UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, PLAINTIFF, v. ALEX. BROWN & SONS, INC. et al. DEFENDANTS.	Civil Action No. 96 CIV 5313 (RWS)

MEMORANDUM IN OPPOSITION TO MOTION OF PLAINTIFFS IN THE IN RE NASDAQ MARKET-MAKERS ANTITRUST LITIGATION TO INTERVENE OR TO APPEAR AS AMICUS CURIAE

The United States opposes the motion of the plaintiffs in a private civil damages case, In re Nasdaq Market-Makers Antitrust Litigation, who have sued certain market makers in Nasdaq stocks under the antitrust laws (hereinafter "private plaintiffs") to intervene in this antitrust action by the United States for injunctive relief against several of the same defendants; in addition, the United States opposes the private plaintiffs' alternate suggestion, that they be allowed to participate as *amicus curiae* in this proceeding to determine whether entry of the proposed consent settlement is "in the public interest." 15 U.S.C. 16(e).

In making this "public interest" determination, "the court's function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1460-61 (D.C. Cir. 1995) (emphasis in

original) (internal quotations omitted); accord, United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975).

The clear purpose of the private plaintiffs' motion is to obtain discovery. Under the Federal Rules of Civil Procedure, the standard for either mandatory or permissive intervention in a Tunney Act proceeding is very high, and obtaining discovery does not meet that standard. "[I]ntervention of right has been recognized only where a showing of bad faith or malfeasance on the part of the Government has been made." United States v. International Business Machines Corp., 1995-2 Trade Cas. (CCH) ¶ 71,135, at 75,456 (S.D.N.Y. 1995). "[A] private party will not be permitted to intervene as of right [in a Tunney Act proceeding] absent a showing that the Government has failed 'fairly, vigorously and faithfully' to represent the public interest." United States v. American Cyanamid Co., 556 F. Supp. 357, 360 (S.D.N.Y. 1982), aff'd in part and rev'd in part, 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984) (quoting United States v. Ciba Corp., 50 F.R.D. 507, 513 (S.D.N.Y. 1970)); see also United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. 1982) (requiring claim of bad faith or malfeasance).

In government antitrust cases, the law explicitly provides a mechanism for private parties to present their views regarding of the proposed relief to the Court. The Antitrust Procedures and

Penalties ("Tunney") Act, 15 U.S.C. 16(b)-(h), provides that any interested person may submit a written comment to the Department of Justice regarding the proposed relief. The Department must then both make public that comment and respond to it in writing. 15 U.S.C. 16(d). Private plaintiffs have not explained why *amicus* status is necessary or desirable to advance any Tunney Act interest.

The private plaintiffs here do not claim that the Department has failed to represent the public interest vigorously, let alone that the Department acted with bad faith or malfeasance in agreeing to resolve the case -- nor could they. Further, they have not shown why the Tunney Act provision permitting them to comment on the proposed relief does not provide an adequate mechanism for expressing their views to the Court. For these reasons and the reasons discussed below, the United States urges the Court to deny both the private plaintiffs' motion to intervene and their alternative motion to participate as *amicus curiae.*

Statement

In May 1994, the results of an economic study conducted by Professors William Christie of Vanderbilt University and Paul Schultz of Ohio State University (the "Christie/Schultz study") were published in several newspapers. The study suggested that dealers in stocks traded on The Nasdaq Stock Market may have tacitly colluded to avoid odd-eighth price quotations on a substantial number of Nasdaq stocks. Beginning that month, the

private plaintiffs filed a number of lawsuits against several market makers in Nasdaq stocks. The private cases have been consolidated in the Southern District of New York, M.D.L. 1023. Competitive Impact Statement ("CIS") 5 n.2, Exhibit A to plaintiffs' Memorandum in Support of Motion to Intervene (hereafter "Pl. Mem.").

In the summer of 1994, the Department of Justice initiated its investigation into possible collusion among Nasdaq dealers. CIS 4. In the course of its investigation, the Department served over 350 civil investigative demands ("CIDs") pursuant to 15 U.S.C. 1312 of the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. 1311-1314. In addition, the Department reviewed hundreds of responses to interrogatories that were submitted by the defendants and others, and took over 225 depositions. CIS 5.

On July 17, 1996, the United States filed a complaint alleging that the defendants[1] had engaged in price fixing in violation of section l of the Sherman Act, 15 U.S.C. l. On the same day, the United States and the defendants filed a proposed Stipulation and Order ("proposed order") to resolve the

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[1] There is not an identity of defendants between the private cases and the government's case. The private plaintiffs' case names twelve defendants not named in the government's case: Cantor, Fitzgerald & Co.; Cowen & Co.; Everen Securities; Jeffries & Co., Inc.; Kidder, Peabody & Co., Inc.; Legg Mason Wood Walker, Inc.; Montgomery Securities; Oppenheimer & Co., Inc.; Robertson, Stephens & Co.; Weeden & Co., L.P.; A. G. Edwards & Sons; and J. C. Bradford & Co. In the government's case there are two defendants not named in the private plaintiffs' case: Furman Selz, LLC; and J. P. Morgan Securities, Inc.

allegations in the complaint. Entry of the proposed order is subject to the Tunney Act. Accordingly, the United States has filed and published in the Federal Register its Competitive Impact Statement and the proposed order that would resolve the case, in response to which the public has a right to file comments. 15 U.S.C. 16(b)-(d). All comments received, as well as the government's response to them, will be available for the Court's review in deciding whether entry of the proposed order is in the public interest. 15 U.S.C. 16(e)-(f).

By notice of motion dated August 28, 1996, the private plaintiffs moved pursuant to Fed. R. Civ. P. 24(a) and (b), and section 2(f)(3) of the Tunney Act, to intervene or, in the alternative, to appear as *amicus curiae* in this case. Private plaintiffs seek to intervene for two purposes. First, they seek to require the Department of Justice to disclose to them the Settlement Memorandum (and all associated materials) that the Department prepared in connection with the negotiation of the proposed order. That Settlement Memorandum (described by the private plaintiffs as the "compilation of evidence") outlines the evidence collected by the Department in the course of its investigation, sets forth the violations uncovered, and explains the Department's legal theory.[2]

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[2] A substantial portion of the Settlement Memorandum contains material gathered by the Department in response to the CIDs served on defendants and others pursuant to the ACPA. Such materials may not be discovered from the government. 15 U.S.C. 1313(c)(3). In addition, the Settlement Memorandum contains confidential evidentiary materials gathered by the Securities and

Second, private plaintiffs seek intervention to challenge paragraph IV(C)(6) of the proposed order, which provides that the audio

> [t]apes . . . [defendants are required to create, review and maintain] pursuant to this stipulation and order shall not be subject to civil process except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended.

The provision would also limit the admissibility of such tapes in evidence in civil proceedings to actions commenced by the Antitrust Division, the SEC, the NASD or any other self-regulatory organization, as defined in the securities laws.[3]

Exchange Commission and made available to the Department for law enforcement purposes. These materials are also not discoverable from the government. 44 U.S.C. 3510(b). As the private plaintiffs note (Pl. Mem. 19), the Department prepared the Settlement Memorandum for the express purpose of describing its case and legal theory to the prospective defendants. The Department did so in the belief that, confronted with some of the evidence the Department had amassed during its investigation (given the legal standard to show a violation), the prospective defendants would be inclined to settle. (Although the Settlement Memorandum was shown to the defendants, they were not permitted to remove it from the premises of the Department or make copies of it.) Private plaintiffs are also seeking to obtain "all evidentiary materials expressly referenced in the compilation of evidence." Pl. Mem. l. Again, that evidence consists of information obtained from defendants and others in response to CIDs, as well as materials made available to the Department by the Securities and Exchange Commission.

[3] In December 1995, private plaintiffs moved for an order pursuant to Fed. R. Civ. P. 37(a) to compel defendants to produce a wide range of documents responsive to or otherwise relating to the CIDs. See In re Nasdaq Market-Makers Antitrust Litigation, 929 F. Supp. 723, 724 (S.D.N.Y. 1996). In March 1996, the Court ruled that although CID materials may not be discovered from the government, there is no corresponding protection for documents (or copies thereof) produced in response to a CID that are in the hands of a defendant; thus, their production, if they met certain

Argument

I. PRIVATE PLAINTIFFS SHOULD NOT BE GRANTED INTERVENOR STATUS IN THIS GOVERNMENT ENFORCEMENT ACTION

Private plaintiffs contend that they are entitled to intervene as a party in this Tunney Act proceeding and to gain access to the government's Settlement Memorandum, together with all evidentiary materials expressly referenced in the Settlement Memorandum and any associated materials. Pl. Mem. 1. They claim this will assist them with discovery in their treble damage action, and that it will enable them to assist this Court in its public interest determination required to be made under the Tunney Act. Pl. Mem. 3. Neither of these purposes is grounds for intervention under Fed. R. Civ. P. 24 or the Tunney Act.

A. Private Plaintiffs Do Not Satisfy the Requirements For Intervention as of Right

Private plaintiffs claim a right to intervene under Fed. R. Civ. P. 24(a)(2), which provides for intervention:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's

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additional criteria, was ordered. Id. at 724-25. On August 28, 1996, the private plaintiffs moved in their case "To Lift The Stay Of Discovery And To Compel Defendants To Produce CID Deposition Transcripts And The Compilation of Evidence," seeking from the defendants essentially the same information, i.e., the Settlement Memorandum and associated evidence, that they seek from the government here under the Tunney Act. Both the motion to intervene in the government case and the discovery motion in the private case are scheduled to be argued on October 16.

interest is adequately represented by existing parties.

Thus, an applicant must show that (l) it has an interest relating to the subject of the action; (2) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (3) its interest is not adequately represented by existing parties. Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984); United States v. International Business Machines Corp., 1995-2 Trade Cas. (CCH) ¶ 71,135, at 75,455 (S.D.N.Y. 1995); In re Ivan F. Boesky Securities Litigation, 129 F.R.D. 89, 94 (S.D.N.Y. 1990).

Private plaintiffs have not made that showing here: they have not demonstrated an "interest" relating to the subject of this action that will in any way be "impair[ed]" by entry of the consent decree. Thus, the standard for mandatory intervention under Fed. R. Civ. P. 24(a)(2) has not been met.

(i) Private Plaintiffs Are Not Entitled to Intervene As of Right to Advance Their Private Interests

Private plaintiffs' principal purpose in seeking intervention is to advance discovery in their private case. See, e.g., Pl. Mem. 2, 9-16. They offer no citation of authority for their conclusory, but erroneous, assertion that they "clearly" have a Rule 24(a) "interest" in this Tunney Act proceeding. See Pl. Mem. 9. The fact that their private treble-damage action is premised upon an alleged price-fixing conspiracy among market makers in Nasdaq stocks (as is the government's complaint) and

that disclosure of the government's evidence in this suit would advance their private suit is plainly not such an interest. E.g., United States v. Automobile Manufacturers Ass'n, 307 F. Supp. 617, 619 (C.D. Cal. 1969), aff'd per curiam, 397 U.S. 248 (1970) ("it is well settled that treble damage claimants do not have an `interest' cognizable under Rule 24(a) F.R.Civ.P. in Government anti-trust actions seeking injunctive relief"); see also H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc., 797 F.2d 85, 87-88 (2d Cir. 1986) (state had no "significantly protectable interest" to warrant intervention in private antitrust suit where intervention was sought to gain access to "work product" materials); In re Penn Central Commercial Paper Litigation, 62 F.R.D. 341, 346 (S.D.N.Y. 1974) (an "interest" under Rule 24(a)(2) "must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit"), aff'd mem., 515 F.2d 505 (2d Cir. 1975); Wright, Miller & Kane, Federal Practice and Procedure (Civil 2d) § 1908, at 270-72 (1986); 3B Moore's Federal Practice ¶ 24.07[2], at 24-54, 24-57 (2d ed. 1993).[4]

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[4] Private plaintiffs, moreover, have not made even the most minimal showing of any present "interest" in the audio tapes that defendants are required to create in the future. See Pl. Mem. 10, heading "A" ("Compilation of Evidence and Audiotapes Are Crucial Evidence in the Multidistrict Litigation"). The content of future tapes is as speculative as the usefulness to which they might be put in some "future litigation brought by [unidentified] injured investors." See Pl. Mem. 15.

Significantly, private plaintiffs do not claim that the entry of the proposed order in this case would affect their ability to prevail in their case. Indeed, there is no suggestion at all by the private plaintiffs that the entry of an order containing mandatory and prohibitory provisions regarding *future conduct* could possibly affect the viability of any claim they have against any of the overlapping defendants for events alleged to have occurred in the past. Thus, entry of the proposed order in the government case will not infringe on any interest the private plaintiffs have in any "transaction which is the subject of the [government] action." Fed. R. Civ. P. 24(a).

Moreover, it is clear that entry of the proposed order will not affect the private plaintiffs' damages claims. No rule of law would be established by entry of the proposed order that would in any way inhibit their ability to obtain an award of damages. Further, it is clear that entry of a forward-looking order could not possibly affect the viability of any claim the private plaintiffs have for past conduct.

In reality, the private plaintiffs do not seek to protect any "interest" that would be impaired by entry of the proposed order, but merely to obtain benefits from this proceeding that more properly are considered in the context of their own lawsuit. See, e.g., Pl. Mem. 16 (noting "[t]he importance to injured investors of obtaining *the evidence* underlying the Competitive Impact Statement . . ." (emphasis added), but conspicuously failing to state how the adjudication of the government's case

and entry of the proposed order would infringe on any legal right of the private plaintiffs).

Given the private plaintiffs' failure to meet the first requirement for mandatory intervention -- the establishment of a cognizable "interest" in the subject of the action -- their motion for intervention as of right must be denied.

Even if facilitation of discovery in the plaintiffs' private action were an appropriate "interest" to be protected under Rule 24(a), that interest would not be "impaired" by entry of the proposed order, as Rule 24 requires. The private plaintiffs seek discovery of the government's Settlement Memorandum. This document contains CID materials obtained by the Department during its investigation, evidence provided to the Department by the SEC for law enforcement purposes and the work product of the Department.

The law protects information collected by the Department under the ACPA from discovery. 15 U.S.C. 1313(c)(3), (e); see In re Nasdaq Market-Makers Antitrust Litigation, 929 F. Supp. at 726. On the other hand, CID materials, if in the possession of a private party, may be discoverable from the private party. Id. If private plaintiffs can make the required showing under the civil rules for discovery of CID materials produced by the defendants, or others, in the course of the government's investigation, they may be able to discover them from the private

parties who possess them.[5] To the extent private plaintiffs simply want to piggyback on the government's investigative efforts and work product to ease their own litigation burden (see, e.g., Pl. Mem. 12-14), that plainly is not a proper basis for intervention. See SEC v. Everest Management Corp., 475 F.2d 1236, 1239 (2d Cir. 1972) (footnote omitted):

> Appellants concede that they will not be precluded by res judicata or collateral estoppel from bringing their own action for money damages regardless of the disposition of the SEC's action. Appellants' essential argument is that if intervention is denied they will be required to bear the financial burden of duplicating the SEC's efforts . . . . This is not the sort of adverse practical effect contemplated by Rule 24(a)(2).

Accord Hayden Co. v. Siemens Medical Systems, 797 F.2d at 89; Cunningham v. Rolfe, 131 F.R.D. 587, 590 (D. Kan. 1990) (no right

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[5] Currently, we understand, most of the defendants in the private case do not possess copies of the CID deposition transcripts of their employees or former employees. Private plaintiffs have moved, in their separat, damages case, for an order directing defendants to obtain copies from the Department. The ACPA permits a witness who has given CID deposition testimony to obtain a copy of his deposition transcript upon payment of "reasonable charges," unless the Assistant Attorney General in charge of the Antitrust Division determines that there is "good cause [to] limit such witness to inspection of the official transcript of his testimony." 15 U.S.C. 1312(1)(6). In their "Memorandum of Law in Support of Plaintiffs' Motion to Lift the Stay of Discovery and to Compel Defendants to Produce CID Deposition Transcript and the Compilation of Evidence" in In re Nasdaq Market-Makers Antitrust Litigation, the private plaintiffs take the position that the defendants have "control" of the CID deposition transcripts of their current and former employees (see Pl. Mem. 16-20 [private case]). The United States expresses no view as to whether any of the defendants have the requisite "control" (see Fed. R. Civ. P. 34) over these transcripts to be able to direct such persons to request them from the Department. The Court will hear argument on this motion on October 16.

to intervene where alternative discovery available to movants in their own separate suit).

(ii) Absent a Showing of Bad Faith or Malfeasance, Private Plaintiffs May Not Intervene as of Right to Second-Guess the Government as to What the "Public Interest" Requires

In addition to the contention that they should be entitled to intervene to obtain discovery in their own case, private plaintiffs claim a right to intervene to advance the "public interest." They claim that they should be given access to the government's investigatory and evidentiary files because "only following disclosure of the Compilation of Evidence . . . can plaintiffs comment on the adequacy of the Consent Decree in an informed way." Pl. Mem. 3, also 24. Clearly, this claim has little connection to the established standards for Rule 24 intervention. Moreover, under the Tunney Act, intervention for this purpose would be completely inappropriate.

The United States, not the private plaintiffs, represents the public interest in government antitrust cases. "Precedent requires that 'the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶71,402, at 77,025

(D.D.C. 1995) (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1991)).

A court's role in passing on a proposed consent judgment is limited because a consent decree embodies a settlement, see United States v. Armour & Co., 402 U.S. 673, 681 (1971), reflecting both the Department's predictive judgment concerning the efficacy of the proposed relief and the Department's exercise of prosecutorial discretion. "A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions . . . . The agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. . . . The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future." Motorola, 1996-1 Trade Cas. at 77,026 (internal quotations omitted).[6]

If a court were to engage in "an unrestricted evaluation of what relief would best serve the public," it might threaten these

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[6] In evaluating the decree as a remedy for the particular violations alleged, the Court must afford the Department even greater deference than when the Court considers an uncontested decree modification -- a context in which a court may reject the proposal only if "'it has exceptional confidence that adverse antitrust consequences will result.'" Microsoft, 56 F.3d at 1460 (quoting United States v. Western Electric Co., 993 F.2d 1572, 1577 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993)).

benefits of "antitrust enforcement by consent decree," Bechtel, 648 F.2d at 666, and thereby frustrate Congress's intent to "retain the consent judgment as a substantial antitrust enforcement tool." S. Rep. No. 298, 93d Cong., lst Sess. 7 (1973); accord H.R. Rep. No. 1463, 93d Cong., 2d Sess. 6 (1974).

Thus, applications for intervention to assist in the "public interest" determination are almost always denied. See, e.g., United States v. International Business Machines Corp., 62 F.R.D. 530, 532 n.1 (S.D.N.Y. 1974); United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 439 (C.D. Cal. 1967), aff'd, 389 U.S. 580 (1968); Wright, Miller & Kane, § 1908, at 266 & nn.13, 15. "[A] private party will not be permitted to intervene as of right absent a showing that the Government has failed 'fairly, vigorously and faithfully' to represent the public interest." United States v. American Cyanamid Co., 556 F. Supp. at 360. "[I]ntervention of right has been recognized only where a showing of bad faith or malfeasance on the part of the Government has been made." IBM, 1995-2 Trade Cas. at 75,456; accord, Bechtel, 648 F.2d at 666; United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 649 (D. Del. 1983); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (W.D. Mo.), aff'd, 534 F.2d 113, 117-118 (8th Cir.), cert. denied, 429 U.S. 940 (1976).

Private plaintiffs have not alleged, and could not allege, bad faith or malfeasance of the government in this case. Thus, they have no right to intervene to protect the public interest.

B. Private Plaintiffs Should Not Be Granted Permissive Intervention

A court may permit intervention under Fed. R. Civ. P. 24(b) "when an applicant's claim or defense and the main action have a question of law or fact in common." But, in deciding whether intervention is appropriate, the court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. The United States concedes that the private plaintiffs' case and its case, as charged in their respective complaints, have "a question of law or fact in common." But the issue to be resolved in this case -- whether entry of the proposed order is in the public interest -- and the issue to be resolved in the private case -- whether plaintiffs are entitled to damages as a result of defendants' alleged violation of the antitrust laws -- involve very different questions of fact and law. Moreover, because granting intervention could "unduly delay or prejudice the adjudication of the rights of the original parties," intervention should be denied.

The Tunney Act, 15 U.S.C. 16(f)(3), provides that, in making the public interest determination, the court may

> authorize full or limited participation . . . by interested persons . . . including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure . . . or participation in any other manner and extent which serves the public interest . . . .

Section 16(f)(3) was not intended to enlarge the Federal Rules of Civil Procedure regarding intervention. H.R. Rep. No. 1463, 93d Cong., 2d Sess. 6 (1974).

In a Tunney Act proceeding, therefore, the court must take into consideration what form of participation will appropriately serve the public interest. 15 U.S.C. l6(f)(3). By leaving the authorization of intervention to the Tunney Act court's discretion, Congress did not intend "to open the floodgates to litigation, nor . . . to broaden the existing right of intervention." 119 Cong. Rec. 24,599 (1973) (remarks of Senator Tunney). The provisions of section 16(f)(3) were intended as a "check on the case that has gone wrong;" they were not intended to be used in the majority of settled cases.[7] It was Congress' expectation that "the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible." S. Rep. No. 93-298 at 6; see also

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[7] I think you recognize and we all should, that of, say, the 80 percent of cases that are settled by consent decrees, either hearings or extensive briefs or anything like that should occur in very few cases.

> The hope is that this bill will provide a check on the case that has gone wrong; that this would not become a time consuming proceeding for district judges, the Attorney General, or the Antitrust Division in general.

The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., lst Sess. 26 (Hearings) (statement of Professor Harvey J. Goldschmid, Columbia School of Law).

H.R. Rep. No. 93-1463 at 6 (bill preserves policy of encouraging settlement by consent decree). This means that, in most cases, the Tunney Act court should rely on the competitive impact statement, the proposed consent decree and public comments to make the public interest determination. 15 U.S.C. 16(b); Motorola, 1996-1 Trade Cas. at 77,024, 77,025 n.8; United States v. Gillette Co., 406 F. Supp. at 715; H.R. Rep. 93-1463 at 8-9; 119 Cong. Rec. 24,598 (1973) (remarks of Senator Tunney).[8]

Thus, as with claims for intervention as of right, the "courts have consistently exercised their discretion to deny motions for permissive intervention in antitrust consent proceedings." IBM, 1995-2 Trade Cas. at 75,458; see G. Heileman Brewing, 563 F. Supp at 649-50; United States v. Carrols Development Corp., 454 F. Supp. 1215, 1221 (N.D.N.Y. 1978); Automobile Mfgrs. Ass'n, 307 F. Supp. at 620-21. "[W]here there is no claim of bad faith or malfeasance . . . the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom." United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. 1982), cited in IBM, 1995-2 Trade Cas. at 75,458; Crosby Steam

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[8] "Before entering the decree, the court must find that it is in the public interest as defined by law . . . . The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (remarks of Senator Tunney).

Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943) (additional parties always take additional time, which tend to make the proceedings a "Donnybrook Fair").

Nothing in this case suggests a different result. The Court can have the full benefit of private plaintiffs' views through the Tunney Act's public comment process without granting them intervenor status. The cost of permitting intervention, on the other hand, could be substantial. If the private plaintiffs are granted intervenor status and have the right to expand the "public interest" inquiry to include an inquiry into their own private rights of discovery, the Tunney Act process will be side-tracked without any countervailing advancement or elucidation of the public interest. See IBM, 1995-2 Trade Cas. at 75,458; United States v. AT&T, 1982-2 Trade Cas. (CCH) ¶64,726, at 71,525 & n.7, 71,526 (D.D.C. 1982).

Moreover, as discussed in part (A), above, the private plaintiffs are free to seek discovery of the materials they seek here in their own lawsuit. The pendency or possibility of another action in which the applicant for intervention can protect his rights is ordinarily a reason to deny permissive intervention. Wright, Miller & Kane, § 1913, at 385-388; Roe v. Wade, 410 U.S. 113, 125-127 (1973); G. Heileman Brewing, 563 F. Supp. at 649; Associated Milk Producers, 394 F. Supp. at 45; Microsoft, 56 F.3d at 1461 n.9; Lipsett v. United States, 359

F.2d 956, 959-960 (2d Cir. 1966); Hayden v. Siemens Medical Systems, 797 F.2d at 88.

Because intervention would not advance the public interest determination in this case, because private plaintiffs have not demonstrated that they will be adversely impacted by entry of the proposed order, and because private plaintiffs can advance their interests in discovery in their private litigation, permissive intervention should be denied.

II. THE COURT SHOULD REJECT PRIVATE PLAINTIFFS' REQUEST TO ORDER IMMEDIATE PRODUCTION OF THE SETTLEMENT MEMORANDUM

Private plaintiffs claim that, irrespective of whether they are granted intervenor status, the Court should order production of the Settlement Memorandum immediately so they can use the fruits of the government's investigative efforts in their private litigation (Pl. Mem. 21-24) and so they may help the Court evaluate whether the decree is in the public interest (id. at 24-28). None of the Tunney Act provisions on which private plaintiffs rely supports such an extraordinary order. The Tunney Act does not contemplate a turnover of evidentiary materials simply to benefit private plaintiffs, nor does it contemplate the intrusion into the settlement process in a government case that plaintiffs suggest.

A. The Settlement Memorandum Is Not a "Determinative" Document Within the Meaning of 15 U.S.C. 16(b)

The United States has represented that there were no "materials and documents" that it considered to be "determinative in formulating" the proposed order. 15 U.S.C. 16(b). The

private plaintiffs contend that the Settlement Memorandum and associated materials provided to defendants in advance of filing and expressly referenced in the Settlement Memorandum were determinative documents (Pl. Mem. 19-20) and should have been made public. That simply is not what the statute says, or what Congress intended.

The statute requires production of "materials and documents *which the United States considered determinative in formulating such proposal.*" 15 U.S.C. 16(b) (emphasis added). On its face, the statute refers only to the formulation of the relief proposal, i.e., the proposed order, not to the decision to file suit on particular claims or other issues beyond the scope of the relief.

The statute also specifies on its face that the requirement of disclosure is limited to "determinative" documents, a term Congress would scarcely have chosen to describe all documents of evidentiary relevance (which plaintiffs are essentially seeking). Webster's Third New International Dictionary provides, as the first-listed definition of this adjective, "having power or tendency to determine." Webster's Third New International Dictionary 616 (1981). This understanding of the term is consistent with its use in other legal contexts.[9]

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[9] See Gagne v. Carl Bauer Schraubenfabrick, GmbH, 595 F. Supp. 1081, 1088 (D. Me. 1984) ("To be determinative, a state law question must be susceptible of an answer which, in one alternative, will produce a final disposition of the federal cause."); Ziegler v. Wendel Poultry Services, Inc., 615 N.E.2d 1022, 1028 (Ohio 1993) (holding that trial court did not have to

Moreover, 15 U.S.C. 16(b) calls for disclosure only if the "United States considered" the documents determinative to the formulation of relief. On its face, the statute does not require disclosure of documents on the basis of the significance that some third party might attribute to them. And the requirement that the government have considered a document to be determinative suggests that Congress had in mind only a small number of documents of particularized significance, and not the broad range of evidentiary materials suggested by the plaintiffs. Indeed, the statutory language makes it clear that Congress did not expect that there would be determinative documents in every case -- and did not intend that the Department would provide a factual summary of the evidence and an analysis of the law in every settled case. The statute refers to "any other materials and documents," not "the other" documents, which would be the more natural term if Congress assumed that there would always be such documents.

Private plaintiffs' expansive interpretation of "determinative document" makes little sense in light of the limited purpose of a Tunney Act proceeding. Under the Tunney Act, "the court is only authorized to review the decree itself," and is "not empowered to review the actions or behavior of the

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give certain proposed interrogatories to a jury because they related to matters of an evidentiary, rather than a determinative, nature); Smith v. Smithway Motor XPress, Inc., 464 N.W.2d 682, 686 (Iowa 1990) (defining a "determinative factor" as a reason that tips the scales decisively one way or the other).

Department of Justice." Microsoft, 56 F.3d at 1459. Moreover, the government's judgments in a Tunney Act proceeding are entitled to deference. Id. at 1461. Thus, the district court in Microsoft was held to have exceeded its authority, id. at 1459, by requiring production of information concerning "the conclusions reached by the Government" with respect to the particular practices investigated, and the areas addressed in settlement discussions. Id. at 1455. There is no reason to assume that Congress intended to require the government to disclose as "determinative" a broad range of materials relating to issues that are not properly before the court in a Tunney Act proceeding.

The legislative history of the Tunney Act supports this reading of the statute. Congress enacted the Tunney Act in response to consent decrees entered in 1971 in three cases involving the International Telephone and Telegraph Corporation (ITT). These cases challenged three ITT acquisitions, including that of the Hartford Fire Insurance Company. The consent decrees permitted ITT to retain Hartford. Subsequent Congressional hearings revealed that the then-head of the Antitrust Division had employed Richard J. Ramsden, a financial consultant, to prepare a report analyzing the economic consequences of ITT's possible divestiture of Hartford. Ramsden concluded that requiring ITT to divest Hartford would have adverse consequences on ITT and on the stock market generally. Based in part on the Ramsden Report, the Department concluded that the need for

divestiture of Hartford was outweighed by the divestiture's projected adverse effects on the economy.

The Ramsden Report, which falls squarely within the government's understanding of the statutory term, was cited by the Act's chief sponsor as exemplifying a "determinative document." During the Senate debate on the determinative documents provision, Senator Tunney expressly stated: "I am thinking here of the so-called Ramsden memorandum which was important in the ITT case." 119 Cong. Rec. 24,605 (1973). Had Congress intended to reach more broadly, it could easily have done so.[10]

Indeed, one witness during the hearings on the Tunney Act specifically urged that "as a condition precedent to . . . the entry of a consent decree in a civil case . . . the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint . . . . was predicated." Hearings, supra note 7, at 57

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[10] Broader language was readily at hand. Congress had before it Senator Bayh's S. 1088, a bill generally similar to Senator Tunney's bill, but which provided for the filing of "copies of the proposed consent judgment or decree or other settlement and such other documents as the court deems necessary to permit meaningful comment by members of the public on the proposed settlement." S. 1088, 93d Cong., lst Sess. § 2(a)(l)(B) (1973). This language would have given the court discretion to require disclosure of a broader range of materials relating to the adequacy of the proposed decree than the formulation Congress ultimately chose, limiting disclosure to documents or materials that the United States considered determinative in formulating relief.

(prepared statement of Maxwell M. Blecher, attorney). Congress, however, rejected that recommendation.[11]

In enacting the Tunney Act, Congress recognized the "high rate of settlement in public antitrust cases" and wished to "encourage[] settlement by consent decrees as part of the legal policies expressed in the antitrust laws." H.R. Rep. 93-1463 at 6. It wanted, however, to remedy any abuses in the consent decree process -- the Tunney Act focuses judicial and public scrutiny on "the Justice Department's decision to enter into a proposal for a consent decree." Id. at 7. The purpose of the competitive impact statement, the public comment procedures, and the requirement that the defendant reveal his "lobbying" contacts with the government (15 U.S.C. 16(g)), are "to enable a court to determine whether a proposed consent decree is in the 'public interest.'" Id. at 21. The provision requiring the government to produce "determinative documents" reflects Congressional concern, not with the strength of the government's case against

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[11] The Department of Justice expressed concern that the determinative documents provision could be read to require extremely sweeping disclosure, chilling discussions within the Antitrust Division and impeding access to information from outside the Department. 119 Cong. Rec. 24,601 (1973) (letter from Assistant Attorney General Kauper to Senator Javits). Senator Javits introduced two amendments designed to meet the Department's concerns. In accepting these amendments, Senator Tunney indicated that they "merely reaffirm[ed] existing law" and were consistent with the Committee's intent. 119 Cong. Rec. 24,605 (1973) (statement of Senator Tunney). Because the amendments had incorporated references to the Freedom of Information Act, the House Committee deleted them to ensure that "Freedom of Information Act case law . . . was not disturbed." H.R. Rep. No. 93-1463 at ll.

the defendants (to which evidentiary documents relate), but with any inducements -- possibly improper -- that led the government to settle a case on particular terms rather than litigate it. See also Hearings, note 7 supra, at 4 (remarks of Senator Tunney) (provision for public disclosure, including defendant's lobbying efforts, were "best guarantee of a sound decision" to settle a suit). Seen in this light, it is not surprising that the government did not have "determinative documents" in this case.

The only case on which private plaintiffs rely that gives "determinative document" a more expansive reading -- United States v. Central Contracting Co., 531 F. Supp. 133, 537 F. Supp. 571 (E.D. Va. 1982) -- has not been followed by any other court. Indeed, of the approximately 150 antitrust consent decrees filed since Central Contracting, the government filed "determinative" documents or materials in only 20 of them.[12] Despite ample

[12] See e.g., United States v. Tele-Communications, Inc., 1996-2 Trade Cas. (CCH) ¶ 71,496, at 77,619 (D.D.C. 1994) ("No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such document to the proposed Final Judgment."); accord Motorola, 1996-1 Trade Cas. at 77,026; United States v. The LTV Corp., 1984-2 Trade Cas. (CCH) ¶ 66,133, at 66,335 (D.D.C. 1984).

opportunities, no court has followed Central Contracting in finding documents determinative even though they do not relate to relief.[13]

B. Private Plaintiffs Are Not Entitled to Review the Settlement Memorandum Under 15 U.S.C. 16(e)(2) and 16(f)(3)

Private plaintiffs also argue that the Court should order production of the Settlement Memorandum pursuant to 15 U.S.C. 16(e)(2) and 16(f)(3). Section 16(e)(2) provides that, in making the Tunney Act public interest determination, the Court may consider "the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations . . . including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." Section 16(f)(3) provides that, in making the public interest determination, the Court may "authorize full or limited participation . . . by interested persons . . . including . . . examination of witnesses or documentary materials, or participation . . . as the court may deem appropriate."

Private plaintiffs claim that, because they are "individuals alleging specific injury from the violations set forth in the complaint" within section 16(e)(2), they are entitled to

[13] In Central Contracting, moreover, the court acknowledged that section 16(b) "does not require full disclosure of Justice Department files, or grand jury files, or defendant's files, but it does require a good faith review of all pertinent documents and materials and a disclosure of" those "materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree . . . . " 537 F. Supp. at 577.

"examination of documentary materials" under section 16(f). Pl. Mem. 18. This interpretation ignores the additional pertinent statutory requirements. Section 16(f)(3) authorizes the Court to grant "interested persons" the right to examine "witnesses or documentary materials" (just as it gives "interested parties" the right to "intervene" or "appear [as] amicus curiae") only if that participation will serve the "public interest."

As we discuss above in the context of intervention, such participation would not serve the public interest here; indeed, it would prolong the resolution of this case -- with no prospect at all that direct involvement of the private plaintiffs in this proceeding would enhance the Court's ability to determine whether entry of the proposed order is in the public interest.

Moreover, granting private plaintiffs the opportunity to examine the government's investigative files simply to identify possible evidence that the defendants carried out the alleged conspiracy through means other than the telephone (Pl. Mem. 24-25), or to find out what evidence the Division had that might have supported a provision in the proposed order that would have required the settling defendants to implement certain quoting rules recently proposed by the SEC (id. 26), would be a pointless detour. As previously noted, cases are generally settled after exhaustive negotiations, and "the agreement reached normally embodies a compromise." Motorola, 1996-1 Trade Cas. at 77,026. As a consent settlement need not be certain to eliminate every anticompetitive effect of a particular practice or mandate the

certainty of free competition in the future to be in the public interest (id.), it would be beside the point for the private plaintiffs to review the government's evidence for the purpose of determining whether they might articulate some basis upon which to suggest to the Court that the form of the proposed order be tweaked in one direction or another to make it "more perfect." Cf. IBM, 1995-2 Trade Cas. at 75,458; United States v. AT&T, 1982-2 Trade Cas. (CCH) ¶64,726, at 71,525 & n.7, 71,526 (D.D.C. 1982). Rather, the issue before the Court is merely whether the relief "is within the reaches of the public interest." Microsoft, 56 F.3d at 1460-61 (emphasis in original).

While "the Court may consider the interests of 'individuals alleging specific injury from the violations set forth in the complaint'" (Pl. Mem. 18), that consideration is limited to "the impact of entry of such judgment upon . . . [those] individuals . . . including . . . the . . . benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. 16(e)(2) (emphasis added). Again, as discussed in part I, above, entry of the proposed order will have no impact upon plaintiffs' private suit. In fact, private plaintiffs are not claiming that the proposed order should not be entered or that the government should proceed to trial. They simply want alternative (and duplicative) avenues of discovery for their private litigation. In the absence of any adverse impact caused by entry of the proposed order, the Tunney Act sections on which plaintiffs rely simply do not provide for the relief they seek.

Private plaintiffs complain that it would be "extremely inefficient to require [them] to reinvent the wheel, rather than build upon the government's investigation." Pl. Mem. 22, also 16 (private plaintiffs want a "road map" for their private case). This lament assumes that the Tunney Act's purpose is to ease the work of lawyers in private antitrust suits by giving them free access to the fruits of the government's investigation. This was not Congress' intent. Entry of the consent decree does not protect from discovery in the private suit any materials that would otherwise be discoverable to plaintiffs; nor, however, does it purport to broaden or amend the rules governing civil discovery. See also SEC v. Everest Management Corp., 475 F.2d at 1239 (intervention not aimed at assisting private plaintiffs who seek to avoid duplication of agency's investigative efforts).

Private plaintiffs rely on a portion of the legislative history of the Tunney Act which suggests that a court may conclude in particular cases that it is appropriate to "condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the prosecution of their claims." S. Rep. No. 93-298 at 6-7; accord H.R. Rep. No. 93-1463 at 8. But had Congress thought courts should routinely condition their approval in this way, it could have simply required that the government make its evidentiary files public. Congress imposed no such requirement. Indeed, the Congress strictly limited disclosure of materials obtained under

the ACPA from defendants and other non-parties. See In re Nasdaq Market-Makers Antitrust Litigation, 929 F. Supp. at 726; 15 U.S.C. 1313(c)(3).[14] Certainly, a general expression in the legislative history of some sentiment in favor of disclosure cannot prevail over an express statutory prohibition on the disclosure by the Department of information obtained pursuant to CIDs.

Similarly, the information incorporated in the Settlement Memorandum that the Department obtained from the SEC -- whose investigation is continuing -- must remain confidential. See 17 C.F.R. 230.122; 17 C.F.R. 240.0-4; 44 U.S.C. 3510(b); Shell Oil Co. v. Department of Energy, 477 F. Supp. 413, 420 (D. Del. 1979) ("Data immune from disclosure in the hands of a federal agency acquiring data retains that protection in the hands of a receiving agency after an inter-agency transfer.").

The Department insured that there would be no use of this information except for settlement purposes by resticting access to the Settlement Memorandum to a limited number of individuals, none of whom were permitted to keep or copy any part of that document. Moreover, each of these individuals had to agree in writing to maintain strict confidentiality of the information

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[14] The legislative history to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which added this provision to the ACPA, explains that, with certain limited exceptions, "information submitted pursuant to a CID will remain confidential, and will be available to no one during the investigation except Division attorneys, the CID recipient, his counsel, and under certain circumstances, the FTC." H.R. Rep. No. 1343, 94th Cong., 2d Sess. 15 (1976).

disclosed. To force public disclosure of such information simply because it was previously disclosed in connection with settlement efforts, and never disclosed in any other context, would forever compromise the ability of government investigative agencies to reach settlements in multi-party proceedings.

Private plaintiffs would be hard-pressed to argue that what remains of the Settlement Memorandum -- the government's legal analysis of the proof required to establish an antitrust conspiracy -- is relevant to plaintiffs' private suit. See Fed. R. Civ. P. 26(b)(1) (discovery provided for "relevant" information only). Further, disclosure of the remaining portions of the Settlement Memorandum would encroach upon a number of established privileges and protections.[15] See Jabara v. Kelley,

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[15] Because the Settlement Memorandum is a predecisional deliberative memorandum prepared as an aid in reviewing and making a decision on the government's enforcement options, it falls within the governmental deliberative process privilege. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 & n.19 (1975); Access Reports v. Dept. of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991); Weissman v. Fruchtman, 1996 WL 15669, at *13 (quoting Mobil Oil Corp. v. Dept. of Energy, 102 F.R.D. l, 5 (N.D.N.Y. 1983)). Further, since the Settlement Memorandum was prepared for the express purpose of negotiating a settlement, it is protected from disclosure under the line of cases initiated by Bottaro v. Hatton Associates, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982)(denying discovery of settlement agreement, inadmissible in evidence under Fed. R. Evid. 408, in absence of particularized showing of likelihood that disclosure will lead to discovery of admissible evidence); accord, e.g., Weissman v Fruchtman, 1986 WL 15669 at *20 (S.D.N.Y. Oct. 31, 1986). Finally, because the Settlement Memorandum is part of the government's investigative files, it is protected by the law enforcement investigative privilege while the investigation is still pending and for a reasonable time thereafter. See Three Crown Ltd. Partnership v. Salomon Bros., Inc, 1993-2 Trade Cas. (CCH) ¶ 70,320, at 70,665-66 (S.D.N.Y. 1993); Raphael v. Aetna Cas. and Sur. Co., 744 F. Supp. 71, 74 (S.D.N.Y. 1990). Should the Court hold that the

75 F.R.D. 475, 481 (E.D. Mich. 1977) ("Of course, as a threshold matter, the plaintiff has the burden of showing that the information he seeks is relevant and material to the proofs of his claims before the Court is even obligated to consider whether defendants' claims of privilege should be upheld in a particular instance.").

Finally, routine disclosure of the materials private plaintiffs seek would deter defendants from entering into negotiated settlements with the government, and, perhaps, from cooperating in investigations that are likely to lead to such negotiations. Such a requirement "would thus, as a practical matter [eliminate the consent decree] as an antitrust enforcement tool, despite Congress' directive that it be preserved." United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd mem. sub. nom. Maryland v. United States, 460 U.S. 1001 (1983). The cost to antitrust enforcement, particularly in an era of declining government resources, would be substantial. Most of the government's civil antitrust cases are settled rather than tried. If more cases are required to be litigated, fewer of them can be brought.

Private plaintiffs' contention that the Court cannot evaluate the effectiveness of the relief provisions of the proposed order in the absence of giving plaintiffs access to the

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Settlement Memorandum is a determinative document or producible pursuant to 15 U.S.C. 16(e)(2) or 16(f)(3), the Department requests the opportunity to fully brief these privilege issues.

Settlement Memorandum (Pl. Mem. 24) is specious. The CIS ("Competitive Impact Statement") gives the plaintiffs, the Court, and the public in general, detailed and specific information concerning the conduct uncovered by the Department in its investigation. While the CIS does not disclose specific names and dates and evidentiary details, such information is unnecessary to enable the Court to evaluate the remedies proposed in light of the nature of the allegations in the complaint.[16] The CIS, as well as the complaint itself -- which sets forth the violations alleged -- provides ample information to enable the Court to determine whether the proposed order adequately remedies the violations uncovered and alleged, and thus whether entry of the proposed order is within the "reaches of the public interest." See Microsoft, 56 F.3d at 1460 (court must look to allegations in complaint, and only those allegations, to determine whether remedies provided are adequate).

Private plaintiffs speculate that, "while the collusion has taken place principally over the telephone," the Settlement Memorandum "likely will reveal the mix of telephone calls, computer messages, and other forms of communication that have been (or could be) used to organize and enforce the market

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[16] Private plaintiffs are seeking such specifics, not to advance the Court's public interest determination, but to advance their private suit by providing them with a "road map" of the government's evidence. Pl. Mem. 16 ("[T]he Competitive Impact Statement itself . . . names no names. It therefore does not provide a road map identifying witnesses who could be interviewed or deposed.").

makers' conspiracy"; private plaintiffs thus suggest that the proposed decree remedies may be inadequate. Pl. Mem. 24-25. This unsupported conjecture provides no basis for affording plaintiffs broad access to the government's files. First, the CIS gives sufficient detail about the way in which the conspiracy has operated to obviate the need for reviewing the Settlement Memorandum in this regard. Although private plaintiffs speculate that the Settlement Memorandum might reveal that the defendants employed electronic means in addition to the telephone to further their price-fixing conspiracy, even if true, private plaintiffs do not need to examine the Settlement Memorandum to make the point (as they are free to do in their public comments) that audio-taping of telephone conversations cannot guarantee that defendants will not attempt to fix prices through other means. See Pl. Mem. 24-25. Similarly, the Court does not need "a full evidentiary record . . . to evaluate the adequacy of the . . . proposed Consent Decree" in failing to impose certain "quoting rules" proposed by the SEC. Id. at 28, 26. The CIS amply explains the Department's reasons for not insisting that the defendant implement those rules as a condition of settlement (complexity involved in requiring less than all industry participants to implement the rules, fairness concerns and the pendency of the rules before the SEC). Only baseless speculation suggests that examination of the Settlement Memorandum would shed additional light on this explanation. In any event, since the government's complaint was filed, the SEC has enacted the

"quoting rules" that the Department supported (see 61 Fed. Reg. 48,290 (Sept. 12, 1996)), presumably mooting this issue.

III. THE COURT SHOULD REFUSE PRIVATE PLAINTIFFS' REQUEST TO MODIFY SECTION IV(C)(6) OF THE PROPOSED ORDER

Paragraphs IV(C)(2)-(6) of the proposed order require, as a method of ensuring compliance with the terms of the decree, that defendants randomly monitor and tape record not less than 3.5% of their Nasdaq trader telephone conversations (up to a maximum of 70 hours per week), identify and produce any tapes containing conversations that may violate the proposed order and furnish the tape of any such conversation to the Antitrust Division within ten business days of its recordation. Paragraph IV(C)(6) specifically provides:

> Tapes made pursuant to this stipulation and order shall not be subject to civil process except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended.

Private plaintiffs claim that this provision should not be read to preclude them or any other "future plaintiffs" from obtaining access to the audio tapes. They ask "the Court [to] reject this provision, or clarify that, by entering the Consent Decree, the Court does not bind any non-party to the Consent Decree. . . . " Pl. Mem. 30.

The Court should not reject or modify paragraph IV(C)(6). In reaching the settlement in this case, the defendants agreed, at the government's insistence, to conduct random taping of their

traders' conversations to enforce compliance with the proposed order. In negotiating this unusually strict provision, the government agreed to limit the use to which the tapes could be put.[17] Since the tapes would not even be created but for the proposed order, the Court should accept the provision in the proposed order preventing their use in private litigation. See In re LTV Securities Litigation, 89 F.R.D. 595, 617-22 (N.D. Tex. 1981) (denying disclosure of documents prepared by Special Officer appointed, in accordance with provisions of a consent

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[17] The disclosure and admissibility limitations of the proposed order apply only to tape recordings created pursuant to the proposed order. To the extent that defendants record trader conversations for their own purposes, such recordings would not be subject to the provision of paragraph IV(C)(6) limiting the disclosure and admissibility of recordings "made pursuant to" the proposed order. See also proposed order, paragraph IV(C)(8) ([u]pon request of the Antitrust Division, a defendant must "immediately identify all tape recordings *made pursuant to . . . [the proposed] order* that are in its possession or control . . . ." (emphasis added). Further, as the proposed order requires that a defendant "record *(and listen to)* not less than three and one-half percent (3.5%) of the total number of trader hours of such defendant" (paragraph IV(C)(4)) -- and to report potential violations to the Antitrust Division (paragraph IV(C)(5)) -- a defendant would have great difficultly "over claiming" recordings not created pursuant to the proposed order. If a recording was not actually "listened to" by the defendant's Antitrust Compliance Officer (or his staff) and a report of potential violations made to the Antitrust Division, the recording would not qualify as having been made pursuant to the proposed order. The Department intends to ensure that each defendant is capable of identifying immediately all tape recordings made pursuant to the proposed order, and may insist that the defendants provide a schedule of the recordings to be made in advance of their creation. See proposed order, paragraph IV(C)(8); see also paragraph IV(C)(3). In this way, it will be clear what recordings have been made pursuant to the order and should be in the firm's inventory.

decree, to investigate and report on defendant's accounting and auditing practices).

Moreover, no existing rights or interests of private plaintiffs are implicated by this provision. Future audio tapes may or may not prove to contain evidence relevant to antitrust violations; certainly they are likely to have much information that is irrelevant, confidential or otherwise protected from disclosure. Nor do private plaintiffs have any particular standing to redress the speculative grievances of potential "future" victims. The private plaintiffs' interest in this regard is no greater than that of any other member of the public who may comment on the decree. The Court should not grant intervention to private plaintiffs to redress speculative wrongs in conjectural "future litigation" by unknown future "injured investors." See Pl. Mem. 15, 16. Should such future litigation develop, the enforceability of this provision can be litigated by parties with standing to press the issue.

Meanwhile, the Department plans, if the Court enters the proposed order, to monitor the tapes carefully and, if evidence of new or continuing violations comes to light, take appropriate enforcement action. In addition, should violations of the securities laws be indicated, the Department will refer such evidence to the SEC, the NASD, or both.

Conclusion

The motion to intervene, participate as *amicus curiae*, or otherwise be permitted to discover documents or have the Court alter the terms of the proposed consent decree should be denied.

Dated: October 2, 1996
Washington, D.C.

Respectfully submitted,

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