UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION This Document Relates to: *Novell, Inc.* v. *Microsoft Corporation*, Civil Action No. JFM-05-1087	MDL Docket No. 1332 Hon. J. Frederick Motz

MICROSOFT'S MEMORANDUM IN SUPPORT OF ITS MOTION PURSUANT TO 28 U.S.C. § 1292(b) FOR CERTIFICATION OF THE COURT'S JUNE 10 RULING TO THE EXTENT IT DENIED MICROSOFT'S MOTION TO DISMISS

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Microsoft respectfully requests that, pursuant to 28 U.S.C. § 1292(b), this Court certify for immediate appeal its June 10 Order to the extent it denied Microsoft's motion to dismiss Counts I and VI of Novell's Complaint. That portion of the June 10 Order effected rulings in the Court's June 10 Opinion that (i) Novell has antitrust standing to pursue claims of damages to its office productivity applications on account of allegedly anticompetitive conduct in the PC operating system market — a market in which those applications concededly did not compete, and (ii) Novell's sale to Caldera, Inc. of the right to sue Microsoft for harm "associated directly or indirectly with" Novell's PC operating systems did not divest Novell of the right to sue Microsoft for allegedly restraining trade in the PC operating system market. Permitting such an interlocutory appeal will expedite resolution of Novell's claims — which pertain to alleged conduct taking place in 1996 or earlier — and should cause no delay in proceedings before this Court.

PRELIMINARY STATEMENT

Counts I and VI seek recovery solely for damages to Novell's "office productivity applications," which all agree did not compete (and had no potential to compete) in the only antitrust market at issue in those claims: the market for PC operating systems.[1] Microsoft contended that such claims fail because (i) only consumers and competitors (and, perhaps, potential competitors) in the relevant antitrust market have standing to pursue the Clayton Act's treble damages remedy and (ii) Novell sold such claims when in 1996 it transferred to Caldera all rights of action "associated directly or indirectly with" Novell's PC operating systems — claims which Caldera later asserted against Microsoft and then released in exchange for money, which it divided with Novell.[2]

With respect to the standing issue, the Court agreed that "competitors and consumers in a given market are favored plaintiffs." (June 10 Opinion at 2 (internal quotation marks omitted).) But after considering the factors set out in *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983), the Court held that Novell nonetheless had standing to assert its PC operating system claims. (June 10 Opinion at 3.) The Court also held that Novell did not sell those claims to Caldera. (*Id.* at 2.) As explained below, certification of these two rulings would satisfy the statutory criteria of 28 U.S.C. § 1292(b).

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[1] To the extent that Count VI alleged harm to an "office productivity applications" market, Novell is now precluded from making such a claim by this Court's holding that claims for harm to such a market are time-barred. *See* June 10 Opinion at 5-6.

[2] Asset Purchase Agreement between Novell, Inc. and Caldera, Inc., dated July 23, 1996, Exhibit B to Microsoft's Opening Brief on the Motion to Dismiss, ¶ 3.1; *see Novell, Inc.* v. *Canopy Group*, 92 P.3d 768, 770, 773 (Utah Ct. App. 2004).

Moreover, factors unique to MDL proceedings generally and to Novell's lawsuit in particular militate heavily toward granting certification. First, both this Court and the Fourth Circuit have recognized the special value of Section 1292(b) certifications in promoting the goals of the MDL statute: timely, efficient and uniform adjudications. Second, even if Counts I and VI arguably were tolled by 15 U.S.C. § 16(i), congressional amendments to Section 16(i) express a clear legislative policy against "'undue prolongation'" of claims tolled by the statute. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978) (quoting S. REP. NO. 619, 84th Cong., 1st Sess. at 6 (1955)). Requiring Microsoft to wait until final judgment to appeal its threshold challenges to Novell's nine year-old claims would run counter to that legislative policy.

Consistent with its interest in expedited resolution, Microsoft does not intend for certification to delay proceedings in this Court. Should the Court grant this motion, Microsoft will seek expedited appellate review.

ARGUMENT

Section 1292(b) certification is designed to avoid unnecessary expense and delay by expediting the ultimate termination of litigation. S. Rep. No. 2434, 85th Cong., 2nd Sess. (1958), *as reprinted in* 1958 U.S.C.C.A.N. 5255, 5256, attached hereto as Exhibit 1. Indeed, as an example of the need for Section 1292(b), the legislative history specifically cites antitrust cases that are brought at the end of (or past) the statute of limitations period — cases that "may take considerable time" at the district court level. (Ex. 1 (S. Rep. No. 2434, pp. 5255-5263) at 5256.)

"Certification for an interlocutory appeal is proper where: (1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation."[3] *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 741 (D. Md. 2003); *see* 28 U.S.C. § 1292(b). These requirements are satisfied here. Indeed, factors unique to MDL proceedings generally and to Novell's lawsuit in particular make certification especially appropriate in this case.

I. The Court's Rulings as to Antitrust Standing and the Ownership of the Claims Asserted in Counts I and VI Are Controlling Questions of Law.

"[I]f resolution of the question" on which certification is sought "will terminate the action in the district court, it is clearly controlling." 19 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 203.31[2] (3d ed. 2005). Thus, both the standing and claim ownership questions are "controlling," because a different resolution of either question would require dismissal of the only claims remaining in this lawsuit. Indeed, "standing to maintain the action" is among the examples of "controlling questions" specifically identified by the Moore treatise. *Id.*; *see also Pinney Dock and Transport Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461-65 (6th Cir. 1988) (considering antitrust standing on a Section 1292(b) appeal).

[3] A district court may make this certification either in the original order or though a subsequent, amended order. FED. R. APP. P. 5(a)(3).

II. There Are Substantial Grounds for Differences of Opinion About Whether Novell Has Standing to Assert Counts I and VI and Whether It Owns Those Causes of Action.

Microsoft respectfully submits that there are substantial grounds to conclude that (i) Novell lacks standing to assert a claim of allegedly anticompetitive conduct in the PC operating system market and (ii) Novell, in any event, sold to Caldera its rights to recover on such a claim.

A. Antitrust Standing

There are two substantial grounds for a difference of opinion about standing. First, the Fourth Circuit and other courts of appeals have held that plaintiffs like Novell, whose allegedly harmed products did not compete in the relevant market, suffer no "antitrust injury" and therefore lack standing to pursue antitrust claims.[4] *White* v.

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[4] At oral argument, Novell argued that its alleged intent to combine WordPerfect with purported "platform" software products, OpenDoc and AppWare, gave it standing. This is not correct. First, Counts I and VI seek no recovery for harm to those "platform" products; instead, they seek damages for harm only to Novell's "WordPerfect word processing application and its other office productivity applications." (Compl., Count I ¶ 153; *see* Count VI ¶¶ 175, 177.) There is no dispute that those applications have no "platform" characteristics at all.

Second, Novell's attempt at oral argument to establish standing on the basis of Microsoft's alleged antagonism toward OpenDoc and "CI Labs" (Novell's Oral Argument Slides 15, 26-27, submitted June 7, 2005; Transcript of June 7, 2005 Oral Argument ("Oral Arg. Tr.") at 54-55), a consortium also known as "Component Integration Laboratories" or "CIL," which Novell and others established "to create OpenDoc" (Compl. ¶ 46; *see* Oral Arg. Tr. at 54 (referring to this entity as "Components Integrated Laboratories")) is especially meritless in view of the facts of record. In 1999, Caldera specifically alleged that Microsoft targeted the very same entity. (Caldera's Consolidated Statement of Facts in Support of Its Responses to Motions for Summary Judgment, ¶ 378 & Exhibit 391, in *Caldera, Inc.* v. *Microsoft Corp.*, No. 2:96CV645B (D. Utah filed April 5, 1999) ("Caldera's CSOF"), attached hereto as Exhibit 2.) Specifically, Caldera quoted a Microsoft e-mail reflecting that Microsoft had told a CIL member that "CIL was the big

(*footnote continued*)

Rockingham Radiologists, 820 F.2d 98, 104 (4th Cir. 1987) (denying standing specifically on the ground that the plaintiff was "neither a provider nor consumer of" services in the relevant market); *Thompson Everett, Inc.* v. *Nat'l Cable Advertising*, 57 F.3d 1317, 1325 (4th Cir. 1995), *aff'g*, 850 F. Supp. 470, 477 (E.D. Va. 1994) ("only a plaintiff qualifying as a competitor or consumer in [the restrained] market could suffer antitrust injury"); *SAS of Puerto Rico* v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 41, 44 (1st Cir. 1995) (no "antitrust injury" where plaintiff was neither "a customer who obtains services in the threatened market [n]or a competitor who seeks to serve that market"); *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997) ("Because B&P was thus not a competitor or a consumer in the market in which trade was allegedly restrained by the antitrust violations pled by B&P, we hold that B&P's alleged injury is not 'antitrust injury' . . . ."); *Ass'n of Wash. Pub. Hosp. Dists.* v. *Philip Morris Inc.*, 241 F.3d 696, 704 (9th Cir.

(*footnote continued*)
issue" in Microsoft's decision not to cooperate with that member, and that Microsoft suggested to that member that "maybe [it] should drop out of CIL." (Ex. 2 (Caldera's CSOF) ¶ 378.) Caldera also complained about "onerous" nondisclosure agreements, which prohibited software developers who received confidential information about Windows from using that information in the development of technology "that is competitive with [Microsoft's], including the technology known as OPENDOC." (Ex. 2 (Caldera's CSOF) ¶ 381.) Novell now makes a virtually identical allegation: "Microsoft routinely required [software developers] to execute nondisclosure agreements . . . contain[ing] terms that uniquely targeted [firms] that were members of CIL, by preventing their employees who worked on OpenDoc from receiving [information about Windows], which effectively prevented CIL from initially developing OpenDoc for Windows 95." (Compl. ¶ 85.) In sum, these efforts by Novell to demonstrate standing show just the reverse — that the alleged Microsoft conduct took place in the PC operating system market and that Caldera (on Novell's behalf and as its assignee) sought and recovered damages for, among other things, conduct relating to OpenDoc and CIL.

2001) (holding that "the injured party" must "be a participant in the [allegedly restrained] market").

It is correct, as the June 10 Opinion observes, that *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") did not explicitly make the "consumer or competitor" rule a "litmus test" for standing. (June 10 Opinion at 2.) But one reason for the adoption of the "consumer or competitor rule" by the Fourth Circuit and other courts is that the Supreme Court later clarified the meaning of the pertinent discussion in *AGC*.

When *AGC* noted that plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained," it was explaining why plaintiff failed the "antitrust injury" test articulated by *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), which *AGC* had identified as one factor in the standing analysis.[5] 459 U.S. at 538-40 (citing *Brunswick*, 429 U.S. at 487-89 (1977)). *See also Pinney*, 838 F.2d at 1463 (noting, on a Section 1292(b) appeal, that the "second *AGC* factor relates to the status of the plaintiff as consumer or competitor"). Subsequent to the 1983 *AGC* decision, the Supreme Court made clear that *Brunswick*'s antitrust injury test is a "requirement" for standing. *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 & n.15

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[5] *AGC* began its discussion of *Brunswick*'s antitrust injury test by observing that "our prior cases have emphasized the central interest in protecting . . . participants in the relevant market." 459 U.S. at 538. It also was in the course of this same analysis where the Court clarified that plaintiff in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) had standing precisely because she was a "consumer" in the restrained market. 459 U.S. at 538 (citing *McCready*, 457 U.S. at 482-83, and noting that *McCready* relied on *Brunswick*, 429 U.S. at 487-89). Here, of course, Novell claims harm to office productivity applications that, all agree, did not compete in the allegedly restrained market.

(1992); *Cargill* v. *Monfort of Colo.*, 479 U.S. 104, 109 (1986). In other words, the absence of antitrust injury is determinative, even if there are other *AGC* factors present (such as the assertion that Microsoft "targeted Novell specifically" (June 10 Opinion at 3)). *Cf. SAS of Puerto Rico*, 48 F.3d at 44-46 (denying standing to an alleged "target" of anticompetitive conduct, whose product threatened defendant's monopoly, because the target did not compete in the monopolized market). Indeed, in 1986 the Supreme Court explained that "antitrust injury is necessary, but not always sufficient, to establish standing":

> [I]n *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U.S. 519 (1983), we applied "the *Brunswick* test," and found that the petitioner had failed to allege antitrust injury. *Id.* at 539-540. . . . A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 [of the Clayton Act], because a party may have suffered antitrust injury but may not be a proper party under § 4 for other reasons. Thus, in *Associated General Contractors*, we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4.

Cargill, 479 U.S. at 110 & n. 5 (internal citation omitted). Thus, because Counts I and VI fail the *Brunswick* test, Novell lacks standing to assert those claims.

In addition to the above, there is ground for disagreement about this Court's application of one of the other *AGC* factors: the existence of more direct victims of competitive harm "whose self-interest" might (or already has) "motivate[d] them to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 541. The presence of this factor "diminishes the justification for allowing a more remote party" to seek treble damages because there is less likelihood that "a significant antitrust violation" will be left "undetected or unremedied." *Id.* Although Microsoft's allegedly

anticompetitive conduct in the PC operating system market has not gone "undetected or unremedied," the Court ruled that this factor favored Novell because it "is the only victim who could bring suit for the acts taken by Microsoft in regard to WordPerfect and Quattro Pro — acts which ultimately had an enormous impact upon the shape of the applications software market." (June 10 Opinion at 3.)

Microsoft respectfully submits that impact in an applications software market does not give rise to antitrust injury or standing in the operating systems market. Moreover, the Court's reasoning would deprive the "more direct victims" factor of its substance, since any company would qualify as the "only victim" who could sue for harm to his own products (unless one counts consumers of those products, many of whom sued Microsoft years ago). Furthermore, the antitrust laws, of course, gave Novell standing to seek a robust remedy for any illegal conduct that impacted "the shape of the applications software market": a suit alleging harm in that separate market. Novell chose not to bring such a lawsuit until after expiration of the limitations period.

B. Ownership of the Claims

There is no dispute that Novell assigned to Caldera all its claims against Microsoft for conduct through July 1996 that related "directly or indirectly" to Novell's PC operating system products, DR DOS and Novell DOS. Microsoft respectfully submits that there is substantial ground for disagreement about the Court's holding that this assignment reserved Novell's right to sue Microsoft for harm during the same time period to the very antitrust market in which those products competed. In fact, Novell has stated that its current claims are "*identical* to those" made by the U.S. Department of Justice for harm to

the PC operating system market. (Novell Br. at 15-16 (emphasis in original).) This alone provides a substantial ground for disagreement.

Moreover, as this Court noted at oral argument, Counts I and VI specifically allege that WordPerfect was harmed derivatively by Microsoft's "suppression of . . . Novell's own DR-DOS." (Compl. ¶ 144; *see id.*, Count I ¶ 151 (incorporating ¶ 144 by reference); *id.*, Count VI ¶ 174 (same); *cf.* Oral Arg. Tr. at 43:1-2 (THE COURT: "But the very claim you're asserting in Count One here is derivative through DOS."); *id.* at 43:19-23, 45:9-22.) Novell's brief, in fact, emphasized the derivative nature of its claims by asserting that "Microsoft destroyed alternative platforms," that Novell's "applications would have thrived on these platforms, and that their suppression cost [Novell] opportunities to compete." (Novell Br. at 11 (citing Compl. ¶¶ 44, 144).)

Substantial grounds for disagreement also exist because the Court's interpretation of the assignment means that Novell could have "split" its claim against Microsoft for harm to the PC operating system market. Under the doctrine of res judicata, this is not permissible. RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-26 (1982). If Novell had brought the Caldera action on its own behalf, it would be precluded from bringing its current claims for harm during the same time period to the same market at issue in the earlier case. *Peugeot Motors of America, Inc.* v. *Eastern Auto Distributors, Inc.*, 892 F.2d 355, 359 (4th Cir.1989) (res judicata "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding"); RESTATEMENT (SECOND) OF JUDGMENTS § 25. The result ought not to be different just because Novell allowed Caldera

to bring the first suit, particularly since (i) Novell contractually required Caldera to file that suit and (ii) "the central purpose of" the Novell-Caldera transaction was Caldera's undertaking "to pay Novell a percentage of its recovery" from Microsoft. *Novell, Inc.* v. *Canopy Group*, 92 P.3d 768, 773 (Utah Ct. App. 2004). In effect, the Court has ruled that a claim for allegedly anticompetitive conduct in the PC operating system market can be made twice by the same party — once for harm to products in that market, and once for harm to other products outside the market (that were allegedly injured derivatively).

III. Certification Will Materially Advance the Ultimate Termination of the Litigation.

A. This Court, the Fourth Circuit and Other Courts Have Recognized That Interlocutory Review is Uniquely Favored in MDL Proceedings.

"The [Judicial] Panel" on Multidistrict Litigation and the Fourth Circuit "properly hold the view that if a party wishes to appeal a decision of the transferee court, the better practice is to allow that appeal prior to remand." 17 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 112.06[3] (3d ed. 2005) (citing *In re Food Lion*, 73 F.3d 528, 532-33 (4th Cir. 1996)). Congress' goals in enacting the MDL statute — to promote the "efficient and uniform adjudication of numerous actions" — would be frustrated by "permitting transferor courts . . . to reconsider the transferee court's" orders at a later date. *In re Food Lion*, 73 F.3d at 532-33.

In addition, *In re Food Lion* holds that to further the achievement of these goals, this Court should, at some point prior to remand of this action to the District of Utah, enter final judgment under Rule 54(b) of the Federal Rules of Civil Procedure as to the dismissal of Novell's Claims II, III, IV and V, thus ensuring that Novell's appeal of

those claims will be heard by the Fourth Circuit. *In re Food Lion*, 73 F.3d at 533 (ruling as a matter of law that in an MDL proceeding, there can be no "'just reason' for delaying" the entry of "final judgment under Rule 54(b) with regard to any decision or order of [the transferee] court that fully disposes of "'fewer than all the claims'") (quoting Rule 54(b)). At least where, as here, the Court's rulings on plaintiffs' remaining claims (Counts I and VI) satisfy the statutory criteria of Section 1292(b), a district judge can and should promote "efficient and uniform adjudication" by certifying those remaining claims for interlocutory review by the same Circuit that must consider the Rule 54(b) appeal. Indeed, although Section 1292(b) was not at issue in *In re Food Lion*, the court specifically noted that the statute is "another tool at the transferee court's disposal" in providing for interlocutory review in MDL proceedings.[6] *Id.*, 73 F.3d at 533 n.14

From the beginning of this MDL proceeding, this Court also has properly focused on achieving a timely, "efficient and uniform" resolution of the cases. More than four years ago, in certifying a different set of issues for interlocutory appeal under Section 1292(b), this Court observed:

> It would be a credit to the judicial system if state and federal courts, appellate and trial, worked together to bring all the pending cases to a just and final resolution in a timely and business-like manner. Permitting an interlocutory appeal would greatly assist in that process.

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[6] With regard to the goal of promoting "uniform" adjudication, Microsoft also notes that in a different context within this MDL proceeding, the Fourth Circuit is being asked now to rule on the meaning and application of the *Associated General Contractors* standing factors. (Brief of Appellants in *Kloth* v. *Microsoft Corp.*, No. 04-2566 (4th Cir., filed March 7, 2005) at 41-49.) Oral argument of the *Kloth* appeal has not yet been scheduled.

In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 728 (D. Md. 2001). And in 2003, this Court once again properly invoked Section 1292(b) to permit a request for appellate review of a different interlocutory order, finding that to "'delay[] review would burden not only the parties, but the judicial system itself.'" *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 743 (D. Md. 2003) (quoting *In re Air Crash Off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431, 435 (S.D.N.Y.1998)). These factors apply with even greater force in 2005, after this MDL proceeding has been pending for more than five years.

B. The Unique Circumstances of Novell's Claims Militate in Favor of Certifying an Appeal.

The alleged conduct set forth in Novell's Complaint took place in 1996 (when Novell sold its PC operating system and applications businesses) or earlier. Even if Counts I and VI arguably were tolled by 15 U.S.C. § 16(i), the Supreme Court has found that the 1955 amendments to that statute expressed a clear congressional policy against the "'undue prolongation'" of such claims. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978) (quoting S. REP. NO. 619, 84th Cong., 1st Sess. at 6 (1955)). In so doing, the Supreme Court quoted the legislative history at greater length:

> While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws.

Greyhound, 437 U.S. at 335 (quoting S. REP. NO. 619, 84th Cong., 1st Sess. at 6). This policy dovetails with Congress' reasoning that Section 1292(b) should be enacted in part

because "antitrust cases may take considerable time" (Ex. 1 (S. Rep. No. 2434, pp. 5255-5263) at 5256), and would be promoted by granting Microsoft an early opportunity to obtain appellate review of its threshold challenges to these arguably tolled — and very old — claims.

CONCLUSION

Microsoft respectfully requests that this Court certify for immediate appeal its June 10 rulings that (i) Novell has antitrust standing to pursue Counts I and VI of the Complaint and (ii) Novell did not sell such claims to Caldera in 1996.

Respectfully submitted,

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June 23, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

This Document Relates to:
Novell, Inc. v. *Microsoft Corporation*,
Civil Action No. JFM-05-1087

MDL Docket No. 1332
Hon. J. Frederick Motz

[PROPOSED] ORDER AMENDING THE COURT'S JUNE 10, 2005 ORDER TO PROVIDE FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Upon motion of defendant Microsoft Corporation, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT the Order of this Court, entered on June 10, 2005, be, and the same is, amended to certify a portion of that Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b):

In the opinion of this Court, this Order, and the June 10, 2005 Opinion which it effected, involve two controlling questions of law as to which there are substantial grounds for difference of opinion: (1) whether plaintiff Novell, Inc. has antitrust standing to pursue Counts I and VI of the Complaint and (2) whether Novell sold such claims to Caldera, Inc. in 1996. Furthermore, this Court believes that an immediate appeal from the Court's rulings on those questions may materially advance the ultimate termination of this litigation.

Dated this ___day of _____, 2005

J. Frederick Motz
United States District Judge