IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION. This Document relates to: *Burst.com, Inc. v. Microsoft Corp.,* Civil Action No JFM-02-cv-2952	MDL Docket No. 1332 Hon. J. Frederick Motz

BURST.COM, INC.'S REPLY TO MICROSOFT CORPORATION'S MEMORANDUM CHALLENGING THE COLLATERAL ESTOPPEL EFFECTS OF CERTAIN SPECIFIC FINDINGS

This Court's November 4, 2002 Opinion preserved a single issue for further briefing: Which of the 395 findings of fact discussed in Sun's Reply Memorandum are "supportive" of the judgment entered against Microsoft and affirmed on appeal to the District of Columbia Court of Appeals. Microsoft's Memorandum Challenging Specific Findings As Not Necessary To The Court Of Appeals' 2001 Decision, though conceding that many of the findings satisfy the Court's standard, almost entirely avoids the single issue on which briefing was permitted and either reargues many issues that the Court has already decided or raises entirely new issues that it had ample opportunity to address previously.

Microsoft disputes the application of collateral estoppel to 91 of Judge Jackson's findings and claims that none of the 39 Court of Appeals findings can be given collateral estoppe1 effect whether they were supportive of the judgment or not. Microsoft has entirely failed to rebut Sun's demonstration that 395 findings were necessary to the judgment. Each of those findings "support" the judgment of monopoly maintenance that was entered against Microsoft. Indeed, in the most recent judgment in *State of New York v. Microsoft Corporation*, CA No. 98-1233, entered on November 4, 2002, the district court expressly incorporated all of Judge Jackson's Findings of Fact.

Microsoft's interpretation of this Court's November 4 Opinion twists it beyond recognition. Microsoft's would require that in order to be supportive of the prior judgment, the specific facts would have to be antitrust violations in and of themselves, or at least an explicit part of one of the anticompetitive acts for which specific liability was "ascribed" in the previous litigation – the so-called twelve acts held to be anticompetitive. Microsoft Mem. at 14, 15, 17, 20, 24, 25-26.

In fact, the November 4 Order sets forth a very simple test. If a fact was supportive of the judgment, Microsoft had great incentive to prevent the court from entering the finding, and thus must have litigated and lost the issue the first time around. Thus, a fact is supportive of the judgment if it tends to prove one of the elements of that cause of action. A single fact alone need not have been weighed for competitive and anticompetitive effect. That Judge Kollar-Kotelly required such a showing before giving a fact "special weight" in the formation of the remedy is simply not relevant to the issue of preclusive effect in subsequent litigation. In these cases, the findings of fact will be offered to the jury to prove only those matters that they reasonably support. If a finding describes an act of Microsoft that harmed a competitor but may have had a procompetitive justification, Microsoft will – so long as other preclusive findings do not already reject the claim – be permitted to offer evidence that such a pro-competitive justification exists.

Burst.com joins in the memorandum filed by the other plaintiffs in these proceedings and adopts their arguments concerning why the 92 specific findings that Microsoft challenges were necessary to the judgment. This reply supplements those briefs as to only a few of the findings of more particular concern to Burst.com.

Findings of Fact 78, 93-132

The D.C. Circuit's decision, in addition to "ascribing" liability to 12 anticompetitive acts, affirmed much more. For example, it found that the District Court had properly found an "applications barrier to entry" which prevented new rivals from

entering the market, and that abundant evidence showed that Microsoft had monopoly power, in addition to the evidence of Microsoft's market share. It was Microsoft's conduct maintaining the barrier to entry by excluding middleware threats that formed the central proposition of the government's case.

Monopoly power is, of course, defined as the ability to control price or exclude competition. Market share may be used to infer monopoly power, but direct proof can also be offered. Such direct evidence of exclusionary conduct was cited throughout the court's findings. Among the evidence that Judge Jackson found supportive of his monopoly power conclusion was "the fact that, over the course of several years, Microsoft took actions that could only have been advantageous if they operated to reinforce monopoly power." *Finding of Fact* 67. Judge Jackson relied on Finding 67 among others to conclude that "over the past several years, Microsoft has comported itself in a way that could only be consistent with rational behavior for a profit-maximizing firm if the firm knew that it possessed monopoly power, and if it was motivated by a desire to preserve the barrier to entry protecting that power. Findings ¶ ¶ 67, 99, 136, 141, 215-16, 241, 261-62, 286, 291, 330, 355, 393, 407." *Conclusions of Law*, at 37, 87 F.Supp. 2d 30, 37.

The D.C. Circuit expressly affirmed the conclusion that Microsoft had monopoly power in the relevant market and Judge Jackson's reliance on such direct evidence:

> "More telling, the District Court found that some aspects of Microsoft's behavior are difficult to explain unless Windows is a monopoly product. For instance, according to the District Court, the company set the price of Windows without considering rivals' prices, Findings of Fact ¶ 62, something a firm without a monopoly would have been unable to do. The District Court also found that Microsoft's pattern of exclusionary conduct could only be rational 'if the firm knew that it possessed monopoly power.' *Conclusions of Law*, at 37." 253 F.3d 34, at 57-58.

Microsoft's sole support for its claim that none of the findings regarding Intel, Apple, IBM and RealNetworks supported the conclusion that Microsoft had monopoly power is its contention that "the court carefully identified which actions supported" the

determination of monopoly power (Reply Br. at 17) and did not identify any of findings concerning its conduct toward these companies other than Finding 99.[1] This contention is incorrect. In fact, Judge Jackson carefully explained his reasoning process in the text of the findings and conclusions, not in the summary citations contained in his *Conclusions of Law*. Thus, Judge Jackson began his discussion of the evidence regarding Microsoft's interactions with these firms: "Other firms in the computer industry have had encounters with Microsoft similar to the experiences of Netscape described above. These interactions demonstrate that it is Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." *Finding of Fact* 93. At the end of the series of findings, Judge Jackson summed up their relevance to his conclusions, as well as those concerning the aborted market sharing demand Microsoft had made of Netscape, as follows: "In any event, Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist." *Finding of Fact* 132. If this were not enough, Judge Jackson reiterated his belief that Microsoft's exclusionary conduct with respect to these firms was motivated by its desire to preserve the applications barrier to entry in his conclusions of law, again citing these very same findings: "The same ambition that inspired Microsoft's efforts to induce Intel, Apple, RealNetworks and IBM to desist from certain technological innovations and business initiatives--namely, the desire to preserve the applications barrier--motivated the firm's June 1995 proposal that Netscape abstain from releasing platform-level browsing

[1] Finding 99 concerns Intel's NSP initiative. Judge Jackson's citation of this finding is thus fundamentally at odds with Microsoft's current contention that its actions with respect to Intel did not support the monopoly power conclusion. But, as explained in the text, this finding and all of the others contained in this portion of Judge Jackson's Findings are clearly linked to Finding of Fact 67. Judge Jackson's Conclusion of Law that this material proved that Microsoft possessed monopoly power was in turn cited as supportive of the monopoly power conclusion by the D. C. Circuit.

software for 32-bit versions of Windows. See *id*. ¶¶ 79-80, 93-132." *Conclusions of Law,* at 39. Clearly, such conduct of threats and inducements cannot succeed if the firm has no monopoly power; the fact that a company would embark on such a strategy is thus clear evidence that it believes that it has such market power and, as affirmed by the D.C. Circuit, is a "pattern of exclusionary conduct [that] could only be rational 'if the firm knew that it possessed monopoly power.'" *See* 253 F.3d 34, at 57-58. Each of these findings is thus supportive of the pattern of exclusionary conduct found, regardless of the fact of whether they individually would have constituted Section 2 violations.

Many of these findings also support the judgment since they demonstrate the exclusionary intent behind the actions that were found to constitute anticompetitive conduct in furtherance of Microsoft's maintenance of its monopoly. Although Microsoft cites cases downplaying the relevance of intent evidence, none of those cases say it is not relevant at all. Indeed, the D.C. Circuit's opinion in the government suit reviewed the case law stating:

> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

253 F.3d at 59.

The citation of *Aspen Skiing Co.* is significant. In that case, the Supreme Court specifically pointed out the relevance of intent evidence to both attempted and actual monopolization claims:

> [T]he question of intent is relevant to both offenses. … In the latter case [the offense of actual monopolization] evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as

> "exclusionary" or "anticompetitive"--to use the words in the trial court's instructions--or "predatory," to use a word that scholars seem to favor. Whichever label is applied, there is agreement on the proposition that 'no monopolist monopolizes unconscious of what he is doing.'

472 U.S. at 602 (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2nd Cir. 1945)).

The Court approved of the jury instruction in the case that summarized the issue of exclusionary conduct as follows:

> To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.

Id., at 597. Design in this context included whether "Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.*, at 608. The Supreme Court went on to identify some particular types of evidence that may be sufficient to show specific intent to monopolize:

> Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or evidence that the conduct was not related to any apparent efficiency.

Id., at 608, n.39 (quoting R. Bork, The Antitrust Paradox 157 (1978)).

Judge Jackson's findings included just such evidence of retaliatory threats made that ceased only when the rival capitulated, and evidence that showed that when Microsoft perceived its own inability to compete on the merits, it sought market-sharing agreements instead. All of this evidence was relevant to show Microsoft's intent to maintain its monopoly position by means other than efficient competitive activity. All of it thus supported the finding of anticompetitive conduct with respect to the acts that the D.C. Circuit identified as exclusionary.

Another, and independent, ground for concluding that many of these fact findings were "necessarily decided" in the government case is through application of the principle of "remedial necessity." If a finding of fact supports the injunctive remedy ordered in a case, as here, then that finding has been "necessarily decided" in the prior action, just as if it were expressly held to support the judgment. Wright and Miller explain: "Although it is always possible that the same remedy might have been ordered on the basis of fewer findings, it is better to recognize a principle of remedial necessity that justified preclusion as to all findings deemed appropriate in justifying the remedy ordered." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 2241 at p. 550, and n. 12 (2d ed. 2002). See, e.g., *Tanker Hygrade No. 18, Inc. v. U.S.*, 526 F.2d 805, 810-12 (Ct.Cl. 1975) (findings in first action were cumulative, not alternative, because each supported injunction actually entered); *Greenberg v. Cutler-Hammer, Inc.*, 452 F.Supp. 1387, 1390-91 (D.C. Wis. 1978) (findings found necessary to support broad injunctive relief).

In the government case, Judge Kollar-Kotelly fashioned a remedial decree that expressly prohibited "threats of retaliation" by Microsoft against software and hardware vendors, "which have the capacity to chill ISV and IHV support for competing products even where the retaliation is prohibited." Memorandum Opinion at 148. In explaining the provision that broadened the stipulated remedy beyond actual retaliation, Judge Kollar-Kotelly stated:

> The factual and liability findings in this case portray a practice by Microsoft of threatened and actual retaliation against software and hardware vendors for engaging in action which promotes or supports non-Microsoft middleware. *See, e.g., Microsoft,* 253 F.3d at 72-73 (discussing Microsoft's dealings with Apple), 77 (describing Microsoft's "threats to Intel"). To remedy this action, Microsoft offers § III.F.1 of its remedy proposal which prohibits retaliation against ISVs and independent hardware vendors ("IHVs") for "developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on and software that competes with Microsoft Platform Software …" Memorandum Opinion at 229; footnote omitted.

Microsoft cannot reasonably dispute that Judge Jackson's findings of prior Microsoft threats of retaliation do not support a decree prohibiting further threats. *Findings of Fact* Nos. 93 through 132 all concern Microsoft's use of monopoly power through coercion and threats against software and hardware vendors, and should be accorded preclusive effect. These findings detail threats against Intel[2] (Nos. 93 – 103, primarily concerning Microsoft's attempts to prevent Intel's development of Native Signal Processor software), Apple[3] (Nos. 104-110, primarily concerning Microsoft's attack on QuickTime), RealNetworks[4] (Nos. 111-14, demand that RealNetworks abandon competing for control of multimedia streaming standards) and IBM[5] (Nos. 115-132, Microsoft pressure to reduce IBM's support for numerous rival products).

As discussed above, Judge Jackson summarized the significance of all of these findings supporting the broad finding that Microsoft had adopted a "business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist." *Finding of Fact*

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[2] "Microsoft was not content to merely quash Intel's NSP software. ... Faced with Gates' threat, Intel agreed to stop developing platform-level interfaces that might draw support away from interfaces exposed by Windows." *Finding of Fact* 102.

[3] "In their discussions with Apple, Microsoft's representatives made it clear that, if Apple continued to market multimedia playback software for Windows 95 that presented a platform for content development, then Microsoft would enter the authoring business to ensure that those writing multimedia content for Windows 95 concentrated on Microsoft's APIs instead of Apple's. The Microsoft representatives further stated that, if Microsoft were compelled to develop and market authoring tools in competition with Apple, the technologies provided in those tools might very well be inconsistent with those provided by Apple's tools. Finally, the Microsoft executives warned, Microsoft would invest whatever resources were necessary to ensure that developers used its tools; its investment would not be constrained by the fact that authoring software generated only modest revenue." *Finding of Fact* 106.

[4] Judge Jackson found that Bill Gates identified RealNetworks as an "adversary" and "authorized the payment of up to $65 million for a streaming software company in order to accelerate Microsoft's effort to seize control of streaming standards. It then entered an agreement in which RealNetworks was to find an attractive value-added position in the market and abandon the base streaming business. *Findings of Fact* 112 and 113.

[5] "When IBM refused to abate the promotion of those of its own products that competed with Windows and Office, Microsoft punished the IBM PC Company with higher prices, a late license for Windows 95, and the withholding of technical and marketing support. ... In July, Gates called an executive at the IBM PC Company to berate him about IBM's public statements denigrating Windows. Just a few days later, Microsoft began to retaliate in earnest against the IBM PC Company. ... In sum, from 1994 to 1997, Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft's offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate." *Findings of Fact* 116, 121, and 132.

132.

Findings of Fact 408-412

In the D.C. Circuit, Microsoft argued that the government had to show more than harm to its competitors to establish a violation of Section 2. The D.C. Circuit agreed:

> In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall,'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (quoting *Wyandotte Transp. v. United States*, 389 U.S. 191, 202, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967)); no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.[6]

Findings 408 through 412 contain Judge Jackson's findings directed at the issue of consumer harm. Finding 409 contains Judge Jackson's finding that "Microsoft also engaged in a concerted series of actions designed to protect the applications barrier to entry, and hence its monopoly power, from a variety of middleware threats, including Netscape's Web browser and Sun's implementation of Java." As the rest of the findings make clear, the other middleware threats included RealNetworks, Apple, IBM and Intel initiatives. Finding 410 specifically references Intel's NSP efforts. Finally, Judge Jackson assessed the effects of Microsoft's activities with respect to all the middleware threats that it confronted during the 1995 to 1999 period and found:

> Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft.

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[6] In these cases, Microsoft has argued that plaintiffs must bear an even heavier burden to show injury to competition than the government had in its equitable enforcement action. Regardless of the relative burden, it is not disputed that both the government and the competitor plaintiffs must show harm to competition and that these findings did just that with respect to the conduct Judge Jackson identified.

> The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest. *Finding of Fact 412*.

This is the very type of injury that Microsoft contended the government had to prove in order to establish that Microsoft's conduct did not simply cause harm to its competitors without any corresponding harm to competition.[7] This evidence was, thus, in Microsoft's view not only necessary but, indeed, indispensable to the judgment. For it now to claim that these findings were not necessary to the judgment because "[n]either the district court nor the Court of Appeals ascribed liability based on these findings" (Msft's Memo. At 25), simply shows the error in Microsoft's approach to the whole issue of determining which findings are "supportive" of the judgment.

For all these reasons, the Court should reject all of Microsoft's challenges to the application of collateral estoppel to all of the specific findings contained in Sun's Reply Appendix A.

DATED: December 6, 2002.

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[7] Indeed, in its latest brief seeking dismissal of various claims advanced by Sun, Microsoft argues that alleged harm to the Java platform "does not concern the purchase and sale of PC operating systems" and bears "no correlation to any reduction in output or increase in prices in Intel-compatible PC operating system." Microsoft's Reply Memorandum In Support Of Motion To Dismiss Claims 1-3, 5-7, 9-10 & 12-14 Of Sun's Amended Complaint And To Strike Certain Damages Demands, p. 5 (Nov. 22, 2002). In fact, this is the very issue that Judge Jackson addressed in Findings 408 to 412, finding extensive damage to the competitive process which in turn damaged consumers, primarily by denying them the benefits of innovation and consumer choice.

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