IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. STANDARD OIL COMPANY (NEW JERSEY) and POTASH COMPANY OF AMERICA, Defendants.	Civ. A. No. 954-64

MEMORANDUM IN SUPPORT OF THE UNITED STATES' AND EXXON MOBIL CORPORATION'S MOTION TO TERMINATE FINAL JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES AND REGULATIONS

OTHER MATERIALS

I. INTRODUCTION

The United States and Defendant Exxon Mobil Corporation ("Exxon Mobil"), the successor in interest to Defendant Standard Oil Company (New Jersey) ("Standard Oil New Jersey"), have jointly moved to terminate the Final Judgment entered in *United States v. Standard Oil Company (New Jersey)*, 253 F. Supp. 196 (D.N.J. 1966) on May 24, 1966 ("1966 Final Judgment").[1] A copy of the 1966 Final Judgment is attached hereto as Exhibit A.

After soliciting public comments on the proposed termination and conducting an extensive investigation focusing on the likely economic effects of the proposed termination,[2] the United States concludes that this decree is no longer necessary to protect competition and that the continued existence of this judgment does not otherwise provide any public benefit. Therefore, it would be in the public interest for the Court to terminate the 1966 Final Judgment.

II. BACKGROUND

A. The Complaint and the 1966 Final Judgment

The 1966 Final Judgment arose out of an investigation into the likely anticompetitive effects of Standard Oil New Jersey's proposed acquisition of Potash Company of America ("PCA"). At the time, Standard Oil New Jersey did not manufacture or sell potash, but it did

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[1] Two defendants were subject to the 1966 Final Judgment: Standard Oil New Jersey and Potash Corporation of America ("PCA"). Of these two defendants, only Standard Oil New Jersey, through its successor in interest, Exxon Mobil, exists today. PCA, after a series of transactions discussed in detail infra, ceased to exist as a separate corporate entity in 2001.

[2] 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 this decree. In response, the United States has received no comments.

purchase potash for use in its fertilizer business. PCA was the second largest producer of potash in North America. The United States was concerned that Standard Oil New Jersey's acquisition of PCA would result in its abandonment of plans for *de novo* entry into the potash business, which it had been considering, and would also foreclose other potash suppliers from competing for sales to Standard Oil New Jersey.

As a result of this investigation, the United States, acting through its Department of Justice ("Department"), filed a Complaint in this Court against Standard Oil New Jersey and PCA on October 21, 1964 (the "Complaint," attached hereto as Exhibit B). The Complaint alleged that Standard Oil New Jersey's acquisition of PCA would violate Section 7 of the Clayton Act. The Court agreed with the United States and found that the vertical aspects of the proposed acquisition raised significant competitive concerns and, thus, on March 31, 1966, the Court permanently enjoined Standard Oil New Jersey from purchasing PCA. *United States v. Standard Oil Company (New Jersey)*, 253 F.Supp. 196, 226 (D.N.J. 1966). The Court entered the 1966 Final Judgment on May 24, 1966.

The 1966 Final Judgment permanently enjoins Standard Oil New Jersey "and all persons acting in its behalf" from acquiring any financial interest in or merging with PCA.[3] The judgment, which is now over forty years old, does not contain an automatic termination provision, unlike most antitrust decrees since 1980 to which the United States is a party. As

[3] Specifically, Section IV of the 1966 Final Judgment provides that Standard Oil New Jersey, "and all persons acting in its behalf are hereby enjoined from taking any action directly or indirectly, to purchase or acquire the stock, assets, properties or businesses of PCA, or from merging and consolidating such assets, properties, or businesses, or acquiring any financial or other interest in PCA, except that nothing herein shall preclude [Standard Oil New] Jersey from purchasing or acquiring goods, wares and merchandise in connection with a bona fide purchase or sale in the regular course of business from PCA."

discussed below, this judgment is no longer necessary in light of the changes in industry circumstances and the fact that changes in law since entry of the judgment protect the public from the potentially anticompetitive conduct addressed by the decree provision. As a result, the provisions of the judgment that remain in effect do not provide a public benefit and should be terminated.

B. Current Industry Conditions

In the almost half century since the 1966 Final Judgment was entered, Standard Oil New Jersey has undergone substantial corporate changes while PCA has essentially ceased to exist. Standard Oil New Jersey was the predecessor to Exxon Mobil. Standard Oil New Jersey officially changed its name to the Exxon Corporation in 1972. In 1991, Exxon sold off its interests in the fertilizer business. Exxon and Mobil Oil Company merged in 1999 to form the Exxon Mobil Corporation. PCA was acquired by Rio Algom Limited ("Rio") in 1986. In 1993, Rio sold the assets of PCA to Potash Corporation of Saskatchewan Inc. ("PotashCorp") but retained ownership of the corporate entity. Rio in turn was acquired by Billiton PLC ("Billiton") in 2000. In 2001, Billiton merged with Broken Hill Proprietary Company to form BHP Billiton Limited ("BHP Billiton"). As part of a restructuring that occurred in the same year, PCA was merged into another BHP Billiton subsidiary and thereupon ceased to exist as a separate corporate entity. The United States and Exxon Mobil have been authorized by PotashCorp and BHP Billiton to represent to the Court that neither of them objects to terminating the 1966 Final Judgment.

Exxon Mobil has reviewed the 1966 Final Judgment periodically and has complied fully with its terms. Over the past forty-three years, Exxon Mobil has not been found in violation of

the 1966 Final Judgment. At present, there is no investigation by the Department relating to the 1966 Final Judgment.

Exxon Mobil informed the Department that it wished to seek termination of the 1966 Final Judgment. In order to determine whether the Department should join in such a motion, the Department conducted an investigation with two principal facets.

The first facet was aimed at providing adequate notice to likely interested parties that Exxon Mobil planned to seek termination of the 1966 Final Judgment. This was accomplished by asking Exxon Mobil to publish voluntarily, at its own expense and in a form acceptable to the Department, a "Notice of Intention to Terminate Potash Final Judgment" (the "Notice," attached hereto as Exhibit C). The Notice ran in *Green Markets* and *Fertecon*, two trade publications whose readership included persons interested in the potash business and in the related fertilizer business, potash being one of three primary plant nutrients used in fertilizer. It described Exxon Mobil's plans to seek termination of the 1966 Final Judgment and specifically invited any interested persons to submit comments or relevant information about these plans to the Department. The Notice appeared in the March 16, 23, 30 and April 6, 2009 issues of *Green Markets*, and in the March 17 and March 31, 2009 issues of *Fertecon*. The Department requested Exxon Mobil to allow a waiting period of sixty days to elapse following the date of publication of the last Notice before filing a Rule 60(b) motion, in order to ensure that any interested person had ample time within which to contact the Department. This sixty-day waiting period expired on June 5, 2009 without any comments having been submitted to the Department, nor have any comments been received since that date. Copies of proofs of

publication from *Green Markets* and *Fertecon* are attached hereto as Exhibits D and E, respectively.

The second facet of the Department's investigation consisted of numerous interviews with both potash competitors and customers. None of the market participants that were contacted had any objection to terminating the 1966 Final Judgment.

Therefore, the United States has joined Exxon Mobil's motion to terminate the 1966 Final Judgment due to the following facts: (a) Exxon Mobil no longer produces fertilizer; (b) PCA no longer exists; (c) there were no comments in response to the published Notice; (d) there were no negative reactions to Exxon Mobil's plans to seek termination of the 1966 Final Judgment during the course of many interviews; and (e) existing antitrust law provides adequate notice to the Division of any future, potentially anticompetitive transactions.

III. ARGUMENT

A. Applicable Legal Standard for Termination

This Court has jurisdiction to terminate the Final Judgment. Section VII of the Final Judgment provides that:

> "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof. . . ."

The Supreme Court has also recognized that "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 Rules 60(b)(5) and (b)(6) of the Federal Rules of Civil Procedure, "[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . . [when] applying it prospectively is no longer equitable; or (6) for any

other reason that justifies relief." *See United States v. IBM Corp.*, 163 F.3d 737, 738 (2d Cir. 1998) (affirming grant of motion by the United States and defendant to terminate antitrust final judgment).

Where, as is the case here, the DOJ supports a defendant's request for termination of an antitrust final judgment, the reviewing court is responsible for determining whether such termination is in the "public interest." *IBM Corp.*, 163 F.3d 737, 738 (2d Cir. 1998); *see also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983); *United States v. Baroid Corp.*, 130 F.Supp.2d 101, 103 (D.D.C. 2001); *United States v. Loew's Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992). 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 the termination is consistent with the public interest. *Loew's*, 783 F. Supp. at 214. The court's "'public interest' determination must be based on the same analysis that the court would use to evaluate the underlying [antitrust] violation." *IBM Corp.*, 163 F.3d at 740 (citing *American Cyanamid*, 719 F.2d at 565). In essence, the court "should look to the elements of that species of antitrust violation to determine whether the present state of affairs is such that dissolution of the decree would be in the 'public interest.'" *Id.* Deference is usually given to the Department's position in light of its antitrust expertise. *Baroid*, 130 F.Supp.2d at 103.

The Department has recognized that obsolete decrees can needlessly burden the parties, the courts, and the competitive process. These considerations, among others, led the Department in 1980 to establish a policy of including in every consent decree a so-called "sunset provision" that, other than in exceptional cases, would result in the decree's automatic termination after ten

years.[4] As a result, the only antitrust decrees to which the United States is a party that remain in effect are those entered within the past ten years, or before 1980 when the "sunset" policy was adopted. The Department's policy statements have encouraged parties to old decrees to seek the Department's consent to their termination. *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* (attached as Exhibit G); and U.S. Department of Justice Press Release, *New Protocol to Expedite Review Process for Terminating or Modifying Older Antitrust Decrees* (April 13, 1999) (attached as Exhibit H). In the United States' view, decrees entered prior to 1979 presumptively should be terminated, unless there are affirmative reasons for continuing them, which we would expect to exist only in limited circumstances.[5]

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[4] *See U.S. v. Liquid Carbonic Corporation,* Civ. No. 07MC107 (E.D.N.Y. 2007), Memorandum of the United States In Response To Defendants' Uncontested Motions To Terminate the 1952 Final Judgment And The 1963 Final Judgment, March 15, 2007, pp. 8-9 (hereinafter "*DOJ Memorandum in U.S. v. Liquid Carbonic*", attached as Exhibit F); *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).

[5] *See DOJ Memorandum in U.S. v. Liquid Carbonic*, at p. 9. Among the 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. None of these circumstances is present in this case.

The United States believes that advance publication of the Defendant's pending proposal provided sufficient public notice and opportunity to comment on the pending joint motion for termination of the 1966 Final Judgment. The Department has contacted many of the participants in the potash market, some of whom confirmed having seen Defendant Exxon Mobil's notice in the trade publications, and has not identified any concern regarding the termination of the 1966 Final Judgment.

B. The 1966 Final Judgment's Provisions are Unnecessary Under Current Antitrust Statutes

The presumption in favor of terminating old decrees is especially justified where changes in the law have rendered the decree's provisions unnecessary. In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"), codified at 15 U.S.C. § 18a, which requires firms of the requisite size to notify the Department of Justice and Federal Trade Commission before making acquisitions above a specified dollar amount and prohibits closing the proposed acquisition until the expiration of a waiting period, usually thirty days. Thus, the government agencies will have notice of and an opportunity to evaluate any significant acquisition by Exxon Mobil. In light of these changes to the Clayton Act since the 1966 Final Judgment was entered, the provision in the decree banning certain acquisitions or mergers is no longer needed.

C. Termination of the 1966 Final Judgment is in the Public Interest

Termination of the 1966 Final Judgment is plainly in the public interest. First, continuation of the decree is not necessary to protect competition. PCA, the entity Exxon Mobil was barred from acquiring in the Final Judgment, no longer exists. Exxon Mobil does not produce or sell potash, nor is it even in the fertilizer business any longer, having sold off its

fertilizer interests in 1991. Therefore, the risk that an acquisition by it of any entity in the potash business would raise competitive concerns is remote, at best. Second, in this case the notification and waiting period requirements under the HSR Act adequately protect the public's interest. Third, because the 1966 Final Judgment is obsolete, the administrative burden to Exxon Mobil of monitoring the decree is unnecessary.

III. CONCLUSION

For the foregoing reasons, the movants request that the Court enter an Order terminating the 1966 Final Judgment in this matter in the form attached herewith.

Dated: December 23, 2009

Respectfully submitted,

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