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

CALDERA, INC.,
 	
        Plaintiff,
 	
vs.
 	
MICROSOFT CORPORATION,
 	
        Defendant.
	CALDERA INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON "PRODUCT DISPARAGEMENT" CLAIMS
	
	Judge Dee V. Benson
	Magistrate Judge Ronald N. Boyce
	
	Case No. 2:96CV645B
	
	FILED UNDER SEAL

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Plaintiff Caldera, Inc. respectfully submits this Memorandum in Opposition to Defendant's

Motion for Partial Summary Judgment on Plaintiff's "Product Disparagement" Claims.

I.   INTRODUCTION

. . . as FUD is our witness, we will never go hungry again.

Microsoft OEM Account Manager. Exhibit 261.[1]

Microsoft's motion isolates one subpart of one of the several related and predatory practices

that Microsoft used to destroy DR DOS, the only serious competitive threat to Microsoft's PC desktop

operating system monopoly. Caldera alleges and will prove the following predatory acts by Microsoft:

(1) exclusionary licensing practices, including per processor and per system licenses, minimum

commitment license terms, and unreasonably long license agreements; (2) false product announcements

("vaporware"); (3) unlawful tying arrangements between MS-DOS and Windows, Microsoft's popular

graphical user interface ("GUI"); and (4) creation of "fear, uncertainty and doubt" (which Microsoft

Microsoft's FUD campaign included at least the following:

- Warning the market that changes in *future* versions of Windows might render DR DOS incompatible—and then carrying through on the threat during the Windows 3.1 beta program;[2]

- Making false and misleading statements to computer makers and others about DR DOS, and especially about DR DOS's compatibility with Microsoft Windows;

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[1] All exhibits cited herein are exhibits to Caldera's Consolidated Statement of Facts, unless otherwise stated.

[2] *See* Consolidated Statement of Facts at ¶ 124 and Exhibit 80 thereto. The beta program included thousands of computer users, all of whom were provided copies of Windows 3.1 before it was released for sale to the general public. The program served several purposes. It allowed Microsoft to have Windows tested in a variety of environments. It also served an important marketing purpose, for it allowed the press and influential users to preview the product. Finally and most important for purposes of this motion, it allowed independent software developers to test their products with Windows 3.1 to ensure compatibility.

- Blacklisting DRI from participating in the Windows 3.1 beta program, thus ensuring that users would encounter errors when they tried to run Windows with DR DOS;[3]

- Taking advantage of the blacklisting by making public allegations that the problems users were encountering running DR DOS with Windows were the fault of DR DOS and it was up to DRI to fix them—secure in the knowledge that blacklisting DRI from the Windows 3.1 beta program ensured that DRI could neither diagnose nor fix the problems;[4]

- Including code in Windows 3.1 during the beta program that was designed solely to display false error messages if a user tried to run Windows 3.1 on DR DOS;[5]

- Introducing bugs in Windows 3.1 that caused fatal errors when users tried to setup Windows on DR DOS;[6] and

- Including code in Windows 3.1 during the beta program that prevented users from running Windows with DR DOS.[7]

This motion does not address all of Microsoft's related predatory acts. It does not even address the entire FUD campaign. Rather, Microsoft has chosen to address just one piece of the FUD campaign, the false and misleading statements that Microsoft made, among other things, (1) to create the perception that DR DOS and Windows were not compatible; (2) to conceal Microsoft's knowledge that DR DOS and Windows were, in fact, compatible or could easily be made so; (3) to conceal the fact that Microsoft placed a false, nonfatal error message in the Windows 3.1 beta to create the perception that DR DOS and Windows 3.1 were not compatible; (4) to conceal the fact that Microsoft created intentional incompatibilities between DR DOS and Windows 3.1; and (5) to conceal the fact that Windows 95 was nothing more than a packaging of two separate products, MS-DOS and

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[3] *See* Consolidated Statement of Facts at ¶¶ 91-102.
[4] *Id.*
[5] *Id*. at 102-112.
[6] *Id*. at 112-121.

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Windows.[8] Caldera's response here thus addresses, consistent with the narrow focus of Microsoft's

motion, the false and misleading statements Microsoft made as one part of its FUD campaign. Caldera

will respond in separate memoranda to the other aspects of Microsoft's FUD campaign—including beta

blacklisting, threats regarding potential future compatibility problems between DR DOS and Windows,

and software code in Windows 3.1 that produced false error messages, bugs, and intentional

incompatibilities with DR DOS.

Microsoft mischaracterizes Caldera's FUD campaign allegations in this regard as a "product

disparagement" claim. Caldera's Complaint does not allege product disparagement. Rather, Caldera

alleges the more insidious and devastating practice of creating false perceptions regarding the

compatibility of complementary products.[9] Microsoft knows, as do all other industry participants, that

because the market cannot understand every complexity of a software product, industry perceptions

about a new product can be more important than reality. As a Microsoft senior manager stated:

> [P]erception is the most important—*it's the important determining factor*, since what people think and what is actually true aren't necessarily connected, and what they believe is more important.

Freedman Dep. at 10-11, Record Support, v.1 to Consolidated Statement of Facts. Brad Silverberg,

the head of Microsoft's desktop operating systems group, summarized the goal of Microsoft's FUD

campaign against DR DOS as follows:

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[7] *Id.*

[8] Microsoft's "divide and conquer" strategy in making summary judgment motions is both misleading and wasteful of judicial resources, but that is the subject of Caldera's separate motion to strike.

[9] Complementary software products are separate products that are designed to run with and enhance the value of each other. For example, word processing software, such as Microsoft's Word and Corel's WordPerfect, are

> We need to create the reputation for problems and incompatibilities to undermine confidence in DR DOS 6.0; *so people will make judgements against it without knowing the details or facts.*

Exhibit 227. The critical false perception that Microsoft sought to create was the perception that DR DOS would not be compatible with Windows.

Prior to 1988, MS-DOS enjoyed a monopoly position in the desktop operating system market. Bill Gates and other senior Microsoft executives readily conceded that MS-DOS was the "cash cow" responsible for Microsoft's success. Exhibit 110. With the entry of DR DOS in 1988, Microsoft faced for the first time a competitive threat on the desktop. Almost immediately, price competition by DR DOS caused a deterioration of Microsoft's revenues and profits. In 1989, Bill Gates estimated that without DR DOS, Microsoft's prices for MS-DOS would have been 30% to 40% higher. Exhibit 29. To make matters worse, in June 1990, DR DOS technologically "leapfrogged" MS-DOS by releasing DR DOS version 5.0, which included product features highly valued by the market and absent in MS-DOS. At about the same time, Microsoft released Windows 3.0, the first commercially successful version of Windows.

With the success of Windows, a critical requirement for a DOS operating system became the ability to run Windows, *i.e.*, to be "compatible" with Windows. As of 1990, both MS-DOS and DR DOS 5.0 were compatible with Windows 3.0. Thus, OEMs and PC users who wanted Windows could use either MS-DOS or DR DOS as their underlying operating system. Microsoft recognized it could eliminate DR DOS as a competitor if it created the false perception that DR DOS would not be

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designed to run "on top of" an operating system. Greater demand for word processing software therefore enhances

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1.   Caldera admits that the First Amended Complaint includes the quoted statements.

2.   Caldera admits that the First Amended Complaint includes the quoted statements.

3.   Caldera admits the Leitzinger report includes the quoted statements.

4.   Caldera admits that the First Amended Complaint includes the quoted statements.

Caldera denies that DR DOS was designed to be nothing more than the functional equivalent of MS-DOS. DR DOS was clearly technologically superior to MS-DOS. *See* Goodman Report at 17-19, Record Support, v.6 to Consolidated Statement of Facts.

5.   Caldera admits that Phil Balma testified to the quoted statement. Caldera further asserts that "clone" is not an accurate description of DR DOS because DR DOS was clearly technologically superior to MS-DOS. *Id.*

6.   Caldera admits paragraph 6.

7.   Caldera admits paragraph 7.

8.   Caldera admits that John Goodman included the quoted statement in a 1994 article.

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demand for the underlying operating system.

9.   Caldera admits paragraph 9.

10.   Caldera admits that Dick Williams testified that DR DOS version 3.31 would not run Windows version 2.0.

11.   Caldera denies paragraph 11. Microsoft misquotes the document.

12.   Caldera denies paragraph 12. Microsoft mischaracterizes the document. The author states that he and his staff found "a few bugs" and that DR DOS "was for the most part functionally compatible to MS-DOS." Microsoft also omits the remainder of the conclusion, which states: "I do feel however that DRI is on the brink of a product which could be a very viable and affordable alternative to MS-DOS once the incompatibilities are ironed out and it has undergone more intense testing. Once this is done, Delta should re-evaluate this operating system and then re-evaluate the contract."

13.   Caldera admits paragraph 13.

14.   Caldera denies paragraph 14. The paragraph suggests that others at DRI shared Mr. Shelton's views, but offers no evidence to support this contention. The paragraph also mischaracterizes Mr. Shelton's views. Mr. Shelton asserts that there were a certain number of SPRs outstanding when DR DOS 5.0 shipped. An SPR is a software performance report, which may or may not reflect an incompatibility. The reports track reports of bugs, and they may or may not be accurate. Deposition of Michael Greenwood ("Greenwood Dep.") at 63, attached as Exhibit 1 to Declaration of Lynn M. Engel ("Engel Decl."); Deposition of Susan Nageotte ("Nageotte Dep."), attached as Exhibit 2 to Engel Decl. Moreover, the paragraph is misleading about the nature of software generally and the quality of DR

DOS software specifically, for it fails to mention the number of bugs key Microsoft products actually

had when released. Those bug counts, according to the lead Microsoft developer with responsibility for

the products, were:

> MS-DOS 5.0   "low hundreds"
>
> Windows 3.0   "low thousands"
>
> Windows 3.1   "low thousands"

Barrett Dep. at 117-18, Record Support, v.1 to Consolidated Statement of Facts.

15.   Caldera admits that the referenced NSTL document states that OS/2 LAN Manager

and LANtastic were not compatible with DR DOS, but denies the remainder of paragraph 15.

16.   Caldera denies paragraph 16. *See* Ivie Report at 22-37 and referenced attachments

thereto, Record Support, v.6 to Consolidated Statement of Facts.

17.   Caldera denies paragraph 17. The referenced exhibit is a subset of messages shared

among Windows 3.1 beta users. DRI was not permitted to test DR DOS with the Windows 3.1 beta,

because Microsoft blacklisted DRI from the Windows 3.1 beta program. The exhibit does not refer to

or otherwise relate to testing by DRI after the release of Windows 3.1.

18.   Caldera admits that Ms. Clifton testified as quoted.

19.   Caldera admits paragraph 19.

20.   Caldera admits that Microsoft made it nearly impossible to ensure DR DOS 6.0

compatibility with Windows 3.1 as of the release date of Windows 3.1, because Microsoft blacklisted

DRI/Novell from the Windows 3.1 beta program. *See* Consolidated Statement of Facts at ¶¶ 198-

222. The blacklisting was part of Microsoft's plan to prevent users from running Windows with DR

DOS. *See, infra*, Statement of Additional Material Facts at ¶¶ 19-27 and Caldera's Opposition to

Microsoft's Summary Judgment Motions on Alleged Intentional Incompatibilities and Perceived

Incompatibilities. Caldera further admits that Mr. Corey testified as quoted.

21. Caldera admits that Microsoft accurately quoted the referenced document (but notes

that the document was a draft and markings on the document suggest it was not circulated).

22. Caldera denies paragraph 22. The document lists "problems being reported," not

incompatibilities between DR DOS and any other product. Moreover, the document notes that it is

difficult to determine whether the reported problems are actual problems or the result of user errors, and

the only Windows problems on the list are noted as "patched" (which means they have been resolved).

In general, the paragraph is an attempt to provide a misleading impression of DR DOS quality. *See* Ivie

Report at 23, 34, Record Support, v.6 to Consolidated Statement of Facts.

23. Caldera admits that the referenced article is quoted accurately, but denies that the article

states their users were reporting "a host of glitches" as represented by Microsoft.

24. Caldera admits that the referenced document is quoted accurately.

25. Caldera denies paragraph 25. The referenced memo was not authored by Jody Clifton

and it does not, in any event, accurately reflect the level of DRI's technical support for DR DOS. Sue

Nageotte, the DRI manager responsible for DR DOS 6.0 technical support, testified that the statements

about the call backlog in the memo were incorrect and that technical support "quickly crunched

through" whatever backlog of calls existed. Nageotte Dep. at 233-34, attached as Exhibit 2 to Engel Decl.

26.   Caldera admits that the referenced document is quoted accurately.

27.   Caldera admits paragraph 27.

28.   Caldera admits that the referenced document is quoted accurately, but denies that the document sets forth an accurate or complete representation of Mr. Lynn's views or an either accurate representation of the quality of Novell DOS 7.0. *See* Deposition of Shawn Lynn ("Lynn Dep.") at 124-45 attached as Exhibit 3 to Engel Decl. (noting many favorable features in Novell DOS 7.0 and conceding that the testing had been done as "idiot" testing); Ivie Report at 22-37 and referenced attachments thereto, Record Support, v.6 to Consolidated Statement of Facts.

29.   Caldera admits that the referenced document is quoted accurately. Caldera denies that it is an accurate or complete representation of Dr. Goodman's opinions regarding Novell DOS 7.0. *See* Goodman Report at 22, Record Support, v.6 to Consolidated Statement of Facts.

30.   Caldera admits that the referenced document is quoted accurately. Caldera denies that it is an accurate or complete representation of Dr. Goodman's opinions regarding Novell DOS 7.0. *See* Goodman Report at 22, Record Support, v.6 to Consolidated Statement of Facts.

31.   Caldera admits paragraph 31.

32.   Caldera admits that the referenced document is quoted accurately (although it is miscited), but denies the remainder of paragraph 32. The quoted statements are in a draft document by an unknown author. In fact, the trade press was reporting favorably on DR DOS during this period, *see*

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Consolidated Statement of Facts at ¶¶ 346-351, and Microsoft was very concerned that Novell's

acquisition of DRI would further strengthen DR DOS as a competitor to MS DOS. *Id.* at ¶¶ 169-184.

33.   Caldera admits that Mr. Singh's testimony is quoted accurately.

34.   Caldera admits that the referenced article contained the quoted language. Caldera

denies the remainder of paragraph 34. Novell did not kill the DOS market. Microsoft did, by

announcing and eventually releasing Windows 95, which eliminated the market for standalone DOS

products. *See* Consolidated Statement of Facts at ¶¶ 176-182; 185-187.

III.   STATEMENT OF ADDITIONAL MATERIAL FACTS

The following statement of additional material facts provides a brief overview of the facts

relevant to Microsoft's FUD campaign, with particular emphasis on Microsoft's false and misleading

statements. The complete statement of all relevant facts is contained in Caldera Inc.'s Consolidated

Statement of Facts (which is incorporated by reference as if set forth in its entirety).

A.   DR DOS Was Superior to MS-DOS and Compatible With DOS Applications, Including Windows.

1.   DR DOS provided PC users and OEMs with a technologically advanced desktop

operating system. When DR DOS 5.0 was released in May 1990, software industry reviewers

confirmed its superiority to MS-DOS and its compatibility to run DOS applications, including

Microsoft's Windows:

> DR DOS 5.0 . . . is one hundred per cent DOS-compatible. . . .

Engel Decl., Exhibit 4 (*PC User*, May 23, 1990).

In the course of a normal day's work you probably wouldn't notice any difference between how you'd interact with MS-DOS or DR DOS. I found no compatibility problems with a broad selection of applications including several word processors, programming tools, debuggers, TSRs, DOS extender applications, three Com network software, the various Norton utilities, and (to my surprise) Windows 3.0.

Exhibit 78 (*PC Magazine,* September 25, 1990) (emphasis added).

. . . DR DOS 5.0 does all the things you wish MS DOS did. It's features include…full compatibility with MS DOS. . . . Everybody's DOS should be this advanced.

Exhibit 106 (*PC Magazine*, January 15, 1991) (emphasis added).

DR DOS 5.0 will run nearly any program that runs under MS DOS, including Microsoft Windows 3.0. *Compatibility is not an issue with DR DOS 5.0.*

Exhibit 109 (*PC Magazine*, February 12, 1991).

Dr DOS a completely competitive operating system built on an aggressive philosophy that promises to force innovation. In a stodgy software world that has changed only reluctantly, this technological breath of fresh air is certainly refreshing.

Exhibit 109 (*PC Magazine*, February 12, 1991) (emphasis added).

2.   Microsoft recognized that DR DOS 3.3, released in 1988, was, "as good as our DOS .

. ", Exhibit 38 (statement by Bill Gates); and that DR DOS 5.0, released in June 1990, was "a far

superior product …", Exhibit 120 (statement by Joachim Kempin, Microsoft's Director of Worldwide

OEM Sales).

B. **Microsoft Performed Internal and Third Party Testing to Confirm DR DOS' Quality and Compatibility.**

3.   Internal Microsoft testing and evaluation confirmed that DR DOS was compatible with

all-important DOS applications, including Windows. One Microsoft tester reported to a senior

Microsoft development manager:

> Last Thursday you asked me for a user's view of DR DOS 5.0….
> 1) DOS compatibility
>
> The most important reason to use ANY version of DOS is to run DOS
> apps. DR DOS 5.0 runs every DOS app I know.
>
> DR DOS 5.0 works successfully with Windows (2.11, win 386 2.11
> and Windows 3.0 and 3.0a)….

Exhibit 123.

4.   In addition to testing DR DOS itself, Microsoft contracted with National Software

Testing Laboratory (NSTL), an independent testing lab, to test DR DOS 5.0 "with networking

software, a memory manager, dos and win apps and anything else you can think of that might raise

some degree of incompatibility." Exhibit 116.

5.   NSTL confirmed Microsoft's internal testing: DR DOS 5.0 was compatible with all

important DOS applications, networking software and graphical extensions of DOS, including Windows

3.0. *Id*.; *see also* Chestnut Dep. at 47, 54, Record Support, v.1 to Consolidated Statement of Facts.

C. **Microsoft Made False and Misleading Statements about DR DOS 5.0.**

6.   Notwithstanding the NSTL report, Microsoft made the following false and misleading

statements in a Microsoft presentation document entitled "MS-DOS 5 vs. DR-DOS 5 Comparison":

- Microsoft asserted that "many applications" had problems running with DR DOS. Exhibit 141. In fact, Microsoft hired NSTL specifically to find problems with DR DOS. NSTL tested 34 applications and could not find any (even minor) problems with 29 of these applications. There were only five applications for which they reported any problems at all. Declaration of Evan Ivie ("Ivie Decl.") at ¶ 3.

- A chart indicating DR DOS 5.0 had problems running with dBASE IV. Exhibit 141. In fact, NSTL reported two minor problems with dBASE IV. One cannot be repeated. The second occurred with both DR DOS 5.0 and MS-DOS 5.0. Ivie Decl. at ¶ 3.

- A chart indicating DR DOS 5.0 had problems running with Sidekick Plus. Exhibit 141. In fact, NSTL found one minor and one major problem with Sidekick Plus. The minor problem had a simple workaround. The major problem, file locking, was a more significant problem for MS-DOS 5.0 than for DR DOS 5.0. Ivie Decl. at ¶ 4.

- A chart indicating DR DOS 5.0 had problems running with Software Carousel. Exhibit 141. In fact, NSTL reported three minor problems with Software Carousel. One problem occurred with MS-DOS 5.0 as well. A second problem was more serious for MS-DOS 5.0 than for DR DOS 5.0. The third reported problem had a simple workaround solution. Ivie Decl. at ¶ 3.

7. Microsoft made other false and misleading statements about DR DOS 5.0. For example, in an August 17, 1990 letter from Deborah Flynn, a Microsoft OEM Account Manager, to

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Jeff Scherb, Vice President at Commodore Business Machines, Microsoft made the following

misleading statements about DR DOS 5.0:

- DR DOS 5.0's password protection feature "simply marks the file as hidden

  73. This is not true. DR DOS 5.0's password protection can be done at the R, W and

  D (read, write and delete) levels and files, directories and the global system can also be

  passworded. Ivie Decl. at ¶ 2.

8.   Another example of Microsoft's false and misleading statements is a "summary of

incompatibility problems" for DR DOS 5.0, dated September 10, 1990, that Microsoft distributed to its

OEM account managers, trade press and Waggener Edstrom, its outside public relations firm:[10]

- Microsoft asserted that Paradox/386 fails when running with DR DOS 5.0. Exhibits 76

  and 85. This is not true. Paradox/386 runs as specified with DR DOS 5.0. Ivie Decl.

  at ¶ 2.

- Microsoft asserted that Paradox/386 displays a "protection error" message when

  running on DR DOS 5.0. Exhibits 76 and 85. This message does not appear when

  Paradox/386 runs with DR DOS 5.0. Ivie Decl. at ¶ 2.

- Microsoft asserted that SpinRite fails when DR DOS is loaded high with default

  parameters. Exhibits 76 and 85. This is not true. SpinRite runs as specified with DR

  DOS 5.0. Ivie Decl. at ¶ 2.

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[10] Microsoft often used Waggener Edstrom as a conduit to pass information to the software industry press and the general media. *See* ¶ 16, *infra.*

- Microsoft asserted that Peachtree Complete Accounting fails when running with DR

  DOS 5.0. Exhibits 76 and 85. This is not true. Peachtree Complete Accounting

  works as specified with DR DOS 5.0. Ivie Decl. at ¶ 2.

D.   Microsoft Tested and Made False and Misleading Statements About DR DOS 6.0.

9.   DR DOS 6.0 was released in September 1991. Once again, industry reviewers gave it

high marks:

> Keeping one step ahead of Goliath, Digital Research this week
> announced and shipped DR DOS 6.0—its reply to Microsoft's recently
> released MS DOS 5.0. Judging from our first look at Digital's most
> recent operating system, DR DOS 6.0 offers an impressive list of DOS
> management features in better memory management.

Exhibit 180 (*InfoWorld*, September 16, 1991).

> VERDICT: more of an operating system than MS DOS, with no
> obvious disadvantages.

Exhibit 193 (*PC User*, September 25, 1991).

> DR DOS has a lot going for it. DRI had already made significant
> headway against MS-DOS earlier this year with DR DOS 5.0 and
> DRI's successful "toss your DOS" campaign. *Microsoft's release of*
> *MS-DOS 5.0 this summer was clearly in response to the growing*
> *acceptance of DR DOS 5.0.*
>
> Now, only months after the release of MS-DOS 5.0, DRI has again
> stepped ahead with the release earlier this month of DR DOS 6.0,
> which once again matches and exceeds the features and capabilities of
> Microsoft's product. Starting from a small base, DR DOS is clearly
> gaining market share.

Exhibit 200 (*PC Week*, September 30, 1991) (emphasis added).

> Best of COMDEX/FALL

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Exhibit 228 (*Business Wire*, October 24, 1991).

10.   Once again, Microsoft immediately performed internal testing of DR DOS 6.0 to

determine its quality and compatibility. On September 19, 1991, Microsoft assigned at least 11 of its

internal developers to spend 2-3 days testing DR DOS 6.0. Lennon Dep. at 220. One developer was

specifically assigned to test Windows 3.1. Exhibit 210.

11.   In addition, in November 1991, Microsoft contracted XXCAL Testing Laboratories to

put DR DOS 6 "through the ringer." Exhibit 168. XXCAL submitted its report on November 13,

1991.

12.   Following its testing of DR DOS 6.0, Microsoft again proceeded to make false and

misleading statements about DR DOS's quality and compatibility. For example, an attachment to an e-

mail dated October 17, 1991 from Richard Freedman to Brad Chase comparing DR DOS 6.0 and

MS-DOS 5.0 that was distributed to OEMs (Freedman Dep. at 242-246, Record Support, v.1 to

Consolidated Statement of Facts), contains the following false and misleading statements:

- Microsoft asserted that DR DOS 6.0's undelete function uses a "non-standard

  implementation." Exhibit 390. DR DOS 6.0 uses the same standard MS-DOS 5.0

  uses. If the DELWATCH feature in DR DOS 6.0 is not turned on, there is no

difference between DR DOS 6.0's and MS-DOS 5.0's undelete method. Ivie Decl. at

4.

- Microsoft asserted that Norton or PC Tools cannot undelete the DR DOS 6.0 files.

  Exhibit 220. Again, if the DELWATCH feature in DR DOS 6.0 is turned on, Norton 5

  can see this and undelete the files. Ivie Decl. at ¶ 4.

13.   Another example is a Microsoft document entitled "MS-DOS vs DR-DOS

Comparative Review," comparing MS-DOS 6.2 and DR-DOS 7, that was "used as a sales tool by

Microsoft OEM and Field Sales Reps." Exhibit 390. It contains the following false and misleading

statements:

- At page 4, Microsoft states "PC Week also reported that DR DOS 7 is likely to break

  third party memory managers." What PC Week actually said was, "the multitasking [in

  Novell DOS 7] will probably also break third party memory managers…." Ivie Decl.

  5 and Engel Decl., Exhibit 5.

- At page 12, Microsoft states that DR-DOS 7 (Novell DOS 7) does not have a disk

  analysis and repair tool. Novell DOS 7, in fact, does have a disk analysis and repair

  tool that works inclusively on compressed disks. This is included in Novell DOS 7's

  CHKDSK utility. Ivie Decl. at ¶ 5.

**E.   Microsoft Conducted a FUD Campaign to Convince PC Users and OEMs That
DR DOS Could Not Remain Compatible With Windows.**

14.   Knowing that DR DOS was a compatible, indeed superior, DOS operating system,

Microsoft nonetheless undertook a campaign to create "fear, uncertainty and doubt" regarding the

quality and compatibility of DR DOS, especially its compatibility to run Microsoft's popular Windows

software application.[11]

15.   Immediately following DR DOS 5.0's release, Microsoft began telling industry press

that Microsoft would impede DR DOS' ability to be compatible. For example, Microsoft's outside

public relations firm, Waggener Edstrom, reported it would meet with "a lot of editors" regarding MS-

DOS 5.0 in 1990, and:

> *informally* plant the bug of FUD in their ears. Have you heard*
> *about problems with DR DOS? … We'll do this very tactfully. If*
> *Digital Research came to Microsoft for help making DR DOS work*
> *with Windows, would Microsoft help them? Maybe not?*

Exhibit 86 (emphasis added).

16.   Microsoft instructed its account managers to tell OEMs that, if they licensed DR DOS,

they "could blow their whole pc business" since DR DOS "could not be compatible" with *future*

versions of Windows. For example, Microsoft account managers were given the following instructions:

How should we sell against DRI

> . . .
> For OEMs committed to shipping Windows, *only we can ensure 100 percent*
> *compatibility with future versions of DOS and Windows.*

Exhibit 80 (emphasis added).

> you need to be clear to them that dr dos and windows will get them
> complaints… *in addition, they will get even more questions later as*
> *we update ms-dos 6 and windows as dr dos could not be*
> *compatible.*

---

[11] Microsoft knew that, since OEMs needed to offer Windows to be competitive, they would not license DR DOS if
it might be incompatible. As Joachim Kempin, Director of Worldwide OEM Sales, stated, an OEM "will hurt if they

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Exhibit 159 (emphasis added).

> also ask them if they really want to risk their reputation on their brand
> new machines with a brand new unproven poorly tested os. *what if it
> doesn't work with the next version of windows? they could
> literally blow their whole pc business—first impressions are hard to
> overcome if they blow it.*

Exhibit 173 (emphasis added).

17.   Having told PC users and OEMs that Microsoft would make it difficult for DR DOS to

maintain compatibility with Windows, Microsoft proceeded to make good on its threat.

18.   Microsoft knew it was improper and anti-competitive to deny DRI information relating

to Windows. For example, when DRI requested information about the Windows 3.1 virtual device

driver (VxD), Microsoft's software developers and development managers stated:

> *Chatterly* (Win/DOS Developer):
> *However, I think it has been decided that Digital Research will not
> be supported.* … Quite some time back DRI was sent a very early
> version of the VxD. I don't know what to tell them. I guess, we must
> somehow politely let them know that we don't want to support them. *I
> don't feel very comfortable in this situation and would not want to
> deal with Digital myself.*
>
> *Quigley* (Windows Developer):
> What do we do with this? *I think its reasonable to give them the
> latest version of this VxD* and tell them it is unsupported.
>
> *Abel* (Windows Group Product Marketing Manager):
> I think what danq suggests is reasonable. *I'm of the opinion that
> people like dri get this stuff anyway and we need to give equal
> access to equivalent third parties to this sort of stuff.*

Exhibit 97 (emphasis added).

> *Cole* (MS DOS/Windows Group Program Manager):

> *Uhmm . . . denying DRI the VxD smells of an antitrust lawsuit.*
> *You're not supposed to use your control of one market, in this case*
> *Windows, to influence another market, in this case DOS. Err*
> *something like that.*
>
> I think this will blow up if we don't give them the VxD.

Exhibit 99 (emphasis added).

19.   Notwithstanding, Microsoft excluded DR DOS from the Windows 3.1 beta program

and took other steps to deny Windows information to DRI. *See* Exhibits 131 and 146.[12] Software

companies that participated in the Windows beta program received pre-release versions of Windows so

they could develop complimentary products that would be compatible with Windows, and have those

products ready for release at the same time as Windows. Cole Dep. at 88-90, Record Support, v.1 to

Consolidated Statement of Facts; *see also* Barrett Dep. at 91-92, Record Support, v.1 to

Consolidated Statement of Facts. Exclusion from the beta program would ensure that a software

company would not be able to have Windows' compatible complimentary products ready for release at

the same time as Windows.

20.   The decision to exclude DR DOS was made by Brad Silverberg, Vice President of

Microsoft's Operating Systems Division, and Steve Ballmer, the Microsoft executive ranking second

only to Bill Gates:

> *Cole:*
> *Verify nothing, we need to jump up and down and scream our*
> *brains out about this. We cannot let DR DOS get beta versions of*
> *Windows.* Bradsi, [Silverberg] is this too drastic?

---

[12] Exhibit 140 also contains all subsequent versions of the "beta blacklist" that Caldera identified in Microsoft's
files.

Exhibit 147 (emphasis added).

> *Silverberg*:
> *after I learned that we sent dr the win vxd I went on a rampage*
> *and everyone assured me dr was off of all our mailing lists.*
> *how could this happen?*

Exhibit 135 (emphasis added).

> *Silverberg*:
> There should be NO HELP for DRI. They are totally on their own. Do
> we know if DR has Win 3.1? They are NOT an official beta tester.

> *Arnej*:
> *From an FTC standpoint situations like this could be very*
> *dangerous, and should probably be handled by higher*
> *management.*

> *Ballmer*:
> *brad pls make sure we are not supporting DRI anywhere in the*
> *company with this stuff thx*

> *Silverberg:*
> Digital Research would like someone to become a beta site. They
> would like to enable their operating system [DR DOS] to support
> Windows 3.10. Specifically they need to modify the Load Hi VxD
> (now part of VMM) allowing their memory manager to function
> correctly.
> Um, I don't think so.
> kala, please make sure this request doesn't get filled.

Exhibit 158.

> 21.   Microsoft knew that it was wrong to selectively exclude DR DOS from the Windows

beta program. Waggener Edstrom, Microsoft's outside public relations firm, warned Silverberg:

> PR is going to have limited ability to help you if Microsoft is deliberately
> and selectively keeping DRI from participating in the beta program.
> That is, if you are making a special case of them that is not consistent

with the way that the beta program is being administered for the rest of the industry.

Exhibit 238.

22.   Yet selective exclusion is precisely what Microsoft did. For example, Novell was a

Windows 3.1 beta site because Microsoft wanted to ensure that Windows would run with Novell's

popular networking software, Netware, even though Netware competed with Lan Manager,

Microsoft's networking software. But when the DRI/Novell merger was announced, Microsoft took

immediate steps to prevent Novell from giving DRI the Windows 3.1 beta:

> *Cole*:
> Surely something in the [nda] agreement must cover a "redefinition" of what the heck
> the "company" is … We should have a telegram issued first thing in the morning from
> MS Legal which forbids Novell to hand beta Windows over to DR.

Exhibit 147.

> *Silverberg:*
> Novell can certainly test themselves with dr-dos. *but cannot*
> *distribute our beta to digital research.*
> *. . . .*
> remind kaikal that we do not support windows on DR DOS. they are
> on their own. < there are plenty of problems, too. hee hee >

Exhibit 191 (emphasis added).

23.   Like Netware, DR DOS does not compete with Windows. The two products are sold

in separate markets.[13]

> *Cole*:

---

[13] Windows is a graphical extension that gives the user the ability to control the PC by "clicking" on graphical
icons rather than by entering typewritten commands.

> *Uhmm . . . denying DRI the VxD smells of an antitrust lawsuit. You're not*
> *supposed to use your control of one market, in this case Windows, to influence*
> *another market, in this case DOS. Err something like that.*

Exhibit 99 (emphasis added).

> *PC Week*:
> Microsoft officials have said they won't help Digital Research, Inc.
> (DRI) resolve incompatibilities between Windows 3.1—*over which*
> *the companies don't compete*—and DRI's DR DOS 6.0, which
> challenges Microsoft's DOS monopoly.

Exhibit 254 (emphasis added).

      24.   Nonetheless, as early as 1991, Microsoft began propagating the fiction that Windows

3.1 and DR DOS were both "operating systems," thus, it was okay to exclude DRI from the beta

program:[14]

> *Silverberg:*
> We recently decided to start referring to Windows as an operating
> system in our communications, not a graphical environment or user
> interface for dos. we should be consistent in the new usage. thanks.

Exhibit 164.

> *Silverberg Public Statement*:
> *Windows is an operating system.* That's how we view it and certainly
> a sign of how it will evolve.

Exhibit 443 (emphasis added).

---

[14] For proper perspective, the Court should know that Microsoft at this exact juncture instructed its OEM field operatives to swipe a DR DOS 6.0 beta if the opportunity arose, so that it could be reviewed by developers of MS-DOS. On September 5, 1991, one of Brad Chase's (MS-DOS Group Product Manager) subordinates wrote: "On my travel around my OEM customers, I've managed to view DR DOS 6.0 on several occasions. During these visits, I have been able to lay my hands on the final beta release of the product together with the glossy outer packaging that they are going to use when the product is lunched. . . . Would you like me to send the disks and package to you as a matter of urgency." Brad Chase replied: "Wow you bet. Please send these disks and all other information the fastest way possible." Exhibit 169. Within a week, the DR DOS 6 beta copies had been received, distributed to developers to compare to MS-DOS 5.0, and raked over the coals to come up with FUD points. Exhibit 178.

25.   In fact, Windows 3.1 is not a "operating system." It is an extension of DOS that

requires the underlying DOS operating system—either MS-DOS or DR DOS—to run. Thus, like

Netware, DR DOS competes with another Microsoft product—MS-DOS. But it does not compete

with Windows.

26.   Microsoft's expert, Professor Hausman, admits that *inclusion* of DR DOS in the

Windows beta program would benefit sales of Windows since it would enhance the attractiveness of

Windows to DR DOS users, and it might add value to Windows itself:

> Q: Well, if DR DOS ran Windows faster and better it could be a
> benefit to Windows?
>
> A: Oh, yeah. There are improvements that they could make that,
> theoretically, could sell more Windows.

Hausman Dep. at 101-105, attached as Exhibit 6 to Engel Decl.

27.   Moreover, Professor Hausman concedes that Microsoft *excluded* DR DOS to harm

DR DOS' ability to compete with MS-DOS:

> Q: But it was principally – it was principally the competition between DR DOS and
> MS-DOS that in your mind would motivate Microsoft to exclude the owners of
> DR-DOS from the Windows 3.1 Beta?
>
> A: I think at that time they saw the principal competition from DR DOS that way
> ….
>
> Q: Okay, and wouldn't inclusion …if it occurred …be a benefit to Windows?
>
> A: It could be a benefit to Windows, but it would be a detriment to the overall
> Microsoft, and that's what they were looking at.
>
> Q: It would be a detriment to Microsoft sales of MS-DOS, right?

A: It could be, yes.

Hausman Dep. at 104-105, attached as Exhibit 6 to Engel Decl.

28.   As shown above, Microsoft used false and misleading statements, threats of *future* incompatibility, and exclusion of DR DOS from the Windows beta program to condition the market to fear that DR DOS could not maintain compatibility with Windows.

29.   Having so conditioned PC users and OEMs, Microsoft initiated the next part of its FUD campaign: Microsoft put code in the Windows 3.1 beta that prevented DR DOS from running and it put encrypted software code in Windows 3.1 beta that displayed a "non-fatal" error message designed to cause users to believe that Windows was not compatible with DR DOS. *See* Hollaar Decl. at ¶¶ 1-6; Hollaar Report at 2-14, Record Support, v.6 to Consolidated Statement of Facts.

30.   Microsoft knew, of course, that DR DOS either was compatible or could easily be made compatible with Windows 3.1, unless Microsoft took specific actions to prevent compatibility. Microsoft documents make it clear that the initial version of the Windows 3.1 beta was fully compatible with DR DOS. On October 29, 1991, Freedman reported that he had tested a Windows 3.1 beta on DR DOS 6.0; that Windows 3.1 ran just fine; and *"In short, I haven't seen any basic kernel incompatibilities."* Exhibit 230 (emphasis added).

31.   Moreover, despite Microsoft's exclusion of DRI from the Windows beta program and its creation of intentional incompatibilities between DR DOS and Windows, within days of Microsoft's release of Windows 3.1 Novell shipped an update to allow DR DOS 6.0 to run under Windows 3.1. Exhibit 293.

32.   By then, though, Microsoft had accomplished its objective of creating fear of Windows compatibility problems.

33.   Microsoft knew that with software products "perception is the most important determining factor." Freedman Dep. at 10-11, Record Support, v.1 to Consolidated Statement of Facts. Accordingly, Microsoft designed the non-fatal error message to create the critical misperception that would kill DR DOS: the misperception that DR DOS was not compatible with Windows. Barnett Report at 15, Record Support, v.6 to Consolidated Statement of Facts.

34.   In September 1991, David Cole, Microsoft's MS-DOS and Windows program manager, outlined the plan to Brad Silverberg, Microsoft's senior executive responsible for MS-DOS and Windows:

> It's pretty clear we need to make sure Windows 3.1 only runs on top of MS DOS or an OEM version of it. *I checked with legal, and they are working up some text we are suppose to display if someone tries to setup or run Windows on a alien operating system. We are suppose to give the user the option of continuing after the warning. However, we should surely crash at some point shortly later.*
>
> Now to the point of this mail. How shall we proceed on the issue of making sure Win 3.1 requires MS DOS. We need to have some pretty fancy internal checks to make sure we are on the right one. *Maybe there are several very sophisticated checks so that competitors get put on a treadmill.* Aaronr [Aaron Reynolds][15] had some pretty wild ideas after 3 or so beers, earleh has some too. *We need to make sure this doesn't distract the team for a couple of reasons 1) the pure distraction factor 2) the less people know about exactly what gets done, the better.*
>
> Please advise.

---

[15] In 1988, Aaron Reynolds (a Microsoft developer) did work at Bill Gates' direction to detect DR DOS and find the differences between DR DOS and MS-DOS.

Exhibit 206 (emphasis added).

35.   Shortly thereafter, Aaron Reynolds wrote, tested and encrypted software code that detected DR DOS and displayed a "warning message" when Windows was run with DR DOS. Reynolds Dep. at 30-31, Record Support, v.2 to Consolidated Statement of Facts. He signed his initials "AARD" to the code.[16] *Id*.

36.   In November 1991, the decision was made to implement the AARD code in the final beta of Windows 3.1. Exhibit 239.

37.   Bill Gates said it best: "Every message coming out of a computer has the potential for 101-102. Accordingly, Microsoft chose a "warning" message that would scare users, without telling them whether there was an actual problem:

> What will be in the Final beta
> …. the message will say: *Non-fatal error detected: error # (Please contact Windows 3.1 beta support)*

Exhibit 248 (emphasis added).

38.   Microsoft intended that the message would make PC users and OEMs think the problem was DR DOS. Asked "what the guy is supposed to do" when he sees the non-fatal error the message, Silverberg responded:

> *What the guy is supposed to do is feel uncomfortable, and when he has bugs, suspect that the problem is DR DOS and then go out to buy MS-DOS. Or decide to not take the risk for the other machines he has to buy for in the office*.

---

[16] It is possible for a software developer to place his "signature" in software code he has written. This is what Reynolds did.

Exhibit 277 (emphasis added).
Exhibit 278 (emphasis added).

39.   But, as the author of the AARD code testified: "There's no problem." Reynolds Dep.

at 79, Record Support, v.2 to Consolidated Statement of Facts.

40.   The Windows 3.1 beta containing the AARD code and "non-fatal error" message went

out to 12,000 to 15,000 sites and to members of the press just prior to Christmas 1991. Cole Dep.

at 178, Record Support, v.1 to Consolidated Statement of Facts; Exhibit 290.

41.   As Microsoft intended, Windows 3.1 beta testers who ran Windows with DR DOS

and saw the non-fatal error message, wrongly concluded that the problem was DR DOS. *See* Exhibit

443.

42.   But Microsoft went even further then putting the false, non-fatal error message in the

Windows 3.1 beta. Microsoft intentionally created actual incompatibilities between DR DOS and

Windows 3.1. The details with respect to Microsoft's creation of intentional incompatibilities are set

forth in Caldera's Consolidated Statement of Facts at ¶¶ 243-264, and will be explained in detail in

Caldera's Opposition to Microsoft's Summary Judgment Motion on Alleged Intentional

Incompatibilities.

43.   As a means of concealing its bad conduct and magnifying the adverse impact of the

AARD code and non-fatal error message, Microsoft made repeated, false and misleading statements to

PC users, OEMs and software industry publications. Microsoft's false and misleading statements were

an integral part of its overall FUD campaign and cannot be separated from other aspects of the FUD

campaign that the false statements were intended to conceal and augment.

44.   Among other things, Microsoft falsely told Windows beta testers that MS-DOS was

"required" to run Windows:

> *Microsoft instructions to beta test support group:*
> For beta testers that report problems W/DR DOS and 3.1
> DR DOS is an untested and therefore unsupported operating system.
> *MS-DOS (or OEM versions of it) is required for Windows.* Using
> DR DOS with Microsoft Windows is at the sole risk of the user. We
> don't support it.

Exhibit 231 (emphasis added).

> *Microsoft response to beta tester on Compuserve forum:*[17]
> Greg, you should be able to get rid of the message by using MS-DOS
> instead of DR DOS.

Exhibit 443.

> OEMs who called Microsoft were told that "Windows was not supposed to work with
> DR DOS."

Reichel Dep. at 61-62.

> *Silverberg instruction to Windows beta support group:*
> "post a nice SOL ["shit out of luck?"] message. bottom line is that he needs ms
> something that is compatible with windows."

Exhibit 263 (emphasis added).

> *Silverberg instruction to Microsoft product support group:*
> windows is designed and tested for ms-dos. not dr dos. it says
> MS-DOS on the box, not MS-DOS or DR DOS . . . *this is what to*
> *tell the world (in a nice way). using a system other than ms-dos*

---

[17] Messages placed on the Windows 3.1 beta test Compuserve Forum could be read by anyone logging onto the Forum.

> *puts the user at his own risk. ...there is another "fix" for them: use ms-dos...*

Exhibit 292 (emphasis added).

> *Letter to DRI/Novell from DR DOS user:*
> This morning I called Microsoft Canada looking for help. *They told me I've purchased the WRONG operating system and that MSDOS 5 is the only answer.* To help me correct the error of my ways (purchasing DRDOS 6) *they will help me by exchanging my Digital Research products for Microsoft products providing, I give the letter outlining my problems and disappointment with your products and support.*

Exhibit 317 (emphasis added).

45.   In addition, despite the extensive DR DOS testing that Microsoft had done internally

and by independent testing laboratories (*see, infra,* Statement of Additional Material Facts at ¶¶ 3-5,

11-12, *supra*), Microsoft falsely told PC users, OEMs and software industry publications that

Microsoft did not test DR DOS:

> *Silverberg statement on Compuserve Forum:*
> Oh, I forgot to say that Windows is designed and tested to work with MS-DOS. We do no testing at all with DR DOS and we do not know first hand whether it's compatible with Win 3.1 or not. There is no code in Windows that says, "if DR-DOS then . . . ". We don't detect it.

Exhibit 443.

> *Microsoft instructions on what to tell a customer about DR DOS 6.0 compatibility:*
> The standard response is: *Windows is only tested with MS-DOS operating systems.* DR-DOS claims to be 100% compatible with MS-DOS, so if that is true, then the user shouldn't have any problems.
>
> *There is really nothing we can do.*

Exhibit 291 (emphasis added).

> *October 1991 report to Microsoft's OEM sales force on what to say about DR
> DOS and Windows 3.1:*
> "And Windows 3.1 is not being tested on DR DOS 5.0 and 6.0."

Exhibit 210.

> *Microsoft statement reprinted in InfoWorld:*
> Microsoft does not test Windows on anything other than Microsoft's
> MS-DOS. We don't have the development or testing resources, nor
> do we consider it our job to test Windows on other systems…

Engel Decl., Exhibit 7 (*InfoWorld*, November 22, 1993).

46.   As shown above, Microsoft designed the AARD code to detect DR DOS. As late as

January 28, 1992, the non-fatal message was to state: "The Windows setup program has detected

another operating system on your machine." Exhibit 270. Microsoft changed the text of the message to

blind the fact that its purpose was to detect DR DOS.

> *Silverberg:*
> I am wondering if we should change the detection words to say we failed to detect
> MS-DOS, rather than say we detected an operating system other than MS-DOS. The
> latter words would make people think we are looking for DR DOS . . . .

Exhibit 270.

47.   Having changed the message to conceal its true purpose, Microsoft falsely denied that

the message was designed to detect DR DOS. Moreover, notwithstanding the AARD code and its

creation of intentional incompatibilities, Microsoft falsely stated that it had done nothing to create

perceived incompatibilities between DR DOS and Windows:

> *Silverberg:*

There is no code in Windows that says, "if DR-DOS then . . . ". We

Exhibit 443.

> *Silverberg statement in Dr. Dobb's Journal, a software industry publication:*
> It has never been the practice of this company to deliberately create
> incompatibilities between Microsoft system software and the system
> software of other OS (operating system) publishers. … *The intended*
> *purpose of this disclosure message was to protect the customer and*
> *reduce the product support burden from the use of Windows on*
> *untested systems*.

Exhibit 381 (emphasis added).

> *Jonathan Lazarus, Microsoft's general manager of systems marketing, statement*
> *in PC Week about reported incompatibilities between Windows 3.1 and DR DOS*
> *6.0:*
> "It's not my problem…. It's their problem."

Exhibit 254. *See also* Exhibit 257.

> *Lazarus statement to PC Week in December 1991*:
> Microsoft had "not deliberately made Windows 3.1 incompatible with DR DOS.
> 'We're not going to do anything to prevent them from running,' Lazarus said."

Exhibit 254.

48.   Of course, those statements were false for at least one other reason. In an earlier

release of the Windows 3.1 beta, Microsoft included code that searched specifically for DR DOS and

when it found DR DOS, it prevented Windows from running. Hollaar Decl. ¶¶ 1-6. Microsoft also

introduced a bug during the Windows 3.1 beta that resulted in a fatal error when users tried to set up

Windows on DR DOS. *Id.*

49.   Microsoft also made false statements about DR DOS' compatibility with Windows,

despite Microsoft's knowledge that DR DOS was compatible or could quickly be made compatible

with Windows 3.1:

> *Microsoft public statement about DR DOS:*
> DR DOS is not DOS, the standard that the industry has come to trust and rely on….
> While DR DOS does run many MS-DOS applications, our own review suggests that it
> has a significant compatibility problem with a range of the leading applications and
> utilities.

Exhibit 218.

> *Microsoft marketing plan*:
> Objectives: FUD DR DOS with every editorial contact made
> …
> Message: DR DOS is incompatible, and if it's not compatible, it's not
> MS-DOS….

Exhibit 328.

50.   Equally false is Silverberg's assertion that Windows is an "operating system" that

competes with DR DOS. Exhibit 245; Engel Decl., Exhibit 8.

51.   DR DOS was devastated by the combined impact of Microsoft's FUD practices—

including the beta test exclusion, the refusal to run code, the AARD code and non-fatal error message,

intentional incompatibilities, and Microsoft's repeated false and misleading statements. On

December 10, 1991, Silverberg stated the obvious:

> oem's and corporations that are thinking about standardizing on dr-dos
> now have reasons to worry about their decision. *they know they will
> have problems now, and they know we are not going to help dr-dos
> compete with us.*

Exhibit 256 (emphasis added).

Microsoft OEM account managers who were seeking licenses for MS-DOS reached the same

conclusion:

> Please advise whomever put together the two documents about DR DOS, the press
> blurb list in the multipage tech expose, that THEY saved this deal (so far) for
> Microsoft. . . . *as FUD is our witness, we will never go hungry again.*

Exhibit 261.

52.   Robert Frankenberg, who at the time was Vice President at Hewlett Packard, testified

that Microsoft's FUD tactics caused OEMs to believe that DR DOS would not remain a viable desktop

PC operating system platform in the future:

> [T]here was a significant amount of fear, uncertainty, and doubt in the
> industry surrounding whether [DR DOS] would remain compatible with
> Windows, and that had a significant impact on whether people believed
> that it would continue to be a viable platform.

Frankenberg Dep. at 56, Record Support, v.3 to Consolidated Statement of Facts.

53.   As it was planning the introduction of "Chicago," the code name for the operating

system product now known as Windows 95, Microsoft made false and misleading statements that

contributed to Microsoft's overall plan to eliminate the market for DR DOS.

54.   Windows 95 is nothing more than MS-DOS and Windows packaged together in a

single box, thereby removing the option of buying a competing DOS product to run the new version of

Windows included in the package. *See* Hollaar Report at 15-26, Record Support, v.6 to Consolidated

Statement of Facts; Consolidated Statement of Facts at ¶¶ 320-340, 391-407.

There are a number of dire competitive threats which Chicago must address. Novell is after the desktop. … This is perhaps our biggest threat. We must respond in a strong way by making Chicago a complete Windows operating system, from boot-up to shut-down. There will be no place or need on a Chicago machine for DR-DOS (or any DOS).

Exhibit 309.

56.   Microsoft's senior software developers concede the true nature of Windows 95:

Q: I think when you and I talked about it before, you described Windows 95 as DOS and Windows stuck together with baling wire and bubble gum?

A: That is a fair if colloquial representation of it, yes.

Q: And what do you mean by that?

A: That basically, yes, there is DOS on the underlying – under the hood there is DOS.

Barrett Dep. at 60-61, Record Support, v.1 to Consolidated to Statement of Facts.

57.   In order to accomplish its goal—eliminating the "place or need for DR-DOS"—Microsoft repeatedly and falsely told the market that, with the introduction of Windows 95, users would no longer need DOS. For example, in a January 10, 1994, letter sent to "all press . . . and providing them general information about Chicago," Microsoft stated:

Chicago will be a complete, integrated protect-mode operating system *that does not require or use a separate version of MS-DOS. . . .*

Exhibit 404 (emphasis added).

58.   As is true of Microsoft's other false and misleading statements, Microsoft's false

statements about Windows 95 were designed to magnify the impact of illegal practice—in this case,

tying two separate products—and to conceal the truth about the product and Microsoft's bad acts.

IV.   SUMMARY JUDGMENT STANDARD

The heavy burden Microsoft faces in seeking summary judgment is a familiar one. Summary

judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In

applying this standard, the court is to examine the factual record in the light most favorable to the party

opposing summary judgment. *Sundance Associates, Inc. v. Reno*, 139 F.3d 804, 807 (10th Cir.

1998). The court "cannot try issues of fact on a Rule 56 motion but only is empowered to determine

whether there are issues to be tried." 10 B Charles A. Wright, Arthur R. Miller & Mary K. Kane,

Federal Practice & Procedure: Civil, § 2712 at 206 (3rd ed. 1998). Moreover, where, as here,

questions of intent are involved, summary judgment is especially inappropriate because intent involves

intangible factors such as witness credibility that can be decided only after a full trial. *Prochaska v.*

Marcoux, 632 F.2d 848, 850 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

V.   ARGUMENT

A.   Caldera's Claims Are Section 2 Claims, Not "Product Disparagement" Claims.

Microsoft's motion is an attempt to pigeonhole one aspect of

the rubric of product disparagement law. Caldera asserts that Microsoft engaged in a comprehensive

FUD campaign, designed to eliminate DR DOS as a competitor. The acts included much more than

36

just false and misleading statements about DR DOS—Microsoft combined its statements with beta

blacklisting, intentional incompatibilities, false error messages, tying and other exclusionary conduct.

None of this conduct facilitated competition on the merits; rather it was conduct designed to preclude

competition—which is exactly the sort of conduct proscribed by Section 2.[18] Supreme Court precedent

is clear on this point: exclusionary conduct is conduct that attempts to "'exclude rivals on some basis

> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 605,

aff'd, 472 U.S. 585 (1985). In other words, prohibited exclusionary conduct is conduct that impairs

the opportunities of rivals and does not "further competition on the merits or does so in an unnecessarily

> *Id*. at 605, n.32 (citation omitted).

Microsoft seeks to avoid this standard, by asking for piecemeal adjudication of the various

aspects of its FUD campaign. In this motion, Microsoft asks that the Court consider its false and

misleading statements in isolation, without considering how these statements facilitated the other aspects

of its plan. The difficulty—and the danger—of this approach is illustrated by the following example.

Microsoft stated:

> There is no code in Windows that says, 'if DR-DOS then. . . . ' We

---

[18] The offense of monopolization under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966). Additionally, when a private plaintiff is seeking damages, antitrust injury must be demonstrated. *See, e.g., Sicor Ltd. v. Cetus Corp*., 51 F.3d 848 (9th Cir.), *cert. denied*, 116 S. Ct. 170 (1995). In this motion, Microsoft challenges whether disparaging statements made as part of its FUD campaign can qualify as exclusionary acts, under the second requirement listed above. Microsoft does not challenge the monopoly power or antitrust injury requirements; nevertheless, evidence on those points is contained within the discussion of direct evidence of harm to competition, in Section V.D., *infra.*

Exhibit 443. The statement is false. But its importance and its impact cannot be shown without

considering that (i) Microsoft did in fact include code in a Windows 3.1 beta release that specifically

checked for DR DOS, (ii) if the code found DR DOS, it refused to allow the Windows 3.1 module to

run, and (iii) DRI had no means of determining the cause of the problem or responding to it because

Microsoft blacklisted DRI from the Windows 3.1 beta program. Thus, what appears to be a relatively

innocuous statement is in fact part of an effective scheme to persuade users that the problems they

encountered were caused not by Windows, but rather by DR DOS—and that DR DOS was

incompatible with Windows. This is how Caldera pled its case, and this is how it intends to present it to

the jury. *See* Exhibit 1 ¶ 52 ("*All of the foregoing* were part of an extended 'FUD campaign' by

Microsoft in response to the release of DR DOS 5.0, DR DOS 6.0, and Novell DOS 7.0.") (emphasis

added).

In *Aspen Highlands*, the Tenth Circuit anticipated the problems inherent in piecemeal

adjudication:

> [D]efendant's argument would require that we view each of the 'six
> things' in isolation. To do this, however would be contrary to
> [Continental Ore]. . . . Plaintiff's evidence should be viewed as a
> whole. Each of the 'six things' viewed in isolation need not be
> supported by sufficient evidence to amount to a §2 violation. It is
> enough that taken together they are sufficient to prove the
> monopolization claim.

Aspen Highlands, 738 F.2d at 1522 n.18; *see also* Caldera Inc.'s Motion To Strike (piecemeal

approach improper under Section 2; *citing Continental Ore Co. v. Union Carbide & Carbon Co.*,

370 U.S. 690, 699 (1962) (antitrust plaintiff "should be given the full benefit of [its] proof without tightly

compartmentalizing the various factual components and wiping the slate clean after the scrutiny of each"); *Photovest Corp. v. Fotomat Corp.,* 606 F.2d 704, 719 (7th Cir. 1979) ("[I]t should be remembered that [defendant's] conduct regarding new store locations must be viewed along with its other behavior which in total was found to support a section 2 violation. Otherwise lawful practices may become unlawful if they are part of an illegal scheme."); T. VAKERICS, ANTITRUST BASICS §5.06, at 5-44 (1998) ("Even though each element of conduct might not, alone, evidence illegal monopolization or an attempt to monopolize, the course of conduct, when viewed in its entirety, may establish a violation of Section 2 of the Sherman Act.").

Microsoft's cited authority is not to the contrary. In each case the principal claim—or in some cases, the only claim—was a product disparagement claim. Microsoft's disparaging statements, however, were but one part of a larger, integrated plan. The disparaging statements were backed-up by the beta blacklisting, the AARD code, intentional incompatibilities, tying and other actions that made those statements far more believable than mere statements alone. And the conduct persisted for years. The cases Microsoft cites in support of the six-part Areeda test share none of these distinguishing features. *See American Professional Testing Service, Inc. v. Hancourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147, 1150-52 (9th Cir. 1997) (defendant distributed advertising fliers over a two month period that falsely suggested that its competitor's bar review course would be unable to continue offering its courses due to a bankruptcy filing by the competitor's parent corporation); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728 (S.D. Tex. 1998) (plaintiff had no evidence on any claim other than disparagement claim); *National Ass'n of*

Pharmaceutical Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2nd Cir. 1988) (alleging one false

statement).

When the principal conduct is product disparagement, it may make sense to impose a relatively

strict standard aimed at demonstrating harm to the market, for disparaging statements alone "are

ordinarily not significant enough to warrant recognition under Section 2 of the Sherman Act." *American*

Professional Testing Service, 108 F.3d. at 1151. A principal reason for these holdings is that

experience shows that over time many consumers will chose not to believe the speaker. *Id*. at 1152;

see also David L. Aldridge Co., 995 F. Supp. at 749. The threat to competition is thus not as clear.

Here, in contrast, Microsoft's acts involved far more than simply disseminating false and

misleading statements. To apply the six-part disparagement standard here would undermine the very

basis of Section 2 and the Tenth Circuit's admonition in *Aspen Highlands* not to engage in piecemeal

adjudication of Section 2 claims, for it would ignore the important relationship among Microsoft's

predatory acts in its campaign to preclude competition in the DOS market. Thus, in cases where

plaintiffs have alleged disparaging statements as tactics in a larger plan, the rationale for the six-part test

is lacking. Many courts, moreover, have not adopted the now more than twenty year old Areeda test,[19]

particularly in cases where the disparaging statements are part of a broader plan of exclusionary

conduct. *See Clark Equipment Co. v. Lift Parts Manufacturing Co*., 1990 WL 8690, *8 (N.D.

Ill.), *vacated in part on other grounds*, 972 F.2d 817 (7th Cir. 1992); *United States Football*

League v. National Football League, 634 F. Supp. 1155, 1175, 1182 (S.D.N.Y. 1986).

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[19] The six-part test was included in the 1978 edition of the Areeda treatise, III Areeda & Turner, *Antitrust Law*,
§ 738c, citing § 738a at 279 (1978 ed.).

B.   **Antitrust Law Imposes Affirmative Duties on Monopolists to Refrain From Acting in a Manner That Harms Competition.**

Microsoft's false and misleading statements bear special scrutiny because Microsoft is a

monopolist. As the Court stated in *Intergraph Corp. v. Intel Corp.,* 3 F. Supp.2d 1255 (N.D. Ala.

1998):

> Because Intel is a monopolists [sic], the law imposes upon it affirmative
> duties to refrain from acting in a manner that unreasonably harms
> competition.
> …
> *Even conduct by a monopolist that is otherwise lawful may violate
> the antitrust laws where it has anticompetitive effects.*

3 F. Supp.2d at 1277 (emphasis added); *see also, Image Technical Services, Inc. v. Eastman*

Kodak Co., 125 F.3d 1195, 1207 (9th Cir. 1997) ("Legal actions, when taken by a monopolist, may

give rise to liability, if anticompetitive."); *Greyhound Computer Corp., Inc. v. IBM,* 559 F.2d 488,

498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (otherwise lawful conduct may be unlawfully

exclusionary when practiced by a monopolist); *Bonjorno v. Kaiser Aluminum & Chemical Corp.,*

752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *Oahu Gas Service, Inc. v. Pacific*

Resources, Inc., 838 F.2d 360, 368 (9th Cir. 1988), *cert. denied*, 488 U.S. 870 (1988) ("Because of

a monopolist's special position the antitrust laws impose what may be characterized as affirmative

C.   Even If the Product Disparagement Standard Were Applied, Microsoft Misstates the Standard.

Microsoft not only argues for the wrong standard, but also distorts it. Microsoft appears to argue that Caldera must prove market harm *and* meet the six-part Areeda test.[20] This is not the law. The cases cited by Microsoft all agree that a disparagement plaintiff who satisfies the Areeda test establishes the requisite market harm. *See, e.g., National Ass'n of Pharmaceutical Mfrs.*, 850 F.2d at 916. The Areeda test is a substitute for proof of harm. In other words, a plaintiff in a pure disparagement case is required to prove market harm directly *or* meet the Areeda test. *Id.*

Moreover, even if the disparagement standard is applied, Microsoft contests only three of the six prongs. And, as set forth below, *see, infra,* Section D, Caldera easily satisfies those three prongs.

D.   Even Under Microsoft's Narrow View of the Law, Microsoft's False and Misleading Statements Give Rise to Section 2 Liability.

In the end, Microsoft's narrow view of Section 2 law cannot keep the story of its FUD campaign—complete with false and misleading statements, intentional incompatibilities, false error messages, blacklisting, tying and other bad acts—from the jury. For even under Microsoft's narrow view of the law, its motion fails.

Microsoft contests only three of the six elements in the Areeda test. Microsoft does not contest that its disparaging statements were material; were clearly likely to induce reasonable reliance; and that

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[20] The six requirements are that the disparaging statements were:
(1)   clearly false,
(2)   clearly material,
(3)   clearly likely to induce reasonable reliance,
(4)   made to consumers having little understanding of the subject matter,
(5)   continued for extended periods of time,

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its false and misleading statements continued for extended periods of time. Microsoft insists, however, that its statements were true; that they were made to informed, knowledgeable recipients; and that they were readily susceptible to counter-statement, explanation or other neutralizing effort or offset by Caldera. Microsoft's Memorandum in Support of Its Motion for Partial Summary Judgment on Plaintiffs' Product Disparagement Claims ("Microsoft Memo") at 3-8. Microsoft has failed to carry its burden of demonstrating no material issues of fact with respect to these issues.

Take, for example, the question whether Microsoft made false or misleading statements. Microsoft argues there are no issues of material fact – that none of its statements were false or misleading—but the evidence shows: Microsoft said it had not included any code in Windows that detected DR DOS, but it had; Microsoft said that it had not done anything to prevent Windows from running DR DOS, but it had; Microsoft said that DR DOS was incompatible with specific applications, but this was not true; Microsoft said that it did not test DR DOS, but this, too, was false; and Microsoft blamed DR DOS / Windows incompatibilities on DR DOS when the truth was the problems were created by Microsoft, not DRI. *See, infra,* Statement of Additional Material Facts at ¶¶ 3-58. Microsoft's other false and misleading statements are set forth in the statement of additional material facts, above.

Nor is it true that Microsoft's statements were made only to sophisticated, knowledgeable users. First of all, it is worth noting that many statements appeared in the press, and thus were available to the general public. Even Microsoft does not contend that the public is in a position to evaluate

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(6) not readily susceptible to counter statement, explanation, or other neutralizing effort or offset by the

whether some complex routine in Windows, for example, is going to cause an incompatibility with a

competing operating system. It is equally true, however, that OEMs and trade press reviewers lack the

ability to make these evaluations. In addition to the expense and resources involved, these evaluations

require an intimate knowledge of Windows, MS-DOS, DR DOS, and a multitude of DOS application

and networking software designed to run with MS-DOS and DR DOS. Recall that many of

Microsoft's statements were aimed at establishing fear, uncertainty and doubt about whether DR DOS

could match MS-DOS functionality and whether DR DOS was compatible with Windows. Microsoft

is uniquely positioned to answer those questions, because it is Microsoft that created those programs

and it is Microsoft's developers that know how those programs work. Moreover, the programs

themselves are not only extraordinarily complex—Windows has millions of lines of code (Reynolds

Dep. at 7-8, Record Support, v.2 to Consolidated Statement of Facts)—but are also carefully guarded

secrets. Microsoft accords its source code the highest level of protection. One need look no further

than the history of discovery in this litigation to understand that absent a court order, no one but

Microsoft has access to its source code. *See, e.g.,* Order Granting Caldera's Motion to Compel

Production of Software Source Code (August 14, 1989). Thus, although OEMs and the trade press

may be knowledgeable about the computers they sell or the industry in general, Microsoft alone was the

only entity with the information necessary to judge the truthfulness of its statements.

An example illustrates the point. Microsoft said that it did not put code in Windows that

prevented Windows from running with DR DOS. Consolidated Statement of Facts at ¶ 45. Only

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plaintiff. *David L. Aldridge Co*., 995 F. Supp. at 749.

Microsoft had access to the Windows source code. OEMs did not have access to it, nor did the trade press or the general public. Only Microsoft was "knowledgeable" about what it had done, and Microsoft alone was in a position to evaluate the information.[21]

For many of the same reasons, Microsoft's statements were not readily susceptible to counterstatement.[22] If Microsoft says a product is incompatible with Windows, the market understandably relies on such a statement, for it is Microsoft who will appear to be best situated to make such a statement – Windows is, after all, Microsoft's product. Moreover, Microsoft ensured that DRI would not be in a position to respond to its statements. Microsoft not only protected its intellectual property from disclosure, it also blacklisted DRI from the Windows 3.1 beta program. Thus, DRI could not announce, for example, that it had tested Windows with DR DOS and that its tests refuted Microsoft's claims. And if that were not enough, Microsoft ensured that any statement by DRI would not be effective, by making sure that the industry knew that DRI had been excluded from the beta program. In addition, the very nature of some of Microsoft's statements made them impossible to refute. Microsoft warned users about future incompatibilities between Windows and DR DOS. OEMs and the trade press were in no position to evaluate these statements, because of their forward looking

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[21] Highly competent software engineers outside of Microsoft might be able to determine, through painstakingly slow debugging processes, that some of the problems may have been caused by Microsoft, but even this select group would lack Microsoft's knowledge of Windows and MS-DOS, which is crucial to evaluating Microsoft's statements. In any event, Microsoft does not, and could not, allege that its statements were limited to statements made to highly competent software engineers.

[22] Microsoft devotes only three sentences to making bare allegations of DRI/Novell's ability to offset Microsoft's FUD campaign. Microsoft Memo. at 7-8. Microsoft fails to meet its initial burden under Rule 56(c) of negating any factual issue with regards to this prong of the test.

nature—and these statements were especially damaging because OEMs knew Microsoft had the *ability*, at any time, to create incompatibilities.

In any event, DRI/Novell had no way of knowing at the time any of the specifics of many of Microsoft's disparaging comments, such as those made to OEMs. For example, OEMs were told of the false incompatibilities of DR DOS under confidential nondisclosure agreements. *See, e.g.,* Exhibit 76.

E.   There Is, in Any Event, an Abundance of Direct Evidence of Harm to Competition.

In addition to meeting the indirect test of market harm discussed above, there is also an abundance of direct evidence of harm to competition. Although not required to do so, Caldera has set forth that evidence below.

Microsoft drove DR DOS from the market, and it did so with anticompetitive tactics. *See, e.g.*, Barnett Report, Record Support, v.6 to Consolidated Statement of Facts. Competition suffered as a result. Market concentration increased. Price competition disappeared. Microsoft's incentive to innovate in the DOS market vanished.

By eliminating DR DOS, Microsoft eliminated the only real competition it faced in the DOS market. Microsoft's market share in the DOS market averaged more than 90% between 1989 and 1992, and increased further after that time. Leitzinger Report at 12, Record Support, v.7 to Consolidated Statement of Facts; see also Engel Decl., Exhibit 9. With the demise of DR DOS, Microsoft's market share increased. Not surprisingly, the standard measure of market concentration,

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the HHI index, rose sharply after DR DOS effectively exited the market. Leitzinger Report at 44,

Record Support, v.7 to Consolidated Statement of Facts.

At the same time, Microsoft eliminated any real price competition when it eliminated DR DOS.

DR DOS had been the only product that had any perceptible effect on MS-DOS pricing. Bill Gates

recognized as much, and complained to others at Microsoft about it. *See* Exhibit 27 ("The DOS gold

mine is shrinking and our costs are soaring . . . I believe people underestimate the impact DR DOS has

had on us in terms of pricing."); Kearl Report, appendices 1-4, Record Support, v.6 to Consolidated

Statement of Facts. MS-DOS prices dropped when DR DOS entered the market, and rose after DR

DOS was effectively eliminated as a competitor. Kearl Report at 26, Record Support, v.6 to

Consolidated Statement of Facts.

Without DR DOS as a competitor, Microsoft also lost competitive pressure to innovate with

respect to MS-DOS. Microsoft itself concedes that before DR DOS entered the market, Microsoft

had allowed MS-DOS to stagnate. *See* Exhibit 38 ("[O]ver the last four years we have done very little

with it [MS DOS] technically . . ."). Hardware had outrun PC operating system capabilities, and

Microsoft had failed to respond. *See* Goodman Report, Exhibit C, Record Support, v.6 to

Consolidated Statement of Facts. While DR DOS was in the market, Microsoft was forced to

innovate, adding features to match those of DR DOS. *Id*.; *see also* Exhibit 195 ("One of the most

important stimulants for adding features [to MS DOS 5.0] was competitive pressure from DR DOS 5.0

. . ."). In contrast, after Novell stopped development of DR DOS in September of 1994, Microsoft

stopped development of MS-DOS; with the exception of a minor update of MS-DOS from version

6.20 to 6.22, Microsoft has not released any new standalone versions of DOS since September of

1994. The harm to competition could not be more evident.

F.   Microsoft Long Ago Waived Any Challenge It Might Have to the Sufficiency of Caldera's "FUD" Pleading Allegations and, in Any Event, Microsoft's "Particularity" Standard Does Not Apply to Caldera's Antitrust Claims.

Microsoft's erroneous assertion that Caldera is required to comply with Rule 9(b) is the direct

result of its attempt to improperly pigeonhole Caldera's assertions into the category of a disparagement

claim. Since this is not a disparagement case, Rule 9(b) simply finds no application. Even assuming

arguendo, however, that disparagement were a proper characterization of Caldera's assertions,

Microsoft's Rule 9(b) argument still fails for a number of reasons.

The first reason is waiver. It has been more than two years since Caldera filed this case. Now,

with expert discovery nearly complete and fact discovery closed, Microsoft makes the surprising

assertion that Caldera somehow failed to plead its FUD claims with sufficient particularity. Microsoft

Memo. at 8. Even if Microsoft had any basis for raising such a challenge, it has long since waived it.

The proper method to challenge a pleading for lack of specificity is either a Rule 12(e) motion for a

more definite statement or a Rule 9(b) motion to dismiss. Microsoft made neither motion, nor

preserved these issues in its responsive pleadings. Microsoft has, in short, waived any right it might

have had to challenge Caldera's pleadings for lack of particularity. *See, e.g., Heil v. Lebow,* 1993 WL

15032, *2 (S.D.N.Y.) (failure to raise a timely 9(b) objection waives it); *Dasko v. Golden Harvest

Products, Inc.*, 965 F. Supp. 1467, 1474 (D. Kan. 1997) ("Defendants cannot argue almost a year

later that plaintiff failed to plead fraud with particularity").

Although, as explained below, Rule 9(b) does not apply to Caldera's FUD claims, the rationale underlying Rule 9(b) makes plain that the rule should not, in any event, be applied at this late stage of the proceedings. The specificity requirements of Rule 9(b) are intended to ensure that a defendant is apprised of claims of fraud in a manner sufficient to permit the framing of an adequate responsive pleading. Thus, it makes sense that a party who fails to raise a Rule 9(b) objection in its responsive pleading normally waives it. *See Todaro v. Orbit Int'l Travel, Ltd.*, 755 F. Supp. 1229, 1234 (S.D.N.Y. 1991); *United Nat'l Records, Inc. v. MCA, Inc.*, 609 F. Supp. 33, 39 (N.D. Ill. 1984); *see also Stonehill v. Security Nat'l Bank*, 68 F.R.D. 24, 44 n.38 (S.D.N.Y. 1975); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1394 at 778 (2d ed. 1990); 2A J. Moore, *Moore's Federal Practice* ¶ 9.03 at 9-35 (2d ed. 1984) (and cases cited therein).

The second reason the Rule 9(b) argument fails is because the rule applies only to fraud claims, not to Section 2 claims. *See In re Commercial Explosives Litigation*, 945 F. Supp. 1489, 1491 (D. Utah) ("complex antitrust litigation is not subject to any greater pleading requirements than Rule 8(a)(2) requires of ordinary litigation"). Indeed, it is not clear in the first instance why Rule 9(b) should apply at all to Caldera's FUD claims. The rule is directed specifically to fraud claims, and explicitly permits general allegations of intent, knowledge and state of mind generally:

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

Fed. R. Civ. P. 9(b) (emphasis added); *Commercial Explosives Litigation*, 945 F. Supp. at 1492,

n.2 (9(b) requires only pleadings of circumstances, not facts). Courts and commentators alike have

cautioned against extending the reach of Rule 9(b) beyond specific application to averments of fraud:

> By its terms, the particularity requirement in Rule 9(b) applies only to
> averments of fraud. Since the rule is a special pleading requirement and
> contrary to the general approach of simplified pleading adopted by the
> federal rules, its scope of application should be construed narrowly and
> not extended to other legal theories or defenses.

5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1297 (2d ed. 1990) (footnotes omitted);

Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Systems, Inc., 915 F. Supp.

939, 942-43 (N.D. Ill. 1996). Caldera's FUD allegations are not fraud claims. They are Section 2

antitrust claims and a plaintiff need not prove fraud to prevail on a Section 2 claim. As discussed below,

Caldera need only prove that Microsoft's disparaging statements constitute exclusionary conduct under

Aspen Skiing. Rule 9(b)'s particularity requirements for fraud claims simply do not apply.

Microsoft's authority is not to the contrary. The cases do not stand for the proposition that

Caldera must specify what disparaging remarks were made, to whom, when and in what context, or that

Caldera must allege specific facts supporting the disparagement claim. At most, Microsoft's cited

authority suggests that, to prevail on a disparagement claim, a plaintiff

> must allege and prove that (a) the statements referred to the plaintiff by
> name or the public knew that the statements referred to the plaintiff, and
> (b) statements were made by the defendant which disparaged the
> plaintiff or its product.

Smith-Victor Corporation v. Sylvania Electric Products, Inc., 242 F. Supp. 302, 307 (N.D. Ill.

1965) (quoted in *Oak Dist. Co. v. Miller Brewing Co.,* 370 F. Supp. 889, 898 (E.D. Mich. 1973);

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See Exhibit 1 at ¶ 52; *see also, id.* at ¶¶ 49, 50, 51. Nothing more is required.

G.   The Constitution Affords No Protection to False, Deceptive, or Misleading Commercial Speech.

Microsoft's assertion that its disparaging statements about DR DOS and Novell DOS were

protected by the First Amendment (Microsoft Memo. at 10) is also a result of its improper

characterization of some of the FUD allegations as a "disparagement claim." As previously discussed,

Caldera disagrees that product disparagement is a proper framework for analyzing Caldera's FUD

allegations. Even if disparagement were a proper description of Caldera's allegations, however, the

First Amendment would not protect Microsoft's FUD campaign.

Microsoft's reliance on the First Amendment to support its disparagement argument is

misplaced because, as Microsoft acknowledges, the Constitution affords protection to commercial

speech only if it is truthful. *Id. (citing Zauderer v. Office of Disciplinary Counsel of the Court of

Ohio*, 471 U.S. 626, 637 (1985)); *see also Central Hudson Gas & Electric Corp. v. Public Service

Commission*, 447 U.S. 557, 566 (1980) (court must determine at the outset that the expression is not

misleading before considering First Amendment protection). Since false or misleading statements are a

key requirement of the product disparagement analysis urged by Microsoft, the First Amendment simply

does not come into play.

The only relevant authority cited by Microsoft in support of its First Amendment argument is to

some passing dicta in *MCI Communications Corp. v. AT &T*, 708 F.2d 1081,1128 (7th Cir. 1983),

cautioning that overly restrictive antitrust restrictions on commercial speech run the risk of infringing on

First Amendment rights.[23] Microsoft's reliance on *MCI* is misplaced. *MCI* was a product

preannouncement case involving a monopolist's statements on its future expectations about its product.

As such, *MCI* has little if any relevance to product disparagement claims, which principally involve

statements about present facts. Furthermore, the warning contained in MCI applies only to statements

that are both "objectively reasonable" and "held in good faith." *Id*. The same is not true here. *MCI*'s

cautions regarding the First Amendment do not apply here.

VI.   CONCLUSION

For the reasons set forth herein, Microsoft's motion for partial summary judgment should be

denied in all respects.

DATED this 30th day of April, 1999.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF, CALDERA, INC.

OF COUNSEL:

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[23] The other cases cited by Microsoft are simply landmark cases establishing the First Amendment test to be applied to cases where a *government agency* restricts the free speech rights of a commercial entity.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1999, true and correct copies of the above and foregoing instrument (Case No. 2:96CV0645B, U.S. District Court, District of Utah, Central Division) were sent as indicated:

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