

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

CHAMBERS OF  
J. FREDERICK MOTZ  
UNITED STATES DISTRICT JUDGE

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December 3, 2008

Memo To Counsel Re: Microsoft Corp. Antitrust Litigation  
MDL 1332

Novell, Inc. v. Microsoft Corp.  
Civil No. JFM-05-1087

Dear Counsel:

I have reviewed the memoranda submitted in connection with Novell's motion seeking collateral estoppel. The motion is granted in part and denied in part.

I apologize for the length of time that the motion has been pending. I have turned my attention to the issues presented on several occasions. However, though I have at times come close to reaching a decision as to every ruling and finding, as I have finally "put pen to paper" I have felt like a medieval monk in trying to make the arcane distinction between findings that were "critical and essential" to the judgment affirmed by the D.C. Circuit in the Government case against Microsoft and those findings that were merely "supportive of" that judgment. Therefore, I have decided presently to address only those findings that in my view clearly were "critical and essential" to the judgment affirmed by the D.C. Circuit in the Government case, deferring until a later stage of this litigation ruling upon findings that are of a more arguable character.

At the outset let me make several general observations.

First, it is now part of the legal and factual landscape that Microsoft violated the federal anti-trust laws in the manner described by the D.C. Circuit. In assessing its posture in this case, Microsoft must assume that it will not be permitted to relitigate any issues that were material in the D.C. litigation and that are material in this case.

Second, I do not need to reach Novell's contention that because Microsoft only challenged the "necessary" criterion for collateral estoppel in its earlier interlocutory appeal, it is precluded from challenging the other criteria here. Whether or not Microsoft can challenge these other criteria, in my view all of the criteria have been met. Specifically, the findings now in issue are "identical to the [findings]" previously litigated in the Government case," the findings were "actually resolved in the prior proceeding"; the judgment in the prior proceeding is final and valid; and Microsoft "had a full and fair opportunity to litigate the [findings] in the prior proceeding." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). Microsoft's argument on the point is that "Novell's claims do not and could not track the claims

asserted in the Government Case because Novell's claims concern different products, markets, conduct and time periods." In my judgment that argument goes to the question of whether the previously findings are material in the present case, not whether they are entitled to collateral estoppel effect.

Third, I decline to decide at this juncture whether any particular findings made in the D.C. litigation are material to this case. (Thus, Microsoft remains free to argue that the several findings that I am ruling in this letter opinion are entitled to collateral estoppel effect are not material to this case). Likewise, I decline at this juncture to propose the precise language that should be used in a jury instruction as to those findings that are entitled to collateral estoppel effect. I confess, however, that in determining what findings I should defer ruling upon, I have considered (1) the potential relevance of the findings in this case, and (2) whether instructing a jury upon them would tend to confuse or clarify the jury's understanding of the issues.

Against this background I will now simply state the factual findings that are to be given collateral estoppel effect in this case. As indicated above, my decision on any other findings is deferred until a later stage of this litigation.

Findings 2, 4, and 6-10

Findings 30, 31, and 33-39

Findings 144, 145, and 148

Finding 159

Finding 239

I believe that my "minimalist" approach to the collateral estoppel issues provides you with sufficient guidance at this stage of the litigation. However, I could be wrong. For example, my deferring ruling on some of the findings conceivably might affect the scope of discovery. Therefore, if either or both of you believe that I should issue a more extensive opinion addressing all of the findings in dispute, you may do so (jointly or severally) either by letter or formal motion or before December 19, 2008.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

J. Frederick Motz  
United States District Judge