

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOVELL, INC.,

Plaintiff-Appellant,

v.

No. 10-1482

MICROSOFT CORPORATION,

Defendant-Appellee.

**MICROSOFT'S MOTION TO STRIKE CERTAIN
DOCUMENTS FROM THE JOINT APPENDIX AND ANY
REFERENCES TO SUCH DOCUMENTS FROM NOVELL'S BRIEF**

Pursuant to Federal Rule of Appellate Procedure 10(a), defendant-appellee Microsoft Corporation ("Microsoft") hereby moves to strike the documents set out at pages JA-2079-83, JA-2681-82, JA-2685-91 and JA-2692-94¹ from the Joint Appendix and to strike any references to those documents from the Brief filed by plaintiff-appellant Novell, Inc. ("Novell") on August 6, 2010.

¹ These documents are (1) a letter from Richard Urowsky to Stephen Susman, dated August 5, 1997 (JA-2079-83); (2) an excerpt from the Liability Report of Frederick R. Warren-Boulton, *In re Microsoft Corp.* (MDL Docket No. 1332), dated August 26, 2002 (JA-2681-82); (3) portions of the expert deposition of Frederick R. Warren-Boulton, *In re Microsoft Corp.* (MDL Docket No. 1332), dated February 20, 2003 (JA-2685-91) and (4) an excerpt from the Expert Report of Kevin M. Murphy, *Friedman v. Microsoft Corp.*, dated July 14, 2003 (JA-2692-94).

Novell here appeals from a March 30, 2010 Judgment entered by the district court (Hon. J. Frederick Motz) after it granted Microsoft's motion for summary judgment in the action. The documents now at issue were not in the record in the district court and were not before Judge Motz when he ruled on the parties' cross-motions for summary judgment.

Rather, these documents were merely appended to a proposed sur-reply brief that Novell sought leave to file after oral argument on the summary judgment motions. (*See* Docket Entry 114, Motion for Leave to File Surreply by Novell, Inc., *Novell, Inc. v. Microsoft Corp.*, Civil No. JFM-05-1087 (D. Md. Feb. 24, 2010), attached as Ex. 1 to the Affidavit of Steven L. Holley in Support of Microsoft's Motion to Strike, sworn to on August 11, 2010 ("Holley Aff.")). Judge Motz never granted Novell's motion for leave to file a sur-reply brief, nor is there any reason to believe that he considered the proposed sur-reply brief in rendering his decision.² Indeed, Judge Motz's opinion makes no reference

² Novell contends that Judge Motz must have considered the proposed sur-reply brief because he "responded to an argument raised therein" and "cited one of the cases used by Novell, right down to the page reference." (Letter from Jeffrey M. Johnson to Steven L. Holley, July 28, 2010, attached as Ex. 2 to Holley Aff.) That is wrong. Although the argument that an assignment of antitrust claims must be express was mentioned in footnote 8 of Judge Motz's opinion, the proposed sur-reply brief was not the first time Novell had made that argument in the district court. Nor was it the first time Novell sought to rely on *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993). Novell's July 2008 brief in support of its first motion for summary judgment makes the same argument and

(*footnote continued*)

whatsoever to any of the four documents at issue. (*See* Opinion, *Novell, Inc. v. Microsoft Corp.*, Civil No. JFM-05-1087 (D. Md. Mar. 30, 2010), attached as Ex. 4 to Holley Aff.)

Under Federal Rule of Appellate Procedure 10(a)(1), only those papers and exhibits that were “filed” in the district court can constitute part of the record on appeal. Fed. R. App. P. 10(a)(1). The law is clear that the “record on appeal does not include exhibits attached to [a] sur-reply brief that was lodged with [the] trial court but never accepted for filing by that court.” 20 MOORE’S FEDERAL PRACTICE § 310.10[2][a], at 310-13 n.16.1 (citing *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127-28 & n.5 (9th Cir. 2009)). For that reason alone, the four documents at issue should be stricken from the Joint Appendix.

This Court has recognized that in an appeal from a grant of summary judgment, only those documents that were considered by the district court constitute part of the record on appeal. *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (“[W]e decline to consider . . . documents not considered by the district court.”); *see also Causey v. Balog*, 162 F.3d 795, 804 n.5 (4th Cir. 1998). In *Rohrbough*, this Court held that documents not considered by

(*footnote continued*)

cites the *Lerman* case as support. (*See* Memorandum of Law in Support of Novell’s Motion for Summary Judgment on Six Affirmative Defenses, July 15, 2008, at 10, attached as Ex. 3 to Holley Aff.)

the district court in deciding a motion for summary judgment were not part of the record on appeal even though plaintiffs had attached those documents to a motion to supplement the record that was filed in the district court. 916 F.2d at 973 n.8. Like the four documents attached to Novell's proposed sur-reply brief, the documents at issue in *Rohrbough* were attached to a motion that appeared on the district court docket sheet and thus were available to this Court. That was not sufficient to make them part of the record on appeal, and the same analysis should apply here.³

Microsoft therefore respectfully requests that this Court strike the four documents at issue from the Joint Appendix and any references to those documents from Novell's Brief.⁴ *See Rohrbough*, 916 F.2d at 973 n.8 (granting motion to strike documents from joint appendix); *Champ v. Baltimore County*, 91 F.3d 129 (Table), 1996 WL 383924, at *3 n.2 (4th Cir. July 10, 1996) (granting motion to strike references in brief to materials that were not part of district court record).

³ Even if the four documents could be said to constitute part of the "record on appeal" for the purposes of Rule 10(a)(1) by virtue of having been attached to Novell's motion for leave to file the sur-reply brief, they were not considered by Judge Motz in granting summary judgment in Microsoft's favor, so Novell should not be allowed to rely on them in this Court. *See Causey*, 162 F.3d at 804 n.5; *Rohrbough*, 916 F.2d at 973 n.8; *see also Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 595 n.6 (9th Cir. 2002).

⁴ The documents are referred to in footnote 9 on pages 39-40 of Novell's Brief.

Pursuant to Local Rule 27(a), Microsoft has informed Novell's counsel of Microsoft's intention to file this motion. Novell does not consent to the granting of this motion and has indicated that it intends to file an opposition to the motion.

CONCLUSION

Microsoft respectfully requests that this Court strike the documents set out at pages JA-2079-83, JA-2681-82, JA-2685-91 and JA-2692-94 from the Joint Appendix and strike any references to those documents from Novell's Brief.

Respectfully submitted,

/s/ David B. Tulchin

David B. Tulchin
Counsel of Record

Steven L. Holley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

G. Stewart Webb
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
(410) 244-7400

Attorneys for Microsoft Corporation

August 11, 2010

CERTIFICATE OF SERVICE

I certify that on August 11, 2010 the foregoing document was served on plaintiff-appellant Novell, Inc.'s counsel of record through the CM/ECF system.

By: /s/ David B. Tulchin
David B. Tulchin

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NOVELL, INC.,

Plaintiff-Appellant,

v.

No. 10-1482

MICROSOFT CORPORATION,

Defendant-Appellee.

**AFFIDAVIT OF STEVEN L. HOLLEY
IN SUPPORT OF MICROSOFT'S MOTION TO STRIKE**

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

STEVEN L. HOLLEY, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a partner of the law firm of Sullivan & Cromwell LLP, attorneys for defendant-appellee Microsoft Corporation ("Microsoft") in the above-captioned action. I am admitted to practice before this Court.

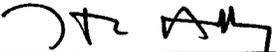
2. I submit this affidavit to place before the Court materials to which reference is made in "Microsoft's Motion to Strike Certain Documents from the Joint Appendix and Any References to Such Documents from Novell's Brief," dated August 11, 2010.

3. Attached hereto as Exhibit 1 is an excerpt from the docket sheet for the district court proceedings in this action, *Novell, Inc. v. Microsoft Corp.*, Civil No. JFM-05-1087 (D. Md.).

4. Attached hereto as Exhibit 2 is a copy of a letter from Jeffrey M. Johnson to Steven L. Holley, dated July 28, 2010.

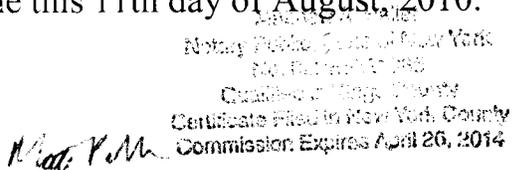
5. Attached hereto as Exhibit 3 is a copy of the Memorandum of Law in Support of Novell's Motion for Summary Judgment on Six Affirmative Defenses in this action, dated July 15, 2008.

6. Attached hereto as Exhibit 4 is a copy of the district court's opinion on the parties' cross-motions for summary judgment in this action, dated March 30, 2010.



Steven L. Holley

Subscribed and sworn to before
me this 11th day of August, 2010.


Matthew P. Miller
Notary Public, State of New York
No. 00000000000000000000
Columbia County
Certificate filed in New York County
Commission Expires April 26, 2014

Notary Public

[1332, APPEAL, CLOSED, MDL](#)

**U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #: 1:05-cv-01087-JFM**

Novell, Inc. v Microsoft Corporation
Assigned to: Judge J. Frederick Motz
Lead case: [1:00-md-01332-JFM](#)
Member case: [\(View Member Case\)](#)

Case in other court: United States District Court for District
of Utah, 04-01045-TS
Fourth Circuit Court of Appeals, 10-
01482

Cause: 15:1 Antitrust Litigation

Date Filed: 05/13/2005
Date Terminated: 03/30/2010
Jury Demand: Plaintiff
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

Plaintiff

Novell, Inc.

represented by **Jeffrey M Johnson**
Dickstein Shapiro LLP
1825 Eye St NW
Washington, DC 20006-5403
12024204726
Fax: 12024202201
Email: johnsonj@dicksteinshapiro.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Max D Wheeler
Snow Christensen and Martineau
10 Exchange Pl
PO Box 45000
Salt Lake City, UT 84145-5000
18015219000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David Leo Engelhardt
Dickstein Shapiro LLP
1825 I St NW
Washington, DC 20006
12024202200
Fax: 12024202201
Email:
engelhardtd@dicksteinshapiro.com
ATTORNEY TO BE NOTICED

Michael Edmund Jacobs
Zelle Hofmann Voelbel & Mason LLP

		(Johnson, Jeffrey) (Entered: 12/14/2009)
12/14/2009	111	NOTICE by Novell, Inc. re (110 in 1:05-cv-01087-JFM) Reply to Response to Motion,,, <i>Notice of Service of Lengthy Exhibits</i> Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(Johnson, Jeffrey) (Entered: 12/14/2009)
01/04/2010	112	REPLY to Response to Motion re (104 in 1:05-cv-01087-JFM) MOTION for Summary Judgment filed by Microsoft Corporation. (Attachments: # 1 Certificate of Service)Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(Major, Alexander) (Entered: 01/04/2010)
02/19/2010	113	Motion Hearing held on 2/19/2010 re 101 MOTION for Summary Judgment filed by Microsoft Corporation held before Judge J. Frederick Motz. (Court Reporter: Christine Asif) (mdw, Deputy Clerk) (Entered: 02/22/2010)
02/24/2010	114	MOTION for Leave to File <i>Surreply</i> by Novell, Inc. Responses due by 3/15/2010 (Attachments: # 1 Text of Proposed Order, # 2 Surreply, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4)Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(Johnson, Jeffrey) (Entered: 02/24/2010)
03/01/2010	115	RESPONSE in Opposition re (114 in 1:05-cv-01087-JFM) MOTION for Leave to File <i>Surreply Papers Regarding Novell's Sale of Its Claims</i> filed by Microsoft Corporation. Replies due by 3/18/2010. Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(Major, Alexander) (Entered: 03/01/2010)
03/03/2010	116	Correspondence re: February 19, 2010 Oral Argument Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(Johnson, Jeffrey) (Entered: 03/03/2010)
03/22/2010	117	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 2/19/2010, before Judge J. Frederick Motz. Court Reporter/Transcriber Christine T. Asif, Telephone number 410-962-4492. Total number of pages filed: 237. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER... Redaction Request due 4/12/2010. Redacted Transcript Deadline set for 4/22/2010. Release of Transcript Restriction set for 6/21/2010. (ca, Court Reporter) (Entered: 03/22/2010)
03/30/2010	118	OPINION in Novell v Microsoft Signed by Judge J. Frederick Motz on 3/30/10 Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(cag, Deputy Clerk) (Entered: 03/30/2010)
03/30/2010	119	ORDER denying (102) Motion by Plaintiff for Summary Judgment; granting (104) Motion by Defendant for Summary Judgment in case 1:05-cv-01087-JFM; denying (1948) Motion by plaintiff for Summary Judgment; granting (1950) Motion by defendant for Summary Judgment in case 1:00-md-01332-JFM; Entering Judgment in favor of Defendant against plaintiff. Signed by Judge J. Frederick Motz on 3/30/10 Associated Cases: 1:00-md-01332-JFM, 1:05-cv-01087-JFM(cag, Deputy Clerk) (Entered: 03/30/2010)
04/23/2010	120	NOTICE OF APPEAL as to 119 Order on Motion for Summary Judgment,

		118 Memorandum Opinion by Novell, Inc.. Appeal Record due by 5/26/2010. (Johnson, Jeffrey) (Entered: 04/23/2010)
04/23/2010		USCA Appeal Fees received \$ 455 receipt number 139135 re 120 Notice of Appeal filed by Novell, Inc. (sls, Deputy Clerk) (Entered: 04/26/2010)
04/26/2010	121	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 120 Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms & Notices. (sls, Deputy Clerk) (Entered: 04/26/2010)
04/28/2010	122	USCA Case Number 10-1482 for 120 Notice of Appeal filed by Novell, Inc. - Case Manager - Richard Sewell. (sls, Deputy Clerk) (Entered: 04/28/2010)

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08/10/2010 17:42:24			
PACER Login:	sc0008	Client Code:	013339/0155
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DICKSTEINSHAPIROLLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

July 28, 2010

VIA ELECTRONIC MAIL

Steven L. Holley
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-3498

Re: Novell, Inc. v. Microsoft Corp. (10-1482)

Dear Steve:

We are in receipt of your letter dated July 26, 2010 regarding the joint appendix.

We disagree with your first point, as we believe that the four documents attached to Novell's Surreply are a part of the record on appeal. Judge Motz's opinion indicates that he not only considered the Surreply, but affirmatively responded to an argument raised therein. *See In re Microsoft Antitrust Litig.*, No. 05-1087, --- F. Supp. 2d ----, 2010 WL 1223604, at *3 n.8 (D. Md. Mar. 30, 2010). Moreover, in responding to Novell's argument, Judge Motz cited one of the cases used by Novell, right down to the page reference. *Id.* (citing *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993)). With the exception of the Surreply, neither party had cited *Lerman* in its moving papers.¹

Moreover, we have spoken with an Appeals Clerk at the United States District Court for the District of Maryland who informed us that the entire record will be forwarded to the Fourth Circuit upon its request, including Docket entry 114 (Novell's Motion for Leave, Surreply, and Exhibits). You make a fair point, however, with respect to the fifth document referenced in your letter and we will remove it. It is not a part of the record on appeal.

¹ The cases cited in your letter are distinguishable. In *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1127 n.5 (9th Cir. 2009), the lower court explicitly rejected plaintiff's proposed surreply, and the Ninth Circuit refused to permit the inclusion of documents attached to that surreply in the record. The Ninth Circuit refused to allow the mere fact of the clerk's filing stamp to override the district judge's decision rejecting the surreply. *Id.* In contrast, Judge Motz accepted and considered Novell's Surreply. Similarly, in *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 973 (4th Cir. 1990), the Fourth Circuit barred the inclusion of several documents that the plaintiff put before the district court after its decision on summary judgment. Here, the distinction is obvious.

July 28, 2010

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DICKSTEINSHAPIROLLP

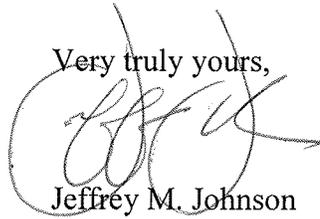
As to your second point, both parties have a duty to ensure that the joint appendix does not contain unnecessary materials. As you know, Federal Rule of Appellate Procedure 30(b)(1) mandates that “[t]he parties must not engage in unnecessary designation of the parts of the record,” and Fourth Circuit Local Rules 30(a) and (b) echo this mandate. Novell intends to comply with its obligations under these rules, and will, prior to filing, revise the joint appendix where necessary to do so. We will apprise Microsoft of any such changes as soon as practicable.

If your concern is that we will remove documents that Microsoft deems necessary to its brief, I should note that Mr. Hassid’s e-mail invited you to provide us a list of those documents that should not be removed. We have yet to receive a listing identifying any such documents.

Finally, as to your third point, we understand the length of time the Federal Rules grant to Microsoft in preparing its designations. Our aim in requesting Microsoft’s responses by Thursday, July 29th, was not to contravene these rules, but rather to facilitate the completion of the joint appendix by accounting for practical considerations. To that end, we still hope to receive, at the very least, Microsoft’s preliminary list of designations some time this week.

As always, please feel free to contact me by phone if you have any further concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey M. Johnson", is written over a circular stamp or watermark.

Jeffrey M. Johnson

cc: R. Bruce Holcomb, Esq.
Charles J. Cooper, Esq.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

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

)
)
) **FILED UNDER SEAL**
) MDL Docket No. 1332
) Hon. J. Frederick Motz
)
)
)

**MEMORANDUM OF LAW IN SUPPORT OF NOVELL'S MOTION
FOR SUMMARY JUDGMENT ON SIX AFFIRMATIVE DEFENSES**

Dated: July 15, 2008

Jeffrey M. Johnson (Bar No. 09328)
R. Bruce Holcomb
David L. Engelhardt
James R. Martin
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Attorneys for Novell, Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

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

)
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) **FILED UNDER SEAL**
) MDL Docket No. 1332
) Hon. J. Frederick Motz
)
)

**MEMORANDUM OF LAW IN SUPPORT OF NOVELL’S MOTION
FOR SUMMARY JUDGMENT ON SIX AFFIRMATIVE DEFENSES**

I. INTRODUCTION

Novell brings this Motion to eliminate two meritless sets of affirmative defenses – standing and claim preclusion – in accordance with the Court’s suggestion to timely raise threshold issues to narrow the disputes and curtail unnecessary discovery.

Microsoft’s standing defense (Affirmative Defense No. 6) rests on the demonstrably incorrect assertion that Novell intentionally sold its right to bring this action when it sold its PC operating system, DR-DOS, to a start-up company, Caldera, Inc. The Court previously rejected this defense in ruling on Microsoft’s motion to dismiss, characterizing it as a “far stretch.” We show below that the written contract between Novell and Caldera unambiguously transferred only a limited claim for harm caused by Microsoft to Novell’s DR-DOS business. Microsoft, as a stranger to the contract, can advance no plausible, alternative interpretation of the contract.

Microsoft’s claim preclusion defenses¹ rest on the equally flawed assertion that Novell and Caldera were in “privity or had a relationship . . . that was akin to privity”²

¹ See Microsoft’s Answer and Defenses (June 24, 2005) at 24-26 (Affirmative Defenses Nos. 4 (estoppel), 5 (waiver), 12 (accord and satisfaction), 13 (res judicata), 14 (collateral estoppel)); Microsoft’s Resps. and Objs. to Novell’s First Set of Interrogs. and Doc. Reqs. Nos. 3, 4, 6, 8-10 (June 16, 2008).

² Interrog. Resp. Nos. 3, 4, 8-10.

in Caldera's prior action against Microsoft, barring Novell from bringing its own claim here. *See Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295 (D. Utah 1999). The premise of these defenses fails for at least two reasons.

First, in the *Caldera* litigation, Microsoft argued, and the court ruled, that Novell was nothing more than an independent third party with a limited financial stake in the outcome. The U.S. Supreme Court recently ruled that such circumstances do not justify application of one of the narrow exceptions to the general rule against nonparty preclusion. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2172-77 (2008). The Court specifically rejected the "all-things-considered balancing approach," on which Microsoft seemingly relies, because of its potential to "spark wide-ranging, time-consuming, and expensive discovery."³ *Id.* at 2176. The Court's ruling is dispositive.

Second, claim preclusion applies only to "successive litigation of the very same claim." *Id.* at 2171 (citation omitted). This case presents a very different claim, arising from fundamentally different facts for an entirely different injury.

Because Microsoft cannot meet its burdens of showing that Novell lacks standing or is otherwise precluded from bringing its claim here, Novell is entitled to summary judgment on Microsoft's Affirmative Defenses Nos. 4 (estoppel), 5 (waiver), 6 (standing), 12 (accord and satisfaction), 13 (res judicata), and 14 (collateral estoppel).

³ The Court's concern is evident here as Microsoft has noticed the July 17 and 18, 2008 depositions of four third-party companies, requiring them to produce documents concerning two prior litigations, *Caldera, Inc. v. Microsoft Corp.* and *Novell, Inc. v. Canopy Group, Inc.* ("*Canopy Group*"). Microsoft already received all documents concerning these cases and is now on a fishing expedition in support of defenses that, we show below, are defective as a matter of law.

II. UNDISPUTED FACTS

A. Novell's DR-DOS

1. Microsoft Targets Novell's DR-DOS

In 1991, Novell purchased DR-DOS, a PC operating system, which competed with Microsoft's dominant MS-DOS.⁴ At the time, Microsoft had a monopoly in the DOS market.⁵ To protect its operating systems monopoly, Microsoft allegedly engaged in a campaign to eliminate DR-DOS from the market.⁶

As a victim of Microsoft's alleged illegal conduct, Novell hired lawyers who drafted a complaint stating an antitrust claim against Microsoft for harm that it caused to the DR-DOS business (the "DR-DOS Claim").⁷ Determining that it was not in Novell's interests to prosecute the suit, Novell's board of directors instructed in-house counsel to negotiate a sale of the DR-DOS business and Claim.⁸

2. Novell Sells Its DR-DOS Business And Claim To Caldera

Novell fielded offers from companies and attorneys interested in bringing the DR-DOS Claim,⁹ including Caldera, in which Novell's former CEO, Ray Noorda, had a majority

⁴ See *Caldera*, 72 F. Supp. 2d at 1301.

⁵ See *id.* at 1298.

⁶ This conduct was at issue in the *Caldera* litigation. See, e.g., *id.* at 1299-1305.

⁷ See Deposition of David Bradford (Novell), *Canopy Group* (4th Jud. Dist. Ct. Utah County July 17, 2001) [NOV00136191-259] 23:8-18 (Ex. 1 hereto); Declaration of Stephen J. Hill, *Canopy Group* (4th Jud. Dist. Ct. Utah County May 2, 2002) [NOV00116692-701] ¶ 2 (Ex. 2 hereto).

⁸ See E-mail from S. Bentley to D. Bradford (Dec. 8, 1995) [NOV00129133-34] (Ex. 3 hereto); Meeting Minutes of Novell's Board of Directors (May 23, 1996) [NOV00119903-05] at 3 (Ex. 4 hereto); see also Deposition of Steve Bentley (Novell), *Canopy Group* (4th Jud. Dist. Ct. Utah County July 18, 2001) [NOV00132632-782] 55:13-56:14, 69:21-70:13 (Ex. 5 hereto).

⁹ See, e.g., Bradford Dep. 16:16-17:16.

stake.¹⁰ Mr. Noorda was well acquainted with the DR-DOS assets and the related lawsuit.¹¹ Novell ultimately agreed to sell to Caldera.¹²

Caldera agreed to pay \$400,000 and additional license fees,¹³ plus royalties on all revenues, including any recovery on the DR-DOS Claim.¹⁴ The parties recorded their deal in two documents: the License Agreement, which set forth the royalty provisions,¹⁵ and the Asset Purchase Agreement, which defined and limited the assets that Novell intended to transfer – specifically, “DOS Products” and “Related Technology.”¹⁶ The Asset Purchase Agreement assigned to Caldera claims “held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products or Related Technology.”¹⁷ The License and Asset Purchase Agreements “together constituted an integration,” as the final and complete expression

¹⁰ See Deposition of Bryan Sparks (Caldera/Canopy Group), *Canopy Group* (4th Jud. Dist. Ct. Utah County Sept. 10, 2001) [NOV00120424-657] 60:3-23 (Ex. 6 hereto).

¹¹ See Bradford Dep. 17:12-24.

¹² See Asset Purchase Agreement between Novell and Caldera (effective date July 23, 1996) [NOV00126008-41] (Ex. 7 hereto).

¹³ See *id.* § 4.1; Novell Cross Platform Services and Novell Products Source Code License Agreement between Novell and Caldera (July 23, 1996) [NOV00127864-915] (“License Agreement”) Ex. B: License Fees and Royalties (“Ex. B”) (Ex. 8 hereto).

¹⁴ See Bradford Dep. 37:17-38:19; License Agreement § 3.s, Ex. B ¶ 3.

¹⁵ See License Agreement §§ 3, 16, Ex. B.

¹⁶ The Asset Purchase Agreement defined and limited the “DOS Products” as the following: CP/M, Concurrent DOS, DR DOS 6.0, DR DOS 5.0, Multiuser DOS, Novell DOS 7.0, PALMDOS, GEM, GEM Draw, GEM Wordchart, GEM Graph, GEM Programmers Toolkit, Draw Plus, and “any other prior or subsequent versions or revisions of such products to the extent owned by Novell as of the Closing.” Asset Purchase Agreement § 2.6.

“Related Technology” is defined as all existing technology “necessary to the performance by the DOS Products of their intended functions or purposes, whether tangible or intangible, in any stage of development,” including source code, programmers’ notes, and development tools, to the extent that technology is “owned by Novell or comprised of Third Party Materials licensed to Novell, as of the Closing.” *Id.* § 2.11.

¹⁷ *Id.* § 3.1.

of the parties' agreement.¹⁸ The License and Asset Purchase Agreements nowhere mention WordPerfect or Quattro Pro.

On July 23, 1996, the parties finalized the sale.¹⁹ Caldera filed its lawsuit the same day.²⁰ The *Caldera* complaint alleged that Microsoft's monopolization of "the DOS Market in violation of § 2 of the Sherman Act" caused "immediate[] and irreparabl[e] injur[y]" to "the DR DOS Business."²¹ Microsoft's exclusionary practices, as alleged in the complaint, include:

- requiring unfair "per processor" licenses that charged original equipment manufacturers ("OEMs") royalties on all PC sales, including PCs containing competing DOS software;
- imposing unreasonably long terms for OEM licenses for operating systems;
- implementing pricing schemes and other terms and practices that effectively required OEMs to purchase their entire DOS software requirements from Microsoft;
- tying MS-DOS and Windows; and
- making false public statements and creating phony Windows error messages, which misled the market into believing DR-DOS could not operate with Windows.²²

The complaint sought damages only for injuries to "the DR DOS Business."²³ The complaint nowhere mentions WordPerfect or Quattro Pro.²⁴

¹⁸ *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 771-73 (Utah Ct. App. 2004).

¹⁹ *See* Asset Purchase Agreement at 1.

²⁰ *See* Deposition of Ralph Yarro (Caldera/Canopy Group), *Canopy Group* (4th Jud. Dist. Ct. Utah County Sept. 26, 2001) [NOV00121175-245] 144:21-145:13 (Ex. 9 hereto).

²¹ *See* Compl., *Caldera* (D. Utah July 23, 1996) [NOV00125439-67] ¶¶ 62, 64 (Ex. 10 hereto).

²² *See id.* ¶ 2.

²³ *Id.* ¶¶ 64, 74, 81, 85.

²⁴ *See id.* at 1-27.

3. Novell Had Only A Tangential, Residual, Economic Interest In The Caldera Litigation

In the ensuing *Caldera* litigation, Microsoft requested that Caldera produce all materials prepared by Novell's counsel related to the DR-DOS Claim, including a draft complaint and related memoranda authored by Novell's lawyers.²⁵ Caldera objected, asserting that the documents contained Novell's work product.²⁶ After Microsoft moved to compel, Novell moved to intervene.²⁷

Microsoft opposed Novell's intervention, arguing that the work product doctrine applies only to the materials of an adversary, a status that Novell relinquished when it sold the DR-DOS Claim.²⁸ Microsoft argued: "Novell has no litigation opponent with regard to the documents at issue. . . . Its interest is at best a remote economic one; Novell clearly has no right to participate in the trial of the case or to influence Caldera's tactical decisions about how to litigate the case."²⁹

²⁵ See Def.'s Reply Mem. in Opp'n to Novell's Mot. to Intervene and in Supp. of Its Expedited Mot. to Compel, *Caldera* (D. Utah July 14, 1998) [MS-PCA 1126267-77] at 2, 4 (Ex. 11 hereto).

²⁶ See Def.'s Mot. to Compel Produc. of Docs. Withheld Based on Alleged Att'y Work Product Protection, *Caldera* (D. Utah June 12, 1998) [MS-PCA 1125725-28] (Ex. 12 hereto).

²⁷ See Mot. to Intervene, *Caldera* (D. Utah July 3, 1998) [MS-PCA 1126129-31] (Ex. 13 hereto).

²⁸ See Hearing Tr., *Caldera* (D. Utah July 16, 1998) [MS-PCA 1127102-49] 27:10-37:14 (Ex. 14 hereto).

²⁹ Def.'s Supplemental Mem. in Opp'n to Novell's Mot. to Intervene, *Caldera* (D. Utah July 24, 1998) [MS-PCA 1126472-81] at 7-8 (Ex. 15 hereto). At oral argument, Microsoft dismissed Novell's financial interest in Caldera's revenues as nothing more than "an accounting interest." *Caldera* Hearing Tr. 29:6-30:7. Novell, by contrast, argued that its indirect financial stake in the outcome of the litigation vested it with the right to intervene. See, e.g., Joint Supplemental Mem. of Caldera and Novell in Supp. of Novell's Mot. to Intervene, *Caldera* (D. Utah July 21, 1998) at 4-5, 8-9 (unpaginated) (Ex. 16 hereto). Novell did *not* argue that it had any right to control the *Caldera* litigation or that it had any litigation interest other than its limited interest in Caldera's revenues. See *id.*

The court agreed with Microsoft, and denied Novell's motion to intervene.³⁰ The court concluded that because Novell was not "in the position of making the strategic and tactical decisions," Novell had no rights to protect.³¹ The court found the following three facts to be significant:

- Caldera obtained the work product documents from Novell when it purchased the DR-DOS assets;
- "Novell has no litigation interest in this case to which the documents have application"; and
- "Novell has no direct property or transactional interest in this case."³²

The court determined that "[t]he only impact on Novell from the result of this case is that if Caldera loses, [Novell's royalty on] its 'profits' may be less"³³ The court concluded: "Novell has *only the most tangential, residual, economic interest in the outcome of the litigation. It is not direct or litigation related.*"³⁴

4. The Microsoft/Caldera Settlement Agreement Makes No Mention Of WordPerfect Or Quattro Pro

On January 7, 2000, Caldera and Microsoft settled.³⁵ Caldera warranted that it "has the right to settle and to release the claims hereunder without the consent or approval of Novell" and that "the consent of no other person or entity (other than Caldera) is necessary for it to enter into this arrangement, to provide the release hereunder, or to dismiss the action, with prejudice,

³⁰ See Order, *Caldera* (D. Utah July 28, 1998) at 5 (Ex. 17 hereto).

³¹ See *Caldera* Hearing Tr. 11:25-12:7.

³² *Caldera* Order at 2.

³³ *Id.*

³⁴ *Id.* (emphasis added).

³⁵ See Settlement Agreement between Caldera and Microsoft (Jan. 7, 2000) [NOV00114048-58] at 1 (Ex. 18 hereto).

against Microsoft.”³⁶ Microsoft never challenged the accuracy of Caldera’s warranties. The Settlement Agreement nowhere mentions WordPerfect or Quattro Pro.³⁷

B. Novell’s Office Productivity Applications

Novell filed this lawsuit for injuries that Microsoft caused to WordPerfect, Quattro Pro, and Novell’s other office productivity applications (the “Applications Claims”).³⁸ Count I alleges that Microsoft thwarted the development and distribution of Novell’s office productivity applications to protect the applications barrier to entry. Count VI alleges that exclusionary agreements foreclosed Novell’s applications from significant distribution channels.

Microsoft asserted several affirmative defenses, including estoppel, waiver, accord and satisfaction, res judicata, and collateral estoppel.³⁹ Microsoft also moved to dismiss the Complaint on a number of grounds, including standing.⁴⁰ In particular, it argued that Novell sold its right to pursue the Applications Claims when it sold the DR-DOS business to Caldera.⁴¹ This Court disagreed: “The fallacy in this argument is that the claim asserted in Count I, while arising from Microsoft’s monopoly in the operating system market, is for damage not to DOS or any other operating system [such as DR-DOS] but for damage *to applications software*.”⁴²

Accordingly, “[i]t is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because DOS competed in the operating system market, such a claim [concerning applications] was either a ‘direct’ or ‘indirect’ claim intended to be transferred from

³⁶ *Id.* at 5-6, ¶ 14.

³⁷ *Id.* at 1-8.

³⁸ *See* Compl. (Nov. 12, 2004).

³⁹ *See* Microsoft’s Answer and Defenses at 24-26.

⁴⁰ *See* Microsoft’s Mem. in Supp. of Its Mot. to Dismiss Novell’s Compl. (Jan. 7, 2005) at 2.

⁴¹ *See id.* at 2, 12-13, 15-17.

⁴² *Novell, Inc. v. Microsoft Corp.*, No. Civ. JFM-05-1087, 2005 WL 1398643, at *1 (D. Md. June 10, 2005) (emphasis added), *aff’d*, 505 F.3d 302 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1659 (2008).

Novell to Caldera.”⁴³ While Novell also had “claims against Microsoft for damage caused to DOS and related technology,” they “were settled after Caldera sued Microsoft” and “are not part of the present action.”⁴⁴

III. ARGUMENT

A. **Defendant Must Establish Every Element Of Its Affirmative Defenses To Defeat Summary Judgment**

Summary judgment should be granted when “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). “[U]nsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the [moving] party should win as a matter of law.” *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006). The party opposing summary judgment “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *see also Francis*, 452 F.3d at 308.

A plaintiff meets its initial burden on a motion for summary judgment “simply by pointing out to the court a lack of evidence for the [defendant] on an essential element of the [defendant’s] affirmative defense.” *Mason v. Brigham Young Univ.*, No. 2:06-CV-826 TS, 2008 WL 312953, at *1 (D. Utah Feb. 1, 2008) (citation omitted). Because the defendant “will ultimately bear the burden of proving its affirmative defense at trial,” it “must make a showing sufficient to establish each essential element of its defense” to defeat the plaintiff’s motion. *Peterson v. Tyson Foods, Inc.*, 983 F.2d 1057, 1993 WL 11899, at *4 (4th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

⁴³ *Id.*

⁴⁴ *Id.*

B. Microsoft Cannot Meet Its Burden Of Showing That Novell Lacks Standing

Under federal common law and state contract law, Microsoft can avoid summary judgment only if it shows that the Asset Purchase Agreement expressly transferred the Applications Claims at issue. Microsoft cannot do so.

1. The Four Corners Of The Contract Establish, As A Matter Of Law, That Novell Transferred Only The DR-DOS Claim

Because Microsoft's standing defense involves the purported assignment of a federal antitrust claim, federal common law governs. *See, e.g., Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1106 (1st Cir. 1994); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 437-39 (3d Cir. 1993) ("*Gulfstream*"). Courts will not find a transfer of federal antitrust claims absent express assignment. *See Gulfstream*, 995 F.2d at 437-39; *In re Linerboard Antitrust Litig.*, 443 F. Supp. 2d 703, 713 (E.D. Pa. 2006).

In an assignment of the type alleged by Microsoft, courts require either all-inclusive or highly specific terms, such as an assignment of "*all . . . causes of action . . . of whatsoever nature*," *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993) (emphasis added), or "*all of [the seller's] rights in any cause of action against 'competitors of the Company in respect of anti-competitive practices in which such competitors may have engaged against the Company'*," *LePage's Inc. v. 3M*, No. CIV.A. 97-3983, 1998 WL 631960, at *1 (E.D. Pa. Sept. 2, 1998) (emphasis added) (citation omitted).

The federal common law also precludes Microsoft's effort to manufacture an ambiguity through discovery, no amount of which will change or add to the plain, specific words of assignment in the Asset Purchase Agreement. General principles of contract law require the same result.⁴⁵

⁴⁵ The License and Asset Purchase Agreements, which are governed by Utah law (*see* License Agreement § 22.c; Asset Purchase Agreement § 10.1), together constitute an integration (*see supra* pp. 4-5 and note 18).

In any contract dispute, “[t]he underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract.” *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1144 (Utah 2002) (citations omitted). The court looks “to the writing itself to ascertain the parties’ intentions,” which are controlling, and considers “each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.” *Green River Canal Co. v. Thayne*, 84 P.3d 1134, 1141 (Utah 2003) (alteration in original) (citations omitted); *WebBank*, 54 P.3d at 1144. “If the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract’s meaning, and a court determines the parties’ intentions from the plain meaning of the contractual language as a matter of law.” *State v. Ison*, 135 P.3d 864, 873 (Utah 2006). The court has a “duty to enforce the intentions of the parties as expressed in the plain language of the [contract’s] covenants.” *Young v. Wardley Corp.*, 182 P.3d 412, 415 (Utah Ct. App. 2008) (alteration in original) (citation omitted).

Novell did not expressly assign “all” causes of action “of whatsoever nature.” The Asset Purchase Agreement is specific, limiting the assigned claims to those “held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products or Related Technology.”⁴⁶ There is no language of assignment of any claim concerning Novell’s office productivity applications. Indeed, in denying Microsoft’s motion to dismiss, this Court rejected as a “far stretch” Microsoft’s argument that, because DOS competed in the PC operating systems market, Novell’s Applications Claims here, alleging monopolization of the PC operating systems

⁴⁶ Asset Purchase Agreement § 3.1. WordPerfect, Quattro Pro, and Novell’s other office productivity applications neither are listed in Section 2.6 of the Asset Purchase Agreement, which identifies by name the “DOS Products” Novell is assigning to Caldera, nor fall under the “Related Technology” definition of Section 2.11, which required that all existing technology, such as “source code” and “programmers’ notes” that are “necessary to the performance by the DOS Products of their intended functions or purposes,” be included in the assignment. *See id.* §§ 2.6, 2.11; *see also supra* note 16 and accompanying text.

market, are associated either directly or indirectly with the DOS Products or Related Technology.⁴⁷

The plain language of the License and Asset Purchase Agreements demonstrates that Novell and Caldera intended to transfer “*specified* assets and liabilities comprising the DOS Business” and “*certain related* rights” of *that* business.⁴⁸ There is not one provision in the 21-plus pages of the Asset Purchase Agreement or the 27-plus pages of the License Agreement that even remotely suggests that Novell intended to transfer any claims relating to Novell’s office productivity applications. On the contrary, the assignment of claims in the integrated contract is complete, clear, and entirely consistent with every other provision in recording Novell’s transfer of all claims associated “directly or indirectly” with only the DOS Products and Related Technology. Absolutely nothing in the License and Asset Purchase Agreements suggests that Novell’s Applications Claims were associated either “directly or indirectly” with the DOS Products or Related Technology.

Microsoft, a stranger to the contract, cannot manufacture an ambiguity by proffering an implausible interpretation. *See Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990) (“To demonstrate ambiguity, the contrary positions of the parties must each be tenable.”). Courts can find an ambiguity only in provisions that are “capable of more than one *reasonable* interpretation because of ‘uncertain meanings of terms, missing terms, or other facial deficiencies.’” *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991)

⁴⁷ *Novell*, 2005 WL 1398643, at *1. Nor can there be any genuine dispute as to whether the contract’s express definitions of “DOS Products” and “Related Technology” include Novell’s office productivity applications, as Novell sold those applications to Corel Inc. months before Novell executed the Asset Purchase Agreement with Caldera. *See* E-mail from B. Gates to R. Fade (Jan. 31, 1996) (discussing industry news: “Corel Acquires WordPerfect Software Products”) [MS-PCA 1287611-13] (Ex. 19 hereto).

⁴⁸ *See* Asset Purchase Agreement §§ 1.1-1.3 (emphasis added). “DOS Business” is defined as “the business of developing, marketing, and distributing the DOS Products.” *See id.* § 2.5.

(emphasis added) (citations omitted). In fact, even if “the *parties* differ as to the interpretation of an agreement,” that “does not alone establish that ambiguity exists.” See *Peterson v. Sunrider Corp.*, 48 P.3d 918, 926 n.7 (Utah 2002) (emphasis added) (citation omitted). “The determination of whether a contract is ambiguous is a question of law for the court, the burden being upon the party claiming that ambiguity exists to show the necessary indefiniteness of meaning.” 11 Richard A. Lord, *Williston on Contracts* § 30:5, at 64-67 (4th ed. 1999) (footnotes omitted).

Microsoft cannot point to any uncertain term, missing term, or other facial deficiency on which a “reasonable,” alternative interpretation could be premised. Indeed, “directly or indirectly” are the *only words* out of the 48-plus pages of agreement to which Microsoft has pointed. In its motion to dismiss, Microsoft tore these words from their context, writing that Novell sold “‘all claims’ even ‘*indirectly*’ relating to PC operating systems.”⁴⁹ But that is not what the Asset Purchase Agreement says, and by deliberately misquoting it, Microsoft confirms the futility of its argument.

Because the four corners of the contract establish, as a matter of law, that Novell and Caldera intended to transfer only the DR-DOS Claim and assets, the Court’s inquiry ends here. The plain language prevents Microsoft from proving either an essential element of its standing defense or a genuine issue of material fact.

2. Beyond The Contract’s Four Corners, The Undisputed Extrinsic Evidence Requires The Same Conclusion

The Court is under no obligation to look beyond the four corners of the contract to determine whether an ambiguity exists, particularly where, as here, there is no suggestion that the parties ever questioned the products and claims assigned. Nevertheless, even if this Court

⁴⁹ Microsoft’s Mem. in Supp. of Its Mot. to Dismiss Novell’s Compl. at 16-17 (emphasis added).

wanted to look beyond the four corners to confirm that the contract means what it says,⁵⁰ the undisputed evidence overwhelmingly confirms the License and Asset Purchase Agreements' unambiguous meaning.

Two principles guide the analysis. First, although courts may look to evidence beyond the language of the contract to determine whether a contract is ambiguous, “[t]he only evidence relevant to that inquiry is evidence of the facts known to the parties at the time they entered the [agreement].” *Level 3 Commc 'ns, LLC v. Pub. Serv. Comm 'n*, 163 P.3d 652, 655 (Utah Ct. App. 2007) (alterations in original) (citations and internal quotation marks omitted). Second, courts will find an ambiguity only “[i]f after considering such evidence the court determines that the interpretations contended for are *reasonably supported by the language of the contract.*” *Id.* (emphasis added) (citations and internal quotation marks omitted). Under these principles, Microsoft cannot meet its burden of showing that the Asset Purchase Agreement's language of assignment is ambiguous.

Whether an ambiguity exists is determined by the objective facts known to the parties at the time they entered the contract, not by subjective, post hoc recollections. *See Nielsen v. Gold's Gym*, 78 P.3d 600, 601-02 (Utah 2003); 11 *Williston on Contracts* § 30:5, at 69 (“Extrinsic evidence properly considered in deciding whether the contract is ambiguous may include . . . any conduct of the parties which reflects their understanding of the contract's meaning.”). The court “determines if there are objective indicia that, from the parties' linguistic

⁵⁰ “[S]ome cases have permitted the consideration of any relevant evidence in determining whether a contract is ambiguous.’ Those cases, however, permitted extrinsic evidence only when it ‘helped uncover ambiguities in the text of the agreements that may not have been obvious on their face.’” *MacDonald v. Nielsen*, No. 20060177-CA, 2007 WL 1153810, at *1 (Utah Ct. App. Apr. 19, 2007) (citations omitted). In such cases, “[r]elevant, extrinsic evidence of the facts known to the parties at the time they entered the [contract] is admissible to assist the court in determining whether the contract is ambiguous.” *Baxter v. Saunders Outdoor Adver., Inc.*, 171 P.3d 469, 472 (Utah Ct. App. 2007) (second alteration in original) (citations omitted). Here, Microsoft cannot show any evidence that will help uncover ambiguities in the text.

reference point, the contract's terms are susceptible of different meanings." 11 *Williston on Contracts* § 30:5, at 68. In determining whether an ambiguity exists, the court looks at evidence of the parties' intent at the time they entered into the agreement, *see Level 3 Commc'ns*, 163 P.3d at 655, as divined from the parties' conduct, *see, e.g., Petrie v. Gen. Contracting Co.*, 413 P.2d 600, 601 (Utah 1966); *Pinson & Assocs. Ins. Agency, Inc. v. Kreal*, 800 S.W.2d 486, 487 (Tenn. Ct. App. 1990) (parties' course of conduct is the strongest evidence of their intent).

Here, Novell and Caldera clearly intended to transfer only those claims associated with the DR-DOS business. In fact, when Novell sold the DR-DOS Claim to Caldera, it did not just sell some theoretical rights. It sold a pre-packaged lawsuit and a draft complaint focused *only* on injuries that Microsoft caused to the DR-DOS business.

That pre-packaged lawsuit stemmed from investigations by the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), which focused on injuries to DOS competitors.⁵¹ To facilitate these investigations, Novell provided information regarding Microsoft's alleged exclusionary practices directed at eliminating DR-DOS as a meaningful competitor.⁵² Novell hired attorneys who reviewed the evidence relating to Microsoft's exclusionary conduct and drafted a complaint articulating the DR-DOS Claim.⁵³ Novell expressly conditioned the sale of the DR-DOS business on Caldera's agreement to pursue the DR-DOS Claim.⁵⁴ Caldera's majority owner, Ray Noorda, already knew the basic facts from his prior employment as Novell's CEO during the FTC and DOJ investigations.⁵⁵ Before agreeing

⁵¹ *See* Microsoft, Form 10-Q (Quarterly Pd. Ended Sept. 30, 1992) [MS-PCA 2173817-29] at 6 (Ex. 20 hereto); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1451 (D.C. Cir. 1995).

⁵² *See generally* Novell, *Restoring Fair Competition to the Market for Operating Systems Software: Consumer Benefits Flowing from Prompt and Effective Remedial Action* (Jan. 28, 1992) [MS-PCA 1131457-512] at 17-34 (Ex. 21 hereto); Bradford Dep. 59:14-60:24.

⁵³ *See* Bradford Dep. 22:24-23:18; Hill Decl. ¶ 2.

⁵⁴ *See* Sparks Dep. 154:16-155:3.

⁵⁵ *See, e.g.,* Meeting Minutes of Novell's Board of Directors (Mar. 9, 1993) [NOV00109142-48] at 1, 3 (Ex. 22 hereto); Bradford Dep. 17:12-24.

to purchase the DR-DOS Claim, Caldera hired the attorneys who wrote Novell's draft DR-DOS complaint and finalized the complaint before executing the contract to purchase the DR-DOS assets. Caldera filed the lawsuit immediately upon execution of the Asset Purchase Agreement. The *Caldera* complaint set forth the DR-DOS Claim that Novell transferred to Caldera. There is no mention whatsoever of WordPerfect or Quattro Pro or any claims relating to injuries to those products.⁵⁶

Moreover, as the Settlement Agreement confirmed, the *Caldera* litigation focused only on Microsoft's anticompetitive conduct directed toward the DR-DOS business.⁵⁷ Like the Asset Purchase Agreement and the *Caldera* complaint, the Settlement Agreement makes no mention of injuries that Microsoft caused to WordPerfect or Quattro Pro,⁵⁸ and Microsoft has never even claimed that it believed at the time that it was actually settling claims concerning WordPerfect or Quattro Pro. It is difficult to imagine a situation where a transferred antitrust claim was better defined.

In light of the clear contract terms, the lack of any dispute between the contracting parties as to the products or claims sold, and the lack of any plausible, alternative interpretation reasonably supported by the contract, these objective facts confirm the obvious: Novell only sold the DR-DOS Claim.

C. Microsoft Cannot Meet Its Burden Of Proving Claim Preclusion

1. Claim Preclusion Does Not Apply To A Nonparty

According to a recent opinion of the Supreme Court, the application of claim preclusion to nonparties "runs up against the 'deep-rooted historic tradition that everyone should

⁵⁶ See *Caldera* Compl. at 1-27.

⁵⁷ See *Caldera* Settlement Agreement at 1-8.

⁵⁸ See *id.*; *Caldera* Compl. at 1-27.

have his own day in court,” because a nonparty, like Novell here, “generally has not had a ‘full and fair opportunity to litigate’” claims settled in the prior suit. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (citation omitted). Accordingly, courts must exercise caution to protect the Due Process rights of nonparties. *Id.* at 2173-74, 2176. The rule against nonparty preclusion is subject only to certain “discrete exceptions that apply in ‘limited circumstances.’” *Id.* at 2172-73, 2175. The record from the *Caldera* litigation affirmatively establishes that Microsoft cannot meet *any* of those narrow exceptions.⁵⁹

Taylor also rebuffed nonparty preclusion based on a “relationship . . . akin to privity” (Interrog. Resp. Nos. 3, 4, 8-10). *See* 128 S. Ct. at 2174-75. The petitioner in *Taylor* unsuccessfully asserted that preclusion may be granted whenever the relationship between the party and nonparty was “close enough.” *Id.* (citation and internal quotation marks omitted). The Court rejected the argument because the “amorphous balancing test [espoused] is at odds with the constrained approach to nonparty preclusion our decisions advance.” *Id.* at 2175.

The Court also criticized the “diffuse balancing approach” that Microsoft’s argument would require:

[It is] likely [to] create more headaches than it relieves. . . . An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. “In this area of the law,” we agree, “crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.”

⁵⁹ The Court recognized six narrow exceptions to the rule against nonparty preclusion. These exceptions only apply where: (1) a person “agrees to be bound by the determination of issues in an action between others”; (2) there is a preexisting substantive legal relationship between the nonparty and a party to the judgment, such as a bailee and bailor or an assignee and assignor of an identical claim; (3) “in certain limited circumstances,” the nonparty was “adequately represented by [a party] with the same interests”; (4) the nonparty “assume[d] control” over the lawsuit; (5) the nonparty “later brings suit as the designated representative of a person who was a party”; or (6) “a special statutory scheme” that is “otherwise consistent with due process” – for example, bankruptcy proceedings – “may expressly foreclos[e] successive litigation by nonlitigants.” *Taylor*, 128 S. Ct. at 2172-73 (citations and internal quotation marks omitted).

Id. at 2176-77 (citations and internal quotation marks omitted). Microsoft's plea for discovery in support of something "akin to" privity creates the very "headache" that *Taylor* seeks to prevent.

Moreover, judicial estoppel prevents Microsoft from asserting facts contrary to those on which it successfully relied in the *Caldera* litigation. Judicial estoppel is grounded in the assumption that there is "only one truth about a given set of circumstances" and prevents "a party from benefiting itself by maintaining mutually inconsistent positions regarding a particular situation." *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998); *see also Lowery v. Stovall*, 92 F.3d 219, 223-24 & n.3 (4th Cir. 1996); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982). Microsoft forcefully asserted in *Caldera* that Novell had no control over the case and was nothing more than an independent third party with an attenuated financial interest in the outcome.⁶⁰ The court agreed, ruling that "Novell has only the most tangential, residual, economic interest in the outcome of the litigation. It is not direct or litigation related."⁶¹ Accordingly, Microsoft's present about-face is judicially estopped, and the *Caldera* court's ruling, as a matter of law, precludes Microsoft from establishing any of the "discrete exceptions" to the rule against nonparty preclusion. *Taylor*, 128 S. Ct. at 2175.

A recent Seventh Circuit case removes all doubt on this score. In *General Auto Service Station LLC v. City of Chicago, Illinois*, 319 F.3d 902 (7th Cir. 2003), the defendant city of Chicago argued that General Auto's claim was precluded because General Auto's alleged "privity," Whiteco, litigated and lost a related claim in a prior action. General Auto showed that the city had successfully opposed General Auto's attempt to intervene in the prior action on the ground that General Auto and Whiteco were "distinct" companies. *See id.* at 905-06. Judge Easterbrook wrote that, "having persuaded the state court that Whiteco and General Auto should

⁶⁰ *See supra* p. 6.

⁶¹ *See supra* p. 7.

be treated as different entities, [the city] now seeks to persuade us that they are (or should be treated as) the same entity. Once again this flip-flop is barred by the doctrine of judicial estoppel.” *Id.* at 906. Microsoft’s planned discovery, in an effort to prove that its own prior position was wrong, does not mitigate, but only compounds, the need for estoppel.

2. Claim Preclusion Only Bars Re-Litigation Of The Same Claim

Even if Microsoft could jump the insurmountable hurdle presented above, it still could not meet its burden of establishing claim preclusion, which only applies to “successive litigation of the very same claim.” *Taylor*, 128 S. Ct. at 2171 (citation omitted). Novell’s current lawsuit arises from a fundamentally different set of facts and does not concern the same cause of action that Caldera pursued for damage to the DR-DOS business. Estoppel applies only when the second claim “arises out of the same transaction or series of transactions as the claim resolved by the prior judgment.” *See Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 162 (4th Cir. 2008) (citations and internal quotation marks omitted).

A comparison of the allegations in the two cases confirms that the respective lawsuits are entirely distinct. The *Caldera* litigation was limited to Microsoft’s predatory conduct in the DOS market⁶² and Caldera’s resulting damages for injuries to “the DR DOS Business.”⁶³

By contrast, Novell here brings its own claims for injury to WordPerfect, Quattro Pro, and other office productivity applications. Novell alleges different exclusionary conduct that ranges far beyond the DOS market, including Microsoft’s (1) withholding and changing technical information to delay the availability of WordPerfect for Windows 95; (2) imposing

⁶² The *Caldera* complaint alleged that Microsoft’s exclusionary conduct consisted of (1) forcing OEMs to agree to “per processor” licenses and unreasonably long terms for license agreements for the use of *MS-DOS*; (2) illegal tying arrangements that required OEMs to purchase *MS-DOS* to obtain Windows software; and (3) making false public statements and creating phony Windows error messages, which misled the market into believing that *DR-DOS* was incompatible with Windows. *See supra* p. 5.

⁶³ *See id.*

restrictions in its agreements with vendors and OEMs that substantially foreclosed all of the efficient methods for distribution of Novell's applications; and (3) imposing unreasonable conditions on Novell's applications to obtain certification of compatibility with Windows 95. *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 309-10 (4th Cir. 2007).

Microsoft cannot credibly argue that the facts alleged in *Caldera* could state Novell's present claims for injury to WordPerfect and Quattro Pro, or vice versa. While both lawsuits accuse Microsoft of causing antitrust injury by "exclusionary conduct," the specific conduct is very different and, more importantly, the injuries were suffered by different lines of business. *See, e.g., Minarik Elec. Co. v. Electro Sales Co.*, 223 F. Supp. 2d 334, 339-40 (D. Mass. 2002) (where two parties have continued contact, it would be against the interest of justice to grant one party immunity for other violations through the device of claim preclusion).⁶⁴ Accordingly, Novell is entitled to summary judgment as a matter of law on Microsoft's Affirmative Defenses Nos. 4 (estoppel), 5 (waiver), 12 (accord and satisfaction), 13 (res judicata), and 14 (collateral estoppel).

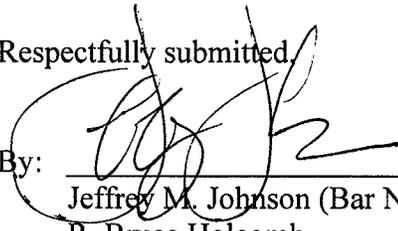
⁶⁴ The result is the same even if some of the evidence adduced in the *Caldera* litigation might be relevant to the claims in this case. *See, e.g., Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 157 (5th Cir. 1971) (settled libel suit did not preclude subsequent antitrust claim even though the alleged libel was admissible to help prove antitrust claim); *Columbia S.S. Co. v. Am. Mail Line, Ltd.*, 510 F.2d 29, 35 (9th Cir. 1975) (dismissal of antitrust claim did not preclude subsequent action based on other anticompetitive acts).

IV. CONCLUSION

For the reasons set forth in this Memorandum of Law, Novell respectfully requests that this Court dismiss with prejudice Microsoft's Affirmative Defenses Nos. 4 (estoppel), 5 (waiver), 6 (standing), 12 (accord and satisfaction), 13 (res judicata), and 14 (collateral estoppel).

Dated: July 15, 2008

Respectfully submitted,

By: 

Jeffrey M. Johnson (Bar No. 09328)

R. Bruce Holcomb

David L. Engelhardt

James R. Martin

DICKSTEIN SHAPIRO LLP

1825 Eye Street NW

Washington, DC 20006-5403

Telephone: (202) 420-2200

Facsimile: (202) 420-2201

Attorneys for Novell, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. *
ANTITRUST LITIGATION * MDL 1332
*
*
NOVELL, INC. *
*
v. * Civil No. JFM-05-1087
*
MICROSOFT CORP. *

OPINION

This lawsuit, brought by Novell, Inc. against Microsoft, Corp., is the last action pending in MDL 1332, *In re Microsoft Corp. Antitrust Litigation*. Earlier in the litigation, on an interlocutory appeal, the Fourth Circuit affirmed a ruling I had made dismissing Counts II through V of Novell’s complaint on limitations grounds. These Counts asserted antitrust claims for harm caused to Novell’s software applications as a result of Microsoft’s monopolization and attempted monopolization of the word processing and spreadsheet markets. The Fourth Circuit held (as had I) that these claims were not tolled during the pendency of the action brought by the United States against Microsoft because, unlike the government case, they were based upon conduct committed by Microsoft in the software applications, not the operating system, market.

Two claims, asserted respectively in Counts I and VI, remain pending: (1) Microsoft violated § 2 of the Sherman Act by taking anticompetitive actions against, and causing damage to, software applications owned by Novell for the purpose of obtaining and maintaining its monopoly in the operating system market; and (2) Microsoft violated § 1 of the Sherman Act by entering into agreements with third parties “not to license or distribute Novell’s office

productivity applications or to do so only on terms that materially disadvantaged those products.”

Discovery on the remaining claims has been completed, and the parties have filed cross-motions for summary judgment. The motions raise two questions: (1) whether Novell continues to own the claims it now asserts or transferred them to Caldera, Inc., and (2) if Novell does continue to own the claims, whether they are viable under the Sherman Act. For the reasons stated in this Opinion, I find that Novell no longer owns the claims and may not pursue them here. As a matter of strict analysis, that is the end of the case. However, in light of the age of MDL 1332 in general and of this lawsuit in particular, I will also address the substantive viability of Novell’s claims. This will enable the Fourth Circuit, upon an appeal of my rulings, to address the antitrust issues presented, in the event that it disagrees with my conclusion relating to the claims ownership issue. As to the antitrust claims, I find that, had Novell not assigned them to Caldera, Count I would have survived Microsoft’s summary judgment motion but Count VI would not have survived Microsoft’s motion.

I.

A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The materiality of facts is determined by the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute about a material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* When considering a motion for summary judgment, a district court draws reasonable inferences and views the evidence in the light most favorable to the non-moving party. *Thompson Everett, Inc. v. Nat’l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). Although “[t]he summary

judgment standard does not differ when applied to antitrust claims. . . . ‘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.’” *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 822 (M.D.N.C. 2000) (quoting *Thompson Everett*, 57 F.3d at 1322).

II.

Under an Asset Purchase Agreement (“APA”) dated July 23, 1996, Novell assigned to Caldera claims “held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products . . .”¹ The term “DOS Products” was defined in the APA to include Novell’s PC operating systems DR DOS and Novell DOS, among other products. Novell had previously sold to Corel Corporation its Business Applications Division, which encompassed various software applications, including WordPerfect (its word processing program), Quattro Pro (its spreadsheet program), and PerfectOffice (a combination of WordPerfect and Quattro Pro). In its agreement with Corel, Novell expressly retained “the antitrust claims for harm that Microsoft caused” to those products.

In my earlier opinion dismissing Counts II through V, I ruled that Novell did not assign to Caldera the claims asserted in Counts I and VI because those claims focused upon harm suffered by Novell’s software applications, not upon harm suffered by the operating systems transferred to Caldera. In reaching that conclusion I stated, “[i]t is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because DOS competed in the

¹ The APA also assigned to Caldera claims “associated directly or indirectly with . . . Related Technology,” and “Related Technology” was defined to mean technology “that is necessary to the performance by the DOS of their intended function and purpose.” Microsoft does not argue that the software application programs involved in this action constituted “Related Technology” within the meaning of the APA.

operating system market, such a claim [for damage to software applications] was either a ‘direct’ or ‘indirect’ claims intended to be transferred from Novell to Caldera.” *In re Microsoft Corp. Antitrust Litig.*, Civ. JFM-05-1087, 2005 WL 1398643, *1 (D. Md. June 10, 2005). The Fourth Circuit did not review that ruling because it was not certified for interlocutory appeal. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 306 n.10 (4th Cir. 2007).

Upon further reflection I have decided that my earlier ruling was wrong. Although the claims asserted by Novell in Counts I and VI are for damage caused to its software applications, the reason Microsoft allegedly engaged in the conduct causing the damage was to obtain and maintain its monopoly in the operating system market – the market in which the DOS Products competed. Novell’s theory as to those claims is that Microsoft intentionally took actions against Novell’s applications because (1) if those applications had retained their popularity, consumers might insist upon purchasing operating systems with which the applications were compatible, thereby threatening Windows 95’s market power; and (2) “PerfectOffice,” developed by Novell, constituted (or nearly constituted) “middleware,” which could have been effectively used with any operating system and that therefore would have “commoditized” Windows 95 and undermined the monopoly Microsoft enjoyed in the operating system market.

In short, Counts I and VI assert claims for damage inflicted upon Novell’s software applications through the prism of the operating system market. Hybrid in nature, the claims were ingeniously designed to survive Microsoft’s anticipated limitations defense by permitting Novell to argue that the pendency of the government case against Microsoft – which was based upon Microsoft’s antitrust violations in the operating system market – tolled limitations.² Successful

²The record suggests, and the parties implicitly agree, that the claims asserted in Counts I and VI were not envisioned until the complaint in this action was prepared, long after the APA was executed. Although

though that argument has been in defeating Microsoft's limitations defense, it is fatal to Novell's position on the claims ownership issue. By associating claims for harm to applications with the operating system market in which the DOS products competed, the argument establishes that the claims were transferred by Novell to Caldera under the APA.

Reduced to its essence, Novell's primary contention is that all that the APA meant to assign was claims for *harm* inflicted upon the DOS products.³ As previously indicated, I accepted this argument when making my prior ruling. However, that is not what the APA itself actually says was assigned. The assignment clause does not mention "harm" but rather "associat[ion]." Under Utah law, which the parties agree applies to this action by virtue of a

contemporaneous memoranda reflect that Novell was aware prior to entering into the APA that it had potential claims against Microsoft for antitrust damage caused to Novell's software applications, these claims were based upon Microsoft allegedly having leveraged its monopoly in the operating system market into a monopoly or near monopoly in the applications markets. Such claims are qualitatively different from those asserted in Counts I and VI. Unquestionably, Novell retained the claims based on Microsoft leveraging its operating system market monopoly into a monopoly in the applications markets, but, as the dismissal of Counts II through V manifest, they are time barred.

³ Novell also contends that the claims it is asserting in Counts I and VI are not "associated" with the DOS Products because although the DR DOS did compete in the operating system market, it was no longer being marketed and supported by Novell in October 1994, when the unlawful conduct alleged in this action began. This contention is not frivolous but it fails for several reasons. First, Novell owned DR DOS in October 1994 and its value certainly would have been affected by anticompetitive activity in the operating system market. Second, although Novell announced in September 1994 that it would exit the DR DOS business, according to the allegations made in the Caldera amended complaint against Microsoft, Novell continued to sell some DR DOS products thereafter. Third, both in its original complaint and in the amended complaint filed in its action against Microsoft, Caldera sought, *inter alia*, an injunction "requiring Microsoft, for a period of ten years, to disclose to Caldera all [application program interfaces ("APIs")] for any operating system it produces, as well as any modifications, enhancements, updates, or new versions of such operating systems at the time that such products are released for beta testing." This request for relief necessarily was premised upon the fact that the failure of Microsoft to disclose APIs (an important part of Novell's claim asserted in Count I of this action) was damaging DR DOS. Fourth, the allegations of misconduct by Microsoft made in this action were undertaken in a market that already was dominated by Microsoft, allegedly in part because of anticompetitive actions it had previously taken against DR DOS. Just as Novell's expert concedes that in order to have antitrust significance the conduct Microsoft directed against Novell's software applications must be considered in light of conduct that Microsoft directed against other competitors, (*see* Novell's Opp. to Microsoft's Mot. for Summ. J. ("Dkt. No. 1952"), Exh. 4 at 6 (Reply Report of Roger G. Noll); Microsoft's Mem. in Supp. of its Mot. for Summ. J. ("Dkt. 1947"), Exh. 3 at 40-43), so too the actions launched by Microsoft against various software application producers must be considered against the background of the anticompetitive conduct it directed against DR DOS in earlier years. Fifth, Novell's expert asserts that Microsoft was motivated to act anticompetitively against Novell in part because of Novell's purchase of DR DOS. (*See* Dkt. No. 1952, Exh. 3 at 89 (Declaration of Roger G. Noll).) All of these facts establish the "association" between the claims asserted in this action and the DR DOS Product claims assigned to Caldera under the APA.

choice of law provision contained in the APA, a court “look[s] to the language of the contract to determine its meaning and the intent of the contracting parties.” *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 207 P.3d 1235, 1240 (Utah 2009). “Only if the language of the contract is ambiguous will . . . [a court] consider extrinsic evidence of the parties’ intent.” *Id. Accord Webbank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1144-45 (Utah 2002).⁴ Here, there is no ambiguity in the APA. It encompasses all claims “associated directly or indirectly” with the DOS Products.⁵

Novell also relies upon the proposition stated in Restatement (Second) of Contracts Section 201(1) (1981), that “[w]here the parties have attached the same meaning to a promise or agreement or a term of art, it is interpreted in accordance with that meaning.” Novell’s contention that this rule would be adopted by the Utah Supreme Court is somewhat questionable

⁴ Ironically, during the discovery phase of this case, Microsoft took the position that it was entitled to inquire into matters concerning the negotiating history of the APA because under Utah law extrinsic evidence should be considered in making the threshold determination of whether contractual language is ambiguous. In *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268-29 (Utah 1995), a case now cited by Novell, the Utah Supreme Court did indicate that extrinsic evidence is relevant to an inquiry into ambiguity. However, in *Daines v. Vincent*, 190 P.3d 1269, 1276-77 (Utah 2008), the Utah Supreme Court, while not disavowing the holding in *Ward*, clarified its meaning and stated that “we did not [in *Ward*] intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit” and that “a correct application of the *Ward* rule to determine what the writing means begins and ends with the language of the contract.” Moreover, as stated in the text, *infra*, the extrinsic evidence cited by Novell as to the meaning of the APA is itself ambiguous and inconclusive.

⁵ The inclusion of the word “indirectly” before the words “associated with” in the APA, while not dispositive, underscores the fact that there is no ambiguity in the agreement. Novell attempts to explain that “indirectly” was added to the APA on the ground that Novell did not want to be perceived as being connected with the suit filed by Caldera against Microsoft. According to Novell, a previous draft of the APA had defined the assigned claims as “any and all claims or causes of action associated with any of the DOS Products or Related Technology, including but not limited to any claims or causes of action for copyright or patent infringement, trade secret misappropriation or violation of any applicable antitrust laws.” Novell asserts that it was “worried that the specific reference to the antitrust claim would draw attention to Novell’s role in instigating the lawsuit.” (Mem. of Law in Supp. of Novell’s Renewed Mot. for Summ. J. on Microsoft’s Affirmative Defenses (“Dkt. No. 1948”) at 19.) Apparently, the reason for this concern was that the commercial value of Novell’s office productivity applications would be harmed if consumers were led to believe that Novell’s applications were not compatible with Windows 95. Of course, to any reasonable person objectively reviewing the APA, “claims indirectly associated” with “DOS Products” does not mean “claims for copyright or patent infringement, trade secret misappropriation or violation of any applicable antitrust laws” related to those products. Moreover, the fact that Novell chose to obfuscate its role in the Caldera litigation, *see Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768 (Utah App. 2004), hardly entitles it to challenge the objective meaning of the language it wrote by reference to its own subjective (and secreted) intent.

in light of the fact that the case upon which Novell relies, *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 834 n.6 (10th Cir. 2005), predicts that the Utah Supreme Court would adopt Section 201(3)(b), not Section 201(1), of the Restatement (Second).⁶ In any event, under the Restatement rule, in determining the subjective intent of the parties to a contract, a court ordinarily looks only to their contemporaneous conduct, not to what they aver they intended after a controversy with a third party has arisen. *See, e.g., Alvin Ltd. v. U.S. Postal Serv.*, 816 F.2d 1562, 1565-66 (Fed. Cir. 1987) (“The parties’ intent must be gathered . . . from the perspective of a reasonably intelligent person acquainted with the contemporary circumstances.” (internal quotations and citations omitted)). This is both sensible and fair because there is no reason that the law should countenance the parties to an agreement retrospectively placing a subjective interpretation upon the agreement’s language, contrary to its objective meaning, to the detriment of a third person who has become embroiled in a dispute with one of the parties to the agreement.

Furthermore, even if I were to consider the extrinsic evidence proffered by Novell, I would not find that it supports Novell’s contention about the meaning of the assignment language in the APA because that evidence is itself ambiguous and inconclusive.⁷ Novell points

⁶ For the Restatement (Second) Section 201(1) to be compatible with Utah case law, it would need to apply only where the express language of the contract is ambiguous. *See, e.g., Café Rio*, 207 P.3d at 1240 (“Where the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” (internal quotations and citation omitted)).

⁷ There is at least one piece of extrinsic evidence that favors Microsoft. As indicated in note 3, *supra*, in the *Caldera* suit one of the claims for relief asserted by Caldera was for an injunction “requiring Microsoft, for a period of ten years, to disclose to all software developments the APIs for any operating system it produces, as well as any modifications, enhancements, updates, or new versions of such operating systems that the time that such products are release for beta testing.” This request for relief manifests that Caldera was taking the position, as asserted by Novell in this action, that Microsoft’s refusal to open APIs for its competitors constituted a violation of § 2 of the Sherman Act. Novell contends that this request for relief by Caldera is irrelevant for present purposes because Caldera asserted that the refusal to open APIs was harming the DOS Products and that it was not concerned about harm being inflicted upon Novell’s software applications by virtue of the same activity. That may well be true, but the fact that Caldera was requesting an injunction requiring the opening of APIs demonstrates the association (direct

to the testimony of Novell's former General Counsel, David Bradford, that Novell and Caldera never "discussed antitrust claims concerning damage caused to Novell's Business Applications business" in connection with the sale of DR DOS, and the similar testimony of Paul Graf, who represented Caldera when the APA was negotiated, that "[n]either party contemplated their claims 'directly or indirectly' related to 'the DOS Products or Related Technology' would include Novell's antitrust claims for harm to its business applications." The truth of this testimony may be assumed, but its meaning is limited. I have no doubt that the parties did not discuss – and that the APA did not intend to assign from Novell to Caldera – claims for harm to Novell's software applications caused by unlawful conduct engaged in by Microsoft for the purpose of monopolizing those applications' markets. Such claims were asserted in Counts II through V of this lawsuit, and they have been dismissed not because Novell does not continue to own them but because they are barred by limitations. Thus, Bradford's and Graf's statements beg the relevant question: whether claims for damage to Novell's applications *caused by unlawful conduct designed to impact the operating system market* were encompassed within the "directly or indirectly associated with" language of the APA. As both parties implicitly agree, the fact of the matter is that any such claims simply were not contemplated, and thus were not discussed, when the APA was negotiated because they were conceptualized and formulated only when it became apparent they would be needed to defeat Microsoft's anticipated limitations defense via the tolling doctrine.⁸

or indirect) between the claims assigned to Caldera that it was asserting in its lawsuit and Novell's claims in the present action.

⁸ Of course, the fact that Novell had not yet envisioned the claims that it now asserts in this action at the time the APA was executed does not mean the claims were not assigned. As previously indicated, under Utah law where the language of a contract is not ambiguous, courts are to resolve its meaning by looking within its four corners. To attempt to identify the potentialities that were known to the contracting parties at the time the agreement was entered into would, in effect, be to inquire into their subjective intentions and undermine the principle that unambiguous

In short, if Novell had intended, as it now argues, to assign to Caldera only claims for harm inflicted upon the DOS Products and Related Technology, it should have so stated in the APA. It did not do so, and the language it in fact employed encompasses the claims that it now seeks to assert in this action because these claims are “associated directly or indirectly with . . . the DOS Products.”⁹

III.

I now turn to the merits of the antitrust claims for monopolization in violation of § 2 (Count I) and unreasonable restraint of trade in violation of § 1 (Count VI). As stated at the outset of this opinion, I find that, had Novell not assigned them to Caldera, Count I would have survived Microsoft’s Motion for Summary Judgment and Count VI would not have.

A.

From the early 1980s through the mid 1990s, Microsoft worked with Novell, and other independent software vendors (“ISVs”), to ensure that Novell’s software applications could function properly on Microsoft’s personal computer (“PC”) operating systems. (*See, e.g.*, Dkt. No. 1952, Exh. 1 (Expert Report of Ronald S. Alepin) at 33.) Such cooperation was in the interest of both parties: Microsoft’s PC operating systems were able to support Novell’s popular

contract language must be construed objectively and reasonably. *See generally II E. Allan Farnsworth, FARNSWORTH ON CONTRACTS* Section 7.9 (3d Ed. 2004). Furthermore, this result is consistent with precedent regarding assignment of antitrust claims. Although the assignment of antitrust claims must be “express,” *see, e.g., Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1106 (1st Cir. 1994), courts have found valid transfers where “all-inclusive” language was used. *See, e.g., Lerman v. Joyce Int’l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993) (finding valid assignment where contract language purported to transfer “any and all . . . causes of action, claims and demands of whatsoever nature”).

⁹ Microsoft also argues that the claims asserted in Counts I and VI are barred by *res judicata* because they could have been, and were not, asserted in the Caldera suit. To the extent these claims were assigned by Novell to Caldera (as I find they were), I agree with Microsoft that they are barred by *res judicata*. However, the *res judicata* argument adds nothing because the assignment of the present claims by Novell to Caldera itself prevents Novell from asserting them here, *res judicata* concerns aside. If, however, I am incorrect on the ownership of claims issue, in my judgment Microsoft’s *res judicata* contention fails because (1) Caldera could not have asserted on behalf of Novell claims Caldera did not possess, and (2) Microsoft now concedes that although Novell had a financial interest in the Caldera litigation, it did not control that litigation.

applications and Novell's applications were able to better function on the popular Microsoft PC operating systems.

In June of 1994, Novell acquired WordPerfect, Quattro Pro, and GroupWise (an e-mail application). By this time, Microsoft had acquired monopoly power in the PC operating system market, (*see id.* at 4 n.3.), and had begun developing a new operating system, Windows 95. However, particularly after Novell's acquisition of these three applications, Microsoft began to view Novell as a threat to its monopoly in the PC operating system market. (*See* Dkt. No. 1952, Exh. 1 at 9–11 (Alepin Expert Report).) Specifically, the capabilities, popularity, number, and diversity of Novell's software applications "could make Microsoft's operating system irrelevant if [Novell's applications] achieved ubiquity":

Future versions of WordPerfect combined with Novell's networking technologies . . . would make PerfectOffice a compelling proposition for users in the next generation of computing. . . . [A] new operating system vendor would need only to recruit PerfectOffice to its platform to develop a credible threat to Microsoft's PC operating systems business.

(*Id.*, Exh. 1 at 77 (Alepin Expert Report).) Microsoft executives were well aware of and concerned by this threat. (*See, e.g., id.*, Exh. 54 (Microsoft executive explaining to investor Warren Buffet that "[i]f we own the key 'franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating system").)

While Windows 95 was being developed, Novell's cooperative relationship with Microsoft began to fracture. First, Novell complains of Microsoft's conduct regarding Windows 95 "namespace extensions." In 1993 and 1994, prior to the Windows 95 launch, Microsoft "evangelized" among ISVs the use of APIs called "namespace extensions."¹⁰ (*Id.*, Exh. 1 at 12

¹⁰ Access to information about Windows 95's APIs—which are "hooks" in an operating system that allow

(Alepin Expert Report).) These namespace extensions allowed “ISVs to integrate custom namespace objects into the Windows 95 shell namespace” and “provide rich, custom views of data.” In the fall of 1993, Microsoft informed WordPerfect that it would publish/document the namespace extensions. (*Id.*, Exh. 1 at 85–86 (Alepin Expert Report).) In June of 1994, Microsoft disclosed to Novell and other ISVs “enough documentation of the namespace extensions ‘for people to understand what we’re doing and write some code.’” (*See id.*, Exh. 1 at 87 (Alepin Expert Report) (internal citation omitted).) Novell began to rely on this documentation to develop versions of WordPerfect and Quattro Pro to function on Windows 95. (*See id.*, Exh. 1 at 87–88 (Alepin Expert Report).) However, in the fall of 1994, Microsoft reversed course and Bill Gates “ordered the withdrawal of the documentation for the namespace extension mechanism” (*Id.*, Exh. 1 at 91–92 (Alepin Expert Report).) Further, “Microsoft told ISVs that the namespace extensions’ functionality would soon disappear from [Windows 95]: ‘Applications that have architected themselves to achieve this functionality need to remove themselves from the system’” (*Id.*, Exh. 1 at 93 (Alepin Expert Report) (internal citation omitted).) Microsoft’s reversal delayed the release and impaired the development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95. (*Id.*, Exh. 1 at 11, 14 (Alepin Expert Report).)

Second, Novell alleges that as it was preparing WordPerfect’s printing function for Windows 95, Microsoft misled it about what APIs and printing functionality Windows 95 would possess. (*Id.*, Exh. 1 at 160–63 (Alepin Expert Report).) “Microsoft’s failure to provide this functionality . . . cost Novell substantial resources and degraded its final products’ functionality.”

applications to achieve functionality within that operating system—was critical for ISVs because it allowed them to develop programs that could function within Windows 95.

(*Id.*, Exh. 1 at 163 (Alepin Expert Report).)

Third, Novell alleges Microsoft improperly denied it a logo license for Windows 95. In September of 1994, Microsoft launched its “Designed for Windows 95” logo program, which allowed an ISV to display the Windows 95 logo if the ISV’s product met various technical requirements. (*Id.*, Exh. 1 at 144 (Alepin Expert Report).) These requirements included the ability to function properly on Windows NT 3.5, Microsoft’s operating system for workstations, a market in which Microsoft had only limited success competing. (*Id.*, Exh. 1 at 148–49 (Alepin Expert Report).) However, Microsoft also allowed an exemption from the Windows NT-compatibility requirement for products that experienced “incompatibilities . . . attributable to functionality that is significantly different in architecture between Windows 95 and Windows NT.” (*Id.*, Exh. 1 at 151 (Alepin Expert Report) (internal quotations and citations omitted).) Despite “architectural differences” in fact being the “root cause” of Novell’s inability to achieve Windows NT compatibility, Novell was denied an exemption and denied a Windows 95 logo license. (*Id.*, Exh. 1 at 152–54 (Alepin Expert Report).)

Fourth, Novell alleges Microsoft injured GroupWise by “withholding and manipulating MAPI,” an API designed to improve the functionality of e-mail applications.¹¹ Specifically, Novell alleges that Microsoft evangelized MAPI among ISVs, and then failed to document the MAPI extensions and failed to properly integrate MAPI with Windows 95. (*See id.*, Exh. 1 at 120–23, 127–34 (Alepin Expert Report).) These actions allegedly impeded non-Microsoft e-mail applications, such as GroupWise, from achieving optimal functionality. (*See id.*, Exh. 1 at 131–34 (Alepin Expert Report).)

¹¹ For the reasons explained in *infra* Section III.B, I have decided that the conduct directed at GroupWise should not be considered in analyzing of Novell’s claims.

Fifth and finally, Novell asserts that Microsoft pressured large application purchasers—such as original equipment manufacturers (“OEMs”), distributors, and resellers—to enter into agreements that precluded or strongly discouraged them from purchasing WordPerfect and Quattro Pro.¹² More specifically:

- (1) In 1995, under “Project Avalanche” agreements, Microsoft sought to “[i]ncrease and sustain North American share for Word and Excel by >10% points” and “[s]ustain Office share at >80% through Office 95 launch.” (*Id.*, Exh. 126 at 1; *cf. id.*, Exh. 3 at 107–08 (Noll Expert Decl.)) These agreements (i) provided a 2 to 5 percent rebate to distributors and resellers who increased their “blended share” of Microsoft Word and Excel; (ii) provided a rebate (under 5 percent) to distributors and resellers who increased their overall sales of certain Microsoft software applications; (iii) required distributors and resellers to provide Microsoft with weekly reports of their sales of WordPerfect, Quattro Pro, and other competing products; and (iv) required distributors and resellers to abide by various other requirements for marketing and selling certain Microsoft software applications. (*See id.*, Exh. 3 at 107–08 (Noll Expert Decl.); *id.*, Exh. 123 at B1–B7; *id.*, Exh. 126 at 1, 12, 20–27.) These contracts were designed to reward distributors and resellers who increased their share of Microsoft software applications. (*See id.*, Exh. 126 at 26; *id.*, Exh. 128.)
- (2) Microsoft executed “per system” licenses with OEMs. Under per system licenses, an OEM paid “a negotiated royalty multiplied by a number equal to the larger of (a) the number of full or partial copies of the particular Microsoft product distributed by the OEM during the term of the license or (b) the number of Customer Systems shipped by the OEM during the term of the license.” (*Id.*, Exh. 136.) “Customer Systems” were defined by characteristics such as microprocessor and model name. (*Id.*, Exh. 136.) Novell contends that these agreements “effectively preclude[ed]” the OEMs that agreed to them from licensing Novell’s products because “[o]nce under a per system license, an OEM had to develop and market a distinct product line if it wanted to pre-install Novell’s applications.” (*Id.* at 41.)

¹² Although these agreements are the crux of the § 1 claim (Count VI), they may also be considered as anticompetitive behavior in the § 2 analysis (Count I). *See infra* note 16.

- (3) “Microsoft forced OEMs to sign contracts with minimum purchase commitments that substantially exceeded a realistic expectation by the OEM.” (*Id.*, Exh. 3 at 100 (Noll Expert Decl.)).) If an OEM fell short of selling enough Microsoft applications to meet its minimum commitment, Microsoft had the right to retain what was the equivalent of a deposit amounting to the unpaid balance on the OEM’s commitment. (*See id.*, Exh. 3 at 100 (Noll Expert Decl.)).) Microsoft often then gave the OEM the choice of forfeiting this deposit or using it as a credit on another contract with Microsoft, “thereby giving the OEM a financial incentive to renew its contract with Microsoft” at the expense of Novell’s products. (*See id.*, Exh. 3 at 100 (Noll Expert Decl.)).)

In March of 1996, Novell sold WordPerfect and Quattro Pro, but retained ownership of GroupWise.

B.

Novell has raised an issue of triable fact as to whether Microsoft’s Novell-injuring conduct was anticompetitive and whether that conduct caused anticompetitive harm in the PC operating system market. I therefore find that, if Novell had not assigned its claims via the APA, summary judgment on Count I would have been inappropriate.

In Count I, Novell alleges that Microsoft violated § 2 of the Sherman Act by willfully and wrongfully maintaining its monopoly in the PC operating system market. The Fourth Circuit described Novell’s theory as follows:

Novell contends that the technological connection between operating systems and applications gives rise to a significant barrier to entry into the operating-systems market and thus protects Microsoft’s Windows monopoly. Novell maintains that its office-productivity applications [such as WordPerfect and Quattro Pro] could perform well on a variety of operating systems and that, during the relevant time period, they were the dominant office-productivity applications in the market. The thrust of Novell’s argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft’s Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly. That is, Novell argues its products 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.

Novell, 505 F.3d at 308. Furthermore, Novell argues that its package of office productivity applications contained middleware and included a desktop shell which could potentially allow PC users to “live” in that desktop shell in lieu of operating in Windows 95, thereby “threat[ening] to become an alternative platform for applications programs that would reduce the need for end-users to upgrade their operating system in order to obtain new application features.” (See Dkt. No. 1952, Exh. 3 at 9 (Noll Expert Decl.).)

As a result of the threat Novell’s applications posed, Novell argues, as detailed above, that Microsoft engaged in the following anti-competitive conduct:

- (1) Withdrawing access to information about, and otherwise changing course regarding, the Windows 95 namespace extensions, thereby delaying and impairing Novell’s development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95.
- (2) Misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect’s costs and decreasing its functionality.
- (3) Refusing to grant a Windows 95 logo license for certain Novell software applications.
- (4) Manipulating APIs to harm GroupWise.
- (5) Entering into licensing agreements with OEMs, distributors, and resellers that discouraged and/or prevented OEMs and distributors from purchasing Novell’s applications.

As a preliminary matter, I agree with Microsoft that the Complaint failed to provide notice that Novell was basing its claims in part on Microsoft’s treatment of GroupWise, and therefore any such allegation is not properly a part of this action. A complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting FED. R. CIV. P. 8(a)(2)). Although “specific facts are

not necessary,” the Complaint must ““give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint in this case limits itself to anticompetitive conduct directed at applications sold by Novell in March of 1996, which would plainly exclude GroupWise. (*See* Novell’s Complaint (“Compl.”) ¶ 2 (emphasis added).) Although the Complaint refers to the anticompetitive treatment of multiple “office productivity applications” in addition to WordPerfect, (*see, e.g., id.* ¶¶ 5, 105), simply pluralizing “office productivity applications,” without any further specificity, is insufficient to put Microsoft on fair notice that Novell would allege antitrust violations based on Microsoft’s treatment of GroupWise. While WordPerfect and Quattro Pro were discussed in some detail (*see, e.g., id.* ¶¶ 32–37, 51–56, 62–63), GroupWise was not even mentioned in the Complaint. Nor am I moved by the fact, relied upon by Novell, that Microsoft pursued discovery about GroupWise. What material is subject to discovery and what conduct may serve as the basis of a claim are two distinct inquiries with different standards. Further, it would be unfair to penalize Microsoft for engaging in a cautious and thorough discovery strategy.

With that matter out of the way, I turn now to the applicable legal framework for this monopolization claim. To violate § 2 of the Sherman Act,¹³ the defendant must (1) have monopoly power in the relevant market and (2) engage in monopolizing conduct—that is, “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.” *Verizon Comm’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United*

¹³ Section 2 reads: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” 15 U.S.C. § 2.

States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (same). To prove the second element, the plaintiff generally must show that the defendant (a) engaged in anticompetitive conduct that (b) caused anticompetitive harm in the relevant market.¹⁴ See *Metronet Serv. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004) (noting that plaintiff must prove that defendant “(1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury”); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994), *abrogated on other ground by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 127 (March 2, 2010) (“‘Exclusionary conduct’ is defined as ‘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 citations omitted)). However, these last two issues—anticompetitive conduct and causation/anticompetitive harm—are not neat, distinct inquiries, but often involve overlapping considerations and analyses. *Cf., e.g., Aspen Skiing*, 472 U.S. 585.

Because Microsoft’s monopoly power in the relevant market is undisputed (Dkt. No. 1947 at 4 n.3), Microsoft would be liable for monopolization under § 2 if it willfully and wrongfully maintained its monopoly—that is, engaged in anticompetitive conduct that caused anticompetitive harm.

¹⁴ Some courts break a monopolization analysis into three elements: (1) monopoly power, (2) willful acquisition/maintenance of monopoly power (or “anticompetitive conduct”), and (3) causation. See, e.g., *Microsoft Corp.*, 253 F.3d 34, 44, 50–79 (D.C. Cir. 2001); *Metronet Serv. Corp.*, 383 F.3d at 1131. Regardless of how the elements are organized, the substantive analysis remains the same.

1. Microsoft's Anticompetitive Conduct

Novell has raised a genuine question of material fact concerning whether Microsoft's behavior, taken as a whole, was anticompetitive.

Microsoft attacks Count I by arguing that that Novell has not presented evidence that Microsoft did anything beyond refusing to cooperate with Novell, and refusing to assist a competitor is not anticompetitive conduct in violation of § 2.

Although a monopolist generally has a right to refuse to cooperate with a competitor, this right is not unqualified: a refusal to cooperate may be anticompetitive if it is an “attempt[] to exclude rivals on some basis other than efficiency[.]” *See Aspen Skiing Co.*, 472 U.S. at 600–01, 605 (internal citations and quotations omitted); *accord Data Gen. Corp.*, 36 F.3d at 1183 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992)). That said, courts should be “very cautious” in recognizing exceptions to the right to refuse to cooperate “because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying the anticompetitive conduct by a single firm.” *Trinko*, 540 U.S. at 407.

In determining whether a refusal to cooperate is impermissible, a court may consider the entirety of the monopolist's pattern of conduct, the potential impact on consumers, and the monopolist's motive—for example, whether the monopolist had a legitimate business justification for its actions or sacrificed short-term profits in an effort to destroy a competitor. *See id.* at 409 (holding that a refusal to cooperate did not violate § 2 because (i) defendant did not remove itself from a previously voluntary course of cooperation or refuse to sell a product at its retail price, (ii) “the services allegedly withheld were not otherwise marketed or available to the public[,]” and (iii) “the existence of a regulatory structure [the Telecommunications Act of 1996]

designed to deter and remedy anticompetitive harm [in the industry at issue]” diminished the likelihood of antitrust harm); *Aspen Skiing Co.*, 472 U.S. 585 (holding that a monopolist-ski mountain owner’s refusal to continue offering a multi-day lift pass with a competitor mountain could violate § 2 because (i) they had offered the pass successfully for years; (ii) the monopolist refused to even let the competitor buy the monopolist’s lift tickets at retail price; (iii) the pass had great appeal among consumers; (iv) elimination of the pass undermined the smaller competitor’s ability to compete; and (v) the facts suggest that the monopolist “was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival”).¹⁵

As an initial matter, it is not entirely clear that Microsoft’s conduct was merely a refusal to cooperate: Novell has presented evidence that Microsoft affirmatively misled Novell about Windows 95 and entered into anticompetitive agreements with OEMs. *Cf. Olympia Equip. Leasing Co. v. W. Union Telegraph Co.*, 797 F.2d 370, 376–77 (7th Cir. 1986) (in explaining the right to refuse to cooperate, noting that antitrust law generally only imposes negative, not positive, duties).

Even assuming Microsoft’s conduct should be characterized as a refusal to cooperate, there is a question of fact about whether it was anticompetitive under *Aspen* and *Trinko*. Microsoft’s conduct ran contrary to the preferences of operating system consumers. Just as skiers would have preferred the multi-day pass in *Aspen*, so too would PC users have preferred an operating system that could immediately and optimally support popular Novell applications

¹⁵ The *Trinko* Court noted that “*Aspen Skiing* is at or near the outer boundary of § 2 liability. . . .” The Court explained that “[t]he 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. . . [and] 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 (internal citations omitted) (emphasis in original).

such as WordPerfect.

Further, Novell has presented evidence of predatory motives. Just as consumer demand for the multi-day pass would have increased the monopolist's short-term profits in *Aspen*, refraining from misleading Novell about the namespace extensions and print functionality may have increased Microsoft's short-term profits by increasing Windows 95's consumer appeal via allowing Novell's popular applications to achieve better functionality on it. (*Cf.* Dkt. No. 1952, Exh. 3 at 11 (Noll Expert Decl.)) A fair inference arises that inhibiting WordPerfect's and Quattro Pro's ability to achieve functionality on Windows 95 was an effort to "sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run [anticompetitive impact]." *See Aspen*, 472 U.S. at 610–11. This inference is particularly believable in light of the substantial concern within Microsoft that popular applications might undermine Microsoft's monopoly in the PC operating system market. (*See, e.g.*, Dkt. No. 1952, Exh. 54.) Further evidence of this anticompetitive motivation is found in:

- (1) The history of voluntary, and therefore presumably profitable, Microsoft-Novell cooperation—both generally over the years and specifically in sharing API information pertaining to Windows 95—to optimize application functionality on Microsoft's operating systems. *See Trinko*, 540 U.S. at 409; *see also Olympia Equip.*, 797 F.2d at 377 (distinguishing *Aspen* in part because "[t]here is no evidence that suppliers [like the defendants] customarily provide their customers with [the information the deprivation of which plaintiffs allege gave rise to an antitrust violation] . . .").
- (2) The denial of the Windows 95 logo license, despite the purported availability of an exemption for the type of problems that Novell alleges caused the incompatibility. *Cf. Trinko*, 540 U.S. at 409 (distinguishing *Aspen* in part because "the services allegedly withheld were not otherwise marketed or available to the public").
- (3) The minimum purchase agreements and per system licenses with OEMs, both of which made it harder for WordPerfect and Quattro Pro to access the OEM market.¹⁶

¹⁶ "Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim." *LePage's Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003). Just because the agreements with the OEMs do not give rise to a § 1 claim, *see infra* Section III.C, it does not necessarily follow that those agreements do not amount to anticompetitive conduct, or are at least evidence of anticompetitive motives, under § 2. *See*

Microsoft argues that “if 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.” (Dkt. No. 1947 at 32 (internal marks omitted) (quoting *Olympia Equip.*, 797 F.2d at 376).) Microsoft’s alleged conduct here, however, is distinguishable from the conduct in *Olympia Equipment*. Microsoft did not just withdraw a charitable helping hand; rather, Microsoft allegedly first cooperated in an effort to improve its own product, subsequently misled Novell into relying on information provided pursuant to that cooperation, and then withdrew its cooperation after Novell reasonably relied on Microsoft’s representations.

Microsoft also argues that it had legitimate business reasons—fostering and benefiting from innovative software development—for its actions. Although courts should be wary of interpreting antitrust laws in a way that hampers innovation, under the circumstances presented here I am not persuaded by Microsoft’s argument. Fostering innovation did not require Microsoft to deny Novell the Windows 95 logo license, nor did it necessitate misleading Novell about the APIs and print functionality. In fact, API innovations arguably would have been more valuable for both consumers and Microsoft if the ISVs had been able to use them to develop applications for Windows 95. *See Data Gen. Corp.*, 36 F.3d at 1183 (“In general, a business justification is valid if it related directly or indirectly to the enhancement of consumer welfare.”). As Novell’s expert has explained, “Microsoft ha[d] no plausible business justification for its actions. The technical acts that undermined the functionality of competing applications were

Microsoft, 253 F.3d at 70 (“[E]xclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.”).

unnecessary and did not improve the functionality or reduce the cost of Microsoft products.”¹⁷
(Dkt. No. 1952, Exh. 3 at 11 (Noll Expert Decl.).)

In short, although, after examining the evidence, a fact-finder may agree with Microsoft that its actions were not anticompetitive under § 2, Novell has presented sufficient evidence to raise a genuine question of fact on this issue.

2. The Anticompetitive Harm Caused by Microsoft’s Anticompetitive Conduct

As discussed above, to prove a monopolization claim under § 2, the plaintiff generally must prove not only that the defendant’s conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market. *See Metronet*, 383 F.3d at 1131; *Microsoft Corp.*, 253 F.3d at 78–80; *Thompson Everett*, 57 F.3d at 1325. More specifically, the plaintiff must establish that it suffered injury caused by conduct which damaged the competitive process itself. *See, e.g., Thompson Everett*, 57 F.3d at 1325 (describing when a private party may sue for violations of antitrust laws, pursuant to § 4 of the Clayton Act).

In most § 2 cases, this analysis hinges on whether the exclusionary conduct harmed competition in the market in which the plaintiff was competing with the defendant. *See, e.g.,*

¹⁷ Microsoft points to two of my prior opinions to argue that “Microsoft is not required to disclose information to its competitors about new Windows operating systems under development.” I have held, in cases brought under the “essential facilities” doctrine, that Microsoft had no antitrust obligation to share information about Windows 95 with ISVs. *See In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 745–46 (D. Md. 2003) (in so holding, noting that “to require one company to provide its intellectual property to a competitor would significantly chill innovation” and “the essential facility doctrine has never been interpreted to deny a person the right to gain temporary benefits from innovations to its own products”); *see also Daisy Mountain Fire Dist. v. Microsoft Corp.*, 547 F. Supp. 2d 475, 490 (D. Md. 2008) (“[E]ssential facility claims involving tangible assets are quite different from claims involving technical innovation, and plaintiff fails to provide a compelling argument for applying the doctrine to technological innovations or information.”). However, in the case at hand, Novell is not proceeding under the essential facilities doctrine. Further, Novell has presented evidence that Microsoft did more than just refuse to disclose information about Windows 95. It has also raised a genuine question of fact about whether Microsoft mislead Novell about characteristics of Windows 95 and about what information it would provide in advance of Windows 95’s launch.

Microsoft Corp., 253 F.3d at 79; *LePage's*, 324 F.3d at 160–62. In this case, Novell's unique § 2 theory makes the inquiry more complicated: Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*.

To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue “contribut[ed] significantly to a defendant's continued monopoly power.”¹⁸ *See Microsoft*, 253 F.3d at 80 (at least in an equitable enforcement action as opposed to an action for money damages, holding that to prove causation plaintiff must prove the conduct was “reasonably capable of contributing significantly to a defendant's continued monopoly power”); *see also Data Gen. Corp.*, 36 F.3d at 1182 (“‘Exclusionary conduct’ is defined as ‘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 citations omitted)); *cf. Morgan*, 892 F.2d at 1361–63 (in rejecting a § 2 claim arising from alleged predatory pricing, (1) suggesting that § 2 liability requires that the pricing have a “measurable impact on [plaintiff's] overall viability as a competitor[,]” and (2) “find[ing] insufficient evidence” that the pricing “had any more than a negligible impact on [plaintiff's] viability as a competitor”).

Under this “contributed significantly” standard, plaintiffs need *not* “present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct.” *Microsoft Corp.*, 253 F.3d at 79. To require such proof would “require that § 2

¹⁸ At times, Microsoft seems to argue that Novell must prove that Microsoft's conduct had a “substantial” anticompetitive impact in the operating system market, (*see* Dkt. No. 1947 at 26), which I would view as a more rigorous test than the contributed significantly standard. Increasing this burden may risk undermining the principle that “antitrust laws are for the benefit of competition.” *Cf. Morgan v. Ponder*, 892 F.2d 1355, 1360 (8th Cir. 1989) (quoting *Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986)).

liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct[,]" which "would only encourage monopolists to take more and earlier anticompetitive action." *Id.* at 79. When a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm because "[t]o some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'" *Id.* (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78).

Microsoft argues that Novell's experts never expressly stated that, but for the actions that harmed WordPerfect and Quattro Pro, competition would have been enhanced in the PC operating system market. Rather, Dr. Roger Noll, Novell's expert on this issue, merely concluded that there was anticompetitive harm caused by the combination of the conduct directed at Novell's software applications and the anticompetitive conduct directed at Netscape, Java, and other third party applications.

Although Dr. Noll implied that the conduct that injured Novell's software applications by itself caused anticompetitive harm in the PC operating system market,¹⁹ it is true that he only formally concluded that such conduct contributed significantly to anticompetitive harm in light of the conduct directed at third parties. (*See* Dkt. No. 1952, Exh. 4 at 28 (Noll Expert Reply).) In his deposition—in response to repeated questioning from Microsoft's counsel about whether the conduct directed at Novell, in and of itself, caused "a significant or substantial impact on competition"—Dr. Noll stated, "I have not analyzed the effect of each specific act by Microsoft on competition in the market for operating systems. I have analyzed the pattern, the totality of

¹⁹ (Dkt. No. 1952, Exh. 4 at 32 (Noll Expert Reply) ("I do not agree that Professor Murphy has proven that the acts against Novell alone had no effect on competition for the x86 operating systems . . .").)

the actions by Microsoft on the market for operating systems.” (Dkt. No. 1947, Exh. 3 at 40.)

Shortly thereafter, the following exchange occurred:

[Microsoft’s Counsel:] Have you analyzed the aggregate of Microsoft’s conduct that was directed against Novell’s office productivity applications in order to ascertain whether that universe, that smaller universe, just conduct against Novell’s office productivity applications, had some adverse impact on competition in the market for operating systems? . . .

[Dr. Noll:] Had Microsoft behaved differently to all other kinds of applications of middleware vendors than it behaved towards Novell. . . . But all the other producers of middleware and applications had – they had dealt with them in a pro-competitive way – and facilitated the development that – of high-quality applications of middleware that were not produced by Microsoft that ran on the Windows platform, then – then I suspect there would have been no adverse effect of knocking Novell out of the industry from the actions against Novell, but that’s – that’s counter [f]actual.

(Dkt. No. 1947, Exh. 3 at 40–43.)

Even taking that answer into account, I conclude that Dr. Noll’s proposed testimony raises a genuine issue of fact regarding whether the conduct directed at Novell was a significant contributor to anticompetitive harm in the PC operating system market. Novell has no obligation to create some “hypothetical market place,” in which none of the other ISVs or applications had been weakened by anticompetitive conduct, and then prove that the conduct at issue would still have significantly contributed to anticompetitive harm in that hypothetical market. *Cf. Microsoft Corp.*, 253 F.3d at 79. It would be contrary to the purpose of § 2 to immunize a monopolist for anticompetitive conduct, which in fact significantly contributed to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, none of which could prove that the conduct directed at any single firm would have by itself significantly contributed to the defendant’s monopoly if none of the other small firms had been similarly weakened. *See*

supra note 18; *Microsoft Corp.*, 253 F.3d at 79.²⁰ Rather, Novell need only prove that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market considering all the characteristics of that market at the time, including the condition of other ISVs and applications.

To be sure, Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well. But Novell is not doing so. Despite Microsoft's assertions to the contrary, implicit in Dr. Noll's opinion is the conclusion that conduct directed at Novell, in and of itself, caused some anticompetitive harm in the PC operating system market. Dr. Noll's deposition statement that knocking Novell out of the market alone would have "no adverse effect," when viewed in context, is properly understood as Dr. Noll agreeing that eliminating Novell's software applications from the market, on its own in some hypothetical market, would not have undermined Microsoft's monopoly position. Such a conclusion is not inconsistent with a finding that Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market in light of the weakened state of other applications and ISVs. (*Cf.*, *e.g.*, Dkt. No. 1952, Exh. 3 at 9–11 (Noll Expert Decl.); *id.*, Exh. 4 at 6–7, 28 (Noll Expert Reply).) A reasonable person may disagree with Dr. Noll, but the decision whether or not

²⁰ (*See also* Dkt. No. 1952, Exh. 4 at 27 (Noll Expert Reply) ("In a 1000-firm market, the harm to any one competitor would not cause harm to competition, but that is irrelevant to ascertaining whether the entire pattern of conduct against all 1000 firms caused anticompetitive harm."))

Microsoft seems to concede that, under some circumstances, the anticompetitive harm caused by a defendant's anticompetitive conduct toward multiple small competitors could be aggregated to reach a significant contribution finding in the relevant market. Microsoft distinguishes itself from such a hypothetical defendant, however, by asserting that its conduct toward Novell was fundamentally different than the anticompetitive conduct Microsoft directed against other ISVs and applications. This argument is unpersuasive. I am not convinced that the conduct directed at the other ISVs is distinguishable in any material way from the conduct directed at Novell. Regardless, I do not think a defendant can avoid antitrust liability by engaging in "different" anticompetitive conduct toward each of its small competitors.

to do so is within the province of a jury.

Accordingly, but for Novell selling its claims under the APA, I would have denied Microsoft's Motion for Summary Judgment on Count I.

C.

I will now finally address Count VI. I find that, even if Novell had not assigned this claim, Microsoft would be entitled to summary judgment because the agreements at issue either were not exclusive, were not otherwise anticompetitive, or did not substantially foreclose competition in any market.

Count VI alleges that Microsoft violated § 1 of the Sherman Act²¹ by entering 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” thereby “unreasonably restrain[ing] trade by restricting the access of Novell’s office productivity applications to significant channels of distribution[.]” (Compl. ¶ 175.)

There is some indication that the parties believe that Count VI concerns only restraining trade in the *software applications markets*, not the *operating system market*. Both parties have briefed the issue as if the operating system market was irrelevant and Microsoft argues that I, in response to Microsoft’s earlier motion to dismiss, tolled Count VI at least in part because it concerned agreements with OEMs (suggesting that Microsoft *may* believe that Count VI’s tolling was unrelated to its connection to the operating system market).

If this is the parties’ view of the matter, it is understandable in light of (i) Count VI’s failure to mention the operating system market, (Compl. ¶¶ 174–77), (ii) my brief explanation as

²¹ Section 1 reads in part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1.

to why Count VI was tolled, *In re Microsoft Corp. Antitrust Litig.*, 2005 WL 1398643, at *1 (“Count VI is based upon Microsoft's exclusionary agreements with OEMs, which allegedly were in [sic] unreasonable restraint of trade. Although Microsoft does not expressly concede the point, such agreements also were a subject of the government case. Thus, limitations has been tolled as to the claim asserted in Count VI.”), and (iii) the fact that § 1, in comparison with § 2, is sometimes less focused on proving a particular anticompetitive impact in a particular market.

The Fourth Circuit, however, apparently believed that Count VI was tolled because Novell alleged unreasonable restraint of trade in the operating system market (though the court may not have actually reached the issue).²² *See Novell*, 505 F.3d at 306–07. In contrast, the Fourth Circuit recognized that Counts II through V arose from allegations of anticompetitive impact in the software applications markets. *Id.* (“Because Counts II through V allege injury that is not specifically alleged in the DOJ complaint, Microsoft argued these claims were not tolled by the DOJ complaint and thus were time-barred. Microsoft sought dismissal of Novell's claims of injury to competition in the PC operating-systems market . . . in Counts I and VI on different grounds [antitrust standing and claim ownership].”) If Novell could prevail on Count VI by proving merely substantial foreclosure in the software applications markets, without proving restraint of trade in the operating system market, Microsoft would have had a persuasive argument that Count VI was not “based in whole or in part” on the government case and thus should not have been tolled. Accordingly, I am of the view that Novell must prove that the

²² The Fourth Circuit explained: “Counts I and VI . . . are predicated on the theory that Microsoft’s conduct injured competition in the market for PC operating systems, a market in which Novell did not directly compete. . . . Section 5(i) of the Clayton Act provides that government anti-trust proceedings toll the statute of limitations for private antitrust actions ‘based in whole or in part on any matter complained of’ by the government. Novell's Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-systems market, which was at issue in the DOJ complaint.” *See Novell*, 505 F.3d at 306–07.

agreements at issue in Count VI have unreasonably restrained trade in the *operating system market*.²³

Novell has not even attempted to present evidence on this point.²⁴ Rather, Novell has briefed the issue as if it only needed to prove restraint of trade—in this case, substantial foreclosure—in the software applications markets. In any event, although I believe Novell’s failure to show restraint of trade in the operating system market dooms Count VI, because of the confusion surrounding this issue I will nonetheless evaluate whether Microsoft’s conduct substantially foreclosed competition in the software applications markets. I find Novell has failed to meet its burden here as well.

a. Substantial Foreclosure Framework

Although Novell never expressly frames it as such, I read Count VI as essentially an allegation of exclusive dealing.²⁵ More specifically, I understand Count VI as alleging that

²³ In its brief before the Fourth Circuit, Microsoft explained the procedural posture and history of Count VI:

Because Counts I and VI allege harm in the same PC operating system market at issue in the DOJ Complaint, Microsoft did not argue that those two claims were time-barred. . . . There was some confusion in the district court concerning what market(s) are at issue in Count VI. Although Count VI does not specify a market, it alleges that Microsoft entered into exclusionary distribution agreements in violation of [§ 1]. . . . [S]uch a claim requires proof of harm to “competition as a whole within” at least one antitrust market. Novell provided no indication that Count VI might pertain to the PC operating system market (as opposed to the alleged applications markets) until oral argument, at which point Microsoft’s counsel immediately responded that to the extent that were so, then Count VI should be dismissed for the same reasons as Count I.

Brief of Defendant-Appellant Microsoft Corp. at *12–*13, *13 n.4, *Novell, Inc. v. Microsoft, Corp.*, Nos. 06-1134, 06-1238, 2006 WL 1348322 (4th Cir. 13, 2006) (internal citations omitted).

²⁴ Novell may have been able to prove restraint of trade in the operating system market by, in part, establishing substantial foreclosure in various software applications markets. To do so, however, Novell would have to prove more than just substantial foreclosure in those software applications markets; it would also have had to point to evidence showing how and why that substantial foreclosure in fact restrained trade in the operating system market.

²⁵ “Exclusive dealing occurs when . . . a buyer . . . agrees to purchase, license or lease all or a substantial portion of its requirements of a product or service exclusively from a particular seller.” WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 2:19 (2009).

Microsoft violated § 1 by entering into agreements with purchasers—OEMs, distributors, and resellers—which *de facto* committed those purchasers to buy software applications exclusively, or almost exclusively, from Microsoft.

Agreements violate § 1 when they unreasonably restrain trade. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Exclusive dealing agreements that are alleged to violate § 1 are evaluated under the Rule of Reason, which balances the procompetitive justifications against the anticompetitive harm. *See, e.g., HOLMES, supra* note 25. The *Tampa Elec. Co v. Nashville Coal Co.*, 365 U.S. 320, 327–30 (1961) substantial foreclosure framework basically serves as a proxy for the Rule of Reason in analyzing exclusive dealing allegations.²⁶ *Cf. Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1301 (9th Cir. 1982) (the *Tampa Electric* framework “clearly is to determine the anticompetitive effects of exclusive-dealing arrangements”). Under *Tampa Electric*, § 1 liability requires the plaintiff to prove that (1) the agreements in question were in fact exclusive, and (2) the exclusive dealing substantially lessened competition—that is, the agreements foreclosed competition in a substantial share of the relevant market.²⁷ *See, e.g., Tampa Elec.*, 365 U.S. at 327–30.

²⁶ Although *Tampa Electric* involved a Clayton Act claim, its analysis pertains to exclusive dealing under § 1 of the Sherman Act as well. *See Tampa Elec.*, 365 U.S. at 335 (“We need not discuss the respondents’ further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader prescriptions of § 3 of the Clayton Act it follows that it is not forbidden by those of the former.”). Some “[c]ourts and commentators disagree as to whether [the *Tampa Electric* test] outlaws a broader range of conduct than does the rule of reason drawn from § 1 of the Sherman Act.” *Bepco*, 106 F. Supp. 2d at 827. I believe (1) that exclusive dealing claims under the Clayton Act and the Sherman Act (§ 1) are either subject to the same standard or that the Clayton Act is broader and (2) that the analytical framework for exclusive dealing claims under § 1 is the same as that articulated in *Tampa Electric*. *See, e.g., Twin City Sportservice*, 676 F.2d at 1301–02 (expressly authorizing use of *Tampa Electric* to analyze exclusive dealing under § 1); *United States v. Microsoft Corp.*, 87 F. Supp 2d 30, 52–53 (D.D.C. 2000), *rev’d on other grounds* by 253 F.3d (utilizing *Tampa Electric*, or something close to it, in analyzing a § 1 claim); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 WL 1236666, at *4 n.2, *4–*8 (C.D. Cal. 2006) (unpublished) (utilizing *Tampa Electric*, or something close to it, in analyzing a § 1 claim and noting “it is easier to meet the threshold of foreclosure for a [Clayton Act] violation than it is for a § 1 violation” (citing *Twin City Sportservice*, 676 F.2d at 1304 n.9)).

²⁷ Section 1 only covers “contract[s], combination[s] . . . , or conspiracy[ies].” In contrast to the pattern of unilateral

b. Project Avalanche Agreements Lacked Exclusivity and Anticompetitiveness²⁸

To be considered “exclusive” under antitrust laws, an agreement must either expressly preclude a party from doing business with the defendant’s competitors, or highly incentivize or have the practical effect of exclusivity. *See LePage’s*, 324 F.3d at 157–58 (in analyzing a § 2 claim, noting that “unilaterally imposed quantity discounts can foreclose the opportunities of rivals when a dealer can obtain its best discount only by dealing exclusively with the dominant firm” (quoting quoting 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 768b2, at 148)); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058–59 (8th Cir. 2000) (holding that discount purchase agreements that did not require buyers to commit to buying a seller’s products for any specified time period were not “exclusive” because buyers

conduct that was considered in analyzing the § 2 claim in Count I, agreements between Microsoft and third parties are the only allegedly anticompetitive conduct that may be considered in assessing the anticompetitive harm in Count VI.

²⁸ Microsoft also argues that the Project Avalanche agreements may not form the basis of Count VI because (1) “[h]ad Novell alleged harm to competition in channels other than the OEM channel, that allegation would have been barred by the statute of limitations because it would not have been based in whole or in part on any matter complained of in the Government case” and (2) Novell did not include such allegations in its Complaint.

As to Microsoft’s first argument, a claim arising from the Project Avalanche agreements may still have been tolled because Novell alleges that those agreements caused harm in the PC operating system market. *See Novell*, 505 F.3d at 307 (quoting 16 U.S.C. § 16(i)) (“Section 5(i) of the Clayton Act provides that government anti-trust proceedings toll the statute of limitations for private antitrust actions ‘based in whole or in part on any matter complained of’ by the government. Novell’s Counts I and VI are indeed based on Microsoft’s anticompetitive conduct in the PC operating-systems market, which was at issue in the DOJ Complaint.”); *see also Novell*, 2005 WL 1398643, at *3 (internal citation omitted) (“The governing test is whether the matters complained of in the private action ‘bear a real relation’ to a matter complained of in the government suit.”).

I also am unpersuaded by Microsoft’s second argument. Again, a complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Erickson*, 551 U.S. at 93 (quoting FED. R. CIV. P. 8(a)(2)). Although “specific facts are not necessary,” the Complaint must “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). Novell’s Complaint put Microsoft on fair notice that it would bring claims based on agreements in the finished goods channel. The Complaint included a section entitled “Other Distribution Channels,” in which Novell alleged “anticompetitive tactics” in “the following channels: independent retailers that sell to individual and small businesses; independent or loosely affiliated resellers that sell to larger organizations . . . ; and direct sales to government agencies, large corporations, and other large organizations.” (Compl. ¶¶ 132–33.) Presumably in an effort to strengthen its argument about the relatedness between Count VI and the government’s suit, Novell only highlighted the OEM agreements in opposing the Motion to Dismiss, and accordingly both this Court and the Fourth Circuit focused on the OEM agreements as the crux of Count VI. Nonetheless, the fact that the Complaint itself challenges non-OEM agreements leads me to conclude that I should consider the allegations about the Project Avalanche agreements.

“were free to walk away from the discounts at any time”); *Masimo Corp.*, 2006 WL 1236666, at 3, *5–6 (holding that, where defendant gave substantially larger discounts to a hospital if it satisfied over 90 percent of its need for “pulse oximetry systems” with purchases from the defendant, the jury reasonably concluded that agreements were exclusive because defendant “in practical effect, offered hospitals their best discount only if they dealt with [defendant] exclusively”); *Microsoft Corp.*, 87 F. Supp 2d at 52–53, *rev’d on other grounds by* 253 F.3d (finding a contract to be exclusive where it imposed “severe shipment quotas and promotional restrictions for third-party [products]”); *see also R.J. Reynolds Tobacco Co. v. Phillip Morris Inc.*, 199 F. Supp. 2d 362, 387 (M.D.N.C. 2002) (“[Exclusive dealing] arrangements typically involve requirements contracts, non-competition clauses, and agreements giving discounts in exchange for exclusivity.”).

Novell has not raised a genuine issue of fact about whether the Project Avalanche agreements with distributors and resellers were exclusive. These agreements were not typical exclusive agreements such as requirements contracts or non-competition agreements. Unlike in *Masimo*, Microsoft did not offer its best discount only if distributors dealt exclusively, or close to exclusively, with Microsoft. Like any discount, the more the distributor purchased the discounted products, the greater it benefited from the discount; but there was no particularly appealing benefit hinging on exclusivity or anything close to it. Nor did these agreements directly penalize distributors and resellers for selling non-Microsoft products. Rather, Microsoft simply offered distributors a modest rebate for increasing their sales and “blended share” of Microsoft products. (*See* Dkt. No. 1952, Exh. 123.) Incentivizing increased sales and share, at least to the extent that these agreements did, hardly has the “practical effect” of exclusivity. In

fact, as Microsoft points out, distributors subject to these agreements were also responsible for 48 percent of Novell's sales in 1995. *Cf. R.J. Reynolds*, 199 F. Supp. 2d at 390 (“Plaintiffs . . . have been successful in securing merchandising contracts with [stores subject to a CMO3 contract with the defendant], which suggest that [the product] sold in CMO3 stores is an inappropriate figure for the foreclosure analysis.”).

Although their lack of exclusivity alone may doom their viability as a basis for § 1 liability, *see supra* note 26, the Project Avalanche agreements are also not anticompetitive by any other measure. First, these agreements warrant “less cause for anticompetitive concern” because they were “imposed on distributors rather than end users.” *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997). “If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution it is unclear whether such restrictions foreclose from competition any part of the relevant market.” *Id. Accord Microsoft Corp.*, 87 F. Supp. 2d at 53 (finding exclusive agreements with distributors did not foreclose a substantial share of the market because internet browser developers could always sell browsers directly to end-users). Further, these agreements basically entail price-cutting, which is particularly likely to have procompetitive and pro-consumer benefits.

In short, because the Project Avalanche agreements were not exclusive or otherwise anticompetitive, they may not form the basis of Novell's § I claim.

c. Agreements with OEMs Did Not Substantially Foreclose Competition

As discussed above, to succeed on a § 1 claim under *Tampa Electric*, a plaintiff must prove that the defendant's conduct foreclosed competition in a "substantial" share of the relevant market. *See, e.g., Tampa Elec.*, 365 U.S. at 327–28; *R.J. Reynolds*, 199 F. Supp. 2d at 387. Substantial foreclosure depends on many factors—the parties' market strength, the degree of exclusivity, business justifications for the agreement, duration of the agreement, barriers to entry in the market, etc.—but requires that the agreements at issue cover at least 20 percent of the relevant market (and usually significantly more than that).²⁹ *See Tampa Elec.*, 365 U.S. at 328–29, 334–35; *Microsoft*, 253 F.3d at 70 (noting "the roughly 40% or 50% share usually required in order to establish a § 1 violation"); *Bepco*, 106 F. Supp. 2d at 828 (21.5 percent and 18.5 percent "fall short of any value presumed to be substantial and lie on the margin of what is considered to be significant"); *R.J. Reynolds*, 199 F. Supp. 2d at 387–88, 391–92 (noting that the lowest coverage courts and commentators have found significant is 20 percent and that courts have found agreements covering up to 50 percent of the market to *not* be substantial).

Because the Project Avalanche agreements are not exclusive or otherwise anticompetitive, to survive summary judgment on Count VI Novell must raise a genuine issue about whether the per system and minimum purchase agreements between Microsoft and OEMs resulted in substantial foreclosure.³⁰ *But cf. R.J. Reynolds*, 199 F. Supp. 2d at 387–88 (holding that Phillip Morris offering retailers discounts in exchange for advantageous advertising space was not exclusive dealing but nonetheless "us[ing] the substantial foreclosure analysis typically

²⁹ "The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals . . ." *Omega Envtl.*, 127 F.3d at 1162 (quoting 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 570b1, at 278).

³⁰ This assumes, without deciding, that these agreements with OEMs would in fact be considered exclusive or anticompetitive.

used in exclusive dealing cases”). However, Novell has not presented evidence that these agreements covered close to twenty percent of any software applications market, and it has therefore failed to meet its burden. (*See* Dkt. No. 1947, Exh. 45.) In fact, Novell does not seem to contest Microsoft’s assertion that the OEM agreements covered at most 10 percent of any relevant market. (*See id.*, Exh. 45; Dkt. No. 1952 at 43–45.) Even if 10 percent could ever amount to substantial foreclosure, which I do not believe it could, Novell has failed to point to any market factor significant enough to support a substantial foreclosure finding with such a small segment of the market covered.³¹

In sum, because Microsoft’s agreements with OEMs did not foreclose a substantial share of any software applications market—and the Project Avalanche agreements were not exclusive or otherwise anticompetitive—a § 1 claim here would not survive summary judgment even if the issue was restraining trade in the software applications markets. Furthermore, Novell has not met its burden of providing evidence that Microsoft’s conduct created an unreasonable restraint in the PC operating system market, and for that reason alone Count VI would have failed even if Novell had not assigned it to Caldera.³²

³¹ The § 1 legality of these minimum purchase and per system agreements is distinguishable from the Section 1 legality of Microsoft’s minimum purchase, per system, per copy, and per processor agreements with OEMs covered by Judge Jackson’s consent order in 1995. In that case, the OEM agreements concerned the distribution of PC operating systems, a market in which OEMs control a substantially greater percentage of the distribution channels than they do in the various software applications markets. *See United States v. Microsoft*, 1995 WL 505998 (D.D.C. 1995); *see also United States v. Microsoft Corp.*, 159 F.R.D. 318, 322 n.9 (D.D.C. 1995) (“In the first half of 1994, 80% of Windows units sold by Microsoft were through OEMs.”), *rev’d by* 56 F.3d 1448 (D.C. Cir.). Consequently, anticompetitive or exclusive OEM agreements in the PC operating system market foreclosed a much greater amount of competition.

³² Microsoft also argues that Novell “abandoned” Count VI because it failed to offer expert evidence of the damages it suffered as a result of the conduct alleged in Count VI. (*See* Dkt. No. 1947 at 44.) Because Count VI may be resolved on other grounds, I did not reach this issue.

