IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (CKK)
STATE OF NEW YORK, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (CKK) Next Court Deadline: March 4, 2002 Status Conference

PLAINTIFF LITIGATING STATES' OPPOSITION TO MICROSOFT CORPORATION'S MOTION TO AMEND THE SCHEDULING ORDER

Plaintiff Litigating States California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, West Virginia and the District of Columbia (collectively the "Plaintiff Litigating States") hereby oppose the motion filed by Defendant Microsoft Corporation ("Microsoft") on December 21, 2001 to amend the Scheduling Order entered by this Court on September 28, 2001 ("Scheduling Order"). That Microsoft stands to benefit from delay is obvious. It is equally obvious that the consumers and competitors who have been and are being harmed by Microsoft's monopolistic conduct stand to suffer further from the passage of

additional time. No "changed circumstance" has in any way reduced the importance of this Court proceeding expeditiously to fashion a remedy that will effectively redress Microsoft's unlawful monopolization.

INTRODUCTION

Microsoft makes two primary arguments in its motion to amend the Scheduling Order ("Microsoft's Mot."): (1) that the Plaintiff Litigating States' proposed remedies are far broader than Microsoft could have anticipated, based in part on plaintiffs' prior representations, and (2) that the intensive discovery now underway was never contemplated for this stage in the proceedings. Neither argument has merit.

Microsoft has been aware since at least the Joint Status Report that the remedies plaintiffs would likely propose at this stage of the proceedings would be broader in scope than the divestiture-dependent interim conduct remedies in the previous Final Judgment. Recognizing that, Microsoft tried — and failed — to convince this Court to limit the scope of relief in advance, before any discovery was taken or any revised remedial plans submitted. No selective parsing of the Joint Status Report can change these facts.

It is likewise clear that, notwithstanding Microsoft's current protestations, the Scheduling Order has always contemplated a period of intensive discovery. The Order provides, for example, for the deposition of up to thirty fact witnesses per side (Scheduling Order at Section 5(h)), as well as document production and other written discovery, all to be completed in less than four months. The maximum rate

at which Microsoft now claims discovery can be accomplished is utterly inconsistent with the pace of activity that the Scheduling Order has always demanded.

This motion is little more than a recycling of Microsoft's previously rejected arguments for delay. This proceeding should continue to move forward to a prompt and fair conclusion pursuant to the terms of the existing Scheduling Order.

ARGUMENT

1. The Scope of Plaintiff Litigating States' Remedial Proposals Provides No Basis for Delay.

a. Microsoft's "Ambush" Claim is Without Foundation

In seeking to justify its proposed wholesale jettisoning of this Court's Scheduling Order, Microsoft insists that the scope of Plaintiff Litigating States' Remedial Proposals is broader than it anticipated or could have anticipated. Microsoft repeatedly claims, for example, that it had no reason to expect a broad, remedial proposal:

- such a plan "cannot be reconciled with plaintiffs' prior representations to the Court in the Joint Status Report" (Microsoft's Mot. at 2);
- "[o]ver the last month, the non-settling States have revealed that they intend to pursue a program of litigation that is considerably broader than what plaintiffs collectively proposed in the Joint Status Report" (*id.*); and
- "[p]laintiffs certainly gave no indication that the provisions of the prior judgment would serve only as a starting point." (*Id.* at 3.)

These assertions are flatly contradicted by the record. The Joint Status Report, submitted by the parties on September 20, 2001, makes absolutely clear

that plaintiffs considered the conduct-related provisions of Judge Jackson's final judgment as the beginning point, and not the outer bound, of appropriate relief in this case once divestiture was no longer an option. In light of the weight given by Microsoft to its claim of surprise, one of the introductory paragraphs of that Joint Status Report, found on page 2, warrants quoting in full:

> Plaintiffs have advised Microsoft of their position that, in order to unfetter the market from Microsoft's anticompetitive conduct, to deny Microsoft the fruit of its violations of the Sherman Act, and to "ensure that their remain no practices likely to result in monopolization in the future," *see Microsoft*, 253 F.3d at 103 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)), they will seek injunctive relief modeled on the conduct-related provisions of the prior Final Judgment, with such additional provisions as Plaintiffs may conclude are necessary to ensure that the relief is effective, given their decision not to seek a structural reorganization of the company. Plaintiffs believe that, given their view of the scope of Microsoft's violations, such provisions are both appropriate and essential to achieve the proper purposes of an antitrust remedy.

(Joint Status Report at 2 (emphasis added).)

Microsoft itself stated elsewhere in the Joint Status Report that "[p]laintiffs have advised Microsoft that they intend to pursue *all* of the vacated conduct provisions . . . together with such *additional* provisions as Plaintiffs conclude are necessary . . . ." (*Id.* at 30 (emphasis in original).) Despite Microsoft's current mischaracterization of the Joint Status Report, Microsoft has been or certainly should have been well aware, since well prior to the entry of the Scheduling Order,

that plaintiffs intended to pursue conduct-related remedies above and beyond those contained in the previous Final Judgment.[1]

b. Broad Remedies Are Demanded by Antitrust Law and the Court of Appeals Decision in This Case

Plaintiff Litigating States' determination to seek broad remedies is wholly consistent with the Court of Appeals' decision. As the Court of Appeals held, "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir.) (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)), *cert. denied*, 122 S. Ct. 350 (2001) (citation omitted). Moreover, because "the inquiry as to the appropriate [antitrust] remedy necessarily looks forward," the analysis of the proper remedy frequently entails examination of "evidence that was not placed into the record at trial or that did not even exist until after judgment on the merits." 1 Areeda & Hovenkamp, *Antitrust Law* (2d ed. 2000) ¶ 325, at 253.

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[1] Microsoft repeatedly quotes plaintiffs' statement in the Joint Status Report that they "have already taken steps to narrow and focus the issues remaining on remand." (Microsoft's Mot. at 3, 8.) This statement refers specifically to the tying claim and divestiture remedy abandoned by the plaintiffs. The immediately following sentence reads: "As Plaintiffs informed Microsoft on September 6, 2001, they will not pursue either the Section 1 tying claim or a structural reorganization of Microsoft on remand." (Joint Status Report at 21.) This position remains unchanged.

The Court of Appeals emphasized that fashioning an appropriate remedy consistent with its guidelines required an evidentiary hearing to resolve any factual disputes between the parties. 253 F.3d at 101. Given the Court of Appeals' explanation of the broad purposes of Section 2 remedies and of the need for an evidentiary hearing to, among other things, "update and flesh out the available information," *id.* at 49, on marketplace developments and the likely efficacy of various remedies, Microsoft should not be surprised at the scope of the pending remedy proposals or of these proceedings.

Microsoft's repeated protestations about the supposedly draconian and overbroad relief proposed by the Plaintiff Litigating States – protestations that are strikingly lacking in specifics – reduce to little more than the assertion that the scope of Plaintiff Litigating States' remedial proposals exceeds that of Microsoft's proposed settlement with the Department of Justice. It surely does. Yet, contrary to Microsoft's suggestion, that is not because the Plaintiff Litigating States have ignored this Court's directive to consider the relationship between their remedy proposal and the decision by the Court of Appeals. The Plaintiff Litigating States have already outlined in broad terms, in their remedy submission of December 7, 2001, and in detailed answers to interrogatories, how their proposal derives from the violation of Section 2 affirmed by the Court of Appeals.[2] The full exposition of that relationship will be forthcoming, of course, when the Plaintiff Litigating States

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[2] A copy of the Supplemental Response of the Plaintiff Litigating States to Defendant Microsoft Corporation's First Set of Interrogatories is attached hereto as Exhibit A. (*See also* Microsoft Mot. at Ex. H.)

put on their case at the upcoming remedies hearing. Microsoft's constant refrain that this proposal is nothing more than a recipe developed to suit disgruntled competitors is little more than idle name-calling, and can provide no shield against the timely imposition of an effective remedy here.

At the September 28, 2001 scheduling conference, the Court and the parties were well aware of (a) plaintiffs' statements in the Joint Status Report as to the likely scope of their remedy proposal, and (b) Microsoft's urging of a much more protracted approach, including an advance limitation on the scope of permissible relief. As Microsoft acknowledges, the Court declined to "rule on the scope of the relief in the abstract." (Sept. 28, 2001 Tr. at 10.) That hearing resulted in the Scheduling Order that has and should continue to govern this case. Plaintiff Litigating States remain prepared to follow that Order, and Microsoft should be directed to do likewise.

2. Intensive Discovery Has Always Been Contemplated.

Microsoft also feigns surprise at the fact that intensive, time-consuming discovery is involved in this proceeding and offers its own version of what may be termed the "impossibility" defense. Microsoft argues, for example, that "[e]ven if the parties are able to schedule three [fact witness] depositions a week . . . the depositions of Microsoft employees could consume as many as ten weeks. That means the non-settling States will likely be deposing Microsoft employees into April 2002." (Microsoft's Mot. at 13.)

But the Scheduling Order has since last September contemplated up to thirty fact witness depositions per side during the discovery period of less than four

months. Microsoft's claimed "maximum pace" for the depositions of its employees is simply impossible to reconcile with the clear terms of that Order. Likewise, if third party discovery were to take as long as Microsoft now claims (i.e. at least six months), then such discovery should have commenced at least two months *before* the Scheduling Order allowed discovery to begin.

Nor are these arguments advanced by Microsoft's effort to rewrite the record with respect to the anticipated scope of discovery. Microsoft again offers misleading and selective excerpts from the Joint Status Report. For example, Microsoft states the plaintiffs took the position that "[f]urther discovery can be *focused primarily* on updating information relating to Microsoft's on-going conduct." (Microsoft's Mot. at 3.) The entire sentence makes clear that plaintiffs expected a significantly broader scope of discovery:

> Further discovery can be focused primarily on updating information relating to Microsoft's on-going conduct, especially with regard to Windows XP (the latest version of its operating system); on the way the market has evolved since the District Court's Final Judgment was entered; on what additional conduct restrictions may be necessary given that there will not be a breakup of Microsoft; and on evidence related to the efficacy of both Plaintiffs' and Microsoft's ultimate proposed final judgments.

(Joint Status Report at 23.) Significant discovery is underway, as expected, and Microsoft should be required to cooperate in the scheduling necessary for the current discovery cut-off to be met.

3. Microsoft's Latest Proposed Delay Seeks More Time Than It Said It Needed for Discovery on Judge Jackson's Divestiture Plan.

This is obviously not the first delay Microsoft has sought in these proceedings. Earlier in this litigation, Microsoft demanded a discovery period of less than four months (excluding trial witness discovery) when it was faced with the full breadth of Judge Jackson's final judgment, which included a divestiture plan Microsoft described as "radical," "unprecedented" and having the potential to "damage, if not destroy, the company's commercial viability." (Defendant Microsoft Corporation's Position as to Future Proceedings on the Issue of Remedy ("Microsoft's Rem. Psn. Paper") at 2, 6 and Exhibit A.)[3] Now Microsoft demands a discovery period of over nine months, more than double the length of the period which Microsoft deemed sufficient to defend against "relief [that] threatens Microsoft's very corporate existence." (Microsoft's Rem. Psn. Paper at 8-9.) Indeed, Microsoft's proposed extended discovery period would be almost *twice* as long as the time between the filing of plaintiffs' complaints and the beginning of the liability trial.

In the Joint Status Report Microsoft argued that "if the Court does not accept Microsoft's position, several months of intensive discovery will be required – and possibly more, depending on what provisions Plaintiffs seek in addition to the vacated conduct provisions." (Joint Status Report at 4.) Foreshadowing its current

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[3] Exhibit A to Microsoft's Rem. Psn. Paper is a draft scheduling order that Microsoft proposed be entered on or after the May 24, 2000 hearing before Judge Jackson. It provides for the immediate commencement of discovery and a discovery deadline (excluding document and deposition discovery of trial witnesses) of September 22, 2000.

delaying motion, Microsoft also argued that at least a six month delay in holding the remedy hearing would be necessary if the proposed remedy covered the areas addressed by the interim conduct-related remedies, and implied that even more time for discovery would be required if the proposed remedy went further than the conduct-related remedies. (Joint Status Report at 8-11.) Confronted with these arguments and the clear statements in the Joint Status Report that plaintiffs might seek "additional provisions" beyond the scope of the previous final judgment (*see, e.g.*, Joint Status Report at 2, 3), the Court dismissed Microsoft's position and entered the current expedited Scheduling Order.

Apparently motivated by the knowledge (now disclaimed) that the scope of relief sought would be broader than the interim conduct-related remedies, Microsoft attempted to obtain an early determination as to the outer boundaries of appropriate relief. (*See, e.g.*, Joint Status Report at 31.) The Court also rejected this argument. (Microsoft's Mot. at 2.)

Undeterred, Microsoft attempted to delay proceedings by moving to stay discovery pending review of the Revised Proposed Final Judgment. (*See* Defendant Microsoft Corporation's Submission Regarding Further Proceedings in Civil Action No. 98-1233 at 2.) This request was also rejected. (Microsoft's Mot. at 2.)

Now Microsoft again moves to delay these proceedings, reviving arguments that have been considered and rejected, including the claim that Microsoft will be

unprepared for a hearing to consider the appropriate remedy in this case.[4] These arguments are no better now than when the Court previously rejected them.

4. The Parties Have Resolved Their Discovery Disputes to Date.

For reasons that are not at all clear, Microsoft spends a number of pages belaboring discovery issues that the parties have already resolved. Thus, Microsoft is correct in noting that Plaintiff Litigating States substantially narrowed the scope of their document requests (both in terms of number of requests and number of individuals whose files must be searched) in response to objections by Microsoft and that as a result a compromise was reached, and that its production of documents should be complete in a few weeks. (Microsoft's Mot. at 5-7.)

Microsoft claims that it "was informed" of – when in fact it agreed to[5] – Plaintiff Litigating States' reservation of the right to serve limited requests for documents in connection with the deposition of any witness whose files had not been previously searched. This agreement was an important *quid pro quo* for a concession by the Plaintiff Litigating States to limit drastically the number of

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[4] Microsoft also suggests that the number of witnesses on Plaintiff Litigating States' preliminary witness list will necessitate a remedies hearing that equals or exceeds the length of the liability hearing. (Microsoft's Mot. at 12.) Plaintiff Litigating States believe that, with appropriate procedures in place, the necessary number of witnesses can be accommodated in a remedies proceeding that will be substantially shorter than the liability trial.

[5] Letter from John Schmidtlein of Williams & Connolly dated December 11, 2001 to Richard C. Pepperman of Sullivan & Cromwell asking for Microsoft's agreement to such subpoenas in exchange for Plaintiff Litigating States' agreement to limit Microsoft's search of employee files (attached as Exhibit B); letter from Mr. Pepperman dated December 13, 2001 to Mr. Schmidtlein confirming that Mr. Schmidtlein's letter of December 11 "accurately reflect[s] the agreement reached during our discussions." (attached as Exhibit C).

individuals whose files Microsoft had to search (only 54 people out of a company of tens of thousands of employees).[6] Microsoft now complains that this agreed upon procedure will delay discovery. (Microsoft's Mot. at 13.) The reality, of course, is that this massive narrowing of the files in which Microsoft must search for responsive documents will greatly expedite the completion of discovery in this case.

5. The Proposed Deal with the DOJ in Fact Underscores the Need for Expedition in This Proceeding.

To bolster its latest effort at delay, Microsoft argues that "there is much less of a need now than there was in September to proceed expeditiously because Microsoft began complying with the RPFJ on December 16, 2001." (Microsoft's Mot. at 12.) Microsoft does not of course mention that many of the key provisions of the RPFJ will be ineffective for some time to come: *e.g.*, the API disclosure provision may be delayed for up to one year after the submission of the RPFJ (Section III.D of the RPFJ); the communications protocol disclosure provision may also be delayed for nine months (Section III.E of the RPFJ); and the end-user desktop configuration remedy faces a delay of up to one year after the submission of the RPFJ (Section III.H of the RPFJ). These lengthy delays alone – wholly apart from the substantive deficiencies in the DOJ proposal – make clear that the RPFJ is no reason to delay these proceedings.

In fact, the pendency of the RPFJ proceeding counsels for expedition here. As Microsoft's motion repeatedly emphasizes, the Plaintiff Litigating States' Remedial

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[6] And with respect to these 54 employees, Plaintiff Litigating States have agreed that Microsoft need not search all of these employees' files for documents responsive to all of the document requests. *See supra* note 5.

Proposals are fundamentally different than the remedy proposals embodied in the DOJ settlement. Microsoft has, in its response of December 12, 2001, offered the DOJ deal as its alternative relief proposal in this litigation. Accordingly, pursuant to the procedural directive of the Court of Appeals, the Plaintiff Litigating States' and Microsoft's contrasting remedy proposals, and in particular the necessity for conduct provisions different than those in the DOJ settlement, will be tested and evaluated in these remedy proceedings in a contested evidentiary hearing. There is every reason for the Court to have the benefit of the record of that contested evidentiary hearing before it reaches any conclusion about whether the RPFJ passes statutory muster under the Tunney Act. Unnecessary delay in these proceedings will make that more difficult to achieve.

CONCLUSION

It has now been more than three years since the commencement of the liability trial, which ultimately resulted in the en banc Court of Appeals finding Microsoft liable for unlawful monopolization. As the Court of Appeals noted, it has been over six years since Microsoft first began its extensive illegal campaign, and "six years seems like an eternity in the computer industry." *Microsoft*, 253 F.3d at 49. It is no surprise that Microsoft would like to continue to delay the proceeding that most threatens to deprive it of the ability to engage in the practices condemned as unlawful by the Court of Appeals. This Court's existing Scheduling Order is the best path to the prompt imposition of a remedy that will prevent further harm to competition and consumers.

Dated: December 31, 2001

Respectfully submitted,

/s/ Brendan V. Sullivan, Jr.
Brendan V. Sullivan, Jr. (Bar No. 12757)
Steven R. Kuney (Bar No. 253286)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel: (202) 434-5000
Fax: (202) 434-5029

Counsel for the Plaintiff Litigating States California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah and the District of Columbia

/s/ Thomas Greene
Thomas Greene
Office of the Attorney General
of the State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Tel: (415) 703-5555

For the Plaintiff Litigating States

/s/ Douglas L. Davis
Douglas L. Davis
Assistant Attorney General for the State
of West Virginia
Consumer Protection/Antitrust Division
P. O. Box 1789
Charleston, West Virginia 25326-1789
Tel: (304) 558-8986

Counsel for the Plaintiff Litigating State West Virginia