From: Dan@hal-pc.org@inetgw
To: Microsoft ATR
Date: 1/24/02 11:08am
Subject: Microsoft Settlement

I am attaching my Comments as a Text File called "MS-DOJ.txt".

Daniel Maddux

Renata Hesse
Trial Attorney
Suite 1200
Antitrust Division
DEPARTMENT OF JUSTICE
601 D Street, NW
Washington, DC 20530

RE: Proposed MICROSOFT Antitrust Settlement

I am submitting these comments regarding the November 01, 2001 proposed settlement between Microsoft and the Department of Justice ("DOJ"). For the following reasons, I think the settlement is NOT in the public interest and should be rejected. Furthermore, I think the DOJ should pursue Judge Jackson's remedy of breaking MICROSOFT into 2 companies. I have divided my comments into 2 sections: General and Specific Objections. My General Objections address the proposed settlement in general. My Specific Objections parse the proposed Final Judgment line by line.

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GENERAL OBJECTIONS

The proposed Final Judgment defeats the DOJ's goal in settling this case. Allegedly the DOJ is settling this case to devote more time and resources to the September 11, 2001 terrorist attacks (see "Circumstances Had Role in U.S.-Microsoft Deal" at http://www.washingtonpost.com/ac2/wp-dyn/A32665-2001Nov2?language=printer). However, the proposed Final Judgment requires more time and resources to implement than Judge Jackson's remedy of splitting MICROSOFT into 2 companies. This proposed Final Judgment requires the DOJ to monitor MICROSOFT'S compliance with this proposed Final Judgment and prosecute MICROSOFT when it fails to comply with this proposed Final Judgment. Monitoring MICROSOFT'S compliance with this proposed Final Judgment and prosecuting MICROSOFT when it fails to comply with this proposed Final Judgment will require the DOJ to devote additional time and resources to this case. Splitting MICROSOFT into 2 companies does not require the DOJ to monitor MICROSOFT'S compliance with this proposed Final Judgment and prosecute MICROSOFT when it fails to comply with this proposed Final Judgment. Since splitting MICROSOFT into 2 companies does not require the DOJ to monitor MICROSOFT'S compliance with this proposed Final Judgment and prosecute MICROSOFT when it fails to comply with this proposed Final Judgment, splitting up MICROSOFT does not require the DOJ to devote additional time and resources to this case. Since this proposed Final Judgment requires the DOJ to devote more time and resources to this case than Judge Jackson's remedy of splitting MICROSOFT into 2 companies, this proposed Final Judgment defeats the DOJ's goal in settling this case.

The proposed Final Judgment fails to protect competition. The goal of United States' Antitrust Law is to protect competition. Some means of protecting competition from the antitrust violations of a monopolist like MICROSOFT are:

* punishing the monopolist
* deterring other parties from violating the law.

This proposed Final Judgment fails to accomplish any of these means.

First, this proposed Final Judgment fails to punish MICROSOFT. This proposed Final Judgment does not require MICROSOFT to pay a fine. Nor does it require MICROSOFT to reimburse purchasers of WINDOWS 98 upgrades for the $40 monopoly tax that it imposed on these customers (see Paragraphs 63-65 on Pages 32-33 of Judge Jackson's FINDINGS OF FACT at http://www.dcd.uscourts.gov/ms-findings2.pdf). Nor does it require MICROSOFT to pay restitution to NETSCAPE (now a division of AOL) for the harm it inflicted on NETSCAPE's Web Browser (see Pages 177-190 of Judge Jackson's FINDINGS OF FACT). Nor does it require MICROSOFT to pay restitution to SUN MICROSYSTEMS for the harm it inflicted on SUN's JAVA software (See Pages 190-202 of Judge Jackson's FINDINGS OF FACT). Nor does it require MICROSOFT to disgorge its unlawfully obtained profits from these antitrust violations (a corporation enjoying a Rate of Return over 30% is generally considered a monopoly. Thus, MICROSOFT should be required to pay the government all of its profits exceeding a 30% Rate of Return starting from the filing date of this case). Nor does it prevent MICROSOFT from leveraging its monopoly in the PC market into other markets, like the Server Market, the Handheld Computer Market, the Television Set Top Box Market, the game console market, the PDA Market, the Telephone Market (particularly the Cell Phone Market), or other markets. Nor does it prevent MICROSOFT from bundling its web browser, streaming media player, or other software into its operating systems. Nor does it prohibit MICROSOFT from adding proprietary extensions to open standards like KERBEROS to prevent interoperability with other operating systems. Furthermore, every restriction in this proposed Final Judgment contains an exception that allows MICROSOFT to continue it current business practices unchanged (See, for example, "States Scorning U.S.-Microsoft Deal" at http://www.washingtonpost.com/ac2/wp-dyn/A27205-2001Nov1?language=printer, "Accord Called Win For Software Giant" at http://www.washingtonpost.com/ac2/wp-dyn/A27196-2001Nov1?language=printer, "Settlement is 'a reward, not a remedy'" at http://news.cnet.com/news/0-1003-202-7763195.html, "Friends, foes see no change" at http://www.boston.com/dailyglobe2/306/business/Friends_foes_see_no_changeP.shtml, "MS-DOJ Pact Disappoints" at http://dailynews.yahoo.com/htx/zd/20011109/tc/ms-doj_pact_disappoints_1.html, and "Not even a slap on the wrist for bully Microsoft" at http://www0.mercurycenter.com/premium/opinion/columns/lenard8.htm). For example, III.H.2. allows end users or OEMs to designate a Non-Microsoft Middleware Product to be invoked in place of a Microsoft Middleware Product. However, VI.N. defines "Non-Microsoft Middleware Product" as software "... (ii) of which at least one million copies were distributed in the United States within the previous year". Since almost *no* non-MICROSOFT software (except possibly AOL Instant Messenger) had a distribution of at least one million copies in the United States within the previous year, III.H.2. does not require MICROSOFT to change their current practice of preventing end users and OEMs from designating Non-MICROSOFT Middleware Products in place of MICROSOFT Middleware Products. Finally, this proposed Final Judgment does not even require MICROSOFT to allocute to the charges brought against it. Since this proposed Final Judgment does not punish MICROSOFT *in any way*, this proposed Final Judgment does not protect competition.

This proposed Final Judgment does not deter other parties from violating the law. A judgment should encourage parties to obey the law. However, this proposed Final Judgment has the opposite effect; it encourages parties to violate the law. Since this proposed Final Judgment does not punish MICROSOFT *in any way*, other monopolists are encouraged to violate United States Antitrust Law, knowing that they too will not be punished. Since this proposed Final Judgment will encourage other

monopolists to violate our antitrust laws, it does not deter other parties from violating the antitrust laws. Since this proposed Final Judgment does not deter other parties from violating the antitrust laws, this proposed Final Judgment does not protect competition.

Further, this proposed Final Judgment encourages crackers (malicious programmers who break into other people'e computers) to violate the law and crack computers running MICROSOFT software. If caught, they can defend themselves by claiming they cannot obtain justice from MICROSOFT in a court of law. Also, other nations will refuse to honor extradition treaties with the United States to extradite crackers who attack our computers, citing this proposed Final Judgment as evidence that their citizens cannot obtain a fair trial in the United States. Since this proposed Final Judgment will encourage crackers to crack computers running MICROSOFT software and other nations to dishonor extradition treaties with the United States, this proposed Final Judgment will encourage persons and companies to violate our laws.

Finally, this proposed Final Judgment is an illusory and ineffective remedy because, in practice, the DOJ will not enforce it. As stated above, this proposed Final Judgment requires the DOJ to monitor MICROSOFT'S compliance with this proposed Final Judgment and prosecute MICROSOFT when it fails to comply with this proposed Final Judgment. Also as stated above, allegedly, the DOJ is settling this case to devote more time and resources to the September 11, 2001 terrorist attacks. Since the DOJ is settling this case to devote more time and resources to the September 11, 2001 terrorist attacks, the DOJ does not want to expend any more time and resources on this case. Futhermore, President Bush is a Republican. Republican Presidents and administrations historically are pro-business and do *not* enforce the antitrust laws. The fact that the DOJ surrendered the remedy of splitting MICROSOFT into 2 companies, combined with the DOJ's capitulation to this proposed Final Judgment, indicates that the Bush administration will not enforce the antitrust laws, or this proposed Final Judgment. Since the DOJ does not want to expend any more time and resources on this case, and the Bush administration will not enforce the antitrust laws, or this proposed Final Judgment, the DOJ will not enforce it against MICROSOFT. Since the DOJ will not enforce this proposed Final Judgment against MICROSOFT, this proposed Final Judgment is an illusory and ineffectice remedy.

Since this proposed Final Judgment does not accomplish the DOJ's goal in settling this case or protect competition, and is in practice an illusory and ineffective remedy, this proposed Final Judgment is not in the public interest. Since this proposed Final Judgment is not in the public interest, this proposed Final Judgment should be rejected.

Instead the DOJ should pursue, and the Court should uphold, Judge Jackson's remedy of splitting MICROSOFT into 2 companies.

MICROSOFT has consistently violated United States Antitrust Law. MICROSOFT has illegally tied licenses of its operating systems to OEMs' sales of processors in computers (i.e., "per-processor" licenses. See THE MICROSOFT FILE: THE SECRET CASE AGAINST BILL GATES by Wendy Goldman Rohm, Times Business, copyright 1998, at Pages 41-42, 67-68, 73, and 83-85). When the first antitrust case settlement in 1995 prohibited per-processor licenses, MICROSOFT switched to illegally tying licenses of its operating systems to OEMs' sales of computer systems (i.e., "per-system" licenses. See THE MICROSOFT FILE at Pages 190-191 and 203-206). MICROSOFT has continually engaged in "vaporware" to kill competing products (See MEMORANDUM OPINION of February 14, 1995, by Judge Stanley

Sporkin, Page 35, at http://www.usdoj.gov/atr/cases/f0100/0102.htm). MICROSOFT has also engaged in predatory pricing by illegally tying/bundling its Middleware Products with its Operating System Products to kill competing products (MICROSOFT illegally tied sales of WINDOWS to MS-DOS; see THE MICROSOFT FILE at Pages 114 and 192-198. MICROSOFT illegally tied sales of WINDOWS to MICR0SOFT OFFICE SUITE; see THE MICROSOFT FILE at Page 159. MICROSOFT illegally tied its web browser, INTERNET EXPLORER, with its Operating System, WINDOWS 98, to kill the competing web browser, Netscape COMMUNICATOR; see THE MICROSOFT FILE at Pages 268-269 and 274-275. MICROSOFT illegally tied its streaming media player, WINDOWS MEDIA PLAYER, with its Operating System, WINDOWS XP, to kill the competing streaming media player, Real Networks REAL PLAYER). By committing these acts, MICROSOFT has consistently violated the Antitrust Laws.

MICROSOFT violated the first antitrust settlement. MICROSOFT provoked this antitrust case by violating the first antitrust settlement. MICROSOFT used its monopoly power in the PC market to coerce the computer industry to use MICROSOFT's web browser,INTERNET EXPLORER, and not the competing web browser, Netscape COMMUNICATOR. Specifically, MICROSOFT used predatory pricing (by illegally tying its web browser with its operating system to force Netscape to give away its web browser for free. See THE MICROSOFT FILE at Pages 268-269 and 274-275) and exclusionary contracts requiring IHVs, ISVs, IAPs, ICPs, and OEMs to use INTERNET EXPLORER and not COMMUNICATOR. By using its monopoly power in the PC market to coerce the computer industry to use MICROSOFT's web browser,INTERNET EXPLORER, and not the competing web browser, Netscape COMMUNICATOR, MICROSOFT violated the first antitrust settlement.

MICROSOFT will violate this proposed Final Judgment and continue violating the antitrust laws. MICROSOFT's illegal concentration of monopoly profits make it the most highly valued corporation in the world. Since MICROSOFT's illegal concentration of monopoly profits make it the most highly valued corporation in the world, MICROSOFT can drag out any enforcement action that the DOJ brings against MICROSOFT for violating this proposed Final Judgment. In other words, MICROSOFT can simply outspend the DOJ and thereby avoid punishment for violating the antitrust laws. Since MICROSOFT can drag out any enforcement action that the DOJ brings against MICROSOFT for violating this proposed Final Judgment, MICROSOFT can, and will, violate this proposed Final Judgment.

To stop MICROSOFT from violating the antitrust laws, it must be split into 2 or more separate companies. As stated above, MICROSOFT's illegal concentration of monopoly profits allow it to violate the antitrust laws with impunity. Since MICROSOFT's illegal concentration of monopoly profits allow it to violate the antitrust laws with impunity, the only way to stop MICROSOFT from violating the antitrust laws is to disperse its illegal concentration of monopoly profits. And the only way to disperse MICROSOFT's illegal concentration of monopoly profits is to split the company into 2 or more separate companies. Thus, the only way to stop MICROSOFT from violating the antitrust laws is to split it into 2 or more companies. Since the only way to stop MICROSOFT from violating the antitrust laws is to split it into 2 or more companies, the remedy in this case should be splitting MICROSOFT into 2 or more companies.

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SPECIFIC OBJECTIONS

1. Proposed Final Judgment, paragraph 2:

The second paragraph is too lenient to MICROSOFT. The second paragraph states:

> AND WHEREAS, this Final Judgment does not constitute any admission by any party regarding any issue of fact or law;

Judge Jackson in his Findings of Fact and Conclusions of Law found that MICROSOFT was a monopoly and that MICROSOFT did abuse its monopoly power to violate United States antitrust law (see FINDINGS OF FACT at http://www.dcd.uscourts.gov/ms-findings2.pdf and CONCLUSIONS OF LAW AND ORDER at http://www.dcd.uscourts.gov/ms-conclusions.pdf). Furthermore, the Circuit Court of Appeals for the District of Columbia upheld these findings and conclusions. Since both the District Court and the Court of Appeals held that MICROSOFT was a monopoly and did abuse its monopoly power, the least that the DOJ should do is require MICROSOFT to allocute to these facts and conclusions of law. Optimally, MICROSOFT should allocute to all of the facts and conclusions of law contained in the DOJ's original complaint which initiated this case. Allowing MICROSOFT to settle this case without admitting that it is a monopoly which abused its monopoly power is like settling with Osama bin Laden and not requiring him to admit that he bombed the World Trade Centers. Since both the District Court and the Court of Appeals held that MICROSOFT was a monopoly and did abuse its monopoly power, allowing MICROSOFT to settle this case without allocuting to the facts and conclusions of law is too lenient to MICROSOFT.

For this proposed Final Judgment to be in the public interest, MICROSOFT should be *required* to allocute to Judge Jackson's Findings of Facts and Conclusions of Law. Since MICROSOFT should be *required* to allocute to Judge Jackson's Findings of Facts and Conclusions of Law, the second paragraph should state:

> AND WHEREAS, this Final Judgment constitutes an admission by MICROSOFT of all facts contained in Judge Jackson's Findings of Facts and all conclusions of law contained in Judge Jackson's Conclusions of Law;

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2. III. Prohibited Conduct, A. First Paragraph

The first paragraph of III.A. is incomplete and thus ineffective as written. III.A. prohibits MICROSOFT from retaliating against OEMs for using Non-MICROSOFT software. However, III.A. does not prohibit MICROSOFT from making its software incompatible with Non-MICROSOFT software. Specifically, III.A. does not prohibit MICROSOFT from making its software prevent the use of other operating systems or middleware running on a PC. In the past, MICROSOFT has written Windows NT (later Windows 2000 and now Windows XP) to prevent OEMs and end users from installing LINUX or the BSD operating systems (FreeBSD, OpenBSD, and NetBSD) on the same hard drive and/or computer. Furthermore, MICROSOFT wrote its Windows 98 upgrade to break the Dynamically-Linked Libraries for competing middleware (like WordPerfect Office Suite) so that the competing middleware would not work. Since MICROSOFT has previously

written their Windows Operating Systems Products to prevent Non-MICROSOFT operating systems and middleware from working on the same hard drive and/or computer, and continues to do so with Windows XP, this proposed Final Judgment should prohibit MICROSOFT from writing its software to prevent Non-MICROSOFT operating systems and middleware from working on the same hard drive and/or computer. Since this proposed Final Judgment does not prohibit MICROSOFT from writing its software to prevent Non-MICROSOFT operating systems and middleware from working on the same hard drive and/or computer, III.A. is incomplete and thus ineffective.

For the first paragraph of III.A. to be in the public interest, the DOJ should rewrite it to expressly prohibit MICROSOFT from writing its software to prevent Non-MICROSOFT operating systems and middleware from working on the same hard drive and/or computer. In particular, MICROSOFT should be prohibited from making its software incompatible with LINUX, the BSD operating systems, Netscape COMMUNICATOR, the OPERA Web Browser, AOL Instant Messenger and related software, SAMBA, and any other Non-MICROSOFT software which runs on a PC.

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3. III. Prohibited Conduct, A. Second Paragraph (from Page 4)

The second paragraph of III.A. is incomplete as written. III.A. second paragraph (continuing from Page 4 onto Page 5) states in part:

> ...Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. ...

As stated above in OBJECTION 1. regarding the second paragraph, both the District Court and the Court of Appeals found MICROSOFT a monopolist which abused its monopoly power. Since both the District Court and the Court of Appeals found MICROSOFT a monopolist which abused its monopoly power, the DOJ and the District Court should monitor MICROSOFT's future behavior very carefully for compliance with this proposed Final Judgment. In particular, this proposed Final Judgment should require MICROSOFT to provide the DOJ and the District Court with copies of any such notice of non-compliance sent to a Covered OEM. Furthermore, these notices should be published in the FEDERAL REGISTER to provide the public with notice of these events. Since this proposed Final Judgment does not require MICROSOFT to provide the DOJ and the District Court with copies of any such notice of non-compliance sent to a Covered OEM, it is incomplete.

For the second paragraph of III.A. to be in the public interest, it must require MICROSOFT to provide the DOJ and the District Court with copies of any such notice of non-compliance sent to a Covered OEM. Thus, the second paragraph of III.A. should be rewritten as follows:

> ...Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Microsoft shall provide the DOJ and the District Court with copies of this written notice,

which shall be published in the FEDERAL REGISTER. ...

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4. III. Prohibited Conduct, A. Third Paragraph

The third paragraph of III.A. contradicts the first paragraph of III.A. The first paragraph of III.A. prohibits MICROSOFT from retaliating against an OEM for using Non-MICROSOFT software. The third paragraph allows MICROSOFT to reward OEMs based on "the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that MICROSOFT product or service". However, OEMs have a limited amount of money. Since OEMs only have a limited amount of money, an OEM can only increase its promotion/usage of MICROSOFT products and services by decreasing its promotion/usage of Non-MICROSOFT products and services. Since an OEM can only increase its promotion/usage of MICROSOFT products and services by decreasing its promotion/usage of Non-MICROSOFT products and services, the third paragraph of III.A. allows MICROSOFT to reward OEMs who only use MICROSOFT products and services. By rewarding OEMs who only use MICROSOFT products and services, MICROSOFT punishes OEMs who do not use only MICROSOFT products and services. Thus, the third paragraph of III.A. allows MICROSOFT to retaliate against OEMs who use/promote Non-MICROSOFT products and services. Since the third paragraph of III.A. allows MICROSOFT to retaliate against OEMs who use/promote Non-MICROSOFT products and services, and the first paragraph of III.A. prohibits MICROSOFT from retaliating against OEMs who use/promote Non-MICROSOFT products and services, the third paragraph of III.A. contradicts the first paragraph of III.A.

For III.A. to be in the public interest, the third paragraph of III.A. should be deleted from this proposed Final Judgment.

5. III. Prohibited Conduct, C. First Sentence

The first sentence of III.C. is incomplete and thus inadequate to protect competition. The first sentence of III.C. states:

> Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives: ...

This sentence is incomplete because it does not prohibit MICROSOFT from restricting an OEM licensee's options or alternatives by preferential treatment of an OEM licensee's competitors. For example, MICROSOFT might inform an OEM licensee like COMPAQ that if COMPAQ puts the AOL icon on its Windows desktop that MICROSOFT will offer COMPAQ's competitors a discount on MICROSOFT's products and services. Since MICROSOFT can restrict an OEM licensee's options or alternatives by threatening to offer preferential treatment to an OEM licensee's competitors, in addition to restricting an OEM licensee's options or alternatives by agreement, the first sentence of III.C. is incomplete and therefore inadequate to protect an OEM licensee from exercising the options and alternatives of III.C.

For the first sentence of III.C. to be in the public interest, it should be rewritten as follows:

> Microsoft shall not restrict by agreement *or by any other means, including but not limited to, offering preferential treatment to an OEM licensee's competitors*, any OEM licensee from exercising any of the following options or alternatives: ...

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6. III. Prohibited Conduct, C. 1.

III.C.1. contains an exception which allows MICROSOFT to continue its illegal business practices. The exception in III.C.1. states:

> ...except that Microsoft may restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, ...

Although this exception requires MICROSOFT's restrictions to be non-discriminatory with respect to Non-MICROSOFT software, in practice MICROSOFT will claim that every Non-MICROSOFT software product that MICROSOFT wishes to destroy does not provide the requisite *particular type of functionality*. For example, MICROSOFT claimed that its Internet Explorer web browser was an integral part of Windows 98, providing a particular type of functionality that could not be separated from the operating system and the competing web browser, Netscape COMMUNICATOR, could not provide. MICROSOFT claimed this to destroy the competing web browser, Netscape COMMUNICATOR. Furthermore, MICROSOFT has bundled its streaming media player software with Windows XP to destroy Real Networks Real Player streaming media player. The fact that MICROSOFT has already claimed that a Non-MICROSOFT software product that MICROSOFT wished to destroy does not provide the requisite particular type of functionality, and continues to do so, indicates that they will use this exception to negate the prohibition of III.C.1. This exception allows MICROSOFT to destroy any competing software by modifying the Windows documentation to state that the corresponding MICROSOFT software provides a particular type of functionality. Since this exception allows MICROSOFT to destroy any competing software by modifying the Windows documentation to state that the corresponding MICROSOFT software provides a particular type of functionality, this exception allows MICROSOFT to continue its illegal business practices.

In practice, the condition placed upon this exception will not be enforced. III.C.1. places the following condition upon the above-stated exception:

> ...provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products.

This condition is only effective if the DOJ polices MICROSOFT's business practices and prevents MICROSOFT from applying discriminatory restrictions on OEM licensees. In theory, the DOJ will police MICROSOFT's business practices and prevent MICROSOFT from applying discriminatory restrictions on OEM licensees. However, the fact that the DOJ has surrendered the remedy of splitting MICROSOFT into 2 companies, combined with the DOJ's acceptance of this proposed Final Judgment, indicates that the DOJ will not police MICROSOFT's business practices and prevent MICROSOFT from applying discriminatory restrictions on OEM licensees. Furthermore, as stated in the GENERAL OBJECTIONS, the DOJ does not want to expend additional time and resources on this case. Since the DOJ will not police MICROSOFT's

business practices and prevent MICROSOFT from applying discriminatory restrictions on OEM licensees, this condition will not be enforced. Since this condition will not be enforced, it is illusory and thus ineffective.

For III.C.1. to be in the public interest, the exception must be deleted. In other words, III.C.1. should be rewritten as follows:

> Installing, and displaying icons, shortcuts, or menu entries for, any Non-Microsoft Middleware or any product or service (including but not limited to IAP products or services) that distributes, uses, promotes, or supports any Non-Microsoft Middleware, on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed.

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7. III. Prohibited Conduct, C. 2.

As discussed above in OBJECTION 6. about III.C.1., III.C.2. contains an exception that allows MICROSOFT to continue its illegal business practices. The exception in III.C.2. states:

> ... so long as such shortcuts do not impair the funtionality of the user interface.

As stated above in OBJECTION 6. about III.C.1., in practice MICROSOFT will claim that every Non-MICROSOFT software product that MICROSOFT wishes to destroy impairs the functionality of the user interface. The Internet Explorer web browser is an example of this behavior. Another example occurred in August 2001, when MICROSOFT allowed OEMs to place whatever icons they chose on the Windows XP desktop. COMPAQ, a MICROSOFT OEM licensee, subsequently placed the AOL icon on the Windows XP desktop in place of the MSN icon. MICROSOFT thereupon reversed its policy and stated that any OEM placing a Non-MICROSOFT icon on the desktop must place the corresponding MICROSOFT icon on the desktop as well. Thus, MICROSOFT's past behavior indicates that they will claim that every Non-MICROSOFT software product that MICROSOFT wishes to destroy impairs the functionality of the user interface.

Also, as stated above in OBJECTION 6. about III.C.1., the DOJ will not police MICROSOFT's compliance with III.C.2. Since the DOJ will not police MICROSOFT's compliance with III.C.2., MICROSOFT is free to prevent OEM licensees from installing or displaying Non-MICROSOFT desktop shortcuts. Since MICROSOFT is free to prevent OEM licensees from installing or displaying Non-MICROSOFT desktop shortcuts, this exception allows MICROSOFT to continue its illegal business practices.

For III.C.2. to be in the public interest, the exception must be deleted. In other words, III.C.2. should be rewritten as follows:

> Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape.

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8. III. Prohibited Conduct, C. 3.

As discussed about III.C.1. above, III.C.3. contains an exception that

allows MICROSOFT to continue its illegal business practices. The exception in III.C.3. states:

> ... provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware.

As stated above in OBJECTION 6. about III.C.1., in practice MICROSOFT will claim that every Non-MICROSOFT software product that MICROSOFT wishes to destroy does not display a user interface of similar size and shape to the user interface displayed by the corresponding MICROSOFT Middleware. For example, MICROSOFT inserted code in Windows 3.1 that detected if a user was running DR-DOS (a competitor to MS-DOS). Upon detecting DR-DOS, Windows 3.1 would warn the user that DR-DOS *might be incompatible with Windows 3.1* and the user should upgrade to MS-DOS (See THE MICROSOFT FILE: THE SECRET CASE AGAINST BILL GATES by Wendy Goldman Rohm, ISBN 0-8129-2716-8, copyright 1998, Times Books, at pages 102-104, 113-114, and 116-118). Since MICROSOFT will claim that every Non-MICROSOFT software product that MICROSOFT wishes to destroy does not display a user interface of similar size and shape to the user interface displayed by the corresponding MICROSOFT Middleware, this exception will allow MICROSOFT to prevent OEM licensees from launching automatically Non-MICROSOFT Middleware at the conclusion of the initial boot sequence or upon connection/disconnection to the Internet. Since this exception will allow MICROSOFT to prevent OEM licensees from launching automatically Non-MICROSOFT Middleware at the conclusion of the initial boot sequence or upon connection/disconnection to the Internet, this exception allows MICROSOFT to continue its illegal business practices.

Also, as stated above in OBJECTION 6. about III.C.1., the DOJ will not police MICROSOFT's compliance with III.C.3. Since the DOJ will not police MICROSOFT's compliance with III.C.3., MICROSOFT is free to prevent OEM licensees from launching automatically Non-MICROSOFT Middleware. Since MICROSOFT is free to prevent OEM licensees from launching automatically Non-MICROSOFT Middleware, this exception allows MICROSOFT to continue its illegal business practices.

For III.C.3. to be in the public interest, this exception must be deleted. In other words, III.C.3. should be rewritten as follows:

> Lanuching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if Microsoft Middleware that provides similar functionality would otherwise be launched automatically at that time.

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9. III. Prohibited Conduct, C. 5.

The exception in III.C.5. allows MICROSOFT to continue its illegal business practices. III.C.5. states:

> Presenting in the initial boot sequence its own IAP offer *provided that the OEM complies with the reasonable technical specifications established by Microsoft, including a requirement that the end user be returned to the initial boot sequence upon the conclusion of any such offer*.

As stated above in OBJECTION 6. regarding III.C.1., in practice MICROSOFT will claim that every Non-MICROSOFT IAP offer that MICROSOFT wishes to destroy does not comply with MICROSOFT's reasonable technical specifications. As stated above in OBJECTION 8. III.C.3., MICROSOFT inserted code in Windows 3.1 suggesting to users that DR-DOS does not meet MICROSOFT's technical requirements. Further, after negotiations between MICROSOFT and AOL broke down in August 2001, MICROSOFT made Windows XP incompatible with AOL's internet software. The fact that MICROSOFT has made their Windows Operating System Products incompatible with competing products indicates that MICROSOFT will use the exception in III.C.5. to claim that competing IAP offers from AOL, other IAPs, or OEMs does not meet MICROSOFT's reasonable technical requirements. Since MICROSOFT will use the exception in III.C.5. to claim that competing IAP offers from AOL, other IAPs, or OEMs does not meet MICROSOFT's reasonable technical requirements, this exception allows MICROSOFT to continue its illegal business practices.

Also, as stated above in OBJECTION 6. about III.C.1., the DOJ will not police MICROSOFT's compliance with III.C.5. Since the DOJ will not police MICROSOFT's compliance with III.C.5., MICROSOFT is free to prevent OEM licensees from presenting their own IAP offers in the initial boot sequence. Since MICROSOFT is free to prevent OEM licensees from presenting their own IAP offers in the initial boot sequence, this exception allows MICROSOFT to continue its illegal business practices.

For III.C.5. to be in the public interest, this exception must be deleted. In other words, III.C.5. should be rewritten as follows:

> Presenting in the initial boot sequence its own IAP offer.

.

10. III. Prohibited Conduct, D.

The deadline stated in the first sentence for MICROSOFT to release its APIs and related Documentation to third parties is too long. The first sentence of III.D. states in relevant part:

> Starting at the earlier of *the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court*; Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, ... the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product.

Currently, the computer industry is operating on Internet time. In Internet time, 3 months is considered equivalent to a normal year. Since MICROSOFT, like its competitors in the computer industry, operates on Internet time, allowing MICROSOFT up to 12 months to disclose their APIs and related Documentation is equivalent to giving MICROSOFT a 3 year head start in developing Middleware for Windows XP and its successors. Furthermore, MICROSOFT's Middleware programmers already have access to these APIs and related Documentation prior to the release of these Windows Operating System Products. Since MICROSOFT's Middleware programmers already have access to these APIs and related Documentation prior to the release of these Windows Operating System Products, and allowing MICROSOFT up to 12 months to disclose their APIs and related Documentation is equivalent to giving MICROSOFT a 3 year head start in developing Middleware for its Windows Operating System

Products, this deadline effectively prevents third parties from developing competing Middleware for MICROSOFT's Windows Operating System Products. Since this deadline effectively prevents third parties from developing competing Middleware for MICROSOFT's Windows Operating System Products, the 12 month deadline for MICROSOFT to release its APIs and related Documentation is too long. Since the 12 month deadline for MICROSOFT to release its APIs and related Documentation is too long, this 12 month deadline should be shortened to 3 months.

For this part of III.D. to be in the public interest, this deadline should be changed from 12 months to 3 months. In other words, the first sentence of III.D. should be rewritten as:

> Starting at the earlier of the release of Service Pack 1 for Windows XP
> or *3* months after the submission of this Final Judgment to the Court,
> ...

.

11. III. Prohibited Conduct, D.

The condition placed upon releasing MICROSOFT's APIs is too lenient to MICROSOFT. The first sentence of III.D. states in relevant part:

> ... Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for
> the sole purpose of interoperating with a Windows Operating System
> Product, ...

As stated above in OBJECTION 1 regarding the seond paragraph, MICROSOFT lost this case. Both Judge Jackson and the Court of Appeals held that MICROSOFT was a monopoly and that it abused its monopoly power. Furthermore, as stated in the GENERAL OBJECTIONS, MICROSOFT has consistently violated the antitrust laws. Since both Judge Jackson and the Court of Appeals held that MICROSOFT was a monopoly and that it abused its monopoly power, and MICROSOFT has consistently violated the antitrust laws, the DOJ should not be appeasing MICROSOFT by limiting the scope of use of MICROSOFT's APIs and related Documentation. Since the DOJ should not be appeasing MICROSOFT by limiting the scope of use of MICROSOFT's APIs and related Documentation, this limitation on third parties' right to use MICROSOFT's APIs and related Documentation is too lenient to MICROSOFT.

For this part of III.D. to be in the public interest, the scope of use of MICROSOFT's APIs and related Documentation should be unconditional. In other words, III.D. should be rewritten as:

> ... Microsoft shall disclose to ISVs, IHVs, IAPs, IAPs, ICPs, and OEMs,
> ... the APIs and related Documentation ...

.

12. III. Prohibited Conduct, D.

The scope of disclosure of MICROSOFT's APIs and related Documentation is too narrow. The first sentence of III.D. states in relevant part:

> ... Microsoft shall disclose... *the APIs and related Documentation* that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. ...

MICROSOFT has consistently withheld APIs from third party developers so that MICROSOFT Middleware would interoperate better with its Windows Operating System Products than with third party Middleware. In particular MICROSOFT has withheld APIs and functions regarding:

* DOS
  (see UNDOCUMENTED DOS by Andrew Schulman, Addison-Wesley, ISBN 0-201-57064-5 and UNDOCUMENTED DOS 2nd Edition by Andrew Schulman, Addison-Wesley, ISBN 0-201-63287-X)

* Windows 3.1
  (see UNDOCUMENTED WINDOWS by Andrew Schulman, Addison-Wesley, ISBN 0-201-60834-0)

* Windows 95
  (see UNAUTHORISED WINDOWS 95 by Andrew Schulman, IDG, ISBN 1-56884-169-8)

* Windows NT
  (see UNDOCUMENTED WINDOWS NT by Prassad Dabak, Sandeep Phadke, Milind Borate, Hungry Minds, Inc., IBSN 0-764-54569-8)

* Windows 2000
  (see UNDOCUMENTED WINDOWS 2000 SECRETS: A PROGRAMMER'S COOKBOOK by Sven B. Scheiber, Addison-Wesley, ISBN 0-201-72187-2)

Furthermore, MICROSOFT has also withheld information regarding their File Formats (see WINDOWS UNDOCUMENTED FILE FORMATS: WORKING INSIDE 16- AND 32- BIT WINDOWS by Pete Davis, Mike Wallace, CMP Books, ISBN 0-879-30437-5). The fact that MICROSOFT has consistently withheld APIs and related Documentation (and information about their File Formats) indicates that they will continue to withhold APIs and related Documentation from Third Party developers. Since MICROSOFT will continue to withhold APIs and related Documentation from Third Party developers, the scope of disclosure required of MICROSOFT in III.D. is too narrow.

Furthermore, III.D. does not explicitly require MICROSOFT to disclose *all* APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product. Since III.D. does not explicitly require MICROSOFT to disclose *all* APIs and related Documentation, MICROSOFT will always argue that this proposed Final Judgment does not require it to disclose *all* APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product. Since MICROSOFT will always argue that this proposed Final Judgment does not require it to disclose *all* APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product, the scope of disclosure required of MICROSOFT in III.D. is too narrow.

In addition, III.D. does not state who determines which APIs and related Documentation MICROSOFT must disclose. Since III.D. does not state who determines which APIs and related Documentation MICROSOFT must disclose, MICROSOFT will claim that they have the right to determine which APIs

and related Documentation it must disclose. Furthermore, as stated in the above GENERAL OBJECTIONS, the DOJ will not expend additional time and resources on this case. Since the DOJ will not expend additional time and resources on this case, they will not contest MICROSOFT's right to determine which APIs and related Documentation MICROSOFT must disclose. Since MICROSOFT will claim that they have the right to determine which APIs and related Documentation it must disclose, and the DOJ will not contest this claim, III.D. basically allows MICROSOFT to determine its punishment. In other words, III.D. allows MICROSOFT to determine which APIs and related Documentation it will disclose. The fact that MICROSOFT is already determining which APIs and related Documentation it will disclose, and is withholding APIs and related Documentation, indicates that MICROSOFT will continue to withhold APIs and related Documentation. Since MICROSOFT will interpret III.D. to allow MICROSOFT to continue withholding APIs and related Documentation, the scope of disclosure in III.D. is too narrow.

Also, as stated above in OBJECTION 6. about III.C.1., the DOJ will not police MICROSOFT to ensure that MICROSOFT discloses all of the APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product. Since the DOJ will not police MICROSOFT to ensure that MICROSOFT discloses all of the APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product, MICROSOFT is free to continue withholding APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product. Since MICROSOFT is free to continue withholding APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product, III.D. does not deter MICROSOFT from continuing to withhold APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product.

For III.D. to be in the public interest, III.D. must require MICROSOFT to disclose the complete source code to all of their Windows Operating System Products. As stated above, MICROSOFT has consistently withheld APIs and related Documentation from Third Party Developers. Since MICROSOFT has consistently withheld APIs and related Documentation from Third Party Developers, the only way to ensure that MICROSOFT discloses all of the APIs and related Documentation used by MICROSOFT Middleware to interoperate with a Windows Operating System Product is to require MICROSOFT to disclose the complete source code of its Windows Operating System Products.

Furthermore, MICROSOFT must disclose the compilers used to compile the binary files for its Windows Operating System Products. MICROSOFT has history of altering its source code to prevent competitors from writing compatible software. In the mid-1990s, MICROSOFT consistently rewrote its Windows 3.1 source code to ensure that IBM's OS/2 operating system remained incompatible with Windows 3.1. More recently, during the trial of this antitrust case, MICROSOFT altered the code of Windows 98 in an attempt to impeach government witness Edward Felten (see "A Tangled Web" at http://www.vcnet.com/bms/departments/dirtytricks.shtml and "MS-DOJ: Microsoft on the retreat?" at http://www.zdnet.com/filters/printerfriendly/0,6061,2175958-2,00.html). The only way to know if MICROSOFT has disclosed the complete source code of its Windows Operating System Products is to compile the source code and compare these compiled binaries with the binaries that MICROSOFT ships to OEMs and end users. Since the only way to know if MICROSOFT has disclosed the complete source code of its Windows Operating System Products is to compile the source code and compare these compiled

binaries with the binaries that MICROSOFT ships to OEMs and end users, III.D. must require that MICROSOFT disclose the compilers it uses to compile binaries of its Windows Operating System Products' source code.

Thus, III.D. should be rewritten as follows:

> ... Microsoft shall disclose... *the complete source code of its Windows Operating System Products, together with the compilers used to compile the source code of the Windows Operating System Product* . ...

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13. III. Prohibited Conduct, D.

The means of disclosure of MICROSOFT's APIs and related Documentation in III.D. is inadequate. The first sentence of III.D. states in relevant part:

> ...Microsoft shall disclose..., *via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation...

MICROSOFT has made their websites unavailable to Non-MICROSOFT web browsers. In 1998, MICROSOFT inserted code in their MICROSOFT Office update website such that persons using Non-MICROSOFT web browsers got a warning message stating that they need to upgrade their web browser to Internet Explorer 4.01 to access the full edition of the update at the website (See "Use Internet Explorer or...?" at http://www.vcnet.com/bms/departments/dirtytricks.shtml). In October 2001, MICROSOFT altered their websites so that Non-MICROSOFT web browsers, like OPERA, could not view any webpages at MICROSOFT's website (See "New look MSN turns away non-MS lovers" at http://www.theregister.co.uk/content/6/22441.html, "The Browser Wars are back: Opera smacks MSN" at http://www.theregister.co.uk/content/4/22618.html, and "Opera tolerating MSN.co.uk goes live" at http://www.theregister.co.uk/content/archive/22714.html). The fact that MICROSOFT has made their websites unavailable to Non-MICROSOFT web browsers indicates that they will continue to do so. Since MICROSOFT will continue to make their websites unavailable to Non-MICROSOFT web browsers, requiring MICROSOFT to disclose their APIs and related Documentation on the MSDN, or any MICROSOFT website, means that these APIs and related Documentation will not be available to Non-MICROSOFT web browsers. Since requiring MICROSOFT to disclose their APIs and related Documentation on the MSDN, or any MICROSOFT website, means that these APIs and related Documentation will not be available to Non-MICROSOFT web browsers, the means of disclosure of MICROSOFT's APIs and related Documentation in III.D. is inadequate.

Also, as stated above in OBJECTION 6. about III.C.1., the DOJ will not police MICROSOFT to ensure that MICROSOFT does not block Non-MICROSOFT web browsers from accessing its websites. Since the DOJ will not police MICROSOFT to ensure that MICROSOFT does not block Non-MICROSOFT web browsers from accessing its websites, MICROSOFT is free to continue blocking Non-MICROSOFT web browsers from accessing its websites. Since MICROSOFT is free to continue blocking Non-MICROSOFT web browsers from accessing its websites, III.D. does not deter MICROSOFT from continuing to block Non-MICROSOFT web browsers from accessing its websites.

For III.D. to be in the public interest, MICROSOFT must be required to publicly disclose its APIs and related Documentation in Non-MICROSOFT websites like SLASHDOT (http://slashdot.org) and FRESH MEAT (http://www.freashmeat.org). In other words, III.D. should be rewritten as follows:

> ...Microsoft shall disclose..., *via Non-MICROSOFT websites, including but not limited to, SLASHDOT (http://slashdot.org) and FRESH MEAT (http://www.freshmeat.org), the APIs and related Documentation...

.

14. III. Prohibited Conduct, D.

The deadline for disclosure of MICROSOFT Middleware may be illusory and thus ineffective. The second sentence of III.D. states

> ...In the case of a major new version of Microsoft Middleware, the disclosures required by this section III.D. shall occur no later than the last major beta test release of the Microsoft Middlware.

MICROSOFT is currently moving towards a subscription-based model for its software. A subscription-based model for new software means that MICROSOFT may not release any more "new" software. Instead, MICROSOFT will simply update a user's current software every month or so. Since MICROSOFT will simply update a user's current software every month or so, MICROSOFT will not be releasing any new major versions of their Operating Systems or Middleware. Since MICROSOFT will not be releasing any new major versions of their Windows Operating System Products or Middleware, MICROSOFT will not be required to release the APIs and related Documentation for these Windows Operating System Products or Middleware. Since MICROSOFT will not be required to release the APIs and related Documentation for these Windows Operating System Products or Middleware, this deadline may be illusory.

To summarize, the requirements of III.D. are too narrow and thus inadequate. For III.D. to be in the public interest, the first sentence of III.D. must be rewritten as follows:

> Starting at the earlier of the release of Service Pack 1 for Windows XP
> or *3* months after the submission of this Final Judgment to the Court,
> Microsoft shall disclose to ISVs, IHVs, IAPs, IAPs, ICPs, and OEMs, *via Non-MICROSOFT websites, including but not limited to, SLASHDOT (http://slashdot.org) and FRESH MEAT (http://www.freshmeat.org), the complete source code of its Windows Operating System Products, together with the compilers used to compile the source code of the Windows Operating System Product and related Documentation*.

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15. III. Prohibited Conduct, E.

For the same reasons stated in OBJECTION 10. regarding III.D., the deadline for releasing Communications Protocols in III.E. is too lenient to MICROSOFT. III.E. allows MICROSOFT to wait *9 months* after the submission of this proposed Final Judgment before disclosing its

Communications Protocols. As stated above in OBJECTION 10. regarding III.D., MICROSOFT and its competitors operate on "Internet time", where 3 months comprises an "Internet year". Since 3 months comprises an "Internet year", the deadline of 9 months for MICROSOFT to disclose its Communications Protocols is too long.

For the deadline of III.E. to be in the public interest, it must be shortened to 3 months. In other words, III.E. should be rewritten as follows:

> Starting *3* months after the submission of this proposed Final Judgment to the Court,...

.

16. III. Prohibited Conduct, E.

The terms of disclosure are too lenient to MICROSOFT. As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case at the District Court and Appellate Court levels. Since MICROSOFT lost this case at the District Court and Appellate Court levels, the DOJ should not concede anything to MICROSOFT, including the terms of disclosing MICROSOFT's Communications Protocols. III.E. states in the relevant part:

> ...Microsoft shall make available for use by third parties, *for the sole purpose* of interoperating with a Windows Operating System Product, *on reasonable and non-discriminatory terms* (consistent with Section III.I.), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court,
>
> (i) implemented in a Windows Operating System Product installed on a client computer, and
>
> (ii) used to interoperate natively (i.e., without the addition of software code to the client or server operating system products) with Windows 2000 Server or products marketed as its successors installed on a server computer.

First, since MICROSOFT lost this case, the scope of disclosure of these Communcations Protocols should not be limited to *the sole purpose of interoperating with a Windows Operating System Product*. Third Parties should be free to make whatever use of these Communications Protocols that they choose. Allowing MICROSOFT to limit their use to *the sole purpose of interoperating with a Windows Operating System Product* simply gives MICROSOFT the opportunity to deny disclosing these Communications Protocols by claiming that the Third Party is not using them for *the sole purpose of interoperating with a Windows Operating System Product*. Since limiting their use to *the sole purpose of interoperating with a Windows Operating System Product* simply gives MICROSOFT the opportunity to deny disclosing these Communications Protocols by claiming that the Third Party is not using them for *the sole purpose of interoperating with a Windows Operating System Product*, this limitation is too restrictive.

Second, *reasonable and non-discriminatory terms* is legalese for royalty-bearing terms. By allowing MICROSOFT to charge Third Parties royalties for disclosing its Communications Protocols, III.E. allows MICROSOFT to discriminate against Open-Source developers, who generally cannot afford to pay royalties. Since III.E. allows MICROSOFT to

discriminate against Open-Source developers, who generally cannot afford to pay royalties, III.E. is too restrictive.

Third, the scope of disclosure in III.E. is inadequate because III.E. does not require MICROSOFT to disclose *all* Communications Protocols. III.E. limits MICROSOFT's disclosure to Communications Protocols that are:

> (i) implemented in a Windows Operating System Product installed on a client computer, and
> (ii) used to interoperate natively (i.e., without the addition of software code to the client or server operating system products) with Windows 2000 Server or products marketed as its successors installed on a server computer.

Since III.E. limits MICROSOFT's disclosure to only Communications Protocols meeting these requirements, III.E. does not require MICROSOFT to disclose all Communications Protocols which are necessary for Third Party developers to make their software interoperate with MICROSOFT's Windows Operating System Products as well as MICROSOFT's Middleware does. Since III.E. does not require MICROSOFT to disclose all Communications Protocols which are necessary for Third Party developers to make their software interoperate with MICROSOFT's Windows Operating System Products as well as MICROSOFT's Middleware does, III.E. allows MICROSOFT to continue withholding Communications Protocols that allow its Middlware to interoperate with MICROSOFT's Windows Operating System Products better than Third Parties' Middleware. Since III.E. allows MICROSOFT to continue withholding Communications Protocols that allow its Middlware to interoperate with MICROSOFT's Windows Operating System Products better than Third Parties' Middleware, the scope of disclosure in III.E. is too narrow.

Furthermore, VI.B. of this proposed Final Judgment defines Communications Protocols too narrowly. The last sentence of VI.B. states:

> ...Communications Protocols shall *not* include protocols used to remotely administer Windows 2000 Server and products marketed as its successors.

Thus, III.E., when read in light of VI.B., further limits MICROSOFT's disclosure to only those Communications Protocols that are not used to remotely administer Windows 2000 Server and products marketed as its successors. Since III.E., when read in light of VI.B., further limits MICROSOFT's disclosure to only those Communications Protocols that are not used to remotely administer Windows 2000 Server and products marketed as its successors, the scope of disclosure in III.E. in light of VI.B, is too narrow.

For III.E. to be in the public interest, all of these limitations on MICROSOFT's disclosure of its Communications Protocols must be deleted. In other words, III.E. should be rewritten as follows:

> Starting *3* months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use *on royalty-free terms* by third parties, *all* Communications Protocols used by *all Microsoft software.

Furthermore, the last sentence of VI.B., excluding protocols used to

remotely administer Windows 2000 Server and products marketed as its successors, must be deleted.

17. III. Prohibited Conduct, F. 2.

The exception of III.F.2. negates the restriction placed on MICROSOFT. The exception states:

> ...except that Microsoft may enter into *agreements that place limitations on an ISV's development, use, distribution, or promotion of any such software* if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft.

MICROSOFT will use this exception to avoid the restrictions of III.F.2., always claiming that the limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft. As stated above in OBJECTION 4. reagrding III.A., ISVs have a limited budget. By requiring ISVs to spend that budget distributing and/or promoting MICROSOFT software, MICROSOFT can prevent ISVs from developing, using, distributing or promoting any software that competes with MICROSOFT software. Since MICROSOFT can prevent ISVs from developing, using, distributing or promoting any software that competes with MICROSOFT software, MICROSOFT will use this exception to avoid the restrictions of III.F.2. Since MICROSOFT will use this exception to avoid the restrictions of III.F.2., the exception negates the restriction that III.F.2. places on MICROSOFT.

For III.F.2. to be in the public interest, the exception must be deleted. In other words, III.F.2. should be rewritten as follows:

> Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software.

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18. III. Prohibited Conduct, G.1.

The prohibition of III.G.1. is too narrow because it excludes Goverments, Educational Institutions, Standards Setting Organizations and Non-Profit Organizations. III.G.1. states in relevant part:

> Microsoft shall not enter into any agreement with:
> 1. any *IAP, ICP, ISV, IHV or OEM*...

Microsoft has been doing, and continues to do, business with:

* Local, State, and National Governments
* Standards Setting Organizations

* Non-Profit Organizations
* Educational Institutions like Universities and Public Schools

Since Microsoft has been doing, and continues to do, business with these groups, they should be included in the prohibition of III.G.1. Since these groups are not included in the prohibition of III.G.1., III.G.1. is too narrow.

For III.G.1. to in the public interest, it must include these other groups. In other words, III.G.1. should be rewritten as follows:

> 1. any IAP, ICP, ISV, IHV, *OEM, government, educational institution, standards-setting organization, or non-profit organization*...

.

19. III. Prohibited Conduct, G.1.

The exception in III.G.1. negates the restriction placed upon MICROSOFT in III.G.1. The exception states:

> ...except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software,...

MICROSOFT has a monopoly in the PC market. MICROSOFT's only competition comes from LINUX, which is available for free. Since LINUX is available for free, every company/entity will *always* be able to represent that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software. Since every company/entity will *always* be able to represent that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, this exception allows MICROSOFT to continue requiring companies/entities to distribute, promote, use or support Microsoft Platform Software in a fixed percentage. Since this exception allows MICROSOFT to continue requiring companies/entities to distribute, promote, use or support Microsoft Platform Software in a fixed percentage, this exception negates the restriction that III.G.1. places upon MICROSOFT.

For III.G.1. to be in the public interest, the exception in III.G.1. must be deleted. In other words, III.G.1. must be rewritten as follows:

> 1. any IAP, ICP, ISV, IHV, *OEM, government, educational institution, standards-setting organization, or non-profit organization* that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software*, or

.

20. III. Prohibited Conduct, G.

The exceptions ending III.G. negate the restrictions that III.G. 1. and 2. place upon MICROSOFT. The exceptions state:

> Nothing in this section shall prohibit Microsoft from entering into:
>
> (a) any bona fide joint venture or
> (b) any joint development or joint services arrangement with any
>
> ISV, IHV, IAP, ICP, or OEM for a new product, technology, or service, or any material value-add to an existing product, technology, or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.
>
> This Section does not apply to any agreements in which Microsoft licenses intellectual property in from a third party.

These exceptions allow MICROSOFT to avoid the restrictions of III.G. by calling this prohibited conduct a joint venture, joint development, or joint services arrangement (Note that exception (b) does not prohibit *MICROSOFT* from competing with the object of the joint venture or other arrangement for a reasonable period of time, only MICROSOFT's partners) or by claiming that it is licensing intellectual property in from a third party. Since these exceptions allow MICROSOFT to avoid the restrictions of III.G. by calling this prohibited conduct a joint venture, joint development, or joint services arrangement or by claiming that it is licensing intellectual property in from a third party, these exceptions negate the restrictions that III.G. 1. and 2. place upon MICROSOFT.

For III.G. to be in the public interest, these exceptions must be deleted from III.G.

21. III. Prohibited Conduct, H.

The deadline in III.H. for MICROSOFT to conform to the restrictions is too long. As stated above in OBJECTION 11. regarding III.D., MICROSOFT and its competitors operate on "Internet time". Three months is a year in "Internet time". Since 3 months is a year in "Internet time", and MICROSOFT and its competitors operate on "Internet time", the deadline in III.H. should be *3* months, not *12* months. Since the deadline in III.H. is 12 months, the deadline is too long.

For the deadline in III.H. to be in the public interest, it must be shortened to 3 months. In other words, the first sentence of III.H. should be rewritten as follows:

> Starting at the earlier of the release of Service Pack 1 for Windows XP or *3* months after the submission of this Final Judgment to the Court, Microsoft shall: ...

.

22. III. Prohibited Conduct, H.

The restrictions that III.H. places upon MICROSOFT are illusory in light of VI.N. III.H. allows end users and OEMs to select Non-MICROSOFT Middleware Products in place of MICROSOFT Middleware Products. However, VI.N. defines "Non-MICROSOFT Middleware Products" as

> a non-Microsoft software product running on a Windows Operating System
> Product ... and (ii) of which at least *one million copies* were distributed in the United States in the previous year.

Very few Non-MICROSOFT software products have a distribution of 1 million copies in the United States in the previous year. Only AOL's software and perhaps Adobe PHOTOSHOP meet this requirement. Furthermore, this requirement excludes practically all Open-Source software. Since very few, and practically no Open-Source, software products meet this requirement, III.H. actually reads as follows:

> MICROSOFT shall allow end users and OEMs to select AOL and Adobe PHOTOSHOP in place of the equivalent MICROSOFT Middleware Product.

In other words, VI.N. renders the restrictions of III.H. illusory. Since VI.N. renders the restrictions of III.H. illusory, VI.N. must be rewritten to delete requirement "(ii)". In other words, VI.N. should be rewritten as follows:

> "Non-Microsoft Middleware Product" means a non-Microsoft software product
> running on a Windows Operating System Product that exposes a range of funtionality to ISVs through published APIs and that could, if ported to
> or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the funtionality supplied by that software product to be ported to or run on
> that non-Microsoft Operating System.

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23. III. Prohibited Conduct, H.1.(a)

The exception in (a) of III.H.1. negates the restriction that III.H.1. places upon MICROSOFT. The exception states:

> ...except that Microsoft may restrict the display of icons, shortcuts,
> or menu entries for any product in any list of such icons, shortcuts,
> or menu entries specified in the Windows documentation as being limited to products that provide particular types of funtionality, provided that the restrictions are non-discriminatory with respect to
> non-Microsoft and Microsoft products; ...

MICROSOFT will always claim that competing software that MICROSOFT wishes to destroy does not provide particular types of functionality. For example, MICROSOFT integrated their web browser, Internet Explorer, into their Operating System, Windows 95/98, and then claimed that Netscape's web browser did not provide similar functionality. MICROSOFT also integrated their streaming media player software, WINDOWS MEDIA

PLAYER, to preclude OEMs installing Real Networks's streaming media player, REAL PLAYER. This past August MICROSOFT allowed OEMs to place Non-MICROSOFT icons and shortcuts on the Windows XP desktop. COMPAQ then announced that it was placing the AOL icon and shortcut on the Windows XP desktop. MICROSOFT immediately changed its policy to requiring OEMs to place MICROSOFT icons and shortcuts alongside Non-MICROSOFT icons and shortcuts of similar functionality. The fact that MICROSOFT has integrated software into their Windows Operating System Products to preclude competition and required OEMs to place MICROSOFT icons and shortcuts alongside Non-MICROSOFT icons and shortcuts indicates that MICROSOFT will use the exception in III.H.1.(a) to claim that competing software that MICROSOFT wishes to destroy does not provide particular types of functionality. Since MICROSOFT will use the exception in III.H.1.(a) to claim that competing software that MICROSOFT wishes to destroy does not provide particular types of functionality, this exception negates the restriction that III.H.1. places upon MICROSOFT.

The DOJ will not stop MICROSOFT from using the exception in III.H.1.(a) to claim that competing software that MICROSOFT wishes to destroy does not provide particular types of functionality. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not police MICROSOFT to ensure that MICROSOFT complies with this proposed Final Judgment. Since the DOJ will not police MICROSOFT to ensure that MICROSOFT complies with this proposed Final Judgment, MICROSOFT is free to use the exception in III.H.1.(a) to claim that competing software that MICROSOFT wishes to destroy does not provide particular types of functionality.

For III.H.1.(a) to be in the public interest, this exception must be deleted. In other words, III.H.1.(a) must be rewritten as follows:

(a) displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed*; and

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24. III. Prohibited Conduct, H.1.(b)

The restriction in III.H.1.(b) is incomplete and allows MICROSOFT to circumvent the restriction. III.H.1.(b) requires MICROSOFT to allow end users and OEMs a "separate and unbiased choice" for enabling/disabling MICROSOFT software and automatic invocations of MICROSOFT software. However, this language is vague and allows MICROSOFT to circumvent this restriction. As mentioned above in OBJECTION 8. regarding III.C.3., MICROSOFT inserted code into Windows 3.1 warning DR-DOS users not to use DR-DOS with Windows 3.1. Currently, MICROSOFT has released Windows XP, which contains the Passport software. Passport includes code that causes a pop-up window to appear at least 5 times a day until a Windows XP user opens a Passport account. Furthermore, MICROSOFT refuses to provide technical support to Windows XP users who do not have a Passport account. Since MICROSOFT has inserted code in their Windows Operating System Products to coerce users to use MICROSOFT software and/or open accounts with MICROSOFT to obtain technical support, III.H.1.(b) should restrict MICROSOFT from engaging in this behavior as well. Since III.H.1.(b) does not restrict MICROSOFT from inserting code in their Windows Operating System Products to coerce users to use MICROSOFT

software and/or open accounts with MICROSOFT to obtain technical support, III.H.1.(b) is inadequate.

For III.H.1.(b) to be in the public interest, it must be rewritten to prohibit MICROSOFT from engaging in the above-mentioned acts. In other words, III.H.1.(b) must be rewritten as follows:

> ... The mechanism shall not include warnings of incompatibilities warning the user to switch to MICROSOFT software, nor shall the mechanism require confirmation from the user more than once, nor shall the mechanism initiate requesting that the end user install or use MICROSOFT software. ...

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25. III. Prohibited Conduct, H.2.

For the same reasons stated above in OBJECTION 23. regarding III.H.1. (a), III.H.2. is inadequate. III.H.2. requires MICROSOFT to allow end users to designate a Non-MICROSOFT Middlware Product in place of a MICROSOFT Middleware Product. However, III.H.2. allows MICROSOFT to require confirmation from the end user to making this change. As stated above in OBJECTION 24. regarding III.H.1.(b), MICROSOFT has used this confirmation technique to harass end users into using MICROSOFT software and opening accounts with MICROSOFT. Since MICROSOFT has used this confirmation technique to harass end users into using MICROSOFT software and opening accounts with MICROSOFT, III.H.2. must prohibit MICROSOFT from using these techniques. Since III.H.2. does not prohibit MICROSOFT from using these techniques, III.H.2. is inadequate.

For III.H.2. to be in the public interest, it must be rewritten to prohibit these harassing techniques. In other words, III.H.2. must be rewritten as follows:

> ... (via a mechanism which may, at Microsoft's option, require confirmation from the end user. *However, this confirmation shall not include warnings of incompatibilities warning the user to switch to MICROSOFT software, nor shall the mechanism require confirmation from the user more than once, nor shall the mechanism initiate requesting that the end user install or use MICROSOFT software.*)...

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26. III. Prohibited Conduct, H.3.

For the same reasons stated above in OBJECTION 23. regarding III.H.1. (a), III.H.3. is inadequate and should be rewritten to prohibit MICROSOFT from engaging in the above-listed harassing techniques.

27. III. Prohibited Conduct, H.

The 2 exceptions ending III.H. negate the restrictions that III.H. places upon Microsoft. The first exception allows MICROSOFT's Windows Operating System Products to invoke a MICROSOFT Middleware Product if the Middleware Product is invoked solely to interoperate with a server maintained by MICROSOFT. MICROSOFT's current .NET strategy is to have

end users run their software from the Internet through a server maintained by MICROSOFT. In other words, MICROSOFT is modifying their Middleware Products so that they will be invoked solely for use in interoperating with a server maintained by MICROSOFT. Since MICROSOFT is modifying their Middleware Products so that they will be invoked solely for use in interoperating with a server maintained by MICROSOFT, MICROSOFT's Middleware Products will completely avoid the restrictions of III.H. Since the first exception ending III.H. allows MICROSOFT to completely avoid the restrictions of III.H., the first exception negates the restrictions of III.H.

The second exception ending III.H. similarly negates the restrictions of III.H. The second exception allows MICROSOFT's Windows Operating System Products to invoke a MICROSOFT Middleware Product if a Non-MICROSOFT Middleware Product does not meet MICROSOFT's *reasonable technical requirements*. As stated above in OBJECTION 12. regarding III.D., MICROSOFT has consistently withheld APIs and related Documentation about their Windows Operating System Products to gain an unfair advantage over their competitors for Middleware Products. The fact that MICROSOFT has consistently withheld APIs and related Documentation about their Windows Operating System Products to gain an unfair advantage over their competitors for Middleware Products indicates that it will continue to do so. Furthermore, the fact that MICROSOFT will continue to withhold APIs and related Documentation indicates that MICROSOFT will withhold the reasonable technical requirements that competitors need to make their Middleware Products interoperate with Windows Operating System Products. By withholding the reasonable technical requirements that competitors need to make their Middleware Products interoperate with Windows Operating System Products and then claiming that Non-MICROSOFT Middleware Products do not meet MICROSOFT's reasonable technical requirements, MICROSOFT can preclude users from invoking Non-MICROSOFT Middleware Products and thereby avoid the restrictions of III.H.

MICROSOFT can successfully withhold reasonable technical requirements in violation of this Final Judgment because the DOJ will not police MICROSOFT. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not police MICROSOFT to ensure that MICROSOFT complies with this Final Judgment. Since the DOJ will not police MICROSOFT to ensure that MICROSOFT complies with this Final Judgment, MICROSOFT will not comply with this Final Judgment. In other words, MICROSOFT will withhold reasonable technical requirements from their competitors to prevent them from making Middleware Products that meet MICROSOFT's reasonable technical requirements.

Since these 2 exceptions ending III.H. negate the restrictions of III.H. they should be deleted from the proposed Final Judgment.

28. III. Prohibited Conduct, I.2.

The scope of the license for MICROSOFT's Intellectual Property Rights ("IPRs") in III.I.2. is too narrow. III.I.2. states in relevant part:

> ...the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment...

As stated above in OBJECTION 6. regarding III.C.1., MICROSOFT has consistently withheld APIs and related Documentation from their

competitors. The fact that MICROSOFT has consistently withheld APIs and related Documentation from their competitors indicates that they will consistently withhold IPRs from their competitors to prevent their competitors from making Middleware Products that can truly compete with MICROSOFT Middleware Products. Since MICROSOFT will consistently withhold IPRs from their competitors to prevent their competitors from making Middleware Products that can truly compete with MICROSOFT Middleware Products, limiting the scope of the license of MICROSOFT's IPRs to "no broader than necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment..." is too narrow.

Once again MICROSOFT can successfully withhold IPRs in violation of this proposed Final Judgment because, as stated above in OBJECTION 6. regarding III.C.1., the DOJ will not police MICROSOFT. Since the DOJ will not police MICROSOFT to ensure that MICROSOFT complies with this proposed Final Judgment, MICROSOFT will not comply with this Final Judgment. In other words, MICROSOFT will not grant their competitors the IPRs necessary to make Middleware Products that can truly compete with MICROSOFT's Middleware Products. Since MICROSOFT will not grant their competitors the IPRs necessary to make Middleware Products that can truly compete with MICROSOFT's Middleware Products, the scope of the license of MICROSOFT's IPRs under III.I.2. is too narrow.

For III.I.2. to be in the public interest, it must be rewritten to grant all software developers a license to all of MICROSOFT's IPRs. Furthermore, this license should be royalty-free for Open-Source Software developers (who generally lack the money to pay royalties). In other words, III.I.2. should be rewritten as follows:

2. MICROSOFT shall license all of its IPRs to ISVs, IHVs, IAPs, ICPs or OEMs. Furthermore, MICROSOFT shall grant a royalty-free license of its IPRs to Open-Source Software developers.

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29. III. Prohibited Conduct, I.5.

The requirement of III.I.5. is too lenient to MICROSOFT. As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case in the District Court and the Court Appeals. Since MICROSOFT lost this case in the District Court and the Court Appeals, the DOJ should not concede anything to MICROSOFT, especially allowing MICROSOFT to require software developers to license back IPRs they developed from licensing MICROSOFT IPRs. Since the DOJ should not concede anything to MICROSOFT, they should not allow MICROSOFT to require software developers to grant back their IPRs developed from licensing MICROSOFT's IPRs. Since III.I.5. allows MICROSOFT to require software developers to grant back their IPRs developed from licensing MICROSOFT's IPRs, III.I.5. is too lenient.

For III.I. to be in the public interest, III.I.5. should be deleted from the proposed Final Judgment.

30. III. Prohibited Conduct, J.1.

III.J.1.(a) allows MICROSOFT to avoid most of the prohibitions of this Final Judgment by claiming they are related to anti-piracy measures. III.J.1.(a) states:

> No provision of this Final Judgment shall:
>
> 1. Require Microsoft to document, disclose or license to third third parties:
>
> (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria;...

III.J.1.(a) allows MICROSOFT to withhold APIs and related Documentation from competitors by claiming these APIs and Documentation relate to anti-piracy, anti-virus, software licensing, digital rights management, encryption or authntication systems. This concession to MICROSOFT is a joke, as MICROSOFT has the worst, bar none, record for security in the computer industry. Instead of allowing MICROSOFT to withhold APIs and related Documentation based on these grounds, this proposed Final Judgment should require MICROSOFT to disclose these APIs and related Documentation because MICROSOFT has no credible anti-piracy, anti-virus, software licensing, digital rights management, encryption or authntication systems. Since III.J.1.(a) allows MICROSOFT to withhold APIs and related Documentation from competitors by claiming these APIs and Documentation relate to anti-piracy, anti-virus, software licensing, digital rights management, encryption or authntication systems, III.J.1.(a) allows MICROSOFT to avoid most of the prohibitions of this Final Judgment.

III.J.1.(b) is a tautology and is thus superfluous to this proposed Final Judgment. If a governmental agency of competent jurisdiction lawfully directs MICROSOFT not to release APIs or related Documentation, then this Court cannot order otherwise. Since if a governmental agency of competent jurisdiction lawfully directs MICROSOFT not to release APIs or related Documentation, then this Court cannot order otherwise, III.J.1.(b) simply restates the law. Since III.J.1.(b) simply restates the law, it is a tautology and thus superfluous to this proposed Final Judgment.

For III.J. to be in the public interest, III.J.1. must be deleted from this proposed Final Judgment.

31. III. Prohibited Conduct, J.2.

III.J.2. is too lenient to MICROSOFT. III.J.2. allows MICROSOFT to condition licensing any API, Documentation, or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third-party intellectual property protection mechanisms of any MICROSOFT product to any person or entity. As stated above in OBJECTION 30. regarding III.J.1., MICROSOFT's security is practically non-existent. Since MICROSOFT's security is practically non-existent, no harm can come from licensing these APIs, Documentation, Communications Protocols, etc. Since no harm can come from licensing these APIs, Documentation,

Communications Protocols, etc., III.J.2. is too lenient to MICROSOFT.

Furthermore, the conditions that III.J.2. allows MICROSOFT to place upon licensees are vague and thus subject to abuse. III.J.2. states these conditions as:

> (a) has no history of software counterfeiting piracy or willful violation of IPRs,
> (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product,
> (c) meets reasonable, objective standards *established by Microsoft* for certifying the authenticity and viability of its business,
> (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communications Protocols to third-party verification, *approved by Microsoft*, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

(b) contains the vague phrase "reasonable business need". (c) contains the vague phrase "reasonable, objective standards". (d) contains the vague phrase "verification and compliance with Microsoft specifications". III.J.2. is also troubling because it allows *MICROSOFT* to determine these conditions. (c) and (d) explicitly state that MICROSOFT shall determine the standards. (c) states "reasonable, objective standards established by Microsoft". (d) states that the program shall be submitted to a third party *approved by Microsoft*". (a) and (b) implicitly allow MICROSOFT to determine the condition. (b) does not explicitly state who determines whether a licensee has a reasonable business need, but given the leniency shown to MICROSOFT in III.J. as a whole, MICROSOFT will argue that it has the right to determine this condition. Likewise with (a). As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case; the District Court and Court of Appeals both held that MICROSOFT was a monopolist and abused its monopoly power to maintain its monopoly. Since these Courts held that MICROSOFT violated the law, MICROSOFT should not be the party determining these conditions. Furthermore, since MICROSOFT is computer-security challenged, MICROSOFT should not be allowed to condition the license of these IPRs on these, or other, conditions.

For III.J. to be in the public interest, III.J.2. should be deleted. To be more precise, III.J. should be deleted in its entirety. Furthermore, this proposed Final Judgment should prohibit MICROSOFT from making software relating to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third-party intellectual property protection mechanisms until a jury of its peers (SUN MICROSYSTEMS, AOL, and IBM, for example) determines that MICROSOFT is capable of making secure software.

32. IV. Compliance and Enforcement Procedures, A.1.

IV.A.1. allows MICROSOFT to continue violating the antitrust laws. IV.A.1. states:

> 1. The United States shall have *exclusive responsibility*

for enforcing this Final Judgment.

In other words, IV.A.1. deprives the States of their concurrent jurisdiction in this case and the corresponding right to enforce this Final Judgment. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Since the DOJ will not enforce this proposed Final Judgment, the States will have to enforce this proposed Final Judgment. However, IV.A.1. ensures that *no one* will enforce this proposed Final Judgment by granting *exclusive responsibility/jurisdiction* to the United States/DOJ. Since IV.A.1. grants exclusive jurisdiction to the United States/DOJ, and the DOJ will not enforce this proposed Final Judgment, IV.A.1. allows MICROSOFT to continue violating the antitrust laws.

For IV.A.1. to be in the public interest, it must grant concurrent jurisdiction to the States to enforce this proposed Final Judgment. In other words, IV.A.1. should be rewritten as follows:

1. The United States, and the individual States, shall share
jurisdiction for enforcing this Final Judgment.

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33. IV. Compliance and Enforcement Procedures, A.2.

IV.A.2. is an illusory and thus ineffective remedy. IV.A.2. allows the United States/DOJ to inspect MICROSOFT's documents, premises, and employees for compliance with this proposed Final Judgment. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Since the DOJ will not enforce this proposed Final Judgment, the DOJ will never inspect MICROSOFT's documents, premises, or employees for compliance with this proposed Final Judgment. Since the DOJ will never inspect MICROSOFT's documents, premises, or employees for compliance with this proposed Final Judgment, this right to inspect is illusory and thus ineffective.

34. IV. Compliance and Enforcement Procedures, A.3.

IV.A.3. is too lenient to MICROSOFT. IV.A.3. states in relevant part:

> The United States shall *not* disclose any information or documents obtained from Microsoft under this Final Judgment *except for the purpose of securing compliance with this Final Judgment*, in a legal proceeding to which the United States is a party, or as otherwise required by law, *provided* that the United States must provide ten days' advance notice to Microsoft before disclosing in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party any information or documents provided by Microsoft pursuant to this Final Judgment which Microsoft has identified in writing as material...

As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not be making any concessions to MICROSOFT, including withholding evidence from the public. Furthermore, the United States' taxpayers

paid for this litigation. Since the United States' taxpayers paid for this litigation, they have a right to see what they paid for. In particular, the public have a right to see the documents that MICROSOFT produced pursuant to this litigation. Since the public have a right to see the documents that MICROSOFT produced pursuant to this litigation, and the DOJ should not concede anything to MICROSOFT, IV.A.3. is too lenient to MICROSOFT.

For IV.A.3. to be in the public interest, IV.A.3. should be rewritten to *require* the United States to disclose the documents and other evidence it obtained from MICROSOFT pursuant to this litigation. In other words, IV.A.3. should be rewritten as follows:

> The United States shall disclose all information and documents obtained from MICROSOFT pertaining to this litigation, including but not limited to publishing this information and documents in the FEDERAL REGISTER and on the DOJ's website.

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35. IV. Compliance and Enforcement Procedures, A.4.

IV.A.4. is too lenient to MICROSOFT. IV.A.4. requires the United States to alllow MICROSOFT "a reasonable opportunity" to cure alleged violations of this propsed Final Judgment before seeking a court order to enforce this Final Judgment. However, this proposed Final Judgment does not define the term "reasonable opportunity". Since this proposed Final Judgment does not define the term "reasonable opportunity", MICROSOFT can prevent the United States from enforcing this proposed Final Judgment by claiming that "reasonable opporuntity" means 5 years. Or, more likely, MICROSOFT can file consecutive motions delaying the United States from enforcing this proposed Final Judgment by claiming that they are "working on the problem and need more time" and thus extend indefinitely the "reasonable opportunity" to cure the alleged defect. Since IV.A.4. allows MICROSOFT to prevent the United States from enforcing this proposed Final Judgment, IV.A.4. is too lenient to MICROSOFT.

IV.A.4. also allows MICROSOFT to claim that its attempt to cure the defect is a defense to enforcement of this proposed Final Judgment. IV.A.4. states in relevant part:

> ...provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any *knowing,willful or systematic* violation.

Proving a *knowing, willful or systematic* violation is extremely difficult. In fact, a lot of prosecutors will not prosecute fraud or other crimes requiring "knowing, willful or systematic violations" precisely because proving "knowing, willful or systematic violations" is so difficult. Furthermore, as stated above in OBJECTION 6. regarding III.C.1., the DOJ does not want to enforce this proposed Final Judgment. Since proving "knowing, willful or systematic violations" is so difficult, and the DOJ does not want to enforce this proposed Final Judgment, *in practice* MICROSOFT will *never* be charged with a *knowing, willful or systematic violation of this proposed Final Judgment. Since *in practice* MICROSOFT will *never* be charged with a *knowing, willful or systematic violation* of this proposed Final Judgment, MICROSOFT will always be able to use their actions to cure an alleged violation as a defense against enforcement of this proposed

Final Judgment. Since MICROSOFT will always be able to use their actions to cure an alleged violation as a defense against enforcement of this proposed Final Judgment, IV.A.4. is too lenient.

For IV.A.4. to be in the public interest, the term "reasonable opportunity" should be replaced with "30 days". Furthermore, the phrase "knowing, willful or systematic" must be deleted from IV.A.4. In other words, IV.A.4. should be rewritten as follows:

> ...provided, however, that the United States shall afford Microsoft *30 days* to cure alleged violations of Sections III.C., III.D., III.E. and III.H., provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any violation.

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36. IV. Compliance and Enforcement Procedures, B.

The Technical Committee ("TC") described in IV.B. is an illusory and thus ineffective remedy. IV.B.2. describes the qualifications of the Technical Committee as:

> The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. ...no TC member (absent the agreement of both parties):
>
> a. shall have been employed in any capacity by Microsoft or any competitor to Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;
>
> b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or
>
> c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC.

Practically every "expert in software design and programming" has been employed by Microsoft or its competitors either as a programmer or as an expert in this antitrust trial. Since practically every "expert in software design and programming" has been employed by Microsoft or its competitors either as a programmer or as an expert in this antitrust trial, no expert qualifies for the TC. The problem here is that, as stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Since the DOJ will not enforce this proposed Final Judgment, MICROSOFT is free to pick a TC member biased towards MICROSOFT without the DOJ objecting under IV.B.2. Furthermore, MICROSOFT will object to every expert that the DOJ selects that is biased against MICROSOFT. For example, in the contempt proceeding in early 1998 preceding the present case, Judge Jackson appointed a technical expert to educate the court in computer software,

operating systems, and web brwosers. This expert had made one off-hand comment about his APPLE computer. MICROSOFT objected to Judge Jackson appointing this expert based upon this 1 off-hand comment. The fact that MICROSOFT objected to Judge Jackson appointing this expert based upon this 1 off-hand comment indicates that MICROSOFT will object to *any* expert that the DOJ selects who is biased against MICROSOFT. Since MICROSOFT will object to every expert that the DOJ selects that is biased against MICROSOFT, and the DOJ will not enforce this proposed Final Judgment, the DOJ will ultimately select a TC member that is also biased towards MICROSOFT. Thus, both MICROSOFT and the DOJ will select TC members who are biased towards MICROSOFT. These 2 TC members will then select a third TC member. Since both MICROSOFT and the DOJ will select an expert biased towards MICROSOFT, this third TC member will also be biased towards MICROSOFT. Since all 3 members of the TC will be biased towards MICROSOFT, they will always find MICROSOFT in compliance with this proposed Final Judgment. Since the TC will always find MICROSOFT in compliance with this proposed Final Judgment, this Technical Committee is an illusory and thus ineffective remedy.

For IV.B. to be in the public interest, IV.B.2. and 3. must be rewritten to remove any input from MICROSOFT. MICROSOFT must be prohibited from selecting or having the right to object to *any* member of the TC. Furthermore, *none* of the TC members must have been employed or retained by MICROSOFT at any time. Finally, instead of MICROSOFT choosing a TC member, *MICROSOFT's competitors* should choose a TC member who, together with the DOJ's choice, choose the third TC member. In other words, IV.B.2. and 3. should be rewritten as follows:

2. ...The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. ...no TC member:

   a. shall have been employed in any capacity by Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;

   b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action on behalf of Microsoft; or

   c. shall perform any other work for Microsoft for two years after the expiration of the term of his or her service on the TC.

3. Within 7 days of entry of this Final Judgment, the United States and MICROSOFT's competitors shall each select one member of the TC, and those two members shall then select the third member. ...

   a. ..., the United States and MICROSOFT's competitors shall each identify the members it selects.

   b. As soon as practical after their appointment by the Court, the two members selected by the United States and MICROSOFT's competitors shall identify the person they propose to select as the third member of the TC.

   c. The United States shall apply to the Court for

appointment of the person selected by the Standing Committee Members.

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37. IV. Compliance and Enforcement Procedures, B.6.

The exception in IV.B.6. is too lenient to MICROSOFT. IV.B.6. requires MICROSOFT to compensate the TC members for their employment and expenses. However, IV.B.6. contains an exception that allows MICROSOFT to contest payment of the TC members. The exception in IV.B.6. states:

> ...except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the TC member.

In November 1998, shortly after this antitrust case was filed, MICROSOFT lobbied Congress to cut the DOJ's budget. Furthermore, in December 2001, MICROSOFT again lobbied Congress to kill a Senate Judiciary Committee Hearing questioning this proposed Final Judgment (see "Experts Question Microsoft Action" at http://dailynews.yahoo.com/htx/ap/20020111/tc/microsoft_antitrust_12.html). The fact that shortly after this antitrust case was filed MICROSOFT lobbied Congress to cut the DOJ's budget, and that MICROSOFT recently lobbied Congress to kill the Senate Judiciary Committee Hearing questioning this proposed Final Judgment, indicates that MICROSOFT will refuse to pay the TC members if they do not find MICROSOFT in compliance with this proposed Final Judgment. Since MICROSOFT will refuse to pay the TC members if they do not find MICROSOFT in compliance with this proposed Final Judgment, the exception in IV.B.6. is too lenient to MICROSOFT.

For IV.B.6. to be in the public interest, this exception must be deleted. In other words, IV.B.6. should be rewritten as follows:

> ... Microsoft shall indemnify each TC member and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the TC's duties. The TC Services Agreement shall include the following: ...

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38. IV. Compliance and Enforcement Procedures, B.8.c.

The first sentence of IV.B.8.c. is too lenient to MICROSOFT. The first sentence of IV.B.8.c. starts:

> The TC shall have access to Microsoft's source code, *subject to the terms of Microsoft's standard source code Confidentiality Agreement* ...

As stated above in OBJECTION 1. regarding the second paragraph,

MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not concede anything to MICROSOFT. Furthermore, as stated above in OBJECTION 12. regarding III.D., MICROSOFT should be *required* to disclose the entire source code and compilers used to compile the binaries for their Windows Operating System Products to comply with the prohibitions of this proposed Final Judgment. Since the DOJ should not concede anything to MICROSOFT, and MICROSOFT should be *required* to disclose the entire source code and compilers used to compile the binaries for their Windows Operating System Products to comply with the prohibitions of this proposed Final Judgment, the TC's access to MICROSOFT's source code should *not* be subject to *any* Confidentiality Agreement. Since IV.B.8.c. conditions the TC's access to MICROSOFT's source upon agreeing to MICROSOFT's standard source code Confidentiality Agreement, IV.B.8.c. is too lenient to MICROSOFT.

For IV.B.8.c. to be in the public interest, IV.B.8.c. must grant the TC access to MICROSOFT's source code without being subject to MICROSOFT's standard source code Confidentiality Agreement. In other words, IV.B.8.c. should be rewritten as follows:

> The TC shall have access to Microsoft's source code. The TC may study, interrogate, ...

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39. IV. Compliance and Enforcement Procedures, B.8.c.

IV.B.8.c. is incomplete and thus inadequate for the TC to perform its duties. IV.B.8.c. states in relevant part:

> ... The TC may *study, interrogate, and interact* with the source code in order to perform its functions and duties, including the handling of complaints and other inquiries from non-parties.

However, IV.B.8.c. does not *explicitly* grant the TC the power to compile the source code. As stated above in OBJECTION 12. regarding III.D., the only way to ensure that MICROSOFT is complying with this proposed Final Judgment is to compile the source code and compare the resulting binaries with the binaries that MICROSOFT ships to OEMs. Since the only way to ensure that MICROSOFT is complying with this proposed Final Judgment is to compile the source code and compare the resulting binaries with the binaries that MICROSOFT ships to OEMs, the TC needs the power to compile the source code of MICROSOFT's software.

MICROSOFT will claim that since the proposed Final Judgment does not explicitly grant the TC the power to compile the source code, that the TC does not have the power to compile the source code. Furthermore, as stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Since MICROSOFT will claim that this proposed Final Judgment does not grant the TC the power to compile the source code, and the DOJ will not contest MICROSOFT's claim, MICROSOFT will prevent the TC from compiling the source code. Since the TC needs the power to compile the source code of MICROSOFT's software to determine if MICROSOFT is complying with this proposed Final Judgment, and MICROSOFT will prevent the TC from compiling the source code, IV.B.8.c. is incomplete and thus inadequate for the TC to perform its duties.

For IV.B.8.c. to be in the public interest, IV.B.8.c. must *explicitly* grant the TC the power to compile the source code of MICROSOFT's

software. In other words, IV.B.8.c. should be rewritten as follows:

> ... The TC may *study, interrogate, compile, and otherwise interact* with the source code in order to perform its functions and duties, including the handling of complaints and other inquiries from non-parties.

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40. IV. Compliance and Enforcement Procedures, B.8.i.

IV.B.8.i. is too lenient to MICROSOFT. IV.B.8.i. allows MICROSOFT to object to the reasonable expenses and fees of the TC. Specifically, IV.B.8.i. states:

> ... Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. ...

As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not concede anything to MICROSOFT, including the right to object to the expenses and fees of the TC. Since the DOJ should not concede anything to MICROSOFT, including the right to object to the expenses and fees of the TC, IV.B.8.i. is too lenient to MICROSOFT.

For IV.B.8.i. to be in the public interest, MICROSOFT's right to object to the fees and expenses of the TC must be deleted. In other words, IV.B.8.i. should be rewritten as follows:

> The TC shall account for all reasonable expenses incurred, including agreed upon fees for the TC members' services, subject to the approval of the United States. [END OF IV.B.8.i.]

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41. IV. Compliance and Enforcement Procedures, B.8.

IV.B.8. is incomplete and thus inadequate for the TC to perform their duties of ensuring MICROSOFT's compliance with this proposed Final Judgment. IV.B.8. does not grant the TC the power to enjoin MICROSOFT from releasing products which violate this proposed Final Judgment. Without this power, this proposed Final Judgment is ineffective. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Furthermore, IV.A. grants the United States excusive jurisdiction to enforce this proposed Final Judgment, so the States cannot enforce this proposed Final Judgment. Since the DOJ will not, and the States cannot, enforce this proposed Final Judgment, the TC is the only body positioned to enforce it. Since the TC is the only body positioned to enforce this proposed Final Judgment, they should have the power to enjoin MICROSOFT from releasing products that violate this proposed Final Judgment. Since IV.B.8. does not grant the TC the power to enjoin MICROSOFT from releasing products that violate this proposed Final Judgment, IV.B.8. is incomplete and thus inadequate for the TC to perform their duties of ensuring MICROSOFT's compliance with this proposed Final Judgment.

For IV.B.8. to be in the public interest, it must grant the TC the right

enjoin MICROSOFT's products which do not comply with this proposed Final Judgment. In other words, IV.B.8. should include an additional part "j." as follows:

> j. The TC shall have the power to enjoin the release, sale, or other transmission of any MICROSOFT software or products which do not comply with this Final Judgment.

42. IV. Compliance and Enforcement Procedures, B.9.

IV.B.9. is too lenient to MICROSOFT. IV.B.9. prohibits the TC from disclosing any information obtained in the course of performing his or her duties to anyone other than MICROSOFT, the United States, and this Court. As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not concede anything to MICROSOFT, including the public desemination of information that the TC learns in the course of performing his or her duties pursuant to the proposed Final Judgment. Furthermore, the United States taxpayers paid for this antitrust trial. Since the United States taxpayers paid for this antitrust trial, they have a right to know what the TC learn in the course of performing their duties pursuant to this proposed Final Judgment. Since IV.B.9. prohibits the TC from disclosing any information obtained in the course of performing his or her duties to anyone other than MICROSOFT, the United States, and this Court, IV.B.9. is too lenient to MICROSOFT.

For IV.B.9. to be in the public interest, it must *require* the TC to publicly disclose all information that it discovers in the course of performing their duties. In other words, IV.B.9. should be rewritten as follows:

> The TC shall publicly disclose, in the FEDERAL REGISTER and any other forum deemed necessary, all information obtained in the course of performing their duties pursuant to this Final Judgment.

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43. IV. Compliance and Enforcement Procedures, B.10.

IV.B.10. is too lenient to MICROSOFT, for the same reasons as stated above in OBJECTION 42. regarding IV.B.9. For IV.B.10. to be in the public interest, it must *require* the TC to make public statements relating to the TC's activities. In other words, IV.B.10. should be rewritten as follows:

> Each member of the TC shall be required to make public statements relating to the TC's activities.

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44. IV. Compliance and Enforcement Procedures, C.1.

The qualifications of the MICROSOFT Internal Compliance Officer in IV.C.1. are illusory and thus ineffective. IV.C.1. requires MICROSOFT to designate an Internal Compliance Officer who shall supervise MICROSOFT's activities in complying with this proposed Final Judgment. However, IV.C.1. states that this Internal Compliance Officer "...shall be an employee of Microsoft...". MICROSOFT has consistently violated

the antitrust laws of the United States and the Euopean Union, among other jurisdictions (for details, see THE MICROSOFT FILE: THE SECRET CASE AGAINST BILL GATES by Wendy Goldman Rohm, Times Business, copyright 1998, ISBM 0-8129-2716-8). MICROSOFT's employees have worked to make these antitrust violations possible. Since MICROSOFT's employees have worked to make these antitrust violations possible, MICROSOFT's employees have a conflict of interest in administering MICROSOFT's program for complying with this proposed Final Judgment. To be more precise, MICROSOFT's employees have *no interest or incentive* to comply with this proposed Final Judgment. Since MICROSOFT's employees have *no interest or incentive* to comply with this proposed Final Judgment, they will *not* ensure that MICROSOFT complies with this proposed Final Judgment. Since MICROSOFT's employees will *not* ensure that MICROSOFT complies with this proposed Final Judgment, designating a MICROSOFT employee as Internal Compliance Officer is an illusory and thus ineffective remedy.

For IV.C.1. to be in the public interest, the qualifications of the Internal Compliance Officer must require that the Officer *not* be an employee of MICROSOFT. Furthermore, IV.C.1. must require that the Officer be selected from MICROSOFT's competitors, specifically SUN MICROSYSTEMS, AOL, and/or IBM. In other words, IV.C.1. should be rewritten as follows:

> Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of SUN MICROSYSTEMS, AOL, or IBM with responsibility for administering Microsoft's antitrust compliance program and helping to ensure compliance with this Final Judgment.

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45. IV. Compliance and Enforcement Procedures, C.3.d.

The warning contained in the certification that MICROSOFT officers and directors must sign is inadequate and thus ineffective. IV.C.3.d. requires MICROSOFT's officers and directors to sign a certification that he or she:

> (i) has read and agrees to abide by the terms of this Final Judgment; and
> (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in *a finding of contempt of court;

The officers and directors of MICROSOFT control the actions of MICROSOFT. Since the officers and directors of MICROSOFT control the actions of MICROSOFT, the actions of the officers and directors of MICROSOFT should be imputed to MICROSOFT. To be more precise, the failure of MICROSOFT's officers and directors to comply with this Final Judgment should be considered a *knowing, willful or systematic violation* of this proposed Final Judgment. Furthermore, punishing an officer or director does not stop MICROSOFT from continuing to violate the antitrust laws. Since punishing an officer or director does not stop MICROSOFT from continuing to violate the antitrust laws, the warning of IV.C.3.d. is not adequate to deter MICROSOFT from continuing to violate the antitrust laws. Since the warning of IV.C.3.d. is not

adequate to deter MICROSOFT from continuing to violate the antitrust laws, it is ineffective.

For IV.C.3.d. to be in the public interest, the warning in the certification must be rewritten to impute the officer or director's failure to comply with this proposed Final Judgment to MICROSOFT. In other words, IV.C.3.d. should be rewritten as follows:

> obtaining from each person designated in Section IV.C.3.a. above...
>
> (ii) has been advised and understands that his or her failure to comply with this Final Judgment comprises a knowing, willful or systematic violation of this Final Judgment;

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46. IV. Compliance and Enforcement Procedures, D.3.a.

IV.D.3.a. renders this proposed Final Judgment an illusory and ineffective remedy. IV.D.3.a. states in relevant part:

> ... the United States may submit complaints related to Sections III.C., III.D. III.E., and III.H. to the Compliance Officer *whenever doing so would be in the public interest.

In other words, IV.D.3.a. allows the United States to abdicate responsibility for enforcing this proposed Final Judgment to MICROSOFT. As stated above in OBJECTION 6. regarding III.C.1., the DOJ will not enforce this proposed Final Judgment. Since the DOJ will not enforce this proposed Final Judgment, the DOJ will seize any opportunity to abdicate enforcing this proposed Final Judgment. Since IV.D.3.a. allows the DOJ to abdicate responsibility for enforcing this proposed Final Judgment to MICROSOFT, and the DOJ will seize any opportunity to abdicate enforcing this proposed Final Judgment, the DOJ will in fact use IV.D.3.a. to claim that letting MICROSOFT resolve these complaints is in the public interest. Since MICROSOFT has no interest in resolving these Complaints, MICROSOFT will ignore these Complaints and continue violating this proposed Final Judgment (Note that MICROSOFT's customers will be submitting the exact same complaints to MICROSOFT's technical support department. Since MICROSOFT's customers will be submitting the exact same complaints to MICROSOFT's technical support department, MICROSOFT will already know about these complaints. Since MICROSOFT will already know about these complaints, they can resolve these complaints without the DOJ submitting the complaints to MICROSOFT). In fact, allowing MICROSOFT to resolve these Complaints is like asking the fox to guard the hen house. Since MICROSOFT will ignore these Complaints and continue violating this proposed Final Judgment, IV.D.3.a. renders this proposed Final Judgment an illusory and ineffective remedy.

For IV.D.3.a. to be in the public interest, the DOJ must be prohibited from allowing MICROSOFT to resolve complaints submitted to the DOJ. In other words, IV.D.3.a. must be rewritten as follows:

> a. Third parties may submit to the Compliance Officer any complaints concerning MICROSOFT's compliance with this Final Judgment. [END OF IV.D.3.a.]

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47. IV. Compliance and Enforcement Procedures, C.4.d.

IV.D.4.d., in practice, prevents the DOJ from ever enforcing this proposed Final Judgment. IV.D.4.d. states:

> No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment.

In other words, should the TC find evidence that MICROSOFT is violating this proposed Final Judgment and refers this evidence to the DOJ, the DOJ cannot use this evidence to enforce this proposed Final Judgment against MICROSOFT. Furthermore, as stated above in the GENERAL OBJECTIONS, the DOJ does not wish to spend any more time and resources prosecuting MICROSOFT. Since the DOJ does not wish to spend any more time and resources prosecuting MICROSOFT, the DOJ will not make any effort to discover this evidence through additional depositions or discovery requests against MICROSOFT. Since the DOJ will not make any effort to discover this evidence through additional depositions or discovery requests against MICROSOFT, and IV.D.4.d. prevents the DOJ from using the evidence the TC discovers, IV.D.4.d. has the practical effect of preventing the DOJ from enforcing this proposed Final Judgment against MICROSOFT.

As a sidenote, IV.D.4.d. stands the Federal Rules of Civil Procedure on their head. The Federal Rules of Civil Procedure prevent an *opponent* from discovering and/or using a party's work product. Here, the TC is representative of the DOJ. Since the TC is a representative of the DOJ, the TC and the DOJ are in a sense the same party. MICROSOFT is the DOJ's opponent. IV.D.4.d. prevents a party from using its own work product to prosecute an opponent. In other words, IV.D.4.d. prevents the DOJ from using its own work product against its opponent, MICROSOFT. Since IV.D.4.d. prevents the DOJ from using its own work product against its opponent, MICROSOFT, IV.D.4.d. stands the Federal Rules of Civil Procedure on their head.

For IV.D.4.d. to be in the public interest, it must be rewritten to *require* that the work product, findings, and recommendations of the TC and testimony of the TC be admissible evidence in *any* legal proceeding, in this or any other country or region like the European Union. In other words, IV.D.4.d. should be rewritten as follows:

> The work product, findings or recommendations by the TC shall be admitted in every enforcement proceeding before the Court for any purpose, and all members of the TC shall testify by deposition, in Court and/or before every other tribunal that calls upon the TC for testimony, regarding every matter related to the Final Judgment.

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48. V. Termination, B.

V.B. is an illusory and thus ineffective remedy. V.B. allows the Court to extend this proposed Final Judgment when MICROSOFT is found to have

engaged in "a pattern of *knowing, willful and systematic violations*". As stated above in OBJECTION 35. regarding IV.A.4., proving a *knowing, willful or systematic* violation is extremely difficult. Furthermore, as stated above in OBJECTION 6. regarding III.C.1., the DOJ does not want to enforce this proposed Final Judgment. Since proving "knowing, willful or systematic violations" is so difficult, and the DOJ does not want to enforce this proposed Final Judgment, *in practice* MICROSOFT will *never* be charged with a *knowing, willful and systematic violation of this proposed Final Judgment. Since *in practice* MICROSOFT will *never* be charged with a *knowing, willful or systematic violation of this proposed Final Judgment, this Court will never find MICROSOFT to have engaged in "a pattern of *knowing, willful and systematic violations*". Since this Court will never find MICROSOFT to have engaged in "a pattern of *knowing, willful and systematic violations*", V.B. is an illusory and thus ineffective remedy.

As a sidenote, the inclusion of V.B. is kind of amusing. As detailed in the above 47 OBJECTIONS, this entire proposed Final Judgment contains so many exceptions that allow MICROSOFT to continue violating the antitrust laws that MICROSOFT will probably never be in violation of it. Furthermore, the DOJ's reluctance to oppose MICROSOFT's demands in any way indicates that the DOJ will probably never enforce this proposed Final Judgment against MICROSOFT. Thus, given the extreme unlikeliness that this proposed Final Judgment will ever be violated, let alone enforced, including a provision to extend this proposed Final Judgment appears farcical.

For V.B. to be in the public interest, the conditions for extending this proposed Final Judgment should be changed to *any* violation of Local, State, National, or International law. In other words, V.B. should be rewritten as:

> In any enforcement proceeding in which the Court has found that Microsoft has violated any Local, State, National, or International law, the Court shall extend this Final Judgment for at least two years, together with such other relief as the Court may deem appropriate.

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49. VI. Definitions, B.

As stated above in OBJECTION 16. regarding III.E., VI.B. defines Communications Protocols too narrowly. Since VI.B. defines Communications Protocols too narrowly, VI.B. should be rewritten as explained in OBJECTION 16. regarding III.E. In other words, VI.B. should be rewritten as follows:

> "Communications Protocol" means the set of rules for information exchange to accomplish predefined tasks between a Windows Operating System Product on a client computer and Windows 2000 Server or products marketed as its successors running on a server computer and connected via a local area network or a wide area network. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network. [END OF VI.B.]

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50. VI. Definitions, J.1.

The definition of "MICROSOFT Middleware" is too restrictive. Specifically, VI.J.1., VI.J.2., and the conjunctive ending VI.J.3. are too restrictive. VI.J.1. states:

> "Microsoft Middleware" means software code that
>
> 1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;

J.1. is too restrictive in requiring that the software code be distributed separately from the Windows Operating System Product. MICROSOFT has a history of bundling Middleware into its Windows Operating System Products to destroy competing Middleware. For example, MICROSOFT bundled Internet Explorer into its Windows 98 operating system product to destroy the competing Netscape COMMUNICATOR web browser. MICROSOFT subsequently bundled its streaming media player, WINDOWS MEDIA PLAYER, into its Windows XP operating system product to destroy the competing Real Networks' REAL PLAYER streaming media player. Since MICROSOFT has a history of bundling Middleware into its Windows Operating System Products to destroy competing Middleware, MICROSOFT can avoid the requirements of VI.J.1. by bundling all of its Middleware into its Windows Operating System Products. Since MICROSOFT can avoid the requirements of VI.J.1. by bundling all of its Middleware into its Windows Operating System Products, VI.J.1. is too restrictive.

For VI.J.1. to be in the public interest, the requirements of VI.J.1. should be changed to software code that competitors distribute or that was not bundled into previous Windows Operating System Products. In other words, VI.J.1. should be rewritten as follows:

> 1. competitors distribute as a Middleware Product or that was not bundled into previous Windows Operating System Products;

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51. VI. Definitions, J.2.

The requirement of VI.J.2. is too restrictive. J.2. states:

> "Microsoft Middleware" means software code that
> ...
> 2. is trademarked;

Whether or not software code is trademarked is irrelevant to whether or not the code is Middleware. For example, MICRSOFT did not own the trademark to INTERNET EXPLORER when it released the product. Since MICROSOFT did not own the trademark to INTERNET EXPLORER when it released the product, INTERNET EXPLORER arguably did not qualify as MICROSOFT Middleware under J.2. Since trademarking software code is irrelevant to whether or not the code is Middleware, VI.J.2. is too restrictive.

For VI.J. to be in the public interest, VI.J.2. should be deleted.

52. VI. Definitions, J.3.

The conjunctive ending VI.J.3. is too restrictive. VI.J.3. states:

> "Microsoft Middleware" means software code that
> ...
> 3. provides the same or substantially similar functionality as a
> Microsoft Middleware Product; *and*

The conjunctive "and" is restrictive, requiring software code to meet all 4 criteria listed in VI.J. to qualify as "Microsoft Middleware". As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not concede anything to MICROSOFT, including the definition of "Microsoft Middleware". In other words, the DOJ should define "Microsoft Middleware" as broadly as possible. To define "Microsoft Middleware" as broadly as possible, VI.J. should use the conjunctive "or", which requires software code to meet only 1 of the 4 criteria listed in VI.J. to qualify as MICROSOFT Middleware. Since VI.J. does not use the conjunctive "or" to end VI.J.3., the conjunctive ending VI.J.3. is too restrictive.

For VI.J.3. to be in the public interest, the conjunctive ending VI.J.3. should be changed from "and" to "or". In other words, VI.J.3. should be rewritten as follows:

> 3. provides the same or substantially similar functionality as a
> Microsoft Middleware Product; *or*

.

53. VI. Definitions, J.

The paragraph ending VI.J. is too restrictive and too lenient to MICROSOFT. The last paragraph of VI.J. states:

> Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. ...

In other words, this paragraph allows MICROSOFT to avoid designating software code as MICROSOFT Middleware by not identifying it as a new major version of a MICROSOFT Middleware Product. Since this paragraph allows MICROSOFT to avoid designating software code as MICROSOFT Middleware by not identifying it as a new major version of a MICROSOFT Middleware Product, this paragraph is too restrictive as to what qualifies as MICROSOFT Middleware.

As stated above in OBJECTION 52. regarding VI.J.3., the DOJ should define "Microsoft Middleware" as broadly as possible. To define "Microsoft Middleware" as broadly as possible, thte last paragraph should be deleted. Thus, for VI.J. to be in the public interest, the last paragraph of VI.J. should be deleted.

54. VI. Definitions, K.2.b.ii.

The definition of "Microsoft Middleware Product" in VI.K. is too restrictive and this too lenient to MICROSOFT. Specifically, the conjunctive ending VI.K.2.b.ii. and VI.K.2.b.iii. are too restrictive. VI.K.2.b.ii. states:

ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; *and*

For the same reasons stated in OBJECTION 52. regarding III.J.3., the conjunctive ending VI.K.2.b.ii. should be changed from "and" to "or". In other words, for VI.K.2.b.ii. to be in the public interest, it should be rewritten as follows:

ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; *or*

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55. VI. Definitions, K.2.b.iii.

The requirement of K.2.b.iii. is too restrictive for the same reasons stated in OBJECTION 51. regarding VI.J.2. For K.2.b. to be in the public interest, K.2.b.iii. should be deleted.

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56. VI. Definitions, N.

The definition of "Non-Microsoft Middleware Product" in VI.N. is too restrictive for the reasons stated in OBJECTION 22. regarding III.H. For VI.N. to be in the public interest, requirement "(ii)" of "Non-Microsoft Middleware Product" must be deleted. In other words, VI.N. should be rewritten as follows:

"Non-Microsoft Middleware Product" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of funtionality to ISVs through published APIs and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the funtionality supplied by that software product to be ported to or run on that non-Microsoft Operating System. [END OF VI.N.]

57. VI. Definitions, P.

For the same reasons stated in OBJECTION 52. regarding VI.J.3., the definition of "Operating System" in VI.P. is too restrictive. For VI.P. to be in the public interest, the conjunctive ending VI.P.(ii) must be changed from "and" to "or". In other words, VI.P. should be rewritten as follows:

"Operating System" means the software code that, inter alia

(i) controls the allocation and usage of hardware resources such as the microprocessor and various peripheral devices) of a Personal Computer,

(ii) provides a platform for developing applications by exposing functionality to ISVs through APIs, *or*

(iii) supplies a user interface that enables users to access functionality of the operating system and in which they can run applications.

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58. VI. Definitions, Q.

The definition of "Personal Computer" in VI.Q. is too restrictive. In particular, the second sentence of VI.Q. exempting certain devices from the definition of "Personal Computer" is too lenient to MICROSOFT. The second sentence of VI.Q. states:

> ... Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.

As stated above in the GENERAL OBJECTIONS, the purpose of an antitrust action is to stop monopolizing behavior and to prevent future monopolizing behavior. Here, MICROSOFT is leveraging their monopoly in the Personal Computer ("PC") market to monopolize the markets for these other products. By excluding these other devices from the definition of PC, VI.Q. allows MICROSOFT to continue leveraging their monopoly in the PC market to monopolize the markets for these other products. Since the purpose of an antitrust action is to stop monopolizing behavior and to prevent future monopolizing behavior, and MICROSOFT is here using their current monopoly to pursue future monopolies in these other markets, VI.Q. defeats the purpose of this antitrust action. Since VI.Q. defeats the purpose of this antitrust action, VI.Q. is too restrictive.

In addition, the first sentence of VI.Q. is too restrictive. The first sentence of VI.Q. defines a PC as a computer containing an Intel x86 compatible processor. Since APPLE computers contain Motorola processors, which are not x86 compatible, VI.Q. excludes APPLE computers from the definition of PC. However, MICROSOFT sells software that runs on APPLE computers, such as MICROSOFT Office Suite and Internet Explorer. Futhermore, as explained in Judge Jackson's Findings of Facts, MICROSOFT conditioned continued releases of its Office Suite on APPLE only using Internet Explorer as the web browser for their computers. Since MICROSOFT conditioned continued releases of its Office Suite on APPLE only using Internet Explorer as the web browser for their computers, MICROSOFT's monopolizing behavior has affected the software market for APPLE computers. Since MICROSOFT's monopolizing behavior has affected the software market for APPLE computers, the definition of PC should include APPLE computers. Since the definition of PC in VI.Q. does not include APPLE computers, VI.Q. is too restrictive.

For VI.Q. to be in the public interest, the definition of PC must include APPLE computers and all other electronic devices for which MICROSOFT sells software. In other words, VI.Q. should be rewritten as

follows:

"Personal Computer" means any computer configured, or which can be configured, to run MICROSOFT software, including but not limited to, computers containing an Intel x86 processor or a Motorola processor, servers, television set top boxes, handheld computers, game consoles,
telephones, pagers, and personal digital assistants.

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59. VI. Definitions, S.

For the same reasons stated in OBJECTION 52. regarding VI.J.3., the definition of "Top-Level Window" in VI.S. is too restrictive. For VI.S. to be in the public interest, the conjunctive ending VI.S.(b) must be changed from "and" to "or". In other words, VI.S. should be rewritten as follows:

"Top-Level Window" means a window displayed by a Windows Operating System Product that

(a) has its own window controls, such as move, resize, close, minimize, and maximize,

(b) can contain sub-windows, *or*

(c) contains user interface elements under the control of at least one independent process.

60. VI. Definitions, U.

The definition of "Windows Operating System Product" in VI.U. is too restrictive. As stated in OBJECTION 58. regarding VI.P., MICROSOFT is leveraging their monopoly in the PC market into other product markets. Since MICROSOFT is leveraging their monopoly in the PC market into other product markets, VI.U. should define "Windows Operating System Product" to prevent MICROSOFT from leveraging their monopoly in the PC market into other product markets. Since the definition of "Windows Operating System Products" in VI.U. does not include MICROSOFT operating systems for servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants, VI.U. is too restrictive.

For VI.U. to be in the public interest, the definition of "Windows Operating System Product" in VI.U. must include *all* of MICROSOFT's operating systems. In other words, VI.U. must be rewritten as follows:

"Windows Operating System Product" means the software code that MICROSOFT distributes for use with *any electronic device*.

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61. VI. Definitions, U.

The second sentence of VI.U. is too lenient to MICROSOFT. The second sentence states:

> The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

As stated above in OBJECTION 1. regarding the second paragraph, MICROSOFT lost this case. Since MICROSOFT lost this case, the DOJ should not concede anything to MICROSOFT, including the definition of what comprises a Windows Operating System Product. Since the DOJ should not concede the definition of what comprises a Windows Operating System Product, VI.U. should *not* allow MICROSOFT to determine what comprises a Windows Operating System Product. Since VI.U. allows MICROSOFT to determine what comprises a Windows Operating System Product, VI.U. is too lenient to MICROSOFT.

For VI.U. to be in the public interest, the second sentence of VI.U. must be deleted.

For the above reasons stated in the General and Specific Objections, I respectfully submit that this proposed Final Judgment is *not* in the public interest. I further submit that even if this proposed Final Judgment is rewritten as the above SPECIFIC OBJECTIONS recommend, it still will not be in the public interest because the DOJ will not enforce it. Since the proposed Final Judgment will not be in the public interest even if rewritten as the above SPECIFIC OBJECTIONS recommend, I respectfully submit that the DOJ and the Court should reject this proposed Final Judgment and adopt Judge Jackson's remedies.

Sincerely yours,

Daniel Maddux
4100 Greenbriar Street
Number 342
Houston, Texas 77098