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

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

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

MR. HAAR: Daniel Haar for the United States.

THE COURT: Good afternoon, Mr. Haar.

MR. HAAR: Good afternoon, your Honor.

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

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

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

THE COURT: Okay. Good afternoon.

MS. LIMARZI: Good afternoon, your Honor. Kristen

THE COURT: Good afternoon.

MR. DUCORE: Good afternoon. Daniel Ducore on behalf

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

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

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

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

a post-Tunney Act invention?

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

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

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

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

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

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

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

that rather than actually provide the notice that would allow the Justice Department and the Federal Trade Commission to examine an acquisition before it occurs, it's presented -- the acquisition is presented to the regulators as a fait accompli where there's actually already perhaps some adverse effects on competition that are taking place as a result of it. And you're placed in a position in which you have to make a more

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

THE COURT: You may.

MR. HAAR: This is --

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

MR. HAAR: I have in fact already shared it with the consenting defendants. So this, your Honor, is from the 1970 version of the Code of Federal Regulations. On the next page it contains the Department of Justice's policy regarding

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

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

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

MR. HAAR: That's right.

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

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

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

THE COURT: Yes.

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

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

MR. HAAR: That's right.

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

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

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

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

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

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

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

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

MR. HAAR: That's right.

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

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

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

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

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

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

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

THE COURT: Right, yes.

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

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

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

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

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

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

MR. HAAR: So we located 47 of these in the course of -- since the H.S.R. Act has been in place, and I guess

colleagues.

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

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

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

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

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

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

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

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

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

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

Now, I'm not saying there were centuries of practice, but there are decades of practice in which consent judgment was

place. That was called Consent Judgment Policy, but by its text it was clearly limited to actions to prevent and

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

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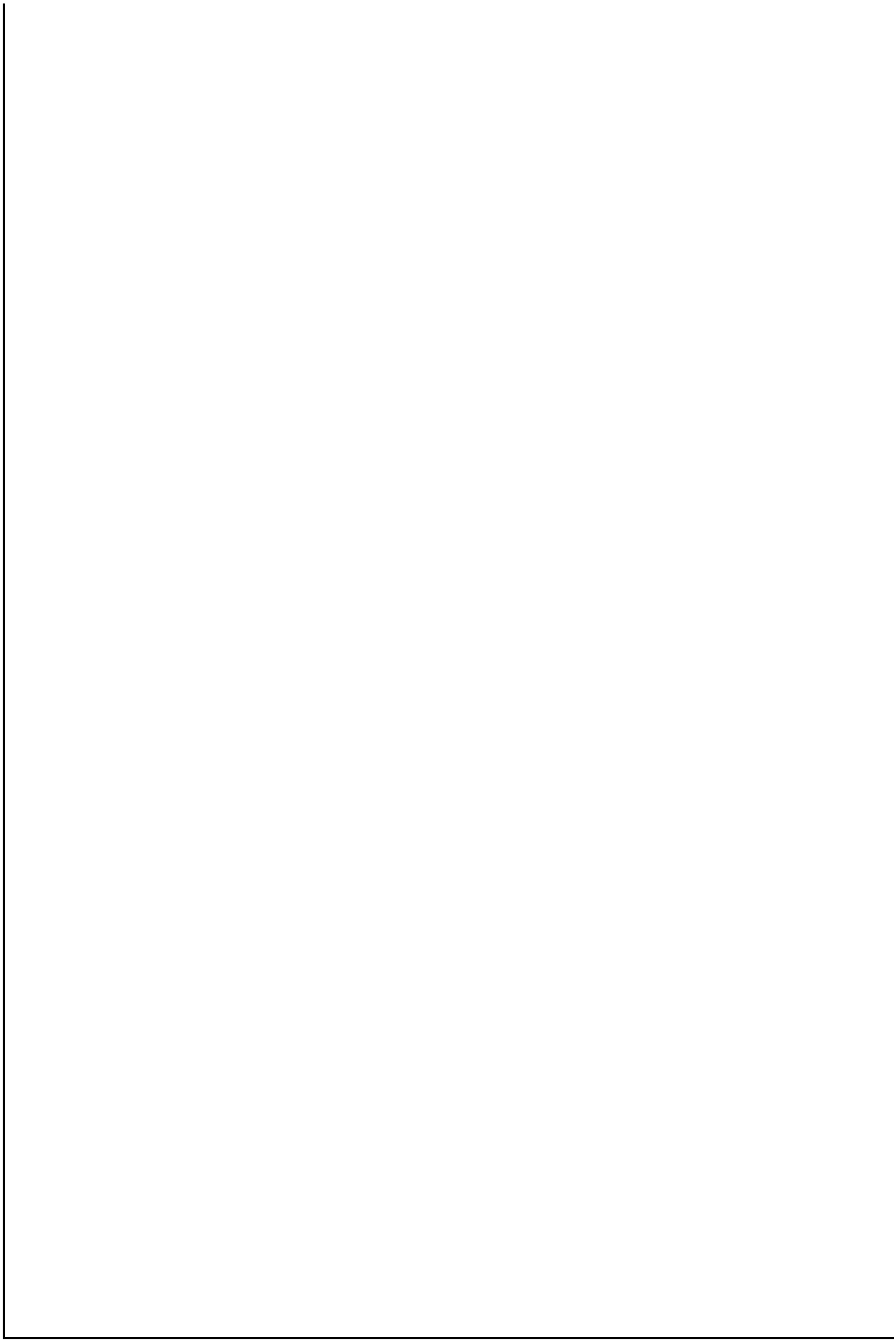

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