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

No. 98-5012

IN RE MICROSOFT CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS

SUPPLEMENTAL BRIEF OF THE UNITED STATES IN OPPOSITION

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GLOSSARY

JA	Joint Appendix in Microsoft Corporation v. United States of America (D.C. Cir. No. 97-5343).
OEM	Original Equipment Manufacturer.
OSR	OEM Service Release.
Pet.	Microsoft Corporation's Petition for a Writ of Mandamus and Motion for Stay of Proceedings.
Reply	Reply of Petitioner Microsoft Corporation in Support of its Petition for a Writ of Mandamus and Motion for Stay of Proceedings.

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SUPPLEMENTAL BRIEF OF THE UNITED STATES IN OPPOSITION

The United States set forth in its prior brief the reasons why the Order of Reference comports with both Article III and Federal Rule of Civil Procedure 53. Microsoft has failed to meet the United States' arguments, and its belated attempt to seek interlocutory review of the district court's refusal to disqualify the special master is meritless. Microsoft's Petition should be denied.

ARGUMENT

II. THE REFERENCE COMPORTS WITH ARTICLE III

Microsoft implicitly concedes that plenary review of the special master's proposed findings avoids any Article III concern, and with good reason. It is settled that a court, over a party's objection, may "refer the fundamental issue[s in the litigation] to a master without running afoul of the Constitution, so long as the judge is prepared to afford de novo review."

Stauble v. Warrob, Inc., 977 F.2d 690, 698 n.13 (1st Cir. 1993). See also e.g., United States v. Raddatz, 447 U.S. 667, 683 & n.11 (1979).

Microsoft therefore argues instead (1) that the Order of Reference does not contemplate plenary review of the master's proposed factual findings and (2) that, even if it did, Rule 53 precludes such review (Reply of Petitioner Microsoft Corporation in Support of its Petition ("Reply") at 2-3). Microsoft's arguments fall wide of the mark.

1. The district court expressly reserved to itself authority to decide "dispositive issues of fact and law." In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991). The reference calls for "propose[d] findings of fact and conclusions of law for consideration by the Court on the issues raised by this case" (Pet. Ex. B. at 1 (emphasis added)). The reference thus contemplates that the court is "free to follow [the master's report] or wholly to ignore it." Mathews v. Webster, 423 U.S. 261, 271 (1976).

Bituminous Coal does not, as Microsoft contends, mandate a different understanding of the reference. Although the reference in Bituminous Coal similarly called for "recommended findings of fact and conclusions of law," 949 F.2d at 1166, that case turned on other facts demonstrating that, regardless what the order said, the district court intended to "defer[]" to the master's findings on "potentially dispositive questions of fact [and] law" instead of "decid[ing them] de novo," id. at 1169. The district judge told the parties that the "special master shall . . . function as a surrogate judge" and that they must "present [their] case to" the special master rather than to the court. Id. at 1167. It was the order of reference "as described by the judge" in conferences with the parties that "str[ode] over the line between allowable assistance to, and impermissible substitution of, the trial judge." Id. at 1168 (emphasis added).

There is no reason to believe that the district court in this case will similarly shirk its responsibilities. To the contrary, in denying Microsoft's motion to revoke the reference, the court explained that the special master simply has "the task of assisting the Court in making findings" (Pet. Ex. F at 1 (emphasis added)). The court thereby confirmed that it, and not the master, will make all pertinent factual findings.

2. Equally meritless is Microsoft's contention (Reply at 2-3) that Rule 53 prevented the court from requesting advisory findings. Rule 53(c), which Microsoft overlooks, expressly provides: "The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts." Fed. R. Civ. P. 53(c). The court accordingly may limit a master's task to preparing an advisory recommendation. Rule 53(e)(2),[1] on which Microsoft relies, sets forth a review standard that applies only when a master is "required to make findings," Fed. R. Civ. P. 53(e)(1) (emphasis added); it is inapplicable when, as here, the reference calls for advisory proposed findings. See Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1454-55 (C.D. Cal. 1984) (holding that "[t]he de novo review provision of the Order of Reference," a "limitation" authorized by Rule 53(c), "supercedes the otherwise applicable standard prescribed by Rule 53(e)(2)"). See generally Linda J. Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L. Rev. 1297, 1331-32 (1975).

Even if Rule 53 were unclear, fundamental canons of construction would compel construing it to permit advisory references. "[I]f there are two possible constructions of the

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[1]Rule 53(e)(2) provides: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. P. 53(e)(2).

Rules, one which would raise a constitutional question and one which would not, the Rules should be construed in a way that will avoid the constitutional issue." McCann v. Flagout Boat Co., 44 F.R.D. 34, 44 (S.D. Tex. 1968); see also e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). If, as Microsoft contends, its construction of Rule 53 (or indeed Microsoft's construction of the Order of Reference) raises a constitutional issue, that is reason "enough" to reject that construction. United States v. Smith, 331 U.S. 469, 475 (1947).

3. In any event, even if the court were required to review the master's proposed findings only for clear error, the reference does not transgress Article III. Article III serves "to safeguard litigants' right to have claims decided before judges who are free from domination by other branches of government." CFTC v. Schor, 478 U.S. 833, 848 (1986) (internal quotations omitted). That right plainly is not threatened by a reference to an adjunct, such as a special master, where "the proceeding is constantly subject to the court's control." Raddatz, 447 U.S. at 682 (internal quotations omitted). Rather, the "only conceivable danger of a 'threat' to [judicial] 'independence'" a reference poses "comes from within, rather than without the judicial department." Id. at 685 (Blackmun, J., concurring). Accordingly, Article III demands only that a reference reserve to the court the "essential attributes of the judicial power." Crowell v. Benson, 285 U.S. 22, 51 (1932); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81 (1982) (plurality opinion).

Reviewing a master's legal conclusions de novo and factual findings for clear error (with the court free to receive further evidence, see Fed. R. Civ. P. 53(e)(2)), satisfies this command. "[T]here is no requirement that, in order to maintain the essential attributes of the judicial power,

all determinations of fact in constitutional courts shall be made by judges." Crowell, 285 U.S. at 51. Thus, in Rogers v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 278 F.2d 268 (D.C. Cir. 1960), this Court upheld an unconsented reference in a civil dispute for "determination and findings [on] all issues of fact in law involved" and anticipated according the master's findings "the force provided in Rule 53(e)(2)." Id. at 270-71 & n.2. Because "the parties should have recourse to the court as to the master's rulings" and the "trial court [will] make[] the final determination of all issues," this Court explained, the reference "did not abdicate the judicial function." Id. at 271-73 (internal quotations omitted). Under Microsoft's reading, the scope of the reference here would be indistinguishable from that upheld in Rogers and comports with Article III. See also Silberman, supra, at 1316 ("To the extent that article III does impose certain requirements on the judicial process, it would seem to be satisfied by appellate, not initial determination, by such constitutional tribunals."); Daniel J. Meltzer, Legislative Courts, Legislative Power, And The Constitution, 65 Ind. L.J. 291, 294 (1990) (same).

Bituminous Coal does not hold otherwise. To the contrary, that decision makes clear that a reference at "the remedy implementation stage" for the purpose of "mak[ing] reports . . . with respect to compliance with an[entered] decree" is not "off limits," 949 F.2d at 1169 (internal quotations omitted); and this case involves determining whether Microsoft's conduct comports with an existing Final Judgment and fashioning appropriate relief. Moreover, as noted above, the district court in Bituminous Coal intended neither to supervise the case nor to conduct adequate Rule 53(e)(2) review. Cf. Burlington Northern R.R. Co. v. Department of Revenue, 934 F.2d 1064, 1072 (9th Cir. 1991) ("rubber stamp[ing]" of master's report violated Article III).

There is no reason to anticipate a similar "abdicat[ion] of judicial responsibility" here. Id.

II. THE DISTRICT COURT'S REFERENCE WAS WELL WITHIN THE SCOPE OF ITS RULE 53 DISCRETION; IN ANY EVENT, MANDAMUS IS INAPPROPRIATE

The district court properly found an "exceptional condition," Fed. R. Civ. P. 53(b), justifying the reference because this case presents "complex issues of cybertechnology and contract interpretation" that "it is in the interest of justice to resolve as expeditiously as possible" (Pet. Ex. B at 1). Microsoft's various objections to the district court's exercise of its discretion, and its contention that mandamus properly is invoked to review an abuse of that discretion, are meritless.

1. Microsoft does not dispute the existence of "exceptional conditions of urgency" (Pet. Ex. B at 1), but it asserts that Professor Lessig lacks any applicable "special expertise" because the case presents "issues of contract interpretation, the ordinary business of trial courts" (Reply Br. at 4). Microsoft's contention is ironic in light of its repeated assertion that the United States' position in this litigation raises technological issues for which "poorly informed lawyers have no vocation" (JA 1377). It is also wrong. A final determination as to whether Microsoft's conduct comports with the Final Judgment may well require applying legal principles to complex technologies, an expertise Professor Lessig's curriculum vitae readily evidences.

For instance, the parties have drawn different inferences from the statement made by a Microsoft negotiator that Section IV(E)(i)'s proviso made "explicit" Microsoft's "right to offer 'merged products' . . . such as Chicago [the code-name for Windows 95]" (JA 761). As the special master recognized in requesting "evidence related to the technology" (Reply Ex. B at 2-4), an evaluation of that statement's significance may require a comparison of Chicago's

technology to that of the predecessor products and a comparison of Microsoft's marketing strategies in 1994 to its current efforts to force OEMs to license Internet Explorer. The district court also was entitled to satisfy itself, based on a full appreciation of the background of the dispute -- including the history of the pertinent technologies -- that the interpretation of Section IV(E)(i) the government advanced was correct.[2]

Indeed, the record presented an apparent disputed technological issue regarding the effect of "disengaging" Internet Explorer 3 from the OEM version of Windows 95 known as OSR 2.0 (JA 1294-95). After the United States referred to a Microsoft advertisement that Internet Explorer 3 "uninstalls easily" (JA 996), Microsoft submitted a sur-reply declaration asserting flatly that the Windows 95 Add/Remove Programs utility contemplated by the advertisement could not be used to "uninstall" Internet Explorer 3 from OSR 2.0 (JA 1198). As it turned out, evidence at the January hearing demonstrated that Microsoft's declaration was wrong and that Internet Explorer 3 can be uninstalled from OSR 2.0 without dire consequences (JA 1365, 1550, 1610-11). But the district court did not know that when it appointed the special master.

2. Because it would be time consuming for the court to acquire the requisite specialized knowledge without the special master's assistance, the reference serves the public interest in the expeditious resolution of this dispute. Although Microsoft contends that the reference, particularly if advisory, will delay resolution of the case (Reply at 3, 5), the district court was entitled to conclude otherwise. The reference, along with the parties' objections to the proposed

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[2]Of course, notwithstanding its determination that such further factual development might be desirable (JA 1294), the court was entitled on the record before it tentatively to reject Microsoft's reading of the decree because that reading rendered Section IV(E)(i) illusory.

findings, will focus the issues, economize the range of specialized knowledge the court must assimilate to resolve the dispute, and thereby facilitate the court's swifter resolution of it. See Mathews v. Webster, 423 U.S. 261, 271 (1976) (magistrate's initial review of an administrative determination "substantially assists the district judge in the performance of his duties" notwithstanding that the judge "may conduct the review in whole or in part anew"); Silberman, supra, at 1332 ("[A]n advisory master's report may be valuable to a court's ultimate determination[].").

Microsoft is wrong in arguing that the need for "speedy resolution of the action" cannot "establish[] an exceptional condition" (Reply at 5). That is true only when the asserted interest in "speedy resolution" is merely a disguised appeal to "calendar congestion" or reflects an aversion to conducting "a lengthy trial." See La Buy v. Howes Leather Co., 352 U.S. 249, 258-59 (1957); In re United States, 816 F.2d 1083, 1089 (6th Cir. 1987). When, as here, the reference facilitates prompt resolution of the action for other reasons, and expedition serves the public interest, an "exceptional condition" may be found. See, e.g., Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1132-33 (2d Cir. 1977); CAB v. Carefree Travel, Inc., 513 F.2d 374, 383 (2d Cir. 1975).

Finally, Microsoft's reliance on the La Buy Court's rejection of a reference based on supposed "'unusual complexity of issues of both fact and law'" (Reply at 4-5 (quoting 352 U.S. at 259)), is misplaced. The La Buy Court simply recognized that "most litigation in the antitrust field is complex" and so an assertion of complexity, without more, would threaten to "make references the rule rather than the exception." 352 U.S. at 258-59. The Court also opined that appointment of a "temporary substitute" in the circumstances presented -- which included that

the judge "could dispose of the litigation with greater dispatch and less effort than anyone else" in view of his "knowledge of the cases at the time of the references" -- would detract from the quality of justice received. Id. at 256, 259. Neither of these consequences is threatened by the reference in this case, which (unlike that in LaBuy) is merely advisory and grounded in conditions beyond ordinary complexity. "This is no La Buy case." Rogers, 278 F.2d at 270-73 (upholding unconsented reference to determine "all issues of fact and law involved in [the] action").

3. In any event, even if the district court erred, there are no "exceptional circumstances amounting to a judicial usurpation of power" that justify issuing an extraordinary writ. Will v. United States, 389 U.S. 90, 95 (1968) (internal quotations omitted). Because the reference in this case comports with Article III, mandamus cannot issue on the ground that the court had "no discretion" (and thus no jurisdiction) to make the reference. Bituminous Coal, 949 F.2d at 1168. Rather, the most Microsoft can claim is that the district court erroneously exercised its discretion. See Cruz v. Hauck, 515 F.2d 322, 330 (5th Cir. 1975) (explaining that Rule 53's "exceptional condition" limitation is not derived from Article III).

In such circumstances, "the writ will ordinarily be denied" if the complaining party possesses "an adequate remedy by appeal or otherwise." National Right to Work Legal Defense v. Richey, 510 F.2d 1239, 1242 (D.C. Cir. 1975) (internal quotations omitted). Because Microsoft can raise its Rule 53 argument in an appeal from a final judgment, Microsoft cannot demonstrate the "special risk of significant irreparable harm," In re Pearson, 990 F.2d 653, 656 n.4 (1st Cir. 1993), that might warrant invoking "the heavy artillery of a prerogative writ," Bituminous Coal, 949 F.2d at 1169. See, e.g., Stauble v. Warrob, Inc., 977 F.2d 690, 693 & n.4

(1st Cir. 1993) (denial of mandamus reflected that the "order of reference, even if improvident, presented no danger of irreparable harm").[3]

Microsoft's contention that "settled law" requires issuing mandamus to correct a mere abuse of discretion (Reply at 4) thus ignores settled limitations on use of the extraordinary writ. La Buy, to which Microsoft points, lends it no assistance. There, the Court upheld the court of appeals' issuance of "supervisory" mandamus to end a district court's "practice" of improperly referring cases to special masters. See 352 U.S. at 258-60; see also In re United States, 872 F.2d 472, 479 (D.C. Cir. 1989) (explicating La Buy); In re United States, 598 F.2d 233, 237 (D.C. Cir. 1979) (same). As this Court has explained, "[n]othing in La Buy suggests that mandamus is any more appropriate, generally, to correct errors relating to the appointment of special masters than to correct other kids of errors." In re Thornburgh, 869 F.2d 1503, 1508 (D.C. Cir. 1989). Obviously, the reference here does not "show any persistent or deliberate disregard of limiting rules such as might bring the case within the ambit of 'supervisory' mandamus." National Right to Work, 510 F.2d at 1243 (citing La Buy).[4]

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[3]As Stauble explains, that a reference might ultimately be judged improper, an error the district court's de novo review may rectify, see, e.g., Thornton v. Jennings, 819 F.2d 153, 154 (6th Cir. 1987) (per curiam), does not comprise such harm. "[T]he general burdensomeness of litigation" is not a "harm sufficient to animate the power of mandamus." In re Pearson, 990 F.2d at 661; accord Schlangenhauf v. Holder, 379 U.S. 104, 110 (1965).

[4]To the extent Prudential Ins. Co. v. United States Gypsum Co., 991 F.2d 1080 (3d Cir. 1993), and In re United States, 816 F.2d 1083 (6th Cir, 1987), relied upon by Microsoft, read La Buy to authorize the routine use of mandamus to challenge references under Rule 53, this Court's decisions foreclose such a misreading of La Buy. Cf. Bituminous Coal, 949 F.2d at 1168 n.4 (recognizing that the limitations on supervisory mandamus are inapplicable when a court exceeds its jurisdiction in violation of Article III).

III. THE DISTRICT COURT PROPERLY REJECTED MICROSOFT'S MOTION TO DISQUALIFY THE SPECIAL MASTER

In its Reply Brief, although not in its Petition, Microsoft argues that "Mandamus is appropriate because the special master's impartiality might reasonably be questioned" (Reply at 5). As the district court found, none of the facts to which Microsoft points, viewed individually or in combination, is "sufficient to raise the appearance of prejudice in the mind of a reasonable person who is familiar with all the facts." United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992) (internal quotations omitted). Because Microsoft cannot meet its heavy burden of demonstrating a clear abuse of discretion, mandamus, even if "the proper vehicle for obtaining review of the district court's" order, should be denied. In re Barry, 946 F.2d 913, 914 (D.C. Cir. 1991) (per curiam) (internal quotations omitted).

1. Microsoft principally relies on an e-mail exchange -- which the United States brought to Microsoft's attention after it had accused Professor Lessig of bias on even less substantial grounds -- between Professor Lessig and Peter Harter, a Netscape employee, in which Professor Lessig inquired whether installing Internet Explorer on his Macintosh personal computer adversely affected the performance of Netscape Navigator (Pet. Ex. G App. A). Microsoft urges that the exchange draws Professor Lessig's impartiality into question because Professor Lessig described Mr. Harter as a "friend" and because Netscape's interests are adverse to Microsoft's in the present action (Reply at 6). But Professor Lessig's sworn declaration (Pet. Ex. G ¶ 3) refutes the insinuation that Professor Lessig and Netscape employees have "the kind of extensive personal contacts which warrant disqualification." Sexson v. Servaas, 830 F. Supp. 475, 481 (S.D. Ind. 1993) (internal quotation omitted) (citing cases).

Nor does Professor Lessig's inquiry regarding Internet Explorer, or his "anticipated tease" from Mr. Harter about "installing a competitor's browser" (Pet. Ex. G ¶ 6), suggest prejudgment or bias. Professor's Lessig's inquiry had "nothing to do" with the issues involved in this proceeding (id. ¶¶ 4-5). As for the "tease," a "reasonable person knowing all the circumstances," In re Cargill, Inc., 66 F.3d 1256, 1260 n.4 (1st Cir. 1995), would not draw the conclusion that Professor Lessig "equat[ed] Microsoft with the devil" (Pet. Ex. E at 13). Cf. Shaw v. Martin, 733 F.2d 304, 309 (4th Cir. 1984) (judge's query whether defendant belonged to "a subversive organization" simply an "ill-advised attempt at humor" that did not warrant disqualification).

2. Microsoft's additional (and earlier) assertion -- that "Professor Lessig's writings and public statements" evidence "apparent bias against Microsoft" (Reply at 6) -- is equally baseless. That Professor Lessig has written on issues involving the Internet is, far from a reason to disqualify him, a compelling reason for him to serve as a special master. "If a judge approached every case completely free of preconceived views concerning the relevant law and policy, we would be inclined not to applaud his impartiality, but to question his qualification to serve as a judge." Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 991 (D.C. Cir. 1984); accord Camacho v. Autoridad de Telefonos de Puetro Rico, 868 F.2d 482, 491 (1st Cir. 1989).

In any event, Professor Lessig's writings show neither "bias against the corporation[n]or a judgment about the merits of this case" (Pet. Ex. G ¶ 12). Professor Lessig's suggestion that leaving the Internet's architecture to "private interests -- whether the relatively open Internet Engineering Task Force or the absolutely closed Microsoft Corporation" -- might pose "a threat

to political freedom" (id. ¶¶ 13-14) (internal quotations omitted) "has no bearing on this case." Camacho, 868 F.2d at 491. And his discussion of Microsoft is unsurprising given its prominent role in the industry. Professor Lessig's "general tenets" plainly "are not so case-specific that they would predetermine his position in this particular case." Rosequist v. Soo Line R.R., 692 F.2d 1107, 1112 (7th Cir. 1982).

Similarly, the remarks Microsoft ascribes to Professor Lessig at a "public forum at Harvard entitled 'Business and the Internet'" (Pet. Ex. E at 13) suggest no basis for recusal. Professor Lessig's "forceful" and "skeptical[]" questioning of forum participants (Pet. Ex. G ¶¶ 8-9 & Att. B) shows no threatened bias or prejudgment. To the contrary, by implying (incorrectly (id. ¶¶ 9-10)) that a summary relating to the forum might have been deliberately suppressed (Pet. Ex. E at 14; id. Ex. A at 5), it is Microsoft which improperly prejudged Professor's Lessig's ability to execute his duties fairly and impartially.

CONCLUSION

For the foregoing reasons, Microsoft's Petition for a Writ of Mandamus should be denied.

Respectfully submitted.

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April 7, 1998

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 1998, I caused the foregoing SUPPLEMENTAL BRIEF OF THE UNITED STATES IN OPPOSITION to be served by hand upon:

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I hereby certify that the foregoing Supplemental Brief of the United States in Opposition contains no more than 3,750 words.

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