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' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL MICROSOFT CORPORATION

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the United States and Plaintiff States (collectively "plaintiffs") respectfully submit this Memorandum in support of their motion to compel Microsoft Corporation ("Microsoft") to comply with the plaintiffs' Third Joint Request for Production of Documents, Requests No. 1, 3, 4, and 5.[1] (attached hereto as Exhibit 1). Plaintiffs have consulted with counsel for Microsoft and have been unable to resolve

[1]Plaintiff United States and Plaintiff States expressly reserve their right to move to compel production in response to other requests for production not discussed herein.

this matter. However, in the course of those discussions the parties agreed to raise with the Court the underlying issue of whether evidence of Microsoft's conduct toward Intel and Apple is relevant to and well within the scope of the allegations in this case. Accordingly, plaintiffs submit this Memorandum in support of their position that Microsoft's anticompetitive activities in connection with Intel and Apple are directly relevant to plaintiffs' Sherman Act Section 1 and 2 claims in this case. Plainly, evidence of Microsoft's attempts to induce others, including Intel and Apple, to take action to hamper Netscape or Java or to undermine the threat they pose to Microsoft's monopoly is relevant to and probative of numerous key issues here. Similarly, evidence that Microsoft sought to induce other firms, including Intel and Apple, not to compete with it and to curtail their software development efforts is relevant to demonstrate Microsoft's overall conduct in securing or maintaining its monopoly and the cumulative anticompetitive effect of such conduct.

I. **BACKGROUND**

Based on specific evidence of anticompetitive acts by Microsoft directed at Intel and Apple developed in the course of pretrial discovery, plaintiffs on August 14, 1998, served on Microsoft their Third Joint Request for Production of Documents. Among the requests for production were specific, narrowly tailored requests for (1) documents relating to any meetings or communications between Paul Maritz or Bill Gates and any representative of Intel Corporation between January 1, 1995 and December 31, 1997 (Request No. 3); (2) documents relating to any meetings or communications between Eric Engstrom or Chris Phillips of Microsoft and any representative of Apple Computer, Inc. that occurred between January 1, 1996 and August 14, 1998 (Request No. 4); (3) documents relating to any meetings or

communications between Microsoft and any PC OEM relating to Apple's QuickTime technology, and (4) certain Microsoft databases relating to OEM license agreements for Microsoft operating system products (Request No. 1).

On August 25, 1998, Microsoft served its objections and refused to produce the requested documents on various grounds, including that they were not relevant to the issues in this case. *See* Microsoft Corporation's Response to Plaintiffs' Third Joint Request for Production of Documents ("MS Response") (attached hereto as Exhibit 2). Microsoft continues to object to producing the requested documents.

Microsoft's position that evidence concerning anticompetitive or predatory acts involving Intel and Apple is not relevant to this case, and that any discovery regarding such acts is improper, is unfounded and contrary to both substantive Sherman Act law and well-settled principles of civil discovery.[2]

II. EVIDENCE OF MICROSOFT'S ANTICOMPETITIVE CONDUCT WITH INTEL AND APPLE IS RELEVANT TO THE SUBJECT MATTER OF THIS LITIGATION

Microsoft bases its relevance claims on the argument that any conduct toward Intel or Apple is unrelated to this case because "plaintiffs have made no factual allegations in this litigation" concerning Microsoft's relationship with Intel or Apple or concerning Apple's QuickTime technology. Microsoft also seeks to justify its refusal to produce documents on these subjects on the grounds that plaintiffs "have no right to conduct a fishing expedition" and "are seeking to inject extraneous issues into this litigation." MS Response at 7, 8, 9. Contrary to

[2]Microsoft's objections to producing the requested documents are improper because the requested documents are relevant to the subject matter of this litigation, are reasonably calculated to lead to the discovery of admissible evidence, and are not privileged, and because Microsoft's refusal to comply is without justification. Accordingly, the Court should order Microsoft to produce immediately the requested documents.

Microsoft's assertion, the subjects underlying the requested discovery are far from extraneous; indeed, they are directly relevant to core issues in plaintiffs' Sherman Act monopolization and attempted monopolization claims. For example, Microsoft has used its monopoly power to induce both Apple and Intel to limit or reduce their use of and support for Netscape's browser. *See* Plaintiffs' Joint Response to Microsoft's Motion for Summary Judgment ("Plaintiffs' SJ Memo") at 6.

Such evidence will be properly admissible at trial, and easily satisfies Federal Rule of Civil Procedure Rule 26(b)(1)'s standard of relevance for purposes of pretrial discovery. Significantly, these issues have been raised repeatedly in depositions conducted by the plaintiffs that have already been taken in this case; accordingly, Microsoft has had ample notice that the plaintiffs' proof will include such evidence.

Plaintiffs' Complaints allege that Microsoft both has illegally maintained its existing operating system monopoly and has attempted to extend that monopoly into other products, and has violated Section 1 of the Sherman Act as well. These allegations are appropriately established by a broad range of proof of Microsoft's market power, its pattern of conduct to maintain that power, and its conduct and intent in attempting to extend that power to other markets. Claims such as these must be evaluated in the overall context of all of Microsoft's activities in maintaining its monopoly, and the cumulative anticompetitive effect of such conduct. Similarly, broad evidence establishing Microsoft's market power, and its use of that power, goes to the heart of plaintiffs' various Section 1 claims.

First, as set forth in Plaintiffs' SJ Memo, Microsoft has used its power to induce Intel and Apple to take actions directly to disadvantage and foreclose Netscape and to reduce the competitive threat posed by Java. *Id.* at 5, 6.

Second, evidence of specific actions taken by Microsoft with regard to Intel and Apple is relevant to prove, *inter alia*, the existence and strength of Microsoft's monopoly power in the operating system market. For example, evidence showing that Microsoft was able to pressure competitors as powerful as Intel (which itself has substantial market power) and Apple into curtailing their software development efforts is relevant to prove the sheer strength of Microsoft's market power, plainly a major element of plaintiffs' case. *Id.* at 8. Similarly, evidence showing the nature and effectiveness of any retaliatory actions taken by Microsoft against other competitors that refused to yield to it further establishes and corroborates its market power. *Id.* Given Microsoft's vigorous denials of plaintiffs' monopoly power allegations, such as those advanced in Microsoft's Response to plaintiffs' PI motions and elsewhere, such evidence is particularly relevant.

Third, evidence of Microsoft's attempts to limit or eliminate competition by Intel and Apple is both relevant and highly probative to demonstrate that Microsoft has engaged in a comprehensive plan and pattern of anticompetitive conduct to monopolize markets (such as the Internet and multimedia software markets) that threaten its operating system monopoly, and that Microsoft has the requisite intent to monopolize those markets.

Fourth, evidence of Microsoft's dealings with Intel and Apple to hamper Netscape and to thwart the development of Java demonstrates that Microsoft perceived a threat to its operating

system monopoly and that it responded to that threat by engaging in a pattern of anticompetitive conduct in response to that threat. *Id.* at 6. Such evidence is necessary to prove Microsoft's intent, which is another intrinsic element of the charged offenses.

Fifth, the requested discovery is relevant to establish the factual context in which the charged violations of the Sherman Act took place. The overall context of Microsoft's response to the threats posed by Netscape and Java, for example, and the broad power Microsoft is able to wield to deal with those threats, help to demonstrate both the nature of Microsoft's conduct and the full extent of the anticompetitive effects of it. [3]

Even if the evidence that Microsoft sought to reduce or eliminate competition between itself and Intel and Apple and to induce them to hamper Microsoft's other competitors were not directly and intrinsically relevant to core issues in the plaintiffs' case, that evidence nevertheless

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[3] *See, e.g.*, *United States v. Weinstock*, 1998 WL 472344, at *5 (6th Cir.) ("[The fact-finder] is entitled to know the `setting' of a case. It cannot be expected to make its decision in a void -- without knowledge of the time, place and circumstances of the acts which form the basis of the charge.") (internal quotation marks omitted); *United States v. Williams*, 95 F.3d 723, 731 (8th Cir. 1996) ("bad acts that form the factual setting of the crime in issue" or that "form an integral part of the crime charged" are not within the ambit of Rule 404(b)); *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (per curiam) ("Evidence of criminal activity other than the charged offense is not considered extrinsic if it is an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, if it was inextricably intertwined with the offense, or if it is necessary to complete the story of the crime of trial."), cited with approval in *United States v. Badru*, 97 F.3d 1471, 1474 (D.C. Cir. 1996). *Cf. Burroughs v. Warner Bros. Pictures*, 12 F.R.D. 491, 493 (D. Mass. 1952) ("The size of the [antitrust] defendants, the amount of their business, the degree of integration between them, *their relationship to other companies in the industry*, the nature of their operations over an extended period of time are all factors which have a bearing on their power or their intent to dominate or monopolize the industry.") (emphasis added); *United States v. Lever Brothers Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961) (in "an antitrust case which presents such complex and difficult issues as the delineation of the relevant market and the determination of whether the sale of assets in question may result in the requisite substantial lessening of competition," reaching "an informed resolution of [those] issues necessarily requires a somewhat detailed examination of sales and production data of [the defendant's] two major competitors"); *see also, e.g.*, *United States v. Crowder*, 141 F.3d 1202, 1207 (D.C. Cir. 1998) (en banc) ("Evidence about what the defendant said or did at other times can be a critical part of the story of a crime, and may be introduced to prove what the defendant was thinking or doing at the time of the [charged] offense."); *Badru*, 97 F.3d at 1475("Given the similar modus operandi between the [drug] couriers' previous trips to Nigeria and the planning and execution of the [charged offense], a jury reasonably could find that appellants conducted the previous trips for the same purpose as the [charged] trip.").

would be admissible at trial under Fed.R.Evid. Rule 404(b).[4] It is well-established in this circuit that "[e]vidence of an uncharged crime or bad act may be admitted if, as required by [FRE] 404(b), it is probative of a material issue other than the defendant's character." *United States v. Gaviria*, 116 F.3d 1498, 1532 (D.C. Cir. 1997); see also *Huddleston v. United States*, 485 U.S. 681, 686 (1988) ("The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character."); *United States v. Miller*, 895 F.2d 1431, 1436 (D.C. Cir. 1990) ("any purpose for which bad-acts evidence is introduced is a proper purpose so long as the evidence is not offered solely to prove character").[5] Material issues other than character that may be addressed by prior bad act evidence include, but are not limited to, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

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[4]Because evidence of Microsoft's conduct directed at Intel and Apple to disadvantage Netscape or generally to maintain its monopoly is intrinsic to proving the elements of the plaintiffs' claims and the context in which those violations occurred, the exclusions of Rule 404 do not apply. *See, e.g.*, *United States v. DeClue*, 899 F.2d 1465, 1472 (6th Cir. 1990) ("Evidence which is probative of the crime charged and does not solely concern uncharged crimes is not `other crimes' evidence.") (emphasis added); *Badru*, 97 F.3d at 1474-75 (Rule 404(b) inquiry may be pretermitted when evidence allegedly pertaining to other bad acts qualifies as evidence intrinsic to the proponent's account of the charged offense); *United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992) ("As many of our sister circuits have held, Rule 404(b) excludes only evidence `extrinsic' or `extraneous' to the crimes charged, not evidence that is `intrinsic' or 'inextricably intertwined.'"); *United States v. Tutiven*, 40 F.3d 1, 5 (1st Cir. 1994) ("The cases are legion in which similar intrinsic circumstantial evidence has been admitted without occasioning either challenge or analysis under Rule 404(b).").

[5]Although in jury trials, the proponent of similar acts evidence must also demonstrate that the probative value of the evidence outweighs its prejudicial effect under Rule 403, that is of no concern in a bench trial such as this one. *See, e.g.*, *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (9th Cir. 1981) ("This portion of Rule 403 [which requires weighing probative value against prejudice] has no logical application to bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of `unfair procedure' is a useless procedure."); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("Adopting the position taken in Gulf States, we hold that in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial."); *Buscaglia v. United States*, 25 F.3d 530, 534 (7th Cir. 1994) (similar).

Since the evidence of Microsoft's conduct toward Intel and Apple would be introduced to prove material elements of the charged offenses rather than to show Microsoft's "character" or "propensity," that evidence would be admissible at trial. For example, because the evidence shows that Microsoft intentionally engaged in anticompetitive conduct toward Intel and Apple that mirrored its alleged conduct toward Netscape, that evidence would tend to prove numerous material elements of the charged violations. See *Crowder*, 141 F.3d at 1208 ("Rule 404(b) evidence will often have . . . multiple utility, showing at once intent, knowledge, motive, preparation and the like."). Such evidence would be admissible to prove Microsoft's engagement in an overall *scheme or plan* to protect its operating system monopoly by using anticompetitive practices to curb and punish any company that threatens that monopoly, its *preparation* to engage in that plan, and its *modus operandi* for carrying out that plan. The evidence of such conduct would be admissible to help prove Microsoft's *knowledge* of the threat posed to its operating system (and, concomitantly, its *motive* for eliminating competitors), as well as its *intent* to monopolize the browser market and any other market perceived to threaten its existing monopoly.[6] Additionally, the evidence produced may be admissible for impeachment purposes on such issues as Microsoft's absence of mistake in its dealings with competitors. See Wright & Graham, 22 FED. PRAC. & PROC. EVID. s. 5240 (listing impeachment as a permissible use of other acts evidence).

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[6]*SeeUnited States v. Southwest Bus Sales, Inc.*, 20 F.3d 1449, 1456 (8th Cir. 1994) ("Rule 404(b) has been admitted to prove intent and lack of mistake in Sherman Act and mail fraud trials.") (citing cases); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1234 (8th Cir. 1992); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 479-80 (10th Cir. 1990); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 530-32 (4th Cir. 1985) (finding evidence of prior bid rigging relevant to intent and knowledge for charged Sherman Act violation).

Accordingly, evidence relating to Intel and Apple, and the documents sought by Requests Nos. 3, 4, and 5, are clearly relevant and discoverable.

Microsoft also objects to plaintiffs document requests on the grounds that they are overly broad. They are not. Requests 3 and 4 each call for production of documents relating to certain meetings or communications between *only two* Microsoft executives and Intel and *only two* Microsoft executives and Apple. Each of those requests also covers a specific and limited period of time. Request 5, which seeks documents relating to meetings or communications with OEMs, is narrowly tailored in its subject matter -- Apple's QuickTime technology -- and plaintiffs would be willing to agree to reasonable but significant limits on the number of OEMs that are subject to the request, as well as to the time period covered by it.

III. DOCUMENT REQUEST NO. 1 PROPERLY SEEKS RELEVANT INFORMATION

Microsoft objects to the production of documents sought by Request No. 1 in part on the grounds that the request is overbroad because it seeks all data in the databases and also on the basis that it purports to seek information properly obtained through an interrogatory. These objections are unfounded. The relevance of Request No. 1 to this litigation is readily apparent. Microsoft's licenses and shipments of its operating system products, its associated revenues and costs, its discounts to particular OEMs, and the other terms of its contractual arrangements with OEMs are central to the plaintiffs' allegations against Microsoft. Indeed, evidence relating to these various terms for Microsoft's operating system products, whether licensed through the OEM channel or not, relate directly and powerfully to plaintiffs' claims about Microsoft's market power. Similarly, such evidence is also relevant to establishing the possible exercise of

market power by Microsoft to discipline or retaliate against particular OEMs that did not act in accordance with Microsoft's wishes.

The fact that such databases may contain data relating to other products does not excuse the failure to produce the relevant information. In addition, there is no basis for Microsoft's assertion that this information should be sought by interrogatory. Plaintiffs clearly are entitled to the underlying data on subjects of such direct relevance.

IV. RULE 26 PROVIDES FOR BROAD DISCOVERY

Under Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." As a general matter, "relevance" for discovery purposes is broadly construed, and "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); see, e.g., *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) ("The scope of examination permitted under Rule 26 (b) is broader than that permitted at trial.") (internal quotation marks omitted). Courts have long held that pretrial discovery is "to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of `fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."). [7]

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[7] *See also Madden v. Turner Broadcasting Systems, Inc.*, 1998 WL 458188, at *2 (3d Cir. 1998) (same); see also, e.g., *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) ("It is a premise of modern litigation that the Federal Rules contemplate liberal discovery, in the interest of just and complete resolution of disputes."); *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) ("The Federal Rules of Civil Procedure creates a `broad right of discovery' because `wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth.'"); *Hickman*, 329 U.S. at 507. Of course, district courts have considerable discretion in handling discovery matters. *See, e.g., Brune v. IRS*, 861 F.2d 1284, 1288 (D.C. Cir. 1988); *Laborers' Int'l Union of N. Am. v. Department of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984) ("Control of discovery is a matter entrusted to the sound discretion of the trial courts.").]

The Rule 26(b) standard is even more relaxed in the antitrust context. See 6 James Wm. Moore, MOORE'S FEDERAL PRACTICE, s. 26.46[1], at 26-116 (3d ed. 1998) ("The scope of discovery in antitrust actions is at least as broad, if not broader than, the scope of discovery in other actions because of the public importance of the decision, and the need to define the issues."); *United States v. AT&T Co.*, 461 F. Supp. 1314, 1341 (D.D.C. 1978) ("If the purposes of the Rules, and of pretrial discovery generally are to be effectuated, actual discovery must be expected to be somewhat of a `fishing expedition,' particularly in antitrust and similarly complex litigation."); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed to permit discovery in antitrust cases."); *Kellam Energy, Inc. v. Duncan*, 616 F. Supp. 215, 217 (D. Del. 1985) ("[T]here is a general policy of allowing liberal discovery in antitrust cases."); *Kinzler v. New York Stock Exch.*, 1973 WL 772, at *2 (S.D.N.Y. 1973) ("Particularly in antitrust cases, where matters which at first blush may not seem pertinent to the specific issue later shed light on intent, broad discovery is favored.").

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reject Microsoft's attempts to unduly limit the scope of the pretrial and trial proceedings in this case, and that it compel Microsoft to produce the documents called for by Requests Nos. 1, 3, 4, and 5.

DATED: September 2, 1998

_____/s/_____

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