IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	)	Civil Action No. 94-1564 (SS)

RESPONSE OF THE UNITED STATES OF AMERICA TO SUPPLEMENTAL SUBMISSION OF AMICI CURIAE

This memorandum responds to the most recent attempt by the anonymous amici to divert this proceeding from its proper purpose under the Tunney Act. They do so by misstating the law and by offering misleading characterizations of the government's submissions. The only thing new in the amici's latest submission is one document recently produced in the government's ongoing investigation of the Microsoft/Intuit transaction, which is entirely irrelevant to this proceeding.

1. The government repeatedly has emphasized that its ongoing and future enforcement efforts -- in particular its investigation of Microsoft's proposed acquisition of Intuit -- could be prejudiced by a public debate concerning evidence or legal theories that are not relevant to this proceeding, but that might well be germane to future cases.[1/] For reasons known only to themselves, the anonymous amici now seek to provoke precisely such a debate. They have submitted to the Court a document that was produced by a third party to the Department of Justice only three days ago, in response to compulsory process issued in the ongoing investigation of the proposed Microsoft/Intuit transaction. Amici

[1] See Memorandum of the United States of America In Support of Motion To Enter Final Judgment and In Opposition to the Positions of I.D.E. Corporation and Amici, at 14-15; Memorandum of the United States of America in Response to the Court's Inquiries Concerning "Vaporware" at 3; Transcript of Motions Hearing, Jan. 20, 1995, at 22.

apparently hope to entice the Court into an analysis or evaluation of this document, entirely outside of the factual and legal context in which the document might be relevant.

Their invitation should be rejected. The amici's tactics forestall any meaningful assessment by the Court of the document or the issues to which it relates -- which, in any event, are not the subject of the complaint now before the Court. Although amici's counsel have provided an unredacted copy of the document to the government,[2/] they did so on the express condition that the document be accorded "the fullest possible protection of confidentiality provided for by law." Microsoft has been denied any access to the document, and thus cannot respond at all. These restrictions, combined with the risk of prejudice to the Microsoft/Intuit or some future investigation, preclude the government from discussing the substance of the document submitted by amici. Under these conditions, any reliance on this document by the Court would be fundamentally unfair.

We can, however, point out what the document is not. The document does not discuss any product that was the subject of the government's complaint or the proposed consent decree. The document does not relate to the anticompetitive licensing practices that are the subject of this case. The document does not relate to the "vaporware" allegations about which the Court has inquired. Thus, even apart from the extraordinary procedural defects of amici's submission, further consideration of the document or the issues to which it relates would be improper. Amici should not be permitted to turn this Tunney Act proceeding into an unbounded inquiry into competition in the software industry, without regard to the specific licensing practices challenged in the government's complaint. The document and the issues to which it relates have no bearing on the sole question that is before this Court today under the Tunney Act: whether the government has a reasonable basis for concluding that the proposed consent decree adequately resolves the specific claims in its complaint. If it does, the Court must find that the

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[2] Amici have not given the government a copy of the redacted version that was submitted to the Court. Therefore, the government has no way of knowing precisely what information has been deleted from the Court's version of this document.

proposed decree is within the reaches of the public interest and enter it. United States v. Western Elec. Co., 993 F.2d 1572 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993).

2. The anonymous amici attempt to justify their tactics by misstating the legal standard that governs the approval of antitrust consent decrees. As we have explained before,[3] antitrust remedies should constitute "a reasonable method of eliminating the consequences of the illegal conduct." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 698 (1978) (emphasis added).[4] Under the Tunney Act, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." United States v. Western Elec. Co., 993 F.2d 1572, 1577 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993) (internal quotations omitted). The government's predictions concerning the effects of the proposed relief can be rejected only if the Court has "exceptional confidence" that the government is wrong. Id.

In this case, however, the government's assessment is supported fully by the declaration of Nobel Laureate Kenneth Arrow. As Professor Arrow explains, "[t]he Department of Justice's complaint against Microsoft and the resulting settlement eliminated unnecessary and artificial obstacles erected by Microsoft to disadvantage future competition." Arrow Dec'l at 4 (emphasis added). The proposed settlement, in his view, "appropriately addresses and remedies the anticompetitive effects" of the illegal

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[3] See Memorandum of the United States of America In Support of Motion To Enter Final Judgment and In Opposition to the Positions of I.D.E. Corporation and Amici, at 7-10.

[4] Quoting United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), amici contend that a consent decree must "effectively open the market to competition" in order to satisfy the "minimum" standard for approval by the Court. Supplemental Submission of Amici Curiae, at 3. That standard was appropriate, and consistent with the principle articulated in Professional Engineers, in the AT&T case, where competition had been foreclosed by a wide variety of exclusionary acts over many years. In this case, however, the rapid growth of Microsoft's installed base "is primarily the result of the extraordinary commercial success of the IBM-compatible PC platform." Arrow Dec'l at 11. Microsoft's illegal practices "made only a minor contribution to the growth of Microsoft's installed base." Id. at 12. The proposed consent decree provides a complete remedy for Microsoft's anticompetitive licensing practices, thereby "eliminating the consequences of illegal conduct," Professional Engineers, 435 U.S. at 698. But the antitrust laws were not meant to provide "remedies" for the consequences of actions by third parties (e.g., IBM's original decision to obtain from Microsoft the operating system for its PC), or the "consequence of good fortune and possibly superior product and business acumen." Arrow Dec'l at 11.

practices. Id. at 13. In contrast, Professor Arrow concludes that the linchpin of amici's argument -- the contention that Microsoft's large installed base was the result of its illegal licensing practices -- is "flawed." Id. at 11. Those practices, he concludes, "made only a minor contribution to the growth of Microsoft's installed base." Id. at 12. We submit that in this case, as in United States v. Western Elec. Co., 993 F.2d 1572, 1582 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993), Professor Arrow's declaration provides more than enough "to establish an ample factual foundation for the judgment call made by the Department of Justice and to make its conclusion reasonable." Thus, the far-reaching inquiry into the software industry that amici urge in this proceeding falls well beyond the proper scope of the review authorized by the Tunney Act.

3. Amici criticize the government's submission concerning "vaporware" because it does not discuss United States v. American Tel. & Tel. Co., 524 F. Supp. 1336 (D.D.C. 1981). The criticism is unwarranted. That case did not reach any conclusion regarding the legality of product preannouncements under the Sherman Act. Rather, the Court denied a motion to dismiss where the plaintiff challenged a broad course of conduct, one element of which was a preannouncement, on the theory that the entire course of conduct constituted an illegal denial of access to an essential facility. The Court explicitly confirmed that it viewed the case as "a single Sherman Act claim on a course-of-conduct basis," id. at 1345, and recognized that even though some of the acts in that course of conduct might not have injured competitors, those acts "may still be relevant as evidence of [defendant's] intent," id. at 1344.

One of the episodes examined by the Court involved AT&T's reaction to a competitor's proposal to develop a digital data network. The court found evidence that AT&T, in opposing the competitor's application for an FCC license, had engaged in "a series of misleading statements, of representations having the effect of actually barring access to an official body, or of an intent to mislead the body concerning central facts." Id. at 1364. In addition, AT&T allegedly responded to the competitor by

engaging in predatory pricing. Id. at 1364 n.118, 1366 n.122. Finally, AT&T's response also included the product preannouncement discussed by amici.

All this behavior constituted just one of seven episodes in the overall course of conduct. And as to the overall course of conduct, the Court did not find that there was antitrust liability. Rather, the Court denied a motion to dismiss under Rule 41(b), recognizing that the motion could be denied "even if under the law that motion might have been granted."[5/] This case surely does not contradict the proposition set forth in the government's submission that "product preannouncements do not violate the antitrust laws unless those preannouncements are knowingly false and contribute to the acquisition, maintenance, or exercise of market power."[6/]

4. Amici fault the government's submission regarding vaporware because, in their words, it "emphasizes" the "purported" need to show market impact. Supplemental Submission of Amici Curiae at 6. This requirement is not "purported." It is hornbook law[7/] and amici cite no authority to the contrary. Amici point to economic articles suggesting that product preannouncements might be anticompetitive. But the government has never disputed that proposition, and has stated clearly and repeatedly that it will challenge preannouncements if the facts support such a challenge under the applicable legal standard. Amici contend that the Department has "committed the United States to a position . . . in which it appears largely to accept a practice which the economists substantially agree `can eliminate competition and reduce welfare.'" Supplemental Submission of Amici Curiae at 7. We cannot accept the notion that by describing the holdings of prior cases, divorced from any factual setting or actual case, and in response to

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[5] Id. at 1343. In light of the length and complexity of the AT&T litigation, the Court was mindful that a Rule 41(b) motion should be granted cautiously, because of the risk that an erroneous ruling would necessitate a second trial. Id.

[6] Memorandum of the United States of America in Response to the Court's Inquiries Concerning "Vaporware" at 2.

[7] See, e.g., A.B.A. Section of Antitrust Law, Antitrust Law Developments at 262-69 (3d ed. 1992); 16B Julian O. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 8.02[1], 9.01[5] (1991).

the Court's request that we do so, we have "committed the United States to a position" on these issues, which will arise in the future only in particular factual settings and on a developed record. But even if that assertion were true, it merely highlights the risk of prejudice to the government's future enforcement efforts of having to discuss complex and fact-sensitive legal issues outside of the context of a particular case or controversy in which those issues are relevant.

Conclusion

The Court should not tolerate further efforts by the anonymous amici or others to prolong this proceeding.[8/] The government has explained in great detail the basis for its conclusion that the proposed settlement provides a complete remedy for Microsoft's illegal conduct, and that the relief is needed now. The government's explanations have been supported in full by the declaration of Nobel Laureate Kenneth Arrow. Nothing presented by the anonymous amici or others refutes these conclusions. The record establishes an ample basis for the Court to find that the proposed consent decree adequately resolves the

[8] Amici urge the Court to prohibit the government and Microsoft from destroying documents collected in connection with this investigation. It has been the intention of the Department to preserve the documents in its possession until the expiration of the proposed Final Judgment, and we represent to the Court that we will do so.

specific claims in its complaint. Accordingly, the proposed Final Judgment is within the reaches of the public interest. We urge the Court to enter the Final Judgment immediately.

Respectfully submitted,

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