IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA. Plaintiff, v. E. I. DU PONT DE NEMOURS AND CO., *ET AL.*, Defendants;	In Equity No. 280
UNITED STATES OF AMERICA, Plaintiff, v. BATES VALVE BAG CORP., *ET AL.*, Defendants;	In Equity No. 705
UNITED STATES OF AMERICA, Plaintiff, v. COLUMBIA GAS & ELECTRIC CORP., *ET AL.*, Defendants;	In Equity No. 1099
UNITED STATES OF AMERICA, Plaintiff, v. VEHICULAR PARKING, LTD, *ET AL.*, Defendants;	Civil Action No. 259

UNITED STATES OF AMERICA, Plaintiff, v. SCHENLEY INDUS., INC., Defendant;	Civil Action No. 1686
UNITED STATES OF AMERICA, Plaintiff, v. CITIES SERVICE CO. AND PETROLEUM CHEMICALS, INC., Defendants;	Civil Action No. 68-213-S
UNITED STATES OF AMERICA, Plaintiff, v. HERCULES, INC., *ET AL.*, Defendants;	Civil Action No. 4667
UNITED STATES OF AMERICA, Plaintiff, v. G. HEILEMAN BREWING CO., INC. AND PABST BREWING CO., Defendants.	Civil Action No. 82-750

THE UNITED STATES' MOTION
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 36 and 107 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 opposing termination. 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

[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 these laws.

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:

- 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.

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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.

- 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 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 prospectively is no longer equitable; or (6) for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5)-(6); *see also Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (explaining that Rule

[4] The United States followed this process to move several other district courts to terminate legacy antitrust judgments. *See 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. 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).

60(b)(5) "encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances" and that "district courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment"); *Bldg. & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (holding that "the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), *i.e.*, 'that it is no longer equitable that the judgment should have prospective application,'" and instructing that "equity demands a flexible response to the unique conditions of each case"). 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.

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[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.

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.[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

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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.

> 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.

Additional reasons specific to each judgment are set forth below:

1. *United States v. E. I. du Pont de Nemours and Co., et al.*, In Equity No. 280

The judgment was entered in 1912 and modified in 1913 and 1921. Jurisdiction was explicitly retained in the second to last paragraph of the judgment. The judgment, among other things, enjoined the defendants from continuing their combination and monopoly of blasting powder, dynamite, and other explosives; required the dissolution of certain defendants; and required the organization of two corporations or alternatively the reorganization of certain defendants. The judgment should be terminated because the core requirements of the judgment have been met.

2. *United States v. Bates Valve Bag Corp., et al.*, In Equity No. 705

The judgment was entered in 1931. Jurisdiction was explicitly retained in Section VI of the judgment. The judgment declared that the exclusive dealing contracts for certain bag filling machines were "null and void," and the court "perpetually enjoined and restrained" the defendants from enforcing such contracts. The judgment should be terminated because most defendants likely no longer exist.

3. *United States v. Columbia Gas & Electric Corp., et al.*, In Equity No. 1099

The judgment was entered in 1936. A supplemental judgment was entered in 1943. Jurisdiction was explicitly retained in Section V of the judgment. The judgment, among other things, enjoined the defendants from exercising any control over, or interference with, the independent action of Panhandle Eastern in its production, transportation, sale or delivery of natural gas. The judgment should be terminated because most defendants likely no longer exist.

4. *United States v. Vehicular Parking, Ltd., et al.*, Civil Action No. 259

The judgment was entered in 1944 and amended in 1946. Jurisdiction was explicitly retained in Section XIII of the judgment. The judgment noted how the defendants engaged in certain anticompetitive behavior, including (1) contracting, combining, and conspiring to restrain trade and commerce in the manufacture, distribution, and sale of parking meters, parts, services, and accessories; and (2) unlawfully monopolizing and attempting to monopolize certain patents and patent applications relating to parking meters and the related sale, manufacturing, and distribution of those meters and parts by improve use of the claims of patents. As a result, the relevant agreements, including patent licensing provisions, were adjudged unlawful, and the defendants, among other things, were enjoined and restrained from fixing prices of parking meters, dividing sales territories, agreeing to limit production, and threatening a suit for patent infringement or royalties. The judgment should be terminated because its terms largely prohibit acts the antitrust laws already prohibit (*e.g.*, price fixing and market allocation).

5. *United States v. Schenley Indus., Inc.*, Civil Action No. 1686

The judgment was entered in 1957. Jurisdiction was explicitly retained in Section V of the judgment. The judgment enjoined the defendant from acquiring any corporation engaged in distilling and distributing whiskey. The judgment should be terminated because the defendant no longer exists.

6. *United States v. Cities Service Co. and Petroleum Chemicals, Inc.*, Civil Action No. 68-213-S

The judgment was entered in 1963. Jurisdiction was explicitly retained in Section IX of the judgment. The judgment, among other things, required Cities Service Company to either divest its interest in Petroleum Chemical Inc. (owned jointly by it and Continental Oil Co.), or to

purchase Continental's interest in Petroleum. The judgment should be terminated because most defendants likely no longer exist, and all requirements of the judgment have been met.

7. *United States v. Hercules, Inc., et al.*, Civil Action No. 4667

The judgment was entered in 1973. Jurisdiction was explicitly retained in Section VIII of the judgment. The judgment, among other things, required the termination of all license agreements among the defendants entered into after September 30, 1969 relating to high density polyethylene, required the dissolution of the defendants' partnership, prohibited each defendant from restricting or limiting other defendant's right to use technological information acquired pursuant to the aforementioned license agreements or participation in the defendants' partnership, and enjoined and restrained defendants from entering into or claiming certain rights under any contract or plan with each other to hinder the other party from entering into competition with it. The judgment should be terminated because, at over forty-six years old, it is well past the age where an antitrust judgment presumptively becomes irrelevant to, or inconsistent with, competition. If the Antitrust Division learns of the defendants engaging in similar anticompetitive behavior in the future, it has all the investigative and prosecutorial powers necessary to ensure that competition is not harmed.

8. *United States v. G. Heileman Brewing Co., Inc. and Pabst Brewing Co.*, Civil Action No. 82-750

The judgment was entered in 1983. Jurisdiction was explicitly retained in Section VII of the judgment. The judgment, among other things, required that the defendants divest certain interests in their companies, or affiliates, as a condition to the defendants' merger. The judgment should be terminated because all requirements of the judgment have been met.

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.[7] On August 24, 2018, and April 16, 2019, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.[8] 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.

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[7] 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.

[8] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Delaware District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-delaware-district (last updated Apr. 16, 2019).

Respectfully submitted,

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Dated: May 24, 2019