

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 98-1233 (CKK)
	)	
MICROSOFT CORPORATION,	)	
	)	
Defendant.	)	Next Court Deadline: March 8, 2002
	)	Status Conference

**PLAINTIFF LITIGATING STATES’  
FIRST AMENDED PROPOSED REMEDY**

Pursuant to this Court’s Scheduling Order of September 28, 2001, Plaintiff States California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, West Virginia and the District of Columbia (the “Litigating States”) submitted their proposals for remedial relief on December 7, 2001. Based upon additional information gained through the discovery process in this matter, and in response to a number of interpretations and misinterpretations of the original December 7, 2001 draft, the Litigating States hereby submit their First Amended Proposed Remedy, in an attempt to clarify the scope and intent of the remedy they propose to address Microsoft’s unlawful maintenance of its monopoly in violation of Section 2 of the Sherman Act.

The explanations set forth below incorporate both the text from the Litigating States' December 7, 2001 filing and the rationale for the major clarifications now being proposed.<sup>1</sup>

## Introduction

A unanimous *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's conclusion that Microsoft Corporation ("Microsoft") unlawfully maintained its monopoly power by suppressing emerging technologies that threatened to undermine its monopoly control of the personal computer operating system market. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert denied*, 122 S. Ct. 350 (2001). The key to Microsoft's monopoly maintenance was the use of its monopoly power to enhance and maintain what the Court of Appeals called the "applications barrier to entry." Computer operating systems can compete successfully only if they provide a platform for the software applications that consumers want their computers to perform; but software developers naturally prefer to write applications for operating systems that already have a substantial consumer base. The applications barrier to entry, coupled with Microsoft's 90% plus market share, gave Microsoft the power to protect its "dominant operating system irrespective of quality" and to "stave off even superior new rivals." *Id.* at 56.

During the mid-1990s, Microsoft was confronted with a potential threat to the applications barrier to entry, and thus to its monopoly power, in the form of two

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<sup>1</sup> The proposed text of the remedial order appears in italics throughout this document. The full text of the amended proposed remedial order is attached as Exhibit A. Attached as Exhibit B is a red-line version of the remedial

new products, Netscape's Internet browser, known as Navigator, and Sun Microsystems' Java technologies. Recognizing the threat posed by these middleware products (*i.e.*, software that can itself be a platform for applications development), Microsoft aggressively and unlawfully prevented these rivals from achieving the widespread distribution they needed to attract software development and ultimately make other platforms meaningful competitors with Microsoft's Windows operating system.

The Court of Appeals catalogued an extensive list of anticompetitive, exclusionary acts by which Microsoft artificially bolstered the applications barrier to entry, including commingling the software code for its own middleware with that of its monopoly operating system, thereby eliminating distribution opportunities for competing middleware; threatening to withhold and withholding critical technical information from competing middleware providers, thereby allowing Microsoft middleware to obtain significant advantages over its rivals; threatening to withhold porting of critical Microsoft software applications and financial benefits from those who even considered aiding its rivals; contractually precluding OEMs and ultimately end-users from the opportunity to choose competitive software; and even deceiving software developers to conceal the fact that the software they were writing would be compatible only with Microsoft's platform.

"The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a

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Continued ...

order indicating all of the changes from the original.

remedy adequate to redress it.” *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). As the Court of Appeals held, “a remedies decree in an antitrust case must seek to ‘unfetter a market from anticompetitive conduct,’ to ‘terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.’” *Microsoft*, 253 F.3d at 103 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)) (citation omitted).

Consistent with these principles, any remedy must prevent Microsoft from continuing the practices it used to artificially enhance and protect the applications barrier to entry – prohibiting, for example, the types of deals with third parties that cut off the critical channels of distribution needed by Microsoft’s middleware competitors. A meaningful remedy must do more, however, than merely prohibit a recurrence of Microsoft’s past misdeeds: (1) it must also seek to restore the competitive balance so that competing middleware developers and those who write applications based on that middleware are not unfairly handicapped in that competition by Microsoft’s past exclusionary acts, and (2) it must be forward-looking with respect to technological and marketplace developments, so that today’s emerging competitive threats are protected from the very anticompetitive conduct that Microsoft has so consistently and effectively employed in the past. Only then can the applications barrier to entry be reduced and much-needed competition be given a fair chance to emerge.

## Specific Remedial Proposals

### A. Unbinding Microsoft's Software

As part of its illegal effort to suppress forms of middleware that threatened to offer a competitive platform for software development, Microsoft commingled the software code for Internet Explorer with the code for its monopoly operating system. *See Microsoft*, 253 F.3d at 66. The Court of Appeals affirmed the District Court's findings that (1) the commingling of Internet Explorer with the Windows operating system deterred computer manufacturers ("OEMs") from installing a rival browser such as Netscape Navigator, (2) Microsoft offered no specific or substantiated evidence to justify such commingling, and (3) "such commingling ha[d] an anticompetitive effect." *Id.*

To prevent further unlawful commingling of Internet Explorer with the Windows operating system, and to prevent similar anticompetitive commingling of other rival middleware (such as multimedia viewing and/or listening software or electronic mail software), Microsoft must be required either to cease such commingling or to offer its operating system software on an unbundled basis.

Questions have been raised about whether Microsoft would be obliged to create and test a multitude of versions of its operating system in order to comply with the States' Proposed Remedy No. 1. The proposal has always required one task: making available a version of the Windows operating system that is not commingled – that is, from which Microsoft middleware can be readily removed, and, if so desired, competitive middleware used in its stead. Accordingly, the text of Proposal No. 1 has been amended to clarify Microsoft's obligation to create this single, uncommingled version of its operating system.

Microsoft has also complained that such uncommingling is not feasible. There is, however, nothing unfeasible about this remedy. Microsoft's argument appears to be that parts of its operating system rely on code that forms part of some middleware, and thus the operating system would "break" if such middleware is removed. But that is the crux of the anticompetitive behavior condemned by the Court of Appeals, and the remedy envisions Microsoft taking steps necessary to ensure that this does not occur. This may mean that the "unbound" operating system, which Microsoft is required to ensure performs effectively and without degradation, may contain some code that performs functionality also found in or relied upon by the removed middleware, to the extent necessary for Microsoft to make available a non-degraded operating system. While Microsoft may require some time to perform this task, there is nothing inherently impossible about ensuring the presence of functionality that Microsoft has already developed. Microsoft's attempt to argue that they are both required to remove functionality from the operating system (by removing middleware) and simultaneously to ensure that such functionality is present, is simply a misreading of this remedy.

The recognition that Microsoft may require some time to produce an unbound operating system is reflected in a modification to the States' Proposed Remedy No. 1 that provides an opportunity for Microsoft, if the task takes longer than the decree provides, to seek additional time to complete the job of creating a totally uncommingled operating system. This flexibility is provided on the condition that any such additional time to comply would necessarily extend the time that this Final Judgment would apply.

Finally, there have also been suggestions that under certain circumstances,

the pricing reduction formula could result in an extremely low price for the uncommingled version of the operating system. That seems extremely unlikely, but to eliminate any doubt on that issue, the amended proposal includes a cap on the maximum discount (25%) that anyone can receive for selling Windows without Microsoft middleware:

1. ***Restriction on Binding Microsoft Middleware Products to Windows Operating System Products.*** *Microsoft shall not, in any Windows Operating System Product (excluding Windows 98 and Windows 98 SE) it distributes beginning six months after the date of entry of this Final Judgment, Bind any Microsoft Middleware Product to the Windows Operating System unless Microsoft also has available to license, upon the request of any Covered OEM licensee or Third-Party Licensee, and supports both directly and indirectly, an otherwise identical but “unbound” Windows Operating System Product, from which the binary code for each Microsoft Middleware Product (including any code providing similar functionality that has been included in any other Microsoft Middleware Product) may be readily removed, such that this “unbound” Windows Operating System Product performs effectively and without degradation (other than the elimination of the functionalities of any removed Microsoft Middleware Products). Microsoft shall not deny timely access to alpha and beta releases of Windows Operating System Products to any OEM or third party seeking to exercise any of the options or alternatives provided under this Final Judgment.*

*With respect to the “unbound” Windows Operating System Product that Microsoft must make available within six months of the entry of this Final Judgment, Microsoft shall make available a Windows Operating System Product that permits the removal of the Microsoft Middleware Products identified in Definition x(i) below. To the extent that Microsoft can demonstrate that, notwithstanding its best efforts, it has been unable to make available in the time specified a fully “unbound” Windows Operating System Product that permits the removal of all of the enumerated Microsoft Middleware Products, then Microsoft may petition for relief with respect to the timing of this obligation, provided that if any delay is permitted, the term of this Final Judgment shall be extended by the length of the delay.*

*The price paid to Microsoft for the “unbound” Windows Operating System Product shall be reduced (compared to the price of the otherwise identical Windows Operating System Product in which Microsoft has chosen to Bind Microsoft Middleware Products) in amounts that vary depending on the Microsoft Middleware Product(s) omitted by the OEM or Third-Party Licensee. The reduction in price in each case must equal the ratio of the development costs of each omitted Microsoft Middleware Product to the relative development costs*

*of that release of the Windows Operating System Product (i.e., development costs incurred since the previous major release; and for the avoidance of doubt, the major release previous to Windows XP is Windows 2000), multiplied by the price of the Windows Operating System Product in which Microsoft has chosen to Bind all such Microsoft Middleware Products. However, subject to the following paragraph, in no case shall the total reduction in the price be greater than twenty-five per cent.*

*If any Microsoft Middleware Product(s) is/are sold separately from the Operating System, and the price of the license(s) for those omitted unbound Microsoft Middleware Product(s) is greater than the result of the price reduction determined under the preceding paragraph, then the amount of the reduction shall be equal to or greater than the price of such separate licenses.*

## **B. Mandating Uniform and Non-Discriminatory Licensing**

The District Court concluded that Microsoft provided significant additional consideration to OEMs who promoted Internet Explorer or curtailed distribution or promotion of Netscape Navigator. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 67 (D.D.C. 1999). The Court of Appeals and the District Court both concluded that Microsoft also employed numerous restrictive license provisions to reduce distribution and usage of Netscape Navigator. 253 F.3d at 61. This restrictive and discriminatory contractual treatment of Microsoft licensees was a critical means of preventing rival middleware from receiving effective distribution in the important OEM channel.

Because Microsoft has monopoly power and thus typically licenses the overwhelming majority of the operating systems used by virtually every major OEM, Microsoft has the undeniable power to harm an OEM or any other third-party licensee, who wishes to distribute non-Microsoft middleware, by providing more favorable licensing terms to the recalcitrant OEM's or third-party licensee's competitors – *i.e.*, those who promote or distribute Microsoft middleware. In order



for competing middleware to have a chance to obtain distribution through the important OEM channel (and thereby achieve a degree of usage that would erode the applications barrier to entry), Microsoft must be required, at a minimum, (1) to offer uniform and non-discriminatory license terms to OEMs and other third-party licensees, and (2) to permit such licensees to customize Windows (including earlier versions of Windows) to include whatever Microsoft middleware or competing middleware the licensee wishes to sell to consumers. Moreover, Microsoft's obligation to license should not be restricted just to OEMs, but rather should include other third parties who also could repackage some or all of Windows with competing middleware and thereby offer software packages that are differentiated from and competitive with Microsoft's Windows.

Some have suggested that the OEM flexibility provision of subsection c. was so broad that it could permit any conceivable change in Windows. The purpose of the provision was to enable OEMs to have the flexibility they are currently denied to respond to consumer demands, and the modification to this provision clarifies that intent. Further, the scope of the equal access obligation in subsection b. has been narrowed to eliminate licensees who are only end-users:

**2. *Windows Operating System Licenses.***

- α. Mandatory, Uniform Licensing for Windows Operating System Products. Microsoft shall license, to Covered OEMs and Third-Party Licensees, Windows Operating System Products, including the version made available for license pursuant to Section 1, pursuant to uniform license agreements with uniform terms and conditions. Microsoft shall not employ Market Development Allowances or other discounts, including special discounts based on involvement in development or any joint development process. Without limiting the preceding sentence, Microsoft shall charge each licensee the applicable royalty for the licensed product as set forth on a schedule, to be established by Microsoft and published on a web site accessible to Plaintiffs and all licensees, that provides for uniform royalties for each such*

*product (which royalties shall in any case be consistent with the requirements of Section 1), except that:*

- i. the schedule may specify different royalties for different language versions; and*
- ii. the schedule may specify reasonable, uniform volume discounts to be offered on a non-discriminatory basis based upon the independently determined actual volume of total shipments of the licensed products (aggregating all Windows Operating System Products, including any versions made available for license pursuant to Section 1).*

*Microsoft shall not engage in any discriminatory enforcement of any license for a licensed Windows Operating System Product (including the version of the Windows Operating System Product offered and licensed pursuant to Section 1) and shall not terminate any such license without good cause and in any case without having first given the Covered OEM or other Third-Party Licensee written notice of the reason for the proposed termination and not less than sixty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM or other Third-Party Licensee (including without limitation any cross-license) that is inconsistent with this Final Judgment.*

*Microsoft shall not, by contract or otherwise, restrict the right of a Third Party Licensee to resell licenses to Windows Operating System Products (including the version of the Windows Operating System Product offered and licensed pursuant to Section 1).*

- b. Equal Access. Microsoft shall afford all Third-Party Licensees, that intend to distribute, sell or market such licenses, and Covered OEM licensees equal access to licensing terms; discounts; technical, marketing, and sales support; support calls; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. Notwithstanding the preceding sentence, Microsoft need not provide equal access to technical information and information about future plans for any bona fide joint development effort between Microsoft and a Covered OEM with respect to confidential matters solely within the scope of that joint effort.*
- c. OEM and Third-Party Licensee Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM or Third-Party Licensee from modifying the BIOS, boot sequence, startup folder, smart folder (e.g., My Music or My Photos), links, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other similar aspect of a Windows Operating System Product (including any similar aspect of any Middleware in that product) to:*

- i. *include a registration sequence to obtain subscription or other information from the user or to provide information to the user;*
- ii. *display and arrange icons or menu entries of, or short-cuts to, or otherwise present, other products, services, features or technologies, regardless of the size or shape of such icons or features, or remove or modify the icons, folders, links, start menu entries, smart folder application or service menu entries, favorites, or other means of presenting Microsoft products, services, features or technologies;*
- iii. *display any non-Microsoft desktop, provided that an icon or other means of access that allows the user to access the Windows desktop is also displayed, or display any other user interface;*
- iv. *launch automatically any non-Microsoft Middleware, Operating System, application or service (including any identification and/or authentication and/or authorization service); or offer a non-Microsoft IAP or other start-up sequence; or offer an option to make or make non-Microsoft Middleware the Default Middleware; or remove the means of End-User Access for Microsoft Middleware Products; or remove the code for Microsoft Middleware Products; or*
- v. *add non-Microsoft Middleware, applications or services.*

### **3. Continued Licensing of Predecessor Version.**

- a. *License and Support.* *Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 98, Windows 2000 Professional, Windows Me, Windows XP, "Longhorn," "Blackcomb," and all their successors), continue for five years after such release to license on the same terms and conditions and support both directly and indirectly the immediately previous Windows Operating System Product (including any unbound versions of that Operating System licensed under Section 1) to any OEM or Third-Party Licensee that desires such a license. In addition, Microsoft shall continue to license and support, both directly and indirectly, Windows 98 SE to any OEM or Third-Party Licensee that desires such a license, on the same terms and conditions as previously licensed, for three years from the date of entry of this Final Judgment.*
- b. *Royalty Rate.* *The net royalty rate for the immediately previous Windows Operating System Product shall be no more than the lowest royalty paid by the OEM or Third-Party Licensee for such product prior to the release of the new version. The net royalty rate for Windows 98 SE shall be no more than the lowest royalty offered to that OEM or Third-Party Licensee for Windows 98 SE prior to December 7, 2001.*
- c. *Marketing Freedom.* *The OEM or Third-Party Licensee shall be free to market Personal Computers in which it preinstalls such immediately*

*previous Windows Operating System Product or Windows 98 SE in the same manner in which it markets Personal Computers preinstalled with other Microsoft Platform Software.*

### **C. Mandatory Disclosure to Ensure Interoperability**

The District Court found that Microsoft threatened to delay and did delay disclosing critical technical information to Netscape that was necessary for the Navigator browser to interoperate with the Windows 95 operating system.

*Microsoft*, 84 F. Supp. 2d at 32-33. This delay in turn substantially delayed the release of a version of the Navigator browser that was interoperable with Windows 95, causing Netscape to be excluded from most of the crucial holiday-selling season and giving Internet Explorer an unfair advantage in the market. *Id.* at 33.

Moreover, the Court of Appeals upheld the District Court's finding that Microsoft illegally gave preferential treatment in terms of early release of technical information to Independent Software Vendors ("ISVs") that agreed to certain anticompetitive conditions, including using only Internet Explorer. *Microsoft*, 253 F.3d at 71.

In order to prevent future incidents in which ISVs receive preferential disclosure of technical information over rival developers, thereby stifling the competitive threat posed by software developed by such rivals, or situations where the disclosure of interoperability interfaces is delayed or denied to developers of rival platforms, perhaps in an attempt to suppress another competitive threat, Microsoft must provide timely access to the information needed to permit rival software to achieve interoperability with Microsoft software and with applications that make use of Microsoft platform software. This will permit the development of platform threats to Microsoft's monopoly, whether in the form of rival middleware,

rival operating systems or rival web services platforms. In response to suggestions that this remedy gave access to Microsoft APIs, technical information and communications interfaces for purposes beyond the enabling of these various types of interoperability, a modification clarifying the purpose of these disclosures has been added. The scope of permissible use is underscored in the intellectual property licensing provision in the States' Proposed Remedy No. 15.

Moreover, because nascent threats to Microsoft's monopoly operating system currently exist beyond the middleware platform resident on the same computer, timely disclosure of technical information must apply to facilitate not only interoperability between applications and middleware, and between middleware and the monopoly operating system on the same computer, but also interoperability with respect to other technologies that could provide a significant competitive platform, including network servers, web servers and hand-held devices.

Finally, to address concerns about potential third party abuse of access to Microsoft's secure facility under Section 4.c, this provision has been amended to provide that access need only be reasonable. Of course, Microsoft could at any time deny access to a person that was not "qualified," e.g., if such person has a history of software piracy, and such person would have recourse under the Special Master complaint procedures in Section 18 if they felt they had been unjustifiably excluded:

**4. *Disclosure of APIs, Communications Interfaces and Technical Information.***

- a. *Interoperability Disclosure.* Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, OEMs and Third-Party Licensees on an ongoing basis and in a Timely Manner, in whatever media Microsoft customarily disseminates such information to its own personnel, for the purpose of enabling non-Microsoft Platform Software and non-Microsoft applications to Interoperate with Microsoft Platform Software and/or applications for Microsoft Platform

*Software, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable:*

- i. each Microsoft application to Interoperate with Microsoft Platform Software installed on the same Personal Computer;*
  - ii. each Microsoft Middleware Product to Interoperate with Microsoft Platform Software installed on the same Personal Computer; and*
  - iii. each Microsoft software program installed on one computer (including without limitation Personal Computers, servers, Handheld Computing Devices and set-top boxes) to Interoperate with Microsoft Platform Software installed on another computer (including without limitation Personal Computers, servers, Handheld Computing Devices and set-top boxes).*
- b. Necessary Disclosure. Microsoft shall disclose to each OEM and Third-Party Licensee all APIs, Communications Interfaces and Technical Information necessary to permit them to fully exercise their rights under Section 2.c.*
- c. Compliance. To facilitate compliance, and monitoring of compliance, with this Section 4, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, IHVs, IAPs, ICPs, and Third-Party Licensees shall be permitted reasonable access to study, interrogate and interact with the source code and any related documentation and testing suites of Microsoft Platform Software for the purpose of enabling their products to Interoperate effectively with Microsoft Platform Software (including exercising any of the options in Section 2.c).*

#### **D. Prohibitions on Certain Licensing and Other Practices**

The Court of Appeals affirmed the District Court's conclusion that Microsoft's licensing practices and/or other dealings with various third parties, including Internet Access Providers ("IAPs"), Independent Software Vendors ("ISVs"), and rival operating system manufacturers, were similarly designed to stifle competition. *Microsoft*, 253 F.3d at 67. These dealings, when coupled with other Microsoft conduct designed to thwart or delay interoperability, confirm that Microsoft must also be prohibited from taking certain actions that could unfairly disadvantage its would-be competitors, whether by (a) knowingly interfering with the performance of their software with no advance warning, or (b) entering into certain types of

contracts that could unreasonably foreclose competing middleware providers.

In connection with the remedy regarding Microsoft's knowing interference with non-Microsoft middleware, Microsoft complained that the notice requirement was overly onerous. The remedy is modified to permit Microsoft to fulfill the requirement with a prominent notice on its developer network website, and the obligation to disclose possible solutions is removed as unnecessary:

5. ***Notification of Knowing Interference with Performance.*** *Microsoft shall not take any action that it knows, or reasonably should know, will directly or indirectly interfere with or degrade the performance or compatibility of any non-Microsoft Middleware when Interoperating with any Microsoft Platform Software, other than for good cause. If Microsoft takes such action with good cause, it must provide notice (by, for example, posting a prominent notice on the MSDN website) to the affected ISV(s) of such non-Microsoft software as soon as Microsoft has such knowledge, but in no case less than 60 days in advance, informing the ISV(s) that Microsoft intends to take such action and stating Microsoft's reasons for taking the action.*
6. ***Ban on Exclusive Dealing.*** *Microsoft shall not enter into or enforce any Agreement in which another party agrees, or is offered or granted consideration, to:*
  - a. *restrict its development, production, distribution, promotion or use of (including its freedom to set as a default), or payment for, any non-Microsoft product, service, feature or technology;*
  - b. *restrict Microsoft redistributable code from use with non-Microsoft Platform Software;*
  - c. *distribute, promote or use any Microsoft product, service, feature or technology exclusively or in a minimum percentage;*
  - d. *interfere with or degrade the performance of any non-Microsoft product, service, feature or technology; or*
  - e. *in the case of an agreement with an IAP or ICP, distribute, promote or use a Microsoft product, service, feature or technology in exchange for placement with respect to any aspect of a Microsoft Platform Product.*
7. ***Ban on Contractual Tying.*** *Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms (including without limitation price) or administration of such license (including any license granted*

*pursuant to Section 1), on a licensee agreeing to license, promote, distribute, or provide an access point to, any Microsoft Middleware Product.*

#### **E. Ban on Retaliation**

The Court of Appeals and the District Court catalogued a variety of conduct by Microsoft that was designed to reward those who acceded to Microsoft's anticompetitive aims and punish those who did not. An effective remedy therefore must prevent Microsoft from taking adverse or other retaliatory or discriminatory actions against OEMs, other third-party licensees, ISVs, and others, who in any way develop, distribute, support or promote competing products. Microsoft must also be barred from any acts of retaliation against any individual or any entity as a result of their participation in any capacity in any phase of this litigation. These provisions are largely unchanged:

8. ***Ban on Adverse Actions for Supporting Competing Products.*** *Microsoft shall not take or threaten any action that directly or indirectly adversely affects any IAP, ICP, IHV, ISV, OEM or Third-Party Licensee (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling and integration programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; ability to install Synchronization Drivers; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that IAP, ICP, IHV, ISV, OEM or Third-Party Licensee to:*

- a. *use, distribute, promote, support, license, develop, set as a default, produce or sell any non-Microsoft product, service, feature or technology; or*
- b. *exercise any of the options or alternatives provided under this Final Judgment.*

9. ***Non-retaliation for Participation in Litigation.*** *Microsoft shall not take or threaten to take any action adversely affecting any individual or entity that participated in any phase of the antitrust litigation initially styled as United States v. Microsoft, Civil Action No. 98-1232 and State of New York v. Microsoft, Civil Action No. 98-1233, including but not limited to pretrial discovery and other proceedings before the liability trial, the liability trial, any of the remedy proceedings before this Court, any proceeding to enforce the Final Judgment or to investigate any alleged violation of the Final Judgment, and any proceeding to*



*review or otherwise consider any settlement or resolution of this matter, based directly or indirectly, in whole or in part, on such individual or entity's participation as a fact witness, consultant or expert on behalf of any party, or on such individual or entity's cooperation in any form, whether by meeting, providing information or documents, or otherwise, with or to any party in this litigation, or any counsel, expert or agent thereto or thereof.*

## **F. Respect for OEM and End-User Choices**

Microsoft engaged in various practices that were designed to coerce OEMs into setting Internet Explorer as the “default browser” on their computers.

*Microsoft*, 84 F. Supp. 2d at 67-68. If competing middleware is to have a fair opportunity to gain distribution sufficient to erode the applications barrier to entry, OEMs and other third-party licensees, as well as end-user consumers, should be accorded the freedom to select a default middleware product other than a Microsoft middleware product. If applications software developers perceive that Microsoft, through its control of the operating system, is unfairly tilting end users to Microsoft applications, then they will be less inclined to develop the applications necessary to erode the entry barrier that preserves Microsoft's monopoly. This provision is unchanged:

***10. Respect for User, OEM and Third-Party Licensee Choices.*** *Microsoft shall not, in any Windows Operating System Product distributed six or more months after the date of entry of this Final Judgment, make Microsoft Middleware the Default Middleware for any functionality unless the Windows Operating System Product (i) affords the OEM or Third-Party Licensee the ability to override Microsoft's choice of a Default Middleware and designate other Middleware the Default Middleware for that functionality, and (ii) affords the OEM, Third-Party Licensee or non-Microsoft Middleware the ability to allow the end user a reasonably accessible and neutrally presented choice to designate other Middleware as the Default Middleware in place of Microsoft Middleware.*

*If the OEM, Third-Party Licensee, or end user has designated non-Microsoft Middleware as the Default Middleware for a functionality, the Windows Operating System Product (including updates thereto) or other Microsoft software or services shall not change the designation or prompt the user to change that designation (including by cautioning the end user against using the non-*

*Microsoft Middleware).* However, in the event that the end user has subsequently installed a Microsoft Middleware Product performing that functionality, the subsequently installed Microsoft Middleware Product may offer the end user a reasonably accessible and neutrally presented one-time choice to make that product the Default Middleware for that functionality.

#### **G. Prohibition on Agreements Not to Compete**

The Court of Appeals and the District Court found numerous instances in which Microsoft entered into agreements with OEMs, ISVs and others that stifled competition. In one particular instance, Microsoft proposed a “special relationship” with Netscape that, if consummated, would have effectively ended any potential competitive threat posed by the Navigator browser to the Windows operating system. 84 F. Supp. 2d at 33. Given Microsoft’s past conduct, a prohibition on offering or agreeing to limit competition with respect to operating system products or middleware products is necessary and appropriate. This provision is unchanged:

*11. **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 Microsoft Middleware Product.*

#### **H. Internet Browser Open-Source License**

Much of the evidence during the trial concerned Microsoft’s relentless campaign to drive down usage of Netscape’s Navigator and push people instead to its own browser, Internet Explorer. Indeed, a substantial percentage of the acts reviewed by the Court of Appeals involved tactics designed to “reduce[ ] the usage share of rival browsers not by making Microsoft’s own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products.” 253 F.3d 34, 65.

Eliminating Netscape and establishing Internet Explorer as the dominant

browser was a critical component of Microsoft's monopoly maintenance strategy. Given that Microsoft's browser dominance was achieved to bolster the operating system monopoly, the remedial prescription must involve undoing that dominance to the extent it is still possible to do so. Accordingly, the appropriate solution is to mandate open source licensing for Internet Explorer, thereby ensuring at a minimum that others have full access to this critical platform and that Microsoft cannot benefit unduly from the browser dominance that it gained as part of its unlawful monopolization of the operating system market.

It had been suggested that this remedy as originally drafted could require the open sourcing of software other than Microsoft's browser products, and their successors, due to references to browser functionality in the provision and definition of browser. This misconception has been clarified with modifications to this remedy and the browser definition:

***12. Internet Browser Open-Source License.*** *Beginning three months after the date of entry of this Final Judgment, Microsoft shall disclose and license all source code for all Browser software. In addition, during the remaining term of this Final Judgment, Microsoft shall be required to disclose and make available for license, both at the time of and subsequent to the first beta release (and in no event later than one hundred eighty (180) days prior to its commercial distribution of any Browser software), all source code for Browser software. As part of this disclosure, Microsoft shall identify, provide reasonable explanation of, and disseminate publicly a complete specification of all APIs, Communications Interfaces and Technical Information relating to the Interoperation of such Browser software and each Microsoft Platform Software product. The aforementioned license shall grant a royalty-free, non-exclusive perpetual right on a non-discriminatory basis to make, use, modify and distribute without limitation products implementing or derived from Microsoft's source code, and a royalty-free, non-exclusive perpetual right on a non-discriminatory basis to use all Microsoft APIs and Communications Interfaces used or called by Microsoft's Browser software not otherwise covered by this Section 12. Nothing in this Section 12 shall require Microsoft to disclose or license the source code for non-Browser software that relies in whole or in part on functionality in Browser software.*

## I. Mandatory Distribution of Java

Microsoft's destruction of the cross-platform threat posed by Sun's Java technology was a critical element of the unlawful monopoly maintenance violation affirmed by the Court of Appeals. Microsoft continues to enjoy the benefits of its unlawful conduct, as Sun's Java technology does not provide the same competitive threat today that it posed prior to Microsoft's campaign of anticompetitive conduct. Because an appropriate antitrust remedy decree should, among other things, attempt "to deny to the defendant the fruits of its statutory violation," *Microsoft*, 253 F.3d at 103 (quoting *United States v. United Shoe Mach. Corp.*, 391 U. S. 244, 250 (1968)), Microsoft must be required to distribute Java with its platform software (*i.e.*, its operating systems and Internet Explorer browser), thereby ensuring that Java receives the widespread distribution that it could have had absent Microsoft's unlawful behavior, and increasing the likelihood that Java can serve as a platform to reduce the applications barrier to entry.

Microsoft has claimed that it could be held to ransom for the Java runtime environment it is obliged to carry and that it was compelled to develop a version of Java to be distributed. The language of this remedy has been clarified to eliminate these misconceptions:

**13. Java Distribution.** *For a period of 10 years from the date of entry of the Final Judgment, Microsoft shall distribute free of charge, in binary form, with all copies of its Windows Operating System Product and Browser (including significant upgrades) a competitively performing Windows-compatible version of the Java runtime environment (including Java Virtual Machine and class libraries) compliant with the latest Sun Microsystems Technology Compatibility Kit (a "Compliant Version"). In no event shall Microsoft be obligated to create such a Compliant Version, or to distribute a Compliant Version that is not made available to Microsoft, without charge and on reasonable terms and conditions, at least 90 days prior to Microsoft's commercial release or major update of any such Windows Operating System Product or Browser. Microsoft must publicly*

*announce the commercial release and major updates of its Windows Operating System Products and Browser at least 120 days in advance.*

## **J. Cross-Platform Porting of Office**

The applications barrier to entry can be eroded only when consumers can obtain significant software application functionality from their computers through means other than Microsoft's monopoly operating system. Cross-platform software, such as middleware, would have permitted the porting of numerous important applications to operating systems other than Microsoft's Windows. To begin to erode the applications barrier to entry that was enhanced by Microsoft's unlawful behavior, and thereby begin to "pry open to competition a market that has been closed by defendants' illegal restraints," *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947), Microsoft should be required to auction to a third party the right to port Microsoft Office to competing operating systems.

The States' Proposed Remedy No. 14 has been clarified in response to Microsoft's claims that Office is not in fact "ported" to the Macintosh operating system, and that licensees could sell a rival version of Office for Macintosh, which option was never the purpose of this provision:

### ***14. Mandatory Continued Provision of Office to Macintosh and Mandatory Licensing of Office for the Purpose of Making Office Available on Other Operating Systems.***

- a. *Continued Porting of Office to Macintosh.* Microsoft shall continue to port or otherwise make available Office to the Macintosh Operating System, pursuant to the same terms and conditions under which it currently ports or otherwise makes available Office to Macintosh, whereby Microsoft shall commercially release the same number of major releases of Microsoft Office for Macintosh as are released of Microsoft Office for Windows, with features consistent with Microsoft Office for Windows.
- b. *Auction of Licenses To Port.* Within 60 days of entry of this Final Judgment, Microsoft shall offer for sale, at an auction administered by an independent third party, licenses to sell Office for use on Operating Systems other than

*Windows and Macintosh, without further royalty beyond the auction price. In conjunction with these licenses, Microsoft shall supply to the winning bidders all information and tools required to port Office to other Operating Systems, including but not limited to all compatibility testing suites used by Microsoft to make Office available to the Macintosh Operating System, the source code for Office for Windows and Office for Macintosh (to be used for the purpose of such porting only), all technical information required to port Office to other Operating Systems (including but not limited to file formats), and all parts of the source code of the Windows Operating System Product necessary for the porting. At such auction, Microsoft shall offer to sell at least three such licenses, as described in this Section 14.b, to three third parties not affiliated with either Microsoft or each other. The terms of such licenses shall become effective (and the relevant source code made available to the licensee) immediately upon their sale.*

- c. *Provision of Necessary Information. As soon as practicable, but in no case later than 60 days prior to the date each new version of Office becomes commercially available for use with a Windows Operating System Product, Microsoft shall provide, to holders of the licenses issued pursuant to Section 14.b, the compatibility testing suites and source code necessary to enable porting of the new version of Office to other Operating Systems. The terms of such licenses shall become effective (and the relevant source code made available to the licensee) no later than the date on which the new version of Office becomes commercially available.*

## **K. Intellectual Property Rights**

For many of the provisions of the remedy to be effective, including but not limited to the disclosure provisions contained in Section 4, various OEMs, ISVs and others must necessarily acquire certain intellectual property rights from Microsoft. Accordingly, it is appropriate for Microsoft to license to such third parties those intellectual property rights that are necessary for the effective implementation of this remedy proposal. Despite Microsoft's recent conversion on the inappropriateness of mandatory cross-licenses, the States' Proposed Remedy No. 15 has been modified to prohibit Microsoft from imposing restrictions that may discourage potential licensees, including mandatory cross-licenses and other restrictions that would limit development to only Microsoft platforms and technologies.

This provision has also been clarified to make explicit that, notwithstanding Microsoft's apocalyptic predictions about the potential wholesale copying of its source code, the rights of third parties to use information disclosed to them are bounded by the options and alternatives provided under the Final Judgment:

**15. Necessary Intellectual Property License.** *Microsoft shall, within 20 days of request, license to IAPs, ICPs, IHVs, ISVs, OEMs and Third-Party Licensees all intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives provided or available to them under this Final Judgment (including without limitation enabling their product(s) to Interoperate with Microsoft Platform Software and/or applications for Microsoft Platform Software), on the basis that:*

- a. the license shall be on a royalty-free basis and all other terms shall be reasonable and non-discriminatory;*
- b. the license shall not (i) be conditional on the use or licensing of any Microsoft software, API, Communications Interface, Technical Information, service, feature or technology; (ii) be conditional on any cross-license to Microsoft, or (iii) restrict any development pursuant to the license to software, services, features and/or technologies that are compatible with or use Microsoft software, services, features and/or technologies;*
- c. the scope of any such license (and the intellectual property rights licensed thereunder) must be as broad as necessary to ensure that the licensee is able to exercise the options or alternatives provided under this Final Judgment (including without limitation enabling licensees' product(s) to Interoperate with Microsoft Platform Software and/or applications for Microsoft Platform Software), but nothing herein shall require Microsoft to permit the use or sub-licensing of any Microsoft source code beyond that necessary to permit the exercise of such options or alternatives; and*
- d. the terms of any license granted under this section shall be in all respects consistent with the terms of this Final Judgment.*

#### **L. Adherence to Industry Standards**

A common tactic in Microsoft's unlawful monopoly maintenance was the limitation on interoperability with potential competitors. This has been accomplished, on occasion, by co-opting and/or undermining the industry standards for software developers. Microsoft also purposely deceived software developers into

believing that the Microsoft Java programming tools had cross-platform capability with Sun-based Java.

The States' Proposed Remedy No. 16 has been clarified in response to concerns regarding the imprecise use of certain terminology:

**16. Adherence to Industry Standards.**

- a. *Compliance With Standards.* If Microsoft publicly claims that any of its products are compliant with any technical standard ("Standard") that has been approved by, or has been submitted to and is under consideration by, a Standard-Setting Body, it shall comply with that Standard. If Microsoft chooses to extend or modify the implementation of that Standard, Microsoft shall continue fully to implement the Standard (as that Standard may be modified from time to time by the Standard-Setting Body). Microsoft shall continue to implement the Standard until: (i) Microsoft publicly disclaims that it implements that Standard; or (ii) the Standard expires or is rescinded by the standard-setting body. However, Microsoft shall not be permitted to require, by contract or otherwise, third parties to use or adopt Microsoft's implementation of the Standard. To the extent Microsoft develops a proprietary implementation of a Standard, Microsoft Platform Software must continue to support non-proprietary, industry implementations of such Standard (including without limitation for the purposes of enabling non-Microsoft Platform Software and non-Microsoft applications to Interoperate with Microsoft Platform Software and/or applications for Microsoft Platform Software).
- b. *Compliance With De Facto Standards.* As to any Standard with which Microsoft is required to comply under the preceding paragraph, to the extent that industry custom and practice recognizes compliance with the Standard to include variations from the formal definition of that Standard (a "De Facto Standard"), Microsoft may discharge its obligations under this provision by complying with the de facto Standard provided that: (i) before doing so, Microsoft notifies Plaintiffs and the Special Master in writing of its intention to do so, and describes with reasonable particularity the variations included in the De Facto Standard; and (ii) Plaintiffs do not, within 30 days of receipt of such notice, object to Microsoft's intention to comply with the De Facto Standard.

**M. Internal Compliance**

Vigilant compliance is absolutely critical to any remedial program's effectiveness. The first prong of such compliance must be an active program of



internal controls to ensure compliance, including the appointment of an internal Compliance Officer and an annual certification by Microsoft that it is adhering to the requirements of the Final Judgment. There are no changes in this provision:

**17. Internal Antitrust Compliance.** *This section shall remain in effect throughout the term of this Final Judgment.*

- a. *Compliance Committee. Within 30 days of entry of this Final Judgment, Microsoft shall establish a compliance committee (the “Compliance Committee”) of its Board of Directors, consisting of at least three members of the Board of Directors who are not present or former employees of Microsoft.*
- b. *Compliance Officer. The Compliance Committee shall hire a Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft. The 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. Microsoft shall give the Compliance Officer all necessary authority and resources to discharge the responsibilities listed herein.*
- c. *Duties of Compliance Officer. The Compliance Officer shall:*
  - i. *within 60 days after entry of this Final Judgment, arrange for delivery to each Microsoft officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, IHVs, or Third-Party Licensees, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;*
  - ii. *arrange for delivery in a timely manner of a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position described in subsection c.i above;*
  - iii. *ensure that those persons described in subsection c.i above are annually briefed on the meaning and requirements of this Final Judgment and the United States antitrust laws and advising them that Microsoft’s legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the United States antitrust laws;*
  - iv. *obtain from each person described in subsection c.i above, within 30 days of entry of this Final Judgment and annually thereafter, and for each person thereafter succeeding to such a position within 5 days of such succession and annually thereafter, a written certification that he or she:*

- (1) *has read, understands, and agrees to abide by the terms of, and has to their knowledge not violated, 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;*
- v. *maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to subsection c.iv above, such certifications have been obtained;*
- vi. *establish and maintain a means by which employees can report to the Special Master potential violations of this Final Judgment or the antitrust laws on a confidential basis;*
- vii. *on an annual basis, certify to the Plaintiffs and the Special Master that Microsoft is fully compliant with this Final Judgment; and*
- viii. *report immediately to the Plaintiffs and the Special Master any credible evidence of violation of this Final Judgment.*
- d. *Removal of Compliance Officer.* *The Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.*
- e. *Retention of Communications and Relevant Documentation.* *Microsoft shall, with the supervision of the Compliance Officer, maintain for a period of at least four years (i) the e-mail, instant messages, and written correspondences of all Microsoft officers, directors and managers engaged in software development, marketing, sales, and developer relations related to Platform Software, and (ii) all documentation necessary or useful to facilitate compliance with this Final Judgment, including without limitation the calculation of development costs in Section 1.*
- f. *Compliance Inspection.* *For purposes of determining or securing implementation of or compliance with this Final Judgment, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:*
  - i. *Duly authorized representatives of a Plaintiff, upon the written request of the Attorney General of such Plaintiff, 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 the option of the duly authorized representatives, to 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.*
- ii. *Upon the written request of the Attorney General of a Plaintiff, 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.*
- iii. *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.*
- iv. *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 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.*

#### **N. The Special Master**

In addition to internal oversight by Microsoft, effective implementation of this remedy also requires a Special Master empowered and equipped to conduct prompt investigations of any complaints and to propose resolutions within the short time frame necessary to be meaningful in such a fast-moving market. Such a Special Master can ensure timely resolution of any disputes and minimize any demand on judicial resources.

This remedy has been modified in subsection g. to recognize what was always implicit -- that Microsoft may request the Court to modify, amend or interpret the Final Judgment:

**18. Special Master.** Pursuant to Rule 53 of the Federal Rules of Civil Procedure (“Rule 53”) the Court will appoint a special master (the “Special Master”) to monitor Microsoft’s obligations under the Final Judgment and to aid the Court in enforcing the Final Judgment.

- a. Appointment. The Court will select a Special Master. Ten days after the Plaintiffs and Microsoft are notified of the selection, the Plaintiffs and Microsoft may file with the Court their written objections to the proposed Special Master. Any party who does not object within ten (10) days shall be deemed to have consented to the Court’s selection. The terms of this subsection shall apply to any replacement Special Master chosen by the Court.
- b. Powers. The Special Master has and shall exercise the power and authority to monitor Microsoft’s compliance with this Final Judgment, including taking all acts and measures he or she deems necessary or proper for the efficient performance of the Special Master’s duties and responsibilities as set forth in this Final Judgment.
- c. Internal Compliance. The Special Master, and those acting under his or her authority, shall have access to all information, personnel, systems, equipment, premises and facilities the Special Master considers relevant to the performance of his or her duties. Microsoft shall develop such financial or other information as the Special Master may request and shall cooperate with the Special Master and facilitate the Special Master’s ability to perform his or her responsibilities and to monitor Microsoft’s compliance with this Final Judgment. To facilitate Microsoft’s compliance, Microsoft will create a full-time position entitled “Special Master Liaison Officer” with primary responsibility for ensuring full cooperation with the Special Master, including without limitation arranging for timely access to personnel, information and facilities. The Special Master Liaison Officer shall be a senior Microsoft executive and shall report directly to the Chief Executive Officer of Microsoft. Microsoft shall give the Special Master Liaison Officer all necessary authority and resources to discharge his or her responsibilities under this subsection. If the Special Master determines that Microsoft is inhibiting the Special Master in any of its Rule 53 functions, the Special Master may file with the Court, sua sponte, a report of non-compliance.
- d. Advisory Committee; Staff and Expenses. The Court, with the assistance of the Special Master, shall appoint an advisory committee of 3 individuals (the “Advisory Committee”) to assist the Special Master on technical, economic, business and/or other areas of expertise. Objections to the Court’s selection shall be lodged in the manner noted in Section 18.a. Microsoft shall indemnify each Advisory Committee member and hold him or her harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Advisory Committee’s functions, except to the extent that such liabilities, losses,

*damages, claims, or expenses result from gross negligence or willful acts by an Advisory Committee member.*

*The Special Master, upon approval from the Court, may hire such additional individuals as a permanent staff or on an advisory basis to assist the Special Master. The Special Master shall submit to the Court a monthly accounting of the Special Master, his or her staff and the Advisory Committee's services and expenses. Upon approval from the Court, Microsoft will remit payment to the Special Master.*

- e. Periodic Reports. The Special Master shall apprise the Court, in writing (with copies to the Plaintiffs), whether Microsoft is in compliance with this Final Judgment thirty (30) days after the date of his or her appointment and every one hundred eighty (180) days thereafter until the Final Judgment terminates.*
- f. Actions and Proceedings.*
  - i. Any person who has reason to believe that Microsoft is not complying with the Final Judgment may submit a complaint to the Special Master. The Special Master shall promptly provide a copy of the complaint to a State chosen by the Plaintiffs to serve as the recipient of such complaints.*
  - ii. To facilitate the communication of complaints by third parties, the Special Master Liaison Officer shall place on Microsoft's Internet website, in a manner acceptable to the Special Master, the procedures for submitting complaints.*
  - iii. The Special Master may preserve the anonymity of any third party complainant where he or she deems it appropriate to do so upon the request of the Plaintiffs or the third party, or in his or her discretion.*
  - iv. Within fourteen (14) days of the receipt of the complaint, the Special Master shall determine if an investigation is warranted. In making this decision, the Special Master may use any of its Rule 53 powers. If the Special Master determines that an investigation is not warranted, the Special Master will issue a statement noting his or her decision to the complainant, Microsoft and each Plaintiff.*
  - v. If the Special Master decides to pursue a formal investigation, the Special Master must notify Microsoft, each Plaintiff and the complainant of: (i) its decision to investigate; (ii) the conduct underlying the potential violation; and (iii) the provision of the Final Judgment at issue. The Special Master will furnish a copy of this notice to the Court.*
  - vi. Within fourteen (14) days of receiving the notice of the Special Master's investigation, Microsoft and the complainant shall file with*

*the Special Master, and copy to the Plaintiffs, a response, including any documentation they wish the Special Master to consider.*

- vii. Upon receipt of the responses, the Special Master shall schedule a hearing within twenty-one (21) days. The Special Master may exercise all powers available under Rule 53 (including without limitation requiring the production of documents and examining witnesses). The Plaintiffs shall have standing to participate in each such hearing.*
- viii. Within fifteen (15) days from the conclusion of the hearing, the Special Master will file with the Court a report containing its factual findings and a proposed order pursuant to Rule 53(e)(1).*
- ix. Pursuant to the requirements of Rule 53(e)(2), Microsoft and the complainant may object to the Special Master's report.*
- g. Power Retained by Court. In addition to acting on the recommendations of the Special Master, the Court may institute its own proceedings and modify, amend or interpret the Final Judgment as necessary either sua sponte or at the request of the Plaintiffs or Microsoft.*
- h. Admissibility in Subsequent Proceedings. (i) Any findings or recommendations by the Special Master and work product of the Special Master and the Advisory Committee are not prohibited hereunder from submission or admission in any subsequent action or proceeding whether before this Court or elsewhere regarding this Final Judgment, and (ii) the Special Master and any person who provided assistance thereto (including without limitation any member of the Special Master Advisory Committee) is not prohibited hereunder from testifying in any such action or proceeding.*

## **O. Consequences of a Pattern of Non-Compliance.**

In a market in which timing is so important, it is all too likely that delaying one's rivals by begrudging compliance with the obligations of the Final Judgment – punctuated by occasional acts of outright non-compliance – could well be profit-maximizing behavior. One prudent and potentially highly effective means of avoiding this situation is to make clear in advance that a pattern of significant, material non-compliance will lead to serious consequences, and thereby reduce the likelihood that such non-compliance will ever be an issue:

## 19. Orders and Sanctions.

- a. Orders. *The Court may act at any time to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.*
- b. Jurisdiction. *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.*
- c. Knowing Act of Material Non-Compliance. *Upon recommendation of the Special Master or the Plaintiffs, or sua sponte, the Court shall review evidence pertaining to Microsoft's Material Non-Compliance with the terms of this Order. If the Court determines that Microsoft has knowingly committed an act of Material Non-Compliance, the Court may, in addition to any other action, convene a hearing to consider an order requiring Microsoft to license its source code for the Microsoft software that is implicated by the act of Material Non-Compliance to anyone requesting such a license for the purpose of facilitating interoperability between the relevant Microsoft product and any non-Microsoft product or, in the case of an act of Material Non-Compliance that does not implicate particular Microsoft software, to order such other sanctions as the Court deems just and appropriate given the nature of Microsoft's actions and the likely deterrent effect of the sanction.*
- d. Pattern or Practice of Material Non-Compliance. *If the Court finds that Microsoft has knowingly engaged in a pattern or practice of Material Non-Compliance with the terms of this Order, the Court may, in addition to any other action, (i) convene a hearing to consider an order requiring Microsoft to pay such civil penalties as the Court deems just and appropriate, given the nature of the violation and the likely deterrent effect of the sanction, and/or (ii) request proposals from the Plaintiffs and/or the Special Master for appropriate further conduct remedies and impose those or other conduct remedies the Court deems just and appropriate, given the nature of the violation and the likely deterrent effect of the sanction.*
- e. Meaning of Material Non-Compliance. *For purposes of this Section, "Material Non-Compliance" shall include any:*
  - i. *violation of the disclosure requirements relating to APIs, Communications Interfaces, and Technical Information that has any significant effect on the ability of ISVs to develop Software Products or Web-Based Software that Interoperate as effectively with Microsoft*

*Platform Software as Microsoft's own Software Products or Web-Based Software do;*

- ii. violation of any anti-retaliation or non-discrimination provision included in this Order;*
  - iii. violation of the provision of this Final Judgment pertaining to interference with the performance of non-Microsoft applications, Middleware, or Web-Based Software; or*
  - iv. other action or omission that the Court determines has the effect of undermining a substantial purpose of this Order.*
- f. Intellectual Property Infringement Claims. Upon recommendation of the Special Master or the representative of the Plaintiffs, or sua sponte, the Court shall review evidence that Microsoft has brought or has threatened to bring a groundless claim of Intellectual Property infringement for the purpose of preventing, hindering, impairing, or inhibiting any non-Microsoft software, Middleware, or Web-Based Software from Interoperating with a Microsoft Operating System Product or Microsoft Middleware Product. If the Court determines that Microsoft has undertaken such action, it shall issue an order enjoining Microsoft from asserting or enforcing any intellectual property rights in related APIs, Communications Interfaces, or Technical Information.*

## **P. Reporting of Software and Related Transactions**

Microsoft can use acquisitions as a weapon to maintain its operating system monopoly. Many of these deals are structured in such a way, or relate to such relatively small businesses, that they are not captured by the disclosure regime under the Hart-Scott-Rodino Act. To ensure governmental oversight over these transactions, the remedy should provide for limited disclosures to the plaintiffs in connection with such transactions. There is no change in this provision, and only a minor change to Section 21.b to conform to the changes to the States' Proposed Remedy No. 1.

### ***20. Reporting of Certain Transactions.***

- a. Notice. For any direct or indirect acquisition (which term includes an acquisition of securities or of assets) or investment by Microsoft or any of its*



*Subsidiaries and for any exclusive license of technology or other intellectual property to Microsoft or any of its Subsidiaries, Microsoft must provide the Plaintiffs with sixty (60) days' prior written notice of the consummation of such acquisition, investment or license transaction where such transaction involves (either as a direct or indirect acquiree, investee or licensor) a person (other than Microsoft or any of its Subsidiaries) whose business (or any part thereof) has been or could reasonably be classified under (or any of whose Subsidiary's businesses, or any part thereof, has been or could reasonably be classified under) any of the following North American Industry Classification System codes, and Microsoft did not own 33% or more of the securities of such person prior to December 1, 2001:*

- i. 334 (computer and electronic product manufacturing);*
  - ii. 42143 (computer and computer peripheral equipment and software wholesalers);*
  - iii. 5133 (telecommunications);*
  - iv. 5132 (cable networks and program distribution);*
  - v. 52 (finance and insurance); or*
  - vi. 5415 (computer systems design and related services).*
- b. Information. Accompanying such written notice shall be the same information that would be reported if the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") were applicable to such transaction. Such information shall be treated as confidential to the extent that it would be so treated under the HSR Act.*

## **21. Effective Date, Term, Broad Interpretation, Costs and Fees.**

- a. Effective Date. This Final Judgment shall take effect 30 days after the date on which it is entered.*
- b. Term. This Final Judgment shall, subject to any extension pursuant to Section 1, expire at the end of ten years from the date on which it takes effect.*
- c. Broad Interpretation. All of the provisions of this Final Judgment, whether substantive, regulatory or procedural, will be interpreted broadly consistent with its remedial purpose of restoring the prospect of competition to the operating systems market.*
- d. Costs and Fees. Plaintiffs shall be awarded reasonable costs and fees. The Plaintiffs shall submit a motion for costs and fees, with supporting documents as necessary, no later than forty-five (45) days after the entry of this Final Judgment.*

## **Q. Definitions**

To clarify a number of the provisions discussed above, several definitions, including “Bind,” “Browser,” “Standard-Setting Body,” “Technical Information,” “Third-Party Licensee” and “Web-Based Software” have been modified.

### **22. Definitions.**

- a. *“Advisory Committee” has the meaning given in Section 18.d.*
- b. *“Agreement” means any agreement, understanding, joint venture, arrangement or alliance, whether written or oral.*
- c. *“APIs” or application programming interfaces mean the interfaces, service provider interfaces, file formats, data structures, Component Object Model specifications and interfaces, registry settings, global unique identifiers (“GUIDs”) and protocols that enable a hardware device or an application, Middleware, server Operating System or network Operating System to efficiently obtain services from (or provide services in response to requests from) and fully Interoperate with Platform Software and to use, benefit from, and rely on all the resources, facilities, and capabilities of such Platform Software. APIs include all interfaces, methods, routines and protocols that enable any Microsoft Operating System or Middleware Product installed on a Personal Computer to (a) execute fully and properly applications or Middleware designed to run in whole or in part on any Microsoft Platform Software installed on that or any other device (including servers, telephones and devices), (b) fully Interoperate with Microsoft Platform Software, applications or directories installed on the same computer or on any other computer or device, and (c) perform network security protocols such as authentication, authorization, access control, encryption/decryption and compression/decompression.*
- d. *“Bind” means to include software or a link to Web-Based Software in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the binary code of that software or link without degrading the performance or impairing the functionality of the Operating System (other than the removal of the functionality provided by that software or Web-Based Software).*
- e. *“Browser” means Internet Explorer 6.0, MSN Explorer 6.10, or their successors (which shall include any future product offering the same functionality as the then most recent version of Internet Explorer or MSN Explorer, whether or not styled as a version of Internet Explorer or MSN Explorer), offered on either Macintosh or Windows.*

- f. *“Communications Interfaces” means the interfaces and protocols that enable software, directories, networks, Operating Systems, network Operating Systems or Web-Based Software installed on one computer (including Personal Computers, servers and Handheld Computing Devices) to Interoperate with the Microsoft Platform Software on another computer including without limitation communications designed to ensure security, authentication or privacy.*
- g. *“Covered OEM” means one of the 20 Personal Computer OEMs having obtained the highest volume of licenses of Windows Operating System Products from Microsoft in the calendar year preceding the effective date of the Final Judgment. Starting on January 1, 2003, Microsoft shall annually determine and publish within 30 days the list of OEMs that shall be treated as covered OEMs for the new calendar year, based on the independently determined volume of licenses during the preceding calendar year.*
- h. *“De Facto Standard” has the meaning given in Section 16.b.*
- i. *“Default Middleware” means Middleware configured to launch automatically (that is, “by default”) to provide particular functionality in the event that the user has not selected specific Middleware for this purpose. For example, a default Web browser is Middleware configured to launch automatically to display Web pages in the event that the user has not selected other software for this purpose.*
- j. *“End-User Access” means the invocation of Middleware directly or indirectly by an end user of a computer, or the end user’s ability to invoke Middleware. “End-User Access” includes invocation of Middleware that the Operating System Product’s design requires the end user to accept.*
- k. *“Handheld Computing Device” means any RAM-based electronic computing device (including without limitation a cellular telephone, personal digital assistant and Pocket PC) that is small enough to be used while held in the user’s hand, that may or may not be capable of networked operation, including Internet access, that contains a computer microprocessor, and that can run software applications or Web-Based Software.*
- l. *“HSR Act” has the meaning given in Section 20.b.*
- m. *“IAP” means an Internet access provider that provides consumers with a connection to the Internet, with or without its own proprietary content.*
- n. *“ICP” means an Internet content provider that provides content to users of the Internet by maintaining Web sites or Web servers.*
- o. *“IHV” means an independent hardware vendor that develops hardware to be included in or used with a computer.*

- p. *“Intellectual Property” means copyrights, patents, trademarks or trade secrets that Microsoft uses or licenses to third parties.*
- q. *“Interoperate” means the ability of two products to effectively access, utilize and/or support the full features and functionality of one another.*
- r. *“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 or Web-Based Software (including without limitation products or services designed for Personal Computers, servers or Handheld Computing Devices).*
- s. *“Manager” means a Microsoft employee who is responsible for the direct or indirect supervision of more than 100 other employees.*
- t. *“Market Development Allowance” means any marketing development allowance, agreement, program, rebate, credit or discount, whereby an OEM or Third-Party Licensee is provided a monetary discount in the applicable royalty for a licensed product (other than the discount specifically described in Section 2.a.ii of this Judgment) in exchange for the OEM or Third-Party Licensee agreeing to some additional licensing term. For example, Microsoft has previously referred to Marketing Development Allowances as marketing development agreements, or MDAs, and marketing development programs, or MDPs.*
- u. *“Material Non-Compliance” has the meaning given in Section 19.e.*
- v. *“Microsoft” means Microsoft Corporation, its successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the Intellectual Property 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.*
- w. *“Middleware” means software, whether provided in the form of files installed on a computer or in the form of Web-Based Software, that operates directly or through other software within an Operating System or between an Operating System (whether or not on the same computer) and other software (whether or not on the same computer) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or made 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 without limitation Internet browsers, network operating systems, e-mail client software, media creation, delivery and playback software, instant messaging software,*

*voice recognition software, digital imaging software, the Java Virtual Machine, calendaring systems, Handheld Computing Device synchronization software, directories, and directory services and management software. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management software.*

- x. *“Microsoft Middleware Product” means*
  - i. *Internet browsers, e-mail client software, media creation, delivery and playback software, instant messaging software, voice recognition software, digital imaging software, directories, Exchange, calendaring systems, systems and enterprise management software, Office, Handheld Computing Device synchronization software, directory services and management software, the Common Language Runtime component of the .Net framework, and Compact Framework, whether provided in the form of files installed on a computer or in the form of Web-Based Software, or*
  - ii. *Middleware distributed by Microsoft that –*
    - (1) *is, or in the three years preceding this Judgment has been, distributed separately from an Operating System Product, any successors thereto, or*
    - (2) *provides functionality similar to that provided by Middleware offered by a Microsoft competitor.*
- y. *“Microsoft Platform Software” means a Windows Operating System Product or Microsoft Middleware Product or any combination of a Windows Operating System Product and a Microsoft Middleware Product.*
- z. *“OEM” means the manufacturer or assembler of a computer (including without limitation servers and Handheld Computing Devices), regardless of whether such manufacturer or assembler applies its trademark to the final product.*
- aa. *“Office” means all software developed and distributed by Microsoft incorporating the brand name “Microsoft Office” and its successors, including at least the individual Microsoft Middleware Products Word, Excel, Outlook (or in the case of Office for Macintosh, Entourage), Power Point, and Access.*
- bb. *“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 (including without limitation Personal Computers, servers and Handheld*

*Computing Devices) or network, providing a “platform” by exposing APIs that applications use to “call upon” the Operating System’s underlying software routines in order to perform functions.*

- cc. “Operating System Product” means an Operating System and additional software shipped with the Operating System, whether or not such additional software is sold separately. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product and any version of any Operating System Product created pursuant to the terms and requirements of this Final Judgment.*
- dd. “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.*
- ee. “Plaintiff” means any of the following plaintiffs in this action: the States of California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah and West Virginia and the District of Columbia.*
- ff. “Platform Software” means an Operating System or Middleware or any combination of an Operating System and Middleware.*
- gg. “Rule 53” has the meaning given in Section 18.*
- hh. “Special Master” has the meaning given in Section 18.*
- ii. “Special Master Liaison Officer” has the meaning given in Section 18.c.*
- jj. “Standard” has the meaning given in Section 16.a above.*
- kk. “Standard-Setting Body” means any organization or group that sets standards, such as the World Wide Web Consortium, the European Computer Manufacturers Association or the Java Community Process.*
- ll. “Subsidiary” of a person means an affiliate controlled by such person directly, or indirectly through one or more intermediaries.*
- mm. “Synchronization Drivers” means software that facilitates or enables the synchronization of information on any two computers (including without limitation Personal Computers, servers and Handheld Computing Devices).*
- nn. “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 or applications for Microsoft Platform Software running on a 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, encryption algorithms and key exchange mechanisms for data translation, reformatting, registry settings and field contents.*

- oo. *“Third-Party Licensee” means any person offering to purchase from Microsoft at least 10,000 licenses of a product or products offered and licensed under Section 1, including without limitation ISVs, systems integrators and value-added resellers, provided that any such person must in good faith intend to distribute, sell, use or market such licenses for commercial purposes.*
- pp. *“Timely Manner”: Disclosure of APIs, Technical Information and Communications Interfaces in a Timely Manner means, at a minimum, publication on a Web site accessible to ISVs, IHVs, OEMs and Third-Party Licensees at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (i) disclosed to Microsoft’s applications developers, or (ii) used by Microsoft’s own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, or (iii) disclosed to any third party, or (iv) 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.*
- qq. *“Web-Based Software” means an application or service that resides, in whole or in part, on a computer and whose functionality is designed to be accessed by a different computer via the Internet.*
- rr. *“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, Windows Me, Windows XP and their successors, including the Windows Operating Systems for Personal Computers codenamed “Longhorn,” and “Blackcomb,” and their successors, as distributed by Microsoft to any licensee, whether or not such product includes software code of any one or more Microsoft Middleware Products.*

### **The Importance of this Remedy Litigation**

The Litigating States’ proposed remedies, taken together, redress Microsoft’s

anticompetitive behavior in a manner that fully comports with the principles and spirit of the Court of Appeals' decision. These proposed remedies are intended to prohibit the recurrence of, and remedy the harm done by, the Microsoft practices that were held to be unlawful by the Court of Appeals. They are framed in terms of the specific anticompetitive conduct in which Microsoft engaged, such as commingling middleware and operating system software code; discriminatory licensing; failure to make timely disclosure of the interfaces necessary to enable its rivals to market software compatible with Windows; actual and threatened retaliation against customers and rivals to discourage their development and use of competing software; refusal to give OEMs and consumers the freedom to choose software based solely on its merits; the pollution of cross-platform technologies like Java; and the abuse of important applications like Office to deter the emergence of alternative software platforms.

These remedies are also intended to minimize the enforcement burden on the Court by giving Microsoft incentives to comply and by appointing a Special Master with substantial authority.

Unlike the previously announced settlement between the Department of Justice ("DOJ") and Microsoft, these remedies create a real prospect of achieving what the DOJ said it intended to accomplish: "stop Microsoft from engaging in unlawful conduct, prevent any recurrence of that conduct in the future, and restore competition in the software market . . ." Assistant Attorney General Charles James, DOJ Press Release, Nov. 2, 2001, at page 1.

To implement a meaningful remedy faithful to the Court of Appeals decision, the Plaintiffs' proposals must and do differ substantially from the DOJ settlement.



By the terms of the Final Judgment, Plaintiffs propose that, unlike the DOJ settlement, Microsoft be required, inter alia: (1) to license an unbundled version of Windows (i.e., in which code for Microsoft's middleware and its monopoly operating system is not commingled); (2) to provide early and broad disclosure of interfaces so that rival software companies have a fair opportunity to bring their products to market at the same time as Microsoft; (3) to disclose technical information so that rival handheld devices, servers and networks can interoperate with Microsoft's dominant Windows operating system; (4) to respect OEM and end-user preferences for non-Microsoft software, so that consumers have real freedom of choice unbiased by Microsoft; (5) to make Internet Explorer, the browser that benefited from so many of Microsoft's anticompetitive acts, available on an open source basis; (6) to carry Java, which Microsoft also labored mightily to destroy, along with its own operating system; and (7) to auction licenses to port Office to work on other operating systems.

These remedies also differ from the DOJ settlement in that they recognize that: (1) carefully crafted carve-outs and exceptions must be avoided, because of their tendency to render potentially useful provisions impotent, and (2) effective compliance requires strict requirements for internal compliance, strong incentives, and an enforcement mechanism (the Special Master) that promises prompt resolution of differences and minimal burden on the Court's resources.

Accepting the determinations and directives from the Court of Appeals, both in its liability determination and in its guidance on remedy, the Litigating States' Proposed Remedy maximizes the prospect for truly meaningful platform competition, and all of the benefits to consumers that such competition would yield.

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Respectfully submitted,

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