ARGUED FEBRUARY 26 & 27, 2001, DECIDED JUNE 28, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,

Defendant-Appellant

Consolidated with No. 00-5213

APPELLEES' RESPONSE TO MICROSOFT'S MOTION FOR STAY OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Microsoft requests a stay of this Court's mandate pending disposition of its petition for certiorari. By its terms, Microsoft's petition seeks interlocutory review of a highly fact-based determination that the Supreme Court has said a court of appeals is in the best position to make. Under the circumstances, Microsoft has little prospect of obtaining certiorari review, let alone winning a reversal, of this Court's unanimous, en banc judgment. Moreover, there is no sense in which resumption of proceedings before the district court would injure Microsoft in any way. By contrast, granting a stay would further delay the public's remedy and contribute to uncertainty in the market. Microsoft therefore has not met any of the requirements for a stay. Accordingly, this Court should deny Microsoft's request and issue its mandate immediately.

To merit a stay, Microsoft "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); D.C. Cir. R. 41(a)(2). More specifically, Microsoft must demonstrate:

> (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed.

Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1319 (Rehnquist, Circuit Justice 1994); *South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (Powell, Circuit Justice 1981). *See also* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 17.19, at 689 (7th ed. 1993) (lower courts apply same factors). Thus, Microsoft's claim that it may obtain a stay by demonstrating "either" certworthiness *or* irreparable injury (Mot. 3) is not only incorrect[1]— but also irrelevant, because Microsoft demonstrates neither. In addition, the balance of equities strongly favors denial of the stay.

1. This Court's judgment is interlocutory. That fact "of itself alone furnishe[s] sufficient ground for the denial" of Microsoft's petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen v. Bangor*

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[1]In *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001) (Ripple, J., in chambers) (Mot. 3), the parties agreed that a stay ought to be granted. *Id.* at 828. And Microsoft overreads *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124 (D.C. Cir. 1978) (Mot. 3). That case was decided prior to the 1994 amendment to Rule 41 that added the requirement that a stay motion "must show that the certiorari petition would present a substantial question *and* that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A) (emphasis added). Even without that requirement in the Rule, the *Deering* court did not say that only one of those elements was required, and it both found the issues presented to be substantial, 647 F.2d at 1128, and concluded that "the balance of the equities" favored continuing the existing stay of the district court's orders—which had the same effect as staying the mandate. *Id.* at 1129. *Cf. Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1110 (D.C. Cir. 1981) (per curiam).

& Aroostook R.R.. Co., 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); STERN, ET AL. § 4.18, at 196.

Microsoft argues that, despite the judgment's interlocutory status, the question of the scope of the district judge's disqualification is ripe for Supreme Court review. Pet. 15. But Microsoft itself foreshadows the likelihood that it will later petition for certiorari to review other aspects of this Court's decision. Pet. 15. Thus, it virtually promises that a grant of certiorari now would lead to multiple, piecemeal appeals—precisely the result the Supreme Court policy disfavoring interlocutory appeals is designed to avoid. *Cf. Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The Supreme Court likely will avert that result by denying certiorari now.

2. This Court's decision was entirely consistent with Supreme Court authority and that of its sister circuits. Microsoft argues that this Court required a showing of actual bias to vacate the Findings of Fact and Conclusions of Law and that that requirement conflicts with Supreme Court authority and decisions of other circuits. But the claimed conflicts are based wholly on demonstrable misreadings of this Court's decision and the other decisions Microsoft cites.

a. Contrary to Microsoft's assertions, this Court did not require "a showing of actual bias to obtain disqualification under 28 U.S.C. § 455(a)." Mot. 6. Indeed, though the Court found no actual bias (Slip Op. 122), it nevertheless *did* disqualify the trial judge—both prospectively and retroactively—because of the appearance of bias. *Id.* at 121. Rather than holding that "actual bias" is a requirement for disqualification, the Court quite properly considered

it as merely one factor in guiding its discretion as to the remedy for the district judge's violation of § 455(a). *Id.* at 122.

b. Next, Microsoft misreads *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), in two ways. First, it studiously avoids the Supreme Court's key holding:

> [T]he Court of Appeals is in a better position to evaluate the significance of a violation [of § 455(a)] than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

Id. at 862. The statute "neither prescribes nor prohibits any particular remedy for a violation." *Id.* Second, and accordingly, the Supreme Court did *not* "require[] that a final judgment . . . be vacated and the case retried" (Mot. 4), but held merely that the court of appeals' "determination that a new trial is in order is well supported." 486 U.S. at 862.

Liljeberg does require a court of appeals to weigh three factors when fashioning a remedy for violations of § 455(a). *Id.* at 864. This Court did just that (Slip Op. 121-22), and in so doing, soundly exercised its discretion. The Court's prospective and partial retroactive disqualification, and vacation of the remedy order, was a stern response to serious misconduct. It also collaterally penalized plaintiffs, "who were innocent and unaware of the misconduct" (*id.* at 122), by delaying remedy proceedings until a new judge is assigned and becomes familiar with the case. There was no evidence that Microsoft's "right to an impartial adjudication" on liability was compromised, no allegation or evidence that the judge's conduct "rose to the level of actual bias or prejudice," and no suggestion that plaintiffs were aware before Microsoft of the judge's misconduct. *Id.* at 122. The Court also took upon itself—because Microsoft challenged almost none of the district court's findings (*id.*)—to review "the record with painstaking care and . . . discerned no evidence of actual bias." *Id.* at 124. This Court's unanimous, en banc exercise of its discretion was

considered, deliberate, thorough, and reasonable. There is no reason to suppose the Supreme Court will disturb it, or even choose to review it.

c. Nothing in this Court's decision conflicts with *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991), or *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), contrary to Microsoft's contention (Mot. 2). Neither case even purports to establish or apply a legal standard that differs from the standard this Court applied. In *Preston*, the court of appeals found a violation of § 455(a) in a wrongful death suit because when the litigation began, the district judge was of counsel to the law firm representing the decedent's employer. 923 F.2d at 734. Thus, unlike here, the conduct giving rise to the § 455(a) violation occurred before the district judge even began his proceedings. In exercising its discretion under *Liljeberg*, the *Preston* court determined that "[t]here is no way . . . to purge the perception of partiality *in this case* other than to vacate the judgment and remand the case to the district court for retrial by a different judge." *Id.* at 735 (emphasis added). By contrast, here the misconduct arose from the judge's reaction to the evidence presented in the case itself and did not implicate any preexisting basis to doubt the judge's impartiality.

In *Cooley*, the court reversed a criminal conviction because the judge had appeared on a "Nightline" broadcast and stated that various abortion protesters are "breaking the law" by violating his earlier-issued injunction 1 F.3d at 990-91. This was a violation of § 455(a). *Id.* at 995. As in *Preston*, the conduct creating the § 455(a) violation occurred before the defendants even appeared in district court. In remedying the § 455 violation, the court of appeals cited *Liljeberg* and summarily stated that it was "satisfied that the remedy *in this case* is to vacate the conviction and sentence" of each defendant. *Id.* at 998 (emphasis added).

Both *Preston* and *Cooley* thus reflect what the courts deciding them thought to be appropriate remedies in the exercise of their discretion, given the facts and circumstances of those two cases. Neither case suggests a legal standard that would require vacatur in every case where an appearance of bias was found, and nothing in either case bears upon what would be an appropriate remedy here. As this Court recognized (Slip Op. 121-22), there are other cases involving violations of § 455 in which courts have determined, as this Court did, that vacatur was not required. *See In re School Asbestos Litigation*, 977 F.2d 764, 787-88 (3d Cir. 1992); *In re Allied Signal Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989) (Breyer, J.). Microsoft's motion mentions neither of these decisions, nor the relevant decisions in *United States v. Cerceda*, 172 F.3d 806, 812-17 (11th Cir. 1999) (en banc) (per curiam) (refusing to vacate sentences or underlying convictions); or *United States v. Jordan*, 49 F.3d 152, 158-59 (5th Cir. 1995) (vacating sentence but not underlying conviction).

3. Microsoft makes no serious claim that issuance of the mandate now will cause it irreparable injury. *See* Mot. 6 (claiming vague "threat of severe and unnecessary injury"). This omission in itself justifies denial of a stay. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (Blackmun, Circuit Justice 1983). Nor could Microsoft demonstrate irreparable injury. Issuing the mandate would merely allow remand proceedings to begin. There is no pending remedial judgment or decree to enforce that would alter Microsoft's business while its petition for certiorari is considered, and its petition will almost certainly be resolved before any new remedial order is actually entered by the District Court. Thus, the only injury to Microsoft would be the cost of participating in the remand proceedings, but "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Ticor Title Ins. Co. v. FTC*, 814

F.2d 731, 740 (D.C. Cir. 1987) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982).

4. Finally, "[i]t is ultimately necessary . . . 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304-05 (Scalia, Circuit Justice 1991) (internal citations omitted). Here, the balance of equities tilts decidedly in favor of appellees. Microsoft offers no equities in its favor (Mot. 6-7), no injury it will suffer from the resumption of proceedings. By contrast, granting the stay will further hurt the public interest in competition and create uncertainty in the market.

Microsoft has been found to have committed serious violations of Section 2 of the Sherman Act through conduct that began in 1995, yet those violations remain unremedied. This Court repeatedly emphasized that rapid technological change has occurred and continues to occur in this market. Slip Op. 10, 37, 61, 83. Microsoft and other market participants continue to develop and introduce new products. Indeed, Microsoft has announced that it will soon introduce Windows XP, the next generation of its monopoly operating system. Because of its monopoly position, Microsoft's products and conduct overhang the market. The sooner remedial proceedings begin, the sooner a resolution can be crafted to assure competitive conditions and give industry participants the certainty they need to plan or commit resources efficiently. Until that remedy is in place, each day of delay contributes additional injury to the public interest in competition. *See California v. American Stores Co.*, 492 U.S. 1301, 1304 (O'Connor, Circuit Justice 1989) (staying merger in part because "lessening of competition 'is precisely the kind of irreparable injury that injunctive relief . . . was intended to prevent'") (citation omitted);

Marathon Oil Co. v. Mobil Corp., 669 F.2d 384, 385 (6th Cir. 1982) (denying stay where court's "prime concern is the preservation of some competition in this market"). Issuing the mandate now would end that delay so that a new trial judge can be assigned, become familiar with the record, meet with the parties, and issue a discovery and scheduling order to govern remand proceedings. Such actions could all occur while not imposing irreparable injury on Microsoft before the Supreme Court can act.

Microsoft's liability has already been adjudicated and affirmed. This Court should deny Microsoft's request for a stay so that remand proceedings before a new judge can begin now.

CONCLUSION

Microsoft's Motion For Stay Of The Mandate Pending Petition For Writ Of Certiorari should be denied.

Respectfully submitted.

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August 10, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2001, I caused one copy of the foregoing APPELLEES' RESPONSE TO MICROSOFT'S MOTION FOR STAY OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI to be served by facsimile, followed by first class U.S. Mail, postage prepaid, or by hand upon:

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