IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, Respondent.	Supplemental to Civil Action No. 94-1564 Hon. Thomas Penfield Jackson

MOTION OF THE UNITED STATES TO UNSEAL DOCUMENTS FILED WITH UNITED STATES' REPLY BRIEF AND DOCUMENTS FILED BY MICROSOFT WITH ITS RESPONSE BRIEF

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The United States requests that this Court issue an order directing the Clerk of the Court to make public all documents and exhibits filed by the United States in conjunction with the United States' Reply Brief and all documents and exhibits submitted under seal with Microsoft's Opposition Memorandum.

I. BACKGROUND

When it filed its Petition for an Order to Show Cause in this matter, the United States submitted several documents received from Microsoft in response to two Visitation Letters, issued pursuant to the Final Judgment, and one Civil Investigative Demand (15 U.S.C. 1312, *et seq*.) At that time, we requested that some of these documents be filed under seal, in order to provide Microsoft with an opportunity to seek a protective order with respect to those documents. The remainder of the Microsoft documents attached to the Petition were filed publicly. Microsoft has objected to the United States filing any of its documents on the public record.

During the October 27, 1997 hearing, the Court ordered the United States to file under seal *any* Microsoft document that the United States wished to file with further pleadings.

(Hearing Transcript at pp 14-16.) Subsequently, as part of its Opposition to the United States' Petition, Microsoft filed selected documents under seal. In accordance with the Court's oral order, the United States has now, with its Reply Brief, submitted Microsoft documents under seal.

The United States requests that all sealed documents in this case be made public because Microsoft has never shown good cause why any documents should be sealed. Microsoft has not: (1) identified specific documents or information it considers highly confidential or a trade secret; (2) explained how the disclosure of such documents or information will cause it substantial harm and injury to its competitive position; or (3) explained why any alleged injury outweighs the public's right to monitor the United States' current enforcement action. Unless Microsoft can show good cause why any of the documents submitted to this Court must be sealed, the Court should unseal the documents filed with Microsoft's Opposition and the United States' Reply.

II. ARGUMENT

Microsoft has asked the Court for a blanket order to keep all Microsoft documents under seal (*See* MS Memo at 45) and has requested a protective order to seal certain exhibits it submitted with the Confidential Declaration of Steven Sinofsky. Unless Microsoft can quickly show good cause why a document should be sealed, Microsoft's requests should be denied and all documents should be unsealed.

A. Microsoft Has Failed To Show Good Cause, Pursuant to Fed. R. Civ. P. 26(c)(7), Why Any Microsoft Document Should Be Filed Under Seal

Rule 26(c)(7) permits a protective order be issued for "trade secret or other confidential research, development, or commercial information," provided, of course, that the movant shows good cause why such information should be protected. The Advisory Notes accompanying Rule 26(c)(7), however, state that "[t]he courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection." Fed. R. Civ. P. 26(c)(7), Advisory Committee Notes, 1970 Amendments; *see also Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 363 n.24 (1979) (stating

"orders forbidding any disclosure of trade secrets or confidential commercial information are rare") (citations omitted).

In order to show good cause sufficient to justify the issuance of a protective order under Rule 26(c)(7), Microsoft must show that disclosure of any trade secret or commercially sensitive information will place Microsoft at a "competitive disadvantage." *See Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D.Ga. 1980); *see also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (responding to a Freedom of Information Act request, this Court disclosed information because movant failed to show that disclosure of costs and pricing data and proprietary management strategies would "cause substantial harm to the competitive position of the submitting source"). Microsoft must demonstrate to this Court that: (1) the information is highly confidential commercial information or a trade secret, (2) disclosure of the information will cause damage to Microsoft, and (3) the injury associated with the disclosure outweighs the need for access. *See Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 491 (D. Col. 1992). Additionally, the Court should consider the age of the information and the extent to which information is already in the hands of public, when deciding whether to issue a protective order. *See United States v. I.B.M.*, 67 F.R.D. 39, 40 (S.D.N.Y. 1975).

1. Microsoft Has Not Identified Which Documents It Considers Confidential Commercial Information or Trade Secret

Microsoft has not identified to the United States which of the thousands of documents submitted to the United States it considers confidential commercial information or a trade secret. Microsoft suggests that the United States was on notice that certain documents warranted exclusion from the public record because Microsoft marked the sensitive documents it submitted to the United States as "Confidential." (Opposition Memorandum, at p. 43) However, Microsoft marked *every single* document submitted to the United States as "Confidential." Indeed, documents marked "Confidential" include much public material, such as photocopies of articles and advertisements of magazines of general circulation, e.g., *Business Week, Fortune, HomePC, PC Magazine*, and *PC Week*. Furthermore, each of these documents were submitted with a cover letter from Microsoft requesting the United States "accord it the highest level of confidentiality protection available under compulsory process." These blanket requests, applied as they were to plainly public materials and business records alike, left the United States with no

guide as to what documents Microsoft really considered confidential commercial information. As such, Microsoft's blanket assertion that all of its documents are confidential falls short of any legal showing that a protective order is warranted.

2. Disclosing To The Public Microsoft's Exhibits Filed Under Seal Would Not Significantly Injure Microsoft

Microsoft's five exhibits filed under seal, Exhibits A, B, C, D, and G to the Steven Sinofsky Declaration, should be unsealed. If the Court were to unseal these exhibits, Microsoft would not suffer a competitive disadvantage sufficient to justify keeping those documents out of the pubic record. Each document is between three and a half to four years old. The exhibits reflect Microsoft's view of the Internet market and its product design that are almost four years old. It is probable that Microsoft's marketing and design plans have either been implemented or changed during the past four years. The public disclosure of these views will hardly place Microsoft at a competitive disadvantage, while substantially illuminating the issues at dispute in this case for the public.

B. The United States Acted Well Within Its Legal Rights When It Filed Microsoft Documents In The Public Record

1. The United States Is Authorized To Publicly File Documents Produced Under The Antitrust Civil Process Act

Microsoft implies in its Opposition that the United States has abused its statutory authority by filing certain Microsoft documents in the public record. However, Microsoft misstates the United States' statutory rights to use information obtained through a Civil Investigative Demand, issued pursuant to 15 U.S.C. § 1313. "Whenever any attorney of the Department of Justice has been designated to appear before any court, . . . in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case . . . or proceeding as such attorney determines to be required." 15 U.S.C. §1313(d)(1). There is no statutory limitation on the ability of the United States to file, in the public record, materials produced pursuant to the CID; moreover, Microsoft

has cited no authority that limits the United States' right to use the documents in the absence of an appropriately entered protected order.

2. The United States Is Authorized To Publicly File Documents Produced Under The Visitation Letters

The United States has a similar right to use documents and information disclosed by Microsoft in response to the two Visitation Letters. In order to determine or secure compliance with the Final Judgment, Section V of the Final Judgment authorizes the United States to request documents and information from Microsoft. Section V (C) provides:

> No information or documents obtained by the means provided by this Section shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States government, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, ...

As such, because the documents submitted in response to the Visitation Letter were for the purpose of securing compliance of the Final Judgment and Microsoft is clearly a party to this action, the United States acts well within its authority when it submits such documents, without limitation as to confidentiality, in this proceeding.[1]

3. The United States Acted Properly When It Filed Microsoft's Documents Publicly With Its Petition And Memorandum In Support Of Petition

The United States was acting within its right, pursuant to the Antitrust Civil Process Act and the Final Judgment, when it publicly attached relevant Microsoft materials as exhibits to its Petition and Memorandum in Support of the Petition. The United States submitted certain documents to this Court under seal as a *courtesy* to Microsoft, not pursuant to any legal obligation, statutory or otherwise. Seeking to be sensitive to any arguable assertion of current confidentiality, the United States wanted to give Microsoft an opportunity, with respect to

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[1]The Final Judgment clearly contemplates a situation wherein Microsoft is entitled to notice prior to the use of its documents in a legal proceeding. Section V(E) requires Microsoft to identify specific documents that it would assert a claim of protection with a mark that reads: "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure." In that instance, pursuant to Section V(E), Microsoft is entitled to prior notice before those documents can be used by the United States in legal proceedings where Microsoft is *not* a party.

certain documents that might contain commercially sensitive information, to show this Court good cause why a protective order should be issued. Microsoft has failed to make the showing required to keep its documents sealed. Accordingly, the United States should be permitted to exercise its rights under the Antitrust Civil Process Act and the Final Judgment to file all documents in the public record.

4. Documents Filed Under Seal With The United States' Reply Brief Should Be Unsealed

The documents that the United States has filed under seal should be unsealed and submitted in the public record. After all, there exists in this Circuit a "strong presumption in favor of public access to judicial proceedings." *EEOC v. National Children's Center*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). This Circuit has stated that "[t]he courts are public institutions that best serve the public when they do their business openly and in full view." *Id.* at 1408. Moreover, this Circuit has recognized the importance of making court records accessible to the public, especially when the Government is a party to the lawsuit and objects to the sealing of documents. *Id.* at 1409; *see also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (responding to a Freedom of Information Act request, this Court stated that disclosure of potentially confidential information in the hands of the Government is important to "open agency action to the light of public scrutiny"). Further, the fact that public filings refer to exhibits and attachments may enhance the need that the exhibits and attachments be part of the public record. *EEOC v. National Children's Center*, 98 F.3d at 1410-1411. As such, the presumption of openness favors unsealing the Microsoft documents in this matter.

Further, the Microsoft documents the United States' filed under seal with its Reply Brief should be unsealed because the documents, if publicly disclosed, would not seriously injure Microsoft's competitive advantage. For example, the exhibits submitted with the Confidential Declaration of Michael McCarthy include documents that were submitted by Microsoft in prior investigations. Many of those documents are two to four years old and reflect Microsoft's internal marketing and design plans from 1993, 1994, and 1995.

III. CONCLUSION

The United States has not submitted any document that would so detrimentally injure Microsoft's competitive position as to justify denying the public the opportunity to observe, criticize, and form their own opinions of the facts of this case. Accordingly, the United States respectfully requests the Court to unseal all documents filed under seal in the United States' Reply Brief and Microsoft's Opposition Memorandum. Should Microsoft further challenge the United States motion to direct the Clerk of the Court to unseal those documents, the United States requests that it be given the opportunity to reply.

Dated:

Respectfully submitted,

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