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

HYPERPHRASE TECHNOLOGIES, LLC
and HYPERPHRASE INC.,

ORDER

Plaintiffs,

02-C-647-C

v.

MICROSOFT CORPORATION,

Defendant.

Plaintiffs Hyperphrase Technologies, LLC and Hyperphrase Inc. ("Hyperphrase") have moved to compel the production of documents by defendant Microsoft Corporation. Hyperphrase does not refer to specific requests for production of documents or interrogatories containing embedded document requests that Microsoft has failed properly to answer; instead, at the conclusion of its motion Hyperphrase specifies the five categories of information it seeks:

1. Microsoft's internal communications to and from its "key execs" about Smart Tags (including, specifically Messrs. Gates and Balmer);

2. Microsoft marketing plans and instructions to its sales force about Smart Tags (including the "Smart Tags V-Team" documents);

3. Videotapes of and other documents relating to Microsoft's marketing presentations of Smart Tags;

4. Microsoft's internal discussions, analyses and projections about how Smart Tags will or could impact the sales of Microsoft products; and

5. A declaration from a Microsoft employee stating that a thorough search has been conducted for these documents, and that all responsive documents located have been produced.

Microsoft's first response is that Hyperphrase never asked for these categories of documents in specific document requests but that it is willing to address them on their merits. In an unrequested reply (which I will allow) Hyperphrase takes issue with this characterization of its requests, but Microsoft is correct: the five listed categories in the motion are not actual interrogatories or RFPs, they are crystallizations that at best have to be inferred from other discovery requests. At this stage, however, everyone is willing to address the substance of Hyperphrase's motion, so the procedural point falls to the wayside.

Microsoft claims that it already has provided most of the information and that further production is imminent. Hyperphrase is unmollified, correctly pointing out that Microsoft has not unequivocally agreed to produce everything requested, and has not committed to a production deadline.

Hyperphrase's motion to compel is denied without prejudice as premature. I deem the five categories of information listed in Hyperphrase's motion to be specific discovery requests in response to which Microsoft must provide full disclosure and/or other appropriate responses not later than June 30, 2003. As soon as Hyperphrase has had sufficient

opportunity to digest Microsoft's responses–but not more than seven days after Microsoft's last disclosure–the parties must meet and confer (via any medium) to resolve any differences regarding disclosures.

Given the large areas of agreement between the parties regarding these issues, they should be able promptly and amicably to resolve any residual misunderstandings or disagreements. Mutual accommodation is required, flyspecking and obstinacy are prohibited. If the parties cannot solve this one on their own, then the loser on any follow-up motion will face Rule 37(b) sanctions in addition to cost shifting under Rule 37(a).

Entered this 20th day of June, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge