From: J(038)B Seybold
To: Microsoft ATR
Date: 1/24/02 2:50am
Subject: Microsoft Settlement

While the proposed settlement appears to meet the defined goals, I am very concerned that the definition of "Microsoft Middleware Product" in the "REVISED PROPOSED FINAL JUDGMENT" is far too narrow and restrictive. Specifically, in "Section IV, Definitions", paragraph K.2.b.i, the definition states "...is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product..."

This definition appears to exclude functionality which was based directly upon or substantially identical in function to the a previous commercial product, but where said functionality was modified by Microsoft. This is a major exclusion, because it is very rare in commercial software for unchanged software to published for two consecutive years. It is common practice for Microsoft to modify software, either by reducing functionality, or by adding functionality, when incorporating the functionality of previously commercial software. Under the provisions of the proposed definition, similar but distinctly different functionality would exclude such modified software from the Microsoft Middleware Product definition. Microsoft could therefore make small or even trivial changes in software that would otherwise be clearly defined as Microsoft Middle Product, and thereby claim that it was exempt from the provisions of this judgment.

Further, the definition of "Microsoft Middleware Product" in the "REVISED PROPOSED FINAL JUDGMENT" carefully excludes new software functionality developed by Microsoft and included as Microsoft Middleware or as part of the Windows operating system, with the intent of competing directly with commercially available software to reduce competition. The pattern shown in the development and release of Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, and Outlook Express is now being repeated in many other areas. For example, the capabilities of Microsoft Backup has been extended to include the file backup functionality provided by NovaStor Corporation's NovaDisk, or Veritas Corporation's Backup Exec. Since NovaStor and Veritas have not been acquired by Microsoft, Microsoft Backup does not meet the definition of a Microsoft Middleware Product.

Therefore, I suggest that the Proposed Final Judgment does not provide the necessary restrictions to preclude continued anticompetitive conduct by Microsoft to unlawfully protect and maintain its operating system monopoly in violation of Section 2 of the Sherman Act.

I suggest that Specifically, in "Section IV, Definitions", paragraph K.2.b.i, be modified to state

"i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by from a Windows Operating System Product,"

thank you for your consideration
John B. Seybold