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 MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Microsoft refuses to provide substantive responses to Novell's Second Set of Interrogatories, which concern Novell's claim that Microsoft withheld and manipulated certain information about its Windows operating system to destroy its competitors. In its defense, Microsoft contends that it timely communicated this information to independent software vendors ("ISVs"), and that these communications are a primary defense to Novell's claim. Microsoft recently represented to the Court that Mr. Gates personally decided to publish the most important information at issue. Microsoft Ltr. (Mar. 10, 2009), 4 (Ex. A). Novell's Interrogatories seek evidence of the alleged publication and other, similar communications.

Instead of specifically identifying the communications, Microsoft states that they *might* be found – Microsoft does not claim to know – somewhere in the 23 million pages of the *Comes* database of prior document productions.[1] Pointing into this sea of documents, Microsoft contends that the "burden of deriving or ascertaining" the evidence of Microsoft's own communications, in support of Microsoft's own defenses, "will be substantially the same for

[1] The *Comes* database is a compilation of document productions from a number of parties in various consumer and competitor cases, including many of Microsoft's prior productions. The Affidavit of Andrew E. Smith (Ex. B) describes the database and some of its relevant shortcomings.

either party," within the meaning of Federal Rule of Civil Procedure 33(d). Microsoft's Resp. at Gen. Obj. 1-3.

For three independent reasons, Rule 33(d) and the *Comes* database do not excuse Microsoft from specifically answering the Interrogatories. First, Microsoft failed to state definitively that the *Comes* database actually contains evidence of the alleged communications. Second, the parties' burdens in searching for the evidence are not substantially similar, particularly since the evidence – if it even exists – should easily be found in Microsoft's *own* database. And third, even if this Court somehow finds that the parties' burdens are similar, Microsoft has failed to "specify[] the records . . . in sufficient detail to enable [Novell] to locate and identify them as readily as [Microsoft] could," as required by Rule 33(d)(1).

NOVELL'S INTERROGATORIES AND MICROSOFT'S OBJECTIONS

The disputed Interrogatories test Microsoft's contention that it communicated information about Windows 95 in a timely and pro-competitive manner. Specifically, Interrogatories 21 and 22 seek evidence of alleged communications between Microsoft and ISVs relating to the namespace APIs. Microsoft's refusal to disclose this information to Novell during the development of products for the Windows 95 platform is an important bad act at issue, and Microsoft's allegedly open distribution of the information is one of its primary defenses. Microsoft previously directed Novell to exactly one document that records a communication of the information, but Microsoft did not cite even this document in its answers to the Interrogatories, presumably because it is dated long after the shipment of Windows 95 and cannot support Microsoft's defenses. Paul Maritz Dep. 144:21-145:2, Jan. 9, 2009 (Ex. C) (referencing a *Comes* trial exhibit Novell has identified as Defendant's Exhibit 3066). Rule 33(d) does not shield Microsoft from its obligation to acknowledge expressly that it cannot identify any communications in support of its defenses, or to specifically identify them forthwith.

Interrogatories 23 and 24 relate to communications regarding Microsoft's Messaging API, or "MAPI," and MAPI's relationship to Windows 95. Interrogatories 25 through 27 relate to Windows 95's printing functionality, including communications with ISVs about the functionality. Novell alleges that Microsoft unlawfully manipulated information about MAPI and the printing functionality. Interrogatory 28 concerns Microsoft's archiving of these and other communications with ISVs on developers' forums. Microsoft has not identified a single document in response to Interrogatories 23 to 28, instead relying on Rule 33(d).

Finally, Interrogatory 29 requests studies concerning Microsoft's logo certification programs, including two studies mentioned in a document that Novell already possesses. Novell contends that Microsoft abused its logo program for anticompetitive purposes. The requested studies are relevant to determining the logo program's actual purposes. Microsoft refuses to identify or produce even the two known studies, again citing Rule 33(d).[2] Our own searches of the database have not identified these studies. *See* Aff. of Andrew E. Smith ¶ 9.

ARGUMENT

Microsoft's refusal to answer the Interrogatories defeats a primary purpose of discovery, which "should . . . bind the responding party to its responses so that the interrogating party may use the response in a trial setting." *Herdlein Techs., Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 105 (W.D.N.C. 1993). Novell seeks to bind Microsoft to a complete and final list of the crucial communications, or to an admission that, as seems apparent with respect to the namespace APIs, relevant communications never occurred. Rule 33(d) does not excuse Microsoft from fulfilling this basic purpose of discovery, for three independent reasons.

[2] The full text of Novell's Interrogatories and Microsoft's Answers and Objections are set forth in the Appendix as Exhibits D and E, respectively.

I. <u>Microsoft Has Failed To State Definitively That The *Comes* Documents Will Reveal Answers To Novell's Interrogatories.</u>

Under Rule 33(d), Microsoft "must show that a review of the documents will actually reveal answers to the interrogatories." *SEC v. Elfindepan*, 206 F.R.D. 574, 576 (M.D.N.C. 2002); *accord Sabel v. Mead Johnson & Co.*, 110 F.R.D. 553, 555 (D. Mass. 1986). Microsoft states only that it "*believes* that the *Comes* database contains every document produced by Microsoft over the past decade in response to large numbers of discovery requests propounded in cases asserting allegations similar to those asserted in Novell's complaint." Resp. at Gen. Obj. 1 (emphasis added). Microsoft fails to represent that the prior productions, even if they are *in* the *Comes* database, "will actually reveal answers to the interrogatories," as required by the Rule. *See Elfindepan*, 206 F.R.D. at 576. For this reason alone, Microsoft's reliance on Rule 33(d) is misplaced with respect to every Interrogatory at issue.

II. <u>Microsoft's Familiarity With Its Own Documents Results In A Lesser Burden.</u>

Microsoft's answers run afoul of another requirement of Rule 33(d). "Rule 33 production is inappropriate where, as here, the burden of ascertaining the answer is not the same" for the requesting as for the answering party. *United Oil Co. v. Parts Assocs., Inc.*, 227 F.R.D. 404, 419 (D. Md. 2005). To determine relative burdens, courts often consider the responding party's familiarity with its own documents, as well as the cost of research, and the nature of the records produced. *T.N. Taube Corp. v. Marine Midland Mortgage Corp.*, 136 F.R.D. 449, 454 (W.D.N.C. 1991). Here, because of the volume of documents at issue, Microsoft's familiarity with its own prior productions, its database of such productions, and its own business files, is the key factor. *See id.* at 454-55.

By now, Microsoft is intimately familiar with these sources of responsive information. Microsoft has "spent millions of dollars and thousands of hours conducting . . . multiple worldwide searches for, and reviews of, its documents." Resp. at Gen. Obj. 1. An

investment of that magnitude gives Microsoft more familiarity with the documents than Novell ever could obtain. *See T.N. Taube*, 136 F.R.D. at 454-55.

Microsoft's burden will be particularly light with respect to the namespace documents because Microsoft affirmatively claims to know of their existence. Joe Belfiore, a current Microsoft employee, testified that Microsoft provided documentation of the namespace APIs to ISVs upon request (Joe Belfiore Dep. 177:10-20, Jan. 13, 2009 (Ex. F)); Brad Struss testified to the existence of similar documentation (Brad Struss Dep. 118:17-23, 124:13-21, Jan. 14, 2009 (Ex. G)); Bob Muglia, another current Microsoft employee, testified that the documentation was "quite widely available" (Robert Muglia Dep. 155:1-24, Feb. 6, 2009 (Ex. H)); and most importantly, Mr. Holley's recent letter to the Court describes Mr. Gates' alleged decision to publish the APIs (Microsoft Ltr. (Mar. 10, 2009), 4). It should be quite easy for these Microsoft employees and attorneys to locate evidence of publications and communications that were so recently the subjects of their affirmative representations.

Novell's burden in searching the *Comes* database would be far greater. Within the database, only the *Comes* trial exhibits are coded in the manner described in Microsoft's objections. Aff. of Andrew E. Smith ¶ 5. Tens of millions of additional pages are searchable only by optical character recognition, which is less efficient and accurate. Aff. of Andrew E. Smith ¶ 6. Surely, Microsoft can search its own files and databases, to find its own communications in support of its own defenses, far more efficiently.

III. Microsoft Failed To Specify Individual Documents Responsive To Novell's Interrogatories.

Even if this Court finds that the parties bear similar burdens in searching for responsive information, Microsoft still has failed to comply with Rule 33(d)'s specificity requirement. It is improper to "simply state that [Microsoft] has already produced the information." *Ayers v. Cont'l Cas. Co.*, 240 F.R.D. 216, 226 (N.D.W.V. 2007). Rule 33(d)

requires Microsoft to specify "the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." Fed. R. Civ. P. 33(d); *Herdlein*, 147 F.R.D. at 105. At a minimum, Microsoft must provide the "category and location" of documents responsive to each Interrogatory at issue. *T.N. Taube* 136 F.R.D. at 455 (citation and internal quotation marks omitted).

Pointing Novell to the "undifferentiated mass of records" in the *Comes* database is an abuse of Rule 33(d), *T.N. Taube* 136 F.R.D. at 455, which does not allow such a "document dump" in lieu of specific answers. *See SEC v. Elfindepan*, 206 F.R.D. at 576; *see also In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 366 (N.D. Ill. 2005). Since the requested information is claimed to be "crucial to the ultimate determination of a crucial issue," the Court should require Microsoft to specifically identify it. *Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486, 491 (W.D.N.C. 1998). In *Capacchione*, the responding party's reference to vague categories of information that could be found in 200 boxes of documents was improper under Rule 33(d). *See id.* at 490. Microsoft's similar tactic here, deployed with respect to a 23 million page database, is an exponentially greater violation of the Rule.

CONCLUSION

The Court should compel Microsoft to give binding answers to Novell's Interrogatories, by admitting that it cannot produce evidence of the alleged communications, or by specifically identifying and producing the complete and final set of communications.

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Respectfully submitted,

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