UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOVELL, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-1482
	)	
MICROSOFT CORPORATION,	)	
	)	
Defendant-Appellee.	)	

NOVELL'S OPPOSITION TO MICROSOFT'S MOTION TO STRIKE

Novell's Surreply from the proceeding below demonstrates that Microsoft misled the district court on a dispositive issue. Microsoft's resulting embarrassment is not a valid reason to strike the Surreply from the record here. Because Judge Motz never denied Novell's motion for leave to file the Surreply, *and affirmatively responded to it in his opinion*, the cases on which Microsoft relies are easily distinguished, and the motion is unsupported.

BACKGROUND

The error on appeal is the district court's holding that when Novell sold one line of business, along with antitrust claims "associated directly or indirectly" with that business, it somehow included claims for injuries to a distinct line of business that Novell operated in a different period of time. Novell tendered the Surreply

at issue to correct misstatements of fact, made by Microsoft during oral argument, about these dispositive periods of time.

Specifically, from 1990 through September 1994, Novell operated, and Microsoft continually attempted to destroy, Novell's DR-DOS business, which competed with Microsoft's own DOS operating system, MS-DOS. *See* Novell's Aug. 6, 2010 Br. at 10-11 (citing *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1298-304 (D. Utah 1999)). Novell finally "announced in September 1994 that it would withdraw from active development and marketing of further versions of [DR-]DOS." *Caldera*, 72 F. Supp. 2d at 1304. As Microsoft admitted in prior proceedings, DR-DOS ceased to be a competitive threat, and no matter what Microsoft thereafter did to maintain its monopoly in the operating systems market by harming *other* Novell businesses, it could not have harmed the non-competitive DR-DOS business, nor become part of the antitrust claim concerning DR-DOS.

After DR-DOS was out of competition with MS-DOS, Microsoft turned its attention to the different threat posed by Novell's recently acquired suite of Business Applications, such as WordPerfect, giving rise to Novell's second and distinct set of claims. The district court's error below was finding that anticompetitive harms to the Business Applications, beginning in October 1994, also harmed DR-DOS, and thus became part of the DR-DOS claim that Novell

subsequently sold. Given the demise of Novell's DR-DOS business in September 1994, the district court's error is obvious.

The issue became critical during oral argument, when Judge Motz made his admittedly "embarrass[ing]" revelation that his "earlier ruling" – that Novell still owned the claims for injuries to the Business Applications – "was wrong." JA-257, JA-371-72. He indicated that unless counsel could change his mind, he would hold that claims for injuries to the Business Applications were "associated" with, and therefore sold with, claims for injuries to the DOS business.

Novell's counsel stressed that "our anticompetitive acts . . . begin after the demise of the DOS business. And that is yet another difference between these claims. And that is why it is not fair to say that they're even indirectly related. They are distinct in every particular." JA-280.

Microsoft recognized that DR-DOS's demise in September 1994 was fatal to its defense, and that Judge Motz was paying close attention to that date.[1] Microsoft responded that "[t]his is simply a factual mistake," and contended that Novell continued to license DR-DOS and provide telephone support to legacy customers after 1994, *see* JA-280-81, as if such support – no matter how limited or trivial – had some bearing on DR-DOS's competitive threat to MS-DOS. Microsoft also

[1] Judge Motz even suggested that "further factual inquiry" may be needed on this topic. JA-312.

presented for the first time an unauthenticated "screen shot" of a purported DR-DOS advertisement downloaded from the Internet, arguing that DR-DOS is viable today, *see* JA-281; JA-5105 – as if the status of DR-DOS today, under new ownership, could bear upon the competitive viability of Novell's DR-DOS in 1994 and 1995.

Microsoft's introduction of the unauthenticated "screen shot" opened the door to Novell's Surreply, which dismantles Microsoft's contentions by showing, in Microsoft's own words, that Microsoft's acts against the Business Applications could not "directly or indirectly" affect the defunct DR-DOS business, and were not part of the DR-DOS claim.

ARGUMENT

I. The Surreply And Its Exhibits Correct A False Implication Made By Microsoft At Oral Argument

The Surreply's exhibits show that Microsoft knew that its contentions at oral argument were misleading. Two of the exhibits record Microsoft's prior, contrary statements. As shown by Surreply Exhibit 1, Microsoft admitted the following in *Caldera*: "The fact is Novell effectively withdrew DR DOS from the marketplace in or about September 1994. What effect could Microsoft's conduct have had on Novell's DR DOS business after then? There no longer was a DR DOS business to be affected." JA-2081.

As shown by Surreply Exhibit 2, Microsoft's expert here, Kevin M. Murphy, explained in *Friedman v. Microsoft Corp.* that "[n]o matter how successful DR DOS might have been in the early 1990s absent Microsoft's allegedly anticompetitive actions, its ability to affect operating system competition in the second half of the 1990s . . . was minimal." JA-2694.

Surreply Exhibits 3 and 4 – the Liability Report and deposition transcript of plaintiffs' expert, Frederick R. Warren-Boulton, from *In re Microsoft Corp.* – confirm the point. In his report, Dr. Warren-Boulton opines that "by 1994, . . . Microsoft had eliminated DR-DOS as a competitive force in the [operating system] market." JA-2682. In his deposition, Dr. Warren-Boulton places "the death" of DR-DOS "as a competitive force . . . in the fall of '93." JA-2689.

Microsoft's only "answer" to this potentially dispositive evidence is that "Novell continued to sell some DR DOS products [after September 1994]," as noted by the district court. JA-372 n.3. That DR-DOS *existed* after September 1994, with trivial sales volume, *see, e.g.*, JA-1824; JA-1876; JA-1929, does not mean that it was a *viable competitor*.

The very website from which Microsoft drew its screen shot shows that, even now, DR-DOS has not returned to compete in the PC operating systems market, but in the hands of new owners is now an "embedded system" for

household appliances and devices *other than* PCs.[2] Microsoft's evidence of this toaster-oven technology only confirms its prior admission that Novell's DR-DOS stopped competing in the PC operating systems market by September 1994. Yet Microsoft has put the screen shot in the Joint Appendix, and apparently intends to argue its false implications to this Court. The Surreply and its exhibits are necessary to have the appeal decided on the merits, and not on the basis of uncorrected misrepresentations.

II. Judge Motz Considered The Surreply

Microsoft speculates that Judge Motz did not consider the Surreply before ruling. *See* Mot. to Strike at 2. In fact, his opinion responds to an argument raised in the Surreply, *see* JA-376 n.8, and purports to distinguish *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993), which Novell cited in the Surreply for the first time in its summary judgment briefing.[3] For this reason alone, the Surreply and its exhibits are properly part of the record.

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[2] *See* DR-DOS Continues Life in Embedded Devices, *available at* http://www.drdos.com/press/index.htm#embed (accessed Aug. 23, 2010); *see also* DR-DOS 8.0 Ships, Advancing DOS as the Best Embedded OS, *available at* http://www.drdos.com/press/drdos.htm?rnd=1080254229353 (accessed Aug. 23, 2010).

[3] That Novell cited this case in its original motion for summary judgment, which the court denied without prejudice on August 28, 2008, means nothing here. Novell's renewed motion for summary judgment, filed on October 7, 2009, "supersede[d] the original," JA-4882 n.1, and there is no reason to believe that Judge Motz hunted through the old, superseded briefs, looking for arguments that Novell was *not* presently making, *except in* the newly tendered Surreply.

In any event, no authority cited by Microsoft, and no authority known to Novell, supports a motion to strike on the present facts. The district court never denied Novell's motion for leave, nor otherwise rejected the Surreply, and Novell presented both the Surreply and its exhibits to Judge Motz well in advance of his ruling. For these reasons, every authority cited by Microsoft is distinguishable.

For example, Microsoft cites Moore's Federal Practice § 310.10[2][a], at 310-13 n.16.1, which relies in turn on *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1127-28 & n.5 (9th Cir. 2009). *See* Mot. to Strike at 3. In *Nicholson*, the lower court *explicitly rejected* plaintiff's proposed surreply, and for that reason, the Ninth Circuit excluded documents attached to it. 580 F.3d at 1127 n.5. In *Rohrbough v. Wyeth Laboratories, Inc.*, plaintiffs "first attempted to supplement the record" *after* the court entered its decision on summary judgment, and the lower court *expressly denied* the motion for leave. 916 F.2d 970, 973-74 n.8 (4th Cir. 1990).[4]

Finally, prior to including the four Surreply exhibits in the Joint Appendix, Novell contacted the appeals clerk at the district court. The clerk informed Novell that on the Court's request the entire record would be forwarded, including

[4] Microsoft's other authorities are distinguishable for similar reasons. In *Causey v. Balog*, 162 F.3d 795, 803 n.5 (4th Cir. 1998), plaintiff provided an affidavit containing new information "after the district court granted summary judgment." In *Barcamerica International USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 595 (9th Cir. 2002), counsel conceded that the depositions at issue were not filed or presented to the district court, and exclusion was thus proper.

Novell's Motion for Leave, Surreply, and Exhibits. *See* JA-15. Even if Judge Motz never accepted the Surreply and its exhibits, this Court should correct the error by accepting them as part of the record, as Novell reasonably understood them to be.

CONCLUSION

Novell respectfully requests the Court to deny Microsoft's Motion to Strike and accept Novell's Surreply and its exhibits as part of the record on appeal.

Dated: August 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 24, 2010, I caused a copy of the foregoing document to be served on Defendant-Appellee Microsoft Corporation's counsel of record through the CM/ECF system.

By: /s/ David L. Engelhardt
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