

Court Rejects MS Motion against Special Master

UNITED STATES OF AMERICA,
Petitioner,
v.
MICROSOFT CORPORATION,
Respondent.

Civil Action 94-1564

MEMORANDUM AND ORDER

The Court has before it the motion of Microsoft Corporation to revoke the reference to a special master made by the Order of December 11, 1997, and to stay further proceedings before him.

The Court appointed a special master for essentially all of the reasons set forth by the government in its succinct and well-stated opposition to the motion, and will therefore deny the motion without further comment. It observes only that the Final Judgment of August 21, 1995, consists of 15 pages setting forth multiple obligations voluntarily undertaken by defendant Microsoft Corporation to settle serious antitrust allegations in this action in advance of trial and "without . . . adjudication of any issue of fact or law." The reference to a special master of the task of assisting the Court in making findings with respect to the effect to be given a discrete provision thereof does not, in this Court's opinion, represent any abdication of its Article III authority.

In its reply to the government's opposition, however, Microsoft has reiterated certain accusations made previously to the Special Master himself (and released to the Press) questioning the Special Master's integrity and impartiality. The bases given for these accusations are both trivial and altogether non-probative. They are, therefore, defamatory, and the Court finds that they were not made in good faith. Had they been made in a more formal manner they might have incurred sanctions. See Fed. R. Civ. P. 11. [1]

Notwithstanding Microsoft's failure to offer evidence, sworn or unsworn, to give substance or credence to its innuendo of bias or prejudice, Professor Lessig has, at the Court's request, submitted his own declaration. The Court credits both his explanation of the facts bearing on the circumstances in which the allegedly compromising utterances were made, and his assurances of impartiality with respect to the matters entrusted to him. Those assurances are consistent with those given earlier and informally to the Court before Professor Lessig's appointment as Special Master was made.

The Court concludes that no basis has been shown, pursuant to 28 U.S.C. [Section] 455 or otherwise, for Professor Lessig to recuse, or for the Court to withdraw the reference to the Special Master. It is, therefor, this 14th day of January, 1998

ORDERED, that the motion of respondent Microsoft Corporation to revoke the reference to the Special Master made by its order of Reference of December 11, 1997, is denied; and it is

FURTHER ORDERED, that the motion of respondent to stay further proceedings before the Special Master, and for certification pursuant to 28 U.S.C. [Section] 1292(b) is denied.

Thomas Penfield Jackson
U.S. District Judge

ENDNOTES

1. The Court notes and considers it significant that Microsoft has not made those accusations under oath. Moreover, the facts given to support them would be insufficient in any event had they been made by affidavit pursuant to 28 U.S.C. [Section] 144.

FILED JAN 14 1998