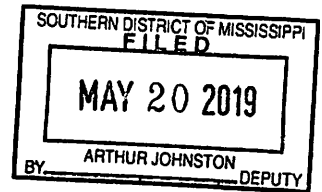


UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION



UNITED STATES OF AMERICA,
Plaintiff,

v.

DEPOSIT GUARANTY NATIONAL BANK
OF JACKSON, ET AL.,

Defendants;

Civ. No. 4311

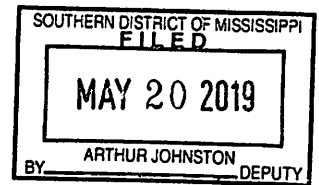
CWR-LRA

UNITED STATES OF AMERICA,
Plaintiff,

v.

SMITH'S BAKERY, INC., ET AL.,

Defendants.



Civ. No. S77-0107

CWR-LRA

**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 two legacy antitrust judgments. The Court entered these judgments in 1969 and 1978, respectively; thus, they are each more than forty 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 company 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 of its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative in a statement published in the Federal Register.² In addition,

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 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>.

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 is examining each judgment to ensure that it is suitable for termination. The Antitrust Division is giving the public notice of—and the opportunity to comment on—its intention to seek termination of its perpetual 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 reviews each perpetual judgment to determine whether it no longer serves to protect competition such that termination would be appropriate.
- If the Antitrust Division determines a judgment is suitable for termination, it posts the name of the case and the judgment on its public Judgment Termination Initiative website, <https://www.justice.gov/atr/JudgmentTermination>.
- The public has the opportunity to comment on each proposed termination within thirty days of the date the case name and judgment are posted to the public website.
- Following review of public comments, the Antitrust Division determines whether the judgment still warrants termination; if so, the United States moves to terminate it.

The United States followed this process for each 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 judgments in the above-captioned cases and the applicable

³ *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination>.

⁴ The United States followed this process to move other district courts to terminate legacy antitrust judgments. To date, at least 15 courts have granted motions to terminate legacy antitrust judgments. *See, e.g., United States v. Kahn's Bakery, Inc., et al.*, Civ. No. EP-75-CA-106 (W.D. Tex. Mar. 26, 2019) (terminating one legacy antitrust judgment); *United States v. Martin Linen Supply Co.*, Civ. No. SA-19-MC-121-XR (W.D. Tex. Mar. 4, 2019) (terminating one legacy antitrust judgment); *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. 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).

legal standards. 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 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 Appendix A, provides that the Court retains jurisdiction. 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); *see also Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008) (“A Rule 60(b)(5) motion is the appropriate vehicle for modifying a permanent injunction that has prospective effect, regardless of whether the modification expands restrictions or eliminates restrictions in the injunction.”); *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 608 (5th Cir. 1963) (Rule 60(b)(6) “must mean to make available those grounds which equity has long recognized as a basis for relief.”) (citation 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.

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

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 the substantive prohibitions have expired, terms of the judgment merely prohibit that which the antitrust laws already prohibit, and 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 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. 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

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.

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

The judgments in the above-captioned matters—each 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.

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.

It is appropriate to terminate the perpetual judgment in *United States v. Deposit Guaranty National Bank of Jackson* because the core terms of the judgment have lapsed. In that matter, the United States challenged a proposed merger between Deposit Guaranty National Bank of Jackson, Mississippi, and City Bank and Trust Company of Natchez, Mississippi. The United States and the defendant agreed to settle the matter, and the court's 1969 consent decree provided that the merged bank would not enter into any additional mergers with any Mississippi commercial banks for a period of ten years without the United States' approval.⁷ See Appendix A. That term expired in December 1979.⁸ Termination of the judgment therefore is a housekeeping action: it will allow the Court to clear its docket of a judgment that should have been terminated long ago but for the failure to include a term automatically terminating it upon satisfaction of its terms.

It is appropriate to terminate the perpetual judgment in *United States v. Smith's Bakery, Inc.* because it prohibits acts that the antitrust laws already prohibit and because a core term of the judgment has lapsed. In that matter, the United States alleged that three commercial bakeries

⁷ In 1973, Deposit Guaranty sought to merge with another commercial bank located in Mississippi without the United States' consent, despite the existence of the ten-year "no merger" provision established by the 1969 consent decree. The Court allowed the merger to proceed, concluding that the consent decree contained a "built in exception" allowing a merger with a "small or foothold bank," "notwithstanding its literal language to the contrary." See Appendix A; *United States v. Deposit Guar. Nat'l Bank of Jackson*, 373 F. Supp. 1230, 1240-41 (S.D. Miss. 1974). In reaching this conclusion, however, the Court declined to vacate the 1969 judgment. *Id.*

⁸ The Deposit Guaranty consent decree also contained inspection and compliance provisions that were complementary to the ten-year merger prohibition. See Appendix A.

had engaged in a conspiracy to fix prices concerning the sale of bakery products. The Court's 1978 consent decree prohibited the defendants from fixing prices, rigging bids, coordinating on production, or allocating markets. These prohibitions amount to little more than an admonition that defendants must not violate the law. Absent such terms, defendants still are deterred from violating the law by the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation; a mere admonition to not violate the law adds little additional deterrence. To the extent a judgment includes terms that do little to deter anticompetitive acts, it should be terminated.

The *Smith's Bakery* decree also prohibited exchanges of information among the bakeries and others regarding prices or bid quotations for a period of 10 years. See Appendix A. That term expired in 1988.

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.⁹ On June 29, 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.¹⁰ 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.

⁹ 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>.

¹⁰ *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination>; *Judgment Termination Initiative: Southern District of Mississippi*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/judgment-termination-initiative-mississippi-southern-district> (last updated Oct. 2, 2018).

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 this judgment is attached as Appendix B.

Dated: May 20, 2019

Don P. Amlin (DC Bar No. 978349)
Trial Attorney
Antitrust Division
United States Department of Justice
450 Fifth St, NW; Suite 8010
Washington, DC 20530
Phone: (202) 598-8180
Email: don.amlin@usdoj.gov

D. MICHAEL HURST, JR.
United States Attorney

KRISTI H. JOHNSON (MS Bar No. 10289)
Assistant United States Attorney
501 E. Court Street – Suite 4.430
Jackson, Mississippi 39201
Phone: 601-973-2887 (direct)
Fax: 601-965-4409
E-Mail: Kristi.Johnson2@usdoj.gov