UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

IN RE: TERMINATION OF LEGACY ANTITRUST JUDGMENTS IN THE EASTERN DISTRICT OF MICHIGAN	No.
UNITED STATES OF AMERICA, Plaintiff, v. THE MASTER HORSESHOER'S NATIONAL PROTECTIVE ASS'N OF AMERICA, *et al*., Defendants;	Equity No. 5565
UNITED STATES OF AMERICA, Plaintiff, v. KRENTLER-ARNOLD HINGE LAST CO., Defendant;	Equity No. 2

UNITED STATES OF AMERICA, Plaintiff, v. KELLOGG TOASTED CORN FLAKE CO., *et al*., Defendants;	Equity No. 5570
UNITED STATES OF AMERICA, Plaintiff, v. EDWARD E. HARTWICK, *et al*., Defendants;	Equity No. 4121
UNITED STATES OF AMERICA, Plaintiff, v. DETROIT TILE CONTRACTORS' ASS'N, *et al*., Defendants;	Civil No. 1962
UNITED STATES OF AMERICA, Plaintiff, v. BROOKER ENGINEERING CO., *et al*., Defendants;	Civil Action No. 3146

UNITED STATES OF AMERICA, Plaintiff, v. WHOLESALE WASTE PAPER CO., *et al*., Defendants;	Civil Action No. 3234
UNITED STATES OF AMERICA, Plaintiff, v. PARKER RUST-PROOF CO., *et al*., Defendants;	Civil Action No. 3653
UNITED STATES OF AMERICA, Plaintiff, v. TIMKEN-DETROIT AXLE CO., Defendant;	Civil Action No. 5642
UNITED STATES OF AMERICA, Plaintiff, v. UNIVERSAL BUTTON FASTENING AND BUTTON CO., Defendant;	Civil Action No. 5860

UNITED STATES OF AMERICA, Plaintiff, v. BESSER MANUFACTURING CO., *et al*., Defendants;	Civil Action No. 8144
UNITED STATES OF AMERICA, Plaintiff, v. BRIGGS MANUFACTURING CO., *et al*., Defendants;	Civil Action No. 8398
UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL AUTOMOTIVE PARTS ASS'N, *et al*., Defendants;	Civil Action No. 9559

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL MILLS, INC., *et al*., Defendants;	Civil Action No. 10669
UNITED STATES OF AMERICA, Plaintiff, v. DETROIT SHEET METAL AND ROOFING CONTRACTORS ASS'N, *et al*., Defendants;	Civil Action No. 12433
UNITED STATES OF AMERICA, Plaintiff, v. R.L. POLK & CO., *et al*., Defendants;	Civil Action No. 13135
UNITED STATES OF AMERICA, Plaintiff, v. MICHIGAN TOOL CO., *et al*., Defendants;	Civil Action No. 12605

UNITED STATES OF AMERICA, Plaintiff, v. THE CINCINNATI MILLING MACHINE CO., *et al*., Defendants;	Civil Action No. 13401
UNITED STATES OF AMERICA, Plaintiff, v. SCOTT PAPER CO., *et al*., Defendants;	Civil Action No. 32049
UNITED STATES OF AMERICA, Plaintiff, v. FORD MOTOR CO., *et al*., Defendants;	Civil Action No. 21911
UNITED STATES OF AMERICA, Plaintiff, v. G. HEILEMAN BREWING CO., *et al*., Defendants;	Civil Action No. 38162

UNITED STATES OF AMERICA, Plaintiff, v. MICHIGAN NATIONAL CORP., *et al.*, Defendants;	Civil Action No. 4-70667
UNITED STATES OF AMERICA, Plaintiff, v. BEATRICE FOODS CO., *et al.*, Defendants;	Civil Action No. 4-71922
UNITED STATES OF AMERICA, Plaintiff, v. ARROW OVERALL SUPPLY CO., *et al.*, Defendants;	Civil Action No. 571167
UNITED STATES OF AMERICA, Plaintiff, v. NU-PHONICS, INC., *et al.*, Defendants.	Civil Action No. 671378

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

The United States moves to terminate the judgments in each of the above-captioned antitrust cases pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The judgments were entered by this Court between 40 and 101 years ago. The United States has concluded that because of their age and changed circumstances since their entry, these judgments no longer serve to protect competition. The United States gave the public notice and the opportunity to comment on its intent to seek termination of the judgments; it received no comments. For these and other reasons explained below, the United States requests that the judgments be terminated.

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

[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 one or both of these laws.

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 company 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 continues to do so because of changed circumstances.

The Antitrust Division has implemented a program to review and, when appropriate, seek termination of legacy judgments. The Antitrust Division's Judgment Termination Initiative encompasses review of all 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

[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 is examining each judgment to ensure that it is suitable for termination. The Antitrust Division is giving the public notice of—and the opportunity to comment on—its intention to seek termination of its perpetual judgments.[4]

In brief, the process the United States is following to determine whether to move to terminate a perpetual antitrust judgment is as follows:

- The Antitrust Division reviews each perpetual judgment to determine whether it no longer serves to protect competition such that termination would be appropriate.

- If the Antitrust Division determines a judgment is suitable for termination, it posts the name of the case and the judgment on its public Judgment Termination Initiative website, https://www.justice.gov/atr/JudgmentTermination.

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[3] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, 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.

- The public has the opportunity to comment on each proposed termination within thirty days of the date the case name and judgment are posted to the public website.

- Following review of public comments, the Antitrust Division determines whether the judgment still warrants termination; if so, the United States moves to terminate it.

The United States followed this process for each judgment it seeks to terminate by this motion.[5]

The remainder of this motion is organized as follows: Section II describes the Court's jurisdiction to terminate the judgments in the above-captioned cases and the applicable legal standards for terminating the judgments. Section III explains that perpetual judgments rarely serve to protect competition and that those that are more than ten years old presumptively should be terminated. Section III

[5] The United States followed this process to move several dozen other district courts to terminate legacy antitrust judgments. *See, e.g.*, *United States v. Jellico Mtn. Coal & Coke Co.*, Case No. 3:19-mc-00011 (M.D. Tenn. Apr. 16, 2019) (terminating five judgments); *United States v. Am. Column and Lumber Co.*, Case No. 2:19-mc-00011-SHM (W.D. Tenn. Mar. 28, 2019) (terminating eight judgments); *United States v. Am. Amusement Ticket Mfrs. Ass'n*, Case No. 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); and *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

also presents factual support for termination of each judgment. Section IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate. Finally, Appendix B summarizes the key terms of the judgments and the reasons to terminate them.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. The judgments in twenty-two of the above-captioned cases provide that the Court retains jurisdiction. Jurisdiction was not explicitly retained in three above-captioned cases,[6] but it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct.[7] In addition, the Federal Rules of Civil Procedure grant the Court

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[6] *United States v. The Master Horseshoer's National Protective Ass'n of America, et al.*; *United States v. Kellogg Toasted Corn Flake Co., et al.*; and *United States v. Hartwick et al.*

[7] *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); *see also Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1145–46 (6th Cir. 1997) (explaining that the "injunctive quality" of consent decrees "requires courts to . . .

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.'") (citation omitted); *West v. Carpenter*, 790 F.3d 693, 696 (6th Cir. 2015) ("Federal Rule 60(b)(6) is a catchall provision that provides for relief from a final judgment for any reason justifying relief not captured in other provisions of Rule 60(b).") (citation omitted). Thus, the Court may terminate each judgment for any reason that justifies relief, including that the judgment no longer serves its original purpose of protecting competition.[8] Termination of these

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retain jurisdiction over the decree during the term of its existence") (citations and quotations omitted).

[8] 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

judgments is warranted. *See United States v. Continental Grain Co.*, No. 1:70-CV-6733, 2019 WL 2323875 (E.D. Tex. May 30, 2019) (granting termination of antitrust judgment under Rule 60(b)(5)).

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each the above-captioned cases because they no longer 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 them. 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. These considerations, among others, led the Antitrust Division in 1979 to establish its

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likely that the judgments no longer serve their original purpose of protecting competition.

policy of generally including in each judgment a term automatically terminating the judgment after no more than ten years.[9] 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.

B. The Judgments Should Be Terminated Because They Are Unnecessary

In addition to age, other reasons weigh heavily in favor of terminating each judgment. These reasons include: (1) many 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) most defendants likely no longer exist. 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.

1. Many terms of the judgments have been satisfied

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

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

- *United States v. Ford Motor Co., et al.*, Civil Action No. 21911 (entered 1970, modified 1974);
- *United States v. G. Heileman Brewing Co., et al.*, Civil Action No. 38162 (entered 1973);
- *United States v. Michigan National Corp., et al.*, Civil Action No. 4-70667 (entered 1976).

In these cases, termination of the judgment is largely a housekeeping action: it will allow the Court to clear its docket of a judgment that should have been terminated long ago but for the failure to include a term automatically terminating it upon satisfaction of its core 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 fixing prices, allocating markets, or rigging bids:

- *United States v. Brooker Engineering Co., et al.*, Civil Action No. 3146 (bid rigging);
- *United States v. National Automotive Parts Ass'n, et al.*, Civil Action No. 9559 (price fixing, market allocation);
- *United States v. General Mills, Inc., et al.*, Civil Action No. 10669 (price fixing, market allocation);

- *United States v. Michigan Tool Co., et al.*, Civil Action No. 12605 (market allocation, price fixing);
- *United States v. Beatrice Foods Co., et al.*, Civil Action No. 4-71922 (price fixing);
- *United States v. Arrow Overall Supply Co., et al.*, Civil Action No. 571167 (price fixing, customer allocation);
- *United States v. Nu-Phonics, Inc., et al.*, Civil Action No. 671378 (price fixing, customer allocation).

These prohibitions amount to little more than an admonition that defendants must not violate the law. Absent such terms, defendants still are deterred from violating the law by the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation; a mere admonition to not violate the law adds little additional deterrence. To the extent a judgment includes terms that do little to deter anticompetitive acts, it should be terminated.

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:

- *United States v. The Master Horseshoer's National Protective Ass'n of America, et al.*, Equity No. 5565 (concerning horseshoes);
- *United States v. Parker Rust-Proof Co., et al.*, Civil Action No. 3653 (concerning likely expired patents);
- *United States v. Timken-Detroit Axle Co.*, Civil Action No. 5642 (concerning likely expired patents);
- *United States v. Universal Button Fastening and Button Co.*, Civil Action No. 5860 (concerning likely expired patents);
- *United States v. Besser Manufacturing Co., et al.*, Civil Action. No. 8144 (concerning likely expired patents);
- *United States v. Michigan Tool Co., et al.*, Civil Action No. 12605 (concerning likely expired patents);
- *The Cincinnati Milling Machine Co., et al.*, Civil Action No. 13401 (concerning likely expired patents);
- *United States v. Scott Paper Co., et al.*, Civil Action No. 32049 (concerning likely expired patents).

The most recent of these judgments is forty-nine years old, and substantial changes in technology during the decades since their entry likely have rendered them obsolete. The *Master Horseshoer's National Protective Ass'n* judgments concern horseshoes from the horse-and-buggy era. The *Parker Rust-Proof*,

Timken-Detroit Axle, *Universal Button Fastening and Button*, *Besser Manufacturing*, *Michigan Tool*, *Cincinnati Milling Machine*, and *Scott Paper* judgments all concern patents that have almost certainly expired. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2407 (2015) ("[A] patent typically expires 20 years from the day the application was filed."). Market dynamics in the industries at issue in these judgments appear to have changed so substantially that the factual conditions that underlay the decisions to enter the judgments no longer exist.

4. Most defendants likely no longer exist

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

- *United States v. Krentler-Arnold Hinge Last Co.*, Equity No. 2 (Krentler-Arnold Hinge Last Co.);
- *United States v. Hartwick, et al.*, Equity No. 4121 (individual defendants);
- *United States v. Detroit Tile Contractors' Ass'n, et al.*, Civil No. 1962 (individual defendants);
- *United States v. Brooker Engineering Co., et al.*, Civil Action No. 3146 (individual defendants);

- *United States v. Wholesale Waste Paper Co.*, et al., Civil Action No. 3234 (Wholesale Waste Paper Co.);
- *United States v. Universal Button Fastening and Button Co.*, Civil Action No. 5860 (Universal Button Fastening and Button Co.);
- *United States v. Detroit Sheet Metal and Roofing Contractors Ass'n, Inc., et al.*, Civil Action No. 12433 (Detroit Sheet Metal and Roofing Contractors Ass'n, Inc. and individual defendants);
- *United States v. R.L. Polk & Co., et al.*, Civil Action No. 13135 (H.A. Manning Co.; The Price & Lee Co.; C.B. Page Directory Co.);
- *United States v. Nu-Phonics, Inc., et al.*, Civil Action No. 671378 (Nu-Phonics, Inc.; Eastside Hearing Aid Center, Inc.; Daniel F. Bifano, d/b/a Cadillac Hearing Aid & Optical Co.; Murray Davis Peppard, d/b/a Dearborn Hearing Aid Center; Allan M. Kazel, d/b/a Metro Hearing Aid Center; Ferndale Hearing Aid Center, Inc.; Lucas, Inc.; William T. Lafler, d/b/a Oakland County Hearing Aid Service).

With the passage of time, many of the 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.[10] On November 2, 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.[11] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

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 will be submitted pursuant to local e-filing rules.

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[10] 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.

[11] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Michigan, Eastern District*, U.S. DEP'T OF JUSTICE, https:// https://www.justice.gov/atr/judgment-termination-initiative-michigan-eastern-district (last updated Nov. 2, 2018).

Respectfully submitted,

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