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)

PLAINTIFFS' RESPONSE TO DEFENDANT MICROSOFT'S MOTION FOR DISCOVERY SANCTIONS

The United States submits this memorandum in response to Defendant's Motion for Sanctions submitted at the beginning of Court this morning.

Defendant Microsoft's motion for sanctions is a cynical attempt to distract attention from a document that damages its defense; Microsoft attempts this diversion by making erroneous, unsupported (and unsupportable) charges about the Government's good faith in document production. The plain fact is that the June 23, 1995 Reback letter, Gov't Ex. 1259, was *not*

responsive to Microsoft's first request for production of documents, or any later Microsoft document request.

Defendant Microsoft has known full well throughout the discovery process, and has been expressly told in writing, that the Government's document search and production was limited to the investigations that "form the basis for" this action.[1] Microsoft was expressly told that meant the investigation, begun in mid-1996, of Microsoft's agreements with OEMs, ISPs, and others regarding the licensing and distribution of Internet Explorer. Microsoft also was expressly told that the Government's document production *did not include* other investigations, such as the 1995 investigation which related to "the licensing of, and bundling of Microsoft Network with Windows 95," in which Civil Investigative Demand #13202 to Netscape (Govt. Ex. 1260) was issued. At no time after it served its document requests until now has Microsoft objected to the government's response to those requests or suggested that they were too narrowly focused.

Defendant now argues that because the Reback letter, Govt Ex. 1259, *relates* to the June 21, 1995 meeting, it necessarily "formed the basis" of this action. That argument, advertently or inadvertently, misstates the issue. The Government's search and production was expressly

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[1]Microsoft claims that the Reback letter was called for by Microsoft's first request for production of documents, served on May 22, 1998 (attached hereto as Exhibit 1). Request No. 1 demanded: "[a]ll documents received from any person other than Microsoft *during the course of the Investigations*, whether or not pursuant to compulsory process." (Emphasis added). The request defined "Investigations" as "all investigations . . . that form any basis for the [5/18/98] Actions." (Definition 5, p. 2). In its response to the request, served on June 15 (attached hereto as Exhibit 2), the United States objected to Microsoft's definition of "Investigation" and stated: "For purposes of this response, the United States interprets the term "Investigations" to mean: all investigations . . . that form the basis for the actions, namely the Government's . . . investigations of Microsoft's agreements with computer manufacturers, Internet Service Providers, Internet Content Providers, Online Services, or other firms concerning the installation, licensing, distribution, marketing, or promotion of Internet Explorer. However, other investigations conducted separately by the Government (including but not limited to Internet-related audio and video streaming technologies) do not at this time form the basis for this action." (U.S. General Objection 7, pp. 2-3). The U.S. response to Document Request No. 1 objected to the phrase "documents received . . . during the course of the Investigations," as, among other things, vague and ambiguous and stated that the Government interpreted that phrase to mean "documents "concerning" the Investigations that were received *during the course of the Investigations*" (emphasis added), as the Government had defined "Investigations" (see above).

limited to files and documents, *produced during the course of* the investigation of Microsoft's "agreements with computer manufacturers, Internet Service Providers, Internet Content Providers, Online Services, or other firms concerning the installation, licensing, distribution, marketing, or promotion of Internet Explorer" -- specifically the investigation that led up to, and that forms the basis for, the present case. That fact does not, and could not, mean that the files of other investigations might not contain any documents produced in the course of those prior investigations that are relevant to this case. However, the fact that Govt Ex. 1259 is relevant to this case does not by itself mean it should have been produced to Microsoft where, as is the undisputed case, it was first produced to the government in the course of an investigation (the 1995 investigation of MSN, the Microsoft Network) that was not a basis of this action and that Microsoft was expressly told was not a basis of this action.

The hollowness of Microsoft's argument is further demonstrated by the relief its present motion seeks. Microsoft's requested order is dramatically different than the request for production of documents that it served on the United States on May 22. While Microsoft may now wish that it had initially requested *all* documents in plaintiffs' possession that are communications between plaintiffs and Netscape "that have any relevance to these actions," its *actual* first request was far narrower, and plaintiffs' response to that request made perfectly clear that it was far narrower. It is far too late for Microsoft to attempt to rewrite its prior request.

Government counsel in this matter received a copy of Govt Ex. 1259 by facsimile from Mr. Reback on October 23, 1998, apparently after Mr. Reback learned from press reports that Microsoft was trying to take his July 28, 1995 letter out of context. The existence of Govt Ex. 1259, along with much other evidence about the real purpose of and events during the June 21,

1995 meeting (most of which consists of internal documents from Microsoft's own files both before and after the meeting), proves that Microsoft's outlandish assertion that the market division aspect of the June 21 meeting was "invented or imagined" after Mr. Reback's July 28 letter is flatly untrue.

Microsoft has egg on its face. It tried to use Mr. Reback's July 28 letter to support a false impression it hoped to create. It is understandably embarrassed by the revelation of Govt Ex. 1259, the June 23 letter -- and by the fact that it probably would never have come to light if it had not been for Microsoft's misuse of Mr. Reback's later letter. However, Microsoft's embarrassment is no excuse for Microsoft's baseless attempt to distract attention from Govt. Ex 1259 by attacking the Government and its discovery production.

There has been no abuse of discovery in this case. The United States responded fully to Microsoft's first request for production of documents, and made clear to Microsoft how it was responding. Microsoft did not object. Consequently, Microsoft's motion for sanctions is wholly unfounded and should be denied.

DATED: October 26, 1998

_____/s/_____
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