

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION.

MDL Docket No. 1332

Hon. J. Frederick Motz

This Document relates to:

*Burst.com, Inc. v.
Microsoft Corp.,*

Civil Action No JFM-02-cv-2952

**BURST.COM, INC.’S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL
SUMMARY JUDGMENT AND TO DETERMINE ISSUES**

Plaintiff Burst.com, Inc. (“Burst”) submits this reply brief in support of its Motion for Partial Summary Judgment Under Rule 56 Or For Determination Of Issues Under Rule 16(C).

I. INTRODUCTION AND BACKGROUND

Burst requests that the court apply collateral estoppel to all 412 findings of fact issued by Judge Jackson and to certain facts found by the Court of Appeals for the District of Columbia. Rather than disputing the truth of a single one of those findings, Microsoft seeks to relitigate all of them, forcing its tiny competitor, Burst, to reprove them.¹ Presumably, if successful in defeating Burst’s collateral estoppel motion, Microsoft’s hoard of lawyers will put Burst to the task of reestablishing the admissibility of each of the government’s trial exhibits, rearguing the inferences to be drawn from that direct evidence, and disputing such obviously true matters as the definition of the relevant operating system market, its monopoly power in that market, and

¹ Microsoft claims that this exercise should not be a burdensome task, since Burst (and the other plaintiffs) could utilize the already existing trial record. It makes no concessions, however, as to the admissibility of any of that material, nor explains why the existence of the trial record distinguishes this case from any other where collateral estoppel is sought.

the existence of a applications barrier to entry. Relitigation of these points would do more damage than simply wasting the resources of the court and parties and creating the threat of inconsistent judicial decision-making; it would force the court to play out a farce for the benefit of the jury. In the ongoing remedies proceedings, Mr. Gates testified that Microsoft “accepts” the decision of the D.C. Circuit. Presumably, in having its Chairman testify in that manner, Microsoft was attempting to show a modicum of contrition and seeking leniency from the Court in doing so. Microsoft should be bound to its acceptance of the Court of Appeal’s ruling and the findings of fact that supported it in all of the forums that must determine the appropriate remedies for its conduct.²

Even before the D. C. Circuit’s decision, Microsoft had abandoned any significant hope of overturning the findings on appeal. With a very few minor exceptions, Microsoft did not challenge any of the findings. Its only attack on most of them was its request that the court to overturn them *in toto* based on Judge Jackson’s claimed judicial bias. In that regard, Microsoft asked the court to engage in a “painstaking review” of the findings against the record that supported those findings. “Reply Brief for Defendant-Appellant,” p. 3 (Jan.29, 2001). The D. C. Circuit reviewed the record with the requested painstaking care, rejected the notion that any of

² Microsoft argues that Mr. Gates’ concession is irrelevant to plaintiffs’ collateral estoppel motions. Although it is true that another principle, that of judicial estoppel, should be applied here to preclude Microsoft from disputing the rulings in the government case, that does not make these circumstances irrelevant to these motions. Microsoft’s primary argument for not applying collateral estoppel is that to do so would be unfair. So, its argues, since the government proceedings were not fair, and Judge Jackson was biased, his findings should not be given the typical deference they would otherwise receive. In contrast to this argument, during the remedy proceeding, Microsoft and Mr. Gates have agreed to put behind their previous claims that Microsoft’s conduct did not violate the law. By accepting the opinion, Microsoft was conveying to Judge Kollar-Kotelly that despite all of its previous arguments that it had done no wrong and that Judge Jackson had it all wrong, Microsoft was ready to conform its conduct to the court’s view of the law. It did so to give the court the perception that Microsoft did finally “get it,” and that it was making changes in its conduct so no additional remedy was warranted. Contrary to Microsoft’s brief in opposition to Netscape’s motion, the acceptance of the judgment was not qualified “pending the exhaustion of further appellate relief.” See “Microsoft’s Memorandum In Opposition To Netscape’s Rule 16(c) Motion For Preclusive Effect Of Factual Findings,” 6, n.2 (Oct. 4, 2002). In such circumstances, certainly no unfairness will be visited on Microsoft in holding it to its Chairman’s word. It should be prevented from relitigating all of the issues that have already been decided by the federal courts in the District of Columbia.

those findings were infused with bias, and upheld each and every one of them under the clearly erroneous standard. 253 F.3d at 118. Having received such an extraordinary review, Microsoft's present argument that the findings were unfairly issued, simply asks this Court to collaterally attack the conclusion reached by the D. C. Circuit that those findings are entitled to the deference normally accorded to such findings.³

Nor does the fact that the Court of Appeals "drastically altered" the District Court's conclusions of liability and held that "most ... of the findings of remediable violations do not withstand appellate scrutiny" affect the nature of the inquiry for this motion. Rather than speculate about what the Court of Appeals meant by these statements, one can read the opinion and understand exactly what was meant. The court summarized:

Of the three antitrust violations originally identified by the District Court, one is no longer viable: attempted monopolization of the browser market in violation of Sherman Act § 2. One will be remanded for liability proceedings under a different legal standard: unlawful tying in violation of § 1. Only liability for the § 2. monopoly maintenance violation has been affirmed--and even that we have revised. 253 F.3d at 103-104.

Thus, leaving only a portion of one of three theories of liability in place, the court simply recounted that it had reversed "most" of the findings of violation. None of this should permit Microsoft to avoid collateral estoppel as to those findings that support the monopoly maintenance claims that were affirmed.

Microsoft concedes that it is the **judgment** of the Court of Appeals that controls; all findings of fact necessary to that judgment are to be given preclusive effect. In this case, the D. C. Circuit affirmed liability under the Sherman Act, Section 2 and the corresponding state law

³ Ironically, in its reply brief on appeal, the only challenges to the government's statement of facts that Microsoft advanced related to matters not included in the Findings of Fact, and specifically cited the Findings to rebut the Government's recitation. Reply Brief for Defendant-Appellant, pp. 7-8.

provisions, including the California Cartwright Act and Unfair Competition Law. Any finding of fact relating to those upheld claims should be given preclusive effect here.⁴ The D.C. Circuit “let stand” all of those findings applying the normal “clearly erroneous” standard of review. 253 F.3d at 118. It does not matter that some of those findings might represent independently sufficient alternative findings, since affirmance by the Court of Appeals necessarily means that they were found as a result of a “careful process of decision.” *In re Dalkon Shield Punitive Damages Litig.*, 613 F.Supp. 1112, 1117 (D.Va. 1985).

II. BURST ALLEGES THAT IT WAS DAMAGED AS PART OF MICROSOFT’S MAINTENANCE OF ITS MONOPOLY

The relevance of Judge Jackson’s findings to Burst’s case is clear. Burst alleges, as the government had in *United States v. Microsoft*, that in the 1995 to 1998 period, Microsoft was faced with a threat to its monopoly, in the form of the Internet. The rise of the Internet shook the desktop model of the PC computer industry to its core. A networked computer offering a rich communications medium exponentially-increased the functionality of personal computers. The opportunity for non-Microsoft controlled entities to lead in the development of computers best able to exploit the enormous consumer demand unleashed by these developments provided multiple threats to Microsoft’s monopoly. Almost immediately, Microsoft recognized three critical competitors who needed to be neutralized, Netscape, Sun and RealNetworks. It also realized that a divide and conquer strategy was appropriate. RealNetworks should not assist

⁴ Microsoft points to a few findings that it claims are unrelated to the monopoly maintenance claim, such as those that established that browsers and operating systems were separate products for the purposes of the tying analysis. Even as to those, however, it is not the case that those findings only related to the tying claim. As the Court of Appeals observed: “The two practices that plaintiffs have most ardently claimed as tying violations are, indeed, a basis for liability under plaintiffs’ § 2 monopoly maintenance claim.” 253 F.3d at 392. As such, the findings of fact relevant to the tying claim were not vacated by the Court of Appeals and were necessary to its monopoly maintenance judgment. Microsoft should be precluded from arguing that Internet browsing software was simply part of what operating systems must do and that its integration of Internet Explorer with Windows was, therefore, simply legitimate procompetitive conduct uninfluenced by its own monopoly designs.

Netscape and Sun, and Intel should be prevented from helping any of them. None of those firms should be allowed to form alliances with other innovative firms in ways that threatened Microsoft, if Microsoft had anything to say about it. Burst alleges that it is directly injured by the agreements that Microsoft reached with Intel and RealNetworks. All of the evidence of Microsoft's monopolistic activities is, at a minimum, relevant to Burst's case to show the background and purpose of the Microsoft's anticompetitive activity directed toward it. All of the findings are thus relevant to its claims.⁵

III. THE FINDINGS CONCERN IDENTICAL ISSUES PRESENTED IN BURST'S CASE

Microsoft claims that collateral estoppel or summary judgment is inappropriate because certain elements of Burst's (and the other competitor plaintiffs') claims are different than those required of the government in an equitable action. Microsoft asserts that a private plaintiff must show that the defendant's reprehensible behavior contributed significantly to the achievement or maintenance of the monopoly, whereas the Government had no such burden, citing Professor Areeda and *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997). Even were it the case that collateral estoppel requires a showing of an identity of claims was necessary as well as identity of issue, which it does not, the Section 2 claim presented in the government case and in Count II of Burst's claim are identical.⁶ First, the D. C. Circuit rejected the notion that a plaintiff complaining of a monopolist's anticompetitive behavior had any obligation to prove that defendant's behavior contributed to achievement or maintenance of monopoly:

⁵ Burst will have no interest in wasting the time of the court and the jury by requiring the reading or other presentation of findings of fact that only have marginal relevance to the issues that the jury will need to resolve. However, the principle that collateral estoppel should apply to all the findings should be established now to guide discovery and trial preparation. Consideration of issues concerning the relevance of specific findings should be deferred to the time of trial.

⁶ Burst will need to show that it was injured by Microsoft's anticompetitive acts (fact of injury), and the extent of that injury (damages).

To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.

We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely potential substitutes. But the underlying proof problem is the same--neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, "the defendant is made to suffer the uncertain consequences of its own undesirable conduct." 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78.

253 F.3d at 79. This ruling was entirely consistent with Professor Areeda's opinion that causation in a Section 2 case, regardless of the identity of the plaintiff, should only require proof the "defendant engaged in anticompetitive behavior capable of contributing to monopoly." III Areeda ¶650c. As Professors Areeda & Hovenkamp also explain:

competitors must show actual harm both to themselves and to the ordinary market processes that could otherwise be expected to produce or maintain competition. Once again, however, consumer harm may be threatened rather than realized. For example, the rival who successfully prosecutes a §2 counterclaim to an infringement suit based on an invalid patent will be able to obtain damages even though the consumer harm from this wrongful infringement suit is threatened rather than actual. ” *Id.* at 651d1.

As to how a competitor-plaintiff might prove threatened consumer harm, Areeda and Hovenkamp opine:

Even though monopolistic conduct requires proof of actual or threatened consumer harm, the proof need not invariably be elaborate. The easiest case is conduct that clearly injures rivals and has no business justification. In that case consumer harm can be inferred from the injury to competitors itself. *Id.* at ¶651d2.

Indeed, requiring a plaintiff such as Burst to prove that the anticompetitive conduct

contributed significantly to the maintenance of monopoly would make its proof more exacting than had it alleged an attempted monopolization claim. As the D. C. Circuit ruled in *United States v. Microsoft*: “To establish a § 2 violation for attempted monopolization, ‘a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.’” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993).” 253 F.3d at 80. Given the findings of actual operating system monopoly maintenance, the third element of dangerous probability of monopolization of that market is clearly present. The first element, predatory or anticompetitive conduct, is identical whether the claim is for monopolization or for attempted monopoly. And as for the second element, the Supreme Court pointed out in *Spectrum Sports* that, just as in a monopolization claim, in an attempted monopolization case, the necessary intent to monopolize may be inferred from the nature of the defendant’s predatory acts. *Spectrum Sports*, 506 U.S. at 459.

Nor have the courts ever established the requirement that a firm excluded from a market by a monopolist’s predatory acts must show some level of monetary damage to consumers in order to recover for its direct injury. The mere fact that competitors have been excluded causes injury to consumers by restricting their freedom of choice. Rather than having an array of products that must compete on the merits of their price and quality, they are offered only one or a limited number of alternatives. Such market foreclosure is at the heart of the concerns addressed by the antitrust laws: *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 478 (1992) (“The alleged conduct--higher service prices and market foreclosure--is facially anticompetitive and exactly the harm that antitrust laws aim to prevent.”)

IV. APPLICATION OF COLLATERAL ESTOPPEL WOULD NOT BE UNFAIR TO MICROSOFT

As for Microsoft's mantra that applying collateral estoppel here would be "unfair," it has not identified any of the typical reasons that that might be true. For example, as was true in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), no unfairness is present on the basis that Burst intentionally failed to join the Government action before the courts ruled in that case, or that Microsoft did not foresee substantial penalties arising from the adverse findings, including the likelihood that private plaintiffs would seek to preclude it from disputing those findings in subsequent litigation. Indeed, in its Petition for a Writ of Certiorari, Microsoft specifically sought Supreme Court review of the D. C. Circuit's decision not to vacate or reverse any of the Findings of Fact because: "since the district judge issued his findings of fact, more than 150 private class actions have been filed against Microsoft under state and federal antitrust laws. Many of the allegations in those cases track the judge's findings in this case. If those findings are allowed to stand, class action plaintiffs undoubtedly will argue that certain findings should be given preclusive effect." Petition for a Writ of Certiorari," p. 24 (Aug. 7, 2001).⁷

Microsoft's primary claims of unfairness relate to the claim that plaintiffs are cherry-picking findings favorable to their cases and ignoring ones favorable to Microsoft. This charge is patently untrue with respect to Burst; it seeks collateral estoppel with respect to all 412 findings.⁸ Indeed, Microsoft elsewhere charges that Burst was over-inclusive for not having

⁷ In that Petition, Microsoft pointed to only two findings that the Court of Appeals to which it had objected. Petition, p. 23 ("relying on the clearly erroneous standard of Rule 52(a), the court affirmed two key findings of fact over Microsoft's vigorous challenge."). One of those findings, relating to whether Microsoft illegally "commingled" Internet Explorer software with Windows software (FOF 161), was the subject of a refused Petition for Rehearing. Microsoft's challenge to the other finding, that the MacOS was not part of the relevant market, was summarily dismissed by the Court of Appeals. 253 F. 3d at 52.

⁸ In its opposition to Burst's motion, Microsoft digresses to argue that Finding 114 significantly undercuts Burst's claims that Microsoft reached anticompetitive agreements with RealNetworks. Nothing in this finding undercuts Burst's complaint. Burst has alleged that although Microsoft was unsuccessful at moving RealNetworks

culled out findings that were not necessary to the Court of Appeals decision.⁹ Nor need the court address the issue that the jury in Burst's case would get an erroneous picture of what happened in the government suit, not being told of all the issues that Microsoft won. The presentation of the findings of fact to the jury can occur without reference to the source of those findings.

Alternatively, the jury could be provided appropriate instructions providing whatever context the Court views as necessary to eliminate any prejudice to Microsoft that is not inherent in the fact that adverse findings have been reached in the prior litigation.

out of the streaming media space entirely, that it reached agreements with RealNetworks that limited competition for innovative video delivery and that those agreements excluded Burst from the market. *See* Complaint ¶55. Moreover, Microsoft misquotes the finding, omitting Judge Jackson's qualification that "apparently" RealNetworks interpreted the agreement differently. Relying only on a RealNetworks' press release, Judge Jackson demonstrated the care with which he reached his findings, refusing to conclude that RealNetworks, in fact, viewed the agreement differently. Nevertheless, all of this is of no relevance to the motion at hand, since Burst has not suggested that Finding 114 should not be given preclusive effect.

⁹ That charge is also erroneous for the reason described throughout the plaintiffs' briefs in support of the motions. As the Judge Paul H. Alvarado recently concluded in the California indirect purchaser action, an appropriate procedure would be to order that collateral estoppel will apply as to all of the affirmed judgments of violation, and to then afford the parties an opportunity to meet and confer in order to reach agreement on the findings of fact that support those conclusions of law. Any disputed findings can then be the subject of additional briefing.

DATED: October 18, 2002.

SPENCER HOSIE (Ca Bar # 101777)
BRUCE J. WECKER (Ca Bar # 078530)
HOSIE, FROST, LARGE & McARTHUR
One Market, Spear Street Tower, 22nd Floor
San Francisco, CA 941
Telephone: 415-247-6000

ROBERT YORIO (Ca Bar # 93178)
MARY A. WIGGINS (Ca Bar # 191687)
CARR & FERRELL, LLP
2225 East Bayshore Road, Suite 200
Palo Alto, CA 94303
Telephone: 650-812-3400

JAMES L. MILLER (Ca Bar # 71958)
DIANE S. RICE (Ca Bar #118303)
BROBECK, PHLEGER & HARRISON, LLP
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
Telephone: (415) 442-0900

By _____/s/_____
Spencer Hosie
Attorneys for Plaintiff Burst.com, Inc.

PROOF OF SERVICE

I am employed in the State of California, County of San Francisco. I am over 18 years of age and am not party to the within action. My business address is One Market, Spear Tower, Suite 2200, San Francisco, California 94105.

On September 3, 2002, I served BURST.COM, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO DETERMINE ISSUES upon counsel named below by placing a true and correct copy thereof in an envelope addressed as follows:

Robert A. Rosenfeld – *via facsimile*
**HELLER EHRMAN WHITE
& MCAULIFFE LLP**
333 Bush Street
San Francisco, CA 94104-2878

David B. Tulchin – *via facsimile*
SULLIVAN & CROMWELL
125 Broad Street
New York, NY 10004-2498

Jonathan Treece – *via facsimile*
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

Michael D. Hausfeld – *via facsimile*
**COHEN MILSTEIN HAUSFELD
& TOLL PLLC**
1100 New York Avenue NW
Suite 500 West Tower
Washington, DC 20005

Stanley M. Chesley – *via facsimile*
WAIT SCHNEIDER BAYLESS & CHESLEY
1513 Central Trust Tower
4th & Vine Streets
Cincinnati, OH 45202

James L. Miller – *via facsimile*
BROBECK PHLEGER & HARRISON LLP
Spear Street Tower
One Market Street
San Francisco, CA 94105

Lloyd "Rusty" Day, Jr. – *via facsimile*
**DAY CASEBEER MADRID
& MATCHELDER LLP**
2030 Stevens Creek Blvd.
Suite 400
Cupertino, Ca 95014

Jeff Rosen – *via facsimile*
KIRKLAND & ELLIS
655 15th Street N.E.
Suite 1200
Washington, DC 20005

Evan Chesler – *via facsimile*
CRAVATH SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Parker Folse – *via facsimile*
SUSMAN GODFREY
1201 Third Avenue, Suite 3100
Seattle, WA 98101

Executed this 18th day of October, 2002.

s/Jerry Shaw
Jerry Shaw