institutions, hospitals, and private commercial organizations (if legislation allows). Other: None.

The information collected is used to determine grantee progress on its Making Officer Redeployment Effective (MORE) Grant. Completion of such report is a condition of the MORE grant award. Upon receipt and review, the agency will notify the grantee if it is not in compliance with the terms and conditions of its grant award under this program.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 1,600 responses; 2 hours per response. The information will be collected twice per year from each respondent. Thus, there will be approximately 3,200 total yearly responses at 2 hours per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 6,400 annual burden hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: November 20, 1996.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

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Antitrust Division

[Civil Action No. 96–5313 (RWS), S.D.N.Y.]

United States v. Alex. Brown & Sons, Inc., et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), the United States publishes below the written comments received on the proposed Final Judgment in *United States* v. *Alex. Brown & Sons, Inc.*, Civil Action No. 96–5313 (RWS), United States District Court for the Southern District of New York, together with the response of the United States to the comments.

Copies of the written comments and the response are available for inspection and copying in Room 9500 of the U.S. Department of Justice, Antitrust Division, 600 E Street, N.W., Washington, D.C. 20530 (telephone: (202) 307–7200) and for inspection at the Office of the Clerk of the United States District Court for the Southern District of New York, Room 120, United States Courthouse, 500 Pearl Street, New York, New York 10007.

Rebecca P. Dick,

Deputy Director of Operations.

Response of United States to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act (''Tunney Act''), 15 U.S.C. 16 (b)–(h), the United States make and files this response to the public comments received regarding the relief described in the proposed Stipulation and Order (''proposed order'') that, if entered by the Court, would resolve this civil antitrust proceeding. The United States has carefully considered the comments received, and remains convinced that entry of the proposed order is in the public interest.

This response and the attached public comments have been submitted to the Federal Register for publication (*see* 15 U.S.C. 16(d)). Moreover, the Untied States has today certified to the Court that it has fulfilled the requirements of the Tunney Act. Upon a determination that the Untied States and the defendants have fulfilled the requirements of the Tunney Act and that entry of the proposed order would be in the public interest, the Court may enter the proposed order.

This action was initiated by the United States with the filing of a complaint on July 17, 1996. The complaint charges that the defendants—all of whom are ''market makers'' in over-the-counter (''OTC'') stocks quoted for public trading on Nasdaq,[1] had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by engaging in a form of price fixing. The complaint alleges that the defendants and others adhered to and enforced a ''quoting convention'' that was designed to and did deter price competition among the defendants and other market makers in their trading of Nasdaq stocks with the general public. As a result of adherence to and enforcement of the ''quoting convention'' by the defendants, investors incurred higher transaction costs to buy and sell Nasdaq stocks than they otherwise would have.

With the filing of its complaint, the United States also filed the proposed Stipulation and Order, signed by all the defendants, which, if entered by the Court, would terminate the litigation. In addition, on July 17, 1996, the United States filed its Competitive Impact Statement (''CIS''). 15 U.S.C. 16(b). Thereafter, the defendants filed statements identifying certain communications made on their behalf, as required by the Tunney Act. 15 U.S.C. 16(g). A summary of the terms of the proposed order and the CIS, and directions for the submission of written comments relating to the proposed order to the Department, were published in *The Washington Post,* a newspaper of general circulation in the District of Columbia, and in *The New York Times,* a newspaper of general circulation in the Southern District of New York, beginning on July 29, 1996, and continuing on consecutive days through August 3, 1996, and on August 5, 1996.

The proposed order and the CIS were published in the Federal Register on August 2, 1996. 61 FR 40433–40451 (Aug. 2, 1996). The 60-day period public comment period began on August 3, 1996 and expired on October 2, 1996. In response to the solicitation of public comments, the United States received comments from three persons. These comments are attached as Exhibits 1–3.

In addition, the private plaintiffs in *In re: Nasdaq Market-Makers Antitrust Litigation,* 94 Civ. 3996 (RWS), M.D.L. No. 1023 (S.D.N.Y.), commented upon the proposed relief in the form of certain filings they made with the Court in connection with their pending motion to intervene in this case, namely (1) a memorandum in support of their motion to intervene and (2) a reply to the government's opposition to the motion. These papers are on file with the Court, and the relevant portions of these documents are attached as Exhibits 4–5.

I. Background

The complaint and proposed order are the culmination of a major, two-year-long investigation by the Department of Justice into the trading activities of Nasdaq securities dealers. The Department's investigation began in the summer of 1994, shortly after the public disclosure of an economic study by Professors William Christie of Vanderbilt University and Paul Schultz of Ohio State University (the ''Christie/Schultz study''). The Christie/Schultz study suggested that securities dealers on Nasdaq might have tacitly colluded to avoid odd-eighth price quotations on a substantial number of Nasdaq stocks, including some of the best known and most actively traded issues, such as Microsoft Corp., Amgen, Apple Computers, Inc., Intel Corp., and Cisco Systems, Inc. After the Christie/Schultz study had received wide-spread publicity, several class action lawsuits

[1] The term ''Nasdaq'' was originally an acronym for the ''National Association of Securities Dealers Automated Quotation System.'' The automated quotation system is now operated by The Nasdaq Stock Market, Inc.

alleging antitrust violations were filed against the defendants and other Nasdaq market makers.[2]

During the course of its investigation, the Department reviewed thousands of pages of documents produced by the defendants and other market participants in response to more than 350 Civil Investigative Demands (''CIDs''). The Department reviewed hundreds of responses to interrogatories that were submitted by the defendants (and others) and took more than 225 depositions of individuals with knowledge of the trading practices of Nasdaq market makers, including current and former officers and employees of the defendants and other Nasdaq market makers, as well as officials and committee members of the National Association of Securities Dealers, Inc. (''NASD''), the organization responsible for oversight of the Nasdaq market.

The Department conducted numerous telephone and in-person interviews of current and former Nasdaq stock traders, Nasdaq investors, and others with relevant knowledge of the industry, and listened to approximately 4500 hours of audio tapes of telephone calls between stock traders employed by the defendants and other Nasdaq market makers. These audio tapes had been recorded by certain of the defendants (and other market makers) in the ordinary course of their business and were produced to the Department in response to its CIDs.

The Department also reviewed and analyzed substantial quantities of data relating to trading and quoting activity in Nasdaq stocks produced in computer-readable format by the NASD. These data included data showing all market maker quote changes on Nasdaq during a twenty-month period between December 1993 and July 1995, and for selected months thereafter, including March 1996. The Department also reviewed eighteen months of data reflecting actual trades in Nasdaq stocks. Finally, the Department reviewed numerous transcripts of depositions taken by the Securities and Exchange Commission (''SEC'') in a concurrent inquiry into the operations and activities of the NASD and the Nasdaq market.

Based upon the evidence discovered during its investigation, the Department concluded that the defendants and others had been engaged for a number of years in anticompetitive conduct in violation of the Sherman Act, as alleged in the complaint. The Department challenged this conduct as violative of Section 1 of the Sherman Act. Entry of the proposed order would resolve the Department's competitive concerns regarding this conduct.

The complaint and proposed order address a mechanism by which the defendants coordinated their price quotes in certain Nasdaq stocks to increase the inside spread.[3] The central allegation of the complaint is that the defendants and others agreed to abide by a long-standing, essentially market-wide commitment to a two-part ''quoting convention.'' This ''quoting convention'' dictates the price increments a market maker can use to adjust or ''update'' its bid and ask price quotes on the Nasdaq system. Under the first part of the quoting convention, if a market maker's dealer spread in a stock is ¾ point (75 cents) or wider, the market maker is required to quote its bid and ask prices in even-eighth increments (e.g., ¼ (25 cents), ½ (50 cents), ¾ (75 cents) or 4⁄4 ($1). (The minimum quote increment for Nasdaq stocks trading at a price of $10 or more is ⅛ point, i.e., a much narrower increment than the ¼ point increment dictated by the quoting convention when an individual dealer spread in a stock is ¾ point or wider.) The quoting convention thus ensures that the inside spread in those stocks is maintained at ¼ point (25 cents), or wider.

Under the second part of the quoting convention, market makers can quote bid and ask prices on Nasdaq in odd-eighth increments, e.g., ⅛ (12.5 cents), ⅜ (37.5 cents), ⅝ (62.5 cents) or ⅞ (87.5 cents), only if they have a dealer spread of less than ¾ point. This requirement deters market makers from quoting bid and ask prices in odd-eighth increments because a narrower dealer spread is likely to create a greater economic risk to the market maker in trading that stock. A market maker with a narrow dealer spread is more likely than a market maker with a wide dealer spread, other things equal, to be required to trade on the ''wrong side'' of the market.[4] When the difference between a market maker's bid and ask quotes is ½ rather than ¾, a market maker may be called upon to buy (or sell) more stock than the trader wants, or buy stock when the market maker wants to sell (or vice versa).

In executing a market order on behalf of a retail customer, market makers historically bought from the customer at the inside bid, and sold to the customer at the inside ask. This execution by the market maker satisfied the retail broker's obligation of ''best execution'' for retail customers. Historically, large institutional customers have sometimes been able to negotiate prices that are better (higher bid prices and lower ask prices) than the inside spread, but the width of the inside spread influences many negotiations between market makers and their institutional customers.

Market makers thus have a significant interest in each others' price quotes because those quotes can either set each others' actual transaction prices or significantly affect those prices. This relationship creates an incentive for market makers to discourage bid and ask price competition that may have the effect of narrowing the inside spread.

Adherence to the quoting convention deterred the use of odd-eighth quotes in many stocks. This, in turn, tended to maintain the inside spread in those stocks at no less than one quarter, or twenty-five cents. This artificial floor on the inside spread in those stocks raised transaction costs on Nasdaq. The proposed order, if entered by the Court, would prohibit the defendants from continuing to adhere to and enforce the quoting convention. In addition, it would establish mechanisms that would enable the Department to determine whether the defendants have, in fact, ceased their unlawful conduct and have complied with the terms of the proposed order designed to ensure against its repetition.

[2] All of the private cases have been consolidated and assigned to this Court, M.D.L. 1023.

[3] Market makers must continuously quote the prices at which they are willing both to buy and sell individual stocks. The price an individual market maker quotes to buy a stock is known as its ''bid'' price. The price it quotes to sell a stock is known as its ''offer'' or ''ask'' price. (A market maker's bid price is always higher than its ask price.) The difference between a market maker's ''bid'' and ''ask'' is known as its ''dealer spread.'' The Nasdaq computer screen collects and displays the bid and offer prices of all the market makers in each stock. The highest bid and the lowest offer from among the quotes of all the market makers in a stock are called the ''inside bid'' and the ''inside ask,'' or—together—the ''inside quotes.'' The difference between the inside bid and the inside ask in a stock is called the ''inside spread.''

[4] To trade on the ''wrong side'' of the market means to buy a stock when one would prefer to sell the stock, or vice versa. Being required to trade on the ''wrong side'' of the market is more likely to occur if a dealer has a narrow dealer spread, than if a dealer has a wide dealer spread. For example, if a market maker has a dealer spread of fifty cents—say, 20 to 20½—when the best bid in the market is 20, the market maker is presumably trying to buy the stock (because its bid is equal to the best bid in the market). If, however, the market moves up quickly, the market maker's 20½ ask price could suddenly become the best ask price in the market, meaning that the market maker would be required to sell stock at that price. With a wider dealer spread—say, 20 to 20¾—the possibility of this occurring is less.

II. The Legal Standard Governing the Court's Public Interest Determination

A. General Standard

When the Untied States proposes to settle a civil antitrust case with a consent judgment, the Tunney Act requires the district court to determine whether ''the entry of such judgment is in the public interest.'' 15 U.S.C. 16(e).[5] The court is not, however, required ''to determine whether the resulting array of rights and liabilities 'is one that will *best* serve society,' but only to assess whether that the resulting settlement is 'within the *reaches* of the public interest.' '' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995) (emphasis in original); *accord, United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied,* 114 S. Ct. 487 (1993); *see also United States* v. *Bechtel,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975). For this reason, a court should not refuse to enter an order terminating a civil antitrust case initiated by the United States ''unless 'it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.' '' *Microsoft,* 56 F.3d at 1460 (quoting *Western Electric,* 993 F.2d at 1577). Congress did not intend the Tunney Act to lead to protracted hearings on the merits, and thereby undermine the incentives for defendants and the government to resolve civil antitrust cases through agreed-upon orders. S. Rep. No. 298, 93d Cong. 1st Sess. 3 (1973).

Tunney Act review is confined to the terms of the proposed relief and their adequacy as remedies for the violations alleged in the complaint. *Microsoft,* 56 F.3d at 1459.[6] Thus, in this case, the Court need decide only whether the proposed order is reasonably directed toward addressing the competitive concern raised by the quoting convention.

No third party has a right to demand that the proposed order be rejected or modified simply because a different order might better serve its private interests. Unless the proposed order ''will result in positive injury to third parties,'' a district court ''should not reject an otherwise adequate remedy simply because a third party claims it could be better treated.'' *Microsoft,* 56 F.3d at 1461 n.9.[7]

The United States—not any third party—represents the public interest in government antitrust cases. *See, e.g., Bechtel Corp.,* 648 F.2d at 660, 666; *Untied States* v. *Associated Milk Producers,* 534 F.2d 113, 117 (8th Cir.), *cert. denied,* 429 U.S. 940 (1976). Moreover, there is no allegation that the government has acted in bad faith in negotiating the relief. The proposed order is intended to ensure that market makers do not continue to collude through the mechanism of the quoting convention to increase transaction costs for investors in Nasdaq stocks. It will effectively accomplish this goal. Moreover, it is directed at private conduct illegal under the antitrust laws. It is not intended or designed—nor could it be—to make the Department the regulator of The Nasdaq Stock Market, Inc. The decree is also not intended to change the structure of the Nasdaq Stock Market by, for example, requiring that market-maker quotes be posted anonymously on Nasdaq, as suggested by one commentor. Exhibit 1 [letter of Professor Junius Peake, dated July 26, 1996] at 2; *see infra* text at 14–15.

III. Entry of the Proposed Order is in the Public Interest

Entry of the proposed order is clearly within the reaches of the public interest under the standards articulated in *Microsoft* and other decided cases. If entered by the Court, the proposed order would prevent each of the defendant market makers, unless otherwise specifically permitted, in connection with their market-making activities in OTC stocks, from agreeing with any other market maker:

(1) to fix, raise, lower, or maintain quotes or prices for any Nasdaq security;

(2) to fix, increase, decrease, or maintain any dealer spreads, inside spreads, or the size of any quote increment (or any relationship between or among dealer spread, inside spread, or the size of any quote increment), for any Nasdaq security;

(3) to adhere to a quoting convention whereby Nasdaq securities with a three-quarter (3⁄4) point of greater dealer spread are quoted on Nasdaq in even-eighths and are updated in quarter-point (even-eighth) quote increments; and

(4) to adhere to any understanding or agreement (other than an agreement on one or a series of related trades) requiring a market maker to trade at its quotes on Nasdaq in quantities of shares greater than either the Nasdaq minimum or the size actually displayed or otherwise communicated by that market;[8]

In addition, the proposed order, if entered by the Court, would bar each of the defendants from engaging in any harassment or intimidation of any other market maker because such market maker:

(1) decreased its dealer spread or the inside spread in any Nasdaq security;

(2) refused to trade at its quoted prices in quantities of shares greater than either the Nasdaq minimum or the size actually displayed or otherwise communicated by that market maker; or

(3) displayed or quantity of shares on Nasdaq greater than either the Nasdaq minimum or the size actually displayed or otherwise communicated by that market maker.

Finally, Section IV(8) of the proposed order, if entered by the Court, would bar each of the defendants from refusing, or threatening to refuse, to trade (or agreeing with or encouraging any other market maker to refuse to trade) with any market maker at the defendant's published Nasdaq quotes in amounts up to the published quotation size because such market maker decreased its dealer spread, decreased the inside spread in any Nasdaq security, or refused to trade at its quoted prices in a quantity of shares greater than either the Nasdaq minimum or the size actually displayed or otherwise communicated by that market maker.

Entry of the proposed order is in the public interest. The United States urges that the Court to enter the proposed order upon a determination that the United States and the defendants have satisfied the requirements of the Tunney Act.

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[5] While not styled ''consent judgment,'' the proposed order serves the same purpose. Violations of the proposed order are punishable as civil or criminal contempt. *See, e.g., United States* v. *Schine,* 260 F.2d 552 (2d Cir. 1958), *cert. denied,* 358 U.S. 934 (1959); 18 U.S.C. 401; *see also* CIS at 3–4, 42, 49, 52.

[6] A district court exceeds its authority if it requires production of information concerning ''the conclusions reached by the Government'' with respect to the particular practices investigated but not charged in the complaint, and the areas addressed in settlement discussions, including ''what, if any areas were bargained away and the reasons for their non-inclusion in the decree.'' *Microsoft,* 56 F.3d at 1455, 1459. To the extent that comments raise issues not charged in the compliant, those comments are irrelevant to the Court's review. *Id.* at 1460.

[7] *Cf. United States* v. *Associated Milk Producers, Inc.,* 534 F.2d 113, 116 n.3 (8th Cir.) (''The cases unanimously hold that a private litigant's desire for [the] *prima facie* effect [of a litigated government judgment] is not an interest entitling a private litigant to intervene in a government antitrust case.''), *cert. denied,* 429 U.S. 940 (1976).

[8] The reference to agreements ''other than an agreement on one or a series of related trades'' is intended to make clear that a market maker is not prohibited from agreeing to buy or sell a specific quantity of stock, and that agreeing to buy or sell a quantity of shares greater than the amount initially specified in a series of related trades also does not violate the proposed order.

IV. Response to Public Comments

As noted, this case has generated three formal comments. In addition, the private plaintiffs in *In re: Nasdaq Market-Makers Antitrust Litigation,* 94 Civ. 3996 (RWS), M.D.L. No. 1023 (S.D.N.Y.), commented upon the proposed relief in the form of certain filings they made with the Court in connection with their pending motion to intervene in this case, namely (1) a memorandum in support of their motion to intervene and (2) a reply to the government's opposition are on file with the Court. Our response to each of these comments is set forth below.

Comments of Professor Junius Peake

Professor Peake is Monfort Distinguished Professor of Finance at the University of Northern Colorado. He served as a member of the Board of Governors of the NASD. He is frequently quoted nationally and internationally in both print and electronic media. *See* Exhibit 1 at 1.

In his letter, Professor Peake expresses concern that the proposed order ''will not necessarily deter retribution by firms which wish to keep spreads wider than might otherwise be the case under real competition.'' *Id.* at 2. Given his view that the proposed order will not deter retribution for spread-cutting, Professor Peake suggests that the appropriate remedy would be to require The Nasdaq Stock Market, Inc. to display market maker quotes anonymously. This would eliminate the possibility of retaliation by one market maker against another for violating the quoting convention or otherwise acting to narrow the spread in a stock for a simple and obvious reason: a firm inclined to retaliate in some way would not be able to identify the culprit firm. *Id.* at 3. In his letter, Professor Peake identifies some of the ways a market maker could—despite the proposed order—retaliate against a spread-cutter without violating the proposed order—all of them a form of refusal to deal. *Id.* at 3.[9]

The relief suggested by Professor Peake is not obtainable in this action. The Department's lawsuit charges a conspiracy among market makers. This charge involves alleged private conduct by the defendant firms. The Nasdaq Stock Market, Inc., which owns Nasdaq—and, in turn, is owned by the NASD—is not a defendant in this action, nor is the NASD. Under the law, the NASD has the authority to organize the market and establish the rules governing its operation, subject to oversight by the SEC. *See* 15 U.S.C. §§ 78o.3 and 78s. Thus, even if, hypothetically, the Department had sought the relief suggested by Professor Peake from the defendant market makers (and the defendants had agreed to it), they could not implement the structural changes in Nasdaq necessary to accomplish this result.

There has been debate in the academic literature for some time on the question of whether market makers should be required to post quotes anonymously on Nasdaq. Professor Peake has long advocated anonymity and other changes in Nasdaq. *See* Comments of Junius W. Peake and Morris Mendleson on SEC's Market 2000 Draft Release, SEC File # S7–18–92 (Nov. 3, 1992). As neither the NASD nor the SEC has acted to require anonymity on Nasdaq (a feature that, as Professor Peake notes, is available on Instinet), they have not made a judgment that having this feature on *Nasdaq* is necessary to the national market system. They are obviously free to revisit this question at any time.[10]

The proposed order will do much to decrease the likelihood that the defendants will endeavor to identify and punish spread cutters. It proscribes the illegal conduct identified in the Department's complaint. In making the ''public interest'' determination required by the Tunney Act, 15 U.S.C. 16(e), ''the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1460–61 (D.C. Cir. 1995) (emphasis in original) (internal quotations omitted). Under this standard, there is no doubt that the proposed relief is within the reaches of the public interest.

In addition, it contains terms that go a considerable distance in increasing the likelihood that recidivist behavior, if it occurs, will be identified. If entered by the Court, the proposed order will subject the defendants to punishment for civil or criminal contempt if they engage—even unilaterally—in any ''harassment or intimidation of any other market maker'' because such market maker:

(1) ''decreas[ed] its dealer spread or the inside spread in any Nasdaq security'' (proposed order, IV(A)(5));

(2) ''refus[ed] to trade at its quoted prices in quantities of shares greater than either (1) the minimum size required by Nasdaq or NASD rules or (2) the size displayed or otherwise communicated by that market maker'' (*id.,* IV(A)(6)); or

(3) ''display[ed] a quantity of shares on Nasdaq in excess of the minimum size required by Nasdaq or NASD rules'' (*id.,* IV(A)(7)).

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[9] In addition to changing the way market-maker quotes are displayed on Nasdaq, Professor Peake would strengthen competition in market making by eliminating the practice of ''preferencing.'' Exhibit 1 at 3. ''Preferencing'' occurs when a broker directs an order to a particular market maker. Pursuant to preferencing agreements, the market maker may pay the broker several cents per share for the order. The market maker then executes the order at the best price displayed on Nasdaq, although this may not be the price displayed by the market maker receiving the preferenced order. Agreements that provide for payment for a steady flow of orders are called ''payment-for-order-flow'' agreements.

Under a ''preferencing'' arrangement, the price quoted by the market maker receiving the preferenced order is irrelevant. Although it will execute order at the best price displayed on Nasdaq, the market maker receives the order without reference to its own quoted price in the stock. For this reason, some market observers believe preferencing arrangements significantly reduce incentives for market makers with preferenced order flow to compete vigorously for orders on the basis of price. (Normally, of course, in most markets, if a firm lowers its price, it can expect to increase sales. If, however, price improvement does not guarantee increased sales (order flow), a Nasdaq stock dealer will have fewer incentives to improve price and will therefore do so less frequently.)

The practice of preferencing, and especially payment-for-order-flow agreements, have been subject to considerable study and controversy. *See, e.g., Market 2000: An Examination of Current Equity Market Developments,* SEC Division of Market Regulation (January 1994). The SEC has not acted to prohibit payment-for-order-flow or other types of preferencing arrangements, and the complaint in this case did not allege that preferencing is an unreasonable restraint of trade. Under the Tunney Act, 15 U.S.C. 16, ''the court is only authorized to review the decree itself.'' *Microsoft,* 56 F.3d at 1459. The district court in *Microsoft* was held to have exceeded its authority, *id.* at 1459, by requiring production of information concerning ''the conclusions reached by the Government'' with respect to practices investigated that the government chose not to charge as violative of the Sherman Act. *Id.* at 1455.

[10] In its 1975 amendments to the securities laws, Congress established a statutory scheme clearly granting the * * * [SEC] broad authority to oversee the implementation, operation, and regulation of the national market system and at the same time to (sic) charging it with the clear responsibility to assure that the system develops and operates in accordance with Congressionally determined goals and objectives.

Sen. Rep. No. 75, 94th Cong., 1st Sess. at 8–9 (1975). These goals and objectives include ensuring that the securities markets (a) provide ''economically efficient mechanisms for the execution of transactions'' and (b) make available ''information with respect to quotations for * * * securities.'' *Id.* at 8. Fair competition is another goal of the securities laws, but, in assuring fair competition, the SEC has been admonished by the Congress not ''to compel elimination of differences between types of markets or types of firms that might be competition-enhancing.'' *Id.*

In a recent rulemaking (*see* 61 Fed. Reg. 48,290 (Sept. 12, 1996)), the SEC directed that market makers that accept limit orders must either execute those limit orders upon receipt or, if the customer limit order is priced better than the market maker's quote, display the limit order to the market in the market maker's quote. The Department submitted formal comments to the SEC strongly supporting the adoption of this rule.

The proposed order also addresses the issue of refusals to deal specifically. Under the proposed order, each defendant is prohibited, directly or through any trade association, in connection with the activities of its OTC desk in making markets in Nasdaq securities, from:

[R]efus[ing], or threaten[ing] to refuse to trade, (or agree[ing] with or encourag[ing] any other market maker to refuse to trade) with any market maker at defendant's published Nasdaq quotes in amounts up to the published quotation size because such market maker decreased its dealer spread, decreased the inside spread in any Nasdaq security, or refused to trade at its quoted prices in a quantity of shares greater than either (1) the minimum size required by Nasdaq or NASD rules or (2) the size displayed or otherwise communicated by that market maker.

Id., IV(A)(8).

Importantly, the proposed order would not merely prohibit the defendants from engaging in the conduct described, but would require each defendant to monitor and record up to 3.5% of its traders' conversations (without the traders having knowledge of the time when this recordation was occurring) and to notify the Department of any conversation which a defendant's Antitrust Compliance Officer ''believes *may* violate'' the order. *Id*., IV(C)(5) (emphasis added).

The Department views these terms as a significant deterrent to repetition of the unlawful behavior. Further, the proposed order permits the Department to assure itself—through review of the tapes required to be created and real-time monitoring of trader conversations—that the prohibitions of the proposed order are being obeyed. *Id*., IV(C)(6)–(8).

The Department recognizes that retaliation could take a large number of different forms. But the proposed order can and does proscribe such retaliation, even though it does not, and could not, anticipate each possible form that such retaliation could take. Instead, the Department has identified broad but unambiguous categories of behavior—harassment, intimidation, refusals to deal, or threats of refusals to deal—and branded any behavior of that type, if directed at another market maker in response to that other market maker's specific pro-competitive acts, to be a violation of the proposed order.

Contrary to Professor Peake's suggestion (Exhibit 1 at 1), the relief that would be provided by the proposed order is not unnecessary and does not constitute an unwarranted burden upon the investing public or the country's corporate stock issuers. As shown, the proposed order would provide significant deterrence to revival of the defendant's unlawful conspiracy. Under the circumstances, the proposed settlement is clearly '' 'within the *reaches* of the public interest' '' (*Microsoft*, 56 F. 3d at 1460 (emphasis in original)), and ought to be entered by the Court.[11]

Comments of William Leighton

Mr. Leighton has bought and sold Nasdaq stocks, and describes himself as ''a person aggrieved and adversely affected by the proposed order.'' Exhibit 2 [letter of Sept. 9, 1996] at 1. He has written three letters to the Department, making a variety of objections to the proposed settlement. His primary objection is that the relief does not provide for the payment of damages to aggrieved persons, such as himself:

The relief sought, which leaves the defendants in possession of the fruits of their unjust enrichment, does not enable those injured and damaged by the actions of the ''defendants'' to recover their losses. There is no provision for disgorgement by the ''defendants'' of the enormous profits which they have realized and which have occasioned huge losses to the public.

Id. As the Department pointed out in its CIS—and, as is the case with all of the Department's settlements in civil antitrust cases—the relief obtained will neither advance or impair private plaintiffs' ability to bring damages cases.[12] The assertion by Mr. Leighton that he will be ''adversely affected by the proposed order'' is, therefore, incorrect. Mr. Leighton is free to pursue a claim for damages against the Nasdaq market makers individually or as part of a class. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969); *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). As the Supreme Court has emphasized, the ''treble damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.'' *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

As the Court knows, there is a consolidated, class-action lawsuit pending in this district in which private plaintiffs claiming to have suffered antitrust injury as a result of a price-fixing conspiracy among Nasdaq market makers are seeking monetary damages. This avenue, among others, is available to Mr. Leighton.

Mr. Leighton also objects to the entry of the proposed order because of alleged legal deficiencies in the action. For example, he suggests that the Department's complaint ''does not state a claim upon which relief could be granted because there is no Case or Controversy present in the constitutional sense.'' Exhibit 2 [letter of Aug. 7, 1996] at 1. Mr. Leighton's assertion of a lack of any Case or Controversy is based upon the defendants' consent to the entry of the proposed order before having been sued—in other words, to the negotiated settlement. *Id.; see also id.* [letter of Sept. 9, 1960 at 3.

A Case or Controversy exists here because the United States and the market maker defendants have adverse interests (*see Muskrat* v. *United States*, 219 U.S. 346, 361 (1911)) and because the United States seeks to enjoin the defendants from engaging in certain specific conduct in the future and to impose upon them certain requirements designed to ensure that they do not continue to engage in the conduct identified in the complaint as unlawful. The fact that the United States and the defendants have reached a settlement, that, if approved by the Court, would resolve the issue, does not mean that there is no justifiable controversy between them. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 n.10 (1982); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 465 n.3 (1978); *Dacanay* v. *Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

Civil antitrust cases brought by the government are, more frequently than not, resolved via consent decrees. Indeed, in enacting the Tunney Act, the Congress recognized that such cases would often be resolved by consent orders. *See* 15 U.S.C. 16 (*passim*); 51 Cong. Rec. 15,824–25 (noting Congress' interest in encouraging capitulation in

[11] Professor Peake notes that, despite long experience in the securities industry, including service on the NASD's Board of Governors, until the week before the Department's complaint and proposed settlement with the market maker defendants were filed, he had ''never before heard of * * * [the quoting] convention.'' Exhibit 1 at 2. While Professor Peake may personally have been unaware of the quoting convention, the complaint, unchallenged by the defendants, alleges the convention and the CIS describes some of the abundant evidence of its existence and effects.

[12] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Order will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Order has no prima facie effect in any subsequent lawsuits that may be brought against the defendants in this case. CIS at 46. The defendants, in agreeing to entry of the proposed order, have not admitted the truth of any of the allegations in the government's complaint. Entry of the proposed order will not constitute evidence against or an admission by any defendant with respect to any allegation in the complaint.

government antitrust suits, and providing that no prima facie effect would flow from such decrees entered before any testimony was taken) (1914); *United States* v. *Blue Chip Stamp Co.,* 272 F.Supp. 432, 440 (C.D. Cal. 1967) (the legality of the consent decree procedure is ''beyond question'') (quoting *Sam Fox Pub. Co.* v. *United States,* 366 U.S. 683, 689 (1961)).

Mr. Leighton also suggests that the United States is not a ''real party in interest'' here—and therefore not a proper plaintiff—because it is ''members of the public [not the government qua government] who buy or sell securities on the NASDAQ and who have suffered, and may continue to suffer, damages as a result of the alleged conduct.'' *Id.* The United States is a proper party to bring an injunctive action under Section 1 of the Sherman Act on behalf of the public. 15 U.S.C. § 4; *United States* v. *Trans-Missouri Freight Assn,* 166 U.S. 290, 309–10 (1897).[13] *See also supra* text at 22–23. Mr. Leighton's comments do not state a sound basis upon which to reject the proposed order.

Comments of Joel Steinberg

Mr. Steinberg is a plaintiff in a lawsuit against Goldman, Sachs & Company. He has communicated with the Department on five occasions in connection with this matter. Exhibit 3. Mr. Steinberg's central objection to the proposed order is that it does not require that any parties injured as a result of the conduct alleged in the complaint be compensated. *Id.* [letter of August 15, 1996] at 1. Mr. Steinberg further complains that the Department did not proceed criminally against the market makers under the antitrust laws. *Id.* [letter of August 15, 1996] at 1; *id.* [letter of August 18, 1996] at 1.

The Department exercised its prosecutorial discretion not to pursue a criminal case against the defendant market makers based upon the quoting convention because the evidence did not meet the criteria the Department has historically required in order to proceed criminally. *See Antitrust Division Manual* at III–12 (2d ed. 1987). Furthermore, to the extent that Mr. Steinberg's comments raised issues not alleged in the complaint, they are outside the scope of Tunney Act review. *Microsoft,* 56 F.3d at 1448, 1459, 1463; *see also ABA Antitrust Section, Annual Review of 1995 Antitrust Law Developments* at 171–72 (1996).

Comments of the Private Plaintiffs

The plaintiffs in *In re: Nasdaq Market-Makers Antitrust Litigation,* 94 Civ. 3996 (RWS), M.D.L. No. 1023 (S.D.N.Y.), a private, class-action civil case to recover damages under the antitrust laws for injuries allegedly sustained by persons who bought or sold Nasdaq stocks that were subject to an alleged price-fixing conspiracy among Nasdaq market makers, commented upon the proposed order in briefs filed in connection with their motion to intervene in the instant action. *See* Exhibit 4 (Excerpts from *Memorandum of Plaintiffs in the In re: Nasdaq Market-Makers Antitrust Litigation to Intervene or to Appeal as Amicus Curiae* (filed Aug. 28, 1996); Exhibit 5 (Excerpts from *Reply Memorandum in Support of Motion of Plaintiffs in the In re: Nasdaq Market-Makers Antitrust Litigation to Intervene or to Appeal as Amicus Curiae* (filed Oct. 14, 1996)).

Plaintiffs object to the provision of the proposed order that would limit use of the audio tapes to be created under it. Paragraphs IV(C) (2)–(6) of the proposed order, if entered by the Court, would require that defendants randomly monitor and tape record not less than 3.5% of their Nasdaq trader telephone conversations (up to a maximum of 70 hours per week). It would also require that they identify and produce any tapes containing conversations that may violate the proposed order and furnish the tape of any such conversation to the Antitrust Division within ten business days of its recordation. Further, paragraph IV(C)(6) specifically provides:

> Tapes made pursuant to this stipulation and order 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.

Plaintiffs ask ''the Court [to] reject this provision, or clarify that, by entering the Consent Decree, the Court does not bind any non-party to the Consent Decree * * *.'' Exhibit 4 at 30.

In reaching the tentative settlement of this case, the defendants agree, at the government's insistence, to conduct random taping of their traders' conversations. In negotiating this unusually strict requirement, the government agreed to the term in the proposed order that would limit the use to which the tapes could be put.[14] Since the tapes would not even be created but for the proposed order, the Court should accept the provision in the proposed order preventing their use in private litigation. *See In re LTV Securities Litigation,* 89 F.R.D. 595, 617–22 (N.D. Tex. 1981) (denying disclosure of

[13] Mr. Leighton makes other technical, legal objections to the case, the primary one being that ''it does not appear that the complaint has been served on the 'defendants.' '' *Id.* [letter of Sept. 9, 1996] at 2. Citing Fed. R. Civ. P. 4, Mr. Leighton claims that deficiency would enable a defendant later to ''dismiss the attorney who has signed the stipulation and claim the Court's lack of jurisdiction over its person.'' *Id.* The defendants in this case have expressly waived service of summons, acknowledged receipt of the complaint, consented to *in personam* jurisdiction and entered their general appearance in the action. Stipulation and Order (filed Aug. 5, 1996). It is clear on this record that defendants have been adequately notified of the government's case and have acceded to the jurisdiction of the Court. *See Precision Etchings & Findings* v. *LGP Gem, LTD.,* 152 F.R.D. 433,436 (D.R.I. 1993); *A.L.T. Corp.* v. *Small Business Admin.,* 801 F.2d 1451, 1458–59 (5th Cir. 1986); Wright & Miller, *Federal Practice and Procedure: Civil* 2d § 1062 (1987).

[14] The disclosure and admissibility limitations of the proposed order apply only to tape recordings created pursuant to the proposed order. To the extent that defendants record trader conversations for their own purposes, such recordings would not be subject to the provision of paragraph IV(C)(6), which limits the disclosure and admissibility only of recordings ''made pursuant to'' the proposed order. *See also* proposed order, paragraph IV(C)(8) ([u]pon request of the Antitrust Division, a defendant must ''immediately identify all tape recordings made pursuant to * * * [the proposed] order that are in its possession or control * * *'' (emphasis added). Further, as the proposed order requires that a defendant both ''record (and listen to) not less than three and one-half percent (3.5%) of the total number of trader hours of such defendant'' (paragraph IV(C)(4) (emphasis added))—and to report potential violations to the Antitrust Division (paragraph IV(C)(5))—a defendant would have great difficultly claiming that recordings not created pursuant to the proposed order were actually made as a result of it.

While a firm might record and listen to all trader conversations for the purpose of ensuring that the tapes of such conversations would be protected from use in civil damages cases, such a decisions would be costly for the firm in two respects. In addition to the obvious economic costs, the firm would incur the obligation of reporting potential violations of the proposed order discovered during the listening process to the Department. Were violations detected, the Department could bring a contempt action. These two factors provide substantial disincentives for firms to record a greater number of hours of trader conversations that are required to be recorded under the proposed order. If a firm were to record all of its trader conversations and then to claim that they had been recorded pursuant to the proposed order, the Department could request their production at any time within 30 days. Further, the failure to report potential violations of the proposed order from among all these conversations could result a charge of contempt. This possibility would act as a disincentive to a firm claiming that recordings made, but not listened to, were actually made pursuant to the proposed order. The Department intends to ensure that, as part of the system each defendant will established to assure compliance with the proposed order, it is capable of identifying immediately upon request all tape recordings in its possession made pursuant to the proposed order. The Department may also require the defendants routinely to provide it with a schedule of the recordings to be made in advance of their actual creation. *See* proposed order, paragraph IV(C)(8); *see also* paragraph IV(C)(3). In this way, it will be clear what recordings have been made pursuant to the proposed order, and, to the contrary, what additional recordings, if any, fall outside the scope of the limitations on discovery and use of recordings made pursuant to the mandate of the proposed order.

documents prepared by Special Officer appointed, in accordance with provisions of a consent decree, to investigate and report on defendant's accounting and auditing practices).

Contrary to the facts in *Ex Parte Uppercu*, 239 U.S. 435, 440, (1915), and *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 265 (9th Cir. 1964), both cases cited by plaintiffs in their motion to intervene, the proposed order does not withhold from the public or from any present parties to litigation information that that would otherwise be available to them. Unless the proposed order is entered, the audio tapes will not be created. Should the tapes be subpoenaed in future litigation, the enforceability of this provision can be litigated at that time by parties with standing to press the issue.

Meanwhile, the Department plans, if the Court enters the proposed order, to monitor the tapes carefully and, if evidence of new or continuing violations comes to light, take appropriate enforcement action. In addition, should violations of the securities laws be indicated, the Department will refer such evidence to the SEC, the NASD, or both.

Conclusion

Entry of the proposed order is in the public interest. The United States has today certified compliance with the Tunney Act. The Court should enter the proposed order as submitted.

Dated: November 15, 1996, Washington, D.C.

Respectfully submitted,

Hays Gorey, Jr., (HG 1946), John D. Worland, Jr. (JW 1962), Jessica N. Cohen (JC 2089).

Attorneys, U.S. Department of Justice, Antitrust Division, 600 E Street, N.W., Room 9500, Washington, D.C. 20530, (202) 307–6200 phone, (202) 616–8544 fax.

Certificate of Service

I, Hays Gorey, Jr., hereby certify that on November 15, 1996, I caused to be served a true and correct copy of the foregoing Response to Public Comments by first-class mail, postage prepaid, upon:

James T. Halverson, Esq., Shearman & Sterling, 153 East 53rd Street, New York, New York 10022–4676, Attorneys for Defendant Herzog, Heine, Geduld, Inc.

Lewis A. Noonberg, Esq., Piper & Marbury, 1200 19th Street, NW, Washington, D.C. 20036–2430, Attorneys for Defendant Alex. Brown & Sons Incorporated.

Robert M. Heller, Esq., Kramer, Levin, Naftalis & Frankel, 919 Third Avenue, New York, New York 10022, Attorneys for Defendant Bear Stearns & Co., Inc.

Richard A. Cirillo, Esq., Rogers & Wells, 200 Park Avenue, 53rd Floor, New York, New York 10166, Attorneys for Defendant CS First Boston Corp.

Frank M. Holozubiec, Esq., Kirkland & Ellis, Citicorp Center, 153 East 53rd Street, 39th Floor, New York, New York 10022–4675 Attorneys for Defendant Dean Witter Reynolds, Inc.

Robert F. Wise, Jr., Esq., Davis Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017, Attorneys for Defendant Donaldson, Lufkin & Jenrette Securities Corporation.

James J. Calder, Esq., Rosenman & Colin, 575 Madison Avenue, New York, New York 10022, Attorneys for Defendant Furman Selz LLC.

John L. Warden, Esq., Sullivan & Cromwell, 125 Broad Street, New York, New York 10004, Attorneys for Defendant Goldman Sachs & Co.

Charles E. Koob, Esq., Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017–3954, Attorneys for Defendant Hambrecht & Quist LLC.

Robert F. Wise, Jr., Esq., Davis Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017, Attorneys for Defendant J.P. Morgan Securities Inc.

Jeffrey Q. Smith, Esq., Cadwalader, Wickersham & Taft, 100 Maiden Lane, New York, New York 10038, Attorneys for Defendant Lehman Brothers, Inc.

Catheirne A. Ludden, Esq., Morgan, Lewis & Bockius, 101 Park Avenue, New York, New York 10178, Attorneys for Defendant Mayer & Schweitzer, Inc.

Jay Fastow, Esq., Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York 10153, Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith

Robert F. Wise, Jr., Esq., Davis Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017, Attorneys for Defendant Morgan Stanley & Co. Incorporated.

Paul B. Uhlenhop, Esq., Lawrence, Kamin, Saunders & Uhlenhop, 208 South LaSalle Street, Suite 1750, Chicago, Illinois 60604 Attorneys for Defendant Nash, Weiss & Co.

Norman J. Barry, Jr., Esq., Donahue Brown Matthewson & Smyth, 20 North Clarke Street, Suite 900, Chicago, Illinois 60602, Attorneys for Defendant OLDE Discount Corporation.

Robert McCaw, Esq., Wilmer, Cutler & Pickering, 2445 M Street, NW, Washington, D.C. 20037–1420 Attorneys for Defendant PaineWebber Incorporated.

Neil S. Cartusciello, Esq., Shanley & Fisher, P.C., One World Trade Center, 89th Floor, New York, New York 10048, Attorneys for Defendant Piper Jaffray Inc.

William P. Frank, Esq., Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022, Attorneys for Defendant Prudential Securities Incorporated.

Jeffrey I. Weinberger, Esq., Munger, Tolles & Olson, 355 South Grand Avenue, 35th Floor, Los Angeles, California 90071, Attorneys for Defendant Salomon Brothers Inc.

Brian J. McMahon, Esq., Crummy, Del Deo, Dolan, Griffinger & Vecchione, P.C., One Riverfront Plaza, Newark, New Jersey 07102, Attorneys for Defendant Sherwood Securities Corp.

Charles A. Gilman, Esq., Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005, Attorneys for Defendant Smith Barney Inc.

R. Bruce Holcomb, Esq., Dickstein Shapiro Morin & Oshinsky, L.L.P., 2102 L Street, NW, Washington, DC 20037, Attorneys for Defendant Spear, Leeds & Kellogg, LP (Troster Singer).

Philip L. Graham, Jr., Esq., Sullivan & Cromwell, 125 Broad Street, New York, New York 10004, Attorneys for Defendant UBS Securities LLC.

Hays Gorey, Jr.

Attorney, U.S. Department of Justice, Antitrust Division, 600 E Street, N.W., Room 9500, Washington, D.C. 20530.

University of Northern Colorado

Junius W. Peake, Monfort Distinguished Professor of Finance, Kepner Hall 1075F, College of Business Administration, Greeley, Colorado 80639–0019, (970) 351–2737, (970) 351–1062 FAX, jwpeake@bentley.UnivNorthCo.edu

July 26, 1996

Judge Robert Sweet,

United States District Court, The Southern District of New York, Federal Court House, Foley Square, New York, NY 10007

Re: United States of America v. Alex Brown & Sons., Inc., et al.

Your Honor: Not being an attorney, and unfamiliar with court protocol, I take the liberty of addressing this letter to you to point out some facts that you might wish to consider in deciding whether to approve the proposed Stipulation and Order between the Department of Justice (''DOJ'') and the 24 broker-dealer defendants (''the 24'') named in the above-captioned civil litigation. Needless to say, I will be glad to send copies to anyone else required, as well as to attorneys for the United States and the defendants.

In my professional opinion the proposed sanctions and agreements between the DOJ and the 24 will not serve their stated purposes, and will, therefore, merely be an unnecessary and expensive added regulatory and financial burden on the investing public and America's stock issuers.

First, may I state my personal qualifications to comment on this matter. As you will note from my letterhead, I am Monfort Distinguished Professor of Finance at the University of Northern Colorado, and have been a member of that university's faculty since 1993. Prior to that time I was in the securities industry as a practitioner and consultant from 1951 onward. I served on a number of securities industry organizations, including the National Association of Securities Dealers, Inc. (''NASD''), at which I served as district committeeman, member of several national committees, member of the Board of Governors and Vice-Chairman of the Board. I have testified before congressional committees of both the House and Senate as an expert in securities operational and structural matters, and have written and delivered papers on financial market microstructure since 1976, a number of which have been published in recognized academic journals, and others which have appeared as chapters in books on finance. I am frequently quoted nationally and internationally in both print and electronic media.

I have also been a paid consultant to the Securities and Exchange Commission (''SEC'' or ''Commission''), the Commodity Futures Trading Commission (''CFTC'') and the Antitrust Division of the Department of Justice, although not on this matter. I have testified as an expert in Federal and state courts in securities cases, and am presently engaged as a consultant to the plaintiffs in the private civil litigation on a similar matter before your Court. However, I wish to make it clear that this letter is written solely at my own initiative as a student of market structure, and that I have had no conversations with any of the plaintiffs' attorneys or anyone else in formulating these opinions, but I have discussed the contents of this letter and my conclusions with my colleague and frequent co-author, Dr. Morris Mendelson, Professor Emeritus of Finance at the Wharton School of the University of Pennsylvania. Dr. Mendelson has asked me to state that he endorses the analysis in this letter and concurs with its conclusions.

The Nasdaq system of the NASD was designed and built at the instigation of the SEC to replace its predecessor, the Pink Sheets® published by the National Quotation Bureau. Market makers' quotations were sent to the Pink Sheets® in the afternoon, and distributed the following morning by messenger to over-the-counter traders nationally. Nasdaq commenced operations in 1971, just 25 years ago. At the time I was a member of the Board of Governors of the NASD, and participated in policy making for the Association, including the development of Nasdaq and the automation efforts of the Association.

Let me explain why the DOJ's proposed solution to the issue of alleged price-fixing, which the DOJ also refers to as a ''quoting convention,'' will not necessarily deter retribution by firms which wish to keep spreads wider than might otherwise be the case under real competition.

DOJ defines ''Quoting Convention'' as: ''any practice of quoting Nasdaq securities whereby stocks with a three-quarter (¾) point or greater dealer spread are quoted on Nasdaq in even eighths and are updated in quarter-point (even eighth) quote increments.'' (DOJ draft Stipulation and Order, page 4.)

Before newspaper articles referred to this term the week prior to the DOJ's press release on July 17th, I had never before heard of such a ''convention'' in Wall Street. However, even assuming there was a ''quoting convention'' on Nasdaq, the fact is (as documented by the DOJ) that it did not exist on Instinet, a competing proprietary trading system. Therefore, I believe that the ''quoting convention'' is a convenient fiction. Nasdaq requires the identity of market makers and their quotations to be disclosed; Instinet keeps them confidential. That is the key difference, and the reason the same market makers who berated and harassed those who ''broke the spread'' on Nasdaq would break it themselves with impunity on Instinet.

Nothing in the DOJ's proposals would require anonymity of quotations over Nasdaq. Nothing in the DOJ's proposals would require disclosure of market makers' bids and offers over Instinet. Thus, any market maker wishing to punish economically any other market maker that narrowed a spread and violated an ''unwritten'' quotation convention would be able to do so with impunity, since ''unadvertised'' economic reprisals appear not to be prohibited by the DOJ proposal, and would be almost impossible to prove.

Here is an example. Assume the following situation:

50 market makers are quoting hypothetical stock XYZA at an inside spread of ¼ point ($.25/share), such as 20 bid, offered at 20¼. Under Nasdaq and Commission rules, investors' orders must be executed at these prices or better (sales at $20/share; purchases at $20.25/share) to meet the Commission's ''best execution'' mandate. Further assume that a fifty-first ''maverick'' market maker, ''Competitive Markets & Co.''. raises its bid to 20⅛, narrowing the spread to 20⅛ bid, offered at 20¼, or ⅛ spread.

Despite the fact that not a signal one of the other 50 market makers has raised its bid, all would now be required to execute any sell orders received from firms with which they have preferencing agreements (typically retail firms which may or may not also be Nasdaq market makers) at 20⅛ per share, since the highest bid on Nasdaq is at that price. By raising its bid, Competitive Markets & Co. has cut the potential market making profits of all 50 competitors in half, from $.25/share to $.125/share. Interestingly enough, Competitive Markets & Co. may not receive any sell orders to execute at its best bid, since it probably has no preferencing arrangements with other firms. Under Nasdaq rules, it will receive only unpreferenced orders.

What form could this retaliation take without violating the DOJ's list of prohibited conduct? Here are some examples:

- A refusal to deal (or a reduction of dealings) with the ''offending'' market maker;
- Cancellation (or cost increase) of a clearing arrangement;
- Reduction or refusal to continue sending research reports;
- Removal of the offender from participation in desirable underwritings;
- Stoppage or reduction of reciprocal order flow;
- Delays in answering the telephone in trading room; and/or
- Removal of a private telephone connection.

A small or new firm, such as Competitive Markets & Co., does not wish to antagonize the larger ones, especially those as prestigious as are many of the 24. As a result, regardless of any specific prohibitions against certain conduct, the mere fact that the entire world will see better bids or offers than have been posted by the leaders will serve as a significant deterrent to firms like Competitive Markets & Co. against bettering prices, regardless of other competitive forces.

So long as the Nasdaq system requires the disclosure of the identity of market makers, and so long as the NASD permits the practice of ''preferencing,'' in which market makers agree with other firms to execute trades at the best prices being displayed on Nasdaq, regardless of whether or not that particular market maker is quoting that price, investors will not achieve the ''national market system'' the SEC was mandated to ''facilitate'' a generation ago.

Please let me know if there is anything else I should do. The reason this letter is so brief is that my wife had major cancer surgery earlier this week, and I have spent most of the time at her bedside. I am confident you understand my situation. However, I believe the American investor is entitled to the finest and most efficient market possible, and wanted to do my best to ensure that will be the case.

Respectfully submitted,

Junius W. Peake

John F. Greaney, Esq.,
Chief, Computers and Finance Section, Antitrust Division, Room #9500, U.S. Department of Justice,600 East Street, N.W., Washington, D.C. 20530

Re: 96 Civ 5313, U.S.A. v. Alex Brown & Sons, Inc., U.S.D.C., S.D.N.Y.

Dear Mr. Greaney: I refer to the ''newspaper notice'' that has appeared on August 5, 1996 in the New York Times relative to the above.

From the tenor of the notice, it would appear that the complaint does not state a claim upon which relief could be granted because there is no Case or Controversy present in the constitutional sense. Apparently, the defendants, who do not appear to have been served with the summons and complaint, have ''consented'' to a proposed order as a result of discussions with the Division before they were even charged with any wrongdoing. Such a procedure removes the matter from the Case or Controversy category and relegates it to a contract between the Division and the putative defendants. I see no jurisdictional basis for a Federal district court to enforce such a contract through contempt proceedings for violation of the contract since the putative defendants are not subject to the jurisdiction of the court unless and until they have been served.

Assuming the truth of the allegations made in the complaint, the real parties in interest appear to be the members of the public who buy or sell securities on the NASDAQ and who have suffered, and may continue to suffer, damages as a result of the alleged conduct. Millions of shares are traded every day on the NASDAQ which may or may not have been traded in violation of the acts complained of. The ''newspaper notice'' does not state how members of the public who have sustained injury and damage as a result of such conduct may invoke remedies based on the proposed order. Ordinarily this would be by intervention in the case.

The ''newspaper notice'' refers ''interested persons'' to the office of the court clerk for an examination of the file. This would entail spending several hours during a business day and the expenditure of money at 25 cents per page for copies of the documents on file. As a minimum of Due Process of Law, your office should have negotiated an agreement with the putative defendants to have the papers printed and mailed at *their* expense to each and every buyer and seller of NASDAQ stocks. Each and every ''interested person'', that is, each person aggrieved by the putative defendants' conduct, should be given an opportunity to decide whether or not to invoke the ''remedies available to persons who may have been injured by the alleged violations'' after studying the papers. At the present time, each aggrieved person is required to go to the court clerk's office and determine for himself or herself just what these remedies are. This constitutes an imposition on millions of people who are innocently trading on NASDAQ.

This letter constitutes an initial comment on the matter. Please send me a complete set of the papers filed by the Division with the court for my further examination and comment. Thank you for your attention to this matter.

Sincerely,

William Leighton

John F. Greaney, Esq.,
Chief, Computers and Finance Section, Antitrust Division, DOJ, 600 E Street, N.W., #9500, Washington, DC 20530

Re: 96 Civ. 5313 RWS U.S.A. v. Alex Brown & Sons, Inc.

Dear Mr. Greaney: This is in further reference to the newspaper notice (''notice''), copy attached, that has appeared in The New York Times of August 5, 1996 inviting comments on the proposed settlement of the captioned action. At my request, your office has since provided me with copies of (1) the complaint, (2) the proposed stipulation and order and (3) the competitive impact statement. I have also received the Division's letter of August 30, 1996 replying to my letter dated August 7, 1996. I have traded in NASDAQ stocks during the period before and after the filing of the complaint and, therefore, I am a person aggrieved and adversely affected by the proposed order.

The relief sought, which leaves the defendants in possession of the fruits of their unjust enrichment, does not enable those injured and damaged by the actions of the ''defendants'' to recover their losses. There is no provision for disgorgement by the ''defendants'' of the enormous profits which they have realized and which have occasioned huge losses to the public. For example, according to the August 25, 1996 issue of the New York Times, copy attached, during the week ending on August 22, 1996, the following securities, among others, were traded on the NASDAQ in the stated amounts. Assuming an illegal ''inside spread'' as charged at paragraph (39) of the complaint, the loss to the public amounts to hundreds of millions of dollars, as follows:

Security	Number of shares traded during the week of August 22, 1996	Illegal charge per share	Damage to the public
Iomega	292,092,000	25¢	$73,023,000
Cisco	259,053,000	25¢	73,013,250
Intel	249,473,000	25¢	62,368,250

Multiplying these huge amounts by the number of weeks covered by the complaint (this period of time is not specifically defined at paragraph (32)), it follows that the public has been ''fleeced'' of hundreds of millions of dollars and is left without any remedy. The complaint does not seek recovery of these sums of money but it does seek ''such other relief as the Court may deem just and proper''. Such relief should consist of monetary awards to those who have been damaged and injured. The promise that there will be no damage or injury to those who will trade on NASDAQ in the future (the ''post-judgment class'') does not constitute an adequate remedy for those already the victims of the proscribed conduct (the ''pre-judgment class''). Apparently, there are pending before the Court actions on behalf of the pre-judgment class none of which have been certified as class actions and none of which can claim the benefit of the proposed Stipulation and Order. If approved by the Court, the stipulation and order will enable the ''defendants'' to resist any meaningful judgment against them based on the facts recited in the complaint.

Moreover, the complaint is fatally defective for a number of reasons. First, it does not appear that the complaint has been served on the ''defendants''. The ''defendants'' have allegedly appointed twenty-five law firms, paying substantial fees, in order to enter into a ''stipulation and order''. There is no proof that these law firms have the authority to bind the ''defendants'' to the terms of the proposed order. Any ''defendant'' who so chooses may dismiss the attorney who has signed the stipulation and claim the Court's lack of jurisdiction over its person. The ''stipulation'' is not the equivalent of the process prescribed by F.R.Civ.P. 4.

F.R.Civ.P. 12(b)(2) expressly provides for the dismissal of an action for lack of jurisdiction over the person. It is elementary that failure to serve a summons and complaint results in lack of jurisdiction over the person. F.R.Civ.P. 12(b)(3) provides for the dismissal of an action for ''insufficiency of process''. Here, no process at all was served upon the twenty-four ''defendants''. F.R.Civ.P. 17(a) provides that *every action* shall be prosecuted in the name of the real party in interest. Here, the complaint does not specify how the United States has been injured or damaged by the alleged conduct of the ''defendants'' since the United States is not trading in NASDAQ stocks. The real parties in interest are those who have traded on the NASDAQ and have lost the money which is safely ensconced in the pockets of the ''defendants''. These ''real parties in interest'' will not even be heard from unless they take the time and trouble of commenting on the proposed stipulation and order on the basis of the ''newspaper notice'' of August 5, 1996. Time will tell if other comments will be filed by other persons aggrieved.

Overriding this case is the lack of a Case or Controversy, the basic constitutional requirement for maintaining a suit in a federal court. Since the ''defendants'' have not been served with a summons and a complaint, their presence in this action is suspect because they have ''consented'' to a ''stipulation and order'' without having the obligation to do so. A complaint which is consented to by those named as defendants does not satisfy the Case or Controversy requirement. It is elementary that the federal courts do not sit to enforce contracts between agencies of the United States, such as the Antitrust Division, and private parties. Here, enforcement is to be had by invoking the Court's contempt power. In the S.D.N.Y., the contempt power in a civil case is exercised pursuant to Civil Rule 43. Therefore, to provide in a ''stipulation and order'' for the exercise of the contempt power means that the Court's docket would be flooded by proceedings pursuant to Civil Rule 43. The defendants' unjust enrichment leaves them particularly apt to resist any enforcement action by the Division. There is no provision for security for the costs of enforcement to be posted by the ''defendants''. In effect, the Division contemplates providing the ''defendants'' with a free ride in the event enforcement proceedings become necessary.

Another objectionable provision in the ''stipulation and order'' is the ''defendants' right'' to engage in conduct protected under *Noerr-Pennington* doctrine. The proposed ''stipulation and order'' is in the nature of an injunction which requires observance of F.R.Civ.P. 65(d). The ''*Noerr-Pennington*'' doctrine is not spelled out in the ''stipulation and order'', thus creating the possibility of unlimited litigation, in the context of a contempt proceeding, concerning the meaning of that doctrine.

Conclusion

For the foregoing reasons, the proposed ''Stipulation and Order'' should be rejected and the complaint dismissed, with leave to amend. A hearing on this matter should be held with the participation of persons who have filed objections or comments on the proposed action. Please advise me of the time and place of such a hearing.

Sincerely,

William Leighton

Chart and newspaper notice have not been reprinted here, however they may be inspected in Room 3229, Department of Justice, Washington, D.C. and at the Office of the Clerk of the United States District Court for the Southern District of New York.

John F. Greaney, Esq.,
Chief, Computers and Finance Section, Antitrust Division, DOJ, 600 E Street, N.W., #9500, Washington, D.C. 20530

Re: 96 Civ. 5313 RWS, U.S.D.C., S.D.N.Y., U.S.A. v. Alex Brown & Sons, Inc. et al.

Dear Mr. Greaney: This is a further comment to the newspaper notice concerning the above case concerning which I have submitted comments on August 7 and September 9, 1996.

I have examined the docket entries in this case and have noted that on August 5, 1996, an order was entered permitting the defendants to waive service of summons, acknowledge receipt of the complaint and consent to *in personam* jurisdiction etc. I note that the Division's letter to me dated August 30, 1996 did not include a copy of the August 5 order.

As to those defendants who have complied with this order, my comments and objections concerning issues under F.R.Civ.P. 12(b)(2) and (3) no longer apply. The fact remains that these defendants have consented to be sued by signing the proposed stipulation and order on or about July 17, 1996, some three weeks before they have entered their appearances within the meaning of F.R.Civ.P. 4. The defendants' actions converts this case into a consent proceeding, not to a Case or Controversy in the constitutional sense.

I also note that on August 28, a motion to intervene was filed and is awaiting adjudication. Please send me a copy of the Division's papers answering that motion. No such papers were docketed as of September 26.

Sincerely,

William Leighton

Hon. Robert R. Sweet,
U.S.D.J., U.S.D.C., S.D.N.Y., 500 Pearl Street, New York, N.Y. 10007

Re: U.S.A. v. Alex Brown & Sons, Inc., et al. 96 Civ. 5313 RWS

Dear Judge Sweet: The comment period with respect to this case has expired on October 2, 1996. As a person aggrieved and adversely affected by the defendants' actions, I have filed comments with the Antitrust Division of the U.S. Department of Justice.

1. On August 5, 1996, an Order has been entered on the docket extending and adjourning *sine die* the defendants' time to answer or move with respect to the complaint. For ready reference, copies of the first two pages of that Order are attached.

The Order refers to a stipulation and proposed order submitted for the Court's consideration on July 17, 1996. As I have already advised the Antitrust Division, I would like to be heard in opposition to the entry of that proposed order. Thus, the purpose of this letter is to ensure that the request for oral argument is before the Court.

I would also like to take the witness stand and testify as to my own recent (1996) experiences in NASDAQ trading. F.R. Evidence 614(a) and 701. There are literally thousands of trades in NASDAQ stocks being consummated every business day. The record should show how some of these trades were made. The stipulation and proposed order of July 17, 1996 provides that no testimony should be heard. Thus, thousands of other individuals, similarly situated, will not be heard for want of a procedure to bring them before the Court.

2. I would also like to point out that the public is not represented before this Court and was not represented before the Antitrust Division for want of notice. The Antitrust Division first gave public notice of this matter on August 5, 1996. It has not given notice of a hearing before the Court. It has submitted a proposed order, copy attached, which recites that ''the entry of this stipulation and order is in the public interest''. Whereas the defendants have pocketed millions of dollars from their illegal conduct and thus have the means to retain counsel in support of their positions, the public is totally unrepresented. It is unrealistic to expect that the public, which has lost the money pocketed by the defendants, would engage in litigation over these losses. Issues such as these should he heard and decided by this Court before the matter is settled by the entry of an order. I fail to see how the ''public interest'' can be served by the elimination of the public from a proceeding looking to foreclose the assertion of damages suffered by the public.

3. Finally, I would like to point out that because no answers have been filed by the defendants, this case does not present this Court with a Controversy in the constitutional sense, see Article III of the Constitution of the United States. The proposed order would require the Court to (i) ''review the complaint'', that is the allegations of the Antitrust Division, without knowing how the defendants would plead, (ii) decide that it has ''jurisdiction over the parties to this stipulation and order'', (iii) open the courthouse doors to many contempt proceedings during the next ten years, which would require the appointment of several magistrate judges, and (iv) under these circumstances, grant ''such other relief as to the Court may seem proper''. There were no defendants before this Court on July 17, 1996 because the Order permitting them to file notices of appearance was not entered until August 5, 1996.

Respectfully,

William Leighton

cc: Hays Gorey, Jr., Esq.,

John F. Greaney, Esq.,

Attorneys for the plaintiff, United States of America, U.S. Department of Justice, Antitrust division, 600 E. Street, NW. #9500, Washington, DC 20530, and to all attorneys for the defendants:

Lewis A. Noonberg, Esq., Piper & Marbury,
Robert M. Heller, Esq., Kramer, Levin, Naftalis & Frankel.
Frank M. Holozubiec, Esq., Kirkland & Ellis
Stuart M. Gerson, Esq., Epstein Becker & Green, P.C.
John L. Warden, Esq., Sullivan & Cromwell
Jeffrey Q. Smith, Esq., Cadwalader, Wickersham & Taft
Catherine A. Ludden, Esq., Morgan Lewis & Bockus
A. Douglas Melamed, Esq., Wilmer Cutler & Pickering
Norman J. Barry, Jr., Esq., Donahue Brown Mathewson & Smyth
James J. Calder, Esq., Rosenman & Colin
Robert H. Munheim, Esq., Salomon Brothers, Inc.
Brian J. McMahon, Esq., Crummy, Del Deo, Dolan Griffinger & Vecchione
Paul B. Unlenhof, Esq., Lawrence, Kamin, Saunders & Unlenhop
Richard A. Cirillo, Esq., Rogers & Wells
Robert F. Wise, Jr., Esq., Davis Polk & Wardwell
Charles E. Koob, Esq., Simpson Thacher & Bartlett
James T. Halverson, Esq., Shearman & Sterling
Otto G. Oberemaier, Esq., Weil, Gotshal & Manges
Neil Cartusciello, Esq., Shanley & Fisher
William P. Frank, Esq., Skadden Arps Slate Meagher & Flom
Charles A. Gilman, Esq., Cahill Gordon & Reindel
Howard Schiffman, Esq., Dickstein Shapiro Morin & Oshinsky
Philiip L. Graham, Jr., Esq., Sullivan & Cromwell.

Stipulation and Order

It is hereby stipulated and agreed by the counsel of record for the parties that:

1. Defendants waive service of summons, acknowledge receipt of the Complaint, and consent to *in personam* jurisdiction before this Court.

2. Each defendant hereby enters its general appearance in the action by counsel of record listed below.

The Clerk is directed to enter the appearances as shown herein. Unless specifically objected to for reasonable cause by any party within twenty (20) days after the attorney appears herein, each attorney not a member of the Bar of this Court who is a member of the bar of any United States District Court or the highest court of any state and is acting as counsel for a party herein shall be deemed admitted *pro hac vice* to practice before this Court in connection with these proceedings.

3. The time for defendants to answer or move with respect to the Complaint is extended and adjourned *sine die* pending consideration by the Court of a stipulation and order submitted for approval on July 17, 1996.

For Plaintiff
United States of America:

Hays Gorey, Jr. (HG–1946)

John D. Worland, Jr. (JW–1962),

Attorneys, U.S. Department of Justice, Antitrust Division, 600 E. Street, N.W., Room 9500, Washington, D.C. 20530, 202/616–5119 phone, 202/616–8544 fax.

The Court having reviewed the Complaint and other filings by the United States, having found that this Court has jurisdiction over the parties to this stipulation and order, having heard and considered the respective positions of the United States and the defendants [at a hearing on ________________, 1996,] and having concluded that entry of this stipulation and order is in the public interest, it is hereby ORDERED:

THAT the parties comply with the terms of this stipulation and order;

THAT the Complaint of the United States is dismissed with prejudice;

THAT the Court retains jurisdiction to enable any of the parties to this stipulation and order to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of this stipulation and order, for the enforcement or modification of any of its provisions, or for punishment by contempt.

So ordered this ________ day of ________, 1996.

United States District Judge

Ms. Janet Reno,

US Attorney General, 10th & Constitution Avenue NW, Washington, DC 20500

Dear Ms. Reno. I wrote to you a month ago concerning Goldman Sachs and their abuse of the system that we are all generally supposed to adhere to. Since that time even more abuses have surfaced including a disgusting report on Prudential Bache, and their own nefarious style of doing business.

In today's Wall St. Journal, and LA Times we see an egregious price fixing example that has been going on for thirty years. Instead of our Justice Dept. moving to stop these same offenders from ever doing business again, we see another compromise. They pay off the government with a fine, and get away ''scot free'' without so much as having to plead guilty. I am embarrassed for the Attorneys that work for you. If there is smoke and they prove it why are these thieves allowed to continue the rape of our investment community?

If your office will not stop this ongoing parade of malfeasance, then who in our government shall I write to in order to voice my concerns? How is it that companies like Goldman Sachs, Prudential Bache, Smith Barney and many more are able to continue this type of behavior as typified by their everyday *course of conduct*?

Please look into this situation personally. We in the investment community regardless of how small an entity, have nowhere else to turn in order to find the kinds of law enforcement necessary to prevent these financial highwaymen from their antics. The unfortunate truth is, that as long as we allow these activities to continue, our greater financial community suffers in confidence. Ask any small investor what he or she feels about this issue and see for yourself. Who do you invest with? Please help.

Respectfully yours,

Joel Steinberg

Ms. Janet Reno,

US Attorney General, 10th & Constitution Avenue NW, Washington, DC 20500

Dear Ms. Reno: I know you are busy, and would not be writing this letter were it not for the significance of the issue. I want to inform you of the course of conduct of the Goldman Sachs Company. I would not be privy to this information, but for the fact that I am involved in a lawsuit with them for fraud among other things. I am not alone in my complaints against them, thus my statement about their course of conduct.

In California they are being sued by the State Attorney Generals Office, for many things, and as the investigation moves forward the suit has grown from $180,000,000.00 to a whopping $600,000,000.00 with the potential for even more as the state pursues its' claims.

At the SEC we have determined a long list of securities violations, that have resulted in fines, censure, restrictions for doing business, and the list goes on in states all over the country.

The point is this, if a outlaw commits a crime in one state, and then crosses a state line for the commission of yet another crime, my understanding is that the federal government is now a potential partner in the prosecution of the offender. This is exactly the case with Goldman Sachs, and there is substantial proof to support this claim. If this is the case why are they able to keep paying fines for all these incidents of criminal activity.

In my case they have stolen my business with Fraud, Fraud in the Inducement, Lies, and blatant misrepresentation, and we have proved it in the Arbitration phase of our lawsuit against them. Nonetheless they are free to operate without any disciplinary actions against them short of perhaps a monetary fine. Charging them with financial penalties for transgressions in the business community, is tantamount to charging a Cocaine dealer Crack for what he has done wrong to society.

Goldman Sachs has thousands of tenants in dozens of shopping centers that we know of, and I can assure you that many people have been financially injured by these people.

With the false premise of being part of a redevelopment agency they have positioned themselves, and executed Mello Roos Bonds to renovate a privately owned mall outside of the redevelopment zone. This parcel of land is a distance away from the redevelopment zone, but made to look contiguous to the Thousand Oaks Blvd. Zone for the necessary approvals.

Because this Mall is privately owned, and as such would *not* qualify for the Mello Roos Bonds, they have manufactured a parking deck to donate to the city for the purpose of qualifying for the bonds. As I understand Mello Roos this is also inappropriate. They have misrepresented information to this community, so the Thousand Oaks City Council would approve the bond request. The City Attorney for the City of Thousand Oaks was the only one privy to much of this information until the completed bond books were in place. Accordingly the votes taken at the City Council meetings might in fact have been different. The bondbooks themselves have several misrepresentations including a bold faced distortion of fact relative to our lawsuit against the beneficiary of the Mello Roos Bonds, as well as others.

It is our hope in the writing of this letter to have you please look into this matter prior to the conclusion of any mediation, between the State of California and the Goldman Sachs Company.

We hope that you will take a much closer look into the activities for they should not have the privilege of doing business in this or any other state. If this sounds excessive, I will remind you that they are causing extreme hardship in my family for their purposeful acts. At the age of fifty I am first beginning to search for employment in the work force. They have stolen a business, with purposeful fraud that we loved, and operated for thirteen years. I do not have the luxury of a huge lawfirm to take our case on a contingency. So far at least the larger lawfirms that we have spoken with fear the cost, expense, and strain on their resources to get involved in a protracted battle with Goldman Sachs. We have spent our entire life savings on defending ourselves from Goldman Sachs.

I am a Veteran, a proud American, I vote always, and try to live my life as an example to my two children. My incredible loving wife of almost thirty years, and I have worked so hard to build the business they stole from us, that it defies description.

One would have to realize what it is to struggle through the retail world starting from nothing, and developing the reputation for quality and service to even begin to comprehend the enormous sacrifice we have made for our business. That struggle has all been for naught for they are trying to grind us into submission with legal fees, so that they can win by attrition, as opposed to proving their case. Please help us before we become another Goldman Sachs statistic. We are desperate for help.

We appreciate any assistance you can provide.

Very truly yours,

Joel Steinberg

Second Request for Action

From wdcun1.usdoj.gov!wdcsun1!daemon Thu Aug 1 17:10:23 1996
Date: Thu, 1 Aug 1996 17:14:09—0400
From: httpd server login <www@justice2>
Message-Id: <9608012114.AA06382@justice2.>
Reply-To: joelybrew@earthlink.net
MMDF-Warning: Parse error in original version of preceding line at justice.usdoj.gov
Apparently-To: antitrust@justice.usdoj.gov
content-length: 2636
WWW comments (Forms submission)
joelybrew@earthlink.net (Joel Steinberg) sent the following comment about The Antitrust Division's WWW server:
Joel Steinberg PO Box 2134 Thousand Oaks, CA 91358 805 497 1366

Dear Sir: I have watched in astonishment, as article after article has been written relevant to rogue dealers and brokers. In my utter amazement as virtually every newspaper that has established itself in the reporting of financial matters continues to report these violations, no one seems to take definitive action.

Where are our Government agencies, and why is this allowed to continue? In the last year or so we have seen dozens of articles on companies like Goldman Sachs, Prudential Bache, Merrill Lynch and many others. How long will these large trading corporations be permitted to legally steal from investors throughout this country, and get away with a slap on the hand or some other ludicrous compromise? These bandits and their normal course of conduct have cost the private sector billions. Is there no agency in this country that seeks to look out for and protect the private investor from the pirates. The recent expose on the Prudential Bache fiasco left billions of dollars lost from the pockets of the private sector. The Goldman Sachs company has a disciplinary file a mile long at the SEC and no one does any thing about it. Is our government incapable of protecting its citizens, or is the hive too sweet to tamper with? Goldman Sachs donated to both the Clinton and Bush campaign. Is that why they are still in business?

They do business interstate, intrastate, internationally, and also provide Local, State and Federal Banking Services.

Among a host of other services not the least of which is the highly abused Bond business, they have been charged with the most egregious activities in the field. Their refusal to meet the criteria set up by the SEC is substantiated by the fact that their latest publicized violation show the IRS on the case for 2.5 Billion Dollars with some other offenders as well. If our officials let out the perception that any Broker, Bond Dealer, Securities Company can operate with out a care when committing these crimes they will set the tone for disaster. Why should these thieves be allowed to operate with impunity? If they only have to concern themselves with the fine they might have to pay then why should they care at all.

Sincerely,

Server protocol: HTTP/1.0 Remote host: 206.250.91.54 Remote IP address: 206.250.91.54

Birgitta C. Dickerson,
US Department of Justice, Anti-Trust Division, Bicentennial building, 600 E Street NW, Washington DC 20530

Re: United States v. Alex. Brown & Sons Inc., et al., Civil No. 96 CIV 5313 (RWS) (S.D.N.Y., July 17, 1996)

Dear Ms. Dickerson: I want to thank you for your response to my correspondence. It is my feeling that if enough people in the appropriate agencies are involved in a dialogue, that there will be a positive result.

I would like to first clarify my position. I applaud and appreciate the Justice Departments agents being involved in the process of searching out the many culprits that violate the laws that make our society so great.

My problem has more to do with the favorite son treatment the violators are given. The slap on the hand is no longer appropriate, once a company has established a recognizable ''course of conduct.'' Why allow them to pay a fine, when the conduct is repetitive?

When companies like Prudential Bache, Goldman Sachs, Morgan Stanley, and many others demonstrate their company's willingness to pay fine after fine, as settlement for their crimes and malfeasance in the market, then something is amuck. In courts all over this great land when a criminal repeatedly violates the law, the judge usually applies sterner penalties with each offense. Not so in the market dealings taking place today. Only monetary compensation seems to be the punishment for what amounts to thoroughly outrageous behavior on the part of many large traders.

In the newest well spring, Mello Roos Bonds through the Community Facilities District, large traders like Goldman Sachs find inexpensive money through redevelopment agencies, and there are repeated violations using US Government Money.

My personal mission because I am a victim of just such a ploy, has become to expose this wherever and whenever I find it. For instance, in my case the Mello Roos Bonds were used to renovate a ''Privately Owned Shopping Center.'' All my research shows me this is a clear violation of the rules. About 15 local businesses that were hardworking, taxpaying, solid Americans with families were put out of business, by this abuse of the rules for Mello Roos Bonds. Thus my interest in the punishment of these scoundrels. As a veteran and a family man I am trying to stop these abuses from going further, and hopefully find some agency that cares enough to take a closer look.

It is too late to help us, for we have lost everything in this ruse, but perhaps a stronger stance from the government will match the punishment to the crime. Conceivably when this begins, the deliberate conduct against the rules in pursuit of the easy profits will begin to ebb.

Sincerely yours,

Joel Steinberg

Hays Gorey Jr.,
U.S. Department of Justice, Antitrust Division, Bicentennial Building, 600 E Street NW 20530

Re: United States v. Alex. Brown & Sons Inc., et al., Civil No. 96 CIV 5313 (RWS) (S.D.N.Y., July 17, 1996)

Dear Mr. Hays, Thank you for your letter dated August 6, 1996, delivered August 12, 1996.

In your letter you have raised several points I am compelled to respond to. Although not my preference you raised some issues that as an American I can not let stand.

I think it is admirable that as stated in your letter, ''As a result of the proposed settlement, millions of investors will no longer be subject to the anti-competitive conduct which resulted in higher trading costs for individual investors and institutions who bought or sold stocks.'' That is great but where do those who lost as a result of these activities find their recompense?

You are correct in your assumption, I do not share the view that your agency has accomplished some great feat for justice. The Antitrust Division taking the position that the proposed relief, given the violation of law as alleged in the complaint, is adequate and effective, in my view is part of the problem. It is tantamount to charging a thief part of what he has stolen, to allow him to continue doing business, in lieu of genuine punishment for the crime.

The act of monetary compensation for the constant purposeful violations in this case and others, simply allows the ''Course of Conduct'' to continue. So you are correct I do not share your enthusiasm. In my opinion there is no equity in matching the punishment, to these crimes. It would gratify investors all over, if the Justice Department categorized these actions as criminal, because that is exactly what they are. Large dealers throughout the investment community have repeatedly demonstrated a history of trying to use loopholes to not be punished after being caught, or claim foul to misdirect the blame when cast in their direction. The pure lack of ethical conduct is demonstrated persistently in articles daily in the national print media.

Lastly, as your innuendo implies in the closing paragraph of your letter, you may presume anything you like, but in fact we have been in contact and supplied all the documentation to the President of the United States, SEC, The Attorney General for the State of California, The Attorney General for the United States Janet Reno, and in each case have done what we could to impart the relevant information as requested. It is no coincidence that Goldman Sachs is being sued by the State of California for $600,000,000.00. Perhaps you should look to see what states are involved in similar cases. You are aware or should be that they have a disciplinary file. Read it for yourself.

In our case, Mello Roos Bonds through the Community Facilities District, being compromised by the skillful manipulation of procedure, and regulation served to induce our lawsuit. So your inference, to that being my reason for correspondence with your office, is also patently incorrect.

We have learned through our own personal experience, and it is our opinion formed from investigating issues relative to our case, that the new ''in vogue'' place to violate, is the Mello Roos cache for large traders. In our case used on privately owned property, which as I understand it, is in itself a violation.

Your lack of compassion is obvious, and your tone naive. Someone needs to reexamine the whole industry, and that is the point. Punish, not settle when you find abuses. Restrict from any profit taking for one day at each offense. Charge a day or two of trading for each offense after that. Progressively increase the punishment for each offense against any faction of the investment community or the marketplace. After several offenses charge them a week.

The point is that monetary compensation for the crimes against the marketplace is not a deterrent. The Justice Department should do something about it.

Sincerely,

Joel Steinberg,
Citizen who cares.

Memorandum of Plaintiffs in the in Re: Nasdaq Market-Makers Antitrust Litigation to Intervene or to Appear as Amicus Curiae

Arthur M. Kaplan, Esq. (AK 6357),
Fine, Kaplan and Black, 23rd Floor, 1845 Walnut Street, Philadelphia, PA 19103, (215) 567–6565

Christopher Lovell, Esq. (CL 2595),
Robert A. Skirnick, Esq. (RS 2636),
LOVELL & SKIRNICK, L.L.P., 63 Wall Street, New York, NY 10005 (212) 608–1900
Leonard B. Simon, Esq. (LS 2068),
Milberg Weiss Bershad Hynes & Lerach, 600 West Broadway, 1800 One America Plaza, San Diego, CA 92101–5050, (619) 231–1058
Co-Lead Counsel for Plaintiffs in the *In Re: Nasdaq Market-Makers Antitrust Litigation* MDL 1023 (RWS)

I. Introduction

This memorandum is submitted in support of the motion by plaintiffs in the *In re: Nasdaq Market-Makers Antitrust Litigation,*[1] pursuant to Section 2(f)(3) of the Tunney Act and Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, to intervene or, in the alternative, to appear as *amicus curiae* in the above-captioned case. Plaintiffs make this motion for the purpose of (a) requiring the Department of Justice to disclose the compilation of evidence it made available to the twenty-four defendants who are parties to the Consent Decree in the process of negotiating that decree, and all evidentiary materials expressly referenced in that compilation of evidence (collectively, the ''Compilation of Evidence''); and (b) challenging the Consent Decree to the extent that it is intended or interpreted to impair the discoverability or admissibility of audiotapes made in accordance with the Consent Decree, as described in the proposed Stipulation and Order at Paragraph IV (C)(6), p. 13 and in the Competitive Impact Statement at 42–44 (the ''future audiotapes'').

The Consent Decree is the culmination of an intensive investigation during which the Antitrust Division amassed a huge volume of documents, enormous computerized data, and extensive testimony (*i.e.*, the Civil Investigative Demand (''CID'') materials. From these materials, the Department of Justice (''DOJ'') prepared the Compilation of Evidence. All twenty-four defendants who are parties to the Consent Decree have reviewed the Compilation of Evidence. Press reports reveal that the Compilation of Evidence was instrumental in the parties' entering into the Consent Decree.

Importantly, this is a ''now or never'' moment for discovery of the Compilation of Evidence. The Court expressly has discretion to disclose this evidence to plaintiffs in the Multidistrict litigation under 15 U.S.C. § 16(b) or (f)(3) at the time of consent decree approval, and as a condition of consent decree approval. After consent decree approval, the Court's power to do so disappears. Since defendants contend that the Compilation of Evidence is not within their ''custody, possession, or control'' for purposes of civil discovery, the Compilation of Evidence will slip out of the Court's control, unless it is impounded now for use in the Multidistrict litigation.

There are two separate, independently sufficient, reasons for impounding the Compilation of Evidence and releasing it to plaintiffs (pursuant to the terms of the existing Confidentiality Order). First, plaintiffs are entitled to the Compilation of Evidence to assist them in the prosecution of the private antitrust claims. Those claims, which overlap substantially with the government's allegations at issue here, have now been pending for more than two years. During that time, defendants have resisted all merits discovery.

This Court already has ruled that the CID materials are relevant to the plaintiffs' case, and not privileged. *See In re Nasdaq Market Makers Antitrust Litigation,* 929 F. Supp. 723 (S.D.N.Y. 1996). Indeed, the Department of Justice itself acknowledged the relatedness of the government and multidistrict cases by filing the government action as a related case for assignment to this Court. Release of the Compilation of Evidence will greatly expedite discovery in the Multidistrict litigation.

Second, the disclosure of the Compilation of Evidence will substantially assist the Court in deciding, pursuant to 15 U.S.C. § 16(e), whether the proposed Stipulation and Order (''Consent Decree'') is in the interest of ''the public generally and individuals alleging specific injury from the violations set forth in the complaint * * *. Indeed, only following disclosure of the Compilation of Evidence (which is material that the Antitrust Division itself considered key in settlement negotiations) can plaintiffs comment on the adequacy of the Consent Decree in an informed way.

Plaintiffs currently challenge the Consent Decree only to the extent that it purports to impair the discoverability and admissibility of audiotapes made in accordance with the Consent Decree. (*See* Stipulation and Order at Paragraph IV(C)(6), p. 13.) This provision is an apparently unprecedented effort by defendants to withhold raw evidence from victims of anticompetitive acts, and should not be countenanced.

Significantly, 15 U.S.C. § 16(e)(2) expressly provides that in approving, rejecting or modifying proposed consent decrees, the Court shall consider not only the interests of the public generally, but also specially the interests of ''individuals alleging specific injury from the violations set forth in the Complaint.''

II. Relevant Background

A. The DOJ Investigation

The Department of Justice began its investigation in October, 1994. As is clearly demonstrated by the Competitive Impact Statement, that investigation was extensive. The Department of Justice deserves congratulations on the vigor of its investigation.[2]

During its nearly two-year investigation, the Antitrust Division amassed a huge volume of documents, enormous computerized data, and extensive testimony, *i.e.,* the CID materials. According to the Competitive Impact Statement at 5, the Antitrust Division took ''over'' 225 depositions.

On July 17, 1996, twenty-four market makers entered into a settlement of the civil antitrust claims brought by the United States for engaging in price fixing of spreads in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Along with its Complaint, the DOJ filed a Competitive Impact Statement, which summarizes a portion of the enormous body of evidence accumulated by the DOJ during the course of its two-year investigation. According to the Competitive Impact Statement:

> The Department has reviewed thousands of pages of documents that were produced by the defendants and other market participants in response to over 350 Civil Investigative Demands (''CIDS'') * * * [and] has reviewed hundreds of responses to interrogatories that were submitted by the defendants (and others). *The Department has taken over 225 depositions.* * * *
>
> The Department has reviewed and analyzed substantial quantities of market data produced in computer-readable format by the NASD * * *. Finally, the Department reviewed numerous transcripts of depositions taken by the Securities and Exchange Commission (''SEC'') in a concurrent inquiry into the operations and activities of the NASD and the Nasdaq market since the fall of 1994.

Competitive Impact Statement at 5–6 (emphasis added).

It was not until after the DOJ provided the defendants with the Compilation of Evidence, that the defendants agreed to settle the government's antitrust charges. For example, according to a May 21, 1996 *Los Angeles Times* report:

[1] M.D.L. No. 1023, 94 Civ. 3996 (RWS) (the ''Multidistrict litigation'').

[2] The Competitive Impact Statement has been filed by the DOJ in support of the proposed consent decree, and is appended for convenience as Exhibit A hereto. Likewise, for convenience the proposed Stipulation and Order (''Consent Decree'') is appended hereto as Exhibit B.

The Justice Department, nearing the end of its antitrust investigation of the Nasdaq Stock Market, is poised to notify major Wall Street trading firms of the evidence against them * * *, sources close to the investigation said Monday.

* * * [J]ustice is now prepared to show its cards, the sources said.

''Antitrust Probe Is Bearing Down on Nasdaq,'' *Los Angeles Times,* May 21, 1996 (Exhibit C hereto).

Subsequently, on June 7, 1996, the *Los Angeles Times* reported the impact that the disclosure of the Compilation of Evidence had on these defendants:

Big Wall Street firms are scrambling to come up with a strategy after being shown what the Justice Department contends is massive evidence of collusion in setting prices of Nasdaq stocks, sources close to the civil antitrust investigation said Thursday.

*Over the last week, more than 20 Nasdaq dealer firms * * * were finally shown a compilation of the department's evidence in an investigation that has been underway since late 1994 * * *.*

After months of intense investigation, the department decided to show its strongest cards in hope of persuading dealers to negotiate a settlement * * *. *The sources said lawyers for these firms are now mulling over the evidence and consulting with their clients on whether to begin settlement talks.*

''Nasdaq Dealers Mull Next Move in Light of U.S. Probe Evidence,'' *Los Angeles Times,* June 7, 1996 (Exhibit D hereto, emphasis added).

In a follow-up article on July 13, 1996, the *Los Angeles Times* reported that, according to a source close to the government, ''the strength of the Justice Department's evidence convinced the firms that they would probably lose if the case came to trial.'' ''Nasdaq Dealers Reportedly Settle in Federal Probe,'' *Los Angeles Times,* July 13, 1996. (Exhibit E hereto.)

B. The Multidistrict Litigation

The first of the private lawsuits against Nasdaq market makers alleging collusion to widen spreads was filed in May, 1994. Those lawsuits were all consolidated before this Court by the Judicial Panel for Multidistrict Litigation.

The allegations in the Multidistrict litigation overlap substantially with those in the DOJ's complaint. However, as a result of two successive stays obtained by defendants in the Multidistrict litigation (first pending defendants' motion to dismiss and later pending class determination) defendants have not even *begun* an independent production of documents and audiotapes pursuant to plaintiffs' *first* set of discovery requests served in January 1995, and have declined to accept service of Plaintiffs' second set of requests. Currently, discovery is stayed by Paragraph 24 of Pretrial Order No. 3.

* * * * *

V. Future Audiotapes Should Not Be Rendered Unavailable to Plaintiffs in the Multidistrict Litigation

According to the Competitive Impact Statement:

[T]apes made pursuant to the proposed Order are required to be retained by each defendant for at least 30 days from the date of recording. The tapes made pursuant to the proposed Order are *not subject* to civil process *except* for process issued by the Antitrust Division, the SEC, the NASD or any other self-regulatory organization. The proposed Order directs that such tapes *not be admissible* in evidence in civil proceedings, *except* in actions, proceedings, investigations, or examinations commenced by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization.

Competitive Impact Statement at 43 (emphasis added). The proposed Stipulation and Order provides at Paragraph IV (C)(6), p. 13 (emphasis added):

Tapes made pursuant to this stipulation and order 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. . . . Such tapes shall *not* be admissible in evidence in civil proceedings, except in actions, proceedings, investigations, or examinations commenced by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization * * *.

Plaintiffs do not believe that this proposed provision, limiting discovery or admissibility of future audiotapes, is binding or enforceable in private antitrust litigation, as against plaintiffs and other non-parties to the Consent Decree. However, unless the Department of Justice and defendants join in this remedial construction, then plaintiffs necessarily object to this provision of the proposed Decree.

Unlike, for example, the reports by defendants' monitors regarding the tapes (*see* Competitive Impact Statement at 43), the audiotapes are raw evidence that is ordinarily discoverable to the victims of the market makers' collusion. To purportedly render future audiotapes undiscoverable and inadmissible is to tie the hands of this Court in the current Multidistrict proceedings, and those of other District Courts in any future proceedings, in advance of a concrete dispute concerning the admissibility or discoverability of particular tapes, and without briefing and argument by future adverse parties.

This proposed provision is inconsistent with and fundamentally contradicts the intended *complementary* roles of private and public antitrust enforcement discussed at 24–25, *supra.* Furthermore, this proposed provision creates a significant risk that defendants will resist the production of *any* future andiotapes whatsoever, using the argument that they were created in compliance with, and are therefore insulated by, the Consent Decree. Certainly, it is unrealistic to assume that audiotaping under the consent decree will not be comingled with the audiotaping done in the ordinary course of defendants' business.

Plaintiffs therefore request that the Court reject this provision, or clarify that, by entering the Consent Decree, the Court does not bind any non-party to the Consent Decree (including the Multidistrict plaintiffs or proposed Class) by the above language. If the Court believes that any future Court might be influenced in matters of discoverability or admissibility by defendants' self-serving effort to conceal raw evidence, then the Court should require the parties to modify the Consent Decree.

Dated: August 28, 1996

Arthur M. Kaplan, Esquire (AR 6357),
Melinda L. deLisle, Esquire,
Fine, Kaplan and Black,
1845 Walnut Street, 23rd Floor, Philadelphia, PA 19103
Christopher Lovell, Esquire (CL 2595)
Lovell & Skirnick, L.L.P.,
63 Wall Street, New York, NY 10005–2818
Leonard B. Simon, Esquire (LS 2068),
Dennis Stewart, Esquire,
Sharon T. Maier, Esquire,
Milberg, Weiss, Bershad, Hynes & Lerach
600 West Broadway, 1800 One America Plaza, San Diego, CA 92101–5050
and
Patricia M. Hynes, Esquire, Milberg, Weiss, Bershad, Hynes & Lerach,
One Pennsylvania Plaza, New York, NY 10019–0165
Robert A. Skirnick, Esquire (RS 2636),
Lovell & Skirnick, L.L.P.,
63 Wall Street, New York, NY 10005–2818
Co-Lead Counsel for Plaintiffs in the *In re: NASDAQ Market-Makers Antitrust Litigation,* MDL 1023 (RWS)
Stanley M. Grossman, Esquire,
Pomerantz Haudek Block & Grossman,
100 Park Avenue, New York, New York 10017–5516
Bruce E. Gerstein, Esquire,
Jerald M. Stein, Esquire, Garwin, Bronzaft, Gerstein & Fisher
1501 Broadway, Suite 1416, New York, New York 10036
Briefing Co-Chairs for Plaintiffs in the In re: Nasdaq Market-Makers Antitrust Litigation, MDL 1023 (RWS)

* * * * *

Reply Memorandum in Support of Motion of Plaintiffs in The in RE: NASDAQ Market-Makers Antitrust Litigation to Intervene or to Appear as Amicus Curiae

Arthur M. Kaplan, Esq. (AK 6357),
Fine, Kaplan and Black,
23rd Floor, 1845 Walnut Street, Philadelphia, PA 19103, (215) 567–6565
Christopher Lovell, Esq. (CL 2595),
Robert A. Skirnick, Esq. (RS 2636),
Lovell & Skirnick, L.L.P.,
63 Wall Street, New York, NY 10005, (212) 608–1900
Leonard B. Simon, Esq. (LS 2068), Milberg Weiss Bershad Hynes & Lerach,
600 West Broadway, 1800 One America Plaza, San Diego, CA 92101–5050, (619) 231–1058
Co-Lead Counsel for Plaintiffs in the *In Re: Nasdaq Market-Makers Antitrust Litigation* MDL 1023 (RWS)

Preliminary Statement

The Tunney Act is a ''sunshine'' act that was intended to allow significant participation by interested persons in a district court's consideration of proposed consent decrees and prevent ''judicial rubber stamping'' of proposed decrees. The principal disclosure provision under the Tunney Act, 15 U.S.C. § 16(b), is mandatory.

The Department of Justice and the defendants seek to prevent the ''sunshine'' that the Act envisions. They oppose all participation by multidistrict plaintiffs—who are the victims of the antitrust violations being addressed by the proposed consent decree. This Court should follow both the letter and the spirit of the Tunney Act by allowing the multidistrict plaintiffs to intervene in the government action to protect their interests.

The principal interests of multidistrict plaintiffs are two-fold. Multidistrict plaintiffs seek: (1) to hold the government to its mandatory disclosure obligations under the Tunney Act, particularly in regard to determinative documents; and (2) to prevent approval of section IV(C)(6) of the proposed decree, which is a protective order provision purporting to limit the discoverability and admissibility of future tape recordings in the multidistrict litigation.

Section IV(C)(6) of the proposed decree is an impermissible arrogation of power by the parties. As the Ninth Circuit stated in *Olympic Refining Company* v. *Carter,* 332 F.2d 260, 265 (9th Cir.), *cert. denied,* 379 U.S. 900 (1964), ''neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it.''

Regardless of whether formal intervention is granted, the Court can and should require that the Compilation of Evidence be disclosed to the multidistrict plaintiffs.[1] That result would best serve the interests of justice by obiviating the need for extensive duplicative discovery in the multidistrict litigation, including the retaking of over 225 depositions. Such an outcome specifically was endorsed in both the House and Senate Reports on the Tunney Act.

I. Multidistrict Plaintiffs Should Be Granted Intervenor Status in the Government Enforcement Action

The defendants and the Department of Justice (''DOJ'') erroneously argue that multidistrict plaintiffs fail to meet the standards for intervention of right, and they further argue that the court should use its discretion to deny permissive intervention, or even *amicus* status. This Court should reject those arguments. Multidistrict plaintiffs meet all of the requirements for intervention of right. If the Court disagrees, it should nevertheless exercise its discretion and allow permissive intervention or *amicus* participation.

A. Multidistrict Plaintiffs Meet the Standards for Intervention of Right

The government argues that multidistrict plaintiffs do not meet the requirements for intervention of right because they have not demonstrated an ''interest'' that will be impaired by entry of the consent decree. Private plaintiffs have two important interests that are not represented by *any* party. First multidistrict plaintiffs have a crystal clear interest in challenging Section IV(C)(6) of the proposed consent decree, which prohibits the discoverability and admissibility of evidence in plaintiffs' own separate civil aciton. Second, multidistrict statutory disclosure obligations under the Tunney Act, so that they can comment meaningfully on the proposed consent decree and so that important evidence already gathered by the government can be impounded and utilized. The multidistrict plaintiffs' interest in these matters is diametrically opposed to positions taken by the parties to the consent decree, and the intervention of right therefore should be granted to multidistrict plaintiffs to protect their own interests.[2]

[1] Defendants and the government have chosen to designate the Compilation of Evidence presented to defendants as ''the Settlement Memorandum,'' which reflects (indeed emphasizes) its determinative role in settlement negotiation. It is class plaintiffs' understanding that this ''Settlement Memorandum'' consisted of several loose-leaf notebooks of raw evidence. Thus, class plaintiffs believe that it is accurate to use the terminology ''Compilation of Evidence'' and ''Settlement Memorandum'' interchangeably.

[2] This case, therefore, is diametrically different from *Cook* v. *Pan American World Airways, Inc.,* 636 F. Supp. 693 (S.D.N.Y. 1986) (Sweet, J.), where this Court found that intervention by certain union members in an age discrimination suit was not appropriate because the defendant union would adequately represent union members' interests. The Court held that ''the movants' interest in preserving the present system is adequately represented by existing defendants'' and ''movants' interests and defendants' interests are identical''. 636 F. Supp. at 697.

United States v. *Simmonds Precision Products, Inc.,* 319 F. Supp. 620 (S.D.N.Y. 1970) is closer to the situation at hand. In that case, the court permitted a union to intervene in government antitrust consent decree proceedings because its interest was opposed to the position taken by the parties. 319 F. Supp. at 621.

1. Multidistrict Plaintiffs Alone Have an Interest in Challenging Section IV(C)(6) of the Proposed Consent Decree

In the proposed consent decree, the parties have agreed to a provision that harms the multidistrict plaintiffs. Paragraph IV(C)(6) of the proposed consent decree is a protective order prohibiting the discoverability and admissibility of raw evidence, i.e., certain future audiotapes, for everyone except the government and other specified regulatory entities. As argued below in Section III, this is an illegal arrogation of power, for which the parties seek this Court's judicial imprimatur. Multidistrict plaintiffs are the *only* ones with an interest in preventing this abuse, and they should be allowed to intervene for that purpose.

As this Court *already* held in the *In re Nasdaq Market-Makers Antitrust Litigation,* 164 F.R.D. 346, 351 (S.D.N.Y. 1996), ''Rule 24 is the proper mechanism for a non-party to seek modification of a protective order and thus to gain access to information generated through judicial proceedings.'' *See also Northern States Power Company* v. *Westinghouse Electric Corp.,* 156 F.R.D. 168, 171 (D.Minn. 1994) (''every circuit to address the issue has concluded that intervention is the proper procedure for non-parties to challenge protective orders'') (citing cases).

The future audiotapes are not, as defendants claim, of insubstantial value to multidistrict plaintiffs. In the multidistrict action, tape recordings of the conversations among the defendants' market makers constitute some of the most important direct evidence of defendants' conspiracy.

Moreover, the multidistrict plaintiffs have alleged an ongoing conspiracy, and have sought injunctive relief. Thus, any evidence of future discussions between market makers will provide a fertile ground for discovery.

Additionally, one of multidistrict plaintiffs' theories for measuring damages involves comparing defendants' profit levels after the conspiracy ends to profit levels during the conspiracy. Of course, a before and after calculation is meaningless (or misleadingly conservative) unless plaintiffs can determine that the conspiracy no longer prevails in the designated ''after'' period. Evidence of future conversations along the market makers will be valuable in making this determination as well.

Although the defendants and the government cite a number of cases in which intervention has been denied to private plaintiffs challenging a proposed consent decree, in *none* of those cases has the proposed consent decree attempted to prohibit the discoverability or admissibility of raw evidence in litigation brought by the private plaintiffs. Multidistrict plaintiffs have a right to have questions of discoverability and admissibility of evidence in their case decided in their own case, not predetermined by agreement among parties in a different action. Therefore, under this Court's prior decision *In re Nasdaq Market-Makers Antitrust Litigation,* 164 F.R.D. at 351, the multidistrict plaintiffs have a right to intervene to challenge the protective order provision of the proposed decree.

* * * * *

B. In the Alternative, Permissive Intervention Should be Granted

The DOJ concedes, as it must, that the multidistrict action shares questions of law and fact in common with the government action, and thus the requirements for permissive intervention are satisfied. However, the DOJ urges this Court to exercise its discretion and deny intervention based on its unsupported assertion that intervention might ''unduly delay or prejudice the adjudication of the rights of the original parties.'' No explanation has been provided by the DOJ or the defendants of any actual prejudice or delay that would in fact result.

Multidistrict plaintiffs do not want to prolong these proceedings. Multidistrict plaintiffs have two principal objectives: (1) compelling the disclosure of the Compilation of Evidence (and any evidentiary materials expressly referenced therein) pursuant to the Tunney Act (and receiving an opportunity to participate meaningfully in the consent decree approval process after reviewing these materials); and (2) removing Section IV(C)(6) of the proposed consent decree. There is no reason why these objectives cannot be accomplished without undue delay.

The parties seek a judicial rubber stamp of their decision, without any meaningful comment from or participation by the victims of these antitrust violations. This Court should not grant the parties' desire to exclude injured persons from the Consent Decree approval process, particularly since 15 U.S.C. § 16(e)(2) suggests that the court should specifically consider, in addition to the more general public interest, the impact of the proposed decree on injured persons.

This Court plainly has discretion to permit permissive intervention in these circumstances. *E.g., United States* v. *American Cyanamid Co.,* 719 F.2d 558, 563 (2d Cir. 1983), *cert. denied,* 465 U.S. 1101 (1984) (affirming the district court's decision to permit permissive intervention in antitrust consent decree proceedings). For example, in *United States* v. *American Telephone and Telegraph Co.,* 552 F. Supp. 131, 218–19 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983), after initial denial, intervenor status later was granted to all who moved to intervene, and the court permitted the intervenors to file briefs, participate in proceedings and oral argument, and appeal the entry of the consent decree. 552 F. Supp. at 218–19.[4]

* * * * *

III. Section IV(C)(6) of the Proposed Consent Decree is an Arrogation of Power, and it Should Not Be Approved by This Court

Under the terms of the proposed consent decree, the defendants have agreed to tape record and monitor not less than 3.5 percent of their Nasdaq trader telephone conversations (up to a maximum of 70 hours per week). However, Section IV(C)(6) of the consent decree contains a protective order providing that tapes made pursuant to the decree are neither discoverable nor admissible in private civil actions.[11] Thus, by agreement, the parties have purported to exempt the defendants from the Federal Rules of Civil Procedure and the Federal Rules of Evidence in the multidistrict litigation, by creating their own category of non-discoverable and inadmissible documents. There is nothing that gives either an antitrust defendant or the DOJ the power to enact such a result. This Court should not put its imprimatur of approval on this illegal arrogation of power.

The only case cited in support of this unprecedented expansion of power by either the DOJ or the defendants is *In re LTV Securities Litigation,* 89 F.R.D. 595 (N.D. Tex. 1981). This case provides no support at all. In *LTV Securities* the Court held that *materials generated by an attorney,* functioning as a ''Special Officer'' appointed by the corporation to implement a consent decree, were entitled to a hybrid of the attorney-

[11] Under the protective order provision of the consent decree, ''The tapes made pursuant to the proposed Order area *not subject to civil process* except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization. The proposed Order directs that such tapes *not be admissible in evidence in civil proceedings,* except in actions, proceedings, investigations, or examinations commenced by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization.'' Competitive Impact Statement at 43 (emphasis added).

client privilege and the privilege afforded SEC investigations.

Although the position of the ''Special Officer'' may be loosely analogous to that of the anticipated tape-monitors in this case, the discoverability of the monitors' reports, of course, has nothing to do with the underlying raw evidence—the tapes themselves. Moreover, the reasoning in *LTV Securities* depended heavily on the fact that the Special Officer was still involved in an ongoing investigation of LTV that would be impacted adversely by the discovery requested. 89 F.R.D. at 618–19. That too is not the case here. *LTV Securities* simply has no relevance to the entry of a protective order prohibiting the discovery and admissibility of raw evidence.

Olympic Refining Company v. *Carter,* 332 F.2d 260 (9th Cir.), *cert. denied,* 379 U.S. 900 (1964), is far more analogous. In *Olympic Refining, documents in a government antitrust suit had been sealed pursuant to a consent decree. A private party filed a civil action against the defendants from the government action, and sought to subpoena the sealed documents from the government's case (some of which were filed with the court under seal and some of which were retained by the government). 332 F.2d at 262–63 n.3. The district court refused to modify the protective order to permit the private plaintiffs to examine the documents. The Court of Appeals issued a writ of mandamus ordering the district court to modify the protective order to permit the private plaintiffs to have access to the previously sealed documents.*

In issuing the writ of mandamus, the Court of Appeals noted that ''[p]rivate treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws.' '' 332 F.2d at 264, *quoting Lawlor* v. *National Screen Serv. Corp.,* 349 U.S. 322, 329 (1955). The Court further held that, although there are numerous benefits that a defendant can gain from entering into a consent decree, nothing in the law permits an antitrust defendant to gain a non-disclosure right over its evidence:

> [A] consenting defendant in a Government antitrust suit gains whatever benefit there may be in accepting the terms of the consent decree rather than risking a more onerous decree entered after litigation. A consenting defendant also benefits from the saving in litigation expense which is made possible by a consent decree. *But neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it.*

332 F.2d at 265 (emphasis added).

The defendants and the DOJ argue that but for the consent agreement, the future tape-recorded evidence in this case would not even exist. The premise for this argument, of course, is as faulty as its conclusion, as this Court well knows from the fact that at least ten defendants *already* were taping their traders before the government investigation even began. There is simply no way to determine how many of the tapes made and monitored ''pursuant'' to the consent decree would have been made (and would have been admissible evidence) even without the decree.[12]

From this erroneous premise, the DOJ and defendants illogically concluded that they have the power to do whatever they want with ''their'' evidence. This contention is without any judicial support. In *Ex parte Uppercu,* 239 U.S. 435, 36 S. Ct. 140 (1915), Justice Holmes, writing for a unanimous Court, noted that once evidence exists, it exists for everyone.

Uppercu arose after the government brought a civil action against Dwight Manufacturing Company. That case was settled and, with the consent of the parties, all of the depositions and exhibits in the case were sealed by the district court. Under the terms of the sealing agreement, the transcripts and exhibits would be available only to the government and the defendant in the original action. Uppercu, who was not a party to the original suit, sought access to the sealed depositions and exhibits in the case. The district court enforced the sealing order and denied Uppercu access.

[12] It cannot logically be argued that all calls monitored under the consent decree will be additional calls, since at least some of the defendants were taping *every* call before the government investigation began.

The Supreme Court issued a writ of mandamus ordering the district court to enforce Uppercu's right of access to the sealed depositions and exhibits. Justice Holmes stated:

> *So 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. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and *the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it,* however proper and effective the sealing may have been as against the public at large.

Uppercu, 239 U.S. at 440, 36 S. Ct. at 141 (emphasis added).

Similarly, in this case, if the parties voluntarily choose to create evidence, it is beyond their power to limit anyone with a legal interest in the evidence (other than themselves) in regard to how that evidence can be used. *See In re Agent Orange Product Liability Litigation,* 821 F. 2d 139, 144 (2d Cir.) (parties that obtained sealing agreement as part of settlement of class action doubtless were aware that their settlement agreement could not limit non-parties to the agreement), *cert. denied,* 484 U.S. 953 (1987). Here, remarkably, the parties purport to do just the opposite. They purport to limit everyone in the world *except* themselves.

Section IV(C)(6) of the proposed consent decree is beyond the power of the parties. It should not be approved the Court.

Conclusion

This Court should follow both the letter and the spirit of the Tunney Act by granting multidistrict plaintiffs' motion to intervene in this proceeding, and by ordering the government to disclose the Compilation of Evidence and the evidentiary materials referenced therein. Finally, because the protective order embodied in section IV(C)(6) of the proposed consent decree is excessive and improper, this Court should refuse to put its imprimatur on it.

Dated: Oct. 14, 1996.

Respectfully Submitted,

Arthur M. Kaplan, Esquire (AK 6357)

Melinda L. deLisle, Esquire

Glenn J. Moramarco, Esquire

Fine, Kaplan and Black

1845 Walnut Street, 23rd Floor, Philadelphia, PA 19103

Christopher Lovell, Esquire (CL 2595),

Lovell & Skirnick, L.L.P.

63 Wall Street, New York, NY 10005–2818

and

Leonard B. Simon, Esquire (LS 2068),

Dennis Stewart, Esquire,

Sharon T. Maier, Esquire,

Milberg, Weiss, Bershad, Hynes & Lerach

600 West Broadway, 1800 One America Plaza, San Diego, CA 92101–5050

and

Patricia M. Hynes, Esquire,

Milberg, Weiss, Bershad, Hynes & Lerach

One Pennsylvania Plaza, New York, NY 10019–0165

Robert A. Skirnick, Esquire (RS 2636),

Lovell & Skirnick, L.L. P.,

63 Wall Street, New York, NY 10005–2818.

Co-Lead Counsel for Plaintiffs in the *In re: Nasdaq Market-Makers Antitrust Litigation, MDL 1023 (RWS).*

* * * * *

[FR Doc. 96–29965 Filed 11–22–96; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10318, et al.]

Proposed Exemptions; GE Capital Investment Advisors, Inc.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

GE Capital Investment Advisors, Inc., Located in New York, New York

[Application No. D–10318]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 F.R. 32836, 32847, August 10, 1990). If the exemption is granted, GE Capital Investment Advisors, Inc. (GECIA) and GECIA Holdings, Inc. (Holdings) shall not be precluded from functioning as a ''qualified professional asset manager'' pursuant to Prohibited Transaction Class Exemption 84–14 (PTE 84–14, 49 FR 9494, March 13, 1984) solely because of a failure to satisfy section I(g) of PTE 84–14, as a result of General Electric Company's ownership interest in them, including any of their subsidiaries or successors which provides investment advisory, management or related services and is registered under the Securities and Exchange Act of 1934, as amended, or the Investment Advisors Act of 1940, as amended; provided the following conditions are satisfied:

(A) This exemption is not applicable to any affiliation by GECIA or Holdings with any person or entity convicted of any of the felonies described in part I(g) of PTE 84–14, other than General Electric Company; and

(B) This exemption is not applicable with respect to any convictions of General Electric Company for felonies described in part I(g) of PTE 84–14 other than those involved in the G.E. Felonies, described below.

Effective Date: This exemption, if granted, will be effective as of January 29, 1996.

Summary of Facts and Representations

Introduction: General Electric Company (G.E.), an indirect 100 percent owner of GECIA Holdings, Inc. (Holdings), has been convicted during the past ten years of certain felonies relating to G.E.'s government contracts operations. In 1995–1996, Holdings created a subsidiary, GE Capital Investment Advisors, Inc. (GECIA), solely to purchase an unrelated investment advisory and management business. G.E.'s felony convictions could bar GECIA from acting as a ''qualified professional asset manager'' (QPAM) under Prohibited Transaction Class Exemption 84–14 (PTE 84–14, 49 FR 9494, March 13, 1984). Part I(g) of PTE 84–14 requires that no person owning, directly or indirectly, 5 percent or more of the QPAM has been