

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 98-1232 (TPJ)

MICROSOFT CORPORATION,

Defendant.

STATE OF NEW YORK *ex rel.*

Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs,

v.

Civil Action No. 98-1233 (TPJ)

MICROSOFT CORPORATION,

Defendant.

**PLAINTIFFS' SUMMARY RESPONSE TO MICROSOFT'S
COMMENTS ON REVISED PROPOSED FINAL JUDGMENT**

Pursuant to Scheduling Order No. 9, plaintiffs submit the following summary response to Microsoft's specific comments as to the form of Plaintiffs' Revised Proposed Final Judgment ("Microsoft Comments").¹ Many of Microsoft's comments go beyond merely addressing the proposed form of the Revised Proposed Final Judgment (the "Final Judgment") and make arguments about the merits that Microsoft has previously raised and that plaintiffs have addressed

¹References below are to existing section numbers in the Final Judgment (except references with an asterisk, which refer to provisions Microsoft proposes to insert); numbers in brackets refer to comment numbers in Microsoft's Comments relating to those provisions.

in their prior filings. This Response does not repeat our prior arguments but rather, as plaintiffs' counsel stated in the June 1, 2000 conference, is limited to "brief" comments on Microsoft's proposed interlineations. It does not purport to set forth a comprehensive response to Microsoft's proposed changes.²

This Response consists of two parts. The first indicates the changes proposed by Microsoft to which plaintiffs do not object or, in some cases, to which plaintiffs do object but for which plaintiffs are willing to agree to certain modifications. The second consists of plaintiffs' summary response to the remainder of Microsoft's proposed changes. As set forth below, these latter changes should be rejected largely because they would undermine or frustrate the purpose and effectiveness of the Final Judgment; the balance are unnecessary in light of the plain language of the Final Judgment.

I. Proposed Changes to Which Plaintiffs Do Not Object³

1.a. [1] While the word "reorganization" accurately describes the corporate actions required by the Final Judgment, Plaintiffs do not object to Microsoft's request to substitute the word "divestiture" in this provision and elsewhere in the Final Judgment where "reorganization" is used (*i.e.*, Sections 1., 1.a., 1.b., 1.d.iii., 2., 3., 5.a., and 7.y.).

1.c.ii. [3] The insertion of a comma is appropriate to correct a typographical error.

² As provided in Scheduling Order No. 9, plaintiffs also are not responding herein to Microsoft's additional arguments in its Comments regarding process or to its Supplemental Offer of Proof.

³Attachment 3 to this Response consists of a red-lined version of the Final Judgment reflecting each of the particular changes to which plaintiffs would agree.

1.c.iii. [1] Microsoft's proposed substitution of "issuance" for "spin off" does not accurately describe the action that is required by the Final Judgment. However, plaintiffs would not object if the widely-used and accurate term "distribution" were substituted instead.

2.b.ii. [1] Plaintiffs do not object to the proposed insertion of the words "with one another".

2.c. [1] Plaintiffs object to both the proposed one-year time period and the proposal that Microsoft file only a memorandum describing written agreements, rather than the agreements themselves. Providing a copy of each Agreement between the Applications Business and the Operating Systems Business will not be burdensome, and the need to ensure that the two businesses do not enter agreements inconsistent with the Final Judgment is critical. Permitting Microsoft to wait up to an entire year to file such agreements is unwarranted. However, *quarterly* filing of the required Agreements and memoranda would be appropriate and practical; consequently, plaintiffs would not object to substituting the words "Three months after" for the word "After" and inserting the words "once every three months thereafter" following the words "of the Plan and".

2.e. Plaintiffs do not object to the proposed deletion in this section.

3.a.ii. [3] Microsoft's argument about the danger of collusion is inaccurate and inapposite in this instance, and it is important that Covered OEMs and the plaintiffs be able to verify Microsoft's compliance with this provision. However, plaintiffs do not object to modifying Microsoft's proposal to substitute the words "a web site accessible to plaintiffs and all Covered OEMs" for the existing words "its web site".

3.e.i. [1] The proposed deletion of this language would permit Microsoft to enter into and enforce agreements that prohibit or limit the other party's development, production, distribution,

promotion or use of non-Microsoft Platform Software. Such agreements were an important part of Microsoft's illegal campaign against Netscape's browser. Microsoft's concern about the word "limit" is unfounded; however, plaintiffs do not object to eliminating that concern by changing the word "limit" to "restrict."

4. [1] Plaintiffs do not object to this proposed change.

4.e.i. [2] Plaintiffs do not object to changing "manager" to a defined term "Manager", so long as the proposed definition is modified as set forth by plaintiffs in the discussion of Section 7.p.*, *infra*.

4.e.ii. [1] Plaintiffs do not object to changing "manager" to a defined term "Manager", so long as the proposed definition is modified as set forth by plaintiffs in the discussion of Section 7.p.*, *infra*.

4.e.iii. Plaintiffs do not object to changing "manager" to a defined term "Manager", so long as the proposed definition is modified as set forth by plaintiffs in the discussion of Section 7.p.*, *infra*.

4.e.v. [1] Plaintiffs do not object to Microsoft's proposed addition of the words "of this Final Judgment" so long as the words "or the antitrust laws" are inserted immediately thereafter.

7.c. [2] Plaintiffs do not object to the proposed deletion of the second reference to "Mobile Explorer".

7.g. [2] Plaintiffs do not object to Microsoft's proposed change of the means of determining "Covered OEM" status, by deleting the words "sales of Personal Computers in the United States" and substituting the words "licenses of Windows Operating System Products from Microsoft".

7.g. [3] Plaintiffs do not object to determining initially which 20 OEMs fall in the category of “Covered OEM” based on license volume during the year preceding the effective date of the Final Judgment or to including a specific means of redetermining which OEMs are “Covered OEMs” on a yearly basis thereafter. Thus, plaintiffs do not object to Microsoft’s proposed change so long as the word “determine” is replaced with “redetermine” to make the above clear.

7.k. [1] Microsoft’s proposed change is unnecessary and unduly restrictive because “Personal Computer” is already defined as including an x-86 or comparable chip. Plaintiffs do not object to clarifying this definition accordingly, *i.e.*, by changing “personal computer” to “Personal Computer.”

7.p.* [1] Plaintiffs do not object to the addition of a definition of Manager that would avoid including employees who supervise only a handful of others. However, Microsoft’s suggested standard of “day-to-day supervision of more than 100” other employees would exclude many persons with important managerial responsibilities, including those who indirectly oversee large numbers of employees or who supervise smaller numbers of managers who themselves supervise important groups that are smaller than 100. With these concerns in mind, plaintiffs would agree to Microsoft’s proposed change provided the words “day-to-day” are replaced with “direct or indirect”.

7.r. [1] Microsoft’s proposed change of the date for determining who is a “Non-Covered Shareholder” is not an acceptable means of addressing the concern Microsoft raises. Plaintiffs would not object to resolving Microsoft’s stated objection to the definition by rewriting the provision as follows:

“‘Non-Covered Shareholder’ means a shareholder of Microsoft on the record date for the transaction that effects the transfer of ownership of the Separated Business under Section 1.c.iii who is not a Covered Shareholder on the date of entry of this Final Judgment.”

II. Microsoft’s Other Proposed Changes Should Be Rejected

Microsoft’s other proposals consist largely of changes that would create loopholes and permit Microsoft to continue to engage in anticompetitive practices like those found by the Court or otherwise to frustrate or undermine the purposes of the Final Judgment. The balance are unnecessary because of existing, express provisions of the Final Judgment. They should be rejected for the following reasons, among others:

1.a. [2] It is in the public interest that the remedy contemplated by the Final Judgment be implemented as soon as possible, and the time periods proposed by plaintiffs are adequate to perform the specified tasks, which involve only preparation of and commenting on the plan of divestiture, not its implementation.

1.c. [1] This change should be rejected both for the reasons set forth in the response to comment [2] on Section 1.a., *supra*, and because the Court will retain authority to modify the Final Judgment as necessary should unanticipated circumstances create unavoidable delays outside of Microsoft’s control that require adjustment of the date for implementing a specific part of the Plan.

1.c.ii. [1] The date (April 27, 2000) on which the determination is made as to the assignment of Intellectual Property is not arbitrary (it is the day before Plaintiffs’ Proposed Final Judgment was filed), and Microsoft’s proposal would allow the company to shift assets before the Plan of divestiture is implemented to frustrate the effectiveness of the Final Judgment.

1.c.ii. [2] The demand for a definition of “Internet browser” should be rejected. The term was used throughout the litigation and the Court recognized an industry consensus as to the functionalities a browser offers. *See* Findings ¶ 150. Microsoft’s attempt to reargue its position should be rejected. *See, e.g.*, Findings ¶¶ 150, 184.

1.d.i. [1] This provision is needed to ensure that the purposes of the Final Judgment are not frustrated before its implementation. Microsoft has repeatedly reorganized itself, and this provision is necessary to ensure, for example, that Microsoft does not take steps during the appeals process to make implementation of the Final Judgment more difficult or to weaken the effectiveness of the remedy. It simply requires Microsoft to preserve, maintain, and operate what will be the Applications Business and the Operating Systems Business “*as separate, distinct and apart from one another as they were* on April 27, 2000” (emphasis added).

1.d.ii. [1] The proposal to strike this provision should be rejected for the reasons set forth in the response to the comment on Section 1.d.i., *supra*.

1.d.iii. [1] The terms “knowingly or willfully” should not be inserted because actions that undermine the proposed remedy should be prohibited, regardless of whether Microsoft undertakes them with that intent.

1.d.iv. [1] There is no justification for the proposed extension of time in which Microsoft is to file a report on the steps it has taken to comply with Section 1.d. Microsoft’s request confuses the actual planning and implementation of the divestiture (Sections 1.a. - 1.c.) with the requirement of this provision, which is simply a report to the Court on the steps Microsoft has taken to preserve the viability and existing separateness of what will become the Applications and Operating Systems businesses (Section 1.d.).

2.b.ii. [2] Microsoft’s proposed provision is overbroad and unnecessary in light of the last sentence of Section 2.b., which already provides that this section “shall not prohibit the Operating Systems Business and the Applications Business from licensing technologies (other than Middleware Products) to each other for use in each others’ products or services, provided that such technology (i) is not and has not been separately sold, licensed, or offered as a product, and (ii) is licensed on terms that are otherwise consistent with this Final Judgment.” The existing formulation achieves the purposes described in plaintiffs’ Reply brief by differentiating permissible licensing of technology from licensing of products Microsoft separately sells, licenses, or offers.

2.b.iii. [1] The term “technical information” should be retained because, in its uncapitalized form, it refers to technical information about products other than Microsoft Platform Software running on a Personal Computer. This provision thus forbids favoritism with regard to technical information that does not fall within the scope of Section 3.d. Permitting the Operating System and Applications companies to give each other preferential access to such information would enable them to frustrate the purposes of Section 2.b.

2.b.iii. [2&3] The proposed revisions are overbroad and unnecessary in light of the last sentence of Section 2.b. (*see response to comment [2] on Section 2.b.ii., supra*). Microsoft’s argument to the contrary is based on selectively quoting plaintiffs’ Reply brief, a full reading of which makes clear that the Operating System and Applications companies will be free to communicate and cooperate “just as Microsoft communicates and cooperates with third-party developers today” -- so long as they do so on a non-discriminatory basis. Plaintiffs’ Reply at 39. The existing provision will prohibit the two companies from “treating each other as preferred partners rather than competitive rivals,” while permitting legitimate cooperation. *Id.* at 41.

2.b. [2] The proposed deletion of the words “is not and has not been separately sold, licensed, or offered as a product, and” should be rejected. Because “technologies” fall within the scope of “products” as that term is used throughout the Final Judgment, the language in question is necessary to ensure that arrangements that involve “technologies” that are not separately distributed as products are not as a practical matter simply a pretext for arrangements involving “products,” and thus to ensure that the Businesses do not evade Section 2.b.ii., by describing as a “technology” that which is actually a “product” as they are distinguished in this section.

3.a.i. [1] The proposed change would allow Microsoft to withhold critical information about its future plans from certain OEMs in retaliation for their supporting non-Microsoft products, an OEM concern that was expressed at trial. The existing language of this provision does not impose any general obligation on Microsoft to disclose such information; it prevents Microsoft from basing its decision to reveal future plans to OEMs on anticompetitive and retaliatory factors.

3.a.i. [2] The proposed change should be rejected because Microsoft should not be allowed to take an adverse action against an OEM where such action is in any respect a result of the OEM’s engaging in any of the behavior enumerated in subsections (1) and (2); with the proposed change, Microsoft would be able to evade the provision by pointing to other plausible but pretextual reasons for retaliation.

3.a.ii. [1] The proposed change would allow Microsoft to reward or punish Covered OEMs based on the extent of their support for Microsoft and non-Microsoft products and services with different Windows non-price licensing terms and conditions. Such terms and conditions are extremely important to OEMs, and Microsoft has used them in the past to threaten

or retaliate against OEMs and could do so again and thus evade the purposes of the Final Judgment.

3.a.ii. [2] The proposed change would allow Microsoft to reward or punish Covered OEMs with different Windows pricing terms through the use of market development allowances; the Court has found that Microsoft uses market development allowances to induce OEMs to take actions that protect Microsoft's monopoly.

3.a.ii. [4] The proposed change would permit Microsoft to reward or punish Covered OEMs by charging them different Windows prices, based on Microsoft's use of undefined and unbounded "objective" pricing criteria. This would create a loophole that would allow the very discrimination and retaliation against OEMs that the provision is designed to prevent.

3.a.ii. [5] The existing requirement of "reasonable" uniform volume discounts is necessary to prevent Microsoft from manipulating the dividing lines between volume levels in order to charge certain Covered OEMs different prices that, while purportedly based on volume, are in fact reward or punishment for their support or non-support of Microsoft or its competitors. "Reasonable" in this context means only that Microsoft cannot contrive its discount categories to achieve that objective.

3.a.ii. [1] ("Without limiting the foregoing" paragraph) Microsoft's proposed deletion of "licensing terms" and "discounts" would allow it to reward or punish Covered OEMs with different Windows prices and non-price licensing terms and conditions and thus to evade the purposes of the Final Judgment. *See* responses to comment on Section 3.a.ii., *supra*. Furthermore, "deny a request" should not be substituted for "deny equal access". The burden should not be on OEMs to know of and affirmatively seek out equal treatment; Microsoft could

take advantage of a Covered OEM’s ignorance of what has been provided to other Covered OEMs to reward or punish that OEM and thus to evade the purposes of the Final Judgment.

3.a.ii. [2](“Without limiting the foregoing” paragraph) Plaintiffs object to this proposed change because there was evidence at the trial that OEMs feared Microsoft would withhold information about future plans from OEMs in retaliation for their supporting non-Microsoft products. *See* response to comment [1] on Section 3.a.i., *supra*.

3.a.ii. [3](“Without limiting the foregoing” paragraph) This proposed change is unnecessary. *See* response to comment [1] on Section 3.a.ii., *supra*.

3.a.ii. [4](“Without limiting the foregoing” paragraph) The proposed change would enable Microsoft to continue to use participation in joint marketing and sales efforts to reward or punish Covered OEMs.

3.a.ii. [5](“Without limiting the foregoing” paragraph) The proposed change would allow Microsoft to continue to enforce provisions in existing agreements with Covered OEMs that are inconsistent with the Final Judgment in a way that would continue to cause anticompetitive harm.

3.a.iii.(4) [1] The proposed change would enable Microsoft to frustrate the purposes of the Final Judgment by creating needless dependencies between its “Windows Operating System Product” and a Microsoft Middleware Product included therein, thereby enabling Microsoft to prevent OEMs from disabling end-user access to such Microsoft Middleware Product and forestalling competition on the merits between Middleware Products. Also, the change is unnecessary because OEMs are unlikely to remove end-user access to a Microsoft Middleware Product if doing so would deprive the user of important functionality.

3.a.iii.(4) [2] The proposed change should be rejected because modifying or removing a small amount of "software code" in a Windows Operating System Product, without removing APIs, may be necessary to enable OEMs to exercise the various options enumerated in 3.a.iii.⁴ Microsoft's proposed change is unnecessary to avoid any legitimate concern, and it would enable Microsoft to thwart the purposes of Section 3.a.iii., and other provisions by prohibiting OEMs from taking limited steps, not involving the removal of APIs, to customize the PCs they sell for their customers' needs or to make non-Microsoft Middleware the Middleware that is invoked by the operating system or by third-party applications and Middleware.

3.a.iii.(4) [3] The proposed change is unacceptable both because it would condition an OEM's use of Microsoft's trademarks and logos on an OEM not exercising any of the options provided to it under Section 3.a.iii. (such as, for example, removing End-User Access to Internet Explorer) and because, as the Court found, Microsoft routinely allows OEMs to use its trademarks and logos when those OEMs make similar, Microsoft-permitted modifications to Windows. *See* Findings ¶ 222.

⁴Microsoft's contention that Plaintiffs have said otherwise and that its proposed change "conforms . . . to the government's explanation" (Microsoft Comments at 17) is inaccurate and based on an incomplete quotation from Plaintiffs' Reply. The Reply in fact reads: "Microsoft asserts that that provision will 'permit OEMs to perform radical surgery on Windows, ripping and replacing large blocks of software code, while still entitling them to market the resulting Frankenstein's monster using Microsoft's valuable Windows trademark and logos'" (Microsoft Summary Response at 29-31). But Section 3.a.iii.4., permits no such thing; it will not authorize OEMs to 'rip and replace' anything in Windows, but will simply enable them to configure their systems so that non-Microsoft software can launch automatically, OEMs can offer their own Internet access provider or other start-up sequence, and non-Microsoft Middleware can be made the default. Indeed, the provision expressly confines OEM removal of Windows features to 'the means of End-User Access for Microsoft's Middleware Product.' . . . little if any underlying software code and no APIs will be removed in the process of exercising this flexibility . . ." (Plaintiffs' Reply at 46-47; portions quoted in Microsoft Comments underlined).

3.b. [1] The proposed change is unacceptable because Microsoft’s proposed definition of “Interoperate” is inappropriate and inconsistent with the purposes of the Final Judgment. *See* discussion of 7.n*, *infra*. In any event, the change is unnecessary.

3.b. [2] The proposed changes would enable Microsoft to withhold APIs, Communications Interfaces and Technical Information regarding interfaces that Microsoft Middleware Products, *e.g.*, Internet Explorer, use to interoperate with the Operating System. The changes would permit Microsoft to manipulate the definition of “internal” and to deny to third parties much information used by its own applications and middleware developers to make products interoperate with its Platform Software. The changes would thereby enable Microsoft to frustrate the purposes of the Final Judgment by hampering interoperation of competing Middleware Products with the Operating System. The proposed deletion of Section 3.b.iii., would have the same effects.

3.b. [3] The proposed deletion would enable Microsoft to continue the kind of anticompetitive behavior that was demonstrated in this litigation by withholding APIs, Communications Interfaces and Technical Information that Microsoft software running on servers and other computing devices uses to interoperate with Windows, thereby stifling potential competition to Windows that is facilitated by software running on such servers and other computing devices.

3.b. [4] Microsoft’s proposed deletion of “effectively” in connection with interoperation, both here and elsewhere in the Final Judgment, (*see infra*, Section 7.cc.) should be rejected. Without a requirement of facilitating “effective” interoperation as the intended purpose of third-parties’ use of the secure facility, Microsoft could unduly minimize the value of this provision by claiming that, so long as OEMs, ISVs, or others had access to just enough source code or

documentation to enable their products to interoperate in a minimal, degraded way, Microsoft had satisfied its obligation -- even though Microsoft's developers face no such limitations.

3.b.[5] The proposed change would permit Microsoft to continue to discriminate in access to information that it makes available to its developers but not third parties. Additionally, it is unnecessary because any third party from which Microsoft licensed source code may either consent to inclusion of its source code in the secure facility or ask Plaintiffs (and if necessary petition the Court) for relief from the provision.

3.b. [6] The proposed change is overbroad, vague and unnecessary. The existing provision permits Microsoft to require agreements of confidentiality that restrict third-party interaction with the source code to "the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software" -- but without imposing unnecessary, additional restrictions that would serve only to ensure that few third parties are able to take advantage of the source code access.

3.b. [7] The disclosure of APIs, Communications Interfaces and Technical Information required by the Final Judgment will enable third parties to make their products interoperate effectively with Windows, thereby increasing the value of Windows as a platform. The information disclosed is not intended for use in PC operating systems; there is thus no need or justification to charge a royalty for access to the same information about interoperation with Microsoft Platform Software on a Personal Computer that Microsoft's own developers receive.

3.b. [8] There is no justification for requiring third parties to disclose to Microsoft the APIs and Communications Interfaces in their products that interoperate with Windows. Microsoft has monopoly power in the market for PC operating systems, and third-party developers of middleware that might challenge that monopoly are thus dependent on access to

Windows APIs, Communications Interfaces and Technical Information. Microsoft has previously withheld access to APIs and interfaces to defeat such threats in the past, and the restoration of competition requires that it not be permitted to do so in the future. No comparable concern has been raised in this case about access to information regarding third parties' products. In any event, third parties that get access to APIs, Communications Interfaces, and Technical Information are doing so to create complements to Microsoft's operating system.

3.b. [9] Microsoft's proposed addition is unnecessary given the "sole purpose" limits on third parties' use of Microsoft's source code at the secure facility. Indeed, Microsoft's proposal would allow it to inspect the source code even of ISVs who have never examined Microsoft's source code at all. In any event, because of these reasons and those set forth in response to comments [7] and [8] on Section 3.b., *supra*, there is no justification for the access Microsoft seeks; it retains its full rights, including appropriate discovery rights, to use the legal process to protect its intellectual property from use beyond that permitted by this provision.

3.c. [1] The proposed changes would severely weaken the provision by permitting Microsoft to take actions that it knows will interfere with or degrade the performance of non-Microsoft Middleware without notifying the supplier of such Middleware of the problem or of ways known to Microsoft to avoid or reduce it. Adding an additional requirement that it be shown that Microsoft "intended" the interference or degradation would enable Microsoft to act pretextually for anticompetitive purposes.

3.d. [1] The proposed changes would permit Microsoft to engage in conduct, such as the "First Wave" agreements at issue in the case, that provides valuable consideration to ISVs for using Microsoft's products rather than competitors' and that excludes competitors on a basis other than competition on the merits.

3.d. [2] This proposed change should be rejected for the reasons set forth in response to comment [1] on Section 3.a.i., *supra*. The provision in the Final Judgment does not impose any general requirement on Microsoft to reveal its future plans to ISVs or IHVs; instead, it prevents Microsoft from deciding whether to reveal such information based on whether the ISV or IHV is willing to favor Microsoft's products or exclude Microsoft's competitors.

3.d. [3] Plaintiffs object to the proposed change for reasons set forth in response to comment [2] on Section 3.a.i., *supra*.

3.d. [4] Microsoft's proposed deletion of the prohibition on discriminating against or rewarding ISVs or IHVs based on whether they "use, distribute, promote or support any Microsoft product or service" should be rejected because it would permit Microsoft to engage in conduct, such as the "First Wave" agreements at issue in the case, that provides valuable consideration to ISVs in return for their using Microsoft's products and not competitors', regardless of their relative merits.

3.d. [5] The proposed language is unnecessary for the reasons set forth in plaintiffs' Reply Brief at page 56; Section 3.d. does not restrict Microsoft from entering into bona fide joint development efforts; it prohibits Microsoft from rewarding or punishing ISVs or IHVs based on whether they support Microsoft or non-Microsoft products.

3.e. [2] The proposed change would permit Microsoft to condition IAP and ICP access to Windows on their agreeing to distribute Microsoft Platform Software and thus would enable Microsoft to achieve the same anticompetitive purpose achieved by the IAP and ICP agreements at issue in the case simply by amending those agreements to require distribution of Microsoft's browser instead of limiting distribution of competing browsers.

3.f. [1] The proposed change would permit Microsoft contractually to tie separate products to Windows simply by having some component of the Windows Operating System Product “rely” on the separate product. For example, Windows could be designed to “rely” on Office to display documents that have a “doc” or “xls” file format, and Microsoft could then use such reliance as a basis to tie Office to Windows.

3.f. [2] This proposed change is unnecessary and would render the provision meaningless; it would permit Microsoft unilaterally to evade the restriction on contractual tying by continuing to call separate products (as it did with Internet Explorer) “improvement[s] to a Windows Operating System Product” and making them available to the installed base of users “via electronic downloading from the Windows Update Web site *or other means*.” Microsoft Comments at 24 (emphasis added).

3.g. [1] The proposed change is unnecessary because Microsoft will have nine months from entry of the Final Judgment to prepare the modified version required by this provision.

3.g. [2] The proposed deletion would reduce the effectiveness of the provision by requiring OEMs, in effect, to pay for Microsoft Middleware Products, even if they want to remove them, and thus would provide a substantial disincentive for the OEMs to license and install competing Middleware Products, thereby foreclosing opportunities for those products to create competition for the Windows platform.

3.h. [1] The Court found that Microsoft repeatedly attempted to enter into anticompetitive market allocation agreements with Netscape and others. Section 3.h., of the Final Judgment is intended flatly to prohibit such agreements; it is appropriate for an antitrust remedy to include simple prohibitions to ensure that the defendant will be unable to repeat its unlawful conduct. This provision is narrow in scope; it applies only to agreements with actual or potential

Platform Software competitors not to compete in the provision of Operating System Products or Middleware Products. The addition proposed by Microsoft is unnecessary and would enable Microsoft to enter into anticompetitive market division agreements regarding such products by labeling them, as it attempted to label at trial the June 1995 Netscape meeting, “joint development agreements” or “agreements ancillary to lawful joint ventures.” As noted in plaintiffs’ Reply Memorandum at page 64, plaintiffs intend to enforce the provision only against anticompetitive agreements, and Microsoft is of course able to seek the views of the Antitrust Division about any contemplated agreement that it fears might violate the provision.

3.i. [1] The proposed change would enable Microsoft to undermine the effectiveness of the provision by making significant changes to the operating system in an OEM Service Release and depriving OEMs of the benefit of those changes unless they license the most current version of the operating system.

3.i. [2] Microsoft’s proposed changes would enable it to undermine the effectiveness of the provision by continuing its practice of making significant changes in versions of an operating system (including OSR releases) after the initial version, but depriving OEMs that wish to take advantage of this provision of the benefits of those changes by giving them only the option of licensing the initial version of the operating system, which does not include those important changes. The number of such “OSR” releases has historically been quite small, and no undue burden will be imposed.

4.e. [1] There is no justification for postponing advising appropriate personnel of the Final Judgment and what it requires within 90 days of its entry.

4.e.iii&iv. [1] Provisions of this kind are common in antitrust decrees, and Microsoft has no justification for objecting to it.

4.g. [1] There is no sound reason, in light of the evidence in this case, that Microsoft cannot, and ought not be required to, retain the e-mails of the persons in question. Indeed, Microsoft's claim that "the government has never had any difficulty obtaining relevant e-mail from Microsoft" is belied by the testimony of Bill Gates. In his deposition, Gates testified that "most people here delete most of the e-mail they receive every day," "I don't keep most e-mail I receive," "I delete 98 percent of my e-mails," and "Q. You never preserve messages that you send? A. I don't preserve them. There is the extremely rare case, which I've done almost never, where you copy yourself on the e-mail." *See* Attachment 1, Gates dep. 9/2/98 at 589:21 - 590:20. *See also* Attachment 2, Engstrom, 2/23/99pm, at 18:12-19:9 (on "a routine basis, I delete all mail . . . two months old.").

5.a.i. [1] The plaintiff States are law enforcement officials responsible for enforcing the antitrust laws in their respective States and are therefore entitled to participate in matters relating to the enforcement of the Final Judgment. As plaintiffs pointed out in their Reply Memorandum at pages 67-68, there is ample precedent supporting the States' authority to enforce a decree in a case brought under both federal and state law. See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 257-260 (1972) (summarizing cases establishing the right of a State "to sue as *parens patriae* to prevent or repair harm to its quasi-sovereign interests").

5.a.i.(1) [1] The language in the Final Judgment is standard in consent decrees, and in any event Microsoft's ~~the~~ proposed change is unnecessary because the operative language of Section 5.a., already provides that access to records is "subject to any legally recognized privilege."

5.a.i.(2) [1] This proposed change should be rejected because there is no justification for preventing individual Microsoft officers, employees and agents from deciding for themselves

which counsel they wish to have present in interviews with plaintiffs (consistent with plaintiffs' obligations under 28 U.S.C. § 530B and other legal obligations).

5.a.ii. [1] This change also should be rejected, for the reasons set forth in response to Comment [1] on Section 5.a.i, *supra*.

5.a.iii. [1] There is no justification for restricting use of information obtained pursuant to Section 5 of the Final Judgment in legal proceedings to which a plaintiff is a party.

5.a.iv. [1] There is no justification for restricting use of information obtained pursuant to Section 5 of the Final Judgment in legal proceedings to which a plaintiff is a party.

6.b. [1] This proposed change is unnecessary because Section 2.e., states that the provisions of Section 4 do not apply to the Applications Business following implementation of the Plan.

6.c. [1] Ten years is customary in antitrust cases, and in any event four years is too short a time for the Final Judgment to remain in effect. Despite its assertion that “[t]en years is an extraordinarily long time in the software industry,” Microsoft has had the dominant position in the operating-systems business for at least a decade (*see* Findings ¶ 35), and under the circumstances there is no sound justification for entering a decree of shorter duration.

6.d. [1] The proposed change is unnecessary. The Due Process Clause is applicable to the federal courts, whether or not the Final Judgment so states.

7.b. [1] The proposed change would enable Microsoft to withhold APIs, Communications Interfaces and Technical Information regarding interfaces that Microsoft Middleware Products, *e.g.*, Internet Explorer, use to interoperate with the Operating System. This would undermine the purposes of the Final Judgment by hampering the opportunity for competing Middleware Products, such as Netscape Navigator, to interoperate with Microsoft's

operating system as well as Microsoft’s own Middleware Products. *See* response to comment [2] on Section 3.b., *supra*. The inclusion of Microsoft’s vague and wholly undefined term “internal” would be inaccurate in this context and is not necessary given that this provision is employed in the Final Judgment only with regard to interoperation across the boundaries identified in Sections 2.b.iii., 3.b.i., 3.b.ii., and 3.b.iii.

7.c. [1] It is unclear what change, if any, is proposed by comment [1] in Section 7.c. Microsoft’s objection to the section is meritless because the provision does not prohibit the Operating Systems Business from offering products that include middleware technologies, either under the license granted the Operating Systems Business in accordance with Section 1.c.ii., of the Final Judgment or by developing such technologies on its own.

7.d. [1] The terms “remove” and “uninstall” are commonly used in software products, including Windows and other Microsoft products, and these were the terms used throughout the trial.

7.f. [1] The proposed change is unnecessary. Any third party from which Microsoft licensed proprietary protocols may either consent to inclusion and disclosure of its protocol as a Communications Interface pursuant to Section 3.d., of the Final Judgment or ask plaintiffs (or if necessary petition the Court) for relief from the provision.

7.g. [1] The proposed change to the number of OEMs included as Covered OEMs should be rejected because the ten largest OEMs do not comprise a large enough set of the major OEMs that install Windows.

7.h. [1] Proper effectuation of the purposes of the Final Judgment requires determination of Covered Shareholder status as of the date of entry of the Final Judgment.

7.j. [1] Plaintiffs object to the proposed change because indirect access to middleware has been an important mechanism for forcing it upon consumers and OEMs.

7.j. [2] The first proposed change is unacceptable because it reverses the meaning of the provision, which is designed to prevent operating system design that binds otherwise separate middleware; and the second proposed change is unnecessary because Microsoft may obtain such functionality without binding it to the browser product.

7.m. [1] The term “Intellectual Property,” like the other defined terms in the Final Judgment, has been defined to serve appropriately the particular purposes of the judgment itself; Microsoft’s assertion that the term has a different “generally recognized legal meaning” is both unsubstantiated and irrelevant.

7.m. [2] See response to comment [1] on Section 7.f., *supra*.

7.n* [1] Microsoft’s proposed definition of “interoperate” should be rejected because it falls far short of expressing what transpires when two pieces of software interact with one another and would thus significantly narrow the applicable provisions of the Final Judgment and thereby undermine its purpose.

7.n. [1] The proposed change to the definition of “ISV” would exclude software developers developing products, including those for servers or for sub-PC devices, that might challenge the Windows monopoly even if those products must interoperate in a network with Microsoft Platform Software.

7.p. [1 & 2] The proposed changes to the definition of “Middleware” would restrict Middleware to the small set of Microsoft products that are already ported to other operating systems and would enable Microsoft to exclude from the scope of the information disclosure and binding provisions of the Final Judgment virtually all Microsoft Middleware, including but not

limited to Internet Explorer, because each individual version of Internet Explorer and of other products is, of course, “designed for use with a particular operating system.”

7.q. [1 & 2] The proposed exclusions from the definition of “Middleware Product” would exclude from the scope of the information disclosure and binding provisions of the Final Judgment both any product not distributed separately and any product that Microsoft chooses to call an “improvement to a Windows Operating System Product” and makes available to the installed base of users. This language would exclude Internet Explorer and other products that are intended to be covered by subpart i of the definition. *See also* response to comment [2] on Section 3.f., *supra*.

7.s [1] The proposed changes to the definition of “OEM” would permit Microsoft to retaliate against smaller OEMs for supporting non-Microsoft products.

7.t. [1 & 2] The proposed changes to the definition of “Operating System” should be rejected because they would permit Microsoft to define the Operating System (not just in the Operating System Product) to include any functionality it chooses and because they would exclude some operating systems shipped by the Operating System Business.

7.u. [1] The proposed exclusions from the definition of “Operating System Product” would permit Microsoft to avoid application of the Final Judgment to new operating systems simply by making them successors to the enumerated products.

7.v. [1] It is unclear what change, if any, is proposed by comment [1] on Section 7.v. Microsoft’s objection to the section is without merit because the provision does not prohibit the Operating Systems Business from offering products that include middleware technologies, either under the license granted the Operating Systems Business under Section 1.c.ii., of the Final Judgment, or by developing such technologies on its own.

7.w. [1] Plaintiffs object to the proposed deletion of the words “, and computers that are commercial substitutes for such computers” because such a deletion is unnecessary and inaccurate. The relevant market at trial was for *operating systems* for Intel-compatible personal computers.

7.z. [1] Plaintiffs have objected to the proposed changes in the definitions of “Operating System” and “Middleware.” *See* responses to comments [1&2] on Section 7.p., and to comments [1&2] on Section 7.t., *supra*.

7.cc. [1] Deletion of the word “effectively” from the definition of “Technical Information” would enable Microsoft to withhold APIs, Communications Interfaces and Technical Information that third-party applications and middleware need to interoperate effectively with Microsoft Platform Software, while providing such information to its own applications and middleware developers. *See* response to comment [4] on Section 3.b. The remaining proposed deletions eliminate necessary language that makes the definition more precise, and would enable Microsoft to withhold Technical Information regarding interfaces that Microsoft Middleware Products, *e.g.*, Internet Explorer, use to interoperate with the Operating System and that Microsoft software running on such servers and computing devices uses to interoperate with Windows, thereby frustrating the purposes of the Final Judgment by hampering interoperation of competing Middleware Products and server-based threats to the Windows platform with the Operating System.

7.dd. [1] The proposed change in the definition of “Timely Manner” would enable Microsoft to advantage its own applications and Middleware Products by giving APIs, Communications Interfaces and Technical Information to Microsoft developers long before such information is released to third-party developers.

7.dd. [2] Microsoft's proposed doubling of the time period is unnecessary. Microsoft has not demonstrated any reason to believe that the existing time period is unreasonable, and doubling it would simply provide Microsoft with another opportunity to favor its own developers over competitors.

7.ee. [1] The proposed deletions from the definition of "Windows Operating System Product" should be rejected because, as Microsoft acknowledges in its Comments on this point, it has chosen and in the future may choose to distribute some or all of its Windows Operating System Products to some OEMs in source code form. The deletions Microsoft proposes would allow it to choose to provide source code selectively in order to reward or punish OEMs contrary to the purposes of the Final Judgment.

CONCLUSION

For the reasons stated above, and those stated in plaintiffs' previous submissions, the Court should enter the Final Judgment with the modifications described in Part I of this Summary Response, and reject the balance of Microsoft's proposed changes.

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Respectfully submitted,

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