

**UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF KENTUCKY**

UNITED STATES OF AMERICA,  
Plaintiff,

v.

LEXINGTON TOBACCO BOARD OF  
TRADE,

Defendant;

Civil No. 1310

UNITED STATES OF AMERICA,  
Plaintiff,

v.

FIRST NATIONAL BANK AND TRUST  
COMPANY OF LEXINGTON, ET AL.,

Defendants.

Civil No. Lex. 1424

**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 two legacy antitrust judgments. The Court entered these judgments in 1958 and 1967, respectively; thus, they are each more than fifty years 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. 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.<sup>2</sup> In addition, the Antitrust Division established a website to keep the public apprised of its efforts to terminate

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

- 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.
- Having received no comments regarding the above-captioned judgments, 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

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

<sup>4</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); *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. American Column and Lumber Co., et al.*, Case 2:19-mc-00011-SHM (W.D. Tenn. Mar. 28, 2019) (terminating eight judgments); *United States v. Jellico Mountain & Coke Co., et al.*, Case No. 3:19-mc-00011 (M.D. Tenn. Apr. 17, 2019) (terminating five judgments).

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 is a Proposed Order Terminating Final Judgments. Appendix C is a Certificate of Dissolution that is relevant for the *Lexington Tobacco* matter.

## **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); *see also East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) (“Federal Rule 60(b)(5) gives a court discretion to relieve a party from a final judgment if ‘the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.’ Fed.R.Civ.P. 60(b)(5).”

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>5</sup> Termination of these judgments is warranted.

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<sup>5</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.

### III. ARGUMENT

In the *Lexington Tobacco* matter, the United States alleged that a tobacco board of trade (whose members included tobacco buying companies, partnerships and individuals engaged in the operation of tobacco warehouses) combined and conspired with its members to fix and maintain warehouse fees and warehouse commissions to be charged to tobacco growers, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Court's 1958 consent decree: (1) ordered the tobacco board to cancel any rules inconsistent with the consent decree and refrain from adopting or enforcing any board rule inconsistent with the judgment; (2) mandated that the board amend its bylaws to require the expulsion of any member engaging in activities inconsistent with the judgment; (3) prohibited the board from entering into or enforcing any agreement with a tobacco warehouseman or their agent that would fix, establish or maintain warehouse fees and commissions; and (4) enjoined the board from suggesting or recommending warehouse fees or commissions, and prohibited the board from circulating or using any schedule or price list containing warehouse fees or commissions. The consent decree also imposed on the board certain notice requirements, as well as inspection and compliance obligations. *See* Appendix A.

In the *First National Bank* matter, the United States alleged that the proposed merger between First National Bank and Security Trust Company was unlawful under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. The United States and the defendant (the merged entity of the two merging banks) ultimately agreed to settle the matter following a complicated procedural history that included a Supreme Court decision.<sup>6</sup> The Court's 1967 consent decree

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<sup>6</sup> After a bench trial, the district court held that the merger did not violate either Section 1 or Section 2 of the Sherman Act. *United States v. First Nat. Bank & Tr. Co. of Lexington*, 208 F. Supp. 457 (E.D. Ky. 1962), *rev'd*, 376 U.S. 665 (1964). On direct appeal to the Supreme Court, the Court held that the merger violated Section 1, but did not reach the question whether the merger violated Section 2. *United States v. First Nat. Bank & Tr. Co. of*

enjoined the combined company from: (1) acquiring or merging with any other commercial bank in Fayette County for ten years, (2) establishing any additional branches in Fayette County for five years, and (3) “acting as trustee or custodian of any [new] non-testamentary trust” (excluding for employees/directors/officers of the defendant) for ten years. The Court modified the consent decree in 1971 to allow an additional exception for the defendant to be a trustee or custodian for a new non-testamentary trust for spouses of directors of the defendant. *See* Appendix A.

It is appropriate to terminate the judgments in each 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 some of the defendants likely no longer exist, terms of the decree have expired, and terms of the judgment merely prohibit that which the antitrust laws already prohibit. 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

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*Lexington*, 376 U.S. 665, 673 (1964). Subsequently, Congress passed a statute effectively overturning this ruling (and other similar rulings that would unwind other consummated bank mergers). Public Law 89-356, 80 Stat. 7, Sec. 2(a). However, the statute seemed to leave open the possibility that the merger at issue could be unwound if it violated Section 2 of the Sherman Act. *See id.* On remand, however, the district court declined to overrule the prior district court decision finding (prior to the Supreme Court's review) that the merger did not violate Section 2. *United States v. First Nat. Bank & Tr. Co. of Lexington*, 263 F. Supp. 268, 269-71 (E.D. Ky. 1967). The United States filed a notice of appeal with the Supreme Court, but the parties settled the case before the Supreme Court ruled again.

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>7</sup>

The judgments in the above-captioned matters—each 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) defendants likely no longer exist, (2) the judgment largely prohibits that which the antitrust laws already prohibit, and (3) the terms of the decree have expired. Each of these reasons suggests the judgments no longer serve to protect competition. In this section, we describe these additional reasons

##### **1. Some Defendants Likely No Longer Exist**

In the *Lexington Tobacco* matter, the sole defendant in the matter (the Lexington Tobacco Board of Trade) was administratively dissolved by the Kentucky Secretary of State in 2009. *See*

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

Appendix C. Accordingly, the related judgment serves no purpose, and should be terminated for that reason alone.

2. Terms of Judgment Prohibit Acts Already Prohibited by Law

In the *Lexington Tobacco* matter, the Antitrust Division has determined that the core provisions of the judgments in the cases at issue merely prohibit acts that are per se illegal under the antitrust laws, specifically price fixing of tobacco warehouse fees and commissions. These terms amount to little more than an admonition that the defendant shall not violate the law. Absent such terms, defendants who engage in the type of behavior prohibited by this judgment still face the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation. To the extent this judgment includes terms that do little to deter anticompetitive acts, the judgment serves no purpose and thus should be terminated.

3. The Terms of the Decree Have Expired

In the *First National Bank* matter, the terms of the decree prohibited the defendant from opening additional branches in the Fayette County for five years, prohibited the defendant from entering into any banking acquisitions in Fayette County for ten years, and prohibited the defendant from acting in a trustee or custodian role for certain trusts for ten years. These prohibitions expired in 1972 and 1977, respectively. Accordingly, the judgment in the First National Bank matter should be terminated because there is no longer any substantive requirement that remains in force.

**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

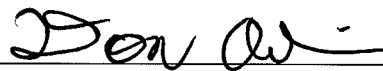


would begin its efforts by proposing to terminate judgments entered by the federal district courts in Washington, D.C., and Alexandria, Virginia.<sup>8</sup> On July 27, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.<sup>9</sup> The notice identified each case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgments in either 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. *See* Appendix B, which is a proposed order terminating the judgments in the above-captioned cases.

Dated: June 21, 2019



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<sup>8</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/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

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