UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): June 7, 2000

MICROSOFT CORPORATION

(Exact name of registrant as specified in charter)

Washington	0-14278	91-1144442
(State or Other Jurisdiction of Incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

One Microsoft Way, Redmond, Washington	98052-6399
(Address of Principal Executive Offices)	(Zip Code)

Registrant's telephone number, including area code: (425) 882-8080

N/A

(Former Name or Former Address, if Changed Since Last Report)

Item 5. Other Events.

On June 7, 2000, the United States District Court for the District of Columbia entered a Final Judgment and Memorandum and Order in the case United States of America v. Microsoft Corporation, Civil Action Nos. 98-1232 (TPJ) and 98-1233 (TPJ). Generally, the Final Judgment ordered the following:

- Within four months of the entry of the Final Judgment, Microsoft must submit a plan to separate its business into two completely different companies (the "Operating Systems Business" and the "Applications Business"), which divestiture would be completed within one year after the plan is approved by all parties to the case.
- Prior to implementation of a divestiture plan, Microsoft must preserve the business of each of the two proposed new companies as they are presently conducted.
- After implementation of divestiture, the two new companies would be prohibited from merging, sharing technology or entering into joint business ventures for 10 years.
- The two new companies would be monitored for compliance with the plan of divestiture and would be subject to a variety of restrictions on their business conduct including the following:

    - A ban on threats or retaliation against computer makers supporting competing products;
    - A requirement of uniform terms for the licensing of Microsoft's operating system products except for different language versions and volume discounts;
    - A requirement of greater flexibility in the configuration of windows operating system products by computer makers;
    - A requirement to disclose of certain Microsoft proprietary information including application program information to software developers;
    - A ban on certain exclusive contracts;
    - A ban on contracts in which Microsoft establishes conditions under which a licensee is required to license, promote or distribute other Microsoft products;
    - A ban on "binding" of certain middleware products (such as browsers) to Microsoft operating system products unless such middleware can be readily removed by either the computer manufacturer or the end user;
    - A requirement that predecessor versions of Microsoft operating system products be made available to requesting computer manufacturers for three years after release of a new product on the same terms and conditions.

The Final Judgment contains a number of other provisions and is attached as an exhibit to this report. You are encouraged to read the full order as well as the other exhibits that are attached.

On June 13, 2000, Microsoft filed a Notice of Appeal and Motion for a Stay of the Judgment Pending Appeal, appealing to the United States Court of Appeals for the District of Columbia Circuit the Final Judgment and the Findings of Fact and Conclusions of Law entered on April 3, 2000 finding that Microsoft violated the federal and state antitrust laws.

The United States Court of Appeals for the District of Columbia Circuit entered an Order on June 13, 2000 agreeing to hear the appeal by the court sitting en banc.

Microsoft issued a press release on June 13, 2000 reporting Microsoft's appeal of the Final Judgment and Microsoft's position with respect to the Final Judgment and its arguments on appeal.

Although Microsoft expects to obtain relief from some or all of the provisions in the Final Judgment, it is unable to predict when or to what extent such relief will be obtained. The failure to obtain sufficient relief through the stay and/or the appeal could have a material adverse effect on the value of Microsoft's common stock. You are encouraged to read our motion for a stay pending the appeal, which is attached as an exhibit. This motion summarizes our objections to the Final Judgment.

Item 7. Financial Statements and Exhibits.

The Exhibits to this report are listed in the Index to Exhibits on page 3.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

MICROSOFT CORPORATION

(Registrant)

Date: June 16, 2000

/s/ Robert A. Eshelman

Robert A. Eshelman
Deputy General Counsel
Finance & Operations

INDEX TO EXHIBITS

Exhibit No.	Description
99-1	Final Judgment entered June 7, 2000 in the United States District Court for the District of Columbia relating to the case United States of America v. Microsoft Corporation, Civil Action Nos. 98-1232 (TPJ) and 98-1233 (TPJ).
99-2	Memorandum and Order entered June 7, 2000 in the United States District Court for the District of Columbia relating to the case United States of America v. Microsoft Corporation, Civil Action Nos. 98-1232 (TPJ) and 98-1233 (TPJ).
99-3	Notice of Appeal of Microsoft Corporation filed June 13, 2000 in the United States Court of Appeals for the District of Columbia Circuit.
99-4	Motion of Appellant Microsoft Corporation for a Stay of the Judgment Pending Appeal filed June 13, 2000 in the United States Court of Appeals for the District of Columbia Circuit.
99-5	Order entered June 13, 2000 in the United States Court of Appeals for the District of Columbia Circuit allowing the hearing of the Company's appeal by the appellate court sitting en banc.
99-6	Press Release dated June 13, 2000.

EXHIBIT 99.1

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, et al., -- --- Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)
MICROSOFT CORPORATION, Counterclaim-Plaintiff, 5. ELIOT SPITZER, attorney general of the State of New York, in his official capacity, et al., -- --- Counterclaim-Defendants.	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;

Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;

The Court having entered judgment in accordance with the Findings of Fact and the Conclusions of Law on April 3, 2000, that Microsoft has violated (S)(S) 1 and 2 of the Sherman Act, 15 U.S.C. (S)(S) 1, 2, as well as the following state law provisions: Cal Bus. & Prof. Code (S)(S) 16720, 16726, 16727, 17200; Conn. Gen. Stat. (S)(S) 35-26, 35-27, 35-29; D.C. Code (S)(S) 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code (S)(S) 553.4, 553.5; Kan. Stat. (S)(S) 50-101 et seq.; Ky. Rev. Stat. (S)(S) 367.170, 367.175; La. Rev. Stat. (S)(S) 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. (S) 11-204; Mass. Gen. Laws ch. 93A, (S) 2; Mich. Comp. Laws (S)(S) 445.772, 445.773; Minn. Stat. (S) 325D.52; N.M. Stat. (S)(S) 57-1-1, 57-1-2; N.Y. Gen. Bus. Law (S) 340; N.C. Gen. Stat. (S)(S) 75-1.1, 75-2.1; Ohio Rev. Code (S)(S) 1331.01, 1331.02; Utah Code (S) 76-10-914; W.Va. Code (S)(S) 47-18-3, 47-18-4; Wis. Stat. (S) 133.03(1)-(2); and

Upon the record at trial and all prior and subsequent proceedings herein, it is this _____ day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

2. Divestiture

1. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. The Plaintiffs shall submit any objections to the proposed plan of divestiture to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs' objections.

2. Following approval of a final plan of divestiture by the Court (the "Plan")/1/ (and the expiration of the stay pending appeal set forth in section 6.a), Microsoft shall implement such Plan.

3. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:

    1. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated

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/1/ Definitions of capitalized terms are set forth in section 7, below.

Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

2. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such Intellectual Property related to the Internet browser, to develop, license and distribute modified or derivative versions of such Intellectual Property, provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating Systems Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.

3. The transfer of ownership of the Separated Business by means of a distribution of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.

4. Until Implementation of the Plan, Microsoft shall:

   1. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment;

   2. use all reasonable efforts to maintain and increase the sales and revenues of both the products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and

business development efforts of both the Operating Systems Business and the Applications Business;

3. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court; and

4. file a report with the Court 90 days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

3. Provisions Implementing Divestiture

   1. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

   2. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

      1. merging or otherwise recombining, or entering into any joint venture with one another;

      2. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;

      3. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

      4. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

Section 2.b.ii shall not prohibit the Operating Systems Business and the Applications Business from licensing technologies (other than Middleware Products) to each other for use in each others' products or services provided that such technology (i) is not and has not been separately sold, licensed, or offered as a product, and (ii) is licensed on terms that are otherwise consistent with this Final Judgment.

3. Three months after Implementation of the Plan and once every three months thereafter throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.

4. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.

5. The obligations and restrictions set forth in sections 3 and 4 herein shall, after the Implementation of the Plan, apply only to the Operating Systems Business.

4. Provisions In Effect Until Full Implementation of the Plan of Divestiture . The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.

1. OEM Relations.

1. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:

(1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or

(2) to exercise any of the options or alternatives provided under this Final Judgment.

2. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that -

(1) the schedule may specify different royalties for different language versions, and

(2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for the proposed termination and not less than thirty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment.

3. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to -

(1) include a registration sequence to obtain subscription or other information from the user;

(2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;

(3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or

(4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft's Middleware Product.

2. Disclosure of APIs, Communications Interfaces and Technical Information. Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable -

   1. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or

   2. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or

   3. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

   To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).

3. Knowing Interference with Performance. Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.

4. Developer Relations. Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to -

    1. use, distribute, promote or support any Microsoft product or service, or

    2. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or

    3. exercise any of the options or alternatives provided under this Final Judgment.

5. Ban on Exclusive Dealing. Microsoft shall not enter into or enforce any Agreement in which a third party agrees, or is offered or granted consideration, to -

    1. restrict its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,

    2. distribute, promote or use any Microsoft Platform Software exclusively,

    3. degrade the performance of any non-Microsoft Platform Software, or

    4. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.

6. Ban on Contractual Tying. Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

7. Restriction on Binding Middleware Products to Operating System Products. Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:

    1. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and

    2. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed separately from a Windows Operating System Product to (b) the applicable version of Windows.

8. Agreements Limiting Competition. Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor's agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.

9. Continued Licensing of Predecessor Version. Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior

to the release. The OEM shall be free to market Personal Computers in which it preinstalls such an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

5. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment, provided that, consistent with section 2.e, this section shall not apply to the Applications Business after the Implementation of the Plan.

    1. Within 90 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.

    2. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.

    3. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment.

    4. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.

    5. The Chief Compliance Officer shall:

        1. within 90 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

        2. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or Manager, or platform software developer or employee involved in relations with OEMs, ISVs or IHVs;

        3. obtain from each officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs or IHVs, within 90 days of entry of this Final Judgment, and for each

person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:

(1) has read, understands, and agrees to abide by the terms of this Final Judgment; and

(2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

4. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4.e.iii, such certifications have been obtained;

5. establish and maintain a means by which employees can report potential violations of this Final Judgment or the antitrust laws on a confidential basis; and

6. report immediately to Plaintiffs and the Court any violation of this Final Judgment.

6. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

7. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at least four years the e-mail of all Microsoft officers, directors and managers engaged in software development, marketing, sales and developer relations related to Platform Software.

6. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.

1. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of divestiture, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

1. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:

(1) Access during office hours to inspect and copy or, at Plaintiffs' option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

2. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.

3. No information or documents obtained by the means provided in this section shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

4. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 calendar days notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

7. Effective Date, Term, Retention of Jurisdiction, Modification.

1. This Final Judgment shall take effect 90 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.

2. Except as provided in section 2.e, the provisions of this Final Judgment apply to Microsoft as defined in section 7.o of this Final Judgment.

3. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.

4. The Court may act sua sponte to issue orders or directions for the
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construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

5. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

6. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as necessary, no later than 45 days after the entry of this Final Judgment.

8. Definitions.

1. "Agreement" means any agreement, arrangement, alliance, understanding or joint venture, whether written or oral.

2. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

3. "Applications Business" means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (e.g., Office,
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BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients),

Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments owned by Microsoft in partners or joint venturers, or in ISVs, IHVs, OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.

4. "Bind" means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.

5. "Business" means the Operating Systems Business or the Applications Business.

6. "Communications Interfaces" means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.

7. "Covered OEM" means one of the 20 OEMs with the highest volume of licenses of Windows Operating System Products from Microsoft in the calendar year preceding the effective date of the Final Judgment. At the beginning of each year, starting on January 1, 2002, Microsoft shall redetermine the Covered OEMs for the new calendar year, based on sales volume during the preceding calendar year.

8. "Covered Shareholder" means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft and who owns directly or beneficially more than 5 percent of the voting stock of the firm.

9. "Default Middleware" means Middleware configured to launch automatically (that is, by "default") to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.

10. "End-User Access" means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. "End-User Access" includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.

11. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer.

12. "Implementation of the Plan" means full completion of all of the steps described in section 1.c.

13. "Intellectual Property" means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.

14. "ISV" means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.

15. "Manager" means a Microsoft employee who is responsible for the direct or indirect supervision of more than 100 other employees.

16. "Microsoft" means Microsoft Corporation, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

17. "Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.

18. "Middleware Product" means

    1. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or

    2. software distributed by Microsoft that -

        (1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel

or through Internet access providers, Internet content providers, ISVs or OEMs, and

(2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

19. "Non-Covered Shareholder" means a shareholder of Microsoft on the record date for the transaction that effects the transfer of ownership of the Separated Business under Section 1.c.iii who is not a Covered Shareholder on the date of entry of this Final Judgment.

20. "OEM" means the manufacturer or assembler of a personal computer.

21. "Operating System" means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a "platform" by exposing APIs that applications use to "call upon" the Operating System's underlying software routines in order to perform functions.

22. "Operating System Product" means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.

23. "Operating Systems Business" means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.

24. "Personal Computer" means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.

25. "Plaintiff" means the United States or any of the plaintiff States in this action.

26. "Plan" means the final plan of divestiture approved by the Court.

27. "Platform Software" means an Operating System or Middleware or a combination of an Operating System and Middleware.

28. "Remaining Business" means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.

29. "Separated Business" means whichever of the Operating Systems Business and the Applications Businesses is transferred to a separate entity pursuant to the Plan.

30. "Technical Information" means all information regarding the identification and means of using APIs and Communications Interfaces that competent software developers require to make their products running on any computer interoperate effectively with Microsoft Platform Software running on a Personal Computer. Technical information includes but is not limited to reference implementations, communications protocols, file formats, data formats, syntaxes and grammars, data structure definitions and layouts, error codes, memory allocation and deallocation conventions, threading and synchronization conventions, functional specifications and descriptions, algorithms for data translation or reformatting (including compression/decompression algorithms and encryption/decryption algorithms), registry settings, and field contents.

31. "Timely Manner": disclosure of APIs, Technical Information and Communications Interfaces in a timely manner means, at a minimum, publication on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (1) disclosed to Microsoft's applications developers, (2) used by Microsoft's own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, (3) disclosed to any third party, or (4) within 90 days of a final release of a Windows Operating System Product, no less than 5 days after a material change is made between the most recent beta or release candidate version and the final release.

32. "Windows Operating System Product" means software code (including source code and binary code, and any other form in which Microsoft distributes its Windows Operating Systems for Personal Computers) of Windows 95, Windows 98, Windows 2000 Professional, and their successors, including the Windows Operating Systems for Personal Computers codenamed "Millennium," "Whistler," and "Blackcomb," and their successors.

Thomas Penfield Jackson
U.S. District Judge

EXHIBIT 99.2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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_____________________________________________
                                            )
UNITED STATES OF AMERICA,                   )
                                            )
          Plaintiff,                        )
                                            )
          v.                                )  Civil Action No. 98-1232 (TPJ)
                                            )
MICROSOFT CORPORATION,                      )
                                            )
          Defendant.                        )
____________________________________________)
                                            )
STATE OF NEW YORK, et al.,                  )
                   -- ---                   )
                                            )
          Plaintiffs,                       )
                                            )
          v.                                )
                                            )
MICROSOFT CORPORATION,                      )
                                            )
          Defendant.                        )
____________________________________________)  Civil Action No. 98-1233 (TPJ)
                                            )
MICROSOFT CORPORATION,                      )
                                            )
          Counterclaim-Plaintiff,           )
                                            )
          5.                                )
                                            )
ELIOT SPITZER, attorney general of the      )
     State of New York, in his official     )
 capacity, et al.,                  )
          -- ---
                                            )
          Counterclaim-Defendants.          )
____________________________________________)
```

MEMORANDUM AND ORDER

These cases are before the Court for disposition of the sole matter presently remaining for decision by the trial court, namely, entry of appropriate relief for the violations of the Sherman Act, (S)(S) 1 and 2, and various state laws committed by the defendant Microsoft Corporation as found by Court in accordance with its Findings of Fact and Conclusions of Law. Final judgment will be entered contemporaneously herewith. No further proceedings will be required.

The Court has been presented by plaintiffs with a proposed form of final judgment that would mandate both conduct modification and structural reorganization by the defendant when fully implemented. Microsoft has responded with a motion for summary rejection of structural reorganization and a request for months of additional time to oppose the relief sought in all other respects. Microsoft claims, in effect, to have been surprised by the "draconian" and "unprecedented" remedy the plaintiffs recommend. What it proposes is yet another round of discovery, to be followed by a second trial - in essence an *ex post* and *de facto* bifurcation of the case already considered and rejected by the Court.

Microsoft's profession of surprise is not credible./1/ From the inception of this case Microsoft knew, from well-established Supreme Court precedents dating from the beginning of the last century, that a mandated divestiture was a possibility, if not a probability, in the event of an adverse result at trial. At the conclusion of the trial the Court's Findings of Fact gave clear warning to Microsoft that the result would likely be adverse, yet the Court delayed entry of its

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/1/ Despite their surprise, compounded no doubt by the Court's refusal on May 24th to allow discovery and take testimony on the issue, Microsoft's attorneys were promptly able to tender a 35-page "Offer of Proof," summarizing in detail the testimony 16 witnesses would give to explain why plaintiffs' proposed remedy, in its entirety, is a bad idea. Within a week they added seven more.

Conclusions of Law for five months, and enlisted the services of a distinguished mediator, to assist Microsoft and the plaintiffs in reaching agreement on a remedy of some description that Microsoft knew was inevitable. Even assuming that Microsoft negotiated in utmost good faith in the course of mediation, it had to have in contemplation the prospect that, were mediation to fail, the prevailing plaintiffs would propose to the Court a remedy most to their liking and least likely to be acceptable to Microsoft. Its failure to anticipate and to prepare to meet such an eventuality gives no reason to afford it an opportunity to do so now.

These cases have been before the Court, and have occupied much of its attention, for the past two years, not counting the antecedent proceedings. Following a full trial Microsoft has been found guilty of antitrust violations, notwithstanding its protests to this day that it has committed none. The Court is convinced for several reasons that a final - and appealable - judgment should be entered quickly. It has also reluctantly come to the conclusion, for the same reasons, that a structural remedy has become imperative: Microsoft as it is presently organized and led is unwilling to accept the notion that it broke the law or accede to an order amending its conduct.

First, despite the Court's Findings of Fact and Conclusions of Law, Microsoft does not yet concede that any of its business practices violated the Sherman Act. Microsoft officials have recently been quoted publicly to the effect that the company has "done nothing wrong" and that it will be vindicated on appeal. The Court is well aware that there is a substantial body of public opinion, some of it rational, that holds to a similar view. It is time to put that assertion to the test. If true, then an appellate tribunal should be given early opportunity to confirm it as promptly as possible, and to abort any remedial measures before they have become irreversible as a practical matter.

Second, there is credible evidence in the record to suggest that Microsoft, convinced of its innocence, continues to do business as it has in the past, and may yet do to other markets what it has already done in the PC operating system and browser markets. Microsoft has shown no disposition to voluntarily alter its business protocol in any significant respect. Indeed, it has announced its intention to appeal even the imposition of the modest conduct remedies it has itself proposed as an alternative to the non-structural remedies sought by the plaintiffs.

Third, Microsoft has proved untrustworthy in the past. In earlier proceedings in which a preliminary injunction was entered, Microsoft's purported compliance with that injunction while it was on appeal was illusory and its explanation disingenuous. If it responds in similar fashion to an injunctive remedy in this case, the earlier the need for enforcement measures becomes apparent the more effective they are likely to be.

Finally, the Court believes that extended proceedings on the form a remedy should take are unlikely to give any significantly greater assurance that it will be able to identify what might be generally regarded as an optimum remedy. As has been the case with regard to Microsoft's culpability, opinion as to an appropriate remedy is sharply divided. There is little chance that those divergent opinions will be reconciled by anything short of actual experience. The declarations (and the "offers of proof") from numerous potential witnesses now before the Court provide some insight as to how its various provisions might operate, but for the most part they are merely the predictions of purportedly knowledgeable people as to effects which may or may not ensue if the proposed final judgment is entered. In its experience the Court has found testimonial predictions of future events generally less reliable even than testimony as to historical fact, and cross-examination to be of little use in enhancing or detracting from their accuracy.

In addition to its substantive objections, the proposed final judgment is also criticized by Microsoft as being vague and ambiguous. Plaintiffs respond that, to the extent it may be lacking in detail, it is purposely so to allow Microsoft itself to propose such detail as will be least disruptive of its business, failing which plaintiffs will ask the Court to supply it as the need appears.

Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants./2/ These officials are by reason of office obliged and expected to consider - and to act in - the public interest; Microsoft is not. The proposed final judgment is represented to the Court as incorporating provisions employed successfully in the past, and it appears to the Court to address all the principal objectives of relief in such cases, namely, to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets. Microsoft's alternative decree is plainly inadequate in all three respects.

The final judgment proposed by plaintiffs is perhaps more radical than might have resulted had mediation been successful and terminated in a consent decree. It is less so than that

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/2/ Two states dissented from the imposition of structural remedies but fully supported the remainder of the relief proposed. The absence of total unanimity merely confirms the collaborative character of the process by which the proposed final judgment was formulated.

advocated by four disinterested *amici curiae*. It is designed, moreover, to take force in stages, so that the effects can be gauged while the appeal progresses and before it has been fully implemented. And, of course, the Court will retain jurisdiction following appeal, and can modify the judgment as necessary in accordance with instructions from an appellate court or to accommodate conditions changed with the passage of time.

It is, therefore, this _____ day of June, 2000,

ORDERED, that the motion of defendant Microsoft Corporation for summary rejection of the plaintiffs' proposed structural reorganization is denied; and it is

FURTHER ORDERED, that defendant Microsoft Corporation's "position" as to future proceedings on the issue of remedy is rejected; and it is

FURTHER ORDERED, that plaintiffs' proposed final judgment, as revised in accordance with the proceedings of May 24, 2000 and Microsoft's comments thereon, be entered as a Final Judgment herein.

____

Thomas Penfield Jackson
U.S. District Judge

EXHIBIT 99.3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICROSOFT CORPORATION, Civil Action No. 98-1232 (TPJ)

Defendant.

NOTICE OF APPEAL

Defendant Microsoft Corporation hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Final Judgment entered in this action on June 7, 2000, as well as from the Order entered in this action on April 3, 2000 (save from the portion of the Order dismissing the plaintiff's first claim for relief). Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, the district court consolidated this action with Civil Action No. 98-1233 (TPJ) for purposes of trial. An appeal is also taken in that action this day.

____

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June 13, 2000 Microsoft Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2000, I caused a true and correct copy of the foregoing Notice of Appeal to be served by facsimile and by overnight courier upon:

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____

Bradley P. Smith

EXHIBIT 99.4

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. ________

MICROSOFT CORPORATION,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Motion of Appellant Microsoft Corporation
for a Stay of the Judgment Pending Appeal

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June 13, 2000 Microsoft Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Microsoft Corporation certifies that it has no corporate parents and that no publicly-held company owns 10% or more of Microsoft Corporation's stock.

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RULES, TREATISES AND OTHER AUTHORITIES

GLOSSARY

"APIs" Application Programming Interfaces. APIs are interfaces exposed by an operating system or other platform software that can be invoked by an application or middleware to obtain services like displaying text on the video monitor or saving a document to the hard disk.

"Conclusions" The term "conclusions" refers to the district court's Conclusions of Law entered April 3, 2000.

"Consent Decree" The consent decree is the final judgment entered in Civil Action No. 94-1564 on August 21, 1995 and reported at 1995 WL 505998 (D.D.C.).

"Findings" The term "findings" refers to the district court's Findings of Fact entered November 5, 1999.

"IAP" Internet Access Provider. Plaintiffs use the term IAP to refer collectively to both ISPs and OLSs.

"ICPs" Internet Content Providers. ICPs are entities that provide content to users of the Internet by maintaining Web sites.

"ISPs" Internet Service Providers. ISPs provide their subscribers with a connection to the Internet via telephone, cable or satellite in exchange for a monthly fee.

"ISVs" Independent Software Vendors. ISVs are entities engaged in developing and marketing software products.

"Linux" Linux is an operating system created in 1991 by Linus Torvalds, a Finnish graduate student, and subsequently modified on a cooperative basis by software developers around the world.

"Mac OS" Mac OS is Apple's operating system for Macintosh personal computers.

"OEM" Original Equipment Manufacturer. OEMs are manufacturers or assemblers of personal computers.

"Office" Microsoft Office. Office is a suite of business productivity applications developed by Microsoft, including Word word processing software, Excel spreadsheet software, PowerPoint presentation graphics software and Access relational database software.

"OLSs" Online Services. OLSs provide their subscribers with a connection to the Internet as well as proprietary content and services like e-mail and personal Web pages.

"OS/2 Warp" OS/2 Warp is an operating system first released by IBM in the fall of 1994. Early versions of OS/2 were developed jointly by IBM and Microsoft.

"Windows 2000 Professional" Windows 2000 Professional is an operating system developed by Microsoft that was commercially released in February 2000. Windows 2000 Professional is the successor to Microsoft's Windows NT 4.0 operating system and is targeted primarily at business customers.

"Windows 2000 Server" Windows 2000 Server is a server operating system developed by Microsoft that was commercially released in February 2000. Windows 2000 Server is the successor to Microsoft's Windows NT 4.0 Server operating system. Windows 2000 Server is used in computer networks and competes with Novell NetWare and a number of UNIX variants, including Tru-64 UNIX from Compaq, HP-UX from Hewlett-Packard, AIX from IBM and Solaris from Sun Microsystems.

"Windows CE" Windows CE is an operating system developed by Microsoft for use in, inter alia, handheld devices and television set-top boxes. Windows CE competes with Aperios from Sony, ultron from Matsushita and other Japanese consumer electronics companies, OS/9 from Microware and a wide range of other embedded operating systems.

LIST OF EXHIBIT

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, defendant-appellant Microsoft Corporation ("Microsoft") hereby moves for a stay of all provisions of the district court's June 7, 2000 final judgment pending resolution of this appeal.

Although the district court's judgment and accompanying memorandum made clear that it was highly unlikely that the district court would stay the judgment pending appeal, Microsoft filed a short stay motion with the district court on June 7, 2000. Five days later, plaintiffs filed a response to Microsoft's stay motion urging the district court to deny the motion, but to defer its ruling until (i) Microsoft filed its notice of appeal and (ii) the district court was in a position to resolve a motion for certification of direct appeal to the Supreme Court--issues wholly unrelated to the district court's consideration of a stay pending appeal. On June 13, 2000, the district court entered an order finding that "consideration of a stay pending appeal is premature in that no notice of appeal has yet been filed" and "reserv[ing] ruling on Microsoft's motion until such time as a timely notice of appeal is filed."

Microsoft's stay motion has been pending for nearly a week, and the district court has "failed to afford the relief requested" by the motion. Fed. R. App. P. 8(a)(2)(A)(ii). Accordingly, Microsoft now asks this Court to stay the judgment pending appeal. Time is of the essence here. Many extreme provisions of the judgment start to take effect 90 days after its entry, and Microsoft must begin preparing immediately if it is to be in compliance with the judgment in 84 days. Microsoft therefore respectfully requests that the Court set an expedited briefing schedule on Microsoft's motion so that it can be resolved as soon as possible. Microsoft will promptly advise the Court if, contrary to all expectations, the district court grants Microsoft's stay motion now that a notice of appeal has been filed.

INTRODUCTION

This is an appeal from a judgment of the district court (Hon. Thomas Penfield Jackson) holding Microsoft liable for violations of Sections 1 and 2 of the Sherman Act and various corresponding provisions of state law. The judgment was entered in two consolidated actions, one brought by the Antitrust Division of the U.S. Department of Justice ("DOJ") and the other by nineteen States and the District of Columbia.

Microsoft's appeal will present an overwhelming case for reversal of the judgment based on an array of serious substantive and procedural errors that infected virtually every aspect of the proceedings below. These flaws culminated in the entry of unprecedented relief that extends far beyond the case that was presented, without affording Microsoft an evidentiary hearing on the terms of one of the most complex antitrust decrees in history. Based on six hearsay declarations submitted by plaintiffs, the district court ordered that Microsoft be split into two companies, disclose its valuable intellectual property to competitors, redesign all of its operating system software to plaintiffs' vague specifications and re-price that software according to an arbitrary court-imposed formula.

Although final implementation of the breakup is stayed pending appeal, the judgment's other extreme provisions take effect 90 days after entry. Absent a stay from this Court, these provisions will (i) result in a confiscation of large amounts of Microsoft's intellectual property, (ii) interfere with Microsoft's release of new products such as its Windows Millenium operating system, (iii) require Microsoft to redesign all of its existing operating systems within six months of the judgment's effective date or else withdraw them from the marketplace, (iv) force Microsoft immediately to divert vast resources from software development to complying with the judgment and formulating the required breakup plan, and (v) make it difficult for Microsoft to conduct business in the highly-competitive, fast-moving software industry at a critical time when software is being transformed from standalone products to Web-based services. The effect of these provisions will be devastating, not only to Microsoft, but also to its employees, shareholders, business partners and customers, and could have a significant adverse impact on the Nation's economy. A stay pending appeal is necessary to prevent these far-reaching and irreversible consequences of a profoundly flawed ruling.

STATEMENT OF THE CASE

A. The Complaints and Preliminary Injunction Motion

On May 18, 1998, the DOJ and various States commenced these actions alleging violations of Sections 1 and 2 of the Sherman Act and the States' respective antitrust statutes. Plaintiffs asserted two claims under Section 1 (unlawful tying and exclusive dealing) and two claims under Section 2 (attempted monopolization of "Internet browsers" and maintenance of a monopoly in "PC operating systems"). (DOJ Compl. (P)(P) 130-41; States First Am. Compl. (P)(P) 85-90, 93-97.) The central allegation of plaintiffs' complaints was that Microsoft had unlawfully foreclosed Netscape Communications Corp. ("Netscape") from distributing and promoting its Web browsing software, called Navigator, by (i) including Microsoft's own Web browsing software, called Internet Explorer, in its Windows 95 and Windows 98 operating systems, (ii) entering into exclusive distribution and promotion agreements relating to Internet Explorer with distributors such as online services ("OLSs"), Internet service providers ("ISPs") and Internet content providers ("ICPs"), and (iii) not granting computer manufacturers ("OEMs") that preinstall Windows the right to modify the initial Windows startup sequence and the Windows desktop to prevent end users from accessing Internet Explorer.

Plaintiffs contended that Microsoft sought to limit Netscape's distribution of Navigator because it was concerned that Navigator could become a competing "platform" to which applications could be written, and thus might reduce what plaintiffs viewed as the sole barrier to entry into the PC operating system business. (DOJ Compl. (P)(P) 3-4, 7-9; States First Am. Compl. (P)(P) 32-37.) According to plaintiffs, this so-called barrier--referred to as the "applications barrier to entry"--results from Microsoft's success in persuading software developers to write large numbers of applications for Windows relative to other operating systems. (DOJ Compl. (P) 3; States First Am. Compl. (P) 35.) In plaintiffs' view, this purported barrier could be eroded if more applications were written for cross-platform "middleware" such as Navigator that has versions that run on multiple operating systems. (DOJ Compl. (P)(P) 66-68; States First Am. Compl. (P)(P) 34-36.)

As the district court observed in its September 1998 summary judgment decision, plaintiffs' complaints both sought virtually the same narrow relief, namely, an order enjoining Microsoft from:

(1) entering into or enforcing certain contractual provisions which allegedly foreclose distribution and/or promotion of competing Internet browsers; (2) distributing a "bundled" version of its operating system and browser unless Microsoft provides a practical way of removing browser functions and provides OEMs that do not wish to license the browser an appropriate deduction from the royalty rate; (3) distributing a "bundled" version of its operating system and browser unless Microsoft treats Netscape Corporation's ("Netscape") browser the same as its own with respect to inclusion and removal; and (4) retaliating against any OEM that chooses to remove Microsoft's browser from Windows 98.

United States v. Microsoft Corp., Nos. 98-1232, 1233, 1998 WL 614485, at *1 (D.D.C. Sept. 14, 1998). Together with their complaints, plaintiffs filed motions for a preliminary injunction seeking largely the same relief--what plaintiffs at the time referred to as a "surgical strike." Plaintiffs argued that in the absence of preliminary relief, Netscape would be effectively foreclosed from getting Navigator into the hands of consumers and that consumers would thus be deprived of their choice of Web browsing software.

B. Pretrial Proceedings

Following a scheduling conference on May 22, 1998, the district court consolidated the two actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. The district court also advanced the trial of both actions on the merits and consolidated it with the preliminary injunction hearing pursuant to Rule 65(a)(2). In view of the narrow focus of plaintiffs' complaints and requested relief, the district court, over Microsoft's objection, scheduled the trial to commence on September 8, 1998--less than four months away. The court also limited each side to twelve trial witnesses and required the parties to file the direct examinations of their witnesses in the form of written declarations.

On June 23, 1998, a little more than a month after the complaints were filed, this Court reversed the district court's December 11, 1997 order granting a sua sponte preliminary injunction in a closely related action brought by the DOJ against Microsoft under a 1994 consent decree. United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998). This Court held, based on the record before it, that Windows 95 and Internet Explorer 4.0 constitute an "integrated product" under the consent decree because there are "facially plausible benefits" to the "integrated design" of Windows 95, including its Internet Explorer components, "as compared to an operating system combined with a stand-alone browser such as Netscape's Navigator." Id. at 950. Based largely on this Court's decision, Microsoft moved for summary judgment on plaintiffs' tying and other claims.

In denying Microsoft's motion for summary judgment on plaintiffs' tying claim, the district court observed that although this Court's opinion "was ostensibly limited to interpreting the specific terms of the Consent Decree, the analysis was, in the Court of Appeals' eyes, `consistent with tying law.'" 1998 WL 614485, at *10 (quoting 147 F.3d at 950). The district court acknowledged that this Court had articulated the controlling legal standard in this case for "determining whether an integration amounts to a single product for purposes of evaluating a tying claim," id., a ruling the court would repudiate eighteen months later in its conclusions of law when it condemned Microsoft's design of Windows 95 and 98 as unlawful ties. In its summary judgment decision, however, the district court applied this Court's standard, stating that it could not "determine whether Windows and IE are `separate products' until it becomes clear what are the synergistic benefits that are unique to the Windows/IE combination, i.e., benefits that could not be obtained by combining another browser with Windows." Id. at *12.

Although the district court denied Microsoft's summary judgment motion, this Court's June 1998 decision eviscerated the central contention of plaintiffs' complaints, namely, that Microsoft had "tied" Internet Explorer to Windows 95 and Windows 98. (See, e.g., DOJ Compl. (P)(P) 18-23, 103-23, 134-37; States First Am. Compl. (P)(P) 47-50, 54-69, 93-95.) In the months following that decision, plaintiffs responded by dramatically expanding the scope of their case, raising new allegations not included in their complaints and seeking to convert the case into an omnibus Section 2 monopoly maintenance action. Over Microsoft's vehement and repeated objections, plaintiffs advanced new allegations concerning Microsoft's interactions with Intel Corporation ("Intel"), Apple Computer Corp. ("Apple"), RealNetworks, Inc. ("RealNetworks") and IBM Corp. ("IBM"). Plaintiffs also contended that Microsoft unlawfully impeded marketplace acceptance of the Java technologies promoted by Sun Microsystems, Inc. ("Sun") by creating its own implementation of Java optimized for use with Windows. This allegation was already the subject of a lawsuit between Sun and Microsoft. See Sun Microsystems, Inc. v. Microsoft Corp., No. C-97-20884-RMW (N.D. Cal.).

Despite the dramatic transformation of the cases, the district court did not require plaintiffs to amend their complaints. Rather, the court assured Microsoft that it "would not be making any findings" and "would not predicate any relief" on matters unrelated to the conduct challenged in the complaints (Sept. 17, 1998 Tr. at 7), an assurance the court would later ignore both in making its findings of fact and in fashioning relief. The court also refused to give Microsoft additional time to conduct discovery and prepare for a greatly expanded trial, notwithstanding Microsoft's repeated pleas for both. Because Microsoft ultimately had less than five months to prepare for trial (and much less time to prepare its defense to plaintiffs' new allegations involving various highly technical subjects), Microsoft was unable to pursue entire avenues of necessary discovery. The limited time available to Microsoft was particularly unfair given that the DOJ had been investigating the issues for years before filing its complaint using compulsory process granted by the Antitrust Civil Process Act.

C. The Trial

Notwithstanding Microsoft's motion for a continuance, trial began on October 19, 1998, less than five months after the complaints were filed. The Final Pretrial Order provided that "no new discovery shall be initiated by any party after entry of this Final Pretrial Order except with prior leave of the Court for cause shown." The parties concluded their cases-in-chief on February 26, 1999, and presented rebuttal evidence between June 1, 1999 and June 24, 1999.

At trial, the district court largely suspended application of the Federal Rules of Evidence, admitting into evidence numerous newspaper and magazine articles and other rank hearsay. For example, sixty-nine paragraphs of the written direct testimony of James Barksdale, then chief executive officer of Netscape and plaintiffs' first witness, contained large amounts of inadmissible hearsay, oftentimes multiple levels of hearsay. Yet, the district court denied Microsoft's motion in limine to exclude such hearsay statements.

In the middle of trial, an event occurred that completely changed the competitive landscape of the software industry. On November 24, 1998, America Online, Inc. ("AOL"), a Microsoft competitor that provided plaintiffs' second witness, agreed to acquire Netscape--the company plaintiffs claimed had been fatally injured by Microsoft's conduct--in a stock acquisition valued at $10 billion at the time of closing. In a related transaction, AOL entered into a three-year "strategic alliance" with Sun, another competitor of Microsoft that likewise provided plaintiffs with a trial witness.

D. Findings of Fact

The district court bifurcated briefing on findings of fact and conclusions of law, and issued its findings of fact on November 5, 1999. Although 412 paragraphs long, the court's findings do not contain a single citation to the record, making it impossible to ascertain the purported basis for many findings and thereby compounding the many evidentiary errors at trial. The court also did not make any specific credibility determinations, and many of its "findings" consist of nothing more than sweeping, conclusory assertions. What is more, the court simply ignored vast amounts of uncontradicted evidence submitted by Microsoft, including Microsoft's explanation of why it did not charge separately for Internet Explorer and Microsoft's detailed description of the many benefits flowing from the integrated design of Windows that cannot be duplicated by combining an operating system with a standalone browser like Navigator.

The district court adopted nearly every position advanced by plaintiffs. The court found that Microsoft possesses monopoly power in the market for "Intel-compatible PC operating systems" (Findings (P) 33), a putative market that is so narrow that it excludes both Apple's Mac OS operating system (id. (P)(P) 20-21) and the competing platform technologies--Navigator and Java--that the court determined posed the greatest competitive threat to Microsoft's purported operating system monopoly and that were the crux of plaintiffs' claims of anticompetitive conduct (id. (P)(P) 68-77).

The court also accepted plaintiffs' position as to the so-called "applications barrier to entry." (Id. (P) 36.) According to the district court, "[t]he overwhelming majority of consumers will only use a PC operating system for which there already exists a large and varied set of high-quality, full-featured applications." (Id. (P) 30.) Even if a competing operating system "attracted several thousand compatible applications," the court stated, it "would still look like a gamble from the consumer's perspective next to Windows, which supports over 70,000 applications." (Id. (P) 40.) The court concluded that "[a]lthough Apple's Mac OS supports more than 12,000 applications," including Microsoft Office, "even an inventory of that magnitude is not sufficient to enable Apple to present a significant percentage of users with a viable substitute for Windows." (Id. (P) 47.)

Many of the district court's other findings are clearly erroneous, particularly those regarding Microsoft's supposed foreclosure of Netscape from specific channels of distribution. For example, the court found that "Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel." (Findings (P) 239.) According to the court, "[b]y the beginning of January 1999, Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping." (Id.) In fact, documents reporting the results of AOL's due diligence investigation prior to acquiring Netscape--elsewhere relied on by the district court--state that as of 1998 Navigator was distributed on "22% of OEM shipments." (DX 2440 at 341778.) When confronted with these documents at trial, plaintiffs' economist, Frank Fisher, acknowledged that Barksdale's testimony that Microsoft had foreclosed Netscape from the OEM channel was an "exaggeration." (June 3, 1999 A.M. Tr. at 56-58.) There is thus no credible evidence to support the district court's finding of foreclosure in the OEM channel.

Significantly, the district court found that Microsoft had not foreclosed Netscape from the marketplace as a whole. In particular, the court found that "Microsoft did not actually prevent users from obtaining and using Navigator" and that "Netscape could still carpet bomb the population with CD-ROMs and make Navigator available for downloading." (Findings (P) 357.) The court further found that "Navigator's installed base has grown even as its usage share has fallen" (id. (P) 378), demonstrating that Netscape was able not only to get Navigator into the hands of consumers, but also to get them to use it instead of Internet Explorer, even though Internet Explorer is included in Windows. In fact, the court noted that "Navigator's installed base in the United States alone grew from fifteen million in 1996 to thirty-three million in December 1998" (id.), the very period in which plaintiffs claimed that Microsoft had foreclosed Netscape from promoting and distributing Navigator. And the court later found (Conclusions at 38) that Netscape was able to distribute 160 million copies of Navigator (nearly 1.6 copies for every Web user) in 1998 alone--the same year in which plaintiffs suggested that a preliminary injunction was necessary to prevent Microsoft from foreclosing Netscape's distribution.

E. Conclusions of Law

The parties subsequently submitted their proposed conclusions of law. Over Microsoft's objection, the district court invited Professor Lawrence Lessig, the same professor whom this Court prevented from acting as special master in the prior consent decree action, to participate as amicus curiae. In overruling Microsoft's objection, the court stated that Professor Lessig would "submit his views exclusively on the issue of technological tying," a subject on which the court said he was "uniquely qualified to offer advice." (Mem. & Order at 2.) In his amicus brief, Professor Lessig stated that the district court's "opinion in the summary judgment stage of this case seemed to indicate" that the standard articulated by this Court in its June 1998 decision governs the "separate product" issue, which lies at the heart of the tying claim. (Brief of Lawrence Lessig at 11.) After discussing this Court's decision, Professor Lessig concluded that "under the Court of Appeals test, Microsoft must prevail." (Id. at 17.)

In its conclusions of law entered on April 3, 2000, the court nevertheless decided that Microsoft violated Section 1 of the Sherman Act by unlawfully tying Internet Explorer to Windows. The court, however, rejected plaintiffs' exclusive dealing claim, holding that the challenged agreements with various third parties "did not foreclose enough of the relevant market to constitute a (S) 1 violation." (Conclusions at 39.) The court also determined that Microsoft had violated Section 2 by maintaining a monopoly in operating systems and by attempting to monopolize Web browsing software, despite the fact that distribution foreclosure is a central premise of both violations in this case.

1. Tying

Having been told by Professor Lessig that Microsoft must prevail under this Court's test for technological tying, the district court simply refused to apply that test. (Id. at 26-27.) The court did so even though it recognized that this Court's decision "sought to guide [the court], insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue." (Id. at 26.) The court held that this Court's "undemanding test" is "inconsistent with pertinent Supreme Court precedents" (id. at 27), namely, Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984), and Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), even though this Court carefully considered both cases in its June 1998 decision.

Specifically, the court concluded that this Court's admonition "to refrain from any product design assessment as to whether the `integration' of Windows and Internet Explorer is a `net plus'. . . is at odds with the Supreme Court's own approach," which focuses on whether there is separate consumer demand for the alleged products. (Conclusions at 29.) "To the extent that the Supreme Court has spoken authoritatively on these issues," the district court stated, it "is bound to follow its guidance and is not at liberty to extrapolate a new rule governing the tying of software products." (Id. at 34.) The district court thus declined to follow this Court's test in favor of the "consumer-demand" test of Jefferson Parish and Eastman Kodak, despite the fact that this Court had expressly rejected the assertion that this "consumer-demand" test should apply to claims of "technological tying." 147 F.3d at 946-47. In so doing, the court recognized that its conclusion "is arguably at variance" with this Court's decision, but asserted that it was obliged to follow this Court's pronouncements only "until the trail falters." (Conclusions at 26-27.)

2. Exclusive Dealing

The district court dismissed plaintiffs' exclusive-dealing claims under Section 1 because the challenged agreements did not exclude Netscape from the marketplace:

Microsoft's multiple agreements with distributors did not ultimately deprive Netscape of the ability to have access to every PC user worldwide to offer an opportunity to install Navigator. Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) mailed directly to an unlimited number of households.

(Id. at 38 (emphasis added).) In fact, the court determined that in 1998 alone, "Netscape was able to distribute 160 million copies of Navigator, contributing to an increase in its installed base from 15 million in 1996 to 33 million in December 1998." (Id.) The court concluded that "the evidence does not support a finding that these agreements completely excluded Netscape from any constituent portion of the worldwide browser market, the relevant line of commerce." (Id.)

3. Monopoly Maintenance

Despite finding that Netscape had access "to every PC user worldwide," the court held that Microsoft had unlawfully maintained a monopoly in operating systems primarily based on its erroneous conclusion that Microsoft had excluded Netscape from the OEM and Internet access provider ("IAP") distribution channels. (Id. at 10-17.) The court stated: "The fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a (S) 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under (S) 2." (Id. at 39.)

The court concluded that Microsoft's design of Windows 95 and Windows 98 to include built-in Web browsing functionality and Microsoft's refusal to permit OEMs to "reconfigure or modify" its copyrighted operating systems to hide access to that functionality reduced the likelihood that OEMs would preinstall Navigator on their new computers. (Id. at 11.) The court also found that "Microsoft adopted similarly aggressive measures to ensure that the IAP channel would generate browser usage share for Internet Explorer rather than Navigator." (Id. at 15.) The court held that Microsoft's agreements with Apple, ICPs and independent software vendors ("ISVs") "supplemented Microsoft's efforts in the OEM and IAP channels" (id. at 17), and that Microsoft also unfairly "impeded Java's progress" (id. at 19).

In holding that Microsoft had unlawfully maintained a monopoly, the district court branded as anticompetitive Microsoft's efforts "to maximize Internet Explorer's share of browser usage at Navigator's expense" at a time when Navigator enjoyed a substantial majority of usage share. (Id. at 10.) Indeed, the notion that Microsoft's desire to increase Internet Explorer's usage share somehow rendered its conduct anticompetitive was a recurring theme throughout the court's ruling. The court also concluded that conduct that was not itself anticompetitive could become unlawful when viewed together with other conduct. (Id. at 20-21.) "Viewing Microsoft's conduct as a whole," the court stated, "reinforces the conviction that it was predacious" by demonstrating that Microsoft induced third parties "to take actions that would help enhance Internet Explorer's share of browser usage at Navigator's expense." (Id. at 21.) By condemning vigorous competition by a new entrant into a purported market, the court evinced a profound misunderstanding of the antitrust laws.

4. Attempted Monopolization

The court's holding that Microsoft attempted to monopolize Web browsing software cannot be reconciled with its own findings of fact. For example, the court found that Microsoft's intent was to "demonstrate that Navigator would not become the standard" Web browsing software at a time when "Navigator seemed well on its way to becoming the standard." (Findings (P)(P) 133, 377.) Indeed, the court found that Navigator usage share was "above eighty percent in January 1996." (Id. (P) 360.) Yet, in its conclusions of law, the court determined that Microsoft's efforts to prevent Netscape from monopolizing Web browsing software established that Microsoft itself had an unlawful intent to monopolize because "there is no evidence that Microsoft tried" to prevent its efforts "from achieving overkill." (Conclusions at 23.) In so ruling, the court invoked the negligence standard in resolving the issue of specific intent:

While Microsoft's top executives never expressly declared acquisition of monopoly power in the browser market to be the objective, they knew, or should have known, that the tactics they actually employed were likely to push Internet Explorer's shares to those extreme heights.(Id. at 22 (emphasis added).)

F. The Final Judgment

The district court's April 3, 2000 order accompanying its conclusions of law stated that it would enter relief "following proceedings to be established by further Order of the Court." The court thereafter held two chambers conferences to discuss the procedures to be employed during the remedies phase of the trial. At those conferences, Microsoft stated that it could not take a position on the procedures to be followed until it received plaintiffs' request for relief. (Apr. 4, 2000 Tr. at 14-16, 18; Apr. 5, 2000 Tr. at 7-8.) The court responded that Microsoft's position was "fair" and "reasonable." (Apr. 4, 2000 Tr. at 15, 18; Apr. 5, 2000 Tr. at 8.) When asked by Microsoft whether it "contemplate[d] further proceedings of some kind or another" on remedies, the court replied, "I would assume that there would be further proceedings." (Apr. 4, 2000 Tr. at 8-9.) The court stated that it might "replicate the procedure at trial with testimony in written form subject to cross-examination." (Id. at 11.)

Microsoft proposed that it file a "summary response" shortly after receiving plaintiffs' proposed relief, which "would consist of three things: our objections to the government's proposal, our counterproposal and our submission to the court of our position on the procedure that should be employed in adjudicating the remedy question." (Apr. 5, 2000 Tr. at 6.) The court thereafter issued Scheduling Order No. 8, which called for Microsoft to submit only a "summary response" to plaintiffs' proposed relief consisting of the three items Microsoft had suggested.

On April 28, 2000, plaintiffs filed their proposed final judgment, together with a supporting memorandum and six declarations. Although such radical relief was not even hinted at in their complaints, plaintiffs (with the exception of two States, Illinois and Ohio) requested that Microsoft be broken up into two separate companies, one that would have Microsoft's operating systems and the other that would have Microsoft's applications and other products (including numerous operating system components).

The other provisions of plaintiffs' proposed final judgment were just as extreme and unwarranted as their breakup proposal. For example, plaintiffs requested that Microsoft be required to disclose proprietary information about its operating systems--including source code--to all who claim a desire to make their products "interoperate effectively" with Microsoft's operating systems, a group that includes all of Microsoft's competitors. Plaintiffs further requested that Microsoft be required to redesign all of its existing and future operating systems to enable OEMs and end users to substitute third-party software for components of the operating system, thus forcing Microsoft to offer new operating system features on an a la carte basis and severely hindering Microsoft's ability to improve its products. Moreover, like the breakup proposal, the scope of the injunctive relief requested by plaintiffs extended far beyond the case that was tried, encompassing products like Windows CE, Windows 2000 Server and Microsoft Office that are wholly outside the markets defined by the court.

In accordance with Scheduling Order No. 8, Microsoft filed its own proposed final judgment, its summary objections to plaintiffs' proposed final judgment and its recommendations for future proceedings on remedies. Microsoft also filed a motion for summary rejection of plaintiffs' breakup proposal, arguing that dismemberment of Microsoft is unwarranted as a matter of law. In its submission on future proceedings, Microsoft asserted that the nature and scope of the procedures required depended on the kinds of remedies the court was prepared to consider; the more extreme the remedies under consideration, the more discovery and the more time Microsoft would need to prepare for an evidentiary hearing on relief. Microsoft thus requested that if the court elected not to enter Microsoft's proposed final judgment, the court should enter a schedule providing for three to six months in which to conduct discovery and prepare for an evidentiary hearing, depending on which of three requested categories of relief the court intended to consider. Such additional proceedings were absolutely essential in this case because much of the relief requested by plaintiffs related to highly complex subjects such as Microsoft's addition of Kerberos support in Windows 2000 that were not even touched on at trial. Indeed, by filing six declarations with their proposed final judgment, plaintiffs implicitly acknowledged that the trial record was insufficient to support the sweeping relief they requested.

Following plaintiffs' submission of a reply in which they urged the district court to enter their proposed final judgment "forthwith," the court held a hearing on May 24, 2000. At the outset of that hearing, Microsoft stated its view that only two matters were before the court: Microsoft's motion for summary rejection of plaintiffs' breakup proposal and the court's consideration of a schedule for further proceedings to take evidence relating to plaintiffs' requested relief. (May 24, 2000 A.M. Tr. at 4.) Notwithstanding the prior discussions in chambers and the terms of Scheduling Order No. 8, the court again changed the rules to Microsoft's prejudice, responding, "I intend to proceed to the merits of the remedy." (Id. at 5.) The court also made clear that it was not interested in further submissions on remedies. When plaintiffs volunteered to submit a brief on a particular issue, the court responded, "I don't want any more briefs." (Id. at 34.)

At the conclusion of the hearing, Microsoft again asked if there would be further process on the issue of remedies, to which the court responded, "I'm not contemplating any further process." (May 24, 2000 P.M. Tr. at 33.) Microsoft then filed an offer of proof summarizing the anticipated testimony of sixteen individuals whom it would have called as witnesses at an evidentiary hearing on relief. Microsoft also stressed that if given an opportunity, it would have developed testimony from additional witnesses about the extreme adverse effects of plaintiffs' proposed final judgment. (Id. at 35-36.)

On May 26, 2000, plaintiffs submitted a revised proposed final judgment that made minor modifications to their initial proposal. Plaintiffs again urged the court to enter their proposed relief without any further proceedings. On May 31, 2000, Microsoft submitted objections to the form of plaintiffs' proposed decree, together with a supplemental offer of proof identifying seven additional witnesses whom Microsoft would have called at an evidentiary hearing. Plaintiffs responded to Microsoft's objections on June 5, 2000, agreeing to make only a few cosmetic changes to their proposed decree and rejecting all of the clarifications to the decree that they themselves had proffered in prior filings. Microsoft submitted a reply on June 6, 2000.

On June 7, 2000, the district court signed plaintiffs' proposed final judgment as ultimately proffered without a single substantive change. The court thus entered radical and unwarranted permanent injunctive relief in these actions without granting Microsoft leave to conduct discovery and without making findings of fact or creating an evidentiary record on the issue of remedies. In ordering the breakup of Microsoft--which, until the court entered its findings of fact, had the largest market capitalization in the world--the court did not even grant Microsoft leave to depose the six individuals who submitted declarations in support of plaintiffs' proposed remedies.

Together with its final judgment, the district court issued a remarkable six-page memorandum that purports to explain the basis for its entry of the sweeping relief requested by plaintiffs. The memorandum is bereft of even a single citation to case law or evidence. According to the court, "a structural remedy has become imperative" because "Microsoft does not yet concede that any of its business practices violated the Sherman Act." (Mem. & Order at 3.) Despite the court's criticism of Microsoft for being "unwilling to accept the notion that it broke the law" (id.), it should go without saying that Microsoft's exercise of its appellate rights provides no conceivable basis for imposing punitive sanctions.

Rather than finding that the judgment would increase competition, the court remarked that even "purportedly knowledgeable people" do not know what "may or may not ensue," and the court dismissed the notion of having an evidentiary hearing to explore that question because "testimonial predictions of future events" are "less reliable even than testimony as to historical fact." (Id. at 4.) In an astounding abdication of the judicial function, the court offered the following reason for its entry of the final judgment served up by plaintiffs:

Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider--and act in--the public interest; Microsoft is not. (Id. at 5 (footnote omitted).)

The court was even more blunt in the many press interviews it gave about the case, both before and after entry of final judgment. For instance, the Wall Street Journal quoted the court as giving the following explanation for its refusal to provide Microsoft with any process before entering relief: "[I]t's procedurally unusual to do what Microsoft is proposing--are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case." John R. Wilke, For Antitrust Judge, Trust, or Lack of It, Really Was the Issue, Wall St. J., June 8, 2000, at A1. And the Washington Post quoted the following explanation for why the court adopted plaintiffs' proposed relief without modification: "I am not an economist. I do not have the resources of economic research or any significant ability to be able to craft a remedy of my own devising." James V. Grimaldi, Reluctant Ruling for Judge, Wash. Post, June 8, 2000, at A1.

Perhaps most shocking, however, are the remarks attributed to the court in an article in The New York Times. When asked about the possibility of a breakup of Microsoft during a February 2000 interview--which was described as "a rare audience with a sitting judge during the course of a trial"--the court is quoted as saying, "I am not sure I am competent to do that." Joel Brinkley & Steve Lohr, Retracing the Missteps in the Microsoft Defense, N.Y. Times, June 9, 2000, at A1. The court apparently echoed that sentiment in a later interview. When asked why it had simply rubberstamped plaintiffs' draconian remedies, the court is quoted as responding, "I am not in a position to duplicate that and re-engineer their work. There's no way I can equip myself to do a better job than they have done." Id. at C9. Lastly, in a repudiation of the most fundamental tenet of American jurisprudence, the court is quoted as offering the following explanation for its rejection of Microsoft's pleas for an evidentiary hearing on relief, "I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." Id. at C8.

ARGUMENT

In determining whether a stay pending appeal is warranted, courts consider four factors: (i) the likelihood that the moving party will prevail on the merits, (ii) the prospect of irreparable injury to the moving party absent a stay, (iii) the possibility of harm to other parties if a stay is granted, and (iv) the public interest in granting the stay. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987); see also D.C. Cir. R. 8(a)(1). If the arguments for one factor are particularly strong, a stay may issue even if the arguments for other factors are less so. See CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995). Hence, "[a] stay may be granted with either a high probability of success and some injury, or vice versa." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). Here, all four factors strongly support issuance of a stay pending appeal.

I. Microsoft Will Prevail on the Merits.

As the preceding discussion makes clear, the proceedings below went badly awry from the outset. The district court's many serious substantive and procedural errors are fatal to its conclusion that Microsoft violated the antitrust laws and to the relief entered. Before listing some of the district court's more egregious errors, two general observations illustrate how misguided the decision below is.

First, the court's ruling condemns Microsoft's efforts to add support for Internet standards like HTML and HTTP to Windows in order to make the operating system relevant in the Internet era. The court found that "consumers in 1995 were already demanding software that enabled them to use the Web with ease," that "IBM had announced in September 1994 its plan to include browsing capability in OS/2 Warp [the principal challenger to Windows at the time] at no extra charge," and that "Microsoft had reason to believe that other operating-system vendors would do the same." (Findings (P) 140.) In such circumstances, adding Internet support to Windows cannot violate the antitrust laws, no matter what Microsoft's "intent" was in doing so. Indeed, Microsoft's addition of such functionality to Windows was but a single instance of a pervasive practice in high-technology industries--the improvement of a product through the integration of new functionality previously provided by separate products. See 147 F.3d at 951.

To hold that efforts to improve a product in response to consumer demand and competitive pressures and to distribute those improvements broadly to consumers violate the antitrust laws is to turn those laws on their head. The record here demonstrates that Microsoft's inclusion of Internet support in Windows made it easier for thousands of software developers to write Internet-enabled applications that rely on platform services provided by the Internet Explorer components of the operating system and for millions of consumers to access the Internet. Even the district court recognized that Microsoft's "inclusion of Internet Explorer with Windows at no separate charge increased general familiarity with the Internet and reduced the cost to the public of gaining access to it." (Findings (P) 408.)

At the same time, Microsoft did nothing to exclude Netscape from the marketplace. There is no claim that Navigator is incompatible with either Windows 95 or Windows 98; to the contrary, Netscape's Barksdale testified that Navigator is "perfectly interoperable" with Windows. (Oct. 22, 1998 P.M. Tr. at 51-52.) The court also found that Netscape had "access to every PC user worldwide," distributing 160 million copies of Navigator in 1998 alone and increasing its user base from 15 million to 33 million between 1996 and 1998. (Conclusions at 38.) Absent a showing of actual exclusion--precluded by these undisputed facts--no antitrust issue is even presented.

Second, accepting, arguendo, plaintiffs' theory of the case, there is no antitrust violation. Plaintiffs' theory was that Microsoft attempted to impede the distribution of Navigator because it threatened to reduce (through a long, speculative and unproven chain of causation) the hypothesized "applications barrier to entry" into the market for "Intel-compatible PC operating systems." There is no dispute, however, that Microsoft entered the alleged market for Web browsing software at a time when Netscape was dominant. It is also undisputed that Microsoft's efforts to develop, promote and distribute Internet Explorer resulted in lower prices, greater innovation and increased distribution of Web browsing software. In fact, the district court found that Microsoft's actions "contributed to improving the quality of Web browsing software, lowering its cost, and increasing its availability, thereby benefiting consumers." (Findings (P) 408.) Unambiguously procompetitive conduct in one supposed market does not become an antitrust violation simply because that conduct allegedly had collateral effects in another supposed market. As Areeda and Hovenkamp have observed:

[A]ggressive but non-predatory pricing, higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like are welcomed by the Sherman Act. They are therefore not to be considered "exclusionary" for (S) 2 purposes even though they tend to exclude rivals and may even create monopoly.

III Phillip E. Areeda & Hebert Hovenkamp, Antitrust Law (P) 651b, at 76 (1996).

In holding that Microsoft violated the antitrust laws by improving Windows and distributing broadly the operating system's Internet Explorer technologies, the district court committed many serious legal errors, several of which are summarized below:

. The district court erroneously held that Microsoft's inclusion of Internet support in Windows 95 and Windows 98 constituted an unlawful tie. In upholding plaintiffs' "technological tying" claim, the trial court became the first court ever to sustain such a challenge to a single, integrated product. As this Court observed, "courts have recognized the limits of their institutional competence and have on that ground rejected theories of `technological tying.'" 147 F.3d at 949. Similarly, in entering relief that intrudes broadly on Microsoft's product design decisions based on the purported tying violation, the district court disregarded this Court's warning about the "undesirability of having courts oversee product design." Id. at 948. The district court was able to reach this unprecedented result only by refusing to apply the test articulated by this Court in the consent decree case and by other courts in cases involving "technological tying" claims. As the court's handpicked amicus curiae stated, under this Court's test, "Microsoft must prevail." (Brief of Lawrence Lessig at 17.) By instead applying a consumer-demand test, the court adopted a standard that would essentially freeze product development. As this Court explained, focusing on consumer demand "seems sure to thwart Microsoft's legitimate desire to continue to integrate products that had been separate--and hence necessarily would have been provided in distinct markets." 147 F.3d at 953.

. The district court erroneously held that agreements with distributors that did not violate Section 1 of the Sherman Act because they did not foreclose Netscape's access to consumers could nevertheless violate Section 2. The court concluded that "[t]he fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a (S) 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under (S) 2." (Conclusions at 39.) That conclusion is contrary to settled law. E.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236-38 (1st Cir. 1983) (Breyer, J.). An act is anticompetitive under Section 2 only if it has a significant exclusionary impact. U.S. Healthcare, Inc. v. Healthsources, Inc., 986 F.2d 589, 597-98 (1st Cir. 1993). Agreements that do not substantially foreclose competitors from the marketplace do not have such an exclusionary impact.

. The district court erroneously held that the provisions in Microsoft's license agreements with OEMs that do not permit OEMs to modify Microsoft's copyrighted operating systems without Microsoft's permission violate Section 2 of the Sherman Act by foreclosing distribution of Navigator. In refusing to grant OEMs a broad license to modify Windows by removing or hiding features of the operating system, Microsoft has simply exercised rights granted to it by federal copyright law. As the holder of valid copyrights, Microsoft is entitled to require its distributors--including OEMs--to deliver Windows to users as Microsoft created it. See WGN Continental Broad. Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982) (Posner, J.); Gilliam v. ABC, 538 F.2d 14, 21, 23 (2d Cir. 1976). Because the challenged provisions of Microsoft's OEM license agreements simply restate, and do not enlarge upon, Microsoft's rights under federal copyright and trademark law, they do not violate the antitrust laws. See Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999); In re Indep. Serv. Orgs. Antitrust Litig., 989 F. Supp. 1131, 1134 (D. Kan. 1997), aff'd, 203 F.3d 1322 (Fed. Cir. 2000). In any event, the court found that "Microsoft's license agreements have never prohibited OEMs from pre-installing programs, including Navigator, on their PCs and placing icons and entries for those programs on the Windows desktop and in the `Start' menu." (Findings (P) 217.)

. The district court erroneously held that Microsoft possesses monopoly power in a relevant product market. The market defined by the court is too narrow because it excludes the most serious threats faced by Microsoft's operating systems, including the competing platform technologies that were the objects of the allegedly anticompetitive conduct in this case. In addition, the court did not find that Microsoft has the power unilaterally to raise prices in or exclude competition from the operating system business, the touchstone of monopoly power. See, e.g., Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989); Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986). In fact, the court found that the evidence was insufficient to establish that Microsoft ever charged a "monopoly price" for Windows. (See Findings (P) 65.)

. The district court erroneously held that Microsoft maintained a monopoly through anticompetitive conduct. The general theme running through the court's ruling is that Microsoft "set out to maximize Internet Explorer's share of browser usage at Netscape's expense." (Conclusions at 10.) That says nothing about whether Microsoft engaged in anticompetitive conduct because "[t]he intent to preserve or expand one's market share is presumptively lawful." MCI v. AT&T, 708 F.2d 1081, 1113 (7th Cir.), cert. denied, 464 U.S. 891 (1983). The district court's condemnation of Microsoft's conduct was all the more misguided given that Microsoft was a new entrant into a line of business dominated by Netscape. Under these circumstances, efforts to maximize Microsoft's share at the expense of Netscape were procompetitive. Indeed, the court found that "[t]he debut of Internet Explorer and its rapid improvement gave Netscape an incentive to improve Navigator's quality at a competitive rate." (Findings (P) 408.)

. The district court erroneously held that Microsoft unlawfully maintained a monopoly even though plaintiffs failed to establish the requisite causal connection between the alleged anticompetitive conduct and Microsoft's maintenance of a purported monopoly in operating systems. "To find that a monopolist's acts may improperly impair rivals' opportunities does not say how substantial a contribution that act has made or may make to achieving or maintaining the monopoly." III Areeda & Hovenkamp, supra (P) 651c, at 77. An antitrust plaintiff "has the burden of pleading, introducing evidence, and presumably proving by a preponderance of the evidence that [anticompetitive] behavior has contributed significantly to the achievement or maintenance of the monopoly." Id. (P) 650c, at 69. The district court found that "[t]here is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems." (Findings (P) 411.) That finding is fatal to plaintiffs' monopoly maintenance claim.

. The district court erroneously held that acts that are not anticompetitive under controlling legal principles can somehow become illegal when viewed in combination with other acts that are not anticompetitive. Relying on Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the court ruled that conduct that does not "independently satisfy the second element of a (S) 2 monopoly maintenance claim" can become anticompetitive when viewed together with other conduct. (Conclusions at 20.) In Intergraph, the Federal Circuit recently rejected just such a reading of Continental Ore. 195 F.3d at 1366-67. Contrary to the district court's ruling, "once a claim is found to be without merit, such a claim cannot be used as a basis for finding other claims to constitute a violation of the antitrust laws." Southern Pac. Communications Co. v. AT&T, 556 F.

Supp. 825, 888 n.69 (D.D.C. 1983), aff'd, 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985). Courts have "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act." City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981).

. The district court erroneously held that Microsoft possessed a specific intent to monopolize Web browsing software. In upholding plaintiffs' attempted monopolization claim, the court stated that Microsoft attempted to "expand[] Internet Explorer's share of browser usage--and simultaneously depress[] Navigator's share--to an extent sufficient to demonstrate to developers that Navigator would never emerge as the standard software employed to browse the Web." (Conclusions at 22-23.) That conclusion is patently insufficient to establish a specific intent to monopolize. "[S]pecific intent in this context refers to a purpose to acquire monopoly power by driving one's rival from the market by exclusionary or predatory means." Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 585 (D.C. Cir. 1984). At most, Microsoft intended to compete vigorously with Netscape to prevent Navigator from achieving a dominant position in the eyes of developers. The antitrust laws encourage, rather than proscribe, such an intent. Ball Mem'l Hosp., 784 F.2d at 1338-39.

. The district court erroneously held that Microsoft's discussions with Netscape in June 1995--when Microsoft allegedly presented a "market allocation proposal"--established a dangerous probability of monopolization, relying on United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), cert. denied, 474 U.S. 1001 (1985). (Conclusions at 24.). Even plaintiffs' witness Barksdale suggested that whatever proposal Microsoft made in June 1995 was vague and in futuro (Oct. 27, 1998 P.M. Tr. at 69-71), and there is no dispute that Netscape rejected Microsoft's alleged proposal (see, e.g., Findings (P)(P) 86-87). Moreover, the June 1995 discussions related to collaboration in the development of new products--a necessary and usually procompetitive activity--not price fixing. Indeed, Microsoft was not even a participant in the purported "Internet browser market" until it released Windows 95 in August 1995. The facts surrounding Microsoft's June 1995 discussions with Netscape are thus a far cry from those at issue in American Airlines, which the court described as "uniquely unequivocal" and "uniquely consequential." 743 F.2d at 1119.

. The district court erroneously imposed extreme and punitive relief unrelated to the violations found in this case. It is well-settled that "[c]ourts are not authorized in civil proceedings to punish antitrust violators" and that relief "must not be punitive." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961). Structural remedies are "not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available." Timken Roller Bearing Co. v. United States, 341 U.S. 593, 603-04 (1951) (Reed, J., concurring). The draconian relief imposed by the court--which includes, but is not limited to, the only breakup of a unitary company ever ordered under Section 2 outside the context of negotiated consent decrees--bears no relation whatsoever to the antitrust violations found. What is more, the relief ordered is punitive in concept and effect, extending to products and markets far removed from those in issue at trial, and thus is unwarranted as a matter of law. See United States v. National Lead Co., 332 U.S. 319, 351-53 (1947).

. The district court erroneously entered a sweeping permanent injunction, including a breakup of Microsoft, over Microsoft's strenuous objection, without conducting an evidentiary hearing on relief or affording Microsoft an opportunity to present evidence. The only basis proffered by plaintiffs in support of the relief ultimately entered were six hearsay declarations untested by cross-examination. Such a "record" cannot provide a basis for awarding permanent injunctive relief. See Fed. R. Civ. P. 43(a). Nor did the district court make corresponding findings of fact and conclusions of law regarding the terms of the decree. In sum, there was no competent adjudication of relief, which by itself requires that the judgment be vacated.

In light of the numerous legal errors and procedural irregularities that pervaded the proceedings below, it is inconceivable that the judgment will withstand appellate review. This is reason alone to stay the judgment pending appeal.

II. Microsoft Will Suffer Irreparable Injury Absent a Stay.

Although the district court's judgment provides that the actual dismemberment of

Microsoft is stayed pending appeal, the judgment's other extreme provisions take effect 90 days after entry.

Absent a stay, those provisions will inflict massive and irreparable injury on Microsoft, possibly resulting in the company's demise as an effective competitor in the software industry. Indeed, the court itself recognized in its June 7, 2000 memorandum that absent appellate intervention, the relief entered will quickly become "irreversible as a practical matter." (Mem. & Order at 3.)

The non-breakup provisions of the judgment reflect three primary objectives, none of which is warranted by the violations found by the court and none of which serves a legitimate purpose under the antitrust laws. First, the judgment reflects a profound hostility to Microsoft's efforts to improve Windows by adding new features and functionality. The judgment treats Windows not as a single product, but rather as a combination of (i) software that fits plaintiffs' narrow (and static) definition of an "operating system" and (ii) an indeterminate set of separate technologies (dubbed "middleware products") that OEMs may elect to turn on or off, or delete altogether, as they choose. By prohibiting Microsoft from maintaining the consistency of Windows as a platform for software development, the judgment will destroy the principal value of a product that Microsoft has spent billions of dollars developing and that has played a major role in the personal computer revolution. Second, for the proffered purpose of promoting "interoperability," the judgment will effect a confiscation of Microsoft's intellectual property in its operating systems by requiring disclosure of proprietary information--an extreme remedy that is unrelated to any of the claims alleged in the complaints and that applies to products that were not even part of this case. Third, the judgment will effectively compel Microsoft to treat all OEMs and ISVs, among others, exactly the same in all respects, whether or not such third parties have the capability or desire to work closely with Microsoft. This will make it virtually impossible for Microsoft to continue to collaborate with a broad array of OEMs and ISVs to develop and market innovative new technologies.

Some examples of the serious injury that will befall Microsoft if a stay is not granted are discussed below.

- The judgment will require Microsoft to disclose large amounts of proprietary information about its operating systems and other products to competitors, the ultimate penalty for a company whose business is based entirely on intellectual property. Paragraph 3.b of the judgment will require Microsoft to disclose the internals of important products to all software developers, hardware vendors and OEMs, a group that includes literally everyone in the computer industry. Even worse, paragraph 3.b will require Microsoft to permit anyone in the industry, including all of Microsoft's competitors, "to study, interrogate and interact" with the source code for Microsoft's operating systems, which are replete with valuable trade secrets and constitute Microsoft's "crown jewels." Although the judgment purports to limit the purpose of such source code access to development of products that "interoperate effectively" with Windows, that restriction is hopelessly vague and thus would be impossible to enforce. In short, the judgment will require Microsoft to disclose much of its intellectual property--the lifeblood of the company--without compensation, thereby undermining Microsoft's incentive to innovate. Once that intellectual property is disclosed, the loss will be irretrievable. FMC Corp. v. Taiwan Tainan Giant Indus. Co., 730 F.2d 61, 63 (2d Cir. 1984) ("A trade secret once lost is, of course, lost forever.").

- The judgment will result in a direct and immediate intrusion into Microsoft's product design decisions. For instance, paragraph 3.g will prohibit Microsoft from adding most new features (not just Web browsing functionality) to its operating systems unless it provides OEMs and end users with a means of removing end user access to those new features. The judgment thus essentially draws a line around Windows, preventing its evolution as a software development platform. The judgment also ignores this Court's admonition about the "undesirability of having courts oversee product design" 147 F.3d at 948, as well as its statement that "by allowing OEMs to conceal IE, rather than refuse it, the remedy fits poorly with the Department's tying theory," id. at 941 n.3. The effect of this interference with Microsoft's development of new products during the pendency of an appeal will be irremediable even if Microsoft prevails.

. The judgment will result in fragmentation of the Windows platform. A primary benefit of Windows is that it provides a consistent platform for software developers and users. The net result of paragraphs 3.a.iii(4), 3.f and 3.g will be to undermine the integrity of Windows as a platform so that neither software developers nor end users can rely on crucial functionality being present. For example, paragraph 3.f will require Microsoft to permit OEMs to remove software code from Windows if Microsoft also distributes that code separately from the operating system through various enumerated channels, a routine practice in the software industry. If software code that comprises Windows is not present on a machine because the OEM removed it, then applications that rely on that software code will not function properly or at all.

. The judgment will require Microsoft to relinquish its rights under federal trademark and copyright laws. Paragraph 3.a.iii(4) will require Microsoft to permit OEMs to substitute third-party software for components of Microsoft's copyrighted Windows operating systems. Not only will Microsoft be compelled to allow OEMs to create derivative works of Windows; the judgment also will permit OEMs to market their modified versions of the operating system using Microsoft's trademarks and logos--denying Microsoft the ability to control what is marketed to customers under the valuable Windows trademark. The damage to Microsoft's copyright and trademark rights will not be curable even if Microsoft prevails on this appeal.

. The judgment will prevent Microsoft from releasing new and innovative operating systems in a timely manner, and may require Microsoft to halt distribution of its currently shipping operating systems. Paragraph 3.g will prohibit Microsoft from "distribut[ing]" any operating system that does not comply with various amorphous design specifications six months after the effective date of the judgment. This provision thus will require Microsoft to reengineer all of its currently shipping operating systems (including Windows 98 and Windows 2000 Professional), as well as soon-to-be-released operating systems like Windows Millenium. It could take several years for Microsoft to redesign those products to remove all cross-dependencies among components that fall within the judgment's vague and open-ended definition of "middleware," depending on how that term is construed. As a result, Microsoft will be unable to release Windows Millenium later this year as scheduled, and it may have to halt distribution of its currently shipping operating systems six months after the judgment becomes effective. Plaintiffs' only response to this serious concern is to note that "Microsoft will have nine months from entry of the Final Judgment to prepare the modified version[s]" of its operating systems required by paragraph 3.g. (Pls.' Response to MS Comments at 18.) More fundamentally, requiring Microsoft to devote the lion's share of its development resources to reengineering its existing products--which Microsoft will need to begin doing immediately absent a stay--will greatly delay Microsoft's release of many other new products.

. The judgment will require Microsoft to modify its existing license agreements with the top 20 OEMs, wreaking havoc with Microsoft's relationships with those companies. Paragraph 3.a.ii compels Microsoft to license Windows to those OEMs "pursuant to uniform license agreements with uniform terms and conditions." Because that paragraph also prohibits Microsoft from enforcing any license provision inconsistent with the judgment, Microsoft will be required to renegotiate existing license agreements with those OEMs within 90 days of entry of the judgment--although why any of them would agree to forego the benefits of their existing contracts is unclear.

. The judgment will make it virtually impossible for Microsoft to work with and assist software developers and hardware vendors seeking to create products for use with Windows. Paragraph 3.d.i provides that Microsoft shall not take "any action affecting" any software developer or hardware vendor "based directly or indirectly, in whole or in part, on any actual or contemplated action" by such party to "use, distribute, promote, or support any Microsoft product." Such regulation of Microsoft's relationships with software developers and hardware vendors will block the sort of collaboration that has facilitated the creation of large numbers of products compatible with Windows.

- The judgment will prevent Microsoft from entering into routine cross-promotional and joint development agreements, even plainly procompetitive ones. Given the judgment's broad definitions of terms such as "platform software" and "middleware," paragraph 3.e will forbid Microsoft from entering into any agreement that in any way limits a third party's development, distribution, promotion or use of any non-Microsoft software. Similarly, paragraph 3.h will proscribe routine interactions with other software developers. Plaintiffs' only response to these concerns is that they "intend to enforce the provision only against anticompetitive agreements." (Pls.' Response to MS Comments at 19.) The scope of an injunction cannot be based on the purported intentions of the party charged with enforcing it.

- The judgment will require Microsoft to submit a "proposed plan of divestiture" not later than four months after its entry. Requiring Microsoft to submit such a plan will cause a huge diversion of effort by Microsoft's executives at a critical time when Microsoft is attempting to change its entire business and programming model to remain competitive in the Internet age. This diversion (and the adverse effect on employee morale when the plan is submitted) will be entirely pointless even in the event that the decreed breakup is affirmed--given the lightening pace of change in the software industry, any "proposed plan of divestiture" created four months after entry of judgment will be out of date when it comes time actually to implement the plan.

- The judgment will require Microsoft to freeze its internal organization. Paragraph 1.d.i compels Microsoft to "preserve, maintain, and operate the Operating System Business and the Applications Business as separate . . . as they were on April 27, 2000." This requirement will make it difficult for Microsoft to adapt its organization to the ever-changing needs of its business. Reorganizations to realign product units across the imaginary boundary decreed in the judgment have been a routine part of Microsoft's business and are essential to ensure that needed resources are brought to bear on the competitive challenges faced by the company. Freezing Microsoft's internal organization will result in stagnation, with fewer products being brought to market.

In sum, compliance with the terms of the judgment, which touch upon virtually every aspect of Microsoft's business, will be impossible despite Microsoft's best efforts. The provisions of paragraph 3, read in conjunction with the definitions of the numerous defined terms (many of which are contrary to normal industry usage), are hopelessly vague and ambiguous. Moreover, the distraction that inevitably will flow from efforts to comply with the judgment will damage Microsoft's most important asset--its ability to recruit, retain and motivate creative people. As an intellectual property firm, Microsoft's entire business depends on that asset. The judgment also will prevent Microsoft from working closely with other companies in the industry to deliver innovative computing solutions unless Microsoft is willing to work with all companies--including its competitors--on identical terms. Simply stated, Microsoft cannot operate its business under the terms of the judgment.

III. No Other Parties Will Be Harmed by a Stay.

No other parties interested in the proceeding will be harmed if the Court grants a stay, much less suffer injury that would outweigh the serious and irreparable injury Microsoft will suffer absent a stay. Plaintiffs cannot claim that they themselves will be harmed in any respect by a stay. Nor can they contend that other interested parties--i.e., the Microsoft competitors that convinced them to bring this lawsuit and seek draconian structural relief--will be injured in any legal sense if relief in these actions is stayed pending appeal.

Nothing in the district court's findings of fact and conclusions of law suggests that any other party will suffer immediate, tangible harm if the relief in these actions is stayed pending appeal. The vague "consumer harm" identified in the court's findings consists primarily of speculation about unspecified innovations that might have come to market and competition that might have existed but for Microsoft's alleged conduct. (Findings (P)(P) 411-12.) Yet, the court determined that there was insufficient evidence to conclude that, absent Microsoft actions, greater operating system competition would exist today. (See, e.g., id. (P) 411.) Similarly, the antitrust violations found by the court focus primarily on Microsoft's alleged efforts to restrict Netscape's access to the OEM and IAP channels of distribution over a very limited period of time. (Conclusions at 10-18.) But the court also found that Netscape was--and is--able to distribute Navigator broadly through other channels of distribution to "every PC user worldwide" (id. at 38), and many of the agreements challenged by plaintiffs have since expired and are not being renewed by Microsoft (Findings (P)(P) 269, 331). There is thus no basis in the district court's ruling to suggest that another party will go out of business or suffer some other irreparable injury unless the relief entered in these actions takes effect immediately.

In contrast to the vague and speculative harm to consumers and competitors discussed in the court's findings, if the judgment is not stayed, Microsoft, its employees, its shareholders, its business partners and customers and the consuming public will suffer certain, definite and immediate harm. That harm clearly outweighs any speculative injury that others with an interest in the proceedings might suffer if a stay is granted.

IV. The Public Interest Weighs Strongly in Favor of a Stay.

The public interest requires a stay of the judgment pending appeal. The devastating effects of the judgment will not be felt by Microsoft and its employees and shareholders alone. Tens of thousands of computer manufacturers, software developers, system integrators and resellers that have built their entire businesses on Windows, as well as the millions of consumers who use Microsoft's products, will also suffer grievous injury absent a stay. Indeed, the entire United States economy may suffer if Microsoft is irreparably injured while it prosecutes this appeal. Some, but by no means all, of the ways in which the public will suffer absent a stay of the judgment pending appeal are described below.

- The public will suffer serious and far-reaching harm if the Windows platform begins to fragment. Millions of computer users and thousands of software developers depend on the consistency and stability of the Windows platform. Paragraphs 3.a.iii, 3.f and 3.g.i of the judgment threaten to destroy the consistency and stability of Windows by giving OEMs broad latitude to modify the operating system and yet market their modified versions using the Windows logo and trademark. If the Windows platform begins to fragment due to these modifications, applications designed to run on Windows will no longer work on some or all versions of the operating system, imposing significant costs on both software developers and consumers.

- The public will suffer irreparable harm if Microsoft cannot develop and release new products in a timely manner. Requiring Microsoft to devote vast resources to redesigning its existing operating systems and otherwise attempting to comply with the provisions of the judgment will greatly retard Microsoft's ability to develop innovative products like the "Pocket PC," the "Tablet PC," the "E-book" reader and the "X-Box" game console. That distraction also will impair Microsoft's ability to pursue its major initiative for the next competitive era--Next Generation Windows Services. To be sure, Microsoft's competitors will benefit if Microsoft's ability to innovate is impeded and its intellectual property is disclosed, but consumers and the economy will not. In addition, Microsoft is scheduled to release its latest consumer operating system, Windows Millenium, later this year. OEMs, software developers and retailers are already counting on this release to help stimulate demand for their products in the critical Christmas season. If Microsoft is required to redesign Windows Millenium in accordance with the judgment, the release of that product will be delayed for many months.

- The public will suffer severe adverse consequences if Microsoft is required to halt distribution of Windows six months after the judgment becomes effective. Despite plaintiffs' unfounded assurances to the contrary, Microsoft cannot redesign all of its existing operating systems such as Windows 95, Windows 98 and Windows 2000 Professional in accordance with the requirements of paragraph 3.g.i in the six-month period provided. If Microsoft were forced to halt distribution of those operating systems, the worldwide personal computer industry would be paralyzed, causing severe economic dislocation.

- Innovation by software developers, hardware vendors and OEMs will be reduced if the judgment takes effect. Paragraphs 3.a and 3.d seek to regulate Microsoft's relationships with companies creating products that are compatible with Windows. By preventing Microsoft from providing information to any software developer, hardware vendor or OEM unless Microsoft provides the same information to everyone else in the industry, including companies creating products for competing operating systems, the judgment will limit the amount and kind of information that Microsoft can provide to companies with the resources and motivation to work closely with Microsoft on joint development projects. The judgment thus will block the sort of cooperative efforts that provide major benefits to consumers by producing a wide range of new technologies.

There can be no doubt that the public interest weighs heavily in favor of a stay. Even plaintiffs admit that the judgment will have profound and uncertain effects on the high-technology sector of the United States economy. There is no reason to subject the Nation's economic well being to such risks before this Court has had an opportunity to review the fatally flawed decision below.

CONCLUSION

The judgment is the culmination of a proceeding permeated by serious substantive and procedural errors, and it imposes harsh and unsustainable burdens on Microsoft, the software industry and the public. The Court should stay the judgment in its entirety pending this appeal.
Respectfully submitted,

____

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VERIFICATION

I, William H. Neukom, Senior Vice President, Law and Corporate Affairs of Microsoft Corporation, state that I have read the foregoing Motion of Appellant Microsoft Corporation for a Stay of the Judgment Pending Appeal, that I know the contents thereof, and that the statements contained in the motion are true of my own knowledge.

I declare under penalty of perjury under 28 U.S.C. (S) 1746 that the foregoing is true and correct.
Executed at Redmond, Washington this 13th day of June, 2000.

____
William H. Neukom

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2000, I caused a true and correct copy of the foregoing Motion of Appellant Microsoft Corporation for a Stay of the Judgment Pending Appeal to be served by facsimile (without the accompanying three volumes of exhibits) and by hand (with the accompanying three volumes of exhibits) upon:

Phillip R. Malone, Esq.
Antitrust Division
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Bradley P. Smith

EXHIBIT 99.5

United States Court of Appeals
For The District of Columbia Circuit

No. 00-5212 September Term, 1999
98cv01232

United States of America,
Appellee

v.

Microsoft Corporation
Appellant

BEFORE: Edwards, Chief Judge; Silberman*, Williams, Ginsburg, Sentelle, Henderson*, Randolph, Rogers, Tatel and Garland*, Circuit Judges

O R D E R

In view of the exceptional importance of these cases and the fact that the number of judges of this court disqualified from participation as a practical possibility precludes any en banc rehearing of a panel decision, it is

ORDERED, sua sponte, by the en banc court that these cases and all motions and petitions filed in these cases be heard by the court sitting en banc. Parties shall hereafter file an original and nineteen copies of all pleadings and briefs submitted.

Per Curiam

FOR THE COURT:

/s/ Mark J. Langer

Mark J. Langer, Clerk

*Circuit Judges Silberman, Henderson, and Garland took no part in the consideration and issuance of this order, and they will take no part in any future consideration of matters before the court involving these cases.

EXHIBIT 99.6

Microsoft Files Notice of Appeal and
Motion for Stay

Appeal Will Point Out "Serious Substantive and Procedural Errors"; Company Asks Court of Appeals to Stay Remedies While Appeal Is Pending

REDMOND, Wash. -- June 13, 2000 -- Microsoft Corp. today filed its notice of appeal and asked the U.S. Court of Appeals to stay all provisions of the U. S. District Court's June 7, 2000, final judgment pending resolution of the appeal process.

"Microsoft is looking forward to the next phase of this case, and we are optimistic that the appellate courts will reverse the recent ruling," said Steve Ballmer, Microsoft president and CEO. "Obviously, we will comply with any final order in this case, but we believe this judgment is both wrong and unfair. We believe the appellate courts will recognize that Microsoft's product innovation is the heart and soul of competition in the high-tech industry."

The company filed a 39-page brief seeking a stay of the June 7 ruling. The company will file a more detailed brief on the merits of its appeal in the future, based on a schedule established by the court.

In Wednesday's filing, the company argues that reversal of the district court judgment is necessary "based on an array of serious substantive and procedural errors that infected virtually every aspect of the proceedings below. These flaws culminated in the entry of unprecedented relief that extends far beyond the case that was presented, without affording Microsoft an evidentiary hearing." (Filing at p. 2.)

"We've created a world-class technology team here at Microsoft. For 25 years, our team has worked to deliver widespread benefits to the economy and to consumers. This ruling says to Microsoft and other creators of intellectual property --the government can take what you have created and give it to others if you are too successful or too popular," Ballmer said.

Microsoft also noted that many of the district court's factual findings are clearly erroneous and that the court ignored unchallenged evidence presented by Microsoft on many key issues. While the company will provide more extensive examples when it files its detailed appeal papers, the stay brief cites several examples in which the district court erred, because it:

- Failed to address evidence submitted by Microsoft showing why the company did not charge consumers a separate fee for the Internet Explorer improvements to Windows, a practice that clearly benefited software developers and consumers.

- Failed to address detailed and unrefuted evidence submitted by Microsoft of the many benefits from the design of Windows with integrated Internet support that cannot be duplicated by combining an operating system with a standalone browser like Netscape Navigator.

- Failed to address the fact that Navigator was distributed on 22 percent of shipments of new personal computers and thus was not foreclosed from the OEM channel of distribution even though this fact was included in a third-party document that the court relied upon for other reasons.

"The factual errors are the tip of the iceberg," said Bill Neukom, Microsoft's executive vice president for law and corporate affairs. "The district court's judgment should also be stayed and its Findings of Fact and Conclusions of Law should be reversed because it misapplied longstanding legal precedent and presided over a pretrial process and a trial that did not afford Microsoft a fair opportunity to defend itself." As part of its analysis of the district court's legal conclusions, Microsoft notes the following:

- The district court declined to apply the legal test for technological tying that was previously articulated by the court of appeals and reflects prior court precedents. Instead, the district court formulated its own test that it said was based on U.S. Supreme Court precedents, despite the fact that the court of appeals considered and rejected the applicability of those specific precedents in its June 1998 decision in favor of Microsoft on the very same issue.

- The district court misapplied a fundamental tenet of the antitrust laws --confusing anticompetitive conduct with pro-competitive conduct. In particular, the court improperly overlooked the pro-competitive, pro-consumer impact of Microsoft's efforts to compete broadly with Netscape by improving Windows to make it relevant in the Internet age and distributing Internet Explorer broadly, particularly in view of the fact that Netscape Navigator held more than 80 percent of the browser usage share in 1996 (according to the court). Microsoft's actions directly benefited consumers by lowering the price, increasing the availability and accelerating the development of browsing technology, as the court found.

In its filing today, Microsoft asks the court of appeals to stay the judgment so that its extreme regulations will not be imposed while the court hears the appeal. On June 7, the district court entered the government's proposed final judgment without a single substantive change and without giving Microsoft the opportunity to call witnesses to testify about the adverse impacts of the government's proposal. According to Microsoft's filing, "The provisions that become effective on September 5, 2000 absent a stay from the Appellate Courts would force Microsoft to:

- disclose its valuable intellectual property -- including source code -- to competitors,

- interfere with Microsoft's release of new products,

- require the company to redesign all of its operating systems within 6 months of the effective date of the judgment date,

- impose price controls on the company,

- and make it difficult for Microsoft to deliver on its vision for the next-generation of Web-based software services.

"The effect of these provisions will be devastating, not only to Microsoft, but also to its employees, shareholders, business partners and customers, and could have a significant adverse impact on the nation's economy, " the Microsoft filing notes. "A stay pending appeal is necessary to prevent these far-reaching and irreversible consequences of a profoundly flawed ruling." (Filing at p. 3.) The Department of Justice has indicated that it intends to ask Judge Jackson to certify the case for direct appeal to the U.S. Supreme Court. The U.S. Supreme Court has complete discretion on whether it will accept jurisdiction of the case.

"We want to resolve this case as quickly as possible. We believe we have a winning legal case, regardless of where the case goes. Given the enormous procedural and factual irregularities throughout this trial record, we believe the court of appeals is the appropriate next step," Neukom said. "In the past 26 years, only two cases have bypassed the appeals court and gone directly to the U.S. Supreme Court, and both of those cases involved very narrow issues of law and the parties were united in seeking immediate U.S. Supreme Court review."

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