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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
SUPPORT OF ITS MOTION TO
PRECLUDE IMPROPER REBUTTAL

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

December 11, 2011

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Although Novell has represented to the Court that it intends to present a rebuttal case on Tuesday, December 13, it refused—despite repeated requests by Microsoft (going back to Monday, December 5)—to identify the witnesses it intended to call on rebuttal until this morning, December 11, at 7:15 a.m. Even then, Novell’s counsel failed to be straightforward, saying in an email message: “For rebuttal, Novell may call Messrs. Harral, Richardson and Gibb.” (Dec. 11 Email from John Schmidlein to Sharon Nelles, attached as Exhibit A to the Declaration of Steven L. Holley in Support of Microsoft’s Motion to Preclude Improper Rebuttal (“Holley Decl.”).) This is precisely the sort of trial by ambush that the Federal Rules of Civil Procedure were designed to prevent. In any event, this cannot be proper rebuttal and should be disallowed.

The three witnesses on Novell’s “may call” list of rebuttal witnesses each already testified at great length at trial. Under clear Tenth Circuit authority, rebuttal evidence is properly excluded where “the Plaintiffs should reasonably have anticipated the evidence they sought to rebut.” *Koch v. Koch Indus.*, 203 F.3d 1202, 1225 (10th Cir. 2000). The only proper purpose of allowing “rebuttal” evidence is “to permit a litigant to counter new, unforeseen facts brought out in the other side’s case.” *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999). Rebuttal is not a vehicle for a plaintiff to get the final word on “hotly contested” matters that already have been addressed at trial. *Id.*; *see also Koch*, 203 F.3d at 1225.

No issues were raised by Microsoft’s witnesses that were not set forth in Microsoft’s pretrial submissions, addressed during Microsoft’s opening statement or raised in Microsoft’s cross-examinations of Novell’s witnesses. Indeed, every single matter addressed by Microsoft at trial was previewed to Novell weeks before the trial

started or during the opening statement. (*See, e.g.*, Dkt. No. 151 ([Proposed] Pretrial Order, filed Sept. 27, 2011); Oct. 18, 2011 Trial Tr. at 86-122, 126-141 (Microsoft’s Opening Statement).) Likewise, every witness who testified during Microsoft’s case was disclosed on Microsoft’s witness list, which Microsoft provided to Novell on July 25, 2011. (July 25, 2011 letter from Steven Holley to Jeffrey Johnson providing Microsoft’s trial witness list, attached as Exhibit B to Holley Decl.) Novell can claim no surprise.

A rebuttal case might be proper had Microsoft made unanticipated arguments in defending against Novell’s claim that withdrawal of support for the namespace extension APIs was anticompetitive and caused harm both to Novell’s office productivity applications and to the PC operating system market. But that is not what happened. For example, during its opening statement, Microsoft described in detail its theory of the case, including the fact that that problems getting Quattro Pro out the door prevented PerfectOffice for Windows 95 from being released at or near the time that Microsoft released Windows 95. (Microsoft’s Opening Statement, Oct. 18, 2011 Trial Tr. at 131-134.) Seven witnesses called by Novell or Microsoft—Messrs. Harral, Gibb, Frankenberg, Bushman, Larsen, Ford and LeFevre—testified about Quattro Pro delays.

It is not proper “rebuttal” for Novell to recall witnesses in an attempt to explain away the testimony of Microsoft’s witnesses about Quattro Pro delays. If Novell’s witnesses had more to say about this (or any other) subject, they should have said it in Novell’s case-in-chief so that Microsoft could have taken account of that testimony *before* Microsoft put on its case. The fact that Microsoft has presented overwhelming evidence to discredit every aspect of Novell’s theory is not a license for Novell to recall some or all of Messrs. Harral, Richardson and Gibb. If Novell “held

back” evidence in order to get the last word at trial, such gamesmanship should not be tolerated.

Rebuttal is appropriate only when necessary to respond to unanticipated evidence, not to give a plaintiff the chance to remedy a “defect” in its case through rebuttal testimony. *Page v. Barko Hydraulics*, 673 F.2d 134, 140 (5th Cir. 1982). And Microsoft is, of course, entitled to proper notice and an opportunity to be heard regarding any proposed rebuttal evidence. Because there has been neither unanticipated evidence nor proper notice, the Court should exercise its broad discretion to preclude whatever “rebuttal” evidence Novell intends to present.

ARGUMENT

A. The Court Should Preclude Any Rebuttal Evidence That Does Not Address Unanticipated Facts Presented by Microsoft.

Federal Rule of Evidence 611(a) provides that “[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” This Rule has been interpreted to give courts discretion to limit or preclude rebuttal “in order to insure that the evidence unfolds coherently, without unfair surprise and needless consumption of time.” 28 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 6164 (1st ed. 2011 update).

Courts preclude rebuttal that “merely repeats matters already adequately covered during the plaintiff’s or prosecution’s case-in-chief.” *Id.* Where evidence offered in rebuttal is the type that the plaintiff reasonably should have anticipated should

have been included in plaintiff's case-in-chief, then it is a proper exercise of the Court's discretion to exclude such evidence. "This discretion is appropriately exercised to prevent the plaintiff or prosecution from 'sandbagging' by withholding evidence until the defendant rests and might be unable to mount an effective response." *Id.*

To prevent unfair "sandbagging," courts in the Tenth Circuit have precluded rebuttal evidence where a plaintiff failed to call a witness or present evidence during its case-in-chief that it reasonably should have known it should introduce at that time. *See, e.g., Koch*, 203 F.3d at 1224; *Pandit v. American Honda Motor Co., Inc.*, 82 F.3d 376, 382 (10th Cir. 1996) (affirming exclusion of rebuttal evidence where evidence was available in case-in-chief and testimony sought to be rebutted was not unexpected); *Sanchez v. Safeway Stores, Inc.*, 451 F.2d 998, 1000 (10th Cir. 1971) (affirming preclusion of rebuttal evidence where evidence not presented during case-in-chief for tactical reasons). Exclusion of plaintiff's rebuttal evidence is also appropriate where a plaintiff could have addressed issues raised in defendant's case through cross-examination of defendant's witnesses. *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 663 (10th Cir. 1991) (affirming preclusion of rebuttal evidence where inconsistencies in testimony should have been addressed on cross-examination).

The purpose of rebuttal is "to permit a litigant to counter new, unforeseen facts brought out in the other side's case." *Faigin*, 184 F.3d at 85 (affirming exclusion of rebuttal expert testimony where plaintiff "knew through pretrial discovery that this aspect of the case would be hotly contested"). As the court in *Faigin* explained, "[w]hen a party knows that a contested matter is in the case, yet fails to address it in a timely fashion, he scarcely can be heard to complain that the trial court refused to give him a second nibble

at the cherry.” *Id.* “Ordinarily, rebuttal evidence may be introduced only to counter new facts presented in the defendant’s case in chief. Such new facts might include ‘surprise’ evidence presented by the defendants.” *Allen v. Prince George’s County*, 737 F.2d 1299, 1305 (4th Cir. 1984) (affirming exclusion of new statistics offered by plaintiff on rebuttal where plaintiff could have elected to present such statistics in its case-in-chief) (citation omitted).

B. Novell Should Not Be Permitted To Recall Its Trial Witnesses.

Novell told Microsoft this morning (December 11) only that it *may* call Messrs. Harral, Richardson and Gibb, each of whom already has testified at great length and addressed every subject about which Novell inquired.¹ Nothing arose during Microsoft’s case that could not have been addressed in Novell’s case-in-chief. The Tenth Circuit has explained why witnesses who have already appeared at trial should not be permitted to testify again in rebuttal. In *Koch v. Koch Industries*, 203 F.3d 1202 (10th Cir. 2000), plaintiffs sought to recall one of their earlier witnesses on rebuttal, and informed the district court that the witness would testify that certain testimony from defendant’s witnesses was contradicted by documents in evidence. *Id.* at 1224. Plaintiffs argued they should be permitted to present such rebuttal testimony in response to an allegedly new theory presented by defendant. The district court precluded the rebuttal testimony on the ground that plaintiffs could have anticipated the defense theory and could have presented evidence in their case-in-chief about that theory.

¹ Mr. Harral testified on October 20 and 24; Mr. Richardson testified on October 25; and Mr. Gibb testified on October 26.

Acknowledging that the district court has broad discretion in deciding whether to admit or exclude rebuttal evidence, the Tenth Circuit stated that “[w]hen plaintiffs . . . seek to rebut defense theories which they knew about or reasonably could have anticipated, the district court is within its discretion in disallowing rebuttal testimony.” *Id.* at 1224 (citations omitted). The Tenth Circuit reasoned that, although defendant’s theory had changed somewhat, plaintiffs reasonably could have anticipated that change. For instance, defendant elicited testimony on cross-examination early in plaintiffs’ case-in-chief that should have put plaintiffs on notice that defendant had modified its theory. Plaintiffs also did not object to defendant’s changed theory as going beyond the scope of the defenses articulated by defendant in the final pretrial order. The Tenth Circuit concluded that “[b]ecause the Plaintiffs should reasonably have anticipated the evidence they sought to rebut and then failed to object to the evidence as supportive of a new theory beyond the 1998 Pretrial Order, the district court did not abuse its broad discretion in precluding the rebuttal witness.” *Id.* at 1225.

Novell has known since before trial about the theories Microsoft would present in its case and the evidence supporting those theories. There have been no surprises here. Every Microsoft trial witnesses was identified to Novell last summer, and every witness was deposed by Novell during the course of the litigation. There was not a single new issue raised by Microsoft at trial. Thus, Novell’s prior witnesses are not appropriate rebuttal witnesses.

Consider Gary Gibb. There is not one subject about which Mr. Gibb could testify in rebuttal that he either did not already address, or could not have addressed, in his testimony during Novell’s case-in-chief. Counsel for Microsoft told the

jury during its opening statements that Microsoft intended to present evidence that problems with Quattro Pro delayed the release of PerfectOffice for Windows 95. “There was—in California among the Quattro Pro software engineers, according to Exhibit 230, there were just two left in December. And you can’t get the suite out. The suite includes WordPerfect and all the functionality of Quattro Pro. The suite itself can’t be released until Quattro Pro is finished.” (Microsoft’s Opening Statement, Oct. 18, 2011 Trial Tr. at 131:16-21.) Counsel for Microsoft explained that the Quattro Pro team did not even plan to begin developing its product for Windows 95 until it had finished “internationalizing” its product for Windows 3.1, which was not expected to happen until March 1995. (*Id.* at 131:22-134:3.)

Mr. Gibb testified about development of PerfectOffice for Windows 95 (Gibb direct, Oct. 26, 2011 Trial Tr. at 809:9-15); the delays experienced by the shared code team; what projects were “critical path” in creating versions of Novell’s office productivity applications for Windows 95 (*id.* at 808:20-809:1); and issues Novell had with getting Quattro Pro finished on time (*id.* at 806:15-25). Microsoft’s witnesses (including Messrs. Bushman, LeFevre, Ford and Larsen) testified about many of these same matters, and counsel for Novell cross-examined them extensively, including questioning each of them about what Mr. Gibb would have known about these matters. (*See, e.g.*, Bushman cross, Nov. 28, 2011 Trial Tr. at 3216:17-20; Larsen cross, Nov. 30 Trial Tr. at 3630:11-14 and 3652:1-10; Ford cross, Nov. 30, 2011 Trial Tr. at 3715:19-24; LeFevre cross, Dec. 2 Trial Tr. at 4067:13-4068:5.) Novell cannot use rebuttal to get the “last word” from Mr. Gibb on these or any other topics.

The same is true for Mr. Harral and Mr. Richardson. They both testified at length about Novell's plans to use the namespace extension APIs in adding Novell products such as QuickFinder to the Windows 95 user interface (Harral direct, Oct. 20, 2011 Trial Tr. at 268-81; Harral direct, Oct. 24, 2011 Trial Tr. at 372-74; Richardson direct, Oct. 25, 2011 Trial Tr. at 601-05); Novell's communications with Microsoft's Premier Support hotline (Harral direct, Oct. 20, 2011 Trial Tr. at 329-31); and the options available to Novell's shared code developers following Microsoft's withdrawal of support for the namespace extension APIs in October 1994. (Harral direct, Oct. 20, 2011 Trial Tr. at 342-47.) Microsoft cross-examined Messrs. Harral and Richardson regarding each of these subjects, including Novell's plans for using the namespace extension APIs (Harral cross, Oct. 24, 2011 Trial Tr. at 434-36; Richardson cross, Oct. 25, 2011 Trial Tr. at 613, 644-46 and 697-98); communications with Premier Support (Harral cross, Oct. 24, 2011 Trial Tr. at 399-400); and the options available to Novell following Microsoft's withdrawal of support for the namespace extension APIs. (Harral cross, Oct. 24, 2011 Trial Tr. at 401-02 and 501-04; Richardson cross, Oct. 25, 2011 Trial Tr. at 628-631.) Novell had every opportunity to question Messrs. Harral and Richardson about these subjects on re-direct if it thought it was necessary to do so. There is nothing these two witnesses could testify about now that they could not have testified about during Novell's case-in-chief.

Novell had a full opportunity to question each of its witnesses. Novell also had the opportunity to cross-examine Microsoft's trial witnesses on those same subjects. In the absence of any unanticipated evidence introduced by Microsoft, there is no basis for any rebuttal.

CONCLUSION

The Court should preclude Novell from presenting any rebuttal witnesses.

Dated: December 11, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2011, I caused a true and correct copy of the foregoing MICROSOFT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO PRECLUDE IMPROPER REBUTTAL to be filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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