IN THE 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) Next Court Deadline: Remedies Hearing

MEMORANDUM AMICUS CURIAE OF THE UNITED STATES REGARDING MICROSOFT CORPORATION'S MOTION FOR DISMISSAL OF THE NON-SETTLING STATES' DEMAND FOR EQUITABLE RELIEF

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MEMORANDUM AMICUS CURIAE OF THE UNITED STATES REGARDING MICROSOFT CORPORATION'S MOTION FOR DISMISSAL OF THE NON-SETTLING STATES' DEMAND FOR EQUITABLE RELIEF

The United States submits this Memorandum in response to the Court's invitation to present its views as *amicus curiae* with regard to Microsoft's motion to dismiss the non-settling States' demand for equitable relief. Microsoft's motion raises a number of important questions concerning the limits of the non-settling States' legal standing as *parens patriae*. The movement of some States into the field of antitrust enforcement with respect to national or international markets, and their demands for relief that will affect competition and consumers outside of their borders, raise issues that have not been fully developed in the jurisprudence. As Microsoft points out, the decided cases tend to address state efforts to vindicate more clearly defined local interests, not the kind of interests at stake here. Nevertheless, the United States finds no definitive case law that would require granting the relief Microsoft seeks as a matter of law. Rather, as discussed more fully below, we believe that the law requires the Court to take cognizance of many of the issues Microsoft raises in the exercise of the Court's equitable discretion.

INTRODUCTION

The current proceeding is unique. Following separate but concurrent and largely coordinated investigations, the United States and several States commenced separate suits in the same court against Microsoft challenging substantially the same conduct. In pursuing the monopoly maintenance claim in court, the States did not assert any particular state interests in the matter, or indicate any actual or potential divergence from the approach taken by the United States with respect to liability or remedy. Microsoft moved the court to consolidate the two cases. The two cases were consolidated for all purposes on May 22, 1998, were tried together to final judgment, appealed together, and remanded together for further proceedings consistent with the Court of Appeals' decision, which treated the U.S. and state cases as being indistinguishable.

Seven months after the appellate decision, this Court deconsolidated the two cases because they had "taken divergent paths." Order at 2 (February 1, 2002). The cases diverged because the United States and nine plaintiff States in this case reached a settlement with Microsoft, while the remaining States did not. The United States agreed to the settlement because it is a complete and fully appropriate remedy for the violations found by the District Court and affirmed by the Court of Appeals and provides immediate and certain relief without further litigation.

The non-settling States – which can take for granted the protection afforded by the settlement now before this Court in the Tunney Act proceeding – came to advance their own far-reaching remedial proposals, many of which appear unrelated to the theories of illegality advanced by the United States and the plaintiff States at trial and the findings of liability sustained by the Courts. This action by the non-settling States raises for the very first time the prospect that a small group of States, with no particularized interests to vindicate, might somehow obtain divergent relief with wide-ranging, national economic implications.

Microsoft asks the Court to rule now as a matter of law that the non-settling States' claims should be dismissed, chiefly for want of standing. The non-settling States appear to agree with Microsoft that, unlike the United States, they are entitled to equitable relief under the federal antitrust laws only if they have met the requisite elements of standing under Section 16 of the Clayton Act, 15 U.S.C. § 26. *See, e.g.*, Memorandum of Defendant Microsoft Corporation in Support of Its Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief at 16 ("MS Mem."); Plaintiff Litigating States' Response to Microsoft's "Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief" at 10 ("Response"). Microsoft and the States disagree on the requisite elements. Microsoft contends that the States are required to demonstrate a "state-specific" injury that can be distinguished from the generalized law enforcement interest in stopping Microsoft's established antitrust violations. The States disagree that they are required to demonstrate a state-specific injury and contend that they have adequately demonstrated their standing as it is defined in existing case law. Microsoft's arguments raise important issues of federal antitrust enforcement policy that — as more fully developed below — are significant to the Court's ultimate decision in this case. But on this motion to dismiss, the United States cannot as *amicus* advise this Court that the precedents cited by Microsoft require dismissal prior to any further evidentiary proceedings.

DISCUSSION

I. THE UNITED STATES IS THE SOLE ENFORCER OF THE FEDERAL ANTITRUST LAWS ON BEHALF OF THE AMERICAN PUBLIC

Although the States have traditionally played a significant role in American antitrust activity, they do not stand on equal footing with the United States as enforcers of the federal antitrust laws. The States possess important authority to seek both monetary and injunctive relief. In pursuing injunctive relief, however, the States appear before the Court as private parties, not as sovereign law enforcers. They do so in the pursuit of *quasi*-sovereign *parens patriae* interests on behalf of the economic well-being of their citizens, and the relief they may seek is subject to the limits Congress and the courts have imposed.

Maintaining recognition of the proper distinction between the state and federal roles in antitrust enforcement is exceptionally important in light of the global nature of competition and the wide array of matters that need the attention of state and federal enforcers. Under our Constitution, for example, the States cannot appropriately conduct international relations with foreign nations pertaining to competition policy. Likewise, full effectuation of the antitrust laws benefits from persistent attention by state authorities to local issues that might escape federal attention. The public interest is best served when federal and state antitrust activity is complementary, not duplicative or conflicting.

A. Under the Federal Antitrust Laws, Only the United States May Seek Injunctive Relief in a Sovereign, Law Enforcement Capacity

The Sherman Act, as enacted in 1890, ch. 647, 26 Stat. 209, 210 (codified as amended at 15 U.S.C. §§ 1-7), gave the federal courts jurisdiction "to prevent and restrain violations" of the Act, and gave the "several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General," the "duty . . . to institute proceedings in equity to prevent and

restrain such violations." *Id.* § 4 (codified as amended at 15 U.S.C. § 4). The Act did not provide for equitable relief at the behest of anyone else.[1] Thus, the Supreme Court held that a suit for equitable relief by the State of Minnesota, alleging violations of the Sherman Act and injury to property values in the State, did not present a case arising under the Constitution or laws of the United States. *Minnesota v. N. Sec. Co.*, 194 U.S. 48 (1904). As the Court explained:

> We cannot suppose it was intended that the enforcement of the [Sherman A]ct should depend in any degree upon original suits in equity instituted by the states or by individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce . . . to those instituted in the name of the United States . . . by district attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.

Id. at 70-71.

In 1914, Congress modified this remedial scheme by enacting the Clayton Act. While it included in Section 15, 15 U.S.C. § 25, a provision virtually identical to the Section 4 of the Sherman Act, the Clayton Act also included a separate provision, Section 16, 15 U.S.C. § 26,

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[1]The Act also provided for federal criminal penalties, §§ 1-2, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-2), which may be sought only by the United States, *Georgia v. Evans*, 316 U.S. 159, 162 (1942), and for damage suits by "[a]ny person who shall be injured in his business or property" by a violation of the Act, § 7, ch. 267, 26 Stat. 210 (1890) (successor provision codified at 15 U.S.C. § 15). In 1976, Congress amended the Clayton Act to provide for civil actions by a state attorney general "as parens patriae on behalf of natural persons residing in such state . . . to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of any violation of" the Sherman Act. 15 U.S.C. § 15c(a)(1); *see* Response at 8-9 & n.7. We confine our attention here to civil remedies other than monetary relief.

allowing private parties to seek injunctive relief when faced with prospective injury resulting from antitrust violations:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings.

Section 16, however, is narrower in scope than the Clayton Act and Sherman Act provisions for equitable relief in actions brought by the United States. While the United States may sue to restrain violations of either Act without any showing of injury, and courts may grant injunctions restraining such violations, others may sue only under Section 16, and only to protect against "threatened loss or damage by a violation." They have no authority to seek an injunction merely on account of a violation of the antitrust laws. *See, e.g., Louisiana v. Texas*, 176 U.S. 1, 19 (1900) ("the vindication of the freedom of interstate commerce is not committed to the State of Louisiana") (quoted in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602-03 (1982)). Moreover, not all threatened loss or damage suffices; rather, "antitrust injury" must be threatened — "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Finally, unlike Section 15, Section 16 explicitly emphasizes that such relief can only be granted under the same conditions and principles considered by courts of equity. 15 U.S.C. § 26.

B. The States Occupy the Position of Private Parties, Not Sovereigns, When Seeking Injunctive Relief Under Section 16 of the Clayton Act

It was not through oversight that the Clayton Act relegates States seeking injunctive relief to the status of "[a]ny person" pursuant to Section 16. *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945). During floor consideration of the Clayton Act, Senator Reed offered an amendment that would have added a new section to the bill: "That the attorney general of any State may, at the cost of the State, bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong. Rec. S14,476 (daily ed. Aug. 31, 1914), *reprinted in* 3 Earl W. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 2288 (1978) ("Kintner"). Had it become law, this provision would have placed state attorneys general on a par with the Attorney General of the United States as fully-fledged enforcers of the antitrust laws pursuant to Section 15 of the Clayton Act and Section 4 of the Sherman Act. As Senator Reed explained, "I believe it to be a wholesome thing that, instead of the enforcement of this great law being reposed simply in one overworked office, the attorneys general of the various States might utilize the law." *Id*. But the Senate rejected the Reed amendment by a vote of 21 to 39. 51 Cong. Rec. S14,526 (daily ed. Sept. 1, 1914), *reprinted in* Kintner at 2323.

Accordingly, state authority to seek injunctive relief under Section 16 of the Clayton Act is not based upon the sovereign interest in law enforcement. Rather (apart from protection of a State's proprietary interests, which is not at issue here), state standing is limited to assertion of its "quasi-sovereign" interests as *parens patriae* on behalf of it citizens. *Georgia*, 324 U.S. at 447-52. While the Supreme Court has not fully defined the quasi-sovereign interests upon which suit may be based, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982) ("*Snapp*"), it has given some guidance.

On the one hand, "the State must articulate an interest apart from the interests of particular private parties." *Id.* at 607. Thus, a State may not appear as a "nominal" party to advance the interests of a single private interest or commercial enterprise, or of a single industry constituent. *Id.; Land O'Lakes Creameries, Inc. v. La. State Bd. Of Health*, 160 F. Supp. 387, 389 (E.D. La. 1958).[2] On the other hand, because it does not act as a sovereign law enforcer, a State — unlike the United States — may not as *parens patriae* be a mere volunteer seeking to vindicate an interest in compliance with the law. *Snapp*, 458 U.S. at 602-03 (quoting *Louisiana*, 176 U.S. at 19). Rather, a State acting as *parens patriae* asserts the "quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general." *Snapp*, 458 U.S. at 607.

In *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976), Pennsylvania's *parens patriae* claim for injunctive and other relief on account of an allegedly unconstitutional New Jersey tax on the New Jersey-derived income of nonresidents was held to be "nothing more than a collectivity of private suits against New Jersey" involving no "sovereign or quasi-sovereign interests of Pennsylvania" and therefore improper. This case must be viewed in light of the fact that it involved the Supreme Court's desire to limit its original jurisdiction docket, but nonetheless may provide some general guidance. There appears to have been no allegation of harm to the Pennsylvania economy apart from the harm to Pennsylvania residents with New Jersey-derived income, who paid an allegedly unconstitutional tax.

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[2]In this respect, the general law of *parens patriae* is not unlike the law of antitrust injury, which requires a showing of harm to competition, not just harm to a competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Related to the prohibition upon advancing the interests of private parties as a nominee, the interest at stake must be one *substantial* enough to merit the State's protection. In making this determination, "the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 607. Decided cases indicate that "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

The important point is that, in order to maintain an action under Section 16 of the Clayton Act, a State must demonstrate something other than the sovereign interest in enforcement of the federal antitrust laws that supports actions by the United States under Section 15. Defining this distinction is, as the case law recognizes, a somewhat amorphous task. As discussed below, the United States cannot agree with Microsoft's contention that established law imposes a "state-specific injury" requirement that requires dismissal here. At the same time, without a clear showing that a proposed remedy is necessary to vindicate a specific interest protected by the antitrust laws the Court should be particularly cautious in using its equitable powers in a manner that could have enormous economic impact.

II. MICROSOFT HAS NOT ESTABLISHED THAT PRECEDENT REQUIRES DISMISSAL OF THE NON-SETTLING STATES' CLAIMS AS A MATTER OF LAW

Microsoft advances a variety of grounds for the immediate dismissal of the non-settling States' case as a matter of law. Ultimately these arguments carry more weight in support of jurisprudential or policy initiatives than as a basis for a district court to dismiss this case as a matter of settled law and controlling precedent. This is true of Microsoft's standing arguments,

its assertions with respect to the primacy of federal enforcement and the Tunney Act, and its constitutional contentions.

A. Dismissal For Want Of A "State-Specific Injury" Is Not Mandated By Existing Caselaw and Established Practice

Central to Microsoft's argument for dismissal is this proposition:

> To establish *parens patriae* standing, the non-settling States must establish that they are seeking to remedy some state-specific injury, rather than merely seeking to substitute their judgment for that of the United States as to the manner in which federal antitrust laws should be enforced.

MS Mem. at 17. Microsoft never really defines what it means by "state-specific injury." It describes this interest variously as an injury to "a distinctive interest of their State and its citizenry," *id.* at 18, an interest "distinctive to [the State's] citizenry" seeking "to remedy state-specific problems," *id.* at 19, and "an injury distinct from that of the citizens of other States." *Id.* at 19-20. Despite this seeming definitional element of uniqueness, Microsoft concedes that such an injury need not be "limited to a single State in order to constitute state-specific injury." Microsoft Corporation's Reply Memorandum in Support of Its Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief at 8 n.2 ("MS Reply"). Microsoft contrasts state-specific injury "distinct from that of the citizens of other States" with what it characterizes as "merely seeking to substitute their judgment for that of the United States as to the manner in which federal antitrust laws should be enforced." MS Mem. at 17; *see also* MS Reply at 8 n.2 ("a generalized interest in competitive markets shared by all citizens of the United States").

Microsoft seeks to support this requirement of "state-specific injury" by examining the claims at issue in the leading Supreme Court cases discussing *parens patriae* authority. First, Microsoft observes that the state *parens patriae* plaintiffs in a number of Supreme Court cases sued to vindicate "state-specific" interests as Microsoft defines them, including amelioration of

local harms or challenges to provisions discriminating against the interests of a State within the federal system. *See* MS Mem. at 18-19 (citing *Louisiana*, 176 U.S. 1; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia*, 324 U.S. 439; and *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972)). Each Supreme Court case Microsoft discusses is *consistent* on its facts with a requirement of the type Microsoft advocates. But none of these cases actually articulates the rule that Microsoft advocates.

Neither Microsoft nor the cases describe the content of an injury that is state-specific, yet might still be shared equally with the other States. Microsoft is clearly correct in saying that a "state-specific" injury must be shown in the sense that a State must demonstrate threatened injury to its *own* citizens as opposed to generalized interests in law enforcement or injuries threatened only to residents of some *other* State or States. The problem for Microsoft, as a defendant whose antitrust violations could presumably be shown to have an impact felt in every State, is that no case denies *parens patriae* standing in a situation where substantial threatened injury to a state's citizens is present yet deemed insufficiently "state-specific" because it is also suffered by the citizens of the other States.

In the leading case, *Snapp*, 458 U.S. at 607, the Court discussed the applicable precedent and concluded in broad terms that, "a State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general." Likewise in *Georgia*, 324 U.S. at 450, a *parens patriae* case asserting antitrust claims, the Court allowed the suit to proceed upon the basis of injury to the State's "economy" and "the welfare of her citizens."[3] The non-

[3]In his *dissenting opinion* in the *Georgia* case, Chief Justice Stone emphasized several of the arguments Microsoft makes here, rejecting the notion that States should be able to proceed as *parens patriae* under the federal antitrust laws based on injury to their own inhabitants because the United States alone serves this function for all of its citizens. 324 U.S. at 474 ("When the

settling and *amici* States likewise cite additional language from the Supreme Court and other lower court cases supporting *parens patriae* standing based upon injuries to the citizens of a State without any limitation requiring that those injuries be distinct from those suffered by citizens of additional States. Memorandum of Plaintiff State of New York as Amicus Curiae in Opposition to the Motion of Defendant Microsoft Corporation for Dismissal of the Litigating States' Demand for Equitable Relief at 7-17 ("New York Brief"); Memorandum of 24 States as Amici Curiae in Support of the Commonwealth of Massachusetts, the District of Columbia, and the States of California, Connecticut, Iowa, Florida, Kansas, Minnesota, Utah, and West Virginia at 2-11.[4]

Microsoft's discussion of state *parens patriae* standing based upon federalism interests also does not suffice to establish a state-specific injury requirement. *See* MS Mem. at 18 & n.10; MS Reply at 10. It is true that, as Microsoft observes, two leading Supreme Court *parens patriae* cases "involved disputes *between* two States." MS Mem. at 18 (emphasis Microsoft's). As the D.C. Circuit has noted, "[a] substantial proportion of the cases in which parens patriae standing has been allowed have been actions between two states," which appears "partly attributable to the Supreme Court's longstanding recognition of its constitutional duty to resolve interstate controversies which, before the Constitution, were settled by diplomacy and negotiation." *Pennsylvania v. Kleppe*, 533 F.2d 668, 676 (D.C. Cir. 1976). But "the presence of a state

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United States brings such a suit it is acting on behalf of the people of the United States, and in the national interest. The authority to bring such suits includes the discretionary authority not to bring them, if the responsible officers of the government are of the opinion that a suit is not warranted or would be of disservice to the national interest. To permit a State to bring a Sherman Act suit in behalf of the public is to fly in the face of the national policy established by Congress . . . .."). Obviously, these arguments did not prove persuasive to the *Georgia* majority.

[4] *E.g.*, *Georgia*, 324 U.S. at 447-48; *California v. Am. Stores Co.*, 495 U.S. 271 (1990); *Hawaii*, 405 U.S. 251; *In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part and rev'd in part sub nom Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

defendant provides *added* impetus to recognize standing to sue wherever the interests of the state are substantially implicated that is *wherever standing is already reasonably clear*." *Id.* (emphasis added). Again, the presence of federalism concerns is one of the factors that has been held to support *parens patriae* standing, but this fact does not establish the existence or content of a state-specific injury requirement.[5]

Cases cited by Microsoft involving state suits against the federal government likewise are not on point. To suggest that an "inevitable collision between the role of the United States as enforcer of federal antitrust laws and *parens patriae* for all American citizens and the much narrower role of the non-settling States" requires dismissal, Microsoft provides a ten-line block quotation from *Kleppe*, 533 F.2d at 676-77. MS Mem. at 23. But Microsoft omits the first sentence of the paragraph it quotes: "In some cases like the present one, *where the defendant is not a state but some agency of the Federal Government*, such important arguments for denying state standing do exist." *Kleppe*, 533 F.2d at 676 (emphasis added). The omitted sentence makes

[5] *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000), *see* MS Mem. at 18-19 n.10 and MS Reply at 10, is cited by Microsoft in its discussion of cases where a federalism interest in freedom from discrimination has been important to establishing *parens patriae* standing. But *DeCoster* does not advance Microsoft's argument. *DeCoster* affirmed denial of *parens patriae* standing for the government of Mexico to bring federal civil rights and other statutory claims on behalf of Mexican migrant workers in Maine. The First Circuit's principal reason for doing so was that federalism interests "are a critical element of parens patriae standing," and "[b]y definition, a foreign nation has no cognizable interests in our system of federalism." 229 F.3d at 339. But the non-settling States are not foreign nations, and they do have cognizable interests in our system of federalism. As *DeCoster* makes clear, there are "federalism justifications for permitting States to bring suit parens patriae against private entities," *id.* at 338, such as Microsoft.

clear that *Kleppe* rests upon considerations that do not arise when private parties, including States as *parens patriae*, sue private entities under federal law.[6]

Microsoft likewise contends that "[t]he Supreme Court has expressly held that a State may not, in its *parens patriae* capacity, pursue a view of the public interest that is inconsistent with that of the federal government, 'the ultimate *parens patriae* of every American citizen.'" MS Mem. at 24. But its citations ("*South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *cf. Florida* v. *Mellon*, 273 U.S. 12, 18 (1927); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-86 (1923)") refer directly to the quoted "ultimate *parens patriae*" phrase, not Microsoft's contention. The full sentence from *Katzenbach* is: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen." The two *Mellon* cites are simply the Supreme Court's cited authority for the *Katzenbach* sentence. All three, like *Kleppe*, support a point not at issue here: that States generally may not, as *parens patriae*, sue the federal government. None provides that States are foreclosed as a matter of law from advancing antitrust claims that conflict with the federal government's enforcement decisions.

In their complaint, the States alleged threatened injury to "the general welfare and economy and to competition in their States." First Amended Complaint ¶ 81. The case was litigated, with liability found and affirmed by the Court of Appeals, upon the basis of this injury. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001). Microsoft contends

[6]Microsoft later effectively recognizes what it omitted from the block quotation, but claims that "the overall framework of *parens patriae* analysis established in *Kleppe* is fully applicable here." MS Reply at 11-12 n.6. Perhaps the overall framework is fully applicable, but the passage Microsoft quoted and on which it relies is specific to the context of state *parens patriae* suits against the federal government.

that a showing of general injury to the citizens of a plaintiff State is insufficient unless it is shown to be state-specific. But, it is unclear whether Microsoft contends that the States have failed to demonstrate any injury to their citizens flowing from the established violations. MS Mem. at 20. The non-settling States contend that *intrastate* injury has already been found. Response at 22 n.25. If there is any doubt on this point, the Court should determine what specific proof the non-settling States rely upon to make showings of threatened injury to their individual economies and citizen welfare. Although this is unclear, the non-settling States may also take the position that they could articulate a "state-specific" injury of the type Microsoft posits if the law were found to require one. To ensure clarity of the record, this Court may wish to determine whether the non-settling States take this position, and if so what proof they would advance to make a showing of state-specific injury if one were required.

B. The Enforcement Judgment Previously Reached by the United States and the Pending Tunney Act Proceeding Do Not Foreclose the Non-Settling States' Claims at this Juncture as a Matter of Law

A major theme of Microsoft's motion is that allowing the non-settling States to proceed with their claim impermissibly conflicts with the authority of the United States as the enforcer of federal antitrust law and with the pending Tunney Act proceeding. Although the non-settling States have overstated the position of the United States in an attempt to bolster their own, the non-settling States are correct in observing that it has not been, and is not, the position of the United States that the agreement by the United States to a settlement or the entry of the Second Revised Proposed Final Judgment ("SRPFJ") in the Tunney Act proceeding requires dismissal of the non-settling State's action as a matter of law. *See* Memorandum of the United States in Support of Entry of the Proposed Final Judgment at 77-78 (No. 98-1232) (the two proceedings are based on different records since November 6, and raise different issues). The United States,

of course, strongly believes that entry of the proposed final judgment in No. 98-1232 is very much in the public interest. Further, the United States recognizes the danger that the relief being sought by the non-settling States — much of which diverges not only from the SRPFJ, but from any theory advanced or relief sought by the United States and the States earlier in this litigation — may harm consumers, retard competition, chill innovation, or confound compliance with the SRPFJ. The United States is hardly indifferent as to the wisdom or propriety of granting such relief in this case. But under existing law, the non-settling States may pursue relief in their separate case. It is the Court's exercise of equitable discretion that must provide protection from these dangers.

Relevant case law supports this conclusion. In *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954), the Court noted that "private and public actions were designed to be cumulative, not mutually exclusive. . . . 'They may proceed simultaneously or in disregard of each other.'" (quoting *United States v. Bendix Home Appliances*, 10 F.R.D. 73, 77 (S.D.N.Y. 1949)).[7] Microsoft also argues that because the Tunney Act procedures are the means for determining whether entry of a consent decree in a government antitrust case would be in the public interest,

[7]Microsoft quotes *Borden* for the proposition that "Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing and industry." *See* MS Mem. at 15, citing 347 U.S. at 519. While the United States takes no exception to this proposition in the abstract, it is important to consider the facts of *Borden.* There the district court had denied the government an injunction on the ground that an existing decree in a private antitrust case enjoined the very conduct the government sought to enjoin, rendering useless the government injunction. The Supreme Court noted that the government could not enforce a private decree by means of contempt proceedings; that the private plaintiff might not be motivated to enforce the decree in some circumstances or might agree to modify the decree in its own private interest; and that the effect of the district court's ruling was "to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined." 347 U.S. at 519. Thus, it held that denying the injunction on the stated ground was an abuse of discretion. *Id.* at 520. The district court's error in *Borden* is thus the mirror image of the situation Microsoft posits here.

the non-settling States should be limited to that forum for arguing that other relief is appropriate. MS Mem. at 38-39. But the Tunney Act proceeding addresses whether entry of the proposed decree in No. 98-1232 would be in the public interest, 15 U.S.C. §16(e), not the merits of entering a different remedy in a different lawsuit. As this Court recently said in No. 98-1232: "The remedy proposed by the Litigating States in *State of New York v. Microsoft* is not before the Court in this case. Accordingly, reference to that proposed remedy has no place in these proceedings. The only proposed remedy in this action is the consent decree proposed jointly by the United States and Microsoft, and thus, any entity seeking to participate in these proceedings should limit its argument to supporting or opposing that remedy."[8] Memorandum Opinion and Order at 3-4 (March 4, 2002) (ACT) (footnote omitted). Existing law does not hold that the non-settling States's relief proposal should be considered only in a separate proceeding where the Court says it cannot consider that proposal. Again, as developed below, the proper place for the principles Microsoft advances to find expression is in this Court's exercise of its equitable powers.

C. Microsoft's Constitutional Claims Do Not Require Dismissal as a Matter of Law

As with its statutory argument, Microsoft's constitutional arguments raise jurisprudential and policy issues that are unquestionably important. Here again, however, Microsoft is unable to cite directly controlling precedent that dictates dismissal. Indeed, many of its claims appear to be derivative of its standing argument, or inconsistent with the fact that the non-settling States are advancing claims under *federal* law. Microsoft's constitutional arguments relating to state law

[8]Of course, in response to the public comments received pursuant to the Tunney Act, the United States did discuss some of the non-settling States' remedy proposals because certain commentors specifically raised them. *See* Response of the United States to Public Comments on the Revised Proposed Final Judgment.

would seem to be beside the point since the States disclaim any ability to seek distinct relief upon that basis.

Microsoft rightly says that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." MS Mem. at 24 (quotation marks omitted). It is true that the Supreme Court in *Snapp* observed that, without more, the "set of interests that the State has in the well-being of its populace" is a concept that "risks being too vague to survive the standing requirements of Article III," and that a "sufficiently concrete" interest must be shown. 458 U.S. at 602. And Microsoft is correct in observing that Congress may not "confer[] standing on individuals who fail to satisfy the requirements for Article III standing." MS Reply at 19, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

As discussed above, however, the Court's observation concerning Article III in *Snapp* preceded a discussion of the precedents in language generally supportive of the non-settling States' position here. In other words, unless the injury asserted by the non-settling States is insufficient to meet the *parens patriae* requirement set forth in *Snapp*, the injury *a fortiori* satisfies Article III as interpreted by the Court. Again, the facts of the Supreme Court's cases are not inconsistent with the "state-specific" injury rule Microsoft advocates, but none of these cases discusses or establishes such a rule. In these circumstances, it is fair to say that Microsoft's constitutional arguments add little beyond its federal statutory argument.

Microsoft also bases it motion on the principle that "States cannot regulate commerce on an extraterritorial basis." MS Mem. at 24. But it is difficult to understand how a State, by bringing an action in federal court as a private litigant under federal law and asking a federal judge to enter an injunction based on federal law, is regulating commerce at all. The cases relied upon by

Microsoft, MS Mem. at 24-25, *citing BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), differ from this one in that they involve *state* law, not federal law.[9]

Microsoft further argues that permitting the States to seek equitable relief here would raise "serious questions under Article II of the Constitution." MS. Mem. at 26. Microsoft states that "Article II requires that decisions about whether and how to enforce the Sherman Act be made only by 'Officers of the United States,' subject to adequate presidential supervision and control." *Id.* at 27. But if a party's decision to seek in federal court injunctive relief under Section 16 from injury threatened by a Sherman Act violation is a decision about whether and how to enforce the Sherman Act, Microsoft would seem to be contending that not just Section 16, but also Sections 4 (damage actions by private parties for antitrust violations) and 4C (state *parens patriae* suits for money damages for violations of the Sherman Act), 15 U.S.C. §§ 15, 15c, are all inconsistent with Article II. All of these provisions permit such decisions by those who are not officers of the United States and are not subject to presidential supervision and control. If, on the other hand, private decisions of this kind are not "decisions about whether and how to enforce the Sherman Act," then Microsoft has no argument.

The cases cited by Microsoft are not sufficiently apposite to dictate dismissal on Article II grounds. *Morrison v. Olson*, 487 U.S. 654, 660-62, 671 (1988), *see* MS Mem. at 27, addresses issues concerning an independent counsel appointed pursuant to federal law by a federal court, given by statute the power to exercise the investigative and prosecutorial functions of the

[9]In its Reply, Microsoft attempts to support its constitutional argument by contending that "[a] federal statute authorizing one State to regulate matters in another State would raise constitutional questions." MS Reply at 18. This is true. But a State's effort to seek equitable relief in federal court under federal law cannot be fairly described as state regulation.

Department of Justice, and held to be an "inferior officer" within the meaning of Article II. *Buckley v. Valeo*, 424 U.S. 1, 109 (1976), *see* MS Mem. at 27, considers "whether, in view of the manner in which a majority of its members are appointed, the [Federal Election] Commission may under the Constitution exercise the powers conferred upon it." Neither case appears directly relevant to constitutional questions concerning private rights of action under federal law. *Printz v. United States*, 521 U.S. 898 (1997), *see* MS Mem. at 28, involved assignment by Congress of administrative functions under the Brady Handgun Violence Protection Act to state officials unsupervised by the President. But there is no serious contention that Section 16 of the Clayton Act conscripts state attorneys general to perform federal functions.[10]

With respect to constitutional claims related to state antitrust law, the United States agrees with *amicus* the State of New York that these arguments appear to be academic. New York Brief at 17 n.9. No issue of state law-based standing need be addressed given the federal-law basis for standing. Although the non-settling States' brief describes state law as an "independent" basis for relief, the United States does not understand these States to mean that state laws would provide a

[10]The two constitutional arguments in Microsoft's opening Memorandum not addressed to issues related to enforcement of *state* law are based upon the premise that the "States have no quasi-sovereign interest to protect." MS Mem. at 26. Microsoft's Reply makes this even clearer with respect to its argument based on Article II, for there Microsoft recognizes that, as a general matter, "Congress is . . . free to create a private cause of action in favor of persons injured by prohibited conduct." MS Reply at 19. Article II problems arise, in Microsoft's analysis, only if Congress violates the constitutional prohibition Microsoft finds on "conferring standing on individuals who fail to satisfy the requirements for Article III standing." *Id.* Microsoft's reliance on the courts' "struggle[] with the constitutionality of *qui tam* provisions of the False Claims Act," MS Mem. at 27 n.12, also makes this clear, for those struggles arise because the *qui tam* relator has no interest related to the injury for which he seeks recovery, unless he is viewed as the assignee of the government's claim. *See Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 773 (2000). Microsoft's arguments would be on point had Congress enacted the Reed Amendment in 1914, and the States had sued here not to protect their quasi-sovereign interests from threatened loss or damage, but rather to enforce the federal antitrust laws in the name of the United States. The statute, however, does not permit them to do so, and they did not do so.

basis for relief beyond what the federal antitrust laws would support. It would be difficult for the non-settling States to take this position in light of their repeated representations that the state and federal antitrust laws are coterminous as they pertain to this proceeding.[11] Indeed, were they to do so, some of the constitutional arguments advanced by Microsoft might be of greater concern.

III. THE LIMITATIONS OF CLAYTON ACT SECTION 16 AND THE ENFORCEMENT JUDGMENT OF THE UNITED STATES ARE IMPORTANT CONSIDERATIONS IN THE COURT'S EXERCISE OF EQUITABLE DISCRETION

Although the case law does not compel dismissal of the States' claims for equitable relief on the grounds Microsoft asserts, the limitations imposed by Section 16 properly may play a significant role in the Court's determinations concerning relief. Unlike Section 15 of the Clayton Act, Section 16 specifically provides that injunctive relief is to be granted "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." 15 U.S.C. § 26. "[T]he bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); accord *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This implies more than that monetary damages will not suffice. It implies also that "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order to effectually protect property rights against injuries otherwise irremediable.'" *Romero-Barcelo*, 456 U.S. at 312 (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). The question is not whether a violation of law has been established — establishing such a violation is a necessary, but not a sufficient, condition for equitable relief. The plaintiff

[11] *See, e.g., United States v. Microsoft Corp.*, 87 F. Supp.2d 30, 55 (D.D.C. 2001) ("The plaintiff states concede that their laws do not condemn any act proved in this case that fails to warrant liability under the Sherman Act.").

must also establish that "he is likely to be harmed by the defendant's wrongful conduct unless that conduct is enjoined." *Blue Cross and Blue Shield United of Wisc. v. Marshfield Clinic*, 152 F.3d 588, 592 (7th Cir. 1998); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) ("significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur").

The distinctions between federal government enforcement of Section 15 and private actions under Section 16 are also relevant to the Court's appropriate exercise of its equitable power. In *American Stores*, the Supreme Court stated:

> Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See *Du Pont*, 366 U.S. at 319-321; see also *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."); *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940) (authorizing issuance of injunction at Government's request without balancing of the equities). A private litigant, however, must have standing--in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

495 U.S. at 295-96.

This Court can and should consider the distinctions between government and private litigants discussed above — including those relevant to defining *parens patriae* standing — as part of this equitable proceeding. The orderly administration of the federal antitrust laws is likewise an important consideration. As Justice Kennedy pointed out in his *American Stores*

concurrence, other statutory antitrust proceedings are relevant considerations in a Section 16 proceeding. *See id.* at 297-98 (while law did not establish a "strict rule" prohibiting pursuit of divestiture by a private party following a federal settlement, such a settlement may be taken into account in equity); *see also Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) (court of equity may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest).

One important principle that must be reflected in the Court's exercise of its equitable discretion is that a *parens patriae* proceeding is not an appropriate vehicle for pursuing the interests of private individuals or commercial entities. *Snapp*, 458 U.S. at 607. Indeed, even the interest of a single "industry" has been described as too narrow to support appropriate *parens patriae* standing. *Land O'Lakes*, 160 F. Supp. at 389. In this respect, the general law of *parens patriae* is similar to the unrelated but critical concept of "antitrust injury" that must be established under Clayton Act precedent. Specifically, antitrust relief must be predicated upon a showing of harm "to competition not competitors." *Brunswick Corp.*, 429 U.S. at 488 (quoting *Brown Shoe*, 370 U.S. at 320).

Microsoft has contended in its motion and before the Court that the relief sought by the non-settling States is in fact formulated for the benefit of particular Microsoft competitors. MS Mem. at 21. If such evidence is developed, vindication of these principles of *parens patriae* standing and antitrust law should be a prime consideration for the Court. The Court should require a clear demonstration that any relief sought is necessary to protect competition for the benefit of the public, not crafted for the private benefit of any individual competitor. If the evidence indicates that remedial proposals benefit particular commercial interests rather than

protecting the public's interest in competition, such remedies would be inappropriate for inclusion in an equitable decree pursuant to Clayton Act Section 16.

In exercising its equitable discretion to determine what remedy, if any, to grant in this case, the Court can also properly consider the proceedings in No. 98-1232. Upon a determination pursuant to the Tunney Act that entry of the proposed judgment in that case would be in the public interest, the SRPFJ necessarily bears on whether the non-settling States would be threatened with loss or damage with respect to their quasi-sovereign interests absent remedial provisions departing from the relief in No. 98-1232. This is consistent with *Borden*, which points out that public and private actions are cumulative and may proceed "in disregard of each other." 347 U.S. at 518-19 (quotation marks omitted). The *Borden* Court was careful to note that it could not "say that the existence of the private decree warrants *no* consideration by the chancellor in assessing the likelihood of recurring illegal activity," *id.* at 520 (emphasis added), and therefore government's entitlement to an injunction in that case despite the prior existence of an injunction granted to a private party.

The substantial policy concerns relating to the deference owed the enforcement judgment of the United States as embodied in the SRPFJ also can and should be considered in the Court's exercise of its equitable discretion. Deference to the enforcement judgment of the United States is proper even outside of the consent decree context. *See Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) ("once the Government has successfully borne the considerable burden of establishing a violation of the law, all doubts as to remedy are to be resolved in its favor") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961)). In determining whether the non-settling States are entitled to a remedy apart from the one proposed by the United States, the Court should consider the unique status and ability of the United States

as the enforcer of the federal antitrust laws to the benefit of all American consumers. *Cf. Kleppe*, 533 F.2d at 675 (one factor in determining *parens patriae* standing "is the presence or absence of a more appropriate party or parties capable of bringing the suit").

When Senator Reed proposed his amendment in 1914 to make state attorneys general enforcers of federal antitrust law equal in power to the Attorney General of the United States, *see supra* p. 7, other Senators raised precisely these concerns. Senator Gallinger asked whether, "if the States are in their individual capacities to prosecute suits under the antitrust laws, . . . there is not great danger of having a diversity of conclusions?" 51 Cong. Rec. S14,477 (daily ed. Aug. 31, 1914), *reprinted in* Kintner at 2289. Senator Colt noted that the "amendment will prevent the carrying out of any uniform policy in the enforcement of the antitrust law." 51 Cong. Rec. S14,518 (daily ed. Sept. 1, 1914), *reprinted in* Kintner at 2303. And Senator Pomerene urged, "let us not tempt the attorneys general of the several States to desert their own duties for another field that, for one reason or another, they might find to be more attractive." *Id.* at 14,519, *reprinted in* Kintner at 2305.

Because of these concerns, the Reed Amendment never became law. They provide a strong indication of the practical considerations that should guide judicial exercise of equitable powers under Section 16 of the Clayton Act as distinguished from Section 15. In this case, that means requiring the non-settling States to demonstrate with a high degree of assurance that any relief they seek is necessary for the protection of competition to benefit their citizens and their economies. The Court should make sure that, as in any case pursuant to Section 16, the remedy proposed is clearly directed toward the specific injury articulated in support of standing. *See supra* pp. 14-15.

The non-settling States' remedial proposals are vast in their scope and potential impact upon the information technology sector of the U.S. economy and beyond. They diverge from the proposed settlement not so much in their approach to prohibiting the specific conduct found by the Court of Appeals to be acts of monopoly maintenance, but rather in their effort to extend the relief to new products, new services, new markets, and even new theories of liability in the name of deterring future violations as a prophylactic matter. Given the nature of state standing under Section 16, the Court may properly inquire in the exercise of its equitable discretion whether a small group of States are the parties best situated to obtain relief of such broad reach and implication.

Proposed remedies without a clear basis in the decision of the Court of Appeals risk straying from appropriate antitrust enforcement grounded in law. Proposed remedies that chill legitimate innovation and product improvement — even by a monopolist — can deprive the public of significant competitive benefits. Perhaps most importantly, remedies that conflict with or undermine the enforcement judgments reached in the SRPFJ endanger our practical system of coordinated national antitrust enforcement. These considerations become magnified in significance when, as here, the competitive issues are national in scope, the plaintiffs seeking relief have neither the authority nor the responsibility to act in the broader national interest, and the plaintiff with that authority and responsibility has taken a different course. The emphasis upon the equitable powers of this Court in Clayton Act § 16 is the means provided by federal antitrust law to avoid these ills of duplicative enforcement authority in this extraordinary case.

CONCLUSION

For the foregoing reasons, the United States does not believe that the arguments advanced in Microsoft's Motion mandate dismissal of the non-settling States' claims as a matter of law.

The important considerations of antitrust policy and federal-state relations set forth in the Motion should be given substantial weight in the Court's exercise of its equitable authority.

Respectfully submitted,

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