

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NOVELL, INC.,

Plaintiff-Appellant,

v.

No. 10-1482

MICROSOFT CORPORATION,

Defendant-Appellee.

**MICROSOFT'S MOTION TO STRIKE CERTAIN
DOCUMENTS FROM THE JOINT APPENDIX AND ANY
REFERENCES TO SUCH DOCUMENTS FROM NOVELL'S BRIEF**

Pursuant to Federal Rule of Appellate Procedure 10(a), defendant-appellee Microsoft Corporation ("Microsoft") hereby moves to strike the documents set out at pages JA-2079-83, JA-2681-82, JA-2685-91 and JA-2692-94¹ from the Joint Appendix and to strike any references to those documents from the Brief filed by plaintiff-appellant Novell, Inc. ("Novell") on August 6, 2010.

¹ These documents are (1) a letter from Richard Urowsky to Stephen Susman, dated August 5, 1997 (JA-2079-83); (2) an excerpt from the Liability Report of Frederick R. Warren-Boulton, *In re Microsoft Corp.* (MDL Docket No. 1332), dated August 26, 2002 (JA-2681-82); (3) portions of the expert deposition of Frederick R. Warren-Boulton, *In re Microsoft Corp.* (MDL Docket No. 1332), dated February 20, 2003 (JA-2685-91) and (4) an excerpt from the Expert Report of Kevin M. Murphy, *Friedman v. Microsoft Corp.*, dated July 14, 2003 (JA-2692-94).

Novell here appeals from a March 30, 2010 Judgment entered by the district court (Hon. J. Frederick Motz) after it granted Microsoft's motion for summary judgment in the action. The documents now at issue were not in the record in the district court and were not before Judge Motz when he ruled on the parties' cross-motions for summary judgment.

Rather, these documents were merely appended to a proposed sur-reply brief that Novell sought leave to file after oral argument on the summary judgment motions. (See Docket Entry 114, Motion for Leave to File Surreply by Novell, Inc., *Novell, Inc. v. Microsoft Corp.*, Civil No. JFM-05-1087 (D. Md. Feb. 24, 2010), attached as Ex. 1 to the Affidavit of Steven L. Holley in Support of Microsoft's Motion to Strike, sworn to on August 11, 2010 ("Holley Aff.")). Judge Motz never granted Novell's motion for leave to file a sur-reply brief, nor is there any reason to believe that he considered the proposed sur-reply brief in rendering his decision.² Indeed, Judge Motz's opinion makes no reference

² Novell contends that Judge Motz must have considered the proposed sur-reply brief because he "responded to an argument raised therein" and "cited one of the cases used by Novell, right down to the page reference." (Letter from Jeffrey M. Johnson to Steven L. Holley, July 28, 2010, attached as Ex. 2 to Holley Aff.) That is wrong. Although the argument that an assignment of antitrust claims must be express was mentioned in footnote 8 of Judge Motz's opinion, the proposed sur-reply brief was not the first time Novell had made that argument in the district court. Nor was it the first time Novell sought to rely on *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993). Novell's July 2008 brief in support of its first motion for summary judgment makes the same argument and

(footnote continued)

whatsoever to any of the four documents at issue. (*See* Opinion, *Novell, Inc. v. Microsoft Corp.*, Civil No. JFM-05-1087 (D. Md. Mar. 30, 2010), attached as Ex. 4 to Holley Aff.)

Under Federal Rule of Appellate Procedure 10(a)(1), only those papers and exhibits that were “filed” in the district court can constitute part of the record on appeal. Fed. R. App. P. 10(a)(1). The law is clear that the “record on appeal does not include exhibits attached to [a] sur-reply brief that was lodged with [the] trial court but never accepted for filing by that court.” 20 MOORE’S FEDERAL PRACTICE § 310.10[2][a], at 310-13 n.16.1 (citing *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127-28 & n.5 (9th Cir. 2009)). For that reason alone, the four documents at issue should be stricken from the Joint Appendix.

This Court has recognized that in an appeal from a grant of summary judgment, only those documents that were considered by the district court constitute part of the record on appeal. *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (“[W]e decline to consider . . . documents not considered by the district court.”); *see also Causey v. Balog*, 162 F.3d 795, 804 n.5 (4th Cir. 1998). In *Rohrbough*, this Court held that documents not considered by

(footnote continued)

cites the *Lerman* case as support. (*See* Memorandum of Law in Support of Novell’s Motion for Summary Judgment on Six Affirmative Defenses, July 15, 2008, at 10, attached as Ex. 3 to Holley Aff.)

the district court in deciding a motion for summary judgment were not part of the record on appeal even though plaintiffs had attached those documents to a motion to supplement the record that was filed in the district court. 916 F.2d at 973 n.8. Like the four documents attached to Novell's proposed sur-reply brief, the documents at issue in *Rohrbough* were attached to a motion that appeared on the district court docket sheet and thus were available to this Court. That was not sufficient to make them part of the record on appeal, and the same analysis should apply here.³

Microsoft therefore respectfully requests that this Court strike the four documents at issue from the Joint Appendix and any references to those documents from Novell's Brief.⁴ *See Rohrbough*, 916 F.2d at 973 n.8 (granting motion to strike documents from joint appendix); *Champ v. Baltimore County*, 91 F.3d 129 (Table), 1996 WL 383924, at *3 n.2 (4th Cir. July 10, 1996) (granting motion to strike references in brief to materials that were not part of district court record).

³ Even if the four documents could be said to constitute part of the "record on appeal" for the purposes of Rule 10(a)(1) by virtue of having been attached to Novell's motion for leave to file the sur-reply brief, they were not considered by Judge Motz in granting summary judgment in Microsoft's favor, so Novell should not be allowed to rely on them in this Court. *See Causey*, 162 F.3d at 804 n.5; *Rohrbough*, 916 F.2d at 973 n.8; *see also Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 595 n.6 (9th Cir. 2002).

⁴ The documents are referred to in footnote 9 on pages 39-40 of Novell's Brief.

Pursuant to Local Rule 27(a), Microsoft has informed Novell's counsel of Microsoft's intention to file this motion. Novell does not consent to the granting of this motion and has indicated that it intends to file an opposition to the motion.

CONCLUSION

Microsoft respectfully requests that this Court strike the documents set out at pages JA-2079-83, JA-2681-82, JA-2685-91 and JA-2692-94 from the Joint Appendix and strike any references to those documents from Novell's Brief.

Respectfully submitted,

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August 11, 2010

CERTIFICATE OF SERVICE

I certify that on August 11, 2010 the foregoing document was served on plaintiff-appellant Novell, Inc.'s counsel of record through the CM/ECF system.

By: /s/ David B. Tulchin
David B. Tulchin