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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION PURSUANT TO 28 U.S.C. § 1292(b)

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July 26, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes and Rules

Other Authorities

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DISTRICT OF MARYLAND

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When Congress enacted 28 U.S.C. § 1292(b) in 1958, the Senate Report specifically cited the situation presented here — an antitrust defendant invoking the bar of the statute of limitations — as a paradigm for the interlocutory appeal permitted by that statute. (Microsoft's Brief ("Microsoft Br.") at 3 & Ex. 1 (S. REP. NO. 2434, pp. 5255-63) at 5256.) Novell never even addresses this basic point. Likewise, Novell never mentions *In re Food Lion, Inc.*, 73 F.3d 528 (4th Cir. 1996), where the Fourth Circuit expressed particularly strong views about the desirability of interlocutory review in MDL cases. Novell also ignores *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978), which definitively explained the "congressional policy" against "undue prolongation of [antitrust] proceedings" that might qualify for the antitrust tolling statute.

The standing and ownership questions on which Microsoft seeks certification satisfy the statutory criteria of Section 1292(b). This Court should grant Microsoft's motion and thereby permit the Fourth Circuit to decide whether it wishes to entertain the appeal.

ARGUMENT

I. The Statutory Criteria

A. The Standing and Ownership Issues are "Controlling Questions of Law" That "May Materially Advance the Ultimate Termination of the Litigation"

Novell contends that the standing and ownership questions are not "controlling" because, in its view, (i) Count VI would "survive" regardless of how the questions are resolved and (ii) only questions that may terminate an entire lawsuit are "controlling." (Novell's Opposition at 1, 3 ("Novell Opp.").) The first proposition is wrong as a matter of antitrust law; the second misconstrues Section 1292(b).

Although Count VI does not specify a market, it alleges that Microsoft and OEMs entered into exclusionary distribution agreements in violation of 15 U.S.C. § 1. (Compl., Count VI ¶¶ 174-77.) That same claim was at issue in *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), which holds that a plaintiff must both identify a relevant market and prove that the challenged agreements had an adverse "impact on competition as a whole within [that] market." *Id*. at 206 (internal quotation marks omitted). Because this Court held on June 10 that Novell's claims based on restraints of trade in the alleged applications markets are time-barred (June 10 Opinion at 5 (adopting the "bright-line rule" that "limitations are not tolled when the government and private suits . . . arose in distinct markets" (internal quotation marks omitted)), the only possibly viable claim in Count VI is one for restraint of trade in the PC operating system market. According to the Fourth Circuit, such a claim requires proof of harm to "competition as a whole within" the PC operating system market. *Dickson*, 309 F.3d at 206. Count VI is thus squarely within the

scope of Microsoft's standing and ownership challenges.[1]

The standing and ownership questions would still be "controlling" even if they did not dispose of all remaining claims. While case-dispositive issues present the most obvious "controlling" questions, the term "has a much broader meaning in the context of § 1292(b)." 19 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 203.31[2] (3d ed. 2005). Indeed, the broader meaning is dictated by the statute's plain language, which permits certification of questions that "may materially advance the ultimate termination" of a case — not merely questions that "will terminate" a case. Courts therefore certify non-case-dispositive questions, as this Court did twice in these MDL proceedings. *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 742 (D. Md. 2003) (collateral estoppel); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 728 (D. Md. 2001) (standing of indirect purchasers to recover damages under the antitrust laws, among other issues).[2]

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[1] Novell's contention that "Microsoft never raised" standing or ownership challenges to Count VI is false. (Novell Opp. at 3.) Count VI does not allege restraint of trade in the PC operating system market and Novell never claimed in its brief that Count VI pertained to that market (as opposed to the alleged application markets). As soon as there was mention at oral argument that Count VI might pertain to the PC operating system market, Microsoft's counsel immediately responded that if that were so, then Count VI should be dismissed on standing and ownership grounds. (Transcript of June 7, 2005 Oral Argument at 20-21.)

[2] Although the Fourth Circuit, in an unpublished decision, stated that "the kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation," *Fannin* v. *CSX Transportation, Inc.*, 1989 WL 42583, at *5 (4th Cir. Apr. 26, 1989) (*see* Novell Opp. at 3), that statement merely described what the panel viewed as a "model" question. *Fannin*, 1989 WL 42583, at *5. The statement did not purport to impose a requirement in any sense, nor could a non-binding decision like *Fannin* do so. *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996); *see* 4th Cir. R. 36(c) (citation of unpublished opinions is "disfavored").

Novell also makes the strange argument that this Court's rulings on the standing and ownership issues are unsuitable for certification because they did not involve pure questions "of law," citing to decisions refusing to certify questions judged to be too fact-intensive. (Novell Opp. at 1, 3-4.) None of those decisions involved a ruling on a motion to dismiss.[3] In any event, standing is a well-recognized issue appropriate for certification under Section 1292(b). (*See* Microsoft Br. at 4.) Indeed, at least three of the U.S. Supreme Court's antitrust standing decisions reached the appellate courts via Section 1292(b). *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199, 205 (1990); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 336 (1979); *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 256 (1972). Moreover, two defenses analogous to and intertwined with the ownership question at issue here — "release" and "res judicata" — also "regularly provide occasions for § 1292(b) appeal." 16 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3931 (2d ed. 1996).

B. There Is "Substantial Ground for Disagreement"

Novell fails entirely to confront the eleven cases cited by Microsoft to establish "substantial ground for disagreement" concerning this Court's rulings on standing and ownership. (Microsoft Br. at 5-11.) Instead, Novell repeatedly quotes this Court's own

[3] The court in *SEC* v. *First Jersey Securities, Inc.* 587 F. Supp. 535 (S.D.N.Y. 1984) refused to certify a question because it was predicated "on specific factual findings" made by the court after a full evidentiary "hearing." *Id*. at 536. The unpublished opinion in *Fannin* concerned a summary judgment motion and questions "heavily freighted with the necessity for factual assessment" (and, moreover, neither the district court nor the petitioner seeking review identified what factual issues had been found in dispute). *Fannin*, 1989 WL 42583, at *5; *see id*. at *1-*2. The obstacles to certification in *Harter* v. *GAF Corp.*, 150 F.R.D. 502 (D.N.J. 1993) were different: plaintiff moved for certification before he even saw the court's decision on the underlying motion, and he failed to identify issues he regarded as "controlling questions of law." *Id*. at 518.

opinion (Novell Opp. at 5-8), thereby showing only that the Court came out the way it did. The decisions cited by Microsoft provide "substantial ground for disagreement" as to both of this Court's rulings.[4]

1. Novell Mischaracterizes the "More Direct Victim" Standing Factor

As Microsoft has already shown, one ground for disagreement about the standing ruling concerns whether Novell is a direct victim of any restraint of trade *in the PC operating system market.* (Microsoft Br. at 8-9.) Novell's response ignores the italicized language, and therefore misses the point entirely.

The "more direct victim" factor does not, as Novell asserts, test whether a company is the most direct victim of alleged harm to its own products. (Novell Opp. at 7 ("Novell . . . is the *only* victim who could bring suit for damages to its WordPerfect and Quattro Pro business.") (emphasis in original) (internal quotations marks omitted).) Such a test would be circular and meaningless. The proper test, instead, is whether restraints in the relevant market more directly affected other victims on whom the public can rely to ensure that a violation is not left "undetected or unremedied." *Associated Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983) ("*AGC*"). If such other victims exist, then they can "vindicate the public interest in antitrust enforcement," and there is no need to

[4] The cases cited by Novell (Novell Opp. at 4-5) are irrelevant. All deny motions for certification on the ground that the movant, unlike Microsoft here, identified no authority to support its suggested answer to the question for which it sought certification. *See CoStar Group Inc.* v. *Loopnet, Inc.*, 172 F. Supp. 2d 747, 750-52 (D. Md. 2001) (movant had "no precedent" on its side of the question); *McDaniel* v. *Mehfoud*, 708 F. Supp. 754, 756 (E.D. Va. 1989) (movants failed to "cite[]" even "one opinion" to support their position); *N.C. ex rel. Long* v. *Alexander & Alexander Servs., Inc.*, 685 F. Supp. 114, 116-17 (E.D.N.C. 1988) (there was "no difference of opinion" on the law).

make triple damages and attorneys fees available to additional plaintiffs. *Id.* In sum, the fact that Novell waited until 2004 to bring its claims concerning word processing and spreadsheet applications markets — claims as to which it had standing, but which were brought after the limitations period had expired — does not provide Novell with standing to allege restraint of trade in a different market.[5]

2. Novell's Standing Argument Is Very Different from Sun's and Netscape's

Novell contends that its standing argument is "identical to" Sun's and Netcape's. (Novell Opp. at 1; *see id.* at 6.) This is wishful thinking. The crucial difference is that Sun's and Netscape's products had *potential* to compete in the PC operating system market as alternative platforms on which applications could be developed. (*See* Microsoft Br. at 2 (acknowledging that "potential" competitors arguably do have standing).) Novell does not contend that its WordPerfect or Quattro Pro applications had any potential to serve as an alternative platform to Windows. (*See* Microsoft Br. at 2.)

II. Certification Is Particularly Appropriate Here

From cases far afield of this one, Novell has lifted quotations stating that Section 1292(b) should be "strictly construed" and limited to "exceptional" cases. (Novell Opp. at 1-2.) As a leading treatise explains, however, these comments can be misleading: a

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[5] Novell argues that "Microsoft cites no case" denying standing to a plaintiff harmed by deliberate, illegal conduct "designed to protect" the defendant's market power. (Novell Opp. at 7.) This is simply wrong. The most obvious examples are *SAS of Puerto Rico, Inc.* v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 44-46 (1st Cir. 1995) (denying standing to "target" of anticompetitive conduct, whose product in one market threatened defendant's monopoly in a different market) and *AGC*, 459 U.S. at 537 (no standing, even though defendants "intended to" and did "cause harm" to plaintiffs by committing alleged antitrust violations, because *inter alia* plaintiffs did not compete in defendants' market). *See also* Microsoft Br. at 5-9.

"flexible approach to" granting certification "is far superior to blind adherence to a supposed need to construe [Section 1292(b)] strictly." 16 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3929 (2d ed. 1996); *see also id*. (noting that the "statute is not limited by its language to 'exceptional' cases"). In any event, the circumstances of this case make certification particularly appropriate. (*See* Microsoft Br. at 11-14.)

A. MDL Considerations

Novell argues that the "MDL policies" favoring interlocutory review as a means of promoting timely, efficient and uniform dispositions "are not in play here" because this is purportedly a "stand-alone" lawsuit raising "issues with no implications beyond their factual setting." (Novell Opp. at 9.) That argument is misguided.

To begin with, the standing and antitrust injury issues on which Microsoft seeks certification are also at issue in the *RealNetworks* case. (*See* Microsoft's Answer, Ninth Affirmative Defense ("RealNetworks . . . does not have standing") and Tenth Affirmative Defense ("RealNetworks . . . cannot demonstrate any antitrust injury").) Moreover, the Fourth Circuit will hear oral argument in September in the consolidated federal class action, *Kloth* v. *Microsoft Corp.*, another case in which the parties disagree on the application of the *AGC* standing factors.

More fundamentally, Novell's argument that "MDL policies" are "not in play here" wholly ignores the Fourth Circuit's leading case on the subject, *In re Food Lion, Inc.*, 73 F.3d 528 (4th Cir. 1996). That case involved "only one [transferor] circuit" (or, "possibly," two), *id*. at 534-35 (Butzner, *J*., dissenting); *see id*. at 531 (majority opinion), yet the court's concern for "efficient and uniform adjudication" in MDL cases was so strong that, without a request by any party, the court issued a writ of mandamus directing the

Judicial Panel on Multidistrict Litigation to re-transfer all remanded cases back to the transferee court so the Fourth Circuit could hear interlocutory appeals of dismissed claims. *Id*. at 532 n.10, 533. *In re Food Lion* also (i) held that "transferee courts in this circuit *must*," prior to remand, certify for interlocutory review "any decision" dismissing fewer than all of a party's claims, *id*. at 533 (emphasis in original) (citing Fed. R. Civ. P. 54(b)), and (ii) specifically suggested that transferee courts consider using Section 1292(b) as a "tool" to provide for efficient and uniform adjudication in MDL cases. *Id*. at 533 n.14.

B. Allegations of Old Conduct

The allegations in Counts I and VI pertain to conduct from the late 1980s to 1996; if they are timely at all, it is only because of 15 U.S.C. § 16(i). Novell does not dispute that the 1955 amendments to Section 16(i) express a "congressional policy" against "undue prolongation" of tolled claims. (Novell Opp. at 9 n.11.) And, contrary to Novell's contentions (*id*.), the U.S. Supreme Court in *Greyhound Corp.* v. *Mt. Hood Stages, Inc*., 437 U.S. 322 (1978) — a case Novell ignores — took a broad view of the congressional policy against "undue prolongation" of antitrust cases, applying it to the unusual question of whether a government petition to intervene in a suit between private parties should be treated as a suit by the government for purposes of Section 16(i). *Id*. at 335.

Finally, the only "irony" (Novell Opp. at 9 n.11) concerning the application of Section 16(i) to this certification motion is Novell's effort to use its own eight-year delay in filing this action as a reason to deny prompt appellate review to Microsoft. Novell argues that because Microsoft defended many antitrust claims similar to Novell's during the eight years Novell waited to sue, the pre-trial phase of this case may not take as long as it otherwise would. (*Id*. at 10.) This argument ignores that Section 1292(b) was intended to

be applied not only to antitrust cases alleging old conduct (*see* Microsoft Br. at 3 & Ex. 1 (S. REP. NO. 2434, pp. 5255-63) at 5256), but also to cases "where a long trial would be necessary . . . upon a decision" that, like the June 10 Opinion, "overrul[ed] a defense going to the right to maintain the action." H.R. REP. NO. 1667, 85th Cong. 2d Sess. (1958) at 1, *as reprinted in* 19 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 203App.02 (3d ed. 2005). In sum, this is a paradigmatic case for certification.

CONCLUSION

This Court should certify for 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 those claims to Caldera in 1996.

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