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

No. 03-8001

UNITED STATES OF AMERICA,

Appellee,

v.

MICROSOFT CORPORATION,

Appellee

CONSUMERS FOR COMPUTING CHOICE

Appellant

No. 03-8002

UNITED STATES OF AMERICA,

Appellee,

v.

MICROSOFT CORPORATION,

Appellee

ROBERT E. LITAN

Appellant

RESPONSE OF THE UNITED STATES TO PETITIONS FOR PERMISSION TO APPEAL

The United States opposes the Petition for Permission to Appeal of *Amicus Curiae* Consumers for Computing Choice ("CCC Pet.") and the Petition for Permission to Appeal of Robert E. Litan ("Litan Pet.") and suggests the Court strike the Petitions as unauthorized filings

requesting relief this Court is not authorized to provide, or in the alternative deny them as meritless.

STATEMENT

1. This proceeding is related to an antitrust case the United States brought against Microsoft in 1998. In June of 2001, this Court affirmed the district court's liability findings on one count, reversed the findings on one count, and vacated and remanded another. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (per curiam) (en banc), *cert. denied*, 122 S. Ct. 350 (2001). On remand, the parties reached a settlement in November of 2001, thus initiating a proceeding under the Tunney Act, 15 U.S.C. 16(b)-(h), to determine whether entry of the settlement as a consent decree would be in the public interest. On November 12, 2002, after an extraordinary Tunney Act proceeding in which the United States received over 32,000 public comments, the district court entered final judgment in the matter, *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 31654530, having determined that to do so would be in the public interest. The settling parties, of course, did not appeal from the judgment to which they had agreed, and the period for filing a timely notice of appeal expired at the end of January 13, 2003.

2. On December 31, 2002, 50 days after the district court entered final judgment in *United States v. Microsoft*, Consumers for Computing Choice ("CCC") and Robert E. Litan, who had participated in various ways in the Tunney Act proceeding, separately moved for leave to intervene for purposes of appeal. *See* CCC Pet. Att. 1; Litan Pet. Att. 1. Unable to discern any basis on which either CCC or Litan satisfied the minimum requirements for intervention pursuant to Rule 24, Fed. R. Civ. P., the United States opposed both motions in responses filed on January 10, 2003. Without waiting for the district court to rule on their motions, CCC and

Litan filed their Petitions in this Court on January 13, 2003, asking this Court to grant them leave to intervene in a case that is not before this Court, so that they may appeal the judgment below.

ARGUMENT

I. The Court Should Strike The Petitions As Unauthorized Filings

We are aware of no authority permitting a nonparty to seek intervention in a district court case by petitioning a court of appeals directly for leave to intervene in district court. Nor are we aware of authority for a court of appeals to transform a petitioner into an intervenor in a case not before the court.

(i) These Petitions are not, and could not be, appeals from the district court's judgment in *United States v. Microsoft*, because CCC and Litan are not parties in that matter in district court, and so cannot appeal from the judgment. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (noting it is well settled "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment"); *United States v. Seigel*, 168 F.2d 143, 144 (D.C. Cir. 1948) (noting it is well settled that "one who is not a party to a record and judgment is not entitled to appeal therefrom"); *see also United States v. LTV Corp.*, 746 F.2d 51, 54 (D.C. Cir. 1984) (dismissing purported appeal of a non-party who had participated actively in the *LTV* Tunney Act proceeding).

(ii) These Petitions are not, and could not be, motions to intervene in this Court in an appeal from the judgment in *United States v. Microsoft*. Although it may be possible to intervene in an appeal, *see Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (noting that Federal Rules of Appellate Procedure "do not expressly

preclude intervention in appeals from the district court"), no appeal in which petitioners seek to intervene is before this Court.[1]

(iii) These Petitions are not, and could not be, appeals from the district court's denial of CCC's and Litan's motions in district court for leave to intervene for purposes of appeal, for the district court has not denied those motions. Indeed, by the ordinary schedule for considering motions in district court, which allows 11 days for an opposition and 5 for a reply, CCC and Litan did not give the district court a chance to decide their motions before filing petitions in this Court a mere two weeks after filing their motions. *See* D.D.C. LCvR 7.1(b) (memorandum in opposition may be filed within 11 days of date of service of motion); *id.* 7.1(d) (reply memorandum may be filed within 5 days of service of memorandum in opposition); Fed. R. Civ. P. 6(e) (additional 3 days for service by mail).[2]

(iv) These Petitions are not, and could not reasonably be considered, inartfully drafted petitions for writs of mandamus that would order the district court to grant intervention for purposes of appeal. Mandamus is an "'extraordinary remedy, to be reserved for extraordinary situations,'" and this Court is "particularly disinclined to issue the writ before the district court

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[1]After these Petitions were filed, an appeal from the denial of the joint motion of two other nonparties to intervene in district court in *United States v. Microsoft* (and purportedly from the final judgment, which nonparties may not appeal) was docketed in this Court as No. 03-5030 (docketed Jan. 22, 2003). CCC and Litan could not properly have sought leave to intervene in an appeal not yet docketed in this Court and not referenced in their Petitions, make no suggestion that they so intended their Petitions, and give no reasons why they should be permitted to intervene in that appeal.

[2]We have received a district court document dated January 17, 2003, styled "Petitioners Consolidated Reply to Memoranda of Defendant Microsoft and Plaintiff The United States In Opposition to the Motion of Consumers for Computing Choice for Leave to Intervene for Purposes of Appeal."

has acted." *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198 (D.C. Cir. 2002) (quoting *National Ass'n of Crim. Def. Lawyers, Inc. v. United States DOJ*, 182 F.3d 981, 986 (D.C. Cir. 1999)). Moreover, neither Petition addresses any of the five factors this Court has said it "consider[s] instructive" in resolving "preemptive petition[s]" for mandamus. *Venezuela*, 287 F.3d at 198. In particular, neither CCC nor Litan gives any reason to believe that it lacks "any other adequate means, such as a direct appeal, to attain the desired relief," a prerequisite to the issuance of *any* writ of mandamus. *Id.* A district court denial of their motions for leave to intervene would be appealable, and surely the district court's failure to decide the CCC and Litan motions before their reply briefs were even due does not suffice to demonstrate that the "district court persistently and without reason refuses to adjudicate a case properly before it." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978).[3] In any event, neither CCC nor Litan gives any hint of seeking a writ of mandamus — or any writ pursuant to the All Writs Act. 28 U.S.C. 1651.

(v) These Petitions are not, and could not be, petitions for permission to appeal pursuant to Fed. R. App. P. 5. That Rule provides for petitions requesting "permission to appeal *when an appeal is within the court of appeals' discretion*." *Id.* 5(a)(1) (emphasis added). As explained in the Advisory Committee Note on the 1998 Amendment to Rule 5:

> This new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. At this time that includes

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[3]It is irrelevant that the deadline for appealing from the district court's judgment in *United States v. Microsoft* was about to pass when CCC and Litan filed their Petitions. Assuming, arguendo, that CCC and Litan could show that their delay in moving to intervene was excusable neglect, they could have sought to have that deadline extended pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. We doubt that they could make any such showing, and inexcusable delay should be fatal to relief of any kind.

> interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1) & (2). If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Currently, the only such newly authorized discretionary appeal is of an order granting or denying class certification. *See* Fed. R. Civ. P. 23(f). Plainly, neither 28 U.S.C. 1292(b)-(d) nor Fed. R. Civ. P. 23(f) has any relevance to the Petitions here. *See* 15 U.S.C. 29(a) (appeal from interlocutory orders in government antitrust cases seeking equitable relief "shall be taken to the court of appeals pursuant to sections 1292(a) (1) and 2107 of Title 28 but not otherwise").

In short, the Petitions are simply unauthorized filings, seeking a form of relief that lies outside the relief this Court is authorized to grant.[4] Accordingly, the Court should strike the Petitions from its docket.

II. The Petitions Are In Any Event Meritless

Neither Petition even addresses the question whether this Court can or should grant the novel order Petitioners seek. *Cf.* Fed. R. App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."). Instead, CCC and Litan have simply attached their district court motions and supporting memoranda to their Petitions. *Cf. id.* 27(a)(2)(C)(i) ("A separate brief supporting or responding to a motion must not be filed"); 30(a)(2) ("Memoranda of law in the district court should not be included in the appendix [to a brief] unless they have independent relevance"). The arguments in the district court memoranda go to whether the district court should grant

[4] "'It is well settled that . . . jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and the laws of the United States.'" *Jaskiewicz v. Mossinghoff*, 802 F.2d 532, 533 (D.C. Cir. 1986) (quoting *Hanford v. Davies*, 163 U.S. 273, 279 (1896)).

intervention. We addressed these arguments at some length in district court; we address them here only briefly.

Rule 24 of the Federal Rules of Civil Procedure governs intervention in district court proceedings, and the Tunney Act provides no exception. *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 780 n.2 (D.C. Cir. 1997) ("*MSL*") ("the Tunney Act looks entirely to Fed. R. Civ. P. 24 to supply the legal standard for intervention"). And this Court has said the Rule 24 standards governing intervention also apply to intervention in this Court. *MSL*, 118 F.3d at 780; *Building & Const. Trades Dept.*, 40 F.3d at 1282-83. Rule 24 contemplates intervention when a statute provides a right to intervene, Fed. R. Civ. P. 24(a)(1), (b)(1), but neither CCC nor Litan relies on any such statute, and, in any event, no statute provides such a right in their situation. *See MSL*, 118 F.3d at 780 n.2. Petitioners must therefore rely on the other criteria of Rule 24, but their district court memoranda barely address those criteria.

> An applicant will be permitted to intervene as of right, on timely application, if
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> [a] the applicant claims an interest relating to the property or transaction which is the subject of the action and [b] 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, [c] unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The interest to which the rule refers must be a "'legally protectable one,'" *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (quoting *Southern Christian Leadership Conference v. Kelly*, 747 F.2d 777, 779 (D.C. Cir. 1984)), a "direct and concrete interest that is accorded some degree of legal protection." *Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring).

CCC claims it has a "legally protectible and cognizable interest in a Final Judgment that restores . . . competition to the market for operating systems and the so-called 'PC ecosystem.'" Memorandum of Points and Authorities in Support of Motion of *Amicus Curiae* Consumers for Computing Choice for Leave to Intervene for Purposes of Appeal at 12 ("CCC Mem."), CCC Pet. Att. 1. CCC does not explain why its interest in the judgment in a case to which it is not a party is sufficiently direct and concrete as to be accorded legal protection. CCC asserts that "the interest of CCC members . . . depends on their ability to have the most advanced tools for computing. The economic and other interests of these consumers are therefore directly affected by the maintenance of Microsoft's monopoly in operating systems." *Id.* This purported interest in the *Microsoft* judgment is entirely abstract and remote.

Litan's claimed interest in the "property or transaction which is the subject of the action" is, if anything, even further off the mark. He claims a "wide range of professional, academic and other interests" which "will increasingly depend on the availability of ever more sophisticated computing tools," the future existence of which may somehow depend on the judgment in *Microsoft*. Memorandum in Support of Motion of Robert E. Litan for Leave to Intervene for Purposes of Appeal at 8, Litan Pet., Att. 1. Nothing but bald assertion, *id.*, makes this a direct and concrete interest in the *Microsoft* judgment that is legally protected.

In any event, neither CCC nor Litan explains how the disposition of our case against Microsoft will "impair or impede [their] ability to protect," Fed. R. Civ. P. 24(a)(2), their interests in competitive markets. Their situations are indistinguishable from that of the applicant in *MSL*. There, this Court "assume[d] arguendo that the more zealously the Department had pursued its antitrust claims, the greater the resulting *advance* in the [applicant's] interest in being

free of anticompetitive behavior," but it refused to "equat[e] failure to promote an interest with its impairment." *MSL*, 118 F.3d at 780 (emphasis in original). Nor do CCC and Litan show their asserted interests are not "adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). As this Court has said, "we do not think representation is inadequate just because a would-be intervenor is unable to free-ride as far as it might wish — a well-nigh universal complaint." *MSL*, 118 F.3d at 781.

Petitioners' request for permissive intervention is no more adequately supported. Rule 24(b)(2) grants a district court discretion to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). If that test is met, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The requirement "that the would-be intervenor advance a 'claim or defense' that shares a common question with the claims of the original parties" advances the "apparent goal of disposing of related controversies together." *EEOC v. National Children's Ctr., Inc.,* 146 F.3d 1042, 1045 (D.C. Cir. 1998); *see also* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1901, at 230 (2d ed. 1986) (citing, in discussing Rule 24, the "public interest in the efficient resolution of controversies"). Without that commonality of claims, there is no saving from adding parties. *See MSL*, 118 F.3d at 782 (stating that "litigative economy, reduced risks of inconsistency, and increased information" are the "hoped-for advantages" of intervention). But neither CCC nor Litan gives any indication of wanting "to become involved in an action in order to litigate a legal claim or defense on the merits," *EEOC*, 146 F.3d at 1045. In district court, neither complied with the requirement of Fed. R. Civ. P. 24(c) that their motions

be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." They plainly have no such claims (or defenses).

Both CCC and Litan claim that a district court (and presumably this Court as well) should grant intervention if the "'would-be intervenor can point to the specific defects'" in the district court's judgment. *MSL,*118 F.3d at 783, quoted at CCC Mem. at 6, CCC Pet. Att. 1; Litan Mem., at 5, Litan Pet. Att. 1. They misread *MSL*. The "threshold" requirement for permissive intervention is common questions of fact or law with the main action, *MSL*, 118 F.3d at 782. Only after the applicant has met this threshold requirement does the court look at "'whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties.'" *Id*. (quoting Fed. R. Civ. P. 24(b)(2)). And it is in analyzing this second requirement of undue delay or prejudice that "specific defects" in the judgment become relevant (because whether the resulting delays are undue depends in part on the merits of the applicant's attack on the judgment). *Id*. at 782-83. Thus, Petitioners' allegations of "specific defects" do not replace legal claims sharing questions of law or fact with the main action.

Nor is the alleged helpfulness of their intervention a sufficient basis for Petitioners' intervention. As Petitioners' claim, this Court in *LTV* said that "[t]o gain status as an intervenor, the would-be appellant must *first* establish that participation by the intervenor would aid the court in making its public interest determination under the [Tunney Act]." 746 F.2d at 54 (emphasis added). *See* Litan Mem. at 5, Litan Pet. Att. 1; CCC Mem. at 9, CCC Pet. Att. 1. But as the context makes clear, the Court was referring to a district court's discretionary determinations. *LTV*, 746 F.2d at n.8 and accompanying text (referring to "decision whether leave to intervene permissively should be granted" and to appellate review under an abuse of

discretion standard). Helpfulness is indeed an important first step, since a district court conducting a Tunney Act proceeding should plainly not exercise its discretion to permit intervention that would not aid the court. But Petitioners ignore the second step, which is to consider the requirements of Rule 24.

CONCLUSION

The Court should strike the Petitions as unauthorized filings, or in the alternative deny them.

Respectfully submitted.

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January 27, 2003

CERTIFICATE OF SERVICE

I certify that on January 27, 2003, I caused copies of the foregoing Response of the United States to Petitions for Permission to Appeal to be served by hand upon the following:

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