

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action  
No. 1:15-cv-01547-RDM

LEUCADIA NATIONAL CORPORATION,

Defendant.

\_\_\_\_\_ /

Washington, DC  
February 3, 2016  
3:03 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action  
No. 1:15-cv-01631-RDM

LEN BLAVATNIK,

Defendant.

\_\_\_\_\_ /

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE RANDOLPH D. MOSS

UNITED STATES DISTRICT JUDGE

Court Reporter:

JEFF M. HOOK, CSR, RPR  
Official Court Reporter  
U.S. Courthouse, Room 4700-C  
333 Constitution Avenue, NW  
Washington, DC 20001

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by computer-aided transcription.

## A P P E A R A N C E S

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## P R O C E E D I N G S

1  
2 DEPUTY CLERK: Civil actions 15-1547 and 15-1631, the  
3 United States of America versus Leucadia National Corporation  
4 and the United States of America versus Len Blavatnik.

5 Counsel, will you please approach the podium and identify  
6 yourselves for the record.

7 MR. HAAR: Daniel Haar for the United States.

8 THE COURT: Good afternoon, Mr. Haar.

9 MR. HAAR: Good afternoon, your Honor.

10 THE COURT: I think we can let everyone make their  
11 appearances and then we'll let you go.

12 MS. WILKINSON: Laura Wilkinson of Weil, Gotshal &  
13 Manges on behalf of Leucadia National Corporation.

14 MR. ABUHOFF: Dan Abuhoff, Debevoise & Plimpton, on  
15 behalf of Len Blavatnik.

16 THE COURT: Okay. Good afternoon.

17 MS. LIMARZI: Good afternoon, your Honor. Kristen  
18 Limarzi on behalf of the United States.

19 THE COURT: Good afternoon.

20 MR. GELFAND: Good afternoon, your Honor. David  
21 Gelfand from the Justice Department on behalf of the United  
22 States.

23 THE COURT: Good afternoon.

24 MR. LIBBY: Good afternoon. Kenneth Libby on behalf  
25 of the United States.

1 THE COURT: Good afternoon.

2 MR. DUCORE: Good afternoon. Daniel Ducore on behalf  
3 of the United States.

4 THE COURT: Good afternoon. Mr. Haar, did I get the  
5 sense that you were the one who was going to lead things off  
6 here?

7 MR. HAAR: That's correct, your Honor.

8 THE COURT: Well, let me just before you get going  
9 say first of all thank you all for coming in, and thank you  
10 for your supplemental briefing. And I think as you've  
11 probably gathered from the fact that I requested the  
12 supplemental briefing and that I scheduled the argument for  
13 today, I have I guess a substantial question about whether the  
14 Tunney Act applies to monetary settlements under the  
15 Hart-Scott-Rodino Act or more generally just purely monetary  
16 settlements.

17 I'm happy to give you some detail of the basis for the  
18 Court's preliminary view or hesitation on the issue which may  
19 be helpful in framing your arguments, although I suspect you  
20 probably have a pretty good idea from what I've already said  
21 about this.

22 Number one, the Court is finding it difficult to  
23 reconcile the plain language of the statute which refers to  
24 consent judgments with the contention that it really only  
25 applies to consent decrees or to equitable relief. And it

1 seems to the Court that just as a matter of the plain  
2 language, that what we have in front of us is a consent -- or  
3 are consent judgments that fit within the literal language of  
4 the statute. And then the question is just whether, if that's  
5 right, there is anything in either the legislative history or  
6 if there is any absurdity that would result from that  
7 interpretation that might counsel against applying what  
8 appears to be the plain language of the statute.

9         And while I understand the argument that at least some of  
10 the steps that need to be taken with respect to soliciting and  
11 obtaining input from the public regarding an antitrust  
12 settlement are focused on consent decrees or equitable relief.  
13 It appears to the Court, at least on reviewing the legislative  
14 history, that the concern that Congress was getting at was  
15 perhaps somewhat broader than that and that there was also a  
16 concern with respect to transparency; and that the interest in  
17 transparency would still be served by following the process.

18         And finally, the Court doesn't see, at least initially,  
19 how that interpretation would result in an absurdity. And I  
20 am of course cautious and sensitive to the fact that there is  
21 40 years of history here. And as I understand it -- although  
22 you can elucidate this for me. But as I understand it, no  
23 court has previously raised substantial question with respect  
24 to the contention that the Tunney Act does not apply to  
25 monetary settlements, at least under the Hart-Scott-Rodino

1 Act.

2 So for what it's worth, those are my concerns. I would  
3 be very interested in hearing your thoughts.

4 MR. HAAR: Thank you, your Honor. In the four  
5 decades since Congress passed the Tunney Act, federal  
6 antitrust agencies and the courts have consistently  
7 interpreted the Tunney Act as not applying to settlements for  
8 procedural infractions where the only remedy is a civil  
9 penalty. That interpretation is reasonable.

10 Now, you brought up the plain language of the statute  
11 which applies to the Tunney Act procedures to consent  
12 judgments in civil cases brought by the United States in  
13 antitrust actions. I looked back through the pre-Tunney Act  
14 case law in the antitrust context, because I think consent  
15 judgment is a technical term and it's useful to have recourse  
16 as to how that term was used in the legal community.  
17 Invariably where consent judgment is used in the antitrust  
18 context, it was confined to settlements where the United  
19 States had brought a substantive antitrust case and the remedy  
20 was injunctive relief. The substantive antitrust violation  
21 was an anti-competitive effect and had harmed competition in  
22 the market, and the injunctive relief was aimed at restoring  
23 competition in the market.

24 THE COURT: Are there any cases that go the other --  
25 I'm not surprised by the proposition that there are lots of

1 cases in which the phrase consent judgment is used to refer to  
2 settlements involving equitable relief and substantive  
3 violations of the antitrust laws. I don't think that  
4 proposition though is inconsistent with the proposition that  
5 the phrase consent judgment also is broad enough to encompass  
6 monetary relief in cases involving procedural infractions.

7 And so the question I have is are there any cases where,  
8 you know, for example different terminology is used when  
9 referring to monetary settlements involving procedural  
10 infractions in a way that the Court could look at that and say  
11 oh, the court and the agencies, they were being careful not to  
12 use the phrase consent judgment because they knew that meant  
13 something different?

14 MR. HAAR: I looked for that example. All the cases  
15 where I found consent judgment were confined to the equitable  
16 remedy context. I didn't find any cases -- federal cases  
17 reported where that involved settlements with civil penalties  
18 so I couldn't test exactly that proposition, what they called  
19 it. I didn't find any cases involving civil penalties where  
20 there was a settlement, and it was available.

21 THE COURT: I know Hart-Scott-Rodino wasn't enacted  
22 until after the Tunney Act was enacted. At the time the  
23 Tunney Act was on the books, were there other antitrust  
24 statutes out there that provided monetary damages in the civil  
25 context for procedural infractions or is that something that's

1 a post-Tunney Act invention?

2 MR. HAAR: So yes, your Honor, there was a civil  
3 penalty in existence at the time the Tunney Act was passed.  
4 It's true the primary provision is the H.S.R. Act where we  
5 have civil penalties. But there was also section 11(1) of the  
6 Clayton Act, and that's 15 U.S.C. Section 21(1). And that  
7 provided the United States the authority to sue for civil  
8 penalties where defendants had violated an order of the  
9 Federal Trade Commission. That had been in existence I  
10 believe since 1959. But I did not locate settlements of those  
11 where we could see that they were called --

12 THE COURT: When you refer to an order of the Federal  
13 Trade Commission, is that referring to an order in a  
14 particular adjudication where the Federal Trade Commission has  
15 adjudicated that somebody has been in violation and --

16 MR. HAAR: Right, so a defendant has been in  
17 violation, either litigated or a consent judgment or decree  
18 through the Federal Trade Commission. But it's a violation of  
19 that, and then the United States was empowered to sue for  
20 civil penalties.

21 THE COURT: So those would have involved substantive  
22 antitrust law perhaps as opposed to procedural?

23 MR. HAAR: It might be a little closer to  
24 substantive. The violation isn't a violation of a substantive  
25 antitrust provision. But I take the point that because the

1 order was aimed at restoring competition, there's a closer  
2 connection.

3 THE COURT: I wanted to ask you another question  
4 related to that. The way you framed things to start with  
5 here -- and I'm interested in this, was I think you framed the  
6 carve-out as being one that applies to procedural infractions  
7 with purely monetary relief.

8 Is it your position that both of those conditions apply  
9 here? From reading the briefs, I thought more of the focus  
10 was really on the question of whether the word or the phrase  
11 consent judgment should be construed to encompass monetary --  
12 purely monetary claims or claims at law versus claims at  
13 equity.

14 So that's the question I have for you is is the  
15 definition that you're proposing one that would create a  
16 carve-out that would have the two requirements, there has to  
17 be a procedural infraction and it has to involve purely  
18 monetary relief?

19 MR. HAAR: I think it's clearest -- and I think  
20 that's the easiest way to do it is to limit the carve-out.  
21 But it's clearest if you look through the legislative history  
22 and if you look at the requirements, whether it's 16(b) and  
23 what the United States is supposed to address in the  
24 competitive impact statement or 16(e) which details the  
25 factors that the court's to look to, especially the impact of

1 the judgment on competition. You can see that in these cases  
2 something very different is going on. The harm is a  
3 procedural harm. It impacts the government's ability to  
4 investigate the possibility of a harm to competition. But the  
5 harm isn't directly a harm to competition. And in the  
6 majority of these H.S.R. 7(a) cases, there is no underlying  
7 harm to competition.

8 And secondly, a reason to also look at the remedy, the  
9 remedy is very different when it's a civil penalty. Where  
10 there's an injunctive remedy as there is in a normal  
11 government suit for a substantive antitrust violation, the  
12 purpose of the remedy -- the injunctive remedy is to restore  
13 lost competition. So in a merger context, there might be a  
14 divestiture ordered that creates an independent competitive  
15 force; or in a price fixing context, there's a prohibition on  
16 doing the anti-competitive act like price fixing.

17 THE COURT: But hasn't it been the practice of the  
18 government to actually follow the procedures under the Tunney  
19 Act where you're settling Hart-Scott-Rodino Act violations or  
20 claims and the settlement includes an injunctive element? So  
21 it's not just that Hart-Scott-Rodino is different than  
22 substantive antitrust law. Because as I understood it, you do  
23 follow the procedure when you have an injunction under  
24 Hart-Scott-Rodino saying -- you know, on a court order saying  
25 you better actually comply with the notice requirements under

1 Hart-Scott-Rodino or else you'll be in contempt of court.

2 MR. HAAR: That's right, your Honor. We have -- and  
3 in cases that were mixed, we've followed the Tunney Act  
4 procedures for the G2 violations -- that's the provision that  
5 gives equitable relief. And I think the reason behind that is  
6 that an injunction really can impact competitive conditions in  
7 the marketplace. You might have an injunction where you have  
8 a defendant who has failed to turn over information pursuant  
9 to a second request for information, and you might have a  
10 preliminary injunction of a merger as a result. And so  
11 there's a real impact on competition from that injunctive  
12 order.

13 Here by contrast, the civil penalty is not designed to  
14 remedy lost competition. It's designed to punish the  
15 violator. The factors that a court considers -- court or the  
16 agencies if it's done through settlement, are things like was  
17 the defendant acting in good faith; what's the defendant's  
18 ability to pay; is the defendant a recidivist. So these are  
19 factors that are very different than the factors laid out in  
20 16(e).

21 THE COURT: I see your point, although it strikes the  
22 Court that it may be a little bit more of a continuum than  
23 perhaps black and white in that regard in that I can certainly  
24 imagine circumstances where a procedural violation of  
25 Hart-Scott-Rodino has significant effects on competition so

1 that rather than actually provide the notice that would allow  
2 the Justice Department and the Federal Trade Commission to  
3 examine an acquisition before it occurs, it's presented -- the  
4 acquisition is presented to the regulators as a fait accompli  
5 where there's actually already perhaps some adverse effects on  
6 competition that are taking place as a result of it. And  
7 you're placed in a position in which you have to make a more  
8 difficult judgment about whether to unwind a transaction  
9 versus declining to approve or allow a transaction to go  
10 forward in the first place.

11 MR. HAAR: That's true, your Honor. And if I can  
12 point to an example, the Flakeboard case which was settled in  
13 2014 I believe was one that involved both -- so it was a gun  
14 jumping violation. The defendants started to coordinate their  
15 activities prior to the closing of the transaction. The  
16 complaint alleged both a Section 1 violation -- so a  
17 substantive antitrust violation, and an H.S.R. civil penalty  
18 violation. So it's true that when there -- there may be an  
19 underlying anti-competitive act, but that's often reachable by  
20 a substantive antitrust claim -- or typically reachable by a  
21 substantive antitrust claim. And therefore, that aspect would  
22 go through Tunney procedures. So I think that that aspect is  
23 taken care of.

24 While we're on the subject of the question of whether  
25 there's any ambiguity about where consent decrees -- or

1 consent judgments apply, if I could hand up something to your  
2 Honor.

3 THE COURT: You may.

4 MR. HAAR: This is --

5 THE COURT: I would ask you to share it with your  
6 opposing counsel, but there is no opposing counsel.

7 MR. HAAR: I have in fact already shared it with the  
8 consenting defendants. So this, your Honor, is from the 1970  
9 version of the Code of Federal Regulations. On the next page  
10 it contains the Department of Justice's policy regarding  
11 consent judgments that was in effect prior to the enactment of  
12 the Tunney Act. And the legislative history of the Tunney Act  
13 both in the House and Senate reports makes clear that the  
14 Tunney Act was designed to strengthen the procedures already  
15 in place, that the Department had already put in place.

16 Now, this is titled Consent Judgment Policy. It's about  
17 halfway down the page in the first column. That's the title  
18 for 15.1. And in subsection A, the text of it I think shows  
19 that it was designed to apply to substantive antitrust  
20 violations where the government gets equitable relief. It  
21 says, "It is hereby established as the policy of the  
22 Department of Justice to consent to a proposed judgment in an  
23 action to prevent or restrain violations."

24 Now, prevent or restrain violations is a technical term  
25 in the law. It comes up in Section 4 of the Sherman Act and

1 Section 15 of the Clayton Act. It empowers the Department of  
2 Justice to sue to prevent and restrain; that is, to use  
3 equitable powers -- to ask the court to use equitable powers  
4 to stop past or future violations of the substantive antitrust  
5 provisions.

6 So I think this suggests that the prior policy and the  
7 one that the drafters of the Tunney Act wanted to strengthen  
8 procedurally was focused on this area of substantive antitrust  
9 violations where there was equitable relief sought.

10 THE COURT: I suppose you could also make the -- even  
11 without piggybacking on how the phrase prevent or restrain is  
12 used elsewhere in the law, you could simply make the point  
13 that preventing or restraining themselves are injunctive  
14 terms.

15 MR. HAAR: That's right.

16 THE COURT: They're not terms that deal with  
17 penalties or fines of some type.

18 MR. HAAR: That's right. When the court -- when the  
19 Department of Justice brings an action to prevent or restrain  
20 a violation, it's seeking equitable relief in an antitrust  
21 case. So I think that's strong evidence that the intent of  
22 the Tunney Act drafters was to strengthen the procedures that  
23 were already in place, and focused on these types of actions.

24 If I could move on to the -- you mentioned a concern  
25 about transparency.

1 THE COURT: Yes.

2 MR. HAAR: It's very true that the drafters of the  
3 Tunney Act and the public in the run up to the Tunney Act had  
4 expressed a concern about transparency of the negotiation of  
5 consent decrees. I think these went hand in hand with the  
6 concerns about how the injunctive aspects of consent decrees  
7 were operating. In cases -- so the cases that were the  
8 primary examples that came up in the legislative history were  
9 the ITT case, and one that was a couple of decades earlier was  
10 the AT&T-Western Electric case. That was the case that led to  
11 some public outrage that in turn led to the Department  
12 adopting in 1961 this consent decree.

13 THE COURT: It started with a 1959 Senate inquiry --

14 MR. HAAR: That's right.

15 THE COURT: -- and then their report. And then in  
16 response to the report, Attorney General Kennedy was convinced  
17 to adopt the policy. Although I think the committee at that  
18 time said, "If you don't do something that works, we're going  
19 to come back and legislate." Then Watergate intervenes with  
20 the ITT case. There's sufficient public outrage about all  
21 that that Congress then comes along and enacts the Tunney Act.

22 MR. HAAR: So ITT was the case where there was a  
23 special concern about the lack of transparency in the  
24 negotiation. But I think the concern works hand in hand with  
25 how the injunction operates. In ITT, there was a concern that

1 the defendant had exerted pressure on the government to get a  
2 consent decree that worked in its favor and to the detriment  
3 of other people operating in the market.

4 The divestiture there, rather than divesting all of the  
5 acquired company The Hartford Fire's assets, it required a  
6 more limited divestiture of certain aspects of ITT, some of  
7 its businesses. The public thought that the secrecy and the  
8 undue influence of ITT had influenced that to the detriment of  
9 other members of the public. So the secrecy was -- concerns  
10 about secrecy were coupled with the concerns to protect third  
11 parties, to protect competitors, to protect the interest of  
12 customers and suppliers.

13 If competition wasn't properly restored, then those  
14 interests of third parties wouldn't be adequately addressed.  
15 So those third parties should have a meaningful opportunity to  
16 comment on whether the proposed decree would adequately  
17 restore competition that had been lost as a result of the  
18 anti-competitive merger.

19 Here in the civil penalties context -- which I might add  
20 is not done in secret, we publish the complaint which has the  
21 factual allegations that go into the determination of the  
22 civil penalty. We publish the complaint on our website. We  
23 publish -- I should say both the DOJ and FTC publish the  
24 complaint, the proposed final judgment on their websites, and  
25 they both issue press releases detailing the important terms

1 of these documents.

2 THE COURT: Is that done pursuant to regulation or  
3 just practice or is there a policy?

4 MR. HAAR: I believe it's just practice.

5 THE COURT: Okay. How consistent and how long has  
6 that practice been in place, if you know?

7 MR. HAAR: I'm not sure. These days it's pretty  
8 consistent, but I don't know how long it's been in place. But  
9 it's not just this practice, but the other important  
10 consideration is that the information that the agencies and  
11 the judge are to take into account when determining the proper  
12 size of the penalty: whether the defendant acted in good  
13 faith; is the defendant a recidivist; what's the defendant's  
14 ability to pay. These aren't considerations that third  
15 parties, competitors, customers, suppliers have important  
16 information that need to be shared with a court to determine  
17 whether the size of the penalty is in the public interest.  
18 These are pieces of information that are directly in the hands  
19 of both the government and of the defendants, are detailed in  
20 the complaint.

21 And of course we're already appearing before the Court.  
22 And if there's anything missing for the Court to review to  
23 make sure the civil penalty is adequate, we are already before  
24 you to share that information with you. So the need for a  
25 third party to supplant that information is just not present

1 here as it is when the remedy is designed to restore lost  
2 competition.

3 THE COURT: One of the things I did notice I think in  
4 the proposed order in the case was that you were asking the  
5 Court to actually make a finding that the settlement was in  
6 the public interest.

7 MR. HAAR: That's right.

8 THE COURT: Which the Court might not ordinarily do  
9 in a case in which there's just a purely monetary settlement.  
10 And I don't know if that's a vestige of the Tunney Act or if  
11 it's based on the notion that -- I guess I wasn't quite sure  
12 what the basis was for asking the Court to make the finding of  
13 the public interest if it wasn't the Tunney Act.

14 MR. HAAR: I think the concern broadly is that we do  
15 believe we're representing the public interest and want the  
16 Court to make a finding that it is in the public interest. I  
17 don't think it's the same public interest inquiry. The Tunney  
18 Act lays out and it specifically defines in 16(e) what the  
19 court is to -- what factors the court is to look at in  
20 determining the public interest. And I think that it's  
21 different in the civil penalties context.

22 This Court addressed that issue in FTC v. Onkyo USA which  
23 we cited in our brief. And it did say we have to make -- the  
24 court has to make a determination that the settlement is in  
25 the public interest. It should be fair, adequate and

1 reasonable. And then it listed factors of the type that I've  
2 mentioned before that go into determining whether the civil  
3 penalty is adequately calculated.

4 So yes, it's the public interest, but public interest in  
5 a proper civil penalty is not what's laid out in 16(e).  
6 Public interest is adequate punishment of the defendant for  
7 the violation. If the defendant acted in good faith and it  
8 was an inadvertent violation, the punishment should be lower.  
9 The statutory maximum is fairly large, it's \$16,000 a day.  
10 But if there's an inadvertent violation, it need not be that  
11 high to adequately punish because it wasn't a willful  
12 violation.

13 THE COURT: It was my understanding that the fair,  
14 adequate and reasonable test that is developed in the case law  
15 does come from the consent decree context typically. And so  
16 there's been a fair amount of litigation about district courts  
17 approving or whether they should approve equitable judgments  
18 or equitable settlements, and whether they need to make a  
19 determination that they're fair, adequate and reasonable.  
20 Because I've never heard of it -- and it may exist, I've never  
21 heard of it in the purely monetary context before.

22 MR. HAAR: I know it's at issue in the Second Circuit  
23 case SEC v. Citigroup which contained both equitable relief  
24 and a civil penalty.

25 THE COURT: Right, yes.

1           MR. HAAR: It may have sort of grown out of this  
2 notion that settlement should be in the public interest. And  
3 maybe some of it came from the spirit of what the courts and  
4 the agencies were doing in another context. But it makes  
5 perfect sense that when the government is empowered to  
6 vindicate a public interest, that the court agrees that the  
7 settlement is in the public interest. I just don't think that  
8 the way that public interest determination is done should be  
9 the same as in the Tunney Act context.

10           The court, in doing the public interest determination  
11 under the Tunney Act, has to consider the effect of the  
12 judgment on competition in the relevant market. It also has  
13 to consider provisions for enforcement and modification. When  
14 there is an ongoing injunctive order, looking at provisions  
15 for enforcement and modification makes perfect sense. But  
16 that's not what the -- that's not how the civil penalty  
17 operates. It's a one-time payment, it's not an ongoing order  
18 that needs to be enforced or could be modified in the future.  
19 And it doesn't directly impact competition in the relevant  
20 market.

21           So I don't think it would be appropriate to take the  
22 factors that a court is required to direct, at least under the  
23 amended 2004 Tunney Act, and place that on the civil penalties  
24 context. The factors that a court would be looking at if the  
25 Tunney Act was mapped onto the civil penalties context I think

1 would be inappropriate in terms of how a court and an agency  
2 is to determine what the appropriate civil penalty is.

3 THE COURT: Let me ask you, as I understand it from  
4 what you've said, the Federal Trade Commission and the  
5 Department of Justice already publish the proposed settlement  
6 and the complaint in advance of any submission to the court.  
7 The court is already required to make a determination with  
8 respect to whether the settlement is one that is fair,  
9 adequate and reasonable.

10 I guess where is the rub? I mean, what are the practical  
11 difficulties? I understand that some of the provisions of the  
12 Tunney Act the court might get to and say well, that one's not  
13 applicable here; I don't have to spend my time worrying about  
14 modification of the consent judgment if someone's simply going  
15 to write a check and they're done with it; that's easy, let's  
16 move on.

17 I guess the question I have for you is why do you care  
18 about whether the Tunney Act applies or not? What difference  
19 would it make?

20 MR. HAAR: It would impose some burdens on the  
21 government, it would impose some burdens on defendants and it  
22 would impose some burdens on the courts, and I think to little  
23 public benefit. Because I do think that the considerations  
24 that the government and the court is directed to address under  
25 the Tunney Act are not appropriately tailored to the civil

1 penalty context.

2 But in terms of the burdens it would place on the  
3 government, we have to publish the competitive impact  
4 statement. We have to publish the comments. We have to  
5 respond to comments and publish that response. It delays  
6 entry of judgment for 60 days. There's a 60-day period when  
7 it has to be open to comment before the court can enter the  
8 final judgment. I think that that delay creates an  
9 uncertainty for defendants.

10 And defendants are also required to disclose lobbying  
11 contacts. So there are certain burdens imposed, and I think  
12 because the concerns are not focused on the civil penalty  
13 context they're not concerns that actually would benefit the  
14 process.

15 THE COURT: Well, what about the lobbying contacts,  
16 wouldn't that benefit the process with respect to public  
17 transparency and public confidence in the settlement knowing,  
18 you know, whether someone with a great deal of influence  
19 weighed in with respect to the settlement?

20 MR. HAAR: I don't think it would be of great  
21 benefit. Unlike the history in the run up to the Tunney Act,  
22 in that context there was great public concern that had been  
23 expressed. People really believed that large companies were  
24 bringing undue influence. As the Senate Judiciary Committee  
25 report said, "Antitrust violators by definition wield great

1 influence." That's true about substantive antitrust  
2 violators, they have power to harm competition in the market.  
3 I think the assumption was that they had the power to wield  
4 influence in Washington. It's not necessarily true when the  
5 only infraction is a procedural one.

6 But my second point is just that no one has been speaking  
7 out publicly about this. This has been -- we've been doing  
8 this for 40 years almost, and it's been working well. I  
9 haven't heard public complaints, I've asked around. We are  
10 unaware of public complaints brought to the government's  
11 attention. And I haven't seen any in the scholarly  
12 literature. So I think this is actually a system that is  
13 working reasonably well, and I don't think there is a concern  
14 with secrecy.

15 THE COURT: About how many settlements of this type  
16 are there a year?

17 MR. HAAR: So we located 47 of these in the course  
18 of -- since the H.S.R. Act has been in place, and I guess  
19 that's about four decades. So between one and two a year is  
20 about the average. I do want to bring this to attention,  
21 because one of my colleagues passed up a note. In the 20  
22 years since the FTC's website has been up, they've published a  
23 press release in every case.

24 THE COURT: Do you know how far in advance that's  
25 done? I mean, you can feel free to ask one of your FTC

1 colleagues.

2 MR. HAAR: I believe it's done on the same day that  
3 the complaint is filed and published. Finally, you mentioned  
4 absurdity as a separate concern. I think the way to see this  
5 is both in terms of the history of the term consent judgment  
6 being used limited in the context of a substantive antitrust  
7 violation leading to equitable relief.

8 But the other thing to take into consideration is that  
9 the considerations the court is directed to address in 16(e)  
10 are inappropriate for the civil penalty context. They're not  
11 the same concerns. The concerns are the ones that I had  
12 mentioned before that the court is to take into account in the  
13 civil penalty context: good faith, recidivism, ability of the  
14 defendant to pay, gravity of the offense. These are all  
15 focused on punishing the violator. If the defendant -- if it  
16 was an innocent, unintentional violation, the punishment  
17 should be less. If it was willful, if the defendant  
18 benefitted from the violation, the punishment should be more.  
19 These are nowhere addressed in 16(e), and many of the  
20 considerations such as considering the impact on competition  
21 are the wrong things for the court and the agencies to be  
22 addressing in determining the right size of the civil penalty.

23 And there is -- this was discussed in the legislative  
24 history in the Hart-Scott-Rodino -- in the run up to the  
25 Hart-Scott-Rodino Act's passage. It was not in the context of

1 discussing what should be considered when a settlement is  
2 proposed to the court, but rather just in what are the factors  
3 that a court is to consider when determining the right size of  
4 the penalty.

5 And Chairman Rodino, Congressman Rodino said that, "Good  
6 faith is not a defense to a civil penalty action." Good faith  
7 is one thing that a court is to consider in determining the  
8 size of the penalty -- how close to the maximum, but it's not  
9 a defense to a civil penalty action. And a court is to  
10 consider that along with other traditional considerations in a  
11 court's discretion when determining the right size of the  
12 penalty. So I think what the drafters of the  
13 Hart-Scott-Rodino Act had in mind was something other than  
14 factors that courts were already required to address in the  
15 Tunney Act process under 16(e).

16 THE COURT: I do think that -- I mean, I take your  
17 arguments. I guess the question I'm still struggling with,  
18 you know, starts with the plain language. And the document  
19 that was submitted here either was called or probably should  
20 have been called or very well could have been called consent  
21 judgment. It is a judgment by consent. The statute requires  
22 that these procedures be followed for consent judgments. I  
23 take your point that this may not have been what anyone was  
24 focused on.

25 But the question that I'm struggling with is just out

1 of -- given the rules of statutory construction, if it is  
2 tautologically true that a consent judgment is a consent  
3 judgment, how does the Court reach the conclusion that a  
4 consent judgment in fact is not subject to the Tunney Act  
5 which applies to consent judgments. That's where I raised the  
6 question of absurdity in that that's one of the rules of  
7 statutory construction, if it would lead to absurd results,  
8 then the court may conclude that the language can't mean what  
9 it says.

10       You make the various ratification arguments that you've  
11 raised in your papers. This doesn't appear to be -- and I  
12 don't take you to be arguing there's a question of deference.  
13 And if it were a plain language issue, there wouldn't be  
14 deference anyway that would apply. I do take your point with  
15 respect to that regulation that you pointed to me. That is  
16 helpful, but it's helpful in the nature of legislative history  
17 which you still don't reach if you're stuck on the plain  
18 language or if you think the language is plain.

19       I guess what I'm still struggling with quite candidly --  
20 and I don't know how I come down on this. But what I'm  
21 struggling with candidly is how I write an opinion saying that  
22 a judgment that I'm being asked to enter by consent is not a  
23 consent judgment within the meaning of the Tunney Act. I just  
24 want to put it out there, because I really want you to have  
25 the opportunity to respond to what's bothering the Court.

1           MR. HAAR: So two main responses -- and I understand  
2 your concerns. First as to what the document was called, it  
3 was titled the Proposed Final Judgment. So the title --

4           THE COURT: But it was done by consent. It is a  
5 final agreement by consent.

6           MR. HAAR: Yes. Secondly, and I think the more --

7           THE COURT: I didn't mean to stick it to anyone by  
8 saying that the title of the document -- that anyone had  
9 suggested the answer to this question by the title of the  
10 document. My point really is is that what it in fact  
11 literally is is a judgment that the court is being asked to  
12 enter by way of consent.

13           MR. HAAR: Fair enough. I think the common sense  
14 view in which I take it is that these were not the type of  
15 consent judgments that Congress intended to subject the Tunney  
16 Act procedures to. I think the text, various structural  
17 aspects of the Tunney Act as well as the legislative history  
18 show that the concerns that were animating Congress simply do  
19 not map onto the civil penalty context.

20           But in terms of statutory interpretation, I think the way  
21 to get there is that -- consent judgment is a technical term,  
22 it's a term of art, a legal term. And the Supreme Court said  
23 in *Morrisette v. United States* which we cited in our brief  
24 that, "Where Congress borrows terms of art in which are  
25 accumulated the legal tradition and meaning of centuries of

1 practice, it presumably knows and adopts the cluster of ideas  
2 that were attached."

3 Now, I'm not saying there were centuries of practice, but  
4 there are decades of practice in which consent judgment was  
5 consistently used in the antitrust context to refer to  
6 settlements of substantive antitrust cases where the relief  
7 was injunctive. The relief was aimed at restoring lost  
8 competition. And that situation exactly maps onto the  
9 concerns expressed in the legislative history and expressed in  
10 the text of the act. But I think --

11 THE COURT: I don't doubt that a settlement involving  
12 equitable relief is in fact a consent judgment. I guess the  
13 question I have though is how you show that a settlement  
14 involving monetary relief is not a consent judgment.

15 MR. HAAR: Well, I could find no evidence that it was  
16 ever used that way in the antitrust context, where there was a  
17 civil penalty and it was termed a consent judgment, prior to  
18 1974. There simply, at least in the published records, are no  
19 examples. So the practice was confined to substantive  
20 violations where they're equitable. As far as I could tell,  
21 the practice was confined to that zone.

22 As well as I believe it's really strong evidence,  
23 especially tied to the legislative history, that shows the  
24 Tunney Act was aimed to expand and strengthen the policies in  
25 the prior regulation that the Department of Justice had in

1 place. That was called Consent Judgment Policy, but by its  
2 text it was clearly limited to actions to prevent and  
3 restrain. And so I think similarly under the Morissette kind  
4 of interpretation, looking at what the legal practice was  
5 prior to, you see both in the case law and in the Department  
6 of Justice's regulations that the use of consent judgment in  
7 the antitrust context was aimed at settlements of substantive  
8 claims where the relief was equitable.

9 THE COURT: Okay, that's helpful.

10 MR. HAAR: Thank you, your Honor.

11 THE COURT: Anything further?

12 MR. HAAR: I just would emphasize the ratification  
13 point which I didn't touch on as much but your Honor brought  
14 up recently. I think that this is a technical term of art.  
15 The practice had been -- of using consent judgment in the  
16 context of equitable relief had been long in place prior to  
17 the Tunney Act. That was incorporated in the initial Tunney  
18 Act. Then we had a practice -- the federal antitrust agencies  
19 had a practice of interpreting consent judgment as not  
20 applying to the civil penalties context. And that's been in  
21 place for decades, was in place for decades when Congress in  
22 2004 amended the Tunney Act to change the standard, especially  
23 in 16(e), to require rather than allow the court to address  
24 certain factors when doing its public interest determination.  
25 I think it shows that this was a long-standing practice.

1 Congress was aware of it, and they constructively ratified it  
2 when it amended the statute without disturbing this  
3 long-standing practice. Thank you.

4 THE COURT: Thank you. Does anyone else want to be  
5 heard? Okay. Well, thank you all. Let me say that -- I want  
6 to compliment -- and I would say the parties, but as I said  
7 there's just one side here at this point. I want to  
8 compliment the Department of Justice and the FTC on the  
9 briefing on this matter. It's been extremely helpful to the  
10 Court. And I also compliment you, Mr. Haar, on the argument  
11 which was also very helpful to the Court.

12 I'm still not entirely sure what the right answer is, but  
13 I do know that you want to move forward with your settlement  
14 so I will endeavor to make a decision promptly.

15 Anything further?

16 MR. HAAR: No, your Honor.

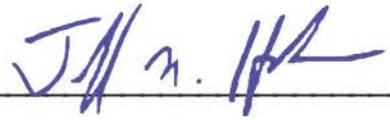
17 THE COURT: Well, thank you.

18 (Proceedings adjourned at 3:45 p.m.)  
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C E R T I F I C A T E

I, Jeff M. Hook, CSR, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: February 10, 2016



A handwritten signature in blue ink, appearing to read 'J.M. Hook', is written over a horizontal line.

Jeff M. Hook, CSR, RPR

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