

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN ANTITRUST INSTITUTE,)	
INC., a non-profit corporation,)	
2919 Ellicott Street N.W., Suite 1000)	Civil Action No. _____
Washington, D.C. 20008-1022)	
)	
Plaintiff,)	
v.)	
)	
MICROSOFT CORPORATION, a)	
Washington corporation, One Microsoft Way,)	
Redland, Washington 98052; and)	
THE UNITED STATES OF AMERICA, c/o)	
U.S. Department of Justice, Antitrust)	
Division, 901 Pennsylvania Ave., N.W.,)	
Washington, D.C. 20530,)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit seeks to compel the defendants to comply with their legal obligations under the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. 16(b) *et seq.*

2. Defendants Microsoft Corporation and the United States of America (referred to herein as the "Microsoft Parties") are opposing parties in the cases *U.S. v. Microsoft Corporation*, Civil Action Numbers 98-1232 and 1233 (CKK), now pending before this Court (referred to herein as the "Microsoft case"). The Microsoft Parties agree that the provisions of the Tunney Act apply to the Microsoft case.

3. The Tunney Act permits public comment on Department of Justice antitrust proposed

settlements. However, the ability for the public to obtain the full measure of its rights under the Tunney Act, and thereby to assist the Court to ascertain whether the Proposed Final Judgment (“PFJ”) is in the public interest, rises or falls with the parties’ compliance with their obligations to make disclosures about the proposed settlement. This case simply seeks to compel the Microsoft Parties to make the disclosures that the Tunney Act requires, which they have failed to do. The required disclosures, when made, will permit the most thoughtful and useful public comments.

4. Plaintiff, the American Antitrust Institute, Inc. (“AAI”), has the standing and intends to provide such comments to assist this Court in considering whether entry of the PFJ is “in the public interest.” Accordingly, AAI, by its undersigned attorneys, does hereby complain against the Microsoft Parties as follows:

JURISDICTION AND VENUE

5. This Court has jurisdiction hereof incident to proceedings in the Microsoft Case. This Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331, in light of the federal questions raised herein. This Court has jurisdiction over the declaratory relief claim set forth herein pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

6. Venue is proper in this district under 28 U.S.C. §§ 1391 because the Tunney Act proceedings are being administered in this Court and the parties can be found in this District.

BACKGROUND

7. Congress passed the Tunney Act in 1974 to expose antitrust settlement proceedings to “sunlight” and to add an independent judicial review of antitrust settlements to ensure that they are in the public interest. The Tunney Act requires the United States Department of Justice (“Justice Department”) to prepare a Competitive Impact Statement (“CIS”) and to make certain disclosures, as described below. It also requires a defendant (in this case, Microsoft) to make certain disclosures, also described below. These disclosures must be made within a statutory time frame. The public may comment on the proposed settlement during a 60-day period. The Justice Department must respond to these comments within 30 days. Finally, with the benefit of informed public comment, the Court must rule on whether the proposed settlement is in the public interest. The Tunney Act proceeding in the Microsoft case has a deadline of January 28, 2002, for public comments to be filed.

8. Members of the public who wish to understand and comment on a proposed antitrust settlement (including the AAI) necessarily depend on the information about the proposed settlement that the Tunney Act requires the parties to disclose. Such disclosure is necessary for the public to have the ability to comment intelligently and usefully.

9. This Complaint alleges that the Microsoft Parties have failed to comply with the Tunney Act. Therefore, the AAI now asks this Court to require the Microsoft Parties to meet their obligations as follows:

A. The CIS must be amended:

- (1) to include an explanation of why certain remedies previously pursued by the Justice Department were abandoned;
- (2) to include an explanation of the Justice Department’s evaluation and comparison of

the remedies that are being pursued in the PFJ and the various alternative remedies that are not; and

(3) to include an explanation of how the PFJ will affect private litigation;

B. The Justice Department disclosures must be expanded to include documents and materials that were considered determinative in formulating the substance of the proposed settlement throughout the settlement negotiation process; and

C. The Microsoft disclosures must be expanded to describe (and not merely acknowledge) communications between any of its employees or agents and any officers or employees of the United States (unless the communication was solely between an attorney who had been formally designated as “Counsel of Record” at the time of the communication and the Attorney General or Justice Department employees).

10. The Microsoft case is a landmark antitrust case. The settlement proposed by the Justice Department and Microsoft will have important implications both for the future of the high technology industry and for the future of the antitrust laws as an instrument of national economic policy. It is especially important in this case that the Microsoft Parties abide by the Tunney Act so that a fully informed public will be able to fulfill its statutorily assigned role in assisting the Court in evaluating whether the proposed settlement is in the public interest.

THE PARTIES

11. AAI is an independent non-profit education, research and advocacy organization, resident in the District of Columbia and described in detail at www.antitrustinstitute.org. Upon information and belief, AAI is the only public interest organization solely devoted to the antitrust field. AAI has standing both as a public interest organization, the mission of which is to support the laws and institutions of antitrust, and as a member of the public that intends to write comments on the Microsoft PFJ under the Tunney Act. AAI's ability to fully evaluate the proposed settlement for purposes of its comments is impaired by the Microsoft Parties' failure to fully comply with the disclosure requirements of the Tunney Act, as alleged herein.

12. The Microsoft Corporation is a Washington corporation that does business in all 50 states and the District of Columbia and is a defendant in the Microsoft case. It has made filings and represented that they are accurate, and has purported to conform to the requirements of the Tunney Act.

13. The United States of America is the government of which the Justice Department is a part. The United States is one of the plaintiffs in the Microsoft case, and has made filings purporting to fulfill its requirements under the Tunney Act.

FIRST CAUSE OF ACTION (Declaratory Judgment Against the U.S.)

14. Paragraphs 1- 13 are incorporated by reference herein, as if set forth in full.

15. Section 16(b) of the Tunney Act requires, *inter alia*:

[T]he 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—

...(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;

...(6) a *description and evaluation* of alternatives to such proposal actually considered by the United States. [Emphasis added.]

Insufficient Disclosures Regarding the Remedies Considered

16. In the five-paragraph section of the CIS titled “The Alternatives to the Proposed Final Judgment,” the Justice Department states, in pertinent part:

The United States considered a number of alternatives to the Proposed Final Judgment. The United States is satisfied, however, that the requirements and prohibitions contained in the Proposed Final Judgment, supported by strong compliance and enforcement procedures, provide a prompt, certain and effective remedy for the violations Microsoft has committed.

[The CIS identifies litigation alternatives considered and lists six classes of remedies considered]

The United States carefully weighed the foregoing proposals, as well as others received or conceived, considering their potential to remedy the harms proven at trial and upheld by the Court of Appeals; their potential to impact the market beneficially or adversely; and the chances that they would be imposed promptly following a remedies hearing. The United States ultimately concluded that the requirements and prohibitions set forth in the Proposed Final Judgment provided the most effective and certain relief in the most timely manner.

17. This meager boilerplate disclosure is all but meaningless. The Tunney Act requires both a description “*and evaluation*” of the alternatives. The CIS fails to explain adequately why various significant alternative remedies were rejected, providing only the self-evident conclusion that they were. By its very use of the term “evaluation,” the Tunney Act requires not only the identification of significant

alternative remedies, but also disclosure of the reasons for their rejection. Otherwise, the public cannot intelligently attempt to understand and evaluate the Justice Department's logic in agreeing to the proposed settlement.

18. The Justice Department has failed to explain adequately why it has abandoned remedies that it vigorously pursued, that the district court approved (*U.S. v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000)), and that the court of appeals left intact as potentially viable remedies (*U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)). The court of appeals vacated the district court's remedies decree for three reasons: (1) the court failed to hold a remedies-specific evidentiary hearing when there were disputed facts; (2) the court failed to provide adequate reasons for its decreed remedies; and (3) in light of the court of appeals' rulings regarding Microsoft's liability, it was not possible to determine to what extent those rulings should affect the remedies provisions. The court of appeals, therefore, did not actually reject the remedies sought by the Justice Department and approved by the district court; it merely required further proceedings and analysis. The Justice Department has failed to explain adequately why it determined that it was in the public interest to pursue some of those remedies before, but that it is no longer in the public interest to do so.

19. In addition, the Justice Department has failed to explain adequately how alternative remedies (those not being pursued in the PFJ) would have affected competition in the marketplace. In addition, the Justice Department has failed to explain adequately the basis for its conclusion in Section V of the PFJ that the remedies that are being pursued in the PFJ would be more effective than the alternative remedies. The Justice Department has insufficiently disclosed the critical analysis it purports to have performed in comparing the different types of available remedies.

20. Such disclosures lie at the core of the purposes of the Tunney Act. Without such disclosures, neither AAI nor any other member of the public can meaningfully evaluate the effectiveness of the remedies chosen by the Justice Department, suggest modifications if appropriate, or fully advise the Court as to whether the PFJ is in the public interest

Insufficient Disclosures Regarding the Effect on Private Litigation

21. In antitrust actions brought by the Justice Department, findings that a defendant has violated the antitrust laws which are incorporated into a final judgment or decree constitute *prima facie* evidence against the defendant in any private actions. Moreover, collateral estoppel may attach to antitrust liability findings, which may be used offensively by private parties against a defendant. 15 U.S.C. § 16(a) provides:

Prima facie evidence; collateral estoppel. A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel

22. In the “Remedies Available to Private Litigants” section of the CIS, the Justice Department states:

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees.”

23. This statement is devoid of substance. It merely recites federal law. The Tunney Act requires more. It requires a statement that explains how the settlement will affect pending and potential private litigation. The court of appeals affirmed in part the district court's findings and conclusions that Microsoft violated the Sherman Act and state law counterparts by employing anticompetitive means to maintain a monopoly in the operating system market. The Justice Department must disclose how the PFJ might impact the evidentiary or collateral estoppel effect of those findings of fact and conclusions of law that were determined by the district court after an extended trial and upheld by a unanimous *en banc* opinion of the court of appeals. The Justice Department must disclose whether the PFJ might make these determinations unavailable to private litigants in the multitude of private cases that are ongoing, thereby imposing a potentially enormous burden on private litigants, as well as the state and federal judicial systems, by requiring the reproof of facts that have already been proven and upheld on appeal at great expense and consumption of time. The non-settling States in the Microsoft case are depending on these very findings, making it even more important to insist on full disclosure on this issue. What actually is *intended* by the PFJ is a matter of great importance, and it should be disclosed explicitly to the public in the CIS. The Justice Department has failed to state what effect its proposed settlement would have on private litigation, in violation of the Tunney Act.

24. A recital paragraph of the PFJ states that "this Final Judgment does not constitute any admission by any party regarding any issue of law" and Section VIII of the PFJ states: "Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment." The PFJ fails to explain the impact of these statements on private litigation, including whether they would impact the evidentiary or collateral estoppel effect of

the findings already made by the district court and affirmed by the court of appeals. The Justice Department must disclose whether it is aware if Microsoft intends to argue in private cases that the district court's determinations are rendered null and void by the proposed settlement. The PFJ statements, without further explanation, create an ambiguity that may delay private litigation for years.

Insufficient Disclosures Regarding Determinative Documents

25. The Tunney Act, 15 U.S.C. § 16(b), also provides, in pertinent part:

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... 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. [Emphasis added.]

26. The Justice Department's CIS disclosure regarding Determinative Materials/Documents is as follows:

No materials and documents of the type described in the Section 2(b) of the APPA [15 U.S.C. § 16(b)] were considered in formulating the Proposed Final Judgment. Consequently, none are being filed with this Competitive Impact Statement.

27. This disclosure is insufficient. The Justice Department apparently has misconstrued the requirements of the Tunney Act, which was intended to bring to light all materials and documents that were determinative in the formulation of a proposed settlement. The Justice Department must disclose documents it considered determinative in formulating the substance of the proposed settlement throughout the settlement negotiation process, and not merely those it considered determinative in finalizing the actual PFJ document at the very end of that process. The proposed settlement between the Justice Department and Microsoft ultimately may have been reached on the particular day they

signed it, but it was the product of extensive negotiations between the parties. Given the long history of this case and the many publicly reported efforts to settle it, it is undoubtedly true that throughout the settlement negotiations, various substantive proposals were made, counterproposals were made, and provisions of the settlement were accepted, modified, or dropped. If any materials or documents were determinative of the Justice Department's decisions to propose, counterpropose, accept, modify, or drop various provisions of the settlement, those materials or documents must be disclosed. Such disclosure is required and necessary for the public to evaluate whether the terms of the proposed settlement were based on proper, sufficient, reliable, and well-reasoned grounds such that it is in the public interest to settle on those terms rather than proceed to trial.

28. The Justice Department has failed to disclose the definition or interpretation of "determinative" documents that it applied in concluding that there were no such documents. In one case, *U.S. v. American Bar Association*, 118 F.3d 776 (D.C. Cir. 1997), the Justice Department argued that the term 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." The Justice Department has not stated whether this definition, or some other definition, was the one it applied in making its determination that it need not disclose any documents under this provision of the Tunney Act. Without such disclosure, there is no way to know whether the Justice Department's determination was correct.

29. With respect to this First Cause of Action, Plaintiff requests this Court to declare that the Justice Department is in violation of Section 16(b) of the Tunney Act and that such provision requires the Justice Department to amend the CIS:

(1) to include an explanation of why certain remedies previously pursued by the Justice

Department were abandoned;

(2) to include an explanation of the Justice Department's evaluation and comparison of the remedies that are being pursued in the PFJ and the various alternative remedies that are not; and

(3) to include an explanation of how the PFJ will impact private litigation.

In addition, the Justice Department disclosures must be expanded to include documents and materials that were considered determinative in formulating the substance of the proposed settlement throughout the settlement negotiation process.

SECOND CAUSE OF ACTION
(Declaratory Judgment Against Microsoft)

30. Paragraphs 1-29 are incorporated by reference herein, as if set forth in full.

31. The Tunney Act, 15 U.S.C. § 16(g), provides:

[E]ach 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. [Emphasis added.]

32. Disclosure under Section 16(g) is necessarily very broad. Any contact between the defendant or its agents or employees and any official or employee of the federal government must be disclosed; only true settlement negotiations within a narrowly-defined exception are exempted from such

disclosure.

33. Defendant Microsoft purports in its filing entitled “Defendant Microsoft Corporation’s Description of Written or Oral Communications Concerning the Revised Proposed Final Judgment and Certification of Compliance Under 15 U.S.C. sec. 16(g),” to have complied with this statutory requirement in the following manner:

Excluding only “communications made by counsel of record alone with the Attorney General or employees of the Department of Justice alone,” Microsoft reports that from September 27, 2001 through November 6, 2001, its counsel met on a virtually daily basis with counsel for the U.S. and the plaintiff States. During mediation, the mediator and his colleague were also present in many meetings. And some meetings also included a vice president of Microsoft. Counsel of Microsoft and some Microsoft employees and a technical expert also met with representatives of the U.S. and the plaintiff States.

34. Microsoft’s disclosure is insufficient under the Tunney Act. Although Microsoft discloses that its “counsel” met with Justice Department employees, it has not met the statute’s requirement by providing a “true and complete” description of any and all communications relevant to the proposal. It merely has revealed that communications occurred. Section 16(g) requires the disclosure of all contacts “concerning or relevant to” a proposed settlement.

35. Microsoft’s narrow interpretation of the statutory word “concerning” is improper. In addition, Microsoft reads the words “relevant to” right out of the statute. That this statutory provision is broad is obvious by its very terms; in order for the phrase “relevant to” not to be mere surplusage, it must encompass contacts less directly focused on the settlement than those that “concern[]” that agreement. The public is entitled to know whether a defendant has engaged in lobbying activities, including contacts with the administration and with members of Congress, that touch even tangentially on that settlement.

36. Upon information and belief, plaintiff alleges that certain communications on behalf of Microsoft

between various representatives and agents of Microsoft and officers or employees of the United States have not been disclosed as required by the Tunney Act. These include, but are not limited to, communications with members of Congress and their staffs. All contacts with “any officer or employee of the United States” must be disclosed, including contacts with Members of Congress or staff, Cabinet officials, staff members of executive departments and White House staff.

37. The Tunney Act requires disclosure of any communications with an attorney that occur prior to the time he or she is designated as “Counsel of Record,” even if that attorney later is so designated. Upon information and belief, Microsoft has not disclosed all such communications. For example, there were meetings between one or more attorneys for Microsoft and Assistant Attorney General Charles James to discuss the PFJ on various occasions, which occurred prior to any “Counsel of Record” designations for that attorney or those attorneys. The substance of these meetings has not been disclosed as required by the Tunney Act.

38. Upon information and belief, various representatives and agents of Microsoft, working on its behalf, communicated with Members of Congress and/or their staffs, with respect to preparation of a letter on August 9, 2001, from 88 Members of Congress to the U.S. Attorney General, Microsoft, and a State Attorney General, expressing their support of settling the Microsoft case “at the earliest possible date.” Members of Congress and their staffs are officers or employees of the United States within the meaning of the statute. Any such letter or related communications are relevant to the formulation of the proposed settlement. These communications have not been disclosed as required by the Tunney Act.

39. With respect to this Second Cause of Action, Plaintiff requests this Court to declare that Microsoft is in violation of Section 16(g) of the Tunney Act and that such provision requires Microsoft

to expand its disclosures to describe (and not merely acknowledge) communications between any of its employees or agents and any officers or employees of the United States (unless the communication was solely between an attorney who had been formally designated as “Counsel of Record” at the time of the communication and the Attorney General or Justice Department employees).

**THIRD CAUSE OF ACTION
(Injunction Relief Against Both Defendants)**

40. Paragraphs 1-39 are incorporated by reference herein, as if set forth in full.

41. For the reasons set forth herein, the Court is requested to enjoin the United States of America and Microsoft Corporation from proceeding with their proposed settlement unless and until they fully comply with the Tunney Act pursuant to Orders of this Court. Such compliance includes the amended or expanded disclosures specified above and an appropriate additional period thereafter for the public to comment on the proposed settlement in light of such disclosures.

PRAYER

1. Plaintiff requests the Declaratory Relief specified in the First and Second Causes of Action.
2. Plaintiff requests the Injunctive Relief specified in the Third Cause of Action.
3. Plaintiff request that this Court provide all other appropriate relief it deems just and proper.

Respectfully submitted this ____ day of January, 2002.

By: _____
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