UNITED STATES DISTRICT COURT
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

MICROSOFT'S MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

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In its motion, Novell, Inc. ("Novell") improperly seeks to shift the burden onto Microsoft Corp. ("Microsoft") of identifying documents already in Novell's possession that are responsive to Novell's Second Set of Interrogatories (the "Interrogatories"). Novell then seeks to bind Microsoft, more than a year before trial, to a "complete and final list" of documents supporting what Novell mischaracterizes as one of Microsoft's "primary defenses."[1] Failing that, it seeks an admission from Microsoft that such documents never existed. Novell is entitled to none of what it seeks.

Microsoft has, under Federal Rule of Civil Procedure 33(d), properly directed Novell to Novell's own massive database of documents because Novell can locate the documents it seeks at least as readily as Microsoft could. If the documents that Novell now seeks cannot be found in that database, they are unlikely to be found at all, as they relate to discrete technical matters that arose more than 13 years ago during

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[1] Novell's Memorandum in Support of Its Motion to Compel Answers to Interrogatories ("Novell Brief") at 2-3.

Microsoft's development of Windows 95. Microsoft had no reason more than a decade ago to believe that such documents would be requested in litigation in 2009.

Nonetheless, should Microsoft discover any unproduced responsive documents, it will comply with its obligation to supplement its production. Even if Microsoft never identifies a single additional document responsive to the Interrogatories, however, any inference that such documents never existed or that any communications reflected in those documents never took place would be wholly inappropriate. Any evidentiary gaps in this case are entirely Novell's fault for waiting so long to bring its claims.

BACKGROUND

A. Documents Produced In This Action

As this Court is aware, Novell's lawsuit concerns events that took place between June 1994 and March 1996, during the brief period that Novell owned WordPerfect and the other office productivity applications that are the subject of its claims. Novell filed this lawsuit in November 2004—more than eight years after the end of the relevant period.

Microsoft agreed in 2005 to grant Novell access to all documents produced by Microsoft in prior competitor and consumer cases in this multidistrict litigation and in all state court cases raising factual allegations similar to those asserted by Novell in this action.[2] All these documents had previously been provided to plaintiffs'

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[2] Letter Agreement between Jeffrey M. Johnson and David B. Tulchin, dated July 14, 2005, attached as Ex. 1 to the Declaration of G. Stewart Webb, Jr. ("Webb Decl."), executed on April 22, 2009.

counsel in *Comes* v. *Microsoft Corp.*, No. CL 82311 (Polk County, Iowa), an action that was settled during trial in February 2007.

Pursuant to its agreement with Microsoft, Novell requested and obtained from the Court an order allowing it access to all documents in the possession of plaintiffs' counsel in *Comes*, consisting of approximately 23 million pages.[3] That vast library of documents was provided to Novell in a fully-searchable database (the "*Comes* database") in which at least a significant subset of the documents are coded with identifying information (*e.g.*, author, recipient, date).[4] The *Comes* database contains an enormous volume of documents 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.[5]

Microsoft has copies of the documents that are in the *Comes* database, but contrary to Novell's supposition, Microsoft (unlike Novell) does not have a single master database.[6] As a result, it is simply not the case that Microsoft can press a button and get documents responsive to the Interrogatories.[7] Novell's ability to locate such documents is on par with Microsoft's, if not better.

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3 Order of February 1, 2008 at 2, attached as Ex. 2 to Webb Decl.

4 Affidavit of Andrew E. Smith ("Smith Aff.") ¶ 5, attached as Ex. B to Novell's Motion to Compel Answers to Interrogatories.

5 Microsoft's Responses and Objections to Novell's Second Set of Interrogatories at 2, attached as Ex. E to Novell's Motion to Compel Answers to Interrogatories.

6 Affidavit of Beau H. Holt ¶¶ 2, 4, sworn to on April 22, 2009.

7 *See id.* ¶ 5.

In notable contrast to the fully-searchable collection of Microsoft documents possessed by Novell, Novell's production to Microsoft has been a mess. In fits and starts over the past 14 months, Novell has dumped millions of pages of documents on Microsoft with no discernible organization. The documents were not produced in a word-searchable format, and many of them are clearly non-responsive to Microsoft's requests for production or consist of unintelligible electronic gibberish. Yet despite retaining this vast quantity of material and knowing that it planned to bring this lawsuit, Novell failed to retain key relevant documents, including the source code for the applications that Novell now alleges were harmed by Microsoft's conduct.[8] Meanwhile, Novell has continued to produce documents in spite of the passing of the discovery cutoff date set by the Court, even though it has been aware of nearly all of Microsoft's document requests since July 2005, when Microsoft served its First Set of Requests for Production. For example, on March 20, 2009—two weeks after the close of fact discovery—Novell produced 97,000 pages of documents to Microsoft.[9] Novell provided no explanation for its late production, nor has it provided any representation to Microsoft as to whether its production is now complete.

B. Novell's Interrogatories And Microsoft's Responses

On January 26, 2009, Novell served its Second Set of Interrogatories on Microsoft, seeking the identification of documents concerning several discrete technical

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[8] *See* Novell's Objections and Responses to Microsoft's Second Set of Requests for Production at 5-7, attached as Ex. 3 to Webb Decl.

[9] Letter from Christopher Branch to Steven L. Holley, dated March 20, 2009, attached as Ex. 4 to Webb Decl.

issues related to the development of Windows 95. Among the documents sought by Novell are "all communications" between Microsoft and independent software vendors (ISVs) between October 1994 and July 1996 concerning the so-called "namespace APIs," as well as "all documents" concerning Microsoft's provision of "b-list" documentation of those APIs during the same period.[10] Novell also seeks the identification of (a) documents or communications concerning print functionality and various aspects of the messaging application programming interface (MAPI) in Windows 95, (b) documents concerning Microsoft's policies and procedures with regard to certain online forums and the NOVSUP email alias, and (c) studies prepared by or for Microsoft concerning Microsoft's Windows logo certification programs.[11] In response to the Interrogatories, Microsoft directed Novell to the *Comes* database, which Microsoft believes contains any potentially responsive documents still in existence.

ARGUMENT

I. Novell Can Identify Responsive Documents Within Microsoft's Previous Productions As Readily As Microsoft Could

To the extent that the Interrogatories call for identification of documents that Microsoft has already produced, Novell is wrong to suggest that it is Microsoft's

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[10] Interrogatory Nos. 21, 22. Microsoft disagrees with Novell's characterization of Microsoft's "allegedly open distribution" of information regarding certain namespace extension APIs in Windows 95 as "one of its primary defenses," Novell Brief at 2, or as "crucial to the ultimate determination of a crucial issue." *Id.* at 6. It is not necessary to resolve that disagreement on this motion, but Novell's efforts to paint this issue as central to the case are misguided.

[11] Interrogatory Nos. 23-29.

burden to identify them. Novell has had these documents for over a year[12] and can search them as readily as Microsoft could. The Federal Rules of Civil Procedure do not require Microsoft to perform such searches on Novell's behalf. Indeed, the "primary purpose or result" of Rule 33(d), which Microsoft relies on in directing Novell to the *Comes* database, "is to shift the time and cost burden, of perusing documents in order to supply answers to discovery requests, from the producing party to the party seeking the information." *SEC* v. *Elfindepan, S.A.*, 206 F.R.D. 574, 576 (M.D.N.C. 2002). Rule 33(d) permits a party to produce business records, including electronically stored information, in answer to interrogatories where, as here, "the burden of deriving or ascertaining the answer will be substantially the same for either party." Fed. R. Civ. P. 33(d). The responding party need only specify the records to 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)(1).

Novell's Interrogatories are precisely the type of interrogatories that are particularly suited to the application of Rule 33(d). In *United Oil Co.* v. *Parts Associates, Inc.*, 227 F.R.D. 404 (D. Md. 2005), the court stated that an interrogatory response directing the requesting party to documents already produced "is suited to those discovery requests requiring compilation or analysis, accomplished as easily by one party as another, or where neither side has clear superiority of knowledge or familiarity with the documents." *Id.* at 419. Here, each of the Interrogatories asks Microsoft to compile "all documents," "all communications" or "all studies" relating to particular subjects.

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[12] *See* Letter from Miriam R. Vishio to Joseph J. Reilly, dated March 31, 2008, attached as Ex. 5 to Webb Decl.

A court in this district approved a party's invocation of Rule 33(d) even where the documents to which the responding party referred were far less accessible than the documents to which Microsoft has referred Novell here. Like Novell, the defendants in *United States* v. *Rachel*, 289 F. Supp. 2d 688 (D. Md. 2003), had propounded very broad document requests and interrogatories on their opponent (the Government). *Id.* at 693. The Government responded to the document requests by producing 175 boxes and 10 filing cabinets of documents, as well as numerous computer diskettes, in "an unheated, unlit garage." *Id.* In its interrogatory responses, the Government referred the defendants to the documents produced "for such additional witnesses or information as may be derived or ascertained from such records as easily by the Defendants as by the United States." *Id.* Rejecting the defendants' challenge to the interrogatory responses, the court concluded that the Government's responses were appropriate because Rule 33(d) "allows a party the option to produce the records when the requesting party is as capable of reviewing documents and formulating a response to the interrogatory as is the answering party." *Id.*

It is clear that, as in *Rachel*, the burden on Novell of identifying documents responsive to its Interrogatories in the *Comes* database "will be substantially the same" as it would be for Microsoft. *See* Fed. R. Civ. P. 33(d). This test does not require that the effort necessary for both parties to obtain the requested information be "precisely equal." 8A Charles Alan Wright, Arthur Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2178 (2d ed. 1994). Despite Novell's attempt to do so, it "cannot deprive [Microsoft] of the Rule 33(d) option by the simple expedient of pointing out that any party is likely to be more at ease with its own records." *Id.*

In amending Rule 33(d) to explicitly permit responding to interrogatories by reference to electronically stored information, the Advisory Committee contemplated the exact type of response Microsoft has provided to Novell. The only additional requirement when directing a party to electronically stored information is that the responding party "ensure that the interrogating party can locate and identify it 'as readily as can the party served'" by providing any necessary technical support. Fed. R. Civ. P. 33 advisory committee's note (2006 Amendment). Novell makes no claim that it lacks the technical ability to search the *Comes* database for responsive documents.

Novell also admits that the *Comes* database is fully text-searchable and that in important parts of it, documents are coded with identifying information such as author, recipient, date and other fields.[13] Microsoft does not have any better mechanism at its disposal for finding documents pertaining to the topics of interest to Novell. Additionally, Novell has access to the lawyer who helped construct and maintain the *Comes* database over the course of "approximately five years" and who spends "at least four to five hours every day" using it.[14] Unlike the mountain of paper that Novell dumped on Microsoft late in the discovery process, the *Comes* database is hardly an "undifferentiated mass of records" as Novell contends.[15]

The situation presented is easily distinguishable from the cases relied on by Novell. In those cases, the records to be reviewed were not electronically searchable. *See, e.g.*, *Capacchione* v. *Charlotte-Mecklenburg Schools*, 182 F.R.D. 486, 490

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13 Smith Aff. ¶ 5.

14 *Id.* ¶ 1.

15 Novell Brief at 6.

(W.D.N.C. 1998) (hundreds of boxes of documents produced in hard copy); *T.N. Taube Corp.* v. *Marine Midland Mortgage Corp.*, 136 F.R.D. 449, 454 (W.D.N.C. 1991) (tens of thousands of documents produced on microfilm or microfiche). Here, even if Microsoft did possess some superior knowledge as to the organization of the documents produced to Novell—which it does not—such knowledge would be of no assistance in locating the documents that Novell seeks. Novell can locate any responsive documents in the *Comes* database at least "as readily as" Microsoft.

Finally, Novell asserts that Microsoft cannot rely on Rule 33(d) because it has not stated definitively that the *Comes* database contains documents responsive to the Interrogatories.[16] This argument misses the mark. Even if, as Novell contends, Rule 33(d) requires Microsoft to "show that a review of the documents will actually reveal answers to the interrogatories,"[17] it does not require Microsoft to affirm that the documents Novell seeks still in fact exist. If no documents responsive to a particular Interrogatory have been retained, the response to that Interrogatory would be that no such documents exist. The *Comes* database contains all potentially responsive documents identified to date. If any such documents are responsive to the Interrogatories, it is axiomatic that they would be found in the *Comes* database. Novell need look no further than the *Comes* database for answers to its Interrogatories.

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16 Novell Brief at 2, 4.

17 *Id.* at 4 (quoting *Elfindepan*, 206 F.R.D. at 576).

II. Microsoft's Inability To Identify Additional Responsive Documents Is Not Grounds For Concluding That Such Documents Never Existed

Novell seeks to impose a false choice on Microsoft: either produce a "complete and final list" of documents responsive to the Interrogatories or admit that such documents never existed. The documents sought by Novell were created more than eight years before Novell filed this lawsuit. Nothing can or should be inferred from the fact that Microsoft might not have retained such documents in the ordinary course of business, since the duty to preserve evidence does not arise until "a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri* v. *Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). Microsoft had no inkling that Novell was lying in the weeds, planning years later to direct laser-like focus on relatively mundane aspects of Microsoft's development of Windows 95.[18]

Novell's motion highlights the purported lack of documentary evidence for Microsoft's assertion that Microsoft provided software developers with "b-list" documentation of the namespace extension APIs, suggesting that such documentation was never provided. The evidence points unequivocally to the opposite conclusion. As Novell admits, several Microsoft witnesses have testified that this documentation was made available to software developers who requested it.[19] In fact, Novell marked a version of the documentation at the deposition of Satoshi Nakajima, the Microsoft

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[18] This stands in sharp contrast to Novell, which was aware of its intention to bring this lawsuit well before 2004 and was therefore under an obligation to retain all potentially relevant documents. It plainly failed to do so, but that is a topic for another day.

[19] Novell Brief at 5.

developer who created the namespace extension mechanism in Windows 95.[20] Further evidence of the documentation is provided by the document referenced in Novell's brief: *Comes* Defendant's Exhibit 3066.[21] This document includes an email in which Microsoft program manager Joe Belfiore states that he is forwarding a version of the documentation to computer-programming author Andrew Schulman as an attachment to the email.[22] *Comes* Defendant's Exhibit 3066 contains the text of that email as it was posted to an online forum; the original email and its attachment have not been found. In suggesting that the documentation was never made available to ISVs, however, Novell seems to imply that *Comes* Defendant's Exhibit 3066 is a fabrication. Novell has not provided a shred of evidence to that effect.

Microsoft has not located the documentation 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.[23] This does not provide any basis for inferring that the documentation never

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[20] *See* Deposition of Satoshi Nakajima (February 24, 2009) Ex. 6; *id.* at 75:19-20 (describing Ex. 6 as containing "the header file that described the set of APIs and interfaces for shell extensions").

[21] *See id.* at 2.

[22] Def.'s Ex. 3066, *Comes* v. *Microsoft Corp.*, No. CL 82311 (Polk County, Iowa), at 93, attached as Ex. 6 to Webb Decl. In response to Mr. Schulman's request for "documentation on how to create namespaces in Win95," *id.* at 95, Mr. Belfiore replies, "We have a preliminary doc that we've been giving to people who ask for it . . . . Here's the doc itself . . . ." *Id.* at 93.

[23] Novell makes the nonsensical argument that because Microsoft's witnesses recently testified regarding the b-list documentation, it should be "quite easy" to locate the documentation itself or evidence that the documentation was communicated to software developers. Novell Brief at 5. It does not follow from the fact that a witness is able to testify as to the existence of documents over 13 years ago that the documents still exist today.

existed or that it was not made available to software developers. To the contrary, Microsoft is free to present testimony about the documentation and emails and other documents that refer to the documentation. Indeed, Microsoft may introduce secondary evidence to prove the contents of the documentation itself. *See Vodusek* v. *Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("When a proponent cannot produce original evidence of a fact because of loss or destruction of evidence, the court may permit proof by secondary evidence."). The same reasoning applies to the other categories of documents requested in the Interrogatories.

In the guise of a motion to compel, Novell is asking the Court to issue some sort of preclusion order that is entirely unjustified. There is ample evidence from which a finder of fact could conclude that documents no longer available did exist in the past, with whatever consequences that conclusion may have for Novell's claims in this case.

III. Novell's Requested Relief Conflicts With Normal Procedures Governing Pretrial Disclosures

Finally, Novell's motion should be denied because it seeks to impose constraints on Microsoft that find no support in the Federal Rules of Civil Procedure. Novell "seeks to bind Microsoft to a complete and final list" of the supposedly "crucial" communications requested in the Interrogatories or, in the alternative, to require Microsoft "to acknowledge expressly that it cannot identify any communications in support of its defenses."[24] This demand is procedurally improper in two respects.

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[24] Novell Brief at 2-3.

First, binding Microsoft to a "complete and final" list of responsive documents at this time would be inconsistent with the ongoing duty imposed on parties by Rule 26(e) to supplement discovery responses if additional information becomes available. *See* Fed. R. Civ. P. 26(e)(1). Ironically, Novell's own actions betray an unwillingness on its part to be bound to any final set of documents. Not only did Novell send out its most recent production of documents on March 20, 2009—two weeks after the close of fact discovery—but Novell still has not certified that its production is complete.

Second, it would be grossly premature at this stage of the proceedings to require Microsoft to identify "a complete and final list" of documents it intends to rely on in defending against Novell's claims.[25] The identification of trial exhibits is governed by Rule 26(a)(3). Under that Rule, a party is not required to identify documents it may seek to introduce into evidence until 30 days before trial, unless the Court orders otherwise. Fed. R. Civ. P. 26(a)(3)(B). Moreover, under the Local Rules of this district, "[t]he Rule 26(a)(3) disclosures are required to be made in the pretrial order." *Marens* v. *Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 42 (D. Md. 2000) (citing D. Md. Loc. R. 106.4.c).[26] The Court has not yet set a date for the pretrial conference or submission of a pretrial

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[25] Surely, Novell does not believe it should be precluded from relying on documents not identified in its response to Microsoft's interrogatories.

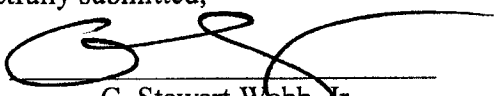
[26] In *Marens*, the plaintiff served interrogatories requesting that the defendant identify its trial witnesses and exhibits. In denying the plaintiff's motion to compel answers to these interrogatories, the court held that "[g]iven the breadth of plaintiff's other discovery requests, there is no compelling reason why he should have the information regarding witnesses and exhibits any earlier than they would be required by Rule 26(a)(3) and Local Rule 106." 196 F.R.D. at 42. The same reasoning applies to Novell's effort to hamstring Microsoft in its trial preparation.

order, and dispositive motions are not scheduled to be argued until March 2010. With trial far more than a year away, Novell has no basis to insist that Microsoft commit itself to the documents it will rely on at that trial.

CONCLUSION

The Court should deny Novell's Motion to Compel Answers to Interrogatories.

Respectfully submitted,

By: 

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