IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

NOVELL'S OPPOSITION TO MICROSOFT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Department of Justice proved that Microsoft unlawfully maintained its monopoly in the market for PC operating systems during the period relevant here.[1] As part of its scheme of monopoly maintenance, Bill Gates ordered the destruction of Novell's "key franchise" applications, including WordPerfect, Quattro Pro, GroupWise, and the PerfectOffice suite, for the purpose of "widening the moat" that protected the unlawful monopoly. In affirming this Court's decision on Microsoft's motion to dismiss, the court of appeals validated Novell's theory, explaining that Novell's "products could provide a path onto the operating-system playing field for an actual competitor of Windows," and were targeted for that reason.[2] A mountain of evidence now proves the theory accepted by the court of appeals and is more than sufficient to raise genuine issues of material fact as to Novell's Count I claim for monopoly maintenance under Section 2 of the Sherman Act.[3]

Microsoft's scheme of monopoly maintenance included a pattern of inducing Novell to rely on promised features of Windows, and then strategically withdrawing the features that became integral to Novell's designs. Microsoft employed these tactics to impair Novell's ability to use the "namespace extensions"; to provide "background printing"; to create messaging and collaboration products; and to obtain a Windows 95 logo. As Mr. Gates explained upon ordering the withdrawal of the namespace extensions, "[w]e can't compete with Lotus and Wordperfect/Novell without

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[1] *See United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

[2] *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 308 (4th Cir. 2007), *aff'g* No. MDL 1332, Civ. JFM-05-1087, 2005 WL 1398643 (D. Md. June 10, 2005), *cert. denied*, 128 S. Ct. 1659 (2008).

[3] Most of this evidence is presented in the reports of Novell's technical expert, Ronald Alepin, and its economist, Dr. Roger Noll. Their reports, which are incorporated by reference, contain more than 1,325 citations to a paper record that is more than 8 feet tall. *See* Alepin Rep. (Ex. 1); Alepin Rebuttal (Ex. 2); Noll Rep. (Ex. 3); Noll Rebuttal (Ex. 4). The expert reports, and all other exhibits to this brief, are attached to the Affidavit of Alex Hassid.

this."[4] The strategic manipulation of technology fatally delayed Novell's products, decreased their functionality, and made them commercially less appealing.

The final element of Microsoft's scheme consisted of exclusionary agreements that restrained Novell's office productivity applications from entering the primary channels of distribution. These restraints of trade are an important part of the monopolization claim; they also support Novell's separate Count VI under Section 1 of the Sherman Act. Novell did not "abandon" this claim, as Microsoft contends. Evidence drawn from discovery in this and other cases defeats summary judgment on this claim.

I. SUMMARY OF MICROSOFT'S SCHEME

A. Microsoft Sought Cooperation From WordPerfect And Novell

Microsoft began dealing with WordPerfect, for the benefit of Microsoft's operating systems business, in the 1980s, and WordPerfect soon became one of Microsoft's most important partners in making its PC operating systems dominant.[5] With the development of Windows 2.0 in 1986, Microsoft "begged [and] pleaded" with WordPerfect to move its applications to the fledgling GUI platform: "We went to visit them; we cornered them at trade shows; we argued with them repeatedly over many, many years."[6] Microsoft understood the importance of having quality applications like WordPerfect's running on Windows.[7]

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[4] MX 5117031-32, at 31 (Ex. 5).

[5] *See, e.g.*, Dep. of E. Meyers, JCCP No. 4106 (Super. Ct. Cal. Sept. 28, 2001) 259:15-17 (Ex. 6); Noll Rep. at 22 (Ex. 3); Alepin Rep. at 33 (Ex. 1).

[6] Dep. of J. Lazarus (Jan. 27, 2009) 84:21-85:3 (Ex. 7).

[7] *See* Alepin Rep. at 33 (Ex. 1); Dep. of J. Raikes (Jan. 27, 2009) 29:1-32:5 (Ex. 8); Dep. of C. Myhrvold (Feb. 12, 2009) 9:11-12:10, 21:14-17, 78:8-12 (Ex. 9).

WordPerfect did as Microsoft asked and began developing products for Windows.[8] WordPerfect, and later Novell, met with Microsoft throughout the early 1990s, frequently attending developer conferences and receiving significant technical information for various versions of Windows, including 3.1, NT, and Chicago (Windows 95).[9] Across this entire period, from 1981 to the release of Windows 95 in 1995,[10] Microsoft disclosed tens of thousands of APIs, protocols, and other specifications, and encouraged Novell (and other ISVs) to rely on that information to develop their products.[11] Microsoft's voluntary dealings with ISVs fueled the success of Microsoft's monopoly, a point confirmed by Mr. Gates himself.[12]

Windows 95 represented a "paradigm shift" in the industry, providing an opportunity for ISVs to increase their market share in the applications market;[13] ISVs who were in second or third place in the market for Windows 3.1 applications would have an open opportunity to become the market leader on Windows 95.[14] For Microsoft, who hoped to make Windows 95 the "new dominant operating system,"[15] and Novell, who hoped to become an applications "leader in the

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[8] Dep. of W. Peterson, JCCP No. 4106 (Super. Ct. Cal. Mar. 19, 2002) 232:15-233:11 (Ex. 10).

[9] *See, e.g.*, NOV-B01024423-38 (Ex. 11); NOV-B01024446-69 (Ex. 12); NOV-25-000628 (Ex. 13); MS7086583-84 (Ex. 14); FL AG 0080441-42 (Ex. 15); MS 5032794-96 (Ex. 16); MS7049089-100, at 99-100 (Ex. 17); MS7093847-48 (Ex. 18).

[10] *See* Alepin Rep. at 33 (Ex. 1); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (collectively "Findings of Fact" or individually "FOF") ¶¶ 6-8. These Findings of Fact are to be given collateral estoppel effect pursuant to the Court's December 3, 2008 Order.

[11] *See, e.g.*, Alepin Rep. at 7, 30-33 (Ex. 1); Dep. of G. Richardson, JCCP No. 4106 (Super. Ct. Cal. Dec. 13, 2001) 79:13-82:10 (Ex. 19); Microsoft's Answer and Defenses ¶¶ 60, 62, 72, 106.

[12] Dep. of W. Gates, JCCP No. 4106 (Super. Ct. Cal. Feb. 27, 2002) 62:11-63:13 (Ex. 20); *see also* Noll Rep. at 22, 128 (Ex. 3); Alepin Rep. at 33 (Ex. 1).

[13] Alepin Rep. at 34-35 (Ex. 1); *see also* Dep. of J. Raikes (Jan. 27, 2009) 73:2-74:21 (Ex. 8); MS-PCA 1269834-35, at 34 (Ex. 21); MX 2231022-29, at 22 (Ex. 22).

[14] Alepin Rep. at 34-35 (Ex. 1).

[15] MS-PCA 1269834-35, at 34 (Ex. 21).

Windows arena,"[16] the mutually beneficial course of dealing included a written contract. Novell joined the "First Wave Program," agreeing to: (1) satisfy the Windows 95 logo requirements and showcase the new features of Windows 95,[17] and (2) support the launch by simultaneously shipping its popular applications.[18] Microsoft agreed in exchange to provide Novell with early builds of Windows 95, including documentation of APIs such as the namespace extensions, MAPI, and printing functionality, and to conduct co-marketing programs such as the logo.[19] As shown below, Microsoft selectively reversed its course of conduct when it perceived an opportunity to destroy its rival.

B. Novell Threatened Microsoft's Operating Systems Monopoly

As Microsoft was evangelizing Windows 95, it was beginning to recognize that Novell was emerging as perhaps the single greatest threat to the Windows monopoly. In 1993, shortly before Novell acquired WordPerfect, Quattro Pro, and GroupWise, Brad Silverberg, head of Microsoft's Personal Systems Group, warned Mr. Gates and his senior executives, Paul Maritz and Steve Ballmer, that developers of middleware could reduce Microsoft's control of the operating system.[20] He believed that "Novell is coming at us from every direction possible and has a very concerted multilayer attack strategy," and that "many people . . . vastly underestimate the competitive situation."[21]

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[16] NOV-B01024443-45, at 43 (Ex. 23).

[17] MX 7191927-30 (Ex. 24); MS-PCA 1624111-46, at 16 (Ex. 25); NOV 00709867-84, at 78-79 (Ex. 26).

[18] MS-PCA 1624111-46, at 16-17 (Ex. 25).

[19] *See generally* MX 7155000-09 (Ex. 27); Dep. of S. Henson (Dec. 17, 2008) 79:14-80:12 (Ex. 28); Dep. of B. Struss (Jan. 14, 2009) 60:20-61:16 (Ex. 29); Dep. of D. Henrich (Jan. 8, 2009) 104:10-19 (Ex. 30).

[20] MS7080466-68, at 66-67 (Ex. 31).

[21] MSC 090001843-44, at 43 (Ex. 32).

Jim Allchin, a top executive in Microsoft's Business Systems Division, explained to Mr. Gates:

> I feel we are much too smug in dealing with Novell . . . . They want to control the APIs, middleware, and as many desktops as they can . . . . We need to start thinking about Novell as THE competitor to fight against[;] . . . we need to start understanding this is war – nothing less.[22]

Microsoft executive John Ludwig agreed. "[O]ur worst nightmare is [N]ovell/[L]otus being successful at establishing their 'middleware' as a standard."[23]

Novell's middleware threat to Microsoft intensified with its acquisition in 1994 of WordPerfect's evolving PerfectOffice and GroupWise platforms.[24] The merged companies' threats included technologies, such as AppWare, PerfectOffice, Corsair, Ferret, Netware, and Unix, as well as their combined support for other technologies and standards, such as OpenDoc, Netscape, and network computing.[25] Mr. Ballmer wrote that Novell was now "a more serious threat than ever,"[26] and Mr. Gates recognized that "[t]he merger . . . changes our competitive framework substantially."[27] He also acknowledged that the merger would make it easier to promote and coordinate "anti-Microsoft platforms/API's/object models," and that Novell would be able to set more standards for workgroups, document management, and other services.[28] In April 1994, Mr. Gates asked his executive staff "what else could be done to attack Novell/WP."[29] Microsoft

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[22] MS7079459-61, at 59 (Ex. 33); *see also* MS 0186262-63, at 63 (Ex. 34).

[23] MS 0185884-85, at 84 (Ex. 35).

[24] Alepin Rep. at 57 (Ex. 1).

[25] Alepin Rep. at 57-58 (Ex. 1).

[26] MS7049492-96, at 93 (Ex. 36).

[27] MX 9037682-84, at 83 (Ex. 37).

[28] *Id.*

[29] MS 5036109 (Ex. 38).

knew "that [if Novell was] successful at getting penetration, they'll be in a position to introduce alternative standards (ie opendoc) that will give us a much harder time to drive the [operating system] and apps agenda."[30]

Mr. Gates had reason to be concerned. Just after the merger, Novell began marketing its new suite of applications, PerfectOffice 3.0, as "*The Perfect Place to Work.*"[31] It would provide capabilities similar to an operating system's shell,[32] causing Microsoft executive Mike Maples to write, "We ought to think hard and open minded about how [Novell] can do so much in so little time."[33] Because PerfectOffice contained middleware, users could "live" in it, rather than Windows.[34] "[T]he PerfectOffice shell, which placed productivity applications and GroupWise in a desktop environment with Netscape and Java, exposed APIs that an ISV could use to write applications to run in the PerfectOffice environment, thereby *rendering integration with Windows unnecessary.*"[35] Novell's PerfectFit middleware architecture gave third parties access to more than 1,500 APIs and 2,000 individual commands in PerfectOffice, which aimed to be cross-platform.[36] Novell evangelized PerfectFit, shipped a developers reference set, and recruited more than 1,800 development partners.[37] Microsoft concluded that it was in a "platform war"[38] with Novell's applications business.

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[30] MS-PCA 1253952 (Ex. 39).

[31] *See* NWP00008281-300, at 283 (Ex. 40).

[32] Alepin Rep. at 10-11 (Ex. 1).

[33] MX 5099114-16, at 14 (Ex. 41).

[34] Noll Rep. at 9 (Ex. 3).

[35] Noll Rep. at 109 (emphasis added) (Ex. 3).

[36] Alepin Rep. at 63-66 (Ex. 1).

[37] *See id.*; MX 9037665-66, at 65 (Ex. 42); NOV-B00154698-700 (Ex. 43).

[38] MX 6046625-34, at 25 (Ex. 44).

Novell's AppWare, parts of which were incorporated into PerfectOffice, was another cross-platform architecture for developers seeking independence from Microsoft's operating system.[39] Microsoft's Senior Vice President, Mr. Maritz, expected AppWare to develop into a "fully fledged" operating system.

> [P]robably one of our, in the long term point of view, most serious competitors . . . [b]ecause if they can essentially continue to add function to this layer, they can incrementally obtain what amounts to an operating system over time, and that is their intent.[40]

Microsoft's executives viewed Novell's AppWare strategy as "insidious"[41] and "a wonderful attempt . . . to again reduce Windows [to] a commodity."[42] In September 1994, Bob Frankenberg, Novell's CEO, demonstrated Corsair, another cross-platform middleware shell to be integrated with WordPerfect 6.1.[43] Mr. Gates witnessed the demonstration and reported that "Novell is a lot more aware of how the world is changing th[a]n I thought they were."[44]

In February 1995, Novell acquired the rights to distribute Netscape Navigator and began integrating into PerfectOffice[45] the singular platform threat that drove Microsoft to commit the acts condemned in *United States v. Microsoft*. With all of this technology integrated into PerfectOffice, "users would not . . . perceive any significant value in the underlying operating system. In such a

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[39] Alepin Rep. at 58 (Ex. 1).

[40] Dep. of P. Maritz, Antitrust Investig. Demand No. 10807 (DOJ May 24, 1994) 38:25-39:20, 108:1-21 (Ex. 45); *see also* Dep. of B. Silverberg, Antitrust Investig. Demand No. 10807 (DOJ June 23, 1994) 125:12-21 ("AppWare is an operating system.") (Ex. 46).

[41] Alepin Rep. at 59 (Ex. 1); MS 5064010-11, at 10 (Ex. 47).

[42] Dep. of B. Silverberg, Antitrust Investig. Demand No. 10807 (DOJ June 23, 1994) 125:12-21 (Ex. 46).

[43] *See, e.g.*, MS-PCA 1001461 (Ex. 48); *see also* MS-PCA 1405628-35, at 28, 30 (Ex. 49).

[44] MS-PCA 1001461 (Ex. 48).

[45] Alepin Rep. at 73 (Ex. 1); NOV-B00636325-41 (Ex. 50); NOV-B00636306-24 (Ex. 51); NOV-B00636355-56 (Ex. 52); NOV-B00636362-81 (Ex. 53).

circumstance, 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."[46]

Novell's threat led Mr. Gates to issue the infamous e-mail in which he ordered the withdrawal of the namespace extensions, "until we have a way to do a high level of integration that will be harder for [the] likes of [Lotus] Notes, WordPerfect to achieve, and which will give Office a real advantage."[47] Mr. Gates admitted that "[w]e can't compete with Lotus and Wordperfect/Novell without this."[48] The court of appeals therefore found that Novell's claims "go beyond mere speculation. They are supported by internal Microsoft communications." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 317 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1659 (2008).

The court of appeals also found that an e-mail from Mr. Raikes to investor Warren Buffett "supports Novell's assertions that its products were directly targeted." *Id.* Mr. Raikes explained to Mr. Buffett that maintaining control of the "key 'franchise'" applications protected Microsoft's monopoly in the operating systems market.

> If we own the key "franchises" built on top of the operating system, we dramatically ***widen the "moat"*** that protects the operating system business. . . . Let's build on this analogy and the strategic synergy between the operating system and the software that runs on it. . . . We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC. . . . And success in those businesses will help increase the opportunity for future pricing discretion.[49]

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[46] Alepin Rep. at 77 (Ex. 1).

[47] MX 5117031-32, at 31 (Ex. 5).

[48] *Id.*

[49] MS-PCA 1301178-81, at 80 (emphasis added) (Ex. 54). Mr. Gates offered a similar analysis years earlier. *See* MS7080466-68, at 66 (Ex. 31).

Mr. Raikes later admitted in deposition that, as Microsoft increased its position in the applications markets, it widened the moat, and customers found it more difficult to leave the Windows monopoly for a competing operating system.[50]

C. Microsoft Launched An Anticompetitive Scheme To Extinguish The Novell Threat

In response to Novell's threat to the moat, Microsoft reversed a long course of cooperation and launched a scheme of anticompetitive conduct. Dr. Noll, Novell's economic expert, described the scheme as "a concerted business strategy which encompassed many acts that had a *common effect*: to prevent applications and middleware products from creating an alternative platform for applications vendors that would destroy the applications barrier to entry."[51] The scheme started with Mr. Gates' order to withdraw the namespace extensions, in an e-mail where he explained, to virtually all of his top executives, his plans to "give Office a real advantage."[52] His executives did as ordered, and in the future, they took advantage of similar opportunities to injure Novell.

The major components of the scheme were as follows:

1. Microsoft withdrew the namespace extension APIs

Microsoft began evangelizing a potential new technology known as the namespace extension APIs at least 22 months prior to the launch of Windows 95.[53] Microsoft explained that

[50] *See* Dep. of J. Raikes (Jan. 27, 2009) 185:10-187:22, 189:5-14, 191:11-192:10, 207:23-208:6 (Ex. 8).

[51] Noll Rebuttal at 33 (emphasis added) (Ex. 4).

[52] MX 5117031-32, at 31 (Ex. 5).

[53] *See, e.g.*, NOV00721976-98, at 81 (Ex. 55).

these APIs were integral to a new paradigm for presenting information, called the Explorer.[54] They allowed developers to add objects such as files, storage devices, printers, and network resources in the Explorer's left-hand pane, and view and organize the contents in the right-hand pane.[55] According to Microsoft, the APIs would allow ISVs to integrate custom namespace objects into the Windows 95 shell namespace, viewable within the Explorer and common dialogs, and provide rich, custom views of data.[56] Mr. Gates characterized the APIs as "critical" and "central to our whole strategy."[57]

Microsoft knew that WordPerfect "*really* want[ed]" this type of extensibility[58] to integrate its custom namespaces into the Explorer and its custom dialogs, and to allow users to search seamlessly across all namespaces with its QuickFinder technology.[59] Having made the extensions integral to its plans, WordPerfect urged Microsoft to document the extensions formally.[60]

In November 1993, Microsoft told WordPerfect that it was going to document the extensions, making WordPerfect "very happy."[61] Microsoft urged both WordPerfect and Novell to exploit the new namespace technology, by tying their own technologies into the Explorer through

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[54] *See, e.g.*, Alepin Rep. at 36-41, 84-87 (Ex. 1); *see also* NOV00721976-98, at 81 (Ex. 55); MS7086583-84 (Ex. 14).

[55] Alepin Rep. at 38-41 (Ex. 1).

[56] *See, e.g.*, NOV00734371-94, at 78, 81, 89-90 (Ex. 56); MX 6055840-44, at 40-41 (Ex. 57).

[57] MX3263492-93, at 92 (Ex. 58). Mr. Gates' recent testimony that the extensions were "trivial and unimportant" contradicts this and other evidence from the relevant time period. *See* Alepin Rebuttal at 17-24 (Ex. 2).

[58] MS7093163 (Ex. 59).

[59] Alepin Rep. at 85, 89-90, 102 (Ex. 1); Alepin Rebuttal at 40 (Ex. 2).

[60] Alepin Rep. at 85 (Ex. 1).

[61] MS7086583-84, at 83 (Ex. 14); *see also* Dep. of B. Struss (Jan. 14, 2009) 27:18-29:10 (Ex. 29).

the namespace extensions.[62] In June 1994, shortly after the Novell-WordPerfect merger, Microsoft shipped the first Chicago beta, M6, which included sufficient documentation of the namespace extensions for Novell to begin developing the WordPerfect products around them.[63]

During the summer and fall of 1994, Novell held at least three design reviews to determine how the WordPerfect products would "exploit this extensibility seamlessly so that [their] applications fit well into [the Windows 95] environment."[64] Novell "invested fairly heavily going down a road using [the namespace extensions]."[65] Microsoft knew at the time that Novell was writing to the namespace extensions,[66] and Novell told Microsoft that there would be "hell to pay" if Microsoft changed them.[67]

On October 3, 1994, only two weeks after seeing Mr. Frankenberg demonstrate Novell's latest innovations in WordPerfect 6.1, Mr. Gates reversed Microsoft's course of conduct, issuing the infamous e-mail to all of his top executives,[68] because "[w]e can't compete with Lotus and

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[62] *See* NOV00734371-94, at 73, 78, 89-90 (Ex. 56); NOV-B06507474-89, at 75 (Ex. 60); NOV-B00932343-54, at 45 (Ex. 61).

[63] Microsoft asserts that "Novell assumed 'the entire risk'" of using the namespaces under a beta licensing agreement. *See* Microsoft's Mem. in Supp. of Its Summ. J. Mot. (Oct. 7, 2009) ("Mem.") at 13 n.16. The beta agreement is not a waiver of future antitrust violations, which would be void as against public policy. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). The reasonableness of Novell's reliance on Microsoft's evangelism is a question of fact.

[64] NOV-B00941714-23, at 14 (Ex. 62); *see also* Alepin Rep. at 87-88 (Ex. 1); Alepin Rebuttal at 28-33 (Ex. 2).

[65] Dep. of T. Creighton, JCCP No. 4106 (Super. Ct. Cal. Mar. 22, 2002) 86:20-87:10 (Ex. 63); *see also* Dep. of G. Richardson, JCCP No. 4106 (Super. Ct. Cal. Dec. 13, 2001) 79:7-81:15 (Ex. 19).

[66] Dep. of G. Richardson, JCCP No. 4106 (Super. Ct. Cal. Dec. 13, 2001) 83:4-11 (Ex. 19); MX 5103184-85, at 84 (Ex. 64).

[67] MX 6109491-98, at 94 (Ex. 65).

[68] There is substantial evidence that Mr. Gates' actions were premeditated. As early as June 1993, Mr. Gates advanced a plan to withhold the extensibility features of Chicago for the exclusive benefit of Microsoft's applications suite, Office. MS7089438-42, at 41 (Ex. 66); MS-PCA

Wordperfect/Novell without this."[69] Microsoft's next beta release, in October 1994, withdrew support for the interfaces.[70]

Rather than attempting to justify Mr. Gates' stated reasons for withdrawing the extensions, Microsoft's technology expert, Dr. John Bennett, suggests that they were "in conflict with the robustness requirements of Windows NT" and did not satisfy the "Cairo" team's vision of a future operating system.[71] Novell's expert, Mr. Alepin, disputes Dr. Bennett's post hoc justifications; he also rejects each of Dr. Bennett's suggested alternatives to using the extensions, and concludes that the work necessary to meet Novell's design requirements, without the extensions, fatally delayed the shipment of Novell's products.[72]

Mr. Gates admitted that his decision came "late in the day," just months before the expected release of Windows 95.[73] His decision "severely crippled" Novell's plans for efficiently

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2535283-95, at 92 (Ex. 67). The plan was designed to give Microsoft a "significant lead" over other ISVs and to make their products look "old." MS 0097121-26, at 22-23 (Ex. 68).

[69] MX 5117031-32, at 31 (Ex. 5). Microsoft raises issues of fact with respect to the viability of WordPerfect's business, even though Mr. Gates repeatedly admitted the superiority of WordPerfect's developers and products. The cited testimony of Pete Peterson, suggesting that WordPerfect was in decline (*see* Mem. at 8-9), is "just rumors and speculation," according to Mr. Peterson himself, because it concerns events occurring long after his tenure. *See* Dep. of W. Peterson (Oct. 1, 2008) 230:25-231:10 (Ex. 69). The chart depicted in Microsoft's brief (at 9) relies on annual data, which in a volatile market is less reliable than the quarterly data used by both parties' experts on damages. *See* Hubbard Rep. at 56 & Ex. 12 (Ex. 70); Warren-Boulton Rep. at 59-60 & App'x F (Ex. 71); Warren-Boulton Rebuttal at 32-35 & Figs. 8, 9, 12 (Ex. 72).

[70] Dep. of S. Nakajima (Feb. 24, 2009), Ex. 12 (Ex. 73).

[71] Bennett Rep. ¶¶ 84, 86, 90-92 (Ex. 74). Microsoft does not dispute that Cairo could have supported the namespace extensions technically. Dr. Bennett only argues that Cairo did not *want* to support the interfaces.

[72] Alepin Rebuttal at 33-41 (Ex. 2).

[73] MX 5117031-32, at 31 (Ex. 5); *see also* Dep. of W. Gates, JCCP No. 4106 (Super. Ct. Cal. Feb. 27, 2002) 72:6-14 (Ex. 20).

finding and displaying information while working inside PerfectOffice.[74] This was a "crucial" component of Novell's strategy for networking applications.[75] Novell's developers had to recreate from scratch the lost functionality of the withdrawn extensions.[76] This work became the "critical path" on the schedule for delivering PerfectOffice for Windows 95.[77] Novell expended 11.5 developer-years on the work, which caused the fatal delay in launching PerfectOffice for Windows 95, and left PerfectOffice lacking 40 percent of its planned functionality.[78]

2. Microsoft manipulated the MAPI messaging standard

Microsoft's manipulation of its messaging API, "MAPI," harmed GroupWise, Novell's messaging collaboration software, which was part of the PerfectOffice suite. In the early 1990s, Microsoft released Simple MAPI, which allowed developers to incorporate basic messaging functions, such as "send" and "receive," into their desktop applications.[79] Microsoft promised a richer version of MAPI, called MAPI 1.0, for future versions of Windows,[80] which would include Simple MAPI, and add Extended MAPI, MAPI middleware, and a service provider interface.[81] The new components promised greater functionality and interoperation between different front-end

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[74] Dep. of A. Harral, JCCP No. 4106 (Super. Ct. Cal. Dec. 12, 2001) 98:21-99:14 (Ex. 75); *see also* NOV-B01491962-66, at 65 (Ex. 76).

[75] Dep. of A. Harral, JCCP No. 4106 (Super. Ct. Cal. Dec. 12, 2001) 98:21-99:14 (Ex. 75); *see also* NOV-B01491962-66, at 65 (Ex. 76).

[76] Dep. of A. Harral, JCCP No. 4106 (Super. Ct. Cal. Dec. 12, 2001) 101:5-11 (Ex. 75).

[77] Dep. of G. Gibb (Mar. 17, 2009) 100:3-18, 109:22-110:12, 115:12-116:10, 120:7-19 (Ex. 77).

[78] Dep. of A. Harral, JCCP No. 4106 (Super. Ct. Cal. Dec. 12, 2001) 89:24-90:14 (Ex. 75); Dep. of G. Gibb (Mar. 17, 2009) 100:3-18, 109:22-110:12, 115:12-116:10, 120:7-19 (Ex. 77).

[79] Alepin Rep. at 114 (Ex. 1); *see also* MS7058541-61, at 50 (Ex. 78).

[80] *See, e.g.*, IBM 7510251964-70, at 64 (Ex. 79); MS5041454-56 (Ex. 80); IBM 7510172810-30, at 27 (Ex. 81).

[81] Alepin Rep. at 114-17 (Ex. 1); *see also* MS7058541-61, at 47-55 (Ex. 78).

clients and back-end servers, so customers could mix and match the components of competing vendors.[82]

Between 1992 and 1994, Microsoft aggressively evangelized MAPI as an industry standard in competition with Vendor Independent Messaging, or VIM, backed by Novell, Lotus, and others.[83] To win the standard, Microsoft touted MAPI as "open" and "cross platform,"[84] and promised MAPI 1.0 as a component of Chicago.[85] At the end of 1994, in response to Microsoft's promises, Lotus and Novell agreed to drop VIM and support MAPI.[86]

Having won the standard, Microsoft promptly changed course. First, Microsoft informed the industry that it had developed MAPI extensions that would remain undocumented,[87] allowing Microsoft's Exchange Server to implement functionality in its Exchange Client that other back-end products could not match,[88] and preventing the clients of ISVs from accessing functionality in the Exchange Server.[89] By refusing to document such basic functionality,[90] Microsoft broke its promise that "[a]ny MAPI-capable application on the front-end [would] operate seamlessly with any MAPI-capable back-end system,"[91] which was "the proposition that

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[82] Alepin Rep. at 111-13 (Ex. 1); *see also* MS5041454-56, at 54 (Ex. 80).

[83] Alepin Rep. at 120-22 (Ex. 1).

[84] *See, e.g.*, MS 5033637-39, at 38 (Ex. 82); MS7058541-61, at 44-45 (Ex. 78).

[85] *See, e.g.*, MSC 00762731-998, at 941-42 (Ex. 83); IBM 7510172810-30, at 27 (Ex. 81).

[86] *See, e.g.*, Alepin Rep. at 126 (Ex. 1); Dep. of R. Hume (Mar. 24, 2009) 138:16-20 (Ex. 84); IBM 7510251895 (Ex. 85).

[87] *See, e.g.*, IBM 7510251895 (Ex. 85); IBM 7510251896 (Ex. 86); IBM 7510251964-70 (Ex. 79).

[88] *See* IBM 7510251973-74 (Ex. 87); Alepin Rep. at 129-32 (Ex. 1).

[89] *See, e.g.*, Alepin Rep. at 132-34 (Ex. 1).

[90] *Compare* Alepin Rep. at 138-39 (Ex. 1) *with* Bennett Rep. ¶ 130 (Ex. 74).

[91] MS 5041454-56, at 54 (Ex. 80); Alepin Rep. at 132, 134 (Ex. 1).

[Microsoft] brought forth to the industry when it was proposing MAPI as an industry standard."[92] Microsoft also broke its commitment to deliver a 16-bit version of MAPI 1.0 for Windows 3.1,[93] preventing Novell from serving its users on Windows 3.1,[94] and its commitment to integrate MAPI with Windows 95, forcing users to install Microsoft's competing Exchange client and proprietary "Inbox" icon simply to gain access to an "industry standard."[95]

Further, Microsoft's periodic release of revised MAPI "DLLs," such as one that shipped with Outlook in 1997, often caused "DLL Hell,"[96] breaking installations of GroupWise,[97] harming Novell's reputation, and requiring Novell to reassign more than twenty developers to resolve the issue for its customers.[98] Microsoft repeated this conduct with Outlook 98, to much the same effect.[99] Finally, in Windows 98, Microsoft moved MAPI from the operating system to an installation CD,[100] and in Windows 2000, changed the location on the CD, impeding GroupWise's

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[92] IBM 7510131533-35, at 33 (Ex. 88). Novell and Lotus were outraged by Microsoft's refusal to document the extensions. *See, e.g.*, IBM 7510251895 (Ex. 85); IBM 7510251896 (Ex. 86).

[93] Alepin Rep. at 134-35 (Ex. 1); Alepin Rebuttal at 48 (Ex. 2); *see also* IBM 7510251955-56, at 55 (Ex. 89); MX3171905-08, at 07 (Ex. 90).

[94] Alepin Rep. at 134-35 (Ex. 1); Alepin Rebuttal at 48 (Ex. 2).

[95] *See, e.g.*, Alepin Rebuttal at 50-52 (Ex. 2); NOV00517855-56 (Ex. 91); NOV00686851-52 (Ex. 92); NOV 00617251-52 (Ex. 93).

[96] DLL Hell occurs when a version of a "dynamic link library" is unexpectedly replaced, and an application seeks to call the version that no longer exists. *See, e.g.*, Alepin Rep. at 138 n.668 (Ex. 1); Compl. ¶ 107; NOV00440032 (Ex. 94); NOV00440033 (Ex. 95).

[97] *See, e.g.*, NOV00440032 (Ex. 94); NOV00440033 (Ex. 95).

[98] Alepin Rep. at 140-41 (Ex. 1).

[99] *See, e.g.*, NOV 00713353 (Ex. 96).

[100] *See* NOV-25-023313 (Ex. 97).

installation and creating error messages that essentially blamed Novell's products for Microsoft's conduct.[101]

3. Microsoft refused to provide promised printing functionality

Microsoft evangelized and pre-disclosed information regarding the ability of Windows 95 to use custom and default print processors.[102] Novell told Microsoft that it intended to use the custom functionality,[103] for which Microsoft provided sample documentation and advice.[104] In February 1995, Microsoft told Novell that the functions would be included in the M8 beta, and in mid-March, Microsoft represented that the necessary files would arrive shortly.[105] The promised functionality was important to Novell's plans to use its own data type, known as "Qcodes," in spooling documents for printing within the Windows 95 printing system.[106]

In late June 1995, only two weeks before cutting the Windows 95 gold master, Microsoft reversed course, telling Novell that the printing functions would not be available, forcing Novell to expend substantial resources to create an inferior substitute that caused customers to complain.[107]

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[101] *See* NOV-25-026752-53 (Ex. 98). Novell's customers continually asked when Novell would support MAPI 2.0, but Microsoft would never give Novell any information about MAPI 2.0. NOV 00755229-30 (Ex. 99).

[102] Alepin Rep. at 157 (Ex. 1); NOV-B01645812-954, at 917, 920-31 (Ex. 100); "Chapter 4 Print Processors," Windows 95 DDK (Mar. 1995), at 47, 49-53 (cited in Alepin Rep. at 156-57 (Ex. 1)) (Ex. 101).

[103] NOV 00516222-25 (Ex. 102); NOV-B01426539-40 (Ex. 103).

[104] NOV-B01645812-954, at 917, 920-31 (Ex. 100); "Chapter 4 Print Processors," Windows 95 DDK (Mar. 1995), at 47, 49-53 (cited in Alepin Rep. at 156-57 (Ex. 1)) (Ex. 101). Microsoft mischaracterizes Novell's reference to Windows NT (Mem. at 14), which is only relevant because Microsoft had already implemented substantially similar functionality in that operating system. *See* NOV-B01645812-954 at 865 (Ex. 100).

[105] NOV 00516222-25 (Ex. 102); NOV-B01426539-40 (Ex. 103).

[106] *See, e.g.*, Alepin Rep. at 158 (citing NOV00431599-624, at 612 (Ex. 104)), 160 (Ex. 1).

[107] Alepin Rep. at 160-64 (Ex. 1); NOV 00516222-25, at 23-25 (Ex. 102); NOV-B01426539-40, at 40 (Ex. 103).

Microsoft must have understood the consequences of giving such late notice of its broken promises.[108] Microsoft's experts do not attempt to justify Microsoft's conduct on technical or business grounds; they question only the reasonableness of Novell's reliance on Microsoft's promises and the extent of injuries that Microsoft caused.[109]

4. Microsoft imposed anticompetitive logo requirements

In 1994, Microsoft launched its "Designed for Windows 95" logo program.[110] As with prior releases of Windows, the logo was important to consumers and ISVs.[111] One of Microsoft's conditions to obtaining the Windows 95 logo was an application's ability to operate on Windows NT, which was an entirely different, server operating system with a 32-bit architecture and a miniscule market.[112] In the past, Microsoft had a separate logo for the additional platform, but under the Windows 95 program, ISVs were required to adapt their products to NT, even if their customers were uninterested in NT.[113] Microsoft admits that ISVs otherwise had little incentive to write programs for NT.[114] Incompatibilities between Windows 95 and NT – including limitations on memory mapped files; the handling of shared data in DLLs; the registry file; and the level of integration with OLE 2.0 – caused some applications to fail to meet the requirement.[115]

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[108] Alepin Rep. at 164 (Ex. 1).

[109] *Compare* Alepin Rep. at 163-65 (Ex. 1) *with* Bennett Rep. ¶¶ 163-171 (Ex. 74).

[110] MX 7191927-30 (Ex. 24); Alepin Rep. at 144 (Ex. 1).

[111] Alepin Rep. at 145-46 (Ex. 1).

[112] Alepin Rep. at 145-49 (Ex. 1); *see also* MS-PCA 1474638-47 (Ex. 105).

[113] Alepin Rep. at 148 (Ex. 1); Alepin Rebuttal at 53 (Ex. 2).

[114] Murphy Rep. ¶ 120 (Ex. 106).

[115] Alepin Rep. at 152-54 (Ex. 1); Alepin Rebuttal at 54-55 (Ex. 2).

ISVs could request an exemption from the NT requirement if their products encountered "functionality that is significantly different in architecture between Windows 95 and Windows NT."[116] Novell requested the exemption, identifying technical and architectural differences between the platforms that adversely impacted its applications.[117] Microsoft denied Novell's request, arguing that the incompatibilities were not "significant enough."[118] Mr. Alepin's analysis shows that the incompatibilities were very significant, causing Novell to waste time and resources that could have been spent making a better product for Windows 95.[119] Microsoft's own expert, Dr. Bennett, does not dispute Mr. Alepin's analysis of the differences between the platforms.[120] Even the Windows 95 Plus! Pack could not qualify for the logo, because its Internet Explorer component only ran on Windows 95, due to "incompatibilities between NT and Win95."[121] Microsoft gave its own product the exemption that it denied to Novell, even though both companies were encountering the same types of incompatibilities. Microsoft now raises an issue of fact with respect to its contention that it might have reconsidered its decision to deny the exemption.[122]

5. Microsoft restrained trade

Microsoft used exclusionary licensing practices, such as minimum commitments, rebate programs, reporting requirements, and per system agreements to substantially foreclose key

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[116] MSC 00700613-18, at 13 (Ex. 107).

[117] NOV 00019380-82 (Ex. 108).

[118] MSC 00700613-18, at 15 (Ex. 107); *see also* NOV 00686920-59, at 49 (Ex. 109).

[119] Alepin Rep. at 152-55 (Ex. 1); Alepin Rebuttal at 54-55 (Ex. 2); *see also* Dep. of T. Freeman (Mar. 31, 2009) 110:21-111:8 (Ex. 110).

[120] Alepin Rebuttal at 52-56 (Ex. 2); Bennett Rep. ¶¶ 133-159 (Ex. 74).

[121] Alepin Rep. at 155 (Ex. 1); *see also* MS-PCA 1102674-75, at 74 (Ex. 111).

[122] *See* Mem. at 15-16; Alepin Rep. at 57 (Ex. 1).

distributors, resellers, and large OEMs during 1994 and 1995.[123] The evidence of the foreclosure is presented below; it supports the Count I claim for monopolization, as well as the separate Count VI claim for agreements in restraint of trade.

II. ARGUMENT

Microsoft seeks summary judgment on Novell's Count I for monopoly maintenance on two grounds, arguing first that Novell cannot prove harm to competition in the operating systems market, and second, that its conduct was lawful. Microsoft misstates the law and ignores triable issues of fact on both issues.

A. Microsoft Harmed Competition In The Operating Systems Market

Novell has produced voluminous evidence of "conduct which unfairly tend[ed] to destroy *competition itself*," *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis added), which is the touchstone of antitrust law. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992).[124] The evidence includes the opinions of Dr. Noll and the admissions of Microsoft's own executives, and it raises issues of fact on the question whether Microsoft's conduct "likely injure[d] competition in the relevant market." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

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[123] *See* Compl. ¶¶ 112-133. *See generally* Noll Rep. at 10-11, 90-92, 96-108 (Ex. 3); Noll Rebuttal at 12-13, 57-65 (Ex. 4). The Court can consider these restraints in support of Novell's Section 2 claim for monopoly maintenance. *See, e.g.*, *Microsoft*, 253 F.3d at 70; *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002); *LePage's Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003).

[124] To determine anticompetitive effect, courts must evaluate the monopolist's conduct "as a whole rather than considering each aspect in isolation." *LePage's*, 324 F.3d at 162 (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

The court of appeals found that "the injury that Novell alleges here is *plainly an injury to competition.*" *Novell*, 505 F.3d at 316 (emphasis added). The court validated Novell's theory on the controlling issue: "Microsoft's activities . . . were intended to and did restrain competition in the PC operating-system market *by keeping the barriers to entry into that market high.*" *Id.* (emphasis added). Microsoft's "quotation" of the court's opinion (Mem. at 25) omits the crucial, italicized words, precisely because Novell's evidence of "the moat," and Microsoft's numerous efforts to "widen the moat," proves the theory that the court of appeals accepted on the pleadings.

Microsoft's only recourse is to misquote the court and misstate the law. Microsoft would require Novell to show that anticompetitive conduct aimed *solely* at Novell's applications "'contributed significantly to the achievement or maintenance'" of monopoly power in the PC operating systems market,[125] while ignoring evidence that Microsoft targeted and injured other products as part of the same scheme to "destroy competition itself." *See Spectrum Sports*, 506 U.S. at 458. Not a single authority supports such a rule.[126] Even the cited treatise[127] recognizes the difficulties of proving a relationship between particular exclusionary acts, on the one hand, and monopoly maintenance, on the other. The courts thus find a sufficient causal relationship wherever

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[125] Mem. at 25 (quoting III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650c, at 93 (3d ed. 2008) ("III *Antitrust Law*")).

[126] Novell agrees that it must show an anticompetitive effect, generally referred to as harm to competition. The issue is the manner in which Novell may prove it. The two cases cited by Microsoft did not reach the issue; and they certainly did not hold that one victim of a multi-victim scheme cannot offer evidence of the entire scheme and all of its victims to prove harm to competition. *See Thompson Everett, Inc. v. Nat'l Cable Advertising, L.P.*, 57 F.3d 1317, 1325-27 (4th Cir. 1995) (finding that the challenged conduct increased competition); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (holding that prices were not predatory, where plaintiff could not show injury to itself, much less competition).

[127] *See* Mem. at 25 (citing III *Antitrust Law* ¶ 650c, at 93).

conduct threatens an exclusionary impact in the relevant market,[128] or where conduct "appears reasonably capable of . . . making a significant contribution to the . . . maintenance . . . of monopoly power." III *Antitrust Law* ¶ 650a, at 90, ¶ 651a, at 96. Always, the focus is on the entirety of the conduct and its impact on the market, competition, and consumers. "[W]hen evaluating many different instances of conduct by defendant, the *conduct as a whole* must always be analyzed, rather than compartmentalized, because it is the *cumulative impact of the conduct on consumers* which is the relevant inquiry in a monopolization claim." *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1078 (D. Colo. 2004) (emphasis added).

Microsoft is asking the Court to become the first to rule that a targeted victim of a proven monopolist cannot establish harm to competition, just because it was one of several emerging threats that the monopolist destroyed to protect the monopoly from competition.[129] In analogous circumstances, the courts have followed the approach that Novell advocates here. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 481-83 (1982), the Supreme Court found that defendant, a health care insurer, injured "the psychotherapy market" by excluding all psychologists from its reimbursement plan. There was no showing that excluding any one competitor – there, an individual psychologist; here, an individual developer – harmed competition all by itself, and obviously, there was no requirement to make such a showing. In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990), the defendant health insurer excluded from certain coverage plans a hospital that did business with competing insurers, which dissuaded additional hospitals from contracting with the competing insurers. *See id.* at 954-55. The court

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[128] *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (Section 2 concerns the behavior of firms with monopoly power that "threatens to defeat or forestall the corrective forces of competition.").

[129] *See* Noll Rebuttal at 26-27 (Ex. 4).

considered the injuries suffered by all of the hospitals and competing insurers, and not just the targeted hospital, in finding harm to competition. *Id.* at 964-67.

Similarly, in *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), a manufacturer maintained its monopoly by preventing its 23 dealers from carrying the products of 12 competing manufacturers. *See id.* at 184-86, 191. The court considered the entirety of the restraint on *all* dealers and manufacturers in finding harm to competition. *Id.* at 191. "'When a monopolist's actions are designed to prevent *one or more new or potential* competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also *to competition in general.*'" *Id.* at 191 (emphasis added) (quoting *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003)).

Dr. Noll followed the same reasoning: "In antitrust economics, . . . harm to a specific competitor is relevant to determining whether competition was harmed, but so is harm to other competitors because only if *competition in general* has been harmed can conduct maintain or increase the market power of the firm that engages in it."[130] Dr. Noll properly focused on the overall, cumulative effect of Microsoft's conduct. "If Microsoft's conduct . . . had many targets, a valid economic analysis must assess whether this conduct harmed competition in applications and middleware markets that threatened to reduce Microsoft's market power" in the PC operating systems market.[131]

There were indeed "many targets." As Microsoft knew, "WordPerfect and GroupWise (and Lotus SmartSuite and Notes) were cross-platform applications . . . . Because office productivity products are extremely important applications, strong cross-platform competitors in

[130] Noll Rebuttal at 26-27 (emphasis added) (Ex. 4).

[131] Noll Rebuttal at 6 (Ex. 4).

these products reduce the applications barrier to entry that protects the dominant position of Microsoft's operating system and GUI."[132] Dr. Noll explained that "Novell was among a group of vendors [including Lotus] that produced cross-platform applications and that, in collaboration with Netscape,[133] was providing a platform that other software vendors could use to create cross-platform applications. Collectively these products threatened the applications barrier to entry,"[134] and their collective destruction harmed competition.[135]

Further, the cross-platform shells of Novell's PerfectOffice and Lotus Notes served as plausible alternatives to the Windows Explorer shell, through which users could launch programs and open files, "offer[ing] a substantially greater threat to Windows than the shells developed by OEMs," which were at issue in the DOJ case, and giving Microsoft "an even stronger incentive" to prevent their success. "Microsoft could limit their penetration," however, "only by undercutting the demand for the applications products that came with them,"[136] such as PerfectOffice. For all of these reasons, Dr. Noll concluded that Microsoft's acts, which reduced competition among applications and middleware, "harmed competition in operating systems by increasing the applications barrier to entry."[137]

When Mr. Gates ordered the withdrawal of the namespace APIs, he targeted the joint Novell/Lotus threat by name, admitting that "[w]e can't compete with Lotus and

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[132] Noll Rep. at 9 (Ex. 3). Microsoft's economic expert, Dr. Kevin Murphy, never addresses this part of Dr. Noll's analysis. Noll Rebuttal at 18 (Ex. 4).

[133] "The presence of Java in Netscape [further] enhanced the use of the PerfectOffice environment as a platform . . . ." Noll Rep. at 89 (Ex. 3).

[134] Noll Rebuttal at 28 (Ex. 4); *see also id.* at 49.

[135] Noll Rep. at 11 (Ex. 3).

[136] Noll Rep. at 39, 117-18 (Ex. 3).

[137] Noll Rep. at 11 (Ex. 3).

Wordperfect/Novell without this."[138] Microsoft cannot deny the significance of the joint threat that motivated Mr. Gates' decision; nor can Microsoft deny the validity of Dr. Noll's consideration of this joint threat, and Microsoft's destruction of it and other threats, in finding harm to competition.[139] Dr. Noll's opinion raises issues of fact that only the jury can resolve.

1. Microsoft does not address the controlling standard

Microsoft's *only* criticism of Dr. Noll is his "failure" to consider Microsoft's unsupported view of the law. Microsoft's counsel repeatedly asked Dr. Noll whether Microsoft's conduct "directed specifically against" Novell's office productivity applications, "in and of itself," had some substantial adverse impact on competition in the operating systems market.[140] Because counsel's questions were not relevant to Dr. Noll's analysis of "the state of competition in the market," and made false assumptions of fact and law, Dr. Noll answered, "I haven't analyzed the case in that way, so I don't have a technically derived opinion from analysis."[141]

When pressed as to whether "*just* [the] conduct against Novell's office productivity applications" harmed competition,[142] Dr. Noll explained that such an inquiry was futile, because it assumed that "nothing had been done to Lotus, . . . nothing had been done to Netscape, nothing had been done to all the other competitors' vendors in those markets."[143]

> Had Microsoft behaved differently to all other kinds of applications [or] middleware vendors than it behaved towards Novell . . . *deal[ing] with them in a pro-competitive way* . . . then I suspect there would have been no adverse

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[138] MX 5117031-32, at 31 (Ex. 5).

[139] Noll Rep. at 11 (Ex. 3).

[140] *See, e.g.*, Dep. of R. Noll (Sept. 10, 2009) 37:17-23, 39:4-10, 40:6-12, 41:14-19 (Ex. 112).

[141] *Id.* at 38:1-19 (emphasis added), 41:22-24; *see also id.* at 39:17-21, 39:25-40:3.

[142] *Id.* at 40:4-12 (emphasis added).

[143] *Id.* at 41:9-13.

> effect of knocking Novell out of the industry from the actions against Novell, but that's – *that's counter [f]actual.*[144]

In short, Dr. Noll found that *if* Microsoft had *not* attacked all of the other competitive threats, then it would make sense to analyze only the destruction of Novell's business applications, and the resulting effect on competition, as Microsoft demands. But as Dr. Noll pointed out, Microsoft *did* attack other threats, and given that fact, counsel never asked Dr. Noll the right question, which is whether the entire scheme of monopoly maintenance, including conduct directed at Novell, Lotus, and other applications and middleware developers, harmed competition.

On the relevant question, Dr. Noll found harm to competition,[145] but Microsoft's own expert, Dr. Murphy, offers no opinion at all. Microsoft's counsel *instructed* Dr. Murphy "to determine whether Novell suffered any anticompetitive harm related to its sales of . . . Word Perfect and Quattro Pro, as a result of allegedly anticompetitive conduct . . . and, if so, whether *that* conduct reduced PC operating systems competition."[146] Microsoft does not cite a legal basis for analyzing such a narrow universe of injured products, and Dr. Murphy, in turn, does not explain how such an analysis makes economic sense. Counsel and expert simply moved in tandem to consider a predetermined list of injured products, and to conclude that conduct targeting only those two products did not, when considered without regard to Microsoft's overall scheme of monopoly maintenance, harm competition.[147]

As Dr. Noll explained, "[i]f the appropriate framework for an economic analysis is the overall impact of Microsoft's conduct on competition in the operating system, then [Dr. Murphy's]

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[144] *Id.* at 41:16-42:13 (emphasis added).

[145] Noll Rebuttal at 32 (Ex. 4).

[146] Murphy Rep. at 1 & n. 1 (emphasis added) (Ex. 106).

[147] Murphy Rep. at 6 (Ex. 106).

opinion is irrelevant."[148] If the Court considers Dr. Murphy's opinion at all,[149] it will find "a classic duel between competing experts" that "falls squarely within the province of the jury." *Schwaber v. Hartford Accident & Indem. Co.*, No. JFM 06-0956, 2007 WL 4532126, at *4 (D. Md. Dec. 17, 2007); *accord Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 931 (6th Cir. 2005); *Imagexpo, L.L.C. v. Microsoft Corp.*, 281 F. Supp. 2d 846, 849 (E.D. Va. 2003).

2. *Under any standard of "harm to competition," Novell's evidence creates genuine issues of material fact*

Harm to competition requires a fact-driven analysis, *see United States v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001), which is unsuitable for summary judgment. "'[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles.'" *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212 (4th Cir. 2002) (citation omitted). Even if law and economics supported Microsoft's myopic interpretation of "harm to competition" under Sherman Act Section 2 (and neither does), there is still sufficient evidence to raise genuine issues of material fact about the harm to competition caused *solely* by the destruction of Novell's applications.

In *United States v. Microsoft*, the court rejected Microsoft's assertion that the middleware products of Netscape and Sun were not yet sufficiently competitive to warrant the protections of antitrust law. "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign," as Microsoft demanded there, and now demands here, "to squash *nascent, albeit unproven, competitors* at will – particularly in industries marked by rapid technological

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[148] Noll Rebuttal at 8 (Ex. 4).

[149] This is the same Dr. Murphy whose "troubling" causation analysis gave the court such "serious concerns" that it was "ascribe[d] little, if any, weight" in the remedies phase of *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 151 (D.D.C. 2002).

advance and frequent paradigm shifts."[150] As one commentator noted, "a rule of law protecting technological innovation with the mere potential to challenge monopoly might be the only workable rule, because it is impossible to determine ex ante whether a particular technology will threaten monopoly; and ex post, the monopolistic conduct may have irrevocably destroyed the nascent technological threat."[151]

Like Sun and Netscape in the DOJ case, Novell constituted a nascent middleware threat to Microsoft's operating systems monopoly. As Microsoft's executives intended, their destruction of Novell's threat "widened the moat" around Microsoft's monopoly, which "tend[ed] to destroy competition itself." *See Spectrum Sports*, 506 U.S. at 458. Having described the moat, having identified Novell as "one of our most serious competitors," and having admitted that "we can't compete" on the merits, Microsoft cannot contend that the targeted destruction of Novell's applications did not harm competition. The jury should be allowed to hold Mr. Gates and his colleagues to their words.[152]

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[150] *See Microsoft*, 253 F.3d at 79 (emphasis added). Protection of nascent competitive threats is consistent with antitrust law's overriding objective of enhancing consumer welfare. *See* IIB Phillip E. Areeda et al., *Antitrust Law* ¶ 407a & n.1, at 34 (3d ed. 2007) (collecting sources); *see also Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (liability will attach if the conduct appears "'*reasonably capable* of contributing significantly to creating or maintaining monopoly power.'" (emphasis added) (citation omitted)); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) (conduct is exclusionary if it "*reasonably appears capable* of making a significant contribution to creating or maintaining monopoly power." (emphasis added) (citations and internal quotation marks omitted)).

[151] Ankur Kapoor, *What Is the Standard of Causation of Monopoly?*, 23-SUM Antitrust 38, 39 (Summer 2009).

[152] In his deposition, Mr. Gates spent considerable effort explaining that he did not mean what he plainly wrote in the e-mail targeting Novell. Dep. of W. Gates (May 19, 2009) at 250:25-273:15 (Ex. 113). His testimony only highlights the issues of fact.

B. Microsoft's Conduct Violated Section 2

Rather than answer the general Section 2 claim of monopoly maintenance that Novell pleaded, Microsoft attempts to disaggregate Novell's proof and attack it under inapplicable legal theories. Microsoft failed at this strategy before. In *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1309 (D. Utah 1999), the court rejected Microsoft's effort to analyze each element of a predatory scheme independently, under theories that the plaintiff did not plead; the court found that Microsoft's motion for summary judgment "offend[s] the purpose behind § 2," and "turns basic civil procedure principles on their head."

The court allowed the jury to consider evidence of numerous acts as part of a "singular claim that Microsoft violated § 2," even though some of the individual acts, if viewed alone, may not have amounted to Section 2 violations. *Id.* at 1306, 1318-19.[153] Here, Novell should be "given the full benefit of [its] proof" of Microsoft's various acts, "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also LePage's*, 324 F.3d at 162.

As in *Caldera*, the acts must be evaluated in light of each other and the contemporaneous evidence. *See* 72 F. Supp. 2d at 1309. In *Caldera*, the evidence, considered as a whole, showed that Microsoft was causing consumers to perceive incompatibilities between Windows and DR DOS, and on that basis, the jury could find liability. *See id.* at 1310-19. Here, the evidence considered as a whole shows that Microsoft delayed and diminished Novell's products, by repeatedly withdrawing technology known to be crucial to Novell's plans, and then restrained sales of the diminished products in the key channels, destroying the value of the business, which

[153] The court entered a similar ruling against Microsoft in *Comes v. Microsoft Corp.*, No. CL 82311 (Iowa Dist. Ct. Polk County filed Nov. 1, 2006) (Ex. 114).

Novell finally sold to Corel at a staggering loss.[154] When viewed as a whole, Microsoft's anticompetitive scheme impaired Novell's opportunities for success without valid business justification. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985).

1. Trinko does not immunize Microsoft's conduct

Microsoft's conduct was more than a simple refusal to deal. Even so, a monopolist's refusal to deal is not lawful when there are sufficient facts to support an inference of anticompetitive intent. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) ("*Trinko*"); *Aspen Skiing*, 472 U.S. at 610-11. The Gates and Raikes e-mails far surpass the quality of evidence that sustained liability in *Aspen Skiing*, where the Court minutely inspected the record before finding a mere inference of anticompetitive intent. The court of appeals already found here that the express words of Messrs. Gates and Raikes made a *prima facie* showing of anticompetitive intent. *See Novell*, 505 F.3d at 316-17. With the e-mails now before this Court, the *Trinko* inquiry is at an end.

Beyond these admissions of intent, additional evidence supports the required inference under *Trinko* and *Aspen Skiing*. As the Third Circuit explained in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 316 (3d Cir. 2007), the *Trinko* plaintiff failed to state a claim because it "did not allege that the defendant engaged in a voluntary course of dealing with its rivals," nor would the defendant have "publicly marketed the allegedly withheld services absent a statutory duty to do so."[155]

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[154] Warren-Boulton Rep. at 4 (Ex. 71); Noll Rebuttal at 73-74 (Ex. 4).

[155] The court employed a similar analysis in *Creative Copier Services v. Xerox Corp.*, 344 F. Supp. 2d 858, 865-66 (D. Conn. 2004), finding a sufficiently pleaded claim where CCS alleged that "(1) Xerox agreed to deal with CCS, (2) actually did deal with it for some time, (3) then stopped dealing with CCS or made it difficult for CCS to deal with Xerox, (4) and that this cessation served no business purpose."

Here, Microsoft voluntarily undertook a 15-year course of conduct that spanned every platform from DOS to Windows 95, included the publication of tens of thousands of APIs, and featured outright "begg[ing]" for WordPerfect's use of the APIs.[156] Microsoft reversed course only when it realized that Novell was using certain Chicago APIs more effectively than Microsoft's own applications developers, and that withdrawing key pieces of promised technology would crush Novell's business. As in *Aspen Skiing*, Microsoft unilaterally terminated its "voluntary *(and thus presumably profitable)* course of dealing," which shows "a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610-11).[157]

2. Microsoft's conduct is not immune from antitrust scrutiny as a technological innovation

The antitrust laws will tolerate any success that a monopolist may achieve "*solely* through 'the process of invention and innovation.'" *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983) (emphasis added) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979)). There is no blanket immunity for design changes and product introductions; it is the monopolist's "'associated conduct,'" and not the innovation itself, that determines liability under Section 2. *Id.* at 545 (quoting *Berkey Photo*, 603 F.2d

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[156] Dep. of J. Lazarus (Jan. 27, 2009) 84:21-85:3 (Ex. 7).

[157] Microsoft's essential facilities cases (Mem. at 29-32) are not remotely analogous. The opinion in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 377 (7th Cir. 1986), is distinguishable for the same reason as *Trinko* – the defendant was not in the business of providing the service that the plaintiff demanded, nor did it historically provide the withheld service to competitors. In *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 748-56 (S.D. Tex. 1998), the complaint was that Windows 95 solved a shortcoming of Windows 3.1, depriving the plaintiff of a market for its third-party solution. The court found, in effect, that the prior defect was not an essential facility. The plaintiff in *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990), experienced growth in profits and market share after the defendant withdrew its facility, which therefore could not be considered "essential."

at 286 n.30). A wide variety of conduct can be considered anticompetitive, including fraudulent inducement, and "a host of other activities that improperly stifle competition." *Caldera*, 72 F. Supp. 2d at 1306. The "associated conduct" here, including fraudulent inducement, is actionable. Because Microsoft's success was at least "'partial[ly] root[ed]'" in the use of its monopoly power, Microsoft's actions may be condemned under Section 2, even if some of its actions can be considered innovations. *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1227 (S.D.N.Y. 1981) (quoting *Berkey Photo*, 603 F.2d at 292). In fact, with respect to the namespaces, MAPI, the printing functions, and the logo, Microsoft did not deliver innovations; it withdrew them.

This Court's decisions in *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 743 (D. Md. 2003), and *Daisy Mountain Fire District v. Microsoft Corp.*, 547 F. Supp. 2d 475 (D. Md. 2008), do not support Microsoft's defense. Both cases concerned essential facilities and monopoly leveraging claims, which are not at issue; nor does Novell complain that Microsoft's own developers were given preferential access to the withdrawn technology, nor seek an injunction that would involve the Court in micro-managing Microsoft's disclosures of technology. *See In re Microsoft*, 274 F. Supp. 2d at 745. As the *Caldera* court observed upon rejecting the same defense, the relief here would not "impose an affirmative duty on a monopolist to prerelease sensitive corporate information or innovations to a competitor under all circumstances." *See* 72 F. Supp. 2d at 1317. Microsoft generally can decide what APIs to disclose, but it cannot refuse to disclose or selectively disclose information as part of an anticompetitive scheme to destroy a rival. *See, e.g., id.*

Further, there is no question here of a legitimate first-mover advantage. Microsoft claims that *it never used* the technologies at issue, and it cannot simultaneously claim that it was seeking to gain temporary benefits *from using* the technologies. *See In re Microsoft*,

274 F. Supp. 2d at 746. While Microsoft "may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced," *Berkey Photo*, 603 F.2d at 281, that is not what Microsoft was doing here. In fact, Microsoft's effective destruction of the namespace and printing APIs was more like vandalism than "us[ing] its superior knowledge," as this Court used the term in *In re Microsoft*, 274 F. Supp. 2d at 746.

Finally, in Microsoft's remaining authorities (Mem. at 31-32), the defendants had no history of open disclosure or evangelism. *Cal. Computer Prods., Inc. v. IBM*, 613 F.2d 727, 731, 744 (9th Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 436-37 (N.D. Cal. 1978) (holding that the defendant's strict policy against any pre-disclosure of interfaces was lawful), *aff'd*, 636 F.2d 1188 (9th Cir. 1980). In the cited cases, finding liability would have condemned a defendant retrospectively for "not decid[ing] on its own initiative to take unusual, self-abnegatory actions." *See GAF*, 519 F. Supp. at 1229 (quoting *Berkey Photo*, 603 F.2d at 285). Here, the only "self-abnegation" was in withdrawing technology that would have made Windows more attractive to consumers.[158]

3. There is no business justification for Microsoft's conduct

Novell's experts have rejected every business justification and alternative offered by Microsoft's own experts with respect to the namespace extensions, MAPI, the Windows 95 logo program, the printing interfaces, and Microsoft's exclusionary agreements.[159] Where experts provide such competing opinions on material facts, summary judgment is inappropriate. *Schwaber*, 2007 WL 4532126, at *4; *Imagexpo*, 281 F. Supp. 2d at 849; *Spirit Airlines*, 431 F.3d at 931.

[158] *See, e.g.*, Alepin Rebuttal at 18 (Ex. 2); Alepin Rep. at 100 (Ex. 1).

[159] *Compare* Alepin Rebuttal at 17-61 (Ex. 2) *with* Bennett Rep. at 43-98 (Ex. 74); *compare* Noll Rebuttal at 12-14, 57-65 (Ex. 4) *with* Murphy Rep. at 32-41 (Ex. 106).

C. Novell Has Pleaded And Shown Harm To Its GroupWise Business

Microsoft falsely asserts that it did not discover Novell's claim for harm to GroupWise until receiving expert reports in May 2009. In fact, Novell pleaded claims for harm to all of its "office productivity applications," and in its first request for discovery, *Microsoft* defined the term to include e-mail collaboration software such as GroupWise. Microsoft focused significant discovery on GroupWise, and even demanded production of an arguably privileged GroupWise document and the reopening of a GroupWise deposition – *before* Novell served expert reports. The Court should construe Novell's Complaint and Microsoft's conduct "so as to do justice" and deny Microsoft's motion with respect to GroupWise. *See* Fed. R. Civ. P. 8(e).

1. The Complaint gave fair notice of harm to GroupWise

Under Fed. R. Civ. P. 8(a)(2), "the statement [of the claim] need only '"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (ellipsis in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rule 8 "'do[es] not require a claimant to set out in detail the facts upon which he bases his claim.'" *Jones v. Murphy*, 470 F. Supp. 2d 537, 545 (D. Md. 2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Count I alleges that Microsoft maintained its monopoly in the operating systems market by engaging in anticompetitive conduct to "thwart the development of products that threatened to weaken the applications barrier to entry, including Novell's WordPerfect word processing application *and its other office productivity applications*."[160] This language cannot reasonably be read to include, as Microsoft contends, WordPerfect and *only one other* application, Quattro Pro, while somehow excluding all other office productivity applications, such as GroupWise. The

[160] Compl. ¶ 153 (emphasis added).

Complaint also alleges that Microsoft sought to "protect its valuable Windows monopoly and to extend its operating systems monopoly into other software markets, including word processing, spreadsheets, [and] . . . *e-mail*," which is the primary component of GroupWise.[161] Microsoft's discovery requests and both parties' experts confirm that a groupware product such as GroupWise is understood to be an office productivity application.[162] As such, GroupWise "falls within the broad umbrella" of Novell's claim. *See Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x 556, 564 (4th Cir. 2008).

Further, the alleged conduct includes withholding "technical specifications concerning Windows 95, and in some instances affirmatively misrepresent[ing] the specifications"; and "creat[ing] and controll[ing] new 'industry' standards."[163] The essence of the GroupWise claim is that Microsoft injured the product by withholding and manipulating MAPI, which was a "technical specification concerning Windows 95"[164] and an "industry standard," as those terms are used in the Complaint.

Microsoft's contrary descriptions of the Complaint are misleading. Paragraph 24, cited by Microsoft, states that "word processing and spreadsheet applications are sometimes referred to herein as 'office productivity applications,'" but it does not allege that they are the only office productivity applications at issue.[165] Paragraph 8, also cited by Microsoft, alleges that Novell

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[161] Compl. ¶ 4 (emphasis added).

[162] Alepin Rep. at 46-52 (Ex. 1); Dep. of K. Murphy (Sept. 16, 2009) 101:3-7, 101:21-105:14 (Ex. 115).

[163] Compl. ¶¶ 79, 83; *see also id.* ¶ 56.

[164] *See* MS 7058541-61, at 47 (Ex. 78).

[165] At least 13 times in the Complaint, Novell refers to more than two of its office productivity applications. *See, e.g.*, Compl. ¶¶ 2, 5, 8, 21, 45, 52, 56, 81, 110, 118, 120, 131, 153. Also, Novell twice refers to its "suite of office productivity applications," PerfectOffice, which included GroupWise. *See id.* ¶¶ 81, 117.

divested "WordPerfect and related office productivity applications" in March 1996. It does not say that Novell divested *all* of its office productivity applications. Finally, as Microsoft notes, the Complaint seeks damages for the "amount of profits lost by WordPerfect during the period 1994-1996," but the very next paragraph explains that "[t]he financial harm to Novell . . . is *not limited to* the amount of profits lost by WordPerfect during the period 1994-1996."[166] Novell retained GroupWise when it sold its other applications in March 1996, and seeks damages subsequently suffered by that line of business.

"[S]pecific facts, elaborate arguments, or fanciful language are not necessary" to satisfy Rule 8(a)(2). *Spencer v. Earley*, 278 F. App'x 254, 259 (4th Cir. 2008) (citing *Erickson*, 551 U.S. 89). Rule 8(a)(2) requires a plaintiff to "provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley*, 355 U.S. at 47). Novell's Complaint met the burden of fair notice.

2. Microsoft acted in accordance with the fair notice it received

Microsoft's first set of requests for production, served in July 2005, defined the "office productivity applications" at issue to include "word processing software programs, spreadsheet software programs . . . and *email/collaboration software programs*," such as GroupWise.[167] Microsoft propounded 28 requests using the defined term,[168] and at least three other requests that

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[166] Compl. ¶¶ 149, 150 (emphasis added).

[167] Microsoft's First Set of Reqs. for Produc. (July 20, 2005) at 3 (emphasis added) (Ex. 116).

[168] *Id.* Nos. 1-3, 12-15, 19-24, 27, 29-30, 32-35, 37-38, 49-54.

are equally broad.[169] In response, Novell produced upwards of 100,000 documents relating to GroupWise, MAPI, and Microsoft's competing product, Exchange (later known as Outlook).[170]

In February 2008, Microsoft served its first set of interrogatories, seeking witnesses and documents concerning Novell's allegations that:

- Microsoft withheld *other* technical specifications concerning Windows 95, and in some instances affirmatively misrepresented the specifications, further delaying Novell's delivery of WordPerfect *and related applications* for the Windows 95 platform (Compl. ¶ 79); and

- Microsoft created and controlled new *'industry' standards* and established unjustified certification requirements to delay the release of Novell's *applications* and to impair their performance for Novell's customers (Compl. ¶ 83).[171]

In response, Novell identified at least 149 documents related to GroupWise, the anticompetitive conduct aimed at it, and Exchange/Outlook.[172] Novell identified Richard Hume as one of six potential witnesses on GroupWise issues.[173]

In March 2009, Microsoft deposed Mr. Hume, who was the developer of GroupWise.[174] Microsoft asked him at least 187 questions relating to GroupWise, Exchange/Outlook, and Microsoft's manipulation of MAPI to hurt GroupWise. Microsoft was not satisfied with the breadth of Mr. Hume's deposition, however, because Novell "clawed back" a document that Microsoft

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[169] *Id.* Nos. 28, 42, 46.

[170] Novell's production includes 50,661 documents responsive to the search term "GroupWise," 10,540 documents to the term "MAPI," 39,220 to the term "Groupware," and 475 to the term "Microsoft Exchange." Allowing for duplication, this is still an extraordinary number.

[171] Microsoft's First Set of Interrogs. (Feb. 28, 2008) at 6-7 (emphasis added) (Ex. 117).

[172] Novell's Objections and Resp. to Microsoft's First Set of Interrogs. (Apr. 7, 2008) at 19-23 (Ex. 118); Novell's Supplemental Resp. to Microsoft's First Set of Interrogs. (Jan. 28, 2009) ("Novell's Jan. 28, 2009 Resp.") at 31-40 (Ex. 119).

[173] Novell's Jan. 28, 2009 Resp. at 32 (Ex. 119).

[174] Dep. of R. Hume (Mar. 24, 2009) 11:23-12:21 (Ex. 84).

wished to use as an exhibit, on an assertion of privilege.[175] The document concerned GroupWise, Exchange, and MAPI. Microsoft demanded production of the document and a resumption of Mr. Hume's deposition, and ultimately moved to compel.[176] All of this discovery and motions practice occurred *before* Novell served expert reports. When the Court subsequently granted the motion, Microsoft's counsel flew from New York City to Provo, Utah to ask Mr. Hume still more questions about GroupWise.[177]

Microsoft has cited no case, and we can find none, where the defendant affirmatively took discovery on a claim and later argued that it did not have notice of the claim. Microsoft's pretense "defies both reason and common sense." *U.S. Football League v. Nat'l Football League*, 638 F. Supp. 66, 67 (S.D.N.Y. 1986) (holding that complaint gave notice of antitrust damage theory, especially where deponents spoke to issue). It also leaves Novell's showing of harm to GroupWise unrebutted.[178]

D. Microsoft Restrained Trade In Violation Of Sherman Act Section 1

Microsoft attempts to limit the breadth of Novell's pleading on Count VI, pretending that it concerns only the OEM channel of distribution. In fact, Count VI alleges that "Microsoft's agreements with OEMs *and others* . . . unreasonably retrained trade by restricting the access of

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[175] *Id.* 62:23-66:11. The document records Mr. Hume's lack of personal knowledge on certain issues.

[176] Microsoft's Mot. to Compel Produc. of Doc. Bearing Produc. Number NOV-B07587565 and to Continue Two Deps. (Apr. 6, 2009).

[177] Dep. of R. Hume (July 15, 2009) (Ex. 120). In January and February 2009, Novell took the depositions of Robert Shurtleff and Tom Evslin. *See* Dep. of R. Shurtleff (Jan. 14, 2009) (Ex. 121); Dep. of T. Evslin (Feb. 19, 2009) (Ex. 122). The transcripts total more than 300 pages and primarily concern GroupWise, Exchange, and MAPI. Not once did Microsoft object that these issues were not in the case.

[178] *See, e.g.*, Bennett Rep. at 75 (Ex. 74); Murphy Rep. at 1 n.1 (Ex. 106); Hubbard Rep. ¶ 154 (Ex. 70).

Novell's office productivity applications to *significant channels of distribution*"[179] in 1994 and the first two quarters of 1995.[180] Novell specifically alleges that Microsoft's rebate programs with distributors were exclusionary.[181]

To defeat this claim on summary judgment, Microsoft must show as a matter of law that its licensing practices did not impose unreasonable restraints on trade. 15 U.S.C. § 1; *see also Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991). Courts generally analyze a restraint's effect on competition under the "rule of reason." *See GTE Sylvania*, 433 U.S. at 49; *see also Dickson*, 309 F.3d at 205. "'[T]he reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.'" *Dickson*, 309 F.3d at 206 (citation omitted). "This evaluation requires a showing of 'anticompetitive effect' resulting from the agreement in restraint of trade." *Id.*[182]

Microsoft's market power and share are relevant to finding a substantial, adverse impact on competition. *See, e.g.*, *Goss v. Mem'l Hosp. Sys.*, 789 F.2d 353, 355 (5th Cir. 1986); *Dickson*, 309 F.3d at 206. Dr. Noll defined separate antitrust markets for suites, word processors, spreadsheets, presentation graphics, relational databases, and groupware. He determined that Microsoft enjoyed substantial market power in all of these markets,[183] and that the agreements at

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[179] *See* Compl. ¶ 175 (emphasis added); *see also id.* ¶¶ 112, 132, 133.

[180] *See* Compl. ¶¶ 112-133; *see also* Noll Rep. at 10-11, 90-92, 96-108 (Ex. 3); Noll Rebuttal at 12-13, 57-65 (Ex. 4).

[181] *See* Compl. ¶¶ 120-121.

[182] A combination or conspiracy can be unlawful even if "'one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion.'" *See Dickson*, 309 F.3d at 205 (citations omitted).

[183] Noll Rep. at 7, 70-83 (Ex. 3); *see also* Noll Rebuttal at 21-23 (Ex. 4); FOF ¶¶ 33, 34 (given preclusive effect on monopoly power in operating systems); FOF ¶ 35 ("*Every year for the last decade*, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent." (emphasis added)).

issue likely entrenched Microsoft's market power in both applications and operating systems.[184] Indeed, Microsoft's revenue share in 16-bit word processors increased from 1994 to 1995,[185] while Novell's share declined.[186]

A restraint that preserves such market power can be considered unreasonable, *see E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004), and a restraint that substantially increases market concentration may suggest an adverse effect on competition. *See, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978).

1. Microsoft restrained the finished goods channel

Here, Microsoft provided rebates to distributors and resellers who met goals that foreclosed Novell's opportunity to enter the finished goods channel.[187] Specifically, in early 1995, Microsoft implemented a "6 month coordinated, aggressive strike" known as "Project Avalanche," at a "unique moment" to capitalize on the "Novell/WP transition" and the build-up towards Windows 95.[188] The project included a "Bonanza Fund" that paid rebates to distributors and

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[184] *See generally* Noll Rep. at 10-11, 90-92, 96-108 (Ex. 3); Noll Rebuttal at 12-13, 57-65 (Ex. 4).

[185] *See* Warren-Boulton Rep., Ex. 3a (Ex. 71).

[186] *See id.*

[187] *See, e.g.*, MS-PCA 1254594-608 (Ex. 123). Arrangements that do not prescribe actual exclusivity also may raise competitive concerns. *See, e.g., LePage's*, 324 F.3d at 154; *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 732 (8th Cir. 1940) (preferential discount to customers who did not buy competing products); *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP, 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. Mar. 22, 2006) (market share discount program), *aff'd*, Nos. 07-55960, 07-56017, 2009 U.S. App. LEXIS 23765 (9th Cir. Oct. 28, 2009) (Ex. 124); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1121 (E.D. Pa. 1976) (practical effect of rebate purchasing scheme was to compel customers to buy all of their requirements from the defendant), *aff'd*, 575 F.2d 1056 (3d Cir. 1978); *In re Champion Spark Plug Co.*, 50 F.T.C. 30, 47-49 (1953) ("a special low price" to distributors who bought all of their requirements from defendant was exclusive dealing).

[188] *See* MX 5090970-95, at 73, 75 (Ex. 125); FL AG 0100493-519 (Ex. 126); MSC 00814090-98 (Ex. 127).

resellers who increased their sales of Microsoft's office productivity applications,[189] to "'***close the door***' on competition."[190]

Such "knowledge of intent may help the court to interpret facts and to predict consequences." *See Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). One goal of Project Avalanche was to "[i]ncrease and sustain North American share for Word and Excel by >10% pts."[191] According to Microsoft's own expert, Dr. Murphy, Microsoft's share of office suite software in 1995 (when most Avalanche agreements were effective) was already 89 percent,[192] and its total share of word processors was 78.6 percent.[193] Microsoft thus intended Avalanche to capture virtually all of the remaining share, effectively "'clos[ing] the door' on competition."[194]

Avalanche was originally conceived as a rebate for increasing Microsoft's share of a distributor's sales by essentially locking competitors such as Novell out of the finished goods channel. Microsoft decided to change the benchmark, at least cosmetically, "due to potential legal issues and a lack of accurate information."[195] The chosen benchmark, however, served "the original objective of incenting accounts to improve their MS share,"[196] and was functionally equivalent to the original, unlawful incentives.[197] One "compliance rebate program" even required distributors

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[189] *See* MX 2325689-91, at 90-91 (Ex. 128); *see also* Noll Rep. at 107-08 (Ex. 3).

[190] MS-PCA 1630238-43, at 39 (emphasis added) (Ex. 129); *see also* FL AG 0100493-519, at 504 (Ex. 126); Noll Rep. at 107-08 (Ex. 3).

[191] FL AG 0100493-519, at 493 (Ex. 126).

[192] *See* Murphy Rep., Ex. 3 (Ex. 106).

[193] *See* Murphy Rep., Ex. 2 (Ex. 106).

[194] MS-PCA 1630238-43, at 39 (Ex. 129); *see also* Noll Rep. at 107-08 (Ex. 3).

[195] FL AG 0100493-519, at 518 (Ex. 126).

[196] FL AG 0100493-519, at 518 (Ex. 126); *see also* Noll Rep. at 108 (Ex. 3).

[197] *See* Noll Rep. at 107-08 (Ex. 3).

and resellers to submit weekly reports of sales of competing products such as WordPerfect.[198] Because distributors and resellers face intense price competition,[199] many of them entered Avalanche and related programs[200] and began pursuing the anticompetitive incentives.

2. Microsoft restrained the OEM channel

The 1994 consent decree between Microsoft and the DOJ placed some limitations on Microsoft's licensing practices for operating systems,[201] and banned the use of per processor licenses. It did not limit Microsoft's anticompetitive practices in licensing office productivity applications, however, and Microsoft executed a substantial number of "per system" licenses that locked up OEMs in 1994 and the first half of 1995.[202] Microsoft's own documents explain that the per system licenses were "essentially the same" as the banned per processor licenses,[203] because the agreements defined the systems very broadly, and often by reference to the processor. Microsoft's pricing[204] persuaded many OEMs to accept these terms,[205] effectively precluding them from licensing Novell's products.

Once 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. The OEM would:

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[198] *See, e.g.*, MS-PCA 1517913-25, at 18-19 (Ex. 130).

[199] *See, e.g.*, Ingram Micro, Inc., 1996 10-K (filed Mar. 24, 1997) at 5 (Ex. 131).

[200] 17 separate agreements are collected as Ex. 132.

[201] *See* NOV00128108-24 (Ex. 133).

[202] *See id.*; Mem. at 20; *see also* Dep. of C. Sittig, JCCP No. 4106 (Super. Ct. Cal. May 30, 2001) 246:4-247:6 (Ex. 134). 13 of these agreements, with a total of 6 OEMs, are collected as Ex. 135.

[203] *See, e.g.*, MS-PCA 1154065-71, at 67 (Ex. 136)).

[204] *See, e.g.*, Dep. of C. Gulledge, JCCP No. 4106 (Super. Ct. Cal. May 18, 2001) 291:20-296:13 (Ex. 137); Dep. of T. Gemmell, JCCP No. 4106 (Super. Ct. Cal. Oct. 2, 2001) 77:12-78:2 (Ex. 138).

[205] *See, e.g.*, MS-PCA 1360288-303, at 297 (Ex. 139); MS-PCA 1336559-75, at 69 (Ex. 140); MS-PCA 1336576-81 at 80 (Ex. 141); FL AG 0001778-90 (Ex. 142); FL AG 0001791-93 (Ex. 143).

> have to create a new product line and market it under that name . . . . [T]hey would have been faithful to that all the way through their sales and manufacturing and distribution policies. So they couldn't have invented a ruse, you know, for us for the purpose or reporting. They would have to sell and market it through under that system name or we probably would have had, you know, a discussion with them.[206]

These burdens on doing business with Novell restrained competition; when the "system" was defined by reference to an Intel chip, there was no practical way to develop a "new product line," and the restraint was complete.

The OEM licenses also had minimum commitments based on "unrealistically high" sales expectations.[207] When an OEM failed to ship enough product to exhaust the "prepaid balance," the unspent portion was recorded as an "unspecified product billing" ("UPB") that accumulated over the life of the contract. Microsoft used the UPBs to pressure OEMs to sign another contract.[208] Microsoft recognized the coercive effect of its minimum commitments in a report to its board of directors: "prepaid balances not only smooth the revenue stream somewhat, but, in the face of increasing competition (Novell/DRI, IBM), *make it costly for a customer to move to a competitor*."[209] Ultimately, minimum commitments incentivized OEMs to renew contracts with Microsoft, to avoid forfeiting the prepaid balance, thus locking OEMs up into the future.[210]

All of these practices, considered together, effectively foreclosed the OEM distribution channel to competition, and had an anticompetitive effect on the markets for word processing,

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[206] *See* Dep. of Richard Fade, JCCP No. 4106 (Super. Ct. Cal. Oct. 4, 2001) 516:2-12 (Ex. 144).

[207] *See* Noll Rep. at 101 (Ex. 3); Noll Rebuttal at 60 (Ex. 4).

[208] *See* Noll Rep. at 100-06 (Ex. 3); *see also* Noll Rebuttal at 60 (Ex. 4).

[209] *See* MS-PCA 1189515 (emphasis added) (Ex. 145).

[210] *See* Noll Rep. at 101 (Ex. 3).

spreadsheet, and suite applications.[211] Finally, Novell's degree of participation in the OEM channel (*see* Mem. at 19-20) goes only to the amount of damages, not to the fact of foreclosure.

3. Microsoft's agreements foreclosed a substantial share of the relevant markets

Microsoft argues that it did not foreclose competition "in a substantial share" of the relevant market. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961). Generally, a foreclosure rate close to 40 percent is necessary to raise competitive concerns. *See, e.g., United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 52-53 (D.D.C. 2000).[212] In attempting to avoid this threshold, Microsoft ignores the largest channel of distribution, and improperly focuses only on the OEM channel. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (in determining substantial foreclosure, courts must consider all potential channels of distribution).

Under the Supreme Court's precedent, the foreclosures of giants Ingram Micro, Inc.[213] and Merisel Americas, Inc., and all others should be aggregated.[214] In *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922), the Court aggregated exclusive contracts with 20,800 different merchants to reach a total, unlawful foreclosure of 40 percent. Similarly, in

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[211] *See generally* Noll Rep. at 10-11, 90-92, 96-108 (Ex. 3); Noll Rebuttal at 12-13, 57-65 (Ex. 4).

[212] *Aff'd in part & rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

[213] Ingram was one the largest distributors in the finished goods channel. *See* Dep. of R. Vellone, JCCP No. 4106 (Super. Ct. Cal. Dec. 19, 2000) 69:23-71:4 (Ex. 146); *see also* Dep. of C. Sittig JCCP No. 4106 (Super. Ct. Cal. May 30, 2001) 95:1-5 (Ex. 134).

[214] The court of appeals, in *Dickson*, 309 F.3d at 210-11, refused to examine the aggregate anticompetitive effects of separate hub-and-spoke conspiracies between Microsoft and various OEMs, but only because it was "untrue that Compaq and Dell, as alleged co-conspirators" should be "responsible for all of Microsoft's unilateral acts with other OEMs who were not members of the alleged conspiracies." Novell here is suing only the hub of each conspiracy; it is not trying to hold the spokes liable for the actions of others.

Standard Oil Co. v. United States, 337 U.S. 293, 295-96 (1949), the Court aggregated the defendant's exclusive dealings with 5,937 different retail buyers, and one scholar has pointed out that in *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), the 75 percent foreclosure could only have been found by aggregating agreements with thousands of theaters.[215]

In 1994 and 1995, around 95 percent of Microsoft's office productivity applications sales were made in the finished goods channel.[216] The major distributors in that channel, Ingram and Merisel,[217] were under restrictive Avalanche agreements. For both 1994 and 1995, these two distributors accounted for around 40 percent of all Microsoft word processing and suite sales in the finished goods channel.[218] Between January 1, 1995 and June 30, 1995, they accounted for 31 percent of Microsoft's word processing and suite sales across both the finished goods and OEM channels.[219] The Avalanche agreements with only these two distributors are virtually sufficient to support a finding of substantial foreclosure.

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[215] *See* Einer Elhauge, Antitrust Analysis of GPO Exclusionary Agreements, Comments Regarding Hearings on Health Care and Competition Law and Policy – Statement for DOJ-FTC Hearing on GPOs – Sept. 26, 2003 at 17-18, *available at* http://www.law.harvard.edu/faculty/elhauge/pdf/statement_ftcdoj.pdf.

[216] *See* Murphy Rep., Ex. 5 (Ex. 106). The finished goods channel is a multi-tier distribution system. *See* Decl. of H. Burg ¶ 4 (Ex. 147). From May 18, 1994 to at least June 29, 2000, Word and Office were distributed within the finished goods channel primarily through distributors, who in turn distributed the products to indirect resellers. *See id.* ¶ 7. The finished goods channel also includes all types of products sold through volume licensing programs. *See* Dep. of R. Vellone, JCCP No. 4106 (Super. Ct. Cal. Dec. 19, 2000) 66:25-69:4 (Ex. 146).

[217] In July 1994, Ingram and Merisel accounted for 37 percent of suite sales, 48 percent of standalone spreadsheet sales, and 55 percent of word processing standalone sales in the channel. *See* FL AG 0099740-54, at 41, 43, 47 (Ex. 148). Similarly, in August 1994, they accounted for 40 percent of Windows suite sales, 64 percent of standalone spreadsheet sales, and 56 percent of standalone word processing sales in the finished goods channel. *See* FL AG 0099719-39, at 20, 22, 26 (Ex. 149).

[218] *See* Microsoft Sales Data, MS-PCA 2598960-82 & MS-PCAIA 5501171 (*see* Hassid Aff. ¶ 3).

[219] *See id.*

Adding the shares of other parties who had Avalanche agreements, such as ASAP Software Express, Egghead Software, Inacom Computer Corporation, SoftMart Inc., and Software Spectrum, the restrained group accounted for around 60 percent of Microsoft's word processing and suite sales from January 1, 1995 to June 30, 1995 across both the finished goods and OEM channels.[220] There is more than sufficient evidence for the jury to find that Microsoft's Avalanche and other agreements foreclosed a substantial share of the relevant markets.

4. Novell suffered injury in fact

An antitrust plaintiff must establish injury in fact. *See, e.g.*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). The antitrust violation need not be the sole cause of the injury, but it must be a material cause. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). Novell may establish its injury by inference or circumstantial evidence. *See id.* at 125; *Cont'l Ore*, 370 U.S. at 697 n.7, 700. "[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith*, 395 U.S. at 123. "[T]he factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the *decline in . . . profits* . . . that defendants' wrongful acts had caused damage to the plaintiffs." *Id.* (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)) (emphasis added).

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[220] *See id.* From January to October 1994, the restrained group, including 800-Software, Corporate Software, and MicroAge Distribution, accounted for 94 percent of suite sales, 96 percent of standalone spreadsheet sales, and 96 percent of word processing sales in the finished goods channel. *See* FL AG 0025564-85, at 65, 67, 71 (Ex. 150). Specifically, in July 1994, they accounted for 95 percent of suite sales, 96 percent of spreadsheet sales, and 96 percent of word processing sales in the finished goods channel. FL AG 0099740-54, at 41, 43, 47 (Ex. 148). In August 1994, they accounted for 91 percent of suite sales, 96 percent of standalone spreadsheet sales, and 94 percent of word processing sales in the finished goods channel. *See* FL AG 0099719-39, at 20, 22, 26 (Ex. 149).

Microsoft argues that its agreements in violation of Section 1 did not injure Novell.[221] Once again, Microsoft limits its analysis to the OEM channel,[222] ignoring the injuries Novell suffered in the more important finished goods channel. At least 72 percent of Novell's own business applications were sold in the finished goods channel in 1995,[223] and Ingram and Merisel combined to account for 35 percent of its total applications sales.[224] Adding Egghead, ASAP, Software Spectrum, Corporate Software, SoftMart, Microage, Vanstar, and Inacom accounts for nearly 48 percent of Novell's sales.[225]

In 1994, prior to Microsoft's imposition of restraints upon *all* of the channels, WordPerfect Corporation's profit per quarter for standalone word processing and suites was on the rise.[226] Novell/WordPerfect's profits for standalone word processors and suites declined 71 percent in the second quarter of 1995,[227] and Novell's share of market revenues fell during the period, while

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[221] Mem. at 38 n.32, 39, 41.

[222] *See* Mem. at 38 n.32, 41.

[223] NWP00017586-600, at 586 (Ex. 151).

[224] *See id.* at 589.

[225] *See id.* Novell acknowledges that other factors affected sales in the entire market, including Novell's sales, during the second quarter of 1995, but it is for the jury to apportion the effects between overall market conditions and the facially unlawful licensing practices.

[226] The Novell Application Division's profit per quarter for standalone word processors and suites, which shipped in the finished goods channel, was $6.2 million for Q3 1994, and $7.9 million for Q4 1994. After the release of PerfectOffice 3.0, profits surged to $17.5 million in Q1 1995. *See* Novell Inc., Form S-4/A (filed June 23, 1994) (Ex. 152), NOV00012472 (Ex. 153), NOV00012474 (Ex. 154), NOV00012478-85 (Ex. 155), NOV00734293-304, at 301-02 (Ex. 156) (to arrive at these calculations using the cited evidence requires two simple steps: (1) relating specific product sales to profit margins from a more aggregate level (i.e., across all office productivity applications) and (2) converting from fiscal quarters to calendar quarters). An internal Microsoft e-mail recognized Novell's success: "[A]t Ingram, Perfect Office is holding it's [sic] own with MS OFFICE; WP for Win is outselling us over 3 to 1" in November and December 1994. *See* MX 5161546 (Ex. 157).

[227] Averaging the profits per quarter for standalone word processing and suites under Novell management (Q3 1994, Q4 1994, Q1 1995) the decline in Q2 1995 was 52 percent. Averaging the last five quarters, including quarters not under Novell management (Q1 1994 (WordPerfect),

Microsoft's increased.[228] This decline in profits and share is circumstantial evidence of injury caused by the market foreclosure. *See Zenith*, 395 U.S. at 124. As the court of appeals explained here, foreclosure of the distribution channels "would have naturally tended to decrease Novell's market share and . . . the value of its applications." *Novell*, 505 F.3d at 316.

5. Novell will prove its damages at trial

Microsoft argues that in the absence of expert opinion on Novell's damages on Count VI, Novell has abandoned the claim. Novell has not abandoned the claim; it will prove its damages with lay testimony, as it is entitled to do.[229] *See, e.g., Faulkner's Auto Body Ctr., Inc. v. Covington Pike Toyota, Inc.*, 50 F. App'x 664, 669 (6th Cir. 2002).

Federal Rule of Evidence 701 permits the use of lay witness opinion testimony on damages, including lost profits and business valuation. The Advisory Committee Notes for the 2000 Amendments to Rule 701 state:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The [2000] amendment does not purport to change this analysis.

Q2 1994 (WordPerfect), Q3 1994 (Novell/WordPerfect), Q4 1994 (Novell/WordPerfect), Q1 1995 (Novell/WordPerfect)), there is a decline in Q2 1995 of 38 percent.

[228] *See, e.g.*, Warren-Boulton Rep., Ex. 5 (Ex. 71). The data underlying Exhibit 12 of Dr. Hubbard's report (Ex. 70) also shows that Microsoft's standalone revenue share increased between January 1, 1995 and June 30, 1995.

[229] Where the damages witness is not an expert, "it [is] for the jury to determine the weight of the evidence, the credit to be given the witness, and the extent to which his testimony should be acted upon." *Story Parchment*, 282 U.S. at 567.

Antitrust cases are no exception to this rule. *See Story Parchment*, 282 U.S. at 567 (holding permissible in an antitrust case lay testimony from the plaintiff's treasurer on the estimated market value of the plant after it had been closed); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 900 (3d Cir. 1985) ("even treating [damages witness] solely as a lay witness, his testimony amply satisfies the standards of Fed. R. Evid. 701").

Damages may be shown using "'a just and reasonable estimate . . . based on relevant data,'" including both "probable and inferential as well as direct and positive proof." *Zenith*, 395 U.S. at 124 (citations and internal quotation marks omitted). Generally, establishing the amount of damages in antitrust cases is subject to a low burden of proof. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, the Supreme Court held that the "vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." 451 U.S. 557, 566 (1981). "'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.'" *Bigelow*, 327 U.S. at 265-66 (quoting *Story Parchment*, 282 U.S. at 565-66).

Plaintiffs are afforded wide latitude in selecting among the available theories of calculating damages. *See, e.g.*, *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 213 (3d Cir. 1983). The reasonableness of the assumptions underlying a plaintiff's damages theory ordinarily is determined by the trier of fact. *See, e.g.*, *LePage's*, 324 F.3d at 165-66. The "before and after" theory of damage, for instance, would compare Novell's diminished profits during the period of violation to the substantial profits earned before the violation. *See, e.g.*, *Story Parchment*, 282 U.S. at 561-62; *Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 378-79 (1927). Finally, even when damages can be determined only by speculation and guesswork, a court may find liability and award nominal damages and attorneys' fees. *See, e.g.*, *Rosebrough*

Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1147-48 (8th Cir. 1981); *U.S. Football League*, 644 F. Supp. at 1051-52.

III. CONCLUSION

Novell respectfully requests the Court to deny Microsoft's motion for summary judgment.

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Respectfully submitted,

By: /s/

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