IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' AND PLAINTIFF STATES' REPLY TO MICROSOFT CORPORATION'S OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO COMPEL PRODUCTION OF DATABASES

Plaintiffs' motion to compel seeks, inter alia, the software tools that Microsoft uses to access and manipulate data contained in Microsoft's basic sales databases. Microsoft characterizes plaintiffs' request as "demanding that Microsoft produce software -- and apparently costly hardware too -- to allow plaintiffs to reproduce Microsoft's revenue reporting systems in their entirety." MS Opposition, at 3 (citation omitted).

Microsoft's "revenue reporting systems" (i.e., its sales databases and the tools necessary to extract meaningful data from them) are, of course, exactly what the plaintiffs have been seeking all along. The information contained in these databases is relevant to this litigation because it would permit plaintiffs to answer basic questions about Microsoft's pricing and revenue practices. For example, plaintiffs need to be able to determine how much revenue Microsoft received from licensing Windows 95 to Compaq in 1997. Microsoft's suggestion (MS Opposition, at 9) that plaintiffs could obtain that information by analyzing the "OEM license agreements" already produced by Microsoft is inaccurate. For many OEMs, the license agreement is modified by an associated Market Development Agreement that lists various discounts the OEM may earn if it meets various conditions. The paper agreements alone do not show the price actually paid by the OEM. To extract that kind of meaningful revenue information from the raw data produced by Microsoft, plaintiffs would have to either (a) spend many hours creating and checking computer programs from scratch, without any guarantee that plaintiffs are accurately interpreting Microsoft's data system, or (b) obtain from Microsoft the software tools that Microsoft has already developed to manipulate that data in the ordinary course of business.

In its Opposition, Microsoft essentially contends that it would be impossible to produce its internal database tools, such as the graphical user interface for MS Sales, to plaintiffs because that software is too large and complex to function on any hardware to which plaintiffs have access. See MS Opposition, at 5-6; Sargent Decl. ¶¶ 6-7. Microsoft also asserts that "putting together a working replica of this one revenue reporting system would take at least four weeks (three weeks to obtain the hardware and another week to populate the data), plus additional time

to ensure that the system actually works properly." MS Opposition, at 6. Ironically, Microsoft implies that the plaintiffs should solve this problem by "set[ting] up their own working database." MS Opposition, at 5. But if it would take more than a month for Microsoft to copy the revenue reporting software it has already developed, it would obviously be futile for the plaintiffs to attempt to build such tools from the ground up in the time remaining before trial.

In a letter dated September 29, 1998, plaintiffs proposed a solution to this dilemma:

> [W]e are prepared to send government representatives to Microsoft's offices so that they can review the data and databases displayed on the appropriate computers in the presence of the most knowledgeable Microsoft personnel. Those employees should at the same time be available to explain their use of the databases and related software. In that way, the government's representatives can leave with not only all the available software, data and information but also with complete answers to all their questions about that material and how the data can be manipulated with the software and information available now only to Microsoft.

(Exhibit 1, attached). Microsoft flatly rejected this request in a letter dated October 1, 1998.[1] In light of the position taken by Microsoft in its Opposition (i.e., that it is technologically impossible to use the relevant software outside of Microsoft's corporate headquarters), that refusal has no legal basis.

Microsoft cannot insulate its revenue reporting system from discovery by ensconcing it in technology that Microsoft is unable or unwilling to share or permit plaintiffs to access. See, e.g., Daewoo Electronics Co. v. United States, 650 F. Supp. 1003, 1006 (C.I.T. 1986) ("It would be a dangerous development in the law if new techniques for easing the use of information become a hindrance to discovery or disclosure in litigation"); Kozlowski v. Sears, Roebuck & Co., 73

[1]Microsoft offered to answer written questions about the databases instead. Given the complexity of the issues and the short time remaining before trial, a written dialogue is not a practical substitute for access to the relevant systems.

F.R.D. 73, 76 (D.Mass. 1976) (as amended) ("The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition"); Advisory Committee Notes, 48 F.R.D. 487, 527 (1970) ("The inclusive description of 'documents' [in Rule 34] is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form"); In re Air Crash Disaster, 130 F.R.D. 634, 635-36 (E.D. Mich. 1989).

Plaintiffs do not ask Microsoft to provide them with expensive hardware, nor do they desire that Microsoft attempt the technologically impossible. To the contrary, they simply seek access to the same tools that Microsoft's own employees use to extract meaningful financial information from the mountain of data (4 gigabytes - the equivalent of roughly two million printed pages of text) contained in Microsoft's basic sales databases. If, as Microsoft now contends, those tools can only be used on Microsoft's own internal systems, then Microsoft has no justification for refusing plaintiffs access to those systems.

Plaintiffs believe that much of the confusion surrounding these databases could be quickly resolved if Microsoft would permit the plaintiffs to examine and work with Microsoft's revenue reporting system in its native environment. Plaintiffs would also require the assistance of those Microsoft personnel most knowledgeable about the various user tools that Microsoft has

developed and the structure of the underlying data. That inspection need not impose an excessive burden on Microsoft, and would probably be the least burdensome way for Microsoft to give plaintiffs meaningful access to this material. In order to minimize any burden this would impose on Microsoft, plaintiffs are of course willing to conduct that inspection at whatever hour of the day is convenient for Microsoft and to pay any reasonable costs incurred as a result.

Conclusion

Therefore, plaintiffs respectfully request that the Court order Microsoft to give the plaintiffs access to the computer systems on which its sales databases and associated tools or interfaces are maintained. We further request that the Court order Microsoft to make available Microsoft personnel knowledgeable about the structure, contents, and use of those databases and tools, including but not limited to the contents of the databases' tables, the definitions of their fields, and the construction and use of queries, reports, and user interfaces.

DATED: October 8, 1998

_____/s/_____
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