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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

CALDERA, INC.

Plaintiff,

vs.

MICROSOFT CORPORATION

Defendant.

CALDERA, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT MICROSOFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S STATE LAW CLAIM OF TORTIOUS INTERFERENCE

Case No.: 2:96CV 0645B
Judge Dee V. Benson
Magistrate Judge Ronald N. Boyce

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Plaintiff, Caldera, Inc., ("Caldera") submits the following Memorandum in Opposition to Microsoft's Motion for Partial Summary Judgment on Plaintiff's State Law Claim of Tortious Interference.

INTRODUCTION

> *"Going back to the negotiations of our agreement, you made yourself completely clear that contractually you would not allow us to do business with DR-DOS or any third party that shipped DR-DOS on more than 50% of their systems . . . and we have not!"*
>
> Letter to Brad Chase, Microsoft Corp., from Central Point Software, Inc. April 23, 1993 (Exhibit 354; Consolidated Statement, ¶ 382).

Microsoft moves for partial summary judgment on Caldera's Fourth Claim for Relief--Tortious Interference with Economic Relations. Microsoft offers two arguments in support of the motion: (1) Caldera's pleadings and evidence are deficient, and (2) Caldera's claims are barred by the statute of limitations. Microsoft argues that either the one-, three- or four-year statute of limitation applies. The four-year statute of limitation applies to this claim, which Caldera commenced on July 23, 1996. However, the statute of limitation was tolled on Caldera's tortious interference claim because of the continuing wrong doctrine and because Microsoft concealed its actions from Caldera. In any event, claims arising on or after July 23, 1992, are within the limitation period.

Microsoft argues that because by 1991 DRI, and later Novell, knew a few things about Microsoft's efforts to destroy DR DOS through anticompetitive and illegal means, the statute of limitation bars Caldera's claim. Microsoft also apparently believes that knowledge gained in 1991 and early 1992 somehow triggers the statute of limitation on tortious acts *that did not occur until months or even years later*. Of course, Microsoft offers no authority or explanation for this position. Microsoft ignores the reality that its tortious acts were part of a continuing scheme that commenced in 1988 and continued with repeated tortious acts until 1995. The statute of limitations does not bar a claim based on such acts.

The undertow of Microsoft's motion is that if all of Caldera's antitrust claims fail, then there is no basis for this state law claim to proceed. Although Caldera relies on the same facts for this tort claim as it does for the antitrust claims, those facts support an independent state law claim for tortious interference with economic relations. If the antitrust claims fail because Caldera is unable to satisfy some element of the antitrust claims, Caldera is still entitled to proceed to trial on the state law claims based on this Court's diversity jurisdiction.

As shown in Caldera's responses to Microsoft's other motions, genuine disputes as to material facts preclude summary judgment on each of Caldera's claims, including the tortious interference claim. Microsoft's motion is without merit and should be denied.

RESPONSE TO MICROSOFT'S "STATEMENT OF UNDISPUTED FACTS"

Caldera Inc.'s Consolidated Statement of Facts in Support of its Responses to Motions for Summary Judgment By Microsoft Corporation ("Consolidated Statement") raises genuine issues of material fact that preclude summary judgment on the tortious interference claim. Caldera incorporates by this reference the Consolidated Statement. Although many of Microsoft's facts are not disputed, they are either not material or do not tell the complete story.

1. Microsoft correctly quotes one sentence from the First Amended Complaint.[1] Paragraphs 93 through 97 of the First Amended Complaint set forth Caldera's claim for Tortious Interference. Paragraph 93 incorporates paragraphs 1-92 of the First Amended Complaint. Those paragraphs include the factual allegations that support all of Caldera's causes of action.

2. No dispute that the state law claim and the antitrust claims are based upon the same facts and that Caldera's other claims are based upon federal antitrust law. The elements of the claims, however, are different.

3. No dispute except that the referenced exhibit relates to DRI, not Novell, and there is no mention in the exhibit of DRI "fostering" the FTC investigation.

4. No dispute; except the document speaks for itself.

5. No dispute; except the document speaks for itself.

6. No dispute; except the document speaks for itself.

7. No dispute; except the document speaks for itself.

8. No dispute; except the document speaks for itself.

9. No dispute as to the documents, except that they speak for themselves. Dispute that the memorandum submitted to the FTC by Novell sets forth all facts or claims Caldera asserts in

[1]The paragraph that is quoted is paragraph 94, not 95.

this action. Many of the facts and circumstances upon which Caldera bases its claims had not even occurred by January 1992. (Consolidated Statement, ¶¶ 292-417.) Dispute that Caldera purchased "allegations" from Novell. (Consolidated Statement, ¶ 420.)

ADDITIONAL MATERIAL FACTS

Microsoft argues that Caldera's claim of tortious interference fails as a matter of law for reasons set forth in the other memoranda in support of motions for partial summary judgment filed by Microsoft. (Microsoft memorandum at p. 2.) That being the case, Caldera, by this reference, incorporates and adopts the arguments and factual statements it makes in its responses to Microsoft's other eight motions, including the Consolidated Statement. Caldera submits that those memoranda establish that genuine disputes as to material facts preclude summary judgment on all of its claims, including the tortious interference claim.

In fact, Caldera submits that nearly all of the 426 paragraphs of the Consolidated Statement establish that from 1988 through 1995, Microsoft, in a calculated and continuous manner, improperly maintained its monopoly in the DOS market at the expense of DRI and Novell. The evidence further shows that Microsoft's predominant purpose was to close the market to competitors through illegal means, and thereby maintain its DOS monopoly. The evidence shows that the destruction of DR DOS was the primary objective of this scheme.

The effect of Microsoft's scheme was that DRI's and Novell's reasonable business prospects for DR DOS were choked off and then destroyed. But even if Caldera's antitrust claims fail due to lack of proof on an element that is unique to an antitrust claim, Caldera's tortious interference claim must still proceed to trial because there are disputed material facts regarding Microsoft's interference with the economic prospects for DR DOS.

SUMMARY JUDGMENT STANDARDS

Caldera has set forth the applicable summary judgment standards in several other briefs, including the Consolidated Statement at pp. 7-11. Those standards are incorporated herein by reference.

ARGUMENT

I. CALDERA'S COMPLAINT AND THE EVIDENCE SUBMITTED ESTABLISH A TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS CLAIM.

To prevail on its tortious interference claim in Utah, Caldera needs only prove: "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose *or* by improper means, (3) causing injury to the plaintiff." *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) (emphasis added). (See Microsoft Memorandum at p. 4).

An alternative improper purpose is established if it is shown that the predominant purpose of the defendant's actions was to injure the plaintiff, rather than to protect a *legitimate* business interest. *Id.* at 307-308. The alternative "improper means" is established if it is shown that the defendants actions are "contrary to law, such as violations of statutes, regulations, or recognized common law rules." *Id.* at 308. "Such acts are illegal or tortious in themselves and hence are clearly 'improper' means of interference." *Id.* (citation omitted). Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. *Id.* In addition, "'Improper means' encompasses antitrust and monopolization violations, [and] also includes fraudulent or inequitable conduct." *Brooks Fiber Communications v. GST Tucson Lightwave*, 992 F. Supp. 1124, 1131 (D. Ariz. 1997) (citations omitted). *See also, Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933, 946 (S.D.N.Y. 1983) ("It is beyond dispute that a conspiracy to unreasonably restrain trade or to monopolize trade would constitute improper means.").

A. Microsoft acted for an improper purpose and by improper means to interfere with Caldera's economic relations.

Microsoft simply claims that Caldera has *no evidence* to establish either the improper purpose or the improper means elements of this tort. (Microsoft memorandum at pp. 4-5) (emphasis added). In support of this argument as to the improper means element, Microsoft simply refers to its motions regarding Caldera's antitrust claims. Caldera submits that its Consolidated Statement is awash with overwhelming evidence of both improper purpose and improper means used by Microsoft to interfere with the business prospects for DR DOS. These acts include:

- Anticompetitive and/or illegal licensing practices, including per processor licenses, minimum commitments, and long term licenses that had the effect of blocking DR DOS out of the lucrative OEM channel. These practices commenced at least by early 1990 and continued until Microsoft agreed to discontinue them in 1994 in order to resolve the complaint filed by the United States Government. (*See* Consolidated Statement ¶¶ 52-59, 130-154, 292-306, 408-413.)

- False or misleading product preannouncements, which were employed to freeze DR DOS out of prospective accounts. Microsoft's vaporware campaign began in 1990 when it preannounced MS-DOS 5.0 in order to stall sales of DR DOS 5.0. The campaign continued in September 1992 with premature and misleading preannouncements regarding MS-DOS 6.0. By 1993, the vaporware regarding Windows 95 had begun, which continued until at least 1994. (*See* Consolidated Statement ¶¶ 83-109, 307-319, 353-374, 402-404.)

- Unlawful tying arrangements between MS-DOS and Windows in an effort to preclude DR DOS from prospective accounts that needed or wanted to include Windows with DOS. This culminated with the release in August 1995 of Windows 95, which was falsely represented to be a stand-alone operating system that did not require DOS. (*See* Consolidated Statement ¶¶ 60-68, 110-118, 155-161, 281-291, 320-340, 375-382, 391-404.)

- Creating and planting "fear, uncertainty and doubt" about DR DOS in the market for DOS, through various means, with the goal of driving potential customers away from DR DOS. These acts occurred on an ongoing basis from 1989 until at least 1994. (*See* Consolidated Statement ¶¶ 38-51, 119-129, 195-280, 383-386.)

- Threatening and intimidating potential DR DOS customers to insure that the customers remained loyal to MS-DOS. (*See* Consolidated Statement ¶¶ 285-291, 375-382.)

These facts create genuine issues of material fact that preclude summary judgment on the tortious interference claim. As was stated in *Leigh Furniture Co. v. Isom*, 657 P.2d 293, 306 (Utah 1982), "Driving away an individual's existing or potential customers is the archetypical injury this cause of action was devised to remedy." Caldera clearly has submitted enough evidence to proceed to trial on this claim.

Microsoft also claims that Caldera has not pleaded a claim for "improper purpose" because it did not allege, in so many words, that Microsoft's predominant purpose was to injure Caldera. (Microsoft memorandum at p. 4.) Caldera's First Amended Complaint ("FAC") sets forth in great detail Microsoft's various willful and intentional acts that establish that its predominant purpose was to destroy DR DOS. These allegations include:

> Through various unfair and predatory acts, Microsoft has willfully maintained a monopoly of the market for MS-DOS operating system software and functionally equivalent software (the "DOS Market"). (FAC ¶ 1.)
>
> Microsoft has erected artificial barriers to the entry and growth of competing operating systems vendors through its contractual relations with original equipment manufacturers (OEMs) of PCS and other predatory conduct, which have had the effect of excluding competitors from the DOS Market, a market in which Microsoft has monopoly power. (FAC ¶ 3.)
>
> Microsoft refused to tolerate this assault on its monopoly position in the DOS Market for at least two (to Microsoft) compelling reasons: . . . . (to control the O/S standard and reap monopoly profits). (FAC ¶ 42.)
>
> Microsoft's purpose was to freeze the OEM and retail channels with fear, uncertainty and doubt about DR DOS releases, thus squelching sales. (FAC ¶ 52.)
>
> Microsoft's dominant purpose in combining the functionality of Windows and MS-DOS in Windows 95 was to tie together and compel the purchase as a package of two products--Windows and MS-DOS--that previously were marketed separately and were distinguishable in the eyes of buyers. Thus, excluding competition in the DOS Market was the dominant purpose of this technological tie, rather that the creation of technological benefits. (FAC ¶ 61.)
>
> There is no legitimate business justification or purpose for Microsoft's (monopolization) conduct. Microsoft has not used the least restrictive means for achieving its business objectives. (FAC ¶ 73.)
>
> There is no legitimate business justification for Microsoft's exclusive dealing arrangements. (FAC ¶ 90.)

Paragraph 95 concludes:

> Microsoft was and is maliciously motivated and knew, or in the exercise of reasonable care should have known, that its actions would damage and continue to damage the DR DOS business and existing and prospective contractual relations with DR DOS customers, and has acted in conscious disregard of this effect.

The undisputed facts submitted by Caldera in the Consolidated Statement establish Microsoft's ill will and desire to injure DRI and Novell through anticompetitive means in order to further its monopolistic desires. There was no legitimate business justification for Microsoft's actions. This evidence of Microsoft's intent to injure DRI and Novell comes from the very top of Microsoft. For example, when the illegal merger of Windows and DOS was first discussed within Microsoft, Nathan Myryvold, Microsoft's principal technical strategist, counseled Microsoft executives as follows:

> Benefits
>
> The good points of this approach are:
>
> --- The MONEY! This obviously will give tremendous systems revenue.
>
> --- It should give great apps revenue---this is something like a 5X - 10X increase in the total number of platforms on which we can sell our apps. Our success may not be completely linear in the market size, but it sure helps.
>
> Those two are huge and obvious wins, and are the main reason to do this. The strategic side is:
>
> . . .
>
> ---- *We put a bullet in the head of our would be competitors on Dos like DRI,* Desqview, dos extenders etc.

Exhibit 24; Consolidated Statement ¶¶ 65-66 (emphasis added).

In September of 1991, in response to the release of DR DOS 6.0, Jim Allchin, a Microsoft executive, ranted:

> We must slow down Novell. . . . As you said Bill, it has to be dramatic. . . . We need to slaughter Novell before they get stronger.

Exhibit 175; Consolidated Statement ¶ 193.

In early 1992, as Novell was reeling from the effects of the beta blacklist and the compatibility scares that Microsoft was spreading relative to DR DOS and Windows 3.1, Novell

made a proposal to Microsoft to improve the cooperation between the companies (which would in turn benefit consumers). In discussing this proposal, Microsoft representatives expose the spite they had for Novell:

> *Silverberg*:
> You'll enjoy this. We just got from Novell a proposal for a new project:
>
> "Under this Development Project, known as Corvette, Microsoft will license EMM386 and HIMEM memory managers in their Source Code to Novell and will provide technical support to Novell in Novell's effort to make DR-DOS compatible with all current and future version of Microsoft Windows 3.1 and Windows NT."
>
> *Cole*:
> I'm rolling on the ground laughing . . . . .) :
>
> *Barrett*:
> And I thought them Utah folks were drug free . . .
>
> *Allchin*:
> I hate them.
>
> Exhibits 281, 282, 283; Consolidated Statement of Facts ¶ 217.

In July 1993, Bill Gates told his executives he was "keen" to hurt Novell:

> Who at Microsoft gets up every morning thinking about how to compete with these guys in the short term--specifically cut their revenue. Perhaps we need more focus on this.
> . . .
>
> *After their behavior in this FTC investigation, I am very keen on this.*
>
> Exhibit 368 (emphasis added); Consolidated Statement ¶ 348.

Later in 1993, Jim Allchin offered the following drastic, if not final, solution:

> This really isn't that hard. If you're going to kill someone there isn't much reason to get all worked up about it and angry--you just pull the trigger. Any discussions beforehand are a waste of time. We need to smile at Novell while we pull the trigger.
>
> Exhibit 383; Consolidated Statement of Facts ¶ 352.

Microsoft was obsessed with desire to destroy DR DOS and thereby seriously harm DRI and Novell. Yet this was not a struggling company fighting for its life, but a monopolist willing to do anything to "kill" its competition. There was no legitimate business reason for Microsoft to act in this way. Caldera has submitted evidence that creates questions of fact as to the elements of a

tortious interference claim according to Utah law.

B. Caldera has met the requirements of Rule 9(b), Fed. R. Civ. P.

As it has done in several of its other motions, Microsoft argues that Caldera's tortious interference claim has not been pleaded with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. (Microsoft Memorandum at p. 4, n. 1.) Caldera has responded to this argument in several of its briefs. (*See* Caldera Inc.'s Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment on "Product Disparagement" Claims at pp. 48-51; Caldera Inc.'s Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment on Plaintiff's "Product Preannouncement" Claims at pp. 1-3.) In order to avoid belaboring the point with the Court, those arguments are only summarized here:

- Microsoft waived this defense by not raising the issue in its responsive pleadings or by prior motion. Microsoft was required to demand a cure to this alleged problem by either filing a Rule 12 motion prior to or simultaneous with its answer, or by alerting Caldera to the problem in an affirmative defense. It did neither.
- Rule 9(b) does not apply to a claim for tortious interference with prospective economic relations.
- Caldera has not asserted a fraud claim. To the extent that Caldera relies upon concealment to toll the statute of limitations, the First Amended Complaint pleads the circumstances required by Rule 9(b) as follows:

> FAC ¶ 26: "Even Windows 95 incorporates DOS technology, albeit in a manner designed to eliminate any customer's ability to make a choice of DOS Software distinct from the choice of graphical interface. Thus, although Windows 95 does not appear to the user to run on top of MS-DOS, it in fact does."
>
> FAC ¶ 46: Vaporware announcements were knowingly false or misleading;
>
> FAC ¶ 61: Various misleading statements and actions regarding Windows 95; and
>
> FAC ¶ 94: "Microsoft, through various improper means as alleged above, has wilfully and intentionally sought to damage existing and prospective business relations of DRI, Novell and Caldera. Microsoft, through various false statements, cover-ups, encrypted code, and other fraudulent and deceptive means, has sought to conceal the true nature and extent of such conduct, thus tolling the applicable statute of limitations."

Caldera has alleged sufficient circumstances to meet the requirements of Rule 9(b).

II. CALDERA'S TORTIOUS INTERFERENCE CLAIM IS NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATION.

Microsoft argues that various statutes of limitation apply to Caldera's tortious interference claim:[2] the one-year statute of limitation (§78-12-29(4)) for libel and slander claims; the three-year statute of limitation (§78-12-26(3)) for fraud claims; and the four-year statute of limitation (§78-12-25(3)) for everything else. The one-year and three-year statutes do not apply to this case. Caldera has not asserted any fraud claims, nor has it asserted a libel or slander claim. As Caldera shows in its Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment on "Product Disparagement" Claims, Microsoft tries to pigeonhole Caldera's FUD claims into a commercial disparagement claim. (*See* Caldera memorandum at pp. 1-5, 36-41.) Microsoft fails in this attempt. Caldera's so-called FUD claims relate to a range of anticompetitive acts that Microsoft used to illegally maintain its monopoly, not just libel or slander. *Id.*

Caldera does allege that Microsoft misled the market and the public about many things, including, but not limited to, its product release dates, the quality and compatibility of DR DOS, the quality of MS-DOS, and the fact that Windows 95 is, in fact, MS-DOS with a Windows GUI, rather than a new operating system. Caldera claims (FAC ¶ 94) that Microsoft concealed its actions and the truth from the public and from DRI and Novell. That concealment tolls the statute of limitation on several of Caldera's claims. Those allegations do not, however, plead a fraud claim to which the three-year statute of limitation would apply.

A. The tortious interference claim is governed by the four-year statute of limitation.

---

[2]In its affirmative defenses in the Answer to First Amended Complaint, Microsoft only specifies the four-year statute of limitation (§78-12-25 Utah Code Annotated) as a defense to Caldera's claims. Answer to First Amended Complaint at p. 14. Therefore, Microsoft may not now rely on a different statute of limitation to bar Caldera's claims. *See, e.g., Crawford v. Zeitler*, 326 F.2d 119, 121 (6th Cir. 1964) (court refused to consider four-year statute of limitation where wrong statute of limitation was raised as defense); *American Theater v. Glasman*, 80 P.2d 922, 923 (Utah 1938) (section of statute of limitation must be specifically pleaded as a defense; citation in pleading to inapplicable statute insufficient).

Microsoft offers no authority for its argument that anything other than the four-year statute of limitation applies to a tortious interference claim. Microsoft does, however, acknowledge that the only time this issue has been before a Utah appellate court, the court applied the four-year statute of limitation to a tortious interference claim. (Microsoft memorandum at p. 6, citing *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 578 (Utah Ct. App. 1996).) In *Anderson*, there was no dispute about the fact that the four-year statute of limitation applied. *See* 920 P.2d at 578.

Other courts have rejected the approach suggested by Microsoft. For example, in *Rolite, Inc. v. Wheelabrator Environmental Systems, Inc.*, 958 F. Supp. 992 (E.D. Pa. 1997), plaintiff sued Wheelabrator for antitrust violations and several state law claims, including unfair competition, defamation, commercial disparagement and tortious interference with prospective business advantage. Wheelabrator moved to dismiss the state law claims based on the one-year statute of limitation for defamation. Wheelabrator claimed that the "gravamen" of Rolite's claims was the defamation claim so all of the claims should be barred by the one-year limitation period. *Id.* at 1008-1009.

The court held that the claims in Rolite's complaint, when viewed in their entirety, were primarily based upon unfair competition, rather than defamation. The court found that the injury Rolite complained of was not a general injury to reputation, as it would be in a defamation action, but the injury complained of was that defendants' actions *"caused customers/potential customers not to deal with Rolite. . . .* Rolite's claims seek to protect its economic interests, not its reputation." *Id.* at 1011 (emphasis added). *See also Bio/Basics Intern. v. Ortho Pharmaceutical Corp.*, 545 F. Supp. 1106, 1109-10 n.1 (S.D.N.Y. 1982) (holding that one-year defamation statute of limitation did not apply to tortious interference claim where plaintiff's allegations state a "paradigmatic tortious interference claim"); *McCulley-Smith Assoc., Inc. v. Armour and Co.*, 358 F. Supp. 331 (W.D. Pa. 1973) (holding that one-year defamation statute of limitation did not apply to tortious interference claims, where all elements of tortious interference claim were pleaded). As

in *Rolite*, the gravamen of Caldera's claims is not a defamation claim, so the defamation statute does not apply. The undisputed and obvious focus of Caldera's claims is that Microsoft, through illegal and anticompetitive means, and with improper purpose, caused potential customers to stay away from DR DOS.

If there is any doubt as to which statute of limitation applies, Utah courts have directed, "The general rule covering situations of this type is stated in 34 Am.Jur., Limitation of Actions, § 50 to be: 'If a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitation is to be preferred.'" *Hardinge Co. v. Eimco Corp.*, 1 Utah 2d 320, 323, 266 P.2d 494, 496 (Utah 1954). *See also State v. Parker*, 872 P.2d 1041, 1044 n.3 (Utah Ct. App. 1994) (reaffirming the rule as stated in *Hardinge*.)

The Court should apply the four-year statute of limitation.

B. Microsoft's actions were part of a continuing tort which tolls the statute of limitation.

Microsoft's scheme to destroy DR DOS and continue its monopoly of the DOS market was conceived and carried out on a continuous basis and through various means from 1988 until 1995 when Windows 95 was finally released. Microsoft's actions constitute a "continuing wrong" that tolls the statute of limitation until the date of the last act in the scheme. In *Tiberi v. Cigna Corp.*, 89 F.3d 1423 (10th Cir. 1996), the court held:

> Under the continuing wrong doctrine . . . 'where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury.' 54 C.J.S. Limitations of Actions §177 (1987). In other words, 'the statute of limitations does not commence until the wrong is over and done with.'

.

Id. at 1430-1431 (footnote and citation omitted). See also Chicksaw Telephone Co. v. Southwestern Bell Mobile Systems, No. 96-6357, 113 F.3d 1245, 1997 WL 290951, (CA-10/DOK May 27, 1997) (table of decisions without full opinion in Federal Reporter; see copy of unpublished opinion attached as Exhibit B to this memorandum).

In the situation of a continuing wrong, as is the case here, any overt act on the part of the

defendant will restart the statute of limitations. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir.1989).

Utah recognizes the continuing wrong doctrine as a defense to a statute of limitations bar. *Walker Drug Co., Inc. v. La Sal Oil Co.*, 902 P.2d 1229 (Utah 1995) (applying doctrine in nuisance and trespass case). The doctrine has been applied in other jurisdictions in a tortious interference context. *Whelan v. Abell*, 953 F.2d 663 (D.C. Cir. 1992). The Court held:

> Under District of Columbia law, a plaintiff establishes a continuing tort by showing '(1) a continuous and repetitious wrong, (2) with damages flowing from each act as a whole, rather than from each individual act, and (3) at least one injurious act within the limitation period.'

Id. at 673 (citation omitted).

The facts here show that each of those elements have been met. Microsoft's wrongful acts continued from 1988 to 1995. (Consolidated Statement ¶¶ 34-417.) Caldera is claiming damages from Microsoft's acts as a whole, rather than each specific act. (*See* Report of William E. Wecker, Record Support-Consolidated Statement, Vol.7.) In addition, at least one injurious act occurred within the limitation period, which commenced on July 23, 1992--four years prior to the date the complaint was filed:

- Long term per processor licenses and other exclusionary licenses were in effect until 1994. (Report of Dr. Jeffrey J. Leitzinger pp. 14-15 and Exhibit 9, attached thereto, Record Support-Consolidated Statement, Vol. 7; Consolidated Statement ¶¶ 408-413.)

- Microsoft FUD began in 1989 and continued until at least 1994 with Brad Silverberg's exchanges with Andrew Schulman regarding the AARD code. (Consolidated Statement ¶¶ 240-242.)

- Microsoft vaporware began in 1990 and continued until 1994 with its various announcements regarding Windows 95. (Consolidated Statement ¶¶ 83-109, 353-374.)

- The Win/DOS tie, which was conceived as early as 1990, was completed in 1995 with the release of Windows 95. (Consolidated Statement ¶¶ 155-161, 391-400.)

- Microsoft's threats, intimidation and retaliation vis-a-vis potential DR DOS customers began in at least 1991 and continued into 1994. (Consolidated Statement ¶¶ 285-291, 375-382.)

The facts of this case clearly fit Caldera's claims into the continuing wrong doctrine articulated in *Whelan v. Abell*, 953 F.2d 663 (D.C.Cir.1992), and other cases.

C. Microsoft's concealment of its actions tolls the statute of limitation.

As an alternative and supplement to the continuing wrong doctrine, Caldera submits that Microsoft's efforts to conceal its tactics from DRI and Novell toll the statute of limitations in this case. This Court has held,

> In this circuit, for a statute of limitation to be equitably tolled on grounds of fraudulent concealment, a party must show three 'elements':
>
> > (1) the use of fraudulent means by the party who raises the ban of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action.

In re Commercial Explosives Litigation, 945 F. Supp. 1489, 1492 (D. Utah 1996) (citations omitted). Similarly, the Utah Supreme Court has held that a statute of limitation is tolled by defendant's acts of concealment if plaintiff shows (1) defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) given defendant's actions, a reasonable plaintiff would not have discovered the claim earlier. *Aurora Credit Services, Inc., v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1278-79 (Utah 1998). The *Aurora* court further explains, "the application of the fraudulent concealment doctrine, a legal rule, to any specific set of facts, 'is necessarily a matter left to trial courts and finders of fact.'" *Id.* at 1279 (citation omitted). Caldera satisfies these standards in this case, and, therefore, the issue must go to the trier of fact for determination.

DRI and Novell had some knowledge of Microsoft's anticompetitive actions. Even at that time, however, Microsoft went to great lengths to conceal the truth, including the scope and severity of its actions. For example, the AARD code incident was concealed, encrypted and covered up until Andrew Schulman exposed the scheme in September 1993. Microsoft continued the cover-up when Brad Silverberg publicly responded to Mr. Schulman with misleading

information. (Consolidated Statement ¶¶ 223-242; Report of Dr. Lee A. Hollaar, Record Support-Consolidated Statement, Vol 6, pp. 13-14.) Even Microsoft's expert, Jerry Hausman knew of the cover-up:

> My memory is that it (the AARD code) said this program or operating system has not been tested with Windows 3.1, and that was pretty much all it said, as I remember, and then it wasn't until a couple of years later, that somebody writing for Doctor Dobbs' Journal sort of deconstructed what had happened, but it wasn't public knowledge at that time.

(Deposition of Jerry Hausman at p. 205; excerpt attached as Exhibit B to this memorandum.)

Microsoft further concealed the incompatibilities it was creating for DR DOS. (Consolidated Statement ¶¶ 243-264.) In order to cover its tracks on this issue, Microsoft concocted the "Roger Sour" incident and then lied to DRI about it. (Consolidated Statement ¶¶ 255-261.) Indeed, the entire purpose of the beta blacklist was to hinder DRI and Novell from discovering what Microsoft was doing with Windows 3.1 to thwart compatibility with DR DOS.

The coverup of the Win/DOS merge commenced in 1992 and continued until Caldera was able to analyze Windows 95 in this case and show how DOS is still intact in Windows 95. (Consolidated Statement ¶¶ 320-340, 391-404; Report of Dr. Lee A. Hollaar, Record Support-Consolidated Statement, Vol.6. pp. 15-26.) This coverup included the final episode of vaporware in this case--as Microsoft used vaporware regarding Windows 95, and the claim that no DOS would be needed, to preempt Novell DOS 7.0 in 1992-1993. (Consolidated Statement ¶¶ 353-374.) This issue of concealment must go to the jury for determination.

Also, in 1992, as part of its effort to conceal what it was doing, Microsoft even directed its sales staff to destroy documents that "could be problematic in the event of an investigation." (Deposition of Stephanie Reichel pp. 264-280, Record Support-Consolidated Statement, Vol. 2.) Documents were, in fact, destroyed or deleted as a result of this directive. *Id.* at 270. These acts raise a jury question on the concealment issue.

D. Microsoft's tortious acts which occurred from July 23, 1992 to the present are not barred by the statute of limitation.

Microsoft argues, "By the time Novell and DRI filed their memorandum before the FTC, in January of 1992, (*see* Ex. 5) all claims and causes of action encompassed in Caldera's amended complaint had clearly accrued. Because even Utah's four-year statute of limitations expired [sic; commenced?] on July 23, 1992, four years prior to the filing of the complaint, Caldera's claim is barred." (Microsoft memorandum at p. 7.)

If the statute of limitation bars claims on Microsoft's tortious acts prior to July of 1992, and it was not tolled, as set forth above, Caldera's claims regarding the tying of Windows and DOS, and the attendant vaporware, the retaliatory ties and continuing FUD regarding the alleged incompatibilities of DR DOS, as well as the claims regarding anticompetitive licenses that were in use post-July 1992, are still timely. The post-July 1992 tortious acts of Microsoft are not barred. Microsoft has not offered any explanation or authority to support summary judgment on Caldera's post-July 1992 claims.

CONCLUSION

Based on the foregoing, as well as the arguments and facts submitted in Caldera's responses to Microsoft's other motions for partial summary judgment, Microsoft's motion for partial summary judgment on the state law claims should be denied.

DATED this _____ day of October, 1999.

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