UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

MICROSOFT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE CERTAIN DOCUMENTS FROM THE JOINT APPENDIX AND ANY REFERENCES TO SUCH DOCUMENTS FROM NOVELL'S BRIEF

After oral argument in the district court on Microsoft's motion for summary judgment, Novell filed a motion seeking leave to file a surreply brief—thereby recognizing that a surreply brief was, without express permission, unauthorized and impermissible. There is no dispute that the district court never granted Novell's motion for leave to file the proposed surreply brief.

Novell now contends that because the district court made reference in a footnote of its decision to a case cited in Novell's proposed surreply brief, the district court must have read and considered the surreply brief in ruling on Microsoft's motion for summary judgment. That argument is specious. The only other argument Novell now makes—that a surreply brief was necessary because Microsoft said something misleading at oral argument—is false and provides no

justification for Novell's improper effort to supplement the record on appeal. Indeed, Novell cannot cite a single case to support its argument that documents attached to a proposed surreply brief that was never accepted for filing by the district court are properly part of the record on this appeal.

Microsoft's motion to strike should be granted for four reasons.

First, accepting Novell's argument that the district court must have considered its surreply brief despite the fact that the motion for leave to file that surreply brief was never granted would require this Court to ignore the rules of the district court: "Unless otherwise ordered by the Court, surreply memoranda are not permitted to be filed." D. Md. Loc. R. 105(2)(a). Absent an express order of the district court, which was not issued in this case, Novell's proposed surreply brief did not become part of the record below (and thus is not properly part of the record on appeal).

Judge Motz's decisions confirm that when he considers a surreply brief in deciding a motion, he does so only after expressly granting leave to file that surreply brief. *See, e.g.*, *Garrison* v. *McCormick & Co.*, 2010 U.S. Dist. LEXIS 64920, at *1 n.1 (D. Md. June 30, 2010); *Villaras* v. *Geithner*, 2009 U.S. Dist. LEXIS 97830, at *3 (D. Md. Oct. 19, 2009); *Bell BCI Co.* v. *HRGM Corp.*, 2004 U.S. Dist. LEXIS 15305, at *2 n.1 (D. Md. Aug. 6, 2004); *Jones* v. *Balt. County*, 2001 U.S. Dist. LEXIS 7064, at *1 n.1 (D. Md. May 18, 2001).

Moreover, when Judge Motz considers the contents of a surreply brief in deciding a motion, he makes clear that he has done so. *See, e.g.*, *Business Loan Express, LLC.* v. *Pak*, 2004 U.S. Dist. LEXIS 12807, at *1 n.1 (D. Md. July 9, 2004) ("Although the filing of such a memorandum is unauthorized without leave of court, I have nevertheless considered it before issuing this opinion." (internal citations omitted)); *Carbaugh* v. *Pangborn Corp.*, 2001 U.S. Dist. LEXIS 1409, at *2 n.1 (D. Md. Feb. 12, 2001) ("Even if [the] motion were granted, the arguments in [the] Surreply, which was filed with the motion, would not change this Memorandum."); *Young* v. *Pharmacia & Upjohn Co.*, 1998 U.S. Dist. LEXIS 22194, at *1 n.1 (D. Md. Dec. 4, 1998) ("[The] surreply will be granted because I have considered all of the submissions in deciding the present motion."). Judge Motz said nothing about Novell's proposed surreply brief in his lengthy decision granting Microsoft's motion for summary judgment.

Second, Novell is engaged in speculation when it contends that the district court must have considered its proposed surreply brief because the district court's decision makes reference in a footnote to one case, *Lerman* v. *Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993), that Novell cited in that proposed surreply brief. Novell claims that because the *Lerman* case does not appear in Novell's summary judgment brief, the district court must have found it by reading Novell's proposed surreply brief. (Novell Opp. at 6.) There are at least two other equally

plausible explanations. The district court may of course have located the case through its own research. More likely, the *Lerman* case may have come to the district court's attention in reading Novell's brief in support of an earlier motion for summary judgment, which cites the case. (JA-3117.) Novell has no way of knowing how the *Lerman* case ended up in the district court's decision, and certainly has no basis for its confident assertion that the district court read and considered Novell's proposed surreply brief in ruling on Microsoft's motion for summary judgment.

Third, Novell has not found a single case that supports its position and has failed to distinguish the cases relied on by Microsoft. It is settled law that a document "merely 'lodged' with the district court" will not be considered on appeal. *Nicholson* v. *Hyannis Air Serv.*, 580 F.3d 1116, 1127-28 n.5 (9th Cir. 2009); *see also* 20 MOORE'S FEDERAL PRACTICE § 310.10[2][a], at 310-13 n.16.1. The record on appeal should include only documents that were considered by the district court in rendering its decision. *Rohrbough* v. *Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990). Novell attempts to distinguish these cases on the grounds that "[t]he district court never denied Novell's motion" and that "Novell presented both the Surreply and its exhibits to Judge Motz well in advance of his ruling." (Novell Opp. at 7.)

It cannot be, however, that merely filing a motion for leave to file a surreply brief is a sufficient basis for including the proposed surreply brief and documents attached to it in the record on appeal. As the court in *Nicholson* noted, to hold otherwise would permit the clerk's office to decide which documents become part of the record instead of reposing that authority where it belongs, namely, with the district court judge presiding over the case. *Nicholson*, 580 F.3d at 1127-28 n.5. Tellingly, Novell is arguing for precisely the result that the court in *Nicholson* found unacceptable. Novell notes that it "contacted the appeals clerk at the district court" and "[t]he clerk informed Novell that on the Court's request the entire record would be forwarded, including Novell's Motion for Leave, Surreply, and Exhibits." (Novell Opp. at 7-8.) In Novell's view, it does not matter that Judge Motz did not grant its motion for leave to file a surreply brief. Novell's proffered approach "would permit the clerk's office to override a judge's decision as to whether a particular document may be 'filed' with the court." *Nicholson*, 580 F.3d at 1127-28 n.5.

Finally, Novell's argument that its proposed surreply brief was a necessary response to misleading statements made by Microsoft at oral argument is false. This is confirmed by the fact that Novell never suggested that Microsoft's statements were misleading—either during oral argument, in the brief seeking leave to file a surreply brief or in the proposed surreply brief itself. Novell's

unfounded accusation is not a basis for including in the record on appeal documents that were not before the district court.

Although not directly relevant to this motion to strike, Novell's claim that Microsoft made a "misstatement of fact" during oral argument (Novell Opp. at 2) is baseless. The statements about which Novell now complains were: (i) that while "Novell said that it would discontinue [DR DOS] at some future time . . . it didn't do it immediately, it continued to license the product to customers" (JA-280); (ii) that Novell "continued to provide support for [DR DOS] customers until February of 1996 on a telephone basis for free. And after that . . . it continued to provide other forms of support for DR-DOS" (JA-281); and (iii) that DR DOS is still available today, so the "product never died. It continued to be marketed" (*Id.*)[1] Those statements were all true, and Novell has not shown otherwise. Novell is also unhappy that Microsoft's counsel showed the district court a screenshot of a website that had been downloaded the previous day "which allows you to click a button and buy DR-DOS." (JA-281) Novell does not claim that the screenshot was a fabrication, nor does Novell deny that DR DOS remains available for

[1] Microsoft made the same points in briefing its motion for summary judgment, *i.e.*, that DR DOS did not "cease to exist" after September 1994 and that the product still had value when Novell sold DR DOS to Caldera in 1996. (*See, e.g.*, JA-5049 & n.4.) Novell had a full opportunity to respond to these points in its briefs. (*See, e.g.*, JA-5063, JA-5075-76, JA-5078.) The notion that Novell was somehow surprised when the points were reiterated at oral argument is completely disingenuous.

licensing via the Internet to this day. In short, the notion that Microsoft made misleading statements to the district court is utterly unfounded.

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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CERTIFICATE OF SERVICE

I certify that on August 27, 2010 the foregoing document was served on plaintiff-appellant Novell, Inc.'s counsel of record through the CM/ECF system.

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