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

In Re Microsoft Corporation, Petitioner.	No. 98-5012

RESPONSE OF THE UNITED STATES TO MICROSOFT CORPORATION'S PETITION FOR A WRIT OF MANDAMUS AND MOTION FOR STAY OF PROCEEDINGS

On January 16, 1998, Microsoft Corporation ("Microsoft") petitioned this Court to issue a writ of mandamus to the district court "requiring [it] to revoke its reference to the special master"; Microsoft further moved this Court to stay the special master's proceedings. Petition for a Writ of Mandamus and Motion for Stay of Proceedings 5-6 ("Petition"). Because the district court properly acted within its prescribed jurisdiction, and because the order of reference, rather than inflicting irreparable harm on Microsoft, advances the public interest in expeditious resolution of the case, both Microsoft's Petition and its Motion for a stay should be denied.

BACKGROUND

1. On October 20, 1997, the United States filed a petition for an order to show cause why Microsoft should not be held in contempt of the Final Judgment entered by the district court on August 21, 1995. The petition alleged that Microsoft's impending requirement that, as a condition of obtaining Microsoft's Windows 95 operating system, Original Equipment Manufacturers ("OEMs") distribute to purchasers of computers on a separate disk Microsoft's then-optional Internet Explorer 4 web browser product, as well as Microsoft's ongoing forced licensing to OEMs of Internet Explorer 3, violated that consent judgment. The United States

requested, in addition to a judgment of contempt, injunctive relief designed to bring Microsoft into compliance.

On December 11, 1997, the district court ruled that it would not hold Microsoft in contempt. See Memorandum and Order 8-9 ("Mem. and Order") (Petition Ex. A). Nonetheless, the court recognized that it did "not necessarily follow that Microsoft's licensing practices are, in fact, in compliance with the [consent decree's] terms." Id. at 9. The court accordingly treated the petition as a request to enforce the Final Judgment through the imposition of injunctive relief. Finding that "[d]isputed issues of technological fact, as well as contract interpretation, abound [in] the record [as it] presently stands," the court declined to resolve the "ultimate question" of "whether Microsoft is actually violating" the Final Judgment without further proceedings. Id. at 13. To preserve the competitive status quo in the interim, the court entered a preliminary injunction. See id. at 14-17.

In order to "assist[] the Court" in judging "the merits of the government's claims and its prayer for permanent injunctive relief," Memorandum and Order (Jan. 14, 1988) (Petition Ex. F); Mem. and Order at 13, the court also appointed Professor Lawrence Lessig to serve as a special master. The reference, the court explained, was necessitated both by "exceptional conditions of urgency" presented by the case and by "the complex issues of cybertechnology and contract interpretation connected therewith." Order of Reference at 1 ("Order") (Petition Ex. B). To facilitate the court's "resolution of these issues as expeditiously as possible," the court directed Professor Lessig to "receive evidence and legal authority," "supervise discovery," rule at his election on "contested matters," and "propose findings of fact and conclusions of law." Id. at 1-2. The court indicated that the proposed findings would merely be "consider[ed] by the Court"

in ruling "on the issues raised by the case," id. at 1, and did not foreclose it from "entertain[ing] further proceedings on the merits," Mem. and Order at 14.

2. Although Microsoft immediately appealed the district court's entry of the preliminary injunction,[1] Microsoft did not move to revoke the reference until December 23, 1997. In its motion, Microsoft challenged the reference on the grounds (1) that the reference was justified by no "exceptional condition" as required by Rule 53; and (2) that the scope of the reference, in view of Microsoft's refusal to consent to it, violated Article III. Microsoft also moved to disqualify Professor Lessig, asserting bias by him against Microsoft. After considering both the parties' submissions and a declaration authored by Professor Lessig responding to Microsoft's accusations, the district court on January 14, 1998, denied Microsoft's motions and declined to grant a stay pending appeal.[2]

3. Since accepting the reference, Professor Lessig has pursued his duties with vigor. Among other things, he has engaged in several exchanges with the parties designed to determine the relevant technological and legal issues; he has requested that the parties produce certain categories of evidence for his review and analysis; he has requested briefing on pertinent issues; and he has expedited proceedings with a view toward meeting the May 31, 1998, deadline for his proposed findings set by the district court.

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[1]Because Microsoft, without seeking clarification, implemented a construction of the preliminary injunction that effectively nullified it, United States subsequently moved to hold Microsoft in contempt of, and to enforce, that injunction. The parties resolved this aspect of the case through a stipulation entered with approval of the court on January 22, 1998.

[2]The District Court also declined Microsoft's request for certification pursuant to 28 U.S.C. 1292(b). The court was right to do so. Section 1292(b) certification is unavailable when, as here, the Untied States brings an action for equitable relief under the antitrust laws and related enactments. See 15 U.S.C. 29(a); Kaufman v. Edelstein, 539 F.2d 811, 816 (2d Cir. 1976).

ARGUMENT

I. MANDAMUS SHOULD NOT ISSUE BECAUSE THE DISTRICT COURT ACTED WELL WITHIN ITS JURISDICTION

"Mandamus" is an "extraordinary," "drastic remedy" "traditionally used only when necessary to prevent an inferior court from operating outside its prescribed jurisdiction." In re Thornburgh, 869 F.2d 1503, 1506 (D.C. Cir. 1989) (internal quotations omitted). The moving party must "show[] that its right to the issuance of the writ is clear and indisputable." Will v. United States, 389 U.S. 90, 96 (1968) (internal quotations omitted). And ordinarily it "must demonstrate that appeal is a clearly inadequate remedy for the alleged error." Thornburgh, 869 F.2d at 1507 (internal quotations omitted). Because the district court's reference did not affect an "untoward or irretrievable delegation of judicial authority," id. at 1508 (internal quotations omitted), Microsoft's Petition should be denied.

1. "Courts have [the] inherent power to provide themselves with appropriate instruments for the performance of their duties," including the "authority to appoint" "special masters" "without the consent of the parties" "to simplify and clarify the issues and to make tentative findings." Ex parte Peterson, 253 U.S. 300, 312-14 (1920). References to special masters "for the purpose of making recommendations to the court" thus long "have been an inseparable adjunct of equity procedure." Note, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779, 789 (1975) (internal quotations omitted). Consistent with applicable rules, courts commonly employ special masters to investigate compliance with, and to recommend modifications to, consent judgments, particularly when ensuring compliance raises "complex[]" issues. Organization for Reform of Marijuana Law v. Mullen, 828 F.2d 536, 543 (9th Cir. 1987); see also In re Pearson, 990 F.2d 653, 658-59 (1st Cir. 1993). And in appropriate circumstances, courts may call upon special masters, including non-judicial officers possessing

"special expertise," Fed. R. Civ. P. 53 (Advisory Committee Notes), to take evidence and recommend the resolution of the merits of a civil dispute notwithstanding the parties' lack of consent. See, e.g., Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1132-33 (2d Cir. 1977); Morse v. Marsh, 656 F. Supp. 939, 942-46 (N.D. Ill. 1987).

Despite the recognized utility of special masters, Microsoft argues that the reference in this case plainly violates its right "to have its obligations and potential liabilities determined by an Article III court" because the district court's "reference is indistinguishable from the one condemned by this Court" in In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165 (D.C. Cir. 1991). See Petition at 5. The reference in this case, however, suffers from none of the infirmities that drove the analysis in Bituminous Coal. There, the district court (1) explained that the special master "shall, for all purposes . . . function as a surrogate judge," id. at 1167; (2) envisioned having absolutely no role in the case except to review the master's report, see id. (explaining to the parties that their "sacrifice" to calendar congestion was that they must "present [their] case to [the special master] and not [the court]" (second alteration in original)); and (3) thereby made clear that it would "defer[]" to the master's recommended findings on "potentially dispositive questions of fact [and] law" rather than "decid[ing those questions] de novo," id. at 1169. In such circumstances, this Court found the unconsented reference to "exceed[] the limits of the district court's reference authority," and granted the writ because the court "transfer[red] to the special master" Article III "authority the judge was not free to cede." Id. at 1168, 1169.

The reference in this case, in sharp contrast, has none of these features. The district court did not cede authority to adjudicate the merits to the special master or otherwise withdraw from involvement in the case; to the contrary, the findings Professor Lessig is to prepare will merely be "consider[ed] by the Court" in ruling "on the issues raised by th[e] case." Order at 1. Nor did

the court foreclose receiving further evidence and argument on the merits following termination of the reference; to the contrary, the court expressly stated that it "will entertain further proceedings on the merits of the government's claims and its prayer for permanent injunctive relief." Mem. and Order at 14. Finally, because the court reserved to itself authority to decide "dispositive issues of fact [and] law," Bituminous Coal, 949 F.2d at 1169, it is plain that the district court will review the findings de novo. See also Memorandum and Order (Jan. 18, 1998) (Petition Ex. F) (explaining that the special master merely will "assist[] the Court in making findings" (emphasis added)).

The reference in this case thus does not, as in Bituminous Coal, "strid[e] over the line between allowable assistance to, and impermissible substitution of, the trial judge." 949 F.2d at 1168. See Stauble v. Warrob, Inc., 977 F.2d 690, 698 n.13 (1st Cir. 1993) ("A judge may, of course, refer the fundamental issue of liability to a master without running afoul of the Constitution, so long as the judge is prepared to afford de novo review or otherwise to honor Article III's commands."); see also NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410, 1415-1417 (9th Cir. 1994) (rejecting Article III objection to a magistrate, serving as a special master pursuant to 28 USC 636(b)(2) without the defendant's consent, making recommended findings to the court of appeals on the merits of a civil contempt action). Indeed, the reference in this case is constitutionally indistinguishable from the Supreme Court's practice of, without consulting the parties, referring actions brought under its original jurisdiction to special masters to "take such evidence as may be . . . necessary," and, subject to de novo review, to "find the facts specifically and state separately his conclusions of law thereon," a practice the Court has made clear comports with Article III. United States v. Raddatz, 447 U.S. 667, 682-83 & n.11 (1980) (internal quotations omitted) (upholding unconsented reference, subject to plenary review by the

district court, to a magistrate to rule on a suppression motion and noting that such a reference is "analogous to a master['s] recommendation" "for Article III purposes"). Accordingly, the order of reference in this case, rather than amounting to a "usurpation of judicial power" that might warrant issuing the extraordinary writ, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953), is confined well within the limits Article III prescribes.

2. To the extent Microsoft further contends that mandamus should issue because the district court abused its discretion in finding the reference justified by "exceptional condition[s]," Fed. R. Civ. P. 53(b), its argument is twice flawed. First, the court properly exercised its Rule 53(b) discretion. As the court explained, this case presents "complex issues of cybertechnology and contract interpretation" that "it is in the interest of justice to resolve as expeditiously as possible." Order at 1 (Petition Ex. B). To understand fully the circumstances that gave rise to the Final Judgment, to ascertain the implications of competing constructions of it, and to determine the appropriate application of it, necessitates not only mastery of the law and the background of the case, but also detailed knowledge of complex technologies and the workings of dynamic markets.

Merely determining the appropriate areas for inquiry, therefore, may require "special expertise." Fed. R. Civ. P. 53 (Advisory Committee Notes). For the court to acquire such knowledge unaided, of course, would take a considerable period of time. This, however, would significantly hamper resolving the matter "expeditiously" -- a result that the district court explained is "exceptionally" "urgent" to secure, and that Microsoft itself previously represented to the court is in its and the public's interest. See Motion for Expedited Consideration and for an Expedited Briefing Schedule at 15, United States v. Microsoft Corp., No. 97-5343 (Dec. 16, 1997) ("Expedition Motion").

The reference to Professor Lessig, whose curriculum vitae amply demonstrates expertise in both the pertinent legal and technological fields, as well as the relationship between them, solves this dilemma. With the cooperation of the parties, Professor Lessig has initiated a thorough and comprehensive inquiry designed to determine the relevant legal and technological issues. Through his ongoing proceedings and proposed findings, Professor Lessig will then focus the issues, economize the range of specialized knowledge the court must assimilate to resolve the dispute, and thereby facilitate the court's swifter resolution of it. Thus, far from resting on simple docket congestion or an impermissible refusal to grapple with complex issues, see La Buy v. Howes Leather Co., 352 U.S. 249 (1957), the reference in this case validly employs the master's special expertise to rapidly narrow the issues for the court's expeditious decision. Cf. Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1132-33 (2d Cir. 1977) (finding "exceptional circumstances" justifying unconsented reference to special master in part because "[f]urther long-term delay in this case to await the availability of a judge would compound the problems of protecting the confidentiality of classified materials").

Second, even if the court had abused its discretion under Rule 53(b) in finding "exceptional condition[s]" to exist, that error alone would not warrant "invok[ing] the heavy artillery of a prerogative writ." Bituminous Coal, 949 F.2d at 1169. Absent an "untoward or irretrievable delegation of judicial authority," which this case does not present, "mandamus is [no] more appropriate, generally, to correct errors relating to the appointment of special masters than to correct other kinds of errors." Thornburgh, 869 F.2d at 1508. Indeed, absent a showing of irreparable harm, which Microsoft asserts only in relation to its Article III argument, an erroneous reference to a special master can be remedied by appeal following a final judgment. See In re Peterson, 990 F.2d at 656-67; Chicago Housing Auth. v. Austin, 511 F.2d 82. 83-84

(7th Cir. 1975). Therefore, "[i]n the final analysis, mandamus lies only if [Microsoft is] right" that the court had "no jurisdiction" to seek Professor Lessig's assistance. Thornburgh, 869 F.2d at 1508.[3]

II. MICROSOFT'S MOTION FOR A STAY OF PROCEEDINGS SHOULD BE DENIED

Because Microsoft's Petition lacks merit, its Motion for a stay pending appeal should be denied. But even if Microsoft had raised "serious legal questions going to the merits," Population Institute v. McPherson, 797 F.2d 1062, 1074 (D.C. Cir. 1986) (per curiam) (internal quotations omitted), it cannot demonstrate the requisite irreparable harm. See Sampson v. Murray, 415 U.S. 61, 88 (1974) ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." (internal quotations omitted)). Microsoft can adequately protect its asserted right in having the merits of this case resolved by an Article III decisionmaker through appeal from a final judgment. See Stauble, 977 F.2d at 693 (holding, following final judgment, that scope of the reference violated Article III yet explaining that earlier denial of mandamus was "amply" justified because the "reference, even if improvident, presented no danger of irreparable harm").[4]

In contrast, staying the order of reference, and thus bringing the proceedings Professor Lessig is actively pursuing to a halt, would impair the significant public interest in bringing this

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[3]We do not understand Microsoft to seek mandamus with respect to the district court's denial of Microsoft's request to disqualify Professor Lessig. To the extent Microsoft raises the issue, its claim that Professor Lessig is biased, or would be perceived to be biased, is groundless for the reasons the United States explained below.

[4]Microsoft's reliance on Ward v. Village of Monroeville, 409 U.S. 57 (1972), is misplaced. In contrast to that case, which held that a trial de novo by a higher court did not obviate due process objections to a partial decisionmaker adjudicating the case in the first instance, see id. at 61-62, an Article III deficiency in a reference may by cured by determination of the merits de novo by the very court that made the reference, see, e.g., Stauble, 977 F.2d at 697-98; Thornton v. Jennings, 819 F.2d 153, 154 (6th Cir. 1987).

matter to a swift conclusion. To stay Professor Lessig's orderly and expeditious proceeding, and thus to require the district court either to proceed with the issues insufficiently focused or to await this Court's judgment on the merits of this Petition, would delay resolution of this case. But as Microsoft itself explained to this Court in seeking expedition in its related appeal, see Expedition Motion at 15, computer manufacturers and software developers, and therefore ultimately consumers, would greatly benefit from "prompt disposition" of the issues involved.

CONCLUSION

For the foregoing reasons, Microsoft's Petition for a Writ of Mandamus and Motion for a Stay of Proceedings should be denied.

Respectfully submitted.

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January 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 1998, I caused the foregoing RESPONSE OF THE UNITED STATES TO MICROSOFT CORPORATION'S PETITION FOR A WRIT OF MANDAMUS AND MOTION FOR STAY OF PROCEEDINGS to be served by hand upon:

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