IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant	)	Civil Action No. 94-1564 (SS)

MEMORANDUM OF THE UNITED STATES OF AMERICA IN RESPONSE TO THE COURT'S INQUIRIES CONCERNING "VAPORWARE"

This Memorandum responds to the Court's inquiries concerning "vaporware."[1/] While "vaporware" is sometimes used as "slang for announced software that may never materialize,"[2/] and other times as "a term used sarcastically for promised software that misses its announced release date, usually by a considerable length of time,"[3/] it is susceptible of other definitions as well and, apparently, has no single precise meaning.[4/] But, under any definition, the hallmark of "vaporware" is a "preannouncement," e.g., a statement, before the product is available for

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[1] Transcript of Motions Hearing, Jan. 20, 1995 [hereinafter "Tr."] at 145.

[2] Donald D. Spencer, Computer Dictionary (1992).

[3] Microsoft Press Computer Dictionary 359 (1991).

[4] For other definitions, see Alan Freedman, The Computer Glossary 725 (1989) ("Vaporware is software that does not exist. It usually refers to products that are advertised, but that are not ready for delivery to customers."); Robin Williams & Steve Cummings, Jargon: An Informal Dictionary of Computer Terms 576 (1993) ("Vaporware is a product that the vendor keeps promising is about to arrive any moment (*real soon now*) -- but it goes so long past its shipment date that no one believes it will ever really ship. Sometimes it never does. *System 7* was vaporware for a while, since it took two years longer to appear than we were told. Apple's Newton was vaporware for a long while.").

purchase, regarding the features or expected release date of the product. This Memorandum discusses the standards under the antitrust laws for evaluating the legality of such preannouncements.[5/] As we explain below, product preannouncements do not violate the antitrust laws unless those preannouncements are knowingly false and contribute to the acquisition, maintenance, or exercise of market power.

While we welcome this opportunity to address the Court's questions regarding the legal standards applicable to vaporware, we respectfully submit that whatever the Court's ultimate view on this subject, that view should not influence its judgment on the sole issue presented in this proceeding: whether the entry of the proposed Final Judgment is within the reaches of the "public interest."

The Court's public interest determination must focus on whether the proposed Final Judgment provides a reasonable and effective means of remedying the specific antitrust violations alleged in the Complaint.[6/] The Complaint in this case did not allege any violations relating to vaporware.[7/] With respect to the violations that were alleged in this case, the proposed Final Judgment will provide complete and effective relief. As Professor Kenneth J.

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[5] We do not address specific allegations that Microsoft has used such preannouncements, or has offered "vaporware." The government has not expressed any view regarding the validity of those allegations.

[6] See Memorandum of the United States of America In Support of Motion To Enter Final Judgment and In Opposition To The Positions of I.D.E. Corporation and Amici, [hereinafter "Memorandum in Support of Motion To Enter Final Judgment"] at 7-10.

[7] The government's decision not to allege particular violations is not subject to review under the Tunney Act. See Memorandum in Support of Motion To Enter Final Judgment at 10-13. That decision, like the decision to dismiss an action filed under the antitrust laws, is committed to the discretion of the Department of Justice. See In re International Bus. Machs. Corp., 687 F.2d 591, 600-03 (2d Cir. 1982) (issuing writ of mandamus to prevent review of stipulated dismissal of an antitrust case).

Arrow[8/] concluded in his Declaration, "the proposed settlement appropriately addresses and remedies the anticompetitive effects of the practices challenged in the complaint."[9/]

Approval of the proposed Consent Decree will not in any way prevent the government from suing Microsoft in the future for antitrust violations other than those alleged in the Complaint. The government is entirely prepared to bring a case relating to vaporware if a violation of the antitrust laws can be established. Although we concluded at the time we filed the Complaint that we did not have the facts needed to support additional antitrust charges, we do not foreclose any future action if evidence comes to our attention or if market conditions change in ways that support such action. To avoid, inter alia, any possible prejudice to such potential cases, this memorandum discusses only the legal standards relating to vaporware, and does not address the government's evaluation of the evidence in its possession that may relate to specific allegations concerning vaporware.[10/]

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[8] The Court of Appeals recently reviewed an analysis by Professor Arrow in a Tunney Act proceeding, and concluded that it was "enough . . . to establish an ample factual foundation for the judgment call made by the Department of Justice and to make its conclusion reasonable. Insofar as the district court may be considered to have found the contrary, the finding was clearly erroneous." United States v. Western Elec. Co., 993 F.2d 1572, 1582 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993).

[9] Declaration of Kenneth J. Arrow, attached to Memorandum in Support of Motion To Enter Final Judgment [hereinafter "Arrow Dec'l"] at 13.

[10] Such discussion would also be inconsistent with the respective roles assigned to prosecutors and the courts. See Memorandum In Support of Motion To Enter Final Judgment at 10-13.

I. Product Preannouncements and the Antitrust Laws

A. The Elements of a Section 2 Violation

Product preannouncements generally involve unilateral conduct by the announcing firm. Therefore, they are analyzed under Section 2 of the Sherman Act, 15 U.S.C. § 2, the provision of the antitrust laws that applies to unilateral anticompetitive behavior. The relevant offenses under Section 2 are monopolization and attempted monopolization. Each violation requires proof of both "exclusionary" conduct and actual or likely market impact.

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The second element of this test incorporates both a market effect (since acquisition or maintenance of market power must be shown) and what is commonly referred to as the requirement of "exclusionary" conduct.[11/]

Attempted monopolization requires (1) the "specific intent to monopolize" and (2) "dangerous probability" that the defendant's exclusionary conduct "would monopolize a particular market." Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 892 (1993).

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[11] Common examples of exclusionary conduct include hoarding excess capacity, see, e.g., United States v. Aluminum Co. of Am., Inc., 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass 1953), aff'd per curiam 347 U.S. 521 (1954); predatory pricing, see, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2587 (1993); and certain refusals to deal without legitimate business reason, see, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

B. Truthful Product Preannouncements Have Not Been Found To Be Exclusionary

In general, "`exclusionary' behavior should be taken to mean conduct other than competition on the merits, or other than restraints reasonably `necessary' to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 626c, at 79 (1978). It should not include "non-exploitative pricing, higher output, innovations, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like [which] are welcomed by the Sherman Act." Id. ¶ 626b, at 77.

In accord with this standard, courts have refused to find that product preannouncements violate the antitrust laws unless they are knowingly false. See, e.g., MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1129 (7th Cir.) ("These cases suggest that AT & T's early announcement of Hi-Lo must be found to be knowingly false or misleading before it can amount to an exclusionary practice."), modified, 1983-2 Trade Cas. (CCH) ¶ 65,520 (7th Cir.), cert. denied, 464 U.S. 891 (1983); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 442 (N.D. Cal. 1978) (declining to find antitrust liability on a product preannouncement theory because "there was nothing knowingly false about the . . . announcement"), aff'd sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981); see also Ronson Patents Corp. v. Sparklets Devices, 112 F. Supp. 676, 688 (E.D. Mo. 1953) (declining to find antitrust liability where company preannounced a product, but never actually released that product).

These holdings reflect the general view that information about products that are not yet available but will be produced in the future will be helpful to consumers as they make

purchasing decisions. "[R]easonable good faith statements about research, development, and forthcoming production serve the social interest in maximizing the relevant information available to buyers." Areeda & Turner, supra, ¶ 738i, at 284. Because of the value of such information, commentators have endorsed the principles espoused in the holdings discussed above: "[N]o liability should attach to statements that truly reflect the monopolist's expectations about future quality or availability where that expectation is both actually held in good faith and objectively reasonable." Id.

C. The Requirement of Market Impact

In discussing misleading advertising under Section 2, courts have emphasized that the practice would not violate the antitrust laws absent the requisite market impact. See Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) ("[The] Sherman Act is not a panacea for all evils that may infect business life. Before we would allow misrepresentation to buyers to be the basis of a competitor's treble damage action under § 2, we would at least require the plaintiff to overcome a presumption that the effect on competition was de minimis."); National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988) ("[B]ecause the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances -- and because the prevalence of arguably improper utterance is so great -- the courts would be wise to regard misrepresentations as presumptively de minimis for § 2 purposes." (quoting Areeda & Turner, supra, ¶ 738a, at 279)). We are not aware of any case finding that a false product preannouncement had the required market impact.

D. Intent To Deny Sales To A Competitor

The Court also has asked whether an undisclosed intent to defeat a competitor might render an otherwise truthful product preannouncement misleading so as to alter its status under the antitrust laws. Tr. at 103, 106, 109-11. The case law provides little support for finding liability on the basis of intent in the absence of underlying conduct otherwise deemed exclusionary. The law has developed to avoid a mistaken imposition of antitrust liability for legitimate competition on the merits, because desirable competitive behavior (including, e.g., the development of better products and the offering of lower prices) usually has the purpose and effect of reducing competitors' sales. "`[I]ntent to harm rivals' is not a useful standard in antitrust. . . . Neither is `intent to do more business,' which amounts to the same thing. Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition." Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338-39 (7th Cir. 1986).[12/] Indeed, as the Supreme Court has noted, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or `purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993) (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945)).

[12] Accord Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990), cert. denied, 112 S. Ct. 274 (1991); Morgan v. Ponder, 892 F.2d 1355, 1359 (8th Cir. 1989); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.).

II. Concerns Relating To Vaporware Do Not Justify Rejection of the Proposed Final Judgment

The Department, after thorough investigation, filed the Complaint herein alleging violations of law based on Microsoft's licensing practices. It did not at that time find a legal basis upon which to include other claims, including vaporware, based on evidence then available to it, including documents presented to the Court in this proceeding. The government, as prosecutor, has the discretion to determine whether it believes a cognizable claim has been made out on the facts known to it. Its exercise of that discretion is not subject to this Court's review in a Tunney Act proceeding. See In re International Bus. Machines Corp., 687 F.2d 59l (2d Cir. 1982). This Court's role under the Tunney Act is to determine whether the proposed Final Judgment adequately remedies the "violations set forth in the complaint." 15 U.S.C. § 16(e)(2). In light of that limitation, it would be legal error to reject the proposed Final Judgment because of concerns about vaporware, which has not been alleged as a violation in this case.[13/]

But it is equally important to note that a rejection of the proposed settlement, or the imposition of any conditions on its approval that are not accepted by both parties, would sacrifice the immediate and certain benefits to competition that the proposed Final Judgment will provide. As the Department's economic expert, Nobel Laureate Kenneth J. Arrow, has observed:

> The Department of Justice's complaint against Microsoft and the resulting settlement eliminated unnecessary and artificial obstacles erected by Microsoft to disadvantage future competition. . . . [T]he complaint and proposed remedies addressed competitive issues that are critical to the success of new competition in this market. The most effective and economic point of entry for sales of IBM-compatible PC operating

[13] See Memorandum in Support of Motion To Enter Final Judgment at 4-16.

> systems is the OEM distribution channel. New operating system software products should have unimpeded access to this channel.

Arrow Dec'l at 4-5.

The Court has conducted a searching inquiry, and will continue to have supervisory power under the Final Judgment, including the ability to sanction and remedy any violation of the Decree with contempt or other punishment it finds appropriate. The Department of Justice remains ready, willing and able to investigate all allegations of past, current or future conduct by Microsoft or any other company which may violate the antitrust laws, and to bring suit when sufficient evidence has been found to justify filing a complaint.

In the matter now before the Court, the government found such a violation, and obtained a proposed consent decree which offers immediate and needed relief to the market. Whatever else the Department may or may not be able to find and allege in the future, this proposed Final Judgment clearly is adequate to remedy the alleged violations, and should be entered.

All of the requirements of the Tunney Act have been satisfied. The Declaration of Nobel Laureate Kenneth J. Arrow and the government's other filings in support of the proposed Consent Decree establish an ample basis for concluding that the proposed Final Judgment is in the reaches of the public interest. See United States v. Western Elec. Co., 993 F.2d 1572, 1582

(D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993). We therefore urge the Court to find that the proposed settlement is in the public interest, and to enter the proposed Final Judgment forthwith.

Respectfully submitted,

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