

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' FURTHER EMERGENCY MOTION TO
COMPEL MICROSOFT CORPORATION AND MEMORANDUM IN SUPPORT**

INTRODUCTION

For four months, plaintiffs have been attempting to obtain basic information concerning Microsoft's Windows and Internet Explorer products -- how many units Microsoft has sold (or given away), to whom, and at what price. For four months, Microsoft has avoided producing that information. Over two months ago, on August 14, plaintiffs served on Microsoft their Third Joint Request for Production of Documents which sought, among other things, "all data

contained therein or other contents thereof” for Microsoft’s “MS Sales,” “OEM Query,” and “Datamart” databases and any other database containing data relating to OEMs and Microsoft operating system products (Request No. 1). Since that time, Microsoft has persistently blocked plaintiffs’ access to this highly relevant data, which likely includes the basic statistical information concerning Windows and Internet Explorer that plaintiffs are seeking. Microsoft’s intransigence thus far has forced plaintiffs to file two separate motions to compel production of the information.

Pursuant to the Court’s most recent order on October 9, Microsoft permitted a team of attorneys and computer experts from the plaintiffs access to Microsoft’s data facilities at its offices in Redmond and has assisted them in retrieving and collecting certain Microsoft data. It is now clear from what that review has revealed that data concerning all Windows and Internet Explorer transactions is available and readily accessible. However, Microsoft counsel has continued to refuse to permit plaintiffs to see or retrieve information in the specific databases identified in Plaintiffs Third Joint Requests relating to certain core issues in this case -- sales, shipments, and pricing of Windows and Internet Explorer -- if that information does not happen to be labeled as “OEM transactions” in the database.

Plaintiffs’ discovery team is still present in Redmond, and has completed all the work it can without access to the other parts of the Microsoft databases that Microsoft is refusing. Given their physical presence at Microsoft and their need to continue their work there, and because trial in this matter is due to begin in three days, plaintiffs respectfully request an immediate hearing or telephone conference to address Microsoft’s continuing intransigence and to resolve this matter.

MICROSOFT'S CONTINUED REFUSAL TO PERMIT ACCESS TO ITS RELEVANT DATA

During their time in Redmond, plaintiffs' representatives have gained considerable knowledge of the contents and organization of the "MS Sales" and "OEM Query" databases. Thus far, it has proven to be relatively easy and quick to extract from the database the information needed. Plaintiffs have also learned that, among other features, the databases contain a field that allows all the other information in the database to be "sorted" or organized according to the channel of distribution to which it relates. These channels include: (1) the OEM channel; (2) the "finished goods" or retail channel; and (3) the online channel. Microsoft thus far has only provided plaintiffs with access to database information from the OEM channel. In effect, Microsoft has altered its database to exclude much relevant information from what is made available to plaintiffs.

Microsoft representatives have suggested that the "finished goods" and "online" channel portions of the database contain data relating to sales and shipments of Windows operating system products and distribution of Internet Explorer through channels other than the OEM channel. However, they have steadfastly refused to allow plaintiffs access to any Windows or Internet Explorer data for these other channels, claiming that plaintiffs' Third Joint Request covers only data relating specifically to OEMs.

In fact, plaintiffs' request called for "*all data* contained therein or other contents thereof" for Microsoft's "MS Sales," "OEM Query," and "Datamart" databases and any other database containing data relating to OEMs and Microsoft operating system products. Plainly, the information plaintiffs now seek is contained in the MS Sales and OEM Query databases. Moreover, the information unquestionably is related to the core issues in this case.

During argument at the Final Pretrial Conference on October 9, Microsoft expressed concern that plaintiffs not have unfettered access to information in the databases concerning hundreds of wholly irrelevant Microsoft products. Plaintiffs do not seek such access. The Court's October 9, 1998 Order specified that Microsoft produce information "relating to the subjects set forth in Request No. 1 of plaintiffs' Third Joint Request." Plaintiffs do not believe that this language was intended, or should be read, to preclude plaintiffs' access to data from Microsoft's "revenue reporting systems" that relate directly to Windows and Internet Explorer, the products at the heart of this litigation. Microsoft's insistence on a hyper-technical reading of the Court's order and plaintiffs' original request is merely another attempt to shield highly relevant and probative data from plaintiffs, or at least to delay the discovery of that information until it is too late to make use of it. There can be no argument that statistical information concerning Microsoft's sales, shipments, pricing, and distribution of Windows products and Internet Explorer is not fundamentally relevant and critical to this case.

Consequently, plaintiffs respectfully request that the Court order Microsoft immediately to provide the plaintiffs, including their representatives currently located in Redmond, access to all data in the OEM Query, OEM Sales, and other responsive databases that relate to Windows or Internet Explorer.

Alternatively, if the Court determines that information in Microsoft's databases relating to sales, shipments, pricing, and distribution of Windows and Internet Explorer outside of the OEM channel is not technically within the scope of plaintiffs Third Joint Request and the Court's October 9 order, plaintiffs request leave from the Court, pursuant to the Final Pretrial Order, to serve narrow, focused discovery requests on Microsoft seeking this data. It is notable

that, had Microsoft not avoided production of the database data for the last two months, and refused full production even after plaintiffs' motions to compel, plaintiffs would have learned of the contents and organization of the "MS Sales" and "OEM Query" databases, and would have been in a position to seek any other needed discovery, long ago.

DATED: October 16, 1998

_____/s/_____
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