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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NOVELL, INC.,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Judge Ted Stewart
Civil No. 2:04-CV-01045-TS

24

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

It is undisputed that if Novell's claims against Microsoft rest "in part" on "any matter complained of" in the Government's 1998 Complaint, then Novell's Complaint is timely under Section 16(i) of the Clayton Act, 15 U.S.C. § 16(i). The Clayton Act test requires this Court to compare the two Complaints and decide whether they have a "real relation" to each other; if the Court finds that "there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences." *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 830 (11th Cir. 1999) (citing *Leh v. Gen. Petroleum Corp.*, 382 U.S. 54, 59 (1965)).[1]

Microsoft's main argument on its motion to dismiss – that Novell's claims do not qualify for tolling – is mystifying. As Microsoft essentially concedes, Novell's Count I and the Government Complaint contain *identical* claims for monopolization of the market for personal computer ("PC") operating systems, which are the basic "platforms" on which applications like Novell's WordPerfect and Quattro Pro are run. Moreover, Novell's Count VI alleges the *same* claims as the Government's First Claim for Relief: Microsoft's agreements with Original Equipment Manufacturers ("OEMs") unreasonably restrained competition.[2]

Either of these "significant . . . overlap[s] of subject matter" defeats Microsoft's tolling argument. The symmetry between the Complaints, however, does not end there. Other "matters" about which both suits "complain" include Microsoft's

[1] The Novell and Government Complaints are attached as Exhibits A and B, respectively.

[2] OEMs such as Dell, Compaq, and IBM manufacture and sell PCs, typically bundling Microsoft's operating system with various software applications at the factory. *See* Novell Compl. ¶ 114. Microsoft's contracts either totally forbade OEMs from pre-loading Microsoft's competitors' software applications, such as word processors, spreadsheets, and Internet browsers, or allowed OEMs to do so only on terms that put these competing products at a severe disadvantage. *See, e.g., id.* ¶¶ 113, 175. Novell anticipates using OEM agreements from the Government suit to support its claims.

acquisition of monopoly power over other software markets to protect its operating systems monopoly, integration of browser technologies into Windows 95 to exclude rivals, and suppression of competing and potentially competing platforms and cross-platform technologies. In addition, Microsoft engaged in much of the same anticompetitive conduct against Novell as it did against other competitors named as examples in the Government case, and caused Novell to suffer injury similar to that suffered by those competitors.

As we show in Parts I-III, these points of similarity (and not, as Microsoft would have it, the purported differences) are dispositive. These similarities, individually and in combination, meet the liberal standards of Rule 12(b)(6) and Section 16(i), as "[i]t is obvious from a comparison of the two complaints" that Novell's "suit is based in part on matters of which the Government complained." *Leh*, 382 U.S. at 64.

In Part IV, we demonstrate that Microsoft's grounds for dismissal of Count I – that Novell sold the claim in an Asset Purchase Agreement with Caldera, Inc. and, in any event, lacks standing – fare no better.[3] First, the plain language of the conveyance in the Agreement (attached as Exhibit C) cannot be read to include any claim for damages to Novell's office productivity applications business. Second, even presuming (as Microsoft incorrectly does) that Novell was not a consumer or competitor in the operating systems market, the Supreme Court (in a decision Microsoft fails to cite) ruled that antitrust standing is not so limited, but also encompasses victims like Novell, who suffer injury proximately caused by the antitrust violation. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

[3] Tellingly, and in our view dispositively, Microsoft does not dispute that Count I qualifies for Clayton Act tolling.

STATEMENT OF ISSUES

1. To suspend the running of the statute of limitations, Section 16(i) of the Clayton Act requires the private party's complaint to rest "in part" on "any matter" in the prior government complaint. Does Novell's Complaint do so?

2. In its Asset Purchase Agreement with Caldera, Novell conveyed claims for injuries to its "DOS Products or Related Technology," as those terms were defined in the Agreement. Did the Agreement also convey claims for injuries to Novell's office productivity applications?

3. An antitrust plaintiff has standing if it pleads an injury proximately caused by the defendant's antitrust violations that is the kind Congress sought to remedy. Does Count I of the Novell Complaint plead such injury?

STATEMENT OF RELEVANT FACTS

Introduction

Between June 1994 and March 1996, Novell owned and marketed some of the most popular and technically advanced office productivity applications used on personal computers, including the WordPerfect word processing application and the Quattro Pro spreadsheet application. The word processing and spreadsheet markets were then the most lucrative and strategically important applications markets in the PC industry.

During that time, Microsoft's Windows operating system had monopoly power over the market for PC operating systems. By 1994, when Novell acquired WordPerfect and Quattro Pro, Microsoft also was in the process of unlawfully monopolizing the office productivity applications markets, both as an end in itself and to protect its core operating systems monopoly. Microsoft needed to control "key 'franchise'" applications like word processors to "widen the 'moat'" that protected its

Windows monopoly.[4] As a result of Microsoft's conduct, Novell sold its failing office productivity applications business in 1996 at a loss of approximately $1 billion, and suffered additional damages.[5]

Novell brought this action under the Clayton and Sherman Acts[6] to recover these losses. Novell did so only after the Government suit ended, as the tolling statute encourages and entitles private plaintiffs to do.

The "Applications Barrier to Entry" That Protected Microsoft's Operating Systems Monopoly

Both the Government and Novell Complaints rest on Microsoft's unlawful monopolization of the market for PC operating systems, and Microsoft's anticompetitive conduct designed to protect that monopoly by extending it into "other software markets."[7] Gov't Compl. ¶ 5; Novell Compl. ¶ 4.

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[4] E-mail from Jeff Raikes, Microsoft, to Warren Buffet (Aug. 17, 1997) [hereinafter "Raikes E-mail"], *quoted in* Novell Compl. ¶ 62.

[5] By then, WordPerfect's market share had fallen from nearly 50 percent to less than 10 percent, and Microsoft Word's share of the word processing market had risen from less than 20 percent prior to 1990 to approximately 90 percent. Novell Compl. ¶ 8.

[6] Section 4 of the Clayton Act, 15 U.S.C. § 15; sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

[7] As alleged in its Complaint, Novell will use much of the same evidence adduced in the Government suit, and seek to collaterally estop Microsoft with respect to much of it. For example, in its Complaint, Novell references more than 200 of the District Court's Findings of Fact (attached as Exhibit D; *see also United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999)), to support its claims. *See, e.g.*, Novell Compl. ¶¶ 17, 23 (citing Findings of Fact ¶¶ 18-67, 90-132, 136-142, 144-241, 247, 307-308, 311-312, 337-338, 340-356, 407, 412). The Complaint also references testimony in the Government suit. *See* Novell Compl. ¶¶ 18, 53, 67-68. Novell will introduce at trial some of the 2519 Government exhibits that demonstrate, for example: the centrality of Windows in Microsoft's strategy to dominate the PC industry; Microsoft's belief that cross-platform technologies were a threat to Windows; Microsoft's use of provisions in OEM agreements to intimidate OEMs; and Microsoft's forcing on the market as the industry standard its Object Linking and Embedding technology ("OLE"), which allows users to share information across applications, even though Microsoft knew that OLE was technically flawed.

As alleged in both Complaints, consumers would not buy an operating system if it lacked a large number of desirable applications that could run on its platform. *See* Gov't Compl. ¶ 3; Novell Compl. ¶ 43. To create an alternative operating system that could run the Windows applications would have been "prohibitively difficult, time-consuming, and expensive." Gov't Compl. ¶ 3. It would have been equally difficult for the developers of these applications to write ("port") them to run on a new, competing operating system. Potential competitors accordingly faced an "applications barrier to entry" into the PC operating systems market. *See id.*; Novell Compl. ¶¶ 42-43.

Competing Products That Threatened to Weaken the Entry Barrier

Microsoft faced two potent threats to the "applications barrier to entry" that kept its Windows monopoly intact: (1) cross-platform technologies that could allow applications to run on multiple operating systems (e.g., "middleware"), and (2) "franchise" applications, like word processors, spreadsheets, and Internet browsers, that could run on multiple operating systems.

Cross-Platform Technologies

Cross-platform technologies threatened to make Windows obsolete. Netscape, Inc.'s "Navigator" Internet browser application, combined with Sun Microsystems, Inc.'s "Java" programming language, is an example of such a technology; Novell's own cross-platform technologies, combined with its applications, is another. *See* Novell Compl. ¶¶ 44-51, 134; Gov't Compl. ¶ 7.

Novell bundled its WordPerfect and Quattro Pro applications into a "suite" and engineered them to exploit the capabilities of Novell's existing cross-platform technologies, such as OpenDoc and AppWare. OpenDoc was an "open-standard"

technology allowing all independent software developers or vendors ("ISVs") to develop applications that shared information across platforms. Novell Compl. ¶ 49. AppWare was a high-level tool for rapid application development that could serve as middleware, just as Netscape's Navigator aspired to do. *Id.* ¶¶ 48, 50-51; Gov't Compl. ¶¶ 7-9. With these cross-platform technologies, Novell was developing WordPerfect to run independently of *any* operating system, especially Windows, while enabling other software developers, who sought similar capabilities, to write their own applications for multiple operating systems. Novell Compl. ¶¶ 47, 50.

Key "Franchise" Applications

Word processing and other office productivity tasks were by far the most common uses of PCs, and compatible word processors and spreadsheets were indispensable complements to any operating system. *See* Novell Compl. ¶ 52. WordPerfect was the most popular word processor available, and had a unique and successful history of being ported to competing platforms. *Id.*

If a new PC operating system entering the market could run these crucial applications – word processors, spreadsheets, and Internet browsers – which virtually every PC owner wanted, it could attract a significant number of users. Such applications accordingly posed the second threat to the "applications barrier to entry." Microsoft recognized that it had to control the office productivity applications market to fend off that threat to its operating systems monopoly:

> *If we own the key "franchises" built on top of the operating system, we dramatically widen the "moat" that protects the operating system business. . . .* We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC . . . . And success in those businesses will help increase the opportunity for future pricing discretion.[8]

[8] Raikes E-mail, *supra* note 4 (emphasis added).

The Weapons Microsoft Used to Repel These Threats

Microsoft used a variety of weapons to deal with these threats to its Windows monopoly, such as excluding rivals from the "OEM channel"; providing, then withholding, technical information regarding the browser technologies integrated into Windows 95; creating incompatibilities among technologies; and suppressing alternative platforms.

Excluding Rivals from the "OEM Channel"

As both Complaints explain, the "OEM channel" was a crucial means of distributing applications to consumers, who typically purchased PCs that OEMs had pre-loaded with most of the applications consumers would ever use. *See, e.g.*, Gov't Compl. ¶ 131; Novell Compl. ¶¶ 113-114. Exclusion from this channel would cause potential competitors near-fatal injury. *See* Gov't Compl. ¶¶ 24-25, 77, 95, 97, 131, & Prayer For Relief ¶ 1; Novell Compl. ¶¶ 113, 115, 130-131.

Microsoft accordingly "set about" to deny Netscape and Sun "access to the distribution, promotion, and resources they needed to offer their browser products to OEMs," for pre-loading on PCs for sale to consumers. *See* Gov't Compl. ¶ 15; Novell Compl. ¶ 136. The Government alleged that through exclusionary agreements and other tie-ins forced upon the OEMs, Microsoft "deprived [OEMs] of the freedom to make competitive choices about which browser or other software product should be offered to their customers" and "substantially reduce[d] . . . competition between Microsoft products and competing software products," including, as Novell alleges here, WordPerfect and Quattro Pro. *See* Gov't Compl. ¶¶ 25, 27; Novell Compl. ¶ 119.

Microsoft recognized that Novell's cross-platform strategy for its applications, like the Navigator and Java combination, could threaten the "applications barrier to entry." Because of the cross-platform potential of Novell's applications,

Microsoft "set about" to exclude them from the OEM channel to protect its Windows monopoly.[9] *See* Novell Compl. ¶¶ 113, 115-131. Microsoft forced OEMs to enter into agreements that denied Novell access to the OEM channel it needed to offer its applications to consumers – the same tactic it used to repel threats, not only from Netscape and Sun, but also from IBM.[10] *Id.* ¶ 17 (citing Findings of Fact ¶¶ 115-132) (finding that Microsoft attempted to stop IBM from distributing a non-Microsoft word processor); *see also id.* ¶¶ 51, 55, 112-131.

The Government also alleged that Microsoft gave away and even paid customers to take Microsoft's Internet Explorer upon purchasing Windows, and entered into other anticompetitive agreements so as to exclude products that threatened the applications barrier to entry. *See* Gov't Compl. ¶¶ 16-17, 131. Novell alleges that Microsoft used the same tactics to ensure that Microsoft Office would be pre-loaded on virtually every PC shipped by a major OEM, and that WordPerfect and Quattro Pro would not. *See, e.g.*, Novell Compl. ¶¶ 117, 120. Novell also alleges that, after establishing its office productivity applications as monopolies, Microsoft used "'preferential access to Office as both a carrot and a stick in working with OEMs, other distributors, and ISVs,'" while at the same time making its applications unavailable on non-Microsoft platforms.[11] *Id.* ¶ 19 (citation omitted).

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[9] Novell specifically alleges that because Microsoft was successful in monopolizing the office productivity applications markets, it was able to use that monopoly to exclude Netscape from the browser market, and to maintain, and indeed strengthen, the applications barrier to entry against other platforms, thereby protecting Microsoft's operating systems monopoly. Novell Compl. ¶ 20.

[10] As the District Court found in the Government suit, this was consistent with "Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." Novell Compl. ¶ 21 (quoting Findings of Fact ¶ 93).

[11] Dr. Carl Shapiro, a leading antitrust economist who served as the Government's expert in the original remedies phase, explained that having applications, like Microsoft

Providing, Then Withholding, Technical Information

As the District Court found in the Government suit, and as Novell alleges here, ISVs like Novell needed technical information about forthcoming versions of Windows as early and as consistently as possible,[12] so they could achieve a competitive "time to market" in their release of new versions of applications to match new versions of the platform. Novell Compl. ¶ 61 (citing Findings of Fact ¶ 338). While redesigning its applications to run on Windows 95, Novell most critically required information about the "browsing" technologies that, as the Government alleged, Microsoft integrated into Windows to injure its competitors.

Beginning with Windows 95, the browsing technologies controlled a new "file management" system that applications needed to find, open, and save documents. Novell Compl. ¶ 66. ISVs eagerly awaited the increased functionality that Microsoft promised to provide through new application programming interfaces ("APIs") – a set of routines, protocols, and tools for building software applications (*id.* ¶ 18) – including extensions for these newly integrated browsing functions. *Id.* ¶ 66.

Microsoft initially cooperated with ISVs in developing applications for Windows 95 by providing access to these new APIs. *Id.* ¶ 72. A few months prior to Windows 95's release, however, and after inducing Novell's reliance on these functions, Microsoft "ripped [them] out . . . without warning to Novell." *Id.* ¶¶ 73, 75.

Word, available "'as complements to rival platforms will thus help those actual and potential rivals to Windows overcome the applications barrier to entry that currently protects the Windows monopoly.'" Novell Compl. ¶ 53 (quoting Declaration of Carl Shapiro, *United States v. Microsoft Corp.*, at 9).

[12] Citing *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 743 (D. Md. 2003), Microsoft asserts that impeding ISVs' access to the Windows specifications would "undermine" the applications barrier to entry. (Br. at 19 n.12.) Whatever the merits of that contention as a general proposition, it has no specific application here, where Novell alleges that Microsoft targeted Novell because it was a competitor that posed a unique threat to the applications barrier to entry.

As Microsoft intended, doing so destroyed WordPerfect's basic file management functions, such as opening a previously saved document. *Id.* ¶ 75.

Microsoft "targeted WordPerfect by name" in its scheme to integrate browsing functions into Windows 95 and to use them to protect its operating systems monopoly. *Id.* ¶ 71. Microsoft Chairman Bill Gates himself made the decision to withdraw Novell's access to the browsing specifications: "We should wait until we have a way to do a high level of integration [between Microsoft Office and Windows] that will be harder for [the] likes of . . . Wordperfect to achieve, and which will give Office a real advantage."[13] Otherwise, Gates admitted, "[w]e can't compete with . . . Wordperfect/Novell." *See id.* ¶¶ 7, 74.

Microsoft's scheme hit its intended target. WordPerfect never recovered from the time-to-market delay caused by Gates' decision. Microsoft could not have injured Novell in this way unless it first integrated browser technology into Windows,[14] which was one of the anticompetitive acts prominently featured in the Government suit. *See, e.g.*, Novell Compl. ¶¶ 21, 78; Gov't Compl. ¶¶ 13, 18, 22, 27, 109.

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[13] Novell Compl. ¶¶ 7, 74 (discussing e-mail from B. Gates to B. Bliss et al. (Oct. 3, 1994)).

[14] Regardless of when full "integration of browsing" functionality into Windows occurred (*see* Br. at 28 n.14), Windows 95 relied on browsing functionality from the outset. As Microsoft admits, it made a decision in early 1994 "'to include comprehensive support for the Internet, including Web browsing functionality in Windows.'" Novell Compl. ¶ 67 (quoting direct testimony of Microsoft's Jim Allchin, *United States v. Microsoft Corp.*, ¶ 79, at 32). Web browsing is the same in principle, and uses the same technology, as locating, accessing, and viewing information on a network or hard drive. *See* Novell Compl. ¶ 67 (citing Allchin, ¶ 73, at 30). "'Thus, Microsoft set about the task in early 1995, before the first version of Windows 95 was even released, of tearing apart and then rebuilding Internet Explorer . . . . Microsoft then "exposed" the functionality performed by these components in the form of hundreds of APIs.'" Novell Compl. ¶ 67 (quoting Allchin, ¶ 85, at 33). These include the same APIs that Microsoft later withdrew from Novell.

Additional Anticompetitive Tactics

Moreover, as contemplated by the broad allegations in the Government Complaint and confirmed by the District Court's findings, Microsoft also used its Windows monopoly to establish its own technologies as industry standards and created incompatibilities with competing technologies. *See* Gov't Compl. ¶¶ 5, 13; Findings of Fact ¶¶ 133, 173, 377-385, 387-394. Novell likewise alleges that Microsoft used its Windows monopoly to establish its proprietary OLE technology (despite its known flaws) as an industry standard, and thereby excluded the more widely admired OpenDoc technology developed by Novell and others. Novell Compl. ¶¶ 45-46, 49, 84. Novell also alleges that Microsoft created incompatibilities between Windows and OpenDoc. *Id.* ¶¶ 85-88.

Finally, the Government alleged that Microsoft destroyed alternative platforms. *See, e.g.*, Gov't Compl. ¶¶ 66-69. Novell does as well, and further alleges that its applications would have thrived on these platforms, and that their suppression cost it opportunities to compete. Novell Compl. ¶¶ 44, 144.[15]

Novell's Sale of Its DR-DOS Operating System and Related Products

In 1996, Novell sold to Caldera the business associated with Novell's own DOS operating system,[16] referred to at various times as "DR-DOS" or "Novell DOS," as well as any claims for injuries that Microsoft might have caused to that line of business. Microsoft subsequently settled those claims.

[15] The District Court also concluded that Microsoft employed similar anticompetitive tactics with respect to other applications and technologies not specifically named in the Government Complaint, including Intel Corp.'s Native Signal Processing; Apple Computer, Inc.'s QuickTime; and RealNetworks, Inc.'s streaming software. Novell Compl. ¶ 17 (citing Findings of Fact ¶¶ 93-114).

[16] DOS operating systems were the predecessors to "graphical" systems such as Windows 95.

The DR-DOS Asset Purchase Agreement between Novell and Caldera conveyed to Caldera claims owned "by Novell at the Closing Date [July 23, 1996] and associated directly or indirectly with any of [Novell's] DOS Products or Related Technology." Asset Purchase Agreement § 3.1. The Agreement narrowly defined "DOS Products" and "Related Technology" as Novell's DR-DOS operating system and related products and only conveyed claims for injuries to those products.[17]

SUMMARY OF ARGUMENT

1. The Government and Novell Complaints contain identical claims for monopolization of the PC operating systems market and allege the same exclusionary agreements with OEMs and use of browser technology to stifle competition. The Count I allegation that Microsoft unlawfully maintained its monopoly power in the operating systems market by itself creates enough of an admitted overlap with the Government case to find tolling without further inquiry. The OEM claims in Count VI independently do as well.

[17] The Agreement's Bill of Sale granted to Caldera the right to assert "any claim, right or title of any kind in and to the properties hereby . . . conveyed." Asset Purchase Agreement Ex. C. The only properties conveyed were:

- the "DOS Products," which § 2.6 of the Agreement defines as the following specific Novell-owned DOS products: CP/M, Concurrent DOS, DR DOS 6.0, DR DOS 5.0, Multiuser DOS, Novell DOS 7.0, PALMDOS, GEM, GEM Draw, GEM Wordchart, GEM Graph, GEM Programmers Toolkit, Draw Plus, and "any other prior or subsequent versions or revisions of such products to the extent owned by Novell as of the Closing";
- "Related Technology," which § 2.11 defines as all existing technology relating to "the development of the DOS Products" to the extent that technology is "owned by Novell or comprised of Third Party Materials licensed to Novell, as of the Closing"; and
- any documentation (e.g., user guides) or transferred marks or copyrights associated with these products. *Id.* § 2.14; *see also id.* §§ 2.4, 2.15, 2.17.

While Count I and/or Count VI is sufficient for tolling, the Novell Complaint significantly overlaps with the Government's Complaint in many other respects. For example, Novell also complains of injuries similar to those inflicted on Netscape and Sun and arising from the same anticompetitive conduct, carried out with the same anticompetitive purpose, over an overlapping period of time, all to be shown at trial with some of the same oral and documentary proof contained in the Government case.

2. The plain language of the limited claim transfer in the Asset Purchase Agreement cannot be read to extend to any claim for damages that Microsoft's maintenance of its operating systems monopoly caused Novell's office productivity applications.

3. Novell has antitrust standing because its injuries were proximately caused by anticompetitive conduct that protected Microsoft's Windows monopoly and extended it into the markets for office productivity applications. Microsoft's scheme to suppress products that threatened its applications barrier to entry caused Novell to suffer the kind of injury that the antitrust laws were designed to redress.

ARGUMENT

I. STANDARD OF REVIEW

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997) (internal quotation marks and citations omitted). Dismissal at such an early stage is appropriate only if it appears that the plaintiff can prove no set of facts entitling it to judgment. *See id.*

The Federal Rules of Civil Procedure "'erect a powerful presumption against rejecting pleadings for failure to state a claim.'" *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d

1248, 1251 (10th Cir. 1999) (citation omitted). This presumption applies with particular force to a motion based on the Clayton Act tolling provision, whose "broad terms" courts must construe liberally in favor of plaintiffs, to save all but those complaints whose reliance on a prior government suit is a "mere sham." *Leh*, 382 U.S. at 59.

II. THE TOLLING STATUTE PROTECTS COMPLAINTS BASED "IN PART" ON "ANY" MATTER COMPLAINED OF IN THE GOVERNMENT SUIT

In ruling on Microsoft's motion, the Court should give effect to "the broad terms of the statute itself – 'based *in whole or in part* on *any matter* complained of' (emphasis added) – read in light of Congress' 'belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.'" *Leh*, 382 U.S. at 59 (quoting *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) (alteration in original).[18] Generally, the question whether a private suit meets the Section 16(i) test must be answered by "a comparison of the two complaints on their face." *Leh*, 382 U.S. at 65; *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 331 (1978).

In making that comparison, a court does not look for a perfect correlation, as "[t]he private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants." *Leh*,

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[18] The tolling statute, 15 U.S.C. § 16(i), provides in relevant part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect to every private . . . action . . . based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

The tolling statute reflects Congress's judgment that in order to encourage the enforcement of the antitrust laws by private parties, "tolling of the statute was more important than the repose established" by the limitations period. *Maricopa County v. Am. Pipe & Constr. Co.*, 303 F. Supp. 77, 85 (D. Ariz. 1969).

382 U.S. at 39.[19] A "real relation" between the cases is sufficient, and "[i]f there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences." *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 830 (11th Cir. 1999) (citing *Leh*, 382 U.S. at 54).

Requiring "virtually identical" complaints "would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants." *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 568, 570 (10th Cir. 1961). It also would defeat the tolling statute's purpose, which is to decrease the burden on private plaintiffs in their enforcement of the antitrust laws by allowing them "to await the outcome of Government suits and use the benefits accruing therefrom." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 (1971). The intended benefits include use of the pleadings, testimony, exhibits, documents, evidence, legal rulings, and final judgment from the prior government suit. *Minn. Mining*, 381 U.S. at 319.

III. NOVELL HAS FILED SUCH A COMPLAINT

A. Same Monopolization and OEM Claims

Microsoft effectively concedes that Novell's Count I contains claims for monopolization of the PC operating systems market *identical* to those in the Government's Third Claim for Relief, and does not seek dismissal of that Count as untimely. (*See* Br. at 2, 3, 12, 15.)[20] The allegation that Microsoft unlawfully maintained

[19] In two companion cases, the Supreme Court rejected the defendants' arguments that a perfect correspondence was required, and adopted a liberal standard first employed by the Tenth Circuit in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 570 (10th Cir. 1961). *See Leh*, 382 U.S. at 56-59, 63-65; *Minn. Mining*, 381 U.S. at 317-18.

[20] In view of these repeated concessions in the text of its Memorandum, we do not respond to Microsoft's odd statement to the contrary buried in footnote 9 of its Memorandum. (*See* Br. at 15 n.9.)

its monopoly power in the operating systems market is by itself a sufficient overlap with the Government case to find tolling without further inquiry. So are the allegations in Novell's Count VI, which make the *same* claims, based on many of the same anticompetitive agreements with OEMs, as in the Government's First Claim for Relief. Both Complaints also allege that Microsoft integrated browser technology into Windows in an anticompetitive manner. Those duplications, individually or in combination, show that the Novell and Government Complaints "significant[ly] overlap" with each other.

Even if these similarities were not enough, the many other examples of the "real relation[ship]" between the two Complaints would be. The most significant of these are discussed below.

B. Same Anticompetitive Purpose

The two Complaints contain parallel allegations of anticompetitive purpose: to monopolize "other software markets" to prevent competitors from scaling the "applications barrier to entry" that protected the operating systems monopoly. This similarity of purpose tolls the statute.

In *Morton's Market*, for example, the United States asserted that the defendants had rigged bids for school milk contracts, while the private plaintiffs alleged price-fixing in wholesale transactions with commercial retailers. 198 F.3d at 826-27. The Eleventh Circuit tolled the statute, even though the means were different, because the *purpose* was the same – to eliminate competition in the wholesale marketplace at issue in the government suit – and the conduct alleged in the private actions, like that alleged in the prior government proceedings, involved the defendants' scheme "to avoid competition in their sales of milk in Florida during the time period." *Id.* at 831; *see also In re Ariz. Dairy Prods. Litig.*, Nos. CIV 74-569A, 74-594, 74-736 PHX CAM

(D. Ariz. Nov. 5, 1984) (attached as Exhibit E) (statute tolled; plaintiff alleged that the retail price-fixing conspiracy in its private suit was an "outgrowth" of the wholesale price-fixing conspiracy in the government action).

C. Similar Injuries Arising from the Same Anticompetitive Conduct

Novell alleges that Microsoft's anticompetitive conduct cited in the Government Complaint caused Novell's market shares to plummet. *See, e.g.*, Novell Compl. ¶¶ 6, 8, 16, 150. A similar allegation in *Minnesota Mining* tolled the statute. 381 U.S. at 322-23. There, the Federal Trade Commission alleged that the defendant's acquisition of two of the largest distributors of products manufactured by the defendant and others – including the primary distributor of products that the private plaintiff manufactured – might have the effect of lessening competition. *Id.* at 315. The private plaintiff alleged that it was injured when its primary distributor began to carry only the defendant's products. *Id.* at 315-16, 322-23. The Supreme Court concluded that the allegation of an injury arising from the acts alleged by the government was based "in part" on the government action. *Id.* at 322-23.

In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 317, 320-21 (S.D.N.Y. 1971), reached the same conclusion. The government's case concerned the defendants' conduct in a *domestic* market for *human* consumption. The private plaintiff subsequently alleged that the same conduct had "world-wide effect," such as damaging the plaintiff in a *foreign* market for *agricultural* consumption. *Id.* at 321-22. The allegation of an injury arising from anticompetitive conduct alleged by the government tolled the statute, even though the private plaintiff's injury also was felt in a different market.[21]

[21] Courts also have applied the tolling statute where a government suit only addressed certain specific products sold by a defendant, but in a context broad enough to encompass other products involved in a subsequent private suit. *See infra* Part III.D.4.

In addition, like the Government's First Claim for Relief, Novell's Count VI alleges that Microsoft harmed Novell through exclusionary agreements with OEMs that locked Novell out of the crucial OEM channel. Even though Novell's injury from this anticompetitive conduct was felt in the office productivity applications markets, it is still injury from the same agreements that "unreasonably restrain[ed] trade and restrict[ed] the access of Microsoft's competitors to significant channels of distribution, thereby restraining competition in the Internet browser market, *among other markets*." Gov't Compl. ¶ 131 (emphasis added). Thus, Novell alleges that its injury arose from the identical anticompetitive conduct alleged by the Government.

D. Neither Microsoft's Case Law Nor the Supposed "Differences" Between the Complaints Support Dismissal

Microsoft cites no case – and Novell knows of none – in which a court refused to toll the statute where, as here, a plaintiff alleges that the defendant: (a) acted for the purpose of protecting the same monopoly alleged by the government; (b) monopolized additional markets in which the plaintiff competed, to protect the monopoly alleged by the government; and (c) in the process, injured the plaintiff in the same way – all of which is to be proven with evidence drawn from the government suit.[22]

Microsoft nonetheless contends that this Court should refuse to toll the statute because the two Complaints supposedly involve different markets, methods of proof, time periods, competitors, and products. (Br. at 23.) Although Microsoft

[22] Novell's reliance on the record developed in the Government suit is both an intended benefit of the tolling statute (*see Minn. Mining*, 381 U.S. at 319), and another reason to apply the statute in the first place. *See Morton's Market*, 198 F.3d at 831 (applying the tolling statute in part because plaintiffs would rely on "the oral and documentary proof contained in the government's cases"). As shown in the Statement of Relevant Facts, Novell's Complaint references hundreds of Findings of Fact and key testimony from the Government suit, and Government exhibits will assist Novell in proving its claims. Microsoft's contention (Br. at 29-30) that Novell will not use evidence developed by the Government is frivolous.

essentially limits its argument to the supposed distinctions between the markets (no doubt because no authority attributes significant weight to the others), we demonstrate below that none of the so-called "differences" has any factual basis or legal significance.

1. **Markets**

The Government and Novell Complaints allege (a) the identical PC operating systems market, and (b) that Microsoft possesses monopoly power in that market. Gov't Compl. ¶¶ 2, 54-55; Novell Compl. ¶¶ 3, 25-26. These significant overlaps would trump any relevant differences in the market, even if there were any. As shown below, there are none.

Contrary to Microsoft's suggestion (Br. at 9-10, 15 n.9), there is no distinction between Windows 95 and Windows 98 in either Novell's or the Government's market description. Any such distinction would be irrelevant because the Government Complaint alleges Microsoft's anticompetitive conduct relating to Windows 95 as well as Windows 98 and, as Microsoft concedes, covers anticompetitive conduct occurring in Novell's damages period. (Br. at 9, 25.) Both versions were the then-current monopoly operating system, used by Microsoft in the same anticompetitive ways for the same continuing purposes.

Moreover, the office productivity applications markets from which Microsoft excluded Novell are among the "other software markets" alleged in the Government suit. The fact that Novell also seeks damages for anticompetitive conduct in this related market does not mean that "Novell's task differs entirely from the [Government's] efforts to define and demonstrate competitive harm to the PC operating system and internet browser markets." (*See* Br. at 24, 30.) The applications barrier to entry is premised on the very fact that the operating systems market and the office productivity applications markets are indispensable complements. As alleged in Novell's

Complaint, Microsoft sought to monopolize the office productivity applications markets precisely *because* of their symbiotic relationship with the operating systems market.

Finally, no authority supports Microsoft's invocation of a bright-line rule requiring a perfect correspondence between the markets at issue in the two suits, or suggests that the Court should consider the markets without regard to their interrelationship generally, or the way Microsoft specifically viewed them. Just the reverse is true: courts disregard purported differences with respect to markets, and focus instead on whether, as here, the objective of the anticompetitive scheme alleged by the private plaintiff was at least in part the same as that alleged in the prior government proceeding. *See Ariz. Dairy Prods. Litig.* (Ex. E); *see also, e.g., Leh*, 382 U.S. at 60-62, 64-65; *Morton's Market*, 198 F.3d at 830-31; *Antibiotic Antitrust Actions*, 333 F. Supp. at 320-22.

In view of this precedent, it is not surprising that the treatise Microsoft cites (Br. at 2, 14, 24), II Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law* ¶ 321a, at 241 (2d ed. 2000) (attached as Exhibit F), likewise does not support the bright-line test advocated by Microsoft. The authors simply advance the unremarkable proposition that a private suit involving different offenses or arising in a "distinct" market does not trigger tolling. *Id.* The statement has no relevance here where Novell alleges the same offenses in the same and substantially related markets.

The cases Microsoft cites (Br. at 23-24) likewise give it no comfort. In each case, the government had defined the monopolized market so narrowly as to exclude completely the possibility of any relationship with the markets alleged in the private suit. In *Peto v. Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967), for example, the government so narrowly defined the market for championship boxing

matches that even non-championship *boxing* matches were excluded, *see United States v. Int'l Boxing Club of N.Y., Inc.*, 150 F. Supp. 397, 401, 408 (S.D.N.Y. 1957), *aff'd*, 358 U.S. 242 (1959); the private plaintiff in *Peto* alleged a *hockey* monopoly. The only similarity was "that some of the defendants [were] the same." *Peto*, 384 F.2d at 683.

In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 782 F. Supp. 481, 486 (C.D. Cal. 1991), the plaintiffs' allegations concerned conduct on the West Coast. The geographic market in the government's proceeding, on the other hand, *expressly excluded* the West Coast. *Id.* at 484, 486. Finally, in *Charley's Tour & Transportation, Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D. Haw. 1985), the government alleged price-fixing for hotel rooms by tour and hotel operators, two of which happened to own charter bus companies and, in that capacity, were named by the private plaintiffs in a suit concerning the charter bus market. The court correctly described the claim of similarity as "no more than an allegation that [one] conspiracy . . . helped fund [another] conspiracy." *Id.*

2. **Time Periods**

Microsoft admits that the time periods overlap for at least a year.[23] That is sufficient for tolling purposes. *See Leh*, 382 U.S. at 60-61, 64. In *Leh*, the Supreme Court suspended the statute of limitations where both complaints overlapped for only two of the twenty years in question. *Id.* at 64. The fact that "plaintiffs alleged a conspiracy corresponding in time to the period during which they were in business obviously does not mean that this conspiracy is not based in part on matters complained of by the Government." *Id.*

[23] Microsoft disputes Novell's continuing violation theory in a footnote, but seeks no relief on the basis of its argument, apparently recognizing that it is both premature and without merit. (Br. at 21 n.13.)

3. **Competitors**

The allegations in the Government Complaint expressly include competitors in addition to Netscape and Sun, and are broad enough to encompass Novell's software products. *See* Gov't Compl. ¶ 27 (referring to "competing software products" and "other software markets"); *see also id.* ¶¶ 4, 5, 25, 37, 97, 131. Novell, like Netscape and Sun with Navigator and Java, was pursuing its own "middleware" strategy with WordPerfect and Quattro Pro and its existing technologies, such as OpenDoc and AppWare.

Microsoft targeted Novell and WordPerfect to stifle this middleware threat to the Windows monopoly, just as it targeted Navigator and Java. The only difference is that Microsoft did so with even more ferocity, because Microsoft considered Novell to be "'THE competitor'" in every area of Microsoft's business.[24]

One purpose of the Clayton Act tolling provision is "to assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Minn. Mining*, 381 U.S. at 317. For that reason, the tolling provision applies against all participants in a conspiracy that is the target of a government suit, even if those participants are not named as defendants or co-conspirators in the government action. *See Zenith Radio Corp.*, 401 U.S. at 335-38. This same objective is served to an even greater degree by tolling the statute of limitations for all competitors who were victims of the defendant's scheme that was the subject of the government action.

4. **Products**

Microsoft notes that the Government suit focused primarily on Internet Explorer, while Novell concentrates on WordPerfect, and contends that this supposed

[24] *See Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1302 (D. Utah 1999) (quoting March 26, 1993 e-mail by Jim Allchin of Microsoft).

difference undercuts Novell's argument. Microsoft is mistaken. Both the Government and Novell Complaints allege that Microsoft intended "to extend its operating system monopoly into other software markets." Gov't Compl. ¶ 5; Novell Compl. ¶ 4.

Additionally, as discussed above, the broadly defined market for related software includes office productivity applications.[25] While the Government Complaint focused on other software, the conduct to which it referred – mainly Microsoft's protection of its PC operating systems monopoly from threats to the applications barrier to entry and its extension of that monopoly into other markets – went beyond any one software product. *See* Gov't Compl. ¶ 27 (referring to "competing software products"). Nothing in the Government suit suggested a limited scope as to the type of software subjected to Microsoft's anticompetitive conduct. Indeed, the District Court made specific findings of fact concerning Microsoft's conduct towards a competing IBM word processing application. *See* Novell Compl. ¶ 17 (citing Findings of Fact ¶¶ 115-132).

In such circumstances, where the defendant produces numerous products over a broad range of markets, a plaintiff's complaint is based "in part" on a government action, even if the government action focused only on a fraction of those markets and products. *See Gregg Communications Sys., Inc. v. AT&T*, 98 F.R.D. 715, 719-20 (N.D. Ill. 1983). In *Gregg*, the definition of the telecommunications equipment market in the government's complaint did not mention telephone accessory devices. The court nonetheless found that the market was "pleaded and *prima facie* proved in broad enough fashion to include the types of telephone terminal equipment" included

[25] *See* Gov't Compl. ¶¶ 54-55 (noting that "*operating systems also control and direct the interaction between applications, such as word processing or spreadsheet programs,* and the . . . complex interactions among operation system software, *applications software,* and the hardware attached to the PC") (emphasis added). The Government's definition of the Internet Browser market also confirms that Internet browsers are merely one type of "specialized software program[]," as are word processing programs. *Id.* ¶ 56.

in the plaintiffs' complaint. *Id.* at 719-20. The scope of the conduct described in the government suit transcended individual products and applied broadly to the whole spectrum of telephone equipment, not just the products expressly mentioned in the government's complaint or proof at trial. *See id.* at 719 n.9.

Moreover, the *Gregg* court found that the government suit *implied* a broader context. Here, the Government suit against Microsoft *expressly alleged* a broader context, and complained of anticompetitive conduct and intent on the part of Microsoft that impacted the general "software applications market," not just Internet browsers.[26]

In sum, the "differences" do not exist or, if they do, they do not matter.

IV. NOVELL DID NOT SELL ITS COUNT I CLAIMS AND HAS STANDING TO BRING THEM

Microsoft does not, because it cannot, argue that Novell's Count I lacks sufficient overlap with the Government suit to save Novell's entire Complaint. As a consequence, it has manufactured other rationales for Count I's dismissal. Neither of its concoctions – that Novell conveyed its Count I allegations in the Asset Purchase Agreement with Caldera and if it did not, it lacks standing to make them – has any merit.

A. The Asset Purchase Agreement Did Not Convey Novell's Count I Claims

Contrary to Microsoft's assertion (*see* Br. at 4-5, 15-17), Novell did not convey to Caldera the antitrust claims for injuries to *every* Novell product relating to Microsoft's

[26] "Microsoft's conduct with respect to browsers is a prominent and immediate *example* of the pattern of anticompetitive practices undertaken by Microsoft with the purpose and effect of maintaining its PC operating system monopoly and *extending that monopoly to other related markets*." Gov't Compl. ¶ 13 (emphasis added); *see also id.* ¶ 36 (challenging "Microsoft's concerted attempts to maintain its monopoly in operating systems *and to achieve dominance in other markets*, not by innovation and other competition on the merits, but by tie-ins, exclusive dealing contracts, and other anticompetitive agreements") (emphasis added).

unlawful maintenance of its PC operating systems monopoly. The plain language of the Agreement proves as much. Even Microsoft does not contend that the definition of "DOS Products or Related Technology" includes Novell's claims for injuries to its office productivity applications. *See* Asset Purchase Agreement §§ 2.6, 2.11. The Agreement does not refer to any conveyance of claims relating directly or indirectly to "PC operating systems," much less claims relating to the Windows operating system (*see* Br. at 16-17). The Agreement instead expressly conveys claims for injuries to the narrowly defined DOS Products, including DR-DOS, which happened to be a PC operating system. *See supra* note 17 and accompanying text.[27]

Microsoft's assertion that Novell sold its Count I claims to Caldera therefore should be rejected.[28]

B. Novell Has Standing To Bring Count I of Its Complaint

The Clayton Act "'is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'" *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The "infinite variety of claims that may arise" under such an all-encompassing statute "make it virtually impossible to announce a black-letter rule that will dictate the result in every case."

[27] Paragraph 144 of Novell's Complaint, on which Microsoft bases much of its argument, merely lists DR-DOS as one of several competing operating systems whose suppression by Microsoft harmed Novell's *office productivity applications*. In this context, it is irrelevant that Novell once owned DR-DOS. The Novell Complaint merely states the obvious: that by suppressing *numerous* operating systems owned and distributed by numerous developers, Microsoft deprived Novell's office productivity applications of opportunities to compete on platforms that were not controlled by Microsoft.

[28] This is so regardless of whether the Court takes judicial notice of the documents attached to Microsoft's Memorandum, or converts Microsoft's motion on the claim transfer issue to one for partial summary judgment. As demonstrated in the text, the documents unambiguously show that Novell did not convey to Caldera the claims asserted in Count I. Microsoft has offered no plausible, contrary interpretation of the documents' express terms, nor parol evidence supporting any contrary interpretation.

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 536 (1983).[29] Rather, a court must analyze each situation in light of the non-exclusive factors identified in the Supreme Court's antitrust standing cases: the causal connection between the antitrust violation and the harm to the plaintiff; the defendant's intent; the nature of the plaintiff's injury; the directness of the injury; and the potential for duplicative recovery. *AGC*, 459 U.S. at 535-45; *McCready*, 457 U.S. at 472-84; *accord Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 962 n.15 (10th Cir. 1990); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219 (4th Cir. 1987).[30]

The "nature of the plaintiff's injury factor is designed to implement the requirement that only *antitrust* injuries are redressable under section 4" of the Clayton Act. *Reazin*, 899 F.2d at 962 n.15 (emphasis in original). Those injuries must be (1) proximately caused by an antitrust violation and (2) of the type the antitrust laws were designed to redress. *McCready*, 457 U.S. at 487, 483. An antitrust violation proximately causes such injury if (a) the plaintiff was the direct victim of the defendant's scheme; (b) the injury was the means by which the violator "sought to achieve its illegal ends"; or (c) the injury was "a necessary step" in accomplishing the anticompetitive scheme. *Id.* at 479.

1. Novell Suffered Antitrust Injury

Microsoft effectively concedes that Count I of Novell's Complaint satisfies every standing factor except the nature and directness of the plaintiff's injury criterion.

[29] *AGC*'s reasoning drew from *McCready*, the Supreme Court's definitive treatment of standing where a plaintiff does not compete with the defendant in the allegedly restrained market. The *McCready* line of cases focuses on determining proximate causation and antitrust injury, each of which is at issue on Microsoft's motion. *See, e.g., Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 962 n.15 (10th Cir. 1990).

[30] The *AGC* factors are derived from a "combination" of *McCready* and *AGC*. *See Pocahontas Supreme Coal Co.*, 828 F.2d at 219-20 (properly denying standing because "the causal connection between harm and violation was too attenuated").

According to Microsoft, "only a consumer or a competitor" in the PC operating systems market can meet this criterion, and Novell supposedly was neither, and its injury was too remote. (Br. at 18-19.)

This argument has no merit, first and foremost because in *McCready* (a decision Microsoft fails to cite), the Supreme Court reaffirmed its longstanding principle that the Clayton Act "'does not confine its protection to consumers, or to purchasers, or to competitors.'" 457 U.S. at 472 (citation omitted). In *McCready*, the plaintiff alleged that Blue Shield conspired with psychiatrists to prevent clinical psychologists from receiving compensation from Blue Shield. *Id.* at 469-70. In furtherance of that scheme, Blue Shield directly harmed McCready when it refused to reimburse her for treatment she received from a psychologist. *Id.* at 470-71.

Both the Fourth Circuit and the Supreme Court rejected Blue Shield's argument that McCready lacked standing because her injury was too remote, she was not a competitor in the restrained market, and the "proximate range of the violation is limited to the sector of the economy in which a violation of the type alleged would have its most direct anticompetitive effects." *McCready v. Blue Shield of Va.*, 649 F.2d 228, 231 (4th Cir. 1981), *aff'd*, 457 U.S. 465, 479 (1982). Rather, McCready's injury was "inextricably intertwined" with the injury Blue Shield sought to inflict on competition in the restrained market, "'flow[ed] from that which [made] defendants' acts unlawful' . . . and [fell] squarely within the area of congressional concern." *McCready*, 457 U.S. at 484 (citation omitted).

Microsoft likewise engaged in a series of anticompetitive acts directly targeted at Novell and designed to protect Microsoft's operating systems monopoly. *See supra* pp. 4-11. Those acts included withholding technical information from Novell,

while providing such information to the Microsoft Word developers and other, less threatening ISVs; preventing Novell's OpenDoc technology from being compatible with Windows 95, despite OpenDoc's technical superiority; and requiring compatibility with Microsoft's OLE as a condition of Windows 95 certification. *See, e.g.*, Novell Compl. ¶¶ 51, 84-88.

Novell likewise has sufficiently pled that the harm it suffered was "clearly foreseeable" and was "a necessary step" in protecting the operating systems monopoly. *McCready*, 457 U.S. at 479. As a direct result of Microsoft's anticompetitive acts, Novell lost profits and suffered a significant reduction in the value of its office productivity applications.

Moreover, when Novell showed that it had the potential to weaken the applications barrier to entry in the years leading up to the release of Windows 95, Novell became a target of Microsoft's campaign to destroy perceived threats, and not just any target, either. In 1993, even before Novell bought the leading word processing application, top Microsoft executive Jim Allchin described Novell's threat to Microsoft in near-apocalyptic terms:

> "I still don't think we take them as serious as is required of us to win. This isn't IBM. These guys are really good; they have an installed base; they have a channel; they have marketing power; they have good products. AND they want our position. . . . We need to start thinking about Novell as THE competitor to fight against – not in one area of our business, but all of them. . . . We better wake up and get serious about them or they will eventually find a way to hurt us badly."

Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1302 (D. Utah 1999) (quoting March 26, 1993 e-mail). Accordingly, as a victim directly and purposefully harmed by Microsoft's conduct, Novell was "'within that area of the economy . . . endangered by [that] breakdown of competitive conditions'" caused by Microsoft's anticompetitive

scheme to protect its operating systems monopoly from threats to the applications barrier to entry. *McCready*, 457 U.S. at 480-81 (alterations in original).[31]

2. **Under *AGC* and *McCready*, Novell's Count I Presents a "Paradigm of Standing"**

In *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993), the court applied *McCready* and *AGC* in a context strikingly similar to Novell's Count I. *Lower Lake Erie* involved a railroad's use of monopoly power to suppress an innovation that threatened a barrier to entry in one market (unloading iron ore from ships), foreseeably injuring the plaintiff steel mills in that and related markets (lake and inland transportation of the iron ore). The plaintiff steel mills had standing because the railroad's anticompetitive conduct directly impacted them, even though they did not compete in the transportation markets. *Id.* at 1168.

Novell similarly was directly impacted because Microsoft thwarted the development of Novell's innovations, thereby protecting and strengthening the applications barrier to entry. Novell Compl. ¶ 153; *see also In re Microsoft Corp. Antitrust*

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[31] *SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Co.*, 48 F.3d 39 (1st Cir. 1995), is not to the contrary (*see* Br. at 19-20). *SAS* was a so-called "supplier case," brought by a supplier of a customer. Like actions brought by employees and shareholders of alleged victims, supplier plaintiffs generally lack standing due to the indirectness of the alleged injury, the risk of duplicative recovery, or the lack of antitrust injury. *See, e.g., Sharp v. United Airlines, Inc.*, 967 F.2d 404, 408 (10th Cir. 1992) (shareholders and employees); *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 803-05 (D. Utah 1988) (employee) (*see* Br. at 18, 20). In *SAS*, the plaintiff was not a consumer or competitor "in the market threatened by the alleged violation," did not have "any other protectable interest under the antitrust law," and suffered no injury from the "anticompetitive effects" of the challenged conduct. 48 F.3d at 45, 46. As shown in the text, that is not true of Novell.

Similarly, in *Legal Economic Evaluations, Inc. v. Metropolitan Life Insurance Co.*, 39 F.3d 951, 954-56 (9th Cir. 1994), and *While v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987) (*see* Br. at 18-19), the plaintiffs (again in contrast to Novell) argued only that they were consumers or competitors, and in a narrow market that they did not claim had a symbiotic relationship with any other market. Neither case (nor *SAS*) holds that *AGC* somehow overruled *McCready*. Nor could they have done so. *See AGC*, 459 U.S. at 530 n.19; *see also Reazin*, 899 F.2d at 962; *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 295-96 (2d Cir. 1983).

Litig., 127 F. Supp. 2d 702, 711 (D. Md. 2001) (under *Lower Lake Erie*, "a firm's stifling of innovative products would cause antitrust injury"). As Judge Motz observed in denying standing to PC consumers, "[i]f, as plaintiffs allege, Microsoft unlawfully prevented competitors from effectively developing and marketing a product, those competitors would be more direct victims of Microsoft's antitrust violations." *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 711.

The *Reazin* court also applied the principles of *McCready* and *AGC* in finding that even though the plaintiff hospital "was not itself a direct participant" in the market for health care financing that Blue Cross had restrained, the hospital had standing because it was a "perceived competitor of Blue Cross" and a "direct victim of Blue Cross' actions," "Blue Cross specifically intended to harm [it]," and the hospital's injuries were "an 'integral aspect'" of Blue Cross' scheme to restrain trade in the market for health care financing. 899 F.2d at 962-63. Microsoft similarly perceived Novell's office productivity applications to be a competitive threat to the applications barrier to entry. Novell's injuries were thus "an integral aspect" of Microsoft's scheme to eliminate this threat.

Indeed, Microsoft considered Novell to be "THE competitor" in all areas of Microsoft's business. When a defendant like Microsoft "aims its conspiracy at a clearly identifiable target" such as Novell, "that target is sufficiently connected to the defendant's allegedly unlawful behavior so as to have standing under Section 4 of the Clayton Act." *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 554 F. Supp. 838, 844 (S.D.N.Y. 1982), *aff'd*, 724 F.2d 290 (2d Cir. 1983).

Just as the plaintiff Crimpers' case was "*a fortiori* to McCready's," so is Novell's, because in each instance not only was the harm to the plaintiff integral to the

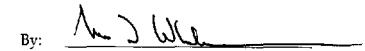
defendant's scheme, but the defendant had the plaintiff "directly in mind." *Crimpers*, 724 F.2d at 295. Given the direct and intended injury to Novell, Novell's Count I presents a "paradigm of standing." *Id.* at 297.

CONCLUSION

The motion should be denied.

Dated: February 22, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of February, 2005, I caused a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** (U. S. District Court, Civil No. 2:04-CV-01045-TS) to be served as indicated below on the following:

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