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

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CALDERA, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

**CALDERA INC.'S MEMORANDUM  
IN OPPOSITION TO DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON PLAINTIFF'S  
"PRODUCT PREANNOUNCEMENT"  
CLAIMS**

Judge Dee V. Benson  
Magistrate Judge Ronald N. Boyce

Case No. 2:96CV645B

**FILED UNDER SEAL**



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COMES NOW Caldera, Inc. complaining of Microsoft Corporation, and files this Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment on Plaintiff's "Product Preannouncement" Claims, and would show the Court as follows:

### **INTRODUCTION**

Long before April 1990, Microsoft had grown complacent and was resting on its MS-DOS monopoly. DRI's announcement of DR DOS 5.0 caught Microsoft by surprise. DR DOS 5.0 was far superior to any product that Microsoft had on the market, and had many compelling features Microsoft did not even have under development. Moreover, Microsoft's current version, MS-DOS 4.01, was widely regarded as a buggy, bloated product. Microsoft realized that OEMs and end users had a compelling reason to switch from MS-DOS to DR DOS — and that if they switched, they might never switch back. In order to preempt the adoption of DR DOS 5.0, Microsoft engaged in a continuous and systematic preannouncement plan designed specifically to injure DRI. Because the *truthful* release date of MS-DOS 5.0 would not preempt DR DOS sales, Microsoft did not tell the truth.

When DR DOS 6.0 later leapfrogged MS-DOS 5.0 shortly after it shipped, Microsoft preannounced a version of MS-DOS that never shipped until four years later, and only then as the DOS component of Windows 95. And when Novell DOS 7.0 loomed on the near horizon, Microsoft preannounced both MS-DOS 7.0 and Windows 95. MS-DOS 7.0 *never* shipped. As to Windows 95, Microsoft *again* missed its announced release-date by over a year. Worse, Microsoft falsely informed the world Windows 95 would not need DOS to run.

In each instance, Microsoft's *modus operandi* remained largely the same: (1) preannounce a new release immediately after DRI announced a new release; (2) falsely promise a shorter-than-expected

release date to curtail DOS users from buying DR DOS; (3) study the new DR DOS version to ascertain its features in order to add those features to its promised version; and (4) deliberately slip the release date in small increments to keep MS-DOS users within the fold. In some instances, Microsoft went further by promising features on a release that it knew would not be included in the next release.

Caldera has overwhelming evidence that Microsoft made preannouncements about their products that were not only in bad faith and objectively unreasonable, but also were knowingly false and misleading. This evidence is more than sufficient to raise a genuine issue of fact regarding the legality of Microsoft's vaporware practices. Summary judgment should be denied.

### **RESPONSE TO MICROSOFT'S "STATEMENT OF UNDISPUTED FACTS"**

Caldera disagrees in every material respect with Microsoft's purported "Statement of Undisputed Facts." Caldera incorporates by reference its Consolidated Statement of Facts as if set forth here in its entirety.

Caldera responds to the numbered paragraphs in Microsoft's purported "Statement of Undisputed Facts" as follows:

1. Disagreed. The testimony and exhibits referred to confirm only that, prior to November 1989, Microsoft had entirely abandoned architectural design and control of future MS-DOS versions, but that at some point after December 1989 took such control back from IBM. *See Consolidated Statement of Facts*, ¶¶ 20-26, 30-33.

2. *See* response to ¶ 1, *supra*. Microsoft also ignores that its only plans by the end of 1989 were to release MS-DOS 4.1 in 1990. *See Consolidated Statement of Facts*, ¶ 87.

3. Disagreed. The cited testimony does not support Microsoft's assertion. To the extent that more developers were assigned to the MS-DOS team, such assignment was made only after DR DOS 5.0 was announced. **Lennon Depo.** at 42.

4. Agreed.

5. Lennon's testimony speaks for itself. Caldera disagrees that the cited testimony supports Microsoft's assertion. At best, by April 1990 Microsoft had been thinking about a next version of MS-DOS for only four months. *See Consolidated Statement of Facts*, ¶ 87. Microsoft also ignores all evidence that its witnesses' self-serving testimony was not credible, and that testimony about purported schedules was neither objectively reasonable nor actually held in good faith. *See id.* at ¶¶ 87-101, 307-318, 353-374. Moreover, Microsoft ignores that its internal schedules are "fake." *See id.* at ¶¶ 85-86, 101, 309, 311, 315, 361-363, 368, 370.

6. Werner's testimony speaks for itself. *See response to ¶ 5, supra.*

7. Chestnut's testimony speaks for itself. *See response to ¶ 5, supra.*

8. The status report is quoted accurately. *See response to ¶ 5, supra.* The "MS-DOS 5.0 Postmortem Report" confirmed this schedule was false and not realistic. *See Exhibit 195; Consolidated Statement of Facts*, ¶ 86.

9. *See response to ¶ 8, supra.*

10. *See response to ¶ 5, supra.* Microsoft also ignores that it was adding significant features in response to DR DOS 5.0, and that this would necessarily delay the schedule. *See Consolidated Statement of Facts*, ¶¶ 88-89, 95-96, 99.

11. Disagreed. MS-DOS 5.0 was nowhere near “code complete” by May 1990. Important features were still being added at least until July 1990. *See Consolidated Statement of Facts*, ¶¶ 95-97, 99.

12. The document is quoted accurately. *But see* response to ¶¶ 5 and 8, *supra*. Microsoft was clearly ignoring what impact features added in response to DR DOS 5.0 would have on its schedules. *See Consolidated Statement of Facts*, ¶¶ 99-100.

13. Caldera agrees only that a bogus first beta shipped on June 11, 1990. The beta was nowhere near a final product, and Microsoft knew that. *See Consolidated Statement of Facts*, ¶¶ 95-97, 99.

14. A beta version may generate “talk” within the industry. Such fact has absolutely nothing to do with Microsoft’s conduct in proactively contacting the media to announce an imminent ship date, and to contact its OEMs around the world to fully disclose its plans and purported schedule. *See Consolidated Statement of Facts*, ¶¶ 90-94, 102.

15. Disagreed. The exhibit cited is merely a public relations memo, and itself suggests a release to manufacture *in 1991*. Feedback from the first beta revealed numerous bugs, and Microsoft already knew that its schedule was going to be much-delayed. *See Consolidated Statement of Facts*, ¶¶ 95-97, 99.

16. Caldera’s First Amended Complaint speaks for itself.

17. Disagreed. The DR DOS 5.0 beta test cycle lasted five months. Microsoft’s cited exhibits do not support a shorter time estimate. Moreover, Microsoft ignores the fact that no significant new features were added to DR DOS 5.0 after the first beta.

18. Disagreed. Exhibit 25 refers only to a “retail” product, which Microsoft at the time was planning to be MS-DOS 4.1. *See Consolidated Statement of Facts*, ¶ 87. Exhibit 26 contains within it no reference to DRI’s purported perception of availability of any MS-DOS product in Summer 1990.

19. The document says what it says. Microsoft’s interpretation is incorrect. By “announcement,” it is clear DRI was at best asserting an understanding that Microsoft planned to ship a beta version by May 22, 1990.

20. Agreed that DRI discussed DR DOS 5.0 publically on April 23, 1990, and May 14, 1990.

21. Disagreed. DRI released DR DOS 5.0 in June 1990. *See Consolidated Statement of Facts*, ¶ 73. Indeed, Microsoft states this elsewhere as an undisputed fact. *See Disparagement Memorandum*, ¶ 13. Moreover, the delay was not because of any known incompatibility problem, but was simply to ensure the fact that DR DOS 5.0 was compatible with Windows 3.0, which shipped in May 1990. *See Consolidated Statement of Facts*, ¶ 90 n.15.

22. The document says what it says. Microsoft wishes to downplay the devastating testimony elicited in regard to this document’s content. *See Consolidated Statement of Facts*, ¶¶ 90-93, 108.

23. Disagreed. The industry’s perception of Microsoft’s neglect and stagnation of MS-DOS 5.0 was accurate. *See Consolidated Statement of Facts*, ¶¶ 15-16, 20-26, 30-33, 71-73.

24. The magazine articles say what they say. Microsoft ignores the fact that its employees initiated contact with these magazines to “leak” plans. *See Consolidated Statement of Facts*, ¶¶ 90, 91, 98, 107-108.

25. As to the truthfulness of Chestnut’s statements, *see* response to ¶ 5, *supra*.

26. Microsoft did not just discuss its plans with “various OEMs,” but with virtually all of its OEMs worldwide. *See Consolidated Statement of Facts*, ¶¶ 90-94, 100, 102. Microsoft ignores the nature of the presentations given, and the fact that they were given specifically to diffuse interest in DR DOS 5.0. *See Id.*, ¶¶ 91-93, 102, 104. Moreover, Microsoft ignores that disclosure to an OEM under a non-disclosure agreement is a fiction insofar as Caldera’s vaporware allegations are concerned. *See Id.*, ¶ 104.

27. Discussing plans with ISVs is not a “public announcement” *per se*. But Microsoft ignores that its own witnesses have stated such disclosure under NDA is a complete fiction, and that Microsoft expects there to be leaks. *See Consolidated Statement of Facts*, ¶¶ 104, 314.

28. Agreed.

29. The articles speak for themselves. Mark Chestnut provided the information regarding estimated ship date, which by that time was contradicted even by Microsoft’s internal records. *See Consolidated Statement of Facts*, ¶¶ 98-100.

30. *See* response to ¶ 5, *supra*. The credibility of these witnesses is clearly at issue.

31. The document speaks for itself. *See* response to ¶¶ 5 and 8, *supra*. This schedule is clearly of the “fake” variety explained in the *Consolidated Statement of Facts*, ¶¶ 85-86.

32. *See* response to ¶ 31, *supra*.

33. Agreed.

34. Disagreed. Microsoft has long attempted to use the arrival of Brad Silverberg as an after-the-fact alibi for its knowingly false and misleading preannouncement of MS-DOS 5.0. Microsoft would have this Court believe that an outsider from Borland came to Microsoft and knew more about

getting the Microsoft core product — which accounted for over forty percent of its yearly revenue — to market than did the senior Microsoft officials in charge of the product. It is utterly a matter of credibility. Whether the jury wishes to believe Microsoft’s self-serving explanations in this regard is up to them. Brad Silverberg is clearly the least credible of all of Microsoft’s many veracity-challenged witnesses. *See Consolidated Statement of Facts*, ¶¶ 106-107, 210, 214-215, 236, 238, 310 n. 29, 330-331.

35. *See* response to ¶¶ 5 and 34, *supra*.

36. *See* response to ¶¶ 5 and 34, *supra*.

37. *See* response to ¶¶ 5 and 34, *supra*.

38. *See* response to ¶¶ 5 and 34, *supra*. A full explanation regarding the schedule for MS-DOS 5.0 appears in Caldera’s **Consolidated Statement of Facts**, ¶¶ 83-109.

39. Agreed that MS-DOS 5.0 was commercially released on June 6, 1991. Evidence in the case shows that Microsoft announced the product would be available as early as August 1990. *See Consolidated Statement of Facts*, ¶ 91. Accordingly, counting the month of August 1990, there was actually a delay of *eleven months*. Microsoft also attempts to downplay that MS-DOS 5.0 did not ship until *fifteen months* after being originally “leaked” to media and OEMs.

40. Some delay and slight schedule slips may be normal. However, the delay attendant to MS-DOS 5.0, 6.0, 7.0 (which still has not shipped) and Windows 95 are not at all normal and common.

41. Only *truthful* product preannouncements are a common industry practice.

42. The announcement of DR DOS 5.0 was entirely truthful. To the extent its schedule was delayed — for less than a month — it was to ensure compatibility with Windows 3.0, a major product that

happened to ship immediately prior to the planned shipment of DR DOS 5.0. *See Consolidated Statement of Facts*, ¶ 90.

43. DRI's announcement of DR DOS 6.0 was truthful, and the predicted dates were met. *See Consolidated Statement of Facts*, ¶¶ 186, 307. Microsoft makes no assertion to the contrary.

44. Novell's announcement of Novell DOS 7.0 was truthful. The delay in its release arose when Novell decided to more closely integrate the product with networking capabilities. *See Consolidated Statement of Facts*, ¶ 349 n. 33.

45. Edwards' testimony speaks for itself. He explicitly confirmed that the Novell DOS 7.0 feature set was largely complete, and had in fact entered early beta tests. **Edwards FTC Decl.** ¶ 65. A larger question, however, was whether the FTC could fashion relief to make its marketing worthwhile. *Id.* ¶ 73.

46. The testimony is quoted accurately. *But see* response to ¶ 44, *supra*.

47. Disagreed. Microsoft's plans for Windows 95 never changed after June 1992. *See Consolidated Statement of Facts*, ¶¶ 328-331. Microsoft's plans for Windows 95 were constantly and ceaselessly communicated to OEMs and the entire world. *See Consolidated Statement of Facts*, ¶¶ 356-360, 364-367, 369, 371-373.

48. Only *truthful* product preannouncements serve procompetitive functions.

49. *See* response to ¶ 48, *supra*.



## ARGUMENT

Caldera has set forth the controlling summary judgment standards in its **Consolidated Statement of Facts** at 7-11. As shown above, numerous issues of fact exist, requiring jury trial.

More importantly, as to Caldera's allegations concerning vaporware, a controlling issue is the *credibility* of Microsoft's witnesses. Doubts as to the credibility of Microsoft's witnesses infect these summary judgment proceedings, especially as to whether its personnel have been candid about their beliefs when Microsoft products would be available. Such doubts are only to be resolved by the jury, and the Court should deny summary judgment for this reason as well. *See Id.*, at 9-11; *Metal Trading Svcs. v. Trans-World Svcs.*, 781 F. Supp. 1539, 1543 (D. Kan. 1991) ("summary judgment is rarely appropriate where the factfinder must determine state of mind").

### I. CALDERA'S FIRST AMENDED COMPLAINT COMPLIES WITH RULE 9(b)

Microsoft argues in passing that certain of Caldera's preannouncement allegations are not pleaded with the particularity required by Fed. R. Civ. P. 9(b), and thus should be dismissed as a matter of law.

**Preannouncement Memo.** at 9-10. Rule 9(b) states:

**(b) Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge, and other condition of mind of a person may be averred generally.*

Fed. R. Civ. P. 9(b) (emphasis added).

Caldera has not pleaded fraud.<sup>1</sup> As discussed below, Caldera need only prove, at most, that Microsoft's product preannouncements were "knowingly false or misleading" when made. Both "knowledge" and "intent" are specifically exempted from Rule 9(b)'s specificity requirement. Fed. R. Civ. P. 9(b).

Beyond this, Microsoft has waived any objection to the particularity of Caldera's preannouncement claims. The proper vehicle to raise such a challenge is by a Rule 12(e) motion for a more definite statement. Fed. R. Civ. P. 12(e). Microsoft filed a detailed answer to Caldera's First Amended Complaint on January 23, 1998. Although it raised 12 affirmative defenses, Microsoft raised no Rule 9(b) objection. Only now — over one year later — has Microsoft identified this purported pleading deficiency. It is too late for Microsoft to raise this challenge. *See Dasko v. Golden Harvest Products, Inc.*, 965 F. Supp. 1467, 1474 (D. Kan. 1997): "Defendants cannot argue almost a year later that plaintiff failed to plead fraud with particularity." The specificity requirements of Fed. R. Civ. P. 9(b) have been imposed to ensure that a defendant is apprised of the fraud claimed in a manner sufficient to permit the framing of an adequate responsive pleading. A party who fails to raise a timely Rule 9(b) objection normally waives the requirement. *See Todaro v. Orbit Int'l Travel, Ltd.*, 755 F. Supp. 1229, 1234 (S.D.N.Y. 1991); *United National Records, Inc. v. MCA, Inc.*, 609 F. Supp. 33, 39 (N.D. Ill. 1984); *see also Stonehill v. Security National Bank*, 68 F.R.D. 24, 44 n.38 (S.D.N.Y. 1975); 5A C. Wright & A. Miller, FEDERAL

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<sup>1</sup> Microsoft cites but one case in support of its contention that antitrust claims relying on fraud must meet Rule 9(b). That case makes the assertion only in passing, without development. *See Michael Anthony Jewelers v. Peacock Jewelry*, 795 F. Supp. 639, 649 (S.D.N.Y. 1992). The allegations there were also a hopelessly confusing mess, with antitrust claims tossed in as an afterthought to other claims of obtaining fraudulent copyright registrations, engaging in sham litigation, mail fraud and RICO. The case has no binding, persuasive, or even analogic use.

PRACTICE AND PROCEDURE § 1394 at 778 (2d ed. 1990); 2A J. Moore, MOORE'S FEDERAL PRACTICE ¶ 9.03 at 9-35 (2d ed. 1984) (and cases cited therein).

Beyond waiver, Microsoft is clearly on notice of Caldera's allegations in this regard. Microsoft propounded, and Caldera answered, an interrogatory specifically addressing this claim. Brad Silverberg, Brad Chase, Mark Chestnut, Tom Lennon, Russ Werner and Rich Freedman — senior Microsoft employees responsible for various versions of MS-DOS and Windows 95 — were each subjected to extended cross-examination on Microsoft's vapor practices regarding MS-DOS 5.0, 6.0, 7.0 and Windows 95. Caldera's allegations regarding vaporware are of no surprise to Microsoft.

## **II. TO ESCAPE LIABILITY, MICROSOFT MUST DEMONSTRATE THAT ITS PREANNOUNCED EXPECTATIONS WERE BOTH ACTUALLY HELD IN GOOD FAITH AND OBJECTIVELY REASONABLE**

Microsoft disclosed false and misleading information prior to releasing three separate products in order to divert purchasers from buying superior DOS products marketed as DR DOS 5.0, 6.0 and Novell DOS 7.0. Microsoft engaged in this conduct with the intent to maintain a monopoly in the DOS market. *See Goodman Report* at 6.

Product preannouncements are analyzed under Section 2 of the Sherman Act. 15 U.S.C. § 2. “The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966). The second element refers to “the use of monopoly power ‘to foreclose competition, to gain a competitive advantage, or to destroy a competitor.’” *Eastman Kodak Co. v. Image Technical Svcs.*,

504 U.S. 451, 481, 112 S. Ct. 2072, 2089 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107, 68 S. Ct. 941, 945 (1948)).

Microsoft does not contest that it has possessed and maintained monopoly power in the relevant market.<sup>2</sup> Microsoft has not contested the fact that its many preannouncements were, indeed, false. Microsoft supports its motion for summary judgment *solely* on the contention that there is *no evidence* of Microsoft's knowledge that its statements were false when made. **Preannouncement Memo.** at 4-5.

As developed below and in its Consolidated Statement of Facts, Caldera has compiled a massive record that easily withstands summary judgment.

#### **A. The Legal Standard Has Both Subjective and Objective Components**

A monopolist, like any other vendor, is free to make or not to make advance announcements of new products. Such announcements are lawful so long as they “*truly* reflect the monopolist's expectations about future quality or availability where that expectation is both *actually held in good faith* and *objectively reasonable*.” P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 782j, at 267-68 (1996) (emphasis added). Although Microsoft cites several cases discussing predatory product preannouncements under Sherman Act § 2, the appropriate standard of conduct that suffices as “willful maintenance” of Microsoft's monopoly is more relaxed than that distilled by Microsoft.

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<sup>2</sup> In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand explained that a plaintiff's demonstration of a defendant's monopoly power in a relevant market creates a *rebuttable presumption* that such power has been unlawfully created or maintained in violation of Section 2. In order to escape liability, then, the defendant has the burden of proving that its dominant share of the market was “thrust upon it.” This view was later endorsed by the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 813-14 (1946) (“we welcome this opportunity to endorse” *Alcoa*).

Areeda & Hovenkamp discuss predatory product preannouncement at length in their highly regarded antitrust treatise. They specifically address — and condemn — the precise tactics identified by Caldera here against Microsoft:

Consider a rapidly evolving product, such as a computer. *A monopolist's announcement that a greatly improved model will soon be available may discourage present sales of a rival's product that is superior to the monopolist's present product.* Buyers may prefer the monopolist's promised model. If that new model appear later than announced and is actually comparable to or only slightly better than the rival's unchanged product, buyers may nevertheless purchase it, *although they would have dealt with the rival at the time of the monopolist's original announcement if they had known then the actual deliver dates or quality of the monopolist's new model.* In that event, rivals would have been unfairly disadvantaged by the monopolist's false statements or predictions about its future product quality and availability dates.

*If the monopolist's original announcement was a knowingly false statement of material fact designed to deceive buyers, it would easily qualify as an exclusionary practice when potentially significant in effect.* Ordinarily, however, the monopolist would not be describing a present state of facts. It would be making an estimate about the quality and production timetable of products not yet in existence. *Statements leading the reasonable buyer to believe future quality or availability of the product will be better than the monopolist expects should be treated just like a false statement of present fact.* But no liability should attach to statements that truly reflect the monopolist's expectations about future quality or availability where that expectation is *both actually held in good faith and objectively reasonable.* Such reasonable good faith statements about research, development, and forthcoming production serve the social interest in maximizing the relevant information available to buyers.

P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 782j, at 267-68 (1996) (emphasis added).

As such, a monopolist *clearly* may not make advance product announcements that are “knowingly false or misleading.” *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1129 (7th Cir.), *cert. denied*, 464 U.S. 891 (1975). Such preannouncements amount to exclusionary conduct in violation of

Section 2 of the Sherman Act.<sup>3</sup> *Id.*; accord *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980): “A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier.” But Microsoft fixates only on the “knowing falsehood” standard, and thus loses sight of the more important, overarching enquiry: whether its preannouncements were *not actually held in good faith* or otherwise *were objectively unreasonable*.

Even under the “knowing falsehood” standard, Caldera clearly meets its burden merely by showing *some evidence* of misleading statements. None of Microsoft’s cases are to the contrary, and indeed, the opinions are filled merely with skepticism about the *quantum* of evidence there presented. For instance, in *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 442 (N.D. Cal. 1978), *aff’d sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981) (emphasis added), the court stated “[i]t was never entirely clear to the court what Memorex claimed was inaccurate about the announcement of NCP.” *See also MCI*, 708 F.2d at 1129 (“Neither AT&T’s application to the FCC for permission to file the Hi-Lo rate, nor the accompanying press release contains any false or misleading information about Hi-Lo or its availability”); *Berkey Photo*, 603 F.2d at 287-88 (“Advertising that emphasizes a product’s strengths and minimizes its weaknesses does not, at least until it amounts to deception, constitute anticompetitive conduct violative of § 2”); *AD/SAT v. Associated Press*,

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<sup>3</sup> A scholarly article focusing on Microsoft’s vaporware practices has slightly restated the standard as that a plaintiff must prove that the defendant (a) did not really believe the announcement when it was made, (b) had no reasonable basis to believe the announcement when it was made, or (c) was aware at the time the announcement was made of specific facts that contradicted the announcement. R. Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L. J. 1163, 1254 (1996). The article discusses Microsoft’s use of vaporware at length, and its deterrent effect in the industry. *See* attachment.

920 F. Supp. 1287, 1301 (S.D.N.Y. 1996) (“There is no evidence in this case to support the claim that AP knowingly made false statements in announcing AdSEND, and there is some evidence to contradict it”); *Southern Pac. Communications Co. v. AT&T*, 556 F. Supp. 825, 965 (D.D.C. 1983) (“as the Court views the evidence, it was the FCC and the specialized carriers, not AT&T, that brought about the delay of which plaintiffs complain here”), *aff’d*, 740 F.2d 980 (D.C. Cir. 1984).

Caldera’s case suffers from no such similar evidentiary deficiency: Microsoft’s practices are well-documented, long-standing, and replete with willful deception.

### **B. Industry Background: A Context for Procompetitive Product Preannouncement**

In order to appreciate the impact of Microsoft’s vaporware campaign, the Court must understand the importance of the market introduction period to a software vendor in general, and in particular, to a competitor in the DOS market. The effort required to build and bring to market a new piece of operating system software is substantial, in terms of both human and financial capital, and requires an investment of tens of millions (and possibly hundreds of millions) of dollars in development and marketing. Because of the particular competitive situation that DRI foresaw when it decided to bring a directly competitive DOS product to market, it knew that the product’s market introduction period would be critical. *See Consolidated Statement of Facts*, ¶ 74. Given Microsoft’s size, resources, and monopoly position in the DOS market, DRI reasonably expected that Microsoft would not sit idly by in the face of a major technological advance. After some period of time, DRI expected that Microsoft would be able to bring a competitive product to market and that competition would likely grow intense. The key was thus to recoup some of its investment and obtain a return reflecting the product’s innovations in the window between introduction of successive versions of DR DOS and the introduction of a competitive Microsoft

product — an opportunity that a competitive marketplace should reasonably be expected to provide. *See Consolidated Statement of Facts*, ¶¶ 71-75.

In a very real sense, Microsoft’s preannouncement campaign slammed DR DOS’s window of opportunity shut — indeed, never even allowed it to be opened. Neither DRI nor Novell was allowed their rightful marketplace recognition or reward for the very real advances made with DR DOS 5.0, 6.0 and Novell DOS 7.0 — particularly in regard to the lucrative, high-volume OEM channel. Without such recognition or reward, little incentive exists to continue to bring such technological advances to computer users throughout the world. *See Goodman Report* at 6.

Before considering Microsoft’s preannouncements of MS-DOS 5.0, 6.0, 7.0, and Windows 95, the Court should also understand the nature of the software development process. There are a number of milestones recognized in the industry:

specification	a written description of the functions and structure of the program
prototype	a program that actually provides a sample of the product as it would function
coding	writing of the actual code to be used in the commercial product
alpha	fully functional, stable program with all features contained in specification; in the alpha stage the code may be sent to a limited number of users who often have a close relationship with the developer
alpha 1.x - x.x	revisions of original alpha code
beta	fully functional, stable code, sufficient to allow productive work and outside testing; beta test sites are normally unrelated to the developer and often include major customers



beta 1.x - x.x	revisions and enhancements to original beta based on beta site input and internal testing
finished code	code frozen for commercial production and distribution

See generally **Ivie Report** at 14-19; **Goodman Report** at 4-5.

The above milestones inform whether a product preannouncement is made in good faith and objectively reasonable. Within this system of milestones, an “announcement” which suggests the *imminent* availability of a *commercially viable* product must be judged to be, at a minimum, clearly misleading until the product’s development has at least resulted in a stable, *fully functional*, program containing *all* of the features anticipated to be in the finished code. In terms of the above milestones, this would mean a product which has reached an advanced beta state. Prior to this point, there is simply too much chance for problems to arise which would require deletion or major revision of a feature or function and postponement of commercial availability to allow a representation of this type to be made. One of Microsoft’s own chief developers confirmed this exact point: “at least until the feature set was completely defined for a new release like [an operating system], any schedule is going to be largely meaningless.” **Lipe Depo.** at 90.

Indeed, the “schedule slips” Microsoft now tries to foist on the Court as excuses arose *only because* Microsoft made its preannouncements during the “specification” and “prototype” phase of development — while at the same time making specific representations of imminent availability of the commercial product. See **Consolidated Statement of Facts** ¶¶ 87-89, 95-97, 100, 309, 310-313, 315, 357-363, 368.

Withholding predictions as to availability would in no way prevent Microsoft or any other developer from releasing information about a product under development at any stage of its process.<sup>4</sup> The developer simply cannot assert that a product is nearing commercial viability until it has reached a stage that is *close enough to its final commercial form* to allow *reasonably accurate claims* to be made. Federal Trade Commission consent orders under Section 5 of the FTC Act have taken this general approach, and banned announcements concerning product availability *when made without a basis in fact*. For example, in *Commodore Business Machines, Inc.*, 105 F.T.C. 230, 244 (1985), the Commission alleged that Commodore had falsely stated that it had developed a microprocessor that permitted its computer far greater software processing capability. In its consent order, Commodore agreed not to represent that a “product will be available for sale to the public or will have any capability, unless at the time of such representation respondent possesses and relies upon a reasonable basis for said representation.” *See also Coleco Industries, Inc.*, 111 F.T.C. 651, 660 (1989) (same language as to false claim that certain product enhancements were presently available for sale).

Microsoft’s actions should similarly be condemned. Microsoft has a legitimate right only to communicate *honest* information about *real* products.<sup>5</sup> It cannot use lies and disinformation to insulate its monopoly position against competition. Any restriction on false and misleading product preannouncements in no way threatens to chill the procompetitive conduct of successful firms, for *false and deceptive*

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<sup>4</sup> Thus, Microsoft’s purported concern about impinging the procompetitive benefits of information exchange in the industry is without basis. *See Preannouncement Memo.* at 7-8.

<sup>5</sup> Thus, its purported concerns about “protected commercial speech and first amendment rights,” *Preannouncement Memo.* at 2, are not even implicated.

*statements can never serve a procompetitive purpose.* Even Microsoft's own economist agrees with this proposition. **Schmalensee Depo.** at 183-184.

### **III. MICROSOFT'S PRODUCT PREANNOUNCEMENTS WERE NOT MADE IN GOOD FAITH AND WERE OBJECTIVELY UNREASONABLE**

#### **A. Microsoft knew what vaporware was and how it could be used effectively to curtail adoption of competitive products by deceiving end users**

Microsoft is well-versed in the use of vaporware tactics to dampen interest in the products of its competitors. Microsoft's use of vaporware traces back to the very origins of the company, when Bill Gates informed MITS — the manufacturer of the world's first PC — that he had a version of BASIC ready to run on the first personal computer, when he had yet to write a single line of code. *See Consolidated Statement of Facts*, ¶ 5. Gates received a mock honor of the “Golden Vaporware Award” for his preannouncement of the first version of Windows — to preempt entry by VisiOn, a GUI announced in 1983 — when by 1985 it still had not shipped. *See R. Prentice, supra n.3*, at 1181 (attached). When Microsoft entered into the Consent Decree with the DOJ in 1994, Judge Sporkin refused to enter it based on the DOJ's refusal to address Microsoft's rampant vaporware practices. *See United States v. Microsoft*, 159 F.R.D. 318, 334-36 (D.D.C. 1995), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995) (finding district court to have exceeded permissible scope of review). Moreover, Microsoft frequently appears on industry “vaporware” lists, and has a long list of vaporware “kills” to its credit. *See R. Prentice, supra n.3*, at 1178-1184 (attached).

These apocryphal stories are confirmed by documents produced by Microsoft in this case. On October 1, 1990 — five months *after* Microsoft begins its vaporware campaign against DR DOS 5.0 — Nathan Mhryvold (in discussing a threat from Sun Microsystems) sent the following memo to the Microsoft executive staff, explaining why and how Microsoft could use preannouncement to crush the demand for a competitive product:



*The purpose of announcing early like this is to freeze the market at the OEM and ISV level. In this respect it is JUST like the original Windows announcement. This time we have a lot better development team, so the time between announce and ship will be a lot smaller. Nevertheless we need to get our message out there.*

We certainly do need to follow this announcement up with a good demo in 6-8 months when the SDK ships, *but preannouncement is going to give Sun a real problem.*

**Exhibit 83** (X0195817-821) (emphasis added)

Mhyrvold elsewhere explained at length how Microsoft killed VisiCorp with vaporware: Microsoft “preannounced Windows, signed up the major OEMs and showed a demo to freeze the market and prevent VisiOn from getting any momentum. It sure worked — VisiOn died, VisiCorp died, and DOS kept on chugging.” **Exhibit 21.**

By Spring 1991, Microsoft’s executive staff considered a presentation from Jeremy Butler — a senior executive — that “business tactics” of “destroying the competition” with “preemptive announcements” was a “questionable” practice. **Exhibit 121** (emphasis added). But by that time, egregious damage had been inflicted on DR DOS sales.

**B. Microsoft had a strong motive to lie**

Microsoft had a tremendous motive to lie. In June 1990, DR DOS surged ahead of MS-DOS in the “feature war,” and never fell behind. Microsoft at every point thereafter had a motive to lie about forthcoming, imminent availability of new versions of MS-DOS.

DR DOS 5.0 shipped in June 1990. In April 1991, Joachim Kempin confirmed that DR DOS 5.0 had been “a far superior product to MS-DOS for the preceding nine months.” **Kempin Depo.** at 263. Moreover, the MS-DOS 5.0 Post Mortem Report noted that the compelling DR DOS 5.0 feature set was

“[o]ne of the most important stimulants for adding features” to MS-DOS 5.0. **Exhibit 195**; *see Consolidated Statement of Facts*, ¶ 96.

DR DOS 6.0 shipped in September 1991. Microsoft executives had already recognized that it would be available “at least a year ahead of MS-DOS 6.” **Exhibit 153**; *see Consolidated Statement of Facts*, ¶ 307. Bill Gates also acknowledged that, for Microsoft’s next version of MS-DOS to be competitive to DR DOS, they would have to “match the garbage that DR DOS does.” **Exhibit 285**; *see Consolidated Statement of Facts*; ¶ 188. Yet, the specifications for MS-DOS 6.0 were not even on the drawing board until February 1992. **Consolidated Statement of Facts**, ¶¶ 311, 315-318.

When Novell announced its feature set for Novell DOS 7.0 in March 1993, Microsoft knew again that DR DOS had hit the mark. Richard Freedman — MS-DOS product manager since MS-DOS 6.0 — wrote Chase and Silverberg:

*if they really release a version with all this junk in it, it will mean that for three ms-dos releases in a row (5, 6 and 7), DR will have had our key features in their product 12-18 months before us (kernel in HMA, compression, VxD/multitasking). given that track record, it’s going to be impossible to shake this “MS as follower” image. it’s been very difficult so far as it is.*

**Exhibit 350** (MS7085933-934) (emphasis added)

In each instance, Microsoft realized it was behind. In each instance, the record confirms that Microsoft deliberately chose to begin leaking its “plans” to dampen interest in the products. *See Consolidated Statement of Facts*, ¶¶ 87-109, 307-319, and 353-374.

**C. Microsoft lied to trade publications and the government on this exact issue**

Caldera’s Consolidated Statement of Facts sets forth at great length the evidence pertaining to Microsoft’s preannouncement of MS-DOS 5.0 to kill DR DOS 5.0 sales. As explained there, the industry

became rightly suspicious of Microsoft’s conduct, and *PC Week* investigated, ultimately writing an article entitled “Microsoft Outlines DOS 5.0 to Ward Off DR DOS.” **Consolidated Statement of Facts**, ¶ 105.

Brad Silverberg replied in a letter submitted to *PC Week* shortly thereafter. *Id.* ¶ 106. Because Silverberg knew that his letter would be reprinted for everyone in the industry to read, the Court may assume

Silverberg knew he was, in fact, addressing the entire industry. His misrepresentations are set forth

alongside directly contradictory evidence in the record:

What Brad Silverberg said:	The truth of the matter is:
<p>“The feature enhancements of MS-DOS version 5.0 were decided and development was begun long before we heard about DR DOS 5.0” <b>Exhibit 90</b>.</p>	<p>“One of the most important stimulants for adding features was competitive pressure from DR DOS 5.0, which we first learned of in the Spring of 1990. The DR DOS feature set led us to add UMB support, task swapping, and undelete.” <b>Exhibit 195</b> (MS-DOS 5.0 Post Mortem Report); <b>Consolidated Statement of Facts</b>, ¶ 96.</p>
<p>“As for the timing of the leaks, it was not an orchestrated Microsoft plan nor did the leaks come from Microsoft.” <b>Exhibit 90</b>.</p>	<p>“On the PR side, we have begun an ‘aggressive leak’ campaign for MS-DOS 5.0. The goal was to build an anticipation for MS-DOS 5.0, and diffuse potential excitement/momentum from the DR DOS 5.0 announcement.” <b>Exhibit 49</b> (DR DOS 5.0 Competitive Analysis); <b>Consolidated Statement of Facts</b>, ¶ 90.</p> <p>“Aggressive — it means that we were calling them, basically.” <b>Chestnut Depo.</b> at 118; <b>Consolidated Statement of Facts</b>, ¶ 108.</p>



<p>“Thus, to serve our customers better, we decided to be more forthcoming about version 5.0.” <b>Exhibit 90.</b></p>	<p>“. . . diffuse potential excitement/momentum from the DR DOS 5.0 announcement.” <b>Exhibit 49</b> (DR DOS 5.0 Competitive Analysis); <b>Consolidated Statement of Facts</b>, ¶ 90.</p> <p>“We are distributing to you a comparison between MS-DOS 5.0 and their version. Inform your customers as discussed. Keep them at bay.” <b>Exhibit 51</b> (Kempin directive to domestic and international OEM sales force); <b>Consolidated Statement of Facts</b>, ¶ 94.</p> <p>“Virtually all of our OEMs worldwide were informed about DOS 5, which diffused DRI’s ability to capitalize on a window of opportunity with these OEMs.” <b>Exhibit 62</b> (Chestnut performance review); <b>Consolidated Statement of Facts</b>, ¶ 102.</p>
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Microsoft misled the government in the exact same way. The Department of Justice briefly looked into vaporware allegations. Bill Neukom submitted a letter to the Department of Justice on May 19, 1994. His misrepresentations are emphasized:

Reporters from PC Week, Infoworld and Computerworld *contacted Microsoft* for comments on MS-DOS 5.0. At the same time, Microsoft was concerned about reports that DRI was telling OEMs that Microsoft had no ongoing commitment to MS-DOS, and Microsoft’s PR Department was advising product groups to be more responsive to inquiries about products under development to avoid a repeat of the problems caused by Microsoft’s ‘no comment’ approach to questions about Windows 3.0 prior to its May 1990 release. *Prompted by these concerns*, Microsoft responded *to the unsolicited inquiries of these three publications*. Articles disclosing Microsoft’s work on MS-DOS 5.0 were published in the April 30 editions of PC Week, Infoworld and Computerworld. *Microsoft conducted no ‘proactive’ briefings on MS-DOS 5.0 with any reporter who wasn’t under NDA.*

**Exhibit 423** (emphasis added)

Mark Chestnut directly contradicted these statements in his deposition in this case, and he (not Bill Neukom) was the man in charge of this campaign at the time Microsoft took it. **Chestnut Depo.** at 118 (“Aggressive — it means that we were calling them, basically”).

Microsoft was clearly not telling the truth. Moreover, doubts as to Microsoft’s credibility infect the testimony of *all* of Microsoft’s witnesses on this issue. If Caldera is right that Silverberg, Chestnut, Lennon, Werner and others were lying at the time — or more gently stated, were making claims not actually held in good faith or which were objectively unreasonable — then, not surprisingly, those witnesses would continue that self-same lie in this case. Indeed, that appears to be Microsoft’s true defense: consistently repeat the same falsehood, and maybe some day, someone will believe it is true. *See Preannouncement Memo.* at 5-6. Whether the jury chooses to believe Microsoft at trial is up to them. Under controlling summary judgment standards, however, this Court is not to assess credibility, but must instead simply view the evidence in the light most favorable to Caldera. *See Consolidated Statement of Facts* at 7-11 (Summary judgment standards). This Court is entitled to send the matter to trial based solely on the severe damage Caldera has inflicted on Microsoft’s credibility on the whole. *See, e.g., Consolidated Statement of Facts*, ¶¶ 45, 58, 106-108, 115, 210, 214-215, 236, 238, 246-247, 253, 258-259, 266-270, 310 n. 29, 314, 330-331, 334, 342, 389-390, 400.

**D. Microsoft knew that its internal schedules were “fake”**

One of the chief architects of Windows 95 testified that “at least until the feature set was completely defined for a new release like Windows 95, *any schedule is going to be largely meaningless.*” **Lipe Depo.** at 90 (emphasis added). Because Microsoft *always* preannounced *long before* its feature set was complete, its predictions were always misleading:

- The *Windows 95* feature set was changing all the way into mid-1994. *LiPe Depo.* at 90. Microsoft began its preannouncement in August 1992. **Consolidated Statement of Facts, *Id.*, ¶ 356.**
- The *MS-DOS 7.0* feature set was never finalized. *Id.*, ¶ 368. Microsoft began its preannouncement at least by August 1993. ¶ 367.
- The *MS-DOS 6.0* feature set was not final until at least February 1992. *Id.*, ¶ 317. Microsoft’s first leaks were in September 1991. *Id.* ¶¶ 310-312.
- The *MS-DOS 5.0* feature set was not final until July or August 1990 *Id.* ¶ 99. The “aggressive leak” campaign began in April 1990. *Id.* ¶ 90.

Microsoft repeatedly suggests that its own internal schedules reflect the “truth” of the preemptive announcements its executives were making. *See, e.g., Preannouncement Memo.* at 5-7. Internal records, however, amply demonstrate that Microsoft’s schedules do not in any way reflect reality. For instance, Windows 3.0 had shipped in May 1990—just as Microsoft began its vaporware announcements concerning MS-DOS 5.0. The “Windows 3.0 Post Mortem” contained the following remarkable admissions:

#### Schedule

- \*Set by BillG (upper management) before feature definitions are outlined.
- \**Problem motivating people to achieve “fake” ship dates.*
- \*Need to be more realistic in our schedules.
- \**Lying to people on the team about schedules.* Morale hit to the team.
- \*How to separate out development schedules and the schedules we give to other groups (USSMD or upper management) *without appearing to “lie” to the product team.*

#### **Exhibit 47** (emphasis added)

The “MS-DOS 5.0 Postmortem Report” similarly reveals a “fake” schedule had been set up for MS-DOS 5.0:

[I]t did seem at times that individuals were confused about how Program Management intended to use their time estimates. *Some individuals produced estimates that represented best-case scenarios, rather than realistic ones, and then were surprised to see their best-case guesses show up on schedule charts.* Others felt a lack of trust when they found their estimates questioned by Program Management. Better explanation of the goals and methods of scheduling could have helped clear up some of these problems.

**Exhibit 195** (emphasis added)

Microsoft suggests that Brad Silverberg's arrival is an after-the-fact alibi for its knowingly false, misleading, bad faith, objectively unreasonable preannouncement of MS-DOS 5.0. *See Preannouncement Memo* at 6-7. Microsoft would have this Court believe that an outsider from Borland came to Microsoft and knew more about getting the Microsoft core product — which accounted for over forty percent of Microsoft's yearly revenue — to market than did the senior Microsoft officials in charge of the product. It is utterly a matter of credibility. Whether the jury wishes to believe Microsoft's self-serving explanations in this regard is up to them. Brad Silverberg is clearly the least credible of all of Microsoft's many veracity-challenged witnesses. *See Consolidated Statement of Facts*, ¶¶ 106-107, 210, 214-215, 236, 238, 310 n. 29, 330-331. And Phil Barrett — a senior developer put on the MS-DOS 5.0 team in May 1990 — testified that he knew then that neither the schedules, the beta test plans, nor even the overall assignments of responsibility were reasonable. *Id.* ¶ 97.

As to DR DOS 6.0, Microsoft initially responded by leaking plans about MS-DOS 5.1 — a product for which no final specifications or schedules even exist. *See Consolidated Statement of Facts*, ¶ 309. Brad Silverberg as early as September 6, 1991, was making presentations to OEMs stating that a new version of MS-DOS was “coming soon.” Yet he had been specifically advised that version 6.0 “was not defined yet and we need to know what it is before we ship it.” **Exhibit 162**. Silverberg admitted that

disclosure of a version as “coming soon” does not comport with shipping eighteen months later — as was the case with MS-DOS 6.0. **Silverberg Depo.** at 128. Even as late as February 1992, Silverberg was acknowledging the falsity of the prior preannouncements: “but realistically, msdos6 is still quite a ways off. . . . i presume msdos won’t be until mid-to-late ‘93.” **Exhibit 274** (MS7022698).

As to Novell DOS 7.0, Microsoft frequently leaked and discussed its “plans” for MS-DOS 7.0, although no final, confirmed specification even exists. *See Consolidated Statement of Facts*, ¶ 368. Richard Freedman — MS-DOS product manager at the time — specifically testified that any leak as to MS-DOS 7.0 *alone* (as opposed to “Chicago”) would have been vaporware, because “there was never a formal schedule and a launch plan and a marketing team and the whole nine yards for this thing.” *Id.* at 118; *see also id.* at 125, 134, 161-162.

Moreover, leaks as to Windows 95 began as early as August 1992, predicting a late 1993 release. *See Consolidated Statement of Facts*, ¶ 353-356. The leaks continued unabated through the launch of MS-DOS 6.0 in March 1993. *See Id.*, ¶¶ 357-360. Direct evidence shows internal awareness that such schedules were never realistic. For instance, in April 1993, David Cole reported to Bill Gates that internal schedules were, as always, of the “fake” variety he had identified as long ago as May 1990 with Windows 3.0, *see Consolidated Statement of Facts*, ¶ 85:

Getting this product out quickly is serious business for us. The original RTM goal we established was Dec 93. *I don't think anyone believed this date*, but we built our feature set and scheduled for that goal. *As expected the minimum compelling feature set could not be completed and tested in time.* The team was not making the optimistic progress planned for in the schedule.

**Exhibit 353** (emphasis added)

Also in April 1993, Cole sent the following e-mail to Paul Maritz and Brad Silverberg to not reveal that the Windows 95 schedules were unrealistic and would not be met:

I'm really counting on you to *keep mum about the potential Chicago schedule slip*, even within systems. *All plans should proceed toward April*. Apparently Carl Stork knows about the situation and will probably loosen his belt, if he even hints at this to Intel we are really screwed. *The pressure must stay on*. Making statements to the Cairo group really has potential to screw us up. Same for OLE. For now it must be M4, M5, M6 then April.

ok?

#### **Exhibit 352** (emphasis added)

Indeed, the leaks and promises that continued all the way into 1994 were based on fake schedules that continued to be out of step with developers' internal views. On April 7, 1994, a schedule circulated to Microsoft marketing personnel that "Chicago" would be released to manufacturing on September 30, 1994, provoking the following comment:

WOW—If you are REALLY still telling the field the RTM is Sept 30—and if you are REALLY serious—we have a ton of work to do VERY fast?!!

Is this just propaganda mail???

Making me nervous about getting the channel lined up this fast if you are serious. . . .

#### **Exhibit 418**

##### **E. Microsoft's product preannouncements were objectively unreasonable and were not good faith estimates of product availability**

Caldera's technical expert, Evan Ivie, has looked at the facts and circumstances surrounding Microsoft's preannouncement of MS-DOS 5.0 in connection with the evidence showing the work required to be done to ship a product meeting the announcements. His opinion is that Microsoft's preannouncements were objectively unreasonable. **Ivie Report** at 38. As to MS-DOS 5.0, Silverberg

confirmed the schedule was unreasonable, as did Phil Barrett. *See Consolidated Statement of Facts*, ¶ 97. Similar recognition appears as to MS-DOS 6.0, 7.0 and Windows 95.

Microsoft musters *no evidence* in its summary judgment papers to counter this opinion, which the jury is entitled to hear and consider when it weighs the evidence.

#### **F. Microsoft's vaporware dramatically impinged sales of DR DOS**

The entire purpose of Microsoft's vaporware campaign was to stifle sales of DR DOS. Microsoft had seen these tactics work before. *See Consolidated Statement of Facts*, ¶¶ 84, 109. They also acknowledged, especially in regards to DR DOS 5.0, that these tactics snuffed out DRI's sales. Caldera's industry expert, John Goodman, emphasizes the severe damage inflicted by preannouncement of MS-DOS 5.0, 6.0, 7.0 and Windows 95. **Goodman Report** at 6.

Microsoft began preannouncing MS-DOS 5.0 in May 1990. By the end of August 1990, Microsoft knew its tactics were working — indeed, OEMs were already actually licensing MS-DOS 5.0, over ten months before launch. *See Id.*, ¶ 102. Chestnut's self-evaluation in his performance review for the period ending June 15, 1990 was quite candid: "virtually all of our OEMs worldwide were informed about DOS 5, which diffused DRI's ability to capitalize on a window of opportunity with these OEMs." **Exhibit 62**; *see also Exhibit 94* ("DR-DOS has not yet been able to gain any momentum in Korea. We have slowed them down with consistent seminars on MS-DOS 5.0 . . ."). *See generally Goodman Report* at 6.

Silverberg, too, acknowledged that vaporware puts a competitor behind, and keeps him behind: "Once you lose a lot of ground it is very very hard to pick up." **Exhibit 274**. As to DR DOS 6.0, Silverberg knew that by February 1992, Microsoft's vaporware had thus far been effective in keeping DRI

at bay: “We can’t just sit on the sidelines ‘til MS-DOS 6, hoping FUD and leaks will carry us.”

**Exhibit 273.**

As to preannouncement of MS-DOS 7.0 and Windows 95, Paul Maritz and Brad Silverberg as early as July 1992 had identified vaporware of “Chicago” as the best way to keep Novell DOS 7.0 at bay. *See Consolidated Statement of Facts*, ¶¶ 353-354. But apart from misrepresentation about when the products would ship, Microsoft told the world “Chicago” was a Windows operating system that would not require MS-DOS to run. *See, e.g. Exhibit 316* (“Maybe we need a corporate Chicago tour later this year that under NDA shows how we are going to mate DOS and Windows and shows how Chicago technically can’t work on DR-DOS?”); *Exhibit 347* (“The next version of Windows . . . will not need DOS to run, Maritz said”); *Exhibit 364* (“Code-named Chicago, the next version of Windows will not need DOS in order to run”). This signal from Microsoft — that the DOS market would be destroyed under Windows 95 — led Novell to withdraw from active development and marketing of successor versions of DR DOS.<sup>6</sup> *See Consolidated Statement of Facts*, ¶ 374. As shown in Caldera’s forthcoming Response to Microsoft’s Motion for Partial Summary Judgment Regarding “Technological Tying,” all of these many preannouncements were false.

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<sup>6</sup> Thus, Microsoft’s assertion — “It is an indisputable, scientific fact that a person can turn on a computer and run Windows 95 without the necessity of a separate DOS operating system,” **Preannouncement Memo**, at 12 — apart from being silly, misses the point. First, Windows 95 cannot run if its DOS component is removed. Second, by misrepresenting Windows 95 as a “DOS-free” environment, Microsoft killed the DOS market.



#### IV. MICROSOFT'S ASSERTION OF AN *IN PARI DELICTO* DEFENSE IS TO NO AVAIL

Microsoft appears to suggest that both DRI and Novell also preannounced successive versions of DR DOS to preempt Microsoft. **Preannouncement Memo.** at ¶¶ 18-20, 42-46. Yet this allegation, even if true, would present no defense for Microsoft. First, Microsoft is a dominant monopolist with 90% market share. See **Consolidated Fact Statement** at 2 n.2. As one court recently observed in a case involving a similarly dominant monopolist (Intel), the antitrust law imposes “affirmative duties” on monopolists to refrain from anticompetitive conduct. *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 1255, 1277 (N.D. Ala. 1998). As noted there, even conduct by a monopolist that is otherwise lawful may violate the antitrust laws where it has anticompetitive effects. *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997) (“Legal actions, when taken by a monopolist, may give rise to liability, if anticompetitive.”); *Greyhound Computer v. IBM*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (otherwise lawful conduct may be unlawfully exclusionary when practiced by a monopolist); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 811 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986) (“When a monopolist competes by denying a source of supply to his competitors, raises his competitor’s price for raw materials without affecting his own costs, lowers his price for finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act”); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir. 1988), *cert. denied*, 488 U.S. 870 (1988) (“Because of a monopolist’s special position the antitrust laws impose what may be characterized as affirmative duties”).

Second, Microsoft's argument is nothing more than the assertion of the long-discredited "*in pari delicto*" defense: "Although *in pari delicto* literally means of 'equal fault,' the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968). The Supreme Court has been emphatic: "[W]e held in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968). At best, Microsoft is simply asserting that DRI and Novell also engaged in vaporware practices similar to Microsoft. As *Perma Life* points out, such assertion, even if true, provides absolutely no defense against Caldera's antitrust claims.

And clearly, DRI's and Novell's practices are in no way similar. DR DOS 5.0 was delayed, at most, one month to confirm compatibility with Windows 3.0, a major software introduction that occurred just prior to the intended release of DR DOS 5.0. See **Consolidated Statement of Facts** ¶ 90 n. 15. Dr DOS 6.0 shipped exactly as announced. *Id.* ¶ 186. Although originally slated for release in late Summer 1993, Novell briefly delayed release of Novell DOS 7 until December 1993, see **Exhibit 394**, due primarily to Novell's decision to include Novell's peer-to-peer networking product, Personal NetWare, in the final version of Novell DOS 7. Personal NetWare was also released as a standalone product in January 1994. **Tucker Depo.** at 273; **Corey Depo.** at 231-232; **Exhibit 380**. See **Consolidated Statement of Facts** ¶ 349 n. 33.

Significantly, Microsoft makes absolutely no argument that any announcement by DRI or Novell was anything but completely truthful.

## CONCLUSION

For all of the foregoing reasons, Microsoft's Motion for Partial Summary Judgment Regarding Plaintiff's "Product Preannouncement" Claims should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April \_\_\_\_, 1999, true and correct copies of the above and foregoing instrument (Case No. 2:96CV0645B, U.S. District Court, District of Utah, Central Division) were sent via Federal Express to:

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