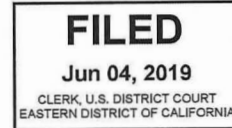


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**UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA**

IN RE: TERMINATION OF LEGACY
ANTITRUST JUDGMENTS IN THE
EASTERN DISTRICT OF CALIFORNIA

Misc. No. 2:19-mc-0083 KJM KJN
**UNITED STATES' MOTION AND
MEMORANDUM REGARDING
TERMINATION OF LEGACY
ANTITRUST JUDGMENTS**

UNITED STATES OF AMERICA,
Plaintiff,
v.
E.L. BRUCE CO., *et al.*,
Defendants;

Civil No. 21783 W

UNITED STATES OF AMERICA,
Plaintiff,
v.
BATTERY SEPARATOR MFRS.' ASS'N,
et al.,
Defendants;

Civil No. 21940-R

1 UNITED STATES OF AMERICA,

Civil No. 1479-ND

2 Plaintiff,

3 v.

4 BAKERSFIELD ASSOCIATED PLUMBING
5 CONTRACTORS, INC., *et al.*,

6 Defendants.

7
8 The United States moves to terminate the judgments in each of the above-captioned antitrust
9 cases pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The judgments were entered by
10 this Court between 61 and 97 years ago. The United States has concluded that because of their age and
11 changed circumstances since their entry, these judgments no longer serve to protect competition. The
12 United States gave the public notice and the opportunity to comment on its intent to seek termination of
13 the judgments; it received no comments opposing termination. For these and other reasons explained
14 below, the United States requests that the judgments be terminated.

15 **I. BACKGROUND**

16 From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States
17 frequently sought entry of antitrust judgments whose terms never expired.¹ Such perpetual judgments
18 were the norm until 1979, when the Antitrust Division of the United States Department of Justice
19 (“Antitrust Division”) adopted the practice of including a term limit of ten years in nearly all of its
20 antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect
21 indefinitely unless a court terminates them. Although a defendant may move a court to terminate a
22 perpetual judgment, few defendants have done so. There are many possible reasons for this, including
23 that defendants may not have been willing to bear the costs and time resources to seek termination,
24 defendants may have lost track of decades-old judgments, individual defendants may have passed away,
25 or company defendants may have gone out of business. As a result, hundreds of these legacy judgments
26 remain open on the dockets of courts around the country. Originally intended to protect the loss of

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28 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 the Sherman Act.

1 competition arising from violations of the antitrust laws, none of these judgments likely continues to do
2 so because of changed circumstances.

3 The Antitrust Division has implemented a program to review and, when appropriate, seek
4 termination of legacy judgments. The Antitrust Division's Judgment Termination Initiative encompasses
5 review of all its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative
6 in a statement published in the Federal Register.² In addition, the Antitrust Division established a
7 website to keep the public informed of its efforts to terminate perpetual judgments that no longer serve
8 to protect competition.³ The United States believes that its outstanding perpetual antitrust judgments
9 presumptively should be terminated; nevertheless, the Antitrust Division is examining each judgment to
10 ensure that it is suitable for termination. The Antitrust Division is giving the public notice of—and the
11 opportunity to comment on—its intention to seek termination of its perpetual judgments.
12 In brief, the process the United States is following to determine whether to move to terminate a
13 perpetual antitrust judgment is as follows:

- 14 • The Antitrust Division reviews each perpetual judgment to determine whether it no longer
15 serves to protect competition such that termination would be appropriate.
- 16 • If the Antitrust Division determines a judgment is suitable for termination, it posts the name
17 of the case and the judgment on its public Judgment Termination Initiative website,
18 <https://www.justice.gov/atr/JudgmentTermination>.
- 19 • The public has the opportunity to comment on each proposed termination within thirty days
20 of the date the case name and judgment are posted to the public website.
- 21 • Following review of public comments, the Antitrust Division determines whether the
22 judgment still warrants termination; if so, the United States moves to terminate it.

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

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25 ² Department of Justice's Initiative to Seek Termination of Legacy Antitrust Judgments, 83 Fed.
26 Reg. 19,837 (May 4, 2018), <https://www.gpo.gov/fdsys/granule/FR-2018-05-04/2018-09461>.

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

⁴ The United States followed this process to move other district courts to terminate legacy
antitrust judgments. *See, e.g., United States v. Idaho State Pharmaceutical Ass'n, Inc. et al.*, Case 1:19-
mc-10427-DCN (D. Idaho Apr. 18, 2019) (terminating four judgments); *United States v. Inter-Island
Steam Navigation Co., Ltd., et al.*, Case 1:19-mc-00115 (D. Haw. April 9, 2019) (terminating five

1 The remainder of this motion is organized as follows: Section II describes the Court's
 2 jurisdiction to terminate the judgments in the above-captioned cases and the applicable legal standards
 3 for terminating the judgments. Section III argues that perpetual judgments rarely serve to protect
 4 competition and that those that are more than ten years old presumptively should be terminated. Section
 5 III also discusses the specific circumstances justifying termination of the judgment. Section IV
 6 concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate.
 7 A proposed order accompanies this motion.

8 **II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS**

9 This Court has jurisdiction and authority to terminate the judgments in the above-captioned
 10 cases. Each judgment, a copy of which is included in Appendix A, provides that the Court retains
 11 jurisdiction. In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate each
 12 judgment. According to Rule 60(b)(5) and (b)(6), “[o]n motion and just terms, the court may relieve a
 13 party . . . from a final judgment . . . (5) [when] applying it prospectively is no longer equitable; or (6) for
 14 any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5)–(6); *see also Frew ex rel. Frew v.*
 15 *Hawkins*, 540 U.S. 431,441 (2004) (explaining that Rule 60(b)(5) “encompasses the traditional power
 16 of a court of equity to modify its decree in light of changed circumstances” and that “district courts
 17 should apply a ‘flexible standard’ to the modification of consent decrees when a significant change in
 18 facts or law warrants their amendment”) (citation omitted); *United States v. Asarco Inc.*, 430 F.3d 972,
 19 979 (9th Cir. 2005) (Under Rule 60(b), “a court may relieve a party from a final judgment when . . . it is
 20 no longer equitable that the judgment should have prospective application. . . . [This] Rule codifies the
 21 courts’ traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the
 22 prospective effect of their decrees.”) (citations and internal quotation marks omitted). Given its
 23 jurisdiction and authority, the Court may terminate each judgment for any reason that justifies relief,
 24 including that the judgment no longer serves its original purpose of protecting competition.⁵ Termination
 25 of these judgments is warranted.

26 judgments); *United States v. The Nome Retail Grocerymen’s Ass’n, et al.*, Case 2:06-cv-01449 (D.
 27 Alaska Mar. 7, 2019) (terminating one judgment); *United States v. Am. Amusement Ticket Mfrs. Ass’n,*
 28 *et al.*, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018) (terminating nineteen judgments).

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
 U.S. MOT. AND MEM. TO TERMINATE JUDGMENTS 3

1 **III. ARGUMENT**

2 It is appropriate to terminate the perpetual judgments in the above-captioned cases because they
3 no longer serve their original purpose of protecting competition. The United States believes that the
4 judgments presumptively should be terminated because their age alone suggests they no longer protect
5 competition. Other reasons, however, also weigh in favor of terminating them. Under such
6 circumstances, the Court may terminate the judgments pursuant to Rule 60(b)(5) or (b)(6) of the Federal
7 Rules of Civil Procedure.

8 **A. The Judgments Presumptively Should Be Terminated Because of Their Age**

9 Permanent antitrust injunctions rarely serve to protect competition. The experience of the United
10 States in enforcing the antitrust laws has shown that markets almost always evolve over time in response
11 to competitive and technological changes. These changes may make the prohibitions of decades-old
12 judgments either irrelevant to, or inconsistent with, competition. These considerations, among others,
13 led the Antitrust Division in 1979 to establish its policy of generally including in each judgment a term
14 automatically terminating the judgment after no more than ten years.⁶ The judgments in the above-
15 captioned matters—all of which are decades old—presumptively should be terminated for the reasons
16 that led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten
17 years.

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

19 In addition to age, other reasons weigh heavily in favor of terminating each judgment. Based on
20 its examination of the judgments, the Antitrust Division has determined that each should be terminated
21 for one or more of the following reasons:

- 22 • Most defendants likely no longer exist. With the passage of time, many of the company
23 defendants in these actions likely have gone out of existence, and many individual defendants

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26 each judgment to terminate them under Fed. R. Civ. P. 60(b)(5) or (b)(6). All of these judgments would
27 have terminated long ago if the Antitrust Division had the foresight to limit them to ten years in duration
28 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.

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

1 likely have passed away. To the extent that defendants no longer exist, the related judgment
2 serves no purpose and should be terminated.

- 3 • The judgment prohibits acts that the antitrust laws already prohibit, such as fixing prices,
4 allocating markets, rigging bids, or engaging in group boycotts. These prohibitions amount
5 to little more than an admonition that defendants must not violate the law. Absent such terms,
6 defendants still are deterred from violating the law by the possibility of imprisonment,
7 significant criminal fines, and treble damages in private follow-on litigation; a mere
8 admonition to not violate the law adds little additional deterrence. To the extent a judgment
9 includes terms that do little to deter anticompetitive acts, it should be terminated.
- 10 • Market conditions likely have changed such that the judgment no longer protects competition
11 or may even be anticompetitive. For example, the subsequent development of new products
12 may render a market more competitive than it was at the time the judgment was entered or
13 may even eliminate a market altogether, making the judgment irrelevant. In some
14 circumstances, a judgment may impede the kind of adaptation to change that is the hallmark
15 of competition, rendering it anticompetitive. Such judgments clearly should be terminated.

16 Additional reasons specific to each judgment are set forth below.

17 1. United States v. E.L. Bruce Co., et al., Civil No. 21783 W (N.D. Cal. Feb. 14, 1941)

18 The judgment was entered in 1941 in the former Northern District of California, Southern
19 Division. Jurisdiction was explicitly retained in Section VII of the judgment. The judgment prohibits
20 defendants—five firms and eight individuals—from fixing the prices of hardwood flooring distribution
21 and from allocating sales or markets. The judgment should be terminated because: (a) most defendants
22 likely no longer exist; and (b) its terms largely prohibit acts the antitrust laws already prohibit (*i.e.*, price
23 fixing and market allocation). An online search of California Secretary of State Business Registration
24 records reveals that four of the five corporate defendants are no longer in an active status. Additionally,
25 all the individual defendants have likely passed away in the nearly 80 years since the entry of the
26 judgment.

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1 2. United States v. Battery Separator Mfrs. ' Ass'n, et al., Civil No. 21940-R (N.D. Cal. Aug. 11, 1941)

2 The judgment was entered in 1941 in the former Northern District of California, Southern
3 Division. Jurisdiction was explicitly retained in Section 8 of the judgment. The judgment prohibits
4 defendant firms and individuals from fixing the prices of wooden battery separators. The judgment
5 should be terminated because: (a) most defendants likely no longer exist; and (b) its terms largely
6 prohibit acts the antitrust laws already prohibit (*i.e.*, price fixing). An online search of the California
7 Secretary of State Business Registration records and an internet search of all the defendant firms
8 indicate that they no longer exist or have successors. Additionally, all of the individual defendants have
9 likely passed away in the nearly 80 years since the entry of the judgment.

10 3. United States v. Bakersfield Associated Plumbing Contractors, et al., Civil No. 1479-ND (S.D. Cal.
11 May 26, 1958)

12 The court entered a judgment in this case on May 26, 1958 and a judgment modification on
13 December 22, 1958 in the former Southern District of California, Northern Division. Jurisdiction was
14 explicitly retained in Section VI. The judgment as modified resolved a case brought against three
15 associations of plumbing, sheet metal, and electrical subcontractors who engaged in price tampering by
16 adopting and enforcing the rules for the operation of their bid depository. The initial judgment enjoined
17 defendants from enforcing rules that: (1) required the submission of separate bids or limited the discount
18 in price at which a combination bid may be submitted, (2) required the payment of a fee to the bid
19 depository, and (3) permitted the withdrawal of any bid during the interval between the time the
20 subcontractor's bid was opened and the time when any such bid was available for delivery to any
21 general contractor. The court later modified the initial judgment on December 22, 1958 to permit the
22 operation of a bid depository in accordance with an approved plan that did not have the aforementioned
23 discount restrictions and reduced the bid depository fee to .5% of the contract for heating and
24 ventilating, sheet metal, and electrical, with a cap of \$250. The judgment as modified should be
25 terminated because its terms largely prohibit acts the antitrust laws already prohibit (*i.e.*, price fixing and
26 bid rigging).

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