EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION	MDL Docket No. 1332 Hon. J. Frederick Motz
This Document Relates To:	
SUN MICROSYSTEMS, INC.,	Case No. C02-01150
Plaintiff,	(Transferred from N.D. Cal.)
v.	
MICROSOFT CORPORATION,	
Defendant.	

MICROSOFT'S MEMORANDUM IN OPPOSITION TO SUN'S RULE 16(c) MOTION FOR PRECLUSIVE EFFECT OF FACTUAL FINDINGS

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Sun seeks preclusion on numerous findings (68, 74-78, 107, 386-93, 397-400, 407) that form the foundation for the district court's conclusion that Microsoft's development and promotion of its own JVM constituted anticompetitive conduct (*see* Sun App. A at 18-20, 27, 83-87, 89). This is peculiar, to say the least, for the Court of Appeals for the D.C. Circuit reversed the district court's imposition of liability based on that conduct:

> The JVM developed by Microsoft allows Java applications to run faster on Windows than does Sun's JVM, *Findings of Fact* ¶ 389, but a Java application designed to work with Microsoft's JVM does not work with Sun's JVM and vice versa. *Id.* ¶ 390. . . . As explained above, however, a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals. *See supra* Section II.B.1. In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design. Microsoft's JVM is not only incompatible with Sun's, it allows Java applications to run faster on Windows than does Sun's JVM. . . . The JVM, however, does allow applications to run more swiftly and does not itself have any anticompetitive effect. Therefore, we reverse the District Court's imposition of liability for Microsoft's development and promotion of its JVM.

253 F.3d at 74-75. Sun cannot obtain preclusive effect for findings that relate to conduct specifically found to be lawful on appeal. Yet that is precisely what it is attempting to do with regard to this set of findings.

Sun also seeks preclusion for Findings of Fact 94-132, which relate to certain Microsoft dealings with Intel, Apple, RealNetworks and IBM. (*See* Sun App. A at 24-33.) Because the district court did not conclude that those dealings constituted independent antitrust violations, they could have been relevant (if at all) only to the district court's conclusion that Microsoft's "conduct as a whole" violated the Sherman Act. 87 F. Supp. 2d at 44. That conclusion, however, was also reversed by the Court of