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UNITED STATES DISTRICT COURT
for the District of Utah
Central Division

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

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Plaintiff Novell, Inc. ("Novell") submits this memorandum in support of its renewed motion seeking collateral estoppel for the Findings of Fact ("Findings") and Conclusions of Law ("Conclusions") of the United States District Court for the District of Columbia in the case *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (the "Government case"), that the United States Court of Appeals for the District of Columbia Circuit affirmed in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). On December 3, 2008, this Court ruled that Microsoft Corporation ("Microsoft") is collaterally estopped from contesting the following Findings: 2, 4, 6-10, 30-31, 33-39, 144-145, 148, 159, and 239. The Court determined that these Findings "clearly were 'critical and essential' to the judgment affirmed by the D.C. Circuit in the Government case." Order at 1 (Dec. 3, 2008) (attached as Exhibit 1). The Court deferred, until a later stage of this litigation, ruling upon (1) whether other Findings were "critical and essential" and would be given preclusive effect, (2) whether the Findings and Conclusions in the Government case were material to the issues in this case, and (3) what language the Court will include in the instructions to the jury regarding the Findings and Conclusions to which the Court gives preclusive effect. *See id.* at 1-2.[1]

[1] In its December 3, 2008 Order, this Court held that all of the criteria for applying collateral estoppel to the Findings except the "necessary" criterion had been met for each of the D.C. District Court's Findings:

> Specifically, the findings now in issue are "identical to the [findings]" previously litigated in the Government case," the findings were "actually resolved in the prior proceeding"; the judgment in the prior proceeding is final and valid; and Microsoft "had a full and fair opportunity to litigate the [findings] in the prior proceeding."

Exhibit 1 at 1 (alterations in original) (quoting *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004)). Novell, which previously argued that Microsoft was collaterally estopped from relitigating the issue of whether the other collateral estoppel criteria had been met (the Court, having found in the December 3, 2008 Order that the other criteria were met, declined to rule on Novell's argument), does not, therefore, address those criteria in this motion.

Novell now moves the Court to preclude Microsoft from relitigating other Findings and Conclusions in the Government case, and for a determination that the Findings and Conclusions are material to the issues in this case.[2] As Novell demonstrates below and in Appendix B, all of the Findings that Novell has asked the Court to preclude Microsoft from contesting are material to the issues in this case and were critical and essential to the affirmed judgment in the Government case. Microsoft, therefore, should be precluded from relitigating those Findings and Conclusions.

I. ISSUES TO BE TRIED IN THIS CASE

Trial in this case currently is scheduled to begin in October on Novell's claim that "Microsoft violated § 2 of the Sherman Act by taking anticompetitive actions against, and causing damage to, software applications owned by Novell for the purpose of obtaining and maintaining its monopoly in the operating system market." *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 699 F. Supp. 2d 730, 734 (D. Md. 2010), *rev'd on other grounds*, No. 10-1482, 2011 WL 1651225 (4th Cir. May 3, 2011). To succeed on this claim at trial, Novell must prove, among other things:

1. Microsoft had monopoly power in the relevant market (the Intel-compatible personal computer ("PC") operating systems market); and

2. Microsoft engaged in anticompetitive conduct that caused anticompetitive harm in the relevant market – that is, "willfully and wrongfully maintained its monopoly."

Novell, 699 F. Supp. 2d at 745.

With respect to monopoly power, there can be no reasonable debate over the relevant market and Microsoft's monopoly power in that market over the entire 1990s period.

[2] Novell intends to address the issue of the appropriate language for preliminary and final jury instructions after the Court determines to which Findings and Conclusions it will give preclusive effect.

See Finding 35. While the Court's December 3, 2008 Order granted preclusive effect to Findings 33-39, as well as certain other Findings related to the relevant market and Microsoft's monopoly power in it, the Order did not grant preclusive effect to all Findings critical and essential to the D.C. District Court's Conclusions regarding those issues and deferred any ruling on the materiality to this case of such Findings.

With respect to anticompetitive conduct and harm to competition, which involve overlapping considerations and analyses, Novell intends to demonstrate at trial, among other things, that Microsoft willfully and wrongfully maintained its monopoly by:

> (1) withdrawing access to information about and changing course and otherwise refusing to cooperate regarding the Windows 95 namespace extensions, thereby delaying and impairing Novell's development of the Perfect Office suite that was designed to run on Windows 95;
>
> (2) misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect's costs and decreasing its functionality; and
>
> (3) refusing to grant a Windows 95 logo certification for Novell's Perfect Office suite.

Novell will further demonstrate 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." *Novell*, 699 F. Supp. 2d at 736 (emphasis added). Novell will show that Microsoft's anticompetitive conduct, which must be viewed as a whole, caused injury to Novell and "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 [independent software vendors] and applications*." *Id.* at 750 (emphasis added); *see Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1309 (D. Utah 1999) (finding

"no bar to allowing [plaintiff] to present *all of its evidence* of Microsoft's alleged anticompetitive conduct to a fact finder in support of its § 2 claim" (emphasis added)).

More specifically, Novell will show that "Microsoft's corporate practice" was to "pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products," Finding 93, and that Microsoft's anticompetitive conduct against applications and independent software vendors ("ISVs") throughout the 1990s (including conduct against Netscape's Navigator and Sun's Java addressed in the Government case) weakened the applications and ISVs that represented threats to Microsoft's operating systems monopoly. In that weakened market, Microsoft's anticompetitive conduct that harmed Novell was reasonably capable of making a significant contribution to Microsoft's continued monopoly power. *See Novell*, 2011 WL 1651225, at *7 ("Novell's expert's opinion about a hypothetical market leaves ample room for 'a finding that Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market *in light of the weakened state of other applications and [independent software vendors]*.'" (alteration in original) (citation omitted)).[3] Novell will further show that Microsoft's intent, motive, purpose, and methodology for its anticompetitive conduct against Novell were the same as those for its conduct against Navigator and Java, i.e., protecting the applications barrier to entry from the cross-platform middleware threat by impeding sales, choking distribution, and deceiving developers.

[3] *See also Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 314 n.22 (4th Cir. 2007) ("As with Novell's office-productivity applications, the primary threat that Java and Navigator posed to Windows was not that they were competitors or potential competitors in the operating-system market . . . but rather that, from outside that market, they could enable an alternative operating system to compete with Windows. The anticompetitive activities that harmed Java and Navigator are undeniably similar to those alleged by Novell. . . . *[W]e are not sufficiently persuaded by Microsoft's proffered distinction between Novell's products and middleware to consider irrelevant the parallels between Novell's claims and the government's claims.*" (emphasis added) (citations omitted)).

In his report, Novell's expert, Dr. Roger G. Noll, chronicles the history of Microsoft's anticompetitive conduct in the 1980s and 1990s (including its use of exclusionary agreements, integration of software in its operating system in an anticompetitive manner, and withholding of critical technical information from and deception of software developers) and explains how Microsoft's anticompetitive conduct that injured Novell harmed competition in the operating systems market in light of the weakened state of other ISVs and applications. *See* Declaration of Roger G. Noll at 8-10, 84-157 (attached as Exhibit 2). Dr. Noll specifically cites Microsoft's conduct against Netscape's Navigator and Sun's Java, among others, *id.* at 89-90, which the D.C. District Court and the D.C. Circuit found to be anticompetitive in the Government case, as evidence that "Microsoft would destroy any product that it regarded as a threat to its core business assets," *id.* at 10. Novell intends to present evidence at trial regarding that anticompetitive conduct to demonstrate the state of the operating systems market in light of Microsoft's anticompetitive conduct against middleware threats like Netscape's Navigator and Sun's Java and the harm to that weakened market caused by Microsoft's anticompetitive conduct against Novell. Microsoft should not be allowed to contest the D.C. courts' Findings and Conclusions regarding its anticompetitive conduct against Netscape's Navigator, Sun's Java, and other middleware applications, all of which not only show Microsoft's anticompetitive conduct and its effect on competition, but also undermine Microsoft's business justification defense and assertion that its actions were intended to foster competition.

II. THE FINDINGS AND CONCLUSIONS IN THE GOVERNMENT CASE

In 1999, after a seventy-six day bench trial in which the court heard testimony from 105 witnesses and admitted 2,733 exhibits, the D.C. District Court issued 412 Findings of Fact and separate Conclusions of Law. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999); *United States v. Microsoft Corp.*, 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). The court determined that Microsoft illegally maintained its monopoly power in the Intel-compatible PC operating systems market in the 1990s through various acts of anticompetitive conduct. The D.C. District Court concluded, and the D.C. Circuit affirmed, the following:

1. Microsoft Possessed Monopoly Power in the Market for the Licensing of Intel-Compatible PC Operating Systems.

- Microsoft illegally monopolized the market for Intel-compatible PC operating systems in violation of state and federal antitrust laws. *See Microsoft*, 253 F.3d at 46.

- Microsoft possessed monopoly power in the market for the licensing of Intel-compatible PC operating systems. *See Microsoft*, 87 F. Supp. 2d at 37.

- The relevant market is the licensing of all Intel-compatible operating systems worldwide because there are currently no products, and there are not likely to be any in the near future, that a significant percentage of computer users worldwide could substitute for these operating systems, without incurring substantial costs. *See Microsoft*, 253 F.3d at 52.

- The proof of Microsoft's dominant, persistent market share protected by a substantial barrier to entry, namely, the "applications barrier to entry," together with the additional indicia of monopoly power, demonstrate that Microsoft enjoys monopoly power in the relevant market. *See Microsoft*, 87 F. Supp. 2d at 37, *aff'd*, 253 F.3d at 54-56.

2. Microsoft Willfully Maintained Its Monopoly Power by Means of an Anticompetitive Campaign Against Rival Developers.

- Microsoft illegally bound its Internet Explorer ("IE") web browser to Windows with "'technological shackles.'" *Microsoft*, 253 F.3d at 64 (quoting the D.C. District Court's Conclusions). Microsoft "weld[ed] IE to Windows [by] excluding IE from the 'Add/Remove Programs' utility [in Windows 98] . . . and [by] commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system." *Id.* at 64-65. This conduct deterred original equipment manufacturers ("OEMs") from installing a second browser (such as Navigator) and thus, "through something other than competition on the merits, ha[d] the effect of significantly reducing usage of rivals' products and hence protecting [Microsoft's] own operating system monopoly." *Id.* at 65.

- Microsoft's license agreements illegally prohibited OEMs from: "(1) removing any desktop icons, folders, or 'Start' menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop." *Id.* at 61. By preventing OEMs from removing visible means of user access to

IE, these license restrictions prevented many OEMs from pre-installing a rival browser (such as Navigator) and, therefore, protected Microsoft's monopoly from the competition that middleware might otherwise present. Microsoft's prohibition on any alteration of the boot sequence prevented OEMs from using that process to promote the services of internet access providers ("IAPs"), many of which, at the time Microsoft imposed the restriction, "used Navigator rather than IE in their internet access software . . . [thus] preventing OEMs from promoting rivals' browsers." *Id.* at 61-62. Finally, Microsoft's prohibitions against OEMs' "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 . . . impose[d] significant costs upon the OEMs . . . [and made them economically unable] to promote rival browsers." *Id.* at 62. Microsoft's intellectual property rights did "'not confer a privilege to violate the antitrust laws,'" *id.* at 63 (citation omitted), 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 (quoting Microsoft's opening brief in the appeal to the D.C. Circuit at 102).

- Microsoft illegally used threats and incentives to induce especially important OEMs, such as Compaq, Gateway, and IBM, to design their distributional, promotional, and technical efforts to favor IE to the exclusion of Navigator. *Microsoft*, 87 F. Supp. 2d at 39.

- Microsoft illegally entered into exclusionary agreements with major IAPs "to provide easy access to [their] services from the Windows desktop in return for the IAPs' agreement to promote IE exclusively and to keep shipments of internet access software using Navigator under a specified percentage." *Microsoft*, 253 F.3d at 68. By ensuring that the "majority" of all IAPs' subscribers were offered IE (either as the default browser or as the only browser), Microsoft's agreements helped keep usage of Navigator below the critical level necessary for Navigator to provide a real threat to Microsoft's operating systems monopoly. *Id.* at 70-71.

- In dozens of exclusionary agreements (the so-called "First Wave Agreements"), Microsoft illegally agreed to give certain ISVs "preferential support" in return for their agreement to "use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface." *Id.* at 71. The ISVs also agreed to use Microsoft's "HTML Help," which is only accessible with IE, to implement their applications' help systems. *Id.* at 72. Microsoft agreed to provide early Windows 98 and Windows NT "betas," other technical information, and the right to use certain Microsoft seals of approval to important ISVs that agreed to Microsoft's terms, including the exclusion of rival browsers. *Id.* at 71-72.

- Microsoft entered into an illegal agreement with Apple Computer in which Microsoft agreed to release new versions of Office for the Macintosh platform in return for Apple's agreement to pre-install IE and make IE the default browser on the Macintosh operating system. *Id.* at 72-74. The agreement reduced the distribution of rival browsers, such as Navigator, on an important non-Microsoft platform, which in turn served to protect Microsoft's monopoly. *Id.* at 73-74.

- Microsoft illegally deceived Java developers about the "Windows-specific nature" of Microsoft's Java developer tools. *Id.* at 74, 76-77. Microsoft's tools included certain "'keywords'" and "'compiler directives'" that could only be executed properly by Microsoft's version of Java. *Id.* at 76. Microsoft never informed Java developers that applications written using Microsoft's developer tools would only work on Windows. As a result, even Java developers who wanted to write Java applications that could be used on competing operating systems ended up – without knowing it – writing applications that could only be used on Windows. *Id.*

- Microsoft illegally "coerc[ed] Intel to stop aiding Sun in improving the Java technologies." *Id.* at 74; *see id.* at 77-78. Microsoft wanted Intel to abandon its efforts to develop a high-performance Java virtual machine ("JVM") (software that permits programs written in Java to run on a computer) for Windows because a fast, cross-platform JVM would threaten Microsoft's monopoly in the operating systems market. Microsoft threatened Intel that if it did not stop helping Sun, then Microsoft would refuse to distribute Intel technologies bundled with Windows. Intel agreed to Microsoft's demands and ceased its development efforts. *Id.* at 77.

- In dozens of exclusionary First Wave Agreements, Microsoft agreed to give ISVs access to Windows technical information in return for their agreement to use Microsoft's non-Sun compliant JVM as the default for their software. *Id.* at 74-76. These agreements had a significant effect upon JVM promotion since the products of "First Wave" ISVs reached millions of consumers. Moreover, when Netscape announced in May 1995 (prior to Microsoft's execution of the First Wave Agreements) that it would include a Windows JVM that complied with Sun's standards with every copy of Navigator, it appeared that Sun's Java would be used widely on Windows. However, Microsoft undertook a number of anticompetitive actions that seriously reduced the distribution of Navigator and thereby seriously reduced the distribution of Sun's JVM. Microsoft's agreements thus foreclosed a substantial portion of the field for Sun's JVM distribution and, in so doing, the agreements protected Microsoft's monopoly from the middleware threat posed by Java. *Id.* at 75-76.[4]

The D.C. District Court explained that Microsoft had waged an unlawful "campaign" against competing software products that threatened to erode the entry barrier that protected its Windows monopoly. *See Microsoft*, 87 F. Supp. 2d at 38-39. This "applications" barrier to entry prevented "Intel-compatible PC operating system[s] other than Windows . . . [from] attract[ing] significant consumer demand." *Id*. at 36.

[4] Novell summarizes these Conclusions in Appendix A.

The D.C. Circuit specifically affirmed the D.C. District Court's determinations that Microsoft had engaged in various types of unlawful conduct – all aimed at protecting Microsoft's monopoly power in the operating systems market against the threat posed by cross-platform middleware applications. Although the D.C. Circuit reversed findings of liability on attempted monopolization and tying claims, *see Microsoft*, 253 F.3d at 46, the court observed that "[t]he facts underlying the tying allegation substantially overlap with those" underlying the monopoly maintenance claim, *id*. at 84, and "[t]he two practices that plaintiffs have most ardently claimed as tying violations are, indeed, a basis for liability under plaintiffs' § 2 monopoly maintenance claim," *id*. at 96.

In its appeal from the D.C. District Court's decision, Microsoft "challenged very few of the findings as clearly erroneous," arguing instead that all of the Findings should be vacated because the District Judge's conduct had created an appearance of bias. *Id*. at 117-18. The D.C. Circuit disagreed, holding that:

> [A]lthough Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias.
>
> In light of this conclusion, the District Judge's factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review.

Id. at 118 (citations omitted). On remand, the D.C. District Court observed:

> Because all of the district court's factual findings survived challenge on appeal, they comprise the law of this case and may be relied upon during the remedy phase of this proceeding. . . . [T]he factual findings of the district court, like the conclusions of the appellate court, comprise the foundation upon which this court must construct a remedy.

New York v. Microsoft Corp., 224 F. Supp. 2d 76, 98 (D.D.C. 2002) (citation omitted).

III. ARGUMENT

A party seeking collateral estoppel must demonstrate that

> (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.

In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 326 (4th Cir. 2004). In addition, when collateral estoppel is used offensively, as here, its application should not be "unfair to the defendant." *Id*. at 326-27.

The MDL court and this Court previously have held that all of the criteria except the "necessary" criterion have been met as to all of the Findings. *See In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 537-38 (D. Md. 2002); Exhibit 1 at 1 (Dec. 3, 2008 Order) (holding that all collateral estoppel criteria except "necessary" criterion were met for Findings for which preclusive effect was sought). This Court further held in its December 3, 2008 Order that the "necessary" criterion was satisfied for twenty-one Findings. *See* Exhibit 1 at 2. Thus, the only issues remaining are which of the other Findings were necessary to the judgment affirmed by the D.C. Circuit in the Government case and which of the Findings and Conclusions in the Government case are material to this case. We show below first that all of the Findings and Conclusions in the Government case to which Novell has asked the Court to give preclusive effect are material to the issues in this case and second that the additional Findings to which Novell has asked the Court to give preclusive effect were "necessary" to the judgment in the Government case.

A. All of the Findings and Conclusions Affirmed by the D.C. Circuit and to Which Novell Asks the Court to Give Preclusive Effect Are Material to the Issues in This Case

To succeed on the Section 2 claim, Novell must prove that Microsoft "(1) ha[d] monopoly power in the relevant market and (2) engage[d] in monopolizing conduct – that is, 'willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" *Novell*, 699 F. Supp. 2d at 744 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)). The relevant market in which Novell alleges that Microsoft maintained monopoly power during the 1990s and that Microsoft harmed as a result of its anticompetitive acts against Novell is the Intel-compatible PC operating systems market. In its memorandum in opposition to Novell's Motion Seeking Collateral Estoppel of April 11, 2008 and the appendix to that opposition, Microsoft conceded that Findings 18, 33, and 34 (summarizing the D.C. District Court's findings with respect to the relevant market and Microsoft's monopoly power in that market) are material to the issues in this case. *See* Microsoft's Memorandum in Opposition to Novell's Motion Seeking Collateral Estoppel at 27 (May 2, 2008) (stating that Microsoft does not challenge the application of collateral estoppel to Findings 18, 33, and 34). Thus, the Court should determine that the D.C. District Court's Findings that "Microsoft enjoys monopoly power in the . . . market [for PC operating systems]," Finding 33, because "[e]very year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent," Finding 35, "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," Finding 34, (as well as the Findings of the D.C. District Court that were necessary to these Findings)

preclude Microsoft from relitigating the issue of Microsoft's "monopoly power in the relevant market," Finding 33, in the 1990s.

The remaining Findings and Conclusions to which Novell asks the Court to grant preclusive effect address the anticompetitive conduct in which the D.C. District Court and the D.C. Circuit determined Microsoft had engaged to maintain its monopoly power in the PC operating systems market. These Findings and Conclusions are material for several reasons.

1. Findings from the Government Case Are Material to Prove the Harm Caused to the PC Operating Systems Market as a Result of Microsoft's Anticompetitive Conduct Against Novell in Light of the Weakened State of Netscape, Sun, and Other ISVs

This Court and the Fourth Circuit both have recognized that the harm to competition in the PC operating systems market caused by Microsoft's anticompetitive conduct against Novell must be assessed "*considering all the characteristics of [the operating systems] market at the time, including the condition of other ISVs and applications*." *Novell*, 699 F. Supp. 2d at 750 (emphasis added).[5] Novell intends to present evidence at trial demonstrating the weakened state of the middleware applications of Netscape, Sun, and other ISVs, why those products were weakened, and the harm to competition in the PC operating systems market resulting from Microsoft's anticompetitive acts against Novell in light of the state of those ISVs and applications.

Specifically, Novell intends to demonstrate that Microsoft's anticompetitive conduct against Novell contributed significantly to maintaining Microsoft's operating systems monopoly because, among other things, Microsoft's anticompetitive conduct against middleware threats

[5] *See Novell*, 2011 WL 1651225, at *7 ("Novell's expert's opinion about a hypothetical market leaves ample room for 'a finding that Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market *in light of the weakened state of other applications and [independent software vendors]*.' That issue is appropriate for trial." (alteration in original) (citation omitted)).

such as Navigator, Java, and other applications weakened the ISVs who developed those applications and virtually eliminated their ability to develop cross-platform middleware that could erode the applications barrier to entry in the operating systems market, as the D.C. Circuit affirmed in the Government case. Any Findings in the Government case regarding anticompetitive activities perpetrated by Microsoft against Netscape, Sun, or other ISVs for which the D.C. Circuit held Microsoft liable, therefore, are material to the issues in this case. *See id.* at 737 n.3 ("[T]he conduct Microsoft directed against Novell's software applications must be considered in light of conduct that Microsoft directed against other competitors.").

2. Findings from the Government Case Are Material to Prove Microsoft's Intent, Motive, and Knowledge for Purposes of Determining Whether Microsoft's Conduct Was Exclusionary, Anticompetitive, or Predatory

Microsoft's intent, motive, and knowledge with respect to its anticompetitive conduct to maintain its operating systems monopoly are material issues in this case. As the Supreme Court explained in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985), "evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory.'" *See also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) ("[C]onsideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct."); *Caldera*, 72 F. Supp. 2d at 1309 (holding a court may look to the "synergy" of Microsoft's conduct as a whole "to demonstrate anticompetitive intent and effect"); *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (holding the courts must "look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation").[6]

[6] This Court has already acknowledged the importance of Microsoft's predatory motive. *See Caldera*, 72 F. Supp. 2d at 1309. It is also well established that motive and intent may be considered in determining whether Microsoft illegally refused to cooperate, whether it made design choices to unreasonably restrict competition, and whether Microsoft's alleged "valid

The anticompetitive conduct in which the D.C. District Court and the D.C. Circuit found Microsoft engaged with respect to Netscape's Navigator, Sun's Java, and other middleware software in the Government case is exactly the type of evidence that is admissible to prove Microsoft's intent, motive, and knowledge in pursuing similar actions against Novell, which posed a similar threat to Microsoft's monopoly. At trial, Novell will demonstrate that Microsoft's anticompetitive conduct against Novell was but another part of "Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products," Finding 93.

Moreover, Dr. Noll opined in his report in reply to Microsoft's expert's report that Novell served as a distribution channel for Netscape's Navigator and Sun's Java because Novell had agreed to bundle Navigator and Java with the Perfect Office suite. *See* Reply Report of Robert G. Noll at 42 (attached as Exhibit 3). If Microsoft were successful in substantially reducing sales of Perfect Office, it could choke off another important distribution channel for middleware products like Navigator and Java, as it did in the OEM and IAP channels through the conduct addressed in the Government case. *See id.* In light of Novell's relationship with Navigator and Java, Microsoft's anticompetitive conduct against those middleware threats clearly is relevant to the question of whether Microsoft's conduct against Novell was exclusionary, anticompetitive, or predatory.

As the Fourth Circuit already has recognized, "[t]he anticompetitive activities that harmed Java and Navigator are undeniably similar to those alleged by Novell." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 314 n.22 (4th Cir. 2007). Novell will prove that using the

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business reasons" are pretextual. *Novell*, 699 F. Supp. 2d at 745-47; *see Aspen Skiing*, 472 U.S. at 600-05; *Microsoft*, 253 F.3d at 58-59; *Caldera*, 72 F. Supp. 2d at 1312-13; ABA Model Jury Instructions for Antitrust Cases, C-39 to C-40.

anticompetitive strategies and tactics that the D.C. Circuit determined to be illegal in the Government case, Microsoft protected and maintained its monopoly in the PC operating systems market against threats to the applications barrier to entry presented by Novell's products. *See* Complaint ¶¶ 45-52. The fact that Microsoft willfully and wrongfully engaged in an anticompetitive strategy against cross-platform middleware applications that started at least as early as 1994 with respect to Netscape's Navigator and Sun's Java is clearly material to understanding Microsoft's intent and motive for conduct against other nascent middleware threats, such as those posed by Novell's applications. *United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1250 (5th Cir. 1973) ("[F]ederal courts in antitrust cases have, for the purpose of showing intent, consistently admitted evidence of conduct prior to the time covered by the indictment."); *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.").[7]

3. Findings from the Government Case Are Material to Prove the Purpose and Character of Microsoft's Actions

In antitrust cases, a jury is "entitled to know the full story," *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 227 (10th Cir. 1973), and "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each," *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also Caldera*, 72 F. Supp. 2d at 1309 ("synergy" of Microsoft's conduct as a whole may be considered "to demonstrate anticompetitive intent and effect"); II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7, at 208 (3d ed. 2007) ("In a monopolization case conduct must always be analyzed 'as a whole.'"). In such cases, "it is not

[7] *See Novell*, 505 F.3d at 315 n.22 ("[W]e are not sufficiently persuaded by Microsoft's proffered distinction between Novell's products and middleware to consider irrelevant the parallels between Novell's claims and the government's claims.").

irrelevant for the plaintiff to introduce evidence regarding the historic development of the alleged violations." *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 106 (3d Cir. 1975).[8] Moreover, evidence regarding "events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation." *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279, 1285 (5th Cir. 1972) (citing *FTC v. Cement Inst.*, 333 U.S. 683 (1948)).[9]

In this case, Dr. Noll's report documents more than a decade's worth of anticompetitive conduct perpetrated by Microsoft against any threat it perceived to its monopoly in the PC operating systems market. *See* Exhibit 2 at 84-157. Although Novell only asserts a claim in this case for Microsoft's anticompetitive conduct which harmed Novell, Microsoft's conduct against all of its potential competitors, both prior to and after the conduct against Novell, is material to the issue of the purpose for which Microsoft pursued anticompetitive conduct against Novell and the character of such conduct. *See Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002). As a result, to the extent the Findings from the Government case regarding Microsoft's anticompetitive conduct against Netscape, Sun, or other vendors were necessary to the judgment affirmed by the D.C. Circuit, this Court should deem such Findings to have preclusive effect and to be material to the issues in this case.

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[8] As the MDL court noted when ruling on the parties' summary judgment motion, in determining whether Microsoft engaged in anticompetitive conduct by refusing to cooperate with Novell, "a court may consider *the entirety of the monopolist's pattern of conduct*, the potential impact on consumers, and *the monopolist's motive* – for example, whether the monopolist had a legitimate business justification for its actions or sacrificed short-term profits in an effort to destroy a competitor." *Novell*, 699 F. Supp. 2d at 745 (emphasis added).

[9] *See Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002); *see also City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1263 (N.D. Ohio 1980) ("[I]t is well-established that evidence of events occurring prior to and following the running of the statute of limitations may be admissible in antitrust proceedings to 'show the purpose and character of particular transactions under investigation.'" (quoting *Panotex Pipe Line*, 457 F.2d at 1285).

In Appendix A, Novell lists the Conclusions that the D.C. Circuit affirmed in the Government case. Given that the Conclusions are material to the issues in this case, the Court should grant them preclusive effect. It is to these Conclusions that the Court should look when determining whether a Finding was "critical and essential" to the judgment in the Government case.

In Appendix B, Novell explains why the Findings to which this Court has granted preclusive effect and the Findings to which Novell now asks this Court to give preclusive effect are material to the issues in this case and were critical and essential to the judgment affirmed in the Government case. In Appendix C, Novell provides the language of the Findings to which it believes the Court should grant preclusive effect.

B. The Findings Listed in Appendix C and Discussed in Appendix B Were Critical and Essential to the Judgment Affirmed by the D.C. Circuit and Should Be Given Preclusive Effect

In addressing Microsoft's appeal of the initial collateral estoppel ruling of the D.C. District Court in the multidistrict litigation involving Microsoft, the Fourth Circuit directed that the MDL court give preclusive effect "only to factual findings that were necessary – meaning critical and essential – to the judgment affirmed by the D.C. Circuit." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 325.[10] Although many of the D.C. District Court's Findings

[10] In light of the fact that this litigation is pending in this Court in Utah, the law of the United States Court of Appeals for the Tenth Circuit should govern any collateral estoppel determination made by this Court. Thus, to the extent the Fourth Circuit's "critical and essential" standard for determining whether a finding is "necessary" to a prior judgment is inconsistent with the standard applied by the Tenth Circuit, this Court should apply the Tenth Circuit's standard. Notably, although Tenth Circuit cases require a determination that a finding is "necessary" or "essential" to a judgment, *see, e.g.*, *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 662 (10th Cir. 2006), Novell has not located a single Tenth Circuit case applying a "critical and essential" standard when determining whether a party is precluded from relitigating issues. Nevertheless, as Appendix B indicates, all of the Findings for which Novell seeks preclusive effect were "critical and essential" to the judgment affirmed by the D.C. Circuit and, therefore, satisfy the Fourth Circuit standard.

meet this standard, Novell seeks preclusive effect only for those that are material to its claims and which would be wasteful to relitigate. All of the Findings listed in Appendix C and discussed in Appendix B meet the "necessary" standard articulated by the Fourth Circuit.

1. There Is No Dispute That Findings 18, 161, 164, 213, and 394 Were Critical and Essential to the Judgment Affirmed by the D.C. Circuit

In Microsoft's memorandum in opposition to Novell's Motion Seeking Collateral Estoppel of April 11, 2008 and the appendix to that opposition, Microsoft conceded that Findings 18, 161, 164, 213, and 394 were "critical and necessary" to the judgment affirmed by the D.C. Circuit.[11] Given Microsoft's concession that these six Findings were critical and necessary and the materiality of these Findings to the issues in this case, as demonstrated in Appendix B, the Court should grant Findings 18, 161, 164, 213, and 394 preclusive effect.

2. The Remaining Findings Discussed in Appendix B Were Critical and Essential to the Judgment Affirmed by the D.C. Circuit

Generally, the offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In holding that the Government proved these elements in the Government case, the D.C. District Court made determinations, which the D.C. Circuit affirmed, regarding: the definition of the relevant market; Microsoft's dominant share in the relevant market; the existence of a barrier to entry; Microsoft's possession of monopoly power; the exclusionary effect of Microsoft's conduct; the lack of procompetitive justification for Microsoft's conduct;

[11] *See* Microsoft's Memorandum in Opposition to Novell's Motion Seeking Collateral Estoppel at 27 (May 2, 2008) (noting that Microsoft does not challenge the application of collateral estoppel to Findings 18, 33, and 34 and does not contest that Findings 18, 33, 34, 161, 164, 213, 394, and 401 "were critical and necessary to the decision in the Government Case").

and the harm caused to competition and consumers. *See Microsoft*, 253 F.3d at 50-51; *Microsoft*, 87 F. Supp. 2d at 36-39.

As explained in Appendix B, all of the Findings to which Novell asks the Court to grant preclusive effect constitute, "logically or practically, a necessary component" of the D.C. District Court's determinations and/or the D.C. Circuit's affirmance. *R.I. Hosp. Trust Nat'l Bank v. Bogosian (In re Belmont Realty Corp.)*, 11 F.3d 1092, 1097 (1st Cir. 1993) (citation omitted) (internal quotation marks omitted). The appropriate question in determining whether a prior determination was "essential to the judgment" is "whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action" barring any reason for applying an exception. Restatement (Second) of Judgments § 27 & cmt. j (1982); *see also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4421, at 548-49 (2d ed. 2002) ("Courts occasionally have been tempted to speculate that a prior decision could have been rested on narrower grounds than those actually chosen, so that resolution of the broader issues was not necessary to the decision. For the most part, such speculation should be resisted." (footnotes omitted)).

The Findings to which Novell asks the Court to give preclusive effect (a) are expressly cited and/or quoted by the D.C. Circuit and/or the D.C. District Court in reaching core legal conclusions or (b) detail the core evidence on which those conclusions were premised and without which the D.C. courts would have been unable to reach the decision they reached. Certain of the Findings are paraphrased in other Findings that were cited by one or both courts or provide essential facts referenced or definitions of terms used in the Findings or Conclusions that were cited.

Granting preclusive effect to the Findings in listed in Appendix C and discussed in Appendix B and the Conclusions in Appendix A promotes judicial efficiency by streamlining the issues on which the parties must present evidence at trial and that the jury must decide. Moreover, doing so does not raise the Fourth Circuit's concern that "a broad application of offensive collateral estoppel risks" unfairness, *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 327. None of these Findings is "collateral or unnecessary," nor will Microsoft be unduly prejudiced as a result of being foreclosed from relitigating key facts and issues that it fully and fairly litigated in the Government case. Because all of these Findings were necessary to determinations that the D.C. Circuit affirmed, there is no concern about lack of appellate review. In fact, Microsoft challenged very few of the Findings as clearly erroneous. In response to Microsoft's claim of an appearance of bias, the D.C. Circuit "reviewed the record with painstaking care," "discerned no evidence of actual bias," and held that "the District Judge's factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review." *Microsoft*, 253 F.3d at 118.

IV. CONCLUSION

Accordingly, for the reasons set forth above and in the accompanying appendices and exhibits, 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.

Dated: August 8, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 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 attorneys of record.

/s/ Maralyn M. English