IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA c/o Department of Justice Washington, D.C. 20530, Plaintiff, v. LEN BLAVATNIK c/o Access Industries 28 Kensington Church Street, 4th Floor London, United Kingdom W8 4EP Defendant.	Civil Action No.1:15-cv-01631-RDM
UNITED STATES OF AMERICA c/o Department of Justice Washington, D.C. 20530, Plaintiff, v. LEUCADIA NATIONAL CORPORATION 520 Madison Avenue New York, NY 10022 Defendant.	Civil Action No. 1:15-cv-01547-RDM

PLAINTIFF'S SUPPLEMENTAL BRIEF

At the direction of the Court, Plaintiff files this Supplemental Brief to explain why the procedures of the Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706 (the "Tunney Act") do not apply to this action for civil penalties for violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (the "HSR

Act"). Over the nearly forty years since the Tunney Act and the HSR Act were passed, no court has required that Tunney Act procedures be applied to settlements of civil penalty actions under the HSR Act. Indeed, some courts have held explicitly that Tunney Act requirements do not apply to such actions. Application of Tunney Act procedures to settlements for exclusively legal relief such as monetary penalties is inconsistent with the statute's history, its language as a whole, and nearly four decades of precedent. Further, the Tunney Act was modified long after the United States first took the position that the Tunney Act requirements do not apply to settlements of civil penalty actions, and Congress implicitly ratified this position by not changing the statute to repudiate it.

I. The Tunney Act's History, and its Text Taken as a Whole, Show it Does Not Apply to Civil Penalty Settlements

The Tunney Act established procedures for courts to follow in exercising their Article III powers when reviewing proposed antitrust consent decrees to assure the decrees are not contrary to the public interest. In particular, the Tunney Act codified and strengthened procedures requiring courts to determine that proposed government antitrust settlements that include injunctive relief are in the public interest—by advising the public of proposed consent decrees that could have a public impact (such as an effect on the relevant market or on the rights of private parties to seek relief), giving interested members of the public the opportunity to comment on the proposed settlement, and enumerating factors for the court to consider in determining whether the proposed settlement serves the public interest. 15 U.S.C. § 16(b)-(e). The Tunney Act's history, and its text taken as a whole, show that it was not intended to apply to government settlements of antitrust actions involving only non-equitable forms of relief, which can have little impact on third parties.

A. "Consent Judgment" Is an Ambiguous Legal Term, but the History of the Tunney Act Indicates it Was Not Intended to Include Settlements of Civil Penalty Actions

According to its text, the Tunney Act applies to "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws." 15 U.S.C. § 16(b). "Consent judgment" is an ambiguous legal term with no ordinary meaning, however, and therefore interpreting it requires understanding its use in the law preceding the Tunney Act's passage. *See Morissette v. United States*, 342 U.S. 246 (1952) ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed").

Prior use of the term "consent judgment" in the antitrust context strongly suggests that the term referred to judgments that included equitable remedies. The Supreme Court used "consent judgment" in that way. *See United States v. Ward Baking Co.*, 376 U.S. 327, 329 (1964) ("consent judgment" provided for injunction against price fixing); *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 688 (1961) ("consent judgment" provided for rules governing American Society of Composers, Authors and Publishers). The history of the Clayton Act, which the Tunney Act revised, confirms this usage. Section 5 of the 1914 Clayton Act gave prima facie effect, in a private suit, to any "final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws," but it specifically exempted "consent judgments or decrees" from having that effect. Pub. L. No. 63-212, 38 Stat. 730, § 5 (codified as amended at 15 U.S.C. § 16(a)). Accordingly, a consent

judgment or decree was understood as a means for resolving either a "criminal prosecution" or a "suit or proceeding in equity" brought by the government. And court practice reflected that view. Thus, the district court in *United States v. Radio Corp. of America* recognized that a "consent decree . . . is a judicial act . . . and, therefore, involves a determination by the chancellor that it is equitable and in the public interest." 46 F. Supp. 654, 655 (D. Del. 1942); *see also United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (rejecting argument that an injunction "entered upon consent is to be treated as a contract and not as a judicial act"); *cf. City of Burbank v. Gen. Elec. Co.*, 329 F.2d 825, 831 (9th Cir. 1964) (recognizing nolo contendere plea in criminal case is also a "consent decree" for purposes of 15 U.S.C. § 16(a)).

Following the fusion of law and equity under the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 2 ("There is one form of action—the civil action."), the language of Clayton Act Section 5 was revised in 1955 to give final judgments and decrees prima facie effect "in any civil or criminal proceeding" brought by the United States under the antitrust laws. Pub. L. No. 84-137, 69 Stat. 283, § 2. But "there is no indication in the relevant legislative history that Congress intended any substantive change by the substitution of these words," and so "the reasonable conclusion is that Congress merely changed the language to conform to that of the Federal Rules of Civil Procedure." *Farmington Dowel Prods Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 972 (D. Me. 1963); *see also City of Burbank*, 329 F.2d at 831 ("Congress intended no material change in purpose by reason of the minor changes in § 5(a) of the Clayton Act occasioned by the passage of § 2 of the 1955 amendments."). Even after the 1955 amendment, "civil . . . proceeding" in revised § 5(a) of the Clayton Act, 15 U.S.C. § 16(a), was interpreted to be coextensive with "suit or proceeding in equity" in the prior text. *See Farmington*, 223 F.

Supp. at 972. And the legislative history confirms this view, making clear that (despite the words "any civil or criminal proceeding") the prima facie effect provision did not apply to at least one legal remedy available to the government—"Government damage suits under the new section 4A." S. Rep. No. 84-619, 1st Sess., at 2 (1955).

Likewise, when Congress adopted the Tunney Act procedures, creating 15 U.S.C. § 16(b)-(h), it applied them to consent judgments in "any civil proceeding" brought by the federal government. But just as Congress in 1955 did not intend the minor change in the Clayton Act's language to widen the scope of the Clayton Act's prima facie effect provision, there is no indication that, when passing the Tunney Act in 1974, Congress intended to import equitable concerns about the public impact of antitrust consent decrees into purely legal settlements for civil penalties.[1] *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."). Even after fusion, legal and equitable remedies remained distinct, *see Tull v. United States*, 481 U.S. 412, 422-25 (1987), and courts' understanding of consent decrees or judgments as equitable persisted. Indeed, courts after the 1955 Clayton Act amendments continued to require that

[1] Although the primary remedies available to the government in antitrust cases were then, as now, criminal and equitable, *see* 15 U.S.C. § 1 (criminal), § 2 (same), § 4 (equitable), § 25 (same), legal remedies were available to the government at the time in two limited contexts. First, the United States could seek monetary damages if the United States itself was "injured in its business or property." 15 U.S.C. § 15a. Second, the United States could seek civil penalties from any "person who violates any order issued by the commission, board, or Secretary under subsection (b) of this section." 15 U.S.C. § 21(l). We are aware of no evidence that Congress intended the Tunney Act's procedures to apply to settlements of cases seeking such monetary remedies.

antitrust consent decrees containing equitable remedies be in the public interest, *see United States v. Carter Prods., Inc.*, 211 F. Supp. 144, 147-48 (S.D.N.Y. 1962) ("While the public interest is a dominant consideration [in deciding whether to enter a proposed consent decree], the rights of third parties may not be ignored."), whereas we are aware of no comparable example of courts' making such determinations for settlements containing only legal relief.

The central concern of the Tunney Act—that courts make independent determinations that a consent decree or judgment is in the public interest—grew primarily out of equity practice. As the Supreme Court recognized in *Virginian Railway Co. v. System Federation No. 40*, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 300 U.S. 515, 552 (1937); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . ."). And, in the antitrust context, the "public interest [is] in a competitive system." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967). Even before the Tunney Act, third parties had some limited rights of participation in government antitrust suits for injunctive relief where they were adversely affected by the anticompetitive practices at issue. *Id.* at 135-36.

The legislative history of the Tunney Act confirms that it was intended to incorporate (and reinforce) these equitable concerns, and thus apply only to consent judgments providing for

equitable (e.g., injunctive) relief.[2] Although courts already had a broad equity power to conduct a reasonable inquiry to ascertain whether a proposed consent decree was in the public interest, S. Rep. No. 93-298, at 5-6 (1973), the information available to the public and the courts did not always permit meaningful evaluation of the proposed decree. And, as Senator Tunney explained when introducing the legislation, antitrust cases often have "profound implications not only for the particular defendants but for the millions of voiceless consumers with whom they deal," and settlements of those cases "may affect the price, the quantity, and the quality of the most basic commodities." 118 Cong. Rec. 31,674 (daily ed. Sept. 21, 1972) (statement of Sen. Tunney).

Congress rectified this deficiency by requiring a public competitive impact statement, which serves to "explain to the public, particularly those members of the public with a direct interest in the proceeding, the basic data about the decree to enable such persons to understand what is happening and make informed comments or objections to the proposed decree." *Id.* The requirement "reflects a continuing concern on the part of the Congress to assure that decisions having a major public impact be arrived at through procedures which take account of that impact." *Id.* at 31,675.

In light of the limited public information available at that time, some legislators believed that courts tended to "rubber stamp" settlements without having adequately considered the competitive impact or the effect on third parties who were allegedly injured by the defendant's conduct. *Id.* The Tunney Act would give courts "adequate information" to exercise

[2] The legislative history of the HSR Act, enacted shortly after the Tunney Act, likewise contains no indication that Congress intended to subject HSR civil penalty settlements to Tunney Act procedures.

"independent judgment with respect to the merits of a particular decree." *Id.* In addition, the Tunney Act provided "aid to the court in making its independent judgment" by presenting "a number of more detailed criteria for determination of the public's interest." *Id.* Congress also feared that antitrust defendants "[b]y definition" could wield influence and economic power over the negotiation process. S. Rep. No. 93-298, at 5. As Senator Tunney explained, "Increasing concentration of economic power, such as has occurred in the flood of conglomerate mergers, carries with it a very tangible threat of concentration of political power. Put simply, the bigger the company, the greater the leverage it has in Washington." 118 Cong. Rec. 31,674 (daily ed. Sept. 21, 1972) (statement of Sen. Tunney). By involving third parties in the process, the Tunney Act provided some counterbalance to the power of antitrust defendants so that the relief embodied in consent decrees might reflect the public interest more broadly.

Congress's concerns that led to the enactment of the Tunney Act do not apply to civil penalty settlements. Such settlements have little or no direct impact on third parties. The defendant's payment of monetary penalties has little or no measurable ongoing market impact. In addition, the payment of a civil penalty does not affect the interests of any private third party. Finally, in contrast to consent decrees that seek injunctive relief and may have a market impact, the court does not need further information about a civil penalty settlement to "make an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest." *United States v. Microsoft Corp.*, 56 F. 3d 1448, 1458 (D.C. Cir. 1995) (internal citation omitted). The facts of the violation, the maximum civil penalty (which is based on the time period of the violation), and the civil penalty to be paid are provided in the complaint and

related public filings. Thus, the limited nature of civil penalty settlements is inconsistent with the concerns Congress expressed when passing the Tunney Act.

B. Reading the Tunney Act as a Whole Shows that It Does Not Apply to Settlements in Civil Penalty Actions

Not only does the history of the Tunney Act show it was not intended to apply to civil penalty settlements, but also the text of the Act as a whole confirms that interpretation. "Courts have a 'duty to construe statutes, not isolated provisions.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). The procedures defined in the Tunney Act, and the factors it requires courts to consider, demonstrate that the Act was intended to apply only to settlements that seek injunctive or other equitable relief and thereby have the potential to affect competitive conditions in a relevant market.

The Tunney Act enumerates six issues that the United States must address in a competitive impact statement under the Tunney Act:

> (1) the nature and purpose of the proceeding;
>
> (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;
>
> (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.

15 U.S.C. § 16(b).

The Tunney Act also directs the court to consider two categories of factors to assess whether the judgment is in the public interest:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

Of the six issues enumerated in section (b) of the Tunney Act, most have no practical application to suits seeking monetary or other legal relief. Because the settlement includes only a monetary penalty provided by the statute, items three through six are of little or no relevance. No unusual circumstances give rise to a proposal for a civil penalty, the relief to be obtained is simple, and there can be but little effect on competition. No remedies are available to potential private plaintiffs for these purely statutory violations, no third parties have a direct interest in the case, and no procedures for modification are available where the relief is a one-time payment of money.

Civil penalty actions are also unlike actions for equitable relief in which relief may be fashioned in a variety of ways to remedy competitive harm. Where the United States brings suit under a statutory provision that provides for civil penalties, *see, e.g.*, 15 U.S.C. § 18a(g)(1), § 21(l), there is no "alternative" to the proposed remedy other than a different amount of

money.[3] In an HSR civil penalty action, the maximum civil penalty is provided by the HSR Act itself, and the only determination is what level of penalty (from zero to the maximum penalty provided by the statute) results in settlement of the case.

Of the issues set forth in the Tunney Act, only items one and two—the nature and purpose of the proceeding and a description of the events—are relevant to a civil penalty proceeding, and both are sufficiently detailed in the government's complaint. A competitive impact statement would thus be of little use, and not aid the court in its determination of whether the settlement is in the public interest.

Similarly, the two factors listed in section (e), which courts are directed to assess in their determination of whether a judgment is in the public interest, embody equitable concerns that have little relevance to settlements for legal relief such as civil penalties. As we noted earlier, a judgment for the payment of a limited, one-time penalty has little or no competitive impact, so factor (A) is inapplicable to civil penalties. The complaint and related public filings provide the court with the facts giving rise to the violation, the maximum penalty, and the penalty agreed upon. Thus, the settlement is transparent, and it is subject to judicial review and approval.

There is, moreover, no direct impact on the rights of third parties where the settlement involves nothing more than a transfer of money from the defendant to the government, so factor (B) is inapplicable. Thus, considering the irrelevance of the Tunney Act's procedures and

[3] For violations of the HSR Act, 15 U.S.C. § 18a, the United States may proceed under either subsection (g)(1) for civil penalties or (g)(2) for injunctive relief. Civil penalty actions are, by definition, brought under subsection (g)(1) of the HSR Act.

factors and construing the statute as a whole, the Tunney Act's text indicates it does not apply to civil penalty settlements.

Applying the Tunney Act to HSR civil penalty actions, moreover, would impose public costs but yield comparably little in public benefits. Tunney Act procedures entail delay, *see* 15 U.S.C. § 16(b) (requiring publication in the Federal Register "at least 60 days prior to the effective date of such judgment"), and place burdens on the parties and on the court, *see, e.g.*, *id.* (requiring United States to file a competitive impact statement), *id.* § 16(d) (requiring United States to consider public comments), *id.* § 16(g) (requiring the defendant to file "a description of any and all written or oral communications" related to the case between it and representatives of the United States apart from the Department of Justice), and *id.* § 16(e) (requiring court to assess particular factors to make its public interest determination). Thus, the Tunney Act should be read not to apply in cases for simple civil penalties, but only in suits for equitable remedies. *See United States v. Kirby*, 74 U.S. 482, 486 (1868) ("[a]ll laws should receive a sensible construction"); *United States v. Andrews*, 600 F.3d 1167, 1174 (9th Cir. 2010) ("statutes should not be interpreted to require such inefficiency").

II. Congress Has Implicitly Ratified the Judicial Practice of Exempting HSR Civil Penalty Actions from Tunney Act Procedures

Congress has implicitly ratified the United States' position that the Tunney Act does not apply to HSR civil penalty settlements by amending the statute without reversing, or even questioning, the established practice of the United States and the courts. As detailed in Section III, *infra*, the United States consistently has told courts that its HSR civil penalty settlements are

not subject to the Tunney Act.[4] Courts uniformly have agreed. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also In re North*, 50 F.3d 42, 45 (D.C. Cir. 1995) ("It is settled law that when a statute has an authoritative interpretation, and Congress reenacts it without change, Congress is presumed to be aware of the interpretation and to adopt that interpretation." (internal punctuation and quotation omitted)).

In 2004, Congress amended the Tunney Act "to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest." Pub. L. No. 108-237, § 221(a)(2).[5] Among other things, the

[4] The United States does follow the Tunney Act procedures when its settlement of an HSR violation includes injunctive relief that may affect competition. *See, e.g.*, *United States v. Third Point Offshore Fund, Ltd.*, Proposed Final J. and Competitive Impact Statement, 80 Fed. Reg. 52,500 (Aug. 31, 2015); *United States v. Flakeboard Am. Ltd.*, Proposed Final J. and Competitive Impact Statement, 79 Fed. Reg. 70,555 (Nov. 26, 2014); *United States v. Gemstar-TV Guide Int'l, Inc. & TV Guide, Inc.*, 68 Fed. Reg. 14,996 (Mar. 27, 2003); *United States v. Computer Assocs. Int'l, Inc.*, Proposed Final J. and Competitive Impact Statement, 67 Fed. Reg. 41,472 (June 18, 2002). In cases where the United States has sought both civil penalties and injunctive relief, the United States and the courts have applied Tunney Act procedures to the injunctive portion of the relief, but not to the HSR civil penalty. *See, e.g., United States v. Flakeboard Am. Ltd.*, 79 Fed. Reg. at 70,560-61. Finally, despite taking the position that Tunney Act procedures are not required for civil penalty settlements, the United States employed the Tunney Act procedures in its first two HSR enforcement cases. *See United States v. Coastal Corp.*, 1985-1 CCH Trade Cases ¶ 66,425 (D.D.C.); *see also United States v. Coastal Corp.*, Proposed Final J. and Competitive Impact Statement, 49 Fed. Reg. 36,454, 36,455 n.1 (Sept. 17, 1984) (noting the United States' view that the APPA was not applicable in actions where the complaint seeks and the final judgment provides for only the payment of civil penalties); *United States v. Bell Resources Ltd.*, 1986-2 CCH Trade Cases ¶ 67,321 (S.D.N.Y.).

[5] 150 Cong. Rec. 6328 (2004) (statement of Sen. Leahy) ("[T]his bill intends to explicitly restate the original and intended role of District courts in this process by mandating that the court make an independent judgment based on a series of enumerated factors.").

amendments mandated rather than allowed the court's consideration of certain factors in making its public-interest determination.[6] When it amended the Tunney Act, however, Congress did not revise the established practice that HSR civil penalty cases are not subject to the Tunney Act. By the time of the 2004 amendments, the United States had brought over 30 civil penalty cases, *see* Plaintiff's Appendix ("Pl.'s App."), and courts had not once required the United States to follow Tunney Act procedures.

Here, the presumption that Congress adopted the United States' and courts' long-standing interpretation is particularly strong given that Congress focused on potential judicial under-enforcement of the Tunney Act but did not identify the exclusion of HSR civil penalty settlements as a problem. Legislators were concerned that courts were not reviewing antitrust consent decrees with sufficient vigor, and hence reiterated Congressional intent and amended the Tunney Act. They concluded these steps were sufficient "to effectuate the original Congressional intent," Pub. L. No. 108-237, § 221(a), confirming that the United States and courts fulfilled Congressional intent in approving HSR civil penalty settlements without using the Tunney Act process.[7] In short, Congress has been attentive to the Tunney Act's application, and has taken steps to address potential problems. Yet, Congress has not expressed any

[6] For example, the amendments changed the language in subsection (e)(1) from "the court may consider" the listed factors to "the court shall consider" the listed factors and added language about "competition" to the factors listed in subsection (e)(1). Pub. L. No. 108-237, § 221(b)(2).

[7] Amendments to the HSR Act also confirm this reading of the Tunney Act. In 2000, Congress revised the HSR Act's provisions for determining whether a transaction triggers the filing requirement, established an appeals process for parties objecting to requests for information from the United States, and made other changes to the Act. Pub. L. No. 106-553, § 630. At the time, courts had accepted the United States' construction of the Tunney Act and approved settlements without using the Tunney Act process in about 30 HSR civil penalty cases. Pl.'s App.

dissatisfaction with the United States' and the courts' consistent view that the Tunney Act does not apply to HSR civil penalty cases. Thus, Congress's review and amendment of the Tunney Act supports the understanding that the United States and the courts have construed it properly.

III. No Court to Date Has Required Tunney Act Procedures in an Action Seeking Only Monetary Penalties

In the forty years since Congress enacted the Tunney Act, no court has required use of the Tunney Act procedures to enter a settlement in which the United States sought only civil penalties. The United States has consistently called the matter to courts' attention in its motions for entry of final judgment, explaining that the Tunney Act is inapplicable when a settlement involves only monetary penalties, and no court to date has required use of Tunney Act procedures to enter a settlement for civil penalties.

In addition, two courts explicitly have held that "[t]he procedures of the Antitrust Penalties and Procedures Act, 15 U.S.C. §§ 16(b)-(h), d[id] not apply" in cases awarding only civil penalties under the HSR Act. *United States v. Farley*, No. Civ. A. 92 C 1071, 1995 WL 76920, at *1 (N.D. Ill. Jan. 11, 1995) (Duff, J.); *United States v. Gen. Cinema Corp.*, Civ. A. No. 91-0008 TFH, 1992 WL 41055, at *1 (D.D.C. Jan. 8, 1992) (Hogan, J.). Similarly, two courts held that "[t]he portion of the Final Judgment requiring the payment of civil penalties for violation of Section 7A of the Clayton Act [i.e., the HSR Act] is not subject to the Antitrust Procedures and Penalties Act ('APPA'), 15 U.S.C. § 16(b)-(h)[ ]." *United States v. Gemstar-TV Guide Int'l, Inc.*, Civ. A. No. 03-0198(JR), 2003 WL 21799949, at *5 (D.D.C. July 11, 2003)

(Robertson, J.); *accord United States v. Computer Assocs. Int'l, Inc.*, Civ. A. No. 01-02062(GK), 2002 WL 31961456, at *4 (D.D.C. Nov. 20, 2002) (Kessler, J.).[8]

Moreover, many courts have entered judgments without requiring the use of Tunney Act procedures in cases where the United States sought and obtained settlements for civil penalties under the HSR Act.[9] *E.g.*, *United States v. Diller*, Civ. A. No. 13-1002, 2013 WL 4101693 (D.D.C. July 3, 2013) (Kessler, J.); *United States v. MacAndrews & Forbes Holdings Inc.*, Civ. A. No. 13-0926 KBJ, 2013 WL 4101650 (D.D.C. July 1, 2013) (Jackson, J.); *United States v. Smithfield Foods, Inc.*, Civ. A. No. 10-120 ESH, 2010 WL 5571865 (D.D.C. Jan. 25, 2010) (Huvelle, J.); *United States v. Malone*, Civ. A. No. 1:09-CV-01147-HHK, 2009 WL 2208117 (D.D.C. June 25, 2009) (Kennedy, J.); *U.S. Dep't of Justice, Antitrust Div. v. ESL Partners, L.P.*, Civ. A. No. 08-2175, 2008 WL 5453763 (D.D.C. Dec. 16, 2008) (Bates, J.); *United States v. Sacane*, Civ. A. No. 05-1897PLF, 2005 WL 2649296 (D.D.C. Sept. 29, 2005) (Friedman, J.); *United States v. Manulife Fin. Corp.*, Civ. A. No. 04-0722, 2004 WL 1944847 (D.D.C. May 27, 2004) (Walton, J.); *United States v. Gates*, Civ. A. No. 04-0721, 2004 WL 1737348 (D.D.C.

[8] In both *Gemstar* and *Computer Associates*, the United States followed Tunney Act procedures with respect to the requested injunctive relief. *See United States v. Gemstar-TV Guide Int'l, Inc. & TV Guide, Inc.*, 68 Fed. Reg. at 15,003; *United States v. Computer Assocs. Int'l, Inc.*, 67 Fed. Reg. at 41,480.

[9] As the attached appendix demonstrates, courts in a total of 47 HSR cases have entered final judgments for civil penalties without applying the Tunney Act. Twenty-nine Motions for Entry of Final Judgment are electronically available in legal databases or on the websites of the Department of Justice or the Federal Trade Commission. These motions demonstrate that, in each case, the court was notified of the United States' interpretation of the Tunney Act and entered the final judgment without applying Tunney Act procedures.

May 4, 2004) (Kollar-Kotelly, J.). *Cf. FTC v. Onkyo U.S.A. Corp.*, Civ. A. No. 95-1378-LFO, 1995 WL 579811, at *1 (D.D.C. Aug. 21, 1995) (Oberdorfer, J.) (finding that entry of judgment was in the public interest "[f]or the reasons provided in th[e attached Joint] Statement"); *id.* at *2 n.2 (Joint Statement) (noting that "the courts have not required use of Tunney Act procedures in cases involving only the payment of civil penalties," even in cases brought under the Clayton Act, and "this Court has consistently entered consent judgments for civil penalties under the Hart-Scott-Rodino Act . . . without employing Tunney Act procedures").

The complete lack of any contrary precedent is particularly striking because the United States has taken the position that the Tunney Act does not apply to civil penalty settlements[10] since at least 1979. *See United States v. ARA Services, Inc.*, Resp. of United States to Cmts. Relating to Proposed Final J. Against Def., 44 Fed. Reg. 41,579, 41,583 (July 17, 1979). Further, the United States asserted this position in a motion for entry of judgment as early as 1983. Mot. for Entry of J., *United States v. RSR Corp.*, No. CA3-83-1828-C (N.D. Tex. Oct. 28, 1983) (attached as Exhibit 1). The district court, like all the courts already discussed, entered judgment without requiring the use of Tunney Act procedures. Final J., *RSR Corp.*, No. CA3-83-1828-C (N.D. Tex. Nov. 1, 1983) (Taylor, J.) (attached as Exhibit 2).[11] In the HSR context,

[10] The United States first expressed its view that the Tunney Act does not apply to civil penalties settlements when settling civil penalty cases under Section 11(l) of the Clayton Act, 15 U.S.C. § 21(l).

[11] In *RSR Corp.*, the United States sought monetary penalties under Section 11(l) of the Clayton Act, 15 U.S.C. § 21(l), based on the defendant's failure to comply with a final order of the FTC. *See* Mot. for Entry of J., *RSR Corp.* (attached as Exhibit 1).

the United States first explained its view that the Tunney Act did not apply to HSR settlements for civil penalties in its first HSR civil penalty case in 1984. *See United States v. Coastal Corp.*, 49 Fed. Reg. at 36,455 n.1. As early as 1988, the United States argued in a motion for entry of judgment that the Tunney Act did not apply to an HSR civil penalty settlement. Mot. for Entry of J., *United States v. Wickes Cos.*, Civ. A. No. 88-0782 (D.D.C. Mar. 23, 1988), https://www.ftc.gov/sites/default/files/documents/cases/1988/03/880323 wickesmotion.pdf. There, the district court entered final judgment without applying the Tunney Act. 1988 WL 81652 (D.D.C. April 12, 1988) (Pratt, J.).

IV. Conclusion

The history of the Tunney Act and its language as a whole indicate that it does not apply to HSR civil penalty settlements. Moreover, the United States and courts have consistently not applied the Tunney Act to HSR civil penalty settlements. Yet, when Congress amended the Tunney Act, it did not address this well-established practice. Accordingly, the United States requests that this Court find that the Tunney Act does not apply to HSR civil penalty settlements and enter the final judgment in this case.

Dated: November 20, 2015

FOR THE PLAINTIFF UNITED STATES
OF AMERICA:

/s/
Kenneth A. Libby
Special Attorney

Federal Trade Commission
Washington, D.C. 20580
(202) 326-2694

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA c/o Department of Justice Washington, D.C. 20530, Plaintiff, v. LEN BLAVATNIK c/o Access Industries 28 Kensington Church Street, 4th Floor London, United Kingdom W8 4EP Defendant.	Civil Action No.1:15-cv-01631-RDM
UNITED STATES OF AMERICA c/o Department of Justice Washington, D.C. 20530, Plaintiff, v. LEUCADIA NATIONAL CORPORATION 520 Madison Avenue New York, NY 10022 Defendant.	Civil Action No. 1:15-cv-01547-RDM

PLAINTIFF'S APPENDIX:

HSR Civil Penalty Settlements Where the Tunney Act Was Not Applied

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Berkshire Hathaway Inc.	(D.D.C. Aug. 20, 2014) (Howell, J.)	Civ. A. No. 14-1420 (BAH)	ECF No. 2, 2014 U.S. Dist. LEXIS 125441, 2014-2 Trade Cas. (CCH) ¶ 78,870	ECF No. 1
United States v. Diller	(D.D.C. July 3, 2013) (Kessler, J.)	Civ. A. No. 13-1002	ECF No. 2, 2013 WL 4101693, 2013-1 Trade Cas. (CCH) ¶ 78,446	ECF No. 1, 2013 WL 3745573
United States v. MacAndrews & Forbes Holdings Inc.	(D.D.C. July 1, 2013) (Jackson, J.)	Civ. A. No. 1:13-cv-00926	ECF No. 2, 2013 WL 4101650, 2013-1 Trade Cas. (CCH) ¶ 78,443	ECF No. 1, 2013 WL 3297697
United States v. Biglari Holdings, Inc.	(D.D.C. May 30, 2013) (Leon, J.)	Civ. A. No. 1:12-cv-01586	ECF No. 9, 2013 U.S. Dist. LEXIS 90893, 2013-1 Trade Cas. (CCH) ¶ 78,409	ECF No. 3[2]
United States v. Roberts	(D.D.C. Dec. 28, 2011) (Kollar-Kotelly, J.)	Civ. A. No. 11-02240 (CKK)	ECF No. 5, 2011 U.S. Dist. LEXIS 152118, 2011-2 Trade Cas. (CCH) ¶ 77,742	ECF No. 2[3]

[1] Each of the 29 located motions for entry of final judgment argued that the Tunney Act did not apply because the United States only sought monetary penalties.

[2] The District Court held a status conference to ask why the proposed final judgment did not include court oversight of the defendant's antitrust compliance. ECF No. 5. In response, the defendant filed an Unopposed Motion for Consent Order that proposed a final judgment that included court oversight. ECF No. 8. The Court entered this proposed Final Judgment without applying the Tunney Act. ECF No. 9.

[3] The District Court ordered supplemental briefing to determine whether the proposed judgment was in the public interest. Minute Entry, Dec. 20, 2011. After this supplemental briefing, the Court entered the final judgment without applying the Tunney Act. ECF No. 5.

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Smithfield Foods, Inc.	(D.D.C. Jan. 25, 2010) (Huvelle, J.)	Civ. A. No. 1:10-cv-00120	ECF No. 4, 2010 WL 5571865, 2010-1 Trade Cas. (CCH) ¶ 76,880	ECF No. 3, 2010 WL 975401
United States v. Malone	(D.D.C. June 25, 2009) (Kennedy, J.)	Civ. A. No. 1:09-cv-01147	ECF No. 3, 2009 WL 2208117, 2009-1 Trade Cas. (CCH) ¶ 76,659	ECF No. 2, 2009 WL 2428927
United States v. ESL Partners, L.P.	(D.D.C. Dec. 16, 2008) (Bates, J.)	Civ. A. No. 1:08-cv-02175	ECF. No. 4, 2008 WL 5453763, 2008-2 Trade Cas. (CCH) ¶ 76,421	ECF No. 3
United States v. ValueAct Capital Partners, L.P.	(D.D.C. Jan. 11, 2008) (Kennedy, J.)	Civ. A. No. 1:07-cv-02267	ECF No. 4, 2008-1 Trade Cas. (CCH) ¶ 75,998	ECF No. 3
United States v. Iconix Brand Group, Inc.	(D.D.C. Oct. 16, 2007) (Huvelle, J.)	Civ. A. No. 07-1852	ECF No. 4, 2007-2 Trade Cas. (CCH) ¶ 75,900	ECF No. 3
United States v. Dondero	(D.D.C. May 22, 2007) (Huvelle, J.)	Civ. A. No. 07 0931	ECF No. 3, 2007-1 Trade Cas. (CCH) ¶ 75,710	ECF No. 2
United States v. Qualcomm Inc.	(D.D.C. Apr. 19, 2006) (Friedman, J.)	Civ. A. No. 1:06CV00672	ECF No. 4, 2006-1 Trade Cas. (CCH) ¶ 75,195	ECF No. 2
United States v. Sacane	(D.D.C. Sept. 29, 2005) (Friedman, J.)	Civ. A. No. 05-1897 (PLF)	ECF No. 2, 2005 WL 2649296, 2005-2 Trade Cas. (CCH) ¶ 74,946	ECF No. 1
United States v. Smithfield Foods, Inc.	(E.D. Va. Nov. 12, 2004) (Doumar, J.)	Civ. A. No. 2:04cv526	2004 U.S. Dist. LEXIS 24425, 2004-2 Trade Cas. (CCH) ¶ 74,614	http://www.justice.gov/file/511316/download

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Manulife Fin. Corp.	(D.D.C. May 27, 2004) (Walton, J.)	Civ. A. No. 04-0722	ECF No. 4, 2004 WL 1944847, 2004-1 Trade Cas. (CCH) ¶ 74,426	ECF No. 2
United States v. Gates	(D.D.C. May 4, 2004) (Kollar-Kotelly, J.)	Civ. A. No. 04 0721	ECF No. 4, 2004 WL 1737348, 2004-1 Trade Cas. (CCH) ¶ 74,417	ECF No. 2
United States v. Hearst Trust	(D.D.C. Oct. 15, 2001) (Jackson, J.)	Civ. A. No. 1:01CV02119	2001 WL 148814, 2001-2 Trade Cas. (CCH) ¶ 73,451	https://www.ftc.gov/sites/default/files/documents/cases/2001/10/hearstmotion.pdf
United States v. Input/Output, Inc.	(D.D.C. May 13, 1999) (Jackson, J.)	Civ. A. No. 99 0912	1999 WL 1425404, 1999-1 Trade Cas. (CCH) ¶ 72,528	http://www.justice.gov/file/499611/download
United States v. Blackstone Capital Partners II Merchant Banking Fund L.P.	(D.D.C. Mar. 31, 1999) (Urbina, J.)	Civ. A. No. 99-0795	1999 WL 34814751, 1999-1 Trade Cas. (CCH) ¶ 72,484	Unavailable
United States v. Loewen Group, Inc.	(D.D.C. Apr. 15, 1998) (Sporkin, J.)	Civ. A. No. 98 0815	1998 U.S. Dist. LEXIS 9472, 1998-1 Trade Cas. (CCH) ¶ 72,151	Unavailable
United States v. Mahle GmbH	(D.D.C. June 24, 1997) (Robertson, J.)	Civ. A. No. 97-1404	1997 WL 599393, 1997-2 Trade Cas. (CCH) ¶ 71,868	https://www.ftc.gov/sites/default/files/documents/cases/1997/06/mahlemot_0.htm
United States v. Figgie Int'l Inc.	(D.D.C. Feb. 14, 1997) (Sporkin, J.)	Civ. A. No. 1:97CV00302	1997 WL 269480, 1997-1 Trade Cas. (CCH) ¶ 71,766	Unavailable

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Foodmaker, Inc.	(D.D.C. Aug. 26, 1996) (Oberdorfer, J.)	Civ. A. No. 96 1879	1996 WL 585294, 1996-2 Trade Cas. (CCH) ¶ 71,555	Unavailable
United States v. Titan Wheel Int'l, Inc.	(D.D.C. May 10, 1996) (Johnson, J.)	Civ. A. No. 1:96CV01040	1996 WL 351143, 1996-1 Trade Cas. (CCH) ¶ 71,406	Unavailable
United States v. Automatic Data Processing, Inc.	(D.D.C. Apr. 10, 1996) (Lamberth, J.)	Civ. A. No. 96 0606	1996 WL 224758, 1996-1 Trade Cas. (CCH) ¶ 71,361	https://www.ftc.gov/sites/default/files/documents/cases/1996/03/960327adpmotion.pdf
United States v. Sara Lee Corp.	(D.D.C. Feb. 8, 1996) (Robertson, J.)	Civ. A. No. 1:96CV00196	1996 WL 120857, 1996-1 Trade Cas. (CCH) ¶ 71,301	https://www.ftc.gov/sites/default/files/documents/cases/1996/02/960206saraleemotion.pdf
United States v. Farley	(N.D. Ill. Jan. 11, 1995) (Duff, J.)	Civ. A. No. 92 C 1071	1995 WL 76920, 1995-1 Trade Cas. (CCH) ¶ 70,883	Unavailable[4]
United States v. Pennzoil Co.	(D.D.C. Oct. 28, 1994) (Friedman, J.)	Civ. A. No. 94-CVO-2077	1994 WL 655049, 1994-2 Trade Cas. (CCH) ¶ 70,760	https://www.ftc.gov/sites/default/files/documents/cases/1994/09/940926pennzoilmotion.pdf
United States v. Anova Holding AG	(D.D.C. Sept. 13, 1993) (Sporkin, J.)	Civ. A. No. 93-1852	1993 WL 475515, 1993-2 Trade Cas. (CCH) ¶ 70,383	Unavailable
United States v. Honickman	(D.D.C. Nov. 2, 1992) (Pratt, J.)	Civ. A. No. 92 2436	1992 WL 350620, 1992 Trade Cas. (CCH) ¶ 70,018	Unavailable

[4] Although the motion for entry of final judgment is unavailable, the Court explicitly held that "[t]he procedures of the Antitrust Penalties and Procedures Act, 15 U.S.C. §§ 16(b)–(h), do not apply," so the issue was presented to and resolved by the Court. 1995 WL 76920, at *1.

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Beazer	(D.D.C. Aug. 14, 1992) (Harris, J.)	Civ. A. No. 92 1881	1992 WL 220784, 1992-2 Trade Cas. (CCH) ¶ 69,923	https://www.ftc.gov/sites/default/files/documents/cases/1992/08/920814beazermotion.pdf
United States v. Atl. Richfield Co.	(D.D.C. Apr. 23, 1992) (Sporkin, J.)	Civ. A. No. 91 3267	1992 U.S. Dist. LEXIS 6751, 1992-1 Trade Cas. (CCH) ¶ 69,803	Unavailable
United States v. Atl. Richfield Co.	(D.D.C. Jan. 27, 1992) (Sporkin, J.)	Civ. A. No. 91 3267	1992 WL 26686, 1992-1 Trade Cas. (CCH) ¶ 69,695	Unavailable
United States v. Gen. Cinema Corp.	(D.D.C. Jan. 8, 1992) (Hogan, J.)	Civ. A. No. 91-0008 TFH	1992 WL 41055, 1991-2 Trade Cas. (CCH) ¶ 69,681	Unavailable[5]
United States v. Cox Enterprises, Inc.	(N.D. Ga. Aug. 16, 1991) (Ward, J.)	Civ. A. No. 1:91-CV-505-HTW	1991 U.S. Dist. LEXIS 15417, 1991-2 Trade Cas. (CCH) ¶ 69,540	Unavailable
United States v. Aero Ltd. P'ship	(D.D.C. May 30, 1991) (Oberdorfer, J.)	Civ. A. No. 91-1315	1991 WL 115777, 1991-1 Trade Cas. (CCH) ¶ 69,541	https://www.ftc.gov/sites/default/files/documents/cases/1991/05/910530aeromotion.pdf
United States v. Atl. Richfield Co.	(D.D.C. Jan. 31, 1991) (Revercomb, J.)	Civ. A. No. 91 0205	1991 WL 290711, 1991-1 Trade Cas. (CCH) ¶ 69,318	https://www.ftc.gov/sites/default/files/documents/cases/1991/01/990130arcomotion.pdf
United States v. Equity Group Holdings	(D.D.C. Jan. 30, 1991) (Jackson, J.)	Civ. A. No. 91 0153	1991 WL 28878, 1991-1 Trade Cas. (CCH) ¶ 69,320	https://www.ftc.gov/sites/default/files/documents/cases/1991/01/910125equitygroupmotion.pdf

[5] Although the motion for entry of final judgment is unavailable, the Court explicitly held that "[t]he procedures of the Antitrust Penalties and Procedures Act, 15 U.S.C. §§ 16(b)–(h), do not apply," so the issue was presented to and resolved by the Court. 1992 WL 41055, at *1.

Case Name	Court and Date of Final Judgment	Docket Number	Citation for Final Judgment	Citation for Motion for Entry of Final Judgment[1]
United States v. Serv. Corp. Int'l	(D.D.C. Jan. 14, 1991) (Revercomb, J.)	Civ. A. No. 910025	1991 WL 24771, 1991-1 Trade Cas. (CCH) ¶ 69,289	https://www.ftc.gov/sites/default/files/documents/cases/1991/01/910107scimotion.pdf
United States v. Reliance Group Holdings, Inc.	(D.D.C. Oct. 31, 1990) (Penn, J.)	Civ. A. No. 90 2698	1990 WL 179593, 1990-2 Trade Cas. (CCH) ¶ 69,248	https://www.ftc.gov/sites/default/files/documents/cases/1990/10/901031reliancemotion.pdf
United States v. Baker Hughes Inc.	(D.D.C. Mar. 22, 1990) (Gesell, J.)	Civ. A. No. 89-3333	1990 WL 56178, 1990-1 Trade Cas. (CCH) ¶ 68,976	Unavailable
United States v. Tengelmann Warenhandels-gesellschaft	(D.D.C. June 7, 1989) (Gesell, J.)	Civ. A. No. 89-1621	1989 WL 90361, 1989-1 Trade Cas. (CCH) ¶ 68,623	Unavailable
United States v. Roscoe Moss Corp.	(D.D.C. May 18, 1988) (Jackson, J.)	Civ. A. No. 88-1344	1988 WL 101294, 1988-1 Trade Cas. (CCH) ¶ 68,040	Unavailable
United States v. Lonrho	(D.D.C. July 18, 1988) (Johnson, J.)	Civ. A. No. 88-1912	1988 U.S. Dist. LEXIS 15146, 1988-2 Trade Cas. (CCH) ¶ 68,232	Unavailable
United States v. Trump	(D.D.C. Apr. 12, 1988) (Pratt, J.)	Civ. A. No. 88-0929	1988 WL 81658, 1988-1 Trade Cas. (CCH) ¶ 67,968	Unavailable
United States v. First City Fin. Corp.	(D.D.C. Apr. 12, 1988) (Pratt, J.)	Civ. A. No. 88-0895	1988 WL 81656, 1988-1 Trade Cas. (CCH) ¶ 67,967	Unavailable
United States v. Wickes Companies	(D.D.C. Apr. 12, 1988) (Pratt, J.)	Civ. A. No. 88-0782	1988 WL 81652, 1988-1 Trade Cas. (CCH) ¶ 67,966	https://www.ftc.gov/sites/default/files/documents/cases/1988/03/880323wickesmotion.pdf

Exhibit 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil No.
RSR CORPORATION, Defendant.	)	

MOTION FOR ENTRY OF JUDGMENT

The government, this date, has filed its complaint in the above-captioned case, and hereby moves this Court for entry of Final Judgment. By agreement of the parties, the Final Judgment provides for the payment of civil penalties of $175,000, under section 11(l) of the Clayton Act, 15 U.S.C. 21(l).

The complaint in this action alleges that the defendant has violated an Order issued by the Federal Trade Commission on November 13, 1981. The defendant is a Dallas corporation engaged in the business of secondary lead recycling. In 1971 and 1972, the defendant expanded its business by acquiring several lead-recycling plants. In 1976, the Federal Trade Commission, upon a finding that the acquisitions substantially lessened competition in the lead markets in the United States, ordered divestiture of some of the defendant's lead-recycling assets. The order was affirmed by the Court of Appeals for the Ninth Circuit on January 8, 1979.[1/]

1/ 1979-1 Trade Cas. (CCH) ¶ 62,450 (9th Cir. 1979). This opinion was revised by that court, 602 F.2d 1317 (9th Cir. 1979).

On November 13, 1981, the Federal Trade Commission modified its Order to require defendant to divest two of its lead-recycling plants, one in Dallas and one in Seattle, Washington. The Order required the divestiture to be completed by November 16, 1982. The defendant failed to divest either of the two lead-recycling plants.

Pursuant to the allegations in the complaint in this action, the defendant has agreed to pay civil penalties of $175,000, in installments over a two and a half year period beginning seven days after the Final Judgment is entered by the Court.2/

The Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b), requires that any proposal for a "consent judgment" submitted by the United States in a case filed under the antitrust laws be filed with the court 60 days in advance of its effective date, published in the Federal Register and newspaper for public comment, and reviewed by the court for purposes of determining whether it is in the public interest. Key features of the Act are preparation by the government of a "competitive impact statement" explaining the proceeding and the proposed judgment, and the consideration by the court of the proposed judgment's competitive impact and impact on the public generally as well as individuals alleging specific injury from the violation set forth in the complaint.

2/ On September 13, 1983, by agreement of parties, the Federal Trade Commission Order was modified a second time. The parties agreed to the appointment of a trustee who would make arrangements to divest the two lead-recycling plants within 150 days from September 15, 1983. The trustee was appointed on September 28, 1983.

The government follows this procedure in civil antitrust actions seeking injunctive relief, but does not believe that the procedure is required in this action because the complaint seeks, and the final judgment provides for, only the payment of civil penalties. Civil penalties are intended to penalize the defendant for violating the law and, unlike injunctive relief, have no "competitive impact," and no effect on other persons or on the public generally. The legislative history of the Antitrust Procedures and Penalties Act does not contain any indication that Congress intended to subject settlements of civil penalty actions to its competitive impact review procedures. In short, notwithstanding the apparent breadth of the Act when read literally, the government believes that a consent judgment in a case seeking only monetary penalties is not the type of "consent judgment" Congress had in mind when it passed the Act. This position was taken by the government with respect to the civil penalties component of the consent judgment in United States v. ARA Services, Inc., Civ. No. 77-1165-C (E.D. Mo.); 44 Fed. Reg. 41579 (July 17, 1979). The court approved the consent judgment, including the civil penalties, August 14, 1979.

For the above reasons, the government asks this Court to issue final judgment in the case.

Respectfully submitted,

JAMES A. ROLFE
United States Attorney

By: _____
MARY ANN MOORE
Assistant United States Attorney

J. PATRICK GLYNN
Director
Office of Consumer Litigation
Civil Division
Department of Justice
Washington, D.C. 20530

ANITA JOHNSON
Attorney
Office of Consumer Litigation

CERTIFICATE OF CONFERENCE

I hereby certify that I have informed counsel for the defendant, Joshua Greenberg, Esq., 425 Park Avenue, New York, N.Y., of the substance of this motion and that he has no objections to the motion.

On this 27th day of October, 1983.

Anita Johnson (by JRF)
Anita Johnson

CERTIFICATE OF SERVICE

I hereby certify that I have served the enclosed Complaint, Final Judgment, and Motion for Entry of Final Judgment on Joshua Greenberg, Esq., Kaye, Scholer, Fierman, Hays & Handler, 425 Park Ave., New York, N.Y. 10022, by first class mail, postage prepaid, on this 28th day of October, 1983.

Anita Johnson (by JRF)
Anita Johnson

Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

RSR CORPORATION

Defendant.

Civil Action No.

FINAL JUDGMENT

Filed: CA3-83-1828-C

Plaintiff, United States of America, having filed its Complaint herein on 10-31-83, 1983, and plaintiff and defendant, by their respective attorneys, having consented to the entry of this Final Judgment and without this Final Judgment constituting evidence or admission by any party with respect to any issue of fact or law herein:

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendant under Section 11(1) of the Clayton Act, as amended, 15 U.S.C. Section 21(1).

II.

The provisions of this Final Judgment shall apply to the defendant, to its subsidiaries, affiliates, successors and assigns, to each of their officers, directors, agents, servants, representatives, employees, and attorneys and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

III.

Entry of this Final Judgment is in the public interest.

IV.

Defendant waives any claim under the Equal Access to Justice Act, 28 U.S.C. Section 2412, arising out of this action.

V.

Defendant shall pay civil penalties as follows:

1. $25,000 seven days after the effective date of this Final Judgment.

2. $50,000 on February 12, 1984.

3. $50,000 on February 12, 1985.

4. $50,000 on February 12, 1986.

Payment of the civil penalties shall be made by wire transfer of the funds to the U.S. Treasury through the Treasury Financial Communications System.

VI.

The Court retains jurisdiction of this matter until payment in full is made by defendant pursuant to Paragraph V.

VII.

Nothing in this Final Judgment alters defendant's obligation to comply with the order of the Federal Trade Commission in Docket 8959.

Dated: 11/1/83

Entered: W. M. TAYLOR, JR.
United States District Judge

The parties, by their respective counsel, having reviewed and agreed to the provisions set forth hereinabove, hereby consent to the entry of this Final Judgment.

FOR DEFENDANT RSR CORPORATION

Howard M. Meyers
President

FOR PLAINTIFF UNITED STATES OF AMERICA

James A. Rolfe
United States Attorney

Mary Ann Moore
Assistant United States Attorney

Howard B. Myers
General Counsel
RSR Corporation

J. Patrick Glynn
Director
Office of Consumer Litigation
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Anita Johnson (by JRF)
Attorney
Office of Consumer Litigation