IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex. rel.*
Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

Next Court Deadline: March 4, 2002
Status Conference

DEFENDANT MICROSOFT CORPORATION'S MOTION TO VACATE ORDERS REQUIRING PUBLIC DEPOSITIONS

Defendant Microsoft Corporation ("Microsoft") hereby moves to vacate the Court's (i) August 11, 1998 Order providing that all depositions taken in this action be open to the public pursuant 15 U.S.C. § 30, and (ii) April 1, 1999 Order establishing a protocol for conducting such depositions. Microsoft has discussed this motion with the non-settling States in accordance with LCvR 7.1(m). They have stated that they do not oppose the motion and thus do not intend to file any memorandum in opposition.

BACKGROUND

A. The Orders Providing for Public Depositions

By an Order dated May 22, 1998, the Court consolidated the action filed by the United States, *United States* v. *Microsoft Corp.*, Civil Action No. 98-1232, and the similar action filed by 20 States and the District of Columbia, *New York, et al.* v. *Microsoft Corp.*, Civil Action No. 98-1233, "pending further order of the Court." (A copy of the Court's May 22, 1998 Order is attached hereto as Exhibit A.)

On August 10, 1998, *The New York Times* and certain other press organizations ("intervenors") filed an "emergency motion" to attend certain depositions pursuant to the Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30. That act provides that "depositions of witnesses for use in any suit in equity brought by the United States [under the Sherman Act] . . . shall be open to the public as freely as are trials in open court." By Order dated August 11, 1998, the Court held that "intervenors and all other members of the public shall be admitted to all depositions to be taken henceforth in this action." (A copy of the Court's August 11, 1998 Order is attached hereto as Exhibit B.) The Court certified its Order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and Microsoft appealed. The Court of Appeals initially stayed but ultimately affirmed the Court's Order, holding that "a deposition taken in pretrial discovery in an antitrust case brought by the Government seeking injunctive relief is subject to 15 U.S.C. § 30." *United States* v. *Microsoft Corp.*, 165 F.3d 952, 958 (D.C. Cir. 1999).

The parties and intervenors thereafter negotiated a protocol for the taking of public depositions, which the Court entered on April 1, 1999. (A copy of the Court's April 1, 1999 Order is attached hereto as Exhibit C.) By the time the April 1, 1999 Order was entered, only the rebuttal phase of the trial remained. As a result, only seven public depositions were taken pursuant to the April 1, 1999 Order. All of those depositions were taken by lawyers representing the United States, with lawyers from the plaintiff States only in attendance.

B. The Order Establishing Two Separate Tracks

Following the Court of Appeals' June 28, 2001 decision remanding these actions, the Court entered an Order directing the parties to engage in intensive settlement discussions. On November 2, 2001, the United States and Microsoft agreed to settle Civil Action No. 98-1232, and filed a Proposed Final Judgment with the Court. On November 6, 2001, nine of the plaintiff

States in Civil Action No. 98-1233 also agreed to settle with Microsoft, and the parties filed a Revised Proposed Final Judgment ("RPFJ") with the Court.

By an Order dated November 8, 2001, the Court recognized the changed circumstances by establishing two separate tracks for the cases going forward. The Court labeled as Track I the Tunney Act proceedings involving the United States, Microsoft and the nine settling States, and labeled as Track II the litigation involving the nine States and the District of Columbia that elected not to settle with Microsoft. The Court's January 2 and January 7, 2002 Orders thus correctly (i) use only the caption for Civil Action No. 98-1233, (ii) appear only on the docket for that action and (iii) define the "parties" to include only the non-settling States and Microsoft.

C. The Press' January 2, 2002 Letter

On January 2, 2002, counsel for *The New York Times* and *The Washington Post* sent a letter to counsel for Microsoft, the United States and the non-settling States stating that "representatives of our clients intend to exercise their right under the [April 1, 1999] Order to attend what we understand to be the forthcoming depositions in this matter." (A copy of this letter is attached hereto as Exhibit D.)

ARGUMENT

The United States has settled its claims against Microsoft and is proceeding separately under the Tunney Act to seek approval of the RPFJ in Track I. Because 15 U.S.C. § 30 is, by its terms, not applicable to the separate action being prosecuted by the non-settling States, the Court should vacate its August 11, 1998 and April 1, 1999 Orders, as to Civil Action No. 98-1233. In the alternative, the Court should make clear that 15 U.S.C. § 30 does not apply to any depositions taken in the non-settling States' action.

The plain language of the Publicity in Taking Evidence Act makes clear that it has no application to depositions in actions brought by plaintiffs other than the United States:

> In the taking of depositions of witnesses for use in any suit in equity *brought by the United States* under sections 1 to 7 of this title, . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable.

15 U.S.C. § 30 (emphasis added). Civil Action No. 98-1233 was not brought by the United States. The only reason why depositions in this action were previously open to the public was because it was consolidated with Civil Action No. 98-1232 and thus depositions in the two cases were taken together. The United States acknowledged this fact at the time the August 11, 1998 Order was entered, explaining that "the issue of 15 U.S.C. § 30's applicability arises in the States' case only because of the consolidation of the States' case with the United States's case." (United States' Opp'n to Microsoft's Mot. for Stay, dated August 12, 1998, at 3 n. 2 (attached hereto as Exhibit E).)

Now that the two actions have been severed by virtue of the United States' settlement with Microsoft and the Court's November 8, 2001 Order establishing two different tracks, the Publicity in Taking Evidence Act is not applicable to depositions taken in the non-settling States' separate action. The forthcoming depositions will be noticed only in Civil Action No. 98-1233, and they will be used only for purposes of evaluating the fundamentally different remedies proposed by the non-settling States. By the same token, the forthcoming depositions will not be taken in Civil Action No. 98-1232, which now involves only a determination under the Tunney Act of whether the RPFJ is in the public interest. For this reason, lawyers representing the United States will not be taking any of the depositions taken in Civil Action No. 98-1233.

CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court vacate the August 11, 1998 and April 1, 1999 Orders, as to Civil Action No. 98-1233. In the alternative, the Court should make clear that 15 U.S.C. § 30 does not apply to any depositions taken in the non-settling States' action.

Dated: Washington, D.C.
January 9, 2002

Respectfully submitted,

____

John L. Warden (Bar No. 222083)
Richard J. Urowsky
Steven L. Holley
Michael Lacovara
Richard C. Pepperman, II
Stephanie G. Wheeler
Ronald J. Colombo
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Bradley P. Smith (Bar No. 468060)
SULLIVAN & CROMWELL
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 956-7500

Counsel for Defendant Microsoft Corporation

William H. Neukom
Thomas W. Burt
David A. Heiner, Jr.
Diane D'Arcangelo
Christopher J. Meyers
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 936-8080

Dan K. Webb
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Charles F. Rule (Bar No. 370818)
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2505
(202) 639-7300

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232
STATE OF NEW YORK, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233

FILED
MAY 22 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the motions of Microsoft Corporation ("Microsoft") to consolidate Civil Action Nos. 98-1232 and 98-1233 for all purposes, and for an enlargement of time in which to respond to plaintiffs' applications for preliminary injunctions and for entry of a scheduling order, for the reasons set forth on the record at the scheduling conference of May 22, 1998, it is, this 22nd day of May, 1998,

ORDERED, that, pursuant to Fed. R. Civ. P. 42(a), Microsoft's motions to consolidate are provisionally granted, and Civil Action Nos. 98-1232 and 98-1233 are consolidated for all purposes, pending further order of the Court; and it is

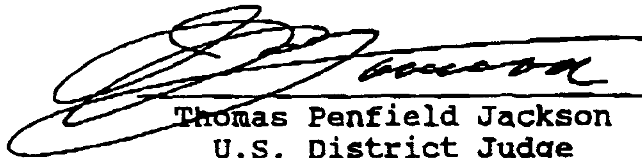
FURTHER ORDERED, that, pursuant to Fed. R. Civ. P. 65(a)(2), the trial of both actions on the merits is advanced and consolidated with the hearing of plaintiffs' applications for preliminary injunctions; and it is

FURTHER ORDERED, that Microsoft shall file its answers to the complaints on or before July 28, 1998; and it is

FURTHER ORDERED, that Microsoft shall file its oppositions to plaintiffs' applications for preliminary injunctions on or before August 10, 1998; and it is

FURTHER ORDERED, that plaintiffs shall file their replies, if any, to defendant's oppositions on or before August 24, 1998; and it is

FURTHER ORDERED, the Court having found that no prejudice to the parties will be caused thereby, that these actions are scheduled for hearing on plaintiffs' applications for preliminary injunctions and for trial on the merits to commence on September 8, 1998.



Thomas Penfield Jackson
U.S. District Judge

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232
STATE OF NEW YORK, ex rel. Attorney General DENNIS C. VACCO, et al., Plaintiffs and Counterclaim-Defendants, v. MICROSOFT CORPORATION, Defendant and Counterclaim-Plaintiff.	Civil Action No. 98-1233

FILED
AUG 11 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the several motions of the New York Times Company, ZDTV, L.L.C., ZDNET, the Seattle Times, Reuters America, Inc., and Bloomberg News (collectively, "intervenors") for leave to intervene to enforce a right of access, pursuant to 15 U.S.C. § 30, to all depositions taken in this action, and in accordance with the proceedings in open court at the hearing of August 11, 1998, it appearing to the Court that the plain language of 15 U.S.C. § 30 mandates that at a minimum the relief sought by intervenors the New York Times Company, ZDTV, ZDNET, and the Seattle Times by their most recent motion must be

granted, but cf., 8 Charles Alan Wright et al., Federal Practice & Procedure § 2041 (2d ed. 1994); Richard L. Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 39 (Nov. 1983), it is, this 11th day of August, 1998,

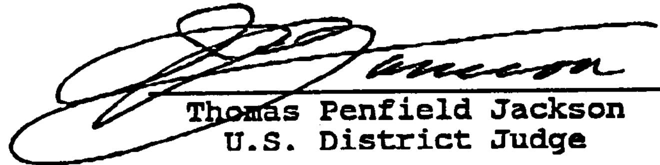
ORDERED, that the motions of prospective intervenors, as members of the public, for leave to intervene to enforce a generic "right of access" are granted in part; and it is

FURTHER ORDERED, that intervenors and all other members of the public shall be admitted to all depositions to be taken henceforth in this action, including the deposition of William Gates III, to the extent space is reasonably available to accommodate them consistent with public safety and order; and it is

FURTHER ORDERED, to the extent it may be necessary to enable an interlocutory appeal to be taken herefrom, the Court states pursuant to 28 U.S.C. § 1292(b) that this Order involves a collateral but controlling question of law as to which there is substantial ground for a difference of opinion as to the extent of public access to pretrial proceedings in this action, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); Ficken v. Alvarez, No. 97-5190, 1998 WL 380562, at **1-2 (D.C. Cir. Jul. 10, 1998); and it is

FURTHER ORDERED, that all depositions in this action are stayed pending presentation by intervenors and the parties, for

entry by the Court, of an agreed form of order establishing a protocol for affording access for intervenors and other members of the public to pretrial depositions which comports with 15 U.S.C. § 30, but which also protects the interests of the parties and of third-party deponents in preventing unnecessary disclosure of trade secrets or other confidential information, see United States v. United Fruit Co., 410 F.2d 553 (5th Cir. 1969); United States v. International Bus. Mach., 67 F.R.D. 40 (S.D.N.Y. 1975).



Thomas Penfield Jackson
U.S. District Judge

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (TPJ)

FILED

APR 01 1999

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

STATE OF NEW YORK *ex rel.*
Attorney General DENNIS C. VACCO, *et al.*,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (TPJ)

MICROSOFT CORPORATION,

Counterclaim-Plaintiff,

vs.

DENNIS C. VACCO,
Attorney General of the State of New York,
in his official capacity, *et al.*,

Counterclaim-Defendants.

ORDER

In order to provide public access to depositions in this action consistent with 15 U.S.C. § 30, while seeking to ensure that the depositions proceed in an orderly and expeditious manner without unnecessary disruption, the Court hereby ORDERS that the following procedures will govern all further depositions in this action:

Notice to the Public of Depositions

1. The Department of Justice Office of Public Affairs shall make available to the press and the public by 4:00 p.m. each business day an updated list of the depositions scheduled in this action. For each deposition, the list shall include the deponent's name, employer, location(s) at which members of the press and the public are to obtain entry to the deposition, and time the deposition will commence. A party that notices a deposition shall provide three days notice to the press and public, but need not provide three days notice for the rescheduling of a deposition that had previously been noticed.

Seating for Press and Public

2. The number of seats allocated to members of the press and the public shall be divided equally. In the event that fewer members of the press attend the deposition than there are seats allocated to the press, additional members of the public may fill the vacant press seats. In the event that fewer members of the public attend the deposition than there are seats allocated to the public, additional members of the press may fill the vacant public seats. The press shall decide among themselves, under the direction of counsel for the intervenors, how the number of seats allocated to the press shall be distributed among competing press organizations, subject to the resolution of any disputes by a press representative designated by counsel for the intervenors or by further order of the Court. In the event that more members of the public show up to attend the

deposition than there are seats allocated to the public, members of the public shall be admitted on a first-come, first-served basis.

3. A deponent shall choose one of the options listed below for allowing the press and the public to attend the deposition:

(a) The deposition shall take place in a courtroom at the nearest available United States Courthouse, and as many members of the press and the public may observe the deposition as there are seats available in the courtroom; or

(b) The deposition shall take place at a location provided by the deponent that would allow sufficient seating for a total of 100 members of the press and the public to observe the deposition in person, unless counsel for the parties agree that it is reasonable to expect fewer members of the press and the public to attend the deposition; or

(c) The deposition shall take place at a location provided by the deponent that allows sufficient seating for 10 members of the press and 10 members of the public to observe the deposition in person. The deponent shall also provide a second location(s) (the "overflow room(s)") sufficient to allow 80 additional members of the press and the public to watch a simultaneous video feed of the deposition table. The costs incurred in providing the video feed shall be incurred by the deponent.

(d) If more than one deposition of witnesses from a single firm are scheduled for the same date, the firm need only provide facilities that satisfy the requirements set forth in paragraph 3(b) or 3(c) for one such deposition; for the other deposition(s) scheduled on that date, the firm need only provide a location

that has sufficient seating to allow 10 members of the press and 10 members of the public to observe the deposition in person. The press representative referred to in paragraph 2 above shall advise counsel for which deposition the larger accommodation is to be made available.

4. If a deposition takes place in a location other than a courtroom at a United States Courthouse, the deposition room shall be arranged so that the deposition occurs at a table that is physically separated from any seating area in the room for members of the press and the public. During the course of the deposition (including breaks), members of the press and the public must remain in their seating area in the deposition room and may not approach the deposition table.

Procedures Relating to the Conduct of the Press and Public During Deposition

5. News organizations or members of the public who observe the deposition in the deposition room or overflow room(s) may retain their seats for the full day.

6. Sketch artists (no more than two in number) shall be treated as members of the press for purposes of attending the depositions.

7. No television cameras, camcorders, tape recorders, cameras, pagers, radios or radio transmitters, or other recording or communications devices shall be permitted in the building in which the deposition is taking place or in the building in which the overflow room(s) is located. Television cameras shall be permitted on the Microsoft campus or the grounds of other firms where depositions are taken only in areas reasonably designated by the deponent or counsel for the deponent. Cellular phones and laptop computers (other than a laptop computer to be used by the court reporter) are not

permitted in the deposition room or the overflow room(s), but may be used in lobbies or hallways in the buildings in which the deposition room and overflow room(s) are located. Facilities shall be provided for members of the press and the public to check cellular phones and laptop computers. The deponent is not required to provide any additional facilities for the press or the public.

8. If the deposition will take place at a location provided by the deponent pursuant to paragraph 3, the deponent shall be entitled to require members of the press and the public who will attend the deposition or watch the deposition in the overflow room(s) to go through reasonable security measures, such as metal detectors and searches of bags and parcels, upon entering the buildings where the deposition room and overflow room(s) are located.

9. Members of the press and the public who enter private property to attend a deposition shall not be permitted to trespass on any portion of private property other than the designated portions of those buildings in which the deposition room or overflow room(s) are located which are made available for use pursuant to this Order. Any member of the press or public found to be trespassing may be expelled from the deposition facilities.

10. Members of the press and the public who are in the deposition room shall conduct themselves in a professional and unobtrusive manner during the deposition. Members of the press and the public may, if necessary, leave the deposition room during the deposition and return later, but they must not disrupt the deposition. Members of the press and the public are not permitted to speak in the deposition room and may be expelled from the deposition for speaking during or otherwise disrupting the deposition.

11. Attendance at a deposition does not give members of the press or the public any greater or lesser rights to receive or view exhibits shown to a witness during a deposition than they would otherwise have.

12. Members of the press and the public shall not be permitted to eat in the deposition room.

13. Members of the press and the public may purchase transcripts of the non-confidential portions of the depositions directly from the court reporter. Pursuant to the Stipulation and Protective Order, entered May 27, 1998, members of the press and the public may not obtain transcripts of the non-confidential portions of the deposition until the third business day after the transcript has been provided to counsel for the deponent, so that counsel for the deponent can ensure that no confidential information was inadvertently included in the non-confidential transcript due to transcription or compilation error. Attendance at a deposition does not give members of the press or the public any greater or lesser rights to receive or view videotapes of the deposition than they would otherwise have.

Procedures Governing Conduct Among Counsel for the Parties And Counsel for Third-Party Deponents

14. Off the record discussions between or among counsel for the parties and counsel for third-party deponents shall be conducted out of the presence of members of the press and the public and shall not be recorded by the court reporter or videographer.

15. If counsel for a party or third-party deponent places a telephone call to Judge Jackson or another judge to resolve a dispute during the deposition, the stenographer shall record such conference call. Members of the press and the public shall

be excluded from the deposition room and overflow room(s) during such a call if counsel for a party or third-party deponent requests a sidebar conference with the Judge and the Judge grants the request.

Protection of Trade Secrets and Other Confidential Information

16. The term "confidential information" as used in this Order shall have the meaning set forth in paragraph A(9) of the Stipulation and Protective Order, entered May 27, 1998, whether such information shall be testimonial or documentary.

17. Counsel for the party that noticed the deposition ("deposing counsel") will endeavor in good faith to reserve until the end of the deposition all questions that deposing counsel reasonably believes will likely elicit trade secrets or other confidential information from the deponent. When deposing counsel has remaining only questions that he or she reasonably believes will likely elicit trade secrets or confidential information from the deponent, members of the press and the public shall leave the deposition room upon the request placed on the record of deposing counsel or counsel for the deponent and the video feed to the overflow room(s) (if any) will be terminated (the "confidential session"). During the confidential session, the deponent shall answer the deposing counsel's questions that elicit trade secrets or other confidential information.

18. If during the public session of the deposition, the deposing counsel asks the deponent a question that the deponent or counsel for the deponent reasonably believes will likely elicit trade secrets or confidential information from the deponent, counsel for the deponent may object to the question on the grounds that it will likely elicit trade secrets or confidential information. Deposing counsel may elect either to defer that question or line of questions until the confidential session of the deposition or to proceed

with that question or line of questions, in which event members of the press and the public shall leave the deposition room upon request placed on the record of deposing counsel or counsel for the deponent and the public video feed to the overflow room(s) (if any) will be terminated. If deposing counsel elects to pursue that question or line of questions at that time, counsel shall reopen the deposition to the members of the press and the public before proceeding with the next non-confidential question or line of questions.

19. If deposing counsel asks the deponent a question that does not appear to elicit trade secrets or confidential information, but in answering the question the deponent begins to disclose trade secrets or other confidential information, the deponent or counsel for the deponent may interrupt the answer to interpose an objection on the grounds that the answer would divulge trade secrets or confidential information. As discussed more fully in paragraph 18, the deposing counsel may then elect to defer the question or line of questions to the confidential session or to pursue the question or line of questions at that time, in which event members of the press and the public shall leave the room upon the request placed on the record of deposing counsel or counsel for the deponent and the public video feed to the overflow room(s) (if any) will be terminated. If deposing counsel elects to pursue that question or line of questions at that time, counsel shall reopen the deposition to the members of the press and the public before proceeding with the next non-confidential question or line of questions.

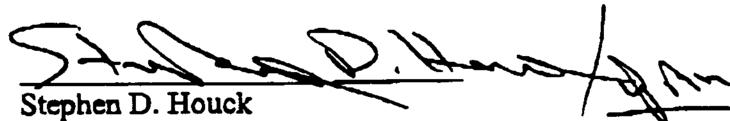
20. Nothing in paragraphs 17-19 of this Order shall be construed to affect the rights of the parties or the intervenors, for good cause shown, to move the Court for further appropriate relief pursuant to 15 U.S.C. § 30 or otherwise.

Effect of Stipulation and Protective Order

21. The Stipulation and Protective Order, entered on May 27, 1998, and the Court's January 22, 1999 Order shall remain in full force and effect, except to the extent they are inconsistent with this Order.

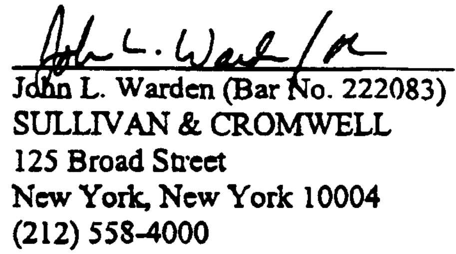
Phillip R. Malone
U.S. DEPARTMENT OF JUSTICE
325 Seventh Street, N.W.
Washington, D.C. 20530
(202) 514-8276

Counsel for Plaintiff
United States of America



Stephen D. Houck
Antitrust Bureau
New York State Department of Law
120 Broadway, Suite 2601
New York, New York 10271
(212) 416-8275

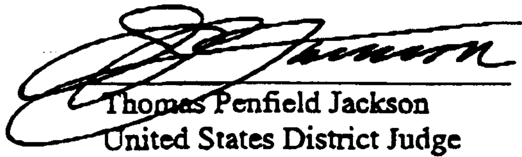
Counsel for Plaintiff
States



John L. Warden (Bar No. 222083)
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Defendant
Microsoft Corporation

SO ORDERED:



Thomas Penfield Jackson
United States District Judge

April 1, 1999

Exhibit D

LEVINE SULLIVAN & KOCH, L.L.P.

1050 SEVENTEENTH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20036

(202) 508-1100
FACSIMILE (202) 861-9888

WRITERS' DIRECT DIAL
(202) 508-1110
(202) 508-1125

LEE LEVINE
MICHAEL D. SULLIVAN
ELIZABETH C. KOCH
JAMES E. GROSSBERG
CELESTE PHILLIPS*
SETH D. BERLIN
JAY WARD BROWN
*RESIDENT AND ADMITTED IN CALIFORNIA ONLY

CAMERON A. STRACHER

ASHLEY I. KISSINGER
AMY LEDOUX
AUDREY BILLINGSLEY
THOMAS CURLEY

January 2, 2002

VIA FACSIMILE AND U.S. MAIL

Brendan V. Sullivan, Jr., Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005

John L. Warden, Esq.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004

Jacqueline S. Kelley, Esq.
U.S. Department of Justice
601 D Street, N.W.
Suite 1200
Washington, DC 20530

Re: ***United States of America v. Microsoft Corp.*, No. 98-CV-1232 (D.D.C.)**
***State of New York, et al. v. Microsoft Corp.*, No. 98-CV-1233 (D.D.C.)**

Dear Counsel:

As some of you are aware from prior proceedings in the referenced actions, we represent The New York Times and The Washington Post in connection with their and the public's right to attend depositions in these matters. With the remand of the cases to the trial court and the scheduling of depositions in the coming weeks, we draw the parties' renewed attention to the Order entered by Judge Jackson on April 1, 1999, which, among other things, requires that advance notice be given of scheduled depositions and prescribes the procedures to be followed for permitting public attendance at them. Representatives of our clients intend to exercise their right under the Order to attend what we understand to be the forthcoming depositions in this matter, and your careful attention to the requirements of the Order, a copy of which is attached for your convenience, will be greatly appreciated.

If you have any questions regarding or would like to discuss the foregoing, please do not hesitate to contact us.

Sincerely,

LEVINE SULLIVAN & KOCH, L.L.P.

By ______________________
Lee Levine
Jay Ward Brown

Enclosure

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' OPPOSITION TO MICROSOFT CORPORATION'S MOTION FOR A STAY

The United States opposes Microsoft Corporation's Motion for a Stay of this Court's Order of August 11, 1998.

1. The United States shares a number of Microsoft's doubts about the desirability of the procedures mandated by the Publicity in Taking Evidence Act, 15 U.S.C. 30. Indeed, last year the Department of Justice recommended to Congress that the Act, which is uniquely applicable to government antitrust cases, be repealed (a recommendation on which Congress did not act). However, the Act is the law of the land, and this Court properly held it applicable to pretrial

discovery depositions. Microsoft's argument that the term "deposition," as used in 15 U.S.C. 30, should be limited to depositions taken in lieu of trial testimony is inapplicable to most of the depositions now scheduled because (to the extent the deponent is not a trial witness) the deposition testimony will be used in lieu of trial testimony and may contain party admissions. Moreover, every court to consider 15 U.S.C. 30 has read it to mean what it says: that it extends to all depositions, including discovery depositions. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958) (assuming 15 U.S.C. 30 would apply to discovery depositions conducted by the United States); United States v. IBM Corp., 67 F.R.D. 40, 43 (S.D.N.Y. 1975) (applying 15 U.S.C. 30 to discovery depositions); Times News Ltd. of Great Britain v. McDonnell Douglas Corp., 387 F. Supp. 189, 196 (C.D. Cal. 1974) (giving 15 U.S.C. 30 as an example of a statute that permits access to discovery depositions). Congress has not seen fit to disturb this consistent line of cases. To the contrary, Congress has legislated on the assumption that the statute applies to discovery depositions.[1]

The statute's legislative history supports, rather than draws into question, the Court's ruling here. In enacting 15 U.S.C. 30, Congress specifically intended to reverse United States v. United Shoe Mach. Co., 198 F. 870 (D. Mass. 1912), which barred the public from attending the taking of testimony by an examiner. The basis for the court's decision was that, while trials were

---

[1]In 1976, Congress amended the Antitrust Civil Process Act, the statute pursuant to which the United States conducts precomplaint discovery in antitrust actions. The ACPA provides, among other things, that the antitrust investigator "shall exclude from the place where the deposition is held all persons except the person being examined, his counsel" and court personnel. 15 U.S.C. 1312(i)(2). Congress added that "[t]he provisions of section 30 of this title shall not apply to such examinations." Id. There would, of course, have been no need to exempt depositions conducted pursuant to the ACPA from 15 U.S.C. 30 if, as Microsoft contends, 15 U.S.C. 30 does not apply to discovery depositions.

traditionally open to the public, that principle did not extend to pretrial proceedings, including the taking of evidence. See id. at 872. The court further explained that, because no judicial officer is present at the taking of a deposition, "all effective protection against [the improper revelation of] scandal, impertinence, and irrelevancy is practically gone." Id.; see also 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (statement of Rep. Kahn) (criticizing the proposed Act because it makes public "a proceeding preliminary to trial" during which "although the attorney . . . may make an objection against any particular question upon the ground that it is immaterial, incompetent, and irrelevant, still the witness is bound to answer"). These considerations, of course, are just as applicable to discovery depositions as depositions taken for the purpose of preserving a witness's testimony. Microsoft's contention that the broad language of 15 U.S.C. 30 must be narrowed because Congress specifically intended not to reach discovery depositions is, therefore, unpersuasive.

2. Microsoft will not suffer irreparable harm absent a stay. The depositions in this case have been stayed until an acceptable procedure is put in place, which we believe can be agreed to promptly. Any possible appeal will presumably be resolved promptly as well. If Microsoft's stay were granted, depositions could not proceed without mooting the intervenors' claims. Given that Microsoft has little likelihood of success on its appeal,[2] a stay would only serve to postpone the

---

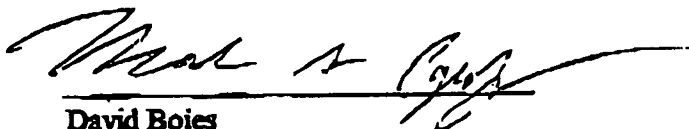
[2]The Court certified the question of 15 U.S.C. 30's applicability for interlocutory appeal pursuant to 28 U.S.C. 1292(b) "to the extent necessary to enable an interlocutory appeal to be taken." Order at 2. Section 1292(b) appeal is unavailable in actions brought by the United States for equitable relief under the antitrust laws. See 15 U.S.C. 29(a); Kaufman v. Edelstein, 539 F.3d 811, 816 (2d Cir. 1976). The certification could apply to the suit brought by the State Attorneys General. However, the issue of 15 U.S.C. 30's applicability arises in the States' case only because of the consolidation of the States' case with the United States's case, and it might be questioned whether, under these circumstances, an interlocutory appeal is appropriate in light of 15 U.S.C. 29(a) and the policy it embodies.

implementation of a procedure that complies with the Publicity in Taking Evidence Act.

CONCLUSION

For the foregoing reasons, Microsoft's Motion for a Stay should be denied.

Respectfully submitted.



David Boies
Special Trial Counsel
Mark S. Popofsky
Attorney

U.S. Department of Justice
Antitrust Division
601 D. Street, NW # 10544
Washington, DC 20530
(202) 514-3764

August 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 1998, I caused the foregoing Opposition of the United States to Microsoft Corporation's Motion for a Stay to be served by fax upon:

Richard Urowsky, Esq.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Fax: (212) 558-3588

Stephen D. Houk, Esq.
New York State Attorney General's Office
120 Broadway, Suite 2601
New York, New York 10271
Fax: (212) 416-6015

Lee Levine, Esq.
Levine Pierson Sullivan & Koch, LLP
1050 Seventeenth Street, NW, Suite 800
Washington, DC 20036
Fax: (202) 861-9888

MARK S. POPOFSKY

Attorney
Antitrust Division