UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS, STATE OF LOUISIANA, *et al.*, Defendants.	In Equity No. 12143
UNITED STATES OF AMERICA, Plaintiff, v. NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Defendant.	Civil Action No. 249
UNITED STATES OF AMERICA, Plaintiff, v. SHEET METAL ASSOCIATION, A CORPORATION, *et al.*, Defendants.	Civil Action No. 261

UNITED STATES OF AMERICA, Plaintiff, v. ENGINEERING SURVEY AND AUDIT COMPANY, INC., A CORPORATION, *et al.*, Defendants.	Civil Action No. 276
UNITED STATES OF AMERICA, Plaintiff, v. NEW ORLEANS ICE DELIVERY CORPORATION, *et al.*, Defendants.	Civil Action No. 2745
UNITED STATES OF AMERICA, Plaintiff, v. NEW ORLEANS INSURANCE EXCHANGE, Defendant.	Civil Action No. 4292
UNITED STATES OF AMERICA, Plaintiff, v. MORRIS WOLF, also known as PETE WOLF doing business as WOLF & CO., *et al.*, Defendants.	Civil Action No. 5858

UNITED STATES OF AMERICA, Plaintiff, v. BATON ROUGE INSURANCE EXCHANGE, Defendant.	Civil Action No. 2088
UNITED STATES OF AMERICA, Plaintiff, v. ARCHER-DANIELS-MIDLAND COMPANY; and GARNAC GRAIN COMPANY, INC., Defendants.	Civil Action No. 70-1545
UNITED STATES OF AMERICA, Plaintiff, v. BUNGE CORPORATION, Defendant.	Civil Action No. 70-1546
UNITED STATES OF AMERICA, Plaintiff, v. NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Defendant.	Civil Action No. 14190

UNITED STATES OF AMERICA, Plaintiff, v. TIDEWATER MARINE SERVICE, INC., *et al.*, Defendants.	Civil Action No. 68-97

UNITED STATES OF AMERICA, Plaintiff, v. VENICE WORK VESSELS, INC., *et al.*, Defendants.	Civil No. 67-1623

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. The judgments were entered by this Court between 47 and 126 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 opposing termination. 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 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 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

[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 one or both of these laws.

[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.

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.

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

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[3] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination.

[4] The United States followed this process to move other district courts to terminate legacy antitrust judgments. *E.g.*, *In Re: Motion to Terminate Legacy Antitrust Judgments*, Case 3:19-mc-00031 (N.D. Tex. May 10, 2019) (terminating six judgments); *United States v. National Steel Corp.*, Case 4:18-mc-03668 (S.D. Tex. Apr. 10, 2019) (terminating five judgments); *Judgment Termination Initiative*, U.S. Dep't of Justice, https://www.justice.gov/atr/JudgmentTermination (last updated May 22, 2019) (collecting similar orders from at least 28 other Districts).

IV concludes. Exhibit A attaches a copy of each final judgment that the United States seeks to terminate. Finally, Exhibit 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. Each 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 each 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 Frew v. Janek*, 780 F.3d 320, 327 (5th Cir. 2015) (explaining that Rule 60(b) should be "construed liberally," that the "rule is broadly phrased," and that the rule "free[s] Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds"). 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.[5] Termination of these judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each of 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

[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 it is likely that the judgments no longer serve their original purpose of protecting competition.

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 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 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:

- All requirements of the judgment have been met such that it has been satisfied in full. In such a case, termination of the judgment is a housekeeping action: it will allow the Court to clear its docket of a judgment that should have been terminated long ago but for the failure to include a term automatically terminating it upon satisfaction of its terms.

- 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.

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

- 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.

Reasons specific to each judgment are set forth below:

1. *United States v. Workingmen's Amalgamated Council*, In Equity No. 12143

The judgment was entered in 1893. Jurisdiction was retained where the judgment explains that the judgment will remain in effect "until the further order of this court." The judgment enjoins the defendant unions from striking. The judgment should be terminated because, at 126 years old, it is well past the age where an antitrust judgment presumptively becomes either irrelevant to, or inconsistent with, competition. While the Antitrust Division no longer pursues claims against union strikes, if the Antitrust Division learns of the defendants engaging in unlawful behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

2. *United States v. Associated General Contractors of America, Inc.*, Civil Action No. 249

The judgment was entered in 1940. Jurisdiction was explicitly retained in Section V of the judgment. The judgment enjoins the defendant association and its members from including in construction bids arbitrary charges for eventual distribution to unsuccessful bidders or for

maintenance of the defendant trade association. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (bid rigging).

3. *United States v. Sheet Metal Ass'n*, Civil Action No. 261

The judgment was entered in 1940. Jurisdiction was explicitly retained in Section IV of the judgment. The judgment enjoins the defendants from rigging bids for sheet-metal, built-up roofing, and air-conditioning work. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (bid rigging).

4. *United States v. Engineering Survey & Audit Co.*, Civil Action No. 276

The judgment was entered in 1940. Jurisdiction was explicitly retained in Section 3 of the judgment. The judgment enjoins associated electrical contractors from dividing profits; comparing contracting bids before submission; adding fixed, non-competitive percentages for bid depository charges; and maintaining price-fixing bid depositories. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing and bid rigging).

5. *United States v. New Orleans Ice Delivery Corp.*, Civil Action No. 2745

The judgment was entered in 1952. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment enjoined ice manufacturers and icing servicers from, among other things, entering into any agreement to fix prices, allocate or limit production, allocate customers, restrict importing or exporting, or group boycott. The judgment should be terminated because (a) its terms largely prohibit acts the antitrust laws already prohibit (price fixing, market allocation, and group boycott) and (b) market conditions likely have changed such that the judgment no longer protects competition.

6. *United States v. New Orleans Insurance Exchange*, Civil Action No. 4292

The judgment was entered in 1957. Jurisdiction was explicitly retained in Section XI of the judgment. The judgment enjoined the defendants from, among other things, engaging in a group boycott, price fixing, or market allocation in the markets for fire, casualty, and surety insurance. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing, group boycott, and market allocation).

7. *United States v. Morris Wolf*, Civil Action No. 5858

The judgment was entered in 1957. Jurisdiction was explicitly retained in Section X of the judgment. The judgment enjoins cotton merchants from, among other things, rigging bids and fixing prices. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (price fixing and bid rigging).

8. *United States v. Baton Rouge Insurance Exchange*, Civil Action No. 2088

The judgment was entered in 1958. Jurisdiction was explicitly retained in Section XI of the judgment. The judgment enjoins an insurance exchange from, among other things, facilitating a group boycott, price fixing, or market allocation. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (group boycott, price fixing, and market allocation).

9. *United States v. Archer-Daniels-Midland Co.*, Civil Action No. 70-1545

The judgment was entered in 1970. Jurisdiction was explicitly retained in Section VII of the judgment. The judgment enjoins two company defendants from tying their grain elevators to specific stevedoring services. The judgment should be terminated because, at nearly fifty years old, it is well past the age where an antitrust judgment presumptively becomes either irrelevant to, or inconsistent with, competition. If the Antitrust Division learns of the defendants engaging

in similar behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

10. *United States v. Bunge Corp.*, Civil Action No. 70-1546

The judgment was entered in 1970. Jurisdiction was explicitly retained in Section VII of the judgment. The judgment enjoins one company defendant from tying its grain elevators to specific stevedoring services. The judgment should be terminated because, at nearly fifty years old, it is well past the age where an antitrust judgment presumptively becomes either irrelevant to, or inconsistent with, competition. If the Antitrust Division learns of the defendants engaging in similar behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

11. *United States v. Associated General Contractors of America, Inc.*, Civil Action No. 14190

The judgment was entered in 1970. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment enjoins a trade association of New Orleans building contractors from, among other things, rigging bids. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (bid rigging).

12. *United States v. Tidewater Marine Service, Inc.*, Civil Action No. 68-97

The judgment was entered in 1971. Jurisdiction was explicitly retained in Section VII of the judgment. The judgment required a charter vessel firm to divest at least eight supply and utility boats and enjoined, for five years, the firm from acquiring certain assets or companies. The judgment should be terminated because all requirements of the judgment have been met.

13. *United States v. Venice Work Vessels, Inc.*, Civil No. 67-1623

The judgment was entered in 1972. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment enjoined a company defendant and four individual defendants from

entering certain agreements designed to limit customers' options for obtaining oil, gas, and mineral work vessels. The judgment should be terminated because (a) its terms largely prohibit acts the antitrust laws already prohibit (market allocation and group boycott) and (b) most defendants have likely retired or passed away.

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.[7] On or before January 30, 2019, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[8] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

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

[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/department-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: Louisiana, Eastern District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-louisiana-east-district (last updated Jan. 30, 2019).

order terminating them. A proposed order terminating the judgments in the above-captioned cases is attached as Appendix B.

Respectfully submitted,

Dated: May 22, 2019

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