UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 14426 [AVC]
	)	August 26, 1998
UNITED AIRCRAFT CORPORATION,	)	
Defendant.	)	

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF UNITED TECHNOLOGIES CORPORATION FOR JUDGMENT TERMINATING CONSENT DECREE

United Technologies Corporation ("UTC"), formerly United Aircraft Corporation, has moved to terminate the Final Judgment entered by this Court on June 11, 1973. In a stipulation between UTC and the United States, (1) UTC has agreed to publish notice of its motion and invitation for comments thereon in (a) two consecutive issues of *The Wall Street Journal*; (b) two consecutive issues of the weekly publication *Automotive News*; and (c) one issue of the bi-monthly publication *Electrical World*; (2) the United States has agreed to publish notice in the Federal Register, and (3) the United States tentatively has consented to the entry of an order

terminating the Final Judgment at any time more than 70 days after the last publication of such notice.

This memorandum summarizes the Complaint that initiated this action and the resulting Final Judgment, explains the reason why the United States has consented to termination of the Final Judgment, and discusses the legal standards and precedents respecting termination or modification of consent decrees. It also discusses the procedures proposed by the United States, and agreed to by UTC, for giving public notice of the pending motion, obtaining public comment on the motion, and assuring the right of the United States to withdraw its consent after any comments are received from nonparties.

I.

THE COMPLAINT AND FINAL JUDGMENT

On May 24, 1971, the United States filed a civil complaint in this Court against United Aircraft Corporation ("UAC"), charging UAC with attempted monopolization in the research, development, manufacture and sale of fuel cells, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, the Complaint alleged that UAC (then one of two potential fuel cell suppliers deemed qualified by NASA to supply the type of fuel cells used in Apollo space missions) had utilized its purchasing power and entered into an exclusive research and

development agreement with the other potential fuel cell supplier to suppress competition in the research and development of fuel cells.

On June 11, 1973, a Final Judgment was entered against UAC by consent between the United States and UAC. In 1975, the name of United Aircraft Corporation was changed to United Technologies Corporation. The Final Judgment applies to UTC's conduct with respect to the research, development and manufacture of fuel cells.

Certain provisions of the Final Judgment have expired by their terms, or have been rendered moot because the subject patents have become public. The only remaining injunctive provisions proscribe UTC from entering into any exclusive fuel cell research and development agreement or joint venture with a U.S. corporation or citizen (§IVA), and using its purchasing power to restrain competition in the research, development or manufacture of fuel cells or equipment specifically designed for use with fuel cells (including, but not limited to, pumps, heat exchangers and purging equipment) (§IVC).

II.

LEGAL STANDARDS APPLICABLE TO THE TERMINATION OF AN ANTITRUST DECREE WITH THE CONSENT OF THE GOVERNMENT

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section IX of the Final Judgment, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction

of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); see also In re Grand Jury Proceedings, 827 F.2d 868, 873 (2d Cir. 1987).

Where, as here, the United States tentatively has consented to a proposed termination or modification of a judgment in a government antitrust case, the issue before the Court is whether termination or modification is in the public interest. See, e.g., United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993); United States v. Western Elec. Co. ("Western Elec. I"), 900 F.2d 283, 305 (D.C. Cir. 1990), cert. denied, 498 U.S. 911 (1990); United States v. Loew's, Inc., 783 F. Supp. 211 (S.D.N.Y. 1992); United States v. Columbia Artists Management, Inc., 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03, 65,706 (N.D. Ill. 1975)). Cf. United States v. American Cyanamid Co., 556 F. Supp. 361, 367 (S.D.N.Y. 1983), rev'd on other grounds, 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984). This is the same standard that a District Court applies in reviewing an initial consent judgment in a government antitrust case. See 15 U.S.C. § 16(e); Western Elec. I, 900 F.2d at 295; United States v. AT&T, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd sub nom, Maryland v. United States, 406 U.S. 1001 (1983); United States v. Radio Corp. of Am., 46 F. Supp. 654, 656 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943).

The Supreme Court has held that where the words "public interest" appear in federal statutes designed to regulate public sector behavior, they "take meaning from the purposes of the regulatory legislation." NAACP v. FPC, 425 U.S. 662, 669 (1976); see also System Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961). The purpose of the antitrust laws, the "regulatory legislation" involved here is, of course, to protect competition. E.g., United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964) (antitrust laws reflect "a national policy enunciated by the Congress to preserve and promote a free competitive economy."). Thus, the relevant question before the Court at this time is whether termination of the Final Judgment would serve the public interest in "free and unfettered competition as the rule of trade." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); see also Western Elec. I, 900 F.2d at 308; United States v. American Cyanamid, 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 405 U.S. 1101 (1984); Loew's, 783 F. Supp. at 213.

It has long been recognized that the government has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. See Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961). The Court's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the government, is to determine whether the government's explanation is reasoned, and not to substitute its own opinion. United States v.

Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981) (quoting United States v. National Broad. Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978)). The government may reach any of a range of settlements that are consistent with the public interest. See, e.g., Western Elec. I, 900 F.2d at 307-09; Bechtel, 648 F.2d at 665-66; United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975). The Court's role is to conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree," Bechtel, 648 F.2d at 666, through malfeasance or by acting irrationally.

The standard is the same when the government consents to the termination or modification of an antitrust judgment. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03. Where the Department of Justice has offered a reasoned and reasonable explanation of why the termination or modification vindicates the public interest in free and unfettered competition, and there is no showing of abuse of discretion or corruption affecting the government's recommendation, the Court should accept the Department's conclusion concerning the appropriateness of termination or modification.

III.

REASONS WHY THE UNITED STATES TENTATIVELY CONSENTS TO TERMINATION OF FINAL JUDGMENT

Since entry of the Final Judgment in 1973, research and development in fuel cell technology has advanced significantly and competition has increased. In the 1970s, due to prohibitive development and production costs, the commercial value of fuel cells was limited to supplying electricity to NASA's spacecraft. Today there are a number of emerging fuel cell technologies being developed for potential commercial application to a variety of industries.

Fuel cells, with zero-to-low emissions and high energy efficiencies, have the potential to provide an environmentally-friendly and renewable energy alternative to, among other things, conventional internal combustion engines and coal-generated utility power systems. UTC was, and still is, a major fuel cell developer and supplier. It faces competition from domestic as well as foreign companies, however, to develop and produce several types of fuel cells that may be used in various commercial applications.

The Final Judgment has accomplished its remedial objective of eliminating a virtual monopoly and restoring competitive conditions in fuel cell research and development. The remaining injunctive provisions are not necessary to prevent further violation by UTC, which continues to be subject to the antitrust laws. Indeed, the remaining injunctions may prevent procompetitive activities by UTC that could benefit consumers and promote efficient energy

development. For these reasons, the United States believes that termination of the Final Judgment is in the public interest.

IV.

PROPOSED PROCEDURES FOR GIVING PUBLIC NOTICE OF THE PENDING MOTION AND INVITING COMMENT THEREON

The Swift & Co. opinion articulated a court's responsibility to implement procedures that will give nonparties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to ensure that the public, and all interested parties, have received adequate notice of the proposed modification. . . .

(Footnote omitted) 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703.

The Department of Justice believes that giving the public notice of the filing of a motion to terminate the judgment in a government antitrust case, and an opportunity to comment upon that motion, is generally necessary to ensure that both the Department and the Court properly assess the public interest. Accordingly, over the years, the Department has adopted and refined a policy of consenting to motions to modify or terminate judgments in antitrust actions only on condition that an appropriate effort be undertaken to notify potentially interested persons of the

pendency of the motion. In the case at bar, the United States has proposed, and UTC has agreed to, the following:

1. The Department will publish in the Federal Register a notice announcing UTC's motion and the Department's tentative consent to it, summarizing the Complaint and Final Judgment, describing the procedures for inspecting and obtaining copies of relevant papers, and inviting the submission of comments.

2. UTC will publish notice of its motion in two consecutive issues of *The Wall Street Journal* and *Automotive News*, and in one issue of *Electrical World*. These periodicals are likely to be read by persons interested in the markets affected by the Final Judgment. The published notices will provide for public comment during the following 60 days.

3. At the conclusion of the 60-day period, the Department of Justice will file with the Court copies of all comments that it receives.

4. The parties will stipulate that the Court will not rule upon the motion for at least 70 days after the last publication by Defendant of the notices described above (and thus for at least 10 days after the close of the period for public comments), and the Department will reserve the right to respond to comments or withdraw its consent to the motion at any time until an order modifying or terminating the Final Judgment is entered.

This procedure is designed to provide all potentially interested persons with notice that a motion to terminate the Final Judgment is pending and an adequate opportunity to comment thereon. UTC has agreed to follow this procedure, including publication of appropriate notices. The parties are therefore submitting to the Court a separate proposed order establishing this procedural approach and asking that it be entered forthwith.

V.

CONCLUSION

For the foregoing reasons, the United States (1) asks the Court to enter the Order submitted herewith directing publication of notice of UTC's motion, and (2) tentatively consents to the termination of the Final Judgment herein.

Dated: __August 26, 1998_____

_____/s/_____
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CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing **Memorandum of the United States in Response to Motion of United Technologies Corporation for Judgment Terminating Consent Decree** and **Stipulation** with attached exhibits were caused to be served by first-class U.S. mail, postage prepaid this ___ day of _____, 1998, on the following counsel of record:

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