IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT UNITED STATES OF AMERICA'S
MOTION TO DISMISS

Defendant United States of America, by and through undersigned counsel, hereby moves to dismiss this action, pursuant to Fed. R. Civ. P. 12(b). The Complaint fails to state a claim for which relief can be granted and this court lacks jurisdiction to hear Plaintiff's claims in any event. The reasons supporting this motion are set forth in more detail in the accompanying Memorandum of Points and Authorities and attached exhibits. A proposed order is also attached for the Court's consideration.

THEREFORE, defendant United States of America respectfully requests that the instant motion be GRANTED and that this action be DISMISSED.

Dated: February 8, 2002.

Respectfully submitted,

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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)

[Proposed] **ORDER**

THIS MATTER having come before the Court on Plaintiff's Motion for Preliminary Injunction and Expedited Hearing and the opposition thereto, and the Defendant United States' Motion to Dismiss and the opposition thereto, and the Court having considered the matter, it is hereby

ORDERED that Plaintiff's Motion for Preliminary Injunction is DENIED; and it is further

ORDERED that Defendant United States' Motion to Dismiss is GRANTED and this action is hereby DISMISSED.

SO ORDERED.

Dated: _____

_____
COLLEEN KOLLAR-KOTELLY
United States District Judge

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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)

DEFENDANT UNITED STATES OF AMERICA'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This case is a collateral attack on the proceedings underway in the Court to determine whether to approve the settlement of a major antitrust litigation. Plaintiff seeks to "enjoin the United States of America and Microsoft Corporation from proceeding with the[] proposed settlement" of their antitrust action, United States of America v. Microsoft Corp., Civil Action No. 98-1232 (CKK) (D.D.C.) (the "Antitrust Case"). The asserted basis for this relief is the allegation that the parties have failed to comply with the requirements of the Antitrust Procedures and Penalties Act ("Tunney Act" or "Act"), 15 U.S.C. § 16(b)-(h). Compl., ¶ 41. Plaintiff has also moved for a preliminary injunction enjoining the Government from closing the public comment period on the proposed settlement – a period which closed on January 28, 2002, pursuant to the dictates of the Act and an Order of the Court in the Antitrust Case.

Whether phrased as an injunction directed at the parties' proceeding with their settlement, or a preliminary injunction requiring that the public comment period be re-opened, the essence of what Plaintiff seeks is the same – an order of this Court essentially halting proceedings currently in progress in the Antitrust Case. The Antitrust Case itself, however, provides the Court with a full opportunity to assess and address the adequacy of Defendants' compliance with the requirements of the Tunney Act. Because (i) the Tunney Act provides no independent cause of action to enforce its disclosure requirements, (ii) Plaintiff has failed to identify any applicable waiver of the United States' sovereign immunity, (iii) Plaintiff has failed to allege facts demonstrating injury from the Government's alleged non-compliance, (iv) the United States has complied with its Tunney Act obligations, and (v) Plaintiff's claim against Microsoft cannot withstand scrutiny, the case should be dismissed. For the same reasons, as well as reasons having to do with the balancing of equities, Plaintiff's Motion for Preliminary Injunction

should be denied.

BACKGROUND

The United States and Microsoft recently submitted to the Court in the Antitrust Case a Stipulation and Revised Proposed Final Judgment ("RPFJ"), triggering the applicability of Tunney Act procedures. Subsequent to the submission of the RPFJ, the Government filed a 68-page Competitive Impact Statement ("CIS") on November 15, 2001, as required by the Tunney Act. The Government also caused both the RPFJ and CIS to be published in the Federal Register on November 28, 2001, 66 Fed. Reg. 59,452 (2001), as well as a summary of each to be published in the Washington Post, the New York Times, and the San Jose Mercury News. 15 U.S.C. § 16(b), (c); Order filed in Antitrust Case, Nov. 8, 2001 ("November 8 Order").[1] Pursuant to the Tunney Act and the Court's November 8 Order, the public comment period on the RPFJ closed on January 28, 2002. 15 U.S.C. § 16(d); November 8 Order at 3 (comment period closes 60 days after publication in Federal Register).

The United States received over 30,000 comments on the RPFJ and is in the process of reviewing and responding to these comments. Declaration of Renata B. Hesse ("Hesse Decl."), ¶ 3, filed concurrently herewith. The United States will file its response to the comments on or before February 27, 2002. See Joint Status Report at 3, filed in Antitrust Case, Feb. 7, 2002 ("Joint Status Report"). Some of the comments raise the same Tunney Act compliance issues that are the subject of the instant litigation. Hesse Decl., ¶ 4. In addition to its own assessment of the parties' compliance with the Tunney Act, therefore, the Court in the Antitrust Case will have the benefit of public comment

[1] A copy of the RPFJ is also attached as Exhibit B to the Affidavit of Albert A. Foer, filed in conjunction with Plaintiff's Motion. A copy of the CIS is attached as Exhibit C thereto.

on this issue.

Plaintiff itself was one of the thousands of commentators responding to the publication of the RPFJ and the CIS. Notwithstanding Plaintiff's assertion in this lawsuit that its ability to meaningfully comment on the RPFJ has been "significantly impaired," Mem. of Points and Auth. in Support of Motion for Preliminary Injunction and Expedited Hearing ("Plaintiff's Memorandum" or "Pl. Mem.") at 2, Plaintiff submitted a 44-page comment to the Government within the statutorily-prescribed comment period. Hesse Decl., ¶ 5; see Comment submitted by American Antitrust Institute, Jan. 24, 2002 ("AAI Comment"), attached as Exhibit 1 to Hesse Decl., and available at <http://www.antitrustinstitute.org/recent/163.pdf>. In its Comment, Plaintiff raises concerns regarding the scope of the Government's and Microsoft's disclosures similar to those at issue in this litigation. AAI Comment at 1, 12. Plaintiff's Comment also contains a detailed analysis of the various components of the proposed settlement and its alleged drawbacks, and a firm conclusion regarding Plaintiff's view of the RPFJ:

> This Court should reject the Proposed Final Judgment ("PFJ") . . . . The PFJ is not in the "public interest," . . . . The PFJ is ambiguous, 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.

AAI Comment at 2.

Apparently dissatisfied with this level of participation in the approval process, Plaintiff filed suit on January 24, 2002 – nearly two months after the publication of the CIS and RPFJ. On January 31, 2002, three days after the public comment period had closed, Plaintiff filed its Motion for Preliminary Injunction. Plaintiff now seeks to have this Court enjoin the Tunney Act proceedings pending in the

Antitrust Case. It seeks to do so by having this Court issue an Order directing that the Government not close the already-closed public comment period, effectively staying proceedings in the Antitrust Case.

ARGUMENT

The Antitrust Case itself provides the Court with an opportunity to assess and address the adequacy of Defendants' compliance with the requirements of the Tunney Act. As a matter of Congressional intent, judicial economy and common sense, the Antitrust Case is the proper forum in which any such compliance issues can and should be addressed. Any contrary result would imply that any of the thousands of commentators in this matter could file suit anywhere in the country to enjoin this Court's handling of its own case. Such a result is neither intended by the Act nor necessary to vindicate Congress's goals. The Court overseeing the Tunney Act proceedings is perfectly capable of ascertaining whether the Act has been complied with and whether it has sufficient information before it to make the public interest determination called for by the Act. 15 U.S.C. § 16(e).

The Tunney Act itself, in fact, does not provide for a private cause of action to enforce the disclosure requirements at issue here, nor does it (or any other statute) provide for any applicable waiver of sovereign immunity. Moreover, Plaintiff has failed to allege facts demonstrating any cognizable injury from the Government's alleged non-compliance with the Act. Even if all of these independent grounds did not mandate dismissal, Plaintiff is entitled to no relief because the Government has met its Tunney Act obligations as a matter of law. Any alleged violation of 15 U.S.C. § 16(g) by Microsoft also does not provide a basis for relief. Accordingly, the case should be dismissed for failure to state a claim and lack of jurisdiction. For the same reasons, Plaintiff has failed to demonstrate a likelihood of success on the merits or irreparable injury, and its Motion for Preliminary Injunction should

be denied.

I. This Action Should Be Dismissed for Failure to State a Claim and Lack of Jurisdiction.

A. The Tunney Act Does Not Provide For a Private Cause of Action to Enforce Its Provisions.

Before addressing the merits of Plaintiff's claims, the Court must assess two threshold issues. The first is whether the Tunney Act "gave [Plaintiff] a cause of action against the government. The second is whether, if it did, the [Act] waived the government's sovereign immunity from the sort of . . . action the [Plaintiff] brought here." First Virginia Bank v. Randolph, 110 F.3d 75, 78 (D.C. Cir. 1997). "[T]hese are analytically distinct questions," id., and Plaintiff's claim fails on both counts.

The Supreme Court has recently reaffirmed that:

> private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Without it, a cause of action does not exist and courts may not create one . . . .

Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (citations omitted). The starting point for such an analysis is the "text and structure" of the statute at issue. Id. at 288; see also Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

1. The Language of the Tunney Act Does Not Create Any Private Cause of Action.

Like the statutory language at issue in the Touche Ross case, by its terms the Tunney Act does not "purport to create a private cause of action in favor of anyone." Id. at 569. Rather, the Act merely sets forth certain filing and disclosure undertakings that the United States and a settling defendant must meet to settle an antitrust action by consent judgment. 15 U.S.C. § 16(b), (c), (d), (g). The Act says

nothing with respect to any right to sue to enforce these requirements. Even if these requirements were construed as bestowing some rights upon interested parties such that a failure to comply impaired those rights (a point the Government does not concede), the Supreme Court has emphasized that "'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'" Touche Rosse, 442 U.S. at 568, quoting Cannon v. University of Chicago, 441 U.S. 677, 688 (1979); see also Alexander, 532 U.S. at 290 (even "statutes that admittedly create substantive private rights" do not provide private cause of action absent Congressional intent). On its face, therefore, the Tunney Act does not provide for a private cause of action.

2. The Structure of the Act Further Supports the Conclusion that the Act Does Not Provide for a Private Cause of Action.

In addition to the lack of any textual basis whatsoever for finding a right to sue, the structure of the Tunney Act provides further support for the conclusion that there is no private cause of action to enforce the disclosure requirements at issue here. The Act's structure makes it clear that the Antitrust Case itself is the proper forum in which the Court can consider the parties' compliance with the Tunney Act's requirements. The existence of this Congressionally intended alternative forum, in turn, demonstrates that Congress' silence with respect to any private cause of action was intentional.

The conclusion that the Antitrust Case is the proper forum in which the Court can consider the parties' Tunney Act compliance is dictated by the language of the statute, applicable case law and logic. By requesting a preliminary injunction in this action, Plaintiff is essentially asking that this Court's left hand (in this case) bind its right (in the Antitrust Case). Indeed, according to the logic implicit in

Plaintiff's Complaint, any allegedly interested party could file suit anywhere in the United States to enjoin the Antitrust Case from proceeding to settlement. Such a haphazard result cannot be the one anticipated by Congress, as it would render the orderly review and approval of antitrust settlements subject to the whims of thousands of would-be litigants outside the control of the Court hearing the antitrust action. Such a result would undermine the carefully constructed process envisioned by the Tunney Act, and is not supported by the language of the Act itself.

Section 16(f) specifically authorizes the Court in the Antitrust Case to utilize a variety of means in making its determination as to whether the RPFJ is in the public interest, including the review of public comments and the responses thereto, and "such other action . . . as the court may deem appropriate." 15 U.S.C. § 16(f). As noted above, similar issues regarding the parties' compliance with Tunney Act requirements have been raised in several comments filed with the Government in the Antitrust Case, which will be made available to the Court. See, e.g., 15 U.S.C. § 16(f)(4). The Tunney Act proceeding can easily accommodate consideration of these issues. 15 U.S.C. § 16(e), (f). Indeed, the Court in the Antitrust Case has asked the parties to address the compliance issues in their February 27 filing with the Court, and the Government will of course comply with the Court's request.

Congress also envisioned that "interested persons" might be allowed to participate – in the manner and to the extent deemed appropriate by the Court – in the Antitrust Case and raise any concerns regarding the proposed settlement or compliance with the requirements of the Tunney Act in that context. 15 U.S.C. § 16(f)(3). Indeed, this Court has recognized that intervention in the Antitrust Case, in certain circumstances, is the proper manner for interested parties to advance their interests related to the Antitrust Case. See, e.g., Memorandum Opinion in Antitrust Case, Jan. 28, 2002

(granting motion to intervene by various media entities); Order in Antitrust Case, Jan. 29, 2002 (directing Government and Microsoft to file Joint Status Report addressing, inter alia, "proposals regarding participation by third-parties").

Perhaps because the language of Section 16(f) is clear, the Government has located no cases addressing the precise question at issue here. Cases addressing similar questions, however, have concluded that the Antitrust Case, and not a separate action, is the appropriate forum for the Court to consider matters relating to the Tunney Act's requirements. Thus, in American Express Co. v. United States Dep't of Justice, 453 F. Supp. 47 (S.D.N.Y. 1978), the Court held that an action seeking a declaration that Tunney Act procedures applied to a proposed modification of an antitrust consent decree was improper, because "any arguments directed to the applicability of the [Tunney Act] to the modification or vacation of an existing consent decree are properly made directly to the court before which such proceedings are pending in the form of a motion to intervene or otherwise participate in those proceedings." Id. at 49. In reaching this conclusion, the American Express court relied on Section 16(f)(3), which, in its view, made clear that it was "[t]he intention of Congress" to have any such arguments raised in the antitrust proceeding itself. Id.;[2] see also United States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532, 538 (S.D.N.Y. 1996) (noting that antitrust case is "only forum in which to seek disclosure" of allegedly determinative document under Tunney Act) (dicta), aff'd sub nom. United States v. Bleznak, 153 F.3d 16 (2d Cir. 1998). The same analysis, and the same conclusion, apply

[2] The American Express court went on to hold: "If American Express has a right to invoke certain aspects of the APPA [Tunney Act] with respect to proceedings now before Judge Cannella [in the antitrust case], then that right is properly invoked before that court by means of the procedures authorized by the APPA itself and committed solely to the judgment of [that] court." Id.

here.

The above conclusion is buttressed by those cases addressing the adequacy of Tunney Act disclosures within the context of Tunney Act proceedings, where such issues would typically be raised. See Massachusetts Sch. of Law v. United States, 118 F.3d 776, 781-82 (D.C. Cir. 1997) (allowing intervention for purpose of seeking allegedly "determinative" document under 15 U.S.C. § 16(b), but holding that disclosure duty is narrow); Alex. Brown, 169 F.R.D. at 539-41 (same) (cited with approval in Mass. Sch. of Law, 118 F.3d at 785). Just as the Antitrust Case is the appropriate forum in which the Court may consider concerns regarding the alleged failure to disclose "determinative documents" pursuant to 15 U.S.C. § 16(b), it is also the appropriate forum in which to consider the other concerns regarding the Government's Tunney Act compliance raised by the Plaintiff (disclosures regarding remedies considered and the effect on private litigation).[3] Any claims of non-compliance with Tunney Act procedures must therefore be raised, in the first instance, in the Antitrust Case itself.[4]

Section 16(f)'s explicit expression of Congressional intent with respect to the nature of third-party involvement in Tunney Act proceedings reinforces the determination that no separate, private cause of action was contemplated by Congress. "The express provision of one method of enforcing a

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[3] The same reasoning also applies with respect to Defendant Microsoft's alleged non-compliance with the disclosure requirements of 15 U.S.C. § 16(g). See infra. Section I.E.

[4] While the Government believes that the Antitrust Case is the proper forum in which these issues could be considered by the Court, it does not concede that Plaintiff is entitled to intervene or otherwise appear in that action for these or other purposes. The appropriateness of such intervention must be determined based on the nature of Plaintiff's showing should it move to intervene or otherwise participate in the Antitrust Case. The Government emphasizes, however, as noted above, that Plaintiff's participation is not necessary in order for these issues to be before the Court in the Antitrust Case.

substantive rule suggests that Congress intended to preclude others." Alexander, 532 U.S. at 290; see also Touche Ross, 442 U.S. at 571-72 ("further justification" for decision that no private cause of action exists can be found in fact that provision at issue "flanked by provisions . . . that explicitly grant private causes of action."). Because Congress explicitly expressed its intent that interested parties be allowed to participate, if otherwise appropriate, in the Antitrust Case itself, its silence with respect to any private cause of action to enforce the Tunney Act's disclosure requirements strongly suggests that no such cause of action exists.[5] Accordingly, Plaintiff's Complaint fails to state a claim for which relief can be granted, and this action should be dismissed.

B. Because No Waiver of Sovereign Immunity Applies to Plaintiff's Claim Against the Government, This Court Lacks Jurisdiction.

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980), quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Moreover, "[w]aivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992) (emphasis added). Absent such an express waiver of sovereign immunity, the

[5] The Tunney Act's legislative history is silent on the question of whether any private cause of action exists. See, e.g., H.R. Rep. No. 93-1463, reprinted in 1974 U.S.C.C.A.N. 6535; S. Rep. No. 93-298 (1973). Such silence provides further support for the conclusion that no private cause of action exists. Touche Ross, 442 U.S. at 571; Alexander, 532 U.S. at 293 n.8 ("'affirmative' evidence of congressional intent must be provided for an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy does not exist.'") (emphasis in original) (quoting Northwest Airlines, Inc. v. Transport Workers Union of America, AFL_CIO, 451 U.S. 77, 94 (1981)).

United States cannot be sued, and this court lacks jurisdiction to hear Plaintiff's claims against the United States. See also Department of the Army v. Federal Labor Relations Auth., 56 F.3d 273, 275-77 (D.C. Cir. 1995).

Here, as discussed above, the Tunney Act does not even provide for a private cause of action, let alone an "unequivocally expressed" intent to waive the Government's sovereign immunity. While the waiver of sovereign immunity need not be found in the same statute creating the substantive cause of action being asserted (which, as noted above, is also lacking in this case), cf. First Virginia Bank, 110 F.3d at 78 ("[t]here may be a separate provision waiving sovereign immunity"), Plaintiff has not identified any other source of the necessary waiver that would enable it to proceed with its suit against the Government. Accordingly, this Court lacks jurisdiction to hear Plaintiff's claims.

In the jurisdictional statement in its Complaint, Plaintiff cites only 28 U.S.C. § 1331, the general federal question jurisdictional provision, and 28 U.S.C. § 2201, the Declaratory Judgment Act. Compl., ¶ 5.[6] While the former would provide this Court jurisdiction to entertain Plaintiff's claims if a private cause of action and a waiver of sovereign immunity were found elsewhere, and the latter would provide for certain remedies if Plaintiff were successful in its claims, neither statute provides the waiver of sovereign immunity necessary to endow this Court with jurisdiction. While Section 1331 provides the Court with subject-matter jurisdiction over actions arising under the Constitution and laws of the United States, "it is well-established that § 1331 does not by itself operate as a waiver of sovereign immunity . . . ." Cermak v. Babbitt 234 F.3d 1356, 1361 (Fed. Cir. 2000) (quotations omitted), cert.

[6] Plaintiff completely fails to address the jurisdictional issue (or the existence of a private cause of action) in its preliminary injunction papers.

denied sub nom. Cermak v. Norton, 121 S. Ct. 1961 (2001); see also, e.g., Berman v. United States, 264 F.3d 16, 20 (1st Cir. 2001); Clopton v. Department of the Navy, 1996 WL 680189, at *1 (D.C. Cir. 1996); cf. Bank of Virginia, 110 F.3d at 78 (noting distinction between subject matter jurisdiction under Section 1331 and waiver of sovereign immunity). Similarly, the Declaratory Judgment Act merely "enlarged the range of remedies available in federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); see also Progressive Consumers Federal Credit Union v. United States, 79 F.3d 1228, 1230 (1st Cir. 1996). Accordingly, neither Section 1331 nor the Declaratory Judgment Act operate as a waiver of sovereign immunity.

Plaintiff has not relied upon the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, to assert a waiver of sovereign immunity, and indeed any such reliance would be misplaced. The APA provides, inter alia, for the right to judicial review of final agency action, and waives the government's sovereign immunity for certain of such claims. 5 U.S.C. §§ 702, 704. The APA's waiver of sovereign immunity, however, is subject to various limitations, including an exception for claims for which an adequate remedy is available elsewhere. 5 U.S.C. § 704 (final agency action "for which there is no other adequate remedy in a court" is subject to judicial review under the APA); Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607-08 (D.C. Cir. 1992) (noting limitations on APA's waiver of sovereign immunity, including claims for which an adequate remedy is available elsewhere); Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1210 (D.C. Cir. 1998) (same). As discussed above, Plaintiff has an adequate remedy available by moving to intervene or otherwise participate in the Antitrust Case itself. 15 U.S.C. § 16(f)(3). Accordingly, the

APA's limited waiver of sovereign immunity is not applicable to Plaintiff's claims.[7] Because Plaintiff has failed to identify any applicable waiver of sovereign immunity – and because no such waiver exists – this Court lacks jurisdiction to hear Plaintiff's claims, and this action should be dismissed.

C. Plaintiff Has Failed to Allege Facts Demonstrating Any Injury From the Government's Alleged Non-Compliance.

This Court also lacks jurisdiction as a result of Plaintiff's failure to demonstrate any injury in fact from the Government's alleged failure to comply with the Tunney Act. It is black-letter law that "standing is an essential and unchanging part of the case-or-controversy requirement of Article III," and therefore goes to the Court's very jurisdiction to hear the case. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order to have standing, "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" Id. at 560 (internal citations omitted). Plaintiff here has failed to allege facts demonstrating any such injury.

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[7] The APA is also inapplicable because the Government's publication of the CIS and its identification of "determinative" documents do not constitute either "agency action" or "final agency action" within the scope of the APA's waiver of sovereign immunity. 5 U.S.C. §§ 702, 704. "Agency action" includes "an agency rule, order, license, sanction, relief, or the equivalent . . . .," a definition clearly inapplicable to either the publication of the CIS or the identification of determinative documents. 5 U.S.C. § 551(13). Moreover, to constitute "final agency action" subject to APA review, 5 U.S.C. § 704; Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 882 (1990) (where only basis for judicial review is APA, agency action must be "final"), the agency's action must "determine[] 'rights or obligations.'" American Telephone and Telegraph Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001), quoting Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1022 (D.C. Cir. 2000); see also Industrial Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1118 (D.C. Cir. 1988); Fourth Branch Assocs. (Mechanicville) v. FERC, 253 F.3d 741, 746 (D.C. Cir. 2001) (final agency action must have "direct and immediate effect on the day-to-day business of the parties") (internal quotation omitted). The actions at issue here do not meet this standard either, and are thus not subject to review under the APA.

Although it states in its Complaint that its "ability to fully evaluate the proposed settlement for purposes of its comments is impaired" by the Government's alleged non-compliance with the Tunney Act, Compl., ¶ 11, Plaintiff fails to plead any facts that support this conclusion or explain, in other than the most conclusory fashion, how the alleged deficiencies hindered its ability to comment. In fact, Plaintiff's own Comment demonstrates that its ability to comment meaningfully has not been impaired.[8] In its 44-page Comment, Plaintiff carefully details the perceived flaws in the RPFJ, and, as noted above, comes to a firm conclusion that its entry would not be in the public interest. AAI Comment at 2-4, 43.[9] Although Plaintiff notes in its Comment that it may provide additional comment "if and when" additional disclosures are made, it nowhere states that its analysis or conclusions are impacted by the alleged non-compliance.[10]

That Plaintiff had enough information upon which to base a detailed analysis is not surprising, since the focus of the Tunney Act disclosures, the public comments, and the Court's public interest

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[8] Because standing goes to the Court's jurisdiction to hear the case, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992); see also Wilson v. United States of America, Civ. A. No. 98-513(GK), 1998 WL 720632, at *1 (D.D.C. July 20, 1998). Moreover, "[t]he burden of proof rests upon the plaintiff to show that the reviewing court has subject-matter jurisdiction." Id.

[9] Indeed, Plaintiff's Comment is one of the approximately 45 comments categorized by the Government as "major" comments "based on their length and the detail with which they analyze the significant issues relating to the RPFJ." Hesse Decl., ¶ 6; see Joint Status Report at 3.

[10] Plaintiff's Comment merely notes that the parties' "failures . . . to comply fully with the requirements of the Tunney Act have kept us . . . from receiving all the information that is required by statute as a basis for these comments." AAI Comment at 1. Plaintiff fails to allege that such alleged failures preclude it from commenting intelligently, as any such claim would be ludicrous in light of Plaintiff's detailed Comment.

determination are the proposed settlement itself – to which Plaintiff clearly has access – and not the other various matters (such as the Government's views regarding various alternative remedies) about which Plaintiff complains. As Senator Tunney, sponsor and floor manager of what became the Tunney Act, stated in his Remarks on introducing the bill, the six items required in the CIS:

> have a dual purpose: first, they explain to the public[,] particularly those members of the public with a direct interest in the proceeding, the basic data about the decree to enable such persons to understand what is happening and make informed comments o[r] objections to the proposed decree during the 60-day period. Second, the items listed in the subsection will serve to focus additional attention by both sides during settlement negotiations upon the factors which should be considered in formulating a decree.

119 Cong. Rec. 3452 (1973) (Remarks of Sen. Tunney) (emphasis added). At the outset of Senate hearings on the bill, Senator Tunney further explained that the items specified in what became Section 16(b) (1)-(6) "do not require considerably more information than the complaint, answer and consent decree themselves would provide and, therefore, would not be burdensome requirements." The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 3 (1973) (statement of Sen. Tunney) ("Tunney Statement"). That is, the RPFJ itself, along with the detailed explanation of its provisions found in the CIS (about which Plaintiff does not complain), provide sufficient information to allow for informed public comment about the proposed settlement. Because Plaintiff was given sufficient information to enable it to comment intelligently about the RPFJ, and because Plaintiff in fact did submit a detailed analysis of the RPFJ without indicating that its ability to do so was in any way impaired, Plaintiff has failed to allege facts sufficient to demonstrate any "injury in

fact" and this action must be dismissed.[11]

D. The Government Has Complied with Its Tunney Act Disclosure Requirements.

Even assuming, arguendo, that jurisdiction exists and that the Tunney Act provides for a private cause of action separate and apart from the Tunney Act proceeding itself, this action should be dismissed because the Government has complied with its Tunney Act obligations. Plaintiff alleges that the United States did not comply with the requirement that the CIS recite six items of information specified in 15 U.S.C. § 16(b), Compl., ¶ 15,[12] and with the "determinative documents" provision of

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[11] The government's Tunney Act disclosures do not, of course, limit the information available to the Court in the Antitrust Case for purposes of its public interest determination pursuant to 15 U.S.C. § 16(e). The Court in the Antitrust Case would have available to it not just the materials made available by the Government before public comment began, but also the comments themselves, the Government's response to comments, and any additional briefing the Court requires. 15 U.S.C. § 16(f); see also Joint Status Report filed in Antitrust Case, Feb. 7, 2002.

[12] Section 16(b) requires that the CIS:

> recite –
>
> (1) the nature and purpose of the proceeding;
> (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
> (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
> (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
> (5) a description of the procedures available for modification of such proposal; and
> (6) a description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. § 16(b).

the same subsection.[13] But, as the Complaint and Plaintiff's Memorandum make clear, Plaintiff is alleging primarily that the United States failed to provide information that the Tunney Act does not require it to provide, and secondarily that the United States failed to supply required information in sufficient detail to satisfy Plaintiff's standards, rather than those of the Act. Neither category involves a failure to comply with the Act.

1. Plaintiff Seeks Information the Act Does Not Require the United States to Provide.

a. The competitive effect of alternatives.

The most glaring example of Plaintiff's demanding information that the Act does not require the United States to provide, in the CIS or elsewhere, is its claim that the Government "failed to explain adequately how alternative remedies (those not being pursued in the PFJ) would have affected competition in the marketplace." Compl., ¶ 19. The Tunney Act, however, does not require any explanation of how alternative remedies would have affected competition in the marketplace. That is no accident. As reported out of Senate Committee, the bill that became the Tunney Act would indeed have required that CIS recitations include "the anticipated effects on competition of such alternatives." S. Rep. No. 93-298, at 9 (proposed 15 U.S.C. § 16(b)(6)). But on the Senate floor, Senator Hruska offered an amendment to strike that requirement, stating:

> There is no reason . . . to require the staff of the Antitrust Division . . . to make a public prediction as to the competitive effects of various alternatives which it has considered.

[13] "Copies of such proposal [for a consent judgment] and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct." 15 U.S.C. § 16(b).

It is sufficient if the various alternatives are disclosed to the court and to the public. 119 Cong. Rec. 24,604 (1973).[14] Senator Tunney agreed with the amendment's "basic intent," and the Senate adopted it by voice vote. Id. Thus, Plaintiff's request that the United States provide information that Congress explicitly decided not to require fails to state a claim for which relief can be granted.

b. Effects on private litigation.

Almost as glaring is Plaintiff's insistence that the United States is required, and failed, to "explain[] how the settlement will affect pending and potential private litigation." Compl., ¶23. In particular, Plaintiff insists that the Government is required to "disclose how the PFJ might impact the evidentiary or collateral estoppel effect of" the findings of fact and conclusions of law in the Antitrust Case that the Court of Appeals affirmed. Id. Indeed, according to Plaintiff, the CIS must disclose "[w]hat actually is intended by the PFJ" concerning these issues, id. (emphasis in original), and must even disclose whether the United States "is aware if Microsoft intends to argue in private cases that the district court's determinations are rendered null and void by the proposed settlement." Id., ¶ 24.

The evidentiary or collateral estoppel effect of determinations in the Antitrust Case is a question to be addressed by the courts in which future litigants might seek to use those determinations. See United States v. AT&T, 552 F. Supp. 131, 211 (D.D.C. 1982) (declining in Tunney Act proceeding to "enter any specific decision or finding regarding" applicability of prima facie evidence section of Clayton Act, 15 U.S.C. 16(a), because "the ultimate decision with respect to this issue must rest with the court

[14] Senator Hruska explained that "[t]hese anticipated effects quite clearly can be speculated upon by the district court considering a proposed consent judgment or by other interested parties." Id.

in which such litigation may be brought"), aff'd mem. 460 U.S. 1001 (1983); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979) (granting trial courts broad discretion to determine whether offensive collateral estoppel should be applied in matters before them). It is not a question for this Court, or for the Tunney Act Court, or for the United States to determine.

Not surprisingly, nothing in the language of the Tunney Act requires the United States to offer, in the CIS or elsewhere, its views about legal questions that may arise in subsequent litigation; its beliefs about what a proposed decree negotiated with an antitrust defendant "intend[s]" with respect to these issues; or its knowledge of what the defendant may argue in subsequent litigation.[15] In neither its Complaint nor its Memorandum does Plaintiff cite any authority to the contrary, or even provide a reason to believe there is any such authority. The United States is aware of none. This alleged disclosure deficiency, therefore, does not state a claim for which relief can be granted.

c. Details concerning determinative documents.

Plaintiff also contends that the CIS disclosure regarding determinative documents is "insufficient," Compl., ¶ 27; implies, without any foundation, that there were determinative documents the Government did not disclose, id.; and contends that the Government "failed to disclose the definition or interpretation of 'determinative' documents that it applied in concluding that there were no such documents." Id., ¶ 28.

The Tunney Act does not require that a CIS mention, let alone define, "determinative

[15] Plaintiff appears to rely on the fourth required CIS recital, "the remedies available to potential private plaintiffs damaged by the alleged violation," 15 U.S.C. 16(b)(4), which does not by its terms refer to legal questions that may arise in litigation brought by those potential plaintiffs. The CIS recites the remedies to which the Act refers. See CIS, § 6, at 63.

documents." See 15 U.S.C. § 16(b) (1)-(6). The only Tunney Act requirements concerning these documents, if they exist, are that the Government make them available to the public at the Tunney Act Court and other district courts it designates, 15 U.S.C. § 16(b); and that the Government publish (in newspapers rather than in the CIS) a list of these documents and the places where they are available for public inspection, 15 U.S.C. § 16(c)(iii). Plaintiff nowhere identifies authority establishing any other requirements.

Plaintiff apparently believes that there exist determinative documents that the Government failed to provide to the Court in the Antitrust Case for disclosure to the interested public. See Compl., ¶¶ 27-28. But, lacking any facts to support this belief, Plaintiff fails even to allege in its Complaint that the Government did not disclose determinative documents. See id., ¶ 28 ("there is no way to know whether the Justice Department's determination [regarding determinative documents] was correct").[16]

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[16] Plaintiff's Memorandum contends that the Complaint "alleges" that the Government "failed to disclose documents and other materials that were determinative in formulating the substance of the proposed settlement." Pl. Mem. at 16, citing the Complaint, ¶¶ 25-29. No such allegation is found in the cited paragraphs or elsewhere. In any event, the Act requires disclosure not of documents "that were determinative," as Plaintiff would have it, but rather of documents "which the United States considered determinative in formulating such proposal." 15 U.S.C. § 16(b) (emphasis added). See Mass. Sch. of Law, 118 F.3d at 784 (Act's "reference to what 'the United States considered determinative'" supports a narrow view of determinative documents) (emphasis omitted); United States v. Bleznak, 153 F.3d 16, 20 (2d Cir. 1998) (quoting determinative document provision of 15 U.S.C. § 16(b), emphasizing "which the United States considered determinative").

Plaintiff also asserts that "[u]pon the filing of the PFJ, AAI acquired a right to obtain the determinative materials and documents, a right which the Justice Department has denied to AAI. See U.S. v. American Bar Association, 118 F.3d 776, 781 (D.C. Cir. 1997) (Tunney Act confers a right to obtain determinative documents)." Pl. Mem. at 16. We note that the Court of Appeals, in the cited passage, was characterizing the "broad view of [15 U.S.C. § 16(b)] espoused by" the appellant in that case, and not stating its own view.

In the absence of even an allegation of noncompliance, Plaintiff has failed to state a claim with respect to the determinative document allegations.[17]

2. Plaintiff's Remaining Contentions Rest on Its Idiosyncratic Evaluation of the Adequacy of the Government's Disclosures, and Are Unsupported by the Tunney Act Itself.

Plaintiff's remaining claims of Government non-compliance turn on Plaintiff's own standards regarding the adequacy of the disclosures the Government has in fact made. These exacting but ill-defined standards find no support in the language or history of the Act. As noted above, Senator Tunney himself endorsed a standard calling for substantially less disclosure than Plaintiff envisions. See Tunney Statement (Act "do[es] not require considerably more information than the complaint, answer and consent decree themselves would provide and, therefore, would not be burdensome").

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[17] Attempting to compensate for this absence of any factual support for its claim, Plaintiff adopts an exceedingly broad definition of determinative documents, drawn from United States v. Central Contracting Co., 537 F. Supp. 571, 575 (E.D. Va. 1982), to contend that, even if documents are individually not determinative, they can be determinative "in the aggregate." Pl. Mem. at 17 n.10. Thus, Plaintiff suggests, it is likely there are determinative documents in any complex antitrust case. Id. at 18. Such a conclusion, however, still constitutes pure speculation. In any event, Central Contracting's broad definition of determinative documents has not been followed by any Tunney Act court, has been squarely repudiated by one district court, Alex. Brown, 169 F.R.D. at 541 ("Central Contracting's broad definition of 'determinative documents' may conflict with Congress's intent to maintain the viability of consent decrees") (cited with approval in Mass. Sch. of Law, 118 F.3d at 785), and cannot be reconciled with decisions of this Circuit and the Second Circuit. See Mass. Sch. of Law, 118 F.3d at 784 (statutory language and legislative history support view that determinative documents are those that "individually" had significant impact on formulation of relief and "confines § 16(b) to at most the documents that are either 'smoking guns' or the exculpatory opposite"); Bleznak, 153 F.3d at 20 (citing Mass. Sch. of Law and quoting "'smoking gun' or exculpatory opposite" with approval). Central Contracting is simply not good law in this regard.

a. Rejection of alternative remedies.

Plaintiff alleges that "[t]he CIS fails to explain adequately why various significant alternative remedies were rejected." Compl., ¶ 17 (emphasis added); see also id., ¶ 19 (Government "failed to explain adequately the basis for its conclusion" that the remedies it selected would be more effective than others").[18] The United States did explain why many alternative remedies were rejected, see CIS at 63; Compl., ¶ 16, in terms consistent with Senator Tunney's concept of providing "basic data about the decree to enable [members of the public with a direct interest] to understand what is happening and make informed comments o[r] objections to the proposed decree," 119 Cong. Rec. 3452 (1973) (Remarks of Sen. Tunney), and with his understanding that the statutory requirements would not be burdensome. See Tunney Statement. The CIS thus provides both "identification of significant alternative remedies [and] the reasons for their rejection." Compl., ¶ 17 (emphasis omitted).

Plaintiff believes this disclosure is inadequate, apparently because, relying on that disclosure alone, "the public cannot intelligently attempt to understand and evaluate the Justice Department's logic in agreeing to the proposed settlement." Id. But Plaintiff provides neither reasons why this is the appropriate standard, nor evidence that the disclosure fails to meet it. The CIS is intended to inform and stimulate public comment "relating to the proposal for the consent judgment," 15 U.S.C. § 16(d), and the CIS can hardly be said to have failed to stimulate public comment concerning the consent decree. See Hesse Decl., ¶ 3 (over 30,000 public comments received). Nothing in the Act or that the

[18] Plaintiff also alleges that the Government "has insufficiently disclosed the critical analysis it purports to have performed in comparing the different types of available remedies." Compl., ¶ 19. We are unsure what "critical analysis" Plaintiff has in mind, why it thinks that analysis was insufficiently disclosed, or why the Government was required to disclose it at all.

Government has found in the legislative history suggests that the CIS was intended to inform the public about, or stimulate evaluation of, the Justice Department's logic, as opposed to the proposed decree. Again, Plaintiff's Complaint fails to state a claim for relief.

b. Abandonment of certain remedies.

Plaintiff also alleges that the Government "failed to explain adequately why it has abandoned remedies that . . ." the district court approved prior to vacation of its remedial order by the Court of Appeals. Compl., ¶ 18. The CIS, however, does explain that, prior to settlement negotiations, the Government "had decided, in light of the Court of Appeals opinion and the need to obtain prompt, certain and effective relief, that it would not further seek a break-up of Microsoft into two businesses." CIS at 61. Plaintiff does not state why this explanation is inadequate. As for the "interim conduct provisions" included in the District Court's judgment, but not included in the RPFJ, the Government considered these alternative remedies, and the CIS explains why they are not included them in the RPFJ. See CIS 61-63. That Plaintiff is dissatisfied with these explanations does not render them legally insufficient. This contention of Plaintiff's thus also fails to state a claim.

As set forth above, all of Plaintiff's claims regarding the insufficiency of the CIS and the government's "determinative document" disclosure either seek information not required by the Tunney Act or are based on Plaintiff's own assessment of the adequacy of the Government's disclosure, an assessment which finds no support in either the language or the Act or the applicable case law interpreting it. Plaintiff's has thus failed to state any claim against the Government for which relief can be granted and this case should be dismissed.

E. Microsoft's Alleged Noncompliance with Its Disclosure Obligation Has No Bearing on Plaintiff's Ability to Comment on the RPFJ.

Plaintiff's claim against Microsoft is also defective as a matter of law because Microsoft's alleged non-compliance with 15 U.S.C. § 16(g) has no bearing on Plaintiff's ability to comment on the RPFJ.[19] The only interest asserted by Plaintiff, and indeed the only conceivable interest it could have in these matters, is its alleged interest in providing informed comments about the RPFJ through the public comment procedure specified in the Tunney Act. See Compl., ¶¶ 3-4, 10-11; Motion for Preliminary Injunction and Expedited Hearing at 2. The Tunney Act provision with which Microsoft allegedly did not comply, 15 U.S.C. § 16(g), however, is not intended to inform the public's comments about the RPFJ. See id. § 16(d). Rather, Section 16(g) merely requires Microsoft to submit certain information to the Court in the Antitrust Case, for that Court's consideration. Whether Microsoft complied with Section 16(g), therefore, is irrelevant to Plaintiff's ability to intelligently comment on the RPFJ. Absent a protectable interest that is claimed to be harmed by the alleged non-compliance with Section 16(g), Plaintiff lacks standing to assert its claim for relief, and its claim against Microsoft should be dismissed.[20]

The Tunney Act treats disclosure requirements intended to inform public comment regarding a proposed consent judgment entirely separately from the other disclosure requirements set forth in the Act. To facilitate public comment on a proposed consent judgment in a Government antitrust case, the

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[19] The Government addresses separately the claim directed at Microsoft's alleged failure to comply with Section 16(g) because the relief sought against Microsoft would delay entry of a proposed consent judgment to which the Government is a party.

[20] For this reason, we do not here address Microsoft's alleged noncompliance. We would, of course, address that alleged noncompliance in the Tunney Act proceeding if the issue properly arose there, whether as a result of the Court's interest or otherwise.

Act provides, in a single subsection, that the proposed decree itself must be published in the Federal Register, along with a CIS, which the Government must furnish to any person requesting it. 15 U.S.C. § 16(b). In addition, that same subsection provides that the Government must file in the Tunney Act district court, and any other district court the Tunney Act court designates, copies of the proposed decree and "any other materials and documents which the United States considered determinative in formulating such proposal." Id. But the Act does not depend solely on the Federal Register to inform the public. The next subsection, 15 U.S.C. § 16(c), requires the Government to publish, repeatedly, summaries of the proposal and the CIS, together with a list of the determinative documents made available for "meaningful public comment," in general circulation newspapers.

By contrast, the lobbying provision at issue here, Section 16(g), merely requires defendants in antitrust cases to file their disclosure statements with the Tunney Act court — there are no requirements of public notice, Federal Register publication, newspaper summaries, or distribution to other district courts. Moreover, the statutory provisions addressing disclosure of information supporting informed public comment (Sections 16(b) and (c)), appear immediately before the provisions dealing with consideration of, and response to, public comment (Section 16(d)) and the court's public interest determination (Sections 16(e) and (f)). The lobbying provision comes after all of those Sections. The statutory structure thus makes clear the different purposes of the two different kinds of disclosure provisions.[21]

[21] While the statutory language is unambiguous, legislative history also bears out the distinction. The Senate Report notes that the "bill seeks to encourage additional comment and response by providing more adequate notice to the public," S. Rep. No. 93-298 at 5, and goes on to describe the provision of information to the public. As in the Act, the Report's description of the lobbying provision

In light of Section 16's structure and legislative history, and the clear distinction between those requirements intended to inform the public so that it might comment on any proposed consent judgment, and the lobbying disclosures required by Section 16(g), it is clear that (whatever the Court's view of the private-cause-of-action question with respect to the claims against the Government) there is no private cause of action to enforce the requirements of Section 16(g). Alexander, 532 U.S. 275; Touche Ross, 442 U.S. 560; see supra Section I.A.

Such a conclusion is also supported by traditional standing analysis. In addition to asserting an "injury in fact," as discussed above, in order to establish standing a plaintiff must also demonstrate "a causal connection between the injury and the conduct complained of – [i.e.,] the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" Lujan, 504 U.S. at 560-61.[22] Because Section 16(g) disclosures are not intended to, and do not, provide Plaintiff or the public with any

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is separated from its treatment of the provision of information to the public by another topic entirely, the court's public interest determination. See id. at 6-7. The House Report is to the same effect. See H.R Rep. No. 93-1463 at 6-7 (information provided to public through Federal Register and newspapers); id. at 9 (lobbying disclosures).

To say that Section 16(g) does not exist to provide grist for public comments about a proposed consent judgment, and therefore that Plaintiff cannot succeed on its claim that it needs full disclosure pursuant to that Section in order to be able adequately to comment on the RPFJ, is not to minimize the significance of public disclosure of lobbying contacts. Senator Tunney, introducing the bill that became the Tunney Act, said he believed that the lobbying provision "will be an important contribution toward vastly improving the atmosphere in which the Antitrust Division must operate in seeking to enforce the law." 119 Cong. Rec. 3453 (1973) (Remarks by Sen. Tunney). Senator Tunney predicted accurately. But that does not change the fact that Section 16(g) disclosures are simply not related to the public's ability to comment on a proposed consent decree.

[22] The Government believes that, for the same reasons discussed above with respect to Plaintiff's claims against the Government, Plaintiff has also failed to demonstrate any "injury in fact" with respect to its claim against Microsoft.

information which could aid in commenting on the merits of the RPFJ, there is simply no causal connection between any alleged non-compliance and Plaintiff's asserted injury (the inability to comment intelligently). Absent such a connection, Plaintiff lacks standing and the claim against Microsoft must be dismissed.

A similar result is reached under the Supreme Court's prudential standing analysis, which requires that a plaintiff assert an injury that is "arguably within the zone of interests protected or regulated" by the statute in question. National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998) ("NCUA"). In making this determination, a court is to "first discern the interests 'arguably . . . to be protected' by the statutory provision at issue . . . ." Id. at 492. Then, it is to "inquire whether the plaintiff's interest" is among those interests to be protected. Id. In this case, the "interests arguably to be protected by the statutory provision at issue," 15 U.S.C. § 16(g), are disclosure of a settling antitrust defendant's lobbying contacts, so that the Tunney Act court can ascertain whether the settlement is the result of improper political considerations, see, e.g., 119 Cong. Rec. 24,597 (1973) (noting the "great influence and economic power of antitrust defendants") (statement of Sen. Tunney) (quoting testimony of Hon. J. Skelly Wright), and not the provision of information to the public about the proposed decree for purposes of soliciting public comments. Plaintiff's interest thus falls outside the zone of interests protected by Section 16(g), and Plaintiff lacks standing.

Whether considered as the absence of a private cause of action, the lack of any injury in fact, the absence of a causal connection between the injury asserted and the relief requested, or a matter of prudential standing, the conclusion is the same: because Section 16(g) is not intended to provide

information to the public to enable it to comment on the RPFJ, Plaintiff's claim against Microsoft should be dismissed.[23]

II. Plaintiff's Motion for a Preliminary Injunction Should Be Denied.

In the event that the Court were to determine that Plaintiff's Complaint survives the Government's Motion to Dismiss, the Motion for Preliminary Injunction should be denied. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original), quoting 11A Charles Alan Wright, Arthur R. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 129-30 (2d ed.1995).

> [I]n considering a plaintiff's request for a preliminary injunction a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.

Al-Fayed v. Central Intelligence Agency, 254 F.3d 300, 303 (D.C. Cir. 2001). Plaintiff here can meet none of these tests.

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[23] Ultimately, the Court in the Antitrust Case is charged by statute with determining whether entry of the RPFJ is in the public interest. 15 U.S.C. § 16(e). If that Court believes that it cannot make this determination without more information than it already has about Microsoft's lobbying contacts, it can easily ask Microsoft to provide that information. As the only district court (of which we are aware) to consider a Section 16(g) challenge said in the course of determining whether entry of a proposed consent decree was in the public interest, "the determination of whether [a defendant] has satisfied the substance of the requirements of § [16](g) [is] a matter for this Court's determination." United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 39-40 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir. 1976).

For the same reasons that this action should be dismissed – no private cause of action, no jurisdiction, no injury, the Government's compliance with the Tunney Act, and no valid claim against Microsoft – Plaintiff has failed to demonstrate a likelihood of success on the merits. Moreover, Plaintiff cannot demonstrate the requisite irreparable injury necessary for the issuance of a preliminary injunction. The Court in the Antitrust Case has the power to consider the very issues raised by Plaintiff's Complaint (with or without Plaintiff's participation), and in fact has requested the parties to address those issues in their February 27 filing with the Court. Plaintiff also can seek the Court's permission to participate in the very Antitrust Case whose proceedings it seeks to enjoin. Plaintiff thus has available an alternative remedy that would provide it the same ultimate relief, the possibility of which it seeks to preserve here through the extraordinary remedy of a preliminary injunction. In light of this alternate remedy, Plaintiff has failed to demonstrate any irreparable injury. 11A Charles Alan Wright, Arthur R. Miller, & M. Kane, Federal Practice & Procedure § 2948.1, at 149-51 (1995) ("[A] preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief."); see also Young v. Vaughn, 1999 WL 155711, at *2 (E.D. Pa. 1999).[24] Absent a showing of irreparable injury, a preliminary injunction is improper.

[24] Plaintiff's delay in bringing this action and filing its Motion for Preliminary Injunction also undermines any claim of irreparable injury. As noted above, the Government published the CIS and RPFJ in the Federal Register on November 28, 2001. Plaintiff waited almost two months after publication to file this action, and another week – after the close of the public comment period – to file its Motion. Such delay belies any allegation of irreparable injury. Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975) ("conclusion that an injunction should not issue is bolstered by [44 day] delay" in seeking preliminary injunction related to allegedly insufficient public comment period); see also GTE Corp. v. Williams, 731 F.2d 676, (10th Cir. 1984); Playboy Enterprises v. Netscape Communications Corp., 55 F. Supp. 2d 1070, 1090 (C.D. Cal.), aff'd, 202 F.3d 278 (9th Cir. 1999); cf. United States v. Airline Tariff Publishing Co., No. 92-2854 (GHR), 1993 WL 95486 (D.D.C.

Finally, the last two factors (injury to other parties and the public interest assessment) also work against Plaintiff. The United States, Microsoft, the settling states, and the public interest generally would be harmed were this Court to enjoin the Tunney Act proceedings in the Antitrust Case. Extending the comment period would cause significant delay. The parties as well as the public have an interest in the timely resolution of the Antitrust Case, subject to approval by the Court overseeing the Tunney Act proceedings. Such approval, of course, is dependent on a finding that approval of the settlement is in the "public interest," 15 U.S.C. § 16(e); the "public interest" determination is thus built into the Tunney Act proceedings, where these matters are more properly addressed. Granting Plaintiff's Motion, therefore, would not further the public interest and would cause harm to the other parties involved.

CONCLUSION

For the reasons discussed above, Plaintiff's Motion for Preliminary Injunction should be DENIED and the case should be DISMISSED.

Dated: February 8, 2002.

Respectfully submitted,

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1993) (rejecting motion to extend Tunney Act comment period and noting that publication of settlement "was attended by considerable publicity . . . . The Court discerns no surprises here.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 8th day of February 2002, in the manner indicated, upon the following:

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