

# MISC 19-1438

UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ MAY 31 2019 ★  
BROOKLYN OFFICE

UNITED STATES OF AMERICA,  
Plaintiff,

v.

A. SCHRADER'S SON, INC.,  
Defendants;

**CHEN, J.**

Civil Action No. 1116

UNITED STATES OF AMERICA,  
Plaintiff,

v.

SEAFARERS SEA CHEST  
CORPORATION, *et al.*,  
Defendants;

Civil Action No. 14674

UNITED STATES OF AMERICA,  
Plaintiff,

v.

NASSAU & SUFFOLK COUNTY RETAIL  
HARDWARE ASSOCIATION INC., *et al.*,  
Defendants;

Civil Action No. 17768

UNITED STATES OF AMERICA,  
Plaintiff,

v.

NASSAU-SUFFOLK PHARMACEUTICAL  
SOCIETY, INC.  
Defendant;

Civil Action No. 63-C-1206

UNITED STATES OF AMERICA,  
Plaintiff,

v.

NASSAU-SUFFOLK PHARMACEUTICAL  
SOCIETY, INC.  
Defendant;

Civil Action No. 63-C-1207

UNITED STATES OF AMERICA,  
Plaintiff,

v.

PERMATEX COMPANY, INC.,  
Defendant;

Civil Action No. 66-C-395

UNITED STATES OF AMERICA,  
Plaintiff,

v.

EHRENREICH PHOTO-OPTICAL  
INDUSTRIES, INC.,  
Defendant;

Civil Action No. 66-C-929

UNITED STATES OF AMERICA,  
Plaintiff,

v.

F. & M. SCHAEFER BREWING  
COMPANY,  
Defendant;

Civil Action No. 62-C-1421

UNITED STATES OF AMERICA,  
Plaintiff,

v.

BIRD CORPORATION, *et al.*,  
Defendants;

Civil Action No. 72-C-860

UNITED STATES OF AMERICA,  
Plaintiff,

v.

ROSS TRUCKING, INC., *et al.*,  
Defendants;

Civil Action No. 70-C-1228

UNITED STATES OF AMERICA,  
Plaintiff,

v.

ROSS TRUCKING, INC., *et al.*,  
Defendants;

Civil Action No. 70-C-1228

UNITED STATES OF AMERICA,  
Plaintiff,

v.

NATIONAL ASSOCIATION FOR AIR  
FREIGHT, INC., *et al.*,  
Defendants;

Civil Action No. 71-C-563

UNITED STATES OF AMERICA,  
Plaintiff,

v.

UNITED ARTISTS THEATRE CIRCUIT,  
INC., *et al.*,  
Defendants;

Civil Action No. 71-C-609

UNITED STATES OF AMERICA,  
Plaintiff,

v.

COMPOSITION ROOFERS &  
WATERPROOFERS EMPLOYERS  
ASSOCIATION OF NEW YORK CITY  
AND VICINITY, *et al.*,  
Defendants.

Civil Action No. 75-C-1275

**THE UNITED STATES' MOTION AND MEMORANDUM REGARDING  
TERMINATION OF LEGACY ANTITRUST JUDGMENTS**

The United States respectfully moves to terminate fourteen legacy antitrust judgments. The Court entered these judgments in cases brought by the United States between 1923 and 1978; thus, they are between forty-one and ninety-six years old. After examining each judgment—and after soliciting public comment on each proposed termination—the United States has concluded that termination of these judgments is appropriate. Termination will permit the Court to clear its docket, the Department to clear its records, and businesses to clear their books, allowing each to utilize its resources more effectively.

## 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.<sup>1</sup> 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 firm 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, nearly all of these judgments likely have been rendered obsolete by changed circumstances.

The Antitrust Division recently implemented a program to review and, when appropriate, seek termination of legacy judgments. The Antitrust Division’s Judgment Termination Initiative encompasses review of all of its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative in a statement published in the Federal Register.<sup>2</sup> In addition, the Antitrust Division established a website to keep the public apprised of its efforts to terminate

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<sup>1</sup> 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 these two laws.

<sup>2</sup> 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.<sup>3</sup> The United States believes that its outstanding perpetual antitrust judgments presumptively should be terminated; nevertheless, the Antitrust Division examined each judgment covered by this motion to ensure that it is suitable for termination. The Antitrust Division also gave the public notice of—and the opportunity to comment on—its intention to seek termination of these judgments.

In brief, the process by which the United States has identified judgments it believes should be terminated is as follows:<sup>4</sup>

- The Antitrust Division reviewed its perpetual judgments entered by this Court to identify those that no longer serve to protect competition such that termination would be appropriate.
- When the Antitrust Division identified a judgment it believed suitable for termination, it posted the name of the case and a link to the judgment on its public judgment termination initiative website, <https://www.justice.gov/atr/JudgmentTermination>.
- The public had the opportunity to submit comments regarding each proposed termination to the Antitrust Division within thirty days of the date the case name and judgment link was posted to the public website.
- Following review of public comments, the Antitrust Division identifies those judgments it still believes warranted termination, and the United States moves to terminate them.

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. Section III

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<sup>3</sup> <https://www.justice.gov/atr/JudgmentTermination>.

<sup>4</sup> The United States followed this process to move other district courts to terminate legacy antitrust judgments. *See, e.g., 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); *United States v. The Wachovia Corp. and Am. Credit Corp.*, Case No. 3:75CV2656-FDW-DSC (W.D.N.C. Dec. 17, 2018) (terminating one judgment); *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments); *United States v. County National Bank of Bennington, et al.*, Case No. 5:19-mc-00032-gwc (D. Vt. March 21, 2019) (terminating one judgment).

explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old should be terminated absent compelling circumstances. This section also describes the additional reasons that the United States believes each of the judgments should be terminated. Section IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate. Appendix B summarizes the terms of each judgment and the United States' reasons for seeking termination. Finally, Appendix C is a Proposed Order Terminating Final Judgments.

## II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction 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. 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 United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995) (“[T]he power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations.”). Given its jurisdiction and its authority, the Court may terminate each judgment for any reason that justifies relief, including that the judgments no longer serve their original purpose of protecting competition.<sup>5</sup> Termination of these judgments is warranted.

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<sup>5</sup> 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.

### **III. ARGUMENT**

It is appropriate to terminate the perpetual judgments in each the above-captioned cases because they no longer continue to 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 these judgments, including that all terms of the judgment have been satisfied, defendants likely no longer exist, terms of the judgment merely prohibit that which the antitrust laws already prohibit, antitrust jurisprudence and its underlying economic rationale has evolved, or changed market conditions likely have rendered the judgment ineffectual. 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. The development of new products that compete with existing products, for example, may render a market more competitive than it was at the time of entry of the judgment or may even eliminate a market altogether, making the judgment irrelevant. In some circumstances, a judgment may be an impediment to the kind of adaptation to change that is the hallmark of competition, undermining the purposes of the antitrust laws. 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.<sup>6</sup>

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. There are no affirmative reasons for the judgments to remain in effect; indeed, there are additional reasons for terminating them.

### **B. The Judgments Should Be Terminated Because They Are Unnecessary**

In addition to age, other reasons weigh heavily in favor of termination of each judgment. These reasons include: (1) all terms of the judgment have been satisfied, (2) most defendants likely no longer exist, (3) the judgment largely prohibits that which the antitrust laws already prohibit, and (4) market conditions likely have changed. Each of these four reasons suggests the judgments no longer serve to protect competition. In this section, we describe these additional reasons, and we identify those judgments that are worthy of termination for each reason.

Appendix B summarizes the key terms of each judgment and the reasons to terminate it.

#### **1. All Terms of Judgment Have Been Satisfied**

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

- *Bird Corporation, et al.*, Civil No. 72-C-860;
- *National Association for Air Freight Inc., et al.*, Civil No. 71-C-563;
- *United Artists Theatre Circuit Inc., et al.*, Civil No. 71-C-609; and
- *Composition Roofers & Waterproofers Employers Association of New York City and Vicinity, et al.*, Civil No. 75-C-1275.

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

Because all of the substantive terms of the judgments were either satisfied or have long since expired, these judgments have been satisfied in full. Termination in these cases is a housekeeping action that has no implication for competition: it will allow the Court to clear its docket of several judgments that should have been terminated long ago but for the failure to include a term automatically terminating the judgments upon satisfaction of their substantive terms.

2. Most Defendants Likely No Longer Exist

The Antitrust Division believes that most of the defendants in the following cases brought by the United States likely no longer exist:

- *A. Schrader's Son, Inc.*, Civil No. 1116 (corporate defendant no longer exists; individual defendants deceased);
- *Seafarers Sea Chest Corporation, et al.*, Civil No. 14674 (one of two corporate defendants no longer exists);
- *Nassau-Suffolk County Retail Hardware Association, Inc., et al.*, Civil No. 17768 (one of two defendants, the trade association, no longer exists);
- *Nassau-Suffolk Pharmaceutical Society, Inc.*, Civil No. 63-C-1206 and 1207 (defendant trade association no longer exists);
- *Ehrenreich Photo-Optical Industries, Inc.*, Civil No. 66-C-929 (corporate defendant no longer exists); and
- *Bird Corporation, et al.*, Civil No. 72-C-860 (one of two corporate defendants no longer exists).

These judgments relate to very old cases brought against corporations, trade associations or trade groups and their individual or firm members. With the passage of time, the individual defendants in these cases likely have passed away and some firm defendants likely have gone out of existence. To the extent that defendants no longer exist, the related judgment serves no purpose, which is an additional reason to terminate these judgments.

3. Terms of Judgment Prohibit Acts Already Prohibited by Law

The Antitrust Division has determined that the core provisions of the judgments in the following cases merely prohibit acts that are illegal under the antitrust laws, such as price fixing and market or customer allocations:

- *Nassau-Suffolk County Retail Hardware Association, Inc., et al.*, Civil No. 17768 (price fixing);
- *F. & M. Schaefer Brewing Co.*, 62-C-1421 (market allocation);
- *Bird Corporation, et al.*, Civil No. 72-C-860 (price fixing, customer allocation, market allocation);
- *National Association for Air Freight Inc., et al.*, Civil No. 71-C-563 (price fixing, customer allocation); and
- *Composition Roofers & Waterproofers Employers Association of New York City and Vicinity, et al.*, Civil No. 75-C-1275 (price fixing).

These terms amount to little more than an admonition that defendants shall not violate the law. Absent such terms, defendants who engage in the type of behavior prohibited by these judgments still face the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation, thereby making such violations of the antitrust laws unlikely to occur. To the extent these judgments include terms that do little to deter anticompetitive acts, they serve no purpose and there is reason to terminate them.

4. Market Conditions Likely Have Changed

The Antitrust Division has determined that the following judgments concern products or markets that likely no longer exist, no longer are substantial in size, or now face different competitive forces such that the behavior at issue likely no longer is of competitive concern:

- *A. Schrader's Son, Inc.*, Civil No. 1116 (valves and other parts used in manufacture and repair of pneumatic tires and tubes);
- *Seafarers Sea Chest Corporation, et al.*, Civil No. 14674 (concerning the sale of slop chest supplies, *i.e.*, supplies stored on a ship that are sold to vessel personnel).

Substantial changes in the markets during the decades since their entry likely significantly altered the companies' positions in the marketplace. For instance, the judgment in

*A. Schrader's Son, Inc.* was entered in 1923. Since that time, the manufacture of pneumatic tubes and tires has changed markedly in that many other companies produce them, more such products are available, and manufacturing methods have been developed. The *Seafarers Sea Chest Corporation* judgment was entered in 1956, when the slop chest industry was consolidated to one supplier; today there appear to be hundreds of providers. Market dynamics in these industries appear to have changed so substantially that the factual conditions that underlay the decisions to enter the judgments no longer exist.

**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, and noting that it would begin its efforts by proposing to terminate judgments entered by the federal district courts in Washington, D.C., and Alexandria, Virginia.<sup>7</sup> On November 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.<sup>8</sup> The notice identified each case, linked to the judgment, and invited public comment. In the above-captioned cases, however, the Division received no comments concerning the judgments. Had comments been received, the Division would have reviewed them and considered whether they provided a reason for retaining any of the judgments.

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<sup>7</sup> Press Release, Department of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments, (April 25, 2018), <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

<sup>8</sup> <https://www.justice.gov/atr/JudgmentTermination>, link titled “View Judgments Proposed for Termination in Eastern District of New York.”

#### 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. *See* Appendix C, which is a proposed order terminating the judgments in the above-captioned cases.

Dated: Brooklyn, New York  
May 31, 2019

Respectfully submitted,

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