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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	NOVELL'S OPPOSITION TO MICROSOFT'S
Plaintiff,	*	MOTION CONCERNING THE PROPER
	*	SCOPE OF EXPERT TESTIMONY
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THE FOURTH CIRCUIT HAS RULED THAT DR. NOLL'S TESTIMONY SHOULD BE PRESENTED TO THE JURY 3

A. Dr. Noll's Testimony 3

B. Microsoft's Challenge to Dr. Noll's Testimony Has Already Been Rejected 6

C. Dr. Noll Should Be Permitted to Testify About the "Moat" Theory Endorsed by the Fourth Circuit and Confirmed in the Government Case 11

D. Tenth Circuit Precedent Supports the Rulings of This Court and the Fourth Circuit; It Adopts the "Reasonably Capable" Standard 12

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985).....14

Aventis Environmental Science USA LP v. Scotts Co.,
383 F. Supp. 2d 488 (S.D.N.Y. 2005).....2

Barry Wright Corp. v. ITT Grinnell Corp.,
724 F.2d 227 (1st Cir. 1983) (Breyer, J.).....13

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982).....14, 15

Capps v. Sullivan,
13 F.3d 350 (10th Cir. 1993) 10

Carter v. Massey-Ferguson, Inc.,
716 F.2d 344 (5th Cir. 1983) 5

Cnty. of Suffolk v. Stone & Webster Eng'g Corp.,
106 F.3d 1112 (2d Cir. 1997).....10

Conwood Co. v. United States Tobacco Co.,
290 F.3d 768 (6th Cir. 2002) 2

CTC Commc'ns Corp. v. Bell Atl. Corp.,
77 F. Supp. 2d 124 (D. Me. 1999) 13

Cytologix Corp. v. Ventana Med. Sys., Inc.,
Nos. 00-12231-RWZ, 01-10178-RWZ, 2006 WL 2042331 (D. Mass. July 20, 2006) 13

Data Gen. Corp. v. Grumman Sys. Support Corp.,
36 F.3d 1147 (1st Cir. 1994), *abrogated on other grounds by*
Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) 6-7, 13

Fiataruolo v. United States,
8 F.3d 930 (2d Cir. 1993) 4

Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.,
806 F.2d 953 (10th Cir. 1986) 14

Hertz Corp. v. Enter. Rent-A-Car Co.,
557 F. Supp. 2d 185 (D. Mass. 2008) 13

Page

Hewlett-Packard Co. v. Boston Scientific Corp.,
77 F. Supp. 2d 189 (D. Mass. 1999) 13

Huffman v. Saul Holdings Ltd. P'ship,
262 F.3d 1128 (10th Cir. 2001) 8, 10

Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.,
817 F.2d 639 (10th Cir. 1987) 13

Klay v. All Defendants,
389 F.3d 1191 (11th Cir. 2004) 10

Lantec, Inc. v. Novell, Inc.,
146 F. Supp. 2d 1140 (D. Utah 2001).....13

Lantec, Inc. v. Novell, Inc.,
No. 2:95-CV-97-ST, 2001 U.S. Dist. LEXIS 24816 (D. Utah Feb. 13, 2001),
aff'd, 306 F.3d 1003 (10th Cir. 2002).....5

LePage's Inc. v. 3M,
324 F.3d 141 (3d Cir. 2003).....14

Morgan v. Ponder,
892 F.2d 1355 (8th Cir. 1989) 7, 13

Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.,
63 F.3d 1540 (10th Cir. 1995) 13, 14

Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.,
311 F. Supp. 2d 1048 (D. Colo. 2004).....13

Novell, Inc. v. Microsoft Corp.,
505 F.3d 302 (4th Cir. 2007) 11

Novell, Inc. v. Microsoft Corp.,
429 F. App'x 254 (4th Cir. 2011) 1, 8

Novell, Inc. v. Microsoft Corp. (In re Microsoft Antitrust Litig.),
699 F. Supp. 2d 730 (D. Md. 2010), *aff'd in relevant part, rev'd in part*
on other grounds, 429 F. App'x 254 (4th Cir. 2011)..... *passim*

Orient Mineral Co. v. Bank of China,
No. 2:98-CV-238BSJ, 2010 WL 624868 (D. Utah Feb. 19, 2010),
aff'd, 416 F. App'x 721 (10th Cir. 2011),
cert. denied, --- U.S. ----, 2011 WL 4533788 (Oct. 3, 2011).....8, 9

Page

Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.,
No. 1:05-CV-64 TS, 2010 WL 3743677 (D. Utah Sept. 20, 2010) 5

Procter & Gamble Co. v. Haugen,
317 F.3d 1121 (10th Cir. 2003) 9

PSI Repair Servs., Inc. v. Honeywell, Inc.,
104 F.3d 811 (6th Cir. 1997) 13

Ramsey v. Culpepper,
738 F.2d 1092 (10th Cir. 1984) 5

Rohrbaugh v. Celotex Corp.,
53 F.3d 1181 (10th Cir. 1995) 9, 10

S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.,
740 F.2d 980 (D.C. Cir. 1984) 13

Taylor Publ'g Co. v. Jostens, Inc.,
216 F.3d 465 (5th Cir. 2000) 13

Town of Concord, Mass. v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 13

Tunica Web Adver., Inc. v. Barden Miss. Gaming, LLC,
No. Civ.A.2:03CV234P-D, 2007 WL 2768914 (N.D. Miss. Sept. 18, 2007) 2

United States v. Alvarez,
142 F.3d 1243 (10th Cir. 1998) 10

United States v. Buchanan,
787 F.2d 477 (10th Cir. 1986) 4

United States v. Dazey,
403 F.3d 1147 (10th Cir. 2005) 4

United States v. Dentsply Int'l, Inc.,
399 F.3d 181 (3d Cir. 2005) 14

United States v. Jordan,
429 F.3d 1032 (11th Cir. 2005) 9

United States v. Logan,
641 F.2d 860 (10th Cir. 1981) 3

Page

United States v. Magallanez,
408 F.3d 672 (10th Cir. 2005) 2

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253 F.3d 34 (D.C. Cir. 2001) ..... *passim*

Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.,
No. 96-1336-JTM, 1997 WL 225966 (D. Kan. Apr. 8, 1997) 13

Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.,
331 F. Supp. 2d 513 (E.D. Tex. 2004) 13

Zuchel v. City & Cnty. of Denver, Colo.,
997 F.2d 730 (10th Cir. 1993) 4

Other Authorities

1B James Wm. Moore et al., *Moore's Federal Practice* (2d ed. rev. 1996) 8-9

I. INTRODUCTION

Microsoft seeks to limit Novell's economic expert, Dr. Roger Noll, from testifying about "the proper inferences to draw from documents in evidence, his opinions about Microsoft's 'real' intent, and his conclusions about legal issues."[1] Microsoft's Mem. Concerning the Proper Scope of Expert Testimony at 1 (Dkt. #233) (Oct. 17, 2011). Novell does not intend to elicit any such testimony.[2] Instead, Dr. Noll will provide the same testimony that this Court found, and the Fourth Circuit affirmed, was sufficient to show that Microsoft's actions caused harm to competition in the personal computer ("PC") operating systems market in light of the weakened state of other applications and independent software vendors ("ISVs"). *See Novell, Inc. v. Microsoft Corp. (In re Microsoft Antitrust Litig.)*, 699 F. Supp. 2d 730, 749-50 (D. Md. 2010), *aff'd in relevant part, rev'd in part on other grounds*, 429 F. App'x 254, 262-63 (4th Cir. 2011). After reviewing Dr. Noll's testimony, this Court wrote that "[a] reasonable person may disagree with Dr. Noll, but the decision whether or not to do so is within the province of a jury." *Novell*, 699 F. Supp. 2d at 750. Similarly, the Fourth Circuit confirmed that the issue upon which Dr. Noll opines "is appropriate for trial." *Novell*, 429 F. App'x at 263.

Dr. Noll will also respond to economic issues that Microsoft injected into this case in opening argument and in cross-examination. As this Court knows, Microsoft improperly argued that Novell must show WordPerfect would have "changed everything in the market for operating systems" if Microsoft had not engaged in anticompetitive conduct. October 18, 2011 Tr. at 139:2-8; October 19, 2011 Tr. at 183:14, 184:8-16; October 20, 2011 Tr. at 198:4-199:5.

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[1] Microsoft does not challenge Dr. Noll's qualifications or expertise.

[2] Although Dr. Noll will not seek to infer Microsoft's "real intent" from a review of documents as Microsoft claims, Dr. Noll will opine as to matters within his expertise relating to topics such as whether, as a matter of economics, Microsoft's asserted business justifications for its conduct were legitimate.

Microsoft claimed that Novell would be unable to adduce evidence that "the market for operating systems would have been any different" had WordPerfect succeeded. October 18, 2011 Tr. at 139:9-14. In effect, Microsoft has challenged Novell before the jury to show how the PC operating systems market could have evolved but for Microsoft's conduct. As a matter of fundamental fairness, Novell should be allowed to meet those arguments, *United States v. Magallanez*, 408 F.3d 672, 678 (10th Cir. 2005), and Dr. Noll is the person to do so. To be clear, Dr. Noll is not Novell's damages expert. He will focus on harm to competition whereas Novell's damages expert will focus on the amount of harm that Novell suffered as a result of the alleged conduct.

There cannot be any serious question that economic experts may testify in monopolization cases regarding the issue of harm to competition. In *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 781-82 (6th Cir. 2002), for example, the Sixth Circuit upheld a jury verdict, in part, because the plaintiff presented an expert who opined that in the "'but for world of unimpeded competition, consumers and [the plaintiff] would have done substantially better.'" Similarly, in *Aventis Environmental Science USA LP v. Scotts Co.*, 383 F. Supp. 2d 488, 504 (S.D.N.Y. 2005), the trial court denied summary judgment because the plaintiff's expert provided evidence supporting harm to competition even though "predicting what would have happened had the challenged actions of Defendants never occurred is well nigh impossible." *See also Tunica Web Adver., Inc. v. Barden Miss. Gaming, LLC*, No. Civ.A.2:03CV234P-D, 2007 WL 2768914 (N.D. Miss. Sept. 18, 2007) (denying motion *in limine* to preclude expert from testifying about harm to competition caused by a group boycott). In fact, Microsoft has proffered its own economic expert to testify about the effect of Microsoft's conduct on the market for PC operating systems. It will be up to the jury to evaluate the

credibility of the experts and the weight that should be given to their respective opinions. Dr. Noll's testimony will fall squarely within the range of accepted expert opinion in monopolization cases.

II. THE FOURTH CIRCUIT HAS RULED THAT DR. NOLL'S TESTIMONY SHOULD BE PRESENTED TO THE JURY

A. Dr. Noll's Testimony

Dr. Noll filed his initial expert report on May 1, 2009 and a reply report on July 24, 2009. Microsoft deposed Dr. Noll on September 10, 2009. Dr. Noll is a Professor *emeritus* at Stanford University, has authored or co-authored more than a dozen books and more than 300 articles, and has consulted with the Antitrust Division of the U.S. Department of Justice. He is, in short, highly qualified. Microsoft has not even attempted to challenge his qualifications.

Dr. Noll's expert report covers a variety of topics suitable for expert testimony, such as, *inter alia*, how Microsoft's monopoly power in the market for PC operating systems was maintained and enhanced by increasing its market power in markets for applications, including office productivity applications, and middleware that run on Microsoft's operating systems. *See, e.g.*, Declaration of Roger G. Noll (May 1, 2009) ("Noll Report," relevant excerpts attached as Exhibit A hereto), at 7-11. This question requires an understanding of some important economic characteristics of the computer industry, such as network effects, the applications barrier to entry, how middleware facilitates vertical and horizontal competition, and how a monopolist in one market can use its power in adjacent markets to preserve its monopoly. *See, e.g.*, Noll Report at 7-11, 156-57; Reply Report of Roger G. Noll (July 24, 2009) ("Noll Reply," relevant excerpts attached as Exhibit B hereto), at 11-12. These issues are all suitable for expert testimony. *See United States v. Logan*, 641 F.2d 860, 863 (10th Cir. 1981) (expert witness is permitted to express his opinion on factual issues within his area of expertise, including ultimate issues of

fact). Dr. Noll will assist the jury in understanding the economic aspects of this case, rather than "simply tell the jury to reach a particular verdict based on his own say-so." *United States v. Dazey*, 403 F.3d 1147, 1171-72 (10th Cir. 2005). Dr. Noll will certainly not offer "unadorned legal conclusions." *United States v. Buchanan*, 787 F.2d 477, 484 (10th Cir. 1986); *see also Zuchel v. City & Cnty. of Denver, Colo.*, 997 F.2d 730, 742 (10th Cir. 1993) ("'[A] witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible.'" (citation omitted)); *Fiataruolo v. United States*, 8 F.3d 930, 941-42 (2d Cir. 1993) ("Experts may testify on . . . mixed questions of fact and law.").[3]

At his deposition, Microsoft's counsel questioned Dr. Noll extensively about the bases for his opinion that Microsoft's conduct harmed competition in the market for PC operating systems. Microsoft demanded that Dr. Noll express an opinion on whether conduct directed at Novell, in and of itself, caused a significant and substantial impact on competition. *See Novell*, 699 F. Supp. 2d at 749. Dr. Noll testified that Microsoft's question was flawed because, from an economic perspective, he analyzed "the totality of the actions by Microsoft on the market for operating systems." *Id.* Dr. Noll explained that "[i]n antitrust economics, actions are anticompetitive if they harm the competitive process; harm to a specific competitor is relevant to determining whether competition was harmed, but so is harm to other competitors because only if competition in general has been harmed can conduct maintain or increase the market power of the firm that engages in it." Noll Reply at 27. Dr. Noll has also explained why,

[3] Microsoft's expert, Kevin Murphy, criticized Dr. Noll's initial report for failing to recognize the three conditions which he claimed needed to be established in order to find Microsoft liable for engaging in anticompetitive conduct. Murphy Report (relevant excerpts attached as Exhibit C hereto) at 13-14. Contrary to Microsoft's claim that Dr. Noll will offer impermissible legal opinions, Dr. Noll expressly rejected the notion that "Professor Murphy and I are entitled to characterize what the plaintiff in an antitrust case must prove to establish liability." Noll Reply at 25. Dr. Noll will limit his testimony to issues appropriate for economic analysis.

from an economic perspective, it is important to evaluate the long-run effects of Microsoft's conduct. For example, Dr. Noll opined that one effect of Microsoft's conduct was to foreclose a distribution channel for Netscape Navigator that Novell sought to integrate and bundle with WordPerfect and its suite of applications, PerfectOffice. Dr. Noll explained:

> The fact that Novell served as one of several important distribution channels for Netscape Navigator illustrates two important points. The first is that the harm to competition arising from Microsoft's conduct against Novell is not limited to the effect on Novell. This conduct also harmed Netscape. The second is that the period in which anticompetitive conduct could cause harm to competition is not limited to the period that Novell owned WordPerfect. The harm to competition in the x86 operating system market from substantially reducing sales of Novell's office productivity applications continued for years after Novell sold WordPerfect to Corel.

Id. at 30.

At trial, Dr. Noll will rely primarily on testimony, documents, and facts that the Court has admitted into evidence or which are incontrovertible. This is perfectly permissible. *See Ramsey v. Culpepper*, 738 F.2d 1092, 1100-01 (10th Cir. 1984); *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 350 (5th Cir. 1983) ("Rule 703 provides that an expert may base his opinion testimony on facts or data presented at trial."); *see also Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.*, No. 1:05-CV-64 TS, 2010 WL 3743677, at *4 (D. Utah Sept. 20, 2010).

Microsoft's motion principally relies on *Lantec, Inc. v. Novell, Inc.*, No. 2:95-CV-97-ST, 2001 U.S. Dist. LEXIS 24816 (D. Utah Feb. 13, 2001), *aff'd*, 306 F.3d 1003 (10th Cir. 2002). Such reliance is misplaced for two reasons. First, the court in *Lantec* allowed the expert to testify at trial before deciding the defendant's *Daubert* motion. Second, Dr. Noll will not commit the same egregious mistakes made by plaintiff Lantec's expert, who relied on unreliable data and unsupported and inconsistent facts, and failed to consider the defendant's explanations for its market power. Dr. Noll has considered, and will address, Microsoft's explanations for its

monopoly power in the market for PC operating systems and how Microsoft used its market power in other applications markets, including office productivity applications, to maintain its PC operating systems monopoly.

B. Microsoft's Challenge to Dr. Noll's Testimony Has Already Been Rejected

In 2009, Microsoft moved for summary judgment on several grounds, including whether sufficient evidence existed to show that Microsoft willfully maintained its monopoly through anticompetitive conduct. *See, e.g.*, Mem. in Supp. of Microsoft's Mot. for Summ. J. (Dkt. #101) (Oct. 7, 2009). In particular, Microsoft argued that Novell could not prove anything more than a legitimate refusal to cooperate with a rival and that, even if Novell could surmount that hurdle, insufficient evidence existed to show that Microsoft's conduct harmed competition or that Microsoft maintained its monopoly by reason of the asserted anticompetitive conduct. *Id.* at 23-35.

This Court disagreed. On the question of harm to competition and unlawful maintenance, this Court engaged in a thorough analysis of Dr. Noll's testimony and concluded that "[a] reasonable person may disagree with Dr. Noll, but the decision whether or not to do so is within the province of a jury." *Novell*, 699 F. Supp. 2d at 749-50. In so ruling, this Court held that Novell must introduce evidence to show that the conduct "contributed significantly" to Microsoft's monopoly maintenance. *Id.* at 748. But the Court applied the quoted phrase consistent with the D.C. Circuit in the Government Case such that Novell meets its burden of proof if it shows that the conduct was "'reasonably capable of contributing significantly'" to Microsoft's "'continued'" monopoly power. *Id.* (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001), and citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*,

36 F.3d 1147, 1182 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); *Morgan v. Ponder*, 892 F.2d 1355, 1361-63 (8th Cir. 1989)).[4]

This Court correctly held that under its "contributed significantly standard," Novell need not present direct proof that Microsoft's "'continued monopoly power is precisely attributable to its anticompetitive conduct'" and explained that to "require such proof would 'require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct[,]' which 'would only encourage monopolists to take more and earlier anticompetitive action'" to eliminate potential threats. *Id.* (alteration in original) (quoting *Microsoft*, 253 F.3d at 79). When a monopolist engages in anticompetitive conduct, courts "should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm because '[t]o some degree, "the defendant is made to suffer the uncertain consequences of its own undesirable conduct."'" *Id.* (alteration in original) (quoting *Microsoft*, 253 F.3d at 79).

Finally, the Court accepted Dr. Noll's 1,000 firm hypothetical and wrote that "[i]t would be contrary to the purpose of § 2 to immunize a monopolist for anticompetitive conduct, which in fact significantly contributed to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, none of which could prove that the conduct directed at any single firm would have by itself significantly contributed to the defendant's monopoly if none of the other small firms had been similarly weakened." *Id.* at 749. The Court's view is consistent with the Sherman Act's purpose to prevent monopolists from unlawfully wielding their market power to eliminate potential threats to competition. *See Microsoft*, 253 F.3d at 79 ("[I]t would be inimical to the purpose of the Sherman Act to allow

[4] As discussed in Section II.D, below, the "reasonably capable" standard is the accepted standard in the Tenth Circuit and elsewhere.

monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts.").

The parties cross-appealed this Court's decision. On the antitrust issues, the Fourth Circuit concurred with this Court's finding on harm to competition and monopoly maintenance, writing that Dr. Noll's opinion left ample room for "'a finding that Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market *in light of the weakened state of other applications and [independent software vendors]'*" and that the "issue is appropriate for trial." *Novell*, 429 F. App'x at 262-63 (emphasis in original) (citation omitted).[5]

Microsoft sought *en banc* review of the Fourth Circuit's decision but, when that did not succeed, opted not to seek a writ of *certiorari*.

Under the law of the case doctrine, the Fourth Circuit's decision is binding on this Court after remand. "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (citation omitted). "The doctrine has particular relevance following a remand order issued by an appellate court." *Id.* After remand, the Court of Appeals' ruling "is not subject to further adjudication" in the district court because "'[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand.'" *Orient Mineral Co. v. Bank of China*, No. 2:98-CV-238BSJ, 2010 WL 624868, at *14 (D. Utah Feb. 19, 2010) (emphasis in original) (quoting 1B James Wm. Moore et al., *Moore's Federal*

[5] The appellate record included both of Dr. Noll's expert reports and some 50 pages of his deposition. JA4820-69 (attached as Exhibit D hereto).

Practice ¶ 0.404[1], at II-2–II-3 (2d ed. rev. 1996)), *aff'd*, 416 F. App'x 721 (10th Cir. 2011), *cert. denied*, --- U.S. ----, 2011 WL 4533788 (Oct. 3, 2011).

The rule that the Court of Appeals' decision is not subject to further adjudication "applies to all 'issues previously decided, either explicitly or by necessary implication.'" *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (citations omitted). "An argument is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("We did not address that argument in so many words, or in any words for that matter, but we did reject it 'by necessary implication,' which is enough under our decisions to bring the law of the case doctrine to bear in this appeal.").

The rule that a decision of the Court of Appeals is not subject to further adjudication is sometimes referred to as the "mandate rule." "According to the Tenth Circuit, an 'important corollary' to the law of the case doctrine 'known as the "mandate rule," provides that a district court "must comply strictly with the mandate rendered by the reviewing court."'" *Orient Mineral Co.*, 2010 WL 624868, at *14 (citations omitted). "The mandate consists of [the Tenth Circuit's] instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). The mandate rule seeks "to preserve the finality of judgments, to prevent 'continued re-argument of issues already decided, . . . and to preserve scarce court resources.'" *Id.* at 1132 (alteration in original) (citation omitted).

A district court may depart from the "mandate rule" only "'under exceptional circumstances,'" none of which are present here: "'(1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but

has since come to light; or (3) if blatant error from the prior . . . decision would result in serious injustice if uncorrected.'" *Huffman*, 262 F.3d at 1133 (alteration in original) (citation omitted). These three "'exceptional circumstances'" that permit departure from the "mandate rule" essentially mirror the three "'exceptionally narrow'" grounds that permit departure from the law of the case doctrine – substantially new evidence, a change in controlling authority, or a prior decision that was clearly erroneous and would cause a manifest injustice if followed.[6] *Id.* (citation omitted).

Moreover, "'a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'" *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (citation omitted). The reason for this rule is that "'[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Cnty. of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (citation omitted). In *Rohrbaugh*, the Tenth Circuit held that plaintiffs "waived their right to challenge the correctness of the holdings in [the prior Court of Appeals' decision] by failing to seek review of that decision when they had the opportunity to do so." 53 F.3d at 1184; *see also Klay v. All Defendants*, 389 F.3d 1191, 1199 (11th Cir. 2004) ("[Defendants'] failure to seek *en banc* review or *certiorari* with respect to these issues caused our previous ruling to become law of the case."). Similarly, in the present case, Microsoft did not seek review

[6] The exception that permits a departure from the law of the case doctrine when the decision is "clearly erroneous" and would work a "manifest injustice" is "rarely, if ever, invoke[d]." *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). "In fact, in the only case we found in which a panel used this exception, the en banc court subsequently reversed the panel." *Id.* (citation omitted).

of the Fourth Circuit's decision in the Supreme Court, and thus waived any right to challenge the correctness of the Fourth Circuit's decision.

In sum, the decision of the Fourth Circuit that Dr. Noll's testimony presents a legitimate issue for the jury that is appropriate for trial is binding on this Court. There is no valid reason for departing from the law of the case, nor has Microsoft suggested any. Dr. Noll should be permitted to testify as he did in his deposition and in his expert report on the questions of harm to competition.

C. Dr. Noll Should Be Permitted to Testify About the "Moat" Theory Endorsed by the Fourth Circuit and Confirmed in the Government Case

Dr. Noll also will testify about the economic underpinnings of Microsoft's plan to "own" the "key franchises" and the effect on competition in the PC operating systems market of Microsoft's dominance of the word processing and suite markets. Noll Report at 8-11; Noll Reply at 18 n.18. As the Court is aware, the Fourth Circuit's 2007 decision affirming Novell's antitrust standing adopted and endorsed the "moat" theory of harm to competition. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 317 (4th Cir. 2007). The Fourth Circuit wrote that the "loss of market share could make a competing operating system featuring Novell's office-productivity applications less attractive to consumers, harming that competing operating system's potential to surmount the barrier protecting the Windows monopoly." *Id.* at 316.[7] In other words, by controlling the market for word processors and suites, Microsoft harmed competition in the PC operating systems market and acquired a weapon that it could use to deter and control potential operating systems competitors. *See, e.g.*, *Microsoft*, 253 F.3d at 72-74.

[7] "Because of the network effects that favor already popular applications, Novell's applications' loss of market share could in turn lead to a decrease in demand for the competing operating systems that support these applications." *Id*. at 309.

Dr. Noll will explain the economic theory behind the "moat," and why WordPerfect's decrease in market share on Windows harmed competition in the operating systems market, and will also provide the jury with textbook, real-world, and irrefutable examples that establish why this case is not just about monopolizing application markets. In 1997, after marginalizing WordPerfect to single digit market share and achieving dominance in the word processing and suite markets, Microsoft used its productivity suite "'Office as a club'" to force Apple into entering into a contract with Microsoft that excluded Netscape Navigator from the Mac operating system. *Id.* at 73 (citation omitted). Apple had no choice but to cooperate with Microsoft because its continued existence depended on Microsoft's willingness to provide it with a license for the word processor and suite. Thus Microsoft could control its rivals by leveraging its dominance in the office productivity applications market. But for Microsoft's anticompetitive conduct, WordPerfect would have provided Apple with a viable alternative to Microsoft's suite which, in turn, would have allowed Apple to support middleware such as Netscape and Java, which had the power to lessen the applications barrier to entry protecting Microsoft's monopoly power in the operating systems market. Indeed, consumer choice is one of the fundamental benefits of competition.[8] *See* Noll Report at 112-13.

D. Tenth Circuit Precedent Supports the Rulings of This Court and the Fourth Circuit; It Adopts the "Reasonably Capable" Standard

While this Court and the Fourth Circuit both found that sufficient evidence existed to show that Microsoft's conduct was a "significant contributor" to Microsoft's monopoly

[8] Dr. Noll also observed in his report that the D.C. Circuit found Microsoft's conduct toward Apple to be anticompetitive because it exerted a substantial effect in restricting distribution of rival browsers even though Apple sold only 5.35 million units annually. By contrast, 51 million office productivity applications were sold annually at the same time, meaning that a 10% drop in word processing market share would create the same level of foreclosure as the Apple contract. In fact, WordPerfect's decline due to Microsoft's anticompetitive conduct amounted to a much larger drop in total word processing share than 10% during the relevant period. Noll Reply at 29-30.

maintenance, this Court's decision equated the quoted term with the standard used in *United States v. Microsoft*, that the evidence must show that the conduct was "'reasonably capable of contributing significantly'" to maintenance of a monopoly. *Novell*, 699 F. Supp. 2d at 748 (quoting *Microsoft*, 253 F.3d at 80); *compare with Microsoft*, 253 F.3d at 79 ("'reasonably appears capable of making a significant contribution to . . . maintaining monopoly power'" (alteration in original) (citations omitted)). Microsoft has argued that this standard should be limited only to equitable enforcement actions, but there are more than a dozen private action cases that use the "reasonably capable" standard,[9] and Novell is not aware of any that apply a stricter test. Most importantly, the Tenth Circuit endorses the "reasonably capable" formulation. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995).

In *Multistate*, a provider of bar-review courses challenged conduct of the dominant supplier and its licensee of engaging in various acts to exclude it from the market. *Id.* at 1543. The Tenth Circuit stated that it defines anticompetitive conduct as "'conduct constituting an

[9] *See, e.g.*, *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (cited in the Government Case); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (cited in the Government Case); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) (cited by this Court in its summary judgment decision); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987); *Hertz Corp. v. Enter. Rent-A-Car Co.*, 557 F. Supp. 2d 185, 193 (D. Mass. 2008); *Cytologix Corp. v. Ventana Med. Sys., Inc.*, Nos. 00-12231-RWZ, 01-10178-RWZ, 2006 WL 2042331, at *4 (D. Mass. July 20, 2006); *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004); *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); *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F. Supp. 2d 189, 197 (D. Mass. 1999); *CTC Commc'ns Corp. v. Bell Atl. Corp.*, 77 F. Supp. 2d 124, 144 (D. Me. 1999); *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, No. 96-1336-JTM, 1997 WL 225966, at *7 (D. Kan. Apr. 8, 1997). Novell could supply the Court with additional decisions upon request.

abnormal response to market opportunities. Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition,' if the conduct appears 'reasonably capable of contributing significantly to creating or maintaining monopoly power.'" *Id*. at 1550 (citation omitted). The Tenth Circuit applied this test to the various acts, including the dominant supplier's decision to schedule its classes at times that made it difficult for students to also attend classes provided by the rival. *Id.* at 1550-56. The rival scheduled its workshop from 9 a.m. to 4 p.m., and the monopolist held its classes from 6 p.m. to 9 p.m. *Id.* at 1552-53. The monopolist argued that, to be actionable, the schedule had to make it "impossible" for students to take both sets of classes. *Id.* at 1553. The Tenth Circuit disagreed, ruling that "[w]hat matters is not so much whether the classes actually overlapped as whether the scheduling pattern was ***reasonably capable of contributing significantly*** to a monopolization attempt . . . ." *Id*. (emphasis added). Thus, the analysis of harm to competition is inherently forward looking – unlike the separate question of harm to the plaintiff – and may be based on events that occur after the plaintiff goes out of business or sells its business. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985), for example, the United States Supreme Court upheld jury instructions that allowed the jury to consider whether the monopolist sacrificed short-run benefits to reduce competition "over the long run."[10] If a monopolist successfully eliminates a competitor or forces

[10] Similarly, in predatory pricing cases, the monopolist lowers prices in the short term to eliminate competition and later recoups its short-term losses through price increases. In exclusive dealing cases, the harm to competition is the foreclosure of *potential* competition. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005). Tying and bundling arrangements are condemned because a monopolist exerts power in one market to erect barriers to entry in another market that may exclude *potential* competition. *See, e.g., Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986); *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003). In the Government Case, the fact that AOL acquired Netscape in late 1998 did not factor at all into the analysis of the future harm to competition caused by Microsoft's anticompetitive conduct. Indeed, the U.S. Supreme Court observed in *Blue Shield of*

the competitor to sell, the law must allow the victim to show that the conduct, including the victim's exclusion, would have affected competition in the relevant market.

III. CONCLUSION

For the foregoing reasons, Microsoft's Motion Concerning the Proper Scope of Expert Testimony should be denied.

Dated: November 3, 2011

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Virginia v. McCready, 457 U.S. 465 (1982), that a § 4 plaintiff "need not 'prove an actual lessening of competition in order to recover. [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.'" *Id.* at 482 (alteration in original) (citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: */s/ Maralyn M. English*