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 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' REVISED PROPOSED FINAL JUDGMENT

At the conclusion of the hearing on remedies on May 24, 2000, the Court directed Plaintiffs to present a clean copy of a form of final judgment that reflected the proceedings. We discuss below the changes to the Proposed Final Judgment that are included in the attached Revised Proposed Final Judgment and certain procedural issues.

Revisions to the Proposed Final Judgment

We have changed the preface of the order to reflect the record in the case.

In response to colloquy with the Court at the May 24 hearing, we have added a sentence to section 2.b to make clear that nothing in section 2.b.ii will prohibit the Operating Systems Company and the Applications Company from licensing technologies (other than Middleware

Products) to one another on a nondiscriminatory basis for use in the other's products if such technologies are not offered as separate products.

We have fixed a typographical error in section 6.a by changing the cross-referenced section from 2.d to 2.e.

In order to permit orderly resolution of any questions that might arise regarding stays pending appeal, we have changed in section 6.a the period before which the Final Judgment takes effect from 30 to 90 days. We have made conforming changes to sections 1.d.iv, 4.a, 4.e.i, and 4.e.iii.

In response to a suggestion of the Court, we have added a new definition, section 7.o, which defines "Microsoft." We have amended section 6.b to conform to this change. We also have renumbered the remaining definitions and amended each reference to those definitions in the Final Judgment to reflect their new numbers.

Finally, in response to an inquiry of the Court, we have changed the threshold for a Covered Shareholder in section 7.h to direct or beneficial ownership of 5 percent of the voting stock of the firm.

We have also made several minor, non-substantive typographical and stylistic corrections.

Microsoft Has Not Engaged Responsibly on the Issue of Process

At the conclusion of the May 24 hearing, Microsoft filed a document captioned "Order of Proof," evidently in order to support an argument that it has not had an adequate opportunity to be heard on remedy issues. Microsoft has not, however, engaged responsibly on those issues.

To the contrary, its eleventh-hour submission of the Offer of Proof appears to be just a cynical ploy calculated to raise diversionary issues on appeal.

Microsoft has known for months of Plaintiffs' interest in remedies along the lines they proposed on April 28 and has had ample opportunity since the filing of the Proposed Final Judgment to set forth its substantive and procedural concerns. It could, for example, have filed declarations from some or all of the individuals listed in its Offer of Proof. At the very least, it could have articulated in precise terms why it believed it needed more time and specified what kind of additional process it believed it needed. Microsoft did neither.

The Court addressed remedy matters in Scheduling Order No. 8, issued on April 5, 2000. That Order reflected the colloquy among the parties and the Court in chambers conferences on April 4 and April 5, in which the Court repeatedly made clear its desire to complete the remedy proceedings "within sixty days" (Tr. 4/4/00, at 11, 14, 19). The Court scheduled "a hearing on remedies" for May 24 and ordered Microsoft, among other things, to set forth its recommendations for proceedings on the issue of remedy by May 10. While the Court did not require Microsoft to describe "the process that should be employed" in the remedy phase until Plaintiffs submitted their proposed remedy on April 28 (Tr. 4/5/00, at 7-8), it ordered Microsoft to specify whatever process it desired -- such as depositions or an evidentiary hearing -- on May 10.

Plainly, the Court expected to conclude the remedy proceedings at the "hearing on remedies" on May 24. If Microsoft had any doubt about that, it could have sought clarification of the Order, or it could have sought an extension of time for good cause shown. It cannot now argue surprise because it obviously knew, and its conduct at the May 24 hearing made clear that

it knew, that the May 24 hearing was to be a substantive hearing on the merits of the remedy proposals.

Microsoft did not seek clarification of the Scheduling Order, nor did it set forth cause for an extension of the schedule. Instead, in its May 10 filing, Microsoft submitted nearly 100 pages of legal memoranda that made numerous unsubstantiated assertions but did not include any declarations or even refer to the kinds of evidence described in the Offer of Proof. Its paper captioned "Position as to Future Proceedings on the Issue of Remedy" filed on that date said only in conclusory terms that "substantial time for preparation and a lengthy evidentiary hearing will be required" (p. 2). While the document referred to Microsoft's need for "time to conduct discovery and prepare for a full trial" (p. 8), it did not identify a single individual whom Microsoft wanted to depose, a single topic for discovery or a single third-party or type of third-party from which it needed discovery, a single witness or type of witness that it intended to call on its behalf, or a single specific factual assertion in Plaintiffs' April 28 remedy submission that it controverted or about which it needed discovery.[1]

[1]Microsoft did suggest a factual dispute in one of its accompanying papers. Microsoft asserted that Plaintiffs' expert Rebecca Henderson of MIT was wrong when she said that "Windows 2000 PCS cannot log in to a Unix Kerberos server" (Microsoft's Summary Response at 6, quoting Henderson Decl. ¶ 50). Microsoft repeated this allegation at the May 24 hearing (Tr. 5/24, p.m. at 24) but did not, even then, identify any other fact asserted by Plaintiffs that it controverted. This allegation is remarkable, both because it is the only fact that Microsoft has sought to controvert and because the allegation is so plainly wrong and, indeed, disingenuous. Microsoft has attacked a sentence fragment; the actual sentence from the Henderson declaration has a very different meaning, one that Microsoft does not controvert. What Professor Henderson said is this: "For instance, according to a Windows 2000 product manager at Microsoft, Windows 2000 PCS cannot log in to a Unix Kerberos server and receive access to Windows 2000 resources such as file and print. RX 13, at 3 (Interactive Week 2/28/00)." (Henderson Dec. At para 50) (material omitted by Microsoft underlined).

Plaintiffs noted these omissions in their May 17 Reply Brief (at pp. 3, 68-69), and Microsoft filed its own further Reply on May 22. This document was not called for by the Court's orders. Microsoft decided to file it on its own initiative and obviously felt free to address whatever issues it chose. Once again, it chose not to submit any declarations, and this time it chose not to address process at all.

Even at the hearing on May 24, Microsoft was not forthright. After the Court invited Microsoft to address process (Tr. 5/24, a.m. at 36) and later asked what discovery Microsoft contemplated, Microsoft replied only that it wanted to take depositions of Plaintiffs' declarants, that "[w]e will have trial witnesses" and that "[w]e may want limited third-party discovery." (Tr. 5/24, a.m. at 62-63.) Not even then did Microsoft identify any of its witnesses, anything about which they would testify, or any fact asserted by Plaintiffs that Microsoft intended to controvert. And, as to depositions, Plaintiffs and their declarants have been ready for depositions since April 28, but Microsoft has not sought to depose a single one.

It was only after the Court said that it was "not contemplating any further process" and agreed with the parties on a schedule regarding "a form of final judgment" (Tr. 5/24, p.m. at 33-34) that Microsoft disclosed the existence of and submitted its Offer of Proof. The fact that Microsoft had prepared but kept secreted in its briefcases a 35-page Offer of Proof concerning testimony from 16 different witnesses that it allegedly wanted to offer itself demonstrates both that Microsoft was not genuinely surprised about what was expected of it and that it was perfectly capable of being forthright with the Court but chose not to do so.

A party that was genuinely interested in having discovery or further proceedings would not have behaved that way. It would have made timely and specific requests for more process; it

would have attempted to show good cause for a continuance; and, if it had evidence or even a bona fide offer of proof, it would have submitted it when process issues were discussed. It would not have waited until the conclusion of the hearing.

Dated: May 26, 2000

Respectfully submitted,

_____/s/_____

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