

Exhibit B

No. 10-1482

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOVELL, INC.,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,

Defendant-Appellee.

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

CONFORMING BRIEF OF APPELLANT NOVELL, INC.

Jeffrey M. Johnson
David L. Engelhardt
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200

R. Bruce Holcomb
ADAMS HOLCOMB LLP
1875 Eye Street NW, Ste. 810
Washington, DC 20006
(202) 580-8820

Charles J. Cooper
Counsel of Record
David H. Thompson
Howard C. Nielson, Jr.
David Lehn
COOPER & KIRK, PLLC
1523 New Hampshire Ave. NW
Washington, DC 20036
(202) 220-9600

Attorneys for Novell, Inc.

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On remand, however, the district court did a complete about-face, concluding that its “earlier ruling was wrong.” JA-371-72. The same district court that once found as a matter of law that the APA’s plain language cannot reasonably be interpreted, as Microsoft maintains, to assign claims for injury to the Business Applications, now held that the very same language cannot reasonably be interpreted any other way.

The district court had it right the first time, and the issue is still not a close one. The APA simply transferred to Caldera all of Novell’s products “associated with the DOS Business,” which the APA expressly defined as seven versions of DR-DOS and six specifically named companion DOS-based applications. Along with these “DOS Products,” the APA “assign[ed] to Caldera” intellectual property rights to, and “all revenues associated with,” the DOS Products. Likewise, the APA “assign[ed] to Caldera all ... claims or causes of action ... associated directly or indirectly with any of the DOS Products.” There was nothing complicated about the transaction: Novell sold its “DOS Business” to Caldera – the DOS Products, the intellectual property rights to those products, and the revenues and claims “associated” with those products.

The language of the APA is thus clear and straightforward, and it means precisely what it says. But the meaning of the APA is equally clear from what it does not say. The APA nowhere mentions WordPerfect or any other Business

Application, let alone any intellectual property in or revenues or claims “associated” with those products. They were not part of the deal.

The district court interpreted language assigning to Caldera all claims “associated directly or indirectly with any of the DOS Products” to include all antitrust claims alleging injury to *any* products Novell ever owned, caused by *any* of Microsoft’s anticompetitive conduct in *any* aspect of the operating system market. According to the district court, because Novell’s antitrust claims here allege that Microsoft targeted the Business Applications to preserve its monopoly in the operating system market, and because DR-DOS had once competed in the operating system market, the claims here are “associated” with the DOS Products and therefore were assigned to Caldera.

This strained interpretation, with all due respect, goes beyond a “far stretch,” for the plain language of the APA is not reasonably amenable to it. But even if the APA were so amenable, then the language would be ambiguous, because the district court’s construction is not *compelled* by the APA’s language. Consequently, the meaning of the APA would have to be resolved through extrinsic evidence.

And the extrinsic evidence – *all* of it – leaves no doubt that the district court’s initial reading of the APA was correct. Both parties to the APA unequivocally attested that it was intended to assign claims for injury *only* to the