IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex rel*.
Attorney General ANDREW M. CUOMO, *et al*.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

**MEMORANDUM OF POINTS AND AUTHORITIES OF MICROSOFT
CORPORATION IN OPPOSITION TO CERTAIN PLAINTIFF STATES'
RESPONSE TO THE COURT'S DECEMBER 10 ORDER**

I.   Introduction

On December 10, 2007, this Court ordered the Movants to provide specific factual information and legal argument in order to explain how each of the expiring provisions "relates to the development of middleware and other applications designed to run on servers, rather than on PC operating systems." Order at 3, *New York v. Microsoft Corp*. (D.D.C. Dec. 10, 2007) ("Dec. 10 Order"). As with their previous three opportunities, the Movants once again fail to provide any specific facts or legal precedent in response to this question. This is not surprising. By their express terms, Sections III.A, C, D, F, G, and H are intended to address different—and in some sense mutually exclusive—concerns from those addressed by Section III.E. Indeed, unlike the expiring provisions, Section III.E was *not* designed to facilitate the development of middleware and applications on Personal Computer Operating Systems.   This important limitation is reflected in the plain language of Section III.E, the rulings of this Court and the Court of Appeals, and the terms of the Microsoft Communications Protocol Program ("MCPP") license itself.

Nevertheless, Movants now argue that these substantive provisions somehow are necessary to protect the ability of MCPP licensees to write protocol implementations that would run on Microsoft's Personal Computer Operating System. Yet Movants have been unable to point to a single existing or potential MCPP licensee that intends to use that license to create an implementation that would run in whole or in part on the desktop and rely on the protections afforded by Sections III.A, C, D, F, G, or H. Instead, the Movants have once again provided a generalized response to this Court's request. Rather than providing legal or factual support, the Movants put forth hypothetical scenarios in which a MCPP licensee theoretically could benefit from the expiring provisions of the Final Judgment. However, there are real-world analogues to the Movants' hypothetical scenarios, including Apple's iTunes and Google. In the real world,

these competitors have achieved success by relying on non-Microsoft protocols (for good business reasons) and have never seriously considered—much less licensed—Microsoft's Communications Protocols.

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Movants have now had *four* separate opportunities to address the question the Court first raised in September 2007. *See* Transcript of Status Conference at 65, *United States v. Microsoft Corp.* (D.D.C. Sept. 11, 2007) (requesting that the parties address whether any of the expiring provisions are necessary for Section III.E to succeed). However, none of their filings provides sufficient basis to conclude that any of the Final Judgments' expiring provisions—let alone all of them—is required to effectuate Section III.E. Indeed, Microsoft's Opposition, the *amicus* brief filed by the Department of Justice, the legal record in this case, and the Movants' own representations to the Court last year indicate precisely the contrary. Having once again failed to carry their legal burden, the Movants' motions to extend the Final Judgments in their entirety should be denied.

II.   Section III.E Was Designed to Encourage Development of Platform Alternatives Running on Servers, Whereas the Expiring Provisions Pertain to the Treatment of Middleware Running on Windows

As this Court suggested in its December 10th Order, the Movants' contention that the expiring provisions of the Final Judgment are necessary to effectuate Section III.E is fundamentally at odds with the Final Judgment itself. On the one hand, the expiring provisions apply to software that runs on a *Personal Computer*.[1] Those remedial provisions were designed

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[1] *See* Modified Final Judgment §§ III.A, B, C, D, F, G, H, *New York v. Microsoft Corp.* (D.D.C. Sept. 7, 2006) (relating to software running on Personal Computer operating systems). The term Personal Computer is defined in the Final Judgment to *exclude* servers. *Id.* § VI.Q ("'Personal Computer' means any computer configured so that its primary purpose is for use by one person at a time .... Servers ... are examples of products that are not Personal Computers within the meaning of this definition."). Notably, the Movants do not address the Court's observation

to provide opportunities for the development and distribution of platform software running on the Personal Computer desktop, such as Netscape's Navigator and Sun's Java Virtual Machine. Those provisions have fulfilled their objectives and now are scheduled to expire.

On the other hand, Section III.E is quite different from the expiring provisions. By its express terms, Section III.E is *solely* designed to enable software that does *not* run on the desktop to communicate or interoperate "natively" with the Windows Operating System Product.[2] In other words, Section III.E is designed to afford opportunities to software running on the *server*— not on a Personal Computer.

The boundaries of Section III.E are not arbitrary. Rather, they represent the deliberate effort to track the narrow findings of liability in this case. The Court of Appeals explained how Section III.E was designed to address software on *servers*:

> In determining the scope of the remedy, the district court acknowledged that network and server-based applications are not middleware in the sense that "the software physically resides on the PC and functions as a platform for other applications." Still, the court reasoned that such applications are capable of functioning in a manner similar to that of middleware "by providing a layer between the operating system and top-level applications." The court's reasoning is supported by its finding that "[s]oftware developers are increasingly writing programs that rely, or 'call,' on APIs exposed by server operating systems such that the server operating system provides the 'platform' for applications."
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> We think the district court prudently sought not to achieve complete interoperability but only to "advance" the ability of non-

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that "Sections III.A, C, D, F.2, and G of the Final Judgments each rely upon at least one term that is ultimately defined with respect to the term Personal Computer. ... [and i]n turn, the term Personal Computer is explicitly defined to exclude servers." Dec. 10 Order at 2 n. 2.

[2] *Id.* § III.E ("Microsoft shall make available for use by third parties, for the *sole* purpose of interoperating or communicating with a Windows Operating System Product ... any Communications Protocol that is ... (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.") (emphasis added).

> Microsoft server operating systems to interoperate with Windows
> and thereby serve as platforms for applications.

Massachusetts v. Microsoft Corp., 373 F.3d 1999, 1223-24 (D.C. Cir. 2004) (citations omitted).[3]

The focused objectives of Section III.E are further evidenced by the limitation in the provision to disclose only "native" communications protocols.   The Court of Appeals emphasized how the disclosure of non-native protocols would be unrelated to the theory of liability:

> Native communication differs from other forms of communication because it does not require that additional software be installed on the client. ... As the district court stated, "Interoperation made possible by software added onto Microsoft's PC operating system products is less clearly related to the facts of this case because it expands beyond the relevant market of Intel-compatible PC operating systems to address the ability of an *application* to interoperate with a server." The court therefore held Microsoft need not disclose communications protocols used to interoperate non-natively.

Microsoft, 373 F.3d at 1223 (citations omitted) (emphasis in original); *id.* at 1225.[4] Section III.E, therefore, was never designed to facilitate the development of applications on the client, as the Movants suggest. *Compare* Memorandum of the Moving Plaintiff States at 2-3, *New York v. Microsoft Corp.* (D.D.C. Dec. 18, 2007) ("Movants' Memorandum") ("Section III.E ... contemplates that MCPP licensees and other ISVs may add software to the client to take advantage of the functionality that the server provides."), *and id*. at 7 (suggesting that adding client software to the Windows client is a "core" purpose of Section III.E), *with Microsoft*, 373

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[3] *See also New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 172-73 (D.D.C. 2002).

[4] This distinction between native and non-native communication exists because MCPP protocols are unnecessary for non-native communications. Once software is added to the client, the server and the application can communicate directly without the need for the proprietary protocols supported in the Windows client. *See, e.g., Microsoft*, 224 F. Supp. 2d at 235 ("[W]here software code is added to Windows to achieve interoperation with Windows servers, the means of interoperation no longer involves the capabilities of the monopoly product—the PC operating system, but instead involves some other software product which runs on Windows, but is not part of Windows itself.").

F.3d at 1224 ("We think the district court prudently sought not to achieve complete interoperability but *only* to 'advance' the ability of non-Microsoft server operating systems to interoperate with Windows and thereby serve as platforms for applications.") (citations omitted) (emphasis added).   To imply otherwise is just plain wrong and contravenes the opinions of this Court and the Court of Appeals.

III.   The Hypothetical Situations Posed by the Movants Are Not Substantiated by Facts and Are Inapposite Because They Relate to the Development of Applications on the Windows Client

Movants have not identified a single instance in which a current MCPP licensee (or potential licensee, for that matter) would use the Communications Protocols to enable interoperability with a non-Microsoft application on the client desktop. This is not surprising given the very specific and unique role of Section III.E. Not only is the development of client-side products well beyond the scope of Section III.E, but, as the Movants concede, it would be beyond the scope of the MCPP license itself. *See* Movants' Memorandum at 3 n. 2. ("The MCPP license authorizes the licensee to implement the server side of the communication, but it does not prohibit adding software to the client so long as it is *not* the product of MCPP disclosure.") (emphasis added).

In the absence of any real-world support, Movants are forced to rely solely on hypothetical examples and unsubstantiated facts. These hypothetical scenarios depend on the development of software on the *Windows client*. *See, e.g.*, *id.* at 3 ("[u]sers also can install Google Desktop at the client level"); *id.* (noting that Apple and Yahoo! offer client-based sidebar products that are similar to Google); *id.* at 4 (developing a media player for the "Windows client"); *id.* at 5 ("[a] licensee may want to add client software to differentiate its product"); *id.* at 6 ("future licensees could easily add features to differentiate their products and create systems that require both server and client pieces"). However, just as the Movants explain that Section

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III.E is necessary to enhance the development of these hypothetical client-side products, they also concede that a party would have to do so *without* use of the MCPP disclosures. *Id.* at 3-4. ("An MCPP licensee could create its client-side product, using means that do not rely on Microsoft's § III.E documentation ....").

Even setting aside the Movants failure to acknowledge that client-side implementations are beyond the scope of Section III.E, the hypothetical scenarios set forth by Movants are flawed for numerous other reasons. Aside from demonstrating how the Internet has become a critical mechanism by which Google, Yahoo!, and Apple can compete with Microsoft—an argument that Microsoft itself made in its previous papers—Movants do not show how Section III.E is, in any way, relevant to these companies.[5]

For example, Movants concede that Google uses standard Internet protocols rather than proprietary MCPP protocols. Movants' Memorandum at 3. As Microsoft explained in its Opposition, most of the applications running on the Web communicate with Windows primarily using the Internet-standard protocols HTTP and TCP/IP (both of which are supported in Windows, as well as in other operating systems and browsers). Thus, the thinly-veiled suggestion by Movants that Google somehow has been inhibited due to the MCPP technical documentation is incorrect.[6] To the contrary, Google's success epitomizes the industry trend

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[5] The reliance on specific hypothetical scenarios where an MCPP licensee seeks to distribute a client-side media player is particularly suspect. Whereas Movants now place great importance on the ability of a media company to use the MCPP protocols to develop applications for the client, in their previous filings Movants dismissed the importance of non-browser Middleware. *See, e.g.,* Reply Memorandum of the Moving Plaintiff States at 16-17, *New York v. Microsoft Corp.* (D.D.C. Nov. 16, 2007) (discounting Microsoft's evidence of an increase in competition for providers of media players). Moreover, the model set forth by Movants is one that has been used with great success by Apple in connection with its iTunes media player *without* using either the OEM distribution channel or MCPP proprietary protocols.

[6] Movants suggest that Microsoft is responsible for Google, Apple, and Yahoo! not taking licenses to the MCPP. *See* Movants' Memorandum at 8. However, Movants do not argue, because they cannot, that these companies have even approached Microsoft about evaluating the technical documentation. As Movants themselves have informed the Court, interested potential licensees may analyze Microsoft's technical documentation and the license before

towards use of standards-based Internet protocols (instead of proprietary protocols, such as those offered by the MCPP) to communicate with Windows clients and computers running other operating systems. Thus, it is not surprising that Google has not approached Microsoft about an MCPP license or evaluated the MCPP technical documentation.

IV.   **Movants Seemingly Concede They Cannot Provide Legal or Factual Support for Their Claim that Each Provision of the Final Judgment Is Contingent on Every Other Provision**

The Court directed the Movants to answer the fundamental question regarding whether "each of Sections III.A, C, D, F.2, G, and H ... relates to the development of middleware and other applications designed to run on servers, rather than on PC operating systems." Dec. 10 Order at 3. Yet, once again, Movants do not offer a direct response to the Court's question.[7] In fact, Movants seemingly concede this point by arguing that the provisions of the Final Judgments merely "complement each other" and that each provision is not "interdependent on every other provision to be effective." Movants' Memorandum at 7. Movants even state that "[they] never argued that § III's provisions are so interdependent that the absence of one would prevent all the others from functioning." *Id.* at 9. The Court (and Microsoft) would have been reasonable to think otherwise given the Movants' previous claim that "Section III is a carefully crafted unitary framework that cannot be disaggregated if it is to succeed." California Motion at 13; *see also* New York Motion at 6 (describing the Final Judgments as being intended "to operate as a unitary whole").

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signing a license. Joint Status Report on Microsoft's Compliance with the Final Judgments at 8, *United States v. Microsoft Corp.* (D.D.C. July 3, 2003) (noting that Microsoft "developed an Evaluation Agreement that allows potential licensees to view the Communications Protocol technical documentation before signing a license").

[7]   As noted in Microsoft's Opposition and the Department of Justice's *amicus* filing, Movants themselves represented that the Final Judgments were capable of being successfully disaggregated when they sought Section III.E's extension in 2006. *See, e.g.,* Joint Motion by the California Group and Microsoft to Modify the Final Judgment at 1-2, *New York v. Microsoft Corp.* (D.D.C. Aug. 31, 2006); Joint Status Report on Microsoft's Compliance with the Final Judgments at 10-13, *United States v. Microsoft Corp.* (D.D.C. May 12, 2006).

More fundamentally, the Movants seem to concede that the Final Judgment is not in fact the "unitary whole" they once professed it to be. Rather, they now argue that Section III.E is only loosely and hypothetically linked to the other substantive provisions of Section III. This is fatal to their request to extend those other provisions on the basis of the agreed-to extension of Section III.E. Quite simply, the Movants have no basis on which to carry their burden for the extraordinary remedy that they are seeking from this Court.

V.   Conclusion

For the reasons set forth in this memorandum as well as in Microsoft's Opposition, the Movants' request for extension of the decrees is due to be denied.

Dated: December 28, 2007

Respectfully submitted,

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