

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)**

ADDENDUM “B”

**List of Issues Proposed to be Raised on Appeal
and Applicable Standard of Review for Each Proposed Issue**

	Issue	Standard of Review
1.	<p>Whether appellant’s Motion for Leave to Intervene for the Sole Purpose of Appeal should have been granted, because:</p> <p>a. Appellant would aid the Court in making its public interest determination under 15 U.S.C §16 (the “Tunney Act”);</p> <p>b. Appellant has complied with the Federal Rules of Civil Procedure, because</p> <p style="padding-left: 40px;">(i) he has a claim or defense that shares with the main action a common question of law or fact, and</p> <p style="padding-left: 40px;">(ii) this intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.</p>	<p>See, 15 U.S.C. §16(f)(3). Abuse of discretion. Errors of law or fact may constitute such abuse. <i>U.S. v. Glen Falls Newspapers</i>, 160 F.3d 853 (2nd Cir. 1998); <i>Brennan v. NYC Board of Edu.</i>, 260 F.3d 123, 128 (2nd Cir. 2001); <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1234-1237 (D.C. Cir. 2004). Findings of fact should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts</i>, 373 F.3d at 1207.</p>
2.	<p>Whether the proposed Final Judgment is not in the public interest pursuant to the Tunney Act.</p>	<p>District Court’s findings of fact should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1207 (D.C. Cir. 2004). <i>U.S. ex rel. Modern Electric v. Ideal Electronic Security</i>, 81 F.3d 240, 244 (D.C. Cir. 1996); <i>Salve</i></p>

		<p><i>Regina College v. Russell</i>, 499 U.S. 225, 231-33 (1991). Whether the proposed Final Judgment is in the public interest. 15 U.S.C. §16(e), considering the competitive impact of such judgment and the impact of entry of such judgment upon competition in the relevant market or markets and upon the public generally. In considering whether the Final Judgment is in the public interest, District Court held that “the relevant inquiry is whether the Government established an ample ‘factual foundation for the [its] decisions such that its conclusions regarding the proposed settlement are reasonable.’ (quoting, <i>U.S. v. Keyspan Corp.</i>, 783 F.Supp. 2d 633, 637 (S.D.N.Y. 2011).</p>
<p>3.</p>	<p>Whether the United States failed to comply with the Tunney Act by not adequately disclosing documents the Government considered to be determinative in formulating its proposal.</p>	<p>The District Court’s factual findings should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); the District Court’s conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1207 (D.C. Cir. 2004). Whether the documents are either “smoking guns” or the exculpatory opposite. <i>United States v. Bleznak</i>, 153 F.3d 16, 20 (2d Cir. 1998).</p>

<p>4.</p>	<p>Whether the District Court erred by failing to exercise its powers under the Tunney Act “to take testimony of Government officials or such other expert witnesses as the court may deem appropriate” or to authorize “examination of witnesses or documentary materials,” including any determinative documents, with respect to the DOJ’s investigation of allegations of predatory pricing.</p>	<p>The District Court’s factual findings should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); the District Court’s conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1207 (D.C. Cir. 2004).</p>
<p>5.</p>	<p>Whether the United States failed to comply with the Tunney Act by failing to file with the court and publish in the Federal Register, by the statutory deadline, the public comments it received during the 60-day comment period pursuant to 15 U.S.C. 16(b).</p>	<p>The District Court’s factual findings should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); the District Court’s conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1207 (D.C. Cir. 2004). No Second Circuit appellate decision has been found that specifies a standard of review for Tunney Act procedural determinations. The Ninth Circuit has held that entry should be reversed if the noncompliance went to the essence of Final Judgment or if appellant was prejudiced by the noncompliance. <i>U.S. v. Bechtel Corp.</i>, 648 F.2 660, 664 (9th Cir. 1981).</p>

<p>6.</p>	<p>Whether, pursuant to the Tunney Act, a revised version of the Final Judgment comprised of Sections I, II (A through L, and N through T, only), III, V (E and F only), VI (A only), VII, VIII, IX, X, XI, and XII, is in the public interest.</p>	<p>The District Court's factual findings should be accepted unless clearly erroneous (Fed. Rule Civ. Proc. 52(a)(5)); the District Court's conclusions of law are reviewed <i>de novo</i>. <i>Massachusetts v. Microsoft Corp.</i>, 373 F.3d 1199, 1207 (D.C. Cir. 2004). Whether the proposed Final Judgment is in the public interest. 15 U.S.C. §16(e), considering the competitive impact of such judgment and the impact of entry of such judgment upon competition in the relevant market or markets and upon the public generally.</p>
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