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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

| | |
|---|---|
| NOVELL, INC.,<br><br>Plaintiff,<br><br>-v-<br><br>MICROSOFT CORPORATION,<br><br>Defendant. | MICROSOFT'S MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO OVERRULE MICROSOFT'S OBJECTIONS TO DOCUMENTS CONCERNING NOVELL'S COMMUNICATIONS WITH DOJ<br><br>Civil No. 2:04 CV 1045<br>Honorable J. Frederick Motz |

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## RULE



## OTHER AUTHORITY

Novell's October 23, 2011 motion to overrule Microsoft's objections to documents concerning Novell's communications with the Antitrust Division of the U.S. Department of Justice ("DOJ") about Microsoft conduct that Novell believed was anticompetitive should be denied for two separate reasons.

*First*, Novell's motion does not address Microsoft's numerous objections to any of these documents, nor could it. All of the documents indisputably 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 (Exhibit A to Novell's Memorandum in Support of Motion to Overrule Microsoft's Objections to Documents Concerning Novell's Communications with DOJ About Microsoft's Conduct (Docket #248) ("Novell Mem.").) These documents plainly were not created in the ordinary course of Novell's business, but are instead self-serving 'talking points' that Novell created to encourage the DOJ to sue Microsoft, one of Novell's chief competitors. These documents are quintessential hearsay and thus are not admissible.

*Second*, because these documents are inadmissible hearsay under the Federal Rules of Evidence, Novell advances the unfounded argument that Microsoft "blatantly opened the door to this evidence in its opening statement" by selectively quoting from them in its opening statement. (Novell Mem. at 1.) Novell's attempt fails because Microsoft's opening statement made the prediction, which will be proven at trial, that Novell will not present to the jury any "contemporaneous document written in 1994 or 1995, that will indicate that they

complained to Microsoft about the decision." (October 18, 2011 Trial Tr. at 140.)[1] Microsoft's counsel also stated, accurately, that "[a]t the time, Novell never complained about Mr. Gates' decision to withdraw the name space extension API's. That's October of 1994." (October 18, 2011 Trial Tr. at 90-91.) Documents created by Novell in late 1995 and early 1996 in an effort to fuel a DOJ inquiry of Microsoft are neither contemporaneous with Microsoft's October 1994 decision to withdraw support for the namespace extension APIs, nor a complaint voiced to Microsoft at the time that decision was made.

Thus, Microsoft has not "opened the door" to permit Novell to introduce into evidence its own documents created for the purpose of fomenting DOJ action against Microsoft. Given the lack of *any* document showing that Novell complained to Microsoft in 1994 or 1995, the undue prejudice to Microsoft that would result from the introduction of these four hearsay documents regarding the "DOJ inquiry" is obvious.

## BACKGROUND

### A. Microsoft's Opening Statement

In Microsoft's October 18, 2011 opening statement to the jury, Microsoft's counsel informed the jury on two occasions that Microsoft believes the evidence at trial will show that Novell can point to no contemporaneous document exchanged between Novell and Microsoft, or even documents internal to Novell, which show that Novell complained to Microsoft after Microsoft informed Novell and other software developers in October 1994 that it had decided to withdraw support for the namespace extension APIs in Windows 95.

[1] The relevant excerpts of Microsoft's opening statement are attached as Exhibit A to the Declaration of Steven L. Holley ("Holley Decl."), executed on October 26, 2011.

In the first instance, Microsoft's counsel explained that: "At the time, Novell never complained about Mr. Gates' decision to withdraw the name space extension API's. That's October of 1994." (October 18, 2011 Trial Tr. at 90-91.) This is unquestionably correct. As demonstrated by DX 3, a document introduced into evidence by Novell's counsel on Tuesday, October 25, the contemporaneous evidence shows that, not only did Novell not complain to Microsoft, but, in fact, Novell indicated to Microsoft that the withdrawal of support for the namespace extension APIs was not an issue for Novell. Soon after the October 1994 decision, Brad Struss, the head of Microsoft's Developer Relations Group, wrote an e-mail to others at Microsoft on October 12, 1994 stating that "we're now in the process of proactively notifying ISVs about the namespace extension api changes" and "[s]o far Stac, Lotus, WP, Oracle, SCC appear to be OK with this." (DX 3 (attached as Exhibit B to the Holley Decl.).) Moreover, Novell has now had two live witnesses testify at trial, *i.e.*, Novell developers directly involved in working with the namespace extension APIs (*see, e.g.*, October 24, 2011 Trial Tr. at 265-267; October 25, 2011 Trial Tr. at 592-593), and neither of them was shown any documents evidencing complaints that Novell made to Microsoft about the withdrawal of support for the namespace extension APIs.

In the second instance, Microsoft's counsel explained that: "We don't think there will be any evidence, no document from Novell, contemporaneous document written in 1994 or 1995, that will indicate that they complained *to Microsoft* about the decision." (October 18, 2011 Trial Tr. at 140 (emphasis added).) This was then followed, less than a minute later, by the following statement:

> 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?

(October 18, 2011 Trial Tr. at 141.)[2] Read in full, Microsoft's counsel statement that Novell did not "complain[] to Microsoft about the decision" makes no reference whatsoever to the existence, or nonexistence, of documents Novell may have created in late 1995 and early 1996 to foment litigation against Microsoft.

In its motion, Novell takes two sentences out of context in order to contend, incorrectly, that "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* . . . ." (Novell Mem. at 2 (emphasis in original).) As the statements and their immediate surrounding context on the pages in question themselves demonstrate, Microsoft's counsel made no such contention and the jury was given no such impression.

**B. Novell's Pre-Litigation Documents**

Upon this flawed premise, Novell's motion seeks the introduction of four documents, all of which relate the efforts by Ryan Richards, Novell's former Associate General

[2] As Novell acknowledges (Novell Mem. at 3), at Novell's request, the Court gave a curative instruction to the jury, explaining: "Don't worry about when the suit was filed. They acted within their rights. It is a long time, but there are reasons and limitations were tolled and they acted within their rights in not filing a suit for whenever they filed the suit. Just disregard that part of the opening statement." (October 20, 2011 Trial Tr. at 200.)

Counsel (who maintained a "bad acts" file against Microsoft),[3] to assemble information in response to an inquiry from the DOJ concerning potential bases to sue Microsoft. Exhibit A to Novell's Memorandum (PX 317) is an e-mail, entitled "DOJ Inquiry," that explains the origin and purpose of all four of the documents that are the subject of Novell's motion. On July 11, 1995, Ryan Richards informed Bruce Brereton (the Vice-President of Novell's Business Application Division), David Bradford (Novell's General Counsel) and several others at Novell, that the DOJ contacted Novell's outside counsel seeking "Novell's input on any concerns we have, particularly from our Applications Group, relating to Windows 95." In light of this request, Mr. 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." Two days later, Mr. Brereton responds with a list of seven "issues that were raised from our development team," relating to the namespace extension APIs and a variety of other concerns not at issue in this action. Microsoft interposed objections to PX 317 on grounds of grounds of hearsay, embedded hearsay, improper opinion, foundation, relevance and Rule 403.

Exhibit B to Novell's Memorandum (PX 320), entitled "DOJ Inquity 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."

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[3] "There [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." (October 30, 2008 Rule 30(b)(6) Deposition of Novell, Inc. by James F. Lundberg at 51:8-53:4, attached as Exhibit C to the Holley Decl.) 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, attached as Ex. D to the Holley Decl.)

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." Microsoft lodged objections to PX 320 on grounds of hearsay, embedded hearsay, foundation, improper opinion, relevance and Rule 403.

In Exhibit C to Novell's Memorandum (PX 330), Novell continues its "due diligence" on additional issues to raise with the DOJ. On August 28, 1995, Bruce Brereton raises to Ryan Richards and others that, while talking to Dave Miller "concerning a different issue," Mr. Miller "mentioned that NSG [NetWare Systems Group] also also has several possible DOJ concerns" and lists three items, including the "Unpublished Explorer APIs" as well as an issue that "MS specifically decided to sensor [sic] all Win95 information going to NSG." Microsoft interposed objections to PX 330 on grounds of hearsay, embedded hearsay and foundation.

Finally, Exhibit D to Novell's Memorandum (PX 352), the last document that Novell seeks to introduce in its motion, is an May 24, 1996 email—written after Novell sold WordPerfect and Quattro Pro to Corel and had entered into an agreement with Caldera to share the proceeds from any private lawsuit against Microsoft—from Paul Smart to Stewart Nelson, titled "Current Department of Justice Inquiry into Microsoft." In this document, Mr. Smart writes that "Rich, Lynn and I talked" and "thought of a few areas: MAPI, Inbox and APIs" and also alludes to "some Marketing stuff regarding announces/promises with Exchange." Microsoft interposed objections to PX 351 on grounds of hearsay, foundation, relevance and Rule 403.

Novell does not contend that any of the issues raised in these four documents were ever conveyed to Microsoft, nor does Novell contend that these documents were created in the ordinary course of Novell's business. They were not. On the contrary, Novell concedes that

these documents were created "for discussion with the DOJ" and "regarding Novell's responses to DOJ's inquiries." (Novell Mem. at 3-4.) None of these documents is admissible because each is hearsay and unduly prejducial under Rule 403. Even if some door had been opened—and none was—the opening could be made wide enough to expand the scope of relevance not eliminate the hearsay laws.

## ARGUMENT

### I. Nothing in Microsoft's Opening Statement "Opened the Door" to Allow Novell To Introduce Inadmissible Evidence to the Jury.

The premise of Novell's motion—that Novell "blatantly opened the door to this evidence in its opening statement" (Novell Mem. at 1)—is incorrect. As demonstrated above, Microsoft's counsel discussed Novell's failure to complain about the decision to withdraw support for the namespace extension API in two instances, neither of which could be misconstrued as "opening the door" for the admissibility of hearsay and unduly prejudicial internal Novell legal documents discussing the gathering evidence in response to a DOJ inquiry. Microsoft's counsel made clear that no documents created *in the October 1994 timeframe* exist to show that Novell voiced complaints "at the time" upon learning of Microsoft's decision to de-document the namespace extension APIs: "At the time, Novell never complained about Mr. Gates' decision to withdraw the name space extension API's. That's October of 1994." (October 18, 2011 Trial Tr. at 90-91.) Internal Novell e-mails, created at a later time in response to a DOJ request and never shared with Microsoft, are not contemporaneous with Microsoft's October 1994 decision.

In the other instance upon which Novell relies, Microsoft's counsel accurately and correctly stated that Novell cannot point to any documents showing that Novell raised any concerns *with Microsoft* after learning of Microsoft's decision to de-document the namespace

extension APIs: "We don't think there will be any evidence, no document from Novell, contemporaneous document written in 1994 or 1995, that will indicate that they complained *to Microsoft* about the decision." (October 18, 2011 Trial Tr. at 140 (emphasis added).) The existence of four documents showing that Novell gathered information to share with the DOJ do not refute Microsoft's prediction that Novell will not present any evidence to the jury "that they complained *to Microsoft* about the decision."

## II. The Four Internal Novell Documents Relating to the DOJ Inquiry are Inadmissible.

Even if some door had been opened—and none was—the four documents at issue are still inadmissible. They are plainly hearsay and do not satisfy any exception to the rule against hearsay, so the 'cure'—if the Court determines there is something to cure—should not be the admission of hearsay and unduly prejudicial evidence.

None of these four documents that Novell seeks to introduce are a "business record" 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)). Novell concedes in its motion, as it must, that the concerns raised in these four documents were not prepared in the ordinary course of Novell's business (and surely were not created in order to raise issues with Microsoft), but rather, were created specifically "for discussion with the DOJ" and "regarding Novell's responses to DOJ's inquiries." (Novell Mem. at 3-4.)

Documents prepared in anticipation of litigation do not merit that presumption of accuracy. According to the Tenth Circuit, "'[i]f any person in the process is not acting in the

regular course of business, then an essential link in the trustworthiness chain fails.'" *United States* v. *McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993) (quoting 2 MCCORMICK ON EVIDENCE § 290 (John William Strong ed., 4th ed. 1992)). 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," such documents do not qualify for admission under the business records exception. *Timberlake Constr. Co.* v. *U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341-42 (10th Cir. 1995) (holding that admission of a letter "was error, for the letter was written in anticipation of litigation and therefore was not admissible as a business record within 803(6)").

This well-established principle applies here. All of these documents were generated solely in response to a DOJ inquiry, as opposed to Novell's "regularly conducted business activity" of developing and marketing software and networking technologies. In fact, the concerns raised in these documents were provided in response to a request made by Ryan Richards, the Novell in-house counsel who maintained a "bad acts" file against Microsoft. Mr. Richards deputized Bruce Brereton to speak to others in Novell's Business Applications Division in order to "determine what we have to offer" the DOJ in response to its request for "Novell's input on any concerns we have." (PX 317 (Exhibit A to Novell Mem.).) Such documents created specifically to gather ammunition to provide to the DOJ is the exact opposite of a document created in the ordinary course of Novell's business. The admitted purpose of the four documents, and the cursory nature of various concerns expressed in these documents, leave no doubt that these documents were created as part of Novell's effort to assemble information in support of the DOJ's inquiry into antitrust claims against Microsoft.

Novell's only attempt to demonstrate that these documents are not hearsay is its circular conclusion that this "evidence is not hearsay" because "[t]hese 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." (Novell Mem. at 7.) It does Novell no good to disavow any motivation to introduce these documents for the truth of the concerns collected in these documents. Rather, Novell must establish a legitimate non-hearsay purpose, such as 'notice' or 'state of mind.' Conveying its concerns to the DOJ bears not at all on any element of Novell's claim and Novell's failure to demonstrate a valid non-hearsay purpose proves the futility of Novell's motion. "[T]he absence of a tenable non-hearsay purpose for offering the hearsay evidence establishes that the evidence could have been offered only for its truth value." *United States* v. *Hinson*, 585 F.3d 1328, 1337 (10th Cir. 2009) (internal quotations and citation omitted).

*Second*, each of the four documents are inadmissible because they are documents prepared by Novell in anticipation of litigation and are thus also inadmissible under Federal Rules of Evidence 402 and 403. 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 concerns collected by a Novell in-house lawyer in order to assist a DOJ inquiry of Microsoft, one of Novell's principal competitors, is anything other than an attempt to drum up interest on behalf of the DOJ to bring an enforcement action 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.[4]

[4] The Court previously sustained Microsoft's objections to two similar Novell documents. Novell argued in favor of the admissibility of PX 346, a December 1, 1995 written submission that Novell made to the Federal Trade Commission. The Court held PX 346 was "not going to come in." (September 29, 2011 Hearing Tr. at 148:8-18.) Microsoft also objected to PX 316, a document created by Novell employee Stuart Jensen, also in response to the same "DOJ Inquiry" on grounds of hearsay, relevance and under Rule 403, asserting that Novell may not introduce its own past hearsay statements generated in the course of its internal investigation of potential claims against Microsoft as evidence of the truth of the matters they contain. The Court sustained this objection on hearsay grounds. (September 29, 2011 Hearing Tr. at 145:8-9; October 7, 2011 Hearing Tr. at 68:22-69:4 ("You can't use a document that was . . . prepared in connection with the [DOJ] inquiry . . . .").

## CONCLUSION

Microsoft requests that the Court deny Novell's motion.

Dated: October 26, 2011

Respectfully Submitted,

/s/James S. Jardine

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of October, 2011, I filed true and correct copy of the foregoing Microsoft's Memorandum in Opposition to Novell's Motion to Overrule Microsoft's Objections to Documents Concerning Novell's Communications with DOJ using the CM/ECF system, which will send notification of such filing to the following:

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