

**No. 10-1482**

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**NOVELL, INC.,**

**Plaintiff-Appellant,**

**v.**

**MICROSOFT CORPORATION,**

**Defendant-Appellee.**

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

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**BRIEF OF APPELLANT NOVELL, INC.**

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August 6, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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This case has been here before. In *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007), *cert. denied*, 552 U.S. 1276 (2008), this Court held that Novell had “antitrust standing” to sue Microsoft for destroying Novell’s once-pervasive WordPerfect word processor and other Novell business applications (“Business Applications”) to protect Microsoft’s undisputed Windows monopoly in the market for personal computer (“PC”) operating systems.

This Court granted Microsoft an interlocutory appeal from the ruling on antitrust standing, but not from the ruling on another issue: whether Novell assigned the present antitrust claims for injury to its Business Applications to another company, Caldera, in connection with the 1996 sale of Novell’s DR-DOS operating system and companion products (“DOS Products”).

The district court had held that, as a matter of law, the plain language of the Asset Purchase Agreement (“APA”) between Novell and Caldera unambiguously provided for the transfer only of Novell’s DOS Products and claims for injury to those products, not of claims for injury to products, such as WordPerfect or the other Business Applications, that were not themselves transferred to Caldera. Indeed, the district court dismissed Microsoft’s contrary interpretation of the APA as “a far stretch.” It is thus not surprising that this Court declined interlocutory review of this issue, for it was not close.

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

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

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

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

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

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

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

DOS Products – the only products being transferred – and not to any other Novell products. The parties’ conduct subsequent to the assignment is equally telling: after acquiring the DOS Products and the claims “associated” with them, Caldera brought suit for antitrust injury *only* to those products, not for injury to the Business Applications or any other products. Thus, even if extrinsic evidence were necessary to determine the meaning of the APA’s assignment provision (and it is not), Novell would nonetheless be entitled to judgment on this issue as a matter of law. And even if the extrinsic evidence were in any way ambiguous, Novell would surely be entitled, at a bare minimum, to a jury trial to resolve the contracting parties’ intent.

As demonstrated in Part IV *infra*, the district court separately erred in ruling that Novell’s Complaint did not fairly notify Microsoft that Novell was seeking redress for injury to its GroupWise e-mail and collaboration application.

### **JURISDICTIONAL STATEMENT**

The U.S. District Court for the District of Utah, where this action was filed in 2004, had subject-matter jurisdiction over Novell’s antitrust claims under 28 U.S.C. §§ 1331 and 1337. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation transferred this action to the District of Maryland in April 2005. JA-5 #26. On March 30, 2010, the district court granted Microsoft’s cross-motion for summary judgment, denied Novell’s motion for summary judgment,

and entered final judgment in favor of Microsoft. JA-368; JA-404. On April 23, 2010, Novell filed a timely notice of appeal. JA-405. This Court has jurisdiction under 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

Whether Novell assigned to Caldera the antitrust claims asserted in Counts I and VI of Novell's Complaint.

Whether Microsoft had fair notice that Count I seeks redress for injury to Novell's GroupWise application.

### **STATEMENT OF THE CASE**

In 2004, Novell filed this lawsuit for injuries to WordPerfect, Quattro Pro (a spreadsheet), GroupWise (an application for e-mail and collaboration), PerfectOffice (a suite of Business Applications), and its other Business Applications. In Count I, Novell alleged that Microsoft maintained its monopoly in the PC operating system market through anticompetitive acts targeting the Business Applications. JA-100-01 ¶¶ 151-155. In Counts II-V, Novell alleged that Microsoft monopolized and attempted to monopolize the markets for word processors and spreadsheets through the same acts. JA-101-03 ¶¶ 156-169. And in Count VI, Novell alleged that Microsoft's exclusionary agreements unreasonably restrained trade. JA-104-05 ¶¶ 174-177.

Microsoft moved to dismiss all six counts on various grounds. Most relevant here, Microsoft contended that Novell “no longer owns the claim asserted in Count I because it transferred it to Caldera in connection with the sale of the [DR-]DOS operating system.” JA-107. In Microsoft’s view, the claim asserted in Count I is “associated directly or indirectly with ... the DOS Products,” and therefore was within the scope of the assignment.

The district court rejected that contention succinctly: “The fallacy in this argument is that the claim asserted in Count I, while arising from Microsoft’s monopoly in the operating system market, is for damage not to [DR-]DOS or any other operating system but for damage to [the Business Applications]. It is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because [DR-]DOS competed in the operating system market, such a claim was either a ‘direct’ or ‘indirect’ claim intended to be transferred from Novell to Caldera.” JA-108.

Microsoft also moved to dismiss Count I on the ground that Novell lacked antitrust standing, and to dismiss Counts II-VI as untimely. The district court rejected Microsoft’s standing argument and its timeliness argument with respect to Count VI but dismissed Counts II-V as untimely. JA-108-11.

At Microsoft’s request, the district court certified for interlocutory review its rulings that Novell still owned Count I and had antitrust standing to bring that

claim. In its certification opinion, the district court explained: “I remain comfortable with my rulings. However, as each day passes, I find that what may seem ‘clear,’ ‘a far stretch,’ or ‘self-evident’ to me does not always appear the same in the eyes of others.” JA-115.

This Court granted Microsoft’s petition for interlocutory review “of the antitrust standing issue only,” declining to consider the assignment issue. JA-118. Novell cross-appealed from the judgment dismissing Counts II-V as untimely. This Court affirmed both rulings before it and remanded for further proceedings on Counts I and VI. *Novell*, 505 F.3d at 319, 322-23.

On remand, Microsoft sought to relitigate the assignment. It moved to compel the production of documents “concerning Novell’s 1996 sale of antitrust claims ... to Caldera,” arguing that “Utah law requires the consideration of extrinsic evidence in determining whether a contract provision is unambiguous.” Microsoft’s Mem. in Supp. of Its Mot. to Compel Produc. of Docs. (Aug. 8, 2008) (JA-8 #64) at 1, 9. Over Novell’s objection, the district court granted Microsoft’s motion, stating: “[D]epending upon how the term ‘indirectly’ in the assignment from Novell to Caldera is construed, it may be that the claims asserted by Novell in Counts I and VI are ‘associated directly or indirectly with any of the DOS Products or Related Technology.’” JA-127.

At the conclusion of discovery, Novell moved for summary judgment on several of Microsoft's defenses. JA-4876. The first set of defenses – waiver, real party in interest, accord and satisfaction, and estoppel – was premised on the alleged assignment. JA-4893. The second set of defenses – res judicata and collateral estoppel – was offered in the alternative. JA-4883; JA-4975. Microsoft cross-moved for summary judgment on these defenses. JA-4968. It separately moved for summary judgment on the merits of Counts I and VI, and on the ground that, under Federal Rule of Civil Procedure 8(a)(2), Novell's Complaint failed to give Microsoft fair notice that it sought redress for injury to GroupWise. Microsoft's Mem. of Law in Supp. of Its Mot. for Summ. J. (Oct. 7, 2009) (JA-12 #102) at 2-3, 36-38.

Granting Microsoft's cross-motion in a March 2010 Order, the district court – contrary to what it had ruled in June 2005 – held that “Novell no longer owns [Counts I and VI] and may not pursue them here.” JA-369, JA-371. The court explained why it believed that its “earlier ruling was wrong”:

Although the claims asserted by Novell in Counts I and VI are for damage caused to its software applications, the reason Microsoft allegedly engaged in the conduct causing the damage was to obtain and maintain its monopoly in the operating system market – the market in which the DOS Products competed. ... By associating claims for harm to applications with the operating system market in which the DOS products competed, the argument establishes that the claims were transferred by Novell to Caldera under the APA. ... The



assignment clause does not mention “harm” but rather “associat[ion].”

JA-371-72. In contrast, with respect to Counts II-V, the district court noted, “[u]nquestionably, Novell retained the claims based on Microsoft leveraging its operating system market monopoly into a monopoly in the applications markets.” JA-372 n.2.

Despite the dispositive finding of a prior assignment of Counts I and VI, the district court decided in the alternative that, “had Novell not assigned them to Caldera, Count I would have survived Microsoft’s summary judgment motion [on the merits] but Count VI would not.” JA-369, JA-376. Also in the alternative, the district court rejected Microsoft’s contention that Counts I and VI, if not assigned, would be res judicata. JA-376 n.9. Finally, the district court held that allegations that Microsoft unlawfully injured GroupWise were “not properly part of this action” because the Complaint “failed to provide notice that Novell was basing its claims in part on Microsoft’s treatment of GroupWise.” JA-382-83.

### **STATEMENT OF FACTS**

The principal issue on appeal turns on the relationship, if any, between the claims asserted against Microsoft by Novell in Counts I and VI, and the DOS Products that Novell assigned to Caldera. This issue requires a detailed review of Microsoft’s efforts to destroy the DOS Products and its later, distinct efforts to destroy Novell’s Business Applications.

**A. Microsoft’s Destruction Of Novell’s DR-DOS Operating System**

Through September 1994, Novell and Microsoft sold competing disk operating systems for Intel-compatible PCs, called DR-DOS and MS-DOS. During that period, Microsoft undertook a course of anticompetitive conduct to “eliminate DR DOS as a competitor” to MS-DOS, which was then “the predominant [disk] operating system.” *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1298-99 (D. Utah 1999);<sup>1</sup> *United States v. Microsoft Corp.* (“FOF”), 84 F. Supp. 2d 9 (D.D.C. 1999) ¶ 6.<sup>2</sup>

Between 1990 and 1994, Microsoft froze DR-DOS out of the market by making “knowingly false and misleading preannouncements relating to the forthcoming” versions of MS-DOS, a practice known as “vaporware.” During this period, Microsoft also used its Windows software to marginalize DR-DOS. Prior to 1995, Windows itself was a “graphical user interface ... sitting on top of” whichever disk operating system (such as DR-DOS or MS-DOS) the user purchased. FOF ¶¶ 7-8. As Windows gained popularity, Windows compatibility became a necessary feature of any viable disk operating system. Microsoft created “the appearance of ‘incompatibility’” between DR-DOS and Windows through a

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<sup>1</sup> Descriptions of Microsoft’s anticompetitive actions toward DR-DOS are as alleged in the *Caldera* case, which settled before trial.

<sup>2</sup> The district court’s December 3, 2008 Order binds Microsoft to the FOF identified in this brief.

“campaign of ‘fear, uncertainty, and doubt.’” *Caldera*, 72 F. Supp. 2d at 1299-1303.

And “[t]o assure DR DOS’s incompatibility with Windows,” Microsoft “beta blacklisted” DR-DOS, denying “access to a Windows 3.1 beta,” including, critically, the application programming interfaces (“APIs”). *Id.* at 1303-04.<sup>3</sup> Microsoft also “intentionally” created incompatibilities between Windows 3.1 and DR-DOS “for the sole purpose of eliminating DR DOS as a competitor.” *Id.* at 1303. Microsoft also leveraged its Windows monopoly to impose exclusionary licenses requiring manufacturers of PCs to “purchase both MS-DOS and Windows” together, thus depriving Novell of any opportunity to sell DR-DOS through those manufacturers. *Id.* at 1300-02, 1304.

Microsoft administered the “*coup de grace*” in 1993, when it pre-announced the release of Windows 95, which would “integrat[e] Windows with DOS, creating a ‘common install,’” thereby “‘making it so there is no reason to try DR DOS to get Windows.’” *Id.* at 1304 (quoting e-mail from Microsoft executive). Novell finally capitulated after “years of Microsoft’s illegal anticompetitive conduct, ... [and] announced in September 1994 that it would withdraw from active

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<sup>3</sup> APIs, which are provided by operating systems, middleware, or network services, “allow applications to achieve functionality.” JA-377 n.10; JA-3903 n.17; JA-3917-18, JA-3937; FOF ¶ 2.

development and marketing of further versions of DOS.” *Id.* By then, DR-DOS was no longer a viable competitor in the operating system market.

**B. Novell’s Sale Of The DOS Products And The Ensuing Caldera Litigation**

Fearing retaliation from Microsoft, Novell ultimately decided not to sue Microsoft, but instead to divest Novell’s inactive DOS assets, while preserving a chance to realize value from its antitrust claims for injuries to DR-DOS. *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 770 (Utah Ct. App. 2004); JA-1824; JA-1882; JA-2602-05.

On July 23, 1996, Novell and Caldera (later, the Canopy Group) executed the APA, which is the subject of this appeal. Caldera agreed to pay Novell \$400,000 and Novell agreed to assign to Caldera “specified assets and liabilities comprising the DOS Business, including the products associated with the DOS Business.” JA-1963 § 1.3, JA-1967 § 4.1. Specifically, Novell agreed to assign all of its “right, title and interest in and to” the “DOS Products,” which were defined as a specific list of seven versions of Novell’s DOS operating system and six DOS-based software applications. JA-1964 § 2.6, JA-1966 § 2.14, JA-1966-67, JA-2006 § 3.1. The APA also assigned to Caldera “Related Technology,” which was defined as “technology ... that is necessary to the performance by the DOS Products of their intended functions or purposes,” and the trademarks and

copyrights to, and the documentation for, the DOS Products. JA-1964-67, 2006 §§ 2.4, 2.11, 2.14-.17, 3.1.

In addition to the DOS Products, Related Technology, and intellectual property, Novell assigned “all revenues associated with the DOS Business that accrue after” July 23, 1996, as well as “any and all claims or causes of action held by Novell [on July 23, 1996,] and associated directly or indirectly with any of the DOS Products or Related Technology.” JA-1966-67 § 3.1. In the separate License Agreement, Caldera agreed to pay Novell a percentage of any “revenue relating to any ... causes of action ... arising prior to” July 23, 1996. JA-2009 § 3(s). Through this royalty provision, Novell retained a financial interest in the DR-DOS antitrust claims it was assigning to Caldera. The APA did not assign or otherwise refer to any of the Novell Business Applications at issue here – WordPerfect, Quattro Pro, GroupWise, PerfectOffice, or related business applications.

Immediately after executing the APA, Caldera filed its complaint for antitrust injuries to DR-DOS, alleging that through the anticompetitive acts detailed above, Microsoft destroyed DR-DOS to monopolize the DOS market. JA-2090 ¶ 1, JA-2103-04 ¶ 44, JA-2108-13 ¶¶ 57, 59, 61-62, 64-71. Caldera sought damages only for injury to the DR-DOS business. JA-2111 ¶ 64, JA-2114 ¶ 74, JA-2117 ¶¶ 81, 85. On January 7, 2000, Microsoft settled for \$280 million all claims that Caldera had asserted or acquired from Novell. JA-2461-62 §§ 2-3.

Neither the Caldera complaint nor the settlement agreement mentioned WordPerfect, Quattro Pro, GroupWise, PerfectOffice, or NetWare.<sup>4</sup>

### **C. Microsoft's Destruction Of Novell's Business Applications**

With DR-DOS no longer threatening Microsoft's operating system monopoly by September 1994, Microsoft turned its attention to a different and emerging threat posed by Novell: its recently acquired suite of leading Business Applications, which could help competing operating systems surmount the applications barrier to entry that protected Microsoft's operating system monopoly. Beginning in October 1994, Microsoft embarked upon a separate and distinct campaign of anticompetitive conduct to destroy these applications. The claims on appeal concern only the antitrust injuries to the Business Applications; the conduct at issue did not affect the dormant DOS Products in any way.

#### **1. Microsoft Needed Independent Software Vendors to Develop Compatible Business Applications**

Microsoft long understood that having a variety of quality applications available to run on its operating systems would benefit Microsoft's business. *See* JA-3925; JA-3253-56; JA-3327-32. To that end, Microsoft sought the aid of independent software vendors, including WordPerfect Corp. JA-3250-51; *see also* JA-3925; JA-3253-56; JA-3327-32. Microsoft "evangelized" its operating systems

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<sup>4</sup> NetWare is a network operating system developed and owned by Novell.

and their features and induced these vendors to build their applications on APIs and other technical specifications disclosed by Microsoft. JA-3925.

The products of independent software vendors – most notably WordPerfect, which was the most popular word processor at a time when “PCs were used primarily for word-processing,” *Novell*, 505 F.3d at 305 – fueled the runaway success of Microsoft’s operating systems, JA-2654-55; *see also* JA-2682; JA-3788; JA-3925, and eventually created the applications barrier to entry that entrenched Windows as a monopoly. This barrier “stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base.” *Novell*, 505 F.3d at 306 (quotation marks omitted).

Microsoft recognized by the mid-1990s that some of the same applications that created the barrier could also neutralize it, simply by migrating themselves – and their customers – to any new operating system that might emerge. And so, like Mao letting a thousand flowers bloom, Microsoft exploited the vendors’ reliance upon its prior cooperation to cripple those applications that had enough popularity to threaten its monopoly.

## 2. Novell Threatened the Applications Barrier to Entry

In the spring of 1994, Novell acquired its Business Applications, including WordPerfect, Quattro Pro, and GroupWise. As a result, Novell suddenly posed a new and distinct threat to Microsoft's operating system monopoly: "a competing operating system, running the popular Novell software applications, [c]ould offer consumers an attractive alternative to Windows," thereby "surmounting the applications barrier to entry and breaking the Windows monopoly." *Id.* at 308.

When Novell bought it, "WordPerfect was a cross-platform leader" in the word-processing market, running on a variety of operating systems and hardware platforms. JA-3902, JA-3911-12. Further, Novell already had begun to develop networking and "middleware" technologies that were designed to help independent software vendors create applications that, because they were platform-independent, would eliminate dependence on Windows. JA-3901-02, JA-3947-55, JA-3960-65.<sup>5</sup> "Novell [also] was poised to integrate its middleware and networking technologies with [the Business Applications] to provide a rich development platform for third parties." JA-3902. The result would threaten to "reduce [Windows to] a commodity." JA-1326.

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<sup>5</sup> "'Middleware' is a term used to refer to software products that have the capability to serve as platforms for software applications themselves. They expose, or make available, their own APIs, and theoretically, software developers could rely upon these APIs rather than Windows's APIs ... ." *Novell*, 505 F.3d at 308 n.14 (citations omitted).



Microsoft's attitude towards WordPerfect changed dramatically once Novell acquired it and the other Business Applications. JA-884-85; JA-3949-50.

Internally, Bill Gates recognized that "[t]he merger ... change[d] [Microsoft's] competitive framework substantially," JA-1033, and asked his executive staff "what else could be done to attack Novell/[WordPerfect]," JA-1051. Steve Ballmer, then a senior Microsoft executive and now CEO, noted that Novell was "a more serious threat than ever." JA-1047.

By July 1994, Microsoft realized that it was in a "platform war" with Novell's Business Applications. JA-1360. Microsoft also believed that Novell was fashioning a strategy to commoditize Windows by developing cross-platform middleware. JA-1326. After witnessing a demonstration of WordPerfect coupled with Corsair, one of Novell's emerging middleware technologies, in September 1994, it dawned on Mr. Gates that "Novell is a lot more aware of how the world is changing th[a]n I thought they were." JA-1413; JA-1773-80.

Microsoft's worst fears were realized in December 1994, when Novell released PerfectOffice 3.0, a "suite" combining the Business Applications with robust middleware technology called "PerfectFit," JA-1421-40, which allowed users to "live" primarily inside the suite and gave other software developers access to more than 1,500 APIs. JA-3955-58. Novell successfully recruited other software developers to take advantage of PerfectFit. *See* JA-3955-58; JA-1327-28; JA-1732-

34. In February 1995, Novell further increased this threat by acquiring the rights to distribute Netscape Navigator and began integrating it into its Business Applications. JA-3965; JA-1669-85; JA-1541-59; JA-417-18; JA-1752-71.

### **3. Microsoft Launches an Anticompetitive Scheme Built on the Windows 95 Platform**

Eventually launched in August 1995, Microsoft's Windows 95 operating system was a "paradigm shift" in the software industry. It changed the dynamics of not only the operating system market, but also the markets for many applications, allowing software vendors to compete anew for market share. JA-3926-27; JA-3257-58; JA-1504-05; JA-1038-45. Vendors who did not have compatible versions of their products ready when Windows 95 launched rapidly lost their market shares to ready competitors, with little or no prospect of recovery.

Microsoft hoped to make Windows 95 the "new dominant operating system," JA-1504-05, while Novell hoped to become an applications "leader in the Windows arena," JA-414-16. In light of these seemingly symbiotic goals, Microsoft initially continued its cooperation with Novell, recruiting WordPerfect and the other Business Applications onto the Windows 95 platform.

Novell contracted to join Microsoft's "First Wave Program," which Microsoft created as a tool for promoting Windows 95. JA-1783; JA-1788; JA-1370-73; JA-1517-18. Under this program, Novell agreed to develop compatible versions of its popular Business Applications that would showcase the new

features of Windows 95 and launch simultaneously with Windows 95. JA-1788-89; JA-1370-73. In exchange, Microsoft agreed to provide Novell with early documentation of APIs and other technical information, to conduct co-marketing programs, and to certify the compatibility of the Business Applications. *See generally* JA-1444-53; JA-3190-91; JA-3247-48; JA-3193.

But as the threat of the Business Applications crystallized, Microsoft reversed course. As later explained by Microsoft executive Jeff Raikes in an e-mail to Warren Buffett, Microsoft came to view its acquisition of new monopolies in business applications as crucial to protecting its existing Windows monopoly: “If we own the key [application] ‘franchises’ built on top of the operating systems, we dramatically widen the ‘moat’ that protects the operating system business. ... We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC.” JA-2086; JA-65 ¶ 62. As even Microsoft recognized, however, its own applications could not compete with Novell’s Business Applications on the merits. *See* JA-1411. So instead of competing with them, Microsoft set out to destroy them as a competitor.

Microsoft “directly targeted” Novell’s Business Applications, *Novell*, 505 F.3d at 316-17, and the impending release of Windows 95 gave Microsoft an opportunity to destroy them. Despite its initial cooperation with Novell, Microsoft began in October 1994 to frustrate the development, marketing, distribution, and

performance of new versions of Novell's Business Applications. Microsoft specifically timed its conduct to ensure that Novell's products would not be ready upon the release of Windows 95. As a result, Novell's Business Applications lost substantial market share and Microsoft obtained new monopolies to strengthen the already formidable barrier around the Windows monopoly.

**a. Microsoft Promoted, Then Withdrew, the Namespace Extension APIs**

In anticipation of the release of Windows 95, Microsoft encouraged software developers to use a powerful new technology called "namespace extension" APIs, which would allow independent software vendors to integrate seamlessly with Windows 95 and offer innovations in browsing the computer, the network, and even the internet – all from inside an application such as WordPerfect. *See, e.g.*, JA-932; JA-3994-96. As Mr. Gates put it, the new APIs were "critical" and "central to [Microsoft's] whole strategy" for Windows 95. JA-1036; JA-3932.

In November 1993, Microsoft told WordPerfect Corp. that it was going to document the APIs, JA-977, and urged WordPerfect, and later Novell, to exploit them, JA-1001-03, JA-1008, JA-1019-20; JA-893; JA-1334. In June 1994, Microsoft provided the first beta version of Windows 95, which included sufficient documentation for Novell to invest heavily in developing its Business Applications around the namespace extension APIs. JA-2665-66; JA-2640-42.

During the summer and fall of 1994, Novell held at least three design reviews on namespace extension APIs to “exploit this [functionality] seamlessly” in the Business Applications. JA-1401; JA-3979-80. Microsoft knew at the time that Novell was designing its applications around the APIs, JA-2644; JA-1414, and Novell even told Microsoft that there would be “hell to pay” if Microsoft changed them, JA-1396.

Novell’s admitted dependence strengthened Microsoft’s hand; Microsoft’s knowledge of the superiority of Novell’s Business Applications caused Mr. Gates to clench that hand into a fist. Just two weeks after seeing Novell demonstrate its latest WordPerfect and middleware innovations, Mr. Gates issued his infamous e-mail of October 3, 1994, ordering the withdrawal of the namespace extension APIs from Windows 95, at least “until [Microsoft] ha[s] a way to do a high level of integration that will be harder for [the] likes of [Lotus] Notes, WordPerfect to achieve, and which will give Office [Microsoft’s own suite of business applications] a real advantage.” JA-1411. Mr. Gates conceded that Microsoft “can’t compete with Lotus and WordPerfect/Novell without this.” JA-1411. Later that month, Microsoft released a new beta version of Windows 95 that withdrew the documentation and support for these crucial APIs. JA-419-38.

Mr. Gates’ decision, which, he acknowledged, came “late in the day,” JA-1411; *see also* JA-2656, “severely crippled” Novell’s plans for allowing users

to find and display information within PerfectOffice, JA-2636-37; *see also* JA-1750. It forced Novell's developers to attempt to recreate from scratch the crucial functionality that was lost with the APIs. JA-2638. This work became the "critical path" on the schedule for completing PerfectOffice, JA-3408-13, fatally delaying the suite's launch and eliminating significant functionality, JA-2635; JA-3408-13.

**b. Microsoft Promoted, Then Manipulated, the MAPI Messaging Standard**

In the early 1990s, Microsoft began to promote its messaging API, "MAPI." In theory, any e-mail application on a PC could establish an interface with any e-mail server, regardless of the vendor, so long as each product was written to the MAPI specification. Between 1992 and 1994, Microsoft aggressively encouraged developers to use MAPI 1.0, JA-4012-18, which Microsoft promised would be an open, cross-platform standard and future component of Windows 95. JA-859-60; JA-1267-68; JA-969; JA-979. These promises led a consortium of developers, including Novell, to drop their competing messaging standard. JA-4018; JA-3422; JA-1527.

But once it had convinced the industry to adopt MAPI 1.0, Microsoft broke its promises, as the industry discovered in 1995, when evidence of Microsoft's undocumented MAPI extensions, which afforded Microsoft's own messaging applications advantages over competitors, such as Novell and its GroupWise

e-mail/collaboration application, came to light. JA-1527; JA-1528; JA-1532-33; JA-1534-40; JA-4021-26. Microsoft also failed to integrate MAPI into Windows 95, as it promised to do, forcing users who wanted to use GroupWise to install Microsoft's own competing messaging application, Exchange, just to gain access to MAPI, the supposed industry standard. JA-4027-29; JA-4681-83; JA-1822-23; JA-1887-88. Throughout the mid to late 1990s, Microsoft continued to revise MAPI in ways that either broke GroupWise, JA-2070-71; JA-2123-24; JA-4031-33; JA-4683, or made it increasingly difficult for GroupWise to access it, JA-2258; JA-2458-59.

**c. Microsoft Promoted but Refused to Deliver Printing Functionality**

Microsoft also promoted a feature of Windows 95 called "custom print processors," which would allow WordPerfect to continue providing greater printing functionality and superior technologies for managing printers. JA-4049; JA-561, JA-564-75; JA-1606, JA-1609-12. Novell informed Microsoft that it intended to use this functionality. *See* JA-1739-41; JA-600. In early 1995, Microsoft provided sample documentation and advice, JA-561, JA-564-75; JA-1606, JA-1609-12, later told Novell that the functionality would be available in a forthcoming beta, and finally assured Novell that the necessary files would arrive shortly. JA-1739-41; JA-600.

Yet, in June 1995 – just two months before the release of Windows 95 – Microsoft informed Novell that the functionality would *not* be available after all. JA-1739-41; JA-600. Microsoft well understood that its late notice would force Novell to omit superior capabilities from the Business Applications and expend substantial resources developing inferior alternatives. JA-4052-56.

**d. Microsoft Promoted the Windows 95 Logo but Made One Impossible for Novell’s Applications to Obtain**

In 1994, Microsoft launched its “Designed for Windows 95” logo program, under which software vendors could display on their packaging a logo indicating compatibility with Windows 95. JA-1370-73; JA-4036. To obtain the logo, an application had to demonstrate compatibility with a second, entirely different, operating system known as Windows NT, which competed with Novell’s own NetWare. JA-4037-41; JA-1472-81. Fundamental differences between Windows 95 and Windows NT made it difficult for developers – including Microsoft itself – to attain “dual compatibility.” JA-4044-46; JA-4685-88. Novell requested an exemption from the requirement, JA-1524-26, but Microsoft denied the request, JA-1663-65, even though it granted an exemption to its own applications, which were equally unable to achieve dual compatibility.

**e. Microsoft Restrained Trade**

During 1994 and 1995, Microsoft used exclusionary licensing agreements, such as rebate programs and minimum commitments, to foreclose Novell’s ability



to distribute its Business Applications through key distributors, resellers, and large PC manufacturers. JA-87-94 ¶¶ 112-133; JA-3670-71, JA-3750-52, JA-3756-68; JA-4558-59, JA-4603-11.

#### **4. The Results of Microsoft's Anticompetitive Conduct**

Through these anticompetitive actions, Microsoft rendered Novell's Business Applications all but irrelevant. WordPerfect's market share fell from 40% in 1993 to 4.9% in 1996, and Microsoft's counterpart, Word, increased its share from 49.8% in 1993 to 89.5% in 1996. JA-3877-83. As a direct result of Microsoft's anticompetitive assault, the value of Novell's Business Applications declined by approximately \$1 billion. *See, e.g.*, JA-3455.

In January 1996, Novell sold its Business Applications Division to Corel. JA-1853-54. But Novell retained its antitrust claims for injury to the Business Applications and its ownership of GroupWise and NetWare.

#### **SUMMARY OF ARGUMENT**

The district court erred in holding that the APA assigned to Caldera the claims asserted in Counts I and VI. By its terms, the APA transferred Novell's DOS Business: the thirteen specific DOS Products, the intellectual property rights to those products, the revenues from those products, and the claims "associated directly or indirectly with any of the DOS Products." The natural – indeed, the only plausible – understanding of this provision is that it conveyed all claims for

injury to the conveyed DOS Products, and not claims for injury to other, unconveyed lines of business.

After first embracing this interpretation, the district court reversed course, ruling that the APA also assigned to Caldera claims for injury to Novell's Business Applications, which were not themselves part of the transaction. The court reasoned that these claims were "associated" with the transferred DOS Products because Microsoft targeted the Business Applications to monopolize the operating system market, in which DR-DOS previously competed. But the plain text of the APA, which never even mentions any of the Business Applications or an operating system market, precludes the district court's finding of an "association." It is inconceivable that the contracting parties intended to assign an unspecified subset of claims for injury to the Business Applications that were *not* transferred under the APA, a subset to be determined by a third party's intent to affect any aspect of the market in which the DOS Products once competed.

The claims at issue have no plausible connection to the DOS Products or the antitrust claims for injury to those transferred products. The set of claims transferred to Caldera and the set at issue here involved different injuries to different lines of business caused by different acts undertaken during different time periods to eliminate different types of threats posed to different Microsoft operating systems.

But even if the text of the APA were not so clear, Novell would still be entitled to summary judgment. Federal common law requires that the assignment of an antitrust claim be express; whatever else it may or may not do, the APA does not *expressly* assign to Caldera claims for injury to the Business Applications. And all of the available extrinsic evidence – including the harmonious recollections of those who negotiated the APA on behalf of Novell and Caldera, and the contracting parties’ subsequent course of conduct – shows that the contracting parties never intended to assign claims for injury to any Novell products other than the DOS Products. Even if the extrinsic evidence somehow failed to resolve an ambiguity in the contract, the district court still would have erred in granting Microsoft summary judgment, because that evidence, at a bare minimum, creates a genuine issue of material fact as to the contracting parties’ intent.

Finally, the district court erred in holding that Novell had not adequately pleaded its claims relating to GroupWise. Microsoft’s own conduct of the litigation shows that the Complaint afforded Microsoft adequate notice.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court “review[s] an award of summary judgment de novo.” *United States v. Bergbauer*, 602 F.3d 569, 574 (4th Cir. 2010), *petition for cert. filed*, No. 10-100, 2010 WL 2810459 (U.S. July 15, 2010). “Summary judgment is

appropriate only ‘if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.’” *Id.* (quoting FED. R. CIV. P. 56(c)(2)). “[T]he court must take care to resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing th[e] motion.” *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks omitted).

The Court reviews a judgment under Federal Rule of Civil Procedure 8 for abuse of discretion. *Gardner v. Easley*, 331 F. App’x 205, 206 (4th Cir. 2009).

## **II. THE APA DID NOT ASSIGN THE CLAIMS ASSERTED IN COUNTS I AND VI**

As the district court initially held, it is a “far stretch” to interpret the APA to assign antitrust claims for injury to the Business Applications, which themselves were not assigned. Indeed, it is an impossible stretch, and all the relevant evidence supports reversal.

### **A. Principles Governing The Interpretation Of The APA**

The APA selects Utah law as controlling, JA-1980 § 10.1, and as explained below, federal common law also informs the interpretation of purported assignments of antitrust claims.

Under Utah law, “[a]n assignment is interpreted according to the rules of contract construction.” *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991).

Under these rules, Utah courts “look to the language of the contract to determine its meaning and the intent of the contracting parties. [Utah courts] also consider each contract provision ... in relation to all of the others, with a view toward giving effect to all and ignoring none. Where the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 207 P.3d 1235, 1240 (Utah 2009) (quotation marks and citations omitted). Utah law permits a court to look to “extrinsic evidence of the parties’ intent” if “the language of the contract is ambiguous.” *Id.* Under Utah law, a contract term is ambiguous only if it is “capable of more than one reasonable interpretation.” *Id.* (quotation marks omitted). Thus, “[t]o demonstrate ambiguity, the contrary positions of the parties must each be tenable.” *R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1074 (Utah 1997) (quotation marks omitted).

The “court faces a conceptually difficult task in deciding whether to grant summary judgment on [the] matter of contract interpretation.” *Wash. Metro. Area Transit Auth. v. Potomac Inv. Props., Inc.* (“WMATA”), 476 F.3d 231, 235 (4th Cir. 2007) (quotation marks omitted). “If [the] court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive

facts are in genuine issue.” *Id.* (quotation marks omitted). If the court “determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis.” *Id.* (quotation marks omitted). “If, however, resort to extrinsic evidence in the summary judgment materials leaves genuine issues of fact respecting the contract’s proper interpretation, summary judgment must of course be refused and interpretation left to the trier of fact.” *Id.* (quotation marks omitted).

Much easier is the task of deciding whether to grant summary judgment on the matter of the interpretation of the contract under federal law. Whereas Utah law allows the court to resort to extrinsic evidence if the contract is ambiguous, federal common law requires that “only an express assignment of an antitrust claim can be valid.” *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 438-39 (3d Cir. 1993).

Under federal common law, an antitrust claim is expressly assigned only if either (1) the assignment makes “specific reference” to the antitrust claim, *id.* at 440, or (2) the assignment is “unambiguous and all-inclusive,” *Lerman v. Joyce Int’l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993) (Alito, J.). *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1106 (1st Cir. 1994) (when owner sold interest in team, his antitrust

claim against other owners in league was not assigned because contract lacked “express language”). An assignment is “unambiguous and all-inclusive” only if the words alone “could not reasonably lead to” any conclusion other than an assignment. *Lerman*, 10 F.3d at 112-13 (finding unambiguous and all-inclusive the sale of a corporate division and, “without limitation, any and all of [the division’s] causes of action [and] claims ... of whatsoever nature” (quotation marks omitted)). A “general assignment of rights” will not do. *Gulfstream*, 995 F.2d at 440.

**B. The APA Unambiguously Did Not Assign The Claims Asserted In Counts I And VI**

The text of the APA shows that the only claims Novell assigned were for injury to the DOS Products, and that Novell did not assign any claims for injury to the Business Applications. The district court’s contrary interpretation is untenable.

**1. By Its Plain Terms, the APA Did Not Assign Claims for Injury to the Business Applications**

We begin with the plain language of the APA. The purpose of the transaction between Novell and Caldera was made pellucid in the APA’s opening recitals. Caldera agreed to “acquire substantially all of the assets and assume certain liabilities of Novell comprising the DOS Business.” JA-1963 § 1.2. Novell, in turn, agreed to “(a) transfer to Caldera specified assets and liabilities comprising the DOS Business, including the products associated with the DOS Business

(‘DOS Products,’ as defined in Section 2.6); and (b) assign to Caldera certain related rights and agreements.” JA-1963 § 1.3.<sup>6</sup>

The APA was clear in effectuating this intent. Section 3.1 of the APA provides: “Novell shall ... assign to Caldera all of Novell’s right, title and interest in and to the Transferred Assets.” JA-1966. Section 2.14 defines “Transferred Assets” to include “the DOS Products,” the “copyrights” and “marks” to those products, and “Related Technology.”<sup>7</sup> JA-1966. Section 2.6, in turn, defines “DOS Products” to mean thirteen specifically identified products, including seven iterations of the DOS operating systems created by Novell and its predecessor, Digital Research, and six related DOS-based software applications. JA-1964.

Section 3.1 of the APA also provides that “Novell shall assign to Caldera all revenues associated with the DOS Business that accrue after the Closing Date.” JA-1966. Finally, Section 3.1 further provides that Novell “shall ... assign to Caldera all of Novell’s right, title, and interest in and to any and all claims or causes of action held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products or Related Technology.” JA-1966-67. In

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<sup>6</sup> Section 2.5 defines “DOS Business” as “the business of developing, marketing, and distributing the DOS Products.” JA-1964.

<sup>7</sup> “Related Technology” was defined by the APA to include such things as “trade secrets,” “source code,” “methods,” and other intellectual property “necessary to the performance by the DOS Products of their intended functions or purposes.” JA-1965 § 2.11.



short, the APA unambiguously transferred to Caldera the constituent elements of Novell's DOS Business – the DOS Products, the intellectual property rights to the DOS Products, the revenues from the DOS Products, and the claims for injury to the DOS Products.

The APA is equally unambiguous in what it did *not* do. It plainly did not transfer to Caldera any Novell products *other than* the thirteen specified “DOS Products.” It did not transfer any intellectual property rights to any Novell products *other than* the thirteen specified “DOS Products.” It did not assign to Caldera any revenues from any Novell products *other than* the thirteen specified “DOS Products.” And it did not assign any claims or causes of action “associated” with any Novell products *other than* the thirteen specified “DOS Products.” Certainly, the APA did not assign such claims expressly, as required by federal common law. All agree that the Business Applications, including WordPerfect and Quattro Pro, were not part of the deal, and Novell no more assigned *claims* “associated” with the Business Applications than it assigned *revenues* “associated” with them, or even the Business Applications themselves.

The district court initially read the APA to mean what it says: it was a contract for the sale of only the thirteen specific DOS Products and other assets and rights in the same line of business. The court initially rejected as a “far stretch” Microsoft's interpretation. As the district court recognized, “[t]he fallacy in

[Microsoft's] argument is that the claim asserted in Count I, while arising from Microsoft's monopoly in the operating system market, is for damage not to [DR-]DOS or any other operating system but for damage to applications software." JA-108.

This case is just that simple. This Court, too, presumably saw no merit in Microsoft's convoluted interpretation of the APA, for it denied Microsoft's request to certify the issue for interlocutory review, even as it granted Microsoft's request to certify the ruling on antitrust standing. JA-118.<sup>8</sup>

## **2. The District Court's Interpretation Is Untenable**

The district court did a complete about-face on remand, concluding that its "earlier ruling was wrong," and accepting as the only reasonable interpretation the same interpretation that it previously belittled as a "far stretch." JA-371-72. The district court came to agree with Microsoft that the claims asserted in Counts I and VI are "associated directly or indirectly with any of the DOS Products" because, "[a]lthough the claims asserted by Novell in Counts I and VI are for damage caused to its [Business Applications], the reason Microsoft allegedly engaged in the conduct causing the damage was to obtain and maintain its monopoly in the

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<sup>8</sup> Certification is appropriate if the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

operating system market – the market in which the DOS Products competed.”

JA-371. Thus, according to the district court, Microsoft’s intent to monopolize the “operating system market” supplies the necessary “associat[ion]” between the DOS Products and Novell’s claims in Counts I and VI for antitrust injury to its Business Applications. JA-372.

For many reasons, the district court’s interpretation is untenable, as we demonstrate below.

**a. The District Court’s Interpretation Attributes to the Parties Intentions They Did Not Have**

The district court’s interpretation is untenable because, among other reasons, it attributes to the contracting parties intentions that they obviously did not have.

First, on the district court’s reading, Novell would have transferred not only the claims for injury to its Business Applications, but also the revenues from the Business Applications and even the Business Applications themselves. The APA, after all, “assign[s] to Caldera all revenues *associated with the DOS Business*” and “transfer[s] to Caldera ... the products *associated with the DOS Business*” no less than it “assign[s] ... any and all claims or causes of action ... *associated directly or indirectly with any of the DOS Products.*” JA-1963 § 1.3, JA-1966-67 § 3.1 (emphasis added). But Novell did not assign to Caldera the Business Applications – those products, except for GroupWise, had already been sold to Corel – or any

revenue from the Business Applications. It follows that Novell did not assign any claims for injury to the Business Applications either.

Second, by the district court's logic, the contracting parties intended to establish a driftnet assignment of *some* nebulous group of claims for *some* unspecified kinds of injury to any untransferred Novell product, to be determined *post hoc* by the presence of some undefined "association" with the transferred DOS Products, no matter how remote, attenuated, or random. This association, under the district court's interpretation, could be supplied by *any* commonality between the claim and the DOS Products, even by the subjective motivations of a third party who is a stranger to the assignment. As the district court explained, here the association was supplied by "the *reason* Microsoft allegedly engaged in the conduct causing the damage." JA-371 (emphasis added).

To illustrate the absurdity of the district court's interpretation of the APA, consider a standard contract claim by Novell against a customer for failure to pay for a shipment of Business Applications. Although such a claim would not on its face appear to have been assigned by the APA, it would have been assigned under the district court's reading of the APA if, for example, the customer purchased the Business Applications at the same time it also purchased a DR-DOS product, or if the customer purchased versions of the Business Applications designed to run on DR-DOS, or if any other "association" could be conceived, *post hoc*, between the

contract claim and the DOS Products. After all, because the APA assigns all types of claims associated with the DOS Products and nowhere mentions the operating system market, there is no textual basis for limiting the district court's expansive reading of the assignment to antitrust claims or to the specific market-based association invoked by the district court.

Third, under the district court's interpretation, the APA would have impermissibly created a risk of Microsoft's incurring duplicative antitrust liability. Counts I and VI "are based on the same alleged conduct as ... and seek recovery for damage to the same Novell products" as Counts II-V. *Novell*, 505 F.3d at 306. The difference between the two sets of claims is merely the theory of which market Microsoft sought to monopolize by injuring Novell's Business Applications. This difference is dispositive under the district court's interpretation: in contrast to the claims asserted in Counts I and VI, the district court observed that the APA "[u]nquestionably" did not assign the claims asserted in Counts II-V because those claims allege "harm to Novell's software applications caused by unlawful conduct engaged in by Microsoft for the purpose of monopolizing those applications' markets," rather than the operating system market. JA-372 n.2, JA-375.

Separating the claims in this way would have created the possibility that Caldera and Novell each would recover the same damages from Microsoft. Even if the district court were correct in finding that the contracting parties had such a

bizarre intent, federal antitrust law would not allow such an assignment, because of the risk of duplicative liability. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543-45 & n.52 (1983); *Novell*, 505 F.3d at 317-19.

Finally, the district court's interpretation is belied by the fact that Novell, just six months before executing the APA, had carefully reserved antitrust claims for injury to the Business Applications when it sold the Business Applications to Corel. It is implausible to interpret the APA to find an oblique intent to assign the same claims that were expressly retained such a short time before, and it is reversible error for the district court to have found that such an interpretation was *compelled* by the APA's text as a matter of law.

**b. The District Court's Supposed "Associations" Are Implausible**

The district court's interpretation is also untenable because the claims asserted in Counts I and VI have no "association" whatsoever with the "DOS Products." The "association" invoked by the district court has no basis in the APA's text. The APA, after all, assigned claims "associated directly or indirectly with any of *the DOS Products*," not claims "associated directly or indirectly with *the operating system market*." The APA does not mention the operating system market at all.

It is true that Microsoft destroyed both the DOS Products and the Business Applications to preserve and further entrench its monopoly of the operating system market. But the DOS Products and the Business Applications were two entirely distinct groups of products in two different lines of business posing two different types of threats to two different Microsoft operating systems, and Microsoft employed two different campaigns of anticompetitive conduct during two different time periods to destroy them.

From 1990 through September 1994, Microsoft targeted DR-DOS, a contemporary competitor of Microsoft's own DOS operating system, MS-DOS, through the use of vaporware, certain exclusionary licenses, beta blacklisting, intentional incompatibilities between Windows 3.1 and DR-DOS, and pre-announcement of the tying of MS-DOS and Windows 95. *See supra* 10-11. Novell did not even acquire the Business Applications until the spring of 1994. And not until October 1994 – after DR-DOS was discontinued – did Microsoft begin to prevent the emergence of new competitors to its Windows operating system monopoly by attacking the Business Applications.<sup>9</sup> Specifically, Microsoft

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<sup>9</sup> The conduct by which Microsoft injured the Business Applications could not have injured the DOS Products because DR-DOS was not among the potential challengers to Microsoft's operating system monopoly that were weakened as a result of Microsoft's destruction of Novell's Business Applications. *See* JA-2081 (“What effect could Microsoft's conduct have had on Novell's DR DOS business after [September 1994]? There no longer was a DR DOS business to be affected.”); JA-2682 (“[B]y 1994, ... Microsoft had eliminated DR-DOS as a competitive

withdrew the namespace extension APIs in Windows 95, manipulated the MAPI standard for Windows 95 and subsequent versions of Windows, refused to implement promised printing functionality in Windows 95, refused to certify the Business Applications for Windows 95, and imposed exclusionary licenses on certain distributors.<sup>10</sup> *See supra* 14-25.

Accordingly, the antitrust claims for injury to the DOS Products were entirely distinct from those for injury to the Business Applications. To treat the claims for injury to the Business Applications as nonetheless being “associated” with the claims for injury to the DOS Products, as the district court did, in effect rewards Microsoft for its multiple anticompetitive schemes.

The district court nonetheless thought it could find such an “association.” None of its supposed connections withstands scrutiny. First, the court said that although Novell was no longer marketing and supporting its DOS Products by October 1994, “its value certainly would have been affected by anticompetitive activity in the operating system market” in October 1994. JA-372 n.3. The court’s

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force in the PC OS market.”); JA-2687-91; JA-2694 (“No matter how successful DR DOS might have been in the early 1990s absent Microsoft’s allegedly anticompetitive actions, its ability to affect operating system competition in the second half of the 1990s ... was minimal.”).

<sup>10</sup> To be sure, Microsoft used exclusionary licenses to injure both the DOS Products and the Business Applications, but not the *same* exclusionary licenses. *See supra* 11, 24-25.



only apparent support was this: “[A]lthough Novell announced in September 1994 that it would exit the DR DOS business, according to the allegations made in the Caldera amended complaint against Microsoft, Novell continued to sell some DR DOS products thereafter.” JA-372 n.3. But those sales were trivial in volume. *See, e.g.*, JA-1824; JA-1876; JA-1929. More fundamentally, whatever the volume of this revenue, the inescapable point is that DR-DOS no longer posed a competitive threat to Microsoft’s operating system monopoly after its discontinuance in September 1994; the anticompetitive acts against the Business Applications were not targeted – directly, indirectly, or even conceivably – at DR-DOS.

Second, the district court thought it significant that Caldera had sought an injunction “requiring Microsoft, for a period of ten years, to disclose to Caldera all [APIs] for any operating system it produces.” JA-372 n.3. This shows, the district court said, that “the failure of Microsoft to disclose APIs” – which was “an important part of Novell’s claim asserted in Count I of this action” – “was damaging DR DOS.” JA-372 n.3; *see also* JA-374 n.7. But Microsoft’s failure to disclose the MS-DOS APIs had nothing to do with Microsoft’s later manipulation of Windows 95 APIs to injure the Business Applications. As explained by Stephen Hill, a lawyer who helped prepare Caldera’s complaint against Microsoft, Caldera “asked for that relief because DR DOS had to support the same APIs as MS-DOS in order to be competitive.” JA-5027-28 ¶¶ 3, 8, JA-5030-32 ¶¶ 16, 19. In any

event, this case is not about Microsoft's failure to disclose APIs. This case concerns Microsoft's evangelization and disclosure, then subsequent withdrawal, of those APIs.

Third, the district court observed that "the allegations of misconduct by Microsoft made in this action were undertaken in a market that already was dominated by Microsoft, allegedly in part because of anticompetitive actions it had previously taken against DR DOS." JA-372 n.3. But Novell does not contend that Microsoft's ascension in the operating system market prior to assaulting the Business Applications injured the Business Applications and therefore that ascension is not part of the claims asserted in Counts I and VI here.

Finally, the district court noted that "Novell's expert asserts that Microsoft was motivated to act anticompetitively against Novell in part because of Novell's purchase of DR DOS." JA-372 n.3. It is no doubt true that Microsoft viewed Novell as a competitor on many different fronts. But the district court's statement fails to distinguish between the different ways Microsoft acted anticompetitively, the different lines of business it attacked, and the different time periods in which it targeted Novell's businesses. Novell's purchase of DR-DOS motivated Microsoft to take certain anticompetitive actions against DR-DOS; Microsoft *later* took distinct actions against the Business Applications; and it took still other actions against other Novell products, such as NetWare.

**3. Novell’s Interpretation Does Not Render “Indirectly” Superfluous**

Microsoft argued below that Novell’s interpretation of the APA is unreasonable because it “fails” to “give[] independent meaning to the term ‘indirectly.’” JA-4997. In Microsoft’s view, all claims for injury to the DOS Business are “associated directly” with the DOS Products – and so if “indirectly” is to have an office, it must encompass claims, such as Counts I and VI, that are based on the theory that Microsoft’s anticompetitive conduct harmed the operating system market in which DR-DOS formerly competed. JA-4997.

Microsoft’s argument is mistaken. Novell’s interpretation does not deny the term “indirectly” any reasonable meaning. Even an “indirect” association must be an “association.” And for the reasons discussed throughout this brief, there is no association – direct, indirect, or otherwise – between the DOS Products and claims for injury to the Business Applications, at least not of a sort that could plausibly have been intended by the contracting parties.

**4. Conclusion: Novell’s Interpretation Is the Only Tenable Interpretation**

In sum, interpreting the assignment provisions of the APA ends where it began – with the unambiguous language of those provisions. The APA assigns any and all, but *only*, claims “associated directly or indirectly with any of the DOS Products.” It does not assign any claims, *none*, “associated directly or indirectly

with any of” the Business Applications. The language of the APA is not amenable to any other construction.

This language certainly cannot be made to yield the bizarre assignment that Microsoft, and now the court below, have concocted from it. It is inconceivable that the parties to the APA intended to assign a subset of claims for injury to Novell products that were *not* transferred under the APA, and that they further intended for the assignment of any particular claim to turn on a contingent, unspecified happenstance involving a stranger to the contract, such as whether the defendant’s wrongful conduct was intended to affect the market in which the DOS Products once competed. The district court should have entered summary judgment for Novell.

**C. Under Federal Law, The Absence Of Express Language Assigning Counts I And VI Precludes Such An Assignment**

Even if the plain language of the APA were not unambiguous in showing that Novell retained claims for injury to the Business Applications, as asserted in Counts I and VI, the plain language would still resolve the assignment in Novell’s favor as a matter of law. As noted above, federal law requires that antitrust claims be assigned expressly, either by “specific reference” to the antitrust claim or by “unambiguous and all-inclusive” language of assignment. *Gulfstream*, 995 F.2d at 440; *Lerman*, 10 F.3d at 112. Such language is absent from the APA, and so the inquiry ends for that reason as well.

**D. Extrinsic Evidence Confirms That Novell Did Not Assign The Claims**

Even if the plain language of the APA and the requirements of federal common law were not dispositive, Novell still would be entitled to summary judgment, because the extrinsic evidence – the testimony of those who participated in the negotiation of the APA on behalf of both Novell and Caldera, and the contracting parties’ subsequent conduct – precludes the district court’s interpretation.<sup>11</sup>

**1. The Harmonious Testimony of the Contracting Parties Shows Conclusively They Did Not Assign the Claims Asserted in Counts I and VI**

The most illuminating extrinsic evidence comes from the testimony of those who negotiated and implemented the APA. These witnesses, representing both contracting parties, agree that the APA was not intended to assign any claims for

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<sup>11</sup> Utah courts approach the question of facial ambiguity pragmatically, considering extrinsic evidence not only where the contract is facially ambiguous, but also to determine whether the contract is facially ambiguous in the first place. *See Daines v. Vincent*, 190 P.3d 1269, 1276-77 & n.5 (Utah 2008) (“when determining whether a contract is [facially] ambiguous, any relevant evidence must be considered,” including “the surrounding circumstances,” “the parties’ course of conduct,” and their “usage” (quotation marks and brackets omitted)); *Trans-Western Petroleum, Inc. v. U.S. Gypsum Co.*, 584 F.3d 988, 993 (10th Cir. 2009) (following *Daines*).

This aspect of Utah law is of no great moment here, however, because all roads lead to the same result: like the plain text, all of the extrinsic evidence demonstrates that Novell and Caldera intended to assign only claims for injury to the DOS Products.

injury to the Business Applications. Their testimony also establishes that the parties did not intend the word “indirectly” to enlarge the scope of the assignment in the manner argued by Microsoft. “Their harmonious recital of what the[] words [of the APA] mean is conclusive.” *Sunbury Textile Mills, Inc. v. Commissioner*, 585 F.2d 1190, 1196 (3d Cir. 1978); *see also Pennzoil Co. v. Fed. Energy Regulatory Comm’n*, 645 F.2d 360, 391-92 (5th Cir. 1981).

Paul Graf, Caldera’s negotiator in the transaction, attested that the “only claims Caldera was interested in purchasing were the claims for the injuries that Microsoft caused to Novell’s DR DOS business”; that “[t]hese DR DOS claims were the only claims discussed by either side during my negotiations with Novell”; that “claims concerning [the Business Applications] were neither contemplated as part of the conveyance nor actually conveyed to Caldera”; and that “[a]ny suggestion that the [APA] conveyed claims for harm to Novell’s applications would be contrary to the parties’ intentions and what I and my client, Caldera, understood was actually being conveyed.” JA-5023-24 ¶¶ 2-3.

Mr. Graf also attested that because the transaction “was completed fairly quickly” and “[t]here was little time to perform due diligence,” he “determined that using the word ‘indirectly’ in the [APA] would better protect Caldera’s rights to all claims associated with *the products actually conveyed* in the [APA] – ‘the DOS Products.’” JA-5024 ¶ 3 (emphasis added). Mr. Graf added: “Neither party

contemplated that claims ‘directly or indirectly’ related to ‘the DOS Products or Related Technology’ would include Novell’s antitrust claims for harm to its business applications.” JA-5024 ¶ 3.

David Bradford, who as Novell’s general counsel was “responsible for” the sale of the DOS Products, similarly attested that Novell transferred to Caldera “a potential antitrust claim against Microsoft for damage caused to the DOS Assets,” but that “Novell unequivocally did not include any claims or assets associated with ... Novell’s business applications.” JA-5038 ¶ 11. Mr. Bradford added: “It would have made no sense to sell Novell’s Business Applications claims to Caldera because Caldera was not in the applications business.” JA-5041-42 ¶ 24.

Mr. Bradford also explained that Microsoft’s “speculation” about the scope of “the ‘directly and indirectly’ language ... makes no sense.” JA-5041 ¶ 23. That “language was included because the parties believed there may have been potential causes of action concerning certain patents that were transferred that related to the DOS operating system.” JA-5041 ¶ 23. Further, Mr. Bradford said, “no one from Novell or Caldera ever construed the ‘directly or indirectly’ language to include any claims relating to Novell’s Business Applications business.” JA-5041 ¶ 23.

Robert Frankenberg, Novell’s CEO, testified during a deposition that “the intent was to sell DR DOS ... to Caldera with the right to sue for acts committed in competition with sales of DR DOS.” JA-3444-45; *see also* JA-3435-37.

Mr. Frankenberg gave essentially the same testimony in *Caldera*: responding to a question about whether the estimated value of the transferred claims “include[d] application claims, or ... only related to DOS,” Mr. Frankenberg stated that “[t]he discussion was only about DOS, because we were selling DOS, not selling the application.” JA-2254-57.

Finally, Stephen Hill, an outside lawyer who first helped Novell find a buyer for the DR-DOS claims, and then represented Caldera in its ensuing lawsuit against Microsoft, JA-5027 ¶ 3, JA-5031-32 ¶ 19, recounted that, “[i]n about May of 1996, Mr. Bradford called and asked me if I knew of anyone who might be interested in buying the DR DOS business and DR DOS claims from Novell,” JA-5029 ¶ 13. Mr. Hill later stated that he attended a meeting with several high-ranking Caldera representatives, at which one of them explained that Caldera “was interested in acquiring the DR DOS business both because he believed Caldera could still make money selling DR DOS and also because he had interest in pursuing claims against Microsoft for harm to the DR DOS business.” JA-5030 ¶ 14.

Mr. Hill added: “At all times, I understood the claims Caldera purchased to be for harm to Novell’s, and thus Caldera’s, DR DOS business, not for harm to Novell’s business applications. No one at Caldera ever told me Caldera had purchased Novell’s antitrust claims for harm to Novell’s business applications, and no one at Novell ever told me Novell had an interest in selling those claims to



Caldera.” JA-5032 ¶ 20. According to Mr. Hill, “[Caldera] did not bring the applications claims because, based on our discussions with officers of both Novell and Caldera and our understanding of the [APA], they were not transferred to Caldera.” JA-5032 ¶ 21.

## **2. The District Court Erred in Dismissing the Testimony of the Contracting Parties**

In dismissing this testimony, the district court misconstrued both the law and the facts. First, the court explained that it would “look[] only to [the contracting parties’] contemporaneous conduct, not to what they aver they intended after a controversy with a third party has arisen.” JA-374. But Utah law requires the court to consider *all relevant evidence*, not merely “contemporaneous conduct.” *See supra* 45 n.11.<sup>12</sup> And courts regularly credit participants’ recollections about what they intended their terms to mean, particularly when the contracting parties’ recollections are in accord. *See, e.g., Sunbury*, 585 F.2d at 1196-99; *Am. Cas. Co. v. Baker*, 22 F.3d 880, 887 (9th Cir. 1994); *Baladevon, Inc. v. Abbott Labs., Inc.*, 871 F. Supp. 89, 97-99 (D. Mass. 1994).

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<sup>12</sup> *Alvin, Ltd. v. United States Postal Service*, which the district court cited, does not apply Utah law and is not on point in any event. The principle recited in that case – “The parties’ intent must be gathered ... from the perspective of a reasonably intelligent person acquainted with the contemporary circumstances” – concerns the parties’ intent with respect to an unforeseen event, which is not the case here. 816 F.2d 1562, 1565-66 (Fed. Cir. 1987) (quotation marks omitted).

Second, the court found the evidence “ambiguous and inconclusive,” JA-374, showing only that the contracting parties “did not ... intend to assign ... claims for harm to Novell’s software applications caused by unlawful conduct engaged in by Microsoft *for the purpose of monopolizing those applications’ markets.*” JA-375 (emphasis added). According to the court, this testimony “beg[s] the relevant question: whether claims for damage to Novell’s applications *caused by unlawful conduct designed to impact the operating system market* were encompassed within the ‘directly or indirectly associated with’ language of the APA,” because “the fact of the matter is that any such claims simply were not contemplated, and thus were not discussed, when the APA was negotiated.” JA-375.

Not a shred of evidence establishes the supposed “fact” that neither Novell nor Caldera contemplated such antitrust claims. Indeed, as discussed below, the United States had already advanced the antitrust theory of Count I in a well-known action against Microsoft. More importantly, there is no testimony, just as there is no contract language, evincing an intent to identify claims for assignment on the basis of the monopolized market; rather, *all* the testimony establishes that the parties intended to assign claims based on the product that was injured. The court did not construe this evidence correctly on its own terms, let alone in the light most

favorable to Novell, as required on Microsoft's cross-motion for summary judgment.

**3. The Parties' Course of Conduct Demonstrates They Did Not Intend to Transfer the Claims Asserted in Counts I and VI**

Under Utah law, where the contracting "parties, by their action and performance, have demonstrated what was their meaning and intent[,] the contract should be so enforced by the courts." *Zeese v. Estate of Siegel*, 534 P.2d 85, 90 (Utah 1975). Here, the parties' course of conduct confirms that the APA did not include the claims asserted in Counts I and VI.

Most tellingly, Caldera never asserted any claims for injury to any products other than the DOS Products, even though it vigorously pursued and settled antitrust claims assigned by the APA. The district court tried to explain away this failure on the ground that "the claims asserted in Counts I and VI were not envisioned until the complaint in this action was prepared, long after the APA was executed." JA-371 n.2. The district court speculated that Counts I and VI "were ingeniously designed to survive Microsoft's anticipated limitations defense by permitting Novell to argue that the pendency of the government case against Microsoft – which was based upon Microsoft's antitrust violations in the operating system market – tolled limitations." JA-371.

The district court's speculation is both inaccurate and beside the point. Caldera "did not include the discussion of Novell's NetWare and applications businesses in the Caldera complaint because *Caldera did not own* those businesses or *claims associated with them.*" JA-5028 ¶ 8 (emphasis added); *see also* JA-5031-32 ¶¶ 17, 20-21. It therefore does not matter whether Caldera and Novell had yet realized they might have antitrust claims like those asserted in Counts I and VI; *no* claims for injury to the Business Applications were assigned, whatever the legal theory.

In any event, claims based on the antitrust theory underlying Count I had been brought against Microsoft well before Caldera's settlement with Microsoft in 2000, and even before the APA was executed in 1996. In a series of high-profile complaints against Microsoft during the mid-1990s, the United States pursued the theory underlying Novell's present claims – that Microsoft would target products and technologies outside the operating system market to protect its monopoly in the market. The United States alleged in 1994 that Microsoft took anticompetitive actions to discourage software companies from "developing applications for competing operating systems." *United States v. Microsoft Corp.*, 159 F.R.D. 318, 321-23 (D.D.C. 1995), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995). And in 1998, the United States alleged that Microsoft attacked Netscape's web browsing application

“with the purpose and effect of maintaining its PC operating system monopoly.”

JA-2142 ¶ 13; *see also* JA-2139-42 ¶¶ 5-12, JA-2159-61 ¶¶ 66-69.

Yet Caldera never asserted the claims in Counts I and VI, and Novell never urged Caldera to do so, even though the claims had great value and Novell had a financial interest in Caldera’s recovery. *See* JA-5031 ¶ 17 (“If we believed Caldera had acquired Novell’s claims for injury to its applications business, we likely would have pursued those claims.”).

The same conclusion must be drawn from Novell’s 2004 assertion of antitrust claims against Microsoft for injury to NetWare resulting from conduct designed to maintain the operating system monopoly. Under the district court’s view, the APA also would have assigned these NetWare claims to Caldera. Yet Microsoft, though fully informed of the terms of the APA, settled the NetWare claims for a substantial sum.

**III. AT MOST, THE APA IS FACIALLY AMBIGUOUS AND THE EXTRINSIC EVIDENCE CREATES A GENUINE ISSUE OF FACT FOR THE JURY**

Even if the district court’s interpretation were tenable, its ruling is still erroneous. If one thing is absolutely clear, it is that the APA does not unambiguously assign the claims at issue. Even if the textual analysis advanced above did not establish the district court’s error, it would at least establish that Novell’s own interpretation is “tenable,” *R & R Energies*, 936 P.2d at 1074, and “reasonable,” *Cafe Rio*, 207 P.3d at 1240. The district court’s initial ruling

confirms the point, as does this Court's refusal to hear the interlocutory appeal. Therefore, the APA is, at worst, facially ambiguous, in which case the extrinsic evidence must be called upon to resolve the contracting parties' intent. *See supra* 29. And if the extrinsic evidence is ambiguous and inconclusive, as the district court incorrectly found, then there is a genuine issue of material fact. *See supra* 29-30; *see also, e.g., Atalla v. Abdul-Baki*, 976 F.2d 189, 195 (4th Cir. 1992); *WMATA*, 476 F.3d at 235.

#### **IV. COUNT I SUFFICIENTLY PLEADED HARM TO GROUPWISE**

The district court also erred in barring Novell from pursuing allegations relating to the e-mail and collaboration software called GroupWise, which was a Business Application and part of the PerfectOffice suite, on the ground that the Complaint failed to provide adequate notice.<sup>13</sup> The record is to the contrary. The Complaint fairly encompasses GroupWise, and from its first discovery request, Microsoft understood as much, vigorously pursuing discovery into GroupWise. Because Microsoft has received fair notice and has not been prejudiced, Novell should not suffer a forfeiture through a crabbed parsing of the Complaint.

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<sup>13</sup> This issue must be addressed even if the assignment is affirmed, because some of the anticompetitive conduct aimed at GroupWise occurred *after* the APA was entered into and thus could not possibly have been assigned, even under the district court's interpretation of the APA. JA-1966 § 3.1 (assigning only claims "held by Novell at the Closing Date," i.e., July 23, 1996).

**A. Novell’s Complaint Gave Notice Of Harm To All Of Its Business Applications, Including GroupWise**

Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” The statement of a claim need only “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted). Moreover, “specific facts, elaborate arguments, or fanciful language are not necessary” under Rule 8(a). *Spencer v. Earley*, 278 F. App’x 254, 259 (4th Cir. 2008) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

Novell’s Complaint repeatedly identifies the harmed products as WordPerfect and *other* Business Applications (often referred to as “office productivity applications”). *See, e.g.*, JA-41-42 ¶¶ 5, 8, JA-57-58 ¶ 45, JA-100 ¶ 153. This language cannot plausibly be read to include WordPerfect and Quattro Pro alone, nor can it be read to exempt any specific Business Application from consideration.<sup>14</sup> Novell should not be penalized for its cautious use of an umbrella term to account for potential harm to each of its Business Applications, given Novell’s incomplete knowledge of Microsoft’s conduct prior to discovery.

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<sup>14</sup> The Complaint refers repeatedly to more than two Business Applications. *See, e.g.*, JA-40-42 ¶¶ 2, 5, 8, JA-46-47 ¶ 21, JA-57-58 ¶ 45, JA-60-63 ¶¶ 52, 56, JA-76-77 ¶ 81, JA-86-87 ¶ 110, JA-89-90 ¶¶ 118, 120, JA-93 ¶ 131, JA-100 ¶ 153. The Complaint twice refers to Novell’s “suite of office productivity applications,” PerfectOffice, which included GroupWise. *See* JA-76-77 ¶ 81, JA-88 ¶ 117.

The district court determined that the “Complaint in this case limits itself to anticompetitive conduct directed at applications sold by Novell in March of 1996, which would plainly exclude GroupWise” because GroupWise was not included in the 1996 sale of Business Applications to Corel. JA-383. The district court purported to find support for this reading in paragraph 2 of the Complaint. JA-383. Paragraph 2 alleges only that Novell sold the rights to WordPerfect and “other” Business Applications, and does not say that Novell sold “*all* other” or “*the* other” Business Applications. JA-40. In any event, the paragraph is at worst unclear and therefore should not be read to create a bar. *See* FED. R. CIV. P. 8(e) (“Pleadings must be construed so as to do justice.”).

**B. Microsoft Understood That Novell’s Claims Included Harm To All Of Its Business Applications, Including GroupWise**

Microsoft’s conduct throughout the course of this litigation shows its understanding that Novell sought redress for injury to GroupWise. In its first set of document requests, for example, Microsoft defined “office productivity applications” as: “word processing software programs, spreadsheet software programs, ... and email/collaboration software programs, and includes all other programs or technologies encompassed by the term ‘office productivity applications’ in Paragraphs 153, 155, and 175 of the COMPLAINT.” JA-2829. Thus, Microsoft was aware that the term “office productivity applications” as used in the Complaint extended beyond word processors and spreadsheet programs to



encompass, among other things, e-mail/collaboration software, of which GroupWise is the prime example.

Similarly, Microsoft's first set of interrogatories sought witnesses and documents concerning Novell's allegations that Microsoft withheld technical specifications concerning Windows 95, thereby delaying Novell's delivery of WordPerfect and related applications, JA-76 ¶ 79, and created and controlled new "industry" standards to delay the release and impair the performance of Novell's applications, JA-77 ¶ 83; JA-2977-78. In response, Novell identified at least 149 documents related to its GroupWise allegations, *see* JA-3001-05; JA-3297-306, and subsequently produced upwards of 100,000 documents relevant to those allegations. When Novell undertook a costly search of its computer back-up tapes for additional documents, the parties agreed to include "GroupWise" as a search term.

Additionally, Microsoft deposed Rich Hume, whom Novell identified as having knowledge about the GroupWise allegations. Indeed, Mr. Hume was one of six witnesses Novell identified as having such knowledge, two others of whom Novell deposed. JA-3298. All three of these depositions focused substantially on the GroupWise allegations, including conduct occurring both before and after March 1996. *See, e.g.*, JA-3373-78; JA-3227-28; JA-3233-34; JA-4543. In connection with its deposition of Mr. Hume, Microsoft even moved to compel the

disclosure of a document that focused on the GroupWise allegations and to re-open the deposition for further examination about GroupWise. *See* JA-129.

Microsoft did not claim surprise until serving its expert reports in 2009, when Microsoft *affirmatively instructed* its experts to refrain from addressing Novell's GroupWise allegations. These instructions came *after* Microsoft saw that Novell's experts were quantifying substantial damages relating to GroupWise. *See* JA-4217; JA-4278 n.1; JA-4465. The instructions were not related to any legitimate issue of notice. Microsoft's reliance on *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987), is thus misplaced; Novell has done substantially more than "hint" at a claim through its expert reports.<sup>15</sup>

Further, Microsoft will not be prejudiced by the continued inclusion of GroupWise in Count I, as the parties have completed discovery on the subject. In short, a fair examination of the record shows that Microsoft's claims of surprising hollow, and the Court should permit Novell to advance its GroupWise allegations.

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<sup>15</sup> *United States Football League v. NFL*, 638 F. Supp. 66 (S.D.N.Y. 1986), provides a better analog than *Deasy*. The court, based on facts similar to those here, denied defendants' motion to preclude plaintiffs from presenting evidence of an antitrust theory that defendants claimed was inadequately pleaded: the complaint contained adequate notice of plaintiffs' theory, defendants chose to ignore deposition testimony consistent with plaintiffs' theory, and defendants delayed in raising the issue; thus, any prejudice arose out of defendants' own actions. *Id.* at 67-68.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand the case with directions to enter summary judgment for Novell on the issue of assignment. The Court also should reverse the judgment that Novell failed to adequately plead injuries to GroupWise.

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Respectfully submitted,

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## **REQUEST FOR ORAL ARGUMENT**

Novell respectfully requests oral argument on the issues raised by its appeal. Novell believes these issues are important and that oral argument would assist the Court in resolving them.

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. \_\_\_\_\_ Caption: \_\_\_\_\_

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*[Appellant’s Opening Brief, Appellee’s Response Brief, and Appellant’s Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee’s Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]*

this brief contains \_\_\_\_\_ *[state the number of]* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains \_\_\_\_\_ *[state the number of]* lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

*[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]*

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(s) \_\_\_\_\_

Attorney for \_\_\_\_\_

Dated: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that on August 6, 2010, I caused the foregoing to be served on all parties or their counsel of record through the CM/ECF system.

/s/ Charles J. Cooper