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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. _____
MICROSOFT CORPORATION,	)	
Defendant.	)	

MOTION FOR EXPEDITED CONSIDERATION AND FOR BRIEFING SCHEDULE

Appellant United States of America hereby moves for expedited consideration of this appeal and to establish a briefing schedule.

On February 14, 1995, Judge Stanley Sporkin signed an order refusing to enter the proposed Final Judgment reached in this action by the United States and Microsoft Corporation ("Microsoft"). In the Order and accompanying Opinion, Judge Sporkin misconstrued the permissible scope of his review under the Tunney Act, 15 U.S.C. 16(b)-(h), and thereby erroneously rejected a consent decree that undoubtedly met the Act's "public interest" test and that was supported by an affidavit submitted by Nobel prize winning economist Professor Kenneth J. Arrow. Moreover, Judge Sporkin's opinion makes clear that, before entering the decree, he would require the government to reveal to

the court all aspects of its investigation of Microsoft, including the government's reasons for every decision that it made in performing its Executive Branch functions, details concerning conduct the government has not at this point challenged, and the government's plans for further action against the defendant. The district court's decision, unprecedented in the history of the Tunney Act, radically alters the nature of Tunney Act review of proposed consent decrees. By so doing, it threatens the ongoing enforcement program of the Antitrust Division, which relies heavily on achieving consent decrees with antitrust defendants. For these reasons, expedited review by this Court is necessary to ensure that the Antitrust Division's enforcement program does not suffer immediate and irredeemable harm.

ARGUMENT

A party seeking expedited consideration generally "must demonstrate the delay will cause irreparable injury and that the decision under review is subject to substantial challenge"; but "[t]he Court may also expedite cases . . . in which the public generally [has] an unusual interest in prompt disposition" and the reasons are "strongly compelling." U.S. Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures 40 (1987). Each of these tests is met here.

I. THE DISTRICT COURT'S DECISION IS SQUARELY WRONG

Judge Sporkin's Opinion in this case transforms the Tunney Act into a blueprint for judicial prosecution of antitrust cases. The Opinion's legal failings are legion, and it is not the government's purpose to besiege the Court in this motion with arguments properly reserved for a merits brief. The district court, however, committed at least three fundamental errors.

First, the court erroneously concluded that the Tunney Act permits a court to review the history of the government's investigation (including related investigations), the government's decision not to challenge particular practices at the time that a consent decree is negotiated, and its intentions to challenge uncharged conduct in the future. As a consequence, the court has sent the message to antitrust defendants that agreeing to a consent decree with the government will open up the entire range of that party's conduct to judicial scrutiny, whether or not that conduct is related to the government's concerns as set forth in the complaint before the court, and whether or not the government has decided to challenge that conduct at the time that the decree is negotiated. The Tunney Act, however, never was intended to substitute the court's views of what case to bring for the government's.

Second, the court departed from settled Tunney Act precedent by failing to limit its consideration of the antitrust consequences of the decree to whether the relief sought in the

proposed Final Judgment adequately remedies the violations set forth in the complaint. Indeed, the court condemned the decree because it did not dissipate market power acquired through lawful conduct and because it did not address antitrust concerns in markets not even alleged in the complaint. In the process, the court flat out rejected, without justification, Professor Arrow's conclusion that the practices challenged by the government did not materially augment Microsoft's "installed base" of users, and his considered judgment that, as a consequence, the decree appropriately remedied the violation alleged by ensuring that Microsoft does not continue the challenged practices in the future.[1/]

Third, Judge Sporkin improperly departed from the principle that he must defer to the policy and litigation judgments of the Department of Justice, as well as its expertise, see, e.g., United States v. Western Elec. Co., 993 F.2d 1572, 1576-77 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993), by impermissibly measuring the proposed Final Judgment against his own vision of an ideal decree. In so doing, the court failed to pay heed to Judge Greene's admonition that "[i]f courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have

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[1] Cf. United States v. Western Elec. Co., 993 F.2d 1572, 1582 (D.C. Cir.) (concluding that the presentation of Professor Arrow was "enough . . . to establish ample functional foundation for the judgment call made by the Department of Justice and to make its conclusions reasonable"), cert. denied, 114 S. Ct. 487 (1993).

imposed after a finding of liability, defendants would have no incentive to consent to judgment . . . . The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved." United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

II. THE COURT'S DECISION WILL IRREPARABLY HARM THE PUBLIC INTEREST IN EFFECTIVE ANTITRUST ENFORCEMENT

These errors, and others, threaten the government's ongoing enforcement program. The consent decree, which conserves the resources both of enforcement agencies and the courts, is a vital tool of antitrust law enforcement. Indeed, from August 1993 through September 1994, the Division filed, on average, approximately two decrees per month. That figure has risen to almost three per month for the period of October 1994 through January 1995.

That record of success is threatened while Judge Sporkin's ruling stands, for its inevitable effect is to deter parties from entering into consent judgments. Both potential defendants and the government will balk at entering into consent decrees if, as Judge Sporkin has held, to gain court approval, the government must reveal to the court all aspects of its investigation. If this were not enough, according to Judge Sporkin, a Tunney Act court may reject a decree both because the government has not

brought the case that the court would like brought or has not required a defendant to surrender competitive advantages that did not result from the violations alleged and which are not necessary to excise in order to craft an effective antitrust remedy for those violations. A defendant confronted with the choice of litigating against the government or acceding to these demands clearly would find the former more inviting.

As a consequence, as long as Judge Sporkin's decision stands, scarce government resources likely will be wasted litigating cases that it otherwise would settle and settle appropriately, and those resources will not be available to investigate or prosecute other antitrust offenses. Obviously, no remedy can repair the resulting harm to the public interest. Thus, the public has an unusual and compelling interest at stake. Antitrust enforcement serves the public interest.

* * *

In addition to the above, the United States notes that it perfected its notice of appeal the day after Judge Sporkin's order was entered. The United States, moreover, is prepared to submit its opening brief within 21 days from the entry of a briefing order.

CONCLUSION

In sum, the Tunney Act does not authorize a court to perform the Executive function of deciding whether the government should

have brought a different antitrust case. Judge Sporkin's contrary ruling raises the specter that, when an antitrust defendant negotiates a proposed consent decree with the Division, it will do no more than open up the entire range of that party's conduct to judicial scrutiny. The court was wrong, its errors are potentially devastating to efficient enforcement of the law, and expedited review is essential.

For the foregoing reasons, the motion to grant expedited consideration and to set a briefing schedule should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the following MOTION FOR EXPEDITED CONSIDERATION AND FOR BRIEFING SCHEDULE, upon the following counsel in this matter by fax on February 16, 1995:

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