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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONNA VIZCAINO, et al.,

Plaintiffs,

No. C93-178C

v.

MICROSOFT CORPORATION, et al.,

Defendants.

REBECCA HUGHES, et al.,

Plaintiffs,

No. C98-1646C

v.

MICROSOFT CORPORATION, et al.,

Defendants.

CLASS ACTION SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

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I.
INTRODUCTION AND SUMMARY OF PROCEEDINGS

1
2
3 1. This Settlement Agreement is made pursuant to Federal Rule of Civil
4 Procedure 23(e) to settle two related cases, *Vizcaino v. Microsoft Corp.*, U.S.D.C., W.D. Wash.
5 No. C93-178C (“*Vizcaino*”), a class action, and *Hughes v. Microsoft Corp.*, U.S.D.C., W.D. Wash.
6 No. C98-1646C (“*Hughes*”), a putative class action. Collectively, the *Vizcaino* and *Hughes* cases
7 are referred to as the “Litigation.”

8 2. As described below, the Named Plaintiffs have claimed in the Litigation that
9 Defendants improperly excluded Class Members from certain employee benefit plans and
10 programs maintained by Microsoft.

11 3. The Litigation first arose following a 1990 administrative claim made by certain of
12 the *Vizcaino* Named Plaintiffs to Microsoft’s plan administrators, in which such Named Plaintiffs
13 claimed they were entitled to employee benefits under the terms of the ESPP, the SPP, and the
14 Health, Insurance, and Disability Plans. The plan administrators denied the plaintiffs’ claims.

15 4. On December 29, 1992, the *Vizcaino* Named Plaintiffs filed *Vizcaino* in state court
16 on their own behalf and on behalf of similarly situated individuals. *Vizcaino* was removed to
17 federal court on February 9, 1993. The *Vizcaino* Named Plaintiffs claimed they were Microsoft
18 employees under the common law and were eligible to participate in the ESPP, the SPP, and the
19 Health, Insurance, and Disability Plans, and to receive paid leave, including sick leave, holidays,
20 and vacation. They sought declaratory relief, injunctive relief, benefits, damages, and attorney fees
21 and costs.

22 5. On July 21, 1993, the United States District Court certified, pursuant to subsections
23 23(b)(1)(A) and (b)(2) of Federal Rule of Civil Procedure 23, a class defined as:
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25 All persons employed by the Microsoft Corporation in the United States who are

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denied employee benefits because they are considered independent contractors or employees of third-party employment agencies, but who meet the definition of employees of Microsoft Corporation under the common law.

6. The parties filed cross-motions for partial summary judgment regarding each of the plaintiffs' benefit claims. The District Court referred these motions to the magistrate judge, who recommended granting Microsoft's motions concerning (1) sick leave, holidays, short-term disability, and vacation and any plans governed by state law, except the ESPP claim, and (2) group health, life and long-term disability insurance and any other plans governed by ERISA, except the SPP claim. The magistrate judge recommended granting plaintiffs' motions on the ESPP and SPP.

7. The District Court adopted the magistrate judge's recommendations on all issues other than the SPP and ESPP claims. The District Court granted the Defendant's motion for summary judgment in its entirety, ruling that the plaintiffs were not entitled to participate in the SPP and ESPP. The District Court dismissed the entire case. The plaintiffs appealed, but only with respect to the SPP and ESPP claims.

8. The Ninth Circuit Court of Appeals reversed the District Court, *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996). The Defendants sought *en banc* review, which was granted. The *en banc* Court sustained the panel decision with respect to the ESPP claim and remanded the SPP claim for further administrative review. *Vizcaino v. Microsoft*, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998).

9. The ESPP permits employees of Microsoft to purchase Microsoft stock at a discounted price during consecutive six-month offering periods commencing January 1 and July 1 of each year. Eligible employees enroll in the ESPP by authorizing a payroll deduction of 2%, 4%, 6%, 8%, or 10% of their base pay, which is paid into the ESPP during each Offering Period. At the end of each Offering Period, Microsoft issues to each participant the number of whole shares that

1 can be purchased with the participant's payroll deductions, at a discount price. The ESPP discount
2 price is 85% of the lower of the market price on the first or the last day of each Offering Period.

3 Alternatively, a participant may, at any time before the end of the Offering Period, elect to
4 purchase no shares and have the full payroll deduction returned, without interest. Individuals who
5 fail to work through the end of an Offering Period have their deferrals returned in cash and receive
6 no stock.

7
8 10. The District Court has ruled that the measure of damages for the Class Members'
9 ESPP claims should be based on the assumption that eligible individuals received stock at the
10 discounted price in each offering period and held it for one year. The Parties argued, and the
11 District Court assumed, that an average participation rate of eligible employees would be used to
12 determine the amount assumed to be invested through the ESPP, for purposes of applying a
13 damages measure. Pending but unresolved as of the date of this Settlement Agreement is
14 Microsoft's motion seeking reconsideration of the District Court's damages measure, as well as its
15 alternative motion for partial summary judgment concerning the interpretation of the measure.

16
17 11. Following the Ninth Circuit's 1997 remand, the SPP administrator denied the Class
18 Members' claim for SPP eligibility. The Class Members appealed to the plan's administrative
19 committee, which denied the appeal in a determination finalized on October 1, 1999. The issue
20 therefore became ready for judicial review by the United States District Court, but it has not been
21 argued or decided at the time of this Settlement Agreement.

22
23 12. After the 1997 remand, the District Court (Dimmick, J.) held that the *Vizcaino* class
24 included only certain individuals who had performed assignments for Microsoft before 1990. In
25 response, Plaintiffs filed several motions and a petition for a writ of mandamus in the Ninth
Circuit, and the *Hughes* Named Plaintiffs filed *Hughes*, a putative class action whose members

1 include individuals who performed assignments for Microsoft after 1990. The Ninth Circuit
2 granted the mandamus petition, held that the *Vizcaino* class includes individuals who performed
3 assignments for Microsoft after 1990, and described factors to be applied to determine whether
4 individuals paid through temporary employment agencies were potentially eligible to participate in
5 the ESPP. *Vizcaino v. United States Dist. Court*, 173 F.3d 713 (9th Cir. 1999), *amended* by 184
6 F.3d 1070 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000). All of the members of the class
7 sought to be represented by the *Hughes* Named Plaintiffs are members of the *Vizcaino* class.
8

9 13. Defendants denied all allegations made by Named Plaintiffs in the Litigation,
10 maintaining that Class Members have been properly classified and that Microsoft's employee
11 benefit plans and programs do not cover Class Members.

12 14. The Parties recognize that to continue the Litigation would delay the resolution of
13 the Litigation for a considerable time (likely several additional years), would create additional
14 burdens and costs for the Parties, and would present uncertainty and risks for all Parties as to the
15 ultimate outcome of the Litigation. To avoid the uncertainty, risks, delays, and burdens of further
16 litigation, the Parties have agreed to enter this Settlement Agreement providing for a release of all
17 Claims as specified in paragraphs 22 and 60 and payment by Microsoft as specified in paragraph
18 63.

19 15. Since 1997, Microsoft has made important changes in its staffing and worker
20 classification practices. In its most recent fiscal year, Microsoft hired over 3,000 Class Members
21 as its W-2 employees entitled to participate in its employee benefit plans and programs. It has
22 adopted practices to ensure the proper classification of independent contractors, temporary agency
23 employees, and other staff, including a comprehensive review of practices regarding independent
24 contractor classifications which took place in 1997. It has conducted reviews of ongoing work and
25

1 has instituted practices designed to limit the length of temporary agency employees' assignments
2 for Microsoft. In view of Microsoft's current practices and policies, declaratory or injunctive relief
3 is neither necessary nor appropriate as part of this settlement, and the Settlement Agreement
4 therefore does not include any provision restricting or imposing conditions on Microsoft's future
5 policies or practices. Further, nothing in this Settlement Agreement constitutes an express or
6 implied contract with regard to Microsoft's future policies or practices.

7
8 16. Over the course of the last three years, the Parties have engaged in extensive
9 settlement discussions, including, most recently, proceedings before United States District Judge
10 William L. Dwyer. The framework of this Settlement is based on the recommendations of Judge
11 Dwyer.

12 17. All provisions in the Settlement Agreement apply to the Class Members, unless an
13 exception is specifically stated. Just as Class membership alone would not necessarily result in
14 relief for any Class Member if the Litigation had proceeded to judgment, Class membership alone
15 does not necessarily make relief available. Class Members are entitled to relief only as specifically
16 stated in this Settlement Agreement.

17 18. Plaintiffs were represented by Stephen K. Strong, David F. Stobaugh and Brian J.
18 Waid of Bendich, Stobaugh & Strong, P.C.

19 19. Defendants were represented by (1) Davies Roberts and Reid, William H. Song,
20 James D. Oswald, and Timothy St. Clair Smith; (2) Song Oswald & Mondress, William H. Song,
21 James D. Oswald, and Michael P. Monaco; (3) Sullivan & Cromwell, Theodore O. Rogers, Jr.,
22 Richard H. Sauer, Margaret K. Pfeiffer, and Joseph J. Matelis; and (4) Preston Gates and Ellis,
23 Fredric C. Tausend, and Carol S. Arnold; and (5) Linda K. Norman and Richard H. Sauer of the
24 Microsoft Corporation.
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II. DEFINITIONS

The following general definitions apply in this Settlement Agreement.

20. “Average Participation Rate” means 7.49%, which is an approximation of the historical average participation rate of W-2 employees of Microsoft in the ESPP.

21. “Average Compensation” means \$54,000, which is an approximation of the average annual compensation received by Class Members on account of personal services performed while on assignment for Microsoft.

22. “Claim” means all compensation or benefit-based claims relating to any Class Member’s status other than as a W-2 Microsoft employee for services performed on or before June 30, 2000, including but not limited to those described in paragraph 60.

23. “Claimants” means individuals who submit claim forms to the Settlement Administrator or individuals whose representatives submit claim forms.

24. “Class” means all individuals who are Class Members.

25. “Class Counsel” means the law firm of Bendich, Stobaugh & Strong, P.C., and the firm’s attorneys, including but not limited to David F. Stobaugh, Stephen K. Strong, and Brian J. Waid.

26. “Class Members” means all individuals who, during the period from December 29, 1986, through June 30, 2000, provided personal services to Microsoft in the United States while classified as Independent Contractors or employees of Third-Party Employment Agencies, provided that the term “Class Members” shall exclude persons designated by Defendants as “vendors” or “v-” workers who were not also classified as Independent Contractors or employees of Third-Party Employment Agencies at any time during the period from December 29, 1986 through June 30, 2000. The term “Class Members” includes the Named Plaintiffs unless otherwise

1 specified in this Settlement Agreement.

2 27. “Consecutive Months” means, for purposes of determining a period of nine
3 consecutive months with regard to a particular Class Member, consecutive months in which the
4 particular Class Member worked 80 or more hours of Eligible Service in each month.

5 28. “Custodial Agent” means the financial institution that has possession and control
6 over the Fund.

7 29. “Defendants” means the *Hughes* Defendants and the *Vizcaino* Defendants.

8 30. “Dismissal Order” has the meaning ascribed to it in paragraph 62 of this Settlement
9 Agreement.

10 31. “Effective Date” has the meaning ascribed to it in paragraph 62 of this Settlement
11 Agreement.

12 32. “Eligible Periods” means those six-month Offering Periods in which a Class
13 Member who was on assignment for Microsoft at the beginning and the end of the Offering Period
14 worked 750 hours or more of Eligible Service or was paid as a Microsoft W-2 employee, but only
15 for the months as a Microsoft W-2 employee during which he or she was first excluded from the
16 ESPP during a partial Offering Period of initial Microsoft W-2 employee service because the
17 person’s service as a Class Member was not considered in permitting ESPP enrollment at the
18 beginning of that Offering Period. Thus, if a Class Member became a Microsoft W-2 employee
19 during an offering period, the Microsoft W-2 employee time from that date to the end of the
20 offering period would be eligible. “Eligible Periods” includes the six-month Offering Periods
21 during the time from January 1, 1987, up to and including June 30, 2000. “On assignment for
22 Microsoft at the beginning and end of the Offering Period” means that the Class Member
23 performed Eligible Service within the first week of the Offering Period (January 1-8 or July 1-8)
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25

1 and the last week of the Offering Period (June 23-30 or December 24-31). In addition, if a Class
2 Member had Eligible Service in two consecutive Offering Periods, that Class Member will be
3 treated as being on assignment for Microsoft at the end of the first such Offering Period and at the
4 beginning of the second such Offering Period if: (i) the two Offering Periods involved occurred
5 before 1998, and there is no greater than a 28-day gap in which the Class Member has no Eligible
6 Service between the last day of Eligible Service in the first Offering Period and the first day of
7 Eligible Service in the second Offering Period; or (ii) one or both of the Offering Periods involved
8 occurred during or after 1998 and there is no greater than a 33-day gap in which the Class Member
9 has no Eligible Service between the last day of Eligible Service in the first Offering Period and the
10 first day of Eligible Service in the second Offering Period.
11

12 33. “Eligible Service” means, as applied to a particular Class Member, all hours from
13 January 1, 1987 through June 30, 2000 during which that Class Member provided personal services
14 for Microsoft while classified as an Independent Contractor or an employee of a Third-Party
15 Employment Agency. For example, a Class Member could have nine Consecutive Months of
16 Eligible Service if (a) paid through one Third-Party Employment Agency for 9 months; (b) paid
17 through one Third-Party Employment Agency for 3 months and then paid thereafter through a
18 second Third-Party Employment Agency for 6 months; (c) paid as an Independent Contractor for 6
19 months and then paid thereafter through a Third-Party Employment Agency for 3 or more months;
20 or (d) paid for 9 months with purchase orders or invoices as an Independent Contractor. In each
21 example above, the Class Member provided nine or more months of Eligible Service for Microsoft.
22 There are other possible combinations and the above are examples.
23

24 34. “ESPP” means Microsoft’s Employee Stock Purchase Plan.

25 35. “ESPP Price” means the price established by the ESPP for each Offering Period,

1 and represents 85% of the lower of two prices: the market price at the beginning of the Offering
2 Period and the market price at the end of the Offering Period.

3 36. “Exclusion Date” refers to the Court-established date by which Class Members may
4 request exclusion from the Class and the Settlement.

5 37. “Fund” has the meaning ascribed to it in paragraph 63 of this Settlement Agreement.

6 38. “Health, Insurance, and Disability Plans” means Microsoft’s Health Benefit Plans,
7 Microsoft’s Life Insurance Plan, Microsoft’s Short-Term Disability Plan, and Microsoft’s Long-
8 Term Disability Plan.

9 39. “*Hughes*” has the meaning ascribed to it in paragraph 1 of this Settlement
10 Agreement.

11 40. “*Hughes* Defendants” means Microsoft Corporation and Mike Murray, in his
12 official capacity.

13 41. “*Hughes* Named Plaintiffs” means Rebecca Hughes, Karen Jacobsen, Anita
14 Zuidweg, Michael Schramm, Roberta Wilson, John Schussler, Richard Pauli, Jim Emerson, Steven
15 Fulgham, and Mehdi J. Beygi.

16 42. “Independent Contractor” means individuals or sole proprietors (not corporations,
17 partnerships, LLCs, or any other legal business entity) who (i) provided personal services to
18 Microsoft similar to services contemporaneously provided by W-2 Microsoft employees, (ii)
19 worked in dedicated Microsoft office space, (iii) received income that was reported by Microsoft
20 on an Internal Revenue Service Form 1099 and, (iv) while providing personal services to
21 Microsoft, employed no W-2 employees of their own. As of December 31, 1997, Microsoft
22 changed its practices regarding Independent Contractors. Accordingly, any individual or sole
23 proprietor on assignment for Microsoft after December 31, 1997 is presumptively not a Class
24
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1 Member and will only be considered a Class Member for periods after that date for which he or she
2 provides documentation to the Settlement Administrator establishing that he or she provided
3 personal services for Microsoft similar to services contemporaneously provided by W-2 Microsoft
4 employees, worked in dedicated Microsoft office space, received income that was reported by
5 Microsoft on an Internal Revenue Service Form 1099 and, while providing personal services for
6 Microsoft, employed no W-2 employees of his or her own.

7
8 43. "Litigation" has the meaning ascribed to it in paragraph 1 of this Settlement
9 Agreement.

10 44. "Microsoft" means Microsoft Corporation, any of its past, present, or future
11 subsidiaries or affiliates, and any other entities as to which Microsoft Corporation has owned,
12 owns, or will own, directly or indirectly, a majority or greater interest presently, in the past, or in
13 the future.

14 45. "Named Plaintiffs" means the *Vizcaino* Named Plaintiffs and the *Hughes* Named
15 Plaintiffs.

16 46. "Non-Excluded Class Members" means all Class Members other than Class
17 Members who properly request exclusion from the Class prior to the Exclusion Date pursuant to
18 the exclusion procedures set forth in the Settlement Agreement and approved by the Court.

19 47. "Offering Period" means a six-month period, either beginning January 1 and ending
20 June 30, or beginning July 1 and ending December 31, occurring between January 1, 1987 and
21 June 30, 2000, inclusive.

22 48. "Parties" means the Named Plaintiffs, the Class, and Defendants.

23 49. "Qualifying Class Member" means a Non-Excluded Class Member who (a) worked
24 at least nine Consecutive Months, (b) was on assignment for an Eligible Period, and (c) performed
25

1 personal services on assignment for Microsoft between January 1, 1987 and June 30, 2000.

2 50. “Qualifying Claimants” means those Qualifying Class Members, or their
3 representatives, who submit claim forms to the Settlement Administrator.

4 51. “Settlement” means the settlement embodied in this Settlement Agreement.

5 52. “Settlement Agreement” means this document, together with any amendments that
6 are made pursuant to paragraph 116.

7 53. “SPP” means the Microsoft Corporation Savings Plus 401(k) Plan.

8 54. “Third-Party Employment Agency” means any entity not owned by Microsoft that
9 (i) is or has been in the business of providing individuals to perform personal services on work
10 assignments for Microsoft; (ii) is or has been compensated by Microsoft on the basis of the hours
11 worked or work performed by each such individual; and (iii) compensates or has compensated each
12 such individual for the work performed while on assignment for Microsoft.
13

14 55. “*Vizcaino*” has the meaning ascribed to it in paragraph 1 of this Settlement
15 Agreement.

16 56. “*Vizcaino* Defendants” means Microsoft Corporation and its pension and welfare
17 benefits plans.

18 57. “*Vizcaino* Named Plaintiffs” means Donna Vizcaino, Jon R. Waite, Mark Stout,
19 Geoffrey Culbert, Lesley Stuart, Thomas Morgan, Elizabeth Spokoiny, and Larry Spokoiny.
20

21 **III.**
GENERAL MATTERS

22 **Compromise of Disputed Claims.**

23 58. This Settlement Agreement is a compromise of the Litigation and is the product of
24 serious and extended negotiations. Defendants’ entry into this Settlement Agreement is a result of
25 compromise and neither the execution nor the performance of this Settlement Agreement,

1 including the issuance of notice of the Litigation or of Forms W-2, 1099, or any other tax form to
2 any or all Class Members, constitutes an admission by any Defendant that any Class Member is,
3 was, or ever will be an employee of Microsoft for any purpose or that any Class Member is, was, or
4 ever will be eligible to participate in the ESPP, the SPP, the Health, Insurance, and Disability
5 Plans, or any other employee benefit plans or programs established, maintained, or contributed to
6 by Microsoft. Plaintiffs' entry into this Settlement Agreement is a result of compromise, and this
7 Settlement Agreement and the orders and judgment under it are not admissions by the Named
8 Plaintiffs and Class Members that the claims compromised or dismissed lacked merit.

9
10 **Exclusion Option for Class Members.**

11 59. The Parties agree that, pursuant to Federal Rule of Civil Procedure 23(d), Class
12 Members should be given the opportunity to exclude themselves from the Class and the Settlement
13 pursuant to the terms set forth in this Settlement Agreement. Neither Class Counsel, nor
14 Defendants, nor Defendants' counsel will encourage, cooperate with others to encourage, or cause
15 others to encourage Class Members to elect to exclude themselves from the Class or the
16 Settlement.

17 **Claims Subject to this Settlement Agreement; Release.**

18 60. This Settlement Agreement completely and finally resolves and settles all Claims
19 against Defendants by Non-Excluded Class Members. Upon the Effective Date, all Claims of any
20 and all Non-Excluded Class Members, or of any of their agents, beneficiaries, legal representatives,
21 trustees, heirs, executors, administrators, predecessors, successors and assigns, or any other person
22 claiming by or through any Non-Excluded Class Member, against Defendants and any other
23 present or former employee benefit plans or compensation programs established, maintained, or
24 contributed to by Microsoft, any present or former trusts that have funded any such employee
25

1 benefit plans or compensation programs, Mike Murray in his official capacity as Microsoft's Vice
2 President of Human Resources and Administration (referenced in the *Hughes* Complaint as
3 Microsoft's Vice President of Human Relations) and as Administrator of the SPP, any other
4 administrators, agents, or fiduciaries of such employee benefit plans or compensation programs,
5 and any of the Defendants' present or former stockholders, trustees, officers, directors, employees,
6 agents, legal representatives, successors, assigns, heirs, executors, administrators, subsidiaries, or
7 affiliates are hereby discharged and released. The Claims discharged and released pursuant to this
8 paragraph include, but are not limited to, any causes of action, counterclaims, suits, rights,
9 demands, or liabilities for eligibility, contributions, benefits, compensation, earnings, damages,
10 rights, debts, obligations, fees, or injunctive or declaratory relief under any employee benefit plan,
11 program, or compensation arrangement, whether or not subject to the Employee Retirement
12 Income Security Act of 1974, 29 U.S.C. § 1001 et seq., now or previously maintained by
13 Defendants, whether in law, by statute, or in equity, whether known or hereafter discovered, and
14 whether now or hereafter not disclosed, partially disclosed, or fully disclosed to Non-Excluded
15 Class Members, which Non-Excluded Class Members ever had, now have, or hereafter can, shall,
16 or may have against the Defendants, including but not limited to those under state or federal law
17 for multiple damages, attorney's fees, costs, and compensation or benefit-based claims that were or
18 could have been raised in the Litigation. In addition, except as specifically provided in this
19 Settlement Agreement, all claims for attorney's fees, costs, expert witness fees, database
20 development costs by any party, discovery costs, and all other litigation expenses and costs are
21 completely settled and resolved by this Settlement Agreement.
22

23
24 61. The Parties specifically agree that the Claims released extend to *all* Claims of any
25 kind or nature whatsoever, including but not limited to any and all Claims which might be

1 cognizable before any arbitrator, federal and/or state agency, and/or federal and/or state court, and
2 the Parties expressly, knowingly, and voluntarily waive all rights under Section 1542 of the Civil
3 Code of the State of California (“Section 1542”) or under any other state or federal statute or
4 common law principle of similar effect. Said Section 1542 provides as follows:

5 1542. General Release - Claims Extinguished. A general release does not extend to claims
6 which the creditor does not know or suspect to exist in his favor at the time of executing the
7 release, which if known by him must have materially affected his settlement with the
8 debtor.

9 For purposes of this Settlement Agreement, the term “creditor” as used and referred to in Section
10 1542 means and refers to each Non-Excluded Class Member, with regard to any and all Claims
11 against Defendants.

12 **Effective Date of Settlement Agreement.**

13 62. Following signature of the Parties’ representatives, this Settlement Agreement is
14 effective on the date that an order by the United States District Court for the Western District of
15 Washington approving the Settlement Agreement pursuant to Federal Rule of Civil
16 Procedure 23(e) and dismissing the Litigation with prejudice (“Dismissal Order”) in the form
17 agreed to by Class Counsel and Defendants and approved by the Court becomes final (“Effective
18 Date”). The Dismissal Order will become final within the meaning of this paragraph when the
19 time for appeal with respect to the Dismissal Order has expired and no appeal has been taken or an
20 appeal otherwise has been foreclosed as a matter of law or, if appealed, the Dismissal Order is
21 affirmed in its entirety and all rights to further appeal or review by any person have been exhausted
22 or foreclosed.

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IV.
COMPENSATION PROVIDED IN SETTLEMENT OF CLAIMS

Class Distribution Fund.

63. Within 30 days of the date of the Dismissal Order's approval by the United States District Court, Microsoft shall fund a settlement Fund ("Fund"), to compensate Named Plaintiffs, Class Counsel and Non-Excluded Class Members, in the amount of ninety-six million, eight hundred eighty-five thousand dollars (\$96.885 million), less such amounts as are to be deducted pursuant to this Settlement Agreement. The Fund shall be held and administered by a Custodial Agent agreed upon by Class Counsel and Defendants pursuant to an escrow agreement in a form to be agreed upon by Class Counsel and Defendants and approved by the Court. This constitutes all of the funds to be paid by Microsoft and the other Defendants in performance of this Settlement Agreement and settlement and dismissal of the Litigation pursuant to this Settlement Agreement. No disbursements, payments, advances, or other alienation of any value shall be made from the Fund until after the Effective Date of this Settlement Agreement has been reached, except for the payments set forth in paragraph 96.

64. The Fund shall be established and maintained as a "qualified settlement fund" under Section 468B of the Internal Revenue Code of 1986, as amended, and the Treasury Regulations thereunder. The Parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment. At the request of Defendants, a "relation back election" as described in Treas. Reg. §1.468B-1(j) shall be made so as to enable the escrow account to be treated as a qualified settlement fund from the earliest date possible, and the Custodial Agent shall take all actions as may be necessary or appropriate to that end. The Fund shall be held by the Custodial Agent until disbursements are authorized, and shall at all times be held and administered under the continuing jurisdiction and supervision of the Court

1 and for the benefit of the Class Members.

2 **Payments to Named Plaintiffs.**

3 65. From the Fund, the *Vizcaino* Named Plaintiffs shall each receive \$25,000 incentive
4 payments, for their participation as class representatives. Their participation from 1990 through
5 2000 has included, but was not limited to, the administrative proceedings, commencement of this
6 lawsuit, discovery matters (including answering interrogatories, producing voluminous personal
7 records, and deposition testimony), preparation of declarations, attendance at meetings, and
8 assisting class counsel.

9
10 66. In addition to the amounts listed in paragraph 65, six *Vizcaino* Named Plaintiffs –
11 Donna Vizcaino, Jon Waite, Mark Stout, Elizabeth Spokoiny, Larry Spokoiny, and Thomas
12 Morgan – shall each receive an additional \$40,000 payment for additional work, participation, and
13 time-loss from employment from 1989 and thereafter.

14 67. The *Hughes* Named Plaintiffs shall each receive \$7,500 incentive payments for their
15 participation as named plaintiffs in that case. (This amount reflects the fact that there have been
16 very limited proceedings in *Hughes* as compared with *Vizcaino*.)

17 68. The payments to the Named Plaintiffs described in paragraphs 65 through 67 shall
18 be disbursed from the Fund to the Named Plaintiffs within fourteen days of the Effective Date. In
19 the course of the proceeding for approval of this Settlement Agreement, Microsoft shall express its
20 support for these payments. The payments to the Named Plaintiffs shall accrue interest (or other
21 earnings) pro rated at the same net rate as that earned by the Fund up to the actual date of
22 disbursement.

23
24 69. In addition to the payments described in paragraphs 65 through 67, the Named
25 Plaintiffs shall receive pro rata shares from the Fund, based on their total service on assignment for

1 Microsoft.

2 **Attorney Fee.**

3 70. Class Counsel shall receive from the Fund the common fund fee approved by the
4 Court as provided in paragraph 75.

5 **Class Members Qualifying for Payment from the Fund.**

6 71. As described herein, to be a Qualifying Class Member, an individual must be a
7 Class Member and must have the required amounts of Eligible Service. A Qualifying Class
8 Member is eligible to receive payment from the Fund for each Offering Period as to which he or
9 she meets the requirements for an Eligible Period. Payment will be made for a Qualifying Class
10 Member's Eligible Periods provided that the Qualifying Class Member is a Qualifying Claimant.
11

12 **Payment Formula for Qualifying Class Members.**

13 72. Offering Periods before 1999. The payment formula for Offering Periods before
14 1999 for Qualifying Class Members' Eligible Periods is based on the damages measure in the
15 Court's Order of October 5, 1998 (*see* ¶ 10). For each such Eligible Period for each Qualifying
16 Class Member, the compensation amount of the Qualifying Class Member will be determined by
17 dividing that Qualifying Class Members' Eligible Service for that Offering Period by 1,040 (full-
18 time hours for six months) and multiplying that number by \$27,000 (half the annual Average
19 Compensation), provided that the maximum compensation amount in any one Offering Period is
20 \$27,000. That compensation amount then will be multiplied by the Average Participation Rate,
21 yielding the amount of compensation to be applied for that Offering Period for the Qualifying
22 Class Member. That compensation amount will then be applied to an imputed purchase of shares
23 of Microsoft stock at the ESPP Price for that Offering Period, including fractional shares. The
24 difference between (i) the compensation amount applied and (ii) the most recent closing price on
25

1 the NASDAQ exchange exactly one year after the last day of the Offering Period involved times
2 the imputed number of shares (as adjusted for stock splits), is the Qualifying Class Member's
3 assumed investment gain for that Offering Period. The Qualifying Class Member's assumed
4 investment gain for that Offering Period will then have interest applied to it at the Washington
5 State prejudgment interest rate, 12% per annum simple interest, from the date one year after the last
6 day of the Offering Period involved through June 30, 2000.

7
8 73. Offering Periods in and after 1999. The payment formula for Offering Periods
9 beginning in or after 1999 shall be as follows, to avoid the adverse effect of post-1999 changes in
10 the price of Microsoft stock under the calculation method described in paragraph 72. For each
11 Eligible Period in and after 1999 for each Qualifying Class Member, the compensation of the
12 Qualifying Class Member will be determined by dividing that Qualifying Class Members' Eligible
13 Service for that Offering Period by 1,040 (full-time hours for six months) and multiplying that
14 number by \$27,000 (half the annual Average Compensation), provided that the maximum
15 compensation amount in any one Offering Period is \$27,000. That compensation amount then will
16 be multiplied by the Average Participation Rate, yielding the amount of compensation to be
17 applied for that Offering Period for the Qualifying Class Member. That compensation amount will
18 then be applied to an imputed purchase of shares of Microsoft stock at the ESPP Price for that
19 Offering Period, including fractional shares. The difference between (i) the compensation amount
20 applied and (ii) the most recent closing price on the NASDAQ exchange as of the last day of the
21 Offering Period involved times the imputed number of shares (as adjusted for stock splits), is the
22 Qualifying Class Member's assumed investment gain for that Offering Period. The Qualifying
23 Class Member's assumed investment gain for that Offering Period will then earn interest at the
24 Washington State prejudgment interest rate, 12% per annum simple interest, from the last day of
25

1 the Offering Period involved through June 30, 2000.

2 **Distribution of the Fund to Qualifying Class Members.**

3 74. The balance remaining in the Fund, including any interest earned by the Fund, after
4 payments to Class Counsel and the Named Plaintiffs and to pay expenses as approved under this
5 Settlement Agreement shall be distributed *pro rata* to Qualifying Claimants after the Effective
6 Date. *Pro rata* means each Qualifying Claimant's share of the gains and interest (numerator) as a
7 fraction of the total of all Qualifying Claimants' gains and interest (denominator) multiplied by the
8 Fund balance.

9
10 **V.
ATTORNEY FEES**

11 75. Class Counsel, Bendich, Stobaugh & Strong, P.C., of Seattle, Washington shall
12 receive a fee award pursuant to the common fund doctrine, paid from the Fund. The common fund
13 fee award is subject to approval by the Court. Class Counsel will seek a common fund fee award,
14 based on a percentage of recovery, of 28% of the Fund. Class Counsel will submit a petition for
15 approval of the fee award to the Court. Such award will, with the remainder of the Settlement
16 Agreement, be subject to final approval by the Court at the Rule 23(e) settlement hearing.

17
18 76. The fee award approved by the Court shall be disbursed from the Fund within
19 fourteen days following the Effective Date, unless the date is modified by subsequent agreement
20 and/or Court order. The award shall accrue interest (and/or other earnings) pro rated in the same
21 net amount as earned by the Fund up to the actual date of disbursement.

22 **VI.
SETTLEMENT APPROVAL AND NOTICE PROCEDURES**

23 **Preliminary Approval & Scheduling.**

24 77. The Parties agree, as soon as practicable after execution of this Settlement
25

1 Agreement, to jointly move the Court to:

2 (1) find preliminarily that this Settlement is a fair and reasonable compromise of the
3 Claims;

4 (2) order that notice of the Litigation and an opportunity to exclude themselves from the
5 Class be provided to Class Members;

6 (3) declare that the content of the proposed notice and the mechanisms of communicating
7 such notice meet the requirements of Fed. R. Civ. P. 23 and the Due Process Clause with respect to
8 all Class Members;

9 (4) establish the Exclusion Date which, unless otherwise ordered by the Court, shall be 35
10 days following mailing of notice of the Litigation and of the opportunity for Class Members to
11 exclude themselves from the Class;

12 (5) establish a date by which the Settlement Administrator shall provide to the Clerk of the
13 Court, Defendants, and Class Counsel a list of those individuals who requested exclusion from the
14 Class before the Exclusion Date;

15 (6) schedule, at least thirty days prior to the settlement hearing, a date by which any Non-
16 Excluded Class Member who objects to the terms of this Settlement Agreement may file written
17 objections to this Settlement Agreement with the Clerk of the Court, and serve such objections on
18 Class Counsel and Defendants; and

19 (7) schedule a settlement hearing date pursuant to Fed. R. Civ. P. 23(e) at which any Non-
20 Excluded Class Member, who meets other requirements established by the Court, may appear in
21 order to object to the fairness, adequacy, or reasonableness of this Settlement Agreement or to any
22 order or findings of the Court.
23
24
25

1 **Objections to Settlement.**

2 78. Unless the Court directs otherwise, all objections to the Settlement shall be
3 submitted in writing to the Court, Class Counsel, and Defendants in a manner and time prescribed
4 by the Court no less than 30 days in advance of the hearing on the settlement. Any objections not
5 so submitted shall be waived. Anyone wishing to appear at the settlement hearing to object to the
6 Settlement shall so specify in his or her written objections.

7 **Notice Provisions.**

8 79. Individual Notice. The Parties agree that the Class Members who can be identified
9 through reasonable effort should be given notice of the Litigation and the Settlement in the form
10 proposed by Class Counsel and Defendants, subject to any modifications ordered by the Court,
11 together with a procedure for requesting exclusion from the Class to be set forth in the notice,
12 subject to any modifications ordered by the Court. After the Court gives preliminary approval of
13 this Settlement Agreement pursuant to paragraph 77 of this Settlement Agreement, both Microsoft
14 and Class Counsel shall provide to the Settlement Administrator a list of the names of those
15 individuals whom each Party believes may be Class Members. The provisions concerning the
16 Parties', Class Counsel's, and the Settlement Administrator's respective duties related to
17 identification of Class Members are described in Article VII of this Settlement Agreement.

18
19 80. Publication. After preliminary approval by the Court of this Settlement Agreement,
20 at a date to be set by the Court, pursuant to paragraph 77, notice of this Settlement Agreement shall
21 be published in a form approved by the Court, (1) twice in the Seattle Times, the Tacoma News
22 Tribune, and the San Francisco Examiner; and (2) by Class Counsel on its internet site, "bs-s.com."
23 Class Counsel will also publish this Settlement Agreement and the individual notice provided for in
24
25

1 paragraph 79 on its internet site, “bs-s.com.”

2 81. Costs of Notice. Microsoft shall advance the costs of providing the individual
3 notice to the Class Members, as set forth in paragraph 79, the costs of publishing notice in the
4 Seattle Times, the Tacoma News Tribune, and the San Francisco Examiner, and the costs of
5 increasing the capacity of “bs-s.com” for the period between preliminary approval and the
6 settlement hearing date in connection with publication of the notice and the Settlement Agreement
7 on that site as set forth in paragraph 80, and such costs will be deducted from the amount to be paid
8 into the Fund by Defendants.
9

10 **VII.**
11 **SETTLEMENT ADMINISTRATION PRIOR TO**
12 **COURT APPROVAL OF THE SETTLEMENT AGREEMENT**

13 **Selection of Settlement Administrator and Custodial Agent.**

14 82. Class Counsel shall propose a Settlement Administrator and a Custodial Agent, in
15 writing, to counsel for Defendants. If Class Counsel and Defendants do not agree upon a
16 designated Settlement Administrator or a Custodial Agent within ten days of Class Counsel’s
17 proposal, the matter will be submitted to mediation.

18 **Responsibilities Re Notice of Settlement Hearing.**

19 83. Microsoft and Class Counsel shall compile the reasonably available records in their
20 possession regarding potential Class Members’ identities and their SSNs and last known address
21 information. Microsoft shall make reasonable efforts to request Class Members’ SSNs and last
22 known address information reasonably available from Third-Party Employment Agencies, with the
23 understanding that Microsoft does not have control over the nature of the responses by such Third-
24 Party Employment Agencies. Class Counsel will cooperate as needed. Subject to an appropriate
25 confidentiality order by the Court, Microsoft and Class Counsel shall provide the Settlement

1 Administrator with the above-described records regarding potential Class Members.

2 84. In providing information to the Settlement Administrator, Class Counsel is acting
3 exclusively as attorneys for the Class. Neither Class Counsel nor the Defendants represent that the
4 information provided to the Settlement Administrator is necessarily complete or accurate.

5 85. Based on the materials provided by Class Counsel and Defendants, as well as
6 database(s) utilized by the Settlement Administrator to locate current address information, the
7 Settlement Administrator shall mail individual notices in a form to be agreed by Class Counsel and
8 Defendants and to be approved by the Court to the last known address, if any, of each Class
9 Member whose identity the Settlement Administrator can determine, with the return address to the
10 Settlement Administrator's Office. The notice will also describe a procedure for requesting
11 exclusion from the Class as approved by the Court, with any such requests to be addressed to the
12 Clerk of the Court c/o the Settlement Administrator. The Settlement Administrator shall also
13 prepare and provide to Class Counsel and Defendants, as soon as practicable after sending the
14 notice, a list of all persons to whom notices were sent together with address information and Social
15 Security Numbers, where available.
16

17 86. No later than 14 days prior to the Settlement Hearing, the Settlement Administrator
18 shall file its report with the Court. The report shall include, but not be limited to (a) the steps taken
19 by the Settlement Administrator to compile the list of Class Members to whom notice was mailed,
20 (b) the list of Class Members to whom notice was mailed, and a list of class members for whom no
21 known address could be determined, such lists to be filed under seal, (c) summary information
22 regarding notices that have been returned as undeliverable, (d) the steps taken to comply with the
23 publication requirements, and (e) a summary of the Settlement Administrator's costs and
24 expenditures for the administration of the notice requirements. A copy of the Settlement
25

1 Administrator's report shall be provided to the Court and to Class Counsel and Defendant's
2 Counsel.

3 87. Requests for Exclusion. No less frequently than weekly, the Settlement
4 Administrator shall provide Class Counsel and Defendants with a list of those individuals who
5 requested exclusion from the Class and a copy of each request for exclusion received. As soon as
6 practicable after the Exclusion Date, the Settlement Administrator shall provide to the Clerk of the
7 Court, Defendants, and Class Counsel a list of those individuals who requested exclusion from the
8 Class before the Exclusion Date, pursuant to paragraph 77, and provide a copy of each request for
9 exclusion to the Court if requested by the Court.
10

11 **Settlement Hearing.**

12 88. Provided that Defendants have not elected to terminate this Settlement Agreement
13 pursuant to paragraph 122, the Parties shall jointly move the Court to approve this Settlement
14 Agreement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and to enter a Dismissal
15 Order, as provided in paragraph 62.

16 **VIII.**
17 **ADMINISTRATION OF CLAIMS AND THE**
18 **CLASS DISTRIBUTION SETTLEMENT FUND**

19 89. The Fund shall be held by the Custodial Agent, or such other person as the Court
20 may appoint, under the continuing jurisdiction and supervision of the Court for the benefit of the
21 Class Members. The Fund shall, pending distribution of Class Counsel's fee award, payments to
22 Named Plaintiffs, distribution to Qualifying Claimants, and payment of expenses authorized by this
23 Settlement Agreement, be held in interest-bearing investments to be approved by the Court. Any
24 and all interest, dividends and earnings on cash or securities deposited in the Fund shall be for the
25 benefit of the Fund, and all income taxes or other liabilities with respect to such interest, dividends

1 and earnings shall be the responsibility of the Fund. The Custodial Agent shall report no less
2 frequently than monthly to Class Counsel, Defendants' counsel, and to the Court concerning
3 earnings on the Fund and taxes due and paid.

4 **Duties of the Settlement Administrator.**

5 90. The Settlement Administrator shall be responsible for and shall have the authority
6 to:

- 7 (a) notify Non-Excluded Class Members of their opportunity to file claims;
8 (b) determine eligibility of Claimants and resolve all claims and decide all
9 questions that arise concerning eligibility of Class Members to receive payments and the amounts
10 of payments to Qualifying Claimants;
11 (c) process claims and prepare disbursement instructions to the Custodial Agent;
12 and
13 (d) comply with applicable tax laws in accordance with paragraph 100.

14 The Settlement Administrator and the Custodial Agent shall provide protection in an
15 amount equal to or greater than the amount paid into the Fund pursuant to paragraph 63 against
16 malfeasance, fraud, or any other misconduct or any other loss with respect to the administration of
17 the Fund, in such manner as Class Counsel and Defendants find adequate.
18

19 91. In carrying out its duties, the Settlement Administrator and the Custodial Agent
20 shall act as fiduciaries with respect to handling, management, and distribution of settlement funds
21 for the Qualifying Class Members.
22

23 92. As a condition of contracting to serve as, or otherwise accepting selection to
24 perform their roles, the Settlement Administrator and the Custodial Agent shall each unequivocally
25 agree in writing that it acknowledges, accepts, and agrees to all of the duties, responsibilities, and

1 obligations specified in this Settlement Agreement and such other agreements as may be adopted
2 pursuant to this Settlement Agreement.

3 93. The Settlement Administrator and the Custodial Agent shall be responsible for
4 employing appropriate employees and subcontractors, such as for tasks of database work, data
5 processing, mass mailing and check processing. The Settlement Administrator and the Custodial
6 Agent shall be solely responsible for selecting, instructing, monitoring, checking the work of,
7 paying and terminating any such employees and subcontractors, and shall hold the Plaintiffs, Class
8 Counsel and Defendants harmless from charges, expenses, and liabilities due to such employees
9 and subcontracts. Defendants' counsel and Class Counsel shall be informed in advance of each
10 proposed subcontract, and the duties and payment provided in any such subcontract, and
11 Defendants' counsel and Class Counsel may disapprove any proposed subcontract, provided that
12 no subcontract may be unreasonably rejected. The Settlement Administrator and the Custodial
13 Agent shall not assign, subcontract, or delegate fiduciary duties, nor any of the duties for which
14 they are responsible, including the handling and management of funds, scheduling, reporting of
15 information to tax authorities, to Class Counsel, to the Defendants and to the Court, making
16 determinations as to the eligibility of Class Members for payment and the amounts they are owed,
17 and overall supervision of settlement administration.

18
19 **Information to be Utilized for Claims Processing.**

20 94. The Parties recognize that information concerning potential Class Members may be
21 incomplete or no longer available due to the passage of time. Microsoft shall provide the
22 Settlement Administrator with reasonably available records containing information about potential
23 Class Members necessary to implement this Settlement Agreement including, to the extent
24 reasonably available, hours and time periods worked while on assignment for Microsoft. Microsoft
25

1 shall include Social Security Numbers and address information, to the extent reasonably available
2 to it. Class Counsel shall provide the Settlement Administrator with information in their
3 possession concerning the identity of potential Class Members and their work histories, which
4 information was provided to Class Counsel by potential Class Members. The Settlement
5 Administrator shall be entitled to rely on the information (a) provided by Class Counsel and
6 Defendants, (b) obtained from Third-Party Employment Agencies, (c) obtained from SSN and
7 address databases normally utilized by the Settlement Administrator, and (d) provided by Class
8 Members if adequately documented. The Settlement Administrator is not required to conduct
9 further searches for Class Members. The Settlement Administrator shall have complete discretion
10 in determining each Class Member's hours of Eligible Service, compensation in relation to
11 Average Compensation, status as a Qualifying Class Member, and status as a Qualifying Claimant.
12 The Settlement Administrator's determinations of all of these matters shall be final.

14 **Parties' Duty to Cooperate with Settlement Administrator to Provide Information.**

15 95. The Court will retain jurisdiction both before and after entry of the Dismissal Order
16 to issue subpoenas and other orders as necessary to obtain documents necessary to implement this
17 Settlement Agreement. The Parties intend that the Court issue such a subpoena or order on the
18 agreement of Class Counsel and Defendants or, in the absence of such agreement, on a showing of
19 need by Defendants, Class Counsel, or the Settlement Administrator. Any costs associated with
20 the subpoena process and approved by the Court will be paid out of the Fund.

22 **Payment for Settlement Administration.**

23 96. The Court-approved costs of the Settlement Administrator and the Custodial Agent
24 shall be paid from the Fund or, if approved by Class Counsel and Defendants, or the Court, prior to
25 establishment of the Fund, Microsoft shall advance such costs and such costs will be deducted from

1 the amount to be paid into Fund by Microsoft. The fees charged for services, whether an hourly
2 rate based on the particular service or a flat rate for particular services, shall be subject to Court
3 approval. The Court may order payment from the Fund for such services prior to the Effective
4 Date.

5 **Miscellaneous Arrangements with Settlement Administrator and Custodial Agent.**

6 97. There will be various documents prepared regarding the services to be provided by
7 the Settlement Administrator and the Custodial Agent relating to fees for services, such as a
8 qualified settlement fund agreement, a custodial account agreement, disbursement agreement(s),
9 and procedures. Such agreements shall first be reviewed by Class Counsel with a copy to the
10 Defendants. These contracts or other documents shall be subject to approval by the Class Counsel
11 and Defendants and the Court. In the event of any disagreement between Class Counsel and
12 Defendants regarding such contracts or documents, Class Counsel and Defendants shall first
13 mediate the dispute before seeking Court resolution.
14

15 **Reporting.**

16 98. The Settlement Administrator and the Custodial Agent shall maintain complete and
17 accurate records showing all receipts and disbursements and documenting their activities. The
18 Settlement Administrator shall prepare reports and create and maintain all the records and
19 information required by this Settlement Agreement and any subsequent agreement. All records and
20 information of the Settlement Administrator and the Custodial Agent shall be made available for
21 inspection at any reasonable time by Class Counsel, Defendants, and such other person(s) as
22 designated by the Court. The Settlement Administrator shall also provide a summary report each
23 month to the Court, Class Counsel, and Defendants of the steps taken and progress made in claims
24 administration. The Custodial Agent shall provide to Class Counsel and Defendants monthly
25

1 reports of deposits, income, and disbursements. All databases utilized by and/or developed by the
2 Settlement Administrator shall be made available to Class Counsel and Defendants' Counsel.
3 Within 45 days following approval of the Settlement Administrator's Final Report, the Settlement
4 Administrator shall transfer to Class Counsel or Defendants all originals and all copies of the
5 records, documents, and any other materials regarding Class Members.

6 **Claim Requirements.**

7 99. Only Qualifying Class Members (or their representatives, guardians, attorneys-in-
8 fact, trustees or representatives of their estate), who submit a claim form within the time period(s)
9 specified by the Court shall qualify to receive a payment from the Fund. The Court retains
10 jurisdiction to determine the persons to whom a payment should be made in the event of a Class
11 Member's death, dissolution of marriage, bankruptcy proceedings, garnishment proceedings, etc. in
12 the event the Settlement Administrator, for whatever reason, cannot make that determination.

13 **Taxes.**

14 100. The Settlement Administrator shall comply with pertinent federal tax laws and
15 regulations, including, but not limited to, I.R.C. § 468B. Any and all federal, state, and local
16 employment and withholding taxes imposed on any person with respect to payments or
17 distributions to any person shall be paid from the Fund without recourse to any of the Defendants,
18 including, without limitation, income tax withholding, FICA, FUTA, and state employment taxes,
19 and in each instance, both the employer and distributee portions of such taxes. The Settlement
20 Administrator shall satisfy all federal, state, local, and other reporting requirements, and any and all
21 taxes or other obligations with respect to payments or distributions of the settlement, including, but
22 not limited to, wage reporting on Form W-2 for distributions to Class Members. Before the
23 District Court approves any distributions to the Class Members from the Fund, the Settlement
24
25

1 Administrator shall file with the Court and serve on Class Counsel and counsel for Defendants a
2 proposed plan, which shall include, among other things, a detailed proposal for how the Settlement
3 Administrator intends to comply with the terms of this paragraph. The report shall also specify
4 those identified as Qualifying Class Members and Class Members who are not proposed to receive
5 distributions from the Fund, and the specific reasons for such determinations, and shall also specify
6 the identities of any individuals who sought to be considered Class Members, but were determined
7 by the Settlement Administrator not to have such status, and the specific reasons for such
8 determinations. Defendants and Class Counsel shall have thirty days within which to comment on
9 the proposed plan of distribution, and shall serve any such comments on Class Counsel,
10 Defendants, and the Settlement Administrator and file them with the District Court. After
11 expiration of the comment period, the Court shall resolve any objections raised in the comments.
12

13 **Disbursement to Class Members.**

14 101. The Fund, together with interest (and/or any other earnings), shall be distributed to
15 Qualifying Claimants as soon as practicable after the requirements of paragraph 100 have been met
16 and the Effective Date has been reached.

17 **Unclaimed Distributions and Funds Remaining.**

18 102. Class Members shall have no more than six (6) months from the date the
19 disbursement is mailed to cash the disbursement check, except that in the event a Class Member's
20 check is returned to the Settlement Administrator as undeliverable, additional efforts shall be made
21 by the Settlement Administrator to locate the Class Member (such as re-mailing to and/or
22 contacting an emergency contact). The Settlement Administrator shall only be obligated to re-mail
23 a check once.
24

25 103. If the Class Member still cannot be located or, if, after re-mailing to a new address

1 or emergency contact the disbursement check is not cashed within ninety days from the date of the
2 second mailing (or a total of 180 days from the first mailing, whichever is later), these unclaimed
3 settlement funds shall be paid as set forth in paragraph 104.

4 104. All unclaimed funds remaining in the Fund, after final payment for the Custodial
5 Agent and the Settlement Administrator's services and expenses and after the close of the check-
6 cashing period, shall be disbursed to an Internal Revenue Code § 501(c)(3) charitable institution or
7 public educational institution to be agreed upon by Defendants and Class Counsel.
8

9 **Final Report.**

10 105. Within thirty days of the check-cashing closing period discussed in paragraphs 102
11 and 103, the Settlement Administrator and the Custodial Agent shall submit final reports to the
12 Court, under seal, with a copy to Class Counsel and Defendants. The report shall include, but not
13 be limited to (1) the steps and procedures taken by the Settlement Administrator in complying with
14 the Settlement Agreement, (2) the income received by the Fund, (3) the identity of each Qualifying
15 Claimant and the gross and net amount disbursed to each or paid in satisfaction of any tax or
16 withholding obligations, (4) the identity of Class Members whose distribution was unclaimed, and
17 (5) the Custodial Agent's and the Settlement Administrator's costs and expenses.

18 106. Upon Court approval of the Final Report, at a time to be set by the Court, the
19 Custodial Agent and the Settlement Administrator shall be relieved of performance of their
20 administrative functions pursuant to this Settlement Agreement.
21

22 **Resignation of or Termination of Services of Settlement Administrator or Custodial**
Agent.

23 107. The Court shall have the authority upon the petition of Class Counsel or the
24 Defendants to suspend, terminate, and/or replace the Settlement Administrator. In the event of the
25 Settlement Administrator's resignation or termination prior to completion of the disbursements to

1 Qualifying Class Members, the Settlement Administrator shall provide the successor with an
2 accounting and all records, files, and all information in its possession or under its control
3 concerning the claims processing and administration.

4 108. The Court shall have the authority upon the petition of Class Counsel or the
5 Defendants to suspend, terminate, or replace the Custodial Agent. In the event of the Custodial
6 Agent's resignation or termination prior to completion of the disbursements to Qualifying
7 Claimants, the Custodial Agent shall transfer the Fund to the successor and provide the successor
8 with an accounting and all records, files, and all information in its possession or under its control
9 concerning the claims processing and administration.
10

11 109. By reviewing agreements or documents with the Settlement Administrator and the
12 Custodial Agent, or in making recommendations, neither Class Counsel nor Defendants shall have
13 any administrative duties concerning the Funds, including but not limited to investment,
14 management, distribution, reporting, and accounting. Neither Class Counsel, Defendants, nor
15 Defendants' counsel are responsible for carrying out or supervising the Settlement Administrator's
16 or the Custodial Agent's actions, obligations or duties, except that nothing in this paragraph shall
17 diminish Class Counsel's responsibilities as counsel for Named Plaintiffs and the Class. Class
18 Counsel may make recommendations to the Settlement Administrator or the Custodial Agent, but
19 only the Court has authority to approve or disapprove the Settlement Administrator's or the
20 Custodial Agent's acts.
21

22 **IX.**
PARTIES' COOPERATION

23 110. The Parties recognize that time is of the essence and they have a duty to the Class to
24 expeditiously and diligently effectuate this Settlement Agreement. The Parties agree to cooperate
25 (a) in presenting this Settlement to the Court, (b) to support its provisions at the Settlement hearing,

1 (c) to draft and review Court orders, notices, forms, and other documents required by or necessary
2 to effectuate this Settlement Agreement, (d) to draft and review documents/agreements with the
3 Settlement Administrator and the Custodial Agent, (e) to timely provide information and records to
4 the Settlement Administrator as required by this Settlement Agreement, (f) to timely provide such
5 additional documents, information and records reasonably requested by the Settlement
6 Administrator and the Custodial Agent to the extent reasonably necessary to carry out their tasks,
7 (g) to minimize expenses, and (h) to do all other acts and duties assigned to each Party in this
8 Settlement Agreement to effectuate and implement this Settlement. In the event of a disagreement
9 with respect to the matters in this paragraph, the matters shall first be mediated before bringing the
10 matter to the Court.
11

12 **X.**
13 **ARBITRATION AND MEDIATION**

14 111. For all matters in this Settlement Agreement which the Parties are required to
15 arbitrate or mediate, the proceedings shall be conducted by the Honorable William L. Dwyer. The
16 Parties may also arbitrate or mediate such other matters as they agree with Judge Dwyer. In the
17 event that Judge Dwyer is unable to serve and the Parties are unable to agree upon a substitute, one
18 will be appointed by the Court.

19 **XI.**
20 **COURT'S AUTHORITY AND ENFORCEMENT**

21 112. Except as otherwise provided herein, the Court may not modify any of the terms of
22 this Settlement Agreement. The Court has authority to interpret and enforce this Settlement
23 Agreement.

24 113. The Court will retain jurisdiction to enforce this Settlement Agreement and to enter
25 orders as are necessary to implement this Settlement Agreement.

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XII.
MISCELLANEOUS PROVISIONS

114. This Settlement Agreement constitutes the entire agreement of the Parties concerning its subject matter, is intended to supersede all prior negotiations, understandings, and agreements, including but not limited to the proceedings before Judge William L. Dwyer, and there are no other written or oral agreements, understandings, representations, or obligations that, as of the date of the Final Order, shall have any further force or effect. This Settlement Agreement represents a unitary whole and each and every term therein is an integral part of the entire Settlement Agreement.

115. This Settlement Agreement shall be governed by, and construed and enforced in accordance with Washington law, without regard to choice of law provisions. If, and to the limited extent that Washington law is preempted, the Settlement Agreement shall be governed by, and construed and enforced in accordance with, federal law.

116. The Settlement Agreement may include amendments, supplements and additions as part of this Settlement Agreement, but only if they are in writing and signed by Class Counsel and Defendants, and specifically refer to this Settlement Agreement. In connection with its consideration of whether to approve the Settlement, the Court may modify the payment amounts provided for in paragraphs 65 through 69 and 75, if such amounts are determined to be unreasonable in the context of the results obtained and the overall Settlement.

117. This Settlement Agreement is binding upon, and shall inure to the benefit of, the Parties, except for Class Members who properly request exclusion, and their respective heirs, executors, administrators, successors, and assigns.

118. This Settlement Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

1 119. No provision of this Settlement Agreement shall provide any rights to, or be
2 enforceable by, any person or entity that is not a Class Member, a Defendant or Class Counsel. No
3 Class Member or Class Counsel may assign or otherwise convey any right to enforce any provision
4 of this Settlement Agreement.

5 120. None of the parties hereto shall be considered to be the drafter of this Settlement
6 Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation
7 or construction that would or might cause any provision to be construed against the drafter hereof.
8

9 **XIII.**
10 **TERMINATION**

11 121. If the Court refuses to approve this Settlement Agreement or any part hereof, or if
12 such approval is modified or set aside on appeal, or if the Court does not enter the final judgment
13 provided for in paragraph 62 hereof, or if the Court enters the final judgment and appellate review
14 is sought and, on such review, such final judgment is not affirmed in its entirety, then this
15 Settlement Agreement shall be terminated and shall become null and void.

16 122. In addition, within 30 days after the Settlement Administrator, pursuant to
17 paragraph 87, provides to the Clerk of the Court, Class Counsel, and Defendants a list of those
18 Class Members who requested exclusion from the Class, Defendants may withdraw fully from and
19 terminate this Settlement Agreement and this Settlement Agreement shall become null and void if,
20 in Defendants' good-faith judgment:

21 (a) Class Members who would have been Qualifying Class Members if they had not
22 excluded themselves from the Class and who represent 20% or more of the total Eligible Periods
23 for all Class Members, elect to exclude themselves from the Class and the Settlement; or

24 (b) For any one calendar year for each calendar year January 1, 1993 through December
25 31, 1999, and for the six month period of January 1 - June 30, 2000, Class Members who would

1 have been Qualifying Class Members if they had not excluded themselves from the Class and who
2 represent 30% or more of the Eligible Periods for all Class Members for the year or for the period
3 in question elect to exclude themselves from the Class and the Settlement; or

4 (c) Class Members who would have been Qualifying Class Members if they had not
5 excluded themselves from the Class and who represent 30% or more of the total Eligible Periods
6 for the years 1987 and 1988 combined for all Class Members elect to exclude themselves from the
7 Class and the Settlement; or

8 (d) Class Members who would have been Qualifying Class Members if they had not
9 excluded themselves from the Class and who represent 30% or more of the total Eligible Periods
10 for the years 1989 and 1990 combined for all Class Members elect to exclude themselves from the
11 Class and the Settlement; or

12 (e) Class Members who would have been Qualifying Class Members if they had not
13 excluded themselves from the Class and who represent 30% or more of the total Eligible Periods
14 for the years 1991 and 1992 combined for all Class Members elect to exclude themselves from the
15 Class and the Settlement.

16
17 123. The Parties expressly reserve all of their rights if the Settlement does not become
18 final in accordance with the terms of this Settlement Agreement and, if the Settlement Agreement
19 is terminated or is not approved, all Parties return to their positions in this Litigation before this
20 Settlement and the Litigation shall return to the status before this Settlement.

21
22 124. In the event of termination, the balance remaining in the Fund (including any and all
23 income earned thereon) shall be returned to Defendants.

24 IN WITNESS WHEREOF, the Parties, through their fully authorized representatives,
25

1 have agreed to this Settlement Agreement.

2 DATED this 8th day of December, 2000.

3 MICROSOFT CORPORATION

CLASS COUNSEL,
on behalf of Named Plaintiffs, individually and
on behalf of the Class

6 By: _____

Theodore O. Rogers, Jr.
SULLIVAN & CROMWELL
125 Broad Street
New York, NY 10004

By: _____

David F. Stobaugh
BENDICH, STOBAUGH & STRONG, P.C.

By: _____

Stephen K. Strong
BENDICH, STOBAUGH & STRONG, P.C.
900 Fourth Avenue, Suite 3800
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www.bs-s.com

14 **CLASS ACTION SETTLEMENT AGREEMENT AMENDMENTS**

15 WHEREAS, Microsoft Corporation and Class Counsel, on behalf of the Named Plaintiffs
16 and on behalf of the Class, entered into a Class Action Settlement Agreement, dated December 8,
17 2000 (the "Settlement Agreement"); and

18 WHEREAS, the United States District Court for the Western District of Washington (the
"Court") held a hearing on February 27, 2001 (the "Fairness Hearing") to consider whether the
19 Settlement Agreement should be given final approval, prior notice of which hearing having been
provided to the Class pursuant to the manner ordered by the Court; and

20 WHEREAS, in response to comments respecting the Settlement Agreement, the Court,
21 Class Counsel, and Microsoft Corporation agreed that the Settlement Agreement should be
modified in certain respects;

22 IT IS HEREBY AGREED THAT, pursuant to paragraph 116 of the Settlement Agreement
23 and as set forth at the Fairness Hearing, the Settlement Agreement is hereby amended as follows
(the "Amendments"). As used in these Amendments, capitalized terms that are defined in the
24 Settlement Agreement but not defined in these Amendments shall have the meanings ascribed to
those terms in the Settlement Agreement.
25

- 1 1. Any Class Member who disagrees with the Settlement Administrator's determination
2 regarding the amount of that Class Member's share of the Fund may petition the Court for a
3 review of that determination. The Court shall retain jurisdiction over *Vizcaino* and *Hughes*
4 in order to adjudicate such disputes and set schedules, including cut-off dates for Class
5 Members to challenge the Settlement Administrator's decisions.
- 6 2. Copies of the Settlement Administrator's proposed plan of distribution described in
7 paragraph 100 of the Settlement Agreement will be provided to the Named Plaintiffs, with
8 identifying and sensitive information regarding the Class Members redacted.
- 9 3. Class counsel will provide notice to the Named Plaintiffs regarding the selection of the
10 entity that will receive any unclaimed funds from the Fund pursuant to paragraph 104 of the
11 Settlement Agreement.
- 12 4. 75% of the attorney fee award to be distributed to Class Counsel will be disbursed from the
13 Fund within fourteen days following the Effective Date, with the remaining 25% of such
14 award to be disbursed upon Court approval of the final report described in paragraph 105 of
15 the Settlement Agreement.
- 16 5. No further amendment of the Settlement Agreement will be made except by Court approval
17 upon written motion of the Parties, and notice of such motion will be posted on Class
18 Counsel's web site.

19 IN WITNESS WHEREOF, the Parties, through their fully authorized representatives, have
20 agreed to these Amendments.

21 DATED this 14th day of March 2001.

22 MICROSOFT CORPORATION

23 CLASS COUNSEL,
24 on behalf of Named Plaintiffs, individually and on behalf
25 of the Class

By: _____

By: _____

Theodore O. Rogers, Jr.
SULLIVAN & CROMWELL
125 Broad Street
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David F. Stobaugh
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By: _____

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