

**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED PAPERS, INC., *et al.*,

Defendants.

Civil Action No.: 3563

**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 above-captioned legacy antitrust judgment. The Court entered this judgment in a case brought by the United States in 1963; thus, the judgment is fifty-six years old. After examining the judgment—and after soliciting public comments on the proposed termination—the United States has concluded that termination of this judgment 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 violations of the Sherman 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. Originally intended to protect the loss of competition arising from violations of the antitrust laws, none of these judgments likely continue to do so because of 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 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 is as follows:

- The Antitrust Division reviewed the judgment and determined that it no longer serves to protect competition such that termination would be appropriate.
- 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 now moves this Court to terminate it.

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

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the judgment. Section III summarizes the judgment. This section 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 additional reasons why the United States

⁴ The United States followed this process to move other district courts to terminate legacy antitrust judgments. *See, e.g., 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).

believes the judgment should be terminated. Appendix A attaches a copy of the final judgment that the United States seeks to terminate. Finally, Appendix B is a Proposed Order Terminating Final Judgment.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING JUDGMENTS

This Court has jurisdiction and authority to terminate the judgment in the above-captioned case. Section XII of the judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. The Federal Rules of Civil Procedure also 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); *accord Margoles v. Johns*, 798 F.2d 1069, 1072-73 (7th Cir. 1986) (“Rule 60(b) allows a district court to relieve a party from a final judgment for the reasons specified in subsections (1) through (5). In addition, subsection (6) provides that the court may grant a motion under Rule 60(b) for ‘any other reason justifying relief.’”). Given its jurisdiction and its authority, the Court may terminate this 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.

⁵ In light of the circumstances surrounding the judgment 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 the judgment to terminate it under Fed. R. Civ. P. 60(b)(5) or (b)(6). This judgment would have terminated long ago if the Antitrust Division had the foresight to limit it to ten years in duration as under its policy adopted in 1979. Moreover, the passage of decades and changed circumstance since its entry, as described in this memorandum, means that it is likely that the judgment no longer serves its original purpose of protecting competition.

III. ARGUMENT

Under the provisions of the 1963 judgment in the above-captioned case, buyers of pulpwood were prohibited from (a) conspiring to fix prices for purchase or sale of pulpwood, (b) exchanging information as to inventories or prices, (c) soliciting assistance or information from another defendant or consumer of pulpwood in an attempt to restrain the purchase of pulpwood or using a common purchasing agent, and (d) furnishing inventory information to any association unless it agreed not to release the information other than in the form of aggregate data. In 1964, the judgment was modified to add an additional provision prohibiting defendants from sponsoring, participating in, or attending any meeting attended by any other consumer of pulpwood at which prices, quantity, or consumption of pulpwood would be discussed.

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 it no longer protects competition. Other reasons, however, also weigh in favor of terminating this judgment, including that terms of the judgment merely prohibit that which the antitrust laws already prohibit. Under such circumstances, the Court may terminate this judgment 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 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 the above-captioned matter—which is over five decades old—presumptively should be terminated for the reason 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, the fact that the judgment largely prohibits that which the antitrust laws already prohibit merits its termination. The Antitrust Division has determined that the core provisions of the judgment prohibit acts that are already illegal under the antitrust laws. As noted earlier, the judgment in this case prohibited buyers of pulpwood from (a) conspiring to fix prices paid for pulpwood, (b) exchanging information as to inventories or prices, (c) soliciting assistance or information from another defendant or consumer of pulpwood in an attempt to restrain the purchase of pulpwood or using a common purchasing agent, and (d) furnishing inventory information to any association unless it agreed not to release the information other than in the form of aggregate data. In 1964, the judgment was modified to add an additional

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

provision prohibiting defendants from sponsoring, participating in, or attending any meeting attended by any other consumer of pulpwood at which prices, quantity, or consumption of pulpwood would be discussed.

These terms amount to little more than an admonition that defendants shall not violate the law. Absent such terms, defendants who 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. To the extent this judgment includes terms that do little to deter anticompetitive acts, it serves no purpose, and there is reason to terminate it.

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, 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 August 24, 2018, the Antitrust Division listed the judgment in the above-captioned case for the Western District of Wisconsin on its public website, describing its intent to move to

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 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>.

terminate this judgment.⁹ The notice identified the case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgment in this case.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment in the above-captioned case is appropriate, and respectfully requests that the Court enter an order terminating it. *See* Appendix B, which is a proposed order terminating the judgment.

Dated: April 23, 2019

/s/ Barry L. Creech

Barry L. Creech (DC Bar No. 421070)
Trial Attorney
Antitrust Division
United States Department of Justice
450 Fifth St, NW; Suite 4042
Washington, DC 20530
Phone: (202) 307-2110
Fax: (202) 307-5802
Email: barry.creech@usdoj.gov

⁹ <https://www.justice.gov/atr/JudgmentTermination>, link titled “View Judgments Proposed for Termination in Wisconsin, Western District.”