CASE BEING CONSIDERED FOR TREATMENT PURSUANT
TO RULE 34(j) OF THE GENERAL RULES

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

No. 96-5247

UNITED STATES OF AMERICA,

Appellee,

v.

AMERICAN BAR ASSOCIATION,

Appellee,

MASSACHUSETTS SCHOOL OF LAW,

Appellant.

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

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

PARTIES AND AMICI

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant Massachusetts School of Law.

RULINGS UNDER REVIEW

The only ruling properly before this Court for review is the Order of July 30, 1996, denying intervenor party status for purposes of appeal. Appellant also seeks review of the Order of June 25, 1996. References to the rulings at issue appear in the Brief for Appellant Massachusetts School of Law.

RELATED CASES

Massachusetts School of Law, as an amicus, filed a notice of appeal seeing review of the final judgment entered below. That purported appeal is pending before this Court as United States v. American Bar Association, No. 96-5220. Except to the extent that No. 96-5220 can be said to be the same case, this case has not previously been before this Court or any other court.

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GLOSSARY

A.	Appendix filed by the Massachusetts School of Law (Joint Appendix)
ABA	American Bar Association
Br.	Brief for Appellant
MSL	Massachusetts School of Law

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COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction of the antitrust case before it under 15 U.S.C. 4 and 28 U.S.C. 1331 & 1337. It had jurisdiction to entertain a motion to intervene pursuant to 15 U.S.C. 16(f)(3) and Fed. R. Civ. P. 24. It denied the motion of Appellant Massachusetts School of Law ("MSL") to intervene for purposes of appeal on July 30, 1996. MSL filed a timely notice of appeal on August 5, 1996.

This Court has jurisdiction over the appeal from the district court's order denying intervention pursuant to 28 U.S.C. 1291. At this time, this Court lacks jurisdiction over any

purported appeal from the final judgment in the antitrust case below, because no party to that case has noticed an appeal.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in refusing to permit the Massachusetts School of Law, an amicus that had participated extensively in the district court proceedings, to intervene for purposes of appeal of the entry of a consent judgment.

2. Assuming the district court so erred, whether the district court abused its discretion in concluding that entry of the consent judgment was in the public interest, either because the decree was not within the reaches of the public interest, or because the government had not provided to the public all of the evidence of unlawful conduct its investigation had discovered, so as to benefit those who, like Massachusetts School of Law, had brought or might bring their own antitrust cases against the defendant.

STATUTES AND REGULATIONS

Pertinent statutes and rules are set forth in an addendum to this brief.

STATEMENT OF THE CASE

A. Proceedings in the District Court

On June 27, 1995, the United States instituted a proceeding pursuant to the Antitrust Penalties and Procedure Act ("Tunney Act"), 15 U.S.C. 16(b)-(h), by filing a complaint in the United States District Court for the District of Columbia charging that the American Bar Association ("ABA") violated section 1 of the Sherman Act, 15 U.S.C. 1, in its accreditation of law schools and simultaneously filing a proposed Final Judgment, agreed to by the United States and the ABA, settling the case. (Joint Appendix ("A.") 31.) On July 14, 1995, the

United States filed the required Competitive Impact Statement ("CIS"). (A.12.) It published the CIS and the proposed Final Judgment in the Federal Register for public comment on August 2, 1995 (A. 1214-20). The United States received more than 40 comments, which it filed with the court along with the government's response. (A.78.) Appellant Massachusetts School of Law ("MSL") submitted an 83-page comment with about 400 pages of exhibits. (See A.138).

On September 27, 1995, MSL moved to intervene in the Tunney Act proceeding, or in the alternative to participate as amicus curiae (with the court to reserve decision on a subsequent grant of intervention for purpose of appeal), attaching 14 exhibits. (Docket entry no. ("Docket") 10.) The district court, Hon. Charles R. Richey, denied intervention on November 1, 1995, but granted MSL amicus status. (A.168.) As amicus, MSL filed a motion for leave to file a brief exceeding 45 pages in length, which the court granted (Docket 37); an amicus brief with 107 exhibits (Docket 43); and a response to a government brief on supplemental public comments, with 25 exhibits (Docket 48). It also participated in the court's hearing on the proposed consent decree (A.1445).

The proposed Final Judgment provided for certain matters to be addressed, after entry of the decree, by an ABA Special Commission and then by the ABA Board of Governors. (A.1216.) The district court, however, chose to delay consideration of the decree until after the ABA addressed those matters. (See A.166; A.171.) The court ordered that the ABA report be filed with the court; that the ABA make copies available for comment; and that the government respond to comments on the report and file comments with the court. (See A.170-72).

After the report, the government's response to comments on the report, and certain proposed modifications of the proposed Final Judgment were filed, the court conducted a hearing (see A.1445) and determined that entry of the decree would be in the public interest. The court entered judgment on June 25, 1966.

Amicus MSL on July 15, 1996, filed both a notice of appeal from the final judgment (Docket 59) and a motion for leave to intervene for purposes of appeal (Docket 58). On July 30, 1996, the district court denied MSL's motion. (A.1491.) On August 5, 1996, MSL filed a notice of appeal from the denial of its motion for leave to intervene for purposes of appeal and purportedly from the amended judgment of July 25, 1996. (Docket 64.)

B. Statement of Facts

1. The Competitive Problem and Its Resolution. In 1994, the Antitrust Division of the United States Department of Justice began an investigation of ABA accreditation of law schools. ABA accreditation, administered since 1921 by the ABA's Section of Legal Education pursuant to authority delegated by the ABA's House of Delegates, is critical to the successful operation of a law school. In over 40 States, bar admission rules make graduation from an ABA-approved law school a prerequisite for taking the bar examination. Moreover, the ABA is the only law school accrediting agency recognized by the United States Department of Education. The ABA's accreditation rules and process, therefore, can have considerable influence on the behavior of law schools, including their competitive behavior in a number of markets.

Following an extensive investigation,[1] the Department determined that the ABA accreditation process and four specific rules arising from that process violated section 1 of the Sherman Act. The Complaint alleged that the ABA restrained competition among professional personnel at ABA-approved law schools (A.42 at ¶36) by fixing their compensation levels and working conditions (A.42 at ¶37a), and by limiting competition from non-ABA-approved schools (A.36 at ¶18; A.37 at ¶20; A.43 at ¶38b). The Complaint also alleged that the ABA allowed its accreditation process to be captured by those with a direct interest in the outcome (A.34 at ¶9); as a result, the ABA at times acted as a guild protecting the interests of professional law school personnel, rather than as a legitimate accreditation agency setting minimum standards for law school quality and thus providing valuable information to consumers. Beyond the standards and practices labeled anticompetitive, the Complaint described a number of other accreditation standards and practices (A.37-39 at ¶¶ 21-26) as addressing "relevant factors to consider in assessing the quality of a law school's educational program" (A.40 at ¶27) but which nevertheless "at times have been applied inappropriately to enhance compensation and working conditions for professional staff." (Id.)

Before the Department filed the Complaint, the ABA indicated its willingness to reform the accreditation process and actually began implementing reforms. The Department, however, insisted that voluntary elimination of anticompetitive behavior was an insufficient

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[1]The Justice Department interviewed numerous law school deans, university and college presidents, and others affected by the ABA's accreditation process. It conducted 27 depositions pursuant to its Civil Investigative Demands and reviewed over 500,000 pages of documents. (A.80.)

remedy and that reform should be subject to the terms of a court-supervised consent decree. (A.80.)

The parties reached agreement on a proposed Final Judgment that would eliminate the problems that concerned the Division. (See generally A.1215-16; A.20-24.) The proposal's remedial measures fall into three groups. First, there are structural measures to ensure that the accreditation process is governed by persons other than those with a direct economic interest in its outcome and that the process is brought more into public view. (A.1215 at § VI.) These measures primarily (a) enhance the role of the ABA's Board of Governors and of the Council of the Section on Legal Education; (b) restrict the role of legal education professionals in the accreditation and standard setting processes and increase the role of others; and (c) provide an enhanced voice for the public and for law schools receiving adverse results from the process. (A.21-23.)

Second, there are prohibitions on plainly anticompetitive conduct. (A.1215 at § IV.) Thus, the proposed Final Judgment was designed to eliminate the adoption or enforcement of any rules, or the taking of any action imposing requirements, related to the base salary, stipend, fringe benefits, or other compensation paid to those who work at law schools (A.20), and to end the collection and dissemination of compensation data, as well as its use in the accreditation process for any law school (A.20-21). And the proposed Final Judgment eliminated potential or actual boycotting of non-approved schools by eliminating the rules that prohibit enrolling bar members or graduates of state-accredited (but non-ABA accredited) law schools, or accepting transfer credits from state-accredited law schools. The prohibition on accrediting of for-profit schools is also eliminated. (Id.)

Third, to address questions about accreditation factors related to legitimate educational policy issues but at times used to achieve anticompetitive objectives, the proposed Final Judgment called for the ABA's Special Commission To Review The Substance And Process Of The ABA's Accreditation Of American Law Schools to review the issues and report to the ABA's Board of Governors, which in turn would file a report. (A.23-24.) The government could challenge any report proposal, with the decree court to decide the challenge by applying antitrust analysis. Because the ABA had initiated the Special Commission in response to academic criticism of its accreditation process and a perception of possible antitrust problems, the United States believed it reasonable to allow the ABA to attempt to reconcile antitrust and educational objectives through the Commission process. The proposal contemplated entry of judgment before the Special Commission reported. (Id.)

2. The District Court's Consideration of the Proposed Final Judgment. The District Court rejected the parties' suggestion that it consider and enter the proposed Final Judgment before the Special Commission reported. A few of the many public comments received concerning the proposed final judgment, including that of MSL, had urged that the court delay its public interest determination until after that report (A.104, 110, 143), so that the court could include the results of the Special Commission process in its determination. Although the United States contended that the proposed decree's inclusion of conditions that would not occur until after its entry was no bar to entry (A.84-87), the court disagreed, concluding that "a public interest hearing prior to the Special Commission's Report and the government's decision whether to challenge its contents would be premature." (A.165.)

The court noted that although the proposed Final Judgment set a date for the filing of the Special Commission's Report with the ABA Board of Governors, it set no time limit for Board of Governors action and left unclear the government's deadline for deciding whether to challenge the Report. (A.165-66) The court set a schedule requiring that the Report and the Board of Governors' decision on review be filed with the Court by the date originally set for the Report alone (February 29, 1996) and allowing one month for the filing of public comments. It further required that the government file its response to the Report, Board of Governor's decision, and public comments one month thereafter and that it indicate in the response whether it intended to challenge of the proposals resulting from the Commission process. (A.171).

After the Commission reported, the government expressed to the ABA its concern about certain Commission proposals. The Board of Governors responded by modifying these proposals. (A.1186.) MSL, among others, filed supplemental comments on the Special Commission Report (A.1184), and the government filed a response indicating that the Commission's proposals, as modified by the Board of Governors, reasonably reconciled the government's antitrust concerns with the legitimate educational policy objectives of accreditation. (A.1191.)

The court then determined that it did not "need testimonial evidence as the record appears to be full and complete." (A.1442.)[2] Following a hearing on June 20, 1996, in

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[2]The record at that point included not just the Competitive Impact Statement and Response to Public Comments, routinely part of Tunney Act proceedings. It also included over 40 public comments, as well as the roughly 400 pages of exhibits attached to MSL's original public comment and the thousands of pages of exhibits attached to its supplemental (continued...)

which the parties and amicus MSL participated, the district court ordered the final judgment entered.[3] The Tunney Act process had taken a year from the date the government filed the complaint and proposed Final Judgment.

3. MSL's Attempted Intervention. MSL is a not-for-profit, state-accredited law school that unsuccessfully sought ABA accreditation. MSL filed an antitrust action against the ABA in the Eastern District of Pennsylvania in November, 1993, seeking an injunction and treble damages. Massachusetts School of Law At Andover, Inc. v. American Bar Association, Cv. A. No. 93CV6206 (E.D. Pa.) ("MSL"). The district court in that case denied MSL much of the discovery it sought. In May 1994, the court denied MSL's motion to compel discovery and held that "accreditation files maintained on each law school that has sought ABA accreditation or information from any particular law school, except the plaintiff itself" were not discoverable at that time. MSL, 853 F. Supp. 837, 841 (E.D. Pa. 1994). On reconsideration, the court further limited discovery by excluding "discovery about the development, implementation, discussion, and debate of" accreditation standards that were not the basis of the ABA's decision concerning MSL. MSL, 857 F. Supp. 455, 460 (E.D. Pa. 1994). (The court did, however, permit discovery of a limited category of information

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[2](...continued)
comment on the Special Commission Report; the 14 exhibits attached to MSL's motion to intervene; the 107 exhibits attached to MSL's amicus brief; and the 25 exhibits attached to MSL's response to the governments repose to supplemental public comments.

[3]In so ordering on June 20, 1996, the district court inadvertently entered the original proposed Final Judgment, rather than the proposed Final Judgment as modified by the parties in the course of the Tunney Act proceeding. (A.1477.). On June 25, the court corrected the error by vacating the June 20 judgment and entering the modified one. (A.1478.)

concerning law schools other than MSL. Id. at 460-61.) That antitrust case was pending in district court at the time of the Tunney Act process in this case.[4]

The day before submitting its public comment on the proposed Final Judgment, MSL filed a 60-page Motion (with 14 attachments) requesting intervenor status or, in the alternative, permission to participate as amicus curiae. After extensive briefing,[5] the district court denied the motion to intervene without prejudice but permitted MSL to participate as amicus. (A.168.)

The district court considered both intervention as of right, pursuant to Fed. R. Civ. P. 24(a), and permissive intervention, pursuant to Fed. R. Civ. P. 24(b), as MSL had argued for both (Docket 10). It found the first subsection of Rule 24(a) not to support intervention because "the Tunney Act does not provide a right to intervene" (A.160), and the court had not been directed to any other statute conferring such a right on MSL. And it found the second subsection of Rule 24(a) not to support intervention because MSL "has not demonstrated that the outcome of this case threatens to impair or impede its ability to protect its legitimate interests." (Id.) Moreover, "because the United States represents the public

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[4]The MSL court subsequently granted summary judgment for the ABA, on the ground that MSL had failed to show it had suffered any injury cognizable under the antitrust laws. MSL, 937 F. Supp. 435 (E.D. Pa. 1996). Although the United States in its antitrust suits has no need to establish such private antitrust injury, it nevertheless has a strong interest in ensuring that decisions in this area accurately state the law and not inappropriately limit the scope of private antitrust enforcement. It therefore, as MSL notes, filed an amicus brief in MSL's appeal, expressing no view as to whether MSL had suffered antitrust injury or on the ultimate merits of the case but urging the court of appeals not to adopt the district court's articulated rationale on several points. The court of appeals has not yet issued a decision.

[5]The United States and the ABA separately opposed MSL's Motion (Docket 11, 12); MSL thereupon filed separate replies to the briefs of the United States (Docket 15, with 2 attachments) and the ABA (Docket 16, with 3 attachments).

interest in government antitrust cases, . . . '[a] private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the Government is not vigorously and faithfully representing the public interest.'" (A.160-61 (citations omitted).) The court noted that "MSL does not allege, much less establish, bad faith or malfeasance on the part of the Government in entering the Consent Decree." (A.161)

In concluding that "permissive intervention is not warranted" (id.), the district court gave less attention to the two criteria set forth in the Rule, because "[e]ven assuming that the MSL meets either of Rule 24(b)'s criteria, . . . its intervention would unduly delay the adjudication of the rights of the original parties." (A.162.) The court did, however, exercise its discretion to permit MSL to participate as amicus. (A.162-64.) By MSL's count, it filed "four major briefs, and several lesser ones." (Br. 36.) The court also permitted MSL, as amicus, to participate in the public interest hearing, although not to call witnesses, because, as the court explained, "[t]he hearing may not [be] used as a discovery tool for proceedings pending elsewhere." (A.1443.)

Following entry of the modified Final Judgment, MSL moved to intervene for purposes of appeal. (Docket 58.) The district court denied the motion on the basis of the briefs, without opinion. (A.1491.) MSL appeals from that denial.

SUMMARY OF ARGUMENT

The district court was well within the legitimate scope of its discretion in denying intervention for purposes of appeal. In denying intervention at an earlier stage in the proceedings, the district court concluded that Massachusetts School of Law ("MSL") did not

satisfy the criteria of Fed. R. Civ. P. 24(a), and that permissive intervention under Rule 24(b) would lead to undue delay. MSL does not here contend that the district court misapplied Rule 24, and indeed it did not. MSL's contention that this Court's decision in United States v. LTV Corp., 746 F.2d 51 (D.C. Cir. 1984), mandated that the district court grant intervention rests on a misinterpretation of this Court's dicta. LTV makes clear that MSL may seek to intervene for purposes of appeal, not that the district court is required to grant that intervention.

Because only a party may appeal the judgment below, the other issues MSL presents are not properly before this Court unless this Court rules that the district court should have granted intervention for purposes of appeal. MSL's arguments are, in any event, unavailing. The final judgment provides all substantial relief the government would likely have obtained following a successful trial. In its public interest determination, the district court, following a period of review extended by the court's desire better to understand the full nature of the relief, properly applied the standard set forth by this Court in United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995). MSL remains unsatisfied by the decree, but the proper standard is whether the decree is within the reaches of the public interest, not whether it serves the interests of parties engaged in private litigation with the defendant.

Nor should the district court's entry of the decree be reversed because the government did not open its investigative files to litigants like MSL or to the public generally. MSL had no right to the government's evidence in the proceeding below, and it was therefore not an abuse of discretion for the district court to enter the decree without assuring that MSL obtained that evidence.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED INTERVENTION

As MSL recognizes (Br. 37 n.12), it may not appeal the judgment in the government's antitrust case against the ABA because it was not a party below. Accordingly, unless this Court concludes that the district court abused its discretion in denying intervention for purposes of appeal, no other issue is properly before this Court.

A. Standard Of Review

The Court reviews district court orders denying intervention under an abuse of discretion standard, whether the denial is of intervention as of right, Building and Const. Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 778-79 (D.C. Cir. 1984); but see Foster v. Gueory, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("clearly erroneous" standard); Cook v. Boorstin, 763 F.2d 1462, 1468 (D.C. Cir. 1985) (Court would "ordinarily be inclined to give substantial weight" to trial court's relevant factual findings), or of permissive intervention, Foster, 655 F.2d at 1324, and 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).[6]

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[6] LTV thus conflicts with MSL's contention that "[w]hether a non-party such as MSL should be allowed to intervene after final judgment for the limited purpose of appeal, is subject to plenary review because it turns upon the meaning of this Court's statements on the question in" LTV (Br. 18). A error of law is, however, an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

B. MSL Alleges No Error In The District Court's Application of Rule 24, And The Court Did Not Err

The Tunney Act provides that the district court may authorize "intervention as a party pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. 16(f)(3). The district court, ruling on MSL's initial intervention motion, carefully applied the provisions of the pertinent civil rule, Fed. R. Civ. P. 24, and denied intervention on the grounds that MSL had demonstrated no right to intervene and that allowing intervention would lead to undue delay. (A.159-62.) Nothing relevant had changed when MSL later moved to intervene for purposes of appeal,[7] and the court properly denied the motion without opinion. (A.1491.) See Foster, 655 F.2d at 1324 ("there is no requirement that the district court make findings of fact and conclusions of law in ruling on a motion to intervene").

In this Court, MSL does not argue that the district court erred, let alone abused its discretion, in applying Rule 24. Indeed, MSL's brief does not refer to Rule 24. Accordingly, this Court should consider the argument waived. E.g., Willoughby v. Potomac Electric Power Co., 100 F.3d 999, 1003 (D.C. Cir. 1996); Bd. of Regents of University of Wash. v. E.P.A., 86 F.3d 1214, 1221 (D.C. Cir. 1996).

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[7]Rule 24(b)'s instruction that the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" does not exclude delay or prejudice resulting from appeal. Cf. LTV, 746 F.2d at 55 (appeal would "disrupt" entry of consent decree).

In any event, the district court's Rule 24 analysis was entirely correct.[8] MSL plainly does not meet the criteria for intervention as of right set forth in Rule 24(a). It is well established that "the Tunney Act does not provide a right to intervene." (A.160 (citing United States v. AT&T, 552 F. Supp. 131, 218 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983)).) See also, e.g., United States v. Airline Tariff Publishing Co., 1993-1 Trade Cas. (CCH) ¶ 70,191, at 69,894 (D.D.C. 1993). And the court correctly concluded that MSL had "not demonstrated that the outcome of this case threatens to impair or impede its ability to protect its legitimate interests." (A.160). Although MSL would no doubt prefer an outcome more helpful to it in its suit against the ABA, "[t]he terms of the proposed decree will neither bind the MSL, which will remain free to seek relief in other fora, nor establish an unfavorable rule of law." (A. 160 (citing United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 649 (D. Del. 1983)).) The decree surely leaves MSL no worse off than if the United States had not sued the ABA at all. Cf. A.1304 (Comments of the Massachusetts School of Law on the Consent Decree and Competitive Impact Statement) ("we believe the Complaint and Decree are a step toward

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[8]The court did not consider whether intervention of right is available at all in Tunney Act proceedings, although the statute provides only that a court "may" grant intervention, 15 U.S.C. 16(f)(3), and that language has routinely been read to bar intervention of right, e.g., United States v. Microsoft Corp., 159 F.R.D. 318, 328 (D.D.C.) ("[i]ntervention is not a matter of right under the Tunney Act"), rev'd on other grounds, 56 F.3d 1448 (D.C. Cir. 1995); United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 647-48 (D. Del. 1983) ("in cases under the [Tunney Act] no third-party participation is of right") (emphasis omitted). Because a court would properly consider the Rule 24(a) criteria in exercising its discretion under the Tunney Act, we did not argue this point below. There is no need for the Court to reach it now -- MSL does not even claim to satisfy the Rule 24(a) criteria.

eliminating serious anticompetitive practices").[9] To the extent that MSL was seeking to intervene to protect the public interest, the district court properly followed this Court in relying on the principle that "'[a] private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest.'" LTV, 746 F.2d at 54 n.7 (quoting United States v. Hartford-Empire Co., 573 F.2d 1, 2 (6th Cir. 1978)); see A.161. It remains true that "MSL does not allege, much less establish, bad faith or malfeasance on the part of the Government in entering the Consent Decree." (A.161).

As for the permissive intervention criteria of Rule 24(b), the Tunney Act no more confers a conditional right to intervene than it confers an unconditional right. And while MSL's suit against the ABA and the government's underlying antitrust case may have "a question of law or fact in common," Fed. R. Civ. P. 24(b)(2), that commonality does not indicate that the interest in judicial economy, cf. Foster, 655 F.2d at 1324 ("interest" test of Rule 24(a) to be applied with concern for efficiency), would be furthered by MSL's intervention. No resolution of any such question was contemplated, and none occurred below: the Final Judgment provides that the parties "have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law." (A.1464.) The district court properly determined that intervention would result in undue delay, rather than efficiency. (A.162.) MSL is free to litigate elsewhere questions common to the two

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[9]As this Court said in United States v. Microsoft Corp., 56 F.3d 1448, 1461 n.9 (D.C. Cir. 1995), unless the "decree will result in positive injury to third parties," a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated."

complaints, and was doing so at the time it sought intervention. The pendency of another action in which the applicant can protect its rights is ordinarily a reason to deny permissive intervention, see Roe v. Wade, 410 U.S. 113, 125-27 (1973), not a reason to grant it. The district court was well within the bounds of its permissible discretion when it denied intervention.

C. MSL's Reliance on United States v. LTV Corp. Is Misplaced

MSL argues that this Court's opinion in LTV "makes clear that MSL should have been granted intervenor status for the limited purpose of appeal." (Br. 36.) In fact, LTV instead makes clear that the district court had discretion to grant or to deny intervenor status and that this Court reviews for abuse of discretion. And nothing in LTV suggests that the district court abused its discretion in limiting MSL to amicus status in this case.

In LTV, Wheeling-Pittsburgh Steel Co. ("Wheeling") appealed from the final judgment after participating in a Tunney Act proceeding without moving to intervene. 746 F.2d at 52-53. This Court dismissed the appeal, holding that a non-party was not permitted to appeal from the judgment. Id. at 55. That holding is no help to MSL.

The Court, however, went on to explain in dicta that the rule against non-party appeals served a useful purpose. Those objecting to a consent decree must first seek to intervene, and in so doing establish that their participation would aid the court. As the Court said, "those who object to the entry of a consent judgment must seek to intervene in the proceedings (either before or after entry of the judgment) as a condition of taking an appeal." Id. at 54. Although the district court's decision regarding intervention may be reviewed on appeal under an abuse of discretion standard, "the responsibility for determining when

intervention by one who objects to the entry of a consent judgment should be permitted falls, as it should, to the trial court in the first instance." Id. at 54. In other words, if the district court denies intervention, the disappointed movant may appeal the denial (at the proper time), as MSL has done here. The Court added, in a footnote: "[t]his procedure will not, as Wheeling suggests, foreclose all appellate review of antitrust consent judgments. Objectors to a consent judgment may seek to intervene in the proceedings for the limited purpose of appeal." Id. at 54 n.9.

Contrary to MSL's argument, the Court's explanation in LTV does not indicate that the district court was required to allow MSL to intervene for purposes of appeal. Rather, the Court emphasized that it is the role of the district court to determine in the first instance whether to grant such intervention.

In MSL's view (Br. 36-37), its claim to intervention was exceptionally compelling -- so compelling that affirmance of the district court's denial of intervention here would be tantamount to a ruling that no private party should ever be allowed to intervene in any Tunney Act proceeding, and thus that there can never be any appellate review of antitrust consent judgments (Br. 36), contrary to this Court's assumption in LTV.[10] MSL points to nothing except the extent of its participation as amicus curiae in support of its claim to

[10]There has been such review in the past. Judge Greene granted intervention for purposes of appeal of the consent decree that transformed the American telecommunications industry. AT&T, 552 F. Supp. at 219. In Microsoft, this Court reviewed a proposed antitrust consent decree that the district court had refused to enter, concluded that the proposed decree was within the reaches of the public interest, and ordered it entered, even though no party had been permitted to intervene, 56 F.3d at 1454 & n.4. Microsoft, however, was not an appeal from entry of a decree.

intervenor status.[11] The district court, however, had ample opportunity to review MSL's extensive filings and to weigh the importance of allowing MSL the right to raise its arguments on appeal against the risk of undue delay. In any event, as the Court emphasized in LTV, it was for the district court to assess the desirability of allowing MSL to intervene. The issue before this Court is whether its decision was an abuse of discretion, not whether MSL should have, or could properly have, been granted intervenor status -- much less whether intervention might be appropriate in other cases. MSL offers no reason to believe that the district court abused its discretion.

II. THE DISTRICT COURT PROPERLY FOUND ENTRY OF THE DECREE TO BE IN THE PUBLIC INTEREST

If the Court concludes that the district court abused its discretion and that it should have granted MSL's motion to intervene, it would then be proper for the Court to consider MSL's other arguments.[12] MSL contends that the district court should have rejected the decree because, in MSL's view, the government should have negotiated different relief and because the government did not make public all the evidence it amassed during its investigation, so

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[11]MSL's formulation of Issue 3 in its statement of issues (Br. 2) implies that a Tunney Act court must grant intervenor status for purposes of appeal to any amicus who participated extensively in the proceedings. If so, the court might well choose not to permit any amicus to participate extensively, because to do so would necessarily also permit an appeal. This might result in a decline in public participation. MSL's formulation also suggests that LTV is a quite formalistic decision. Wheeling apparently participated extensively in the Tunney Act proceedings. 746 F.2d at 52-53. If MSL is right, this Court barred an appeal for failure to file in district court a motion the district court was required to grant.

[12]Although it is not clear that MSL meets constitutional standing requirements, see United States v. Western Elec. Co., 900 F.2d 283, 310 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990) (where only intervenor appeals, this Court must determine whether it independently satisfies standing requisites of U.S. Const., Art. III), we do not argue the point here.

that private parties, like MSL, could more easily prosecute their own claims against the ABA. MSL's arguments are without merit.

A. Standard of Review

The district court's public interest determination is reviewable for abuse of discretion. E.g. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1120 n.5 (D.C. Cir. 1983) (approval of proposed settlement by consent decree), cert. denied, 467 U.S. 1219 (1984), the precise mode of review depending on the alleged abuse. 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). And in the context of the Tunney Act, a district court commits an error of law, and thus abuses its discretion, by failing to accord appropriate deference to the government's settlement proposal. See United States v. Western Elec. Co. (Triennial Review Remand), 993 F.2d 1572, 1577-78 (D.C.Cir.), cert. denied, 510 U.S. 984 (1993). This Court has left unresolved whether the district court's underlying findings, which if improper could constitute abuse of discretion, are reviewed under the "clearly erroneous" standard or are reviewed de novo, see id. (citing Fed. R. Civ. P. 52 but analogizing Tunney Act appellate review to review of district court's application of substantial evidence standard in reviewing agency decision), although in either event with substantial deference to the government.

B. The District Court Did Not Abuse Its Discretion In Concluding That The Proposed Final Judgment, As Modified, Was Within The Reaches Of The Public Interest

As the United States explained below, the proposed Final Judgment prohibited the ABA's plainly anticompetitive accreditation practices (e.g., A.20; A.1191-92; A.1446) and

remedied the capture of the accreditation process by the economically interested (e.g., A.21; A.1192-94; A.1446). Moreover, the United States explained that certain practices, not necessarily anticompetitive, had been reviewed and, where appropriate, modified through a process properly bringing educational concerns to bear (e.g., A.23-24; A.1190-91; A.1447-49). The proposed Final Judgment was, we explained, "a good settlement." (A. 1447). The district court's decision to enter it was entirely proper.

In deciding whether entry of a proposed consent decree "is in the public interest," 15 U.S.C. 16(e), the district court's proper task is not to determine whether the proposal before it is the best conceivable settlement, "but only to confirm that the [proposed] settlement is within the reaches of the public interest." Microsoft, 56 F.3d at 1460 (emphasis in original) (internal quotation marks omitted). This important, but nevertheless limited, role follows from the nature of a consent decree, which embodies a settlement, see United States v. Armour & Co., 402 U.S. 673, 681 (1971); Microsoft, 56 F.3d at 1459, inherently reflecting the government's predictive judgment concerning the efficacy of the proposed relief and the government's exercise of prosecutorial discretion. With respect to these matters, the district court properly is deferential to the government's judgments. As this Court has explained, the court must afford the government even greater deference than when it considers an uncontested decree modification, when the court may reject the proposal only if "'it has exceptional confidence that adverse antitrust consequences will result -- perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'" Microsoft, 56 F.3d at 1460 (quoting Triennial Review Remand, 993 F.2d at 1577). This deference is based not only on the government's predictive

expertise, but also on its judgment of litigation risk. There are no findings of illegal practice in a Tunney Act case, and it is "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial." Id. at 1461.

Within these limits, a court considers whether a proposed decree contains ambiguities or inadequate compliance mechanisms that might cause implementation problems after entry. Id. at 1461-62. And a court gives due attention to claims by third parties that they would be "positively injured" by entry of the decree. Id. at 1462. But in considering the adequacy of the remedies proposed in light of the allegations of the complaint, the district court, giving proper deference to the government, will only in the most unusual of cases have a proper basis for concluding that "the remedies were . . . so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" Id. at 1461. As this Court has explained, a district court is "not obliged to accept [a proposed decree] that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General." Id. at 1462.

The district court's public interest determination here carefully followed this Court's directions.[13] The court engaged in a lengthy process, informed by both extensive public comment and MSL's active participation. That process resulted in explicit amendments to the proposed decree (see A.1512-13),which "constituted part of the basis for the Court's" public interest determination. (A.1477.) Moreover, the court de facto modified the

[13]As the district court stated, "the Microsoft case is the most definitive construct that I know of with respect to the authority of the Court." (A. 1447)

proposed decree by refusing to adhere to the parties' proposed schedule, so that its public interest determination could be made after the results of the Special Commission process became available, thus removing possible ambiguities concerning the remedy. As the court explained, it "postpone[d] the scheduled hearing until the relief afforded by Section VII of the proposed Final Judgment is subject to meaningful review." (A.166.) It concluded at the end of the process that although the government conceivably "might have struck a better bargain" with the ABA, albeit not one satisfactory to MSL (A.1455), it owed "a great deal of deference" to the government (id.), and it entered the decree.

At bottom, MSL's attack on the court's determination amounts to a complaint that the decree is not satisfactory to MSL. MSL presented the same attack to the district court at length (Docket 48, with 25 exhibits); the government responded to MSL's points (Docket 49); MSL argued these points to the court orally (A.1453-62); and the court did not accept MSL's contention that the decree was not within the reaches of the public interest. MSL's contrary view provides no reason for concluding that the district court abused its discretion.

MSL argues that the Court erroneously believed that it had to give "total deference to the Government" (Br. 26, citing A.1453-56). The cited pages, however, show that the court believed it had to give only "a great deal of deference" to the government (A.1455), as this Court teaches, see supra pages 21-22. Had the court granted the government total deference, it would have entered the decree months before it did and before the Special Commission reported, as the government had urged.

The cited pages also show that the court correctly rejected MSL's proffered standard: that the decree "must efficaciously and adequately pry open the market to competition and

solve the anticompetitive problems aimed at in the Complaint." (A.1453.) The court responded, correctly, that Microsoft rejected that standard for determining whether a proposed decree was in the public interest. (A.1453.) MSL's standard, appropriately cabined in light of the allegations in the complaint, may be the proper test for a decree after a government victory at trial. See International Salt Co. v. United States, 332 U.S. 392, 401 (1947). But Microsoft makes clear that it is "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying weakness in the government's case." 56 F.3d at 1461. In our view, the decree will effectively open up the market to the extent that it had been closed by the ABA's illegal restraints, and it provides "all substantial relief the Government would likely obtain following a successful trial." (A.29.) But the decree would be within the reaches of the public interest even if it represented less than the government might have been able to achieve at trial.

MSL tries to avoid the Microsoft standard by observing that "neither the Government nor the ABA ever even attempted to claim the Government's case had any weaknesses" (Br. 26, emphasis omitted). But there is no hint in Microsoft that the government must publicly identify potential weaknesses in its case. Indeed, requiring such disclosure would risk exposing the government's internal deliberations, which are exempt from disclosure under Microsoft, at least absent "a credible showing of bad faith." 56 F.3d at 1459. And such disclosure might fatally compromise the government's litigation posture, should the court reject the settlement and the case go to trial. The government is not required to advertise the weaknesses of its position as the price of judicial approval.

In an argument heading, MSL contends that the court entered the decree "without assessing . . . whether the decree has an effective compliance mechanism, efficaciously cures violations, or results in harm to third parties." (Br. 22.). There is simply no basis for that contention; the district court carried out its task carefully and conscientiously. Indeed, the court delayed the Tunney Act process for months so that it could assure "that relief is subject to meaningful review." (A.162.) And as the court explained in discussing the compliance mechanism with MSL's counsel (A.1454-55), it did not "think the ABA could be asked to do much more." (A. 1455.) MSL points to nothing except its disagreement with the court's result as evidence that the court failed to consider the efficacy of the remedy.

Nor does MSL suggest any reason to believe that the court improperly ignored harm to third parties. Under Microsoft, a court may "inquire into whether a decree will result in any positive injury to third parties, see 15 U.S.C. § 16(e)(2)," 56 F.3d at 1461 n.9. But MSL does not point to any positive injury that entry of the decree would cause to third parties; rather, it asserts that "consumer/students" (Br. 27) suffer injury from ABA practices (id. at 27-31). This is nothing more than a rephrasing of its argument that the decree inadequately remedies the violations alleged. As we have shown, the district court did consider the adequacy of the remedy under the appropriate standard; there was no abuse of discretion. An antitrust decree does not become a "mockery of judicial power," Microsoft, 56 F.3d at 1462, by failing to impose MSL's vision of appropriate legal education.

C. The District Court Did Not Abuse Its Discretion By Entering The Decree Without Requiring The Government To Provide To The Public The Evidence It Had Obtained Showing That The ABA Had Violated The Sherman Act

MSL argues that it was error for the district court not to order the government to make public the evidentiary fruits of the government's extensive investigation for the benefit of MSL and other private litigants. Recognizing that the government has never voluntarily made its antitrust investigative files public and that no Tunney Act court has ever ordered it to do so, MSL nonetheless contends that the district court abused its discretion by failing to depart radically from that precedent.

Even if MSL were correct in its assertion that the Tunney Act requires the government to disclose its investigative files for the benefit of private litigants, that would not establish that the district court abused its discretion in concluding that entry of the decree was in the public interest. The purpose of a Tunney Act proceeding is not "to review the actions or behavior of the Department of Justice." Microsoft, 56 F.3d at 1459. But, in any event, the Tunney Act mandates no such disclosure.

1. The Tunney Act's Determinative Documents Provision Does Not Encompass the Government's Evidentiary Files

The Tunney Act requires that the government make available to the public copies of the proposed consent decree and "any other materials and documents which the United States considered determinative in formulating such proposal." 15 U.S.C. 16(b). MSL contends, incorrectly, that the "determinative documents" in question are "the evidentiary materials which show the violations of law." (Br. 34.) The statutory language and its

legislative history and policies, however, make clear that MSL is wrong, and no court has ever accepted its position.

The statutory provision refers to documents that individually had a significant impact on the government's formulation of relief -- i.e., on its decision to propose or accept a particular settlement. Although evidence may shape the government's view of the underlying violation, it is unlikely that any particular piece of evidence supporting liability will shape the settlement. It is not sufficient for the evidence to be relevant to the relief proposal; the statute requires that the materials be considered "determinative."[14] Webster's Third New International Dictionary defines this adjective first as "having power or tendency to determine," with the synonyms "limiting, shaping, directing, conclusive." Webster's Third New International Dictionary 616 (1981). This understanding of the term is consistent with its use in other legal contexts.[15]

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[14]MSL cites the legislative testimony of one law professor that the language encompassed "those materials and documents which were relevant to the relief, and that of necessity includes those materials and documents which go to establish or prove the violation of law." Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 93d Cong., 1st Sess. 128 (1973) (statement of Howard Lurie); see Br. 34 & n.11. Professor Lurie's testimony is both wrong and an inadequate basis for inferring congressional intent.

[15]For example, an Ohio court held that a trial court did not have to give certain proposed interrogatories to a jury because they related to matters of an evidentiary, rather than a determinative, nature. Ziegler v. Wendel Poultry Services, Inc., 615 N.E.2d 1022, 1028 (Ohio 1993). This is consistent with an earlier Ohio decision defining "determinative issues" in a special verdict form as the ultimate issues which, when decided, will definitely settle the controversy between the parties. Miller v. McAllister, 160 N.E.2d 231, 237 (Ohio 1959). An Iowa court defined a "determinative factor" behind a decision as a reason which tips the scales decisively one way or the other. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990). And where Maine law provides for certification by a federal (continued...)

Moreover, the statute refers only to documents the government considered to be determinative. This limitation suggests that Congress had in mind only a small number of documents of particularized significance, and not the full range of evidence related to a defendant's violations. Indeed, the statutory language makes clear that Congress did not expect that there would be determinative documents in every case. The statute refers to "any other materials and documents," not "the other" documents, which would be the more natural term if Congress assumed that there would always be such documents or intended to require the disclosure of investigative files.

The legislative history of the Tunney Act also supports our view.[16] Congress enacted the Tunney Act in response to three 1971 consent decrees involving acquisitions by the International Telephone and Telegraph Corporation ("ITT"), including that of the Hartford Fire Insurance Company ("Hartford"), which the decrees permitted ITT to retain. Subsequent Congressional hearings revealed that a financial consultant, Richard J. Ramsden, had prepared for the Antitrust Division a report analyzing the economic consequences to

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[15](...continued)
court of questions of law "determinative of the cause," "[t]o be determinative, a state law question must be susceptible of an answer which, in one alternative, will produce a final disposition of the federal cause." Gagne v. Carl Bauer Schraubenfabrick, GmbH, 595 F. Supp. 1081, 1088 (D. Me. 1984).

[16]Little in the legislative history directly addresses the meaning of the determinative document provision. The provision was not in S. 782 as introduced, but was added as an amendment to the bill by the Senate Judiciary Committee. Only one statement in a committee report bears on the substantive standard for "determinative." See S. Rep. No. 298, 93d Cong., 1st Sess. 2-3 (1973) ("Also provision is made for a more complete description of the proposed consent judgment and other materials and documents the Department of Justice considered significant in formulating the proposed consent decree."). The Report substitutes "significant" for "determinative," which is consistent with the government's interpretation, and otherwise does little but track the statutory language.

requiring ITT to divest Hartford. Ramsden concluded there would be adverse consequences for ITT and the stock market generally. Based in part on the Ramsden Report, the Department concluded that the need for divestiture of Hartford was outweighed by the projected adverse effects on the economy.

The Ramsden Report, which falls squarely within the government's understanding of the statutory term, was the specific example of a determinative document that Congress had in mind. During the Senate debate on the determinative documents provision, Senator Tunney expressly stated: "I am thinking here of the so-called Ramsden memorandum which was important in the ITT case." 119 Cong. Rec. 24,605 (1973). Congress was not thinking of the government's evidence. See United States v. Alex Brown & Sons, Inc., 1996 WL 683608, at *10 (S.D.N.Y. Nov. 26, 1996).

Had Congress intended to reach more broadly, it surely knew how to do so. Indeed, one witness during the hearings on the Tunney Act specifically urged that "as a condition precedent to . . the entry of a consent decree in a civil case . . ., the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint . . . was predicated." The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust a Monopolies of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 57 (1973) (prepared statement of Maxwell M. Blecher). Congress, however, did not follow that recommendation.

Policy reasons also support a narrow definition. As one court recently pointed out, a "broad definition of 'determinative documents' may conflict with Congress's intent to maintain the viability of consent decrees as means of resolving antitrust cases." Alex Brown,

1996 WL 683608, at *9. If the determinative documents provision required disclosure of the government's evidence in every negotiated settlement, that requirement would plainly "deter future defendants from entering into negotiated settlements with the Government, and, perhaps, from cooperating in investigations that are likely to lead to such negotiations." Id. at *13.[17]

MSL relies for support on decisions in one case, United States v. Central Contracting Co., 527 F. Supp 1101 (E.D. Va. 1981), 531 F. Supp. 133 (E.D. Va. 1982), and 537 F. Supp. 571 (E.D. Va. 1982), which have been followed by no court in the roughly 150 Tunney Act proceedings since concluded. Most recently, the court in Alex Brown expressly rejected the reasoning of Central Contracting. 1996 WL 683608, at *9-*11.

Moreover, even if Central Contracting were entitled to deference, it provides no support for MSL's contention that the determinative documents provision requires wholesale disclosure of the government's evidence as to liability. Central Contracting required disclosure of "'[t]he materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree,'" 537 F. Supp. at 577 (quoting 531 F. Supp. 133), rather than try the case. The court also was of the view, unsupported by statutory text or legislative history, that documents individually not determinative can in the aggregate be determinative of "the way in which the United States elects to proceed in a given situation." 531 F. Supp. at 134. But the court expressly

[17]An interpretation of the Tunney Act mandating disclosure of evidence would also raise a host of issues relating to evidentiary privileges and confidentiality concerns. In particular, a court ordering such disclosure would have to address issues raised by the confidentiality provisions of the Antitrust Civil Process Act, 15 U.S.C. 1313.

acknowledged that "[t]he Act clearly does not require a full airing of Justice Department files," 537 F. Supp. at 575. Ultimately, it required disclosure of only a few documents, documents that arguably met the government's interpretation of the determinative document provision.[18] "The documents in Central Contracting were non-evidentiary documents . . that did not relate directly to the strength of the Government's case on the merits." Alex Brown, 1996 WL 683608, at *9. Thus, MSL's implausible interpretation of the statute is supported by no authority at all.

2. The District Court Was Not Required to Condition Entry of the Decree on Disclosure of the Government's Evidence

As MSL correctly observes (Br. 31), the Tunney Act's legislative history suggests that a court may conclude in particular cases that it is appropriate to "condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims." S. Rep. No. 298, 93rd Cong., 1st Sess. 6-7 (1973); accord H.R. Rep. No. 1463, 93rd Cong., 2nd Sess. 8 (1974). No Tunney Act court has ever done so,[19] and MSL gives no sound reason why the court's conclusion that this enforcement

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[18]Although believing that it had no determinative documents, the government in this case nonetheless provided to the court (and to MSL) three documents that might, like the Central Contracting documents, arguably fall within that category. These documents indicated that the ABA was reforming its accreditation process prior to entering into the consent decree. They might have led the government to propose a decree that did not address these matters, but in fact they did not. See Docket 11 at 20 n. 19 & exhibits A-C.

[19]In two pre-Tunney Act cases, courts ordered the government to impound evidence, which, however, would become available to private plaintiffs only through appropriate processes in separate litigation. In United States v. Automobile Manufacturers Ass'n., 307 F. Supp. 617 (C.D. Cal. 1969), aff'd sub nom. New York v. United States, 397 U.S. 248

(continued...)

proceeding was not an appropriate "discovery tool for proceedings pending elsewhere" (A. 1443) constituted an abuse of discretion.

Indeed, MSL's primary argument seems not to be that there are strong reasons to order disclosure in this case, but rather that the government and the courts have been consistently in error since the passage of the Tunney Act because they have not routinely disclosed the government's files. (Br. 32.) Neither the statute nor common sense supports that position. Had Congress thought courts should routinely condition their approval in this way, it would have simply required that the government make its evidentiary files public. But Congress imposed no such requirement.

Although permitted by the statute to condition entry of the decree on provision of the government's evidence to MSL (or other private litigants), the court heard MSL's arguments, rejected them, and chose instead to let MSL pursue discovery in MSL's own pending litigation. That decision fell well within the scope of the court's discretion.

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[19](...continued)
(1970), private plaintiffs opposed entry of a consent decree in the government's case and sought to force the government to try the case. The court rejected the private plaintiffs' motion, but ordered the government to impound all evidentiary materials and make them available to the private plaintiffs "by subpoena or other appropriate means, where good cause therefor can be shown." 307 F. Supp. at 620. Similarly, in United States v. National Bank and Trust Co. of Central Pa., 319 F. Supp. 930 (D.D.C. 1970), a motion to intervene was denied because the movant was protecting only his private interest. Nevertheless, the court ordered documents impounded in the hands of the Justice Department "subject to appropriate orders or subpoenas arising from the private litigation." Id. at 933.

CONCLUSION

The Court should affirm the district court's denial of intervention. If it permits intervention, the Court should affirm the judgment entered below.

Respectfully submitted.

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ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

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Federal Rule of Civil Procedure 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the 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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

The Tunney Act, 15 U.S.C. 15 (b)-(h)

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal 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. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall 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.

(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.

CERTIFICATE REQUIRED BY RULE 28(d)

I certify that the foregoing Brief for Appellee United States of America contains no more than 12,500 words.

CERTIFICATE OF SERVICE

I certify that on January 21, 1997, I caused copies of the foregoing Brief for Appellee United States of America to be served by Federal Express upon the following:

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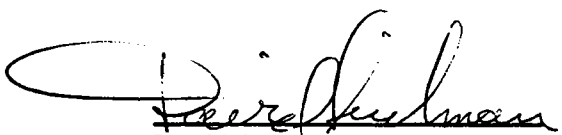

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