KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Facsimile:
202 879-5200

Elizabeth S. Petrela
To Call Writer Directly:
(202) 879-5170
elizabeth_petrela@dc.kirkland.com

May 5, 2003

VIA COURIER

Mark Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: ***United States of America, Appellee v. Microsoft Corporation, Appellee, Computer & Communications Industry Association (CCIA) and Software & Information Industry Association (SIIA), Appellants*, No. 03-5030.**

Dear Mr. Langer:

Enclosed for filing in the above-referenced matter please find one original and nineteen copies of the Proof Brief of Appellants Computer and Communications Industry Association (CCIA) and Software and Information Industry Association (SIIA).

An electronic (.pdf) copy of the filing has been emailed to your office in accordance with the Court's March 26, 2003, scheduling order.

We will file a separate electronic copy of the brief on CD-ROM on or before May 14, 2003, in accordance with the Court's May 2, 2003 order. Thank you.

Sincerely,

Elizabeth S. Petrela

Enclosures

SCHEDULED FOR ORAL ARGUMENT ON NOVEMBER 4, 2003

No. 03-5030

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

AND

THE SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION,

Appellants,

v.

THE UNITED STATES OF AMERICA

AND

MICROSOFT CORPORATION,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

PROOF BRIEF OF APPELLANTS COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA) AND SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION (SIIA)

Kenneth W. Starr
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Robert H. Bork
1150 17th Street, N.W.
Washington, D.C. 20036

May 5, 2003

Counsel for Appellants

Additional Counsel

Glenn B. Manishin
Stephanie A. Joyce
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Mark S. Kovner
Elizabeth S. Petrela
Steven A. Engel
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for Appellants Computer & Communications Industry Association and the Software & Information Industry Association

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici.* Appellee the United States of America was the plaintiff in the proceedings below. Appellee Microsoft Corporation was the defendant in the proceedings below. Appellants participated as *amicus curiae* in the proceedings below. In addition, the following individuals and entities were permitted to participate as *amicus curiae* in the District Court: SBC Communications, the Project to Promote Competition and Innovation in the Digital Age (ProComp), the States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, the American Antitrust Institute (AAI), the Association for Competitive Technology (ACT), NetAction, Computer Professionals for Social Responsibility (CPSR), Novell, Inc., and Consumers for Computing Choice and Open Platform Working Group. As of the date of this filing, neither these nor any other entities have been granted party status or have otherwise been granted leave to appear before this Court.

Rulings Under Review. This appeal challenges the final order entered by the United States District Court for the District of Columbia (Kollar-Kotelly, J.) on January 11, 2003, denying Appellants' motion to intervene in this case for purposes of appealing the District Court's Final Judgment, entered on November 12, 2002, in the proceedings below. The Final Judgment approves the consent

decree submitted by the parties below and incorporates all of the court's prior rulings in the case, including the District Court's order and opinion dated July 1, 2002, holding that the parties met their procedural obligations under the Tunney Act, 15 U.S.C. § 16.

The District Court's January 11 order denying Appellants' motion for intervention is reported at *United States v. Microsoft Corp.*, No. 98-1232, 2003 WL 262324 (D.D.C. Jan. 11, 2003). The District Court's Final Judgment approving the consent decree is reported at *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002). The District Court's July 1 order and opinion holding that the parties met their procedural obligations under the Tunney Act is reported at *United States v. Microsoft Corp.*, 215 F. Supp. 2d 1 (D.D.C. 2002).

Related Cases. The liability phase of this case was previously reviewed by this Court in the consolidated appeal *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*) (*en banc*). On remand, the case was severed into the case below, *United States v. Microsoft Corp.*, D.D.C. No. 98-1232, and the separate litigation by 21 state attorneys general in *State of New York, et al. v. Microsoft Corp.*, D.D.C. No. 98-1233.

The appeal from the remedy proceedings in *State of New York, et al. v. Microsoft Corp.*, D.D.C. No. 98-1233, is currently before this Court in Nos. 02-

7155 (*State of New York et al. v. Microsoft Corp.*, Commonwealth of Massachusetts, Plaintiff-Appellant) and 02-7156 (*State of New York, et al. v. Microsoft Corp.*, State of West Virginia, Plaintiff-Appellant). These consolidated appeals are closely related to this case because they challenge the District Court's failure to award relief beyond that specified in the consent decree.

Two other related cases are currently pending before the federal courts. The first is the appeal to the United States Court of Appeals for the Fourth Circuit in *Sun Microsystems, Inc. v. Microsoft Corp.*, No. 03-1116. The second is the multi-district litigation currently pending in the United States District Court for the District of Maryland in *In re Microsoft Corporation Antitrust Litigation*, MDL Docket No. 1332. These cases are related to this appeal because they involve, in the context of private antitrust litigation, issues regarding the relief necessary to remedy the antitrust violations affirmed by this Court.

CORPORATE DISCLOSURE STATEMENT

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry. SIIA has approximately 650 members that develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members include software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. SIIA's membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies. A complete list of SIIA's members is publicly available at <http://www.siia.net/glance/members.asp>. SIIA has participated extensively in many phases of this case as *amicus curiae*, including the liability phase in the District Court in which SIIA filed, at Judge Jackson's request, a joint brief with Appellant CCIA regarding the extent of Microsoft's antitrust liability. SIIA is a non-profit organization and no one has stock or ownership interests in it. Consequently, SIIA is neither a privately nor publicly held company. It has no parent organization, and no publicly held company owns 10% or more of SIIA.

The Computer & Communications Industry Association is a trade association that has represented computer technology and telecommunications companies, many of whom directly compete with or are customers of Microsoft, for nearly 30 years. CCIA's member companies, listed on the association's

website at <http://www.ccianet.org/membership.php3>, range from small start-ups to global leaders that operate in all aspects of the high-tech economy. CCIA's members include computer and communications companies, equipment manufacturers, software developers, service providers, resellers, integrators and financial services companies. Like SIIA, CCIA has participated as *amicus curiae* in several phases of this case. CCIA is a non-profit organization and no one has stock or ownership interests in it. Consequently, CCIA is neither a privately nor publicly held company. It has no parent organization, and no publicly held company owns 10% or more of CCIA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

Treatises

GLOSSARY

API	Application programming interface. APIs "exposed" by a computer program, such as an operating system or middleware, that provide other computer programs with means of access to blocks of code that perform particular tasks, such as displaying text on the computer screen. (FF ¶ 2)
CIS	The "Competitive Impact Statement" filed by the DOJ on November 15, 2001, as required by Section 2(b) of the Tunney Act, and reported at 66 Fed. Reg. at 59,452 (Nov. 28, 2001). (R.650)
DOJ	The United States Department of Justice. Also referred to as the "Government" and the "United States".
FF	Findings of fact in the District Court's November 5, 1999 order. *See United States v. Microsoft Corp.,* 84 F. Supp. 2d 9 (D.D.C. 1999).
Final Judgment	The District Court's November 12, 2002, order approving the consent decree. (R. 746)
IAP	Internet Access Provider. A company, like America Online, that provides computer users with access to the Internet. (FF ¶15)
IE	Internet Explorer, Microsoft's Web browser. (FF ¶ 17)
Intel-compatible PC	A PC designed to use a microprocessor in, or compatible with, Intel's 80x86/Pentium microprocessor family. (FF ¶ 3)
Internet	A global electronic network of computers. (FF ¶ 11)
ISV	Independent software vendor. A developer of applications. (FF ¶ 28)
Java	A programming language and related middleware that enable applications written in that language to run on different operating systems. (FF ¶ 73)
JVM	Java Virtual Machine. A program that translates Java bytecode (which a Java compiler has produced from sourcecode written in the Java language) into instructions that the operating system can

	understand. (FF ¶ 73)
Middleware	Software that relies on APIs provided by the operating system on which it runs, but also exposes its own APIs. (FF ¶ 28)
Navigator	Netscape Communications Corporation's Web browser. (FF ¶ 17)
OEM	Original equipment manufacturer. A manufacturer of PCs. (FF ¶10)
OS or Operating System	A software program that controls the allocation and use of computer resources. (FF ¶2)
PC	Personal computer. A digital information processing device designed for use by one person at a time. (FF ¶ 1)
Platform	Software, like an operating system or middleware, that exposes APIs. (FF ¶ 2)
Port, or Porting	Adapting an application program written for one OS to run on a different OS. (FF ¶ 4)
Web	The World Wide Web. A massive collection of digital information resources stored on servers throughout the internet, typically provided in the form of hypertext documents, commonly referred to as "Web pages." (FF ¶ 12)
Web Browser (or Browser)	Software that enables a user to select, retrieve, and perceive resources on the Web. (FF ¶ 16)
Windows	A family of software packages produced by Microsoft, each including an operating system. The principal members of this family for purposes of this case are Windows 95, Windows 98, and successors, which include operating systems for Intel-compatible PCs. (FF ¶ 6-8)

STATEMENT AS TO STATUTES AND REGULATIONS

Pertinent statutes and regulations are bound with this brief as Addendum A.

JURISDICTIONAL STATEMENT

CCIA and SIIA appeal from the District Court's final judgment, entered on January 11, 2003, denying their motion for leave to intervene for purposes of appeal, and from the District Court's final judgment, entered on November 12, 2002, approving the parties' proposed consent decree under the Tunney Act, 15 U.S.C. § 16(b). The District Court had jurisdiction over the proceedings below pursuant to 15 U.S.C. § 4, 28 U.S.C. § 1331, and 15 U.S.C. § 16(b). This Court has jurisdiction under 28 U.S.C. § 1291 to hear this appeal of the District Court's final orders.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in denying Appellants' motion for leave to intervene for purposes of appeal; and

2. Whether the District Court erred in approving the parties' proposed consent decree under the Tunney Act, 15 U.S.C. § 16(b), even though: (1) the decree violates this Court's mandate and settled requirements of antitrust law by failing to remedy Microsoft's violations of the Sherman Act, 15 U.S.C. § 2; and (2) the parties failed to comply fully with the Tunney Act's procedural requirements.

STATEMENT OF THE CASE

The proposed consent decree between the United States and Microsoft should not have been approved because it fails to remedy Microsoft's predatory practices that were ruled illegal by this unanimous *en banc* Court. *See United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001). Refusing to prohibit the practices held unlawful in this very case cannot be "in the public interest." 15 U.S.C. § 16(b).

Perhaps the best example of the many fatal defects in the decree is its failure to remedy Microsoft's illegal commingling of operating system (OS) and middleware code, the method by which Microsoft bolted its Internet Explorer browser to its monopoly Windows operating system in order to preserve that monopoly. The decree does nothing to constrain the commingling of any middleware and OS code. To the contrary, it permits Microsoft to determine "in its sole discretion" what software constitutes Windows, which means not only that Microsoft may commingle code without restraint but may withhold critical programming interfaces from actual or potential rivals. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 166 (D.D.C. 2002) (R.741). Had this decree been in effect in 1995, it would not have prohibited Microsoft's proven antitrust violations against Netscape and Java. *See Microsoft,* 253 F.3d at 50-79. That is indefensible.

As the District Court correctly stated, in order to unfetter a market from anticompetitive conduct, an antitrust decree must eliminate "practices likely to result in monopolization in the future." *Microsoft*, 231 F. Supp. 2d 144, 154 (D.D.C. 2002) (quoting *Microsoft*, 253 F.3d 34, 103 (D.C. Cir. 2001) (*per curiam*) (*en banc*)). Yet the court approved a consent decree that neither cures what has been done illegally in the past nor prevents illegal conduct in the future.

In approving the settlement, the District Court held that this Court "appears" to have adopted a test of the "proportionality between the severity of the remedy and the strength of the evidence of the causal connection." *Microsoft*, 231 F. Supp. 2d at 164. This Court's discussion of causation concerned the availability of structural relief. *See Microsoft*, 253 F.3d at 80. The District Court transformed that discussion into a general law for all relief, including conduct remedies. *See Microsoft*, 231 F. Supp. 2d at 164. That defies this Court's ruling. *See infra* at pp. 24-25. If the District Court's causation standard were correct, a monopolist could always strangle a new competitor in its crib and then claim immunity because no one could possibly prove that absent the strangulation, the nascent competitor would in fact have succeeded in eroding the defendant's monopoly power. The message sent by such a rule is that monopolists should destroy incipient competition the moment it appears and that antitrust courts will not condemn that predatory tactic.

* * * * *

In February 2001, this Court heard Microsoft's appeal contesting its antitrust liability *en banc* and reached a unanimous conclusion: Microsoft had unlawfully maintained its Windows monopoly through a dozen separate violations of the antitrust laws. *See Microsoft*, 253 F.3d at 50-97. This Court then remanded the case to the District Court to fashion a remedy that "seek[s] to 'unfetter [the] market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Id.* at 103 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)).

Two years later, this case returns to this Court in a profoundly different posture. The DOJ — after years of litigation and what it termed a "terrific victory" on appeal, Tr. 19:2 (3/6/02) (Beck) (R.731) — settled the suit in return for wholly inadequate conduct remedies that fail to carry out this Court's mandate in any respect. The resulting consent decree does not achieve any of the remedial objectives identified by this Court and leaves Microsoft in an even stronger market position than it was when this case began. *Microsoft,* 253 F.3d at 103.

The decree is equally inadequate in constraining Microsoft's future violations of the antitrust laws. Microsoft's negotiations with the Government

produced loopholes the size of triumphal arches through which Microsoft may march undeterred by the antitrust laws. The remedies the decree purports to impose are meaningless because Microsoft may define many of its obligations "in its sole discretion." *Microsoft,* 231 F. Supp. 2d at 166. It comes as no surprise, therefore, that more than a year and a half after the decree went into effect, there has been no meaningful increase in competition in the marketplace. To the contrary, the evidence is that Microsoft has continued to expand its dominance over middleware markets, illegally suppressing the potential emergence of new platform threats.

Congress passed the Tunney Act to prevent consent decrees that deprive the public of the benefits of the antitrust laws. *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995); *United States v. Airline Tariff Pub. Co.*, 836 F. Supp. 9, 11-12 (D.D.C. 1993). In the typical case, a consent decree deprives the public of hypothetical benefits because the Government settles before trial. The consent decree in this case deprives the public of far more than just hypothetical benefits; it deprives the public of actual benefits mandated by this Court. The Government cannot plead uncertainty about its prospects: it has already won. Enacted to "prevent 'judicial rubber stamping' of the Justice Department's proposed decree," the Tunney Act requires that before a federal court may approve a settlement, the court must make an "independent

determination" that the proposed decree would serve "the public interest" by ending the defendant's anticompetitive conduct. *Microsoft*, 56 F.3d at 1458 (quoting S. Rep. No. 298, at 5, 8 (1974)). Because the decree in this case fails to remedy Microsoft's proven antitrust violations, the District Court's decision approving it must be set aside. *See Microsoft*, 253 F.3d at 103; *see also, e.g., Airline Tariff*, 836 F. Supp. at 11-12 (a decree should be approved only if it "meets the requirements for an antitrust remedy").

Concerned about the anticompetitive effects of the District Court's approval of the parties' decree, CCIA and SIIA petitioned the court for leave to intervene for the limited purpose of appealing its ruling. *See* Motion to Intervene at 1 (R.764). CCIA and SIIA emphasized that they are appropriate intervenors because they represent numerous companies adversely affected by Microsoft's proven antitrust violations, including the very companies this Court identified as the primary victims of Microsoft's illegal campaign.[1] *See id.* at 10-11 (citing *Mass Sch. of Law at Andover, Inc. (MSL) v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997)). Ignoring established precedent, the District Court denied the petition on the ground that the court had already found the settlement "in the public interest." *See United States v. Microsoft*, No. 98-1232, 2003 WL 1191451, at *5 (D.D.C. 2003) (R.771).

---

[1] *See Microsoft*, 253 F.3d at 50-78. The associations' complete membership lists are available on the Internet. *See* http://www.ccianet.org/membership.php3; http://www.siia.net/glance/members.asp.

This reasoning is entirely circular and defeats the purpose of the Tunney Act. On the District Court's theory, no one could ever intervene to appeal the approval of a consent decree. That is not the law. *See* 15 U.S.C. § 16(b).

The District Court's denial of intervention should be reversed and, on the merits, the consent decree should be vacated and the case remanded for the entry of a proper decree.

STATEMENT OF FACTS

A. Background.

This Court, sitting *en banc*, unanimously affirmed the District Court's central holding that Microsoft had maintained its Windows monopoly in violation of Section 2 of the Sherman Act. *See Microsoft*, 253 F.3d at 59-78.[2] In remanding the case, this Court made clear that an effective remedial decree "must seek to unfetter [the] market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that

---

[2] The Court reversed the District Court's determination that some of Microsoft's other business practices also violated Section 2, and reversed the District Court's conclusion that Microsoft's unlawful maintenance of its operating systems monopoly doubled as an illegal attempt to monopolize the market for web browsers. *See Microsoft*, 253 F.3d at 46, 50-84. The Court then vacated and remanded for further legal analysis the District Court's holding that Microsoft unlawfully tied its web browser to Windows. *See id.* at 94. Finally, because it had narrowed the District Court's conclusions on liability and found procedural defects in the remedy proceedings below, the Court vacated and remanded the District Court's order mandating Microsoft's divestiture. *See id.* at 103-117.

there remain no practices likely to result in monopolization in the future." *Id.* at 103 (quotation marks and citations omitted). The Court faulted the District Court for failing to hold an evidentiary hearing on these issues or otherwise to explain how its divestiture remedy served these goals. *See id.*

B. District Court Proceedings on Remand.

On remand, the consolidated cases were reassigned to Judge Colleen Kollar-Kotelly, who ordered the parties to file a Joint Status Report identifying the issues that remained for resolution. *See* Order at 2 (8/28/01) (R.621). The DOJ informed Microsoft that it would no longer pursue either its Section 1 tying claim or its request for a structural remedy for Microsoft's established antitrust violations. *See* Joint Status Report at 2 (9/20/01) (R.628). Shortly after receiving the parties' proposed trial schedule, the court ordered the parties to "enter into intensive settlement negotiations." *Microsoft*, 231 F. Supp. 2d at 150. The court's order, dated September 28, 2001, stated that: "In light of the recent tragic events affecting our nation, this court regards the benefit which will be derived from a quick resolution of these cases as increasingly significant . . . . The court cannot emphasize too strongly the importance of making these efforts to settle the cases and resolve the parties' differences in this time of rapid national change." Order at 1-2 (9/28/01) (R.634). The court did not explain how the merits of the issues here were affected by the attacks of September 11 and the subsequent "time of rapid

national change." *Id.* Little more than a month later, the United States and Microsoft announced that they had agreed on a Revised Proposed Final Judgment. *See* Status Report (11/6/01) (R.646); Joint Stipulation (11/6/01) (R.647).[3]

C. The DOJ's Competitive Impact Statement.

On November 15, 2001, the United States filed its "competitive impact statement" ("CIS") describing the proposed settlement as required by Section 2(b) of the Tunney Act. *See* Competitive Impact Statement (11/15/01) (R.650); 15 U.S.C. § 16(b). The CIS briefly surveyed the litigation efforts preceding negotiation of the consent decree but failed to provide other information required by the statute. *See* CIS at 1-9 (R.650); 15 U.S.C. § 16(b)(1)-(6). The CIS did not identify, for example, the "unusual circumstances giving rise to [the decree]," 15 U.S.C. § 16(b)(3), or the "materials and documents [that the DOJ] considered determinative in formulating [the settlement] proposal," *id.* § 16(b). Nor did it supply the requisite "evaluation" of proposed alternatives to the decree's remedial provisions. *Id.* § 16(b)(6); *see* CIS at 5-9 (R.650).

---

[3] Following the liability trial in the District Court, the United States had sought and obtained interim conduct restrictions to prevent Microsoft from engaging in anticompetitive conduct in the months preceding its divestiture. *See United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000) (final judgment imposing divestiture). Acknowledging the remedial problem created by its abandonment of structural relief following remand, the DOJ promised to offer in compensation strengthened conduct relief modeled upon the interim "conduct-related provisions" previously fashioned by the District Court. Joint Status Report at 2 (9/20/01) (R.628).

Microsoft's Disclosure of Its Contacts With the Government. Approximately two weeks after the DOJ published the CIS, Microsoft, pursuant to Section 2(g) of the Tunney Act, filed a description of its communications with the United States regarding the proposed settlement. *See* Msft. § 2(g) Disc. Stmt. (12/10/01) (R.652). Section 2(g) requires a "true and complete" description of "any and all written or oral communications" by or on a defendant's behalf with "any officer or employee of the United States concerning or relevant to" a proposed consent decree. 15 U.S.C. § 16(g). Only communications between "counsel of record alone" and "employees of the Department of Justice alone" are excluded from this broad disclosure obligation. *Id.*

At the time Microsoft filed its disclosure statement, the Government had been pursuing antitrust litigation against Microsoft for six years and Microsoft had not only engaged in extensive settlement negotiations with the DOJ, *see Microsoft,* 253 F.3d at 47-48, but since 1998 had engaged in an intense lobbying campaign to end the federal antitrust litigation against it.[4] Yet the Section 2(g) disclosure that Microsoft filed on December 10, 2001 was: (1) limited to a roughly two-month

---

[4] *See, e.g.*, Ian Hopper, *Microsoft Lobbied Congress Over Case,* SAN JOSE MERCURY NEWS, Jan. 11, 2002, at 3C; Rajiv Chandrasekaran & John Mintz, *Microsoft's Window of Influence; Intensive Lobbying Aims to Neutralize Antitrust Efforts*, WASH. POST, May 7, 1999, at A01; James V. Grimaldi & Jay Greene, *Microsoft Trial: Company Hard At Work Outside the Courtroom,* SEATTLE TIMES, Feb. 17, 1999, at A1; *Microsoft's Political Donation in Question; South Carolina GOP Says Decision to Quit Lawsuit Coincidental*, CHI. TRIB., Dec. 25, 1998, at 3.

period that began on September 28, 2001; and (2) disclosed "in very general terms" only "two communications by or on behalf of Microsoft with any officer or employee of the United States." *Microsoft*, 215 F. Supp. 2d at 19 (citing Msft. § 2(g) Disc. Stmt. (12/10/01) (R.652)).

At the March 6, 2002, hearing on the proposed settlement, the District Court "inquired as to the time period covered by Microsoft's disclosure" and Microsoft responded by "opt[ing] to supplement its December 10, 2001, [filing] to include relevant communications during the period commencing with the issuance of [this Court's] mandate on August 24, 2001." *Id.* (citing Msft. Supp. § 2(g) Disc. Stmt. (3/20/02) (R.732)). This amendment resulted in the disclosure of only one additional "communication." *Id.* (citing Msft. Supp. Disc. at 1 (3/20/02) (R.732)).

D. Publication of, and Comment On, the Proposed Decree.

On November 28, 2001, the United States published the CIS and the RPFJ for comment in the Federal Register. *See* Notice of Filing (R.651); 66 Fed. Reg. at 59,452 (Nov. 28, 2001). The response from the public was overwhelming. The DOJ "received 32,392 comments on the proposed final judgment and provided the final text of these comments to the Court on February 28, 2002." *Microsoft*, 215 F. Supp. 2d at 151.

Appellants' comments, supported by affidavits from renowned economists including Nobel laureate Joseph Stiegliz, set forth criticisms of the proposed

settlement echoed in many other submissions.[5] These filings identified fundamental legal and technical flaws in the decree's treatment of various issues, notably:

- *Illegal Commingling of Middleware Applications with the Windows OS.* The vast majority of comments identified the decree's failure to address the illegal commingling of OS and middleware code as a prime example of the settlement's inability to remedy Microsoft's Section 2 violations. *See, e.g.*, CCIA Comments at 45-54; AOL Comments at 17-24; AAI Comments at 13-18.

- *API and Communications Protocol Disclosures.* The comments uniformly concluded that these provisions were so ambiguous or inadequate that they were competitively meaningless. *See, e.g.*, ProComp Comments at 36-55; SIIA Comments at 25-36.

- *Icon-Focused OEM Flexibility.* These provisions were similarly criticized as ineffective because they do not prevent Microsoft from illegally ensuring that its own middleware code and applications will be present on, and invoked by, every Windows PC. *See, e.g.*, CCIA Comments at 44-59; SBC Comments at 54-60.

- *Microsoft's Suppression of Netscape and Java.* The decree's remedial provisions were criticized for failing to deprive Microsoft of the "fruits" of its illegal conduct by restoring the competitive environment that Microsoft destroyed in the course of its illegal campaign against Netscape and Java. *See, e.g.*, ProComp Comments at 25-33; SBC Comments at 26-28; Litan/Noll/Nordhaus Comments at 40-47.

- *Oversight and Enforcement.* Public comments on the settlement also strongly criticized the decree for (1) vesting oversight of the decree with a technical committee that was neither independent nor qualified to make legal determinations; and (2) severely limiting public disclosure of compliance reports and the Committee's enforcement

[5] The Appellants' Tunney Act submissions, along with those of other commentators, were filed with the District Court on CD-ROM. *See* Notice of Filing (R.709).