ORAL ARGUMENT SCHEDULED FOR OCTOBER 20, 1998

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

Nos. 98-5399, -5400 (Consolidated)

MICROSOFT CORPORATION,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

MICROSOFT CORPORATION,
Defendant-Counterclaim Plaintiff-Appellant,

v.

STATE OF NEW YORK, *ex rel*
Attorney General DENNIS C. VACCO, *et al.*,
Plaintiffs-Counterclaim Defendants-Appellees,

THE NEW YORK TIMES COMPANY, *et al.*,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties and intervenors appearing before the district court and in this Court are listed in the brief for Appellant Microsoft Corporation ("Microsoft").

B. Ruling Under Review

The description of the ruling under review appears in the brief for the Intervenors.

C. Related Cases

This case (although not the present appeal) is related to United States v. Microsoft Corp., No. 94-1564 (D.D.C.), which is described in Microsoft's brief.

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TABLE OF AUTHORITIES

Statutes and Rules

Other

GLOSSARY

ACPA	Antitrust Civil Process Act, 15 U.S.C. 1311 et seq.
CID	Civil Investigative Demand
Intrv. Br.	Brief For The Intervenors
JA	Joint Appendix
MS Br.	Brief for Appellant Microsoft Corporation
Order	Order entered by the District Court on August 11, 1998.
U.S. Stay Op.	Opposition of the United States of America to Appellant Microsoft Corporation's Motion for a Stay Pending Appeal (Aug. 14, 1998)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellant Microsoft's brief accurately sets forth the basis for subject matter jurisdiction in the district court. The United States further agrees with Microsoft's conclusion that, in the

particular circumstances presented by this case, the collateral order doctrine applies and, therefore, this Court has jurisdiction pursuant to 28 U.S.C. 1291.

Entry of a stay pending appeal by this Court did not moot this appeal. Depositions have been proceeding under the terms of the original Protective Order, which excludes the public, and will likely be concluded before this appeal is heard. But, as the Intervenors explain (Brief for Intervenors ("Intrv. Br.") at 2), affirmance of the decision below would allow them to obtain appropriately edited versions of the deposition videotapes and transcripts. Although this may not be a "'fully satisfactory'" vindication of Intervenors' rights under 15 U.S.C. 30, "the availability of a 'partial remedy'" is "'sufficient to prevent [a] case from being moot.'" Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam) (quoting Church of Scientology of California v. United States, 506 U.S. 9, 13 (1992) (alteration in original)).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly conclude that 15 U.S.C. 30 confers upon the public the right to attend the depositions at issue in this case as long as the public's attendance is consistent with the court's preserving the integrity of its proceedings and preventing significant harm from the improper public disclosure of confidential information?

2. Does Federal Rule of Civil Procedure 26, through The Rules Enabling Act, 28 U.S.C. 2072, effect a pro tanto amendment of 15 U.S.C. 30?

STATUTES

The text of 15 U.S.C. 1312, an applicable statute not set forth in Microsoft's brief, appears in the Intervenors' brief.

STATEMENT OF THE CASE

1. On May 18, 1998, the United States commenced an action charging Microsoft with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2. The Complaint alleged, among other things, that Microsoft has engaged, and continues to engage, in a broad course of conduct that improperly maintains Microsoft's monopoly in desktop operating systems and unlawfully restrains trade. The same day, twenty State Attorneys General, joined by the District of Columbia, filed a closely related suit. Plaintiffs in both cases filed motions for preliminary injunctions. On May 22, 1998, the court consolidated the actions, consolidated the hearing on the plaintiffs' motions for preliminary relief with the trial on the merits, and set a September 8, 1998, trial date (JA 222-23). As is customary in antitrust actions brought by the United States, the parties negotiated a protective order to govern certain aspects of discovery in the expedited action; the court entered the stipulated Protective Order on May 27, 1998 (JA 236).

The parties did not discuss the Publicity in Taking Evidence Act ("Act"), 15 U.S.C. 30, in formulating the Protective Order. The Act has seldom been invoked over the years, and no third party had at that point sought to avail itself of the statute. A number of news organizations had moved to intervene for the purpose, among other things, "of enforcing the public's right of access" to certain documents filed under seal (JA 161, 224, 231, 290). Although the news organizations (Intervenors here) indicated that, if permitted to intervene, they might "move for an order enforcing the public right to access . . . to these proceedings generally" (JA 161, 226, 231), they neither invoked the Publicity in Taking Evidence Act at that time nor sought to attend any depositions in the matter.

The parties commenced expedited discovery, and all parties noticed a number of depositions. These depositions are not, as Microsoft contends, mere "discovery depositions" that cannot be "a substitute for live trial testimony" (Brief for Appellant Microsoft ("MS Br.") at 8). To the contrary, the district court ruled that in certain circumstances deposition testimony may supplement the in-court presentation, which the court limited to "between 6 and 12 live witnesses" (JA 326, 400-02, 411-12, 476-79; see also JA 592).[1]

2. Among the depositions noticed by the United States were those of several Microsoft employees, including Microsoft Chairman and CEO William Gates III. When Microsoft refused to make all of the requested individuals available for depositions and sought to limit Mr. Gates' availability to a single 8-hour period, the United States filed a motion to compel (JA 386, 391, 395-97). The district court granted that motion at a hearing on August 6, 1998. During the hearing, which was open to the public, it was revealed that Mr. Gates' deposition would commence on August 12, 1998, and that other Microsoft personnel would also be deposed in the near future (JA 461-63). Four days later, the Intervenors filed a motion to enforce 15 U.S.C. 30. The Intervenors requested, among other things, an order "admit[ting] the public to all depositions taken in this action, including, particularly, the deposition of Bill Gates" (JA 489).

The district court held a hearing on the motion the next day, August 11, 1998. The judge observed that he did not "think there is any question" that 15 U.S.C. 30 permits the public some access to the depositions in this matter (JA 537). The court thus granted the Intervenors' motion

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[1]The court later clarified that, in addition to 12 witnesses allotted to each side for its case-in-chief, each side also may call up to 2 "rebuttal or surrebuttal witnesses after the close of defendant's case-in-chief" (JA 476, 480).

in part, ordering "that intervenors and all other members of the public shall be admitted to all depositions to be taken henceforth in this action, including the deposition of Williams Gates III" (JA 560).

The district court's Order did not, as Microsoft asserts, "provide[] the public with an absolute right to attend" the depositions (MS Br. at 4). Rather, the court allowed public access only "to the extent [such attendance is] consistent with public safety and order" (JA 560). Moreover, the court stayed further depositions pending the parties' formulation of a protocol that "protects the interests of the parties and of third-party deponents in preventing unnecessary disclosure of trade secrets or other confidential information" (JA 560-61). See JA 561 (citing United States v. United Fruit Co., 410 F.2d 553 (5th Cir. 1969); and United States v. IBM Corp., 67 F.R.D. 40 (S.D.N.Y. 1975)).

3. Microsoft immediately moved for a stay of the August 11 Order. On August 12, 1998, the district court denied Microsoft's motion. Microsoft promptly filed a notice of appeal and moved this Court for a stay pending appeal. On August 19, 1998, the Court granted Microsoft's motion. Depositions resumed thereafter, pursuant to the terms of the original Protective Order, which does not provide for public access. Trial is scheduled to commence on October 15, 1998.

SUMMARY OF ARGUMENT

Although the United States is concerned that the Publicity in Taking Evidence Act, 15 U.S.C. 30, in certain circumstances may interfere with prompt and orderly discovery, we believe that the district court properly construed and applied the Act here.

1. The Publicity in Taking Evidence Act expressly provides that "depositions" taken for

use in any government equity suit brought under the Sherman Act "shall be open to the public as freely as are trials in open court." 15 U.S.C. 30. It appears from the legislative history that Congress understood "deposition" to be a general term denoting the taking of testimony during which, although objections might be raised, "the witness is bound to answer." 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (statement of Rep. Kahn), reprinted in 8 The Legislative History of the Federal Antitrust Laws and Related Statutes 6404 (Earl W. Kintner ed., 1984). Although the principal use of depositions in government antitrust cases in 1913 was to preserve testimony for use at trial, there is no persuasive evidence that Congress intended to limit the Act's reach to depositions taken solely for that specific purpose.

Thus, the only case generating reported decisions in which a court was called upon to apply 15 U.S.C. 30 to depositions in a government antitrust case applied the statute to modern discovery depositions. See United States v. IBM Corp., 67 F.R.D. 40, 42-46 (S.D.N.Y. 1975); United States v. IBM Corp., 62 F.R.D. 526, 528-29 & n.2 (S.D.N.Y. 1974). Other courts, including the Supreme Court, consistently have indicated in dictum that the Act applies. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958). Congress also appears to have read the statute to apply to "discovery" depositions because it expressly exempted pre-complaint (so-called CID) depositions from 15 U.S.C. 30's requirements in the 1976 amendments to the Antitrust Civil Process Act, 15 U.S.C. 1311 et seq. Such an exemption would have been unnecessary if 15 U.S.C. 30 applied only to depositions taken for the purpose of preserving trial testimony.

2. Although the effect of The Rules Enabling Act, 28 U.S.C. 2072, on the Publicity in

Taking Evidence Act is a closer question, we believe that Federal Rule of Civil Procedure 26 does not conflict with, and therefore does not effect a pro tanto repeal of, 15 U.S.C. 30. Rule 26(c)(5) does not categorically exclude the public from depositions; rather, it permits a court to exclude the public from a deposition for "good cause." See Avirgan v. Hull, 118 F.R.D. 257, 261-62 (D.D.C. 1987). The Rules nowhere define "good cause," and it is settled that good cause is to be defined in light of the nature of the particular interests in question. As the district court in IBM and the district court below properly concluded, 15 U.S.C. 30 permits the court to exclude the public from depositions to the extent necessary to preserve the integrity of its proceedings and to prevent the improper revelation of sensitive and confidential information. Thus, Rule 26(c)(5) and Rule 15 U.S.C. 30 may be harmonized by, in determining whether there is "good cause" for a protective order, taking into account the specific congressional mandate to allow public access in government antitrust suits unless that access threatens the integrity of the proceedings or legitimate confidentiality interests.

Accordingly, the district court in this case acted appropriately in directing the parties and Intervenors to attempt to work out a protocol that permits the public to attend depositions yet at the same time protects legitimate confidentiality interests and preserves the integrity of the court's proceedings.

ARGUMENT

The United States has concerns about the Publicity in Taking Evidence Act's singling out of government antitrust cases for a special public access rule. Indeed, the Department of Justice recommended to Congress last year that the Act be repealed -- a recommendation on which

Congress did not act. Notwithstanding the United States' policy concerns, we cannot agree with Microsoft's contention that the Act as it stands does not apply to depositions in this case.

I. The Publicity In Taking Evidence Act, 15 U.S.C. 30, Applies To The Depositions At Issue In This Case

1. The Intervenors persuasively explain why the plain and ordinary meaning of the word "deposition" encompasses "discovery" depositions (Intrv. Br. at 14-17). Microsoft's principal contention is that the term must be given a narrower meaning, and restricted to depositions used in lieu of live testimony, because that was all Congress had in mind when it enacted the statute. Microsoft bases this argument on Congress's expressed intention in enacting 15 U.S.C. 30 to reverse the decision in United States v. United Shoe Machinery Co., 198 F. 870 (D. Mass. 1912). In United Shoe, the court refused to permit the public access to pretrial depositions in a Sherman Act case brought by the government because, even though the depositions at issue there were to be used in lieu of live testimony, such depositions are "in no proper sense a trial or a part of a judicial trial," id. at 874, and the public had only a right to attend the trial itself. See id. at 872-74. In promulgating 15 U.S.C. 30, Microsoft asserts, "Congress rejected" "the general distinction between the taking of evidence and the trial itself and concluded that the proceedings before the examiner in United Shoe should have been open to the public" because "there was no subsequent public evidentiary hearing or trial" (MS Br. at 17-18). Therefore, Microsoft reasons (MS Br. at 18-19), 15 U.S.C. 30 should be restricted to depositions taken in lieu of trial testimony by a "traveling court," as they were in United Shoe.

Microsoft draws the wrong lesson from Congress's legislative reversal of United Shoe. Congress did not overturn United Shoe because the deposition testimony at issue there would not

subsequently be made public (MS Br. at 18). To the contrary, Congress understood that, even if used in lieu of live witnesses, such testimony routinely was made public when the court ruled on objections and considered the merits.[2] Nor did Congress deem pretrial depositions in government Sherman Act cases effectively part of "the trial." To the contrary, Congress recognized that the court in United Shoe correctly characterized such depositions as pretrial proceedings.[3] Rather, in passing 15 U.S.C. 30, Congress intended to extend a public right of access to pretrial depositions, a statutory right that had not existed before. There is no evidence that Congress intended to restrict that right of access to pretrial depositions depending on the use to which pretrial depositions were put.[4]

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[2]See 49 Cong. Rec. 2511, 2513 (Feb. 3, 1913) (remarks of Rep. Norris), reprinted in Kintner, supra, at 6400; 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (remarks of Rep. Kahn) (explaining that depositions, even if used to preserve trial testimony, are eventually made public), reprinted in Kintner, supra, at 6404; Equity R. 67, 210 U.S. 508, 532-33 (1907) ("[T]he court may, at its discretion, permit the whole, or any specific part, of the [deposition] to be adduced orally in open court upon final hearing."). Indeed, the United Shoe court expressly noted that "the public will have" the right "to hear [deposition] testimony" "when [that] testimony is offered," 198 F. at 875, and asserted that "[t]he public interests are fully preserved from the fact that the trial in the present case must be conducted with open doors," id.

[3]See 49 Cong. Rec. 2511, 2512 (Feb. 3, 1913) (remarks of Rep. Norris), reprinted in Kintner, supra, at 6398.

[4]Indeed, that Congress intended 15 U.S.C. 30 to have a broader reach is confirmed by the statute's structure. The Publicity in Taking Evidence Act covers not only "the taking of depositions" but also "hearings before any examiner . . . appointed to take testimony." 15 U.S.C. 30. The "depositions" clause would have no independent operation if, as Microsoft contends, Congress intended to limit 15 U.S.C. 30's right of access to testimony taken by an examiner acting as a "traveling court," a procedure covered by the statute's "hearings before any examiner . . . appointed to take testimony" clause. Indeed, Congress was aware that, because of the Supreme Court's promulgation of new rules of Equity in 1912, see 226 U.S. 629 (1912), Sherman Act cases would be subject to "traveling courts" only in "exceptional" circumstances. See 8 Kintner, supra, at 6377.

Microsoft (MS Br. at 12-13) purports to find such evidence in what it contends was the well-understood meaning of "deposition" in 1913 -- a recording of testimony taken for the purpose of use at trial in lieu of the witness's live testimony. But even in 1913, the term "deposition" more generally referred to the process by which the testimony was taken. See Webster's Revised Unabridged Dictionary 393-94 (1913) (defining deposition as "the written testimony of a witness, taken down in due form of law, and shown to or affirmed by the deponent."); see also Intrv. Br. 14-16. Thus, the Congress that enacted the Publicity in Taking Evidence Act understood a "deposition" to mean "a proceeding preliminary to trial" during which, although objections might be raised (and later ruled upon), "the witness is bound to answer." 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (statement of Rep. Kahn) (emphasis added), reprinted in Kintner, supra, at 6404. Congress may not have foreseen the use of depositions purely as discovery devices; but its understanding of "depositions" applies equally to "discovery" depositions and depositions taken to preserve testimony, and "it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.'" Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 511 (D.C. Cir. 1965) (quoting Benjamin Cardozo, The Nature of the Judicial Process 15 (1921)).

Simply put, the context in which 15 U.S.C. 30 was enacted does not "prove that Congress intended" that the term "deposition" "should be applied only" to the functional equivalent of trial testimony. Patagonia Corp. v. Board of Governors, 517 F.2d 803, 811 (9th Cir. 1975) (emphasis in original). It is not surprising, then, that every court to consider the applicability of the statute to discovery depositions has either assumed or concluded that the statute applies to such

depositions. See Intrv. Br. at 22-24. Nor is it surprising that Congress, in amending the Antitrust Civil Process Act ("ACPA"), found it necessary expressly to exempt discovery (indeed, pre-complaint) depositions taken pursuant to that Act from 15 U.S.C. 30's scope. See U.S. Stay Op. at 8.[5]

2. In any event, under Pretrial Order No. 2, the depositions taken in this case may in certain circumstances be used in place of live testimony (JA 476-79). Thus, even if 15 U.S.C. 30 were given the limited reading Microsoft urges, it would still apply to depositions in this case. To be sure, as Microsoft points out, the district court placed limitations on the use of depositions as substantive evidence. But in light on the court's restrictions on the number of live witnesses, some deposition excerpts likely will be used in the same manner as de bene esse depositions.

Microsoft appears to suggest that, even to the extent that depositions in this case will predictably be offered in lieu of live testimony at trial, the court need not comply with 15 U.S.C. 30 because an open public trial suffices to meet the statute's goals (MS Br. at 20). But Congress specifically rejected the arguments -- advanced by the court in United Shoe -- that making

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[5]Microsoft's contention (MS. Br. at 25 n.8) that Congress's exemption of the ACPA from 15 U.S.C. 30 is inapposite runs counter to settled canons of construction because it would render Congress' reference to 15 U.S.C. 30 in 15 U.S.C. 1312(i)(2) mere surplusage. See, e.g., Bailey v. United States, 516 U.S. 137, 145 (1995). Moreover, the argument rests on the erroneous premise that 15 U.S.C. 30 is restricted by its terms to depositions taken in the course of a "suit in equity." Rather, the statutory language more broadly covers "the taking of depositions of witnesses for use in any suit in equity." 15 U.S.C. 30 (emphasis added). Indeed, it is the very breadth of that language, which otherwise would encompass CID depositions, that explains why Congress exempted CID depositions from 15 U.S.C. in the ACPA. In any event, even if Microsoft were correct, and Congress simply made "explicit" that 15 U.S.C. 30 does not apply to pre-complaint discovery depositions, there would have been no reason to make that "explicit" if, as Microsoft argues, 15 U.S.C. 30 does not apply to "discovery" depositions taken pursuant to the Federal Rules.

deposition testimony publicly available following the court's ruling on objections (the equivalent, Microsoft asserts, of trial testimony) and "the fact that the trial . . . must be conducted with open doors," United Shoe, 198 F. at 875, provided adequate substitutes for the public's attendance at a deposition's taking. See supra note 2. Even if there is much to be said for Microsoft's argument as a matter of policy, doubts about the wisdom of a statute provide no basis for judicial repeal of the law Congress passed. It is "the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 483-84 (1992).

II. Federal Rule of Civil Procedure 26 Does Not Conflict With, And Therefore Does Not Effect A *Pro Tanto* Repeal Of, 15 U.S.C. 30

Microsoft further argues that, to the extent 15 U.S.C. 30 is construed to apply to "discovery" depositions, Federal Rule of Civil Procedure 26(c)(5), through the Rules Enabling Act, 28 U.S.C. 2072, effectively repeals it. This, in our view, is a closer question than the proper construction of 15 U.S.C. 30, but we find Microsoft's argument ultimately unpersuasive.

1. A Federal Rule enacted pursuant to The Rules Enabling Act repeals a preexisting statute only if the Rule and statute are in "irreconcilabl[e]" conflict. Henderson v. United States, 517 U.S. 654, 663 (1996) (applying 28 U.S.C. 2072). If the Publicity in Taking Evidence Act were interpreted to confer an absolute right to attend depositions, and to deny the court any discretion to impose any limitations on that access, there would be such a conflict with the authorization for protective orders in Federal Rule 26. Neither the district court below, nor any other court so far as we are aware, however, has so construed 15 U.S.C. 30. By its terms, the statute authorizes public access only to the extent that the public is granted access to "trials in

open court." 15 U.S.C. 30. And the statutory prohibition on orders barring public access was a response to the decision in the United Shoe case imposing an across the board ban on public access to any deposition without regard to the subject matter of the deposition or other specific circumstances. There is accordingly no reason to believe that Congress intended to deprive the courts of authority to impose specific limitations on public access for good cause in circumstances that would justify in camera proceedings. See United States v. IBM Corp., 67 F.R.D. 40, 43-46 (F.R.D. 1975). Thus, the right of access under 15 U.S.C. 30 is not absolute, but rather is limited by countervailing interests in maintaining the integrity of judicial proceedings and in protecting against disclosure of sensitive information, the release of which would cause immediate, substantial harm. See id. at 46.

Similarly, Rule 26(c)(5) authorizes the entry of protective orders only for "good cause shown." Fed. R. Civ. P 26(c)(5). "Good cause" is nowhere defined in the Rules. Rather, it is settled that "good cause" depends on the particular circumstances of each case. See, e.g., Hines v. Wilkinson, 163 F.R.D. 262, 266 (S.D. Ohio 1995). Indeed, "the concept of 'good cause' implies that a flexible approach to protective orders may be taken, depending upon the nature of the interests sought to be protected and the interests that a protective order would infringe." Id. at 266.

Accordingly, application of Rule 26(c)(5)'s "good cause" standard is fully consistent with application of the Publicity in Taking Evidence Act, which defines an interest to be protected in applying the Rule. As courts have recognized, a protective order under Rule 26(c)(5) -- even one excluding the public entirely from certain depositions -- comports with 15 U.S.C. 30 if the court

finds the limitation necessary to preserve the integrity of its proceedings or otherwise to protect against significant harm stemming from the disclosure of sensitive commercial information. See, e.g., United States v. United Fruit Co., 410 F.2d 553, 555-56 (5th Cir. 1969); United States v. IBM Corp., 67 F.R.D. 40, 42-46 (S.D.N.Y. 1975); United States v. IBM Corp., 82 F.R.D. 183, 185 (S.D.N.Y. 1979).

This reconciliation of the statute and Rule allows the Court to fulfill its obligation "'to give effect to each if [it] can do so while preserving their sense and purpose.'" See MS Br. at 23 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)). See also Morton v. Mancari, 417 U.S. 535, 551 (1974); United States v. Borden Co., 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible . . . .").[6] Microsoft's contention (MS Br. at 22-23) that Rule 26(c)(5) and 15 U.S.C. 30 should be reconciled by restricting the latter's scope to evidentiary proceedings conducted before special masters, by contrast, effectively nullifies the clause of the statute relating to depositions. Under Microsoft's view, the statute applies only to the second enumerated category of proceedings: "hearings before any examiner or special master appointed to take testimony." 15 U.S.C. 30. But courts "are not at liberty to construe any statute so as to deny effect to any part of its language," Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879), where there is no irreconcilable conflict forcing that result. There is no such conflict here.

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[6]The absence of a definition of "good cause" in the Federal Rules distinguishes this case form those cited by Microsoft. See MS Br. at 21-22 (citing cases). In each, a discrete rule sharply conflicted with a contrary rule contained in a preexisting statute. By contrast, the "good cause" standard properly is informed by, and therefore does not conflict with, 15 U.S.C. 30.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's August 11, 1998, Order.

Respectfully submitted.

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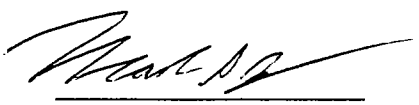

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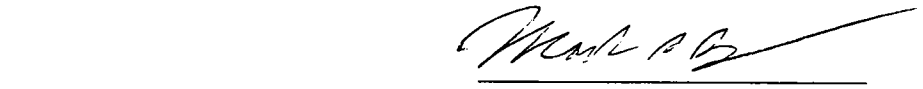
CERTIFICATE PURSUANT TO D.C. CIR. RULE 28(d)(1)

I hereby certify that the foregoing Brief for Appellee United States of America contains no more words than permitted by D.C. Circuit Rule 28(d)(1).



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