IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN RE: TERMINATION OF LEGACY ANTITRUST JUDGMENT IN THE DISTRICT OF COLORADO	No.
UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ALFALFA DEHYDRATING AND MILLING CO., *et al.*, Defendants.	Civil No. 6111

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE UNITED STATES TO TERMINATE LEGACY ANTITRUST JUDGMENT

The United States moves to terminate the judgment in the above-captioned case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In separate filings, the United States also seeks to terminate nine other legacy antitrust judgments.[1] The memorandum of law supporting each of the ten motions to terminate a legacy antitrust judgment is identical across the ten filings.

The Court entered these ten legacy antitrust judgments in cases brought by the United States between 1917 and 1972; thus, these judgments are between forty-seven and 102 years old.

[1] The nine other legacy antitrust judgments are: *The Colorado and Wyoming Lumber Dealers' Ass'n*, In Equity No. 5749 (1917), *U.S. v. The Cement Securities Company*, In Equity No. 7295 (1924), *U.S. v. Retail Lumbermen's Ass'n*, Civil No. 378 (1941), *U.S. v. W.C. Bell Services, Inc.*, Civil No. 380 (1941), *U.S. v. Nat'l Retail Lumber Dealers Ass'n*, Civil No. 406 (1942), *U.S. v. Ideal Cement Co.*, Civil No. 415 (1942), *U.S. v. Band-It Co.*, Civil No. 7796 (1963), *U.S. v. El Paso Natural Gas Co.*, Civil No. C-2626 (1971), *U.S. v. Metro Denver Concrete Ass'n*, Civil No. C-2478 (1972).

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.[2] 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, such as the ten at issue here, 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 corporate 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 are no longer necessary to protect competition.

[2] 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.

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.[3] 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.[4] 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 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.
- 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 now moves to terminate it.

[3] 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.

[4] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination.

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

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the ten judgments. Section III explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old presumptively should be terminated. 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.[6] Finally, Appendix C is a proposed order terminating the final judgment in the above captioned case.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction to terminate the ten judgments. All but one of the judgments provide that the Court retains jurisdiction. Jurisdiction was not explicitly retained in one[7] of the ten legacy antitrust judgments, but it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct.[8] In

---

[5] The United States followed this process to move several other district courts to terminate legacy antitrust judgments. To date, at least ten courts have granted motions to terminate legacy antitrust judgments. *See, e.g., In re Termination of Legacy Antitrust Judgments in the District of Utah*, Case No. 2:19-mc-00219-DAK (D. Utah April 4, 2019) (terminating five judgments); *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. Dec. 17, 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).

[6] Appendix A and Appendix B is identical for all ten of the legacy antitrust filings.

[7] *U.S. v. Colorado and Wyoming Lumber Dealers' Ass'n*, In Equity No. 5749 (D. Colo. Dec. 29, 1917).

[8] *See United States v. Swift & Co.*, 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 David C. v. Leavitt*, 242 F.3d 1206, 1210

addition, 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); *Zimmerman v. Quinn,* 744 F.2d 81, 82-83 (10th Cir. 1984) (Rule 60(b)(5) "is based on the historic power of a court of equity to modify its decree in light of changed circumstances[]" and Rule 60(b)(6) "permits the lower court to vacate judgment whenever such action is appropriate to accomplish justice.")(quotations and citations omitted). 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.[9] Termination of these judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each of the ten legacy antitrust 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 some of these judgments, including that the terms of the judgment merely

(10th Cir. 2001) ("a court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an agreement by the parties purports to do so.").

[9] 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.

prohibit acts that which the antitrust laws already prohibit.[10] 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 policy of generally including in each judgment a term automatically terminating the judgment after no more than ten years.[11] The ten legacy antitrust judgments—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 termination of each judgment. These reasons include: (1) all requirements of the judgment have been satisfied; and (2) the judgments largely prohibit that which the antitrust laws already prohibit. Each of these reasons suggests the judgments no longer serve to protect competition.

---

[10] Appendix B summarizes the key terms of the judgments and the reasons to terminate them.

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

1. Terms of the Judgment Have Lapsed or Been Satisfied

The Antitrust Division has determined that most of the terms of the judgment in *U.S. v. Ideal Cement Co.*, Civil. No. 415, have lapsed or been satisfied. The judgment required defendants to revoke several contracts within 10 days. In addition, the decree enjoined defendants from entering into certain contracts for two years; that provision has lapsed. Finally, the judgment permanently enjoined several defendants from honoring certain 1940s-era contracts.

The judgment in *US v. National Alfalfa Dehydrating and Milling Company*, Civil No. 6111, required the divestiture of seven alfalfa dehydrating plants. That divestiture took place years ago. In addition, the decree enjoined defendants from acquiring an interest in any entity that produces, markets, or stores dehydrated alfalfa for five years. That provision has lapsed.

2. Terms of Judgments 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 and customer allocation:

- *U.S. v. Colorado and Wyoming Lumber Dealers' Association*, In Equity No. 5749 (prohibiting group boycott and customer allocation);
- *U.S. v. Cement Securities Co.*, In Equity No. 7295 (prohibiting price fixing and market allocation);
- *U.S. v. Retail Lumbermen's Association*, Civil No. 378 (prohibiting price fixing and market allocation);
- *U.S. v. W.C. Bell Services, Inc.*, Civil No. 380 (prohibiting price fixing and customer allocation);
- *U.S. v. National Retail Lumber Dealers Association*, Civil No. 406 (prohibiting price fixing, group boycott, and customer allocation);
- *U.S. v. Band-It Company*, Civil No. 7796 (prohibiting price fixing and customer allocation); and

- *U.S. v. Metro Denver Concrete Assoc.*, Civil No. C-2478 (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.

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.[12] On August 15, 2018, the Antitrust Division listed the judgments in the ten legacy antitrust cases on its public website, describing its intent to move to terminate the judgments.[13] The notice identified each case, linked to the judgment, and invited public comment. No public comments were received with respect to any of the ten legacy antitrust cases.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment in the above-captioned case is appropriate, and respectfully requests that the Court enter an order

[12] Press Release, Department of Justice, Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments, (April 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[13] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: District of Colorado*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-colorado-district (last updated Oct. 2, 2018).

terminating it. A proposed order terminating the judgment in the above-captioned case is attached as Appendix C.

Respectfully submitted,

Dated: May 23, 2019

/s/

Ethan D. Stevenson
Trial Attorney
United States Department of Justice
Antitrust Division
Media, Entertainment and Professional Services Section
450 5th St., NW
Suite 4000
Washington, DC 20001
Phone: (202) 598-8091
Email: ethan.stevenson@usdoj.gov