UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE: TERMINATION OF ANTITRUST JUDGMENTS

Civ. No. _____

UNITED STATES OF AMERICA,
Plaintiff,

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., *et al,*
Defendants;

Civil Action No. 297
Date entered: 8/6/1915

UNITED STATES OF AMERICA,
Plaintiff,

v.

KLAXON CO.,
Defendant;

Civil Action No. 2005
Date entered: 12/3/1918

UNITED STATES OF AMERICA,
Plaintiff,

v.

SCHERING CORP., *et al.*,
Defendants;

Civil Action No. 1919
Date entered: 12/17/1941

UNITED STATES OF AMERICA,
Plaintiff,

v.

SWISS BANK CORP.,
Defendant;

Civil Action No. 1920
Date entered: 12/17/1941

UNITED STATES OF AMERICA, Plaintiff, v. BENDIX AVIATION CORP., Defendant;	Civil Action No. 2531 Date entered: 2/13/1946
UNITED STATES OF AMERICA, Plaintiff, v. U.S. PIPE & FOUNDRY CO., *et al.*, Defendants;	Civil Action No. 10772 Date entered: 7/21/1948
UNITED STATES OF AMERICA, Plaintiff, v. ALLEGHENY LUDLUM STEEL CORP., *et al.*, Defendants;	Civil Action No. 4583 Date entered: 10/25/1948
UNITED STATES OF AMERICA, Plaintiff, v. SAND SPUN PATENTS CORP., *et al.*, Defendants;	Civil Action No. 125-49 Date entered: 7/22/1949

UNITED STATES OF AMERICA, Plaintiff, v. WESTINGHOUSE ELECTRIC AND MANUFACTURING CO., *et al.*, Defendants;	Civil Action No. 5152 Date entered: 6/1/1953
UNITED STATES OF AMERICA, Plaintiff, v. GENERAL INSTRUMENT CORP., *et al.*, Defendants;	Civil Action No. 8586 Date entered: 9/30/1953
UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC CO., *et al.*, Defendants;	Civil Action No. 4575 Date entered: 10/6/1953
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN LEAD PENCIL CO., *et al.*, Defendants;	Civil Action No. 73-54 Date entered: 2/5/1954

UNITED STATES OF AMERICA, Plaintiff, v. THE EMBROIDERY CUTTERS ASS'N, *et al.*, Defendants;	Civil Action No. 889-54 Date entered: 11/12/1954
UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ELECTRICAL CONTRACTORS ASS'N, N.J. CHAPTER, INC., *et al.*, Defendants;	Civil Action No. 575-56 Date entered: 7/13/1956
UNITED STATES OF AMERICA, Plaintiff, v. GARDEN STATE RETAIL GASOLINE DEALERS ASS'N, INC., *et al.*, Defendants;	Civil Action No. 482-55 Date entered: 9/19/1956
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TYPE FOUNDERS CO., INC., Defendant;	Civil Action No. 698-58 Date entered: 6/20/1958

UNITED STATES OF AMERICA, Plaintiff, v. THE GEMEX CORP., Defendant;	Civil Action No. 1350-58 Date entered: 7/31/1959
UNITED STATES OF AMERICA, Plaintiff, v. NEW JERSEY AUTO GLASS DEALER ASS'N, Defendant;	Civil Action No. 575-60 Date entered: 6/29/1960
UNITED STATES OF AMERICA, Plaintiff, v. DRIVER-HARRIS CO., *et al.*, Defendants;	Civil Action No. 942-56 Date entered: 5/25/1961
UNITED STATES OF AMERICA, Plaintiff, v. HUNTERDON COUNTY TRUST CO., *et al.*, Defendants;	Civil Action No. 1100-61 Date entered: 4/16/1962

UNITED STATES OF AMERICA, Plaintiff, v. BECTON, DICKINSON AND CO., Defendant;	Civil Action No. 567-60 Date entered: 7/20/1964
UNITED STATES OF AMERICA, Plaintiff, v. DRIVER-HARRIS CO., *et al.*, Defendants;	Civil Action No. 942-56 Date entered: 8/13/1964
UNITED STATES OF AMERICA, Plaintiff, v. DRIVER-HARRIS CO., *et al.*, Defendants;	Civil Action No. 942-56 Date entered: 12/2/1964
UNITED STATES OF AMERICA, Plaintiff, v. JOHNSON & JOHNSON, Defendant;	Civil Action No. 840-64 Date entered: 4/18/1966

UNITED STATES OF AMERICA, Plaintiff, v. ALUMINIUM LIMITED., *et al.*, Defendants;	Civil Action No. 1174-64 Date entered: 11/4/1966
UNITED STATES OF AMERICA, Plaintiff, v. R.J. REYNOLDS TOBACCO CO., Defendants;	Civil Action No. 345-65 Date entered: 9/22/1969
UNITED STATES OF AMERICA, Plaintiff, v. THE AMERICAN OIL CO., *et al.*, Defendants;	Civil Action No. 370-65 Date entered: 8/12/1971
UNITED STATES OF AMERICA, Plaintiff, v. E.I. DU PONT DE NEMOURS AND CO., *et al.*, Defendants;	Civil Action No. 74-1086 Date entered: 4/18/1977

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN BUILDING MAINTENANCE CORP., *et al.*, Defendants;	Civil Action No. 74-719 Date entered: 10/25/1977

UNITED STATES OF AMERICA, Plaintiff, v. CURTIS CIRCULATION CO., INC., *et al.*, Defendants.	Civil Action No. 611-65 Date entered: 12/15/1977

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 thirty legacy antitrust judgments. The Court entered these judgments in cases brought by the United States between 1915 and 1977. After examining each judgment—and after soliciting public comment 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 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

[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.

[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.

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.

In brief, the process by which the United States has identified judgments it believes should be terminated is as follows:[4]

- 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 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. This section also

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[3] https://www.justice.gov/atr/JudgmentTermination.

[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. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments); *United States v. York Corp.*, Civil Action No. 19-614 (M.D. Pa. Apr. 10, 2019) (terminating one judgment); *United States v. Anthracite Export Ass'n, et al.*, Civil Action No. 19-615 (M.D. Pa. Apr. 10, 2019 (terminating one judgment).

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 summarizes the terms of each judgment and the United States' reasons for seeking termination. Finally, the Antitrust Division respectfully submits a Proposed Order Terminating Final Judgments.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction to terminate the judgments in the above-captioned cases. Most of the judgments, copies of which are included in Appendix A, provide that the Court retains jurisdiction. Jurisdiction was not explicitly retained in two of the judgments,[5] but it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct.[6]

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 Bldg. & Constr. Trades Council v. NLRB,* 64 F.3d 880, 887-88 (3d Cir. 1995) (holding that "the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), *i.e.*, that it is no longer equitable that the judgment should have prospective

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[5] *United States v. Delaware, Lackawanna & Western Railroad Co., et al.,* Case No. 297 (D.N.J. August 6, 1915); *United States v. Klaxon Co.,* Case No. 2005 (D.N.J. December 3, 1918).

[6] *See United States v. Swift & Company*, 286 U.S. 106, 114-15 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.") (citations omitted).

application," and instructing that "equity demands a flexible response to the unique conditions of each case"); *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 273 (3d Cir. 2002) (describing Rule 60(b)(6) as a "catchall provision which allows a court to relieve a party from the effects of an order for any other reason justifying relief from the operation of the judgment.").

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.[7] Termination of these judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in 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 all terms of the judgment have been satisfied, defendants likely no longer exist, terms of the judgment merely prohibit that which the antitrust laws already prohibit, or 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

[7] 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 circumstances 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.

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.[8]

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.

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. These reasons include: (1) all terms of the judgment have been satisfied, (2) most defendants likely no longer exist, (3) the judgment largely prohibits that which the antitrust laws already prohibit, and (4) market conditions likely have changed. Each of these four reasons suggests the judgments no longer serve to protect competition. In this section, we describe these additional reasons, and we identify those judgments that are worthy of termination for each reason. Appendix B summarizes the key terms of each judgment and the reasons to terminate it.

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

1. All Terms of Judgment Have Been Satisfied

The Antitrust Division has determined that the terms of the following judgments have been satisfied:

- *Swiss Bank Corp.*, Civil No. 1920 (entered 1941);
- *Sand Spun Patents Corp., et al.,* Civil No. 125-49 (entered 1949);
- *General Instrument Corp., et al.,* Civil No. 8586 (entered 1953);
- *Aluminum Limited, et al.,* Civil No. 1174-64 (entered 1966, modified 1968);
- *R. J. Reynolds Tobacco Co.*, Civil No. 345-65 (entered 1969).

Termination in these cases is a housekeeping action that has no implication for competition—it will allow the Court to clear its docket of judgments that should have been terminated long ago but for the failure to include a term automatically terminating them upon satisfaction of their substantive terms.

2. Most Defendants Likely No Longer Exist

The Antitrust Division believes that most of the defendants in the following cases brought by the United States likely no longer exist:

- *Delaware, Lackawanna & Western Railroad Co., et al.*, Civil No. 297 (entered 1915);
- *Klaxon Co.*, Civil No. 2005 (entered 1918);
- *Sand Spun Patents Corp., et al.*, Civil No. 125-49 (entered 1949);
- *General Instrument Corp., et al.*, Civil No. 8586 (entered 1953);
- *The Embroidery Cutters Ass'n, et al.*, Civil No., 889-54 (entered 1954);
- *Garden State Retail Gasoline Dealers Ass'n*, Inc. *et al.*, Civil No. 482-55 (entered 1956);
- *American Type Founders Co., Inc., et al.*, Civil No. 698-58 (entered 1958);
- *New Jersey Auto Glass Dealer Ass'n*, Civil No. 575-60 (entered 1960);
- *Curtis Circulation Co., Inc., et al.,* Civil No. 611-65 (entered 1977).

Each of these cases is more than forty-one years old. With the passage of time, the individual defendants in these cases likely have passed away and some firm defendants likely have gone out of existence or been acquired by other firms. To the extent that defendants no

longer exist, the related judgment serves no purpose, which is an additional reason to terminate these judgments.

3. 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 prohibit acts that are illegal under the antitrust laws, such as price fixing, bid rigging and market allocations:

- *Schering Corp., et al.*, Civil No. 1919 (price fixing, market allocation);
- *Bendix Aviation Corp.*, Civil No. 2531 (market allocation);
- *United States Pipe and Foundry Co., et al.*, Civil No. 10772 (price fixing, output restrictions);
- *Allegheny Ludlum Steel Corp., et al.*, Civil No. 4583 (price fixing);
- *Sand Spun Patents Corp., et al.*, Civil No. 125-49 (price fixing, market allocation);
- *Westinghouse Electric & Manufacturing Co., et al.,* Civil No. 5152 (market allocation);
- *General Instrument Corp., et al.*, Civil No. 8586 (price fixing);
- *General Electric Co., et al.,* Civil No. 4575 (market allocation);
- *American Lead Pencil Co. et al.*, Civil No. 73-54 (price fixing, bid rigging);
- *The Embroidery Cutters Ass'n, et al.*, Civil No., 889-54 (price fixing);
- *National Electrical Contractors Ass'n, N.J. Chapter Inc., et al.,* Civil No. 575-56 (price fixing, bid rigging, customer allocation);
- *Garden State Retail Gasoline Dealers Ass'n*, Inc. *et al.*, Civil No. 482-55 (price fixing);
- *American Type Founders Co., Inc., et al.*, Civil No. 698-58 (price fixing, customer allocation;
- *The Gemex Corp.*, Civil No. 1350-58 (price fixing);
- *New Jersey Auto Glass Dealer Ass'n*, Civil No. 575-60 (price fixing);
- *Driver-Harris Co., et al.,* Civil No. 942-56 (Jelliff Manufacturing Corp.) (price fixing, market allocation);
- *Hunterdon County Trust Co., et al.,* Civil No. 1100-61 (price fixing, bid rigging);
- *Driver-Harris Co., et al.,* Civil No. 942-56 (Hoskins Manufacturing) (price fixing, market allocation);
- *Driver-Harris Co., et al.,* Civil No. 942-56 (H.K. Porter Co.) (price fixing, market allocation);
- *The American Oil Co., et al.,* Civil No. 370-65 (price fixing);
- *E.I. du Pont de Nemours and Co., et al*, Civil No. 74-1086 (price fixing, bid rigging);
- *American Building Maintenance Corp., et al,* Civil No. 74-719 (price fixing, bid rigging, customer allocation).

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 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.

4. Market Conditions Likely Have Changed

The Antitrust Division has determined that the following judgments concern products or markets that likely no longer exist, no longer are substantial in size, or now face different competitive forces such that the behavior at issue likely no longer is of competitive concern:

- *Klaxon Co.*, Civil No. 2005 (entered 1918);
- *Schering Corp., et al.*, Civil No. 1919 (entered 1941).

Substantial changes in the markets during the decades since their entry likely significantly altered the companies' positions in the marketplace. For instance, the 1918 *Klaxon* decision regulated, in part, resale price maintenance in the sale of warning signals to automobile accessory jobbers. The *Schering Corp.* judgment was regarding the manufacture of hormones nearly eighty years ago. Market dynamics in these industries appear to have changed so substantially that the factual conditions that underlay the decisions to enter the judgments no longer exist.

5. Other Reasons to Terminate

The following judgments included provisions mandating that defendants grant licenses related to certain patents they held and prohibiting them from using their patents to facilitate illegal conduct:

- *Schering Corp., et al.*, Civil No. 1919;
- *Bendix Aviation Corp.*, Civil No. 2531;
- *United States Pipe and Foundry Co., et al.*, Civil No. 10772;
- *Allegheny Ludlum Steel Corp., et al.*, Civil No. 4583;
- *Sand Spun Patents Corp., et al.*, Civil No. 125-49;
- *Westinghouse Electric & Manufacturing Co., et al.,* Civil No. 5152;
- *General Electric Co., et al.,* Civil No. 4575;
- *Driver-Harris Co., et al.,* Civil No. 942-56 (Jelliff Manufacturing Corp.);
- *Driver-Harris Co., et al.,* Civil No. 942-56 (Hoskins Manufacturing);
- *Driver-Harris Co., et al.,* Civil No. 942-56 (H. K. Porter Co.).

In each case, the relevant patents have expired or the subject licensing agreements have terminated. As a result, the mandatory licensing provisions of, and patents subject to, each judgment have become obsolete, which is another reason to terminate these judgments.

Finally, the following judgments prohibited conduct that might not be illegal today and would likely be reviewed under a rule of reason standard:

- *Delaware, Lackawanna & Western Railroad Co.*, Civil No. 297 (vertical integration);
- *Klaxon Co.*, Civil No. 2005 (vertical resale price maintenance);
- *Becton, Dickinson and Co.,* Civil No. 567-60 (resale price maintenance);
- *Johnson & Johnson,* Civil No. 840-64 (sales conditioned on exclusive dealing).

These judgments are all well past the age where an antitrust judgment presumptively becomes either irrelevant to, or inconsistent with, competition. If the Antitrust Division learns of the defendants engaging in unlawful behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

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, 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.[9] On October 19, 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. In the above-captioned cases, however, the Division received no comments concerning the judgments. Had comments been received, the Division would have reviewed them and considered whether they provided a reason for retaining any of the judgments.

[9] 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.

[10] https://www.justice.gov/atr/JudgmentTermination, link titled "View Judgments Proposed for Termination in District of New Jersey."

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.

DATE: May 30, 2019

Respectfully submitted,

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