IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

BRIEF ON REMEDY OF AMICI CURIAE
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION AND
SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION

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INTEREST OF THE AMICI CURIAE

The Computer & Communications Industry Association (CCIA) and the Software and Information Industry Association (SIIA) are technology trade associations. Each has a long pedigree, broad membership and a record of participation in antitrust matters involving Microsoft. CCIA was one of the principal *amici* in the review of the current consent decree in both this Court and the court of appeals. SIIA has appeared in this proceeding as *amicus curiae* supporting the United States at the liability stage. In this brief, the two organizations present their views on an appropriate remedy.

1. The Computer & Communications Industry Association is an association of computer technology and telecommunications companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and on-line services, resellers, systems integrators, and third-party vendors. Its member companies employ nearly one million persons and generate annual revenues exceeding $300 billion. CCIA's mission is to further the business interests of its members, their customers, and the industry at large by being the leading industry advocate in promoting open, barrier-free competition in the offering of computer and communications products and services worldwide. CCIA's motto is "Open Markets, Open Systems, Open Networks, and Full, Fair and Open Competition," and its website is at www.ccianet.org.

For more than 26 years, CCIA has supported antitrust policy that ensures competition and a level playing field in the computer industry. CCIA supported the Tunney Act in the 1973 congressional hearings preceding the enactment of that legislation, and participated as *amicus curiae* in the proceedings examining the current Microsoft consent decree. CCIA is intimately familiar with the shortcomings of that decree, and its failure to prevent or deter Microsoft from continuing on an anticompetitive course.

2. The Software and Information Industry Association is the world's largest trade association representing the interests of firms in the software, information and Internet industry. Formed on January 1, 1999, through the merger of the 15-year-old Software Publishers Association (SPA) and the 30-year-old Information Industry Association, SIIA leads industry efforts in e-business, copyright, privacy, taxation and other public policy issues. SIIA's website is at www.siia.net.

3. CCIA, SIIA, and their members participate in all aspects of the computer software, information, communications, and Internet industries. They have a vital interest in the outcome of this proceeding because the future structure of the computer software industry and of Internet computing — and the range of conduct that the law permits within it — will determine to a substantial extent whether they thrive in a fair, innovative, and competitive environment. Competitive markets produce the greatest amount of innovation and provide consumers with the best products at the lowest prices. Just as those results benefit consumers, they are in the best interests of the industry.

CCIA, SIIA, and their members are thoroughly familiar with the markets and practices at issue in this case, and with the practical significance of that conduct. SIIA and CCIA reject the notion that the software industry can function efficiently only under rules prescribed by a monopolist who dictates when innovation may take place, what form it may take, and who may engage in it. Like the computer, communications and content industries, the software industry functions best when companies within it are free to engage in a dynamic and unrestrained competitive process. In competitive markets, innovation occurs and software interoperates smoothly without Microsoft's governance.

4. Although Microsoft used to be a member of SIIA — and a member of the SIIA Board of Directors — Microsoft resigned from SIIA and withdrew its funding after SIIA filed an amicus brief criticizing Microsoft's conduct at the liability stage of this proceeding. Microsoft has also induced some other companies dependent upon it to withdraw funding from both amici. These events shed a strong light

on the remedy issue now before the Court. Microsoft's power and wealth give it the ability to both punish its critics and retain battalions of lawyers, lobbyists, and publicists to undermine the government at every turn. If the Court adopts a "good conduct" remedy in this case, it can be sure that Microsoft will seek to silence those who would inform the decree court of future infractions, and will dispute the meaning of every provision in the decree — just as it did after the entry of the consent decree in 1995 — with the predictable consequence that the decree will be reduced to a dead letter. As we demonstrate in this brief, Microsoft is too powerful to be "fenced in" with a good conduct code, no matter how carefully that code is written.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is little dispute that this is the most important antitrust case of our generation, the case that will determine whether the structure of software markets — and the progress of the 21st Century economy — will be based on competition or monopoly. Few, if any, issues will affect consumers more in the coming years. Because the formulation of a remedy for antitrust violations is the "most significant phase of the case," *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973), it is crucial that the Court arrive at its judgment with both care and speed. Software markets move quickly; if permitted to continue on its course unimpeded, Microsoft can consolidate the rewards of its anticompetitive conduct quickly as well. The plaintiffs' evidence shows that, after more than a decade of antitrust enforcement scrutiny, Microsoft continues to use illegal means to shortcircuit competitive challenges to its dominance. It is time for those abuses to end.

A. As this Court has recognized, the structural problem that has given force to Microsoft's anticompetitive abuses is the applications barrier to entry. That is the structural condition that Microsoft has exploited (and has reinforced and preserved). No list of behavioral proscriptions could effectively contain that exploitation. Microsoft has shown remarkable inventiveness in devising new ways to leverage its market power to foreclose competition. Accordingly, any effective remedy must attack this problem, whether directly (as proposed in the Remedies Brief of Amici Curiae Robert Litan *et al*. ("Economists' Brief")), or indirectly, as the plaintiffs propose.

A structural remedy is needed because behavioral remedies do not address the two principal competitive problems demonstrated by the trial evidence and subsequent events: (1) Microsoft's monopoly power in operating systems, which provides multifaceted opportunities for abusive, coercive conduct that excludes competition, and (2) Microsoft's successful leveraging of that monopoly into a monopoly in the Internet browser. The latter monopoly provides a chokehold over Internet computing that permits Microsoft to transform open-standard Internet computing into a Microsoft-proprietary domain. As the Court is well aware, if a remedy requires future, reactive enforcement proceedings to impose tangible constraints on Microsoft, Microsoft will use those proceedings as an opportunity for gamesmanship and obstruction — annexing additional markets to its monopoly in the meantime, as it has done while the 1995 consent decree has been in force. Plaintiffs' Proposed Final Judgment provides a measured but effective way of dealing with these problems, and does so without the delay and administrative intrusion occasioned by a remedy that relies on conduct restraints alone.

Plaintiffs' Proposed Final Judgment accords with the remedial principles laid down by the Supreme Court in antitrust case after antitrust case. Antitrust remedies must restore competition, neutralize a monopoly that has been abused, deprive a violator of the benefits of its illegal conduct, and prevent a recurrence of anticompetitive activity. Where the antitrust violation involves monopoly, and there is a continuing incentive and ability to abuse that monopoly, only a structural remedy can satisfy these criteria.

B. Plaintiffs' Proposed Final Judgment provides an appropriate framework for relief on the facts of this case. The reorganization of Microsoft into separate operating systems and applications businesses takes away the operating system's control over the most significant aspects of the applications barrier to entry — including control over the Internet browser achieved by Microsoft's illegal conduct proved at trial. Although the operating systems company will remain a monopoly immediately after the reorganization, it will face the Office and Internet Explorer monopolies as competitive threats rather than reinforcements of its power. Each of the companies to be formed in the reorganization will have incentives to undermine the other's monopoly control, whether by entering the other's market, by ensuring inter-operability with the other's rivals, or merely by cooperating in the development of cross-platform middleware aimed at the other's platform. Consumers benefit from the unleashing of both actual and potential competition.

The conduct restrictions in Plaintiffs' Proposed Final Judgment do not prevent either successor company from engaging in any line of business, and thus avoid the principal drawback of the *AT&T* decree. The proposed conduct provisions instead are appropriate interim measures to prevent Microsoft from engaging in anticompetitive behavior similar to that proved in this case, without impinging on the development of software. Given Microsoft's track record, such restraints are needed until the reorganized, independent successor companies establish a competitive dynamic.

This Court need not delay final resolution of this case if it enters Plaintiffs' Proposed Final Judgment. That Judgment would be final for the purposes of an expedited appeal to the Supreme Court, and the details of implementation can be formulated while the appeal is pending. Before judgment is entered, Microsoft may be afforded an opportunity to cross-examine the plaintiffs' witnesses promptly, but should not receive additional discovery. Microsoft knows its own organizational structure and its own illegal practices. It should not be permitted to use the judicial process to seek out and intimidate those who provided information to the government, in hopes of deterring assistance by customers and others in the enforcement of the decree and in the reporting of future violations.

C. Although Plaintiffs' Proposed Final Judgment goes far toward undoing the competitive harm caused by Microsoft's widespread monopolistic abuses, a small but competitively significant adjustment would make the remedy more robust. The Court should supplement the proposed reorganization with a provision separating the Internet Explorer intellectual property and associated personnel into a separate company (with a license of the current Internet Explorer product to the operating systems and applications companies). In the alternative, the Court should order that the applications company make the Internet Explorer product — which provides no royalties now — an "open source" product so that other software developers could use the source code. Either of these small additions would ensure that the monopoly over productivity applications that Microsoft holds does not supplant the operating system as the point of leverage for a monopoly over the software used in Internet computing.

D. At the remedy stage of this case, the danger is not of doing too much but of doing too little. This is the most significant monopolization violation proved in a generation, and the most significant monopolization case litigated to judgment in many decades, in an industry of surpassing importance to the current and future national economy. If Microsoft walks away from *this* case with only another set of conduct restrictions to evade, Section 2 of the Sherman Act will be drained of much of its practical effect. That is a price the public should not be asked to pay.

ARGUMENT

MICROSOFT SHOULD BE REORGANIZED TO REDUCE ITS MONOPOLY POWER

A. Microsoft's Violations Call For Structural Relief Because They Reflect A Serious Structural Problem

1. *Microsoft's Violations Reflect Pervasive and Multifaceted Abuses of Monopoly Power*

a. This case involves the monopolization of the software central to current desktop computing — the operating system — and the attempted (now, successful) monopolization of the software that is central to Internet computing — the Internet browser. Microsoft's anticompetitive conduct was not narrow and confined. Rather, Microsoft aimed its pervasive illegal practices at any product or firm that presented even a potential threat to Microsoft's monopoly power. That conduct was not the work of a few rogue employees without corporate authority or control. To the contrary, anticompetitive conduct was orchestrated at the highest levels of the company — often under the direction of Bill Gates himself, a state of affairs that has continued since the evidence closed. See Henderson Dec. ¶ 69 (citing Gov't Remedy Ex. 1).

Moreover, despite Microsoft's recurrent contentions, its monopolistic abuses harmed consumers. See Findings ¶¶ 57, 60, 62-66, 171-174, 210-216, 225-229, 247, 339-340, 379, 397, 408-412. Consumers have lost the price and functionality benefits that competition produced in the browser market before Microsoft achieved dominance, and could produce in operating systems (and other middleware) as well. Consumers feel this injury every time another hour is lost from a crash caused by an operating system that is under no competitive pressure to improve stability. The plaintiffs' evidence substantiates the breadth of consumer harm, see Henderson Dec. ¶¶ 28, 92-98; Romer Dec., ¶¶ 4-5, 11, 14, as did SIIA's *amicus* brief on liability issues (at 32-41).[1] That these lost benefits are not easy to quantify does not diminish their significance. Moreover, because the antitrust laws presume harm from illegal monopolization — only a

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[1] An MIT professor recently pointed out another consumer harm. The widely noted susceptibility of Microsoft products to viruses reflects the simple fact that "the Windows monopoly is a computer monoculture with all the same problems as other monocultures." Richard C. Lanza, *The E-Mail Virus Is Telling Us Things*, N.Y. TIMES, May 6, 2000, at A26 (letter to the editor). Precisely because Microsoft's communications applications "are tightly integrated with Microsoft's Windows operating system, a rogue script can do almost anything." *Return to Sender*, ECONOMIST, May 13, 2000, at 82. The social cost of such problems is magnified when the monopoly is illegally maintained, as the record shows here.

harmful monopoly would have to act illegally to protect its position — such quantification is irrelevant to the remedial issues here. See *Blue Cross & Blue Shield United* v. *Marshfield Clinic, Inc.*, 152 F.3d 588, 591 (7th Cir. 1998) (Posner, C.J.), cert. denied, 525 U.S. 1071 (1999). Indeed, that a "plaintiff is unable to quantify the harm that the defendant's practice has inflicted" *supports* strong injunctive relief rather than weighing against it. *Ibid*.

To contend successfully that consumers are not harmed by the monopolistic suppression of competition that has insulated Windows, Microsoft would have to convince the Court of one of two equally meritless propositions. First, Microsoft might claim that PC operating systems constitute an unimportant market. But Microsoft has acknowledged elsewhere that the 130 million PC operating systems sold per year are and will remain "at the center of" computing.[2] Second, Microsoft might contend that competition does not provide consumer benefits in the PC operating systems market. But that argument has been "foreclose[d]" by Congress and the Supreme Court. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978).

b. When "a firm found to have monopoly power has committed a substantial antitrust violation," a remedy must "make the market more structurally competitive." PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 207 (1999 supp.). Microsoft plainly has "monopoly power" and Microsoft's conduct plainly amounts to "a substantial antitrust violation." See Conclusions, pp. 6-7, 20-21, 24, 26, 32-34. Through a "deliberate assault upon entrepreneurial efforts that ** * could well have

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[2] *The Best Is Yet to Come*, remarks by Bill Gates to WINHEC 2000, New Orleans, Apr. 25, 2000, http://www.microsoft.com/billgates/speeches/04-25winhec00.htm; Henderson Dec. 43; see also, *e.g.*, *Gartner's Dataquest Says Worldwide PC Industry Experienced 15 Percent Growth in First Quarter 2000*, press release, Apr. 24, 2000, http://gartner11.gartnerweb.com/dq/static/about/press/pr-b200019.html; Steve Ballmer, address to Microsoft financial analyst meeting, July 22, 1999, http://www.microsoft.com/msft/speech/analystmtg99/ballmerfam99.html.

enabled the introduction of competition into the market for Intel-compatible PC operating systems," Microsoft "trammeled the competitive process through which the computer software industry generally stimulates innovation and conduces to the optimum benefit of consumers." *Id*. at 20.

This is not a case of a firm with a large market share that strayed over the legal limit in a few isolated instances. Rather, Microsoft conducted a monopolistic campaign of a range and breadth with few parallels in American economic history — and this record reflects only a snapshot of a company that has made anticompetitive activity a primary business tactic for many years. Microsoft's effort to protect its operating systems monopoly — and to extend that monopoly into the Internet browser market — encompassed a full catalogue of exclusionary practices: market division proposals, coercive exclusive arrangements, tying, and many less orthodox forms of predatory conduct that exploited Microsoft's market power.

In particular, the Findings are replete with successful schemes "in which [Microsoft] has applied its monopoly power to the task of protecting the applications barrier to entry." Findings ¶ 340. As this Court recognized, the core of "Microsoft's business strategy" is to "direct[] its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist." *Id.* ¶ 132. It is "Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." *Id*. ¶ 93.

In this Court's words, "Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products." Findings ¶ 412. The evidence in this case, and the unfortunate experience under the current consent decree, amply demonstrate that Microsoft will abuse monopoly power by any means available to it.

As a result, the remedy for Microsoft's extraordinary array of antitrust violations must go beyond narrow behavioral proscriptions touching on particular tactics that Microsoft has used with exclusionary effect. Rather, the remedy must deprive Microsoft of the incentive and the ability to continue and enlarge its consistent, harmful course of conduct. So long as Microsoft possesses its monopoly, and maintains control over the applications barrier to entry that insulates and helps perpetuate that monopoly, nothing will change. That is unmistakably clear both from the plaintiffs' evidence (see Henderson Dec. ¶¶ 6-8, 12-13, 18, 69-70, 96-98) and from Microsoft's counterproposal of an injunction that would forbid little, if any, of the conduct that this Court found illegal.

c. An ideal remedy would produce competition immediately, as the Economists' Brief suggests (at 8, 49-67). Ironically, Microsoft seems to endorse this approach, criticizing the plaintiffs' proposal because it "will not result in an immediate and certain increase in competition in any market defined by the Court." Microsoft Summ. Resp. 2. If this Court agrees that relief must succeed with certainty, then it should take Microsoft at its word and follow the recommendation in the Economists' Brief.

Plaintiffs' Proposed Final Judgment takes a more cautious course, but one that aims to correct the structural condition that now protects Microsoft's monopoly: the applications barrier to entry. See Findings ¶¶ 36-52. If something is not done to erode the applications barrier, there is a clear danger that the same problems will recur again and again, in modified forms.

Judge Greene recognized this problem when he decided to impose a divestiture remedy in the *AT&T* case over the strong objections of the Department of Defense and several States. See *United States* v. *AT&T*, 552 F. Supp. 131, 153-154 (D.D.C. 1982) (noting opposition by States), aff'd per curiam sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983); *id.* at 208-209 (Dep't of Defense).[3]

[3] Although the *AT&T* remedy was the result of a consent decree after the government and AT&T agreed to end the litigation, the decision approving the decree is a persuasive precedent because the remedy was

Judge Greene acknowledged that "[i]t would be difficult to formulate an order that would effectively deal with all of the different kinds of anticompetitive behavior" at different times "and with respect to many different subjects." *Id*. at 167. That was particularly so because, in the judge's view, the Bell System's "pattern" — like Microsoft's — "has been to shift from one anticompetitive activity to another" once one goal had been achieved or a particular practice drew government scrutiny. *Ibid*.

In this case, as in *AT&T*, "it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior" that an aggressive monopolist with demonstrated contempt for the antitrust laws "might employ in the future." 552 F. Supp. at 168. Thus, Judge Greene observed, "courts have generally rejected this type of detailed injunction in favor of the 'surer, cleaner remedy of divestiture.'" 552 F. Supp. at 168 n.155 (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961), and citing *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 165-175 (1948), and *United States* v. *Crescent Amusement Co*., 323 U.S. 173, 189-190 (1944)). The same considerations lead to the same conclusion here.

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thoroughly and vigorously disputed, and was analyzed in an extensive opinion. Several States and the Department of Defense, among others, opposed the remedy as excessive despite the agreement. Judge Greene treated the case as fully contested, and relied on Supreme Court precedent laid down in litigated cases. And the Supreme Court — which cannot and will not review cases in which there is no live controversy — accepted the appeals of the States and others and affirmed the decree on the merits. *Maryland* v. *United States*, 460 U.S. 1001 (1983). See also *California* v. *United States*, 464 U.S. 1013 (1983) (affirming plan of reorganization).

2. *Conduct Restrictions Are Plainly Inadequate To Constrain Microsoft's Anticompetitive Threat Or To Reinvigorate Competition*

One thing should be obvious from the breadth of the anticompetitive conduct proved in this case and the adverse experience with the current consent decree: conduct remedies alone will not work against a powerful monopolist like Microsoft with no disposition to abide by the antitrust laws. The problem in such a case — the problem in *this* case — is the combination of durable monopoly power with the ability, incentive, and inclination to misuse it. A conduct remedy will do nothing to rectify any of these conditions.

Conduct remedies already have proved inadequate. Microsoft has been subject to the conduct remedies in the 1995 consent decree for five years, but the structure of the operating systems market has not changed. To the contrary, Microsoft's market share has grown, see Findings ¶ 35, and its monopoly has become stronger with the addition of a monopoly over Internet browsers. See Henderson Dec. ¶ 41. The current experiment with a conduct remedy has been costly: while the 1995 decree has been in effect, competition in the browser market was lost to Microsoft's anticompetitive conduct. Another loss of a competitive, innovative market that threatens the Windows monopoly would be devastating. Not only is there no hope that conduct remedies alone will open up the operating systems market to competition, or even significantly restrain Microsoft from committing additional anticompetitive acts, but conduct remedies would create insuperable enforcement problems and heavy supervisory burdens for the Court.

The Supreme Court long has understood the inadequacy of conduct remedies in cases involving substantial violations of Section 2 of the Sherman Act. In a monopolization case courts must "start from the premise that an injunction against future violations is not adequate to protect the public interest." *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948). The leading antitrust treatise agrees that the "presumptive rule" should "favor[] maximum feasible relief against monopoly based in part on significant exclusionary practices." 3 AREEDA & HOVENKAMP, *supra*, ¶ 655, at 101 (rev. ed. 1996).

That is because "[t]he track records of [conduct] remedies in dislodging monopoly power have * * * not been very promising." AREEDA & HOVENKAMP, *supra*, ¶ 704.3, at 212 (1999 supp.). The reason for that failure is plain. "Simply enjoining [particular] practices without attacking the structural monopoly does no more than encourage the monopolist to look for some new way of exercising its dominance that is not covered by the current injunction." *Id.* at 213.

a. *The Limits Inherent in Drafting a Conduct Decree Make Evasion Inevitable.*

The principal difficulty with a decree confined to conduct relief is that the injunction must reliably prohibit every type of violation in which the defendant has engaged, as well as foreseeable conduct that the offender might substitute if its past methods were forbidden. In cases involving one or two isolated practices, conduct remedies may make sense. Here, however, where Microsoft has shown virtually limitless ingenuity in devising ways to protect its monopoly, a conduct remedy standing alone would be doomed to fail just as the current consent decree has failed. A decree that did no more than catalogue, characterize, and prohibit each type of anticompetitive conduct proved at trial would be enormously complex but easy to evade.

That is exactly what happened with the 1995 consent decree over which this Court has presided. Microsoft has either violated — or evaded by shifting the focus of proscribed conduct — almost every provision of that decree. The decree prohibits Windows license agreements for longer than one year — but only with OEMs. *United States* v. *Microsoft Corp.*, No. 94-1564, 1995–2 Trade Cas. ¶ 71,096, at § IV(A) (D.D.C.) ("*1995 Decree*"). Accordingly, Microsoft, directly and through non-OEM resellers, has entered 3-year licensing agreements with the business enterprises that are responsible for most of Microsoft's profits; those agreements include Windows upgrades for the term of the agreement.[4] Those

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[4] See, *e.g.*, Microsoft Corp., *Microsoft Enterprise Agreement*, http://www.microsoft.com/CIO/licensing/agree.htm (visited May 2000); Microsoft Corp. white paper, *The*

agreements typically involve a lump sum for a bundle of products, based on the number of PC desktops in an organization, rather than on actual installation of software.[5] Thus, were it not for the limitation of the 1995 decree restrictions to OEMs, Microsoft's enterprise agreements likely would also violate the decree prohibitions on per processor licenses (§ IV(C)) and lump sum pricing (§ IV(H)), and the restriction of Microsoft Windows licenses to "per copy" agreements (§ IV(D).

The current consent decree prohibits Microsoft from entering into any "License Agreement" that limits an OEM's distribution of any non-Microsoft operating system software product. *1995 Decree* § IV(B). But a "License Agreement" was defined to include any OEM license of "Covered Product(s)" (*id*. § II(4)), which in turn were defined to include stand-alone products that perform OS functions (*id*. § II(1)), as Microsoft claims that Internet Explorer does. Thus, Microsoft's coercive exclusionary agreements aimed at Netscape likely violated this provision as well as Section 2 of the Sherman Act. And

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Business Value of a Microsoft Enterprise Agreement, July 1998, http://www.microsoft.com/enterprise/licensing/agreement/Eawhite.doc; Steve Ballmer, address to Microsoft financial analyst meeting, July 22, 1999, http://www/microsoft.com/msft/speech/analystmtg99/ballmerfam99.htm ("the consumer audience * * * is absolutely the smallest percentage of [Microsoft's] business").

[5] See *Microsoft Enterprise Agreement*, *supra*; *Business Value*, *supra*; Stuart Glascock & Barbara Darrow, *Enterprise Deals Sought — Microsoft, Resellers Broaden Scope of Enterprise Agreements*, COMPUTER RESELLER NEWS, Apr. 20, 1998, http://www.techweb.com/se/directlink.cgi?CRN19980420S0003.

the trial evidence has shown that Microsoft disregarded the 1995 decree's prohibition (§ IV(E)) of OEM Windows licenses that were "expressly or impliedly conditioned" on the licensing of any other product or on "the OEM not licensing, purchasing, using, or distributing any non-Microsoft product." The tie between Internet Explorer and Windows plainly violated this provision before Windows 98 was released, and — on the record developed at trial — may well have violated the consent decree afterward as well, despite the proviso permitting Microsoft to develop "integrated" products. See *United States* v. *Microsoft Corp*., 147 F.3d 935, 950 & n.15, 952 (D.C. Cir. 1998) (*Microsoft II*) (limiting dictum about "integration" of Windows and Internet Explorer to "the facts before us"). Microsoft also evaded this provision by taking advantage of its narrow limitation to OEMs; Microsoft's contracts with ISPs and OLSs imposed identical competitive injuries.

The experience with the 1995 decree shows that conduct proscriptions alone are entirely inadequate to contain a firm as dedicated to the destruction of competition as Microsoft. And while Microsoft's own proposed remedy might be dismissed as a caricature of ineffectual antitrust relief, it nonetheless provides further illustration of the inherent weakness of conduct restrictions. Section 4 of that proposal purports to address Microsoft's illegal restrictions on the boot-up sequence, icon displays, and the default browser assignment. But it does not do that at all. To the contrary, that provision would allow Microsoft to use discriminatory pricing and services to coerce OEMs to forgo all of these options, or to retaliate in any other way, so long as Microsoft did not outright cancel or refuse a Windows license altogether. That would allow Microsoft to repeat much of the conduct condemned by this Court. The proposed default browser provision is meaningless under its own terms, since Section 4(b)(c) permits Microsoft to displace the "default" browser whenever a Web page is optimized for a Microsoft browser. Section 5 of Microsoft's proposed decree, while barring contracts that exchange placement on the Windows desktop for a third party's agreement not to aid Microsoft *platform* (but not applications) software, would not stop Microsoft from simply refusing to offer such placement to parties that aided Microsoft's competitors — much as Microsoft did with AOL. And Section 6 would do little more than give judicial approval to Microsoft's discriminatory treatment of ISVs, allowing Microsoft to refuse access to technical information on any ground related to Microsoft's limitless conception of its own intellectual property rights. Section 7 of Microsoft's proposal would not stop Microsoft from repeating the coercive conduct aimed at Apple (Findings ¶¶ 104-110; Conclusions, p.17), since that provision would apply only to Microsoft software that was "ready for commercial release" at the time of the threat. Although Microsoft's proposal should not be confused with a good-faith effort to devise an effective antitrust decree, it nonetheless shows how superficially attractive conduct restrictions in fact restrict nothing at all.

Even conduct restrictions devised in good faith, like those in Plaintiffs' Proposed Final Judgment, are valuable primarily as supplements to structural relief — as interim measures to slow down Microsoft's anticompetitive activity until the reorganization takes effect. Without a more direct approach to the problem of monopoly power, those conduct provisions at most would make Microsoft alter some details of its practices without materially affecting its anticompetitive strategy. For example, without a reorganization, the conduct provisions in Section 3 of the plaintiffs' proposal would permit Microsoft to use identical tactics to exert its market power over OEMs so long as the tactics involved the Microsoft Office monopoly, even if the goal of that pressure was to preserve the Windows monopoly. Other provisions, like the general prohibition on exclusivity, simply echo the unenforced provisions of the 1995 consent decree, and at best would make Microsoft shift its exclusionary tactics from one method to another. And, although the disclosure provisions in Section 3(b) should prevent the continued misuse of the Windows monopoly to bolster the applications barrier to entry by providing an unfair advantage to in-house applications and middleware developers, without a reorganization that provision would be unlikely to alter the status quo — and would be particularly difficult to enforce.

A few obvious pathways to evasion exemplify the inherent limitations in the conduct provisions of Plaintiffs' Proposed Final Judgment. Because some restrictions apply only to enumerated relationships with OEMs, ISVs, hardware vendors, ISPs, or other third parties, Microsoft could argue that the decree permitted it to engage in *exactly* the same exclusionary behavior within the context of end-user licensing. Like other software vendors, Microsoft already is moving toward a software-as-service model in which at least large end-users license software for a fixed period, including all upgrades released during that time. See, *e.g.*, Microsoft Summ. Resp. 17; Mary Jo Foley, *Microsoft: The Next Generation*, ZDNet News, Apr. 28, 2000, http://www.zdnet.com/zdnn/stories/news/0,4586,2556472,00.html; Mary Jo Foley, *Microsoft Dabbles in Software Hosting Waters*, SM@RT RESELLER, June 2, 1999, http://www.zdnet.com/sr/stories/0,4538, 2268932,00.html; Gary Bolles, *Road to Software Rentals*, SM@RT RESELLER, Mar. 8, 1999, http://www.zdnet.com/sr/stories/issue/0,4537,392493,00.html. Though some of this software rental occurs through third-party application service providers, it would be a simple matter for Microsoft to recharacterize the software licenses as direct licenses to the end-users.

In addition, Microsoft could argue that many of the conduct restrictions in Plaintiffs' Proposed Final Judgment apply to only one version of Microsoft's flagship Windows 2000 operating system, Windows 2000 Professional, which runs single desktops and can operate as a server for small networks. See Plaintiffs' Proposed Final Judgment § 7(dd). The other versions of Windows 2000 contain almost exactly the same code — except that additional server features are added, and the operating system can run on more central processing units. It would be a simple matter for Microsoft to repackage its operating systems to position one of the server-oriented brands as the desktop operating system as well, and then discontinue Windows 2000 Professional. Once Microsoft's decree obligation to maintain the superseded operating system expired, Microsoft could assert that, under the language of the decree, its remaining operating systems were not subject to the conduct restraints.

These examples merely illustrate the obvious — that conduct decrees by their nature cannot anticipate and keep pace with a determined and devious violator.[6] Experience with the current consent decree proves that Microsoft will find a way to work around any remedy that does not directly and effectively address its market power. As Microsoft has boasted, the 1995 decree did not "change [Microsoft's] business practices at all," Gov't Ex. 940, and nothing will change after another conduct decree. See James Grimaldi, *Microsoft Defends Its Practices; CEO Ballmer Sees No Need to Change*, WASH. POST, Apr. 19, 2000. Even if this Court retains broad power to modify the decree, the Court will not be able to respond when it discovers that the conduct restrictions contain loopholes that permit evasion, unless it undertakes the burden and delay of a "complete hearing and findings of fact." *United States* v. *Western Electric Co.*, 894 F.2d 430, 438 (D.C. Cir. 1990) (quoting *Brown* v. *Neeb*, 644 F.2d 551, 560 (6th Cir. 1981)); see also *id*. at 434.

Microsoft's monopoly power also allows it to continue to mandate the adoption of Microsoft-friendly standards. The trial evidence revealed Microsoft's efforts to undermine standard Java because the standard would increase cross-platform programming efficiency. The evidence also showed that Microsoft intends to co-opt other standards, including HTML, the language that has driven the growth of the World Wide Web, and weigh it down with Microsoft-specific extensions. See Findings ¶¶ 233, 322; 11/10/98 (a.m.) Tr. 21-22; Gov't Ex. 564, at 3; see also Henderson Dec. ¶¶ 34-36. This activity has continued, as Microsoft has attempted to undermine the Kerberos security standard. See *id*. ¶¶ 49-51; Romer Dec. ¶ 35-36; Felten Dec. ¶¶ 77-81. This ability to dictate standards, like Microsoft's ability to retard software

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[6] This brief does not attempt to identify and explain specific improvements in the conduct provisions that might reduce the possibility of evasion. The *amici* may seek leave to submit such recommendations.

innovation that depends on interoperation with the operating system, is a particularly dangerous aspect of illegal monopolization because it permits Microsoft to extend its monopoly into Internet computing while protecting the monopolies it already possesses. Microsoft's predilection to sabotage threatening cross-platform standards is impossible to confine through a series of behavioral orders. An effective remedy must attack Microsoft's repeatedly and ingeniously abused market power, not its anticompetitive tactic *du jour*.

Also weighing against a conduct remedy in this case is the need to address where Microsoft's monopoly is going, not just where it has been. Microsoft already has used its operating systems monopoly to breed monopolies in the Internet browser and desktop productivity applications. A behavioral remedy would have to be sufficient to protect competition in adjacent markets most susceptible to future monopolization. Those include the markets for directory services and streaming media software (both already tied to Windows 2000), enterprise server operating systems, enterprise databases, enterprise e-mail and collaborative computing servers, enterprise server applications, Internet infrastructure software (web servers, proxy servers, applications servers), consumer finance and transaction applications, and online services providing proprietary content. Microsoft already has used its ability to insinuate technological links between its desktop monopolies and enterprise software, and to bundle its Windows operating systems with other software (both technologically and contractually), to accelerate its acquisition of market power in enterprise software markets. See Henderson Dec. ¶¶ 38-40; Romer Dec. ¶¶ 35-36; see also SIIA Br. Supporting U.S. 9-13. Indeed, 40% of the functionality of the desktop version of Windows 2000 is useless without a Windows 2000 server. See *Ballmer Is Bullish on Windows 2000*, PC WEEK, Nov. 19, 1999, http://www.zdnet.com/pcweek/stories/news/0,4153,1018247,00.html.

Microsoft also has hinted that the strategy of its "Next Generation Windows Services" is to insert "technological shackles" (Conclusions, p.10) in its monopoly desktop software to compel the use of Microsoft software throughout the Internet, so that the ocean of innovation on the Internet becomes a stagnant Microsoft-proprietary pond. Dominic Gates, *How to Integrate Everything: Undaunted by its Antitrust Defeat, Microsoft Plows Ahead with its Plan to Dominate the Internet*, INDUSTRY STANDARD, May 22, 2000, at 120; see *id*. at 121 (noting that reorganization proposed by plaintiffs in this case likely would prevent that result); see David Kirkpatrick, *The New Face of Microsoft*, FORTUNE, Feb. 7, 2000, at 87, 88 (Microsoft is aiming for "a new kind of operating system, in which Windows gets spread throughout the Internet, just as the current Windows is in every nook and cranny of your computer's hard drive"). See also Microsoft Summ. Resp. 17-18. Such conduct is impossible to predict, much less prohibit in advance with enforceable specificity.

b. *Effective and Timely Enforcement of Conduct Restrictions Is Practically Impossible.*

Even if it were possible to craft a set of behavioral remedies that could not profitably be circumvented, it would be necessary to ensure that Microsoft complied with those restrictions. Effective monitoring and enforcement would require continuing oversight of Microsoft's commercial activities by government agencies and the court. As the Supreme Court has observed, "the policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture." *Du Pont*, 366 U.S. at 334. Accord, *AT&T*, 552 F. Supp. at 167-168. Comprehensive behavioral decrees inevitably require interpretation and application as the defendant introduces new products, moves into new markets, or changes its business strategies in its traditional markets. Microsoft and the government plaintiffs would return to court repeatedly to argue over the boundaries of the decree prohibitions and to determine their application to Microsoft's latest exclusionary initiatives. Given Microsoft's litigious bent and enormous wealth, this would tax the scarce resources of the Court and the enforcement authorities to the breaking point.

One of Microsoft's leading legal public relations spokesmen, Charles F. (Rick) Rule, has explained the contrast between the efficiency of structural relief and the comparative inefficiency of behavioral relief in the *AT&T* case. Rule inherited the Bell System divestiture decree and had to live with it as Assistant Attorney General for Antitrust in the 1980s. Near the end of his tenure in that position, Rule gave an accounting of "the lessons of the AT&T decree." See *Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree,* Remarks of Charles F. Rule before The Brookings Institution, Developments in Telecommunications Policy, Oct. 5, 1988 ("Rule Speech").

Rule praised the divestiture: "there is little doubt that the breakup of AT&T achieved substantial benefits." Rule Speech 14. But continued supervision of the industry under the conduct remedies imposed in the decree created an enormous problem. "Unfortunately, the choice of the Department [of Justice] and decree court as [regulators] was, in my opinion, a big mistake." *Id*. at 21. In Rule's words, "Unless you have served on the front lines of the Department's peacekeeping force, it is hard to imagine the barrage of time-consuming and often petty complaints that constantly bombards the Department." *Id*. at 23.

In this case, federal and state enforcement agencies would have to monitor the day-to-day operations of a fast-moving business with 35,000 employees, many products, and frequent upgrades and new product introductions. They would have to investigate complaints of non-compliance, debate decree interpretation and modification issues, and litigate contempt proceedings. The difficulty of this task would be most acute regarding decree provisions that attempted to restrict Microsoft's decisions regarding compatibility or other technical matters, or the degree to which information may flow between divisions of the firm. These would be the hardest for outsiders to observe and the easiest for Microsoft to explain away with arguments that the actions did not fall squarely within a particular conduct restriction.

Those drawbacks would be magnified given Microsoft's evident disregard of the legal norms imposed by antitrust laws. Microsoft responded to this Court's effort to enforce the anti-tying provisions of the 1995 consent decree by proposing to distribute a version of Windows that did not work — and with a straight face told this Court that its order required such a response. See *Microsoft Asserts Compliance With Injunction in Only Way Possible*, 74 ANTITRUST & TRADE REG. REP. (BNA) 49 (Jan. 15, 1998).

Not only did Microsoft successfully dodge the 1995 consent decree, but its conduct related to this case makes clear that a conduct remedy would be a wasted effort. Microsoft executives at several junctures appeared to be incapable of simply telling the truth under oath and, during James Allchin's trial testimony, Microsoft presented this Court with a crudely faked videotape. Even if the Court concludes that these incidents do not warrant reference to the United States Attorney for criminal investigation, they certainly indicate that Microsoft does not take legal obligations seriously and cannot be trusted to comply with them. Nothing would change under a remedy that required only compliance with specific conduct proscriptions — except that Microsoft might refine its deceptions so as to escape detection. Meanwhile, outside the courtroom, Microsoft has campaigned for legislation to undermine antitrust enforcement, while trying to intimidate state and federal law enforcement officials with a massive lobbying and public relations campaign that equates a reduction in Microsoft's monopoly rents with damage to the public welfare.[7]

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[7] Microsoft lobbyists tried to push through proposals that would have cut funding for the pursuit of the case against Microsoft, or for antitrust enforcement against high technology generally. See, e.g., *Washington Wire*, WALL ST. J., Apr. 9, 1999, at A1; *Senators Decry Threat to Cut Antitrust Funds Over Microsoft*, Dow Jones News Service, March 11, 1999; Rajiv Chandrasekaran & John Mintz, *Microsoft's Window of Influence; Intensive Lobbying Aims to Neutralize Antitrust Efforts*, WASH. POST, May 7, 1999, at A1; James Grimaldi & Jay Greene, *Microsoft Hard At Work Outside Courtroom*, SEATTLE TIMES, Feb. 17, 1999, at A1. See also *Microsoft's Political Donation In Question; South Carolina GOP Says Decision To Quit Lawsuit Coincidental*, CHI. TRIB., Dec. 25, 1998, at 3.

There are few, if any, precedents for Microsoft's effort to buy its way out of the consequences of its lawbreaking through public relations and lobbying campaigns. See John R. Wilke, *Microsoft Steps Up Lobbying, Donations to Fight Government's Antitrust Case*, WALL ST. J., May 16, 2000, at A3; James Grimaldi, *Microsoft's Lobbying Largess Pays Off*, WASH. POST, May 17, 2000, at A1, A17 (noting that Microsoft has created new advocacy associations including the Association for Competitive

Success in that undertaking would, of course, render any conduct decree meaningless.

Microsoft merely confirmed its contempt for the antitrust laws and this enforcement proceeding when it proposed a remedy that would not prohibit most of the conduct at issue in this case, and would permit the rest with slight variations. Indeed, in its proposal Microsoft continues to refuse to implement an antitrust compliance program. See 1/27/99 (a.m.) Tr. 5 (Maritz) (Microsoft has no antitrust compliance program); see also *United States* v. *Microsoft Corp.*, 159 F.R.D. 318, 336-337 (D.D.C.) (noting Microsoft's refusal to implement antitrust compliance program), rev'd, 56 F.3d 1448 (D.C. Cir. 1995); but see Plaintiffs' Proposed Final Judgment § 4 (requiring such a program). Rather than take steps to ensure compliance with the antitrust laws, Microsoft created a new high-level management position to focus on the public relations aspects of its coercive and exclusionary conduct. See Kara Swisher, *Microsoft Appointee: Change Agent or PR Ploy?*, WALL ST. J., May 15, 2000, at B1.

Microsoft's refusal to bring its market conduct within legal bounds is chronic and intractable. While this Court has been considering Microsoft's liability, Microsoft has undertaken to redesign its software to injure Palm, a competitor that it views as posing a long-term threat to the Windows monopoly. See Plaintiffs' Mem. Supp. Proposed Final Judgment 10 (citing Gov't Rem. Exs. 1-2); Henderson Dec. ¶ 69.

Technology and Americans for Technology Leadership). Microsoft's retaining campaign adviser Ralph Reed to lobby Governor Bush, see *Bush Top Consultant Is Hired By Microsoft*, BOSTON GLOBE, Apr. 11, 2000, at A8, however, is reminiscent of ITT's use of Nixon Administration insiders to end the antitrust case against it. See also Grimaldi, *Microsoft's Lobbying Largess*, *supra*, at A17 (noting that Microsoft also retained former Gore campaign manager, who then warned Democratic National Committee chair not to permit candidates to advocate structural relief in this case).

See also Henderson Dec. ¶ 44 (explaining current need for handheld devices to interoperate with PCs). And in its efforts to foreclose another middleware threat, Microsoft has duplicated the "technological shackl[ing]" that is one of the key elements of the conduct found illegal in this case (Conclusions, p.10). To avoid having to compete on the merits in the market for streaming media, Microsoft is duplicating the tying arrangement it used to gain a monopoly over Internet browsers. See *Microsoft Unleashes New Media Player*, May 2, 2000, http://www.zdnet.com/zdnn/stories/news/0,4586,2560616,00.html (Reuters story) (noting that the Microsoft media player, unlike others, can be used only in conjunction with Microsoft media server software). Microsoft considered RealNetworks "an OS contender" (Gov't Ex. 1368), and this Court explicitly recognized the middleware threat posed by streaming media. See Findings ¶¶ 104-114.

Even now, Bill Gates continues to declare that "Microsoft is very clear that it has done absolutely nothing wrong," Steve Lohr & Joel Brinkley, *Microsoft Management Tells Workers There Will Be No Breakup*, N.Y. TIMES, Apr. 26, 2000, at C1, C9, an attitude reflected in its proposed remedy, which seems to assume that Microsoft won this case rather than lost it. Microsoft did not "change [its] business practices at all" after the 1995 consent decree. See Gov't Ex. 940. It "ha[s]n't changed anything" in response to the current case. Henderson Dec. ¶ 97 (quoting Brad Chase from Gov't Rem. Ex. 17); see also Grimaldi, *Microsoft Defends Its Practices*, *supra*, at E1 (paraphrasing Steve Ballmer remark that Microsoft "had no reason to change its business practices"). And, if its proposed remedy were all that resulted from this case, Microsoft would not change anything after judgment was entered in this case despite the sweeping liability that this Court found. Given Microsoft's corporate history and inability to distinguish right from wrong under the antitrust laws, as confirmed by the proposed remedy it filed with this Court, "an injunction can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself." *Du Pont*, 366 U.S. at 334.

Beyond this, the inevitable delay between anticompetitive conduct and a final order enforcing a decree vastly reduces the effectiveness of even an accurate and comprehensive "good conduct" regime. Nothing would happen to Microsoft upon commission of an anticompetitive act; probably nothing would happen before the act had the full desired effect in the marketplace. See Henderson Dec. ¶ 111 (quoting Gov't Ex. 1458, at 209). Much time would elapse before Microsoft had to comply with a contempt order, if any order could be secured. See *Microsoft II*, 147 F.3d at 940 (conduct prohibitions that are ambiguous as applied to particular business practices cannot be enforced by contempt). The act would have to be detected by rivals or customers, then reported to the enforcement agencies, then investigated and evaluated by those agencies, then submitted to this Court, whose order no doubt would be appealed and might be stayed until the appeal was decided.

That is exactly what happened under the 1995 consent decree. By the time the government had gathered enough evidence to bring a case, Microsoft was only a few months away from releasing Windows 98. When this Court enjoined the release of that product according to Microsoft's plans, Microsoft argued that the timely release of its next monopoly operating system was critical to the health of the entire economy. Not only was the injunction stayed pending appeal, but the court of appeals held that, given ambiguities in the decree, this Court should have conducted a more comprehensive proceeding. That is, when decree terms are not perfectly clear — a common pitfall when complex technology is at issue — the enforcement process will take even longer.

This enforcement lag alone provides a compelling reason not to make conduct restrictions the centerpiece of a decree, rather than a supplement to a structural solution.[8] Although the plaintiffs might haul

[8] Microsoft insists that the temporary conduct provisions in Plaintiffs' Proposed Final Judgment are too broad. See Summ. Resp. 23-55. If the Court finds any substance in Microsoft's litany of complaints, that would only confirm the inherent problems with formulating effective conduct relief. Interpreting and

Microsoft back into court for a contempt hearing or decree modification, Microsoft likely would avoid a preliminary injunction or other swift relief in all but the most obvious cases. Microsoft could continue to squeeze out competition while this Court sorted out the dispute.

c. *Structural Relief Should Not Be Postponed for a Probationary Period*.

For similar reasons, there is nothing to be gained by withholding an order of structural relief until some later date, after conduct remedies have failed. To begin with, conduct remedies have failed already. Microsoft has been on probation for the five years since the 1995 consent decree was entered. If that decree had contained a "crown jewels" provision authorizing the imposition of structural relief upon proof of decree violations, much of the current case would have been just such a proceeding. Even if the use of "technological shackles" (Conclusions, p. 10) to tie Internet Explorer to Windows perhaps did not violate the 1995 decree, the contractual tying and coercive exclusivity proved in this case almost certainly did. See *1995 Decree* § E(i), (ii).

To give Microsoft *another* probationary period not only would be an undeserved windfall, but would require an entire new trial before significant relief could be imposed — a trial for which the plaintiffs would have even greater difficulty than before finding witnesses who would risk Microsoft's retaliation when two prior cases had produced nothing but admonitions against bad behavior. The likely — if not inevitable — need for an additional full-scale proceeding contrasts sharply with the "surer, cleaner remedy" of reorganization that has earned the Supreme Court's endorsement. *Du Pont*, 366 U.S. at 334.

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enforcing the language of conduct provisions will produce protracted litigation. Any effective antitrust remedy must rely on structural requirements that cannot be litigated to a standstill.

Moreover, if consideration of structural relief is postponed, any order actually imposing such relief would be appealed and delayed still further, while an order imposing structural relief now can be passed upon by higher courts without delay. Delaying structural relief would spawn years of uncertainty for customers, investors, and employees, all of whom would know that Microsoft's conduct could trigger a new divestiture proceeding at any time.

There is no danger of precipitous remedial action if Plaintiffs' Proposed Final Judgment is entered now. The actual reorganization will not take place until the Supreme Court affirms this Court's judgment and remands the case. If, by the time of the remand, circumstances have changed so dramatically that no reorganization is warranted — if, that is, if Microsoft no longer has monopoly power — then this Court will be able to modify the remedy accordingly. See, *e.g.*, *United States* v. *Aluminum Co.*, 148 F.2d 416, 446-447 (2d Cir. 1945) (finding that divestiture would be inappropriate if federal government succeeded in disposing, to suitable competitors, of manufacturing capacity in monopolized market built and owned by federal government during World War II).

3. *The Law of Antitrust Remedies Compels Structural Relief For Pervasive Monopolization Offenses*

a. Under established antitrust remedial principles, a structural reorganization is the preferred remedy in a major monopolization case brought by the government. This is the biggest and most egregious Section 2 violation that the government has litigated to judgment since *Standard Oil,* one matched in scope in the interim only by the partially litigated *AT&T* case. A governmental remedy should "pry open to competition a market that has been closed by [a] defendant['s] illegal restraints." *Ford Motor Co.* v. *United States*, 405 U.S. 562, 577-578 (1972). To do that, a remedy cannot merely nibble around the edges of the monopolized market, but should make sufficiently fundamental changes to allow competition on the merits. The increased efficacy and reduced reliance on judicial oversight characteristic of structural relief have led the Supreme Court to recognize divestiture as "the most important of antitrust remedies." *California* v. *American Stores Co*., 495 U.S. 271, 281 (1990) (quoting *Du Pont*, 366 U.S. at 330-331). Indeed, because divestiture "is simple, relatively easy to administer, and sure," *ibid*., "the *public*" is ordinarily "*entitled* to" that "surer, cleaner remedy" rather than one that permits a monopolist to continue as it was, subject only to behavioral restrictions. *Du Pont*, 366 U.S. at 334 (emphasis added). Unless and until the Supreme Court changes the governing law, structural relief is required in this situation.[9]

The remedy is the most important part of an antitrust case, see *Glaxo Group*, 410 U.S. at 64, because a mere declaration of wrongdoing, if unaccompanied by tangible consequences, makes government antitrust litigation "a futile exercise." *Du Pont*, 366 U.S. at 323. Relief in an antitrust case should both "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *Ibid*. (quoting *United States* v. *United States Gypsum*, 340 U.S. 76, 88 (1950)). When non-competitive

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[9] The decision in *United States* v. *National Lead Co.*, 332 U.S. 319 (1947), certainly does not stand for any "*general* reluctance to order divestiture." Microsoft Mem. Supp. Rejection 10 (emphasis added). In stark contrast to this case, the violation in *National Lead* rested entirely on "patent pooling and related agreements" between *two* strong competitors, and there was "neither allegation in the complaint nor finding of fact by the District Court" that the property sought to be divested was "used in a manner violative of the Sherman Act." 332 U.S. at 351. It is no surprise that the Supreme Court found that the district court did not abuse its discretion in refusing to order divestiture in a *collusion* case in which "effective and lawful competition * * * already exist[ed]." *Id*. at 353. This case does not involve collusion, but rests instead on Microsoft's unilateral misuse of its Windows monopoly "in a manner violative of the Sherman Act" and in the absence of effective competition.

market structure has permitted the "illegal conduct" to succeed, the remedy must address that structure. See AREEDA & HOVENKAMP, *supra*, at 207 (1999 supp.).

Protestations that structural relief goes too far in a monopolization case repeatedly have fallen on deaf ears in the Supreme Court and should meet the same fate here. A reorganization is not a disproportionate remedy for monopolization, but rather is the only appropriate remedy for a substantial monopolization violation like that proved in this case. See AREEDA & HOVENKAMP, *supra*, at 207 (1999 supp.); *United Shoe*, 391 U.S. at 250. The Supreme Court has rejected contentions "that the injunction should go no farther than the violation or threat of violation," *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947), and that "antitrust violators may not be required to do more than return the market to the status quo ante." *Ford*, 405 U.S. at 573 n.8. The "consequences of proved violations" extend beyond the precise scope of the violations themselves, *International Salt*, 332 U.S. at 400, and certainly do here. As a result, the Supreme Court has characterized as "absurd" the suggestion that a monopolist that has "restrain[ed] commerce by suppressing competition * * * must be left in possession of the power that it has acquired, with full freedom to exercise it." *Ford*, 405 U.S. at 574 n.9 (quoting *Northern Securities Co.* v. *United States*, 193 U.S. 197, 357 (1904)). To the contrary, a decree should "render impotent the monopoly power found to be in violation" of the antitrust laws. *United States* v. *Grinnell*, 384 U.S. 563, 577 (1966). And, in formulating relief, "any plausible doubts should be resolved against the monopolist." 3 AREEDA & HOVENKAMP, *supra*, ¶ 653c1, at 96.

In addition, because the relief is in the form of an injunction, the remedy necessarily will be forward-looking. A remedy should take into account "probable future trends in the * * * market" that are "visible at the time" of the violation, *Ford*, 405 U.S. at 580 (Stewart, J., concurring in the judgment), because "Congress * * * intended" antitrust "decrees to deal with the future economic condition of the enterprise as well as past violations." *International Salt*, 332 U.S. at 401 n.10. Thus, a remedy's effectiveness should be judged with respect to where the market is going, not where it has been. A remedy is useless if it would have made sense a few years ago but will not alter the status quo a few years from now.

Having been "caught violating the [Sherman] Act," Microsoft "must expect some fencing in." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 381 (1973) (quoting *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957)). Microsoft's demonstrated "proclivity for predatory practices" requires full and reliable prophylactic relief. *Ibid*.

b. In its most comprehensive exposition of the standards for appropriate relief in monopolization cases, the Supreme Court announced clear criteria. Having found monopolization, the Court held, the decree court has a "duty * * * to prescribe relief" that accomplishes three goals. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968) (emphasis added). First, the relief should "terminate the illegal monopoly." *Ibid*. Second, the decree should prevent "practices likely to result in monopolization in the future." *Ibid*. Third, the order should "deny to the defendant the fruits of its statutory violation." *Ibid*. This last factor is important. The Supreme Court has repeatedly emphasized the need to prevent a monopolist from retaining the accrued competitive benefits of its illegal conduct. See *ibid*. (collecting cases); see also *Glaxo Group*, 410 U.S. at 64 (quoting *U.S. Gypsum*, 340 U.S. at 88). These advantages may permit a monopolist to maintain its monopoly without additional violations of the antitrust laws. Although a full divestiture of the Microsoft monopoly to create immediate competition in PC operating systems (see Economists' Brief 49-67) may be the most direct and foolproof way to achieve all of these goals, the limited remedy set forth in Plaintiffs' Proposed Final Judgment serves these goals effectively.

First, although Plaintiffs' Proposed Final Judgment would not immediately "terminate the illegal" operating systems monopoly, *United Shoe*, 391 U.S. at 250, it would deprive Microsoft of two of the biggest barriers now preventing the emergence of a competitive operating systems market. To begin with, by separating the browser development assets from the operating systems assets, the proposed reorganization reinvigorates middleware as a competitive threat to Windows. After the reorganization, Internet Explorer may continue to be more closely integrated with Microsoft applications than with competing applications, but that will not necessarily tie users to Windows, particularly if Office is ported to other operating systems. In addition, by separating Windows from Office, plaintiffs' proposal erodes the most important element of the applications barrier to entry that was exploited in this case. That erosion has two procompetitive consequences. It makes up for the success of Microsoft's illegal conduct in delaying or eliminating other challenges to the operating systems monopoly. See Findings ¶¶ 411-412. It also weakens the weapon — monopoly power — that has too often tempted Microsoft to engage in anticompetitive abuses. The proposed reorganization attacks the operating systems monopoly far more directly than conduct restrictions could, while creating the possibility of renewed competition in the Internet browser market that Microsoft has illegally monopolized during the course of this litigation.

Second, Plaintiffs' Proposed Final Judgment also helps prevent the recurrence of anticompetitive practices similar to those proved at trial and "likely to result in monopolization in the future." *United Shoe*, 391 U.S. at 250. The central problem proved in this case is Microsoft's broad, strategic, and wide-ranging abuse of market power. The separation of the browser and the Office suite from Windows undermines the Windows monopoly and thus addresses the disease rather than the mere symptoms of Microsoft's abuses. For example, if a unitary Microsoft remained in control of Internet Explorer, the browser could provide a ready means of further insulating the operating systems monopoly rather than providing a potential challenge to it — as shown by the events examined at trial. If the operating systems monopoly had to rely on outsiders for advanced Internet browsing capability even temporarily, however, a competitive browser market would afford many other market participants an opportunity to sidestep Microsoft's monopoly by orienting themselves more toward independent, competitive browsers and less toward the Windows operating system.

Third, Plaintiffs' Proposed Final Judgment deprives Microsoft of some of "the fruits" of its illegal conduct. *United Shoe*, 391 U.S. at 250. Much of the conduct in this case was directed at obtaining control over Internet browsing in order to protect the Windows monopoly. A principal benefit of that conduct was Microsoft's success in controlling the browser market to serve the goal of making the Internet "Windows centric." Gov't Ex. 611. Plaintiffs' Proposed Final Judgment appropriately takes that control away from the Windows monopoly and gives it to a competing applications company. Likewise, Microsoft tried to transform the browser from a middleware threat to the Windows monopoly into a vehicle for *extension* of that monopoly — and, indeed, made the browser into another aspect of the applications barrier to entry. The proposed reorganization appropriately strips away the portion of that barrier that has been added by the new Internet Explorer monopoly. That is not "punishment"; rather, it precisely remedies a competitive wrong.

c. Microsoft claims that structural relief cannot be ordered against a Section 2 violator unless the evidence clearly demonstrates that the particular competition suppressed would have displaced the monopoly. *E.g.*, Mem. Supp. Judgment 2; Mem. Supp. Rejection 6-8. But assessment of a market in the absence of actual illegal conduct necessarily involves counterfactual estimation, so causation is inherently difficult to show. Thus, it is not surprising that this Court could not find with confidence that Navigator and Java "*already* would have ignited genuine competition in the market for Intel-compatible operating systems." Findings ¶ 411 (emphasis added).

Microsoft's argument proves far too much, however, because it would give a free ride to monopolists that successfully but illegally crushed incipient competitive threats. If structural relief cannot be ordered in such a case, even though conduct relief would be ineffective, then no preventive measure would stand between a monopolist like Microsoft and its ability to abuse monopoly power to eliminate competition — at least so long as competition is crushed while the threat is incipient. Microsoft in effect asks to be rewarded for its own ruthless efficiency in deploying anticompetitive conduct against potential challenges to its monopoly as soon as it recognized those challenges. Microsoft's self-serving argument is plainly insufficient to overcome the presumption that structural relief is required. See AREEDA & HOVENKAMP, *supra*, at 207 (1999 supp.). Microsoft destroyed the threats that existed; its success in doing so before the threats were strong enough to achieve demonstrable success should not entitle Microsoft to preserve its monopoly at the expense of the next set of potential competitors. Cf. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-810 (1946) ("actual exclusion of competitors" not necessary even in a *criminal* case brought under Section 2). Microsoft also should not be heard to claim (Mem. Supp. Rejection 14-15) that it was uncertain about the legality of its use of exclusionary conduct to protect its monopoly. Judge Bork demonstrated in his earlier *amicus* brief that liability rested squarely on established Supreme Court antitrust precedent. Microsoft was not "uncertain" about the antitrust consequences of its action; it simply didn't care. Despite operating under an antitrust consent decree, Microsoft had no antitrust compliance program to inculcate a corporate conscience in such matters.

d. Finally, the fact that this is a public antitrust case fundamentally affects the remedial calculation. After government plaintiffs have sustained the burden of proof of a major violation, they are entitled to reasonable deference in their selection of an effective remedy. *Ford*, 405 U.S. at 575. Effective structural remedies call for predictions about the future and require law enforcement experience and expertise. Although courts must independently review proposed remedies, they should defer to reasoned judgments of federal and state law enforcement officials on what is feasible and effective. See *United States* v. *Western Electric Co.*, 900 F.2d 283, 294 n.12 (D.C. Cir. 1990) (referring to the Department of Justice as the "Prime Mover" of a divestiture case).[10] The extensive analysis offered by the plaintiffs and their witnesses amply warrants such relief.

B. Plaintiffs' Proposed Final Judgment Provides An Appropriate Framework For Relief

1. *Reorganization Of Microsoft Into An Applications Business And An Independent Operating Systems Business Comports With The Liability Findings*

Plaintiffs' Proposed Final Judgment appropriately addresses the violations found in this case: the destruction of competition in a software application (the Internet browser) in order to insulate the operating systems monopoly from competition; the attempted (and now completed) acquisition of a monopoly over the Internet browser market; and the multifaceted abuse of the operating systems monopoly that buttressed the applications barrier to entry. Microsoft's anticompetitive activity has relied upon the applications barrier that protects its operating systems monopoly, and has reinforced that barrier through extraordinary effort and ingenuity.

The Internet browser posed a threat that applications might no longer depend on the operating system to the extent they had in the past. Applications instead might be written to interface with the browser or other middleware, middleware that in turn could run atop a variety of operating systems. As Microsoft recognized, such a development could "commoditize the underlying operating system," Gov't Ex. 20, returning Microsoft to a competitive operating systems market in which it would have to price at competitive levels rather than extracting an estimated 80% profit margin, see Kirkpatrick, *supra*, at 90. That prospect fills Microsoft officials with understandable dread. See James Grimaldi, *U.S., States Favor Plan to Split*

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[10] Of course, entirely different considerations apply to requests for structural relief in private antitrust actions. See *California* v. *American Stores, Co.*, 495 U.S. 271, 295-296 (1990).

Up Microsoft, WASH. POST, April 24, 2000, at A1, A8 (quoting Ballmer as complaining that no software company could make money "selling the same thing" as another firm). Even more significantly, however, a breach in the applications barrier would mean that Microsoft no longer controlled a critical chokepoint in the software industry, and thus would render it unable to use its power to coerce OEMs, ISVs, ISPs, and others in the computer and software industry to keep Microsoft's core products free from competition.

The reorganization aims directly at the applications barrier to entry. Separating Windows from a good portion of the applications barrier does not exceed the scope of this case simply because the applications barrier itself involves software products that are not operating systems. The applications barrier to entry is the structural condition that undergirds the monopoly power that Microsoft has repeatedly abused. The applications barrier to entry is particularly severe because the most widespread applications, personal productivity applications, are controlled by Microsoft through its Office suite, which accounts for almost all such suites sold for personal computers. See Romer Dec. ¶ 17. Moreover, by adding the Internet browser to the barrier, Microsoft's conduct in this case successfully reinforced that structural limitation on competition. That state of affairs makes the reorganization more appropriate, not less so. As Judge Bork recently explained, "Microsoft's predation in the browser market was merely the most prominent of its efforts to preserve the applications barrier to competition with its operating system." Robert Bork, *There's No Choice: Dismember Microsoft*, WALL. ST. J., May 1, 2000, at A34. Just as Microsoft sought to reinforce the applications barrier to entry by controlling the Internet browser market, through Office Microsoft controls the most important aspect of that barrier. One monopoly thus reinforces the other.

Section1 of Plaintiffs' Proposed Final Judgment removes this leverage favoring the Windows monopoly — including the leverage provided by Microsoft's dominance of the Internet browser — by forcing Microsoft to reorganize into one separate company for the "Operating Systems Business" (*i.e*, the

"Windows Company"), and another for the "Applications Business" (*i.e.*, the "Applications Company"). Plaintiffs' Proposed Final Judgment does not immediately terminate the Windows monopoly, but substantially undermines it. Rather than dictating a result or choosing a competitive technology, Plaintiffs' Proposed Final Judgment merely tries to create the conditions that will permit the market to make the choice without the distortions caused by Microsoft's abuse of monopoly power on multiple fronts.

To begin with, Plaintiffs' Proposed Final Judgment would end Microsoft's ability to leverage the Windows monopoly into other markets — especially middleware markets — at least until the Windows Company could develop middleware of its own (or could acquire a middleware product without violating the antitrust laws). The current Microsoft applications assets, including middleware, would be owned and controlled by an Applications Company that at the very least would compete with any middleware developed by the Windows Company, and that would provide significant resistance to any anticompetitive forays.

More fundamentally, the Windows Company and the Applications Company no longer would have the incentive and ability to reinforce each other's monopolies. The Windows Company would lack the incentive and ability to give Microsoft applications developers the advantage of preferential access not only to the specifications, but to the design of the monopoly operating system. Moreover, the Windows Company and the Applications Company each would have strong incentives to offset and undermine the market power of the other.

That countervailing power could take many forms because, unlike the *AT&T* decree, Plaintiffs' Proposed Final Judgment does not place any limit on the lines of business in which the successor companies may engage. As a consequence, each successor company could invade the other's market directly using its substantial capital and engineering resources: the Windows Company could develop applications, and the Applications Company could develop a new operating system. Short of that — and immediately —

each would have strong incentives to cooperate with the rivals of the other. No longer tied to a corporate objective of maintaining and expanding the Windows monopoly, the Applications Company would have an incentive to port its products to other platforms (and to bring Office for Macintosh up to parity with Office for Windows). That course of action would quickly undermine important elements of the applications barrier preventing significant entry into the operating systems market, and thus would advance the development of Linux and other operating systems as competitive alternatives to Windows.[11] See Shapiro Dec. § III(A), at 9-10; Henderson Dec. ¶¶ 102-106.

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[11] Some commentators have raised concerns that the reorganization could raise a "double marginalization" problem for consumers if each monopolist raised its prices in a futile effort to appropriate a greater share of the combined monopoly rents for Windows and Office — without taking into account the impact of its price increase on the combined monopoly rents if the other followed suit. We believe that the danger is overstated, largely for the reasons expressed in the Shapiro Declaration (Section III(D), at 14-15). Section 3(i) of Plaintiffs' Proposed Final Judgment provides a safeguard for three years after the reorganization by requiring Microsoft, upon any new operating system release, to keep the immediately prior version of Windows available at an unchanged price. If that temporary requirement also were extended to Office (and to licensees other than OEMs), both Microsoft successor companies would be competing sufficiently against themselves to restrain price increases. If the Court remains troubled by the possibility of short-term price increases before increased competition unfolds, however, the decree could cap the prices of Windows and Office at their levels as of April 27, 2000, for the first three years after implementation of the decree. In the alternative, the decree could require the Windows Company and the Applications Company to award each other one-time cross-licenses (at reasonable royalties) in Windows and Office.

Even if the Applications Company did not itself port the Office suite and other applications to non-Windows operating systems, however, that company would have strong incentives to assist middleware developers attempting to make Microsoft Office run smoothly on Linux and other operating systems. The same motivation would apply across the board, to both desktop and server applications and to a wide variety of middleware with the potential to displace the dominance of the operating system as a platform. Likewise, the Windows Company no longer would have the ability and incentive to aid the Applications Company at the expense of competing applications developers. If applications developers competed on a level playing field, that could only increase competition — and decrease prices — for the applications that consumers use most.

Microsoft claims that the proposed reorganization would dissipate efficiencies that purportedly result from single-firm ownership of the Windows monopoly, the Office monopoly, and the browser monopoly. *E.g.*, Summ. Resp. 11-23; Mem. Supp. Rejection 24. Those arguments essentially restate the position Microsoft took with RealNetworks: that "[O]ffice and Windows [a]re one, * * * and Word/Excel ([O]ffice) [a]re part of the OS." Gov't Ex. 1368. But the supposed efficiencies resulting from single-firm control over several tiers of the software industry are illusory. The rest of the software industry (and the computer and communications industries) long have thrived in areas where no such control— much less monopoly control — rests in one company. This non-monopolistic market structure has produced common standards such as TCP/IP and HTML, and has permitted interoperability for a stunning array of products. Microsoft's claims here — that every software product that Microsoft decides to monopolize becomes an integral part of the operating system as soon as Microsoft says so, see, *e.g.*, Summ. Resp. 22 (identifying the Internet browser, the Web server, and streaming media are "core Windows technologies") — plainly demonstrate the need for relief that both cabins and undermines this illegally maintained monopoly.

There is no technical advantage to single-firm hegemony over multiple tiers as opposed to the disclosure of interfaces needed to permit interoperability between products made by different software vendors. See Felten Dec. ¶¶ 46-47; Shapiro Dec. § III(D), at 13-14. Companies can achieve full integration of separate programs in this way. Even Microsoft had to admit that Caldera achieved "OS Integrated Browsing" although the operating system and the browser were not developed by the same organization. See Felten Dec. ¶ 47 (citing Gov't Ex. 1707 (Microsoft videotape demonstration)); 2/1/99 (p.m.) Tr. 73 (Allchin)).

Microsoft's claim (Mem. Supp. Rejection 16) that consumers would not have gotten the benefits of toolbars if Microsoft had not owned both Excel and Windows is fatuous. To begin with, it is not true that "[t]he concept of toolbars * * * was first developed by the team building Microsoft Excel" (Summ. Resp. 20); toolbars appeared on Apple's MacPaint 1.5 program years before Excel was first released. Moreover, Microsoft claims that it adds improvements to Windows based on suggestions by ISVs. See Shapiro Dec. § III(D), at 13-14 & nn.22-23 (citing sources). In any event, no developer could long have kept the idea of toolbars to itself; the basic toolbar functionality would be no more protectable than the Macintosh user interface that Microsoft copied. See *Apple Computer, Inc.* v. *Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994). Likewise, tablet PCs and voice recognition software have emerged from companies that do *not* have complementary monopolies. See Jay Greene, *Don't Worry, Bill — Innovation Will Survive*, BUS. WK., May 22, 2000, at 48. These products will reach consumers without being offered by an operating systems monopolist.

The main result from having Windows and Office developers under one roof is the creation of an anticompetitive advantage: Microsoft's ability to engage in technological tying of competitive applications to the operating system, and to give its own developers preferential access to Windows functionality before competitors. Microsoft's propensity to intermingle applications code with the code for the monopoly operating system increases the security dangers of a software monoculture. Microsoft's e-mail client, Outlook, and its word processor, Word, provide virus writers an easy medium to attack not only those programs but also the entire operating system. See n.1, *supra*.

When it was in the process of acquiring the Office monopoly in the 1980s and early 1990s, Microsoft denied that it gave its applications developers special access to the operating systems development process, going so far as to claim that the "Chinese wall" between applications developers and OS developers was "like the separation of church and state." James Gleick, *Making Microsoft Safe for Capitalism*, N.Y. TIMES MAG., Nov. 5, 1995, at 50, 57 (quoting Ballmer). See *United States* v. *Microsoft Corp.*, 159 F.R.D. 318, 337 n.36 (D.D.C.) (noting press reports of similar claims by Microsoft), rev'd, 56 F.3d 1448 (D.C. Cir. 1995). But see *ibid*. (noting that Microsoft denied that any such separation ever existed). Bill Gates now claims that "if we did not have Office and Windows and those groups working together * * * , there would be no Windows as we know it." James Grimaldi, *Clinton's Aides Get Briefing on Microsoft*, WASH. POST, Apr. 26, 2000, at E1. "Windows as we know it" now, of course, is an anticompetitive tool, which uses lack of operating systems choice to force Microsoft products throughout an enterprise. See Henderson Dec. ¶¶ 39, 49-51. Beyond this, Bill Gates has confirmed what competing applications vendors long have suspected — that independent applications developers not only do not enjoy parity with Microsoft applications developers, but rather that "Office and Windows * * * groups work[] together" to ensure that the products of each reinforce the monopoly of the other.

Nonetheless, Microsoft has argued that it provides outside applications developers full and equal access to the Windows platform, and that Windows developers can incorporate suggestions from outside applications developers. See Shapiro Dec. § III(D), at 13-14 & nn.22-23 (citing sources). The reorganization proposed in Plaintiffs' Proposed Final Judgment would make Microsoft live up to its claims about the "openness" of the Windows platform.[12] That is not an efficiency loss, but rather represents a gain to consumers when the Windows and Office monopolies each have incentives to cooperate with the competitors of the other, fostering innovation in both operating systems and applications. As leading industry analysts recently observed, a reorganization along the lines of Plaintiffs' Proposed Final Judgment is "the only effective way to prevent future wasted resources, to encourage technology innovation, and to focus Microsoft on producing the best possible products." Anthony Picardi & Dan Kusnetzsky, *Microsoft on Trial: An Analysis of Possible Outcomes*, International Data Corp., at 7 (1999) ("*IDC Microsoft on Trial*").

It is true that, under Plaintiffs' Proposed Final Judgment (without the supplement proposed below), the Applications Company would be able to try to use the monopoly Internet browser to extend the scope of the monopoly productivity suite into server computers and Internet computing. But there is a fundamental difference between the ability to combine an operating system with a browser and the combination of a browser with other applications. Every PC must have an operating system, making the operating system monopoly a particularly dangerous and pervasive threat to competition. There is good reason to believe

[12] The Court thus should disregard Microsoft's hyperbolic claim (Position as to Proceedings 1) that the disclosure provision amounts to "wholesale confiscation of Microsoft's intellectual property." Section 3(b) of Plaintiffs' Proposed Final Judgment would not permit anyone to copy Microsoft's protected products, but simply would mandate the type of limited disclosure of technical information that the Supreme Court endorsed in *United States* v. *National Lead*, 332 U.S. at 353-360. The provision is carefully crafted to do no more than prevent Microsoft from using the interfaces with its leading monopoly product as a point of leverage into other markets or as a means of punishing those who present or aid competitive challenges.

that competition in applications can revive, however, as software developers provide end-users with more ability to perform more functions using PC resources in conjunction with Web-based programs through the Internet, or server-based programs through an intranet. When the distribution of productivity applications is divorced from the distribution of the monopoly operating system, competition in productivity applications will have an opportunity to develop – as will browser competition.

Plaintiffs' Proposed Final Judgment poses no risks to innovation. Because many products and services that businesses and consumers want are not controlled by a monopoly, most of the software industry long has worked in an environment in which products from many vendors must interoperate. That environment has engendered and sustained the enormous growth and innovation in Internet computing and, before that, networked client-server computing, which have fundamentally changed the way the commercial world does business. Indeed, Microsoft has been nearly alone in doggedly resisting this trend and insisting on proprietary protocols and interfaces that force users to rely on a single vendor. Most of the interoperability loss on the Intel platform today is due to Microsoft's abuse of its dominant position to *create* incompatibilities between its products and those of competitors. "Microsoft's goal is to own the computing platform and to create barriers to efficient interoperation with its products for its competition," *IDC Microsoft on Trial*, *supra*, at 8, but that is not the inevitable course of the software industry and contradicts the goals of federal antitrust law.

The idea that separating the Windows monopoly from the Applications Company would impede *innovation* — as opposed to the mere growth of Microsoft's influence — is transparently absurd. See Jay Greene, *Don't Worry, Bill — Innovation Will Survive,* Bus. Wk., May 22, 2000, at 48. Unlike the *AT&T* decree, plaintiffs' proposal does not impose any line-of-business restraints on either the Windows Company or the Applications Company. Either company can develop any product that it wants, and the two can compete with each other directly or indirectly. As University of California, Berkeley professor and former Antitrust Division chief economist Richard Gilbert has explained, by omitting the "innovation-stifling conditions that were imposed on telecommunications," Plaintiffs' Proposed Final Judgment "allows the marketplace, not the courts, to decide where the industry will go next." Richard Gilbert, *A Better Breakup Than AT&T's*, N.Y. TIMES, MAY 10, 2000, at A29. Almost all of the limited restrictions on the Windows Company's conduct are confined to business practices. The sole exception requires that any shackling to Windows of middleware products (like those at the forefront of this case) be accompanied by a simple add/remove utility, paralleled by a requirement of economic neutrality to benefit those OEMs who choose to package the monopoly product with competing middleware (or to leave that choice to the end-user).[13] See Plaintiffs' Proposed Final Judgment § 3(g). That preserves each company's ability to innovate, but avoids creating perverse incentives to intermingle code in order to tie competitive products to monopoly products. See Lessig Br. 39 (Feb. 1, 2000). The burden on Microsoft is trivial, despite its protestations, *e.g.*, Microsoft Summ. Resp. 4-6, 48-52; Microsoft already provides add/remove functionality for dozens of applications that are "integrated" with Windows.

2. *The Proposed Reorganization Is A Moderate Approach To A Serious Structural Problem*

Plaintiffs' Proposed Final Judgment helps jump-start competition with minimal disruption to Microsoft and minimal regulation of the activities of the Windows Company and the Applications Company, while providing Microsoft a significant ability to tailor the details for maximum efficiency when it proposes

[13] The provision for a discount based on the proportion of code devoted to the removed function further rewards Microsoft for efficient application design. The less code needed for a middleware application, the smaller the discount that an OEM would receive for removing it — reducing OEMs' incentives to remove the Microsoft middleware in favor of a competing product.

its plan of reorganization under Section 1(a). The reorganization proposed in Section 1(c) closely tracks Microsoft's existing organizational structure, which — despite Microsoft's new, contrary claims (Mem. Supp. Rejection 22-24) — differentiates platform products from applications. See Greenhill & Williams Dec. ¶¶ 27-41; *Microsoft Reunifies Windows Divisions*, COMPUTER RESELLER NEWS, Dec. 3, 1999, http://www.techweb.com/wirestory/TWB19991203S0020. Microsoft's protestations about its "unitary" organization (Mem. Supp. Rejection 22) ring hollow in light of its annual or more frequent voluntary restructuring, which make clear that a restructuring along product lines would cause little incremental disruption. See Greenhill & Williams Dec. ¶¶ 58-63; see *Microsoft to Merge Two Main Business Groups*, WALL ST. J., Mar. 31, 2000, at B6 (reporting that Microsoft will combine its operating systems group with its development tools group). And the costs and dislocations associated with the proposed reorganization are minor for a company of Microsoft's size and scope. See Greenhill & Williams Dec. ¶ 88. The Bell System divestiture, which involved a million employees and billions of dollars worth of complex and minutely integrated equipment spread across the entire nation, was a far bigger undertaking than the reorganization of Microsoft. Microsoft has about 35,000 employees, and its value is not in its physical plant but in products that exist in computer code and supporting documentation. Because Microsoft's assets thus consist almost entirely of intellectual property and personnel, both of which are easily transferred — and because the principal tangible assets, computers, are easily moved — the proposed reorganization would be substantially easier to accomplish than many other voluntary or involuntary divestitures, including that of the Bell System. See generally Economists' Br. 58-60.

Microsoft is not the first huge monopolist to claim that its company cannot possibly be divided to promote competition without ruinous results. Ninety years ago, Standard Oil warned:

> The *inherent vice of this decree* is that is *seeks to create an artificial division* which never existed before; it does not seek to compel members who were formerly independent

> to resume that independence, but it seeks to compel different subcompanies, *which have never been independent*, which have never been more than mere agencies created for certain purposes, to sever their allegiance with the principal, and to stand apart, independent and hostile to that principal and to each other.

Brief on the Law on Part of Appellants, *Standard Oil Co.* v. *United States*, No. 725, Oct. Term, 1909, at 120-121 (emphasis added), quoted in William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1296-1297 (1999). Standard Oil likewise insisted that the units proposed for divestiture all were

> naturally a part of one whole — all operated together and to and with each other — all were useful to the other, and to be so useful must have a connection with one or more of the others. * * * There are many parts, but each part has its place, and if a part is taken out, the whole structure is disintegrated.

Id. at 284, quoted in Kovacic, *supra*, at 1296. At oral argument, Standard reiterated, "[A]ll these separate entities are parts of an organism, members of a single great business. Tear them apart and who knows what will become of them * * * ?" Oral Argument on Behalf of Appellants, *Standard Oil Co.* v. *United States*, No. 398, Oct. Term, 1910, at 44, quoted in Kovacic, *supra*, at 1297. Microsoft's identical, overheated protests deserve no credence.

In fact, Plaintiffs' Proposed Final Judgment reflects a compromise between a full structural remedy that would directly create competition or would flatly preclude Microsoft from competitively abusing browser technologies, and one that would rely, futilely, on mere conduct regulation alone. First, as the Economists' Brief explains (at 48-52), the only sure way to "terminate the illegal monopoly," *United Shoe*, 391 U.S. at 250, and restore operating systems competition is to reorganize the Operating Systems Business into three companies with equal assets competing head to head. But Plaintiffs' Proposed Final Judgment stops well short of that, choosing instead to use milder means to "pry" the operating systems market "open to competition," *Ford*, 405 U.S. at 577-578, in a way that "enabl[es], but [does] not compel[], competition to Windows." Shapiro Dec.§ II(B), at 3. Second, although a requirement that the Windows Company obtain HTML rendering only through third parties would be "easy to enforce" and "far from rocket science," Dan Gillmor, *eJournal: News, Views and a Seattle Diary*, Mercury Center (San Jose Mercury News), Apr. 24, 2000, http://weblog.mercurycenter.com/ejournal/2000/04/24 (quoting software developer Dave Winer), Plaintiffs' Proposed Final Judgment does not prohibit the Windows Company from continuing to offer an Internet browser as a "Windows" component. Plaintiffs' proposal provides this additional leeway to the Microsoft successors despite the competitive risks of allowing the Windows Company to duplicate Microsoft's behavior (so long as it uses any browser other than Internet Explorer).

Thus, Plaintiffs' Proposed Final Judgment surgically removes an obstruction to competition, but relies on market forces to displace Microsoft's monopoly. Even Microsoft witness Gordon Eubanks told the New York Times that this remedy would pose no danger to the industry and could produce more competition on the desktop. See Steve Lohr & Joel Brinkley, *Microsoft Management Tells Workers There Will Be No Breakup*, N.Y. TIMES, Apr. 26, 2000, at C1, C9. That understates the remedy's benefits, but correctly assesses the limited risk of the reorganization.

The software market certainly has not shifted in a way that makes a structural remedy less relevant. To the contrary, although the demise of browser competition makes a conduct remedy directed at the browser irrelevant, Microsoft's success in its anticompetitive foray against Netscape has strengthened Microsoft's monopoly, see Henderson Dec. ¶ 41, has confirmed Microsoft's ability and incentive to misuse market power, and therefore has made structural relief more necessary than ever. The multidirectionality of Microsoft's anticompetitive activity dooms specific *conduct* remedies to irrelevance. Only by taking action to weaken Microsoft's monopolistic hold can a remedy hope to prevent recurrence of the type of anticompetitive conduct proved in this case. At this moment, Microsoft is using its market power to try to disadvantage Palm and RealNetworks to fend off those two potential threats to the Windows monopoly. See p.22, *supra*.

Microsoft contends that a reorganization is inappropriate because in no "contested case" has a court ordered a divestiture from a "unitary" company. Mem. Supp. Rejection 4.[14] But the reorganization here falls along established divisional lines that provide an appropriate template for divestiture. See *id*. at 5. As part of its annual restructuring, Microsoft last year placed all of its Windows development groups in a *single division*. See, *e.g.*, *Microsoft Reunifies Windows Divisions*, *supra*. The only material alteration from this design would be the transfer of Internet Explorer to the Applications Company, the type of modest adjustment that is typical in antitrust remedies. If Microsoft means to argue that divestiture is only appropriate when mergers have been challenged, that obviously is not true. As the plaintiffs point out (Br. 31-32), the Supreme Court has directed or upheld divestitures when the exercise of monopoly power, not its acquisition, was at issue. *E.g.*, *AT&T*; *United Shoe*, 391 U.S 244; *Crescent Amusement*, 323 U.S. at 188-190. And if Microsoft means that divestiture is not appropriate unless the monopoly has been gained in part by acquisition, see Mem. Supp. Rejection 16-17, this case fits that description. Despite Microsoft's claim that it has not bolstered its position "by acquiring or merging with its rivals," *id*. at 17, Microsoft in fact acquired many of the components of Windows and Office, and many other elements of

[14] Of course, Microsoft would like to ignore cases like *AT&T* that were litigated in part but that were settled by consent decree in light of the expected results. This ignores the vigorous adversary debate, and the lengthy opinions on the merits, that preceded Judge Greene's order of divestiture. See n.3, *supra*. See also, *e.g.*, *United States* v. *United Fruit Co.*, 1958 Trade Cas. (CCH) ¶ 68,941, at 73,799 (Pt. VIII) (D. La.) (consent decree, entered after years of litigation, required defendant to divest, not an existing division, but a newly created company that included assets, contracts, and personnel sufficient to create a sustainable competitor to the defendant monopoly).

its applications business, from other companies or in the course of acquiring other firms.[15] In any event, no

[15] The acquired products and technologies fall into four major categories:

(1) Elements of the Windows bundle, such as the original MS-DOS (purchased from Seattle Computer Systems), Paintbrush (acquired from Zsoft); Zoomit (technology acquired for Active Directory), Photo Access (technology for Windows CE), SNTC Ltd. (digital cellular products for Windows CE);

(2) Middleware such as Internet Explorer (licensed from Spyglass), speech recognition software (acquired with Entropic and minority acquisition of Lernout & Hauspie), streaming media software (licensed from RealNetworks, acquired from Interactive Objects Inc., and acquired with Vxtreme), DimensionX (Java multimedia), and WebTV;

(3) Office components such as PowerPoint (acquired with Forethought), LinkAge (added to Exchange), FrontPage (acquired with Vermeer Technologies), the Access database (much of the technology for which was acquired with Fox Software), and Visio (technical drawing software acquired last year and recently added to Office); and

(4) Other applications including important development tools such as Visual Basic (acquired from Cooper Software) and Visual C++ (acquired from Lattice), BackOffice server applications suite components such as SQL Server (database licensed from Sybase, online applications processing technology acquired from Panorama Software) and e-commerce server software (eShop), and Sendit (wireless Internet access now part of Microsoft Server Applications unit), and Composer (color imaging software acquired with Altamira).

See generally, *e.g.*, *The Microsoft Empire: Built on Monopoly Money?*, G2 Computer Intelligence, Inc., Nov. 11, 1999, http://www.g2news.com. See also John Dvorak, *Microsoft's Real Problem: No Innovation*, PC MAGAZINE, May 2, 2000, http://www.zdnet.com/pcmag/stories/opinions/0,7802,2559857,00.html (noting that acquired companies tend to lose their innovative edge).

Microsoft's current strategy to extend its monopoly to server and appliance operating systems involves acquisitions of and large investments in customers like telephone and cable service providers — *i.e.*, buying customers to tilt the competitive landscape without winning on the merits. See *The Microsoft Empire*, *supra*. As Steve Ballmer has explained, "We usually make investments that are designed to help accelerate adoption of our technology. We invest in Qwest so that Qwest will host Windows 2000 * * * . We invest in AT&T since they're able to use Windows 2000 Server and Windows CE clients as part of their TV-based infrastructure." *Ballmer Is Bullish on Windows 2000*, PC WEEK, Nov. 19, 1999, http://www.zdnet.com/pcweek/stories/news/0,4153,1018247,00.html.

monopolist, "unitary" or not, is — or should be — immune from the only effective relief for monopolization. A structural monopoly problem requires a structural solution no matter how the problem arose. As respected commentators throughout the Nation have recognized, Plaintiffs' Proposed Final Judgment provides an appropriate solution for the violations in this case.[16]

3. *Plaintiffs' Proposed Final Judgment Will Not Delay Final Resolution Of This Case*

Plaintiffs' Proposed Final Judgment appropriately calls for Microsoft to develop and propose a plan of reorganization to implement the details of the divestiture decree. See Plaintiffs' Proposed Final Judgment § 1(a)-(c). In the plan, Microsoft can decide how to distribute personnel in an orderly fashion, making the

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[16] Robert Bork, *There's No Choice: Dismember Microsoft*, WALL. ST. J., May 1, 2000, at A34; Richard Gilbert, *A Better Breakup Than AT&T's*, N.Y. TIMES, May 10, 2000, at A29; *The Remedy for Microsoft*, N.Y. TIMES, Apr. 28, 2000, at A22 (editorial); *Bill Rockefeller?*, ECONOMIST, Apr. 29, 2000, at 18 (editorial); *Two Is Better Than One*, BOSTON GLOBE, Apr. 28, 2000, at A22 (editorial); *Unbroken Windows*, CHRISTIAN SCI. MONITOR, May 1, 2000, at 10 (editorial); *Microsoft, version 2.0: Structural Breakup Is the Right Remedy, But How Many Pieces Would Be Enough?*, S.J. MERCURY NEWS, May 1, 2000 (editorial); Dan Gillmor, *Break Up Microsoft*, S.J. MERCURY NEWS, Apr. 23, 2000, http://www.mercurycenter.com/svtech/columns/gillmor/docs/dg042300.htm; Stephen H. Wildstrom, *A Win-Win-Win Breakup?*, BUS. WK., May 15, 2000, at 31. See also *Does Microsoft Stifle Innovation?*, BUS. WK., May 15, 2000, at 198 (editorial); Phillip Robinson, *Microsoft Has Long Carried A Big Stick to Bludgeon Innovators*, DALLAS MORNING NEWS, May 4, 2000, at 3F; Mike France, *Fighting for Market Share Is One Thing*, BUS. WK., May 8, 2000, at 48.

most efficient use of its current, similar organizational structure. Its complaints about the lack of detail on this score in Plaintiffs' Proposed Final Judgment are misguided.

Entering Plaintiffs' Proposed Final Judgment would not, however, delay the speedy final resolution of this case. This Court need not specify the details surrounding structural relief in order to render a final judgment that may be certified for direct appeal to the Supreme Court under the Expediting Act, 15 U.S.C. § 29(b). The Supreme Court has made clear that an appeal — including an appeal under the Expediting Act — can proceed once this Court enters its judgment identifying the relief, even though resolution of the details of divestiture is deferred. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-310 (1962); see ROBERT L. STERN *et al.*, SUPREME COURT PRACTICE 55 (7th ed. 1993). This is the "settled course" in divestiture cases, in which the Supreme Court "has consistently reviewed antitrust decrees contemplating either future divestiture or comparable remedial action prior to the formulation and entry of the precise details of the relief ordered." See *Brown Shoe*, 370 U.S. at 309-310; see also *id*. at 307 & n.14 (collecting cases). As in the *AT&T* litigation, the plan of reorganization can proceed while the appeal is pending. See, *e.g.*, *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. Aug. 11, 1982) (decree entered), aff'd, *Maryland* v. *United States*, 460 U.S. 1001 (Feb. 28, 1983); *United States* v. *Western Electric Co.*, 569 F.Supp. 1057 (D.D.C. July 8, 1983) (plan of reorganization), aff'd, 464 U.S. 1013 (1983).

Plaintiffs' Proposed Final Judgment appropriately suggests (at § 6(a)) that the Court might stay implementation of the divestiture but allow the conduct remedies to restrain Microsoft's anticompetitive acts while the appeal proceeds. As the Court has observed, 4/4/00 Tr. 11, 13, this is a clear case of "general public importance" that warrants a direct appeal to the Supreme Court under the Expediting Act, 15 U.S.C. § 29(b). The legislative history of that provision confirms Congress's view that direct appeals are appropriate when an antitrust case has special importance to the United States economy, regardless of the certiorari criteria that apply in other cases. See, *e.g.*, H.R. Rep. No. 93-1463, at 14 (1974); S. Rep. No. 93-298, at 4 (1974); see also SUPREME COURT PRACTICE, *supra*, at 53-55.

This undeniably is such a case. Microsoft has acknowledged "the lightening [*sic*] pace at which the software industry moves" (Mem. Supp. Judgment 10), and has asserted both that software is "the single most productive and envied industry in the United States" (Position as to Proceedings 10) and that "Windows is very important to the Nation's economy" (Summ. Resp. 4). Microsoft also has claimed that, while "the threat of a breakup hang[s] over [Microsoft's] head," Microsoft risks "los[ing] irreplaceable employees" and "third parties may be unwilling to enter into routine business agreements with Microsoft while its continued corporate existence remains in doubt" (Mem. Supp. Rejection 5-6).

Microsoft thus is in no position to contend that the software markets at issue here move slowly, that immediate resolution is unnecessary, or that Microsoft's domination of the desktop is not important to the national economy. It is critical not only that the reorganization set forth in Plaintiffs' Proposed Final Judgment be implemented to restore competition to the core of the software industry, but that competition supplant monopoly before Microsoft grabs yet another market through its continuing campaign of illegal conduct.[17]

Although Microsoft may legitimately seek to cross-examine the plaintiffs' witnesses on the remedy issue, that process should not become a pretext for delaying this Court's entry of a remedy and an appealable final judgment. See Microsoft's Position as to Proceedings, *passim*.[18] Most important, this

[17] Thus, the Court should reject Microsoft's request for a toothless preliminary injunction that would permit a piecemeal appeal but would further delay the final resolution of this case and the effective remediation of Microsoft's violations.

[18] Microsoft misrepresents (Position as to Proceedings 5-6) the scope of the remedy proceedings in *National Lead* — much less any associated due process concerns. The large record to which the Supreme Court referred was the entire *trial* record, one matched (if not overmatched) in scope by the 78 days of

Court should not permit this remedy proceeding to become an opportunity for Microsoft to harass and intimidate persons who have provided the plaintiffs with information necessary to the investigation and conclusion of this case. See *id*. at 8. Microsoft already is using the press to spread word that it wants to use the discovery process to explore the thought processes of enforcement personnel and the identities and communications of witnesses. See Michael J. Martinez, *Microsoft Seeks Federal Records*, DENVER POST, May 3, 2000, at C4; Joel Brinkley & Steve Lohr, *Microsoft to Dig In Against Breakup*, NEW ORLEANS TIMES-PICAYUNE, May 2, 2000, at C1. Microsoft has no legitimate claim on such discovery, however, even if it were otherwise permissible. (It is not. See *City of Burlington* v. *Westinghouse Electric Corp.*, 246 F. Supp. 839, 847 (D.D.C. 1965) (denying similar discovery to avoid fostering "a fear of exposure * * * which would hinder law enforcement"); 5 U.S.C. § 552(b)(7) (excepting disclosure of enforcement-related communications from Freedom of Information Act).)

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testimony and thousands of exhibits in *this* case. As the Court pointed out, a proposed "form of decree" was submitted *after* the three-month trial in that case, 332 U.S. at 333-334; after the findings and conclusions were entered, the additional proceedings on remedy consisted of "further conferences with counsel." *Id*. at 334.

Microsoft is thoroughly familiar with its own corporate structure and its array of antitrust violations. It is untenable for Microsoft to claim (Position as to Proceedings 8) that it had no inkling that the plaintiffs might propose structural relief; the leading antitrust treatise calls for such relief in almost all monopolization cases, 3 AREEDA & HOVENKAMP, *supra*, ¶ 636c, at 56, and opinion leaders as staid as *The Economist* have been calling for a breakup for months. See *Now Bust Microsoft's Trust*, ECONOMIST, Nov. 13, 1999, at 15. Indeed, the front page of Microsoft's hometown newspaper reported the likelihood of a breakup proposal long ago. See Joel Brinkley, *The Goal: Break Up Monopoly; 'Dramatic' Microsoft Systems Remedy Sought*, SEATTLE POST-INTELLIGENCER, Nov. 10, 1999, at A1. Microsoft's transparent desire to use the judicial process to burden the plaintiffs' sources of information should be seen for what it is: an effort to intimidate witnesses and chill cooperation with the government.[19] It is precisely because of improper efforts such as these that Plaintiffs' Proposed Final Judgment (in Section 2(d)) specifically prohibits retaliation against witnesses in this case. Sadly, Microsoft needs to be specifically instructed not to commit a federal crime, see 18 U.S.C. §§ 1510-1513.

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[19] Microsoft's announced plans already have succeeded in chilling public comments by industry insiders who are concerned that Microsoft will again seek depositions to support its contention that "the industry is ganging up on" the monopolist. See Ephraim Schwartz, *Proposed Microsoft Breakup a Moot Point, Say Some Industry Observers*, InfoWorld.com, Apr. 28, 2000, http://www.infoworld.com/articles/pi/xml/00/04/28/000428pivendorreax.xml. And Microsoft quickly moved to silence a software news Web site that exposed Microsoft's half-step palliation of the Kerberos problem that the plaintiffs' remedy papers identified. See John Schwartz, *Microsoft, Slashdot Exchange Volleys*, WASH. POST, May 12, 2000, at E1.

4. *The Benefits Of Restoring Competition Outweigh Any Risks*

This Court should not be dissuaded from entering Plaintiffs' Proposed Final Judgment based on a concern about the destabilizing effect of competition on a long-monopolized market. There is no reason to fear that sort of change: to favor the stability of monopoly over the uncertainty of competition would constitute a "frontal assault on the basic policy of the Sherman Act." *Professional Engineers*, 435 U.S. at 680. That policy forecloses the claim that certain markets should be surrendered to "monopolistic arrangements" rather than exposed to vigorous competition. *Id*. at 690.

Consumers stand to gain the most from the increased competition and innovation that would follow upon the full implementation of Plaintiffs' Proposed Final Judgment. See Romer Dec. ¶¶ 58, 61-62; Henderson ¶ 28. Lower prices, greater reliability, and new functionalities all could be expected to emerge on a far faster schedule than under a monopoly, where the rationing of limited product improvements is critical to profit maximization. The proposed reorganization not only would enhance competition and improve innovation, as the Sherman Act is designed to do, but would do so in a way that imposes no serious harm on shareholders or employees. Employees are empowered by decentralized business structures with more room for advancement and development. Microsoft's bench is deep, and many talented engineers who have been foreclosed from leadership roles would get the opportunity to use their talents more fully.

Moreover, experience shows that divestitures often increase shareholder wealth.[20] The Standard Oil divestiture stands as a model remedy that broke up monopoly power, created successor companies that

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[20] If a structural remedy costs Microsoft or its shareholders some money, those costs result from the necessary "den[ial] * * * of the fruits" of the monopoly (*United Shoe*, 391 U.S. at 250) — including the effects of past and anticipated monopoly rents on the stock price. See Romer Dec. ¶¶ 69-70. "[T]he pinch on private interests is not relevant to fashioning an antitrust decree." *Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 472 (1969) (disregarding adverse tax effects of divestiture on

eventually invaded each other's original territories and engaged in fierce competition, accelerated technological advances, and enhanced shareholder value. See William S. Comanor & F.M. Scherer, *Rewriting History: the Early Sherman Act Monopolization Cases*, 2 INT'L J. ECON. & BUS. 263, 266-268 (1995). Standard Oil, much like Microsoft today, had attacked divestiture as "confiscatory" and "ruinous," and said that the remedy "if carried to its logical conclusions attacks the very foundations of the modern business world." Standard Oil Brief, *supra*, at 127, quoted in Kovacic, *supra*, at 1298. Standard also warned that if the antitrust laws required monopolies to break up, "prices will be higher; hundreds of thousands of men will be deprived of employment; and our foreign trade * * * will be destroyed." Standard Oil Argument, *supra*, at 102-103, quoted in Kovacic, *supra*, at 1297. The defenders of the Bell System monopoly attacked that divestiture in almost identical terms. See Joel Brinkley, *Microsoft Cites AT&T to Fight Breakup*, N.Y. TIMES. May 15, 2000, at C4 (noting similarities between Microsoft's arguments and Bell System contentions that monopoly was necessary for technological innovation and that divestiture would primarily benefit Japanese competitors).

Barely a year after the Standard Oil divestiture, however, Theodore Roosevelt remarked, "Wall Street's prayer now is: 'Oh, Merciful Providence, give us another dissolution,'" Comanor & Scherer, *supra*, at 266 (quoting Roosevelt), and the *AT&T* case produced similar results. See, *e.g.*, *100 Shares of the Old Ma Bell Today*, MONEY, Aug. 1999, at 87 (100 shares of AT&T, worth $6150 at divestiture, were worth $56,144 in mid-1999). In fact, there are several striking resemblances between the Bell System's position on the eve of the divestiture decree in 1982 and Microsoft's position now. The Bell

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defendant and shareholders). "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *Du Pont*, 366 U.S. at 326. Such effects serve goals of general deterrence by motivating large shareholders and boards of directors to look more closely at firms' compliance with the antitrust laws — scrutiny woefully absent in this instance.

System considered itself "a single integrated enterprise" that was "technologically integrated" and physically integrated nationwide. Brief of AT&T, *United States* v. *Western Electric Co.*, No. 87-5388, at 5 (D.C. Cir. filed July 25, 1989). See also Romer Dec. ¶ 14. That integration of technologies and services into a monopolized (albeit regulated) base spurred a government antitrust case that prompted a sweeping divestiture.

Although initially opposed by several States, the FCC, the Department of Defense, and the Department of Commerce, and viewed with trepidation by many consumers, the divestiture of the Bell System in fact increased long distance and equipment competition dramatically. Interconnection problems addressed by the case have proven to be readily manageable. The telephone network is greatly improved and is a new center of commerce, information, and entertainment, as well as ordinary conversation. The stunning growth of the Internet and ubiquitous wireless telephony typify what happens when competitive markets replace monopolized ones. And the divested fragments of the old Bell System are all thriving, creating substantial wealth for shareholders while facing new forces of competition in their particular markets. See *100 Shares of the Old Ma Bell*, *supra*.

It thus is not surprising that respected analysts have recognized that a restructuring of Microsoft along the lines of the proposed remedy, perhaps adding a second spin-off consisting of Internet Explorer and other properties, may well maximize shareholder value.[21] Congress properly determined that

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[21] See, *e.g.*, Mary Meeker (Morgan Stanley Dean Witter), *Judging Microsoft*, Smartmoney.com, Apr. 5, 2000 ("Financially, we believe a breakup could enhance shareholder value."); *Of Two Minds on Microsoft*, N.Y. TIMES, Apr. 9, 2000, § 3, at 6 (quoting George Godfrey, ING Barings: "you'd win as a shareholder"); Anthony Picardi & Dan Kusnetzsky, International Data Corp., *Microsoft on Trial: An Analysis of Possible Outcomes* 7 (1999) ("[T]he long-term growth of the company (and its progeny) and the health of the industry would be best served if it were broken up"); Douglas Crook, Prudential Securities analyst report, *MSFT: Reiterate Strong Buy Rating and $145 Price Target*, Jan. 14, 2000 ("[W]e believe a divided Microsoft may have a higher market capitalization than the combined entity.").

competition produces "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pacific Ry*. v. *United States*, 356 U.S. 1, 4 (1958). This Court should not hesitate to follow the course laid down by the Supreme Court, and above all should not allow Microsoft to "game" the judicial process by emerging from this case as it emerged from the consent decree, confident that nothing material will change.

C. The Browser Properties Should Be Separate

Plaintiffs' Proposed Final Judgment goes far toward providing an appropriate remedy for the problems of abused monopoly power that have been worsened by the violations proved in this case. The Court should modestly enhance that proposal, however, to deal directly with Microsoft's now-successful monopolization of the Internet browser market and its concomitant threat to the competitive structure of Internet computing. Rather than reorganizing Microsoft into only a Windows Company and a single Applications Company, the Court should supplement Plaintiffs' Proposed Final Judgment by separating the Internet Explorer product and personnel into a third, independent company. In the alternative, the Court should allow the product and personnel to remain with the Applications Company, but should order that the source code for the Internet Explorer product be disclosed and treated as "open source" for the use of other software developers and vendors, ending the monopoly position of the browser.

To allow a Microsoft successor to use the browser as a point of leverage (or a means of protection) for its dominant applications suite would reward Microsoft for its illegal conduct, even if the benefits did not accrue to the operating systems business. Microsoft did not have a browser monopoly when the trial began, but it acquired one in the meantime. Even during a time period in which one would expect Microsoft to be most restrained, it extended its market power.

1. If Microsoft's Applications Company retains Internet Explorer without limitation, that Company will retain control over the critical link between the productivity applications monopoly it now has

and the monopolies over Internet computing and the server market that Microsoft has sought to acquire. As Microsoft executive Paul Maritz put it, “the most important thing we can do is not lose control of the Web client,” because “[b]y controlling the client, you also control the server.” Gov’t Ex. 498. The Applications Company could suppress competition by adding features and protocols to the browser for which the Applications Company has some particular need or advantage in implementation (*e.g.*, through expertise or already existing software), and by refusing to add features and protocols that would similarly advantage a competitor. Microsoft expert Richard Schmalensee acknowledged this incentive at trial: “[I]f one company controlled the browser and its look and feel and how it presented applications, it could severely enhance or detract from the application functionality of programs or applications running on the server.” 6/24/99 (p.m.) Tr. 46-47; see also *id*. at 48; Henderson Dec. ¶ 82 (quoting Rasmussen Dep., 12/15/98 (a.m.), at 67-68).

Accordingly, rather than leave the monopoly browser with the monopoly productivity applications, the remedy should separate the three monopolies — operating systems, Internet browser, and desktop applications — by spinning off an independent company to maintain and develop the Internet Explorer product. That would remove the likelihood that the focus of the desktop monopoly would simply shift from the operating system to the productivity applications (with a welded-in browser). The Internet Explorer Company would receive all intellectual property embodied in the current stand-alone release of Internet Explorer that may be downloaded from Microsoft’s website. The details of the transfer of the intellectual property in Internet Explorer could parallel the provisions in Plaintiffs’ Proposed Final Judgment (at § 1(c)(ii)), except that the intellectual property in Internet Explorer would be conveyed to the Internet Explorer Company rather than to the Applications Company (which in turn would receive a one-time license like that afforded the Windows Company in Plaintiffs’ Proposed Final Judgment § 1(c)(ii)). Likewise, and crucially, the Internet Explorer Company would receive all Microsoft employees and contractors currently working on any component of Internet Explorer, on the terms set out in Section 1(c)(i) of Plaintiffs' Proposed Final Judgment for the transfer of those employees and contractors to the Applications Company.[22]

Once the Internet Explorer Company becomes independent, software vendors would be on a more equal footing when it comes to access to browser developments and compatibility between browsers and applications. Given the importance of the browser as the universal client, the universal interface to web-based (and other server-based) computing, see Henderson Dec. ¶¶ 12, 81-86; Harris Direct ¶ 5, this parity is as critical as the parity relating to the operating system. The safeguards applicable to the Windows Company and the Applications Company, prescribed in Section 2 of Plaintiffs' Proposed Final Judgment, should also apply to the Internet Explorer Company and to its relationship with the Windows Company and the Applications Company. This supplement would have another benefit: the addition of a third company with a key monopoly product will destabilize the relationship between the Windows Company and the Applications Company, reducing the likelihood of collusion (or the onset of tacit collusion) between the two.

The new Internet Explorer Company would have excellent prospects. The Internet Explorer Company would instantly become one of the most vigorous Internet companies, as the default supplier of the Internet user interface to an installed base of more than 100 million Internet users. The Internet Explorer Company surely would sponsor its own Internet portal, and could sell placement on toolbars and channel bars. Potential content ventures alone would be substantial for a holder of even a temporary 80-90% share

22 In submitting its plan of reorganization under Plaintiffs' Proposed Final Judgment § 1(a), Microsoft might propose to transfer additional assets or employees to the Internet Explorer Company to maximize innovation and shareholder value.

of the Internet browser market. The Internet Explorer Company could generate revenue by providing engineering services to a wide variety of applications providers that wanted to integrate their offerings with the leading browser. The Windows Company and the Applications Company would be motivated to pay the Internet Explorer Company to provide and maintain the functionality that they wanted to invoke from within their products, at least until they developed competing browsers of their own. The thriving applications service provider (ASP) market would provide another source of revenue for the Internet Explorer Company. ASPs are particularly dependent upon the browser interface, and could be charged for browser customization and for feature addition. OEMs and portals also might pay the Internet Explorer Company to deliver customized browsers or to provide browser integration with other offerings.

Even if the initial Internet Explorer Company ran into difficulties, the Internet Explorer assets would not exit from the market. Many software or content companies would jump at the chance to own the leading browser software and market it in conjunction with their applications or content businesses.

2. In the alternative, if the Court desires to leave the Internet Explorer product and personnel with the Applications Company as the plaintiffs propose, the Court could limit the potential for anticompetitive use of the browser monopoly by ordering that the Applications Company disclose the source code of the Internet Explorer product and license the use of that code (and the code of any successor products) on a full, "open source" basis. Although the Applications Company ordinarily would be entitled to a reasonable royalty for intellectual property subject to a compulsory licensing remedy, Microsoft has established the reasonable commercial royalty for the Internet Explorer product at zero. For that reason, and because the zero-royalty distribution of Internet Explorer was an important part of Microsoft's predatory campaign to foreclose competition in the Internet browser market, it is appropriate to set the reasonable royalty for Internet Explorer at zero for the purposes of an antitrust decree. If the

Court disagrees, the "reasonable" royalty under these circumstances should not exceed a nominal amount, since the value of the product for Microsoft has consisted in its anticompetitive effects.

The provision requiring open-source treatment of the Internet Explorer product should be a continuing obligation to disclose the source code in a "Timely Manner" within the meaning of Section 7(cc). The obligation should have the duration specified in Section 3 of Plaintiffs' Proposed Final Judgment, except that Microsoft and its successors should be permanently enjoined from asserting intellectual property rights to any Internet Explorer product source code that is disclosed pursuant to the decree.

3. Supplementing Plaintiffs' Proposed Final Judgment by adding an independent Internet Explorer Company to the reorganization, or by making Internet Explorer an open source product, would produce substantial incremental competitive benefits with little additional disruption. In entering its decree, this Court therefore should make that limited alteration.

D. Significant Structural Relief In This Case Is Necessary To Preserve The Credible Deterrent Force Of The Antitrust Laws

Given Microsoft's demonstrated incentive and ability to evade or to neutralize conduct restrictions, failure to require serious structural relief would send a dangerous message to the business community and the public in this highly publicized case. Conduct remedies alone would cost Microsoft very little and would do little if any good for competition. The practical message for other businesses with monopoly power and for the counsel who advise them would be clear:

> There are no structural remedies to fear. If Microsoft was not subjected to structural relief, no one ever will be. A monopolist can bank the advantages of its anticompetitive conduct, and deal with manageable legal problems later when its goals have been achieved.

That cannot be the message sent by the remedy in this case.

Unless there is a good-faith desire to comply with the law, any company, including Microsoft, can and will skirt any conduct prohibition that may be crafted. "Crown jewels" provisions are ineffective: if structural relief is not sought and obtained on this record, it is hard to imagine a court ordering a divestiture later based on the breach of a technical decree obligation.

Without a meaningful divestiture remedy, Microsoft will be free to leverage its operating system monopoly and extend it into servers, Internet computing, and any other adjacent field that holds promise of additional profit. No one will dare to bring antitrust violations to the attention of the government if the results of this monumental suit are a toothless "good conduct" code just like the 1995 consent decree. The public deserves — and the law requires — an effective structural remedy in this historic case.

CONCLUSION

The Court should enter the Plaintiffs' Proposed Final Judgment with the modification described above.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2000, I caused a true and correct copy of the foregoing BRIEF ON REMEDY AS *AMICI CURIAE* OF THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION AND THE SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION to be served by hand upon:

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