

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION**

UNITED STATES OF AMERICA,

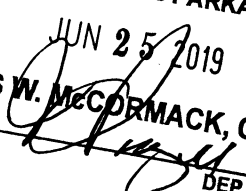
Plaintiff,

v.

BORDEN, INC.; COLEMAN DAIRY, INC.;
AND DEAN FOODS PRODUCTS
COMPANY, INC.,

Defendants.

Civil No. LR-C-77-108

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JUN 25 2019
JAMES W. MCCORMACK, CLERK
By:  DEP CLERK

**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 the legacy antitrust judgment in this case. The Court entered the judgment in 1979; thus, the judgment is nearly forty years old. After examining the judgment—and after soliciting public comment—the United States has concluded that termination of this 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 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, none of these judgments likely continue 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, 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 judgment the United States seeks to terminate with the accompanying motion concerns violations of the Sherman Act.

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 the 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 this judgment.⁴

In brief, the process by which the United States determined that it was appropriate to file its motion seeking to terminate the judgment in the above-captioned case is as follows:⁵

- The Antitrust Division reviewed the judgment to determine whether it no longer serves to protect competition such that termination would be appropriate.
- 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 termination, the United States moves this Court to terminate it.

The remainder of this memorandum is organized as follows: Section II provides a summary of the judgment. Section III describes the Court's jurisdiction to terminate the judgment. Section IV explains that perpetual judgments rarely serve to protect competition and

³ <https://www.justice.gov/atr/JudgmentTermination>.

⁴ Given the extensive notice provided to the public, the lack of public opposition, the age of the judgment, and the relief sought, the United States does not believe that additional service of this motion is necessary.

⁵ The United States followed this process to move several dozen other district courts to terminate legacy antitrust judgments. *See, e.g., In re: Termination of Legacy Antitrust Judgments in the Southern District of Iowa*, Case No. 4:19-mc-00012-JAJ (S.D. Iowa Apr. 8, 2019) (terminating two judgments); *United States v. Armco Drainage & Metal Products, Inc.*, Case No. 3804 (D.N.D. Apr. 9, 2019) (terminating one judgment); *United States v. Ed Phillips & Sons Co., et al.*, No. 8:73-cv-00144-LSC-SMB (D. Neb. Apr. 26, 2019) (terminating four judgments); *United States v. Am. Amusement Ticket Mfrs. Ass'n*, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018) (terminating nineteen judgments).

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 that this judgment should be terminated. Section V concludes. Appendix A attaches a copy of the final judgment. Appendix B is a proposed order terminating the judgment.

II. SUMMARY OF THE LEGACY JUDGMENT

The judgment in this case arose out of a complaint filed on April 27, 1977 alleging that Defendants violated Section 1 of the Sherman Act (15 U.S.C. § 1). The judgment prohibited the defendants from entering into or maintaining any agreement or understanding to raise, fix, or maintain the prices of dairy products produced or marketed in Arkansas or to submit collusive or rigged bids or price quotations to any purchaser of dairy products in Arkansas. Each defendant was further restrained from communicating to or exchanging with any other producer, seller, or distributor of dairy products any prices or other terms or conditions for the sale of dairy products except in communication with bona fide distributors or in connection with a bona fide sales transaction with another dairy. The decree also required compliance audits and reports for five years.

III. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction to terminate the judgments in the above-captioned cases. The judgment, a copy of which is included in Appendix A, provides in Section IX 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); *see Smith v. Bd. of Educ. of Palestine-Wheatley Sch. Dist.*, 769 F.3d 566, 572 (8th Cir. 2014) (“federal

courts of equity [have] substantial flexibility to adapt their decrees to changes in the facts or law”).

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.⁶ Termination of this judgment is warranted.

IV. ARGUMENT

It is appropriate to terminate the perpetual judgment in this 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 that it no longer protects competition. Other reasons, however, also weigh in favor of termination, including that key terms essentially prohibit that which the antitrust laws already prohibit and other terms have been satisfied. 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 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

⁶ 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 to terminate the judgment under Fed. R. Civ. P. 60(b)(5) or (b)(6). This 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 entry of the judgment, 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.⁷

The judgment in this matter—which is nearly four 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 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 termination of the judgment. First, key provisions of the judgment in Section IV essentially prohibit that which the antitrust laws already prohibit. Section IV(A) enjoins each defendant from, among other things, agreeing to fix the prices of dairy products or submitting collusive bids. These provisions prohibit acts that are illegal under the antitrust laws and thus amount to little more than an admonition that defendants shall not violate the law. Absent such terms, defendants who engage in price fixing 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.

Second, other key terms of the judgment have been satisfied. Section VII of the judgment required each defendant for five years following entry of the judgment to conduct an annual

⁷ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

audit of its operations to determine compliance with the judgment and to report the findings of the audit to the Court, to the United States, and to responsible officers of the defendants. These obligations have long since expired.

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, D.C., and Alexandria, Virginia.⁸ On June 15, 2018, the Antitrust Division listed the judgment in this case on its public website, describing its intent to move to terminate the judgment.⁹ The notice identified the case, linked to the judgment, and invited public comment. The Division received no comments concerning this judgment.

⁸ Press Release, Department of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments, (April 25, 2018), <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

⁹ <https://www.justice.gov/atr/judgment-termination-initiative-arkansas-eastern-district>, link titled “View Judgments Proposed for Termination in Arkansas, Eastern District of.”

V. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment in this 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,

Dated: 6.24.2019



RICHARD PENCE
(A.R. Bar # 69059)
Assistant United States Attorney
425 West Capitol Avenue Suite 500
Little Rock, AR 72201
Phone: (501) 340-2626
Email: richard.pence@usdoj.gov



KELLY SCHOOLMEESTER
(D.C. Bar # 1008354)
Trial Attorney
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530
Phone: (202) 514-5807
Email: kelly.schoolmeester@usdoj.gov