

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex. rel.*
Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

Next Court Deadline: March 4, 2002
Status Conference

**DEFENDANT MICROSOFT CORPORATION'S STATEMENT
OF FACTS CONCERNING THE NEW WITNESSES ADDED
TO ITS FINAL WITNESS LIST**

In accordance with the Court's instruction yesterday evening, defendant Microsoft Corporation ("Microsoft") sets forth below the facts surrounding its identification of the 23 new witnesses added to its final witness list. Yesterday afternoon, the non-settling States moved to strike 18 of those witnesses, more than half of Microsoft's total number of witnesses. If the Court establishes a briefing schedule on the non-settling States' motion, Microsoft will respond in full at the appropriate time.

Contrary to the non-settling States' suggestion, Microsoft did not withhold from disclosure to the non-settling States the names of witnesses whom Microsoft had previously selected in an effort to obtain some tactical advantage. In nearly every instance, the new witnesses added to Microsoft's final witness list were not selected by Microsoft until the week (and, in most cases, the very day or one day before) the parties exchanged final witness lists. That the non-settling States were able to identify the majority of their fact witnesses when they submitted their proposed remedy to the Court

on December 7, 2001 should come as no surprise. The non-settling States' fact witnesses are employees of the very Microsoft competitors who have spent months crafting the "relief" now advanced by the non-settling States and who would be the principal beneficiaries of such relief if entered by the Court. The non-settling States began working with competitors like America Online, Sun Microsystems, Oracle, Novell and RealNetworks last fall, while Microsoft was still engaged in around-the-clock mediation in an attempt to settle this case in accordance with the Court's instructions.

In contrast, Microsoft's witness list is necessarily reactive and was built from knowledge obtained during discovery from the non-settling States and third parties concerning the issues the non-settling States intend to pursue at trial. Microsoft's final witness list constitutes the best efforts of Microsoft's counsel to represent the interests of its client, while working nonstop since November 6, 2001 to do everything humanly possible to prepare for trial under the aggressive timetable established by the Court.

Until it received the non-settling States' proposed judgment and preliminary witness list on December 7, 2001, Microsoft could not even begin to identify its fact witnesses, particularly its third-party witnesses. The preliminary witness list that Microsoft served on December 12, 2001 thus was Microsoft's first attempt to identify its fact witnesses, after having examined the States' sweeping and draconian proposed remedy and preliminary witness list for only five days. Once Microsoft received the non-settling States' proposed remedy and preliminary witness list, Microsoft (i) served an interrogatory on the non-settling States asking them to describe the subjects that their witnesses will address in their trial testimony, (ii) served subpoenas for documents on the

third-party witnesses identified by the non-settling States, and (iii) began to retain expert witnesses to analyze the many serious defects in the States' remedy proposal.

On January 4, 2002, the non-settling States provided Microsoft with a very general description of the anticipated trial testimony of most, but not all, of their witnesses in response to Microsoft's interrogatory. This interrogatory response gave Microsoft its first notice of the subjects that Microsoft's witnesses will need to address at trial. With that information in hand, Microsoft was finally able to begin in earnest the process of identifying its own fact witnesses. Prior to receiving this interrogatory response, Microsoft had no idea what subjects witnesses like Larry Pearson of SBC, a telephone company, intended to address in their testimony.

Microsoft's Third Party Witnesses. The principal focus of the non-settling States' motion to strike is Microsoft's 15 third-party witnesses. Microsoft began contacting potential third-party witnesses on January 9, 2002, only five days after receiving the non-settling States' initial interrogatory response. After Microsoft personnel made initial contact with the third parties, Microsoft's counsel participated in numerous telephone calls with the third parties' counsel over the course of several weeks. Before agreeing to testify, these third parties quite properly insisted on time to understand the issues in the case and review both the States' remedy proposal and the RPFJ negotiated by Microsoft, the United States and the nine settling States. In many instances, Microsoft visited the third parties to meet personally with the proposed witnesses and assess their value as trial witnesses. Not surprisingly, this process took time—about one month. Knowing that they then would be subject to subpoenas for documents and deposition testimony, not to mention the subject of intense press scrutiny, third parties

did not take lightly the decision to participate in this litigation by producing a witness, and thus most declined to make a final decision until days before Microsoft was required to submit its final witness list.

Nor could Microsoft devote its full attention to the process of identifying third-party witnesses, as the non-settling States were able to do last fall. At the same time that Microsoft was having discussions with potential third-party witnesses, Microsoft also had to (i) respond to the non-settling States' expansive document requests, interrogatories and requests for admission; (ii) engage in time-consuming negotiations to obtain document discovery from the non-settling States' third-party witnesses; (iii) produce reports for its six expert witnesses without knowing the subjects that the non-settling States intend to address through expert testimony; (iv) defend the depositions of 17 Microsoft employees and take the depositions of the non-settling States' 14 fact witnesses; (v) prepare an extensive list of disputed and undisputed facts; and (vi) brief various issues such as press access to depositions, the scope of third-party document productions and intervention motions in Civil Action No. 98-1232. In short, Microsoft was, and is, doing the best it can under very difficult circumstances. As the non-settling States would admit, the current schedule is grueling.

On February 2, 2002, the parties exchanged initial drafts of their disputed and undisputed facts. The non-settling States' draft list brought to light dozens of new factual assertions to which Microsoft must respond at trial, highlighting the need for additional witnesses in new areas. Many of those facts have literally nothing to do with the theory of the case that was tried or the liability determinations affirmed by the Court of Appeals. Indeed, the non-settling States are essentially attempting to present several new

liability cases under the guise of pursuing a remedy for the anticompetitive acts found by the Court of Appeals.

With time running out, Microsoft's counsel worked around-the-clock during the week of February 4, 2002 to identify its third-party witnesses. Testimony from such witnesses is critical in this case to establish that the States' sweeping remedy proposal, if entered by the Court, would damage a broad swath of the computer industry—from system integrators, to OEMs, to ISVs, to customers, etc. In virtually every case, however, the process of obtaining third-party witnesses required “sign-offs” at various levels of the third parties' corporate hierarchies, including approval from the third parties' in-house legal departments. Several witnesses whom Microsoft wished to call declined to testify at the last minute for reasons of corporate policy or legal department objections.

Microsoft sets forth below the date on which each of its third-party witnesses agreed to testify and the date on which Microsoft decided to include that witness on its final witness list. Of course, Microsoft could not make a final decision as to which witnesses to call until it had some understanding of the full universe of third-party witnesses who were willing to testify.

<u>Witness</u>	<u>Agreed to Testify</u>	<u>Selected as Witness</u>
Scott Borduin (Autodesk, Inc.)	February 1, 2002	February 7, 2002
Heather Davisson (Opus-I Inc.)	February 7, 2002	February 7, 2002
Howard Elias (Compaq Computer Corp.)	February 7, 2002	February 7, 2002

Dr. Mark R. Fracasso (Women's HealthCare Associates)	February 7, 2002	February 7, 2002
Brent Frei (Onyx Software Corp.)	January 25, 2002	February 7, 2002
Kenneth Glueck (Oracle Corp.)	(adverse witness)	February 7, 2002
Mitchell Hill (Avanade, Inc.)	February 7, 2002	February 7, 2002
Chris Hofstader (Freedom Scientific, Inc.)	February 5, 2002	February 7, 2002
John R. Johnston (August Capital)	February 8, 2002	February 8, 2002
James Kellner (Applied Systems, Inc.)	January 22, 2002	February 7, 2002
W.J. Sanders III (Advanced Micro Devices, Inc.)	February 8, 2002	February 8, 2002
Philip Schoonover (Best Buy Co., Inc.)	February 5, 2002	February 7, 2002
Steven Silva (Charter Communications Inc.)	February 8, 2002	February 8, 2002
Gregg Sutherland (Qwest Communications International, Inc.)	February 8, 2002	February 8, 2002
Richard L. Ulmer (Unisys Corporation)	February 8, 2002	February 8, 2002

Given the state of flux surrounding these third-party witnesses that existed through the week of February 4, 2002, Microsoft was not in a position to disclose any of its third-party witnesses to the non-settling States until February 8, 2002.

Additional Microsoft Witnesses. The non-settling States also seek to strike three Microsoft employees identified on Microsoft's final witness list—Linda Averett, Gayle Brock and Roger Needham. Each of these witnesses was added to

Microsoft's witness list in response to recent developments in highly expedited discovery.

Microsoft did not know that it might need Linda Averett as a witness until the non-settling States disclosed on January 23, 2002 that they intend to call David Richards of RealNetworks as a witness. Mr. Richards was not included on the non-settling States' preliminary witness list. Even then, Microsoft did not fully understand the factual assertions that the non-settling States intend to advance concerning "media players" until Microsoft received the States' draft list of disputed and undisputed facts on February 2, 2002. Microsoft still has not deposed Mr. Richards, and RealNetworks still has not produced any documents to Microsoft pursuant to Microsoft's recent subpoena. Similarly, Microsoft did not know that it might need Gayle Brock as a witness until Microsoft deposed Peter Ashkin of AOL on January 30, 2002. It was only then that Microsoft learned the full extent to which Mr. Ashkin will testify about events that allegedly occurred while he was employed by Gateway. Ms. Brock was the Microsoft account manager responsible for the Gateway account when Mr. Ashkin worked there. Contrary to the non-settling States' assertion, Microsoft already has produced all documents responsive to the non-settling States' document requests from Ms. Brock's files. Finally, Microsoft did not know that it might need Roger Needham as a witness until January 25, 2002, when it learned through the non-settling States' expert reports the extent to which the States intend to challenge Section III.J of the RPFJ. As with its third-party witnesses, Microsoft did not ultimately decide to include these three Microsoft employees on its witness list until February 7, 2002.

The other five Microsoft employees added to Microsoft's witness list either have been deposed already or will be deposed in the next two weeks. The non-settling States do not seek to strike these witnesses. Microsoft also removed one witness on its preliminary witness list, Yusuf Mehdi, from its final witness list. The non-settling States have not informed Microsoft whether they intend to proceed with Mr. Mehdi's deposition notwithstanding his removal from Microsoft's witness list.

Dated: Washington, D.C.
February 12, 2002

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