IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICROSOFT CORPORATION'S RESPONSE TO MOTIONS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

Pursuant to the Court's October 26, 2000 Order, appellant Microsoft Corporation ("Microsoft") hereby responds to the various motions filed by those seeking leave to participate as *amici curiae*.

The Association for Competitive Technology ("ACT") and the Computing Technology Industry Association ("CompTIA") have sought permission to file a single joint brief in support of Microsoft's appeal. Both parties to No. 00-5212 have consented to participation by ACT and CompTIA as *amici* pursuant to Circuit Rule 29(b), and their motion should be granted.

Although Microsoft is willing to consent to the filing of a single joint brief by entities supporting appellees, Microsoft opposes the eight motions seeking separate *amicus* participation. *First*, Microsoft's competitors—acting in their own name or under the guise of various "trade associations"—should not be allowed to file multiple 25-page *amicus* briefs. If allowed to participate at all, these entities should be required to file a single joint brief, as they were "strongly encouraged" to do by the Court's October 11, 2000 Order. Any other outcome would be unfair to Microsoft and unduly burdensome for the Court. *Second*, efforts by organizations or private individuals with no particularized interest in this case (or the software industry generally) to participate as *amici* should simply be denied, regardless of which side they support.

ARGUMENT

"An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan* v. *CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). Four of the pending motions—those filed by America Online, Inc. ("AOL"), the Computer & Communications Industry Association ("CCIA"), the Project to Promote Competition & Innovation in the Digital Age ("ProComp") and the Software and Information Industry Association ("SIIA")—should be denied, or granted only on condition that these entities file a single joint brief. The other four motions—those filed by the Association for Objective Law ("TAFOL") and the Center for the Moral Defense of

Capitalism ("CMDC"), Lee A. Hollaar, Carl Lundgren and Laura Bennett Peterson—should be denied because the movants have made no showing that they have a particularized interest in this case that warrants their participation as *amici*.

A. If Allowed to Participate as *Amici*, Microsoft's Competitors Should File a Single Joint Brief.

AOL. AOL, the world's leading Internet access provider with more than 25 million subscribers, is one of Microsoft's fiercest competitors. Appellees filed this case largely at the behest of Netscape Communications Corp. ("Netscape"), a company acquired by AOL and in whose shoes AOL "now stands." (AOL Mot. at 3.) Netscape's then CEO, James Barksdale, was appellees' first witness at trial. David Colburn, an AOL senior vice president, was appellees' second witness at trial. AOL's joint venture with Sun Microsystems, Inc. ("Sun"), called iPlanet, is a principal competitor to Microsoft in the supply of software for use in electronic commerce. Sun is itself one of Microsoft's leading competitors in the supply of operating system software; a Sun vice president testified for appellees at trial; and Sun is actively litigating against Microsoft in other venues. AOL, Sun and their allies would be primary beneficiaries of the extreme relief awarded against Microsoft in the district court.

AOL is hardly a "friend of the court" in the traditional sense. To the extent AOL has any "unique expertise" regarding the technical issues in this case (AOL Mot. at 2), that "factual perspective" (*id.* at 3) is already reflected in the record. AOL and Netscape witnesses testified extensively at trial, and it would be totally improper for AOL to attempt to supplement their testimony now with additional facts outside the record. AOL has no unique insight into the legal issues in the case, and its partisan repetition of evidence already volunteered at trial would contribute nothing to the Court's resolution of the case. If allowed

to participate as an *amicus*, however, AOL should at a minimum be required to coordinate its efforts with those of other Microsoft competitors with whom it has a common interest regarding this case, as demonstrated by its membership in ProComp discussed below.

CCIA and SIIA. These two trade associations are dominated by Microsoft's competitors, notably Sun and Oracle Corporation ("Oracle"), one of Microsoft's leading competitors in the supply of database software. Neither CCIA nor SIIA is likely to offer the Court any unique insights on the legal issues presented by Microsoft's appeals. Their joint brief on the issue of remedies below—though characterized as "excellent" by the district court (SIIA Mot. at 2)—was an unseemly effort to fill the record with hearsay accusations against Microsoft drawn almost entirely from newspaper and magazine articles. Their brief to the Supreme Court supporting direct appeal was no different. The record is already riddled with hearsay, and there is no occasion for inviting more at this stage. In any event, the ability of CCIA and SIIA to file joint briefs in the past (*id.*) demonstrates that it is practicable for them to coordinate with Microsoft's other commercial adversaries in filing a single joint brief here (if they are allowed to participate as *amici*). *See* Circuit Rule 29(d) ("*Amici curiae* on the same side must join in a single brief to the extent practicable.").

ProComp. ProComp is a trade association founded in 1998 by Netscape and other Microsoft competitors to provide lobbying and public relations support for the government's assault on Microsoft. ProComp brags that its member companies provided "key witnesses" for appellees' case. (ProComp Mot. at 3.) Those member companies include three of the self-described "Gang of Four," *i.e.*, IBM, Netscape (now AOL), Oracle and Sun, that have sought to coordinate their development and marketing activities "to preempt Microsoft." (DX 1894 at IBM 60969 (a copy of which is annexed hereto as Exhibit A).) Oracle and Sun

are also members of both CCIA and SIIA, and those two trade associations are, in turn, members of ProComp. If allowed to participate as *amici*, there is no reason why these interlocking trade associations cannot coordinate their efforts in this Court.

B. Entities with No Particularized Interest in this Case Should Be Denied Participation as *Amici*.

TAFOL and CMDC. Although these two organizations apparently support Microsoft's effort to overturn the judgment entered below, Microsoft did not consent to their participation as *amici*, consistent with its general position on this issue. Their filing does not specify their particularized interest in this case or otherwise provide a sufficient basis for allowing them to file an *amicus* brief.

Peterson, Lundgren and Hollaar. The Court should continue to reject the entreaties of private individuals to participate in this case as *amici*. *See* Order dated October 10, 2000 (denying motion of Roy A. Day for leave to participate as *amicus*). Neither Ms. Peterson's "analytical framework" (Peterson Mot. at 1) nor Mr. Lundgren's "economic invention" (Lundgren Mot. at 1) merit the attention of the Court. Nothing they have to say will make a meaningful addition to the parties' presentations on the factual and legal issues in the case.

Mr. Hollaar—who has made something of a career of testifying against Microsoft—claims to have "unique insight" (Hollaar Mot. at 2) into the design of Microsoft's operating systems by virtue of having examined their source code. *First*, the record is not open to supplementation with Mr. Hollaar's personal views about the design of Windows 95 and Windows 98. *Second*, Mr. Hollaar's claimed insight is not unique because Edward Felten, one of appellees' three technical experts, studied the source code for Windows 98 and testified at trial based on the results of that study. One of Microsoft's witnesses, Dr. James

Allchin, also testified about Windows 95 and 98 based on his knowledge of their source code. *Third*, Mr. Hollaar has apparently forgotten that he became acquainted with the source code of Microsoft's operating systems in the *Caldera* and *Bristol* cases pursuant to protective orders that strictly prohibit him from using that knowledge for any purpose other than preparing his testimony in *those* cases. The source code for Microsoft's operating systems is extremely valuable intellectual property, and Mr. Hollaar's willingness to breach obligations imposed on him by other federal courts to preserve its confidentiality should not be countenanced.[1]

[1] Microsoft notes that the certificate of service attached to Mr. Hollaar's motion bears a document identification number in the footer that is almost identical to the one on ProComp's, *viz.*, NYB1192923.1 (Hollaar) versus NYB1192197.1 (ProComp). From other information available to Microsoft, these numbers clearly indicate that both documents were prepared by ProComp's counsel in New York. If Mr. Hollaar can share word processing equipment with ProComp's counsel, he can also presumably share his views with them for presentation to the Court (to the extent he is permitted to do so under outstanding Court orders).

* * *

For the foregoing reasons, Microsoft requests that the Court deny the motions for leave to participate as *amici curiae* filed by AOL, CCIA, Lee A. Hollaar, Carl Lundgren, Laura Bennett Peterson, ProComp, SIIA, and TAFOL and CMDC. Alternatively, Microsoft requests that if any of these movants are granted permission to participate as *amici curiae*, they be required to file a single joint brief.

Respectfully submitted,

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October 30, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2000, I caused a true and correct copy of the foregoing Microsoft Corporation's Response to Motions for Leave To Participate as *Amici Curiae* to be served by facsimile and by hand upon:

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