ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2003

FINAL VERSION

No. 03-5030

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

MICROSOFT CORPORATION,
Appellee,

COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION
and SOFTWARE & INFORMATION INDUSTRY ASSOCIATION,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief of Appellants Computer and Communications Industry Association (CCIA) and Software and Information Industry Association (SIIA).

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellants.

(C) **Related Cases.** References to related cases appear in the Brief for Appellants.

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GLOSSARY

API	Application programming interface.
Br.	Brief of Appellants Computer and Communications Industry Association (CCIA) and Software and Information Industry Association (SIIA).
CCIA	Computer and Communications Industry Association.
CIS	Competitive Impact Statement.
IE	Internet Explorer.
J.A.	Joint Appendix.
MSL	Massachusetts School of Law.
OEM	Original equipment manufacturer, a manufacturer of personal computers.
OS	Operating system.
PC	Personal computer.
SIIA	Software and Information Industry Association.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of the underlying antitrust case under 15 U.S.C. 4 and 28 U.S.C. 1331 & 1337, and of appellants' intervention motion under 15 U.S.C. 16(f)(3) and Fed. R. Civ. P. 24. It denied appellants' motion on January 11, 2003. Appellants filed a timely notice of appeal on January 13, 2003.

This Court has jurisdiction regarding the denial of intervention pursuant to 28 U.S.C. 1291. No party has appealed from the final judgment, and the Court currently lacks jurisdiction over any purported appeal from that order.

STATEMENT OF ISSUES PRESENTED

Whether the district court abused its discretion in denying appellants' motion for leave to intervene for purposes of appeal of the entry of a consent judgment.

If the Court reversed the denial of appellants' motion, two additional issues would be presented:

A. Whether the district court abused its discretion in determining that there were no procedural obstacles to entry of the consent decree; and

B. Whether the district court abused its discretion in concluding that entry of the consent decree was in the public interest.

STATEMENT REGARDING STATUTES AND REGULATIONS

Addendum A of the Brief of Appellants contains 15 U.S.C. 2 and 16(a)-(b). Other pertinent statutes are bound with this brief as Addendum A.

STATEMENT OF THE CASE

Appellants CCIA and SIIA, two computer-industry trade associations, seek to appeal entry of the consent decree in the government's antitrust case against Microsoft, to which they are not parties. They sought leave to intervene for purposes of appeal, which the district court denied. They now appeal that denial.

On June 28, 2001, this Court affirmed in part, reversed in part, and vacated in part the district court's judgment finding Microsoft liable for violations of the Sherman Act, vacated the remedial order in its entirety, and remanded. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). On remand, the district court ordered the parties to enter into settlement negotiations. Order at 2 (9/28/01) (J.A.78). The United States and Microsoft reached a settlement, filed with the district court as the "Revised Proposed Final Judgment" on November 6, 2001. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002) (J.A.1611). That filing triggered procedures under the Tunney Act, 15 U.S.C. 16(b)-(h), which governs the district court's determination of whether entry of a proposed consent decree in a government antitrust case is in the public interest.

After lengthy Tunney Act proceedings, the district court held that the parties had complied with the Act's procedures, *United States v. Microsoft Corp.*, 215 F. Supp. 2d 1, 3 (D.D.C. 2002) (J.A.1586). It later conditionally approved the decree, subject to a procedural amendment, *Microsoft*, 231 F. Supp. 2d at 202 (J.A.1656), and then entered it as amended, *United States v. Microsoft Corp.*, 2002 WL 31654530 (D.D.C. Nov. 12, 2002) (J.A.1658).

CCIA and SIIA jointly moved for leave to intervene for purposes of appeal on December 20, 2002. The court denied their motion on January 11, 2003, and this appeal ensued.

STATEMENT OF FACTS

1. Background. In 1998, the United States sued Microsoft, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[1] After trial, the court found Microsoft had violated Section 2 by unlawfully maintaining its monopoly in the market for Intel-compatible PC operating systems ("OSs") and by unlawfully attempting to monopolize the market for internet browsers, and that it had violated Section 1 by illegally tying its Windows operating system and its Internet Explorer ("IE") browser. The court ordered Microsoft to submit a plan of divestiture that would split the company into an OS business and an applications business, and ordered interim conduct restrictions. *Microsoft*, 253 F.3d at 45.

On appeal, this Court affirmed that Microsoft unlawfully maintained its OS monopoly through specific acts impeding the emergence of two nascent middleware threats to that monopoly. However, it rejected 8 of 20 findings that particular acts constituted exclusionary conduct and held that Microsoft's general course of conduct was not an additional basis for liability. *Id.* at 50-80. The Court reversed the determination that Microsoft had attempted to monopolize the browser market in violation of Section 2. *Id.* at 80-84. The Court also vacated the judgment on the Section 1 tying claim, remanding it for reconsideration under the rule of reason, *id.*

[1]The court consolidated the government's suit with one brought by twenty states and the District of Columbia. Following remand, the United States and some states settled with Microsoft, other states continued to litigate over remedy, and the district court de-consolidated the cases. Order at 3 (Feb. 1, 2002) (J.A.1060).

at 84-97, with specific limits on the government's theories and proof on remand, *id.* at 95.

The Court vacated the remedial order and remanded for further proceedings, *id.* at 107, because, notably, it had (i) "drastically" (*id.* at 105, 107) altered the district court's conclusions on liability, and (ii) found that an evidentiary hearing on remedy was necessary. *Id.* at 101-03. Recognizing that, "[a]s a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful," *id.* at 105, the Court directed the district court to "reconsider whether the use of the structural remedy of divestiture is appropriate." *Id.*

The Court directed the district court to "consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the [operating system] market." *Id.* at 106. Absent "clear[]" indication of a "'significant causal connection between the conduct and creation or maintenance of the market power,'" Microsoft's unlawful behavior "should be remedied by 'an injunction against continuation of that conduct.'" *Id.* at 106 (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650a, at 67 (rev. ed. 1996)) (emphasis omitted). The Court emphasized that it had "found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference," *id.* at 106-07, and that the district court "expressly did not adopt the position that Microsoft would have lost its position in the [operating system] market but for its anticompetitive behavior." *Id.* at 107.

The remedy should be "tailored to fit the wrong creating the occasion for the remedy," the Court instructed, thus leaving both the scope and the particulars of remedy to be addressed in district court. *Id.* at 107. Indeed, in rejecting Microsoft's rehearing petition alleging an error Microsoft claimed might suggest a particular remedy related to commingling, Petition for Rehearing 1-2 (D.C. Cir. No. 00-5212, July 18, 2001) (J.A.20-21), the Court said that "[n]othing in the Court's opinion is intended to preclude the District Court's consideration of remedy issues." Order (D.C. Cir. No. 00-5212, Aug. 2, 2001) (J.A.34).

Seeking to achieve expeditious and effective relief consistent with this Court's guidance, the government (and all the plaintiff states) elected to pursue neither the tying claim nor structural reorganization on remand. Joint Status Report at 21 (Sept. 20, 2001) (J.A.57). The court ordered intense settlement negotiations and probable mediation, emphasizing the importance of expedition to effective relief. Order at 2-3 (Sept. 28, 2001) (J.A.78-79). Five weeks later, the United States and Microsoft reached agreement and sought judicial approval of their proposed consent decree. *Microsoft*, 231 F. Supp. 2d at 150-51 (J.A.1611).

2. Tunney Act Proceeding. Pursuant to the Tunney Act, 15 U.S.C. 16(b)-(h), the United States filed its Competitive Impact Statement ("CIS") (J.A.136), on November 15, 2001, and then published a Revised Proposed Final Judgment, the

CIS, and a description of the procedures for submitting public comments on the proposed decree. 66 Fed. Reg. 59,452 (Nov. 28, 2001) (J.A.203). An unprecedented 32,392 comments resulted, many "lengthy and detailed," *Microsoft*, 215 F. Supp. 2d at 10, 13 (J.A.1593, 1596), occupying 6,652 *Federal Register* pages, *see id.* at 10 (J.A.1593) (citing 67 Fed. Reg. 23,654 (Books 2-12) (May 3, 2002)). "[W]ith painstaking care, the government sorted these comments by subject matter and responded in detail," *id.* at 17 (J.A.1600); *see* Response of the United States to Public Comments on the Revised Proposed Final Judgment (Feb. 27, 2002), (J.A.1126) ("Response"), taking 61 *Federal Register* pages. It also submitted economics professor David Sibley's expert declaration addressing the substance of the proposed decree and responding to comments. Memorandum of the United States in Support of Entry of the Proposed Final Judgment, App. C (Feb. 27, 2002) (J.A.1062) ("Sibley").

Invoking the Tunney Act's flexible procedures, *see* 15 U.S.C. 16(f), which allow courts to obtain a wide range of views, the court permitted extensive amicus participation, *see, e.g.*, Memorandum Opinion and Order at 3-4 (Feb. 28, 2002) (J.A.1380C-D) ("SIIA Order"); Memorandum Opinion and Order at 6-7 (Feb. 28, 2002) (J.A.1379-80) ("CCIA Order"), receiving eight amicus briefs and holding a hearing at which it heard oral argument on behalf of six amici, including appellants.

Four months after the hearing, the district court, carefully considering objections raised in public comments, *see Microsoft*, 215 F. Supp. 2d at 2 n.1 (J.A.1587), ruled that the parties had sufficiently complied with the Tunney Act's procedural requirements, and that the matter was "ripe for the Court's public interest determination." *Id.* at 3 (J.A.1586). It later issued an opinion exhaustively reviewing the provisions of the proposed decree and the objections raised in public comments, in light of this Court's guidance regarding antitrust consent decrees generally and the particular circumstances of this case, *see Microsoft*, 231 F. Supp. 2d at 152-64 (J.A.1612-23). The court concluded that the proposed consent decree would be in the public interest if modified to permit the court to retain jurisdiction to act sua sponte in decree enforcement. *Id.* at 202 (J.A.1656). The court subsequently entered the proposed decree as amended. *Microsoft*, 2002 WL 31654530 (J.A.1658).[2]

3. Motions to Intervene. Appellant CCIA twice sought to intervene in the Tunney Act proceeding.[3] It relied on Fed. R. Civ. P. 24(b)(1) (permissive intervention "when a statute of the United States confers a conditional right to intervene"), but the court, noting that CCIA had "ignore[d] this Circuit's precedent" making Rule 24(b)(1) generally unavailable in Tunney Act proceedings, CCIA Order at 3

[2]Nine of the state plaintiffs in *New York v. Microsoft Corp.*, 231 F. Supp. 2d 203 (D.D.C. 2002), joined the settlement. The court in their case conditionally found it to be "fair, reasonable, and in the public interest," *id.* at 206, and, following amendment, entered it as the final judgment between Microsoft and those states, Final Judgment Pursuant to Rule 54(b), *New York v. Microsoft Corp.*, No. 98-1233 (D.D.C. Nov. 12, 2002). No one appealed from entry of that decree, identical to the decree here.

[3]SIIA, seeking "'full or limited participation,'" nevertheless "expressly [did] not seek to intervene." SIIA Order at 1 (J.A.1380A).

(J.A.1376) (citing *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 780 n.2 (D.C. Cir. 1997) ("*MSL*")), also considered Rule 24(b)(2) (permissive intervention when "applicant's claim or defense and the main action have a question of law or fact in common"). Aware that this Court construes that rule's "claim or defense" requirement liberally, the court nevertheless could not "find that CCIA has satisfied its burden." CCIA Order at 4 (J.A.1377). For that reason, and to avoid delay and prejudice, the court denied permissive intervention. *Id.* at 5 (J.A.1378). CCIA does not challenge that decision.

After the court entered judgment, CCIA, joined by SIIA, tried again, seeking both permissive intervention and intervention as of right for purposes of appeal. Appellants did not file "a pleading setting forth the claim or defense for which intervention is sought," required by Fed. R. Civ. P. 24(c). Instead, they merely alluded to members of their associations "with actual and potential legal claims against Microsoft – arising out of facts substantially the same as those litigated in this case," Memorandum of Points and Authorities in Support of Joint Motion by *Amici Curiae* CCIA and SIIA for Leave to Intervene for Purposes of Appeal at 10 (Dec. 20, 2002) (J.A.1742), without specifying the nature of the claims.

The court did not repeat its discussion of claims, defenses, or common questions of fact or law, but turned directly to an additional factor: "delay or prejudice." Fed. R. Civ. P. 24(b)(2). This factor, applicable if the court finds the applicant's claim to have questions of law or fact in common with the main action, may require consideration of the applicant's likelihood of success on appeal, at least in a Tunney Act context. *MSL*, 118 F.3d at 782-83. CCIA and SIIA's "arguments with regard to the defects in the Final Judgment are identical to those made in their Tunney Act filings," *United States v. Microsoft Corp.*, 2003 WL 262324, at *4 (D.D.C. Jan. 11, 2003) (J.A.1768), and so the court, having rejected those arguments after extensive Tunney Act proceedings, denied permissive intervention in light of *MSL*'s delay analysis. *Id.*

The court also denied intervention as of right. Even if appellants had alleged an interest within the meaning of Rule 24(a)(2), the court concluded it could not "find that disposition of this action would impair their ability to protect that interest," because "the Judgment in this case has no 'res judicata, collateral estoppel, or stare decisis effect' on Movants," *id.* at *3 (J.A.1767) (quoting *MSL*, 188 F.3d at 781). Moreover, appellants' claim that no party adequately represented their interest misapplied Rule 24(a) as interpreted in *MSL*. *Id.* Finally, the court rejected appellants' reliance on alleged deficiencies in the parties' disclosures, noting that appellants had failed to "articulate a basis to support their claims that the Court's decisions regarding procedural matters . . . are faulty," and declining "to sift through the voluminous record . . . for Movants' earlier briefs and filings and make their arguments for them." *Id.*

SUMMARY OF ARGUMENT

The district court conducted a careful and comprehensive Tunney Act review of the proposed consent decree in this government antitrust enforcement action, painstakingly reviewing massive quantities of information, including this Court's prior decision, the government's submissions, Microsoft's submissions, amici's submissions, and an unprecedented number of public comments. It concluded that the consent decree "takes account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations," and that, with one minor amendment, its entry is in the public interest. *Microsoft*, 231 F. Supp. 2d at 202 (J.A.1656). Appellants, private trade associations representing many of Microsoft's rivals, nonetheless seek to intervene for the purpose of pursuing their own vision of relief. In so doing, they ignore the legal standards governing intervention and distort the purpose of the Tunney Act.

I. The district court properly exercised its discretion in denying permissive intervention for purposes of appeal. Appellants neither filed a complaint in intervention, *see* Fed. R. Civ. P. 24(c), nor identified any "claim or defense" that would share "question[s] of law or fact" with the government's action. Fed. R. Civ. P. 24(b)(2). Because no liability issues remain for appellate review or a hypothetical remand, intervention would not contribute to the efficient resolution of controversies, the point of permissive intervention.

Appellants address intervention as of right only in a footnote at the end of their brief, thus waiving any claim to it. But the court properly denied it. Here, appellants' only claimed "interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), is a generalized one in "determinative documents" they assert to exist – without any basis – despite government denials the court found supported by the record, *Microsoft*, 215 F. Supp. 2d at 12 (J.A.1595). Such flimsy claims provide no basis even for limited intervention to appeal with respect to document disclosure (which appellants never sought), much less intervention to appeal the judgment.

Because intervention was properly denied, no other issues are properly before the Court. Only if appellants were permitted to intervene for purposes of appealing the entry of the judgment would appellants' other issues be presented.

II. Contrary to appellants' claims, the government fully complied with Tunney Act procedural requirements. It explained the unusual circumstances giving rise to the decree, CIS at 7-9, 61-62 (J.A.142-44, 195-96); described the decree's provisions and their functions in detail, *Microsoft*, 215 F. Supp. 2d at 13 (J.A.1596) (citing CIS at 17-60 (J.A.152-94)); described and evaluated the alternatives it considered, *see* 15 U.S.C. 16(b)(6), *Microsoft*, 215 F. Supp. 2d at 15-17 (J.A.1597-99); and produced all the documents it "considered determinative in formulating" the decree, 15 U.S.C. 16(b) – of which there were none. The extensive public comment demonstrates that the government's disclosures fully served the statutory purpose. Similarly, Microsoft's disclosures relating to its "widely known," CCIA/SIIA Br. 57-58, lobbying activities were sufficient to inform the district court whether there had been improper contacts between the United States and Microsoft, *Microsoft*, 215 F. Supp. 2d at 21 (J.A.1602-03) – and there were none.

III. The district court properly found the decree to be in the public interest. In criticizing it, appellants' pervasive error is to misread this Court's guidance concerning causation. Because this Court found the anticompetitive effect of Microsoft's conduct "only through inference," 253 F.3d at 107, sweeping equitable relief aimed at terminating "illegal monopoly" and the like is improper – although the decree goes well beyond simply prohibiting the precise conduct found unlawful, *see, e.g.*, 231 F. Supp. 2d at 189-90 (J.A.1645) (required licensing of communications protocols)

Appellants' more specific complaints are ill-founded. For example, the decree does prohibit anticompetitive commingling – by assuring that any commingling lacks the anticompetitive aspects this Court recognized. And the decree appropriately addresses Java-related aspects of Microsoft's conduct. The United States and the court had sound reasons for not elevating Sun Microsystems' Java product to a preferred position among middleware. Appellants' remaining complaints were all addressed in the Tunney Act proceeding; that appellants repeat them here neither gives them greater weight nor shows the district court to have abused its discretion.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED INTERVENTION

A. Standard of Review

The Court reviews orders denying both permissive intervention and intervention as of right for abuse of discretion, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (as of right); *EEOC v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (permissive), whether intervention is sought before or after entry of the judgment, *United States v. LTV Corp.*, 746 F.2d 51, 54 (D.C. Cir. 1984). An error of law, reviewed de novo, constitutes an abuse of discretion. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *MSL*, 118 F.3d at 779. Factual findings underlying the decision are reviewed for clear error. *See Fund for Animals*, 322 F.3d at 732 (citing Fed. R. Civ. P. 52(a)). Thus, "[r]eversal of a district court's denial of permissive intervention is a very rare bird indeed." *Nat'l Children's Center*, 146 F.3d at 1048 (quotation marks and citation omitted).

B. Rule 24 Governs Intervention in Tunney Act Proceedings

The Tunney Act authorizes a broad array of procedures for information gathering and public participation in the court's public interest determination, 15 U.S.C. 16(f), including, with no special prominence, "intervention as a party pursuant to the Federal Rules of Civil Procedure." *Id.* 16(f)(3). Rule 24 thus establishes the sole legal standard governing Tunney Act intervention. *MSL*, 118

F.3d at 779; *see* 119 Cong. Rec. 24,599 (July 18, 1973) (Remarks of Sen. Tunney) (statute was "not intended to broaden the existing right of intervention").

Parties to a settled case are unlikely to appeal entry of their settlement as a consent decree,[4] yet Congress made no special, alternative arrangement for appeals. And so far as we know, Tunney Act district courts have only rarely granted intervention before the public interest determination (and then only for strictly limited purposes), and have permitted later intervention for purposes of appeal only twice (neither appeal resulting in decree reversal).[5]

C. The District Court Properly Exercised Its Discretion in Denying Permissive Intervention for Purposes of Appeal

Appellants do not contend on appeal that any statute "confers a conditional right to intervene," Fed R. Civ. P. 24(b)(1); they now seek permissive intervention only under Rule 24(b)(2), which provides that a court "may" grant intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." If that condition is satisfied, "[i]n exercising its discretion the court shall

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[4]*But see United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir. 1981) (Tunney Act appeal by settling defendant).

[5]*See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Thomson Corp.*, 1997 WL 90992 (D.D.C. Feb. 27, 1997), *aff'd sub nom. Hyperlaw, Inc. v. United States*, 1998 WL 388807, 159 F.3d 636 (D.C. Cir. 1998) (unpublished table decision). In *MSL*, this Court affirmed denial of intervention for purposes of appeal except with respect to a narrow question regarding determinative documents. 118 F.3d at 785. We know of no appellate decision other than *MSL* reviewing a Tunney Act denial of intervention for purposes of appeal.

consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* These requisites reflect the rule's purpose: promoting the "public interest in the efficient resolution of controversies." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1901, at 230 (2d ed. 1986).

The first requisite "appears to limit permissive intervention to circumstances in which the putative intervenor seeks to become involved in an action in order to litigate a legal claim or defense on the merits," *Nat'l Children's Center*, 146 F.3d at 1045 (recognizing exception for intervention to challenge confidentiality orders), with the "apparent goal of disposing of related controversies together." Absent claims or defenses with common questions of law or fact, there is no efficiency from adding parties. *See MSL*, 118 F.3d at 782 ("litigative economy, reduced risks of inconsistency, and increased information" are the "hoped-for advantages" of intervention). And, as the second requisite establishes, even the benefits of simultaneously resolving related controversies will not justify subjecting the parties to the original litigation to prejudice or undue delay.

Not only did appellants fail to file the "pleading setting forth the claim or defense for which intervention is sought" that Rule 24 (c) requires, *cf. Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring) (discussing relationship between pleading requirement of Rule 24(c) and "claim or defense" in Rule 24(b)(2)), but they have not otherwise identified the claims alleged to have questions of law or fact in common with those in the main action, *see* p. 9 *supra*; Br. 19-20 (referring to unspecified “antitrust claims” associated with two members of appellant associations). Appellants name only Netscape and Sun Microsystems as having antitrust claims. But those two firms have filed their own antitrust actions against Microsoft,[6] and neither has sought “to litigate a legal claim or defense on the merits,” *Nat’l Children’s Center*, 146 F.3d at 1045, in this case. The pendency of another action in which an applicant can protect its rights ordinarily counsels against permissive intervention. *See Roe v. Wade*, 410 U.S. 113, 125-27 (1973). Although the Court passed over this factor in *MSL*, *see* 118 F.3d at 778, 783, subsequent language suggests its pertinency, *see Nat’l Children’s Center*, 146 F.3d at 1045. In any event, appellants’ failure even to identify claims or common issues, leaving it to the court to ferret them out, justified the denial of permissive intervention.

Moreover, it is unlikely that appellants could have identified claims or common issues whose resolution in this proceeding would promote efficiency. As in *MSL*, the only substantive issue on appeal would be “whether the district court properly applied the Tunney Act,” 118 F.3d at 782. In *MSL*, a remand might conceivably have led to a trial on the merits, where “the overlap of legal and factual issues in the

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[6] *Netscape Communications Corp. v. Microsoft Corp.*, No. 02-00097 (D.D.C., filed Jan. 22, 2002); *Sun Microsystems, Inc. v. Microsoft Corp.*, No. 02-01150 (N.D. Cal., filed March 8, 2002). Netscape has apparently settled. *See* Press Release, AOL Time Warner, AOL Time Warner and Microsoft Agree to Collaborate on Digital Media Initiatives and Settle Pending Litigation (May 29, 2003), available at http://media.aoltimewarner.com/media/press_view.cfm?release_num=55253203.

two plaintiffs' substantive antitrust claims might produce efficiency gains." *Id.* Here, the trial is over, and liability was affirmed. Litigation efficiency can best be promoted through appropriate use of this case's settled findings and conclusions in other cases involving related claims. *See In re Microsoft Corp. Antitrust Litigation*, 232 F. Supp. 2d 534 (D. Md. 2002) (collateral estoppel effect of findings from government's case); *see also* 15 U.S.C. 16(a).[7]

D. Appellants Have Waived Their Claim for Intervention as of Right, Which the District Court Properly Rejected

In the last portion of one footnote – long after the section of their brief addressing intervention – appellants note that they sought intervention of right below and assert that its denial was reversible error. Br. 52 n.16. This footnote does not satisfy Fed. R. App. P. 28(a)(9)(A) (requiring a statement of "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"), and the point should be deemed waived. *See, e.g.*, *Davis Broadcasting Inc. v. FCC*, 2003 WL 21186042 (D.C. Cir. May 16, 2003) (appellants' "opening brief offers only a perfunctory argument on this issue in a footnote, and we should therefore consider the argument waived"); *SEC v. Banner Fund Int'l*, 211

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[7] Thus, we need not here contend that an appeal would lead to undue delay. The consent decree is currently in force, as is an identical and unchallenged decree in the litigation between Microsoft and the settling states, *see* note 2 *supra*. This appeal, of course, creates industry uncertainty, but so too do the Massachusetts and West Virginia appeals in *New York v. Microsoft*.

F.3d 602, 613-14 (D.C. Cir. 2000) (Court will not "address an 'asserted but unanalyzed' argument").

Moreover, appellants' perfunctory argument is meritless. Intervention of right is granted where an applicant

> claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The interest claimed must be a "legally protectable one," *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (quotation and citation omitted).

Appellants claim a legally protected interest in allegedly "withheld documents" of the sort considered in *MSL, see* Br. 52 n.16, i.e., determinative documents. *MSL*, however, is distinguishable. *Microsoft*, 2003 WL 262324, at *3 (J.A.1767). There, the government did not deny the existence of documents that the applicant sought for use as evidence in its ongoing private litigation, but denied that they were "determinative documents" under 15 U.S.C. 16(b), *see* 118 F.3d at 781-82. This Court found intervention appropriate for raising that statutory issue on appeal and resolved it in the government's favor. 118 F.3d at 781, 784-85. Here, appellants do not describe the documents they seek, why they seek them, or their reasons for believing the government has them. Instead, they merely dispute the government's statement that there are no determinative documents, Br. 55-56, relying on an old district court case from another circuit that rests on a discredited view of determinative documents, *see Microsoft*, 215 F. Supp. 2d at 12 n.12 (J.A.1595) (explaining how *MSL*, 118 F.3d at 784, conflicts with that view). Allowing intervention of right based solely on a bald assertion that there must be determinative documents would effectively confer on non-parties an automatic right to appeal, for which Congress did not provide in the Tunney Act.

In any event, the Court in *MSL* sanctioned intervention only for the limited purpose of seeking document disclosure, *see* 118 F.3d at 782, 784, not for challenging the public interest determination. Appellants sought no such limited review below, and do not seek it here. Even if appellants were entitled to intervene to seek disclosure of documents, there would be no basis for reversing the district court's refusal to allow them to intervene for the broader purpose of challenging the terms of the decree.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE TUNNEY ACT'S PROCEDURAL REQUIREMENTS WERE SATISFIED

A. Standard of Review and Extent of Compliance Required

No appellate decision specifies the standard of review for Tunney Act procedural determinations, but we believe that the proper standard is abuse of discretion. The ultimate public interest determination is reviewed under that standard, *see* p. 25 *infra*, and as appellants acknowledge, the Act's procedural requirements serve to inform that determination, Br. 51. The district court is well placed to judge whether the parties' actions serve that function. It would be paradoxical to subject subsidiary procedural issues to more exacting review than the ultimate issue and thus reject a decree even if the court properly found its entry to be in the public interest; it would also be counter-productive to do so, when speed and certainty of relief are appropriate goals of settlement.

Moreover, a district court properly evaluates the parties' procedural performance for *substantial* compliance. *United States v. Bechtel Corp.*, 648 F.2d 660, 664 (9th Cir. 1981) ("strict technical compliance" with the Act not required; compliance should be evaluated in light of Act's purposes). Such an evaluation inherently involves judgment and discretion. Appellants cite *United States v. Central Contracting Co.*, 527 F. Supp. 1101, 1104 (E.D. Va. 1981), to support their claim that "technical and formalistic failures to comply with" procedural requirements suffice for denying entry of a decree, Br. 53, but that court's criticism of the "flout[ing]" of requirements and a "record [that] is almost silent" as to any compliance, "particularly where there has been no response from the public," hardly applies here.

B. The United States Fully Satisfied Its Procedural Obligations under Section 2(b) of the Tunney Act

Appellants claim that the government failed to comply with the Act's procedural requirements in various ways. Their arguments, however, amount to nothing more than a protest that any process leading to a result with which they disagree must have been flawed.

First, contrary to appellants' contention, the government did explain the "unusual circumstances giving rise to," 15 U.S.C. 16(b)(3), the proposed consent decree. *See* CIS at 7-9 (J.A.142-44) (describing this Court's decision, the narrowing of issues and the reasons for it, and the district court's order regarding negotiations); 61-62 (J.A.195-96) (reasons for avoiding further litigation, and reasons for not seeking a break-up of Microsoft, including this Court's decision). Appellants do not point to any unusual circumstances that should have been, but were not, disclosed under Section 16(b)(3).

Second, there is no merit to appellants' complaint that the government did not disclose the "materials and documents which the United States considered determinative in formulating" the proposed decree. 15 U.S.C. 16(b). We explained that there were no such documents. CIS at 68 (J.A.202). This Court has said that the statute refers "at the most to documents that are either 'smoking guns' or the exculpatory opposite." *MSL*, 118 F.3d at 784. The district court, noting that the trial record revealed the documents on which the government heavily relied in proving liability, found that the

> record of this case supports the government's position that there exists no document so significant that it could be considered alone, or in combination with other documents, to be a "smoking gun." In the absence of any allegation of bad faith or reason to conclude otherwise, *see HyperLaw, Inc. v. United States*, 1998 WL 388807, at *3, 159 F.3d 636 (D.C. Cir. 1998) (unpublished table decision), the Court concludes that the United States has satisfied its disclosure obligations with regard to "determinative documents." 15 U.S.C. § 16(b).

215 F. Supp. 2d at 12 (footnote omitted) (J.A.1595). Appellants provide no basis for treating the court's acceptance of the government's representation as an abuse of discretion.

Third, appellants assert that the government should have provided a "complete description of the settlement's conduct remedies," Br. 54, but the Act requires only "an explanation of the proposal for a consent judgment," 15 U.S.C. 16(b)(3). And, as the court noted, that explanation occupies "the bulk of the CIS," which "deconstructs each section and definition in the proposed final judgment, detailing the scope of the decree and the conduct it prohibits." 215 F. Supp. 2d at 13 (J.A.1596) (citing CIS at 17-60 (J.A.152-94)). Considering "the relevant portion of the CIS, the comments, and the legislative history," the information in the CIS "comports with the underlying goals of subsection b(3)." *Id.* Appellants fail to demonstrate any error, much less an abuse of discretion, in that conclusion.

Similarly, appellants contend the CIS's "description and evaluation of alternatives to such proposal actually considered by the United States," 15 U.S.C. 16(b)(6), is inadequate. The CIS explains why, following remand, the United States decided not to continue to seek a break-up remedy. CIS at 8, 61 (J.A.143, 195). It explains the reasons for differences between the interim conduct provisions of the Initial Final Judgment (which this Court vacated) and the provisions of the consent decree. *Id.* at 61-62 (J.A.195-96). And it describes and evaluates other specific remedies considered. *Id.* at 62-63 (J.A.196-97). Accordingly, the district court considered appellants' criticisms and reasonably rejected them in light of the CIS, statutory purpose, and legislative history. 215 F. Supp. 2d at 15-17 (J.A.1597-99).

Appellants misconceive the nature of the CIS, treating it as if it were an end in itself. The CIS begins a public dialog, and as the court pointed out, the volume and quality of the public comments it stimulated shows it accomplished its purpose. 215 F. Supp. 2d at 13 (J.A.1596). The court is then informed not only by the CIS, but by those public comments – as well as by the government's response, which here supplemented the CIS in addressing alternatives. *See* Response ¶¶ 71-413 (J.A.1175-1339) (responding to comments concerning definitions and provisions of proposed decree), 414-425 (J.A.1340-46) (comparison with decree this Court vacated), 426-448 (J.A.1346-58) (discussing other proposed remedies). The court in this case did not want for information, and it did not abuse its discretion in finding the government's disclosures adequate.

C. Microsoft's Disclosures Provide No Basis for Rejecting the Decree

Appellants also complain that Microsoft's required disclosures, *see* 15 U.S.C. 16(g), were inadequate because they covered a period beginning with the "last round of settlement negotiations" the court had ordered, rather than the period "since 1998." Br. 57-58. (Actually, Microsoft amended its disclosure to cover the period beginning with issuance of this Court's mandate. *See Microsoft,* 215 F. Supp. 2d at 19 (J.A.1601).) Whichever date governs, however, the court's conclusion that the disclosure was adequate was not an abuse of discretion.

First, the record adequately disclosed to the court what appellants themselves claim was "widely known" – that since 1998 Microsoft has engaged in substantial lobbying. Br. 57-58. CCIA itself submitted with its public comment the 22-page Declaration of Edward Roeder (J.A.599) devoted to the topic. *See also* Comments of Relpromax Antitrust Inc., Exhibit 10, Exhibit A, Attachments 1, 9-43 (lobbying data and reports), available at http://www.usdoj.gov/atr/cases/ms_tuncom/major/ mtc-00030631_ex10.pdf.

Second, the court found that the point of the statutory provision is "to require the disclosure of information sufficient to inform the Court as to whether there has been some improper contact between the United States and the defendant." *Microsoft*, 215 F. Supp. 2d at 21 (J.A.1603). The court obviously found itself sufficiently informed and the disclosures sufficient. Appellants offer nothing to suggest that these findings were an abuse of discretion or that there was any improper contact between the United States and Microsoft.

III. THE DECREE IS IN THE PUBLIC INTEREST

A. Standards of Appellate and District Court Review

Entry of a consent decree is reviewed for abuse of discretion. *E.g.*, *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1120 n.5 (D.C. Cir. 1983); *see also Microsoft*, 253 F.3d at 105 (equitable relief lies within a district court's discretion).

In determining whether to enter a consent decree in a government antitrust case, a district court properly looks for ambiguities, inadequate enforcement mechanisms, positive injury inflicted on third parties, and especially whether "the discrepancy between the remedy and undisputed facts of antitrust violations could be such as to render the decree 'a mockery of judicial power,'" *MSL*, 118 F.3d at 782. Its role is not, however, to substitute its judgment for that of the Executive Branch. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995). This Court set out the goals of a remedy, *Microsoft*, 253 F.3d at 103, and a decree is in the public interest unless "the remedies [are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest,'" *Microsoft*, 56 F.3d at 1461. The court properly considers litigation risk, *id.* & n.8; *see also Microsoft*, 231 F. Supp. 2d at 174 (J.A.1631) (taking remedy-related litigation risk into account in evaluating proposed decree),[8] and accords significant weight to the government's predictive judgments about the efficacy of remedial provisions (as it would even in a fully litigated case, *see Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972)). *See* 231 F. Supp. 2d at 170-71 (J.A.1628) (deference to government's predictive judgment regarding efficacy).

B. The District Court Carefully Considered Appellants' Objections and Properly Rejected Them

The district court, carefully explaining each provision's likely effect, *see, e.g.*, *Microsoft*, 231 F. Supp. 2d at 170 (J.A.1628) (uniform license provision); *see also* Response, *passim*, considered and rejected appellants' complaints. Appellants' brief

[8]Litigating the remedy in the states' case against Microsoft produced a result similar to the settlement here and, because there was no settlement, left the possibility that Microsoft would seek Supreme Court review even as to liability. And there was no guarantee that the United States could have obtained by litigation a decree as satisfactory as that it obtained through settlement.

demonstrates that they would prefer different relief than the government secured, but it fails to establish that the district court abused its discretion in concluding that the decree falls well within the reaches of the public interest. We respond concisely to appellants' lengthy list of complaints, as the Court's Order of March 26 presumably anticipated in dividing the normal word allocation between adverse parties to the underlying antitrust case.

1. Appellants' Remedial Aims Are Inconsistent With This Court's Earlier Decision

Appellants want the decree to "terminat[e] Microsoft's monopoly," Br. 30, but this Court's finding of "a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference," 253 F.3d at 106-07, stands in the way. The government never alleged, and no court found, that Microsoft *acquired* its monopoly unlawfully. *See id.* at 58 (addressing only monopoly maintenance); 56 F.3d at 1452. The decree, therefore, should "terminat[e]" any quantum of monopoly Microsoft possessed only because of conduct this Court found to have violated Section 2, whether the remedial means addresses conduct or structure. Microsoft's unlawful conduct removed or reduced "nascent" or "potential" threats, 253 F.3d at 79, posed by technologies or products that *might* have matured into viable alternative development platforms, *might* have led to cross-platform applications development, and ultimately *might* have weakened the applications barrier to entry and encouraged new OS competition. Such competition *might* have constrained or eliminated Microsoft's monopoly power. *See id.* at 107 (no finding that "Microsoft would have lost its position in the OS market but for its anticompetitive behavior"). Such a tenuous causal connection is not enough to establish any quantum of illegal monopoly for the decree to "terminat[e]."

Microsoft's unlawful conduct matters and must be stopped: "it would be inimical to the purpose of the Sherman Act to allow monopolists free rein to squash nascent, albeit unproved, competitors at will." *Id.* at 79. Such conduct, despite its uncertain results, *cf.* Br. 31 n.9, justifies a finding of liability based on inferred causation, *see id.*, and justifies injunctive relief that goes beyond the precise conduct found illegal – as the relief here clearly does, *see, e.g.*, 231 F. Supp. 2d at 189-90 (J.A.1645) (required licensing of communications protocols), 191-92 (J.A.1646-47) (requirements related to interoperation with Microsoft server operating system products), 202 (J.A.1656) (decree addresses conduct only "related" to Microsoft's anticompetitive conduct). But the tenuous causal connection found by this Court cannot justify appellants' preferred market engineering, based on a presumption that particular nascent threats would have matured so as to significantly lessen or eliminate Microsoft's monopoly power. With no stronger causal link from conduct to monopoly than this Court found, the remedy properly focuses on targeted prohibitions and related affirmative requirements designed to permit nascent threats to flourish in the future.

2. The Decree Precludes Anticompetitive Commingling

Appellants complain, Br. 25-29, the decree fails to prohibit "commingling" of software code despite the finding that some unlawful commingling occurred in Windows 98. But this Court's conclusion that some anticompetitive commingling occurred, *see* 253 F.3d at 66, did not require the prohibition of commingling, as the Court later explained, *see* p. 6 *supra*. The district court found that "the end-user focus" of Sections III.C and III.H, which allow OEMs to remove end-user access to Microsoft Middleware Products and to feature competing middleware instead, "carries a great potential for the advancement of competition." 231 F. Supp. 2d at 181 (J.A.1638). These provisions eliminate what this Court saw as the "anticompetitive effect" of commingling, which was the "disincentive to OEMs to install non-Microsoft middleware products." *Id.* at 180 (J.A.1637); *see* 253 F.3d at 66 (the commingling found "deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs").

Appellants contend that developers will write for the "IE/Windows" APIs, not competing middleware APIs, if the code remains present, and therefore that a remedy for the anticompetitive effect of commingling must remove Microsoft's code, not just end-user access; they assert, without explanation, that Microsoft's liability was "predicated" on the "unlawful integration of IE . . . code." Br. 27. (Appellants' claim that end users must be allowed to remove code, not just access, Br. 27-29, is a minor variation on the same theme.) As the district court explained, however, "Nonparty cries for removal of software code as a remedy appear to reflect a substantive misunderstanding of the commingling liability in this case." *Microsoft*, 231 F. Supp. 2d at 180 (J.A.1637). The liability theory proved, found, and affirmed viewed not the presence of code, but "rivals' [browser] usage share," as determining "developers' interest in rivals' APIs as an alternative to" Microsoft's APIs. *Microsoft*, 253 F.3d at 66. That is the mechanism through which commingling of browsing and non-browsing code in a single file produced an anticompetitive effect.

Commingling, combined with other restrictions, reduced rivals' browser usage shares by "deterr[ing] OEMs from pre-installing rival browsers." *Id.* An OEM is unwilling to install a "second browser" because "an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine." *Id.* at 64. *See also United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 49 (D.D.C. 1999) (Finding of Fact ¶ 159: support costs increase because "the redundancy can lead to confusion among novice users"). If a second browser is not installed, it will not be used, and it will therefore not attract developer attention to its APIs. In contrast, an OEM who removes end-user access to Microsoft's product avoids having to support it, because removing the means of access is "from the user's perspective . . . equivalent to removing" the program itself. *Id.* at 51 (Finding of Fact ¶ 165). The remedy thus eliminates the disincentive to install non-Microsoft products and thereby has the effect of precluding commingling that would have the anticompetitive impact this Court explained.[9]

3. The Decree Addresses Java Appropriately

Appellants complain, Br. 29-34, the decree fails to (i) address Microsoft's unlawful conduct toward Sun's Java, and (ii) put Sun's product in as favorable a competitive situation as it conceivably might have reached absent Microsoft's violation. Their complaints fail to demonstrate an abuse of discretion.

The decree addresses Java-related actions this Court found unlawful, 253 F.3d at 75-78, through prohibitions on exclusive dealing and retaliation, Sections III.A, III.F, and III.G, *see* 231 F. Supp. 2d at 164-65 (J.A.1622-24), 169-70 (J.A.1627-28) 181-83 (J.A.1637-40); *see also id.* at 165-68 (J.A.1623-27) ("Microsoft Middleware Product" includes "functionality provided by . . . Microsoft's Java Virtual Machine"; "Microsoft Platform Software" included Microsoft Middleware Products; "Non-Microsoft Middleware Product" broadly defined; referenced provisions accordingly apply). Appellants nitpick, Br. 33 n.12, but the government and the court answered their points. 231 F. Supp. 2d at 184 (J.A.1640); Response ¶¶ 264-269 (J.A.1268-70).

Although the single instance (ended over five years ago by court order) of Microsoft's attempting to deceive Java developers into unwittingly writing Windows-

[9]Code with no end-user access may nevertheless be run and thus conceivably result in training costs and the like, but this Court concluded that Microsoft could not be held liable for Windows' overriding of user's default browser preference in limited circumstances for valid technical reasons. 253 F.3d at 67. Code necessary to lawful aspects of Windows is not code the remedy should require be removed.

only applications violated Section 2, the trial court did not find that Microsoft's failure to warn actually resulted in any unintended Windows-only applications. *See Microsoft Corp.*, 84 F. Supp. 2d at 106-07 (Finding of Fact ¶ 394); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 43 (D.D.C. 2000). Whatever else might be said about a prohibition on such deceptive conduct without consequences[10] – a provision plainly difficult to specify meaningfully and enforce – its omission establishes no abuse of discretion.

The decree "'restor[es]' the competitive environment," Br. 30, by imposing prohibitions and affirmative obligations that free *all* middleware to develop as threats to Microsoft's OS monopoly, market forces permitting. *See, e.g.*, CIS at 3-4 (J.A.138-39); Sibley ¶¶ 18, 52 (J.A.1075-76, 1092-93); Response ¶ 457 (J.A.1363). Appellants insist the decree should have elevated Sun's Java to a preferred position among middleware by making Microsoft distribute it. Br. 31-34. The government explained why it rejected this market-distorting device, Response ¶¶ 430-431 (J.A.1348-49) (favoring one competitor over others is not proper government role;

[10]The court elsewhere said the issue "concerns a single, very specific incident of anticompetitive conduct [which] ceased . . . before Judge Jackson entered his factual findings. . . . Plaintiffs have not offered any evidence which indicates that Microsoft has engaged or is likely to engage in deception similar to that involving the Java developer tools, or any other developer tools for that matter. Accordingly, the Court finds that Plaintiffs have not shown that there exists a continued threat of harm from this anticompetitive act." *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 265 (D.D.C. 2002), *appeals docketed*, Nos. 02-7155, 02-7156 (D.C. Cir. Dec. 9, 2002). The court found no showing that an order not to "engag[e] in any deception similar to that of the Java developers is either appropriate or necessary." *Id*. at 190.

device would likely result in decreased innovation and product improvement); *see also* Sibley ¶ 80 (J.A.1113) (provision would "improperly preordain market outcomes"), and the district court gave similar reasons for rejection in *New York v. Microsoft*, 224 F. Supp. 2d at 188-90. Tellingly, appellants note that another court granted Sun this remedy as preliminary relief against Microsoft, Br. 33, but omit that the granting court "would have made the same decision as did Judge Kollar-Kotelly were [it] called upon to consider the propriety of a must-carry remedy in the context of determining whether to approve the proposed consent decree in the Department of Justice action." *In re Microsoft Corp. Antitrust Litigation*, 237 F. Supp. 2d 639, 656 (D. Md. 2002), *appeal docketed*, No. 03-1116 (4th Cir. Jan. 22, 2003).

4. Appellants' Other Criticisms Misunderstand the Record and the Decree

Appellants' other criticisms fault the decree for not aiding Microsoft's competitors in ways unrelated to the unlawful conduct in this case. Thus, for example, they note that the decree neither "make[s] Windows API specifications available to direct OS competitors" nor "require[s] Microsoft to disclose API specifications for" its middleware. Br. 38 n.13. This is true, but these disclosures are unrelated to the case's liability theory. The government never alleged that withholding OS API specifications from OS competitors, or middleware API specifications from middleware competitors, was anticompetitive.

Similarly, appellants complain that "the decree's API disclosure provisions require Microsoft to reveal only those APIs 'used by Microsoft Middleware to interoperate with the Windows Operating System Product,'" *id.* at 39 (quoting decree Section III.D). Again, this is true, but irrelevant. The government's case rested "on the theory that Microsoft had acted anticompetitively in an effort to boost its own middleware and stifle rival middleware because those products posed a potential 'platform threat.'" 231 F. Supp. 2d at 187 (J.A.1642). Section III.D's disclosure requirements prevent competitive products from being "disadvantaged by comparison to Microsoft's middleware technology," *id.*, by insuring that non-Microsoft middleware can use the same APIs as the Microsoft middleware with which it competes. Moreover, the limitations on disclosure appellants criticize do *not* "mean[ ] . . . that a Microsoft competitor can never offer middleware for use on Windows that does more than comparable Microsoft middleware." Br. 40. We explained CCIA's error earlier, Response ¶ 280 (J.A.1275) (noting that early web browsers achieved their results even though Microsoft then had no comparable middleware), and the results computer programmers can achieve are obviously not limited to what an OS's APIs provide; programmers can write their own code.

Appellants claim the decree is "fatally ambiguous," Br. 42-46 (referring to "Microsoft Middleware," "Windows Operating System Product," "interoperate," and "server operating system product"), but the district court, which retains enforcement jurisdiction, 2002 WL 31654530, at *16 (J.A.1669-70) (Final Judgment; court retains jurisdiction to enforce and construe decree), considered such criticisms, *see* 231 F. Supp. 2d at 166 (J.A.1624-25) ("Windows Operating System Product"), 190-91 (J.A.1645-47) ("interoperate"), and found the decree "sufficiently clear," *id.* at 191 (J.A.1647); *see also id.* at 187-88 (J.A.1642-43) (finding "Microsoft Middleware" definition, which identifies code and thereby specifies required API disclosures, appropriately drawn).[11] In particular, the court explained why the criticism that "Microsoft has the power to define what constitutes Windows and what constitutes middleware," Br. 46, is misplaced. 231 F. Supp. 2d at 166 (J.A.1624-25). This Microsoft "power" is the "discretion to determine which code to include in its distribution of" Windows, but not to determine thereby what constitutes a "Microsoft Middleware Product," because those terms are not "mutually exclusive" and depend on different criteria. *Id.* (J.A.1625). The court's analysis is sound.

Appellants argue that other decree provisions allow Microsoft to continue to limit competition from middleware developers. Br. at 40-41 ("reasonable technical specifications" and matters related to user interface). These provisions, limited in scope, serve legitimate purposes, as we explained below. Response ¶¶ 175, 179, 182 (J.A.1226, 1228, 1229-30). Moreover, the district court addressed appellants' concerns, appropriately recognized the realities of negotiation, and concluded that, even if flawed, these provisions were not in themselves outside the reaches of the

[11] *See also* CIS at 37 (J.A.171); Response ¶¶ 318-320 (J.A.1293-94) (explaining that by relying on the normal meaning of "server operating system product," the decree includes every Microsoft product that could be a server operating system).

public interest, nor was an overall-procompetitive decree that included them. *See* 231 F. Supp. 2d at 175 (J.A.1632). Appellants also argue that the disclosure provisions should have been much more sweeping, so as to "unfetter" the operating system market. Br. at 36 (proposing an "open source" and "porting" requirement). But their proposals have no apparent relation to Microsoft's antitrust violations, resting instead on appellants' incorrect remedial theory, *see* pp. 27-28 *supra*, that would require sowing Microsoft's fields with salt.[12]

Appellants' critique of the decree's Technical Committee provisions, Br. 48-49, simply "misunderstand[s] the role" of that committee, 231 F. Supp. 2d at 199 (J.A.1654). The court analyzed appellants' criticisms, *id.* at 198-200 (J.A.1652-54), as did the government, Response ¶¶ 382-392 (J.A.1322-28), explaining the misconceptions. In short, that expert committee is there to assist the Department with technical issues and "is not intended as a substitute for the enforcement authority of the United States." 231 F. Supp. 2d at 199 (J.A.1653).

Finally, appellants erroneously claim that the decree "affirmatively harms" someone (OEMs, presumably) because Section III(H)(3) "grant[s] to Windows . . . the ability automatically to delete icons on the desktop." Br. 49-50.[13] The decree

[12]The district court rejected just such proposals for similar reasons in *New York v. Microsoft*. *See* 224 F. Supp. 2d at 185-86, 241-45.

[13]The claim is also factually misleading. The "automatic" deletion requires user confirmation, moves – not deletes – icons, and "must be unbiased with respect to Microsoft products and non-Microsoft products," so that it is "not used as a sword with which Microsoft can attack its competitors." 231 F. Supp. 2d at 178-79

provision is not a grant; it restricts what Microsoft may do. In any event, a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." *Microsoft*, 56 F.3d at 1461 n.9.

CONCLUSION

The Court should affirm the denial of intervention, or, in the alternative, affirm the final judgment in the antitrust case.

Respectfully submitted.

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Initial filing: June 18, 20003
Final version: August 6, 2003

(J.A.1635-36).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Order of March 26, 2003, because this brief contains 8,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2), and, I have been informed by counsel for Microsoft, Microsoft's brief contains fewer than 5000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10.0 in 12 point New Century Schoolbook.

____

David Seidman
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Dated: August 6, 2003

STATUTORY ADDENDUM

ADDENDUM A – Statutes and Regulations

The Tunney Act: 15 U.S.C. 16. Judgments

(a) See Brief for Appellants at A-3.

(b) See Brief for Appellants at A-3.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct––

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60–day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60–day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider––

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may––

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

ADDENDUM OF UNPUBLISHED OPINIONS

ADDENDUM B – Unpublished Opinions

United States Court of Appeals,
District of Columbia Circuit.

DAVIS BROADCASTING INC., of Columbus Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION, Appellee.
Clear Channel Broadcasting Licenses, Inc., et al., Intervenors.

No. 02-1109.

May 16, 2003.

Appeal from an Order of the Federal Communications Commission.

Before: EDWARDS, SENTELLE, and GARLAND, Circuit Judges.

JUDGMENT

PER CURIAM.

***1** This cause was considered on appeal from an order of the Federal Communications Commission and was briefed by counsel. It is

ORDERED AND ADJUDGED that the order of the Federal Communications Commission ("FCC" or "Commission") is hereby affirmed.

Appellant Davis Broadcasting, Inc. ("Davis") challenges an FCC decision approving assignments of six broadcast radio licenses in or near Columbus, Georgia, from Cumulus Licensing Corp. ("Cumulus") to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"). *See In re Solar Broadcasting Co., Inc.,* 17 F.C.C.R. 5467, 2002 WL 424319 (2002) (*"Solar Decision"*). Davis claims that the FCC arbitrarily and capriciously failed to designate an evidentiary hearing pursuant to 47 U.S.C. § 309(d)(2), (e) to consider "substantial and material question[s] of fact" before approving the applications to assign. In particular, Davis argues that the Commission ignored "serious questions about the applicants' qualifications based on conduct and transactions involving Davis' radio market" that appellant raised in a petition to deny. *See* Appellant's Br. at 31. We disagree.

Most of the alleged misdeeds concern licenses, stations, and even parties different from those immediately involved in the appealed assignment determination. The one exception is Davis' contention that the pre-assignment Local Marketing Agreement between Cumulus and Clear Channel was an indirect and unauthorized transfer of control in violation of 47 U.S.C. § 310(d). *See* Appellant's Br. at 48 n. 4. As the FCC correctly notes, however, Davis' opening brief offers only a perfunctory argument on this issue in a footnote, and we should therefore consider the argument waived. *See Railway Labor Ass'n v. United States R.R. Ret. Bd.,* 749 F.2d 856, 859 n. 6 (D.C.Cir.1984). In any event, the FCC's disposition of this claim is adequately explained and fully justified.

The FCC reasonably found that Davis' allegations of Solar's and Cumulus' misconduct with regard to the Cusseta construction permit applications did not raise any substantial questions of fitness that would affect this assignment to Clear Channel. *Solar Decision,* 17 F.C.C.R. at 5490-91 ¶ 81. Furthermore, the FCC permissibly elected to address any other aspects of those allegations in different proceedings that are not before us here. *See id.* at 5492 ¶ 83; *see also* 47 U.S.C. § 154(j). Likewise, the FCC reasonably concluded that Davis' allegations regarding misrepresentation and lack of candor by Solar and Cumulus in different transactions presented no substantial and material question of fact requiring an evidentiary hearing under 47 U.S.C. § 309. *See Solar Decision,* 17 F.C.C.R. at 5491-92 ¶ 82.

In sum, we find that Davis presented no "substantial and material question" requiring the Commission to conduct an evidentiary hearing on the issues raised in the petition. Accordingly, we affirm the Commission's decision and deny the appeal.

***2** Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

2003 WL 21186042 (D.C.Cir.)
END OF DOCUMENT

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 2003, I caused copies of the foregoing Brief for the United States (Final Version) to be served electronically in accordance with Fed. R. App. P. 25(c)(1)(D) and by first class mail upon the following:

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