novell's reliance. *See supra* pp. 33-34. At most, it creates an issue of fact for the jury.

Similarly, the District Court's reliance on evidence from Microsoft's

Brad Struss provided no reason for substituting the Court's judgment for that of a jury and disregarding the above evidence.

- Struss testified he did not know whether WordPerfect was part of a group of ISVs who were actively developing with the namespace extension APIs in Fall 1994. JA-14298 (Struss); JA-4202. Based on this evidence alone, a reasonable jury could discount Struss's recollection of what he understood concerning Novell's reliance on the APIs.

- Struss's email reporting that WordPerfect appeared "OK" with the "namespace extension API changes" was based on a call to WordPerfect in which Microsoft representatives had *relied on Microsoft's deceptive script*.[5] JA-6926-30. Any lack of protest from WordPerfect could only have reflected its acceptance of Microsoft's pretextual explanation, not a lack of prior reliance.

In sum, the District Court's failure to apply the appropriate standard of review in evaluating this evidence is an independent ground for reversal.

3. Microsoft Altered A Voluntary Course Of Dealing Without A Legitimate Competitive Reason In Violation Of *Aspen Skiing*

Under *Aspen Skiing*, which addresses the circumstances under which a monopolist may be held liable for unilaterally refusing to deal with a competitor, if "a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory." *Aspen Skiing*, 472 U.S. at 605

[5] This is clear from examination of the full email chain, which begins with circulation of the script at 1:41 a.m. on October 12, 1994, with the instruction "PLEASE READ THIS ENTIRE DOCUMENT CAREFULLY BEFORE YOU DO ANYTHING ELSE!" JA-6926. The 12:03 p.m. email cited by the District Court then reported Microsoft was in the process of notifying the various ISVs, and stated, "So far Stac, Lotus, WP, Oracle, SCC appear to be OK with this." *Id*.

(citation and internal quotation marks omitted). The significance of a defendant's "prior conduct" in analyzing refusals to deal is that it sheds "light upon the motivation of its refusal to deal." *Trinko*, 540 U.S. at 409. Thus, in *Aspen Skiing*, the defendant's termination of a joint ski ticket with the plaintiff's smaller mountain was anticompetitive because it "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id*. In contrast, in *Trinko*, the plaintiff did "not allege that Verizon voluntarily engaged in a course of dealing with its rivals," and so the defendant's prior conduct shed "no light upon the motivation of its refusal to deal." *Id*.

Here, the District Court correctly found that "the text of Gates' email provides sufficient evidence upon which a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual." JA-213. Once Gates' admissions established the anticompetitive character of the alteration of the course of dealing, Novell carried its burden of establishing that Microsoft altered its course of dealing "to exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation and internal quotation marks omitted).

Ample additional evidence further demonstrated that the de-documentation of the namespace extension APIs ran counter to Microsoft's legitimate interests in increasing sales of Windows 95 by improving the product, and thus "suggested a

willingness to forsake short-term profits to achieve" the "anticompetitive end" that Gates identified. *Trinko*, 540 U.S. at 409. For example, Microsoft created the First Wave Program to further its interest in having ISVs release new applications within 90 days of Windows 95's release. *See supra* p. 13. When Microsoft de-documented the namespaces, however, it knew there was "no way" Marvel could stop using the namespace extension APIs and "still have" a "chance of shipping with Win '95." JA-5755. Microsoft must have recognized that if Marvel, a Microsoft application, could not timely overcome the de-documentation, then ISVs would face even greater difficulties in doing so, and therefore the de-documentation would impair Windows 95's profitability.

Microsoft also viewed ISVs' ability to extend the shell with the namespace extension APIs to be a competitive advantage for Windows 95 that Microsoft relinquished by de-documenting them. *See* JA-3494 (identifying as a competitive advantage of Windows 95 over Mac that the Explorer can "be extended by ISVs, so we can expect to see this very powerful application be used as a browser for all kinds of information stored in all kinds of places"); JA-14751-52 (Nakajima) (explaining that enabling developers to customize the Explorer using the namespace extension APIs helped Windows 95 better suit the needs of users); JA-11306 (Harral) (describing how Novell's planned uses of the APIs would help "make Windows the best version of Windows that it could be"). Microsoft's later

republication of the namespace extension APIs establishes that it had an interest in making them available to ISVs and that the de-documentation ran counter to that interest.[6] JA-11286-87 (Harral).

According to the District Court, Novell failed to establish anticompetitive conduct because there "is no evidence that Microsoft withdrew support for the namespace extension APIs for the purpose of terminating its relationship with Novell." JA-218. By requiring complete termination of a relationship, the District Court erred. The "critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal." *Christy Sports*, 555 F.3d at 1197; *see also Aspen Skiing*, 472 U.S. at 608 ("Perhaps most significant, however, is the evidence related to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose."). When the evidence demonstrates the absence of a valid business reason, *Aspen Skiing* does not require a complete refusal to deal. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132

[6] In a footnote in a separate section of its opinion addressing harm to competition in the operating systems market, the District Court posits that increased applications sales from de-documenting the namespace extension APIs would have offset any profits Microsoft sacrificed in sales of Windows 95. JA-219 n.18. As an initial matter, there is no evidentiary basis for this assertion in the record, and all inferences must be drawn in Novell's favor. Further, as Professor Noll testified when questioned by the District Court on this point, the hypothesis is irrelevant. JA-12905-09 (Noll). Microsoft's profits in the applications market cannot immunize Microsoft for the harm to competition it caused in the operating systems market when both resulted from conduct that was not competition on the merits and when Microsoft's anticompetitive gains in the applications market protected its operating systems market monopoly power. *See id.*; *see also infra* pp. 43-54.

(9th Cir. 2004) ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal."); *Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 892-95 (N.D. Cal. 2011) (upholding claim based on alteration of course of dealing where defendant's licensing agreements continued to allow its competitors to use the trademark of its drug in their promotional materials but defendant suddenly raised the price of that drug); *A.I.B. Express, Inc. v. FedEx Corp*., 358 F. Supp. 2d 239, 250-51 & n.86 (S.D.N.Y. 2004) (defendant refused to deal on same terms as offered over prior five-year course of dealing); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1106-08, 1112-14 (D. Colo. 2004) (radio station denied access to concert promoter even though station still permitted promoter to purchase ads and support).[7]

[7] The District Court also wrongly asserted that Windows 95 "contained Microsoft's common open file dialog, and Novell never advised Microsoft that this dialog was insufficient for its own purposes." JA-218. To the contrary, there is ample evidence that Microsoft Office used a custom file open dialog rather than the common file open dialog, JA-15224, JA-15303 (Belfiore), and Microsoft knew of the high quality of WordPerfect's custom file open dialog and its superiority to Microsoft's common file open dialog. *See supra* pp. 24-25. Microsoft thus would have been well aware that its common file open dialog would be insufficient for Novell's purposes.

B. Microsoft's Conduct Was Reasonably Capable Of Contributing Significantly To Maintaining Microsoft's Monopoly Power In The Operating Systems Market

1. The District Court Applied An Incorrect Legal Standard

In assessing the harm to competition in the operating systems market caused by Microsoft's conduct, the District Court erroneously departed from the D.C. Circuit's test and reasoning in *Microsoft*, as well as the standard the District Court had applied on summary judgment. *See Novell*, 505 F.3d at 309 ("Novell's present claims echo the government's theory" from *Microsoft*).

Microsoft held that Microsoft harmed competition by injuring two middleware developers, Netscape and Sun, that together "showed potential as middleware platform threats" sufficient to "weaken" or "erode" – but not eliminate – "the applications barrier to entry" that protected Microsoft's monopoly power in the operating systems market. *Microsoft*, 253 F.3d at 55, 79, 82 (citing FOF ¶¶ 68-77). The D.C. Circuit recognized that Section 2 liability does not "turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." *Id*. at 79. Such a standard "would only encourage monopolists to take more and earlier anticompetitive action." *Id*. Neither "plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, 'the defendant is made to suffer the

uncertain consequences of its own undesirable conduct.'" *Id*. (quoting 3 Areeda & Hovenkamp, Antitrust Law ¶ 651c at 78).

Microsoft's Section 2 liability thus did not depend on showing that Navigator and Java "would actually have developed into viable platform substitutes" for Windows. *Id.* Instead, the Court recognized that "as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power." *Id*. This is because it "would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts." *Id*.

The District Court followed these basic principles in rejecting Microsoft's contention at summary judgment that its conduct did not cause anticompetitive harm in the operating systems market. *See Novell*, 699 F. Supp. 2d at 748 (relying on the "hypothetical marketplace" discussion in *Microsoft* and stating that when "a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm"); *see also King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1162 n.1 (10th Cir. 1981) (holding in determining antitrust damages that the "most elementary conceptions of justice and public policy require that the wrongdoer

shall bear the risk of the uncertainty which his own wrong has created") (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946)).

In granting Microsoft's Rule 50 motion, however, the District Court did not even mention the "hypothetical marketplace" principle cited in its summary judgment opinion. Instead, as discussed below, it adopted assumptions that would permit the crushing of nascent threats that, as it previously recognized, the antitrust laws are designed to prevent. The District Court's Rule 50 ruling thus departed from the law of the case as well as *Microsoft*.

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

Ample evidence established that, by eliminating WordPerfect as a viable competitive threat, Microsoft's anticompetitive conduct strengthened the applications barrier to entry and thereby unlawfully maintained its monopoly power in the operating systems market.

Microsoft knew its strength in the applications market protected its monopoly power in the operating systems market. *See* JA-4293; *supra* pp. 6-8. At the time of Microsoft's anticompetitive conduct, the word processor was the most important franchise, and WordPerfect – with the best reviews in the industry and, in Microsoft's words, "its huge and loyal installed base," JA-2904 – was by far the most potent competitor to Microsoft in word-processing. *See supra* pp. 8-10.

WordPerfect also ran on an array of operating systems both historically and during the relevant time period. *See supra* p. 9. The evidence established that WordPerfect would have continued to write for multiple operating systems that could have competed with Windows but for Microsoft's conduct. *See id.*; JA-11931-33 (Frankenberg).

Based on this evidence, a reasonable jury could conclude that Microsoft's destruction of WordPerfect and PerfectOffice was reasonably capable of contributing significantly to maintaining Microsoft's monopoly power. Indeed, Microsoft recognized during the relevant time period that WordPerfect's presence (or lack thereof) on an operating system would affect that platform's ability to compete. *See* JA-14205 (Struss) ("WordPerfect was a major software application, that we felt it was critical to have their support for Windows 95 and for Windows 95 to be successful."); JA-2668 (citing WordPerfect's decision to stop development of its "OS/2 versions" as "a great example of how we kill OS/2" – a competing operating system). After the late release of PerfectOffice, Microsoft Word went from having an even installed base with WordPerfect – which was consistently producing superior products – to a 90 percent share. *See supra* pp. 8-9, 26. Microsoft thereby "dramatically" widened "the 'moat' that protects the operating systems business." JA-4293. The District Court's conclusion that Novell's key franchise did not threaten Microsoft's monopoly power was based on

two fallacious assumptions that improperly shifted the burden to Novell of resolving the uncertainty created by Microsoft's conduct.

First, the District Court asserted that "Novell recognized that Windows 95 was a superior operating system, constituting a 'significant step forward'" and thus that there was "no basis for inferring that office productivity applications Novell developed that did not draw upon the superior functionality of Windows 95 would have been as successful as the applications that ran on Windows 95." JA-221.

In fact, Gary Gibb explained that Windows 95 was a "significant step forward" only when contrasted with Microsoft's prior product, which was "really old technology" and a "pretty face on a very poor technology architecture." JA-11722 (Gibb). Windows 95 was approaching "pretty much a part of what everybody else was" and "was not revolutionary in its technology." *Id.*; *see also* JA-2369 (email from Microsoft executive stating, "No one thought" a preview of the Windows 95 user interface was "earth-shattering" and that most felt it reflected "'obvious' improvements"); JA-4432 (Windows 95 shell was less extensible than OS/2's shell).

In violation of the hypothetical marketplace principle (*see supra* pp. 43-45), the District Court improperly required Novell to speculate about alternative operating systems, the applications Novell would have designed for those systems, and how those hypothetical systems and applications would have affected

consumer choices. A reasonable jury could have concluded that Novell's cross-platform capability and considerable success and "responsiveness" (as Microsoft acknowledged) in designing products prior to Windows 95, JA-2964, established that it could and would have designed competitive applications on non-Windows 95 platforms.

Second, the District Court concluded Novell was not a threat because Microsoft had previously maintained its monopoly power notwithstanding WordPerfect's prior popularity. JA-221. In addition to violating the Rule 50 standard, this inference in Microsoft's favor assumed that the competitive world that existed after the rise of the Internet and middleware would have mirrored the world that existed before that time. This assumption contradicted binding findings of fact from the Government's case against Microsoft. *See supra* pp. 7-8. That WordPerfect in the past had failed by itself to displace Windows proved nothing about its potential to do so in this new world. At a minimum, the availability of a popular word processor would have been a necessary condition for an operating system to compete with Windows. For this reason alone, Microsoft's elimination of WordPerfect – the top rival to Microsoft Word – contributed significantly to maintaining its monopoly power.

Moreover, the conclusion that WordPerfect could not have worked with these nascent paradigms to challenge Microsoft's monopoly power inappropriately

required Novell to recreate the hypothetical marketplace that would have existed absent Microsoft's anticompetitive conduct toward WordPerfect, Navigator, and Java. The District Court further disregarded the evidence that Microsoft itself *viewed all three technologies as threats to the maintenance of its monopoly power in the operating systems market*. A reasonable jury could have concluded that a popular cross-platform suite (PerfectOffice) that boasted the "best word processor" (WordPerfect), and a cross-platform Internet browser that Microsoft viewed with "dread" (Navigator), combined with middleware technology (Java), would have posed a considerable threat to the applications barrier to entry and Microsoft's monopoly power. JA-14668 (Ford); JA-15065 (LeFevre); JA-1629-30 (FOF ¶ 77).

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

The District Court also disregarded ample evidence of the threat posed by Novell's middleware. This evidence included Microsoft's *own recognition* of the threat posed by Novell's AppWare. By Microsoft's own admission, AppWare was one of its "most serious competitors." JA-645 (Maritz); *see also* JA-2659 (AppWare was "direct competition to Windows"); *supra* pp. 11-12. A reasonable jury could readily have concluded that Microsoft's own assessment reflected the reality of the threat that it faced. The District Court did not address this evidence.

Likewise, PerfectFit made available more APIs than Navigator and Java

combined, and enabled ISVs to develop applications that could be ported to any operating system where PerfectOffice was installed. *See supra* p. 12. Further, more than 1,000 companies became "PerfectFit Partners," who received dedicated Novell technical support. JA-11156-57 (Harral); JA-11718, 11821-22 (Gibb); JA-3437.

Novell further presented ample evidence that Microsoft's exclusion of Novell's middleware harmed competition in the operating systems market in the same way as Microsoft's exclusion of Navigator and Java. Like Navigator and Java, Novell's office productivity applications complemented Windows, were very popular, and had the potential to gain widespread use on Windows 95 due to WordPerfect's existing installed base. *See supra* pp. 8-9; JA-1628-30 (FOF ¶¶ 69-72, 76-77).

The District Court similarly failed to account for the cumulative nature of the threat posed by middleware that Microsoft recognized and binding findings of fact established. "Microsoft was concerned with middleware as a category of software; *each type of middleware contributed to the threat posed by the entire category*." JA-1627-28 (FOF ¶ 68) (emphasis added). By requiring Novell to show that one middleware product, by itself, could have eliminated the applications barrier to entry, the District Court directly contradicted this finding.

The District Court concluded that Novell's middleware was not a threat

based on a fundamental misconception about the technology. That the namespace extension APIs were "'platform specific' to Windows" is immaterial to whether Novell could have "effectively ported" its applications to other platforms. JA-222 (citation omitted). No evidence supports the suggestion that developing PerfectOffice with the namespace extension APIs in Windows 95 would have prevented the development of PerfectOffice for platforms without that feature. To the contrary, Novell's applications had been successfully ported to more than a dozen operating systems. JA-11147 (Harral).

The District Court additionally erred in concluding that Novell's middleware did not pose a threat because it would not have been ubiquitous on Windows 95 and/or because it did not by itself support full-featured personal productivity applications. JA-222-26. These requirements were based on the erroneous assumption that Novell's middleware had to have the potential, by itself, to eliminate (rather than erode or diminish) the applications barrier to entry. JA-226; *see also* JA-12869 (Noll). This test in turn was specifically contradicted by the evidence already discussed and rejected by the two sources that the District Court used to support it.

First, the Court purported to rely on the D.C. District Court's discussion of the applications barrier to entry to conclude that "*elimination* (or, at least, near elimination) of the barrier to entry" was required. JA-226. Both the D.C. District

Court and the D.C. Circuit, however, reached the opposite conclusion – that middleware had the potential to threaten Microsoft's monopoly power in the operating systems market in the future by *diminishing* the barrier to entry even though it was not a reasonable substitute at the time. *Microsoft*, 253 F.3d at 55, 78-79. Any other conclusion would license Microsoft to crush individual nascent threats while benefiting from the evidentiary uncertainty that its conduct created.

Second, the District Court similarly disregarded Professor Noll's testimony that, while the existence of a cross-platform application that was present on all or nearly all PCs would be a condition for completely "eliminating the applications barrier to entry," it "is not correct to say that something less than that couldn't increase competition" by weakening it. JA-12869 (Noll); *see also* JA-222.

The suggestion that middleware could only threaten Microsoft's monopoly power if full-featured applications could be written to it, JA-223-26, also failed to acknowledge that Novell's products were simultaneously middleware *and* a set of full-featured personal productivity applications that included the best application in the most important category. *See supra* pp. 8-12, 45-49. The APIs made available by PerfectOffice's middleware thus did not have to support another applications suite to satisfy the user's office productivity needs, because PerfectOffice itself fulfilled those needs. The District Court similarly failed to account for the D.C. Circuit's conclusion that Microsoft's conduct toward Navigator and Java

harmed competition even though neither had the ability to support full-featured applications. JA-1623 (FOF ¶ 28).

The District Court also mistakenly held that to the extent that Professor Noll's testimony that diminishing the barrier to entry was sufficient was "based on the premise that other companies would produce similar middleware that, in combination with Novell's products, would diminish the barrier to entry, there is no evidence that such other products existed." JA-224. To the contrary, the findings of fact established that "each type of middleware contributed to the threat posed by the entire category," JA-1627-28 (FOF ¶ 68), and contained extensive discussion of specific middleware products Java and Navigator, and the combined effects of those products "working together." *Microsoft*, 253 F.3d at 78-79; JA-1627-30 (FOF ¶¶ 68-77).

Novell also presented evidence of an agreement with Netscape that enabled Novell to bundle Navigator – which eventually contained Java – with its applications. JA-11943 (Frankenberg); JA-3858-86; *see also* JA-12765-69 (Noll). Professor Noll testified that the result of Microsoft's conduct was "that 7 million PCs do not have the WordPerfect middleware, and that [sic] do not have Netscape Navigator that would have been loaded with the WordPerfect middleware. So that substantially reduces the degree to which the applications barrier to entry is being undermined by WordPerfect and Novell." *See* JA-12769 (Noll). WordPerfect and

Navigator's combined threat is indistinguishable from the threat posed by the Java-Navigator license agreement, except that the Novell agreement would have significantly increased the distribution potential for all three technologies. JA-1629-30 (FOF ¶¶ 76-77).

III. NOVELL PRESENTED AMPLE EVIDENCE THAT MICROSOFT'S ANTICOMPETITIVE CONDUCT CAUSED NOVELL'S INJURY

A. The District Court Provided No Basis For Disregarding The Considerable Evidence That Microsoft's Common File Open Dialog Was Not A Viable Competitive Option

As explained in more detail above, Novell presented ample evidence that Microsoft's conduct left Novell with three non-viable options. *See supra* pp. 22-25. The first option – trying to use the incomplete June 1994 documentation to call upon the now undocumented namespace extension APIs – was reckless and futile. *See supra* p. 23. Neither the District Court nor Microsoft's expert witness suggested that Novell should have pursued this option. JA-16000 (Bennett) (agreeing that "it's a bad practice to call on undocumented APIs"). The second option – using the Windows 95 common file open dialog entailed an unacceptable sacrifice of functionality for WordPerfect. *See supra* pp. 23-25. The third option – attempting to recreate the operating system-level functionality provided by the now de-documented APIs in the WordPerfect custom file open dialog – caused Novell's product to miss the critical 90-day window. *See supra* pp. 25-26.

In spite of this evidence, and even though it was the jury's role to make these factual determinations, the District Court held that if the 90-day window was critical, "Novell clearly would have implemented a different development plan." JA-228. The District Court, however, did not propose any new suggestions aside from the three non-viable options discussed above. *See id.* The District Court could not properly speculate under the governing standard of review regarding the existence of a mystery fourth option, let alone conclude that a reasonable jury could only have concluded that that option existed and was competitively viable.

The District Court also ignored the Rule 50 standard in deciding that "Novell could have released those products using Microsoft's common file open dialog." JA-228. Novell's witnesses testified to the contrary. *See* JA-11561-63 (Richardson) (the common dialog "was a huge step backwards for us" and the third option of replicating the operating system-level functionality "was the only option we had left"); JA-11436 (Harral) ("we could have made the choice to use the common open dialog in 1994 so to ship '95 but that also would have been a choice to have disenfranchised our customer base"); JA-11750-51, JA-11781-82 (Gibb) (explaining Novell could not cut the file open dialog "back to an extreme because, again, it was core differentiator [sic]" and that use of the common dialog "would be a huge step backwards for our customers").

In its statement of facts, the District Court stated that Microsoft's common

file open dialog "would have caused Novell to stop providing features that it had provided to its customers in the past, thereby 'disenfranchis[ing] [its] customer base.'" JA-205 (alteration in original) (citing to Harral, Richardson, and Gibb testimony). Yet, when it concluded Novell "could have released" its products "using Microsoft's common file open dialog," JA-228, the District Court devoted only cursory discussion to the issue and did not even discuss the aforementioned testimony of Novell's witnesses, much less provide a basis for concluding that a reasonable jury could not have credited it. Instead, the court cites two Microsoft witnesses who once worked for Novell – one of whom has since worked for Microsoft for over a decade. JA-228; *see also* JA-14971 (LeFevre). Under Rule 50, the District Court was required to credit *Novell's* witnesses and grant *Novell* the benefit of all reasonable inferences. It failed to do so in violation of the governing standard.

B. The District Court's Mistaken Inferences And Conclusions Concerning Novell's Complaints To Microsoft And Executive Involvement Provided No Basis For Finding An Absence Of Causation

In concluding that there was an absence of urgency at Novell that demonstrated a lack of causation, the District Court relied on a purported absence of (1) complaints "to anyone at Microsoft who could have reversed the decision" and (2) "evidence that any top-level executive was involved in the decision-making process concerning the writing of shared code for WordPerfect." JA-227. This

evidence supposedly demonstrated that "Novell simply did not believe the deadline of bringing applications to market within 90 days of the release of Windows 95" was "material to the success of Novell's applications." JA-227 n.23. This analysis was flawed for a number of reasons.

The direct evidence of causation forecloses the District Court's reliance on a supposed lack of complaints to Microsoft. *See* Statement of Facts Part V, Argument Part III.A. Regardless of how or if Novell complained or which executives were involved in the decision, Microsoft's decision left Novell with no viable options for releasing a competitive product within the critical window. *See id.* Nothing in the antitrust laws requires that a wronged party involve particular executives in a decision or exhaust its administrative remedies with the party that has wronged it. Nor does Rule 50 allow a district court to conclude that the absence of one type of evidence – even if true – means a plaintiff has failed to carry its burden using other evidence.

Moreover, the District Court's inference "that Novell simply did not believe the deadline of bringing applications to market within 90 days of the release of Windows 95," JA-227 n.23, contradicted the direct evidence that Novell viewed the deadline as important. *See supra* p. 22. The District Court also ignored direct testimony concerning the shared code team's 80-hour work weeks and a "Panic Mode" memorandum stating that there was "no conceivable way" that the dialog

could be complete by the target date of August 22, 1995. *See supra* p. 25; JA-11285 (Harral); JA-4200. Under the applicable standard of review, the District Court could not disregard this evidence of urgency in favor of its own views of how Novell should have handled Microsoft's conduct.

Regarding complaints, Novell's CEO testified that he complained "on a number of occasions" to Bill Gates in 1995 about the issue of undocumented APIs but that Gates "refused to talk about it." JA-11965-66 (Frankenberg). Moreover, a reasonable jury could easily have concluded that a lack of complaints reflected not that the issue was unimportant, but that Microsoft had falsely told Novell that the de-documentation was based on technical justifications. *See supra* pp. 19-22, 38 & n.4. Novell's dependent and competitive relationship with Microsoft also counseled against vehement complaints. *See* JA-11966-67 (Frankenberg) (Novell's Netware product was "intimately dependent on Microsoft's cooperation."); JA-7170 (noting WordPerfect did not "want to tip their hand" regarding its use of the namespace extension APIs); JA-12919 (C. Myhrvold).

The District Court also concluded that Novell's executives were uninvolved based entirely on the supposed absence of evidence of their involvement. JA-227-28. This was improper under a standard that required all reasonable inferences to be drawn in Novell's favor. Moreover, ample evidence demonstrated contemporaneous executive involvement in the decision to replicate the namespace

extension API functionality. While relying on Novell CEO Bob Frankenberg's testimony that "some or all" of a group of specific executives would have been involved in the decision, JA-206, the District Court disregarded Frankenberg's testimony that in early 1995, he learned of "being denied access to interfaces that we previously had access to" from Mark Calkins, Jeff Waxman, or Ad Rietveld – all of whom were part of that group of executives. JA-11965, JA-12077-78, JA-12119 (Frankenberg). The lead engineer in shared code further testified that management knew that the issue was "a big deal." JA-11354-55. Based on this evidence, a reasonable jury could have concluded that Novell's highest executives kept themselves informed of the problems Microsoft caused and accepted the developers' plans to address those problems.

The District Court thus had no basis to conclude that Novell left the decision to develop the custom file open dialog (rather than use Microsoft's common dialog) to a "middle manager" (a dismissive reference to Gary Gibb) and low level programmers. JA-206-07. Indeed, elsewhere in its opinion, the District Court referred to Nolan Larsen, a Microsoft witness who reported to Gibb, as an "executive of Novell." JA-205; JA-5271. Further, as Microsoft's witness confirmed, Gibb (the Director of PerfectOffice Windows 95), Steve Weitzeil (the head of WordPerfect for Windows development), and Tom Creighton (the head of shared code), all favored the decision to develop the custom dialog. JA-14998,

JA-15069-70 (LeFevre).

C. The District Court's Conclusion That Quattro Pro, Not Microsoft's Conduct, Caused The Delay Improperly Resolved A Disputed Question Of Fact That Was For The Jury

The District Court also mistakenly concluded that Microsoft's conduct did not prevent the timely release of PerfectOffice within the 90-day window because, due to a "mass exodus of programmers" in December 1995, Quattro Pro – PerfectOffice's spreadsheet application – was not ready for release until 1996. JA-228. In reaching this conclusion, the District Court improperly resolved conflicting evidence in Microsoft's favor rather than Novell's, in direct contravention of the applicable standard of review.

The District Court ignored direct testimony from the Director of the PerfectOffice suite (Gibb) that Quattro Pro did not delay the release of PerfectOffice and that, had shared code delivered on time, Novell would have been able to release PerfectOffice within 60 to 90 days of the release of Windows 95. JA-11743, JA-11838 (Gibb); JA-11427 (Harral) ("WordPerfect was not late. Quattro Pro was not late. It was shared code that was late."). The District Court provided no basis for concluding that a reasonable jury could not have credited this testimony. Moreover, numerous witnesses, called by both parties, confirmed that Gibb was in the best position to know the particular issues that arose in developing PerfectOffice. *See* JA-11482 (Harral); JA-12179-80 (Frankenberg); JA-14168

(Bushman); JA-14600-01, JA-14605 (Larsen); JA-14669 (Ford).

Contemporaneous records confirmed Gibb's testimony. *See* JA-9147 (showing that Quattro Pro was "code complete" as of August 23, 1995). Likewise, when Novell's Board of Directors reviewed the pending decline in value of its Business Applications Division, it did not mention Quattro Pro delays as a contributing factor, but acknowledging that "MS interference," not Quattro Pro, "has delayed competitive 32-bit apps." JA-9640.

The District Court cited Frankenberg's testimony as contrary evidence, JA-228, despite acknowledging during trial that Frankenberg had no real knowledge of Quattro Pro's development progress and that his testimony merely summarized the document with which he was presented (*see* DX 230, discussed below), JA-12082; JA-13854. The District Court similarly cites Karl Ford's testimony, JA-228, although Ford testified that Gibb was in the best position to know, that he merely "heard" Quattro Pro was having issues and "figured that they were late and at risk with the schedule," JA-14654, JA-14669 (Ford).

Documentary evidence relied upon by the District Court similarly offered no basis for concluding that a reasonable jury could not have credited Gibb's testimony and the other evidence cited above:

- The March 1996 "Release To Manufacturing" date for Quattro Pro in DX 231 reflects only that Novell intended to release the entire suite to manufacturing on the same date; it did not reflect that Quattro Pro, rather than shared code, was responsible for the delay. JA-9147. Instead, it

shows that Quattro Pro was code complete in August 1995, well before PerfectFit. *Id.* No PerfectOffice application (including Quattro Pro) could be released to manufacturing without shared code. *See* JA-11427 (Harral); JA-8893.

- DX 230 (JA-9145) is consistent with (1) Gibb's testimony that any Quattro Pro bug fixes occurring in December 1995 were merely "cleaning and polishing" that would not have delayed the release of PerfectOffice had PerfectFit been ready, JA-11742-43 (Gibb); and (2) the fact that Quattro Pro beta testing (an established purpose of which is to identify and fix bugs, JA-11234 (Harral); JA-12327 (Alepin)) had itself been delayed by PerfectFit. JA-9147 (showing that Quattro Pro beta began on the same date as the PerfectFit and PerfectOffice beta though code complete well before those products); *see also* JA-11427 (Harral).

- Despite the concerns about Quattro Pro's development raised in DX 211 (JA-8893), Novell affirmatively chose a September 1995 release date. JA-11826 (Gibb).

- DX 221, an email from March 1995 (JA-8988-89), is consistent with Gibb's recollection that he was nervous "early on" that Quattro Pro might delay the suite but ultimately Quattro Pro was "very conservative in their estimates" and "over delivered" with a code completion date of August 1995, JA-11740, JA-11743 (Gibb); JA-9147.

Accordingly, Novell presented sufficient evidence for a reasonable jury to find that Microsoft's conduct, not Quattro Pro, delayed the release of PerfectOffice 95. These were jury issues that the District Court improperly resolved on a Rule 50 motion and, therefore, a new trial is required.

CONCLUSION

For the foregoing reasons, Novell requests that the judgment of the District Court be reversed and that this case be remanded for trial.

November 21, 2012

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REQUEST FOR ORAL ARGUMENT

Novell respectfully requests oral argument on the issues raised by its appeal. Novell believes these antitrust issues are important and that oral argument would assist the Court in resolving them.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,999 words. I relied on my word processor, which is Microsoft Word 2010, to obtain the word count. I certify that this information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/ Jeffrey M. Johnson

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

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

/s/ Jeffrey M. Johnson

CERTIFICATE OF SERVICE

I certify that on November 21, 2012, I caused the foregoing **APPELLANT'S OPENING BRIEF** to be served on all parties or their counsel of record through the Court's CM/ECF system.

/s/ Jeffrey M. Johnson

ATTACHMENT 1

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

NOVELL, INC.	*	
	*	
v.	*	Civil No. 2:04-cv-01045-JFM
	*	
MICROSOFT CORP.	*	

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OPINION

Novell, Inc. instituted this action against Microsoft under § 4 of the Clayton Act, 15 U.S.C. § 15, alleging violations of the Sherman Act, 15 U.S.C §§ 1–2.[1] Initially, Novell asserted three sets of claims: (1) that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by unlawfully monopolizing and attempting to monopolize the software *applications* market; (2) that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by unlawfully maintaining its monopoly in the *operating systems* market; and (3) that Microsoft violated § 1 of the Sherman Act and caused antitrust injury to Novell by engaging in exclusionary agreements in unreasonable restraint of trade. Novell has abandoned the third claim, *see Novell, Inc. v. Microsoft Corp.*, 429 F. App'x. 254, 258 n.7 (4th Cir. 2011), and the Fourth Circuit affirmed a ruling I made that Novell's monopolization and attempted

[1] This case was brought in the wake of the 1998 government antitrust enforcement action against Microsoft. That action ultimately resulted in a ruling, supported by factual findings made by Judge Thomas Penfield Jackson, that Microsoft violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the operating systems market. *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part*, 253 F.3d 34 (D.C. Cir. 2001). Novell's claim that it was injured by virtue of Microsoft's monopolization of the operating systems market was tolled while the government action was pending because it overlapped with the government's claim in that action. Some of Judge Jackson's factual findings in the government case have been granted collateral estoppel effect in this action. (*See* Oct. 4 Court Correspondence, ECF No. 163; Trial Tr. at 143–57, 167–97, Oct. 18 & Nov. 14, 2011). In this Opinion, I refer to Judge Jackson's findings as Factual Finding ¶ ___.

monopolization claims in the applications market are barred by limitations. *See Novell, Inc. v. Microsoft Corp.*, No. MDL 1332, No. 05-cv-1087(JFM), 2005 WL 1398643, at *5 (D. Md. June 10, 2005), *aff'd*, 505 F.3d 302, 322 (4th Cir. 2007).[2] Thus, the only remaining claim is the second: that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by maintaining its monopoly in the *operating systems* market. For this claim, Novell advanced two somewhat different theories: the "franchise theory" and the "middleware theory."[3]

That claim was tried to a jury. After an approximately eight-week trial, the jury hung and was unable to return a verdict.[4] Now pending is Microsoft's motion under Fed. R. Civ. P. 50(b) for judgment as a matter of law. Although Novell presented evidence from which a jury could

[2] The Fourth Circuit had jurisdiction to review the limitations question because this action had been transferred to the District of Maryland for resolution of pretrial issues pursuant to the Multidistrict Litigation Act. *See* 28 U.S.C. § 1407. I served as the trial judge in the action under an intercircuit assignment to the District of Utah, the district in which the case was filed. In the District of Maryland pretrial proceedings, the case number for this action was No. 05-cv-1087-JFM. In the District of Utah, its case number is No. 2:04-cv-01045-JFM. ECF references in this Opinion are to the Utah docket.

[3] I discuss these theories in section V.B. In the government case, Judge Jackson defined "middleware" as software that "relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers." Finding of Fact ¶ 28. The D.C. Circuit accepted this definition, writing that middleware simply refers to "software products that expose their own APIs." *Microsoft*, 253 F.3d at 53. The products Novell developed that it alleges constitute middleware are PerfectFit (the shared code written into WordPerfect and PerfectOffice), AppWare (which was included in PerfectOffice), and OpenDoc.

[4] After the jury hung, I interviewed the jurors and permitted counsel to do so as well. It appears undisputed that eleven of the twelve jurors would have returned a verdict in favor of Novell on the issue of liability. However, in light of what jurors said after the trial, it would be entirely speculative to assess the amount of damages the jury would have awarded had it not hung on the issue of liability. It might have taken into account in awarding damages not only weaknesses in Novell's damages claim but weaknesses in its liability claim as well. In any event, the fact that a majority of the jurors would have returned a verdict of liability in favor of Novell does not relieve me of the responsibility to rule on independent claims or on Microsoft's Rule 50(b) motion. *See Noonan v. Midland Capital Corp.*, 453 F.2d 459, 463 (2d Cir. 1972) ("If the position of some jurors favoring plaintiff is enough [to prevent a judge from granting a Rule 50(b) motion], there could never be a judgment for insufficiency of the evidence notwithstanding a verdict."); *Stewart v. Walbridge, Aldinger Co.*, 882 F. Supp. 1441, 1443 (D. Del. 1995) ("[T]he fact that the jury was unable to reach a unanimous verdict does not in any way affect this Court's duty to rule on the [Rule 50(b)] motion.").

have found that Microsoft engaged in aggressive conduct, perhaps to monopolize or attempt to monopolize the applications market, it did not present evidence sufficient for a jury to find that Microsoft committed any acts that violated § 2 in maintaining its monopoly in the operating systems market. Therefore, Microsoft's Rule 50 motion will be granted.[5]

I.

In the mid-1990s, Microsoft, which for many years had possessed a monopoly in the PC operating systems market, was developing a new operating system. This operating system became known as Windows 95 and was released for sale to the public on August 24, 1995.[6] Microsoft also sold a word processing application, Word, and a spreadsheet application, Excel. Beginning in 1990, Microsoft marketed these two applications together in an office productivity suite, Office. (Gibb, Trial Tr. at 823, Oct. 26, 2011; Frankenberg, Trial Tr. at 1080, Nov. 7, 2011).

WordPerfect, a word processing application, was originally developed by WordPerfect Corporation, a company located in Orem, Utah. WordPerfect competed with Word and was

[5] This Opinion does not contain extensive citations to Tenth Circuit antitrust law because I have concluded that the facts governing my ruling are so case specific that the proper disposition of the Rule 50 motion requires close examination of the evidence in this case rather than comparison of this case to others. I note, however, my holding entirely accords with the Tenth Circuit's view that, as a general matter, a tough-minded business decision that adversely affects competition does not constitute an *ipso facto* violation of the Sherman Act. *See Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1198 (10th Cir. 2009).

[6] Windows 95 was launched at a gala event at Microsoft's corporate headquarters. Gary Gibb, who managed the development of the versions of Novell's office productivity applications for Windows 95, attended the event. He testified that he was displeased because he was not invited into the tent where Jay Leno, a television personality, was serving as the master of ceremonies. It was apparent to Gibb that Microsoft was using the event to market not only Windows 95 but also Microsoft's own office productivity applications, which ran on Windows 95. (Gibb, Trial Tr. at 818, Oct. 26, 2011). Gibb's perception of the event reflects that in 1995, Novell was concerned that what Microsoft was attempting to do was to use Windows 95 to increase its share of the applications market, not to maintain its monopoly in the operating systems market.

particularly popular with customers who used character-based DOS operating systems. In the mid-1980s and early 1990s, WordPerfect was the acknowledged "king of the hill" on the DOS platform. (Peterson, Trial Tr. at 4667, Dec. 7, 2011; *see* Middleton, Trial Tr. at 4178 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011). Although Microsoft manufactured and sold a character-based operating system known as MS-DOS, as early as 1984 it began concentrating on an alternative type of operating system, known as a graphic user interface ("GUI") system. (Gates, Trial Tr. at 2709, 2713, Nov. 21, 2011). As Microsoft developed Windows, its GUI-based operating system, Bill Gates, the Chief Executive Officer of Microsoft, attempted to persuade Pete Peterson, then a principal of WordPerfect, to write for Windows.[7] (Peterson, Trial Tr. at 4708–09, Dec. 7, 2011). WordPerfect, however, was reluctant to devote significant resources to developing applications to run on Windows because Peterson "was not going to put any effort into producing a product that would put another penny in Bill Gates' pocket." (Bushman, Trial Tr. at 3152–53, Nov. 28, 2011). In May 1990, Microsoft released Windows 3.0. WordPerfect did not release a Windows 3.0–compatible WordPerfect program until eighteen months later, in November 1991. (Middleton, Trial Tr. at 4187 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011)

Novell announced its intent to purchase WordPerfect on March 21, 1994 and completed the purchase on June 24, 1994. At the same time, Novell purchased Quattro Pro, a spreadsheet application that had been developed by Borland, Inc., a company located in Scotts Valley, California. (Frankenberg, Trial Tr. at 1080, Nov. 7, 2011). Robert Frankenberg, who was the Chief Executive Officer of Novell after its purchase of WordPerfect and Quattro Pro, saw that GUI operating systems were the wave of the future, and he was more inclined than Peterson to

[7]At the same time, some executives at Microsoft encouraged developers to write for another operating system, OS/2, rather than for Windows. (*See* Peterson, Trial Tr. at 4708, Dec. 7, 2011). Novell relies upon this evidence to infer that Microsoft, in pursuit of monopoly power, was talking from both sides of its mouth.

work with Microsoft and to develop versions of its applications for Windows. (*Id.* at 1040). The WordPerfect products for Windows had generally not been well received by the market, and Frankenberg recognized the need to improve those products. In November 1994, Novell released WordPerfect 6.1 for Windows, which met with favorable industry reviews. (*See* Pl.'s Exs. 239 & 241). Frankenberg also saw the need for Novell to market an office productivity suite, and in late December 1994 WordPerfect successfully released a Windows-compatible suite, PerfectOffice 3.0.[8] (Frankenberg, Trial Tr. at 1012, Nov. 7, 2011). Although Frankenberg recognized that Microsoft had "a huge head start" in the suite market, in January of 1994 approximately 74% of users had yet to choose among the available suite products. (*Id.* at 1008–09, 1063; Pl.'s Ex. 412 at 2).

On June 10, 1994, shortly before Novell finalized its purchase of WordPerfect Corporation and Quattro Pro, Microsoft provided independent software vendors ("ISVs"), including WordPerfect, with the Milestone 6 beta version of Windows 95. (*See* Harral, Trial Tr. at 434–35, Oct. 24, 2011). Novell was extremely enthusiastic about Windows 95 when it was released in beta form to ISVs. Frankenberg testified that Windows 95 was a significant step forward and that Novell was "very excited and very interested" in it. (Frankenberg, Trial Tr. at 1225–26, Nov. 8, 2011). He further testified that Novell's business strategy was to "take advantage of the capabilities in Windows 95." (*Id.* at 1226). The testimony of other Novell witnesses was to the same effect. (Harral, Trial Tr. at 253–54, 256–57, Oct. 20, 2011; Richardson, Trial Tr. at 607, Oct. 25, 2011; Gibb, Trial Tr. at 788, Oct. 26, 2011; Noll, Trial Tr. at 1911, Nov. 15, 2011).

[8] PerfectOffice 3.0 did not achieve a sizeable market share. (*See* Noll, Trial Tr. at 1915, Nov. 15, 2011). However, this may well have been due to the fact that many consumers were not buying new applications during 1994 and the first seven months of 1995 because they were awaiting the release of Windows 95 and applications written to it.

On October 3, 1994, Microsoft withdrew support for the part of this beta version making namespace extension application programming interfaces ("APIs") accessible to ISVs. (*See* Pl.'s Ex. 1). Prior to the hearing on the Rule 50 motion, Novell contended that the act of withdrawing support for the namespace extension APIs was itself an unlawful act because beta versions of a release cannot be modified except to fix bugs discovered during the course of the beta process. Novell did not, however, press this argument at the Rule 50 hearing. Its reason for not doing so is clear. Although one Novell software developer, Adam Harral, did so suggest, (Harral, Trial Tr. at 303, Oct. 20, 2011), all of the other evidence was to the contrary. Microsoft's licensing agreement with WordPerfect/Novell provided that the beta version "may be substantially modified prior to first commercial shipment," and that WordPerfect "assume[d] the entire risk with respect to the use of the beta." (Def.'s Ex. 18 at 1 ¶ 2; Def.'s Ex. 19 ¶ 2). Moreover, numerous witnesses, including Frankenberg and other persons who during the relevant time frame had been employed by Novell, testified that they understood the beta versions of Windows 95 "could change" and "might change" prior to commercial release. (Frankenberg, Trial Tr. at 1201, 1204–05, 1209, Nov. 8, 2011; Larsen, Trial Tr. at 3603, 3654–58, Nov. 30, 2011). Novell's expert witnesses likewise agreed with this proposition. (Alepin, Trial Tr. at 1555–56, Nov. 10, 2011; Noll, Trial Tr. at 1878, Nov. 15, 2011).

The parties dispute the reasons that Microsoft decided, on October 3, 1994, to withdraw support for the namespace extension APIs. Microsoft argues it had legitimate "stability" and "robustness" concerns, particularly because, as Novell's own technical expert, Ronald Alepin, conceded, an ISV that wrote a bad program using the namespace extension APIs could cause Windows 95 to crash. (Alepin, Trial Tr. at 1601–02, Nov. 10, 2011; *see* Gates, Trial Tr. at 2781–82, Nov. 21, 2011). Moreover, according to Microsoft, there was an internal debate at

Microsoft between the Windows team and another team, working on what was known as the "Cairo Shell," about the design of the namespace extension APIs. (Gates, Trial Tr. at 2792–93, Nov. 21, 2011; Muglia, Trial Tr. at 3385–90, 3397–3400, Nov. 29, 2011; Nakajima, Trial Tr. at 3763–64, 3768–71, Dec. 1, 2011; Belfiore, Trial Tr. at 4269–71, 4278–80, Dec. 5, 2011). Finally, Microsoft contends that the namespace extension APIs did not provide the functionalities Gates had contemplated. (Gates, Trial Tr. at 2786–87, 2800–04, Nov. 21, 2011; Pl.'s Ex. 1).

Novell argues that all of the reasons Microsoft articulated for the October 3, 1994 decision were pretextual, and that, as revealed in an internal email Gates authored, the real reason for withdrawing support for the namespace extension APIs was to provide a competitive advantage to Microsoft's own office productivity suite, Office. (*See* Pl.'s Ex. 1). In the October 3, 1994 email announcing the withdrawal decision, Gates stated: "I have decided that we should not publish these extensions. We should wait until we have a way to do a high level of integration that will be harder for the likes of Notes [a Lotus product], WordPerfect to achieve, and which will give Office a real advantage." (*Id.*).[9]

According to Novell, Gates's decision to withdraw support for the namespace extension

[9] There is additional evidence that by October 1994 Gates was concerned about competition from Lotus and Novell. For example, Gates wrote an email, after watching a demonstration of Novell's new technology at a conference held in Scottsdale, Arizona on September 20, 1994, stating that "Novell [was] a lot more aware of how the world [was] changing than I thought they were." (Pl.'s Ex. 222; *see* Pl.'s Exs. 17, 31–33, 54, 72, 88, 91, 127, 201). There also was evidence that other executives at Microsoft perceived Novell's products to constitute middleware threats to Microsoft's operating system. Brad Silverberg, a senior Microsoft executive, wrote in an email dated June 15, 1993 that "our competitors are going to do everything they can to fragment windows, they will build their own middleware to claim api ownership." (Pl.'s Ex. 54 at MS 0185884). Likewise, John Ludwig of Microsoft wrote an internal email in which he stated, *inter alia*, that "our worst nightmare is novell/lotus being successful at establishing their 'middleware' as a standard. [O]urs ought to be ubiquitously available to forestall this. [O]ur huge advantage vis-à-vis novell is our end-user franchise, we shouldn't cast aside this advantage." (*Id.*; *see* Pl.'s Exs. 32 at MS 7079459, 33 at MS 5011635, 44 at MS 7080466–67).

APIs was consistent with a plan that had been discussed and adopted by Microsoft executives in June 1993, at a retreat at Gates's estate on Hood Canal. That plan called for Windows 95 to be shipped with limited extensibility, reserving for Microsoft's applications the functionality that the namespace extension APIs provided. (*See* Pl.'s Ex. 61). The plan's purpose was to give Microsoft's applications "a very significant lead over [Microsoft's] competitors, and make [Microsoft's] competitors' products look 'old.'" (*Id.* at MS 00971223). Microsoft was concerned that if the extensibility were not withheld from ISVs, Word and Excel would have to "battle against their competitors on even turf. Given that Lotus and WordPerfect have largely caught up, [Word and Excel] almost certainly lose ground – if not in market share, then in margins." (Pl.'s Ex. 62 at MX 1389851).[10]

After Microsoft withdrew support for the namespace extension APIs in October 1994, Novell was confronted with three options: (1) to continue to write its own programs using the namespace extension APIs that were no longer supported by Microsoft but were still accessible to ISVs in possession of the beta version; (2) to use Microsoft's common file open dialog (instead of the namespace extension APIs), which remained available to ISVs after the withdrawal of support for the namespace extension APIs; or (3) to write its own customized file open dialog. (*See* Harral, Trial Tr. at 342–44, Oct. 20, 2011). Although it explored the first option, Novell concluded that it could not use the previously released documentation for the namespace extension APIs because Microsoft was no longer providing any assistance for writing programs based upon those APIs. (*Id.* at 345–46). Novell also concluded that the second option

[10] As Novell's counsel acknowledged in closing argument, the Hood Canal plan was never implemented in light of the fact that Excel, Word, and Office did not use the functionality provided by the namespace extension APIs. (Trial Tr. at 5324–25, Dec. 13, 2011). However, Novell contends the Hood Canal plan is relevant in casting light upon the reason for Gates's decision to withdraw support for the namespace extension APIs on October 3, 1994. That contention is not unreasonable.

was unsatisfactory because to use it would "impose[] the standards of the operating system" on developers. (*Id.* at 271). Specifically, using Microsoft's common file open dialog would have caused Novell to stop providing features that it had provided to its customers in the past, thereby "disenfranchis[ing] [its] customer base." (Harral, Trial Tr. at 504, Oct. 24, 2011; Richardson, Trial Tr. at 629–30, Oct. 25, 2011; *see* Gibb, Trial Tr. at 891, Oct. 26, 2011). Therefore, in January 1995 Novell stopped trying to reproduce the lost functionality and chose the third option, beginning to write its own customized file open dialog by having two developers, Harral and Richardson, work around the clock, sometimes in excess of 80 hours per week, under Gibb's supervision. (*See* Harral, Trial Tr. at 350–54, Oct. 20, 2011).

When Gates decided to withdraw support for the namespace extension APIs, some Microsoft executives were concerned that the decision would not be well received by ISVs. In that regard, Brad Silverberg wrote an email to other Microsoft executives, including Gates, on October 5, 1994, predicting there would be a "firestorm of protests" from ISVs, including WordPerfect, that were using the shell extensions. (Pl.'s Ex. 220 at MX 5103184). However, shortly before Silverberg's email was written, Brad Struss, who headed the Windows 95 team for Microsoft's Development Relations Group and worked closely with Novell, reported that Novell "ha[d] not begun any work on IShellFolder, IShellView, etc.," i.e. the namespace extensions. (Def.'s Ex. 17 at MX 6109491). Struss's email also included the results of a survey Microsoft conducted of major ISVs to ascertain if ISVs in fact were using the namespace extension APIs. (*Id.*). On October 12, 1994, after the decision to withdraw support for the namespace extension APIs was made, Struss advised Microsoft executives by email that Microsoft was "notifying ISVs about the namespace api changes." (Def.'s Ex. 3 at MX 6055840). He reported that "WP [WordPerfect] . . . appear[s] to be OK with this." (*Id.*). Struss also testified at trial that he told

others at Microsoft "what [he] knew to be true or what had been communicated to [him] from WordPerfect, which is that they were not using it and they were not dependent upon it." (Struss, Trial Tr. at 3270, Nov. 28, 2011).

Novell presented no witness to rebut this testimony or to contradict what was said in the October 12 email. There also is no evidence in the record that Novell ever complained to Microsoft about Microsoft's decision to withdraw support for the namespace extension APIs. Further, there is no evidence that any top-level executive at Novell was involved in the decision-making process concerning the choice of the third option, i.e., writing of customized code for WordPerfect. Frankenberg testified that any action that could jeopardize the timely release of WordPerfect or Quattro Pro would have been referred to some or all of four senior executives: Ad Rietveld, Executive Vice President of the Novell Applications Group; Dave Moon, Senior Vice President of the Business Applications Group; Mark Calkins, Vice President and General Manager of the Business Applications Group; and Glenn Mella, Vice President of Marketing. (Frankenberg, Trial Tr. at 1140–42, 1179–80, Nov. 7–8, 2011). Moreover, Frankenberg agreed that in any business or organization faced with an important decision, a formal memorandum would normally be presented to the senior executives laying out the concerns, issues, and considerations facing that business and making some strategic or tactical choice. (*Id.* at 1181, Nov. 8, 2011). Novell presented no evidence that any such memorandum was ever written, and Frankenberg testified that he knew of no evidence that Calkins, Mella, Moon, or Rietveld were presented with a decision about how to respond to Gates's decision to withdraw support for the namespace extension APIs. (*Id.* at 1181–82).[11] Instead, Novell assigned responsibility for supervising the writing of code for a custom file open dialog for WordPerfect and Quattro Pro to

[11] Rietveld, Calkins, Moon, and Mella did not testify at trial.

Gibb, a middle manager, who, in turn, assigned the responsibility for writing the code to Harral and Richardson.

Microsoft sought commitments from several of the most important ISVs to ship their Window 95–compatible applications within 90 days of the release of Windows 95. (*See* Pl.'s Ex. 148). Frederick Warren-Boulton, Novell's economic expert, testified that if Novell's product was shipped according to that timeframe, the application would have been "in pretty good shape," and that his damage calculations are based on the assumption that Novell could have released their product according to the agreement, but for the alleged anticompetitive conduct. (Warren-Boulton, Trial Tr. at 2417–24, Nov. 17, 2011).

According to Novell, because it took one year for Novell to write its customized file open dialog, Novell was unable to meet that timetable. (Novell Mem. Opp'n Rule 50 Mot. ("Novell Opp'n") at 69, ECF No. 501). Microsoft strongly disputes this assertion. It argues Quattro Pro—the spreadsheet component of PerfectOffice—was not ready to be released to manufacturing until well into 1996, and that this explains the delay in Novell's marketing of PerfectOffice. (*See* Microsoft Mem. Supp. Rule 50 Mot. ("Microsoft Mem.") at 48, ECF No. 494). An internal Novell memorandum indicated that although in late 1994 Novell had been considering a September 30, 1995, release date for PerfectOffice for Windows 95, the Quattro Pro team then "believe[d] this [was] barely achievable with all their resources and with no additional functionality." (Def.'s Ex. 211). On March 1, 1995, Bruce Brereton, Novell's Vice President of the Business Applications Unit, wrote in an email that because Quattro Pro believed that "December 30 is a more realistic date," Novell had decided to "move . . . the Storm [PerfectOffice for Windows 95] RTM [release to manufacturer] date back by one month (to December 30) and have put WP on the same time-line as Storm." (Def.'s Ex. 221).

In light of Brereton's email, Frankenberg testified that as of March 1, 1995 the plan became to get PerfectOffice out, i.e., released to manufacturing, on December 30, 1995. (Frankenberg, Trial Tr. at 1220–21, Nov. 8, 2011). In March 1995 a "markets requirement report" prepared by the applications group ranked "Quattro Pro delivering late" as the highest "overall risk" for the PerfectOffice development project. (Def.'s Ex. 223 at 41). David LeFevre, who was then an employee of Novell (he subsequently became an employee of Microsoft), testified that he attended daily meetings in 1995 with Gibb and others where the matters discussed included "all the different product challenges" of releasing PerfectOffice in a timely manner. (LeFevre, Trial Tr. at 4037, Dec. 2, 2011). According to LeFevre, "the product that was causing the biggest problem was Quattro Pro." (*Id.* at 4045–47).

Karl Ford, then the lead developer for the user interface in WordPerfect for Windows 95, also attended regularly scheduled meetings in 1995, and he learned that "the schedule" was at risk because of Quattro Pro. (Ford, Trial Tr. at 3691–92, 3699–3700, Nov. 30, 2011). The problem of having Quattro Pro ready to be released to manufacturing became even more severe toward the end of 1995, when many developers left Quattro Pro for other employment in Silicon Valley, the area where Scotts Valley—home of Quattro Pro—was located. (*See* Def.'s Ex. 230). On December 23, 1995, four months after the release of Windows 95, Brereton wrote an email to Frankenberg and others reporting that "this past Thursday/Friday about 15 additional people [at Quattro Pro] submitted their resignations," leaving the Quattro Pro development team in Scotts Valley, California with "just 2 people." (*Id.*). In January 1996, Nolan Larsen, an executive of Novell, traveled to Scotts Valley and found that it "was kind of a train wreck" and that "[t]hose people who had not resigned were kind of walking around a little bit shell shocked. So it was – it was very chaotic." (Larsen, Trial Tr. at 3620, Nov. 30, 2011). Larsen and LeFevre testified

that Quattro Pro was not ready to be shipped by March 1996. (*Id.* at 3624–25; LeFevre, Trial Tr. at 4062–63, Dec. 2, 2011).

Gibb, however, testified that Quattro Pro was not "critical path" because the delay in the development of shared code on which Harral and Richardson were working was the only issue holding up the release. (Gibb, Trial Tr. at 804–07, Oct. 26, 2011). Ultimately, Quattro Pro and PerfectOffice were not released until May 1996, after the sale to Corel Corporation in March 1996. As described in section III, *infra*, according to Novell, this delay prevented WordPerfect and PerfectOffice from obtaining a sizeable share of the Windows 95–compatible word processing and suite markets. This, in turn, Novell argues, prevented Novell products from becoming successful "middleware," which could have been an effective competitor with Windows 95 in the operating systems market.

On November 8, 2004, Novell and Microsoft entered into a settlement agreement under which any claims not pled in Novell's draft complaint in this action, filed Nov. 12, 2004, were released. (*See* Settlement Agreement, Holley Decl. Supp. Microsoft Mem., Ex. A, ECF No. 497). The complaint in this action asserted claims for damages suffered by Novell's "lost sales of office productivity applications and a diminution in value of Novell's assets, reputation and goodwill in amounts to be proven at trial." (Compl. ¶ 155). The complaint further alleged, in the prayer for relief, that Microsoft maintained its monopoly in three specific markets, the operating systems market, the word processing applications market, and the spreadsheet applications market. (*Id.* at 67).

II.

A Rule 50 motion "test[s] whether there is a legally sufficient evidentiary basis for a reasonable jury to find for the moving party." *Keylon v. City of Albuquerque*, 535 F.3d 1210,

1215 (10th Cir. 2008). Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2008) (citing *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996)); *see Miller v. Auto. Club of N.M., Inc.*, 420 F.3d 1098, 1131 (10th Cir. 2005) ("Judgment as a matter of law is only appropriate when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'") (quoting Fed. R. Civ. P. 50(a)(1)). All reasonable inferences are drawn in favor of the non-moving party, and the court does not "weigh the evidence, pass on the credibility of witnesses, or substitute [its] conclusions for that of the jury." *Miller v. Eby Realty Grp., LLC*, 396 F.3d 1105, 1110 (10th Cir. 2005). The decisive question is whether "the plaintiff has arguably proven a legally sufficient claim." *Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1219 (10th Cir. 2009).

III.

Novell's theory may be briefly stated. According to Novell, Microsoft violated § 2 of the Sherman Act when it decided in October 1994 to withdraw support for the namespace extension APIs, a decision that Novell asserts led to Microsoft's maintenance of its monopoly in the *operating systems* market.[12] This decision was made personally by Gates, who was motivated by a desire to provide time for Microsoft to catch up with Novell and Lotus in development of its office productivity applications, Word, Excel, and Office. (*See* Pl.'s Ex. 1). As a result of Microsoft's decision, Novell could no longer use the namespace extension APIs and lost valuable time in developing WordPerfect, Quattro Pro, and PerfectOffice. (*See* Rule 50 Hr'g Tr.

[12] To repeat, Novell's theory is not that the October 3, 1994 decision had an anticompetitive effect in the *applications* market in violation of § 2. Any claim based upon that theory is, as stated above, barred by limitations.

at 172–74, ECF No. 507). Novell was not able to put those applications on the market until May 1996. (*See* Warren-Boulton, Trial Tr. at 2090, Nov. 16, 2011). This had the effect of preventing WordPerfect and PerfectOffice from becoming effective competitors with Word and Office in the applications market. Moreover, in the longer run, by preventing Novell's applications from being widely used with Windows 95, the decision to withdraw support for the namespace extension APIs prevented WordPerfect and PerfectOffice (and two other Novell programs, AppWare and OpenDoc) from being accepted in the market as middleware. (*See* Rule 50 Hr'g Tr. at 119–27). If Novell's products had been accepted in the market as middleware, ISVs would have begun to write programs using APIs exposed by the Novell applications, thereby reducing the barrier to entry into the PC operating systems market and threatening Microsoft's monopoly in that market. (*Id.* at 194–96).

Microsoft argues that this theory is unique and unprecedented because it is based upon conduct that occurred in one market, the software *applications* market, to assert a Sherman Act § 2 claim in an entirely different market, the *operating systems* market. (*See id.* at 6). That alone, according to Microsoft, is fatal to Novell's claim. (*Id.*). Novell counters that although Microsoft, through Gates, was motivated by a desire to disadvantage Novell's applications in favor of Microsoft's own applications, its conduct was intentional, and a jury could appropriately find that its conduct had anticompetitive effects in the operating systems market. (*Id.* at 165–68). According to Novell, that is sufficient to establish a § 2 violation.

I need not decide this issue because, even assuming Novell's argument is correct, its claim nevertheless fails for three separate and independent reasons: (1) Microsoft's conduct was not anticompetitive within the meaning of the Sherman Act; (2) Novell did not present sufficient evidence from which a jury could find that its products would have been successfully developed

as middleware; and (3) there is no underlying business reality to the claims. Each of these reasons is examined in section V. Before discussing those issues, however, I will first address two arguments made by Microsoft that I believe lack merit.

IV.[13]

A.

Microsoft argues it has articulated legitimate business reasons for the decision Gates made on October 3, 1994, to withdraw support for the namespace extension APIs and that the fact-finder is not to weigh the factors that led to a particular decision in assessing whether that decision was a violation of antitrust laws. (*See* Microsoft Mem. at 110 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 605 (1985); *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns*, 63 F.3d 1540, 1550 (10th Cir. 1995))). The fallacy in that contention is that in this case, the jury was not asked to weigh the factors that Microsoft articulated in support of the October 3, 1994 decision, but rather to decide whether those articulated reasons were pretextual in light of Gates's email suggesting the decision was made to give Microsoft application developers time to catch up with Microsoft's major competitors, Novell and Lotus. Fact-finders are frequently called upon to answer this question of pretext, particularly in the field of employment discrimination law. *See, e.g., Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153–54 (2000) (holding that a plaintiff "introduced enough evidence for a jury to reject [the defendant's explanation]" as pretextual); *Townsend v. Lumbermens Mut. Cas. Co.*, 204 F.3d 1232, 1243–44 (10th Cir. 2002) (holding that a jury "could reasonably have found" a defendant employer's stated reasons for demoting an employee "were

[13] Microsoft also makes several arguments to the effect that Novell did not present sufficient evidence of damages. These arguments are, however, in large part merely different iterations of other contentions I address in section V.

pretextual, potentially entitling him to a finding of discrimination").

Here, although I am granting Microsoft's Rule 50 motion for the reasons stated in section V, I believe the text of Gates's email provides sufficient evidence upon which a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual. Therefore, if the only question raised by the Rule 50 motion were whether the jury was asked to weigh the factors that led Microsoft to make the October 3, 1994 decision, I would deny the Rule 50 motion.

B.

As stated in section I, *supra*, on November 8, 2004, Microsoft and Novell entered into a settlement agreement pursuant to which Novell released any and all claims it had against Microsoft with the exception of claims asserted in a draft complaint that became the complaint in this action. In Count I of the complaint (the only count remaining in the case), Novell alleged that as a result of Microsoft's alleged misconduct, it "was damaged by, without limitation, lost sales of office productivity applications and a diminution in the value of Novell's assets, reputation, and goodwill in amounts to be proven at trial." (Compl. ¶ 155). The term "office productivity applications" is defined earlier in the complaint as "word processing and spreadsheet applications." (*Id.* ¶ 24).

Microsoft argues that because the only Novell applications allegedly damaged by Microsoft's alleged misconduct were the word processing application, WordPerfect, and spreadsheet application, Quattro Pro, Novell released Microsoft from any claim that it had for damages to Novell's office productivity suite, PerfectOffice. (*See* Microsoft Mem. at 126–27). Microsoft also points out that the complaint does not refer in any way to the suite market. (*See id*. at 128–30).

In entering into the release—which certainly was a significant business transaction—Microsoft had the right to rely upon the language of the release and the language of the draft complaint referred to in the release. Those documents made no reference whatsoever to PerfectOffice. Moreover, in deciding to enter into the settlement agreement, Microsoft may have considered the omission of any reference to PerfectOffice to be significant because, as the evidence at trial established, by 1994 it was clear that the office suite market stood separate and apart from the word processing and spreadsheet applications markets. (*See* Gibb, Trial Tr. at 823, Oct. 26, 2011; Frankenberg, Trial Tr. at 1080, Nov. 7, 2011). As Frankenberg's testimony highlighted during the trial, Novell as well as Microsoft understood the importance of the suite market in 1994. Frankenberg testified that in 1994 approximately three-quarters of the suite market was open, and Novell was planning to make substantial inroads into it. (*See* Frankenberg, Trial Tr. at 1008–09, 1063, Nov. 7, 2011; Pl.'s Ex. 412 at 2).

Nevertheless, Microsoft's argument fails. The complaint referred not only to damages resulting from lost sales of office productivity applications but also damages resulting from "a diminution in the value of Novell's assets, reputation, and goodwill in amounts to be proven at trial." (Compl. ¶ 155). Novell's damages expert, Frederick Warren-Boulton, did not calculate damages on a product-by-product basis but instead on the basis of the decrease in the sales price paid to Novell by Corel, allegedly caused by Microsoft's withdrawal of support for the namespace extension APIs. (*See* Warren-Boulton, Trial Tr. at 2094–98, Nov. 16, 2011). This decrease in sales price falls well within the "diminution in value" category of damages referred to in the complaint and thus was not released by the agreement entered into November 8, 1994.

V.[14]

I will now discuss the three reasons Microsoft's Rule 50 motion should be granted.

A.

A monopolist is free "to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). It is well established that a monopolist generally has no duty to cooperate with its competitors. *See, e.g.*, *Trinko*, 540 U.S. at 408; *Aspen Skiing*, 472 U.S. at 600; *Image Technical Servs., Inc., v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997). In accordance with this principle, Novell's counsel properly conceded during the hearing on Microsoft's Rule 50 motion that it would not have been unlawful for Microsoft to keep the namespace extension APIs to itself and never disclose them to ISVs. (Rule 50 Hr'g Tr. at 191–92). Novell argues, however, that Microsoft's conduct was anticompetitive within the meaning of § 2 of the Sherman Act because when it decided to withdraw support for the namespace extension APIs in October 1994, it intentionally made a decision that had an adverse effect upon competition in the operating systems market. (*See id.* at 165–68).

The distinction Novell seeks to draw is unpersuasive. A decision not to publish the namespace extension APIs in the first place is as "intentional" as a decision to withdraw support for the namespace extension APIs after they have been published. Therefore, the principle that a monopolist generally has no duty to cooperate with a competitor governs unless the act of withdrawing support for the namespace extension APIs was itself anticompetitive.[15]

[14] Some of the facts stated in section I are repeated in sections IV and V in connection with the portions of the legal analysis to which they pertain.

[15] Prior to the hearing on the Rule 50 motion, Novell contended that the act of withdrawing

The decision to withdraw support for the namespace extension APIs therefore did not constitute a violation of § 2 of the Sherman Act unless it was made deceptively for an anticompetitive purpose or unless, by making it, Microsoft terminated a previously existing profitable relationship.[16] *See, e.g.*, *Aspen Skiing*, 472 U.S. at 599–604; *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1224–25 (10th Cir. 2009); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009).

Any deception claim necessarily is based upon the premise that Microsoft withdrew support for the namespace extension APIs because it knew that Novell was using those APIs in the development of its applications and that, by withdrawing support for those APIs, Microsoft knew that Novell would fall behind schedule. There is no evidence to support this premise.[17]

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support for the namespace extension APIs was itself an unlawful act because beta versions of a release cannot be modified except to fix bugs discovered during the course of the beta process. However, as I noted in section I, *supra*, Novell did not press this contention at the Rule 50 hearing, and it is unsupported by the evidence.

[16] Microsoft argues that while deception may give rise to a common law tort, it cannot, as a matter of law, form the basis for a Sherman Act claim. Although deception usually sounds in tort, *see* Restatement (Second) of Torts § 526 (1977) (defining fraudulent misrepresentation/deceit), I see no reason it could not also give rise to an antitrust claim if the purpose of the deception is to mislead a competitor into taking action (or not taking action) that would substantially change the competitive environment. Microsoft distinguishes cases in which deceptive conduct has given rise to antitrust liability on the grounds that such cases typically involve deception of third parties, not competitors. *See Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'n, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997); *Int'l Travel Arrangers, Inc. v. W. Airlines*, 623 F.2d 1255, 1260–63 (8th Cir. 1980). Those cases, however, do not turn on the identity of the party deceived but on whether the challenged conduct in fact harmed competition. *See Rambus, Inc., v. Fed. Trade Comm'n*, 522 F.3d 456, 464 (D.C. Cir. 2008) ("Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim. . . . Cases that recognize deception as exclusionary hinge, therefore, on whether the conduct impaired rivals in a manner tending to bring about or protect a defendant's monopoly power.").

[17] What the evidence, specifically Gates's email announcing the decision to withdraw support for the namespace extension APIs, does suggest is that Microsoft was attempting to buy time for its own office productivity application developers to catch up, so that eventually Microsoft could use the enhanced technology created by Windows 95 as effectively (and potentially, by integration of the applications and the operating system, more effectively) as its major

First, as just stated, because of the undisputed industry practice, Microsoft had no reason to believe that Novell was relying upon the documentation for the namespace extension APIs contained in the beta version Microsoft released to ISVs. (*See* Def.'s Ex. 17 at MX 6109491). Second, the evidence establishes that shortly before the decision to withdraw the namespace extension APIs was made, Brad Struss of Microsoft was advised that Novell was not yet using the namespace extension APIs, (*id.*), and that after the decision, he contacted Novell and was notified that "WP . . . appear[s] to be OK with this." (Def.'s Ex. 3 at MX 6055840). Likewise, Struss testified at trial that he told others at Microsoft "what [he] knew to be true or what had been communicated to [him] from WordPerfect, which is that they were not using it and they were not dependent upon it." (Struss, Trial Tr. at 3270, Nov. 28, 2011). Novell did not rebut this evidence in any way, and there is no evidence that Novell made any contemporaneous complaint to anyone at Microsoft about withdrawal of support for the namespace extension APIs.

The claim that Microsoft purposely destroyed a preexisting profitable business relationship is equally flawed. Preliminarily, it should be noted that *Aspen Skiing*, upon which Novell bases its argument, has been characterized by the Supreme Court as being "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409. The facts in *Aspen Skiing* were unusual, involving a defendant's exploitation of a situation largely bestowed upon it by Mother Nature. The defendant owned three mountains in a ski resort area and engaged in sharp business practices to prevent the owner of the fourth mountain from competing effectively for skiing

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competitors, including Novell. That, however, is quite different from imputing to Microsoft knowledge that Novell needed the namespace extension APIs to develop its own applications. Of course, in fact, as the evidence established, Novell could have used Microsoft's common file open dialog, which remained available to it after support for the namespace extension APIs was withdrawn, to develop its applications. According to Novell, those programs simply would not be as good as they could have been if Microsoft had continued to make its own technology available to Novell.

business. *See Aspen Skiing*, 472 U.S. at 589–95. In contrast, what Novell is asserting here is that Microsoft could not withdraw from Novell a product that was the result of Microsoft's own ingenuity and that Novell believed would give it optimal advantage in its competition with Microsoft in the applications market.

There is no evidence that Microsoft withdrew support for the namespace extension APIs for the purpose of terminating its relationship with Novell. The final version of Windows 95 made available to all ISVs, including Novell, contained Microsoft's common file open dialog, and Novell never advised Microsoft that this dialog was insufficient for its own purposes. (*See* Harral, Trial Tr. at 502, Oct. 24, 2011; Gibb, Trial Tr. at 847–49, Oct. 26, 2011; Alepin, Trial Tr. at 1604, Nov. 10, 2011). Moreover, after it withdrew support for the namespace extension APIs, Microsoft continued to provide assistance to Novell and never terminated their relationship. (Struss, Trial Tr. at 3253–54, 3259–69, Nov. 28, 2011; Def.'s Ex. 2 at MX 6062581; *see* Frankenberg, Trial Tr. at 1131, Nov. 7 , 2011 (stating that he is "sure" people in the operating system group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95)).

For these reasons, Novell has not created a jury question on the issue of whether Microsoft's conduct was anticompetitive.

B.

The evidence is undisputed that during 1995 Novell's focus was on writing office productivity programs that would run on Windows 95. In Novell's view, Microsoft's new operating system was a "significant step forward" and a "wonderful evolution" in technology. (Harral, Trial Tr. at 253–54, 256–57, Oct. 20, 2011; Frankenberg, Trial Tr. at 1225–26, Nov. 8, 2011; *see* Gibb, Trial Tr. at 788, Oct. 26, 2011; Noll, Trial Tr. at 1911, Nov. 15, 2011).

Therefore, as Frankenberg acknowledged, in the short term Microsoft's share of the operating systems market would have increased, not decreased, if it had not withdrawn support for the namespace extension APIs. (*See* Frankenberg, Trial Tr. at 1226–28, Nov. 8, 2011; Noll, Trial Tr. at 1949–50, Nov. 15, 2011).[18]

Therefore, Novell's theory necessarily is that the anticompetitive effects it alleges did not occur until sometime after 1995. Novell has never specified exactly when those effects did occur. Novell sold WordPerfect to Corel in March 1996, and there is no evidence that by that time there was any operating system on the market comparable to Windows 95 to which Novell planned to write its applications or for which those applications could have been written. That fact, however, may not be dispositive because Novell's damages claim is based upon the alleged diminution in the value of its assets caused by Microsoft's conduct. Presumably, Corel would

[18] Novell argues that Microsoft's willingness to sacrifice the short-term profits it would have earned from increased sales of Windows 95 to customers who would buy the operating system if it ran Novell's applications constituted a classic hallmark of anticompetitive behavior because monopolists are assumed to be rational, and the sacrifice of short-term profits can be explained only by the desire to reap long-term gains by maintaining the monopoly. *See, e.g.*, *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 635 F. Supp. 1287, 1309 (D. Kan. 1986), *aff'd*, 899 F.2d 951 (10th Cir. 1990). The flaw in this argument is that there is no evidence that Microsoft sacrificed any short-term profits by withdrawing support for the namespace extension APIs. Novell's own theory is that support for the APIs were withdrawn to prevent a decline of sales of Microsoft's office productivity programs (Word, Excel, and Office) because Novell and Lotus would have been able to put products superior to them on the market if support for the namespace extension APIs had not been withdrawn. Thus, assuming that Microsoft's revenues from the sale of Windows 95 might have slightly declined because a limited number of purchasers would not buy Windows 95 unless there were Novell applications made for Windows 95, there is no basis for inferring that the decline of revenues would not have been more than offset by an increase of revenues in the sales of Word, Excel, and Office.

I recognize that this conclusion may appear somewhat disturbing because arguably it rewards Microsoft for unsavory behavior in the applications market. Nevertheless, the reasoning is sound. Although the proposition upon which Novell relies makes eminent sense as a matter of theory, it is based upon a factual inference about how a rational actor would behave, and here the evidence does not support the inference. Moreover, Novell has only itself to blame for the quandary in which it finds itself because it was its own delay in filing this action that resulted in its claims in the applications market being barred by limitations. *See Novell*, 2005 WL 1398643, at *5.

have paid more for what it bought if by that time Microsoft had not, as Novell alleges, effectively destroyed Novell's applications and prevented them from being cross-platformed to other operating systems then under development. Therefore, I will assume, as Novell implicitly argues, that within a reasonable period of time after Windows 95 was put on the market (say two or three years), another operating system would have come into existence to which Novell's office productivity products could have been written.[19]

In asserting that it could and would have written to an operating system other than Windows 95 within a reasonable period of time after 1995, Novell relies upon two theories: the "franchise theory" and the "middleware theory."

(1)

In advancing the franchise theory, Novell posits that its applications were so popular that if Microsoft had not withdrawn support for the namespace extension APIs, Novell's applications would have flourished in the market, regardless of the operating system on which they ran. There is no evidence to support this theory. In fact, it is contradicted by the record.

First, Novell recognized that Windows 95 was a superior operating system, constituting a

[19]Although I accept this assumption, it is problematic. While the evidence is undisputed that historically WordPerfect had been cross-platformed to various operating systems, (*see* Harral, Trial Tr. at 216, Oct. 20, 2011; Gibb, Trial Tr. at 776–77, 781, Oct. 26, 2011; Frankenberg, Trial Tr. at 994–97, Nov. 7, 2011), this is not an instance in which it can reasonably be said that the past is a prologue of the future, particularly in light of the technological breakthrough that Novell acknowledges Windows 95 achieved. Likewise, although Harral and Gibb testified that looking into the future Novell intended to make the PerfectOffice suite cross-platform after the initial release of PerfectOffice for Windows 95, (Harral, Trial Tr. at 371, Oct. 24, 2011; Gibb, Trial Tr. at 787, Oct. 26, 2011), mere intent and aspiration do not provide sufficient evidence that, in fact, Novell's applications would have been cross-platform. Moreover, although one of Novell's experts testified that Linux "became a full-fledged, commercial product" in 1996, (Noll, Trial Tr. at 1961, Nov. 15, 2011), the version of WordPerfect for Linux that Corel released in the spring of 1996 was an older version of WordPerfect that did not contain the same shared code as the version of WordPerfect developed for Windows 95. (Murphy, Trial Tr. at 4914–16, Dec. 8, 2011). As such, it was inferior to the WordPerfect application that ran on Windows 95. (*Id.*).

"significant step forward." (Frankenberg, Trial Tr. at 1225–26, Nov. 8. 2011). In light of that fact, there is no basis for inferring that office productivity applications Novell developed that did not draw upon the superior functionality of Windows 95 would have been as successful as the applications that ran on Windows 95.

Second, historical data disprove Novell's claim. WordPerfect was extremely popular in the 1980s and early 1990s when it ran on many non-Microsoft operating systems. (Peterson, Trial Tr. at 4667, Dec. 7, 2011; *see* Middleton, Trial Tr. at 4178 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011). However, this popularity did not diminish Microsoft's share of the PC operating systems market, which was approximately 90% during that period. (Noll, Trial Tr. at 1329–30, Nov. 15. 2011; Murphy, Trial Tr. at 4722–23, Dec. 7, 2011; Finding of Fact ¶ 35). On this record, it cannot reasonably be inferred that if in the years after 1995 Novell's applications ran on operating systems other than Windows, that fact would have challenged Microsoft's monopoly in the PC operating systems market.

(2)

Novell's second argument is its middleware theory. For a middleware product to have an impact on competition in the PC operating systems market, the product (1) must be cross-platformed to various operating systems; (2) must be ubiquitous on the "dominant operating system"; and (3) must expose a sufficient number of APIs of its own to entice ISVs to write applications to it rather than to the operating system on which it sits. (*See* Noll, Trial Tr. at 1923–26, Nov. 15, 2011; Finding of Fact ¶ 28). Novell's office productivity applications did not meet any of these requirements.

As to the first requirement, assuming that within a reasonable period of time after 1995 effective operating systems would have come into existence to which Novell's office

productivity applications could have been written, there is no basis for inferring that Novell's office productivity applications written for Windows 95 via the namespace extension APIs could have been effectively ported to those systems. This is so because the namespace extension APIs were, as Novell's own technical expert testified, "platform specific" to Windows. (Alepin, Trial Tr. at 1482–83, 1532–33, Nov. 9–10, 2011; *see* Murphy, Trial Tr. at 4783–84, Dec. 7, 2011; Bennett, Trial Tr. at 5023, Dec. 12, 2011 (stating that "namespace extension APIs . . . [were] a unique component of Windows 95")).

As to the second requirement, although the parties agree that the dominant operating system was Windows 95, they disagree as to the meaning of ubiquity. Microsoft contends it means that Novell's software had to run on "all or nearly all PCs running the 'dominant operating system.'" (Microsoft Mem. at 73–75; Microsoft Reply Supp. Rule 50 Mot. at 37–39, ECF No. 503). Novell argues that "something less than that" might be sufficient "by weakening, though not eliminating, the applications barrier to entry." (Novell Opp'n at 90 (quoting Noll, Trial Tr. at 1926, Nov. 15, 2011)). Novell provided no evidence as to what this lesser threshold might be.

In any event, under either definition of ubiquity, the evidence is clear that Novell's office productivity applications would never have been ubiquitous on Windows 95. In 1995, prior to the release of Windows 95, WordPerfect had roughly a 15% share of the Windows-compatible word processing market, and PerfectOffice had less than a 5% share of the Windows-compatible suite market.[20] (*See* Holley Decl. Supp. Microsoft Mem., Exs. G & K, ECF Nos. 495–7, 495–11). WordPerfect's share of the word processing market at the end of 1994 was substantially

[20] According to Microsoft expert Kevin Murphy, these market share numbers must be further reduced by approximately 50% because office suites or any of their component applications were installed on only one-half of all PCs. (Murphy, Trial Tr. at 4750, Dec. 7, 2011).

greater—approximately 36%—if one includes the installed base of PCs using the DOS platform. (*See* Pl.'s Ex. 599A at tbl. 13). However, 36% is only 36%, and it is entirely speculative to assume, as Novell apparently does, that its applications would have increased to a substantially greater number of computers using Windows if Microsoft had not withdrawn support for the namespace extension APIs.[21] This assumption is made even more speculative by the fact that an internal Novell memorandum dated April 14, 1995, stated that "only 30% of th[e] WordPerfect for DOS installed base is remaining with WordPerfect as they transition to a Windows word processor." (Def.'s Ex. 224 at 20).

The parties also disagree about the meaning of the third requirement. Microsoft argues that to constitute middleware, an application must "expose a sufficiently broad set of APIs to enable ISVs profitably to develop *full-featured* personal productivity applications that rely solely upon those APIs exposed by the middleware." (Microsoft Mem. at 70 (emphasis added)). Novell, on the other hand, relying upon the testimony of Roger Noll, its antitrust expert, and

[21] Novell's reliance upon the DOS installed base also raises a significant question as to whether Novell assigned the claims asserted in this action to Caldera, Inc. when it sold its DOS business to Caldera. In the Asset Purchase Agreement it made with Caldera, Novell transferred "all of Novell's right, title, and interest in and to any and all claims or causes of action held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products or Related Technology." (*See* Asset Purchase Agreement, Holley Decl. Supp. Microsoft Mem., Ex. P, at 4–5, ECF No. 495–16). I previously ruled that this assignment encompassed the operating systems monopoly claim asserted in this action because the claim asserted here arose in the operating systems market in which DOS had competed. *See In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d 730, 739 (D. Md. 2010). The Fourth Circuit reversed my ruling. *See Novell, Inc. v. Microsoft Corp.*, 419 F. App'x. 254, 261 (4th Cir. 2011). I remain bound by that decision. If the Tenth Circuit finds resolution of the issue to be necessary to its decision on Microsoft's Rule 50 motion, however, it may conclude that the law of the case doctrine does not apply and that it may revisit the Fourth Circuit's ruling because the evidence presented at trial is more extensive than was the evidence in the summary judgment record upon which the Fourth Circuit relied. Specifically, the Tenth Circuit might decide that because, as the record now reflects, Novell's claim depends in large part upon the conversion of its share of the DOS installed base into a significant share of the Windows market, that claim is "associated directly or indirectly with . . . the DOS Product or Related Technology" and thus was transferred to Caldera.

Ronald Alepin, its technical expert, contends that the third element is satisfied if the application "expose[s] a wide range of APIs and sophisticated functionality to developers." (Novell Opp'n at 28). Novell concedes that if Microsoft's interpretation of the meaning of the third element is correct, Microsoft is entitled to judgment as a matter of law because Novell did not present evidence to show that its software exposed sufficient APIs of its own to allow ISVs to write full-featured personal products applications to it. (Trial Tr. at 5436–37, 5439, Dec. 15, 2011). Thus, on this issue, whether Microsoft is entitled to judgment in its favor on the Rule 50 motion turns on the meaning of the third requirement.

Microsoft's position is based upon the Findings of Fact made in the government case, upon which Novell's claim is founded. Judge Jackson found that "[c]urrently, no middleware product exposes enough APIs to allow independent software vendors ("ISVs") profitably to write full-featured personal productivity applications that rely solely on . . . APIs [of the middleware product itself]." Finding of Fact ¶ 28. In contrast, Novell argues the exposure of APIs that would result in "something less" than the writing of full-featured personal product applications is sufficient to constitute a threat to Microsoft's monopoly. (Novell Opp'n at 89–90). This argument is based on the concept, expressed by Noll, that diminishing, as opposed to nearly eliminating, the barrier to entry that protected Microsoft's monopoly in the PC operating systems market was itself sufficient. (Noll, Trial Tr. at 1926, Nov. 15, 2011). To the extent this testimony is based on the premise that other companies would produce similar middleware that, in combination with Novell's products, would diminish the barrier to entry, there is no evidence such other products existed.

Although in other circumstances conduct directed at reducing a barrier to entry might constitute a violation of § 2 of the Sherman Act, under the facts of this case, I find Novell's

reasoning to be unpersuasive. The findings made in the government case made clear that Microsoft possessed its monopoly by virtue of what Judge Jackson described as a "chicken-and-egg" problem. As Judge Jackson described:

> The overwhelming majority of consumers will only use a PC operating system for which there already exists a large and varied set of high-quality, full-featured applications, and for which it seems relatively certain that new types of applications and new versions of existing applications will continue to be marketed at pace with those written for other operating systems. Unfortunately for firms whose products do not fit that bill, the porting of applications from one operating system to another is a costly process. Consequently, software developers generally write applications first, and often exclusively, for the operating system that is already used by a dominant share of all PC users. Users do not want to invest in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it.

Finding of Fact ¶ 30. Other findings made by Judge Jackson are to the same effect. *See* Findings of Fact ¶¶ 36, 37, 39, 40.[22]

In light of these findings, it cannot be reasoned, as Novell argues, that Microsoft's

[22] The barrier to entry issue was eloquently described, from a business point of view, in an email sent on August 17, 1997, by Jeff Raikes, then a Microsoft executive, to Warren Buffett. (Pl.'s Ex. 360 at MS-PCA 1301176). In the email, Raikes wrote of the importance of "widen[ing] the moat," i.e. increasing the barrier to entry, by tying together Microsoft's applications and Windows. I admitted the email into evidence despite the fact that it was not written until after the events that gave rise to this action on the ground that the jury might find it reflected the views of Microsoft's executives during the relevant time period.

Novell referred to the email at trial and has likewise referred to it in opposing Microsoft's Rule 50 motion. In the event that the Tenth Circuit reverses my ruling that Microsoft's Rule 50 motion should be granted, it would be helpful in the retrial of this case if the Tenth Circuit were to decide whether the Raikes email was properly admitted. It would also be helpful, in the event of a reversal of my Rule 50 ruling, if the Tenth Circuit resolved a disagreement between the parties as to the proper causation standard. Microsoft contends that the standard that should be applied is whether its decision to withdraw support for the namespace extension APIs "contributed significantly to its continued monopoly power." (Microsoft Mem. at 82). Conversely, Novell contends that the appropriate standard is whether Microsoft's decision was "reasonably capable of contributing significantly" to Microsoft's monopoly power. (Novell Opp'n at 94–95). In reaching my decision, I have not found it necessary to resolve this issue.

operating systems monopoly would have been threatened by a middleware product that exposed only a limited number of APIs that permitted ISVs to write only a specialized set of applications to it. The barrier to entry that Judge Jackson found in the government case was created by a "chicken-and-egg" problem, and that problem arose because ISVs would write only to programs that supported full-featured personal productivity applications. *See* Finding of Fact ¶ 30. In other words, contrary to what Novell argues in support of what Microsoft has aptly described as its "watered-down version" of the third requirement, Microsoft's monopoly in the PC operating systems market was threatened not by a product that exposed only a limited number of its own APIs but only by a product that exposed sufficient APIs to entice full-featured applications to be written to it. (*See* Microsoft Mem. at 77–78). Otherwise stated, *diminishment* of the barrier to entry is not sufficient because mere diminishment would not have affected the PC operating systems market. In order to constitute a realistic threat to Microsoft's monopoly in that market, *elimination* (or, at least, near elimination) of the barrier to entry through development of full-featured applications using APIs from middleware that ran on operating systems other than Windows was required.

In sum, Novell did not present sufficient evidence from which a reasonable jury could find that its applications could have successfully developed into middleware that threatened Microsoft's monopoly in the operating systems market.

C.

Claims asserted under the Sherman Act, like any other claim asserted in a court, are not cognizable simply because they are theoretically coherent. They must also be based on fact. Here, the absence of any evidence suggesting that the withdrawal of support for Microsoft's namespace extension APIs was the source of any contemporaneous urgency at Novell reflects

that the claim Novell asserts is a lawyers' construct and is not based on an underlying business reality.[23]

First, as stated in section I, *supra*, there is no evidence that anyone at Novell made any complaint to anyone at Microsoft who could have reversed the decision to withdraw support for the namespace extension APIs.

Second, as also stated in section I, there is no evidence that any top-level executive was involved in the decision-making process concerning the writing of shared code for WordPerfect. Frankenberg testified that any action that could jeopardize the timely release of WordPerfect or Quattro Pro would generally have been referred to some or all of four senior executives. (Frankenberg, Trial Tr. at 1140–42, 1179–80, Nov. 7–8, 2011). Novell presented no evidence that any memorandum was written to those executives, and Frankenberg testified that he knew of no evidence whatsoever that any of the four executives were presented with a decision about how to respond to Gates's decision to withdraw support for the namespace extension APIs. (*Id.* at 1181–82, Nov. 8, 2011). Instead, Novell assigned responsibility for writing shared code for

[23] This statement is not meant as an unfavorable observation about Novell's counsel. They have skillfully and energetically pursued a claim that I have concluded is not supported by the evidence. It is not, however, frivolous. Likewise, my statement is not intended to reflect badly upon Novell. The evidence presented at trial showed that Novell simply did not believe the deadline of bringing applications to market within 90 days of the release of Windows 95—a deadline that was dictated solely by marketing considerations—was material to the success of Novell's applications. The tradition and culture at WordPerfect had been to develop better products than WordPerfect's competitors, and to depend upon the high quality of those products to achieve market success. Therefore, it is not surprising that Gibb, Harral, and Richardson—who had been employed by WordPerfect prior to its sale to Novell—would have been primarily concerned about delivering the best software applications they could write, even if that entailed some delay. Unfortunately, economic realities, including cost-cutting measures Novell felt compelled to take, were collapsing the world to which they had been accustomed and were destroying Novell's ability to provide hand-tailored products and services to its customers. (Frankenberg, Trial Tr. at 1097–98, Nov. 7, 2011; Bushman, Trial Tr. at 3161–62, Nov. 28, 2011; Acheson, Trial Tr. at 3968, 3972, Dec. 2, 2011; LeFevre, Trial Tr. at 4024–26, Dec. 2, 2011; Def.'s Exs. 15–16).

WordPerfect and Quattro Pro to a middle manager, Gibb, who, in turn, assigned the responsibility to only two programmers, Harral and Richardson. However valiant the efforts of Harral and Richardson, if being ready to release WordPerfect, Quattro Pro, and PerfectOffice within 90 days of Microsoft's release of Windows 95 was as critical as Novell now claims it to have been, Novell clearly would have implemented a different development plan.

Third, although Gibb testified that Quattro Pro was "code complete" in time for the release of Quattro Pro and PerfectOffice within 90 days of Microsoft's release of Windows 95,[24] because of the mass exodus of programmers at Novell's facility in Scotts Valley, California, Quattro Pro was not ready for release to manufacturing until 1996. (Gibb, Trial Tr. at 806–09, Oct. 26, 2011; Frankenberg, Trial Tr. at 1145, Nov. 7, 2011; Def.'s Ex. 230).

Fourth, if, as Novell now argues, the 90-day period after the release of Windows 95 was critical to the success of WordPerfect, Quattro Pro, and PerfectOffice, Novell could have released those products using Microsoft's common file open dialog. In fact, Ford and LeFevre testified that they urged Gibb to pursue that option. (Ford, Trial Tr. at 3710–11, Nov. 30, 2011; LeFevre, Trial Tr. at 4041–43, Dec. 2, 2011).

In short, no reasonable jury could find, on the basis of the evidence presented at trial, that Microsoft's withdrawal of support for the namespace extension APIs caused Novell's failure to develop its applications within 90 days of the release of Windows 95.

[24] Gibb's testimony that Quattro Pro was code complete in time for Quattro Pro and PerfectOffice to be released on schedule is subject to serious question, in light of the facts stated in section I, *supra*.

VI.

For these reasons, Microsoft's Rule 50 motion will be granted. A separate order to that effect is being entered herewith.

Date: July 16, 2012 ____/s/_____

J. Frederick Motz
United States District Judge

ATTACHMENT 2

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

NOVELL, INC.	*	
	*	
v.	*	Civil No. 2:04-cv-01045-JFM
	*	
MICROSOFT CORP.	*	
	*****	

ORDER

For the reasons stated in the accompanying Opinion, it is, this 16th day of July 2012

ORDERED

1. The motion filed by Microsoft Corp. under Fed. R. Civ. P. 50(b) is granted; and

2. Judgment is entered in favor of Microsoft Corp. and against Novell, Inc.

____/s/_____
J. Frederick Motz
United States District Judge

ATTACHMENT 3

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

NOVELL, INC.	*	
	*	
v.	*	Civil No. 2:04-cv-01045-JFM
	*	
MICROSOFT CORP.	*	
	*****	

ORDER

For the reasons stated in the accompanying Opinion, it is, this 16th day of July 2012

ORDERED

1. The motion filed by Microsoft Corp. under Fed. R. Civ. P. 50(b) is granted; and

2. Judgment is entered in favor of Microsoft Corp. and against Novell, Inc.

____/s/_____
J. Frederick Motz
United States District Judge