APPENDIX B

This Appendix B to the Reply Memorandum in Support of Novell's Renewed Motion Seeking Collateral Estoppel addresses the specific arguments in Microsoft's Memorandum in Opposition to Novell's Renewed Motion Seeking Collateral Estoppel ("Microsoft's Opposition" or "MS Opp.") regarding why certain Findings of Fact ("Findings") of the United States District Court for the District of Columbia in the case *United States v. Microsoft Corp.* ("*Microsoft I*"), 84 F. Supp. 2d 9 (D.D.C. 1999) (the "Government Case"), for which Novell seeks preclusion are allegedly not necessary to the judgment in the Government Case affirmed by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Microsoft Corp.* ("*Microsoft III*"), 253 F.3d 34 (D.C. Cir. 2001). As the Memorandum in Support of Novell's Renewed Motion Seeking Collateral Estoppel ("Novell's Memorandum" or "Novell's Mem.") and the appendices thereto demonstrated, the Findings discussed below were necessary to the judgment in the Government Case, and Microsoft's Opposition fails to demonstrate otherwise or to explain why Microsoft wants to reserve the right to relitigate these fundamental findings. In fact, as Novell's reply memorandum demonstrated, Microsoft conceded in prior cases that Findings 1-67 were necessary to the judgment affirmed in the Government Case.

1. FINDING 17

Microsoft asserts that Finding 17 "provides only background information" and is "evidentiary detail . . . [that] is miles short of 'necessary' to, the judgment as affirmed by the D.C. Circuit." MS Opp. at 25. Finding 17 defines one of the key terms for the Government Case – "Netscape," explains that Netscape distributed a web browser called Navigator, Navigator was the first widely popular graphical browser, and Microsoft's competing browser was called Internet Explorer. Judge Kollar-Kotelly cited Finding 17 in her decisions on remand for this

exact reason. *See New York v. Microsoft Corp.* ("*Remedies I*"), 224 F. Supp. 2d 76, 90 n.15, 92 n.18 (D.D.C. 2002); *United States v. Microsoft Corp.* ("*Remedies II*"), 231 F. Supp. 2d 144, 156 n.10, 158 n.13 (D.D.C. 2002), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). It is self-evident that to draft the judgment in the Government Case, the court had to define the parties and key participants, concepts, and terms to use in the judgment. Finding 17 provides this critical information and was, therefore, necessary for the court's judgment.

2. FINDINGS 20, 28, 29, AND 32

Microsoft's Opposition asserts Findings 20, 28, 29, and 32 are not critical and necessary because "they merely provide background information . . . to the determination in Finding of Fact 18" about the relevant market. MS Opp. at 26. These Findings were critical to the D.C. courts' definitions of the relevant market and the applications barrier to entry, which required an analysis of the products that were reasonably interchangeable or viable substitutes for Microsoft's product. *See* Novell's Mem. App. B at 2.

Microsoft argued to the D.C. District Court and the D.C. Circuit that the Apple computer operating system, middleware (including Navigator and Java), and other non-Intel personal computer products "should have been included in the relevant market." *Microsoft III*, 253 F.3d at 52-54. The D.C. District Court rejected these arguments in Findings 20, 28, 29, and 32, and the D.C. Circuit affirmed. *Id.* (citing Findings 20, 28, and 29); *see United States v. Microsoft Corp.* ("*Microsoft II*"), 87 F. Supp. 2d 30, 36 (D.D.C. 2000) (determining that no "viable alternative to existing Intel-compatible PC operating systems" could be marketed "within a reasonably short period of time" (citing Findings 18 and 30-32)) , *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001); *Remedies I*, 224 F. Supp. 2d at 104 (noting that the D.C. Circuit "summarily rejected" Microsoft's argument that Apple's Mac OS should be included in

the relevant market and "ultimately concluded that middleware did not meet the test of 'reasonable interchangeability'" (citations omitted)). Absent Findings 20, 28, 29, and 32, the relevant market in the Government Case would have been very different – a determination that could have affected almost every other Finding and Ruling in the Government Case.

The D.C. courts also have recognized that Findings 28 and 29 were critical and necessary to define "middleware," *Microsoft III*, 253 F.3d at 53, explain why middleware posed a threat to Microsoft's monopoly power, *id.* at 55, and explain why Java was middleware, *id.* at 74. Judge Kollar-Kotelly cited these Findings for multiple purposes in her remand decisions, including as an explanation of "middleware." *See Remedies I*, 224 F. Supp. 2d at 90 & n.14, 94, 113; *Remedies II*, 231 F. Supp. 2d at 156 & n.9, 160. The D.C. Circuit, on the appeal of Judge Kollar-Kotelly's remedial decisions, relied on these Findings for the purpose of defining middleware. *See, e.g.*, *Massachusetts v. Microsoft Corp.* ("*Remedies Appeal*"), 373 F.3d 1199, 1208 n.3 (D.C. Cir. 2004).

3. FINDINGS 42, 44, 55, 56, 59, 60, AND 66-77

Microsoft's Opposition asserts that Findings, 42, 44, 55, 56, 59, 60, and 66-77 "provide only evidentiary detail" that established that Microsoft possessed monopoly power in the PC operating systems market and "are ***by definition*** not critical and necessary to the determination in Findings of Fact 33-34 . . . that Microsoft had monopoly power" in that market or to "the three main factors relied on by Judge Jackson to reach that determination." MS Opp. at 26 (emphasis added). It is unclear by what "definition" of critical and necessary Microsoft has determined that these Findings are not entitled to preclusive effect, but that definition is clearly erroneous.[1]

[1] Microsoft's Opposition also suggests that Novell seeks to have the Court apply the "erroneous (and reversed) 'supportive of' standard applied by this Court in 2002," and cites as evidence of

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Findings 42, 44, 55, 56, 59, 60, and 66-77 provide the evidence that is critical and necessary to Findings 33 and 34 – absent these Findings, the D.C. District Court would have been unable to find, and justify to the D.C. Circuit on appeal, that "Microsoft's dominant market share [of the PC operating systems market] is protected by a high barrier to entry" and that "as a result of that barrier, Microsoft's customers lack a commercially viable alternative to Windows." Finding 34. Had the D.C. Circuit been presented only with Findings 33 and 34 in support of the D.C. District Court's determination that Microsoft had monopoly power, the D.C. Circuit would have deemed the Findings conclusory and asked how the District Court came to such conclusions. To successfully prove its antitrust claim, the Government had to present evidence, not just conclusory findings, to the D.C. District Court to establish the elements of its § 2 monopoly maintenance cause of action.

As Appendix B to Novell's Memorandum indicated, the D.C. courts' reliance on Findings 42, 44, 55, 56, 59, 60, and 66-77 further demonstrates that these Findings were critical and necessary to the judgment in the Government Case affirmed by the D.C. Circuit. In affirming the D.C. District Court's § 2 monopoly maintenance liability determination, the D.C. Circuit specifically cited to and relied on Findings 44, 59, 60, and 68-77.[2] Judge Kollar-Kotelly also cited Findings 68-77 for various propositions in her remedial decisions. *See Remedies II*, 231 F. Supp. 2d at 156 (citing Finding 68 to explain the threat middleware posed to the

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this suggestion Novell's alleged concession that Findings 59 and 60 "merely 'support [the D.C. Circuit's] causation conclusion.'" MS Opp. at 24 (alteration in original) (quoting Novell's Mem. App. B at 7). Microsoft, again, mischaracterizes Novell's argument and selectively quotes it to change the context. In Appendix B to Novell's Memorandum, Novell explained that the D.C. Circuit "cited Findings 59 and 60 to support its causation conclusion." Novell's Mem. App. B at 7. These findings did not "merely 'support'" the D.C. Circuit's causation conclusion – they were the foundation for it. Without these Findings, the D.C. Circuit could not have made its causation conclusion. *See Microsoft III*, 253 F.3d at 79.

[2] *See Microsoft III*, 253 F.3d at 56 (citing Finding 44); *id.* at 74 (citing Findings 73, 74, and 76); *id.* at 79 (citing Findings 59, 60, and 68-77).

applications barrier to entry); *id.* at 160 n.15 (citing Findings 73 and 74 to define the Java technologies); *Remedies I*, 224 F. Supp. 2d at 105 (citing Findings 69, 74, 76, and 77 to describe the attributes of middleware); *id.* at 112-13, 115 (citing Findings 69-78 to describe the attributes of middleware products, which were "[t]he products upon which Judge Jackson focused in imposing liability"). Moreover, as the D.C. Circuit held on the appeal of the D.C. District Court's remedial order following remand of the Government Case, Findings 68 through 77 "document[ed] the threat posed by Netscape and Java" and were "***crucial to*** [the District Court's] holding [that] Microsoft stifled competition." *Remedies Appeal*, 373 F.3d at 1240 (emphasis added) (citing *Microsoft I*, 84 F. Supp. 2d at 28-30).

4. FINDING 78

Finding 78 describes Microsoft's concern that various forms of middleware would weaken the applications barrier to entry. Microsoft's Opposition asserts Finding 78 is not subject to preclusion because it has "no relevance to any of the 12 acts found to be anticompetitive by the D.C. Circuit." MS Opp. at 26. This Finding, however, reflects Microsoft's understanding that certain, specific middleware products threatened the applications barrier to entry that protected Microsoft's operating systems monopoly. It was for this very reason that Judge Kollar-Kotelly quoted Finding 78 in her decision as to the appropriate remedial order to enter:

> The term "middleware," as used in the liability phase of this case, was not limited to precise types of functionality, but instead encompassed products displaying certain "key" attributes that "endow" the technology with the "potential to diminish the applications barrier to entry." *Findings of Fact* ¶ 69. In other words, the middleware in need of protection was characterized as the software products which "Microsoft feared . . . because they facilitated the development of user-oriented software that would be indifferent to the identity of the underlying operating system." *Findings of Fact* ¶ 78. . . .
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> . . . .

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> . . . The products upon which Judge Jackson focused in imposing liability were not merely middleware, but were middleware *threats*, because of their popular use, platform capabilities, and their ensuing ability to reduce the applications barrier to entry. *Findings of Fact* ¶¶ 69-78.

Remedies I, 224 F. Supp. 2d at 112, 115; *see also Microsoft II*, 87 F. Supp. 2d at 39 ("the desire to preserve the applications barrier" to entry inspired "Microsoft's efforts to induce Intel, Apple, RealNetworks and IBM to desist from certain technological innovations"). Thus, in addition to being necessary to the judgment in the Government Case affirmed by the D.C. Circuit, Finding 78 (as well as many of the other Findings) was necessary for the remedial order affirmed by the D.C. Circuit.

5. FINDINGS 80, 84, 90-95, 115-116, 119-125, AND 132

As Appendix B to Novell's Memorandum explained, Findings 80, 84, 90-95, 115-116, 119-125, and 132 were critical and necessary to the D.C. District Court's determination that Microsoft acted with anticompetitive intent. Microsoft's arguments to the contrary are wrong.

With respect to Finding 80, although Judge Jackson cited to "Findings ¶¶ 79-89" in his analysis of the Government's attempted monopolization claim, *Microsoft II*, 87 F. Supp. 2d at 45, he also cited to much of the same Findings, including specifically to Finding 80, in his § 2 liability analysis when discussing Microsoft's efforts to combat the browser threat, s*ee id.* at 39. Furthermore, as Appendix B to Novell's Memorandum explained, Findings 80 and 84, as well as Findings 93-95, 99-102, 115, 116, 119-125, and 132, served as the basis for the Judge Jackson's determination that Microsoft acted with anticompetitive intent and that Microsoft's subsequent actions were anticompetitive. *See* Novell's Mem. App. B at 14-15; *Microsoft II*, 87 F. Supp. 2d at 39 (finding that the preservation of the applications barrier to entry motivated Microsoft's June 1995 proposal to Netscape, which "illuminates the context in which Microsoft's subsequent behavior toward [OEMs], [IAPs], and other firms must be viewed"). Simply because Judge Jackson cited certain Findings in support of a liability determination that the D.C. Circuit

overturned does not mean that the Finding should not be given preclusive effect if it was necessary to a liability determination that the D.C. Circuit affirmed. *See In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 537 (D. Md. 2002) ("If a fact was necessary to the judgment against Microsoft on the monopoly maintenance claim, it is irrelevant [for collateral estoppel purposes] that the fact also related to another claim on which Microsoft prevailed."), *rev'd on other grounds*, 355 F.3d 322 (4th Cir. 2004).

Judge Jackson used these Findings regarding Microsoft's intent, to "understand the likely effect of [Microsoft's] conduct." *Microsoft III*, 253 F.3d at 59. It is of no moment that the D.C. Circuit did not cite to or mention these Findings for any of its liability findings – the appellate court affirmed Judge Jackson's determination, based on his conclusion that Microsoft's intent in taking the 12 acts the courts found illegal demonstrated that the acts were anticompetitive. These Findings, therefore, were necessary to the judgment in the Government Case as they were the basis for Judge Jackson's determination that the actions Microsoft took against the middleware threats at issue were motivated by anticompetitive intent and demonstrated that Microsoft had maintained its "monopoly power by anticompetitive means," as Judge Jackson noted in his Conclusions of Law:

> In this case, Microsoft early on recognized middleware as the Trojan horse that, once having, in effect, infiltrated the applications barrier, could enable rival operating systems to enter the market for Intel-compatible PC operating systems unimpeded. Simply put, middleware threatened to demolish Microsoft's coveted monopoly power. ***Alerted to the threat, Microsoft strove over a period of approximately four years to prevent middleware technologies from fostering the development of enough full-featured, cross-platform applications to erode the applications barrier.*** In pursuit of this goal, Microsoft sought to convince developers to concentrate on Windows-specific APIs and ignore interfaces exposed by the two incarnations of middleware that posed the greatest threat, namely, Netscape's Navigator Web browser and Sun's implementation of the Java technology. Microsoft's campaign succeeded in preventing-for several years, and perhaps permanently-Navigator and Java from fulfilling their potential to open the market for Intel-compatible PC operating systems to

> competition on the merits. Findings ¶¶ 133, 378. Because Microsoft achieved this result through exclusionary acts that lacked procompetitive justification, the Court deems Microsoft's conduct the maintenance of monopoly power by anticompetitive means.

Microsoft II, 87 F. Supp. 2d at 38-39 (emphasis added).

Moreover, Microsoft's objection to the Court granting preclusive effect to Findings 93-95, 99-102, 115, 116, 119-125, and 132 because Judge Jackson allegedly relied on "[n]one of them" for his determination that Microsoft had monopoly power is specious. MS Opp. at 27. Judge Jackson, as Microsoft's Opposition admits, specifically cited Finding 99, as well as Finding 215, 241, and 407 in support of his monopoly power determination; nevertheless, Microsoft continues to assert these Findings are not entitled to preclusive effect. Notwithstanding Microsoft's clearly inconsistent positions, the Court should grant preclusive effect to Findings 80, 84, 90-92, 93-95, 99-102, 115, 116, 119-125, and 132 because, as demonstrated in Appendix B to Novell's Memorandum and above, these Findings were necessary to the judgment in the Government Case affirmed by the D.C. Circuit.[3]

6. FINDINGS 141 AND 142

Microsoft's Opposition asserts that "no preclusion" can apply to Findings 141 and 142 because they "discuss Microsoft's decision to provide copies of [Internet Explorer] to consumers without charge," and the D.C. Circuit "held that providing free software to consumers

[3] Microsoft's Opposition also asserts that the Court should not grant preclusive effect to Findings 115-132 because Judge Kollar-Kotelly, on remand, allegedly emphasized that those Findings were not a basis for imposing liability. MS Opp. at 28. Microsoft, again, mischaracterizes Judge Kollar-Kotelly, who wrote that "[a]lthough Microsoft has a history of retaliation against OEMs, *see, e.g.*, *Findings of Fact* ¶¶ 115-32, such retaliation did not provide a clear basis for liability." *Remedies I*, 224 F. Supp. 2d at 163 n.68. The only thing these words indicate is that Judge Kollar-Kotelly determined that any facts demonstrating a "history of retaliation against OEMs" in Findings 115-132, among others, "did not provide a clear basis for liability." *Id.* Judge Kollar-Kotelly did not determine that Findings 115-132 were not "a clear basis for liability" for any of the other conduct they described or that they were not a basis for Judge Jackson's determination that Microsoft's actions against middleware threats were motivated by anticompetitive intent.

did not violate the antitrust laws. MS Opp. at 28. Putting aside the fact that Microsoft admits that Judge Jackson specifically identified Finding 141 as a basis for his monopoly power determination, *see id.* at 27, there is no merit to Microsoft's argument.

Although Finding 141 and 142 both reference the fact that Microsoft planned not to charge for IE, they do so only in the context of demonstrating that Microsoft acted against its legitimate self interest by engaging in conduct that could be profitable only to the extent that it protected the applications barrier to entry. Had Judge Jackson believed that the conduct described in Finding 141 and 142 were procompetitive, the outcome of the Government Case would have been different. *See Microsoft III*, 253 F.3d at 59 (describing balancing test for § 2 anticompetitive conduct). The D.C. Circuit, in fact, agreed that Microsoft's efforts to keep Netscape off of Windows lacked a procompetitive justification. *Id.* at 62, 64, 71, 74. Neither Finding 141 nor Finding 142 suggest that Microsoft violated any laws by giving IE away at no cost; rather these Findings clearly go to showing that Microsoft engaged in the anticompetitive acts that the D.C. Circuit affirmed because Microsoft decision makers did not believe giving IE away free would stifle the browser threat.[4]

7. FINDING 143

Microsoft's Opposition concedes that Finding 143 "relates to the motivation behind Microsoft's decision to include web browsing functionality in Windows and actions taken by Microsoft that had the effect of limiting Netscape Navigator's access to certain distribution

[4] If there is any concern that Findings 141 and 142 suggest that Microsoft's giving IE away for free violated the antitrust laws, which Novell believes it does not, the Court can address that concern by deleting the ten out of 180 words in Finding 141 ("including it with Windows at no additional cost to consumers") and the nine out of 248 words in Finding 142 ("even though Internet Explorer was 'a no revenue project'") that reference the fact that Microsoft was providing free software. The Court, however, should grant preclusive effect to the remaining portions of Findings 141 and 142, which Microsoft implicitly concedes were critical and necessary to the judgment in the Government Case affirmed by the D.C. Circuit.

channels." MS Opp. at 28. Nevertheless, Microsoft argues Finding 143 is not entitled to preclusive effect because it "provides background information and evidentiary detail related to more central findings, such as Finding of Fact 213 . . . , and thus is at most incidental to the core findings that were critical and necessary." *Id.*

Notwithstanding Microsoft's assertions to the contrary, Finding 143 is a core, central, and necessary Finding on which the D.C. Circuit specifically relied – as proof of Microsoft's motive (i.e., to neutralize the Netscape browser threat) and intent for its exclusive deals with IAPs – in the appellate court's liability determination. *Microsoft III*, 253 F.3d at 71 (citing Finding 143 for the proposition that "Microsoft sought to 'divert enough browser usage from Navigator to neutralize it as a platform'"). Finding 213, for which Microsoft asserts Finding 143 is mere background information and evidentiary detail, does not even mention the word "Navigator" or "browser," nor does it explain why Microsoft took the anticompetitive acts Microsoft concedes Finding 213 summarizes. These Findings formed the basis for the D.C. courts' legal conclusions that Microsoft's actions had an anticompetitive effect and lacked procompetitive justifications.

Microsoft's Opposition, nevertheless, appears to suggest that the Court should deny preclusive effect to Finding 143 because it mentions Microsoft's intent not to charge for IE and its development and promotion of IE, both of which the D.C. Circuit allegedly held did not violate the antitrust laws. MS Opp. at 28. Finding 143, however, only references Microsoft's development and promotion of IE and willingness to give IE away for free in the context of explaining Microsoft's motive for its anticompetitive conduct against Navigator: "Decision-makers at Microsoft worried that simply developing its own attractive browser product, pricing it at zero, and promoting it vigorously would not divert enough browser usage from Navigator to

neutralize it as a platform." It was for this very motive that the D.C. Circuit cited Finding 143 in affirming the D.C. District Court's determination that Microsoft's exclusive agreements with IAPs were anticompetitive. *See Microsoft III*, 253 F.3d at 71.

8. FINDINGS 156-158, 160, 166, 203, 206, 208, AND 227

Although Microsoft's Opposition concedes that Findings 156-158, 160, 166, 203, 206, 208, and 227 address Microsoft's illegal integration of IE into Windows and the provisions of Microsoft's exclusionary license agreements with OEMs, Microsoft argues that the Court should not give preclusive effect to these Findings because the D.C. Circuit allegedly "did not find that Microsoft's integration of web browsing functionality into Windows was unlawful." MS Opp. at 29. Microsoft seeks to revise history – the D.C. Circuit clearly held that it was unlawful for Microsoft to integrate IE into Windows 95 by "excluding IE from the Add/Remove Programs utility and commingling browser and operating system code." *Microsoft III*, 253 F.3d at 66-67. As Appendix B to Novell's Memorandum demonstrated, Findings 156-158, 160, 166, 203, 206, 208, and 227 were necessary for the D.C. courts to reach their conclusion that Microsoft's binding of IE to Windows in this manner was anticompetitive. *See* Novell's Mem. App. B at 16-18. The D.C. Circuit, in fact, itself cited several of these Findings in affirming the D.C. District Court's decision. *See id.* Microsoft's conclusory assertion that these Findings are unnecessary based on Microsoft's incorrect reading of the D.C. Circuit's holding does nothing to change the analysis.

9. FINDINGS 204, 205, 214, 215, 221, AND 222

As with several of the other Findings to which Novell asks the Court to grant preclusive effect, Microsoft's Opposition objects to the Court giving such effect to Findings 204, 205, 214, 215, 221, and 222 because, Microsoft contends, these Findings only provide "background information" and "evidentiary detail" for Finding 213. As Appendix B to Novell's

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Memorandum demonstrated, these Findings provided key facts that were central to the D.C. courts' determination that Microsoft's act of requiring OEMs to accept Microsoft's exclusionary licensing restrictions and of binding IE to Windows was anticompetitive. *See* Novell's Mem. App. B at 16-18. Furthermore, Microsoft concedes that the D.C. District Court relied on Finding 215 for its determination that Microsoft had monopoly power in the PC operating systems market. *See* MS Opp. at 27 (citing *Microsoft II*, 87 F. Supp. 2d at 37).

10. FINDING 241

Despite conceding that the D.C. District Court specifically identified Finding 241 as a basis for its conclusion that Microsoft had monopoly power in the PC operating systems market, *see* MS Opp. at 27, Microsoft objects to the Court collaterally estopping Microsoft from relitigating Finding 241 because the Finding allegedly is cumulative of Finding 239 and summarizes other Findings, some of which allegedly relate to liability determinations that the D.C. Circuit reversed. With respect to the latter argument regarding Finding 241 addressing liability determinations reversed on appeal, it is not clear from Finding 241 that any portion of it inaccurately states the facts determined by the D.C. District Court. Significantly, Microsoft's Opposition does not identify any portion of Finding 241 that is erroneous or relates to a liability determination that the D.C. Circuit rejected.

With respect to Microsoft's assertion that Finding 241 is cumulative of Finding 239, Appendix B to Novell's Memorandum explained that Finding 241 was critical and necessary to the D.C. District Court's determination regarding Microsoft's effort (and the motive behind that effort) to eliminate OEMs as a viable distribution point for Navigator. *See* Novell's Mem. App. B at 19-20. The D.C. Circuit also relied on Finding 241 in rejecting an argument the Commonwealth of Massachusetts made challenging the remedial order after remand. *See Remedies Appeal*, 373 F.3d at 1209 ("The district court found Microsoft had combined

commingling of code and removal of IE from the Add/Remove Programs utility in a manner that ensured the presence of IE on the Windows desktop.").

11. FINDINGS 337 AND 340

Microsoft asserts that Findings 337 and 340 are "at most incidental to the core findings" of the D.C. courts because they generally discuss Microsoft's agreements with ISVs and "make no reference to the specific agreements the D.C. Circuit found to be anticompetitive." MS Opp. at 30. Reading Findings 337, 339 and 340 together, however, demonstrates that each was necessary to the D.C. courts' determination that Microsoft's exclusionary agreements with ISVs were anticompetitive. As the D.C. Circuit recognized, these Findings demonstrated both the exclusionary effect of Microsoft's agreements with ISVs and Microsoft's motive for forcing such agreements on ISV. *See Microsoft III*, 253 F.3d at 71-72.

12. FINDING 377

Microsoft objects to being collaterally estopped from relitigating Finding 377 because that Finding only describes "the alleged effect of Microsoft's conduct on a single competitor, Netscape." MS Opp. at 30. Microsoft's Opposition asserts that because the D.C. Circuit's judgment "focused exclusively on whether inflicting harm on nascent 'middleware' threats to Windows in general would contribute to Microsoft's monopoly . . . and whether Netscape Navigator actually constituted such a nascent 'middleware' threat," Finding 377 was not critical and necessary to that judgment. *Id.* Putting aside Microsoft's continued refusal to accept that there is no "alleged" effect in Finding 377 given the D.C. courts' determination, even were Microsoft correct that the description of how it destroyed Netscape was not critical to the judgment in the Government Case (which it is not), Microsoft's Opposition ignores the fact that motive and intent are relevant to establishing effect, and the D.C. courts relied on Finding 377 for that purpose. *See Microsoft III*, 253 F.3d at 53.

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13. FINDINGS 386, 395, AND 407

Microsoft's Opposition asserts that Findings 386, 395, and 407 are not critical and necessary because they (a) allegedly relate to the portion of the D.C. District Court's liability determination regarding Microsoft's development of its Java virtual machine ("JVM") that the D.C. Circuit reversed, and (b) do not relate to the anticompetitive acts that Microsoft took against Java that the D.C. Circuit affirmed. MS Opp. at 30-31. As Appendix B to Novell's Memorandum clearly demonstrates, the conclusory assertions in Microsoft's Opposition are meritless – both the D.C. District Court and the D.C. Circuit relied on one or more of these Findings 386, 395, and 407 in concluding that Microsoft took anticompetitive actions against Java in violation of § 2. Furthermore, Microsoft's Opposition concedes that the D.C. District Court specifically cited Finding 407 in concluding that Microsoft had monopoly power in the PC operating systems market, *id.* at 27, which the D.C. Circuit affirmed in its entirety, *see Microsoft III*, 253 F.3d at 57.

Significantly, this Court already addressed these very arguments almost nine years ago. In opposing a motion for collateral estoppel filed by Sun Microsystems, Inc. regarding the Findings in the Government Case, Microsoft asserted that it was inappropriate to grant preclusive effect to Findings 386 and 407, among others (but, surprisingly, not to Finding 395), because the D.C. Circuit had reversed the D.C. District Court's liability determination regarding Microsoft's development and promotion of its own JVM. *See* Microsoft's Mem. Opp'n Sun's Rule 16(c) Mot. Preclusive Effect Factual Findings at 8, *Sun Microsystems, Inc. v. Microsoft Corp.*, MDL Docket No. 1332 (D. Md. Oct. 4, 2002) (attached as Exhibit 4 to Novell's reply memorandum). This Court rejected this argument because, among other things:

> many of the findings that Microsoft argue[d] should not be given preclusive effect did not concern Microsoft's internal development of its own JVM but external actions it took to stifle competition from Sun,

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> including (a) entering into "First Wave Agreements" with [ISVs], (b) deceiving ISVs into believing that they were developing cross-platform applications, and (c) threatening Intel (ultimately with success) not to cooperate with Sun and Netscape in developing a Java runtime environment.

In re Microsoft Corp. Antitrust Litig., 232 F. Supp. 2d at 536.

14. FINDINGS 409-412

Although it does not explicitly say so, Microsoft's Opposition appears to argue that Findings 411 and 412 were not critical or necessary to the judgment in the Government Case affirmed by the D.C. Circuit because they allegedly relate to the D.C. District Court's finding of § 2 liability for Microsoft's "course of conduct," which the D.C. Circuit reversed. MS Opp. at 31. Microsoft made this same liability argument to Judge Kollar-Kotelly, who rejected the argument.

> On remand, Microsoft argued to Judge Kollar-Kotelly, as it has in this Court, that:
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> the "acts condemned by Judge Jackson," but not specifically addressed by the appellate court, "apparently were the basis for his conclusion that 'Microsoft's conduct as a whole . . . reinforces the conviction that [Microsoft] was predacious.'" Drawing further upon this rationale, Microsoft argues that the appellate court's reversal of the "course of conduct" liability determination implicitly reverses any of the district court's liability findings not specifically addressed by the appellate court.

Remedies I, 224 F. Supp. 2d at 98 (alterations in original) (citations omitted). In rejecting this argument, Judge Kollar-Kotelly noted that "[w]hile an attractive and simple resolution to a complex quandary, Microsoft's reasoning is flawed." *Id.*

Because the D.C. Circuit reversed the D.C. District Court's "course of conduct" liability "on the grounds that the district court had *failed to identify* the acts sufficient to support its finding of liability," *id.*, Judge Kollar-Kotelly concluded that "it [wa]s antithetical to conclude that specific anticompetitive acts clearly described by the district court elsewhere in its conclusions of law [we]re somehow reversed," *id.* at 99. In light of this flawed logic, Judge

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Kollar-Kotelly held that she had "no basis upon which . . . [to] conclude that, by reversing liability based upon a 'course of conduct,' the appellate court implicitly reversed findings of anticompetitive conduct entered by Judge Jackson elsewhere in his opinion." *Id.*

Microsoft's Opposition also appears to suggest that Findings 409-412 were not critical and necessary because they comment on "the supposed effect of Microsoft's conduct on consumers." MS Opp. at 31. As Appendix B to Novell's Memorandum demonstrated, Findings 409-412 served as the basis on which the D.C. District Court determined that the Government had proved an essential element of its monopoly maintenance claim – harm to competition. *See* Novell's Mem. App. B at 24-25. It was on this basis that the Iowa District Court in *Comes v. Microsoft Corp.* disagreed with the decision in *Gordon v. Microsoft Corp.* and held that Microsoft was precluded from relitigating Findings 409-412.