IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ANTITRUST INSTITUTE, INC., Plaintiff, v. MICROSOFT CORPORATION, and the UNITED STATES OF AMERICA, c/o Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, Defendants.	)	Civil Action No. 02-CV-138 (CKK)

DECLARATION OF RENATA B. HESSE

I, Renata B. Hesse, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am an attorney in the Antitrust Division of the United States Department of Justice ("Department"). I am also the Chief of Staff in charge of the Department's day-to-day handling of matters relating to United States of America v. Microsoft Corp., Civil Action No. 98-1232 (CKK) (D.D.C.) (the "Antitrust Case"). In this capacity I am responsible for, inter alia, overseeing the handling and review of the public comments regarding the Revised Proposed Final Judgment ("RPFJ") submitted to the Department in the Antitrust Case.

3. The Department has received over 30,000 public comments on the RPFJ, and is in the process of reviewing and responding to these comments. See Joint Status Report, filed Feb. 7, 2002 in Antitrust Case ("Joint Status Report").

4. Some of the comments submitted to the Department raise the same Tunney Act compliance issues that are the subject of the above-captioned matter. For example, certain of the comments argue that the Competitive Impact Statement filed by the United States on November 15, 2001, provides neither an adequate explanation of the alternatives to the RPFJ considered by the United States nor an adequate evaluation of the RPFJ itself. Certain of the comments also raise issues relating to the adequacy Microsoft's disclosures pursuant to 15 U.S.C. § 16(g).

5. Plaintiff American Antitrust Institute submitted a 44-page comment to the Government within the statutorily-prescribed comment period. A true and correct copy of this comment, downloaded from Plaintiff's website, is attached hereto as Exhibit 1.

6. In light of its length and the detail with which it analyzes the issues relating to the RPFJ, the Department has classified Plaintiff's Comment as a "'major' comment," as that term is used in the Joint Status Report. See Joint Status Report at 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of February, 2002.

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RENATA B. HESSE

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The American
Antitrust Institute

2919 ELLICOTT ST, NW • WASHINGTON, DC 20008

January 24, 2002

Renata Hesse
Trial Attorney
Antitrust Division
U.S. Department of Justice
601 D Street, N.W., Suite 1200
Washington, D.C. 20530
Facsimile: (202) 616-9937 or (202) 307-1454
E-mail: microsoft.atr@usdoj.gov

Re: AAI Tunney Act Comments

The American Antitrust Institutes submits these comments under the Tunney Act. Separately, we have filed with the U.S. District Court a complaint for declaratory and injunctive relief, arguing that failures of the U.S. and Microsoft to comply fully with the requirements of the Tunney Act have kept us and the public generally from receiving all the information that is required by statute as a basis for these comments. With that in mind, these comments must be viewed as preliminary, subject to amendment or expansion if and when additional public disclosures are made.

The American Antitrust Institute ("AAI") is an independent non-profit education, research and advocacy organization, described in detail at www.antitrustinstitute.org. The mission of the AAI is to support the laws and institutions of antitrust. To our knowledge, we are the only public interest organization devoted solely to the field of antitrust.

Executive Summary

This Court should reject the Proposed Final Judgment ("PFJ") between Microsoft, the U.S. Department of Justice ("DOJ"), and the settling states. The PFJ is not in the "public interest," as this term is defined under the Tunney Act.[1] The PFJ is ambigous, will be extraordinarily difficult, if not impossible, to implement and affirmatively harms consumers and other third parties. Most importantly, however, the PFJ constitutes a mockery of judicial power since it fails to satisfy any of the remedial goals established by the Court of Appeals.

Standard of Review. Under the Tunney Act a reviewing court is not permitted to "rubber stamp" a proposed consent order if that consent order makes a "mockery of judicial power."[2] Normally, this standard gives substantial discretion to the DOJ's determination of what is in the "public interest." But this deference is not appropriate in cases like this one where there has been a full trial and decision on the merits.[3] In such cases the court has a special obligation to ensure that the remedial goals of the court that imposed liability on the defendant—in this case the D. C. Court of Appeals[4]—have been met. A consent judgment, such as the PFJ, which effectively ignores the findings of liability and remedial goals expressly stated by a unanimous *en banc* decision of the Court of Appeals is a mockery of judicial power.

Even when courts are reviewing consent orders entered *before* a trial, a consent judgment is not in in the "public interest" if it: (1) is ambiguous;[5] (2) presents foreseeable problems in compliance and implementation;[6] or (3) affects third parties detrimentally.[7] Since virtually every

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[1] 15 USCS Section 16(e).

[2] The Antitrust Procedures and Penalties Act of 1974: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong. 1 (1973). (opening remarks of Senator Tunney); United States v. ABA, 118 F.3d 776, 783 (D.C. Cir. 1997)

[3] See Section I(A), infra

[4] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (hereinafter "Microsoft III").

[5] Unites States v. Microsoft Corp., 56 F. 3d 1448, 1461 (1995) (the reviewing judge "should pay special attention to the decree's clarity").

[6] Id. at 1462 (if the judge "can foresee difficulties in implementation we would expect the court to insist that these matters be attended to").

[7] Id ("certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.").

key provision in the PFJ is ambiguous, will be extraordinarily difficult to implement, and will have a direct and substantial detrimental effect on consumers and other third parties, the PFJ is not in the "public interest" even under the lower standards of scrutiny applied to pretrial settlements.

Substantive Failings of the PFJ. The DOJ asserts that the PFJ "will provide a prompt, certain and effective remedy."[8] While a prompt, certain and effective remedy is often better than a perfect remedy achieved after extended litigation, virtually any remedy this Court would order after litigation would be better than the PFJ. The PFJ is neither prompt, certain, nor effective.

A prompt remedy would take effect quickly and provide procedures to enforce swift compliance. Most of the so-called restrictions on Microsoft's conduct will not take effect for 12 months.[9] Given the rapid pace of change in information technology, Microsoft's dominance of the covered middleware markets may well be a fait accompli before much of the PFJ would take effect. The procedural provisions also fail to provide for quick resolution of disputes over compliance. The Technical Committee cannot resolve disputes, but only "advise" Microsoft and the government of its conclusions.[10]

A certain remedy, at the very least, would set forth a clear delineation of what Microsoft can and cannot do. Yet many of the most important putative restrictions on Microsoft are vague and all are riddled with exceptions and qualifications. This lack of clarity will almost certainly compound the delay already present in the PFJ since the inevitable differences of opinion cannot be resolved without extended litigation to determine the "intent" of the parties according to the rules of contract law.

Finally, and most fundamentally, the remedy should be effective. As the Court of Appeals explained, a remedy should (1) free the market place from the effects of Microsoft

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[8] Competitive Impact Statement ("CIS"), p. 2.

[9] See, e.g., PFJ sections III.D and III.H.

[10] See PFJ section IV.D.4.c. Moreover, the PFJ's "gag orders" prohibiting both testimony from Committee members and use of their work product in enforcement proceedings will cause further delay since enforcement will always require the government to duplicate the Committee's work in amassing evidence.

anticompetitive conduct, (2) deny to Microsoft the fruits of its illegal monopolization, and (3) ensure that Microsoft does not undertake similar practices likely to result in future monopolization.[11] Yet the PFJ affirmatively allows some of the most egregious anticompetitive acts such as the commingling of middleware and operating system software.[12]

The following comments focus upon the deficiencies of the PFJ rather than attempt to propose alternative measures. Nonetheless, we urge the Court to consider the proposals put forward by the nine dissenting states. These proposals correct many of the PFJ's deficiencies identified in these comments.

Discussion

I. Standards of Review: The Tunney Act Requires Careful Review of the PFJ To Determine Whether It Is In The Public Interest

The Microsoft case is widely considered the most important antitrust case of our time. It is critically important to the future of antitrust that this case be decided —or settled— on the merits in a way that the public will perceive justice to have been achieved. All the more so when Microsoft has been found (after a full trial and by a unanimous landmark appellate opinion) to have abused a monopoly in an industry that all agree will have a profound impact on our future. With so many economic interests affected in cases like this, it is important that special efforts be made to keep antitrust settlements transparent so that the public will recognize them to be free of political taint or corruption.

A. Especially Careful Review Is Warranted in a Fully Litigated Case

The Tunney Act directs Courts to carefully scrutinize proposed antitrust Consent Orders.[13] The Tunney Act mandates that the Court shall make an independent inquiry into whether the

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[11] *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001). The PFJ does nothing to deprive Microsoft of the fruits of illegal monopolization, and the DOJ's Competitive Impact Statement ("CIS") omits this goal in its discussion of the remedial goals. CIS, pp. 2 and 24.

[12] See Section II *infra.*

[13] The Tunney Act "will make our courts an independent force rather than a *rubber stamp* in reviewing consent decrees, and it will assure that the courtroom rather than the backroom becomes the final arbiter in antitrust enforcement." The Antitrust Procedures and Penalties Act of 1974: Hearings on S. 782 and S. 1088 Before the

proposed consent order is in the "public interest,"[14] and authorizes the Court to take evidence and receive arguments to assure itself that the consent order serves the public interest.[15] As noted in the landmark Tunney Act decision of United States v. AT&T, a degree of deference to the DOJ in the reviewing the consent order is appropriate – otherwise, parties would have no incentive to compromise and settle.[16] The *AT&T* court also noted, however, that the standard of review would vary depending on the circumstances.[17] *AT&T* rejected the notion that courts must unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp, role which was at the crux of the congressional concerns when the Tunney Act became law."[18]

The need for deference is important in cases where there has been no trial since the "public interest" must include consideration not only of an appropriate remedy but also whether and for what the defendant may be found liable at trial.[19] More importantly, the court has little knowledge of the determinative facts. But once a trial has established the defendant's liability, the need for deference diminishes greatly. As the court in *AT&T* stated, the concern "that the

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Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong. 1 (1973). (opening remarks of Senator Tunney).

[14] 15 U.S.C. 16(e).

[15] 15 U.S.C. 16(f).

[16] *See* United States v. AT&T, 552 F. Supp. 131, 151 (1982) ("If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved. See S.Rep. No. 93-298, supra, at 6; H.R.Rep. No. 93- 1463, supra, at 6.")

[17] "It follows that [where no evidence has been taken and no liability has been found] a lower standard of review must be applied in assessing proposed consent decrees than would be appropriate in other circumstances. H.R.Rep. No. 93-1463, supra, at 12. For these reasons, it has been said by some courts that a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is "within the reaches of public interest." United States v. AT&T, 552 F. Supp. 131, 151 (1982)

[18] United States v. AT&T, 552 F. Supp. 131, 151 (1982) , *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983).

[19] At pretrial stage, "[r]emedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegation in the complaint have been formally made out is quite unwarranted." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) ("*Microsoft I*").

courts would generally not be able to render sound judgments on settlements because they would not be aware of all the relevant facts ... is of relatively little relevance here, for this Court has already heard what probably amounts to well over ninety percent of the parties' evidence both quantitatively and qualitatively, as well as all of their legal arguments[, and the reviewing court] is thus in a far better position than are the courts in the usual consent decree cases to evaluate the specific details of the settlement."[20] Once liability has survived appellate scrutiny, as in the case at bar, the need for deference to the DOJ's understanding of the public interest almost completely vanishes since the only consideration left in determining the public interest is whether the consent order does in fact remedy the defendant's violation of the law.

The DOJ argues for a cursory review, limited to the allegations contained in the complaint.[21] The DOJ's argument, however, relies on cases such as the 1995 Microsoft consent decree case ("*Microsoft I*"), [22] where the case settled prior to a trial. *Microsoft I*, however, was expressly concerned with the entry of a consent decree where "there are no findings that the defendant has actually engaged in illegal practices."[23] While *Microsoft I* was correct in stating that it would be "inappropriate for the judge to measure the remedies in the [pretrial settlement] decree as if they were fashioned after trial,"[24] in the case at bar, there has in fact been a trial, a finding of liability and an affirmance of that finding on appeal. The DOJ also relies on selected passages from *AT&T* while ignoring the passages quoted here. Simply put, the law does not compel the court to ignore the record developed at trial and affirmed on appeal as the DOJ asserts.

The Court in this case faces an unprecedented situation. Although almost all Tunney Act proceedings have involved cases where the litigation has not started, in this case the facts and law have been fully argued. There are findings of liability by both a District Court and Court of

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[20] US v. A T & T, 552 F. Supp. 131, 152 (D.D.C. 1982).
[21] CIS, pp. 65-68.
[22] *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) ("*Microsoft I*").
[23] *Id*. at 1460-61.
[24] *Id*. at 1461.

Appeals.[25] The public has expended large amounts of money and time in establishing the facts and the specific nature of a substantial violation of the antitrust laws. The only thing remaining in this historic, massive and protracted case, before the PFJ was signed, was the remedy proceeding.

We have not located another case in which the settlement occurred this late in a proceeding. In prior Tunney Act proceedings there were few, if any facts established through the legal process and the Court's knowledge of the facts was admittedly limited.[26] Here, all of the trial court's Findings of Fact were affirmed by the Court of Appeals.[27] It also agreed with Judge Jackson that Microsoft had violated the antitrust laws.[28]

These unique circumstances require that this Court should carefully follow the instructions of the Court of Appeals as to what constitutes an appropriate remedy.[29] As was held by the Court of Appeals: the remedy must (a) restore competition to the illegally monopolized market,[30] (b) deprive the violator of the "fruits" of its illegal acts,[31] and (c) prevent the violator from engaging in similar behavior in the future.[32]

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[25] *United States v. Microsoft Corp*., 87 F. Supp. 2d 30 (D.D.C. 2000) ("Conclusions of Law"), *United States v. Microsoft Corp*., 253 F.3d 34, 117 (D.C. Cir. 2001) ("*Microsoft III*")

[26] The closest example was the AT&T settlement, US v. A T & T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The Settlement was agreed upon during the trial, before the Court had issued its decision.

[27] United States v. Microsoft Corp., 253 F.3d 34, 117 (D.C. Cir. 2001) .

[28] *Id*., 60-80.

[29] See, Jonathan B. Baker and Andrew I. Gavil, Ill-Gotten Gains, Toothless Settlement Lets Microsoft Keep Rewards of Monopolization,The Legal Times, Nov. 12, 2001, available at. http://www.antitrustinstitute.org/recent/152.cfm. ("When the settlement follows trial and appeal, judicial concerns about encroaching on prosecutorial power to decide what charges to bring and congressional concerns about uninformed courts venturing into the realm of prosecutorial discretion – both of which underlie the narrow role allotted the District Court in the usual Tunney Act review -- are mooted. Once the nature and scope of the violations have been determined, as they have here, all that is left is to set the appropriate remedy -- a peculiarly judicial task, concerning which the executive branch may advise but not encroach")

[30] The Court of Appeals explained: "The Supreme Court has explained that a remedies decree in an antitrust case must seek to "unfetter a market from anticompetitive conduct," *United States v. Microsoft Corp*., 253 F.3d 34, 103 (D.C. Cir. 2001).

[31] Quoting the Supreme Court, the goal is to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation..." *Id*.

[32] "[E]nsure that there remain no practices likely to result in monopolization in the future," United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968), quoted in United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001).

In a case that has proceeded as far as this one, this Court should use its substantial discretion to see that the views of the Court of Appeals as to what constitutes appropriate relief is implemented. Accordingly, this Court is only under a limited obligation to give deference to the DOJ as to whether the Court of Appeals requirements have been satisfied. Indeed, at this stage of the proceedings, the very nature of this task is more of a judicial function than a prosecutorial function. Accordingly, a settlement at this stage will be in the "public interest" only if these three requirements of a remedy are strictly achieved. This Court has an obligation to the Court of Appeals to ensure that this occurs.

B. Especially Careful Review Is Warranted By the Importance of this Case to the Economy

All cases are of great importance to the litigants, but few cases have far reaching economic consequences on their own. From this point of view, it is no exaggeration to say that this Court is reviewing the most important consent order since the break up of AT&T a generation ago. The words of the court in *AT&T* apply with equal force to the case at bar:

> *This is not an ordinary antitrust case.* The American Telephone and Telegraph Company, with its various components and affiliates, is the largest corporation in the world by any reckoning, and *the proposed decree, if approved, would have significant consequences* for an unusually large number of ratepayers, shareholders, bondholders, creditors, employees, and competitors....[the decree would have] a potential for substantial private advantage at the expense of the public interest. *In view of these considerations, and of the potential impact of the proposed decree on a vast and crucial sector of the economy and on such general public interests as* the cost and availability of local telephone service, *the technological development of a vital part of the national economy, national defense, and foreign trade,* ***the Court would be derelict in its duty if it adopted a narrow approach to its public interest review responsibilities***.[33]

Virtually the same thing could be said with respect to the position of Microsoft within the personal computer and Internet industry. The personal computer industry and the Internet now reach into almost every facet of the economy. Consumers of personal computers, just like

[33] United States v. A T & T, 552 F. Supp. 131, 151 (D.D.C. 1982) (emphasis added).

consumers of telecommunications services a generation ago, have an enormous stake in ending the monopoly and enjoying the choices of new technologies and other benefits from a newly competitive marketplace. With so much at stake, any court would be derelict in its duty under the Tunney Act if it did not carefully review the PFJ to ensure that its entry is in fact in the public interest.

C. Especially Careful Review Is Warranted Because the PFJ Is Ambiguous, Difficult to Implement and Enforce, and Will Harm Consumers and Other Third parties

Under the Tunney Act, even when courts review consent orders entered into before a trial, they are charged with providing an especially close review to those portions of the consent order that: (a) are ambiguous (i.e., the reviewing judge "should pay special attention to the decree's clarity"[34] since it will be very difficult for the Court to administer unclear provisions); (b) relate to compliance mechanisms (if the judge "can foresee difficulties in implementation we would expect the court to insist that these matters be attended to")[35] and (c) affect third parties detrimentally ("certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.")[36]

Every key provision in the PFJ is ambiguous and therefore unlikely to effectively achieve its desired result, will be extraordinarily difficult if not impossible effectively to implement, and will have direct and substantial detrimental effect on a number of third parties, including consumers. These are three additional reasons why this Court should scrutinize the PFJ especially closely. Section II of this Discussion also will show that this scrutiny will reveal to the Court that the PFJ is not in the "public interest." Section II of this discussion will demonstrate why this Court should reject the PFJ because: (a) key terms are so ambiguous or riddled with

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[34] United States V. Microsoft Corp., 56 F.3d 1448, 1463 (1995).
[35] *Id*. at 1462.
[36] *Id*.

loopholes that they will not achieve any of the objectives of the relief portion of this litigation; and (b) difficulties in implementation, including the ineffective and cumbersome enforcement mechanism, will similarly serve to render the PFJ toothless. These two problems will exacerbate other features of the PFJ, which will cause significant injury to many third parties, including in particular consumers.

D. Especially Close Review Is Warranted Because the PFJ Is a "Mockery of Judicial Power"

Finally, under the Tunney Act a reviewing court should not "rubber stamp" a proposed Consent Order that makes a "mockery of judicial power."[37] The PFJ does exactly this.

Although a prompt, certain and effective remedy is often better than a perfect remedy achieved after extended litigation, virtually any remedy that this Court would order after litigation would be better than the PFJ. Section II of this discussion will demonstrate that the PFJ is neither prompt, certain, nor effective.

If the Court of Appeals' three requirements for an adequate remedy are not satisfied, the public's investment in this case will be wasted and the public interest will not be served. Worse, future monopolists will be sent a signal that they will not be made to account for their illegal behavior, and so many might conclude that the entire Microsoft proceeding has been a mockery of judicial power.

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[37] United States v. ABA, 118 F.3d 776, 783 (D.C. Cir. 1997) ("The district court must examine the decree in light of the violations charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes "a mockery of judicial power"); *See also*, United States v. Central Parking Corp., 2000 U.S. Dist. LEXIS 6226 (D. D.C. 2000) **(**It appears, upon examination in light of the violations charged in the complaint, that the terms of the decree are not ambiguous, that the proposed enforcement mechanism is adequate, that third parties will not be "positively injured," and that the decree does not make a mockery of judicial power);United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995).

E. The Court Should Not Make its Tunney Act Determination Until It Has Heard The Nonsettling States' Evidence As To Which Remedy Is In The Public Interest

Not only is this case unique in that the consent order has been submitted after a finding of liability has been made and upheld on appeal, it is also unique in that the Court continues to have a responsibility to fashion a remedy independent of whether it accepts the PFJ in its current or in modified form. This is because nine of the Plaintiff states did not accept the terms of the PFJ. Clearly, these non-settling Plaintiff states in the Microsoft case believe that the PFJ is an unsatisfactory remedy for Microsoft's illegal conduct.[38] They believe that only much more stringent remedies would constitute an effective remedy.[39] They have asked for, and are entitled to, a hearing on their proposed remedy, and this remedy hearing is scheduled to start on March 11.[40]

The peculiar situation of this "two track" proceeding requires that the Court hold off its decision under the Tunney Act until after it has heard the arguments to be presented by the nine non-settling States. These plaintiffs have a constitutional right to completion of the trial, and this includes the right to a Hearing before a Court that not only is unbiased, but also a Court that appears to be unbiased. However, if this Court rules under the Tunney Act that the PFJ is in the "public interest" prior to the completion of the non-settling States' hearing, this Court will appear to be biased. It will appear that, even before this Court has heard the evidence that the plaintiff states produce during the March 11 hearing, this Court already had determined the appropriate remedy in the Microsoft case.

To avoid even the appearance that this Court has prejudged the plaintiff-states' case, this Court should receive and carefully review the public comments on the PFJ, and receive and carefully review the Justice Department's responses. But then this Court should hold off making a Tunney Act determination until the plaintiff-states' hearing is completed.

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[38] These states filed their own proposal with the Court on December 7, 2001.

[39] *Id*.

[40] See Scheduling Order filed October 2, 2001.

This is especially true in light of the overall purpose of the Tunney Act. The Tunney Act granted authority to the Court to take additional evidence in order to ascertain whether the remedy is in the "public interest." It sets deadlines for the DOJ, the defendant and the public, but it does not prevent this Court from waiting until the remaining parties have presented their evidence. Moreover, this delay will not cause any hardship to Microsoft, which has sought to delay the remedial proceedings in this case on numerous occasions. Since not postponing of the Court's Tunney Act determination would harm the remaining plaintiffs by depriving them of their right to a remedy determination that appears to be unbiased, and will not adversely affect Microsoft, a balancing of the equities (as would be done in a preliminary injunction proceeding) clearly suggests that the Court should not make a Tunney Act "public interest" determination until all of the evidence concerning the appropriate remedy is before this Court.

It is important to stress the need for further evidence and argumentation with respect to the remedy in this complicated case. As commentators under the Tunney Act, we are asked to rely on the Competitive Impact Statement ("CIS") filed by the Department of Justice. The CIS mentions that the Department considered a variety of alternative remedies, but it fails utterly to analyze them, saying in less than one page, conclusorily and in disregard of its obligation to help the public comment on the case, that it has rejected all alternatives. Without the detailed explanation by the Government of why various alternatives (including many that were proposed by the American Antitrust Institute) were rejected, it is impossible for the public commentors to play their proper role under the Tunney Act in providing the Court with advice as to the implications of the PFJ. Because of this shortcoming, it is especially appropriate for the Court to hear the evidence in support of alternative remedies that will be promulgated by the non-settling States before judging what is in the public interest.

II. Substantive Failings of the Proposed Final Judgment

As noted in the previous section, the Court is not to "rubber stamp" whatever settlement the DOJ puts forward. The degree of deference given the DOJ depends on the stage of the

proceeding. Where, as here, the issues of liability been fully litigated and the remedial goals clearly established, the Court is obligated to ensure that any consent order fulfills those goals. Under this standard, the Court should reject the PFJ as a mockery of judicial power. But even under the more deferential standards used to review pretrial consent orders, the Court should reject the PFJon grounds that it is ambiguous, unenforceable, injures consumers and other third parties.

A. The PFJ Constitutes a Mockery of Judicial Power

This case presents unique circumstances in that the issues of liability have been fully litigated and affirmed by the Court of Appeals in an unanimous en banc decision. Consequently, the Court must strictly follow the standard for a proper remedy established by the Court of Appeals: "a remedies decree in an antitrust case must seek to [1] 'unfetter a market from anticompetitive conduct,' [2] 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and [3] ensure that there remain no practices likely to result in monopolization in the future.'"[41] The PFJ fails to prohibit the most pernicious anticompetitive conduct identified by the Court of Appeals and does nothing to inhibit Microsoft's power to continue to use these tactics to maintain its operating system ("OS") monopoly or to expand that monopoly into other markets. Not only does the PFJ do absolutely nothing to deprive Microsoft of the fruits of its monopoly, the Competitive Impact Statement ("CIS") filed by the DOJ does not even mention this remedial goal mandated by the Court of Appeals. A proposal which completely ignores critical holdings of the Court of Appeals consitutes a mockery of judicial power.

1. Failure to Prohibit Anticompetitive Integration of Middleware and the Operating System

The PFJ fails to restrict, let alone prohibit, the most egregious types of illegal activity identified by the Court of the Appeals, Microsoft's integration of its products into the Operating System. As with many of the deficiencies in the PFJ, Microsoft's continuing and unfettered

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41 *Microsoft III*, 253 F.3d at 103 (citations omitted).

ability to integrate products into the operating system transgresses all three remedial goals established by the Court, for it is not only the most important tool used by Microsoft to maintain its current monopoly and create new ones, the exclusive power to integrate software into the operating system is a fruit of Microsoft's illegally maintained monopoly.

While the DOJ completely ignores the Court of Appeals mandate to deprive Microsoft of the fruits of illegal monopoly, the CIS concedes that appropriate relief should, among other things, "end the unlawful conduct."[42] The Court of Appeals unanimously and squarely held that Microsoft's integration of the browser middleware and the operating system "constitute exclusionary conduct, in violation of § 2" of the Sherman Act.[43] More specifically, the Court of Appeals found that Microsoft violated the law by commingling software code and by failing to create a way to *remove* the commingled code from the operating system.[44] Not only does the PFJ fail to end this unlawful conduct by requiring Microsoft either to stop the commingling or to provide a way to remove the commingled code, the PFJ actually endorses such anticompetitive integration by giving "Microsoft in its sole discretion" the right to determine the "the software code that compromises a Windows Operating System Product."[45] It is hard to imagine anything that could more readily constitute a mockery of judicial power than to authorize the defendant to engage in conduct which the court has specifically found to be illegal. Yet that is precisely what the PFJ does.

The importance of integration to Microsoft's ability to maintain and extend its monopoly can hardly be understated. It is Microsoft's weapon of mass destruction against competition. Network effects assure that middleware distributed with every new PC will dominate the market and drive out even superior products simply because the middleware is distributed with every new PC. In markets characterized by network effects, ubiquity beats quality. Microsoft can

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[42] CIS, p. 24.

[43] *United States v. Microsoft Corp.*, 253 F.3d 34, 67 (D.C. Cir. 2001); CIS, pp.3 and 7.

[44] *Id*. at 66-67

[45] PFJ, sec. VI.U.

achieve this universal distribution without resort to threats of retaliation or contractual restrictions simply by commingling its middleware code with the operating system software code. As the Court of Appeals found, Microsoft can and has used this type of integration to snuff out middleware that threatened the applications barrier to entry which protects Microsoft's operating system monopoly. So important is this weapon to Microsoft that it sought a rehearing on this matter, despite the fact that the Court had unanimously found that the conduct violated Section 2 of the Sherman Act. Not surprisingly, the Court of Appeals refused to rehear the issue.[46]

The Court of Appeals identified two types of illegal integration, commingling the browser middleware code with the operating system and excluding the browser middleware code from the Add/Remove programs utility. Yet the PFJ neither prohibits commingling nor mandates a method of removing commingled code. Section III.H of the allows OEMs and end users to hide Microsoft middleware products, but Microsoft can force the OEMs to install Microsoft middleware products as part of the operating system. OEMs and consumers can remove the icons for Microsoft middleware products, but neither OEMs nor consumers remove the middleware product itself. It is simply untrue to say that OEMs will have "freedom to make middleware decisions"[47] when Microsoft "in its sole discretion" can force OEMs to distribute and consumers to accept Microsoft's middleware product as part of the operating system.[48]

Similarly, OEMs and end users can change the settings so that, for example, the PC will launch RealPlayer instead of Microsoft's Windows Media Player middleware to play certain types of music, but neither the OEM nor the end user can really turn off the Windows Media Player. Windows Media Player will still play the music whenever "necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product."[49]

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[46] United States v. Microsoft 2001 U.S. App. LEXIS 17137 (D.C. Cir.)
[47] CIS, p.3.
[48] PFJ, sec. VI.U.
[49] PFJ, sec. III.H.

Given the existence of network effects, this inability to turn off, let alone remove, Microsoft middleware will ensure that Microsoft defeat rivals offering cross platform alternatives. Consider the music example. RealPlayer does not play music streamed in Microsoft's proprietary format and Windows Media Player does not play music streamed in RealNetworks proprietary format. Consequently, whenever consumer wants to hear music streamed in Microsoft's format, the PC will automatically play the music using Windows Media Player even though the consumer or the OEM has installed RealPlayer. But the situation is not reciprocal. If the consumer or OEM has not installed RealPlayer *and* chosen it as the option to play music, when the consumer attempts to listen music streamed in RealNetwork's format the PC will not automatically invoke RealPlayer. Instead, the PC will display an error message, probably leading the consumer to believe that the content provider's products are defective. Now consider the position of content provider. She can stream her music in RealNetwork's format, which may provide superior features, but which can only be listened to on a subset of PCs. Alternatively, she can stream her music in Microsoft's format and have it play on all PCs, even PCs where the OEM or end user has attempted to disable Windows Media Player. Of course, she will choose to stream in Microsoft's format and as more and more content providers reach the same obvious conclusion, demand for RealPlayer will evaporate regardless of which format provides the better quality music or lower prices. (Note that price is an issue. Even if Microsoft does not charge a separate price for Windows Media Player, Microsoft does sell the server software, encoding tools, etc., to content providers.)

Realistically, ISVs cannot avoid the implications of integration by purchasing installations from OEMs. The obstacles to successful implementation of such a strategy are overwhelming. First, network effects dictate that an ISV will have to purchase installation from every OEM or it will fail to achieve the universal distribution necessary to have a fighting chance against Microsoft. The price for universal distribution will not be cheap. Again, consider the plight of RealNetworks. Since an OEM cannot remove Windows Media Player, Real Networks would

have to compensate the OEM for the additional testing, support and hardware costs of having two media players installed on the PC.[50] OEMs will demand payment because the universal distribution needed by RealNetworks to survive will also mean that an OEM cannot achieve a competitive advantage over its rivals by installing RealPlayer, *e.g.*, IBM cannot differentiate its PCs from Dell's by installing RealPlayer when Dell also installs RealPlayer, and if RealPlayer is not installed on both IBM and Dell PCs, RealNetworks cannot reasonably hope to survive against Microsoft in this middleware market. The cost to RealNetworks is compounded by the fact that Microsoft not only does not have to compensate the OEM for the cost of installation, Microsoft also gets paid by the OEM for installation of Windows Media Player as part of the overall royalty for Windows. Consequently, every PC shipped would represent an expense to RealNetworks and income to Microsoft. In short, any ISV who seeks to challenge Microsoft in a middleware market will do so at an enormous and probably insurmountable cost disadvantage.

The PFJ contains provisions which further discourage ISVs from challenging Microsoft's integrated middleware and diminish their chances of success if they do. For example, the PFJ gives Microsoft the right to have Windows automatically request the end user to change back to Microsoft middleware fourteen days after the PC's first use.[51] Assume that RealNetworks convinces an OEM to install RealPlayer and to configure the PC to use RealPlayer instead of Windows Media Player for music. Two weeks after the consumer purchases her new PC, she may be confronted with a pop up window asking her to switch to Windows Media Player every time she tries to listen to music. Microsoft is free to make it impossible to turn off these incessant requests except by agreeing to turn off RealPlayer and turn on Windows Media Player. Just to get rid of the annoying message, at least some consumers will agree to switch to Windows Media Player. In other words, RealNetworks cannot really purchase more than fourteen days worth of

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[50] *Microsoft III*, 253 F.3d at 64.

[51] PFJ, sec. III.H.3

installation on a PC. Microsoft, however, will Windows Media Player permanently installed as part of the operating system.

Microsoft also has an unrestricted right to automatically override the consumer's or OEM's configuration whenever the consumer installs "a new version of a Windows Operating System Product."[52] There are no restrictions on Microsoft's power to issue "new versions" of Windows. Nor is there any restriction on Microsoft's ability to update a consumer's PC to these new versions automatically when the consumer connects to the Internet. Microsoft is free to issue automatic updates to new versions of Windows which do little more than sweep away the configuration. So even among consumers who refuse Microsoft's repeated requests to switch to Windows Media Player, the RealPlayer installation may last only until Microsoft issues its next operating system update.

At best, therefore, all an ISV can purchase from an OEM will be a temporary presence on many PCs. Not only will this discourage ISVs from entering the market with competitive middleware products, those who do will find that a temporary presence creates the same problems as lack of universal distribution due to network effects. Why should someone stream audio, write applications, etc., for a non-Microsoft middleware product that is available on a hit or miss basis when Microsoft middleware is universally present on a permanent basis?

There are two effective tools to deal with the issue of anticompetitive integration: (1) prohibit integration by Microsoft or (2) require Microsoft to include competitive middleware with the operating system. The PFJ contains neither tool. Given a unanimous *en banc* decision of the Court of Appeals holding that Microsoft illegally commingled middleware code with the operating system, the failure of the PFJ to provide either tool constitutes a mockery of judicial power.

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[52] PFJ, sec. III.H.3.

2. Microsoft Remains Free to Withhold Vital Information

Without disclosure of the operating system's APIs and related information, IHVs, IAPs, ICPs, OEMs, and perhaps most importantly ISVs cannot develop functional products that will work on Windows. Microsoft used selective disclosure of this information as a reward/retaliation mechanism in order to obtain compliance from third parties in its effort to eliminate competition from cross platform middleware products. Furthermore, by withholding information from ISVs that is available to Microsoft's own developers or by disclosing the information to ISVs later than the information is made available to Microsoft's own developers, Microsoft can retard an ISV's ability to develop competitive products, including middleware.

In a competitive market for operating systems, Microsoft would fully disclose all APIs and related information in order to attract support from third parties and to make sure that their products worked as well as they possibly could with the Windows operating system. But Microsoft does not operate in a competitive marketplace, and Microsoft has an incentive to engage in selective, incomplete and delayed disclosures in order to prevent the development of cross platform middleware products.

Rather than simply compel Microsoft to make the complete and timely disclosures that would ordinarily be required by a competitive marketplace, the PFJ puts into place a regime which seems designed to preserve Microsoft's unbridled ability to exploit its monopoly power through selective disclosure. For example, the PFJ does not require disclosure of all APIs but only the subset of "the APIs and related documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product."[53] There are a number of problems with this restricted set of mandatory disclosures. First, ISVs may want to use APIs in Windows that Microsoft does not happen to use for its own middleware. While a certain API or set of APIs may be the best way for Microsoft to implement its middleware on Windows, a different set of APIs may prove better for a competitor's middleware. Under the terms of the PFJ, however,

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[53] PFJ, sec. III.D.

Microsoft only has to disclose the APIs used by its own middleware. In other words, and contrary to the CIS, competitiors do not have *access* to the same APIs as Microsoft's own middleware developers. Rather, they have access only to those APIs *used* by Microsoft's middleware developers.

Second, Microsoft has complete discretion over which APIs fall into this subset of mandatory disclosures. Under the PFJ, an API is limited to the interfaces "that Microsoft Middleware running on a *Windows Operating System Product* uses to call upon that *Windows Operating System Product* in order to obtain any services from that *Windows Operating System Product*."[54] The PFJ also gives Microsoft complete control over what constitutes the "Windows Operating System Product."[55] The repeated references to "Windows Operating System Product" in the definition of APIs make clear that Microsoft can refuse to disclose APIs simply by exercising its unfettered discretion under the PFJ to remove those APIs from the "Windows Operating System Product."

Third, the APIs used by important Micorosoft Middleware Products such as Windows Media Player may not be subject to mandatory disclosure. The PFJ does not require disclosure of the APIs used by "Microsoft Middleware Products." Instead, the PFJ requires disclosure of the APIs used by "Microsoft Middleware."[56] The definition of "Microsoft Middleware Products" expressly includes not only Windows Media Player, but also other important middleware such as Microsoft Internet Explorer.[57] However, these products are not expressly included in the definition of "Microsoft Middleware."[58] Not all software which provides "the same or substantially similar functionality as a Microsoft Middleware Product"[59] falls within the definition of "Microsoft Middleware." It must also be "distribute[d] separately separately from a

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[54] PFJ, sec. VI.A.
[55] PFJ, sec. VI.U.

[56] PFJ, sec. III.D and VI.A
[57] PFJ, sec. V.K
[58] PFJ, sec. VI.J
[59] PFJ, sec. VI.J.3.

Windows Operating System Product to update that Windows Operating System Product."[60] If, for example, Microsoft ceases to distribute Internet Explorer and Windows Media Player separately from Windows or if Microsoft no longer treats these separate distributions of Internet Explorer and Windows Media Player as Windows updates, then Internet Explorer no longer constitutes "Microsoft Middleware" and Microsoft no longer has an obligation to disclose the APIs used by Internet Explorer.[61]

Whether a product falls within the definition of "Microsoft Middleware," and hence whether the APIs it uses must be disclosed, also depends on whether the product is trademarked.[62] Under PFJ section VI.T, a product is "Trademarked" if Microsoft claims a trademark in the product, separate from its trademark claims for "Microsoft®" and "Windows®," by, for example, marking the name with the ® character. But a product is not Trademarked if its name is "comprised of the Microsoft ® or Windows® trademarks together with descriptive or generic terms." In other words, Microsoft Internet Explorer® and Windows Media Player® would be Trademarked and the APIs used by those products would be subject to disclosure. But Microsoft® Internet Explorer and Windows® Media Player would not be Trademarked and the APIs used by those products would not be subject to any mandatory disclosure. Under PFJ Section VI.T, Microsoft "disclaims any trademark rights in such descriptive or generic terms." Consequently, if the Court enters the PFJ, Microsoft Internet Explorer® and Windows Media Player® will automatically become Microsoft® Internet Explorer and Windows® Media Player and the APIs used by those products will fall outside the scope the PFJ's mandatory disclosure provisions.

Fourth, the number of APIs subject to mandatory disclosure is further reduced by PFJ section III.J.1(a) which allows Microsoft to refuse disclosure of APIs "which would compromise the

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[60] PFJ, sec. VI.J.1.

[61] Note that Microsoft's current distribution of these products for the Macintosh platform will not constitute the required separate distribution because the Macintosh versions cannot be updates to Windows.

[62] PFJ, sec. VI.J.2.

security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems." The importance of the APIs for these functions can be seen from the fact that anyone who wishes to play music distributed by the PressPlay joint venture created by two of the five major record labels will need access to the digital rights management APIs. The CIS asserts that "the APIs ... for the Secure Audio Path digital rights management service ... must be disclosed."[63] Unfortunately, the CIS is wrong. Section III.J.1(a) of the PFJ states: "No provision of the Final Judgment shall ... [r]equire Microsoft to ... disclose ... portions of APIs ... which would compromise the security of a particular installation or group of installations of ... digital rights management." The CIS appears to assume that "installation" refers to an "end-user installation,"[64] when, in fact, the the term "end-user installation limitation" is not stated anywhere in Section III.J.1.a. Installation could just as easily mean Microsoft particular installation of this technology in Windows generally as it could an consumer's particular installation on his own PC. Indeed, the former interpretation is more probable, at least with respect to APIs, since it is hard to conceive of a Windows API installed only on the PC of one particular consumer.

Fifth, not only are ISVs limited to an articificially and anticompetitively limited subset of the APIs, ISVs do not get access to those APIs until the "last major beta test release" of the Microsoft Middleware. In other words, ISVs can never hope to catch up with Microsoft's own developers. While Microsoft's developers presumably have access to new APIs as soon as they are created, ISVs do not get access to new APIs until Microsoft releases a beta version of the revised operating system to 150,000 or more beta testers.[65] It is not clear that Microsoft has ever had 150,000 beta testers in any of its beta testing programs.

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[63] CIS, p. 35.

[64] Page 51 of the CIS states that Section III.J.1.a is "limited to specific end-user implementations of security items."

[65] PFJ, sec.III.D and. VI.R.

Sixth, the PFJ delays the initial disclosure of the APIs for a year.[66] There is no need for this delay. Microsoft already discloses the APIs it wants to disclose through the Microsoft Developer Network mechanism utilized by the PFJ. The CIS restates the one year delay, but provides no justification for it. Consequently, it is a mockery of judicial power to allow Microsoft to continue this anticompetitive conduct for another year.

Finally, PFJ section J.2 empowers Microsoft to exclude Open Source developers from access to many, if not all, APIs. The most important source of competition for Microsoft may well come not from commercial ISVs but the Open Source movement, *i.e.*, the creators of Linux, Apache, etc. While the Open Source movement has significant potential for creating competition, the Open Source movement does not constitute a for profit business or even a traditional nonprofit business. Section III.J.2(b), however, gives Microsoft the right to condition access to many APIs on proof of "a reasonable *business need* for the API" and section III.J.2(c) allows Microsoft to limit access to those who meet "reasonable, objective standards *established by Microsoft* for certifying the authenticity and viability of its *business.*" Participants in the Open Source movement will have difficulty establishing that they are a *business* with *business needs* under many tests, but it will certainly be impossible to meet the standards established by Microsoft given that Microsoft has already attacked the Open Source model as "unhealthy" and doomed to failure.[67] Indeed, Microsoft has even branded all Open Source software as "a virus."[68]

The CIS is simply wrong when it states that "Subsection III.J.2, by it explict terms, applies only to licenses for a small subset of the APIs and Communications Protocols that Microsoft will have to disclose."[69] In reality, Section III.J.2, "by its explicit terms," covers APIs and other

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66 More specifically, the PFJ section III.D states that the mandatory disclosures will begin "[s]tarting a the earlier of the release of Service Pack 1 for Windows XP or 12 months after submission of the [Proposed] Final Judgment for to the Court."

67 *See*, Prepared Text of Remarks by Craig Mundie, Microsoft Senior Vice President The Commercial Software Model The New York University Stern School of Business May 3, 2001 <http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.asp>

68 See, *e.g.*, Stephen Shankland , " Microsoft license spurns open source" CNet News.com, June 22, 2001 <http://news.com.com/2100-1001-268889.html?legacy=cnet>

69 CIS, p. 53.

information "*related* to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, [and] third party intellectual property protection mechanisms." Virtually all APIs fall into this category, depending on how one defines "related to" and Microsoft will have no incentive to define the phrase narrowly. But even under a narrow interpretation of section III.J.2, participants in the Open Source movement may still be excluded from disclosures of APIs and other critical information on grounds that they are not ISVs because they do not constitute an entity. Sec. VI.I.

The District Court found, and the Court of Appeals affirmed, that Microsoft illegally maintained its monopoly by engaging in selective and delayed disclosures of APIs. The PFJ allows this practice to continue virtually unabated. Consequently, the PFJ is a mockery of judicial power.

3. Failure to Prohibit Anticompetitive Corruption of Cross-Platform/Open Standards

Microsoft's assault on middleware threats to its Operating System monopoly has not been limited to integration. Java represented a perhaps even greater threat to Microsoft's Operating System than Netscape's web browser, and unlike the Netscape web browser, Java continues to be a viable product. Created by Sun, Java is at its essence a technology that allows programmers to write applications that will run on any operating system with a Java Virtual Machine installed. Microsoft licensed Java from Sun and began to market programming tools for ISVs to use in writing Java applications. Microsoft also created its own version of the Java middleware for Windows. Microsoft, however, secretly altered its implementation of Java so that applications written using Microsoft's programming tools would not run correctly under any operating system other than Windows. The Court of Appeals condemned Microsoft's use of these tactics as part of an "embrace and extend" strategy—Microsoft embraced an open/cross-platform and then extended it with Windows-only proprietary technology—as a violation section 2 of the Sherman Act. Use of the "embrace and extend" strategy, whether done openly or in secret, effectively

renders any cross-platform technology useless as a means of breaking down the applications barrier to entry.[70]

While the PFJ does purport to contain language which restricts—but does not eliminate—Microsoft's use of exclusive dealing agreements and threats of retaliation for using competing middleware products, including, presumably, Sun's Java Virtual Machine, nothing in the PFJ restricts Microsoft's ability to subvert an open standard by engaging in a surreptitious embrace and extend strategy. If, as the CIS asserts, "[c]ompetition was in this case principally because Microsoft's illegal conduct maintained the applications barrier to entry into the personal computer operating system market by thwarting the success of middleware that would have assisted competing operating systems in gaining access to applications and other needed complement," then Microsoft must be prohibited from polluting the open standards on which cross-platform middleware relies. The failure of the PFJ to do so constitutes a mockery of judicial power.

4. Microsoft Remains Free to Retaliate Against Those Who Favor Competitive Products

Section III.A of the PFJ initially purports to prohibit retaliation against OEMs who distribute competitive middleware products. Yet section III.A then renders this prohibition meaningless by giving Microsoft the right to provide "Consideration" "commensurate with the absolute level or amount of that OEM's development, *distribution*, *promotion*, or *licensing* of that Microsoft product or service." Consideration includes both "monetary payment" and "the provision of preferential licensing terms."[71] So Microsoft may reward OEMs who distribute, promote or license Microsoft products to the exclusion of competitive middleware products. Of course, those OEMs who favor competitive middleware products will not receive "Consideration" from Microsoft. It does not matter that this use of Consideration is limited to "absolute" versus "relative" levels of distribution. The additional support costs of installing two products which

[70] *Microsoft III*, 253 F.3d at 74-78.
[71] PFJ, sec. VI.C.

provide the same functionality will deter most OEMs from installing competitive product when they are already installing the Microsoft product. By any reasonable standard, therefore, Microsoft's ability to give consideration to OEMs for the distributing, promoting and licensing of Microsoft's products amounts to an unrestricted right to retaliate against OEMs who distribute, promote or license non-Microsoft products.

Similarly, Section III.G.1 purports to prohibit Microsoft from offering "Consideration" to OEMs as well as IAPs, ICPs, ISVs, and IHVs in exchange for their distribution of Microsoft Platform software in a fixed percentage, but the section goes on to state Microsoft may enter such agreements whenever "Microsoft in good faith obtains a representation that is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software." Note that the OEMs and others are not required to distribute any competitive product, only to represent that they could distribute competitive products. The CIS points out that Microsoft could grant an ISV preferential marketing, technical and other support "on the condition that the ISV ship the Windows Media Player along with 70% of the ISV's products" so long as "the ISV affirmatively states that it is commercially practicable for it also to ship competing media players with at least the same (or greater) number of shipments."[72] Commercial practicability is not defined in the PFJ, and it is difficult to imagine that an ISV (or OEM, IAP, etc.) would refuse to make such a representation in exchange for preferential treatment from Microsoft. At the same time, it is difficult to believe that an ISV would distribute two products that perform the same function. As with OEMs, the additional distribution costs may be small, but the additional support costs to help consumers sort out which product to use are likely to be prohibitive.

Section III.F.2 also purports to prohibit Microsoft from giving an ISV Consideration in exchange for the ISV's agreement to refrain from "developing, using, distributing, or promoting any software" that competes a Microsoft or runs on a competing platform. Yet the very same

[72] CIS, pp. 42-43.

section gives Microsoft the right to enter into these exclusive agreements as part of a "bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software." All ISVs who write software for Windows must use Windows, even if only to test whether products will run under Windows. Consequently, Microsoft is relatively free to offer Consideration, including preferential developer support, to any ISV as part of the ISV's other contractual obligations with Microsoft. Section III.F.2 does, to be sure, require that the restrictions be connected to "bona fide contractual obligations" and limits the permissible restrictions to those that are "of reasonable scope and duration." But these are all undefined terms, so challenges to conduct under this section as unreasonable in scope or duration may require years of litigation. Since the Technical Committee ("TC") cannot issue binding decisions, nor can its members testify, nor can its work product be used in any enforcement proceeding, the TC will add a layer of delay rather than expedite resolution of these disputes.

B. Consumers and Other Third Parties Will Be Injured

Independently of whether the PFJ consitutes a mockery of judicial power, the Court can and should refuse to a consent order which poses a high risk of injury to consumers or other third parties. The PFJ contains provisions which will affirmatively make matters worse in at least four important ways. First, the PFJ contains language which Microsoft may be able use to require competitors to license their intellectual property to Microsoft. This would take away the rights of third parties to negotiate with Microsoft over whether and on what terms Microsoft may use their property. Second, the Court of Appeals modified the standard for tying from "illegal per se" to "rule of reason," but the PFJ purports to immunize Microsoft from tying claims altogether. This poses an unacceptable risk that the third party victims of Microsoft's tying may lose some or all their rights to challenge this conduct. Third, whereas Microsoft now makes it possible to remove certain middleware such as Windows Messenger from middleware, the PFJ will limit Original Equipment Manufacturers ("OEMs") and consumers to deleting icons. Finally, the PFJ enables Microsoft to retaliate with legal immunity against OEMs and others in a variety of ways.

1. The PFJ Requires Cross-Licensing of Third Party Intellectual Property to Microsoft.

Currently, ISVs and other third parties are at least theoretically free to license their intellectual property to Microsoft or not as they see fit. The extent to which third parties actually have the power to exercise this legal right may remain in doubt due to Microsoft's monopoly power, but the PFJ, with no consideration for the possible anticompetitive effects of cross licensing with a monopolist in networked markets, appears to sweep away the intellectual property rights of third parties who deal with Microsoft.

The loss of the legal right to refuse to cross license intellectual property with Microsoft is found in section III.I.5 which provides:

> an ISV, IHV, IAP, ICP, or OEM may be required to grant to Microsoft on reasonable and nondiscriminatory terms a license to any intellectual property rights it may have relating to the exercise of their options or alternatives provided by this [Proposed] Final Judgment; the scope of such license shall be no broader than necessary to insure that Microsoft can provide such options or alternatives.

The scope of this provision and its potential impact on third parties is astonishing. Assume, for example, that an OEM wishes to enable dual booting, i.e., to allow the end user to choose between using Linux (or some other OS) and Windows when she turns on her PC. Can Microsoft insist that it receive a license from the OEM for the software that makes the choice possible? The answer would seem to be yes. After all, the OEM would be attempting to take advantage of "options or alternatives provided" by the PFJ and Section III.I.5 does say that Microsoft may require the OEM to grant Microsoft "a license to *any* intellectual property rights it may have *relating* to the exercise of [its] options or alternatives." Expanding Microsoft's ability to insist on cross-licensing will likely have two types of negative effects. In some cases, it will raise the price of dealing with Microsoft too high for the other company, in which case the company will be disadvantaged in the marketplace. In other cases, the cross-licensing will occur and Microsoft may gain important intellectual property that will give it a competitive advantage over its

competitors. In either instance, the incentives for other companies to produce new intellectual property will be reduced and consumers will suffer.

2. The PFJ May Immunize Microsoft From Tying Claims.

One of the more remarkable phenomena in this case has been Microsoft's success at escaping liability for tying under Section 1 of the Sherman Act. When the lawsuit began, Microsoft, like everyone else, was subject to the rule that tying is illegal *per se*. The Court of Appeals ignored at least a half century of Supreme Court precedent and held that the rule of reason analysis should apply to Section 1 claims of tying against Microsoft.[73] (Note that the Court of Appeals already found that this conduct violated the rule of reason standard under Section 2 of the Sherman Act.) Section VI.U of the PFJ, however, dispenses with even the rule of reason analysis and tries to immunize Microsoft from tying claims altogether when it states that the "software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." Even the failed 1995 Consent Decree required Microsoft to offer at least a plausible procompetitive reason for its tying of software to the Operating System.[74] It is difficult even to conceive of a greater victory for a convicted abusive monopolist who is already in the process of tying new products to its core operating system monopoly. This provision of the PFJ alone makes a mockery of the entire case, but it also could mean that the victims of tying, whether it be consumers forced to purchase products they do not want or ISVs whose products are excluded from the OEM channel of distribution, may also be left without remedy. Clearly, the PFJ gives consumers and other third parties no legally enforceable rights.[75] The PFJ also presents an unacceptably high risk of depriving them of their existing rights. Such a consent order is not in the public interest.

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[73] *Microsoft III*, 253 F.3d at 89-95.

[74] *See* United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998).

[75] PFJ, sec. VIII.

3. The PFJ Delays Changes in Microsoft's Conduct which Should Already Be in Place.

Section III.H allows OEMs and consumers to hide certain Microsoft middleware by deleting the icons for the Microsoft products and replacing them with icons for competitive products beginning "at the earlier of the release of Service Pack 1 for Windows XP or 12 months after submission of this [Proposed] Final Judgment to the Court." In the rapidly changing middleware markets affected by this provision, a year may provide Microsoft more than enough time to eliminate viable competitors by excluding them from access to consumers, and there is no justification for giving Microsoft a year to implement this provision. On July 11, 2001, Microsoft issued a press release stating these changes would be incorporated into Windows XP when it shipped in October *2001*. [76] . If Microsoft could implement this flexibility in October 2001, why must competition take a battering for another full 12 months? The delay can only serve to entrench Microsoft's efforts to eliminate competition in the middleware markets covered by Section III.H of the PFJ.

4. The PFJ Enables Microsoft to Retaliate Against OEMs and Others.

As noted in our comments on justice and ambiguity, Microsoft may in fact remain free to retaliate against OEMs, Independent Software Vendors ("ISVs") and others who do not favor Microsoft middleware products. While the other comments focus on Microsoft's ability to take advantage of loopholes and vague and ambiguous provisions within the PFJ, perhaps it is as important to note that the PFJ covers only a small number of Microsoft products. Programming tools and Application Programming Interfaces ("APIs") not used by Microsoft are critically important to ISVs and others. Similarly, Microsoft Office's commanding market share makes it an indispensible product to OEMs. The Court of Appeals noted the willingness of Microsoft to use these products in its illegal efforts to maintain the Windows monopoly, yet the PFJ leaves Microsoft free to retaliate against ISVs, OEMs and others by discriminating on price and other

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[76] *See* Microsoft Press Release, <http://www.microsoft.com/presspass/press/2001/Jul01/07–11OEMFlexibilityPR.asp>

terms of access to these products. Without realistic protections against retaliation, the record of this case indicates strongly that many remedial portions of the PFJ will be ineffective.

C. The Proposed Final Judgment Is Ambiguous

"A district judge pondering a proposed consent decree understandably would and should pay special attention to the decree's clarity."[77] The PFJ fails to set forth specific and precise remedies for the antitrust concerns identified by the Court of Appeals. There are no clear prohibitions on Microsoft's conduct in the Proposed Final Judgment. Many of the putative restrictions on Microsoft are vague and all are riddled with exceptions and qualifications. As the experience over the 1995 Consent Decree shows, Microsoft and the government may have enormous differences of opinion as to the meaning of the terms. This lack of clarity will almost certainly compound the delay already present in the Proposed Final Judgment since the inevitable differences of opinion cannot be resolved without extended litigation to determine the "intent" of the parties according to the rules of contract law.

1. Unclear Whether Microsoft Can Retaliate Against OEMs Who Favor Competitive Products

A critical issue in Microsoft's illegal maintenance of its monopoly has been its ability to retaliate against those who stand in its way, especially OEMs. OEMs provide an extraordinarily important distribution channel for software, including any cross-platform middleware that could serve to break down the applications barrier to entry. Unlike Microsoft, OEMs face intense competition and operate on razor thin profit margins. Consequently, they are especially vulnerable to retaliation from Microsoft. Seemingly small differences in the price charged for Windows can account for the success of one OEM and the demise of another. Nor is retaliation limited to price differences for Windows. If Microsoft can retaliate through the prices it charges for other products, such as Microsoft Office, and through the level of support that Microsoft gives an OEM. Since OEMs currently have no viable alternative to Windows, they simply cannot afford incur Microsoft's disfavor.

[77] *United States v. Microsoft*, 56 F.3d 1448, 1461(D.C. Cir. 1995).

Section III.A.1 appears to prohibit Microsoft retaliating against OEMs who favor rival products:

> Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration ... from that OEM, because it is known to Microsoft that the OEM is or is contemplating ... developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software ...

Now assume that an OEM wants to develop, distribute and promote a new type of software that will compete with JAVA as a tool for creating applications that will run on multiple Operating Systems. As such, this technology threatens to erode the Applications Barrier to Entry that protects Microsoft's monopoly. Can Microsoft retaliate against the OEM for doing this? No one can tell from the language of the PFJ. First, there is the question of whether this new technology competes with a "Microsoft Platform Product." Microsoft Middleware products are included within the PFJ's definition of a "Microsoft Platform Product."[78] It is still unclear, however, whether this new OEM middleware would compete with "Microsoft Platform Software." The PFJ narrowly defines "Microsoft Middleware Products."[79] Microsoft's "Java Virtual Machine" is included in the definition of Microsoft Middleware Products,[80] but the OEM is not offering a different "Java Virtual Machine," The OEM is offering an alternative to using Java. True, this technology threatens Microsoft's monopoly in the same way as Java does, but it remains unclear whether this new technology competes with any Microsoft Middleware Products. Therefore, it remains unclear whether the new technology competes with Microsoft Platform Software. Therefore, it remains unclear whether Microsoft may retaliate against the OEM for offering this technology.

Consider another example where an OEM seeks to distribute the Netscape web browser, and the OEM promotes its use of Netscape in advertising, etc. Presumably this presents a clearer case since the definition of Microsoft Middleware Products expressly includes the Internet Explorer

[78] PFJ, sec. VI.L(ii).
[79] PFJ, sec. VI.K
[80] PFJ, Sec. VI.K.1

web browser and, therefore, it would seem almost certain that the Netscape web browser competes with Microsoft Platform Software. May Microsoft retaliate against the OEM for distributing the Netscape web browser? Again, the answer is unclear. As previously noted, section III.A.1 does state that Microsoft cannot condition any Consideration that it gives an OEM based on whether the OEM distributes or promotes software that competes with Microsoft Platform Software. But Section III.A also states that "[n]othing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, *distribution, promotion,* or licensing of that Microsoft product or service." In other words, Microsoft cannot withhold Consideration for promoting Netscape, but Microsoft can withhold Consideration for failing to promote Internet Explorer. OEMs have limited resources to devote to the distribution and promotion of software, and if an OEM devotes its marketing budget to Netscape, the OEM cannot also spend those funds distributing and promoting Internet Explorer. Consequently, the OEM's distribution and promotion of Netscape may mean that the OEM has not given the required level of distribution or promotion to Internet Explorer, thereby entitling Microsoft to withhold the Consideration that Microsoft gives to competing OEMs who do not distribute and promote Netscape. This contradiction recreates the same type of ambiguity found the 1995 Consent Decree which prohibited Microsoft from tying products to Windows, but expressly allowed Microsoft to integrate products into Windows.

2. Unclear Whether Non-Microsoft Middleware and Non-Microsoft MiddleWare Products as Defined by the PFJ Could Ever Exist

Some of the most important provisions of the PFJ concern the rights of OEMs, consumers, and others to use Non-Microsoft Middleware and Non-Microsoft Middleware Products. Section III.H, for example, allows an OEM or end user to hide Microsoft Middleware Products and install Non-Microsoft Middleware Products as the default mechanism to perform the same functions. Thus, it would seem that an OEM could remove the icon for Internet Explorer and

replace it with an icon for Netscape's web browser, but in reality this will depend on whether Netscape's web browser constitutes a Non-Microsoft Middleware Product.

To constitute a Non-Microsoft Middleware Product, Netscape's web browser must, among other things, expose "a range of functionality to ISVs through published APIs."[81] Generally speaking, APIs are the special codes that an application uses to communicate with Middleware or the Operating System. Indeed, Middleware constitutes a competitive threat to Microsoft's Operating System monopoly because Middleware contains its own set of APIs so that an application does not have to communicate directly with the Operating System. As long as the PC contains the appropriate Middleware, the application will run regardless of whether the PC uses Windows or some other Operating System. This is not to say that the Operating System APIs are irrelevant. The Middleware still uses the Operating System's APIs, but the applications use the Middleware APIs. Netscape's web browser does expose APIs as that term is commonly used.

The PFJ, however, contains a much narrower definition of APIs than that commonly used. Under PFJ section VI.A, only "the interfaces ... that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product" constitute APIs. In other words, APIs that exist outside the Windows Operating System do not appear to constitute APIs at all. These APIs are, of course, Microsoft's intellectual property.

So, for an OEM to have the right to install Netscape as the default web browser the question is not whether Netscape exposes Netscape APIs, but whether Netscape exposes Windows APIs. This makes no sense since it could easily mean that there is no such thing as Non-Microsoft Middleware Product, thereby rendering a significant portion of the PFJ meaningless. But this interpretation is more than plausible given the express language of the PFJ. Ultimately, the Court may reject this interpretation and refuse to use the PFJ's definition of APIs for purposes of determining what constitutes a Non-Microsoft Middleware Product. Then again, the Court might not. Either way, the PFJ is ambiguous on this fundamental point.

[81] PFJ, sec. VI.N.

3. Unclear Whether Microsoft May Retaliate Against ISVs Who Favor Competitive Products

Just as Section III.A.1 initially appeared to limit Microsoft's ability to retaliate against OEMs, so too Section III.F.1 provides that "Microsoft shall not retaliate against any ISV ... because of that ISV's ... developing, using distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software" and Section III.F.2 states that "Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISVs refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software." As with the prohibition against OEM retaliation, whatever clarity these provisions might otherwise have vanishes upon careful examination.

Assume that an ISV plans to develop a game that will make use of some RealPlayer's multimedia functionalities. Does the PFJ allow Microsoft to punish the ISV for not using RealPlayer instead of Windows Media Player? Could Microsoft, for example, refuse to provide the ISV with technical support in retaliation? The answer is far from clear. RealPlayer competes with Windows Media Player, which is included in the definition of Microsoft Middleware Products and, therefore, within the definition of Microsoft Platform Product which would seem to invoke Section III.F's ban on retaliation. But Section III.F.2 contains an exception to the general rule against withholding Consideration in retaliation for the use of competing software:

> Microsoft may enter into agreements that place limitations on an ISV's development, use , distribution or promotion or any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software ...

The PFJ does not define or give any guidance as to how to define what is "reasonably necessary," "reasonable scope and duration," or "a bona fide contractual obligation."

If Microsoft wants to retaliate, Microsoft would simply argue that it offered Consideration only as part of a contract to promote Windows Media Player and that the ISV who uses RealPlayer either did not enter into such a contract or breached the contract by using RealPlayer. Such an interpretation of the exception would render the main prohibition meaningless and the Court might interpret the exception more narrowly, but then again the Court might accept the broad interpretation of the exception. Either way, the provisions that relating to retaliation against ISVs who favor non-Microsoft products are ambiguous.

4. Unclear Whether Microsoft Must Make Any Disclosures to Third Parties.

The PFJ contains language which standing on its own might require Microsoft to make certain disclosures of APIs, Communications Protocols, and related documentation that enable ISVs and others to write software capable of running on Windows. These comments have already pointed out that the loopholes contained in the API provisions allow Microsoft almost complete discretion to continue to withhold APIs. The ambiguities surrounding the mandatory disclosure provisions for Communications Protocols allow Microsoft to withhold critical information.PFJ section III.E states that "Microsoft shall make available for use by third parties ... any Communications Protocol that is ... (1) implemented in a Windows Operating System Product ... and (ii) used to interoperate natively ... with a Microsoft server operating system product."

There are three critical terms in determining what Microsoft must disclose: "Communications Protocol," "Windows Operating System Product," and "Microsoft operating system product." The PFJ defines "Communications Protocol" as:

> [T]he set of rules for information exchange to accomplish predefined tasks between a *Windows Operating System Product* and a *server operating system* connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.[82]

[82] PFJ, sec. VI.B

The incorporation of "Windows Operating System Product" and "server operating system" into the definition of "Communications Protocol" makes the definition of these terms especially important in understanding what Microsoft must disclose. The PFJ definition of "Windows Operating System Product" expressly allows Microsoft to include whatever it wants and by implication to exclude whatever it does not want from the "Windows Operating System Product." [83]

The definition of "Windows Operating System Product" and its incorporation into the definition of "Communications Protocal" makes Microsoft's obligation to disclose "Communications Protocol" a moving target. But the third critical term, "server operating system product," is not defined at all. Nor does the PFJ define server operating system. The CIS, perhaps in belated recognition of this issue, purports to define the term,[84] but there is no reason to believe that Microsoft agrees with the CIS definition. Thus, exactly what Microsoft must disclose as under the Communications Protocol provision remains ambigous.

Microsoft's obligations to disclose Communications Protocols are also subject to the same exceptions in PFJ section III.J that apply to the API disclosure provisions. Just as PFJ section III.J.1 threatens to remove a broad set of APIs from disclosure, so too it may exempt many if not most of the Communications Protocols that Microsoft would otherwise have to disclose. Similarly, PJF section III.J.2 may well mean that Microsoft can deny disclosure of Communications Protocols to competitors, including the Open Source movement, just as it does for APIs.

5. Unclear Whether Open Source Developers Are ISVs.

The Open Source Movement presents one of the biggest threats to Microsoft. Linux is undoubtedly the most famous Open Source project, but a wide variety of Open Source Projects are underway. Although some commercial enterprises bundle Open Source software with additional proprietary software, documentation or services, e.g., Red Hat, the Open Source

[83] PFJ, sec. VI.U
[84] CIS, p. 37

software itself is distributed without charge. A number of references in the PFJ suggest that its protections may not apply to Open Source developers despite their unusual potential for creating competition against Microsoft.

For example, section III.J.2(c) specifically states that Microsoft can refuse to license "any API, Documentation or Communcations Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanism of any Microsoft product" to any one who fails to meet "reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business." Ambiguity exists on two levels here. First, Microsoft could argue that virtually all of its APIs, etc., are in some way "related to" this wide range of key technologies. Second, Microsoft would seem to have almost carte blanche to refuse access to anyone on grounds that they do not meet Microsoft's standards for "authenticity and viability." What constitutes "reasonable, objective standards" is anyone's guess, but even if this language sufficiently protects commercial enterprises, Microsoft may still be able to refuse to grant access to Open Source developers since, by definition, they do not even charge for their software, let alone make a profit.

More fundamentally, the PFJ defines an ISV as "an entity other than Microsoft that is engaged in the development or marketing of software products."[85] Much of the Open Source community remains a loose collection of individuals who post changes to software code on an ad hoc basis in a variety of sometimes shifting locations on the Internet. Whether these communites constitutes "entities" is unclear.

6. Additional Ambiguities

Trying to pin down what Microsoft may or may not do is like trying to hold water in your hand. Virtually every provision raises questions. The preceding discussion identifies the most important ambiguities, but there are more. Fore example: When does an OEM installed

[85] PFJ, sec. VI.I

"shortcut" for Non-Microsoft Middleware "impair the functionality of the user interface"?[86] What constitutes "a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product?[87] What constitutes "commercially practicable"?[88]. What constitutes a "bona fide joint venture" or a "joint development or joint services arrangement"?[89] What constitutes "a reasonable technical requirement" or "valid technical reasons"? PFJ, sec. III.H. What constitutes a "bona fide join venture"?[90] What constitutes "a reasonable period of time" ?[91]

D. The Enforcement Mechanism Is Inadequate

The PFJ cannot possibly achieve its purported goals without an enforcement mechanism adequate to deter violations by Microsoft or bring about compliance when violations occur. For this to occur, the line between permissible and impermissible conduct must be clearly drawn. Unfortunately, most of the "prohibitions" contained in Section III of the PFJ are riddled with exceptions and undefined terms. Consequently, even under the best of circumstances, fairly extensive litigation would be necessary to determine the exact parameters of permissible conduct.

But the Microsoft case does not present the best of circumstances. The delay inevitably caused by disputes over the interpretation of vague language and complex exceptions inevitably play to Microsoft's advantage. The PFJ lasts at most seven years. PFJ, sec. V. Consider the issue of Microsoft's "integration" of middleware with the operating system. This issue appeared to be settled with the consent decree that Microsoft agreed to in 1994 and which the Court entered in 1995. Microsoft never accepted the government's interpretation of the 1995 Consent Decree or the law on that issue. This dispute ultimately led to the current litigation. Microsoft eventually

[86] PFJ, sec. III.C.2.
[87] PFJ, sec. III.C.3.
[88] PFJ, sec. III.G.1
[89] PFJ, sec. III G.
[90] PFJ, sec. III.I.
[91] PFJ, sec. III.I.

lost the dispute in 2001 when the Court of Appeals held that Microsoft's integration of the browser middleware with the operating system violated Section 2 of the Sherman Act (a decision which will effectively be reversed if the Court enters the PFJ in 2002). In the meantime, Microsoft has effectively eliminated all competition in the browser middleware market largely by integrating its browser into the operating system.

The rapidly changing nature of the software markets compounds the necessity of a swift and certain enforcement mechanism. "By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically."[92] Despite the pressing need of swift and sure enforcement, the PFJ seems designed to enable and to reward delay.

1. The Enforcement Mechanism Lacks Appropriate Penalties.

An effective enforcement mechanism must contain a penalty sufficient to deter misconduct by the defendant. Ideally, the enforcement mechanism would reward the defendant for extending itself to accomplish the remedial goals, but at the very least the mechanism should severely punish a pattern of willful misconduct. The PFJ, however, does neither.

The PFJ provides no incentives for Microsoft to cooperate in the effort to break down its Operating System monopoly. Worse, the PFJ does not punish Microsoft for deliberate and repeated violations of the PFJ's restrictions. Microsoft's only stated penalty for "engag[ing] in a pattern of willful and systematic violations" of the restrictions is "a one-time extension of this [Proposed] Final Judgment of up to two years." PFJ, sec.V.B. The base period of the PFJ is five years. If Microsoft has repeatedly violated the PFJ for five years, why should it care if the PFJ is extended to seven years? If Microsoft can get away with ignoring the restrictions for five years, surely it will not pose any problem for Microsoft to ignore the restrictions for another two years.

2. The Technical Committee Will Only Delay Enforcement.

The Technical Committee can only serve to delay resolution of complaints about Microsoft's failure to comply with the restrictions contained in the PFJ. The Technical Committee cannot

[92] *Microsoft III*, 253 F.3d at 49.

resolve disputes, but only "advise" Microsoft and the government of its conclusions. The Proposed Final Judgment's "gag orders" prohibiting both testimony from Committee members and use of their work product in enforcement proceedings will cause further delay since enforcement will always require the government to duplicate of the Committee's work in amassing evidence.

Assume, for example, that Microsoft refuses to disclose an API to an ISV in retaliation for the ISV's use of RealPlayer technology. This denial immediately places the OEM at a significant disadvantage over ISVs who comply with Microsoft's wishes that they only use Windows Media Player. Assume further that the ISV immediately contacts the TC with its complaint alleging violations of sections III.D and F of the PFJ. The TC must then begin the investigation. While it is impossible to know how long such an investigation would take, the powers and duties of the TC outlined in section IV.B.8.b enable the TC to undertake a truly exhaustive investigation:

> The TC may, on reasonable notice to Microsoft:
>
> (i) interview, either informally or on the record, any Microsoft personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Microsoft;
> (ii) inspect and copy any document in the possession, custody or control of Microsoft personnel;
> (iii) obtain reasonable access to any systems or equipment to which Microsoft personnel have access;
> (iv) obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access; and
> (v) require Microsoft personnel to provide compilations of documents, data and other information, and to submit reports to the TC containing such material, in such form as the TC may reasonably direct.

While such expansive investigatory powers are laudable in many respects, they do represent a tradeoff in favor of accuracy over speed. After such a thorough investigation, however, the TC may only conclude whether the "complaint is meritorious," and if so, "it shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure." PFJ, sec. IV.D.4.c.

Assuming that the TC finds merit in the ISV's complaint, it is not clear whether the TC may inform the ISV of its findings. PFJ section IV.B.8 states that "TC members may communicate with non-parties about how their complaints ... might be resolved with Microsoft," but whether communication "about how their complaints might be resolved" includes the TC's findings and recommendations remains unclear. PFJ section IV.D.4.c authorizes the TC to communicate its findings only to Microsoft and the Plaintiffs. PFJ section IV.B.9 provides that "any report and recommendations prepared by the TC ... shall not be disclosed to any person other than Microsoft and the Plaintiffs." It is certainly possible to construe these provisions as prohibiting the TC from informing the complaining ISV of anything other than a range of possible outcomes.

What happens if, after extensive investigation, the TC finds merit in the ISV's claim and recommends that Microsoft disclose the APIs to the ISV? If Microsoft resists the decision, whether to proceed against Microsoft rests not with the OEM victim or the TC, but with the Plaintiffs. Section IV.A.1 of the PFJ gives the Plaintiffs "exclusive authority" to enforce the restrictions. Any one of the Plaintiff's may now take up the ISV's complaint, but if the Plaintiff who is willing to pursue the OEM's complaint is one of the settling states, it must first consult with "with the United States and with the plaintiff States' enforcement committee." PFJ, sec. IV.A.1. After consulting with the United States and the plaintiff States' enforcement committee, the enforcing state must then "afford Microsoft a reasonable opportunity to cure" the alleged violation. PFJ, sec. IV.A.4. Note that this is a second opportunity for Microsoft to cure the violation, since the first opportunity was given with the TC's decision. If the United States decides to take up the ISVs complaint, then it apparently avoids the delay of consulting with the enforcement committee, but the United States must still give Microsoft an opportunity to cure.

The "consultation" and "reasonable opportunity to cure" delays are merely the tip of this iceberg. Although the TC has conducted an extensive investigation and gathered much, perhaps even all of the relevant evidence, neither an enforcing state nor the United States use the evidence accumulated by the TC and the TC members are prohibited from testifying. Section IV.D.4.d specifically provides:

> No work product, findings or recomendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any tribunal regarding any matter related to this [Proposed] Final Judgment.

In other words, the United States or the enforcing state will needlessly duplicate the discovery work of the TC and the Court will have to conduct a de novo review of the evidence without the benefit of the TC's insights and expertise.

3. The Court Will Be Denied Access to the Insights and Expertise of the Technical Committee.

Despite the fact that the Technical Committee cannot render enforceable decisions, the TC will be in an excellent position to evaluate both Microsoft's overall conduct and the appropriateness of various alternative remedies for specific complaints and problems. The TC members will have expertise "in software design and programing." PFJ, sec. IV.B.2. The TC will have considerable access to Microsoft documents and personnel. PFJ, sec. IV.B.8.b. In addition to its own experience with complaints, the TC will apparently receive reports from Microsoft advising the TC of the nature and disposition of complaints filed with Microsoft's compliance officer. PFJ, sec. IV.D.3.c. The TC, in short, has an exceptional vantage point from which to "monitor Microsoft's compliance with its obligations under [the Proposed] [F]inal [J]udgment." PFJ, sec. IV.B.8.a.

Despite the exceptional value of the TC to the Court as both expert witnesses on technical issues and as eye witnesses to larger issues, including whether Microsoft "engaged in a pattern of willful and systematic violations," PFJ, sec. V.B, section IV.D.4.d expressly prohibits members of the TC from testifying "by deposition, in court or before any other tribunal." By denying the Court access to witnesses with critical information and expertise, the PFJ ensures that the Court will have to make rulings without regard to some of the most important evidence on the issues that will inevitability arise under the ambiguous provisions of the PFJ.

Conclusion

The acid test of the PFJ must be whether it would have protected Netscape as it tried to launch a middleware challenge to Microsoft's operating system monopoly in 1994. Sadly, even a cursory reading of the PFJ reveals that the answer is no. Since Microsoft did not have comparable middleware, there would, even under the most favorable interpretations of the API disclosure provisions in PFJ section III.D, have been nothing to prevent Microsoft from engaging in selective disclosures to Netscape. Microsoft would have been free to deny Netscape access to many, if not all, of the Communications Protocols necessary for any Internet middleware to work on Windows since the new, untested company would certainly have failed to meet Microsoft's test of a viable business under PFJ section III.J.2(c). Most importantly, nothing in the PFJ could change the economics of the OEM industry which make it unprofitable to install two web browsers and therefore, in what can only be called a mockery of judicial power, PFJ VI.U would expressly allow Microsoft to choke off Netscape's acess to the crucial OEM distribution channel by declaring Internet Explorer to be a part of the Windows Operating System Product. For the foregoing reasons, we urge the Court to reject the Proposed Final Judgment.

Respectfully submitted on behalf of the American Antitrust Institute by:

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Albert A. Foer, President, American Antitrust Institute

_____

Robert H. Lande, University of Baltimore Law School,

Secretary and Senior Research Scholar of the American Antitrust Institute

_____

Norman W. Hawker, Western Michigan University,
Research Fellow of the American Antitrust Institute

_____

Oded Pincas, Research Fellow of the American Antitrust Institute