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**UNITED STATES DISTRICT COURT
for the District of Utah
Central Division**

Novell, Inc.,	*	NOVELL’S MEMORANDUM
Plaintiff,	*	IN SUPPORT OF ITS MOTION
	*	FOR A CURATIVE INSTRUCTION
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

In light of Microsoft counsel's blatantly improper argument about the timing of the filing of Plaintiff's lawsuit, Novell, Inc. ("Novell") respectfully submits this memorandum in support of its motion for a curative jury instruction.

Novell requests that the jury be given the following instruction:

During opening statements, counsel for Microsoft made reference to the fact that Novell did not file this lawsuit until 2004. The jury should draw no adverse inference against Novell based on the fact that it filed the present lawsuit in 2004 rather than at some earlier time. Under the law, Novell had the legal right to file its lawsuit when it did and was under no legal obligation to bring this lawsuit at any earlier date.

In its opening statement, Microsoft repeatedly argued that the jury should infer, from the fact that Novell's suit was not brought until 2004, that Novell's suit lacks merit: "Novell didn't even file this lawsuit until November of 2004, more than ten years later." October 18, 2011 Tr. at 91:1-2. "[T]his conduct that allegedly is so bad . . . Novell said nothing about at the time and waited more than ten years before it even brought this case" *Id.* "We don't blame anyone or say it's anyone's fault. But making a misjudgment about a business that you buy and then, ten years later, blaming someone else for your mistake, that, with all respect, I think is wrong." *Id.* at 103:23-104:2. "And as I told you when I started this opening statement way back when, though the decision was made in '94 and Novell made no complaint in 1994, the lawsuit was filed 10 years later." *Id.* at 141:3-6.

In making this argument, Microsoft took improper advantage of the fact that (1) the jury has been shielded from learning of the existence of the Government case, and (2) the jury is unaware of the fact that the statute of limitations was tolled during the pendency of the Government's prosecution of that case. Novell has been unfairly prejudiced as a result. The

Court should therefore give the jury the brief instruction set forth above in order to cure this unfair prejudice.

The Clayton Act's tolling provision provides:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under Section 4A of the Clayton Act, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however* That whenever the running of the statute of limitations in respect of a cause of action arising under Section 4 or 4C of the Act is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 16(i). The purpose of the Clayton Act's tolling provision is to further Congress' "clearly expressed desire that private parties be permitted the benefits of prior government actions." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320 (1965); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 (1971) (purpose of Clayton Act tolling provision is to allow private plaintiffs "to await the outcome of Government suits and use the benefits accruing therefrom"). Allowing the government action to proceed to completion before the private litigant is required to file suit also serves purposes of judicial economy; for example, "difficult questions of law may be tested and definitively resolved before the private litigant enters the fray." *Minnesota Mining & Manufacturing*, 381 U.S. at 319.

As the Court noted in its June 10, 2005 Order, Microsoft "acknowledges that the claim asserted in Count I is not time-barred because the focus of the government case against Microsoft (during the pendency of which limitations of private rights of action were tolled under

15 U.S.C. § 16(i)) was upon Microsoft's monopoly in the operating market."¹ Moreover, on November 7, 2003, Microsoft entered into an agreement with Novell to further toll the statute of limitations after the completion of the Government case. This tolling agreement subsequently was extended by agreement of the parties on multiple occasions. For example, on November 4, 2004, David B. Tulchin on behalf of Microsoft, and R. Bruce Holcomb on behalf of Novell, signed a letter extending the tolling agreement to November 12, 2004.

As matters currently stand, the jury will not know that the existence of the Government case tolled the statute of limitations, much less the sound policy reasons for allowing private parties like Novell to await the completion of such proceedings before having to decide whether or not to bring a private action. Indeed, the Court ruled that the jury should not even be told that the findings as to which this Court granted collateral estoppel were made in the Government case, but should instead only be informed that the findings were made in a case that was brought in the District of Columbia. As a result, the jury will not be informed that, during the time period between the events at issue and the filing of Novell's suit, a Government investigation and trial of antitrust claims against Microsoft took place and that the existence of this litigation tolled the statute of limitations for Novell's claim.

Microsoft took unfair advantage of the Court's prior rulings when it repeatedly argued that the reason that the present lawsuit was not filed until 2004 was because the suit lacked merit. Microsoft made this argument because it knew that the jury would not be told the real reason for the delay: the pendency of the Government antitrust case against Microsoft and the resulting tolling of the statute of limitations.

¹ Microsoft appealed the denial of the motion to dismiss Count I on the ground of antitrust standing, but did not appeal as to Count I with respect to the statute of limitations issue.

It is unjust and unfair to allow Microsoft to try to impugn the merit of Novell's claims and thereby punish Novell for exercising its legal rights under the Clayton Act, by allowing the jury to infer that the reason for the delay in filing was because the suit was not meritorious. To prevent this unfair prejudice to Novell, the jury should be given the instruction proffered above.

CONCLUSION

For the foregoing reasons, Novell respectfully requests that the Court give the requested curative instruction.

Dated: October 18, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: /s/ Jeffrey M. Johnson
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