IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212

MICROSOFT CORPORATION,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellees.

Nos. 00-5213

MICROSOFT CORPORATION,
Defendant-Appellant,
v.
STATE OF NEW YORK, et al.,
Plaintiff-Appellees.

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

REPLY OF LEE A. HOLLAAR TO MICROSOFT'S RESPONSE TO MOTIONS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

Microsoft objects to my motion to participate at *amicus* for a number of reasons, which I address here.

Microsoft correctly states that "the record is not open to supplementation with Mr. Hollaar's personal views about the design of Windows 95 and Windows 98." I completely agree that such a submission would be improper, but I do not intend to provide my personal views on the design of Windows in my brief. In my motion where I indicated that I was the only technical expert for the plaintiffs in *Caldera* and *Bristol*, I was simply indicating to the Court that I have a background different from others who might ask to participate as *amicus*.

Instead, I plan to address the technical realities of software integration, applicable not only to Microsoft Windows but to software in general, which will be critically relevant in this Court's resolution of some of the legal issues presented in this case. I have thought a great deal on this matter while working on *Caldera*, and am concerned that the decision of the Court might not rest on a sound technical foundation if the matters that I plan to address in my brief are not brought to the Court's attention.

Microsoft claims that I have

> 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 continanced.

Let me assure the Court that I take my obligations under the protective orders issued in *Caldera* and *Bristol* very seriously, and would do nothing in the filing of my brief to violate

those obligations. To the extent that I comment on anything related to those two cases, it would be from the publicly-available record and not from any confidential information I received as an expert in those cases.

I find Microsoft's claim that I am willing to breach my obligations under the protective orders both unwarranted and insulting. There was no instance in either case where I did not completely protect Microsoft's information from improper disclosure, and there is no reason to believe that I will do so now. For my deposition in *Bristol*, I went so far as to retain separate counsel in case I were to be asked about something that was covered by the *Caldera* protective order. Furthermore, Microsoft's confidential information was returned to them by me immediately at the conclusion of each case and is no longer in my possession.

But if Microsoft is concerned that my brief might contain information governed by the protective orders, I am willing to provide Microsoft with an advance copy of my brief before I show it to anyone other than attorneys assisting me with the brief or file it with the Court. I will remove any information that I obtained under the protective order that is not in the public record and to which Microsoft objects.

Microsoft states that I have "made somewhat of a career of testifying against Microsoft" but forgets that in *Caldera* I was first approached by Microsoft to be their technical expert. I indicated to Microsoft that I had previously been retained by the Department of Justice in a Microsoft matter unrelated to both *Caldera* and this case. After I was contacted by attorneys for Caldera, on a referral by a colleague at Brigham Young University who was already a technical expert for Caldera, I informed Caldera's attorneys that before I could talk with them, I would have to clear it with Microsoft's attorneys because of being previously asked to be an expert for

Microsoft. I again contacted Microsoft's attorneys and indicated that I had been approached by Caldera's attorneys, and Microsoft again asked me to be their technical expert. In the end, both sides presented their arguments to me based on information based on publicly-available information. After my study of both arguments, including some testing of Windows 3.1 and Windows 95, I concluded that Caldera's position had the technical merit while Microsoft's did not, and I became their expert.

Bristol was a case on a very fast trial schedule, and both Microsoft and Bristol went with the technical experts from the *Caldera* case because of our familiarity with the technical underpinnings of the case. In *Bristol*, I retained independent counsel to assure that I would not be providing information covered by the *Caldera* protective order to Bristol and its attorneys.

Far from making a career of testifying against Microsoft, when I was approached by lawyers in the class actions against Microsoft, I indicated that I felt that it would be inappropriate for me to work with them because of the confidential Microsoft information I had learned in *Caldera* and *Bristol*, and that I questioned the merit of their claims.

Microsoft also notes that the certificate of service attached to my motion contains information indicating that it was produced with the assistance of ProComp's counsel in New York. When I discovered that I would have to file my motion that day, rather than at the time of filing the brief, I first contacted an attorney in Washington DC who was a friend, but that attorney's firm does work for Microsoft in an unrelated area. It was suggested that I contact a mutual friend of ours, who is associated with ProComp, and he directed me to ProComp's counsel. ProComp's counsel assisted me in submitting my brief by providing a template for the

proper style of the brief, providing the proper certificate of service, and delivering it to the Court and the parties because there was not time for me to do it by express mailing.

Beyond that, I have no connection with ProComp on this matter, and anticipate that material in my brief, having to do with assisting this Court in understanding the technical nature of integration of different software products, will not be duplicative of ProComp's (or any other *amicus*') brief.

Again, because of my particular perspective and unique expertise surrounding the technological issues in this case that I believe would be helpful to the Court, I ask the Court for leave to file a brief as *amicus curiae*.

Dated: October 30, 2000

Respectfully submitted,

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CERTIFICATE of SERVICE

I hereby certify that on this 30th day of October, 2000, I served a copy via first class mail of the foregoing **REPLY OF LEE A. HOLLAAR TO MICROSOFT'S RESPONSE TO MOTIONS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*** to the following:

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