

No. 10-1482

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

NOVELL, INCORPORATED,

Plaintiff-Appellant,

—v.—

MICROSOFT CORPORATION,

Defendant-Appellee.

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

BRIEF OF APPELLEE MICROSOFT CORPORATION

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September 17, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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BRIEF OF APPELLEE MICROSOFT CORPORATION

In June 1994, Novell, Inc. (“Novell”) acquired several office productivity applications, most notably the WordPerfect word processing software and Quattro Pro spreadsheet software. Less than two years later, in March 1996, Novell sold WordPerfect and Quattro Pro to Corel Corporation (“Corel”). In November 2004—more than eight years later—Novell filed this action seeking treble damages for harm allegedly inflicted on WordPerfect and Quattro Pro by Microsoft Corporation (“Microsoft”) during the brief period Novell owned those products. The claims at issue on this appeal (Counts I and VI of Novell’s complaint) are premised on the theory that Microsoft inflicted injury on Novell’s office productivity applications so as to maintain Microsoft’s monopoly in the

personal computer (“PC”) operating system market—a market in which WordPerfect and Quattro Pro did not compete. This convoluted theory was crafted to enable Novell to claim the benefit of the Clayton Act’s tolling provision, 15 U.S.C. § 16(i), which tolls the statute of limitations for a private antitrust action “based in whole or in part on any matter complained of” in a government enforcement action.

Earlier this year, the district court correctly determined that Novell does not own the claims asserted in Counts I and VI and thus has no standing to assert them against Microsoft. When Novell sold its PC operating system business to Caldera, Inc. (“Caldera”) in July 1996, it assigned 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 § 3.1 (emphasis added).) The term “DOS Products” was defined to include Novell’s PC operating system called DR DOS. That assignment plainly encompasses the present claims, which allege harm to competition in the PC operating system market, *i.e.*, the very market in which the “DOS Products” competed.

Even if Novell had not sold its claims, they would be barred by the doctrine of *res judicata* because they arise out of the same core of operative facts as the claims Caldera asserted against Microsoft. As the instigator and major

beneficiary of Caldera's lawsuit against Microsoft, Novell cannot sue Microsoft a second time for harm to competition in the PC operating system market in the mid-1990s.

There is an alternative ground for affirmance of the judgment, *i.e.*, Microsoft's alleged actions directed at WordPerfect and Quattro Pro did not harm competition in the PC operating system market. Harm to competition in the relevant market resulting from injury to WordPerfect and Quattro Pro is a necessary element of Novell's claims. Although the district court did not dismiss the complaint on this ground, the admissions of Novell's expert on this point are a sufficient basis for affirmance.

The district court's dismissal of Novell's complaint should be affirmed, and this litigation should, at long last, be brought to an end.

STATEMENT OF THE ISSUES

1. Whether Novell's assignment to Caldera of "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" precludes Novell from maintaining the claims in Counts I and VI, which allege harm to competition in the very market in which "the DOS Products" competed.

2. Whether Novell is barred by the doctrine of *res judicata* from bringing the claims asserted in Counts I and VI, which arise out of the same core of operative facts as did the claims asserted against Microsoft by Caldera.
3. Whether the district court's dismissal of Count I should be affirmed on the alternative ground that Novell cannot show that Microsoft's alleged actions directed at WordPerfect and Quattro Pro harmed competition in the PC operating system market.
4. Whether the district court's dismissal of Count VI should be affirmed because the agreements at issue were nonexclusive, were not otherwise anticompetitive and did not substantially foreclose competition in any market.
5. Whether the district court abused its discretion in finding that Novell's GroupWise product—which is not mentioned in Novell's complaint—is not part of this case.

STATEMENT OF THE CASE

A. Novell's Complaint

In November 2004, Novell filed its complaint seeking to recover treble damages under the federal antitrust laws for injury allegedly inflicted on WordPerfect and Quattro Pro by Microsoft during the 20-month period Novell owned those products. All of the allegations in Novell's complaint pertain to

events that occurred prior to March 1996, when Novell sold WordPerfect and Quattro Pro to Corel. The complaint is clear that the only products for which Novell seeks to recover damages are WordPerfect and Quattro Pro. (*See, e.g.*, JA-40 ¶ 2, JA-42 ¶ 8, JA-51 ¶ 24, JA-62 ¶ 56.) The complaint is also clear that Novell seeks to recover damages only for “lost profits” and the “decline in WordPerfect’s value” that occurred “during the period 1994-1996.” (JA-100 ¶ 150.)

Novell’s complaint contained six claims. (JA-100-05 ¶¶ 151-77.) Four of those claims, Counts II through V, alleged that Microsoft sought to monopolize markets for word processing and spreadsheet software—the markets in which WordPerfect and Quattro Pro competed—in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. (JA-75 ¶ 78, JA-101-04 ¶¶ 156-73.) These were straightforward antitrust claims.

Count I, on the other hand, alleged that Microsoft inflicted injury on WordPerfect and Quattro Pro so as to maintain its monopoly in the PC operating system market—a market in which WordPerfect and Quattro Pro did not compete. (JA-100-01 ¶¶ 151-55.) As the district court observed, Count I was “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.)

Count VI alleged that Microsoft violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by using its monopoly power in the PC operating system market to extract two types of agreements from PC manufacturers (known as “original equipment manufacturers” or “OEMs”) that injured WordPerfect and Quattro Pro: (i) “agreements with OEMs and others not to license or distribute Novell’s office productivity applications” and (ii) agreements with OEMs to license or distribute WordPerfect and Quattro Pro “only on terms that materially disadvantaged these products.” (JA-104 ¶ 175.) Novell alleged that Microsoft was able to extract such agreements from OEMs because they “lack a commercially viable alternative to licensing Windows for pre-installation on their PCs.” (JA-88 ¶ 115.)

B. Microsoft’s 2005 Motion to Dismiss

On January 7, 2005, Microsoft moved to dismiss the complaint. With regard to the four counts alleging monopolization of purported markets for word processing and spreadsheet software, Microsoft argued that they were barred by the statute of limitations, which provides that a civil antitrust claim “shall be forever barred unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b. Microsoft moved to dismiss Counts I and VI on the

grounds that Novell lacked antitrust standing to assert claims for harm to competition in the PC operating system market because WordPerfect and Quattro Pro did not compete in that market. Microsoft also argued that Novell did not own these claims, having sold them to Caldera in 1996.

On June 10, 2005, the district court dismissed Counts II through V as barred by the applicable statute of limitations, but allowed Counts I and VI to proceed. Based on the facts alleged in the complaint, the district court concluded that Novell had standing to assert claims for harm to competition in the PC operating system market and that it had not sold those claims to Caldera. *Novell, Inc. v. Microsoft Corp.*, 2005 WL 1398643 (D. Md. June 10, 2005). The district court certified its decision for interlocutory appeal, and this Court agreed to hear the appeal but declined to consider the sale of claims issue. (JA-118.)

On October 15, 2007, this Court affirmed the district court's decision, holding that Novell had antitrust standing to assert the claims in Counts I and VI and that Count II through V were barred by the statute of limitations. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007). This Court recognized that WordPerfect and Quattro Pro did not compete in the market for PC operating systems, *id.* at 308, but allowed the claims in Counts I and VI to proceed because Novell alleged that injury inflicted by Microsoft on WordPerfect and Quattro Pro "harmed competition in the PC operating system market." *Id.* at 319-20.

C. Discovery

Starting in February 2008, the parties engaged in more than a year of extensive fact discovery. Novell was given access to a database containing more than 20 million pages of documents from prior antitrust cases against Microsoft. The parties took the depositions of 47 fact witnesses, and Novell obtained transcripts of many other depositions from prior antitrust cases against Microsoft. In May 2010, Novell served three expert reports covering technical issues, antitrust economics and damages. Microsoft served expert rebuttal reports in June 2010 and Novell served expert reply reports in July 2010.

D. The Motions for Summary Judgment

On October 7, 2009, Novell moved for summary judgment on Microsoft's real-party-in-interest, *res judicata* and other defenses. Microsoft cross-moved for summary judgment on the grounds that (i) Novell is not the real party in interest because it sold the claims asserted in Counts I and VI to Caldera and (ii) Counts I and VI are barred by the doctrine of *res judicata*. Microsoft also moved for summary judgment on the grounds that (i) the Microsoft actions challenged by Novell did not constitute "exclusionary conduct" under the antitrust laws; (ii) the injury allegedly inflicted by Microsoft on WordPerfect and Quattro Pro did not have an adverse impact on competition in the PC operating system market; (iii) GroupWise—a product not mentioned in Novell's complaint—was

not a part of this action; and (iv) the agreements about which Novell complained in Count VI did not foreclose Novell's products from a substantial portion of any market.

On March 30, 2010, the district court denied Novell's motion and granted Microsoft's cross-motion, holding that "Novell no longer owns the claims" asserted in Counts I and VI (JA-369), having sold them to Caldera pursuant to a 1996 Asset Purchase Agreement ("APA"). Under the APA, Novell assigned to Caldera all claims "held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products." (JA-1966-67 § 3.1.) As noted previously, the term "DOS Products" was defined to include DR DOS, Novell's PC operating system. (JA-1964 § 2.6.)

As Novell points out, in 2005 the district court had concluded that Novell had not assigned the claims asserted in Counts I and VI to Caldera "because those claims focused upon harm suffered by Novell's software applications, not upon harm suffered by the operating systems transferred to Caldera." (*Id.*) With the benefit of fuller briefing on the issue, the district court changed its mind, stating that "[u]pon further reflection I have decided that my earlier ruling was wrong." (JA-371.)

In dismissing Novell's remaining claims, the district court correctly noted that "Counts I and VI assert claims for damage inflicted upon Novell's

software applications through the prism of the operating system market”—the very market in which DR DOS competed. (JA-371.) As the court explained:

Hybrid in nature, the claims [in 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. Successful though that argument has been in defeating Microsoft’s limitations defense, it is fatal to Novell’s position on the claims ownership issue. 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.

(JA-371-72.)

The district court also found five additional grounds of “association” between the claims asserted in Counts I and VI and the DOS Products:

- “Novell owned DR DOS in October 1994 and its value certainly would have been affected by anticompetitive activity in the operating system market”;
- “Novell continued to sell some DR DOS products” after it announced it was exiting the PC operating system business in September 1994;
- In its lawsuit against Microsoft, Caldera sought injunctive relief that would have addressed both Microsoft’s alleged conduct directed at DR DOS as well as alleged conduct that forms “an important part of Novell’s claim asserted in Count I of this action”;
- “[T]he 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”; and

- “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.)

The district court squarely rejected Novell’s contention that the APA assigned only “claims for *harm* inflicted upon the DOS Products.” (JA-372.)

Noting that “[t]he assignment clause does not mention ‘harm’ but rather ‘associat[ion]’” (*id.*), the court concluded:

In short, if Novell had intended, as it now argues, to assign to Caldera only claims for harm inflicted upon the DOS Products and Related Technology, it should have so stated in the APA. It did not do so, and the language it in fact employed encompasses the claims that it now seeks to assert in this action because these claims are “associated directly or indirectly with . . . the DOS Products.”

(JA-376.)

The district court went on to find that “had Novell not assigned them to Caldera, Count I would have survived Microsoft’s summary judgment motion but Count VI would not have survived Microsoft’s motion.” (JA-369.) On the merits of Count I, the district court held—incorrectly—that “Novell has raised an issue of triable fact as to whether Microsoft’s Novell-injuring conduct was anticompetitive and whether that conduct caused anticompetitive harm in the PC operating system market.” (JA-381.) The district court also held “that the Complaint failed to provide notice that Novell was basing its claims in part on

Microsoft's treatment of GroupWise, and therefore any such allegation is not properly a part of this action." (JA-382.) Finally, regarding Count VI, the district court held that even if Novell had not assigned this claim to Caldera, "the agreements at issue either were not exclusive, were not otherwise anticompetitive, or did not substantially foreclose competition in any market." (JA-394.)

Novell asks this Court to reverse the district court's decision to dismiss on the grounds that the claims asserted were sold to Caldera in 1996. Novell also asks this Court to reverse the district court's determination that GroupWise is not properly part of this case. Novell advances no arguments for reversing the district court's alternative grounds for dismissing Count VI, namely, that the agreements at issue were not exclusive, were not otherwise anticompetitive and did not substantially foreclose competition in any market. Accordingly, even if this Court finds that the claim in Count VI was not sold to Caldera in 1996, Novell has advanced no argument for reversing the district court's dismissal of that claim.

STATEMENT OF FACTS

A. Novell's Sale of Antitrust Claims to Caldera

When Novell acquired WordPerfect and Quattro Pro in June 1994, it "intended to distribute" them with DR DOS (JA-4605)—a PC operating system that Novell acquired in 1991. *See Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d

1295, 1301-02 (D. Utah 1999). Novell believed that WordPerfect and Quattro Pro were “key franchise” applications that would enhance the value of DR DOS.

(JA-2765; *see also* JA-2763-64.)

Shortly after acquiring WordPerfect and Quattro Pro, Novell formed the view that it could bring “a major antitrust action” against Microsoft based on its conduct in the PC operating system market. (JA-1441.) In a November 1994 memorandum to Novell’s board of directors, Novell’s general counsel David Bradford explained that such a lawsuit would allege that Microsoft “lock[ed] out Novell and DRI from the desktop operating system market” and, in turn, “unlawfully leveraged its operating monopoly to achieve an unfair competitive advantage in the applications market.” (JA-1442.) Mr. Bradford opined that the close linkage between the two sets of claims could provide a tactical advantage to Novell: “Were a jury to find against Microsoft in the desktop operating system monopoly they are very likely to piggyback their decision for the applications market as well.” (JA-1443.)

In April 1995, Novell had its regular outside counsel, Stephen Hill of Snow, Christensen & Martineau (“Snow Christensen”), prepare a draft complaint against Microsoft. (JA-2668 ¶ 2, JA-1686.) This draft complaint alleged, among other things, that Microsoft’s monopolization of the PC operating system market injured both DR DOS and Novell’s office productivity applications, including

WordPerfect. (JA-1707-08 ¶¶ 38-40, JA-1717-21 ¶¶ 72-76, 79-83.) Two weeks later, Mr. Bradford suggested to Novell CEO Robert Frankenberg that, rather than sue immediately, Novell could use the threat of an antitrust lawsuit “to assure leverage in a negotiation with Microsoft.” (JA-1691; *see also* JA-1730-311.) This was the approach Novell took initially.

In June 1995, Mr. Frankenberg sent a letter to Microsoft CEO Bill Gates threatening to bring a lawsuit against Microsoft for monopolizing the “desktop operating systems market” and “leverag[ing] its dominant OS [operating system] position in the applications market,” which Mr. Frankenberg also referred to as “the Word Processing and Spreadsheet markets.” (JA-1736.) He asked that Microsoft make available to Novell certain application programming interfaces (“APIs”) exposed by Microsoft’s PC operating systems “at the same time and same level of specificity as those things are made available to Microsoft’s own applications programmers.” (JA-1737.) In a follow-up letter, Mr. Frankenberg again demanded that Novell’s applications developers receive “equal access” to the APIs exposed by Microsoft’s PC operating systems. (JA-1772.)

At a May 23, 1996 meeting of Novell’s board of directors, Mr. Bradford made a presentation about the potential “case against [Microsoft] for monop[olizing] of the PC [operating system] market.” (JA-1878, 1883.) The board declined to authorize a lawsuit, and instead directed Novell’s officers to sell

both Novell's DR DOS business and the antitrust lawsuit (JA-1882), but to do so in a way that "[a]void[s] or minimize[s] adverse publicity to Novell" and, at the same time, "[r]eturn[s] value to the stockholders in the event the buyer brings an action against [Microsoft] and such litigation is successful." (JA-2059.) This is exactly what Novell did: it sold its PC operating system business and related antitrust claims against Microsoft to Caldera, a company owned by Novell's founder and largest shareholder, Ray Noorda. (JA-1928, JA-2625.) The transaction was structured so that Novell would "participate[]" in any "suit recoveries" (JA-1932) while keeping its role in the litigation obscured from Microsoft so as to "minimiz[e] any negative consequences." (JA-1929; *see also* JA-3441.)

To keep Microsoft and others in the dark, the written contract effectuating the assignment of antitrust claims from Novell to Caldera was drafted in an intentionally vague manner. Bryan Sparks, the former CEO of Caldera, testified that the written contract between Novell and Caldera "isn't the entire agreement" and that the parties deliberately omitted Caldera's obligation to sue Microsoft in order to "hide the fact" that Novell was "participating in the lawsuit." (JA-2625; *see also* JA-2615, JA-2622.) In a subsequent lawsuit by Novell seeking a larger portion of Caldera's settlement with Microsoft, a Utah court found that "[t]he main purposes of this sale were to obligate Canopy [Caldera's successor] to bring suit against Microsoft, to allow Novell to share in the recovery, and at the

same time to obfuscate Novell's role in the action against Microsoft." *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 770 (Utah Ct. App. 2004).

B. Caldera's Lawsuit Against Microsoft

1. The Claims Asserted by Caldera

Caldera filed suit against Microsoft on July 23, 1996, the same day it purchased Novell's antitrust claims. Caldera was represented by a team of law firms Novell had assembled (JA-2668-69 ¶ 4) and its complaint was based on the draft complaint Novell had prepared (*compare* JA-1934-62 with JA-1693-729). On February 12, 1998, Caldera filed an amended complaint adding allegations related to Windows 95. (JA-2109-10 ¶ 61.)

Caldera alleged that Microsoft violated Sections 1 and 2 of the Sherman Act by engaging in anticompetitive conduct in the PC operating system market.¹ Caldera's 1998 amended complaint made claims almost identical to those Novell makes in this action (*see infra* pp. 50-51), namely that Microsoft (i) gave internal applications developers "early access" to APIs exposed by Microsoft's new PC operating systems (JA-2112 ¶ 67(b)); (ii) "chang[ed] APIs, or refus[ed] to

¹ As the district court held and Novell now concedes, the market at issue in the *Caldera* action and this action are the same, *i.e.*, the PC operating system market. (JA-371, JA-372 n.3; Novell Br. at 39 ("Microsoft destroyed both the DOS Products and the Business Applications to preserve and further entrench its monopoly of the operating system market."))

support certain APIs” in Microsoft’s PC operating systems in order to render competitors’ complementary products technologically incompatible (JA-2112 ¶ 67(c)); and (iii) made it difficult for OEMs to license software products offered by Microsoft competitors. (JA-2091-92 ¶ 3(a)-(e), JA-2112 ¶ 67(d).) Caldera’s complaint alleged that Microsoft’s anticompetitive conduct took place during the period from 1992 through the filing of Caldera’s amended complaint in 1998. (JA-2109 ¶ 59.) In addition to damages, Caldera sought injunctive relief requiring Microsoft to disclose “all APIs for any operating system it produces, as well as any modifications, enhancements, updates, or new versions of such operating systems at the time that such products are released for beta testing.” (JA-2120-21.)

Caldera also alleged the existence of an applications barrier to entry protecting Microsoft’s PC operating system monopoly. According to Caldera, this barrier resulted from “the absence of a variety of high quality applications that run on a new operating system, and the difficulty of convincing independent software . . . vendors to develop such applications,” and “the lack of a sizable installed base of users” for new operating systems. (JA-2112-13 ¶ 68(b)-(c).) The same applications barrier to entry is central to Novell’s claims in this action. (*See, e.g.*, JA-56 ¶ 42.)

2. Novell's Participation in the *Caldera* Litigation

Novell's involvement in the *Caldera* litigation did not end upon the filing of the complaint. Snow Christensen, Novell's regular outside counsel and the law firm Caldera hired at Novell's request to prosecute its antitrust claims against Microsoft, communicated with Novell regularly about the litigation. Novell's general counsel, Mr. Bradford, consulted with Caldera's lawyers about litigation strategy, including proposing responses to Microsoft discovery requests and suggesting potentially helpful witnesses. (JA-2068, JA-2060, JA-2066, JA-2126.)

When Novell moved to intervene in the *Caldera* action to assert work product protection over certain documents sought by Microsoft in discovery, Novell emphasized its sizable financial stake in the case and its interest in the injunctive relief being sought by Caldera. (JA-2210, JA-2215.) The magistrate judge, under the impression that "the litigation feature of the sale is not the most prominent or substantial part of the relationship between Caldera and Novell" (JA-2214), found that "Novell has only the most tangential, residual, economic interest in the outcome of the litigation." *Caldera, Inc. v. Microsoft Corp.*, 181 F.R.D. 506, 507 (D. Utah 1998). Mr. Bradford disagreed with the court's decision, writing to Mr. Hill of Snow Christensen: "If I know anything about the law,

sounds like the judge was flat out wrong—particularly since we DO have a very real financial interest in the case.” (JA-2250-51.)

3. The Settlement of the *Caldera* Litigation

The *Caldera* litigation was settled in January 2000, with Caldera releasing Microsoft from all claims and liability “associated directly or indirectly” with DR DOS and any liability “relate[d] directly or indirectly to the facts alleged in” the *Caldera* litigation. (JA-2463 ¶ 6.) This broad release expressly extended to “the Novell Claims and all claims asserted, or that could have been asserted, in the [*Caldera*] Action.” (JA-2461 ¶ 2.)

Microsoft paid \$280 million to Caldera to settle the case, and Caldera paid \$35.5 million to Novell as a so-called “royalty.” (JA-2482 ¶ 16, JA-2484 ¶¶ 26-28, JA-2678.) Dissatisfied with that amount, Novell sued Caldera’s successor (Canopy) seeking a larger share of the settlement. *Canopy Group*, 92 P.3d at 770-71. Novell prevailed, obtaining an additional \$17.7 million of the amount Microsoft paid Caldera, for a total of more than \$53 million. (JA-2683.)

C. Count I of Novell’s Complaint

In Count I, Novell alleges that Microsoft inflicted injury on WordPerfect and Quattro Pro so as to maintain its monopoly in “the market for Intel-compatible PC operating systems” (JA-51 ¶ 24)—a market in which, as noted above, WordPerfect and Quattro Pro did not compete (JA-100-01 ¶¶ 151-55.)

Novell alleges that the conduct underlying Count I was part of a “single continuous campaign” by Microsoft “in pursuit of a single anticompetitive objective, namely the destruction of Novell” in order “to maintain [Microsoft’s] monopoly in the PC operating systems market.” (JA-47-48 ¶ 22.) This alleged campaign to “slaughter” Novell “dates to at least the early 1990s” (*id.*) and includes Microsoft actions directed at both DR DOS and Novell’s office productivity applications.

Count I alleges that Microsoft “engag[ed] in anticompetitive conduct to thwart the development of products that threatened to weaken the applications barrier to entry.” (JA-100 ¶ 153.) Specifically, Novell contends that Microsoft took various actions in connection with the development of Windows 95 that “delayed” and “degraded the functionality” of versions of WordPerfect and Quattro Pro that Novell was developing for use with Windows 95. (JA-75 ¶ 78.) Novell’s complaint alleges that Microsoft: (i) withheld technical information from Novell concerning a feature of the Windows 95 operating system called “namespace extensions” (JA-66-75 ¶¶ 65-78) and (ii) refused to grant Novell an exemption from a particular requirement of the Windows 95 logo licensing program (JA-79-80 ¶ 89). Although not mentioned in the complaint, in expert reports submitted in May 2009, Novell also claims that Microsoft (i) failed to include certain custom print processor functionality in Windows 95 (*see* JA-4047-

57) and (ii) engaged in conduct that harmed GroupWise, Novell's email and collaboration software (*see* JA-3997-4035).

1. Development of Windows 95

During the lengthy development of Windows 95, Microsoft provided pre-release versions of the operating system to independent software vendors ("ISVs"). (JA-3979.) Providing these pre-release—or "beta"—versions of Windows 95 to ISVs was beneficial to all concerned. (*See* JA-3923.) Microsoft learned about "bugs" the ISVs found in their testing, and ISVs got the opportunity to make their applications work well with Windows 95 long before it was commercially released to users. (JA-3404, JA-3397.)

Microsoft also provided ISVs with documentation describing how various features of the forthcoming operating system would work. (JA-3244.) This included preliminary information about the APIs exposed by Windows 95 for use by ISVs. (JA-3923, JA-3788.) There are literally thousands of APIs exposed by an operating system as complex as Windows 95.² There are also thousands of internal interfaces in the operating systems that are not exposed to ISVs for valid engineering reasons. (JA-4127, JA-4134, JA-4139, JA-3924.) In addition to these

² *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 155 n.6 (D.D.C. 2002) ("Windows contains thousands of APIs, controlling everything from data storage to font display.").

internal interfaces, Microsoft typically did not provide information to ISVs about APIs that might not work in future versions of Windows. (JA-4127, JA-3924.)

2. Namespace Extension APIs

Count I alleges that Microsoft harmed WordPerfect and Quattro Pro by failing to document the so-called “namespace extension” APIs in Windows 95. Novell claims that it needed the namespace extension APIs to enhance “the file management functionality” of WordPerfect and Quattro Pro, thereby making those products “richer and fuller-featured.” (JA-3906.) The namespace extension APIs were only six of several thousand APIs exposed by Windows 95. (JA-3931.) The APIs offered limited functionality, giving ISVs a mechanism to add custom folders to the hierarchical “tree view” in the left pane of the Windows Explorer.³ (JA-3931.)

For a few months in the summer of 1994, Microsoft encouraged ISVs to use the namespace extension APIs and provided ISVs with preliminary documentation about those APIs. (JA-3979.) By October 1994, however, Microsoft changed course, advising ISVs that the namespace extension APIs

³ The Windows Explorer was a viewer that allowed users to view information about files and other system resources like printers and networks in an integrated fashion. There was a hierarchical display of folders in the left hand “scope pane” and a list display of the contents of a given folder in the right hand “view pane.” (See JA-3928-29, JA-4186.) A screenshot depicting the Windows Explorer in Windows 95 appears at JA-642.

would not be supported in future versions of Windows and that ISVs should use them “at their own risk.” (JA-3984-85.)

Although the parties vigorously dispute the reason for that decision, they agree that the namespace extension APIs remained in Windows 95 and could have been used by Novell had it been willing to run the risk that future versions of Windows might not support them. (JA-3984 n.450.) More importantly, Novell’s contention that the namespace extension APIs were “critical” to developing high quality word processing and spreadsheet applications for Windows 95 (*see* Novell Br. at 22) is belied by the fact that the namespace extension APIs were not used by any of Microsoft’s own office productivity applications. (JA-3198, JA-4129, JA-4202, JA-4816-17.) If Microsoft Word and Microsoft Excel for Windows 95 made no use of the namespace extension APIs, then Novell should not have been set back significantly in its efforts to develop versions of WordPerfect and Quattro Pro for Windows 95 as a result of Microsoft’s advice—rendered more than eight months before the commercial release of Windows 95—not to use those APIs.

3. Custom Print Processor

Windows 95 provided a mechanism for all ISVs—including Novell—to print documents from their applications. (*See* JA-4049-50.) Novell received extensive information from Microsoft about how to use this standard print processor functionality. (JA-1560-630, JA-4056.) None of this is in dispute.

Novell's complaint is that Microsoft did not go further and include in Windows 95 the *custom* print processor functionality included in Microsoft's more sophisticated Windows NT operating system. (See JA-4051-57, JA-3811; Novell Br. at 23-24.) While Novell might have found it convenient to have such custom print processor functionality in the operating system, having it was not critical to developing versions of WordPerfect and Quattro Pro for Windows 95. Indeed, no other applications—including Microsoft's own—had access to such custom print processor functionality in Windows 95. (JA-4056.)

4. Windows 95 Logo Licensing Program

Under the Windows 95 logo licensing program, Microsoft permitted ISVs that satisfied certain criteria to place Microsoft's trademarked Windows 95 logo on the packaging for their applications. (JA-4036-37.) One of the requirements for obtaining a "Designed for Windows 95" logo was that an application "run successfully on both Windows 95 and Windows NT 3.5 (or greater)." (JA-4224 (quoting JA-643-44).) Windows NT was a more robust operating system designed primarily for corporate customers to use on "workstation[s] and departmental and workgroup server[s]." (JA-4040.)

ISVs could request an exemption from the Windows NT compatibility requirement if the incompatibilities experienced by their products were attributable to "functionality that is significantly different in architecture between" Windows

95 and Windows NT. (JA-1663.) On March 6, 1995, Novell asked Microsoft for an exemption from the Windows NT compatibility requirement. (JA-1524.) On March 31, 1995, Microsoft responded that “[a]t this point in time, we do not believe the issues you raise constitute significant enough architectural issues between Windows NT and Windows 95 to warrant an exception being granted.” (JA-1665.) Microsoft offered “to have a conference call between our teams” to discuss the Windows NT compatibility requirement, and pointed out that “participation in the Windows 95 Logo Program is optional and by no means required to ship a great Windows 95 application.” (JA-1665.) It is undisputed that this correspondence occurred five months before Windows 95 was commercially released and that Novell never followed up on the issue with Microsoft.

D. Novell’s Untimely Added Groupware Allegations

GroupWise is a client/server software package that provides “email, calendaring, and task . . . management.” (JA-3942.) The GroupWise client software resides on a user’s PC and the GroupWise server software resides on a network server and processes information on behalf of numerous clients. (JA-3656-58, JA-3939.) GroupWise is not mentioned once in Novell’s lengthy complaint. Novell’s experts, however, devoted considerable attention in their May 2009 reports to harm purportedly inflicted on GroupWise by Microsoft. (JA-3997-4035, JA-3518-19, JA-3656-58.)

In his expert report, Novell's expert in antitrust economics, Professor Roger Noll, excluded products such as GroupWise from his definition of "office productivity applications." (JA-3708.) Professor Noll also opined that such so-called "groupware" is in a separate relevant market from word processors, spreadsheets or other office productivity applications. (JA-3725.)

Despite this, Novell's damages expert, Frederick Warren-Boulton, ignored the distinction between GroupWise client software and GroupWise server software, computing substantial damages for harm allegedly inflicted by Microsoft on GroupWise server software. (JA-3656-58.) This made no sense, both because GroupWise server software did not run on Windows 95 and because his damages computation related solely to the period from 1997 through 2001, after Novell sold WordPerfect and Quattro Pro to Corel. (JA-3656-58; *see also* Novell Br. at 54 n.13.)

SUMMARY OF ARGUMENT

In 1996, Novell sold to Caldera "any and all claims or causes of action" that were "associated directly or indirectly" with DR DOS, Novell's PC operating system. (JA-1966-67.) The unambiguous language of the APA encompasses the claims asserted in Counts I and VI, which, as the district court noted, are "claims for damage inflicted upon Novell's software applications"—

WordPerfect and Quattro Pro—“through the prism of the operating system market” in which DR DOS competed. (JA-371.)

Not only is the APA clear, but extrinsic evidence demonstrates that Novell and Caldera intended the assignment to encompass all claims associated with Microsoft’s allegedly anticompetitive conduct in the PC operating system market. Caldera immediately sued Microsoft on the claims it purchased from Novell, and when Caldera settled the action in 2000 (a recovery in which Novell shared), it gave Microsoft a broad release covering “the Novell Claims and all claims asserted in the Action, or which could have been asserted in the Action.” (JA-2461.)

The district court correctly held that Novell assigned to Caldera in 1996 the claims that are the subject of this appeal.

The doctrine of *res judicata* also bars Novell from asserting the claims in Counts I and VI. Novell, as the architect and substantial beneficiary of Caldera’s antitrust lawsuit against Microsoft, was in privity with Caldera in that litigation and cannot assert claims against Microsoft that arise from the same core of operative facts as the claims asserted by Caldera. Novell and Caldera were in privity for two reasons. *First*, Novell had a contractual relationship with Caldera—the true nature of which was intentionally obscured—that obligated Caldera to sue Microsoft and share the spoils of that lawsuit with Novell. *Second*,

Novell's interests were adequately represented by Caldera, which was not only contractually obligated to sue Microsoft on Novell's behalf but purported to settle Novell's claims along with its own. Having been in privity with Caldera and having recovered tens of millions of dollars on claims that Microsoft monopolized the PC operating system market, Novell cannot itself bring suit for purported injury to WordPerfect and Quattro Pro based on the same cause of action.

As a separate and distinct ground for affirming the district court's grant of summary judgment, Count I fails on the merits. The theory of Count I is that by inflicting injury on WordPerfect and Quattro Pro, Microsoft sought to eliminate the threat those products allegedly posed to the "applications barrier to entry" protecting Microsoft's PC operating system monopoly. After almost five years of litigation and extensive discovery, Novell cannot show that WordPerfect and Quattro Pro posed any threat to the applications barrier to entry or that Microsoft's alleged actions directed at WordPerfect and Quattro Pro "contributed significantly to the achievement or maintenance" of monopoly power in the relevant market. III Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 650c (3d ed. 2008). Indeed, Novell's expert on antitrust economics, Professor Noll, testified at his deposition that "I suspect that there would have been no adverse impact" on competition in the PC operating system market from

Microsoft's actions directed at Novell's office productivity applications.

(JA-4826.)

The district court was incorrect when it found that "Novell has raised an issue of triable fact as to whether Microsoft's Novell-injuring conduct was anticompetitive and whether that conduct caused anticompetitive harm in the PC operating system market." (JA-381.) Professor Noll's admission is fatal to the convoluted theory espoused by Novell in Count I of the complaint.

Count VI also fails on the merits, as the district court correctly held. (JA-394.) Because Novell makes no effort to show otherwise, there are no grounds for reversing the judgment as to Count VI even if this Court were to disagree that the claim was sold by Novell or barred by *res judicata*.

Finally, the district court correctly held that Novell's attempt to inject a new product—GroupWise server software—and a new time period—1997 through 2001—into this case after the close of discovery should not be allowed.

ARGUMENT

I. Novell Assigned the Claims Asserted in Counts I and VI to Caldera

As the district court held, the plain meaning of the APA demonstrates that Novell assigned the claims asserted in Counts I and VI to Caldera. Having sold those claims, Novell is not the real party in interest under Federal Rule of

Civil Procedure 17(a), and thus is precluded from asserting the claims against Microsoft. *In re Maco Homes, Inc.*, 180 F.3d 163, 165-66 (4th Cir. 1999).

A. The APA Unambiguously Assigned the Claims Asserted in Counts I and VI to Caldera

Novell transferred 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 § 3.1 (emphasis added).) The term “DOS Products” is defined to include DR DOS, Novell’s PC operating system. (JA-1964 § 2.6.) The claims asserted in Counts I and VI, which the district court correctly described as “claims for damage inflicted upon Novell’s software applications through the prism of the operating system market” in which DR DOS competed (JA-371), are plainly encompassed by the assignment. *See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 207 P.3d 1235, 1240 (Utah 2009) (“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 . . .”).⁴

⁴ Utah law governs the interpretation of the APA. (JA-1980 § 10.1.)

1. The APA Assigned All Claims Arising out of Allegedly Anticompetitive Conduct by Microsoft in the PC Operating System Market

Novell reads the assignment narrowly to include only claims for harm to the DOS Products (Novell Br. at 31)—an interpretation that ignores the plain language of the APA. As the district court observed, “[t]he assignment clause does not mention ‘harm’ but rather ‘associat[ion].’” (JA-372 (alteration in original).) Use of the term “indirectly” confirms that the assignment sweeps more broadly than Novell would have it: Novell does not account for how a claim for harm to the DOS Products could be anything other than “associated directly” with those products. Novell thus fails to proffer a reasonable interpretation of the assignment that gives independent meaning to the term “indirectly.” *See Café Rio*, 207 P.3d at 1240; *Vulcan Steel Corp. v. Markosian*, 462 P.2d 166, 167 (Utah 1969) (“[t]he court may not add, ignore or discard words in the process” of interpreting contract). Indeed, despite insisting that its interpretation “does not deny the term ‘indirectly’ any reasonable meaning,” Novell studiously avoids explaining what that meaning might be. (*See* Novell Br. at 43.)

Once the term “indirectly” is taken into account, the meaning of the assignment of claims from Novell to Caldera is entirely unambiguous. The word “indirect” means “coming or resulting otherwise than directly or immediately, as effects or consequences.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY

(2d ed. 2001). Thus, claims “associated indirectly” with DR DOS must include—at a minimum—all claims arising out of conduct that injured DR DOS, regardless of whether that conduct was directed at DR DOS.

Novell’s complaint alleges that the claims asserted in Counts I and VI arise out of a “single continuous campaign” by Microsoft to destroy Novell in order “to maintain its monopoly in the PC operating systems market” and that this campaign “dated to at least the early 1990s.” (JA-47-48 ¶ 22.) Novell’s expert in antitrust economics, Professor Noll, asserts in his May 2009 report that Microsoft “target[ed]” Novell because of the threat to its PC operating system monopoly posed by an “array” of Novell products that included DR DOS, WordPerfect and Quattro Pro. (JA-3667-68, JA-3749.) Counts I and VI allege that Microsoft inflicted injury on WordPerfect and Quattro Pro to strengthen the applications barrier to entry protecting Microsoft’s PC operating system monopoly. (JA-56 ¶ 42, JA-100 ¶ 153.) *See Novell*, 505 F.3d at 308-10. In other words, the actions about which Novell complains in Counts I and VI are expressly alleged to have been carried out for the purpose of maintaining Microsoft’s operating system monopoly.

Under Novell’s own theory, the Microsoft conduct that allegedly injured WordPerfect and Quattro Pro reduced the potential for those products to enable DR DOS to compete with Windows, and therefore reduced demand for

DR DOS itself. Indeed, Professor Noll admits that Novell “intended to distribute” WordPerfect and Quattro Pro with DR DOS (JA-4604-05), and Novell’s counsel told the district court that Novell’s purchase of office productivity applications enabled Novell to market DR DOS to OEMs on the basis that Novell had versions of WordPerfect and Quattro Pro that were “compatible with [its] operating system.” (JA-2763-64.) Under Novell’s theory, injury inflicted on WordPerfect and Quattro Pro by Microsoft had a necessary adverse effect on DR DOS, since conduct that aided Microsoft in maintaining its PC operating system monopoly must have had an adverse effect on DR DOS, itself a PC operating system. As a result, the claims asserted in Counts I and VI are—at very least—“associated indirectly” with the DOS Products.

Novell invokes an irrelevant hypothetical to demonstrate the supposed “absurdity” of this interpretation under extreme assumptions. (*See* Novell Br. at 36-37.) Yet, the issue before this Court is not defining the outer bounds of the concept of direct and indirect “association” under the APA, but rather deciding whether the claims asserted in Counts I and VI fall within those bounds. *See McEwan v. Mountain Land Support Corp.*, 116 P.3d 955, 961 (Utah Ct. App. 2005) (potential uncertainty as to how contract provision would be applied in circumstances not before the court “immaterial” to whether provision is ambiguous). That issue is easy to resolve.

The market-based “association” relied on by the district court arises directly out of the theory advanced by Novell in Counts I and VI, which expressly links injury allegedly inflicted by Microsoft on WordPerfect and Quattro Pro with harm to competition in the PC operating system market, and thus with DR DOS, which competed in that market. As the district court found, this linkage was not incidental, but rather an intentional—albeit ultimately self-defeating—effort by Novell to evade the four-year statute of limitations. (JA-371-72.) As the district court held, “[b]y 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.” (JA-372.)

Seeking to avoid this result, Novell argues that such an interpretation would dictate—contrary to fact—that the APA transferred revenues from Novell’s office productivity applications and the applications themselves to Caldera, because the APA “assign[s] to Caldera all revenues *associated with the DOS Business*” and “transfer[s] to Caldera . . . the products *associated with the DOS Business*.” (Novell Br. at 35 (quoting APA §§ 1.3, 3.1).) As an initial matter, Novell no longer owned WordPerfect and Quattro Pro at the time the APA was executed, so the assignment posited by Novell was not possible. There is, however, a more fundamental problem with Novell’s argument: it relies on a false parallelism between the *revenues* and *products* assigned in the provisions relied on

by Novell and the *claims* assigned in the provision relied on by Microsoft. Microsoft never claimed that WordPerfect and Quattro Pro were “associated” with DR DOS *per se*. Rather, it is DR DOS’s participation in the PC operating system market that provides the association between DR DOS and the claims asserted in Counts I and VI. It does not “follow[] that Novell did not assign any claims for injury to the Business Applications.” (Novell Br. at 36.) It merely follows that Novell did not assign *all* such claims—only those that are directly or indirectly associated with the DOS Products, which includes the claims asserted in Counts I and VI.

2. The District Court Correctly Found Several Grounds of “Association” Between Novell’s Claims and DR DOS

In addition to concluding that the APA unambiguously assigned all “claims for damage inflicted upon Novell’s software applications through the prism of the operating system market” (JA-371), the district court identified five additional grounds for finding an “association” between the claims asserted in Counts I and VI and the DOS Products. (JA-372 n.3.)

First, the district court noted that, despite Novell’s assertion that DR DOS “was no longer being marketed and supported by Novell in October 1994, when the unlawful conduct alleged in this action began . . . , Novell owned DR DOS in October 1994 and its value certainly would have been affected by anticompetitive activity in the operating system market.” (JA-372 n.3.) Indeed,

Novell owned the DOS Products until July 1996, when it was paid \$400,000 plus royalties (and an additional \$600,000 in related license fees) by Caldera for those products. *Canopy*, 92 P.3d at 770. Caldera continued to market DR DOS after buying the product from Novell, and by September 1997 had “generated or contracted for approximately \$4,000,000 in DR DOS revenues.” (JA-2110 ¶ 63.) In fact, DR DOS remains available for license to this day. (JA-5105.) Contrary to what Novell contends, DR DOS still had value after September 1994, and that value would necessarily have been affected by Microsoft conduct that hindered the ability of DR DOS to compete in the PC operating system market. This provides the required “association” between DR DOS and the claims asserted in Counts I and VI, whether or not (as Novell now contends) DR DOS “no longer posed a competitive threat to Microsoft’s operating system monopoly.” (Novell Br. at 41.)

Second, it is simply untrue that Novell had stopped marketing DR DOS by October 1994. As the district court found, “although Novell announced in September 1994 that it would exit the DR DOS business, . . . Novell continued to sell some DR DOS products thereafter.” (JA-372 n.3; *see also* JA-2110 ¶ 62.) Novell concedes this, but protests that “those sales were trivial in volume.” (Novell Br. at 41.) The volume of Novell’s DR DOS sales is irrelevant to whether Microsoft’s allegedly anticompetitive conduct in the PC operating system market had an adverse effect on those sales.

Third, Caldera sought in its lawsuit against Microsoft a ten-year injunction requiring Microsoft to disclose the APIs exposed by its PC operating systems. (JA-372 n.3; JA-2120-21.) Not only would that injunctive relief have addressed much of the alleged conduct underlying Count I, but the ostensible effect of that injunctive relief would have been to prevent Microsoft from injuring competition in the PC operating system market (and thereby DR DOS). As the district court found, “[t]his request for relief necessarily was premised upon the fact that the failure of Microsoft to disclose APIs (an important part of Novell’s claim asserted in Count I of this action) was damaging DR DOS.” (JA-372 n.3.)

Fourth, the district court found 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; *see also* JA-97-98 ¶¶ 144, 147.) Novell’s rejoinder in its appellate brief—that “Microsoft’s ascension in the operating system market . . . is not part of the claims asserted in Counts I and VI” (Novell Br. at 42)—is directly at odds with the views expressed by Professor Noll, Novell’s expert in antitrust economics, and with Novell’s own theory of its case. As the district court explained, “[j]ust as Novell’s expert concedes that in order to have antitrust significance the conduct Microsoft directed against Novell’s software applications must be considered in light of conduct that Microsoft

directed against other competitors, so too the actions launched by Microsoft against various software application producers must be considered against the background of the anticompetitive conduct it directed against DR DOS in earlier years.” (JA-372 n.3 (citations omitted) (citing JA-4552, JA-4824-27).) The district court properly refused to allow Novell to have it both ways.

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.) In response, Novell seeks to impose a sharp dichotomy between Microsoft’s conduct directed at DR DOS and Microsoft’s conduct directed at Novell’s office productivity applications. (*See* Novell Br. at 42.) This dichotomy appears nowhere in Novell’s complaint, which speaks about a “single continuous campaign” against Novell by Microsoft to maintain its PC operating system monopoly. (JA-47-48 ¶ 22.) More importantly, such a dichotomy is flatly contradicted by Professor Noll, who opined that the conduct underlying Counts I and VI was undertaken in response to the *combined* threat of DR DOS, WordPerfect, Quattro Pro and other Novell software products. (JA-3667-68, JA-3749.)

B. Federal Common Law Does Not Mandate a Different Interpretation of the APA

Novell argues that federal common law precludes the district court’s interpretation of the APA, but that is wrong. Although federal common law may

govern the *assignability* of a federal antitrust claim (*i.e.*, whether a claim is assignable at all), that does not mean federal common law governs interpretation of a contract purporting to assign a federal antitrust claim. *See Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 604 (5th Cir. Unit A 1982); *In re Preston Trucking Co.*, 392 B.R. 623, 631 n.7 (D. Md. 2008). On the only occasion of which we are aware that this Court has addressed the issue, it held that interpretation of a contract purporting to transfer a federal antitrust claim was governed by state law. *Levey v. E. Stewart Mitchell, Inc.*, 762 F.2d 998 (Table), 1985 WL 188301, at *2 (4th Cir. May 2, 1985).

Even if there were uniform rules of contract interpretation applicable to assignments of federal antitrust claims, Novell's arguments still fail. *First*, the language of the APA complies with the notion that an assignment of federal antitrust claims must be "express." *See Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 440 (3d Cir. 1993). This requirement is met by "all-inclusive" language that makes explicit reference to legal claims, which is what the APA contains. *See Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993). The assignment in the APA is very different from the assignment in *Gulfstream*, which "made no reference to legal causes of action or claims" and thereby made it difficult to determine if the parties intended to transfer federal antitrust claims. *Id.* As the district court found, no such concern is raised by the

broad language of the APA, which refers to “any and all claims or causes of action” associated with the DOS Products. (JA-376 n.8.)

Second, Novell raises its argument about the district court’s interpretation of the APA creating a risk of duplicative recovery for the first time on this appeal, and thus the argument should be disregarded. *See United Rentals, Inc. v. Angell*, 592 F.3d 525, 531 nn.2, 3 (4th Cir. 2010). Even if that were not the case, the argument is baseless. The two cases relied upon by Novell discuss the risk of duplicative recovery as a factor to be assessed in deciding whether a party has standing to assert an antitrust claim; the cases say nothing about interpretation of contracts assigning federal antitrust claims. *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. Novell has no authority for the proposition that federal common law prevents an antitrust claim from being assigned on the grounds that such an assignment might result in duplicative recovery, which is a strange concern for Novell to be voicing in any case given that the party adversely affected would be Microsoft, not Novell.

C. Extrinsic Evidence Confirms that Novell Assigned the Claims Asserted in Counts I and VI

Not only does the language of the APA unambiguously cover the claims asserted in Counts I and VI, extrinsic evidence shows that was what Novell and Caldera intended. Under governing Utah law, when the language of a contract

is ambiguous, the court may “consider extrinsic evidence of the parties’ intent.”

Café Rio, 207 P.3d at 1240. Here, such evidence demonstrates that the assignment was intended to encompass all claims arising out of Microsoft’s allegedly anticompetitive conduct in the PC operating system market.

1. Extrinsic Evidence Demonstrates that Novell Intended to Assign All Claims Arising out of Microsoft’s Allegedly Anticompetitive Conduct in the PC Operating System Market

In November 1994, Novell was considering “a major antitrust action” against Microsoft for harm to DR DOS, WordPerfect and Quattro Pro. (JA-1441.) Novell would allege that Microsoft “lock[ed] out Novell and DRI from the desktop operating system market” and, in turn, “unlawfully leveraged its operating monopoly to achieve an unfair competitive advantage in the applications market.” (JA-1442.) Novell believed it could use its claim that Microsoft injured DR DOS in order to monopolize the PC operating system market to persuade a jury to “piggyback their decision for the applications market as well.” (JA-1443.) Indeed, Novell drafted a complaint against Microsoft that linked Novell’s PC operating system claims and office productivity application claims in just this way. (*See* JA-1693-729.) Making explicit the link between DR DOS and Novell’s office productivity applications, Mr. Bradford explained that “the destruction of DR DOS provides . . . the best platform from which to insist on injunctive relief that can protect Novell’s interests in the future.” (JA-1687.)

Novell ultimately decided to pursue an antitrust lawsuit against Microsoft through its proxy, Caldera. In its lawsuit against Microsoft, Caldera requested the same injunctive relief Novell had previously considered seeking with regard to APIs exposed by Microsoft's PC operating systems. (*Compare* JA-2120-21 *with* JA-1728.) When Novell sought to intervene in the *Caldera* action in 1998, the lawyer who spoke on Novell's behalf asserted that Novell had "an interest in the injunctive relief because it affects their business as a competitor of Microsoft, and I mean *in the software applications business*." (JA-2215 (emphasis added).) As the district court found, "the fact that Caldera was requesting an injunction requiring the opening of APIs demonstrates the association (direct or indirect) between the claims assigned to Caldera, which it was asserting in its lawsuit, and Novell's claims in the present action." (JA-374 n.7.)

2. The Affidavits Submitted by Novell Do Not Support Novell's Interpretation of the APA

In the district court, Novell sought to prove that the claims asserted in Counts I and VI were excluded from the assignment by submitting affidavits from two lawyers involved in the negotiations (David Bradford and Paul Graf) and from Novell's principal outside counsel for many years who later represented Caldera in its lawsuit against Microsoft (Stephen Hill). Novell's affidavits—prepared more than 13 years after the fact—do not establish what Novell contends they do.

Indeed, the affidavits are consistent with the district court's finding 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.) As the district court observed, those claims "were conceptualized and formulated only when it became apparent they would be needed to defeat Microsoft's anticipated limitations defense via the [Clayton Act] tolling doctrine" triggered by the federal government's 1998 antitrust case against Microsoft. (JA-375.) As the district court found, contemporaneous evidence shows that, prior to entering into the APA, Novell believed it had antitrust claims against Microsoft for harm to Novell's office productivity applications "based upon Microsoft allegedly having leveraged its monopoly in the operating system market into a monopoly or near monopoly in the applications markets." (JA-372 n.2; *see, e.g.*, JA-1442, JA-1686, JA-1736.) "Such claims are qualitatively different from those asserted in Counts I and VI" (JA-372 n.2), which are based on the idea that WordPerfect and Quattro Pro were injured by anticompetitive conduct in the PC operating system market itself.

Given that Counts I and VI were not in anyone's contemplation in 1996, it is entirely unremarkable that, as Mr. Bradford says, Novell and Caldera never "discussed antitrust claims concerning damage caused to Novell's Business Applications business" in connection with the sale of DR DOS. (JA-5041 ¶ 23.) It

is often true in contract disputes that “the precise matter at issue was never considered” by the parties. *Shoney’s, Inc. v. Schoenbaum*, 894 F.2d 92, 97 (4th Cir. 1990). In such circumstances, courts are nevertheless obligated to interpret the disputed terms by looking to “the most reasonable [interpretation] suggested by the language” of the contract. *Id.* In doing so, a court must determine “the meaning that would attach to the [contract] by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the [contract], *other than oral statements by the parties of what they intended it to mean.*” *Erickson v. Bastian*, 102 P.2d 310, 313 (Utah 1940) (emphasis added); *see also* JA-374 (district court observing that “in determining the subjective intent of the parties to a contract, a court ordinarily looks only to their contemporaneous conduct, not to what they aver they intended after a controversy with a third party has arisen”). Novell’s post-hoc affidavits are irrelevant to this determination. The only reasonable interpretation of the broad assignment of claims by Novell to Caldera is that it encompasses the claims asserted in Counts I and VI.⁵

⁵ Moreover, in the absence of any “objective corroboration” that Novell and Caldera intended to assign only claims for harm to the DOS Products, Novell’s self-serving affidavits are not sufficient to create a genuine issue of material fact regarding the correct interpretation of the APA. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 433 (4th Cir. 2004).

3. The Contracting Parties' Course of Conduct Does Not Support Novell's Interpretation of the Assignment

Novell argues that Caldera's failure to assert claims for injury to products other than the DOS Products demonstrates that no such claims were assigned under the APA. (Novell Br. at 51-53.) This merely confirms the district court's finding that the convoluted claims asserted in Counts I and VI (of harm to products that did not compete in the market in which competition was supposedly restrained) were not formulated until long after Caldera filed its lawsuit against Microsoft in 1996.⁶

II. The Claims Asserted in Counts I and VI Also Are Barred by the Doctrine of *Res Judicata*

The doctrine of *res judicata* (*i.e.*, claim preclusion) independently bars Novell from asserting the claims asserted in Counts I and VI. Having orchestrated and substantially benefitted from the *Caldera* litigation, Novell cannot now bring another lawsuit against Microsoft asserting claims concerning the same antitrust

⁶ What Novell refers to as its "2004 assertion of antitrust claims against Microsoft for injury to NetWare" proves even less. (*Id.* at 53.) Novell points to no evidence in the record to support its bald assertion that "[u]nder the district court's view, the APA also would have assigned these NetWare claims to Caldera." (*Id.*) Moreover, whether or not Microsoft "settled the NetWare claims for a substantial sum" (*id.*) is irrelevant to the question of whether the present claims fall within the scope of the assignment in the APA. In contract interpretation, the relevant course of conduct is that of the parties to the contract, not that of third parties such as Microsoft. *See WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1145 (Utah 2002).

market that arise out of the same core of operative facts. This lawsuit is an improper attempt by Novell to obtain a “second bite at the apple,” splitting a single cause of action based on Microsoft’s allegedly anticompetitive conduct in the PC operating system market. As this Court held in *Pueschel v. United States*, 369 F.3d 345, 355 (4th Cir. 2004), the goals of *res judicata* would be frustrated if parties are allowed to engage in artful pleading that resulted in the splitting of claims.⁷ Absent Microsoft’s consent, such claim splitting is impermissible. See *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir. 1990).

For *res judicata* to preclude Novell’s present claim, “three elements must be present: (1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action.” *Ohio Valley Env’tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009) (citation omitted). There is no dispute that the stipulated judgment of dismissal following the settlement in *Caldera* constitutes a “judgment

⁷ Although Novell has previously argued that “claim preclusion does not bar an action brought by an assignor on a ‘partial assignment’ even where the claims rest on the same facts” (JA-4908 n.80), the authority invoked by Novell, RESTATEMENT (SECOND) OF JUDGMENTS § 55 (1982), does not address the present situation, in which the assignor is in privity with the assignee by virtue of an ongoing interest in the assigned portion. Having split its cause of action and retained an interest in both the assigned and purportedly retained elements of the claim, Novell is attempting to litigate the same cause of action twice—a result foreclosed by the rule against claim splitting. See *Pueschel*, 369 F.3d at 355.

on the merits” for the purposes of *res judicata*. See *Arizona v. California*, 530 U.S. 392, 414 (2000). The other two elements of *res judicata* are also present.

A. Novell and Caldera Were in Privity with Respect to the *Caldera* Litigation

In *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008), the Supreme Court held that claim preclusion against a nonparty is appropriate when, *inter alia*, (i) there was a pre-existing “substantive legal relationship” between the nonparty and a party to the prior action, such as the assignor and assignee of a claim; or (ii) the nonparty was “adequately represented by someone with the same interests” who was a party to the earlier action. *Id.* at 2172. The Novell/Caldera relationship fits squarely within both categories.

1. The Substantive Legal Relationship Between Novell and Caldera Establishes Privity

Even if Novell had not assigned to Caldera the claims asserted in Counts I and VI, the parties would still be in privity by virtue of the substantive legal relationship arising from the claims that *were* assigned. Under the terms of the deal, Caldera was obligated to sue Microsoft and share the proceeds of that lawsuit with Novell. *Canopy Group*, 92 P.3d at 770. That agreement is enough to establish privity between Novell and Caldera because a substantive legal relationship that gives rise to privity “is one in which the parties to the first suit are

somehow accountable to nonparties who file a subsequent suit raising identical issues.” *Pelt v. Utah*, 539 F.3d 1271, 1290 (10th Cir. 2008).

2. Novell’s Interests Were Adequately Represented in the *Caldera* Litigation

Novell is also bound by the outcome of the *Caldera* litigation because it was “adequately represented” by Caldera, which had the “same interests” as Novell throughout the litigation. *Taylor*, 128 S. Ct. at 2172. Courts find privity based on a nonparty’s adequate representation in a prior lawsuit where (i) “the interests of the nonparty and [its] representative are aligned”; and (ii) the party to the earlier suit “understood itself to be acting in a representative capacity.” *Id.* at 2176. The undisputed facts establish both elements of this test.

First, by retaining a substantial stake in the antitrust lawsuit it obligated Caldera to bring against Microsoft, Novell’s interests in the litigation were indistinguishable from Caldera’s. Indeed, when Novell moved to intervene in that action, it asserted an interest in both the monetary *and* injunctive relief sought by Caldera against Microsoft. (JA-2215.)

Second, Caldera understood that it was acting on Novell’s behalf in the *Caldera* litigation. In addition to being contractually obligated to pursue claims on Novell’s behalf, *Canopy Group*, 92 P.3d at 770, Caldera (i) sought the injunctive relief Novell wanted (*see* JA-1686); (ii) based its complaint on the draft complaint prepared by Novell (JA-2669 ¶ 5); (iii) was represented by a legal team

Novell had assembled (JA-2668-69 ¶ 4); (iv) conferred with Novell's lawyers about litigation strategy (*see, e.g.*, JA-2068); and (v) kept Novell apprised of its settlement negotiations with Microsoft. (*See* JA-2471-72.) Moreover, in settling with Microsoft, Caldera understood it was settling Novell's residual interests in the litigation along with its own. (*See* JA-2463 ¶ 6, JA-2465 ¶ 14(a)(ii).)

Caldera was acting, in effect, as Novell's assignee for collection⁸—a relationship that is “effective to establish preclusion by representation.” 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4454 (2d ed. 2009); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. b (1982). Having been adequately represented by Caldera in the *Caldera* litigation, Novell is now bound by the outcome of that litigation, pursuant to which Novell was paid more than \$53 million.

B. Novell's Claims Arise out of the Same Cause of Action Asserted in the *Caldera* Litigation

Having been in privity with Caldera, Novell is precluded from asserting any claims that “arise out of the same transaction or series of transactions or the same core of operative facts” as the claims asserted in the *Caldera* litigation.

⁸ “Assignees for collection” are “assignees who [bring] suit to collect money owed to their assignors but who promise[] to turn over to those assignors the proceeds secured through litigation.” *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2538-39 (2008).

Pueschel, 369 F.3d at 355. The claims asserted in Counts I and VI arise out of Microsoft's alleged monopolization of the PC operating system market—the same cause of action asserted in the *Caldera* litigation—and are therefore barred.

This Court has held that the factors to be considered in deciding whether two sets of claims arise out of the same cause of action include “their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.” *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) (citation omitted). By this measure, the claims asserted in Counts I and VI of the complaint in this case and the claims asserted in the *Caldera* litigation are strikingly similar.

Both suits allege that Microsoft engaged in anticompetitive conduct in the PC operating system market. Moreover, the time period at issue in both cases encompasses the same June 1994 to March 1996 period when Novell owned WordPerfect and Quattro Pro and when Microsoft completed developing and commercially released Windows 95. (*See, e.g.*, JA-42 ¶ 8, JA-55 ¶ 37, JA-99-100 ¶ 150, JA-2109 ¶ 59.) Novell here alleges, just as *Caldera* did, that Microsoft (i) changed APIs or removed them from its PC operating systems to render them incompatible with Novell's products (JA-74 ¶ 76, JA-2112 ¶ 67(c)); (ii) withheld technical information from Novell about Microsoft's new PC operating systems that prevented Novell from releasing complementary products in a timely manner

(JA-76 ¶ 79, JA-2092 ¶ 3(g)); (iii) gave its own applications developers access to technical information about its PC operating systems that was unavailable to Novell or other ISVs (JA-76-77 ¶ 81, JA-2112 ¶ 67(b)); and (iv) entered into contracts with OEMs that prevented them from installing Novell's products on their new PCs. (JA-87-90 ¶¶ 113-20, JA-2118 ¶¶ 87-88.) Central to both lawsuits are allegations of anticompetitive conduct by Microsoft in connection with Windows 95. (JA-2109-10 ¶ 61.)⁹

In short, the claims asserted in Counts I and VI are part of the same cause of action as the claims asserted in the Caldera litigation. Both arise out of the same core of operative facts, namely, Microsoft's alleged "single continuous campaign" to destroy Novell in order "to maintain its monopoly in the PC operating systems market." (JA-47-48 ¶ 22.) Having taken the position that its claims were all of a piece, Novell cannot now contend they are entirely separate. *Cf. Crystal Imp. Corp. v. AVID Identification Sys., Inc.*, 582 F. Supp. 2d 1166, 1171 (D. Minn. 2008) (holding that two antitrust claims were part of the same cause of action where plaintiff's "claim is just one segment of a 'series of

⁹ Nor can Novell distinguish its present claim from those asserted in *Caldera* on the grounds that Count I seeks damages for harm to Novell's office productivity applications rather than DR DOS. "Claims may arise out of the same transaction or series of transactions even if they involve different harms or different theories or measures of relief." *Harnett v. Billman*, 800 F.2d 1308, 1314 (4th Cir. 1986).

connected transactions’ stemming from [defendant’s] alleged campaign to maintain monopoly power in the [relevant] market”).

C. The District Court Was Incorrect in Disregarding Microsoft’s *Res Judicata* Defense

In *dicta*, the district court stated that if the APA did not assign the claims asserted in Counts I and VI to Caldera, those claims could not be barred by *res judicata* because “(1) Caldera could not have asserted on behalf of Novell claims Caldera did not possess, and (2) Microsoft now concedes that although Novell had a financial interest in the *Caldera* litigation, it did not control that litigation.” (JA-376 n.9.) This conclusion is incorrect.

First, although *res judicata* is typically applied to claims that could have been brought by the plaintiff in the prior action, that is by no means a requirement. The application of *res judicata* requires only “(1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action.” *Ohio Valley Envtl. Coalition*, 556 F.3d at 210 (citation omitted).

The claims asserted in Counts I and VI would be barred even if Novell had not assigned them to Caldera because Novell, through its proxy Caldera, already litigated other claims arising out of the same core of operative facts. The doctrine of *res judicata* “preclud[es] parties from contesting matters that they have had a full and fair opportunity to litigate” in order to “protect against the

expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Taylor*, 128 S. Ct. at 2171 (citation and internal quotation marks omitted). Novell had a “full and fair opportunity” to litigate the claims asserted in Counts I and VI in the *Caldera* action but chose not to do so. Novell cannot split its claim and now get a second bite at the apple. Indeed, the law recognizes that there are sometimes equitable reasons why even a party that is not in privity with a plaintiff in an earlier action is precluded from asserting claims that could not have been brought by the plaintiff in that action. *See Christiansen v. Farmers Ins. Exchange*, 540 F.2d 472, 474-75 (10th Cir. 1976); *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1505, 1522 (D. Colo. 1989), *rev’d on other grounds*, 964 F.2d 1059 (10th Cir. 1992); RESTATEMENT (SECOND) OF JUDGMENTS § 62 (1982); 18A Wright, Miller & Cooper, *supra*, § 4453.

Second, the fact that Novell did not control the *Caldera* litigation is not determinative. The assumption of control over a prior litigation is only one possible basis for nonparty preclusion. *See Taylor*, 128 S. Ct. at 2173. The substantive legal relationship between Novell and Caldera and Caldera’s adequate representation of Novell in the *Caldera* litigation is each sufficient to establish privity. *See supra* pp. 47-48.

Because the requirements of *res judicata* are met, Novell cannot bring a claim arising out of the same cause of action as the claims already asserted by Caldera. The doctrine of *res judicata* is a separate and independent basis for affirming the district court's dismissal of Counts I and VI.

III. The Alleged Harm to WordPerfect and Quattro Pro Had No Adverse Effect on Competition in the PC Operating System Market

The dismissal of Count I should also be affirmed on the independent ground that the injury allegedly inflicted by Microsoft on WordPerfect and Quattro Pro had no impact on competition in the PC operating system market. Novell's principal expert has conceded that Microsoft's conduct directed at Novell's office productivity applications, in and of itself, caused no harm to competition in the PC operating system market. The district court's conclusion that there is a triable issue of fact on this point was clearly erroneous. (JA-392.)

To prevail on its Section 2 monopolization claim in Count I, Novell must prove that Microsoft's conduct directed at and damaging WordPerfect and Quattro Pro, as this Court put it, was "intended to and did restrain competition in the PC operating-system market." *Novell*, 505 F.3d at 316. Indeed, a private antitrust plaintiff must demonstrate that the conduct complained of "contributed significantly to the achievement or maintenance" of monopoly power in the relevant market.

III Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 650c (3d ed. 2008); *see Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (to be exclusionary, challenged conduct must be “capable of making a significant contribution to creating or maintaining monopoly power”); *accord Thompson Everett, Inc. v. Nat’l Cable Adver., L.P.*, 57 F.3d 1317, 1326 (4th Cir. 1995). It is not enough for Novell to point to injury inflicted by Microsoft on products owned by companies other than Novell.

Novell’s expert in antitrust economics has conceded the lack of the requisite causal connection. In his reports, Professor Noll opined that Microsoft’s conduct directed at Novell (including conduct directed at NetWare, a product that is not part of this case), when combined with conduct directed against Netscape Navigator and Sun’s Java technology, might “collectively” have had an impact on competition in the PC operating system market. (JA-4552, JA-4574.) It was only by aggregating the effects of Microsoft’s conduct on products other than Novell’s office productivity applications (and companies other than Novell) that Professor Noll could find any impact whatsoever on competition in the PC operating system market. (JA-4574.)

At his deposition, Professor Noll was asked specifically whether Microsoft’s conduct directed at WordPerfect and Quattro Pro, in and of itself, harmed competition in the PC operating system market. Professor Noll was unable

to say it had, testifying “I suspect that there would have been no adverse impact” on competition in the PC operating system market solely as a result of Microsoft’s conduct directed at Novell’s office productivity applications. (JA-4826.) When asked again, he reiterated that he “suspect[ed] that there would have been no” harm to competition in the PC operating system market resulting from Microsoft’s conduct directed at Novell’s office productivity applications. (JA-4826.) He confirmed what he said in his report, namely, to find an impact on competition in the PC operating system market, one must consider “the totality of actions by Microsoft” (JA-4824-27, JA-4842-46)—*i.e.*, according to Professor Noll, the impact on competition arose from Microsoft conduct directed at products produced by companies other than Novell. Professor Noll’s unwillingness to opine that Microsoft’s conduct directed solely at WordPerfect and Quattro Pro had an adverse impact on competition in the PC operating system market is understandable given the trivial nature of the conduct about which Novell complains. *See supra* pp. 21-25.

Professor Noll also testified that while “Netscape combined with Java” may have constituted a threat to Microsoft’s PC operating system monopoly, no other applications vendor—including Novell—had products sufficiently important to threaten the applications barrier to entry. (JA-4856.) Professor Noll was explicit that “Quattro Pro was not a threat to Microsoft’s operating system”

and that “WordPerfect by itself would pose no such threat.” (JA-4845.) Even with regard to PerfectOffice, Novell’s suite of office productivity applications, Professor Noll testified that while it “comes closer, . . . the threat of PerfectOffice is primarily in conjunction with other products. It’s not primarily independent.” (JA-4846.) If Novell’s office productivity applications posed no threat to the applications barrier to entry, then nothing Microsoft did to those products could have affected competition in the PC operating system market. It is that simple.

No court has ever permitted a plaintiff to “piggy-back” on the anticompetitive effect of conduct directed at other parties in seeking to make out a claim under Section 2 of the Sherman Act. In fact, the antitrust laws “bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.” *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001). As the court held in *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1200 (7th Cir. 1986), a plaintiff must prove that it was injured “by reason of” conduct that violated the antitrust laws. By relying not on Microsoft’s conduct directed at WordPerfect and Quattro Pro but instead on Microsoft’s conduct directed at Netscape Navigator and Sun’s Java to demonstrate the requisite injury to competition, Novell is attempting to do precisely what the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), said an

antitrust plaintiff may not do—predicate a claim of antitrust injury on “the mere presence of the violator in the market.” 429 U.S. at 486, 487.

While the district court agreed that “Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well” (JA-393), the district court erroneously concluded that it was “implicit in Dr. Noll’s opinion . . . that conduct directed at Novell, in and of itself, caused some anticompetitive harm in the PC operating system market.” (JA-393.) In fact, Professor Noll never made such an assertion. He conceded instead that he had no basis to conclude that Microsoft’s conduct directed at WordPerfect and Quattro Pro, standing alone, had any effect on competition in the PC operating system market. This absence of a causal connection is an alternative ground for affirming the judgment.

IV. There Is No Basis for Overturning the District Court’s Grant of Summary Judgment on Count VI

The district court correctly held that “even if Novell had not assigned th[e] claim [in Count VI], Microsoft would be entitled to summary judgment because the agreements at issue either were not exclusive, were not otherwise anticompetitive, or did not substantially foreclose competition in any market.” (JA-394.) Novell makes no effort to undermine that holding; indeed, its brief is

completely silent on the issue. Accordingly, there is no basis for overturning the district court's dismissal of Count VI.

V. Novell May Not Now Seek Redress for Alleged Harm to GroupWise

There is not one mention of GroupWise in Novell's 178-paragraph complaint. As the district court explained, "the Complaint failed to provide notice that Novell was basing its claims in part on Microsoft's treatment of GroupWise, and therefore any such allegation is not properly part of this action." (JA-382 (applying Fed. R. Civ. P. 8(a)(2)).) This aspect of the district court's decision is reviewed for abuse of discretion, *Gardner v. Easley*, 331 Fed. App'x 205, 206 (4th Cir. 2009), a standard Novell cannot hope to meet.

The complaint alleges that Microsoft inflicted injury on Novell's "office productivity applications," a term Novell itself defines to mean "[w]ord processing and spreadsheet applications." (JA-42 ¶ 8, JA-51 ¶ 24.) Novell owned only two such products, *i.e.*, WordPerfect and Quattro Pro. (*See* JA-40 ¶ 2.) As the district court held, "simply pluralizing 'office productivity applications,' without any further specificity, is insufficient to put Microsoft on fair notice that Novell would allege antitrust violations based on Microsoft's treatment of GroupWise." (JA-383.) If there were any doubt on the point, Novell should be bound by its statement to this Court in 2006 that it was seeking "standing to pursue claims against Microsoft for injury to Novell's word-processing and spreadsheet

applications.” (JA-2899.) Novell said nothing to this Court four years ago about GroupWise being part of the case.

The complaint is also clear that Novell seeks damages for “the amount of profits lost by WordPerfect during the period 1994-1996” and the “precipitous decline in WordPerfect’s value” that resulted from “the dramatic decline in WordPerfect’s sales and profits.” (JA-99-100 ¶ 150.) Novell sold WordPerfect and Quattro Pro to Corel on March 1, 1996, and, thus, any lost profits or decline in value by definition accrued prior to that sale. In its 2007 decision permitting Count I to go forward, this Court understood that point—the Court’s decision states expressly that “[a]ll six of Novell’s claims arose prior to March 1996, when Novell sold WordPerfect and Quattro Pro to Corel Corporation.” *Novell*, 505 F.3d at 308.

Despite this, and without any attempt to amend its complaint, Novell submitted expert reports in May 2009 which assert that Novell is entitled to recover substantial damages for alleged harm to Novell’s GroupWise server software in the period 1997 to 2001. Attempting to inject a new product and a new time period into the case at such a late stage by means of expert reports was plainly impermissible. As the district court commented at oral argument on the summary judgment motions: “[It] sure knocked my socks off when all the sudden a whole new product comes along and a different time frame. And I’ve been presiding over this litigation for a long time [since 2005].” (JA-210-11.)

It is well-established that “[h]inting at a claim in an expert witness statement” is not a proper substitute for amending the complaint. *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987). In *Deasy*, this Court held that “[i]t would not be desirable to have discovery statements serve as amendments to the pleadings. Parties should not be encouraged to plead in this tentative and whimsical fashion, advancing their own cases while keeping their opponents off balance.” 833 F.2d at 42; see also *Barclay White Skanska, Inc. v. Battelle Mem’l Inst.*, 262 F. App’x 556, 563 (4th Cir. 2008). That is precisely what Novell tried to do with GroupWise.

As a last resort, Novell seeks to justify its last-minute insertion of GroupWise into the case based on *Microsoft’s* discovery efforts. (Novell Br. at 56-58.) That is illogical. As the district court properly held, “[w]hat material is subject to discovery and what conduct may serve as the basis of a claim are two distinct inquiries with different standards . . . it would be unfair to penalize Microsoft for engaging in a cautious and thorough discovery strategy.” (JA-383.)

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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September 17, 2010

REQUEST FOR ORAL ARGUMENT

Microsoft respectfully requests oral argument. The issues raised on this appeal are important, and Microsoft believes that oral argument will assist the Court in its consideration of those issues.

ADDENDUM

Rule 8(a) of the Federal Rules of Civil Procedure provides as follows:

- (a) **Claim for Relief.** A pleading that states a claim for relief must contain:
- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
 - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Rule 17(a) of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

(a) Real Party in Interest.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

- (A)** an executor;
- (B)** an administrator;
- (C)** a guardian;
- (D)** a bailee;
- (E)** a trustee of an express trust;
- (F)** a party with whom or in whose name a contract has been made for another's benefit; and
- (G)** a party authorized by statute.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides as follows:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides as follows:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Attorney for _____

Dated: _____

CERTIFICATE OF SERVICE

I certify that on September 17, 2010 the foregoing document was served on plaintiff-appellant Novell, Inc.'s counsel of record through the CM/ECF system.

By: /s/ Edward M. Grauman
Edward M. Grauman