UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. CONTINENTAL OIL CO. Defendant;	Civil Action No. 4763
UNITED STATES OF AMERICA, Plaintiff, v. CONTINENTAL OIL CO., *et al.*, Defendants;	Civil Action No. 8026
UNITED STATES OF AMERICA, Plaintiff, v. WOLVERINE WORLD WIDE, INC., Defendant;	Civil Action No. 9186
UNITED STATES OF AMERICA, Plaintiff, v. WOHL SHOE CO., *et al.*, Defendants.	Civil Action No. 9187

UNITED STATES OF AMERICA,
Plaintiff,

v.

CLOVIS RETAIL LIQUOR DEALERS TRADE ASSOCIATION, *et al.*,
Defendants.

Civil Action No. 74-477

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 41 and 51 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

[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.

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 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:

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[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.

- 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 IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate. Finally, Appendix 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

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[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. Union Pacific Railroad*, Case No. 2:19-mc-00219-DAK (D. Utah Apr. 3, 2019) (terminating five judgments); *United States v. Trans-Missouri Freight Assoc.*, Case No. 6:19-mc-00104-JAR (D. Kan. Apr. 24, 2019) (terminating four judgments); *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).

prospectively is no longer equitable; or (6) for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5)–(6); *accord In re Gledhill,* 76 F.3d 1070, 1080 (10th Cir. 1996) ("Rule 60(b)(6) gives the court a grand reservoir of equitable power to do justice. . .[and] grants federal courts broad authority to relieve a party from a final judgment upon such terms as are just....") (citations and quotations 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.[5] 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 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

[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.

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.

- 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.

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

Additional reasons specific to each judgment are set forth below:

1. ***United States v. Continental Oil Co.***, Civ. No. 4763 (D. N.M. Feb. 21, 1968)

The Court entered the judgment in 1968, retaining jurisdiction in Section VI of the judgment. The judgment required Continental Oil Co. (Conoco) to divest certain facilities and pipelines in order to remedy the competitive harm caused by Conoco's acquisition of Malco Refineries, Inc. The judgment also enjoined Conoco from acquiring without court approval any oil refinery or (subject to a limited exception) any wholesale distributor of gasoline in New Mexico for a ten-year period.[7] *See* Appendix A-2-7. The Court should terminate this judgment because of its age, and also because all requirements of the judgment have been satisfied in full (Conoco accomplished the divestiture ordered by the Court, and the ten-year acquisition prohibition has long since expired).

2. ***United States v. Continental Oil Co., et al.***, Civ. No. 8026 (D. N.M. Jan. 20, 1971)

The Court entered the judgment in 1971, retaining jurisdiction in Section X of the judgment. Among other things, the judgment restricted Conoco and several other oil and chemical companies from entering into certain contracts with each other concerning the sale of paving asphalt in New Mexico, and forbade those oil and chemical company defendants from allocating customers and geographic markets, fixing prices, or exchanging pricing terms relating to specific customers. The judgment also enjoined a marketing agent company from representing more than one person selling paving asphalt. *See* Appendix A-10-17. The Court should terminate this judgment because of its age, and also because the terms largely prohibit acts the antitrust laws already prohibit (price fixing and market allocation).

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[7] The Court modified the judgment in 1972 to account for refinancing efforts of the divestiture buyer that involved Conoco. *See* Appendix A-8-9.

3. ***United States v. Wolverine World Wide, Inc.***, Civ. No. 9186 (D. N.M. July 10, 1972)

The Court entered the judgment in 1972, retaining jurisdiction in Section XII of the judgment. The judgment prohibited Wolverine (a manufacturer of shoes) from entering into agreements with retailers to fix the resale price of shoes, from refusing to sell shoes to any other retailer on the basis of the prices set by that retailer, and from restricting the advertising of prices lower than those suggested by Wolverine. The judgment also enjoined Wolverine from encouraging adopting or adhering to any minimum or suggested retail price, from encouraging or suggesting retailers to report to Wolverine any price deviations adopted by other retailers, and from refusing to sell to dealers who do not follow prices desired by Wolverine, among other prohibited conducted aimed at preventing retailers from charging prices lower than the prices desired by Wolverine. *See* Appendix A-18-23. The Court should terminate this judgment because of its age, and also because the prohibited conduct (resale price maintenance) might not be illegal today and would likely be reviewed under a rule of reason standard. The judgment 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 unlawful behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

4. ***United States v. Wohl Shoe Co., et al.***, Civ. No. 9187 (D. N.M. Aug. 21, 1972)

The Court entered three related judgments in August 1972, September 1973, and February 1974, retaining jurisdiction in Sections IX, X, and III, respectively, of those judgments. The three judgments prohibit the various defendants (Nordstrom's Albuquerque Inc. and Paris Show Stores in the 1972 judgment, Penobscot Shoe Co. in the 1973 judgment, and Wohl Shoe Co. in the 1974 judgment) from fixing prices for shoes or engaging in certain communications

with manufacturers that would support a price fixing agreement.[8] *See* Appendix A-24-35. The Court should terminate this judgment because of its age, because the competitive landscape for the retail sale of shoes has changed significantly since 1972, and also because its terms largely prohibit acts the antitrust laws already prohibit (price fixing).

5. ***United States v. Clovis Retail Liquor Dealers Trade Assoc., et al.***, Civ. No. 74-477 (D. N.M. Mar. 31, 1978)

The Court entered the judgment in 1978, retaining jurisdiction in Section XI of the judgment. Among other things, the judgment enjoined each of the defendants (a retail liquor store trade association and its members) from entering into or maintaining price-fixing agreements or from exchanging pricing information with other liquor retailers. The judgment also prohibited each of the defendants from participating in any retail liquor dealer trade association in the Clovis, New Mexico area for a five-year period. *See* Appendix A-37-45. The Court should terminate this judgment because of its age, because most or all of the defendants are no longer in business, and also because the terms of the judgment largely prohibit acts the antitrust laws already prohibit (price fixing). Additionally, the five-year period in which the defendants were enjoined from participating in a trade association has long since expired.

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.[9] On November 30, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public

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[8] In October 1978, the Court entered an order relieving Nordstrom's Albuquerque, Inc. from the operation of the judgment. *See* Appendix A-36.

[9] 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.

website, describing its intent to move to terminate the judgments.[10] 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 order terminating them. A proposed order terminating the judgments in the above-captioned cases is attached as Appendix B.

Respectfully submitted,

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[10] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: New Mexico District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-new-mexico-district (last updated Nov. 29, 2018).