IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' REPLY TO MICROSOFT'S OPPOSITION TO MOTION FOR CERTIFICATION OF DIRECT APPEAL TO THE SUPREME COURT

Microsoft's response to plaintiffs' certification motion ("Microsoft Opposition") provides no basis for denying plaintiffs' motion for certification of direct appeal to the Supreme Court. Instead, Microsoft repeats the unsuccessful arguments it made to the Court of Appeals that the Final Judgment should somehow be split into two separate cases; misstates and misapplies the appropriate legal standard for certification; and ignores the incontrovertible importance of prompt resolution of this case to consumers and the national economy. This is precisely the type of extraordinary case that the Expediting Act's provision of speedy resolution was intended to achieve, and plaintiffs' motion for certification should be granted.

1. **The Court's Entire Final Judgment Should Be Certified For Direct Appeal**

Microsoft contends that the United States' and States' cases are separate; that the States' action cannot be appealed directly to the Supreme Court because the Expediting Act does not apply to the States' action; and that the prospect of appeals proceeding simultaneously in different appellate courts "militates against certifying the DOJ's case." Opposition at 2-6. Microsoft's logic is flawed.[1]

The United States' and States' actions cannot, at this late point, be artificially segregated for purposes of appeal under the Expediting Act. This Court consolidated the actions "for all purposes," and it issued one set of Findings of Fact, one set of Conclusions of Law, and one Final Judgment.[2] The Act provides for direct "appeal from a final judgment." 15 U.S.C. § 29(b). Because there is only one Final Judgment,[3] Microsoft's appeal from it can and should be certified

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[1]The appropriateness of certifying this entire consolidated case for direct appeal is explained fully in plaintiffs' recent brief in the Court of Appeals, Plaintiffs' Joint Reply On Their Motions 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 (June 16, 2000) (attached as Ex. C to Microsoft's Opposition).

[2]Microsoft's citation to plaintiffs' mid-trial request that the States be allowed separate cross-examination of witnesses ignores Microsoft's response to that request that plaintiffs' interests were "identical," that plaintiffs had "fail[ed] to identify a single respect in which their interests diverge in any meaningful manner," and that the two sets of claims did not "differ in any substantive respect." Microsoft's Memorandum In Opposition To Plaintiffs' Joint Motion To Permit "Supplemental" Cross-Examination at 2, 3 (Dec. 3, 1998) (attached as Ex. A to Plaintiffs' Joint D.C. Circuit Reply). It also ignores that this Court declined to grant the motion, reserving consideration on a witness-by-witness basis only if plaintiffs could show divergent interests between the United States and the States. Our interests never diverged and we never sought supplemental cross-examination again. The trial was conducted entirely as one consolidated case.

[3]Microsoft provides no support for its assertion that the Final Judgment "provides different relief for the DOJ and the States," Opposition at 4. The only difference in relief is § 6.f, which permits the States to seek costs and fees; there is no substantive difference at all.

in its entirety.

We agree with Microsoft that "[h]aving appeals of closely related cases proceed simultaneously in the Supreme Court and in the Court of Appeals would be contrary to the basic goal of the Expediting Act." Opposition at 5. But if the Court grants our motion, there is no realistic prospect of such a situation developing. The Court of Appeals has already made clear that, if certification is granted, it will stay its hand with respect to the entire case unless and until the Supreme Court remands the case for its consideration. See Orders in Nos. 00-5212 and 00-5213 (June 19, 2000). And, given the confusion and inefficiency that would result from simultaneous appellate review of the same Final Judgment in two courts, it is unlikely that the Supreme Court would choose that path. In any event, even were the Supreme Court to conclude that it had jurisdiction over only the United States' action under the Expediting Act, it could grant a petition by the States for certiorari before judgment under the "imperative public importance standard" of Supreme Court Rule 11, and thereby reunite all portions of Microsoft's appeal from the Final Judgment. See 28 U.S.C. §§ 1254(1), 2101(e); Sup. Ct. R. 11.[4]

Failing to certify a final judgment in a civil antitrust case brought by the United States simply because of the States' participation would thwart the scheme of the Expediting Act, and there is no reason to believe that Congress intended that district court orders consolidating cases would bar direct review by the Supreme Court. Were Microsoft's argument accepted, the United States would be forced, as a practical matter, to oppose any consolidation in future antitrust cases in order to preserve its rights under the Expediting Act, even if consolidation would plainly

[4]The Plaintiff States intend to file such a petition, purely as a precautionary matter, upon certification by this Court.

facilitate the prompt and efficient resolution of the claims. Defendants seeking consolidation (as Microsoft did in this case) would suffer, as would the public interest in effective antitrust enforcement.

2. **The Proper Standard For Certification Is Readily Met In This Case**

The question before this Court under the Expediting Act is whether this case is the exceptional one "where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation.'" United States v. Western Electric Co., 1983-2 Trade Cases ¶65,596 at 68,971 (D.D.C. 1983). See United States v. Western Electric Co., 1982-83 Trade Cases ¶65,130 at 71,311 (D.D.C. 1982); H.R. Rep. No. 93-1463, 93d Cong. 2d Sess. 14 (1974). Microsoft does not contest the obvious fact that this is such a case, and does not attempt to dispute that prompt resolution of the issues, including imposition of the full remedy for the nation's consumers and economy if that remedy is upheld, is of great public importance because of its impact on the country's economic welfare. Indeed, Microsoft itself has repeatedly asserted this very importance -- e.g., its contention that resolution of this case "could have a significant adverse impact on the Nation's economy," (Motion Of Appellant Microsoft Corporation For A Stay Of The Judgment Pending Appeal, at 3 (June 13, 2000)). Similarly, the Court of Appeals has recognized the "exceptional importance" of this case. Orders of June 13, 2000 in Nos. 00-5212, 5213.

Microsoft does not focus on the controlling legal standard. Rather, it raises the extraneous specter of a "morass of procedural and substantive issues implicating many factual and legal disputes." Microsoft Opposition at 10. This characterization of the appeal is both inaccurate and, in any event, not properly a part of this Court's certification decision. The Expediting Act affords the Supreme Court broad discretion to remand an appeal to the court of appeals if it considers the case inappropriate for its plenary review. But Microsoft's argument, which effectively amounts to an argument that district courts should never certify direct appeals in litigated antitrust cases under the Expediting Act, is plainly inconsistent with the statutory standard. In any event, Microsoft's assertion that the case will be laden with an "extensive reexamination of factual issues," Microsoft Opposition at 7, is simply inaccurate. It has not articulated any credible argument that any specific finding among the Court's extensive Findings of Fact is clearly erroneous, and there is none; similarly, its various claims of all manner of procedural error are unfounded. Instead, the real issues to be resolved on appeal of this case involve the standard for evaluating Microsoft's conduct under the Sherman Act, particularly Section 2, and the appropriateness of the Court's remedy order.

3. Certification of Direct Appeal Will Ensure The Most Prompt And Efficient Resolution Of The Appellate Issues In This Case

Finally, Microsoft suggests that certification of direct appeal to the Supreme Court will delay, rather than expedite, the ultimate resolution of this case. Microsoft's predictions about the speed with which the Court of Appeals might address the case ignore a fundamental and obvious fact: However quickly that court acts, it likely will not render a decision that is satisfactory to both sides, and an appeal to the Supreme Court is thus inevitable. Intermediate review will do

nothing to obviate further petitions to the Supreme Court and, given the significance of this case and its impact on the nation's economy, the Supreme Court would likely grant review at that time. Indeed, Microsoft's Response appears to recognize as much: It expressly describes plaintiffs' request for certification as a "demand that Microsoft's appeals be resolved at breakneck speed." Microsoft Opposition at 11.

Microsoft cannot have the argument both ways. In fact, far from speeding resolution of this case, Microsoft's attempt to have the Court reject a direct, expedited appeal and its insistence on ensuring an additional level (and many additional months) of review would result simply in that much more time passing before the liability issues here can be resolved and, most critically for the nation's consumers and economy, before the final remedy can begin to restore competitive conditions in these critical markets. Particularly here, in an industry Microsoft vigorously characterizes as fast paced and quickly changing, such delay would undermine the ultimate value of the remedy to correct the harmful results of Microsoft's anticompetitive actions and to restore competition. Consequently, the purposes of the Expediting Act are even more applicable and important here than they were in the AT&T appeals, and the standard for certification under the Act even more clearly satisfied.

For the above reasons, plaintiffs respectfully request that the Court enter an order certifying that immediate consideration of the appeal of this case by the Supreme Court is of general public importance in the administration of justice.

Dated: June 20, 2000

Respectfully submitted,

_____/s/_____

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Certificate of Service

The undersigned certifies that on June 20, 2000, copies of the Plaintiffs' Reply to Microsoft's Opposition to Motion for Certification of Direct Appeal to the Supreme Court were served upon:

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