IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION This Document Relates to: *Novell, Inc. v. Microsoft Corporation*, Civil Action No. JFM-05-1087	)	MDL Docket No. 1332 Hon. J. Frederick Motz

NOVELL'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL ANSWERS TO INTERROGATORIES

In lieu of substantively answering Novell's Interrogatories, Microsoft has invoked Federal Rule of Civil Procedure 33(d), directing Novell to search for documents that may or may not exist in a 23 million page database with limited search functions. As shown in Novell's opening brief, Microsoft has not met the requirements of responding through Rule 33(d) and instead must provide substantive written answers under oath. In its opposition, Microsoft fails to cure any of the deficiencies in its reliance on Rule 33(d). Microsoft still has not provided (1) an express statement that responsive documents can actually be found in the *Comes* database, (2) evidence that Novell's burden in finding responsive documents would not be substantially greater than Microsoft's own burden, or (3) any specifically identified documents or categories of documents for which Novell is supposed to search, all as required by Rule 33(d).[1]

[1] Microsoft's complaints about Novell's own production are not relevant to this motion.

ARGUMENT

I. Microsoft's Responses To The Interrogatories Are Deficient

Novell's Interrogatories call for Microsoft to provide documents and other responsive information, or an admission, where appropriate, that responsive documents never existed or no longer exist. As Microsoft concedes, "If no documents responsive to a particular Interrogatory have been retained, the response to that Interrogatory would be that no such documents exist." Microsoft Br. at 9. Microsoft is now obligated to provide exactly such an answer wherever appropriate, and to provide it under oath, in writing and for use at trial.

Similarly, Microsoft concedes – in its brief, but not in its sworn answers – that it "has not located the documentation [concerning the namespace APIs] to date, and given that over 13 years have passed since the release of Windows 95, it is quite possible that it was not retained." Microsoft Br. at 11. Again, if Microsoft has determined that the documents do not exist, it must provide this concession in a sworn response that binds Microsoft at trial,[2] and saves Novell the considerable time and effort of futile searches through 23 million pages in the *Comes* database. *See Herdlein Techs., Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 105 (W.D.N.C. 1993).

Finally, Microsoft implausibly claims that it did not foresee the relevance of the responsive documents to future litigation, and therefore may not have preserved them. In fact, many of the documents were equally relevant to actions stretching back to the mid-1990s. The namespace APIs in particular were at issue as early as *Coordinated Proceedings, Special Title (Rule 1550(b)), Microsoft I-V Cases*, J.C.C.P. No. 4106 (Cal. Sup. Ct. San Francisco County),

[2] Novell seeks to bind Microsoft to its responses only for documents it knows of or has in its possession to date. *See Herdlein Techs., Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 105 (W.D.N.C. 1993). Novell does not dispute Microsoft's right or obligation to supplement.

filed in February 1999, and in several actions since.[3] Microsoft's counsel represented to the Court that the alleged publication of these APIs should be the central focus of Mr. Gates' forthcoming deposition, presumably because the alleged publication will be a central defense at trial, as it was in other actions. The serious consequences of any failure to preserve this evidence are for another day. The point here is that, if Microsoft does not have responsive documents, it must admit this fact under oath. Microsoft cannot invoke Rule 33(d) to escape this and other obligations in response to the Interrogatories.

II. Microsoft Has Not Met The Requirements For Proceeding Under Rule 33(d)

A. Microsoft fails to state definitively that responsive documents are in the *Comes* database

Microsoft does not state definitively that the *Comes* database actually contains responsive documents,[4] and Microsoft thus cannot force Novell to search that database, presumably in vain. *See SEC v. Elfindepan*, 206 F.R.D. 574, 576-577 (M.D.N.C. 2002). Microsoft's statement that it "believes" the *Comes* database contains all potentially responsive documents, without taking any position on the documents' actual existence, Microsoft Br. at 5, does not satisfy the Rule's requirement of an affirmative representation. *See Elfindepan*, 206 F.R.D. at 576-577. It is now apparent that Microsoft cannot make this representation, because, as Microsoft virtually concedes in its Opposition, the documents do not exist, in the *Comes* database or elsewhere. Rule 33(d) does not shield Microsoft from admitting this fact under oath.

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[3] *See, e.g., Gordon v. Microsoft Corp.*, No. MC 00-5994, Technical Expert Report of Professor David Martin (Minn. Dist. Ct. June 2, 2003) (relevant pages attached as Exhibit A); *Comes v. Microsoft Corp.*, No. CL 82311, Expert Report of Ronald S. Alepin (Iowa Dist. Ct. Polk County June 2, 2006) (relevant pages attached as Exhibit B).

[4] Microsoft admits in its brief that "it has copies of the documents that are in the *Comes* database." Microsoft Br. at 3.

B. Microsoft has tendered no evidence indicating that the parties would bear substantially similar burdens

Microsoft asserts on the one hand that it has spent a decade of effort and countless millions of dollars reviewing and organizing its documents, Microsoft's Resp. at Gen. Obj. 2, while arguing on the other hand that it is no more familiar with those documents than the average private litigant. In fact, when Microsoft boasts of its own efforts to organize its own documents for use in numerous related cases, it effectively concedes that its "familiarity may make such a difference as to be determinative." 8A Wright & Miller, Fed. Prac. & Proc. Civ.2d § 2178, *2 (2008). The facts concerning the parties' respective burdens confirm this point.

1. Novell's Interrogatories are sufficiently focused

Microsoft attempts to embellish burden by complaining about the breadth of Novell's requests. Microsoft Br. at 7. While it objects to requests using the terms "all documents," "all studies," and "all communications," Microsoft concedes that the requests apply to "particular subjects." Microsoft Br. at 6. Novell's Interrogatories are expressly focused by topic and time. As we have seen, it is highly unlikely that Interrogatories 21 and 22, concerning the alleged publication of the namespace APIs, call for a large volume of documents; it is more likely that no such documents ever existed, and in either case, the burden of production will be light. Interrogatory 27 concerns only the Windows 95 printing subsystem and five of its specific APIs. Interrogatory 29 admittedly requests all studies of Microsoft's logo certification, but Novell has limited the time period from 1993 to 1996, and specifically identified two studies referenced in a Bates stamped document to facilitate Microsoft's search.

Given the tight focus of Novell's Interrogatories, and Microsoft's flat refusal to provide any of the representations or other information required by Rule 33(d), Microsoft's reliance on *United States v. Rachel*, is misplaced. 289 F. Supp. 2d 688 (D. Md. 2003). In *Rachel*, the

Government, in properly invoking Rule 33(d), provided more than just an "unlit garage" full of documents, as Microsoft claims.[5] The Government provided documents as they were maintained in the ordinary course of business, under the same conditions in which the Government's own attorneys reviewed them, and the Government also made available for the requesting party's assistance the same two agents who worked on the relevant investigation and assisted the Government's own counsel. *Id.* at 693. Microsoft has provided nothing remotely similar for the benefit of Novell.

2. Microsoft provides no evidence of the difficulty of searching its databases

Microsoft asserts equivalence between Novell's burden in searching the *Comes* database and Microsoft's burden in searching its own databases. Microsoft Br. at 8. But Microsoft does not allow the Court to make a meaningful comparison, because Microsoft has provided literally no evidence of any burden whatsoever in using its own databases. Microsoft indicates only that there is more than one database, and that more than one query will be needed, Aff. of Beau H. Holt ¶¶ 4, 5, but it gives no indication of how many queries it might take, how long the queries might take, or whether its databases are organized by topic or by lawsuit to expedite the queries. Microsoft will not even tell the Court whether it has already searched these databases in the investigation of its defenses, and can answer the Interrogatories without any further burden.

Nor does Microsoft explain why it does not simply ask its witnesses or attorneys whether they have copies of responsive documents that they have purported to describe in depositions and to the Court. There would be minimal burden in questioning those individuals – or in admitting

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[5] The requesting party in *Rachel* was given the option of moving boxes of their choice out of the "unheated, unlit garage" that Microsoft referenced, though the party failed to take advantage of the Government's accommodation. 289 F. Supp. 2d at 693. Microsoft, conversely, has offered Novell no accommodation whatsoever to ease a 23 million page review.

that none of them have any documents to corroborate their assertions.[6] In short, Microsoft has made literally no showing of equivalent burdens.

3. Novell's ability to search electronically does not equalize the parties' burdens

Novell has provided evidence of the difficulties of searching the *Comes* database – the limited objective coding, the vast number of pages, and the display of results as single pages rather than full documents. Aff. of Andrew E. Smith ¶¶ 5, 2, 7. Comparing this specific, un-rebutted evidence to Microsoft's unsupported assertions of unnamed difficulties in using its own databases, the only conclusion is that Novell would bear a greater burden.

Microsoft's only response is that the *Comes* database contains electronically stored information ("ESI") that is electronically searchable. The two cases cited by Microsoft do not even concern ESI, much less establish that the availability of ESI dispositively reduces the requesting party's burden under Rule 33(d). *See Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486 (W.D.N.C. 1998); *T.N. Taube Corp. v. Marine Midland Mortgage Corp.*, 136 F.R.D. 449 (W.D.N.C. 1991). The 23 million pages in the *Comes* database represent vastly more information than the 200 boxes of paper documents at issue in *Capacchione*, or the tens of thousands of documents on microfilm/fiche in *T.N. Taube*.

C. Microsoft refuses to specify responsive documents in sufficient detail

Microsoft has failed to "specify[] the records that must be reviewed in sufficient detail to enable the interrogating party to locate and identify them as readily as [Microsoft] could." *See* Fed. R. Civ. P. 33(d)(1). "Crucial to this inquiry is [whether Microsoft has] adequately and precisely specified for each interrogatory, the actual documents where information will be

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[6] To the extent Microsoft has already culled or reviewed responsive documents, Microsoft's burden is clearly the lesser. 8A Wright & Miller, Fed. Prac. & Proc. Civ.2d § 2178 at *2.

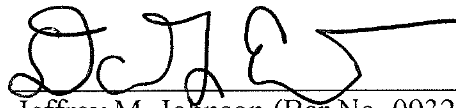
found." *See Elfindepan*, 206 F.R.D. at 576. Instead, Microsoft has essentially suggested that Novell search through 23 million pages for un-described documents that probably do not exist.

CONCLUSION

The Court should compel Microsoft to answer the Interrogatories at issue, either by admitting under oath that it does not possess responsive documents or by identifying and producing the complete set of responsive documents and all other responsive information.

Dated: May 7, 2009

Respectfully submitted,

By: 

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