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.	**PUBLICLY-FILED VERSION** (Some text has been redacted in accordance with a court order) Civil Action No. 98-1233 (TPJ)

UNITED STATES' AND PLAINTIFF STATES' MEMORANDUM IN SUPPORT OF RENEWED MOTION TO COMPEL MICROSOFT CORPORATION TO PRODUCE DATABASES

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 renewed motion to compel Microsoft Corporation ("Microsoft") to comply with Plaintiffs' Third Joint Request for Production of Documents, Request No. 1.[1]

[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.

I. BACKGROUND

On August 14, 1998, the plaintiffs served their Third Joint Request for Production of Documents on Microsoft. On August 25, 1998, Microsoft formally objected to all of the specific document requests in that request for production. Plaintiffs filed a motion to compel Microsoft's compliance with Requests Nos. 1, 3, 4, and 5 on September 2, 1998. This court held a hearing on that motion on September 3, 1998, and granted plaintiffs' motion with respect to Requests Nos. 3, 4, and 5.

This Court did not rule on Request No. 1 because Microsoft's lawyers represented at the September 3 hearing that they had "offered to work with [plaintiffs] to get them what they think they need within Request Number One" and would "continue to do that." Microsoft's counsel purported to be "kind of surprised, because of that, to find [Request No. 1] in the motion to compel," and claimed that the dispute over that request was "something solvable between the parties." Hrg. Tr. 4. Based on that representation by Microsoft, this Court asked defendant to continue to work with the plaintiffs to get them the materials they needed. Hrg. Tr. 27.

Despite repeated requests by plaintiffs, Microsoft has not complied with Request No. 1. Instead of providing copies of the materials identified, Microsoft has produced stripped-down versions that cannot be used or analyzed in an efficient manner. Plaintiffs have made every effort to work with Microsoft to resolve this matter without the Court's intervention, but those efforts have been fruitless.

II. PLAINTIFFS ARE ENTITLED TO THE MATERIALS SOUGHT BY REQUEST NO. 1

Request No. 1 sought the production of the following materials:

For each database containing data relating to OEMs and any Microsoft operating system product, including but not limited to the "MS Sales," "OEM Query," and "Datamart" databases and any other OEM database relating to Microsoft operating system product license terms, royalty start and end dates, number of units shipped, royalties paid, MDA or other discount levels or discounts earned or credited, sales forecasts, actual revenue received, minimum commitments, sales, or costs, and for the time period January 1, 1990 to present:

a. All data contained herein or other contents thereof, in CD-ROM, machine readable form; and

b. The title and a description of each field contained in the database and a description of the database software, including version number, used to maintain the database.

Third Joint Request, at 4-5. As plaintiffs explained in their original memorandum in support of their motion to compel, "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." Memorandum in Support of Motion to Compel, at 9. The databases sought by Request No. 1 are Microsoft's internal records of such transactions, and are therefore plainly relevant and discoverable.

To date, Microsoft has produced only data from two databases: "MS Sales" and "OEM Query." Those databases were not produced in their original format, and were sent without sufficient documentation or information to permit the plaintiffs to extract any information from them in an accurate way.

"MS Sales" was produced as text-file tables compressed onto three CD-ROMs.

In short, it is as if Microsoft was required to produce to plaintiffs a working car, and instead it produced a box of parts and an incomplete assembly manual.

"OEM Query" was produced as tables formatted in MS Access 97.

It is impossible for us, certainly in the time before trial, fully to understand the contents of OEM Query without receiving it in its original form.

Microsoft did provide plaintiffs with two written pieces of partial documentation on MS Sales and one on OEM Query. In a recent conversation, Microsoft's counsel asserted that these are sufficient to link together the tables within each database. However, the data supplied to us contains tables whose names do not appear in the documentation, and the documentation appears to list tables that were not included in the data we received. The documentation provided also identifies but does not otherwise define or describe the variables included in the tables. Relinking hundreds of tables would likely require weeks of skilled work which would be unnecessary if the databases had been supplied in their original formats.

Microsoft has failed to produce any version of "Datamart."

Receiving these databases in their original form is crucial for plaintiffs' analysis because only the original databases reliably preserve electronic links among the hundreds of tables and hundreds of variables. These databases will be useful to plaintiffs only when Microsoft has produced them in the same form in which it uses them during the ordinary course of business, along with any end-user tools used by Microsoft employees to access and manipulate the data. Microsoft must also provide any existing documentation explaining the use of these applications and some instruction from Microsoft personnel about their use. Microsoft has persistently refused to do any of these things.

Plaintiffs are clearly entitled to each of these items. Rule 34(a) of the Federal Rules of Civil Procedure specifically provides for discovery of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Plaintiffs are not even asking Microsoft to translate this data into some new form; they simply seek the original databases and accompanying tools that are used by Microsoft employees. That request is clearly within the scope of Rule 34.

> In many instances it will be essential for the discovering party to know the underlying theory and the procedures employed in preparing and storing the machine-readable records. When this is true, litigants should be allowed to discover any material relating to the record holder's computer hardware, the programming techniques employed in connection with the relevant data, the principles governing the structure of the stored data, and the operation of the data processing system. When statistical analyses have been developed from more traditional records with the assistance of computer techniques, the underlying data used to compose the statistical computer input, the methods used to select, categorize, and evaluate the data for analysis, and all of the computer outputs normally are proper subjects for discovery.

Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985) (quoting Federal Judicial Center Manual for Complex Litigation ¶ 2.715, at 75 (1977)) (internal quotation marks omitted); cf. Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 WL 649934, at *2 (S.D.N.Y.) (unreported) ("The law is clear that data in computerized form is discoverable even if paper `hard copies' of the information have been produced, and that the producing party can be required to design a computer program to extract the data from its computerized business records, subject to the Court's discretion as to the allocation of the costs of designing such a computer program.").

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court compel Microsoft to comply with the Plaintiffs' Third Joint Request for Documents, Request No. 1.

DATED: October 2, 1998

_____/s/_____
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