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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
RESPONSE TO NOVELL'S LETTER
CONCERNING DOCUMENTS NOT IN
EVIDENCE

Civil No. 2:04 CV 1045
Honorable J. Frederick Motz

November 21, 2011

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Microsoft submits this memorandum in response to Novell's November 20, 2011 submission concerning correspondence between Bob Frankenberg and Bill Gates and concerning Novell's request to introduce PX 317 and PX 320 into evidence ("Novell's Letter"). Novell rested its case on Thursday, November 17, at which time Microsoft moved for judgment as a matter of law. During oral argument on Microsoft's motion on Friday, November 18, Novell's counsel twice alluded to several documents not in evidence, prompting the Court to inquire as to their contents. Novell's Letter misdescribes these documents, and its request to introduce PX 317 and PX 320 into evidence should be denied.

First, Novell's Letter asserts that letters exchanged between Bob Frankenberg and Bill Gates between June 23, 1995 and September 29, 1995 (DX 215D-DX 215G) are "plain that Mr. Frankenberg raised issues regarding Microsoft's undocumented calls and interfaces in 1995, though Mr. Gates refused to address them." (Novell's Letter at 3.) These letters between Frankenberg and Gates discuss a variety of then-emerging issues between the two companies, but, as former Novell CEO Robert Frankenberg admitted during cross examination, the withdrawal of support for the namespace extension APIs was not one of them. (Testimony of Robert Frankenberg ("Frankenberg"), Nov. 7, 2011 Trial Tr. at 1119.)¹ This may explain why Novell chose not to seek to introduce this correspondence during Frankenberg's testimony at trial.

Second, Novell's Letter asserts that two emails (PX 317 and PX 320) written about nine months *after* Microsoft's October 1994 decision to withdraw support for the namespace extension APIs are "evidence that the most senior executives in Novell's Business

¹ The relevant excerpts of Robert Frankenberg's trial testimony are attached as Exhibit A to the Declaration of Steven L. Holley ("Holley Decl."), executed on November 21, 2011.

Applications Division knew of the issues plaguing [sic] the development of its Windows 95 suite.” (Novell’s Letter at 3.) These two documents were created by Novell in an attempt to foment litigation by the Department of Justice (“DOJ”) against Microsoft. The Court has previously denied Novell’s request to introduce these documents into evidence. Novell now moves again to introduce these documents into evidence or, in the alternative, for a curative jury instruction “that there are certain documents, which cannot be admitted for legal reasons, that indicate that the senior executives in Novell’s Business Applications Division knew of the issues surrounding the namespace extension APIs and the decision to develop a custom file open dialog.” (Novell’s Letter at 3.)

The Court should deny both requests. These two documents were created in July 1995 for the express purpose of gathering information on “what we have to offer” the DOJ, in anticipation of a DOJ enforcement action against Microsoft. (PX 317, Holley Decl. Ex. B.) These documents were not created in the ordinary course of Novell’s business, but are instead ‘talking points’ that Novell created to encourage the DOJ to sue Microsoft, one of Novell’s chief competitors. As Microsoft previously argued to the Court, these documents are inadmissible hearsay and unduly prejudicial.

Furthermore, the “curative instruction” Novell seeks is false and misleading. Neither document shows that any of Novell’s senior executives was aware of Microsoft’s withdrawal of support for the namespace extension APIs in or around October 1994, or that any senior Novell executive participated in Harral and Richardson’s decision to create Novell’s advanced file open dialog. In fact, these documents are evidence that the first time any Novell executive became interested in Microsoft’s decision was in July 1995—more than nine months after Microsoft made its decision to withdraw support for the namespace extension APIs.

BACKGROUND

The Frankenberg/Gates Correspondence: Novell's counsel contended during oral argument on November 18 that there are letters showing that Bob Frankenberg complained to Bill Gates concerning Microsoft's withdrawal of support for the namespace extension APIs.

There was a great deal of argument by Mr. Tulchin that there were no complaints with respect to Mr. Frankenberg complaining to Mr. Gates. That is not the record in the case. The complaints from Mr. Frankenberg, which he testified were both oral and in writing, came after the de-documentation. To him—and this is the highest executive in the company. He is at 30,000 feet. He's not a developer on the ground with namespace extensions. This was nothing more than another instance of Microsoft having undocumented APIs in interfaces that Microsoft's own applications were using. And he complained bitterly to Mr. Gates about these matters at the time over and over again, both orally and in writing.

(Nov. 18 Trial Tr. at 2577.) Novell's Letter now states that that DX 215D-215G are “plain that Mr. Frankenberg raised issues regarding Microsoft's undocumented calls and interfaces in 1995, though Mr. Gates refused to address them.” (Novell's Letter at 3.) Yet precisely as Bob Frankenberg testified (Frankenberg, Nov. 7 Trial Tr. at 1118-19), none of the letters address the namespace extension APIs.

Only one Frankenberg letter even addresses the subject of APIs at all. In his June 23, 1995 letter to Gates, Frankenberg writes to “identify some of the more important issues between our companies and begin the process of trying to settle them.” (DX 215D, Holley Decl. Ex. C.) Frankenberg lists four items that “Novell expects to receive to settle these issues,” including the following:

(1) EQUAL ACCESS: - Microsoft would make available to Novell those OS [Operating System] interfaces (including application programming interfaces, service provider interfaces, binary interfaces, etc.), calls hooks, features, documentation or code of any type which might interact with Novell's software

products at the same time and same level of specificity as those things made available to Microsoft's own applications programmers.

(DX 215D at 1, 3.) In the portion of DX 215D that Novell focuses on (Novell's Letter at 2), Frankenberg requested that Microsoft provide Novell, on a going-forward basis, with access to all of Microsoft's technical information concerning all interfaces, including all APIs, in Microsoft operating systems that might interact with all Novell software products at the same time and level of specificity as given to Microsoft's applications developers.²

Novell implies that Frankenberg was referring to Microsoft's decision to withdraw support for the namespace extension APIs in Windows 95, and was asking Microsoft to reverse its October 1994 decision—a decision made more than eight months earlier. But at trial, Frankenberg testifies that none of his correspondence with Gates referred to complaints about the withdrawal of support for the namespace extension APIs:

Q. And do you happen to recall any letter that you sent to Mr. Gates which mentions the namespace extension APIs?

A. No, not specifically.

Q. Have you seen any such letter?

A. No.

* * *

Q. Have you seen any e-mail that you ever sent to Mr. Gates

² Novell suggests that DX 215F pertains to the withdrawal of support for the namespace extension APIs because Frankenberg's August 21, 1995 letter—written three days before the release of Windows 95—states that “the equal access issue must be addressed. Novell, as well as other software applications companies, should be given access to Microsoft's operating system equal to that of your applications developers.” (DX 215F, Holley Decl. Ex. D.) This letter, which alludes to DX 215D, relates to whether Microsoft was obligated to provide all of its technical information concerning Windows 95 to its competitors. Like DX 215D, it does not reference Microsoft's decision to withdraw support for the namespace extension APIs.

which made reference to his decision to withdraw support for the namespace extension APIs?

A. No, I have not seen an e-mail from me. I saw an e-mail from Bill Gates to a number of his people, but not from me.

(Frankenberg, Nov. 7 Trial Tr. at 1119.)³ On redirect examination, Novell's counsel elicited testimony that Frankenberg complained to Gates orally concerning undocumented APIs, and that these undocumented APIs by implication would have included the namespace extension APIs "amongst many others." (Frankenberg, Nov. 8 Trial Tr. at 1242, 1244.) But Frankenberg never testified that his letters specifically reference, or intended to reference, the namespace extension APIs. Novell chose on re-direct to forego using the very witness to which it now points.

The DOJ Inquiry E-mails:

Novell's counsel contended during the oral argument on November 18 that Bruce Brereton—who has never been called as a witness by Novell—learned of Microsoft's withdrawal of support for the namespace extension APIs and was involved in development choices made by Harral and Richardson.

As as Your Honor knows, Mr. Brereton was fully aware of this problem. In fact, his name appears on the e-mails with respect to the complaints about this precise issue to the Department of Justice when the Department of Justice came to us in 1995 to ask what is the bully in the classroom doing to you with respect to applications. Now Your Honor didn't allow that evidence in, but I think it is the height of hypocrisy for Mr. Tulchin to at least argue to you—maybe he can argue it to the jury because they don't know, they are not going to know—that Mr. Brereton didn't know anything about this, and apparently wasn't involved in any of the decisions involving this, because the record, which Your Honor

³ Mr. Frankenberg was shown these letters before he testified. At trial, he explained that "[i]n the documents that I have reviewed prior to trial, there are letters and references to meeting dates where those things were discussed." (Frankenberg, Nov. 7, 2011 Trial Tr. at 1119.)

would not let us put in, was Mr. Brereton, the highest person in this stack, was fully aware of this problem and was, in fact, complaining to the Department of Justice at the time.

(Nov. 18 Trial Tr. at 2594.) Novell's Letter further contends that two internal Novell DOJ Inquiry e-mails, PX 317 and PX 320, are "evidence that the most senior executives in Novell's Business Applications Division knew of the issues plaguing [sic] the development of its Windows 95 suite." (Novell's Letter at 3.) These contentions are disproven by the contents of these e-mails, which confirm the Court's understanding that Novell has not identified any document showing that any Novell executive was ever consulted concerning this allegedly huge issue at the time the supposed decision was taken.

PX 317 is a July 11, 1995 e-mail, entitled "DOJ Inquiry," in which Ryan Richards, Novell's former Associate General Counsel,⁴ informed Brereton and several others at Novell that the DOJ sought "Novell's input on any concerns we have, particularly from our Applications Group, relating to Windows 95." (PX 317.) Richards "suggest[s] those who will participate [in a call with the DOJ] get together tomorrow, if possible, and determine what we have to offer." (*Id.*) Two days later, Brereton responds with a list of "issues that were raised from our development team," related to the namespace extension APIs and other concerns not at issue in this action. (*Id.*) Brereton writes that "MS removed the ability to hook into the Explorer. That is why we are doing our Open Dialog/Name space browser from scratch. I also

⁴ Both PX 317 and PX 320 include the handwritten initials "RR" of Ryan Richards. Mr. Richards filed an affidavit in this action stating that "[s]ince at least 1992—when I was working for WordPerfect—I had been investigating Microsoft's unlawful conduct and had determined that litigation was the likely avenue to seek redress against Microsoft." (Affidavit of Ryan Richards, sworn to on April 23, 2009, at 2 ¶ 5, Holley Decl. Ex. E.) Novell's in-house counsel testified that "[t]here [wa]s, and there has been maintained, a file of documents that has been referenced as Microsoft's bad acts," including documents "that go back to probably about the 1994 time period after I had joined Novell, which would have been the latter half of 1994." (Oct. 30, 2008 Rule 30(b)(6) Deposition of Novell, Inc. by James F. Lundberg at 51:8-53:4, Holley Decl. Ex. F.)

don't know if MS apps are going under the covers and extending the explorer themselves.” (*Id.*)⁵ PX 317 also states that, as Microsoft has asserted in this action, its decision to withdraw support for the namespace extension APIs was undertaken “because they [Microsoft] were not ready to publish how to do shell integration with NT/Cairo and they did not want to get us going down a road they were unwilling to support later.” (*Id.*) The e-mail thus confirms Novell’s understanding about the legitimate reasons Microsoft had for withdrawing support for the namespace extension APIs. Nowhere in this document does Brereton state that any Novell executive—including Messrs. Rietveld, Moon, Calkins and Mella—was ever involved in the decision to attempt to write Novell’s advanced file open dialog. Microsoft lodged objections to PX 317 on grounds of hearsay, embedded hearsay, improper opinion, foundation, relevance and Rule 403.

PX 320, entitled “DOJ Inquiry Update,” is a July 20, 1995 email from Mr. Richards to Mr. Bradford that provides “[a]n update on the DOJ inquiry.” Mr. Richards explains that “I met with Mark Calkins and a couple of our GroupWare developers the end of last week to gather information that we think might be useful to the DOJ.” (PX 320, Holley Decl. Ex. G.) After summarizing the four issues gathered for presentation to the DOJ, Richards explains that “[o]ur next step is a conference call with” the DOJ, Novell’s outside counsel and “those here at Novell who know most about these issues.” (*Id.*) Microsoft lodged objections to PX 320 on grounds of hearsay, embedded hearsay, foundation, improper opinion, relevance and Rule 403.

⁵ Novell contends that “[t]here is no criticism in PX 317 about the decision to rebuild the file open dialog ‘from scratch,’ indicating that the most senior executives in Novell’s Business Applications Division approved of the decision.” (Novell’s Letter at 3.) An e-mail written for the purpose of gathering ammunition to feed to the DOJ, nine months after Microsoft’s October 1994 decision, does not support the contention that Novell’s executives were aware of, and agreed with, Harral’s decision to create an advanced file open dialog.

Novell previously tried to introduce these documents into evidence and failed. On October 23, Novell renewed its motion to overrule Microsoft's objections to these documents based on the theory that Microsoft's counsel "opened the door" in its opening statement by stating Novell never complained to anyone, rather than that never complaining to Microsoft, about the withdrawal of support for the namespace extension APIs. On October 27, the Court denied Novell's motion, explaining that the Court and jury understood that "the opening statements talked about complaints to Microsoft" and therefore did not open the door to these documents. (Oct. 27 Trial Tr. at 960-62.)

ARGUMENT

Novell's Has No Basis to Introduce the DOJ Inquiry E-mails Into Evidence.

PX 317 and PX 320, should not be admitted because they are inadmissible hearsay, unduly prejudicial to Microsoft and fail to support Novell's counsel's assertions.

First, these documents plainly were not created in the ordinary course of Novell's business but were created for the express purpose of gathering information on "what we have to offer" the DOJ, in response to an inquiry from the DOJ concerning "any concerns we have" that may be of interest to the DOJ in anticipation of the DOJ bringing a lawsuit against Microsoft. (PX 317.) These e-mails are self-serving 'talking points' that Novell created to encourage the DOJ to sue Microsoft. PX 317 and PX 320 should therefore be excluded by the Court as hearsay because they are not "business records" under Federal Rule of Evidence 803(6).

The Tenth Circuit has stated that "[t]he rationale behind this exception is that business records 'have a high degree of reliability because businesses have incentives to keep accurate records.'" *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008) (quoting *United States v. Gwathney*, 465 F.3d 1133, 1140 (10th Cir. 2006) (holding Western Union response to DEA subpoena inadmissible under Rule 803(6)). Documents like these, prepared in anticipation

of litigation, do not merit any presumption of accuracy because “[i]t is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business.” *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341-42 (10th Cir. 1995) (holding that admission of a lawyer-drafted letter “was error, for the letter was written in anticipation of litigation and therefore was not admissible as a business record within 803(6)”). These documents are inadmissible hearsay and are no less objectionable now than they were a month ago when the Court first excluded them.

Second, PX 317 and PX 320 are inadmissible because whatever marginal probative value they may have is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403. It strains credulity to suggest that information collected by a Novell in-house lawyer, in order to assist a DOJ investigation of Microsoft—one of Novell’s principal competitors—is anything other than an attempt to foment litigation by the DOJ against Microsoft. Thus, the discussion of Novell’s supposed concerns pertaining to the namespace extension APIs and a host of other concerns not at issue in this action is certain to deceive the jury, confuse the issues and cause undue prejudice to Microsoft.

Third, Novell’s request for a curative instruction stating “that there are certain documents, which cannot be admitted for legal reasons, that indicate that the senior executives in Novell’s Business Applications Division knew of the issues surrounding the namespace extension APIs and the decision to develop a custom file open dialog” (Novell’s Letter at 3) makes no sense and is itself false and misleading. PX 317 and PX 320 do not show that any Novell executive was informed by Novell’s developers that the decision to withdraw support for the namespace extension APIs had or might have an adverse impact on Novell’s development

efforts, nor that any Novell executive was consulted by anyone before the software developers in Novell's shared code group spent almost a year attempting to write an advanced file open dialog.

On the contrary, these two e-mails were created more than nine months after Microsoft's October 1994 decision to withdraw support for the namespace extension APIs. PX 317, Brereton's July 13, 1995 e-mail concerning the "DOJ Inquiry" lists "issues that were raised from our development team," concerning the namespace extension APIs and other unrelated concerns. Novell still has pointed to no evidence to show that any of its senior executives—Messrs. Rietveld, Moon, Calkins and Mella—were ever made aware of Microsoft's withdrawal of support for the namespace extension APIs in October 1994, or in the subsequent months, or that Brereton had any involvement in Harral and Richardson's decision to create Novell's advanced file open dialog. Moreover, although PX 317 was written for the purpose of finding complaints about Microsoft to share with the DOJ, Brereton acknowledges that Microsoft's decision was made because Microsoft was "not ready to publish how to do shell integration with NT/Cairo and they did not want to get us going down a road they were unwilling to support later." (*Id.*)

PX 320, a Ryan Richards e-mail dated July 20, 1995, states that he met with Mark Calkins and a couple of our GroupWare developers the end of last week to gather information that we think might be useful to the DOJ." Again, it does not show that Calkins—much less Frankenberg, Rietveld, Moon or Mella—was aware, at any point before July 13, 1995, that Microsoft "remov[ed] hooks and integration features in Win95 against which we had been coding for some time." (PX 320.) Both these e-mails highlight the fact that the only documents that Novell can point to show that any of Novell's senior executives or Brereton was aware of the namespace extension API issue are documents created more than nine months after

Microsoft's decision and selectively retained in the Ryan Richards "bad acts" file. They do not support Novell's request for its proposed instruction.

CONCLUSION

Microsoft requests that the Court deny Novell's request to admit PX 317 and PX 320 into evidence.

Dated: November 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of November, 2011, I filed true and correct copy of the foregoing Microsoft's Memorandum In Response to Novell's Letter Concerning Documents Not in Evidence using the CM/ECF system, which will send notification of such filing to the following:

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