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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE: TERMINATION OF LEGACY ANTITRUST JUDGMENTS IN THE DISTRICT OF OREGON	No. 3:19-mc-00441 MO

Consolidating:

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE & TELEGRAPH CO., ET AL., Defendants;	Equity No. 6082

UNITED STATES OF AMERICA, Plaintiff, v. THE WHEELER-OSGOOD COMPANY, ET AL., Defendants;	Civil No. E-8680-34
UNITED STATES OF AMERICA, Plaintiff, v. OREGON WHOLESALE GROCERS' ASSN., ET AL., Defendants;	Civil No. E- 8700-34
UNITED STATES OF AMERICA, Plaintiff, v. TUBESALES, ET AL., Defendants;	Civil No. 62-512

UNITED STATES OF AMERICA, Plaintiff, v. JANTZEN INC., ET AL., Defendants;	Civil No. 64-111
UNITED STATES OF AMERICA, Plaintiff, v. OREGON ATHLETIC EQUIPMENT CO., INC., ET AL., Defendants.	Civil No. 68-424

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 forty-seven and 105 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

[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 this motion concern violations of 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.

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 now moves to terminate it.

The United States followed this process for each judgment it seeks to terminate by this motion.[4]

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[3] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination.

[4] The United States followed this process to move several other district courts to terminate legacy antitrust judgments. *See United States v. The Nome Retail Grocerymen's Assoc.*, Case No. 2:06-cv-1449-HRH (D. Alaska Mar. 7, 2019) (terminating two legacy 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); *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).

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. Most judgments provide that the Court retains jurisdiction. Jurisdiction was not explicitly retained in two[5] of the 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);

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[5] *U.S. v. The Wheeler-Osgood Company*, Civ. No. E-8680-34 (D. Or. 1925); *U.S. v. Oregon Wholesale Grocers' Association*, Civ. No. E-8700-34 (D. Or. 1926).

[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); *see also Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) ("[E]ven in the absence of express authorization in the decree or request from the parties, the power to modify in appropriate circumstances is inherent in the equity jurisdiction of the court.").

Gilmore v. People of the State of California, 220 F.3d 987, 1007 (9th Cir. 2000) ("Rule [60(b)(5) and (b)(6)] codif[y] the long-established principle of equity practice that a court may, in its discretion, take cognizance of changed circumstances and relieve a party from a continuing decree."); *Jeff D. v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004) ("federal courts are to apply a flexible standard in assessing motions under Rule 60(b)"); *cf. U.S. v. The Nome Retail Grocerymen's Assoc.*, Case No. 2:06-cv-1449-HRH (D. Alaska Mar. 7, 2019)(terminating two legacy judgments).

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.[7] 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.

[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). 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.[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.

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:

- 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, 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.

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

- 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.

Additional reasons specific to each judgment are set forth below:

1. *U.S. v. American Telephone and Telegraph Co*., Equity No. 6082 (D. Or. 1914).

The judgment was entered in 1914 and modified in 1914, 1919, and 1922. *See* Appendix A-3 (1914), A-16 (1914), A-20 (1919), A-26 (1922). Jurisdiction was explicitly retained in Paragraph 14 of the original judgment. Defendants in this case had, among other acts, sought to monopolize the telephone communications business in Oregon, Washington, Montana, and Idaho by reducing or threatening to reduce rates below a paying basis, forcing other independent telephone companies to deal exclusively with the Defendants, and securing control of independent telephone companies and then severing or significantly degrading their telephone connections. The judgment enjoined Defendants, including the American Telephone and Telegraph Company ("AT&T"), from disrupting telephone interconnects, refusal to deal, and attempted monopolization, among other things. The judgment should be terminated because the twenty-five individual defendants likely are deceased. In addition, market conditions have changed such that the judgment no longer protects competition or may even be anticompetitive. More specifically, the later breakup of AT&T, which resulted in the divestiture of the regional Bell Operating Companies, significantly diminished the dominant position of AT&T at the time this decree was entered.

2. *U.S. v. The Wheeler-Osgood Company*, No. E-8680-34 (D. Or. 1925).

The judgment was entered in 1925. *See* Appendix A-29. Jurisdiction was not explicitly retained in this judgment. Defendants were fir door manufacturers who, among other acts, agreed to curtail their production of fir doors and eliminate competition among themselves as to the grades, sizes, and terms and conditions of the sale of the doors for the purpose of enabling them to maintain prices. Defendants were enjoined from, among other things, price fixing and information exchange related to the manufacturing of fir doors. The judgment should be terminated because the judgment's core terms largely prohibit acts the antitrust laws already prohibit (price fixing).

3. *U.S. v. Oregon Wholesale Grocers' Association*, No. E-8700-34 (D. Or. 1926).

The judgment was entered in 1926. *See* Appendix A-33. Jurisdiction was not explicitly retained in this judgment. The complaint alleged that the Oregon Wholesale Grocers' Association and its members had fixed and maintained prices of groceries, exchanged price lists, and excluded certain competitors by agreeing not to deal with manufacturers who sold directly to competitors. The judgment should be terminated because its core terms largely prohibit acts the antitrust laws already prohibit (price fixing and group boycotts).

4. *U.S. v. Tubesales*, No. 62-512 (D. Or. 1963).

The judgment as to defendants Tubesales, The Republic Supply Company of California, and Alaskan Copper Companies was entered in 1963. *See* Appendix A-36. The judgment as to defendant Esco Corporation was entered in 1965. *See* Appendix A-39. Jurisdiction was explicitly retained in Section VII of both judgments. Defendants, wholesale distributors of stainless steel pipe and tubing in the states of Washington, Oregon, California, Idaho, and Utah, were charged

with price fixing. The judgments should be terminated because their core terms largely prohibit acts the antitrust laws already prohibit (price fixing and bid rigging).

5. *U.S. v. Jantzen, Inc., No.*, 64-111 (D. Or. 1966).

The judgment was entered in 1966. *See* Appendix A-43. Jurisdiction was explicitly retained in Section IX of the judgment. Four swimwear manufacturers were prohibited under the terms of the consent decree from, among other things, agreeing with other manufacturers to fix prices, establish price breaks for retail clearance sales, or refusing to sell swimwear to any retailer or class of retailer. The judgment should be terminated because its core terms largely prohibit acts the antitrust laws already prohibit (price fixing).

6. *U.S. v. Oregon Athletic Equipment Company, Inc.*, No. 68-424 (1969).

The judgment was entered in 1969. *See* Appendix A-48. Jurisdiction was explicitly retained in Section X of the judgment. Defendants had conspired to fix prices of athletic goods and rigged bids that were submitted to large purchasers of sporting equipment such as schools. The judgment should be terminated because its core terms largely prohibit acts the antitrust laws already prohibit (bid rigging).

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 June 15, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website,

[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.

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,

Dated: May 21, 2019

s/ Monsura A. Sirajee

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[10] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Oregon, District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-oregon-district (last updated March 28, 2019).