

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 MOTION TO COMPEL
AMERICA ONLINE, INC. TO COMPLY WITH SUBPOENAS DUCES TECUM**

Defendant Microsoft Corporation ("Microsoft") hereby moves to compel America Online, Inc. ("AOL") to comply with subpoenas duces tecum issued on November 21, 2001 and December 13, 2001. Given that the discovery cutoff date is less than a month away and that the depositions of the two AOL trial witnesses identified by the non-settling States are scheduled for the coming weeks, Microsoft also requests that the Court shorten the time for AOL to submit its response to this motion.

INTRODUCTION

AOL is a textbook example of a third party that is cooperating with the non-settling States but stonewalling Microsoft on discovery. AOL is one of the principal architects of the extreme "relief" proposed by the non-settling States. On November 16, 2001, AOL submitted a 39-page white paper to the non-settling States setting out AOL's preferred remedy. (*See* Strengthening the Proposed Settlement in *U.S. v. Microsoft* by Fixing the Consent Decree and Adding Other Pro-Competitive Remedies, attached hereto as Exhibit K (filed under seal).)

AOL's proposal bears a striking resemblance to the requested relief that the non-settling States ultimately filed with the Court on December 7, 2001. In addition, two of the trial witnesses on the non-settling States' preliminary witness list are from AOL: Peter Ashkin and John Borthwick. And a third witness on the non-settling States' witness list, James Barksdale, is a member of the AOL Time Warner board of directors. If there were any doubt about where AOL's loyalties lie, AOL has requested that the depositions of Peter Ashkin and John Borthwick occur at the offices of Williams & Connolly LLP, counsel for the non-settling States.

By contrast, AOL has fiercely resisted Microsoft's efforts to obtain legitimate discovery. Microsoft has served two subpoenas for documents on AOL seeking discovery relevant to the non-settling States' over-broad request for relief. Microsoft has bent over backwards in negotiations with AOL's counsel to accommodate AOL's concerns and to limit the scope and burden of these subpoenas. At the conclusion of these negotiations, AOL remains unwilling to provide Microsoft with the discovery to which it is entitled under the Federal Rules of Civil Procedure, instead presenting Microsoft with a take-it-or-leave-it proposal that Microsoft cannot accept. Microsoft thus has no alternative but to seek the assistance of the Court.

BACKGROUND

A. The Subpoenas

Microsoft has served two subpoenas for documents on AOL. Microsoft served the first subpoena on November 21, 2001, before the non-settling States served their preliminary witness list. (A copy of the November 21, 2001 subpoena is attached hereto as Exhibit A.) That subpoena sought documents from AOL because AOL develops so-called "middleware" products that compete with various components of the Windows desktop operating system and because AOL has lobbied the non-settling States to pursue draconian relief in this action. Following

receipt of the non-settling States' preliminary witness list—which identified two trial witnesses from AOL—Microsoft served a second subpoena for documents on AOL on December 13, 2001. (A copy of the December 13, 2001 subpoena is attached hereto as Exhibit B.) That subpoena requested, among other things, all documents concerning (i) communications between Peter Ashkin or John Borthwick and Microsoft and (ii) the subject matters as to which Messrs. Ashkin and Borthwick are expected to testify. The second subpoena also requested that AOL produce all communications between AOL and certain identified third parties concerning Microsoft or this action.

B. AOL's Responses

AOL responded to Microsoft's first subpoena on December 24, 2001. (A copy of AOL's December 24, 2001 response is attached hereto as Exhibit L (filed under seal).) In that response, AOL did not produce any documents, but rather referred Microsoft to a number of Web pages. Significantly, AOL refused to produce any documents concerning its communications with the non-settling States about this action or any documents concerning AOL's efforts to block Microsoft's attempts to enable MSN Messenger users to communicate with AOL Instant Messenger users.

AOL responded to Microsoft's second subpoena on January 11, 2002. (A copy of AOL's January 11, 2002 response is attached hereto as Exhibit C.) In that response, AOL refused to produce all documents concerning communications between Peter Ashkin or John Borthwick and Microsoft. AOL instead agreed to produce such documents only to the extent that they are "in the possession of Messrs. Ashkin and Borthwick" and "they concern the subject matters on which Messrs. Borthwick and Ashkin expect to testify." AOL also refused to produce all documents concerning the subject matters as to which Peter Ashkin or John Borthwick may

testify. AOL instead agreed to produce such documents only to the extent that they are “in the possession of Messrs. Ashkin and Borthwick.” Further, as it had done in its earlier response, AOL refused to produce any documents concerning its communications with the non-settling States or third parties about this action.

As a result of these objections, AOL produced only 851 pages of documents in response to Microsoft’s second subpoena, a document production that fits comfortably in a single redweld folder. To put this document production in perspective, SBC Communications, Inc.—another third party that has agreed to provide a witness for the non-settling States—has produced 27 *boxes* of documents in response to a similar subpoena from Microsoft. And Novell, Inc.—which has also agreed to provide the non-settling States with a witness—has produced seven boxes of documents, plus 14 CD-ROMs (each of which contains more than a box of material if printed), in response to Microsoft’s subpoena. For its part, Microsoft has produced more than 50 *boxes* of documents (approximately 125,000 pages) in response to the non-settling States’ first request for production of documents.

C. The Negotiations

Following the January 7, 2002 Status Conference, Microsoft wrote AOL’s counsel to express concern with AOL’s document production and, in accordance with this Court’s instructions, to inform AOL of the Court’s comments during the January 7 conference about intransigent third parties. (A copy of Microsoft’s January 8, 2002 letter is attached hereto as Exhibit D.) Microsoft then attempted to limit the outstanding issues relating to AOL’s document production in a good-faith effort to reach an agreement and move forward with discovery.

In a letter dated January 14, 2002, Microsoft addressed AOL’s response to Microsoft’s first subpoena. (A copy of Microsoft’s January 14, 2002 letter is attached hereto as

Exhibit E.) Microsoft explained that the non-settling States' over-broad discovery requests and proposed relief had made instant messaging software interoperability an appropriate area of discovery. Nevertheless, to minimize AOL's burden, Microsoft stated that AOL could limit its search for documents concerning AOL's efforts to block MSN Messenger users from communicating with AOL Instant Messenger users to the files of eight specified individuals. Microsoft also reaffirmed its request that AOL produce all documents concerning its communications with the non-settling States about this action.

In a letter dated January 15, 2002, Microsoft addressed AOL's response to Microsoft's second subpoena. (A copy of Microsoft's January 15, 2002 letter is attached hereto as Exhibit F.) Microsoft stressed that it is entitled to *all* documents concerning communications between Peter Ashkin or John Borthwick and Microsoft in the possession of either Mr. Ashkin or Mr. Borthwick, not simply those documents that AOL determines relate to those witnesses' expected testimony. Microsoft made clear that is entitled to such discovery not just to prepare to cross-examine Messrs. Ashkin and Borthwick at trial, but also to discover other evidence that may support Microsoft's defense in this action. Microsoft further emphasized that AOL cannot limit its search for documents concerning the subjects as to which Peter Ashkin or John Borthwick may testify to the files of Messrs. Ashkin and Borthwick themselves, but rather must search the files of other AOL employees likely to have responsive documents. Microsoft proposed that AOL search the files of only eleven additional AOL employees for such documents. Finally, Microsoft reiterated its request for documents concerning AOL's communications with the non-settling States and certain third parties, but stated that it was willing to agree on a limited search group for such documents.

Counsel for Microsoft and AOL discussed the subpoenas on January 17, 2002. Microsoft again made every effort to accommodate AOL's concerns. First, in response to AOL's objection that it should not be required to produce documents concerning communications with Microsoft that have no relation to this action, Microsoft agreed that AOL could limit its document production to communications that relate to subjects encompassed by the non-settling States' proposed final judgment. Second, Microsoft agreed to remove one of the eleven AOL employees from the search group of individuals whose files need to be searched for documents concerning the expected testimony of Messrs. Ashkin and Borthwick. Third, although Microsoft initially proposed that AOL search the files of only three AOL employees (Paul Cappuccio, Randall Boe and Barry Schuler) for documents concerning communications with the non-settling States and third parties, Microsoft agreed to remove Paul Cappuccio, the general counsel of AOL Time Warner, from the search group as an accommodation to AOL's counsel. Fourth, Microsoft agreed to send a letter to AOL's counsel addressing in writing certain questions that AOL had posed during the telephone call. (A copy of Microsoft's January 18, 2002 letter is attached hereto as Exhibit G.)

During the January 17 telephone conference, AOL continued its stonewalling, refusing to budge an inch from the extreme position it had taken in its original responses to Microsoft's subpoenas. AOL stated, however, that it would respond to Microsoft's proposed compromises on January 18 or by January 21 at the latest. (*See* Microsoft's January 21, 2002 letter, attached hereto as Exhibit H.) AOL ultimately did not respond until January 22, and that response was inadequate. (A copy of AOL's January 22, 2002 letter is attached hereto as Exhibit I.)

Despite Microsoft's best efforts to arrive at a compromise, AOL did not agree in its January 22 letter to any of Microsoft's proposals. AOL also stated that it would not agree to produce *any* additional documents unless Microsoft bowed to AOL's unreasonable demands that

- (i) Microsoft agree in writing not to serve any additional document subpoenas on AOL and
- (ii) Microsoft relieve AOL of its obligation to provide a privilege log under the Federal Rules of Civil Procedure.

The positions staked out by AOL in its January 22 letter were nothing short of extreme. For example, Microsoft had proposed that AOL produce all documents concerning communications between Peter Ashkin or John Borthwick and Microsoft in the possession of Messrs. Ashkin and Borthwick that relate to the subjects addressed in the non-settling States' proposed judgment. This proposed compromise was more than reasonable, yet AOL rejected it. Instead, AOL offered to produce responsive documents in the possession of Messrs. Ashkin and Borthwick only to the extent that those documents relate to the subject matter of their testimony or "reference" the non-settling States' proposed judgment. In short, although documents concerning communications between the two AOL trial witness and Microsoft on subjects addressed in the non-settling States' proposed judgment are clearly relevant, AOL refused to produce them unless AOL determined that the documents relate to the subject matters of its witnesses' testimony or the documents expressly "reference" the non-settling States' proposed judgment. When Microsoft called AOL's counsel at 3:20 p.m. on January 23 to inform AOL that Microsoft intended to file the instant motion to compel, AOL finally retreated from this untenable position.

Given that the discovery cutoff date is less than a month away, Microsoft cannot waste any more time on what have proven to be largely futile negotiations. Microsoft thus files

this motion to compel AOL to produce documents responsive to Microsoft's subpoenas, as limited by Microsoft's proposed compromises set forth above.

ARGUMENT

The Federal Rules of Civil Procedure provide that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party” FED. R. CIV. P. 26(b)(1). AOL does not object to Microsoft's outstanding discovery requests as unduly burdensome. Nor could it plausibly do so given AOL's vast resources and prominent role in this litigation. Rather, AOL asserts that Microsoft's outstanding requests are not relevant for purposes of discovery. “The concept of relevancy is broadly construed at the discovery stage of an action, and discovery rules are to be accorded liberal treatment.” *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 59 (D.D.C. 1984). This is “particularly” the case in “antitrust and similarly complex litigation.” *United States v. AT&T*, 461 F. Supp. 1314, 1341 (D.D.C. 1978). Indeed, “[t]he rules permitting discovery ‘often allow extensive intrusion into the affairs of both litigants and third parties.’” *Tavoulaareas v. Wash. Post Co.*, 111 F.R.D. 653, 658 (D.D.C. 1978) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984)).

There are three outstanding issues relating to Microsoft's two subpoenas for documents. Throughout negotiations, AOL refused to compromise on these issues, while Microsoft continued essentially to negotiate against itself. Only after Microsoft had reached its rock-bottom position on each issue did AOL move at all and then not nearly far enough for the parties to reach an agreement. If Microsoft were to accept AOL's current proposal, Microsoft would forgo discovery to which it is entitled under the Federal Rules of Civil Procedure—discovery that is necessary for Microsoft to defend itself against the non-settling States' extreme “relief,” much of which is designed to benefit AOL.

By stretching the negotiations out until the end of January—indeed, until minutes before Microsoft filed the instant motion—AOL has been able to run out the clock such that less than a month remains until the discovery cutoff date and even less time remains until the depositions of the two AOL witnesses. (Peter Ashkin’s deposition is scheduled for January 30, and John Borthwick’s deposition is scheduled for February 6.) As one of the principal sponsors and beneficiaries of the non-settling States’ proposed judgment, AOL should not be permitted to evade its discovery obligations by claiming that it is a neutral third party in this litigation. Nor should Microsoft be required to accept the unreasonable limits that AOL has attempted to impose unilaterally on Microsoft’s right to discovery.

A. Documents Relating to the Testimony of Messrs. Ashkin and Borthwick

In its December 13 subpoena, Microsoft requested “[a]ll documents concerning the subject matters as to which Peter Ashkin or John Borthwick may testify in these Actions.” AOL initially took the position that it would search for responsive documents only in the files of Messrs. Ashkin and Borthwick themselves. Microsoft subsequently learned that Mr. Ashkin is expected to testify about his experience prior to joining AOL, and thus Microsoft agreed to limit its request that AOL search the files of additional individuals to documents concerning Mr. Borthwick’s anticipated testimony. In an effort to reach a compromise, Microsoft proposed that AOL search for responsive documents in the files of only eleven additional people: the nine individuals identified on an organizational chart that AOL produced and identified as relevant to Mr. Borthwick’s testimony, plus Barry Schuler (CEO of AOL) and Jim Bankoff (President of AOL Web Properties and Netscape). (A copy of this organizational chart is attached hereto as Exhibit M (filed under seal).) When AOL complained about the size of the search group, Microsoft agreed that AOL need not search the files of Jim Bankoff as a compromise. AOL

ultimately agreed to search for responsive documents in the files of only five of the nine people identified on the relevant organizational chart and flatly refused to search the files of Mr. Schuler for documents relevant to Mr. Borthwick's testimony.

Although Microsoft expressed a willingness to negotiate the identity of the people included in the search group, AOL's proposal—which cuts Microsoft's proposed search group in half—is not a fair compromise. The nine people identified on the relevant organizational chart all possess documents relevant to Mr. Borthwick's anticipated testimony. AOL does not contend otherwise. Microsoft is also entitled to relevant documents from the files of AOL's CEO, Barry Schuler. Given the interests at stake in this litigation, a search group of ten people is not too large for a company with the enormous resources of AOL Time Warner. Indeed, AOL Time Warner recently hired two of the nation's leading law firms, Kirkland & Ellis and Cravath, Swaine & Moore, to prosecute a private antitrust action against Microsoft on behalf of Netscape, an AOL subsidiary. By contrast, in response to the non-settling States' document requests, Microsoft agreed to search the files of 56 Microsoft officers and employees for responsive documents. Given that less than a month remains until the discovery cutoff date, Microsoft cannot agree to defer searches of other employees' files until after AOL has produced documents from its proposed search group of only five people that it has selected.

B. Communications with the Non-Settling States and Trade Associations

Microsoft's November 21 and December 13 subpoenas both requested documents concerning AOL's communications with the non-settling States and certain third parties about Microsoft and this action. Microsoft has subsequently limited these requests to communications with the non-settling States and three specific trade associations, the Computer and Communications Industry Association ("CCIA"), the Project to Promote Competition and Innovation in

the Digital Age (“ProComp”) and the Software and Information Industry Association (“SIIA”). These trade associations have lobbied the non-settling States to pursue extreme relief in this action on behalf of Microsoft’s competitors, including AOL. For example, on November 4, 2001, CCIA, ProComp, SIIA, AOL, Sun Microsystems and Oracle jointly submitted a red-lined version of the Proposed Final Judgment (“PFJ”) agreed to by the United States and Microsoft to the non-settling States that critiqued various provisions of the PFJ. (A copy of this red-lined version of the PFJ is attached hereto as Exhibit N (filed under seal).)

In response to Microsoft’s requests, AOL proposed that it search the files of only Barry Schuler and Randall Boe (Microsoft agreed to remove Paul Cappuccio from the search group as a professional courtesy to AOL’s counsel, who claimed that including Mr. Cappuccio in the search group would create serious issues for AOL Time Warner) for documents concerning communications between AOL and the non-settling States “regarding their remedy proposal in the aftermath of Microsoft’s settlement with the other plaintiffs.” AOL made this proposal contingent, however, on Microsoft’s agreement that AOL need not provide a privilege log.

This proposal is inadequate for three reasons. First, Microsoft is entitled to documents concerning *all* communications between AOL and the non-settling States about this action, not simply communications that relate to the non-settling States’ remedy proposal “in the aftermath of Microsoft’s settlement with the other plaintiffs.” Second, Microsoft is entitled to documents concerning communications between AOL and the above three trade associations that relate to this action. Third, Microsoft is entitled to a privilege log under the Federal Rules of Civil Procedure. Rule 45(d)(2) provides:

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported

by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Microsoft should not be forced to abandon its rights as a litigant under the Federal Rules of Civil Procedure in order to obtain discovery to which it is plainly entitled.

As Assistant Attorney General Charles A. James recently observed in the Fall 2001 issue of *Antitrust*, several Microsoft competitors have advocated remedies in this action that “would bring about a wholesale emasculation of Microsoft, while providing their own companies specific strategic, technological, and financial advantages.” Charles A. James, *The Real “Microsoft” Case and Settlement*, 16 ANTITRUST 58, 64 (ABA Fall 2001) (attached hereto as Exhibit J). AOL is one of those competitors. Assistant Attorney General James further stated:

In sum, it is understandable why competitors would want Microsoft to unbundle its integrated products, refrain from all collaborative activity, and widely disseminate its proprietary intellectual property. Those requirements, however, are largely beyond the scope of the court of appeals’ decision or otherwise do not advance the public goals. The antitrust laws protect competition, not competitors.

Id. at 65-66. Microsoft is entitled to explore in discovery whether the “relief” the non-settling States have proposed was in fact crafted by AOL (and by trade associations like ProComp acting on AOL’s behalf) with an eye *not* towards providing benefits to consumers—the intended beneficiaries of the antitrust laws—but rather towards hobbling Microsoft in the marketplace and providing AOL with specific strategic, technological and financial advantages. AOL should not be permitted to shield its activities from discovery by using its captive trade associations to lobby the non-settling States. There can be no doubt that AOL and trade associations like ProComp have an identity of interests in this action. In fact, both AOL and ProComp are represented by the same law firm, Kirkland & Ellis.

C. Instant Messaging Software Interoperability

In its November 21 subpoena, Microsoft requested “[a]ll documents concerning actions taken by AOL to block Microsoft’s attempts to enable MSN Messenger users to communicate with AOL Instant Messenger users.” Microsoft subsequently agreed that AOL could limit its search for responsive documents to only eight individuals. AOL has flatly refused to produce any documents in response to this request.

Under the non-settling States’ proposed judgment, two principal issues are interoperability between client and server computers and compliance with industry standards, both of which are implicated by this request. The non-settling States have identified instant messaging software as a kind of platform software and have served three requests for production of documents on Microsoft directed specifically at instant messaging software, including one request that asks Microsoft to produce “[a]ll documents discussing competition between any Microsoft instant messaging software and any other software product.” Microsoft is entitled to explore in discovery actions that AOL has taken to prevent MSN Messenger from interoperating with AOL Instant Messenger, particularly given AOL’s commanding lead in the number of users of instant messaging software. AOL should not be permitted to argue that Microsoft should be required to disclose all of its intellectual property to enable other software to interoperate with Windows, while AOL itself is taking affirmative steps to prevent competing instant messaging software from interoperating with its market-leading instant messaging software. Such documents are unquestionably relevant for purposes of discovery.

CONCLUSION

The non-settling States have been permitted to conduct free-ranging, essentially unbounded discovery into numerous aspects of Microsoft’s business. The adversary system and

basic notions of fairness require that Microsoft be permitted to conduct adequate discovery of the third parties whose interests the non-settling States are championing here and who are providing trial witnesses for the non-settling States. Simply stated, Microsoft is entitled to much more discovery from AOL than the few tidbits that AOL has grudgingly offered to provide after weeks of negotiations, and Microsoft should not be required to forgo all future document discovery from AOL as a condition to obtaining AOL's cooperation with valid discovery requests.

The Court therefore should order AOL to produce (i) all documents concerning the subjects as to which Mr. Borthwick may testify in the possession of Mr. Borthwick, the nine people identified on the organizational chart attached hereto as Exhibit M, and Barry Schuler; (ii) all documents concerning communications between AOL and the non-settling States, CCIA, ProComp or SIIA relating to this action in the possession of Barry Schuler or Randall Boe; and (iii) all documents concerning actions taken by AOL to block Microsoft's attempts to enable MSN Messenger users to communicate with AOL Instant Messenger users in the possession of the eight individuals identified in Microsoft's January 14 letter attached hereto as Exhibit E. Because the deposition of John Borthwick is currently scheduled for February 6, Microsoft respectfully requests that AOL be ordered to produce these documents by February 1.

In the alternative, the Court should preclude the testimony of any witness from AOL and any of its affiliates. At the January 7 Status Conference, the Court issued a stern warning to recalcitrant third parties:

I want to make it clear that the third parties can't cooperate with the states and then turn around and stonewall or delay Microsoft. If that happens, the court can preclude the testimony from these third parties.

(Jan. 7, 2002 Tr. at 12.) Ignoring the Court's warning, AOL has delayed Microsoft's efforts to obtain legitimate discovery at every turn. In response to such a cynical manipulation of the discovery process, the Court can—and should—preclude the trial testimony of Peter Ashkin and John Borthwick.

Dated: Washington, D.C.
January 23, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2002, I caused a true and correct copy of the foregoing Defendant Microsoft Corporation's Motion To Compel America Online To Comply with Subpoenas Duces Tecum (and accompanying public and sealed exhibits) to be served by facsimile and by hand upon:

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