IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN BAR ASSOCIATION, Defendant.	)	Civil Action No. 95-1211(CRR)

GOVERNMENT'S OPPOSITION TO MASSACHUSETTS SCHOOL OF LAW'S MOTION TO BE GRANTED INTERVENING-PARTY STATUS FOR PURPOSES OF APPEAL

Massachusetts School of Law's ("MSL") motion should be denied since MSL has not met the standard for permissive intervention and since the Court's entry of the Final Judgment clearly met the standards of the Tunney Act, 15 U.S.C. § 16(b)-(h). Contrary to MSL's claim, the Court plainly understood and correctly applied this Circuit's decision in United States v. Microsoft, 56 F.3rd 1448 (D.C. Cir. 1995), and MSL is not entitled to discovery of the Justice Department's investigatory files as "determinative" documents under the Tunney Act.

Last fall, MSL moved for party intervenor status under both a claim of "right" pursuant to Rule 24(a), Fed.R.Civ.P., and for permissive intervention pursuant to Rule 24(b). The Court's November 1 Memorandum Opinion ruled that MSL was not entitled to intervention under a claim of right and denied permissive intervention, stating that "the usual rule . . . has been that private parties will not be allowed to intervene in government

antitrust litigation," Wright, Miller & Kane, Federal Practice & Procedure 2nd § 1908 at 266 (1986), while noting that allowing MSL to participate as a party "would unduly delay the resolution of this case" (p. 8). MSL was allowed to participate as amicus curiae. Thereafter, MSL burdened the Court and the parties with numerous lengthy pleadings up to and including the instant Motion.[1] MSL has attempted to use this case to further its private litigation against the ABA and permissive intervention will only permit it to further burden this Court, the Court of Appeals, and the parties, and is contrary to the public interest in resolving this litigation.

I. THE COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION TO MSL

MSL has apparently abandoned its earlier claim that it is entitled to intervene as a matter of right under Rule 24(a). No statute confers on MSL the right to intervene and entry of the Final Judgment does not impair or impede MSL's ability to protect

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[1] This Motion was accompanied by a full shipping container of "exhibits" consisting nearly entirely of briefs MSL filed in its pending private litigation against the ABA. In addition, MSL filed a Notice Of Appeal along with this Motion. The Government intends to file today with the Court of Appeals a motion to dismiss MSL's appeal. Professor Moore apparently reads Hobson v. Hansen, 44 F.R.D. 18 (D.D.C. 1968), to hold that the filing of a notice of appeal together with a motion to intervene for purposes of appeal deprives the district court of jurisdiction to decide the motion to intervene. 9 Moore's Federal Practice ¶ 203.06 n.10. That reading, however, overlooks the critical fact that Dr. Hansen, a named defendant in his official capacity, had filed a notice of appeal in that capacity, although he also sought to intervene for purpose of appeal in another capacity. A party's notice of appeal from a final judgment deprives the district court of jurisdiction, but it does not follow that a notice of appeal filed by one who has no right to appeal similarly deprives the court of jurisdiction. Consequently, the Government believes the Court has jurisdiction to rule on MSL's Motion.

its legitimate interests. Nowhere in the instant Motion has MSL revived its claim of a right to intervene.

Allowing MSL permissive intervention will harm, not promote, the public interest by wasting judicial and the parties' resources on possible further proceedings in this Court and then a subsequent meritless appeal. MSL clearly intends to attempt to use intervenor status to seek the discovery, under the guise of "determinative" documents, it has failed to obtain in its two private lawsuits against the defendant.

As the Court noted in its November 1 Memorandum, intervention is rarely granted to private parties in Government antitrust cases. MSL cites only one antitrust case, United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 219 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), in which intervention was granted for appeal purposes. AT&T is in no way comparable to this proceeding.[2] In another Government antitrust case MSL cites approvingly, however, the district court denied the request by a third party for intervention for purposes of appeal. United States v. LTV Corp., 746 F.2d 51, 55 n.12 (D.C. Cir. 1984). As we have represented to the Court earlier and often in response to MSL's previous filings, the Government obtained in the Final Judgment nearly all the relief we sought. Entry of the Final Judgment met the

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[2] AT&T is sui generis. Judge Greene granted intervention to over 100 parties, including numerous state regulatory commissions. United States v. Western Electric Co., 578 F. Supp. 677, 678 (D.D.C. 1983). AT&T, of course, involved the dissolution of the world's largest company and the disruption of numerous federal and state regulatory schemes.

standard set in the Tunney Act as explained by this Circuit in Microsoft. Consequently, permissive intervention for MSL is undesirable and unnecessary.[3]

II. THE MICROSOFT DECISION SETS A CLEAR STANDARD THAT THIS COURT APPLIED

MSL erroneously claims that the Court misunderstood and misapplied Microsoft as barring it "from determining whether the decree pries open the market to competition when the challenge was to whether decree provisions cured violations charged in the complaint rather than to whether they cured violations not charged in the complaint," Memorandum, p. 4 (emphasis in original), relying on one out-of-context exchange between the Court and MSL's counsel. The parties fully (as well as frequently) briefed the Court as to the Microsoft standard and its application to this proceeding, and the Court definitely was not confused in applying the standard.

The clear standard enunciated in Microsoft is whether the relief in the Final Judgment is "within the reaches of the public interest" in remedying the violations charged in the Complaint. While the Court correctly indicated at the June 20 hearing that it could not look at matters not charged in the Complaint

[3] A motion for permissive intervention is addressed to this Court's discretion and the courts of appeal have rarely questioned the exercise of that discretion; "...there apparently is only a single case in which an appellate court has reversed solely because of an abuse of discretion in denying permissive intervention." Wright, Miller & Kane, Federal Practice & Procedure Civil 2d § 1923, p. 516. That case, Crumble v. Blumenthal, 549 F.2d 462 (7th Cir. 1979), is dissimilar to this one. It was a private suit for damages incurred due to defendants' violation of the Civil Rights and Fair Housing Acts. Intervenors claimed damages from the same violation. The trial judge failed to give any reason for denial of permissive intervention.

(Tr. 4), it had no misunderstanding as to the proper standard of review.[4] Indeed, when MSL made the same claim during the June 20 hearing it makes again in this Motion, the Court observed: "I have to give deference to them [the prosecutors], a great deal of deference. They might have struck a better bargain. I doubt if they could have satisfied you" (Tr. 11). This is consistent with the holding in Microsoft that the trial court's function is not to determine whether the proposed settlement "will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest," and that the trial court must afford deference to the prosecutor and reject the settlement only if "it has exceptional confidence" that it is not within the reaches of the public interest. 56 F. 3d at 1460.

MSL further argues that the Court of Appeals made statements in Microsoft that "do not always appear internally consistent" so that "clarification to give guidance to trial courts would be helpful." Memorandum, p. 5. While that statement might conceivably be true with respect to some future Tunney Act proceedings, it has no application to this one. The parties in this case and the Court have shown no confusion as to Microsoft's application here. Consequently, there is no need to seek appellate "clarification" of the applicability of Microsoft to this proceeding and certainly no need to grant MSL intervenor status to pursue such an unnecessary appeal.

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[4] The Court commented to Government counsel that: "Your success in the Court of Appeals in the Microsoft case is the most definitive construct that I know of with respect to the authority of the Court" (Tr. 3).

III. MSL SHOULD NOT BE GRANTED INTERVENOR STATUS TO CONTINUE TO PURSUE DISCOVERY IN THIS PROCEEDING THAT HAS BEEN DENIED IT IN ITS PRIVATE ACTIONS AGAINST THE DEFENDANT

MSL wishes for intervenor status to pursue its belief that the Government and dozens of district courts have misapplied the "determinative" documents requirement in the Tunney Act during the past two decades. MSL is alone among the nearly 50 commenters in this proceeding to claim that the Tunney Act requires the Government to produce additional "documentary and other evidence" that it obtained during its investigation. Not coincidentally, MSL is the only commenter with a pending private antitrust suit against the ABA. MSL should not be granted intervenor status to pursue to the Court of Appeals the discovery denied it here and in its two pending private lawsuits.

As MSL acknowledges, the "determinative" documents issue has been fully briefed previously. MSL also acknowledges that it knows of "no case, during the entire 21 year period of the Tunney Act" (Memorandum, p. 8) in which the Government or any district court has adopted the construction of the Tunney Act MSL has urged in this case and wishes to pursue to the Court of Appeals.[5]

The Tunney Act requires the United States to make available as "determinative" documents material that "the United States

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[5] One court, in United States v. Central Contracting Co., 537 F. Supp. 571 (E.D. Va. 1982), adopted a construction of the "determinative" document provision with which we disagree. Central Contracting involved a civil case that was companion to a criminal prosecution and the court required production of plea agreement-related documents in the criminal case, not the underlying investigatory evidence that MSL seeks here. We previously provided as exhibits to our October 10 Opposition To Intervention documents similar to those produced in Central Contracting.

considered determinative in formulating such [settlement] proposal. . . ." 15 U.S.C. § 16(b). On its face, the statute refers to materials relating to the relief sought in the settlement, and not the underlying evidence that caused the Government to file suit. This construction is consistent with the instruction in Microsoft that the trial court's role is not to inquire into the Government's exercise of prosecutorial discretion, but "only . . . to review the decree itself." 56 F.3d at 1459.

The Tunney Act was adopted in reaction to the settlement of three cases the Government brought against ITT in the early 1970s. Senator Tunney, during the debate on the meaning of the "determinative" documents requirement, expressly stated: "I am thinking here of the so-called Ramsden Memorandum which was important in the ITT case." 119 Cong Rec § 13934 (daily ed. July 18, 1973).[6] The Government's and numerous trial courts' construction of the "determinative" documents requirement is consistent with the language of the Tunney Act and Congressional intent, as stated by Senator Tunney. There is no need to burden the Court of Appeals by granting MSL intervenor status to pursue its novel construction of the Act.

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[6] Ramsden was Richard Ramsden who was retained by the Government to prepare a report on the economic consequences of the proposed settlement of one of the ITT cases. There is nothing analogous to a Ramsden report in this proceeding.

CONCLUSION

MSL should not be granted intervenor status so that it can burden the Court of Appeals with its needless request for clarification of the Microsoft decision or to advance its novel construction of the Tunney Act. Accordingly, the Court should adopt the attached Order denying MSL's Motion.

Dated: July 29, 1996 Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff,	)	Civil Action No. 95-1211(CRR)
v.	)	
AMERICAN BAR ASSOCIATION, Defendant.	)	

ORDER

The Court having considered the motion of *amicus curiae*, the Massachusetts School of Law, to be granted intervenor-party status for purposes of appeal and the oppositions of plaintiff United States of America and defendant American Bar Association, it is, by this Court, this __ day of ______, 1996

ORDERED that the Massachusetts School of Law's Motion To Intervene shall be, and hereby is, DENIED.

Dated: ___________, 1996

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CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

On July 29, 1996, I caused a copy of the Government's Opposition To Massachusetts School of Law's Motion To Be Granted Intervening-Party Status For Purposes Of Appeal to be served by first-class mail upon:

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