UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

20, 2015, Dkt. 3, with which Defendant Blavatnik summarily concurred, Dkt. 4. No *amicus* briefs were filed. The Court heard oral argument on the issue on February 3, 2016.

Although the Court recognizes that the Justice Department's reading of the Act is supported by 40 years of consistent practice, the Court cannot reconcile that practice or the Government's position in this case with the plain language of the Tunney Act, which applies to "*any* proposal for a *consent judgment* submitted by the United States" and not merely to proposed injunctive decrees. 15 U.S.C. § 16(b) (emphasis added). The Court is also unconvinced that either the legislative history of the Tunney Act or any subsequent congressional action provides a basis to depart from—or to assign a unique meaning to—that plain language. Because the Tunney Act procedures, accordingly, must be followed in this case, and because the Government has yet to comply with those procedures, the Court **DENIES** the Government's Motion for Entry of Final Judgment (Dkt. 1-4) without prejudice.

I. BACKGROUND

Congress enacted the Tunney Act against the backdrop of a long history of concern about the Justice Department's process for settling antitrust cases. In 1959, the Antitrust Subcommittee of the House Committee on the Judiciary issued a report on the settlement of antitrust enforcement matters. *See* Antitrust Subcomm., H.R. Comm. on the Judiciary, 86th Cong., 1st Sess., *Rep. on the Consent Decree Program of the Dep't of Justice* (Comm. Print 1959) ("1959 Report").[1] The report explained that the Subcommittee had received complaints "that consent decrees . . . eliminated the judiciary from enforcement of the antitrust laws;" that they deprived private litigants of the ability to benefit from the Government's prosecution of

[1] *Available at* http://catalog.hathitrust.org/Record/011396134.

The Subcommittee resolved to give the Attorney General the opportunity to "accomplish this revision through changes in the rules that govern the administration of his Department," but cautioned that, should he decline to act "or if the changes he institutes are inadequate, Congress should, by legislation, establish mandatory procedures and standards of conduct for this area." *Id.*

The Justice Department responded in July 1961, when then-Attorney General Robert Kennedy issued an administrative order entitled "Consent Judgment Policy." 28 C.F.R. § 50.1 (1970). That order established a "policy" that the Department would "consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws only after or on condition that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to entry of such proposed judgment by the court." *Id.* § 50.1(a). "Pursuant to this policy," the order further provided that proposed antitrust consent judgments would "be filed in court or otherwise made available upon request to interested persons . . . at least 30 days prior to entry by the court," and that the Department would "receive and consider any written comments, views or relevant allegations relating to the proposed judgment" before entry of the judgment. *Id.* § 50.1(b). The Department reserved discretion to decide whether to disclose comments and "reserve[d] the right" (1) to disavow the proposed consent judgment if new facts or considerations came to light in the comment process and (2) "to object to intervention by any party not named as a party by the Government." *Id.* The Department also adopted other reforms through less formal means, but abandoned them shortly thereafter. *See* Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Colum. L. Rev. 594, 607–609 (1973) (discussing the use of settlement clauses providing that the

settlement would have *prima facie* effect in a treble damages action and pre-filing negotiation practices).

The Department's antitrust settlement authority was once again subject to scrutiny when "the details of the [International Telephone & Telegraph Corporation ("ITT")] antitrust settlement bec[a]me public in [the] Spring [of] 1972." *Id.* at 603. The Justice Department's settlement with ITT permitted "the nation's ninth largest corporation" to merge with Hartford Fire Insurance "in exchange for divesting itself of several smaller subsidiaries." *Id.* at 603–04. Senate confirmation hearings for Attorney General Richard G. Kleindienst probed the ITT settlement and suggested a connection between ITT's contributions to the 1972 Republican National Convention and the Nixon administration's willingness to settle on terms unduly favorable to ITT, but Kleindienst denied any White House involvement in the matter. *Id.* at 604; 120 Cong. Rec. 29,269–70 (1974). The Watergate tapes revealed, however, that President Nixon had indeed told then-Deputy Attorney General Kleindienst that he did not want an ITT prosecution. *See* Ciara Torres-Spelliscy, Brennan Ctr. for Justice, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions* (Mar. 19, 2014).[2] As a result, President Nixon's "unlawful activities . . . relating to the confirmation of Richard Kleindienst as Attorney General of the United States" were included in the Articles of Impeachment adopted by the House Judiciary Committee. 120 Cong. Rec. at 29,268 (1974). Attorney General Kleindienst also ultimately pleaded guilty in 1974 to a charge of failing to testify "accurately and fully" at his confirmation hearings about White House involvement in the ITT case. *See* Torres-Spelliscy, *supra*.

[2] *Available at* https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions.

Just two years after enacting the Tunney Act, Congress enacted the Hart-

view, "[a]pplication of Tunney Act procedures to settlements for exclusively legal relief such as monetary penalties is inconsistent with the statute's history, its language as a whole, and nearly four decades of precedent." *Id.* at 2. It further contends that Congress has "implicitly ratified" its position. *Id.*

A. The Text

In order to determine whether the Tunney Act applies to proposed settlements for civil penalties, the Court "begin[s] with the text of the statute." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011). The Act applies to "[*a*]*ny* proposal for a *consent judgment* submitted by the United States for entry in *any civil proceeding* brought by or on behalf of the United States *under the antitrust laws*." 15 U.S.C. § 16(b) (emphases added). The Court can easily dispose of two issues. First, there can be no reasonable dispute that an HSR Act civil penalty action arises "under the antitrust laws." Although enacted after the original Clayton Act of 1914 (as well as the Tunney Act), the relevant portions of the HSR Act were inserted into the Clayton Act. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (ame4(o)-.DrB4o2(a9l)-6(t)3,uniginal Ct w.6(l (w)-12(el)-6(l)-6224)Tj 0.69 0 Td (

that is used in § 4 of the Sherman Act and § 15 of the Clayton Act to refer to the courts' equitable powers to enjoin actions in violation of the substantive antitrust laws. *See* 15 U.S.C. §§ 4, 25. That contention, indeed, finds support in the text of § 4 of the Sherman Act and § 15 of the Clayton Act, which provide that "it shall be the duty of the several United States attorneys . . . to institute proceedings in *equity* to prevent and restrain" violations of those statutes. *Id.* (emphasis added).

The problem with the Government's argument is that it essentially skips over the question of the plain meaning of the Tunney Act and argues, instead, that the Department's pre-Tunney Act practice shows that Congress did not intend to -saio1-6(o)0.002ua/u..002ua2(ha)424e(i)-2(o)-Td T

enforcement of the Sherman and Clayton Acts, as they then existed, but it says little, if anything, about the plain meaning of the phrase "consent judgment" in the Tunney Act.

The Government's contention that the phrase "consent judgment" can be construed to exclude monetary judgments would have greater purchase if the Tunney Act used the phrase "consent decree," because that term has sometimes been used to connote purely equitable relief. *See Decree*, Black's Law Dictionary (10th ed. 2014) ("'The chief differences between decrees in equity and judgments at common law are [that] [t]he former are pronounced by courts of equity; the latter, by courts of law.'").[3] The Act, however, does not refer to "consent decrees," only to "consent judgment[s]." And although it is possible to construe the word "decree" as limited to the award of equitable relief, the word "judgment" admits of no such limitation. To the contrary, a "judgment" is "[a] court's final determination of the rights and obligations of the parties." *Judgment*, Black's Law Dictionary (10th ed. 2014). The term may be "used in a broad sense to *include* decrees in equity," *id.* (emphasis added), but it does not under any recognized definition *exclude*

The Government also argues that a previously enacted provision of the Clayton Act, which like the Tunney Act appears in § 5 of the Clayton Act, shows that Congress used the phrase "consent judgment" to refer solely to settlements invoking the equitable—or injunctive—power of the courts. As originally enacted, § 5 of the Clayton Act (now § 5(a)) provided "[t]hat a final judgment or decree" entered "in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws" could be used as "prima facie evidence" in a private suit for damages. Pub. L. No. 63-212, § 5, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 16(a)). The law, however, expressly exempted "consent judgments or decrees entered before any testimony has been taken." *Id.* From this, the Government draws the conclusion that, at least in 1914, Congress understood a "consent judgment or decree" to mean an order embodying the resolution of either a "criminal prosecution" or a "suit or proceeding in equity"—but not an action at law. Dkt. 3 at 4. Finally, the Government argues that the 1955 amendment to the "prima facie evidence" provision—which substituted "any civil . . . proceeding" for the prior reference to "any . . . proceeding in equity," Pub. L. No. 84-137, § 2, 69 Stat. 282, 283 (1955)—was merely intended to conform the law to the 1938 merger of law of equity, and was not intended to reflect any substantive change in the law. Dkt. 3 at 4. Thus, according to the Government, the phrase "consent judgment" should be construed in the Clayton Act as rooted in the Act's original focus on "proceedings in equity," which did not contemplate the award of monetary relief. *Id.*

2328, 2328. The amendments thus added a new

The competitive impact statement must, among other things, identify "the anticipated effects on competition of [the proposed] relief," "the remedies available to potential private plaintiffs damaged by the alleged violation in the event that [the] proposal for the consent judgment is

violate the antitrust laws—might appear to have, at most, a limited competitive impact, the Government has consistently applied the Tunney Act to HSR Act settlements involving injunctive relief. *See* Dkt. 3 at 13 n.4. Yet every time the Government agrees to resolve a HSR Act claim on purely monetary terms, it necessarily agrees not to seek injunctive relief. That decision implicates the same policy considerations as the Government's decision to seek injunctive terms. That is, if it is appropriate to assess the impact on competition of a proposed HSR Act injunctive settlement, then it is appropriate to assess the consequences of declining to seek injunctive relief. It is also an overstatement to suggest that purely monetary settlements will have no competitive consequences. As the Government itself stated in its first HSR civil penalty action, "While civil penalties . . . have no competitive impact in and of themselves, the civil penalty . . . will help deter Defendant and others . . . from failing to comply with the notice and waiting requirements of the HSR Act. Compliance with these requirements will strengthen antitrust enforcement and thereby help to maintain competitive markets." 49 Fed. Reg. at 36,456. Thus, although the competitive impact of an HSR civil penalty settlement is an indirect one, there is no reason that the Department and the Court cannot assess how that indirect impact affects the public interest.

In summary, nothing in the structure or purposes of the Tunney Act suggests that applying it to consent judgments for civil penalties would be "'untenable in light of [the statute] as a whole,'" *King v. Burwell*, 135 S. Ct. 2485, 2495 (2015) (quoting *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994)), and thus the Court finds no reason "to depart from what would otherwise be the most natural reading of the pertinent statutory phrase," *id.* Nor is there any basis to conclude that Congress assigned anything but the plain meaning to the phrase "consent judgment" anywhere in the Clayton Act, including in the Tunney Act. To

Similarly, the Justice Department's 1961 "Consent Judgment Policy" was most clearly directed at antitrust settlements involving injunctive relief. The policy was adopted in response to the 1959 Report, which was itself prompted by concerns about inadequate injunctive decrees. The policy, moreover, applied only to settlements in actions "to prevent or restrain violations" of the antitrust laws, 28 C.F.R. §

merely “jettisoned its 40 least profitable outlets;” the 1969 “smog case,” where the automobile industry was not required to “undo its past damag

15 U.S.C. § 16(a), and "a bad or inadequate consent decree may as a practical matter foreclose further review of a defendant's practices." 118 Cong. Rec. at 31,674 (statement of Sen. Tunney). Those concerns admittedly have little to do with a monetary settlement of an HSR Act claim. But, Congress also recognized that "the public's interest in deterrence of future antitrust violations by the defendant and by other potential defendants may be affected profoundly by the willingness of the Justice Department to settle cases and the price exacted for such settlements." *Id.* To the extent that compliance with the HSR Act "help[s] to maintain competitive markets," as the Department has professed, 49 Fed. Reg. at 36,456, the public has an interest in ensuring that HSR Act settlements exact an appropriate price. Following in the wake of the ITT settlement and the related scandal, moreover, Congress was concerned with both transparency and the fact that antitrust settlements may invite intensive lobbying, because "the stakes are high" for "those who exercise the greatest corporate influence." 118 Cong. Rec. at 31,676 (statement of Sen. Tunney). It thus concluded that "it is particularly important to assure some measure of public scrutiny of the exercise of that influence." *Id.* Although that rationale may apply most acutely in cases where the Government seeks to block large mergers or to require divesture of substantial interests, the principle applies broadly enough to include HSR Act monetary penalties.

For present purposes, the Court need not—and does not—conclude that Congress was focused on purely monetary settlements. Because the plain language of the Tunney Act reaches all "consent judgments"—whether for injunctive or monetary relief—the questions are whether "reliance on [the literal] language would defeat the plain purpose of the statute," *Bob Jones Univ. v. United States*

King, 135 S. Ct. at 2489. For the reasons explained above, the answer to both of these question is "no." To the contrary, inclusion of proposed monetary judgments within the scope of the Act serves its objectives of increasing transparency and accountability in the settlement of antitrust cases and ensuring that antitrust settlements "exact a price" sufficient to deter future violations of the antitrust laws.

C. Practice and Congressional Ratification

The Government further contends that district courts have a longstanding practice of exempting consent judgments for civil penalties from Tunney Act procedures and that Congress has implicitly ratified this practice. Dkt. 3 at 12–15. To be sure, district courts have on many occasions since the passage of the Act entered civil penalty consent judgments without first applying Tunney Act procedures, *see* Dkt. 3 at 21–26 (table collecting 47 HSR entries of judgment); *see also id.* at 35 (Exh. 2) (entry of judgment for civil penalty under 15 U.S.C. § 21(*l*)), but these unpublished cases provide, at best, limited support for the Government's construction of the Act.

Neither the Government nor this Court has identified any cases analyzing the issue in any depth, or any Court of Appeals decision addressing it at all. *United States v. Computer Associates International, Inc.*, provides the longest discussion of the matter. *See* No. 01-2062, 2002 WL 31961456, at *9 (D.D.C. Nov. 20, 2002). The final judgment entered by the district court in that case, however, simply stated: "The United States does not believe that the payment of civil penalties under the HSR Act is subject to the [APPA]. Consequently, the civil penalties component of the proposed Final Judgment is not open to public comment." *Id.* A footnote then explained:

> Obtaining civil penalties in a consent judgment is not the type of "consent judgment" Congress had in mind when it passed the APPA. Thus, in consent

settlements seeking both equitable relief and civil penalties, courts have not required use of APPA procedures with respect to the civil penalty component of the proposed final judgment.

No. 108-237, § 221(b)(2), 118 Stat. 661, 668–69 (2004) (codified at 15 U.S.C. § 16)—the only amendments that Congress has made to the Act. Those amendments: (1) made it mandatory, rather than permissible, for courts to consider all of the "public interest determination" factors enumerated in § 5(e); (2) revised some of the § 5(e) enumerated factors and added others; (3) permitted district courts to authorize a more cost-effective method of disseminating public comments than publication in the Federal Register under § 5(d); and (4) specified which agents of the defendant are subject to the lobbying disclosure requirements of § 5(g). *Id.* The amendments also included legislative findings indicating that Congress's principle purpose was to overrule the D.C. Circuit's decisions in *United States v. Microsoft*, 56 F.3d 1448, 1462 (D.C. Cir. 1995), and *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997), both of which held that a proposed consent judgment should be rejected only if it would make "a mockery of judicial power." *See* Pub. L. No. 108-237, § 221(a), 118 Stat. at 668; *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11–14 (D.D.C. 2007).

Nothing contained in those amendments or Congress's consideration of the legislation approaches the type of showing required to find an implicit ratification of a judicial or administrative interpretation of a pre-existing statute. First, and foremost, Congress did not re-enact the Tunney Act as a whole and did not re-enact the provision containing the language at issue here. That language—"any proposal for a consent judgment submitted by the United States"—appears in § 5(b) of the Clayton Act. The 1994 amendments, however, did not touch § 5(b), but, rather, added language to § 5(d) and § 5(g) and added and deleted language in § 5(e). Pub. L. No. 108-237, § 221(b)(2), 118 Stat. 661, 668–69 (2004). Thus, Congress did not "re-enact . . . without change" the statutory provision on which the Government places an interpretive gloss. *Lorillard*, 434 U.S. at 580. *Cf. Jama*, 543 U.S. at 349; *NLRB v. Gullett Gin*

Co., 340 U.S. 337, 366 (1951); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 146–47 (1920); *In re North*, 50 F.3d 42, 45 (D.C. Cir. 1995).

Nor does the Government point to any evidence that Congress gave any consideration to the meaning of "consent judgment" in § 5(b) or that it was even aware of the practice of exempting consent judgments seeking civil penalties from Tunney Act review. Although courts often presume that Congress is "aware of an administrative or judicial interpretation of a statute and . . . adopt[s] that interpretation when it re-enacts a statute without change," that presumption turns in significant part on the condition that the pre-existing interpretation is one that "affects the new statute." *Lorillard*, 434 U.S. at 580–81. The notion is that Congress necessarily legislates against a backdrop of established law. Courts assume that Congress is aware of that law and, absent evidence to the contrary, that it understands how new legislation fits within the existing framework. It is an altogether different matter, however, to make the unrealistic assumption that Congress is aware of—and intends to ratify—

Finally, application of the ratification doctrine to the 2004 amendments is particularly out of place here, since those amendments sought to ensure robust judicial review of "consent judgments." *See SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 11–14. The Government's argument, in contrast, would contradict the plain terms of the Tunney Act, and it would do so in the absence of any congressional acknowledgment or evidence that the issue of purely monetary antitrust settlements was subject to a moment's consideration or debate. The ratification doctrine is a tool for discerning congressional intent—not a means of creating it. The Court, accordingly, rejects the Government's contention that Congress has adopted through silence a narrowing and atextual interpretation of "consent judgment."

III. CONCLUSION

For the forgoing reasons, the Government's Motion for Entry of Final Judgment (Dkt. 1-4) is **DENIED** without prejudice.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: February 12, 2016