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)

PLAINTIFFS' OPPOSITION TO MICROSOFT'S MOTION IN LIMINE TO EXCLUDE HEARSAY STATEMENTS IN THE DIRECT EXAMINATION OF JIM BARKSDALE

Microsoft attempts to exclude some fifty paragraphs of Mr. Barksdale's testimony.[1] The testimony generally falls into two categories. The first category comprises summary statements made to or heard by Mr. Barksdale in the regular course of business -- precisely the type of statements this Court has allowed in order to streamline the testimonial stage of these

[1] Microsoft served this motion to exclude large portions of Mr. Barksdale's statement at approximately 5:30 p.m. yesterday, the day before Mr. Barksdale was set to testify even though Microsoft had Mr. Barksdale's statement for almost a week and filed and served other motions yesterday morning that relate to witnesses it knew were testifying well after Mr. Barksdale.

proceedings. Microsoft concedes that these statements and documents surpass the admissibility hurdle of the business records exception to the hearsay rule and are otherwise admissible pursuant to the Court's ruling to permit summary witnesses for the "legitimate function . . . of convey[ing] information from colleagues or subordinates within . . ." Nestcape. Microsoft Motion at 5. Despite these concessions, Microsoft asserts that Mr. Barksdale's recitation of certain of the information he received from his subordinates and colleagues is inadmissible "double hearsay." The challenged business records are admissible over Microsoft's "double hearsay" objections because the challenged testimony and records: (1) contain Microsoft admissions; (2) constitute admissible business records immune from Microsoft's hearsay objections; (3) are offered as evidence of state of mind, and reason and motive of customers and potential customers; and/or (4) are sufficiently reliable as to be admissible even if hearsay.

The second category of statements are not hearsay statements, but rather admissions of Microsoft's Chairman, Mr. Gates, its President, Mr. Ballmer, and other Microsoft executives, which were made as a regular practice as top Microsoft executives and as to which they have manifested a belief as to their truth by failing to deny them in a timely manner.

As a separate matter, Microsoft's asserted reliability and trustworthiness concerns are unjustified. As the Court learned from the documents and statements presented during Plaintiffs' opening arguments, Plaintiffs will present ample evidence from Microsoft documents and statements to demonstrate the trustworthiness of and to corroborate the statements contained in Mr. Barksdale's testimony. Moreover, the statements and documents presented in Mr. Barksdale's testimony contain exactly the kind of testimony Microsoft otherwise concedes is admissible -- reports from subordinates and colleagues within Netscape relating to and recorded in

the course of Netscape business. Because Netscape is in the business of selling software, the statements recorded in the challenged documents are the very type of statements that Netscape relies on in making business decisions about its development and sales efforts. Finally, because this trial is not occurring before a jury, the risks of prejudice are minimal.

ARGUMENT

A. Paragraphs 152-156 are admissible business records

Microsoft's motion to exclude paragraphs 152-156 is overbroad because paragraphs 152-156 and the underlying documents contain many factual recitations that are not even addressed in Microsoft's motion and are clearly admissible. Specifically, paragraphs 152-156 each contain the factual assertion that certain Netscape customers canceled their contracts with Netscape on an identified date. The fact that these Netscape customers canceled their contracts with Netscape and the document memorializing the cancellation are admissible business records. *See* Fed. R. Evid. 803(6). In addition, Micosoft's motion to exclude paragraphs 152-156 is improper because the additional statements contained in paragraphs 152-156 and the underlying documents fall within the state of mind exception to the hearsay rule as discussed below.

B. Paragraphs 139-144, 156, 150-51, 164-172, 178-80, 182-189, 192, 194-204, and 216-17 ("the customer motive and reason paragraphs") are admissible under the state of mind exception to the hearsay rule[2]

Microsoft incorrectly asserts that the statements contained in the customer motive and reason paragraphs are inadmissible hearsay because the statements and underlying documents are offered to prove the truth of the matters asserted therein, *i.e.* that Microsoft took the actions

[2] Paragraphs 162-163 are merely summary transition paragraphs and thus are not separately addressed.

described in the paragraphs at issue. To the contrary, this testimony is offered for two reasons: (1) as evidence of Netscape's customers' and potential customers' state of mind; and (2) as evidence of Netscape's and Mr. Barksdale's state of mind.

In antitrust cases, a customer's state of mind in deciding to deal with one competitor versus another often is directly relevant. Indeed, recognizing this relevance, courts have long held that evidence of a customer's state of mind in making a decision to deal with one competitor over another is admissible, over hearsay objections, even where that evidence is contained in letters received by a competitor or where the evidence simply amounts to account of oral statements of customers. For example, in *Herman Schwabe , Inc. v. United Show Machinery Corp.*, plaintiff offered letters from five customers and a conversation with a sixth in support of its Section 1 claims. The customer letters and the conversation set forth the reasons those customers chose not to do business with plaintiff. The Court admitted the letters and the testimony regarding the conversation as evidence of motive or reason pursuant to the state of mind exception to the hearsay rule. 297 F.2d 906, 914 (2d Cir.), *cert. denied*, 369 U.S. 862 (1962); *see also Lawlor v. Loewe*, 235 U.S. 522, 536 (1915) (reasons given by customers for refusing to deal with seller of plaintiff's hats, including letters from dealer, were admissible in action under Sherman Act); *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 128 (2d Cir. 1980) (alleged hearsay testimony regarding responses of potential customers is excepted from the hearsay rule); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990) (district court erred in not considering alleged "hearsay" testimony on the reasons why customers were not doing business with a particular seller because: (1) the testimony was relevant to actual injury; and (2) testimony was admissible under state of mind exception to the hearsay rule).

Because the state of mind of Netscape's customers is relevant to Plaintiffs' Section 1 and Section 2 claims, the paragraphs at issue fall within the state of mind exception to the hearsay rule and should be admitted for the limited purpose of showing the customer's state of mind.

In addition, the customer motive and reason paragraphs and underlying documents are admissible because they evidence Netscape's state of mind. Microsoft has made numerous allegations that Netscape made bad business decisions; that Netscape employees have said negative things about Netscape's products and Netscape's ability to compete; and that Netscape's development efforts with regard to certain browser technologies were inadequate. As Mr. Barksdale explains in his testimony, the "almost daily reports" he received "took a serious toll on Netscape." Direct Testimony of Jim Barksdale at ¶127, 139. Microsoft cannot strip Netscape of its ability to offer an explanation for reasons underlying some of the actions it took and some of the opinions its employees expressed by hiding behind a hearsay objection to evidence when it is aware the evidence will be corroborated by its own documents and statements.

C. Paragraphs 145, 157, and 190 and 17, 22, 28, 30, 117, 119-122, and 129 constitute Microsoft admissions

Microsoft attacks paragraphs 145, 157, and 190 as business record e-mails that allegedly contain "double hearsay" in the form of third party reports to Netscape. Microsoft is incorrect. Paragraphs 145, 157, and 190 instead contain and summarize e-mail communications from Microsoft to various Netscape customers and potential customers. In the e-mails, Microsoft offers free product or cash in exchange for switching to Microsoft's free product, Internet Explorer. Because this testimony and the underlying documents are Microsoft authored e-mails, they are admissible as Microsoft admissions. *See* Fed. R. Evid. 801(d)(2).

Similarly, paragraphs 17, 22, 28, 30, 117, 119-122 and 129 contain party admissions, and thus, are not hearsay. *See* Fed. R. Evid. 801. Mr. Barksdale testifies only as to statements by Microsoft executives that he heard, read or were reported to him; Mr. Barksdale does not offer the documents containing these statements. Microsoft's reliance on *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1191) as a basis for excluding these statements is misplaced. *Larez* explictly acknowledges the inherent reliability of quotations contained in newspaper articles and also acknowledges that the underlying statements, regardless of whether they are reported in a newspaper, are admissions. The *Larez* court found newspaper articles containing statements were inadmissible because they contained "double hearsay," *i.e.* the admissions were reported by a reporter, and therefore, the reporter needed to testify to properly offer the admissions into evidence. In this case, however, calling reporters is precisely the waste of judicial resources this Court has sought to avoid. Moreover, Microsoft has not denied these statements in a timely fashion, and has thereby manifested a belief as to their truth.

D. Paragraphs 6 and 239 Are Admissible.

Paragraph 6 is admissible pursuant to Rule 803(3). As is set forth in the paragraphs up to and including paragraph 6, Paragraph 6 is offered as evidence of Mr. Barksdale's state of mind.

Paragraph 239 contains many factual statements about Netscape's business and business decisions as to which Mr. Barksdale has first-hand knowledge. These statements are admissible. Because Microsoft does not identify the alleged hearsay, Plaintiffs assume that Microsoft claims that Mr. Barksdale's description of MSN constitutes hearsay. Mr. Barksdale's statements about MSN, however, are simply offered as a reflection of his state of mind, *i.e.* how he compares his good decisions as well as his mistakes to those of his competitors, and thus, are admissible

pursuant to Rule 803(3).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Microsoft's motion to exclude portions of Mr. Barksdale's testimony be denied.

DATED: October 20, 1998

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of October, 1998, I served a true and correct copy of the foregoing Plaintiffs' Request for Production of Documents by Facsimile upon:

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