IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' RESPONSE TO MICROSOFT'S MOTION FOR STAY

On June 7, 2000, immediately upon entry of the Final Judgment in this case, Microsoft filed with this Court a perfunctory motion to stay all provisions of the Judgment pending appeal. Microsoft's filing fails entirely to make any of the showings required to obtain such a stay. Moreover, for the reasons stated in the second portion of this Memorandum below, it is premature to rule on Microsoft's stay motion.

Of the four well-established factors required for the granting of a stay pending appeal -- (l) a strong showing that it is likely to prevail on the merits of its appeal; (2) irreparable injury absent a stay; (3) a lack of substantial harm to other parties from a stay; (4) and serving the public

interest by granting the stay, D.C. Cir Rule 8(a)(1); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998) -- Microsoft's two-paragraph motion asserts only two -- the purported harm to itself and lack of harm to others to support its request for a stay -- and does so without offering any evidentiary support. The filing does not even mention the likelihood of success or the evaluation of the public interest. This disregard for the most basic presentation necessary to justify a stay reveals Microsoft's motion as nothing more than an effort to move immediately to the appellate tribunal without satisfying the requirements of Federal Rule of Appellate Procedure 8(a)(1).

The deficiencies of even the limited showing Microsoft has attempted in its Motion reveal the absence of any basis for granting a stay. For a showing of irreparable injury, Microsoft offers no evidence whatsoever. Microsoft has demonstrated no injury, let alone that which is "certain and great" and "likely to occur in the near future," Wisconsin Gas Company v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), a failing that is hardly surprising in light of the fact that Microsoft produced no "specific facts and affidavits supporting assertions that these factors exist." Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 154 (6th Cir. 1991). The sum total of its argument is that it has "outlined some of this harm" in its papers regarding plaintiffs' Proposed Final Judgment (*see* Motion for Stay at 2), and that one of plaintiffs' experts opined that the ultimate implementation of the Proposed Final Judgment would "profoundly change the dynamics in the software industry." *Id.*, quoting Romer Decl. ¶ 28.

Neither of these offerings approaches the level of specificity and certainty of harm required to satisfy the standard for a stay. *See* Wisconsin Gas, 758 F.2d at 674; *see also* Reynolds

Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985) (Scalia, J.). The unspecified "outline" which presumably refers to Microsoft's earlier, and equally unformed and unsupported, predictions of corporate disaster is, at best, a "[b]are allegation[]" of impending harm, which is of "no value since the court must decide whether the harm will in fact occur." *Id.* Moreover, Microsoft's citation to Professor Romer's statement that the Proposed Final Judgment, once imposed, would work considerable change in the software industry is both patently misleading and completely unhelpful to Microsoft in this effort. What Microsoft omits from its citation of Professor Romer's statement is the fact that his reference to profound changes in the software industry is expressly directed at the divestiture -- to "the threat that each company poses to the other" after that divestiture. Romer Decl. ¶ 28. But implementation of the divestiture is already stayed until completion of the appeals process by the Final Judgment itself. *See* Final Judgment § 6.a. Contrary to Microsoft's assertion, these changes will *not* "be implemented before Microsoft has had an opportunity to secure appellate review of both the Court's liability determination and the relief awarded in the Final Judgment." Motion for Stay at 2.

Moreover, Microsoft's assertion that "there has been no showing that the government or any other party interested in these proceedings will suffer any tangible prejudice from a stay" (Motion for Stay at 3) both misstates Microsoft's own obligation -- which is to *demonstrate* that such harm is unlikely or insubstantial -- and grossly understates the likelihood of that harm. The harm to plaintiffs here from entry of a stay is harm to the public interest, a concern which Microsoft did not address at all. Whenever competition is illegally impeded, as it was by Microsoft here, there is substantial and irreparable injury worked on the public. Where the extent of the harm to competition has been, as the Court found here, so substantial and pervasive in a

fast-moving sector of the economy, the irreparable injury to the public interest is particularly great. Lengthy delays in implementation of the interim conduct remedies that will prevent recurrence and continuation of Microsoft's illegal behavior would greatly damage the public interest. Moreover, to have the divestiture order itself affirmed but to have to wait thereafter for the lengthy process of devising and approving and implementing the plan of divestiture (Microsoft would not even have to begin *planning* for the divestiture if the entire Final Judgment is stayed) would deprive the public of the very benefits that this Final Judgment is meant to provide. Moreover it would further prolong the uncertainty of Microsoft employees and stockholders and business partners as to how the divestiture would be implemented. *Cf.* Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987) ("particular regard should be given to the public interest"); California v. American Stores Co., 492 U.S. 1301, 1304-05 (1989) (substantial lessening of competition during pendency of appeal constitutes irreparable injury in state-initiated antitrust suit, because "lessening of competition 'is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent'").

Finally, Microsoft did not even attempt an argument that it was likely to succeed on the merits of its appeal. It is not.

The Court Should Briefly Reserve Its Decision Until It Resolves The Expediting Act Issue.

For the above reasons, the Court should deny Microsoft's motion, but it is important to appreciate the larger procedural context within which that motion was made. Microsoft represented to the Court that it sought "a stay pending appeal" and that it "intends to appeal promptly" the Final Judgment. Motion for Stay at 2. Contrary to that representation, however, Microsoft has not filed its notice of appeal. In fact, counsel for Microsoft has told plaintiffs that it

will not file its notice of appeal until *after* the Court has ruled on -- and presumably denied -- its stay motion, so that it can then simultaneously file a lengthy and detailed motion for a stay in the Court of Appeals. Accordingly, ruling on its stay motion presently is premature.

Microsoft has no legitimate reason to delay filing its notice of appeal. Plaintiffs have publicly stated that they will file with the Court a motion for certification of the case for direct appeal to the Supreme Court pursuant to the Expediting Act, 15 U.S.C. § 29(b), immediately after Microsoft files its notice of appeal; but, as Microsoft is aware, we cannot do so until that notice has been filed.[1] Microsoft's insistence that it will not file its notice of appeal until after this Court resolves its stay motion (even though those two events should be unrelated), and its intention then to seek a stay from the Court of Appeals while this Court is considering whether to certify the case for direct appeal to the Supreme Court, is simply an attempt to manipulate the Court and thwart the operation of the Expediting Act.

The interests underlying the Expediting Act would be served by having Microsoft's appellate stay motion presented to and resolved by the court that will have jurisdiction over the merits of its appeal, not by having Microsoft begin stay proceedings in the Court of Appeals while this Court is considering whether it should certify the appeal directly to the Supreme Court. To ensure an efficient, orderly, and prompt resolution of these issues, plaintiffs respectfully request that the Court enter the attached proposed Scheduling Order No. 10. That order provides for the

[1]15 U.S.C. 29(b), provides in part: "An appeal from a final judgment [in a civil case brought by the United States under the Sherman Act] shall lie directly to the Supreme Court, if, *upon application of a party filed within fifteen days of the filing of a notice of appeal*, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." (Emphasis added).

following:

(1) Microsoft shall file, if it chooses to do so, a reply to this Response no later than Wednesday, June 14.

(2) Plaintiffs shall immediately file their motion for certification of direct appeal under the Expediting Act, no later than one business day after Microsoft files its notice of appeal, which Microsoft shall serve on plaintiffs.

(3) Microsoft shall file its response, if any, to the motion for certification no later than four business days after it is filed.[2]

(4) Plaintiffs shall file their reply, if any, to Microsoft's response to the motion for certification no later than one business day after such response is filed.

(5) The Court would reserve its ruling on Microsoft's motion for stay until after Microsoft has filed its notice of appeal with this Court and the parties have quickly briefed the motion for certification. The Court will then rule simultaneously on Microsoft's motion for stay and plaintiffs' motion for certification promptly, within a short time to be determined by the Court.

This procedure will ensure that the stated premise of Microsoft's stay motion — that it will file a notice of appeal — will have occurred by the time the motion is addressed by the Court. In any event, Microsoft cannot be entitled to a premature stay pending appeal while it

[2]In order to place Microsoft on notice of the form and substance of plaintiffs' certification motion — which would already have been filed but for Microsoft's refusal to file its notice of appeal — plaintiffs attach to this Response as Attachment 1 a form of their certification motion. Microsoft will thus have ample opportunity to review the motion even before it is filed and to respond quickly once it is. Thus, a four-business day period for Microsoft's response once the certification motion is filed will be entirely adequate, and Microsoft in fact will be in a position to respond in an even shorter time and expedite the ultimate resolution if it chooses to do so.

purposefully avoids filing a notice of appeal. The procedure also will permit the Court to make a considered but prompt determination of which appellate court should be presented initially with all of the appellate issues in this case. It will not unduly delay resolution of the stay application because Microsoft has complete control over the timing of the process; by promptly filing its notice of appeal it will ensure that both the stay issue and the certification question will be resolved very quickly. Any delay will continue to be solely of Microsoft's own making.

In light of Microsoft's complete failure even to attempt to make the required legal showing, Microsoft's motion for a stay of the Final Judgment pending appeal ultimately should be denied. However, plaintiffs request that the Court first enter proposed Scheduling Order No. 10

and briefly reserve ruling on the stay motion until Microsoft's notice of appeal has been filed, the plaintiffs' motion for certification has been quickly briefed, and the Court is in a position promptly to resolve the two motions simultaneously.

Dated: June ___, 2000

Respectfully submitted,

_____/S/_____

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Certificate of Service

The undersigned certifies that on June 12, 2000, copies of the Plaintiffs' Response to Microsoft's Motion for Stay and Proposed Scheduling Order No. 10 were served upon:

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