

F. Microsoft entered into exclusionary agreements with other firms that restricted their ability to promote, support, and distribute non-Microsoft browsers

283. Microsoft also induced other firms to enter into exclusionary agreements designed to increase its share of the browser market and protect its operating system monopoly.

1. Microsoft used its leverage over office productivity suites to coerce Apple to enter into an exclusionary agreement that favored Internet Explorer and severely disadvantaged browser rivals

284. Microsoft, by threatening to cease development of its Office for Macintosh productivity suite, coerced Apple into making Internet Explorer the default browser on all Macintosh operating systems and to disadvantage competing browsers.

a. To facilitate winning the browser war, Microsoft sought to obtain default status for Internet Explorer on the Macintosh

285. Microsoft made inducing Apple to favor Internet Explorer and disfavor competitive browsers a key goal.

285.1. Apple develops and markets computer systems. Apple's operating system for its desktop computers is known as the Macintosh Operating System or the "Mac OS."

iii. Tevanian Dir. ¶¶ 7, 10.

285.2. Although the Macintosh has a tiny share of PC sales compared to Intel-compatible personal computers, Macintosh users are particularly active users of the Internet.

i. Avadis Tevanian, the Senior Vice President of Software Engineering at Apple Computer, testified that "given the demographics of our users, Macintosh users were more likely to go on the Internet, and so the percentages don't actually translate." Tevanian, 11/9/98am, at 58:18-59:2.

iv. A January 27, 1998 Internet Explorer 5 for Macintosh draft transition plan stated that "it's becoming increasingly apparent that the cross-platform browsers directly affect overall IE market share exponentially." GX 370.

285.3. Microsoft accordingly sought to obtain preferences for Internet Explorer on the Macintosh.

285.3.1. Although Apple had bundled Internet Explorer with its operating system, Mac OS 8.0, since April 1997, Microsoft remained dissatisfied; indeed, Microsoft asserted, failure to make Internet Explorer the default browser breached an oral agreement between the two firms.

- i. Tevanian testified that “Gates was unhappy that, although we were including it with Mac OS 8, we were not including it as the default.” Tevanian, 11/9/98am, at 25:16 - 26:5; see also Tevanian Dir. ¶¶ 30-32. Then-Apple CEO Gil Amelio wrote to Gates attempting to appease him on this issue. GX 1053 (7/3/97 letter from Amelio to Gates: “I’d like to comment on the inclusion of Internet Explorer with our release of Mac OS 8. I know that this is a source of great irritation to you.”).

285.3.2. Gates made increasing Internet Explorer share on Apple’s platform a “key” goal, and identified making Internet Explorer the “standard” or default browser as the means of accomplishing that.

- i. As early as June 23, 1996, Gates stated his goals for the Apple relationship: “I have 2 key goals in investing in the Apple relationship -- 1) Maintain our applications share on the platform and 2) See if we can get them to embrace Internet Explorer in some way,” and proposed to Apple that Apple “ship IE on all their systems as the standard browser.” GX 260 (6/23/96 Gates e-mail to Microsoft executives).
- b. To accomplish its objective, Microsoft used its leverage over Apple, specifically Apple’s dependence on Microsoft’s Office productivity suite, to coerce Apple to enter into an exclusionary agreement that favored Internet Explorer and disfavored rivals**

286. To accomplish its objective of increasing its browser share with Macintosh users, Microsoft coerced Apple, by threatening to cancel continued support for Microsoft's Office productivity suite for the Macintosh, into agreeing to favor Internet Explorer and restrict its promotion, distribution, and support of Microsoft's browser rivals.

(1) Microsoft's Office productivity suite ("Mac Office") was and remains vital to Apple's business

287. Microsoft's continued support for its Office productivity suite for the Macintosh is vital to Apple's computer business.

287.1. Microsoft Office is an "office productivity suite" that includes word processing, spreadsheet, and presentation programs. Microsoft's version of Office that runs on the Macintosh is known as Microsoft's Office for Macintosh or "Mac Office."

i. Tevanian Dir. ¶¶ 34-35.

287.2. Because Office, including Mac Office, is the dominant product in its critical category, Microsoft's continued support for Office on the Macintosh is vital to Apple's business.

287.2.1. Office, including its Macintosh version, is the dominant office productivity suite.

i. An internal Apple strategy presentation states: "Excel owns 100% of the Mac productivity spreadsheet market" and "Word has 92 % of the word processing productivity market." GX 1036, at MAC 10347; Tevanian, 11/9/98am, at 30:17-21.

ii. Tevanian Dir. ¶¶ 34-35.

287.2.2. Both Apple and Microsoft recognize that Microsoft's continued support for Mac Office is vital to the Macintosh's survival.

- i. Tevanian testified that for most Apple customers, “Office was a critical application that they depended on. And if Office were no longer to be available and if new versions were not to be produced, then we would basically lose our customers.” Tevanian, 11/9/98am, at 28:8-15.; Tevanian Dir. ¶ 35.
- ii. Microsoft documents recognize the significant leverage Mac Office gave Microsoft over Apple. E.g., GX 267 (1/21/98 Bradford e-mail to Gates and others, explaining that “MacOffice is the biggest Apple carrot. From a browser, mail client and java perspective, Apple has other options.”); GX 263 (6/27/97 Waldman e-mail to Gates et al.: “The threat to cancel Mac Office 97 is certainly the strongest bargaining point we have, as doing so will do a great deal of harm to Apple immediately.”).

287.2.3. In the summer of 1997, Microsoft had substantially completed development work for a new version of Mac Office (Mac Office 97, later Mac Office 1998).

Failure to release or support this product would have had a devastating effect on Apple’s business.

- i. Tevanian testified that without good versions of Office available for the Macintosh: “There’s the first effect, which is customers can’t get Office, which is, of course, devastating in and of itself. The second effect, which makes the problem even worse, is if other software developers, who are developing other applications, which are also important to customers, see that Microsoft is pulling away and Office is pulling away, then they would pull away themselves because they would see the whole platform as just dying out.” Tevanian, 11/9/98am, at 29:13 - 29:21; Tevanian, 11/9/98am, at 27:17 - 28:25; Tevanian Dir. ¶ 35 (“Because Microsoft Office completely dominates the market for office productivity suites, it is critical to the commercial viability of the Apple Mac OS to have a version of Microsoft Office that can run on the Mac OS operating system.”); GX 1036, at MAC10347 (“As the largest Macintosh developer, [Microsoft’s] abandonment of the platform would have serious ramifications.”); Tevanian Dir. ¶ 15 (explaining how the commercial viability of an operating system is dependent on the availability of well accepted, broadly used application programs).

- ii. Tevanian further testified: “Because the prior Office for Macintosh version was poor in terms of performance and stability, Apple computer users were especially anxious to obtain a new and improved version of Microsoft Office.” Tevanian Dir. ¶ 36; Tevanian, 11/9/98am, at 31:24-32:5 (explaining that Apple customers “did not at the time have access to a good version of Office; the previous version of Office was just really bad”); Tevanian, 11/4/98pm, 23:4-19, 25:7 - 26:4 (same); GX 263 (6/27/97 Gates e-mail acknowledging Microsoft’s neglect of the Mac business).
- iii. Tevanian testified that Microsoft had substantially completed development work on the MacOffice update by June 1997 and had shown Apple personnel a preliminary beta. Tevanian Direct ¶ 37; see also GX 263 (6/23/97 Waldman e-mail to Gates describing work accomplished).

(2) Microsoft used the threat of stopping development of and support for Mac Office to extract Apple’s agreement to favor Internet Explorer and to restrict its distribution of rivals

288. Recognizing the importance of updating and supporting Mac Office, Microsoft used the threat of canceling such support to coerce Apple into entering an exclusionary agreement.

288.1. Through the spring and summer of 1997, Apple and Microsoft were engaged in a wide-ranging discussion concerning the settlement of, among other things, a patent dispute, and the issue of how Apple bundled Internet Explorer.

- i. Tevanian testified that in the spring of 1997, Microsoft insisted on merging negotiations to resolve the disputes over patents, browsers, and other issues to seek a comprehensive solution. Tevanian Direct ¶¶ 33-34; see also GX 1046 (4/27/97 e-mail from Microsoft’s Maffei to Apple’s Scalise containing 12 point proposal).

288.2. Even though it had substantially completed development for its new version of Mac Office, Microsoft threatened to cease supporting Mac Office and other Microsoft applications ported to the Macintosh unless Apple agreed, among other things, to make Internet

Explorer the default browser for the Mac OS and to restrict Apple's distribution and promotion of non-Microsoft browsers.

288.2.1. Microsoft knew that Apple needed the new release of Mac Office and Microsoft's commitment to support it.

- i. In a June 27, 1997, e-mail to Bill Gates, Ben Waldman, the Microsoft manager in charge of Mac Office 97, stated, "The threat to cancel Mac Office 97 is certainly the strongest bargaining point we have, as doing so will do a great deal of harm to Apple immediately." GX 263 (6/27/98 Waldman e-mail to Gates).
- ii. Tevanian testified that "Microsoft was aware that Apple desperately needed to maintain support for Microsoft Office for Macintosh. In addition, there was a strong demand in the market for Microsoft Office 98 for Macintosh based on the reports of its development." Tevanian Dir. ¶ 36; Fisher Dir. ¶ 153 ("As Microsoft knew, withdrawal of support for this crucial application would have a devastating effect on the viability of the Macintosh operating system.").
- v. Tevanian further testified that Microsoft's refusal to release the new version of Office, even if the outdated version remained available, would have had the net effect of canceling the Mac Office program because applications that are not updated fall behind. Tevanian, 11/4/98pm, at 23:4 - 24:8; Tevanian, 11/9/98am, at 32:11-16 ("Generally speaking, applications need to be updated every once in a while to take advantage of new features in the operating system or, in some cases, to deal with just other issues that may come up. So any -- any application that is in use by customers will often need to be upgraded on a frequent basis.") .

288.2.2. Microsoft used the threat of withdrawing support for Office to coerce Apple's acceptance of its exclusionary terms.

- i. Tevanian testified: "In mid-May 1997, Microsoft's negotiators told Apple's negotiating team that Microsoft would remove its support for Microsoft application programs for the Mac OS operating system if Apple refused to resolve the disputes concerning the

patents, the browsers and other aspects of the companies' relationship on terms acceptable to Microsoft." Tevanian Dir. ¶ 34.

- ii. Ben Waldman, who was in charge of Mac Office wrote to Gates: "The pace of our discussions with Apple as well as their recent unsatisfactory response have certainly frustrated a lot of people at Microsoft. The threat to cancel Mac Office 97 is certainly the strongest bargaining point we have, as doing so will do a great deal of harm to Apple immediately. I also believe that Apple is taking this threat pretty seriously" GX 263 (2/27/97 Waldman e-mail to Gates) (emphasis added). Gates' response was to ask Waldman when the product would ship and "Can we avoid Apple knowing how far along we are for the next 30 days?" GX 263 (6/27/98 Gates to Waldman e-mail).
- iii. Waldman later assured Microsoft CFO Greg Maffei that he has done his part to convey the threat: "Did you convey your concerns to Apple (i.e. that you were recommending cancellation to Bill), and did they have a response? When I spoke with [Apple's] Gable yesterday, I told him that we had almost given up on any hope of progress, and that you would be recommending to Bill that we cancel Mac Office 97. . . . In any case, he took notes, and I think he got the message that we would, in fact, cancel. (Each time I talked about cooperating, I qualified it with `if we continue.'" GX 264 (6/27/97 Waldman to Maffei, Gates e-mail).
- iv. Paul Maritz admitted that Microsoft threatened to cancel MacOffice in connection with the multi-part negotiations between the two firms. Maritz, 1/28/99pm, at 27:13 - 28:4. Gates' testimony that Microsoft never threatened Apple that it would cancel development of Mac Office (Gates Dep., played 11/2/98pm, at 25:9 - 26:3, 29:8 - 38:15) is not credible in light of this admission.

288.3. Because of Apple's dependence on Mac Office, Apple agreed, in an August 5, 1997, "Technology Agreement," to Microsoft's restrictive terms.

- i. GX 1167 (8/5/97 Technology Agreement Between Apple and Microsoft).
- ii. Tevanian testified that, but for Microsoft's threat to withdraw support for Mac Office, Apple would not have agreed to these restrictive terms. Tevanian Dir. ¶¶ 38, 42.

- iii. Apple's Fred Anderson explained to Jim Barksdale that Apple felt it had no choice but to give in to Microsoft's threat: "Apple needed to insure that Microsoft would continue to provide Microsoft Office for Mac or we were dead. [MS was] threatening to abandon Mac. Trading card was making Internet Explorer default browser." GX 595; Barksdale, 10/27/98am, at 18:11 - 19:15.

289. Apple thus agreed, in exchange for Microsoft's commitment to provide an up-to-date version of Mac Office and other support for 5 years, to a number of restrictions on its ability to distribute and promote non-Microsoft browsers.

289.1. First, Apple agreed to bundle Internet Explorer as the "default" browser on all Macintosh computers and the Mac OS operating system for five years. Default status means that Internet Explorer will automatically be launched when the user invokes the "Browse-the-Internet" icon preinstalled on the Mac OS desktop.

- i. GX 1167 § 3.1 (requiring Apple to bundle Internet Explorer as the "default selection" for Macintosh with all system software releases of the Mac OS as long as Microsoft supports Office for the Mac); Tevastian Dir. ¶ 38; Tevastian, 11/9/98am, at 38:25 - 40:11, 41:11-25.

289.2. Second, if Apple bundles another browser, it cannot be placed on the desktop and must be placed in a folder, where it is more difficult for users to find.

- i. GX 1167 §3.1.
- ii. Tevastian explained that Section 3.1 of the Agreement requires that "any other browsers that we would bundle would be somewhere in the operating system, not on the desktop, so the user would have to go find them to actually -- to find out where they were and see that they were there." Tevastian, 11/9/98am, at 40:12 - 41:5, 42:1-4.

289.3. Third, Microsoft insisted that Apple not include Netscape Navigator in the "default" installation for the Mac OS 8.5 upgrade. Unless a user is aware of, and makes the effort

to select, a “custom” installation option, Navigator will not be installed on users’ computer hard drive when the upgrade product is loaded.

- i. Tevanian explained that, because of Microsoft’s insistence that Netscape not be shipped as the default browser, the Mac OS 8.5 operating system upgrade product does not include Navigator in default installation of the operating system upgrade. This means that Navigator is not installed on the computer hard drive during the default installation, which is the type of installation most users choose. Therefore, users who use the default installation will be unable to access Navigator on the computer without retrieving the CD-ROM and doing a custom install. Tevanian, 11/4/98pm, at 68:7 - 69:8; Tevanian, 11/9/98pm, at 44:18 - 45:13.
- ii. On December 5, 1997, Microsoft’s Don Bradford wrote to Gates: “Navigator will be available on companion media but users must use ‘Custom Install’ to get it.” GX 266.

289.4. Fourth, the agreement requires that Apple “will not be proactive or initiate actions to encourage users to swap out of Internet Explorer for Macintosh.” Apple and Microsoft have interpreted this to prohibit Apple from promoting competing browsers.

- i. GX 1167 § 3.1.
- ii. GX 266 (12/5/97 Bradford e-mail to Gates et al.: “all of Apple’s . . . marketing collateral will be updated by” the Summer of 1998 “to use only IE”).
- iii. Tevanian testified that, “our interpretation of this sentence has been that we can’t promote browsers other than Internet Explorer. And, in fact, that has been represented to us as being the case, by Microsoft, who has actually been policing how we do our marketing and what we say in our speeches and actually been critical of us in certain cases where we have mentioned other browsers. Q: And you are referring to the time that Mr. Jobs said at the MacWorld Expo that people could switch out or switch Netscape Navigator as the default browser in place of Internet Explorer? A: That would have been one of them.” Tevanian, 11/4/98pm, at 61:6 - 62:3; see also Tevanian, 11/9/98am, at 42:10-22; Tevanian Dir. ¶ 41.

289.5. Fifth, Apple agreed to “encourage its employees to use Microsoft Internet Explorer for Macintosh for all Apple-sponsored events and will not promote another browser to its employees.” This agreement prevented Apple from using competitive browsers in demonstrations at trade shows and other public events.

- i. GX 1167 § 3.2.
- ii. After the agreement was signed, Apple’s Guerrino De Luca instructed Apple employees that there were “several cases in which we currently, and understandably, use other browsers in our demos, events, etc. We must limit or avoid these cases.” GX 1105.
- iii. Tevanian, 11/9/98am, at 43:1 - 44:17 (explaining how Apple has instructed its employees not to use other browsers in demonstrations and how Microsoft has policed this provision).

289.6. Sixth, the Technology Agreement contains other provisions that favor Internet Explorer and severely restrict competitive opportunities for competing browsers, including (i) requiring that Microsoft’s Internet Explorer logo be displayed on “all Apple-controlled web pages where any browser logo is displayed” and (ii) granting Microsoft the right of first refusal to supply the default browser for any new operating system that Apple develops during the term of the agreement. The agreement also commits the two parties to work together on Java development.

- i. GX 1167 §§ 3.2, 3.7 & 3.8.

290. Microsoft policed Apple’s marketing activities and promotions in order to enforce its agreement.

- i. Tevanian testified that, while at times Apple employees have had to demonstrate Netscape’s browser at trade shows for technical reasons, “often a Microsoft person will see that happening and they will contact us and let us know that they don’t think it’s appropriate.” As a result, according to Tevanian, “even though, in some

cases, we need to mention other browsers, we always try to make sure that we have the right perspective with the promotion of IE versus the other browsers.” Tevanian, 11/9/98am, at 43:15 - 44:17; Tevanian, 11/4/98pm, at 61:6 - 62:3.

- ii Microsoft’s Ben Waldman wrote to, among others, Gates on February 13, 1998, that “the spirit” of its agreement with Apple “is that apple should be using” Internet Explorer “everywhere, and if they don’t do it, then we can use Office as a club.” GX 268.

c. The restrictions Microsoft coerced Apple into accepting had significant exclusionary effects

291. Microsoft’s coercion of Apple to make Internet Explorer the default browser and to restrict Apple’s promotion and support of competing browsers has had, and will continue to have, significant exclusionary effects.

291.1. First, Microsoft’s restrictions -- ensuring Internet Explorer is the default browser; relegating other browsers to less favorable placement; requiring Netscape’s omission from the default installation for the Mac OS 8.5 upgrade; and preventing Apple from promoting the usage of other browsers -- raise rivals’ costs, reduce their usage on the Macintosh, and harm consumers.

291.1.1. As Microsoft recognized, most computer users (including Macintosh users) tend to use browsers that come preinstalled on their machines in an easy-to-locate place on the desktop. Accordingly, Microsoft has ensured that most purchasers of the Mac OS will use Internet Explorer and will not use competing browsers, thus advancing its intended goal of increasing Internet Explorer share on the Mac OS at the expense of competitive browsers.

- i. Tevanian testified that Apple’s experience showed that “customers seldom reconfigure their systems to change the default browser,” Tevanian Dir. ¶ 41. “Most of our customers just use the system as we send it to them, which is, they just double-click on the . . . Internet icon and don’t bother . . . to change the default. In fact,

most of them don't even know that they can." Tevanian, 11/9/98am, at 45:19 - 46:23.

- ii. An internal Microsoft planning document recognizes the same self-evident proposition: "On MacOS we are finally in the enviable position of being the default browser on the OS. This is a huge advantage especially in the case of the large chunk of customers who use whatever browser comes with/is integrated with their operating system. GX 370, at 2 (emphasis added); Tevanian, 11/9/98am, at 48:4 - 12.
- iii. Tevanian testified: "The Technology Agreement gives Microsoft significant advantages in its efforts to defeat Netscape Navigator and gain total control of the browser market. . . . Making Microsoft's Internet Explorer the default browser on the Mac OS did not confer any substantive technical benefit on users, but it would help Internet Explorer to become the most commonly used browser among Mac customers." Tevanian Dir. ¶ 41 (emphasis added).
- iv. Tevanian explained that "most users simply won't switch" or "won't know how to switch, so the natural evolution would be for more people to use IE. . . . As more and more customers use IE versus Navigator, it helps Microsoft to consolidate their position and gain more control of the market." Tevanian, 11/9/98am, at 49:5-24.
- v. Professor Fisher testified: "You have a browser on the desktop, typically IE. You could find another browser, if you looked for it . . . but the question of whether you can do it and the question of whether people will do it are two quite different things. . . . If they've got a satisfactory thing already there in front of them, they typically won't bother to go and find something which gives essentially the same service but requires some difficulty." Fisher, 1/12/99am, at 18:6-17.
- vi. See also supra Part V.D; ¶ 220; infra Part VII.A; ¶ 370.

291.1.2. Although it is possible for users to obtain browsers in other ways and to change the default browser, the process for doing so is not known to most users, and is

difficult and confusing enough for the typical user that it serves as a significant impediment to typical users switching default browsers.

- i. Microsoft introduced a series of screen shots showing the process for changing the default browser. DX 1783; DX 1784. A review of the screen shots and Tevanian's testimony shows that the process is sufficiently obscure, especially in light of the restrictions Microsoft has placed on Apple, that it serves as a significant impediment to typical users switching defaults. See generally Tevanian, 11/4/98pm, at 65:12 - 75:23; see also Tevanian, 11/9/98am, at 45:19 - 46:23 (most users are not aware they can switch default browsers); see supra ¶ 290.4 (Technology agreement prohibits action by Apple to encourage users to switch default browsers).
- ii. Tevanian explained that, "because of Microsoft's insistence, we do not install Netscape by default, so the user will never see the Netscape pop up at all. They have to take an extra action to install Navigator." Tevanian, 11/4/98pm, at 68:17-21. Tevanian elaborated: The "operating system includes Netscape Navigator on the CD-ROM. If you use the default installation process, which is what almost every user does, it is not installed on your hard drive. You need to go back to your CD-ROM at a later date to specifically install it." Tevanian, 11/4/98pm, at 70:8-14.
- iii. Tevanian testified that switching browsers on Mac OS 8.5 is "actually pretty complicated. You have to know what package it's in and search for it. It's hidden underneath the package. . . . [W]hen you get the operating system on the CD, it comes with lots of different components, and if you go into what we call a custom installation, which, again, most people don't do because it's an advanced feature, you get a list of all the things that are installed by default as well as a list of other things that you can optionally install. So, you would first have to know to go there, and then you would have to know which package the browser is in." Tevanian, 11/4/98pm, at 76:2-19.

291.2. Second, absent Microsoft's restrictions, Apple would not have disfavored competitive browsers and favored Internet Explorer.

- i. Tevanian testified: “If Microsoft had not exercised its monopoly power in the office application market by threatening to stop supporting Office for Macintosh, Apple would not have resolved the disputes on the terms outlined above.” Tevanian Dir. ¶ 42.
- ii. Apple has a fundamental interest in a competitive browser market so that it is not dependent on one supplier. GX 593; GX 268 (internal Microsoft e-mails discussing Apple’s interest in Netscape remaining a viable competitive alternative).
- iii. Macintosh users met the announcement that Apple had agreed to make Internet Explorer the default browser with derision, as the very videoclip introduced by Microsoft showed. DX 1850; played 11/9/98am, at 53:15 - 55:24.
- d. **Microsoft’s coercion of Apple to agree to exclusionary restrictions lacks justification**

292. Microsoft’s coercion of Apple to favor Internet Explorer and disfavor rivals lacks any legitimate business purpose.

292.1. First, Microsoft’s threat to abandon a profitable product can be explained only as a predatory act designed to help facilitate maintenance of Microsoft’s operating system monopoly.

292.1.1. Because Microsoft had already incurred most of the sunk costs of product development of the new Mac Office by the end of June 1997, canceling the release of this historically profitable product at that point would have meant the loss of both those costs and the anticipated profit.

- i. Tevanian testified: “By June 1997, Microsoft had substantially completed the development work on Microsoft Office 98 and, in fact, had shown a preliminary ‘Beta’ version of the product to some Apple personnel. Although Microsoft had made a substantial investment getting Office 98 for Macintosh ready for market, it was willing to risk an outright loss of that entire investment to force Apple to terms.” Tevanian Dir. ¶ 37.

- ii. Maritz admitted that Microsoft “had a version of Mac Office . . . ready to ship.” Maritz, 1/25/99pm, at 60:9-16; see also GX 263 (6/27/97 Ben Waldman e-mail to Gates detailing the work already accomplished on the Mac Office 97, including “thousands of bug fixes,” performance improvements, and many new features, and noting “we are close to shipping”).
- iii. Maritz’s testimony that he asserted in March 1997 that there was little reason to continue Mac Office development (Maritz Dir. ¶ 377) is misleading because it is clear that Mac Office development was not canceled in March and in fact continued until the Technology Agreement was signed. GX 263 (6/27/97 Waldman e-mail to Gates).

292.1.2. Canceling Mac Office in 1997 would also have resulted in substantial losses of goodwill for Microsoft as a result of breaking promises to customers, poor public relations, and reduced employee morale.

- i. In asking Gates not to cancel the project, Waldman offered, among others, the following reasons: “Keeping our word -- customers, press, etc. As you noted in April, we’ve given our word to our customers that we will do this product. We’ve also been clear on this point with press and analysts. Pulling out at this point, no matter how high our frustrations with Apple, would be a blight on our integrity,” and “canceling this now would be devastating” to the developer team. GX 263 (6/27/97 Waldman e-mail to Gates); Maritz Dir. ¶ 377 (arguments in favor of continuing Mac Office development related to maintaining good will of existing customers and public relations).
- ii. See also GX 263 (6/27/97 Waldman e-mail to Gates: “our indecision so far has caused quite a bit of harm”).

292.2. Second, there is no technical reason for Microsoft’s insistence that Apple favor its browser over rivals.

- i. “Making Microsoft’s Internet Explorer the default browser on the Mac OS did not confer any substantive technical benefit on users, but it would help Internet Explorer to become the most commonly used browser among Mac customers.” Tevanian Dir. ¶ 41.

292.3. Third, Microsoft's contention that the restrictions on which it insisted were a very minor part of the overall agreement (Maritz Dir. ¶¶ 382-383) and added only after the other principal elements of the August 5, 1997, deal (including a patent dispute) were worked out (Maritz Dir. ¶ 385), is neither credible nor important.

292.3.1. The agreement specifically links Microsoft's support for Office to the exclusionary browser-related terms.

- i. The Technology Agreement expressly conditions Apple's obligation to bundle Internet Explorer as the default browser, as well as the other restrictions on competitive browsers, on Microsoft's continued development of Office for Macintosh. GX 1167, §§ 2.1, 3.1 ("For so long as Microsoft is in compliance with Section 2.1 above and has not elected to cease future development and releases of Microsoft Office for Macintosh . . . Apple shall bundle . . . Microsoft's Internet Explorer . . ."). Both obligations last the five-year term of the contract. GX 1167, §§ 2.1, 3.1.
- ii. By contrast, neither the patent cross license nor the stock purchase agreement mention Internet Explorer or Office for Macintosh. GX 583; Maritz, 1/25/99pm, at 71:25 - 72:17.

292.3.2. Paul Maritz's second-hand testimony -- that issues regarding Office had been resolved before issues concerning the browser (Maritz Dir. ¶ 385) -- is also belied by the contemporaneous documents, which demonstrate that Microsoft had been insisting on obtaining default status for Internet Explorer since 1996.

- i. On June 25, 1996, Gates proposed to Apple that Apple "immediately ship IE on all their systems as the standard browser" GX 260.
- ii. Microsoft's Maffei proposed to Apple on April 27, 1997, that Apple offer Internet Explorer as its default browser. GX 1046.

- iii. Maritz conceded that he did not know whether or not the issue of default browser was raised before July 20, 1997 -- as clearly reflected by GX 1046 -- because his knowledge was limited to what Maffei had told him about a conversation that Maffei had with Jobs under a tree in Palo Alto on July 20, 1997. Maritz, 1/25/99pm, at 36:2 - 41:20.
- iv. Maritz later admitted that he knew that one of Gates' and Maffei's intentions was to make Internet Explorer the default browser for Apple. Maritz, 1/25/99pm, at 54:1-7; 50:16 - 53:2 (discussing GX 579) (7/1/97 Gates e-mail to Maritz: the original proposal to Apple had three elements, the first of which was Microsoft browser getting a privileged position.); Maritz, 1/25/99pm, at 51:4-16; Maritz, 1/28/99pm, at 29:7-21.
- v. Maritz conceded that none of the contemporaneous documents corroborate his testimony -- based on what Maffei told him -- that the issue of Internet Explorer's status had been raised only after other issues had been resolved. Maritz, 1/25/99pm, at 63:5 - 64:24.
- vi. Tevanian testified that Microsoft indicated to Apple in negotiations that making Internet Explorer the default was an important part of the agreement and a "deal breaker." Tevanian, 11/9/98am, at 49:25 - 50:9.

292.3.3. Microsoft's contention is also undermined by the fact that, even after Apple agreed to make Internet Explorer the default browser, Microsoft continued to use the threat of withholding Mac Office support as a "club" to ensure Apple continued to advantage Internet Explorer.

- i. On January 21, 1998, Microsoft's Don Bradford wrote: "Mac Office is the biggest Apple carrot. . . . Negotiating from a single point, centered around MacOffice, will give us better leverage. . . . Think we should use this opportunity to push Apple into stronger support of IE." GX 267 (1/21/98 Bradford e-mail to, among others, Gates).
- ii. On February 13, 1998, Ben Waldman wrote to Bradford, Gates and other Microsoft executives regarding Apple's usage of Internet Explorer: "Though the language of the agreement uses the word

‘encourage’ I think that the spirit is that Apple should be using it everywhere and that if they don’t do it, then we can use Office as club.” GX 268 (2/13/98 Waldman e-mail). Bradford replied: “Do agree that Apple should be meeting the spirit of our cross license agreement and that MacOffice is the perfect club to use on them.” GX 268 (2/13/98 Bradford e-mail) (emphasis added).

- iii. In July 1998, Waldman wrote to Gates, regarding Apple: “I suspect that they are starting to get a bit uncomfortable with me running all the Mac stuff, because now they can’t play off different parts of MS against each other, and I am holding them to their commitments (they care a lot about Office, and I’m using that to get them to be more supportive of IE).” GX 908

292.3.4. That the exclusionary terms were included as part of a larger set of agreements does not either eliminate the anticompetitive purpose and effect of those terms or provide any justification for their inclusion in the agreements.

292.4. Fourth, Microsoft’s insistence on imposing exclusionary restrictions on Apple demonstrates that developing a version of Internet Explorer for the Macintosh and giving it away for free was intended, not simply to enable its customers to standardize on Internet Explorer across multiple operating systems, but rather to exclude Netscape.

- i. See infra Part V.G; ¶ 298.

2. Microsoft also induced RealNetworks not to support Netscape

293. Microsoft also induced RealNetworks not to support Netscape.

293.1. In order to receive distribution of its software through Windows, RealNetworks entered into an agreement that provided for distribution of RealNetworks’ software with Internet Explorer in exchange for RealNetworks’s agreement to notify and consult with Microsoft before supporting any programming interfaces published by Netscape or Sun, and to not support such interfaces if Microsoft offers an equivalent solution.

- i. The July 18, 1997, agreement between Microsoft and RealNetworks requires, among other things, RealNetworks, in return for distribution of its media player with Internet Explorer (and thus with Windows) to

GX 1369 §

4.1, §6.6 (sealed).

293.1.1. This agreement placed a substantial impediment on RealNetworks's ability to support Netscape's or Sun's efforts to establish a rival platform that might erode the applications barrier to entry.

- i. RealNetworks' Jacobsen explained: "In essence, Microsoft has rights of first discussion if we're going to go support something that would compete with DirectDraw or DirectShow. . . . The impact on us is to put a speed bump in discussions with Sun or Netscape because before we could conclude an agreement with Sun or Netscape, we would have to go to Microsoft to have discussions with them." GX 1455 at 147:11 - 148:21.
- ii. Microsoft, he further explained, would be given the opportunity to propose an alternate to the Sun or Netscape interface, and only if that solution did not work would RealNetworks be permitted to support Sun or Netscape interfaces. GX 1455 at 149:21 - 151:4. If this clause were invoked, Mr. Jacobsen testified, he expected that Microsoft "would engage in some serious discussions in between carrots and sticks" to convince RealNetworks not to support the competitive interfaces. GX 1455 at 150:23 - 151:4.

293.1.2. The restrictions Microsoft placed on RealNetworks' dealings with Netscape and Sun lack justification.

- i. Microsoft has not advanced any technical reason that RealNetworks' software could not support both Microsoft's and the alternate interfaces. Microsoft's own media software supports both Internet Explorer APIs and Netscape APIs. Engstrom, 2/24/99am, at 15:12-15 (Microsoft has designed the Windows

Media Player to work with the Netscape browser plug-in APIs, in addition to the Internet Explorer APIs).

- ii. Robert Muglia's suggestion that the provision is justified because Microsoft simply wanted prior notice of RealNetworks partnering with Netscape or Sun (Muglia Supp. Dir. ¶ 28) cannot explain the requirement of prior "discussions" with Microsoft, nor the prohibition against supporting the interface when Microsoft provides an equivalent solution.

3. Microsoft conditioned access to early beta releases of Windows and other technical assistance on ISVs' agreeing to make Internet Explorer the default browser and to adopt Microsoft-controlled Internet standards

294. Microsoft similarly used its leverage over ISVs, through so-called "First Wave" agreements, to extract preferences for Internet Explorer and adoption of Microsoft-controlled Internet standards.

294.1. Because of the importance of "time to market" in the software industry, it is crucially important to ISVs that they obtain early beta releases and other technical information relating to Windows in order to develop applications.

- i. Gordon Eubanks acknowledged that "early access to select specifications and beta releases of Windows NT 5 and SDKs on an ongoing basis" is both "important" and "necessary" to Symantec. Eubanks, 6/16/99pm, at 16:4 - 17:19.
- ii. Microsoft's other ISV witness, Michael Devlin, also acknowledged that "The irony of being called an independent software vendor is that while we're not controlled by" major platform vendors, "our products rely on services provided by those platforms," many important aspects of an ISV's business rely on the willingness of platform vendors to cooperate with the ISV, and Rational is becoming increasingly dependent its ability to support the Microsoft platform. Devlin, 2/4/99am, at 14:2 - 15:16.
- iii. William Harris of Intuit testified that Intuit depends on "Microsoft for the information, specifications, training, development assistance and development tools necessary to develop our products in an effective and timely manner." Harris Dir. ¶¶ 27-28.

- iv. An internal Oblix e-mail reports, regarding finalization of its First Wave agreement with Microsoft that “we need to be totally in bed with them as over the long run people like Enteva (who are focused only on MSFT) may be our only real competition.” GX 2072.

294.2. In its so-called “First Wave” agreements, Microsoft conditioned access to early beta releases of Windows, other technical information, and the right to use certain Microsoft logos, on ISVs’ agreeing to set Internet Explorer 4.0 as the default browser for applications with an HTML-based user interface, and to adopt Microsoft’s “HTML Help” to implement the application’s help system.

- i. GXs 2071; 2400-2463.

294.3. Because of the importance of the technical information and early beta releases, numerous important ISVs entered into these agreements and thereby facilitated Microsoft’s control over Internet standards and its success in its browser campaign.

- i. Among the important ISVs subject to these restrictive terms are Symantec (GX 2071);
- ii. As early as May 1995, Bill Gates instructed Microsoft executives to develop a new version of Help tied to Microsoft’s browser as a means of forcing Microsoft browser use. GX 20, at 5 (5/26/95 Internet Tidal Wave memo: “eliminate today’s Help and replace it with the format our browser accepts including exploiting our unique extensions so there is another reason to use our browser”).
- iii. See infra Part VII.D; ¶¶ 398-400.

294.4. Microsoft has suggested no justification for conditioning an ISV’s access to Windows beta releases on its adopting Internet Explorer as the default browser or using Microsoft’s HTML-based help system.