UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

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

MDL Docket No. 1332
Hon. J. Frederick Motz

Oral Argument Requested

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

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Novell's opposition memorandum ("Novell Opp.") does not dispute any of the material facts set forth in Microsoft's opening brief ("Microsoft Mem."), thereby making it clear that Microsoft's motion for summary judgment presents legal issues appropriate for resolution by the Court at this juncture. After conducting 13 months of wide-ranging discovery, including taking the depositions of 31 current and former Microsoft officers and employees, Novell points to no evidence that gives rise to a genuine issue of material fact. Indeed, Novell expressly acknowledges, or by its silence concedes, among other things, that:

- Microsoft provided documentation for the namespace extension APIs for only four months, between June and October 1994, after which it advised ISVs (including Novell) that use of those APIs would be at their own risk (Microsoft Mem. at 12; *accord* Novell Opp. at 11);

- the namespace extension APIs were not used by any of Microsoft's own office productivity applications, including Microsoft Word and Microsoft Excel (Microsoft Mem. at 13; *accord* Novell Opp. at 31);

- custom print processor functionality was not necessary for applications running on Windows 95 to print documents—and no applications, including Microsoft's own, had access to customer print processor functionality in Windows 95 (Microsoft Mem. at 14);

- on March 31, 1995, Microsoft executive Brad Chase invited Novell to discuss further its request for an exemption from the requirements of the Windows 95 logo licensing program, but Novell never took advantage of that invitation (Microsoft Mem. at 15-16);

- Microsoft never entered into any agreements with OEMs that prohibited them from distributing Novell's word processing or spreadsheet applications with their new PCs (Microsoft Mem. at 39-40);

- between 1994 and 1996, only 4% to 10% of Microsoft's word processing and spreadsheet applications were licensed through the OEM channel (Microsoft Mem. at 43);

- when Novell acquired WordPerfect Corporation in 1994, only one-half of one percent of total WordPerfect revenues were derived from the OEM channel (Microsoft Mem. at 19).

Summary judgment is now fully appropriate on count I, because (a) no private antitrust claim is stated where the conduct alleged to have injured the plaintiff concededly had no adverse impact on competition in the market at issue, and (b) Microsoft had no obligation to provide technical information or other assistance to Novell to enable it to become a more formidable competitor. Summary judgment is also appropriate on count VI, because (a) Novell was not foreclosed from licensing its office productivity applications through the OEM channel (the only foreclosure alleged in the complaint), (b) any new claim about foreclosure in the "finished goods" channel is indisputably barred by the statute of limitations and (c) there is no evidence that Novell was foreclosed from a "substantial share" of the market.

ARGUMENT

I. Count I Should Be Dismissed

A. The Conduct Allegedly Directed at Novell Did Not Harm Competition in the Relevant Market.

Novell adopts the position of its antitrust economics expert, Roger Noll, that the harm allegedly inflicted on Novell's office productivity applications likely "would have [had] no adverse effect" on competition in the PC operating system market. (Novell Opp. at 24-25 (quoting Deposition of Roger Noll, September 10, 2009 at 42, attached as Ex. 3 to the Affidavit of Steven L. Holley in Support of Microsoft's Motion for Summary Judgment ("Holley Aff."), sworn to on October 7, 2009).) Indeed, Novell fails to present evidence (or even expert opinion) showing that Microsoft's alleged conduct directed at WordPerfect and Quattro Pro harmed competition in the PC operating system market.[1] As a result, this Court is presented with a pure legal issue: may a private antitrust plaintiff proceed to trial when the allegedly wrongful conduct (here, conduct directed at WordPerfect and Quattro Pro) did not have an adverse effect on competition in the relevant market (here, the PC operating system market). Although "Novell agrees that it must show an anticompetitive effect, generally referred to as harm to competition" (Novell Opp. at 20 n.126), it argues that it can prevail

[1] The parties agree that with respect to count I, Novell claims that Microsoft harmed Novell's word processing and spreadsheet applications by engaging in the following conduct: (i) discontinuing formal documentation for six namespace extension APIs in pre-release versions of Windows 95, (ii) failing to include in Windows 95 certain custom print processing functionality present in the more sophisticated Windows NT 3.1 operating system, and (iii) declining to grant Novell an exemption from certain requirements of the Windows 95 logo licensing program. (Microsoft Mem. at 11-15; Novell Opp. at 9-13, 16-18.)

even if Microsoft's alleged conduct directed at WordPerfect and Quattro Pro caused no harm to competition in the market at issue in count I.[2]

Novell insists that the relevant inquiry is not limited to conduct that allegedly harmed WordPerfect and Quattro Pro (conduct that Novell admits did not harm competition), but rather to "the entirety of [Microsoft's] conduct [directed against others] and its impact on the market, competition, and consumers." (Novell Opp. at 21.) None of the cases on which Novell relies supports that radical proposition.

Novell relies on *LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003), as authority for the proposition that "[t]o determine anticompetitive effect, courts must evaluate the monopolist's conduct 'as a whole rather than considering each aspect in isolation.'" (Novell Opp. at 19 n.124 (quoting 324 F.3d at 162).) What Novell omits to mention is that the court in *LePage's* was looking only at conduct *directed at the plaintiff* in deciding whether that conduct "as a whole" had harmed competition. *LePage's* 324 F.3d at 162. Similarly, Novell relies on *Nobody in Particular Presents, Inc.* v. *Clear Channel Commc'ns, Inc*., 311 F. Supp. 2d 1048 (D. Colo. 2004), as further support for the proposition that a defendant's "conduct as a whole must always be analyzed" in determining whether competition has been harmed. (Novell Opp. at 21 (citing 311 F. Supp. 2d at 1078).) As in *LePage's*, however, the plaintiff

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[2] As shown in Microsoft's opening brief, to establish the requisite anticompetitive effect, Novell must demonstrate that Microsoft's conduct directed at WordPerfect and Quattro Pro "'contributed significantly to the achievement or maintenance' of monopoly power" in the PC operating system market. (Microsoft Mem. at 25 (III Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 650c (3d ed. 2008)); *see also U.S.* v. *Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* . . . harm to one or more *competitors* will not suffice.") (emphasis in original).)

in *Nobody in Particular* alleged that the defendant had engaged in several anticompetitive acts, all of which were directed at the plaintiff, and the only issue considered by the court was whether those anticompetitive acts should be considered individually or on a cumulative basis. In none of the cases Novell cites did the court look beyond conduct directed at the plaintiff in assessing whether the plaintiff had demonstrated harm to competition.[3] The absence of any harm to competition resulting from Microsoft's alleged conduct directed at Novell compels the dismissal of count I as a matter of law.

In 2005, at the pleading stage, Novell avoided dismissal based on the statute of limitations for only two of its six claims, and only by making the argument that Microsoft's alleged conduct directed at WordPerfect and Quattro Pro was designed to protect Microsoft's position in the PC operating system market. By this argument (that Microsoft's alleged conduct directed at WordPerfect and Quattro Pro caused harm to competition in the PC operating system market), Novell was able to make its claims seem related closely enough to the Department of Justice case (which involved the same PC operating system market) to take advantage of the tolling provision of 15 U.S.C. § 16(i). Now after lengthy (and very costly) discovery, Novell admits that Microsoft's alleged conduct directed at

[3] Novell cites *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982), and *Reazin* v. *Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951 (10th Cir. 1990), as support for the proposition that the Court can consider harm to other products in determining whether Novell has made the necessary showing of harm to competition in this case. (Novell Opp. at 21-22.) Far from involving "analogous circumstances," as Novell claims, these cases speak to an entirely different issue. In both *McCready* and *Reazin*, the acts that harmed the plaintiff also harmed other competitors of the defendant and the court looked to the cumulative impact of those acts to determine if competition had been harmed. Novell has made no allegation—and there is no evidence—that Microsoft's alleged acts directed at WordPerfect and Quattro Pro had any impact on other products or companies.

Novell's office productivity applications did not affect Microsoft's position in the PC operating system market at all, and seeks instead to turn the already implausible claim completely on its head and eliminate any requirement of causation or injury. No reported antitrust case has ever permitted that result.

Thus, unable to show that Microsoft's alleged conduct directed at WordPerfect and Quattro Pro harmed competition in the PC operating system market, Novell turns its attention to unrelated conduct allegedly directed at Netscape and Sun. Novell argues that if Microsoft's alleged conduct directed at Netscape and Sun—conduct that had no effect on Novell's office productivity applications—harmed competition in the PC operating system market, then Novell is excused from showing that Microsoft's alleged conduct directed at WordPerfect and Quattro Pro had an anticompetitive effect. No court has ever permitted a plaintiff to "piggy-back" on the anticompetitive effect of conduct directed at other parties, let alone other parties in another market, in seeking to make out a claim under Section 2 of the Sherman Act. In fact, the antitrust laws "bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation." *Watkins & Son Pet Supplies* v. *Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001).

Novell asks this Court to extend the scope of antitrust liability far beyond what any court has ever recognized, expanding the universe of plaintiffs able to recover treble damages to include any party harmed by a monopolist's conduct, regardless of whether that conduct bears any relationship to the illegal acquisition or maintenance of monopoly power. As the court held in *Local Beauty Supply, Inc.* v. *Lamaur Inc.*, 787 F.2d 1197, 1200 (7th Cir. 1986), a plaintiff must prove more than a violation of the antitrust laws in order to prevail; a plaintiff must prove that it was injured "by reason of" conduct that violated the antitrust laws.[4] By seeking to rely not on Microsoft's alleged conduct directed at WordPerfect and Quattro Pro but instead on unrelated conduct directed at Netscape and Sun to demonstrate the requisite injury to competition, Novell is attempting to do precisely what the Supreme Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), said an antitrust plaintiff may not do, *i.e.*, predicate a claim of antitrust injury on "the mere presence of the violator in the market." 429 U.S. at 486, 487. Novell must show that its alleged injury "flows from that which makes [Microsoft's] acts unlawful," *id.* at 489, but there is a complete disconnect between Microsoft's alleged conduct directed at WordPerfect and Quattro Pro—which is what Novell says caused its injury—and Microsoft's alleged conduct directed at Sun and Netscape—which is the sole source of purported illegality relied on by Novell.

Under Novell's proposed standard, once a monopolist has committed a single act that harmed competition in some market, then every other arguably "wrongful" act the monopolist commits (even in other markets), be it a business tort, a breach of contract or simply an act of "malice," would give rise to a claim for treble damages under the antitrust laws, notwithstanding the fact that the conduct that harmed plaintiff caused no harm to competition. In essence, Novell is arguing that the antitrust laws should be transformed into

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[4] This rule stems from the Supreme Court's decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 561 (1977), which held that a plaintiff in an antitrust case "must establish cognizable injury attributable to [the] antitrust violation." *See Bayou Bottling, Inc.* v. *Dr. Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) (plaintiff cannot recover under the antitrust laws if its alleged injury "does not flow from that which ostensibly made the defendants' activities illegal").

"a federal law of unfair competition," the very thing the Supreme Court has held should not occur. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). No court has ever adopted Novell's theory. To the contrary, the Supreme Court has expressly held that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Assoc'd Gen. Contractors of Ca., Inc.* v. *Ca. State Council of Carpenters*, 459 U.S. 519, 534 (1983). Here, of course, Novell's claimed injuries cannot even be "traced" to a violation.

Requiring a plaintiff to demonstrate that the conduct that allegedly caused the plaintiff harm also harmed competition in the relevant market is particularly important where, as here, the relationship between the purportedly injured products and the allegedly monopolized market is so attenuated. As the Court is well aware, Novell's count I—alleging that Microsoft harmed Novell's word processing and spreadsheet applications in order to maintain a monopoly in a market (PC operating systems) in which those products did not compete—was brought to enable Novell to circumvent the statute of limitations that had long since expired on any claims for harm to competition in purported markets for word processing and spreadsheet applications. (Microsoft Mem. at 23-25.) Having managed to circumvent the statute of limitations at the motion to dismiss stage, Novell now admits that not only did WordPerfect and Quattro Pro not compete in the PC operating system market, but also that Microsoft's alleged conduct directed at those products did not harm competition in the PC operating system market. Despite those admissions, Novell persists in arguing that it is entitled to treble damages from Microsoft under the antitrust laws—an amount Novell calculates to be in excess of eight billion dollars (*see* Expert Report of Frederick R. Warren-Boulton, May 1, 2009 ("Warren-Boulton Report") at 3, attached as Ex. 27 to Holley Aff.)—

for damage allegedly caused to Novell's word processing and spreadsheet applications even though the conduct that purportedly injured Novell caused no injury to competition in the relevant market. The antitrust laws do not permit such an anomalous result.

B. Microsoft Did Not Engage in Impermissible Conduct.

Not only is the admitted lack of harm to competition in the PC operating system market from Microsoft's alleged conduct directed at WordPerfect and Quattro Pro fatal to count I, but the "bad acts" Novell alleges are not actionable under the antitrust laws. Microsoft has previously shown, and Novell does not contest, that each of the allegations underlying Novell's count I is an instance in which Microsoft declined to provide Novell with technical information or other assistance that supposedly would have aided Novell's development of office productivity applications for use with Windows 95. (Microsoft Mem. at 29-35.) Novell asks this Court to ignore established precedent holding that such refusals are not improper under the antitrust laws, arguing that even if the three instances, taken alone, "may not have amounted to Section 2 violations," they are, when "considered as a whole," sufficient to make out a "general Section 2 claim." (Novell Opp. at 28.) This argument is meritless. Refusals to assist a competitor—whether viewed individually or collectively—are not prohibited by the antitrust laws. (*See* Microsoft Mem. at 29-35.)

Novell's additional argument that it is not asserting a "refusal to deal" claim, but rather a "general Section 2 claim of monopoly maintenance" (Novell Opp. at 28), is mere semantics. Novell admits that its complaint concerns instances in which Microsoft "refuse[d] to disclose or selectively disclose[d] information" to Novell about Windows 95 when the new operating system was still under development. (Novell Opp. at 31.) Yet Novell fails to explain how a claim of monopoly maintenance that relies exclusively on allegations that

Microsoft failed to assist a competitor should be analyzed any differently from a refusal to deal. When a plaintiff alleges that it has been harmed by several instances in which a monopolist declined to provide the plaintiff with assistance, as Novell does here, courts consistently analyze the plaintiff's allegations using the analytical framework applicable to refusals to deal. *See*, *e.g.*, *Covad Commc'ns Co.* v. *Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005); *MetroNet Servs. Corp.* v. *Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004).

When properly analyzed, Novell's claims are plainly unsustainable. Microsoft's decisions (i) to withdraw formal documentation for six namespace extension APIs in Windows 95 after making such documentation available for a four-month period in 1994, (ii) not to grant Novell an exemption from certain requirements of the Windows 95 logo licensing program, and (iii) not to include custom print processing functionality in Windows 95 do not come close to meeting the high standard set forth by the Supreme Court. As discussed in Microsoft's opening brief at 32-34, the Supreme Court has clearly held that refusals to deal are impermissible only if they fit within the very narrow exception carved out by *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), an exception that "is at or near the outer boundary of § 2 liability." *Verizon Commc'ns Inc*. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). Novell's claim falls far beyond that outer boundary.

Recent cases have affirmed the very limited scope of *Aspen Skiing*. In *IBM* v. *Platform Solutions, Inc.*, 2009 WL 3127744 (S.D.N.Y., Sept. 30, 2009), Judge Kaplan dismissed a complaint in which plaintiff alleged that defendant's "decision 'to cease a prior course of conduct' violated the antitrust laws" because defendant allegedly "had 'no legitimate business reason' for changing its [prior course of conduct], and 'its sole purpose was to suppress competition from a more favorable technology.'" 2009 WL 3127744 at *7. Judge Kaplan held that such allegations "cannot satisfy the 'limited exception' to the refusal to deal doctrine [in *Aspen Skiing*] . . . . T3 has not demonstrated that IBM has foregone short term profits . . . 'to achieve an anticompetitive end.'" 2009 WL 3127744 at *7 (quoting *Trinko*, 540 U.S. at 408). The court further held that a defendant's decision not to continue support for technology it had earlier supported "does not constitute anticompetitive conduct under the Sherman Act." *Id.* at *7. Novell's claims are indistinguishable from those dismissed in the *Platform Solutions* case.

Finally, Novell argues that Microsoft's conduct with regard to the namespace extension APIs and the custom print processor was wrongful because Microsoft allegedly withdrew a helping hand it had previously extended. (Novell Opp. at 30 (arguing that Microsoft "withdr[ew] key pieces of promised technology").) Novell implies that this withdrawal of voluntary assistance was willfully deceptive. (Novell Opp. at 31-32.) Even if Microsoft had deceived Novell—and there is no evidence to indicate it did—such deception might at most give rise to a business tort claim, not an antitrust claim. The antitrust laws are clear that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Brooke Group Ltd.*, 509 U.S. at 225 (internal quotations removed).

C. GroupWise Has No Place in This Case.

Not once in its 68-page, 178-paragraph complaint, nor in any of the more than 250 pages of briefing previously submitted to this Court and the Fourth Circuit, did Novell so much as mention the word GroupWise, let alone make any suggestion that it was asserting a claim for harm to the GroupWise server software product. Despite this, Novell now claims that it is entitled to recover more than $750 million (Warren-Boulton Report at 4) for a claim it plainly never asserted. Seeking to demonstrate that GroupWise somehow belongs in this case, Novell is reduced to searching through Microsoft's discovery requests and parsing questions Microsoft asked of a single deponent in this action. Yet Novell fails to explain how the complaint itself can be read to include a claim for harm to a product that is not mentioned in the complaint, that occurred well outside the time period encompassed by the complaint and which Novell never referred to in a pleading prior to submission of its expert reports in 2009, months after the close of fact discovery. (*See* Microsoft Mem. at 36-37.)

Novell has never sought permission to amend its complaint to assert a claim for harm to the GroupWise server software product, and is not permitted to slip in such a claim through the back door by way of its 2009 expert reports or its current opposition to Microsoft's summary judgment motion. *See Deasy* v. *Hill*, 833 F.2d 38, 41 (4th Cir. 1987) (expert reports); *Barclay White Skanska, Inc.* v. *Battelle Mem'l Inst.*, 262 F. App'x 556, 563 (4th Cir. 2008) (brief opposing summary judgment).

The complaint could not be clearer that the products at issue are those that Novell sold in March 1996—of which GroupWise was not one. The complaint states, for example:

- "[u]ntil March 1996, Novell owned the rights to develop and distribute the WordPerfect word processing application . . . as well as other office productivity applications, including the Quattro Pro spreadsheet" (Compl. ¶ 2);

- "Novell sold WordPerfect and the related applications in 1996" (Compl. ¶ 8);

- "Novell suffered lost profits and goodwill during the period in which it owned the rights to WordPerfect and related office productivity applications, and the value of these assets declined by approximately $1 billion between May 1994 and their sale in March 1996" (Compl. ¶ 8);

- "[t]hree markets are relevant to this action: the market for Intel-compatible PC operating systems, the market for word processing applications, and the market for spreadsheet applications" (Compl. ¶ 24).

No other harm is alleged in the complaint—not to GroupWise and not to any other product Novell retained when it sold WordPerfect and Quattro Pro to Corel Corporation in March 1996.[5] As noted in Microsoft's opening brief, the Fourth Circuit understood the complaint to allege that "[a]ll six of Novell's claims arose prior to March 1996, when Novell sold WordPerfect and Quattro Pro to Corel Corporation." *Novell, Inc.* v. *Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007). This accords with Novell's representation to the Fourth Circuit that Novell sought only "standing to pursue claims against Microsoft for injury to Novell's word-processing and spreadsheet applications." (Brief of Appellee-Cross-Appellant Novell Inc., May 16, 2008 ("Novell Fourth Circuit Brief") at 6, attached as Ex. 44 to Holley Aff.) Having stated explicitly that it sought recovery only for harm to WordPerfect and

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[5] Novell misleadingly asserts that because the complaint states that "[t]he financial harm to Novell . . . is not limited to the amount of profits lost by WordPerfect during the period 1994-1996" (Compl. ¶ 150), the complaint must also encompass harm suffered by GroupWise. (Novell Opp. at 35.) Yet the very same paragraph of the complaint referred to by Novell makes clear that the additional damages sought by Novell are for the "substantial drop in the value of the WordPerfect business" from May 1994 to March 1996. (Compl. ¶ 150.) Again, there is no reference to GroupWise or to any product retained by Novell after March 1996. It is especially telling that Novell must read the language of its own complaint out of context in order to justify its assertion of a GroupWise claim at this late date.

Quattro Pro, Novell cannot inject a new product, new market and new time period into this case after the close of discovery.[6]

As a last resort, Novell seeks to amend its complaint on the basis of *Microsoft's* discovery efforts, focusing on Microsoft's questioning of Mr. Hume at his deposition. (*See* Novell Opp. at 36-37.) This is entirely illogical. Novell identified Mr. Hume as a knowledgeable witness in response to six interrogatories—none of which referred, even indirectly, to GroupWise. (*See* Novell, Inc.'s Supplemental Responses to Microsoft's First Set of Interrogatories, January 28, 2009 at 6, 14-15, 18-19, 21, 29, 31-32, attached as Ex. 1 to the Supplemental Affidavit of Steven L. Holley ("Holley Supp. Aff."), sworn to on December 11, 2009.) Once Mr. Hume was identified by Novell, it was a "natural precaution" for Microsoft to ask him about GroupWise—a product within his area of responsibility—but that says nothing about the scope of the claims asserted by Novell in the complaint. *See Deasy*, 833 F.2d at 41.[7]

II. Count VI Should Be Dismissed

Novell also seeks to add claims about a distribution channel that was never mentioned in its complaint. There is no evidence of any kind that Novell's word processing

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[6] Of course, it matters not at all that Novell produced some documents relating to GroupWise and identified a GroupWise developer, Richard Hume, in its interrogatory responses. (*See* Novell Opp. at 35-36.) The Fourth Circuit has explicitly disavowed the practice of amending a pleading through discovery statements, let alone impliedly through the production of documents. *Deasy*, 833 F.2d at 41-42.

[7] Although Novell argues that it identified Mr. Hume and certain documents related to GroupWise prior to serving its expert reports, it neglects to mention that it did not do so until it served its *supplemental* interrogatory responses on January 28, 2009—fewer than six weeks before the close of fact discovery on March 6, 2009.

or spreadsheet applications were foreclosed from the OEM channel—the only distribution channel mentioned in count VI. Apparently realizing that it cannot prevail on the claim set forth in its complaint, Novell belatedly seeks to add the allegation that Microsoft restrained competition in the so-called "finished goods" channel. This new claim fails for three reasons. *First,* Novell's complaint does not allege harm to competition in the finished goods channel, and any claim regarding Microsoft's licensing of its office productivity applications in the finished goods channel is barred by the statute of limitations in any event. *Second*, the agreements Novell now seeks to challenge were not anticompetitive. *Third,* Novell has not identified any evidence that these agreements foreclosed Novell from distributing its word processing or spreadsheet applications in the finished goods channel, much less foreclosed it from a substantial share of the purported markets for word processing and spreadsheet applications generally.

A. Novell Was Not Foreclosed from the OEM Channel.

Novell concedes by its silence that there were no "agreements with OEMs and others not to license or distribute Novell's office productivity applications." (Compl. ¶ 175.) Nor has Novell met its burden to show that there are disputed issues of material fact as to whether Microsoft had agreements with OEMs that required them to distribute Microsoft's products "only on terms that materially disadvantaged" Novell's word processing or spreadsheet applications.[8] *Id.* Even if Novell could point to disputed issues of material fact

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[8] Novell misstates the parties' respective burdens under Section 1 of the Sherman Act, arguing that "Microsoft must show as a matter of law that its licensing practices did not impose unreasonable restraints on trade." (Novell Opp. at 38.) This is incorrect. The law is clear that "[u]nder the rule of reason, [plaintiff] bears the burden of proving that the actions of the defendants have unreasonably restrained trade." *Oskansen* v. *Page Mem'l Hosp.*, 945 (*footnote continued*)

pertaining to its claim that the challenged OEM licensing practices were anticompetitive, it does not identify any evidence that those practices (including per system licenses and minimum commitments) ever prevented Novell from licensing a single application in the OEM channel. In short, there is no evidence that Novell's applications were foreclosed to any extent from the OEM channel.

Conceding its failure to identify any evidence that a single OEM declined to distribute Novell's applications as a result of Microsoft's allegedly anticompetitive agreements, Novell now argues that it should be permitted to "establish its injury by inference or circumstantial evidence." (Novell Opp. at 45 (*citing Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969); *Cont'l Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 n.7 (1962)).) Novell argues that the decline in profits and market share that WordPerfect and PerfectOffice experienced in the second quarter of 1995 "is circumstantial evidence of injury caused by the market foreclosure." (Novell Opp. at 46-47.) This is nonsense. As Novell acknowledges, "other factors affected sales in the entire market" during the second quarter of 1995, but Novell nonetheless contends that the jury should be permitted to "apportion the effects between overall market conditions and the facially unlawful licensing practices." (Novell Opp. at 46 n.225.) Contrary to Novell's new argument, Novell's damages expert, Dr. Warren-Boulton, attributes *all* of Novell's purported injury to the conduct alleged in count I of the complaint and offers no opinion that Novell

(*footnote continued*)
F.2d 696, 709 (4th Cir. 1991). To prevail on summary judgment, Microsoft need only show that there are no genuine issues of material fact concerning whether the challenged practices were anticompetitive. *Id*. Microsoft has met that burden.

was injured in any way by the conduct alleged in count VI.[9] (Warren-Boulton Report at 8-13.)

Even if Novell could establish that its own expert is incorrect in attributing none of Novell's damages to the conduct alleged in count VI, it must also demonstrate that any injury it did suffer was the result of foreclosure "in a substantial share" of the purported markets for word processing and spreadsheet applications. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961).[10] Novell cannot do so. Indeed, even if Novell could demonstrate that it was *completely* foreclosed from distributing its word processing and spreadsheet applications in the OEM channel, such foreclosure would not approach the 40% threshold for substantial foreclosure. As Microsoft demonstrated in its opening brief, only 4% to 10% of Microsoft's word processing or spreadsheet applications were licensed through the OEM channel between 1994 and 1996. (Microsoft Mem. at 43.) Foreclosure in such a low range does not approach the "substantial foreclosure" required to make out a claim under Section 1. *See, e.g.*, *R.J. Reynolds Tobacco Co.* v. *Philip Morris*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), *aff'd*, 67 Fed. App'x 810 (4th Cir. 2003) (34% foreclosure not substantial).

B. Novell's New Claims Regarding the Finished Goods Channel Also Fail.

Recognizing the absence of evidentiary support for its claim that it was foreclosed from the OEM channel and the impossibility of demonstrating that any such

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9 Novell does not dispute that its damages expert did not opine that it suffered any harm as a result of the conduct alleged in count VI. Instead, Novell argues that it should be permitted to prove damages at trial through lay testimony, or that it is entitled to "nominal damages." (Novell Opp. at 47-49; *see* Microsoft Mem. at 44.)

10 Novell agrees that this is the standard, and that foreclosure of at least 40% "is necessary to raise competitive concerns." (Novell Opp. at 43.)

foreclosure was substantial, Novell belatedly attempts to assert a claim that "Microsoft provided rebates to distributors and resellers who met goals that foreclosed Novell's opportunity to enter the finished goods channel." (Novell Opp. at 39.) Novell's complaint never mentions the finished goods channel, and had it done so, that claim would have been barred by the statute of limitations.

The first time Novell ever said it was attempting to assert a claim for harm to competition in the finished goods channel was in Novell's November 13, 2009 brief in opposition to Microsoft's motion for summary judgment. Novell's new position—that count VI concerns not just agreements with OEMs, but also agreements in the "finished goods" channel—contradicts its complaint (which makes no mention of that channel), conflicts with representations Novell made to the Court in opposition to Microsoft's motion to dismiss, and ignores the Court's previously stated view concerning the scope of count VI.

Novell never suggested that count VI concerned distribution channels other than the OEM channel during either its briefing or oral argument on Microsoft's motion to dismiss. In opposing that motion in 2005, Novell argued that count VI makes "the *same* claims, based on many of the same anticompetitive agreements with OEMs, as in the Government's First Claim for Relief." (Novell's Memorandum in Opposition to Microsoft's Motion to Dismiss, February 22, 2005 at 16 (emphasis in original), attached as Ex. 2 to Holley Supp. Aff.) At oral argument before this Court on Microsoft's motion to dismiss later in 2005, Novell referred to count VI as its "OEM count," and argued that "Microsoft used the same means that were at issue in the government case in the Novell case; that is, it excluded Novell from the OEM channel through anticompetitive behavior." (Transcript of June 7, 2005 argument on Microsoft's motion to dismiss at 35-36, 56 attached as Ex. 3 to Holley

Supp. Aff.) Novell described count VI the same way to the Fourth Circuit. On appeal, Novell argued that by "coercing PC manufacturers [*i.e.*, OEMs] into restrictive and exclusionary agreements, Microsoft intentionally caused Novell's share of the office productivity markets to decline dramatically." (Novell Fourth Circuit Brief at 24.) No mention was made of any other channels of distribution.

Taking Novell at its word, this Court allowed count VI to proceed to discovery, finding that it was "based upon Microsoft's exclusionary agreements with OEMs" which "also were a subject of the government case" 2005 U.S. Dist. LEXIS 11520 at *3 (D. Md. June 10, 2005). The Fourth Circuit affirmed on the same basis. 505 F.3d 302 (4th Cir. 2007). Had Novell alleged harm to competition in channels other than the OEM channel, that allegation would have been barred by the statute of limitations because it would not have been "based in whole or in part on any matter complained of" in the Government Case, which did not address distribution of word processing or spreadsheet applications (or PC operating systems for that matter) in the finished goods channel. 15 U.S.C. § 16(i).

During discovery, Novell provided no hint to Microsoft that count VI involved distribution channels other than the OEM channel. Novell took no discovery relating to alleged foreclosure in the finished goods channel; its responses to Microsoft's discovery requests about count VI did not identify documents relating to the finished goods channel, and Novell never identified any witness knowledgeable about that channel. Novell did not serve subpoenas seeking documents or depositions from any participant in the finished goods channel, nor did it elicit a single line of testimony about that channel from any of the 31 witnesses it did depose. Moreover, Novell's damages expert, Dr. Warren-Boulton, offered no opinion that Novell suffered any damages resulting from foreclosure from in channel of distribution, including the finished goods channel. As a result, Microsoft was unaware of any claim of foreclosure in the finished goods channel until Novell filed its opposition to Microsoft's motion for summary judgment on November 13, 2009—five years and a day after Novell filed its complaint. Just as Novell cannot slip a new claim for GroupWise through the back door by way of its expert reports, Novell also cannot amend its complaint by making a new argument in its opposition to Microsoft's motion for summary judgment. *Barclay White Skanska, Inc.*, 262 F. App'x at 563 (new claim in brief opposing summary judgment is barred). The weakness of Novell's position is revealed by its efforts to abandon meritless claims and suddenly assert new "claims" that were never set forth in its complaint or otherwise disclosed over the last five years. Such gamesmanship is impermissible.

In any event, Novell falls far short of its burden to present evidence sufficient to create a disputed issue of material fact with respect to its claim that Microsoft's marketing programs in the finished goods channel were anticompetitive. The marketing program about which Novell complains (referred to internally at Microsoft as Project Avalanche) provided modest discounts to retailers who met specified sales goals for Microsoft's word processing and spreadsheet applications. (Novell Opp. at 39.) It is undisputed that the program "d[id] not prescribe actual exclusivity" (Novell Opp. at 39 n.187), and Novell does not allege that the program tied licenses of office productivity applications to licenses of Microsoft's PC operating systems. Unlike the cases Novell cites for the proposition that Microsoft's marketing programs "may raise competitive concerns" (Novell Opp. at 39 n.187), the challenged marketing program: (i) did not involve the bundling of a market-leading product with other less popular products; (ii) did not condition rebates on a distributor's refusal to sell competing products; (iii) did not condition rebates for Microsoft's word processing and spreadsheet applications on the licensing of Microsoft's market-leading PC operating systems; and (iv) varied only slightly in amount, depending on a distributor's sales performance. All that the challenged program entailed was a 2-5% discount to distributors that increased their "blended share of Word and Excel" sales. (Office Drive/Incremental Share Program, dated September 8, 1994, MX 2325689-91 at 90, attached as Ex. 4 to Holley Supp. Aff.) Another aspect of this marketing program provided a 1.5% maximum discount to distributors that increased their overall sales of Microsoft's word processing and spreadsheet applications. (*See, e.g.*, Rebate and Marketing Fund Addendum to The 1994/1995 Microsoft Channel Agreement (January-June 1995) with MicroAge Computer Centers, Inc., MS-PCA 1517913-25, at 20-21, attached as Ex. 5 to Holley Supp. Aff.)

Microsoft's marketing programs were entirely permissible under the antitrust laws because they provided small discounts to distributors to encourage them to sell more Microsoft products. It is well established that "the Sherman Act was not designed to disallow discounts or other preferential treatment for volume customers." *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 338 (D.C. Cir. 1982); *MCI Commc'ns Corp*. v. *Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1130 (7th Cir. 1983) ("The mere existence of volume or package pricing does not support antitrust liability") (citing *Chillicothe Sand & Gravel Co*. v. *Martin Marietta Corp*., 615 F.2d 427, 433 (7th Cir. 1980)). Indeed, "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

Novell not only fails to demonstrate that the challenged marketing programs were anticompetitive, but also fails to present any evidence the programs foreclosed Novell from a substantial share of the market. As with the OEM licensing practices about which

Novell complains, Novell has not identified a single example of any distributor in the finished goods channel reducing or eliminating its sales of Novell's word processing or spreadsheet applications as a result of Microsoft's marketing programs. That is unsurprising given that Novell conducted no discovery on the claim it now seeks to assert. Given the complete dearth of evidence, Novell cannot possibly meet its burden of showing that it was substantially foreclosed from distributing its word processing and spreadsheet applications in the finished goods channel.

Novell argues at length that it should be permitted to "aggregate" foreclosure from various distribution channels to reach a level of substantial foreclosure that could be actionable under Section 1. (Novell Opp. at 43-45.) Novell attempts to reach this threshold by aggregating foreclosure from an allegedly "restrained group" of distributors that were parties to the "Avalanche agreements" Novell now seeks to challenge. Novell argues that distribution via the allegedly "restrained group" "accounted for around 60 percent of Microsoft's word processing and suites sales" in the first half of 1995. (Novell Opp. at 44-45.) But Novell cannot aggregate foreclosure that it did not actually suffer. *See Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1163-64 (9th Cir. 1997) (considering only exclusive dealing contracts for purposes of determining whether there was substantial foreclosure, and finding no substantial foreclosure where ample alternative channels of distribution existed).

Novell admits that it distributed 48 percent of its word processing and spreadsheet applications through the allegedly "restrained group" of distributors in 1995. (Novell Opp. at 46.) That is utterly inconsistent with the notion that Novell was completely foreclosed from this channel—even assuming such a gerrymandered group of distributors can properly be viewed as a distribution channel for purposes of Section 1. If Novell sold nearly half of its word processing and spreadsheet applications through the allegedly "restrained group" of distributors, it plainly was not foreclosed from using those distributors, much less having been foreclosed from the finished goods channel of distribution as a whole. Thus, even if it were permissible for Novell to alter its existing count VI—which is limited to the "OEM channel" as Novell expressly represented to this Court and the Court of Appeals—the new claim Novell seeks to assert is deficient as a matter of law.

CONCLUSION

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

Respectfully submitted,

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