

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

IN RE: TERMINATION OF LEGACY
ANTITRUST JUDGMENT IN CIVIL
ACTION NO. 75-75,

UNITED STATES OF AMERICA,
Plaintiff,

v.

COLONIAL BAKING CO. OF
EL DORADO; COTTON'S OUACHITA
BAKERY, INC.; and WOLF BAKING
COPMANY, INC.
Defendants.

Miscellaneous Action No. _____

**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 antitrust judgment. In 1978, the Court entered this judgment in a case brought by the United States; thus, this judgment is over forty years old. After examining the judgment—and after soliciting public comments on each proposed termination—the United States has concluded that termination of this judgment is appropriate. Termination will permit the Court to clear its docket, the Department to clear its records, and the business to clear its 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.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, 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.² In addition,

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 Clayton Act.

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>.

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 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:

- 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 judgment, the United States moves this Court to terminate it.

The United States followed this process for each judgment it seeks to terminate by this motion.⁴

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

⁴ The United States followed this same 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. 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. Martin Linen*

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

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment in the above-captioned case. The judgment, a copy of which is attached in Attachment A, expressly provides that the Court retains jurisdiction. Moreover, the Court's inherent authority to terminate a judgment it has issued is now encompassed in the Federal Rules of Civil Procedure. 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 Frew v. Janek*, 780 F.3d 320, 327 (5th Cir. 2015) ("In analyzing the 60(b) aspect, [w]e recognize that Rule 60(b) is to be construed liberally to do substantial justice." (citing *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir. 1980) (quoting *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir. 1965))).

Supply Co., et al. Civ. Act. No. SA-19-MC-121-XR (W.D. Tex. Mar. 4, 2019) (terminating one judgment).

Given its jurisdiction and its authority, the Court may terminate the above-captioned 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 1978 final judgment in the above-captioned case, several baking companies were enjoined from fixing the wholesale prices of bakery products, reducing and eliminating discounts, and submitting collusive and rigged bids in the Monroe region of Louisiana, as alleged in the complaint. Additionally, for a period of ten years, the companies were prohibited from communicating pricing information with other baking companies.

It is appropriate to terminate the perpetual judgment in the above-captioned case because it no longer continues to serve its original purpose of protecting competition. The judgment is more than ten years old. The United States believes that the judgment presumptively should be terminated because its age alone suggests it no longer protect competition. Other reasons, however, also weigh in favor of terminating this judgment, including that terms of the judgment merely prohibit that which the antitrust laws already prohibit, and certain time-limited restrictions of the judgment already have expired. Under such circumstances, the Court may terminate the judgment pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

⁵ 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 the judgments likely no longer serve their original purpose of protecting competition.

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 and technological 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 over four 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 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) the judgment largely prohibits that which the antitrust laws already

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

prohibit, and (2) certain restrictions in the judgment already have expired. Each of these reasons suggests the judgment no longer serves to protect competition.

1. Terms of Judgment Prohibit Acts Already Prohibited by Law

The Antitrust Division has determined that the core provisions of the judgment in the above-captioned case merely prohibit acts that are illegal under the antitrust laws. As noted earlier, this judgment prohibited several baking companies from fixing the wholesale prices of bakery products, reducing and eliminating discounts, and submitting collusive and rigged bids in the Monroe region of Louisiana.

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.

2. Certain Judgment Provisions Already Have Expired

The above-captioned judgment also contained a provision that the defendant companies were prohibited from communicating pricing information with other baking companies for a period of ten years. That provision expired in 1988. To the extent that certain restrictions in the judgment already have expired, that is another reason to terminate the judgment.

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 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 Register.⁸ On September 7, 2018, the Antitrust Division listed the judgment in the above-captioned case on its public website, describing its intent to move to terminate the judgment.⁹ The notice identified the case, linked to the judgment, and invited public comment. The Division received no comments concerning the judgment in the above-captioned 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, and the likelihood that many of the corporate defendants are defunct, the United States has not attempted any additional service of this Motion.

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

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 Louisiana, Middle District."

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* Attachment B, which is a proposed order terminating the judgment in the above-captioned case.

Dated: May 20, 2019

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