IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2415
CA-02-288-1

S.M. OLIVA,

Party in Interest – Appellant

and

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

MOUNTAIN HEALTH CARE, P.A.,

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MEMORANDUM FOR APPELLEE UNITED STATES OF AMERICA

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RELEVANT STATUTE

15 U.S.C. 16(b), part of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h) (the "Tunney Act"), provides in pertinent part:

> Copies of such proposal [for a consent judgment in a government antitrust case] and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite –
>
> (1) the nature and purpose of the proceeding;
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> (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
>
> (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
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> (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
>
> (5) a description of the procedures available for modification of such proposal; and
>
> (6) a description and evaluation of alternatives to such proposal actually considered by the United States.

STATEMENT OF THE CASE

On December 13, 2002, the United States filed a civil antitrust Complaint alleging that defendant Mountain Health Care, P.A. (hereafter "MHC"), and its physician owners and members, restrained competition in the sale of physician services to managed health care purchasers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. MHC chose not to contest the charges and agreed to a consent decree requiring it to dissolve itself permanently. Accordingly, the United States filed the proposed Final Judgment simultaneously with the Complaint.

The Tunney Act, 15 U.S.C. 16(b), establishes procedures to govern the entry of consent decrees in civil antitrust cases brought by the United States. Pursuant to the Act, the parties' Stipulation, the proposed Final Judgment, and the United States' Competitive Impact Statement were published in the *Federal Register* on January 10, 2003. 68 Fed. Reg. 1478 (Jan. 10, 2003).

On February 15, 2003, Appellant S.M. Oliva, acting *pro se*, filed a motion in the district court for leave to file a brief *amicus curiae*. On March 7, Mr. Oliva filed comments on the proposed Final Judgment on behalf of Citizens for Voluntary Trade, of which he is president (Oliva br. at 4-5). The sixty-day period for submitting public comments expired on March 12, 2003. On March 27, 2003, the district court accepted Mr. Oliva's *amicus* brief and indicated that it would treat

the brief as a supplemental comment.

The United States responded to nine written comments, including Mr. Oliva's extensive comments, plus his *amicus* brief, on July 10, 2003. On July 17, 2003, Mr. Oliva requested leave to file a second *amicus* brief. The district court did not rule on that motion. On August 13, 2003, after the public comments and the United States' response were filed with the court and published in the *Federal Register*, 68 Fed. Reg. 44,570 (July 29, 2003), the United States moved for entry of the proposed Final Judgment. The district court found that the proposed decree was in the public interest and entered the Final Judgment on September 15, 2003.

Mr. Oliva then filed a motion to intervene for purposes of appeal, representing that "Movant's claim in this case is that the United States did not comply with [sic] Tunney Act's requirement, under 15 U.S.C. § 16(b), to disclose all 'materials and documents which the United States considered determinative in formulating' its consent judgment with defendant Mountain Health Care[.]"[1] His motion did not mention the Competitive Impact Statement. Mr. Oliva further stated that he did *not* intend to challenge the terms of the Final Judgment or whether the Final Judgment was in the public interest:

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[1] Memorandum of Points and Authorities in Support of Motion of *Amicus Curiae* S.M. Oliva for Leave to Intervene for Purposes of Appeal (filed September 23, 2003) at 2.

> Movant will not seek appellate review of the terms of the Final Judgment relating to MHC's dissolution. The sole question for appellate review will relate to disclosure of determinative documents and materials. The Government has already obtained the antitrust relief provided in the Final Judgment, and that will not change even if Movant prevails on appeal.[2]

The United States filed an opposition to Mr. Oliva's motion to intervene. On October 30, 2003, however, the district court granted Mr. Oliva's motion "[f]or the reasons set forth in said Motion." Mr. Oliva filed his Notice of Appeal on November 7, 2003.

STATEMENT OF FACTS

A. The Competitive Impact Statement and Statement Concerning Determinative Documents

Pursuant to the Tunney Act, the government filed with the court and published in the *Federal Register* a Competitive Impact Statement that described the complaint and the proposed relief. As it explained, defendant MHC was a physician-owned network consisting of the vast majority of the physicians in private practice, representing virtually every medical specialty, in the greater Asheville, North Carolina, area. In certain practice specialties, 100 percent of the Asheville area physicians were MHC members. MHC also included the majority of physicians with admitting privileges at Mission St. Joseph's Hospital, the only

[2] *Id.* at 3.

hospital available to the general public in Asheville and surrounding Buncombe County. Competitive Impact Statement ("CIS"), 68 Fed. Reg. 1480 (Jan. 10, 2003).

MHC acted as a vehicle for collective decisions by its participating physicians on price and other significant terms of dealing with managed care insurance companies, self-insured employers, and third-party administrators. CIS, 68 Fed. Reg. at 1480; Complaint ¶ 8. Independent physicians and medical practices typically compete against each other to offer health care services to managed care purchasers. CIS, 68 Fed. Reg. 1480. MHC and its physicians established a uniform fee schedule that MHC incorporated into contracts with managed care purchasers. Complaint ¶ 10; CIS, 68 Fed. Reg. 1480. MHC's imposition of a uniform fee schedule eliminated price competition among MHC's physicians, Complaint ¶ 14, and increased physician reimbursement fees paid by managed care purchasers in the greater Asheville area. Complaint ¶ 14; CIS, 68 Fed. Reg. 1480. Because the majority of physicians in the Asheville area were members of MHC, few, if any, competitive alternatives remained for managed care purchasers. *Id.*

As the CIS explained, the proposed Final Judgment required MHC to dissolve permanently. In addition, it imposes certain obligations on MHC to

facilitate that dissolution, including providing notice to members and customers. The CIS further explained that the government considered no alternatives to the proposed decree except a full trial on the merits.

The CIS also included a statement with respect to the statutory requirement to make available "materials and documents which the United States considered determinative in formulating" the proposed decree. The United States represented that "There are no determinative materials or documents within the meaning of the [Tunney Act] that were considered by the United States in formulating the proposed Final Judgment." 68 Fed. Reg. 1481.

B. Mr. Oliva and Citizens for Voluntary Trade

Mr. Oliva is President of Citizens for Voluntary Trade ("CVT") (Oliva br. at 4), a group that is opposed to the antitrust laws. According to its website,[3] CVT

> believes that antitrust law works to the detriment of consumers, producers, and the free market as a whole. Antitrust has allowed the government to arbitrarily rig economic outcomes in favor of politically connected interest groups. Antitrust forces businessmen to consider the interest of government regulators – rather than stockholders and customers – when making fundamental economic decisions. Ultimately, antitrust puts the government in the position of denying individual rights rather than protecting them.

In its comments on the proposed Final Judgment here, CVT expressed its view that "the Sherman Act is unconstitutional" (68 Fed. Reg. 44,585 (July 29, 2003)), and

[3] www.voluntarytrade.org/about_us.htm

CVT's board of directors resolved that "the principles of capitalism are inconsistent with the enforcement of the antitrust laws." *Id.* at 44,577.[4] Mr. Oliva and CVT have attempted to challenge, by means of intervention or otherwise, numerous antitrust settlements or consent decrees entered into by the United States and the Federal Trade Commission. *See* Oliva br. at 5 n.10 and CVT website, *supra*.

Mr. Oliva does not claim that he is a doctor or that he otherwise participates in the Asheville, North Carolina healthcare market. He gives his address as Washington, D.C., and he does not claim first-hand knowledge of the healthcare market in the Asheville, North Carolina area or of the conduct of defendant MHC.[5]

SUMMARY OF ARGUMENT

The district court properly found that the United States complied with the

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[4] CVT's comments further asserted that "The government's war on physicians must end. Every day the United States spends trying to blame doctors for the failure of three decades of government policies is a day that this country moves closer towards the complete socialization of health care under central control." *Id.* at 44,587. To the same effect, CVT's comments assert that "In 1965, Congress brought an end to the free market that successfully served Americans for most of the republic's history" by enacting Medicaid and Medicare. *Id.* at 44,580.

[5] *See*, *e.g.*, CVT Comment Ex. A at 3 n.5 and accompanying text (relying on telephone interview with MHC president Ellen Wells); Ex. B at 46 (relying on information "Mountain president Ellen Wells told CVT"); Ex. B App. A (attaching documents from MHC website), 68 Fed. Reg. 44,571.

procedural requirements of the Tunney Act and that entry of the Final Judgment, which completely terminated the violation alleged and prevented its repetition, was in the public interest. Even if Mr. Oliva had standing to appeal from the entry of a decree that does not affect him personally, his procedural objections would not establish any abuse of discretion by the district court. In reality, Mr. Oliva seeks not to enforce the requirements of the Tunney Act, which focuses on the terms of the proposed consent decree, but to obtain a hearing on the government's exercise of prosecutorial discretion in filing the Complaint, for which the Tunney Act provides no authority.

Mr. Oliva's argument that the district court should not have entered the decree because the government did not release the schedule of fees imposed by MHC as a document "which the United States considered determinative in formulating" the proposed decree, *see* 15 U.S.C. 16(b), is without merit in light of the government's representation that there were no such documents and the tenuous connection between the specific fees charged and formulation of a decree permanently dissolving the defendant organization and thereby precluding it from any future price fixing. Nor does Mr. Oliva's contention that the government should have provided additional background details about the violation in the Competitive Impact Statement – an issue with respect to which he did not seek and

was not granted leave to intervene – suggest any such abuse in the district court's entry of the decree, for the CIS gave more than sufficient information to fulfill its function of triggering public comments.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL BECAUSE IT PRESENTS NO CASE OR CONTROVERSY

This Court may consider only cases or controversies. U.S. Const. art. III; *see also, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 61 (1986).[6] The United States and MHC have settled their dispute. The district court granted Mr. Oliva's motion to intervene in the proceeding in district court (for the purposes of appeal), but status as an intervenor in itself does not satisfy the requirements of Article III. Those requirements must be satisfied independently. *Diamond*, 476 U.S. at 68-69. Because Mr. Oliva lacks any judicially cognizable interest in the alleged determinative documents, the amount of detail in the CIS, the controversy between the United States and MHC, or the decree entered below, he lacks standing to maintain this appeal, there is no case or controversy here, and this Court accordingly lacks jurisdiction to address his concerns.

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[6] The United States challenged Mr. Oliva's standing in the district court in opposing intervention. The district court implicitly rejected that challenge by granting the motion to intervene, but the question of jurisdiction is properly before this Court.

No court has ever held in the Tunney Act context that a third party who lacks any interest in the terms of the consent decree or any other interest that might be impaired by events in the government's antitrust case nonetheless has standing to contest, on its own in the court of appeals, either the adequacy of the government's disclosure of determinative documents or the adequacy of the CIS. In the leading case on intervention and determinative documents, *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781-82 (D.C. Cir. 1997), the court concluded that the School was entitled to intervene as of right to seek disclosure of documents, but did so on the basis of the School's interest in using these documents in its own antitrust suit.[7] The School's interest in obtaining evidence for that suit amounted to an "interest relating to the property or transaction which is the subject of the [government's] action" with respect to which "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."

[7] The court did say that "On the broad view of this provision espoused by [the School], once the proposed decree was filed [the School] acquired a legal entitlement to access" to determinative documents, 118 F.3d at 781, but that was clearly a characterization of the School's legal theory, which the court did not adopt.

Fed. R. Civ. P. 24(a).[8] Mr. Oliva has no comparable interest. He disclaims any interest in the terms of the decree, Oliva br. at 9 (not challenging "the merits of the final judgment itself"), never suggests he is affected in any way by whatever happens in health care markets in North Carolina, and claims no interest in the information he seeks to obtain apart from his desire to prolong the Tunney Act proceedings with additional time for commentary.

Mr. Oliva's desire to have the government provide more information is just that – a concerned bystander's desire – and no more, unless the Tunney Act creates a judicially cognizable interest in that information, a "legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), enforceable by anyone who cares enough to seek to enforce it. But the Tunney Act does no such thing. Neither the text of the Tunney Act nor its policy suggests it was intended to do so. As Mr. Oliva recognizes, the purpose of requiring disclosure of determinative documents and the matters addressed in a CIS is "*to assist the district court* in determining whether a consent judgment is in the public interest," Oliva br. at 2

[8] The court also cited *United States v. Alex. Brown & Sons*, 169 F.R.D. 532, 539-40 (S.D.N.Y. 1996), as involving similar considerations. There, the intervenors plainly sought documents for use in their own antitrust case. Moreover, on appeal, where no question of standing arose, those intervenors also challenged a provision of the decree. *United States v. Bleznak*, 153 F.3d 16, 18-20 (2d Cir. 1998).

(emphasis added), not to satisfy the desires of concerned bystanders. The Tunney Act permits concerned citizens to inform a district court of their views as to the adequacy of disclosures (as Mr. Oliva did, *see* Oliva br. at 4-5, 6-7), and district courts can and do consider at length the adequacy of disclosure when appropriate, *see*, *e.g.*, *United States v. Microsoft Corp.*, 215 F. Supp.2d 1, 9-17 (D.D.C. 2002) (addressing determinative documents and adequacy of CIS). Permitting mere bystanders to force appellate review of these matters would unduly prolong Tunney Act proceedings and threaten the viability of the consent decree as an antitrust enforcement tool, a result Congress did not intend. *See Massachusetts School of Law at Andover*, 118 F.3d at 784-85. Delay and uncertainty in finalizing consent decrees can only weaken them, to the detriment of the consumers who benefit from antitrust enforcement.

Nor can Mr. Oliva claim to litigate on behalf of the public interest. The United States represents the public interest in government antitrust cases. *See*, *e.g.*, *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *United States v. Associated Milk Producers, Inc.,* 534 F.2d 113, 117 (8th Cir. 1976), and Mr. Oliva could stand in for the United States only after a showing of government bad faith or malfeasance, *see, e.g., Associated Milk Producers*, 534 F.2d at 117, but he fails even to allege bad faith or malfeasance by the United States.

In sum, there is no case or controversy here unless Mr. Oliva's desire for more information amounts to a legally protected, judicially cognizable interest, and it does not. The Court accordingly lacks jurisdiction to hear this appeal.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE FINAL JUDGMENT, WHICH IT FOUND IN THE PUBLIC INTEREST

A. Standard of Review

No appellate decision specifies the standard of review for Tunney Act procedural determinations, but we agree with Mr. Oliva that the proper standard is abuse of discretion. The ultimate public interest determination is reviewed under that standard,[9] and the Act's procedural requirements serve to inform that determination. The district court is well placed to judge whether the parties' actions serve that function. Moreover, a district court properly evaluates the parties' procedural performance for *substantial* compliance. *United States v. Bechtel Corp.*, 648 F.2d at 664 ("strict technical compliance" with the Act not required; compliance should be evaluated in light of Act's purposes). Such an

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[9] *See, e.g.*, *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1120 n.5 (D.C. Cir. 1983); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir.) (equitable relief lies within a district court's discretion), *cert. denied*, 534 U.S. 952 (2001). *See generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (where a district court balances "all relevant public and private interest factors," its decision may be reversed only for "a clear abuse of discretion"); *cf. Evans v. Jeff D.*, 475 U.S. 717, 738 (1986) (approval of class action settlement).

evaluation inherently involves judgment and discretion.

B. The United States Fully Satisfied its Procedural Obligation With Respect to Determinative Documents

Mr. Oliva contends that the government failed to comply with the Tunney Act's requirement that it make public, along with the proposed decree, "any other materials and documents which the United States considered determinative in formulating such proposal." 15 U.S.C. 16(b). To the contrary, the United States fully complied with the statute.

As the United States explained in the CIS, it did not consider any specific documents to be "determinative in formulating [its] proposal" for relief. CIS at 10. The United States' judgments in a Tunney Act proceeding are "entitled to deference,"[10] and its representation here is scarcely surprising, in light of the nature of the relief provided in the proposed decree. Defendant MHC, at a relatively early stage of the investigation, chose not to fight the case and agreed to dissolve itself permanently, thereby putting an end to all of the challenged agreements with

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[10] *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532, 540-41 (S.D.N.Y. 1996) (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461(D.C. Cir. 1995)), *aff'd*, *United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998). The statutory language makes clear that Congress did not expect that there would be determinative documents in every 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.

respect to price and other terms. There was no need for the United States to weigh the benefits of various forms of limited relief against the risks of litigation when, by consent, it could obtain complete and permanent relief in the form of MHC's dissolution.

Mr. Oliva's fundamental complaint is not that he was denied documents relevant to the formulation of relief and that he was therefore unable to comment on the terms of the consent decree (which he does not challenge, *see* Oliva br. at 9). Rather, he seeks to use the Tunney Act process to dispute the government's exercise of prosecutorial discretion in bringing the case. *See* Oliva br. at 12-13.[11] But the Tunney Act neither requires nor sanctions the kind of proceeding Mr. Oliva seeks.

The Tunney Act establishes procedures to ensure that a district court will have adequate information in making its determination that a consent decree proposed in a government antitrust case is in the public interest. Its "thrust was to bring into 'sunlight' the government's motives for entering a decree, thereby taking out of the 'twilight' the government's decision-making processes with

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[11] *See also* CVT comments at 68 Fed. Reg. 44,577 (July 29, 2003) (CVT board resolves that "the case currently pending against Mountain Health Care is baseless as a matter of fact, law, and justice"); *id.* (CVT "requests the government dismiss its complaint against Mountain Health Care").

respect to antitrust settlements." *Bleznak*, 153 F.3d at 20. The district court's role in a Tunney Act proceeding is not, however, to substitute its judgment for that of the Executive Branch. Rather, the district court "should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Massachusetts School of Law at Andover*, 118 F.3d at 783.

In particular, it is not the role of the court under the Tunney Act to review the Executive Branch's exercise of prosecutorial discretion in filing the complaint. Thus, the court may not reject a proposed decree because it does not address claims the government chose not to bring, *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995), or because it provides relief that is "not necessary" or "to which the government might not be strictly entitled," *Bechtel Corp.*, 648 F.2d at 666. Rather, "the court is only authorized to review the decree itself" and is "not empowered to review the actions or behavior of the Department of Justice." *Microsoft Corp.*, 56 F.3d at 1459.

Nonetheless, before the district court, Mr. Oliva demanded broad disclosure of multiple categories of documents, which would have amounted to almost

everything in the government's investigatory files.[12] He now appears to concede (Oliva br. at 16-17) that such broad demands are improper under precedent establishing that the Tunney Act "does not require that the government give access to evidentiary documents gathered in the course of an investigation culminating in settlement." *Massachusetts School of Law at Andover*, 118 F.3d at 785. *See also Bleznak*, *supra*. He attempts to avoid this precedent, however, by limiting his argument to the MHC fee schedule (Oliva br. at 20), which he characterizes as the

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[12] In his motion to intervene (at 2-3), Mr. Oliva contended that the United States should have disclosed:

1. "Information describing the healthcare marketplace in Western North Carolina, including any details of the specific market for physician services";

2. "Information detailing MHC's fee schedules during the period the United States conducted its investigation, and provide any information regarding the fees charged by competitors in the Western North Carolina market, as well as fees charged by physicians in neighboring markets";

3. "Any letters, memoranda, or other documents exchanged between the United States and any competitor of MHC, including managed care plans such as HMOs";

4. "Specific evidence of consumer harm resulting from MHC's actions"; and

5. "Information describing other principal factors that contribute to the prices paid by managed care purchasers in Western North Carolina."

"sole *controlling* piece of evidence used by the government in assessing the need for antitrust relief," *id*. at 12, and the "foundation of the government's case," *id*. at 13. That position, although less sweeping than his demand for all of the government's evidence of liability, is equally without merit.

First, the statutory requirement to disclose determinative documents is confined on its face to documents that individually had a significant impact on "formulating such proposal" for *relief*. It is possible, of course, for a document to contain information that is both relevant to proof of liability and determinative as the government evaluates the effectiveness of possible forms of relief and formulates its proposed decree. But Mr. Oliva's effort to come within the language of the statute by arguing that there would have been no case without this evidence, and thus no need to formulate any relief, amounts to an invitation to read the explicit limitation to documents determinative "in formulating such proposal" out of the statute.[13]

Second, the Act calls for disclosure only if the "United States considered"

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[13] When it crafted the Tunney Act, Congress had before it broader language, consistent with Mr. Oliva's position, in the form of Senator Bayh's S. 1088, a bill that would have provided for disclosure of "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., 1st Sess. § 2(a)(1)(B) (1973). But Congress *rejected* that proposal and instead restricted disclosure to documents that the *United States* considered determinative in formulating the *relief*.

the documents determinative in formulating relief. On its face, the Act does not require disclosure of documents on the basis of the significance that Mr. Oliva or anyone else might attribute to them. The district court would have had no basis to assume that the government must have considered the MHC fee schedule the "foundation of its case" even as to liability, much less as to formulation of the proposed decree. Contrary to Mr. Oliva's apparent suggestion (Oliva br. at 14), the government's liability theory did not require proof that the fees listed on the schedule were too high. The United States alleged that MHC and its physician members engaged in price fixing in violation of Section 1 of the Sherman Act. It is settled law that price fixing by competitors is *per se* unlawful, and "[i]t is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927)).[14]

Mr. Oliva relies on language in a single district court opinion to support his expansive reading of the government's obligation to release documents determinative as to the formulation of relief. *See United States v. Central Contracting Co.*, 537 F. Supp. 571 (E.D. Va. 1982). That decision has not been

[14] Moreover, the document Mr. Oliva seeks is hardly the only evidence of the existence of the agreements challenged. The United States conducted a thorough pre-complaint investigation that included depositions of multiple witnesses.

followed by any other court, and its reasoning has been criticized as inconsistent with "Congress's intent to maintain the viability of consent decrees as a means of resolving antitrust cases." *Alex. Brown & Sons, supra*, 169 F.R.D at 541. And even in *Central Contracting*, the court did not order production of any documents simply because they were important evidence of liability; it only required disclosure of "[t]he materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree." 537 F. Supp. at 577. *See Alex. Brown & Sons, Inc.*, 169 F.R.D. at 541 ("The documents in *Central Contracting* were non-evidentiary documents . . . that did not relate directly to the strength of the Government's case on the merits"). *Central Contracting*, therefore, provides little support for Mr. Oliva's position that the government was required to disclose the fee schedule on the ground that it was important to the government's liability case, despite the express terms of the statute.

C. Appellant's Challenge to the Competitive Impact Statement is Procedurally Improper and, in Any Event, Meritless

Mr. Oliva also contends (Oliva br. at 17-20) that the CIS should have included more detail about MHC's conduct and market conditions. Mr. Oliva, however, was not granted leave to intervene on that issue. His motion to intervene never mentioned the CIS, and it represented unambiguously that "[t]he sole question for appellate review will relate to disclosure of determinative documents."

Mot. at 3. The district court's order granting the motion stated expressly that it did so "[f]or the reasons set forth in said Motion."

In any event, the CIS filed by the United States complied with the statute. Mr. Oliva contends that the CIS should have (1) "described" the "substantive terms" of the MHC fee schedule, Oliva br. at 17, and (2) "assess[ed] MHC's actual place and function within western North Carolina's healthcare market." *Id.* at 20. But the six requirements for a CIS enumerated in Section 16(b) do not include disclosing the contents of, or even describing, specific evidentiary documents, or analyzing a market, although the CIS filed in this case did include considerable detail about the defendant's conduct and the market.

The CIS more than satisfied the requirement that it include "a description of the practices or events giving rise to the alleged violation of the antitrust laws." It identified the relevant market (defining "Western North Carolina" in terms of counties, 68 Fed. Reg. at 1480); identified MHC as consisting of "more than 1,200 participating physicians practicing in Western North Carolina" and "the vast majority of the physicians in private practice in Asheville, North Carolina, and surrounding Buncombe County, representing virtually every medical specialty," *id.*; described the unlawful practices ("[t]he participating physicians authorized [MHC] to represent them in negotiations with managed care purchasers" and the

physicians "developed a uniform fee schedule for use in negotiations with managed care purchasers"), *id.*; and described the competitive effects of the violation ("[t]he physician reimbursement rates that have resulted from [MHC's] negotiations with managed care purchasers are higher than those which would have resulted from individual negotiations with each competing independent physician or medical practice"), *id.* The CIS also specifically described the fee schedule as "developed, in part, by comparing and blending the rates of multiple physicians," *id.*, and as having the effect of ensuring that "each competing physician is paid the same amount for the same service." *Id.*

Mr. Oliva treats the CIS as if it were an end in itself. But in the context of the Tunney Act, the function of the CIS is simply to begin a public dialog, and in this case it accomplished that purpose by triggering extensive comments from CVT, as well as other comments. The district court is then informed not only by the CIS, but by those public comments and by the government's response. The district court in this case did not want for information, and it did not abuse its discretion in finding the government's disclosures adequate for purposes of entering the final judgment.

CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction or, in the

alternative, affirm the final judgment entered below.

Respectfully submitted.

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