IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE: TERMINATION OF LEGACY ANTITRUST JUDGMENTS IN THE MIDDLE DISTRICT OF TENNESSEE	Civil Action No. _____
UNITED STATES OF AMERICA, Plaintiff, v. JELLICO MOUNTAIN COAL & COKE COMPANY, *et al.*, Defendants.	Civil Action No. 2820
UNITED STATES OF AMERICA, Plaintiff, v. CRESCENT AMUSEMENT COMPANY, INC., *et al.*, Defendants.	Civil Action No. 54
UNITED STATES OF AMERICA, Plaintiff, v. GENERAL SHOE CORPORATION, Defendant.	Civil Action No. 2001

UNITED STATES OF AMERICA,
Plaintiff,

v.

THIRD NATIONAL BANK IN NASHVILLE, *et al.*,
Defendants.

Civil Action No. 3849

UNITED STATES OF AMERICA,
Plaintiff,

v.

BLUE BELL, INC., *et al.*,
Defendants.

Civil Action No. 7004

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

The United States respectfully submits this memorandum in support of its motion to terminate five legacy antitrust judgments. The Court entered these judgments in cases brought by the United States between 1891 and 1976; thus, these judgments are between forty-two and one hundred twenty-seven years old. After examining each judgment—and after soliciting public comments 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 violations of the antitrust laws, nearly all of these judgments likely have been rendered obsolete by changed circumstances.

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

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[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.

[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.

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 the United States is following to determine whether to move to terminate a perpetual antitrust judgment is as follows:

- 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 moves this Court to terminate them.

The United States followed this process for each judgment it seeks to terminate by this motion[4].

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[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) (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. Jan. 2, 2019) (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).

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 United States seeks to terminate. Appendix B summarizes the terms of each judgment and the United States' reasons for seeking termination. The United States is also filing a Proposed Order Terminating Final Judgments.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction to terminate the judgments in the above-captioned cases. A copy of each of the judgments is attached in Appendix A. Three of the judgments expressly provide that the Court retains jurisdiction. Although two of the judgments do not explicitly state the Court retains jurisdiction, it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct. *See United States v. Swift & Company*, 286 U.S. 106, 114-15 (1932).

Moreover, the Court's inherent authority to terminate a judgment it has issued is now encompassed in the Federal Rules of Civil Procedure. 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); *accord East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) ("Federal Rule 60(b)(5) gives a court discretion to relieve a party from a final judgment if 'the judgment has been satisfied, released or discharged; it is based on an earlier

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judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.' Fed.R.Civ.P. 60(b)(5)."

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

It is appropriate to terminate the perpetual judgments in each the above-captioned 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 these judgments, including that defendants likely no longer exist, terms of the judgment merely prohibit that which the antitrust laws already prohibit, or changed market conditions likely have rendered the judgment ineffectual. 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

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[5] In light of the circumstances surrounding the five Tennessee judgments which are the subject of this motion, 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). All of these judgments would have terminated long ago if the Antitrust Division had 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 their entry, as described in this memorandum, means that the judgments likely no longer serve their original purpose of protecting competition.

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) most defendants likely no longer exist, (2) the judgment largely prohibits that which the antitrust laws already prohibit, and (3) market conditions likely have changed. Each of these reasons suggests the judgments no longer serve to protect competition. In this section, we describe these additional reasons, and we identify those judgments that are worthy of termination for each reason. Appendix B summarizes the key terms of each judgment and the reasons to terminate it.

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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.

1. Most Defendants Likely No Longer Exist

The judgment in *Jellico Mountain Coal and Coke Co., et al.*, Civil Action No. 2820, was entered in 1891. Fifteen of the sixteen corporate defendants appear to no longer exist from a search of corporate records with the Tennessee Secretary of State's office. None of the thirty-eight individual defendants is still living. To the extent that defendants no longer exist, the related judgment serves no purpose, which is a reason to terminate this judgment.

2. Terms of Judgment Prohibit Acts Already Prohibited by Law

The Antitrust Division has determined that the core provisions of the judgments in the following cases merely prohibit acts that are illegal under the antitrust laws, such as price fixing and acquisitions in which the effect may be substantially to lessen competition:

- *Jellico Mountain Coal and Coke Co., et al.*, Civil Action No. 2820 (prohibiting price fixing),
- *General Shoe Corporation*, Civil Action No. 2001 (acquisitions substantially likely to lessen competition),
- *Third National Bank in Nashville, et al.*, Civil Action No. 3849 (acquisition substantially likely to lessen competition), and
- *Blue Bell, Inc., et al.*, Civil Action No. 7004 (acquisition substantially likely to lessen competition).

These terms amount to little more than an admonition that defendants shall not violate the law. To the extent these judgments include terms that do little to deter anticompetitive acts, they serve no purpose and there is reason to terminate them.

3. Market Conditions Likely Have Changed

The Department has determined that the following judgment concerns markets that likely now face different competitive forces such that the behavior at issue likely no longer is of competitive concern:

- *Crescent Amusement Co., et al.*, Civil Action No. 54 (concerning attempted monopolization in the exhibition of motion picture films).

This judgment is seventy-six years old, and none of the defendant theatre companies exists as a theatre circuit today. Because the remaining movie distributor defendants were enjoined from undertaking certain licensing practices with the now defunct theatre companies, the decree no longer has any force as to the movie distributor defendants remaining in existence. The remaining provisions of the decree requiring divestitures and prohibiting certain individuals from serving as directors were long ago satisfied, so the decree no longer has any operable provisions.

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 May 4, 2018, the Antitrust Division described its Judgment Termination Initiative in a statement published in the Federal Register[8]. On October 19, 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[9]. The notice identified each case, linked to the judgment, and invited public comment for a period of 30 days. The Division received no comments concerning the judgments in any of the above-captioned cases.

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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] 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.

[9] https://www.justice.gov/atr/JudgmentTermination, link titled "View Judgments Proposed for Termination in Tennessee, Middle District."

Given the public notice provided through the Federal Register and the Antitrust Division's website, as well as the age of the judgments and the likelihood that many of the individual and corporate defendants are either deceased or defunct, the United States has not attempted any additional service of this Motion.

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.

Respectfully submitted,

DONALD Q. COCHRAN
United States Attorney
Middle District of Tennessee

By: M. Wildasin

MARK H. WILDASIN (B.P.R. # 015082)
Assistant United States Attorney
Middle District of Tennessee
110 Ninth Avenue, South, Suite A-961
Nashville, TN 37203
Phone: (615) 736-5151
Email: mark.wildasin@usdoj.gov

By: Barry L. Creech w/permission by MHW.

BARRY L. CREECH (D.C. Bar # 421070)
Trial Attorney
Antitrust Division
United States Department of Justice
450 Fifth St., NW; Suite 4042
Washington, DC 20530
Phone: (202) 307-2110
Email: barry.creech@usdoj.gov

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