Exhibit 4

No. 06-1134
No. 06-1238

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NOVELL, INC.,

Plaintiff-Appellee,

— v. —

MICROSOFT CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANT MICROSOFT CORPORATION

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April 13, 2006

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No. 06-1134 / 06-1238 Caption: Novell, Inc. v. Microsoft Corporation

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Microsoft Corporation (name of party/amicus) who is Appellant (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   [X] YES [ ] NO
2. Does party/amicus have any parent corporations?
   [ ] YES [X] NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
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   If yes, identify entity and nature of interest:
   Novell, Inc. (Appellee)
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   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

David B. Tulchin/jr
(signature)
David B. Tulchin

April 13, 2006
(date)

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BRIEF OF APPELLANT MICROSOFT CORPORATION

Novell brought this action against Microsoft in late 2004, seeking treble damages under the federal antitrust laws. All six claims in the Complaint seek recovery based on Microsoft's conduct prior to March 1996. Four claims allege harm to competition in purported markets for "office productivity applications" (*i.e.*, word processing and spreadsheet software). Those four claims (Counts II, III, IV and V) were properly dismissed by the district court (Hon. J. Frederick Motz) because they were asserted long after expiration of the applicable four-year statute of limitations.

The remaining claims (Counts I and VI) seek damages for injuries to Novell's same "office productivity applications," based on the same alleged

conduct during the same pre-March 1996 period, but allege injury to competition in the market for personal computer ("PC") operating systems. In asserting these two claims, Novell seeks treble damages for injuries to products (Novell's WordPerfect word processing application and Quattro Pro spreadsheet application) that concededly did not compete — and could not have competed — in the allegedly restrained market for PC operating systems. Novell contended that the statute of limitations for Counts I and VI had been tolled by Section 5(i) of the Clayton Act (15 U.S.C. § 16(i)) because those claims pertained to the same PC operating system market at issue in a prior government suit.

Microsoft moved to dismiss Counts I and VI on the ground that Novell lacks antitrust standing to assert claims for harm to competition in the PC operating system market (as opposed to the distinct markets in which the pertinent Novell products competed). The district court declined to dismiss Counts I and VI, but acknowledged that "there is substantial ground for difference of opinion" about the correctness of its antitrust standing ruling. (J.A. 211.)[1]

The district court's antitrust standing ruling is clearly wrong as a matter of law. Word processing and spreadsheet applications did not compete in the market for PC operating systems — nor did they have the potential even to serve as a "platform" for general purpose applications, as the D.C. Circuit held that

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[1] References to the joint appendix are abbreviated as "J.A. __."

Netscape's Web browser and Sun Microsystems' Java technology did.[2] Thus, Novell's claims do not allege "antitrust injury" — a requirement for antitrust standing. In addition, Novell lacks antitrust standing in any event. Because dozens of other plaintiffs already have sought to enforce the antitrust laws in the PC operating system market, Novell — which seeks recovery for injury only to products outside that market — cannot possibly qualify as a "proper plaintiff under § 4." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n. 6 (1986).

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Utah, where this action was filed in 2004, had federal subject matter jurisdiction over Novell's federal antitrust law claims under 28 U.S.C. §§ 1331 and 1337. Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation transferred this action to the District of Maryland in April 2005. (J.A. 118.)

This Court has jurisdiction over Microsoft's appeal pursuant to 28 U.S.C. § 1292(b). On August 19, 2005, the district court granted Microsoft's motion under that statute to seek leave of this Court to appeal the district court's ruling on antitrust standing. (J.A. 211-14.) Microsoft filed such a petition on September 2, 2005, and this Court granted it on January 31, 2006. (J.A. 242.)

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[2] *United States* v. *Microsoft Corp.*, 253 F.3d 34, 54-55, 79 (D.C. Cir. 2001).

STATEMENT OF THE ISSUE

Did the district court err in holding that Novell has antitrust standing to assert a claim of competitive harm to the PC operating system market where Novell seeks to recover solely for injury to products that did not compete in — or even potentially compete in — that market, and where numerous consumers, competitors and potential competitors already have sued Microsoft for damages with respect to products in that market?

STATEMENT OF THE CASE

In November 2004, Novell filed this action in the U.S. District Court for the District of Utah, and it was thereafter transferred by the Judicial Panel on Multidistrict Litigation to the District of Maryland. Novell's Complaint seeks recovery solely for alleged injuries to its WordPerfect word processing program and Quattro Pro spreadsheet program — products that the Complaint often refers to as "office productivity applications." (J.A. 25, 74-75, 78-79, ¶¶ 24, 153, 155, 175, 177.) Four of the six claims in the Complaint — styled Counts II, III, IV and V — allege monopolization or attempted monopolization of the purported markets in which Novell's "office productivity applications" competed, *i.e.*, a market for word processing programs and a market for spreadsheet programs. The two other claims, Counts I and VI, are based on the same alleged conduct as Counts II through V and seek recovery for damage to the same Novell products, but based on

the theory that such conduct injured competition in the entirely distinct market for PC operating systems.

It is undisputed that all six of Novell's claims arose prior to March 1996, when Novell sold its word processing and spreadsheet products to Corel Corporation ("Corel") (J.A. 14, 73-74, ¶¶ 2, 150), and that the statute of limitations for federal antitrust claims is four years. *See* 15 U.S.C. § 15b. As a result, all agree that each of Novell's six claims is time-barred unless it was tolled by Section 5(i) of the Clayton Act (15 U.S.C. § 16(i)), by the filing of the U.S. Department of Justice's complaint against Microsoft on May 18, 1998 (the "DOJ Complaint").

Microsoft moved to dismiss all six Counts in the Complaint on January 7, 2005. Microsoft argued that the DOJ Complaint had not tolled Novell's claims regarding the two "office productivity applications" markets in which Novell's products competed. The district court agreed, dismissing Counts II through V as time-barred in a June 10, 2005 letter opinion (the "June 2005 Opinion"). (J.A. 207-209.)

Microsoft sought dismissal of Novell's claims of injury to the PC operating system market in Counts I and VI on different grounds. Specifically, Microsoft contended that (i) Novell does not have antitrust standing to raise such claims, because, among other things, the allegedly injured products did not even have the potential to compete in the PC operating system market; and (ii) Novell

does not own such claims, having sold them (along with its PC operating system business) to Caldera, Inc. in 1996. The district court rejected these arguments in its June 2005 Opinion. (J.A. 205-206.)

On August 19, 2005, the district court certified its antitrust standing and ownership rulings on Counts I and VI pursuant to 28 U.S.C. § 1292(b). (J.A. 211-14.) Microsoft filed a petition for leave to appeal, which this Court granted "with respect to the antitrust standing issue only" on January 31, 2006. (J.A. 242.)

Thereafter, Novell moved in the district court pursuant to Fed. R. Civ. P. 54(b) for an order allowing it to cross-appeal the dismissal of Counts II through V. The Rule 54(b) motion, which Microsoft did not oppose, was granted on February 13, 2006. (J.A. 243.)

By order dated March 7, 2006, this Court consolidated Microsoft's appeal of the antitrust standing ruling on Counts I and VI with Novell's cross-appeal of the statute of limitations ruling on Counts II through V. Pursuant to that order, this opening brief addresses only the issue raised by Microsoft's appeal: whether Novell's claim for damages to WordPerfect and Quattro Pro gives it antitrust standing to assert injury to competition in the distinct market for PC operating systems.

STATEMENT OF FACTS

As this Court well knows, there has been no shortage of private antitrust lawsuits alleging that Microsoft unlawfully monopolized or otherwise harmed competition in the PC operating system market, some brought by consumers and some by competitors or potential competitors in that market. There have been more than 70 cases filed in, or removed by Microsoft to, a federal court, including one case (discussed below) brought at Novell's behest by a third party that had purchased Novell's PC operating system claims. There also have been about 90 related actions prosecuted in the courts of 37 states.[3] Long after most of those cases were filed, Novell brought suit in November 2004 asserting that it, too, should be able to recover treble damages arising from injury to competition in the

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[3] This Court has heard six prior appeals in related private antitrust cases against Microsoft, all of which involved claims concerning products that competed in (or had the potential to compete in) the PC operating system market. *Kloth* v. *Microsoft Corp.*, No. 04-2566 (argued on Feb. 1, 2006); *Deiter* v. *Microsoft Corp.*, 436 F.3d 461 (4th Cir. 2006) (affirming district court's certification of consumer class); *Aikens* v. *Microsoft Corp.*, 159 Fed. Appx. 471 (4th Cir. 2005) (affirming district court's denial of motion to remand and dismissal of state-law claims); *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322 (4th Cir. 2004) (reversing district court's decision applying collateral estoppel to 356 findings of fact from the government case); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517 (4th Cir. 2003) (reversing district court's decision granting preliminary injunction to Sun Microsystems); *Dickson* v. *Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (affirming district court's dismissal of claims alleging conspiracy between Microsoft and certain computer manufacturers).

PC operating system market, even though the allegedly damaged Novell products never competed in that market.

A. Novell

Novell is a software company. Its principal products have long been server operating systems used to provide file and print services and user and group administration services to PCs in local area networks. Although Novell sought in the mid-1990s to diversify its product line by acquiring different types of software from other companies, those efforts were quickly abandoned.

1. Novell's Word Processing and Spreadsheet Applications

In June 1994, Novell acquired (a) the WordPerfect Corporation and its WordPerfect word processing application, and (b) the Quattro Pro spreadsheet application from Borland International Inc. (J.A. 29, ¶ 37.) Novell owned these so-called "office productivity applications" — the only products for which it seeks recovery in this action — less than 2 years, until March 1996, when it sold those products to Corel. (J.A. 14, 73-74, ¶¶ 2, 150.)

2. Novell's PC Operating System Business

From 1991 to 1996, Novell also owned a PC operating system that it acquired from Digital Research, Inc. (J.A. 72, ¶ 144.) This product, which competed directly with Microsoft's PC operating systems, was originally known as DR DOS (J.A. 72, ¶ 144), and was re-named "Novell DOS" in December 1993. *See Caldera, Inc.* v. *Microsoft Corp.*, 72 F. Supp. 2d 1295, 1304 (D. Utah 1999).

In July 1996, four months after Novell sold its "office productivity applications" to Corel, "Novell decided to get out of the PC operating system market." (J.A. 159.) It thus sold to Caldera both its (a) PC operating system business and (b) all "claims or causes of action held by Novell . . . and associated directly or indirectly with" Novell's PC operating system products. (J.A. 249-50, ¶ 3.1.) The terms of the transaction required Caldera to sue Microsoft on those Novell claims, and reserved for Novell a substantial portion of any recovery. *Novell, Inc.* v. *Canopy Group, Inc.*, 92 P.3d 768, 770, 773 (Utah Ct. App. 2004).

Caldera asserted Novell's antitrust claims against Microsoft in 1996, on the same day it purchased them from Novell. Caldera alleged that Microsoft had harmed "competition in the manufacture, sale and distribution of [PC] operating system software" by monopolizing that market in violation of 15 U.S.C. § 2 and by entering into "exclusive dealing arrangements" with others in violation of 15 U.S.C. § 1. (J.A. 292-93, 316-17, 320, ¶¶ 2, 74-75, 87.) Microsoft paid a substantial sum to settle that action in January 2000, and the proceeds were then split between Caldera and Novell. *Novell, Inc.* v. *Canopy Group, Inc.*, 92 P.3d at 770-71. Thus, Novell itself must be counted among the many participants in the PC operating system market who have sought and obtained recovery (albeit indirectly) for Microsoft's allegedly anticompetitive conduct in that market.

B. Novell's Complaint Against Microsoft in This Action

The Complaint in this action contends that Microsoft's anticompetitive conduct toward Novell (or its predecessors in the applications business) began between 1987 and 1990. (J.A. 27-28, ¶¶ 30-32.) There are no allegations of wrongful conduct directed at Novell after March 1996, when Novell sold WordPerfect and its other "office productivity applications" to Corel. (J.A. 14, ¶ 2.)

1. The Relevant Markets

Novell's Complaint defines three "relevant" antitrust markets: "the market for Intel-compatible PC operating systems, the market for word processing applications, and the market for spreadsheet applications." (J.A. 25, ¶ 24.) The latter two purported markets are often referred to by the Complaint as "office productivity applications" markets. (J.A. 25, ¶ 24.)

The PC operating system market and the "office productivity applications" markets are mutually exclusive. As Novell concedes in its Complaint, the products within those respective markets do not compete with one another in any way: "There are no practical substitutes for Intel-compatible PC operating systems," on the one hand, and "no practical substitutes for word processing applications" or "for spreadsheet applications," on the other. (J.A. 25-26, ¶¶ 25, 27, 28.)

The Complaint distinguishes PC operating systems from "office productivity applications" by explaining that the former "control PCs and provide the basic 'platform' for" applications "such as WordPerfect." (J.A. 14, ¶ 3; *see also* J.A. 25-26, ¶ 25; J.A. 86.) In contrast to PC operating systems, the Complaint defines "word processing applications" as "software that creates, edits, prints, and stores text-based documents" (J.A. 26, ¶ 27), and "spreadsheet applications" as "software that electronically organizes, displays, and manipulates numerical and other data." (J.A. 26, ¶ 28; *see also* J.A. 166-167 (concession by Novell's counsel that WordPerfect and Quattro Pro "were not related to [Novell's PC operating system product, DR] DOS. These were separate applications. . . . [T]hey were not related to DOS at all.")) In Novell's own view, the two types of products are very different, and Microsoft wholeheartedly agrees.

2. The Claims

The Complaint sets forth six claims:

- Count I, alleging monopolization of the PC operating system market;
- Counts II, III, IV and V, alleging monopolization and attempted monopolization of markets for "word processing applications" and "spreadsheet applications"; and
- Count VI, alleging exclusionary distribution agreements in violation of 15 U.S.C. § 1 that caused harm either to the PC operating system market, or one of the two purported markets for "office productivity applications," or some combination thereof.

(J.A. 74-79, ¶¶ 151-77.) Although Counts I and VI allege anticompetitive conduct in the PC operating system market, those claims — like all others in the Complaint — seek recovery solely for alleged injury to Novell's "office productivity applications." (J.A. 74-75, 78-79, ¶¶ 153, 155, 175, 177.)

3. Microsoft's Motion to Dismiss

The district court granted Microsoft's motion to dismiss Counts II through V — those alleging wrongful conduct in alleged markets for word processing and spreadsheet applications — but denied the motion as to Counts I and VI — those alleging wrongful conduct in the PC operating system market.

(a) The Dismissal of Counts II through V

In the June 2005 Opinion, the district court correctly ruled that Novell's claims for harm to competition in the alleged "office productivity applications" markets could not benefit from the antitrust tolling statute, 15 U.S.C. § 16(i), because among other things those antitrust markets are "distinct" from the markets at issue in the DOJ Complaint. (J.A. 207-209.) These claims were thus dismissed. (J.A. 208-209.)

(b) The Antitrust Standing Ruling

Because Counts I and VI allege harm in the same PC operating system market at issue in the DOJ Complaint, Microsoft did not argue that those two claims were time-barred. (J.A. 204-205.) Instead, Microsoft sought dismissal of Novell's claims concerning the PC operating system market on two other grounds:

Novell's lack of antitrust standing and its sale of the claims to Caldera.[4] As to antitrust standing, Microsoft pointed out that WordPerfect and Quattro Pro were not actual or potential competitors in the PC operating system market. Novell never disputed that basic point.

In its June 2005 Opinion, the district court recognized that in Counts I and VI, Novell is "not" seeking redress "for damage" to "any ... [PC] operating system," but nevertheless held that Novell has antitrust standing based on what it referred to as the "series of factors to be considered" under *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). (J.A. 205-206.)

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[4] There was some confusion in the district court concerning what market(s) are at issue in Count VI. Although Count VI does not specify a market, it alleges that Microsoft entered into exclusionary distribution agreements in violation of 15 U.S.C. § 1. (J.A. 78-79, Count VI ¶¶ 174-77.) As this Court has held, such a claim requires proof of harm to "competition as a whole within" at least one antitrust market. *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002). Novell provided no indication that Count VI might pertain to the PC operating system market (as opposed to the alleged applications markets) until oral argument, at which point Microsoft's counsel immediately responded that to the extent that were so, then Count VI should be dismissed for the same reasons as Count I. (J.A. 138-139.) In the district court's analysis of antitrust standing and ownership of claims, however, it adhered to the parties' approach in the briefs and thus referenced only Count I when discussing those issues. Subsequently, the district court acknowledged Microsoft's antitrust standing and ownership of claims challenges to Count VI as well when it certified its ruling for interlocutory appeal. (J.A. 211-14.)

In certifying its antitrust standing ruling for interlocutory appeal, the district court acknowledged that "there is substantial ground for difference of opinion" about its correctness. (J.A. 211.) This Court subsequently granted Microsoft leave to appeal "with respect to the antitrust standing issue only." (J.A. 242.)

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a motion to dismiss under Rule 12(b)(6). *Holly* v. *Scott*, 434 F.3d 287, 288 (4th Cir. 2006). Although the Court must assume the truth of well-pleaded facts, "'it is not . . . proper to assume that plaintiffs can prove facts that they have not alleged.'" *Estate Constr. Co.* v. *Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) (quoting *AGC*, 459 U.S. at 526).

SUMMARY OF ARGUMENT

Counts I and VI of the Complaint, which allege harm to the market for PC operating systems, are defective because those Counts seek recovery only for injury to Novell's "office productivity applications," which do not compete with PC operating systems in any way. A plaintiff does not allege "antitrust injury" where it seeks recovery only for damage to products that did not compete, or even have the potential to compete, in the relevant antitrust market.

Many actual participants in the PC operating system market already have sought to vindicate any public interest in redressing allegedly anticompetitive conduct by Microsoft in that market. Those actual participants include Novell itself, which recovered from Microsoft indirectly on the PC operating system claims it required Caldera to litigate. Under such circumstances, Novell would not be a proper antitrust plaintiff even if it could allege antitrust injury. The district court's antitrust standing ruling on Counts I and VI should be reversed.

ARGUMENT

Section 4 of the Clayton Act (15 U.S.C. § 15) does not provide a treble damages remedy to every plaintiff injured by an antitrust violation. Instead, courts have "put principled limits on the literally unbounded reach of" that statute by requiring plaintiffs seeking treble damages to show "[a]ntitrust standing." *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211, 219 (4th Cir. 1987). To satisfy the antitrust standing requirement, a plaintiff must at a minimum allege "antitrust injury," and also demonstrate other characteristics of a "proper plaintiff under § 4." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 110-11 & nn. 5, 6 (1986). Part of the "proper plaintiff" inquiry is whether there "exist[s] . . . an identifiable class of" persons other than the plaintiff who could more efficiently "vindicate the public interest" in remedying any competitive injury to the specified market. *Id.*; *AGC*, 459 U.S. at 542. Novell's Counts I and

VI, which are based on alleged harm to competition in the PC operating system market but which seek recovery solely for damage to products outside that market, do not satisfy either of these two requirements.

The district court recognized that Novell is seeking recovery "for damage not to . . . any . . . [PC] operating system but for damage to applications software," and acknowledged that "[c]ertainly, consumers and competitors in a given market are favored plaintiffs." (J.A. 205 (internal quotation marks omitted).) It also recognized that in *AGC*, the Supreme Court denied standing to a plaintiff who "'was neither a consumer nor a competitor in the market in which trade was restrained.'" (J.A. 205 (quoting *AGC*, 459 U.S. at 539).) Nevertheless, the district court held that Counts I and VI adequately allege antitrust standing because they meet other elements of what the court termed "the multi-factored test established by" *AGC*. (J.A. 206.) In reaching that conclusion, the district court made three errors. Specifically, it failed to recognize that (1) only damage to products in the relevant antitrust market may qualify as "antitrust injury"; (2) the absence of antitrust injury precludes Novell from establishing antitrust standing even if some other *AGC* factors are present; and (3) because dozens of actual participants in the PC operating system market already have sought to enforce antitrust claims against Microsoft, Novell would not be a "proper plaintiff under § 4" even if it could establish antitrust injury. *Cargill, Inc.*, 479 U.S. at 110-11 & nn. 5, 6.

I. Counts I and VI Do Not Allege "Antitrust Injury"

When the Supreme Court in *AGC* observed 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 of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *AGC*, 459 U.S. at 538-40 (citing *Brunswick*, 429 U.S. at 487-89); *see Cargill, Inc.*, 479 U.S. at 110 & n. 5. *Brunswick* holds that an antitrust plaintiff's "injury should reflect the anticompetitive effect" of defendant's actions, 429 U.S. at 489, and such an anticompetitive effect may only be assessed in a specifically defined market. *See Deiter* v. *Microsoft Corp.*, 436 F.3d 461, 467-68 (4th Cir. 2006) (noting antitrust injury requirement and explaining that "plaintiffs would have to define and prove a relevant market and then injury to competition in *that* market") (emphasis in original); *see also Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993) (holding that the only "way to measure" harm to competition is by reference to a properly defined market).

As set forth in *AGC*, the antitrust injury requirement of *Brunswick* is designed to advance the "central interest in protecting . . . participants in the relevant market." *AGC*, 459 U.S. at 538. Linking *Brunswick* to the Court's then most recent antitrust standing decision, *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), the Supreme Court explained that plaintiff in *McCready* suffered

antitrust injury under *Brunswick* precisely because she was a "consumer" in the restrained market. *AGC*, 459 U.S. at 538 ("McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services."). In contrast, plaintiff in *AGC* "was neither a consumer nor a competitor in the market in which trade was restrained."[5] *AGC*, 459 U.S. at 539.

From *AGC*, this Court and other Courts of Appeals have drawn the logical conclusion that only damages suffered *in the allegedly restrained market* can qualify as antitrust injury. This Court so held in *White* v. *Rockingham*

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[5] In *AGC*, the Supreme Court also clarified that because plaintiff in *McCready* was a consumer in the relevant market, *McCready*'s abstract description of standing in more "expansive" terms (*see, e.g.*, *McCready*, 457 U.S. at 472 (observing that Section 4 "does not confine its protection to consumers, or to purchasers, or to competitors")) was merely a "paraphras[e] of the language of § 4" and "added nothing to the even broader language that the statute itself contains." *AGC*, 549 U.S. at 529 n. 19; *see Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999) (noting this limitation by *AGC* on *McCready*'s broad language). *AGC* also clarified *McCready*'s use of an otherwise uselessly vague standing metaphor on which Novell relied in the district court. Specifically, *McCready* observed that "[a]lthough [plaintiff] was not a competitor of the conspirators, the injury she suffered was *inextricably intertwined* with the injury the conspirators sought to inflict on [the relevant] market." *McCready*, 457 U.S. at 483-84 (emphasis added). *AGC* "reinterpreted" the metaphor "as a legal conclusion," explaining that the *McCready* plaintiff's antitrust injury arose from her status as a "consumer" in the restrained market. *SAS of P.R., Inc.* v. *P.R. Tel. Co.*, 48 F.3d 39, 46 (1st Cir. 1995) (citing *AGC*, 459 U.S. at 539, and noting that *AGC* made the consumer point just "after a reference to" *McCready*'s metaphor). *McCready* therefore is of no help to Novell.

Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987) (holding that plaintiff "cannot prevail on his claim of monopoly in the product market of medical and surgical hospital services because he is neither a provider nor consumer of these services"); *see also Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995) (relying on *AGC* to find no "antitrust injury" where plaintiff was "not a would-be competitor" in relevant market). Parties like Novell "whose injuries are . . . experienced in another market do not suffer antitrust injury." *Ass'n of Wash. Pub. Hosp. Dists.* v. *Philip Morris Inc.*, 241 F.3d 696, 705 (9th Cir. 2001).

Indeed, as four other Courts of Appeals have stated, the requirement of damage in the relevant market is a "corollary" to the antitrust injury rule. As the Ninth Circuit put it, "The requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors."[6] Justice Alito, too,

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[6] *Ass'n of Wash. Pub. Hosp. Dists.* v. *Philips Morris, Inc.*, 241 F.3d 696, 704-05 (9th Cir. 2001); *accord Automated Salvage Transp., Inc.* v. *Wheelabrator Envtl. Sys.*, 155 F.3d 59, 79 (2d Cir. 1998); *Schuylkill Energy Res., Inc.* v. *Pa. Power & Light Co.*, 113 F.3d 405, 415 (3d Cir. 1997); *Elliott Indus. Ltd. P'ship* v. *BP Am. Prod. Co.*, 407 F.3d 1091, 1125 (10th Cir. 2005); *see also Bell* v. *Dow Chem. Co.*, 847 F.2d 1179, 1183 (5th Cir. 1987) (citing *AGC* for the proposition that "the parties that have standing to sue" are "consumers and competitors in the [restrained] market").

during his tenure on the Third Circuit, wrote that where a plaintiff is "not a competitor or a consumer in the market in which trade was allegedly restrained," the "alleged injury is not 'antitrust injury,' meaning injury 'of the type that the antitrust statute was intended to forestall.'" *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997) (quoting *AGC*, 459 U.S. at 540).

The rule requiring injury in the relevant market is broad enough to encompass injury to products that had the potential to compete in that market as well as those that actually competed. *See Thompson Everett, Inc.*, 57 F.3d at 1325 (finding no "antitrust injury" where plaintiff was not a "would-be competitor" in relevant market). Thus, the district court was wrong when it stated that if Microsoft's antitrust standing argument about Counts I and VI were correct, "it would seem . . . that Sun and Netscape also lacked antitrust standing to the extent they were not direct competitors in the [PC] operating system market." (J.A. 206.) The crucial difference is that Sun's and Netscape's products had the *potential* to compete in the PC operating system market because there was a chance they would evolve into alternative platforms for general purpose applications. *United States* v. *Microsoft Corp.*, 253 F.3d 34, 54-55, 79 (D.C. Cir. 2001). Novell has never contended that WordPerfect or Quattro Pro had any potential to serve as an alternative to PC operating systems. To the contrary, Novell pled that there were "no practical substitutes for" Windows. (J.A. 26, ¶ 25.) Similarly, Novell's

counsel conceded at oral argument that WordPerfect and Quattro Pro "were not related to" Novell's PC operating system product, DR DOS, "at all." (J.A. 166-167.)

The district court's ruling, apart from its misconceived references to Sun's and Netscape's claims, relied heavily on an alleged competitive threat to Microsoft posed by two Novell technologies that are *not* "office productivity applications": the "OpenDoc protocol" and the "AppWare development environment." (J.A. 205; *see* J.A. 34, ¶ 51.) These technologies allegedly possessed "cross-platform" characteristics that Novell claims would somehow allow them to compete with Microsoft's PC operating systems at some unspecified future date. But the salient fact about OpenDoc and AppWare for purposes of this action is that Novell is not seeking recovery for any injuries to them. Counts I and VI, instead, seek recovery solely for alleged harm to Novell's "office productivity applications" (J.A. 74, 78-79, ¶¶ 153, 175, 177), and the Complaint identifies only two such products: WordPerfect and Quattro Pro. (J.A. 14, 25, ¶¶ 2, 24.)

Indeed, when Microsoft argued in the district court that the claims asserted in Counts I and VI were owned by Caldera, which purchased all "claims or causes of action held by Novell . . . associated directly or indirectly with" Novell's PC operating system products, Novell explicitly disclaimed that it was seeking recovery for anything other than "office productivity applications." (J.A.

110 (sale to Caldera did not "include[] Novell's claims for injuries to its office productivity applications"); *see also* J.A. 159 (conceding that Novell was "out of the PC operating system market" after sale to Caldera).) That disclaimer extended to OpenDoc, which was at issue in the lawsuit Caldera filed against Microsoft at Novell's behest.[7] The district court relied on Novell's disclaimer in rejecting Microsoft's argument that Counts I and VI had been sold to Caldera, ruling that "[t]he fallacy" in Microsoft's contention was that "the claim[s] asserted" are "for damage not to DOS or any other [PC] operating system but for damage to applications software." (J.A. 205.)

Were there any doubt remaining about the scope of Novell's claims, it is eliminated by what Novell said to this Court. In opposing Microsoft's request for an interlocutory appeal, Novell asserted without equivocation that: "Count I is for damage to applications software." (J.A. 238.) Having restricted its claims to injury allegedly suffered by WordPerfect or Quattro Pro, Novell cannot now claim it is seeking recovery for injury to "platform" software products.

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[7] Caldera alleged that Microsoft "extorted onerous" nondisclosure agreements prohibiting software developers from using information about Windows in the development of technology "that is competitive with [Microsoft's], including the technology known as OPENDOC." (J.A. 467-468, ¶ 381.) Caldera also alleged that Microsoft sought to break up the consortium, known as "CIL," that Novell and others established "to create" OpenDoc. (J.A. 466-467 & 469-473, ¶¶ 378-80 & Ex. 391; J.A. 32, ¶ 46 (explaining that CIL was formed "to create OpenDoc").)

II. Novell's Failure to Allege Antitrust Injury is Dispositive

Subsequent to *AGC*, the Supreme Court clarified that antitrust injury is a "requirement" for antitrust standing. *Cargill, Inc.*, 479 U.S. at 110 & n. 5; *see Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 & n. 15 (1992) (explaining in RICO case that "antitrust injury" is a "requirement of Clayton Act causation"). Accordingly, this Court and other Courts of Appeals have ruled that because claims for damage to products outside the relevant market do not allege antitrust injury, plaintiffs lack antitrust standing to bring them. *White*, 820 F.2d at 104; *Barton & Pittinos, Inc.*, 118 F.3d at 184 n. 9 ("Because B&P fails the antitrust injury requirement, it would lack standing even if the other *AGC* ... factors favored it."); *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 704-05 (affirming dismissal for lack of antitrust standing on the "independent ground" that plaintiffs suffered no "antitrust injury"); *see also Thompson Everett, Inc.*, 57 F.3d at 1325.

Novell cannot overcome the absence of antitrust injury by alleging that but for anticompetitive conduct by Microsoft, WordPerfect's success in the "office productivity applications" market would have threatened Microsoft's monopoly in the entirely distinct market for PC operating systems. (J.A. 34-35, ¶ 52.) It is true that WordPerfect was a competitor to Microsoft Word, but such competition between two word processing applications has no bearing on Novell's standing to remedy wrongdoing in the entirely distinct market for PC operating

systems. *See, e.g., Exhibitors' Serv., Inc.* v. *Am. Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986) ("While it is true that the two firms compete, the requirement laid down in *Associated General Contractors* is that the plaintiff and [defendants] compete in the market in which trade was *restrained*." (emphasis in original) (internal quotation marks omitted)).[8]

Similarly unhelpful to Novell is the allegation that Microsoft "specifically targeted Novell" in response to the supposed threat posed by WordPerfect — an allegation on which the district court placed considerable weight. (J.A. 205-206.) As the Supreme Court explained in *AGC*, the "'availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the [defendant].'" *AGC*, 459 U.S. at 537 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 479 (1982)). That point was driven home by the result in *AGC*, with antitrust standing denied to a plaintiff that

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[8] The alleged basis of the incipient threat posed by WordPerfect to Microsoft's Windows monopoly — that WordPerfect was "being developed to run independently of any [PC] operating system, especially Windows," and therefore might team up with a Windows competitor (J.A. 205; *see* J.A. 91) — is in any event completely undercut by Novell's own admission that WordPerfect had always been capable of doing that: "WordPerfect was historically available on many different [PC] operating systems." (J.A. 34-35 ¶ 52; *see* J.A. 91 (WordPerfect "had a unique and successful history of being ported to competing platforms").) Novell's own contradiction of its theory of harm to competition provides yet another basis for denying it antitrust standing.

defendants "intended to" and did "cause harm" because, *inter alia*, plaintiff suffered its injuries outside the allegedly restrained market. *AGC*, 459 U.S. at 537.

Following the mandate of *AGC*, courts have held that plaintiffs cannot establish antitrust standing by alleging that their products were the targets of anticompetitive conduct. *See, e.g., Exhibitors' Serv., Inc.*, 788 F.2d at 578 ("[A]llegations of violation, harm and intent are insufficient as a matter of law to establish the plaintiff as a proper party."). *SAS of Puerto Rico, Inc.* v. *Puerto Rico Telephone Co.*, 48 F.3d 39 (1st Cir. 1995) is directly on point. In that case, plaintiff had developed a device to be used with pay phones that allegedly "threatened" a monopoly possessed by defendant, the local telephone company, in the market for long distance service accessed from pay phones in Puerto Rico. *Id.*, 48 F.3d at 41-42, 44. Accepting as true the allegation that defendant had engaged in anticompetitive conduct that harmed plaintiff, the Court of Appeals for the First Circuit nevertheless dismissed the complaint because plaintiff was merely a supplier to defendant's competitors in the allegedly restrained market, as opposed to being a competitor itself.[9] *Id.* at 44.

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[9] Toward the end of the *SAS* decision, the First Circuit hypothesized that a plaintiff suffering injuries outside the relevant market — in the court's words, a "second-best plaintiff" — might have standing in the rare case where there is "no first best with the incentive or ability to sue." *Id.* at 45; *cf. Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 76-77 (3d Cir. 2001) (questioning, in *dicta*, whether the rule requiring injury in the relevant market should be

(footnote continued)

In sum, antitrust standing cannot be predicated on the assertion that Novell in some broad sense was a competitor or a "perceived competitor" of Microsoft. (J.A. 206.) In the absence of an allegation that the Novell products for which Novell seeks recovery competed *in the same market* as Microsoft's PC operating systems, the claim must fail. The necessary allegation was not made by Novell, for all concede that the harmed products (WordPerfect and Quattro Pro) never competed in the PC operating system market. The district court missed this point.[10]

III. Novell Also Would Not Be "a Proper Plaintiff Under § 4 For Other Reasons"

As the Supreme Court has explained, "a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." *Cargill, Inc.*, 479 U.S. at 110 n. 5; *see Barton & Pittinos, Inc.*, 118 F.3d at 182

(footnote continued)
"absolute"). No Fourth Circuit decision indicates that standing is ever available to such a "second-best plaintiff." In any event, numerous "first-best" plaintiffs "with the incentive or ability to sue" Microsoft for harm to the PC operating system market already have done so.

[10] In invoking the undifferentiated concept of a "perceived competitor," the district court relied on *Reazin* v. *Hospital Corporation of America*, 899 F.2d 951 (10th Cir. 1990). (J.A. 206.) The correctness of *Reazin*'s standing analysis is doubtful, but the case is distinguishable from this one in any event. Plaintiff in *Reazin* — unlike Novell — "*was* a competitor of [defendant's] co-conspirators;" thus, *Reazin* "involve[d] a horizontal conspiracy among competitors to harm another competitor." *Id.*, 899 F.2d at 965 (emphasis in original).

("Even a plaintiff who can show antitrust injury may lack antitrust standing . . . ."). Thus, in "order to protect against multiple lawsuits," courts "should examine" factors "such as . . . the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4." *Cargill, Inc.*, 479 U.S. at 111 n. 6.

This factor — the existence of parties more directly harmed by allegedly anticompetitive conduct *in the PC operating system market* — also cuts strongly against Novell. As the Supreme Court stated in *AGC*, the "existence of an identifiable class of persons whose self-interest" might (or already has) "motivate[d] them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing" additional plaintiffs to sue because there is less likelihood that "a significant antitrust violation" will be left "undetected or unremedied." *AGC*, 459 U.S. at 541. Microsoft's allegedly anticompetitive conduct in the PC operating system market obviously has not gone "undetected or unremedied"; indeed, Microsoft has been sued for alleged harm to that market over one hundred times, including a Novell-mandated suit by Caldera in 1996 based on Novell's PC operating system business.[11]

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[11] Allegations that WordPerfect suffered derivatively as a result of injuries to non-Microsoft PC operating systems likewise cannot give Novell antitrust standing. *See Holmes*, 503 U.S. at 268; *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211, 219-20 (4th Cir. 1987).

Illogically, however, the district court ruled that the "more direct victims" 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." (J.A. 206.) That statement merely confirms that Novell suffered no antitrust injury in the PC operating system market. More importantly for present purposes, such reasoning deprives the "more direct victims" factor of all substance because any company would qualify as the "only victim" who can sue for harm to its own products.

The antitrust laws, of course, gave Novell standing to seek redress from Microsoft for any anticompetitive conduct that had an adverse impact on "the shape of the applications software market." Novell chose not to bring such a suit (*i.e.*, Counts II through V of the instant Complaint) until 2004, eight years after the allegedly injurious conduct. Although Novell had antitrust standing to assert those causes of action, its claims were dismissed for the entirely separate reason that they were barred by the four-year statute of limitations. It cannot conveniently evade the limitations bar by bringing a claim for harm to the same products in a market in which they did not compete.

CONCLUSION

This Court should reverse the district court's ruling that Novell has antitrust standing to recover for alleged injury to its "office productivity applications" on account of harm to competition in the PC operating system market. Counts I and VI should be dismissed for lack of antitrust standing.

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REQUEST FOR ORAL ARGUMENT

Microsoft respectfully requests oral argument. The issues raised by Microsoft's appeal of the district court's ruling on antitrust standing are important, and Microsoft believes that oral argument will assist the Court in its consideration of those issues.

ADDENDUM

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in relevant part, as follows:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. . . .

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1134, 06-1238 Caption: Novell, Inc. v. Microsoft Corporation

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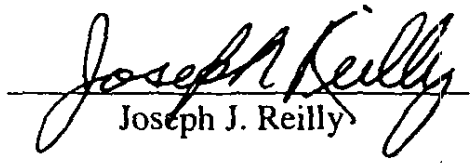

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