

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

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No. 00-5212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,

Defendant-Appellant

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**MOTION OF UNITED STATES OF AMERICA FOR SUMMARY DISMISSAL OF  
MICROSOFT'S MOTION FOR LEAVE TO FILE A MOTION FOR STAY PENDING  
APPEAL ON THE GROUND THAT IT IS PREMATURE, OR TO DEFER  
CONSIDERATION PENDING A DETERMINATION AS TO JURISDICTION**

This Court should summarily dismiss Microsoft's motion for leave to submit an overlong motion, not because of the length of the motion for stay pending appeal, but because it is premature. Microsoft failed to comply with the requirement of Rule 8, Fed. R. App. P., that it first give the district court a chance to rule on its stay motion. This failure is all the more striking, since the district court has made clear that it seeks to move this matter quickly to the appeal stage; plainly stated that it would rule on a stay request once a notice of appeal was filed and therefore is likely to rule on the stay request within a matter of days; and, indeed, would likely have already ruled but for Microsoft's procedural maneuvering.

Even if the Court does not summarily deny Microsoft's motion, it should defer all consideration of the stay motion until the district court acts on Microsoft's stay motion—possibly

mooting the stay motion in this Court—and until it can be determined whether the Court will have jurisdiction over Microsoft’s appeal. On June 13, 2000—the day that Microsoft filed its notice of appeal—the United States filed with the district court a motion to certify the consolidated case for direct appeal to the Supreme Court under the Expediting Act, 15 U.S.C. 29(b). The district court is likely to rule on that motion within days; it could do so sooner, but Microsoft has asked to have until next Monday to reply to that motion. Certification would immediately divest this Court of jurisdiction over the appeal, and jurisdiction would be restored only if the Supreme Court chooses at some future time to cede the case back to this Court and restore its jurisdiction. See 15 U.S.C. 29(b). When the status of this case in this Court is thus clarified, the Court should set a schedule for responses to whatever motions are then appropriate.

1. On May 18, 1998, the United States filed a complaint in the district court for the District of Columbia, alleging that Microsoft Corporation had (1) violated section 2 of the Sherman Act, 15 U.S.C. 2, by unlawfully maintaining its monopoly in the market for the worldwide licensing of Intel-compatible personal computer (PC) operating systems and by attempting to monopolize the market for Internet web browsers; and (2) violated section 1 of the Sherman Act, 15 U.S.C. 1, by unlawfully tying its Internet browser to its Windows operating system and by a series of other unlawful agreements.

On May 22, 1998, the district court, upon Microsoft’s motion, consolidated the United States’ suit “for all purposes” with a similar case brought by the Attorneys General of 19 states and the District of Columbia. State of New York et al. v. Microsoft Corp., Civil Action No. 98-1233 (TPJ).

The consolidated case was tried to the district court between October 19, 1998, and June

24, 1999. On November 5, 1999, the court entered extensive Findings of Fact. United States v. Microsoft Corp., 84 F. Supp.2d 9 (D.D.C. 1999). On April 3, 2000, the court entered Conclusions of Law, United States v. Microsoft Corp., 87 F. Supp.2d 30 (D.D.C. 2000), and an order adjudging Microsoft in violation of sections 1 and 2 of the Sherman Act and state antitrust laws.

On June 7, 2000, the court entered a Final Judgment<sup>1</sup>, which requires Microsoft to separate its operating systems business from its applications business and transfer the assets of one of them (the "Separated Business") to a separate entity. Final Judgment ¶ 1(a), (c). The Final Judgment also contains injunctive provisions temporarily enjoining Microsoft from continuing practices that the court found to have contributed to the Sherman Act violations. Final Judgment ¶3(a)-(f).<sup>2</sup>

The Final Judgment is to take effect on September 5, 2000—90 days after its entry. ¶ 6(a). Within four months from entry of the Final Judgment, Microsoft is to submit for court approval a proposed plan of divestiture to carry out the separation the decree mandates. Id. at ¶ 1(9a). Implementation of divestiture, however, is stayed pending completion of all appeals. Id. at ¶ 6(a).

2. On June 8, 2000, Microsoft filed a perfunctory two-paragraph motion for a stay

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<sup>1</sup>Having consolidated the United States' and states' cases for all purposes, the district court entered one final judgment, based on a single set of findings of fact and conclusions of law addressing the claims in both complaints. Because the same single judgment is at issue in both of Microsoft's notices of appeal, we assume they will be treated together on appeal.

<sup>2</sup> The injunctive provisions of ¶ 3 remain in effect until the earlier of three years from entry of the implementation of the Plan of Divestiture, or the expiration of the term of the Final Judgment (10 years from its effective date). Id. at ¶¶ 3, 6(c).

pending appeal, but it chose not to file a notice of appeal, and later stated that it had no intention of doing so until the district court ruled on its stay motion.

On June 12, 2000, the United States filed a response noting Microsoft's failure to address the established factors governing the granting of a stay pending appeal. The United States also observed that Microsoft's refusal to file a notice of appeal precluded the government from requesting a certification for direct appeal to the Supreme Court, since the filing of a notice of appeal is a prerequisite to certification under the Expediting Act. 15 U.S.C. 29(b). Thus the district court has yet to make its statutorily mandated determination as to the appellate court that would have jurisdiction, in the first instance, over the appeal.

On June 13, 2000, the district court, observing that "consideration of a stay pending appeal is premature in that no notice of appeal has yet been filed," reserved its ruling on Microsoft's motion for a stay "until such time as a timely notice of appeal is filed." Stay Motion Exh. 32.

Microsoft immediately filed notices of appeal and, simultaneously, a motion for leave to file a 39 page motion for stay in this Court. The same day, the United States filed in the district court a motion to certify the case for immediate appeal to the Supreme Court pursuant to the Expediting Act. Microsoft has indicated that it will respond to that motion in four days.

**I. MICROSOFT HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 8 OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

The fundamental premise of Rule 8, Fed. R. App. P., is that the district court should be afforded the opportunity to consider in the first instance a motion for stay pending appeal.

Rule 8(a)(1) provides that a party seeking a stay pending appeal "must ordinarily move first in the

district court.” Under Rule 8(a)(2)(A), a motion for stay pending appeal directed to this Court “must” either “show that moving first in the district court would be impracticable” or “state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.”

Although Microsoft was on notice that its failure to file its notice of appeal was the reason the district court had not yet ruled on its motion for a stay, Microsoft did not await the district court’s ruling for even an hour before filing in this Court. Nor did it afford the district court any opportunity to consider the 39 pages worth of argument it now offers this Court, instead making only a perfunctory, two-paragraph motion that failed even to mention two of the required elements.

Microsoft has offered no legitimate excuse for its failure to comply with Rule 8. The Final Judgment does not take effect until September, and implementation of structural relief is stayed pending appeal; there was no need for Microsoft’s extreme haste in filing its appellate stay request. Moreover, as Microsoft knew when it filed in this Court, its own delay in filing the notice of appeal was the reason the district court had not yet ruled; that notice now filed, a district court ruling on Microsoft’s motion may issue at any moment. And there was no reason why Microsoft could not have afforded the district court an opportunity to consider the arguments in its lengthy appellate filing. This Court should not countenance this evasion of Rule 8; Microsoft’s motion for leave to file its premature stay motion should be denied summarily.

**II. IN ANY EVENT, THIS COURT SHOULD DEFER CONSIDERATION OF THE MERITS OF MICROSOFT’S MOTION UNTIL IT CAN BE DETERMINED WHETHER THE COURT WILL HAVE JURISDICTION OVER MICROSOFT’S APPEAL**

The district court is now considering whether to certify this case for direct review by the Supreme Court, pursuant to the Expediting Act, 15 U.S.C. 29. The Expediting Act provides:

**Appeals**

**(a) Court of appeals; review by Supreme Court**

Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the [Sherman Act or other federal antitrust statute] in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals . . .

**(b) Direct appeals to Supreme Court**

An appeal from a final judgment pursuant to subsection (a) of this section 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. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

If the district court certifies the case for direct Supreme Court review pursuant to the Act, this Court will lack jurisdiction over the appeal and associated motions. See 15 U.S.C. 29(b) (an appeal “shall lie directly to the Supreme Court” if the district court appropriately certifies it; “When such an order is filed, the appeal and any cross appeal shall be docketed in the time and

manner prescribed by the rules of the Supreme Court,” which shall thereupon either dispose of it in the manner of any other direct appeal or “deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance”) (emphasis added). As this Court has observed, the scheme of the Act indicates that, “upon certification all parties . . . must pursue all matters on appeal to the Supreme Court.” United States v. AT&T, 714 F.2d 178, 182 (D.C. Cir. 1983).

It makes little sense for the Court to rush into briefing of Microsoft’s likelihood of prevailing on appeal before ascertaining whether it will have jurisdiction over the case. The district court is likely to rule on the government’s motion to certify under the Expediting Act in a matter of days (under the Act, it must make its determination within fifteen days of the government’s motion). As Microsoft’s own stay papers reveal, this case fits precisely within the Expediting Act and direct review by the Supreme Court is warranted, given the need for speedy resolution of this case and the impact of this case on the nation’s economy. Motion for Stay, p. 3; see United States v. Western Electric Co., 1983-2 Trade Cases ¶ 65,696 at 68,971 (D.D.C. 1983). The Final Judgment, on the other hand, does not go into effect for another two and a half months. Under the circumstances, there is no good reason not to follow the orderly procedure provided by statute, pursuant to which the district court determines whether the court of appeals or the Supreme Court will have jurisdiction over the appeal, at least in the first instance, and appellant files its stay motion -- if one is still needed -- in the appellate court with jurisdiction.

### **CONCLUSION**

The Court should deny Microsoft’s motion for leave to file its motion for stay pending

appeal summarily because the motion is premature. In any event, the Court should defer further action, including briefing of the merits of Microsoft's stay motion, until district court action has clarified whether the stay motion in this Court is moot and whether this Court has jurisdiction over the appeal.

Respectfully submitted.

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/s/

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