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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable P. Casey Pitts, Judge

UNITED STATES OF AMERICA, Plaintiff, VS. HEWLETT PACKARD ENTERPRISE, CO., et al., Defendants.	)	**NO. C 25-00951 PCP**

San Jose, California
Tuesday, November 18, 2025

TRANSCRIPT OF PROCEEDINGS

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Tuesday - November 18, 2025 **10:01 a.m.**

P R O C E E D I N G S

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THE CLERK: All rise. The United States District Court for the Northern District of California is now in session, the Honorable P. Casey Pitts presiding.

(Pause in proceedings.)

THE CLERK: Calling case number 25-CV-951, United States versus HPE, et al. on today for the motion to intervene and the motion to lift the stay.

Will the parties please approach the podium and state your appearances for the record beginning with Plaintiffs' Counsel.

MR. SU: Good morning, Your Honor, Henry Su from the U.S. Department of Justice antitrust division representing the United States.

THE COURT: Good morning. Maybe we hear from Defendants and then the Movants if that makes sense.

MR. LIVERSIDGE: Good morning, Your Honor, Sam Liversidge from Gibson Dunn for Hewlett Packard Enterprise, and with me are my colleagues Eric Vandevelde and Dan Nowicki; and also here is Jennifer Mellott from the Freshfields firm. Thank you.

THE COURT: Okay. Good morning.

MR. BILLER: Good morning, Your Honor, Arthur Biller on behalf of the Attorney General for the State of Colorado.

We have a couple of other states with us in person. Would Your Honor like if they introduced themselves?

THE COURT: Certainly.

MR. SMITH: Good morning, Your Honor, Tim Smith, Oregon Department of Justice.

THE COURT: Good morning.

MR. WANG: Good morning, Your Honor, Brian Wang from California Department of Justice. With me is Mike Jorgenson as well.

THE COURT: Okay, good morning. And any other appearances for the United States this morning?

MR. SU: Your Honor, with me at counsel table are Jeremy Goldstein and Michael Lepage who are also with the Antitrust Division.

THE COURT: Okay. Good morning.

So, we technically have two motions on the calendar this morning. The motion to the lift -- to lift the stay, I take it, is effectively moot now that the Government has reopened; is that correct?

MR. SU: Yes, Your Honor, that's correct.

THE COURT: Okay. Then I -- is there any disagreement from the Defendants on that question?

(No response.)

MR. LIVERSIDGE: Your Honor, there's no disagreement about lifting the stay. Obviously, we take issue with what

rights the proposed intervenors have and what they should be allowed to do in the case. So, we do oppose their ability to file that motion but not because of a stay.

THE COURT: Right. And as I understood it, I have not yet decided -- I did not put that motion for hearing today since it hasn't been filed and presumably it depends upon status or at least arguably depends upon them achieving party status here. So, under those circumstances, I will lift the stay. There is no longer a stay in place in this action.

And so, I don't think there is a need for a further ruling on that motion this morning; and I don't need to hear from them.

Obviously the focus of the morning is the motion to intervene which has been filed by the States. And so, I will hear from them first as the moving parties, and then I will give both the United States and the Defendants an opportunity to respond.

MR. SU: Thank you, Your Honor.

MR. BILLER: Thank you, Your Honor, Arthur Biller on behalf of the Attorney General for the State of Colorado.

Your Honor, I want to make three sort of overarching points before then moving on to some of the specific legal issues on the intervention.

First of all, not since the Nixon era before the Tunney Act was passed have we seen the kind of improper lobbying that

has been alleged here.

Here is some -- just some of what has been in the public reporting: HPE hired lobbyists with close ties to the administration to lobby high-level officials at the Department of Justice including the then Chief of Staff and the Acting Associate Attorney General. And those individuals reportedly had literal backroom meetings where they hashed out this settlement.

The Chief of Staff then pushed the settlement through over the objection of lawyers up and down the Antitrust Division.

THE COURT: Counsel, I mean, I have read the briefs and I'm well aware of the arguments that have been made and the claims of procedural improprieties and the process by which the settlement in this case was agreed upon.

I guess my question to you is: It seems that in -- that while that may have been a concern that drove adoption of the Tunney Act, that ultimately what Congress created was a structure wherein my job is to determine whether this settlement is in the public interest.

And did not -- I mean, perhaps, there are ways in which the credibility of the Government -- of various assertions about the facts presented about the viability of the settlement and its effect on competition could turn in some way upon the process by which the settlement was agreed upon, but isn't the ultimate focus of this proceeding the settlement and its

relation to the competitive harms that were alleged in the original complaint in this case?

I mean, isn't that really the focus of what I need to do here rather than conduct a sort of broad inquiry into how that settlement came to be?

MR. BILLER: Thank you for that question, Your Honor. And it's both. So, the Tunney Act at the end of the day is a statute that is fundamentally about the rule of law, and the rule of law concerns itself with not just substance but with process.

And the legislative -- both the legislative history and the text of the statute make it very clear that part of the public interest determination is the process by which the settlement was reached.

THE COURT: And where do you see that in the text of the statute? I mean, I know there is a requirement for a certain kind of reporting that exists, and then I know there's some position you've taken that that wasn't satisfied here.

But in terms of the provisions regarding my obligation to evaluate the settlement that's been presented before me, where in the text of the statute is there a sort of a basis for focusing in particular on the process as opposed to the substance?

MR. BILLER: Right. So, I think there are a few places in the statute, Your Honor. The first one is the

Defendants are required to disclose all of their lobbying contacts with the Government with respect to the settlement.

Now, there would be no point in having that kind of a disclosure if the Court couldn't do anything to look further into it.

THE COURT: Unless it is simply a sort of transparency function for the sake of the public and anyone else considering -- considering this -- these issues. You know, it creates a political basis for -- for others who want to oppose; but, you know, it's not clear to me that that necessarily ties into, you know, the categories.

I'm looking at 15 U.S. Code 16(e)(1) which sets forth the specific matters I shall consider in evaluating the settlement, and I'm not sure where in that language the process is part of that analysis.

MR. BILLER: Right. So, in terms of -- those factors in Section (e), I think those support a public interest determination as well -- an evaluation of the process as well, but I do just want to make one other point about this disclosure obligation, which is that if all that disclosure obligation is, is a piece of paper that lists the individuals who talked about a settlement, it really doesn't do anybody much good.

And when you have the kind of red flags about the process that are present here, I don't think that the Tunney Act

envisions that the Court would just turn a blind eye to that disclosure, and that the purpose of that disclosure is for the Court to be able to look into the process and know who the relevant witnesses would be about the process in order to look into it in cases like this where there are allegations of impropriety.

Now, as to the factors that the Court is required to look at, one of the things that the Court is required to examine is the alternative remedies that were actually considered by the Government. That's in (e)(1)(A).

And the Court can only do that if it knows obviously what those alternatives were, which necessarily requires looking into the process and not just looking at sort of the -- you know, the eight corners of the complaint and the settlement.

So, the Court is required to look at what else did the Court consider. And in this case we have, you know, what else the Department of Justice considered in terms of the folks who were trying to evaluate this on the merits. And that's something that the Court should look at because that appears to have been very different than what we ultimately ended up with because of essentially a rotten process.

The Court is also required under Section (e)(1)(B) to consider the impact that approving the settlement would have upon public generally.

And here, I think is where the history of the Tunney Act

and the problems that it was trying to solve really come into play because we have to ask, what impact would it have on the public to approve a settlement that was the product of the kind of undue influence that Congress was so concerned with when they passed the Tunney Act?

They make very clear that they were concerned with the history of the Department of Justice succumbing to undue influence from lobbyists. And their solution to that was to create transparency and empower the Court with tools to look into the process in cases where that's warranted.

THE COURT: I mean, I guess the thing I'm struggling with is that certainly they could have -- I mean, they could have squarely focused on the questions of process in the text of the statute and in the process of approving the settlement. They have seemed to have focused primarily on the elements of the settlement itself rather than the questions of process.

And, you know, the arguments that have been raised by the Government about questions of deliberative process privilege, questions of separation of powers, there are -- you know, it could be that Congress made a decision given those concerns and that -- that squarely having a proceeding that was really focused on the process -- internal processes at the Department of Justice leading to a settlement would have been problematic from that perspective.

I mean, that would be the alternative way of thinking

about what Congress did here, which is that they saw a problem. They also did not want to impose undue stress on the separation of powers and the internal deliberations at the Department of Justice. And they did make a change, you know, that absent this provision it would generally be the case that as a non-class action between the Government and the United -- and the Defendants that it could be settled without my approval; right? I mean, that is a big change in the structure of the way that these things work requiring my approval.

Now, I suppose if it is a consent decree, I would have to sign off on it still; but they ultimately did drastically restrict what would otherwise be the powers of the Government in settling litigation that is being pursued. So, they did make a big change there.

But, I don't know, the argument would be that Congress may have been aware of the concerns about undue interference and internal decision making at the Department of Justice, and it's the reason that they chose this particular model.

MR. BILLER: So, there's a couple of points there that I want to make sure I address, Your Honor.

So, with respect to the separation of powers concern, I think the -- you know, what Congress did was it gives the Court the approval -- the ability to either approve or reject the settlement; right. It can't force the Department of Justice to prosecute a case that it may not want to prosecute.

So, it is basically thumbs up or thumbs down on the consent decree. A couple of cases courts have modified the consent decrees, so that's sort of within the authority as well; but it doesn't interfere with separation of powers for the Court to approve or disapprove of a settlement as being in or not in the public interest.

Another way to look at it, Your Honor, is that the Tunney Act is not a separation of powers issue; but it is an exercise of checks and balances, which is also obviously a fundamental concept of the Constitution. And the Judiciary has the ability to check the Executive Branch.

And what Congress was doing with this statute is provide the Court with an ability to exercise a check on the Executive Branch in the context of these antitrust settlements.

With respect to the deliberative process privilege question, you know, there's -- obviously there's case law about deliberative process privilege. We would be happy to brief this in more detail if we get to that point, Your Honor, but what I will note is that deliberative process privilege, for one thing, does not shield facts; right. It shields the deliberative kind of communications, but it doesn't shield facts.

So, you know, the fact that, you know, a lobbyist met with the DOJ Chief of Staff would not be shielded by deliberative process privilege. What they discussed with each other would

not be shielded by deliberative process privilege.

The fact that the Chief of Staff may have ordered the Antitrust Division to take this settlement and not another settlement is another thing that's a fact and would not be shielded by the deliberative process privilege.

The other thing is that there's a well-established exception --

THE COURT: I mean, I guess that almost seems like a work product issue. I mean, it is -- certainly, when I was in practice, I would have taken the position that any communication from the senior partner working on a case with me as to how we were supposed to pursue the case would be protected -- would be privileged; correct?

MR. BILLER: Well, the question under attorney work product, Your Honor, is whether it gets into the mental impressions of a lawyer, number one.

And, number two, there's also the question of whether the need for that information overcomes the policy behind shielding those kinds of things.

And I think in this case we'd certainly be able to show that the need and the public interest in finding out how this settlement came to be would overcome the policies behind deliberative process privilege and maybe in some instances attorney work product.

But more importantly on the deliberative process privilege

side, there's also an exception for Government misconduct. Courts routinely overcome deliberative process privilege claims when there are allegations of Government misconduct, and that's certainly what we have here with all the public reporting about how this settlement came to be.

THE COURT: Can I ask you -- I mean, separate and apart from the question of process, you know, did the States take the position that the proposed merger poses the substantial threat to competition set forth in the United States' original complaint in this matter?

MR. BILLER: Yes, Your Honor, it does. And, you know, we've obviously -- we have referenced the allegations in the complaint and in the United States pretrial briefing that discuss the anticompetitive harm of this merger; and we have also made arguments about why the remedies in this settlement do not address those harms and how the Department of Justice has failed to explain in its competitive impact statement as well as in the response to public comments that they filed on Friday, about how they failed to explain how these proposed remedies actually remedy any of the harms that they have alleged in this case.

THE COURT: So, just to be clear -- and I think you have said this in your briefs but to be clear -- the States would adopt the original plea -- complaint in this case as their own pleading for purposes of intervention if such a

pleading is required?

MR. BILLER: If we got to that point, Your Honor, yes, we could do that. Obviously, we would need to be able to see some of the evidence that underlies those allegations. But, you know, principally what we are concerned with is, first, removing the taint of a corrupted process from this settlement before we get into the issue of litigating the underlying merger. But as we have expressed, our interest in this case with respect to Rule 24 is that we have an interest in protecting our citizens from an unremedied anticompetitive merger; and that's certainly --

THE COURT: And you would say that that's based on the facts alleged in the original complaint; correct?

MR. BILLER: Yes, Your Honor, as well as what's in the pretrial briefing that we have been able to see that's on the public record.

THE COURT: Okay. So, why don't you explain to me -- I mean, you know, the core issue here seems to me is the question of Rule 24 and how the States satisfy one of the requirements for either mandatory or permissive intervention under Rule 24.

(Pause in proceedings.)

MR. BILLER: Absolutely, Your Honor. So, we have -- we have laid out arguments for basically three ways that we are allowed to intervene in this case. One is intervention of

right, and then there are two methods under permissive intervention that we have argued as well.

First of all, with respect to intervention of right, the States have an interest that would be practically impaired if intervention were denied in this case.

And, as we have said, the standard is a practical one that should be interpreted liberally in favor of intervention.

Courts are clear that it doesn't require absolute certainty that the interest would be impaired, but the point is if the intervenors' rights are threatened, then intervention should be granted to protect --

THE COURT: And what is that interest and what are those rights that you --

MR. BILLER: So, the States are sovereign enforcers of the Federal antitrust laws. And in that role, we have an interest to prevent anticompetitive harm to our citizens. We have an interest -- a sovereign interest in protecting the public from an unremedied anticompetitive merger.

THE COURT: And you could file suit today; correct?

MR. BILLER: We could, Your Honor.

THE COURT: And seek a preliminary injunction barring any further -- now that -- I guess there might have to be some coordination to avoid, you know, conflict between what's going on here and whatever is happening in the case you are in; and we might have some fights about the All Rights Act or the

Anti-Injunction Act, but that's an option that's available to the States; right?

MR. BILLER: It certainly is, Your Honor, but the reason that we are trying to intervene in this case is because this case presents a potential impairment of our interest that we are trying to avoid, and that is that if the -- if this settlement is approved and the divestiture and the licensing of the Juniper source code are sold, that would impair our ability to get complete relief in a separate case. So, if --

THE COURT: The complicated part with that argument, though, is that, you know, essentially the settlement -- and this would all be the Government stepping away from -- the United States Government stepping away from its efforts to block this and, you know, essentially saying we no longer want to be the barrier to this merger happening.

It seems that, you know, that doesn't -- you may have benefited in the past from the fact that the Government brought this action and has been standing in the way of the completion of the merger, but it's a little -- I'm just not sure what rights or interests for purposes of mandatory intervention are implicated by the Government -- United States Government effectively saying, Okay, I know we have put this on ice for a while and now we are no longer going to do so, in the sense that you still -- it doesn't impact your ability to litigate the merits of the merger and its effects on competition, to

seek other relief, you know.

MR. BILLER: Right. So, it would be a different situation if the Government were voluntarily dismissing this case altogether, right, because then we could file our own action; and even though the parties may have closed, we would have the ability to try to unwind that in a separate case.

The issue here is that they are trying to put in motion a remedy that would then impair the remedies that we could seek in a separate action.

So, one of the things that they are doing is they are licensing out the Juniper -- part of the Juniper source code to another competitor; right.

So, if we wanted to unwind this merger in a separate action and have a complete divestiture of Juniper and restore them as an independent competitor in the market, that is impaired now because their source code has now been licensed to one of their competitors. So now, they are no longer the only ones who have that code.

THE COURT: So, but let me -- I mean, on that front is it -- if I were to enter that the order that they have proposed, would -- would you be prohibited from seeking the return of the source code or seeking other -- are there remedies you would be prohibited from pursuing by virtue of the fact that I have signed off on the consent decree here as a legal matter?

MR. BILLER: Well, Your Honor, I -- that's a good question. And, you know, once that license goes out to a competitor and by virtue of court order, they have a perpetual and irrevocable license to that code. The only way to undo that would be to take up an appeal of the order that's entered here. I don't think that another court would have the ability to undo or rewrite what this Court has done.

So, the only place that we could prevent that is in this action. The -- and there may be a similar issue with respect to the divestiture of Instant On, but certainly the license of Juniper source code is the thing that really impairs our interest if we were to stand Juniper back up as an independent competitor.

In addition to that, Your Honor, this is essentially the only court where we can get to the bottom of what happened with this merger; and it is our position that there is a public interest in transparency and in finding out what happened here.

Essentially, Your Honor, the way that this settlement came about based on the public reporting is every American's worst fear of how Government actually works; that the big companies, the big players, they know the right people in Government and they have the power and they can get their deals through.

And maybe in other places, that is how Government works, I don't know. But with respect to Federal antitrust enforcement by the Department of Justice, Congress has made a very clear

determination that that is not how Government is going to work; that when it comes to antitrust enforcement, that's going to be done on the merits and not on the basis of improper lobbying or influence by antitrust violators, who, as Congress pointed out, by their very nature, wield great economic power and political power and have the ability to influence the Government in ways that other players don't necessarily have.

And there is certainly a public interest in finding out what happened here. We, as joint sovereign enforcers of the antitrust laws, have an interest in Federal antitrust enforcement on the merits. Our citizens certainly have an interest in that. And that interest also would be impaired absent intervention because this is the only venue where we can get discovery on that and hold a hearing and find out what happened.

THE COURT: And I think you also have arguments as to the permissive intervention, correct, two other bases?

MR. BILLER: Yes, Your Honor.

So, with respect to permissive intervention under Rule 24(b)(2), this is the provision that allows intervention by a State government officer or agency if a party's claim is based on a statute administered by the officer or agency.

Now, the main issue here in the briefing is basically whether we administer the Clayton Act for purposes of Rule 24. There is a decision that we have cited from the D.C. circuit --

Nuesse versus Camp -- that says permissive intervention for the Government is generally approved when an aspect of the public interest with which he is officially concerned is involved in the litigation.

And we have also pointed to the Wright & Miller treatise, which has, you know, put together a lot of cases on this; and their conclusion is that the whole thrust of the rule is to allow intervention liberally to government agencies and officers speaking -- seeking to speak for the public interest.

And that is certainly what we are seeking to do here. And --

THE COURT: So, I mean, under that view, there is effectively a sort of -- I mean, it is permissive, so there is some discretion involved; but your view is that essentially that the State Attorneys General, who generally represent the public interest and enforce any number of both Federal and State laws, have a sort of basis for intervening in any action that they think involves the public interest?

MR. BILLER: Not necessarily, Your Honor, but I think we certainly meet the requirement in the circumstances of this case because we are -- the States are recognized by Congress as sovereign enforcers of the Federal antitrust laws.

The DOJ and the FTC, for what it's worth, also recognize us as sovereign enforcers. They have a protocol for coordination in merger investigations between the Federal

enforcement agencies and States Attorneys General. That's available on both the DOJ and FTC websites.

And importantly there, the DOJ and the FTC refer to -- make the statement that each Federal and State government entity is fully sovereign and independent; and they recognize our role in merger investigations and lay out how the Federal Government and States can work together on those matters.

THE COURT: And I think that's unquestioned that there's a role as sovereign enforcers. The question is whether this (b)(2) is -- encompasses that kind of role as opposed to -- I mean, on my read of it -- on my first read at least, you can see it as really contemplating circumstances where there may be litigation between private parties, and one of the parties' claims or defenses depends upon, you know, a determination by a State agency, for example, of liability or tagging or something like that. And the rule drafters were thinking, well, in that case if they are going to be litigating the merits of this franchise tax board determination that the franchise tax board should be able to come into the case and help defend its determination and then provide its expertise.

I mean, that seems to be the canonical instance that -- at least the way that it's written, I would think is kind of what was contemplated by the rule drafters when they enacted this provision.

And so, where is it that this other context where, you

know, the idea that there is multiple sovereign enforcers, multiple parties with the right to bring actions under a particular statute, that that means that they are administrators of that statute for purposes of 24(b)?

MR. BILLER: Right. So, Your Honor, I think you make a good point about what the usual case is; that this is something that would allow, you know, Government officials to intervene when there's a statute with which they have a role.

This is certainly an unusual case. I can't -- you know, it's extremely unusual for the States to try to intervene in a case brought by the Federal Government that they did not, you know, bring as co-Plaintiffs; right. Many times States join the Federal Government as co-Plaintiffs.

But the text of the rule, I think, is -- and the purpose of it is about the ability of Government officials to protect the public interest that they have in a statute that may be involved in a case.

And we have got an unusual situation here where the Federal Government is no longer doing that. And so, the States have determined to move to intervene. And I think we meet the purpose of the statute because, again, it's an aspect of the public interest with which we are officially charged. There are certainly a whole host of federal statutes where States are not recognized as sovereign enforcers and, you know, the Federal antitrust laws, the Clayton Act, is something that

stands out because Congress has recognized the role of the States specifically.

So, you know, we have cited 15 U.S.C. Section 15f, for example, where the Department of Justice is required to provide notice to the States when they bring a case that the States may also have a right to bring.

In those circumstances the States can ask the Department of Justice for their investigative file so that we can get the underlying evidence that we might need to make a determination about what we want to do. That's pretty unique in the federal structure.

You know, the -- the House report on the HSR Act notes that States are, you know, in effect an ideal spokesman for the public in antitrust cases because a primary duty of the States is to protect the health and welfare of its citizens and to promote the public interest.

Very recently Congress also further recognized our role by passing the State Antitrust Venue Act. This is the law that basically exempts State -- Federal antitrust claims brought by the States are exempted from the MDL process. So, basically States get their choice of venue just like the Federal Government does.

So, this is a unique area of the law where Congress has decided that the States and the Federal Government basically stand on the same footing. They both represent the public

interest. They both have the ability to enforce these laws. They both have the ability to conduct investigations; share information with each other. And its -- the federalism principle here is a core tenet of Federal antitrust enforcement, and that's why we meet the elements for permissive intervention under that provision.

THE COURT: Okay. And I know you also have an argument under (b)(1) as well; correct?

MR. BILLER: That's right, Your Honor. And this is the one where if there is a common question of law or fact with the action -- and the term "claim" here basically means an interest or remedy that's recognized at law. And, basically, we have a claim here for the same reasons that we have an interest under intervention of right although here obviously it's discretionary by the Court whether to grant it. It is permissive.

I will just note that there is no requirement of a separate lawsuit. The United States kind of hints that there might be, but then they acknowledge that there's not because there are intervention cases where the intervenors have not filed separate lawsuits. So, that's not a requirement.

And a lot of the cases that are cited by HPE on this issue are really inapposite. They -- they involve private parties, not State government enforcers, which I think is an important distinction, as I have laid out; and they tend to involve, you

know, competitors trying to intervene in Government antitrust cases where they don't really share a common question because they may have other interests that they are trying to protect.

(Pause in proceedings.)

MR. BILLER: Unless Your Honor has other questions about intervention, just a couple other quick points I would like to make. One is that, you know, HPE makes an argument that the Department of Justice adequately represents the States' interests and they make this argument that there is a nearly irrebuttable presumption that the Department of Justice represents our interests. I think that's wrong.

A couple of important points here is -- one is the Department of Justice is not making this argument. So, the party that is purported to represent our interest is not claiming that they, in fact, do adequately represent our interests; and that should be conclusive on this question. But there's certainly not an irrebuttable presumption that the Government adequately represents our interests.

There are plenty of cases where -- plenty of Government litigation where intervention has been allowed because courts have recognized that the interest of the Government may diverge from particular parties.

And this is also an area where it is important to note that we are separate sovereigns; and although the Government may represent the American people as a whole, we also represent

our citizens and may have different sovereign interests than they do.

The last thing I will say, Your Honor, is the response that the Department of Justice filed -- the response to the public comments that they filed on Friday, I think further shows the need for intervention in this case and for a thorough review under the Tunney Act.

So, for one thing, as I have mentioned, the response is filled with boilerplate assertions that could be copied and pasted onto any settlement. You know, they say that, you know, there were risks involved with going to trial, so we decided to settle.

You could say that about any case. The question is what are the actual risks that they identified on the merits and how did that inform their decision to take a settlement and how did it inform the decision to accept this settlement as opposed to other alternatives that may have been available on the merits.

But -- and then, you know, they also talk about the divestiture and the license and how they think that it will -- those things will help to restore competition.

Again, that's a real conclusory assertion. There is no economic explanation there about how those remedies are going to aid competition in the future. There's nothing from, you know, their economists talking about how this remedies the harms that he had identified, you know, in his expert report.

It's -- it's just -- it's purely conclusory.

And they also, I think, very importantly make this assertion -- which they have also made in the briefing on intervention -- that the Court has absolutely no ability to look into the process that led to the settlement. And I have talked about, you know, the reasons why that's wrong and why the Tunney Act is, in fact, concerned with the process.

But just to put a finer point on it, you know, the Department of Justice says that it would weaken merger enforcement if courts were allowed to do this, but the truth is the exact opposite. It would strengthen merger enforcement for courts to be able to provide a check on what the Department of Justice does in their settlements because it ensures that the antitrust litigation is done on the merits and not on the basis of the kinds of influences that Congress was trying to eliminate from this process by passing the Tunney Act.

That strengthens merger enforcement because it let's the lawyers at the Antitrust Division do their job without fear that someone is going to come in over their head and overrule them and force them to take a settlement that they think is not warranted on the merits.

The people that were litigating this case did not sign the settlement agreement. That's a huge red flag. And it's mixed in with a lot of other huge red flags. We have people who got fired over this settlement. We had one person who made a

public speech about how this was a perversion of justice and a violation of the rule of law.

And the reason I bring up these issues, Your Honor, is because it's really important to highlight the unprecedented nature of this case. Other courts may not have undertaken this kind of review, but it's because they have never had to. They have never been presented with a situation like this.

If there was ever a case that justified and required a court to use the full authority and the full weight of the Tunney Act to conduct a thorough evaluation, it is this case. Otherwise, we may not -- we may as well not have a Tunney Act, Your Honor.

It was designed to prevent this kind of situation, and it was designed to give the Court the tools to look into it; and we would urge the Court to allow intervention because the States can aid the Court in making its public interest evaluation; finding out what happened; get to the bottom of it, and make a thorough inquiry as to whether this settlement is in the public interest.

THE COURT: Thank you.

MR. BILLER: Thank you.

THE COURT: I will hear from either the United States or the Defendants, whoever wants to go first.

MR. SU: The United States will go first, Your Honor.

THE COURT: Okay.

MR. SU: May it please the Court. So, I would like to start off with -- by talking about the Tunney Act and the solution that Congress conceived of based on reports, concerns, about the fact that, you know, consent decrees were being negotiated in secrecy and the fact that there might have been lobbying involved.

I think the Court is absolutely correct; that the solution that Congress came up with was an elegant one and an elegant one that respects the separation of powers framework. The idea that to -- to give sunlight to the consent decree by requiring that the Court -- that the Department of Justice put the proposed final judgment and a competitive impact statement out in the public for everyone to comment and then a process of judicial review where the Court is the one that gets to decide based on all the comments whether the proposed final judgment served the public interest.

THE COURT: So, I mean, let's assume -- say that it is -- your argument is correct and that the focus of the proceedings is on the substance of the settlement, the precise scope of what is relevant to that, it's really a question of discovery; isn't it? I mean, it is a question that goes to the propriety of various forms of discovery that might be pursued. It goes to the evidence that might be properly presented to me as opposed to necessarily being a question on whether intervention is appropriate because it is -- Congress clearly

specifically contemplated the possibility of intervention and circumstances where the Court charged with evaluating whether a particular settlement is in the public interest, you know, deems it helpful.

And so, you know, why -- let me ask you as -- starting on the actual requirements of Rule 24 here, if I were to enter an order requiring the divestiture of the source code as part of the relief, is it correct that, you know, that any attempt by the States to procure an order from another court prohibiting that divestiture would be impermissible and presumably, you know, the Defendants would be able to come before me and ask for an injunction to protect my own order?

MR. SU: No, Your Honor. We have had cases where States have pursued different remedies from what the Department of Justice has pursued. A prime example, for instance, is the second *Microsoft* case where DOJ and some of the States entered into a consent decree. And separately there was a separate track where some States decided, Well, we don't want that remedy; we want to litigate, and that led to a separate remedies trial for those States. But DOJ in that case was in track one and proceeded under the -- exactly the same process that we have here in the Tunney Act.

THE COURT: And there is no issue with my -- if a different court were to issue an order that specifically conflicted with the order that I have made in this case

requiring the divestiture of the source code?

MR. SU: Well, Your Honor, as the Court has said, yes, there could be some issue around coordination, around the All Writs Act and all that, stuff but there is nothing that --

THE COURT: I mean, generally I have the power to enforce my orders, correct, and to prevent other parties from seeking relief that is squarely contrary to any order that I issued; right? Isn't that the whole point of the All Writs Act in some ways?

MR. SU: Yes, Your Honor, definitely does but I think, you know, based on what I have heard from Mr. Biller, the concern of the States really fall -- you know, really come down to, they don't think that the proposed final judgment does enough. So, there's nothing that prevents them from getting more relief from the Court.

THE COURT: No, but they say there is, which is that if they think that the remedy that's necessary is a full restoration of Juniper Networks as an independent entity with all of its competitive strengths that it had before the proposed merger, they say that ordering the source code to be divested to a competitor will immediately mean that they can not be restored to their position they were in prior to the proposed merger.

I mean, that's their position; that that form of relief becomes -- it's certainly -- their argument is that it becomes

impossible for them to restore Juniper Networks to its full pre-merger state as a competitor by virtue of the relief that would be ordered by me to be implemented as a condition of the proposed settlement.

MR. SU: So, Your Honor, actually the proposed final judgment contemplates a license of Juniper's missed AIOps software. So, it is not a divestiture. Juniper still --

THE COURT: Okay, really fits the license we are talking about; right?

MR. SU: Juniper still has the source code; still has the software; will still -- and I will let Mr. Liversidge address this in more detail -- but, you know, the company still has the code and can still continue to --

THE COURT: But presumably if this is such a valuable asset that it is, you know, going to remedy some of the alleged anticompetitive harms here, that giving that valuable -- licensing that valuable asset to a competitor means that it is -- it creates a significant competitive disadvantage compared to where they were before when they were the sole ones who had this purportedly incredibly important source code; correct?

MR. SU: Well, I mean -- I think that would -- your question, Your Honor, could be further developed on the record of your public interest determination. But I would suggest that, you know --

THE COURT: I mean, I think it goes to the question -- as I see it under 24(a)(2) -- of whether there is, in fact, a -- there is an impairment of their own interest in enforcing the antitrust laws that could result from my entrance of an order that, you know, means they no longer have the availability -- one of the forms of relief that they would otherwise have access to. I mean, it seems to me that's where it fits into the Rule 24 analysis.

MR. SU: I would disagree, Your Honor. I think that, you know, in other cases where States have pursued different remedies from the Department of Justice, they have been able to seek additional remedies or different remedies from what's here; and I don't -- it just -- you know, standing here today, I'm not prepared to say that simply because the missed AIOp source code, you know, has been licensed to a competitor, that that means that, you know, the States required -- you know, relief is completely foreclosed. I think that remains to be seen.

And I think, you know, let's take step one, which is -- you know, they should file their own case then if they -- you know, if they are concerned about this.

THE COURT: All right. Why is it not the case that there is at the very least a common issue of fact presented by the claims or defenses here that the States share such that they should be granted permissive intervention on that grounds?

MR. SU: Well, there is a common issue of fact or law concerning the application of Section 7 to this merger. I will grant the Court that. But it goes back to the fundamental issue here, which is that their remedy here is to file their own lawsuit. Nothing has precluded them from doing that.

THE COURT: But you could also see -- I mean, in some ways, you know, a lot of these rules are designed to streamline these proceedings --

MR. SU: Right.

THE COURT: -- instead of resulting in unnecessarily duplication of proceedings. So, yes, they could do that. There is a case here. The Government articulated both in its complaint and in its pretrial brief the reasons it thought that this merger would substantially threaten competition in a particular market.

So, from the perspective of streamling proceedings, isn't having it all worked out here before me, you know, more efficient and consistent with the goals of the Federal Rules of -- in allowing for permissive intervention rather than sort of requiring them to go through the process of filing a separate case and then coming before me?

MR. SU: Well, this -- Your Honor's question gets to the point that has not been addressed by the Movants here, which is the question of timeliness and delay and prejudice.

The point is they are seeking to intervene at this

juncture when the proceeding that's before the Court is that which is outlined under the Tunney Act. You know, it's an -- and so, what they are -- what they propose to do would be to indefinitely postpone, prolong the process, and it would be contrary to what the Ninth Circuit has said in *Wilderness Society*; that there should be an efficient resolution of issues.

THE COURT: But, you know, that may mean that at the end of the day, that they would not be allowed to, you know, come -- to pursue a full set of claims like they would have pursued had they filed at the initial -- at the outset and had they been parties at the outset. And the Government entered into its proposal. They could have said, No, we are going to keep going before you, Your Honor. We are going to keep litigating the merits of this merger. That, they cannot do. They have limited -- at this point, you know, we are in the context of the parties that filed this case has entered into a settlement; and the question before me is whether it is in the public interest to approve that settlement.

So, they have already -- by virtue of waiting, you know, they have limited the scope of their power as parties to the proceeding. And I'm not sure I see any further prejudice argument here.

I mean, you know, obviously the Tunney Act process takes time. We -- you know, the comments were just filed along with

the Government's response in the last week or so. And, you know, three months to sort of organize a number of States and get sign-off from the various officials, I mean, that doesn't strike me as an inappropriate amount of time given what was at stake.

Obviously to have the States move is a very different process, and I'm sure, as you know from working in the Federal Government, then to have, you know, private parties who can -- you know, an individual can move immediately and certainly even a private party generally can move a lot more quickly to get the sign-off necessary to do so.

And so, what is the prejudice if I think it is helpful to this proceeding to ensure -- if I'm going to sign off on the settlement that it is in the public interest, what is the prejudice of allowing the States to be part of that process?

MR. SU: So, two responses, Your Honor. One is in terms of the prejudice, there is the issue that the plans to divest the instant on business and to license the AIOp software are ongoing. We have been -- the Department has been getting monthly reports from HPE about where that stands.

THE COURT: Right, and that will presumably continue unless they are granted a motion -- if they are granted the right to intervene and they file their motion and I grant their motion; right. I mean, they will come in and ask me to put that on hold. But, as that stands, that's moving forward;

correct?

MR. SU: Yes, Your Honor, but my point is, again, on the theme of an efficient resolution of issues, the prejudice comes from the fact that the proposed remedies that we have proposed to the Court, the sooner we get this done, the sooner the public will start to enjoy the benefits of that competition.

And, as Your Honor knows being here in Silicon Valley, technology changes very quickly. And so, we want to make sure that the timing is not prejudice by, you know, a detour or, you know, that the States want to --

THE COURT: Right. But if there are real questions as to whether the settlement that's -- even just focusing on the question of its impact, if there are real questions as to whether the remedies proposed here will address competitive harms that were alleged by the United States in its original complaint -- I know there's a question of whether those competitive harms are even present -- but it seems like the -- you know, if I have to -- it seems like there may be benefits to the public from moving quickly arguably; but that depends on the first instance on a determination that this is, in fact, in the public interest as the Tunney Act requires me to determine; correct?

MR. SU: That is correct. That leads me to my second response to your question, Your Honor, which is that while the

Tunney Act certainly contemplates that there could be intervention, Congress was also very clear that the stated preference was for the Court to adopt the least burdensome, most efficient process which starts with the comments, the public comments. The States here have filed public comments which Your Honor, you know, will be able to fully consider in making, you know --

THE COURT: I mean, I'm having trouble seeing if you look at --

MR. SU: Yeah.

THE COURT: -- you know, far from sort of suggesting that they wanted this to be as streamlined and fast a process as possible, I mean, Section (f) specifically talks about appointing a special master, designating experts. I mean, it really goes through a lot of potentially time consuming and expensive and intense proceedings; right. I mean, that's what Congress talked about under Section (f) in terms of how these might proceed.

So, I'm not sure that -- you know, reading that, I'm not sure that it suggests Congress's goal is that this was to be as fast a process as possible. Now, they created this initial comment process, but I'm not sure I see anything in the statute that suggests Congress was assuming that would be enough. If anything, it seems like Section F seems to suggest that Congress expected that these would generally involve quite a

bit more.

MR. SU: Well, what I would say there is subsection (f) certainly gives the Court a toolkit for making its public determination, and so there are various ways that courts can proceed. And certainly we look at the case law. Other judges have chosen to do this or that. So, there is a toolkit.

But I would point the Court to the *Holman Brewing* case which -- from the Southern District of New York, where the district court there said: Look, looking at the legislative history, there is a clear preference for less burdensome, you know, process or getting public comment and making --

THE COURT: Right. But, I mean, the text of the statute is much better evidence of what governs me here than the legislative history; correct?

MR. SU: Well, again, I would submit that subsection (f) gives the Court a toolkit, but the Court is not required to use all of those avenues.

THE COURT: No. But in terms of the evidence of what Congress was thinking about when it enacted the statute, I would think that the actual text of the statute as enacted and laying out all of these potential things that are available in these proceedings, you know, I would suggest better evidence than legislative history as to how to think about the statute and Congress' intentions.

MR. SU: Looking at the words of the statute, subsection (f) is not mandatory. It is simply a list of options that the Court may avail itself of in making that public --

THE COURT: Right --

MR. SU: -- determination.

THE COURT: -- but if we are looking for statutory suggestions of what kind of proceedings Congress contemplated and certainly if we are looking for a statutory suggesting that their preference was for an abbreviated proceeding that would be based solely on the comments and the Government's responses thereto, section -- subsection (f) seems to be pretty strong contrary evidence as to that position.

MR. SU: Well, when Congress was talking about the Tunney Act, it wasn't suggesting that across the board comments should be enough but rather simply that we start with the comments. And in most cases, you know, that we have cited, Your Honor, in our briefs, courts have decided intervention is not necessary. The -- you know, these non-parties have been heard. They can participate with comments or they can be recognized as amici curiae. So, there are other less burdensome options here on the table.

THE COURT: I mean, as far as I can tell, there's really -- from my quick read of the briefs, there's really only kind of two Ninth Circuit decisions that actually address the

Tunney Act; correct?

MR. SU: Yes, that's correct.

THE COURT: And they don't say much -- they were -- particularly to the circumstances of this case. I mean, they do emphasize the independent nature of my review --

MR. SU: That's correct.

THE COURT: -- under the Tunney Act; correct? And so, you know, however we proceed in this case, I will say, that, you know, it is important to remember that it's United States and Supreme Court -- Supreme Court and Ninth Circuit is what will govern our proceedings here. Other courts' rulings on these matters are relevant as to the extent they are persuasive; but in terms of how we actually proceed here, we are sort of in a unique situation in the absence of much of the way of governing precedent.

MR. SU: Acknowledged, Your Honor. And the two cases that would be cited in our brief would be *Bechtel* and *B&S*.

THE COURT: Right, which I have read yesterday in preparation. So, I'm aware of what those cases do.

MR. SU: So, you know, again, I would say, as the Ninth Circuit said in *Wilderness Society*, Rule 24 is to be driven by practical and equitable considerations in an efficient resolution set of issues.

And so, we can go through Rule 24 subsection by subsection; but I think at the end of the day, it comes down to

the fact that the States have always had the ability to challenge this merger on their own.

They say they are sovereign enforcers for their residents. We don't disagree. So, if they want -- if they decide it's in their interest to protect their residents because, you know, the proposed final judgment isn't good enough, they can do that. They can do that. They don't need to intervene in this proceeding to take it in directions that Congress never contemplated.

THE COURT: And let me just ask a final question and -- unless you have anything else you want to offer -- I mean, do you agree that given the Government is -- the United States Government's position is now that the competitive harms alleged in the complaint and in the pretrial brief are adequately addressed by the settlement and the States disagree with that position, do you agree that I could not conclude that the United States Government is adequately representing the States' interests in this matter?

MR. SU: I would say, Your Honor, we still stand before you representing the public interest. But, again, I don't disagree that the States are sovereign enforcers, protectors of the interest of their own residents.

THE COURT: Even if they have a different view on what that public interest is; correct?

MR. SU: Who may have, yes. Yes. And, again, to the

extent they want different remedies or they want to block the merger entirely, they can do that in their own proceeding. Right now what we have before you is just public interest determination.

THE COURT: But the Government is asking me to approve relief that they think is inadequate, and that seems enough to say for purposes of intervention to conclude, as they suggest, that the Government isn't -- you know, they are not effectively adequately represented in these proceedings, the States are not. The underlying question of public interest is the merits. But to say that, it would be error, wouldn't it, to conclude that you are adequately representing their interests, States in their position?

MR. SU: I would agree, Your Honor. But, again, going back to first principles, the point here isn't so much adequate representation as it is can they be heard --

THE COURT: Right. And that's --

MR. SU: -- and they can be heard through comments and everything else.

THE COURT: Yeah, but it's just one of the elements of intervention.

MR. SU: Yes.

THE COURT: That would be sufficient if they were -- and the presence of that with representation, perhaps, to deny intervention. So, I'm just asking on that front.

MR. SU: Correct, Your Honor. And, again, but-for practical reasons we think the less -- you know, what makes the most sense here is for them to bring their own action rather than intervening and taking, you know, as they outlined in their motion they want discovery on both the -- you know, the prosecutorial discretion and the work product underlying our decision to take the settlement. They want discovery into the communications -- decision making leading up to the settlement, which is deliberative process. It's -- you know, it's executive privilege.

So, there are a whole host of issues, you know, regarding the -- the direction that they want to go with this, which, as I have said, will derail the -- this proceeding and take it in directions that Congress never contemplated.

THE COURT: Okay, thank you.

MR. SU: Thank you, Your Honor.

MR. LIVERSIDGE: Good morning, Your Honor, I would like to just start with a big picture point if I could. The parties entered into this settlement to resolve the case on June 27th. As part of that agreement, HPE agreed to fully divest one of its networking businesses; and it agreed to license the software that essentially was at the heart of the Government's case.

We have now completed the 60-day comment period under the Tunney Act, and we have a total of 12 comments. We don't have

a single comment from any competitor or customer or other participant in this industry. We effectively have no objection to this settlement from anyone that participates in the relevant market.

We -- and frankly, that is consistent with what every other enforcement agency around the world who has looked at this has found. They have declined to challenge it. They have approved it without requiring any remedies at all.

We now have a group of States that have moved to intervene for the stated purpose of taking discovery into the settlement and the process that led to it. That's the stated purpose. And they want to do that without having any claims at all in the case or any claims anywhere.

They hedged a bit this morning saying maybe they will adopt some claims at some point. They don't have any claims at this point. They have no claims in the case, and they are asking for freedom to come in and conduct discovery to lead to some result that is completely unclear based on claims that don't exist.

We understand completely that the Court needs to take the steps necessary to assure itself that this settlement is in the public interest. We obviously take no interest with that. We are not asking for a rubber stamp.

We are fully prepared to move forward with that process, but we think that the process that the States are trying to

outline here and get into goes far beyond what the case law contemplates. In fact, we think it's unprecedented.

We are not aware of a single case in history where a proposed intervenor has been allowed to intervene as a right in a Tunney Act proceeding. We are not aware of a single case in history where an intervenor has been given full party rights including the right to take discover in a Tunney Act proceeding.

THE COURT: I mean, that's fine. It's also -- it may not have happened. It seems to have been expressly contemplated by Congress in the Tunney Act when it specifically talked about intervention pursuant to Federal Rule of Civil Procedure. I mean, they -- maybe that -- you know, that they might be this is the closest case to what motivated the Tunney Act. That's their position. And this may be a sui generis case in that respect. That's certainly what they are telling me in their argument.

And so, I think that, you know, whether or not any of the prior cases have justified that, I think the question of whether it is appropriate here is its own question; correct?

MR. LIVERSIDGE: Understood, Your Honor, but I think what the Tunney Act process contemplates is for the Court to take the steps that it needs to take to ensure itself that this settlement is in the public interest.

I don't know that the statute or anything else envisions

giving private parties or states the right to come in and start conducting discovery and particularly discovery into a settlement process, which I think the case law uniformly says is far out of bounds; and I don't think any court -- plenty of courts have said that's not an appropriate process under the Tunney Act.

I know we are focused on Ninth Circuit and Supreme Court. There's limited guidance in the Ninth Circuit, but we obviously have decisions from the D.C. Circuit saying that's not an appropriate process; that is not appropriate inquiry under the Tunney Act. And we have a lot of courts following that and citing that same law.

So, I think what they are trying to do here goes far beyond what the case law has outlined in the --

THE COURT: Right. And so, I guess the question I have is, you know, if -- is the case that has been noted in some ways that there's some questions about the relationship between the relief that was offered as -- in settlement and agreed to in settlement and the underlying allegations of the complaint, you know, like -- as you know, we were getting ready to go to trial at the time of the -- I think we were getting ready for our final pretrial conference. I think it was settled on the Friday before our Monday conference if I recall correctly. So, I was knee deep in the weeds of the parties' briefing on this issue; and I don't recall reading about

Instant On at any point as I was going through the detailed discussions of the evidence that had been generated, the expert reports, the various entities that had been surveyed about their use of the various enterprise networking WLAN technology.

And so, in that respect, you know, it was interesting to see the settlement. And so, if I think that even focusing on the question of that issue, if I think that there would be some value to having that fully presented by having a -- you know, a party here to sort of present the view that is going to differ from the view of the Defendants and the United States Government -- given that they have agreed upon this and they have an interest presumably in procuring approval -- if I think that is the case, why is it not the case that the States should be allowed to intervene?

And then the scope of whatever discovery they might try to pursue, of future proceedings, the extent to which those proceedings will involve questions of process as well as substance, isn't that really a question that should be decided after this initial question of intervention and in the context of, you know, particularly discovery requests about a particular plan for actually getting to the point of having deciding on the question of final approval.

I mean, in some ways it's -- there is a big question here; and there is a question to me of whether it has really been briefed in a way that -- fully briefed in a way that I think

would be best to enable, you know, a final decision on what exactly is on the side of permissibility and relevance, what is not. I mean, these are deep questions that at some level there is a question of -- an overarching question but also are probably going to turn to a great degree on particular issues and particular facts and whether those facts bear upon, you know, what -- what those facts bear upon as far as what is before me now.

MR. LIVERSIDGE: And Your Honor those are all good points and questions; and I think a lot of courts have dealt with sort of this intervention question at this stage as well as what those rights look like in reaching a decision on intervention. And, frankly, courts sometimes say intervention when they don't really mean full party intervention. Often they don't. I think for the most part even when courts say, I'm going to let you intervene, it's not, I'm going to let you intervene as a party in the case. I don't think anyone --

THE COURT: Well, that's what "intervention" means; right. And I think some of the cases, for example, they have allowed intervention for the purposes of pursuing an appeal, which is the canonical, you have to be a party and not an outsider to pursue an appeal; right.

MR. LIVERSIDGE: Yes, understood. I guess, my point is intervention as a party with full party rights as though they are prosecuting claims in the case, this is, you know, of

course, a Tunney Act proceeding. And so, courts have said, I'm going to allow you to intervene but your right to intervene is for purposes of pursuing appeal or I'm going to let you file a brief that comments on the adequacy of these remedies.

We don't -- we don't take issue with that. We are ready and willing to have all of the briefing and the hearing on the adequacy of this settlement and whether it is in the public interest, and we are not opposed to them filing a brief laying out all of their concerns as part of this process.

What we are concerned about is this desire to get into what we, frankly, view as a little bit of a sideshow where we are now conducting discovery into DOJ process, how the settlement was reached, who was involved, all of those things which the case law outlines is really not what we are supposed to be focused on here.

I think the Court said it well at the outset, which is, you know, this process is to be focused -- is really focused on the outcome, not the process by which that outcome was reached.

And so, we are concerned that they seem to be attempting to come in with pretty unlimited rights here in a situation where we are trying to decide if this settlement and its terms are in the public interest, which we are fully prepared to do.

And we do -- we have concerns about that. We think it's going to lead to delay, and we don't think it's supported by the case law. We don't think it's warranted. We actually do

think that there is a presumption that the Government represents the interest of the public. There are a lot of cases that say that; that that is a presumption that can only be rebutted through extraordinary evidence.

THE COURT: And that may be what they are proposing to provide. I mean, I think their argument would be that, you know, certainly there is an argument to the extent that this process is relevant, it's, you know, to the extent that the Defendant -- they will be here arguing for application of a presumption of regularity and good faith in all of this; that they will say that in the context of this particular settlement, that presumption does not apply. And the normal rules that have been set forth by other courts don't apply here.

And, in fact, you know, this is the canonical Tunney Act case. And it's actually kind of their argument -- they said earlier -- it would be contrary to Congress' goal in enacting the Tunney Act to apply all of those rules under the circumstances here. I mean, isn't that the central aspect of their argument for why what they want to go into is relevant here?

MR. LIVERSIDGE: I think that probably captures what they are trying to do. I would say that, you know, there is no evidence that has been presented and that would lead us down that path. And I think --

THE COURT: They would say there is smoke and that's why they need an opportunity. That would be their response.

MR. LIVERSIDGE: That would be. I'm not sure there's smoke. I mean, just a related point, Your Honor, we have put forward declarations from the CEO of the company and the COO basically making the point that there is no other agreement here to resolve this case besides the one that is in front of the Court. The Government has said the same thing. There just isn't. There is no side deal quid pro quo.

So, it is unclear what it is we are really delving into or would be except for the process, which seems what they want to do, and which we feel like pretty clearly the case law says should not be allowed.

And so, we don't object to them having the type of rights that courts have allowed in these proceedings where they are allowed to comment and help decide the Court decide is this in the public interest, is this settlement in the public interest. But we have great concerns about this idea of now opening up some sort of separate mini proceeding and discovery process to look into, you know, the steps that were taken to reach the settlement.

And we don't think they have satisfied the requirements for intervention. And so, we don't think they get to that part. We think what they are proposing to do is really unprecedented here. We don't think any court has allowed any

intervenor to do that.

Your Honor, I'm not going to go through all of the technical arguments again. Obviously you have spent time on that today. I do think that we have standing arguments that we think are valid. We don't think they have standing. They can't have standing as a party without claims.

I know the Ninth Circuit has allowed some instances where people have moved to modify protective orders without claims or had the right to appeal after a case was over, but this is not what's being proposed.

THE COURT: Well, I mean, that I didn't fully understand because they -- I mean, there is the pleading issue, which seems to be at least arguably resolved by deeming the Government's complaint to be their own pleading for purposes of that. And if that's the case then, I mean, they would, you know, everyone is saying, they could file their own case. That suggests they have Article III standing of some kind; correct?

MR. LIVERSIDGE: Well, I think unless they are --

THE COURT: What -- you know, it is unclear to me how they could lack Article III standing here but actually they could go out and file their own lawsuit on behalf of their citizens. I mean, that -- unless they can only do that in State court, not Federal court which I don't think is the rule.

Then presumably they have standing because they are alleging that they are -- the citizens they represent will be

harmed by a substantial reduction in competition in this particular market.

MR. LIVERSIDGE: Yeah, and they have -- I mean, I think it was a little vague. They have not said that they are going to adopt the Government's complaint. They have not said that. He was, I think Counsel was --

THE COURT: Well, they said they agree with the allegations about reduction of competition in the market; correct?

MR. LIVERSIDGE: They said they agree with the allegations. They have not said they are adopting those claims or that they would ever file those claims. And so, I think, you know, the Washington case that we cited from the Ninth Circuit sort of makes the point that you can't just say, I have theoretical standing. If you have the same claims as somebody that's already in the case with standing, you can get standing that way but we have not heard that those are claims they plan to file or even pursue ever.

And so, we think there are standing issues here. And I guess finally, Your Honor -- I guess two quick points. One is we do think there is significant prejudice to the company from further delay. I know the Court has said that we will move quickly and we intend to move quickly. But, you know, this uncertainty is difficult.

The integration process is ongoing. Lots of changes have

been made. Juniper no longer exists as a separate publicly traded company. Its operations are fully subsumed by HPE. There is a separate networking business that now has products sales teams, engineering teams, all under one umbrella. Those sales teams are going out together to sell these products.

And so, the idea of further delay and even pausing -- if that it's hard to envision what that would look like given the current status of the business -- but, you know, there is huge prejudice and harm to the company from continued uncertainty here for our customers, for our employees, for everyone involved.

And so, we would like to move forward with this process as quickly as we can and, you know, get to the briefing and the hearing on the Tunney Act decision about this settlement, which we think is well within the reaches of the public interest as outlined by the *Bechtel* case in the Ninth Circuit.

THE COURT: Okay.

MR. LIVERSIDGE: Thank you, Your Honor.

THE COURT: Thank you. I will give proposed intervenors an opportunity to respond.

(Pause in proceedings.)

MR. BILLER: Thank you, Your Honor. Just to address some of the points that were made, so, in terms of this issue about our ability to pursue a separate case, I know Mr. Su pointed out the *Microsoft* case and mentioned that there are

other circumstances where the States seek different remedies. I think there's an important difference with those previous situations.

So, *Microsoft* for example, did not involve a divestiture. Those were basically behavioral remedies that were imposed on Microsoft, and there were some States who decided that those remedies were not sufficient; and so, they did continue to litigate on their own. But there was nothing about the settlement that the Department of Justice reached that impaired the ability of those States to do that, right, because there was no divestiture. They were just seeking additional remedies on top of what the DOJ had sought.

That's different than the situation here where there is this license. And the ability to seek a divestiture that would completely unwind the merger is, you know, contradictory to the remedy that the Department of Justice is trying to put forward here. So, I think that's a key distinction.

In terms of the efficiency questions, I think Your Honor raised some good points about that. And I would just add that in the event that the settlement is rejected and the Department of Justice -- we will see what the Department of Justice does in that situation -- but if they decide that they no longer wish to pursue this merger -- a claim against this merger, the States would be able to pick that up and pursue that claim at that time; and it would be much more efficient to do that in

this case rather than filing a separate case because, as Your Honor recognized, we were about a week and a half away from trial in this case. There's already a substantial pretrial record. There's trial exhibits. There's various other you know, pretrial disclosures. Discovery was closed. Depositions were already conducted. We have the transcripts.

There's a lot of efficiency that can be gained. And particularly for, you know, HPE, who I understand wants to move quickly and get a resolution on this, that can be achieved much more quickly in this case than it could by filing a separate action and basically starting all over from scratch.

In terms of the prejudice question, Your Honor rightly pointed out that there are obviously procedures in the Tunney Act and it's -- it's contemplated in the statute that some cases will require more time than others.

In routine cases, sure, you can decide it on the papers. This is not a routine case. And, as I said before, if there were ever a case that required or was appropriate for a court to make use of the tools that are explicitly listed in the statute, it would be this one.

And, you know, the parties I think don't get to dictate the timing on this just because they have started a process already before they have even gotten approval by the Court.

And if the -- if the remedies here -- the divestiture and the license -- are really as meaningful and important to

competition as the parties say that they are, then they will be just as valuable and there will be just as many competitors interested in buying that divestiture and buying that license, you know, at the end of this process as there may be today. But if it is something that's going to evaporate, you know, if you don't get those things out the door by the end of the year, then that's another question of whether there really is meaningful remedies as the parties say they are.

In terms of, you know, I think one of the big -- one of the main points that the parties and certainly HPE makes is that the reason intervention should be denied is because what we are asking for to do as intervenors is somehow not allowed; right.

And I think we have shown that actually everything that the States are asking for is explicitly contemplated by the Tunney Act. Obviously there is a mention of intervention in the statute, and I will just note that in the same paragraph -- this is (f)(3) in the statute -- the same paragraph that mentions intervention, right after intervention as a party pursuant to the Federal Rules of Civil Procedure, it says examination of witnesses or documentary materials; right.

So, as intervenors, Congress contemplated that interested parties could come in as intervenors and they could get documents, they could examine witnesses. There's obviously an explicit reference of an evidentiary hearing. Intervenors

would absolutely be allowed to participate in that and just because a court has never done that before, doesn't mean that it's not something that's allowed; right.

For 50 years the Tunney Act has basically been doing its job; right. Antitrust cases, as far as we know, have been resolved on the merits; and there have been some controversial ones where folks have disagreed with where the Government ultimately landed. And, you know, in that case it's been appropriate to -- for the most part invite additional briefing from interested parties.

I will note one case did hold an evidentiary hearing. The CVS/Aetna merger, the court held an evidentiary hearing. It held -- it was a two-day hearing. The court had an opportunity to hear from health policy experts. They heard from expert economists. They heard from a CVS executive. And, you know, third parties were able to come in and present that testimony to the court.

But even in that case, you didn't have the kind of allegations about the process that you have here. And when you take, you know, the substance and you add in these concerns about how we got here, then, certainly it warrants more than what's been done in the previous cases.

And the one last thing that I will note, Your Honor, that's truly remarkable is that in all the briefing and in the argument today -- and, you know, Mr. Liversidge brought up the

client declarations that they filed with their response to motion for intervention -- nowhere does anybody deny what's in public reporting.

The big thing that's missing is the public reporting is wrong; right. Nobody ever said that. Nobody is denying what happened here and what's in the public reports. They are just asking the Court to turn a blind eye to it, and that's not what the Tunney Act intended.

It is the complete opposite of that, and the States are well positioned as intervenors to aid the Court in determining what happened here. Thank you.

THE COURT: Thank you.

So, obviously the motion has been well argued and briefed and fully developed. Given the timing concerns, I mean, I do think ultimately a written order regarding the questions of intervention are appropriate. I do want to rule orally so the parties can move forward with an understanding of how the case will proceed.

I think that there is a significant question that I still will need to work through in the written order over whether the requirements of Rule 24(a)(2) are satisfied given the possibility that any order entered here might conflict with the States' abilities to pursue the full remedies and any action they might pursue on their own. I think I need to spend some more time thinking through that issue. I do think the

requirements for intervention under Rule 24(b)(1) have been satisfied here.

I don't think that the motion to intervene was untimely or that there has been a substantial showing of prejudice resulting from the timing of the filing of the motion and as the Government concedes, that there is a shared issue of fact or law as between the Intervenors' and the Government's claims in this case. And I do think that the policies of the Tunney Act and of the Federal Rules themselves with respect to intervention are promoted by allowing the States to participate in this proceeding as parties.

So, I will grant them intervention at the very least under Rule 24(b)(1) as a form of permissive intervention, and we will decide as we move forward, once I get a written order, whether intervention is also appropriate under 24(a)(2).

At this time the way I would propose that we move forward is that the States will be entitled to intervene as parties. I will ask the States to identify within seven days whether they adopt the allegations in the United States' complaint as to the alleged harm to the market for enterprise WLAN products set forth in the original complaint, whether they adopt those allegations in full or only in part for purposes of satisfying the pleading requirements of the Federal Rules.

I will allow the States to file their proposed motion, which is one of the forms of the relief they want.

I also think beyond filing motion, I am not going to resolve the full scope of what the next steps in this case will look like. I do think -- as I mentioned, I do think that it is the case that the ultimate focus of the review is primarily on the substance of the settlement and its focus -- and its impact on the market and the competitive -- you know, whether it remedies competitive harm that was alleged or shown, which, you know, is an entirely separate question, I don't think I'm in a place now to speak precisely to the scope to which questions of process bear upon that analysis or bear upon the Tunney Act review given that the -- it hasn't been fully briefed. And I think I rather decide that in the context of full briefing.

But I do think -- you know, I think in any event, it will certainly be helpful to have the States present the arguments as to what -- the substance of the proposed settlement and then for us to figure out the extent to which -- the process through which the settlement was achieved should also be part of my analysis here.

What I would propose is that presumably -- you know, I think at this point I think the next motions calendar that's available 35 days out is in early January. So, if the States were to file their motion now, that would be sort of the date we would hear that motion unless there is an agreement or an administrative motion to shorten time on that.

I would propose that we set a status conference in this

matter for December 16th, and we can do that in person or we can do that virtually if it's overly complicated to do that in person at that time. I will let the parties speak with one another about that.

And what I would like is a joint statement by December 9th that sets forth essentially the parties' positions on how we should move forward with completing the Tunney Act review process, one way or the other, including the scope of whether there is going to be any additional discovery, how we should move forward to resolve these issues.

And I think that we can come together in December then and get some clarity for everyone understanding the time pressures we are under on what the next step in the cases are going to look like. Does that make sense to everyone?

MR. SU: Yes, Your Honor.

MR. BILLER: Yes, Your Honor.

MR. LIVERSIDGE: Yes.

THE COURT: Anything else that we need to address this morning then?

(No response.)

THE COURT: Okay. Thank you. Have a good morning.

THE CLERK: Thank you. Court is concluded.

(Proceedings adjourned at 11:37 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: November 19, 2025

Marla Knox

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter