UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MORGAN DRIVE AWAY, INC.; NATIONAL TRAILER CONVOY, INC; and TRANSIT HOMES, INC., Defendants.	)	Civil Action No.74-1781 (TAF)

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF MORGAN DRIVE AWAY, INC. FOR JUDGMENT TERMINATING THE FINAL JUDGMENT IN THIS CASE

Defendant Morgan Drive Away, Inc. ("Morgan") has moved to terminate the Final Judgment entered by this Court on June 30, 1976. The Judgment's provisions were framed to prevent the three largest firms in the industry at that time from restricting competition in the for-hire transportation of mobile homes in the United States. As explained below, changed business conditions, including deregulation of the trucking industry and changes in the structure of the industry, have lessened the opportunity for firms engaged in the transportation of mobile homes to restrict competition. Of the three original Judgment defendants, only Morgan is still in business and thus is the only mobile home transportation service provider subject to the Judgment.

In a stipulation between Morgan and the United States, Morgan has agreed to publish notice of its motion and invitation for comments thereon in two consecutive issues of (a) The Wall Street Journal and (b) Manufactured Home Merchandiser; the United States has agreed to publish notice in the Federal Register; and the United States has tentatively agreed to the entry of an order terminating the Final Judgment at any time more than seventy (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 reasons that the United States has consented to termination of the Final Judgment; and discusses the legal standards and precedents applicable to termination or modification of consent decrees. It also discusses the procedures proposed by the United States, and agreed to by the defendant, 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 RESULTING FINAL JUDGMENT

On December 5, 1974, the United States filed its complaint in this case, following the entry of pleas of nolo contendere by all defendants in a criminal case based on the same facts filed in August 1973. This case charged that the defendants -- Morgan, based in Elkhart, IN., National Trailer Convoy, Inc. of Tulsa,OK, and Transit Homes, Inc., of Greenville, SC -- had, since the early 1950's, conspired to

restrain and to monopolize, and did monopolize, the transportation of mobile homes within the United States. Among the violations alleged in the complaint were that the defendants deprived applicants to state and federal regulatory agencies for mobile home transportation authority of meaningful access to and fair hearings before those agencies. The means alleged to have been used included (1) protesting virtually all applications regardless of the merits, (2) inducing others to protest such applications, (3) jointly financing the protests and providing personnel to aid in the protests, (4) using tactics to deter, delay and increase the costs of the applications, and (5) providing, procuring, and relying on testimony in agency application proceedings that they knew to be false and misleading. The suit also charged that the companies conspired to coerce competitors to charge the same rates as they charged and to fix rates without authorization of federal or state law.

The Final Judgment, filed January 21, 1976, and entered by the Court on June 30, 1976, after a Tunney Act review, enjoined the defendants from using the tactics alleged in the Complaint in litigation before administrative agencies as a means of excluding competition in the interstate transportation of mobile homes. The Judgment also enjoined the defendants from joint activities in connection with regulatory applications, from fixing interstate, intrastate, or military rates without proper legal authorization, from mutual stabilization of driver compensation, and from agreements to refrain from hiring one another's personnel.

II.

LEGAL STANDARDS APPLICABLE TO THE TERMINATION

OF AN ANTITRUST DECREE WITH THE CONSENT OF THE UNITED STATES

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Paragraph XIV of the 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, 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. 1993); United States v. Western Elec. Co., 900 F. 2d 283, 305 (D.C. Cir. 1990); United States v. Loew's, Inc., 783 F. Supp. 211, 213 (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 (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).

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).

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. Microsoft Corp, 56 F.3d 1448, 1461-62 (DC Cir. 1995); United States v. Bechtel Corp., 648 F. 2d 660, 666 (9th Cir. 1981), (citing United States v. National Broad. Co., 449 F. Supp. 1127 (C.D. Cal. 1978)). The government may reach any of a range of settlements that are consistent with the public interest. See, e.g., Microsoft, 56 F.3d at 1461; 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. See also, Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"). Where the Department of Justice has offered a reasoned and reasonable explanation of why the termination 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 of the decree.

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

The Final Judgment in this case was premised in part on the existence of a regulatory framework for the transportation of mobile homes that formed the basis for the allegations in the Complaint. For that reason, more than half of the injunctive provisions in the decree refer to activities relevant to federal and state regulation of the industry. See especially Par. VI (a through m). Elimination of virtually all of the regulatory machinery for limiting entry into or conduct of the business of moving mobile homes has effectively mooted a large part of the prophylactic provisions of the Judgment.

Another focus of the Final Judgment was to reinforce the principles underlying the antitrust laws. For example, the defendants were enjoined from fixing interstate or intrastate prices and from enforcing or coercing others to charge or refrain from charging any interstate or intrastate rate. (See Par. V (c), V (e), and V (f)). In addition, the Judgment enjoins agreements or understandings with others regarding the seeking or holding of employment in competitor firms in the transportation of mobile homes. (See Par. VII (b)). Thus many of the non-regulatory-based provisions in the Judgment basically restate well-settled antitrust principles that remain fully applicable to the defendant's conduct. A third category

of injunction contained in the Judgment covers activities that the defendants used in connection with their efforts to monopolize the business of mobile home transportation. (See, e.g., Par. VIII which enjoins the use of threats to coerce other motor carriers to do or refrain from doing any act). This type of injunction is no longer necessary given the regulatory changes in the industry. Today, with deregulation, the industry is no longer amenable to abuse of the regulatory system to deter or prevent entry, and, indeed, the removal of regulatory barriers to entry makes it far less likely that any attempt by Morgan to exclude competitors would lead to supracompetitive prices. In addition, it appears that the industry is less concentrated now than at the time the decree was entered.

Thus, the Judgment provisions designed to restore and maintain competitive conditions in the for-hire transportation of mobile homes appear no longer to be necessary to accomplish these purposes. For this reason, the United States believes that termination of the Final Judgment is in the public interest.

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

It is the Department's policy to consent to motions to modify or terminate judgments in antitrust actions only on the condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion. In this case, the United States has proposed, and Morgan has agreed to, the following:

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

2. Morgan will publish notice of its motion in two consecutive issues of The Wall Street Journal and Manufactured Home Merchandiser. 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 sixty (60) days.

3. Within a reasonable period of time after the conclusion of the 60-day period, the Department will file with the Court copies of any comments that it receives and its response to those comments.

4. The parties request that the Court not rule upon the motion for at least seventy (70) days after the last publication by defendants of the notices described above (and thus for at least ten (10) days after the close of the period for public

comments), and the Department reserves the right to withdraw its consent to the motion at any time until an order terminating the Final Judgment is entered.

This procedure is designed to notify all potentially interested persons that a motion to terminate the Final Judgment is pending and provide them with an adequate opportunity to comment thereon. The defendant has agreed to follow this procedure, including publication of appropriate notices. The parties have submitted a proposed order setting forth this procedural approach which they request the Court to enter forthwith.

For the foregoing reasons, the United States tentatively consents to the termination of the Final Judgment herein.

Respectfully submitted,

"/s/"
JOEL I. KLEIN
Assistant Attorney General

"/s/"
ROGER W. FONES
Chief
Transportation, Energy and Agriculture Section

"/s/"
JOHN M. NANNES
Deputy Assistant Attorney General

"/s/"
DONNA N. KOOPERSTEIN
Assistant Chief
Transportation, Energy and Agriculture Section

"/s/"
REBECCA P. DICK
Director of Non-Merger Enforcement

"/s/"
JOAN S. HUGGLER
Attorney
Transportation, Energy and Agriculture Section
D.C. Bar # 927244

United States Department of Justice
Antitrust Division
325 Seventh St. N.W. Suite 500
Washington, D. C. 20004
(202) 307-6456

Dated: November 12, 1999