EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, vs. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General DENNIS C. VACCO, *et al.*, Plaintiffs, vs. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, vs. DENNIS C. VACCO, Attorney General of the State of New York, In his official capacity, *et al.*, Counterclaim-Defendants.	

FILED
DEC 0 3 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

DEFENDANT MICROSOFT CORPORATION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' JOINT MOTION TO PERMIT "SUPPLEMENTAL" CROSS-EXAMINATION

Local Rule 105 provides the simple and straightforward response to plaintiffs' motion to have two lawyers from their side examine each of Microsoft's witnesses. That rule states that "[e]xcept by permission of the Court *only one attorney on*

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each side shall examine a witness, address the Court on a question arising in a trial, or address the Court or jury in final argument" (emphasis added). Plaintiffs do not dispute that Local Rule 105 is controlling. In fact, they cite the rule in their memorandum as authority for the proposition that "a federal district court enjoys great discretion to manage the trial." (*See* Pls.' Mem. at 6 & n.2).

Consistent with Local Rule105, the Court ruled at the final pretrial conference on October 9, 1998 that only one lawyer on each side should examine a witness: "I agree. I think that it should be one lawyer per witness." (10/9/98 Tr. at 13.) Rather than identify a compelling reason to depart from the traditional "one-lawyer-one-witness" rule, plaintiffs devote the lion's share of their memorandum to advancing the unremarkable propositions that consolidation does not merge two cases into a single action and that cross-examination is a fundamental aspect of our judicial process. (*See* Pls.' Mem. at 3-8.) Both propositions are entirely beside the point. They are not grounds for the Court to revisit its ruling at the pretrial conference, nor do they justify a departure from the clear import of Local Rule 105.

Although plaintiffs pay lip service to the notion that their interests are not identical (*see* Pls.' Mem. at 8-9), they fail to identify a single respect in which their interests diverge in any meaningful manner. Plaintiffs do not claim that there is a potential conflict of interest between the Department of Justice and the States. Nor do they assert that counsel for plaintiffs have been unable to work together harmoniously. To the contrary, plaintiffs acknowledge that counsel "in both actions have cooperated and worked closely together." (Pls.' Mem. at 8.)

Plaintiffs also do not seriously contend that the claims asserted by the Department of Justice and the States differ in any substantive respect. Plaintiffs simply point out that "the pendent state law claims asserted by Plaintiff States may permit additional relief" and that, "if they prevail, Plaintiff States, unlike the United States, are entitled to attorney's fees." (Pls.' Mem. at 9.) Plaintiffs fail to explain, however, why those two supposed differences necessitate "supplemental" cross-examination or require that "all Plaintiffs" be permitted "to adduce evidence they believe important to the development of their respective cases." (Pls.' Mem. at 9.) There may be "differences between the parties" (Pls.' Mem. at 9), but none that requires separate cross-examination in contravention of Local Rule 105.

Plaintiffs also note that Microsoft has asserted counterclaims against the States. (Pls.'s Mem. at 8.) Plaintiffs do not contend, however, that those counterclaims raise any issues different from those raised by plaintiffs' complaints. Indeed, the States took the exact opposite position in their answer to Microsoft's counterclaims, asserting the following defense: "The Counterclaim is not appropriately before this Court because any issue raised therein is implicated by the Sixth and Seventh Affirmative Defenses which Microsoft has already asserted in this action." (Counterclaim-Defendant States' Answer to Microsoft Corporation's Counterclaim at 6.) While Microsoft obviously disagrees with that legal assertion, the States are estopped from taking a contrary position now.

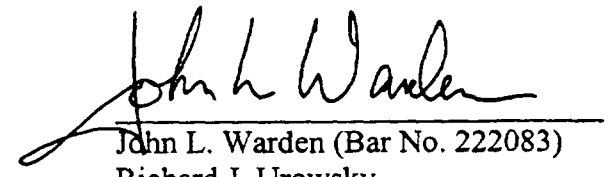
Finally, the history of this litigation belies plaintiffs' assertion that their interests differ in any meaningful respect. The States amended their original complaint on July 17, 1998 to eliminate their purported claim regarding Microsoft Office, which the

Department of Justice had not alleged. The Court then granted Microsoft summary judgment on the States' monopoly leveraging claim, thus eliminating the only other claim alleged by the States but not by the Department of Justice. In addition, lawyers from the Department of Justice have taken the lead in nearly every deposition taken in this action. In fact, representatives of the States did not ask a single question in 46 depositions, and they did not even attend an additional 25 depositions. For plaintiffs now to claim that "supplemental" cross-examination is necessary to "protect all parties' rights" and "develop a fair and accurate trial record" is disingenuous to say the least. (Pls.' Mem. at 10.)

For the foregoing reasons, the Court should deny plaintiffs' joint motion to permit "supplemental" cross-examination.

Dated: Washington, D.C.
December 3, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 1998, I caused a true and correct copy of the foregoing Defendant Microsoft Corporation's Memorandum in Opposition to Plaintiffs' Joint Motion to Permit Limited Supplemental Cross-Examination to be served by facsimile and hand upon:

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2000, I served a copy of the foregoing Plaintiffs' Joint Reply On Their Motions For Summary Dismissal Of Microsoft's Motion For Leave To File A Motion For Stay Pending Appeal On The Ground That It Is Premature, Or To Defer Consideration Pending A Determination As To Jurisdiction, by Federal Express next-day delivery upon the following:

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