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 DENNIS C. VACCO, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

UNITED STATES' AND PLAINTIFF STATES' JOINT PRETRIAL STATEMENT

Pursuant to Local Rule 209(b), the Court's Amended Scheduling Order filed September 14, 1998, and the proposed Second Amended Scheduling Order filed with the Court October 6, 1998, the United States and the Plaintiff States hereby file their Joint Pretrial Statement.

I. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs allege in their Complaints and will prove at trial that Microsoft, the dominant supplier of personal computer desktop operating systems for more than 15 years, has engaged in a pattern of anticompetitive conduct that has illegally preserved its dominance of the PC operating system market and that threatens illegally to extend that dominance to other markets. As the Court observed in the hearing on September 3, 1998, this case essentially involves three broad series of allegations: that Microsoft has maintained its operating system monopoly through a variety of exclusionary acts and predatory conduct; that it has unreasonably restrained competition through a variety of unreasonable restraints of trade, including tying and other exclusionary agreements; and that it has attempted to monopolize the market for Internet browsers. Tr. at 9.

Plaintiffs will establish *inter alia* that Microsoft has recognized and illegally attempted to thwart two recent developments in the software industry that have the potential to erode the applications programming barrier to entry that protects Microsoft's monopoly position, and thereby ultimately to threaten Microsoft's PC operating system monopoly. Those developments are Internet browsers (primarily Netscape's Navigator browser), which are used to access and view material on the ever-expanding World Wide Web, and Java.

Plaintiffs' proof at trial will show that, among other actions taken to protect its Windows monopoly, Microsoft has engaged in a pattern of anticompetitive conduct to eliminate the potential threats posed by Netscape and Java. Microsoft entered into a series of anticompetitive agreements with customers and competitors to restrict the distribution and use of non-Microsoft

Java and to substitute the use of Microsoft's version of Java. Microsoft also actively undertook to eliminate Netscape as a viable browser supplier, thereby eliminating Netscape's distribution of Java and forestalling Netscape's potential as a platform that could erode the primary barrier to entry into operating system competition with Microsoft. Microsoft attempted both to stop Netscape from competing with it altogether, and to eliminate Netscape's ability to compete effectively as a browser supplier through a series of predatory and anticompetitive acts and agreements. Among other things, Microsoft:

- Attempted to monopolize the browser market by illegally proposing to Netscape that the two companies divide the market and restrict or eliminate competition, with Netscape agreeing not to compete for Internet browsers on Windows 95;
- Set out to "cut off Netscape's air supply" by distributing Microsoft's browser at a zero (indeed, a negative) price (and thereby eliminating Netscape's ability to charge for its browser) and entering into agreements with Internet Content Providers which required those ICPs to agree not to pay Netscape;
- Induced and discouraged customers, suppliers, and others from doing business with Netscape, including by agreements, understandings, and by announcing publicly (and telling customers privately) that Microsoft would make its browser "forever free" and that Netscape therefore had no viable business;
- Entered into agreements with PC manufacturers and Internet Service Providers that effectively foreclosed Netscape from the most important channels of distribution and substantially increased Netscape's costs;

- Entered into agreements with ISPs, ICPs, and others to eliminate or reduce those firms' promotion and/or distribution of Netscape's browser;
- Used its monopoly power to induce major computer industry firms, including Apple and Intel, to limit or reduce their use of and support for Netscape's browser; and
- Tied Microsoft's Internet Explorer browser to its monopoly Windows PC operating system and prohibited PC makers from removing that browser.

Rather than competing legitimately and on the merits, Microsoft has resorted to these and other predatory and anticompetitive agreements and conduct. Microsoft's conduct with respect to Java and browsers are examples, and part, of a broad pattern of antitcompetitive conduct designed to eliminate competition, to maintain and strengthen Microsoft's core monopoly over PC operating systems, and to monopolize key applications markets.

Because Microsoft's unlawful practices are continuing and are imposing ongoing harm to competition, plaintiffs filed with their Complaints motions for a preliminary injunction, as well as requests for permanent relief.

B. Identities of the Parties

Plaintiffs are the United States of America; 19 states: New York, California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Ohio, South Carolina, Utah, West Virginia, and Wisconsin; and the District of Columbia. The defendant is Microsoft Corporation.

C. Jurisdiction

This Court has jurisdiction over the federal claims alleged in the Complaints pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337. The Court has

supplemental jurisdiction over the various state-law claims alleged in the States' Complaint pursuant to 28 U.S.C. § 1367(a).

II. PLAINTIFFS' STATEMENT OF CLAIMS

Plaintiffs' Complaints advance four separate claims that Microsoft has violated the federal antitrust laws:

- First, Microsoft has willfully maintained, and unless restrained will continue willfully to maintain, its monopoly power in the market for PC operating systems, in violation of Section 2 of the Sherman Act. (*See* United States' Complaint ("U.S. Comp.") ¶¶ 138-39; States' First Amended Complaint ("States' Comp.") ¶¶ 85-87);
- Second, Microsoft has willfully attempted to monopolize, and to destroy effective competition in, the Internet browser market through a course of conduct that includes tying and unreasonably exclusionary agreements, in violation of Section 2 of the Sherman Act (*See* U.S. Comp. ¶¶ 140-141; States' Comp. ¶¶ 88-90);
- Third, Microsoft has entered into exclusionary agreements that unreasonably restrain trade in violation of Section 1 of the Sherman Act (*See* U.S. Comp. 130-133; States' Comp. ¶¶ 96-97); and
- Fourth, Microsoft has unlawfully tied its Internet browser product to its separate, monopoly Windows operating system product, in violation of Section 1 of the Sherman Act (*See* U.S. Comp. ¶¶ 134-37; States' Comp. ¶¶ 93-95).

The Plaintiff States also assert, in addition to the federal antitrust claims that are discussed above, parallel claims under their state antitrust and/or unfair competition and related laws (*See* State Comp. ¶¶ 98-141).[1]

III. PLAINTIFFS' STATEMENT OF DEFENSES

The Plaintiff States have raised the following defenses to Microsoft's counterclaims: That the counterclaims (1) fail to state a claim upon which relief may be granted; (2) are barred for lack of subject matter jurisdiction; (3) do not present an actual case or controversy; (4) do not present any claim which is ripe for judicial determination; (5) are not appropriately before this Court because any issue raised therein is implicated by the Sixth and Seventh Affirmative Defenses which Microsoft has already asserted in this action; (6) are barred due to sovereign immunity; (7) are barred due to prosecutorial immunity; and (8) are barred because the filing of the First Amended Complaint is protected by the First Amendment.

IV. SCHEDULE OF WITNESSES TO BE CALLED BY PLAINTIFFS

Pursuant to Paragraph 7 of the Court's Pretrial Order No. 2, entered August 6, 1998, and Paragraph 2 of the proposed Second Amended Scheduling Order, filed with the Court October 6, 1998**,** plaintiffs will simultaneously exchange with defendant and file with the Court their Schedule of Witnesses, in the form of an Appendix A to this Pretrial Statement, on October 8, 1998. Pursuant to Paragraph 8 of Pretrial Order No. 2, plaintiffs' Schedule of Witnesses will not include rebuttal witnesses to be called after the close of defendant's case-in-chief.

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[1]The Plaintiff States' First Amended Complaint also alleged that Microsoft illegally leveraged its monopoly power in violation of Section 2 of the Sherman Act. The Court has dismissed that claim.

V. LIST OF EXHIBITS TO BE OFFERED IN EVIDENCE BY PLAINTIFFS

Pursuant to Paragraph 4 of the proposed Second Amended Scheduling Order, plaintiffs are exchanging today with defendant a draft list of exhibits to be offered in evidence at trial (as a draft Appendix B to this Pretrial Statement). Also pursuant to Paragraph 4 of the proposed Second Amended Scheduling Order, plaintiffs will exchange with defendant on October 10, 1998, and file with the Court on October 13, 1998, their final List of Exhibits to be Offered in Evidence, in the form of a final Appendix B.

VI. PLAINTIFFS' DESIGNATION OF DEPOSITION EXCERPTS

Pursuant to Paragraphs 4 and 11 of Pretrial Order No. 2, and Paragraph 5 of the proposed Second Amended Scheduling Order, plaintiffs will serve on defendant and file with the Court their deposition designations, in the form of an Appendix C to this Pretrial Statement, at the same time as plaintiffs are required to file the direct examinations of their trial witnesses, currently October 13, 1998.

VII. PLAINTIFFS' ITEMIZATION OF DAMAGES

Plaintiffs' Complaints do not seek monetary damages against defendant, although the Plaintiff States do seek certain penalties pursuant to their state law claims.

VIII. PLAINTIFFS' REQUEST FOR RELIEF

In a civil antitrust action brought by the United States, once a defendant has been determined to have violated the antitrust laws, the permanent relief fashioned by the court should accomplish two objectives: it should (1) prevent "a recurrence of the violation," and (2) "eliminate [the violation's] consequences." *National Society of Prof. Eng'rs v. United States*, 435 U.S. 679, 697 (1978). *See also United States v. United States Gypsum Co.*, 340 U.S. 76, 88

(1950) ("A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.").

In their Complaints and Motions for Preliminary Injunction, plaintiffs identified certain relief that is immediately necessary to preserve competition in the market for internet browser software.[2] Plaintiffs also requested that the Court declare that Microsoft's actions had violated

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[2] *See, e.g.*, U.S. Comp. Prayer ¶ 2; U.S. Motion for PI Prayer ¶¶ 1-6. In particular, the United States requested that Microsoft, and persons acting on behalf of Microsoft, be preliminarily and permanently enjoined from: (1) requiring any person to license or distribute Microsoft's Internet browser software or any other software product or service as a condition of licensing or distributing any Microsoft operating system product; (2) requiring or inducing any person to agree not to license, distribute, or promote any non-Microsoft Internet browser software or other software product, or to do so on any disadvantageous, restrictive or exclusionary terms; (3) taking or threatening any action adverse to any person in whole or in part as a direct or indirect consequence of such person's failure to license or distribute Microsoft's Internet browser software or other software product, of such person's licensing or distributing any non-Microsoft Internet browser or other software product, or of such person's cooperation with the United States; (4) restricting the right of any person to modify the screens, boot-up sequence or functions of any Microsoft operating system product which such person has licensed so as automatically or otherwise to add non-Microsoft Internet browser software or other software products, including but not limited to alternative user interfaces, or automatically or otherwise to substitute such non-Microsoft Internet browser software or other software product for Microsoft's Internet browser software or other software product, so long as such addition or substitution does not materially impair the performance of such Microsoft operating system product; (5) for a period of three years (or such other period as the parties may agree or the Court may order), distributing a single version of its operating system which includes Microsoft's browser software, unless (i) Microsoft also includes with such operating system the most current version of the Netscape Internet browser, and (ii) each OEM is permitted at its option to delete the software that provides the Internet Explorer icon and the other means by which users may readily use IE to browse the web, the software that provides the icon and the other means by which users may readily use the Netscape Internet browser, or both; and (6) distributing at a single price a version of Windows 98 bundled with the software that provides the Internet Explorer icon and the other means by which users may readily use IE to browse the web unless: (i) Microsoft makes available to any OEM that licenses the operating system a practical and commercially reasonable option of deleting (after first installation) or not installing (at first installation) the software that provides the Internet Explorer icon and the other means by which users may readily use IE to browse the web, and (ii) for any OEM that deletes (after first

the antitrust laws, and "enter such other preliminary and permanent relief as is necessary and appropriate to restore competitive conditions in the markets affected by Microsoft's unlawful conduct" and "such additional relief as it may find just and proper." U.S. Compl. ¶¶ 1, 3, 4.[3]

Depending on the nature and scope of the violations determined by the Court at trial, plaintiffs will seek such additional permanent relief as is necessary to restore competitive conditions and to prevent Microsoft from committing similar violations in the future. To that end, plaintiffs may request that the Court conduct additional proceedings for the purpose of hearing evidence concerning such additional relief. Further proceedings of this kind are common in antitrust actions brought by the United States under the antitrust laws. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972); *United States v. E.I. DuPont De*

installation) or does not install (at first installation) the software that provides the Internet Explorer icon and the other means by which users may readily use IE to browse the web, Microsoft deducts from that OEM's Windows 98 royalty an amount equal to the OEM's reasonable cost of deleting or not installing such software or its functions. Compl. ¶2.

[3]See also Prayer for Relief ¶¶ (c) and (d) of the States' Comp. (pp. 34-35), which request, *inter alia*, certain injunctive relief regarding mandatory licensing and information disclosure.

Nemours & Co., 366 U.S. 316, 320 (1961); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967).

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