UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FILED
MAY 24 2019
Clerk, U.S. District Court
Greensboro, NC
BY

UNITED STATES OF AMERICA, Plaintiff, v. WACHOVIA BANK AND TRUST CO., N.A., Defendant.	19MC28 Civil No. C-135-WS-71

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 a legacy antitrust judgment. The Court entered this judgment in 1972 in a case brought by the United States; thus, it is nearly forty-seven years old. After examining the judgment—and after soliciting public comment on its proposed termination—the United States has concluded that termination of the judgment is appropriate. Termination will permit the Court to clear its docket, the Department to clear its records, and Defendant to clear its 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

[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.

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 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 to ensure that it is suitable for termination. The

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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.

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 the above-captioned case should be terminated was as follows:[4]

- The Antitrust Division reviewed the judgment and determined that, for reasons explained in this memo, it was a candidate for termination.
- 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 moves this Court to terminate.

The remainder of this memorandum is organized as follows: Section II provides a summary of the legacy judgment. Section III describes the Court's jurisdiction to terminate the judgment. Section IV 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 additional reasons that the United States believes the judgment should be terminated. Section V concludes. Appendix A attaches a copy of the final judgment that the United States seeks to terminate. Appendix B is a Proposed Order Terminating Final Judgment.

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[4] The United States followed this process to move several dozen 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); and *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

II. THE JUDGMENT

The judgment in this case arose from a complaint charging the Defendant with violating Section 1 of the Sherman Act. The judgment enjoined Defendant Wachovia Bank and Trust Company N.A. from, among other things, entering into any agreement limiting or restricting the number, location or use by any third person of night depositories, branch banking offices or other banking facilities in a shopping center. It also required the Defendant within thirty days of entry of the judgment to release in writing any other person with whom it had a similar agreement.

III. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment. Section VI of the judgment provides that the Court retains jurisdiction. The Federal Rules of Civil Procedure grant the Court authority to terminate the judgment. Rule 60(b)(5) and (b)(6) provide 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 Thompson v. U.S. Dep't. of Housing & Urban Dev.*, 404 F.3d 821, 826 (4th Cir. 2005) (noting that the court's inherent authority to modify a consent decree is encompassed in Rule 60(b)(5) and that the standard for modification is a flexible one).

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

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[5] In light of the circumstances surrounding the judgment, 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). The 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 circumstances 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.

IV. ARGUMENT

It is appropriate to terminate the perpetual judgment in the above-captioned 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 also weigh in favor of terminating the judgment, including that key terms of the judgment have been satisfied, or changed market conditions likely have rendered the judgment unnecessary. Under such circumstances, the Court may terminate the 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 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]

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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.

The decades-old judgment in the above captioned case 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 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, other reasons weigh heavily in favor of terminating the judgment. These reasons include: (1) key terms of the judgment have been satisfied, and (2) market conditions likely have changed rendering it unnecessary.

1. Key Terms of Judgment Have Been Satisfied

The Antitrust Division has determined that key terms of the judgment have been satisfied such that termination is appropriate. Section IV of the judgment required the Defendant to release any person with which it had an agreement limiting the number of commercial banks that could establish banking offices, night depositories, or other banking facilities at a shopping center. These obligations were satisfied long ago.

2. Market Conditions Likely Have Changed

The Antitrust Division has determined that the judgment concerns a market which now faces different competitive forces such that the judgment no longer is necessary. The judgment is nearly forty-seven years old, and substantial changes in banking during the decades since its entry likely have rendered it unnecessary. The judgment was entered before (1) deregulation of the banking sector, and (2) the advent of online banking (which includes online/mobile check deposits). Market dynamics appear to have changed so substantially that the factual conditions that underlay the decision to enter the judgment no longer exists.

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, DC, and Alexandria, Virginia.[7] On July 13, 2018, the Antitrust Division listed the above-captioned judgment on its public website, describing its intent to move to terminate it.[8] The notice identified this case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgment.

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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/north-carolina-middle-district, link titled "View Judgments Proposed for Termination in North Carolina, Middle District of."

V. 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. A proposed order terminating the judgment is attached. *See* Appendix B.

Respectfully submitted,

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Dated: May 24, 2019

APPENDIX A:

FINAL JUDGMENT

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil No. C-135-WS-71
	)	Entered: September 5, 1972
WACHOVIA BANK AND TRUST COMPANY, N.A., Defendant.	)	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint herein on June 22, 1971 and the plaintiff and the defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party hereto with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby;

ORDERED, ADJUDGED and DECREED, as follows:

I

This Court has jurisdiction of the subject matter of this action and of the parties hereto under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Sec. 4), commonly known as the Sherman Act, and the Complaint states a claim upon which relief may be granted against the defendant under Section 1 of said Act (15 U.S.C. Sec. 1), as amended.

II

For purposes of this Final Judgment:

(A) Defendant shall mean Wachovia Bank and Trust Company, N.A.;

(B) Shopping center shall mean a tract or parcel of land on which is constructed one or more buildings primarily designed to provide space for the operation of multiple retail and service establishments and which also contains an enclosed mall providing convenient access to customers of some or all such establishments;

(C) Holly Hill Realty shall mean the real estate developer of Holly Hill Mall Shopping Center, Alamance County, North Carolina;

(D) Night depository shall mean an assemblage usually consisting of a metal dropbox and a vault used by banks for collecting customer deposits;

(E) Person shall mean any individual, corporation, partnership, association, firm, or any other business or legal entity.

III

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its officers, directors, agents, and employees and to each of its subsidiaries, successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

(A) Defendant is enjoined and restrained from entering into, adhering to, enforcing, maintaining or claiming any rights under any provision of any contract, agreement, arrangement or understanding with any person which limits or restricts the number, location or use of night depositories, branch banking offices or other banking facilities in a shopping center by any third person.

(B) Defendant has heretofore by letter of July 8, 1971, fully released Holly Hill Realty from those terms and provisions of its lease agreement which limited or restricted the number of commercial banks which may establish branch banking offices, night depositories, or other banking facilities in Holly Hill Shopping Center, and Defendant is ordered and directed within thirty (30) days from the date of entry of this Final Judgment similarly to release in writing any other person with whom Wachovia has a similar agreement relating to a shopping center, and to notify the plaintiff as to the fact and manner of compliance herewith.

V

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, shall be permitted, subject to

any legally recognized claim of privilege, (a) access during the office hours of said defendant to such books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession, custody or control of said defendant which relate to any matters contained in this Final Judgment, and (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding such matters.

Upon the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing to the Department of Justice with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Paragraph V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party, for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VI

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying

out of this Final Judgment, for the modification of any of the provisions contained herein, for the enforcement of compliance therewith, and the punishment of any violation of any of the provisions contained herein.

DATED: September 5, 1972.

/s/ HIRAM H. WARD
United States District Judge

APPENDIX B:

PROPOSED ORDER TERMINATING FINAL JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. WACHOVIA BANK AND TRUST CO., N.A., Defendant.	Civil No. C-135-WS-71

[PROPOSED] ORDER TERMINATING FINAL JUDGMENT

The Court having received the motion of plaintiff United States of America for termination of the final judgment entered in this case, and the Court having considered all papers filed in connection with this motion, and the Court finding that it is appropriate to terminate the final judgment, it is

ORDERED, ADJUDGED, AND DECREED:

That said final judgment is hereby terminated.

Dated: _____

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United States District Judge
Middle District of North Carolina