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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. B & W MARKET, ET AL., Defendants.	)	Civil Case No. 5258

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

The United States respectfully submits this memorandum in support of its motion to terminate the above-captioned legacy antitrust judgment. The Court entered this judgment in a case brought by the United States in 1969; thus, the judgment is fifty years old. After examining

the judgment—and after soliciting public comments on the proposed termination—the United States has concluded that termination of this judgment is appropriate. Termination will permit the Court to clear its docket and the Department to clear its records, 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.[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 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, none of these judgments likely continue to do so because of 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

[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 judgment the United States seeks to terminate with the accompanying motion concerns violations of the Sherman Act.

encompasses review of all of 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 examined the 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 this judgment.

In brief, the process by which the United States determined that the judgment in this case should be terminated is as follows:

- The Antitrust Division reviewed the perpetual judgment entered by this Court and determined that it no longer serves to protect competition such that termination would be appropriate.

- The Antitrust Division posted the name of the case and a link to the judgment on its public Judgment Termination Initiative website, https://www.justice.gov/atr/judgment-termination-initiative-wyoming-district

- During a thirty-day period beginning June 1, 2018 and ending July 2, 2018, the public had the opportunity to submit comments regarding the proposed termination to the Antitrust Division.

- Having received no comments regarding the above-captioned judgment, the United States now moves this Court to terminate it.

The United States followed this same process to identify legacy antitrust judgments in other jurisdictions and file motions in those district courts to terminate those judgments.[4]

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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] https://www.justice.gov/atr/JudgmentTermination.

[4] *See, e.g., In Re: Termination of Legacy Antitrust Judgments in the District of Utah*, Case 2:19-mc-00219-DAK (D. Ut. Apr. 03, 2019) (terminating five judgments); *United States v.*

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the judgment. Section III summarizes the judgment. This section explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old, such as the judgment in this case, should be terminated absent compelling circumstances. This section also describes additional reasons why the United States believes the judgment should be terminated. Section IV concludes. Appendix A attaches a copy of the final judgment that the United States seeks to terminate. Finally, Appendix B is a Proposed Order Terminating Final Judgment.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING JUDGMENTS

This Court has jurisdiction and authority to terminate the judgment in the above-captioned case. Section VIII of the judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. Moreover, the Federal Rules of Civil Procedure grant the Court authority to terminate this 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); *accord David C. v. Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001) ("[A] court sitting in equity has the authority to modify an unlitigated consent decree. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ('We are not doubtful of the power of a

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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*, Case 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); and *United States v. Standard Sanitary Mfg. Co., et al.*, Case No. 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . (citations omitted))."'' Given its jurisdiction and its authority, the Court may terminate this judgment for any reason that justifies relief, including that the judgment no longer serves its original purpose of protecting competition.[5] Termination of this judgment is warranted.

III. ARGUMENT

Under the provisions of the 1969 judgment in the above-captioned case, a dairymen's association, three grocery stores, and the stores' managers were prohibited from inducing or coercing any distributor or vendor not to sell or deliver dairy products at retail and from boycotting or refusing to do business with any person. Additionally, the association, for a period of three years, was required to either sell and deliver dairy products to home customers or make its products available for other vendors to deliver to homes.

It is appropriate to terminate the perpetual judgment in this case because it no longer continues to serve its original purpose of protecting competition. The United States believes that the judgment presumptively should be terminated because its age alone suggests it no longer protects competition. Other reasons, however, also weigh in favor of terminating this judgment, including that all the corporate defendants appear to no longer exist, terms of the judgment merely prohibit that which the antitrust laws already prohibit, and changed market conditions likely have rendered the judgment ineffectual. Under such circumstances, the Court may

[5] In light of the circumstances surrounding the judgment 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 the judgment to terminate it under Fed. R. Civ. P. 60(b)(5) or (b)(6). This judgment would have terminated long ago if the Antitrust Division had the foresight to limit it to ten years in duration as under its policy adopted in 1979. Moreover, the passage of decades and changed circumstance since its entry, as described in this memorandum, means that it is likely that the judgment no longer serves its original purpose of protecting competition.

terminate this judgment pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Judgment Presumptively Should Be Terminated Because of Its 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 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.[6]

The judgment in the above-captioned matter—which is decades old—presumptively should be terminated for the reason 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 judgment to remain in effect; indeed, there are additional reasons for terminating it.

B. The Judgment Should Be Terminated Because It Is Unnecessary

In addition to age, other reasons weigh heavily in favor of termination of this judgment. These reasons include: (1) certain defendants likely no longer exist, (2) the judgment largely

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

prohibits that which the antitrust laws already prohibit, and (3) market conditions likely have changed. Each of these reasons suggests the judgment no longer serves to protect competition. In this section, we describe these additional reasons.

1. Certain Defendants Likely No Longer Exist and/or Are No Longer Subject to the Terms of the Final Judgment

From a corporate records search of the Idaho and Wyoming Secretary of States' Offices, as well as publically available information, it appears the association and three corporate defendants in this Final Judgment (Upper Snake River Valley Dairymen's Association, Inc., B & W Market, Fred's Market, Inc., and Jackson Food Market) no longer exist. Moreover, provision VI of the Final Judgment states that the three individual defendants, who were managers of the corporate defendant food markets, were bound by the Final Judgment as long as they had an ownership interest in or were employed by those defendant food markets. To the extent the association and corporate defendants no longer exist, the Final Judgment serves no purpose, which is a reason to terminate this judgment. Moreover, the individual defendants, even if they were still living, would no longer be bound by the Final Judgment if the corporate defendants are no longer in business.

2. Terms of Judgment Prohibit Acts Already Prohibited by Law

The Antitrust Division has determined that the core provisions of the judgment prohibit acts that are already illegal under the antitrust laws. As noted earlier, the judgment in this case prohibited a dairymen's association, three grocery stores, and the stores' managers from inducing or coercing any distributor or vendor not to sell or deliver dairy products at retail and from boycotting or refusing to do business with any person. Additionally, the association was required to either sell and deliver to home customers or make its products available to home vendors for a period of three years. These terms amount to little more than an admonition that

defendants 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, thereby making such violations of the antitrust laws unlikely to occur. To the extent this judgment includes terms that do little to deter anticompetitive acts, it serves no purpose, and there is reason to terminate it.

3. Market Conditions Likely Have Changed

Finally, the industry at issue in the judgment in this case likely faces different competitive forces such that the behavior at issue likely no longer is of competitive concern. During the forty-nine years since entry of this judgment, changes in the economics underlying the distribution of dairy products to both retailers and home customers likely has rendered this judgment obsolete. Market dynamics in this industry appear to have changed so substantially from that which existed forty-nine years earlier that the factual conditions that underlay the decision to enter this judgment 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 above-captioned judgment. 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.[7] On May 4, 2018, the Antitrust Division described its Judgment Termination Initiative in a statement published in the Federal

[7] 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.

Register.[8] On June 1, 2018, the Antitrust Division listed the judgment in the above-captioned case for the District of Wyoming on its public website, describing its intent to move to terminate this judgment.[9] The notice identified the case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgment in this case.

Given the public notice provided through the Federal Register and the Antitrust Division's website, as well as the age of the judgment, the relief sought, the appearance that all the corporate defendants are out of business, and the fact that the three individual defendants are no longer bound by the Final Judgment, the United States has not attempted any additional service of this Motion.

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[8] 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.

[9] https://www.justice.gov/atr/JudgmentTermination, link titled "View Judgments Proposed for Termination in Wyoming, District of."

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 terminating it. *See* Appendix B, which is a Proposed Order terminating the judgment.

DATED this 29th day of April 2019.

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