

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

This Document Relates to:
Novell, Inc. v. Microsoft Corporation,
Civil Action No. JFM-05-1087

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) MDL Docket No. 1332
) Hon. J. Frederick Motz
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**MEMORANDUM IN SUPPORT OF
NOVELL'S MOTION SEEKING COLLATERAL ESTOPPEL**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
BACKGROUND	2
I. THE GOVERNMENT’S CASE AGAINST MICROSOFT.....	2
II. THE CURRENT LAWSUIT	4
III. PREVIOUS LITIGATION CONCERNING THE PRECLUSIVE EFFECT OF DETERMINATIONS IN THE GOVERNMENT CASE.....	6
ARGUMENT	8
I. PRECLUSIVE EFFECT SHOULD BE GIVEN TO THE RULINGS THAT MICROSOFT ILLEGALLY MAINTAINED ITS WINDOWS MONOPOLY	8
II. PRECLUSIVE EFFECT SHOULD BE GIVEN TO THE 72 FINDINGS	10
III. MICROSOFT SHOULD BE PRECLUDED FROM RELITIGATING THE CRITERIA FOR COLLATERAL ESTOPPEL OTHER THAN “NECESSITY”	13
CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Belmont Realty Corp. v. Bogosian</i> , 11 F.3d 1092 (1st Cir. 1994)	2, 12
<i>Commercial Assocs. v. Tilcon Gammino, Inc.</i> , 998 F.2d 1092 (1st Cir. 1993)	12
<i>Cowgill v. Raymark Indus. Inc.</i> , 832 F.2d 798 (3d Cir. 1987).....	15
<i>Hoult v. Hoult</i> , 157 F.3d 29 (1st Cir. 1998).....	12
<i>In re Diet Drugs Prods. Liab. Litig.</i> , 990 F. Supp. 834 (J.P.M.L. 1998).....	16
<i>In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.</i> , 73 F.3d 528 (4th Cir. 1996)	16
<i>In re Microsoft Corp. Antitrust Litig.</i> , 232 F. Supp. 2d 534 (D. Md. 2002).....	6, 10, 11, 15
<i>In re Microsoft Corp. Antitrust Litig.</i> , 355 F.3d 322 (4th Cir. 2004)	<i>passim</i>
<i>Lee v. Am. Nat’l Ins. Co.</i> , 260 F.3d 997 (9th Cir. 2001).....	14
<i>Louviere v. Shell Oil Co.</i> , 588 F. Supp. 95 (E.D. La. 1984)	16
<i>Microsoft Corp. v. Novell, Inc.</i> , 76 U.S.L.W. 3490 (U.S. Mar. 17, 2008).....	6
<i>Microsoft Corp. v. United States</i> , 534 U.S. 952 (2001).....	4
<i>Munoz v. County of Imperial</i> , 667 F.2d 811 (9th Cir.1982)	15
<i>New York v. Microsoft Corp.</i> , 224 F. Supp. 2d 76 (D.D.C. 2002).....	2, 4
<i>Novell, Inc. v. Microsoft Corp.</i> , JFM-05-1087, 2005 WL 1398643 (D. Md. June 10, 2005).....	5
<i>Novell, Inc. v. Microsoft Corp.</i> , 505 F.3d 302 (4th Cir. 2007)	5, 6
<i>Palmer v. Radisson Hotel Int’l</i> , 45 F. Supp. 2d 162 (D.P.R. 1999).....	14
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979).....	15
<i>Ritter v. Mount St. Mary’s College</i> , 814 F.2d 986 (4th Cir. 1987).....	11
<i>Sheeran v. Gen. Elec. Co.</i> , 593 F.2d 93 (9th Cir. 1979)	14
<i>Umstead v. Durham Hosiery Mills, Inc.</i> , 592 F. Supp. 1269 (D.C.N.C. 1984)	15

United States v. Grinnell Corp., 384 U.S. 563 (1966).....11

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)..... *passim*

United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999)1, 3

United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000)3, 11

United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000)3

Wilder v. Thomas, 854 F.2d 605 (2d Cir. 1998)2

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996).....14

Statutes

15 U.S.C. § 12, 5

15 U.S.C. § 22, 5

28 U.S.C. § 1292(b)7, 14

Other Authorities

88 Harv. L. Rev. 607 (1975).....14

9 J. Moore & B. Ward, *Moore’s Federal Practice* ¶ 110.25[1] (2d ed. 1995).....14

18 James Wm. Moore, *Moore’s Federal Practice* § 132.04[2][c] (3d ed. 2007).....10

16 Charles Alan Wright et al., *Federal Practice and Procedure* § 929 (1977).....14

16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3929.1 (2d ed. 1996) 14-15

18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421 (2d ed. 2002).....12

Plaintiff Novell, Inc. (“Novell”) asks this Court to preclude defendant Microsoft Corporation (“Microsoft”) from contesting legal rulings and 72 factual findings that were resolved against Microsoft in prior litigation brought by the United States, twenty states, and the District of Columbia. This Court has been down this road before. Following extensive briefing and oral argument, this Court ordered previously that the doctrine of collateral estoppel precluded Microsoft from relitigating 350 of the findings of fact made by the D.C. District Court in *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (referred to, collectively, as the “Findings” and, individually, as “Finding ___”). This Court also ordered that preclusive effect be given as a general proposition to legal rulings made in the Government case, but deferred deciding which specific legal rulings to incorporate into jury instructions. Microsoft obtained leave for interlocutory appeal of this Court’s order, but appealed only the narrow question of whether the 350 Findings satisfied the “necessary” criterion for the application of collateral estoppel, and thereby waived any right to contest the other criteria.

Here, Novell seeks preclusive effect for rulings that Microsoft illegally engaged in “twelve acts constitut[ing] ‘anticompetitive conduct’ in violation of Section 2” of the Sherman Act that Microsoft concedes were the basis for the successful monopolization claims brought against it in the Government case.¹ These 12 rulings (“Rulings”) are set forth in Appendix A in impartial, balanced language appropriate for use in jury instructions.

Novell also seeks preclusive effect for 72 Findings set forth in Appendix B, which support Novell’s claims and would be wasteful to relitigate. This Court previously deemed all but one of the 72 Findings precluded.² The Fourth Circuit reversed and remanded solely for

¹ Microsoft’s Mem. Challenging Specific Findings As Not Necessary (Nov. 20, 2002), at 9.

² The previous plaintiffs did not seek preclusion for Finding 227, which concerns Microsoft’s efforts to restrict computer manufacturers’ modification of Windows, due to Microsoft’s fear that modifications could weaken its monopoly.

reconsideration of the “necessary” criterion for collateral estoppel, directing this Court “to give preclusive effect only to factual findings that were necessary – meaning critical and essential – to the judgment affirmed by the D.C. Circuit.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004).

As shown below, and in detail in Appendix C, all 72 Findings meet the “necessary” standard because they are critical and essential to the legal rulings affirmed by the D.C. Circuit. Microsoft has conceded this for 5 of the 72 Findings and portions of 3 others. Furthermore, nearly all of the 72 Findings are quoted, expressly cited, or paraphrased by the D.C. Circuit’s opinion and/or the D.C. District Court’s opinion in connection with core legal conclusions. The remaining Findings provide essential information. The 72 Findings are all “logically or practically, a necessary component” of the judgment affirmed by the D.C. Circuit. *Belmont Realty Corp. v. Bogosian*, 11 F.3d 1092, 1097 (1st Cir. 1994) (citation and internal quotation marks omitted); *see also Wilder v. Thomas*, 854 F.2d 605, 620 (2d Cir. 1998).

As also shown below, Microsoft is precluded from contesting that the other criteria for collateral estoppel are satisfied because it failed to appeal this Court’s prior determination. Should the Court want further briefing on the other criteria, including those that already have been briefed extensively in this proceeding, Novell will provide it.

BACKGROUND

I. THE GOVERNMENT’S CASE AGAINST MICROSOFT

Microsoft’s antitrust violations were well-established in the hard-fought Government case. The Government alleged that Microsoft engaged in a sustained series of anticompetitive and exclusionary activities that violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *See New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 86 (D.D.C. 2002). Following extensive discovery, the D.C. District Court held a seventy-six day bench trial, *see United States v.*

Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001), hearing testimony of 105 witnesses and admitting 2,733 exhibits into evidence. After the close of evidence, Microsoft submitted a 1,512-paragraph proposed findings of fact. The District Court entered an opinion with 412 factual findings detailing Microsoft's monopoly power in the PC operating systems market, Microsoft's anticompetitive and exclusionary conduct, and the harm caused to competition, competitors and consumers. *See Microsoft*, 84 F. Supp. 2d at 12-112. The District Court separately issued conclusions of law, *see United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), and a remedial order which, *inter alia*, split Microsoft into two separate companies. *See United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000).

The District Court explained that Microsoft had waged an unlawful "campaign" against competing software products that threatened to erode the entry barrier that protected its Windows monopoly. *Microsoft*, 87 F. Supp. 2d at 38-39. This "applications" barrier to entry "prevent[ed] Intel-compatible PC operating system[s] other than Windows [from attracting] significant consumer demand." *Id.* at 36.

A seven-judge *en banc* panel of the D.C. Circuit, "[a]fter carefully considering the voluminous record on appeal – including the District Court's Findings of Fact and Conclusions of Law, the testimony and exhibits submitted at trial, the parties' briefs, and the oral arguments," *Microsoft*, 253 F.3d at 46, unanimously affirmed the determination that Microsoft had violated Section 2 of the Sherman Act by unlawfully maintaining its monopoly in the Intel-compatible PC operating systems market. The D.C. Circuit specifically affirmed determinations that Microsoft had engaged in twelve types of unlawful conduct. *See infra* Appendix A. The D.C. Circuit reversed findings of liability on attempted monopolization and tying claims, *Microsoft*, 253 F.3d at 46, but observed that "facts underlying the tying allegation substantially overlap with those" underlying the monopoly maintenance claim, *id.* at 84, and "[t]he two practices that plaintiffs

have most ardently claimed as tying violations are, indeed, a basis for liability under plaintiffs' § 2 monopoly maintenance claim." *Id.* at 96.

Microsoft "challenged very few of the findings as clearly erroneous," arguing instead that all of the Findings should be vacated because the district judge's conduct had created an appearance of bias. *Id.* at 117. The D.C. Circuit disagreed, holding that:

[A]lthough Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias.

In light of this conclusion, the District Judge's factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review.

Id. at 118 (citations omitted). Finding that there was an "appearance of partiality," the D.C. Circuit ordered the case assigned to a different district court judge for further proceedings. *Id.* at 46, 116. Microsoft's petition for a writ of *certiorari* was denied. *See Microsoft Corp. v. United States*, 534 U.S. 952 (2001) (mem.).

On remand, the United States and nine individual States settled with Microsoft, *see New York v. Microsoft*, 224 F. Supp. 2d at 87, and the nonsettling States litigated the issue of an appropriate remedy and won a judgment awarding injunctive relief. *Id.* at 266-77. In fashioning a remedy, the D.C. District Court observed:

Because all of the district court's factual findings survived challenge on appeal, they comprise the law of this case and may be relied upon during the remedy phase of this proceeding. . . . [T]he factual findings of the district court, like the conclusions of the appellate court, comprise the foundation upon which this court must construct a remedy.

Id. at 98 (citation omitted).

II. THE CURRENT LAWSUIT

In 1994, Novell purchased the highly regarded, immensely popular WordPerfect application and combined it with Quattro Pro and other complementary software to create

PerfectOffice, an integrated “suite” of office-productivity applications. *See* Complaint ¶ 37 (Nov. 12, 2004). Because of Microsoft’s anticompetitive conduct, Novell’s applications then suffered steep declines in market share, and in March 1996 Novell sold them to Corel Corporation at a great loss. *See id.* ¶ 8. Novell brought this lawsuit under Sections 1 and 2 of the Sherman Act, alleging *inter alia* that Microsoft deliberately destroyed Novell’s products with the purpose and effect of unlawfully maintaining Microsoft’s monopoly in the Intel-compatible PC operating systems market (Count I), and unreasonably restraining trade through exclusionary agreements with PC manufacturers (Count VI). This Court denied Microsoft’s motion to dismiss these claims, holding that Novell has antitrust standing to pursue them.³ *See Novell, Inc. v. Microsoft Corp.*, JFM-05-1087, 2005 WL 1398643, at *3 (D. Md. June 10, 2005).

The Fourth Circuit affirmed. Noting that “Novell’s Counts I and VI are indeed based on Microsoft’s anticompetitive conduct in the PC operating-systems market, which was at issue in the [Government case],” *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007), the Fourth Circuit explained:

The thrust of Novell’s argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft’s Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly. . . .

Building on this same theory [of threats to the Windows monopoly from outside the operating systems market], the government . . . argued that Microsoft preserved its advantage in the PC operating-system market by targeting certain “middleware” products, specifically [Sun Microsystems, Inc.’s] Java programming environment and Netscape’s Navigator web browser. Java and Navigator were defined by the D.C. District Court as *outside* of the PC operating-system market, a finding affirmed by the D.C.

³ This Court granted Microsoft’s motion to dismiss Counts II-V, which allege that Microsoft unlawfully monopolized and attempted to monopolize the word processing and spreadsheet applications markets. *See Novell, Inc. v. Microsoft Corp.*, JFM-05-1087, 2005 WL 1398643, at *1 (D. Md. June 10, 2005). The Fourth Circuit affirmed. *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 304 (4th Cir. 2007).

Circuit. Notwithstanding the fact that the primary threats at issue in the government action stood outside of the PC operating-system market, Microsoft was found to have unlawfully monopolized that market.

Id. at 308-09 (citations and footnotes omitted). The United States Supreme Court recently denied Microsoft's petition for a writ of *certiorari*. See *Microsoft Corp. v. Novell, Inc.*, 76 U.S.L.W. 3490 (U.S. Mar. 17, 2008) (No. 07-924).

III. PREVIOUS LITIGATION CONCERNING THE PRECLUSIVE EFFECT OF DETERMINATIONS IN THE GOVERNMENT CASE

In the wake of the Government case, private antitrust actions were filed against Microsoft. In 2002, plaintiffs Netscape Communications Corporation ("Netscape"), Sun Microsystems, Inc. ("Sun"), Burst.com, Inc. ("Burst"), and Be, Inc. ("Be"), and a plaintiff class moved to preclude Microsoft from relitigating 356 Findings.⁴ Following extensive briefing and oral argument, this Court issued an opinion preliminarily granting preclusive effect. See *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 537 (D. Md. 2002). This Court concluded, however, that although "Microsoft has been given ample opportunity in opposing plaintiffs' motions to contest those findings it contends were not necessary to the judgment against it, . . . I will give Microsoft one last opportunity to challenge specific findings as not meeting the 'necessary' requirement." *Id.* at 538.

Following another round of briefing, this Court issued an order giving preclusive effect to 350 Findings. See Order of Court (Apr. 4, 2003). This Court also ordered that "[c]ollateral estoppel, of course, attaches to legal findings as well as factual findings," and "as a general proposition, preclusive effect will be given to the rulings made by the [D.C.] Court of Appeals," but deferred the question of which rulings to incorporate into jury instructions. *Id.*

⁴ Initially, Be, Burst, and the plaintiff class sought preclusion on all the Findings, while Netscape sought preclusion on 278 and Sun sought preclusion on 356. Be, Burst and the plaintiff class agreed to limit their motions to the 356 Findings on which Sun had moved.

Microsoft moved for certification of the Order for interlocutory appeal under 28 U.S.C.

§ 1292(b). Microsoft conceded that it

does not contend that none of the district court's findings of fact may be given preclusive effect. As just one example, the district court's "market definition" findings are clearly "necessary" to the D.C. Circuit's decision, under any standard.

Microsoft's Mem. in Supp. of its Mot. for Certification, at 2 n.1 (Apr. 11, 2003). This Court granted Microsoft's motion, *see* Order (May 9, 2003), and the Fourth Circuit granted Microsoft leave to appeal without limiting the scope of appeal. *See In re Microsoft Corp. Antitrust Litig.*, No. 03-181 (4th Cir. July 3, 2003) (attached as Exhibit 1).

Microsoft, however, appealed only the "necessity" criterion. The Fourth Circuit explained that "[t]he single criterion at issue in this appeal is whether the district court correctly applied the requirement that facts subject to collateral estoppel be 'critical and necessary' to the judgment in the prior litigation." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004). The Fourth Circuit "reverse[d] and remand[ed], directing the district court to give preclusive effect only to factual findings that were necessary – meaning critical and essential – to the judgment affirmed by the D.C. Circuit." *Id.* at 325.

On remand, Burst filed a motion seeking preclusive effect for 311 Findings and 15 excerpts from the D.C. Circuit's opinion. *See* Burst.com, Inc.'s Collateral Estoppel Br. on Remand (June 7, 2004). Microsoft's opposition conceded that 16 Findings – including 8 for which Novell seeks preclusion – were necessary. Microsoft conceded that Findings 18, 33, and 34 are "critical and essential to the [D.C.] Court of Appeals' determination that Microsoft possessed monopoly power in a relevant market," and that Findings 161, 164, 213, 394 and 401 (among others) are "critical and essential to the Court of Appeals' determination that Microsoft engaged in twelve specific acts of anticompetitive conduct." Microsoft's Mem. in Opp. to

Burst's Mot. (July 1, 2004), at 22, 23. The parties settled before this Court could rule on Burst's motion.

ARGUMENT

A party seeking collateral estoppel "must demonstrate that (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 326. In addition, when collateral estoppel is used offensively, as here, its application should not be "unfair to the defendant." *Id.* at 326-27.

This Court previously held that these criteria are satisfied for legal rulings and 350 Findings. After remand from the Fourth Circuit, the open issues were: (1) which rulings to incorporate into jury instructions; and (2) which Findings satisfy the "necessity" criterion for collateral estoppel. We show below that the rulings listed in Appendix A should be incorporated into jury instructions, and that the 72 Findings listed in Appendix B satisfy the "necessary" standard. Finally, we show that Microsoft may only contest "necessity" because, by failing to appeal this Court's prior determination that the other criteria are satisfied, it waived its right to litigate them.

I. PRECLUSIVE EFFECT SHOULD BE GIVEN TO THE RULINGS THAT MICROSOFT ILLEGALLY MAINTAINED ITS WINDOWS MONOPOLY

Offensive collateral estoppel can foreclose relitigation of legal rulings, *see In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 326 – e.g., that Microsoft possessed monopoly power in a relevant market. This Court previously held:

[A]s a general proposition, preclusive effect will be given to the rulings made by the Court of Appeals. However, I agree with Microsoft that it is premature to ascertain which of the statements made by the Court of Appeals should be incorporated into the jury instructions relating to preclusive findings. Some of those statements, *e.g.*, “Microsoft benefits from the applications barrier to entry,” may be incorporated verbatim. Others might be excluded as being redundant to Judge Jackson’s findings or as being phrased in a manner inappropriate for a jury instruction.

Order of Court (Apr. 4, 2003) (footnote omitted).

Novell seeks preclusion for Rulings affirmed by the D.C. Circuit which identify the twelve specific acts of anticompetitive conduct which formed the basis for finding Microsoft liable for maintaining a monopoly. Generally, they cover: (1) the definition of the relevant market; (2) Microsoft’s possession of monopoly power; (3) prohibitions that Microsoft imposed on computer manufacturers; (4) manipulation of Windows 98 to exclude competing Internet browsing technology; (5) improper agreements with Internet Access Providers, software developers, and other operating system developers to exclude competing Internet browsing technology; (6) improper agreements to give software developers preferential access to Windows in exchange for their agreement not to incorporate competing technology in their products; (7) deceiving software developers regarding the Windows-specific nature of Microsoft’s Java developer tools; and (8) Microsoft’s pressuring a computer chip maker to exclude “cross-platform” technology.

In Appendix A, we limit the description of the Rulings to concise, *verbatim* statements from the Fourth Circuit opinion and concessions by Microsoft in a previous brief, in order to maintain a neutral and balanced tone appropriate for a jury instruction. Although the Rulings contain technical terms, we address those terms in the 72 Findings. If needed, additional definitions can be given to the jury. Consistent with this Court’s guidance, we also avoid redundancy to the 72 Findings for which we seek preclusion.

II. PRECLUSIVE EFFECT SHOULD BE GIVEN TO THE 72 FINDINGS

The Fourth Circuit directed that preclusive effect be given “only to factual findings that were necessary – meaning critical and essential – to the judgment affirmed by the D.C. Circuit.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 326. Although other Findings also meet this standard, Novell seeks preclusive effect only for those that support its claims and would be wasteful to relitigate. *See In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d at 535 (rejecting Microsoft’s complaint that plaintiffs sought to “cherry pick” Findings for preclusive effect); *see also* 18 James Wm. Moore, *Moore’s Federal Practice* § 132.04[2][c], at 132-160 to 132-161 (3d ed. 2007) (when a party to a previous action had a full and fair opportunity to litigate issues, its opponent in a subsequent action is free to either relitigate those issues or seek offensive preclusion on some or all of them).

Beyond articulating the standard, the Fourth Circuit opinion provides limited guidance. First, the Fourth Circuit explained that the “supportive of” standard initially applied by this Court “changes the criterion, rendering it too broad to assure fairness in the application of the doctrine.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 327. The Fourth Circuit voiced concern about giving preclusive effect to “unnecessary or collateral” findings that might evade appellate review. *Id.*

Second, the Fourth Circuit directed that “[o]n remand the district court must limit itself to those facts critical and necessary to the judgment actually affirmed by the D.C. Circuit,” *id.* at 329, and further explained:

The D.C. Circuit held that Microsoft illegally maintained a monopoly in the market of “licensing of all Intel-compatible PC operating systems worldwide” through 12 specified acts of anticompetitive conduct, described by the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34, 50-80 (D.C. Cir. 2001). Microsoft may be precluded from relitigating the facts necessary to this judgment under the doctrine of offensive collateral estoppel.

Id. at 328. *A fortiori*, this Court may give preclusive effect to a fact that is necessary to a holding by the D.C. District Court that was affirmed, even if the fact also is necessary to a holding that was reversed.⁵

The 72 Findings all meet the “necessary” standard articulated by the Fourth Circuit. This Court previously explained that, with respect to the “necessary” criterion, “the devil is in the details.” *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d at 538. The details here include Microsoft’s concession that Findings 18, 33, 34, 161 and 164, and portions of Findings 213, 394, and 401 are necessary. Appendix C explains in detail why these and each of the other 72 Findings is critical and essential to the monopolization rulings affirmed by the D.C. Circuit.

Generally, the offense of monopolization has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In holding that these elements were proven, the D.C. District Court made determinations regarding: the definition of the relevant market; Microsoft’s dominant share in the relevant market; the existence of a barrier to entry; Microsoft’s possession of monopoly power; the exclusionary effect of Microsoft’s conduct; the lack of procompetitive justification for Microsoft’s conduct; and harm caused to competition and consumers. *See Microsoft*, 253 F.3d at 50-51; *Microsoft*, 87 F. Supp. 2d at 37-38.

⁵ The Fourth Circuit also provided as guidance that “if a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 328 (citation omitted). In this case, however, this limitation does not come into play. Even though each of the 12 findings of anticompetitive conduct independently supports a judgment that Microsoft violated Section 2 of the Sherman Act, the D.C. Circuit specifically affirmed each of those 12 findings. *Ritter v. Mount St. Mary’s College*, 814 F.2d 986, 993 (4th Cir. 1987) (“If one of the two determinations [that independently support the result in the prior litigation] is upheld on appeal, however, collateral estoppel can obtain as to that issue.”).

As explained in Appendix C, all 72 Findings constitute “logically or practically, a necessary component,” *Belmont Realty Corp.*, 11 F.3d at 1097 (citation and internal quotation marks omitted), of the D.C. District Court’s determinations and/or the D.C. Circuit’s affirmance. This is confirmed by following the roadmap provided by these courts’ detailed, fact-intensive opinions. *See Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) (“[A] finding is ‘necessary’ if it was central to the route that led the factfinder to the judgment reached, even if the result ‘could have been achieved by a different, shorter and more efficient route.’” (quoting *Commercial Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092, 1097 (1st Cir. 1993))); *see also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421, at 548-49 (2d ed. 2002) (“Courts occasionally have been tempted to speculate that a prior decision could have been rested on narrower grounds than those actually chosen, so that resolution of the broader issues was not necessary to the decision. For the most part, such speculation should be resisted.”).

The vast majority of the 72 Findings are expressly cited and some are quoted by the D.C. Circuit and/or D.C. District Court in reaching core legal conclusions. The remaining Findings are paraphrased in Findings that were cited by one or both courts, or provide essential definitions of terms used in Rulings or Findings that were cited, or provide essential facts referenced in Rulings or Findings that were cited.

Granting preclusive effect to the 72 Findings does not raise the Fourth Circuit’s concern that “a broad application of offensive collateral estoppel risks” unfairness. *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 327. Stated another way, none of the 72 Findings is “collateral or unnecessary.” Because all 72 Findings are necessary to determinations that were affirmed on appeal, there is no concern about lack of appellate review. In fact, Microsoft challenged very few of the Findings as clearly erroneous. In response to Microsoft’s claim of an appearance of

bias, the D.C. Circuit “reviewed the record with painstaking care,” “discerned no evidence of actual bias,” and held that “the District Judge’s factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review.” *Microsoft*, 253 F.3d at 118 (citations omitted). Accordingly, this Court should preclude Microsoft from contesting the 72 Findings listed in Appendix B.

III. MICROSOFT SHOULD BE PRECLUDED FROM RELITIGATING THE CRITERIA FOR COLLATERAL ESTOPPEL OTHER THAN “NECESSITY”

This Court previously ruled that the plaintiffs established all of the criteria for collateral estoppel. Microsoft could have challenged any or all of the criteria on appeal, but instead challenged only “necessity.” *See supra* pp. 1, 7. “Necessity” was the only issue addressed by the Fourth Circuit, and the Fourth Circuit’s decision left intact this Court’s determinations that the other criteria are satisfied. We respectfully submit that collateral estoppel applies to the unappealed, unreversed determinations. This Court should give them preclusive effect, and bar Microsoft from relitigating them.⁶

All the criteria for collateral estoppel are met. This Court’s prior order “actually resolved” issues that are “identical” to those now before the Court – i.e., whether the criteria for collateral estoppel are satisfied. This Court’s prior holding that the criteria for collateral estoppel are satisfied is “necessary” to its order precluding Microsoft from relitigating issues of law and fact. Microsoft unquestionably had a “full and fair opportunity” to litigate these issues, including two rounds of briefing before this Court and an appeal to the Fourth Circuit. Microsoft has never complained of any unfairness.

⁶ This holds as well for Finding 227, even though it was not expressly addressed by the Court’s prior order. There can be no serious dispute that Finding 227 satisfies the criterion of being litigated and conclusively established in the Government case. For the remaining criteria other than “necessity,” collateral estoppel applies for the reasons explained in this Part III.

In addition, this Court's prior order, as modified on appeal, constitutes a final and valid order for purposes of collateral estoppel. Microsoft sought and obtained from this Court certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the Fourth Circuit granted Microsoft's petition for leave to appeal without limitation on the scope of issues.

See supra p. 7.

In this situation, appellate jurisdiction and the scope of appellate review applied to the entire order. As the United States Supreme Court explained in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), under 28 U.S.C. § 1292(b):

[T]he appellate court may address any issue fairly included within the certified order because "it is the *order* that is appealable, and not the controlling question identified by the district court." "[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question." [The] "scope of review [includes] all issues material to the order in question."

Id. at 205 (citations omitted) (quoting 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed. 1995); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3929, at 144-45 (1977); Note, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b), 88 Harv. L. Rev. 607, 628-29 (1975)); *see Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1000 (9th Cir. 2001) (scope of appellate review under 28 U.S.C. § 1292(b) extends to all issues material to the order in question).

Microsoft's failure to challenge on appeal the criteria for collateral estoppel – when it had an unrestrained opportunity to do so – estops Microsoft from relitigating the unappealed issues. *See, e.g., Sheeran v. Gen. Elec. Co.*, 593 F.2d 93, 97 (9th Cir. 1979) (issue not raised on interlocutory appeal precluded from subsequent appellate review); *Palmer v. Radisson Hotel Int'l*, 45 F. Supp. 2d 162, 167 (D.P.R. 1999) (for purpose of issue preclusion, court orders become final on any part that is not appealed); *see generally* 16 Charles Alan Wright, Arthur R.

Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3929.1 (2d ed. 1996) (failure to include on a § 1292(b) interlocutory appeal a matter that might have been included and was central should forfeit review of the omitted matter on final judgment).

This Court previously decided that “it is difficult to imagine a case in which it would be more appropriate to invoke collateral estoppel.” *In re Microsoft Corp. Antitrust Litig.* 232 F. Supp. 2d at 535. To relitigate the application of the same underlying facts to the same collateral estoppel criteria would be an unnecessary and expensive waste of time and resources. “Adherence to the rule that a party waives a ‘contention that could have been but was not raised on [a] prior appeal’ is, of course, necessary to the orderly conduct of litigation.” *Cowgill v. Raymark Indus. Inc.*, 832 F.2d 798, 802 (3d Cir. 1987) (quoting *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.1982)).

Furthermore, applying collateral estoppel is not unfair to Microsoft. In exercising its discretion to allow the use of offensive collateral estoppel, a “court should consider the following nonexclusive factors: (1) whether the plaintiff could have easily joined in the action against the defendant in the earlier action; (2) whether the defendant had an incentive in the prior action to have defended the action fully and vigorously; (3) whether the defendant had won litigation other than the prior action that determined the same issues or facts favorably to the defendant; (4) whether procedural opportunities are available in the pending action that were not available in the prior action.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 326 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979)).

First, Novell could not have “easily joined” in the previous collateral estoppel motions because it was still investigating its claims. There was no bad faith or gamesmanship involved. *See Umstead v. Durham Hosiery Mills, Inc.*, 592 F. Supp. 1269, 1272-73 (D.C.N.C. 1984) (allowing collateral estoppel even though plaintiff could have joined earlier action absent

evidence of bad faith); *Louviere v. Shell Oil Co.*, 588 F. Supp. 95, 98 (E.D. La. 1984) (even if delay is intentional, collateral estoppel is allowed when record is devoid of proof of purposeful delay or attempted gamesmanship). Indeed, Microsoft entered into a tolling agreement with Novell effective November 7, 2003, *see* Complaint ¶ 22, while Microsoft's appeal of this Court's collateral estoppel order was pending with the Fourth Circuit. In October 2004 Microsoft and Novell mediated Novell's claims. Novell filed its lawsuit after mediation failed. Second, Microsoft had every incentive to contest the previous collateral estoppel motions, which included all but one of the Findings now at issue, and did so vigorously, as this Court knows. Third, Microsoft has not won litigation calling into question the soundness of this Court's previous ruling that the criteria for collateral estoppel other than "necessity" are satisfied. Fourth, the procedural protections currently available to Microsoft are identical to those previously available to and utilized by Microsoft.

Furthermore, applying collateral estoppel promotes the goal of the multidistrict litigation statute – i.e., “to eliminate duplicative discovery, prevent inconsistent or repetitive pretrial rulings . . . and conserve the resources of the parties, their counsel and the judiciary.” *In re Diet Drugs Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1998); *see In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 531-32 (4th Cir. 1996) (“The multidistrict litigation statute, 28 U.S.C. § 1407, was enacted as a means of conserving judicial resources in situations where multiple cases involving common questions of fact were filed in different districts.”). In sum, Microsoft should be precluded from relitigating criteria for collateral estoppel other than “necessity.”

