IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, Respondent.	Supplemental to Civil Action No. 94-1564 Hon. Thomas Penfield Jackson

UNITED STATES' MEMORANDUM IN OPPOSITION TO MICROSOFT'S MOTION TO REVOKE REFERENCE TO SPECIAL MASTER AND TO STAY FURTHER PROCEEDINGS BEFORE SPECIAL MASTER

I. Introduction

Microsoft's Motion To Revoke The Court's Order Of Reference To Special Master And To Stay Further Proceedings Before The Special Master ("Motion") provides no legitimate basis for rescinding the Court's appointment or staying the Special master's actions. The Court's limited Order of Reference is warranted under the exceptional conditions of this case, and it properly reserves ultimate adjudicatory responsibility to the Court. Microsoft has demonstrated neither error in the process of choosing the special master nor any colorable claim of bias on his part. Accordingly, Microsoft's Motion should be denied and proceedings before the special master should proceed without delay.

II. Exceptional Conditions Support the Court's Decision To Refer To A Special Master

In a non-jury case, a court may refer a matter to a special master "upon a showing that some exceptional condition requires it." Fed.R.Civ.P. 53(b). "Rule 53 itself clearly envisions

considerable discretion in the district court in deciding when an 'exceptional condition' exists . . . ." *In re United States Department of Defense*, 848 F.2d 232, 236 (D.C. Cir. 1988). In accordance with the Rule, the Court identified in its December 11, 1997 Order of Reference ("Order") two exceptional conditions -- that this case involves "complex issues of cybertechnology and contract interpretation" that "it is in the interest of justice to resolve as expeditiously as possible," and "exceptional conditions of urgency." (Order at 1.) Those exceptional conditions justify the Court's reference to the Special master for the purposes set forth in the Order.

A. Complex Issues Justify Reference To A Special Master

The Court found that the matter before it involves complex, disputed issues of "cybertechnology" and "contract interpretation." (Order at 1.) Microsoft has submitted hundreds of pages of argument, declarations, and exhibits relating to the complex issues surrounding the technology of operating system and browser software and their interaction, as well as to the background, context, and course of the consent decree negotiations leading up to the Final Judgment. Indeed, in light of Microsoft's proffer of extensive, highly technical evidence, Microsoft's opposition to the appointment of a special master with sophisticated technical expertise is puzzling.

While the United States has focused primarily on what it believes to be the most relevant and material evidence -- the commercial reality of Microsoft's development and treatment of Internet Explorer as a separate product -- the government also has submitted arguments, declarations, and exhibits responding to many of the detailed technical issues advanced by Microsoft. Although the United States continues to believe that whether Microsoft has violated the consent decree turns on its recognition and treatment of Internet Explorer as a product

separate from Windows 95, expertise in the relevant technology is undoubtedly important for understanding the background and context of the dispute, for evaluating technical issues relating to operating system and browser technologies and the potential application to those technologies of the various terms used in Section IV(E) of the consent decree, and for determining appropriate relief.

It is well established that special expertise is a factor that courts may consider in determining whether to make references to a special master. *See, e.g., In re United States Department of Defense*, 848 F.2d at 236, citing Fed.R.Civ.P. 53, Advisory Committee Notes, 1983 Amend. ("masters may prove useful when some special expertise is desired"). In fact, courts often refer complex technical issues to special masters for further discovery and proposed recommendations. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1566 (Fed. Cir. 1988) ("Masters can properly aid the court in evaluating issues of patent validity and infringement."); *Allen-Myland, Inc. v. International Business Machines Corp.*, 770 F. Supp. 1014, 1029 (E.D. Pa. 1991) (special master given the responsibility of recommending injunctive relief in copyright infringement action relating to operating system software). In this case, the Court's reference to a special master with special expertise in issues relating to cybertechnology is entirely appropriate.

Microsoft has argued that, if the Court needs advice on the technical issues in this case, "the Court should seek the assistance of a technical expert." (Motion at 4.) However, the Court is justified in concluding that the mere assistance of a technical expert would not be sufficient to achieve a speedy resolution of this case, which involves not only an evaluation of technical evidence but also the application of such evidence to Section IV(E) of the consent decree. Where technology and law intersect, the appointment of a lawyer well versed in both as special

master is clearly accepted. *See, e.g., Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d at 1567 ("Where complicated issues of patent law are involved, the appointment of an experienced patent attorney is quite appropriate."). As Microsoft acknowledges, Professor Lessig has precisely such a background. In addition, a technical expert would not be of any value in supervising fast-paced, complex technical discovery, a key role the court has specified for the special master here.

B. Conditions Of Urgency Support Reference To A Special Master

As the Court recognized, and both parties previously have argued, this matter involves issues of urgency that demand quick resolution. The United States has repeatedly urged prompt action to stop Microsoft's continuing illegal conduct in conditioning OEMs' Windows 95 licenses on the licensing of Internet Explorer. Microsoft itself recently told the Court of Appeals that a swift resolution of its pending appeal is necessary not only for its own benefit, but also for third party software developers and, indeed, for "significant segments of the United States economy." (Microsoft Motion For Expedited Consideration And For An Expedited Briefing Schedule at 16.) For Microsoft now to contend in this Court that exceptional conditions of urgency do not exist is extraordinary.

Contrary to Microsoft's assertions, courts often consider the urgency of resolving a particular matter as an appropriate factor weighing in favor of referring that matter to a special master. A notable example is *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165 (D.C. Cir. 1991), a case which Microsoft's Motion describes as "essentially indistinguishable from this one." (Motion at 5). There the court, over defendant's objections, referred a civil matter to a special master, identifying "urgency" as one of the primary reasons warranting the reference. The Court of Appeals stated that it would not "second guess" the court's judgment that the

assistance of a special master was required to move preparation of the case "forward at a pace appropriate to the need for expeditious resolution of the matters in controversy," and upheld the justifications underlying the reference. *Id*. at 1169.[1/] *See also United States v. Conservation Chemical Co*., 106 F.R.D. 210, 228 fn.8 (W.D. Mo.) ("the proposition that urgency cannot constitute an exceptional circumstance is both erroneous and contrary to existing case law"), *mandamus issued sub nom, In re Aramco, Inc*., 770 F.2d 103, 105 (8th Cir. 1985) (upholding the reference, but instructing the district court to reserve for itself the authority to decide the merits of the case).

Microsoft's reliance on *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), to support its contention that a court may not consider urgency as a justification for a special master reference is misplaced. *La Buy* does not address whether the need for prompt resolution of issues constituted an "exceptional condition" under Rule 53(b). Rather, it stands only for the proposition that *court congestion*, in and of itself, does not amount to such an exceptional circumstance as to justify reference to a special master. *Id*. at 259. Moreover, the lower courts have not read *La Buy* in the strained, narrow way suggested by Microsoft; in fact, the "actual utilization" of special masters since *La Buy* has been "quite lively." 9A Wright and Miller, Federal Practice and Procedure § 2605 (2d ed. 1995). Finally, the reference here, in contrast to that in *La Buy*, does not rest upon considerations that threaten to "make references the rule rather than the exception." 352 U.S. at 259.

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[1]While upholding the court's reliance on "urgency" to justify the reference, the Court of Appeals remanded the case and instructed the district court to reserve for itself the ultimate determination of liability and resolution of potentially dispositive questions of fact or law, *ibid*., precisely what the Court has done in this case by limiting Professor Lessig's role to providing *proposed* findings of fact and conclusions of law and by reserving for itself the responsibility of deciding dispositive issues. *See* Section III, *infra*.

The Court's reference plainly will promote the prompt resolution of this case. A special master equipped with a thorough understanding of the relevant technological issues will facilitate potentially complex discovery, ensure an expeditious narrowing of the relevant issues, and, ultimately, assist in the formulation of timely and effective relief.

III. The Court's Order Does Not Delegate Ultimate Adjudicatory Authority To The Special Master, But Rather Only Directs Him To Propose Findings Of Fact And Conclusions Of Law

Rule 53 provides that the "order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only . . . . " Fed.R.Civ.P. 53(c). In this case, the Order of Reference directs the special master to "receive evidence and legal authority . . . , and . . . *propose* findings of fact and conclusions of law for consideration by the Court . . . ." (Order at 1 (emphasis added)). The Court's December 11, 1997 Memorandum and Order, filed simultaneously with the Order of Reference, makes clear that the Court will permit a period of discovery, "following which *the Court* will entertain further proceedings on the merits of the government's claims and its prayer for permanent injunctive relief." (Mem. at 14 (emphasis added)).

In *Bituminous Coal Operators' Ass'n,* the Court of Appeals remanded the otherwise proper reference to a special master with instructions that the court modify it so as to reserve for itself the "authority and responsibility to try the case, to determine liability, and to decide de novo . . . all potentially dispositive questions of fact or law." 949 F.2d at 1169. *See also United States v. Conservation Chemical Co.*, 106 F.R.D. at 228 fn.8 (upholding reference to a special master but requiring that the district court reserve for itself the authority to decide the merits of the case).

This Court has done precisely that in this case, limiting Professor Lessig's role to supervising discovery, receiving evidence, and providing *proposed* findings of fact and conclusions of law. The Court has expressly reserved for itself the responsibility of deciding dispositive issues. The Court's instruction that the special master "propose findings of fact and conclusions of law" surely reflects the ordinary legal and common sense that "proposals" may be accepted or rejected by the Court, wholly in accordance with *Bituminous Coal Operators' Ass'n. See* 949 F.2d at 1169. The Court specifically did not direct the special master to actually *make* findings of fact that would be governed under the clearly erroneous standard of review of Rule 53(e)(2).[2/] *See* 9 Moore's Federal Practice 3d, § 53.13[3][d]. In light of the referral's specification that the master propose findings and conclusions, and the Court's unambiguous statement that, following the special master's report, it will entertain further proceedings on the merits, there is no basis to argue that the Court has abdicated its ultimate adjudicatory authority.

IV. The Court's *Sua Sponte* Order of Reference Was Appropriate

Microsoft suggests that this Court acted improperly by *sua sponte* appointing the special master without first giving Microsoft an opportunity "to make an informed decision as to whether Professor Lessig is a suitable candidate . . . ." (Motion at 6-7.) Microsoft misunderstands its role in the appointment of the special master. It is the province of the Court and the special master to determine whether the special master is suitable. The Court is free to designate a special master without consulting the parties, *see In re Pearson*, 990 F.2d 653, 659

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[2] Regardless of the scope of the special master's reference, the district court always retains its authority to decide questions of law and mixed question of law and fact *de novo*. 9 Moore's Federal Practice 3d § 53.13[3][d][B]; *D.M.W. Contracting Co. v. Stolz*, 158 F.2d 405, 407 (D.C. Cir. 1946) *cert. denied*, 330 U.S. 839 (1947)(court not bound by special master conclusions of law); *Swoboda v. Pala Mining, Inc.*, 844 F.2d 654, 656 (9th Cir. 1988) (same).

(1st Cir. 1993), or holding a hearing, *see Gary W. v. Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979).

Microsoft does not have the right to choose the special master or to veto the Court's choice. To have any other rule would invite special master "shopping." Moreover, just as a judge should not be recused on the basis of innuendo or the preferences of a particular party, a special master should not be disqualified on such grounds. C*f.* 28 U.S.C. § 144 (requiring filing of sufficient affidavit demonstrating bias in order for judge to be recused); *United States v. Dansker*, 537 F.2d 40, 53 (3d Cir. 1976) (if affidavit of bias of judge is legally insufficient to compel his disqualification, then the judge has the duty to preside).

Microsoft's Motion seems to suggest that it is entitled to examine Professor Lessig about his views on a variety of matters, including "his views regarding competition and the Internet and antitrust law generally." (Motion at 7.) Microsoft cites no authority for this extraordinary claim. The Court is obligated neither to subject Professor Lessig to examination by Microsoft nor to require Professor Lessig to expound his views on the above subjects for Microsoft's benefit. *See Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988).

V. Microsoft Has Not Shown Bias, Nor Has It Moved To Disqualify The Special Master

Microsoft complains that it was not given an opportunity to object to Professor Lessig on the basis of bias. Although the Court *sua sponte* appointed Professor Lessig as special master, Microsoft remains free to file a motion to disqualify him on the basis of bias. If Microsoft believes that any basis exists to disqualify Professor Lessig, it should move promptly to do so and present whatever evidence it has to support the motion. Indeed, if Microsoft has such evidence, but fails to present it promptly, it will have waived any claim based on the appearance of bias. *See Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988).

Rather than move to disqualify, Microsoft's Motion merely indicates that Microsoft is "concerned" that Professor Lessig "may have" already formed views about the issues in this case. However, Microsoft's purported bases for its "concerns" about Professor Lessig are vague and not well founded. For example, Microsoft makes the unremarkable observation that "Professor Lessig has recently taught courses in antitrust law and has written on subjects related to competition and the Internet." (Motion at 7.) However, Microsoft does not explain why such expertise should render Professor Lessig unsuitable as a special master. In fact, it is this very experience and knowledge about legal and technical issues that make him qualified to serve as a special master in this case. *See Southern Pac. Communications v. A.T.&T,* 740 F.2d 980, 991 (D.C. Cir. 1984) ("If a judge approached every case completely free of preconceived views concerning the relevant law and policy, we would be inclined not to applaud his impartiality, but to question his qualification to serve as a judge."), *cert. denied*, 470 U.S. 1005 (1985); *see also Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., Mem. Op.); *Cruz v. Hauck*, 515 F.2d 322, 327 (5th Cir. 1975).

Having combed Professor Lessig's extensive writings for useful nits, Microsoft has proffered three out-of-context quotes, accompanied by inaccurate and tortured characterizations of his writings, in order to support the notion that Professor Lessig has "preconceived notions" about "Microsoft and the government's proper role in the development of software products." (Motion 8.) A fuller and fairer reading of Professor Lessig's academic writings suggests merely that he recognizes the new and difficult legal issues presented by the increasing role of the computer in our society generally and the role and effects of cybertechnology in particular. Of course, "[i]t is well established that the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case." *Southern Pac.*

Communications v. A.T.&T, 740 F.2d at 990. Moreover, Professor Lessig's passing mentions of Microsoft or its products are hardly surprising in light of Microsoft's unique prominence in the software industry and do not demonstrate bias or bear on whether he can fairly supervise discovery or impartially fulfill his other duties under the Order of Reference.[3/]

If Microsoft chooses to bring a motion to disqualify the special master, disqualification would be appropriate only if Microsoft could establish facts "sufficient to raise the appearance of prejudice in the mind of a reasonable person who is familiar with all the facts." *United States v. Heldt*, 668 F.2d 1238, 1273-74 (D.C. Cir. 1981), *cert. denied sub nom., Hubbard v. United States*, 456 U.S. 926 (1982).[4/] However, none of the complaints about Professor Lessig raised in Microsoft's Motion, including Microsoft's selective and misleading references to his writings, reasonably suggests any personal bias against Microsoft.

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[3]The United States last week provided to Microsoft and the special master a document in the government's possession constituting a June 1997 electronic-mail exchange between Professor Lessig and an apparent acquaintance who was an employee of Netscape. (*See* Attachment A) The message inquired whether installing Internet Explorer onto an Apple computer might have affected certain "bookmark" files in the Netscape Navigator browser that was already installed on that computer, a question unrelated to any of the technical or legal issues in this case. Microsoft today sent Professor Lessig and the United States a letter making a variety of accusations against Professor Lessig, including that the e-mail exchange shows he has "actual bias against Microsoft" and that he is "a partisan of Netscape." These assertions are unfounded and overblown and depend largely on assumptions and conjecture. They do not appear to raise any credible basis to conclude that the e-mail, viewed in light of all the facts of this case, relates to any relevant issues or creates any reasonable indication that Professor Lessig is biased against Microsoft or has a "closed mind" about any of the matters in dispute. Certainly the fact that Professor Lessig is acquainted with employees of Netscape or others in the computer industry, or that he has attended forums or other events dealing with the Internet, is unremarkable given his position and expertise. *See supra*; *Southern Pac. Communications v. A.T.&T*, 740 F.2d at 990-91. Professor Lessig has indicated that he will discuss any issues the parties wish to raise concerning this e-mail during a conference call on January 6, 1998.

[4]*See also United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992) (disqualification requires extrajudicial statements that "are of such a character that 'an informed observer would reasonably question the judge's impartiality.'") (citation omitted); *United States v. Dansker*, 537 F.2d 40, 53 (3d Cir. 1976) (recusal appropriate only when the facts would convince a reasonable person that the special master possessed a personal, as opposed to a judicial, bias against the movant); *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1477 (D.S.C. 1996) (recusal standard is "objective reasonableness and is not to be construed to require recusal on spurious or loosely based charges of partiality."); S.Rep.No. 93-419, 93d Cong., 1st Sess. 5 (1973) ("in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis.") (emphasis in original).

VI. The Court Should Not Certify Its Order for Interlocutory Appeal

Microsoft contends that, if the Court denies Microsoft's motion to revoke the reference, this Court should immediately certify its Order of Reference for interlocutory appeal under 28 U.S.C. § 1292(b). As a general matter, "an order of reference to a special master is considered to be interlocutory and not subject to immediate appellate review." 9 Moore's Federal Practice 3d § 53.30; *see also* 9A Wright and Miller, Federal Practice and Procedure § 2615; *Hammon v. Barry*, 752 F. Supp. 1087, 1091-92 (D.D.C. 1990) (special master reference is an "interlocutory, non-appealable order").

In order to certify an order for interlocutory appeal, the Court must find that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

> [I]nterlocutory appeals under 28 U.S.C. § 1292(b) are rarely allowed, and movants . . . bear the "burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."
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> Mere disagreement, even if vehement . . . does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996) (citations and internal quotations omitted).

In this case, Microsoft has not shown that the order involves a controlling question of law inasmuch as the Court, as explained above, has retained ultimate adjudicatory authority over the matter. Further, Microsoft has not even attempted to show that interlocutory appeal will materially advance the ultimate termination of the litigation. Indeed, in light of Microsoft's

request for stay, it is clear than an interlocutory appeal will delay the proceeding. Thus, its request for certification should be denied.

VII. Microsoft's Request For A Stay Should Be Denied

Microsoft's request for a stay of proceedings before the special master represents an attempt to delay the ultimate resolution of the important issues facing the Court. This tactic is particularly disingenuous as Microsoft is simultaneously telling the Court of Appeals that expeditious resolution of this case is vital. *See* Section II.B., *supra.*

The standard for granting a stay is as follows:

> In deciding whether to grant a stay pending appeal, the Court must consider whether the moving party is likely to prevail on the merits of his appeal, whether, without a stay, the moving party will be irreparably injured, whether the issuance of a stay will substantially harm other parties interested in the proceeding, and, finally, wherein lies the public interest.

Hammerman v. Peacock, 623 F. Supp. 719, 721 (D.D.C. 1985), *citing Wisconsin Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669, 674 (D.C. Cir. 1985); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982). Microsoft has not even mentioned these factors, much less demonstrated that they warrant a stay. Microsoft is unlikely to be heard on the merits of its proposed interlocutory appeal, much less prevail on the merits. Microsoft will not be irreparably injured by proceeding before the special master because the Court has retained ultimate adjudicatory authority over the matter. On the other hand, granting a stay will harm the public interest because it almost certainly will delay ultimate resolution of this litigation, a result Microsoft itself has argued is not in the public interest.

Moreover, a stay will not in any way further judicial economy, particularly given that the special master has already begun aggressive and expeditious handling of discovery and presentation of evidence. Microsoft previously has indicated that it anticipates a large amount of

discovery. *See, e.g.*, Memorandum of Microsoft Corporation in Advance of the October 29, 1997 Scheduling Conference, at 9. Staying the reference will delay discovery and thus delay ultimate resolution of the case. Thus, Microsoft's motion for a stay should be denied.

VII. Conclusion

For the foregoing reasons, Microsoft's motion to revoke the reference to the special master and to stay further proceedings before the special master should be denied.

Dated: January 5, 1998

Respectfully submitted,

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