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' MEMORANDUM IN OPPOSITION TO MICROSOFT CORPORATION'S MOTION TO LIMIT TRIAL

Plaintiffs submit this memorandum in response to Microsoft's Motion to Limit Trial filed yesterday. Microsoft's motion to limit or delay the trial is based on two false premises. First, and most important, Microsoft misstates or ignores the contents of plaintiffs' complaints and motion for preliminary injunction. In fact, everything that plaintiffs' recent papers say, and everything that plaintiffs plan to prove at trial, concerning Microsoft's anticompetitive efforts to protect its operating system monopoly by crushing the competitive threat presented by competing web browsers and Java is noticed by the Complaints, Memoranda

in Support of Motions for Preliminary Injunction ("the PI Motions"), and the numerous exhibits and deposition excerpts filed by plaintiffs in May 1998.

Second, Microsoft misstates the applicable standard. In fact, it is neither necessary nor appropriate to identify all of a party's evidence in a complaint, or to suggest that a party may not discover additional evidence in the course of preparing for trial and use that evidence at trial. Indeed, that is precisely the function of pretrial discovery. To the limited extent that plaintiffs offer evidence adduced in discovery concerning events and transactions not strictly limited to browsers and Java, those events and transactions--

(a) directly evidence monopoly power and barriers to entry, which issues are (of course) part of plaintiffs' complaints, and of every Sherman Act Section 2 case;

(b) demonstrate Microsoft's intent to monopolize, which issue is (of course) also part of plaintiffs' complaints, and of every Sherman Act Section 2 attempt case; and/or

(c) demonstrate a pattern that is relevant to understanding and establishing Microsoft's conduct with respect to browsers and Java.

As set forth in plaintiffs' Complaints and the PI Motion, Microsoft recognized the potential threat posed to its PC operating system monopoly by Netscape's browser (U.S. Complaint ¶¶ 6, 8, 9 107, & 122) and Java and reacted with a pattern of anticompetitive and predatory conduct and agreements (U.S. Complaint ¶¶ 13, 15, 35, 74, 108, 126, 131, & 132).

With respect to browsers, the Complaints and PI Motion detail--

(a) Contractual and other restrictions on the abilities of OEMs, Internet service providers, Internet content providers, and others to promote, distribute, use, or

pay for Netscape's browser (*see, e.g.*, U.S. Complaint ¶¶ 17, 22, 26, 28, 29, 30, 32-33, 75-76, 78-92).

(b) A predatory campaign to "cut off Netscape's air supply" by giving away for free the browser that cost Microsoft hundreds of millions of dollars to develop, knowing that Netscape's viability as an effective browser competitor depended on revenues from licensing its browser (U.S. Complaint ¶ 16);

(c) Contractual and other restrictions on what screens OEMs could employ (U. S. Complaint ¶¶ 24, 25, 77, 83-102);

(d) Bundling Internet Explorer with Windows, and prohibiting PC manufacturers ("OEMs") from deleting it (*see, e.g.*, U.S. Complaint ¶¶ 12, 18, 20, 22, 24, 77, 103-121);

(e) A public campaign to undermine Netscape;

With respect to Java the Complaints and the PI Motion detail --

(a) an effort to eliminate the Java threat by eliminating its primary distribution vehicle (the Netscape browser) (U.S. Complaint ¶¶ 7-8, 15, 74); and

(b) an effort to "pollute" and restrict the use of Java so that Java could not be used effectively to support cross-platform applications (U.S. PI Motion at 62, n.57 (citing PI exhibits 92, 100, and 101).

The foregoing conduct was at the heart of plaintiffs' claims of anticompetitive conduct in their May 1998 Complaints and PI papers; it is at the heart of plaintiffs' claims of anticompetitive conduct detailed in the Response to Microsoft's Motion for Summary Judgment (the "Response") filed this week; and it will be at the heart of plaintiffs' proof of anticompetitive conduct at trial.

Similarly, most of the evidence of Microsoft's anticompetitive conduct with Apple and Intel, and almost all the evidence and description of that conduct contained in plaintiffs' Response, are evidence of anticompetitive conduct and restrictions explicitly designed to exclude or disadvantage Netscape's browser and undermine Java -- evidence directly relevant to plaintiffs' claims from the beginning. Plaintiffs' May 1998 papers were, and remain, a clear, detailed, and more-than-sufficient roadmap to plaintiffs' claims -- in fact, a far better roadmap than is typical in antitrust, or any other, litigation.

The remainder of the evidence to which Microsoft's Motion is directed is admissible to prove plaintiffs' existing claims and allegations, as well as to respond to Microsoft's asserted defenses. For example the Intel evidence (with respect to Microsoft's efforts to get Intel to agree not to compete in software) and the Apple evidence (with respect to Microsoft's efforts to divide media streaming market with Apple are evidence of:

(a) Microsoft's monopoly power; and/or

(b) A pattern of anticompetitive conduct and agreements that is relevant to assess the purpose and effect of Microsoft's conduct concerning competing browsers and Java (U.S. Complaint ¶¶ 13, 38, 114, 137, 139, 141).

The evidence relating to DR-DOS and Real Networks is similarly relevant and admissible. All of this evidence is plainly admissible as part of plaintiffs' case-in-chief under controlling Supreme Court precedent and other relevant case law cited in Plaintiffs' Motion to Compel filed September 2, 1998. Such evidence is also admissible to respond to Microsoft's repeated (but false) assertions that it has succeeded, and is succeeding, simply by making better products and satisfying consumer demands. Microsoft wants to be able to try to build a record

that its dominance merely reflects consumer choice (and/or good fortune) and that it would never set out to hurt a competitor other than by tough-but-fair competition and innovation, and then rule out the proof that gives the lie to those assertions.

Microsoft's various protestations that it has not had adequate notice of the above evidence and that plaintiffs are dramatically shifting the focus of this case on the eve of trial are erroneous. As just described, the subjects about which Microsoft complains are simply relevant evidence that will be used to prove the allegations in plaintiffs' Complaints. Moreover, Microsoft has been on notice of most of the specific evidence it now seeks to exclude for a period of at least several weeks. For example, evidence relating to Microsoft's conduct toward Intel, directed both at excluding Netscape and Java and at inducing Intel not to compete with Microsoft, was detailed at least as early as a July 22, 1998 deposition (and documents produced to the United States by Intel had been disclosed to Microsoft even earlier, in early June). That evidence was discussed at length, and thoroughly examined by Microsoft, in a deposition of an Intel witness on August 8, and recently in additional depositions. Similarly, the United States issued a deposition subpoena for Apple witnesses on July 31, 1998, and disclosed to Microsoft documents produced by Apple in early June and in mid-August. The Apple evidence was recently subject to discovery by both sides in a deposition of an Apple executive conducted on August 28.

Microsoft's claims that some of these areas of evidence will require extensive discovery and time at trial is greatly exaggerated. In particular, the Intel and Apple evidence deals with specific, discrete meetings or communications in which Microsoft representatives made statements, attempted to induce Intel and Apple to take certain action, and/or threatened

retaliation. Most of the depositions relating to these discrete events have been completed, and there are relatively few documents relating to them. Permitting discovery into these issues, and allowing them their rightful and lawful place as proof in this trial, will not prolong or expand the proceedings, and Microsoft will not be prejudiced.

Finally, Microsoft argues that plaintiffs are attempting to bring into this case the allegations of a separate lawsuit filed by Bristol Technologies. That claim too is greatly overstated. Plaintiffs have simply issued a single document subpoena to Bristol. Moreover, Microsoft's statement that Bristol's lawsuit has "nothing to do with the claims asserted by plaintiffs" is misleading. Bristol has been subpoenaed in this case because it was contracted by Microsoft to do development work to port Microsoft's Internet Explorer web browser to the UNIX operating system. Of course, the cross-platform nature of Internet Explorer and other browsers is a fundamental part of plaintiffs' case, and has been since the Complaint.

Microsoft's motion is a thinly veiled attempt to delay or disrupt a trial that Microsoft knows it cannot win. The present trial schedule was established initially by the Court's Order of May 22, 1998, and modified by a stipulated order August 22, 1998 (well after Microsoft was

aware of most of the evidence, and plaintiffs' reliance on the evidence, about which Microsoft now complains). There is no basis to abandoned the agreed trial schedule now.

DATED: September 3, 1998

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