

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION, *et al.*

Respondents.

Case No. 2:15-cv-00102 RSM

**UNITED STATES' RESPONSE TO
THREE MOTIONS FOR LEAVE TO
FILE AMICI CURIAE BRIEFS (DKT.
NOS. 152, 155 & 165)**

NOTED FOR: November 11, 2016

The United States respectfully requests that the Court deny three pending motions for leave to file “amicus” briefs. (Dkt. Nos. 152, 155 & 165). The proffered briefs, attached to their respective motions and together totaling 36 pages, serve no purpose other than to bolster positions taken by Microsoft and KPMG, and, when combined with the Microsoft and KPMG filings, effectively sidestep the page limits to which Microsoft stipulated for this round of briefing.

In the alternative, should the Court grant the motions (or a subset of them), the United States requests that the Court (1) grant the United States permission to file a response to each of the amici briefs permitted by the Court no later than December 13, 2016; (2) limit each response filed by the United States to twelve pages in length; (3) bar the filing of other responses or replies with respect to the amici briefs or the United States' responses; (4) close all briefing as of

December 13, 2016; and (5) bar counsel for the amici from participating in any oral argument that may occur with respect to the briefing, absent further order from the Court.

I. Background

On October 27, 2016, Microsoft and KPMG LLP filed separate reply briefs to address matters raised by the United States in its Response to Microsoft's Brief Regarding Privileged Documents Still in Dispute. (Dkt. Nos. 160 & 170). Microsoft and KPMG conformed their respective replies to the page length limit of twelve pages established in a Stipulated Order entered by the Court on September 7, 2016. (Dkt. No. 137).

The Court's Stipulated Order limited Microsoft's Opening Brief (Dkt. No. 140) and the United States' Response (Dkt. No. 145) to twenty-four pages each. The United States' Response conforms to this limit. To be clear, however, counsel for the United States had more to say with respect the tax practitioner privilege under 26 U.S.C. § 7525(a), the so-called tax shelter exception to the privilege under 26 U.S.C. § 7525(b), the attorney work product protection and the attorney-client privilege than it could find a way to fit into its twenty-four page Response. But in light of the page limit, further explanation or explication would have to await oral argument, if the Court granted Microsoft's request for argument, which the United States does not oppose.

KPMG and Microsoft were not, however, the only e-filers on October 27, 2016. Three additional briefs, collectively totaling thirty-six pages of additional argument in support of positions taken by Microsoft with respect to its claims of privilege, were filed by "friends of Microsoft."

The three proffered briefs advocate for positions asserted by Microsoft. The brief filed by counsel for the Chamber of Commerce misapplies case law regarding work product protection and presents a one-sided and mistaken analysis of the tax practitioner privilege and

1 what constitutes a “tax shelter” for purposes of the exception to that privilege found in § 7525(b).
 2 (*See* Dkt. No. 152-2). Adopting a divide-and-conquer strategy that implies some coordination
 3 among the filers, counsel for the Software Finance and Tax Executives Council, National
 4 Foreign Trade Council, Financial Executives International, Information Technology Industry
 5 Council, and National Association of Manufacturers proffered a brief that focuses on a different
 6 aspect of § 7525(b) – the definition of the term “promoter.” (Dkt. No. 155-2). A third brief,
 7 proffered by counsel for the Silicon Valley Tax Directors Group, Semiconductor Industry
 8 Association, Computer Technology Industry Association, Information Technology Industry
 9 Council, and TechNet, summarizes arguments regarding § 7525 in favor of Microsoft’s position
 10 and then spends several pages focused on explaining cost sharing arrangements and why a cost
 11 sharing arrangement (and by implication, the Americas Transaction) is not a tax shelter. These
 12 briefs collectively present an incomplete and inaccurate analysis of the privileges at issue, and
 13 they all overlook the uniquely illusory nature of the Americas Transaction on the facts submitted
 14 into the record.

15
 16 Collectively, the three amici briefs unilaterally expand the page limits for advocacy in
 17 support of Microsoft’s privilege claims by thirty-six pages. The Court should either deny the
 18 pending motions in the interest of judicial economy or permit the United States to respond to
 19 each of the serial briefs.

20 **II. Argument**

21 The Federal Rules of Civil Procedure do not address standards for granting leave of
 22 “friends of the court” to file amici briefs. Ninth Circuit precedent affords a federal district court
 23 “broad discretion” to permit amici briefing. *E.g., Microsoft Corp. v. United States Dept. of*
 24 *Justice*, No. C16-0538JLR. 2016 WL 4506808, at *9 (W.D. Wash. Aug. 29, 2016) (*citing*
 25 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v.*

1 *Conner*, 515 U.S. 472 (1995)). Although there is no requirement that amici be “totally
 2 disinterested” in the outcome of a dispute (*see Funbus Systems, Inc. v. State of Cal. Public Util.*
 3 *Comm’n*, 801 F.2d 1120, 1124 (9th Cir. 1986)), the Court need not indulge an “endless stream”
 4 of advocacy briefing proffered by friends of Microsoft. In evaluating the utility of amici brief,
 5 the Court has considered in the past the following two factors: (1) whether the amici have
 6 “unique information” or a unique perspective regarding an issue; or (2) whether the legal issues
 7 involved have potential ramifications beyond the parties directly involved. *See Skokomish*
 8 *Indian Tribe v. Goldmark*, No. C13–5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21,
 9 2013). Applying these factors to the issues before the Court in this privilege dispute, there are no
 10 compelling reasons to grant the amici motions.

11 Here, Microsoft and KPMG are each one of the largest and most dominant firms in their
 12 respective fields. They have each retained able outside counsel to represent them in this action,
 13 and their counsel have articulated their respective positions. The amici brief simply color in
 14 many details (in an apparently-coordinated fashion) that Microsoft and KPMG did not have
 15 space to develop. In addition, no “unique” information unavailable to Microsoft and KPMG is
 16 presented in the proffered briefs, and no unique “perspective” is provided or needed to resolve
 17 this discovery dispute. It is true that the amici have an interest in seeing the Seventh Circuit’s
 18 opinion in *Valero Energy Corp. v. United States*, 69 F.3d 626 (7th 2009), undermined or rejected
 19 by the Court here, but that interest is no different from interests that all taxpayers share in
 20 wishing for a taxpayer-friendly construction of the Internal Revenue Code. Moreover, this is a
 21 privilege dispute, not a dispute over the underlying merits of a purported cost sharing
 22 arrangement.

23 Another problem with the amici’s requests is that they are untimely and the amici have
 24 not requested leave to file their briefs late. This Court has stated that since there are no Federal
 25 Rules of Civil Procedure or Local Civil Rules regarding the filing of amicus briefs, it will look to

1 Federal Rules of Appellate Procedure for guidance. *See Microsoft Corp. v. United States Dept.*
 2 *of Justice*, 2016 WL 4506808, at *9. Rule 29(e) requires an amicus curiae to file a motion for
 3 leave to file its brief, with a copy of the brief, not later than seven days after the principal brief of
 4 the party it supports is filed. Since Microsoft filed its opening brief on September 12, 2016, that
 5 deadline expired on September 19, 2016. The amici did not file their motions for leave until
 6 October 27, 2016, which is well over a month late. Even if the Court determines that the
 7 applicable date from which to apply Rule 29(e) is the date the United States' filed its response,
 8 the amici's deadline would have been October 19, 2016, and they are still late.

9 In the event that the Court finds the proffered briefing to be of assistance and therefore
 10 grants the three motions, then the United States respectfully requests that the undersigned
 11 counsel have an opportunity to respond to the incomplete and inaccurate analyses and arguments
 12 found in the amici briefing. The United States has played by the rules. It should not have to
 13 move forward on the basis of one-sided briefing that affords the proponents of Microsoft's
 14 claims a thirty-six page briefing advantage. In addition, the United States would further request
 15 that the Court cabin the participation of the amici to their submitted briefs. To the extent the
 16 Court finds that they do offer a "unique perspective," their briefs articulate those perspectives.
 17 Nothing more is needed. Nor is there any need for amici's counsel to participate in oral
 18 argument. *See Microsoft Corp. v. United States Dept. of Justice*, 2016 WL 4506808, at *9
 19 (ruling that a non-party afforded amicus status "shall not file reply memoranda or participate in
 20 oral argument unless authorized in advance by the court.").

21 CONCLUSION

22 For the reasons set forth above, the motions of the "amici" should be denied. In the
 23 alternative, the United States requests that the Court (1) grant the United States permission to file
 24 a response to each of the amici briefs permitted by the Court no later than December 13, 2016;
 25 (2) limit each response filed by the United States to twelve pages in length; (3) bar the filing of

1 other responses or replies with respect to the amici briefs; (4) close all briefing as of December
2 13, 2016; (5) bar counsel for the amici from participating in any oral argument that may occur
3 with respect to the briefing, absent further order from the Court.

4 Dated this 7th day of November, 2016.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 7th day of November, 2016, via the Court's ECF system to all parties.

/s/ Amy Matchison
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