

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

Next Court Deadline:

November 15, 2007

Supplemental Status Report

**BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO THE MOTIONS TO EXTEND
THE STATES' FINAL JUDGMENTS**

Certain members of the California Group ("California Movants") and certain members of the New York Group ("New York Movants")¹ filed motions to extend their Final Judgments on October 16, 2007, and October 18, 2007, respectively (collectively, "Motions"). The United States of America, Plaintiff in *United States v. Microsoft*, CA No. 98-1232 (CKK), hereby files this brief as amicus curiae in opposition to the Motions, in accordance with the Court's order of October 30, 2007.

¹ This brief will refer to the California Movants and New York Movants collectively as "Movants" or "Moving States."

I. INTRODUCTION

The United States respectfully submits that there is no basis for the Court to order a five-year extension of the Final Judgments in a contested proceeding. While the Court does have the authority to modify the Final Judgments in certain circumstances to ensure their effectiveness,² neither the California Movants nor the New York Movants satisfy this standard. As the New York Group informed the Court two months ago, the Final Judgments “have achieved [their] goals” and “are enabling the competition they are designed to protect.”³ The California Movants do not provide any evidence that the goals of the expiring provisions of the Final Judgments have not been achieved, when those goals are properly considered in light of the Court of Appeals decision and this Court’s ruling. Accordingly, there is no *legal* basis upon which to seek such an extension.

The California and New York Movants advance inadequate and mutually inconsistent arguments to justify extension of the Final Judgments; both state groups argue theories, moreover, that are directly contravened by the states’ own past statements and actions. As the Movants have not satisfied the standard for extending the Final Judgments, the Motions should be denied.

² See, e.g., *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002).

³ Review of the Final Judgments by the New York Group and the United States at 2, 8 (filed Aug. 30, 2007) (hereinafter “NY/US Effectiveness Report”).

II. ARGUMENT

This amicus brief makes three principal points which all compel the conclusion that the Motions should be denied: (1) given the effectiveness of the Final Judgments, the Moving States have not established any legal basis for extension of the expiring provisions; (2) Section III.E does not expire until November 2009 and therefore there is no reason to consider an additional extension of Section III.E until Fall 2009; and (3) neither the previous extension of Section III.E nor the difficulties in the implementation of Section III.E justify an extension of the expiring provisions of the Final Judgments.

A. As the Final Judgments Have Accomplished Their Goals, the Moving States Have Not Met Their Burden of Establishing That They Are Entitled to an Extension of the Expiring Portions of the Final Judgments

When considered in the context of the actual goals of the Final Judgments — as described at the time by the settling Plaintiffs, this Court, and the Court of Appeals — the Final Judgments have in fact “achieved these goals.”⁴ The Moving States fundamentally misapprehend the goals of the Final Judgments and the standard for a contested judgment modification.

The California Group argued in its effectiveness report that the Final Judgment as a whole has “had little or no discernible impact in the marketplace as measure by the most commonly used metric — market shares” and that the middleware provisions in particular “have yielded little, if any, tangible pro-competitive results.”⁵ After the Court pointed out at the last Status Conference that this line of argument provides no basis for the extension of the Final

⁴ *Id.* at 2.

⁵ California Group’s Report on Remedial Effectiveness at 2, 7 (filed August 30, 2007).

Judgments they seek,⁶ the California Movants have now shifted ground and present two different arguments for extending the Final Judgments.

First, the California Movants argue that extension of the Final Judgment is necessary to “pry open” the OEM channel to non-Microsoft web browsers.⁷ They make no showing, however, that any conduct by Microsoft (either in violation of the decree or otherwise) has foreclosed the OEM channel to third-party browsers. Rather, they simply state that to date, no OEM has shipped a non-Microsoft web browser as the default web browser. This is a non sequitur. The Final Judgments do not mandate that OEMs, who are not parties in this case, install non-Microsoft web browsers as a default. The Final Judgments only seek to ensure that *Microsoft* does not block the OEM distribution channel.

Second, the California Movants argue that extension of their Final Judgment is necessary to prevent Microsoft from abusing its monopoly power in the future. At most, this is an indirect restatement of the arguments in the California effectiveness report that the Final Judgments have failed because Microsoft’s market power has endured. (After all, as long as Microsoft has monopoly power, there remains the potential for Microsoft to abuse that power.) The Final Judgments, however, aim to “‘eliminate Microsoft’s illegal practices, to prevent recurrence of the same or similar practices and to restore the competitive threat that middleware products

⁶ It would hardly be a sound exercise of judicial discretion, after all, to extend a judgment based on allegations that it has proved completely ineffective in the “hope” that it would somehow become more effective over the following five years.

⁷ Plaintiff States’ Memorandum of Points and Authorities in Support of their Motion to Extend the Final Judgment Through November 12, 2012 at 16-18 (filed October 16, 2007) (hereinafter “California Movants’ Memorandum”).

posed prior to Microsoft's unlawful conduct.'"⁸ As these goals have been achieved, an extension of the Final Judgments based on potential future misconduct by Microsoft is not supported by the law.

Neither of these arguments provides a sound basis for extending the Final Judgments. Under the most liberal statement of the standard for judgment modifications, set forth in *United States v. United Shoe Machinery Corp.*, the moving plaintiff must show that the "principal objects" of the judgment have not been achieved and that "other . . . means" are necessary "to achieve the result."⁹ As the California Movants have failed to establish that the goals of the Final Judgments have not been achieved, the California Movants' request should be denied.

The New York Movants' about-face is even more difficult to understand than the California Movants' reasoning. Just two months ago, the New York Group joined with the United States in concluding that the Final Judgments had "achieved [their] goals" by "safeguard[ing] the ability of software developers to develop, distribute, and promote competing middleware products."¹⁰ Since a contested judgment modification requires the plaintiff to demonstrate that the judgment has failed to achieve its "principal objects," the conclusion

⁸ NY/US Effectiveness Report at 2 (quoting Competitive Impact Statement at 17).

⁹ *United Shoe*, 391 U.S. at 251-52. The United States understands that Microsoft argues *Rufo* articulates a standard for judgment modifications that should apply to this case; Microsoft also argues that the *Rufo* standard is more restrictive than *United Shoe*. See Memorandum of Points and Authorities of Microsoft Corporation in Opposition to Certain Plaintiff States' Motions to Extend the Final Judgments at 5-9 (filed Nov. 6, 2007); see also *Cook v. Billington*, 2003 WL 24868169, at *2-*3 (D.D.C. 2003) (discussing different standards articulated in *United Shoe* and *Rufo* and their application in D.C. Circuit cases). As the Moving States have failed to meet the standard of *United Shoe*, the Court need not determine whether the *Rufo* standard in fact is narrower in scope or whether it applies to the instant case.

¹⁰ NY/US Effectiveness Report at 2.

reached in the New York Group’s effectiveness report demonstrates that no judgment modification is warranted.

It is difficult to determine the exact factual basis for the New York Movants extension request. On the one hand, they acknowledge “that reduction of Windows market share is not the litmus test for the Final Judgments’ success.”¹¹ On the other hand, in the next sentence they argue that “the absence of meaningful erosion in Windows market share is still problematic for the public interest.”¹² They continue by arguing that Microsoft’s monopoly position in the individual desktop operating system market is durable.¹³ It appears the New York Movants are arguing that this is the type of “changed circumstance” that might justify a decree modification.¹⁴ But the durability of Microsoft’s dominance is not a “changed circumstance” — indeed, it was well established when this litigation began. In any event, as the New York Group itself stated in its effectiveness report, “[t]he litigation, however, did not afford a basis for extinguishing Microsoft’s Windows monopoly position or for reducing it by a particular amount.”¹⁵

Even more troubling is the legal standard — or lack thereof — that the New York Movants appear to argue should apply to their contested request to modify a consent judgment. In a number of places, the New York Movants suggest Microsoft must demonstrate why the

¹¹ Joinder of Plaintiff States of New York, Maryland, Louisiana, and Florida in Moving to Extend the Final Judgments at 4 (filed October 18, 2007) (hereinafter “New York Movants’ Memorandum”).

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ See *Rufo*, 502 U.S. at 383 (setting forth “changed circumstances” test for decree modifications).

¹⁵ NY/US Effectiveness Report at 5.

extension would not be in the public interest. For example, they argue that “there is no basis for concluding that the provisions negotiated in 2001 are any less relevant today” and that “Microsoft itself should hardly be heard to object to extending the decree” since Microsoft has committed to incorporating the principles in the Final Judgments to its business practices on an ongoing basis.¹⁶ The New York Movants therefore conclude that “the likely benefit to the public interest from extending the Final Judgments — the continuing restoration of competition — decidedly outweighs any conceivable burden on Microsoft.” But this is not the law. The New York Movants are not entitled to a contested modification of their judgment because they think it would be a “benefit to the public interest.” They must, at a minimum, establish that the Final Judgments have failed to meet their remedial goals in some substantial way.

The New York Movants’ requested decree modification also represents bad public policy. The United States and the New York Group negotiated a *consent* decree with Microsoft to resolve this case. If a few states from the New York Group are granted a substantial modification of the decree — without establishing any change in circumstances and after admitting that the expiring provisions of the decree have accomplished their goals — that would set an unfortunate and troubling precedent; it would destabilize the finality of consent decrees and thereby undermine the ability of the United States to settle antitrust cases in general, and in particular to settle cases jointly with antitrust enforcers in the states. The Court should therefore reject the New York Movants’ attempt to unilaterally alter their consent decree in the guise of a thinly supported modification request.

¹⁶ New York Movants’ Memorandum at 6-7.

B. There Is No Need to Consider an Additional Extension of Section III.E at This Point in Time

The California Movants cite no evidence to support their assertion that Section III.E must be extended now, two years before it is scheduled to expire, when just last year they agreed that it was appropriate to wait until Fall 2009 to determine whether an additional extension of Section III.E is necessary.¹⁷ In the absence of any such evidence, the United States will honor its representation to the Court and will wait until the Fall of 2009.

The United States, in conjunction with the state Plaintiffs, concluded last year that an extension of Section III.E was necessary to ensure that the provision had a full opportunity to succeed as envisioned by the Final Judgments. The United States and the state plaintiffs jointly obtained Microsoft's agreement to an extension of Section III.E and the necessary supporting provisions of the Final Judgments. The term of the extension was two years. As the Plaintiffs explained in the May 12, 2006 Joint Status Report, the agreement also gave Plaintiffs the unilateral right to request that the Court grant an additional extension of up to three more years; Microsoft agreed not to oppose any such request.

Section III.E, therefore, does not expire until at least November 12, 2009. In negotiating this extension, Plaintiffs carefully preserved their rights to seek an additional extension should it be necessary. The United States and all the state Plaintiffs informed the Court that they would evaluate, *in the Fall of 2009*, whether such an additional extension was necessary.¹⁸ The California Movants' filing discusses a number of subsequent developments relating to

¹⁷ The New York Movants do not make this argument in their filing.

¹⁸ Joint Status Report at 10-11 (May 12, 2006).

Microsoft’s implementation of Section III.E.¹⁹ Some of these developments may ultimately be relevant to Plaintiffs’ Fall 2009 evaluation of the propriety of requesting an additional extension of Section III.E. It is premature and unnecessary — for the Court and for the other Plaintiffs — to decide at this point in time whether such an extension would be warranted.

C. The Previous Extension of Section III.E and Necessary Supporting Provisions Does Not Provide a Basis for Extension of the Entire Final Judgments

In 2006, both the California Group and the New York Group joined the United States in recommending that the Court extend Section III.E of the Final Judgments. Despite making this request — and representing to the Court that the extension of Section III.E and supporting provisions, without extending the Final Judgments’ other provisions, was in the public interest — the Moving States now claim that Section III of the Final Judgment is a “unitary framework” that cannot be “unbundled” by allowing the remaining provisions of Section III to expire.²⁰

This argument is both wrong on the merits and flatly inconsistent with the states’ actual enforcement activities. The 2006 extension of the Final Judgments included all of the supporting substantive and enforcement provisions of the Final Judgments necessary to ensure the success of the communications protocol licensing program and to guarantee Plaintiffs’ ability to enforce compliance.²¹ The California Group argued in 2006 that the proposed extension was needed to ensure that Section III.E was given a “full opportunity to succeed” and that the extension was

¹⁹ See California Movants’ Memorandum at 9-13.

²⁰ See California Movants’ Memorandum at 16; New York Movants’ Memorandum at 6.

²¹ In particular, Sections I, II, III.E, III.F.1 (as modified), III.F.3, III.I, III.J, IV, V, VI, VII, and VIII of the U.S. Final Judgment were extended, while the remaining sections retained their original expiration date of November 12, 2007. The states’ judgments were modified in parallel.

“necessary and appropriate to effectuate the remedies included in the original Final Judgment.”²²

Similarly, the New York Group argued that the proposed extension of Section III.E and certain specified supporting provisions “served the public interest by ensuring that the remedies included in the Final Judgment will have their intended effect.”²³

In 2006, neither the California Group or the New York Group argued that extension of the other substantive provisions of Section III was necessary. Rather, the Moving States have conceded by their own conduct that the extension of Section III.E without the remaining provisions of Section III was an appropriate response to Microsoft’s difficulties in implementing Section III.E. The California Movants now argue, however, that the extension of Section III.E without the middleware-related provisions of the Final Judgment would “emasculat[e] the core portion of the remedy.”²⁴ The California Movants offer no explanation why their agreement to such an extension in 2006 was in the public interest then, but now would “emasculate” the judgment itself.

The Court should not permit the Moving States to “bootstrap” an extension of the entire decree onto the consensual modification of Section III.E agreed to by all the parties. The Moving States should not be allowed to argue that the agreement entitles them to additional relief beyond that contained in the agreement itself.

²² Joint Motion by the California Group and Microsoft to Modify the Final Judgment and Supporting Memorandum of Points and Authorities at 2, 4 (filed Aug. 31, 2006).

²³ Joint Motion by the New York Group and Microsoft to Modify the Final Judgment and Supporting Memorandum of Points and Authorities at 1 (filed Aug. 30, 2006).

²⁴ California Movants’ Memorandum at 16.

There are sound reasons why the United States — in fact, all of the Plaintiffs — supported an extension of Section III.E (and its supporting provisions) in May 2006 without including the remaining provisions of Section III. First, the compliance problems that provided the impetus for the agreement all surrounded Microsoft’s implementation of its communications protocol licensing obligations under Section III.E in the form of the Microsoft Communications Protocol Program (“MCPPI”). Delays in the effective implementation of Section III.E meant that, in Plaintiffs’ view, Section III.E would not have the full period of time to succeed that was provided in the Final Judgments. Second, while Section III.E is designed to promote the same overall goals as the rest of the Final Judgments, Section III.E is readily separable in practice from the remaining substantive provisions of Section III. The problems with Section III.E did not prevent the other parts of Section III from having their desired effect. OEMs continued to benefit from the anti-retaliation and uniform licensing provisions of Section III.A and III.B. Consumers still benefitted from the middleware provisions of Section III.C and III.H while the problems with Section III.E were being resolved. The Moving States have also not established that problems relating to Section III.E have impaired the effectiveness of the remaining provisions of the Final Judgments.

III. CONCLUSION

For the foregoing reasons, the United States respectfully submits that the Court should deny the Moving States' motions to extend the Final Judgments.

Dated: November 9, 2007

Respectfully submitted,

FOR THE UNITED STATES
DEPARTMENT OF JUSTICE'S
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