UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

This Document Relates to:
Novell, Inc. v. *Microsoft Corporation*,
Civil Action No. JFM-05-1087

MDL Docket No. 1332
Hon. J. Frederick Motz

Oral Argument Requested

MICROSOFT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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IN RE MICROSOFT CORP. ANTITRUST LITIGATION This Document Relates to: *Novell, Inc.* v. *Microsoft Corporation*, Civil Action No. JFM-05-1087	MDL Docket No. 1332 Hon. J. Frederick Motz Oral Argument Requested

MICROSOFT'S MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT

Microsoft Corporation ("Microsoft") respectfully submits this memorandum in support of its motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the remaining counts (I and VI) of the complaint filed by plaintiff Novell, Inc. ("Novell") on November 12, 2004.

This litigation involves certain software products that Novell acquired on June 24, 1994 from WordPerfect Corporation ("WP Corp.") and Borland International ("Borland"), and sold on March 1, 1996 to Corel Corporation ("Corel"). The products Novell acquired in June 1994 included WordPerfect (a word processor) and Quattro Pro (a spreadsheet).

Count I of Novell's complaint alleges that "Microsoft willfully and wrongfully obtained and maintained its monopoly power in the Intel-compatible operating systems market" by means of "engaging in anticompetitive conduct designed to thwart the development of products that threatened to weaken the applications barrier to entry, including Novell's WordPerfect word processing software and its other office productivity

applications," and that this violated Section 2 of the Sherman Act. (Compl. ¶ 153, attached as Ex. 1 to Affidavit of Steven L. Holley in Support of Microsoft's Motion for Summary Judgment ("Holley Aff."), sworn to on October 7, 2009.)

There are two fatal flaws in count I. *First*, it is now undisputed that the conduct at issue had no substantial impact on competition in the personal computer ("PC") operating system market. The theory of count I is that, by causing harm to WordPerfect and Quattro Pro, Microsoft could eliminate the threat they allegedly posed to the applications barrier to entry, thereby fortifying Microsoft's strong position in the PC operating system market. After almost five years of litigation and extensive discovery, Novell has no evidence to support the contention that WordPerfect and Quattro Pro were a threat to the applications barrier to entry or that, absent the conduct at issue, competition in the PC operating system market would have been enhanced. Indeed, Novell's own expert on antitrust economics, Professor Roger Noll, admits that the Microsoft conduct that supposedly harmed WordPerfect and Quattro Pro did *not* adversely affect competition in the PC operating system market. *Second*, and as an entirely independent ground for dismissal, the acts about which Novell complains are all instances in which Microsoft allegedly failed to provide adequate assistance to Novell, one of its competitors. A claim that a company was denied assistance from a competitor—even one that is a monopolist—is not cognizable as "exclusionary conduct" under the antitrust laws. Thus, count I of the complaint should be dismissed.

Count VI alleges that Microsoft entered into agreements with PC manufacturers (known in the industry as original equipment manufacturers, or OEMs) "not to license or distribute Novell's office productivity applications or to do so only on terms that

materially disadvantaged these products," in violation of Section 1 of the Sherman Act. (Compl. ¶ 175.)

Novell's count VI fails for three reasons. *First*, there is not a single agreement between Microsoft and any OEM in which Microsoft "forbade OEMs from pre-installing both Novell and Microsoft products on their machines." (Compl. ¶ 117.) Nor is there evidence that any of the terms of Microsoft's agreements with OEMs "materially disadvantaged [Novell's] products." (Compl. ¶ 175.) *Second*, even if Novell could show that its opportunity to distribute WordPerfect and Quattro Pro through the OEM channel was adversely affected by Microsoft's allegedly exclusionary agreements with OEMs, Novell cannot meet its burden to show that such reduced access to that channel foreclosed competition in a "substantial share of the line of commerce affected." *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The indisputable fact is that, for both Novell and Microsoft, distribution of word processing and spreadsheet applications through the OEM channel constituted a very small percentage of the overall licensing of such products, and there were ample alternative avenues for distribution open to and pursued by Novell. *Third*, Novell's damages expert, Dr. Frederick Warren-Boulton, excluded from his analysis any damages purportedly arising from the conduct alleged in count VI. It thus appears that Novell has abandoned this claim.

NOVELL'S COMPLAINT

On June 24, 1994, Novell acquired the WordPerfect word processing application (by acquiring all the common stock of WP Corp.) and the Quattro Pro

spreadsheet application (by purchasing rights to that product from Borland).[1] (Compl. ¶ 37.) Novell sold these software products to Corel on March 1, 1996. (Compl. ¶ 150.)[2] Eight and a half years later, Novell filed its complaint in the United States District Court for the District of Utah, seeking to recover for harm allegedly inflicted on WordPerfect and Quattro Pro by Microsoft during the 20-month period that Novell owned those products.

Novell's complaint set forth six claims under the federal antitrust laws. (Compl. ¶¶ 151-77.) Count I alleges that Microsoft "engag[ed] in anticompetitive conduct to thwart the development of" WordPerfect and Quattro Pro in order to "obtain[] and maintain[] its monopoly power in the Intel-compatible operating systems market" in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.[3] (Compl. ¶ 153.) In counts II through V, Novell alleged that the same Microsoft conduct underlying count I—the conduct that harmed Novell's word processing and spreadsheet applications—enabled Microsoft to obtain monopoly power in purported markets for word processing and spreadsheet applications, or to attempt to monopolize such markets, also in violation of Section 2 of the Sherman Act.[4]

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1 Novell combined WordPerfect and Quattro Pro into a "suite" of applications, later called PerfectOffice. (Compl. ¶ 81.)

2 Novell's sale of WordPerfect and Quattro Pro to Corel closed on March 1, 1996. (Novell, Inc., Form 10-Q, March 12, 1996, attached as Ex. 2 to Holley Aff.)

3 For purposes of this motion only, Microsoft does not contest plaintiff's PC operating system market definition (Compl. ¶ 25) or its claim that Microsoft possessed monopoly power in that market (Compl. ¶ 26) during the relevant time period. In this connection, it should be noted that even Novell's expert in antitrust economics testified that he assumes that "the position of Microsoft as the leader in operating systems as of 1988, '89, was purely for efficiency reasons" and that he "know[s] of nothing that would cause [him] to suspect that . . . [Microsoft] used anticompetitive acts to achieve its position in operating systems as of then." (Deposition of Roger Noll, September 10, 2009 ("Noll Dep.") at 81, attached as Ex. 3 to Holley Aff.)

4 Microsoft was a direct competitor of Novell in word processing and spreadsheet applications. Microsoft Word competed with WordPerfect and Microsoft Excel competed with Quattro Pro. (*See* Compl. ¶ 20.) The applications suite that contained Microsoft Word and Microsoft Excel was called Microsoft Office.

(Compl. ¶¶ 156-73.) Count VI alleges that Microsoft entered into "agreements with OEMs and others not to license or distribute Novell's office productivity applications or to do so only on terms that materially disadvantaged these products,"[5] in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Compl. ¶ 175.)

A. Microsoft's 2005 Motion to Dismiss

On January 7, 2005, Microsoft moved to dismiss the complaint. With regard to the four counts concerning competition in purported markets for word processing and spreadsheet applications, Microsoft argued that these claims—brought more than eight years after Novell sold WordPerfect and Quattro Pro to Corel—were barred by the statute of limitations, which provides that a civil antitrust claim "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15(b). On June 10, 2005, this Court dismissed counts II through V of the complaint, *Novell, Inc.* v. *Microsoft Corp.*, 2005 U.S. Dist. LEXIS 11520 (D. Md. June 10, 2005), and, on October 15, 2007, the Fourth Circuit affirmed that dismissal. *Novell, Inc.* v. *Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007).[6]

As to counts I and VI, Microsoft moved for dismissal on the ground that Novell lacked antitrust standing to assert claims for harm to competition in the PC operating system market (because Novell's word processing and spreadsheet applications did not

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[5] WordPerfect and Quattro Pro are sometimes referred to in the complaint as "office productivity applications," a term Novell defines to mean "word processing and spreadsheet applications." (Compl. ¶ 24.)

[6] Microsoft also argued that count VI was barred by the statute of limitations, but the Court ruled otherwise. 2005 U.S. Dist. LEXIS 11520 at *3 (D. Md. June 10, 2005).

compete in that market).[7] (Microsoft Fourth Circuit Brief at 2, attached as Ex. 4 to Holley Aff.) Novell argued in opposition that WordPerfect and Quattro Pro, "though themselves not competitors or potential competitors to Microsoft's Windows, . . . could provide a path onto the operating-system playing field for an actual competitor of Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows." 505 F.3d at 308.

Count I, asserting that the challenged conduct adversely affected competition in the PC operating system market, was designed to enable Novell to claim the benefit of the tolling provision of 15 U.S.C. § 16(i). This provision tolls the statute of limitations for a private antitrust action that is "based in whole or in part on any matter complained of" in an earlier government enforcement action. Novell's complaint goes to great lengths (*see* Compl. ¶¶ 4, 6, 14-21, 23, 40-55, 153) to make its claims appear related to those asserted in *United States* v. *Microsoft Corp.*, an action brought by the Antitrust Division of the U.S. Department of Justice on May 18, 1998 (the "Government Case").[8]

In its 2005 decision on Microsoft's motion to dismiss, this Court allowed counts I and VI to proceed to discovery. The Fourth Circuit affirmed, noting that Novell's theory for counts I and VI was that Microsoft's conduct in relation to word processing and

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[7] Microsoft also moved to dismiss counts I and VI on the ground that Novell did not own those claims, having sold them to Caldera in 1996. (Brief of Appellant Microsoft Corporation, April 13, 2006 ("Microsoft Fourth Circuit Brief") at 5-6, attached as Ex. 4 to Holley Aff.) The Court declined to dismiss on that ground, 2005 U.S. Dist. LEXIS 11520 at *4, and the Fourth Circuit declined to grant Microsoft's petition for interlocutory appeal on the issue. 505 F.3d at 307. This issue will be raised by Microsoft on an upcoming cross-motion for summary judgment.

[8] Judge Jackson's Findings of Fact in the Government Case are reported at 84 F. Supp. 2d 9 (D.D.C. 1999). The D.C. Circuit Court's decision is reported at 253 F.3d 34 (D.C. Cir. 2001). Judge Kollar-Kotelly's decision in the remedies phase of the Government Case is reported at 231 F. Supp. 2d 144 (D.D.C. 2002).

spreadsheet applications was "intended to and did restrain competition in the PC operating-system market by keeping the barriers to entry into that market high." 505 F.3d at 316.

B. Novell's Surviving Claims

In count I, Novell alleges that Microsoft engaged in various conduct in connection with development of the Windows 95 operating system that "delayed" and "degraded the functionality" of the versions of WordPerfect and Quattro Pro that Novell was developing for Windows 95.[9] (Compl. ¶ 78.) Novell's complaint alleges two wrongful actions by Microsoft: (i) that Microsoft withheld technical information from Novell concerning a feature of the Windows 95 operating system called "namespace extensions" (Compl. ¶¶ 65-78); and (ii) that Microsoft refused to grant Novell an exemption from the requirements of the Windows 95 logo licensing program. (Compl. ¶ 89.) Although never mentioned in Novell's 68-page, 178-paragraph complaint, Novell's experts now assert (in reports they submitted in May 2009) that Microsoft (i) failed to include certain custom print processing functionality in the Windows 95 operating system (*see* Alepin Report at 155-65); and (ii) engaged in conduct that harmed GroupWise, Novell's groupware server software. (*See* Alepin Report at 105-43).

In count VI, Novell alleges that Microsoft used its monopoly power in the PC operating system market to extract two types of agreements from OEMs that harmed WordPerfect and Quattro Pro: (i) "agreements with OEMs and others not to license or

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[9] The versions of WordPerfect and Quattro Pro developed for Windows 95, and the suite that contained them, were not released until June 1996, three months after Novell sold its office productivity applications to Corel. (Corel Press Release, "Corel Ships Corel WordPerfect Suite 7 for Windows 95," May 26, 1996, NOV00663918-921 at 918, attached as Ex. 5 to Holley Aff.; Expert

(*footnote continued*)

distribute Novell's office productivity applications" (Compl. ¶ 175); and (ii) agreements with OEMs to license or distribute Novell's word processing and spreadsheet applications "only on terms that materially disadvantaged these products." (Compl. ¶ 175.) Novell alleges that Microsoft was able to extract such agreements from OEMs because they "lack a commercially viable alternative to licensing Windows for pre-installation on their PCs." (Compl. ¶ 115.) Novell further alleges that Microsoft used the two types of agreements to foreclose Novell from distributing WordPerfect and Quattro Pro through the OEM channel.[10] (Compl. ¶ 113.)

Novell alleges that, as a result of the conduct alleged in counts I and VI, "WordPerfect's share of the word processing market . . . [declined] to less than 10 percent by the time Novell sold WordPerfect and the related applications in 1996." (Compl. ¶ 8.) The undisputed market share numbers[11] (shown in the chart below) establish, however, that WordPerfect was in a steady decline that began well before the Microsoft conduct about which Novell complains.[12]

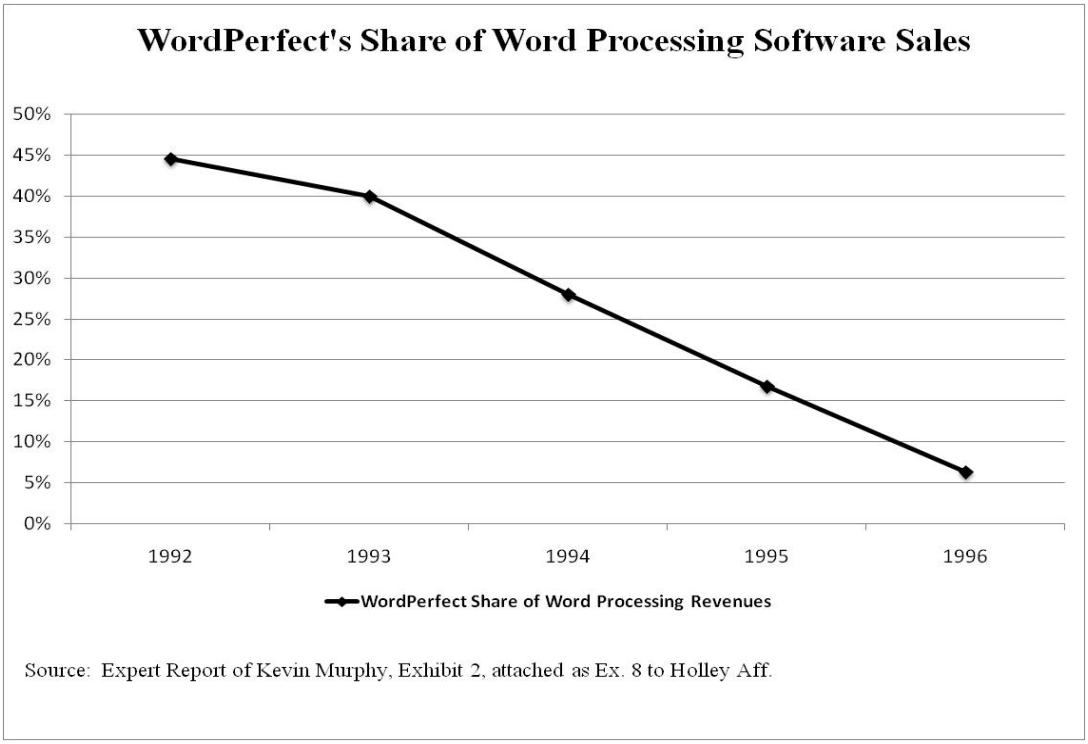
(*footnote continued*)
Report of Ronald Alepin, Novell's technical expert, May 1, 2009 ("Alepin Report") at 14, attached as Ex. 6 to Holley Aff.)

[10] Novell sets out a long list of contractual provisions allegedly contained in Microsoft's agreements with OEMs, and makes allegations about conduct by Microsoft that adversely affected Novell's ability to distribute its office productivity applications through the OEM channel. (*See* Compl. ¶¶ 113-31.) Despite the extensive discovery in this case, and the even more voluminous record available to Novell from prior antitrust cases involving Microsoft, there is no evidence that these alleged contractual provisions ever existed, or that any OEM decided not to license Novell's office productivity applications as a result of anything Microsoft did. *See* pp. 20-22, *infra*.

[11] Novell's expert on antitrust economics, Professor Noll, does not dispute Professor Murphy's market share data. (Noll Dep. at 230-31, attached as Ex. 3 to Holley Aff.)

[12] Although not necessary to resolve the present motion, Microsoft will prove at trial, if one occurs, that WordPerfect's decline was a function of dramatic changes in the software industry having nothing to do with allegedly anticompetitive conduct by Microsoft. Pete Peterson, who ran day-to-day operations at WP Corp. from 1982 to 1992, testified that, as a result of these changes, Novell

(*footnote continued*)



Source: Expert Report of Kevin Murphy, Exhibit 2, attached as Ex. 8 to Holley Aff.

NOVELL'S ALLEGATIONS AND THE UNDISPUTED MATERIAL FACTS

A. Development of Windows 95

Count I of Novell's complaint concerns Microsoft conduct relating to the development and release of its Windows 95 operating system (codenamed "Chicago"). During that lengthy process, Microsoft provided pre-release versions of the new operating system to independent software vendors ("ISVs") (Alepin Report at 87), the first of which was provided to ISVs in June 1994. (Microsoft, Chicago Project FY94 Q4 Report, MSC 00515375-6 at 375, attached as Ex. 9 to Holley Aff.) Providing these pre-release—or "beta"—versions of Windows 95 to ISVs was beneficial to all concerned—Microsoft learned

(*footnote continued*)
purchased "a sinking ship" when it bought WP Corp. (Deposition of Pete Peterson, October 1, 2008 ("Peterson Dep.") at 12, attached as Ex. 7 to Holley Aff.)

about "bugs" found during testing conducted by ISVs, and ISVs got the opportunity to make their applications work well with Windows 95 before it was commercially available to users. (Deposition of Microsoft founder and former CEO Bill Gates, March 4, 2009 and May 19, 2009 ("Gates Dep.") at 116, attached as Ex. 10 to Holley Aff.; Deposition of WP Corp. software engineer Scott Kliger, February 25, 2009 at 46, attached as Ex. 11 to Holley Aff.)

In addition to beta versions, Microsoft also provided ISVs with documentation describing how the forthcoming Windows 95 operating system would work. (Deposition of former manager of Microsoft's Developer Relations Group, Bradford Struss, January 14, 2009 at 45, attached as Ex. 12 to Holley Aff.) This included preliminary information about the application programming interfaces ("APIs") that would be exposed by Windows 95 for use by ISVs. (Alepin Report at 31; Declaration of Roger Noll, May 1, 2009 ("Noll Report") at 128, attached as Exhibit 13 to Holley Aff.) APIs are, in effect, the "hooks" that an application—for example, a word processor—uses to call upon functionality provided by the operating system. (*See* Alepin Report at 25.) There are literally thousands of published APIs exposed by an operating system as complex as Windows 95.[13] There are also thousands of internal interfaces in the operating systems and, for a number of reasons, Microsoft does not provide information to ISVs about those internal interfaces. (Gates Dep. at 270, 288, 293, attached as Ex. 10 to Holley Aff.; Alepin Report at 32). In addition, Microsoft typically did not provide information to ISVs about APIs that might not continue to work in future

[13] *See United States* v. *Microsoft Corp.*, 231 F. Supp. 2d at 155 n.6 ("Windows contains thousands of APIs, controlling everything from data storage to font display").

versions of Windows. (Gates Dep. at 270, attached as Ex. 10 to Holley Aff.; Alepin Report at 32.)

B. Namespace Extension APIs

Count I alleges that Microsoft harmed Novell's word processing and spreadsheet applications by failing to document certain information about the so-called "namespace extension" APIs in Windows 95. Novell claims that without this technological assistance from Microsoft, the versions of WordPerfect and Quattro Pro designed for use with Windows 95 were both late to market and of lower quality than they otherwise would have been.[14] (Compl. ¶ 78; Alepin Report at 98-101.) Novell claims that it wanted to use the namespace extension APIs to enhance "the file management functionality" of WordPerfect and Quattro Pro, thereby making those products "richer and fuller-featured." (Alepin Report at 14.) The namespace extension APIs were only six of several thousand APIs exposed by Windows 95. (Alepin Report at 39.) The namespace extension APIs also offered quite limited functionality; they provided ISVs with a mechanism to add custom folders to the hierarchical "tree view" in the left pane of the Windows Explorer.[15] (Alepin Report at 39.)

The namespace extensions were demonstrated to ISVs, including WP Corp., at a "Windows 95 Design Preview" in September 1993—almost two years before Windows

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[14] It is undisputed that the versions of WordPerfect and Quattro Pro designed for use with Windows 95 were never released by Novell. Instead, they were released by Corel months after Novell sold its office productivity applications to Corel. (Alepin Report at 14.)

[15] The Windows Explorer was an integrated file viewer that allowed users to view information about files and other system resources like printers and networks in an organized way. There was a hierarchical display of folders in the left hand "scope pane" and a list display of the contents of a given folder in the right hand "view pane." (*See* Alepin Report at 36-37; Expert Report of John Bennett, June 24, 2009 ("Bennett Report") at 44, attached as Ex. 14 to Holley Aff.) A screenshot depicting the Windows Explorer in Windows 95 is attached as Exhibit 15 to the Holley Affidavit.

95 was commercially released. (NOV00721976-98 at 81, attached as Ex. 16 to Holley Aff.; Alepin Report at 84-85.) At the design preview, "Microsoft announced that there were no plans to allow ISVs" to use the namespace extensions. (NOV00721976-98 at 81, attached as Ex. 16 to Holley Aff.; Alepin Report at 85.) When Rich Hume, a WP Corp. developer, inquired about using the namespace extensions, he was told that Microsoft did not want to document the namespace extension APIs because they were poorly designed (a Microsoft executive called them "real hacks") and because Microsoft did not plan to support those APIs in future versions of Windows. (NOV00721976-98 at 81, attached as Ex. 16 to Holley Aff.; Alepin Report at 85.)

Although it had initially decided not to make information about the namespace extension APIs available to ISVs, Microsoft subsequently changed course. (Alepin Report at 87.) On June 10, 1994, it provided preliminary documentation for the namespace extension APIs to Novell and other ISVs. (Alepin Report at 87.) Four months later, however, in October 1994, Microsoft advised ISVs that the namespace extension APIs would not be supported in future versions of Windows and that ISVs should use them only "at their own risk." (Alepin Report at 92-93.) The "beta release in late October 1994" of Windows 95 no longer included documentation about how to use the namespace extension APIs. (Alepin Report at 92; deposition of former Microsoft developer Satoshi Nakajima, February 24, 2009 at 110-11, attached as Ex. 17 to Holley Aff.) It is undisputed that the namespace extension APIs remained in Windows 95 and could have been used by Novell if it chose to take the risk that a future version of Windows might not support these APIs. (Alepin Report at 92 n.450 ("To be clear, Microsoft did not withdraw the [namespace]

extensions . . . [the namespace extensions were] used by components that were arguably part of the operating system.").)[16]

Although Novell's count I is in large measure premised on the assertion that Novell needed the namespace extension APIs to develop quality word processing and spreadsheet applications and get those products to market in a timely fashion, the namespace extension APIs were not used by any of Microsoft's own office productivity applications, including Microsoft Word and Microsoft Excel. (Deposition of senior Microsoft developer Joseph Belfiore, January 13, 2009 at 200, attached as Ex. 19 to Holley Aff.; Gates Dep. at 272, attached as Ex. 10 to Holley Aff.; Bennett Report at 60; Deposition of John Bennett, August 31, 2009 at 212-13, attached as Ex. 20 to Holley Aff.)

Further, there is no dispute that it was possible for an ISV to "achieve the same functionality" provided by the namespace extension APIs using other APIs exposed by Windows 95. (Noll Dep. at 157, attached as Ex. 3 to Holley Aff.; *see also* Deposition of Ronald Alepin, August 20, 2009 at 142-43, attached as Ex. 21 to Holley Aff.)

C. Custom Print Processor

In all beta versions of Windows 95, and in the final product, all ISVs—including Novell—were provided with the ability to print documents from their applications. (*See* Alepin Report at 157-58.) Novell received information from Microsoft about how to use the standard print processor functionality, and the "device driver kit" that informed ISVs

[16] The namespace extension APIs were provided to Novell pursuant to a contract which expressly stated that Windows 95 might "be substantially modified prior to first commercial shipment" and that Novell assumed "the entire risk with respect to the use of the" product. (December 10, 1993 beta licensing contract between Novell and Microsoft, attached as Ex. 18 to Holley Aff.)

how to implement that functionality in an application was in Novell's files. (NOV-B01645812-954, attached as Ex. 22 to Holley Aff.) None of this is in dispute.

Although no allegations related to printing appear in Novell's complaint, Novell's experts now assert that Novell was injured because Windows 95 did not contain the extra "*custom* print processor" functionality that was included in Microsoft's more sophisticated Windows NT operating system. (*See* Alepin Report 159-65; Noll Report at 151.) It is undisputed that "custom print processor" functionality was not necessary for applications running on Windows 95 to print documents. (*See* Alepin Report at 164; NOV-B01645812-954, attached as Ex. 22 to Holley Aff.) It is also undisputed that because "custom print processor" functionality was not included in Windows 95, no application—including Microsoft's own—had access to such functionality in the operating system. (Alepin Report at 164.)

D. Windows 95 Logo Licensing Program

Microsoft licensed the Windows 95 logo to ISVs as one way of indicating to consumers that applications worked well with the new operating system. (Alepin Report at 144.) Under the logo licensing program, Microsoft permitted an ISV to place Microsoft's trademarked Windows 95 logo on the packaging for the ISV's application. (Alepin Report at 144-45.)

In early July 1994, more than a year before the commercial release of Windows 95, Microsoft provided ISVs with the requirements for obtaining a license to use a "Designed for Windows 95" logo. (Alepin Report at 144.) Among these was a requirement of "Windows NT compatibility." (Windows 95 Logo Requirements, December 20, 1994, NOV00709867-84 at 78-79, attached as Ex. 23 to Holley Aff.) Windows NT was intended

primarily for corporate customers on "workstation[s] and departmental and workgroup server[s]." (Alepin Report at 148.) The Windows NT compatibility requirement meant that an application had to "run successfully on both Windows 95 and Windows NT 3.5 (or greater)." (Bennett Report at 82 (quoting Microsoft Developers Network, Windows 95 Logo Requirements, attached as Ex. 24 to Holley Aff.).) ISVs seeking to license the Windows 95 logo could request an exemption from the Windows NT compatibility requirement "if the incompatibilities experienced by their products were attributable to 'functionality that is significantly different in architecture between' Windows 95 and Windows NT." (E-mail from Brad Chase to Mark Calkins, March 31, 1995, MSC 00700613-18 at 13, attached as Ex. 25 to Holley Aff.)

On March 6, 1995, Mark Calkins, then General Manager of Novell's Business Applications Group (which included WordPerfect and Quattro Pro), asked Microsoft for an exemption from the Windows NT compatibility requirement. (E-mail from Mark Calkins, March 6, 1995, NOV00023746-48 at 46, attached as Ex. 26 to Holley Aff.) On March 31, 1995, Brad Chase of Microsoft responded that "[a]t this point in time, we do not believe the issues you raise constitute significant enough architectural issues between Windows NT and Windows 95 to warrant an exception being granted." (MSC 00700613-18 at 15, attached as Ex. 25 to Holley Aff.) Mr. Chase added, however, that he "would be glad to have a conference call between our teams" to discuss the Windows NT compatibility requirement, and pointed out that "participation in the Windows 95 Logo Program is optional and by no means required to ship a great Windows 95 application." (MSC 00700613-18, attached as Ex. 25 to Holley Aff.) This exchange of correspondence occurred five months before

Microsoft commercially released Windows 95, yet neither Mr. Calkins nor anyone else at Novell ever followed up on this issue with Microsoft.

E. Novell's Groupware Claims

Novell's complaint never mentions the GroupWise product or even the term groupware, which is used to refer to software products such as GroupWise that provide "email, calendaring, and task . . . management." (Alepin Report at 50.) Despite this, Novell's experts spend considerable time in their May 2009 reports discussing GroupWise and harm purportedly inflicted on that product by Microsoft's conduct.[17] (Alepin Report at 105-43; Expert Report of Frederick R. Warren-Boulton, May 1, 2009 ("Warren-Boulton Report") at 66-67, Appendix I at 116-18, attached as Ex. 27 to Holley Aff.) The name GroupWise actually refers to two related products, "client software" that resides on an individual's PC and "server software" that resides on a network server. (Warren-Boulton Report Appendix I at 116-18.) Messages are stored on, and most information is processed by, the GroupWise server software. (Alepin Report at 47.)

In his expert report, Professor Noll distinguishes "groupware applications" (*i.e.*, GroupWise client software) from the "network server software that manages and stores communications" (*i.e.*, GroupWise server software). (Noll Report at 35.) Professor Noll makes clear that a groupware application (such as the GroupWise client software or Microsoft Outlook) is distinct from the server software that supports it. (Noll Report at 35-36.) Professor Noll excludes groupware, such as GroupWise, from his definition of "office

[17] The conduct to which Novell's experts point relates to Microsoft's alleged manipulation of, and withholding of information concerning, a set of technologies referred to broadly as MAPI.
(*footnote continued*)

productivity applications," stating that the distinct categories of software that were included in "Novell's software portfolio" were "office productivity applications, groupware, desktop middleware and network server" software. (Noll Report at 48.) Professor Noll also states that groupware is in a separate relevant market from word processors, spreadsheets or other office productivity applications. (Noll Report at 65.)

Although GroupWise comprised two distinct software products—client software and server software—Novell's damages expert has made clear that Novell is seeking to recover damages for harm allegedly inflicted only on GroupWise server software (Warren-Boulton Report Appendix I at 116-18), and only for the period 1997 through 2001, after Novell sold WordPerfect and Quattro Pro to Corel. (Warren-Boulton Report Appendix I at 116-18.)[18]

Novell's complaint includes no allegations related to GroupWise, and seeks no damages for Microsoft conduct that occurred after March 1996. The complaint instead makes clear that the only relevant products are "word processing and spreadsheet applications," products which are "sometimes referred to as 'office productivity applications.'" (Compl. ¶ 24.)

(*footnote continued*)
Although those technologies evolved over time, they relate to the way in which groupware client software communicates with groupware server software. (*See* Alepin Report at 111-20.)

[18] Novell acquired GroupWise when it acquired WP Corp. in June 1994. (Alepin Report at 50.) GroupWise was not sold to Corel when Novell sold WordPerfect and Quattro Pro in March 1996. (Warren-Boulton Report at 66-67.) To this day, Novell still owns GroupWise. (*See* http://www.novell.com/products/groupwise/.)

F. Microsoft's Agreements with OEMs

Both WP Corp. and Novell licensed their applications—including WordPerfect—through a variety of distribution channels. Just prior to Novell's acquisition of WordPerfect in June 1994, WP Corp. licensed its word processing software through "wholesale distributors, resellers, VARs [value added resellers, which combined software and hardware for specialized users], mass merchants, mail order companies, and others," and planned to continue focusing its "primary attention" on these channels in the future. (1994 WP Corp. Business Plan, NOV00062806-12 at 07, attached as Ex. 28 to Holley Aff.) WP Corp. expected to obtain more than 80% of its application revenues in 1994 through these channels (NOV00062806-12 at 07, attached as Ex. 28 to Holley Aff.) and an additional 12% from direct sales to large accounts and end users. (*Id.*)

Once Novell acquired WordPerfect and Quattro Pro, its internal marketing documents describe an even broader array of distribution channels through which Novell licensed these products. An April 3, 1995 Novell Business Applications Business Plan lists numerous "standard distribution channels," including the retail channel, value added resellers, computer superstores (such as Comp USA), mass merchants (such as Wal-Mart), corporate outbound sales (in which offers are made to potential corporate customers by phone), mail order, OEMs and direct sales to end users. (NOV00019346-71 and 65, attached as Ex. 29 to Holley Aff.)

Microsoft licensed Microsoft Word and Microsoft Excel through a variety of distribution channels as well. In the years 1994 through 1996, Microsoft licensed between 89.8% and 96.1% of Microsoft Word, Microsoft Excel and Microsoft Office either as "Fully Packaged Product" in the retail channel, or through volume licensing to large customers.

(Expert Report of Kevin Murphy, June 24, 2009 ("Murphy Report") Exhibit 5, attached as Ex. 30 to Holley Aff.)

In contrast, the OEM channel was comparatively unimportant for distributing office productivity applications. It is undisputed that WP Corp. never even attempted to make OEMs a significant distribution channel for WordPerfect. (Noll Report at 98 ("Before being acquired by Novell, WordPerfect did not place much emphasis on selling through the OEM channel.").) Indeed, at the time Novell acquired WordPerfect on June 24, 1994, licenses of WordPerfect through the OEM channel accounted for just 0.5% of the total revenue from WordPerfect licensing. (Noll Report at 98, citing "Novell Business Applications Business Plan," April 3, 1995, NOV00019346-71 at 61-62, attached as Ex. 29 to Holley Aff.) Pete Peterson confirmed that WP Corp. "didn't pursue the OEM channel very much," and never licensed a "significant amount" of WordPerfect through the OEM channel. (Peterson Dep. at 85-87, attached as Ex. 7 to Holley Aff.) Clive Winn, Vice President of Sales and Marketing for WP Corp., also testified that "we did not focus much on OEM sales." (Deposition of Clive Winn, December 10, 2008 at 20, attached as Ex. 31 to Holley Aff.)

Once Novell acquired WordPerfect and Quattro Pro, Novell's primary focus remained on major distributors and resellers, and not on the OEM channel. (Deposition of WP Corp./Novell sales and marketing employee, Craig Bushman, November 18, 2008 at 91, attached as Ex. 32 to Holley Aff.; Deposition of WP Corp./Novell sales manager, David Acheson, November 19, 2008 and December 9, 2008 at 26-27, attached as Ex. 33 to Holley Aff.) As a result, the products at issue were always licensed principally through channels

other than the OEM channel, and the OEM channel was never significant for either WP Corp. or Novell.

In its complaint, however, Novell alleges that anticompetitive conduct by Microsoft is what explains Novell's failure to achieve greater success in the OEM channel. (Compl. ¶ 131.) Despite this, and after extensive discovery in this action, Novell has no evidence that "Microsoft forbade OEMs from pre-installing both Novell and Microsoft products on their machines . . . ." (Compl. ¶ 117.) To the contrary, Microsoft's license agreements with OEMs for Windows operating systems during the relevant period are silent on the subject of applications licensing.[19]

Moreover, there are no Microsoft agreements with OEMs that "materially disadvantaged" Novell's word processing and spreadsheet applications. (*See* Compl. ¶ 175.) There is no evidence that (a) Microsoft ever increased or threatened to increase the price of Windows to OEMs that distributed Novell's applications, (b) any OEM chose not to license Novell's applications because of rebates paid by Microsoft for licenses of Microsoft Office, (c) Microsoft required OEMs to divulge proprietary information about the licensing of Novell's applications or that any OEM was ever discouraged from licensing WordPerfect or Quattro Pro as a result of such reporting requirements, (d) any OEM ever decided not to license Novell's applications because of minimum licensing commitments imposed by Microsoft, or (e) Microsoft ever withheld or threatened to withhold Market Development Funds (which were paid to OEMs for meeting certain milestones in their promotion of

[19] *See, e.g.*, Microsoft OEM License Agreement with Micron Computer, February 1, 1994, MS-PCA 1203091-103, attached as Ex. 34 to Holley Aff.; Microsoft OEM License Agreement for

(*footnote continued*)

Windows operating systems) from OEMs who distributed Novell's applications. This whole series of Novell allegations (*see* Compl. ¶¶ 113-48, 174-77) is devoid of factual support.

Professor Noll, who has been engaged by various plaintiffs in at least six antitrust class actions against Microsoft over the past decade, was asked by Novell "to undertake an economic analysis of the liability issues in this case." (Noll Report at 3.) Nowhere in his 157-page report or his 74-page reply report does he assert that any OEM ever decided not to license Novell's applications because of an agreement the OEM had with Microsoft, nor does he provide a single example of this ever taking place.[20] Novell had more than a year to conduct discovery in this case. (February 26, 2008 Scheduling Order (setting close of fact discovery for March 6, 2009), attached as Ex. 36 to Holley Aff.) Novell had nationwide subpoena power, and Professor Noll had at his disposal all 47 depositions taken in this case, in addition to many depositions taken in prior antitrust cases involving Microsoft. He also had access to many millions of pages of documents produced by Microsoft and third parties.[21] Novell made the decision not to depose a single OEM representative or to request documents from any OEM. Moreover, Novell did not ask questions of any of the 47 witnesses deposed in this case about the supposed impact of any

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(*footnote continued*)
Desktop Operating Systems with Advanced Digital Systems, April 1, 1995, MS-PCA 1632652-57, attached as Ex. 35 to Holley Aff.

[20] Professor Noll opines at some length in his reports about ways in which Microsoft's agreements with OEMs supposedly harmed ISVs *other than* Novell. (Noll Report at 96-106.) While Microsoft vigorously disputes the facts involved in each of Professor Noll's supposed examples, those factual disputes are irrelevant because not a single one of the examples involved an OEM deciding not to license *Novell's* applications as a result of some agreement with Microsoft. Instead, virtually all of Professor Noll's examples relate to the licensing of Lotus' applications by OEMs.

[21] Professor Noll complains that he cannot draw conclusions about Microsoft's agreements with OEMs "due to incomplete discovery." (Noll Report at 92.) If discovery is "incomplete," that is entirely the result of Novell's decision not to conduct any.

Microsoft agreements with OEMs on Novell's ability to distribute its word processing and spreadsheet applications through the OEM channel.

There is absolutely nothing behind count VI.

ARGUMENT

I. The Standard for Granting Summary Judgment

Summary judgment should be granted where "there is no genuine issue as to any material fact," and the movant "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts[;] the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)) (citations omitted) (affirming grant of summary judgment in complex antitrust case). "To avoid summary judgment, the plaintiffs must produce not 'merely colorable' but 'significantly probative' evidence." *Abcor Corp.* v. *AM Int'l, Inc*., 916 F.2d 924, 930 (4th Cir. 1990) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

As the Supreme Court has stated, summary judgment is not "a disfavored procedural shortcut, but rather [is] an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp*. v. *Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted). Indeed, the Fourth Circuit has noted that, "because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization." *Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P*., 57

F.3d 1317, 1322 (4th Cir. 1995); *Oksanen* v. *Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) ("summary judgment is an important tool for dealing with antitrust cases").

II. Summary Judgment Should Be Granted in Microsoft's Favor on Count I

A. Novell Cannot Show Harm to Competition in the Relevant Market

Novell's complaint, filed in November 2004, contained six counts. Four of them (counts II-V) alleged that conduct engaged in by Microsoft caused harm to office productivity applications—Novell's WordPerfect word processing software and Quattro Pro spreadsheet software—and to competition in purported markets for word processing and spreadsheet software. (Compl. ¶¶ 156-73.) Novell's complaint contained an additional count—count I—designed to circumvent the four-year statute of limitations.[22] Count I alleges that the same Microsoft conduct alleged in counts II-V caused harm to the same Novell office productivity applications, but that the market in which that conduct adversely affected competition is the PC operating system market[23]—the market at issue in the Government Case. (Compl. ¶¶ 151-55.)

The theory espoused by Novell in count I was that WordPerfect and Quattro Pro had "the potential to provide Microsoft's competitors with a way across the barriers to entry that protected Microsoft's existing operating systems monopoly"—in particular, the "applications barrier to entry." (Compl. ¶¶ 5, 153.) As the Fourth Circuit explained,

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[22] A civil antitrust suit "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Novell's causes of action accrued no later than March 1996, when Novell sold to Corel the products allegedly harmed by Microsoft's conduct. (*See* Noll Dep. at 47-48, attached as Ex. 3 to Holley Aff.)

[23] Novell claimed that the conduct in question "directly and proximately harmed competition" in the PC operating system market. (Compl. ¶ 149.)

> the "applications barrier to entry"—stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.

505 F.3d at 306 (quoting *United States* v. *Microsoft Corp.*, 253 F.3d at 55).

Of course, the unstated (but unmistakable) purpose of making this peculiar claim—a claim that Microsoft's conduct in purported markets for word processing and spreadsheet software caused injury to competition in the very different (though adjacent) market for PC operating systems—was to enable Novell to seek to benefit from the tolling provision in the Clayton Act. As stated above, Novell's complaint was brought more than eight years after it sold the products at issue. The claim in count I, that the market adversely impacted by the conduct at issue was the PC operating system market, was designed to fit that claim within 15 U.S.C. § 16(i), which tolls the statute of limitations for a private antitrust action "based in whole or in part on any matter complained of" in an earlier government enforcement action.

The Government Case involved conduct by Microsoft in the PC operating system market that allegedly enabled Microsoft to maintain a monopoly in that same market. There was no claim in the Government Case that Microsoft engaged in wrongful conduct in purported markets for word processing or spreadsheet software. Indeed, although Judge Jackson's lengthy opinion in the district court refers to Microsoft conduct directed against Netscape's Navigator and Sun's Java technology—so-called "middleware" that might, under certain yet-to-arise conditions, weaken the applications barrier to entry—neither Judge Jackson nor the D.C. Circuit on appeal made any reference to WordPerfect or Quattro Pro or

to word processing or spreadsheet software more generally. The notion that WordPerfect or Quattro Pro, had they been more successful on Windows 95, might have threatened Microsoft's position in the market for PC operating systems is entirely new to this lawsuit.

In 2005, this Court dismissed counts II-V as time-barred. *Novell, Inc.* v. *Microsoft Corp.*, 2005 U.S. Dist. LEXIS 11520 at *14 (D. Md. June 10, 2005). This Court denied Microsoft's motion to dismiss count I, ruling that it could proceed to discovery based on the allegation that Microsoft "obtained and maintained its monopoly power in the Intel-compatible operating system market" by means of "specifically target[ing] . . . WordPerfect and Quattro Pro." (*Id.* at *2, *5.) The Court of Appeals affirmed, holding that Novell's claim that the Microsoft conduct that harmed WordPerfect and Quattro Pro was "intended to and did restrain competition in the PC operating-system market" was sufficient to survive a motion to dismiss. *Novell*, 505 F.3d at 316.

Of course, to establish a violation of the antitrust laws under the theory of count I, Novell must do more than make allegations. It must prove that the conduct at issue was, as the Fourth Circuit put it, "intended to and did restrain competition in the PC operating-system market." 505 F.3d at 316. Indeed, a private antitrust plaintiff must demonstrate that the conduct complained of "contributed significantly to the achievement or maintenance" of monopoly power in the relevant market—in this case the PC operating system market. III Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 650c (3d ed. 2008); *see Thompson Everett*, 57 F.3d at 1326 (granting summary judgment to defendants on the ground that the plaintiff did "not advance[] evidence" that the challenged conduct had "a substantial anticompetitive effect"); *accord Morgan* v. *Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (to be exclusionary, challenged conduct must be "capable of making a significant

contribution to creating or maintaining monopoly power") (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983)); *Data General Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) (exclusionary conduct is "conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power") (internal quotation marks omitted).

In January 2008, following the appeals of this Court's decision on the motion to dismiss, Novell proposed a discovery period covering more than 13 months and allowing for 500 hours of depositions of fact witnesses. (January 24, 2008 Joint Status Report Re: Scheduling Order, attached as Ex. 37 to Holley Aff.) Microsoft proposed a much more limited discovery period. This Court adopted Novell's proposed scheduling order, thus giving Novell every opportunity to develop evidence in support of the two surviving counts in its complaint. Once discovery started, the parties took depositions of 47 fact witnesses, and Novell has obtained the transcripts of depositions of many more Microsoft witnesses from prior antitrust actions. The parties also have available more than 45 million pages of documents that were produced in this case or in prior actions against Microsoft. Yet, despite this extensive record, Novell has no evidence of any kind that the Microsoft conduct allegedly directed at WordPerfect or Quattro Pro had any substantial impact on competition in the PC operating system market.

Indeed, Professor Noll has conceded the lack of any such impact. In his reports, Professor Noll opined that the Microsoft conduct directed against Novell (including conduct directed at DR DOS and Netware that are not a part of this case), when combined with conduct directed against Netscape Navigator and Sun's Java technology, may

"collectively" have had an impact on competition in the PC operating system market. (Reply Report of Roger Noll, July 24, 2009 ("Noll Reply Report") at 6, 28, attached as Ex. 38 to Holley Aff.) It was only through such "aggregation" of the effects of Microsoft's conduct on products other than Novell's office productivity applications that Professor Noll could find any impact on competition in the PC operating system market. (Noll Reply Report at 28.) Of course, Novell has already been paid for claims against Microsoft relating to DR DOS and Netware,[24] and the Microsoft conduct against Netscape Navigator and Sun's Java technology was the subject of the Government Case. *See United States* v. *Microsoft Corp.*, 253 F.3d at 74-80.[25]

At his deposition, Professor Noll was asked specifically whether the Microsoft conduct directed at WordPerfect and Quattro Pro, in and of itself, harmed competition in the PC operating system market. He refused to say that it had, testifying "I suspect that there would have been no adverse impact" on competition in the PC operating system market from the conduct directed at Novell's office productivity applications. (Noll Dep. at 42, attached as Ex. 3 to Holley Aff.) When asked again, Professor Noll reiterated that he "suspect[ed] that there would have been no" harm to competition in the PC operating system market from all the Microsoft conduct directed against Novell's office productivity applications. (Noll

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[24] Novell sold the DR DOS business to Caldera, Inc. in 1996, and Caldera immediately brought an antitrust action against Microsoft challenging the very practices discussed by Professor Noll. The case settled for $280 million and Caldera paid more than $48 million of that amount to Novell as a "royalty." (*See* complaint in *Novell, Inc.* v. *Canopy Group*, Fourth Judicial District Court, Utah County, Case No. 000402011C, filed May 23, 2000 attached as Ex. 39 to Holley Aff.) In 2004, Microsoft settled all claims related to Netware with Novell.

[25] The same conduct was also the subject of private antitrust actions against Microsoft brought by Netscape and Sun in this Court. *Netscape Communications Corp.* v. *Microsoft Corp.* 02-CV-97 (D. Md.); *Sun Microsystems, Inc.* v. *Microsoft Corp.*, JFM-02-2739 (D. Md.). Those actions were both settled.

Dep. at 42, attached as Ex. 3 to Holley Aff.) He affirmed the theory articulated in his report, namely that in order to find some impact on competition in the PC operating system market, one must consider Microsoft's conduct directed against WordPerfect and Quattro Pro in combination with the conduct directed at Netscape Navigator, Sun's Java technology and other products—in other words, one must consider "the totality of actions by Microsoft." (Noll Dep. at 40, 41-43, 132-36, attached as Ex. 3 to Holley Aff.) He further testified that, although "Netscape combined with Java" may have been a threat to Microsoft's PC operating system business, no other applications vendor—including Novell—was sufficiently important to threaten the applications barrier to entry and, thus, Microsoft's leading position in the PC operating system market.[26] (Noll Dep. at 198, attached as Ex. 3 to Holley Aff.) Professor Noll was explicit that "Quattro Pro was not a threat to Microsoft's operating system" and that "WordPerfect by itself would pose no such threat." (Noll Dep. at 135, attached as Ex. 3 to Holley Aff.) Even with regard to PerfectOffice, Novell's suite of office productivity applications, Professor Noll testified that while it "comes closer, . . . the threat of PerfectOffice is primarily in conjunction with other products. It's not primarily independent." (Noll Dep. at 136, attached as Ex. 3 to Holley Aff.)

In sum, there is no evidence of any adverse impact on competition in the PC operating system market based on the conduct challenged in count I, and Novell's expert in

[26] Professor Noll explains that "Netscape and Java threatened Microsoft's applications barrier to entry" because Java and Netscape "could be used by ISVs as an alternative to Windows as a platform for applications" and "[t]he combined effort of Netscape and Sun['s Java] threatened to hasten the demise of the applications barrier to entry." (Noll Report at 109 (quoting *United States* v. *Microsoft*, 84 F. Supp. 2d at 30) (Findings of Fact ¶ 77).) As Judge Jackson found, Sun's Java technology was intended "to enable applications written in the Java language to run on a variety of platforms with minimal porting" and the stated goal of Sun's Java technology was to permit ISVs to "write once, run anywhere." *United States* v. *Microsoft*, 84 F. Supp. 2d at 29 (Findings of Fact ¶ 74).

antitrust economics has pointedly refused to opine that competition in the PC operating system market was harmed by the Microsoft conduct allegedly directed at Novell's office productivity applications. This absence of evidence establishing causation requires dismissal of count I.

B. The Microsoft Conduct of which Novell Complains Is Permissible under the Antitrust Laws

The allegations underpinning count I are premised on the notion that Microsoft had some affirmative duty to assist—or to continue assisting—a competitor. Novell complains that Microsoft harmed its office productivity applications designed for use with Windows 95 by (i) discontinuing the formal documentation of six APIs in pre-release versions of Windows 95, (ii) failing to include in Windows 95 certain functionality that Novell would have liked, and (iii) failing to endorse Novell's applications by granting Novell a license to use the Windows 95 logo. These allegations are not cognizable under the antitrust laws.

The objective of our antitrust laws is to promote competition. Successful companies—even monopolists—are encouraged to compete vigorously. *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 544 (9th Cir. 1983) ("A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."). Monopolists are encouraged to innovate and are entitled to retain the benefits of such innovation. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979). Moreover, a monopolist is not required to help its smaller rivals or shield them from the rigors of competition. *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) ("A firm with lawful monopoly power has no general duty to

help its competitors."); *Twin Labs., Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990) ("Antitrust law . . . does not require one competitor to give another a break just because failing to do so offends notions of fair play.").

This Court has recognized on two occasions that Microsoft is not required to disclose information to its competitors about new Windows operating systems under development. *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 745 (D. Md. 2003) (Motz, J.); *Daisy Mountain Fire Dist*. v. *Microsoft Corp*., 547 F. Supp. 2d 475, 489 (D. Md. 2008) (Motz, J.). In *In re Microsoft Corp.*, this Court considered allegations that Microsoft had violated the antitrust laws because it "refused, limited, and manipulated its actual and potential competitors' access to the specifications [for Windows] while preferentially or freely granting itself such access." 274 F. Supp. 2d at 744. Plaintiffs in that case argued that Microsoft was "under a duty to disclose to independent software vendors ('ISVs') information about how applications programming interfaces ('APIs') worked." *Id.* The Court rejected those claims, stating that "because the software development industry is dynamic and involves continuous innovation, a requirement that Microsoft disclose significant information to its competitors would be unworkable . . . . Delay and confusion would be inevitable, and the software development process would be strangulated." *In re Microsoft Corp.*, 274 F. Supp. 2d at 745. *See also Daisy Mountain*, 547 F. Supp. 2d at 489 (same holding). The same reasoning should be applied here to Novell's allegations that it was denied technical information about the namespace extension APIs in Windows 95, that Microsoft should have included custom print processor functionality in Windows 95, and that Microsoft should have granted Novell an exemption to the Windows NT compatibility requirement of the Windows 95 logo licensing program.

Novell complains that, without ongoing access to complete documentation of the namespace extension APIs, "ISVs' applications could not reach the market at the same time as Windows 95, and would surrender time-to-market leads to Microsoft's own applications." (Compl. ¶ 70; *see also* Alepin Report at 91 (Microsoft prevented Novell "from shipping applications that used the extensions . . . before Microsoft Office could do so").) Even if this allegation had merit—and it does not, since it is undisputed that Microsoft Office never made use of these APIs (*see* p. 13, *supra*)—this Court has held that Microsoft is permitted to "use[] its superior knowledge of its own APIs to obtain a 'first mover advantage' in the applications market" because even an alleged monopolist has "the right to gain temporary benefits from innovations to its own products." *In re Microsoft*, 274 F. Supp. 2d at 746.

Other courts have likewise held that an integrated company, even if it has monopoly power, has a right to use its innovations exclusively for its own benefit. *See California Computer Prods.* v. *IBM*, 613 F.2d 727, 744 (9th Cir. 1979) (IBM had no duty to disclose information about design change in interface between peripheral equipment and CPUs that rendered plaintiff's peripheral equipment obsolete); *David L. Aldridge Co.* v. *Microsoft Corp.*, 995 F. Supp. 728, 755-56 (S.D. Tex. 1998) ("Because Microsoft could lawfully decline to reveal advances in technology, it did not offend the antitrust laws by failing to distribute design information about Windows 95 to Aldridge . . . ."); *GAF Corp.* v. *Eastman Kodak Co.*, 519 F. Supp. 1203, 1229 (S.D.N.Y. 1981) (Kodak had no duty to disclose technical information to competitor regarding new Kodacolor film and related development process); *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F. Supp. 423, 437 (N.D.

Cal. 1978) (IBM had no duty to disclose computer interface information to competing suppliers of peripheral equipment), *aff'd*, 636 F.2d 1188 (9th Cir. 1980).

The analysis does not change merely because Microsoft provided some technical information about the namespace extension APIs to Novell in June 1994 or allegedly told Novell that custom print processor functionality would be included in Windows 95 by the time the new operating system was commercially released. The fact that Microsoft voluntarily provided assistance to Novell in developing versions of its office productivity applications and allegedly said it would provide more such help in the future did not give rise to an affirmative duty on Microsoft's part to continue helping its competitor. As the Seventh Circuit has held, "[i]f a monopolist does extend a helping hand, though not required to do so, and later withdraws it . . . does he incur antitrust liability? We think not." *Olympia Equip.*, 797 F.2d at 376.

Although the right of a monopolist to refuse to assist its competitors is almost unqualified, a very limited exception to this general principle may exist when the impugned conduct is precisely the type at issue in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In *Aspen Skiing*, defendant was the owner of three of the four ski mountains in the Aspen area. Plaintiff owned the fourth. Plaintiff and defendant

> had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. The defendant refused even that.

Verizon Commc'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408-09 (2004) (citing *Aspen Skiing*, 472 U.S. at 593-94). On the basis of these unusual facts, the Supreme Court found an antitrust violation.

Recently, the Supreme Court has taken steps to limit *Aspen Skiing* to its facts. *Trinko*, 540 U.S. at 409; *see also Pac. Bell Tel. Co.* v. *linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1122 (U.S. 2009). In *Trinko*, the Supreme Court held that "*Aspen Skiing* is at or near the outer boundary of § 2 liability." 540 U.S. at 409. The Court emphasized that in *Aspen Skiing* there was

> significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

Trinko, 540 U.S. at 409 (emphasis in original). Absent these very specific factual circumstances, an antitrust violation would not have been found. The Court in *Trinko* rejected a broad application of *Aspen Skiing* and held that the defendant's "alleged insufficient assistance in the provision of service to rivals" did not give rise to a legally cognizable claim under Section 2 of the Sherman Act. *Id.* at 410.

Novell's allegations fall well beyond "the outer boundary of § 2 liability" that *Aspen Skiing* delineated. With regard to the namespace extension APIs, Novell can point to no long-standing, multi-year course of conduct, as existed in *Aspen Skiing*. Instead, Novell relies on a three-month period in 1994, during the beta testing of Windows 95, when the namespace extension APIs were documented. *See* pp. 12-13, *supra*. *Aspen Skiing* provides no support for the proposition that, by documenting a small group of APIs for three months

during the beta testing of a new operating system, nearly a year before its commercial release, Microsoft incurred a legal obligation (at the risk of treble damages) to continue providing documentation for those APIs. Further, Microsoft did not single out Novell for this treatment—documentation of the namespace extension APIs was not made available to any ISVs, and even Microsoft's own developers of word processing and spreadsheet applications did not use the APIs. *See* p. 13, *supra*.

Similarly, Novell alleges that, by telling Novell in 1994 and early 1995 that custom print processor functionality "should be" included in Windows 95 (Alepin Report at 161), Microsoft thereby legally bound itself to include such functionality in the new operating system. Such an aspirational statement about the features in a complex product still under development (and substantially behind schedule) falls far short of making out an antitrust violation.

Novell's allegations concerning the Windows 95 logo licensing program also fail to pass muster under the antitrust laws. Microsoft was under no legal obligation to grant Novell an exemption to one of the program's explicit requirements. In any case, Novell's current complaints about the Windows 95 logo licensing program ring particularly hollow in light of Novell's conduct in relation to its own logo licensing program.[27] In 1995, Novell had a logo licensing program for products that worked with Novell's very popular NetWare

[27] Novell's complaints about Microsoft's decision not to grant a Windows 95 logo to the versions of WordPerfect and Quattro Pro designed for use with Windows 95 are also meritless because Novell never released those products and, thus, had no use for the logo. (Deposition of Karl Ford, Senior WordPerfect for Windows Developer, February 16, 2009 at 19 (testifying that WordPerfect for Windows 95 "shipped after Corel bought us . . . which would be in '96."), attached as Ex. 40 to Holley Aff.) WordPerfect and Quattro Pro for Windows 95 were released by Corel about three months after Novell sold its office productivity applications to Corel. (Corel Press Release,

(*footnote continued*)

server operating system, called the "Yes, It Runs" program. In a letter dated December 20, 1995 from Gary H. Mueller, Novell's Vice President of Developer Relations, to Mark Wood, a Microsoft Product Manager, Novell informed Microsoft of its "decision not to license the Yes, It Runs trademark to Microsoft." (NOV00754815, attached as Ex. 41 to Holley Aff.) Novell stated that "Novell reserves the right to refuse the Yes logo to anyone for any reason" and that licensing the logo to Microsoft was "not in the best interest of Novell." (NOV00754815, attached as Ex. 41 to Holley Aff.) There is no basis for concluding that Microsoft's obligations differed from those Novell imposed on itself.[28]

In sum, count I of the complaint—predicated on harm that Microsoft allegedly inflicted on Novell's applications—is premised on the claim that Microsoft could have and should have done more to assist Novell in creating versions of WordPerfect and Quattro Pro for use with Windows 95.[29] The antitrust laws require no such thing.

(*footnote continued*)
"Corel Ships Corel WordPerfect Suite 7 for Windows 95," May 26, 1996, attached as Ex. 5 to Holley Aff.) Novell has no standing to challenge conduct that injured only Corel.

[28] There is no valid claim in this action for some business tort or unfair trade practice. "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945)).

[29] In May 1996, Novell Associate General Counsel Ryan Richards conducted interviews with Novell developers, in part "to gather information concerning Microsoft's anticompetitive acts, in anticipation of civil litigation against Microsoft for damage caused to Novell's business interests." (Affidavit of Ryan L. Richards, sworn to on April 23, 2009 at 1, attached as Ex. 42 to Holley Aff.) After speaking with several Novell developers, Mr. Richards concluded that there were "[n]o big issues that are harming our products." (NOV-B07587565, attached as Ex. 43 to Holley Aff.)

C. Novell May Not Now Seek Redress for Alleged Harm to its GroupWise Product

Novell's GroupWise product has no place in this case. The complaint makes claims for harm inflicted on Novell's "office productivity applications," a term that Novell itself defines to mean "[w]ord processing and spreadsheet applications." (Compl. ¶¶ 8, 24.) The only such products identified in the complaint (and the only such products Novell owned) were WordPerfect and Quattro Pro. (*See* Compl. ¶ 2.) Novell's complaint (all 178 paragraphs and 68 pages) makes claims for harm to no Novell products other than WordPerfect and Quattro Pro.

Furthermore, the complaint asserts that there are only "[t]hree markets" that are "relevant to this action: the market for Intel-compatible PC operating systems, the market for word processing applications, and the market for spreadsheet applications." (Compl. ¶ 24.) The complaint thus unambiguously disavows any claim of harm to other Novell products that competed in other markets. In its brief to the Fourth Circuit, Novell clearly stated that it sought "standing to pursue claims against Microsoft for injury to Novell's word-processing and spreadsheet applications." (Brief of Appellee-Cross-Appellant Novell Inc., May 16, 2006 ("Novell Fourth Circuit Brief") at 6, attached as Ex. 44 to Holley Aff.) Thus, consistent with the complaint, Novell sought—and was granted—standing to pursue claims only for harm to WordPerfect and Quattro Pro. It is too late to change that now.

Novell's complaint is also clear that it seeks damages for "the amount of profits lost by WordPerfect during the period 1994-1996" and the "precipitous decline in WordPerfect's value" that resulted from "the dramatic decline in WordPerfect's sales and

profits." (Compl. ¶ 150.) Novell sold WordPerfect and Quattro Pro to Corel on March 1, 1996, and, thus, any lost profits or decline in value of those products by definition accrued prior to that sale. The Fourth Circuit, in permitting count I to go forward, understood this same point—*i.e.*, that "[a]ll six of Novell's claims arose prior to March 1996, when Novell sold WordPerfect and Quattro Pro to Corel Corporation." *Novell*, 505 F.3d at 308.

Despite this, and without any attempt to amend the complaint, Novell submitted expert reports in May 2009 which argue that Novell is entitled to recover for harm to its GroupWise server software. This is plainly impermissible; the complaint makes no reference to GroupWise or groupware software, and the briefs filed by Novell before this Court and the Fourth Circuit are likewise silent on the subject.[30] Not only do Novell's experts seek to introduce a new product—a product that Professor Noll concedes is in a separate market from word processors, spreadsheets and other office productivity applications (Noll Report at 65)—they also seek to encompass a time period that is wholly outside the bounds of the complaint, belatedly injecting claims for purported damages in the period 1997-2001. (Warren-Boulton Report at 67.)[31]

Fourth Circuit law is clear that "[h]inting at a claim in an expert witness statement" is not a proper substitute for amending the complaint. *Deasy* v. *Hill*, 833 F.2d 38,

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[30] A single passing reference is made to "e-mail" in the complaint, one in a long list of "other software markets" into which Microsoft allegedly sought to "extend its operating systems monopoly." (Compl. ¶ 4.) One mention of "e-mail" (which is not synonymous with groupware) in a 68-page complaint, unaccompanied by any allegation of anticompetitive conduct by Microsoft, is insufficient to put Microsoft on notice that Novell was asserting a claim related to its GroupWise product.

[31] Novell's damages expert is explicit that Novell seeks to recover for harm to GroupWise server software that occurred after March 1, 1996, when Novell sold WordPerfect and Quattro Pro. (Warren-Boulton Report at 67 (stating that he has "been instructed to limit [his] calculation of the GroupWise damages to the 5-year period" that followed the March 1, 1996 sale to Corel) and at

(*footnote continued*)

41 (4th Cir. 1987). The court in *Deasy* held that "[i]t would not be desirable to have discovery statements serve as amendments to the pleadings. Parties should not be encouraged to plead in this tentative and whimsical fashion, advancing their own cases while keeping their opponents off balance." 833 F.3d at 42.

Thus, alleged harm to GroupWise is not properly a part of this action. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a plaintiff to "provide the defendant with 'fair notice of the plaintiff's claim and the grounds upon which it rests.'" *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). Novell's complaint provides no notice of claims related to GroupWise, nor any notice that Novell would seek damages for the period after Novell sold WordPerfect and Quattro Pro to Corel. That should be the end of the matter.

III. Summary Judgment Should Be Granted in Microsoft's Favor on Count VI

To survive summary judgment on count VI, Novell must show that there are disputed issues of material fact as to whether Microsoft entered into contracts, combinations or conspiracies with OEMs that imposed an unreasonable restraint on trade. 15 U.S.C. § 1; *see also Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Oksanen*, 945 F.2d at 702. To do so, Novell must show that there are disputed issues of material fact not only regarding the existence of the alleged agreement, but also "that the conspiracy produced adverse, anti-competitive effects within the relevant product and geographic market,"[32] and

(*footnote continued*)
Appendix I (restricting his damages calculation for alleged harm to GroupWise server software to the 1997-2001 period).)

[32] Although Microsoft can establish that its agreements with OEMs were procompetitive, there is no reason to take up that inquiry on this motion. The key point is that there is no evidence in the

(*footnote continued*)

"that the plaintiff was injured as a proximate result of the conspiracy." *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 611 n.10 (4th Cir. 1985) (citing *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1195-96 (6th Cir. 1982).) Novell can make none of these necessary showings.

A. There Were No Agreements Prohibiting OEMs from Distributing Novell's Word Processing or Spreadsheet Applications

As a threshold matter, Novell must show the existence of some allegedly exclusionary agreements. *See Advanced Health-Care Servs., Inc.* v. *Radford Comty. Hosp.*, 910 F.2d 139, 146-47 (4th Cir. 1990) (affirming dismissal of Section 1 claim where plaintiff could not show any agreement between defendant and another party). Count VI is based on the allegation that Microsoft entered into "agreements with OEMs and others not to license or distribute Novell's office productivity applications or to do so only on terms that materially disadvantaged these products . . . ." (Compl. ¶ 175.) There is nothing to support the assertion that such agreements ever existed.

First, Microsoft's license agreements with OEMs for Windows operating systems are silent on the topic of OEMs distributing word processing or spreadsheet applications.[33] There are no provisions in these contracts that even mention distribution of word processing or spreadsheet applications, and certainly none that prohibited OEMs from distributing products that competed with Microsoft Word or Microsoft Excel. Professor Noll

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(*footnote continued*)
extensive record of this case that Microsoft's agreements with OEMs had an impact on decisions made by OEMs about whether to distribute Novell's word processing or spreadsheet applications during the relevant period. (*See* pp. 20-22, *supra*.)

[33] *See, e.g.*, MS-PCA 1203091-103, attached as Ex. 34 to Holley Aff.; MS-PCA 1632652-57, attached as Ex. 35 to Holley Aff.

admitted this, testifying that "[t]o my knowledge, it's not the case that the word 'prohibit' would apply to anything Microsoft did with respect to anybody's other software product" in the OEM channel during the relevant period. (Noll Dep. at 255, attached as Ex. 3 to Holley Aff.)

Second, although Novell alleges in its complaint that Microsoft threatened to raise the price of Windows operating systems or take other adverse actions against OEMs who distributed Novell's office productivity applications (Compl. ¶¶ 118-29), there is no evidence that any such actions occurred. In fact, Professor Noll admitted that he had not seen testimony "by any representative of any OEM that would support the notion that the OEM was pressured in any way by Microsoft not to distribute Novell's office productivity applications." (Noll Dep. at 257, attached as Ex. 3 to Holley Aff.) Nor was he aware of evidence "that indicates that Microsoft threatened to cut off Windows to that OEM" if an OEM distributed Novell's word processing or spreadsheet applications. (Noll Dep. at 257-58, attached as Ex. 3 to Holley Aff.)

Indeed, the only agreements identified in Professor Noll's report are those that he says discouraged those OEMs from distributing software products supplied by companies *other than Novell*. (*See, e.g.*, Noll Report at 99-102 (providing purported examples of the impact of various Microsoft actions on distribution of Lotus SmartSuite).) Professor Noll admits that "WordPerfect and later Novell were not the targets" of the supposedly exclusionary conduct by Microsoft, but rather that Novell's "potential customers—the OEMs—were the targets. Consequently, OEMs could anticipate that Microsoft plausibly would take similar actions against them if they began to distribute PerfectOffice when Novell decided to go after the OEM channel in 1995." (Noll Report at 100.)

There are two points to be made in response. First, and most obviously, Novell has no standing to challenge actions by Microsoft that allegedly had an adverse impact on other companies' products. *See Supermarket of Marlinton* v. *Valley Rich Dairy*, 1998 U.S. App. LEXIS 21110 at *10 n.18 (4th Cir. August 27, 1998) ("[A]n antitrust plaintiff must demonstrate that it suffered 'some damage' as a causal result of the defendant's violation." (quoting M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L.J. 311, 315 (1997))); *see also Barber & Ross Co.* v. *Lifetime Doors, Inc*., 810 F.2d 1276, 1279 (4th Cir. 1987) ("To bring a claim under the antitrust laws, a plaintiff must assert an 'injury in his business or property by reason of any thing forbidden in the antitrust laws.'" (quoting 15 U.S.C. § 15 (2006)). Novell is not permitted to step into the shoes of Lotus or any other third party allegedly injured by Microsoft's conduct.

Second, the assertion by Professor Noll that "OEMs could anticipate that Microsoft plausibly" would punish them if they distributed Novell's office productivity applications is pure speculation that is not supported by any evidence. This case has been pending for five years, and Novell has had every opportunity to obtain evidence in support of its allegations. Novell took not a single deposition of an OEM. It never served a subpoena seeking documents from any OEM. It has no evidence that any OEM was deterred from, or decided against, licensing Novell's word processing or spreadsheet software on account of anything that Microsoft did or said. Professor Noll himself cites no such evidence, and acknowledged in his deposition that he had not identified testimony "by any representative of any OEM that would support the notion that the OEM was pressured in any way by Microsoft not to distribute Novell's office productivity applications." (Noll Dep. at 257,

attached as Ex. 3 to Holley Aff.) Under such circumstances, summary judgment is not only appropriate, it is absolutely necessary.

B. Novell Was Not Foreclosed from a Substantial Share of the Market

Even if there were evidence of agreements between Microsoft and OEMs not to distribute Novell's office productivity applications, those agreements would have to foreclose competition "in a substantial share of the line of commerce affected" before Novell could establish liability under Section 1. *Tampa Elec. Co.*, 365 U.S. at 327.[34] In considering whether substantial foreclosure has been proven, courts must consider all potential channels of distribution that remain available to the plaintiff. *Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997).

Courts in this circuit have granted summary judgment in favor of defendants where the challenged contracts did not create "substantial foreclosure." For example, in *R.J. Reynolds Tobacco Co.* v. *Philip Morris*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), *aff'd*, 67 Fed. App'x 810 (4th Cir. 2003), Philip Morris made promotional payments to retailers in exchange for favorable display, advertising, and promotional space in stores. The court assumed, *arguendo*, that the challenged agreements foreclosed plaintiff from 34% of the market, and found that even being denied access to more than one-third of the market was not the "substantial foreclosure" required under Section 1. 199 F. Supp. 2d at 388-89; *see also Bepco, Inc.* v. *Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 828 (M.D.N.C. 2000) (granting

[34] While the Court in *Tampa Electric* examined the arrangements at issue under Section 3 of the Clayton Act, which concerns exclusive dealing arrangements, the Court acknowledged that, if such an arrangement does not fall within the "broader proscription" of Section 3 of the Clayton Act, "it follows that it is not forbidden by those of" Sections 1 and 2 of the Sherman Act. *Tampa Elec.*, 365 U.S. at 334.

summary judgment in favor of defendant where challenged agreements foreclosed 21.5% of market, a degree of foreclosure "far short of any value presumed to be substantial and [that] lie[s] on the margin of what is considered to be significant").

In the PC operating system business, OEMs were "the most important direct customers." *United States* v. *Microsoft Corp.*, 84 F. Supp. 2d at 24 (Findings of Fact ¶ 54). The same was never true for word processing or spreadsheet applications. Even Microsoft licensed only a fraction of its office productivity applications through the OEM channel. From 1994 to 1996, Microsoft licensed between 4% and 10% of its office productivity applications through the OEM channel. (Murphy Report Exhibit 5, attached as Ex. 45 to Holley Aff.) By contrast, during the same period, Microsoft licensed between 89.8% and 96.1% of Microsoft Word, Microsoft Excel and Microsoft Office either as a "Fully Packaged Product" in the retail channel, or through volume licensing to large customers. (Murphy Report Exhibit 5, attached as Ex. 45 to Holley Aff.)[35] Assuming *arguendo* that, but for Microsoft's allegedly anticompetitive conduct, Novell could have licensed its word processing and spreadsheet applications in the OEM channel in the same range as Microsoft, that would amount to foreclosure of only 4-10% of the market. Such modest foreclosure does not come close to "substantial foreclosure" required to make out a viable claim under Section 1.

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[35] Pete Higgins, the Microsoft executive in charge of Microsoft's applications division from 1992 to 1996, confirmed that the OEM channel was not a "significant channel" for distributing Microsoft Office. (Deposition of Pete Higgins, December 17, 2008 at 162, attached as Ex. 46 to Holley Aff.) Likewise Dale Christensen, a Microsoft employee who investigated the potential for OEM distribution of applications in 1993 and 1994, testified that distributing Microsoft Office through the OEM channel at the time "wasn't a big deal." (Deposition of Dale Christensen, February 5, 2009 at 29, attached as Ex. 47 to Holley Aff.)

C. Novell Has, in Any Event, Abandoned Count VI

Novell's damages expert, Dr. Warren-Boulton, describes in some detail the "major conduct" directed against Novell by Microsoft that gives rise to Novell's claim for damages. (Warren-Boulton Report at 8-13.) Specifically, Dr. Warren-Boulton lists four actions by Microsoft that he says resulted in "lost functionality and delay" to Novell,[36] and explains how this "lost functionality and delay" gave rise to the damages he calculates in his report. (Warren-Boulton Report at 9-12.) There is not a single word in either Dr. Warren-Boulton's 67-page report or his 47-page reply about any damages suffered by Novell as a result of the conduct alleged in count VI of Novell's complaint.[37] Moreover, there is no effort to estimate any damages attributable to the conduct alleged in count VI, and such damages are nowhere to be found in Dr. Warren-Boulton's damages calculations.

In sum, Novell should be deemed to have abandoned count VI.

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[36] Dr. Warren-Boulton explains that the "major conduct" by Microsoft that resulted in "lost functionality and delay" included: (i) "De-documenting the namespace extensions;" (ii) "Using its control of the messaging API ('MAPI')" to Microsoft's own benefit; (iii) "requiring Novell to develop its applications for Windows NT" to obtain a "Designed for Windows 95" logo; and (iv) "Preventing Novell from taking advantage of the Windows 95 print spooler." (Warren-Boulton Report at 8-9.)

[37] Of course, any attempt by Novell to calculate damages flowing from count VI would have been futile in any event, since Novell has not presented any evidence that a single OEM failed to distribute Novell's office productivity applications on account of the conduct alleged in count VI.

CONCLUSION

The Court should grant Microsoft's summary judgment motion and dismiss counts I and VI of Novell's complaint.

Respectfully submitted,

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