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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

Novell, Inc.,	*	REPLY MEMORANDUM IN SUPPORT OF
Plaintiff,	*	NOVELL'S RENEWED MOTION SEEKING
	*	COLLATERAL ESTOPPEL
v.	*	
	*	
Microsoft Corporation,	*	Case No. 2:04-cv-01045-JFM
Defendant.	*	Hon. J. Frederick Motz

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I. INTRODUCTION

In its Memorandum in Support of Novell's Renewed Motion Seeking Collateral Estoppel ("Novell's Memorandum" or "Novell's Mem.") and Appendix B thereto, Novell satisfied its burden of demonstrating why the Court should preclude Microsoft from relitigating certain Findings of Fact and Rulings from the Government Case.¹ While lengthy, Microsoft's Memorandum in Opposition to Novell's Renewed Motion Seeking Collateral Estoppel ("Microsoft's Opposition" or "MS Opp.") fails to address the detailed analysis in Appendix B to Novell's Memorandum and entirely overlooks the purpose of Novell's motion and the underlying principles of collateral estoppel – namely whether, as a matter of fairness and judicial economy, Microsoft should be permitted to relitigate facts and issues that were already decided against it.

Instead, Microsoft asks the Court to make premature rulings on the admissibility of evidence – regardless of whether such evidence will be presented as a finding of fact or conclusion of law that Microsoft is collaterally estopped from relitigating or whether such evidence is presented through fact or expert testimony. Whether the facts underlying the collateral estoppel motion are admissible in Novell's case-in-chief (which, Novell contends, they are) and whether Microsoft should be allowed, in cross-examining Novell witnesses or in its defense case, to take positions inconsistent with those facts (they should not), are questions that should be answered in the context of trial.

¹ For purposes of this memorandum and the appendices attached hereto, "Findings" refers to the Findings of Fact of the United States District Court for the District of Columbia in *United States v. Microsoft Corp.* ("Microsoft I"), 84 F. Supp. 2d 9 (D.D.C. 1999) (the "Government Case"), and "Conclusions" refers to the Conclusions of Law of the D.C. District Court as set forth in *United States v. Microsoft Corp.* ("Microsoft II"), 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001), that the United States Court of Appeals for the District of Columbia Circuit affirmed in *United States v. Microsoft Corp.* ("Microsoft III"), 253 F.3d 34 (D.C. Cir. 2001). The term "Rulings," as used herein, refers to the Rulings of the D.C. Circuit as set forth in Appendix A to Novell's Memorandum.

Microsoft certainly understands the law of collateral estoppel, having lost or conceded many of these same arguments before in related litigation. As in prior filings, it paraphrases a purported quote from District Judge Colleen Kollar-Kotelly that “the vast majority” of the D.C. District Court’s findings were “unconnected” to the D.C. Circuit’s liability determinations. MS Opp. at 23. In fact, Judge Kollar-Kotelly said no such thing. Microsoft invented the quote through sharp editing of her remand decision.

Although it recycles prior arguments, Microsoft fails to mention that it previously **admitted** that some 67 Findings, including ones Microsoft labeled as “background.” were “necessary” to the D.C. Circuit’s decision – even though the D.C. Circuit did not specifically cite each Finding in its decision. Microsoft’s Mem. Opp’n Pls.’ Mot. Appl. Collateral Estoppel Against Microsoft (“MS MN Opp.”) at 16, *Gordon v. Microsoft Corp.*, No. MC 00-005994 (Minn. Dist. Ct. May 22, 2003) (referenced pages attached as Exhibit 1). Microsoft’s prior admission confirms that so-called “background information” or “evidentiary detail” often is necessary to a court’s judgment. A trier-of-fact requires evidence from which to make factual findings, and without the background information and evidentiary detail, those findings cannot be made.

Rather than confront these significant flaws in its collateral estoppel analysis, Microsoft sidesteps them and instead asks this Court effectively to overturn its ruling on harm to competition, overturn the United States Court of Appeals for the Fourth Circuit’s decision affirming the viability of Novell’s monopoly claim, and wholly adopt Microsoft’s revisionist history of its conduct.

In its opposition, Microsoft incorrectly cites “hornbook” law for the proposition that relevancy/materiality is a prerequisite to application of the doctrine of collateral estoppel.

MS Opp. at 38. Notably, nowhere in the collateral estoppel test that Microsoft sets forth on page 21 of its opposition is there any mention of materiality or relevance being a part of that test. *See id.* at 21. The authorities Microsoft cites all address the *admissibility* of findings and rulings from a prior proceeding, not whether such findings or rulings are entitled to preclusive effect. *See id.* at 21-23. Similarly, no part of the collateral estoppel analysis in either the Fourth Circuit or the United States Court of Appeals for the Tenth Circuit requires the Court to assess whether findings or rulings from a prior case are material before the Court can decide to grant such findings or rulings preclusive effect.

The Court can, as it already has with respect to 21 Findings, determine which Findings and Rulings it will give preclusive effect and, at some later time, determine materiality and admissibility. When and how these facts are addressed at trial is context-specific.

II. THE FINDINGS AND RULINGS FROM THE GOVERNMENT CASE TO WHICH NOVELL ASKS THE COURT TO GRANT PRECLUSIVE EFFECT WERE NECESSARY TO THE JUDGMENT IN THE GOVERNMENT CASE

Novell seeks collateral estoppel for 102 Findings. Of those 102 Findings, there can be little debate that collateral estoppel should be granted to at least 52 because:

- this Court has already ruled that 21 Findings are entitled to preclusive effect;
- Microsoft concedes that Findings 18, 161, 164, 213, 239, 339, and 394 were necessary to the prior decision, but asserts that only Finding 18 of these is material to this case;²

² See MS Opp. at 22 n.21, App. B. at 38-39, App. C.

- Microsoft admitted in a prior case that another 13 of the 102 Findings at issue here were “necessary”;³ and
- the D.C. Circuit explicitly relied on more than 20 other Findings in its decision affirming the District Court’s § 2 liability determination.⁴

As set forth more fully in Novell’s opening papers and below, the remaining 49 Findings to which Novell asks the Court to grant preclusive effect consist of facts that were necessary to the judgment in the Government Case. Microsoft’s arguments to the contrary are based on flawed logic, mischaracterizations of the underlying rulings, and a fundamental misunderstanding of the law.

We address in Sections III and V below the separate question of how the estopped findings should be applied at trial and why they are material to this case.

A. The Undisputed Findings

This Court has ruled already on 21 Findings and the only question for those is how they should be applied at trial. The same question must be answered for the seven Findings that Microsoft does not deny were necessary to the prior decision.

In its opposition, Microsoft disputes that Findings 17, 20, 28, 29, 32, 42, 44, 55, 56, 59, 60, 66, and 67 were necessary to the judgment in the Government Case, apparently forgetting that just a few years ago it admitted that: “Microsoft does not dispute that the ‘background’ (FF ¶¶ 1-17), ‘market definition’ (FF ¶¶ 18-32) and ‘market power’ (FF ¶¶ 33-67) findings listed in plaintiffs’ appendix **were necessary** to the D.C. Circuit’s decision.” MS MN Opp. at 16

³ See MS MN Opp. at 16. Microsoft actually conceded that Findings 1-67 were necessary, but of these, Novell asks the Court to address only Findings 17, 20, 28, 29, 32, 42, 44, 55, 56, 59, 60, 66, and 67. Microsoft does not contest that Findings 2, 4, 6-10, 18, 30-31, and 33-39 were necessary and are material. See MS Opp. App. C.

⁴ See App. A (attached hereto).

(Ex. 1) (emphasis added). This was not the only time that Microsoft admitted that these Findings were necessary. In *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 22281574 (Minn. Dist. Ct. Aug. 20, 2003), Microsoft told the court that it did not contest 266 of the Findings. *See id.* at *12 (“[A]t the hearing, counsel for Microsoft candidly stated that Microsoft does not contest that 266 of Judge Jackson’s Findings were necessary and essential to the finding of monopolization affirmed by the Court of Appeals. Counsel was, however, careful to preserve Microsoft’s objections based on the unfairness and injustice to Microsoft . . .”). Microsoft should not now be allowed to change its position merely because it is strategically beneficial to do so, and, therefore, the Court should grant preclusive effect to Findings 17, 20, 28, 29, 32, 42, 44, 55, 56, 59, 60, 66, and 67.

B. The Majority of the D.C. District Court’s Findings Constituted a Basis for the § 2 Liability Determination Affirmed by the D.C. Circuit

Echoing arguments it has made in the past, Microsoft asserts in its opposition that “[t]he great majority of Judge Jackson’s Findings of Fact **did not** constitute a basis for any liability determination upheld by the D.C. Circuit,” and, therefore, could not have been critical and necessary to the D.C. Circuit’s decision. MS Opp. at 23 (emphasis added). This is a mischaracterization of the D.C. courts’ rulings. In fact, the exact opposite is true – *the majority* of Judge Jackson’s Findings (222 of 412) *did* constitute a basis for the § 2 liability determination that the D.C. Circuit upheld.

In the Conclusions in the Government Case, Judge Jackson undertook an extensive analysis of the Government’s § 2 claim. As a basis for his § 2 liability determination, Judge Jackson cited 222 of his 412 Findings.⁵ Of the 190 Findings not cited by Judge Jackson in the

⁵ See *Microsoft II*, 87 F. Supp. 2d at 36-44 (citing Findings 18-33, 35-55, 57-67, 79, 80, 93-133, 136, 137, 141, 143-147, 155-177, 195, 198, 202-239, 241, 250, 251, 255-262, 272, 277, 284-286, 288-291, 295, 305, 306, 309, 310, 329, 330, 334, 335, 339, 340, 355, 356, 359-361, 376-378,

§ 2 aspect of his decision, the D.C. Circuit cited 32 Findings in affirming his determination that Microsoft illegally maintained its operating systems monopoly.⁶

Following the D.C. Circuit's remand of the Government Case, Judge Kollar-Kotelly addressed the appropriate equitable remedy for Microsoft's anticompetitive conduct. After receiving evidence, the court issued a decision making additional factual findings and legal rulings with respect to the appropriate remedy. *See New York v. Microsoft Corp.* ("Remedies I"), 224 F. Supp. 2d 76 (D.D.C. 2002). In that decision, Judge Kollar-Kotelly commented that "in its review of the district court's liability findings, the appellate court did not have occasion to rely upon the vast majority of factual findings entered by the district court, ***but not cited by the district court as a basis for § 2 liability.***" *Id.* at 138 (emphasis added). Judge Kollar-Kotelly clearly was referring to the fact that the D.C. Circuit relied on 32 of the 190 Findings that Judge Jackson *did not* cite in his Conclusions in support of his § 2 liability determination.⁷ She was not commenting on the importance of the 222 Findings that Judge Jackson *did* cite in support of that determination. Nevertheless, Microsoft here (as it has done before) half-quotes Judge Kollar-Kotelly's decision – excluding the critical language italicized above – to argue that the appellate court actually dismissed "the vast majority" of Judge Jackson's Findings. MS Opp. at 23.⁸

383, 387-394, and 396-407). Although the D.C. District Court also found § 2 liability based on Microsoft's course of conduct, the D.C. Circuit determined that the District Court did not cite sufficient findings supporting that determination and reversed the liability finding; as a result, Novell has not counted the Findings cited by the District Court in support of its "course of conduct" liability determination within the 222 Findings on which the District Court based its § 2 liability, unless the court also cited those Findings in support of a separate basis for § 2 liability.

⁶ See *Microsoft III*, 253 F.3d at 52-79 (citing Findings 4, 6, 7, 15, 68-77, 88, 89, 192, 242, 244, 245, 249, 270, 308, 332, 344, 347, 349-352, 354, and 411).

⁷ See *supra* note 6.

⁸ Microsoft has mischaracterized this portion of Judge Kollar-Kotelly's ruling for more than eight years. *See, e.g.*, MS MN Opp. at 5, 15 (Ex. 1) (filed May 22, 2003); Microsoft's Mem. Opp'n Pls.' Mot. Appl. Collateral Estoppel on Remand ("MS IA Opp.") at 21, 31, *Comes v.*

Nowhere, as Microsoft has argued since at least May of 2003, did Judge Kollar-Kotelly ever “stress[] that ‘the vast majority’ of the factual findings entered prior to appeal were ‘unconnected’ to the D.C. Circuit’s liability determinations.” *Id.*

C. All of the Findings to Which Novell Asks the Court to Grant Preclusive Effect Were Critical and Necessary to the Judgment in the Government Case

Setting aside Microsoft’s attempt to inject a materiality requirement into the collateral estoppel analysis, there appears to be no dispute between the parties as to the test the Court should apply to determine whether to grant preclusive effect to Findings and Rulings in the Government Case. Both parties appear to agree that a Finding or Ruling must have been “critical and necessary” to the affirmed judgment for collateral estoppel to apply. The only dispute appears to be regarding what the words “critical and necessary” mean.⁹ Microsoft’s primary arguments are that Findings that (1) did not form a basis for the liability affirmed on appeal; (2) relate to aspects of the trial court decision the D.C. Circuit rejected on appeal; or (3) provide “background information” or “evidentiary detail” underlying other determinations, are not “critical and necessary” and, therefore, should not be given preclusive effect. MS Opp. at 24-26. With respect to (1) and (2), Novell demonstrates in Appendix B to this reply memorandum that each of the Findings to which it asks the Court to grant preclusive effect were necessary to the judgment in the Government Case. Significantly, nowhere in Microsoft’s Opposition does

Microsoft Corp., No. CL82311 (Iowa Dist. Ct. Mar. 31, 2006) (referenced pages attached as Exhibit 2).

⁹ Microsoft’s Opposition argues that Novell, by citing to the First Circuit’s decision in *In re Belmont Realty Corp.*, 11 F.3d 1092 (1st Cir. 1993), “seeks to apply [a] much more lenient standard” than the “critical and necessary” standard. MS Opp. at 22 n.20, 24. In fact, Novell views the phrase “logically or practically, a necessary component,” 11 F.3d at 1097, to be consistent with Tenth Circuit law.

Microsoft address the specific bases Novell identified in Appendix B to Novell's Memorandum for each Finding to which Novell asks the Court to grant preclusive effect.

With respect to (3), Microsoft conceded in the *Gordon* case in Minnesota, *see* MS MN Opp. at 16 (Ex. 1), that Findings it now labels in its opposition as "background information" or "evidentiary detail" were necessary to the D.C. Circuit's decision. *See, e.g.*, Findings 17, 20. Even without this concession, however, Microsoft's argument fails because when analyzed, Microsoft's arguments lead to nonsensical results.

1. Findings That Define Terms, Describe Concepts, and Provide Evidentiary Detail Are as Critical and Necessary to the Judgment in the Government Case as Are the Conclusory Findings That Microsoft Concedes Are Entitled to Preclusive Effect and That Use or Rely on Those Terms, Concepts, and Evidentiary Detail
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Microsoft concedes collateral estoppel applies to several of the District Court's Findings in which the court sets forth one or more factual conclusions, but provides no factual detail or description to support the conclusions. Without the definitions or descriptions of key terms and concepts and the "evidentiary detail" in the Findings to which Microsoft objects, the Findings it concedes lack meaning and are confusing. For example, Microsoft's Opposition concedes that collateral estoppel applies to Finding 18, which identifies the relevant market as the Intel-compatible personal computer ("PC") operating system market, and Finding 34, which states in part that "Microsoft's dominant market share is protected by a high barrier to entry" and "largely as a result of that barrier, Microsoft's customers lack a commercially viable alternative to Windows." MS Opp. at 25 n.24. Microsoft argues, however, that the Court should not give preclusive effect to Findings 28 and 29, which explain why middleware is not a viable alternative to Windows – an issue that is critical to defining the relevant market – and Finding 42, which describes the effects of the barrier to entry – an issue that is critical to determining whether monopoly power exists – because these Findings merely provide "background information" and

“evidentiary detail” for Findings 18 and 34, respectively. *Id.* at 26. This argument is nonsensical – the Findings to which Microsoft objects on the grounds that they contain only background information and evidentiary detail are as critical and necessary to the judgment in the Government Case as are the Findings that are wholly conclusory. It is counter-intuitive to suggest that the D.C. courts could have determined that there was a high barrier to entry without the Findings describing that barrier; rather, the Findings describing the barrier themselves were critical, essential, and indispensable to the Finding that states in a conclusory fashion, without any explanation, that a barrier exists.

2. Microsoft Objects to Giving Preclusive Effect to Findings Allegedly Containing Only Background Information or Evidentiary Detail Solely to Confuse the Jury

Microsoft’s objection to the so-called “background” facts appears to be calculated to undermine the effect of other, more conclusory statements that rest on these facts. For example, as Appendix B to Novell’s Memorandum indicated, Finding 17 defines “Netscape” and explains that it distributed a web browser called Navigator. *See Remedies I*, 224 F. Supp. 2d at 90 n.15; *United States v. Microsoft Corp.* (“*Remedies II*”), 231 F. Supp. 2d 144, 156 n.10 (D.D.C. 2002), *aff’d sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). Finding 17 also explained that Internet Explorer (“IE”) was Microsoft’s web browser. *See Remedies I*, 224 F. Supp. 2d at 92 n.18; *Remedies II*, 231 F. Supp. 2d at 158 n.13. Microsoft, nevertheless, 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. Microsoft makes similar arguments regarding Findings 28 and 29, *id.* at 26, which define and describe “middleware” – a term used throughout the D.C. courts’ opinions.

Findings 17, 28, and 29 and other Findings providing definitions, describing concepts, and providing “evidentiary detail” make the critical link that explains the relationship

among Netscape, Navigator, Microsoft, and IE and among these companies, products, and the anticompetitive conduct in which the D.C. courts found Microsoft had engaged. Without these Findings, the D.C. courts' decisions do not make sense. This is exactly the reason Microsoft argues that Finding 17 (as well as other key Findings, such as 28 and 29 explaining middleware) is not necessary.

Microsoft is well aware, based on its experience in prior cases, that if the Court grants preclusive effect to certain of the Findings and Rulings from the Government Case and determines those Findings and Rulings are relevant and admissible, the jury in this case likely will receive a set of instructions regarding the Findings and Rulings (as the jury in the *Comes* case in Iowa did regarding the 146 Findings the Iowa court determined Microsoft was precluded from relitigating). Devoid of all of the Findings defining key terms and concepts, Microsoft apparently hopes the instructions the jury receives regarding the Findings and Rulings from the Government Case will serve only to confuse the jury. After all, how are jurors to understand "that Microsoft's actions increased its browser usage share and thus protected its operating system monopoly from a middleware threat," *Microsoft III*, 253 F.3d at 67, if they do not know that Navigator is Netscape's browser and IE is Microsoft's browser and what "middleware" is? As Judge Kollar-Kotelly recognized in her decisions regarding the appropriate remedial order in the Government Case, Finding 17 provides critical information that was necessary for the court's judgment. *See Remedies I*, 224 F. Supp. 2d at 90 n.15, 92 n.18; *Remedies II*, 231 F. Supp. 2d at 156 n.10, 158 n.13.

3. The Flaw in Microsoft’s Narrow Definition of What Is Critical and Necessary to the Judgment in the Government Case Affirmed by the D.C. Circuit Is Clear from the Opinions of the D.C. Courts in the Government’s Case Against Microsoft

Since the D.C. District Court issued its Findings, both the D.C. District Court and the D.C. Circuit have had several opportunities to address, analyze, and apply those Findings. The D.C. courts’ treatment of the Findings in subsequent proceedings demonstrates that Microsoft’s interpretation of what was critical and necessary to the judgment in the Government Case is flawed.

For example, the D.C. courts have recognized that Findings 68-77 and Findings 28 and 29 were critical and necessary to several aspects of the judgment affirmed by the D.C. Circuit. Findings 68-77, the D.C. Circuit held, “document[ed] the threat posed by Netscape and Java” and were “***crucial to*** [the District Court’s] holding [that] Microsoft had stifled competition.” *Massachusetts v. Microsoft Corp.* (“*Remedies Appeal*”), 373 F.3d 1199, 1240 (D.C. Cir. 2004) (emphasis added) (citing *Microsoft I*, 84 F. Supp. 2d at 28-30). The D.C. Circuit also has cited Findings 28 and 29 to define “middleware,” *Microsoft III*, 253 F.3d at 53, and explain why middleware posed a threat to Microsoft’s monopoly power, *id.* at 55, and cited Finding 28 to explain why Java was middleware, *id.* at 74. Similarly, 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. These decisions demonstrate that whatever definition Microsoft is using for the term “necessary,” it is flawed – as the D.C. courts have recognized, Findings 68-77 and Findings 28 and 29 were critical and necessary to the judgment in the Government Case for a variety of reasons.

Similarly, in the appeal of the Findings to the D.C. Circuit, the appellate court set up a two-part test to evaluate harm to competition: “(1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.” *Microsoft III*, 253 F.3d at 79. On the first issue, the D.C. Circuit relied on Findings 59 and 60 to conclude that “it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts.”¹⁰ *Id.* On the second issue, the D.C. Circuit relied on Findings 68-77 to conclude that both Navigator and Java “showed potential as middleware platform threats.” *Id.* Absent these factual findings, the D.C. Circuit could not have ruled in favor of the Government. The same is true for Findings 203, 214, and 222.

D. There Is Nothing Unfair in This Case About Precluding Microsoft from Relitigating the Findings and Rulings from the Government Case

Microsoft’s Opposition argues that the Court in this case should not apply collateral estoppel to the Government Case on the grounds that giving the Findings and Rulings from that case to the jury would be unfair to Microsoft. Microsoft’s arguments rest primarily on issues of admissibility, not whether it would be unfair to preclude Microsoft from relitigating the Findings.

¹⁰ In its discussion of relevant market, the D.C. Circuit confirmed that products like Navigator and Java could not yet be considered reasonable substitutes for the Windows operating system. Nevertheless, the D.C. Circuit agreed that “[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.” *Microsoft III*, 253 F.3d at 54. As the D.C. Circuit observed, Microsoft had previously admitted that Netscape’s Navigator and Sun’s Java reasonably constituted middleware threats and by the middle of 1995, Netscape was “clearly a potentially lethal competitor to Windows.” *Id.* at 79 (citation omitted) (internal quotation marks omitted).

Microsoft also suggests, without any legal support, that it would somehow be unfair to apply collateral estoppel to Findings that Novell did not include in the motion it filed in 2008. MS Opp. at 50. Microsoft's argument makes no sense. As expected, this case has evolved since 2008. The parties have completed discovery, exchanged expert reports, completed expert discovery, and litigated through appeal this Court's summary judgment rulings. Throughout that time, the Findings have not changed. Microsoft cannot demonstrate any prejudice whatsoever from Novell's addition of the Findings and Rulings in its renewed motion.

III. PRACTICAL CONSIDERATIONS JUSTIFY APPLYING COLLATERAL ESTOPPEL TO THE FINDINGS AND RULINGS FROM THE GOVERNMENT CASE

Microsoft recites a litany of premature arguments revolving around the admissibility and use of collaterally estopped facts. Microsoft would have this Court believe that applying collateral estoppel to the Findings and Rulings from the Government Case will somehow complicate the trial of this case or make it less efficient. Microsoft is wrong in every respect.

First, the application of collateral estoppel in this case will conserve judicial resources, not waste them, as Microsoft's Opposition argues. If, as Novell asserts, the facts are material and admissible, then countless hours of trial time will be saved by simply providing those facts to the jury and instructing the jury to accept them as true. Similarly, Microsoft will be estopped from wasting the jury's time by relitigating facts that have already been decided. It would be both time-consuming and fundamentally unfair, for example, to allow Microsoft to argue that it did not engage in anticompetitive conduct to eliminate Navigator and Java as potential threats to Microsoft's operating systems monopoly.

To be clear, Novell does not intend to waste the Court's resources by presenting evidence at trial to prove collaterally estopped facts. If relevant facts are not collaterally estopped, however, Novell will seek to prove them at trial through witnesses and documents.

For example, if estoppel is not granted for Finding 93 (“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”), Novell will seek to present evidence that Microsoft, in fact, had such a corporate practice and as part of that practice took anticompetitive acts against Novell.

The sole purpose of Novell’s motion is to expedite trial by avoiding the needless presentation of potentially dozens of witnesses and hundreds of exhibits¹¹ to prove, once again, that Microsoft took anticompetitive acts against Navigator, Java, and other middleware threats to protect its operating systems monopoly. To the extent that Microsoft feels at trial that Novell is presenting unnecessarily cumulative evidence, the Court can of course address that issue when Microsoft objects. It would be premature, however, for the Court to make rulings on the admissibility of specific testimony and exhibits related to the issues in the Government Case without knowing the purpose for which such testimony and exhibits are being offered.¹²

¹¹ As this Court is undoubtedly aware, Judge Jackson heard testimony from 105 witnesses and received into evidence 2,733 exhibits.

¹² Microsoft wrongly asserts that courts in the Tenth Circuit “have repeatedly rejected attempts by a party to obtain the benefits of offensive collateral estoppel *and* then introduce additional evidence at trial on the same issues.” MS Opp. at 53. None of the cases Microsoft cites support such a broad proposition. *Coburn v. Smithkline Beecham Corp.*, 174 F. Supp. 2d 1235 (D. Utah 2001), involved a lawsuit related to the drug Paxil. The court, noting it would be “reversible error . . . to apply collateral estoppel,” *id.* at 1239, denied the plaintiffs’ motion for collateral estoppel on the issues of “general causation” and “fault” decided in an earlier jury trial involving the same drug because the issues in the two cases were not identical. *Id.* at 1238. According to the court, the jury verdict in the prior action regarding “general causation” was ambiguous because it was unclear under what theory the jury found “fault.” *Id.* The court further noted, in dicta, that applying collateral estoppel there would not promote judicial economy, the prior decision was based on the testimony of experts whose testimony had been found unreliable in other circumstances, and there were inconsistent judgments involving related drugs. *Id.* at 1239-40. On the point of judicial economy, the court noted that the defendant still would be presenting evidence about general causation in the context of proving no specific causation and it was unclear how the plaintiffs could establish that the drug caused someone to commit suicide without expert testimony on “general causation.” *Id.* at 1239. Moreover, the other cases cited by Microsoft on this point, *In re Air Crash Disaster at Stapleton International Airport*, 720 F. Supp.

Microsoft also argues that presenting collaterally estopped facts will “confuse” the jury. MS Opp. at 49. Again, Microsoft’s argument is premature. It is also wrong. Microsoft’s fairness arguments are either predicated on its own flawed comparison of the time periods and products at issue in the Government Case and in this case, as discussed in section V.B below, or meritless as a matter of law.¹³ To the extent that Microsoft has legitimate concerns regarding jury confusion, a limiting instruction may be given.

IV. APPENDIX A TO NOVELL’S MEMORANDUM APPROPRIATELY PHRASES THE RULINGS FROM THE GOVERNMENT CASE

As yet another example of Microsoft’s refusal to acknowledge that the D.C. courts in the Government Case determined Microsoft engaged in anticompetitive conduct to maintain its monopoly in the operating systems market, Microsoft attacks the Rulings to which Novell asks the Court to grant preclusive effect. Without citing a single case to support its positions or offering any alternative to the Rulings of the D.C. Circuit set forth in Appendix A to Novell’s

1505 (D. Colo. 1989), *rev’d on other grounds sub nom. Johnson v. Cont’l Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992), and *Setter v. A.H. Robins Co.*, 748 F.2d 1328 (8th Cir. 1984), are clearly distinguishable. In both cases, the respective courts noted that the facts for which the plaintiffs sought collateral estoppel on one issue would need to be presented to the judge and the jury again for purposes of assessing punitive damages. *In re Air Crash Disaster*, 720 F. Supp. at 1524 (“All of the evidence presented in the first trial to establish that defendants’ conduct was ‘willful or reckless,’ as defined by Idaho law, would be presented in subsequent trials of liability for punitive damages under Texas law.”); *Setter*, 748 F.2d at 1331 (finding judicial economy would not be served because “the same facts . . . that would have been relevant on the issue of liability would still have to come in and be considered by the court or jury on the issue of exemplary damages”). Clearly, punitive damages are not at issue here.

¹³ Microsoft’s Opposition asserts that granting preclusive effect to the Findings and Rulings from the Government Case creates a risk that the jury will give “undue significance” and “disproportionate weight” to those Findings and Rulings. MS Opp. at 50 (citing *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002)). The Tenth Circuit’s concerns in the *Herrick* case do not apply in the context of collateral estoppel. As the Tenth Circuit explained in *Personnel Department, Inc. v. Professional Staff Leasing Corp.*, 297 F. App’x 773, 787 (10th Cir. 2008), the concern in *Herrick* was that a jury could construe a judicial opinion being presented to it as resolving, by judicial declaration, “key disputed factual issues in the case.” The Findings and Rulings from the Government Case will not resolve any “key disputed factual issues” in this case.

Memorandum, Microsoft asserts that the D.C. Circuit's Rulings are not proper subjects for collateral estoppel.

Most of Microsoft's arguments relate to the manner in which Novell paraphrased the D.C. Circuit's Rulings. Again, Microsoft offers no alternative. Instead, Microsoft appears to suggest that the Court must read to the jury the entirety of the D.C. Circuit's decision (or at least the analysis dealing with the 12 anticompetitive acts the D.C. Circuit determined Microsoft took) to present the "proper context." MS Opp. at 34 ("The sentences, paragraphs and sections of the D.C. Circuit's decision are interrelated and were intended to be read as an integrated whole."). Under this rationale, the entirety of the D.C. District Court's Findings would need to be read to the jury to provide the "proper context." Suffice it to say, Novell believes that Appendix A accurately reflects the D.C. Circuit's legal rulings, and including any greater explanation to provide context, which the Findings to which Novell asks the Court to grant preclusive effect will provide, is unnecessary.¹⁴

Aside from disagreeing with Novell's phrasing of the Rulings, the only argument Microsoft makes with respect to the Rulings set forth in Appendix A to Novell's Memorandum is that it is inappropriate to collaterally estop Microsoft from relitigating the following Ruling:

Microsoft's intellectual property rights did not confer a privilege to violate the antitrust laws, [*Microsoft III*, 253 F.3d] at 63, and Microsoft could not justify these license restrictions on the grounds that it was simply exercising its rights as the holder of valid copyrights, *id.* at 62-63.

¹⁴ Microsoft's historic positions in opposing collateral estoppel motions demonstrate that Microsoft's "context" objection to the Rulings is simply an improper attempt to apply "reciprocal collateral estoppel," *Gordon*, 2003 WL 22281574, at *4, an argument this Court has squarely rejected. See *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 535 (D. Md. 2002) ("Microsoft complains that the plaintiffs seek to 'cherry pick,' that is to select certain of the findings . . . for collateral estoppel effect while disregarding others. Of course, on an abstract level this complaint is merely a challenge to the doctrine of non-mutual offensive collateral estoppel, a challenge that necessarily fails since the doctrine is firmly embedded in the law."), *rev'd on other grounds*, 355 F.3d 322 (4th Cir. 2004).

Novell's Mem. App. A at 2. Microsoft contends that "the D.C. Circuit's analysis [and, presumably, its rejection] of Microsoft's copyright defense was not 'critical and necessary' to the judgment affirmed by the D.C. Circuit." MS Opp. at 35. As Microsoft puts it, "[a] rejected legal defense has never, to [Microsoft's] knowledge, been the subject of collateral estoppel in a later jury case." *Id.*

This argument is without merit. The case law is replete with situations where a party is collaterally estopped from presenting a defense actually or necessarily decided against that party in a prior proceeding. Microsoft's argument on this matter is the equivalent of a criminal defendant convicted of murder arguing in a civil trial brought by the decedent's survivors that the defendant is entitled to present evidence that he/she acted in self-defense. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-33, 337 (1979) (holding that defendant was collaterally estopped from relitigating a defense that it previously lost when sued by the SEC and that such a finding would not violate defendant's Seventh Amendment right to a jury trial, even though the SEC action had been for equitable relief and decided during a bench trial); *United States v. One Parcel of Real Prop. Known as 16614 Cayuga Rd.*, 69 F. App'x 915, 917-18 (10th Cir. 2003) (defendant was collaterally estopped from raising a constitutional defense "as a defense to the civil forfeiture action, because these same issues were fully litigated in his state criminal prosecution and all of the criteria for application of collateral estoppel have been met").

There can be no doubt that the D.C. Circuit's consideration, and rejection, of Microsoft's copyright defense with respect to Microsoft's license restrictions prohibiting original equipment manufacturers ("OEMs") from adding icons or folders different in size or shape from those supplied by Microsoft and from using the "Active Desktop" feature to promote third-party brands was critical and necessary to the § 2 liability determination affirmed by the D.C. Circuit

in the Government Case. Had the D.C. Circuit accepted Microsoft's defense, it would not have found that these license restrictions were anticompetitive conduct that violated § 2. Given that Microsoft had a full and fair opportunity to litigate this issue in the D.C. courts, the Court should preclude Microsoft from presenting evidence in this case that the licensing restrictions in the Government Case for which Microsoft asserted this defense were justified.

V. MICROSOFT CANNOT DENY THAT ITS CONDUCT IS MATERIAL TO THE ISSUES IN THIS CASE

In addition to being conclusively established, the facts decided in the Government Case are plainly material to many issues in this case. This Court acknowledged as much in rejecting Microsoft's argument that Novell's expert, Dr. Roger Noll, inappropriately relied on facts regarding Microsoft's anticompetitive conduct against middleware threats that was the focus of the Government Case. This Court found that Dr. Noll's consideration of "the weakened state of other applications and [independent software vendors ("ISVs")]" presented a question that falls "within *the province of a jury.*" *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 750 (D. Md. 2010) (emphasis added), *rev'd on other grounds*, No. 10-1482, 2011 WL 1651225 (4th Cir. May 3, 2011). The Fourth Circuit agreed, holding that Dr. Noll's testimony presented an issue that "is appropriate *for trial.*" *Novell, Inc. v. Microsoft Corp.*, No. 10-1482, 2011 WL 1651225, at *7 (4th Cir. May 3, 2011) (emphasis added).

Given these rulings alone, there can be no reasonable doubt that the issues covered by Dr. Noll's testimony are "material" to this case. Whether this Court chooses to grant collateral estoppel or not, the jury will have to consider the purpose and effect of Microsoft's conduct against perceived middleware threats like Novell, Netscape, Sun, and Lotus. All of that conduct, inspired by Microsoft founder Bill Gates, occurred in the same time frame, for the same illegal

objective, and through very similar means. And all of that conduct is appropriately considered and relied upon by Dr. Noll in forming his expert opinions in this case.

Undeterred by the rulings of this Court and the Fourth Circuit, Microsoft nevertheless presses on and denies yet again the relevance of its anticompetitive efforts to suppress nascent middleware threats. Microsoft's arguments in opposition to this motion cannot be seen as anything other than a back-door effort to overturn the decisions of this Court and the Fourth Circuit. Furthermore, as Novell's Memorandum showed, Microsoft's anticompetitive conduct also demonstrates its motive and intent.

A. Microsoft Mischaracterizes the Court's Summary Judgment Decision

In denying Microsoft's summary judgment motion, this Court wrote: "Novell need only prove that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market considering all the characteristics of that market at the time, including the condition of other ISVs and applications." *Novell*, 699 F. Supp. 2d at 750. Microsoft seizes on the words "at the time" to argue that any conduct that did not occur contemporaneously with the conduct directed toward Novell is irrelevant to any issue in this case. This Court is in the best position to interpret its own ruling, but Novell certainly does not construe these three words, "at the time," to undermine the rest of this Court's discussion of (1) Dr. Noll's analysis and his conclusion that "there was anticompetitive harm caused by the combination of the conduct directed at Novell's software applications and the anticompetitive conduct directed at Netscape, Java, and other third party applications," (2) the policy against permitting anticompetitive conduct directed at multiple small threats, and (3) Novell's obligation to create some "hypothetical market" in which Microsoft did not scheme to exclude middleware threats. *Id.* at 749.

This Court’s entire opinion demonstrates that the relevant “time” was the period in which Microsoft engaged in its pattern of conduct and the years in which the effects of that conduct were felt. By definition, “middleware’s threat is only nascent,” but the Sherman Act does not limit its prohibition to actions taken against threats that “are already well-developed enough to serve as present substitutes.” *Microsoft III*, 253 F.3d at 54. “[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will.” *Id.* at 79. As Dr. Noll explained, Novell was a nascent threat and the harm caused by eliminating this threat would necessarily be felt after the conduct occurred, in this case in 1996, 1997, and afterward. *See* Noll Reply Rep. at 6-7 (Novell’s Mem. Ex. 3). Microsoft’s assertion that the jury cannot hear about the conduct that occurred when Novell’s applications would have, but for Microsoft’s anticompetitive conduct, developed along with Navigator, Java, and other middleware threats would reverse this Court’s prior ruling and improperly limit Dr. Noll’s testimony.¹⁵

Indeed, this Court correctly recognized that the jury should consider the “entirety of the monopolist’s pattern of conduct.” *Novell*, 699 F. Supp. 2d at 745; *see also Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1308-09 (D. Utah 1999) (plaintiff’s evidence should be viewed as a whole and specific acts should not be viewed in isolation so long as “‘taken together they are sufficient to prove a monopolization claim’” (citation omitted)).

Perhaps most importantly, the Fourth Circuit did not use the “at the time” language to so narrowly restrict this Court’s ruling. Instead, the Fourth Circuit found that Microsoft

¹⁵ On pages 6-7 of his Reply Report, Dr. Noll specifically points out that “even if the damages that Novell can recover for conduct affecting WordPerfect and Quattro Pro are restricted to the period that Novell owned these products, ***assessment of the harm to competition arising from this conduct is not so restricted because this harm does not depend on which firm sells which products, and could have taken place after Novell’s exit from the market.***” Noll Reply Rep. at 6-7 (Novell’s Mem. Ex. 3) (emphasis added).

mischaracterized the impact of Dr. Noll's testimony and accepted this Court's finding that Microsoft's actions contributed to ““anticompetitive harm in the PC operating system market *in light of the weakened state of other applications and [independent software vendors].*”” *Novell*, 2011 WL 1651225, at *7 (alteration in original) (citation omitted).

B. The Bases on Which Microsoft Distinguishes the Government Case from This Case Are Flawed

Microsoft devotes a significant portion of its opposition to arguing that the Findings relate to different products, different parties, and different conduct. *See MS Opp.* at 3-4, 7-11, 15-17, 38-41. As discussed above, Microsoft's arguments conflict directly with the rulings of this Court and the Fourth Circuit.

- Different products. Both cases involve “middleware” software and Microsoft's efforts to quash the threat posed by such software to Microsoft's operating systems monopoly. *See Novell*, 699 F. Supp. 2d at 736 (noting that Novell's theory is that “Microsoft intentionally took actions against Novell's applications because . . . ‘PerfectOffice,’ developed by Novell, constituted (or nearly constituted) ‘middleware,’ which could have been effectively used with any operating system and that therefore would have ‘commoditized’ Windows 95 and undermined the monopoly Microsoft enjoyed in the operating system market”).

- Different parties. While “different,” Novell, Netscape, Sun, Lotus, and a select few other ISVs all presented the same middleware threat. In fact, as Dr. Noll explained, they all reinforced each other and the sum of their parts presented an even greater threat to Microsoft's Windows monopoly. *See Noll Reply Rep.* at 28-33 (Novell's Mem. Ex. 3). As Judge Jackson found in the Government Case, “Microsoft was concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category.” Finding 68.

- Different conduct. Microsoft argued in its summary judgment motion that its anticompetitive conduct directed against Netscape and Sun was “fundamentally different” from its anticompetitive conduct against Novell. This Court concluded that (a) a defendant could not avoid antitrust liability by simply engaging in “‘different’ anticompetitive conduct toward each of its small competitors,” and (b) it was “not convinced that the conduct directed at the other ISVs is distinguishable in any material way from the conduct directed at Novell.” *Novell*, 699 F. Supp. 2d at 749 n.20. Indeed, WordPerfect, Quattro Pro, and PerfectOffice all served as distribution channels for Navigator and Java. *See Decl. of Roger Noll at 92 (Novell’s Mem. Ex. 2)*. Further, Microsoft’s deception of Sun (Finding 407) and its refusal to provide needed Windows 95 access to IBM (which planned to pre-install Lotus’ SmartSuite on its computers) (Finding 125) and Netscape (Finding 91) were all very similar to Microsoft’s conduct directed toward Novell.

- Different time period. Apart from its flawed interpretation of the phrase “at the time,” Microsoft’s discussion of the timing of its conduct is highly misleading and inconsistent with the Findings in the Government Case (providing further evidence why this Court should estop Microsoft from challenging those Findings). As Judge Jackson wrote: “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.” *Microsoft II*, 87 F. Supp. 2d at 38 (emphasis added). In fact, Microsoft’s anticompetitive campaign grew out of events in 1994. Microsoft grew increasingly concerned about the user interfaces provided by LotusNotes which could work across multiple operating systems and serve as a distribution vehicle for Navigator and Java. *See Finding 78*. Netscape released Navigator in 1994, which “alarmed” Microsoft, *see*

Finding 72, and Microsoft de-documented the namespace extension APIs to prevent Lotus and Novell from using them. In the Spring of 1995, Microsoft strong-armed Intel to prevent it from providing cross-platform functionality, Findings 94, 99-102, and Microsoft learned of Netscape/Sun plans to release Java with Navigator, Findings 75-76. Gates wrote his infamous “Internet Tidal Wave” memo in May 1995, warning of Netscape’s plans and the danger they presented to Microsoft, and triggering Microsoft efforts to eliminate Navigator and Java as threats. Findings 72, 77, 80, 84. In February of 1995, Microsoft began taking anticompetitive actions against IBM for its plan to pre-install the Lotus SmartSuite on its PCs, Findings 123-125, 132, and Novell acquired a worldwide license to use, reproduce, distribute, combine, and integrate Netscape Navigator with its software products, including PerfectOffice for Windows 95, WordPerfect for Windows 3.1 and Windows 95, and WordPerfect 3.5 for Macintosh. These Findings highlight the overlap in the timing of Microsoft’s anticompetitive campaign to eliminate threats to the Windows monopoly.¹⁶

C. Microsoft Misrepresents and Mischaracterizes Novell’s Materiality Arguments

Novell argued in its Memorandum that the Findings were material to various issues in this case, including (1) harm to competition, (2) Microsoft’s intent, motive, and knowledge, and (3) the purpose and character of Microsoft’s actions. Microsoft’s Opposition incorrectly mixes the second and third issues and recasts them to suggest that Novell seeks to inject “character”

¹⁶ Once again, Microsoft’s actions and statements in this case cannot be reconciled with its actions and statements in prior cases. For example, in 2003, it wrote that the Government Case “focused on acts and conditions between 1995 and 1998.” MS MN Opp. at 29-30, 31 (Ex. 1). Similarly, in 2006, Microsoft told the Iowa court repeatedly that the time period for the Government Case was 1995 to 1998. See MS IA Opp. at 4 (“The Government Action focused on . . . anticompetitive conduct between 1995 and 1998.”), 5, 13, 55 (Ex. 2). Microsoft also argued in the MDL that the Government’s case “address[ed] Microsoft’s actions from 1995 to 1998.” Microsoft’s Mem. Opp’n Be’s Rule 16 & 56 Mot. Preclusive Effect Fact Findings & Issues at 1, *Be, Inc. v. Microsoft Corp.*, MDL Docket No. 1332 (D. Md. Oct. 4, 2002) (referenced pages attached as Exhibit 3).

evidence into this case in violation of Federal Rule of Evidence 404(b), MS Opp. at 41-42, an issue of admissibility that is more appropriately reserved for a motion *in limine* or objection at trial.

Novell, however, did not use the word “character” a single time in its argument regarding intent, motive, and knowledge, and Novell does not intend to present evidence of Microsoft’s character to show its propensity to violate the Sherman Act. Instead, as Novell’s Memorandum clearly indicated, Novell intends to present the Findings and Rulings from the Government Case to demonstrate (1) the weakened condition of Netscape, Sun, and other ISVs addressed in the Government Case for the purpose of proving that Microsoft’s conduct against Novell harmed competition in the operating systems market; (2) Microsoft’s intent, motive, or knowledge for purposes of determining whether Microsoft’s conduct against Novell was exclusionary, anticompetitive, or predatory; and (3) the anticompetitive purpose and character of particular transactions as courts have held is permissible in antitrust cases. *See* Novell’s Mem. at 12-17.

Microsoft’s citation to Rule 404(b) is both premature and wrong. First, Rule 404(b) does not apply at all because the Findings raise issues that are intrinsic to Novell’s case. *Elliot v. Turner Constr. Co.*, 381 F.3d 995, 1004 (10th Cir. 2004). Second, even if one assumed, *arguendo*, that Rule 404(b) could conceivably apply, Rule 404(b) only excludes evidence offered “to prove the character of a person in order to show action in conformity therewith.” Rule 404(b) specifically acknowledges that evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as motive, opportunity, intent, plan, or knowledge.

Federal courts in antitrust cases have routinely admitted evidence over Rule 404(b) objections to show intent and have admitted evidence of conduct subsequent to the time covered

by the case. *See, e.g., 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.”);¹⁷ *Jerrold Elecs. Corp. v. Wescoast Broad. Co.*, 341 F.2d 653, 655-65 (9th Cir. 1965); *ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 656-57 (E.D. Pa. 2003); *Strobl v. N.Y. Mercantile Exch.*, 582 F. Supp. 770, 774 (S.D.N.Y. 1984) (later bad acts probative of defendant’s intent, motive, and method), *aff’d*, 768 F.2d 22 (2d Cir. 1985). Microsoft’s anticompetitive strategies and tactics against other cross-platform middleware threats bear directly on whether Microsoft’s anticompetitive conduct against Novell was “part of a larger, ongoing pattern of anticompetitive conduct,” and thus provide crucial insight into Microsoft’s specific intent and motive for its conduct against Novell. *ID Sec. Sys. Can.*, 249 F. Supp. 2d at 657. In addition, intent in antitrust cases is relevant to show that particular conduct is anticompetitive and caused a harmful effect. *See Wood v. United States*, 41 U.S. 342, 360-61 (1842); *United States v. Olivo*, 69 F.3d 1057, 1063 (10th Cir. 1995).¹⁸

In addition, Microsoft has put its motive into issue by arguing that Microsoft had “no incentive” to prevent Novell from providing excellent applications for Windows 95. MS

¹⁷ Microsoft’s attempt to distinguish *Syufy* is misguided. MS Opp. at 44. Although the Ninth Circuit held that the trial court did not commit prejudicial error by admitting evidence of subsequent conduct, the court also specifically determined that evidence of the subsequent conduct was relevant. 793 F.2d at 1002.

¹⁸ Microsoft’s citations to the contrary are inapposite. In *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186 (10th Cir. 1997), the court held simply that evidence that Enron breached a contract with another contractor was inadmissible to prove that “Enron typically breached contracts” but agreed that the evidence might properly have been admitted to show motive, had it been in issue. *Id.* at 1194. *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360 (D. Kan. 1987), *aff’d*, 899 F.2d 951 (10th Cir. 1990), involved a defendant’s effort to introduce evidence of the plaintiff’s prior conduct, which was not relevant. *Id.* at 1433-34. In *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3d Cir. 2000), the Third Circuit held only that evidence that ARCO allegedly fabricated reasons for firing a former employee was not admissible to prove it had fabricated reasons for firing the plaintiff and the plaintiff failed to show a “common scheme or plan” that might allow the evidence to be admitted for a proper purpose. *Id.* at 190-92.

Opp. at 47. Microsoft should have had the same incentive with respect to Navigator and Java – two other incredibly popular software programs that ran on Windows. Yet, Microsoft also recognized that it had a conflicting incentive to prevent Navigator, Java, IBM/Lotus Notes and SmartSuite from providing Windows 95 applications. All presented middleware threats and, as Judge Jackson observed, “middleware threatened to demolish Microsoft’s coveted monopoly power.” *Microsoft II*, 87 F. Supp. 2d at 38.

D. The D.C. Courts’ Findings and Rulings Regarding Microsoft’s Exclusionary Licensing Agreements and Other Arrangements with OEMs and Internet Access Providers and Regarding Microsoft’s “Corporate Practice” of Pressuring ISVs to Halt Development of Competitive Software Are Material to the Issues Here

Microsoft asserts that the Findings regarding its exclusionary licensing agreements with OEMs and internet access providers (“IAPs”) are immaterial to the issues in this case because they allegedly were “relevant only to the allegations of Count VI,” which the Court eliminated in its summary judgment ruling. MS Opp. at 45.¹⁹ In the same vein, Microsoft asserts that the Findings regarding Microsoft’s “corporate practice” are immaterial because Novell did not “allege that Microsoft ever pressured Novell to stop developing” competitive software. *Id.* at 46.

The significance of these Findings and Rulings is not, as Microsoft’s Opposition suggests, related to whether Novell also asserts that Microsoft engaged in the exact same anticompetitive act against Novell as it did against Netscape, Sun, or other ISVs and applications (Novell will prove at trial that in some instances it did). Rather, in addition to the reasons discussed above and in Novell’s Memorandum, these Findings and Rulings are material to the

¹⁹ Microsoft incorrectly asserts that “Novell acknowledged that such Findings of Fact and Legal Rulings are relevant only to the allegations of Count VI,” *id.*, in Novell’s 2008 collateral estoppel motion – nowhere in Novell’s 2008 papers regarding the collateral estoppel motion does Novell suggest that any of the Findings or Rulings from the Government Case are relevant only to a specific count of Novell’s complaint.

issues in this case because of the D.C. courts' determination regarding Microsoft's motive for these anticompetitive actions against Netscape and Sun (which are the same motivations for Microsoft's anticompetitive conduct at issue in this case), i.e., to squash nascent threats to Microsoft's operating systems monopoly. Microsoft's conduct consisted of a pattern and plan to eliminate middleware threats, not some series of isolated and disconnected events. *Microsoft III*, 253 F.3d at 79; *see id.* at 70-71.

VI. CONCLUSION

Accordingly, for the reasons set forth above, in the appendices to this memorandum, and in Novell's Memorandum and the appendices and exhibits thereto, this Court should preclude Microsoft from contesting the Findings listed in Appendix C and discussed in Appendix B and the Conclusions listed in Appendix A to Novell's Memorandum.

Dated: September 1, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Maralyn M. English _____