

**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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**REPLY MEMORANDUM IN SUPPORT OF
NOVELL'S MOTION SEEKING COLLATERAL ESTOPPEL**

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INTRODUCTION

Microsoft's Memorandum in Opposition suffers from at least seven fatal defects.

We elaborate on each in the body of this Reply. In summary:

1. Microsoft's principal argument – that Novell's collateral estoppel motion¹ does not pass a threshold “relevance” test – fails legally and factually. As this Court has recognized, a court does not conduct an independent relevance inquiry as part of its collateral estoppel analysis at a pre-discovery stage. Rather, it does so only later, when and if relevance disputes arise over the admissibility of evidence.

2. In any event, even if such a relevance test existed, Novell's motion would satisfy it. Microsoft argues that its conduct condemned in the Government case is irrelevant here because it involved different victims and products and a later time period. That argument is foreclosed by the Fourth Circuit's conclusion that “[t]he anticompetitive activities that harmed Java and Navigator are undeniably similar to those alleged by Novell,” *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 314 n.22 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1659 (2008), and by uniform precedent on the scope of evidence admissible in a monopolization case. Microsoft ignores the strong common denominators between the Government's claims and Novell's claims, which include:

¹ Novell seeks preclusive effect for 72 of the 412 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 __”). These 72 Findings are set forth in Appendix B to our opening brief. In addition, Novell seeks preclusive effect for legal rulings made in the Government case that Microsoft illegally engaged in 12 acts of anticompetitive conduct in violation of section 2 of the Sherman Act. These 12 rulings (“Rulings”) are set forth in Appendix A to our opening brief.

- ◆ the same motive – i.e., protecting the applications barrier to entry from software threats like Java, Navigator, and WordPerfect;
- ◆ the same anticompetitive objective – i.e., impeding sales and quashing distribution of threatening software;
- ◆ the same tactics – i.e., targeting the threatening software’s most important distribution channels and leveraging Microsoft’s Windows monopoly to exclude the software;
- ◆ the same harmful results – i.e., thwarting the development of Navigator, Java, and WordPerfect, and harming consumers and competition; and
- ◆ conduct and events that occurred while Novell owned WordPerfect or shortly thereafter, and flowed directly from Microsoft’s recognition – nearly a year before Novell sold WordPerfect – that Navigator and Java threatened the applications barrier to entry.

3. Microsoft similarly confuses the difference between claim preclusion, which Novell does not seek, and issue preclusion, which Novell does seek. Microsoft’s claim preclusion cases are inapposite. Microsoft cites no issue preclusion authority that would allow it to relitigate any issue resolved by the Court’s April 4, 2003 Order except the “necessity” criterion.

4. As for Microsoft’s attacks on Novell’s characterizations of the Rulings, all that needs to be said is that they are taken *verbatim* either from the Fourth Circuit’s opinion or Microsoft’s own briefing to this Court.

5. Nor is there any support in law for Microsoft’s notion that factual findings that form the basis for admittedly “necessary” legal conclusions are not themselves necessary. Microsoft does not and cannot cite legal authority for this proposition, which is inconsistent with the Fourth Circuit’s standard.

6. Law aside, logic compels the same conclusion. For example, just as the summary finding that Microsoft possessed monopoly power in the market for Intel-compatible PC operating systems is necessary, as Microsoft concedes, so too are findings that are part and parcel of the summary finding – i.e., what Intel-compatible PC operating systems are, what the market for them is, and the nature and extent of Microsoft’s monopoly power. Allowing Microsoft to relitigate these findings would lead in effect to relitigation of the admittedly preclusive summary findings.

7. Microsoft’s contention that Findings addressing the applications barrier to entry are unnecessary to the Rulings and irrelevant to Novell’s claims verges on the frivolous. If anything is central to the Government action and Novell’s claims, the applications barrier to entry is it. The Rulings condemn anticompetitive acts that were designed to and in fact did impede the development of software that threatened the applications barrier to entry. Novell similarly alleges that its “WordPerfect and other office productivity applications posed a significant threat to the applications barrier to entry,” Complaint ¶ 45, and Microsoft employed an array of anticompetitive tactics against Novell’s products that closely resembled those condemned in the Government case, *see, e.g., id.* ¶¶ 40-148.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE COLLATERAL ESTOPPEL ISSUE NOW AND DEFER QUESTIONS OF RELEVANCE

This Court’s February 5, 2008 scheduling order set collateral estoppel for resolution at the outset of fact discovery. Doing so will avoid discovery on issues resolved in the Government action.

Relevance is not, as Microsoft contends (Mem. Opp. at 12), a “preliminary question” in the collateral estoppel analysis. Rather, collateral estoppel and relevance are independent

inquiries. The collateral estoppel criteria do not include relevance in the second action.

In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 326-27 (4th Cir. 2004). As this Court previously held:

By finding that preclusive effect is to be given to the factual findings in the government case, I am not deciding that these findings are relevant to the claims of any particular plaintiff. That is an issue (more accurately, a series of issues) that awaits decision on a later occasion.

In re Microsoft Corp. Antitrust Litig., 232 F. Supp. 2d 534, 535 n.2 (D. Md. 2002), *rev'd on other grounds*, 355 F.3d 322 (4th Cir. 2004). Microsoft cites no legal authority for its contrary proposition,² which is squarely at odds with Microsoft's counsel's representation to this Court that it "makes sense" to adopt "a two-step process, where we'll try to deal with essential to the judgment, necessary to the judgment, and then recognizing that there are, in this group of cases, different relevant issues."³

II. THE RULINGS AND FINDINGS ARE RELEVANT TO NOVELL'S CLAIMS

Even though the question of the relevance of the Rulings and 72 Findings is premature, we explain here and in the companion Appendix A why they are relevant.⁴

² The authorities cited by Microsoft – i.e., 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4416 (2d ed. Supp. 2008), and *Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1031 (9th Cir. 2001) – do not state that relevance is a preliminary question to collateral estoppel. Instead, they explain the uncontroversial proposition that evidence from the first action must be relevant in order to be admissible in the second action.

³ *In re Microsoft Antitrust Litig.*, Tr. of Oral Argument 103:24-104:3, 104:25-105:1, Oct. 24, 2002 (cited pages attached hereto as Exhibit 1).

⁴ We include this discussion here in case the Court elects to address relevance issues now at this early stage. Our doing so should not be interpreted to limit in any way Novell's arguments should issues of relevance or admissibility arise in the future. Microsoft admits (Mem. Opp. at 12 n.9) that Findings 18, 33, and 34 are relevant, and that collateral estoppel applies to them. Microsoft also correctly concedes the relevance of 20 other Findings – i.e., Findings 2, 4, 6-10, 30, 31, 35-39, 44, 52, 54, 55, 64, and 66.

The Findings and Rulings, *inter alia*, “demonstrate that it is Microsoft’s corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft’s most cherished software products.” Finding 93. Novell alleges that Microsoft protected and maintained its Windows monopoly against the threats posed by Novell’s software products by employing the same kinds of anticompetitive strategies that were found to be illegal in the Government action. Complaint ¶¶ 45-52. For example, the Government case found Microsoft liable for: (1) integrating certain browsing functions with Windows in an anticompetitive manner, Rulings 5, 6; (2) preventing applications that threatened Microsoft’s Windows monopoly from running properly on the operating system by withholding critical technical information concerning Windows and deceiving software developers, Rulings 10, 11; and (3) using its Windows monopoly to prevent OEMs and ISVs from distributing applications that threatened its Windows monopoly, Rulings 1-4, 8, 9-12. Similarly, in this case, Novell alleges that Microsoft integrated the same technologies into Windows to exclude Novell’s software applications and employed the same exclusionary strategies to destroy WordPerfect. Complaint ¶ 21.

As a leading antitrust hornbook explains, such evidence is relevant because “[i]n a monopolization case conduct must always be analyzed ‘as a whole.’” II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7, at 208 (3d ed. 2007); *see also Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (explaining that in Sherman Act cases, “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each”); *United States v. E.I. Du Pont De Nemours & Co.*, 10 F.R.D. 618, 621 (D. Del. 1950) (in a monopolization case it may be “necessary for the entire corporate practice of an indicted

company to be subject to inquiry”). “A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices.” Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7, at 208. While each practice “viewed in isolation might be viewed as de minimis or an error in judgment,” the “pattern gives increased plausibility to the claim. For example, a monopolist might accidentally file a single baseless infringement suit, but a pattern of such suits indicates wilfulness.” *Id.* at 208-09.

Microsoft’s contention (Mem. Opp. at 12-13) that the Rulings and Findings are irrelevant because the Government case involved different victims, products, conduct, and time periods was rejected by the Fourth Circuit:

The anticompetitive activities that harmed Java and Navigator are **undeniably similar** to those alleged by Novell. . . .

. . . [W]e are not sufficiently persuaded by Microsoft’s proffered distinction between Novell’s products and middleware to consider irrelevant the parallels between Novell’s claims and the government’s claims.

Novell, 505 F.3d at 314-15 n.22 (emphasis supplied). The Fourth Circuit also gave short shrift to Microsoft’s related notion (Mem. Opp. at 8-9) that the Rulings and Findings are irrelevant because Novell’s office productivity applications did not directly compete in the PC operating systems market:

As with Novell’s office-productivity applications, the primary threat that Java and Navigator posed to Windows was not that they were competitors or potential competitors in the operating-system market (indeed, the court found that they were not competitors or potential competitors within the relevant time frame) but rather that, from outside that market, they could enable an alternative operating system to compete with Windows.

Novell, 505 F.3d at 314 n.22.

That some Rulings and Findings might concern conduct after March 1, 1996, when Novell sold WordPerfect, does not make them irrelevant. A defendant’s later conduct can be

admissible to prove a monopolization claim as “circumstantial evidence of what [a defendant’s] specific intent may have been at the time” of the alleged anticompetitive conduct, and whether the defendant’s actions “were part of a larger, ongoing pattern of anticompetitive conduct.” *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 657 (E.D. Pa. 2003); *see also Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1002 (9th Cir. 1986) (“Behavior after the relevant period could shed light on intentions during that period.”); *Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770, 774 (S.D.N.Y. 1984) (evidence of later bad acts probative of defendant’s intent, motive, and method).

Microsoft’s “undeniably similar” conduct at issue in the Government case overlaps or is close to the relevant time frame in this case. Microsoft concedes (Mem. Opp. at 4-7) that five Rulings (1-4 & 11) involve illegal conduct beginning in the spring of 1996 (i.e., at or about the time that Novell sold WordPerfect), three Rulings (6, 7, & 12) involve illegal conduct beginning later in the summer of 1996 (just months after the sale), and the remainder involve illegal conduct beginning in 1997 (within 1 to 1 1/2 years of the sale). Moreover, Microsoft’s illegal actions against Java and Netscape, like its actions against Novell’s products, flowed from anticompetitive strategies that Microsoft devised to protect the applications barrier to entry at least as early as January 1996, while Novell still owned WordPerfect, in response to threats that Microsoft identified at least as early as the spring of 1995. *See infra* App. A at 4-5. In short, the Rulings and Findings for which Novell seeks preclusion are relevant because they involve conduct that, like Microsoft’s actions against Novell, was part of an anticompetitive campaign to thwart threats to the applications barrier to entry.

III. MICROSOFT IS PRECLUDED FROM RELITIGATING ANY COLLATERAL ESTOPPEL CRITERIA OTHER THAN NECESSITY

Offensive collateral estoppel (issue preclusion, here) applies not only to the Rulings and 72 Findings, but also to the rulings in this Court's April 4, 2003 Order that were not appealed or reversed. Mem. Supp. at 13-16. Microsoft tries to evade such preclusion on the theory that Novell was not a party to the Order and Novell's claims (supposedly) do not "closely track" the Government's. Mem. Opp. at 19-22. Microsoft overlooks that: (1) offensive collateral estoppel requires only the identity of the defendant, not the plaintiff, *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 326; and (2) regardless of whether Novell's **claims** closely track those previously asserted, collateral estoppel applies to the **issues** resolved in this Court's April 4, 2003 Order, 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4416, at 393 (2d ed. 2002) ("Issue preclusion . . . is available whether or not the second action involves a new claim or cause of action.").⁵

Microsoft mistakenly asserts that its decision to forgo raising certain issues in its interlocutory appeal of the April 4, 2003 Order cannot preclude it from relitigating them here. Mem. Opp. at 20-21. Collateral estoppel necessarily precludes relitigation of final determinations in different actions between the same parties, *Sheeran v. General Electric Co.*, 593 F.2d 93, 97 (9th Cir. 1979); *Palmer v. Radisson Hotel International*, 45 F. Supp. 2d 162, 167 (D.P.R. 1999), or in the case of offensive collateral estoppel, between a different plaintiff and a defendant who "has previously litigated unsuccessfully in an action with *another party*."

⁵ Novell has never suggested that collateral estoppel applies simply by virtue of MDL consolidation, as Microsoft suggests (Mem. Opp. at 20). Rather, collateral estoppel applies to issues resolved in the April 4, 2003 Order because the criteria for collateral estoppel are satisfied. Preclusion, of course, also promotes the goals of MDL consolidation, including avoiding inconsistent rulings, streamlining litigation, and economizing judicial resources.

In re Microsoft Corp. Antitrust Litig., 355 F.3d at 326 (emphasis supplied) (citation omitted).

As explained in the Restatement (Second) of Judgments § 29 cmt. b (1982), preclusive effect that results from a party's failure to appeal an issue when it had the opportunity to do so applies equally when it is invoked by a non-party. Microsoft's admittedly considered decision to forgo appeal of certain issues (Mem. Opp. at 10, 20-21) forecloses its attempt to re-open them now.

The April 4, 2003 Order constitutes a final determination of issues that Microsoft litigated as fully as it desired and lost. Mem. Supp. at 14-15. The "finality" criterion for collateral estoppel "does not require a judgment 'which ends the litigation . . . and leaves nothing for the court to do but execute the judgment.'" *Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964) (alteration in original) (citation omitted). Rather, it "includes many dispositions which, though not final in that sense, have nevertheless been fully litigated." *Id.* As the Fourth Circuit has held, "finality" is a "flexible concept" which "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.'" *Swentek v. USAIR, Inc.*, 830 F.2d 552, 561 (4th Cir. 1987) (quoting *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961)), *abrogation on other grounds recognized by Mikels v. City of Durham, N.C.*, 183 F.3d 323 (4th Cir. 1999); *see also Dyndul v. Dyndul*, 620 F.2d 409, 412 (3d Cir. 1980) ("'Finality' for purposes of issue preclusion is a more 'pliant' concept than it would be in other contexts."). *See generally* 19 Charles Alan Wright, Arthur A. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4434 (2d ed. 2002 & Supp. 2008); Restatement (Second) of Judgments § 13 (1982).

Microsoft is thus reduced to relying (Mem. Opp. at 21) on a section of the Restatement that no longer exists. The language that Microsoft quotes comes from section 68

of the Restatement (First) of Judgments, which is “out of print” and “replaced” by the Restatement (Second) of Judgments.⁶ The Restatement (Second) of Judgments omits the provision quoted by Microsoft.⁷

Also misplaced is Microsoft’s reliance on *Dana Corp. v. NOK, Inc.*, 882 F.2d 505 (Fed. Cir. 1989). Dana Corporation (“Dana”), a patent holder, sued IPC Ltd. Partnership (“IPC”) for patent infringement. *Id.* at 506. The trial court ruled that the patent was valid and infringed, but on appeal the Federal Circuit reversed the finding of validity. *Id.* Meanwhile, in a separate action, Dana sued a different defendant, NOK, Inc. (“NOK”), for infringement of the same patent, the trial court found in favor of Dana, and NOK appealed. *Id.* On appeal of the NOK action, the Federal Circuit held that its decision in the IPC action collaterally estopped Dana from relitigating against NOK the invalidity of the patent. *Id.* at 508. Thus, the *Dana* decision supports Novell because the Federal Circuit held that collateral estoppel can preclude a party that litigates and loses in one action from relitigating the issue against a different party in a different action.

Microsoft quotes *Dana* as saying that the “general proposition that conceded or unappealed issues are not reviewable counsel[s] in favor of not applying collateral estoppel [to such issues].” Mem. Opp. at 21 (bracketed material added by Microsoft). In fact, the “general proposition” referred to pertained to the question of what issues are reviewable on

⁶ See <http://www.ali.org/ali/Judge.htm> (website of the American Law Institute, publisher of the Restatement of Judgments).

⁷ Even if it had survived, the defunct section 68 of the Restatement (First) of Judgments would not help Microsoft. That section dealt with the preclusive effect accorded to defenses asserted against causes of actions that are not covered by a final judgment. See Restatement (First) of Judgments § 68 cmt. d (1942) (“[A] defendant is not precluded from interposing a defense to [a] subsequent action which he might have interposed but did not interpose in the first action.”). (footnote continued on next page)

appeal, not the application of collateral estoppel.⁸ Furthermore, this passage is part of the court's description of its holding in another patent case, *Thompson-Hayward Chemical Co. v. Rohm & Haas Co.*, 745 F.2d 27 (Fed. Cir. 1984), and the court stressed that the "concerns regarding conceded or unappealed issues in *Thompson-Hayward* are inapplicable here." *Dana*, 882 F.2d at 507 n.1. *Thompson-Hayward*, like *Dana*, supports Novell because the Federal Circuit held that collateral estoppel barred relitigation of the validity of a patent, an issue decided in a previous action, even though validity was not challenged at trial. 745 F.2d at 34.

Also inapposite are *Environmental Defense v. United States EPA*, 369 F.3d 193, 202 (2d Cir. 2004), and *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618, 647 n.15 (E.D. Mich. 2000), in which the courts denied collateral estoppel because, unlike here, no identity of issues existed. In *Environmental Defense*, which involved a challenge to a New York clean air plan, the court denied collateral estoppel to previous rulings involving a challenge to a Texas clean air plan, because the objections to each plan entailed different underlying facts, destroying identity of issues. 369 F.3d at 201-02. Similarly, the court in *In re Cardizem* denied collateral estoppel on the issue of "antitrust injury" because this required a finding of harm that was necessarily specific to the individual parties.⁹ 105 F. Supp. 2d at 647 n.15.

The question here is preclusion of issues that Microsoft did litigate, not whether Microsoft may assert previously unasserted defenses.

⁸ Microsoft quotes the passage in a misleading way. The *Dana* court referred to the "general proposition" in another patent case, *Thompson-Hayward Chemical Co. v. Rohm & Haas Co.*, 745 F.2d 27 (Fed. Cir. 1984), that "conceded or unappealed issues are not reviewable." *Dana*, 882 F.2d at 507 n.1. In *Thompson-Hayward*, the question was whether the appellate court could find that collateral estoppel applied to an issue that was not even raised at trial and therefore was not even reviewable as a general proposition.

⁹ Microsoft's citation to *In re Cardizem* elides the court's reference to "antitrust injury" which was a critical component of the court's ruling. Mem. Opp. at 22.

IV. THE RULINGS ARE APPROPRIATELY PHRASED

Microsoft characterizes (Mem. Opp. at 2-3, 23-24) our description of the Rulings as “stray phrases and summaries” that are “torn out of context,” but never says how or why. The introductory sentence of our description is taken *verbatim* from the Fourth Circuit opinion describing the rulings made in the Government case, *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 328, while our description of the Rulings is taken *verbatim* (save citations and quotation marks) from Microsoft’s own description of them to this Court.¹⁰ Mem. Supp., App. A.

V. THE 72 FINDINGS ARE NECESSARY

Microsoft erroneously argues (Mem. Opp. at 25-27) that only 8 Findings (18, 33, 34, 161, 164, 213, 394, and 401) are necessary, and the remainder bear on liability determinations not affirmed on appeal in the Government case. The 72 Findings are necessary to the judgment against Microsoft that was affirmed; indeed, nearly all of them are quoted, expressly cited, or paraphrased by the D.C. Circuit and/or the D.C. District Court in reaching core rulings on Microsoft’s liability.¹¹ Mem. Supp., App. C. They meet the Fourth Circuit standard because they are necessary and critical to the Rulings, are not “unnecessary or collateral,” and received appellate review. *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 327-28.

¹⁰ Notably, the Minnesota state court, in an opinion on which Microsoft relies, held that very similar language would be provided as a “proven fact” to the jury. *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 22281574, at *9-*11 (Minn. Dist. Ct. Aug. 20, 2003).

¹¹ Microsoft also cites (Mem. Opp. at 26) the observation by the D.C. District Court (on remand) that “the vast majority” of the original 412 Findings were “unconnected” to liability determinations. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002). The court made this observation, however, in connection with fashioning a remedy, not as part of a collateral estoppel analysis, *id.* at 138, and it has no bearing on the small number of Findings (72 out of 412 – less than 18% of the total) for which Novell seeks preclusive effect.

A. Findings 2, 4, and 6-10

These Findings do not “simply provide background information.” Mem. Opp. at 27. Rather, they provide definitions and essential background for terms used in the Rulings and admittedly-necessary Findings 18, 33, and 34. Mem. Supp., App. C at 2-3. Furthermore, the D.C. Circuit cited or paraphrased Findings 2, 4, 6, and 7 in rejecting Microsoft’s challenge to the exclusion of middleware from the definition of the relevant market. Mem. Supp., App. C at 2-3.

In effect, Microsoft takes the inherently contradictory position that, although it is precluded from relitigating that the relevant market is “the licensing of all Intel-compatible PC operating systems world-wide” (Finding 18) and that it possessed monopoly power in this market (Findings 33 & 34), it is free to relitigate the issues of what Intel-compatible PC operating systems are, the scope of the market, the extent of its monopoly power, and the nature of the entry barrier that protects its monopoly. This effectively undoes Microsoft’s concession that collateral estoppel attaches to Findings 18, 33, and 34, and eviscerates their preclusive effect.

B. Findings 30 and 31

Findings 30 and 31 do not “merely provide evidentiary support” for the definition of the relevant market. Mem. Opp. at 27. They also describe the applications barrier to entry and how it protects Microsoft’s Windows monopoly – cornerstones of the opinions in the Government case. Microsoft would make a dead letter of its concession that it is precluded from relitigating that its “dominant market share is protected by a high barrier to entry” (Finding 34), by insisting that it is free to relitigate what the high barrier to entry is.

C. Finding 35

Finding 35 does not just provide “evidentiary details” (Mem. Opp. at 27-28), but instead describes the uncontested economic statistics which are essential to the finding that Microsoft possessed “a dominant, persistent, and increasing” market share protected by the applications barrier to entry.

D. Findings 36-39, 44, 52, 54, 55, 64, and 66

These Findings likewise provide much more than “evidentiary details” (Mem. Opp. at 27-28) about Microsoft’s monopoly power. They lay out essential features of the applications barrier to entry, including how market forces perpetuated it, and how Microsoft devised and executed business strategies to “augment and prolong” it. Finding 66. Even a casual reading of the opinions by the D.C. District Court and D.C. Circuit makes clear that it is not simply the existence of the applications barrier to entry that is critical and necessary, but also the ways in which the applications barrier to entry served to protect Microsoft’s Windows monopoly and motivated Microsoft’s anticompetitive conduct. Both courts undertook detailed, nuanced analyses of the applications barrier to entry, and applied them repeatedly in finding Microsoft’s conduct to be illegal. Mem. Supp., App. C at 4-5.

E. Findings 68, 72, and 74-77

These Findings are not mere “evidentiary details” about Microsoft’s monopoly power. Mem. Opp. at 27-28. They contain essential information about the applications barrier to entry, explain how Netscape and Java threatened that barrier, and describe how Microsoft identified those threats and began to respond in 1995. The D.C. Circuit expressly cited Finding 72 in concluding that Netscape and Java threatened to erode the applications barrier to entry, and Findings 68, 72, and 74-77 in finding a causal link between Microsoft’s

anticompetitive conduct and the maintenance of its Windows monopoly. Mem. Supp., App. C at 5-6.

F. Findings 80 and 84

Findings 80 and 84 describe how Microsoft pressured Netscape in the summer of 1995 to drop its development of Navigator or move development in a direction more favorable to Microsoft. They were not relied upon solely as evidence of an unlawful attempt to monopolize. Mem. Opp. at 28. The D.C. District Court also cited this as evidence that “illuminates the context in which Microsoft’s subsequent behavior toward [OEMs], [IAPs], and other firms must be viewed,” *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 39 (D.D.C. 2000), *aff’d in part, rev’d in part*, 253 F.3d 34 (D.C. Cir. 2001), including “subsequent behavior” found to be illegal by the D.C. District Court and the D.C. Circuit on appeal. Mem. Supp., App. C at 8.

G. Findings 90, 91, and 92

These Findings relate to Microsoft’s 12 illegal acts. *Compare* Mem. Opp. at 28-29. Like Finding 84, they describe how Microsoft withheld critical information from Netscape in 1995 as a “punitive measure” after Netscape rebuffed pressure from Microsoft to halt development of Navigator. *Microsoft*, 87 F. Supp. 2d at 39. Although this conduct was not found to be illegal, it is evidence of the intent and design – i.e., the “context,” *id.* – of conduct that was found to be unlawful. Mem. Supp., App. C at 8.

The D.C. Circuit opinion did mention Microsoft’s withholding of technical information. *Compare* Mem. Opp. at 28. Microsoft was found liable for denying access to Windows technical information to software developers who refused to use Microsoft’s JVM as the default JVM for their software (Ruling 10), and deceiving software developers about the Windows-specific technical nature of Microsoft’s Java developer tools (Ruling 11). These

illegal acts were part of the “subsequent behavior,” *Microsoft*, 87 F. Supp. 2d at 39, illuminated by Microsoft’s punitive actions against Netscape described in Findings 90, 91, and 92.

H. Findings 93, 115, 116, 119-125, 130, and 132

Even if these Findings were not necessary to the finding that Microsoft possessed monopoly power (Mem. Opp. at 29), they are necessary to the Rulings that Microsoft illegally forced OEMs to accept Windows license restrictions (Rulings 1-4). Mem. Supp., App. C at 7-9. Microsoft’s contrary assertion (Mem. Opp. at 29) is bereft of any explanation or support.

I. Findings 144, 145, and 148

These Findings go far beyond providing “background information and evidentiary details.” Mem. Opp. at 29. They address (Mem. Supp., App. C at 11) the “core” of Microsoft’s exclusionary strategy to “ensur[e] that the firms comprising the most effective channels for the generation of browser usage would devote their distributional and promotional efforts to Internet Explorer rather than Navigator.” *Microsoft*, 87 F. Supp. 2d at 39. Furthermore, the D.C. District Court cited Findings 144 and 145 in concluding that the licensing terms that Microsoft illegally imposed on IAPs (Ruling 7) had an exclusionary effect: “Given the importance of the IAP channel to browser usage share, it is fair to conclude that these inducements and restrictions contributed significantly to the drastic changes that have in fact occurred in Internet Explorer’s and Navigator’s respective usage shares. [Findings] 144-47, 309-10.” *Microsoft*, 87 F. Supp. 2d at 41.

J. Findings 161, 164, and 213

Microsoft correctly concedes (Mem. Opp. at 30) that Findings 161, 164, and 213 are necessary and critical, but misstates the fact that Novell **does** seek preclusion for them.

K. Findings 157-160, 166, 169, 175-177, 203, 208, and 227

If Microsoft is arguing (Mem. Opp. at 30) that these Findings fail to meet the necessary standard because they do not concern the illegal OEM license restrictions (Rulings 1-4), Microsoft is wrong. Findings 157-160, 166, 169, 203, 208, and 227 are necessary to the D.C. Circuit's holding that the OEM license restrictions are anticompetitive because they "serve[] to reduce usage share of Netscape's browser and, hence, protect Microsoft's operating system monopoly," *Microsoft*, 253 F.3d at 60, and Findings 159, 175-177, and 227 are necessary to the D.C. Circuit's holding that "the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification," *id.* at 64. *See* Mem. Supp., App. C at 10-12.

Microsoft's related claim (Mem. Opp. at 30) that the D.C. Circuit did not condemn Microsoft's integration of Web browsing functionality into Windows ignores the rulings that Microsoft illegally took steps to make it harder for users to remove Internet Explorer from Windows, by excluding Internet Explorer from the "Add/Remove Programs" utility (Ruling 5) and commingling browsing and non-browsing code in the same files (Ruling 6). As explained in our opening brief (Mem. Supp., App. C at 13-14), Findings 159, 160, 175, and 176 are necessary to these Rulings. Microsoft's brief is conspicuously silent on this point.

L. Finding 239

Finding 239 details how Microsoft succeeded in "exiling Navigator from the crucial OEM distribution channel." This Finding is necessary because the D.C. District Court cited it in concluding that Microsoft's illegal OEM license restrictions caused a decline in Navigator's

usage share and “prevented Navigator from being the vehicle to open the relevant market to competition on the merits.”¹² *Microsoft*, 87 F. Supp. 2d at 39-40; *see* Mem. Supp., App. C at 11.

Nor is there any substance to Microsoft’s contention (Mem. Opp. at 30) that Finding 239 is not entitled to collateral estoppel because it might pertain to reversed liability rulings. Microsoft neither identifies any such rulings nor explains how Navigator’s usage share declined due to legal conduct by Microsoft. Moreover, the D.C. Circuit rejected Microsoft’s claim that the illegal OEM restrictions did not block Netscape from distributing Navigator through the OEM channel, holding that “[t]hat claim is insufficient to shield Microsoft from liability for those restrictions because, although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones.” *Microsoft*, 253 F.3d at 64.

M. Finding 386

Finding 386 does not pertain only to Microsoft’s development of a JVM technology that was incompatible with Sun’s JVM, for which the D.C. Circuit reversed the D.C. District Court’s finding of liability. Mem. Opp. at 30-31. Finding 386 also describes Microsoft’s motive in employing an “array of tactics” against Java, *Microsoft*, 87 F. Supp. 2d at 43, including its acts ruled to be illegal in Rulings 10, 11, and 12. The D.C. Circuit quoted (without citation) Finding 386 in part to explain the motive behind Microsoft’s illegal actions against Java: “Microsoft took steps ‘to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa.’” *Microsoft*, 253 F.3d at 74

¹² Microsoft’s contention (Mem. Opp. at 30) that Finding 239 is cumulative of other Findings is irrelevant. What matters is that Finding 239 is necessary, regardless of whether it contains facts also found in other Findings. In any event, Finding 239 is not cumulative of other Findings for which Novell seeks preclusion.

(quoting *Microsoft*, 87 F. Supp. 2d at 43, which in turn was quoting in part Finding 386, without explicitly citing this finding).

N. Findings 395 and 407

The scope of these Findings is not limited solely to liability determinations that were reversed on appeal. Mem. Opp. at 31. The D.C. Circuit expressly cited Finding 395 in explaining the motive behind Microsoft's illegal First Wave agreements (Ruling 10). Mem. Supp., App. C at 17. Similarly, the D.C. District Court cited Finding 407 in concluding that the purpose and effect of Microsoft's anticompetitive actions was to impede Java's progress towards facilitating porting of applications between Windows and other platforms, *Microsoft*, 87 F. Supp. 2d at 43, and the D.C. Circuit agreed, *Microsoft*, 253 F.3d at 76-77. See Mem. Supp., App. C at 15.

O. Findings 411 and 412

These Findings are necessary to the D.C. District Court's holding that Microsoft's illegal conduct harmed competition. Mem. Supp., App. C at 19. Furthermore, contrary to Microsoft's assertion (Mem. Opp. at 31-32), they are necessary to liability rulings that were affirmed on appeal.

The D.C. District Court cited Findings 411 and 412 in a two-paragraph section of its opinion pertaining to Microsoft's "course of conduct." *Microsoft*, 87 F. Supp. 2d at 44. The first paragraph cites Findings 411 and 412 in describing the harm to competition caused by Microsoft's conduct, a "single, well-coordinated course of action" which included the 12 specific acts for which liability was upheld. *Id.* These citations make clear that Findings 411 and 412 are an essential part of the finding that Microsoft's conduct caused harm to competition. That the D.C. Circuit reviewed Findings 411 and 412 is apparent from its conclusion that the "course of

conduct” section of the D.C. District Court’s opinion contained “broad, summarizing conclusions.” *Microsoft*, 253 F.3d at 78-79. The D.C. Circuit did not reverse or criticize Finding 411 or 412.

The D.C. Circuit did reverse the holding in the second paragraph of the “course of conduct” section – which does not cite Finding 411 or Finding 412 – that Microsoft’s entire course of conduct was predatory and constituted an independent violation of section 2 of the Sherman Act. Findings 411 and 412 were left intact by the D.C. Circuit, which did not base its reversal upon erroneous factual findings, but rather a judgment that, given the factual findings, there was no additional legal basis for liability. *Id.* at 78.

Microsoft cites (Mem. Opp. at 32) the Minnesota state court decision *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 22281574, at *11 (Minn. Dist. Ct. Aug. 20, 2003), which concluded that, under Minnesota law, Findings 411 and 412 do “not appear necessary and essential to the violation affirmed by the [D.C. Circuit].” That decision, of course, is not binding on this Court and, we respectfully submit, is erroneous for at least three important reasons.

First, as noted above, contrary to the Minnesota state court’s conclusion, *id.*, the D.C. Circuit did evaluate Findings 411 and 412.

Second, although the Minnesota state court was “not convinced that a detailed description of the harm caused by a monopolist’s anticompetitive conduct is essential to a finding of liability,” *id.*, both the D.C. Circuit and the D.C. District Court in fact described the harm to competition in great detail. *See, e.g., Microsoft*, 253 F.3d at 60 (OEM license restrictions), 66-67 (integration of Internet Explorer and Windows), 71 (IAP contracts), 71-72 (ISV agreements), 73-74 (Apple agreement), 75-76 (Java “First Wave” agreements),

76-77 (deception of Java developers), 77 (Intel). This is because harm to competition is an element of a monopolization claim, *see, e.g., id.* at 58, and because in some cases the anticompetitive harm caused by Microsoft's conduct had to be balanced against procompetitive benefits, *id.* at 59.

Third, although the Minnesota state court expressed concern that "some of Judge Jackson's references in Findings 408 through 412 appear to be to some of the 8 acts of anticompetitive conduct" that were reversed, *Gordon*, 2003 WL 22281574, at *11, Novell does not seek preclusive effect for Findings 408, 409, or 410, and the court's concern is not implicated by Findings 411 and 412, which summarize predominantly, if not wholly, the harms associated with the affirmed monopoly maintenance rulings.

* * *

In sum, the 72 Findings for which Novell seeks preclusion are necessary to the judgment against Microsoft affirmed in the Government action.

