IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

IN RE: MICROSOFT LITIGATION
NOVELL, INC. V. MICROSOFT CORPORATION
_____/

Case No. JFM-05-1087/MDL 1332
Tuesday, June 7, 2005
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:

On Behalf of Plaintiff:
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On Behalf of Defendant Microsoft:
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THE CLERK: The matter now pending before this Court is Civil Docket Number JFM-05-1087, Novell versus Microsoft

Corporation. This matter comes before the Court for a hearing. And counsel, I would just ask that you announce yourself before you speak, please.

THE COURT: Thank you. Mr. Tulchin.

MR. TULCHIN: Thank you, Your Honor. Good morning. May it please the Court, it's a pleasure to be here again, Your Honor. This is, of course, our Motion to Dismiss the Novell case. The complaint was filed in November of 2004 originally in the District of Utah, and transferred relatively recently to the Court here.

As Your Honor said in the San Francisco against Microsoft case in April, "There was no practical impediment preventing plaintiffs from instituting this action long ago." And the case that was filed by Novell --

THE COURT: I'm starting to think it's time for me to stop taking these new cases. Now is the second time in recent memory -- I've got to start reading my prior opinions to figure out what I meant.

MR. TULCHIN: I'll give you the cite. It's been reported.

THE COURT: Oh, no, no. It's not that. It's what I just did in the Peek case and now, from my reading, trying to figure out how I read that Lower Lake Erie case. It's one thing

to have to read cases, it's another thing to read your own opinions and not remember what you meant.

MR. TULCHIN: Well, after five years, Your Honor, of being involved in this --

THE COURT: Was there perhaps a practical impediment until the government case was resolved? Obviously, Microsoft is

alleged to have done various anticompetitive things over the years. Asking somebody to get into the fray of private antitrust litigation before things were sort of settled, that may have been a practical impediment.

MR. TULCHIN: Well, of course, Your Honor, I can't speak for Novell's motivations. I'm not purporting to do that. But I can say this, that five of the six claims here are for markets other than the PC operating system market for harm allegedly inflicted in those markets. And private plaintiffs in other cases, as the Court well knows, began bringing those claims involving applications, word processing software, and spreadsheet software more than five years ago. The government case involved that not at all.

Of course, some of the state's attorneys general brought a claim that was pending for approximately two months before they dropped it in 1998 against Microsoft, relating to those applications. That claim was dropped. But for purposes of the tolling provision, of course the only thing that counts are cases brought by the United States.

THE COURT: Well, the real, the real starting point for this case is November, 2003, is that right? Wasn't there a tolling agreement? Am I right?

MR. TULCHIN: Yes, Your Honor. But it's also --

THE COURT: I understand. Your point's the same.

MR. TULCHIN: Correct. Correct. There was a tolling agreement. Both sides agree that if our argument is correct about the limitations period, Claims Two through Six are defective because even assuming the tolling, the claims were brought too late.

And I might say, Your Honor, that I think the argument

that Novell makes here really is premised on two very illogical propositions. The first which comes up throughout their brief is that Claim One, though it may be defective, and I'll come to that in a moment, bears a real relationship to the claim made in the government case concerning the PC operating system business. Now, that arguably is correct. But Novell goes on to say that because Claim One bears a relationship to the government's claim in the DOJ case, then Claims Two through Six are saved because Claims Two through Six can benefit from tolling even if a different claim in the same complaint, and even if that claim is defective, has a relationship.

THE COURT: I will ask Novell's counsel about that. Of all of the issues on these motions, that seems to me to be the easiest one. I agree with you. You can't bring, you can't bring

untimely claims and just associate them in the same complaint with the timely complaints and say everything's timely.

MR. TULCHIN: Again, Your Honor, I certainly can't speak for Novell or for its motivation. But to my reading of the complaint, that is the reason Claim One is in the complaint to begin with, so that this argument so could be made. And I say that because Claim One seems to me to be clearly defective for two reasons. And really, the simplest and easiest reason is that Novell doesn't own the claim. That claim was sold in 1996 to Caldera.

The interesting proposition there, Your Honor, is that Novell says several times in their brief that Claim One is identical -- that's their word -- to the claim made in the government case, even though Novell's Claim One is for harm to the PC operating system market, but with respect to other

products that didn't compete in that market, namely Novell's office productivity applications. They say that's identical.

And then they say that their Claim One is not identical at all. It's very, very different from the claim that Caldera made for harm in the PC operating system business. And the Caldera claim, of course, is identical in many ways to the government case.

So you have a situation where Novell says that A is identical to B. B is certainly identical to C. There's no argument about that. But they argue that A and C are very

different; that because the claim they sold was a claim involving PC operating systems, that even though their complaint makes a claim in that market, it's very different from the claims sold because they allege harm to products that did not compete in that market.

And to go back to basics, Your Honor. The relevant markets in Novell's complaint, this is Paragraph 24 on Page 13, are defined as three: Intel-compatible PC operating systems, word processing applications, and spreadsheet applications. And then they say in Paragraph 24 that those last two are sometimes referred to as office productivity applications together.

Of course, the complaint has no allegations of any wrongful conduct after 1996. That's when both Word Perfect was sold and Novell's operating systems business was sold. The principal wrongful conduct in the complaint, it's 55 paragraphs, is headed --

THE COURT: It has to be 1994 to '96, right?

MR. TULCHIN: Yes, Your Honor, and that's really the point. That's when they owned these businesses. Word Perfect they owned for only that two year period, from '94 to March of

'96. And the operating system business they had from '91 until July, 1996.

THE COURT: Perhaps more accurately they can only claim damages '94 to '96.

MR. TULCHIN: I'm sorry, Your Honor. I couldn't hear.

THE COURT: I'm sorry. It's my fault. More accurately, they can clearly only claim damages from '94 to 96. I guess there's an open question to the extent they can rely upon prior conduct.

MR. TULCHIN: Correct. But they can't certainly rely on conduct subsequent to the dates of the sale, and that's my point. There are allegations in the complaint of conduct going all the way back to '87.

The government case, of course, involved principally Windows 98 and the bundling of Internet Explorer into Windows 98. And actually, when I say "the government case" when I meant to say what was the government complaint, the Department of Justice's complaint in the government case because it is true, and this is a little bit off the point, that Judge Jackson's opinion went off and covered much more ground than what the government alleged in its complaint. Whether that was proper or improper is not for today. But for purposes of tolling, what matters is a comparison of the two complaints.

I do have just a few slides, Your Honor. I'm not all that fond ordinarily of a lot of Power Point presentations but I thought this particular situation would lend itself to a few. If I so see number one.

What we've done here, Your Honor, is just copy from Novell's complaint at Pages 62 through 66 the headings that they

use in describing their claims for relief. And the point here is

8

that Counts Two, Three, Four, Five and Six are in markets other than the PC operating system market.

THE COURT: There's a general allegation in the government complaint about Microsoft did what it did in part to extend its monopolies into other software markets. I don't have quite the exact language. But that's true, isn't it?

MR. TULCHIN: There is an assertion in the complaint along those lines, Your Honor, but there is no claim made with respect to any other market other than PC operating systems, of course, and Internet, the so-called Internet browser market. The Court of Appeals eventually rejected the definition of the browser market that the government brought.

THE COURT: But that does raise a legal question in interpreting the relevant statutory language, matters, whatever it is, in any matter complained of. Does that mean there has to be a claim asserted in connection with that matter in order for there to be tolling?

MR. TULCHIN: Well, I think it does, Your Honor. I mean, the cases have all compared the claims made in the government case with the claims made by the private plaintiff in the later private case.

The assertion in the government case, there is sort of an offhand reference to other software markets. But that assertion alone, if it was enough to constitute tolling, would effectively mean that all claims against Microsoft in any market

9

for any conduct, no matter when they occurred or whether they

pertained to PC operating systems at all, would always be tolled for one year beyond the end of the government case.

THE COURT: And again, I'm not sure this is a sensible distinction I'm drawing. But I'm trying to puzzle through this and I do find it puzzling. The claims are not, and I'll hear from the other side, they're not congruent. Certainly, you're talking about different markets for different products. But the conduct that's alleged, at least in part, is the same, giving rise to alleged, to claims in what are clearly related markets.

MR. TULCHIN: Well, Your Honor --

THE COURT: So the question then becomes, is that enough, it would seem to me, under the statute? And I'm not sure all of the other cases really provide me with a lot of guidance. There are cases where if it's on the West Coast, you don't look at the East Coast. On the other hand, there are cases where if you looked at the domestic market, and that was the only focus of the government case, you could bring a private right of action for something that happened on an international market. So I'm not sure how I can reconcile all of that.

MR. TULCHIN: Well, I'm more than happy to provide some reconciliation. I want to make a couple of comments, though, if may, Your Honor.

First, I think it's essential to remember how important it is in an antitrust case, and particularly in monopolization

cases, to define the market. The market, after all, is sort of the whole shooting match in many ways. And without a definition of the market, an antitrust case, again particularly a Section Two case, has no boundaries or meaning or scope or definition. It is the most fundamental part of the case.

In fact, in a case that we did not cite in our brief,

it's not otherwise relevant, I note that Novell itself prevailed in an antitrust case brought against it in the District of Utah a few years ago for exactly this reason; that the plaintiff did not adequately define and prove the market. And the reason I make that point, of course, Your Honor, is that when the Court said these are related markets, I sort of stumbled a little bit or maybe paused a little bit over the phrase "related markets."

It's quite true that windshield wipers for new automobiles perhaps are a related market to the tires that are installed by manufacturers on automobiles as well. And there are many other things much, much closer, of course.

But "related" isn't the same as "overlapping." And I think the right word to use here is "distinct." "Distinct" is the word used by Areeda and Hovenkamp and I think it does capture this concept perfectly. That if the markets overlap in some way, and in the case of the national and international situation that Your Honor described, one may have been a sub-market of the other. In the case of the Refined Petroleum Products, there was an East Coast market defined in the government complaint.

Actually, I think the government complaint defined a market consisting of the East Coast and the Gulf coast. And the private plaintiffs brought an action involving the market for refined petroleum products. There was a huge overlap among the defendants. They were all almost the same. The products were the same. The time period was the same. The only thing different was the geographical scope of the market. And that in itself was viewed by the Court as sufficient, to use Areeda's word, to constitute a distinct market.

The market is so basic in an antitrust case that unless

there is some overlap between the claims in one case and the claims in the other, the rest of it, that is the type of conduct alleged, is almost always going to be similar, in any event.

THE COURT: Isn't this case unusual in that the relationship, it's not only the products are distinct, but it's been said a lot of times, I don't know who uses the word now, but the symbiotic relationship between the applications market and the operating system market, the conduct, they are related in a way that I'm not sure has existed in any prior case, in the international versus domestic case, in the West Coast case versus the East Coast case.

Here, the very conduct which Microsoft itself allegedly recognized in the famous moat language of Mr. Allchin, that there is a relationship that is somewhat unique to the nature of the markets in this particular series of cases.

MR. TULCHIN: Well, I'm not sure it really is all that unique, Your Honor, because there are many products that are just downstream from others. And if you monopolize an upstream product, you then gain power in the downstream perhaps.

But the key point here, I think, Your Honor, in response to your question, are really two points, if I may. The first is that Novell alleges wrongdoing, again in the period '87 until '96, when they sold these businesses. And everyone agrees that during that period it was in Microsoft's interest to do exactly the reverse of what Novell alleges.

The whole theory of the government case, the applications barrier to entry, was that it was in Microsoft's interest to make sure that as many applications as possible would be written to Windows.

THE COURT: That's certainly what I wrote once.

There's no question about.

MR. TULCHIN: Yes, sir, that is something that you wrote.

THE COURT: But was I right? If you want to start monopolizing not the operating system market but you want to monopolize the applications market, then you do have a motivation to, to exclude other applications.

MR. TULCHIN: Well, Your Honor, I'm not shy about saying I think you were right.

THE COURT: At least on that occasion.

MR. TULCHIN: On this occasion in particular, as well as many others. But certainly here, the logical flaw in the fundament of the theory is that somehow Microsoft was trying to keep Novell away from Windows, to deprive Novell of an opportunity of writing its software to Windows, which is the very thing that the government alleged and many, many other cases since have alleged did not occur. It's the opposite, since the theory of the government case and of many other cases has been that the applications barrier to entry was exactly the success Microsoft had in getting applications developers to write to Windows so that no other operating system would be able to compete with all those applications available on it.

And the second thing, Your Honor, is that I do think that this is a case, with all respect to my colleagues, where it is important to follow the Supreme Court's admonition about the possible sham nature of a second complaint. After all, these conduct allegations that go on and on in Novell's complaint, it is 60-some pages long, are written precisely in order to make it appear that there is some similarity between these claims and the

government case. Novell drafted this complaint with this discussion today in mind.

And again, Count One, the count for harm to the PC operating system market, the claim that was so clearly sold to Caldera, is in the complaint for this reason.

So if the focus is alleged tactics or conduct and if a

private plaintiff can simply repeat allegations in the government case without more, let's say, searching analysis of the nature of their claims as compared to the claim made by the government, then indeed the statute of limitations can be used, as the Supreme Court said, through a sham complaint to continue on.

Now here it is nine years, Your Honor, after these businesses were sold.

THE COURT: Let's count it as eight. That was my point before.

MR. TULCHIN: You're right. We should count it as about eight. And the claims here, and this was the point of my first slide, Your Honor, in Counts Two through Six, are for other markets, not for the PC operating system market. They are in markets distinct from, different from the market involved in the government case.

If I could, in slide two, this is just to flesh out a little bit what Novell does say. I'm sorry. This is slide two, but it pertains to the first count. And as Novell says in their brief and certainly in their complaint, their claim for harm in the PC operating system market is not for products that competed in that market but for wrongdoing in that market, but injury to products that are office productivity applications.

Novell says that that makes this claim different from the Caldera claim that, the claim they sold to Caldera, but the

same as the government case. Again, there's just no logic to it.

15

And to remind the Court of what Section 3.1 of the Asset Purchase Agreement says -- this is just a portion of it, Your Honor, it goes on for quite a while. But it is the most important sentence for purposes of our motion. This is the July, 1996 agreement between Novell and Caldera involving the sale by Novell of all its operating system products to Caldera. In Section 3.1., after talking about a sale of the product, it says, also at closing, Novell shall grant, transfer, convey and assign to Caldera all of Novell's right, title and interest in and to any and all claims or causes of action held by Novell at the closing date -- that's in July, 1996 -- and associated directly or indirectly with any of the DOS products or related technology. Now, the sentence goes on. But I think --

THE COURT: Let me ask you a question. I'm not doing, this is not just cute but I sort of wonder about.

MR. TULCHIN: Yes, Your Honor.

THE COURT: Do you consider Caldera was Novell's agent in the Caldera litigation? And if so, as I understand it, similar language is used in the release that was signed by Caldera. So I understand your focus here, perfectly appropriate, they don't own it because they transferred it. But also, to the extent that Caldera was the agent of Novell, there actually is a contract with Microsoft.

MR. TULCHIN: Yes. And I think that's right either way you look at it, Your Honor. I think the two are sort of the same

16

side of, sorry, different sides of the same coin is what I meant

to say. Because here's the sale to Caldera. And I want to come to the agreement, the settlement agreement with Caldera after Caldera's sued.

But here's the sale in July, '96. And it says all causes of action held by Novell and associated directly or indirectly with any of their PC operating systems.

THE COURT: Theoretically, at least, I'm not sure how it would work, it would have to be signed, it would have to be a very carefully drafted complaint and there would have to be a factual basis for it, but conceivably, I guess, if they have standing at all, which is your second issue, conceivably they, Novell could say we are suing for damage caused to our applications software by virtue of harm caused to operating systems other than DOS. And I don't quite know how that would work. But certainly that transfer in the release doesn't cover other operating systems.

MR. TULCHIN: Well, actually, Your Honor, I don't agree. I think it's broad enough when it says "associated directly or indirectly with any of the DOS products" to include all PC operating systems, that is any injury in the market for PC operating systems. The DOS products, that's a defined term in the agreement. And it is operating systems, including DR-DOS and Novell-DOS, that competed in that market.

But even if, Your Honor, you're correct, that the

language is narrower than I think it is, yes, I think in a sense that's what Novell is saying; they can't get out of the trap because if they're correct that their claim is for injury in the PC operating system market but injury to other products, then they have no standing. But even, even if they had standing, Your

Honor, this sale is broad enough to amount to a sale of the claim that's encapsulated right now in Claim One, cause of action one, in the Novell complaint. And that's really what the Caldera case was about.

You know, Caldera sued Microsoft right after this sale and alleged harm to the DOS products in the PC operating system market. Now, you might say, well, they didn't allege harm to the office productivity applications products in that market. And getting past the issue of whether they had standing to do so. It would be just a sort of classic splitting of a cause of action for Caldera to come back here a second time and say, well, we can sue again for harm to the PC operating system market. We sued you once for harm in that market caused to products A and B, now we're going to sue you again for harm in that market caused to products C and D involving the same conduct, the same time period, etc.

I don't think that Caldera can get away with it and I don't think Novell can any more than that.

If we could have the next slide, please. The settlement agreement -- well, I skipped over the fact, of course,

that Caldera sued Microsoft, the case went on for sometime. It was settled in early January of 2000. And I recognize, Your Honor, that the Caldera/Microsoft agreement isn't in any legal, jurisprudential way binding on Novell. But I do think it's interesting that when those two parties settled, Caldera referred to the claims that we're talking about now, that it had purchased from Novell, as the Novell claims. And it gave Microsoft a release with respect to any claims that have been asserted in the action or that are based on, arise from or otherwise relate directly or indirectly to the facts alleged in the action,

including, without limitation, the Novell claims.

Again, this release is, if Caldera came back into Court and said, we want to start a second case involving office productivity applications in the PC operating system market, the release would be broad enough, clearly, to bar that.

And yet Novell, which shared in the proceeds of this settlement, Novell had to sue Caldera to get what it claimed was its proper share, and it did so. It sued Caldera, by that time it was called the Canopy Group. It sued Caldera in Utah in state court and it prevailed. And the court there found that the central purpose of the '96 asset purchase agreement from Novell to Caldera was to pay Novell a percentage of the recovery that Caldera ultimately received from Microsoft.

So not only did Novell sell this claim, but this is truly an unusual situation where, after selling it and retaining

an interest in the proceeds, Novell, in fact, obtained payment for the very claim that they're now reasserting here against Microsoft.

Again, I'm not a mind reader, Your Honor, and I don't purport to know for sure. But it does seem to me that this complaint is written with these two things in mind. One, let's get into the complaint some claim that looks like the government case. It's a PC operating system claim. And we'll say that we're suing for Microsoft's unlawful monopolization of PC operating systems. But we have a problem, we, Novell. We already sold that claim, in fact then recovered on it. So we'll say that the claim is for harm to products that don't compete in that market.

And I think what Novell does is they sort of catch

themselves coming and going. They either sold the claim or they don't have standing or, in fact, both, which I think is the case here. And because Claim One is in the nature of a sham, it's in there only so that, although it's clearly defective for two reasons, it's in there only so that my colleague, when he gets up to argue, and I don't know what he'll say, of course, Your Honor, but I anticipate that he will be able to point the Court, as you were saying earlier, to paragraphs in his complaint that pertain to the PC operating system market, because there are many, many of them in this very long complaint, and say, look, isn't this very similar to what the government alleged in the DOJ complaint.

And it is similar. But again, that similarity can't save Claims Two through Six. The Statute of Limitations here, Your Honor --

THE COURT: How about Claim Six? Isn't Claim Six the OEM exclusive agreement?

MR. TULCHIN: It is, Your Honor. And Claim Six, again, makes clear that the claim there is for harm to the office productivity applications. But the market is the PC operating system market. They allege a grievance between Microsoft and others, that is OEM's, I believe, for distribution of PC operating systems. And they say that was a bottleneck for Novell to get through.

But I think Claim Six falls in the same category of Two through Five, Your Honor. It is a claim in a distinct market.

I should say, Your Honor, because, of course, in talking about, in talking about tolling --

THE COURT: But with alleged defects in another market. Because by virtue of the fact that Windows gets installed with the OEM's, then Microsoft Word becomes the word processing program of choice.

MR. TULCHIN: Well, but Your Honor, I think you get back into a standing problem if you take this sort of too far away. I mean, Novell either has the problem that the claim is in the PC operating system market, and if so that's a claim that they sold, and on top of that it's a claim as to which they have no standing because they've alleged harm to products that don't

compete in that market, or Claim Six is a claim with respect to an entirely distinct market, the market for office productivity applications, the same markets that they refer to in Claims Two, Three, Four and Five. And if it's in the office productivity applications market, then it's defective as well because of the Statute of Limitations.

So I think, again, there's no way for them to thread that needle. It's either a PC operating system claim like Count One and defective for the reasons that Count One is defective, or it's an office productivity applications claim and barred by 15 USC Section 15-B.

Your Honor, in talking about tolling, in talking about tolling, sometimes it's sort of easy to lose sight of the more fundamental principle before you get to tolling, or whether or not there is tolling, which is that there are important policies behind the limitations period. And of course that's true not just in the antitrust world, but with respect to almost all legal claims that a litigant can bring. 15 USC 15-B provides that an antitrust suit, quote, "Shall be forever barred unless commenced within four years after the cause of action accrued", unquote.

And of course the causes of action here had to accrue no later than 1996 because that's the year that Novell got out of all of these businesses. The lawsuit was, of course, brought in

November of 2004.

And tolling is supposed to be a limited exception or

suspension, let's say, to the four year Statute of Limitations period. And to look at slide five for a moment. There are only seven, Your Honor, so we're getting there.

The point that we wanted to make to the Court about the tolling provision, again, perhaps we're preaching to the converted here, Your Honor, but the tolling provision doesn't talk about one complaint being related to the government complaint; it talks about rights of action. So it says the running of the statute of limitations in respect of every private or state right of action arising under the antitrust laws shall be suspended. And, of course, the suspension only applies when there's a real relation between the claims.

And then, again, to go back, and I know I touched upon this briefly, but in slide six, I think this is something that is not only worthy of note but, again, Your Honor, I think dispositive of our motion with respect to Counts Two, Three, Four, Five and Six. The Areeda and Hovenkamp treatise, which is widely recognized as authoritative, it doesn't have the force of law, of course, but many courts have referred to or relied on it, does say in black and white that if the claim in the private case arises in a market distinct from the market involved in the U.S. case, then there is no tolling. And Areeda and Hovenkamp say that without qualification or ambiguity.

On Page 20 of Novell's brief, Novell recognizes this principle, they call the proposition unremarkable. And they say

where a private suit involves different offenses or arises in a distinct market, there is no tolling. That's our position as well, Your Honor. We think Areeda's correct there. And at least to my understanding of the complaint in this case, Counts Two through Six make claims in markets that are distinct from the PC operating system market.

That's why Paragraph 24 of Novell's complaint very carefully defines the market involved in the Novell case. Actually, I should say markets, plural. It defines three of them. And it doesn't say that they overlap; they don't. Your Honor has dealt with a similar contention. I know that over these last five years we've been through lots of different sort of iterations of different claims.

But in 2003 Your Honor said, in a different context, it was a class certification motion made by lead counsel for the consumers, but Your Honor said that the office productivity applications and PC operating systems are in, quote, "separate markets", unquote. That's at 214 Federal Rules decision at Page 374.

And yes, the markets are related. I mean, it would often be the case that if there's the same defendant involved, it's quite conceivable that markets would be related. But they're different markets and different products. Novell itself has acknowledged that in the way they've drafted the complaint. And again, because the whole concept of what the market is is so

basic, it's not, in an antitrust case, it's not the sort of concept that can be sort of fuzzy around the edges. You have to define your market. You have to say what it is. And where the markets are distinct, by definition the claims made in a private case do not relate closely enough to the claims made in the

government case to justify the application of the tolling provision which, after all, is an exception to the general rule about the limitations period.

Just as the last slide, Your Honor, and then I'll be pretty close to finish --

THE COURT: Let me ask this.

MR. TULCHIN: Yes, sir.

THE COURT: Could a middleware developer other than Sun or Netscape have brought an action and said it had been tolled?

MR. TULCHIN: Yes, Your Honor. There's no doubt that if you said that you had middleware, and office productivity applications by definition are not middleware, they have to run on top of an operating system, they can't replace or substitute for the operating system, but if you have middleware and you brought a claim for harm to your middleware product in the PC operating system market, you would benefit by the tolling provision. There's no question about it. You would have one year from the end of the government case. I think Novell says the government case ended in November, 2002.

THE COURT: Even though the focus of the government

case was primarily upon activities in that regard with Sun and Netscape?

MR. TULCHIN: Yes. Yes. You would be able to benefit from tolling. And in fact, Count One here, although I struggle with the meaning of a claim for harm in the PC operating system market to products that aren't in that market, but that claim, Count One in Novell's case arguably does benefit from the tolling provision because it is in the same market, the PC operating system market, that the government defined in its complaint filed

in 1998.

So as to Count One here, I don't think that these office productivity applications are middleware. But whether they are or they aren't, arguably Novell benefits by tolling. It doesn't say Count One, which is defective for two other reasons and most clearly because the claim was sold and then released and then Novell was paid for it.

But yes, the tolling provision would apply to claims for injury to middleware if the claim was unlawful monopolization in the PC operating system market. There's no question in my mind.

Claims Two through Six here are not those sort of claims. And the reason I put up slide seven was just to go back to the government complaint in 1998. The DOJ made no claim in the markets that are defined by Novell in Claims Two through Six or anything like them. There were two markets, operating systems

and browsers, and that's all. No claim for office productivity applications.

In fact, the DOJ knew that others were making a claim in those markets because the attorneys general of 20 states, when they filed their complaint on the same day as the Department of Justice, included claims in office productivity applications markets. The DOJ deliberately did not do so, for whatever reason. The attorneys general later dropped that claim in May of '98. But certainly, Novell doesn't argue that they can benefit from the fact that parties other than the United States, the tolling provision is clear on this, that parties other than the United States made those sort of claims.

So just in conclusion, Your Honor, there aren't a huge number of reported cases that flesh out the meaning of the

tolling provision. There are not. There are cases out there, though, that are helpful. The Charlie's Tour case from the District of Hawaii is helpful.

I think the Petroleum Products case that we talked about from the Central District of California is dispositive here because if there's no tolling where the products are the same and defendants are the same and the conduct is the same, but the only difference in the markets is geographical, West Coast as opposed to East Coast and Gulf Coast, then there certainly is no tolling when the markets are distinct, to use the Areeda word.

Just one other quick point, Your Honor, about standing.

We haven't talked about this at great length. But the principal argument, as I read Novell's brief, that it makes about standing with respect to Count One is based on its reading of two cases, which I know Your Honor has struggled with before. We all have struggled with them. One is the Third Circuit's case, decision in the Lake Erie case. And the other is the U.S. Supreme Court's decision in McCready.

Since the dates of those decisions, the courts have been quite clear that, in order to have standing, one must be a consumer or a competitor in the asserted market. The Associated General Contractors case is clear about that, one year after McCready, and indeed says that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action.

I know I've been going on for a while but I just want to point out three decisions by U.S. Court of Appeals exactly on point. The Fourth Circuit decision in White against Rockingham, 820 F.2d. 98 at Page 104, from 1987, saying that Dr. White could

not maintain his antitrust action, quote, "because he is neither a provider nor a consumer of these services", unquote. Again, competitor or consumer.

The two other cases are Lucas against Bechtel from the Ninth Circuit in 1986, 800 F.2d. 839, at Page 844. And perhaps most analogous to our case SAS of Puerto Rico against the Puerto Rico Telephone Company, 48 F.3d 39, and particularly at Page 45,

from the First Circuit in 1995. The SAS of Puerto RICO case was, in fact, a standing case but there the markets were very closely related. The allegation was unlawful monopolization in the long distance telephone service market and the provision of pay phone service market. And the plaintiff was in the business of upgrading and maintaining pay phones. So if the defendant successfully monopolized the pay phone market, that clearly was going to impact a plaintiff whose business it was to maintain pay phones. And yet the First Circuit threw the case out on standing grounds, saying, again, that the list of those who may be derivatively injured but are denied standing is much, much longer than the plaintiffs who are permitted to have standing. And the list of those permitted to have standing, according to the First Circuit, again, like AGC, says, are competitors or consumers.

Your Honor, thank you very much for your time. Counts Two through Six cannot benefit by tolling. They're in distinct markets. There is no reason they cannot have been brought many, many years ago. Certainly, they were all sold, these claims were sold many years ago.

And Count One, though it might benefit from tolling because it's in the PC operating system market, Count One is defective both because of lack of standing and because Novell doesn't own the claim, it sold it and benefitted from the later

lawsuit. Thank you, Your Honor.
THE COURT: I think you said it once in your brief.

29

You don't really think that the claims in Counts Two to Six were sold --
MR. TULCHIN: No.
THE COURT: Except for events after 1996.
MR. TULCHIN: I'm sorry, Your Honor. Maybe I'm missing --
THE COURT: I think you misspoke. There actually was a reference in the memorandum, I think, to the same thing. The counts in the Claims Two to Six were not sold.
MR. TULCHIN: Well, actually, Your Honor, they might have been sold. The agreement between Novell and Corel -- thank you.
THE COURT: Oh, you don't know the answer to that.
MR. TULCHIN: Correct. Because the sale in '96 --
THE COURT: You don't know what the details of that sale were.
MR. TULCHIN: Correct.
THE COURT: I just want to make sure I understood.
MR. TULCHIN: It wasn't a matter of public record. We don't have it. And we haven't made any argument that those Claims Two through Six were sold.
THE COURT: I misunderstood. Either you misspoke at the end or I misheard you, but I understand
MR. TULCHIN: I may have misspoke, Your Honor. If so, apologize.

30

MR. MARQUIS: Good morning, Your Honor. While we are setting up our slides, I would like to introduce you to the people sitting at our counsel table. First like to introduce myself. I'm Milton Marquis and I'm at the Dickstein Shapiro law firm. It's an honor to be in your courtroom. I think this is first time that we've been here.

THE COURT: Nice to have you here. You've had some ambivalence whether you wanted to be here but you're here.

MR. MARQUIS: Well, we're happy to be here, Your Honor. To my far right is Bruce Holcomb, who's also a partner at the Dickstein Shapiro law firm. Ryan Richards, who's the Deputy General Counsel for Novell. And Miriam Vishio, who's a colleague of mine at Dickstein and Shapiro.

MR. HOLCOMB: And it's the non-lawyer who can use the computer.

THE COURT: Yes. One person with some real skills.

MR. MARQUIS: That's right. We're a little bit challenged when it comes to computer.

THE COURT: Well, you've been kept out of the market.

MR. MARQUIS: That's right. We're just switching.

Good morning, Your Honor. I would like to start by first putting on the projector the language from the tolling statute. And the tolling statute makes clear that a private plaintiff satisfies the tolling requirement if its action is based in whole or in part on any matter complained of by the

government. And this means that a private plaintiff is not required to bring the identical action, the same action. All that's required is that if the government complained of it, the private plaintiffs can avail themselves of the tolling statute.

The government case involved Microsoft's very broad, anticompetitive campaign to obstruct all applications that threatened its operating system monopoly. Very broad, government made it very clear. And Microsoft was, the government also alleged that Microsoft extended its operating system monopoly that it had unlawfully maintained by virtue of this very broad anticompetitive campaign into other software markets. It's very clear in the government complaint that it involved other software markets.

The Supreme Court in the Leh decision instructed that courts should give full effect to the terms of the statute. That is, they should give full effect to the broad terms of the statute itself that private actions that are based upon, in part, any matter complained of satisfy the tolling requirement, and warn against a stingy interpretation, interpretation of that language.

The tolling provision satisfied a very important policy objective of Congress. The tolling statute first appeared in the Clayton Act in 1914. President Woodrow Wilson wanted to make sure that that was part of the act in order to promote the very important goal of promoting private antitrust enforcement.

My colleague indicated that there was no, quote, "practical impediment" to Novell bringing this case earlier. The tolling statute encourages and incentivizes private plaintiffs to do exactly what Novell and many other companies that have been harmed by Microsoft's anticompetitive activity to do; that is, wait until the government brings its action with the resources and the authority of the federal government to resolve questions of law, questions of fact, that would impact an action brought by Novell. And that's precisely what Novell did.

Novell waited until the government action was completed, until all appeals were completed, and then brought its action to avail itself of the evidence in the government complaint, to avail itself of Judge Jackson's very voluminous findings of fact, to avail itself of the testimony offered by the government's fact witnesses and experts, and to use that evidence, to use those materials generated in the government action in its action.

The Supreme Court has made it clear that all that is required is that the plaintiff, the subsequent plaintiff action involve the same subject matter. That's what the Supreme Court has instructed.

The subject matter of the government case was Microsoft's broad campaign to obstruct any application that threatened its operating system monopoly. The subject matter of the government case was Microsoft's anticompetitive campaign to

extend that operating system monopoly into other software markets.

Novell has alleged the exact same conduct. The Novell case involves the same subject matter as the government case; that is, Novell office applications were among those other markets into which Microsoft extended its operating system monopoly. And in the last Circuit Court case that involved the tolling statute, the Eleventh Circuit confirmed that if there is a significant, although incomplete, although incomplete, overlap of subject matter, the statute is tolled even as to the differences.

Your Honor, there's many overlaps between the Novell action and the government action. And we have listed, we've

listed those. The Novell action involves and alleges the same operating system monopoly count as the government action.

THE COURT: But you would agree that simply, if that count was without merit, which you, of course, you think it does have merit, but merely the inclusion of that count would not save the complaint if the other counts were not saved by tolling?

MR. MARQUIS: The courts, and there's not a great deal of case law on this issue, we certainly acknowledge that, Your Honor. But the preceding case, an Eleventh Circuit case that says that if there's an overlap of subject matter, we have overlap by virtue of Count One, that is the operating system count, that it tolls antitrust actions even as to the

differences. Now, we contend that Counts Two through Six are not different from, they involve the same subject matter of the government case. But the case law seems to be pretty clear, as clear as it can be because of the limited quantity, that the overlap of subject matter and the subject matter of the Novell action and the DOJ action involves Microsoft's anticompetitive campaign to protect its operating system and extend the operating system monopoly into other markets. That by virtue of Novell making the same allegation with respect to the operating system, that that would toll the statute even as to the differences, even though we, obviously we acknowledge or we declare here today that two through six is not different from the government case.

THE COURT: But still, private litigants cannot create overlap by asserting a meritless claim, can they?

MR. MARQUIS: Well, if --

THE COURT: I'm not asking you to say Count One's meritless.

MR. MARQUIS: Certainly. Well, Count One is, has a

great deal of merit. If it were not a merit, if it were a claim that did not have merit, then there wouldn't be overlap, there wouldn't be overlap with respect to subject matter. But because Count One has merit and it tracks the government complaint, there is overlap with regard to subject matter.

As I mentioned, same operating system count. Maintenance of its operating. Novell has alleged that Microsoft

used unlawful means to maintain the operating system monopoly. The same thing with the, with the government case.

Your Honor mentioned the OEM counts. Novell has alleged the same OEM allegations as the government. The government alleged that Microsoft unreasonably restrained trade and restricted access of Microsoft's competitors, didn't single out its competitors, it was not limited to particular competitors. The government said that Microsoft unreasonably restrained trade and restricted the access of Microsoft competitors to significant channels of distribution, including the OEM channel.

And Judge Jackson made numerous findings to that effect, that it was part of Microsoft's anticompetitive campaign to put pressure on OEM's. The OEM market, unfortunately, unlike the operating system market and the application markets, is fiercely competitive. An OEM requires a license for Windows. An OEM that did not preload Windows would be at a competitive disadvantage. And because the profit margin are thin in the OEM market, Microsoft used that leverage, leveraged its operating system monopoly by charging OEM's that did not cooperate, OEM's that did not cooperate with Microsoft a higher Windows royalty rate.

As I said, OEM's needed the Windows license. They needed to preload Windows. Very thin profit margins. And so Microsoft, the government alleged and Judge Jackson found,

36

pressured OEM's not to carry products of competitors. And they were able to do that, among other things, by charging OEM's that did not cooperate, that carried products of competitors, a higher Windows royalty rate.

That's precisely the conduct that Novell has alleged in the present case; that Microsoft charged lower royalty rates to OEM's that did not carry Novell's office applications.

So it's exactly the same type of conduct, it's the same subject matter, and it's precisely the same claims that the government alleged and proved, that Novell has set up and teed up for this litigation.

As I mentioned, the courts have made it very clear that all a private plaintiff need to do to satisfy, to avail itself, to qualify for the tolling statute is allege that the subject matter of the private complaint is the same subject matter as the government complaint.

What was the subject matter of the government complaint? It was Microsoft's anticompetitive campaign, broad campaign to destroy threats to the applications barrier to entry that protected the Microsoft operating system monopoly.

How did they do it? They did it in two ways. Microsoft monopolized key franchise applications, complementary applications, applications that have a symbiotic relationship with the operating system, and they destroyed all middleware threats, all applications that had the potential to serve as an

37

alternate platform for applications.

Now, turning to the key franchise complementary applications anticompetitive conduct. My colleague acknowledged that applications and operating systems are related. That's absolutely correct. You could not find two products that are more related than applications and an operating system. Microsoft has on numerous occasions, and certainly some of the evidence that was presented at trial, some of the evidence that Novell will present has blurred the line between applications and operating systems. But for purposes of this litigation, even though Microsoft acknowledges that applications and operating systems are related, they're so-called distinct.

Well, they're not distinct. There is a symbiotic, commercial relationship between applications and between the operating system. The demand in one affects demand in the other. It's quite clear, the evidence presented in the government case made that clear, that an application that could not run on an operating system or that could not run on the more popular operating systems would have no commercial value at all. Likewise, an operating system that was not compatible with applications would have no commercial value.

So to say that these products are distinct is contrary to positions that my colleagues have taken in other litigation and is certainly contrary to the evidence, more importantly, that was presented at the government trial.

Now, a popular application that's ported to another operate system threatens the Windows monopoly. Why is that?

Well, an entrant into the operating system market needs several things. It needs applications that are compatible with

it. It need, more importantly, it needs a widely popular, widely used, so-called key franchise applications that's compatible with that operating system if it has any hope at all of enjoying commercial success in the operating system market.

Word Perfect was such an application. Word Perfect was historically the most popular application. Word Perfect historically had been ported to other operating systems. Word Perfect had every incentive, had every incentive of being compatible with an operating system entrant in order to eliminate the stranglehold that Microsoft had on the operating system market. So therefore, Word Perfect was a threat.

It is perfectly logical for a monopolist to target applications that threaten its monopoly.

THE COURT: How is Word Perfect a threat to Microsoft's operating system?

MR. MARQUIS: It was a threat because Word Perfect, because it was a widely-used application. Computer users, at least at the time that Novell earned Word Perfect, computer users used their computers for word processing more than any other function. So someone buys a computer. They go to use it for processing. Maybe now it's more the Internet than for word

processing. But certainly in the office context, putting aside people kind of goofing off on the Internet, in the office context, certainly word processing is the most valuable use, the most frequently-used application on a computer.

If Microsoft -- excuse me -- in Word Perfect is an independent company, Word Perfect is popular, everybody's using Word Perfect, not just the federal government, but everybody's using Word Perfect, a potential entrant into that operating

system market could collaborate with Word Perfect, which was the case when Novell bought Word Perfect, and have that application compatible with its operating system. So that when it enters into the market, it can go to OEM's disk operating system and say to OEM's, I have a version of Word Perfect that's compatible with my operating system. I have a version of a spreadsheet that's part of the Word Perfect package that's compatible with my operating system. Give me a chance.

It can go out to consumers who are already using Word Perfect. They know Word Perfect. They like Word Perfect. They can go to consumers and tell those consumers, don't worry about Windows, our operating system is just as effective as Windows and, guess what? We have a version of Word Perfect that's compatible with our operating system so you'll never miss a beat.

THE COURT: So DOS's business plan, I'm sure it's more complicated than this, but its business plan in 1994 was to buy Quattro -- how do you pronounce it?

MR. MARQUIS: Quattro Pro, yes.

THE COURT: And Word Perfect. It had DOS. Package those two and say, look, Word Perfect works with this, terrific. We've got our key. That's what you mean by key franchise.

MR. MARQUIS: Yes.

THE COURT: Not only application system, but application systems with good will attached to them. And we then market them through OEM's, whatever.

MR. MARQUIS: That's absolutely correct, Your Honor.

THE COURT: Why doesn't that make any, why doesn't that make any claim related to Microsoft's conduct directly or indirectly related to a claim to, why wasn't that sold to Caldera?

MR. MARQUIS: Why wasn't?
THE COURT: Why wasn't a claim relating to the key franchises sold to Caldera since the very business plan of Novell was to package the two together?
MR. MARQUIS: I think I misheard you, Your Honor. It was to package Quattro Pro and, Quattro Pro and Word Perfect together to operate on Windows and to operate on other operating systems, which would --
THE COURT: But I heard what you said was the danger to the operating system was that other operating systems could, you know, people with key franchises --
MR. MARQUIS: Correct.

THE COURT: -- could develop or purchase other operating systems, then go to the market. And the threat to Windows was that then this operating system, Windows, would become immaterial because the key franchises could be used with another operating system. And that was the predicate for my question.
Wasn't Novell's business plan, then, they had DOS, which was a good operating system. They didn't have the key franchises, they bought the key franchises. So therefore that was their business plan. It turned out not to work perhaps because of misconduct by Microsoft, among other things. But that was the business plan.
It would seem to me if, in fact, that was what Novell was all about, then any claim related to damage to DOS was directly or indirectly related to a claim for damage to the key franchises.
MR. MARQUIS: Well, I can certainly turn to that, Your

Honor. When Novell sold to Caldera the DR-DOS business. As part of that sale, Your Honor, Novell sold all claims related to the DR-DOS business, not to the application business. And DR-DOS just happens to be a PC operating system. Novell decided to get out of the PC operating system market in large part, if not in complete part, due to the anticompetitive tactics by Microsoft.

The claims that were sold to Caldera were only claims related to harm to the DR-DOS business. Novell had already sold

the Word Perfect business prior to the sale to Caldera and had expressly retained all antitrust claims related to harm to word processing.

THE COURT: But the asset agreement and the release both say any claim directly or indirectly. And this goes to Count One.

MR. MARQUIS: Correct.

THE COURT: That if, in fact, the claim is that Windows did things to damage DR-DOS or Novell-DOS, DOS --

MR. MARQUIS: Certainly.

THE COURT: -- that that was the focus of misconduct. Why isn't a claim for damage to related key franchises related directly or indirectly to the claim that was sold to Caldera?

MR. MARQUIS: Your Honor, Novell sold specific assets comprising the DOS business. The legal claims related to the DOS business were among the assets that were conveyed to Caldera. I want to highlight the transfer here.

It says here, Novell shall grant, transfer, and convey and assign to Caldera all of Novell's right, title and interest in any and all claims, causes of action associated directly or indirectly with any DOS products or related technology. And so the claims related to the DOS products themselves, which are

specifically named, and these are the DOS products, these are the DR-DOS, the various versions and the technology that's associated with the DOS products, that was what was transferred.

43

THE COURT: But the claim you're asserting in Count One here is derivative through DOS. I mean, the very claim is damage to operating system. And maybe could you try to frame a complaint that it was an operating system other than DOS, but I don't think you could possibly do that. That's not really what the focus of your claim is.

It seems to me that any claim for damage to the key franchises based upon Microsoft's anticompetitive activity as to DOS is derivative through the DOS claim and then, therefore, is directly, certainly indirectly associated with the DOS technology.

MR. MARQUIS: I think I understand your question, Your Honor. Claim Number One involves Microsoft's anticompetitive activity targeting Word Perfect; that is, obstructing Word Perfect from the OEM channels, obstructing the development of Word Perfect running on Windows. And Microsoft obstructed Word Perfect in order to maintain its operating system monopoly. That's the harm to the operating system monopoly.

THE COURT: Wait a second. I really am confused. I'm not trying to be smart. I'm trying to understand.

That's not how I read Count One. I read Count One not as activity directed toward Perfect, but activity directed to the operating system. As Count One.

MR. MARQUIS: Yes. Count One is activity targeting Word Perfect with the intent and effect of monopolizing the

44

operating system market. Just as Microsoft targeted Netscape, just as Microsoft has targeted other applications that threaten the operating system monopoly, Count One involves injury to Word Perfect's business that was designed to maintain Microsoft's operating system monopoly.

So it's not, the claim does not involve Microsoft's targeting of DR-DOS. It doesn't involve Microsoft's targeting of any other application. It involves Microsoft's targeting of Word Perfect that had the effect of monopolizing or maintaining the monopoly in the operating system market.

THE COURT: All right.

MR. MARQUIS: Now, Microsoft, Microsoft's reply is that, well, how can Novell bring such a claim when it's not a competitor or a consumer in that market? Well, the simple answer is that the Supreme Court has made it quite clear that you don't have to be a competitor or a consumer in the market. If your injury is related to a harm in another market, even if you're not in that market, you have standing, that firm has standing to raise that claim. And that's precisely what Novell has done here.

THE COURT: I thought in the contractor's case they said McCready had standing precisely because he was a consumer.

MR. MARQUIS: Yes. The Supreme Court said in McCready -- excuse me -- in Associated General Contractor's case that McCready, because there was a consumer, was directly injured

by the conduct at issue there. But the Associated General Contractor's court made it quite clear that the Court was not establishing any bright line test, it disclaimed all bright line

test. Specifically, the Court said that there is no test, there is no black letter rule that's going to apply in every case. And then the Court announced several factors that courts, lower courts should use in determining whether or not a plaintiff has standing to bring a claim.

THE COURT: I'm sorry. Let me go back to Count One again because I really, and I really want to understand. It's entitled Monopolization of the Intel-compatible Operating Systems Market. What I had understood until this very moment, and if I've got a misconception, I've got to clear it up, this does look a lot more like the government's case, directly, I'm not really in equipoise as to Counts Two through Six, but that the focus of Count One was activity in which Microsoft engaged vis-a-vis other operating systems that had ancillary affects upon Novell's Word Perfect and Quattro applications program, but that the whole focus of the count was not activity directed against Word Perfect but activity directed against operating systems because the very market is designed as a monopolization of the Intel-compatible operating systems.

And maybe this is a distinction without a difference. It may go to the question of relations for the purpose of the assets transfer.

MR. MARQUIS: Certainly. I apologize if we were unclear. Count One of the Novell complaint involved Microsoft's targeting of Word Perfect with the intent and effect of maintaining its operating system monopoly and as an application that presented a threat, a dual threat to the applications barrier to entry that protects Microsoft's operating system monopoly, Microsoft targeted Word Perfect. So as a threat, as a company, as an application that threatened the monopoly of Word

Perfect -- excuse me -- of Microsoft, Word Perfect was targeted in that the effect of destroying Word Perfect helped Microsoft maintain its operating system monopoly.

This is the same type of allegation that courts, for example, in the Crimpers case, which, I believe, is a Third Circuit case, that case involved a promoter of television content. And the large monopoly TV content promoters were concerned that this promoter, because the promoter facilitates direct contact between the smaller content providers and the networks, would cut these monopolists out of action. That is, the smaller content providers would no longer be beholden to the monopolist and could deal directly with the networks.

The defendants in that case raised the same arguments that Microsoft is raising here. They said, well, wait a minute. If you are a trade show promoter, you're not a competitor in the TV content market. You're not a competitor in the broadcast market. You're not a consumer in those markets, you're not a

competitor in those markets, so how can you have standing to allege a restraint of trade in a market in which you were not, quote, "a competitor" because you were not a broadcaster?

Well, the court said, well, wait a minute, Section 4 of the Clayton Act is very broad. And the promoter here was not just a mere supplier to someone who was injured by virtue of anticompetitive content. The promoter here facilitated competition in the market, and because it facilitated that competition in the market, made it possible, in effect provided a platform, similar to our case here, a platform for smaller program managers, content providers, to deal directly with the networks, you are, in effect, a competitor in that market. You

were de facto a competitor in the market and you were harmed by virtue of anticompetitive conduct to maintain the monopoly of the two big content providers.

THE COURT: It's always dangerous for anybody to think out loud, especially me. But if the focus of the claim in Count One is what you did to Word Perfect in order to preserve the, which was connected with DOS, in order to preserve the monopoly in the operating system market -- forget the standing -- why isn't that claim related directly or indirectly to DOS? I mean, you're saying, the whole focus is, you know, you hurt Word Perfect and that's what we're claiming damages for, but the theory is that by targeting Word Perfect you were preserving your monopoly in the operating system market. And part of that was

damaging DOS.

And so I don't see why that wouldn't make the claim directly or indirectly related to the DOS technology.

MR. MARQUIS: Because DR-DOS just happened to be owned by Word Perfect. These were separate assets that were --

THE COURT: I understand that. Maybe theoretically you could have a plea to claim that didn't include DOS. But that's what I've been trying to say and articulate. I don't see how you could possibly do that. I mean, the whole purpose was to combine these key franchises with a good operating system. You're not really complaining about harm done to other operating systems. You're complaining about harm that was done to DOS by virtue of attacking Word Perfect.

MR. MARQUIS: Yes. We're complaining about harm that was done to the PC operating system market. That would include any other PC operating system not limited to DR-DOS. And that is what Novell is complaining about. It is complaining about --

THE COURT: But any damages that you proved would have to relate to your own key franchises, which were connected with DOS. So therefore the claim would be related directly or indirectly.

MR. MARQUIS: Well, the key franchises were not related to DOS. These were separate applications. These were separate products. It happened to be owned by the same companies that were sold at different times. But they were not related to DOS

at all. They were freestanding applications that could run on any number of applications. And so it was not part of Novell's strategy to combine the Word Perfect applications with DR-DOS. Separate, distinct applications.

Let me just finish up with --

THE COURT: You're not suggesting -- I'm a little confused by the memoranda. Certainly, the applications programs, they are not middleware.

MR. MARQUIS: Well, they are middleware. The applications that we mentioned, two threats to the operating system monopoly. One was the key franchise. If we could turn back to, turn back to eleven or slide eleven, please.

The first threat to the operating system monopoly was that Word Perfect was a key franchise. In here, we have excerpted a quote from Jeff Raikes, who's a senior executive at Microsoft, who makes it clear, who confirms that owning and controlling so-called key franchise applications helps to widen the moat. And the moat here is to applications barrier entry. Helps to widen the moat that protects the operating system monopoly. We hope to make a lot of money off these franchises, he wrote, but even more important is that they should protect our

Windows royalty per PC.

So job number one for Microsoft during the time that Novell owned Word Perfect was protecting the Windows monopoly by controlling applications that could be attractive to other

operating system vendors and widening that moat in allowing these applications to protect the Windows monopoly.

Now, you've heard my colleague talk about the government case and how the government case was about browsers, how the government case was about the operating system. Both statements are true. But the government case was about any application that threatens the applications barrier to entry:

And the government certainly alleged, certainly alleged that complementary applications, very important, critical, commercially symbiotic applications was a threat to the Windows monopoly. So the government put office applications front and center in its case.

THE COURT: Now, that very slide raises a fundamental legal question, which Mr. Tulchin says you just compared the complaint so I shouldn't even be listening to what the government expert economic witness said. Do you disagree with that?

MR. MARQUIS: I do disagree with that. There are several cases where the courts have looked at the evidence that the government presented at trial to confirm the breadth of the complaint. If you look at Section Five of the complaint, the complaint says that Microsoft obstructed applications that threatened the applications barrier to entry and extended its monopoly, extended its monopoly into other operating markets, other markets.

Now, my colleague says, well, that's just a broad

phrase. Well, it was intentionally broad because the government wanted to make it clear that the breadth of Microsoft's anticompetitive campaign. So there are at least two cases, well, three cases where courts have looked at the evidence and the findings of the Court in determining whether there's a real relationship between the government case and the private case. One is the Gregg case (phonetic), that's an AT&T case, where the judge in the subsequent private action looked at the findings of Judge Green in the AT&T case and found that, yes, even though the applications or the products that were at issue in the private case were not specifically mentioned in the complaint, which is certainly the case here, even though they were not specifically mentioned in the complaint, the complaint was broad enough, the government's action was broad enough to encompass those particular products.

And it did not turn upon whether the telephone accessory equipment, which was at issue in the private case, was, quote, a "sub-market" of the case, of the products that were mentioned in the complaint. It turned on the fact that Judge Green in the AT&T case made specific findings of fact, which is certainly the case here, that related to the products that were at issue in that private case.

The same is true with the last Circuit Court of Appeals case that construed the tolling statute. And that's the Morton's Market case. There the Court said even though in the government

case the federal government restricted its allegations to bid rigging, rigging of bids for school milk contracts, there was no mention, no mention in the complaints, no mention in the

indictments of price fixing at the retail level.

The Court, the Eleventh Circuit held that, well, if you look at some of the evidence, look at the evidence that the government proffered in that case, it certainly is at least a suggestion that this conduct extended beyond just bid rigging of school milk contracts and that it did, in fact, involve the products or the conduct that was at issue in the private case.

So there are at least two cases and there are several other cases. And the Supreme Court itself said generally you compare the complaints, but you don't have to stop with the complaints. If there's any doubt, and we don't think that there is any doubt that if you look at the two complaints that they tee up the same subject matters, that you can look at the findings of fact in determining whether there's a real relationship.

In addition, Novell plans to use many of the findings of fact because they present a clear road map as to Microsoft's anticompetitive behavior. It talks about the applications barrier to entry. That's an issue that's been resolved.

It talks about the critical importance of time to market, that it's important that an application be released in a timely fashion before consumers adapt to an application by a competitor.

So there are numerous examples in the government case where Judge Jackson made specific findings concerning the breadth. For example, in the government complaint, there's no discussion of RealNetworks. There's no discussion of Apple's streaming technology. But yet Judge Jackson made specific findings.

Now, my colleague says, well, he just kind of went off

on a tangent. No, he didn't go off on a tangent. The Department of Justice presented witnesses that testified to Microsoft's anticompetitive tactics in a wide range of products. And included among those products was the office productivity applications.

Not only did the government experts testify as to Microsoft's scheme to monopolize those applications and how office applications could be a valuable complement to competitors hoping to enter into the office system market, there were specific findings of fact, there was testimony presented that Judge Jackson gave credence to with respect to office productivity applications.

Yes, we certainly acknowledge that office applications were not specifically mentioned in the government complaint. However, there was a government witness. Judge Jackson gave credence to that government witness that talked about Microsoft's anticompetitive conduct in the office market by threatening to withhold a Windows license -- recall, Your Honor, that we talked

about how critical it is for an OEM to have a Windows license -- by threatening to withhold a Windows license to IBM because IBM had planned, had announced that it would plan to carry a competing office application. And Judge Jackson made a specific finding that this conduct was designed to maintain Microsoft's operating system monopoly and to extend that monopoly into another market.

Turning to the middleware threat. That certainly undeniably was part of the government case.

THE COURT: I know that. The question is how does Word Perfect relate to middleware? It just wasn't clear.

MR. MARQUIS: Absolutely. Certainly, Your Honor.

Middleware -- excuse me -- Word Perfect had two technologies that incorporated that were middleware, and that were integrated into Word Perfect. One technology was OpenDoc, which is a technology that allows applications regardless of what operating systems they run on, to be read and edited on other applications, and AppWare. These applications posed the same threat, the same type of cross-platform threat that was certainly at issue in the government case.

As I mentioned, OpenDoc would allow a user to view and edit information across applications and across multiple operating systems.

The second bullet there is an excerpt from a business plan from Components Integrated Laboratories, which was a

consortium of Microsoft competitors, where it's clear that part of the business plan was to make this a de facto standard and execute a brilliant end-run around Microsoft's stronghold on Windows.

The second technology that was integrated into Word Perfect was AppWare. And AppWare, just like Netscape, just like Java, the Netscape/Java combination, did expose API's. And API's allow independent software vendors to write applications to it, as opposed to the operating system. And so because this AppWare exposed API's, it posed a middleware threat, just as RealNetworks, just as the Apple streaming technology exposed API's, so did AppWare. And AppWare was integrated in Word Perfect.

So just as Office certainly is middleware, I'd hate to correct counsel for Microsoft, he should know his products better than I, but I think it's indisputable that Office, Microsoft's

product, exposes API's. It presents the same middleware threat except it's a Microsoft product, and the government experts certainly gave unrebutted testimony that Office exposed API's, so did Word Perfect.

So in sum, Word Perfect posed the same middleware threat as Netscape, as Apple, as RealNetworks. And so in conclusion, Word Perfect was a middleware application.

Your Honor, you talked about, I believe Your Honor mentioned the same anticompetitive means. And certainly,

Microsoft used the same means that were at issue in the government case in the Novell case; that is, it excluded Novell from the OEM channel through anticompetitive behavior. It provided and then withheld critical technical information. If I could just make a point about that.

My colleague says that Microsoft would have every incentive to make its application or make Windows compatible with every application. That's not true. Microsoft has every incentive to obstruct applications that threaten its monopoly, either because it's a key franchise application or because it's middleware. And that certainly occurred, and the DOJ certainly made that allegation, and Judge Jackson certainly made findings to that effect.

First of all, Microsoft obstructed Netscape. Netscape was a very popular application. But Microsoft obstructed Netscape by withholding critical technical information with respect to Windows 95, which is the same period that involved the owner, Novell's ownership of Word Perfect. Microsoft withheld critical technical information to developers that were developing applications compatible with Java.

And there's a separate section in Judge Jackson's

finding entitled "Withholding Technical Information." So it certainly is in Microsoft's interest, as a monopolist, to withhold this technical information.

As I mentioned previously, Your Honor, Novell intends

to avail itself of the same oral and documentary proof. This is also an indication of overlap. The Supreme Court in the Leh case made it clear that one way of determining whether a private civil action and a government action was related, will that private plaintiff, will that subsequent private plaintiff use evidence that's proffered in the government case? And here, it's clear that Novell would certainly do so.

So Your Honor, I've been up here for a while and I think I will just conclude by again turning back to, to Count One. Novell's Count One involves Microsoft's anticompetitive activity targeting Novell that had the intent and effect of maintaining its operating system monopoly.

Novell sold claims that related strictly to the DR-DOS business, which was not part of the Word Perfect business, they were separate applications, in that it received -- excuse me -- Caldera received recoveries relating to the injury to its business, which was the DR-DOS business.

Finally, Your Honor, with respect to standing, the Supreme Court has made it quite clear that competitors or consumers, that the Supreme Court did not erect a bright line kind of competitor or consumer bright line in that any actor that's injured by a violation of the antitrust laws that directly impacts, that directly impacts the anticompetitive or the competition-reducing aspects of that conduct would have standing. And so that --

THE COURT: But you have to, and to determine that, you'd look at the factors set forth in Associated General Contractors?

MR. MARQUIS: That's correct, Your Honor. That's correct, Your Honor. And if you like me -- slide, this is our final slide, I promise. Slide 28, Novell satisfies each of the AGC factors. That is, there's a direct causal connection between the antitrust violation and the harm to the intended victim, which is Novell. Microsoft, I don't believe, is disputing that the type of injury suffered by Novell is the type of injury that the antitrust laws were designed to prevent.

We don't have an issue hear of duplicative damages. Novell is certainly the most direct victim of the anticompetitive conduct alleged in this case. So Novell satisfies all of the AGC factors.

One final point I would like to make with respect to standing. And that is when the Supreme Court and AGC talked about competitors or consumers, the Supreme Court was making a rather unremarkable observation that the plaintiff in that case, which was a union, may not benefit by competition at the contractor's level because usually when there's competition at the contractor's level, these contractors or these businesses try to restrain cost, they try to reduce cost. And so the Supreme Court was saying with respect to the antitrust injury component of the AGC factors, that, just make the observation that a union

may not benefit from competition. And because a union may not benefit from competition, it cannot suffer injury as a result of

the competition-reducing aspect of the defendant's conduct.

It did not, the Court was clear, it did not establish a bright line test, consumer/competitor test. And even if it did, which it did not, Novell certainly was a perceived competitor because it posed as middleware threat. And so it was a de facto competitor in the operating system market because of its middleware attributes. It was a substitute for Windows. It was a substitute for Windows for applications developers because it sat on top of the operating system and exposed API's in the same way that Netscape did. So with that, Your Honor --

THE COURT: Let me ask you one more question, just because your phrase reminded me I wanted to ask you about. Speaking of unremarkable propositions, what about Professor Areeda's unremarkable proposition as to Counts Two and Six, if you're talking about different markets, there's no tolling?

MR. MARQUIS: Well, Professor Areeda stated that if there were, quote, "distinct markets" and these are not distinct markets. These are not the situation that you have in --

THE COURT: In some respects you would agree that the applications market is distinct from the operating system market.

MR. MARQUIS: Not for purposes of tolling. I think in the context of tolling, these markets are not distinct in that there's a clear relationship with respect to subject matter, you

have the same scheme, the same product. So there's a clear relationship with respect to subject matter between Microsoft's conduct targeting the Office applications and the conduct that was present in the government case.

So there is not a distinct market for tolling purposes. Maybe for other purposes there could be distinct markets. But for tolling purposes, they are not distinct markets. They are

clearly, as Microsoft counsel acknowledged, they are related markets. They are not only related markets, they are symbiotic, commercially-related markets in that demand in one affects demand in the other. And as the government testified and presented evidence, that there is a clear relationship between Office Apps and the operating systems.

And so Professor Areeda was just making the rather unremarkable statement that if you have markets that have nothing to do with each other, which is certainly the case in the Peto case, which Microsoft cited, which involves championship boxing and hockey, well, there's no relationship between those markets. Those are distinct markets. Certainly in the Charlie's Tour case, which my colleague mentioned, there's no relationship between hotel rooms and tour buses. You could run a hotel without a tour bus. You can have a tour bus without a hotel.

So those are the types of distinct markets that Professor Areeda was discussing, Your Honor. So with that, I thank you very much for your attention.

THE COURT: We'll take a very short break. Although knowing Mr. Tulchin, he's not going to be very long.

(Brief Recess.)

THE COURT: Mr. Tulchin.

MR. TULCHIN: Thank you, Your Honor. I do hope to be brief. I think there are just a few points to mention.

The first is that on Page 14 of Novell's brief in this matter, Novell itself says that the question of whether a private suit meet the Section 16(i) test must be answered by, quote, "a comparison of the two complaints on their face", unquote, citing two Supreme Court cases. We cited them as well for the same

proposition, Leh, 382 U.S. 54 at Page 65, and Greyhound Corporation, 437 U.S. 322 at 331.

So yes, Your Honor, the answer to your question, as Novell itself has said, is that for purposes of deciding whether tolling should apply under 16(i), you look at the two complaints. Novell is never mentioned in the DOJ complaint. Not a single Novell product is ever mentioned in the DOJ complaint. The DOJ alleged that the victims of Microsoft's alleged anticompetitive conduct were Sun and Netscape.

There was no claim in the DOJ case for withholding or depriving an ISV of technical information about Windows. That kind of essential facility claim, whether it's valid or invalid, good or bad, was not part of the government case.

And I thought I heard Mr. Marquis say in response to a

question from the Court that if Count One is defective, if Count One should be dismissed, then he conceded that Counts Two through Six are barred by the Statute of Limitations.

THE COURT: I didn't hear him say that.

MR. TULCHIN: Well, I thought what he said in response to your question, Your Honor, is that their argument about tolling depended on the presence of Count One in the complaint.

THE COURT: That was an inartful question. My question was simply, your basic point is you can't include a meritless claim and use that as a basis for tolling that otherwise wouldn't be appropriate. A, I didn't understand him to say that the Count One was meritless; or two, that even assuming it was meritless, that meant that his tolling argument as to two to six fell.

MR. TULCHIN: Perhaps I misunderstood it. But certainly, I think the answer to your question was yes, that you can't include a meritless claim just in order to manufacture an

argument about tolling. I mean, Counts Two through Six, I think it's quite clear from the statute itself, must be measured independently of what Count One asserts.

THE COURT: Now, regardless of what the memorandum, Novell's memorandum might have said, Mr. Marquis cited to me the AT&T case and Morton Salt for markets, that you can look beyond the complaint.

MR. TULCHIN: No, because the Morton's Market case was a case where there was only one count to begin with. So the

reference to the complaint there necessarily referred just to the single cause of action. But the two Supreme Court cases, Leh and the Greyhound court case, both say that the proper thing to do for purposes of tolling is to compare the two complaints.

I don't think it helps Novell to go beyond that because, despite all the mixing and matching of things from the government case and assertions in the complaint, the key thing, and it still has not been answered, is whether or not you can get tolling if you make claims pertaining to markets distinct from the market or markets involved in the government case.

Mr. Marquis, I think, sort of just bumped into himself in responding to Your Honor's question. He said well, maybe they're distinct for some purposes and not for others. I think he said that for tolling purposes, these markets are not distinct. I just don't think he can have it both ways.

The complaint, Novell's complaint makes it very clear that there are three distinct markets. And of course, markets can be related. That doesn't mean they're not distinct. The Refined Petroleum Products, and again, we've talked about this case before, those markets were very, very related. They

involved exactly the same conduct, the same period of time, mostly the same defendants, and all the same products. The only thing different was geography. Clearly, those markets were related. One would say they're identical but for the geographical difference.

That's not enough. The Areeda treatise restates the law properly here. The fact that the markets are distinct is dispositive.

Just one other point, Your Honor. There was a lot of discussion about what Count One says and what it doesn't say and what it's directed to and what it isn't directed to. And I thought I understood Count One to be the same thing Your Honor did. For a claim for harm to the PC operating system business, that's what it seems to say, that incidentally caused harm to Novell's office productivity applications, Word Perfect and the spreadsheet, Quattro Pro.

Mr. Marquis attempted, I think, to dance around that, to mix and match all these allegations which are in the complaint only to provide the tolling argument, but again, Novell's brief submitted in opposition to our motion, I think, answers the question as clearly as it can be answered. Page 12, under Summary of Argument, Point One, the very first sentence in Novell's Point One in its summary of argument is this: "The government and Novell complaints contain identical claims for monopolization of the PC operating systems market and allege the same exclusionary agreements with OEM's and use of browser technology to stifle competition."

And again, Novell is trying to have it both ways. If the claims are identical, there are claims for harm to the PC operating system market, if the claims are identical, then,

clearly, Count One is defective because that claim was sold.

THE COURT: Let me ask you a little bit this because I'm really am concerned that I had misunderstood, and at least I have to rethink this.

If, in fact -- and I'm not sure it's not there in the memorandum, I don't know whether I just missed it, in Novell's memorandum -- in, if fact, what the allegation is is there was activity directed toward Word Perfect because it posed a threat in the way described by Mr. Marquis, because it was a franchise -- franchise application?

MR. MARQUIS: Yes, Your Honor.

THE COURT: With a lot of good will, that, therefore, users would demand that it be available not only, it be available across the board regardless of the operating systems, that this did, that this activity directed to Word Perfect threatened Microsoft's monopoly in the operating system because people would demand, you know, multiple operating systems. And alternatively -- and this was in the memorandum and I just didn't understand it, I think -- about how it itself is a middleware product in that it could open other API's, however it all worked. And I didn't understand it that way before. When you were speaking I didn't give you an opportunity to address that conceptualization of Count One.

MR. TULCHIN: Well, of course that's not what Novell says in Count One or the way it describes Count One in the

sentence I just read.

THE COURT: I'm not sure that it doesn't say it,

though, now that I've been rereading it.

MR. TULCHIN: Well, it says, Your Honor, that the claim is identical to the claim made by the government. Now, they say that because saying it's identical, presumably Novell thinks, helps on the argument about tolling, that Count One is close enough to the government case to be tolled. We've never disputed that Count One might be tolled, we've said arguably it is. Of course, that affects not at all the analysis of Counts Two through Six. The statute, 16(i), makes that clear, it talks about rights of action.

THE COURT: No. But this does impact upon the assignment question. If, in fact --

MR. TULCHIN: It does. It does impact upon the assignment question, I agree. If the claim is identical, as Novell says when they're arguing for tolling, though I think there's a flaw in the argument logically, if they're identical, well, then, clearly the claim was sold. If they're not identical, then, and the claim is for some conduct directed at Word Perfect as middleware, as a threat to the monopoly in the operating system business, then clearly we say again the claim was sold to Caldera because it relates directly or indirectly to the DOS business. It's in the PC operating system market.

But what that does, what Mr. Marquis's argument does is

significantly weaken his argument about tolling because now -- the government made no such claim of some action against office productivity applications as purported middleware.

What the Department of Justice did was to make a claim pertaining to Netscape's Navigator and Sun's Java, which were defined to be middleware in the government complaint, but never

any claim having to do with word processing software.

THE COURT: But I asked you earlier, and I wasn't trying to trap you, because I didn't understand the issue. But I did ask you, I think, before, wouldn't you agree if you were a middleware developer, your claim would be tolled by the government case even if you were not Netscape or Sun, since the focus of the government complaint, to some extent, was on middleware?

MR. TULCHIN: Yes, for harm to the PC operating system market. The claim that Novell sold might be tolled. But, I mean, Novell is trying to sort of, again, mix and match and shift and make an argument on one subject, tolling, and sort of import it into the other without logically separating the two points, which are really quite different.

The question of whether Novell still owns this claim and the question of whether there's tolling for Counts Two through Six really have to be analyzed quite differently. They're entirely different legal questions. And even if there's tolling for Count One, Counts Two through Six have to be analyzed

in exactly the situation that we've described, distinct markets.

There has never been a case, Your Honor, no case cited by Novell, no case of which I'm aware, where there has been tolling granted to a claim like Claims Two through Six for harm to a market distinct from the market set forth in the government case, the case brought by the United States. There has not been such a case.

The cases granting tolling have to do with cases where the markets overlap, where there are two circles that intersect and there's an overlap between the markets. The fact that these two are related is nothing more than the Refined Petroleum

Products case where the markets were, in fact, much, much more closely related.

Even the SAS case, it's a different question, it's standing. And I don't mean to shift back and forth the way I think my adversary has. But even the SAS case on the standing question had to do with a company whose business it was to maintain and upgrade pay telephones, alleging monopolization of the telephone market. And standing there was denied. And those are highly, highly related markets, of course. Demand in one would affect demand in another. If the defendant has a monopoly in the pay telephone business, then clearly the plaintiff might or might not be able to do any business maintaining and upgrading them. They'd have to go through the defendant in every case. And there, standing was denied because that plaintiff was not a

consumer or a competitor, according to the First Circuit, 1995, 12 years after AGC, in the affected market.

And here, for tolling -- again, I apologize because I know I'm doing the same thing that I think accused Mr. Marquis of doing, of changing from one point to another a little bit -- but here as to tolling, the fact that the markets are related, that they're both software, that applications run on top of operating systems, is of no help whatsoever to Novell. The markets are distinct. The proposition is unremarkable.

THE COURT: But the statutory language, and I'm not trying to be cross them, I'm trying to think this out, because I said before, I find this puzzling. The statutory language is, of course, "matters complained of", I think.

I mean, here the markets are related in a very important way, as I understand Novell's allegations. And

frankly, the sport of using Microsoft's executive's words against him is getting a little old. But Mr. Allchin's e-mail or whatever it was about the moat is important here, isn't it, because that establishes, it's the conduct that the government was complaining about was, according to Mr. Allchin, you know, keep the moat, not only we may make money off of the applications, off the franchises, that would be great, but we have to widen the moat in order to make sure that, you know, to keep our operating system monopoly. He didn't say it that way. But our strength of our operating system. And that therefore

there is a relationship in a very, very important way, which is exactly what Novell is complaining about in this case. And so that when you get something as simple as Count Six, then, with the OEM's, to the extent that they can prove, look, we can allege and then prove we were keeping franchise applications -- excuse me -- Microsoft was keeping Word Perfect from being installed, preinstalled in machines, this was preserving the monopolies in both markets. Excuse me. It was preserving the, it was helping to preserve the monopoly in the operating system market as well as benefitting it in the applications market, where it was seeking to, was seeking to make its own applications more popular.

MR. TULCHIN: Your Honor, I understand the theory. The theory has been advanced by Mr. Chesley and Mr. Hausfeld on behalf of purported classes in this court and in dozens of state courts around the country. I understand what the theory is. The question here for purposes of whether the Statute of Limitations applies, and of course all those other claims were brought within the limitations period, the question here is, did Novell wait too long to assert the theory.

The government never made any claim that Microsoft unlawfully attempted or succeeded in monopolizing the markets for word processing software, for spreadsheet software, for applications productivity software. There's no claim by the United States. And there's no claim by the United States of the

sort that the Court just articulated; that this widened the moat theory. And it was Mr. Raikes's e-mail, but it doesn't matter.

THE COURT: I'm sorry.

MR. TULCHIN: It doesn't matter. It doesn't matter. It's an e-mail from 1997 which has been public since the DOJ trial in 1998 or 9. And the question for the limitations issue under 15 USC 15(b) and 16(i) is whether Novell waited too long, to November, 2004, to make that claim.

The answer to the question of whether they waited too long is not whether they can articulate a theory which we find to be illogical and contrary to the essential theory of the government case. That's not the question. And the debate today should not be whether the theory is defective on its face or passes muster if there were some Motion to Dismiss that theory on a more substantive ground.

The question is whether or not it's timely. And to answer that question, again, you have to compare the two complaints. And if the claim is made in a different market, and Claims Two through Six are, Novell hasn't denied that -- all they've said is that the distinct market language from Areeda doesn't mean what it says, the word "distinct" can mean one thing for tolling and something else in the complaint, I don't think that's a good answer -- but if they are distinct, then for purposes of the limitations period, whether the theory makes

sense or not, it was asserted here too late.

72

On Count One, where there is all this other stuff that pertains to the government case, and Novell itself says that their Count One is identical to the government claim for monopolization of the PC operating systems market. We don't say that the claim was brought too late, we say it was defective for the other two reasons we've discussed, Your Honor. Thank you very much.

THE COURT: Thank you. Mr. Marquis, I was going to ask you one question, I just remembered.

MR. MARQUIS: Certainly.

THE COURT: How do you deal with the fact that the, I mean, in terms of distinguishing between what really was being complained of, the fact that the government did not assert the claims, the claims that you are asserting in Counts Two to Six, that they were temporarily asserted by the attorneys general, so that the existence of the claims was known? I mean, people were thinking about these things. But the government chose not to assert it, which is the only material question. And then sort of the odd question, the attorneys general themselves seem to have some problems with the claims because they withdrew them shortly thereafter.

Doesn't that show, doesn't the fact that they were asserted by the attorneys general and not by the government to some extent reflect what were the matters complained of in the government case?

73

MR. MARQUIS: Your Honor, respectfully, I don't think

so. The AG's, the attorneys general are separate entities. And the tolling statute turns on what did the government complain of, what did DOJ complain of. And DOJ complained of Microsoft's obstructing applications that threatened its operating system monopoly. That's what the PC operating system count was about in the government case; that Microsoft harmed competition in the operating system market by taking out, destroying other applications, not other operating systems. It had nothing to do with Microsoft's conduct directed at other operating systems. It had all to do with Microsoft's conduct targeting applications that threatened the operating system.

Now, in Paragraph Five of the DOJ complaint, DOJ makes it clear that this is a very broad campaign and that Microsoft obstructed alternate platforms, applications, and extended this operating system monopoly into other software markets. That is in the DOJ complaint. Those three words, "other software markets." And so DOJ quite clearly complained about Microsoft's conduct in other software markets.

And this Court can certainly look at Judge Jackson's findings to confirm that, that the DOJ case was broad, that it involved other software markets. It can certainly look at the testimony presented by DOJ to confirm that the DOJ complaint involved other software markets.

And just going back to the Leh case, the Leh case said

generally, you look at the two complaints. Even if you look at the two complaints in this case, the other software market's language is dispositive.

So I can't explain why the attorneys general made, filed a complaint and then amended it. But what I can say, Your Honor, is that the DOJ made very plain not only in the complaint,

but in the way it tried its case, that this case was beyond, that it involved other software markets that threatened Microsoft's monopoly. Thank you, Your Honor.

THE COURT: Well, I want to thank you all for your excellent arguments, helping me through this thicket. This is obvious, I was wrong about some just conceptions, or at least I've got to rethink them. The questions are not easy ones and I've got to think them through.

I will tell you my ordinary practice would be, right or wrong, to try to turn my attention to this immediately and have an opinion out to you within a couple weeks while it's fresh in my mind. Unfortunately, my schedule is such that there's going to be another series of things that's going to occupy my attention, I've got to get ready for for a while. So I'm not going to be able to do this.

It could very well be, I realize that the case got transferred here. I've got to at least get through the next sequence of things I'm got to do, which is going to take a couple weeks, before I get back to this. It could be that those issues

are going to take precedence for me for a while. So it could be -- and I'm just warning you all about this -- it may be a while before I get the opinion out. And it could be that by the time we get back to it, I'm going to be sufficiently muddled, I'm going to have another short hearing. But thank you all very much.

MR. TULCHIN: Thank you, Your Honor.

(Conclusion of Proceedings.)

REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of Novell, Inc. V. Microsoft Corporation, Case Number(s) MDL 1332/JFM-05-1087, on June 7, 2005.

I further certify that the aforegoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this _____ day of _____, 2005.

Mary M. Zajac,
Official Court Reporter

7

8