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

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

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

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Before: Honorable J. Frederick Motz, Judge

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Appearances:

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On Behalf of Plaintiff:

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Milton A. Marquis, Esquire
Miriam R. Vishio, Esquire
R. Bruce Holcomb, Esquire

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On Behalf of Defendant Microsoft:

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David B. Tulchin, Esquire
Steven J. Aeschbacher, Esquire
Joseph J. Reilly, Esquire
G. Stewart Webb, Jr., Esquire

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Reported by:
Mary M. Zajac, RPR
Room 3515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

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THE CLERK: The matter now pending before this Court is

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Civil Docket Number JFM-05-1087, Novell versus Microsoft

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

6 THE COURT: Thank you. Mr. Tulchin.

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

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

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

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

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

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

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

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

7 alleged to have done various anti competitive things over the
8 years. Asking somebody to get into the fray of private anti trust
9 litigation before things were sort of settled, that may have been
10 a practical impediment.

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

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

4

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

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

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

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

11 And I might say, Your Honor, that I think the argument
Page 3

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. TULCHIN: Yes, Your Honor, and that's really the
19 point. That's when they owned these businesses. Word Perfect
20 they owned for only that two year period, from '94 to March of
Page 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. TULCHIN: Well, Your Honor --

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

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

24 First, I think it's essential to remember how important
25 it is in an anti-trust case, and particularly in monopolization

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

6 In fact, in a case that we did not cite in our brief,
Page 8

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

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

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

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

10 The market is so basic in an anti-trust case that unless

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

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

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

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

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

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

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

16 There's no question about.

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

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

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

25 THE COURT: At least on that occasion.

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

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

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

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

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

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

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

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

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

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

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

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

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1 And to remind the Court of what Section 3.1 of the
2 Asset Purchase Agreement says -- this is just a portion of it,
3 Your Honor, it goes on for quite a while. But it is the most
4 important sentence for purposes of our motion. This is the July,
5 1996 agreement between Novell and Caldera involving the sale by
6 Novell of all its operating system products to Caldera. In
7 Section 3.1., after talking about a sale of the product, it says,
8 also at closing, Novell shall grant, transfer, convey and assign
9 to Caldera all of Novell's right, title and interest in and to
10 any and all claims or causes of action held by Novell at the
11 closing date -- that's in July, 1996 -- and associated directly
12 or indirectly with any of the DOS products or related technology.
13 Now, the sentence goes on. But I think --

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

16 MR. TULCHIN: Yes, Your Honor.

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

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

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1 side of, sorry, different sides of the same coin is what I meant
Page 13

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

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

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

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

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

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

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

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

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

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

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

11 including, without limitation, the Novell claims.

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

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

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

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

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

14 And I think what Novell does is they sort of catch

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

20

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

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

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

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

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

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

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

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

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

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

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

24 November of 2004.

25 And tolling is supposed to be a limited exception or

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

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

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

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

23

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

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

14 But in 2003 Your Honor said, in a different context, it
15 was a class certification motion made by lead counsel for the
16 consumers, but Your Honor said that the office productivity
17 applications and PC operating systems are in, quote, "separate
18 markets", unquote. That's at 214 Federal Rules decision at Page
19 374.

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

24

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

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

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

11 THE COURT: Let me ask this.

12 MR. TULCHIN: Yes, sir.

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

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

25 THE COURT: Even though the focus of the government

25

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

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

10 in 1998.

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

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

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

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

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

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

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

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

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

27

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

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

15 I know I've been going on for a while but I just want
16 to point out three decisions by U.S. Court of Appeals exactly on
17 point. The Fourth Circuit decision in White against Rockingham,
18 820 F.2d. 98 at Page 104, from 1987, saying that Dr. White could

19 not maintain his anti trust action, quote, "because he is nei ther
20 a provider nor a consumer of these services", unquote. Again,
21 competi tor or consumer.

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

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

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

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

24 I amsui t. Thank you, Your Honor.

25 THE COURT: I think you said it once in your brief.

29

1 You don't really think that the claims in Counts Two to Six were
2 sold --

3 MR. TULCHIN: No.

4 THE COURT: Except for events after 1996.

5 MR. TULCHIN: I'm sorry, Your Honor. Maybe I'm
6 missing --

7 THE COURT: I think you misspoke. There actually was a
8 reference in the memorandum, I think, to the same thing. The
9 counts in the Claims Two to Six were not sold.

10 MR. TULCHIN: Well, actually, Your Honor, they might
11 have been sold. The agreement between Novell and Corel -- thank
12 you.

13 THE COURT: Oh, you don't know the answer to that.

14 MR. TULCHIN: Correct. Because the sale in '96 --

15 THE COURT: You don't know what the details of that
16 sale were.

17 MR. TULCHIN: Correct.

18 THE COURT: I just want to make sure I understood.

19 MR. TULCHIN: It wasn't a matter of public record. We
20 don't have it. And we haven't made any argument that those
21 Claims Two through Six were sold.

22 THE COURT: I misunderstood. Either you misspoke at
23 the end or I misheard you, but I understand

24 MR. TULCHIN: I may have misspoke, Your Honor. If so,
25 apologize.

30

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

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

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

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

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

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

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

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

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

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

5 The government case involved Microsoft's very broad,
6 anti competitive campaign to obstruct all applications that
7 threatened its operating system monopoly. Very broad, government
8 made it very clear. And Microsoft was, the government also
9 alleged that Microsoft extended its operating system monopoly
10 that it had unlawfully maintained by virtue of this very broad
11 anti competitive campaign into other software markets. It's very
12 clear in the government complaint that it involved other software
13 markets.

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

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

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

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

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

22 The subject matter of the government case was
23 Microsoft's broad campaign to obstruct any application that
24 threatened its operating system monopoly. The subject matter of
25 the government case was Microsoft's anti competitive campaign to

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1 extend that operating system monopoly into other software
2 markets.

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

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

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

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

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

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

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

15 MR. MARQUIS: Well, if --

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

18 MR. MARQUIS: Certainly. Well, Count One is, has a
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19 great deal of merit. If it were not a merit, if it were a claim
20 that did not have merit, then there wouldn't be overlap, there
21 wouldn't be overlap with respect to subject matter. But because
22 Count One has merit and it tracks the government complaint, there
23 is overlap with regard to subject matter.

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

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

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

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

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

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

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

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

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

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

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

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1 alternate platform for applications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 MR. MARQUIS: Quattro Pro, yes.

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

5 MR. MARQUIS: Yes.

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

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

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

14 MR. MARQUIS: Why wasn't?

15 THE COURT: Why wasn't a claim relating to the key
16 franchises sold to Caldera since the very business plan of Novell
17 was to package the two together?

18 MR. MARQUIS: I think I misheard you, Your Honor. It
19 was to package Quattro Pro and, Quattro Pro and Word Perfect
20 together to operate on Windows and to operate on other operating
21 systems, which would --

22 THE COURT: But I heard what you said was the danger to
23 the operating system was that other operating systems could, you
24 know, people with key franchises --

25 MR. MARQUIS: Correct.

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1 THE COURT: -- could develop or purchase other
2 operating systems, then go to the market. And the threat to
3 Windows was that then this operating system, Windows, would
4 become immaterial because the key franchises could be used with
5 another operating system. And that was the predicate for my
6 question.

7 Wasn't Novell's business plan, then, they had DOS,
8 which was a good operating system. They didn't have the key
9 franchises, they bought the key franchises. So therefore that
10 was their business plan. It turned out not to work perhaps
11 because of misconduct by Microsoft, among other things. But that
12 was the business plan.

13 It would seem to me if, in fact, that was what Novell
14 was all about, then any claim related to damage to DOS was
15 directly or indirectly related to a claim for damage to the key
16 franchises.

17 MR. MARQUIS: Well, I can certainly turn to that, Your

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

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

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1 the Word Perfect business prior to the sale to Caldera and had
2 expressly retained all anti trust claims related to harm to word
3 processing.

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

7 MR. MARQUIS: Correct.

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

10 MR. MARQUIS: Certainly.

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

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

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

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

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

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

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

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

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

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

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

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

11 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

13 were de facto a competitor in the market and you were harmed by
14 virtue of anti competitive conduct to maintain the monopoly of the
15 two big content providers.

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

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1 damaging DOS.

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

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

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

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

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

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

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

5 Let me just finish up with --

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

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

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

22 Windows royalty per PC.

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

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

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

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

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

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

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

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

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

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

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

4 indictments of price fixing at the retail level.

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

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

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

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

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1 So there are numerous examples in the government case
2 where Judge Jackson made specific findings concerning the
3 breadth. For example, in the government complaint, there's no
4 discussion of Real Networks. There's no discussion of Apple's
5 streaming technology. But yet Judge Jackson made specific
6 findings.

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

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

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

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

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

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

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

12 MR. MARQUIS: Absolutely. Certainly, Your Honor.
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13 Middleware -- excuse me -- Word Perfect had two technologies that
14 incorporated that were middleware, and that were integrated into
15 Word Perfect. One technology was OpenDoc, which is a technology
16 that allows applications regardless of what operating systems
17 they run on, to be read and edited on other applications, and
18 AppWare. These applications posed the same threat, the same type
19 of cross-platform threat that was certainly at issue in the
20 government case.

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

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

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

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

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

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

21 So in sum, Word Perfect posed the same middleware
22 threat as Netscape, as Apple, as Real Networks. And so in
23 conclusion, Word Perfect was a middleware application.

24 Your Honor, you talked about, I believe Your Honor
25 mentioned the same anti competitive means. And certainly,

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

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

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

21 And there's a separate section in Judge Jackson's
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22 finding entitled "Withholding Technical Information." So it
23 certainly is in Microsoft's interest, as a monopolist, to
24 withhold this technical information.

25 As I mentioned previously, Your Honor, Novell intends

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

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

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

18 Finally, Your Honor, with respect to standing, the
19 Supreme Court has made it quite clear that competitors or
20 consumers, that the Supreme Court did not erect a bright line
21 kind of competitor or consumer bright line in that any actor
22 that's injured by a violation of the anti trust laws that directly
23 impacts, that directly impacts the anti competitive or the
24 competition-reducing aspects of that conduct would have standing.
25 And so that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 (Brief Recess.)

4 THE COURT: Mr. Tulchin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. MARQUIS: Yes, Your Honor.

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

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

1 sentence I just read.

2 THE COURT: I'm not sure that it doesn't say it,
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3 though, now that I've been rereading it.

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

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

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

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

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

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

7 any claim having to do with word processing software.

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

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

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

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

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

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

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

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

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1 consumer or a competitor, according to the First Circuit, 1995,
2 12 years after AGC, in the affected market.

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

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

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

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

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

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

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

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

3 THE COURT: I'm sorry.

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

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

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

25 sense or not, it was asserted here too late.

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

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

10 MR. MARQUIS: Certainly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. TULCHIN: Thank you, Your Honor.

8 (Conclusion of Proceedings.)

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1 REPORTER'S CERTIFICATE

2
3 I, Mary M. Zajac, do hereby certify that I recorded
4 stenographically the proceedings in the matter of Novell, Inc. V.
5 Microsoft Corporation, Case Number(s) MDL 1332/JFM-05-1087, on
6 June 7, 2005.

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

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

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Mary M. Zajac,
Official Court Reporter

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