

IV. Microsoft Attempted To Enter Market-Division Agreements To Eliminate Platform-Level Software That Threatened Its Operating System Monopoly

A. Microsoft tried to eliminate the browser threat by proposing a naked market-division agreement to Netscape

63. Microsoft initially tried to eliminate the threat non-Microsoft browsers posed to the applications barrier to entry by attempting to bribe, and later threatening, Netscape into giving up its core Window 95 web-browsing business. Had Netscape accepted Microsoft's market-division proposal, Microsoft would have succeeded in killing the browser threat in its infancy and likely would have acquired a monopoly over browsers.

1. Microsoft first unsuccessfully sought to purchase or license Netscape's browser software code

64. Before it fully recognized the threat that Internet browsers posed to its operating system monopoly, Microsoft unsuccessfully sought to purchase or license the software code for Netscape's Navigator browser.

64.1. When Microsoft decided that it wanted to offer its own Internet browser product in late 1994, it opened discussions to license browser software code with several companies, including Netscape.

iii. Microsoft's Thomas Reardon "contacted Netscape in the early fall of 1994 and explained his desire to explore whether Netscape would be willing to consider some sort of licensing arrangement for the first version of its web browsing software." Rosen Dir. ¶13 (citing Reardon Dep., 9/9/98, at 153-54, 224).

64.2. Netscape representatives rejected Microsoft's proposal.

v. Barksdale testified that Netscape did not want to sell their software "at the price they [Microsoft] offered. They offered a flat fee of a couple of million dollars to take us out of the game. And that would have killed our product in their space." Barksdale, 10/21/98am, at 28:6-10; Barksdale Dir.

¶ 96 (“those discussions did not prove fruitful because Netscape was not interested in Microsoft’s proposal, which was to purchase the Navigator code for what Netscape considered to be a low flat fee payment.”).

64.3. In late December 1994, in what he described as "a moment of weakness," Netscape then-CEO James Clark -- without the knowledge of the rest of the Netscape board -- attempted to reopen those discussions, but he was rebuffed by Microsoft. The discussions went no further and were not renewed.

- i. Barksdale Dir. ¶ 97.
 - ii. According to Barksdale, Clark said he turned to Microsoft because of “fear on the part of a small company looking into the eyes of the world’s most powerful software company and kind of feeling that they might somehow help us if we licensed it to them.” Barksdale, 10/27/98am, at 49:22 - 50:1.
 - iii. Clark Dep., 7/22/98, at 58:6 - 60:18 (DX 2562)
- 2. When Microsoft recognized the threat that Netscape’s browser posed to its monopoly, Microsoft set out to eliminate the threat by seeking Netscape’s agreement not to compete and to divide the browser market**
- a. Microsoft recognized that it could cripple the browser threat by eliminating Netscape as a browser supplier for Windows 95**

65. With Netscape’s dramatic success in early 1995, Microsoft realized that Internet browsers, in particular Netscape, posed a serious threat to the applications barrier to entry that protects Microsoft’s monopoly power. Microsoft thus also recognized that inducing Netscape to abandon its efforts to develop platform-level browsing software for Windows 95 would eliminate the browser threat to its operating system monopoly.

65.1. By June of 1995, Microsoft recognized that Netscape was a significant competitor in Internet browsers and therefore posed a threat to Microsoft's operating system monopoly.

i. See supra Part III.B.2; ¶ 56.1.

65.2. In the first half of 1995, Microsoft and other industry participants expected that Windows 95 would quickly become the dominant PC operating system when it was released.

i. Barksdale Dir. ¶ 110 (In the June 21, 1995, meeting between representatives of Netscape and Microsoft, "We all anticipated" that Windows 95 "would shortly be the dominant operating system.")

65.3. Microsoft understood, therefore, that it could eliminate the platform threat posed by Netscape's browser by convincing Netscape not to make its browser available as an alternative platform for Internet software development on Windows 95. Indeed, convincing Netscape not to offer a competitive, platform-level browser on Windows 95 was Microsoft's primary goal for its negotiations with Netscape.

i. On April 14, 1995, Daniel Rosen, the person at Microsoft most responsible for negotiating a deal with Netscape (Rosen Dir. ¶7), wrote to Paul Maritz and other Microsoft executives about "the potential structure of a [Microsoft] relationship with Netscape." Rosen wrote that the "acceleration of Internet related activities makes it critical that we begin to make these choices ASAP, or they will be made for us With Netscape, we face a small, aggressive, FOCUSED competitor or ally. Their focus is both good news and bad. They can be successful, simultaneous with our success, if we can decide what we want Will they adopt our tools? Will they cede the client and its standards to us?" GX 18 (emphasis added).

ii. This goal was reiterated on May 15, 1995, when Rosen wrote to Maritz and others that "our goal should be to wrest leadership of the client evolution from [Netscape]." GX 331, at MS98 0103672. On May 25, Thomas Reardon was even more direct, writing in an email to Rosen and others that any agreement to exchange "protocol specs" with Netscape

"would really be a veiled effort on our part to move them off of the Windows client." GX 952 (emphasis added).

- iii. One week later, Maritz wrote to Bill Gates and Rosen that he viewed Microsoft's "imperative to be first and foremost to ensure that we keep control of the standard Internet client api's and protocols," that in order to do so Microsoft would have to "coopt Netscape," and that he was open to any strategy that would achieve that result. GX 953.
- iv. Microsoft's intention to eliminate competition from Netscape was expressed again that same day by Thomas Reardon, who sent a list of "working goals" for Microsoft's relationship with Netscape to Maritz and other Microsoft executives. Those goals included "move Netscape out of the Win32 Internet client area" and "avoid cold or hot war with Netscape. Keep them from sabotaging our platform evolution." Reardon also wrote that Dan Rosen "points out that we must offer them [Netscape] some story as to how they can slowly shift away from the core client business, or at least the core Win32 client business" and that "Dan feels there is reasonable hope for engaging Netscape in long term strategic cooperation, where Netscape might run with the Mac and Win16 clients." GX 24.
- v. There is no meaningful difference, in these discussions, between the terms "Internet client" and "browser." Rosen, 2/22/99am, at 30:10-17 ("The client . . . was focused on all of those things one needed to connect a PC to the Internet to do useful things."); GX 20, at 5 (lengthy May 26, 1995 Gates memo refers to "O'Hare," which became Internet Explorer 1.0, in the same paragraph as both "our Internet client" and "our browser"); GX 22 (May 31, 1995, e-mail to Maritz and others states that "Netscape is very influential on what happens with Clients"); Rosen 2/22/99pm, at 8:23-25 ("I think it would be fair to say" that Microsoft's Internet client "would include certain components that were then shipping with the browser, but not necessarily all of them."); Rosen 2/23/99am, at 6:20-7:3 (defining the Windows "client code" as "TCP/IP, Internet shortcuts, HTTP and HTML rendering, among others").

b. Microsoft first suggested that Netscape not compete with it in the Windows 95 browser business at a June 2, 1995, meeting

66. Microsoft began discussing Netscape's Windows 95 browser plans in a June 2, 1995, meeting with James Barksdale. At that meeting, Microsoft suggested that Netscape consider

abandoning its independent base of platform-level browsing code on Windows 95 and merely build on top of Microsoft's code.

66.1. James Barksdale visited Microsoft and met with Daniel Rosen, Nathan Myrhvold, and Paul Maritz. Both sides discussed potential points of technical and other cooperation.

- i. The meeting “explored possible areas of collaboration between the two companies.” Barksdale Dir. ¶ 101. “Microsoft principally was interested in getting” Netscape “to consider adopting certain security protocols, incorporating into Navigator certain viewers that would enhance Microsoft content, and other technologies” Barksdale Dir. ¶ 101; see also GX 25 (Rosen summary: Microsoft wants Netscape “Support of STT”); GX 26 (Microsoft offered to provide Netscape “with early disclosure of any ‘standards and protocols’ that would allow” Netscape to improve its browser so that it could work with MSN content, and Microsoft suggested that Netscape “could be the preferred or perhaps exclusive developer of these sorts of products.”). There were also discussions of Microsoft possibly bundling Netscape server software. GX 25, at MS98 0009972; see also GX 26.
- ii. The meeting was “very friendly, non threatening,” GX 26; see also Barksdale Dir. ¶ 101; GX 25 (Rosen’s notes: “a cordial, open discussion of issues and direction.”); Rosen Dir. ¶ 64.

66.2. Microsoft’s goal at the time of the meeting was to “move Netscape out of the Win32 Internet client area.” Rather than directly confront James Barksdale with that plan on June 2, however, Microsoft initially suggested that Netscape consider not competing and, instead, “using Microsoft's underlying code for its browser, adding their value-added components on top.”

- i. Rosen's notes of the meeting record, under the heading "What Microsoft wants from Netscape," that Microsoft asked Barksdale for "Strong support of Win95 and its evolution path. (Stronger support than for other products like Acrobat or Java). This might include using Microsoft's underlying

code for its browser, adding their value-added components on top." GX 25, at MS98 0009972.

- ii. Thomas Reardon conceded that Netscape's "core client" already included an HTML renderer but noted: "There's lots of value-added stuff beyond HTML rendering in the Navigator product." Reardon Dep., 9/9/98, at 347:20-25 (DX 2606). A value-added application was "roughly anything that takes advantage of an API. It's an application. That's it. . . . But I should qualify it. I was making a distinction between core client technology, HTML, HTTP, transport technology, rendering technology, and programs that run above that or alongside of that independent of HTML, the HTML rendering itself." Reardon Dep., 9/9/98, at 343:23 - 345:10 (DX 2606).

66.3. James Barksdale responded by stressing the importance of Netscape's upcoming Windows 95 browser to Netscape's plans. He did not fully appreciate until the later June 21 meeting the import of Microsoft's statements that Netscape should simply use Microsoft's underlying code and add value-added components on top of it .

- i. Barksdale "wanted to stress the importance of the client to Netscape's business strategy." Barksdale Dir. ¶ 101. He informed the Microsoft participants that Netscape planned to release a retail version of Navigator on Windows 95 shortly and that Windows 95 and Windows 3.1 were Netscape's primary browser distribution platforms. GX 25, at MS98 0009972 (Rosen's notes). When the parties discussed "browser cooperation," Barksdale responded that "he would like to explore ways to cooperate, but he wants to continue to add value in browser code." In fact, Barksdale even suggested at one point that Microsoft "distribute his browser." GX 25, at MS98 009972.
- ii. Barksdale told the Microsoft attendees that Netscape was planning to charge for its retail browser product to all but student and non-profit customers, that they were "selling a lot of site licenses for browsers," and that they were pleased with the revenues they were receiving from licensing both browser and server software to enterprises. GX 25, at MS98 at 0009972.

66.4. Microsoft's internal discussions following the June 2 meeting further demonstrate that Microsoft's principal goal for any "strategic relationship" was convincing Netscape to abandon the Windows 95 Internet client market.

- i. On June 5, 1995, Daniel Rosen circulated his notes of the June 2 Netscape meeting to Bill Gates, Paul Maritz, and other Microsoft executives, giving an optimistic assessment of the potential for a "broad strategic relationship" between Microsoft and Netscape. GX 25, at MS98 0009973. Maritz responded that he did not believe "that Netscape is 'ready for a broad strategic relationship.' It was clear that he/they view the client as a key place to make money, since that 'hook is so important for selling additional software.' Barksdale was primarily interested for us to distribute his client and his server" GX 27.
- c. **At a June 21, 1995, meeting Microsoft expressly proposed a naked market-division agreement to stop Netscape from offering a competing platform**

67. At a subsequent meeting held on June 21, 1995, under the pretext of exploring forms of complementary collaboration, Microsoft proposed to Netscape that the two firms divide the browser market, with Netscape to cease developing its independent browser for the Windows 95 market.

67.1. On June 21, 1995, Microsoft representatives Daniel Rosen, Chris Jones, Thomas Reardon, Richard Wolf, Anthony Bay, James Allard, and Barb Fox came to Netscape for a follow-up meeting to the June 2, 1995, meeting.

- i. Rosen Dir. ¶¶ 70-75 (list of Microsoft attendees, who they were, and what Rosen expected them to discuss at the meeting); GX 32 (formal agenda for the meeting).

67.2. On the morning of June 21, 1995, prior to meeting with Netscape, the Microsoft representatives had a pre-meeting at the St. Claire Hotel in San Jose to discuss their

objectives for the meeting. The consensus from that discussion was that Microsoft's primary goals for the meeting were to determine whether Netscape intended to compete with Microsoft at the platform level and, if so, to convince Netscape not to do so.

- i. Rosen testified that he "had asked the group of Microsoft representatives to meet in a conference room . . . rented in the St. Claire Hotel in San Jose." Rosen Dir. ¶ 79. Jones attended the meeting as the representative of the platform group at Microsoft (Rosen, 2/22/99am, at 55:5-6), and "gave the best summary of the purpose and goals of the meeting," during the pre-meeting discussion, "so we nominated him to give our goals statement." Rosen Dir. ¶ 82.
- ii. Jones, when asked whether he recalled at the premeeting "any discussion about a desire of anybody on the part of Microsoft who was participating to be able to persuade or influence Netscape not to compete with Microsoft," testified: "Absolutely." Jones Dep., 1/13/99, at 582:10-18. See also Jones Dep., 10/27/98am, at 39:25 - 40:17.
- iii. Discussion at the premeeting focused on the "line between solutions and platform" and on how to persuade Netscape to stay on the solutions side of that line on Windows 95. Jones Dep., 1/13/99, at 581:4-19. When asked whether there was "any discussion about trying to influence Netscape in any way to either move toward or stay on one side of the line . . . as opposed to simply finding out where it was that they intended to do business," Jones answered: "It was both." Jones Dep., 10/27/98am, at 39:24 - 40:11.

67.3. Following their premeeting, the Microsoft delegation met with Janes Barksdale, Marc Andreessen, Mike Homer, and Ram Shriram for approximately four hours. The discussion covered a wide range of technical issues from the pre-arranged agenda.

67.4. In addition, the Microsoft team, led by its designated spokesman Chris Jones, told the Netscape representatives that Netscape should not develop a browser for Windows 95 because Microsoft intended to develop its own Windows 95 browser. Microsoft proposed that the two companies agree not to compete with each other by drawing a "line"

between what Microsoft called "the platform" and what it called "solutions," with Netscape agreeing not to compete on the platform side of the line. In exchange for Netscape's agreement to abandon a Windows 95 browser and to stay on the solutions side of the line, Microsoft offered not to compete with Netscape in browsers that ran on operating systems other than Windows 95 and in non-platform solutions that ran on top of Windows 95 and Internet Explorer.

- i. James Barksdale testified: "I experienced something I had not ever seen happen in my more than thirty years of experience with major U.S. corporations Microsoft apparently came to Netscape with a single focus: to convince Netscape not to compete with its Windows 95 browser product, Internet Explorer. Microsoft proposed a division of the browser market between our companies: if Netscape would agree not to produce a Windows 95 browser that would compete with Internet Explorer, Microsoft would allow Netscape to continue to produce cross-platform versions of its browser for the relatively small market of non-Windows 95 platforms: namely, Windows 3.1, Macintosh, and UNIX. Moreover, Microsoft made clear that if Netscape did not agree to its plan to divide the browser market, Microsoft would crush Netscape, using its operating system monopoly, by freely incorporating all the functionality of Netscape's products into Windows." Barksdale Dir. ¶ 25.
- ii. "Microsoft's officials made clear that they believed that Netscape should work with them on areas other than a browser for Window 95, but that we should not develop our own browser for Windows 95 because they intended to build a Microsoft browser for the Windows 95 operating system. They proposed that a 'line' be drawn between the area in which we developed products and competed and the area in which they developed products. Microsoft proposed that we build products that would run on top of the Windows 95 operating system and browser. They offered to allow us to continue to develop browsers for other operating systems, as long as we did not try to compete with them in developing a browser for the Windows 95 platform." Barksdale Dir. ¶ 110.
- iii. Netscape's Marc Andreessen "who is an extraordinarily fast typist," took detailed notes on his laptop computer as the meeting was going on. Barksdale Dir. ¶¶ 108, 112. Those simultaneous notes record that Microsoft asked Netscape "would you be interested in having a partnership where NS gets all the non-Win95 stuff and MS gets all the Win95 stuff? If NS doesn't want to, then that's one thing. If NS does

want to, then we can have our special relationship. THREAT THAT MS WILL OWN THE WIN95 CLIENT MARKET AND THAT NETSCAPE SHOULD STAY AWAY.” GX 33, at NSC 017100 (emphasis in original).

- iv. Microsoft’s Chris Jones, when asked whether there was “any discussion in the meeting with the Netscape people that essentially, under some form of a deal or partnership, Microsoft could take, essentially would take the part of the business that related to Windows 95 and Netscape could handle remaining parts of the business, for example, the cross platform clients” answered: “Oh, I believe there was a discussion of that nature, yes.” Jones Dep. (played 10/27/98am), at 40:19 - 41:3.
- v. Microsoft left no doubt of its intent to convince Netscape to agree to stop competition. Andreessen testified: “I got the feeling that I was being visited by a force that was extremely powerful in the space where I chose to operate, and that I was basically being given the terms and conditions by which an arrangement would be struck, where, among other things, the market would be segmented and our company would be allowed to succeed in certain limited areas, and Microsoft would be allowed to succeed in areas that it chose to define.” Andreessen Dep., 7/15/98, at 429:10-20 (DX 2555). He wrote in a June 21 email, that: “Much of the conversation centered on a discussion of how the line would be drawn between the platform and their value added.” GX 535.
- vi. Chris Jones opened the meeting by commenting that Microsoft “believes” that there is a “set of things that are provided in Internet servers and browsers that will be in the core operating systems or given away with the OSs, as a facility like the Win32 API. What MS needs is someone -- a partner -- who is going to take those core services to build on top of them and create solutions for customers. MS has some ideas about what these features are, where the line is, and who the partners should be. All of the relationship points revolve around critical fact of -- is Netscape the kind of company that’s going to partner with MS on this or not? Will MS & NS be able to cooperate & agree on the line, where it’s drawn, etc. If not, companies will compete. If so, then arrangement can be highly beneficial, with ‘aligned interests’.” GX 33, at NSC 017098 (Andreessen’s notes) (emphasis added).

67.5. In addition to offering not to compete with Netscape for non-Windows 95 browsers and for “solutions,” Microsoft also offered to make Netscape a "preferred" ISV and to

give Netscape preferential access to technical information about how to make its products work better with Microsoft's operating systems.

- i. “Microsoft officials said that, if we agreed to the ‘special relationship’ they proposed, Microsoft would support us by making Netscape a ‘preferred’ ISV. The Microsoft personnel made clear that issues concerning the RNA API and related technical information we had been seeking could be resolved ‘[d]epending on how we walk out of this room today.’ If we agreed to the ‘special relationship they proposed, the Microsoft representatives said that we would be the first ISV to receive the technical information” Barksdale Dir. ¶ 110. Concerning Barksdale’s repeated requests for the RAS “dialer” APIs that Netscape had been requesting, Rosen responded: “We can fix that problem. In a perfect world, anyone can plug into that. With a special relationship with you, you’ll be the first to plug into it.” GX 33, at NSC 017101. Microsoft effectively stated that, if Netscape agreed not to compete, “then we [Netscape] can have our special relationship.” Id.
- ii. Microsoft offered to "consider licensing us the ability to turn Navigator into a container," but only "IN THE CONTEXT OF THE LARGER DEAL," and stated that the necessary APIs “have been abstracted out into a layer above the normal Office Compatible program and people who want to use them are picked specifically by MS and are arbitrary -- MS reserves right to say who’s in and who’s out. Again, part of the broader discussion . . . There are things we can do if we're working together that we can't do otherwise.” GX 33, at NSC 017099 (Andreessen’s notes). Microsoft also offered to help Netscape do "tight integration" with MSN, but only on the condition that the two companies have a "tight relationship. . . . If we didn't have a tighter relationship, you'd be back to what a normal ISV can do." GX 33, at NSC 017100. Microsoft also suggested that MSN content “could in fact be hosted on a Netscape server,” but “they refuse to talk about it until we have the broader relationship established.” GX 33, at NSC 017100-1.

67.6. Microsoft made clear that all of this preferential treatment and its own willingness not to compete on non-Windows 95 browsers and “solutions” on top of Internet Explorer depended on Netscape's agreement not to compete and to divide markets and that, if Netscape declined the offer, "Microsoft would crush them."

- i. To Barksdale and Netscape, “the main goal for this meeting was to get access to certain code and APIs necessary for . . . product development” Barksdale asked “whether obtaining those things was tied to . . . acceptance of this ‘special relationship’ Microsoft had proposed” Microsoft answered that Netscape’s “obtaining the necessary technical information ‘certainly isn’t independent’” of Netscape’s acceptance. “Microsoft made it very clear that they would attempt to crush” Netscape “by attempting to own the client.” Barksdale Dir. ¶¶ 110-112. See also GX 34 (June 22, 1995 AOL email detailing Andreessen’s report, one day after the meeting, of Microsoft’s threat that “if Netscape didn’t do the deal, Microsoft would crush them.”).
- ii. Microsoft indicated “implicitly” that it “would bring full force of all of its energy to crush us in the market . . . [p]resumably using many of the same tactics they have used over the last three years, to seek to make sure that we didn’t have the opportunity to succeed as an independent company.” The “tactics” Microsoft would employ included exclusionary contracts with ISVs and OEMs and “release of full-on competitive or even cloned products that would be priced at a level that would make it impossible for [Netscape] to compete, which subsequently happened.” Andreessen Dep., 7/15/98, at 429:10 - 431:8 (DX 2555).

67.7. The testimony of James Barksdale and Marc Andreessen about Microsoft’s June 21 market-division proposal is credible and consistent with the available contemporaneous documents from Netscape, Microsoft and third parties like America Online .

i. See supra ¶ 67.2, 67.4, 67.8-9.

67.8. Microsoft’s internal discussions following the June 21, 1995, meeting leave no doubt that Microsoft proposed an agreement not to compete and to divide markets.

i. On the evening of the June 21 meeting, Dan Rosen prepared a summary and sent it to the other Microsoft attendees for their comments. The summary, though “naive” (GX 537), is substantially consistent with Marc Andreessen’s notes and James Barksdale’s memory of the meeting and makes clear that Microsoft’s goal was to prevent platform-level competition. GX 535.

- Rosen wrote in part that “ChrisJo summed up the purpose nicely: ‘We need to understand if you will adopt our platform and build on top of it or if you are going to compete with us on the platform level.’” GX 535.

- Rosen also wrote that: "Much of the conversation centered on a discussion of how the lines would be drawn between the platform and their value added. On the client end, we discussed 'sucking most of the functionality of the current Netscape browser (but not the toolbar, cool places or advertising) into the platform; they seemed OK with this concept." GX 535.
- ii. Thomas Reardon responded to Rosen's draft the next morning with a more skeptical assessment, though one which unequivocally confirms that moving Netscape out of the Windows 95 browser market was Microsoft's central goal for the meeting. He wrote that Netscape was "trying to preempt share with a win95 product of their own. i do not think they are so easily displaced from win95 client arena, they continue to move down the path of selling/giving away a 'premium' browser for win95." GX 535 (emphasis added).
- iii. Richard Wolf's comments on Rosen's draft agreed with Rosen that Netscape would not be "competing with us in defining a platform . . ." but expressed skepticism that Netscape would be willing to "drop a broad based client in favor of vertical markets." GX 501.
- iv. Chris Jones began his response to Rosen's draft with a list of "Microsoft's goals, in priority order." Number one on that list was that Microsoft "Own client platform." Confirming precisely Barksdale's and Andreessen's descriptions of the meeting, Jones wrote: "The critical question is: Do they want to align strategically with us or not? Are they willing to bet that we'll be successful, and will they make the commitment and changes necessary in their strategy to do this? Because of our priority to own client and server platform, if they can agree to use our client code on Win 95, and use our BackOffice and NT APIs, and promote these as the solutions, then they will have aligned with our businesses and we have a deal." GX 557 (emphasis added).
- v. After gathering those comments from the other Microsoft attendees, Rosen sent a revised draft to Bill Gates, Nathan Myhrvold, Paul Maritz, and 17 others on the afternoon of June 22, 1995. That draft incorporated Chris Jones's assessment of Microsoft's objectives: "Our goals going into the meeting were (in priority order): 1. Establish Microsoft ownership of the Internet client platform for Win95." He also echoed Jones's view that "the

critical question" is whether Netscape would be willing to "align strategically with us . . . The test of this alignment will be Netscape's agreement to use Microsoft's client code on Win 95." Rosen, ignoring Reardon's more skeptical assessment, ended instead with the optimistic conclusion that Netscape "seemed to embrace this strategy" in the meeting. GX 536, at MS98 009585, MS98 0009587 (emphasis added).

- vi. Reardon disagreed and responded with an e-mail entitled: "Netscape meeting: reality." Leading off a list of eight points about the meeting that he felt Rosen had missed, Reardon wrote: "1) Netscape is preempting O'Hare. We sent them a list of about thirty talking points. They sent back ten, nearly all revolving around shipping their Win95 browser." Reardon also described Rosen's view that Netscape was "OK with this concept" of Microsoft sucking browser functionality into the platform as "bunk. . . . There was a noticeable increase in the level of tension," Reardon wrote, "whenever this sort of language came up. one clearly telling quote from Barksdale: 'all we want is our god given 95% market share for the browser'. he said this with a wink, but i don't know what could be more clear." Reardon concluded that: "We will compete on just about every technology. . . . maybe i am being a dick, but there is no deal here." GX 536, at MS98 0009584 - 0009585.
- vii. Top Microsoft management agreed that Rosen was inaccurate. Brad Silverberg forwarded Reardon's "reality" email to Bill Gates, who responded that "I think Thomas is reading the situation pretty well. I think Dan is great but I agree he is being a little naive in this case." GX 537.
- viii. In a July 12, 1995, phone call with Dan Rosen, James Barksdale discussed a possible server joint venture for Windows . After a series of internal messages, Paul Maritz summarized recent events regarding Netscape: "My thoughts: we originally hoped that there was some way to leverage a relationship with Netscape based on a business model whereby they would be prepared to cede the client to us or at least give us some major advantage, if we could give them some major advantage in the server area. They are not prepared to give us a significant client advantage (either for O'Hare or for MSN), so we should treat them as an ISV, but not much more." When Rosen ventured that Netscape "may be willing to give us a client advantage," Maritz wrote that with respect to "them

building on top of our browser, I am very skeptical that they would agree to this. Their history is to [sic] closely bound up with the browser - this is after all Andreessen's company." Rosen replied that, "Given your message, I understand that you don't see the need to continue discussions with Netscape at a 'strategic' level." Maritz responded with one word, "Right." GX 540 (emphasis added).

67.9. The account of the June 21 meeting contained in Microsoft and Netscape records is also corroborated by a contemporaneous memorandum from the files of America Online.

- i. On June 22, 1995, one day after the meeting took place, AOL's David Kaiser reported being told by Marc Andreessen that "Microsoft was at Netscape yesterday. . . . They wanted:
 - * equity
 - * a board seat
 - * Netscape to renounce the network as a platform
 - * Netscape to disclose all plans to microsoft
 - * Netscape to limit access to APIsAnd in return, Netscape would be Microsoft's special partner, get inside information, etc . . . and if Netscape didn't do the deal, Microsoft would crush them." GX 34.

3. **Microsoft's after-the-fact assertion that its market division proposal was simply exploring forms of legitimate cooperation is pretextual and contrary to the evidence**
 - a. **Microsoft's contention that it was not trying to get Netscape out of the browser business is erroneous and rests on a misleading play on words**

68. Microsoft's witnesses did not genuinely dispute the basic substance of Barksdale's and Andreessen's testimony about the June 21 meeting; instead, they attempted to cast the proposal not to compete in a less sinister light through a manipulation of the word "browser." Although Microsoft's negotiators made clear to Barksdale and Andreessen that Microsoft wanted Netscape out of the Win32 browser business, Microsoft now contends that it simply wanted Netscape to build what Microsoft calls a "browser" on top of "Microsoft technologies." This contention is inconsistent with the contemporaneous documents and is, in any event, of no consequence. Even on Microsoft's version of the facts, its proposal to Netscape was a naked attempt to eliminate platform-level competition and to divide markets.

68.1. Mr. Rosen testified that Microsoft's objective for the June 21, 1995, meeting was to convince Netscape to build software products on top of the "Microsoft technologies" or "browsing software" that Microsoft was building into Windows.

- i. Daniel Rosen admitted that: "We wanted to persuade Netscape's engineers to develop browser and other software offerings on top of Windows 95" (Rosen Dir. ¶ 127) and that Microsoft "did make clear that there would be browsing software in Windows 95 and that we expected users to take

advantage of that software.” Rosen Dir. ¶ 128; see also Rosen Dir. ¶ 50; Rosen, 2/22/99am, at 10:2-10.

- ii. Thomas Reardon testified: “I knew that we were going to be providing Internet APIs for HTML rendering, for HTTP, et cetera. I wanted Netscape to use those APIs. That simple.” Reardon Dep., 9/9/98, at 343:23 - 349:9 (DX 2606) (sealed).

68.1.1. But Mr. Rosen's testimony on this point was inconsistent.

68.1.1.1. At times, Mr. Rosen testified that Microsoft wanted Netscape to continue to build a Windows 95 "browser" as part of a joint venture with Microsoft.

- i. Rosen Dir. ¶ 127 (“We wanted to persuade Netscape’s engineers to develop browser and other software offerings on top of Windows 95.”); Rosen, Dir. ¶ 50 (Microsoft did not want Netscape to agree to stop developing browser software for use on Windows); Rosen, 2/22/99am, at 8:12-24 (allegedly Microsoft "spent considerable effort during the spring of 1995 trying to convince Netscape to build and market" a browser to run on Windows 95.); see also Rosen, 2/22/99am, at 11:13-18 (same).

68.1.1.2. At other times, Mr. Rosen testified that, because Microsoft purportedly would be building "browsing software" into Windows 95 (Rosen Dir. ¶ 128), the proposal was instead that Netscape should concentrate on "higher-level client-side applications (like groupware and multimedia extensions)” (Rosen Dir. ¶ 59).

- i. Rosen testified that when James Barksdale said that he “wanted to continue to add value in browser code” at the June 2, 1995 meeting, Rosen understood that comment “to be consistent with the sort of higher-level client-side applications (like groupware and multimedia extensions) that I described above.” Rosen Dir. ¶ 59.
- ii. Rosen testified that Microsoft encouraged Netscape to develop “cool looking and sounding app[lication]s’ that took full advantage of Internet-related features in Windows 95. Examples of such applications included so-called

‘groupware’ packages, multimedia extension packages and the like.” Rosen Dir. ¶ 50 (citing DX 734).

68.1.1.3. In the end, Mr. Rosen presented no clear explanation of what kind of software he envisioned Netscape creating as part of any deal and simply repeated the vague words "cool looking and sounding apps."

- i. Rosen testified that Microsoft’s “principal interest -- making Windows more desirable -- was best served by encouraging Netscape to stay in the client software business and to develop what Mr. Reardon had called ‘cool looking and sounding apps’ that took full advantage of Internet-related features in Windows 95.” Rosen Dir. ¶ 50 (citing DX 734).
- ii. Rosen testified that “it was strongly in Microsoft’s self-interest to encourage Netscape to continue to ‘add value’ on top of Windows, that is, to accept the invitation publicly extended by Thomas Reardon in Germany in April 1995 to become one of the favored ‘Web ISVs’ for Windows 95. Having Netscape continue to develop what Mr. Reardon called ‘cool looking and sounding apps’ for Windows 95 would, we believed, boost demand for Windows 95.” Rosen Dir. ¶ 124.

68.1.1.4. On cross-examination, Mr. Rosen seemed to settle on a story that Microsoft wanted Netscape to build a "browser" of some kind on top of the browser code that Microsoft now says it was building into Windows 95.

- i. Rosen, 2/22/99am, at 10:2-10 (there was “a lot of discussion about whether they would adopt the Microsoft technologies that we were building into Windows 95 to build such a product or whether they would try to do more things on their own”).

68.1.2. The contemporaneous documents do not reflect any such understanding within Microsoft at that time and make clear that none was communicated to

Netscape. Microsoft never said, and Netscape never understood, what kind of software, if any, Microsoft wanted it to build on the Windows 95 platform.

- i. Barksdale testified, in reference to Microsoft's proposal that Netscape build software in the form of vertical applications, "that was never clear to me what that was." Barksdale, 10/21/98am, at 42:16-18.
- ii. Barksdale testified that "it would be a little difficult to figure out what that might be unless you go up to the server . . ." and that "it got very, very confusing to me because the line seemed to automatically exclude what we thought was going to be one of our very best products." Barksdale, 10/22/98pm, at 37:13 - 38:2.

68.2. Mr. Rosen's apparent contention that Netscape would have been free to build a "browser" on top of the "Microsoft technologies" in Windows 95 is just a play on words.

68.2.1. There was no meaningful distinction between the "technologies" Mr. Rosen now claims Microsoft intended to reserve for itself and Microsoft's browser, Internet Explorer. The contemporaneous documents make it clear that the "platform" technologies that Microsoft said it would build into Windows would duplicate the entire functionality of Netscape's browser product, with the possible exception of "the toolbar, cool places or advertising."

- i. Rosen's notes stated that: "Much of the conversation centered on a discussion of how the lines would be drawn between the platform and their value added. On the client end, we discussed 'sucking most of the functionality of the current Netscape browser (but not the toolbar, cool places or advertising) into the platform; they seemed OK with this concept.'" GX 535.
- ii. Andreessen's notes reflect that Microsoft asked whether Netscape would be "interested in having a partnership where NS gets all the non-Win95 stuff and MS gets all the Win95 stuff? . . . THREAT THAT MS WILL OWN THE WIN95 CLIENT MARKET AND

THAT NETSCAPE SHOULD STAY AWAY.” GX 33 (emphasis in original).

68.2.2. In any event, building on top of those “Microsoft technologies” would have required Netscape to abandon its independent platform-level browser and associated APIs and, along with them, any hope of competing with Microsoft at the platform level.

68.2.2.1. Several companies have recently written specialized browsing programs on top of the so-called Internet “technologies” that Microsoft distributes with Windows 95 and Windows 98; they are often called “shell browsers,” and consist of a small amount of user interface code that relies on Internet Explorer to do the actual work of connecting to the Internet and displaying retrieved information.

i. See infra V.C.1.c; ¶ 187.2

68.2.2.2. Because the underlying code relied on by a shell browser is Internet Explorer's, such a browser does not offer platform competition to Internet Explorer.

- i. Rosen conceded that if Netscape adopted all of Microsoft's underlying technologies for its browser, they would no longer pose a platform threat. Rosen, 2/22/99pm, at 31:9-12; Rosen, 2/23/99am, at 54:3-6. (similar).
- ii. Maritz conceded that if Netscape adopted Microsoft's technologies for its browser, that would “mitigate” the platform threat. Maritz, 1/26/99pm, at 49:3-10; see also Maritz, 1/26/99am, at 29:19-22 (Netscape's APIs made it a threat); Maritz, 1/26/99am, at 30:4-6 (same); Maritz, 1/26/99pm, at 53:9-12 (Microsoft's goal was to keep control of the browser APIs).
- iii. When asked whether “a browser like Encompass that uses the technologies of the Microsoft platform is not going to be viewed as a serious competitive threat to Microsoft,” Maritz, answered: “Correct.” Maritz, 1/25/99pm, at 30:5-8; see also Maritz, 1/25/99pm, at 30:14-19.

- iv. Professor Fisher testified that, for purposes of his conclusions in this case, there was "absolutely no difference" between shell browsers and Internet Explorer. Fisher, 1/5/99pm, at 20:4-23.
- b. **Rosen's other testimony, both regarding the June 21, 1995, meeting and more generally, is evasive and misleading**

69. To the extent that Mr. Rosen's testimony about the June 21 meeting diverged from James Barksdale's in more than a semantic way, Mr. Rosen's testimony was incredible. Mr. Rosen's demeanor on the stand was evasive and unhelpful, and his testimony was riddled with inconsistent and implausible assertions.

69.1. First, Mr. Rosen testified that he never viewed Netscape as a competitive threat in early 1995 and was not aware of a single person within Microsoft who did (Rosen, 2/22/99am, at 48:13). That assertion is flatly inconsistent with the contemporaneous documents, the testimony of Microsoft's other witnesses, and Mr. Rosen's role in the Netscape discussions.

- i. See supra Part III.B.2; ¶ 56.1.
- ii. Rosen wrote a May 1995 memo that the "threat of another company (Netscape has been mentioned by many) to use their Internet WWW browser as an evolution base could threaten a considerable portion of Microsoft's future revenue." GX 331.
- iii. When confronted with that memo on cross examination Rosen claimed first that he did not believe what he had written even at the time he wrote it and that he had never sent the memo to the people to whom it is addressed (Rosen, 2/22/99am, at 23:24 - 27:18). Rosen's testimony was demonstrably false, and he was quickly forced to admit that his testimony was untrue, conceding that he must have sent the memo to Ben Slivka. Rosen, 2/22/99pm, at 4:22 - 5:9.

69.2. Second, Mr. Rosen testified that Netscape always considered its leadership position in Internet client software to be a financial dead-end and a waste of engineering resources and was therefore eager to cede to Microsoft responsibility for client technologies on

Windows 95 (Rosen Dir. ¶44; Rosen, 2/22/99am, at 41:3-4). But the record shows that everyone at Microsoft, including Rosen, understood that client innovation was an important part of Netscape's business strategy.

- i. Rosen's notes from the June 2, 1995 meeting with James Barksdale report that Netscape was "pleased so far with their ability to sell servers and browsers to enterprises . . ." that they "are selling a lot of site licenses for browsers Windows 95 and Win 3.1 are their primary browser development platforms." Rosen also reported that "Netscape feels that they must be free to support any protocol, API, etc. that becomes popular, without restriction." And on the subject of "browser cooperation," Barksdale said that "he would like to explore ways to cooperate, but he wants to continue to add value in browser code." GX 25.
- ii. Maritz responded to Rosen's notes from the June 2 meeting with the comment that "It was clear that he/they view the client as a key place to make money, since that 'hook is so important for selling additional software.' Barksdale was primarily interested for us to distribute his client and his server." GX 27.
- iii. Commenting on Rosen's draft of his notes from the June 21 meeting, Thomas Reardon suggested that he "add something about barksdale's joking about 95% market share, i think it is somewhat telling. . . . i do not think they are so easily displaced from win95 client arena, they continue to move down the path of selling/giving away a 'premium' browser for win95." GX 535.
- iv. Rosen wrote on May 15, 1995, that Microsoft would have to "wrest leadership of the client evolution from" Netscape. GX 331 (emphasis added).

69.3. Third, Mr. Rosen was deliberately evasive during cross-examination about the meaning of the words "browser" and "client" in his testimony.

- i. Rosen testified that when, Richard Wolf used the word "client" in DX 771, he meant "browser." Rosen, 2/23/99am at 30:7-21, 59:19-21.
- ii. But when Rosen used the word "client" in GX 23, two hours later, he meant something entirely different. Rosen, 2/23/99am, at 47:4-8.

- ii. Rosen conceded that Internet Explorer was “Microsoft’s Internet client.” Rosen, 2/22/99am, at 42:11-13. And when asked whether “Netscape had leadership of the Internet client with respect to various platforms . . .” Rosen answered: “Yes.” Rosen, 2/22/99am, at 40:1-3.

69.4. Fourth, Rosen claimed that Microsoft was not building a browser of its own in mid-1995 (Rosen 2/22/99am, at 15:1-23), that he had never heard any mention of a "browser battle" between Microsoft and Netscape (Rosen, 2/22/99am, at 17:1-18), and that he was not aware that gaining browser market share was a goal of Microsoft (Rosen, 2/22/99am, at 18:2-5). Those statements are false. They are contradicted by the rest of the trial record and the testimony of other Microsoft witnesses.

69.4.1. Mr. Rosen testified that the June 21, 1995, meeting was "primarily a technical 'brainstorming session' to seek areas of cooperation on technologies, protocols and the like" (Rosen Dir. ¶ 68), rather than a "'relationship' discussion" (Rosen Dir. ¶ 55) at which issues of broad business strategy and alignment would have been discussed. That contention is belied by the contemporaneous documents.

- i. Rosen's own notes from the earlier June 2, 1995, meeting suggested that the "Next Steps" should be for each side to "prepare a list of the things they want from and are willing to give to form a relationship" and concluded that "Netscape is open to a broad strategic relationship with Microsoft." GX 25.
- ii. And when Rosen sent Microsoft's list to Netscape, it included client terms, server terms, authoring terms, technology terms, services terms, marketing terms, and general terms including the possibility of a Microsoft investment in Netscape and a seat on Netscape's board. GX 556.

69.4.2. There is no contemporaneous evidence that anyone at Microsoft, including Mr. Rosen, ever discussed or contemplated a proposal that Microsoft would license

Netscape's cross-platform browsers and distribute them under Microsoft's brand name (Rosen Dir. ¶¶ 97, 99). In light of the documents, Mr. Rosen's prior testimony, and the clear and credible testimony of James Barksdale, Mr. Rosen's trial testimony on this point is neither credible nor persuasive.

- i. The internal documents suggest, at most, that Microsoft discussed letting Netscape "run with the Mac and Win16 clients," (GX 24) on its own in return for Netscape's agreement to vacate the Windows 95 market.
- ii. By contrast, at trial Rosen testified that what Barksdale and Andreessen remember as an offer to cede the non-Windows 95 browser business to Netscape was actually such a proposal and attempted to portray that offer as merely a "continuation" of Microsoft's December 1994 discussion with Netscape about the possibility that Microsoft would license Netscape's browser code for Windows 95. Rosen Dir. ¶ 97. This characterization of events first emerged in Rosen's testimony at trial.

69.4.3. Mr. Rosen's testimony that the discussion about the "line" between Windows 95 and the browser at the June 21 meeting was initiated and pressed by Netscape, not Microsoft (Rosen Dir. ¶¶ 85-88, 95), is also inconsistent with the evidence.

- i. When asked at his deposition who were "the primary speakers on this topic of the line," Rosen answered that "it was primarily Thomas Reardon and potentially some discussions with Chris Jones." Rosen Dep., 2/22/99pm, at 56:16-21.
- ii. Chris Jones testified that the subject of "the line" was extensively discussed at the Microsoft premeeting, where no Netscape personnel were present. Jones Dep., 2/22/99pm, at 40:14-22, 49:5-20.

69.4.4. Mr. Rosen's testimony that Microsoft wanted Netscape to continue to make products that exposed APIs to independent software developers is wholly

inconsistent with the contemporaneous documents and the testimony of Microsoft's other witnesses.

- i. See supra Part III.B; ¶ 56 (detailing Microsoft's recognition that Netscape could develop APIs that could threaten the applications barrier to entry).
- c. **Microsoft's contention that it engaged in legitimate joint venture discussions with Netscape is contrary to the evidence**

70. Microsoft asserts more generally that the June 21, 1995, meeting was merely an effort by Microsoft to find ways that Microsoft and Netscape could work collaboratively together (Rosen Dir. ¶¶ 54, 77, 79). But the evidence shows that Microsoft's offers to aid or collaborate with Netscape were merely a pretext designed to secure Netscape's agreement to Microsoft's naked market division proposal and that those offers were not genuinely intended to further any procompetitive collaboration between the two companies.

70.1. First, contemporaneous Microsoft documents make plain that its objective at the June 21, 1995, meeting was to eliminate the browser threat to the applications barrier to entry and that any proposed "joint venture" was merely an artifice to mask Microsoft's anticompetitive purpose.

70.1.1. Microsoft's internal correspondence both before and after the June 21, 1995, meeting leaves no doubt that securing Netscape's agreement not to compete with Microsoft in the Windows 95 browser market was Microsoft's primary objective for that meeting. Those issues commanded the attention of Microsoft executives at the very highest levels and were the subject of extensive discussion.

- i. See supra ¶¶ 66.2, 66.4, 67.2, 67.8.

- ii. In a June 1, 1995 email to Bill Gates and other Microsoft executives, Thomas Reardon wrote: "Dan points out that we must offer them some story as to how they can slowly shift away from the core client business, or at least the Win32 client business" GX 24.

70.1.2. Netscape understood the Microsoft proposal would put Netscape out of business.

- i. Marc Andreessen testified at his deposition that "the proposal . . . would result in crippling Netscape as a potential competitor of Microsoft, and, indeed, as an independent company." Andreessen Dep., (played 10/27/98am), at 25:11 - 18:14.
- ii. Barksdale agreed with Andreessen's assessment that Microsoft intended to divide the market and effectively "cripple" Netscape. Barksdale, 10/27/98am, at 29:17.
- iii. Barksdale testified: "Most of the matters on which they would have had Netscape confine its work were not commercially valuable." Barksdale Dir. ¶ 113.

70.1.3. Microsoft swiftly abandoned any plans for a collaboration with Netscape when Netscape rejected the market division.

- i. Paul Maritz wrote that "we originally hoped that there was some way to leverage a relationship with Netscape based on a business model whereby they would be prepared to cede the client to us or at least give us some major advantage, if we could give them some major advantage in the server area. They are not prepared to give us a significant client advantage (either for O'Hare or for MSN), so we should treat them as an ISV, but not much more." GX 540.
- ii. Dan Rosen understood from Maritz's email that Maritz no longer saw "the need to continue discussions with Netscape at a 'strategic' level." GX 540.

70.2. Second, the one aspect of Microsoft's offer that was clear -- Microsoft's offer to refrain from competing with Netscape in the Macintosh, Unix, and 16-bit Windows

segments of the browser market -- would not have aided any legitimate, procompetitive collaboration between the two companies and was nothing more than a naked bribe designed to secure Netscape's agreement to the market division scheme.

70.2.1. One of the inducements that Microsoft offered in exchange for Netscape's agreement to abandon the Windows 95 browser business was a promise not to compete with Netscape's browser on other platforms.

- i. See supra ¶ 67.4.
- ii. Microsoft was thinking about a "long term strategic cooperation, where Netscape might run with the Mac and Win16 clients," at least as early as June 1, 1995. GX 24; see also GX 33; Jones Dep., 10/28/98am, at 40:18 - 41:3.

70.2.2. The contemporaneous documents do not suggest that Microsoft contemplated any technical or marketing efficiencies from such an arrangement.

- i. See supra ¶¶ 67.2, 67.4, 67.8.

70.3. Third, that Microsoft's "joint venture" characterization is pretextual is confirmed by the fact that eliminating Netscape as a browser supplier would have reduced the value of, and thus demand for, Windows and was completely unnecessary to achieve any legitimate purpose.

70.3.1. Microsoft makes money by selling copies of its operating systems, and its legitimate business interests lie in maximizing consumer demand for that software. Browsers are complements to operating systems; a good Windows 95 browser would therefore have increased demand for Windows, and thus Microsoft's profits, regardless of whether that browser was produced by Microsoft.

- i. Fisher testified, "if browsers are complements to operating systems . . . it should not matter who makes the complement." Fisher Dir. ¶ 129(b).
- ii. Warren-Boulton testified that "Microsoft has a legitimate interest in ensuring that Windows users are able to acquire high quality browsers at low prices, because that would increase the demand for Microsoft's operating system." Warren-Boulton Dir. ¶ 187.
- iii. Rosen testified that "it was strongly in Microsoft's self-interest to encourage Netscape . . ." to build applications for Windows 95 because those applications would "boost demand for Windows 95." Rosen Dir. ¶ 124 (emphasis in original).

70.3.2. That general principle was particularly true of Netscape's web browser in late 1994 and 1995. Netscape's browser was the "killer app" of 1995 and generated tremendous consumer enthusiasm and demand for PCs.

- i. Barksdale specifically described Netscape's Navigator, which would run on top of Windows 95, as "the killer app of 1995." Barksdale, 10/27/98pm, at 71:6-11.
- ii. See supra Part III; ¶ 53.1.2..
- iii. Barksdale testified that, at the time of the June 21, 1995 meeting, Netscape's browsing software "delivered incomparably better performance than other browsers available at the time," and that consumers preferred it by a wide margin. Barksdale Dir. ¶ 231.
- iv. Barksdale described Netscape's final version of Navigator 1.0 as a product which "delivered many times the performance of other browsers available at the time," with innumerable innovative features. Barksdale Dir. ¶ 54
- v. Barksdale testified that Netscape's browser was available across many different platforms, including Mac, OS/2, and various "flavors" of UNIX. Barksdale Dir. ¶ 80. Further, the cross-platform availability of Netscape Navigator was of great value to enterprises seeking to standardize their software and training efforts, Barksdale Dir. ¶ 80; infra Part V.B.1.b.(2); ¶ 107, and to

independent software vendors seeking to maximize the appeal of their programming efforts, Barksdale ¶ 85.

70.3.3. By contrast, Microsoft's first version of Internet Explorer for Windows 95 was still in development and was not released until July 1995. Cross-platform versions of Internet Explorer did not become available for the Macintosh and UNIX operating systems until much later. And when Internet Explorer 1.0 for Windows 95 was eventually released, it was markedly inferior to Netscape's then-current browsing software.

- i. Barksdale testified that the release of Navigator 1.0 “delivered incomparably better performance than other browsers available at the time;” more specifically, “Microsoft’s 1.0 release of Internet Explorer was substantially inferior to Navigator’s 1.0 release.” Barksdale ¶¶ 231-232.
- ii. Reviews in the trade press consistently concluded that Netscape Navigator was faster and more functional than Internet Explorer. Schmalensee Dir. App. F Table F-1 (all publications Dean Schmalensee listed selected Netscape over Internet Explorer in 1995).
- iii. Recognizing that performance gap, consumers preferred Netscape Navigator to Internet Explorer by an overwhelming margin in late 1995 (Myhrvold Dir. ¶ 26-27), even though a license for Navigator cost \$39 and Microsoft was giving away Internet Explorer for free. Schmalensee Dir. ¶ 275; Myhrvold Dir. ¶ 104. In fact, consumers still preferred Navigator to Internet Explorer by almost four to one as late as January 1997. GX 5.
- iv. Barksdale testified that Netscape's browser share in January 1996 was approximately 84 percent. Barksdale, 10/21/98pm, at 33:1-4.

70.3.4. Moreover, by June 21, 1995, Netscape had already invested millions of dollars to develop a new version of its browser for Windows 95; these investments promised to further enhance the value of Windows and thus offered consumers significant benefits.

- i. A May 11, 1995 email from Dan Rosen to Tom Johnston at Microsoft, asking to "borrow/copy the Netscape Win95 new client they gave us," makes it clear that Microsoft had a beta version of Netscape's Windows 95 browser more than a month before the meeting. GX 1892.
- ii. Barksdale testified, "At the same time Microsoft was releasing Internet Explorer, Netscape was well on its way to its 2.0 release of Navigator." Barksdale ¶ 233.

70.3.5. The tremendous consumer enthusiasm for browsing software and the Internet in late 1995, and the clear preference of consumers for Netscape's browser at that time, demonstrate that consumers would have been harmed if Netscape had acceded to Microsoft's demands and abandoned its Windows 95 web browser.

- i. James Barksdale described Navigator as a "separate" product which helps Microsoft sell Windows, adding, "a lot of people buy computers because they want to run the Netscape Navigator. It would help them to cooperate with companies like ours." Barksdale, 10/27/98am, at 71:23 - 72:1.
- ii. Barksdale testified, "that's why they wouldn't have asked us to get out of it immediately. We were going to release product in about a month. It was going to be great for Windows 95. It was going to help them sell a lot more because the Navigator is a hot application that ran on top of Windows 95. It was the killer app of 1995." Barksdale, 10/27/98pm, at 71:6-11.

70.4. Fourth, the pretextual nature of any joint venture proposal is also illustrated by the fact that Microsoft threatened to withhold technical support that Netscape needed in order to "add value" on top of Microsoft's platform and retaliated against Netscape by withholding that support when Netscape rejected the market division proposal.

70.4.1. Microsoft retaliated against Netscape by withholding the dialer API.

70.4.1.1. Microsoft knew that Netscape needed certain critical technical information and assistance in order to complete its Windows 95 browser in time for the retail release of Windows 95; indeed, Netscape had repeatedly asked Microsoft for some version of the dialer API and obtaining it was Netscape's primary objective at the June 21, 1995, meeting.

- i. Beginning in March 1995, Netscape's technical staff corresponded with Microsoft repeatedly in an effort to discuss the technologies necessary for the development of a Netscape browser that would work efficiently on Windows 95. Barksdale Dir. ¶ 95; Barksdale Dir ¶ 106; DX 728
- ii. Reardon, in a June 23, 1995, email string to Maritz and others entitled "Netscape meeting: reality," wrote: "We sent them a list of about thirty talking points. They sent back ten, nearly all revolving around shipping their Win95 browser." GX 536.
- iii. On July 7, 1995, Mike Homer wrote to Daniel Rosen that "I know that we have discussed this with you before, but I wanted to reiterate how urgently we need the following information: 1. RNA (remote network access) phonebook API. Currently the only way to create/edit phonebook entries is through the WIN 95 interface. Our product will need to create an RNA phonebook entry for the registration server (this would happen during install) and also to configure the customer's new account once the account has been created. To make these calls, we need to have an API that will allow him to configure the required information. We first requested these in early June . . ." Barksdale added: "Dan - these are big deals, please help us." GX 240.
- iv. Barksdale testified, in reference to the meeting with Microsoft, that: "Our top priority was to obtain APIs and other technical information we needed from Microsoft in order to release a browser compatible with the Windows 95 operating system." Barksdale Dir. ¶ 105.

70.4.1.2. At the June 21 meeting, Microsoft representatives informed Netscape that Microsoft possessed a secret internal dialer API and that, if Netscape was sufficiently cooperative on other matters, that technology could be made available to Netscape immediately.

- i. Andreessen's notes reflect that when Barksdale asked about the RAS "dialer" APIs that Netscape had been requesting, Rosen responded: "We can fix that problem. In a perfect world, anyone can plug into that. With a special relationship with you, you'll be the first to plug into it." Rosen also stated that: "We need to give you code. Our alternative is to give you stuff that wasn't developed for that purpose. There's internal stuff that implements internal APIs, and those APIs are known only within Microsoft." J. Allard then added that: "'Depending on how we walk out of this room today, we have a solution for your problem...' or else in 3 months." Rosen concluded by saying that: "If we had a special relationship, you wouldn't be in this position." GX 33.
- ii. Barksdale testified that Microsoft's message was, in essence, "'depending on how we get along here today, you can have the thing right now and we'll all be good friends, and if it doesn't . . . go our way, then you may have to wait a little while for it.'" Barksdale, 10/27/98am, at 53:3-8; see also Barksdale, 10/27/98am, at 54:20-23.

70.4.1.3. Microsoft's representatives at the June 21, 1995, meeting repeatedly threatened that, if Netscape did not agree to the proposed "special relationship" with Microsoft, Microsoft would provide that technology on a delayed basis, if at all.

- i. Marc Andreessen's contemporaneous notes record, for example, that Microsoft offered to "consider licensing us the ability to turn Navigator into a container," but only "IN THE CONTEXT OF THE LARGER DEAL." GX 33 (emphasis in original). Andreessen's notes also reflect that Microsoft explained that "[t]here are things we can do if we're working together that we can't do otherwise," and that

Microsoft offered to help Netscape do "tight integration" with MSN, but only on the condition that the two companies have a "tight relationship;" "If we didn't have a tighter relationship, you'd be back to what a normal ISV can do." GX 33.

- ii. Barksdale testified that, over the weeks leading up to the meeting, Netscape repeatedly asked Microsoft to provide "dialer" APIs that would enable Netscape's Windows 95 browser to access the Internet through a dial-up ISP. Barksdale Dir. ¶¶ 106, 111.
- iii. Andreessen's notes record that when James Barksdale raised the issue at the June 21 meeting, Daniel Rosen acknowledged that Microsoft had an internal solution to the dialer problem and offered to provide those internal APIs to Netscape, but only on the condition that Netscape agree to the previously outlined "special relationship." "We can fix that problem. In a perfect world, anyone can plug into that. With a special relationship with you, you'll be the first to plug into it. Others will be in the future." GX 33.
- iv. Andreessen's notes reflect that Microsoft representative J. Allard then clarified that "[d]epending on how we walk out of this room today, we have a solution for your problem . . . ' or else in 3 months" and that Dan Rosen added, "[i]f we had a special relationship, you wouldn't be in this position." GX 33.

70.4.1.4. Microsoft followed through on its threat. When Netscape rejected Microsoft's market division proposal, Microsoft -- despite Netscape's repeated requests for assistance -- withheld a working version of the dialer API until October, a little more than the "3 months" threatened by James Allard at the June 21 meeting. The delay pushed back the release of Netscape's browser until substantially after the release of Windows 95 (and Internet Explorer) and caused Netscape to miss most of the holiday selling season.

- i. On July 7, 1995, Mike Homer wrote to Daniel Rosen that “I know that we have discussed this with you before, but I wanted to reiterate how urgently we need the following information: 1. RNA (remote network access) phonebook API. . . . We first requested these in early June” Barksdale added: “Dan - these are big deals, please help us.” GX 240.
- ii. On July 18, 1996, Rick Schell wrote to Paul Maritz that Netscape “repeatedly asked for the API set that would allow us to make phone book entries. Microsoft did not provide those APIs until October 1995, which caused us to miss most of the holiday selling season. However, those APIs were used prior to that by Microsoft’s Plus pack, available at the time of the Win95 launch.” GX 241.
- iii. Barksdale testified that “we did not receive the APIs and other technical information we had been seeking until October 1995 . . . or approximately three months later, which was well after the launch of Windows 95 and was precisely what Microsoft had threatened at the June 21 meeting.” Barksdale Dir. ¶114. See also GX 240; GX 241; Barksdale, 10/22/98pm, at 53:14-18.

70.4.2. Microsoft also retaliated against Netscape by refusing to give Netscape a license to a scripting tool that was necessary for Netscape to enable its Windows 95 users to access certain Internet service providers.

70.4.2.1. In 1996, Netscape attempted to negotiate a license for a readily-available scripting tool that Netscape needed to make its browser compatible with some dial-up ISPs.

- i. Barksdale Dir. ¶207.
- ii. Barksdale testified that Netscape “believed that the scripting engine was readily available. John Freeborg, a Netscape employee, confirmed that fact by making up the name of an ISP and getting on Microsoft’s ISP mailing list, using his home address. On June 28, 1996, Freeborg received a packet from Microsoft explaining that the scripting engine we were requesting was available to ISPs for redistribution on a royalty-free basis if the ISP signed a Microsoft license that, among other things, required the ISP to use Internet Explorer as the ‘preferred web browser.’” Barksdale Dir. ¶ 208. See also GX 239; GX 243; GX 245.

70.4.2.2. A licensing agreement for the scripting tool was approved by both Netscape's and Microsoft's legal departments, and Netscape forwarded a signed copy to Microsoft for signature on July 18, 1996.

- i. Barksdale testified that: "By mid-July, both Netscape's legal department and Microsoft's legal department had approved the licensing agreement under which we sought the scripting tool. Rick Schell signed the agreement on Netscape's behalf on July 18, 1996. The agreement was forwarded to Microsoft for signature." Barksdale Dir. ¶ 209
- ii. Julie Herendeen wrote on July 26, 1996 that "John sent the contract to Ed Mitchell at Microsoft for signature last Thursday. Ed gave the contract to Carl Stork, head of the PC/Win 95 division on Thursday 7/18." GX 243.

70.4.2.3. Microsoft responded by writing a letter to Netscape refusing to discuss the scripting license unless Netscape cooperated with Microsoft on other, unrelated matters.

- i. On August 14, 1996, John Freeborg of Netscape wrote that Will Poole of Microsoft "advised us that Paul Maritz has written a letter to Rick listing all open issues between Microsoft and Netscape (one of which will be the scripting license) where they feel both parties could be more cooperative. He wouldn't elaborate on specifics, but they are unwilling to keep the Win 95 scripting license as a separate issue." GX 248.

70.4.2.4. Netscape never got a license to the scripting tool and, as a result, was unable for a time to do business with certain ISPs.

- i. Barksdale testified that "we were never able to license the scripting tool" and that "Microsoft's refusal to license the scripting tool to us -- a tool that was freely available to others for redistribution on a royalty free basis -- effectively foreclosed Netscape for a period of time from doing

business with those ISPs, such a Sprynet, that required scripting.” Barksdale Dir. ¶ 213

70.4.3. Microsoft also retaliated against Netscape by embarking on a relentless campaign to prevent other companies in the computer industry from aiding Netscape in any way.

70.4.3.1. Microsoft threatened to retaliate against personal computer OEMs that did business with Netscape by changing the terms of their Windows 95 licensing agreements.

- i. Barksdale testified that “Microsoft made clear through its words and actions that PC computer manufacturers should not get too close to Netscape or there could be negative consequences in their dealings with Microsoft. This was a serious matter for those OEMs; without a Windows license, and without cooperation from Microsoft in general, their P.C. businesses are worthless.” Barksdale Dir. ¶ 30.
- ii. Barksdale testified that “I was told that senior executives of Microsoft, including Bill Gates, called the CEOs of certain OEMs to warn them that there would be negative consequences resulting from doing business with Netscape.” Barksdale Dir. ¶ 163.
- iii. When NCR put a Netscape logo on its home page, a Microsoft representative told NCR that Netscape was Microsoft's "#1 competitor" and that NCR's "licensing relationship" with Microsoft "is going to get a lot harder." GX 192.
- iv. An employee with Netscape's Japanese affiliate reported on November 12, 1996 that “I have heard many times from our partners who have OEM agreement with us to bundle Navigator in their PCs that, MS threatens them that if they OEM our Navigator, MS tries to increase the royalty license for Windows.” GX 199; Barksdale Dir. ¶ 172 (same).

- v. See also infra Part V.C.2.b; ¶¶ 205-208 (Microsoft threatened to penalized firms that favored Netscape).

70.4.3.2. Microsoft executives also threatened ISPs and ISVs that entered into cooperative agreements with Netscape.

- i. Barksdale testified that, when Pacific Bell announced a joint venture with Netscape, Microsoft executive Steve Ballmer called to "express[] displeasure over the announcement," and to say that Pacific Bell "had become 'an enemy' of Microsoft by doing business with Netscape." Barksdale Dir. ¶ 164.
- ii. In a June 14, 1996, e-mail, Autodesk told Netscape that they were "taking a lot of grief (phone calls, email threats, etc.)" from Microsoft "for working so closely with you guys." GX 76.
- iii. When Microsoft learned that Attachmate was bundling Netscape Navigator with their products and planning to develop a TCP/IP gateway, Microsoft threatened to bundle its own 3720 emulation software (which is directly competitive with another Attachmate product) into the operating system. Attachmate abandoned its TCP/IP project and ceased distributing Navigator. GX 91.

4. Acceptance of Microsoft's market-division proposal would have resulted in both the maintenance of Microsoft's operating system monopoly and a Microsoft monopoly in the browser market

71. Had Netscape accepted Microsoft's naked proposal to divide the browser market, Microsoft would have succeeded in thwarting the browser threat in its incipency and would have eliminated the principal threat Microsoft perceived to its monopoly position in operating systems.

71.1. Netscape's acceptance of Microsoft's offer would have eliminated the threat to Microsoft's operating system monopoly that Netscape presented in 1995.

71.1.1. Netscape was the only significant browser supplier, and thus the only significant potential browser threat to Microsoft's operating system monopoly, in 1995. Accordingly, had Microsoft convinced Netscape to accept its offer, Microsoft would quickly have gained a sufficient share of browsers to ensure that no other browser rival controlled browser-related APIs.

- i. Professor Fisher testified that Microsoft's market division proposal "is significant, first, because if Netscape had agreed, Microsoft would have succeeded in eliminating its only serious browser competitor and in monopolizing the market for browsers." Fisher Dir. ¶ 99.
- ii. Fisher testified that, from the introduction of Internet Explorer 1.0 on, Netscape was always Microsoft's "only serious browser competitor." Fisher Dir. ¶ 99.
- iii. Barksdale testified that "by the end of 1995, Netscape had an over 70 percent market share for Internet clients." Barksdale Dir. ¶ 66.

71.1.2. Had Netscape accepted Microsoft's offer, Netscape would have been relegated to a small and ever-decreasing share of the overall browser market.

- i. Marc Andreessen testified at his deposition that "the proposal . . . would result in crippling Netscape as a potential competitor of Microsoft, and, indeed, as an independent company." Andreessen Dep. (played 10/27/98am), at 25:11 - 18:14.
- ii. Barksdale agreed with Andreessen's assessment that accepting Microsoft's proposal would have crippled Netscape as an independent company. Barksdale, 10/27/98am, at 29:17.
- iii. Barksdale testified that: "Most of the matters on which they would have had Netscape confine its work were not commercially valuable." Barksdale Dir. ¶ 113.
- iv. Andreessen also testified that he believed "in addition that it is of very little likelihood that Microsoft would have chosen to live up to" its side of the bargain, "because once we had been reduced to

such a state of weakness, we would have had no market power whatsoever, and our desires would have been irrelevant." Andreessen Dep. (played 10/27/98am), at 26:23 - 27:3.

71.1.3. By quickly gaining a substantial share of the browser business, Microsoft would have ensured that browser rivals could not gain sufficient usage to induce applications developers to write to their platform rather than to Windows and would thereby have maintained its operating system monopoly.

- i. Warren-Boulton testified that, "by reducing the market share of competing browsers to low levels, Microsoft could significantly diminish the possibility that applications developers will write to those browsers' APIs." Warren-Boulton Dir. ¶ 88.

72. Microsoft would also have quickly monopolized the browser market.

72.1. As will be explained, there is a separate product market for Internet browsers.

- i. See infra Part VII.B.1; ¶ 384.

72.2. Had Netscape accepted Microsoft's proposal, Microsoft would swiftly have gained a dominant share of browsers.

- i. See supra ¶ 71.1.1.

72.3. Microsoft's large share of the browser market would have been protected by substantial barriers to entry, including Microsoft's control of the standards and extensions web site developers employ.

- i. Dr. Fisher testified that "if IE were the dominant browser and Microsoft decided to support only Windows-based technology, developers would have little incentive to create applications that were not Windows-based." Fisher Dir. ¶ 95.
- ii. See also infra Part VII.D.1; ¶¶ 398-400.

72.4. Microsoft would therefore have gained monopoly power over browsers.

i. See infra Part VII.B.3.e; ¶ 390.