

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	Civil Action No. 1:99-CV3212
)	Filed June 19, 2002
)	Judge: Thomas Hogan
Plaintiff,)	
)	
v.)	
)	
CBS CORPORATION;)	
INFINITY BROADCASTING)	
CORPORATION; and)	
OUTDOOR SYSTEMS, INC.,)	
)	
Defendants)	
)	

**MEMORANDUM IN SUPPORT OF JOINT MOTION
TO MODIFY THE FINAL JUDGMENT**

The United States and Defendants CBS Corporation, Infinity Broadcasting Corporation and Outdoor Systems, Inc. (collectively "CBS") file this Memorandum in Support of the Joint Motion to Modify the Final Judgment entered in this matter on June 6, 2000. Changed circumstances require substitution of the assets to be divested in order to achieve the purposes of the Final Judgment.

I. Background

On December 6, 1999, the United States filed a Complaint alleging that the acquisition by Infinity Broadcasting Corporation and CBS Corporation (collectively "CBS") of Outdoor Systems, Inc. ("OSI") violated Section 7 of the Clayton Act. The Complaint alleged that CBS and OSI were two of the largest out-of-home advertising companies in the United States; that the sale of out-of-home advertising constituted a relevant antitrust product market; and that the acquisition was likely to substantially reduce competition in three metropolitan areas: New York, New Orleans, and Phoenix.

Also on December 6, 1999, the parties filed a Stipulation and proposed Final Judgment incorporating a proposed settlement that required CBS and OSI to divest four assets: (1) out-of-home display faces (bulletins, walls, posters, and other outdoor advertising signs) in the New York City area that yielded approximately \$25 million in net revenues in 1998; (2) either the New York City bus shelter advertising business or the New York City Subway advertising business (at Defendants' option); (3) the New Orleans bus advertising business; and (4) the Phoenix bus advertising business.

II. The Final Judgment

Following entry of the Final Judgment on June 6, 2000, CBS and OSI completed the divestiture of three of four businesses, but were unable to complete the divestiture of the New York City Bus Shelter or the Subway Advertising Business within the time permitted by the Final Judgment. Pursuant to Section V of the Final Judgment, which provides for the appointment of a Trustee to sell any unsold assets, Gordon J. Davis was appointed Trustee on November 26, 2001 to effect the divestiture of either the New York City Subway Business or the New York City Bus Shelter Business in accordance with (and subject to) the terms of the Final Judgment entered in this matter. The Trustee concluded that there were significant obstacles to an efficient sale of the Bus Shelter Business. The Trustee therefore elected to focus his efforts on the sale of the Subway Business and so advised the parties and the Court.

The Trustee sent out offering packages to prospective purchasers of the Subway Business and received an offer to acquire the assets. The Trustee conveyed the offer to the Metropolitan Transportation Authority of the State of New York ("MTA"), the agency that oversees the Subway Business.

The MTA advised the Trustee and the parties that it was not prepared to

approve the prospective purchaser based on financial and operational concerns. The Trustee has advised the parties that he believes that further efforts to find a buyer for the Subway Business would be futile.

III. Modification of the Final Judgment is in the Public Interest

A. Standard for Modification

This Court has jurisdiction to modify the Final Judgment under both Section XII of the Final Judgment ("Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment [and] for the modification of any of the provisions hereof") and Federal Rule of Civil Procedure 60(b)(5). When considering an uncontested motion to modify an existing Final Judgment in which the United States has joined, the Court's role is limited to determining whether the proposed modification is within the 'zone of settlements' consistent with the public interest. As the D.C. Circuit has held:

[T]he "public interest test," as applied to a modification assented to by all parties to a decree, "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today." That formation made clear that it was not up to the court to reject an agreed-on change simply because the proposal diverged from its view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties we repeat) reasonably regarded as advancing the public interest.

United States v. Western Electric Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citation omitted); see also United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir.

1995) (court's function in reviewing agreed-upon decree modification is "not to determine whether the resulting array of rights and liabilities 'is one that will best service society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest'"). The proposed termination of the Final Judgment unquestionably meets this standard.

B. The Proposed Modification Is Within The Zone Of Settlement Which Will Advance The Public Interest

The efforts of the Defendants and the Trustee to divest either the New York City subway or bus advertising assets have been unsuccessful. The Defendants have therefore proposed and the Department has agreed that in the current environment other assets might offer a greater likelihood of divestiture. As an alternative, the Defendants propose to modify the Final Judgment and substitute its New York City Telephone Kiosk Advertising business ("Telephone Kiosk Business").

Telephone kiosk advertising appeals to the same audience as bus and subway advertising. Defendants have approximately 5,000 telephone displays in New York City. Telephone kiosks are located at heavily trafficked street corners and major intersections. The advertising displays generally are illuminated and highly visible to both pedestrians and motorists both day and night.

Many of the same advertisers who select New York City subway advertising reinforce their messages with telephone kiosk advertising and vice versa. Like subway advertising, telephone kiosks afford advertisers the opportunity to select specific locations thereby tailoring their efforts to reach specific audiences. Unlike the Subway Business, no approval of the MTA or other government entity is required to divest the

Telephone Kiosk Business.

Assuming the United States does not withdraw its consent, the parties hereto contemplate that CBS will divest the Telephone Kiosk Business to an acquirer acceptable to the United States within 30 days after notice of the entry of an Order modifying the Final Judgment following notice and a public comment period. In the interim, the Trustee will monitor CBS's efforts to divest the business. During this monitoring period, CBS will advise the Trustee regarding contracts and negotiations with potential purchasers and grant the Trustee access to any necessary personnel, books, records, and facilities, subject to any applicable privileges. If CBS has not divested the Telephone Kiosk Business within that time, the Trustee will effect the divestiture in accordance with (and subject to) the terms of the Final Judgment, as modified.

The Trustee's initial six-month term will expire on May 26, 2002. The parties agree that Trustee's term should be extended for an additional six months until November 26, 2002 to allow the Trustee to monitor and/or effect the divestiture of the substitute assets, subject to further order of the Court.

IV. Conclusion

For the reasons set forth above, the Court should enter the accompanying proposed Order and modify the Final Judgment.

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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