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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. TECHNICOLOR, INC., TECHNICOLOR MOTION PICTURE CORP., AND EASTMAN KODAK CO., Defendants.	Misc. No. 2:19-MC-00121-VAP **UNITED STATES' MOTION TO TERMINATE LEGACY ANTITRUST JUDGMENTS AND MEMORANDUM IN SUPPORT THEREOF**

I. INTRODUCTION

The United States respectfully moves to terminate the judgments in the above-captioned antitrust case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The judgments were entered by this Court about 70 years ago.[1] The United States has concluded that because of their age and changed circumstances since their entry, the 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 opposing termination. For this and other reasons explained below, the United States requests that the judgments be terminated.

II. 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, 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

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[1] This case was originally filed as case No. 7507-WM in the former Southern District of California prior to the establishment of the Central District of California in 1966.

[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 this motion concern violations of the Sherman Act.

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.[3] In addition, the Antitrust Division established a website to keep the public informed 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 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.

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[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.

- 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 each judgment it seeks to terminate.[5]

The remainder of this motion is organized as follows: Section III describes the Court's jurisdiction to terminate the judgment and the applicable legal standards for terminating the judgment. Section IV argues that perpetual judgments rarely serve to protect competition and that those that are more than ten years old presumptively should be terminated. Section IV also discusses specific circumstances justifying termination. Section V concludes. Appendices A and B to the Motion and Memorandum in Support attach copies of the judgments that the United States seeks to terminate. A proposed order terminating the judgments accompanies this motion.

III. APPLICABLE LEGAL STANDARDS FOR JUDGMENT TERMINATION

This Court has jurisdiction and authority to terminate the judgments. The judgments provide that the Court retains jurisdiction. In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate the judgments. According to Rule 60(b)(5) and (b)(6), "[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 Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (explaining that Rule 60(b)(5) "encompasses the traditional power of a court of equity to modify its decree in light of

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[5] The United States followed this process to move several dozen other district courts to terminate legacy antitrust judgments. *See, e.g.*, *In re: Termination of Legacy Antitrust Judgments in the District of Idaho*, Case 1:19-mc-10427-DCN (D. Idaho Apr. 18, 2019); *United States v. Inter-Island Steam Navigation Co., et al.*, Case 1:19-mc-00115 (D. Haw. April 9, 2019) (terminating five judgments); *United States v. Odom Co., et al.*, Case 3:72-cv-00013 (D. Alaska Mar. 29, 2019) (terminating one judgment); *United States v. The Nome Retail Grocerymen's Ass'n, et al.*, Case 2:06-cv-01449 (D. Alaska Mar. 7, 2019) (terminating one judgment); *United States v. Am. Amusement Ticket Mfrs. Ass'n, et al.*, 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).

changed circumstances" and that "district courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment") (citation omitted); *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (Under Rule 60(b), "a court may relieve a party from a final judgment when . . . it is no longer equitable that the judgment should have prospective application. . . . [This] Rule codifies the courts' traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the prospective effect of their decrees.") (citations and internal quotation marks omitted). Given its jurisdiction and authority, the Court may terminate the judgments for any reason that justifies relief, including that the judgments no longer serve their original purpose of protecting competition.[6] Termination of the judgments is warranted.

IV. ARGUMENT

It is appropriate to terminate the judgments because they no longer serve their original purpose of protecting competition. The United States believes that these perpetual 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 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

[6] 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 the judgments to terminate them under Fed. R. Civ. P. 60(b)(5) or (b)(6). The 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, mean that it is likely that the judgments no longer serve their original purpose of protecting competition.

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.[7] The judgments—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 the judgments. Based on its examination of the judgments, the Antitrust Division has determined that they should be terminated for the following reasons:

- Market conditions likely have changed such that the judgments no longer protect 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.
- All the relevant patents have expired. From 1861 until the United States enacted the Uruguay Round Agreements Act ("URAA") which took effect on June 8, 1995, patent terms lasted 17 years from grant with no extensions. *See* Act of March 2, 1861, ch. 88, § 16, 12 Stat. 246, 249 (1861). The URAA changed the patent term from seventeen years from the date of issue to the current twenty years from the earliest filing date. Pub. L. 103-465, 108 Stat. 4809, 4984.

This case has two separate decrees entered against different defendants. One consent judgment was entered in 1948 against defendant Eastman Kodak Company ("Kodak"). Jurisdiction was explicitly retained in Section XV of the judgment. The core

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

terms of the consent judgment required defendant film manufacturer Kodak to license its patents to any applicant on a royalty-free basis and required it to provide certain technical information to all licensees. The judgment required Kodak to sell professional color motion-picture film to any domestic user requiring it. It prohibited Kodak from conditioning sale of professional color motion-picture film and other services on customer's promise to buy professional color motion picture film exclusively from Kodak, resell film at specific prices, refrain from selling such film, or have it processed by specified persons. It enjoined Kodak from entering into certain agreements with manufacturers. The judgment should be terminated in part because the terms that relate to patents are no longer relevant as the patents have expired. The remaining provisions should be terminated because circumstances have changed since the judgment was entered. For example, there has been increasing substitution of digital for film in making and distributing Hollywood movies.

A second consent judgment in this same case was entered in 1950 against defendants Technicolor, Inc. and Technicolor Motion Picture Corporation ("Technicolor defendants"). Jurisdiction was explicitly retained in Section XIV of the judgment. Like the judgment against Kodak, this judgment's core terms required the Technicolor defendants to license their patents to any applicant on a royalty-free bases and required them to provide certain technical information to all licensees. It terminated certain agreements. It enjoined the Technicolor defendants from conditioning the sale of any of their products to purchase of any of their other products. The judgment required that the Technicolor defendants make certain cameras available and process certain film. The judgment should be terminated in part because the terms that relate to patents are no longer relevant as the patents have expired. The remaining provisions should be terminated because circumstances have changed since the judgment was entered. For example, there has been increasing substitution of digital for film in making and distributing Hollywood movies.

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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.[8] On March 22, 2019, the Antitrust Division listed the judgments on its public website, describing its intent to move to terminate them.[9] The notice identified the case, linked to the judgments, and invited public comment. No comments were received opposing termination.

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[8] 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.

[9] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Central District of California*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-california-central-district (last updated Mar. 22, 2019).

V. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgments in the above-captioned case is appropriate and respectfully requests that the Court enter an order terminating them. A proposed order terminating the judgments in the above-captioned case accompanies this motion.

Respectfully submitted,

DATE: 6/11/2019

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