UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE LIQUID CARBONIC CORPORATION; AIR REDUCTION COMPANY, INC.; PURE CARBONIC, INC.; WYANDOTTE CHEMICALS CORPORATION; AND INTERNATIONAL CARBONIC ENGINEERING COMPANY, Defendants.	Civil Action No. 07MC107 Judge: Amon Date Stamp: March 15, 2007

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO DEFENDANTS' UNCONTESTED MOTIONS TO TERMINATE THE 1952 FINAL JUDGMENT AND THE 1963 FINAL JUDGMENT IN *UNITED STATES v. GENERAL DYNAMICS CORP.*

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I. INTRODUCTION

Defendants The BOC Group, Inc. ("BOC") and Praxair, Inc. ("Praxair") have moved to terminate the Final Judgment entered by the Court on March 7, 1952, as amended (hereinafter "1952 Final Judgment").[1] A copy of the 1952 Final Judgment is attached as Appendix 1. BOC, Praxair, and American Air Liquide Holdings, Inc. ("Air Liquide") have also moved to terminate the Final Judgments in *United States v. General Dynamics Corp.*, 1963 Trade Cas. (CCH) ¶¶ 70,890-892, and 70,919 (E.D.N.Y. 1963), entered by the Court on October 17, 1963 (hereinafter "1963 Final Judgment"), a copy of which is attached hereto as Appendix 2.[2]

After soliciting public comments on the proposed termination and conducting an extensive investigation focusing on likely economic effects, the United States has tentatively consented to termination of the 1952 Final Judgment and the 1963 Final Judgment, subject to such further public notice and comment as may be ordered by the Court.[3] The United States has

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[1] BOC is a successor in interest to original defendants Air Reduction Company, Inc. ("Airco") and Pure Carbonic, Inc. ("Pure Carbonic"). Praxair is a successor in interest to defendant The Liquid Carbonic Corp. ("Liquid Carbonic"). Defendant International Carbonic Engineering Co. ("ICEC"), a patent holding and licensing firm, no longer exists. Although defendant Wyandotte Chemical Corp. exited the CO_2 business in the 1960s after it was acquired by BASF, it was nonetheless served with copies of the pending motions and supporting memoranda.

[2] With respect to the 1963 Final Judgment, BOC is a successor in interest to original defendant Airco and Praxair is a successor to defendant General Dynamics Corp. Air Liquide became subject to the 1963 Final Judgment when a corporate subsidiary acquired the carbon dioxide ("CO_2") business once owned by defendant Chemetron Corp. The fourth defendant under the 1963 Judgment, Olin Mathieson Chemical Corp. ("Olin"), remains bound by the decree, but exited the CO_2 business in 1971. The parties have nonetheless served Olin with copies of the motion and the supporting memoranda.

[3] The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "Tunney Act"), which provides for public notice and comment on antitrust settlements proposed by the United States, does not apply to decree terminations. Nevertheless, the United States solicited public comments in furtherance of its investigation of the proposed termination of these decrees. In response, the United States received two written comments, one from a competitor and one from a customer. We address the commenters' concerns below. *See* Section IV.D., *infra*, pp. 17-19.

concluded that these judgments are no longer necessary to protect competition, that some of their provisions may well inhibit competition, and that the continued existence of these judgments does not otherwise provide any public benefit. It would be in the public interest for the Court to terminate both the 1952 Final Judgment and 1963 Final Judgment as to all defendants.

As discussed below, the pending motions raise similar legal and factual issues and involve many of the same parties. The parties submit that, in the interest of judicial economy, these motions should be assigned to, and heard by, the same judge (*cf. United States v. Eastman Kodak Co.*, 63 F.3d 95, 97-100 (2d Cir. 1995)), especially since the judges to whom the 1952 and 1963 cases were originally assigned – respectively, Judge Rayfiel and Chief Judge Mishler – are deceased.

II. THE COMPLAINT AND FINAL JUDGMENTS

A. The 1952 Final Judgment

The 1952 Final Judgment arose out of an investigation in the 1940s into anticompetitive practices by the original four defendants, certain other CO_2 suppliers, and ICEC, a patent holding and licensing company in which the defendants and other suppliers had an interest. The primary competitive concern of the United States was the collective, anticompetitive behavior by these defendants.

As a result of this investigation, the United States filed a Complaint on June 24, 1948 against ICEC (which is no longer in existence), Wyandotte Chemicals Corporation (which is no longer in existence), Liquid Carbonic (now Praxair), and Airco and Pure Carbonic (both now BOC). *United States v. Liquid Carbonic Corp.*, The Federal Antitrust Laws 1890 - 1951 ¶ 930, at 369 (E.D.N.Y. June 24, 1948). The Complaint alleged that the defendants had engaged in a combination and conspiracy to restrain and monopolize the manufacture and sale of gaseous

CO_2, liquid CO_2, and solid CO_2 (dry ice) (hereinafter collectively referred to as "CO_2 products") within the United States, in violation of Sections 1 and 2 of the Sherman Act. The Complaint alleged that the defendants eliminated competition by acquiring plants, competitors, and distributors and by pooling their patents in an effort to restrict licensees for such patents. It also charged that the defendants agreed to eliminate competition by fixing prices and allocating customers and territories. The Complaint further alleged that the defendants conspired to handicap small distributors, with whom the defendants competed.

On March 7, 1952, the United States and the defendants agreed to enter into the 1952 Final Judgment in lieu of trial. *United States v. Liquid Carbonic Corp.*, 1952 Trade Cas. (CCH) ¶ 67,248 (E.D.N.Y. 1952). The 1952 Final Judgment required, among other things, divestiture by Liquid Carbonic of certain manufacturing plants and the cancellation by defendants Airco and Liquid Carbonic of existing contracts with certain producers for the purchase of CO_2 products. It also enjoined both companies from entering into new contracts with these producers.

B. The 1963 Final Judgment

In the 1950s, the United States initiated an investigation of the original parties to the 1952 Final Judgment, except ICEC, to determine whether they had violated the Final Judgment. As a result of this investigation, the United States filed a Complaint on August 22, 1961 against four CO_2 suppliers: General Dynamics (now Praxair), Airco (now BOC), Chemetron Corporation (now Air Liquide) and Olin (no longer in the CO_2 business). *United States v. General Dynamics Corp.*, [1961 - 1970 Transfer Binder] Trade Cas. (CCH) ¶ 45,060 (E.D.N.Y. Dec. 15, 1961). The Complaint alleged that the defendants had engaged in a combination and conspiracy to restrain and monopolize CO_2 markets within the United States, and had monopolized, and attempted to monopolize, such trade and commerce in violation of Section 1

of the Sherman Act and, except for Olin, Section 3 of the Clayton Act. In particular, it alleged that each defendant engaged in unlawful behavior in the CO_2 industry by tying the use of storage tanks and

other related equipment owned by that defendant to the purchase of CO_2 from the defendant (and vice versa). The Complaint further alleged that the defendants foreclosed competition through the use of long-term requirements contracts. As in the 1952 Final Judgment, the Complaint alleged that the defendants had engaged in these activities to handicap small distributors, with whom the defendants competed in the sale of CO_2, primarily in the form of dry ice and small cylinders of gaseous CO_2 products sold to small customers.

On October 17, 1963, the United States and the defendants named in the Complaint agreed to enter into the 1963 Final Judgment in lieu of going to trial. *United States v. General Dynamics Corp.*, 1963 Trade Cas. (CCH) ¶¶ 70,890-70,892, 70,919 (E.D.N.Y. 1963).[4]

C. Provisions of the Final Judgments That Remain in Force

[4] The 1963 Final Judgments for General Dynamics (now Praxair) and Airco (now BOC) vary slightly from those for Chemetron (now Air Liquide) and Olin, apparently due to the fact that General Dynamics and Airco were parties to the 1952 Final Judgment, while Chemetron and Olin were not. *Compare* 1963 Trade Cas. (CCH) at ¶¶ 70,890 (General Dynamics) and 70,919 (Airco), *with* 1963 Trade Cas. (CCH) at ¶¶ 70,891 (Chemetron) and 70,892 (Olin). The consent decrees in *General Dynamics* and *Airco* omit § IV(A), which appears in the consent decrees in *Chemetron* and *Olin*, but they include § VIII, which is not in the *Chemetron* and *Olin* decrees. These differences, however, are not material to the question of whether the decrees should be terminated.

Fourteen of the substantive provisions of the 1952 Final Judgment remain in effect,[5] and nine substantive provisions of the 1963 Final Judgment remain in effect.[6] As discussed below, none of these provisions is needed to protect competition in light of the many changes in industry circumstances over the past four-plus decades and the fact that most of the potentially anticompetitive conduct addressed by the decree provisions is also adequately addressed by the antitrust laws themselves. In addition, several provisions of these decrees impose obligations that are inconsistent with the requirements of modern antitrust law and policy, and their continued existence may well be inhibiting rather than preserving effective competition. The 1952 Final Judgment continues to enjoin the defendants from buying and selling CO_2 from one another, except in cases of operational distress. *See Liquid Carbonic Corp*., 1952 Trade Cas. (CCH) ¶ ¶ 67,248, 67,377-78, at § VI(A). The 1963 Final Judgment continues to enjoin the defendants from (a) tying or conditioning the sale or lease of CO_2 storage tanks to a customer's purchases of CO_2 (Section VI(A)-(E) of the 1963 Final Judgment); and (b) entering into any CO_2 supply contract that exceeds one year in length and accounts for more than one-half of a customer's entire CO_2 requirements (Section VI(F) of the 1963 Final Judgment). *See General Dynamics Corp.*, 1963 Trade Cas. (CCH) ¶¶ 70,890-70,892, 70919, at § VI(A)-(F). Because the provisions of the two decrees that remain in effect either are no longer necessary or may be interfering with the competitive process, their continued existence does not provide a public benefit and the two decrees should be terminated.

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[5] 1952 Final Judgment at §§ IV(A)-(E), IV(G), V(A)-(C), VI(A)-(B), VII(D)-(E), and VIII(A).

[6] 1963 Final Judgment at §§ IV(A)-(B), IV(D), VI(A)-(F). Paragraphs IV(A)-(B) and IV(D) in the General Dynamics-Airco decrees correspond to paragraphs IV(B)-(C) and IV(E) in the Chemetron-Olin decrees.

III. LEGAL STANDARDS APPLICABLE TO TERMINATION OF AN ANTITRUST FINAL JUDGMENT WITH THE CONSENT OF THE UNITED STATES

This Court has jurisdiction to terminate the Final Judgment. Section XIII of the 1952 Final Judgment gives the Court jurisdiction to "modif[y] or amend[] any of the provisions thereof"; Sections XI or XII of the 1963 Final Judgment (depending on which defendant's version) give the Court jurisdiction to "modif[y] or terminat[e] any of the provisions herein"; and "the power of a court of equity to modify an injunction in adaptation to changed conditions" is "inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, "[o]n motion and upon terms as are just, the court may relieve a party . . . from a final judgment . . . [when] it is no longer equitable that the judgment should have prospective application." *United States v. International Business Machines Corp.*, 163 F.3d 737 (2d Cir. 1998) ("*IBM*") (affirming grant of joint motion by United States and defendant to terminate antitrust consent decree).

Where, as here, the United States tentatively consents to termination of all of the provisions of an antitrust judgment, the issue before the court is whether such termination is in the public interest. *IBM*, 163 F.3d at 740; *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983)*; United States v. Loew's Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987). Exercising "judicial supervision," *IBM*, 163 F.3d at 740, the court should approve a consensual decree termination where the United States has provided a reasonable explanation to support the conclusion that termination is consistent with the public interest. *Loew's*, 783 F. Supp. at 214. *See also United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) (public interest test applies to a termination of decree restrictions with assent of all parties to the decree; district

court should approve an uncontested termination "so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today"); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576-77 (D.C. Cir. 1993) (under "deferential" public interest test, court should accept a consensual termination of decree restrictions that Department of Justice "reasonably regarded as advancing the public interest;" it is "not up to the court to reject an agreed-on change simply because the proposal diverge[s] from *its* view of the public interest;" rather, court "may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result").

The "public interest" standard takes its meaning from the purposes of the antitrust laws. *IBM*, 163 F.3d at 740; *Am. Cyanamid*, 719 F.2d at 565. As the Court of Appeals has emphasized, "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *IBM*, 163 F.3d at 741-42 (alteration in original) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)). The purpose of an antitrust decree is to remedy and prevent the recurrence of the violation alleged in the complaint. Where the government has consented to termination, the focus is on whether there is a "*likelihood* of potential future violation, rather than the mere *possibility* of a violation." *IBM*, 163 F.3d at 742 (emphasis added). In this context, if the government reasonably explains why there is "no current need for" the constraints imposed by a decree, termination will serve "the public interest in 'free and unfettered competition as the rule of trade.'" *Loew's*, 783 F. Supp. at 213, 214 (S.D.N.Y. 1992) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958)).

Obsolete decrees are worse than unnecessary; they may themselves have anticompetitive effects, burdening the parties, the courts, and the competitive process. *See, e.g., IBM*, 163 F. 3d

at 740; *Loew's*, 783 F. Supp. at 214. Where the United States and the defendants jointly seek termination long after entry of a decree that has no termination date, it is reasonable to presume that the violation has long since ceased and that competitive conditions were adequately restored. Thus, for example, the Second Circuit affirmed termination of the *IBM* decree under the public interest standard because there was no longer any material threat of antitrust violations absent the decree restrictions and because the decree "resulted in artificial restraints . . . which do not further the cause of healthy competition." *IBM*, 163 F.3d at 740. Termination of an antitrust decree, of course, leaves the parties "fully subject to the antitrust laws of general application." *Loew's*, 783 F. Supp at 214.

IV. REASONS WHY THE UNITED STATES HAS TENTATIVELY CONSENTED TO TERMINATION OF THE 1952 FINAL JUDGMENT AND 1963 FINAL JUDGMENT

Termination of the Final Judgments is plainly in the public interest. The United States' extensive experience with the enforcement of the antitrust laws has shown that, as a general matter, industries evolve and change over time in response to competitive and technological forces. In most situations, the passage of many decades results in significant industry change that renders the rigid prohibitions placed years before in consent decrees either irrelevant to the parties' ongoing compliance with the antitrust laws, or an affirmative impediment to the kind of adaptation to change that is a hallmark of the competitive process.

These considerations, among others, led the Antitrust Division in 1980 to establish a policy of including in every consent decree a so-called "sunset provision" that, except in exceptional cases, would result in the decree's automatic termination after no more than ten

years.[7] As a result of the Division's consistent adherence to this policy, the only antitrust consent decrees to which the United States is a party that remain in effect are those entered within the past ten years, or before 1979 when the "sunset" policy was adopted. The Division has encouraged parties to old decrees to seek the Division's consent to their termination, especially where they contain provisions that may be restricting competition. *See* U.S. Department of Justice, Antitrust Division, DOJ Bull. No. 1984-04, *Statement of Policy by the Antitrust Division Regarding Enforcement of Permanent Injunctions Entered in Government Antitrust Cases* (hereinafter, "DOJ Policy Regarding Decree Enforcement"); and U.S. Department of Justice Press Release, *New Protocol to Expedite Review Process for Terminating or Modifying Older Antitrust Decrees* (Apr. 13, 1999) (hereinafter, "New DOJ Decree

[7] *Antitrust Division Manual*, § III.H.5.a.i. (2007 ed.). This change in policy followed Congress' 1974 amendment of the Sherman Act to make violations a felony, punishable by substantial fines and jail sentences. With these enhanced penalties for *per se* violations of the antitrust laws, the Division concluded that antitrust recidivists could be deterred more effectively by a successful criminal prosecution under the Sherman Act than by a criminal contempt proceeding under provisions of an old consent decree aimed at preventing a recurrence of price-fixing and other hard-core antitrust violations. *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 867 (S.D.N.Y. 1987).

Termination Protocol").[8] In the United States' view, decrees entered prior to 1979 presumptively should be terminated, except in special circumstances.[9]

In this case, there are several specific reasons why immediate termination of these two very old decrees would be in the public interest. Since the decrees were entered, there have been substantial changes in the CO_2 industry, which have made the subject decree provisions at best superfluous, and at worst potentially anticompetitive. Antitrust case law has also changed such that certain conduct that was deemed *per se* illegal – and was categorically prohibited by these final judgments – is now subject to rule of reason analysis, and would be permissible unless its likely effects are shown to be, on balance, anticompetitive. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

A. Changes in the Carbon Dioxide (CO_2) Industry

Both of the Final Judgments have been in effect for more than 40 years. In these intervening years, most of the original defendants either left the CO_2 business or went out of

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[8] In addition, in the early 1980s, the Division conducted its own review of over 1,200 old consent decrees then in effect to ensure that none "hinder[ed] . . . competition" or "reflect[ed] erroneous economic analysis and thus produce[d] continuing anticompetitive effects." The Honorable William French Smith, Attorney General of the United States, *Remarks at the Annual Meeting of the District of Columbia Bar* (June 24, 1981), at 11. Although that effort was necessarily constrained by the Division's limited resources and other enforcement priorities, it did lead to the termination of several decrees that at the time appeared most problematic. *See also* Jeffrey I. Zuckerman, *Removing the Judicial Fetters: The Antitrust Division's Judgment Review Project* (1982) at 2-3 (attached hereto as Appendix 3); *see Department of Justice Authorization for Fiscal Year 1984 Before the Subcommittee on Monopolies & Commercial Law, Committee on the Judiciary*, 98th Cong. 16 (1983) (statement of William F. Baxter, Assistant Attorney General, Antitrust Division).

[9] Among the special circumstances where continuation of a decree entered more than ten years ago may be in the public interest are: a pattern of noncompliance by the parties with significant provisions of the decree; a continuing need for the decree's restrictions to preserve a competitive industry structure; and longstanding reliance by industry participants on the decree as an essential substitute for other forms of industry-specific regulation where market failure cannot be remedied through structural relief.

business entirely. These decades have also seen significant changes in the competitive landscape of the CO_2 industry, including in the commercial form in which CO_2 is sold, how it is manufactured and distributed, who it is sold to and their volume requirements, and the greater ease of entry by new competitors because of the greater availability of the raw feedstock required for CO_2 production. These industry changes have led to a market that now includes as many as eight other CO_2 suppliers located throughout the country that are not subject to the decrees. Therefore, the industry now is less prone to potentially anticompetitive coordinated conduct than in the 1940s and 1950s when the conduct underlying the decrees took place.

When the Final Judgments were entered, there were few sources of CO_2 feedstock. In contrast, today raw CO_2 feedstock is readily available from natural CO_2 wells and as a by-product of chemical production and rapidly expanding ethanol production, among other sources.[10] Perhaps as a consequence of the greater availability of raw CO_2 feedstock, there has been substantial entry into the CO_2 business, resulting in the emergence of significant new competitors to BOC, Praxair, and Air Liquide.

In addition, a major objective of both Final Judgments – to protect independent distributors of CO_2 from the major CO_2 producers – has been rendered largely irrelevant by industry changes. When the Final Judgments were entered, the primary CO_2 products were dry

[10] Production of CO_2 has risen dramatically since the 1950s, from approximately 850,000 tons per year to approximately 11.7 million tons annually today. Indeed, in the Midwest, one of the nation's largest CO_2-producing areas, CO_2 is now so plentiful that more CO_2 is vented than processed. The country's expansion in production of CO_2 has been triggered, in part, by an exponential increase in production and use of ethanol, a "green" gasoline additive. Over the last four years alone, the nation's annual ethanol production capacity has more than doubled from 2.2 billion gallons to 4.6 billion gallons, and it is expected to double again by 2008. Production of raw CO_2, a by-product of ethanol production, is also projected to more than double by 2008.

ice and gaseous CO_2 sold (in 20- or 50- pound high-pressure steel cylinders) to small-volume (100 to 200 pounds per year) businesses, such as soda fountains and local restaurants that used the CO_2 for beverage carbonation or food refrigeration. Local distributors played an important role as intermediaries between manufacturers and these small end users. Today, however, small distributors account for only a small percentage of CO_2 sales, and small businesses account for a only a small amount of CO_2 consumption. Instead, most CO_2 currently is sold to large customers that buy tanker-load volumes in bulk liquid form directly from manufacturers, several of which first appeared in the market after the Final Judgments were entered. And, as discussed below,[11] because of the greater number of uncommitted sources of raw CO_2 feedstock now available, eliminating the Final Judgments' constraints is unlikely to have any adverse competitive effect even on small customers.

B. Changes in Antitrust Case Law

The interpretation and application of the antitrust laws have also changed significantly since entry of the Final Judgments. The defendants' Memorandum in Support of Uncontested Motion to Terminate FInal Consent Decree points out that the 1952 Final Judgment prohibits BOC and Praxair from engaging in certain business practices that were *per se* illegal at the time, which would now be evaluated under a rule-of-reason analysis. For example, until 1984 all tying arrangements were treated as *per se* illegal. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Following the Supreme Court's decision in *Jefferson Parish,* and its more recent decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006), it is clear that Section 1 of the Sherman Act authorizes *per se* condemnation of a tying arrangement

[11] *See, e.g.*, Section IV.C.

only if the plaintiff proves that the defendant has market power in the tying product market. *Jefferson Parish*, 466 U.S. at 2. As a result, while certain tying arrangements are still considered *per se* illegal, most are reviewed under a rule-of-reason inquiry. *Id.*; *Indep. Ink*, 126 S.Ct. at 1291-92.

C. The Final Judgments Are No Longer Necessary

Many of the provisions in the Final Judgments, including those that required the defendants to divest assets and license patents, have either been completed or have expired and thus are no longer operative. Of those provisions that remain in effect, some simply duplicate existing antitrust laws, including but not limited to those provisions that prohibit fixing prices and dividing customers and competitors.[12] After the passage of decades, decree provisions that in substance require defendants to abide by the antitrust laws add little, if anything, to antitrust compliance. Since the remedies available under current antitrust statutes for criminal antitrust violations, such as hard-core price-fixing and market allocation, are generally more severe than those that could be obtained by holding a defendant in contempt under an outstanding decree, the United States typically does not seek to preserve such decree provisions. Hard-core violations of the Sherman Act now are classified as felonies and are subject to far harsher penalties, including more substantial monetary fines and longer jail time, than in the 1950s and 1960s.[13] The Department believes that these antitrust penalties provide greater deterrence to resumption of the

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[12] *See, e.g.*, 1952 Final Judgment at IV(A). This conduct is prohibited under longstanding antitrust principles. *See, e.g., United States v. Topco Assocs*., 405 U.S. 596, 608 (1972)*; United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)*; Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 237-38 (1899).

[13] *See* note 7, *supra*, p. 9.

challenged anticompetitive conduct than would the threat of prosecution for criminal contempt of the decrees.

Other decree provisions that remain in effect flatly prohibit conduct that today would more properly be evaluated under the rule of reason, and only prohibited if anticompetitive harm from the conduct outweighed procompetitive benefits.[14] Flat prohibitions may have been appropriate at the time of the decrees to restore competition, but such prohibitions are no longer necessary in light of the passage of time, industry change and the evolution of antitrust standards. In particular, two individual provisions and one group of five provisions in the Final Judgments restrict the freedom of the defendants in a manner that is inconsistent with modern antitrust standards and could hinder the defendants' ability to compete with other CO_2 suppliers that are not subject to the consent decrees.

1. Section VI(A) of the 1952 Final Judgment

Under Section VI(A) of the 1952 Final Judgment, BOC and Praxair are prohibited from buying and selling CO_2 from one another, except in cases of operational distress. *Liquid Carbonic Corp.,* 1952 Trade Cas. (CCH) ¶ 67,248 at § VI(A). When this decree was entered, this provision was imposed to make it more difficult for defendants to collude. As discussed above, however, major industry changes since 1952 have led to a marketplace that appears significantly less conducive to the sort of collusive conduct addressed by the 1952 Final Judgment. Substantial new competitive entry has occurred, and today there are at least four and as many as eight CO_2 suppliers competing for CO_2 sales in various regions throughout the country.

[14] *See, e.g.*, 1952 Final Judgment at VII(D).

Moreover, an outright prohibition on inter-company sales of CO_2 appears to impose on BOC and Praxair unnecessary inefficiencies that do not burden their competitors. Because transportation costs are high relative to the value of CO_2, it can be efficient for a manufacturer with a customer located far from that manufacturer's own source of supply to acquire CO_2 from another manufacturer located closer to the customer rather than transporting CO_2 from a far-away location. Unlike BOC and Praxair, competing CO_2 suppliers (not subject to the 1952 Final Judgment) are free to purchase CO_2 from any supplier to meet the needs of their customers and provide competitive pricing. This provision precludes only BOC and Praxair from attempting to realize efficiencies in distribution that could be passed on to their customers, and thus may have the effect of increasing the overall cost of distributing CO_2. Therefore, this restriction should be eliminated.

2. Section VI(A)-(E) of the 1963 Final Judgment

Under Section VI(A)-(E) of the 1963 Final Judgment, BOC, Praxair, and Air Liquide are required to lease or sell storage tanks and related equipment to any customer of CO_2 on a nondiscriminatory price basis. *General Dynamics Corp.*, 1963 Trade Cas. (CCH) ¶¶ 70,890-70,892, and 70,919 at § VI(A). The original purpose of the provision was to prevent any one of the defendants from conditioning the initial or continued lease of CO_2 tanks and equipment upon the customer's purchase of CO_2 exclusively from that defendant, which was thought to prevent smaller CO_2 distributors from gaining a foothold in the CO_2 market. At the time, the majority of customers were small, and they leased storage tanks from the CO_2 manufacturers instead of purchasing their own tanks.

BOC, Praxair, and Air Liquide are still subject to this provision today, even though they do not manufacture tanks and their customers now either own their own storage tanks or can

easily replace their tanks by purchasing or leasing them from a supplier other than the defendants. For any effort by BOC, Praxair, or Air Liquide to tie CO_2 purchases to the provision or use of storage tanks to be anticompetitive, the manufacturers would need to possess, individually or collectively, market power in the provision of the storage tanks. *See Indep. Ink*, 126 S.Ct. at 1293. In the absence of such power, arrangements linking the use of the manufacturer's tanks to the purchase of CO_2 from that manufacturer may well serve procompetitive purposes. These defendants plainly have no market power in the supply of tanks. They do not manufacture storage tanks, and there are at least 20 independent sources of storage tanks to which customers can turn. Therefore, this restriction is no longer necessary to preserve competition and should be eliminated.

3. Section VI(F) of the 1963 Final Judgment

Under Section VI(F) of the 1963 Final Judgment, BOC, Praxair, and Air Liquide are precluded from entering into contracts with customers that have the effect of obligating them to purchase their requirements of CO_2 for a "period of more than one (1) year." *General Dynamics Corp.*, 1963 Trade Cas. (CCH) ¶¶ 70,890, 70,892, and 70,919 at § VI(F). This proscription appears to have been intended to remedy a concern that the major producers of CO_2 could employ long-term contracts to foreclose smaller rivals from large and profitable customer accounts.[15] Today, BOC, Praxair, and Air Liquide are still precluded from offering long-term contracts to their customers, while competing CO_2 suppliers (not subject to the Final Judgments) typically do offer such contracts. The extensive use of long-term contracts in this industry suggests that customers may prefer the stability and reliability provided by long-term supply

[15] Under the 1963 Final Judgment, the defendants are permitted to enter into long-term contracts for less than all of a customer's requirements.

arrangements, and that in preventing the defendants from entering into these types of arrangements the decree may be impeding beneficial competition.

It is well established in economics that securing long-term commitments from customers can be procompetitive, by reducing risks and enhancing output. If the restriction on such arrangements is removed in this industry, BOC, Praxair, and Air Liquide, like their rivals, would have the ability to try to obtain customer commitments to reduce the investment risk associated with expanding already-constructed facilities or constructing new liquid CO_2 facilities. Without this ability, faced with greater investment risk, they are less likely than their competitors to make investments to expand CO_2 output. In fact, BOC, Praxair, and Air Liquide have opened only four of the 20 new CO_2 plants built in the last six years. Therefore, the restriction on long-term contracts appears to be inhibiting competition and should be eliminated.

D. The Two Public Comments Received by the Department Do Not Establish That Continuing the Decrees Would Serve the Public Interest

As noted above, before tentatively agreeing to join the defendants in moving the Court to terminate these Final Judgments, the United States conducted its own investigation of the industry and also solicited and received public comments on the defendants' proposal. Only two written comments were submitted, one from a competing supplier of CO_2, and the other from a CO_2 customer. These commenters requested that the Department not disclose their identities or enough details of their comments so that their identities can be deduced.

In its comment, the CO_2 customer focused exclusively on the provisions of the 1963 Final Judgment that enjoin defendants from tying the supply of storage tanks to their customers' purchases of CO_2.[16] That comment expressed concern about the cost of buying and installing

[16] *See* Section IV(C)(2)-(3), *supra*, pp. 15-17.

new storage tanks to allow a choice of CO_2 suppliers in the event the incumbent tank owner attempted to require the customer to purchase CO_2 from it. However the commenter provided no basis for concluding that such switching would be uneconomical, and the Department's investigation indicated that tanks are readily available from many third parties, and even small customers routinely install their own storage tanks. As discussed above, moreover, the ban on the defendants' tying tank supply to CO_2 sales has little, if any, continuing competitive significance. Because the defendants have no market power in the provision of storage tanks, they cannot force customers to purchase CO_2 by threatening not to provide them with tanks.

The other commenter, a competing supplier of CO_2, focused on the provisions of the 1963 Final Judgment that enjoin defendants from entering into long-term CO_2 supply contracts and also suggested that the defendants currently are engaged in a wide-ranging conspiracy to divide markets, fix prices, rig bids, and eliminate competitors, and that termination of the 1963 Final Judgment would allow the defendants more effectively to thwart competition from rivals. The proscription on entry into long-term customer supply contracts originally was intended to prevent the defendants from exploiting their market power to impede entry or expansion by rival suppliers. The ease with which new firms can now enter the CO_2 industry and existing producers can rapidly expand their CO_2 production mitigates against an inference that the defendants have any power to impede entry. Moreover, allowing the defendants to enter into long-term customer contracts could be a procompetitive development, as such contracts could frustrate future industry attempts to cooperate to increase prices of liquid CO_2 and could promote an overall increase in industry output by reducing the cost of developing and exploiting new sources of liquid CO_2.

As to the alleged conspiracy, over the years, the United States has conducted several civil and criminal investigations of the CO_2 industry and found that antitrust enforcement was not warranted. Nor does this commenter provide any concrete basis for believing that the defendants are colluding in violation of the decree or the antitrust laws. In any event, if the defendants conspired to thwart competition by the commenter or others, such conduct likely would violate the antitrust laws, an offense punishable by severe criminal or civil penalties, without regard to the termination of these decrees. To the extent the commenter fears it will have to compete more aggressively against defendants freed of outdated restrictions on their ability to meet customer demands for products and services (e.g., long-term supply contracts), that apprehension goes to the very heart of the competitive process and provides no legitimate basis for retaining these two ancient consent decrees.

E. Summary

In sum, the 1952 Final Judgment and the 1963 Final Judgment were designed to restore and maintain competition in an industry in which the participants had for years colluded to suppress competition. As a result of the passage of time, changes in substantive antitrust law, and sweeping changes in the CO_2 industry, these decrees no longer serve the public interest. They are not necessary, both because their purposes are amply served by the existing body of antitrust law and because sweeping industry changes over the past four-plus decades, including the entry of additional CO_2 suppliers, have rendered the structure of the CO_2 industry in the United States less susceptible to the sort of collusion the decrees sought to prevent. Moreover, several provisions of these decrees are inconsistent with modern antitrust principles and appear to be inhibiting rather than protecting competition. Therefore, the United States believes that

termination of the 1952 Final Judgment and 1963 Final Judgment would be in the public interest and tentatively consents to such termination.

V. PROPOSED PROCEDURES FOR PROVIDING PUBLIC NOTICE OF THE PENDING MOTIONS AND INVITING ADDITIONAL COMMENT THEREON

In *United States v. Swift & Co.*, the court noted its responsibility to implement procedures that will provide non-parties adequate 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. . . .

1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975) (footnote omitted). There has been sufficient notice and opportunity for comment in this case.

First, early in the course of its investigation of the defendants' proposal to terminate the Final Judgments, the United States asked the defendants – and they agreed – to publish notice of their proposal and provide the public an opportunity to submit comments to the United States. The notice was published in three widely read industry publications: it appeared in *Chemical Week* on March 1, 2006 and March 8, 2006; *Food Engineering* on March 10, 2006; and *Beverage World* on March 15, 2006. See Appendix 4. The United States received two sets of comments from third parties who urged continuation of certain provisions of the decrees, and it took the comments into account in its competitive analysis of the decrees and assessment of the likelihood that termination would undermine or enhance industry competition. The United States believes that advance publication of the defendants' pending proposal provided sufficient public notice and opportunity to comment on the pending motions for termination of the 1952 and 1963 Final Judgments.

Second, notwithstanding the adequacy of that prior notice, the parties have agreed to certain procedures that may be followed in bringing this matter to a conclusion, as reflected in the Stipulation attached to this Memorandum. If the Court should agree with the United States that further notice and comment procedures are not required, the United States requests that the Court promptly enter an order in the form of Exhibit A to the Stipulation.

If the Court concludes that further notice and comment procedures are appropriate, then the United States requests that the Court promptly enter an order in the form of Exhibit C to the Stipulation, establishing additional notice and comment procedures. Following this additional notice, period of public comment, and after receiving the United States' response to all comments, the Court may, if it concludes it is in the public interest, enter an order in the form of Exhibit E to the Stipulation. As outlined in the attached Stipulation, the United States proposes – and BOC, Praxair, and Air Liquide have agreed to – the following additional notice and comment procedures:

1. The United States will publish in the Federal Register a notice announcing the motions to terminate the 1952 Final Judgment and the 1963 Final Judgment, and the United States' tentative consent to it, summarizing the Complaints and Final Judgments, describing the procedures for inspecting and obtaining copies of relevant papers, and inviting the submission of comments. (*See* Exhibit D to the Stipulation).

2. BOC, Praxair, and Air Liquide will publish, at their own expense, notice of their motions in issues of Food Engineering and Beverage World; and two consecutive issues of Chemical Week. These periodicals are likely to be read by persons interested in the markets affected by the 1952 Final Judgment and the 1963 Final

Judgment. The published notices will provide for public comment during the sixty (60) days following publication of the last notice. (*See* Exhibit B to the Stipulation).

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

4. The parties request that the Court not rule upon the Motions to Terminate for at least seventy (70) days after the last publication of the notices described above, *i.e.*, for at least ten (10) days after the close of the period for public comment, and the United States reserves the right to withdraw its consent to the motions at any time prior to entry of an order terminating the 1952 Final Judgment and the 1963 Final Judgment.

This procedure is designed to provide additional notice to all potentially interested persons, informing them that two separate motions to terminate the Final Judgments are pending and providing them a further opportunity to comment thereon. BOC, Praxair, and Air Liquide have agreed to follow this procedure, including publication of the appropriate notices. The parties therefore submit herewith to the Court two separate orders establishing this procedure.

The United States proposes the foregoing procedure in accord with Antitrust Division policies that were in place when notice was published in March 2006. In cases such as this, however, where notice was published informing interested parties that the Department was considering the potential termination of the decrees, and where interested parties submitted comments to the Department that were taken into account in the Department's analysis, the Department no longer believes that further notice automatically should be required. If the Court

concludes that further notice and comment is appropriate in this matter, the Department requests that the Court promptly enter the agreed orders providing for such notice. If the Court concludes that no further notice is necessary, the Department requests that the Court enter an order terminating the decrees.

VI. CONCLUSION

For the foregoing reasons, the United States tentatively[17] consents to termination of the 1952 Final Judgment and the 1963 Final Judgment.

Dated: March 13, 2007.

Respectfully submitted,

_____/s/_____
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[17] The Department's consent is tentative because it has reserved the right to withdraw that consent for any reason prior to the entry of orders terminating the 1952 Final Judgment and 1963 Final Judgment.