UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. INTER-ISLAND STEAM NAVIGATION CO., LTD., ET AL., Defendants.	Civil No. 887 MEMORANDUM IN SUPPORT OF THE UNITED STATES OF AMERICA'S MOTION TO TERMINATE LEGACY ANTITRUST JUDGMENTS
UNITED STATES OF AMERICA, Plaintiff, v. HAWAII RETAIL DRUGGISTS ASSOCIATION, Defendant.	Civil No. 2064
UNITED STATES OF AMERICA, Plaintiff, v. FIRST HAWAIIAN BANK, ET AL., Defendants.	Civil No. 2540

UNITED STATES OF AMERICA, Plaintiff, v. INTER-ISLAND TRAVEL SERVICE, LTD., D/B/A TRADE WIND TOURS OF HAWAII AND INTERNATIONAL TRAVEL SERVICE, LTD., ET AL., Defendants.	Civil No. 75-0334
UNITED STATES OF AMERICA, Plaintiff, v. HAWAIIAN HOLIDAYS TOURS, INC., ET AL., Defendants.	Civil No. 76-0371

MEMORANDUM IN SUPPORT OF
THE UNITED STATES OF AMERICA'S MOTION
TO TERMINATE LEGACY ANTITRUST JUDGMENTS

The United States of America respectfully submits this memorandum in support of its motion to terminate five legacy antitrust judgments. The Court entered these judgments between 1951 and 1978; they are each between forty and sixty-eight years old. After examining each judgment -- and after soliciting public comment on each proposed termination -- the United States has concluded that

termination of these judgments 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 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. Originally intended to protect the loss of competition arising from

[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 judgments the United States seeks to terminate with the accompanying motion concern violations of these two laws.

violations of the antitrust laws, nearly all of these judgments likely are no longer necessary to protect competition.

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 each judgment covered by this motion to ensure that it is suitable for termination. The Antitrust Division also gave the public notice of -- and the opportunity to comment on -- its intention to seek termination of these judgments.

In brief, the process by which the United States has identified judgments it believes should be terminated is as follows:[4]

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[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.

[4] The United States followed this process to move several other district courts to terminate legacy antitrust judgments. *See United States v. Am. Amusement Ticket Mfrs. Ass'n*, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018)

- The Antitrust Division reviewed its perpetual judgments entered by this Court to identify those that no longer serve to protect competition such that termination would be appropriate.

- When the Antitrust Division identified a judgment it believed suitable for termination, it 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 each 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 above-captioned judgments, the United States moved this Court to terminate them.

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the judgments in the above-captioned cases. Section III explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old should be terminated absent compelling circumstances. This section also describes the additional reasons that the United States believes each of the judgments should be terminated. Section IV concludes. Appendix A attaches a copy of each final judgment that the

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(terminating nineteen judgments); *In re: Termination of Legacy Antitrust Judgments*, No. 2:18-mc-00033 (E.D. Va. Nov. 21, 2018) (terminating five judgments); *United States v. The Wachovia Corp. and Am. Credit Corp.*, Case No. 3:75CV2656-FDW-DSC (W.D.N.C. Dec. 17, 2018) (terminating one judgment); *United States v. Capital Glass & Trim Co., et al.*, Case No. 3679N (M.D. Ala. Dec, 17, 2018) (terminating one judgment); *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

United States seeks to terminate. The United States will submit electronically a proposed order terminating these judgments.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction to terminate the judgments in the above-captioned cases. Each judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. The Federal Rules of Civil Procedure grant the Court authority to terminate each 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 Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (explaining that Rule 60(b)(5) "encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances" and that "district courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment") (citation omitted); *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (Under Rule 60(b), "a court may relieve a party from a final judgment when . . . it is *no longer equitable* that the judgment should have prospective application. . . . [This] Rule codifies the courts' traditional authority, inherent in the jurisdiction of the chancery, to modify or

vacate the prospective effect of their decrees.") (citations and internal quotation marks omitted).

Given its jurisdiction and its authority, the Court may terminate each judgment for any reason that justifies relief, including that the judgments no longer serve their original purpose of protecting competition.[5] Termination of these judgments is warranted.

III. ARGUMENT

The judgment in *Inter-Island Steam* was entered in 1951. Its terms (1) prohibit defendants Hawaiian Airlines and Inter-Island Steam from operating common carrier by water services between parts of the territory of Hawaii without government approval if either of those defendants owns stock of the other or are controlled by the same individual or company if either operate an airline; (2) bar Inter-Island Steam and Hawaiian Airlines from entering into agreements with each other, or with any travel agency, that would prohibit the other defendant or the travel agency from arranging similar tours with, or providing transportation

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[5] In light of the circumstances surrounding the 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 each judgment to terminate them under Fed. R. Civ. P. 60(b)(5) or (b)(6). These 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 circumstance since their entry, as described in this memorandum, means that it is likely that the judgments no longer serve their original purpose of protecting competition.

services for, a common carrier other than one of those defendants; and (3) enjoin defendants from entering into any price or rate fixing agreements. *See* Appendix A-2-5.

The judgment in *Hawaii Retail Druggists* was entered in 1963. The judgment prohibits the association of Hawaii-based retail druggists from entering into any agreement that would fix prices, and prohibited the association from boycotting or threatening to boycott any drug product manufacturer or supplier, among other related prohibitions. *See* Appendix A-6-9.

The judgment in *First Hawaiian Bank* was entered in 1969 after the merger of First National Bank of Hawaii and Cooke Trust Company. The Court permitted the merger (creating a new entity, First Hawaiian Bank), but it also issued a judgment later in 1969 that barred First Hawaiian Bank from merging, acquiring or holding any of the stock, assets or accounts of any other trust company or commercial bank with a trust department for a period of ten years. *See* Appendix A-10-13.

The judgment in *Inter-Island Travel Service* was entered in 1978. The judgment prohibits the defendants from fixing prices and travel agent commissions on free-independent-travel tour packages to Hawaii, and bars the defendants from exchanging price information with each other or with other tour operators, except for bona fide business transactions. *See* Appendix A-14-18.

The judgment in *Hawaiian Holiday Tours* was entered in 1978. The judgment prohibits five Hawaiian tour company defendants from engaging in price-fixing activities, and also barred the companies from exchanging information (with certain limited exceptions) concerning the sale of group package tours. *See* Appendix A-19-23.

It is appropriate to terminate the judgments in each of these cases because they no longer continue to serve their original purpose of protecting competition. The United States believes that the judgments presumptively should be terminated because their age alone suggests they no longer protect competition. Other reasons, however, also weigh in favor of terminating the judgments, including that some of the defendants likely no longer exist, terms of the judgments have expired, and terms of the judgments merely prohibit acts the antitrust laws already prohibit. 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 Judgments Presumptively Should Be Terminated Because of Their 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 judgments in the above-captioned matters -- all of which are 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 judgments to remain in effect; indeed, there are additional reasons for terminating them.

B. The Judgments Should Be Terminated Because They Are Unnecessary

In addition to age, other reasons weigh heavily in favor of termination of each judgment. These reasons include: (1) defendants likely no longer exist, (2) the judgment largely prohibits that which the antitrust laws already prohibit, and (3) the terms of the decree have expired. Each of these reasons suggests the

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

judgments no longer serve to protect competition. In this section, we describe these additional reasons.

1. Some Defendants Likely No Longer Exist

In four of these five cases, almost all of the defendants no longer exist. In *Inter-Island Steam* (1951), only one of the four defendants (Hawaiian Airlines) remains. There was only one defendant in *Hawaii Retail Druggists* (1963), and that defendant (a trade association) disbanded. In *Inter-Island Travel Service* (1978), three of the four defendants are out of business, and the remaining defendant (Vacations Hawaii) was sold to Las Vegas-based Boyd's Gaming Corp. in 1995. Finally, in *Hawaiian Holiday Tours* (1978), at least four out of the five defendants are no longer in business, and it remains unclear whether the fifth defendant (Hawaii Unlimited, which is not incorporated) still operates. Accordingly, the related judgments serve little purpose, and should be terminated for that reason alone.

2. Terms of Judgment Prohibit Acts Already Prohibited by Law

In many of these judgments -- *Inter-Island Steam* (1951), *Hawaii Retail Druggists* (1963), *Inter-Island Travel Service* (1978), and *Hawaiian Holiday Tours* (1978) -- the Antitrust Division has determined that the core provisions of the judgments merely prohibit acts that are per se illegal under the antitrust laws, specifically price fixing. These terms amount to little more than an admonition

that the defendants shall not violate the law. Absent such terms, defendants still in business which engage in the type of behavior prohibited by this judgment still face the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation, thereby making such violations of the antitrust laws unlikely to occur. To the extent the judgments include terms that do little to deter anticompetitive acts, the judgments serve no purpose and thus should be terminated.

3. The Terms of the Decree Have Expired

In *First Hawaiian Bank* (1969), the terms of the decree prohibited the defendant from merging, acquiring or holding any of the stock, assets or accounts of any trust company or commercial bank with a trust department for a period of ten years. This prohibition expired in 1979. Accordingly, the judgment in *First Hawaiian Bank* should be terminated because there is no longer any substantive requirement that remains in force.

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 judgments. 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, D.C.,

and Alexandria, Virginia.[7] On August 27, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[8] The notice identified each case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgments in any of the above-captioned cases.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgments in each of the above-captioned cases is appropriate, and respectfully requests that the Court enter an order terminating them. A proposed order terminating the judgments shall be submitted electronically to the Court.

Dated: April 9, 2019, at Honolulu, Hawaii.

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[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/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[8] https://www.justice.gov/atr/judgment-termination-initiative-hawaii-district, link titled "View Judgments Proposed for Termination in Hawaii, District of."