

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

IN RE: MICROSOFT LITIGATION

MDL No. 1332/JFM-00-1242
Thursday, October 24, 2002
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:

On Behalf of the Competitor Plaintiffs:
On Behalf of Netscape:
James P. Ulwick, Esquire
Jeffrey A. Rosen, Esquire
Evan Chesler, Esquire
On Behalf of Sun Microsystems:
Lloyd R. Day, Jr., Esquire
Kevin Arquit, Esquire
On Behalf of Burst:
Bruce Wecker, Esquire
On Behalf of BE:
Stephen Susman, Esquire
James Miller, Esquire
On Behalf of Consumer Plaintiffs:
Stanley Chesley, Esquire
On Behalf of Defendant Microsoft:
David B. Tulchin, Esquire
Robert Rosenfeld, Esquire

Also Participating: Professor Arthur R. Miller

(Please Note: Only those who verbally participated have
been listed.)

Reported by:
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Room 3515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1 the DOJ action.

2 And I would be very surprised if Netscape is content to
3 live with those instructions to the jury and not seek to
4 embellish or perhaps repeat and embellish an awful lot of that
5 evidence because it's very hard to draw that line between
6 causation and damages.

7 And in this context, where some of the acts were found
8 unlawful, some were found lawful, and a whole lot of them were
9 not talked about at all, I would submit that it's not only
10 difficult and would be a management nightmare, but it's unfair
11 because it suggests that certain things have more potency or
12 should, with the jury, than other things, only because that
13 subset happened to be discussed in the DOJ action, when this case
14 is really about a lot more.

15 That's a short way of saying, I think you got that
16 exactly right this morning and I hope you feel that way, too.

17 So that's, I think that is our response on the Rule 56
18 motion, both on causation and on injury. This is, because of the
19 nature of this case and the special circumstances in this case,
20 this is not the right case for any determinations under Rule 56
21 as to antitrust injury or harm.

22 Now, those are the main points I want to talk about.
23 But I do also want to mention some issues relating to relevance.

24 As I understand Your Honor's approach, you're talking
25 about a two-step process, where we'll try to deal with essential

1 to the judgment, necessary to the judgment, and then recognizing
2 that there are, in this group of cases, different relevance
3 issues. And I would just advert to Mr. Susman's discussion of
4 this.

5 Time period issues which may affect sort of distortion
6 and issues, but also there just are time period issues. In the
7 BE case, the complaint properly read, the unlawful conduct really
8 almost starts at the end of the relevant period in the DOJ action
9 and then continues beyond. And I think, for example, in this
10 Circuit, the Dracos case is quite clear as to where the burden
11 falls in terms of demonstrating that that subsequent conduct in a
12 fast moving and, as we all know, far more regulated industry than
13 it used to be, by consent decrees or otherwise, the world
14 changes.

15 And we just argued this in California in connection
16 with class certification issue, the effect of the consent decree
17 in limiting the plaintiff's ability to modify the class
18 determination.

19 So I think there are a number of those types of
20 relevance issues in these cases. Certainly, the Burst case as
21 well, where Burst is never mentioned. The marketing which Burst
22 is operating is mentioned only in the context of four findings
23 and those four findings really take a position contrary to the
24 position that Burst is taking in its complaint.

25 There are a raft of those. And while I think a two

1 step process makes sense, I don't think we should kid ourselves
2 that there are going to be a lot of very difficult issues there.
3 Those issues may benefit from the resolution of the motions to
4 dismiss first so we're not making unnecessary relevance
5 determinations and the like. But in many ways, those issues
6 aren't going to be as complicated as this essential to the
7 judgment issue that we've been talking about.

8 Unless you have some questions, those are the points I
9 wanted to cover. I know David has a couple comments as well.

10 THE COURT: All right.

11 MR. TULCHIN: Thank you, Your Honor. I will try to be
12 relatively brief. I do have a few points that I'd like to make,
13 if I may. And the main thrust of my comments will pertain to the
14 issue that you addressed first this morning. And I know I'm
15 swimming upstream on that one, but I think it's important that I
16 try to do that.

17 I should first say, though, Your Honor, that to
18 emphasize a point or two that's been made. The reason Netscape
19 wants summary judgment and is willing, in fact asks the Court to
20 ignore what the DC Circuit said about the difference in
21 causation, Mr. Rosen never mentioned the comments about
22 edentulous causation in a government equitable enforcement case.
23 The reason for that is exactly because impact here, the question
24 of antitrust injury and whether there was any causation, is one
25 that Netscape, of course, wants to avoid putting to the jury.