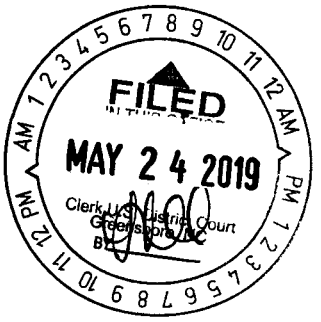

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONTAINER CORP. OF AMERICA, ET AL.,

Defendants.

19MC27

Civil No. C180-G63

C-180-G-63

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 1970 in a case brought by the United States; thus, it is forty-nine 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 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

[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 a violation 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 Defendants with violating Section 1 of the Sherman Act in connection with the exchange of information for corrugated containers. The judgment enjoined Defendants from, among other things, (1) for ten years from entry of the judgment, exchanging information regarding the most recent prices charged or quoted for sales of corrugated containers shipped from the Southeastern United States; (2) exchanging information regarding prices for the purpose or with the effect of restraining competition in the price of corrugated containers; (3) discussing with any manufacturer of corrugated containers the fact that prices for an identified customer will be or have been changed for the purpose of inviting compatible pricing practices or otherwise stabilizing prices, or minimizing or restraining competition in price; and (4) distributing to any manufacturer of corrugated containers price lists or similar pricing material used in computing prices for corrugated containers unless such has been made generally available to customers of the Defendants.

III. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment, a copy of which is attached in Appendix A. Section VII 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.

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. 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

[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.

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 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, the judgment should be terminated because its key terms have been satisfied. Section IV.A of the judgment required the Defendants to discontinue, for ten years from entry of the judgment, exchanging information regarding prices for corrugated containers shipped in the Southeastern United States. These obligations were satisfied long ago.

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

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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.

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.

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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Antitrust Division
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Dated: May 24, 2019

[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."

APPENDIX A:

FINAL JUDGMENT

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Container Corp. of America, et al., U.S. District Court, M.D. North Carolina, 1970 Trade Cases ¶73,091, (Feb. 6, 1970)

Click to open document in a browser

United States v. Container Corp. of America, et al.

1970 Trade Cases ¶73,091. U.S. District Court, M.D. North Carolina. Civil Action No. C 180 G63. Filed February 6, 1970. Case No. 1759 in the Antitrust Division of the Department of Justice.

Sherman Act

Exchange of Information—Specific Sales to Identified Customers—Judgment.—Cardboard box manufacturers were prohibited by a litigated judgment from exchanging information about prices or conditions of sale. Specifically, the firms may not exchange information as to specific sales to identified customers (most recent price charged or quoted) for the purpose or with the effect of stabilizing prices, minimizing price reductions, restraining competition in price, or inviting compatible or harmonious pricing practices.

For the plaintiff: William L. Osteen, U. S. Atty., Greensboro, N. C, and Lewis Bernstein, Atty., Dept. of Justice, Washington, D. C.

For the defendants: Ralph M. Stockton, Jr., of Hudson, Ferrell, Petree, Stockton, Stockton and Robinson, Winston-Salem, N. C., for Container Corp. of America; Charles F. Blanchard, of Yarborough, Blanchard & Tucker, Raleigh, N. C, for Miller Container Corp. and Albemarle Paper Mfg. Co.; W. P. Sandridge, Jr. and W. F. Womble, of Womble, Carlyle, Sandridge & Rice, Winston-Salem, N. C, for Carolina Container Co.; W. C. Harris, Jr., of Holding, Harris, Poe & Cheshire, Raleigh, N. C, for Continental Can Co., Inc.; Charles T. Hagan, Jr., Greensboro, N. C, for Crown Zellerbach Corp.; John W. Hardy, of Douglas, Ravenel, Josey & Hardy, Greensboro, N. C, for Dixie Container Corp. of N. C; McNeill Smith, of Smith, Moore, Smith, Schell & Hunter, Greensboro, N. C, for Inland Container Corp.; Arthur O. Cooke, of Cooke & Cooke, Greensboro, N. C, for International Paper Co.; Richard L. Wharton, of Wharton, Ivey & Wharton, Greensboro, N. C, for The Mead Corp.; Welch Jordan and William D. Caffrey, of Jordan, Wright, Henson & Nichols, Greensboro, N. C, for Owens-Illinois Glass Co.; Winfield Blackwell, of Blackwell, Blackwell, Canady & Eller, Winston-Salem, N. C, for St. Joe Paper Co.; Norman Block and A. L. Meyland, of Block, Meyland & Lloyd, Greensboro, N. C, for St. Regis Paper Co.; D. Newton Farnell, Jr., Greensboro, N. C, for Tri-State Container Corp.; Thornton Brooks, of McLendon, Brim, Holderness & Brooks, Greensboro, N. C, for Union Bag-Camp Pulp & Paper Co.; Armistead W. Sapp, Jr., Greensboro, N. C, for West Virginia Pulp & Paper Co.; Fred B. Helms, of Helms, Mulliss, McMillan & Johnston, Charlotte, N. C, for Weyerhaeuser Co.; John W. Hardy, of Douglas. Ravenel, Josey & Hardy, Greensboro, N. C, for Dixie Container Corp.

Final Judgment

STANLEY, D. J.: This cause was regularly brought on for trial on January 26, 1966, and this Court having entered its opinion, findings and conclusions, and Final Judgment on August 31, 1967 dismissing the complaint, an appeal having been taken to the Supreme Court of the United States and the Supreme Court having entered its opinion on January 14, 1969 and issued its mandate on that date reversing and remanding the cause for further proceedings in conformity with its opinion;

Now, Therefore, it is hereby;

Ordered, Adjudged and Decreed as follows:

I

The conduct of the defendants in furnishing to one another, upon request, information as to the most recent price charged or quoted to specific customers on specific orders in the circumstances in this case constituted a

combination in restraint of trade in violation of Section 1 of the Act of Congress of July 2, 1890, (15 U. S. C., § 1) entitled "An act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Corrugated containers" shall mean any and all kinds of shipping containers made of corrugated container board;

(B)"Person" shall mean any individual, partnership, corporation, association or other legal or business entity;

(C) "Southeastern United States" shall mean that area of the United States consisting of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, and Kentucky.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents and employees, 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; *provided, however*, that this Final Judgment shall not apply to transactions or communications solely between a defendant and its officers, directors, employees, parent company and subsidiaries, companies under common ownership or control, or between or among any of them, or to transactions which occur outside of the United States and which do not affect the commerce of the United States.

IV

[*Exchange of Price Information*]

All of the defendants except Albermarle Paper Company are jointly and severally enjoined and restrained from:

(A) For sales of corrugated containers shipped from the Southeastern United States, and for a period of ten (10) years from the date of entry of this Final Judgment, furnishing to, or requesting from, any other manufacturer or seller of corrugated containers the most recent price charged or quoted, or the price to be charged or quoted to an identified customer or identified potential customer with respect to a specific order for particular corrugated containers, whether communicated in the form of a specific price or information from which such specific price may be computed;

(B) Furnishing to, or requesting from any other manufacturer or seller of corrugated containers the most recent price charged or quoted or the price to be charged to an identified customer or identified potential purchaser with respect to a specific order for particular corrugated containers, whether communicated in the form of a specific price or information from which such specific price may be computed, for the purpose or with the effect of stabilizing prices, minimizing price reductions or otherwise restraining competition in price of corrugated containers;

(C) Discussing with any manufacturer or competing seller of corrugated containers the fact that the prices most recently charged or quoted to an identified customer will be or have been changed, or the reasons therefor, for the purpose or with the effect of inviting compatible or harmonious pricing practices or otherwise stabilizing prices, or minimizing or restraining competition in price;

(D) Distributing to any manufacturer of corrugated containers any pricing manual, price lists, or similar pricing material of any kind which has been used or is to be used in computing prices charged or to be charged for corrugated containers unless such has been made generally available to customers of the defendant to which such pricing material is applicable.

V

[*Bona Fide Transactions*]

In connection with proposed or actual bona fide purchases from or sales to a manufacturer or seller of corrugated containers, nothing contained in this Final Judgment shall apply to a defendant's negotiations, arrangements or communications (a) with that manufacturer or seller or with any agent, broker, distributor or representative of such manufacturer or seller or (b) with any agent, broker, distributor, or representative of such defendant.

VI

[*Compliance & Inspection*]

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 any defendant, made to its principal office shall be permitted, subject to any legally recognized claim of privilege, (a) reasonable access during the office hours of said defendant to those parts of the 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 such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing 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 Section VI 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.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violations thereof.

VIII

[*Costs*]

The defendants shall pay the appropriate taxable costs herein.

APPENDIX B:

PROPOSED ORDER TERMINATING FINAL JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. CONTAINER CORP. OF AMERICA, ET AL., Defendants.	Civil No. C180-G63

[PROPOSED] ORDER TERMINATING FINAL JUDGMENTS

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: _____

_____
United States District Judge
Middle District of North Carolina