GÓMEZ BARKER ASSOCIATES, INC.

Government Relations & Public Affairs Counselors
2350 Coral Way, Suite 301
Miami, Florida 33145
Telephone (305) 860-0780
Facsimile (305) 860-0580

January 18, 2002

Hon. Colleen Kollar-Kotelly
U.S. District Court, District of Columbia

c/o Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Dear Judge Kollar-Kotally:

The recent proposed settlement between the Department of Justice and Microsoft fails to put an end to Microsoft's predatory practices.

The final settlement in *U.S. v. Microsoft* does not adequately protect competition and innovation in this vital sector of our economy, does not sufficiently address consumer choice and fails to meet the standards for a remedy set in the unanimous ruling against Microsoft by the Court of Appeals for the District of Columbia. Its enforcement provisions are vague and unenforceable. The five-year time frame of the proposed settlement is far too short to deal with the antitrust abuses of a company that has maintained and expanded its monopoly power through years of fear and intimidation.

Microsoft's liability under the antitrust laws is no longer open for debate. The company has been found liable before the District Court, lost its appeal to the United States Court of Appeals for the District of Columbia in a 7-0 decision, saw its petition for rehearing in the appellate court denied, and had its appeal to the Supreme Court turned down. The courts have decided that Microsoft possesses monopoly power and has used that power unlawfully to protect its monopoly.

The next step is to find a remedy that meets the appellate court's standard to "terminate the monopoly, deny to Microsoft the fruits of its past statutory violations, and prevent any future anticompetitive activity." This proposed settlement fails to do so. In fact, the weak settlement between Microsoft and the Department of Justice ignores key aspects of the Court of Appeals ruling against Microsoft. The decision gives Microsoft "sole discretion" to unilaterally determine that other products or services which don't have anything to do with operating a computer are nevertheless part of a Windows Operating System product. The deal fails to terminate the Microsoft monopoly and, instead, guarantees its survival.

The flawed settlement empowers Microsoft to retaliate against would-be competitors, take the intellectual property of competitors doing business with it and permits Microsoft to define many key terms, which is unprecedented in any law enforcement proceeding.

In addition, the proposed settlement contains far too many strong-sounding provisions that are riddled with loopholes. The agreement requires Microsoft to share certain technical information with other companies. However, Microsoft is under no obligation to share information if that disclosure would harm the company's security or software licensing. Who gets to decide whether such harm might occur? Microsoft. The settlement says that Microsoft "shall not enter into any agreement" to pay a software vendor not to develop or distribute software that would compete with Microsoft's products. However, another provision permits those payments and deals when they are "reasonably necessary." The ultimate arbiter of when these deals would be "reasonably necessary?" Microsoft.

Furthermore, the weak enforcement provisions in this proposed deal leave Microsoft free to do practically whatever it wants. The company appoints half the members of its overseeing committee and has the ability to violate regulations, knowing that whatever the committee finds inappropriate is not admissible in court. Finally, Microsoft must only comply with the lenient restrictions in the agreement for only five years. This is clearly not long enough for a company found guilty of violating antitrust law.

Sadly, the proposed final judgment has the potential to make the competitive landscape of the software industry worse, it contains so many ambiguities and loopholes that it may be unenforceable and will likely lead to years of additional litigation. Various industry experts from such institutions as Morgan Stanley, the Harvard Business School, Schwab Capital Markets and Prudential Financial have been quoted as saying that this settlement is beneficial to Microsoft's current monopolistic intentions.

Antitrust law has protected free markets and enhanced consumer welfare in this country for more than a century. The Microsoft case does not represent a novel application of the law, but is the kind of standard antitrust enforcement action that could ensure vigorous competition in all sectors of today's economy. These same standards have been applied to monopolies in the past, such as Standard Oil and AT&T. Court decisions to break up these monopolies led to prices declining as much as 70% and an increase in competition-driven innovation.

The end result is that Microsoft is now able to preserve and reinforce its monopoly, and is also free to use anticompetitive tactics to spread its dominance into other markets. After more than 11 years of litigation and investigation against Microsoft, surely we can do better.

Thank you for your time.

Regards,

Fausto Gomez
President
Gomez Barker Associates

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