

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

**ORDER**

Before the Court is Microsoft's "Notice and Informal Memorandum in Support of its Objections to the Non-Settling States' Designations of Depositions and Trial Testimony" and the Litigating States' response thereto. Microsoft's memorandum sets forth its objection to the Litigating States' April 6, 2002, designation of portions of deposition testimony for eighteen additional witnesses.<sup>1</sup> The Litigating States designated these portions of deposition testimony with the intention that the testimony would be admitted as part of their case-in-chief. Microsoft's objection is based upon the fact that Plaintiffs failed to timely identify any of these eighteen additional witnesses on their witness list or as witness to be presented via deposition

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<sup>1</sup>Microsoft also objects to Plaintiffs' designation of portions of testimony from the "Liability Phase" of the trial which, although already in the record of this case, Plaintiffs would like to call to the Court's attention for consideration in conjunction in this "Remedy Phase." As indicated orally in Court, Plaintiffs shall provide the Court with copies of these portions of testimony, and Microsoft shall provide the Court with any counter designations of testimony from the "Liability Phase." The parties' designations of prior testimony may be accompanied by succinct argument which addresses the relevance of the prior testimony to the remedy proceedings, as well as whether consideration of such evidence runs contrary to the already-established law of the case. Following receipt of this testimony and on that more complete record, the Court will make a case-by-case determination as to whether the designated portions of testimony may properly be considered in conjunction with the remedy proceedings.

testimony. The parties' filings were supplemented by oral argument presented to the Court on the morning of April 10, 2002, the record of which is incorporated herein by reference.

In response to the parties' filings and argument, the Court, also on the morning of April 10, 2002, orally presented a detailed procedural history of the recent litigation schedule in this case, identifying the applicable deadlines for the designation of witnesses to be presented live or via deposition, as well as the details relevant to the Court's adoption of those deadlines. By the above reference, the Court incorporates its comments to the parties made on the record and in open court on April 10, 2002. Following this colloquy and upon consideration of the parties' respective proffers, the Court found that Microsoft would suffer significant prejudice if Plaintiffs were permitted to present the deposition testimony of eighteen untimely designated witnesses.

As a compromise, Plaintiffs proposed that they offer into evidence the deposition testimony of only those witnesses which would be presented by Microsoft. This proposal reduced the number of potential witnesses to be presented by deposition from eighteen to a maximum of thirteen. Following further discussion with the parties, the Court determined that any deposition testimony which was appropriate for introduction in the ordinary course of cross-examination of Microsoft's witnesses would be accepted into evidence as permitted by the Federal Rules of Evidence. The Court further determined that, to the extent that Plaintiffs were unable to introduce portions of depositions in the normal course of cross-examination, those designated portions of the witness's deposition, along with Microsoft's counter designations should be presented to the Court for a determination on a case-by-case basis.<sup>2</sup>

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<sup>2</sup>The Court issues this Order not to augment or supplement the discussion on the record of April 10, 2002, but to memorialize Court's discussion with the parties, as well as the procedure ultimately instituted by the Court.

Based on the foregoing, it is this 12th day of April, 2002, hereby

**ORDERED** that Microsoft's objections are SUSTAINED.

**SO ORDERED.**

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COLLEEN KOLLAR-KOTELLY  
United States District Judge