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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

NOVELL, INC., Plaintiff, -v- MICROSOFT CORPORATION, Defendant.	**MICROSOFT'S MOTION TO DISMISS NOVELL'S COMPLAINT** Civil No. 2:04 CV 1045 TS Judge Ted Stewart

January 7, 2005

18

Microsoft Corporation hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint filed by Novell, Inc. ("Novell") on November 12, 2004. In accordance with Local Rule 7-1(a), Microsoft sets forth herein the "specific grounds for the relief sought." For a complete treatment of those topics, please see Microsoft's Memorandum in Support of Its Motion to Dismiss Novell's Complaint, which Microsoft also is filing today.

Grounds for the Relief Sought

The Complaint seeks to recover for antitrust injuries to Novell's WordPerfect word processing application and its Quattro Pro spreadsheet application. Count I of the Complaint alleges that Microsoft harmed the Novell products by unlawfully maintaining a monopoly in the market for "Intel-compatible Personal Computer operating systems" (the "PC operating system" market). Counts II through VI allege that Microsoft harmed the Novell products by unlawfully monopolizing, attempting to monopolize or otherwise injuring asserted markets for "word processing applications" and "spreadsheet applications."

1. *Dismissal of Count I*

Microsoft moves for dismissal of Count I on two grounds. First, Novell does not own the claim. *See* Fed. R. Civ. P. 17(a) (providing that an action may only be prosecuted by the "real party in interest"). In 1996, Novell sold to a third party, Caldera, Inc. ("Caldera"), any claims it had against Microsoft for direct or indirect harm relating to PC operating systems, and required Caldera to allege such harm in a suit against Microsoft. Caldera later obtained a substantial settlement payment from Microsoft, a large portion of which went to Novell, and in exchange Caldera released Microsoft from the claims Novell now seeks to assert in Count I.

Second, Count I does not seek damages for any Novell products that competed in the PC operating system market; it only asserts injury to Novell products in distinct markets.

Because a private antitrust plaintiff lacks "antitrust standing" to recover for injuries to products that did not compete in the allegedly restrained market, Count I must be dismissed.

2. Dismissal of Counts II through VI

The remaining counts in the Complaint — Counts II through VI — all concern asserted markets for "word processing applications" or "spreadsheet applications." These claims arose no later than March 1996, when Novell sold its "word processing applications" and "spreadsheet applications" products to Corel Corporation. Since the limitations period on antitrust claims is four years, 15 U.S.C. § 15b, these claims are time-barred unless there is some valid ground for tolling.

Novell's tolling theory rests on 15 U.S.C. § 16(i), which suspends the limitations period for private claims "based in whole or in part on any matter complained of" in an antitrust action brought by the federal government during the pendency of that action and for one year thereafter. According to Novell, Section 16(i) tolled its claims upon the filing of a complaint by the United States Department of Justice against Microsoft on May 18, 1998 (the "DOJ Complaint"). But the DOJ Complaint made no claims pertaining to purported markets for "word processing applications" or "spreadsheet applications." Indeed, the DOJ Complaint mentions word processing and spreadsheet applications only once, and then only in contradistinction to PC operating systems, which are said to "control and direct" such applications. (DOJ Compl. ¶ 54.)

The difference in markets is fatal to Novell's effort to toll the statute of limitations with respect to Counts II through VI, because in an antitrust case the relevant market is what provides the context in which allegations of harm to competition must be evaluated. *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993). Thus, when a comparison of the government complaint to the private claims "shows that the government and subsequent private

suits . . . arose in distinct markets, the statute is not tolled." 2 Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 321a, at 241 (2d ed. 2000). Although the disparity in markets is sufficient in and of itself, the DOJ Complaint differs from Novell's Complaint in many other respects as well. Counts II through VI are time-barred.

CONCLUSION

For the foregoing reasons and those stated in more detail in Microsoft's Memorandum in Support of Its Motion to Dismiss Novell's Complaint, Microsoft requests that this Court grant the motion to dismiss.

DATED this 7th day of January, 2005

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2005, I caused a true and correct copy of the foregoing to be served upon the following by overnight mail:

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