

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term, 1997

6  
7  
8 (Argued: March 16, 1998

Decided: August 6, 1998)

9  
10 Docket No. 97-6130

11  
12 -----  
13 UNITED STATES OF AMERICA,

14  
15 Plaintiff-Appellee,

16  
17  
18 ALEX. BROWN & SONS INC., BEAR STEARNS & CO. INC., CS FIRST BOSTON  
19 CORP., DEAN WITTER REYNOLDS INC., DONALDSON, LUFKIN & JENRETTE  
20 SECURITIES CORP., FURMAN SELZ LLC, GOLDMAN, SACHS & CO.,  
21 HAMBRECHT & QUIST LLC, HERZOG, HEINE GEDULD, INC., J.P. MORGAN  
22 SECURITIES INC., LEHMAN BROTHERS INC., MAYER & SCHWEITZER, INC.,  
23 MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MORGAN STANLEY &  
24 CO., INC., NASH, WEISS & CO., OLDE DISCOUNT CORP., PAINWEBBER  
25 INC., PIPER JAFFRAY INC., PRUDENTIAL SECURITIES INC., SALOMON  
26 BROTHERS INC., SHERWOOD SECURITIES CORP., SMITH BARNEY INC.,  
27 SPEAR, LEEDS & KELLOGG, LP, and UBS SECURITIES LLC,

28  
29 Defendants-Appellees,

30  
31 v.

32  
33 DONALD BLEZNAK, ANDREW BLEZNAK, RICHARD I. BURSTEIN, CHEVRA  
34 GEMILATH CHASODAM, CARL S. CLARK and PATRICIA CLARK, DANIEL  
35 D'ADDARIO, ROSEANN D'ADDARIO, MAXINE DAMPF, JEROME D. DERDEL,  
36 SULOCHANA DESAI, H. LESLIE FINEBERG, NICHOLAS FRANGIOSA, NEAL  
37 HANSEN and DONNA HANSEN, TIMOTHY HENNESSEY, BRENT JOHNSON,  
38 CHARLES KAYE, JERRY KRIM, JAMES KRUM, ROBERT LIPINSKI, JOHN  
39 LORGE, THE STATE OF LOUISIANA, through its Attorney General,  
40 RICHARD P. IEYOUB, WILLIAM LUTZ, JR., DENNIS MALONEY, KEVIN  
41 MALONEY, RICHARD I. PERLMAN, JEFFREY SACHS, DAVID SIEGEL, TWO  
42 GUYS LIMITED PARTNERSHIP AND THEIR GENERAL PARTNER, GELTMORE,  
43 INC., PETER WASSERMAN, DENNIS WEINER, and SUMNER WOODROW.

44  
45 Intervenors-Appellants.

46  
47 -----  
48 B e f o r e: WINTER, Chief Judge, LEVAL, Circuit Judge,

1 and TRAGER, District Judge.\*

2  
3  
4 Appeal from two decisions of the United States District  
5 Court for the Southern District of New York (Robert W. Sweet,  
6 Judge), one approving a consent decree, the other holding that a  
7 Settlement Memorandum prepared by the Department of Justice was  
8 not a "determinative" document subject to disclosure under  
9 Section 16(b) of the Tunney Act. We affirm.

10 LEONARD B. SIMON, Milberg, Weiss,  
11 Bershad, Hynes & Lerach, San Diego,  
12 California (Arthur M. Kaplan,  
13 Michael D. Basch, Richard A.  
14 Koffman, Melinda L. deLisle, Fine,  
15 Kaplan and Black, Philadelphia,  
16 Pennsylvania; Christopher Lovell,  
17 Lovell & Stewart, New York, New  
18 York; Robert A. Skirnick, Maria A.  
19 Skirnick, Meredith Cohen Greenfogel  
20 & Skirnick, New York, New York, of  
21 counsel), for Intervenor-  
22 Appellants.

23  
24 ANDREA LIMMER, Department of  
25 Justice, Washington, D.C. (Joel I.  
26 Klein, Assistant Attorney General,  
27 John F. Greaney, Hays Gorey, Jr.,  
28 John D. Worland, Jr., Catherine G.  
29 O'Sullivan, of counsel), for  
30 Plaintiff-Appellee.

31  
32 PHILIP L. GRAHAM, JR., Sullivan &  
33 Cromwell, New York, New York (John  
34 L. Warden, Sullivan & Cromwell; Jay  
35 N. Fastow, Weil, Gotshal & Manges,  
36 New York, New York; Howard  
37 Schiffman, Dickstein Shapiro Morin

---

\* The Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39

& Oshinsky, Washington, D.C.; Lewis  
A. Noonberg, Piper & Marbury,  
Washington, D.C.; Robert M. Heller,  
Kramer, Levin, Naftalis & Frankel,  
New York, New York; Richard A.  
Cirillo, Rogers & Wells, New York,  
New York; Frank Holozubiec,  
Kirkland & Ellis, New York, New  
York; James J. Calder, Rosenman &  
Colin, New York, New York; Charles  
E. Koob, Simpson Thacher &  
Bartlett, New York, New York, James  
T. Halverson, Steptoe & Johnson,  
Washington, D.C.; Jeffrey Q. Smith,  
Cadwalader, Wickersham & Taft, New  
York, New York; Catherine A.  
Ludden, Morgan, Lewis & Bockius,  
New York, New York; Robert F. Wise,  
Jr., Davis, Polk & Wardwell, New  
York, New York; Paul B. Uhlenhop,  
Lawrence Kamin Saunders & Uhlenhop,  
Chicago, Illinois; Norman J. Barry,  
Jr., Donahue Brown Mathewson &  
Smyth, Chicago, Illinois; Robert B.  
McCaw, Wilmer, Cutler & Pickering,  
Washington, D.C.; Matthew Farley,  
Shanley & Fisher, New York, New  
York; William P. Frank, Skadden,  
Arps, Slate, Meagher & Flom, New  
York, New York; Jeffrey I.  
Weinberger, Munger Tolles & Olson,  
Los Angeles, California; Brian J.  
McMahon, Crummy, Del Deo, Dolan,  
Griffinger & Vecchione, Newark, New  
Jersey; Charles A. Gilman, Cahill  
Gordon & Reindel, New York, New  
York, of counsel), for Defendants-  
Appellees.

40 WINTER, Chief Judge:

41           Intervenors -- plaintiffs in In re NASDAQ Market-Makers  
42 Antitrust Litigation, 94 Civ. 3996 (RWS) -- appeal from two  
43 decisions by Judge Sweet. The first approved a consent decree

1 between the United States and appellees. On appeal, appellants  
2 challenge a provision of the consent decree that largely  
3 prohibits certain audio tapes from being subject to discovery or  
4 admitted at trial. Judge Sweet's other decision held that a  
5 Settlement Memorandum prepared by the Antitrust Division of the  
6 Department of Justice ("government" or "DOJ") was not a  
7 "determinative" document subject to public disclosure under  
8 Section 16(b) of the Tunney Act, 15 U.S.C. § 16(b). Appellants  
9 claim this ruling was also error. We affirm.

10 The facts underlying this action are more fully set forth in  
11 two decisions of the district court. See United States v. Alex.  
12 Brown & Sons, Inc., 963 F. Supp. 235 (S.D.N.Y. 1997); United  
13 States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532 (S.D.N.Y.  
14 1996). We assume familiarity with these opinions and summarize  
15 here only those facts relevant to this appeal.

16 This matter grew out of a complaint filed by the government  
17 alleging claims under Section 4 of the Sherman Act, 15 U.S.C.  
18 § 4. The complaint alleged that appellees had used their  
19 positions as "market makers" in NASDAQ stocks to manipulate the  
20 price of those stocks so as to increase their profits.

21 NASDAQ is a computerized stock quotation system operated by  
22 the National Association of Securities Dealers ("NASD"). Market  
23 makers establish the price of a particular NASDAQ stock by  
24 quoting to the system the prices at which they are willing to buy

1 and sell that stock. Because market makers tend to execute a  
2 retail customer's order to buy or sell a NASDAQ stock by buying  
3 and selling at the quoted prices, the spread between those prices  
4 typically determines the market maker's profit on any  
5 transaction. Because the spread is an important factor in  
6 determining the profit, there is an incentive for market makers  
7 to inflate the spread. The core of the government's claim was  
8 that appellees conspired to use a quoting convention that widened  
9 the dealer spread<sup>1</sup> and coerced non-complying market makers to  
10 adhere to this convention. The evidence underlying this claim  
11 included 4500 hours of audio tapes of traders' phone calls that  
12 appellees had regularly recorded. The practice of taping such  
13 calls ceased by the time the complaint was filed.

14 A. The Consent Decree

15 A consent decree was filed simultaneously with the  
16 government's complaint. The decree prohibits appellees from,  
17 inter alia, adhering to the quoting convention, see Note 1,  
18 supra; agreeing to fix the quotes of any NASDAQ security or the  
19 spread between the buy-and-sell quotes; and harassing or  
20 intimidating other market makers.

21 The decree also establishes an "antitrust compliance  
22 program." As part of this program, appellees are required to  
23 install a monitoring system on phones used by market makers to  
24 buy and sell NASDAQ securities. They must also designate an

1 "Antitrust Compliance Officer" to record and listen to calls  
2 placed on these telephones. The decree provides that the  
3 compliance officer "shall record (and listen to) not less than  
4 three and one-half percent (3.5%) of the total number of trader  
5 hours of [the appellees]; provided, however, that in no case  
6 shall the total number of hours required to be recorded (and  
7 listened to) exceed seventy (70) hours per week." Individuals  
8 subject to monitoring are told of the existence of the taping  
9 system but not the times when their conversations may be  
10 monitored. If the compliance officer discovers a conversation  
11 that might violate the decree, the audio tape is to be retained  
12 and furnished to the DOJ. Otherwise, tapes may be destroyed  
13 after thirty days from the date of recording.

14 Paragraph IV(C)(6) of the consent decree gives rise to the  
15 present issue. It contains restrictions on the discovery or use  
16 of the tapes by third parties:

17 Tapes made pursuant to this stipulation and  
18 order shall not be subject to civil process  
19 except for process issued by the Antitrust  
20 Division [of the Department of Justice], the  
21 SEC, the NASD, or any other self-regulatory  
22 organization, as defined in Section 3(a)(26)  
23 of the Securities Exchange Act of 1934, as  
24 amended. Such tapes shall not be admissible  
25 in evidence in civil proceedings, except in  
26 actions, proceedings, investigations, or  
27 examinations commenced by the Antitrust  
28 Division, the SEC, the NASD, or any other  
29 self-regulatory organization . . . .  
30

31 Appellants objected to this paragraph of the consent decree.

1 They argued to the district court that a consent decree cannot  
2 diminish legal rights of non-parties and, therefore, that the  
3 decree cannot prevent third parties from discovering relevant  
4 evidence or introducing it at trial. Nevertheless, the district  
5 court approved the consent decree as reasonable. It noted that  
6 the intervenors have no current right to tapes created pursuant  
7 to the decree because they do not yet exist. See Alex. Brown,  
8 963 F. Supp. at 241. It further found that but for the consent  
9 decree these tapes would never come into existence. See id.  
10 Finally, the court noted that the tapes might be subject to an  
11 "investigatory privilege" and, thus, might be non-discoverable  
12 and inadmissible in any event. Id. at 242-43 (citing In re LTV  
13 Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981)). We agree with the  
14 district court.

15 We do not quarrel with the principle asserted by appellants  
16 that parties may not use a consent decree to limit non-party  
17 rights that would otherwise prevail. See People Who Care v.  
18 Rockford Bd. of Educ. Sch. Dist. No. 205, 961 F.2d 1335, 1337  
19 (7th Cir. 1992). However, the district court's findings -- which  
20 are not clearly erroneous -- that, without Paragraph IV(C)(6),  
21 there would be no consent decree and that, without the consent  
22 decree, there would be no tapes, distinguish the instant matter  
23 from the cases relied upon by appellants. Without the consent  
24 decree, there would be no tapes to discover or use as evidence.

1 With the consent decree, there will be tapes subject to Paragraph  
2 IV(C)(6).

3 Cases such as People Who Care are thus entirely  
4 distinguishable. In that case, a consent decree between various  
5 public groups and a school board purported to alter the seniority  
6 provisions of a collective bargaining agreement between the  
7 school board and a non-party teachers' union. Unlike the present  
8 case, therefore, existing rights with tangible consequences were  
9 affected. See also Perkins v. City of Chicago Heights, 47 F.3d  
10 212, 216-17 (7th Cir. 1995) (vacating consent decree that  
11 disregarded state law); Olympic Ref. Co. v. Carter, 332 F.2d 260,  
12 265 (9th Cir. 1964) (holding parties cannot limit third-party  
13 access to existing evidence through consent decree).

14 We note two other matters. At oral argument, appellants  
15 suggested that appellees have an interest in taping all  
16 conversations in question as a means of recording transactions in  
17 NASDAQ securities. Indeed, that had been appellees' practice  
18 before the complaint was filed in the instant matter. Appellants  
19 suggested that Paragraph IV(C)(6) might therefore shield from  
20 discovery or evidentiary use tapes of virtually all such phone  
21 conversations. However, Paragraph IV(C)(6) does not purport to  
22 shield from discovery or evidentiary use every audio tape created  
23 by appellees. Rather, only those tapes made pursuant to the  
24 decree are subject to its restrictions. The consent decree



1 requires that appellees tape at least 3.5 percent of the total  
2 number of trader hours, or 70 hours per week, whichever is less.  
3 Were appellees to tape all of their traders' conversations, they  
4 would have difficulty arguing that such tapes were protected by  
5 Paragraph IV(C)(6), because the taping would far exceed that  
6 required by the decree. We of course do not address, much less  
7 define, what level of taping would exceed that protected by  
8 Paragraph IV(C)(6).

9 Second, all we do today is affirm the district court's  
10 approval of the consent decree with Paragraph IV(C)(6) in it. We  
11 do not purport to address issues arising out of an attempt to  
12 enforce this provision in other proceedings or other tribunals.  
13 Nor do we address the merits of a claim of "investigatory" or  
14 other privilege.

15 B. The Settlement Memorandum

16 The complaint and consent decree were the result of a two-  
17 year investigation in which the government reviewed thousands of  
18 pages of documents, a significant amount of market data, and the  
19 audio tapes that appellees had made of their traders' telephone  
20 calls. The government also prepared a "Settlement Memorandum"  
21 that summarized selected evidence and set forth some of the legal  
22 underpinnings of its case. The Memorandum was given to appellees  
23 during settlement negotiations.

24 Appellants argue that the Settlement Memorandum had to be

1 disclosed under the Tunney Act, 15 U.S.C. § 16(b)-(h).  
2 Specifically, they claim that the Settlement Memorandum  
3 contributed to the DOJ's decision to enter into the consent  
4 decree and is a "determinative" document that must thus be  
5 disclosed. See 15 U.S.C. § 16(b); United States v. Central  
6 Contracting Co., 537 F. Supp. 571, 577 (E.D. Va. 1982) (holding  
7 that "documents that substantially contribute to the  
8 determination [by the government] to proceed by consent decree"  
9 are determinative documents under Tunney Act) (quotation marks  
10 omitted). Section 16(b) provides that all "[c]opies of [a  
11 proposed consent decree] and any other materials and documents  
12 *which the United States considered determinative* in formulating  
13 such [a proposed decree], shall . . . be made available to the  
14 public at the district court . . . ." 15 U.S.C. § 16(b)  
15 (emphasis added).

16 The district court found that the Settlement Memorandum was  
17 "the result of the internal effort of DOJ to organize its  
18 evidence for the purpose of evaluating its case and presenting it  
19 to Defendants in settlement negotiations." Alex. Brown, 169  
20 F.R.D. at 541. It was also intended to "facilitate negotiations  
21 by demonstrating to Defendants the supposed strength of the  
22 Government's case." Id. at 536. The district court concluded  
23 that, because the Memorandum did not determine the government's  
24 decisions concerning the consent decree but merely summarized

1 pieces of evidence, it was an organizational tool, not a  
2 determinative document. See id. at 541.

3 We again agree with the district court. The range of  
4 materials that are "determinative" under the Tunney Act is fairly  
5 narrow. See Andover, Inc. v. United States, 118 F.3d 776, 784  
6 (D.C. Cir. 1997). The history of the Act demonstrates that its  
7 thrust was to bring into "sunlight" the government's motives for  
8 entering a decree, thereby taking out of the "twilight" the  
9 government's decision-making processes with respect to antitrust  
10 settlements. H.R. Rep. No. 93-1463 (1974), reprinted in 1974  
11 U.S.C.C.A.N. 6535, 6537. The use of the word "determinative" in  
12 Section 16(b) "rules out the claim to all the investigation and  
13 settlement material, and confines § 16(b) at the most to  
14 documents that are either 'smoking guns' or the exculpatory  
15 opposite." Andover, 118 F.3d at 784. Indeed, were the law  
16 otherwise, "determinative" would come to mean "relevant."

17 Given this view of the Tunney Act, the Settlement Memorandum  
18 cannot be deemed a determinative document. There is nothing to  
19 suggest that its existence was a substantial inducement to the  
20 government to enter into the consent decree. Moreover, as the  
21 district court found, the Memorandum was prepared at least as  
22 much to induce appellees to enter into the decree as to persuade  
23 the government to do so. See Alex. Brown, 169 F.R.D. at 542.  
24 (Memorandum here was "internal evaluation . . . undertaken to

1 persuade defendants to enter into a consent decree.").<sup>2</sup>

2 We therefore affirm.

3

## FOOTNOTES

1. This "quoting convention" was an agreement among market makers to avoid "odd-eighths" -- i.e.,  $1/8$ ,  $3/8$ ,  $5/8$ ,  $7/8$  -- buy-and-sell quotes on certain securities. The effect of this convention was to raise the minimum inside spread to  $1/4$  point, resulting in higher transactions costs to investors and higher profits to market makers.

2. In connection with this issue, appellants have filed a motion asking us to take judicial notice of several court filings cited in their brief. Because these filings are not relevant to our disposition of this appeal, we deny the motion as moot.

TRANSMITTED ELECTRONICALLY