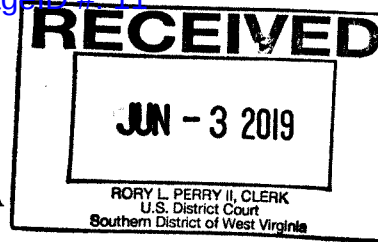


**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**



UNITED STATES OF AMERICA,

Plaintiff,

v.

STANDARD ULTRAMARINE AND
COLOR CO.

and

AMERICAN CYANAMID CO.,

Defendants.

Misc. Action No. 2:19 - 127

**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 Final Judgment in the above-captioned antitrust case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. This Court entered the Final Judgment over 60 years ago, in 1954. After examining the Final Judgment, which prohibits, among other things, price fixing and market allocation in the markets for colored pigment and related products—and after soliciting public comments on the Final Judgment’s proposed termination—the United States has concluded that because of its age and changed circumstances since its entry, this judgment no longer serves to protect competition. The United States gave the public notice and the opportunity to comment on its intent to seek termination of the Final Judgment and received no comments. For these and other reasons explained below, the United States requests that the Final Judgment 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 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 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

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 here concerns a violation of the Sherman 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>.

³ Judgment Termination Initiative, U.S. Dep’t of Justice, <https://www.justice.gov/atr/JudgmentTermination>.

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.

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

The remainder of this memorandum is organized as follows: Section II describes the Court's jurisdiction to terminate the Final Judgment and the applicable legal standards. Section III explains that perpetual judgments rarely serve to protect competition and that those that are more than ten years old should be terminated. Section III also demonstrates that the Final Judgment is no longer necessary because much of the prohibited conduct is already illegal.

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 No. 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).

II. STANDARD FOR TERMINATION UNDER RULE 60(B)

This Court has jurisdiction and authority to terminate the Final Judgment in this case. Section XIII of the Final Judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate the Final Judgment. Rules 60(b)(5) and (b)(6) provide 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 Thompson v. U.S. Dep’t. of Housing & Urban Dev.*, 404 F.3d 821, 826 (4th Cir. 2005) (noting that the court’s inherent authority to modify a consent decree is encompassed in Rule 60(b)(5) and that the standard for modification is a flexible one). Thus, the Court may terminate the Final 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

It is appropriate to terminate the Final Judgment in this case because it no longer serves its original purpose of protecting competition. The United States believes that the Final Judgment presumptively should be terminated because its age alone suggests it no longer protects competition. In addition, the Final Judgment should be terminated because it largely prohibits acts that are already illegal under the antitrust laws. Under such circumstances, the

⁵ In light of the circumstances surrounding the Final Judgment the United States is moving to terminate, the United States does not believe it is necessary for the Court to make an extensive inquiry into the facts of the Final 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.

Court may terminate the Final Judgment pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Final Judgment

The Final Judgment, attached as Appendix A, prohibits Defendants Standard Ultramarine and Color Company and American Cyanamid Company, which both manufactured colored pigments and related products, from entering into agreements to fix prices, allocate territories or customers, or otherwise prevent competition (Final Judgment § VIII); exchanging competitively-sensitive information with other manufacturers (Final Judgment § V); and engaging in other activities and maintaining certain agreements described in the Final Judgment. The Final Judgment resolved a civil antitrust action brought against the Defendants for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

B. The Final 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. 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 Final Judgment in this matter, which was entered in 1954, and is thus over six 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.

⁶ U.S. Dep't of Justice, Antitrust Division Manual, at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

C. The Final Judgment Should Be Terminated Because It Largely Prohibits Acts that Are Already Prohibited by the Antitrust Laws

In addition, the Final Judgment should be terminated because it largely prohibits acts that the antitrust laws already prohibit such as price fixing and customer or territorial allocations. 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 the Final Judgment includes terms that do little to deter anticompetitive acts, it should be terminated.

D. 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 Final Judgment. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments.⁷ On August 24, 2018, the Antitrust Division listed the Final Judgment in this case on its public website, describing its intent to move to terminate the judgment.⁸ The notice identified the associated case, linked to the Final Judgment, and invited public comment. No comments were received.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the Final Judgment in the above-captioned case is appropriate, and respectfully requests that the Court enter an order terminating it. A proposed order terminating the Final Judgment is also being submitted for the

⁷ 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/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

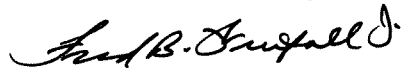
⁸ Judgment Termination Initiative, U.S. Dep’t of Justice, <https://www.justice.gov/atr/JudgmentTermination>; Judgment Termination Initiative: Southern District of West Virginia, U.S. Dep’t of Justice, <https://www.justice.gov/atr/judgment-termination-initiative-west-virginia-southern-district> (last updated October 2, 2018).

Court's consideration in accordance with the Local Rules of this Court.

Dated: June 3, 2019

Respectfully submitted,

MICHAEL B. STUART
United States Attorney



s/Fred B. Westfall, Jr.

WV State Bar No. 3992

Assistant United States Attorney

Attorney for United States

P.O. Box 1713

Charleston, WV 25326

Phone: 304-345-2200

Fax: 304-347-5443

E-mail: fred.westfall@usdoj.gov

Counsel for the United States of America

/s/Christine A. Hill

D.C. Bar No. 461048

Attorney

United States Department of Justice

Antitrust Division

Defense, Industrials, and Aerospace Section

450 Fifth Street, N.W., Suite 8700

Washington, D.C. 20530

(202) 305-2738

christine.hill@usdoj.gov

Counsel for the United States of America