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*)
JASON D. WALLACH (*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 MEMORANDUM IN SUPPORT OF
Plaintiff,	*	MOTION TO OVERRULE MICROSOFT'S
	*	OBJECTIONS TO DOCUMENTS CONCERNING
v.	*	NOVELL'S COMMUNICATIONS WITH DOJ
	*	ABOUT MICROSOFT'S CONDUCT
Microsoft Corporation,	*	
Defendant.	*	Case No. 2:04-cv-01045-JFM
	*	Hon. J. Frederick Motz

Plaintiff Novell, Inc. ("Novell") respectfully submits this memorandum in support of its motion to overrule Microsoft Corporation's ("Microsoft") objections to documents concerning Novell's communications with the Department of Justice ("DOJ") about Microsoft's conduct. Microsoft opened the door to this evidence by asserting, in its opening statement, that Novell "never complained" to anyone and "remained silent" about Microsoft's decision to de-document the namespace extensions APIs – which, Microsoft argued, demonstrated as a matter of "common sense" that Microsoft's conduct must have had little impact on Novell. The evidence of Novell's communications with the DOJ refutes Microsoft's assertion that Novell "remained silent," and belies Microsoft's argument that therefore the decision to de-document the namespace extension APIs was not significant to Novell. Because this evidence is so highly probative, and because Microsoft so blatantly opened the door to this evidence in its opening statement, Microsoft's objections to these documents on the grounds of relevance, foundation, and Rule 403 should be overruled. Moreover, because the evidence is being introduced to establish the fact that Novell did complain and did not remain silent about Microsoft's conduct, and is not being introduced to prove the truth or validity of Novell's complaints, Microsoft's objections on the grounds of hearsay, embedded hearsay, and "improper opinion" should be overruled.

BACKGROUND

In its opening statement, Microsoft repeatedly argued that Novell had failed to complain to anyone, and had remained silent, about Microsoft's decision to de-document the namespace extension APIs – and that this purported silence demonstrated that Microsoft's decision had little impact on Novell. Microsoft asserted in its opening statement:

> At the time, Novell never complained about Mr. Gates' decision to withdraw the name space extension APIs. That's October of 1994. Novell didn't even file this lawsuit until November of 2004, more than ten years later. So, when you hear there was deception and hypocrisy and spin, when the lawyer says it was all a façade, this conduct that allegedly is so bad – and it's easy to toss around those words. That's what the courtroom is for, for the evidence. This conduct that was supposedly so bad, Novell said nothing about at the time and waited more than ten years before it even brought this case, filed the lawsuit.

10/18/11 Tr. at 90:24-91:9.

Later in its opening statement, Microsoft stated:

> And as I told you when I started this opening statement way back when, though the decision was made in '94 and Novell made no complaint in 1994, the lawsuit was filed 10 years later. If this decision had been such a killer for Novell, had made life so impossible, if there was no way for Novell to compete in the market, I ask you, because as a juror you don't have to leave your common sense home, would Novell have remained silent at the time?

Id. at 141:3-10.

Microsoft's argument in the opening statement was not limited to the assertion that Novell failed to complain *to Microsoft*. Rather, Microsoft argued that Novell did not complain *to anyone*: "At the time, Novell never complained about Mr. Gates' decision to withdraw the name space extension APIs . . . [and] didn't even file this lawsuit until November of 2004, more than ten years later" *id.* at 90, "[t]his conduct that was supposedly so bad, Novell said nothing about at the time and waited more than ten years before it even brought this case," *id.*, at 91, "Novell made no complaint in 1994, the lawsuit was filed 10 years later," *id.* at 141, "[i]f this decision had been such a killer for Novell . . . would Novell have remained silent at the time?" *id.*

This Court gave a curative instruction informing the jury to disregard "when the suit was filed," but also instructed the jury that "[i]t is fair game to say why didn't you comment earlier, why didn't you criticize it earlier, and this is a matter of evidence for you all to decide." 10/20/11 Tr. at 200:6-19.

In fact, there is evidence that, contrary to Microsoft's assertion, Novell did not remain silent about Microsoft's conduct. This evidence includes documents relating to communications between Novell and the DOJ regarding Microsoft's conduct.

Plaintiff's Exhibit 317 (attached as Exhibit A) is an email chain that begins on July 11, 1995 with an email from Novell's in-house counsel Ryan Richards relaying a request from the DOJ for "input on any concerns" Novell had, "particularly from our Applications Group, relating to Windows 95." Richards requests that, in preparation for their forthcoming telephone call with DOJ on this topic, the recipients of the email "determine what we have to offer" the DOJ in response to their inquiry.

Plaintiff's Exhibit 317 also includes the response of Bruce Brereton, the head of Novell's applications group, to Richards' inquiry via email two days later, reporting "several issues that were raised by our development teams." The very first issue that Brereton raises regarding Microsoft's conduct for discussion with the DOJ is that Microsoft "removed the ability to hook into the Explorer. That is why we are doing our Open Dialog/Name space browser from scratch. I don't know if [Microsoft] apps are going under the covers and extending the explorer themselves." Brereton also notes that "the largest area that has held us up has been that Microsoft initially published integration features (plug & play, shell integration, etc.) and then pulled the features without letting us know. We have been coding against what they said they would provide, and when they pull the feature, we have to redesign and recode." Brereton

further adds that "I believe there were addition[al] issues for the QF [QuickFinder] group when tying into the shell. Since they want to replace their find [functionality] several API's were changed and even removed to make things difficult."

Plaintiff's Exhibit 320 (attached as Exhibit B) is a memorandum from Richards to Novell general counsel David Bradford dated July 20, 1995 (5 days after Brereton's email) updating Bradford on Novell's response to DOJ's inquiry. It states that Richards, after gathering information from a number of developers, had forwarded 13 pages of information to Novell's outside counsel, and with him had identified "those items most likely to be of interest to the DOJ." These items included the fact that Microsoft, "late in the game and without notice, remov[ed] the hooks and integration features in Win95 against which we had been coding for some time. We've had to redesign code to account for the changes." The memorandum goes on to state that the "next step" would be a conference call that day among Novell employees most knowledgeable about these issues, Novell's in-house and outside counsel, and a DOJ attorney.

Plaintiff's Exhibit 330 (attached as Exhibit C) is a memorandum from Brereton to Richards dated August 28, 1995, following up on the "DOJ issues," including "Unpublished Explorer APIs. [Microsoft] apps can do things we can't."

Plaintiff's Exhibit 351 (attached as Exhibit D) is a May 24, 1996 memorandum regarding Novell's responses to DOJ's Microsoft inquiries, this one from Paul Smart to Stewart Nelson, both employees of Novell. In the memo, Smart discusses various aspects of Microsoft's misconduct to be relayed to general counsel Bradford for purposes of Novell's response to DOJ's inquiries. Smart complains of Microsoft's conduct with respect to "Explorer APIs." He states that "Microsoft is now hooking their Internet mail UI [user interface] in to the Explorer. They used hooks that they originally pitched as part of Win95, then they took the hooks away and told

everyone that they would not be available. Now they've released a beta (I think) version of their Internet Mail UI product which is hooked in to the Explorer like they originally told us we'd be able to do and then retracted. When we asked about that they gave us the exact APIs (I think) that were originally given/retracted." [1]

Microsoft raises a litany of objections to these Exhibits: relevance, foundation, Rule 403, hearsay, embedded hearsay, and "improper opinion."[2]

ARGUMENT

I. MICROSOFT'S ARGUMENT THAT NOVELL REMAINED SILENT ABOUT MICROSOFT'S CONDUCT OPENS THE DOOR TO EVIDENCE REFUTING THIS ASSERTION, AND THEREFORE MICROSOFT'S OBJECTIONS TO EVIDENCE RELATING TO NOVELL'S COMMUNICATIONS WITH THE DEPARTMENT OF JUSTICE SHOULD BE OVERRULED

"'It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party.'" *United States v. Magallanez*, 408 F.3d 672, 678 (10th Cir. 2005). For example, in *Magallanez*, defense counsel referred during opening statement to a large stack of discovery documents, and asserted that none of "that stuff" implicated the defendant in the conspiracy alleged by the government. The Tenth Circuit held that this assertion in the opening statement "invited the government to address the relevance of the discovery documents." *Id.* Defendant therefore "cannot seek to exclude as irrelevant the agents' testimony regarding the background of the investigation after

[1] Although the affected product referenced in Plaintiff's Exhibit 351 – GroupWise – is no longer at issue in this litigation, the document is evidence that Novell did in fact complain about the *same* conduct (regarding the namespace extension APIs) that is at issue in this litigation and that Microsoft claimed in its opening statement that Novell "remained silent" about.

[2] Specifically, Microsoft objects to Exhibit 317 on the grounds of relevance, foundation, Rule 403, hearsay, embedded hearsay and improper opinion, Exhibit 320 on the grounds of relevance, foundation, Rule 403, hearsay, embedded hearsay, and improper opinion, Exhibit 330 on the grounds of foundation, hearsay and embedded hearsay, and Exhibit 351 on the grounds of relevance, foundation, Rule 403, and hearsay.

opening the door for the government to explain why 'that stuff' related to him." *Id.* The Tenth Circuit also affirmed the trial court's overruling of the defendant's Rule 403 objection to this evidence. *Id.* at 678-79; *see also United States v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006) (affirming trial court's overruling of objection that testimony that government uses proffers to "gauge truthfulness" constituted improper vouching, where "the defendant opened the door to such testimony in his opening statements by implying that the government used a proffer to coerce a witness into giving false testimony," which "left the government the necessity of explaining how it uses proffers"); *United States v, Croft*, 124 F.3d 1109, 1120 (9th Cir, 1997) (trial court properly allowed evidence to bolster the credibility of a witness where defendant opened the door by branding that witness a liar in opening statement); *United States v. Moore*, 98 F.3d 347, 350 (8th Cir. 1996) (affirming trial court's decision to overrule Rule 404(b) and Rule 403 objections to admission of defendant's prior arrest and conviction for the purpose of proving intent and knowledge, where defense counsel opened the door to such evidence by arguing in opening statement that defendant was merely "the wrong man at the wrong time at the wrong place").

Here, Microsoft's repeated argument in opening statement that Novell "remained silent" and "never complained" regarding Microsoft's decision to de-document the namespace extension APIs opened the door to admission of evidence on that subject by Novell: evidence that, contrary to Microsoft's argument, Novell did complain, at least as early as 1995, regarding the very conduct about which Microsoft argued Novell "remained silent" and "never complained." The evidence is thus highly probative, in that it refutes an argument that Microsoft made a centerpiece of its opening. As the above cases make clear, when a party opens the door to a subject in its opening statement, objections to evidence offered by the opposing party

regarding the same subject, based on such grounds as relevance, foundation, and Rule 403 should be overruled, because fairness dictates that the opposing party be permitted to offer evidence to refute the assertion. The fact that Novell's evidence refutes the assertions Microsoft made in its opening statement will certainly be harmful to Microsoft's case, but such "prejudice" is not the "*unfair* prejudice" with which Rule 403 is concerned. *See United States v. Schneider*, 594 F.3d 1219, 1227 (10th Cir. 2010).

Microsoft's objections to this evidence based on hearsay, embedded hearsay, and "improper opinion" are equally unavailing. Rule 801 of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c) (emphasis added). These documents are not being offered for the truth of Novell's complaints about Microsoft's conduct, but only for the fact that Novell made such statements, rather than remaining silent as Microsoft contends. Thus, the evidence is not hearsay.

"If the significance of an out-of-court statement lies in the fact that the statement was made and not in the truth of the matter asserted, then the statement is not hearsay." *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1124 (9th Cir. 2004). As the Tenth Circuit explained in *United States v. Lewis*, 594 F.3d 1270, 1282 (10th Cir.), *cert. denied*, 130 S. Ct. 3441 (2010), "a party may offer a statement by A that the Yankees won the pennant in 1999. The matter asserted by A is that the Yankees were American League champions in 1999. But if the party offering A's statement is merely trying to prove that A was capable of speech, then A's statement is not offered into evidence for the truth of the matter asserted, and the statement is not hearsay." Similarly, Microsoft successfully argued in its Opposition to Novell's Motion *in limine* to Preclude Admission of Newspaper and Magazine Articles (Docket # 174), at 10, that the product

reviews it intends to introduce into evidence are not hearsay because "[i]t is the fact that the reviews were published, not the truth or falsity of the statements in the reviews, that is relevant." Here, because Novell is proving the fact that Novell did not "remain silent" about Microsoft's conduct but instead complained to the DOJ – and not the truth or falsity of its complaints – the evidence is not hearsay.

Likewise, because the evidence is not being offered for the validity of Novell's complaints but only for the fact that they were made, Microsoft's "improper opinion" objections should be overruled. As Microsoft successfully argued in its Opposition to Novell's Motion *in limine* to Preclude Admission of Newspaper and Magazine Articles (Docket # 174), at 6, "because the documents are not being offered for their truth, the validity of the opinions contained in them is not relevant," and therefore an "improper opinion" objection is invalid. "'[I]t makes no sense to apply Rule 701 where the out-of-court statement is offered to prove merely that the statement is made and not for the truth of the opinions or facts stated. In such a case, whether the opinion is "helpful" or "rationally based" is of no consequence since the value of the evidence is not dependent upon the reliability of the opinion.'" *Id.* at 18 (quoting 29 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6253 (1st ed. 2011)). Thus, because the evidence is being offered for the fact that the statements were made, rather than their validity, Microsoft's "improper opinion" objection should be overruled.

CONCLUSION

For the foregoing reasons, Microsoft's objections to documents concerning Novell's communications with the Department of Justice regarding Microsoft's conduct should be overruled.

Dated: October 23, 2011

SNOW, CHRISTENSEN & MARTINEAU

By: */s/ Maralyn M. English*
Max D. Wheeler
Maralyn M. English

DICKSTEIN SHAPIRO LLP
Jeffrey M. Johnson
Paul R. Taskier
Jason D. Wallach
Adam Proujansky

ADAMS HOLCOMB LLP
R. Bruce Holcomb

WILLIAMS & CONNOLLY LLP
John E. Schmidtlein

Attorneys for Novell, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October 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*