IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK ex rel. Attorney General DENNIS C. VACCO, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' RESPONSE TO MICROSOFT'S MOTION IN LIMINE TO EXLUDE PORTIONS OF THE DIRECT TESTIMONY OF DR. AVADIS TEVANIAN, JR.

Defendant Microsoft Corporation late Friday filed a motion seeking to exclude specific portions of Dr. Avie Tevanian's testimony from evidence on three different theories: (1) that certain parts constitute inadmissible hearsay; (2) that some of his assertions may only be proffered by a witness qualified as an expert; and (3) that some of his testimony is not based on his personal knowledge. Each of these arguments is without merit.[1]

[1]The current motion is the second time that Microsoft has filed a motion *in limine* on the eve of a witness' appearance in court seeking to exclude certain portions of that witness' direct

I. Dr. Tevanian's Testimony Regarding Compaq, AVID, and TrueVision is Not Inadmissible Hearsay

Similar to its motion *in limine* challenging portions of the direct testimony of James Barksdale, Microsoft asserts that certain portions of Dr. Tevanian's testimony are inadmissible hearsay.[2] Microsoft attacks a number of paragraphs of Dr. Tevanian's testimony relating to Apple's dealings with original equipment manufacturers ("OEMs")--Compaq, AVID, and TrueVision--on the grounds that these paragraphs contain hearsay statements made by OEM employees to Apple employees about the reasons they chose not to do business with Apple.

Microsoft's hearsay objection fails on two grounds. First, the Court is entitled to conclude, and there is a basis for doing so, that the statements possess sufficient guarantees of trustworthiness under Fed. R. Evid. 807. Second, the statements of the OEMs are admissible because they come within the exception to hearsay rules permitting statements about "the declarant's then existing state of mind." FED. R. EVID. 803(3).[3] Dr. Tevanian is offering these

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testimony. Microsoft has been in possession of all of the plaintiffs' witnesses' written testimony -- including Dr. Tevanian's -- for several weeks now. There is no reason for Microsoft to wait until the last minute to file such motions, and their doing so imposes significant burdens on plaintiffs to respond in a very short time and on the Court to address the motions in a very limited time. Plaintiffs therefore request that the Court order Microsoft to file *any* objections to the remaining witnesses' written direct testimony by Friday, November 6, 1998.

[2] Many of the statements asserted by Microsoft to be hearsay are based both on Dr. Tevanian's discussions with and the sworn deposition testimony of another Apple employee, Phillip Schiller, to which Dr. Tevanian refers in his testimony. Microsoft has previously acknowledged that because of the limits the court has placed on the number of witnesses the parties may present, testifying witnesses should be given some latitude to report information obtained from other people in their companies. Moreover, such information is particularly trustworthy where as here it is in the form of sworn deposition testimony.

[3] A number of the paragraphs challenged by Microsoft contain no hearsay statements by OEMs whatsoever, *see* Tevanian Testimony ¶¶ 115, 122, 126, 127, 133, and 138, and therefore do not need to qualify for the "state of mind" exception to the hearsay rule.

statements to show that the "[OEMs] and independent software vendors who support, or who are considering supporting, QuickTime *fear* reprisal from Microsoft." Tevanian Testimony ¶ 115 (emphasis added). Statements that demonstrate that the declarant is afraid are clearly covered by the 803(3) exception to the hearsay rule. *See United States v. Alzanki,* 54 F.3d 994, 1008 (1st Cir. 1995); *United States v. Joe,* 8 F.3d 1488, 1493 (10th Cir. 1993); *United States v. Liu,* 960 F.2d 449, 452 (5th Cir. 1992); *Barber v. Scully,* 731 F.2d 1073, 1074-75 (2d Cir. 1984).

II. Dr. Tevanian's Lay Opinions Regarding Market Definition and Microsoft's Market Power Are Admissible

Microsoft next seeks to exclude Dr. Tevanian's testimony concerning the definition of certain markets and Microsoft's power within those markets. Microsoft argues that testimony related to market definition and market power "is reserved to qualified expert economists, not fact witnesses such as Dr. Tevanian." Def.'s Mot. at 3. This reasoning is flawed for two reasons. First, Microsoft misconstrues the nature of Dr. Tevanian's discussion of Microsoft's power in various markets. Dr. Tevanian's testimony shows what Apple perceived and understood Microsoft's power to be. The perceptions of participants in the computer software industry about Microsoft's actions and the consequences of those actions is direct evidence of Microsoft's market power, and thus is relevant to proving the allegations in the Complaints. Dr. Tevanian's opinions about the definitions of various markets and Microsoft's power in those markets is evidence of his own company's state of mind.

Second, the fact that the plaintiffs have not sought to qualify Dr. Tevanian as an expert does not preclude him from offering a lay opinion on the proper definition, from his experienced perspective in the business, of various markets in the computer software industry, or on Microsoft's power within those markets. A lay opinion is admissible so long as it is "(a)

rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." FED. R. EVID. 701. Several Circuit Courts of Appeals have interpreted Rule 701 to permit "a lay witness with first-hand knowledge [to] offer an opinion akin to expert testimony in most cases, so long as the trial judge determines that the witness possesses sufficient relevant and specialized knowledge to offer the opinion." *Asplundh Mfg. Division v. Benton Harbor Eng'g*, 57 F.3d 1190, 1201-02 (3d Cir. 1995); *see also United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) ("No longer is lay opinion testimony limited to areas within the common knowledge of ordinary persons. Rather, the individual experience and knowledge of a lay witness may establish his or her competence, with or without qualification as an expert, to express an opinion on a particular subject . . . ."); *Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir. 1983) ("[A] layman can under certain circumstances express an opinion even on matters appropriate for expert testimony."); *Farner v. Paccar*, 562 F.2d 518, 529 (8th Cir. 1977).

Dr. Tevanian's testimony about markets and market power within the computer industry easily satisfies the Rule 701 standard as articulated in cases such as *Asplundh*. Dr. Tevanian has a doctorate in computer science, and during the past 10 years he has held senior executive positions in the software engineering departments of NeXT and Apple. *See*Tevanian Testimony ¶¶ 2-4. These facts indicate that Dr. Tevanian has "a reasonable basis grounded either in experience or specialized knowledge for arriving at the opinion that [he] expresses." *Asplundh*, 57 F.3d at 1201.[4] Moreover, some of Dr. Tevanian's statements and conclusions are based on

[4] Thus, Dr. Tevanian's lack of training in economics and antitrust law--to which Microsoft repeatedly refers in its brief--is relevant, if at all, only to the weight of his testimony, not to its admissibility. It does nothing to undermine the relevant and specialized knowledge he

actual market share research conducted by Apple and its consultants, and the fruits of this research is likely to be of considerable use to the court. *See, e.g,* Tevanian Testimony ¶ 14 (opinion regarding market share in desktop operating systems based on research performed by Dataquest, an independent market research firm).

The cases cited in Microsoft's brief do not support its sweeping claim that all discussion of market definition or market power is "reserved" for experts. Rather, they stand for the much narrower proposition that a defendant is entitled to summary judgment if the *only* evidence submitted by the plaintiff related to market definition or market power is lay opinion testimony. *See, e.g., Colsa Corp. v. Martin Marietta Servs., Inc.,* 133 F.3d 853, 855 n.4 (11th Cir. 1998) (summary judgment proper where neither of the plaintiff's two witnesses regarding the relevant market were experts); *American Key Corp. v. Cole National Corp.,* 762 F.2d 1569, 1579-80 (11th Cir. 1985) (baseless lay opinion regarding relevant market insufficient to avert summary judgment for defendant);[5] *Forro Precision, Inc. v. IBM,* 673 F.2d 1045, 1059 (9th Cir. 1982) (summary judgment proper against a plaintiff who presented no "expert testimony or other credible evidence to support an inference of market power"). These holdings are inapplicable to this case. Dr. Tevanian's lay opinions and observations about Microsoft's market power are admissible because they are based on his personal education and experience in the computer

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possesses from his experience and the conclusions he can draw from that knowledge.

[5] The language of the *American Key* opinion does at times refer to the lay opinion offered by the plaintiff in that case as "inadmissible," but it is clear from context that the reason the lay opinion is inadmissible is not merely because it is offered by a lay person rather than an expert, but rather because it is a *baseless* lay opinion. The essential holding is that when a lay opinion related to market power is offered "*without support*, [it] is . . . insufficient to raise an issue of fact" so as to avoid summary judgment. *American Key,* 762 F.2d at 1580 (emphasis added).

industry. His testimony is a well-grounded and useful complement and prelude to the expert testimony to be introduced later in this case.

III. Personal Knowledge

Microsoft's final objection to Dr. Tevanian's testimony is that certain passages consist of "speculation regarding Microsoft's intentions [and] predictions as [to] what Microsoft will do in the future." Microsoft seeks to exclude these passages on the grounds that Microsoft's intentions and plans are not within Dr. Tevanian's personal knowledge, and that therefore Federal Rule of Evidence 602 bars him from testifying about them.

This argument entirely misconstrues Dr. Tevanian's testimony. To the extent that Dr. Tevanian refers to Microsoft's intentions or plans at all,[6] his testimony shows what Apple perceived Microsoft's intentions and plans to be, and what his knowledge and experience lead him to conclude that Microsoft is capable of doing. Dr. Tevanian has personal knowledge about Apple's observations and perceptions of events, and these observations and perceptions are essential to a full presentation and clear understanding of his testimony and to "the determination of a fact in issue," FED. R. EVID. 701, namely, Microsoft's use of its power to hinder the ability of firms in the computer industry to innovate outside the Microsoft-defined parameters of the Windows operating system.

[6] Many of the passages that Microsoft claims contain "speculation" by Dr. Tevanian about Microsoft's intentions or plans manifestly contain no such thing. *See, e.g,* Tevanian Testimony ¶¶ 14, 20, 30-32, 35, 78, 109, 142, 143, and 146. These passages simply describe either (1) Apple's understanding of Microsoft's role in the software marketplace, or (2) actions actually taken by Microsoft and Dr. Tevanian's views about the impact of those actions on Apple.

IV. Conclusion

For the foregoing reasons, the plaintiffs respectfully request that the court deny Microsoft's motion *in limine*, because any testimony that is hearsay is admissible pursuant to the 803(3) exception and/or Rule 807. Further, Dr. Tevanian's lay opinions based on his observations, education, and experience in the computer industry regarding market definition and market power are admissible. Finally, Dr. Tevanian's testimony regarding Apple's understandings of Microsoft's plans and intentions are based on personal knowledge and are therefore admissible.

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Respectfully submitted,.

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