

MAX D. WHEELER (3439)
MARALYN M. ENGLISH (8468)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone (801) 521-9000
Facsimile: (801) 363-0400

JEFFREY M. JOHNSON (*admitted pro hac vice*)
PAUL R. TASKIER (*admitted pro hac vice*)
JAMES R. MARTIN (*admitted pro hac vice*)
ADAM PROUJANSKY (*admitted pro hac vice*)
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

R. BRUCE HOLCOMB (*admitted pro hac vice*)
ADAMS HOLCOMB LLP
1875 Eye Street, NW, Suite 810
Washington, DC 20006-5403
Telephone: (202) 580-8820
Facsimile: (202) 580-8821

JOHN E. SCHMIDTLEIN (*admitted pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Telephone: (202) 434-5901
Facsimile: (202) 434-5029

Attorneys for Novell, Inc.

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

Novell, Inc.,	*	NOVELL’S PROFFER IN RESPONSE TO
Plaintiff,	*	MICROSOFT’S MOTION TO PRECLUDE
	*	“IMPROPER REBUTTAL”
	*	
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

Novell respectfully submits this proffer of rebuttal testimony that it would have presented regarding issues surrounding Quattro Pro had the Court not granted Microsoft's Motion To Preclude Improper Rebuttal Testimony. For the reasons sets forth below, Novell objects to the Court's ruling and offers the following to preserve its rights on appeal.

INTRODUCTION

Microsoft argued in a motion filed on Sunday, December 11 that this Court should preclude Novell's entire rebuttal case on the ground that Microsoft supposedly disclosed its case so completely prior to the presentation of Novell's case-in-chief that Novell should have anticipated any and all issues that Microsoft raised at trial. Microsoft's argument is factually and legally incorrect. Contrary to what Microsoft claims, it has presented evidence that could not reasonably have been anticipated and addressed in Novell's case-in-chief because such evidence was not disclosed during discovery or in pre-trial filings. And, contrary to Microsoft's argument, the law does not require a plaintiff to anticipate every possible argument that a defendant could present in its case-in-chief, at the risk of losing its opportunity for rebuttal. Nonetheless, the Court ruled on Monday, December 12, that Novell could present no rebuttal regarding the issue of whether the development of Quattro Pro delayed the shipment of PerfectOffice 95.

ARGUMENT

I. NOVELL SHOULD NOT BE PRECLUDED FROM PRESENTING REBUTTAL

Courts have permitted plaintiffs to present rebuttal evidence in a myriad of circumstances. "Rebuttal evidence may be introduced to explain, repel, contradict or disprove an adversary's proof. The fact that testimony would have been more appropriately offered during the proponent's case-in-chief does not preclude its admission as rebuttal evidence" *United States v. Kelley*, 187 F. App'x 876, 888 (10th Cir. 2006) (citation omitted); *see also*

United States v. Harpster, No. 90-3339, 1991 WL 268832, at *2 (10th Cir. Dec. 13, 1991) (“““[T]he fact that [the evidence] might have been offered in chief does not preclude its admission in rebuttal.””” (citations omitted)). Contrary to what Microsoft implies, testimony offered to contradict evidence in the defense case serves a proper function of rebuttal, and is therefore permissible, even if the testimony could also have been presented in the plaintiff’s case-in-chief. *United States v. Morris*, 41 F. App’x 160, 167 (10th Cir. 2002).

Plaintiffs are not required to present evidence in their case-in-chief to preemptively “rebut every possible scenario that defendants might paint,” a requirement that “not only would be inefficient but would obfuscate the issues presented to the jury.” *United States v. Tejada*, 956 F.2d 1256, 1267 (2d Cir. 1992). Rather, plaintiffs are permitted to present testimony in rebuttal that “rebutts an inference that a party’s adversary has sought to make.” *Id.*; see also *United States v. Rucker*, 188 F. App’x 772, 779 (10th Cir. 2006) (affirming admission of rebuttal testimony where defendant “opened the door” to such testimony in its case-in-chief).

Here, the brief testimony that Novell intended to present from Gary Gibb was proper rebuttal. It would “explain, repel, contradict or disprove” testimony elicited from witnesses called by Microsoft during its case. As the above case law makes clear, the possibility that some of this testimony could conceivably have been presented in plaintiff’s case-in-chief does not make it improper rebuttal. Novell was not required to anticipate “every possible scenario that defendants might paint” in its case-in-chief.

Microsoft’s Motion relies on Wright & Miller, Federal Practice & Procedure § 6164, for the proposition that this Court should completely preclude Novell from presenting a rebuttal case. Contrary to Microsoft’s argument, the treatise sets forth the normal procedure as follows: “At the completion of the presentation of [its case-in-chief], the defense rests. The plaintiff or

prosecution is now entitled to present rebuttal evidence.” *Id.* The Court’s discretion to limit rebuttal testimony “gives courts the power to enforce the traditional principle that evidence offered to rebut must accomplish the function of rebuttal: ‘to explain, repel, counteract, or disprove the evidence of the adverse party.’” *Id.* (citation omitted). Moreover, it “is clear that the courts have the discretion to permit” rebuttal evidence even if it “could have been offered during the plaintiff’s or prosecution’s case-in-chief.” *Id.* Indeed, “exclusion of rebuttal evidence that could have been offered during plaintiff’s or the prosecution’s case-in-chief has been held an abuse of discretion where its probative value outweighs the interests of preventing unfair surprise and saving time.” *Id.*

Here, the interests in preventing unfair surprise and saving time are minimal. A defendant cannot claim to be “unfairly surprised” by “rebuttal evidence going to issues which [defendant] itself raised.” *Denison v. Swaco Geologist Co.*, 941 F.2d 1416, 1425 (10th Cir. 1991); *see also United States v. Posey*, 647 F.2d 1048, 1052 (10th Cir. 1981) (affirming admission of rebuttal testimony by expert who performed new test suggested by defendant’s expert in defendant’s case-in-chief). Here, all of the rebuttal testimony that Novell seeks to introduce goes to issues that Microsoft raised, and as to which it cannot be unfairly surprised. Moreover, the rebuttal testimony would require little time – especially in the context of this lengthy trial – and therefore should not be excluded on the basis of saving time.

II. THE PROFFERED TESTIMONY OF GARY GIBB IS PROPER REBUTTAL

Microsoft’s contention that “[n]othing arose during Microsoft’s case that could not have been addressed in Novell’s case-in-chief,” Microsoft’s Mem. at 5, is patently incorrect, particularly on the issue of whether the code for Quattro Pro was “missing” or not complete and available to ship as part of the PerfectOffice 95 suite in January 1995. Second, contrary to

Microsoft's statements that "[t]here have been no surprises here" and that "[t]here was not a single new issue raised by Microsoft at trial," *id.* at 6, Microsoft's witnesses testified to facts and issues that never were disclosed during deposition.

For example, Mr. Larsen's trial testimony was very different from his deposition testimony. Mr. Larsen testified at trial that during the weeks he was in Scotts Valley in early 1996 there was never a time when the Quattro Pro version for Windows 95 became finalized and ready to be shipped. *See id.* at 3624:21-3625:5. Indeed, Mr. Larsen testified that he "had a difficult time even finding all of the source code for the various pieces of the product, which was somewhat alarming because without the source code it's very difficult if not impossible to re-create the current shipping version of the product without having to go back and rewrite extensions of it. *Id.* at 3622:22-3623:2. Mr. Larsen further testified that when he left Novell around March 1996, Quattro Pro was not close to being ready to be included in Novell's suite for Windows 95. *Id.* at 3626:6-23. Mr. Larsen provided no such testimony at his deposition.

Novell intended to recall Mr. Gibb to rebut the inaccuracies in Mr. Larsen's testimony, which Novell could not and did not anticipate in its case-in-chief. Specifically, Novell proffers that it would have presented the following through Mr. Gibb during rebuttal:

- From the very beginning, the Project Storm development team always included Quattro Pro developers who attended the regular meetings that Mr. Gibb conducted to monitor development of all of the components that comprised the PerfectOffice 95 suite.
- Mr. Gibb met and interacted regularly with Quattro Pro developers before, during and after the events described in Mr. Larsen's testimony.

- Mr. Gibb personally traveled to California with Mr. Larsen and others in January 1996 to the Quattro Pro offices.
- The Quattro Pro code was completed and ready for beta testing months before several Quattro Pro developers resigned in December 1995. Accordingly, the Quattro Pro code was not “missing” in January 1996.
- Pre-release versions of Quattro Pro were sent to journalists to be reviewed in the Fall of 1995 and Quattro Pro was demonstrated at Comdex in November 1995.
- The work that was done in Scotts Valley in January 1996 involved bug fixes – not the development of new features or functionality for the Quattro Pro spreadsheet.
- If the Shared Code Group had completed its work in late 1994 or early 1995 – as was projected before the withdrawal of the documentation for the namespace extension APIs – Novell would have shipped PerfectOffice 95 within 60 to 90 days of the release of Windows 95 – even if that meant shipping English versions in the first instance and later shipping foreign language versions (as Novell had done with PerfectOffice 3.0).

CONCLUSION

For the foregoing reasons, Novell objects to the Court’s granting of Microsoft’s Motion to Preclude Improper Rebuttal.

Dated: December 13, 2011

SNOW, CHRISTENSEN & MARTINEAU

By: /s/ Maralyn M. English

Max D. Wheeler
Maralyn M. English

DICKSTEIN SHAPIRO LLP

Jeffrey M. Johnson
Paul R. Taskier
James R. Martin
Adam Proujansky

ADAMS HOLCOMB LLP

R. Bruce Holcomb

WILLIAMS & CONNOLLY LLP

John E. Schmidlein

Attorneys for Novell, Inc.

