UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Plaintiff, v. HIRAM NORCROSS, *et al*., Defendants;	Civil Action No. 21-CV-302
UNITED STATES OF AMERICA, Plaintiff, v. KANSAS CITY ICE CO., *et al*., Defendants;	Civil Action No. 2536
UNITED STATES OF AMERICA, Plaintiff, v. BEARING DISTRIBUTORS CO., *et al*., Defendants;	Civil Action No. 6895
UNITED STATES OF AMERICA, Plaintiff, v. TELESCOPE CARTS, INC., *et al*., Defendants;	Civil Action No. CV-6935

UNITED STATES OF AMERICA, Plaintiff, v. GAMBLE-SKOGMO, INC., *et al*., Defendants;	Civil Action No. 12776
UNITED STATES OF AMERICA, Plaintiff, v. UNION CARBIDE CORP., Defendant;	Civil Action No. CV-12881
UNITED STATES OF AMERICA, Plaintiff, v. CHAS. PFIZER & COMPANY, INC., Defendant;	Civil Action No. 152980-1
UNITED STATES OF AMERICA, Plaintiff, v. KANSAS CITY MUSIC OPERATORS ASS'N, *et al*., Defendants.	Civil Action No. 18238-4

UNITED STATES OF AMERICA, Plaintiff, v. ASSOCIATED MILK PRODUCERS, INC, *et al*., Defendants;	Civil Action No. 74 CV 80-W-1

UNITED STATES OF AMERICA, Plaintiff, v. MID-AMERICA DAIRYMEN, INC., *et al*., Defendants.	Civil Action No. 73 CV 681-W-1

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. This Court entered the judgments between 42 and 95 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. 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 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 prevent 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 involved a 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 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

---

[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 several dozen other district courts to terminate legacy antitrust judgments. *See, e.g., United States v. Ed Phillips & Sons Co., et al.*, Case 8:73-cv-00144-LSC-SMB (D. Neb. Apr. 26, 2019) (terminating four judgments); *In re: Termination of Legacy Antitrust Judgments in the Southern District of Iowa*, Case 4:19-mc-00012-JAJ (Apr. 8, 2019) (terminating two judgments); *United States v. Armco Drainage & Metal Products, Inc.*, Case No. 3804 (D. N.D. Apr. 9, 2019) (terminating one judgment); *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).

be terminated. Section III also presents factual support for termination of each judgment. Section IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. A copy of each judgment is included in Appendix A. In each case, the judgment 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); *see also McDonald v. Armontrout*, 908 F.2d 388, 390 (8th Cir. 1990) ("The district court retains authority over a consent decree, including the power to modify the decree in light of changed circumstances, and is subject to only a limited check by the reviewing court"); *see also Smith v. Bd. of Educ. of Palestine-Wheatley Sch. Dist.*, 769 F.3d 566, 572 (8th Cir. 2014) *("*"federal courts of equity [have] substantial flexibility to adapt their decrees to changes in the facts or law").

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 these judgments is warranted.

[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 their entry, as described in this memorandum, means that it is likely that the judgment no longer serves its original purpose of protecting competition.

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.[6] Termination of these judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each 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 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 with the passage of decades markets almost always evolve 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.[7] The judgments in the above-captioned matters—all of which are

[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 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.

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

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.

- 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.

Additional reasons specific to each judgment are set forth below:

1. *United States v. Hiram Norcross, et al.*, No. 21-cv-302 (W.D. Mo. 1924)

The court entered this judgment in 1924, and modified it in 1927. *See* Appendix A-1, at 4, 14. The court explicitly retained jurisdiction in paragraph 12 of the judgment. *Id.* at 12. The

defendants had created the Norcross Audit & Statistical Bureau to collect information on regional sales of Portland cement, facilitating a scheme among the several cement-company defendants to limit production and withhold cement from the market in order to raise and maintain the price of Portland cement. The decree enjoined the cement-company defendants from adhering to the formal "subscription agreements" with the bureau, as well as maintaining informal agreements among themselves as to base prices, freight and delivery terms, and production capacity. The court modified the agreement to permit the exchange of certain information on "actually closed" contracts. This court should terminate these two decrees because of their age, but also because the terms largely prohibit acts the antitrust laws already prohibit (price fixing, capacity allocation).

2. *United States v. Kansas City Ice Company, et al.*, No. 2536 (W.D. Mo. 1934)

The court entered this judgment in 1934, and issued a supplemental decree later that same year. *See* Appendix A-2 at 16, 22. Jurisdiction was explicitly retained in Section V of the judgment. *Id*. at 21. The defendants had organized a scheme to monopolize trade in ice by centralizing marketplace decisions – such as pricing, production, and customer territories – within a single firm, the Kansas City Ice Company. The decree enjoined price-fixing, customer allocation, and agreements to limit production, and dissolved the Kansas City Ice Company. This court should terminate these two decrees because of their age, but also because the terms largely prohibit acts the antitrust laws already prohibit (price fixing, customer allocation, capacity allocation).

3. *United States v. Bearing Distributors Company, et al.*, No. 6895 (W.D. Mo. 1953)

The court entered this judgment in 1953. *See* Appendix A-3. Jurisdiction was explicitly retained in Section XIII of the judgment. *Id*. at 30. The defendants were manufacturers of tractor cabs – canvas enclosures to provide weather protection for the tractor driver. The defendants

owned rights in patents for tractor cabs, and restrained competition by entering into certain patent licensing agreements that denied other manufacturers the right to make the product. The decree directed defendants to grant patent licenses, and enjoined further infringement suits. The judgment should be terminated because its age, but also because the patents have long since expired. Therefore, the terms of the decree no longer protect competition.

4. *United States v. Telescope Carts, Inc., et al.*, No. cv-6935 (W.D. Mo. 1953)

The court entered this judgment in 1953. *See* Appendix A-4, at 31. Jurisdiction was explicitly retained in Section XI of the judgment. *Id*. at 38. The individual defendant owned the patent for the design that allows shopping carts to nest within another for compact storage. The inventor and Telescope Carts, Inc. used licensing agreements to allocate the market for sale and distribution of telescope shopping carts. The decree annulled the agreement and required defendants to license the patent under reasonable terms. The judgment should be terminated because its age, but also because the patent has long since expired. Therefore, the terms of the decree no longer protect competition.

5. *United States v. Gamble-Skogmo, Inc., et al.*, No. 12776 (W.D. Mo. 1960)

The court entered this judgment in 1960. *See* Appendix A-5 at 40. Jurisdiction was explicitly retained in Section VII of the judgment. *Id*. at 43. The United States filed a complaint alleging that Gamble-Skogmo's acquisition of a controlling interest in Western Auto violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and pursuant to a consent decree, the court enjoined Gamble-Skogmo from holding any interest in the firm, or exchanging any trade secrets. This court should terminate the decree because of its age, but also because the merger was successfully blocked, and thus the primary requirement of the judgment has been satisfied, and, because Gamble-Skogmo appears no longer to exist, further enforcement regarding sharing of trade secrets is not necessary. Finally, judgments such as this have been largely mooted by

subsequent statutory developments, which require that sufficiently large stock or asset acquisitions or sales be reported to federal antitrust authorities for their review. *See generally United States v. Mercy Health Services*, 107 F.3d 632, 637 (8th Cir. 1997) (Under the Hart–Scott–Rodino Antitrust Improvements Act of 1976, "the United States would have the opportunity to investigate the anticompetitive effects of a proposed merger in the future.").

6. *United States v. Union Carbide Corp.*, No. cv-12881 (W.D. Mo. 1964)

The court entered this judgment in 1964. *See* Appendix A-6 at 44. Jurisdiction was explicitly retained in Section VII of the judgment. *Id*. at 47. The defendant manufactured antifreeze. The decree enjoined defendant from certain sales practices, including agreements with distributors to maintain retail prices for defendant's brand. The judgment should be terminated because of its age. Decrees such as this one, entered more than 50 years ago, are presumptively irrelevant to, or inconsistent with, competition. Should the defendant engage in unlawful behavior in the future, the Antitrust Division is in a position to investigate and prosecute any such conduct as a violation of the antitrust laws.

7. *United States v. Chas. Pfizer & Company, Inc.*, No. 152980-1 (W.D. Mo. 1966)

The court entered this judgment in 1966. *See* Appendix A-7 at 48. Jurisdiction was explicitly retained in Section IX of the judgment. *Id*. at 51. The defendant was a cosmetics manufacturer. The decree enjoined defendant from fixing the prices at which defendants' cosmetics were resold to customers, as well as refusing to sell to firms because of pricing decisions of those firms. The judgment should be terminated because of its age. This decree was entered 53 years ago, and is presumptively irrelevant to, or inconsistent with, competition. In such cases, should a defendant once again engage in unlawful behavior, the Antitrust Division is in a position to investigate and prosecute any such conduct as a violation of the antitrust laws.

8. *United States v. Kansas City Music Operators Ass'n, et al.*, No. 18238-4 (W.D. Mo. 1971)

The court entered this judgment in 1971. *See* Appendix A-8 at 52. Jurisdiction was explicitly retained in Section X of the judgment. *Id*. at 60. The defendants operated cigarette vending machines and juke boxes. The decree enjoined defendants from using threats or coercion against competitors, as well fixing prices for the sale of vending machines. This court should terminate this decree because of its age, but also because the terms largely prohibit acts the antitrust laws already prohibit (price fixing, group boycotts).

9. *United States v. Associated Milk Producers, Inc.*, No. 74 CV 80-W-1 (W.D. Mo. 1975)

The court entered this judgment in 1975. *See* Appendix A-9 at 62. Jurisdiction was explicitly retained in Section XV of the judgment. *Id*. at 70. The defendant was a dairy marketing cooperative. The decree prohibited Associated Milk Producers from attempting to monopolize by entering into contracts to control or restrain milk distribution, from using threats or coercion to influence milk-haulers, and from interfering with milk haulers' rights to purchase milk at prices, terms, or conditions they choose. This court should terminate this decree because of its age, but also because the terms largely prohibit acts the antitrust laws already prohibit (group boycotts).

10. *United States v. Mid-America Dairymen, Inc.*, No. 73 CV 681-W-1 (W.D. Mo. 1977)

The court entered this judgment in 1977. *See* Appendix A-10 at 73. Jurisdiction was explicitly retained in Section XV of the judgment. *Id*. at 80. The United States alleged defendants had attempted to monopolize the sale of milk by eliminating competition from independent producers. The decree enjoined defendants from entering contracts with milk haulers whereby they commit to transport milk exclusively for members of the cooperative. This court should terminate this decree because of its age, but also because the terms largely prohibit acts the antitrust laws already prohibit (group boycotts).

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 December 13, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[9] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

[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.

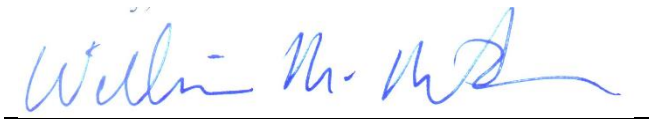
[9] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Missouri, Western District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-missouri-western-district (last checked May 2, 2019).

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 order terminating them.

Respectfully submitted,

Dated: May 22, 2019



WILLIAM M. MARTIN
Bar No. 84612
Trial Attorney
United States Department of Justice
Antitrust Division
450 Fifth St., NW, Suite 8600
Telephone: 202-616-2371
Email: william.martin@usdoj.gov