UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. THE TRANS-MISSOURI FREIGHT ASSOCIATION, *et al.*, Defendants;	Civil Action No. 6799
UNITED STATES OF AMERICA, Plaintiff, v. SOLVAY PROCESS COMPANY, *et al.*, Defendants;	Civil Action No. 2046
UNITED STATES OF AMERICA, Plaintiff, v. NATIONWIDE TRAILER RENTAL SYSTEM, INC., *et al.*, Defendants;	Civil Action No. W-655
UNITED STATES OF AMERICA, Plaintiff, v. SOCONY MOBIL OIL COMPANY, INC., *et al.*, Defendants.	Civil Action No. 2487

THE UNITED STATES' 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. This Court entered the judgments between 49 and 121 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 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

[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 the Sherman Act.

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 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.

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 moves to terminate it.

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[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.

[3] *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.[4]

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 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 is a proposed order terminating the final judgments.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. Three of the four judgments, copies of which are included in Appendix A, provide that the Court retains jurisdiction. Jurisdiction was not explicitly retained in one case,[5] but it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct.[6] In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate each judgment. Rule 60(b)(5) and (b)(6)

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[4] The United States followed this process to move several 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. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments); *United States v. Union Pacific Roalroad*, Case No. 2:19-mc-00219-DAK (D. Utah Apr. 3, 2019).

[5] *United States v. The Trans-Missouri Freight Assoc.*, Civ. No. 6799 (D. Kan. 1897).

[6] *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 EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979) ("[A] court of equity has continuing jurisdiction to modify a decree upon changed circumstances, even if the decree was entered by consent.").

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 In re Gledhill,* 76 F.3d 1070, 1080 (10th Cir. 1996) ("Rule 60(b)(6) gives the court a grand reservoir of equitable power to do justice. . .[and] grants federal courts broad authority to relieve a party from a final judgment upon such terms as are just....") (citations and quotations 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.[7] 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 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

[7] 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.

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.[8] 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. Based on its examination of the judgments, the Antitrust Division has determined that each should be terminated for one or more of the following reasons:

- Most defendants likely no longer exist. 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.

- The judgment prohibits acts that the antitrust laws already prohibit, such as fixing prices, allocating markets, rigging bids, or engaging in group boycotts. 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.

- Market conditions likely have changed such that the judgment no longer protects competition or may even be anticompetitive. For example, the subsequent development of new products may render a market more competitive than it was at the time the judgment was entered or may even eliminate a market altogether, making the judgment irrelevant. In some circumstances, a judgment may impede the kind of adaptation to change that is the hallmark of competition, rendering it anticompetitive. Such judgments clearly should be terminated.

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

Additional reasons specific to each judgment are set forth below:

1. *United States v. The Trans-Missouri Freight Ass'n, No. 6799 (D. Kan. June 7, 1897)*

The judgment was entered in 1897. Among other things, the judgment enjoined a freight association and its railway company members from (1) jointly setting rates, rules, and regulations, and (2) conspiring to monopolize freight traffic. In addition to its age, the judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing and monopolization). *See* Appendix A-2-5.

2. *United States v. Solvay Process Co., No. 2046 (D. Kan. March 14, 1944)*

The judgment was entered in 1944. Jurisdiction was explicitly retained in Section V of the judgment. The judgment enjoined the defendant manufacturers of soda ash from (1) maintaining without operating (or from threatening to acquire) facilities to manufacture soda ash for the purpose of restraining competition, and (2) constructing or acquiring soda ash facilities in Kansas unless permitted by the Court upon a finding that such action will not unreasonably restrain competition. In addition to its age, the judgment should be terminated because market conditions likely have changed such that the judgment no longer protects competition. For instance, Solvay and its successor company (Honeywell International) no longer operate any soda ash facilities in Kansas, and the production process used in the facilities at issue in 1944 is no longer used in the United States. *See* Appendix A-6-8.

3. *United States v. Nationwide Trailer Rental Sys., Inc., No. W-655 (D. Kan. Feb. 7, 1956)*

The judgment was entered in 1956. Jurisdiction was explicitly retained in Section VIII of the judgment. The defendants included a trailer rental company and two of the company's officers. The judgment was directed toward the corporate defendant (though encompassing all agents and employees of the company, including the individual defendants, in Section IV of the

judgment), and among other things enjoined the company from engaging in price-fixing and customer allocation activities. The Court dismissed the judgment as to the corporate defendant on June 19, 1970, leaving only the two individual defendants remaining. The judgment should be terminated because (a) it is unknown whether the individual defendants from the 63-year-old judgment are still alive, and (b) its terms largely prohibit acts the antitrust laws already prohibit (price fixing and market allocation). *See* Appendix A-9-15.

4. *United States v. Socony Mobil Oil Co., No. 2487 (D. Kan. July 24, 1969)*

The judgment was entered in 1969. Jurisdiction was explicitly retained in Section VIII of the judgment. Among other things, the judgment enjoined defendants from fixing prices, rigging bids, and allocating markets for the sale or distribution of liquid asphalt, as well from exchanging certain pricing and bidding information. In addition to its age, the judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing, bid rigging, and market allocation). *See* Appendix A-16-23.

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.[9] On July 13, 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.[10] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

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[9] 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.

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

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 as Appendix B; an electronic copy of that proposed order will be emailed to the Chambers of the Judge assigned to this case.

Dated: April 22, 2019

Respectfully submitted,

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