

FILED: US
DISTRICT COURT CLERK
WESTERN DISTRICT OF KY

19 APR 17 PM 3: 58

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

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN AIR FILTER COMPANY,
INC.; METAL TEXTILE CORPORATION;
WILLIAM M. REED; ANDERS JORDAHL;
and RUSSELL B. KINGMAN,
Defendants.

Civil Action No. 574

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE OWENSBORO NATIONAL BANK;
M. JACKSON MITCHELL; RAYMOND A.
ALEXANDER; and EDWARD E. CURTIS,
Defendants.

Civil Action No. 2529

UNITED STATES OF AMERICA,
Plaintiff,

v.

CLARK MECHANICAL CONTRACTORS,
INC.; HUSSUNG MECHANICAL
CONTRACTORS, INC.; PAUL JEANES,
JR. PLUMBING, INC.; KOENIG
CORPORATION; RAYMOND M. MEYER
COMPANY, INC.; JAMES E. SMITH &
SONS, INC.; COLEMAN L. WALTRIP CO.,
INC.; and WARD ENGINEERING
COMPANY, INC.,
Defendants.

Civil No. 7264

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAIRYMEN, INC.,
Defendant.

Civil Action No. 7634-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

WHITTENBERG ENGINEERING &
CONSTRUCTION CO.; F. W. OWENS &
ASSOCIATES, INC.; GARST-RECEVEUR
CONSTRUCTION CO.; STRUCK, INC.;
SULLIVAN & COZART, INC.; COUPE
CONSTRUCTION CO.; PLATOFF
CONSTRUCTION CO., INC.; ALE
BORNSTEIN, INC.; HAYS & NICOULIN,
INC.; E. L. NOE & SONS, INC.; and W. C.
SCHICKLI CONSTRUCTION CO., INC.,
Defendants.

Civil Action No. C 75-0380L(A)

UNITED STATES OF AMERICA,
Plaintiff,

v.

OWENSBORO RIVER SAND & GRAVEL
CO., INC. and TRANSIT-MIX CONCRETE
CO.,
Defendants.

Civil Action No. 77-0110-0(G)

UNITED STATES OF AMERICA,
Plaintiff,

v.

READY ELECTRIC CO., INC.;
HENDERSON ELECTRIC CO., INC.;
MARINE ELECTRIC CO., INC.;
BORNSTEIN ELECTRIC CO., INC.;
UNITED ELECTRIC CO., INC.; JOE H.
HAYES ELECTRICAL CO., INC.; LINK
ELECTRIC CO., INC.; WALTER B.
DIECKS ELECTRIC CO.; MITTEL
ELECTRIC CO., INC.; MIDDLETOWN
ELECTRIC CO.; and BENTLEY ELECTRIC
CO., INC.,

Defendants.

Civil No. C75-0196L (A) ✓

UNITED STATES OF AMERICA,
Plaintiff,

v.

STEWART MECHANICAL
ENTERPRISES, INC.,
Defendant.

Civil No. C75-0377L(A) ✓

UNITED STATES OF AMERICA,
Plaintiff,

v.

HALL CONTRACTING CORPORATION;
DIXIE CONSTRUCTION CORPORATION;
MIMS PIPELINE CONSTRUCTION
COMPANY, INC.; and BUTLER
PIPELINES, INC.,

Defendants.

Civil No. C 78-0063 L (B) ✓

UNITED STATES OF AMERICA,
Plaintiff,

v.

UNITED PIPELINE CONSTRUCTION CO.;
HALL CONTRACTING CORPORATION;
and BUTLER PIPELINES, INC.,
Defendants.

Civil No. C 78-0064 L (B)

**THE UNITED STATES' MOTION TO
TERMINATE LEGACY ANTITRUST JUDGMENTS**

The United States moves to terminate the judgments in each of the above-captioned antitrust cases pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The United States has concluded that because of their age and changed circumstances since their entry, these judgments—which were entered between thirty-three and seventy-two years ago—no longer serve to protect competition. The United States gave the public notice and the opportunity to comment on its intent to seek termination of the judgments; it received no comments opposing termination. For these and other reasons explained below, the United States requests that these judgments be terminated.

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

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.

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 continues 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 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.⁴

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 *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination> (last updated Apr. 12, 2019).

⁴ The United States followed this process to move several other district courts to terminate legacy antitrust judgments. See *United States v. Am. Column & Lumber Co.*, Case 2:19-mc-00011 (W.D. Tenn. Mar. 28, 2019) (terminating eight judgments); *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination> (last updated Apr. 12, 2019) (collecting similar orders from at least fourteen other Districts).

In brief, the process by which the United States has identified judgments it believes should be terminated 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.
- Following review of public comments, the Antitrust Division identified those judgments it still believed warranted termination, and the United States moves 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. The section also describes the additional reasons that the United States believes each of the judgments should be terminated. Section IV concludes. Exhibit A attaches a copy of each final judgment that the United States seeks to terminate. Exhibit B summarizes the terms of each judgment and the United States' reasons for seeking termination. Finally, Exhibit C is a proposed order terminating the final 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 Exhibit A, provides that the Court retains jurisdiction.⁵

⁵ *United States v. Am. Air Filter Co.*, Civil Action No. 574, Section VII (W.D. Ky. Sept. 10, 1946); *United States v. The Owensboro Nat'l Bank*, Civil Action No. 2529, Section VI (W.D. Ky. Feb. 2, 1972); *United States v.*

In addition, 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); *accord 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”); *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 938 (6th Cir. 2013) (explaining that “Rule 60(b)(5) . . . covers changed circumstances”).

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.⁶ 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

Clark Mech. Contractors, Inc., Civil No. 7264, Section XI (W.D. Ky. Sept. 13, 1973); *United States v. Dairymen, Inc.*, Civil Action No. 7634-A, at 5–6 (W.D. Ky. Oct. 26, 1983); *United States v. Whittenberg Eng’g & Constr. Co.*, Civil Action No. C 75-0380L(A), Section X (W.D. Ky. Nov. 15, 1978); *United States v. Owensboro River Sand & Gravel Co.*, Civil Action No. 77-0110-0(G), Section X (W.D. Ky. Jan. 25, 1979); *United States v. Ready Elec. Co.*, Civil No. C75-0196L (A), Section X (W.D. Ky. July 20, 1979); *United States v. Stewart Mech. Enters., Inc.*, Civil No. C75-0377L(A), Section X (W.D. Ky. July 20, 1979); *United States v. Hall Contracting Corp.*, Civil No. C 78-0063 L (B), Section X (W.D. Ky. Sept. 11, 1979); *United States v. United Pipeline Constr. Co.*, Civil No. C 78-0064 L (B), Section X (W.D. Ky. Sept. 11, 1979).

⁶ 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). All of 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.

alone suggests they no longer protect competition. Other reasons, however, also weigh in favor of terminating these judgments, including that the defendants likely no longer exist and terms of the judgment merely prohibit that which 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.⁷

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.

⁷ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

B. The Judgments Should Be Terminated Because They Are Unnecessary

In addition to age, other reasons weigh heavily in favor of terminating 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) the judgment concerns expired patents. Each of these reasons suggests the judgments no longer serve to protect competition. In this section, this motion describes these additional reasons and identifies those judgments that are worthy of termination for each reason. Exhibit B summarizes the key terms of each judgment and the reasons to terminate it.

1. Most Defendants Likely No Longer Exist

The Antitrust Division believes that most of, if not all, the defendants in *United States v. The Owensboro National Bank*, Civil Action No. 2529, likely no longer exist. The judgment applies to three individuals. With the passage of nearly forty-seven years, these defendants have likely passed away or at least retired. To that extent, the judgment serves no purpose.

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 fixing prices, dividing markets, and rigging bids:

- *United States v. Clark Mech. Contractors, Inc.*, Civil No. 7264 (fixing prices, allocating markets, and rigging bids);
- *United States v. Whittenberg Engineering & Construction Co.*, Civil Action No. C 75-0380L(A) (rigging bids);
- *United States v. Owensboro River Sand & Gravel Co.*, Civil Action No. 77-0110-0(G) (fixing prices);
- *United States v. Ready Elec. Co.*, Civil No. C75-0196L (A) (rigging bids);
- *United States v. Stewart Mech. Enterprises, Inc.*, Civil No. C75-0377L(A) (rigging bids);
- *United States v. Hall Contracting Corp.*, Civil No. C 78-0063 L (B) (rigging bids);
- *United States v. United Pipeline Constr. Co.*, Civil No. C 78-0064 L (B) (rigging bids).

These terms amount to little more than an admonition that defendants must not violate the law. Absent such terms, defendants who engage in the type of behavior prohibited by these judgments 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 these judgments include terms that do little to deter anticompetitive acts, they serve no purpose and there is reason to terminate them.

3. Terms of the Judgment Concern Expired Patents

Finally, the oldest judgment, that in *American Air Filter Co.*, Civil Action No. 574 (W.D. Ky. Sept. 10, 1946), should be terminated because it concerns expired patents. For example, the judgment prohibit suits for damages or royalties, alleged to have accrued prior to the judgment, on specified air-filter patents. In addition, the judgment required certain patents to be dedicated to the public, and a license to use certain other patents to be granted to any applicant at a reasonable royalty. Given the time that has elapsed since entry of the judgment, any relevant patents would have expired long ago. As a result, the judgment has become obsolete, which justifies its termination.

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.⁸ A few months later, the Antitrust Division listed the judgments in the above-captioned cases on its public website,

⁸ Press Release, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments*, U.S. DEP'T OF JUSTICE (April 25, 2018), <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

describing its intent to move to terminate the judgments.⁹ The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

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 in the above-captioned cases is attached as Exhibit C.

Respectfully submitted,

Dated: April 15, 2019

A handwritten signature in blue ink, appearing to read "R. Cameron Gower", is written over a horizontal line.

R. Cameron Gower (NY Bar No. 5229943)
United States Department of Justice
Antitrust Division
450 Fifth Street NW, Suite 7100
Washington, DC 20530
Telephone: (202) 286-0159
Email: richard.gower@usdoj.gov

⁹ *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination> (last updated Apr. 12, 2019); *Judgment Termination Initiative: Kentucky, Western District*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/judgment-termination-initiative-kentucky-western-district> (last updated Oct. 23, 2018).