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

CALDERA, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON PLAINTIFF'S
EUROPEAN AND JAPANESE CLAIMS**

Judge Dee V. Benson

Case No. 2:96CV645B

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INTRODUCTION

Microsoft has moved for partial summary judgment on Caldera's Sherman Act claims for damages suffered "(i) by DRI US's¹ European subsidiaries in European markets or European trade, and (ii) by DRI US's Japanese subsidiary in Japanese markets or Japanese trade." Defendant's Memorandum in Support of its Motions for Partial Summary Judgment on Plaintiff's European and Japanese Claims (hereinafter "Defendant's Memo") at ix. Microsoft's motion fundamentally misapprehends Caldera's claims because Caldera has not asserted claims for damages suffered by DRI's European and Japanese subsidiaries.

Rather, Caldera's claims seek recovery only of damages suffered directly by DRI and Novell as a result of Microsoft's anticompetitive conduct in Europe, Japan, and other countries throughout the world. Caldera's damages claim is predicated solely on the loss of revenue to DRI and Novell and includes no calculation or claim for revenues lost to DRI's European and Japanese subsidiaries. Microsoft's motion either misunderstands this fact or chooses to ignore it.

Thus, Microsoft's motion is misguided and proceeds from a faulty premise. It deals with no claims Caldera has made. It precludes no evidence of Microsoft misconduct abroad. It has no impact on Caldera's claims for damages.

CALDERA'S RESPONSE TO MICROSOFT'S STATEMENT OF UNDISPUTED FACTS

Caldera responds immediately below to the respective numbered paragraphs of Microsoft's Statement of Undisputed Facts.² For convenience, Caldera incorporates by reference its Consolidated Statement of Facts in Support of

¹As referred to herein, "DRI" means Digital Research, Inc., the U.S. company based in Monterrey, California. Defendant's Memo refers to DRI as DRI US.

²Caldera's responses to Microsoft's Statement of Undisputed Facts are for purposes of this motion only. Caldera objects to, and disputes, Microsoft's unnumbered paragraphs as improper argument. **Microsoft Memo** at ix.

Responses to Motions for Summary Judgment by Microsoft Corporation (hereinafter “Consolidated Statement”), referring to the specific numbered paragraphs of or exhibits to the Consolidated Statement where appropriate.

1. Undisputed.

2. Disputed. Microsoft oversaw and directed all overseas marketing from its headquarters in Redmond, Washington. *See Consolidated Statement*, Exhibit 324 at MS0013259 (OEM Business Manual).

3. Undisputed.

4. Disputed to the extent that Microsoft intends this paragraph to indicate it licensed no packaged product in Europe. Microsoft, for example, directly licensed packaged product to Vobis, a German OEM. *See Intel Depo* at 25-26, 196-97; **Exhibit 1** (Microsoft/Vobis license, Depo. Exhibit 619, MSC5033652-83).

5. Disputed. DRI and Novell’s OEM license agreements clearly contemplate and prescribe terms governing the re-export of computers and operating systems to countries throughout the world. *See Exhibits 7, 8, and 9* described in ¶ 10 *infra*.

6. Undisputed.

7. *See* ¶¶ 2 and 3 *supra*.

8. Caldera admits that DRI and later Novell offered several versions of DR DOS in competition with Microsoft’s MS-DOS from approximately 1988 through 1996. There is disagreement between the parties as to who really cloned whom, and even as to the meaning of the word clone. The following facts, however, are undisputed. Microsoft’s first version of MS-DOS was based on a product it obtained from Seattle Computing called QDOS -- Quick and Dirty Operating System. **Consolidated Statement** ¶¶ 8, 9. QDOS was a clone of DRI’s CP/M (“Control Program for Microprocessors”), *i.e.*, it mirrored CP/M’s function calls. *Id.* ¶ 8, 11, 12. CP/M was the dominant operating system in the market for 8-bit personal computers in the late 1970s and early 1980s. *Id.*, ¶ 4. Although DR DOS was designed to support applications written for MS-DOS, it evolved from CP/M and its successors, including Concurrent DOS and DOS plus. **Constant FTC Decl.** ¶ 9; **Tucker Decl.** ¶¶ 3-5; **DiCorti Decl.** ¶ 2.

en released, DR DOS 5.0 and subsequent versions of DR DOS provided functionality not available in any version of -DOS, continually forcing Microsoft to play catch-up. **Consolidated Statement ¶¶ 74-76, 186-188, 346-347.**

9. Disputed. Although development of DR DOS was undertaken at DRI's European Development Center (the "EDC") in Hungerford, England, significant portions of the code included in the initial version of DR DOS were derived directly from Concurrent DOS, which was developed by DRI engineers at DRI's facilities in Monterey, California. **Tucker Decl. ¶¶ 3-5; Consolidated Statement ¶ 18.** EDC engineers developed DR DOS for DRI as a work-for-hire product, and DRI has at all times owned the product. **Tucker Decl. ¶ 6.** DRI reimbursed the EDC for its research and development expenses. **Tucker Decl. ¶ 2** ("the EDC was the only facility outside of the United States that ever engaged in software development [for DRI] other than for product translation"); **Exhibit 2** (Registration Statement, Amendment No. 2 to Form S-4, submitted by Novell, Inc., on September 2, 1991, Depo. Exhibit 1626 ("Registration Statement")) at 73 ¶ 11 ("the parent reimburses research and development expenses plus 9% to one foreign subsidiary"). DRI developers wrote copyright strings for all DR DOS code showing copyright ownership by DRI. **Tucker Decl. ¶ 7.** At all times prior to its merger with Novell, DRI owned all intellectual property rights to DR DOS. **Id.; DiCorti Depo. ¶ 2; Exhibit 3** (Agreement and Plan of Reorganization Among Novell, Inc., MDAC Corp. and Digital Research, Inc., dated July 16, 1991 (hereinafter "Merger Agreement")) § 3.1(r), Disclosure Schedule § 3.1(r) Technology). Following the Novell/DRI merger, DRI assigned to Novell all intellectual property rights to the product. **Exhibit 4** (Certificate of Recordation dated December 21, 1992, and Assignment between Digital Research, Inc., and Novell, Inc., dated December 10, 1992). Novell assigned those rights to Caldera on July 23, 1996. **Defendant's Memo**, Exhibit 5 (Asset Purchase Agreement between Caldera, Inc., and Novell, Inc., dated July 23, 1996 ("Asset Purchase Agreement")) §§ 2, 3. Novell engineers in Provo, Utah developed networking features that Novell incorporated into Concurrent DOS 7.0. **Tucker Depo. (7/16/97) 106-108.** In short, regardless of the location of development teams, DR DOS has at all times been the property of U.S. companies -- DRI, Novell and Caldera.

10. Disputed. DRI licensed DR DOS to its sales subsidiaries in Europe and Japan, which in turn licensed the product to OEMs. *See, e.g., Exhibit 7* (OEM License Agreement between Digital Research SA [DR

ce] and Hanatarex S.p.A. (“Digital Research has granted [DR France] the right to grant licenses to reproduce, use, supply, distribute and market DRI’s products”)); **Exhibit 8** (OEM License Agreement between Digital Research (UK) [DR UK] and TOBAR (UK) Ltd. (“Digital Research Inc. has granted [DR UK] the right to grant licenses to reproduce, use, supply, distribute and market DRI’s products”)); **Exhibit 9** (OEM License Agreement between Digital Research GmbH [DR Germany] and Soft-Tronik GmbH (“Digital Research Inc. has granted [DR Germany] the right to grant licenses to reproduce, use, supply distribute and market DRI’s products”)); **Exhibit 10** (OEM License Agreement between Digital Research (Japan) Inc. [DR Japan] and Sekisui Chemical Co., Ltd. (“[DR Japan] has been granted a license by [DRI] . . . to grant . . . exclusive, nontransferable licenses to use, reproduce, and distribute Licensed Programs”)). *See also* ¶ 3 *infra*.

11. Undisputed, although Microsoft hopes to minimize or ignore the significant role DRI played in Europe and Asia. *See* ¶ 10 *supra* and ¶ 13 *infra*.

12. Undisputed except that Novell signed license agreements with European OEMs beginning 1992. **Defendant’s Memo**, Exhibit 6, Europe at 31-44.

13. Disputed. DRI oversaw all development, marketing, sales and licensing of DR DOS worldwide under the leadership of Dick Williams, its CEO. **Tucker Decl.** ¶ 7. Williams met with OEMs through the world. **Williams FTC Decl.** ¶¶ 76, 78, 118. DRI established its foreign subsidiaries for the purpose of marketing and providing technical support for DR DOS. **DiCorti Decl.** ¶ 3; **Exhibit 2** at 46. DRI wrote all standard license agreements for the license of DR DOS and required its foreign subsidiaries to obtain its approval of all licenses that included deviations from standard provisions. **DiCorti Depo.** at 27-32, 158-159, 179-183, 195. DRI supervised all foreign sales, **id.** at 38, did all product pricing, **id.** at 174-176, and dealt with foreign customers. **Id.** at 314-15. DRI maintained records of all DR DOS sales, **id.** at 77-80, and expanded its bank lines to generate capital for the marketing of DR DOS in foreign countries. **Id.** at 236-37. In short, DRI had substantial direct involvement in the licensing of DR DOS in Europe and Japan, and did enter directly into license agreements with OEMs in all other Asian countries and in North America. **Defendant’s Memo** at xiii ¶12, Exhibit 6.

14. Disputed. The two licenses Microsoft attaches elsewhere as Exhibits 9 and 10 to its memorandum demonstrate the falsity of the statements in this paragraph. Exhibit 9 is not even a license for DR DOS. Moreover, both licenses require DRI to provide the licensed software. *See, Defendant's Memo*, Exhibit 9 ¶ 3 (requiring DRI to provide the licensed products); *Defendant's Memo*, Exhibit 10 at 1 (providing that DRI granted to DR Japan the right to use the software).

15. Disputed. Microsoft asserts a conclusion of law drawn from disputed facts. DRI registered copyrights for the DR DOS products in the United States. *See, Exhibit 4* (Certificate of Recordation covering registered DRI copyrights). Under the Berne Convention of 1989 and the Universal Copyright Convention, foreign states, including all major European countries and Japan, extend copyright protection to works copyrighted in the United States. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE §2[4] at INT-38, §3 at INT-41 to -64 *passim* (Melville & Paul Edward Geller ed. 1991). In most foreign states no copyright filing is required. *Id.*

16. Caldera does not dispute that the licenses attached as exhibits to Defendant's Memo provide for payment by the OEM to the foreign DRI subsidiary. But Microsoft's assertion is misleading. DRI's European and Japanese subsidiaries paid a "commission" to DRI of 30%-35% on foreign retail sales and 55%-70% on foreign OEM sales. *Exhibit 2* (Registration Statement) at 73 ¶ 11. Commissions payable by DRI's foreign subsidiaries were set at very high rates so that substantially all of each subsidiary's cash revenues, after payment of sales and other expenses, were remitted to DRI. *DiCorti Decl.* ¶ 4.

17. Undisputed. Indeed, as stated in the foregoing paragraph, the European and Japanese subsidiaries remitted to DRI virtually all revenues above their costs.

18. Caldera does not dispute that DRI did not pay U.S. income taxes on revenues not remitted to the United States.

19. Disputed. DRI owned all rights to the DR DOS software that its subsidiaries sublicensed to European and Japanese OEMs. *See*, ¶ 14 above. Thus DRI provided the licensed product itself to European and Japanese OEMs.

20. Disputed. DRI and Novell also provided technical support out of Monterey, California, Provo, Utah. **Tucker Depo.** (7/16/97) at 88-89.

21. *See* paragraph 5 *supra*. DRI's and Novell's OEM license agreements clearly contemplate and prescribe rules governing the re-export of computers and operating systems to countries throughout the world. *See Exhibits 7, 8 and 9* hereto.

22. Undisputed. The documents, however, speak for themselves and should be considered in their entirety.

23. Undisputed.

24. Undisputed. The Asset Purchase Agreement speaks for itself and should be considered in its entirety.

25. Caldera does not dispute that DRI's foreign subsidiaries never transferred rights to claims of Microsoft's anticompetitive conduct. Caldera does dispute the premise and implications of such assertions. In particular, Caldera disputes that DRI's subsidiaries ever possessed Sherman Act claims of their own, separate and distinct from DRI's claims, or that the foreign subsidiaries needed to transfer anything to DRI/Novell before DRI/Novell could transfer the claims asserted in this action to Caldera.

CALDERA'S STATEMENT OF ADDITIONAL MATERIAL FACTS

The Microsoft conduct at issue affected both U.S. domestic and export commerce. As Caldera has argued, and as Microsoft's market expert economist Kenneth Elzinga concedes, the relevant geographic market in this case is the world. **First Amended Complaint** ¶ 65; **Elzinga Depo.** at 127-128, 505. That means predatory Microsoft conduct anywhere in the world will have a ripple effect throughout the world. **Elzinga Depo.** at 506. Or,

and differently, “[b]ecause the market is worldwide, anti-competitive conduct by Microsoft anywhere in the world will affect domestic commerce.” **Kearl Rebuttal Report**, Addendum at 1.

For example, software operating systems manifest network effects that are not limited by geography or national boundaries. The more consumers that use an operating system anywhere in the world, the more incentive that independent software vendors (ISVs) have to write applications for that operating system. In turn, the more applications there are for an operating system, the more valuable it becomes to consumers. Hence, anticompetitive Microsoft conduct in Europe and Japan that had the effect of excluding DR DOS, such as, for example, per processor licenses and tying arrangements, diminished the value of DR DOS to ISVs, and thus consumers, worldwide. **Kearl Rebuttal Report**, Addendum at 1.

Software operating systems are also characterized by very high “first copy” costs and essentially zero costs for “second and beyond” copies. The cost of writing the code for an operating system is high; once the code is written, however, it can be duplicated at no additional cost. Thus there are scale economies such that the more copies of a software product a firm sells, the lower will be the average cost per unit of the product and the lower the per copy price. Therefore, a firm’s pricing decisions in the United States are linked to actual and expected sales in Europe or Japan or elsewhere in the world. Again, anticompetitive Microsoft conduct that excluded DRI from licensing DR DOS to DRI’s customers abroad would have affected DRI’s pricing decisions in the United States and its ability to compete profitably on a worldwide basis. Microsoft anticompetitive conduct in Europe and Japan and elsewhere outside the United States increased DRI’s per-copy costs of DR DOS, making the product less viable worldwide. **Kearl Rebuttal Report**, Addendum at 2.

Microsoft was well aware of these characteristics of software operating systems. As was its intent, Microsoft succeeded first in harming and then in wholly eliminating DR DOS, its most effective interbrand PC operating system competitor,³ from both domestic and export commerce. Consumers therefore suffered diminished choice and

³In a memo dated May 18, 1989, Bill Gates wrote: “I believe people underestimate the impact DR DOS has had on us in terms of pricing.” **Consolidated Statement ¶ 54.**

novation, and, as Microsoft had long desired, higher prices.⁴ **Kearl Rebuttal Report** at 22-24; **Leitzinger Expert Report** at 43-45.

Indeed, Microsoft knowingly leveraged the effects of its European misconduct into United States commerce. **Consolidated Statement** ¶ 118.⁵ And clearly, Microsoft's vaporware and FUD campaigns (including management, beta blacklist, AARD code, and intentional incompatibilities) were worldwide in scope and explicitly designed to influence OEMs and users *everywhere simultaneously*.

DRI decided to develop DR DOS under the direction of its president, Dick Williams, shortly after Mr. Williams joined the company in 1988. **Consolidated Statement** ¶ 17. In so doing, DRI built upon technologies developed by DRI in Monterey, California. *Id.*, ¶ 18. Although most of the code for DR DOS products was written at DRI's European Development Center in Hungerford, England, DRI at all times at issue owned all intellectual property rights to DR DOS.⁶ **Caldera's Response to Microsoft's Statement of Undisputed Facts** (hereinafter "Caldera's Response") at 5 ¶ 9 *supra*.

In addition, DRI management located in Monterey, California, oversaw the continuing development of the product as well as all licensing activities of DRI's foreign subsidiaries in Europe and Japan. *Id.* at 7 ¶ 13 *supra*. Dick Williams traveled the world to meet with OEMs regarding the possible license of DR DOS. **Williams FTC Decl.** ¶¶ 6, 78, 118. DRI licensed DR DOS to its subsidiaries in Europe and Japan who in turn, under DRI's direction,

⁴ Following the demise of DR DOS, Joachim Kempin, Microsoft's Vice President for Worldwide OEM Sales, wrote Bill Gates: "While we have increased our prices over the last 10 years other component prices have come down and continue to come down." Quoted in **Kearl Rebuttal Report** at 24. A Microsoft internal document shows both average operating system revenue per system and operating system share of PC cost steadily increasing from 1990 through 1996. *Id.* at 23.

⁵Microsoft issued a press release in the United States on DRI's loss of the Vobis account. **Exhibit 5** (E-mail from Stefanie Reichel dated July 5, 1992, Depo. Exhibit 2744, which the **Consolidated Statement** erroneously refers to as Exhibit 334).

⁶DRI assigned its copyrights to DR DOS to Novell on December 10, 1992 following the merger of DRI into Novell. **Exhibit 4** (Assignment dated December 10, 1992).

licensed the product to OEMs. *Id.* at 6 ¶ 10. These subsidiaries paid DRI a “commission” on revenues from OEM sales in Europe and Japan of 55-70%. *Id.* at 8 ¶ 16. DRI also licensed DR DOS directly to OEMs in other foreign countries throughout the world, notably to OEMs in Korea and Taiwan. **Defendant’s Memo** at xiii ¶ 12, Exhibit 6; **on FTC Decl.** ¶¶ 1-2, 7-12.

Thus, DRI engaged in the export of DR DOS to Europe, Japan and other countries throughout the world. As explained by Caldera’s expert Professor Kearl, and Microsoft’s expert Professor Elzinga, Microsoft anticompetitive conduct injuring DR DOS anywhere in the world both adversely affected DRI’s ability to export the product and also adversely affected the viability of the product worldwide.

ARGUMENT

I. The Instant Motion Does Not Affect Any of Caldera’s Claims for Damages.

Microsoft moves for partial summary judgment only with respect to the claims for damages suffered by DRI’s European and Japanese subsidiaries. The motion, however, does not address *DRI’s* claims for damages in Europe and Japan; *DRI’s* claims for damages *anywhere else in the world*; or any of the claims of *Novell or its subsidiaries anywhere in the world*.

Caldera’s damages model for the DRI period, *i.e.*, the period after Novell’s acquisition of DRI, includes damages for injury to DRI’s European and Japanese subsidiaries.⁷ Caldera claims most of its damages for the period prior to Novell’s acquisition of DRI.⁸ Although DR DOS sales rose after Novell’s acquisition of DRI in November 1991, DR DOS sales collapsed in the second quarter of 1992. The collapse in sales resulted from a concerted Microsoft effort

⁷See, generally, **Wecker Report** (Consolidated Statement, Record Support, Volume 7).

⁸Caldera claims a total of \$590 million (base case) in damages. Of this amount, only \$ 11.9 million is for the period prior to Novell’s acquisition of DRI. **Wecker Report**, Exhibit 4, Table 1, Column 9.

owing the acquisition to drive DR DOS from the market.⁹ Microsoft was very concerned about the threat Novell posed to its PC operating system monopoly.¹⁰

II. Caldera Has Standing to Assert Claims for Damages for Anticompetitive Microsoft Conduct Outside the United States.

Although Microsoft's motion asks only for partial summary judgment on the claims of DRI's European and Japanese subsidiaries, Microsoft implies that Caldera lacks standing to bring claims for *DRI's* damages resulting from Microsoft's conduct in Europe and Japan: "Here, Caldera's purported damages arise out of the wholly foreign trade of the European DRI companies and DR Japan." **Defendant's Memo** at 11. Microsoft's factual predicate for this argument is

[T]here is no evidence whatsoever that DRI US ever attempted during the time period at issue to license DR DOS in Europe or Japan or was in any way affected by Microsoft's European or Japanese companies. *DRI US simply did not suffer damages in U.S. export commerce to Europe or Japan*, as required to establish standing under Paragraph (1)(B) of the FTAIA [the Foreign Trade Antitrust Improvements Act of 1982].

Id.

Microsoft misapprehends both the law and the facts. First, the FTAIA has no bearing on the issue of standing. The FTAIA merely sets forth a test for determining whether the *Court* has subject matter jurisdiction with respect to the *defendant's* conduct in export commerce. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 & n.23 (1993) (London reinsurers who engaged in conspiracy taking place wholly outside the United States to restrain trade in insurance within the United States satisfies standard for subject matter jurisdiction under both existing case law and the

⁹*See, Consolidated Statement of Facts* ¶¶ 223-242 (Windows 3.1 beta containing the AARD code), ¶¶ 198-222 (beta blacklist), ¶¶ 265-284 (the DR DOS 6.0 FUD campaign), ¶¶ 391-401 (Chicago vaporware campaign), ¶¶ 110-118 (the Vobis lockup), ¶¶ 281-284 (MS-DOS/Windows tying), ¶¶ 292-306 (per processor license push), and ¶¶ 414-418 (Windows 95 tying arrangement).

¹⁰*Consolidated Statement of Facts* ¶¶ 53-55, 169-171 (memoranda referring to Novell threat on the desktop). On August 6, 1989, Bill Gates wrote the following in an e-mail to Steve Ballmer: "DOS being cloned has had a dramatic impact on our pricing for DOS. I wonder if we would have it around 30-40% higher if it wasn't cloned. I bet we would!" **Consolidated Statement**, Exhibit 29.

FTAIA); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (same with respect to Japanese FAX er suppliers who engaged in criminal conspiracy taking place wholly outside the United States to inflate price of FAX er in the United States).

Second, DRI was engaged in export commerce. At all relevant times it exported DR DOS to Europe, Japan and other locations outside the United States.¹¹ It suffered substantial injury as a result of Microsoft's licensing and other anticompetitive practices in Europe and Japan.

A. Microsoft Engaged in Export Trade or Commerce.

The FTAIA provides:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -

(1) such conduct has a direct, substantial, and reasonably foreseeable effect

(A) on trade or commerce which is not trade or commerce with foreign nations or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

Thus, under the FTAIA, the threshold inquiry is whether the anticompetitive conduct at issue involves international trade or commerce. If so, the FTAIA provides that the Court has subject matter jurisdiction under the Sherman Act under subsection (1)(A) if the conduct has a direct, substantial and reasonably foreseeable effect on U.S. domestic trade or commerce, or under subsection (1)(B) if the conduct has a direct substantial and reasonably foreseeable effect on

¹¹DRI exported DR DOS to its foreign subsidiaries pursuant to license agreements with such subsidiaries who in turn sublicensed DR DOS to OEMs in Europe and Japan. DRI also exported DR DOS pursuant to direct licenses with OEMs located in other areas outside the United States. See, section II.B.2. *infra*.

opportunities to export from the United States. *E.g., Coors Brewing Company v. Miller Brewing Co.*, 889 F. Supp. 4, 1398 (D.Colo. 1994).

Microsoft acknowledges that it engaged in export trade within the meaning of the FTAIA. **Defendant's Memo** at 8. Microsoft admits that its executives in Redmond, Washington, oversaw its licensing business in Europe and Japan, and that Microsoft signed licenses with European and Japanese OEMs in Redmond. **Defendant's Memo**, Statement of Undisputed Facts ¶¶ 1, 6 at x, xi. Hence, the Sherman Act applies to Microsoft's conduct in Europe and Japan if such conduct had a direct, substantial and reasonably foreseeable effect on United States domestic or export trade commerce.

B. Microsoft's Anticompetitive Conduct in Europe and Japan had a Direct, Substantial and Reasonably Foreseeable Impact on U.S. Domestic and U.S. Export Trade or Commerce.

1. Microsoft's Conduct Affected Domestic Commerce.

Under subsection (1)(A) of the FTAIA, the Court has subject matter jurisdiction, as Microsoft concedes, if Microsoft's conduct in Europe and Japan affected United States commerce. **Defendant's Memo** at 9. There is substantial evidence that Microsoft's conduct had the requisite domestic effect.

Caldera has pleaded, and Microsoft's economic market expert admits, that the relevant geographic market is the entire world.¹² **First Amended Complaint** ¶ 65; **Elzinga Depo.** at 127-128, 505. Consequently, Microsoft's anticompetitive conduct anywhere in the world will impact domestic commerce. **Kearl Rebuttal Report**, Introduction at 1; **Elzinga Depo.** at 506.

For purposes of this motion, Microsoft does not dispute that it engaged in the anticompetitive conduct Caldera complains of in Europe and Japan (or, for that matter, anywhere else in the world). Such conduct included the

¹²Microsoft notes that Novell's Complaint to the European Commission stated that the EC (the European Community) was the relevant geographic market. **Defendant's Memo** at 6. Novell's Complaint stated further that DR DOS was sold in every member state of the EC (the only area over which the Commission had jurisdiction) under substantially similar conditions of competition. **Defendant's Memo**, Exhibit 19 ¶¶ 55-57. Novell's Complaint did not state that the market was *limited* to the EC. Rather, as Caldera and Microsoft agree, the relevant market encompasses the world and necessarily encompasses all of the EC's member states.

owing: exclusionary MS-DOS licenses,¹³ having the purpose and effect of “blocking out” DR DOS,¹⁴ **Consolidated Statement ¶¶** 130-154, 292-306, 387-390; tying, price tying and retaliatory tying, *id.* ¶¶ 60-62, 110-118, 281-291, -382; FUD, beta blacklist, AARD code, intentional Windows incompatibilities, *id.* ¶¶ 38-51, 195-280, 383-386; malware, *id.* ¶¶ 83-109, 307-319, 353-374 and the DOS/Windows merge into Windows 95. *Id.* 63-68, 155-161, -340, 391-407.

In a world market, as Caldera’s and Microsoft’s economists agree, such anticompetitive conduct can be expected to have a worldwide effect. Hence, Microsoft anticompetitive conduct in Europe and Japan had the direct, substantial and reasonably foreseeable effect of driving DR DOS from the worldwide market, harming United States consumers. Similarly, Microsoft misconduct elsewhere in the world caused injury to DRI in Europe and Japan. **Kearl Nuttall Report**, Supplement at 1-2; *Caribbean Broadcasting System v. Cable & Wireless*, 148 F.3d 1080, 1087 (3d Cir. 1998) (defendants’ anticompetitive conduct to protect their advertising and broadcasting monopoly in the Eastern Caribbean precluded plaintiff from competing for radio advertising customers located in the United States, thereby causing United States customers to pay excessive prices for advertising and thus affecting United States domestic commerce); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (criminal conspiracy among Japanese paper suppliers taking place wholly outside the United States to inflate price of FAX paper in the United States had effect on domestic commerce); *Coors Brewing Company vs. Miller Brewing Company*, 889 F. Supp. 1394, 1398 (D. Colo. 1995) (distribution alliance between Miller Brewing Company and Molson Breweries of Canada Limited in Canada had a direct, substantial and reasonably foreseeable effect on Coors’ ability to export to Canada; given the integrated nature of the North American beer market, the alliance also affected United States domestic commerce). Hence,

¹³Such licenses included per processor pricing, high minimum commitments, and long durations.

¹⁴The following are typical comments of Microsoft sales people when they signed OEMs to per processor licenses: “Another DRI prospect bites the dust with a per processor DOS agreement”; “The [per processor license] will *block out* DR once signed”; and “The new license is a per processor deal, which allowed us to completely kick out DRI.” **Consolidated Statement ¶** 137.

Court has subject matter jurisdiction with respect to Microsoft's anticompetitive conduct in Europe and Japan under section (1)(A) of the FTAIA.

2. Microsoft's Conduct Affected Export Commerce.

The Court also has subject matter jurisdiction pursuant to subsection (1)(B). To establish subject matter jurisdiction under this subsection, an antitrust plaintiff must establish that the defendant's conduct had a direct, substantial and reasonably foreseeable effect on plaintiff's continuing ability to export from the United States. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 814 (9th Cir. 1988); *The 'In' Porters, S.A., v. Hanes Printables, Inc.*, 663 F. Supp. 494, -500 (M.D.N.C. 1987).

DRI exported DR DOS from the United States. DRI entered into licenses with its European and Japanese subsidiaries authorizing them to sublicense the product to OEMs in those areas. **Caldera's Response** at 6, ¶ 10, *ra. E.g., Optimum, S.A. v. Legent Corp.*, 926 F. Supp. 530 (W.D.Pa. 1996) (sale in Argentina through a foreign distributor of software products designed and sold by an American firm involved United States export commerce). It also directly entered into DR DOS licenses with OEMs in other parts of the world outside the United States. **Defendant's Memo** at xiii ¶12, Exhibit 6.

Microsoft's anticompetitive conduct in Europe and Japan had the same direct, substantial and reasonably foreseeable effect on DRI's continuing ability to export DR DOS as it did on U.S. domestic commerce. In both instances Microsoft's predatory acts blocking DR DOS sales in Europe and Japan contributed to the commercial collapse of the market and Novell's ultimate withdrawal of the product from the market. Microsoft's anticompetitive conduct thus eliminated competition and thereby harmed consumers in both U.S. domestic and export trade and commerce. *See* U.S. Department of Justice & FTC Antitrust Enforcement Guidelines for International Operations, Illustrative Example D (1995) (hereinafter "International Guidelines"), *reprinted in* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, App. B, ¶ 63, 584 (Supp. 1998) (agreement of dominant foreign producers to coerce their foreign distributors into not marketing competing U.S. product creates a direct and reasonably foreseeable effect on U.S. export commerce); *cf.* International Antitrust Guidelines, Illustrative Example E, *reprinted in* AREEDA & HOVENKAMP, *supra*, App. B, at 585 (agreement of trade

association composed of foreign producers and distributors to boycott distributions of competing U.S. product creates a direct and reasonably foreseeable effect on U.S. export commerce).

Microsoft's anticompetitive conduct in Europe and Japan contributed to the commercial demise of DR DOS worldwide and thus had an effect on both United States domestic and foreign commerce. Hence, the Court may exercise subject matter jurisdiction as to Microsoft's conduct in Europe and Japan pursuant to subsections (1)(A) and (B) of the FTAIA.

C. As Domestic Corporations Engaged in U.S. Export and Domestic Commerce, DRI and Novell had standing to Assert Claims for Damages Suffered from Anticompetitive Conduct by Microsoft Outside the United States.

Microsoft cites numerous authorities for the proposition that foreign persons or corporations who do not do business in the United States lack standing to bring suit under the antitrust laws, even when such persons are directly harmed by anticompetitive behavior that has a direct and reasonably foreseeable effect on U.S. commerce. *See Defendant's Memo* at part II-B (discussing *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 498, at *4 (N.D. Cal. 1997) (Irish corporation with principal place of business in Ireland which purchased citric acid directly from defendant's foreign facilities lacked standing to sue for damages suffered from defendant's anticompetitive conduct because it was "neither a competitor nor a consumer in the United States domestic market"); *S. Megga Communications Ltd.*, 1997 WL 86413 (D.Del. 1997) (Hong Kong corporation with manufacturing operations in the PRC lacked standing to sue for damages suffered from defendant's alleged anticompetitive foreign conduct because it did not do business that imported or intended to import its products within the United States, and did not suffer an injury within the United States); *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985) (resident of Argentina who purchased silver on the London commodity market lacks standing to sue for damages suffered as the result of defendant's anticompetitive conduct committed in United States commodities markets)).

These authorities have nothing to do with the case that Caldera has brought. DRI and Novell are both domestic corporations which were engaged in both export and domestic commerce in connection with the development and marketing of DR DOS. **Caldera's Response** ¶¶ 9-10, 13-15 *supra*. Thus, it is beyond dispute that these

corporations (and Caldera as their successor) have standing to sue for damages suffered as the result of anticompetitive conduct by Microsoft in foreign countries which has a direct and foreseeable effect on the very export and domestic commerce in which these corporations were engaged. *Compare Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and in fact produce some substantial effect in the United States.”); *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 11, 4 (1st Cir. 1997) (“[T]he case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One’s jurisdictional reach.”); *AREEDA & HOVENKAMP, supra*, ¶373d1, at 278 & n.16 (“Standing is clear and seldom challenged when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff . . . so that the defendant could maintain or create a monopoly.”) (citing *Yellow Pages Cost Consultants v. GTE Directories*, 951 F.2d 108 (9th Cir. 1991); *Sweeney v. Athens Regional Medical Center*, 709 F. Supp. 1563 (M.D.Ga. 1989)).

CONCLUSION

Caldera does not assert claims for damages suffered by DRI’s European and Japanese subsidiaries and its motion is unaffected by exclusion of claims for damages suffered by those subsidiaries, if any. However, Caldera does assert claims for DRI’s and Novell’s damages suffered in export commerce, and its damages model consequently computes damages only for injury suffered by DRI and Novell. Microsoft’s anticompetitive conduct abroad impeded DRI’s and Novell’s ability to export and to compete domestically. The Court therefore has subject matter jurisdiction in respect to such conduct, and Caldera has standing to assert claims relating thereto. Microsoft’s motion should be denied in all respects.

DATED this 19th day of April, 1999.

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