UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE CHESAPEAKE & OHIO FUEL COMPANY, *et al.* Defendants;	In Equity No. 5298

UNITED STATES OF AMERICA, Plaintiff, v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *et al.*, Defendants;	In Equity No. 1584

UNITED STATES OF AMERICA, Plaintiff, v. THE AMERICAN CONE AND WAFER COMPANY, Defendant;	In Equity No. 155

UNITED STATES OF AMERICA, Plaintiff, v. TILE MANUFACTURERS CREDIT ASSOCIATION, *et al.*, Defendants;	In Equity No. 201
UNITED STATES OF AMERICA, Plaintiff, v. COLUMBUS CONFECTIONERS' ASSOCIATION, *et al.*, Defendants;	In Equity No. 546
UNITED STATES OF AMERICA, Plaintiff, v. THE WHITE-HAINES OPTICAL COMPANY, *et al.*, Defendants;	Civil Action No. 2167
UNITED STATES OF AMERICA, Plaintiff, v. NEW WRINKLE, INC., *et al.*, Defendants;	Civil Action No. 1006

UNITED STATES OF AMERICA, Plaintiff, v. THE E. F. MACDONALD COMPANY, Defendant;	Civil Action No. 2429
UNITED STATES OF AMERICA, Plaintiff, v. ALLEN-BRADLEY COMPANY, *et al.*, Defendants;	Civil Action No. 2565
UNITED STATES OF AMERICA, Plaintiff, v. DIEBOLD, INCORPORATED, Defendant;	Civil Action No. 4485
UNITED STATES OF AMERICA, Plaintiff, v. CINCINNATI INSURANCE BOARD, Defendant;	Civil Action No. 5489

UNITED STATES OF AMERICA, Plaintiff, v. THE E. W. SCRIPPS COMPANY, Defendant;	Civil Action No. 5656
UNITED STATES OF AMERICA, Plaintiff, v. SIMMONS COMPANY, Defendant;	Civil Action No. 70-121
UNITED STATES OF AMERICA, Plaintiff, v. RICHTER CONCRETE CORP., *et al.*, Defendants;	Civil Action No. 7755
UNITED STATES OF AMERICA, Plaintiff, v. THE AAV COMPANIES, *et al.*, Defendants;	Civil Action No. 8698

UNITED STATES OF AMERICA, Plaintiff, v. LEGGETT & PLATT, INCORPORATED, Defendant;	Civil Action No. 7976
UNITED STATES OF AMERICA, Plaintiff, v. LEGGETT & PLATT, INCORPORATED, Defendant;	Civil Action No. C-1-78-36
UNITED STATES OF AMERICA, Plaintiff, v. BALDWIN-UNITED CORPORATION, *et al.*, Defendants.	Civil Action No. C-1-82-179

MOTION OF PLAINITFF UNITED STATES TO TERMINATE 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. As explained in the accompanying Memorandum in Support of the Motion of Plaintiff United States to Terminate Legacy Antitrust Judgments, 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 in the accompanying Memorandum, the United States requests that the judgments be terminated.

Dated: May 28, 2019

Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff, v. BALDWIN-UNITED CORPORATION, *et al.*, Defendants.	Civil Action No. C-1-82-179

MEMORANDUM IN SUPPORT OF THE MOTION OF PLAINTIFF UNITED STATES TO TERMINATE LEGACY ANTITRUST JUDGMENTS

The United States respectfully submits this memorandum in support of its motion 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 37 and 118 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 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

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[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 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.

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 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.[4]

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.[5]

The remainder of this memorandum 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

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[3] *Judgment Termination Initiative*, U.S. Dep't of Justice, https://www.justice.gov/atr/JudgmentTermination.

[4] Given the extensive notice it provided to the public, the lack of public opposition, the age of the judgments, and the relief sought, the United States does not believe that additional service of this motion is necessary.

[5] The United States followed this process to move several dozen other district courts to terminate legacy antitrust judgments. *See, e.g., United States v. Jellico Mtn. Coal & Coke Co.*, Case No. 3:19-mc-00011 (M.D. Tenn. Apr. 16, 2019) (terminating five judgments); *United States v. Am. Column and Lumber Co.*, Case No. 2:19-mc-00011-SHM (W.D. Tenn. Mar. 28, 2019) (terminating eight judgments); *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*, No. 2:18-mc-00033 (E.D. Va. Nov. 21, 2018) (terminating five judgments); and *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine 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 IV concludes. Appendix A attaches a copy of each judgment that the United States seeks to terminate. Appendix B summarizes the terms of each judgment and further details the United States' reasons for seeking termination. Finally, Appendix C is a proposed order terminating the judgments.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. All but two of the judgments expressly provide that the Court retains jurisdiction. Although two judgments do not explicitly state the Court retains jurisdiction,[6] it has long been recognized that courts are vested with inherent power to modify judgments they have issued that regulate future conduct.[7] In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate each judgment. Rule 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 East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) ("Federal Rule 60(b)(5) gives a court discretion to relieve a party from a final judgment if the 'judgment has been satisfied, released or discharged; it is based on an earlier judgment that

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[6] *United States v. Chesapeake & Ohio Fuel Co.*, In Equity No. 5298 (S.D. Ohio 1900); *United States v. Am. Cone and Wafer Co.*, In Equity No. 155 (S.D. Ohio 1918).

[7] *See United States v. Swift & Company*, 286 U.S. 106, 114-15 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.") (citations omitted); *East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) ("It is settled law that a Rule 60(b) motion is considered a continuation of the original proceeding. If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion.").

has been reversed or vacated; or applying it prospectively is no longer equitable.'") (internal citation omitted); *West v. Carpenter*, 790 F.3d 693, 696 (6th Cir. 2015) ("Federal Rule 60(b)(6) is a catchall provision that provides for relief from a final judgment for any reason justifying relief not captured in other provisions of Rule 60(b)."") (internal citation omitted). 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.[8] 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. Additional reasons also weigh in favor of terminating many of 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

[8] 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 circumstances 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.

generally including in each judgment a term automatically terminating the judgment after no more than ten years.[9] 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.[10]

B. The Judgments Should Be Terminated Because They Are Unnecessary

In addition to age, other reasons weigh heavily in favor of terminating many of these judgments. These reasons include: (1) all or most of the requirements of the judgment have been met; (2) most defendants likely no longer exist; and (3) the judgment prohibits acts the antitrust laws already prohibit. A further discussion of each of these reasons and identification of the judgments that are worthy of termination for each reason follows below. A summary of each judgment and the reasons to terminate it also appears in Appendix B.

1. Requirements of the Judgment Have Been Met

The Antitrust Division has determined that the core provisions of the judgments in the following six cases have been satisfied such that termination is appropriate:

- *United States v. Lake Shore & Mich. S. Ry. Co.*, In Equity No. 1584 (most judgment terms completed);
- *United States v. Diebold, Inc.*, Civil Action No. 4485 (judgment terms completed);
- *United States v. E. W. Scripps Co.*, Civil Action No. 5656 (judgment terms completed);
- *United States v. Leggett & Platt, Inc.*, Civil Action No. 7976 (judgment terms completed);
- *United States v. Leggett & Platt, Inc.*, Civil Action No. C-1-78-36 (judgment terms completed); and
- *United States v. Baldwin-United Corp.*, Civil Action No. C-1-82-179 (judgment terms completed).

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

[10] The judgment in *United States v. Baldwin-United Corp.*, Civil Action No. C-1-82-179 (S.D. Ohio 1982), entered in 1982, was one of the few exceptions in which antitrust final judgments entered after 1979, did not have a ten-year limit on their terms. For the reasons set forth below, the United States believes that it should be terminated along with the other judgments discussed in this memorandum.

Because the key substantive terms of these judgments have been met, 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.

2. Most Defendants No Longer Exist

The Antitrust Division believes that most defendants in the following case likely no longer exist:

- *United States v. Tile Mfrs. Credit Ass'n*, In Equity No. 201 (most defendants likely no longer exist).

With the passage of time, many of the company defendants in this action likely have gone out of existence. To the extent that defendants no longer exist, the related judgment serves no purpose and should be terminated.

3. Judgment Prohibits Acts that the Antitrust Laws Already Prohibit

The Antitrust Division has determined that the core provisions of the judgments in the following eight cases merely prohibit acts that the antitrust laws already prohibit, such as fixing prices, allocating markets, rigging bids, or engaging in group boycotts:

- *United States v. Tile Mfrs. Credit Ass'n*, In Equity No. 201 (price fixing and group boycotts);
- *United States v. Columbus Confectioners' Ass'n*, In Equity No. 546 (price fixing and group boycotts);
- *United States v. White-Haines Optical Co.*, Civil Action No. 2167 (price fixing);
- *United States v. New Wrinkle, Inc.*, Civil Action No. 1006 (price fixing);
- *United States v. Allen-Bradley Co.*, Civil Action No. 2565 (price fixing and bid rigging);
- *United States v. Cincinnati Ins. Bd.*, Civil Action No. 5489 (group boycott);
- *United States v. Richter Concrete Corp.*, Civil Action No. 7755 (price fixing and bid rigging; and
- *United States v. AAV Cos.*, Civil Action No. 2303 (price fixing and market allocation).

The core terms of these judgments 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.

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.[11] On November 2 and December 18, 2018,[12] the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[13] 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

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[11] Press Release, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments*, U.S. Dep't of Justice (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[12] Although most of the above-captioned judgments were posted for comment on November 2, 2018, one (*Leggett & Platt, Inc.*, Civil Action No. C-1-78-36 (S.D. Ohio June 7, 1978)) was posted on December 18, 2018.

[13] *Judgment Termination Initiative*, U.S. Dep't of Justice, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Ohio, Southern District,* U.S. Dep't of Justice, https://www.justice.gov/atr/judgment-termination-initiative-ohio-southern-district (last updated Dec. 18, 2018).

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

Dated: May 28, 2019

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