IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Supplemental to Civil Action No. 94-1564 (TPJ)
MICROSOFT CORPORATION,	)	Hon. Thomas Penfield Jackson
Defendant.	)	

UNITED STATES' RESPONSE TO MICROSOFT'S SUR-REPLY

I. Introduction

On Wednesday, December 3, 1997, thirteen days after the United States filed its Reply Brief and less than 48 hours before the hearing in this matter, Microsoft filed a Motion to File a Sur-Reply Memorandum and four additional declarations from Microsoft executives. The proffered papers address what Microsoft calls "sharp factual disputes" and are offered in support of its request for discovery and a "full evidentiary hearing" on unspecified issues. Sur-Reply Memorandum at 2. In fact, however, Microsoft's Sur-Reply does not address or demonstrate any dispute about a material fact that needs to be resolved in order for the Court to decide that Microsoft's marketing of IE 3.0, and its intended marketing of IE 4.0, violate the consent decree.

Allowing Microsoft to prolong adjudication of this matter will jeopardize the Court's ability to order full and effective relief, especially with regard to Microsoft's imminent requirement that OEMs ship Internet Explorer 4.0 with Windows 95 beginning in February 1998. The longer Microsoft delays the Court's ruling, the more likely it is that OEMs will acquiesce in Microsoft's insistence that they distribute IE 4.0, and the more likely it is that any relief ordered by the Court will be less than fully effective.

II. Microsoft's Sur-Reply Does Not Create Any Dispute of Material Fact

Microsoft's Sur-Reply creates no dispute regarding those facts and issues that are material to deciding that Microsoft is violating Section IV(E)(i) of the Final Judgment. To the contrary, the following material facts and propositions of law remain undisputed:

- Section IV(E)(i) prohibits Microsoft from requiring OEMs, as a condition of licensing Windows 95, also to license any "other product";
- Microsoft requires OEMs to license IE 3.0, and intends to require them to license IE 4.0, in order to obtain a license to Windows 95;
- Microsoft pervasively markets, distributes, describes and monitors IE as a separate product, and there is separate demand for Windows 95 and IE;
- The undisputed evidence about Microsoft's commercial practices concerning IE, and the separate demand for Windows 95 and IE, is precisely the type of evidence that the Supreme Court and lower courts have made clear should be used in antitrust proceedings to determine whether bundled items are properly regarded as one product or two separate products; and
- IE 4.0 is now offered only as a separate, standalone product and is not bundled with Windows 95 in any distribution channel.

Accordingly, the only disputed material issue is the legal issue whether the forced licensing of IE with Windows 95 can be saved by the proviso to Section IV(E)(i), which permits Microsoft to "develop[] integrated products."

Most of Microsoft's Sur-Reply addresses the narrow question, which Microsoft raised in its Opposition to the Petition, whether the United States was aware of Microsoft's alleged plans to include an Internet browser in Windows 95 prior to negotiation of the Consent Decree. But, even if one were to credit all of Microsoft's allegations on this point, they would still not create a genuine dispute about a material fact because the following facts remain undisputed:

- There is no allegation that Internet browsers were ever discussed in the consent decree negotiations; and

- While Microsoft alleges that a handful of documents, out of hundreds of thousands submitted by it to DOJ, suggested that Internet-related technologies might be included in the operating system, there is no evidence -- and Microsoft does not allege -- that the documents suggest, or that DOJ can be charged with knowledge, (i) that Microsoft was planning both to market Internet Explorer as a separate product and to require OEMs to license it, or (ii) that Microsoft would be permitted to do so by the proviso to Section IV (E)(i).

For other reasons, too, Microsoft's Sur-Reply does not raise disputes material to the issue before the Court. Among other things, the Slivka declaration relies on documents that Microsoft does not allege were produced to DOJ and that, therefore, do not shed light on what DOJ knew or agreed to in 1994. (Slivka Declaration at ¶ 6.)[1] And the Sinofsky declaration attempts to explain away documents, which Microsoft did submit to DOJ and which state that Microsoft did not then intend to include a browser with Windows 95, by arguing that those documents reflected Microsoft's efforts to conceal, from the public and from other Microsoft employees, the company's plans to include a web browsing client with Windows 95. (Sinofsky Supp. Decl. ¶¶ 3, 4, 6-10.) The thrust of Mr. Sinofsky's declaration is that a reader of those Microsoft documents would **not** have thought that Microsoft planned to include a browser with Windows 95. Accordingly, even if the Court were to credit Sinofsky's argument, it falls far short of creating a genuine dispute as to whether DOJ knew in 1994 that Microsoft intended to do what it has since done and agreed then that it would be permitted to do so.[2]

Similarly, while the Allchin and Cole declarations address other issues, neither raises a genuine dispute about material facts. Allchin attempts to reinterpret a December 1996 document

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[1]In addition, the Slivka Declaration's discussion of IE's development in relation to Windows 95 misses the central point that, while Microsoft included IE with the OEM version of Windows 95 beginning in August 1995, Microsoft has continually marketed and distributed IE as a separate product in every other distribution channel. It also ignores the undisputed facts that Windows 95 was initially distributed at retail without IE and continues to this day to be distributed at retail with IE 3.0 provided only on a separate disk that the user is not required to install.

[2]The United States does not concede the accuracy of the arguments in Microsoft's Sur-Reply. Our point here is simply that they do not raise genuine disputes about material facts.

and plainly sheds no light on DOJ's understandings in 1994.[3] Cole addresses only issues concerning the remedy regarding IE 3.0 and has nothing to do with IE 4.0.[4]

[3] In his declaration, Mr. Allchin denies that his December 20, 1996 e-mail to Paul Maritz meant, as it says, that IE is "just an add-on to Windows" and that he was urging Microsoft to leverage "Windows marketshare" in order to win the browser war. (Allchin Declaration, Exhibit A.) Mr. Allchin argues that the e-mail was intended to advocate a "better solution for customers and third-party software developers" by focusing **future** development on technical integration of IE with Windows 95. Mr. Allchin's reconstruction of what he was thinking in December 1996 does not address any issue material to this proceeding. It is, moreover, hard to reconcile with the plain language of the e-mail, which states that Allchin does not "understand how IE is going to win" against Netscape in light of its market share, proposes "leveraging Windows more," and includes no discussion about building a better Windows 95 solution for customers and third-party software developers. (Id.)

[4] Mr. Cole's Supplemental Declaration focuses on problems that allegedly might ensue should this Court order relief with respect to IE 3.0. The declaration obscures more than it enlightens. Indeed, the declaration acknowledges that Microsoft has made the retail version of IE 3.0 easy to uninstall by using an uninstall program that comes with Windows 95. (Cole Supp. Decl. ¶10.) That same uninstall program is available in the latest OEM version of Windows 95, OSR 2.0. Although Microsoft has not enabled the program to uninstall the copy of IE 3.0 that it requires OEMs to install with Windows 95, Microsoft could easily enable the program to do so, as it has already done for the retail version of IE 3.0.

III. Conclusion

The Sur-Reply does not raise a dispute as to any issue of material fact. There is no need for any further evidentiary proceedings. The Court should thus decide, on the present record, that Microsoft's forced licensing of IE 4.0 and IE 3.0 violates the consent decree.

Date: December 4, 1997

Respectfully submitted,

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