IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

NOVELL'S MEMORANDUM IN OPPOSITION TO MICROSOFT'S 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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INTRODUCTION

Microsoft, like most unsuccessful Rule 12(b) movants, does not agree with the Court's June 10, 2005 Opinion and wants to re-argue its motion to dismiss immediately in the Court of Appeals. A disagreement with a district court's decision and a desire to have immediate appellate review, however, do not justify 28 U.S.C. § 1292(b) certification, and Microsoft has not shown that it is entitled to such an extraordinary remedy.

Microsoft's Count I release and standing arguments do not raise pure questions of law. They are not "controlling" questions either, because Count VI will go to trial regardless of the outcome of this motion.[1] Nor can there be "substantial" grounds for differences of opinion with regard to (a) Novell's standing, which this Court said was "clear," and identical to Sun's and Netscape's conceded standing, (b) a release argument this Court correctly termed "a far stretch," or (c) Novell's antitrust injury, which this Court deemed "self-evident[]."[2]

ARGUMENT

As a "narrow exception to the longstanding rule against piecemeal appeals," CoStar Group Inc. v. LoopNet, Inc., 172 F. Supp. 2d 747, 750 (D. Md. 2001),

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[1] Novell alleges in Count VI that Microsoft entered into exclusionary agreements with OEMs in unreasonable restraint of trade. As the Court held, "such agreements also were a subject of the government case. Thus, limitations has been tolled as to the claim asserted in Count VI." (Slip op. at 2.) Microsoft's contention that this Court held otherwise (see Microsoft's Memorandum ("Mem.") at 2 n.1) has no foundation.

[2] Microsoft's certification motion inappropriately re-argues the merits, and introduces new "facts" and contentions. Novell's refusal to accept Microsoft's invitation to turn this motion into one for reconsideration should not be taken as conceding anything in Microsoft's Memorandum.

Section 1292(b) interlocutory review constitutes "an extraordinary remedy." Fannin v. CSX Transp., Inc., 873 F.2d 1438, 1989 WL 42583, at **2 (4th Cir. Apr. 26, 1989).[3] Because interlocutory review is "limited to exceptional cases," CoStar Group, 172 F. Supp. 2d at 750, Section 1292(b) "should be used sparingly" and its requirements "strictly construed." Myles v. Laffitte, 881 F.2d 125, 127 (4th Cir. 1989). As its legislative history makes plain, Section 1292(b) should be employed only in the rare case that presents a question dispositive of the litigation and there is "serious doubt" as to how it should be decided. S. Rep. No. 85-2434 (1958), as reprinted in 1958 U.S.C.C.A.N. 5255, 5259 (see Mem. Ex. 1). A "mere question as to the correctness of the ruling" is insufficient. Id.

Microsoft accordingly has to establish that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). Specifically, Microsoft must make three independent showings: (1) the Court's order raises a "controlling question of law"; (2) there is a "substantial ground" for a difference of opinion on this controlling question; and (3) an immediate, interlocutory appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Microsoft has not shouldered this burden.

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[3] Although unpublished, the Fannin opinion (attached as Exhibit A) has precedential value on this motion and no published opinion would serve as well. See 4th Cir. R. 36(c).

I. THE STANDING AND RELEASE ISSUES DO NOT PRESENT QUESTIONS OF PURE LAW AND IN ANY EVENT DO NOT "CONTROL"

Microsoft correctly notes that a question of law "controls" only if it "'will terminate the action in the district court.'" (Mem. at 4 (quoting 19 James W. Moore et al., Moore's Federal Practice § 203.31[2] (3d ed. 2005))); see Fannin, 1989 WL 42583, at **5 (movant must present a "narrow question of pure law whose resolution will be completely dispositive of the litigation"). Microsoft identifies two issues, standing and ownership of claims,[4] but neither issue "controls." Count VI (alleging that Microsoft's exclusionary agreements with OEMs unreasonably restrained trade) would survive even if the Court of Appeals were to reverse the Court's rulings on Count I.

In its briefs and oral argument on its motion to dismiss, Microsoft sought dismissal of Count VI only on statute of limitations grounds.[5] The Court held that the Government suit tolled the statute with respect to Count VI. (See Slip op. at 2.) Microsoft never raised, and this Court never ruled upon, any contention that Novell lacked standing to bring Count VI or had released the claim. Microsoft instead aimed those arguments solely at Count I. Microsoft's after-the-fact argument cannot serve as a

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[4] Microsoft never says what the "narrow questions" of "pure law" are. See Harter v. GAF Corp., 150 F.R.D. 502, 518 (D.N.J. 1993) (movant "failed even to indicate what is the controlling question of law over which there is a substantial dispute"). Microsoft does take issue with the Court's findings with respect to Novell's standing and ownership of claims, but those were based on the Court's application of the uncontested legal principles to the facts. Such mixed questions of fact and law are not appropriate for Section 1292(b) certification. See, e.g., SEC v. First Jersey Sec., Inc., 587 F. Supp. 535, 536 (S.D.N.Y. 1984).

[5] See, e.g., Microsoft's Mem. in Supp. of Its Mot. to Dismiss Novell's Compl. at 1-3, 13-14, 20-30; Microsoft's Reply Mem. in Supp. of Its Mot. to Dismiss Novell's Compl. at 1-2, 6-13; June 7, 2005 Tr. 4:7-10, 28:15-29:25.

basis for claiming that the Court's Opinion raises a controlling question of law. As we show next, even if it could, there would not be a substantial ground for a difference of opinion about the question.

II. NO SUBSTANTIAL GROUNDS FOR DIFFERENCES OF OPINION EXIST

The term "difference of opinion" "refers to the legal standard applied in the decision for which certification is sought and whether other courts have substantially differed in applying that standard." Harter v. GAF Corp., 150 F.R.D. 502, 518 (D.N.J. 1993). Disagreement with a court's ruling, McDaniel v. Mehfoud, 708 F. Supp. 754, 756 (E.D. Va. 1989), or with a court's interpretation of case law does not meet this definition. See, e.g., CoStar Group, 172 F. Supp. 2d at 750.

Microsoft's motion rests on a disagreement with this Court's application of the uncontested legal standard to the facts.[6] Section 1292(b), however, "forecloses

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[6] Microsoft claims that Novell said it had standing due to Microsoft's "antagonism" to OpenDoc, and also disputes the facts Novell cited at oral argument and in its Complaint regarding OpenDoc, CIL, and the "platform" characteristics of its applications. (Mem. at 5 n.4.) The record belies Microsoft's claims. Additionally, under Rule 12(b)(6) and Section 1292(b), the allegations in Novell's Complaint are to be taken as true, not certified for review as to whether they are "meritless in view of the facts of record." (Mem. at 5 n.4.)

Moreover, whether Caldera made a similar allegation about OpenDoc is irrelevant to the standing and controlling question of law inquiries. Nothing in Microsoft's excerpt (see Mem. Ex. 2) establishes – any more than its previous submissions did – that Novell's Count I was a direct or indirect claim intended to be conveyed or that Novell lacks standing to assert its present claims simply because DOS competed in the operating system market.

If anything, the cited paragraphs further confirm that, as this Court ruled, Novell released claims relating to its DOS operating systems. These paragraphs refer repeatedly to allegations of Microsoft's anticompetitive conduct, including conduct relating to OpenDoc and CIL, that harmed DR DOS, one of the products explicitly conveyed in the Asset Purchase Agreement. As this Court held (Slip op. at 2), "[o]f course, Novell did also have claims against Microsoft for damage caused to DOS and

interlocutory appeals in situations in which the law is well settled and the dispute arises in the application of the facts at hand to that law." North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 685 F. Supp. 114, 115 (E.D.N.C. 1988); see also Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364, 366 (S.D.N.Y. 1982) (denying motion to certify standing question and holding that Section 1292(b) is not a vehicle for "securing early resolution of disputes concerning whether the trial court properly applied the law to the facts").

In any event, as we demonstrate in Parts II.A and II.B below, the Court's Opinion on the standing and release issues rests on grounds as to which there can be no substantial dispute.

A. Novell's Standing Is "Self-Evident"

Microsoft's standing argument, and specifically its contention about antitrust injury (Mem. at 5-8), ignores the Court's holding that Novell satisfied the antitrust injury requirement (see Slip op. at 3). We quote what Microsoft chose to leave out of its Memorandum, because the quotations simultaneously defeat Microsoft's argument, and also correct its mischaracterization of the Opinion.

As the Court observed:

> [T]he gravamen of the claim asserted in Count I is that Microsoft specifically targeted Novell for the purpose of maintaining its monopoly in the operating system market. According to Novell, WordPerfect and Quattro Pro, its popular office productivity applications, posed a threat to Microsoft's operating system monopoly because Novell had engineered them to exploit Novell's

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related technology, but these claims (which were settled after Caldera sued Microsoft) are not part of the present action."

> existing cross-platform technologies, such as OpenDoc and AppWare.

(Slip op. at 2 (emphasis added).) Moreover, "because these applications were being developed to run independently of any operating system, particularly Windows, and because the consumer demand for them was great, Microsoft saw the need to attack them." (Id.) For that reason, Novell "contends that 'Microsoft recognized that it had to control the office productivity applications market to fend off that threat to its operating systems monopoly.'" (Id.) Such "destruction of a competitor's product for the purpose of maintaining a monopoly self-evidently is the type of harm for which the antitrust laws are intended to provide redress." (Id. at 3.) The Court then quoted Microsoft's own admission that owning key "franchise" applications such as word processing would allow Microsoft to protect its Windows monopoly and raise the application barrier (the "moat," in Microsoft parlance) to entry. (Id.) Against this background, the Court found it "clear" that Novell satisfied "the various parts of the multi-factored" AGC test,[7] and Novell's antitrust injury to be "self-evident[]." (Id.)

Finally (and, in our view, dispositively), the Court noted that an implication of Microsoft's Count I standing argument was that "Sun and Netscape also lacked antitrust standing" to the extent that "they were not direct competitors in the operating system market, i.e., owners of alternative operating systems, but rather developers of middleware products that threatened to render Microsoft's operating system obsolete." (Slip op. at 3 n.1.) And, even if that were not a necessary implication, the Court held, "Novell may (just as Netscape and Sun did) assert antitrust claims for harm allegedly

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[7] Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983).

caused to its non-operating system products as a result of Microsoft's anticompetitive behavior designed to protect its Windows monopoly." (Id.)

Microsoft's other argument, that there is a "more direct victim" than Novell, verges on the frivolous. Novell is not just the most direct victim, it is "the only victim who could bring suit" for damages to its WordPerfect and Quattro Pro business. (Slip op. at 3 (emphasis added).) Microsoft drove Novell out of the market by using unlawful conduct designed to protect its Windows operating system monopoly. Microsoft cites no case in which a court held that such a victim lacked standing.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), allows a plaintiff to recover for antitrust conduct that damages its "property." Novell suffered, and seeks damages for, that very injury, not injury derivative of someone else's harm, or injury suffered as a supplier or as an indirect purchaser. Novell's injury was direct and gives it standing under any reading of the antitrust laws.

B. Microsoft's Release Argument Is At Best "A Far Stretch"

Microsoft misstates what this Court found with respect to the ownership of claims. What this Court held could not be clearer: "Count I, while arising from Microsoft's monopoly in the operating system market, is for damage not to DOS or any other operating system but for damage to applications software." (Slip op. at 2.) For that reason, "[i]t is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because DOS competed in the operating system market, such a claim was either a 'direct' or 'indirect' claim intended to be transferred from Novell to

Caldera."[8] (Id.) Again, there is no disagreement here as to the applicable law – only its application to the facts.[9] As we have shown, that is no basis for Section 1292(b) certification.

III. THERE IS NOTHING "UNIQUE" ABOUT THIS CASE THAT JUSTIFIES CERTIFICATION

Microsoft says that unique MDL factors support certification. (See Mem. at 3.) But the MDL cases Microsoft cites in support of that proposition bear no resemblance to this case. In re Air Crash off Long Island, N.Y., on July 17, 1996, 27 F. Supp. 2d 431, 434, 435 (S.D.N.Y. 1998), for example, dealt with a question of first impression that "resolved strongly divergent views" of "78 years of judicial decisions" in an MDL proceeding involving 200 cases that could fall under the jurisdiction of nine courts of appeals after remand. Similarly, this Court's collateral estoppel ruling in In re Microsoft Corp. Antitrust Litigation, 274 F. Supp. 2d 741, 742-43 (D. Md. 2003), was a "foundational" ruling on a question that could not be "more central to the proper structuring of the private antitrust litigation against Microsoft," and would control the

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[8] After two briefs and an oral argument, Microsoft now has decided that the "splitting of claims" res judicata principle bars this suit. (Mem. at 10.) This argument simply rehashes (under a different rubric) Microsoft's argument that Count I was associated directly or indirectly with the claims conveyed to Caldera. This Court already has rejected this argument for the reasons stated in the text.

[9] According to Microsoft, this Court noted at oral argument that "Counts I and VI specifically allege that WordPerfect was harmed derivatively by Microsoft's 'suppression of . . . Novell's own DR-DOS.'" (Mem. at 10 (alteration in original) (quoting Compl. ¶ 144).) Microsoft glosses over the fact that these were initial comments by the Court and only referenced Count I (see June 7, 2005 Tr. 43:19-23, 45:9-10), and overlooks the Court's subsequent colloquy with counsel (see, e.g., id. at 47:16-49:4, 65:2-66:3). Most importantly, Microsoft ignores the Court's holding that Novell's Count I alleges injury to Novell's applications, not its operating system (see Slip op. at 2).

scope of discovery in the four competitor cases and the scope of evidence at the consumer class action trial. The facts in the third MDL Section 1292(b) case on which Microsoft relies are even farther afield. In In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702, 704 (D. Md. 2001), 61 consumer cases were consolidated under the umbrella of a class action complaint. The litigation was "of importance not only to the parties but to an entire industry, and perhaps to the national economy, as well." Id. at 728. Novell's case, by contrast, is a stand-alone litigation involving only two parties that raises standing and release issues with no implications beyond their own factual setting. The MDL policies to which Microsoft refers (see Mem. at 11-13) simply are not in play here.

Nor are there any "unique circumstances" (Mem. at 13) implicating Section 1292(b) policies.[10] This case should not take "considerable time" (Mem. at 3, 14),[11] particularly since much of the discovery materials already have been produced,

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[10] While Microsoft presumes that Novell intends eventually to appeal this Court's dismissal of Counts II-V prior to remand, Novell will not decide whether to appeal until the remand date approaches, as it is entitled to do.

[11] In passing, we cannot help but note the irony of Microsoft's trying to use the 1955 amendments to 15 U.S.C. § 16(i) as a reason to grant certification. (Mem. at 3, 13-14.) The amendments reflect Congress' balancing of two policy goals: to create a uniform statute of limitations period for private antitrust cases, and to safeguard the rights of private antitrust plaintiffs by tolling the limitations period during the pendency of a government suit. Congress struck that balance by creating a uniform, four-year statutory period and extending tolling of the statute of limitations during the pendency of a government suit and for one year thereafter. That was Congress' solution to "undue prolongation" of antitrust claims, a solution that reflected Congress' 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), aff'd, 431 F.2d 1145 (9th Cir. 1970).

and many of the depositions have been taken, in other cases. Indeed, Microsoft already has deposed several Novell witnesses and reviewed numerous documents produced by Novell in these other cases.[12] Moreover, while any antitrust case naturally requires a substantial effort, the amount needed here would be significantly less given the prior litigation by present parties and the government.

CONCLUSION

The motion should be denied.

Dated: July 12, 2005

Respectfully submitted,

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[12] Most recently, Microsoft inspected and reviewed documents in Novell's records warehouse in Provo, Utah, for a consumer case in the District Court of Minnesota (Gordon v. Microsoft Corp., No. MC 00-5994) that involved, *inter alia*, claims relating to office productivity applications. The case (which settled during trial in 2004) featured trial testimony of former and current Novell employees. Microsoft's lead counsel there serves in the same capacity here.