

APPENDIX A

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In this Appendix A, we demonstrate that the contested Rulings and Findings are relevant to Novell's claims.

A. Rulings and Findings Related to the Illegal Exclusion of Navigator

Rulings 1-9 and Findings 68, 72, 76, 77, 80, 84, 90-93, 144, 145, 148, 157-161, 164, 166, 169, 175-177, 203, 208, 213, 227, and 239 concern Microsoft's anticompetitive actions to thwart Navigator's threat to Microsoft's Windows monopoly by excluding Navigator from the most important distribution channels – including the OEM, IAP, ISV, and Apple computer channels – and binding Internet Explorer more tightly to Windows. This evidence of “repeated and varied exclusionary practices,” II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7, at 208 (3d ed. 2007), is relevant to Novell's allegations that Microsoft employed similar strategies to eliminate the similar threat posed by WordPerfect.

1. Rulings 1-4 and Findings 144, 145, 148, 203, 208, 213, 227, and 239

Findings 144, 145, and 148 describe how, “[v]ery soon after it recognized [by April or May 1995] the need to gain browser usage share at Navigator's expense,” Finding 144, Microsoft identified and targeted the most efficient distribution channels from which to exclude Navigator. Findings 203, 208, 213, 227, and 239 concern the illegal license restrictions that Microsoft forced on OEMs (Rulings 1-4). Finding 203 explains how allowing OEMs to remove the most visible means of access to Internet Explorer and pre-install Navigator would subvert Microsoft's “purpose in forcing OEMs to take Internet Explorer – capturing browser usage share from Netscape.” Finding 208 explains that this objective was so important to Microsoft that it was prepared to lose all Windows sales through its highest-volume OEM partner, Compaq.

Finding 213 describes the illegal license restrictions that Microsoft forced upon the OEMs.

Finding 227 explains that Microsoft's true motivation for these license restrictions was not its professed concern about the integrity and quality of Windows, but rather "the fear – once again – that OEMs would pre-install and give prominent placement to middleware that could weaken the applications barrier to entry." Finding 239 describes the success of Microsoft's efforts to exile Navigator from the OEM channel.

Microsoft's contention (Mem. Opp. at 14, 16) that this evidence is irrelevant because it concerns the exclusion of Web browsing software, not office productivity applications, was rejected by the Fourth Circuit, which offered as an example of an anticompetitive activity that was "undeniably similar" to Microsoft's conduct against Novell, "the D.C. Circuit[']s finding] that provisions in Windows licenses issued to OEMs restricting them from distributing browsers other than Microsoft's own served to reduce Netscape's browser's market share." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 314 n.22 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1659 (2008).

This is evidence of Microsoft's "repeated and varied exclusionary practices," Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7, at 208, designed "to eliminate the applications of Novell and other ISVs from [the OEM] channel, while 'handcuffing' OEMs to Microsoft's operating system and office productivity applications," Complaint ¶ 113. It is relevant to Novell's allegation that Microsoft employed exclusionary tactics against WordPerfect that were similar to those used against Navigator and found to be exclusionary and illegal. *See, e.g., id.* ¶¶ 23, 44-45; *see also id.* ¶¶ 112-148.

Microsoft's contention (Mem. Opp. at 14-15) that this evidence is irrelevant because the illegal conduct occurred after Novell's sale of WordPerfect on March 1, 1996 is wrong. As

Microsoft acknowledges (Mem. Opp. at 5), Microsoft began to force OEMs to accept illegal license restrictions in the spring of 1996 – i.e., at or within months of the time of the sale. Furthermore, the roots of the illegal OEM license restrictions date back to at least as early as April or May of 1995 – nearly a year before Novell sold WordPerfect – when Microsoft identified Netscape as a potential threat to the applications barrier to entry and “came to the conclusion that Microsoft’s best prospect of quashing that threat lay in maximizing the usage share of Microsoft’s browser at Navigator’s expense.” Finding 157. By the summer of 1995, Microsoft “consistently and steadfastly refused” requests by OEMs for permission to remove the Internet Explorer icon from the desktop before shipping their computers. Finding 204. Microsoft conceived of the exclusionary strategy at least as early as January 1996 – while Novell still owned WordPerfect – when the Microsoft executive in charge of OEM sales identified “[c]ontrol over start-up screens, MSN and IE placement” as an area of neglect by Microsoft, and “recognized that establishing control over the boot process was necessary to ensure preferential positioning for MSN and Internet Explorer.” Finding 212.

2. Rulings 5 and 6 and Findings 157-161, 164, 166, 169, and 175-177

Findings 157-161, 164, 166, and 169 describe how Microsoft bound Internet Explorer more tightly with Windows 95 and Windows 98 in order to foreclose Navigator, while Findings 175-177 explain that there was no legitimate justification for Microsoft’s doing so. This evidence does bear on Novell and its products (*compare* Mem. Opp. at 15), because Novell alleges that Microsoft employed a similar strategy of binding browsing technologies into Windows in order to exclude WordPerfect and other Novell applications, Complaint ¶ 21.

Microsoft also is wrong (Mem. Opp. at 15) that this evidence only deals with Windows 98 and is outside of the time period relevant to this case. Although Rulings 5 and 6 only concern Windows 98, Microsoft's binding of Internet Explorer into Windows 98 was simply an extension of its binding of Internet Explorer into Windows 95, the predecessor to Windows 98, and was the fruition of an anticompetitive strategy that began at least as early as April or May of 1995, when Microsoft identified Netscape as a potential threat to the applications barrier to entry and concluded that the best chance of quashing this threat was to maximize the usage share of Internet Explorer at Netscape's expense. *See supra* pp. 1, 3. As part of this strategy, beginning in 1995, Microsoft ensured that every copy of Windows 95 carried a copy of Internet Explorer, and included a term in OEM licenses that prohibited OEMs from modifying or deleting any part of Windows 95, including Internet Explorer, before shipment. Finding 158. In late 1995 or early 1996, while Novell still owned WordPerfect, Microsoft set out to strengthen the technical bonds between Internet Explorer and Windows 95. Finding 160. Except for a few months in 1997, Microsoft "never allowed OEMs to ship Windows 95 to consumers without Internet Explorer." Finding 158. The D.C. District Court specifically found that there was no legitimate justification for Microsoft's binding of Internet Explorer into Windows 95. Findings 175-176.

3. Rulings 7, 8, and 9

Rulings 7, 8, and 9 concern Microsoft's illegal exclusive dealing contracts with IAPs (Ruling 7), ISVs (Ruling 8), and Apple (Ruling 9). Microsoft contends (Mem. Opp. at 15-16) that these Rulings are irrelevant because Novell does not allege that Microsoft sought to exclude

WordPerfect from the IAP channel, and because Microsoft's illegal agreements with ISVs and Apple did not involve Novell or its software products.

To the contrary, this evidence of anticompetitive conduct is part of the "pattern [that] gives increased plausibility to [Novell's] claim." Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7, at 208. It bolsters Novell's claim that Microsoft used its Windows monopoly to prevent ISVs from distributing WordPerfect because it, like Navigator, threatened Microsoft's Windows monopoly. Complaint ¶ 21. It also bolsters Novell's claim that Microsoft targeted WordPerfect's major distribution channels and employed anticompetitive strategies to foreclose WordPerfect from them, just as it did with Navigator. *Id.* ¶¶ 112-148. Microsoft's illegal exclusive deals with IAPs, ISVs, and Apple share a common motive and common tactics with its alleged conduct against WordPerfect.

They also were close in time to Microsoft's actions against Novell. By late 1995, Microsoft identified the IAP channel as the other major one (in addition to the OEM market) for Netscape, and in February 1996, a top Microsoft executive outlined a strategy to diminish Netscape's usage share that included "exclusive arrangements" with IAPs. Finding 242. This took place while Novell owned WordPerfect. As Microsoft acknowledges (Mem. Opp. at 6), it began signing illegal exclusive deals with IAPs in July 1996, just months after Novell sold WordPerfect; it signed its illegal exclusive deal with Apple in August 1997; and the illegal "First Wave" agreements were signed in 1997 and 1998.

4. Findings 68, 72, 76, 77, 80, 84, and 90-92

Findings 68, 72, 76, 77, 80, 84, and 90-92 explain: the threat that middleware such as Navigator and Java posed to Microsoft's Windows monopoly (Findings 68, 76, & 77); the

recognition of this threat by Microsoft executives in 1995 (Findings 72 & 80); Microsoft's efforts to pressure Netscape to halt the development of "platform-level browsing technologies for Windows 95" (Finding 80; *see also* Findings 84 & 90-92); and Microsoft's successful efforts to punish Netscape for failing to succumb to the pressure (Finding 92).

This evidence is not irrelevant because it concerns Navigator and Java rather than Novell and its products. Mem. Opp. at 16-17. Rather, as explained above, it is relevant to Novell's claim that Microsoft's actions against it were part of a campaign to destroy software that threatened Microsoft's Windows monopoly.¹ *See supra* p. 2. Furthermore, these Findings concern conduct by Microsoft during the time that Novell owned WordPerfect.

B. Rulings and Findings Related to the Illegal Exclusion of Java

Rulings 10-12 and Findings 68, 74-77, 386, 394, 395, 401, and 407 relate to Microsoft's illegal efforts to thwart the threat posed by Java. Findings 68 and 74 explain how Java threatened to erode the applications barrier to entry. Finding 75 explains that by the late spring of 1996, senior Microsoft executives were "deeply worried" about the threat from Java. Findings 76, 77, and 395 describe how in 1995, Sun and Navigator combined efforts, Netscape became the principal vehicle by which Sun distributed its Java runtime environment to PC users of Windows systems, and Microsoft executives identified these developments "as a further reason to dread the increasing use of Navigator." Finding 77. In particular, "[w]hen Netscape

¹ Microsoft's contention (Mem. Opp. at 16-17) that Novell does not claim that WordPerfect and Quattro Pro were "middleware" misses the point. As the Fourth Circuit concluded, "[a]s with Novell's office-productivity applications, the primary threat that Java and Navigator posed to Windows was not that they were competitors or potential competitors in the operating-system market (indeed, the court found that they were not competitors or potential competitors within the relevant time frame) but rather that, from outside that market, they could enable an alternative operating system to compete with Windows." *Novell*, 505 F.3d at 314 n.22.

announced in May 1995 that it would include with every copy of Navigator a copy of a Windows JVM that complied with Sun's [Java] standards, it appeared that Sun's Java implementation would achieve the necessary ubiquity on Windows" for software developers to begin writing Java applications using Sun's developer tools. Finding 395. Finding 386 explains that, to reinforce and maintain the applications barrier to entry, Microsoft "became interested in maximizing the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa." Finding 401 describes one of the illegal "First Wave" license restrictions imposed by Microsoft designed to ensure that Java applications would run only on Microsoft's version of Windows JVM, thereby undermining Sun's version, and concludes that "[t]he record contains no evidence that the relevant provision . . . had any purpose other than to maximize the difficulty of porting Java applications between Windows and other platforms." Finding 407 finds that, as a result of Microsoft's conduct, it "succeeded in greatly impeding Java's progress [towards facilitating porting between Windows and other platforms enough to weaken the applications barrier to entry] with a series of actions whose sole purpose and effect were to do precisely that."

Microsoft's contention (Mem. Opp. at 18) that this evidence is irrelevant because it concerns only Java, not Novell or its products was rejected by the Fourth Circuit: "The anticompetitive activities that harmed Java and Navigator are undeniably similar to those alleged by Novell." *Novell*, 505 F.3d at 314 n.22. As one example of the "undeniable similarity" between Novell's claims and those in the Government case, the Fourth Circuit pointed to "internal Microsoft memoranda indicating an objective 'to thwart Java's threat to Microsoft's monopoly in the market for operating systems,' in which Microsoft espoused an intent to deceive

Java developers into writing applications that only performed properly on Windows.” *Id.* (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001)).

This is evidence that Microsoft’s anticompetitive conduct towards Novell was part of a pattern of exclusionary conduct. Like the cooperation between Netscape and Sun that particularly threatened Microsoft,

the combination of WordPerfect, a popular application, with the system-neutral OpenDoc-protocol and AppWare development environment, threatened Microsoft’s operating systems monopoly. Microsoft employed an array of tactics to minimize that threat, including preventing OpenDoc’s compatibility with Windows 95 and requiring OLE-compatibility as a condition of Windows 95 certification. It pursued these and other tactics directly and indirectly, through its campaign to minimize WordPerfect’s market share.

Complaint ¶ 51.

Yet again, Microsoft’s contention (Mem. Opp. at 18) that this evidence pertains only to the time period after March 1, 1996 misses the mark. As with Netscape, Microsoft’s illegal conduct towards Java was the product of a strategy conceived and implemented well beforehand. Microsoft recognized in May 1995 that Java posed a serious threat to Microsoft’s Windows monopoly, when Netscape publicly announced that it would include with every copy of Navigator a copy of a Windows JVM that complied with Sun’s Java standards. Finding 395.

C. Findings Related to IBM

Findings 115, 116, 119-125, 130, and 132 are relevant because they describe how “from 1994 to 1997 Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft’s offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate.”

Finding 132. IBM was a computer manufacturer dependent upon Windows for its computer sales, but also a developer of software. Finding 115. Like Novell, IBM produced a competing office productivity application, SmartSuite. Finding 115. After IBM announced in July 1995 that it would make SmartSuite its primary desktop offering in the United States, Microsoft terminated negotiations with IBM for a license to Windows 95, and refused to release to IBM the Windows 95 “golden master” code, which IBM needed for product planning and development. Finding 122. Microsoft also discriminated against IBM by charging it higher royalties for Windows than other OEMs. Finding 130.

Microsoft contends (Mem. Opp. at 18-19) that this evidence is irrelevant because it does not involve Microsoft’s actions against Novell, and the Findings in question did not give rise to liability affirmed on appeal in the Government case. To the contrary, it is evidence of yet another exclusionary practice by Microsoft designed to protect the applications barrier to entry, and therefore is relevant evidence of an anticompetitive pattern. *See, e.g., United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 38-39 (D.D.C. 2000), *aff’d in part, rev’d in part*, 253 F.3d 34 (D.C. Cir. 2001). The evidence is particularly salient because it overlaps the time that Novell owned WordPerfect, and because IBM, like Novell, sold an office productivity application, SmartSuite, that was targeted by Microsoft.

D. Findings Related to the Harm Caused by Microsoft

Findings 411 and 412 describe the harm that Microsoft caused to consumers and competition. They are directly relevant to Novell’s allegation that “[t]hrough [its] misconduct, Microsoft has harmed consumers and competition by, without limitation, depriving consumers of the lower prices and more rapid pace of innovation that competition would have brought.”

Complaint ¶ 154 (monopolization claim); *see also id.* ¶ 176 (exclusive dealing claim). The fact that consumers and competition were harmed by Microsoft's anticompetitive actions against Navigator, Java, and other software products makes it more likely that harm was caused by similar anticompetitive actions against Novell and its products.

Microsoft's contention (Mem. Opp. at 19) that "[t]he D.C. Circuit reversed the district court's sweeping course of conduct findings" is false. The D.C. Circuit did not reverse Finding 411, Finding 412, or, for that matter, any Finding.