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Jeffrey A. Modisett
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January 24, 2002

BY FACSIMILE (202)616-9937 and (202)307-1545

Renata Hesse
Trial Attorney
Suite 1200
Antitrust Division, Department of Justice
601 D Street, NW
Washington, D.C. 20530

Re: ***United States vs. Microsoft Corporation*, Civil Action No. 98-1232 (CKK)**

Dear Ms. Hesse:

Pursuant to Fed. Reg. 59452, Vol. 66, No. 229 (Nov. 28, 2001), attached please find the notarized affidavit of former Senator John V. Tunney of California for submission in the above-captioned case.

Sincerely,

Jeffrey A. Modisett
Partner
Manatt, Phelps & Phillips, LLP

Attachment

40462021.1

AFFIDAVIT OF JOHN V. TUNNEY

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS:
)

JOHN V. TUNNEY, being first duly sworn upon his oath, deposes and says:

1. The following facts are known to me of my own personal knowledge and, if called as a witness, I could and would competently testify thereto.

2. From 1971 to 1977, I represented the State of California as a United States Senator in Congress.

3. While serving as a member of the Judiciary Committee of the United States Senate during the 93rd Congress, I authored that certain bill described below, and acted as the Floor Manager of the legislation during its consideration by the full Senate. That legislation was passed by Congress and signed into law by the President of the United States. That portion of the law to which I refer below is codified as Section 2(g) of the Antitrust Procedures and Penalty Act, 15 U.S.C. §16(g), and is a subsection of the law now commonly referred to as the "Tunney Act." This legislation was signed into law December 21, 1974.

4. I authored the following language, which was included in the final version of the legislation:

> Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each 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.

5. Recently, I was asked to review the Tunney Act and certain public documents on file in the case of the *United States vs. Microsoft Corporation*, Civil Action No. 98-1232 (CKK), in the United States District Court for the District of Columbia. Among the documents I reviewed was one filed by Microsoft Corporation 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)," purportedly to comply with the provision set forth in paragraph 4, above.

6. With respect to this provision of the Antitrust Procedures and Penalties Act, it is clear that Congress intended that there should be full disclosure of all communications by a defendant or on behalf of a defendant with any officer or employee of the United States, except for communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice. It is equally clear that by "government official," Congress meant "members of the Executive, Legislative, and Judicial branches of government". Congress specifically intended to cover communications by officers of a defendant corporation, lawyers of such corporation, lobbyists of such corporation, or anyone else acting on behalf of such corporate defendant. If I had not been satisfied this was the plain meaning of the statute, I, as the principal author of the legislation, would not have pressed the legislation through to final passage. I am satisfied that the clear language of the statute ensures disclosures of the

type described in this paragraph. The legislative history and intent of its author buttress these conclusions.

7. In my opinion, it is essential that all discussions between the defendant corporation and the government (with the specific exception noted in paragraph 6, above) in an antitrust case that might have led to a proposed settlement decree be disclosed. If a defendant corporation did not have to disclose any contacts or communications with the government until such time as there is an actual decree, the very purpose of the disclosure would be defeated. The Tunney Act was never intended to allow for a situation where, in theory, prolific lobbying could be conducted by the defendant prior to the time the presiding judge has ordered settlement negotiations, without public disclosure. If allowed, the Tunney Act would not have reformed the practices utilized in settlement of the ITT case, which in significant fashion demonstrated the need for the legislation in the first instance. The disclosure provisions were designed to help ensure that no defendant can ever achieve through political activities what it cannot obtain through the legal process. Failure to comply with these provisions raises an inference or, at a minimum, an appearance of impropriety.

8. Contrary to some press reports, the Tunney Act was not intended in any way to prevent the Department of Justice from entering into settlements in antitrust suits, especially before trial where litigation risk is generally present. The Act in fact recognized the propriety of such settlements, and merely proscribed procedures to ensure that such settlements were reached on the merits.

9. The legislative history and plain language make clear that Congress intended that a judge make an independent assessment of whether any such settlements are in the public interest, precisely because the policy objective was to ensure that lobbying contacts did not influence the law enforcement function of the Antitrust Division of the Department of Justice. I remain convinced that the policy objective was correct.

10. The language of the Act was clearly drawn and was intended to be inclusive and not exclusive. In my opinion, the filing of "Written or Oral Communications" by Microsoft Corporation, referred to in paragraph , 5, above, is inadequate to satisfy the clear language and intent of the Tunney Act.

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FURTHER, AFFIANT SAYETH NAUGHT.

JOHN N. TUNNEY

SUBSCRIBED AND SWORN to before me
this 22nd day of January, 2002.

Eleanor McKenna
NOTARY PUBLIC in and for said
County and State

ELEANOR McKENNA
Notary Public, State of New York
No. 31-4973011
Qualified in New York County
Commission Expires October 9, 2002

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