IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: TERMINATION OF LEGACY ANTITRUST JUDGMENTS IN THE SOUTHERN DISTRICT OF INDIANA	No. 1:19-mc-00036

Consolidating:

UNITED STATES OF AMERICA, Plaintiff, v. NAT'L ASS'N OF RETAIL DRUGGISTS, ET AL., Defendants.	Equity No. 10593

UNITED STATES OF AMERICA, Plaintiff, v. F.S. BOWSER & CO., ET AL., Defendants.	Equity No. 117

UNITED STATES OF AMERICA, Plaintiff, v. EVANSVILLE CONFECTIONERS' ASSN., ET AL., Defendants.	Equity No. 86
UNITED STATES OF AMERICA, Plaintiff, v. GROWERS FINANCE CORPORATION Defendant.	Civil Action No. 914
UNITED STATES OF AMERICA, Plaintiff, v. ALLIANCE AMUSEMENT COMPANY, ET AL., Defendants.	Civil Action No. 493

UNITED STATES OF AMERICA, Plaintiff, v. HERFF JONES COMPANY, ET AL., Defendants.	Civil Action No. JP65-C-465
UNITED STATES OF AMERICA, Plaintiff, v. WAYNE CORPORATION Defendant.	Civil Action No. IP72-C-215

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

The United States of America respectfully submits this memorandum in support of its motion to terminate seven legacy antitrust judgments. This Court entered the judgments in these cases as follows:

Case Name	Case Number	Date Judgment Entered
National Association of Retail Druggists	Equity No. 10593	May 9, 1907
F.S. Bowser & Co.	Equity No. 117	June 10, 1915
Evansville Confectioners' Assn.	Equity No. 86	February 21, 1929
Growers Finance Corp.	Civil Action No. 914	March 2, 1945
Alliance Amusement Co.	Civil Action No. 493	September 9, 1955
Herff Jones Co.	Civil Action No. JP65-C-465	June 14, 1967
Wayne Corp.	Civil Action No. IP 72 C 215	June 5, 1972

The oldest judgment that is the subject of this motion is over one hundred and ten years old. The newest judgment is over forty-five years old. After examining each judgment—and after soliciting public comment on each proposed termination, and receiving no comments—the United States has concluded that termination of all seven of these judgments is appropriate. Termination will permit the Court to clear its docket, and the Department to clear its records, 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.[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.

[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 the Sherman Act.

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 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.[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 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 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.

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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.

- 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 now 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 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 rarely serve to protect competition and those that are more than ten years old presumptively should be terminated. This section 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. Appendix B summarizes the terms of each judgment and the United States' reasons for seeking termination. Appendix C is a Proposed Order Terminating 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. Five judgments, copies of which are included in Appendix A, provide that the

[4] 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. Capital Glass & Trim Co., et al.*, Case No. 3679N (M.D. Ala. Jan. 2, 2019) (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).

Court retains jurisdiction. Jurisdiction was not explicitly retained in two[5] above-captioned cases, but it has long been recognized that courts are vested with inherent power to modify judgments they have issued which regulate future conduct.[6] 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 Margoles v. Johns*, 798 F.2d 1069, 1072-73 (7th Cir. 1986) ("Rule 60(b) allows a district court to relieve a party from a final judgment for the reasons specified in subsections (1) through (5). In addition, subsection (6) provides that the court may grant a motion under Rule 60(b) for 'any other reason justifying relief.'").

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.[7] Termination of these judgments is warranted.

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[5] *United States v. National Association of Retail Druggists, et al.*, Equity No. 10593 (1907); *United States v. F.S. Bowser & Co., et al.*, Equity No. 117 (1915).

[6] *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).

[7] 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). 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 many 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. 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.[8]

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. For example, in the *National Association of Retail Druggists* case, this Court entered the judgment in 1907. Thus, over one hundred years ago, the judgment stopped an industry-wide conspiracy to fix prices on proprietary drugs.

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

In short, there are no affirmative reasons for any of the judgments that are part of this motion 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) terms of the judgment have been satisfied; (2) defendants no longer exist or are deceased; (3) terms of the judgment prohibit acts that are prohibited by law. Each of these 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 that each should be terminated.

1. Terms of the Judgment Have Lapsed or Been Satisfied

The Antitrust Division has determined that the terms of the judgment in *United States v. Herff Jones Company*, Civil Action No. JP65-C-465, have been satisfied. The judgment required Herff Jones to divest the John Roberts Manufacturing Co. within six months. That divestiture took place years ago. In addition, the decree enjoined the Herff Jones Company from acquiring any interest in any entity that manufactured or distributed class rings. That provision of the judgment had a ten-year term, which has lapsed. Finally, the judgment also enjoined two individuals from owning stock in both the Herff Jones and John Roberts companies. Both individuals are deceased. Thus, all the terms of the *Herff Jones* judgment have lapsed or been satisfied.

The judgment in *United States v. Wayne Corporation*, Civil Action No. IP72-C-215 (1972) enjoined the Wayne Corporation from colluding with distributors to fix prices and

allocate sales territories with respect to "professional vehicles." At the time of the judgment, the Wayne Corporation manufactured ambulances, hearses, and flower cars, all defined as professional vehicles in the judgment. The Wayne Corporation ceased manufacturing professional vehicles in 1980.

2. Defendants No Longer Exist or Are Deceased

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

- *United States v. National Assn. of Retail Druggists, et al.*, Equity No. 10593 (1907),
- *United States v. F.S. Bowser & Co., et al.*, Equity No. 117 (1915),
- *United States v. Evansville Confectioners' Assn., et al.*, Equity No. 86 (1929),
- *United States v. Growers Finance Corp.*, Civil Action No. 914 (1945),
- *United States v. Alliance Amusement Co.*, et al., Civil Action No. 493 (1955), and
- *United States v. Herff Jones Co., et al.*, Civil Action No. JP65-C-465 (1967).

These judgments relate to very old cases brought against corporate defendants, trade associations, and individuals. As shown in Appendix B, most of the corporate defendants appear to have gone out of existence, and the individual defendants are deceased. To the extent that defendants no longer exist, the related judgment serves no purpose, which is a reason to terminate these judgments.

3. Terms of the Judgment Prohibit Acts Already Prohibited by Law

The *Wayne Corporation* (price fixing and sales territory allocations) and *National Association of Retail Druggists* (price fixing) judgments enjoin activities that are illegal under the antitrust laws. 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 that the judgments in these cases include terms that do little to deter anticompetitive acts, they serve no continuing purpose and there is reason to terminate them.

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 these judgments. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments.[9] On October 10, 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.[10] The notice identified each case, linked to the judgment, and invited public comment. No public comments were received with respect to these judgments.

[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.

[10] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Southern District of Indiana*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-indiana-southern-district (last updated Oct. 4, 2018).

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 C.

Respectfully submitted,

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