

1 Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d, 1295 (D. Utah 1999)

2

3 MEMORANDUM OPINION & ORDER

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5 BENSON, District Judge.

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7 I. INTRODUCTION

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11 II. BACKGROUND & DESCRIPTION OF PLAINTIFF'S CLAIMS

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13 This case finds its genesis in the mid-1970s with the advent of the personal computer.

... Critical to the evolution of the personal computer was the development of the computer
... operating system. An operating system functions as the control center of the computer. It
... controls the computer's interaction with peripheral hardware such as keyboards, modems,
... and printers and also serves as the underlying support structure for software
... applications. An operating system functions as the interface between the computer and the
... software applications. Independent software vendors (ISVs) write software application
... programs, such as games, spreadsheets, and wordprocessors, that rely for their operation
... on certain general functions written into the operating system.

14

15 As the computer age dawned, new and old companies alike scrambled to pioneer the emerging
... frontier. Founded in 1976 by Gary Kildall, Digital Research, Inc. (DRI) developed one of
... the first operating systems for personal computers, known as CP/M (Control Program for
... Microprocessors). According to plaintiff, CP/M was the dominant operating system for 8-bit
... personal computers in the late 1970s and early 1980s. CP/M operated much the same as a
... disc operating system (DOS) operates today. Both CP/M and DOS are character based,
... requiring the user to direct the computer to perform desired operations by using specific
... keystrokes.

16

17 At the same time DRI was making inroads into the operating systems market, a new start-up
... partnership called Microsoft was formed which focused on programming languages. In July
... 1980, IBM approached Microsoft about designing 16-bit versions of its most popular
... products to be used with IBMs forthcoming personal computer, which at the time was still
... undisclosed {1298} to the public. IBM was also looking for an operating system to install
... onto its personal computers. At that time, DRI had preliminary designs for a 16-bit
... version of CP/M. IBM contacted DRI about obtaining a license of this 16-bit version, known
... as CP/M-86, but the parties were unable to reach an agreement. {1298}

18

19 Microsoft also began exploring the possibility of developing or acquiring its own
... operating system. In 1981, Microsoft first licensed and later purchased for a reported
... \$50,000 a 16-bit CP/M clone from Seattle Computer Products, a small original equipment
... manufacturer (OEM). This system, named QDOS (Quick and Dirty Operating System), mirrored
... the functionality of CP/M. Thereafter, IBM obtained a license from Microsoft for QDOS.
... When IBM launched its personal computer in August 1981, this operating system was
... installed on each computer, offered as PC-DOS 1.0 to IBM's direct customers, and offered
... by Microsoft as MS-DOS 1.0, to all other OEMs. IBM's personal computer incorporated the
... Intel x86 microprocessor. Other OEMs were able to use this same microprocessor to
... essentially clone the IBM personal computer, and MS-DOS was compatible with all of these
... clones. Accordingly, literally millions of Microsoft's operating systems were installed
... worldwide. By 1985, MS-DOS was the prevalent operating system in the world for personal
... computers using Intel x86 microprocessors. As a result, Microsoft enjoyed enormous
... financial success. By 1988 Microsoft had obtained a monopoly position in the DOS market.

19... For purposes of the present motions, Microsoft does not dispute the contention that it has
... such a monopoly in the operating systems market. {1298}

20

21 By the mid-1980s, the computer industry began exploring alternatives to DOS, which were
... considered by many to be difficult to use because they required the user to type in
... commands in order to operate the computer. As a result, graphical user interfaces (GUIs)
... were developed, which replaced some of the character-based commands of DOS with graphical
... commands that users could execute through the use of point-and-click technology. In using
... a GUI, the user operates a "mouse" that controls an arrow on the screen and enables the
... user to control the computer by pointing at screen icons and clicking on them. GUIs were
... initially utilized by Apple Computer, Inc. In the early 1980s Apple developed the
... Macintosh microprocessor, which, unlike the IBM personal computer, ran on the Motorola
... 68000 microprocessor chip. However, unlike Microsoft's GUI, called Windows, Apple's GUI
... was a complete operating system. Windows had the appearance of running the computer as its
... own operating system, but it was in essence merely operating on top of DOS, unable to
... function without the underlying DOS program. Notwithstanding, Microsoft's Windows gained
... widespread popularity due to the dominance of the Intel x86 microprocessor chip. Since its
... inception in 1985, Windows has maintained a monopoly position in the GUI market. {1298}

22

23 Despite the dominant market position of MS-DOS, DRI continued development of its operating
... system. In 1987, DRI developed DR DOS, an operating system that competed directly with
... MS-DOS and was compatible with software written for use with MS-DOS. In May of 1988, DRI
... launched DR DOS 3.31. Plaintiff claims DR DOS was a better product than MS-DOS, as it
... included features MS-DOS did not have, operated at a faster speed, and was less expensive.
... Plaintiff contends that DR DOS's superiority over MS-DOS was due in part to Microsoft's
... assumption that the new operating system it was developing with IBM, called OS/2, would
... replace DOS as the preferred operating system. Therefore, according to plaintiff,
... Microsoft spent little time in further developing or improving MS-DOS. {1298}

24

25 Contrary to Microsoft's and IBM's projections, computer users did not switch to OS/2 at
... the rate anticipated, and DOS continued to be the preferred operating system. In July
... 1990, DRI launched DR DOS 5.0, an updated and improved version {1299} of DR DOS 3.31.
... Nicknamed "the Leopard," DR DOS 5.0 received positive reviews from several trade magazines
... as well as computer industry awards.[1] In an internal Microsoft e-mail sent to Phil
... Barrett, a Microsoft executive, from one of his subordinates, DR DOS 5.0 received similar
... high praise when compared to MS-DOS:

26

27 Last Thursday you asked me for a user's view of DR DOS 5.0.... I used DR DOS 5.0 with
... a HUGE number of apps. I found it INCREDIBLY superior to MS DOS 3.31 and IBM DOS 4.01. 1)
... DOS compatibility

28

29 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).

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33 CONCLUSION:

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35 DR DOS is vastly superior to MS dos 5.0. Both have nearly identical features ... I
... don't see any real `cutting edge' advantage of one over the other.

36

37 (Pl.'s Exhibit 123).

38

39 Caldera claims that Microsoft, alarmed at this positive reception of DR DOS 5.0 the
... computer industry and concerned about losing its DOS monopoly, began to engage in a series
... of practices to eliminate the threat DR DOS posed to Microsoft's market dominance.
... Initially, rather than competing with DRI, Microsoft attempted to bargain for DRI's exit
... out of the market. In essence, as plaintiff alleges, Microsoft offered DRI a certain
... amount of money for the use of DR DOS technology. Microsoft was proposing that DRI market
... MS-DOS instead of DR DOS and that each company license rights in the other's product. DRI,
... uninterested in a long-term relationship with Microsoft, offered DR DOS technology to
... Microsoft for \$30 to \$40 million. Microsoft refused.

40
41 Plaintiff alleges that beginning in approximately the latter half of 1990 with the
... introduction of DR DOS 5.0 into the marketplace, Microsoft began its improper campaign to
... eliminate DR DOS as a competitor and to illegally maintain its operating systems monopoly.
... By this time, DR DOS had captured approximately six percent of the operating systems
... worldwide market. Among the first of these allegedly improper actions was Microsoft's use
... of preemptive false and misleading announcements of forthcoming, competitive MS-DOS and
... Windows products. This practice of preannouncing upcoming products is known in the
... industry as "vaporware." Caldera claims that beginning in April 1990, Microsoft began
... making knowingly false and misleading preannouncements relating to the forthcoming MS-DOS
... 5.0, an allegedly comparable product to DR DOS 5.0. Plaintiff claims Microsoft knowingly
... mislead the public by stating MS-DOS 5.0 would be available to OEMs by September 1990, a
... full nine months before it was actually on the market.

42
43 Following DRI's April 26, 1990 announcement at an England trade show that DR DOS 5.0 would
... be available in eight weeks, Microsoft immediately announced {1300} to the trade press its
... development of MS-DOS 5.0. An e-mail sent by Mark Chestnut, then a product manager of
... MS-DOS 5.0, to a number of Microsoft executives on May 2, 1990, stated:

44
45 On the PR side, we have begun an "aggressive leak" campaign for MS-DOS 5.0. The goal
... is to build an anticipation for MS-DOS 5.0 and diffuse potential excitement/momentum from
... the DR DOS 5.0 announcement. At this point, we are telling the press that a major new
... release from Microsoft is coming this year which will provide significant memory relief
... and other important features. This was picked up by the major weeklies in the U.S. and was
... the page 1 story in PC Week on 4/30.

46
47 Additionally, Chestnut himself flew to several countries, meeting with dozens of OEMs and
... telling them that they could expect MS-DOS 5.0 by September 1990. Plaintiff alleges that
... Chestnut's representations caused these OEMs to postpone any decision to switch to DR DOS.

48
49 Caldera argues that the purpose behind Microsoft's preannouncements was to prevent OEMs
... from entering into licensing agreements with DR DOS 5.0. and that Microsoft knew it could
... not possibly comply with the schedule it was announcing to the public. Caldera's expert
... states that such an aggressive schedule was objectively unattainable. For one thing, a
... release date of September 1990 would only allow for a three-month beta test cycle, which,
... according to Caldera, is an unacceptably short beta testing period.[2] Plaintiff argues
... that by the end of 1990, however, Microsoft was aware that its tactics were working. In a
... performance self-evaluation, Chestnut wrote "virtually all of our OEMs worldwide were
... informed about DOS 5, which diffused DRI's ability to capitalize on a window of
... opportunity with these OEMs." (Pl.'s Exhibit 62).

50
51 By mid-October 1990, the media became concerned about the veracity of Microsoft's
... preemptive remarks directed at DR DOS 5.0. Such media pressure was not taken lightly.
... Following an interview with PC Week, a trade magazine, regarding the release of MS-DOS
... 5.0, Chestnut wrote to other Microsoft employees on October 17, 1990:

52
53 I'm afraid that this guy [Paul Sherer of PC Week] is going to write that we are being
... open about DOS 5 beta because we are trying to pre-empt DR DOS 5 sales. I tried real hard
... to present a different point of view, but I don't think he bought it. I'm concerned that
... this article may make us look bad. Can you guys follow up and see if we need to do some
... damage control?

54
55 This was the toughest interview I've ever done, I felt like Richard Nixon giving his
... "I am not a crook" speech.

56
57 (Pl.'s Exhibit 87).

58
59 In addition to Microsoft's "vaporware" strategies, Caldera alleges that following the
... launch of DR DOS 5.0 Microsoft refined and dramatically expanded a campaign of "fear,
... uncertainty, and doubt" (FUD) against DRI and all of its forthcoming versions of DR
... DOS.[3] Plaintiff alleges {1301} that account managers were directed to share purported
... "serious problems" with OEMs considering a switch to DR DOS 5.0. Caldera asserts that
... Microsoft deliberately withheld from these same OEMs independent tests confirming DR DOS
... 5.0 compatibility with MS-DOS and Windows, while creating its own tests to give the
... appearance of "incompatibility."

60
61 In addition to its improper vaporware and FUD campaigns, Caldera alleges that Microsoft
... also forced OEMs away from DR DOS 5.0 by what plaintiff refers to as the "licensing
... triple-whammy," which refers to (1) per processor licenses, (2) minimum commitments
... subject to forfeiture, and (3) increased license duration. Per processor licensing
... agreements required an OEM to pay Microsoft a royalty on every machine the OEM shipped
... regardless whether the machine contained MS-DOS or a different operating system. This is
... in contrast to a per system licensing agreement, which required OEMs to pay a royalty on
... only those computers shipped with MS-DOS installed. The use of per processor agreements is
... argued by plaintiff to be Microsoft's most effective single weapon against DR DOS.
... Plaintiff alleges that DRI had no realistic chance to license DR DOS to OEMs under a per
... processor license with Microsoft. It would make no sense for an OEM to install DR DOS when
... it had already paid for MS-DOS on every machine. Microsoft contends that OEMs were free to
... depart from the per processor licensing scheme, and that price differentials between
... license types were "relatively minor." However, plaintiff points to the depositions of
... several OEM executives who testified that even slight price differentials between the per
... processor and per system licenses meant that only the per processor license was
... financially viable.

62
63 Plaintiff also asserts that Microsoft's use of minimum commitments with prepaid balances
... raised the costs to OEMs who may have wanted to switch to an alternative operating system.
... As alleged, during the life of a Microsoft contract, OEMs could find themselves
... over-committed with respect to units of Microsoft products. Plaintiff claims that given
... the nature of Microsoft's mandatory, nonrefundable minimum commitment payments, OEMs faced
... the prospect of either forfeiting their prepaid balance or signing a new agreement with
... Microsoft to partially recoup the prepaid balance. The rationale, plaintiff asserts,
... behind Microsoft's minimum commitments policy was not just to provide an OEM an
... opportunity to recoup the prepaid balance, but rather to sign a new license agreement so
... that the OEM would continue to distribute only MS-DOS.

64
65 Microsoft's final licensing tactic aimed at DR DOS, as plaintiff alleges, was increased
... license duration. Microsoft began increasing its licensing agreements from two-year to
... three-year terms and gave OEMs a small price break for agreeing to the longer term.
... Caldera claims that the increased licensing time was implemented only after DR DOS became

65... a threat to MS-DOS's monopoly position, and that Microsoft deliberately increased the term
... length as part of its illegal scheme to drive DRI from the market. The strategy, plaintiff
... alleges, foreclosed DR DOS from effectively competing for existing OEM business.

66

67 On July 17, 1991, DRI announced its intent to merge with Novell. The result of this
... announcement intensified the threat DR DOS posed to Microsoft. The potential merger was a
... concern on more than one level. One Microsoft executive, Jim Allchin, expressed: "I
... thought about it all night. Since I came here I said there were two things that concerned
... me related to Novell: one Novell partnering with IBM and two Novell coming to us at the
... {1302} desktop. Both fears have now come true." (Pl.'s Exhibit 148). One of Microsoft's
... MS-DOS's product managers, Richard Freedman, expressed:

68

69 The offensive scenario presumes Novell is actively developing products to compete with
... Win Peer and NT, and ultimately plans to enter the standalone OEM DOS business. It is this
... worstcase scenario we're focusing on.

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72

73 This scenario assumes Novell aims to own the desktop, both server and workstation, and
... assumes they'll attempt to do this first by integrating Netware and DR DOS, and then,
... having legitimized DR DOS, by going after OEM business. IBM licensing DR DOS is a major X
... factor in this scenario.

74

75 (Pl.'s Exhibit 153). Plaintiff alleges that these and other excerpts indicate that
... Microsoft was alarmed at not only the prospect of Novell competing in the MS-DOS arena,
... but also that an alliance between IBM and Novell would make DR DOS a much larger threat.
... On September 23, 1991, IBM officially endorsed DR DOS 6.0, which was scheduled to be
... released to the public in September or October of the same year. Plaintiff alleges that in
... response to IBM's endorsement and in anticipation of an IBM/Novell alliance, Bill Gates
... publicly threatened retaliation against IBM should it choose DR DOS. Caldera claims that
... as a result of the threatened retaliation and intense FUD concerning DR DOS
... incompatibility with Windows, IBM withdrew its consideration of DR DOS.[4]

76

77 In late September 1991, Novell released DR DOS 6.0. Plaintiff alleges with this release,
... Microsoft adhered to the same pattern of attack, vaporware, FUD, and per processor
... licensing agreements, but with more intensity. Microsoft executives were aware of the
... threat Novell/DRI and the new DR DOS 6.0 posed. Jim Allchin wrote on September 9, 1991:

78

79 We must slow down Novell.... As you said Bill, it has to be dramatic We need to
... slaughter Novell before they get stronger.

80

81 (Pl.'s Exhibit 175). On March 26, 1993, Allchin also wrote:

82

83 I still don't think we take them as serious as is required of us to win. This isn't
... IBM. These guys are really good; they have an installed base; they have a channel; they
... have marketing power; they have good products. AND they want our position. They want to
... control the APIs, middleware, and as many desktops as they can in addition to the server
... market they already own.

84

85 We need to start thinking about Novell as THE competitor to fight against – not in one
... area of our business, but all of them.

86

87 If you want to get serious bout stopping Novell, we need to start understanding this
... is war – nothing less. That's how Novell views it. We better wake up and get serious about

87... them or they will eventually find a way to hurt us badly.

88

89 (Pl.'s Exhibit 349). Plaintiff alleges that with this mind-set, Microsoft intensified its
... improper FUD campaign against DR DOS. Specifically, plaintiff asserts that Microsoft
... attempted to convince OEMs that DR DOS would to be incompatible with the upcoming Windows
... 3.1, when in fact Microsoft knew that DR DOS was, or with minor adjustments could be,
... compatible with Windows. On April 6, 1992, Windows 3.1 was launched worldwide. Following
... this release, plaintiff claims users immediately bombarded Microsoft with requests
... regarding problems setting up Windows 3.1 over DR DOS. Microsoft's standard response,
... according to plaintiff, was to tell the users that Windows was only tested {1303} with
... MS-DOS, not DR DOS, and that using a system other than MS-DOS puts the user at his own
... risk. When confronted with the issue of compatibility between Windows and DR DOS,
... Microsoft's marketing staff was instructed to respond, "we only test windows on Microsoft
... supported operating systems, so there's really no way to know in the future what will work
... and what will not." (Pl.'s Exhibit 176). Recognizing the damage that its FUD campaign
... could have on DR DOS, Microsoft stated: "We need to create the reputation for problems and
... incompatibilities to undermine confidence to drdos6; so people will make judgments against
... it without knowing details or fa[c]ts." (Pl.'s Exhibit 227).

90

91 To assure DR DOS's incompatibility with Windows, plaintiff alleges that Microsoft placed
... DRI on a "beta blacklist." According to plaintiff, Microsoft knew that if the DR DOS
... development team had access to a Windows 3.1 beta, it would allow them to make DR DOS
... compatible and consequently allay public fears of incompatibility. DRI submitted a formal
... request to become a beta site. The request was denied on August 2, 1991. Being placed on
... Microsoft's beta blacklist had an alleged direct effect on DR DOS sales.[5] One
... corporation notifying DRI of its decision to reject DR DOS 6.0, stated that

92

93 the most important factor, however, is the rift developing between Digital Research
... and Microsoft. By this I mean Microsoft not allowing you to beta test Windows 3.1. Since
... the users who would be most inclined to switch to DR DOS are also using Windows, this one
... factor is of particular concern.

94

95 (Pl.'s Exhibit 266).

96

97 According to Caldera, Microsoft continued its attacks on DRI by intentionally making
... Windows 3.1 incompatible with DR DOS, not for any technologically significant reason, but
... for the sole purpose of eliminating DR DOS as a competitor. Caldera supports its claim
... with internal Microsoft statements, such as these written by David Cole and Phil Barrett
... on September 30, 1991, respectively: "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," and "[t]he approach we will take is
... to detect dr 6 and refuse to load. The error message should be something like `Invalid
... device driver interface.'" (Pl.'s Exhibits 205 and 206). Microsoft developers discussed
... reliable DR DOS detection mechanisms, and allegedly incorporated "Bambi," Microsoft's code
... name for its updated disc cache utility, which among other things detects DR DOS and
... refuses to load, in Windows 3.1.

98

99 In addition to Bambi, Microsoft added a version check known as the extended memory
... specifications (XMS) to the Windows 3.1 SETUP program. The XMS made it impossible for
... Windows to install on a DR DOS system. When it detected DR DOS the user was told:

100

101 The XMS driver you have installed is not compatible with Windows. You must remove it
... before SETUP can successfully install Windows.

102

103 Caldera alleges that there was no valid competitive purpose for this version check, and

103... that this message was not just misleading, but wrong, and that the DR DOS XMS driver was
... compatible with Windows 3.1. Caldera further alleges that Microsoft introduced a computer
... "bug," known as the nested task flag, that would cause a fatal error when users tried to
... run Windows 3.1 with DR DOS. Additionally, it is alleged that Microsoft installed
... "software locks" in the Korean version of Windows causing Windows to malfunction when it
... operated with DR DOS. Caldera claims that Microsoft knew about these problems, knew the
... cause of the problems, knew how to fix them, yet did nothing. Finally, Caldera complains
... of Microsoft's insertion of a line of code in a beta version of Windows 3.1. The code was
... designed to detect the presence of MS-DOS. In the {1304} event that MS-DOS was not
... detected, the following message was displayed:

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105 Non-fatal error detected: Error number [varied]. Please contact Windows 3.1 beta
... support. Press enter to exit or C to continue.

106
107 Through Microsoft's alleged use of vaporware, per processor licensing agreements, FUD,
... beta blacklisting, and the insertion of incompatibilities between Windows and DR DOS,
... Caldera claims that Microsoft was essentially forcing OEMs to purchase both MS-DOS and
... Windows. By this method Microsoft, Caldera asserts, was using its monopoly in the GUI
... (i.e. Windows) market, to illegally maintain its monopoly in the operating systems market.
... One OEM, an alleged leading proponent of DR DOS, stated: "[Microsoft] just said they had
... changed the way in which they market the product, instead of it being available as two
... separate packages it now came as an integrated package, which was DOS and Windows 3.11 or
... DOS and Windows for Workgroups 3.11, take it or leave it." (Harvey Depo. at 33).

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109 [...]

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111 In August 1995, Microsoft released Windows 95. For ten years prior thereto, Microsoft had
... sold MS-DOS and Windows separately. However, Windows 95 combined {1305} the functions of
... Windows and DOS into one product. Microsoft touts Windows 95 as one of the most popular
... software products in history, selling within four months after its release nearly eleven
... million copies through OEM channels and nearly five million copies through retail
... channels. After its release, virtually all new personal computers came with Windows 95
... preinstalled by OEMs. With the release of Windows 95, users of the Intel based personal
... computer had a totally integrated (from boot-up to shutdown) graphical operating system
... for the first time. Microsoft claims that Windows 95 offered many new features of
... functionality over that provided by the combination of MS-DOS 6.0 and Windows 3.0 when
... those products were installed separately on a personal computer. Caldera, however, alleges
... that in reality Windows 95 is not an integrated software product, but rather two products
... — MS-DOS 7.0 and Windows 4.0, which Caldera asserts are merely updated versions of both
... MS-DOS 6.22 and Windows 3.1 — packaged together using a common installation program with
... blue cloud graphics to make them appear to be a single product. Plaintiff claims that
... MS-DOS 7.0 and Windows 4.0 can be easily isolated and sold as separate products. Since the
... release of Windows 95, updated versions of Windows and MS-DOS were not sold separately.
... Plaintiff claims Novell would have been able to compete with Microsoft but for Microsoft's
... prior conduct and ultimately this illegal tying arrangement of, Windows 95, which
... plaintiff argues was the coup de grace for DR DOS.

112
113 On July 23, 1996, Caldera acquired DRI from Novell. Included in the purchase was the right
... to bring this lawsuit against Microsoft. Based on the foregoing, Caldera filed its
... complaint against Microsoft, alleging the improper use and maintenance of monopoly power
... in violation of § 2 of the Sherman Act and for the illegal restraint of trade in violation
... of § 1 of the Sherman Act. Caldera supports its § 1 claim by arguing that Windows 95
... constitutes an illegal tie of two separate products formerly sold as MS-DOS and Windows.
... Caldera supports its § 2 claim, as aforementioned, by alleging that Microsoft engaged in

113... an anticompetitive scheme, the factual components of which consist of, improper licensing
... arrangements, improper preannouncements, improper intentional and perceived
... incompatibilities, beta blacklisting, the improper creation of fear, uncertainty, and
... doubt, and the illegal tying together of its products. Caldera acknowledges that each
... instance of alleged misconduct taken alone may not amount to a violation of § 2. However,
... when viewed in totality, Caldera asserts that Microsoft has engaged in an unlawful,
... anticompetitive scheme to illegally maintain its monopoly in the operating systems market.

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115 III. DISCUSSION

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117 [...]

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119 Anticompetitive conduct describes a wide variety of behavior including espionage,
... sabotage, predatory pricing, fraud, price discrimination, price-fixing, bid-rigging,
... illegal tying arrangements, product disparagement and a host of other activities that
... improperly stifle competition. Section 2 prohibits a monopolist from engaging in
... anticompetitive practices that are designed to deter potential rivals from entering the
... market or from preventing existing rivals from increasing their output, no matter how
... flagrant or subtle the violation. A monopoly may not improperly "wield [its] resulting
... power to tighten its hold on the market." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603
... F.2d 263, 275 (2d Cir.1979). Perhaps the clearest way to explain what a monopolist may
... legally do is to say that the monopolist may engage in all of the same procompetitive
... activities that allowed it to become a legal monopolist in the first place. These would
... include building a better or less expensive product, engaging in better public relations,
... employing effective (and honest) advertising campaigns, and developing aggressive and
... effective marketing techniques. If these activities result in even more market share, and
... drive competitors out of the market, the monopolist is nevertheless fully entitled to such
... expansion, and its conduct is not a violation of the Sherman Act. Conversely, a monopolist
... may not engage in any activities other than those that are procompetitive, as generally
... described above.

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121 A. PLAINTIFF'S MOTION TO STRIKE

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125 B. MICROSOFT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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127 The Court now addresses Microsoft's motions for partial summary judgment regarding (1)
... "Plaintiff's Claim of Intentional Incompatibilities," (2) "Plaintiff's Claim of
... Predisclosure," (3) "Plaintiff's Claim of Perceived Incompatibilities," and (4)
... "Plaintiff's Claim of Technological Tying."

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129 [...]

130
131 1. INTENTIONAL INCOMPATIBILITIES

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133 Caldera alleges that in an effort to eliminate competition in the operating systems
... market, Microsoft introduced intentional incompatibilities between Windows and DR DOS.
... Caldera maintains that these incompatibilities, in connection with other anticompetitive
... behavior such as Microsoft's exclusion of DRI from beta testing Windows 3.1 and
... Microsoft's campaign to spread fear, uncertainty, and doubt about Windows' compatibility
... with DR DOS, amounted to a violation of § 2 of the Sherman Act. In response to this
... allegation, Microsoft seeks summary judgment on Caldera's claims of intentional
... incompatibilities.

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135 [...]
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137 Next Caldera alleges that Microsoft intentionally placed a detection device known as Bambi
... to detect DR DOS and refuse to load Windows 3.1 if DR DOS was detected. Bambi was
... Microsoft's code name for SMARTDRV, a Windows 3.1 module. Caldera claims that Microsoft
... included code located within the Bambi module in at least one beta release of Windows 3.1
... that checked for DR DOS. Once DR DOS was detected, an error message appeared on the
... computer monitor and Windows refused to run. Caldera claims that the incompatibility was
... intentionally inserted and that there was no technological reason or value to adding the
... error message. Caldera offers the declaration of its expert witness Dr. Hollaar, in
... support of its allegations.

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139 [...]
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141 Microsoft contends that in order for Caldera to succeed on its claim it must first show
... that each of the alleged incompatibilities between DR DOS and Windows "had no purpose
... other than to preclude competition from DRI." (Def's Reply Mem. at 12). In support of this
... heavy burden, Microsoft relies on Transamerica Computer Co., Inc. v. I.B.M. Corp., (In re
... IBM Peripheral EDP Devices Antitrust Litig.), 481 F.Supp. 965 (N.D.Cal.1979). In
... Transamerica, the plaintiffs were manufacturers of peripheral computer equipment such as
... key boards and printers that were compatible with IBM personal computers. The plaintiffs
... brought suit for antitrust violations when IBM redesigned its central processing unit
... (CPU) to make it incompatible with any peripheral product not made by IBM. Defendant IBM
... maintained that the redesign had technological value and therefore the resulting
... incompatibilities could not support a § 2 claim.

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143 [...]
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145 Contemporaneous with the appearance of these incompatibilities, several internal Microsoft
... memoranda were sent between Microsoft executives discussing possible plans to make Windows
... 3.1 incompatible with DR DOS. One such memorandum sent September 27, 1991 by Brad
... Silverberg, a top Microsoft executive, to Jim Allchin, another Microsoft executive,
... discussed the possible partnership between IBM and Novell involving DR DOS and how
... Microsoft would respond. The email reads:

146
147 after IBM announces support for dr-dos at comdex, it's a small step for them to also
... announce they will be selling netware lite, maybe sometime soon thereafter. but count on
... it.

148
149 We don't know precisely what ibm is going to announce, my best hunch is that they will
... offer dr-dos as the preferred solution for 286, os 2 2.0 for 386. they will also probably
... continue to offer msdos at \$165 (drdos for \$99). drdos has problems running windows today,
... and I assume will have more problems in the future.

150
151 Allchin responded, "You should make sure it has problems in the future. :-)" (Pl.'s
... Exhibit 197).

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153 [...]
154
155 Perhaps the most direct evidence offered by plaintiff that suggests the incompatibilities
... were intentionally placed by Microsoft for the purpose of eliminating DR DOS as a
... competitor, and not for procompetitive purposes, comes form a series of e-mails sent
... between Charles Stevens, Phil Barrett, and Brad Silverberg on September 29, and 30, 1991

155... relating to the Bambi incompatibility. Stevens writes:

156
157 I tracked down a serious incompatibility with DR-DOS 6 – They don't use the `normal'
... devise driver interface for >32M partitions. Instead of setting the regular START SECTOR
... field to Offfffh an then using a brand new 32-bit field the way MS-DOS has always done,
... they simply extended the start sector field by 16 bits.

158
159 This seems like a foolish oversight on their part and will likely result in extensive
... incompatibilities when they try to run with 3rd part device drivers.

160
161 I've patched a version of Bambi to work with DRD6, and it seems to run Win 3.1 without
... difficulty. This same problem may have caused other problems with Win 3.1 and swapfile
... under DRD6

162
163 It is possible to make Bambi work, assuming we can come up with a reasonably safe
... method for detecting DRD6.

164
165 (Pl.'s Exhibit 208). The day after Barrett received this e-mail he responded: "The
... approach we will take is to detect dr 6 and refuse to load. The error message should be
... something like `Invalid device driver interface.' mike, tom, mack – do you have a reliable
... dr6 detection mechanism?" That same day Barrett also sent an e-mail to Brad Silverberg
... which read: "heh, heh, heh my proposal is to have bambi refuse to run on this alien
... os. comments?" (Pl.'s Exhibits 205 and 207).

166
167 [...]

168
169 Caldera has presented sufficient evidence that the incompatibilities alleged were part of
... an anticompetitive scheme by Microsoft. Accordingly, defendant's Motion for Partial
... Summary Judgment on Plaintiff's Alleged Intentional Incompatibilities is denied.

170
171 2. PREDISCLASURE

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173 [...]

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175
176 Before the release of Windows 3.1, Microsoft had always included DR DOS in its beta
... testing. However, in July 1991, Microsoft elected to exclude all competitors in the
... operating system market, including DR DOS, from beta testing Windows 3.1. {1315}

177
178 [...]

179
180 [T]he question currently before the Court is not whether Microsoft was under a duty to
... include DRI in beta testing, but rather whether excluding DRI from beta testing, in which
... it had previously been included, was predatory conduct under the attenuating
... circumstances. Among the purposes of § 2 of the Sherman Act is to encourage competition in
... the marketplace by prohibiting monopolists from acting in anticompetitive ways. Although
... Microsoft was under no duty to predisclose information to DRI, it could not do so as part
... of an overall anticompetitive plan to eliminate DRI from the DOS market. It is a very
... different thing to impose an affirmative duty on a monopolist to prerelease sensitive
... corporate information or innovations to a competitor under all circumstances than it is to
... prohibit a corporation from acting in an anticompetitive manner. As previously discussed,
... generally a corporation may keep its innovations secret from competitors. This may foster
... competition. However, this is not always the case and when a monopolist acts in an
... anticompetitive manner it is proscribed by § 2. While this Court does not intend to

180... announce a new rule that monopolists have a duty to predisclose innovations to a
... competitor, the Court does intend to uphold the basic antitrust principle that a
... monopolist may not eradicate its competitors through anticompetitive means.

181

182 [...]

183

184 Therefore, defendant's partial summary judgment motion relating to plaintiff's
... predisclosure claims is denied.

185

186 3. PERCEIVED INCOMPATIBILITIES

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188 Microsoft also seeks partial summary judgment on Caldera's allegations of anticompetitive
... conduct relating to a routine, known as the AARD code, contained in one of the beta
... versions of Windows 3.1. The AARD code was designed to detect the presence of MS-DOS in
... the computer onto which the Windows beta was loaded. When the AARD code detected a foreign
... DOS system, a message was displayed which read:

189

190 Non-fatal error detected: Error number [varied]. Please contact Windows 3.1 beta
... support. Press enter to exit or C to continue.

191

192 Caldera argues that this error message was false as no error had actually occurred. In
... fact, all that had occurred was that MS-DOS had not been detected and therefore, another
... operating system was present. Caldera further contends that the AARD code was an
... intentional incompatibility created by Microsoft and was part of Microsoft's campaign to
... create doubts about the compatibility between DR DOS and Windows.

193

194 [...]

195

196 Mr. Cole sent an e-mail to Brad Silverberg regarding the AARD code and the suggestion that
... a less severe message be installed than the one currently under contemplation.

197

198 A kind-gentle message in setup would probably not offend anyone and probably won't get
... the press up in arms, but I don't think it serves much of a warning. BillP made an
... excellent point, what is the guy supposed to do?

199

200 With a TSR, the solution is to just remove it. With DR-DOS, or any others, I doubt the
... user is in a position of changing. He will no doubt continue to install. When he finds
... problems, he will call PSS. We will get a lot of calls from Dr DOS users. Perhaps a
... message in the phone system for Windows. It would say something like "if you are not using
... MS-DOS or an OEM version of MS-DOS, then press". Then give them the message.

201

202 (Pl.'s Exhibit 277). Mr. Silverberg replied: "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." (Pl.'s Exhibit 278).

203

204 While it may very well be that Microsoft had a legitimate business reason to include the
... AARD code in its final beta version, a reasonable fact finder could conclude that the code
... was inserted to make DR DOS appear incompatible with Windows. This may not give rise to a
... claim of product disparagement or, standing alone, a § 2 violation. However, inserting the
... code with such a purpose is certainly not competition on the merits and viewed in context
... with other alleged anticompetitive behavior may give rise to a § 2 violation. Plaintiff is
... entitled to present the AARD code as evidence of anticompetitive behavior in establishing
... its § 2 claim. Accordingly, defendant's motion for partial summary judgment on Plaintiff's

204... Claim of Perceived Incompatibilities is denied.

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206 4. TECHNOLOGICAL TYING

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210 B. TECHNOLOGICAL TYING ARRANGEMENTS

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214 Accordingly, Caldera will be allowed to present its § 1 tying claim to a jury.

215

216 C. CALDERA'S § 2 TYING CLAIM

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218 Furthermore, in addition to presenting its § 1 tying claim to the jury, Caldera will be
... allowed to present to the jury Microsoft's alleged unlawful tying arrangement of Windows
... 4.0 and MS-DOS 7.0 as part of Caldera's evidence in support of its § 2 claim for
... anticompetitive conduct. "Illegal tie-ins ... under section 1 may also qualify as
... anticompetitive conduct for section 2 purposes." *Multistate Legal Studies v. Harcourt*
... *Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1550 (10th
... Cir.1995).

219

220 IV. CONCLUSION

221

222 For the foregoing reasons, the Court finds that plaintiff's "Motion to Strike Microsoft's
... Partial Summary Judgment Briefs Relating to Substantive Antitrust Violations" is DENIED,
... and defendant's Motions for Partial Summary Judgment on "Plaintiff's Claim of
... Predisclosure," "Plaintiff's Claim of Perceived Incompatibilities," "Plaintiff's Claim of
... Intentional Incompatibilities," and "Plaintiff's Claim of Technological Tying" are DENIED.

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