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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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NOVELL, INC.,

Plaintiff,

-v-

MICROSOFT CORPORATION,

Defendant.

MICROSOFT'S MEMORANDUM IN  
OPPOSITION TO NOVELL'S  
RENEWED MOTION SEEKING  
COLLATERAL ESTOPPEL

Civil No. 2:04 CV 1045  
Honorable J. Frederick Motz

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August 22, 2011

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When Novell, Inc. (“Novell”) first sought in 2008 to obtain collateral estoppel on 72 Findings of Fact and 12 purported legal rulings<sup>1</sup> made in *United States v. Microsoft Corp.* (the “Government Case”),<sup>2</sup> there were still two claims—Counts I and VI—in this case. Since then, one of those claims (Count VI) has been dismissed, but Novell now has expanded its collateral estoppel motion to include 101 Findings of Fact and 16 Legal Rulings. The 101 Findings of Fact include 38 Findings of Fact for which Novell had not previously sought preclusion<sup>3</sup> (having also dropped nine Findings of Fact that it argued in 2008 were both “critical and necessary” to the judgment in the Government Case and material to this action). In other words, while Novell’s case has shrunk since 2008, its request for collateral estoppel has expanded significantly.

None of the Findings of Fact at issue in Novell’s renewed motion, other than the 17 Findings of Fact to which Microsoft Corporation (“Microsoft”) does not contest preclusion,<sup>4</sup>

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<sup>1</sup> “Findings of Fact” refers to the 412 findings of fact made by Judge Jackson in *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact). “Legal Rulings” refers to the 12 purported legal rulings for which Novell sought preclusion in 2008, and the 16 for which Novell seeks preclusion in its renewed motion. The 16 Legal Rulings on which Novell seeks preclusion in its renewed motion are not, however, the actual “Conclusions of Law” made by Judge Jackson, *see* 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law), which were later affirmed in part and vacated in part by the D.C. Circuit, 253 F.3d 34 (D.C. Cir. 2001). *See* pp. 7-11, *infra*.

<sup>2</sup> 84 F. Supp. 2d 9 (D.D.C. 1999); 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).

<sup>3</sup> Findings of Fact 17, 20, 28, 29, 32, 42, 56, 59, 60, 67, 69-71, 73, 78, 94, 95, 99-102, 141-143, 156, 204-206, 214, 215, 221, 222, 241, 337, 339, 340, 377, 409 and 410 were not raised in Novell’s 2008 motion.

<sup>4</sup> Of the 21 Findings of Fact as to which the Court granted collateral estoppel effect in its December 3, 2008 decision, 16 are material to Novell’s sole remaining claim (Findings of Fact 2, 4, 6-10, 18, 30, 31 and 33-39) and Microsoft does not oppose giving collateral estoppel effect to those Findings of Fact. The Court also gave collateral estoppel effect in its December 2008 decision to five additional Findings of Fact (Findings of Fact 144, 145, 148, 159 and 239), but these Findings of Fact are not material to any issue in this action. In addition to the 16 Findings of Fact listed above, Microsoft does not challenge collateral estoppel treatment as to one additional finding (Finding of Fact 18) requested by Novell in its renewed motion.

are entitled to preclusive effect. They either were not “critical and necessary” to the judgment affirmed in the Government Case,<sup>5</sup> see *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 329 (4th Cir. 2004), or are not material to Count I of Novell’s complaint (the “Complaint”),<sup>6</sup> or both.<sup>7</sup>

Novell attempts to obscure the fact that the specific acts on which Microsoft’s liability was premised in the Government Case occurred between the spring of 1996 and 1998, while the three alleged acts in this case occurred in 1994 and 1995. Novell cannot show that earlier conduct relating to different products is material to the claim asserted in Count I of the Complaint. In fact, Novell’s renewed motion reflects an impermissible attempt to argue to the jury that Microsoft is a habitual “bad actor” with bad character—that if Microsoft behaved badly against other competitors during a *later* time period, it therefore must have behaved badly as against Novell in an *earlier* time period. This is not a legitimate use of collateral estoppel.

First, most of the Findings of Fact for which Novell seeks collateral estoppel relate either to acts that formed no basis for the trial court’s finding of liability in the Government Case that were affirmed on appeal or to aspects of the trial court’s decision that were rejected on appeal. See *United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (noting that the trial court’s liability determinations were “drastically altered” on appeal).

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<sup>5</sup> Findings of Fact 17, 20, 28, 29, 32, 42, 44, 55, 56, 59, 60, 66-78, 80, 84, 90-95, 99, 100-102, 115, 116, 119-125, 132, 141-143, 156-158, 160, 166, 203-206, 208, 214, 215, 221, 222, 227, 241, 337, 340, 377, 386, 395, 407 and 409-412 were not “critical and necessary” to the judgment in the Government Case.

<sup>6</sup> Findings of Fact 17, 67-78, 80, 84, 90-95, 99-102, 115, 116, 119-125, 132, 141, 142, 143, 144, 145, 148, 156-161, 164, 166, 203-206, 208, 213-215, 221, 222, 227, 239, 241, 337, 339, 340, 377, 386, 394, 395, 407 and 409-412 are not material to Count I of Novell’s Complaint.

<sup>7</sup> Findings of Fact 17, 67-78, 80, 84, 90-95, 99-102, 115, 116, 119-125, 132, 141-143, 156-158, 160, 166, 203-206, 208, 214, 215, 221, 222, 227, 241, 337, 340, 377, 386, 395, 407 and 409-412 are doubly infirm—they were neither “critical and necessary” to the judgment in the Government Case nor are they material to the sole remaining claim in this action.

Therefore, Novell has not met and cannot meet its burden of showing that the 101 Findings of Fact for which it seeks preclusion were “critical and necessary to the judgment *actually affirmed* by the D.C. Circuit.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 328 (emphasis in original). In addition, Novell’s 16 Legal Rulings are not entitled to collateral estoppel because (a) all are paraphrased excerpts from judicial decisions that have been removed from their proper context, and (b) 14 of the Legal Rulings are not relevant to Count I of the Complaint.

Second, most of the Findings of Fact and Legal Rulings for which Novell seeks preclusion are wholly immaterial to the sole remaining claim in this case and therefore not entitled to collateral estoppel effect. Count I of Novell’s Complaint alleges that Microsoft took anticompetitive actions against, and caused damage to, WordPerfect and Quattro Pro during the period when Novell owned those products (June 1994 to March 1, 1996), and did so “for the purpose of obtaining and maintaining its monopoly in the operating system market.” *Novell, Inc. v. Microsoft Corp.*, 699 F. Supp. 2d 730, 734 (D. Md. 2010), *rev’d on other grounds*, 2011 WL 1651225 (4th Cir. May 3, 2011). In sharp contrast, the Government Case dealt with Microsoft’s efforts to suppress the nascent “middleware” threat posed to Microsoft’s PC operating systems by Netscape Navigator and Sun’s Java technology. As a result, the Government Case related to different products (web browsers and Java virtual machines in relation to the Windows 98 operating system) than the products at issue in this case (word processing and spreadsheet software in relation to the Windows 95 operating system). Moreover, the Government Case concerned a different and later time period (March 1996 to May 1998) than the time period in which Microsoft supposedly engaged in anticompetitive conduct in this case (October 1994 to July 1995). In short, Novell’s case as currently configured has essentially nothing to do with the Government Case.

In the memorandum in support of its collateral estoppel motion, Novell identifies just three actions by Microsoft that supposedly harmed Novell's products: "(1) withdrawing access to information about and . . . otherwise refusing to cooperate regarding the Windows 95 namespace extensions . . . (2) misleading Novell about Windows 95 print functionality . . . and (3) refusing to grant a Windows 95 logo certification for Novell's Perfect Office suite." (August 8, 2011 Memorandum of Law in Support of Novell's Renewed Motion Seeking Collateral Estoppel ("Novell Mem.") at 3.) Novell must establish that these three acts not only were anticompetitive, but also that they, as this Court has stated, "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." 699 F. Supp. 2d at 750. Critically, the Findings of Fact and Legal Rulings for which Novell seeks collateral estoppel never mention Novell or WordPerfect or Quattro Pro or PerfectOffice—and they never identify office productivity applications as a potential "middleware" threat to Microsoft's PC operating system monopoly. Indeed, the conduct for which Microsoft was found liable in the Government Case all took place after Novell sold the products at issue in Count I to Corel Corporation ("Corel"), and well after Microsoft's alleged conduct from October 1994 to July 1995 that is at issue in this case. As a result, the conduct found to be anticompetitive in the Government Case is immaterial to this action because only the condition of other software developers and their applications "*at the time*" Microsoft allegedly took action to harm WordPerfect and Quattro Pro could demonstrate "weakened" competition in the PC operating system market in the earlier 1994-1995 time period. *Novell*, 699 F. Supp. 2d at 750.

The Court<sup>8</sup> should deny Novell's renewed collateral estoppel motion on three additional and independent grounds. Allowing Novell to introduce dozens of Findings of Fact and Legal Rulings on matters that are irrelevant to Count I will confuse the members of the jury about the connection between this case and the Government Case, leading them to believe that those Findings of Fact and Legal Rulings are relevant in assessing whether Microsoft's unrelated conduct that allegedly harmed WordPerfect and Quattro Pro was anticompetitive. Moreover, Novell's renewed motion asks this Court to return to the drawing board—by requesting preclusion for 38 new Findings of Fact not even mentioned in its original motion in 2008—which is itself a sufficient basis for the Court to reject Novell's motion with respect to these 38 new Findings of Fact. Finally, Novell completely distorts the purpose of collateral estoppel by announcing that, even if it obtains the preclusion it is seeking, it still intends to seek to introduce evidence at trial on the same matters as to which it contends Microsoft is collaterally estopped. That is impermissible as a matter of black-letter law.

The Court should deny Novell's renewed collateral estoppel motion in all respects.<sup>9</sup>

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<sup>8</sup> References to “the Court” in this memorandum include references to the Hon. J. Frederick Motz while this action was pending in the District of Maryland as part of the MDL proceedings there.

<sup>9</sup> For the Court's convenience, Microsoft attaches three appendices to this memorandum. Appendix A (“Microsoft App. A”) includes the 101 Findings of Fact on which Novell now seeks preclusion, including the alterations that Novell noted in Appendix C to its August 8, 2011 memorandum, and Microsoft's position with respect to each of them. Appendix B (“Microsoft App. B”) repeats verbatim each of the 16 Legal Rulings that are listed in Appendix A to Novell's memorandum, and numbers them sequentially. Appendix C (“Microsoft App. C”) is a summary table that lists the 101 Findings of Fact on which Novell now seeks preclusion and Microsoft's position with respect to each.

## STATEMENT OF FACTS

### A. The Government Case

On May 18, 1998, the United States, 19 states and the District of Columbia filed civil actions against Microsoft in the U.S. District Court for the District of Columbia. Their complaints alleged that Microsoft engaged in anticompetitive conduct in the market for Intel-compatible PC operating systems and in a purported market for web browsers. The complaints alleged five violations of the Sherman Act: (a) unlawful exclusive dealing in violation of Section 1, (b) unlawful tying of Internet Explorer (“IE”) to Windows in violation of Section 1, (c) unlawful attempted monopolization of the web browser market in violation of Section 2, (d) unlawful maintenance of an alleged PC operating system monopoly in violation of Section 2 and (e) unlawful leveraging of the alleged PC operating system monopoly to foreclose competition in the purported market for web browsers in violation of Section 2.<sup>10</sup>

Four of these five claims were rejected as a matter of law or abandoned by the plaintiffs. First, Judge Jackson granted Microsoft’s motion for summary judgment on the monopoly leveraging claim. *United States v. Microsoft Corp.*, 1998 WL 614485, at \*29 (D.D.C. Sept. 14, 1998). Second, in his Conclusions of Law issued in April 2000, Judge Jackson rejected the exclusive dealing claim and dismissed it. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 55 (D.D.C. 2000).

On appeal, the D.C. Circuit reversed Judge Jackson on two of the remaining three claims against Microsoft. The D.C. Circuit reversed Judge Jackson’s holding that Microsoft was liable for attempted monopolization of a purported market for web browsers, 253 F.3d at 81-84,

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<sup>10</sup> The state plaintiffs included a claim for unlawful maintenance of an alleged monopoly in a purported market for suites of office productivity applications in their original Complaint, filed May 18, 1998, but they withdrew this claim in their First Amended Complaint, filed July 17, 1998. (*See* Docket #17 in Case No. 1:08-cv-01233 (D.D.C.).)

and his holding that Microsoft's alleged tying of IE to Windows was *per se* unlawful, remanding that claim for a new trial under the rule of reason. *Id.* at 84-97. (The plaintiffs later abandoned the tying claim. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 95 (D.D.C. 2002).)

Even as to the one remaining claim—that Microsoft unlawfully maintained a monopoly in the Intel-compatible PC operating system market—the D.C. Circuit affirmed on substantially narrower grounds than those set forth in the trial court's decision. Indeed, the D.C. Circuit reversed the trial court's decision with respect to eight of the 20 acts that the trial court had found to be anticompetitive. 253 F.3d at 58-78. The D.C. Circuit also reversed the trial court's "conclusion that Microsoft's course of conduct separately violate[d] § 2 of the Sherman Act." *Id.* at 78.

None of the 12 specific acts that formed the basis for the monopoly maintenance claim affirmed by the D.C. Circuit have anything to do with Novell or WordPerfect or Quattro Pro or PerfectOffice or office productivity applications. Judge Jackson's Findings of Fact and Conclusions of Law, which together occupy 130 pages in the Federal Supplement, do not mention Novell, WordPerfect, Quattro Pro or PerfectOffice. The D.C. Circuit decision, totaling 85 pages in the Federal Reporter, also does not pertain to Novell or any of the products at issue in this case. Notably, office productivity applications are never mentioned as a potential "middleware" threat to Windows in either decision.

In short, the U.S. Department of Justice never claimed (let alone proved) that anything Microsoft did to Novell or its products contributed in any way, shape or form to any unlawful maintenance of a monopoly in the PC operating system market. Novell seeks preclusion for the plain purpose of sowing confusion with the jury and trying to "piggyback" its

case on other conduct against other software companies in a different time period involving different products.

The different time periods involved in the two cases are of great importance to this motion, although Novell ignores when the relevant conduct actually took place.<sup>11</sup> Novell argues that it is entitled to show the “weakened state of competition” in the PC operating system market as of the time that Microsoft supposedly engaged in wrongful conduct against Novell. Given that the conduct in the Government Case took place after (not before or during) the time period in which WordPerfect and Quattro Pro were allegedly injured by Microsoft’s conduct (*see* pp. 8-11, 15-17, *infra*), the Government Case does not establish, and cannot be used to attempt to show, a “weakened state” of competition in the PC operating system market during the period in which Novell owned WordPerfect and Quattro Pro.

The D.C. Circuit stated that Microsoft’s wrongful conduct was “primarily” directed at Netscape; *i.e.*, that Microsoft’s liability for monopoly maintenance under Section 2 of the Sherman Act was premised “primarily on Microsoft’s efforts to suppress Netscape Navigator’s threat to its operating system monopoly.” 253 F.3d at 50. These “efforts” commenced with agreements Microsoft began entering into in the spring of 1996, and continued into 1997 and 1998. 84 F. Supp. 2d at 61, 72, 95, 108. The 12 specific acts upon which Microsoft’s liability was premised in the Government Case and the time when the acts were committed are:

1. Microsoft’s license agreements for Windows improperly prohibited PC manufacturers (“OEMs”) from removing “visible means of user access” to IE (*i.e.*, desktop icons, folders and “Start” menu entries). 253 F.3d at 61.

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<sup>11</sup> Novell states that Microsoft’s conduct took place in “the 1990s” (Novell Mem. at 4, 6, 11), presumably to give the impression that the acts in question here overlapped with those in the Government Case. Novell cannot obscure the true chronology with that lack of precision.

- According to Judge Jackson’s Findings of Fact, these provisions in Microsoft’s license agreements for Windows first began to be used by Microsoft in the **“spring of 1996.”** 84 F. Supp. at 61, ¶ 213.
2. Microsoft’s license agreements for Windows improperly prohibited OEMs from modifying the initial boot sequence for Windows in order to promote the services of Internet Access Providers (“IAPs”). 253 F.3d at 61-62.
- According to Judge Jackson’s Findings of Fact, these provisions in Microsoft’s license agreements for Windows also first began to be used by Microsoft in the **“spring of 1996.”** 84 F. Supp. at 61, ¶ 213.
3. Microsoft’s license agreements for Windows improperly prohibited OEMs from promoting rival web browsing software by adding icons or folders to the Windows desktop that were different in size or shape from those supplied by Microsoft. 253 F.3d at 62.
- According to Judge Jackson’s Findings of Fact, these provisions in Microsoft’s license agreements for Windows also first began to be used by Microsoft in the **“spring of 1996.”** 84 F. Supp. at 61, ¶ 213.
4. Microsoft’s license agreements for Windows improperly prohibited OEMs from using the “Active Desktop” feature of Internet Explorer 4.0 to promote rival web browsing software. 253 F.3d at 62.
- According to Judge Jackson’s Findings of Fact, these provisions in Microsoft’s license agreements for Windows first began to be used by Microsoft in the **“spring of 1996”** and the “Active Desktop” feature was released “later . . . as part of Internet Explorer 4.0.” 84 F. Supp. 2d at 61, ¶ 213 (emphasis added). Internet Explorer 4.0 was released **“in late 1997.”** *Id.* at 44, ¶ 135.
5. Microsoft improperly excluded IE from the “Add/Remove Programs” utility in Windows 98. 253 F.3d at 65.
- According to Judge Jackson’s Findings of Fact, the concept of excluding IE from the “Add/Remove Programs” utility began gaining support within Microsoft **“in the early spring of 1997.”** 84 F. Supp. 2d at 52, ¶ 169. Windows 98 was not released until **June 1998.** *Id.* at 13, ¶ 8.
6. Microsoft improperly commingled software code that provided web browsing functionality with software code that provided other functionality in the same files in Windows 98. 253 F.3d at 66.
- Windows 98 was not released until **June 1998.** 84 F. Supp. 2d at 13, ¶ 8. According to Judge Jackson’s Findings of Fact, no allegedly improper commingling of software code occurred before “the release of Internet Explorer

3.0 and ‘OEM Service Release 2.0’ (‘OSR 2’) of Windows 95 in **August 1996.**” *Id.* at 50, ¶ 161.

7. Microsoft improperly agreed to provide easy access to IAPs’ services from the Windows desktop in return for their agreement to promote IE exclusively and to keep shipments of Netscape Navigator under a specified percentage. 253 F.3d at 68.

– According to Judge Jackson’s Findings of Fact, these agreements with IAPs were signed “[b]etween **July 1996 and September 1997.**” 84 F. Supp. 2d at 72, ¶ 256.

8. Microsoft improperly agreed to provide preferential support to certain software developers in return for their agreement to use (i) IE as the default web browsing software for any software applications they developed with a hypertext-based user interface and (ii) Microsoft’s “HTML Help” to implement the help system in their applications. 253 F.3d at 71-72.

– According to Judge Jackson’s Findings of Fact, these agreements with certain software developers—referred to as “First Wave agreements”—were signed in “**1997 and 1998.**” 84 F. Supp. 2d at 108, ¶ 401.

9. Microsoft improperly agreed to release new versions of Microsoft Office for the Apple Macintosh in return for Apple’s agreement to preinstall IE and make it the default web browsing software on new Macintosh computers. 253 F.3d at 72-74.

– According to Judge Jackson’s Findings of Fact, this agreement between Microsoft and Apple was signed on **August 7, 1997.** 84 F. Supp. 2d at 95, ¶ 350.

10. Microsoft improperly agreed to give certain software developers preferential access to Windows technical information in return for their agreement to use Microsoft’s Java virtual machine (“JVM”) as the default JVM for their applications. 253 F.3d at 75-76.

– According to Judge Jackson’s Findings of Fact, these agreements were part of the First Wave agreements that were signed in “**1997 and 1998.**” 84 F. Supp. 2d at 108, ¶ 401.

11. Microsoft improperly deceived software developers regarding the “Windows-specific nature” of Microsoft’s Java developer tools. 253 F.3d at 76-77.

– According to Judge Jackson’s Findings of Fact, Microsoft did not begin to develop its own Java developer tools until **after** signing an agreement with Sun Microsystems on **March 12, 1996.** 84 F. Supp. 2d at 105, ¶ 388.

12. Microsoft improperly pressured Intel to not support cross-platform Java technology by threatening to support the 3-D graphics technology developed by one of Intel’s competitors. 253 F.3d at 77.

– According to Judge Jackson’s Findings of Fact, Microsoft’s threat to support 3-D graphics technology developed by AMD, a competitor to Intel, occurred **after February 1997**. 84 F. Supp. 2d at 110, ¶ 406.

In the Government Case, the earliest Microsoft conduct upon which liability was based took place after March 12, 1996, 84 F. Supp. 2d at 105, ¶ 388, and that conduct was directed at Sun’s Java technology. *Id.* at 105, 108, 110.<sup>12</sup> As shown below, all of the conduct in the Government Case upon which liability was based post-dates the conduct allegedly directed at WordPerfect and Quattro Pro that is at issue in this action. Indeed, this conduct even post-dates Novell’s sale of its office productivity applications to Corel on March 1, 1996. (Compl. ¶ 150.)

**B. Novell’s Complaint and Original Motion Seeking Collateral Estoppel**

On November 12, 2004, Novell filed a six-count complaint against Microsoft under the Sherman Act seeking to recover for antitrust injury suffered by WordPerfect, a word processing application, and Quattro Pro, a spreadsheet application. Novell purchased WordPerfect Corporation and bought Quattro Pro from Borland on June 24, 1994. (Compl. ¶ 37.) On March 1, 1996, Novell sold both these applications to Corel. (Compl. ¶ 150.) All agree that, as a result, “Novell’s claims [in this action] arose prior to March 1996.” *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007).

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<sup>12</sup> Judge Jackson’s decision included reference to Microsoft’s conduct against other companies, either (a) as part of the eight bases for liability that were reversed on appeal, or (b) as part of his conclusion that Microsoft was liable for a general “course of conduct” in the PC operating system market. Importantly, the D.C. Circuit reversed Judge Jackson’s “conclusion that Microsoft’s course of conduct separately violate[d] § 2 of the Sherman Act.” 253 F.3d at 78. The D.C. Circuit explained that “[t]he ‘course of conduct’ section of the District Court’s opinion contain[ed], with one exception, only broad, summarizing conclusions,” and the sole exception pertained to actions that were “not in themselves unlawful.” *Id.*

When Novell made its first collateral estoppel motion in April 2008, only two of Novell’s six claims remained.<sup>13</sup> Count I alleges that “Microsoft willfully and wrongfully obtained and maintained its monopoly power in the Intel-compatible operating systems market” by “engaging in anticompetitive conduct to thwart the development of products that threatened to weaken the applications barrier to entry, including Novell’s WordPerfect word processing application and its other office productivity applications.” (Compl. ¶ 153.) Count VI alleged that Microsoft entered into agreements with OEMs and others to exclude Novell’s applications from important software distribution channels, violating Section 1 of the Sherman Act. (Compl. ¶ 175.) Novell has never sought, nor been granted, leave to amend the Complaint.

On April 11, 2008, Novell filed its first motion seeking collateral estoppel on 72 of the 412 Findings of Fact made by Judge Jackson in the Government Case and 12 purported Legal Rulings made by the D.C. Circuit in the Government Case. Novell told this Court that it sought preclusion on Findings of Fact that “support[ed] Novell’s claims and would be wasteful to relitigate,” and claimed that it had used “impartial, balanced language” to paraphrase the 12 Legal Rulings to make them “appropriate for use in jury instructions.” (Novell’s April 11, 2008 Mem. in Support of Motion for Collateral Estoppel (D. Md. Docket #53-1) (“Novell 2008 Mem.”) at 1.)<sup>14</sup> Full briefing ensued.

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<sup>13</sup> Counts II through V of Novell’s Complaint, which alleged that Microsoft unlawfully monopolized or attempted to monopolize purported markets for word processor software and spreadsheet software—the markets in which WordPerfect and Quattro Pro actually competed—were dismissed as barred by the applicable four-year statute of limitations (15 U.S.C. § 15b) because those claims were not tolled by the Government Case. *Novell, Inc. v. Microsoft Corp.*, 2005 WL 1398643 (D. Md. June 10, 2005), *aff’d*, 505 F.3d 302 (4th Cir. 2007).

<sup>14</sup> “D. Md. Docket” indicates docket entries filed in this action under case number JFM-05-CV-1087 (D. Md.).

On December 3, 2008, the Court issued its decision, having clearly expended significant judicial resources in considering Novell’s complicated and extensive request. (D. Md. Docket #76 (the “December 2008 Decision”).) The Court determined to give collateral estoppel effect to 21 of the Findings of Fact—although the Court permitted Microsoft at a later date to contest the materiality of those 21 Findings of Fact to any claim that might actually go to trial (*see* p. 14, *infra*)—and declined, as of that time, to give collaterally estoppel effect to the other 51 Findings of Fact and the 12 Legal Rulings. (Dec. 2008 Decision at 2.) Sixteen of the 21 Findings of Fact contain information about PC operating systems, including MS-DOS and Windows (Findings of Fact 2, 4 and 6-10), a description of the “applications barrier to entry” into the PC operating system market, and assertions about Microsoft’s monopoly power in that market (Findings of Fact 30, 31 and 33-39). The Court also granted collateral estoppel on five Findings of Fact concerning the OEM and IAP channels for distributing web browsing software and Microsoft’s bundling and promotion of IE in those channels to the exclusion of Netscape Navigator (Findings of Fact 144, 145 and 148), Microsoft’s integration of web browsing software into Windows and refusal to allow OEMs to remove it (Finding of Fact 159), and the effect of Microsoft’s conduct in “exiling Navigator from the crucial OEM distribution channel” (Finding of Fact 239).<sup>15</sup> The Court explained that, even with respect to the 21 Findings of Fact on which it granted collateral estoppel, it was not deciding “whether any particular findings made in the D.C. litigation are material to this case,” and therefore “Microsoft remains free to argue that the several findings that I am ruling in this letter opinion are entitled to collateral estoppel effect are not material to this case.” (Dec. 2008 Decision at 2.)

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<sup>15</sup> As a result of the Court’s dismissal of Count VI, these five Findings of Fact (144, 145, 148, 159 and 239) are no longer material to this action. *See* p. 45, *infra*.

The Court declined to accept Novell's assertions that the other 51 Findings of Fact and the 12 purported Legal Rulings were entitled to preclusion, explaining that it would "defer[] until a later stage of this litigation ruling upon" those "more arguable" requests for preclusion. (*Id.* at 1.) The Court stated that "in determining what findings I should defer ruling upon, I have considered (1) the potential relevance of the findings in this case, and (2) whether instructing a jury upon them would tend to confuse or clarify the jury's understanding of the issues." (*Id.* at 2.) Nowhere did the Court authorize Novell to expand its request for collateral estoppel to Findings of Fact not raised in its initial motion.

**C. Novell's One Remaining Claim and Renewed Motion Seeking Collateral Estoppel**

On March 30, 2010, the Court granted Microsoft's motion for summary judgment dismissing Count VI of the Complaint, which alleged that Microsoft violated Section 1 of the Sherman Act by entering into agreements "with OEMs and others not to license or distribute Novell's office productivity applications or to do so only on terms that materially disadvantaged these products." *Novell*, 699 F. Supp. 2d at 750-56. In dismissing Count VI, this Court found that the "agreements at issue either were not exclusive, were not otherwise anticompetitive, or did not substantially foreclose competition in any market." *Id.* at 750. Novell did not appeal that dismissal. *Novell, Inc. v. Microsoft Corp.*, 2011 WL 1651225, at \*4 n.7 (4th Cir. May 3, 2011).<sup>16</sup> Count VI is thus no longer in the case.

Novell's sole remaining cause of action, Count I, alleges that Microsoft engaged in anticompetitive conduct directed at WordPerfect and Quattro Pro (neither of which competed

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<sup>16</sup> Because of the dismissal of Count VI, the 20 Findings of Fact and 5 Legal Rulings once pertinent to Count VI—Findings of Fact 143-145, 148, 158, 159, 160, 203-206, 208, 213-215, 221, 222, 227, 239 and 241 and Legal Rulings 4-6, 8 and 11—are no longer material to this case.

in the PC operating system market) in order to unlawfully maintain Microsoft's monopoly in the PC operating system market. (Compl. ¶¶ 151-55.) Novell alleges that "Microsoft willfully and wrongfully obtained and maintained its monopoly power in the Intel-compatible operating systems market by engaging in anticompetitive conduct to thwart the development of products that threatened to weaken the applications barrier to entry, including Novell's WordPerfect word processing application and its other office productivity applications." (Compl. ¶ 153.)

In its current motion, Novell says that it "intends to demonstrate at trial . . . 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" (Novell Mem. at 3; *see also* Compl. ¶¶ 75-78);

"(2) misleading Novell about Windows 95 print functionality, thereby increasing WordPerfect's costs and decreasing its functionality" (Novell Mem. at 3); and

"(3) refusing to grant a Windows 95 logo certification for Novell's Perfect Office suite." (Novell Mem. at 3; *see also* Compl. ¶ 89.)<sup>17</sup>

These are the only three acts that allegedly harmed Novell's office productivity applications and supposedly "contributed significantly to anticompetitive harm in the PC operating system market." (Novell Mem. at 3.)

As Novell has itself acknowledged, the three alleged acts all took place during 1994 and 1995 (*i.e.*, prior to the time that Microsoft engaged in any conduct found unlawful in

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<sup>17</sup> It should be noted that Novell's Complaint does not include any allegation relating to "Windows 95 print functionality." Novell first contended that Microsoft engaged in anticompetitive conduct with respect to print processor functionality in the May 1, 2009 report of Novell's technical expert, Ronald Alepin. Whether this allegation is properly part of this case is an issue that Microsoft may raise before or at trial.

the Government Case). In its briefing to the Court in opposition to Microsoft's motion for summary judgment, Novell specified the following dates of Microsoft's supposedly anticompetitive conduct:

**1. Namespace Extension APIs**

“On **October 3, 1994**, only two weeks after seeing Mr. Frankenberg demonstrate Novell's latest innovations in WordPerfect 6.1, Mr. Gates reversed Microsoft's course of conduct, issuing the infamous e-mail to all of his top executives, because ‘[w]e can't compete with Lotus and Wordperfect/Novell without this.’ Microsoft's next beta release, **in October 1994**, withdrew support for the interfaces.” (Novell's Nov. 13, 2009 Opp. to Microsoft's Motion for Summary Judgment (D. Md. Docket #106) at 11-12.)

**2. Print Processor Functionality**

“In **late June 1995**, only two weeks before cutting the Windows 95 gold master, Microsoft reversed course, telling Novell that the printing functions would not be available, forcing Novell to expend substantial resources to create an inferior substitute that caused customers to complain.” (*Id.* at 16.)

**3. Logo Licensing Program**

“**In 1994**, Microsoft launched its ‘Designed for Windows 95’ logo program. As with prior releases of Windows, the logo was important to consumers and ISVs . . . . Microsoft denied Novell's request, arguing that the incompatibilities were not ‘significant enough.’” (*Id.* at 17-18 (citing **April 3, 1995** e-mail).)

Novell contends that Microsoft engaged in this alleged conduct because “PerfectOffice, developed by Novell, constituted (or nearly constituted) middleware, which

could have . . . undermined the monopoly Microsoft enjoyed in the operating system market.”<sup>18</sup> (Novell Mem. at 3 (quoting *Novell*, 699 F. Supp. 2d at 750) (internal quotation marks omitted).) Novell states that it intends to show that the injury allegedly suffered by WordPerfect and Quattro Pro as a result of the three acts “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.” (Novell Mem. at 3 (quoting *Novell*, 699 F. Supp. 2d at 736) (emphasis omitted).)

Novell’s request for preclusion as to dozens of Findings of Fact (including the 38 Findings of Fact that Novell did not include in its 2008 motion) and 16 Legal Rulings on this basis is wholly illogical. Microsoft’s conduct directed at WordPerfect and Quattro Pro allegedly occurred—as shown above—in October 1994, April 1995 and June 1995. Microsoft’s conduct at issue in the Government Case took place no earlier than March 1996—well after the alleged conduct at issue in this action. (*See* pp. 8-11, *supra*.) The 101 Findings of Fact and the 16 Legal Rulings as to which Novell seeks preclusion do not concern the characteristics of the PC operating system market, nor the condition of other software developers and their applications, “*at the time*” of Microsoft’s supposed acts towards Novell.

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<sup>18</sup> Novell’s theory that its PerfectOffice suite of office productivity applications “constituted (or nearly constituted)” a supposed “middleware” threat to Windows is problematic in several respects. Microsoft will address these issues in depth elsewhere, but one important point to bear in mind is that suites of office productivity applications were never mentioned in the Government Case as potential “middleware” threats to Windows. *See* pp. 46-48, *infra*. Indeed, having an application such as WordPerfect running on Windows 95 would strengthen—not undermine—the “applications barrier to entry” that was at the heart of the Government Case.

#### **D. The Fourth Circuit's Decision on Collateral Estoppel**

In 2002, in the Microsoft MDL proceedings, several plaintiffs<sup>19</sup> moved for collateral estoppel, arguing that Microsoft should be estopped as to 395 of Judge Jackson's Findings of Fact. This Court ruled that 350 of the Findings of Fact were entitled to preclusive effect, *In re Microsoft Corp. Antitrust Litig.*, 232 F. Supp. 2d 534, 538 (D. Md. 2002); April 4, 2003 Order (Docket #775 in MDL No. 1332 (D. Md.)), but granted Microsoft's motion seeking an interlocutory appeal under 28 U.S.C. § 1292(b). 274 F. Supp. 2d 741, 742 (D. Md. 2003).

On appeal, the Fourth Circuit reversed. In its January 15, 2004 decision, the Fourth Circuit set out a five-factor test to be employed when determining if collateral estoppel applies: "(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). The Fourth Circuit emphasized that in order for collateral estoppel to apply, the finding from the previous decision must be "critical and necessary," meaning it must be "essential, indispensable, or requisite" to the judgment. *Id.* at 327. As a result, "the criteria for foreclosing a defendant from relitigating an issue or fact [must] be applied strictly" so as to "preclude a defendant from relitigating a fact actually found against the defendant in prior litigation [only] when the fact was critical and necessary to the judgment in the prior litigation." *Id.* at 326-37.

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<sup>19</sup> Be Incorporated, Burst.com, Netscape, Sun Microsystems and a class of consumers in an action entitled *Kloth v. Microsoft Corp.*

The Fourth Circuit rejected the standard that preclusion may apply to any finding “supportive of” the judgment because that standard was “too broad to assure fairness in the application of the doctrine.” *Id.* at 327. A “fact that is ‘supportive of’ a judgment may be consistent with it but not necessary or essential to it,” and thus that standard “might lead to inclusion of all facts that may have been ‘relevant’ to the prior judgment. Such a broad application of offensive collateral estoppel risks the very unfairness about which the Supreme Court was concerned.” *Id.* Therefore, “[i]f a trial court were to make an unnecessary or collateral finding in a case and the defendant appealed the judgment, the appellate court, in affirming the judgment, would generally not reach the unnecessary findings. Thus, such findings would evade appellate review.” *Id.*

By mandating that “only ‘necessary’ findings are given preclusive effect”—rather than granting preclusion to findings that are “supportive of” the judgment—the Fourth Circuit ensured that “the defendant will have received a full opportunity for litigation in the prior proceeding, including the opportunity for appellate review” before collateral estoppel can apply. *Id.* This is consistent with the well-established principle, discussed below, that a party is entitled to dispute facts alleged against it at a trial, and that collateral estoppel is a narrow exception to that principle that must be cautiously applied in the interest of fairness. (*See pp. 48-50, infra.*)

Because the D.C. Circuit “did not review the 412 factual findings to determine whether they were clearly erroneous or whether they should be affirmed on appeal,” the Fourth Circuit instructed that, “[o]n remand the district court must limit itself to those facts critical and necessary to the judgment *actually affirmed* by the D.C. Circuit.” *In re Microsoft*, 355 F.3d at 328 (emphasis in original). As shown below, p. 21-22, *infra*, the Fourth Circuit’s requirement

that “only ‘necessary’ findings are given preclusive effect,” rather than all findings “supportive” of the judgment, is consistent with Tenth Circuit law.

**E. The Import of Novell’s Renewed Motion**

At trial, Novell apparently will argue that it suffered harm because it was unable to release WordPerfect and Quattro Pro for Windows 95 to the market on a timely basis and that that delay resulted from decisions Microsoft made in 1994 and 1995 (a) not to make available to Novell formal documentation of, or a license for, certain intellectual property belonging to Microsoft (the namespace extension APIs and Microsoft’s trademarked Windows logo), and (b) not to include custom print processor functionality in its new Windows 95 operating system (a decision about what features should be included in a complex product still under development that any software developer is fully entitled by law to make). These allegations are legally insufficient, and Novell’s version of the facts concerning the three acts that underlie its claim will be wholly refuted at trial.

Given the weakness of Novell’s claims regarding its own products, Novell apparently wants to tell the jury about other conduct that Microsoft directed at other companies involving other products and during a time period that post-dates the conduct alleged to be wrongful in this case. That, however, is not a proper use of collateral estoppel. Novell is attempting to use Findings of Fact and purported Legal Rulings to persuade the jury that because Microsoft’s conduct towards two different competitors in the 1996-1998 time period was found to be unlawful, Microsoft is a bad actor and therefore must have done something unlawful to harm WordPerfect and Quattro Pro in the 1994-1995 time period. Under the Federal Rules of Evidence, such “character” evidence is inadmissible because of its unduly prejudicial effect. The threat of undue prejudice to Microsoft is especially great here because Novell not only seeks

preclusion, but also intends to ask its all-purpose expert, Roger Noll, to testify about the very same Microsoft conduct as to which Novell seeks preclusion.

## **ARGUMENT**

### **I. Novell Cannot Satisfy the Test for Collateral Estoppel.**

Novell has not carried, and cannot carry, its burden of showing that preclusive effect is appropriate. *Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (burden is on party asserting collateral estoppel); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (same); *Coburn v. Smithkline Beecham Corp.*, 174 F. Supp. 2d 1235, 1238 (D. Utah 2001) (same). In considering Novell’s first collateral estoppel motion, the Court applied the Fourth Circuit’s five-factor test, which requires “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*, 355 F.3d at 326.

Although this action is now pending in the District of Utah, the Tenth Circuit, like the Fourth Circuit, requires that “in order to preclude relitigation of a particular issue under collateral estoppel, the prior determination of that issue must have been necessary to the judgment.” *Gibson v. Campbell*, 348 Fed. Appx. 358, 360 (10th Cir. 2009); *see also Affiliated Ute Citizens v. Ute Indian Tribe*, 22 F.3d 254, 256 (10th Cir. 1994) (“Collateral estoppel requires in part a final adjudication of the issue on the merits, and it arises only when the adjudication was necessary to the judgment.” (citation omitted)); *SEC v. Stansbury Holdings Corp.*, 2007 WL 552248, at \*5 (D. Colo. Feb. 20, 2007) (denying collateral estoppel because “the conclusions of

the [court] concerning Stansbury’s alleged misrepresentations and omissions were not necessary to the [court’s] decision”).<sup>20</sup>

Of the 72 Findings of Fact for which Novell sought collateral estoppel effect in its first motion, the Court found that only 21 met all five criteria for collateral estoppel but deferred decision as to the materiality of those Findings of Fact and also deferred decision on whether the remaining 51 were “critical and necessary” to the judgment in the Government Case. (Dec. 2008 Decision at 1-2.) Of the 101 Findings of Fact on which Novell seeks preclusion in its renewed motion, only 27 were “critical and necessary” to the judgment in the Government Case, and of that number, 10 are not material here.<sup>21</sup> In addition, none of the purported Legal Rulings meet the five necessary criteria for collateral estoppel.

**A. The Findings of Fact for Which Novell Seeks Preclusion Were Not “Critical and Necessary” to the Judgment in the Government Case.**

To obtain preclusive effect for the 101 Findings of Fact at issue on this motion, Novell must demonstrate that each of them was “critical and necessary” to the judgment in the

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<sup>20</sup> Novell asserts that the Tenth Circuit’s standard, rather than the Fourth Circuit’s standard, should apply to its motion, but fails to demonstrate how Tenth Circuit decisions applying a “necessary” or “essential” standard differ in any way from the Fourth Circuit’s “critical and necessary” standard. (See Novell Mem. at 17 n.10.) Notably, “in describing the scope of the ‘critical and necessary’ criterion,” the Fourth Circuit explained that “we have used the alternative word ‘essential’ [and] all of the terms that we have used—critical, necessary, essential, and material—are words of limitation . . . .” *In re Microsoft*, 355 F.3d at 327 (citations omitted). In any event, Novell implicitly concedes that Tenth Circuit law provides no support for its motion because it cites no Tenth Circuit decisions that support its argument. Instead, Novell seeks to apply the much more lenient standard of a 1993 First Circuit decision. (See Novell Mem. at 19.)

<sup>21</sup> In addition to the 21 Findings of Fact which the Court’s December 2008 Decision found to be “critical and necessary” to the judgment in the Government Case, Microsoft does not contest that six of the other Findings of Fact that are the subject of Novell’s motion (Findings of Fact 18, 161, 164, 213, 339 and 394) were necessary to the judgment in the Government Case. Of these six Findings of Fact, however, only Findings of Fact 18 is material to any matter raised by Count I in this action. See pp. 38-45, *infra*. Microsoft demonstrates below why each of the other 74 Findings of Fact on which Novell seeks preclusive effect was not “critical and necessary” to the judgment in the Government Case.

Government Case. *In re Microsoft*, 355 F.3d at 326-27. The Fourth Circuit was clear that a trial court must “take care to limit application [of collateral estoppel] to facts that were necessary to the judgment *actually* affirmed by the D.C. Circuit.” *Id.* at 328 (emphasis in original). *Accord Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996) (“[O]nly the basis that is actually considered [on appeal] can have any preclusive effect in subsequent litigation.”); *see also Coburn*, 174 F. Supp. 2d at 1238 (applying collateral estoppel strictly to include only “precisely what the jury actually and necessarily decided”).

The 412 Findings of Fact made by Judge Jackson in 1999 pertained to four separate claims for (a) exclusive dealing, (b) attempted monopolization of a purported market for web browsers, (c) tying and (d) unlawful maintenance of a monopoly in the PC operating system market. Only the monopoly maintenance claim ultimately survived—and only in substantially narrowed form. 253 F.3d at 104 (“Only liability for the § 2 monopoly-maintenance violation has been affirmed—and even that we have revised.”). The great majority of Judge Jackson’s Findings of Fact did not constitute a basis for any liability determination upheld by the D.C. Circuit.

Following remand of the Government Case to a new judge, the district court stressed that “the vast majority” of the factual findings entered prior to appeal were “unconnected” to the D.C. Circuit’s liability determinations, and emphasized that the D.C. Circuit, “in its review of the district court’s liability findings . . . 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.” *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 138 (D.D.C. 2002). These “unconnected” findings were not “critical and necessary” to the D.C. Circuit’s holding that Microsoft unlawfully maintained a monopoly in Intel-compatible PC

operating systems through 12 specific anticompetitive acts. *In re Microsoft*, 355 F.3d at 327.

The vast majority of the Findings of Fact at issue in Novell’s renewed motion are similarly “unconnected” and thus cannot be given preclusive effect.

Despite the limited grounds on which the D.C. Circuit affirmed Judge Jackson’s liability determinations, Novell seeks collateral estoppel for Findings of Fact spanning the entire breadth of the Government Case, including aspects for which no liability was upheld on appeal. In fact, Novell implicitly concedes that it is unable to satisfy the “critical and necessary” standard applied by the Fourth Circuit and Tenth Circuit, and thus argues for the more lenient standard applied by a First Circuit decision—namely, that the Findings of Fact at issue need only be “logically or practically, a necessary component” of the prior judgment. (Novell Mem. at 19 (quoting *In re Belmont Realty Corp.*, 11 F.3d 1092, 1097 (1st Cir. 1993)).)<sup>22</sup> For example, echoing the erroneous (and reversed) “supportive of” standard applied by this Court in 2002, Novell seeks preclusion on Findings of Fact 94, 95, 99-102, 115-116, 119-125 and 132 because, “[a]lthough this conduct was not found to be illegal, it was a ‘necessary component,’ of” the district court’s analysis. (App. B to Novell Mem. at 15 (quoting *In re Belmont Realty*, 11 F.3d at 1097).) Similarly, Novell seeks preclusion on Findings of Fact 59 and 60 even though it concedes that those findings merely “support [the D.C. Circuit’s] causation conclusion.” (App. B to Novell Mem. at 7.) None of this comes close to meeting the applicable standard.

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<sup>22</sup> More recent First Circuit cases require, among other elements, “that the determination of the issue in the prior proceeding was essential to the final judgment or order.” *See, e.g., Enica v. Principi*, 544 F.3d 328, 337 (1st Cir. 2008). Moreover, the First Circuit’s *In re Belmont Realty* decision did not actually apply principles of non-mutual offensive collateral estoppel, but instead applied *res judicata* to a subsequent lawsuit between the same two parties that litigated the prior lawsuit. *In re Belmont Realty*, 11 F.3d at 1094, 1097.

In 2004, in the *Burst* case, Microsoft agreed that, under the standard established by the Fourth Circuit, 16 of Judge Jackson’s Findings of Fact were critical and necessary to the D.C. Circuit’s liability determinations.<sup>23</sup> Of these 16, Novell seeks preclusion for eight— Findings of Fact 18, 33, 34, 161, 164, 213, 339 and 394. Microsoft does not here contest that these eight Findings of Fact were critical and necessary to the decision in the Government Case, but as is shown below, pp. 38-45, *infra*, five of these eight Findings of Fact are not material to the claim in this action, and thus are not eligible for collateral estoppel.<sup>24</sup> The remaining Findings of Fact for which Novell seeks preclusion in its renewed motion<sup>25</sup> fail, as shown below, to satisfy the “critical and necessary” test.

**Finding of Fact 17:** This Finding of Fact provides the release dates for the first web browsers with graphical user interfaces (1993), Netscape Navigator, “the first widely-popular graphical browser distributed for profit,” (December 1994) and Microsoft’s Internet Explorer (July 1995). 84 F. Supp. 2d at 14. This Finding of Fact is not critical and necessary to the D.C. Circuit’s affirmation of Judge Jackson’s liability determinations against Microsoft because it provides only background information. This is exactly the sort of evidentiary detail that may be “supportive” of, but is miles short of “necessary” to, the judgment as affirmed by the D.C. Circuit.

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<sup>23</sup> See Microsoft’s July 1, 2004 Memorandum in Opposition to Burst’s Motion to Apply Collateral Estoppel to 311 Findings of Fact and 15 Excerpts from the D.C. Circuit’s Opinion in the Government Case (Docket #134 in *Burst.com v. Microsoft Corp.*, Case No. 02-CV-2952 (D. Md.)) at 27-34.

<sup>24</sup> Of these eight Findings of Fact, Microsoft does not contest that Findings of Fact 18, 33 and 34 should be given preclusive effect.

<sup>25</sup> Findings of Fact 17, 20, 28, 29, 32, 42, 44, 55, 56, 59, 60, 66-78, 80, 84, 90-95, 99, 100-102, 115, 116, 119-125, 132, 141-143, 156-158, 160, 166, 203-206, 208, 214, 215, 221, 222, 227, 241, 337, 340, 377, 386, 395, 407 and 409-412 were not “critical and necessary” to the judgment in the Government Case.

**Findings of Fact 20, 28, 29 and 32:** These Findings of Fact state that customers cannot easily substitute a non-Intel-compatible PC operating system for an Intel-compatible PC operating system, the meaning of the term “middleware” and other general information concerning “middleware.” 84 F. Supp. 2d at 15, 17-19. As such, they merely provide background information and were not critical and necessary to the determination in Finding of Fact 18 (for which Microsoft does not contest preclusion) that “the relevant market is the licensing of all Intel-compatible PC operating systems worldwide.” *Id.* at 14.

**Findings of Fact 42, 44, 55, 56, 59, 60 and 66-77:** These Findings of Fact provide only evidentiary detail underlying the determination that Microsoft possessed monopoly power in a market for Intel-compatible PC operating systems. 84 F. Supp. 2d at 21-22, 24-30. They are by definition not critical and necessary to the determination in Findings of Fact 33-34 (for which Microsoft does not contest preclusion) that Microsoft had monopoly power in the market for Intel-compatible PC operating systems (Finding of Fact 33) or the three main factors relied on by Judge Jackson to reach that determination (Finding of Fact 34). *Id.* at 19.

**Finding of Fact 78:** This Finding of Fact concerns Microsoft’s dealings with (a) Intel regarding Native Signal Processing software, (b) Apple regarding QuickTime multimedia playback software, (c) RealNetworks regarding streaming media software and (d) IBM regarding its Lotus Notes groupware product and its SmartSuite suite of office productivity applications. *Id.* at 30. These four technologies and companies have no relevance to any of the 12 acts found to be anticompetitive by the D.C. Circuit. Indeed, the D.C. Circuit did not even mention these technologies in its lengthy opinion.

**Findings of Fact 80 and 84:** These Findings of Fact describe a proposal that Microsoft supposedly made to Netscape in June 1995—which Netscape rejected. 84 F. Supp. 2d

at 31-32. Judge Jackson relied on these Findings of Fact only as evidence of an unlawful *attempt* to monopolize the putative market for web browsers. *Id.* at 45-46. The D.C. Circuit “reverse[d] the District Court’s determination of § 2 liability for attempted monopolization.” 253 F.3d at 84. In addition, not only was Microsoft’s alleged proposal to Netscape not among the 12 acts found on appeal to be anticompetitive by the D.C. Circuit, the court did not even mention that alleged proposal in its opinion.

**Findings of Fact 90-92:** These Findings of Fact concern Microsoft’s alleged withholding of certain technical information from Netscape after a June 1995 meeting between the two companies. 84 F. Supp. 2d at 33-34. They are unrelated to any of the 12 acts found to be anticompetitive by the D.C. Circuit, which did not mention Microsoft’s supposed withholding of technical information in its opinion. In fact, the D.C. Circuit specifically stated that Findings of Fact 90-92 were examples of Findings of Fact for which “Judge Jackson did not ascribe any liability.” *New York v. Microsoft Corp.*, 224 F. Supp. 2d at 143. Under the circumstances, Novell has no basis for seeking preclusion.

**Findings of Fact 93-95, 99-102, 115, 116, 119-125 and 132:** These Findings of Fact relate to Microsoft’s interactions with Intel regarding its Native Signal Processing software and with IBM regarding payments due under Microsoft’s Windows license agreement with IBM. 84 F. Supp. 2d at 34-36, 38-41, 43. None of them pertain to the determination that Microsoft possessed monopoly power in the market for Intel-compatible PC operating systems. Although Judge Jackson found that Microsoft’s actions toward other firms were evidence of monopoly power, *id.* at 28 (Finding of Fact 67), he carefully identified which Finding of Fact supported that determination. 87 F. Supp. 2d at 37 (citing Findings of Fact 67, 99, 136, 141, 215-16, 241, 261-62, 286, 291, 330, 355, 393 and 407). These Findings of Fact (specified above) for which now

Novell seeks collateral estoppel were not among the findings cited by Judge Jackson as “support” for the conclusion that Microsoft possessed monopoly power. In fact, on remand, the district court emphasized that Findings of Fact 115-132 were *not* a basis for imposing liability on Microsoft. *New York v. Microsoft Corp.*, 224 F. Supp. 2d at 163. Indeed, Novell itself concedes that the conduct described in Findings of Fact 94, 95, 99-102, 115, 116, 119-125 and 132 “was not found to be illegal” by the district court or the D.C. Circuit. (App. B to Novell Mem. at 15.) Again, Novell is greatly overreaching.

**Findings of Fact 141 and 142:** These Findings of Fact discuss Microsoft’s decision to provide copies of IE to consumers without charge. 84 F. Supp. 2d at 45-46. The D.C. Circuit held that providing free software to consumers did not violate the antitrust laws. 253 F.3d at 68. There can be no preclusion in such circumstances.

**Finding of Fact 143:** This Finding of Fact relates to the motivation behind Microsoft’s decision to include web browsing functionality in Windows and actions taken by Microsoft that had the effect of limiting Netscape Navigator’s access to certain distribution channels. 84 F. Supp. 2d at 46-47. As such, this Finding of Fact provides background information and evidentiary detail related to more central findings, such as Finding of Fact 213 (for which Microsoft does not contest preclusion), and thus is at most incidental to the core findings that were critical and necessary to the judgment in the Government Case. Significantly, the D.C. Circuit held that Microsoft did not violate the antitrust laws by giving IE away for free and did not hold that Microsoft violated the antitrust laws in developing IE or encouraging third parties to promote and distribute IE. 253 F.3d at 68, 70.

**Findings of Fact 156-158, 160, 166, 203, 206, 208 and 227:** These Findings of Fact discuss Microsoft’s integration of IE into Windows and various provisions of Microsoft’s

Windows license agreements with OEMs. 84 F. Supp. 2d at 49-51, 59-60. The D.C. Circuit did not find that Microsoft’s integration of web browsing functionality into Windows was unlawful. 253 F.3d at 64-65. It held instead that Microsoft violated Section 2 of the Sherman Act only by excluding IE from the “Add/Remove Programs” utility in Windows 98 and by “commingling” software code related to web browsing functionality and other functionality in the same files in Windows 98. 253 F.3d at 64-67.

**Findings of Fact 204, 205, 214, 215, 221 and 222:** These Findings of Fact provide evidentiary detail concerning the provisions of Microsoft’s license agreements with OEMs that prevented them from altering the Windows desktop and initial boot sequence and from removing ready means of access to IE, including a particular complaint from Hewlett-Packard about these restrictions. 84 F. Supp. 2d at 59-62, 64-65. As such, they are mere background information for more central findings, such as Finding of Fact 213 (for which Microsoft does not contest preclusion), which formed the basis for liability determinations affirmed by the D.C. Circuit. 253 F.3d at 61.

**Finding of Fact 241:** This Finding of Fact summarizes prior Findings of Fact pertaining to different liability determinations—some of which were affirmed and some of which were reversed by the D.C. Circuit. 84 F. Supp. 2d at 69. To the extent that it pertains to the former, Finding of Fact 241 is cumulative of Finding of Fact 239 (which this Court granted collateral estoppel effect in its December 2008 Decision). To the extent it pertains to the latter, Finding of Fact 241 is not critical and necessary to the judgment in the Government Case. Indeed, because Finding of Fact 241 seeks to summarize all of the Findings of Fact described in the preceding portion of the decision, including those that were not the basis for liability determinations affirmed by the D.C. Circuit, Finding 241 is by definition not critical and

necessary to the judgment in the Government Case—and it would be prejudicial to Microsoft for Finding 241 to be given collateral estoppel effect.

**Findings of Fact 337 and 340:** These Findings of Fact contain a general discussion of Microsoft’s agreements with ISVs that supposedly induced them to rely on the web browsing functionality in Windows rather than on Netscape Navigator. *Id.* at 93-94. Findings of Fact 337 and 340 make no reference to the specific agreements found to be anticompetitive as, for example, Finding 339 (for which Microsoft does not contest preclusion) does. Thus, Findings of Fact 337 and 340 are at most incidental to the core findings that were critical and necessary to the judgment in the Government Case. *See* 253 F.3d at 71-72.

**Finding of Fact 377:** This Finding of Fact describes the alleged effect of Microsoft’s conduct on a single competitor, Netscape, and is at most incidental to the core findings relating to the causation element of the government’s monopolization claim—*i.e.*, whether competition was harmed as a result of Microsoft’s conduct. 84 F. Supp. 2d at 103. Finding 377 was not critical and necessary to the D.C. Circuit’s judgment, which focused exclusively on whether inflicting harm on nascent “middleware” threats to Windows in general could contribute to Microsoft’s monopoly in the PC operating system market and whether Netscape Navigator actually constituted such a nascent “middleware” threat. 253 F.3d at 79. Moreover, the D.C. Circuit noted that “harm to one or more competitors will not suffice” to establish that an act is anticompetitive. *Id.* at 58.

**Findings of Fact 386, 395 and 407:** These Findings of Fact summarize in general terms Microsoft’s development of a Java virtual machine (“JVM”), and its alleged effect on Sun’s Java technology. 84 F. Supp. 2d at 105, 107, 110. These Findings of Fact are not critical and necessary to the judgment in the Government Case because (a) the D.C. Circuit

expressly “reverse[d] the district court’s imposition of liability for Microsoft’s development and promotion of its JVM,” 253 F.3d at 75, and (b) these Findings of Fact do not pertain to the two acts involving Microsoft’s JVM that were found to be anticompetitive (Findings of Fact 394 and 401), *see id.* at 75-76.

**Findings of Fact 409-412:** According to the district court, these Findings of Fact describe the effect on consumers of Microsoft’s efforts to protect the “applications barrier to entry.” 84 F. Supp. 2d at 110. In its conclusions of law, the district court did not cite Findings of Fact 409 and 410 at all, and it cited Findings of Fact 411 and 412 only as support for the conclusion that Microsoft had engaged in an illegal “course of conduct.” 87 F. Supp. 2d at 44. The D.C. Circuit, however, *reversed* the district court’s “conclusion that Microsoft’s course of conduct separately violate[d] § 2 of the Sherman Act.” 253 F.3d at 78. Although the D.C. Circuit twice cited Finding of Fact 411, *see id.* at 78, 107, it did so not in affirming any liability determination, but in pointing out that “the District Court expressly did *not* adopt the position that Microsoft would have lost its position in the [operating system] market but for its anticompetitive behavior.” *Id.* at 107 (emphasis added). Findings of Fact 409-412 plainly were not necessary and essential to the portion of the judgment in the Government Case that was sustained on appeal. Moreover, these Findings of Fact contain comments about the supposed effect of Microsoft’s conduct on consumers, which was not a basis for liability in the Government Case.

For these same reasons, a Minnesota state court in *Gordon v. Microsoft Corp.* held that Findings of Fact 409-412 do “not appear necessary and essential to the violation affirmed by the Court of Appeals.” 2003 WL 22281574, at \*11 (Minn. Dist. Ct. Aug. 20, 2003). The *Gordon* court noted that “[t]he Court of Appeals certainly found it unnecessary to evaluate

Judge Jackson’s findings about harm [Findings of Fact 408-412] in affirming the Section 2 violation,” *id.*, and further emphasized that “even if details of the harm were material, some of Judge Jackson’s references in Findings of Fact 408 through 412 appear to be to some of the 8 acts of anticompetitive conduct which he found but which the D.C. Circuit disallowed.” *Id.* In fact, in its 2008 collateral estoppel motion, Novell argued that the Court should not follow the *Gordon* court’s decision specifically because “Novell does not seek preclusive effect for Findings of Fact 408, 409 or 410, and the court’s concern is not implicated by Findings of Fact 411 and 412, which summarize predominantly, if not wholly, the harms associated with the affirmed monopoly maintenance rulings.” (App. A to Novell’s May 23, 2008 Reply Mem. in Support of Motion Seeking Collateral Estoppel (D. Md. Docket #59-2) at 21.) Having implicitly conceded in 2008 that Findings of Fact 409 and 410 were not “critical and necessary” to the judgment affirmed by the D.C. Circuit, Novell should not be permitted to reverse course here.

**B. The Court Should Not Accord Preclusive Effect to the Purported Legal Rulings Created by Novell.**

The Court should deny Novell’s request for preclusion as to the 16 Legal Rulings, which Novell contends are “liability rulings made by” the D.C. Circuit in the Government Case and by the Fourth Circuit in a different Microsoft case. (*See* App. A to Novell Mem. at 1.) None of Novell’s paraphrases of judicial decisions are proper subjects for collateral estoppel.

*First*, Novell’s Legal Ruling 1 is a paraphrased excerpt from the Fourth Circuit’s observation about the Government Case in the Fourth Circuit’s 2004 decision reversing this Court’s collateral estoppel ruling. *See In re Microsoft*, 355 F.3d at 326. One court’s observation about another court’s decision in a different case cannot possibly be worthy of collateral estoppel effect.

Novell's Legal Ruling 1 also fails to qualify for collateral estoppel effect because Novell seeks preclusion on the Fourth Circuit's supposed ruling that "Microsoft illegally maintained a monopoly . . . through various specified acts of anticompetitive conduct" (Microsoft App. B at 1), when in reality, the Fourth Circuit never used the phrase "various specified acts." The Fourth Circuit employed the more exact phrase "through 12 specified acts of anticompetitive conduct." *In re Microsoft*, 355 F.3d at 328. As explained above, those 12 specified acts have nothing to do with Novell or WordPerfect or Quattro Pro or office productivity applications. The language in Novell's Legal Ruling 1 is not "identical to" the language in the Fourth Circuit's decision and is highly misleading. As a result, it should not be given preclusive effect under any incarnation of the collateral estoppel doctrine.

*Second*, Novell's Legal Rulings 2 and 3 are paraphrased excerpts from the D.C. Circuit's decision in the Government Case concerning the relevant market and Microsoft's monopoly power. There is no need to grant preclusive effect to varying phraseology concerning Microsoft's monopoly power in the PC operating system market given that Microsoft has not challenged the application of Finding of Fact 18 (which defines the relevant market) or Findings of Fact 33 and 34 (concerning Microsoft's power in the relevant market). In fact, Legal Rulings 2 and 3 would only serve to confuse the jury. Novell did not include Legal Rulings 2 and 3 among the 12 Legal Rulings for which it sought preclusion in its original 2008 motion because, it then said, "[c]onsistent with this Court's guidance, we also avoid redundancy to the 72 Findings of Fact for which we seek preclusion." (Novell 2008 Mem. at 9 (citing April 4, 2003 Order (Docket #775 in MDL No. 1332)).) Novell should not be permitted to renege on its "no redundancy" promise now.

*Third*, Novell’s Legal Rulings 4-6 and 8-16 are, as Novell concedes, an attempt to “summarize” the 12 specific acts found to be anticompetitive by the D.C. Circuit. (*See* Novell Mem. at 8 n.4 (“Novell summarizes these Conclusions in Appendix A.”).) Novell’s purported summaries do not accurately reflect the 12 specific acts and are merely Novell’s effort to ascribe more negative connotations to those acts than the D.C. Circuit did. For example, Novell’s summary of (a) Microsoft’s agreement to create an additional version of Microsoft Office for the Apple Macintosh (Legal Ruling 13) and (b) Microsoft’s First Wave Agreements with various ISVs (Legal Ruling 14) each compress several pages of the D.C. Circuit’s analysis into a cherry-picked, two-sentence distillation of a complicated and nuanced topic. (*See* Microsoft App. B at 3.) As reworked by Novell, such paraphrases are not “identical” to rulings made by the D.C. Circuit in the Government Case. 355 F.3d at 326. Such poetic license should not be given preclusive effect.

Moreover, the summaries Novell purports to have derived from the D.C. Circuit’s decision in creating these 12 Legal Rulings are torn from their proper context, temporal and otherwise. As such, the 12 Legal Rulings illustrate the pitfalls inherent in attempting to accord preclusive effect to isolated excerpts of a long appellate opinion, thereby converting a reasoned explanation of a court’s conclusions into misleading snippets. The sentences, paragraphs and sections of the D.C. Circuit’s decision are interrelated and were intended to be read as an integrated whole. Individual sentences or phrases may not be taken out of context and presented to a jury in a later case divorced of their surrounding context.

*Fourth*, in Legal Ruling 7, Novell seeks preclusion on its truncated description of the D.C. Circuit’s analysis of Microsoft’s copyright defense. (Microsoft App. B at 1-2.) As an initial matter, this Legal Ruling is not a “liability ruling,” as Novell contends (*see* App. A to

Novell Mem. at 1), but rather a cryptic abbreviation of the D.C. Circuit’s elaborate analysis of whether Microsoft’s copyrights permitted it to impose license restrictions on OEMs without regard to the antitrust laws. Novell understood in its 2008 collateral estoppel motion that the D.C. Circuit’s analysis of Microsoft’s copyright defense was not “critical and necessary” to the judgment affirmed by the D.C. Circuit, and therefore did not include Legal Ruling 7 in its 2008 motion. (*See* April 11, 2008 App. A to Novell 2008 Mem (D. Md. Docket #53-3).) A rejected legal defense has never, to our knowledge, been the subject of collateral estoppel in a later jury case.

In addition, while Microsoft expects that Novell may assert at trial that Microsoft was somehow required by law to make certain of its intellectual property available to Novell (namely, formal documentation of the namespace extension APIs and a license to use Microsoft’s trademarked Windows 95 logo), these issues are unrelated to whether Microsoft’s copyrights on Windows entitled Microsoft to prevent OEMs from altering the operating system, which was the issue in the Government Case. Novell’s request for preclusion on Legal Ruling 7 demonstrates another fundamental weakness of Novell’s case. Novell must establish that, despite Microsoft’s rights as the owner of valuable intellectual property, Microsoft did not have the right to choose not to (a) document formally the namespace extension APIs because those APIs had technical issues and might not be supported in future versions of Windows, (b) include custom print processor functionality in Windows 95 or (c) allow Novell to market its office productivity applications using Microsoft’s trademarked Windows 95 logo if Novell declined to comply with requirements of the logo licensing program. Novell will be unable at trial to do so—which is presumably why Legal Ruling 7 seems directed toward stripping from Microsoft

the protections of *Trinko* and to expand beyond recognition the limited holding of *Aspen Skiing*.<sup>26</sup>

As this Court noted in its 2010 summary judgment decision, under the Supreme Court's *Aspen Skiing* and *Trinko* decisions, "a monopolist generally has a right to refuse to cooperate with a competitor" and therefore "courts should be 'very cautious' in recognizing exceptions to the right to refuse to cooperate." *In re Microsoft*, 699 F. Supp. 2d at 745 (quoting *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)). The treatment of Microsoft's copyright defense in the Government Case, which concerned license restrictions that prevented OEMs from modifying Windows before they preinstalled it on their personal computers, has no bearing on whether Microsoft should be required to share its intellectual property with Novell.

Finally, as with the other Legal Rulings, the language in Legal Ruling 7 is a combination of phrases, an excerpt from a case cited by the D.C. Circuit, and the D.C. Circuit's own analysis. (*Compare* Microsoft App. B at 1-2, *with* 253 F.3d at 62-63.) That mishmash is not "identical" to the rulings of the D.C. Circuit in the Government Case. 355 F.3d at 326. As such, it should not be given collateral estoppel effect.

## **II. Many of the Findings of Fact and Requested Legal Rulings as to Which Novell Seeks Preclusion Are Not Material to this Action.**

Not only must Novell demonstrate that the Findings of Fact and Legal Rulings for which it seeks preclusion were "critical and necessary" to the judgment as affirmed in the Government Case, it must also show that they are material to the one claim remaining in this

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<sup>26</sup> Microsoft remains of the view, as it argued on summary judgment, that Count I is precluded by *Aspen Skiing* and *Trinko*.

action. 73 of those Findings of Fact and 14 of the Legal Rulings are not material because they have nothing to do with the claim in this action.<sup>27</sup> Apparently—as telegraphed by its expanded collateral estoppel motion—Novell is hoping to convince the jury that if Microsoft engaged in anticompetitive conduct directed at Netscape and Sun after March 1996 to maintain its monopoly in the PC operating system market, then Microsoft must also have engaged in different anticompetitive conduct before July 1995 directed at WordPerfect and Quattro Pro for the same purpose. There are several problems with this approach.

**A. Materiality.**

This Court has ruled that for Novell to prevail on Count I, it “must prove that the specific Microsoft conduct which caused injury to Novell’s applications also caused anticompetitive harm in the *PC operating system market*.” *Novell*, 699 F. Supp. 2d at 748 (emphasis in original). Novell thus must prove to the jury that the three alleged acts described above, p. 15, *supra*, not only harmed WordPerfect and Quattro Pro, but also caused anticompetitive harm in the PC operating system market. *Id.* at 748-50. This Court has emphasized that “Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing [that] the conduct which injured [Novell’s] applications had an anticompetitive impact as well.” *Id.* at 750.

This legal standard, which governs Count I, is the lens through which this Court’s “materiality” inquiry should be viewed. As the Court explained in its December 2008 Decision, even Findings of Fact and Legal Rulings that were “critical and necessary” to the judgment in the

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<sup>27</sup> The only Findings of Fact and Legal Rulings that are arguably material to this case are Legal Rulings 2-3 and Findings of Fact 2, 4, 6-10, 18, 20, 28-39, 42, 44, 55, 56, 59, 60 and 66. Of these Findings of Fact, Findings of Fact 28, 29, 32, 42, 44, 55, 56, 60 and 66 were not critical and necessary to the judgment in the Government Case.

Government Case are worthy of preclusive effect only if they are also “material to this case.” (Dec. 2008 Decision at 2); *see also In re Microsoft*, 232 F. Supp. 2d at 535 n.2 (“By finding that preclusive effect is to be given . . . , I am not deciding that these findings are relevant to the claims of any particular plaintiff.”), *rev’d on other grounds*, 355 F.3d 322 (4th Cir. 2004). It is hornbook law that facts in one action may not be given preclusive effect in a second action if those facts are irrelevant to determination of the second action. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4416 (2d ed. Supp. 2008) (“The prior determination either precludes any further dispute about the matter, or it is irrelevant and cannot be admitted even as some evidence bearing on the matter.”).

Novell must therefore establish that each of the 101 Findings of Fact and 16 Legal Rulings raised in its motion (other than the 28 Findings of Fact as to which Microsoft concedes materiality) is material to the sole remaining claim in this case. (Dec. 2008 Decision at 2.) If Novell cannot make that showing, then collateral estoppel should not be granted. *See, e.g., Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1031 (9th Cir. 2001) (where an issue is “capable of collateral estoppel effect . . . [o]nly those issues in the first proceeding that are relevant in the second proceeding are admissible”); *see also Coburn*, 174 F. Supp. 2d at 1238 (holding that “the facts . . . in the case at bar are much different,” and therefore “it would be inappropriate for this court to apply collateral estoppel”).

**B. Microsoft’s Conduct at Issue in the Government Case Did Not Concern Novell and Occurred Months or Years After Microsoft’s Conduct Allegedly Directed Towards WordPerfect and Quattro Pro.**

73 of the Findings of Fact and 13 of the Legal Rulings on which Novell seeks collateral estoppel relate to parties, products and conduct that have nothing to do with Count I of

the Complaint. Novell's stated rationale for seeking preclusion as to these 73 Findings of Fact and 13 Legal Rulings do not establish that they are material to Novell's sole remaining claim.<sup>28</sup>

None of the Findings of Fact upon which liability determinations were upheld by the D.C. Circuit involved allegations that Microsoft wrongly withheld or withdrew technical information about Windows 95 or any other PC operating system from Novell or any other developer of office productivity applications. Nor did the Government Case involve any allegations regarding formal documentation of the namespace extension APIs in Windows 95, the inclusion of custom print processor functionality in Windows 95 or the requirements of the Windows 95 logo licensing program. In fact, neither Novell nor any of its office productivity applications at issue in this action were ever mentioned in the Findings of Fact. That is no surprise because the Government Case was dramatically different from the claim asserted in Count I of Novell's Complaint. As the D.C. Circuit noted, the plaintiffs "rel[ie]d almost exclusively on Microsoft's varied efforts to unseat Netscape Navigator as the preeminent internet browser," and, in deciding the Government Case, Judge Jackson "[f]ocus[ed] primarily on Microsoft's efforts to suppress Netscape Navigator's threat to its operating system monopoly." *Microsoft*, 253 F.3d at 47, 50. Moreover, the conduct for which Microsoft was found liable in the Government Case all took place well after the three acts that Novell alleges harmed WordPerfect and Quattro Pro—indeed even after Novell sold those applications to Corel. (*See* pp. 8-11, 15-17, *supra*.)

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<sup>28</sup> Findings of Fact 17, 67-78, 80, 84, 90-95, 99-102, 115, 116, 119-125, 132, 141, 142, 143, 144, 145, 148, 156-161, 164, 166, 203-206, 208, 213-215, 221, 222, 227, 239, 241, 337, 339, 340, 377, 386, 394, 395, 407 and 409-412 and Legal Rulings 1 and 4-16 are not material to Count I of Novell's Complaint.

Novell offers three arguments as to why the 101 Findings of Fact and 16 Legal Rulings at issue on this motion are material to the claim asserted in Count I despite the fact that they concern different parties, products and time periods. *First*, Novell contends—without citation to any evidence—that the Government Case involved Microsoft’s “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.” (Novell Mem. at 15.) This is false. As shown above, p. 11, *supra*, the earliest conduct for which liability was found in the Government Case occurred after March 12, 1996,<sup>29</sup> while five of the 12 specific acts upon which liability was predicated in the Government Case did not occur until 1997 or 1998.<sup>30</sup> Novell sold WordPerfect and Quattro Pro to Corel on March 1, 1996 (Compl. ¶ 150), and its claim thus necessarily pertains only to conduct before that date.

*Second*, Novell repeatedly argues that the Findings of Fact and Legal Rulings at issue on this motion are material because they purportedly establish a “weakened state” of competition in the PC operating system market resulting from harm that Microsoft inflicted on Netscape, Sun and perhaps others. (*See, e.g.*, Novell Mem. at 4, 5, 12-13.) This ignores the temporal problem noted above, as well as the Court’s admonition that Novell must 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

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<sup>29</sup> This was the date on which Microsoft signed an agreement with Sun enabling Microsoft to develop and distribute Java technology. 84 F. Supp. 2d at 105, ¶ 388. Microsoft created its own Java development tools after March 12, 1996, and later statements to ISVs about those development tools was found by Judge Jackson and the D.C. Circuit to be anticompetitive. 253 F.3d at 76-77.

<sup>30</sup> Microsoft was found to have entered into allegedly anticompetitive agreements with IAPs “[b]etween July 1996 and September 1997” ((84 F. Supp. 2d at 72-73, ¶ 256), with ISVs in “1997 and 1998” (*Id.* at 108-09, ¶ 401) and with Apple in August of 1997 (*Id.* at 108, ¶ 350).

the time, including the condition of other ISVs and applications.” 699 F. Supp. 2d at 750. Novell itself asserts that the three acts that allegedly harmed WordPerfect and Quattro Pro took place in October 1994, April 1995 and June 1995. The conduct towards Netscape and Sun held to be anticompetitive in the Government Case had not yet occurred, and thus none of that conduct could have “weakened” competition in the PC operating system market in the earlier time period in which Microsoft allegedly engaged in anticompetitive conduct in this case. Simply put, Findings of Fact and Legal Rulings relating to later conduct say nothing about marketplace conditions “at the time” that the three acts at issue in this case occurred.

Novell’s purpose in seeking collateral estoppel on the 101 Findings of Fact and 16 Legal Rulings is revealed by its third argument about materiality—that the 101 Findings of Fact and 16 Legal Rulings show Microsoft’s anticompetitive “intent, motive or knowledge,” which Novell sometimes describes as evidencing the “purpose” and “character” of Microsoft’s earlier conduct towards Novell. (*See* Novell Mem. at 13-17.) Novell indicates that one of its experts, Roger Noll, will testify that “Microsoft’s conduct against Netscape’s Navigator and Sun’s Java, among others, found to be anticompetitive in the Government case . . . [is] evidence that ‘Microsoft would destroy any product that it regarded as a threat to its core business assets.’” (Novell Mem. at 5.) Novell concedes that, while it “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.” *Id.* at 16 (citing *Telecor Commc’ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002).)

Novell's effort to prove its case based on things Microsoft allegedly did to other companies months or years after the conduct at issue in this case is improper. It is black letter law that a party may not use evidence of other acts "to prove the character of a [party] in order to show action in conformity therewith." Fed. R. Evid. 404(b); see *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence that Enron breached a contract with another contractor in order to prove that "Enron typically breached contracts and, therefore, that Enron breached its contract with" plaintiff); see also *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 202-03 (3d Cir. 2000) (district court erred in admitting evidence of defendant employer's firing of another employee for purposes of "establish[ing] ARCO's common scheme, plan or pattern of action" to fabricate reasons to fire employees); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1434 (D. Kan. 1987) (evidence of a party's past antitrust violation to show violation in subsequent case ruled impermissible character evidence that "once a monopolist, always a monopolist"), *aff'd*, 899 F.2d 951, 976 (10th Cir. 1990).

Evidence of a party's "character" is excluded because it "is of slight probative value and may be very prejudicial." Fed. R. Evid. 404(a) advisory committee's note. "Circumstantial use of character evidence raises questions of relevancy." *Id.* Under a limited exception to this rule, evidence of a party's other actions may be admissible to show "motive . . . intent . . . [or] knowledge." Fed. R. Evid. 404(b). Courts do not rely on this exception, however, where the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury . . ." Fed. R. Evid. 403.

Here, the danger of unfairness to Microsoft is patently obvious. Novell does not just seek to introduce circumstantial evidence of Microsoft's supposed "bad character" in an effort to show motive, intent or knowledge. Instead, Novell seeks to present this evidence to the jury in the form of excerpts from prior judicial decisions that Microsoft would be precluded from challenging under the collateral estoppel doctrine. Not only would such a process be unfair to Microsoft, it would be unprecedented in the Tenth Circuit.

The cases upon which Novell relies do not support the extraordinary proposition that collateral estoppel may be used to require a jury to accept evidence of a defendant's subsequent acts to show that defendant's intent, motive or knowledge at an earlier time. Novell cites *Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002), but there the Tenth Circuit considered only the admissibility of a defendant's contemporaneous statement to a federal regulatory agency during the same time period the defendant's conduct allegedly harmed the plaintiff. *Id.* at 1137-38. The *Telecor* court was not asked to address whether evidence of the defendant's prior conduct was admissible, much less whether the defendant could be precluded from challenging evidence of such prior conduct under the collateral estoppel doctrine. The same is true as to *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220 (10th Cir. 1973), also cited by Novell, in which the Tenth Circuit considered the admissibility of evidence that defendants conspired to allocate the market for liquid asphalt in

multiple states during the time period for which plaintiffs claimed injury, even though the plaintiffs sought damages for injuries to their operations in only one state. *Id.* at 225-26.<sup>31</sup>

Indeed, the only case Novell cites that involved evidence of subsequent conduct, *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990 (9th Cir. 1986), is inapposite because, unlike here, defendant “opened the door” to the use of such subsequent conduct by raising the issue first. *Id.* at 1002. Novell’s remaining authorities deal only with admissibility of evidence of a defendant’s prior or contemporaneous acts, not whether evidence of subsequent conduct is admissible to prove earlier “character” or “purpose,” as Novell proposes to do here. For example, in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), the court considered the admissibility of evidence of defendant’s conduct *before* the alleged damages period in order to show the “the historic development of the alleged violations.” *Id.* at 106.<sup>32</sup>

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<sup>31</sup> Novell’s remaining cases are even more attenuated. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, the Supreme Court did not consider evidence of prior or subsequent conduct, but rather whether the Court of Appeals should have viewed plaintiff’s five claims involving the same antitrust conspiracy as a whole, rather than viewing each claim separately. 370 U.S. 690, 698-99 (1962); *see also LePage’s Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (noting that defendants’ anticompetitive acts affecting plaintiff should be considered as a group rather than in isolation). Novell’s reliance on the *Caldera* case is misplaced because the court said nothing about allowing *Caldera* to use conduct alleged in other actions against Microsoft to support its claim. *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1309-11 (D. Utah 1999). The other cases Novell cites simply explain how evidence of intent may be relevant to a monopolization claim, not whether a defendant’s subsequent conduct that does not involve the plaintiff may serve as evidence of monopolistic intent or motive. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

<sup>32</sup> *See also United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1250 (5th Cir. 1973) (“federal courts in antitrust cases have, for the purpose of showing intent . . . admitted evidence of conduct *prior* to the time covered by” the case) (citations omitted and emphasis added); *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279, 1285 (5th Cir. 1972) (considering admissibility of “facts as they existed *prior* to entry of [plaintiffs] into the pipeline market” at issue in the case) (emphasis added); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1263-64 (N.D. Ohio 1980) (considering admissibility of defendant’s *prior* conduct).

The 73 Findings of Fact and 14 Legal Rulings that Microsoft contests on materiality grounds have no relation to conduct in the 1994-1995 time period when the three acts at issue in this case occurred. As such, they are not material to the claim alleged in Count I.

**C. The Findings of Fact and Legal Rulings Concerning Microsoft’s Allegedly Exclusionary Arrangements with Software Distributors Relate to Count VI of the Complaint, Which Was Dismissed.**

26 of the Findings of Fact<sup>33</sup> and Legal Rulings 4-6, 8 and 11 relate to Microsoft’s allegedly exclusionary licensing agreements and other arrangements with OEMs and IAPs to exclude Netscape Navigator from various software distribution channels. In its 2008 collateral estoppel motion, Novell acknowledged that such Findings of Fact and Legal Rulings are relevant only to the allegations of Count VI. (May 23, 2008 App. A to Reply Mem. in Support of Novell’s Motion Seeking Collateral Estoppel (D. Md. Docket #59-2) at 1-2 (citing Compl. ¶¶ 112-48).) Count VI was dismissed long ago, and Findings of Fact and Legal Rulings that relate to Count VI are not material to Count I. Consequently, they are not entitled to preclusive effect.

**D. The Findings of Fact Relating to Microsoft’s Alleged “Corporate Practice” of Pressuring ISVs to Halt Development of Competitive Software Are Immaterial Because Novell Does Not Allege Any Similar Conduct Here.**

22 of the Findings of Fact<sup>34</sup> on which Novell seeks collateral estoppel relate to Judge Jackson’s determination that Microsoft had a “corporate practice” of pressuring firms to stop developing software that could weaken the “applications barrier to entry” into the PC operating system market or otherwise compete with Microsoft’s products. (Novell Mem. at 4,

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<sup>33</sup> Findings of Fact 143-145, 148, 156-160, 203-206, 208, 213-215, 221, 222, 227, 239, 241, 337, 339, 340 and 410.

<sup>34</sup> Findings of Fact 80, 84, 90-95, 99-102, 115, 116, 119-125 and 132.

14.) As shown above, these Findings of Fact are not critical and necessary to the judgment in the Government Case because the D.C. Circuit reversed the imposition of liability based on Microsoft's purported "course of conduct." (*See* pp. 11 n.12, 26-28, *supra.*) In addition, these Findings of Fact are immaterial because Novell does not allege that Microsoft ever pressured Novell to stop developing versions of WordPerfect, Quattro Pro or PerfectOffice for use with Windows. In fact, the evidence at trial will demonstrate just the opposite: that in 1993 and 1994, Microsoft strongly encouraged Novell to create versions of its office productivity applications for use with Windows 95. (*See* Microsoft's October 7, 2009 Mem. in Support of Motion for Summary Judgment (D. Md. Docket #101-2) at 9-10 (citing Alepin Report & deposition testimony).)

Novell asserts that Microsoft's supposed "corporate practice" is material to the claim asserted in Count I because Microsoft's conduct directed towards WordPerfect and Quattro Pro in 1994-1995 is consistent with Microsoft's later conduct directed at companies like Netscape and Sun. That assertion, however, is contradicted by Novell's concession that Microsoft actively encouraged Novell and other ISVs to write applications for Windows 95. (*See* Nov. 13, 2009 Opp. to Microsoft's Motion for Summary Judgment (D. Md. Docket #106) at 3-4, 9-10, 16.) Indeed, the notion that Microsoft would do things to prevent or delay Novell from developing versions of its office productivity applications for Windows 95 is flatly inconsistent with the "applications barrier to entry" at the heart of the Government Case. The theory of the Government Case was that Microsoft urged as many ISVs as possible to write applications for Windows—rather than for competing operating systems—because Microsoft knew that consumers would be more likely to use an operating system with tens of thousands of applications. 84 F. Supp. 2d at 19-20, ¶¶ 33-39. Under the theory of the Government Case,

Microsoft had no incentive to obstruct Novell's creation of new versions of WordPerfect and Quattro Pro for Windows 95.

In its 2004 Complaint, Novell sought to explain the contradiction between its case and the theory of the Government Case by arguing that “WordPerfect, a popular application, with the system-neutral OpenDoc-protocol and AppWare development environment, threatened Microsoft's operating systems monopoly” in a manner similar to the assertion in the Government Case “that Microsoft's operating systems monopoly was threatened by a popular application, Netscape, supporting a system-neutral programming language, Java.” (Compl. ¶ 51.) This formulation was, as this Court has noted, “ingeniously designed to survive Microsoft's anticipated limitations defense.” 699 F. Supp. 2d at 736. And it worked, for that purpose.

Having dodged the statute of limitations by highlighting the supposed similarity of its case to the theory of the Government Case, Novell has changed course. Novell now contends that its PerfectOffice suite of office productivity applications was itself a nascent “middleware” threat to Windows. This change is of critical importance, because it requires Novell squarely to contend that Microsoft took steps to delay the availability of Novell's popular word processing and spreadsheet applications on Windows 95—contrary to Microsoft's clear business interest in preserving the “applications barrier to entry”—and that Microsoft did so in order to combat a threat to Windows that was purely hypothetical at the time. That is a bridge too far.

The notion that Microsoft interfered with Novell's efforts to create versions of WordPerfect and Quattro Pro for Windows 95 is what underpins the supposed relevance of the 22 Findings of Fact concerning Microsoft's efforts to stop other companies from creating software products that would weaken the “applications barrier to entry.” But that notion is

irreconcilable not only with the fact that Microsoft actively encouraged Novell to create versions of WordPerfect and Quattro Pro for Windows 95, but also with the theory of the Government Case on which Novell relied in saving Count I from being time-barred—namely, that Microsoft was doing everything it could to preserve the “applications barrier to entry.” As a result, the 22 Findings of Fact should not be given preclusive effect. Alternatively, Count I should be dismissed as time barred.

### **III. Even if Novell Could Otherwise Satisfy the Test for Collateral Estoppel, Application of Estoppel Here Would Be Unfair.**

The doctrine of collateral estoppel functions as a limited exception to the Seventh Amendment right to have a jury determine contested issues. The Tenth Circuit has explained that, even when the elements of collateral estoppel are present, “the decision whether to apply the doctrine is within the court’s discretion.” *Arapahoe Cnty. Public Airport Auth. v. FAA*, 242 F.3d 1213, 1220 (10th Cir. 2001) (citations omitted); *see also Starkey v. Miller*, 2007 WL 4522702, at \*6 (D. Colo. Dec. 17, 2007) (“[C]ollateral estoppel is an equitable doctrine applied at the court’s discretion and need not be applied in every case in which it could be applied.”) (citing *Arapahoe*).

The collateral estoppel doctrine is “detailed, difficult, and potentially dangerous,” and therefore the “caution that is required in application of offensive collateral estoppel counsels that the criteria for foreclosing a defendant from relitigating an issue or fact be applied strictly.” *In re Microsoft*, 355 F.3d at 327 (citations omitted); *see also Whelan v. Abell*, 953 F.2d 663, 669 (D.C. Cir. 1992). Where, as here, a party seeks to use collateral estoppel offensively on issues or facts litigated in a previous case, the Court should not impose estoppel “where . . . the application of offensive estoppel would be unfair to a defendant.” *In re Microsoft*, 355 F.3d at 326 (citations omitted).

For the reasons discussed above, *see* pp. 38-48, *supra*, it would be “fundamentally unfair,” *Coburn*, 174 F. Supp. 2d at 1239, to import all of the 101 Findings of Fact and 16 Legal Rulings on which Novell seeks collateral estoppel in this case. Doing so presents a substantial risk of jury confusion in derogation of Microsoft’s Seventh Amendment rights, first, regarding the purported connection between Microsoft’s conduct in 1994-1995 towards Novell and Microsoft’s subsequent conduct in 1996-1998 towards Sun and Netscape and, second, regarding the weight the jury should afford the Findings of Fact and Legal Rulings from the Government Case.

As Novell states repeatedly (*see* Novell Mem. at 4, 5, 11-15), it plans to argue to the jury that Microsoft’s actions directed towards Netscape Navigator and Sun’s Java technology are directly relevant to Novell’s remaining claim in this action. Were the Court to grant Novell’s motion, the jury would be told to accept dozens of Findings of Fact and various Legal Rulings relating to Microsoft’s actions directed towards Netscape Navigator and Sun’s Java technology—none of which discuss Novell or have anything to do with its products. That would inevitably confuse the jury because those actions have no connection to the three acts alleged by Novell in this case, all of which predate the conduct at issue in the Government Case. Moreover, telling the jury it must accept Findings of Fact and Legal Ruling relating to Netscape Navigator and Sun’s Java technology could easily lead the jury to believe the three acts at issue in this case are merely a tag-along to the conduct at issue in the Government Case, despite this Court’s clear instruction that “Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing [that] the conduct which injured [Novell’s] applications had an anticompetitive impact as well.” *Novell*, 699 F. Supp. 2d at 750.

Finally, the jury will be tempted to attribute undue significance to the 101 Findings of Fact and 16 purported Legal Rulings on which Novell seeks collateral estoppel. The jury will be told that these Findings of Fact and Legal Rulings emanated from other federal courts following years of litigation between Microsoft and the U.S. Department of Justice. In such circumstances, the jury will be hard-pressed not to give disproportionate weight to the Findings of Fact and Legal Rulings as opposed to what little evidence Novell can muster in support of its claim that the three acts at issue in this case had an anticompetitive effect on the PC operating system market. The Tenth Circuit has cautioned that “[j]uries are likely to give disproportionate weight to such findings of fact because of the imprimatur that has been stamped upon them by the judicial system.” *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002) (citing *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993)). That is particularly true here, where the Findings of Fact are the product of a high profile governmental enforcement action. Given the serious risk of jury confusion and the resulting unfairness to Microsoft, the Court should deny Novell’s motion.

**IV. The Court Should Not Entertain Novell’s Request for Preclusion on Findings of Fact Which Novell Raises for the First Time in its Renewed Motion.**

On April 11, 2008, close to four years after filing its Complaint, Novell filed its original motion seeking collateral estoppel on 72 of Judge Jackson’s 412 Findings of Fact, as well as 12 purported Legal Rulings<sup>35</sup> derived from the D.C. Circuit’s decision. Novell claimed that those 72 Findings of Fact “support[ed] Novell’s claims and would be wasteful to relitigate.” (Novell 2008 Mem. at 1.)

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<sup>35</sup> In Novell’s renewed motion, these 12 purported legal rulings have expanded into the 16 purported Legal Rulings.

After extensive briefing by the parties, the Court issued a decision in December 2008, explaining that it had “come close to reaching a decision as to every ruling and finding” for which Novell requested preclusive effect, but that it had “decided presently to address only those findings that in my view clearly were ‘critical and essential’ to the judgment affirmed by the D.C. Circuit in the Government case, deferring until a later stage of this litigation ruling upon findings that are of a more arguable character.” (Dec. 2008 Decision at 1.) The Court granted collateral estoppel on 21 of the Findings of Fact for which Novell sought preclusion, but “deferred” decision on the other 51 Findings of Fact and the 12 purported Legal Rulings. (*Id.* at 1-2.) The Court also declined to decide whether any of the matters on which Novell had sought estoppel collateral were material to this case, leaving that determination to a later day. (*Id.* at 2.)

Without any explanation, Novell’s renewed motion seeks collateral estoppel on 38 Findings of Fact that were not part of its 2008 motion. There is no basis for Novell expanding the number of Findings of Fact and legal rulings on which it seeks collateral estoppel on the eve of trial, especially when Novell’s case has been narrowed substantially since the original motion was filed in 2008.<sup>36</sup> The Court should refuse to address Novell’s belated effort to expand the scope of its collateral estoppel motion, especially given that the new Findings of Fact on which Novell seeks collateral estoppel have no bearing on the three acts at issue in this case.

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<sup>36</sup> Findings of Fact 17, 20, 28, 29, 32, 42, 56, 59, 60, 67, 69-71, 73, 78, 94, 95, 99-102, 141-143, 156, 204-206, 214, 215, 221, 222, 241, 337, 339, 340, 377, 409 and 410 were not included in Novell’s 2008 motion.

**V. The Court Should Deny Novell’s Motion Because Novell Seeks Preclusion for the Improper Purpose of Paving the Way to Introduce Even More Evidence on the Same Issues.**

The Court should deny Novell’s renewed motion for the separate and independent reason that Novell does not seek collateral estoppel to settle issues addressed in the Findings of Fact and Legal Rulings for which it seeks preclusive effect. Novell’s 2008 motion admitted that “[t]o relitigate the application of the same underlying facts to the same collateral estoppel criteria would be an unnecessary and expensive waste of time and resources” (Novell 2008 Mem. at 15) and Novell now acknowledges that collateral estoppel “promotes judicial efficiency by streamlining the issues on which the parties must present evidence at trial and that the jury must decide.” (Novell Mem. at 20.) Yet, as in other instances, Novell has since shifted gears: Novell now says that, even if it obtains collateral estoppel on various Findings of Fact and Legal Rulings, 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.” (Novell Mem. at 12; *see also* Novell Mem. at 4, 5, 14-15 (same).) Introduction of evidence regarding these other issues is not proper, particularly if Novell obtains collateral estoppel as to them.

**A. Collateral Estoppel Is Designed to Promote Judicial Economy by Definitively Resolving the Issues at Hand, Not as a One-Way Mechanism for Relitigating Those Same Issues.**

Properly applied, the collateral estoppel doctrine performs a valuable function: it serves the “dual purpose of protecting litigants from the burden of relitigating an identical issue . . . and of promoting judicial economy by preventing needless litigation.” *Joseph A. by Wolfe v. N.M. Dep’t of Human Servs.*, 28 F.3d 1056, 1059 (10th Cir. 1994) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). In exercising its “broad discretion to determine when

offensive, non-mutual collateral estoppel should be applied,” a court should decline to “apply collateral estoppel” in cases where it “would be fundamentally unfair and would not promote at least one of the policies underlying the doctrine of collateral estoppel—judicial economy.”

*Coburn*, 174 F. Supp. 2d at 1239.

Issues that are subject to collateral estoppel need not be proven or disproven at trial—they have already been resolved. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 138 F. Supp. 2d 357, 365 (E.D.N.Y. 2001) (Weinstein, J.) (evidence of an issue that has been resolved “introduced solely to prove or disprove it, directly or indirectly, is irrelevant and inadmissible”) (citations omitted). If collateral estoppel effect is granted, “its estoppel effect is binding on all parties, including the party asserting it.” *United States v. Guy*, 2006 WL 2225818, at \*2 (N.D. Ohio Aug. 2, 2006).

Courts in the Tenth Circuit and elsewhere 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. *See, e.g., Coburn*, 174 F. Supp. 2d at 1238 (denying offensive collateral estoppel where a party sought to elicit expert testimony at trial about issues subject to collateral estoppel); *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1505, 1524 (D. Colo. 1989) (denying offensive estoppel because the same underlying evidence would be introduced at trial in support of plaintiffs’ claim for punitive damages, and thus preclusion would not “save time, expense, or burden”), *rev’d on other grounds sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992); *Setter v. A.H. Robins Co., Inc.*, 748 F.2d 1328, 1331 (8th Cir. 1984) (affirming denial of collateral estoppel where evidence about issues subject to collateral estoppel would still be introduced at trial). Consistent with

these cases, Novell should not be allowed to defeat the very judicial economy that the collateral estoppel doctrine was designed to effectuate.

**B. Novell Is Very Open About its Plan to Misuse the Collateral Estoppel Doctrine at Trial.**

At trial, Novell evidently plans to introduce evidence about issues that are addressed in the Findings of Fact and Legal Rulings on which Novell seeks collateral estoppel, at the same time arguing that Microsoft has no ability to contest those issues or to cross-examine Novell's expert on those matters.<sup>37</sup> For example, Novell says that it "intends to present evidence at trial" about "Microsoft's conduct against Netscape's Navigator and Sun's Java, among others . . . found to be anticompetitive in the Government case" that is referred to in Roger Noll's report. (Novell Mem. at 5.) Citing Finding of Fact 93, Novell states that it "will demonstrate [at trial] 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.'" (Novell Mem. at 14 (quoting Finding of Fact 93).) But Novell cannot get preclusive effect for Finding of Fact 93 and also introduce testimony from its expert on the very same issue. That would be entirely improper.

Given Novell's stated intentions, granting Novell's renewed motion would not promote judicial economy and would do nothing to eliminate wasteful litigation. Novell will simply use those Findings of Fact and Legal Rulings as a jumping off point for one-sided relitigation of issues addressed in the Government Case, a relitigation in which Novell appears to

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<sup>37</sup> Even if the Court were to deny collateral estoppel effect, neither Roger Noll nor any other Novell witness should be permitted to testify that the conduct at issue in the Government Case shows Microsoft's intent, purpose or methodology.

believe that Microsoft should have its hands tied behind its back. Novell does not cite a single case in support of this remarkable proposition, which would be profoundly unfair to Microsoft, and Microsoft is aware of no such case. As a result, Novell's motion should be denied.<sup>38</sup>

### CONCLUSION

Novell's motion should be denied in all respects.

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<sup>38</sup> To the extent the Court holds that any of the Findings of Fact or Legal Rulings on which Novell seeks collateral estoppel were "critical and necessary" to the Government Case and are also material to this action, the Court should rule that Novell may not introduce any additional evidence—testimonial or documentary—related to those Findings of Fact or Legal Rulings.