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**UNITED STATES DISTRICT COURT
for the District of Utah
Central Division**

Novell, Inc.,
Plaintiff,

v.

Microsoft Corporation,
Defendant.

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NOVELL'S REPLY MEMORANDUM IN
SUPPORT OF ITS MOTION TO LIMIT THE
TESTIMONY OF JOHN BENNETT

Case No. 2:04-cv-01045-JFM
Hon. J. Frederick Motz

Novell, Inc. (“Novell”) respectfully submits this Reply Memorandum in further support of its Motion to Limit the Testimony of John Bennett.

DISCUSSION

Microsoft’s Opposition Memorandum does not dispute the fact that Dr. Bennett’s expert report says absolutely nothing about Dr. Bennett having (in the words of Microsoft’s counsel) “actually torn apart the versions of Microsoft’s applications to see whether they ever used these name space extension APIs.” October 6, 2011 Tr. at 68. Because Dr. Bennett was required to disclose any such work in his expert report under Rule 26, and did not do so, Rule 37(c) requires that Dr. Bennett not be permitted to testify about it at trial unless the failure to disclose was “substantially justified” or “harmless.” Microsoft has not satisfied this standard.

Microsoft first argues that Dr. Bennett should not be barred from testifying about the work that was not disclosed in his expert report on the ground that Dr. Bennett’s conclusion that Microsoft Office applications did not use the namespace extension APIs “does not require extensive analysis” and “is obvious from installing and using Microsoft Office 95 and Office 97.” Microsoft Opposition at 1. Assuming *arguendo* that this were the case, this would in no way justify the failure to disclose the basis for Dr. Bennett’s opinion in his expert report. An expert report is required “to state ‘the testimony the witness is expected to present during direct examination.’” *Cohlma v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 430 (N.D. Okla. 2008) (quoting 1993 Advisory Committee Notes to Rule 26). There is no exception to this rule for bases for expert opinions that are supposedly “obvious.” Indeed, if it is true, as Microsoft implies, that no technical expertise is necessary to reach this opinion, then it is not a proper subject for expert testimony in the first place.

Second, Microsoft argues that its failure to disclose the bases for Dr. Bennett's opinion in his expert report is excused by his having revealed some of the information not contained in his report at his deposition. But the law is clear that "Rule 26(a)(2) does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony." *Scholl v. Pateder*, Civil Action No. 1:09-cv-02959-PAB-KLM, 2011 WL 3684779, at *2 (D. Colo. Aug. 22, 2011) (quoting *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008)); accord *Coumerilh v. Tricam Indus., Inc.*, Civil Action No. 05-cv-02510-MEH-CBS, 2007 WL 470621, at *2 (D. Colo. Feb. 7, 2007); *Dixie Steel Erectors, Inc. v. Grove U.S., L.L.C.*, No. CIV-04-390-F, 2005 WL 3558663 (W.D. Okla. Dec. 29, 2005).

Third, Microsoft argues that, because the expert report stated Dr. Bennett's opinion that Microsoft Office applications did not call the namespace extension APIs, it did not have to disclose the work Dr. Bennett did to reach that opinion. This is clearly not the law. Rule 26, by its express terms, required Dr. Bennett's expert report to provide "a complete statement of all opinions the witness will express and the basis and reasons for them," as well as "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B) (emphasis added) "Expert reports must include 'how' and 'why' the expert reached a particular result, not just his conclusory opinion." *Cohlma*, 254 F.R.D. at 430.

Fourth, Microsoft argues that its failure to disclose Dr. Bennett's work in the expert report was justified because Dr. Bennett only performed the work subsequent to the filing of the report, in response to criticisms by Dr. Alepin regarding Dr. Bennett's failure to conduct any technical analysis. This is also not a valid justification. "If the proponent of expert testimony desires to have the expert do significant additional work after the opposing party has disclosed its expert case, that matter should promptly be raised with the court." *Dixie Steel Erectors*, 2005

WL 3558663, at *8. “[S]elf-help is not a remedy available to a litigant desirous of sending its expert back to the drawing board or back into the laboratory to do significant additional work after the original report has been rendered.” *Id.*

The cases on which Microsoft relies for the proposition that Dr. Bennett should be permitted to testify beyond the scope of his expert report are readily distinguishable. In *Nadler v. West Park Hospital*, 254 F.3d 1168, 1177-78 (10th Cir. 2001), the Tenth Circuit ruled that the failure to disclose the basis for an expert’s testimony in his report did not warrant granting a new trial, largely because the party seeking the new trial had failed to request a continuance to address the expert’s testimony, “which likely would have been possible” and not disruptive of the trial under the circumstances of the case. *Id.* at 1178. “Thus, plaintiffs never made what likely would have been a successful attempt to cure (or at least mitigate) the alleged prejudicial impact of [the expert’s] testimony.” *Id.* Here, by contrast, there is no opportunity to cure or mitigate the prejudicial impact of the failure to disclose the bases for Dr. Bennett’s testimony in his report – at least without seriously disrupting the trial.

Also misplaced is Microsoft’s reliance on *Gillum v. United States*, 309 F. App’x 267, 270 (10th Cir. 2009). In *Gillum*, the Tenth Circuit held that the district court’s ruling excluding an expert witness’ entire testimony for failure to provide an adequate expert report, resulting in the grant of summary judgment against the party offering the expert, was too extreme a sanction. In reaching this conclusion, the Tenth Circuit emphasized the fact that, when the inadequacy of the expert’s report became clear at the expert’s deposition, the party made the expert available for a second deposition before the end of the discovery period, thereby providing an ability to cure any prejudice. “By no means do we condone the provision of inadequate expert reports and begrudging snippets of information, and we caution that parties who behave in this manner act to

their peril. Under the circumstances of this case, however, the total exclusion of [the expert's] testimony, which necessarily resulted in the grant of summary judgment for the United States, was too extreme a sanction." *Id.* Here, by contrast, Novell does not seek the exclusion of all of Dr. Bennett's testimony, but merely a portion of that testimony. Therefore, the *Gillum* court's concerns are not implicated here.

In sum, Microsoft cannot demonstrate that its failure to comply with Rule 26 was substantially justified or harmless. Novell is entitled to rely on Dr. Bennett's expert report as a definitive statement of the expert's direct testimony. The significant prejudice that would result if Dr. Bennett is permitted to testify regarding bases for his opinion, and work performed by him, that were never disclosed in his expert report is readily apparent. Such prejudice cannot be cured by cross-examination at trial. *See Poole v. Milwaukee Elec. Tool Corp.*, No. CIV-05-950-D, 2007 WL 7024595, at *3 (W.D. Okla. Sept. 28, 2007). As in *Dixie Steel Erectors*, Microsoft's highly experienced attorneys and expert knew what Rule 26 required, and their violation of Rule 26 did not result from "some oversight or unavoidable misfortune." Therefore, pursuant to Rule 37, this Court should preclude Dr. Bennett from testifying beyond the scope of his expert report.

Finally, in response to Novell's argument that Dr. Bennett should not be permitted to testify regarding the material in his expert report that is not the proper subject for expert testimony because it requires no technical expertise, Microsoft asserts that it "has no intention of eliciting testimony from Professor Bennett that exceeds the scope of his technical expertise." Microsoft Opposition at 10. Therefore, this Court should bar Dr. Bennett from testifying regarding the sections of his report, such as those entitled "WordPerfect Coding for Windows 95 had not Started" and "No High Level Complaints to Microsoft," which contain no technical

analysis or explanation but simply repeat Microsoft's erroneous factual arguments on these subjects.

CONCLUSION

For the foregoing reasons, and those set forth in Novell's original Memorandum, this Court should grant Novell's motion and preclude Dr. Bennett from testifying as to matters outside the scope of his expert report, and matters requiring no technical expertise.

Dated: December 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

By: /s/ Maralyn M. English
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