IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-6130

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ALEX. BROWN & SONS INC., BEAR, STEARNS & CO. INC., CS FIRST BOSTON CORP., DEAN WITTER REYNOLDS INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORP., FURMAN SELZ LLC, GOLDMAN, SACHS & CO., HAMBRECHT & QUIST LLC, HERZOG, HEINE GEDULD, INC., J.P. MORGAN SECURITIES INC., LEHMAN BROTHERS INC., MAYER & SCHWEITZER, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, MORGAN STANLEY & CO., INC., NASH, WEISS & CO., OLDE DISCOUNT CORP., PAINEWEBBER INC., PIPER JAFFRAY INC., PRUDENTIAL SECURITIES INC., SALOMON BROTHERS INC., SHERWOOD SECURITIES CORP., SMITH BARNEY INC., SPEAR, LEEDS & KELLOGG, LP, and UBS SECURITIES LLC,

Defendants-Appellees,

v.

DONALD BLEZNAK, ANDREW BLEZNAK, RICHARD I. BURSTEIN, CHEVRA GEMILATH CHASODAM, CARL S. CLARK and PATRICIA CLARK, DANIEL D'ADDARIO, ROSEANN D'ADDARIO, MAXINE DAMPF, JEROME D. DERDEL, SULOCHANA DESAI, H. LESLIE FINEBERG, NICHOLAS FRANGIOSA, NEAL HANSEN and DONNA HANSEN, TIMOTHY HENNESSEY, BRENT JOHNSON, CHARLES KAYE, JERRY KRIM, JAMES KRUM, ROBERT LIPINSKI, JOHN LORGE, THE STATE OF LOUISIANA, through its Attorney General, RICHARD P. IEYOUB, WILLIAM LUTZ, JR., DENNIS MALONEY, KEVIN MALONEY, RICHARD I. PERLMAN, JEFFREY SACHS, DAVID SIEGEL, TWO GUYS LIMITED PARTNERSHIP AND THEIR GENERAL PARTNER, GELTMORE, INC., PETER WASSERMAN, DENNIS WEINER, and SUMNER WOODROW,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in determining that entry of an antitrust consent decree that requires the defendants to create, monitor, and maintain for government inspection tapes of telephone conversations, but precludes discovery of those tapes by private litigants, was in the public interest.

2. Whether a government memorandum summarizing the evidentiary and legal foundations of its case for use in settlement negotiations with the defendants, together with all the evidence to which it refers, is a "determinative document" within the meaning of section 16(b) of the Tunney Act, 15 U.S.C. 16(b).

STATEMENT OF THE CASE

l. In May 1994, several newspapers published accounts of a study conducted by Professors William Christie and Paul Schultz (the “Christie/Schultz study”) suggesting that dealers might have colluded to maintain quarter-point spreads between the bid and asked price on stocks traded on the Nasdaq Stock Market. A90.[1] Shortly thereafter, private plaintiffs filed lawsuits against several market makers in Nasdaq stocks. The private cases were consolidated in the Southern District of New York, M.D.L. 1023. A91 n.2.

The Department of Justice also initiated an investigation into possible collusion among Nasdaq dealers. A90. In the course of this investigation, the Department served over 350 civil investigative demands (15 U.S.C. 1312), reviewed hundreds of responses to interrogatories, and took over 225 depositions. A91.

2. On July 17, 1996, the United States filed a complaint alleging that the defendants had fixed prices, in violation of section l of the Sherman Act, 15 U.S.C. l. A42. On the same day, the United States and the defendants filed a proposed Stipulation

[1] "A" references are to page numbers in the Joint Appendix.

and Order ("consent decree"). A56. Pursuant to the Tunney Act, 15 U.S.C. 16(b)-(e), the United States published the text of the proposed decree in the Federal Register, together with a Competitive Impact Statement. A87; see 15 U.S.C. 16(b)-(d).

The consent decree prohibits the defendants from, inter alia, entering into agreements to fix prices for Nasdaq securities, to fix spreads, to adhere to quoting conventions, or to harass or intimidate other dealers for decreasing spreads or failing to adhere to various quoting conventions. A60-62. It also requires each defendant to establish an antitrust compliance program, administered by an Antitrust Compliance Officer. See Section IV.C; A64-66.

As part of the compliance program, each defendant must install "a system or systems capable of monitoring and recording any conversation on the telephones on its OTC desk used . . . to make markets in Nasdaq securities." Section IV.C(2); A66.[2] These taping and monitoring operations must be conducted according to a methodology approved by the Antitrust Division. Section IV.C(3); A66-67. The defendant's Antitrust Compliance Officer or his staff must record and listen to at least 3.5 percent of the defendant's trader hours (up to a maximum of seventy hours per week). The persons whose conversations are subject to monitoring are to be told of the taping system but not informed when their conversations will be monitored or recorded.

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[2] "OTC desk" is defined to mean "any organizational element of a defendant engaged in market making, or its successor, that accounted for ten percent (10%) or more of such defendant's total market-making volume, measured in shares, in Nasdaq securities in the immediately preceding fiscal year." A58.

Section IV.C(4); A67. If the ACO finds any conversations that he "believes may violate" the proposed decree, he must provide them to the Antitrust Division within ten business days, and maintain a copy of the tape. Section IV.C(5); A67.

The decree permits the government, without advance notice, to demand the right to monitor trader conversations as they are occurring, "from a location not observable by traders." Section IV.C(7); A68. The government may also require a defendant to produce tape recordings created pursuant to the decree within thirty days of the date of their creation (Section IV.C(5),(6),(8); A67-69), and it may direct a defendant to record the conversations of a particular trader. Section IV.C(4),(9); A67-69.

The decree specifies that the tapes made pursuant to the decree "shall not be subject to civil process except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended;" nor shall such tapes be "admissible in evidence in civil proceedings, except in actions . . . . commenced by" those organizations. Section IV.C(6); A68.

3. On August 28, 1996, private plaintiffs in a class action against many of the same defendants who were party to the United States' suit[3] moved to intervene in the Tunney Act proceeding.

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[3] There is not an identity of defendants between the private cases and the government's case. The private plaintiffs' case names twelve defendants not named in the government's case: Cantor, Fitzgerald & Co.; Cowen & Co.; Everen Securities; Jeffries & Co., Inc.; Kidder, Peabody & Co., Inc.; Legg Mason

The private plaintiffs sought to challenge Section IV.C(6) of the proposed decree, to the extent that it limits the discovery and use of the tapes. They also sought to require the Department of Justice to disclose to them the Settlement Memorandum (and all evidentiary materials expressly referenced therein) that the Department had prepared in connection with the negotiation of the proposed consent decree. A750-751, 755. That Settlement Memorandum outlines the evidence collected by the Department in the course of its investigation, sets forth the violations uncovered, and explains the Department's legal theory. A743. The private plaintiffs sought this Settlement Memorandum in order to make use of the government's evidence and its "road map" of the case. A761.

4. On November 26, 1996, the court granted the motion to intervene, and denied the discovery motion. A770. The court rejected private plaintiffs' contention that the Settlement Memorandum was a "determinative document" requiring disclosure under the Tunney Act.[4] Based on the purposes, policies, and legislative history of the Tunney Act, the court concluded that section 16(b) was intended to expose "external influences on the consent decree process," not "documents, such as the Settlement

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Wood Walker, Inc.; Montgomery Securities; Oppenheimer & Co., Inc.; Robertson, Stephens & Co.; Weeden & Co., L.P.; A. G. Edwards & Sons; and J. C. Bradford & Co. In the government's case there are two defendants not named in the private case: Furman Selz LLC; and J. P. Morgan Securities, Inc.

[4] The Act requires that copies of the proposed decree and "any other materials and documents which the United States considered determinative in formulating such proposal" be made available to the public. 15 U.S.C. 16(b).

Memorandum, reflecting the Government's internal evaluation of its evidence." A760.

Following further briefing and a hearing, the district court concluded that the decree as proposed by the parties was in the public interest. A852-885. With respect to the limitation on private discovery of the tapes created pursuant to Section IV.C(6), the court reasoned that "the question is whether extremely effective Government enforcement and monitoring is worth the price of withholding information, which otherwise probably would not exist, from potential private plaintiffs in the future." A880. If the decree were rejected, the court found,

> the Government and the public would likely lose the benefits of an extraordinarily powerful prophylactic and investigatory tool, and the potential plaintiffs still would be left to make their cases without the benefit of tape recordings. At bottom, then, the choices are (1) Government enforcement using tape recorded evidence plus private enforcement without tapes; or (2) Government and private enforcement without tapes. Assuming the government is vigilant in its role, the first choice provides stronger enforcement than the second, and thus the public interest balance tips in favor of approving the Consent Decree.

A880-881.

The court entered the decree on April 22, 1997. A885. The private plaintiff-intervenors filed a notice of appeal on May 21, 1997. A886.

SUMMARY OF ARGUMENT

The Tunney Act requires the district court to enter a government consent decree if it is in the public interest.

United States v. Microsoft Corp., 56 F.3d 1448, 1458 (D.C. Cir. 1995). The court properly concluded that the decree was in the public interest in this case. The decree provides highly effective measures for deterring the recurrence of the anticompetitive activities alleged in the complaint, and for detecting any violations that might occur. The decree does this through a toughly negotiated enforcement mechanism: the compelled random taping of the defendants' traders' conversations; monitoring of those tapes and reporting any possible decree infractions or other violations to the Department of Justice and appropriate regulatory bodies; and government compliance monitoring. The defendants ultimately agreed to these taping provisions, but only in exchange for restrictions on the discovery and use of the tapes by third parties. There is no reason to believe that the defendants would have agreed to the decree in the absence of those restrictions. Faced with the choice of approving the decree with the restriction on private use of the tapes and denying the government as well as the public the benefits of the decree, the district court reasonably concluded that the public interest would be served by entry of the decree as proposed by the parties.

Contrary to intervenors' claim, neither they nor any other potential private plaintiffs are adversely impacted by entry of the decree. The decree does not abrogate any existing rights or impose any obligations on non-parties. Intervenors have no existing right to tapes that do not exist and that would not be created but for the decree. Indeed, the courts have approved

similar discovery restrictions in various contexts where, as here, they advance the public interest in settling civil disputes, promote effective law enforcement, and foster communications that otherwise would not occur. E.g., Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996); In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981).

The Settlement Memorandum which the Department of Justice prepared to summarize its evidence and induce a settlement with the defendants is not a "determinative document" within the meaning of section 16(b) of the Tunney Act. The plain language of section 16(b), as well as its legislative history, establishes that documents come within this provision only if they are considered by the government to be determinative in formulating the decree, and that determinative documents do not encompass the bulk of the government's evidentiary files simply because those files were reviewed and summarized by the government in deciding on a course of enforcement action.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT ENTRY OF THE DECREE AS NEGOTIATED BY THE PARTIES WAS IN THE PUBLIC INTEREST

As the district court found, the decree "promotes the public interest in ensuring that competition is restored to a market that has been subject to an alleged restraint on competition." A869. That determination was based in large measure on the "extremely effective Government enforcement and monitoring" (A880) made possible by the taping requirement. The court considered intervenors' argument that private litigants should

also have access to the tapes but found that the tapes would be unlikely to exist in the absence of the non-disclosure provisions. Thus, "the choices are: (1) Government enforcement using tape recorded evidence plus private enforcement without tapes; or (2) Government and private enforcement without tapes." A881. In these circumstances, the court's conclusion that entry of the decree as proposed serves the public interest was amply justified.

A. Standard of Review

The Tunney Act requires the district court to determine whether entry of a government antitrust consent decree is in the public interest. 15 U.S.C. 16(e). The proper scope of a district court's review of a proposed consent decree under the Tunney Act is a question of statutory interpretation that is reviewed de novo, see, United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995); FLRA v. Department of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990); and the district court's factual findings are subject to the clearly erroneous standard of review. See Fed. R. Civ. P. 52(a); E.E.O.C. v. Local 638, 81 F.3d 1162, 1174 (2d Cir.), cert. denied, 117 S. Ct. 333 (1996); Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1176 (2d Cir. 1995), cert. denied, 116 S. Ct. 1351 (1996). Where a district court applies the proper scope of review, however, its application of a public interest standard is normally reviewed under an abuse of discretion standard. See, e.g., Piper Aircraft Co v. Reyno, 454 U.S. 235, 257 (1981); cf.

Evans v. Jeff D., 475 U.S. 717, 738 (1986)(approval of class action settlement).

B. The Role of the District Court Under the Tunney Act is to Determine Whether the Proposed Decree Serves the Public Interest

The district court's function in a Tunney Act proceeding is "not to determine whether the proposed Decree results in the balance of rights and liabilities that is the one that will best serve society, but only to ensure that the resulting settlement is in the `public interest.'" A860; United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). "Moreover, the Government's judgment with respect to the public interest in a Tunney Act proceeding is entitled to deference." A860; Microsoft at 1460-61. "The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." Bechtel Corp., 648 F.2d at 666. The district court "should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C.Cir. 1997) (citations omitted).

C. The Proposed Decree Provides Effective Relief for the Antitrust Violations Alleged

The proposed decree not only prohibits the practices challenged in the government's complaint, but also provides for effective enforcement, primarily by means of the taping and monitoring requirements, which the district court accurately characterized as "an extraordinarily powerful prophylactic and investigatory tool." A880. For, as a result of the decree, every trader at the defendant firms is on notice that his conversations are subject to monitoring without notice. Moreover, the Antitrust Compliance Officer and his staff must actually monitor and listen to every conversation that is recorded and, if the ACO comes across any conversation that he "believes may violate" the decree, he must notify the Antitrust Division within ten business days and retain a copy of the tape. Section IV.C(5) (A67) (emphasis added). The ACO need not determine that there has been a decree violation; he is required to notify the government whenever there is a possibility of a violation.

The effectiveness of the monitoring and taping provisions as an enforcement tool does not depend solely on the diligence of the Antitrust Compliance Officer, however, for the decree also affords the government independent means of verifying compliance. The government may, without advance notice, demand the right to listen in on trader conversations "from a location not observable by traders." Section IV.C(7); A68. It may require a defendant to produce the tape recordings created in the thirty days preceding the request pursuant to the decree (section IV.C(5),

(6),(8); A67-69), thereby allowing it to monitor not only the traders' compliance but also the ACO's compliance with the requirements of the decree. And the government is empowered to direct a defendant to record the conversations of a particular trader. Section IV.C(4),(9); A67, 69. Thus, the government can obtain immediate information about the conversations of any trader it suspects of decree violations without the necessity of a further court order or showing of probable cause.[5]

We know of no other case in which any industry has been required randomly to record and monitor its employees' conversations, and even to cede to a government agency the power to direct the defendant firm to record particular employees' conversations. The decree provides both an incentive and a mechanism for effective internal compliance efforts, ensuring that the government will have high caliber evidence to support contempt charges, if decree violations are detected through the monitoring process, or to support criminal charges under the Sherman Act. Moreover, use of this evidence will not be confined to the Justice Department; the tapes will be subject to process issued by the SEC, the NASD or other self-regulatory organizations.

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[5] The consensual nature of the records eliminates the need for a showing of probable cause. Compare 18 U.S.C. 2518(3)(court may grant application for wiretap if it "determines on the basis of the facts submitted by the applicant that . . . there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense").

Accordingly, the district court had ample basis for its conclusion that the decree "secures significant public benefits by providing effective enforcement of its prohibitions." A862.

D. Failure to Enter the Proposed Decree Would Deny the Government and the Public the Important Benefits It Confers and Undermine the Congressional Purpose to Retain the Consent Decree As an Effective Enforcement Option

Appellants do not seriously dispute that the decree provides important public benefits -- prohibiting anticompetitive conduct and establishing a powerful deterrent and enforcement tool -- that could not otherwise have been secured without the expense and uncertainty of litigation, and effectively remedies the violations allege din the government's complaint. They complain, rather, that the decree does not also allow for the use of the tapes created pursuant to it by private litigants, and thereby strengthen private antitrust enforcement.

An antitrust consent decree is by its nature, however, the result of negotiation and compromise. See United States v. Armour & Co., 402 U.S. 673, 681 (1971); United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,402, at 77,026 (D.D.C. 1995). "The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." Armour, 402 U.S. at 681.

Because a public antitrust consent decree embodies an agreed-upon settlement between the government and the defendant, it will virtually always be possible to improve the decree, from the standpoint of the government and the public, by eliminating provisions included for the benefit of the defendant. But "an unrestricted evaluation of what relief would best serve the public," taking no account of the settlement process, might threaten the benefits of "antitrust enforcement by consent decree," United States v. Bechtel, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1991), and thereby frustrate Congress's intent to "retain the consent judgment as a substantial antitrust enforcement tool." S. Rep. No. 93-298, at 7 (1973). Few defendants would enter into consent decrees if courts routinely rejected decrees that reflected a compromise, seeking to force modifications designed to deprive the defendant of the benefit of its bargain. In a Tunney Act proceeding, therefore, it is "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial." Microsoft at 1461.

In this case, the defendants strongly opposed the government's demand for a provision requiring them to tape conversations. Ultimately, the defendants agreed to a taping requirement, but only with restrictions on the discovery and use of the tapes by private litigants. There is no reason to believe that defendants would have agreed to the decree without the discovery restrictions or that they would do so in the future.

The district court, therefore, did not have the option of entering the decree without the provisions included for the benefit of the defendants; the choices were to enter or reject the decree to which the parties agreed.[6] And, the court recognized, if it refused to enter the decree with the restrictions, "the Antitrust Division would be deprived of a very powerful enforcement tool in this and future cases. It would lose the ability to leverage the private resources of the Defendants to serve the public's interest in effective enforcement of the antitrust laws." A874-75. Nor would there be any guarantee, the court emphasized, that the government would be able to obtain the relief provided by the consent decree after trial, even if it bore the delay and expense of litigation and prevailed. A879. For this "`compelling' reason -- and to obtain the other public benefits provided by the decree" (A869-870), the district court concluded that the disclosure limitation was justified.

As intervenors observe (Int. Br. 17-19), Congress created the treble damage remedy to encourage private antitrust suits as a supplement to government enforcement. But it does not follow that this decree cannot be in the public interest because the tapes created pursuant to the decree will not be available to

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[6] It is the parties' agreement that serves as the source of the court's authority to enter a consent decree. See Local No. 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986) (citing United States v. Ward Baking Co., 376 U.S. 327 (1964) (court cannot enter consent decree to which one party has not consented); Ashley v. City of Jackson, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from denial of certiorari)).

private litigants.[7] Private plaintiffs, as the court pointed out (A. 878), would be equally unable to benefit from the tapes if there were no decree requiring taping and, as a consequence, no tapes created. Entry of the decree will facilitate enforcement actions by the Department of Justice, the SEC, and the NASD, and thereby, in some cases, facilitate private enforcement as well. See A879-880 (noting that private parties may be able to obtain evidence from the record in public enforcement actions); 15 U.S.C. 16(a) (prima facie effect of final judgment by government in litigated case). Faced with the choice between approving the decree with the restriction on private use of the tapes or rejecting the decree, thereby denying the government and the public the benefits of the decree, the district court reasonably concluded that the public interest would be served by entry of the decree as proposed by the parties. A869.

E. Entry of the Consent Decree As Negotiated by the Parties Does Not Impermissibly Deprive Non-Parties to the Decree of Their Rights

Intervenors' primary argument is that the decree impermissibly purports to "extinguish the rights of persons not party to the Consent Decree." Int. Br. 14-17. Although intervenors correctly assert that a consent decree cannot impose

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[7] It is, of course, pure conjecture to suggest that the tapes will contain information of any significance to private plaintiffs. The decree provides that "[p]ersons whose conversations are subject to monitoring . . . shall be told of the existence of the taping system but shall not be informed as to the times when their conversations will or might be monitored or recorded." Section IV.C.(4); A67. Traders are thus on notice that their conversations may be monitored at any time; they are also aware that any decree infractions discovered will be reported to law enforcement authorities.

affirmative obligations on, or extinguish the existing rights of, non-parties (Local Number 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986)), the decree does not impose such obligations or extinguish such rights.

As the district court noted, "the parties here have not attempted to disregard or annul any otherwise valid law, to abrogate existing claims or impose duties or obligations on third parties." A867. The cases on which intervenors rely to claim that courts cannot enforce protective provisions against third parties (Int. Br. 15-16, 20-21) are thus inapplicable. Compare Martin v. Wilks, 490 U.S. 755, 761 (1989) (decree giving racial preference in hiring attempted to supersede or extinguish rights of nonfavored individuals); People Who Care v. Rockford Board of Education, 961 F.2d 1335 (7th Cir. 1992) (decree eliminated seniority rights of non-parties in existing collective bargaining agreements); Perkins v. City of Chicago Heights, 47 F.3d 212 (7th Cir. 1995) (parties to consent decree could not agree to disregard a valid state law even if they believed law was invalid; court must first find law invalid before approving decree); Association for Retarded Citizens of Conn. v. Thorne, 30 F.3d 367 (2d Cir. 1994) (district court could not impose affirmative decree obligations on federal agency that had not been a party to the decree), cert. denied, 513 U.S. 1079 (1995).

Intervenors contend that the decree deprives them of their rights by denying them information that would otherwise be available through discovery. But, as the district court found, "[t]he tapes that the Intervenors assert that they and others

should have a `right' to discover do not yet exist [and] they will not exist unless the Decree is approved and entered." A868. Although the intervenors dispute this factual finding (Int. Br. 22), they cannot show that it is clearly erroneous.

To the contrary, the court's finding is amply supported by the record. Only ten of 24 defendants ever taped their traders' conversations (A841), and there is nothing to suggest that those defendants who had never taped would do so in the future, particularly with the benefit of hindsight. Indeed, every defendant that had been taping stopped doing so after the government investigation began. Ibid. Although every defendant has not submitted a separate affidavit to indicate why it stopped taping (see Int. Br. 22-23), the court was entitled to infer that each one did so because of the government's investigation and the damaging evidence that the tapes provided. See A139 ("The Department's investigation depended heavily on the conversations discovered on tapes produced pursuant to process"). And, in any event, counsel for the defendants submitted an affidavit representing that the defendants have no intention of resuming taping in the future in the absence of the decree provisions requiring it. A841, 847.[8]

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[8] Contrary to intervenors' claim (Int. Br 22), the fact that this affidavit was submitted by the attorney representing defendants, rather than the individual defendants themselves, did not preclude the district court from relying on this evidence. A client speaks though his attorney in court (Lockette v. Greyhound Lines, Inc., 817 F.2d 1182, 1186 (5th Cir. 1987), quoting Singleton v. Bunge Corp., 364 So.2d 1321 (La. App. 4th Cir. 1978)), and any statement by the attorney is held to be an admission of the client. United States v. McKeon, 738 F.2d 26, 30, 32 (2d Cir. 1984); Vaccaro v. Alcoa Steamship Co., 405 F.2d 1133, 1137 (2d Cir. 1968); Glick v. White Motor Co., 458 F.2d

Intervenors note that the defendants that chose to tape in the past will be able to use the tapes created pursuant to the decree for their own business purposes while claiming protection from private discovery. See Int. Br. 4, 24 n.10, also A852. But there is no harm to the public in general or to the intervenors in particular in allowing the defendants to use the tapes created pursuant to the decree for legitimate business interests if they so choose. Intervenors will not be denied evidence that they could have obtained but for the decree, since the defendants would not create the tapes but for the decree. And only tapes created pursuant to the decree and fully subject to all of its monitoring and disclosure requirements are protected from third-party access; any taping that defendants choose to undertake outside the requirements of the decree would be subject to normal private discovery. See A875.[9]

Because the tapes to which intervenors seek access will not exist in the absence of the decree, the cases on which they primarily rely are inapposite. See Int. Br. 15-17, 26-27. Ex parte Uppercu, 239 U.S. 435 (1915), involved a sealed deposition and exhibits that were not created as the price for settlement of the government's case, nor were they created or provided to the government in reliance on the sealing order. The Supreme Court

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1287, 1291 (3d Cir. 1972).

[9] The cost of monitoring under the decree is likely to be substantial. The defendants will have to employ 30 people full time to fulfill this monitoring requirement. A129. Given the cost and potential for disclosure to the government, it is unlikely that defendants would seek to create more tapes than necessary pursuant to the decree merely to take advantage of the limitation on disclosure to private litigants.

held that "[s]o long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule." Id. at 440. In this case, however, the evidence does not physically exist and it will not exist unless an exception to the "general rule" applies. In Olympic Refining Co. v. Carter, 332 F.2d 260, 265 (9th Cir.), cert. denied, 379 U.S. 900 (1964), the information sought had been sealed by the district court in the prior government litigation because it contained sensitive competitive information and trade secrets. The information was not created in reliance on the protective order, and it would have existed even in the absence of the order. Similarly, although the court of appeals reversed an order sealing records in Meyer Goldberg, Inc. v. Fisher Foods, Inc., 823 F.2d 159, 164 (6th Cir. 1987), it expressly noted that such an order could be affirmed if "any of the parties relied upon the sealing of the tapes as a basis for settlement."

In short, contrary to intervenors' contention, the courts have not recognized an absolute private right to discovery, applicable even if allowing private litigants access would have the effect of making information unavailable for law enforcement or other legitimate purposes. To the contrary, courts have expressly declined to recognize such a right in various contexts. As the Supreme Court stated in Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996), "[e]xceptions from the general rule disfavoring testimonial privileges may be justified . . . by a `public good transcending the normally predominant principle of

utilizing all rational means for ascertaining the truth.'" (citations omitted). See also In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) ("[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis"). Thus, the Supreme Court in Jaffee v. Redmond recognized a patient-psychotherapist privilege, reasoning that discovery of conversations between therapists and patients would chill such communications, and so the admissions against interest sought through discovery would be unlikely to come into being. 116 S. Ct. at 1929.[10]

Indeed, in a case closely analogous to this, a federal district court created a "hybrid" privilege to foreclose a class of plaintiffs in a securities fraud case from obtaining documents produced and created pursuant to a government consent decree. In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981). The consent decree had required the defendant, LTV, to retain a Special Officer to investigate and report on the kinds of practices of the defendant that had led to the SEC complaint. The Special Officer was to report appropriate conduct to LTV's Audit Committee, and was also required to provide the SEC with "any documents, statements or other information in his possession as well as reports or recommendations he prepare[d] prior to submitting them to LTV." Id. at 615. The district court held that this information was protected from disclosure to the

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[10] As intervenors observe (Int. Br. 30-31), Nasdaq traders would undoubtedly continue to converse if the decree were not entered. But there would be no tapes of the conversations available to enforcement agencies, and thus no effective deterrent and enforcement mechanism.

private plaintiffs.[11] Although neither the "attorney-client" nor the "work product" privilege strictly applied to the information at issue, the court created a hybrid privilege to protect the evidence. See id. at 617-18.

> Allowing the type of discovery requested here may kill the goose that lays the golden egg -- the Commission may be deprived of a useful enforcement option, while shareholders will hardly be benefited by inhibiting corporate self-investigation.

Id. at 619. LTV's reasoning and holding was generally endorsed by this Court in In re Steinhardt Partners, L.P., 9 F.3d at 236 (recognizing that confidentiality should be maintained for information disclosed to the government based on an explicit agreement to retain its confidentiality).[12] The district court

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[11] Contrary to intervenors' assertions, therefore, (Int. Br. 26), the kind of evidence at issue in LTV is not significantly distinguishable from the information sought here -- tapes created solely pursuant to the decree requirements that tapes be produced for inspection by the defendants' compliance officers and the government. 89 F.R.D. at 615, also 622; see also A875 ("only those tapes generated solely as a result of the Consent Decree will be protected").

[12] This Court has also held that district courts have the power to limit disclosure of evidence to enforcement authorities in order to protect the interests of private litigants. Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221, 1225 (2d Cir. 1991) (upholding power of district court to "limit[] disclosure of potentially incriminating testimony where parties have voluntarily consented to testify in civil cases in reliance upon [] protective orders", quoting Andover Data Services v. Statistical Tabulating Corp., 876 F.2d 1080, 1084 (2d Cir. 1989)). Similarly, in Palmieri v. State of New York, 779 F.2d 861 (2d Cir. 1985), the court upheld sealing orders on which parties had relied in reaching a settlement in a private antitrust action, concluding that the order was not "improvidently granted" because it would result in information being withheld form government prosecutors. The court found it significant that "the very papers and information that the [state] Attorney General seeks apparently would not even have existed but for the sealing orders." 779 F2d at 865

properly relied on the rationale of LTV in concluding that the public interest in obtaining the benefits of the consent decree outweighed intervenors' private discovery interests.[13]

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMPILATION OF EVIDENCE IS NOT A DETERMINATIVE DOCUMENT

Intervenors contend that the Settlement Memorandum, and all the underlying depositions and evidence referred to therein, were "determinative documents" that should have been made public in the Tunney Act proceeding. 15 U.S.C. 16(b). The Settlement Memorandum contains evidence and references to the evidence that the government considered material in proving its case. It was disclosed to the defendants to induce them to settle. See A757. To argue, as intervenors do, that the Settlement Memorandum is a "determinative document" misreads the plain language of section 16(b), ignores the clear legislative history explaining its

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(emphasis added). Accord, Minpeco S.A. v. Conticommodity Services, Inc., 832 F.2d 739, 742-743 (2d Cir. 1987) (upholding protective order on the ground, inter alia, that parties had relied on the protective provisions in being deposed and turning over documents); Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 87 (E.D.N.Y. 1981) (unless a valid "protective order is to be fully and fairly enforceable, witnesses relying on [it] will be inhibited from giving essential testimony in civil litigation," quoting Martindell).

[13] The district court also found support for affording protection to the tapes in existing privileges. A871 n.3 (citing Troupin v. Metropolitan Life Ins. Co., 169 F.R.D. 546 (S.D.N.Y. 1996); see also In re Dep't of Investigation, 856 F.2d 481, 484 (2d Cir. 1988); United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995); Association for Women in Science v. Califano, 566 F.2d 339, 343-44 (D.C. Cir. 1977); Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). Whether or not the facts of this case fit squarely within an existing privilege (see Int. Br. 31-33), misses the point. The district court did not find that the tapes would necessarily qualify for an existing privilege, but only that the same reasoning applied by the courts to create such privileges has force in this case as well.

meaning and purpose, and misapprehends the Tunney Act's policy and purpose. See Massachusetts School of Law v. United States, 118 F.3d 776 (D.C. Cir. 1997) ("United States v. ABA"[14]) (rejecting very claims that intervenors make here).[15]

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

Section 16(b) requires production of "materials and documents which the United States considered determinative in formulating such proposal." (emphasis added). On its face, the statute refers only to the formulation of the relief proposal, i.e., the decree. It does not address documents relating to the decision to file suit on particular claims, to the likelihood of the government prevailing, or to other issues beyond the scope of the relief. Thus, contrary to intervenors' suggestion (Int. Br. 37, 41), it is not sufficient that evidence is shared with defendants in the course of settlement negotiations, or even that it is shared for the purpose of convincing defendants to settle by demonstrating the strength of the government's case, however helpful such material might be to a private plaintiff seeking to build its own case. Nor is it sufficient that government officials reviewed the evidence in determining whether to seek to settle the case.

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[14] Massachusetts School of Law attempted to intervene in the district court in United States v. American Bar Association and then appealed from the denial of intervention. As in this case, both the United States and the defendant were appellees on appeal.

[15] See page 9, supra, for the standard of review.

The statute also specifies on its face that the requirement of disclosure is limited to "determinative" documents, a term Congress would scarcely have chosen to describe all documents of evidentiary significance. Webster's Third New International Dictionary provides, as the first-listed definition of this adjective, "having power or tendency to determine." Webster's Third New International Dictionary 616 (1981). This understanding of the term is consistent with its use in other legal contexts.[16] It is not, however, consistent with intervenors' broad-ranging demand for all of the evidence described in the Settlement Memorandum.

Moreover, 15 U.S.C. 16(b) calls for disclosure only if the "United States considered" the documents determinative to the formulation of relief. United States v. ABA, 118 F.3d at 784. On its face, the statute does not require disclosure of documents on the basis of the significance that a third party might attribute to them. And the requirement that the government have considered a document to be determinative suggests that Congress had in mind only a small number of documents of particularized significance, and not the broad range of evidentiary materials suggested by the intervenors. Ibid. Indeed, the statutory

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[16] See Gagne v. Carl Bauer Schraubenfabrick, GmbH, 595 F. Supp. 1081, 1088 (D. Me. 1984) ("To be determinative, a state law question must be susceptible of an answer which, in one alternative, will produce a final disposition of the federal cause."); Ziegler v. Wendel Poultry Services, Inc., 615 N.E.2d 1022, 1028 (Ohio 1993) (holding that trial court did not have to give certain proposed interrogatories to a jury because they related to matters of an evidentiary, rather than a determinative nature); Smith v. Smithway Motor XPress, Inc., 464 N.W.2d 682, 686 (Iowa 1990) (defining a "determinative factor" as a reason that tips the scales decisively one way or the other).

language makes it clear that Congress did not expect that there would be determinative documents in every case -- and did not intend that the Department would provide a factual summary of the evidence and an analysis of the law in every settled case. The statute refers to "any other materials and documents," not "the other" documents, which would be the more natural term if Congress assumed that there would always be such documents.

Intervenors claim that the Settlement Memorandum is a 16(b) document because the government has stated that it is "a predecisional deliberative memorandum prepared as an aid in reviewing and making a decision on the government's enforcement options" (Int. Br. 35, 37, quoting U.S. Mem. in Opp. to Mot. to Intervene). Intervenors would thus read the term "determinative" out of the statute. Like any responsible litigant, the government routinely reviews all of its evidence before deciding on its enforcement options in any particular case. That does not mean that everything the government reviews before deciding on a course of action is a "determinative" document. As the district court recognized, the Settlement Memorandum "did not 'determine' the Government's decision to enter into a consent decree or the shape of the proposed relief, any more than the individual elements of evidence it contained determined the relief. It was, instead, the result of the internal effort of DOJ to organize its evidence for the purpose of evaluating its case and presenting it to Defendants in settlement negotiations." A757.

B. The Legislative History Clearly Explains That Routine Evidence Does Not Constitute Determinative Documents

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

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

Congress intended to reach more broadly, it could easily have done so.[17]

Indeed, one witness during the hearings on the Tunney Act specifically urged that "as a condition precedent to . . . the entry of a consent decree in a civil case . . . the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint . . . . was predicated." The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., at 57 (1973) ("Hearings") (prepared statement of Maxwell M. Blecher, attorney). Congress, however, rejected that recommendation.[18]

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

[18] The Department of Justice expressed concern that the determinative documents provision could be read to require extremely sweeping disclosure, chilling discussions within the Antitrust Division and impeding access to information from outside the Department. 119 Cong. Rec. 24,601 (1973) (letter from Assistant Attorney General Kauper to Senator Javits). Senator Javits introduced two amendments designed to meet the Department's concerns. In accepting these amendments, Senator Tunney indicated that they "merely reaffirm[ed] existing law" and were consistent with the Committee's intent. 119 Cong. Rec. 24,605 (1973) (statement of Senator Tunney). Because the amendments had incorporated references to the Freedom of Information Act, the House Committee deleted them to ensure that

Intervenors' claim that the district court improperly interpreted "`determinative documents' to require[] disclosure only of documents 'exposing external influences on the consent decree process'" (Int. Br. 38-40, emphasis in original) misreads the district court opinion. The court in fact acknowledged that "determinative documents" were not necessarily limited to recommendations prepared by outside consultants. The court also recognized, however, that the "events that led Congress to enact the 'determinative document' provisions support the conclusion that Congress was more concerned with exposing external influences on the consent decree process than it was with documents, such as the Settlement Memorandum, reflecting the Government's internal evaluations of its evidence, even when that internal evaluation is undertaken to persuade defendants to enter into a consent decree." A760.

In enacting the Tunney Act, Congress recognized the "high rate of settlement in public antitrust cases" and wished to "encourage[] settlement by consent decrees as part of the legal policies expressed in the antitrust laws." H.R. Rep. 93-1463, at 6 (1974). It wanted, however, to remedy any abuses in the consent decree process -- the Tunney Act focuses judicial and public scrutiny on "the Justice Department's decision to enter into a proposal for a consent decree." H.R. Rep. 93-1463, at 7. The purpose of the competitive impact statement, the public comment procedures, and the requirement that the defendant reveal

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"Freedom of Information Act case law . . . was not disturbed." H.R. Rep. No. 93-1463, at ll (1974).

his "lobbying" contacts with the government (15 U.S.C. 16(g)), are "to enable a court to determine whether a proposed consent decree is in the 'public interest.'" Id. at 21. The provision requiring the government to produce "determinative documents" reflects Congressional concern, not with the strength of the government's case against the defendants (to which evidentiary documents relate), but with any inducements -- possibly improper -- that led the government to settle a case on particular terms rather than litigate it. See also Hearings, at 4 (remarks of Senator Tunney) (provision for public disclosure, including defendant's lobbying efforts, were "best guarantee of a sound decision" to settle a suit). Seen in this light, it is not surprising that the government did not have "determinative documents" in this case.

Intervenors do not seriously contend that the consent decree in this case was adopted behind "closed doors." See Int. Br. 33-35. The government fully complied with the Tunney Act in letter and spirit by publishing a competitive impact statement and other information necessary to permit full and enlightened public comment. Compare also Int. Br. 42 (suggesting that court merely "rubber stamped" decree). As evidenced by this appeal, public comment was indeed extensive and robust. In was unnecessary for the Settlement Memorandum to be disclosed in order to afford meaningful public comment. As the district court found (A766-767), the competitive impact statement contained a summary of all of the government's evidence. Although it did not contain the names, dates, and details of the Settlement Memorandum, such

detail was unnecessary to enable the court and interested parties to evaluate the remedies proposed in light of the nature of the allegations in the complaint. See also Microsoft, 56 F.3d at 1460 (court must look to allegations in complaint, and only those allegations, to determine whether remedies provided are adequate).

Indeed, in the district court the intervenors were more forthright: they conceded that they wanted the Settlement Memorandum, not to enable the court and the public to provide more meaningful comment on the appropriateness of the decree, but to "facilitate their own discovery efforts." A761. They argued that "it would be inefficient to require them to 'reinvent the wheel' by duplicating the Government's investigation through private discovery," and "that they should have access to the Settlement Memorandum as a 'road map' for their private case." A761. But, as the district court recognized, A761, the Tunney Act was not enacted as a discovery device for private plaintiffs and certainly was not intended to provide an end run around the normal rules of discovery. Entry of the consent decree does not protect from discovery in the private suit any materials that would otherwise be discoverable to plaintiffs;[19] nor, however, does it purport to broaden or amend the rules governing civil discovery. See also SEC v. Everest Management Corp., 475 F.2d at

[19] Much of the government's evidence will in fact be disclosed (or has already been disclosed) to intervenors in their private suit. Judge Sweet has ordered the defendants to disclose evidence that is either in their possession or that the defendants have a statutory right to request from the Antitrust Division because it was produced by them or their employees pursuant to civil investigative demands. See A766 n.7.

1239 (intervention is not aimed at assisting private plaintiffs who seek to avoid duplication of agency's investigative efforts); In re LTV Securities Litigation, 89 F.R.D. at 618 n. 19, 621 (private plaintiffs' request for compilation of evidence in order to get a "free ride" did not warrant disclosure).

Thus, in United States v. ABA, the Court of Appeals for the District of Columbia Circuit recently rejected claims by a private antitrust plaintiff that determinative documents in the United States' settlement with the American Bar Association included evidentiary material concerning the defendant's alleged antitrust violations. Following the reasoning and approach of the district court in this case, the court adopted the government's claim that determinative documents were "documents that individually had a significant impact on the government's formulation of relief -- i.e., on its decision to propose or accept a particular settlement." 118 F.3d at 784. Relying on the language of section 16(b), the court noted that by referring to documents that "the United States considered determinative" Congress "surely" meant to rule out "the claim to all the investigation and settlement material. Ibid. Pointing to the legislative history, the court concluded that the term is limited to the "Ramsden memorandum" type of document. Ibid.[20] Moreover,

[20] The only case that gives "determinative document" a more expansive reading is United States v. Central Contracting Co., 531 F. Supp. 133, 537 F. Supp. 571 (E.D. Va. 1982), which has not been followed by any other court. But even in Central Contracting, the court acknowledged that section 16(b) "does not require full disclosure of Justice Department files, or grand jury files, or defendant's files." 537 F. Supp. at 577. The court did not order production of evidence but, as the district court found in this case (A757), "non-evidentiary documents

the court found that the legislative history of the Tunney Act "displays a firm intent to preserve the government's ability to negotiate settlement agreements [with which] a broad disclosure requirement would directly interfere." Id. at 784-785.[21] "The advantages of settlement to a defendant would be seriously undermined if it were sure to result in a discovery bonanza for private plaintiffs." Id. at 875.

Similarly, in this case, the district court concluded that disclosure of the kind of material intervenors are seeking would deter future defendants from negotiating settlements with the government and, perhaps, even from cooperating with government investigations.

> The cost to antitrust enforcement, particularly in an era of declining government resources, would be substantial. Most of the government's civil antitrust cases are now settled rather than tried. If more cases are required to be litigated because the substance of settlement negotiations are discoverable, fewer of them can be brought.

A766.

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prepared by sources external to the DOJ that did not relate directly to the strength of the Government's case on the merits, but nonetheless bore heavily on the Government's determination to proceed by consent decree and on the shape of the relief itself."

[21] The fact that the government does not routinely produce a great many documents that it considers to be "determinative" in Tunney Act cases does not suggest a need for "skeptical" scrutiny. See Int. Br. 47. Rather, what this suggests is that, under the law, the standards for disclosure are often not met. The government makes disclosure of "determinative documents" as required by law. In United States v. ABA, for example, the government turned over as arguably "determinative" documents indicating that the ABA had voluntarily abandoned certain practices that the government had challenged, even though they did not influence the government's formulation of relief.

Finally, apart from the fact that the Tunney Act itself provides no support for including the Settlement Memorandum and evidence underlying it within the Act's disclosure provisions, the district court also noted that much of the information the intervenors are seeking is protected from discovery by a variety of privileges. A763-765. This includes information obtained from the defendants pursuant to civil investigative demands (15 U.S.C. 1313(c)(3)); information obtained from the SEC (44 U.S.C. 3510(b); Shell Oil Co. v. Department of Energy, 477 F. Supp. 413, 420 (D. Del. 1979); and even the Settlement Memorandum itself. See In re LTV Securities Litigation, 89 F.R.D. at 618 n.19 (protecting, inter alia, Special Officer's analysis and compilation of defendants' records).[22]

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[22] The Settlement Memorandum is a predecisional deliberative memorandum prepared as an aid in reviewing and deciding on the government's enforcement options, and thus comes within the governmental deliberative process privilege. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 & n.19 (1975); Access Reports v. Dept. of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991). Sharing the Settlement Memorandum with defendants for the purpose of exploring settlement options does not destroy the privilege. Ryan v. Department of Justice, 617 F.2d 781, 789-790 (D.C. Cir. 1980); Formaldehyde Institute v. Dept. of HHS, 889 F.2d 1118, 1121-22 (D.C. Cir. 1989); In re LTV Securities Litigation, 89 F.R.D. at 620-621; compare Int. Br. 44. Because it was prepared for the express purpose of negotiating a settlement, the Settlement Memorandum may come within the protection afforded in Bottaro v. Hatton Associates, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) and Fed. R. Evid. 408. Finally, as part of the government's investigative files, the Settlement Memorandum and underlying evidence is protected by the law enforcement investigative privilege while the investigation is pending and for a reasonable time thereafter. See Three Crown Ltd. Partnership v. Salomon Bros., Inc, 1993-2 Trade Cas. (CCH) ¶ 70,320, at 70,665-66 (S.D.N.Y. 1993); Raphael v. Aetna Cas. and Sur. Co., 744 F. Supp. 71, 74 (S.D.N.Y. 1990). See A764-765, A875-876 (investigation in this case is "ongoing").

Thus, the language, history, and purposes of the Tunney Act belie Intervenors' claims that the Settlement Memorandum (and all the evidence underlying it) is a "determinative document." Rather, these sources, as well as other policy factors, support the district court's decision to enter the consent decree as negotiated by the parties.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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