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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 MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS NOVELL'S COMPLAINT** Civil No. 2:04 CV 1045 TS Judge Ted Stewart

January 7, 2005

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INTRODUCTION

In its Complaint against Microsoft, Novell, Inc. ("Novell") seeks to recover under the Sherman and Clayton Acts for alleged antitrust injuries to WordPerfect word processing software and "other office productivity applications, including the Quattro Pro spreadsheet" (Compl. ¶¶ 2, 4-5) that Novell owned for a short period of time in the mid-1990s. The Complaint contains six "counts," five of which claim injury in purported markets for "word processing applications" or "spreadsheet applications." (*Id.* ¶¶ 156-77.) It is indisputable that these claims — numbered Counts II through VI — arose prior to March 1996, when Novell sold its word processing and spreadsheet applications to Corel Corporation ("Corel") (*Id.* ¶¶ 2, 150), and therefore that this action was commenced more than 8½ years after those claims accrued.

The applicable statute of limitations, 15 U.S.C. § 15b, bars federal antitrust claims brought more than four years after they accrued. As a result, Counts II through VI of the Complaint are time-barred unless they are saved by 15 U.S.C. § 16(i). That section of the Clayton Act tolls the four-year statute of limitations during the pendency of an antitrust action brought by the federal government and for one year thereafter, but only if the claims raised in the private action are "based in whole or in part on any matter complained of" in the government suit. In that connection, Novell relies exclusively on the complaint filed by the United States Department of Justice ("DOJ") against Microsoft on May 18, 1998 (the "DOJ Complaint," submitted herewith as Exhibit A). 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, as examples of software that personal computer ("PC") operating systems "control and direct." (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 other respects as well. Counts II through VI are time-barred.

Count I of the Complaint must also be dismissed, although for different reasons. In Count I, Novell alleges harm to the market for "Intel-compatible PC operating systems." The market for PC operating systems was the focus of the DOJ Complaint and thus Section 16(i) might arguably come into play. Nevertheless, Count I is otherwise defective, for two independent reasons.

First, Novell does not own the claim. In July 1996, Novell sold its PC operating system business and any claims it had against Microsoft "associated directly or indirectly with" its PC operating systems to Caldera, Inc. ("Caldera"). In return, Novell received a portion of the recovery that Caldera obtained from Microsoft in settlement of those claims.

Second, Count I seeks damages not with respect to any Novell products that competed in the PC operating system market, but instead for alleged injury to word processing and spreadsheet applications that competed in entirely different markets. As a result, Novell lacks "antitrust standing" to assert Count I.

STATEMENT OF ISSUES

1. As to Count I of the Complaint:

a. Whether a plaintiff that in July 1996 sold all of its rights to sue a specific defendant for injuries relating to a given market may nevertheless bring a suit against that defendant in which it asserts the same claims that it sold (and later indirectly recovered upon).

b. Whether a plaintiff that does not allege injury to any of its products that competed or potentially competed in a defined market may nonetheless recover for injuries to it solely because the same conduct that allegedly injured it also allegedly inflicted anticompetitive harm on other vendors' products in that market.

2. As to Counts II through VI of the Complaint:

Whether private antitrust claims brought long after the expiration of the applicable four-year limitations period may benefit from tolling for claims "based in whole or in part on any matter complained of" in a suit brought by the federal government, where the private claims and the government complaint involve different markets, time periods that overlap only slightly, different competitors, different products and different methods of proof.

BACKGROUND AND UNDISPUTED FACTS

A. Novell

Novell is a software company with headquarters in Waltham, Massachusetts. Its principal products have long been server operating systems used to provide file and print services and user and group administration services to PCs in local area networks. Although Novell sought in the mid-1990s to diversify its product line by acquiring applications from other companies, those efforts were quickly abandoned.

1. Novell's Applications Software Business

Prior to 1994, Novell did not develop or market word processing applications or spreadsheet applications, and thus did not compete in the purported markets referred to in Counts II through VI. (Compl. ¶¶ 37, 150.) This changed on June 24, 1994, when Novell acquired (a) WordPerfect Corporation and its WordPerfect word processing application, and

(b) the Quattro Pro spreadsheet application from Borland. (*Id.* ¶ 37.) Novell remained in the word processing and spreadsheet businesses for less than two years. In March 1996, Novell sold its WordPerfect and Quattro Pro products — what Novell calls its "office productivity applications" — to Corel.[1] (*Id.* ¶¶ 2, 24.)

2. Novell's PC Operating System Business

From 1991 to 1996, Novell also owned a PC operating system that it acquired from Digital Research. (Compl. ¶ 144; *see id.* ¶¶ 134-48.) This product, which competed directly with Microsoft's PC operating systems, was originally known as DR-DOS (Compl. ¶ 144), and was re-named "Novell DOS" in December 1993. *See Caldera, Inc.* v. *Microsoft Corp.*, 72 F. Supp. 2d 1295, 1304 (D. Utah 1999).

In July 1996, just four months after it sold its office productivity applications to Corel, Novell sold to Caldera both its (a) PC operating system business and (b) any rights it had to bring any antitrust claims against Microsoft for harm relating "directly or indirectly" to its PC operating systems.[2] In exchange, Caldera agreed to pay Novell, among other things, a portion of any recovery it obtained from Microsoft on those claims.[3]

Caldera subsequently asserted Novell's antitrust claims against Microsoft, alleging that Microsoft had harmed "competition in the manufacture, sale and distribution of

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[1] Microsoft does not know whether, as part of this transaction, Corel acquired the claims that Novell now seeks to assert against Microsoft. As a result, Microsoft reserves in full its rights as to this issue.

[2] Asset Purchase Agreement between Novell, Inc. and Caldera, Inc., dated July 23, 1996 (the "Asset Purchase Agreement"), submitted herewith as Exhibit B, ¶ 3.1.

[3] *Novell, Inc.* v. *Canopy Group*, 92 P.3d 768, 770, 773 (Utah Ct. App. 2004) (citing to a Novell-Caldera "license agreement," signed on the same date as the Asset Purchase Agreement, and obligating Caldera to pay Novell "royalties," including "a percentage of any recoveries from lawsuits").

[PC] operating system software," and that Microsoft's conduct had injured Novell DOS and DR-DOS.[4] The parties settled that case in January 2000, with Caldera (a) stipulating to dismissal of its complaint with prejudice and (b) releasing Microsoft from all liability "associated directly or indirectly" with any of the PC operating systems that Caldera had purchased from Novell and any liability "relate[d] directly or indirectly to the facts alleged in" the Caldera action.[5]

That was not, however, the end of litigation relating to the antitrust claims pertaining to the PC operating system business that Novell sold to Caldera. Novell later sued Caldera's successor, The Canopy Group, alleging that Novell had not received its bargained-for share of Caldera's recovery from Microsoft. On appeal, a Utah appellate court found that by its contract with Novell, Caldera had been obligated to sue Microsoft, and that Caldera's undertaking "to pay Novell a percentage of its recovery" was "the central purpose of, and impetus for creating," the Novell-Caldera transaction. *Novell, Inc.* v. *Canopy Group*, 92 P.3d 768, 773 (Utah Ct. App. 2004). Novell has already recovered on the antitrust claims it sold to Caldera pertaining to PC operating systems — the claims set out in Count I of the Complaint — and Microsoft has been released from all such claims.[6]

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[4] First Amended Complaint ¶¶ 2, 74-75, in *Caldera, Inc.* v. *Microsoft Corp.*, No. 2:96CV645B (D. Utah filed Feb. 12, 1998), submitted herewith as Exhibit C. Caldera's pleading conceptualizes the operating system market as consisting of two "relevant markets" — a "DOS Market" and a "market for graphical user interfaces that run on top of DOS Software" — but the distinction is irrelevant to the instant motion because Caldera accused Microsoft of unlawfully using monopoly power in both sub-markets. (*Id.* ¶¶ 64, 73, 79, 81.)

[5] Settlement Agreement between Microsoft Corporation and Caldera, Inc., dated Jan. 7, 2000 (the "Settlement Agreement"), submitted herewith as Exhibit D (with the amount of the settlement payment redacted, because it remains confidential), Recital & ¶ 6.

[6] In ruling on this Rule 12(b)(6) motion, this Court may consider the documents cited by Microsoft herein because they all are subject to judicial notice. 2 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2004) ("In deciding whether to dismiss, the

(*continued*)

B. Novell's Current Complaint Against Microsoft

1. The Allegedly Wrongful Conduct

The Complaint contends that Microsoft's anticompetitive conduct toward Novell began between 1987 and 1990. (Compl. ¶¶ 31, 32.) There are no allegations of wrongful conduct toward Novell after March 1996, when Novell sold WordPerfect and its other "office productivity applications" to Corel. (*Id.* ¶ 2.) The purportedly wrongful conduct directed to Novell's word processing and spreadsheet applications — the only conduct relevant to Novell's claims — is very different from the Microsoft conduct challenged in the DOJ Complaint.

Novell devotes more than 50 paragraphs of its Complaint to allegations that Microsoft wrongfully "Withh[eld] Technical Information About Its Monopoly Windows Platform." (Compl. p. 24; *see id.* ¶¶ 56-111.) For example, Novell alleges that Microsoft "retract[ed] the documentation of browsing extensions" for Windows 95; "refuse[d] to publish the APIs that were used to place items on the Windows Clipboard"; "withh[eld] the RTF [rich

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(*continued*)
court may consider . . . matters of which the judge may take judicial notice."); *see, e.g.*, *Hall* v. *Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004); *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). Each of the documents, which may be found in an Appendix of Exhibits submitted herewith, has been filed publicly in a federal or state court save for the Settlement Agreement (Ex. D); that document was central to the *Novell* v. *Canopy Group* litigation and appears to have been filed therein, though almost all the records of that case are under seal. Moreover, Novell has "undisputed notice . . . of the[] contents" of each of the exhibits, a factor that would weigh in favor of permitting consideration of the exhibits even if they had not been filed in court. *Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (noting that a "finding that plaintiff has had notice of [non-public] documents used by defendant in a 12(b)(6) motion is significant" in determining whether such documents may be considered).

In the event this Court determines that any of the documents submitted by Microsoft may not be considered on a motion to dismiss, Microsoft asks that, unless the pertinent Count of the Complaint is dismissed for other reasons, the Court convert that aspect of the motion to a motion for summary judgment. *See* Fed. R. Civ. P. 12(b) (permitting conversion of motions under Rule 12(b)(6) to motions for summary judgment under Rule 56).

text format] specifications from Novell"; and "*refuse[d] to disclose technical specifications that* were required to overcome . . . the 64k . . . memory limitation." (*Id.* ¶¶ 74, 80, 92, 97.) The DOJ Complaint, in contrast, contains no allegations that Microsoft wrongfully withheld technical information about Windows from application software developers such as Novell.[7] *See* pp. 26-27, *infra*. For a more comprehensive description of the many other differences between the DOJ Complaint and the Novell Complaint, *see* pp. 23-30, *infra*.

2. The Claims

Novell's Complaint defines three "relevant" antitrust markets: "the market for Intel-compatible PC operating systems, the market for word processing applications, and the market for spreadsheet applications." (Compl. ¶ 24.) The latter two purported markets are sometimes referred to in the Complaint as "office productivity applications markets." (*Id.*) The PC operating system market and the office productivity applications market are mutually exclusive, *i.e.*, word processing or spreadsheet applications do not compete with PC operating systems and vice versa. For example, the Complaint distinguishes the two types of products by explaining that operating systems "control PCs and provide the basic 'platform' for developing applications such as WordPerfect." (*Id.* ¶ 3.) The Complaint further explains that an "operating

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[7] Indeed, the federal district judge presiding over the multidistrict litigation proceedings against Microsoft in Maryland granted partial summary judgment against the consumer plaintiffs with respect to their allegations that Microsoft illegally withheld technical information from developers of "word processing software" and "spreadsheet software." *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 743, 744-46 & n.1 (D. Md. 2003). Specifically, the court held that the essential facilities doctrine does not apply to proprietary information about Microsoft's PC operating systems, reasoning that "to require one company to provide its intellectual property to a competitor would significantly chill innovation." *Id.* at 745. In addition, the court held that even if the essential facilities doctrine did apply, there was insufficient evidence that information allegedly withheld by Microsoft from developers of word processing and spreadsheet applications was "necessary for them to compete in the applications software development market." 274 F. Supp. 2d at 744 n.1, 745.

system . . . manages the execution of software applications, such as word processors and spreadsheets." (*Id.* ¶ 25.) In contrast to PC operating systems, the Complaint defines "word processing applications" as "software that creates, edits, prints, and stores text-based documents" (*id.* ¶ 27), and "spreadsheet applications" as "software that electronically organizes, displays, and manipulates numerical and other data." (*Id.* ¶ 28.) In Novell's own view, the two types of products are very different.

The Complaint sets forth six causes of action. Count I alleges harm to Novell in the PC operating system market — a market in which it once competed, but not with the word processing or spreadsheet products that, according to the Complaint, were injured by Microsoft's conduct. (Compl. ¶¶ 151-55 ("Monopolization of the Intel-Compatible Operating System[] Market").) The remaining five counts assert harm to Novell in purported markets for word processing and spreadsheet applications. (*Id.*, Count II ¶¶ 156-60 ("Monopolization of the Market for Word Processing Applications"), Count III ¶¶ 161-65 ("Monopolization of the Market for Spreadsheet Applications"), Count IV ¶¶ 166-69 ("Attempted Monopolization of the Market for Word Processing Applications"), Count V ¶¶ 170-73 ("Attempted Monopolization of the Market for Spreadsheet Applications"), and Count VI ¶¶ 174-77 ("Exclusionary Agreements in Unreasonable Restraint of Trade," *i.e.*, agreements that "restrict[ed] the access of Novell's office productivity applications to significant channels of distribution").) These markets were not involved or mentioned in the DOJ Complaint.

C. The DOJ Action

1. The DOJ Complaint

(a) Relevant Markets

Novell's Complaint is highly different from the DOJ Complaint. Most notably, the DOJ Complaint contains no allegation of harm to any market for word processing applications or spreadsheet applications.[8]

The DOJ Complaint pertained solely to "two relevant product markets: The market for personal computer operating systems, and the market for Internet browsers." (DOJ Compl. ¶ 53; *see also id.* ¶¶ 54-56.) The DOJ Complaint refers to office productivity applications only once, and then only in contradistinction to PC operating systems, which are said to "control and direct" such applications. (*Id.* ¶ 54.) Novell is not mentioned at all in the DOJ Complaint, and there is likewise no mention of WordPerfect, Quattro Pro or any other applications ever owned by Novell. Instead, the DOJ Complaint asserts that the targets of Microsoft's conduct were Netscape and Sun Microsystems, and their Navigator and Java software products. (*Id.* ¶¶ 7-9, 66-68.) Further, the DOJ Complaint is based on allegations of anticompetitive conduct by Microsoft in the period 1995 through 1998 (*id.* ¶¶ 69-123), while Novell's Complaint covers a roughly nine-year period ending in 1996; and the focus of the DOJ

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[8] A complaint filed by certain state attorneys general made a claim of harm to a purported market for "office productivity" applications. (Complaint filed in *New York* v. *Microsoft Corp.* ¶¶ 88-95, 98, 117-19, No. 98-1233 (D.D.C. filed May 18, 1998), submitted herewith as Exhibit E.) The allegations of that complaint are not relevant to the instant motion, however, because Section 16(i) of the Clayton Act applies only to actions "'instituted by the United States.'" *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 335-36 (1978) (quoting 15 U.S.C. § 16(i)). In any event, two months after filing their action, the state attorneys general abandoned their claim relating to office productivity applications. (First Amended Complaint filed in *New York* v. *Microsoft Corp.*, No. 98-1233 (D.D.C. filed July 17, 1998), submitted herewith as Exhibit F.)

Complaint is Windows 98 (which was released in June 1998, more than two years after Novell sold the products at issue in this case) while the focus of the allegations in Novell's Complaint relating to PC operating systems is Windows 95. In short, the two complaints are vastly different.

(b) The DOJ's Theory of Harm to Competition in the Operating System and Internet Browser Markets

The theory of the DOJ Complaint was that Microsoft's alleged monopoly in the PC operating system market existed because it was protected by a barrier to entry created "by the number of software applications that must run on an operating system in order to make the operating system attractive to end users." (DOJ Compl. ¶ 3.) According to the DOJ Complaint, "[b]ecause end users want a large number of applications available, because most applications today are written to run on Windows, and because it would be prohibitively difficult, time-consuming and expensive to create an alternative operating system that would run the programs that run on Windows, a potential new operating system entrant faces a high barrier to successful entry." (*Id.* ¶ 3.) This concept is often referred to as the "applications barrier to entry." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001). Under the theory of the DOJ Complaint, it was very much in Microsoft's interest to have applications such as WordPerfect available to run on Windows because that would help maintain the popularity of Microsoft's PC operating system.

The DOJ Complaint alleged that Microsoft engaged in anticompetitive conduct against Netscape's Navigator web browsing software and Sun Microsystems' Java software (DOJ Compl. ¶¶ 7-9, 66-68), two products referred to in the case as "middleware." *United States* v. *Microsoft*, 253 F.3d at 53-55. According to the DOJ Complaint, Navigator and Java might someday evolve into threats to Windows because they ran on multiple operating systems

and exposed their own application programming interfaces ("APIs") to software developers. (DOJ Compl. ¶¶ 7-9, 66-68.) The theory was that if enough software developers wrote applications to run on such cross-platform middleware, these "alternative platform[s]" might "threaten[] to reduce or eliminate [the applications] barrier [to entry] protecting Microsoft's operating system monopoly." (*Id.* ¶ 9; *see also id.* ¶¶ 7, 66-68.) The DOJ Complaint made no allegation — or even suggestion — that word processing or spreadsheet applications had any "middleware" potential.

2. The Ensuing Proceedings in the DOJ Case

Following a bench trial, the district court issued Findings of Fact, *United States* v. *Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999), and Conclusions of Law, *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

On appeal, the United States Court of Appeals for the D.C. Circuit "drastically altered the District Court's conclusions on liability." *United States* v. *Microsoft*, 253 F.3d at 105. The Court of Appeals reversed the district court's conclusion that Microsoft was liable for attempted monopolization of the purported market for web browsing software and found that the DOJ had failed even to prove the existence of such a market. *Id.* at 81-84. It also rejected the district court's conclusion that Microsoft's alleged tying of Internet Explorer to Windows was per se unlawful and remanded that claim for a new trial under a rule of reason test designed to take account of the special characteristics of platform software such as Windows. 253 F.3d at 84-97. The D.C. Circuit affirmed liability only with respect to the claim that Microsoft unlawfully maintained a monopoly in the PC operating system market, and did so on grounds substantially narrower than those relied upon by the district court. *Id.* at 58-80. None of the

twelve acts that the D.C. Circuit found to be anticompetitive had anything to do with Novell or its word processing or spreadsheet applications.

D. Procedural History of this Action

In its Complaint, Novell asserts that the DOJ case against Microsoft ended on November 12, 2002 and, therefore, that Section 16(i) of the Clayton Act suspended the four-year statute of limitations through November 12, 2003. (Compl. ¶¶ 15, 16.) Shortly before November 12, 2003, Microsoft and Novell entered into a tolling agreement. (*Id.* ¶ 22.) Pursuant to that agreement, as subsequently amended, Microsoft consented to tolling from November 2003 to November 2004, but not retroactively to any period prior to November 2003.

On November 12, 2004, Novell filed its Complaint in this Court, and that same day filed a "Notice of Potential 'Tag-Along' Action" with the Judicial Panel on Multidistrict Litigation (the "Panel"), explaining that its lawsuit shared common questions of fact with other private antitrust actions against Microsoft that the Panel had transferred to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1407(a). As a result, the Panel issued a conditional transfer order on December 14, 2004, but — in a change of position — Novell thereafter notified the Panel that it intended to oppose transfer to Maryland. Novell's motion to vacate the Panel's conditional transfer order should be fully briefed by February 8, 2005.

SUMMARY OF ARGUMENT

Count I

Count I of the Complaint, the only cause of action that alleges harm in the market for PC operating systems, is defective for two independent reasons. 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"). Novell sold its PC operating system business to Caldera in 1996, a sale

that included any claim Novell had against Microsoft for direct or indirect harm relating to its PC operating systems. Caldera sued Microsoft on the antitrust claims it acquired from Novell and obtained a substantial settlement, a good portion of which went to Novell. In return, Caldera released Microsoft from the claims Novell seeks to assert in Count I.

Second, although Count I complains of Microsoft's alleged monopolization in the PC operating system market, that Count only asserts injury to Novell's "office productivity applications" (Compl. ¶¶ 153, 155), which Novell concedes are distinct products from PC operating systems. (*Id.* ¶¶ 3, 25.) Because a plaintiff does not have antitrust standing to recover for injuries to products that did not compete in the market allegedly affected by anticompetitive conduct, Count I must be dismissed.

Counts II – VI

A civil antitrust suit "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Novell's causes of action accrued no later than March 1996, when Novell sold to Corel the products allegedly harmed by Microsoft's conduct — WordPerfect word processing software and "other office productivity applications, including the Quattro Pro spreadsheet." (Compl. ¶ 2.) As a result, the "four years" to which Section 15b refers expired no later than March 2000, unless there is some valid ground for tolling.

Novell's tolling theory rests on 15 U.S.C. § 16(i), which suspends the four-year statute of limitations 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 against Microsoft upon the filing of the DOJ Complaint on May 18, 1998. Counts II through VI of the Novell

Complaint concern the purported markets for word processing applications and spreadsheet applications. Of course, the DOJ Complaint contains no allegations relating to such markets.

This difference in markets is fatal to Novell's argument that the statute of limitations was tolled as to Counts II through VI, for it is fundamental that "[w]hen [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); *see Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993) (explaining the central role that market definition and analysis play in antitrust cases). There are many other salient differences between Counts II through VI and the DOJ Complaint, meaning that the claims in Counts II through VI are all time-barred.

ARGUMENT

On a motion to dismiss under Rule 12(b)(6), a court will construe factual allegations in the nonmoving party's favor and will treat them as true. *Hackford* v. *Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994). That said, courts "are not bound by conclusory allegations, unwarranted inferences, or legal conclusions." *Id.*; *Eastern Shore Markets, Inc.* v. *J.D. Assocs. L.P.*, 213 F.3d 175, 180 (4th Cir. 2000) (same). Novell has inserted into its Complaint many such conclusory allegations, unwarranted inferences, and legal conclusions, particularly as to the purported applicability of Section 16(i).

In ruling on a motion to dismiss, courts are also entitled to reject allegations that are "devoid of any reference to actual events," *Ostrzenski* v. *Seigel,* 3 F. Supp. 2d 648, 650 (D. Md. 1998), and need not "ignore facts set forth in the complaint that undermine the

plaintiffs' claims." *Gen. Refractories Co.* v. *Stone Container Corp.*, No. 98-3543, 1999 WL 14498, at *2 (N.D. Ill. Jan. 8, 1999).

I. Count I of the Complaint is Fatally Flawed.

Given that Count I is the only cause of action in the Complaint that alleges harm to a market addressed in the DOJ Complaint — PC operating systems — it might arguably benefit from Section 16(i).[9] Nonetheless, Count I should be dismissed for each of the two independent reasons discussed below.

A. Count I Should Be Dismissed Because Novell Does Not Own the Claim.

Only the "real party in interest" may prosecute a claim, Fed. R. Civ. P. 17(a), and it is well-settled that a potential plaintiff loses its "real party" status by assigning its right to sue to another entity. *In re Maco Homes, Inc.*, 180 F.3d 163, 165-66 (4th Cir. 1999); *Audio-Visual Marketing Corp.* v. *Omni Corp.*, 545 F.2d 715, 719 (10th Cir. 1976); 4 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 17.111[a] (3d ed. 2004) ("Under a valid assignment, the assignee of a claim becomes the real party in interest for that claim."). Claims brought by someone other

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[9] Even Count I is time-barred. A comparison of Count I to the DOJ Complaint reveals that Novell's claim involves different competitors, different products that allegedly were injured and differences in the anticompetitive conduct alleged. The degree of market similarity, too, is suspect, given that the DOJ Complaint is primarily focused on Microsoft's behavior with respect to Windows 98, an operating system that was released two years after Novell sold the products at issue in this case.

Moreover, there is a real question as to whether Count I should be viewed as eligible for tolling regardless of its relationship to the DOJ Complaint. Courts are required to determine, as a threshold matter, whether a plaintiff's "reliance upon the government proceeding is not mere sham." *Leh* v. *Gen. Petroleum Corp.*, 382 U.S. 54, 59 (1965). The decision to bring a claim that Novell does not own and has no standing to assert raises the issue of whether Novell is bringing it only because Count I is the sole vehicle through which it can make references to a market addressed in the DOJ Complaint.

than the real party in interest are subject to dismissal on a Rule 12(b)(6) motion. *Id.* § 17.12[2][a].

As noted previously, in 1996 Novell sold to Caldera its right to bring a claim *against Microsoft for harm in the PC operating system market.* The Novell-Caldera contract "grante[d] . . . to Caldera all of Novell's right, title, and interest in and to any and all claims or causes of action held by Novell [as of July 23, 1996] and associated directly or indirectly with" DR-DOS, Novell DOS and related Novell products and technologies, "including . . . any claims [for] damages, . . . whether any such claim is matured or unmatured." (Ex. B, Asset Purchase Agreement ¶ 3.1.) Thus, Novell long ago sold to Caldera the claim that Novell seeks to assert in Count I, for at least two reasons.

First, although Count I does not seek recovery for injuries to any Novell product that competed in the PC operating system market,[10] the Complaint alleges that WordPerfect was harmed by Microsoft's "suppression of . . . Novell's own DR-DOS." (Compl. ¶ 144.) Because Count I is a "claim . . . associated directly . . . with" DR-DOS, it is clearly a claim that Novell assigned to Caldera.

Second, even if Novell had alleged harm in the PC operating system market without mentioning DR-DOS, that would not salvage Count I. Under the plain language of Paragraph 3.1 of the contract, Novell assigned to Caldera "all claims" even "indirectly" relating

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[10] The Complaint makes reference to Novell's PC operating systems (*e.g.*, DR-DOS) (Compl. ¶ 144), and to a technology called "AppWare" that allegedly possessed "middleware" characteristics (Compl. ¶¶ 50-51), but Count I seeks damages only for purported injuries to Novell's "WordPerfect word processing application and its other office productivity applications." (Compl. ¶ 153.)

to PC operating systems. Given the breadth of the assignment, Novell retained no right to sue Microsoft for any alleged harm to or misconduct in the PC operating system market.

Furthermore, as a matter of equity, Novell should be estopped from denying that it transferred the claims. The Utah courts have determined that Novell engaged in deceptive conduct to hide its role in the Caldera action. Indeed, one of the "main purposes of" Novell's transfer of the claims was "to obfuscate Novell's role in the action against Microsoft." *Novell, Inc.* v. *Canopy Group*, 92 P.3d 768, 770 (Utah Ct. App. 2004). "To accomplish this, Novell and Caldera executed two separate documents," *id.*, "deal[t] with Novell's entitlement [to a portion of a recovery] in very broad, general terms," and purposefully omitted from the written contracts the requirement that Caldera "sue Microsoft." *Id.* at 772. Thus, it would be fundamentally inequitable to allow Novell to prosecute a second action through Count I.[11]

B. Count I Should Be Dismissed for the Independent Reason that Novell Lacks Antitrust Standing to Pursue It.

Unlike the federal government, "a private antitrust plaintiff must show 'standing' to sue." 2 Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 335a at 286 (2d ed. 2000). While some courts use terms other than antitrust standing to identify the showing a private plaintiff must make, all courts recognize the need "to put principled limits on the literally unbounded reach of the threefold damage remedy authorized by § 4 of the Clayton Act."

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[11] Microsoft does not now know whether Novell, in addition to mandating the Caldera suit against Microsoft, retaining a substantial equity stake in its outcome, and actually receiving a portion of the payment Microsoft made in exchange for a full release, also controlled the prosecution of the case to an extent that Microsoft has meritorious defenses of collateral estoppel or accord and satisfaction. *Cf. Supporters to Oppose Pollution, Inc.* v. *Heritage Group*, 973 F.2d 1320, 1327 (7th Cir. 1992) (Easterbrook, *J.*) (If "suit # 1" is by "the cat's paw" and "suit # 2" is by "the cat," then "cat and cat's paw are the same, and the second suit must be dismissed."). As a result, Microsoft reserves in full its rights as to this issue.

Pocahontas Supreme Coal Co. v. *Bethlehem Steel Corp.*, 828 F.2d 211, 219 (4th Cir. 1987); *see Sharp* v. *United Airlines, Inc.*, 967 F.2d 404, 409 (10th Cir. 1992) (noting that if standing rules were not enforced, "there would be no principled way to cut off a myriad" of antitrust claims).

To survive a motion to dismiss, a private antitrust plaintiff must plead, at a minimum, (1) that it suffered "*antitrust* injury," which means "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977); and (2) that such antitrust injury is not unduly "remote" from the alleged violation, a "proximate cause" requirement similar to the one applicable in tort cases. *Associated Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 545 & n.2 (1983); *see Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 & n.15 (1992) (explaining that "antitrust injury" and "proximate cause" are both "requirement[s] of Clayton Act causation").

With rare exception, only a plaintiff who is a consumer or a competitor in the allegedly affected market can satisfy the antitrust injury and proximate cause requirements of antitrust standing, as Judge Winder of this Court has explained. *Boisjoly* v. *Morton Thiokol, Inc.*, 706 F. Supp. 795, 804 (D. Utah 1988) ("Courts have generally allowed standing only to direct purchasers of the subject product or competitors in the relevant market . . . ."). The Supreme Court clarified the importance of this principle in its landmark standing case, *Associated General Contractors,* which denied antitrust standing to a plaintiff that "was neither a consumer nor a competitor in the market in which trade was restrained." 459 U.S. at 539; *see White* v. *Rockingham Radiologists*, 820 F.2d 98, 104 (4th Cir. 1987) (holding that plaintiff could not prevail on his claim that defendant monopolized a market for medical and surgical hospital services "because he is neither a provider nor a consumer of these services"). Count I does not

seek recovery for any harm suffered by Novell as a consumer or competitor in the market for PC operating systems. *See* p. 16 & n.10, *supra*. Consequently, Novell is not a "proper party to bring a private antitrust action" alleging harm in that market. *Associated Gen. Contractors*, 459 U.S. at 535 n.31, 544.

Novell cannot overcome this hurdle by arguing that absent allegedly anticompetitive conduct by Microsoft, Novell's WordPerfect application would have sparked competition in the market for PC operating systems. (Compl. ¶ 52.) In the words of the district judge presiding over the multidistrict litigation proceedings against Microsoft, there is a "logical flaw at the fundament of" this theory.[12] More importantly, the theory provides no basis for concluding that Novell has antitrust standing. Even plaintiffs whose products are the alleged targets of anticompetitive conduct do not have antitrust standing unless those products competed in the affected market. *See, e.g., SAS of Puerto Rico, Inc.* v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 44-46 (1st Cir. 1995); *Legal Econ. Evaluations, Inc.* v. *Metro. Life Ins. Co.*, 39 F.3d 951, 954-56 (9th Cir. 1994). In *SAS of Puerto Rico*, for instance, plaintiff had developed an attachment for pay phones that allegedly "threatened" the monopoly of defendant, the local telephone company, in the market for long distance service from pay phones in Puerto Rico. 48 F.3d at 41, 44. Accepting as true plaintiff's allegation that defendant had engaged in anticompetitive conduct that harmed plaintiff, the court nevertheless dismissed the complaint because plaintiff was

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[12] *In re Microsoft Antitrust Litig.*, 274 F. Supp. 2d 743, 746 (D. Md. 2003). Like Novell, plaintiffs in the consumer class actions alleged that Microsoft deliberately impeded development of non-Microsoft "word processing software" and "spreadsheet software." *Id.* at 744-46 & n.1. The "logical flaw" of such a charge is that if it were true, Microsoft "would have been undermining the structure upon which its operating system monopoly was based." *Id.* at 746. That structure "depends upon Microsoft encouraging ISVs [independent software developers] to choose the Windows operating system." *Id.*

merely a supplier to competitors in the market as opposed to being a competitor itself. *Id.* at 44. Thus, even if WordPerfect was a target of Microsoft's allegedly anticompetitive conduct, Count I must be dismissed.

In another part of its Complaint, Novell advances a different theory about how Microsoft's allegedly anticompetitive conduct injured Novell. In this second iteration, Microsoft's "suppression" of competition in the PC operating system market caused derivative harm to WordPerfect by decreasing Novell's opportunities to write versions of WordPerfect for PC operating systems other than Windows. (Compl. ¶ 144.) This alternative formulation does nothing to remedy Novell's lack of antitrust standing.

As an initial matter, the second theory does not alter WordPerfect's status as a product that competed outside the allegedly restrained market. Moreover, "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts" has not alleged proximate causation. *Holmes*, 503 U.S. at 268. Novell cannot recover for purely derivative injury to WordPerfect resulting from allegedly anticompetitive conduct by Microsoft directed toward PC operating systems. *See Pocahontas Supreme Coal Co.*, 828 F.2d at 219-20. Such derivative injury is "too remote and indirect" to give rise to antitrust standing. *Id.* at 219; *Sharp*, 967 F.2d at 409. As a result, Count I of the Complaint must be dismissed.

II. Counts II Through VI Are Time-Barred.

Because the allegedly wrongful conduct toward Novell occurred at least 8½ years before the Complaint was filed, Counts II through VI are time-barred unless they were tolled by the DOJ Complaint pursuant to 15 U.S.C. § 16(i).

Novell bears the burden of establishing that Section 16(i) applies to its claims. *Charley's Tour & Transp. Co.* v. *Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D. Haw. 1985) ("plaintiff bears the burden of showing that the two suits are based in whole or in part on the same matter"); *see Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974) (holding that "[a]ll presumptions are against" an antitrust plaintiff "seeking the benefit of . . . exceptions" to the four-year limitations period on antitrust claims).[13]

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[13] As a separate point, Novell contends that it is entitled to recover for all "harm" suffered after May 18, 1994 — four years before the date the DOJ Complaint was filed — as a result of "every act that Microsoft" committed "prior to" that date. (Compl. ¶ 22.) This entitlement allegedly exists because "Microsoft's entire course of conduct" since "at least the early 1990s" constitutes "a continuing violation" of the antitrust laws. (*Id.* ¶ 22.) This is incorrect for two reasons.

First, while the continuing violation doctrine as applied to the antitrust laws does allow a plaintiff in some circumstances to allege conduct prior to the limitations period in order to establish a defendant's liability, it does not allow a plaintiff to recover for additional harm during the limitations period that results from such pre-period conduct. The right to recover all "damages that will flow in the future" from a given act accrues as soon as a plaintiff feels any adverse impact from that act. *Zenith* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (antitrust plaintiffs may not use conduct within the limitations period "as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period").

Second, on October 19, 1993 Novell's predecessor in interest, WordPerfect, voluntarily dismissed with prejudice under Fed. R. Civ. P. 41(a)(1) an action it had brought against Microsoft asserting claims relating to unfair competition in word processing applications. A copy of the order of dismissal in *WordPerfect Corp.* v. *Microsoft Corp.*, 93 Civ. 7127 (LMM) (S.D.N.Y.), as well as WordPerfect's complaint and a simultaneously filed application for injunctive relief in that case, are submitted herewith as Exhibits G.1, G.2, and G.3, respectively. WordPerfect's application for injunctive relief specifically directed the court's attention to federal antitrust enforcement investigations regarding Microsoft's "anticompetitive practices." Ex. G.3 at 3 & n.1. Because voluntary dismissals with prejudice have "the same res judicata effect as a final adjudication on the merits favorable to the defendant," 8 James W. Moore, et al., MOORE'S FEDERAL PRACTICE §§ 41.33[6][c], 41.34[6][c] (2004), the dismissal precludes Novell from suing for alleged anticompetitive conduct toward WordPerfect prior to October 19, 1993. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

A. The Applicability of Section 16(i)

While Section 16(i) is not to be given a "niggardly construction" when evaluating a plaintiff's argument for suspension, *Leh* v. *Gen. Petroleum Corp.*, 382 U.S. 54, 59 (1965), the Supreme Court has cautioned that in light of the expressed "congressional policy" against "undue prolongation" of antitrust cases, Section 16(i) must be interpreted as "a statute of repose." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (internal quotation marks omitted). The test adopted by the courts for determining the applicability of Section 16(i) is whether the matters complained of in a private antitrust claim "bear a real relation" to the matters "complained of in the government suit." *Leh*, 382 U.S. at 59. This test usually requires a court to examine the markets at issue in the two cases, as well as factors such as the time period, competitors and products involved and the methods of proving the respective claims. *Id.* at 61-66; *see also Peto* v. *Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967); *Charley's Tour & Transp. Co.*, 618 F. Supp. at 86.

The "real relation" test "in general must be limited to a comparison of the two complaints on their face." *Greyhound*, 437 U.S. at 331 (internal quotation marks omitted). This is because Section 16(i) permits tolling of the normal four-year statute of limitations only where the private claims are based on matters "'complained of'" by the federal government. *Id.* (quoting § 16(i)). This limitation also effectuates the legislative preference for "certainty and predictability in [Section 16(i)'s] application." *Greyhound*, 437 U.S. at 335.

The rule that complaints must be compared on their face does not mean, however, that a plaintiff can insert gratuitous references to a prior government action or allege whatever it thinks will be superficially useful. The Supreme Court has cautioned that courts should be "concern[ed] that" any "invocation of [Section 16(i)] be made in good faith," and emphasized

that "care must be exercised to insure that reliance upon the government proceeding is not mere sham." *Leh*, 382 U.S. at 59.

B. Counts II through VI of the Complaint Bear No "Real Relation" to the DOJ Complaint.

Counts II through VI of the Complaint bear no "real relation" to the DOJ Complaint because they address different markets, different time periods, different competitors, different products, different allegedly anticompetitive conduct, and implicate different methods of proof.

1. The Difference in Markets Alone Is Fatal.

Counts II through VI only allege harm to two purported markets: one for word processing applications and one for spreadsheet applications. The DOJ Complaint concerns two entirely different purported markets: "The market for personal computer operating systems, and the market for Internet browsers." (DOJ Compl. ¶ 53.) Novell concedes there is no overlap between the alleged markets for word processing and spreadsheet applications on the one hand, and the alleged markets for PC operating systems and web browsing software, on the other. (Compl. ¶¶ 25-28.) In a related context, the district court hearing the consumer class action cases against Microsoft agreed that office productivity applications and PC operating systems are in "separate markets." *In re Microsoft Corp. Antitrust Litig.*, 214 F.R.D. 371, 374 (D. Md. 2003).

The disparity in markets involved in Counts II through VI of the Complaint versus the DOJ Complaint is fatal to Novell's claims. Courts have held that the statute of limitations is not tolled for private claims concerning markets different from those at issue in a prior government case. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 481, 486 (C.D. Cal. 1991) (FTC action defining relevant market as area east of the Rocky Mountains did not suspend limitations period for a private claim alleging

anticompetitive conduct on West Coast); *Charley's Tour & Transp. Co.*, 618 F. Supp. at 86; *see also Peto*, 384 F.2d at 683 (government action alleging conspiracy to monopolize professional boxing did not toll limitations period for private action alleging conspiracy to monopolize professional hockey). Indeed, a leading commentator views such cases as establishing a bright line rule: When a comparison of the two complaints "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) (emphasis added).

This bright line rule is fully consistent with the indispensable role that market definition and analysis play in antitrust cases. In fact, the only "'way to measure'" harm to competition is by reference to the effects of a defendant's conduct on a properly defined antitrust market. *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993) (quoting *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965)); *see also United States* v. *Microsoft*, 253 F.3d at 81 (holding that the "relevant market . . . establishes a context for evaluating the defendant's actions"). This Court, too, has instructed that "[w]ithout a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning." *Lantec, Inc.* v. *Novell, Inc.*, 146 F. Supp. 2d 1140, 1144 (D. Utah 2001) (Stewart, *J.*), *aff'd*, 306 F.3d 1003 (10th Cir. 2002); *see also id.* at 1149-50 (underlining *Spectrum Sports'* instructions that both monopolization and attempted monopolization claims "'*require inquiry into the relevant product and geographic market and the defendant's economic power in that market*'" (quoting *Spectrum Sports*, 506 U.S. at 459) (emphasis in *Lantec*)).

If private antitrust claims involve different markets than a prior government action, that typically means that other factors bearing on the "real relation" test will be significantly different as well. As shown below, that is certainly true here.

2. The Time Periods Are Different.

The earliest conduct referenced in the DOJ Complaint occurred in May 1995 (DOJ Compl. ¶¶ 70-71), and the conduct central to the DOJ's claims did not begin until "early 1996." (*E.g.*, *id.* ¶ 76). Counts II through VI, on the other hand, refer to conduct dating back to the late 1980s (Compl. ¶¶ 31, 32), and many allegations relate to conduct purportedly undertaken by Microsoft in 1994 or earlier. (*See* Compl. ¶¶ 96-111, a section devoted entirely to conduct relating to versions of Windows prior to Windows 95.) Moreover, Novell does not — and could not — complain of any conduct engaged in by Microsoft after March 1996, when Novell sold its word processing and spreadsheet applications to Corel. Thus, there is an overlap of roughly 12 months out of the approximately 10-year period covered by the combination of Counts II through VI of the Novell Complaint and the DOJ Complaint. The dissimilarity in time periods is another reason not to apply Section 16(i) in this case. *See, e.g.*, *Peto*, 384 F.2d at 683 (refusing to toll statute of limitations after noting, among other things, that private complaint and government complaint involved "different periods of time").

3. The Competitors Are Different.

The DOJ Complaint focused on the competitive threat to Microsoft's PC operating systems posed by two named competitors: Netscape and Sun Microsystems. Novell's Complaint (in support of Counts II through VI) contains a number of superfluous references to those two companies (*e.g.*, Compl. ¶¶ 134-43), but that is nothing more than a "sham" effort to deceive the reader into believing that Counts II through VI resemble the DOJ Complaint. *Leh*, 382 U.S. at 59. Netscape and Sun Microsystems did not develop and market office productivity applications during the time Novell did. That is why Counts II through VI concern the fates of

two very different Microsoft competitors: Novell and WordPerfect. Neither Novell nor WordPerfect is even mentioned in the DOJ Complaint.

4. The Products Are Different.

According to the DOJ Complaint, Netscape's Navigator web browsing software and Sun's Java technologies could function as a "software 'layer' between operating systems and application programs," thus offering "the potential to become alternative platforms" to Windows, "on which software applications and programs could run." (DOJ Compl. ¶ 66.) Novell provides the same description of Netscape Navigator and Sun's Java technology, stating that they could "function on multiple operating systems" and "were potentially able to provide platforms for end-use applications, which made them a threat to replace Windows itself as such a platform." (Compl. ¶ 44.) The Complaint does not allege that Novell's word processing and spreadsheet applications posed a similar platform threat to Windows. Instead, those products are accurately described as examples of "end-use applications." (Compl. ¶¶ 44, 144.) Counts II through VI involve products that bear no resemblance to the products at issue in the DOJ Complaint.

5. Differences in Anticompetitive Conduct Alleged

(a) The DOJ Complaint Did Not Allege That Microsoft Withheld Technical Information About Windows.

The allegations of anticompetitive conduct in the DOJ Complaint are focused and narrow, a point underscored by the DOJ's statement that it was "challeng[ing] only . . . tie-ins, exclusive dealing contracts, and other anticompetitive agreements." (DOJ Compl. ¶ 36.) The vast majority of Novell's allegations of anticompetitive conduct, however, do not involve "tie-ins, exclusive dealing contracts," or other "anticompetitive agreements." Instead, they accuse Microsoft of "Withholding . . . Technical Information About Its Monopoly Windows Platform." (Compl., p. 24 (title for the section containing ¶¶ 56-111).) As noted previously, the

DOJ Complaint does not claim that Microsoft withheld technical information from vendors of word processing software that they needed to make their products run on Windows — indeed, such a claim is fundamentally inconsistent with the DOJ's theory of an applications barrier to entry. *See* pp. 10-11, *supra*.

(b) Novell's Allegation That Microsoft Withheld Information About "Browser Extensions" Has No Analogue in the DOJ Complaint.

The Complaint prominently asserts that one category of allegations about Microsoft's withholding of technical information does relate to the DOJ Complaint, but Novell is wrong. According to Novell, its allegation that Microsoft withheld information about the "integration of browsing functions into" the initial version of Windows 95 relates to the DOJ Complaint because "Microsoft was held liable in the Government Suit" for precisely the same "anti-competitive integration of browsing functions." (Compl. ¶ 78); *see id.* ¶ 77 (stating that alleged withholding of information about integration of web browsing functionality ceased upon Microsoft's release of the initial version of Windows 95); *see also id.* ¶¶ 4, 6, 7 (referring to these allegations three times in the two-and-a-half page Section entitled "Nature of this Action" that introduces the Complaint), ¶¶ 66-78 (describing these allegations in full).

Novell provides no citation to the D.C. Circuit's opinion for its assertion that "Microsoft was held liable in the Government Suit" for the "integration of browsing functions" into the initial version of Windows 95, and for good reason: the opinion contains no such holding, and the tying claim that existed in the DOJ case (involving Windows 98) was reversed and remanded by the Court of Appeals and not pursued further. *United States* v. *Microsoft*

Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).[14] But even if Novell were accurately characterizing what transpired in the DOJ case, the Novell Complaint's allegations that Microsoft withheld information about "browser extensions" would not aid Novell in establishing a "real relation" between the two complaints.

As noted above, a private antitrust plaintiff must allege that the actions taken by the defendant proximately caused "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Brunswick Corp.*, 429 U.S. at 489. To the extent Novell suffered "antitrust injury" as a consequence of Microsoft's integration of web browsing functionality into Windows — a highly dubious proposition — such injury allegedly "flow[ed]" from Microsoft's alleged withholding of information about that web browsing functionality. The DOJ Complaint alleges a completely different type of antitrust injury. The DOJ charged that the mere fact of Microsoft's integration of web browsing functionality into Windows — not any lack of disclosure of technical information to software developers about that integration — foreclosed competition in the purported market for web browsing software, which in turn reduced the threat that such web browsing software allegedly posed to Microsoft's PC operating system monopoly. (*E.g.*, DOJ Compl. ¶¶ 22, 117.) The

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[14] Moreover, Novell's entire discussion of the "integration of browsing" functionality into Windows is highly misleading. For example, the Complaint says that the alleged conduct directed toward Novell ceased upon release of the initial version of Windows 95 (Compl. ¶ 77), an event that occurred in August 1995, *United States* v. *Microsoft Corp.*, 84 F. Supp. 2d 9, 41 (D.D.C. 1999) ("*Findings of Fact*"). Yet, Novell's description of the integration of web browsing functionality into Windows is based on verbatim quotations from the written direct testimony of a senior Microsoft executive that, on their face, concern either "Windows 95 starting with the OSR 2.0 version" (Compl. ¶ 67), which was not released until August 1996 — after Novell's sale to Corel and one year after the alleged conduct toward Novell stopped, *Findings of Fact,* 84 F. Supp. 2d at 50, ¶ 161, or Windows 98 (Compl. ¶ 67), which was not released until almost three years after the alleged conduct toward Novell ceased. *Findings of Fact*, 84 F. Supp. 2d at 31 (Windows 98 released in June 1998).

allegations of anticompetitive conduct made by Novell, therefore, have nothing to do with the allegations of anticompetitive conduct made by the DOJ.

6. The Methods of Proof Would Be Different.

The methods of proving the claims in Counts II through VI would necessarily be different from the proof adduced by the DOJ. This is obvious from a review of only a few of the differences discussed above: Novell seeks to prove a case about its own business and word processing and spreadsheet applications in 1994-96 and Microsoft's conduct from 1987-96, whereas the DOJ Complaint concerned entirely different companies and products and a later time period. The reasons for the decline of WordPerfect and Quattro Pro would be central to the proof of this case at trial, whereas the DOJ case had nothing to do with those products or the reasons for their failure in the marketplace.

Finally, there are the very distinct proofs required by the difference in the allegedly injured markets. *In re Microsoft Corp. Antitrust Litig.*, 214 F.R.D. at 374 ("The liability and damage[s] issues presented by claims arising out of these separate markets [PC operating systems and office productivity applications] are not the same."). Proving that an antitrust market exists is a monumental exercise, requiring a substantial amount of "resources" and "evidentiary and theoretical rigor." *United States* v. *Microsoft*, 253 F.3d at 84. This Court has itself delineated some of the many factors that must be considered in the analysis: "recognition of a separate market" by "the industry or consumers," "consumer patterns or switching costs in relation to such a market," "the costs of the various products," and "how the consumer would react to a price increase in such costs," *i.e.*, "price sensitivity." *Lantec, Inc.* v. *Novell, Inc.*, 146 F. Supp. 2d 1140, 1148-49 (D. Utah 2001) (Stewart, *J.*), *aff'd*, 306 F.3d 1003

(10th Cir. 2002). Novell's task differs entirely from the DOJ's efforts to define and demonstrate competitive harm to the PC operating system and internet browser markets.

* * *

In sum, Counts II through VI cannot benefit from Section 16(i) because they bear no "real relation" to the DOJ Complaint. The four-year statute of limitations applies, meaning that the 8½ year-old claims asserted by Novell are time-barred and should be dismissed.

CONCLUSION

For the foregoing reasons, Microsoft requests that this Court grant its motion to dismiss Novell's Complaint.

DATED this 7th day of January, 2005.

Respectfully submitted,

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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 Memorandum in Support of Microsoft's Motion to Dismiss Novell's Complaint, as well as the separately bound Appendix of Exhibits, to be served upon the following by overnight mail:

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