

UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF WISCONSIN

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IN RE: TERMINATION OF LEGACY  
ANTITRUST JUDGMENTS IN THE  
EASTERN DISTRICT OF WISCONSIN

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Civil Action No. \_\_\_\_\_

UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 1696

LINE MATERIAL CO., *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 60-C-57

HAMILTON MANUFACTURING  
COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 59-C-163

BRUNSWICK-BALKE-COLLENDER  
COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 62-C-49

HUBBARD AND COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 62-C-206

AMERICAN OPTICAL COMPANY, AN  
ASSOCIATION, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 64-C-86

BAY WEST PAPER COMPANY,  
Defendant.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 67-C-395

NATIONAL FUNERAL DIRECTORS  
ASSOCIATION OF THE UNITED STATES,  
INC.,  
Defendant.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 59-C-215

PABST BREWING COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 71-C-197

WEBSTER ELECTRIC COMPANY, INC.,  
Defendant.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 72-C-211

GREAT LAKES COAL & DOCK  
COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 72-C-210

THE C. REISS COAL COMPANY, *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 74-C-546

NATIONAL BOARD OF FUR FARM  
ORGANIZATIONS, INC., *et al.*,  
Defendants.

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

Civil Action No. 80-C-407

CAPITOL SERVICE, INC., *et al.*,  
Defendants.

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**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 thirteen legacy antitrust judgments. The Court entered these judgments in cases brought by the United States between 1948 and 1983; thus, they are all at least three decades old. After examining each judgment—and after soliciting public comments 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.<sup>1</sup> 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.<sup>2</sup> 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-

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<sup>1</sup> 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.

<sup>2</sup> The judgment *Capitol Service, Inc., et al.*, Civil Action No. 80-C-407, entered in 1983, was one of the few exceptions in which antitrust final judgments entered after 1979 did not have a ten year limit on its terms. For the reasons set forth below, we move that it be terminated along with the other judgments discussed in this memorandum.

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.<sup>3</sup> 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.<sup>4</sup> 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:

- 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>.

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<sup>3</sup> 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>.

<sup>4</sup> <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.
- Having received no comments regarding the above-captioned judgments, the United States moves this Court to terminate them.

The United States followed this process for each judgment it seeks to terminate by this motion.<sup>5</sup>

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. 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, a Proposed Order Terminating Final Judgments is attached.

## **II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS**

This Court has jurisdiction to terminate the judgments in the above-captioned cases. A copy of each of the judgments is attached in Appendix A. Twelve of the thirteen judgments expressly provide that the Court retains jurisdiction. Although one of the judgments does not explicitly state the Court retains jurisdiction,<sup>6</sup> it has long been recognized that courts are vested

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<sup>5</sup> The United States followed this process to move 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); *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

<sup>6</sup> *United States v. Capitol Service, Inc., et al.*, Civ. Act. No. 80-C-407 (1983).

with inherent power to modify judgments they have issued that regulate future conduct.<sup>7</sup> Moreover, the Court's inherent authority to terminate a judgment it has issued is now encompassed in the Federal Rules of Civil Procedure. 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); *accord Margoles v. Johns*, 798 F.2d 1069, 1072-73 (7th Cir. 1986) ("Rule 60(b) allows a district court to relieve a party from a final judgment for the reasons specified in subsections (1) through (5). In addition, subsection (6) provides that the court may grant a motion under Rule 60(b) for 'any other reason justifying relief.'").

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.<sup>8</sup> Termination of these judgments is warranted.

### **III. ARGUMENT**

It is appropriate to terminate the perpetual judgments in each the above-captioned cases because they no longer continue to serve their original purpose of protecting competition. The

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<sup>7</sup> 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.").

<sup>8</sup> 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.

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 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 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.<sup>9</sup>

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

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<sup>9</sup> U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

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) most defendants likely no longer exist, (2) the judgment largely prohibits that which the antitrust laws already prohibit, and (3) market conditions likely have changed. Each of these 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.

1. 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:

- *Hamilton Manufacturing Co., et al.*, Civil Action No. 60-C-57 (judgment entered 1960),
- *Brunswick-Balke-Collender Co., et al.*, Civil Action No. 59-C-163 (judgment entered 1961),
- *Great Lakes Coal and Dock Co., et al.*, Civil Action No. 72-C-211 (judgment entered 1976), and
- *C. Reiss Coal Co., et al.*, Civil Action No. 72-C-210 (judgment entered 1976).

These judgments relate to very old cases brought against corporate defendants. As discussed in more detail in Appendix B, most of the corporate defendants appear to have gone out of existence. To the extent that defendants no longer exist, the related judgment serves no purpose, which is a reason to terminate these judgments.

## 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 or territorial allocations, bid rigging, group boycotts, and acquisitions or mergers in which the effect may be substantially to lessen competition:

- *Line Material Co., et al.*, Civil Action No. 1696 (prohibiting price fixing),
- *Hamilton Manufacturing Co., et al.*, Civil Action No. 60-C-57 (prohibiting price fixing and group boycotts),
- *Brunswick-Balke-Collender Co., et al.*, Civil Action No. 59-C-163 (prohibiting price fixing, bid rigging, and customer allocation),
- *Hubbard and Co., et al.*, Civil Action No. 62-C-49 (prohibiting price fixing and bid rigging),
- *American Optical Co., An Association, et al.*, Civil Action No. 62-C-206 (prohibiting attempted monopolization),
- *National Funeral Directors Association*, Civil Action No. 67-C-395 (prohibiting price fixing),
- *Pabst Brewing Co., et al.*, Civil Action No. 59-C-215 (acquisition substantially likely to lessen competition),
- *Great Lakes Coal and Dock Co, et al.*, Civil Action No. 72-C-211 (prohibiting price fixing, customer allocation, and bid rigging),
- *C. Reiss Coal Co., et al.*, Civil Action No. 72-C-210 (prohibiting price fixing, customer allocation, and bid rigging),
- *National Board of Fur Farm Organizations, et al.*, Civil Action No. 74-C-546 (prohibiting price fixing), and
- *Capitol Service, Inc., et al.*, Civil Action No. 80-C-407 (prohibiting price fixing and market allocation).

These terms amount to little more than an admonition that defendants shall not violate the law. 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 Department has determined that the following judgments concern markets that likely now face different competitive forces such that the behavior at issue likely no longer is of competitive concern:

- *American Optical Co., An Association, et al.*, Civil Action No. 62-C-206 (concerning laboratories and dispensing outlets for the manufacture and sale of eyeglasses),
- *Pabst Brewing Co., et al.*, Civil Action No. 59-C-215 (concerning an unlawful merger),
- *Bay West Paper Co.*, Civil Action No. 64-C-86 (concerning customer and/or territory allocation), and
- *Webster Electric Co.*, Civil Action No. 71-C-197 (concerning customer and/or territory allocation),

The most recent of these judgments is forty-three years old, and substantial changes in each of the industries involved in these judgments likely have rendered them obsolete. In *American Optical Co.* defendant Bausch & Lomb exited the ophthalmic eyeglass business in 1982 and sold or otherwise disposed of its wholesale laboratories involved in this business. In *Pabst Brewing Co.*, some of the beer brands at issue in the judgment no longer exist. For both *Bay West* and *Webster Electric*, the Supreme Court held that the types of customer and territorial distributor restrictions involved are not per se illegal in *Continental TV v. GTE-Sylvania*, 433 U.S. 36 (1977). Moreover, in *Webster Electric*, the defendant appears to have exited the sound equipment industry at issue in the judgment.

In each of the judgments, 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.

### **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.<sup>10</sup> On May 4, 2018, the Antitrust Division described its Judgment Termination Initiative in a statement published in the Federal Register.<sup>11</sup> On August 24, 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.<sup>12</sup> The notice identified each case, linked to the judgment, and invited public comment. During a thirty day comment period, the Division received no public comments concerning the judgments in any of the above-captioned cases.

#### 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. A proposed Order terminating the judgments in the above-captioned cases is attached.

Dated: April 24, 2019

/s/ Barry L. Creech

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<sup>10</sup> Press Release, Department of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments, (April 25, 2018), <https://www.justice.gov/opa/pr/departement-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

<sup>11</sup> 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>.

<sup>12</sup> <https://www.justice.gov/atr/JudgmentTermination>, link titled “View Judgments Proposed for Termination in Wisconsin, Eastern District.”