

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:75CV2656-FDW-DSC**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE WACHOVIA CORPORATION and
AMERICAN CREDIT CORPORATION,

Defendants.

**MEMORANDUM IN SUPPORT OF THE MOTION OF
THE UNITED STATES TO TERMINATE LEGACY ANTITRUST JUDGMENT**

The United States respectfully submits this memorandum in support of its motion to terminate the legacy antitrust judgment in this case. The Court entered the judgment in 1975; thus, the judgment is over forty years old. After examining the judgment—and after soliciting public comment—the United States has concluded that termination is appropriate. Termination will permit the Court to clear its docket, the Department to clear its records, and businesses to clear their books, allowing each to utilize its resources more effectively.

I. BACKGROUND

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired.¹ Such

¹ The primary antitrust laws are the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27. The judgment the United States seeks to terminate with the accompanying motion concerns a violation of the Clayton Act.

perpetual judgments were the norm until 1979, when the Antitrust Division of the United States Department of Justice (“Antitrust Division”) adopted the practice of including a term limit of ten years in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them. Although a defendant may move a court to terminate a perpetual judgment, few defendants have done so. There are many possible reasons for this, including that defendants may not have been willing to bear the costs and time resources to seek termination, defendants may have lost track of decades-old judgments, individual defendants may have passed away, or firm defendants may have gone out of business. As a result, hundreds of these legacy judgments remain open on the dockets of courts around the country. As a result of changed circumstances, these judgments likely no longer continue to serve their original purpose of protecting competition, and some may even be anticompetitive.

The Antitrust Division recently implemented a program to review and, when appropriate, seek termination of legacy judgments. The Antitrust Division’s Judgment Termination Initiative encompasses review of all of its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative in a statement published in the Federal Register.² In addition, the Antitrust Division established a website to keep the public apprised of its efforts to terminate perpetual judgments that no longer serve to protect competition.³ The United States believes that its outstanding perpetual antitrust judgments presumptively should be terminated; nevertheless, the Antitrust Division examined the judgment covered by this motion to ensure that it is suitable

² Department of Justice’s Initiative to Seek Termination of Legacy Antitrust Judgments, 83 Fed. Reg. 19,837 (May 4, 2018), <https://www.gpo.gov/fdsys/granule/FR-2018-05-04/2018-09461>.

³ <https://www.justice.gov/atr/JudgmentTermination>.

for termination. The Antitrust Division also gave the public notice of—and the opportunity to comment on—its intention to seek termination of this judgment.

In brief, the process by which the United States determined that the judgment in this case should be terminated was as follows:⁴

- The Antitrust Division reviewed the judgment and determined that, for reasons explained in this memo, it was a candidate for termination.
- The Antitrust Division posted the name of the case and a link to the judgment on its public Judgment Termination Initiative website, <https://www.justice.gov/atr/JudgmentTermination>.
- The public had the opportunity to submit comments regarding the proposed termination to the Antitrust Division within thirty days of the date the case name and judgment link was posted to the public website.
- Having received no comments regarding the judgment, the United States moved this Court to terminate it.

The remainder of this memorandum is organized as follows: Section II provides a summary of the legacy judgment. Section III describes the Court's jurisdiction to terminate the judgment. Section IV explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old, such as the judgment in this case, should be terminated absent compelling circumstances. This section also describes the additional reasons that the United States believes that this judgment should be terminated. Section V concludes. Exhibit A attaches a copy of the final judgment and a proposed order terminating that judgment has been submitted simultaneously.

⁴ The process is identical to that followed by the United States when it recently and successfully moved the District Court for the District of Columbia to terminate nineteen legacy antitrust judgments. *See* Order Granting Motion to Terminate Legacy Antitrust Judgments, *United States v. Am. Amusement Ticket Mfrs. Ass'n, et al., et al.*, Case No. 1:18-mc-00091-BAH (D.D.C. Aug. 15, 2018).

II. THE JUDGMENT

The judgment in this case arose out of a complaint charging Defendants with violating Section 7 of the Clayton Act in connection with Wachovia Corporation's ("Wachovia") proposed acquisition of American Credit Corporation ("American Credit"). Among other things, the judgment required Wachovia to divest nearly all of its interest in American Credit within two years of entry of the final judgment, or submit to the government a plan of divestiture whereby Wachovia would spin-off all of its interest in American Credit to its own shareholders.

Wachovia also was prohibited from regaining ownership or control of any divested property. The judgment also enjoined Wachovia, for a period of ten years, from acquiring the stock or assets of any company engaged in consumer or automobile finance in North Carolina, or any company engaged in commercial financing in the United States, without prior consent from the Antitrust Division or the Court. It further enjoined any officer, director, agent, or employee of Wachovia from being, at the same time, an officer, director, agent, or employee of the purchaser of any divested assets.

Finally, the judgment required the Defendants to file a written report with the Antitrust Division every six months during the divestiture period, setting forth the steps it had taken to accomplish the divestiture.

III. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment entered in this case. Section X of the judgment provides that the Court retains jurisdiction. The Federal Rules of Civil Procedure grant the Court authority to terminate the judgment. Rule 60(b)(5) and (b)(6) provides that, "[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . .

(5) [when] applying it prospectively is no longer equitable; or (6) for any other reason that

justifies relief.” Fed. R. Civ. P. 60(b)(5)-(6); *see also Thompson v. U.S. Dep’t of Housing & Urban Dev.*, 404 F.3d 821, 826 (4th Cir. 2005) (“The court’s inherent authority to modify a consent decree or other injunction is now encompassed in Rule 60(b)(5) of the Federal Rules of Civil Procedure.”); *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC, et al.*, 859 F.3d 295, 299 (4th Cir. 2017) (“Rule 60(b) also contains a catchall section, which gives a court authority to relieve a party from a judgment for ‘any other reason’ not articulated in sections (1) through (5), Fed. R. Civ. P. 60(b)(6), but only when the movant demonstrates ‘extraordinary circumstances.’” (citation omitted)).

Given its jurisdiction and its authority, the Court may terminate the judgment for any reason that justifies relief, including that the judgment no longer serves its original purpose of protecting competition.⁵ Termination of this judgment is warranted.

IV. ARGUMENT

It is appropriate to terminate the perpetual judgment in this case because it no longer continues to serve its original purpose of protecting competition. The United States believes that the judgment presumptively should be terminated because its age alone suggests that it no longer protects competition. Other reasons, however, also weigh in favor of termination, including that the principal remedy has already been achieved, with any unexpired terms of the judgment either forbidding conduct which is either already illegal or not likely to be anticompetitive given

⁵ In light of the circumstances surrounding the many legacy judgments for which it seeks termination, the United States does not believe it is necessary for the Court to make an extensive inquiry into the facts of this judgment to terminate it under Fed. R. Civ. P. 60(b)(5) or (b)(6). All these legacy judgments would have terminated long ago if the Antitrust Division had the foresight to limit them to ten years in duration as under its policy adopted in 1979. Moreover, the passage of decades and changed circumstances since the entry of this judgment, as described in this memorandum, means that it is likely that it no longer serves the original purpose of protecting competition.

changed market circumstances. Under such circumstances, the Court may terminate the judgments pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Judgment Presumptively Should Be Terminated Because of Its Age

Permanent antitrust injunctions rarely serve to protect competition. The experience of the United States in enforcing the antitrust laws has shown that markets almost always evolve over time in response to competitive and technological changes. These changes may make the prohibitions of decades-old judgments either irrelevant to, or inconsistent with, competition. The development of new products that compete with existing products, for example, may render a market more competitive than it was at the time of entry of the judgment or may even eliminate a market altogether, making the judgment irrelevant. In some circumstances, a judgment may be an impediment to the kind of adaptation to change that is the hallmark of competition, undermining the purposes of the antitrust laws. These considerations, among others, led the Antitrust Division in 1979 to establish its policy of generally including in each judgment a term automatically terminating the judgment after no more than ten years.⁶

The judgment in this matter—which is over four decades old—presumptively should be terminated for the reasons that led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten years. There are no affirmative reasons for the judgment to remain in effect; indeed, there are additional reasons for terminating it.

B. The Judgment Should Be Terminated Because It Is Unnecessary

In addition to age, other reasons weigh heavily in favor of termination of the judgment. First, market conditions have changed significantly. The Antitrust Division has determined that

⁶ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

the judgment concerns products or markets that face different competitive forces now, such that the behavior at issue likely no longer is of competitive concern.

The judgment was entered years before significant banking deregulation began in the 1980s. Among other changes in the marketplace, deregulation led to interstate banking that removed restrictions on the opening of bank branches in different states which arguably led to the rise in both regional and national banks. In addition, banking deregulation helped to spur innovation and expedite the growth of increasingly complex banking organizations that would offer more financing, lending, and other services.

Second, the principal terms of the judgment have been satisfied. The primary objective of the judgment was for Wachovia to divest its interest in American Credit, an objective that was fulfilled long ago.

C. There Has Been No Public Opposition to Termination

The United States has provided adequate notice to the public regarding its intent to seek termination of the judgment. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments and noting that it would begin its efforts by proposing to terminate judgments entered by the federal district courts in Washington, DC, and Alexandria, VA.⁷ On July 13, 2018, the Antitrust Division listed the judgment in this case on its public website, describing its intent to move to terminate the judgment.⁸ The notice identified the case, linked to the judgment, and invited public comment. The Division received no comments concerning this judgment.

⁷ Press Release, Department of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments, (April 25, 2018), <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

⁸ <https://www.justice.gov/atr/north-carolina-western-district>, link titled “View Judgments Proposed for Termination in North Carolina, Western District of.”

V. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment in this case is appropriate and respectfully requests that the Court enter an order terminating it. A proposed order terminating the judgment is submitted simultaneously.

Respectfully submitted,

s/Lorenzo McRae

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Dated: December 14, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) Civil Action No. 2656
 v.)
) FINAL JUDGMENT
 THE WACHOVIA CORPORATION and)
 AMERICAN CREDIT CORPORATION,) Filed: August 4, 1975
)
 Defendants.) Entered October 14 1975

Plaintiff United States of America, having filed its complaint herein on April 24, 1970 and defendants The Wachovia Corporation and American Credit Corporation having appeared by their attorneys, and plaintiff and the defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of law or fact herein and without this Final Judgment constituting evidence or admission by any party with respect to any issue of law or fact herein;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby, ORDERED, ADJUDGED, AND DECREED:

I

This Court has jurisdiction over the subject matter and the parties consenting hereto. The complaint states a claim upon which relief may be granted under Section 7 of the Act of Congress of October 15, 1914 (15 U.S.C. §18), as amended, commonly known as the Clayton Act.



II.

As used in this Final Judgment:

(A) "Wachovia" means defendant The Wachovia Corporation and its subsidiaries;

(B) "American Credit" means defendant American Credit Corporation and all its subsidiaries except Southeastern Financial Corporation and Virginia Crafts, Inc., a manufacturer of tufted carpets and rugs;

(C) "Southeastern Financial" means American Credit's subsidiary Southeastern Financial Corporation.

III.

The provisions of this Final Judgment shall apply to Wachovia and American Credit and to their officers, directors, agents, employees, successors and assigns and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

(A) Wachovia is hereby ordered and directed to divest, as a single competitive entity, all of its interest, direct or indirect, in American Credit within two (2) years of the date of entry of this Final Judgment, or submit to the plaintiff thirty (30) days prior to the expiration of such period a plan of divestiture, approved by the Board of Directors of Wachovia, whereby Wachovia will spin-off all of its interest in American Credit to its own shareholders, such spin-off to be completed within six (6) months of the expiration of the two (2) year divestiture period. Should Wachovia require additional time in which to complete such a spin-off, plaintiff shall grant such additional time, as is necessary, upon a showing by Wachovia of a good-faith effort to comply with the requirements of this subsection.

(B) Defendants shall take such action as is necessary for American Credit to sustain itself as a competitive entity in order to insure Wachovia's ability to accomplish divestiture.

(C) Defendants shall submit to plaintiff for approval the details of any proposed plan of divestiture intended to implement the provisions of subsection (A) above. Within thirty (30) days of the receipt of these details, the plaintiff may request supplementary information concerning the plan, which shall be furnished by Wachovia. Following the receipt of any such supplementary information submitted pursuant to plaintiff's last request for such information, plaintiff shall have thirty (30) days in which to object to such plan of divestiture by written notice to Wachovia. If no request for supplementary information is made, said notice of objection shall be given within thirty (30) days of receipt of the originally submitted details of the plan. If plaintiff objects to the proposed plan of divestiture it shall not be consummated unless plaintiff withdraws its objection or the Court gives its approval to the plan. If plaintiff does not object, the plan shall be submitted to the Court for approval.

(D) If the proposed plan of divestiture is contingent upon the approval of the Board of Governors of the Federal Reserve System, the time period set forth in subsection (A) above shall be tolled from the date of application to the Board until such application is approved or denied.

(E) Nothing in this Final Judgment shall prohibit Wachovia from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security interest on the property divested for the purpose of

securing full payment of the price at which such property is disposed of or sold.

(F) Should Wachovia regain ownership or control of any property divested pursuant to this Final Judgment Wachovia shall divest such reacquired property in accordance with the provisions of this Final Judgment within one (1) year from the date of such reacquisition.

V.

If the requirements of Subsection (A) of Section IV have not been completed within the designated time or such additional time as may be granted pursuant to Section IV(A), the Court shall, if the plaintiff so applies, and after opportunity for the parties to be heard, irrevocably convey to a trustee all of Wachovia's undivested interest in American Credit. The trustee shall have full authority to manage all of Wachovia's interest in American Credit and shall dispose of same with all deliberate speed. The fees and expenses of the trusteeship as are required to accomplish divestiture shall be paid by Wachovia as accrued.

VI.

No officer, director, agent or employee of Wachovia shall at the same time be an officer, director, agent or employee of the purchaser of any stock or assets divested pursuant to this Final Judgment.

VII.

(A) Wachovia is enjoined and restrained, for a period of ten (10) years from the effective date of this Final Judgment from acquiring all or part of the stock or assets of any company engaged in consumer or automobile finance in the State of North Carolina, or any company engaged in commercial finance or factoring in the United States without the prior consent of plaintiff or if plaintiff does not give its consent, without the approval of the Court.

(B) Nothing in this Final Judgment shall prohibit Wachovia from acquiring, directly or indirectly, all or part of the stock or assets of any state or federally chartered commercial bank or any company engaged primarily in mortgage banking.

(C) Nothing in this Final Judgment shall prohibit Wachovia from acquiring, in the ordinary course of business, any property, including commercial paper, or from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security interest on such property.

VIII.

Beginning ninety (90) days after the date of entry of this Final Judgment, and continuing every six (6) months during the divestiture period, Wachovia shall furnish a written report to plaintiff setting forth the steps it has taken to accomplish the divestiture required herein.

IX.

(A) For the purpose of determining or securing compliance with this Final Judgment and for no other purpose each defendant shall permit, subject to any legally recognized privilege, duly authorized representatives of the Department of Justice, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to such defendant's principal office: (1) Access during the regular office hours of such defendant, to inspect and copy any and all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession, custody or control of such defendant which relate to any matters contained in this Final Judgment; and (2) Subject to the reasonable convenience of such defendant and without

restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, such defendant shall submit such reports in writing, with respect to the matters contained in this Final Judgment, as may from time to time be requested.

No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X.

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 modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Entry of this Final Judgment is in the public interest.

/s/ JAMES B. McMILLAN
United States District Judge

Dated: Oct. 14. 1975