IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,

Defendant-Appellant

No. 00-5213

STATE OF NEW YORK, EX REL. ATTORNEY GENERAL
ELIOT SPITZER ET AL.,

Plaintiffs-Appellees

v.

MICROSOFT CORPORATION,

Defendant-Appellant

RESPONSE OF UNITED STATES OF AMERICA AND THE PLAINTIFF STATES TO MICROSOFT'S MOTION FOR AN ORDER GOVERNING FURTHER PROCEEDINGS

As the Court has recognized, these consolidated cases are of "exceptional importance."[1] And, because the district court stayed implementation of the judgment in its entirety pending

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[1] Because of the importance of prompt resolution of this appeal, appellees are filing this response two days before the Court's deadline. Microsoft should be similarly able to expedite its reply.

appeal, at Microsoft's request and over plaintiffs' objections, it is essential for effective antitrust law enforcement in a critical sector of the nation's economy that the appeal be concluded expeditiously. The Court's decision to hear the case *en banc* serves that end. Microsoft's proposals for an extended briefing schedule with exceptionally massive pleadings do not.

Briefing Schedule

Microsoft's proposed schedule, particularly its request for 60 days from the issuance of a briefing order to prepare its principal brief, and 30 days after submission of appellees' brief to prepare its reply brief, is excessive and would delay resolution of this appeal unnecessarily. Microsoft already has had ample time to formulate its position (it specified the same "principal" issues for appeal on July 26 as it did on October 2, *compare* Jurisdictional Statement at 21-23 *with* Motion, Appendix A), and it should be ready to file its opening brief promptly.[2] Almost four months have passed since the district court entered its final order on June 7, 2000. Moreover, Microsoft has had the district court's findings of fact, which will be the subject of most of the factual issues it will raise on appeal, for almost eleven months—since November 5, 1999,[3] and the district court's conclusions of law since April 3, 2000. Accordingly, as we informed Microsoft in our discussions pursuant to this Court's September 26 order, we believe that a November 1 due date (36 days after the remand) provides ample time for Microsoft to complete and file its opening

[2] Although it was not clear until September 26 whether the appeal would proceed in the Supreme Court or this Court, that determination should affect the substance of Microsoft's appellate position only in marginal respects, because unlike cases reviewed on certiorari, appeals under the Expediting Act, 15 U.S.C. 29, may properly encompass a broad range of appellate issues, not merely those on which the Court grants certiorari.

[3] Moreover, since Microsoft submitted its Proposed Findings of Fact to the district court on August 10, 1999, it has long had a ready compilation of the evidence it relies on to prove its defense and to support whatever factual allegations it will seek to raise or challenge on appeal.

brief.

The appellees, on the other hand, have been restricted in their ability to prepare for appellate briefing because Microsoft has not yet identified all the issues on which it plans to base its appeal.[4] Moreover, because appellees propose to avoid unnecessary duplication by joining in a single brief on the federal issues (see pages 5 and 7, below), the multi-party coordination process will further complicate the task, as will the Thanksgiving holiday. Nonetheless, our proposal calls for appellees to respond 38 days after Microsoft's opening brief, on December 8. Microsoft would have the standard two weeks for its reply brief, due on December 22. We believe that our proposal reflects a fair balance between the parties' need for a reasonable opportunity to present their arguments and the compelling public interest in prompt disposition of this important case.

If, however, the Court determines that the briefs should be substantially longer than we recommend below, appellees would require a reasonable increase in the time allowed them to respond. We also ask that the Court take into account the Thanksgiving and Christmas/New Year's holidays, which substantially affect the availability of staff and support services, and which could disproportionately affect the appellees if Microsoft were allowed more time for its opening brief than we have proposed.

Length of Briefs

The Court "disfavors motions to exceed limits on the length of briefs . . . [S]uch motions will be granted only for extraordinarily compelling reasons." D.C. Cir. R. 28(f)(1). Microsoft

[4] Microsoft promises to challenge "a number of the district court' factual findings" (Motion for an Order Governing Further Proceedings at 4), but it has thus far specified just two (Jurisdictional Statement at 16). Microsoft lists nineteen "principal legal issues" in its motion, but its specific legal arguments are only hinted at, and the list is described as non-exhaustive (Motion at 3, Appendix A; Jurisdictional Statement at 16).

nonetheless proposes briefs *four times* the length permitted by Fed. R. App. P. 32(a)(7): 56,000 words for the principal briefs—well over 200 pages in non-proportionally spaced type—and 28,000 words for Microsoft's reply. There is no justification for this extraordinary request. This is an appeal, not a retrial. Although Microsoft attempts to portray its case as unusually complex, a review of the appendix of "principal legal issues" it intends to raise on appeal (Motion at 3, Appendix A) demonstrates that those legal issues do not differ significantly in complexity or scope from those presented in any civil antitrust case (and, indeed, many of Microsoft's "legal" issues are largely factual disputes with the district court's findings). Microsoft also indicates that it intends to challenge "a number of" the district court's factual findings, but it is the responsibility of appellate counsel to identify the most significant factual issues—those that it contends constitute "clear error" and on which the determinative legal conclusions depend. Criminal and civil appellants in cases large and small are routinely subject to the length limits of Rule 32. The size of the record here may justify some latitude on the principal brief, but far short of quadrupling the page limits on principal and reply briefs.

The cases on which Microsoft relies do not support its extraordinary request. Of the old antitrust cases cited by Microsoft, in only one did the court permit defendant to file a 200-page brief. And that case, Brown Shoe, was indeed unusual because it was the first in which the Court undertook a comprehensive review of the 1950 amendments and accompanying extensive legislative history to section 7 of the Clayton Act. Brown Shoe Co. v. United States, 370 U.S. 294, 311-312 (1962). Here, Microsoft asks the Court to review antitrust issues with which the courts are well familiar and have long experience. Nor do the agency cases from this Circuit provide support for Microsoft's request. In none of these cases was a single petitioner granted

anywhere near the 56,000 words sought by Microsoft. Rather, the respondent agency was given additional space to respond to multiple briefs filed by numerous petitioning parties. In Michigan v. EPA, 1999 WL 229221 at *3 (D.C. Cir. Mar. 19, 1999), involving 32 separate petitions for review, the EPA was given 38,500 words to respond to 11 different briefs totaling 42,250 words. In Transmission Access Policy Study Group v. FERC, 1998 WL 633827 (D.C. Cir. Aug. 13, 1998), involving 65 separate petitions, the agency was given 62,500 words to respond to 13 briefs totaling 127,500 words; and in American Trucking Ass'n v. EPA, 1998 WL 65651 (D.C. Cir. Jan. 21, 1998), involving 6 separate petitions, the EPA was given 41,250 words to respond to three briefs totaling 41,249 words.

The excessively long briefs Microsoft seeks to file would burden the Court and inevitably delay disposition of the appeal. As explained above, we believe the Court should set a schedule that will allow briefing to be completed this calendar year, even though such a schedule will be significantly more burdensome for the appellees than for Microsoft. Allowing Microsoft virtually unlimited latitude to expand brief lengths would make it impractical for appellees to meet such a schedule. Moreover, if Microsoft is allowed to file principal and reply briefs totaling 63,000 more words than the rules provide, appellees would of course require a corresponding increase in the length of their briefs.

Microsoft's legitimate needs would be fairly accommodated by increasing the limit for its principal brief by 10,000 words, to 24,000 words. The United States and the States will undertake to consolidate their arguments on the federal issues in a single brief limited to the same 24,000 words as Microsoft's principal brief. The States would also file a separate brief of no more than 7,000 words on issues of particular interest to them. Microsoft's reply brief should be

limited to the standard 7,000 words.

Amicus Briefs

The Court's rules provide that "[a]mici curiae on the same side must join in a single brief to the extent practicable." D.C. Cir. R. 29(d). We see no reason to depart from that rule by imposing an absolute limit of one amicus brief per side "absent a strong showing of cause for separate briefs," as Microsoft proposes. Motion at 2 n.2. Given the exceptional importance of this case, and the unusually wide range of interests involved, there is even more reason than usual to preserve the opportunity for potential amici to demonstrate that it is not practicable to join in a single brief.

In order to avoid delaying the briefing schedule, we propose that amici be required to file their briefs at the same time as the principal brief of the party they support, rather than 7 days later as permitted by Fed. R. App. P. 29(e).

Oral Argument

We urge the Court to set argument for as soon as possible after the briefs and appendix are filed. As the Court has recognized by its actions so far, this important case deserves the speediest possible resolution. We hope that the Court will set the case for argument in January 2001.

In our view, Microsoft's request for 90 minutes of argument per side is premature. We suggest that the parties should submit their oral argument time requests promptly after the filing of Microsoft's reply brief.[5]

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[5] Microsoft's suggestion that the Court "consider" additional pre- or post-argument briefs is also premature. Motion at 6. There is no reason at this time to think that such briefs would be necessary.

Appendix and Format of Additional Copies of Briefs

Appellees agree with Microsoft's proposal to use a deferred joint appendix. We further propose that, to avoid delaying completion of the briefing, Microsoft file the joint appendix simultaneously with its reply brief. Pursuant to Fed. R. App. P. 30(c)(2)(B), final versions of the principal briefs would be filed by January 5, 2001.

The United States and the States also agree with Microsoft's proposal that the Court authorize the parties to file additional copies of their briefs, along with hyperlinks to supporting authority and factual materials, in CD ROM format, similar to the CD ROM versions of the Proposed Findings of Fact and Proposed Conclusions of Law plaintiffs filed with the district court.

CONCLUSION

The Court should issue an order providing that:

> Microsoft shall file its opening brief, limited to 24,000 words, by November 1, 2000.
>
> Appellees shall file a single brief, limited to 24,000 words, on the federal issues and a single brief on the issues of particular concern to the State appellees, limited to 7,000 words, by December 8, 2000.
>
> Microsoft shall file its reply brief, limited to 7,000 words, by December 22, 2000.
>
> Briefs of amici curiae shall be filed at the same time as the principal brief of the party they support.
>
> Microsoft shall file the deferred appendix on December 22, 2000.

Respectfully submitted.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2000, I served a copy of the foregoing RESPONSE OF UNITED STATES OF AMERICA AND THE PLAINTIFF STATES TO MICROSOFT'S MOTION FOR AN ORDER GOVERNING FURTHER PROCEEDINGS on the following:

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