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As of: Aug 22, 2013

LANTEC, INC., a Utah corp.; LANCOMPANY INFORMATICA LTDA., a Brazil corporation; LANTEC INFORMATICA LTDA., a Brazil Corp.; LANTRAINING INFORMATICA LTDA., a Brazil Corp.; Plaintiffs, vs. NOVELL, INC., a Delaware corporation, Defendant,

Case No. 2:95-CV-97-ST

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2000 U.S. Dist. LEXIS 19905*; *2001-2 Trade Cas. (CCH) P73,448

September 14, 2000, Decided
September 15, 2000, Filed

DISPOSITION: [*1] GRANTED NOVELL'S MOTION TO DISMISS ANTITRUST CLAIMS OF LANCOMPANY AND LANTRAINING; DENIED AS MOOT NOVELL'S ALTERNATIVE MOTION IN LIMINE TO EXCLUDE EVIDENCE OF LANCOMPANY'S AND LANTRAINING'S ANTITRUST DAMAGES; AND DENIED PLAINTIFFS' MOTION TO STRIKE SAID MOTIONS OF NOVELL; AND DENIED NOVELL'S MOTION TO STRIKE PLAINTIFFS' RESPONSE.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant moved to dismiss antitrust claims by plaintiff foreign corporations for lack of subject matter jurisdiction.

OVERVIEW: Pursuant to *Fed. R. Civ. P. 12(b)(1)*, defendant moved to dismiss plaintiffs' antitrust claims for lack of subject matter jurisdiction under the Foreign Trade AntiTrust Improvement Act (FTAIA), *15 U.S.C.S. § 6a*. Defendant argued that because plaintiffs were Brazilian companies who participated wholly in foreign markets, the court lacked subject matter jurisdiction over their antitrust claims. The court dismissed for lack of subject matter jurisdiction. Plaintiffs failed to allege a direct effect, a substantial effect, or a reasonably foreseeable effect on domestic commerce. Plaintiffs also failed to allege or show facts from which it could be shown that defendant's actions toward plaintiffs had a "substantial" effect on the domestic market under the FTAIA.

OUTCOME: The court granted defendant's motion to dismiss for lack of subject matter jurisdiction because, under the FTAIA, there was not the requisite effect by plaintiffs on the domestic market of the United States.

LexisNexis(R) Headnotes

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview
Constitutional Law > Congressional Duties & Powers > General Overview
Constitutional Law > The Judiciary > Congressional Limits

[HN1] Subject matter jurisdiction is an issue that may be raised at any time. Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in *U.S. Const. art. III, § 2, cl. 1*. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. This reflects the constitutional source of federal judicial power that power only exists in such inferior courts as the Congress may from time to time ordain and establish. Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

[HN2] No action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

[HN3] A challenge to subject matter jurisdiction may be raised at any time in the proceedings.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

[HN4] Generally, a *Fed. R. Civ. P. 12(b)(1)* motions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations as true. Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under *Rule 12(b)(1)*. In such instances a court's references to evidence outside the pleadings does not convert the motion to a *Rule 56* motion.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

[HN5] A court is required to convert a *Fed. R. Civ. P. 12(b)(1)* motion to dismiss into a *Fed. R. Civ. P. 12(b)(6)* motion or a *Fed. R. Civ. P. 56* summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

[HN6] A *Fed. R. Civ. P. 12(b)(1)* motion can properly be a "speaking motion" and include references to evidence extraneous to the complaint without converting it to a *Fed. R. Civ. P. 56* motion. The focus of the inquiry is not merely on whether the merits and the jurisdictional issue arise under the same statute. Rather the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited

Jurisdiction

[HN7] Since federal courts are courts of limited jurisdiction, the court presumes no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. Thus, plaintiffs bear the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. Mere conclusory allegations of jurisdiction are not enough.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

[HN8] Whether the motion challenging subject matter jurisdiction is brought under *Fed. R. Civ. P. 12(b)(1)* or under *Fed. R. Civ. P. 56*, the burden of the party seeking to establish jurisdiction remains essentially the same--they must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Application of U.S. Law > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

[HN9] In 1982, Congress amended the Sherman Act by adding the Foreign Trade AntiTrust Improvement Act (FTAIA), *15 U.S.C.S. § 6a*, to exempt from United States antitrust law conduct that lacked sufficient domestic effect. By the addition of the FTAIA, Congress imposed a single and objective standard for determining when foreign antitrust conduct is, and is not, subject to the United States' antitrust law.

Antitrust & Trade Law > Monopolization > Attempts to Monopolize > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

[HN10] Although the Sherman Act prohibits monopolization and attempted monopolization of any line of interstate or foreign commerce, section 1 of the Foreign Trade AntiTrust Improvement Act makes the Sherman Act inapplicable to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless- (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.

Antitrust & Trade Law > International Application of U.S. Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN11] An effect is direct if it follows as an immediate consequence of the defendant's activity. However, an allegation that income flows between corporations is insufficient to establish the requisite domestic effect. An allegation of a loss of competition resulting from the loss of the participation of a company that was expecting funds from a company that was injured by a refusal to deal is far from following as an immediate consequence of the alleged wrongful refusal to deal. The effect required for jurisdictional nexus must be the anti-competitive effect in the domestic market.

Antitrust & Trade Law > International Application of U.S. Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN12] The test of "reasonably foreseeability" is whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments.

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JUDGES: TED STEWART, United States District Judge.

OPINION BY: TED STEWART

OPINION

DECISION GRANTING NOVELL'S MOTION TO DISMISS THE ANTITRUST CLAIMS OF LANCOMPANY AND LANTRAINING; DENYING AS MOOT NOVELL'S ALTERNATIVE MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF LANCOMPANY'S AND LANTRAINING'S ANTITRUST DAMAGES; AND DENYING PLAINTIFF'S MOTION TO STRIKE SAID MOTIONS OF NOVELL; AND DENYING NOVELL'S MOTION TO STRIKE PLAINTIFF'S RESPONSE

This matter is before the court on the following Motions: Novell's Motion to Dismiss the [*3] Antitrust Claims of plaintiffs Lancompany Informatica, Ltda., (Lancompany) and LanTraining Informatica Ltda., (LanTraining) for lack of subject matter jurisdiction and in the alternative Motion *In Limine* to Exclude Evidence of LanCompany's and LanTraining's Antitrust Damages; and, Plaintiffs' Motion to Strike said Motions of Novell; and Novell's Motion to Strike Plaintiffs' Response to Novell's Reply Memorandum in Support of its *Rule 12(b)(1)* Motion to Dismiss.

The court will first address Novell's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Lantec's Motion to Strike Novell's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Pursuant to *Fed. R. Civ. P. 12(b)(1)*, Novell moves to dismiss LanCompany's and LanTraining's antitrust claims for lack of subject matter jurisdiction. Novell contends (1) because LanCompany and LanTraining are Brazilian companies who participate wholly in foreign markets, this court lacks subject matter jurisdiction over their antitrust claims; and, (2) these companies have no standing to pursue or assert these claims.

As an initial matter, Plaintiffs contend that Novell admitted subject matter jurisdiction in its Answer and therefore [*4] is foreclosed from raising the issue at this late date. However, [HN1] subject matter jurisdiction is an issue that may be raised at any time.

> Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: . . . , that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art, III, § 1.
>
> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, [HN2] no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the

> consent of the parties is irrelevant, *California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972)*, principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 95 L. Ed. 702, 71 S. Ct. 534 (1951)*, [*5] and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982) (underlined emphasis added).

Thus, it is irrelevant if Novell admitted jurisdiction in its Answer to the Amended Verified Complaint because "subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings." *Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).* [HN3] A challenge to subject matter jurisdiction may be raised at any time in the proceedings. *U.S. v. Burch, 169 F.3d 666, 668 (10th Cir. 1999)* (challenge to subject matter jurisdiction may be raised at any time in proceedings including in collateral attack under § 2255).

Plaintiffs move to strike Novell's *Rule 12(b)(1)* motion asserting lack of subject matter jurisdiction because they contend the motion can properly be brought only as a [*6] motion to dismiss for the failure to state a claim under *Rule 12(b)(6)* or a motion for summary judgment under *Rule 56*. Lantec contends that because the deadline for filing such motions under *Rules 56* and *12(b)(6)* expired on October 1, 1998, Novell's motion is untimely and should be stricken. Further, Plaintiffs contend that because Novell's Motion must be considered under *Rule 12(b)(6)*, the issue is whether or not LanTraining and LanCompany have stated a claim under the Sherman Act, an issue Plaintiffs contend is not jurisdictional. Plaintiffs also contend that Novell's failure to raise this issue earlier is the result of its counsel's having taking a contrary position on behalf of Novell in an entirely different case in this district.

The last contention may be quickly resolved. The court has reviewed the submissions from that case, *Caldera v. Microsoft, 72 F. Supp. 2d 1295*, Case No. 96-CV-645-B, which the parties attached as exhibits to their memoranda in this matter. The court does not find the facts of that case to be similar to those alleged in this case and therefore does not find *Caldera* to be controlling.

The parties argue extensively regarding the correct procedural posture of Novell's [*7] Motion regarding subject matter jurisdiction. In this circuit, the following rules are applicable:

> [HN4] Generally, *Rule 12(b)(1)* motions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. *Ohio Nat'l Life Ins. Co. v. United States 922 F.2d 320, 325 (6th Cir. 1990).* In reviewing a facial attack on the complaint, a district court must accept the allegations as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under *Rule 12(b)(1). Wheeler v. Hurdman, 825 F.2d 257, 259 n.5* (10th Cir.), *cert. denied, 484 U.S. 986, 98 L. Ed. 2d 501, 108 S. Ct. 503 (1987).* In such instances a court's references to evidence [*8] outside the pleadings does not convert the motion to a *Rule 56* motion. *Wheeler, 825 F.2d at 259 n.5.*
>
> However, [HN5] a court is required to convert a *Rule 12(b)(1)* motion to dismiss into a *Rule 12(b)(6)* motion or a *Rule 56* summary judgment motion when resolution of the jurisdictional question is

> intertwined with the merits of the case. *Id. at 259.* The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statue which provides the substantive claim in the case. *Wheeler, 825 F.2d at 259.*

Holt v. U.S., 46 F.3d 1000, 1002-03 (10th Cir. 1995) (considering jurisdictional issue under wholly separate statute (the Flood Control Act) from the underlying FTCA claim).

Thus, [HN6] a *Rule 12(b)(1)* motion can properly be a "speaking motion" and include references to evidence extraneous to the complaint without converting it to a *Rule 56* motion. *Wheeler, 825 F.2d at 259 n.5.*

Based upon the foregoing, the court will deny Plaintiffs' Motion to Strike Novell's Motion to Dismiss for Lack of Jurisdiction. A Motion challenging subject matter jurisdiction can be brought [*9] at any time in the proceedings and is properly brought under *Rule 12(b)(1)*, although it may, if appropriate, be subsequently converted to a motion under *Rule 12(b)(6)* or *Rule 56.*

Although the *Holt* test could be read as meaning that any time the jurisdictional challenge arises out of a section of the same statute that creates the cause of action in another section, the jurisdictional question is automatically considered to be intertwined with the merits, a recent Tenth Circuit case clarifies that the test is not so simplistic. "Under *Wheeler,* however, the focus of the inquiry is not merely on whether the merits and the jurisdictional issue arise under the same statute. Rather the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Pringle v. U.S., 208 F.3d 1220, 1223 (10th Cir. 2000).*

LanCompany and LanTraining, as the parties invoking jurisdiction have the burden of showing subject matter jurisdiction.

> [HN7] Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. If jurisdiction [*10] is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. Thus, [plaintiffs] bear the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. Mere conclusory allegations of jurisdiction are not enough.

U.S. v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999) (quoting *U.S. ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548,* (10th Cir. 1992), *cert. denied 507 U.S. 951, 122 L. Ed. 2d 742, 113 S. Ct. 1364 (1993)).*

[HN8] Whether the motion challenging subject matter jurisdiction is brought under *Rule 12(b)(1)* or under *Rule 56*, the burden of the party seeking to establish jurisdiction "remains essentially the same--they must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence." *Spectrum Emergency, supra, 190 F.3d at 1160 n.5.*

Novell contends that LanCompany's and LanTraining's claims should be dismissed because this court lacks subject matter jurisdiction over the antitrust claims of these two foreign corporations. [HN9]

[*11] In 1982, Congress amended the Sherman Act by adding the Foreign Trade AntiTrust Improvement Act (FTAIA), *15 U.S.C. § 6a*, to exempt from United States antitrust law conduct that lacked sufficient domestic effect. *See Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1105 (S.D. N.Y. 1984)* (citing Congressional purposes).

By the addition of the FTAIA Congress imposed a single and objective standard for determining when foreign antitrust conduct is, and is not, subject to the United States' antitrust law. *Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D. N.Y. 1985).*

> [HN10] Although the Sherman Act prohibits monopolization and attempted monopolization of any line of interstate or foreign commerce, section 1 of the FTAIA makes the Sherman Act inapplicable to

> conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade [*12] or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.

Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1085 (D.C. Cir. 1998) (quoting *15 U.S.C. § 6a*) (underlined emphasis added).

Under the Tenth Circuit case law cited above, the court must determine whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim and therefore requires conversion of Novell's motion to a motion under *Rule 12(b)(6)* or *Rule 56. Pringle, 208 F.3d at 1223.*

In this case, although the merits of the antitrust claims and the jurisdictional issue arise under sections of the same statute, the resolution of the jurisdictional question does not require resolution of an aspect of the substantive claim. The requirement that there be a "direct, substantial and reasonably foreseeable" effect on domestic commerce is not an aspect of the substantive antitrust claims. Accordingly, the court need not convert the motion to one under *Rule 12(b)(6)* or *Rule 56* and may consider affidavits, and other evidence [*13] on the issue of the jurisdictional elements under *Section 6a.*

There are several reasons why, as a practical matter, the analysis of the motion under *Rule 12(b)(1)* in no way prejudices Plaintiffs. First, many of the key facts are undisputed. For example, it is undisputed that LanCompany and LanTraining are Brazilian companies; are headquartered in Brazil; and conduct their business solely in Brazil and Latin America. Second, because Novell makes a facial challenge to subject matter jurisdiction over LanCompany's and LanTraining's antitrust claims, the factual allegations of the Complaint are presumed true for purposes of the Motion. Third, the court may look to the materials submitted by Plaintiffs in support of their jurisdictional allegations to determine if Plaintiffs have met their burden of establishing the court's subject matter jurisdiction over LanCompany's and LanTraining's antitrust claims. In support of subject matter jurisdiction, Plaintiffs have submitted Dr. Beyer's expert report, a portion of his deposition and a transcript of a hearing transcript from the *Caldera* case.

Novell contends that even assuming as true the allegations that Novell terminated its dealings [*14] with LanCompany and LanTraining for the purpose of bringing pressure on Lantec and Lantec Brazil, and to eliminate Lantec's source of capital by "assassinating" or putting out of business the foreign companies upon which Lantec depended for funds, there is no showing of a "direct, substantial and reasonably foreseeable" effect on domestic commerce.

Plaintiffs oppose the 12(b)(1) motion because they contend their Amended Verified Complaint alleges Novell injured the two foreign corporations by conduct that had the requisite direct, substantial and reasonably foreseeable anti-competitive effect on domestic commerce. Plaintiffs contend that by using LanCompany and LanTraining as a fulcrum or conduit to crush Lantec by eliminating its foreign source of capital, Novell eliminated competition in relevant market and thereby had a direct, substantial and reasonably foreseeable effect on trade or domestic commerce in the United States.

However, a close reading of the Amended Verified Complaint reveals that it does not allege such an effect on domestic commerce, or facts from which such an effect on domestic commerce are shown.

The Amended Verified Complaint alleges generally that Novell's [*15] conduct toward all plaintiffs had the effect of "unreasonably restraining interstate trade and commerce in the relevant market" P 218(f) and "affecting

a substantial amount of interstate commerce in the relevant market" P 218(s).

The specific allegations regarding LanCompany and LanTraining are:

> 212. Novell developed a scheme to breach its contracts with the Lantec Companies [defined earlier as all four plaintiffs] and to refuse to deal with any of the Lantec companies so that it could enter into a relationship with WordPerfect for the development and sale of NetWare messaging applications to the exclusion of the Lantec Companies. Novell manipulated and utilized LanCompany and LanTraining in order to curtail Lantec's and Lantec Brazil's sales and distribution channels and to cut off their sources of investment capitol. Novell refused to deal with LanCompany and LanTraining as a fulcrum, conduit or market force to injure Novell's competitors and competition in the NetWare Messaging Applications market, including Lantec and Lantec Brazil and LanCompany and LanTraining injury is inextricably intertwined with the injury to competition in the relevant market.

Amended [*16] Verified Complaint at P 212 (underlined emphasis added).

The Complaint defines the "relevant geographic market as "the world." P 149. Plaintiffs submitted the deposition testimony of their expert, Dr. Beyer, that the principal products in this case are designed and specified by suppliers who are residents of the United States. However, neither his deposition nor his expert report opine that Novell's actions in terminating its agreements with and refusing to deal with the two Brazilian companies which do no business in the United States' domestic market, had a direct, substantial and reasonably foreseeable effect on domestic commerce.

The court agrees with Novell that Plaintiffs have failed to allege a direct effect, a substantial effect, or a reasonably foreseeable effect on domestic commerce. "[HN11] An effect is direct if it follows as an immediate consequence of the defendant's activity." *Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 931 (2nd Cir. 1998)* (citations and quotation marks omitted). However, "an allegation that income flows between corporations is insufficient to establish the requisite domestic effect." *Optimum v. Legent Corp., 926 F. Supp. 530 (W.D. Pa. 1996).* [*17] An allegation of a loss of competition resulting from the loss of the participation of a company that was expecting funds from a company that was injured by a refusal to deal is far from following as an immediate consequence of the alleged wrongful refusal to deal.

Plaintiffs have also failed to allege or show facts from which it could be shown that Novell's actions toward the Brazilian companies had a "substantial" effect on the domestic market. The effect required for jurisdictional nexus must be the anti-competitive effect in the domestic market. *Liamuiga Tours, 617 F. Supp. at 923-24* (citing FTAIA's legislative history).

This case is distinguishable from the case relied upon by Plaintiffs, *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC 331 U.S. App. D.C. 226, 148 F.3d 1080, 1085 (D.C. Cir. 1998).* In *Caribbean Broadcasting,* the complaint alleged that the foreign company was competing in the market in which many companies based in the United States were customers. *148 F.3d at 1086.* In *Caribbean Broadcasting,* the D.C. Circuit distinguished an earlier case, *The "In" Porters, S.A. v. Hanes Printables, 663 F. Supp. 494 (M.D. N.C. 1987),* [*18] because the "foreign firm in that case did not sell to American consumers." *148 F.3d at 1086.*

[HN12] The test of "reasonably foreseeability" is whether the alleged domestic effect "would have been evident to a reasonable person making practical business judgments." *Eurim-Pharm, 593 F. Supp. at 1106 n.4.* In this case, the alleged domestic effects are too far removed from Novell's alleged actions toward LanCompany and LanTraining for the effects to have been "evident" to a reasonable person making practical business judgments.

In support of its contention that the Amended Verified Complaint establishes Novell's actions toward LanCompany and LanTraining adequately allege a direct, substantial and reasonably foreseeable effect on the domestic market, Plaintiffs contend that where the injury to the two foreign plaintiffs is "inextricably intertwined" with the injury inflicted on the domestic market they may sue even though they are not consumers or competitors in the relevant market. Plaintiffs' Memorandum in

Opposition at 10. In support of this theory Plaintiffs cite *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982).* [*19] *McCready,* involved the issue of a plaintiffs standing to allege an antitrust injury. *McCready* did not involve the FTAIA or a foreign corporation's claim of violations of the United States' antitrust laws and is therefore not helpful on the issue of subject matter jurisdiction under the FTAIA.

The standing analysis applied in *McCready* cannot be substituted for the clear objective standard set forth by Congress in the FTAIA. Further, any expansion of the FTAIA's plain language regarding jurisdiction would re-write the statute-an impermissible role for the courts. Such a broadening of the jurisdictional standard based upon case law would open the door to uncertainty over the scope of the U.S. anti-trust laws in international commerce, uncertainty that Congress attempted to eliminate by enacting the FTAIA. *See Liamuiga Tours, 617 F. Supp. at 923,*

Further, the alleged injury at issue in *McCready* was held to be "inextricably intertwined" with the alleged antitrust conspiracy because the plaintiff therein was in essence the direct purchaser who paid the higher costs alleged to have been caused by the anti-competitive actions, a situation not present in [*20] this case. *Compare Serpa Corp. v. McWane, Inc., 199 F.3d 6 (1st Cir. 1999)* (declining to apply "inextricably intertwined" language of *McCready* to afford antitrust standing to distributor allegedly injured by anti-competitive effect of manufacturer's purchase of competitor).

Plaintiffs also attempt to rely on a theory developed to afford former employees standing to bring claims under antitrust statutes. Plaintiffs cite *Reverend Royal Brown v. Archer Daniels Midland Co., 1996 U.S. Dist. LEXIS 11481, 1996 WL 442274* *3 (E.D. La 1996), which in turn followed the *Province v. Cleveland Press Pub. Co. 787 F.2d 1047, 1054 (6th Cir. 1986)* line of cases involving the standing of former employees to bring actions when they lose their jobs as a result of antitrust violations. In this line of cases the *McCready* "inextricably intertwined" theory of standing is expanded to allow employees or companies who are injured by anti-trust violations standing to sue when their injuries are "inextricably intertwined" to the injury to the relevant market because the plaintiff was used by the antitrust violator as "a fulcrum, conduit or market force to injure competitor or participants [*21] in the relevant product and geographical market." *Id.*

Once again, such case law regarding theories of standing is not a substitute for the single objective standard set forth the FTAIA. Further this area of law in which there is a split of authority over whether such an extension of the law of standing is warranted even for domestic plaintiffs. *See Sullivan v. Tagliabue, 25 F.3d 43 (5th Cir. 1994)* (collecting cases showing split of authority) and *Thomason v. Mitsubishi Electronic Sales America, Inc., 701 F. Supp. 1563 (N.D. Ga. 1988)* (same).

The court notes that Plaintiffs also rely on these same lines of cases in connection with their contentions regarding standing. However, the court's determination that it lacks subject matter jurisdiction over the antitrust claims of the two foreign corporations which operate solely in Brazil, because there is not the requisite effect on the domestic market of the United States, renders moot Novell's contention that the claims should be dismissed for lack of standing.

The court will also deny as moot Novell's Alternative Motion *In Limine* to Exclude Evidence of LanCompany's and LanTraining's Antitrust [*22] Damages for lack of standing.

Finally, the court will deny Novell's Motion to Strike Plaintiffs' Response to Novell's Reply Memorandum in Support of its *Rule 12(b)(1)* Motion to Dismiss the LanCompany and LanTraining Antitrust Claim.

The court will enter an appropriate order in accordance with the foregoing.

DATED this 14th day of September, 2000.

BY THE COURT:

TED STEWART

United States District Judge