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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	Civil Action No. 72-344(AGS)

UNITED STATES' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PARTIAL JUDGMENT TERMINATION

I. INTRODUCTION

This memorandum supplements the *United States' Memorandum in Support of Partial Judgment Termination* ("*U.S. Sup. Mem.*")(dated September 11, 1995), in which we explained why, subject to having an opportunity to consider public comments, we intended to consent in certain respects to the motion of International Business Machines Corporation ("IBM") to terminate the final judgment. The parties fully complied with the Court's order to solicit comments on the partial judgment termination, and the period for public comment expired on December 14, 1995.

No comments were filed in accordance with the instructions in the notice soliciting public comments. The Government received one anonymous letter complaining about IBM during the public comment period. However, this letter may not have been intended as a comment because it was not properly filed and, as we explain below, it does not appear to address the portions of the judgment that have been designated for termination in any markets in which IBM may continue to exercise market power. Accordingly, the Government believes that it is now appropriate for the Court to enter the *Order Terminating the Judgment in Certain Respects*, which the parties submitted as Exhibit C with their Stipulation of September 7, 1995 (the "Exhibit C order").

II. SOLICITATION OF PUBLIC COMMENTS

On September 11, 1995, the Court entered an *Order Directing Publication of Notice*. The order approved the notice of partial judgment termination and request for public comments thereon which the parties submitted as Exhibit A with their September 7, 1995 Stipulation (the "Exhibit A notice"). The order required IBM to publish the Exhibit A notice in two consecutive issues of the national edition of The Wall Street Journal, two consecutive issues of Computerworld, and one issue of Datamation; it also required the Government to publish the Exhibit A notice in the Federal Register. The order provided a 60-day public comment period after publication of the final Exhibit A notice, and it provided 30 days after termination of the public comment period

for the parties to file responses to any public comments.[1]

The Government published the Exhibit A notice in the September 25, 1995 issue of the Federal Register (attachment 1). IBM published the Exhibit A notice in the October 10 and 11, 1995 issues of the national edition of The Wall Street Journal (attachment 2); in the October 2 and 9, 1995 issues of Computerworld (attachment 3); and in the October 15, 1995 issue of Datamation (attachment 4). The 60-day public comment period terminated on December 14, 1995, and the 30-day period for the parties to file responses to public comments expires January 16, 1996. The Court may enter the Exhibit C order at any time after January 16, 1996.

III. NO COMMENTS WERE FILED IN RESPONSE TO THE PUBLISHED SOLICITATIONS FOR PUBLIC COMMENTS

No comments were filed in response to the published solicitations for public comments on partial judgment termination. The Government received one anonymous complaint about IBM during the public comment period (attachment 5). However, this complaint may not have been intended as a comment on this portion of the proceedings because it was not filed in accordance with the Exhibit A notice, and it does not address the portions of the judgment that have been designated for termination in markets where IBM may possess market power.

[1] The Exhibit A notice was developed from the form of notice generally used by the Government to solicit public comment in antitrust judgment termination/modification cases. The required publications and designated public comment period also conformed to the practice generally followed in such cases.

The anonymous complaint contends that IBM engages in certain conduct that is not covered by the judgment. Thus, IBM is alleged to have purchased non-IBM equipment; it is alleged to have engaged in below-cost pricing; and it is alleged to have injured competition by "seeding" the "industry" with ex-employees who ostensibly continue to have financial incentives to see IBM do well. The complaint does not distinguish between IBM's market position for different types of products and services. We explained earlier that termination is appropriate for products and services other than System/360 ... 390 and AS/400 products and services because IBM is not the dominant supplier of such products and services. The judgment therefore does not constrain IBM from exercising market power in markets for products and services other than System/360 ... 390 and AS/400 products and services. (*U.S. Sup. Mem.* at 1-2.)

The complaint also appears to contend that IBM engages in certain conduct that may be regulated to some extent by those judgment provisions that have not been designated for termination in the markets in which IBM may continue to enjoy market power. For example, IBM is alleged to have engaged in discriminatory software licensing practices. Under these circumstances, the anonymous complaint provides no indication that partial termination of the judgment through entry of the Exhibit C order would be contrary to the public interest.

Before the Government tentatively consented to partial judgment termination, the Court received at least two submissions

from entities that opposed termination of Section VIII, one of the sections that has been designated for termination. (*Letter of July 28, 1994 from Hayward D. Fisk, Vice President, General Counsel and Secretary of Computer Sciences Corporation, to The Honorable David N. Edelstein* (attachment 6); *Memorandum of Law in Support of Sungard Data Systems Inc.'s and Affiliated Computer Services, Inc.'s Motion to Intervene* (dated December 22, 1994).) The Government addressed those submissions in our initial memorandum in which we explained why we consented to termination of Section VIII. (*U.S. Sup. Mem.* at 3-9.)

IV. CONCLUSION

Because the period for public comments has now expired and because the Government received no information causing us to reconsider our tentative consent to partial judgment termination, the Government now consents to such termination and recommends that the Court enter the Exhibit C order submitted by the parties. For the Court's convenience, we have enclosed a clean copy of the Exhibit C order for the Court's signature (attachment 7).

Respectfully submitted,

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January 16, 1996

CERTIFICATE OF SERVICE

This is to certify that the United States' Supplemental Memorandum in Support of Partial Judgment Termination was sent by fax and U.S. Mail, postage prepaid, to the following counsel of record on January 16, 1995:

INTERNATIONAL BUSINESS MACHINES CORPORATION

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