UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. NEW DEPARTURE MANUFACTURING COMPANY, *et al.*, Defendants;	Equity No. 48-A
UNITED STATES OF AMERICA, Plaintiff, v. ABRASIVE GRAIN ASSOCIATION, *et al.*, Defendants;	Civil Action No. 3672
UNITED STATES OF AMERICA, Plaintiff, v. SCHINE CHAIN THEATRES, INC., *et al.*, Defendants;	Civil Action No. 223
UNITED STATES OF AMERICA, Plaintiff, v. GENERAL RAILWAY SIGNAL COMPANY, *et al.*, Defendants;	Civil Action No. 5237

UNITED STATES OF AMERICA, Plaintiff, v. THE RUDOLPH WURLITZER COMPANY, Defendant;	Civil Action No. 7337
UNITED STATES OF AMERICA, Plaintiff, v. SCOTT AVIATION CORPORATION, Defendant;	Civil Action No. 84-32
UNITED STATES OF AMERICA, Plaintiff, v. THE GENERAL FIREPROOFING COMPANY, *et al.*, Defendants;	Civil Action No. 8994
UNITED STATES OF AMERICA, Plaintiff, v. SPERRY RAND CORPORATION, *et al.*, Defendants;	Civil Action No. 8995

UNITED STATES OF AMERICA, Plaintiff, v. THE SHAW-WALKER COMPANY, *et al.*, Defendants;	Civil Action No. 8996
UNITED STATES OF AMERICA, Plaintiff, v. GREATER BUFFALO PRESS, INC., *et al.*, Defendants;	Civil Action No. 9004
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN STEAMSHIP COMPANY, *et al.*, Defendants;	Civil Action No. 1970-283
UNITED STATES OF AMERICA, Plaintiff, v. GREATER BUFFALO ROOFING & SHEET METAL CONTRACTORS' ASSOCIATION, INC., Defendant.	Civil Action No. 75-334

UNITED STATES' MOTION AND MEMORANDUM REGARDING TERMINATION OF LEGACY ANTITRUST JUDGMENTS

The United States respectfully submits this motion and memorandum in support of terminating fourteen legacy antitrust judgments. The Court entered these judgments in cases brought by the United States between 1913 and 1977. They are between forty-two and one hundred and six years old. 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

[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 concern violations of these two laws.

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 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.

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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] *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. *See, e.g., United States v. Alden Paper Co., et al.*, Case 1:19-mc-00015-DNH (N.D.N.Y. Apr. 29, 2019) (terminating five judgments); *United States v. County National Bank of Bennington, et al.*, Case No. 5:19-mc-00032-gwc (D. Vt. March 21, 2019) (terminating one 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. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

- 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. 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 summarizes the terms of each judgment and the United States' reasons for seeking termination. Finally, Appendix 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 Appendix A, provides that the Court retains jurisdiction. 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). "[T]he

power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations." *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995).

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.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each of 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 judgments have been satisfied, terms of the judgments merely prohibit that which the antitrust laws already forbid, or changed market conditions likely have rendered the judgments 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. The

[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 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.

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]

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]

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 judgments have been satisfied, (2) the judgments largely prohibit that which the antitrust laws already forbid, (3) market conditions likely have changed, and (4) corporate defendants likely no longer exist and/or individual defendants have likely passed away. Each of the 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 the judgments and the reasons to terminate them.

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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.

[7] The one exception is *United States v. Scott Aviation Corporation*, Civil Action No. 84-32, in which the Government moves for termination of the judgment due to age, only.

1. All Terms of Judgment Have Been Satisfied

The Antitrust Division has determined that the terms of the judgments in the following cases have been satisfied such that termination is appropriate:

- *Schine Chain Theatres, Inc., et al.*, Civil No. 223 (entered 1949, modified 1952);
- *American Steamship Company, et al.*, Civil No. 1970-283 (entered 1970); and
- *Greater Buffalo Press, Inc., et al.*, Civil No. 9004 (Greater Buffalo Press, Inc., International Color Printing Company, Southwest Color Printing Corporation, and Dixie Color Printing Corporation) (entered 1973, modified 1975).

Because the substantive terms of the judgments were either satisfied or have long since expired, these judgments have been satisfied in full. Termination in these cases is a housekeeping action that has no implication for competition: it will allow the Court to clear its docket of several judgments that should have been terminated long ago but for the failure to include a term automatically terminating the judgments upon satisfaction of their substantive terms.

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 price fixing, customer allocations, or group boycotts:

- *New Departure Manufacturing Company, et al.*, Equity No. 48-A (price fixing);
- *Abrasive Grain Association, et al.*, Civil No. 3672 (price fixing);
- *General Railway Signal Company, et al.*, Civil No. 5237 (price fixing, bid rigging, market allocation);
- *The General Fireproofing Company, et al.*, Civil No. 8994 (price fixing, market allocation);
- *Sperry Rand Corporation, et al.*, Civil No. 8995 (Diebold, Inc.) (price fixing, market allocation);
- *Sperry Rand Corporation, et al.*, Civil No. 8995 (Sperry Rand Corporation, The General Fireproofing Company, Steelcase, Inc., and Art Metal, Inc.) (price fixing, market allocation);
- *The Shaw-Walker Company, et al.*, Civil No. 8996 (price fixing);
- *Greater Buffalo Press, Inc., et al.*, Civil No. 9004 (The Hearst Corporation) (price fixing, market allocation); and
- *Greater Buffalo Roofing & Sheet Metal Contractors' Association, Inc.*, Civil No. 75-334 (price fixing).

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.

3. 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:

- *New Departure Manufacturing Company, et al.*, Equity No. 48-A (concerning coaster brakes); and
- *The Rudolph Wurlitzer Company*, Civil No. 7337 (concerning coin-operated phonographs).

The most recent of these judgments is sixty-one years old, and substantial changes in technology during the decades since their entry likely have rendered them obsolete. The *New Departure Manufacturing Company, et al.*, judgment was entered in 1913 and concerns motorcycle brake systems dating from before the First World War. The *Rudolph Wurlitzer Company* judgment was entered in 1958 and concerns coin-operated phonographs, which is a technology that has been supplanted in the sixty-one years since the entry of the consent decree. 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.

4. Defendants Likely No Longer Exist

The Antitrust Division has determined that defendants likely no longer exist in the following judgments:

- *New Departure Manufacturing Company, et al.*, Equity No. 48-A (individual defendants); and
- *Schine Chain Theatres, Inc., et al.*, Civil No. 223 (Schine Chain Theatres).

With the passage of time, company defendants in these actions likely have gone out of existence, and many individual defendants likely have passed away. To the extent that defendants no longer exist, the related judgment serves no purpose and should be terminated.

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.[8] On February 1, 2019, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[9] 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. If comments had been received, then the Division would have reviewed them and considered whether they provided a reason for retaining any of the judgments.

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[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/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

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

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. *See* Appendix C (proposed order terminating the judgments in the above-captioned cases).

Respectfully submitted,

DATE: 5/28/2019

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