UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ELECTRIC SIGN ASSOC., MAURICE R. ELY, JOHN K. LAMB, SIDNEY C. FRASER, and HENRY K. LAMBKE, Defendants.	Civil Action No.: 51C2064 JUDGE: Amy St. Eve DATE STAMP: June 30, 2004

MEMORANDUM OF THE UNITED STATES
IN RESPONSE TO MOTION OF INTERNATIONAL SIGN
ASSOCIATION FOR ORDER TERMINATING FINAL JUDGMENT

The International Sign Association, a successor in interest to defendant National Electric Sign Association ("NESA"), has filed a motion to terminate the Final Judgment entered by this Court on April 5, 1954. Because the underlying consent decree no longer is necessary to sustain a competitive environment in the marketplace, the United States tentatively consents to termination of the Final Judgment as it affects NESA and its successors, subject to public notice and an opportunity for public comment.

I. BACKGROUND

NESA was incorporated in Illinois as a non-profit trade association on January 26, 1944, to represent the interests of manufacturers, users, and suppliers of on-premise electric signs[1] and electric sign products. NESA's membership then consisted of electric sign manufacturers, electric sign parts manufacturers, and electric sign parts distributors. The parts distributors comprised the Supply Distributor Section of the association, which represented companies who bought electric sign parts from parts manufacturers and resold the parts to electric sign manufacturers.

On December 18, 1951, the United States filed a complaint against defendants NESA; Maurice R. Ely, the executive secretary of NESA; John K. Lamb, the national chairman of the Supply Distributor Section and president of Cincinnati Sign Supplies, Inc.; Sidney C. Fraser, former national chairman of the Supply Distributor Section and president of Neon Sign Supply, Inc.; and Henry K. Lambke, former regional chairman of the north central region of the Supply Distributor Section and president of Neon Materials, Inc.[2] The complaint alleged that defendants conspired to fix prices and restrain competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

According to the complaint, NESA excluded from membership in the Supply Distributor Section any parts distributor who also engaged in the manufacture of electric signs or who resold

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[1]An on-premise sign advertises goods or services offered by businesses on the property where the sign is located. An off-premise sign, by contrast, is a billboard or other sign advertising a good or service not located on the property where the sign is situated.

[2]With the exception of Lamb, each of the individual defendants is dead. Lamb has no individual obligations under the Final Judgment.

sign parts at less than the parts manufacturers' suggested resale price.[3] NESA also attempted to "induce, persuade and coerce" parts manufacturers to sell parts only to parts distributors and not directly to sign manufacturers or to parts distributors also engaged in the business of manufacturing signs. Compl. ¶ 14. In order to conduct the alleged conspiracy successfully, defendants "[a]gree[d] to carry out a program of surveillance to detect and report to parts manufacturers any parts [distributor] who also engages in the manufacture of electric signs or who resells electric sign parts at prices less than those suggested by the manufacturers of such parts." Compl. ¶ 14(c). The complaint asserted that such behavior restrained price competition in the wholesale and resale markets for electric sign parts, denied parts distributors a continuous supply of sign parts from parts manufacturers, and "eliminate[d] and restrain[ed] illegally the freedom of the parts manufacturers to choose their customers." Compl. ¶ 16.

On April 5, 1954, defendants entered into a consent decree. Under the decree, NESA was "ordered and directed to grant equal, uniform and non-discriminatory membership in [NESA], upon application therefor, to any parts manufacturer, parts [distributor] or sign manufacturer." Final Judgment ("FJ") ¶ IV(A). The Final Judgment also required NESA "to amend [its] Bylaws so as to incorporate therein Sections V and VI of [the] Final Judgment,[4] and to furnish to each of its present and future members a copy of [the] Final Judgment by registered

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[3]According to ¶ 12 of the complaint, "[t]he parts manufacturers usually publish in varying forms schedules of resale prices which they transmit to parts jobbers as suggested resale prices to be charged electric sign manufacturers for electric sign parts."

[4]Sections V and VI of the Final Judgment proscribed defendants from engaging in any exclusionary or otherwise potentially or patently anticompetitive conduct such as price fixing, market allocation, concerted refusals to deal, resale price maintenance, or evaluations of parts manufacturers, parts distributors, or sign manufacturers that are disseminated among association members. FJ ¶¶ V-VI.

mail, return receipt requested." FJ ¶ IV(B). Finally, NESA was

> enjoined and restrained from calling, sponsoring or participating in (i) any regional or sectional meeting of [NESA members] unless all [NESA members] within said region or section are given notice of such meeting and equal opportunity to attend [or] (ii) any national convention or meeting of [NESA members] unless all such members thereof are given notice of such meeting or convention and equal opportunity to attend.

FJ ¶ IV(C). The provisions of the Final Judgment are applicable to NESA, "its officers, directors, agents, employees, subsidiaries, successors and assigns." FJ ¶ III.

On March 5, 1981, NESA relocated from Illinois to Alexandria, Virginia. The association voted to change its name in January 1996 to the "International Sign Association" ("ISA"), and it was reincorporated as a non-profit organization in Virginia the same year. Originally concerned only with the manufacture of electric signs, ISA has expanded its focus to include other types of signs and sign parts, including digital and vinyl signs. ISA's membership now includes sign designers and manufacturers, sign component designers and manufacturers, sign component distributors, purchasers of on-premise signs, independent contractors, consultants, trade publications, insurance providers, school art departments, and international sign businesses. ISA has over 2,400 member companies worldwide and is divided into nine divisions.[5]

The sign industry, meanwhile, has gone through significant changes since the filing of the complaint in this case. With the development of sign franchising and automation, the

[5]The ISA is divided into a Custom Sign Companies Division-United States and Canada, National Sign Companies Division, Sign Product Manufacturers Division, Sign Supply Distributors Division, Corporate Identity Division, Digital Sign and Graphics Division, Affiliated Associations Division, Architectural Signing & Graphics Division, and Past Chairman's Division. Representatives from each division comprise ISA's board of directors.

number of sign parts manufacturers, supply distributors, and sign manufacturers has grown significantly. The number of trade associations in the sign industry has grown as well since the early 1950s, at which time NESA was the only national or international sign association. Three international sign associations now exist, along with hundreds of regional and state associations. Less than ten percent of all United States sign companies, however, are current members of one of the three international sign associations.

As a successor in interest to NESA, ISA is bound by the terms of the 1954 consent decree. Pursuant to the decree, ISA includes sections V and VI of the Final Judgment in its corporate bylaws and represents that it has provided a copy of the Final Judgment to all new association members. ISA further represents that it has complied with the terms of the Final Judgment and has not otherwise engaged in anticompetitive behavior in the fifty years since the Final Judgment was entered.

II. LEGAL STANDARDS APPLICABLE TO THE TERMINATION OF AN ANTITRUST CONSENT DECREE

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Paragraph IX of the Judgment, Rule 60(b)(5) of the Federal Rules of Civil Procedure, and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); 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 of a judgment, the issue before the Court is whether termination is in the public interest. E.g., United States v. Western Elec. Co., 993 F. 2d 1572, 1576 (D.C. Cir. 1993) ("Western Elec. II"); United States v. Western Elec. Co., 900 F. 2d 283, 305 (D.C. Cir. 1990) ("Western Elec. I"); 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, 65,706 (N.D. Ill. 1975)); cf. United States v. American Cyanamid Co., 556 F. Supp. 361, 367 (S.D.N.Y.), rev'd on other grounds, 719 F.2d 558 (2d Cir. 1983).

A district court applies the same public interest standard in a termination motion as it does in reviewing an initial consent judgment in a government antitrust case. 15 U.S.C. § 16(e); Western Elec. II, 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). It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. E.g., 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 by the United States, is not to substitute its own opinion but to assess whether the United States' explanation is well-reasoned. United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. 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, 1143 (C.D. Cal. 1978)); United States v. Medical Mutual of Ohio, 1999-1 Trade Cas. ¶ 72, 465 at 84,271 (N.D. Ohio 1999); United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977).

In a consent decree proceeding, the United States may reach any of a range of settlements that are consistent with the public interest. E.g., Microsoft, 56 F.3d at 1461; Western Elec. II,

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 should conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree" through malfeasance or by acting irrationally. Bechtel, 648 F.2d at 666; see also Microsoft, 56 F.3d at 1461 (examining 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 United States has offered a reasonable explanation of why the termination of a consent decree vindicates the public interest in preserving free and unfettered competition, and there is no showing of abuse of discretion or corruption affecting the United States' recommendation, the Court should accept the United States' conclusion concerning the appropriateness of termination.

III. THE UNITED STATES' RATIONALE FOR ITS TENTATIVE CONSENT TO TERMINATION OF THE FINAL JUDGMENT AS IT APPLIES TO NESA AND ITS SUCCESSORS

Under United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), an antitrust consent decree termination is appropriate where the defendants demonstrate that the basic purposes of the decree have been achieved. Id. at 248. The Second Circuit in United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995), recognized that significant changes in the factual or legal climate may justify a consent decree termination even where the United Shoe standard for decree terminations has not been satisfied. Id. at 102. In this case, consent decree termination is justified both because the basic purposes of the consent decree have been achieved and because the competitive climate of the sign industry has changed significantly.

The complaint in this case alleged that specific NESA rules promulgated by the individual defendants constituted exclusionary or price-fixing conduct. The terms of the subsequent consent decree were directed toward eliminating such conduct, specifically resale price maintenance within the Supply Distributor Section and association rules intended to prevent parts manufacturers from selling directly to sign manufacturers and to prevent supply distributors from vertically integrating into sign production. ISA stipulates, and the United States tentatively concurs, that no such conduct currently occurs within ISA and that ISA has complied with the terms of the decree. Thus, the purpose of the consent decree, the elimination of specific anticompetitive conduct within the trade association, has been achieved.

Even if the purpose of the consent decree had not been achieved, significant changes within the sign industry and its trade associations warrant termination of the decree under Eastman Kodak. The 50-year-old decree in this case addressed antitrust concerns peculiar to the sign industry in the 1940s, and the competitive environment of the sign industry today would not be conducive to a trade association's exercise of similar exclusionary practices. Less than five percent of the sign companies in the United States today are members of ISA and less than ten percent of sign companies are members of any international sign trade association. An attempt by ISA, or any other sign association, to maintain resale prices in the supply distributor business probably would be complicated by the large numbers of supply distributors and parts manufacturers who are not ISA members.

Likewise, a supply distributor's business probably would not suffer if it were barred from membership in ISA for violating an internal ISA rule regarding pricing or vertical integration. Most benefits to ISA membership, which include attendance at trade shows and education

programs related to government affairs, are available to both ISA members and non-ISA members. Thus, sign companies that choose not to be members of ISA are at no significant competitive disadvantage because of such non-affiliation.

The presence of other trade associations today, in contrast to the absence of other trade associations at the time of the complaint, also makes price maintenance or other exclusionary conduct by ISA less likely to be successful. If a sign company was denied membership in ISA because of its unwillingness to participate in a pricing cartel, the sign company could gain membership and enjoy member benefits in another sign association.

For these reasons, it appears that ISA members could compete effectively either as members of other trade associations or without trade association membership if ISA implemented a policy that barred them from membership. Because ISA membership apparently does not convey significant or indispensable benefits today, any attempt by ISA to coordinate prices or reduce output likely would not be successful.

In light of the fulfillment of the purpose of the consent decree, changes in the sign industry, and the simple passage of time, the terms of the Final Judgment no longer are necessary to protect the competitive environment of the sign industry. Accordingly, the United States tentatively concludes that the termination of the Final Judgment is in the public interest.

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

The court in Swift & Co. articulated its responsibility to implement procedures that will give non-parties 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.

Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703.

It is the policy of the United States to consent to motions to 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 ISA has consented to, the following:

1. The United States will publish in the Federal Register a notice announcing the motion of ISA to terminate the Final Judgment and the United States' 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. ISA will publish notice of its motion in two consecutive issues of the Washington Post and Signs of the Times. 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 sixty-day period, the United States 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 until the United States has filed with the Court copies of any comments that it receives along with its responses to those comments, and the United States reserves the right to withdraw its consent to the motion at any time prior to entry of an order terminating the Final Judgment.

This procedure is designed to notify all potentially interested persons that a motion to terminate the Final Judgment is pending and provide adequate opportunity to comment thereon. ISA has agreed to follow this procedure, including publication of the appropriate notices. The parties therefore submit herewith a separate proposed order establishing this procedural approach and request that the Court enter this order promptly.

V. CONCLUSION

For the foregoing reasons, the United States tentatively consents to the termination of the Final Judgment in this case.

Respectfully submitted,

_____/s/_____
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