UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION and STORAGE TECHNOLOGY CORPORATION, Defendants.	Civil Action: Filed December 18, 1997

FINAL JUDGMENT

WHEREAS, the United States of America, having filed its Complaint herein on December 18, 1997, and the United States and Defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of fact or law;

AND WHEREAS, Defendants having agreed to be bound by the provisions of this Final Judgment pending approval by the Court;

AND WHEREAS, the essence of this Final Judgment being prompt and certain action to ensure that the OEM agreement referred to herein will not substantially lessen competition in the development, production, or marketing of DASD as hereinafter defined;

AND WHEREAS, Defendants having represented to Plaintiff that the provisions of this Final Judgment can and will be accomplished;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over each of the parties hereto and the subject matter of this action. Venue is proper in this Court. The Complaint states a claim upon which relief may be granted against the Defendants under Section 1 of the Sherman Act (15 U.S.C. § 1).

II. DEFINITIONS

I. "IBM" means International Business Machines Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

A. "STK" means Storage Technology Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

C. "Defendants" means, collectively or individually as the context requires, IBM and/or STK.

D. "DASD" means direct access magnetic disk storage subsystems configured for attachment to IBM System 390 mainframe computers, any future versions, models, or generations of IBM System 390 mainframe computers (regardless of name or other product designation), and plug-compatible mainframe computers, without regard to whether or not such subsystems also attach to any other computer processor product. The term "DASD" does not include parts or subassemblies sold or shipped to repair or upgrade existing DASD installations, and it does not include any used DASD.

E. "STK DASD" means any DASD product developed, manufactured, or supplied by STK at any time prior to the expiration of this Final Judgment, including but not limited to Iceberg, Kodiak, the products marketed by IBM as RAMAC Virtual Array and RAMAC Scaleable Array, and any future versions, models, or generations of any of the aforementioned products (regardless of name or other product designation). The term "STK DASD" does not include Virtual Storage Manager, any future versions, models, or generations thereof (regardless of name or other product designation), or any existing or future STK Nearline storage products, or any used DASD.

F. "Agreement" means any agreement or understanding, whether written or oral, formal or informal.

G. "OEM agreement" means the agreement dated June 7, 1996, pursuant to which IBM has purchased STK DASD, including all

attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

H. "Modified OEM agreement" means the agreement dated December 18, 1997, pursuant to which IBM has agreed to purchase STK DASD from STK, and STK has agreed to sell STK DASD to IBM, including all attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

I. "STK Minimum" means a number of terabytes of STK DASD determined for a twelve-month period by multiplying the number of months before January 1, 2000, included in such period by 10.5; multiplying the number of months after December 31, 1999, included in the period by 16; and adding the two products together. For example, the STK Minimum for the period from October 1, 1998, through September 30, 1999, would be 126 terabytes (10.5 X 12), and the STK Minimum for the period from October 1, 1999, through September 30, 2000, would be 175.5 terabytes ((10.5 X 3) + (16 X 9)).

J. "Purchase" means, in connection with IBM purchases of STK DASD, a transaction in which IBM acquires title to the STK DASD purchased, other than a financing transaction that meets each of the following conditions: (1) IBM Credit Corporation acquires title to STK DASD, ordered by a customer from STK or an STK remarketer other than IBM, in order to finance the STK DASD;

(2) such STK DASD carries an STK logo and conforms in appearance to other STK DASD sold by STK, or an STK remarketer other than IBM, to non-IBM purchasers; (3) the price for the STK DASD is negotiated between the customer and STK or an STK remarketer other than IBM, without participation by IBM; (4) such STK DASD is not installed on the customer's premises by IBM or any person acting on its behalf; (5) warranty service, if any, for such STK DASD is not provided by IBM or any person acting on its behalf; and (6) the transaction if financed by other than IBM would be considered a sale by STK under Section VI.A. of this Final Judgment. The term "purchase" does not include a transaction in which IBM may act as sales agent, distributor, or other channel of distribution in which IBM does not acquire title to the STK DASD.

K. "Change of control" means the acquisition by an entity of more than 20 percent of the outstanding common shares of STK representing the right to vote for STK's board of directors, the sale of all or substantially all of the assets of STK, or any consolidation, merger, or other reorganization of STK in which STK is not the continuing or surviving corporation or pursuant to which shares of such common stock would be converted into cash, securities, or other property.

L. "Derivative work" means a work that is based on an underlying work that would be a copyright infringement if prepared without the authorization of the copyright owner of the

underlying work. Derivative works are subject to the ownership rights and licenses of others in the underlying work.

III. APPLICABILITY

A. The provisions of this Final Judgment apply to the Defendants, their successors and assigns, their subsidiaries, affiliates, directors, officers, managers, agents, employees, attorneys and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise. Defendants and each person bound by this Final Judgment shall cooperate in ensuring that the provisions of this Final Judgment are carried out.

B. Each Defendant shall require, as a condition of the sale or other disposition of all or substantially all of the assets used in its business for developing, manufacturing and selling DASD that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

C. Nothing contained in this Final Judgment is or has been created for the benefit of any third party, and nothing herein shall be construed to provide any rights to any third party.

IV. TERMS OF IBM PURCHASES FROM STK

A. Defendants may enter into or carry out any agreement pursuant to which IBM may in any manner distribute STK DASD, including any such agreement pursuant to which IBM may act as sales agent, distributor, or any other channel of distribution

for STK DASD in which IBM does not acquire title to the STK DASD to be distributed, provided that in each such instance such agreement is not inconsistent with the provisions of this Final Judgment. The volume of STK DASD distributed under any such agreement, except in an agency agreement in which IBM acts only as agent for the end-user customer, shall be included in IBM's and not STK's volumes of terabytes computed pursuant to Section VI of this Final Judgment. Where IBM acts as agent to procure the STK DASD for the end-user customer and also finances the transaction, the STK DASD so distributed shall also be included in IBM's and not STK's volumes of terabytes computed pursuant to Section VI of this Final Judgment.

B. Defendants shall not make any changes to any of the terms of the modified OEM agreement, or enter into any other agreement, that would be inconsistent with any of the unexpired provisions of this Final Judgment. Defendants shall provide to the Antitrust Division of the United States Department of Justice written notice (or a copy) no later than 15 business days after receipt by the Defendants' Contract Administrators of any written amendment, executed by authorized representatives of Defendants, of the following documents included within the modified OEM agreement: the "OEM Agreement Between IBM and STK" dated December 18, 1997; the "IBM Developer Base Agreement;" the "Statement of Work" referenced in the IBM Developer Base Agreement; and the "Description of Licensed Works" (but not including any exhibits,

attachments, or schedules to such documents, or other documents referenced in such documents).

C. Except to the extent set forth in this Final Judgment, Defendants shall not enter into or carry out any agreement that: (1) sets any IBM volume commitments, or provides for recovery payments or liquidated damages from IBM as a consequence of IBM's failure to purchase a certain volume of STK DASD; or (2) contains any provision under which any IBM obligation to STK is contingent upon any level of sales or shipments of STK DASD by STK to persons other than IBM.

D. Except to the extent set forth in this Final Judgment, Defendants shall not enter into or carry out any agreement pursuant to which IBM is bound to purchase any volume of STK DASD, or that contains any provision requiring IBM to make payments for IBM's failure to purchase a certain volume of STK DASD; provided, however, that IBM may provide STK with non-binding monthly, quarterly, and/or 12-month estimates, expressed in terabytes or other units of storage capacity, of anticipated purchases of STK DASD, and IBM, subject to Section VI of this Final Judgment, may become contractually obligated to purchase STK DASD as follows: (1) on or after the 30th day before the beginning of a calendar quarter, IBM may bind itself to purchase up to 80 percent of its estimate of purchases for that quarter; (2) IBM may thereafter issue binding purchase orders for deliveries within such quarter without regard to the estimate;

(3) to the extent that IBM's purchases of STK DASD for a given quarter are less than IBM's estimate for that quarter, IBM may bind itself to purchase during the subsequent quarter some or all of the difference between IBM's estimated and actual purchases from the prior quarter, in addition to up to 80 percent of its estimate for the subsequent quarter; and (4) in the event of termination or winding down of the modified OEM agreement, in the last quarter in which IBM provides an estimate of purchases, IBM may issue purchase orders for volumes to satisfy its future needs and such volumes may be delivered in that quarter or subsequent quarters. IBM shall issue purchase orders for STK DASD only to the extent that they reflect IBM's actual intention to purchase and take delivery of the STK DASD ordered. IBM shall purchase and pay for all STK DASD for which it becomes contractually obligated pursuant to the foregoing provisions; provided, however, that nothing in this Final Judgment shall preclude IBM and STK, in the event of a bona fide dispute concerning IBM's obligation to purchase or accept delivery of STK DASD under a purchase order, or concerning whether or to what extent IBM is obligated to purchase STK DASD under a specific binding estimate, from pursuing their remedies at law or resolving the dispute in a commercially reasonable manner.

E. Defendants: (1) may establish prices and volume discounts for the purchase of STK DASD by IBM, provided, however, that such discounts are based upon actual volumes of STK DASD and

upgrades purchased, rather than projected volumes, and may reflect credits obtained as a result of STK's failure to meet on-time delivery, quality, or product deliverable requirements; but (2) shall not enter into or carry out any agreement in which any prices or other terms applicable to IBM's purchases of STK DASD are contingent upon any prices or other terms offered by STK to any prospective end-user customer for STK DASD.

F. If demand for STK DASD exceeds supply, Defendants shall not enter into or carry out any agreement that favors allocation to IBM over other purchasers if STK cannot meet delivery commitments. In all such situations, STK will allocate production for shipment to IBM and to other customers based upon the delivery dates requested in purchase orders received by STK for STK DASD from IBM or other customers. For a given date, STK will allocate production for shipment to IBM and to other customers on a pro rata terabyte basis.

V. LICENCES; PRODUCT DEVELOPMENT

A. IBM shall grant STK licenses effective immediately to all hardware and software developments and enhancements that have been funded by IBM under the OEM agreement or modified OEM agreement or that IBM is obligated to fund under the modified OEM agreement to Iceberg, Kodiak, future versions or models thereof, IXFP, and Snapshot (hereinafter, "Funded Enhancements"), which shall be at least equivalent in scope to the licenses set forth in Attachment A of this Final Judgment.

B. STK may pay hardware and software royalties to IBM. For STK's sales, shipments, licenses, or other distribution of STK DASD, hardware upgrades or components therefor, and IXFP and Snapshot software to persons other than IBM that are shipped or otherwise distributed prior to April 1, 1999, royalties for Funded Enhancements and derivative works thereof used with the following (but not including royalties for customer service that include the right to install basic enhancements and maintenance modifications, and software and microcode, other than IXFP and Snapshot, distributed separately from hardware or major enhancements or hardware that are not based on capacity) may not exceed the amounts set forth below:

1. STK shall make a nonrefundable payment to IBM of $4 million during 1998, payable in equal quarterly installments beginning January 1, 1998. This payment will initially be applied to any royalties that become due under the modified OEM agreement for shipments before April 1, 1999. Unused portions of this payment that do not exceed $2 million may be credited toward royalties due for shipments after March 31, 1999.

2. For sales, leases, licenses, or any other distribution by STK of STK DASD, STK DASD hardware upgrades, or components to customers other than IBM, STK may pay IBM up to: (a) $0.08 per megabyte through December 31, 1998; and

(b) $0.067 per megabyte from January 1, 1999, through March 31, 1999;

3. For each copy of IXFP software licensed or otherwise distributed by STK to customers other than IBM for use on STK DASD, STK may pay IBM up to: (a) $5,400 through December 31, 1997; (b) $5,500 from January 1, 1998 through December 31, 1998; and (c) $3,000 from January 1, 1999, through March 31, 1999;

4. For each copy of Snapshot software licensed or otherwise distributed by STK to customers other than IBM for use on STK DASD, STK may pay IBM up to: (a) $18,000 through December 31, 1998; and (b) $10,000 from January 1, 1999, through March 31, 1999. Except as provided above, STK may pay hardware and software royalties to IBM under the provisions of the modified OEM agreement, including but not limited to, the provision that beginning April 1, 1999, the royalties for each STK DASD subsystem or controller sold, leased, licensed, or otherwise conveyed by STK to customers other than IBM will not exceed the lesser of $3,500 or five percent of the revenue received. Except as otherwise provided in the modified OEM agreement with respect to a change of control or termination for cause, all royalties will become fully paid-up no later than (a) when the sum of all payments made by STK on account of such royalties, including any portion of the initial $4 million payment that

can be credited to royalties after March 31, 1999, but excluding royalties paid under Sections V.B.2., V.B.3., and V.B.4. above, equals $18 million, or (b) on December 31, 2002, whichever first occurs.

C. For the duration of the modified OEM agreement, IBM shall offer to sell to STK IBM disk drives and IBM disk drive replacements for use in STK DASD that IBM has assisted in enhancing or developing under the OEM agreement, regardless of whether such STK DASD are shipped to other customers, provided that IBM makes such disk drives generally available. Such offers shall be made under terms no less favorable to STK than IBM's standard non-price terms and conditions, and at a price no greater than the average of the five lowest prices paid by IBM's OEM customers who have committed to purchase comparable quantities during the same calendar quarter.

D. The provisions of this Section V shall terminate on December 31, 2002.

VI. IBM PURCHASE VOLUMES

A. For each calendar year during the period January 1, 1999, through December 31, 2002, IBM's total purchases of STK DASD (measured in terabytes) for use in the United States shall not exceed 67 percent of the volume of STK DASD (measured in terabytes) purchased by IBM during the calendar year 1998 for use in the United States, unless (1) STK has already shipped a total of at least the STK Minimum to STK's United States customers

other than IBM during the preceding 12 months, or (2) IBM and STK obtain prior approval of the United States under the provisions of Section VI.B. below.

B. IBM may purchase STK DASD without regard to the limitation of Section VI.A. above if approved by the United States Department of Justice. The United States may approve such purchases upon the submission of a written request to the Antitrust Division of the United States Department of Justice, supported by both Defendants, and setting forth the additional purchase volumes requested, the time period(s) for which the additional purchases are requested, and the reasons and circumstances related to the request. The United States will approve the request if it concludes that notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM’s proposed additional purchases would not substantially lessen that competition. The United States will not unreasonably withhold approval, and if it does not deny a request in writing setting forth the reasons for the denial within 30 days of submission, the request will be deemed approved. If the United States denies a request, the Court may review the matter upon the filing of an application by both Defendants. The Court may overrule a denial by the United States of a request made before January 1, 2001, only if Defendants establish that notwithstanding STK's failure

to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM’s proposed additional purchases would not substantially lessen that competition. The Court may overrule a denial by the United States of a request made on or after January 1, 2001, only if Defendants establish either (1) that notwithstanding STK's failure to supply the STK Minimum to United States customers, IBM faces vigorous competition from STK in the United States for the development, production and marketing of DASD, and IBM’s proposed additional purchases would not substantially lessen that competition or (2) that because of technological advances, the entry of new competitors, or otherwise, a material change has occurred since the date of this Final Judgment in the competition in the United States for the development, production and marketing of DASD, such that IBM’s proposed additional purchases would not substantially lessen such competition.

C. The provisions of this Section VI shall terminate on December 31, 2002.

VII. COMPLIANCE INSPECTION

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege or doctrine:

A. Duly authorized representatives of the Department of Justice, upon written request of the Attorney General or of the

Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a Defendant made to its principal office, shall be permitted:

1. Access during regular office hours of Defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of Defendants and without restraint or interference from them, to interview or depose officers, employees, and agents of Defendants, who may have counsel present, regarding any such matters.

B. Defendants shall submit written reports with respect to matters contained in this Final Judgment as follows:

1. On the 30th day after the beginning of each calendar quarter, STK shall submit to the Antitrust Division of the United States Department of Justice a written report setting forth: (a) the total of IBM’s purchases of STK DASD for use in the United States during the preceding quarter, measured in terabytes; (b) the total of IBM’s distribution of STK DASD for use in the United States, through a means of distribution in which IBM did not acquire title to the STK DASD, during the preceding quarter, measured in terabytes;

(c) the total of IBM Credit Corporation’s purchases of STK DASD bearing STK’s logo for use in the United States during the preceding quarter, measured in terabytes; (d) the total of STK’s shipments of STK DASD to United States customers other than IBM pursuant to transactions in which IBM ordered such STK DASD as agent for such customers, during the preceding quarter, measured in terabytes; (e) the total of all other STK shipments of STK DASD to United States customers other than IBM during the preceding quarter, measured in terabytes.

2. Apart from the foregoing, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to Defendants' principal office, Defendants shall submit such written reports, under oath if requested, with respect to any matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to Plaintiff, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by Plaintiff to Defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which a defendant is not a party.

VIII. RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

IX. TERMINATION

This Final Judgment shall expire on the fifth anniversary of the date of its entry.

X. PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

_____

UNITED STATES DISTRICT JUDGE

Dated: _____

Attachment A

A. An STK Incidental Use License for any purpose.

B. For IKA Storage Systems, an STK Material Use License for any purpose.

C. For products other than IKA Storage Systems, an STK Material Use License for any purpose.

D. "STK Incidental Use License" means a nonexclusive, worldwide license to use (1) the ideas, concepts, and techniques contained in, (2) the structure, sequence and organization of, and (3) other nonliteral aspects of IBM Materials and their Derivative Works. Such license shall not include the right of STK to make a copy of any of the IBM Materials or any Derivative Work thereof owned by IBM which is substantially similar thereto and would constitute literal infringement under applicable copyright law.

E. "STK Material Use License" means a nontransferable, nonexclusive, worldwide, license to use, execute, reproduce, display, perform, transfer, distribute, sublicense, and prepare Derivative Works, of the IBM Materials and its Derivative Works. Such license includes the right of STK to authorize others to do any of the above, and also applies to associated audio and visual works. Except for the right to sublicense STK subsidiaries pursuant to Section 11.0 of the IDA, the right to sublicense under this definition is limited to granting sublicenses for microcode which include terms and conditions substantially similar to the STK Customer Agreement, to granting sublicenses for software other than microcode under the terms and conditions that STK uses for similar software of its own, and to granting sublicenses to third-party maintainers under reasonable terms and conditions. Nothing in this definition of STK Material Use License or elsewhere in the Modified OEM Agreement shall be construed, subject to the payment of royalties due, to prevent STK from distributing through OEMs other than IBM, Funded Enhancements that are incorporated in STK DASD, provided that nothing in the Final Judgment to which this definition is attached shall obligate IBM to grant or obligate IBM to permit STK to grant rights under such license to OEMs other than the right of STK to permit OEMs to distribute Funded Enhancements contained in STK products. In the event of a Change of Control, subject to the payment of royalties due and the acquiring entity’s agreement to be bound by the Modified OEM Agreement,

nothing in this license shall be construed to prevent the acquiring entity from developing, producing, or marketing Funded Enhancements incorporated in DASD.

F. "Change of Control" means the acquisition by an entity of more than 20 percent of the outstanding common shares of STK representing the right to vote for STK's board of directors, the sale of all or substantially all of the assets of STK, or any consolidation, merger, or other reorganization of STK in which STK is not the continuing or surviving corporation or pursuant to which shares of such common stock would be converted into cash, securities, or other property.

G. "Derivative Work" means a work that is based on an underlying work that would be a copyright infringement if prepared without the authorization of the copyright owner of the underlying work. Derivative works are subject to the ownership rights and licenses of others in the underlying work.

H. "Funded enhancements" means hardware and software developments and enhancements that have been funded by IBM under the OEM agreement of June 7, 1996 or the Modified OEM Agreement, or that IBM is obligated to fund under the Modified OEM Agreement.

I. "IBM" means International Business Machines Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.

J. "IBM Materials" means deliverables funded in accordance with the IBM Developer Agreement, attached as Exhibit 3 to the Modified OEM Agreement.

K. "IDA" means the IBM Developer Agreement, attached as Exhibit 3 to the Modified OEM Agreement.

L. "IKA Storage Systems" means Iceberg, Kodiak, and Arctic Fox storage systems, as defined in the IDA Description of Licensed Work (Attachment 2 to Exhibit 3 of the Modified OEM Agreement as Attachment).

M. "Modified OEM Agreement" means the agreement dated December 18, 1997, pursuant to which IBM has agreed to purchase STK DASD from STK, and STK has agreed to sell STK DASD to IBM, including all attachments, exhibits, schedules, and other documents referenced therein, and all amendments, additions, updates, or modifications to any of the foregoing.

N. "STK" means Storage Technology Corporation, its successors and assigns, each subsidiary and division thereof, and each officer, director, employee, agent and other person acting for or on behalf of any of them.