

1 KATRINA ROUSE (CABN 270415)
katrina.rouse@usdoj.gov
2 ALBERT B. SAMBAT (CABN 236472)
albert.sambat@usdoj.gov
3 Attorneys for the United States
4 Antitrust Division
U.S. Department of Justice
5 450 Golden Gate Avenue
6 Box 36046, Room 10-0101
San Francisco, CA 94102
7 Telephone: (415) 934-5300
8 Facsimile: (415) 934-5399

9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12
13 UNITED STATES OF AMERICA,
14 Plaintiff,

15 v.

16 CALIFORNIA WHOLESALE
17 GROCERS' ASS'N,
18 WILLIAM CLUFF CO.,
19 DELANEY BROS.,
20 DODGE, SWEENEY & CO.,
21 HAAS BROS.,
22 J.H. NEWBAUER & CO.,
23 SUSSMAN, WORMSER & CO.,
24 TILLMAN & BENDEL, INC.,
25 HALL, LUHRS & CO.,
26 LINDLEY CO.,
27 BERT MCDOWELL CO.,
28 MEBIUS & DRESCHER CO.,
SW. GROCERY CO.,
KLAUBER-WANGENHEIM CO.,
SIMON LEVI CO. OF SAN DIEGO,
KEYSTONE CO. OF SAN JOSE,
WALSH-COL CO.,

Misc. No. 2:19-MC-00086

**UNITED STATES' MOTION
TO TERMINATE LEGACY
ANTITRUST JUDGMENT
AND MEMORANDUM IN
SUPPORT THEREOF**

1 HEDGES-BUCK CO.,
2 J.R. GARRETT CO.,
3 CALIFORNIA WHOLESALE
4 GROCERY CO.,
5 R.L. CRAIG & CO.,
6 HAAS, BARUCH & CO.,
7 M.A. NEWMARK & CO.,
8 SIMPSON-ASHBY CO.,
9 UNITED WHOLESALE GROCERY
10 CO.,
11 NAU-MURRAY CO.,
12 SMART & FINAL CO.,
13 ENRICO MARRE & ALPHONSE
14 MARRE (COPARTNERS DOING
15 BUSINESS UNDR THE FIRM NAME
16 AND STYLE OF E. MARRE & BRO.,
17 P.T. CUMBERSON,
18 W.M. DELANEY,
19 E.G. WILLIAMS,
20 F.M. VANSICKLEN,
21 S. LILIENTHAL,
22 J.H. NEWBAUER,
23 S.R. NEWBAUER,
24 J. BLUMLEIN,
25 A.J. FALK,
26 W.T. HOLLING,
27 W.E. SPROUSE,
28 W.J. GRAHAM,
J.W. PHELPS,
VICTOR H. TUTTLE,
J. KRAFFT,
M.R. NEWMARK,
J.H. GOUGH,
E.S. BOSBYSHELL,
A.R. JOHNSTON,
MRS. D.A. LINDLY,
C.H. WELCH,
J.E. SMITH,
P.C. DRESCHER,
E.E. GARNETT,

1 H. KLAUBER,
2 J.P. HADDOCK,
3 BERT LEVI,
4 W.G. ALEXANDER,
5 T.J. TRODDEN,
6 J.D. CAMPBELL,
7 H. NAU,
8 J.S. SMART, AND
9 W.S. SUDDABY,
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11 Defendants.
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1 **I. INTRODUCTION**

2 The United States respectfully moves to terminate the judgment in the above-
 3 captioned antitrust case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.
 4 The judgment was entered by this Court 93 years ago.¹ The United States has concluded
 5 that because of its age and changed circumstances since its entry, the judgment no longer
 6 serves to protect competition. The United States gave the public notice and the
 7 opportunity to comment on its intent to seek termination of the judgment; it received no
 8 comments opposing termination. For this and other reasons explained below, the United
 9 States requests that the judgment be terminated.²

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 11 ¹ This case was originally filed as case No. H-80-M in the former Southern District
 12 of California prior to the establishment of the Central District of California in 1966.

13 ² For the convenience of the Court, the United States notes that one or more of the
 14 arguments in support of termination are the same for the following 35 judgments: (1)
 15 *United States v. Pac. Coast Plumb. Supply Ass'n, et al.*, Civil No. 1686-92 (S.D. Cal. Jan.
 16 6, 1912); (2) *United States v. S. Cal. Wholesale Grocers' Ass'n, et al.*, Civil No. H-81-J
 17 (S.D. Cal. Sept. 22, 1925); (3) *United States v. Cal. Wholesale Grocers' Ass'n, et al.*,
 18 Civil No. H-80-M (S.D. Cal. May 5, 1926); (4) *United States v. Eighteen Karat Club, et*
 19 *al.*, Civil No. L12J (S.D. Cal. May 4, 1927); (5) *United States v. S. Cal. Marble Ass'n, et*
 20 *al.*, Civil No. 1254-H (S.D. Cal. Nov. 12, 1940); (6) *United States v. Harbor Dist.*
 21 *Lumber Dealers Ass'n, et al.*, Civil No. 1401-Y (S.D. Cal. Feb. 14, 1941); (7) *United*
 22 *States v. Heating, Piping, & Air Conditioning Contractors Ass'n of S. Cal., et al.*, Civil
 23 No. 1642-Y (S.D. Cal. July 10, 1941); (8) *United States v. Santa Barbara Cty. Chapter,*
 24 *Nat'l Elec. Contractors Ass'n, et al.*, Civil No. 1678-H (S.D. Cal. Aug. 4, 1941); (9)
 25 *United States v. Harbor Dist. Chapter, Nat'l Elec. Contractors Ass'n, et al.*, Civil No.
 26 1677-RJ (S.D. Cal. Aug. 4, 1941); (10) *United States v. San Pedro Fish Exch., et al.*,
 27 Civil No. 1772-B (S.D. Cal. Sept. 15, 1941); (11) *United States v. Retail Furniture*
 28 *Dealers Ass'n of S. Cal., et al.*, Civil No. 2230-Y (S.D. Cal. May 7, 1942); (12) *United*
States v. S. Cal. Gas Co., et al., Civil No. 2231-Y (S.D. Cal. May 7, 1942); (13) *United*
States v. Schmidt Lithograph Co., et al., Civil No. 2424 BH (S.D. Cal. Sept. 14, 1942, as
 modified on Nov. 25, 1975); (14) *United States v. Produce Exch. of L.A., et al.*, Civil No.
 2539-Y (S.D. Cal. Nov. 2, 1942); (15) *United States v. California Fruit Growers Exch.,*
et al., Civil No. 2577-BH (S.D. Cal. Nov. 18, 1942); (16) *United States v. John B. Reeves*
& Son, et al., Civil No. 8769-WM (S.D. Cal. May 29, 1950); (17) *United States v.*
Stationers Ass'n of S. Cal., Inc., et al., Civil No. 14777-C (S.D. Cal. Jan. 15, 1954); (18)
United States v. Kosher Butchers' Ass'n of L.A., et al., Civil No. 17914 Y (S.D. Cal. Mar.
 1, 1955); (19) *United States v. Los Angeles Meat & Provision Drivers Union, Local No.*
 626, *et al.*, Civil No. 682-60 HW (S.D. Cal. Jun. 17, 1963); (20) *United States v. Kaynar*

1 **II. BACKGROUND**

2 From 1890, when the antitrust laws were first enacted, until the late 1970s, the
 3 United States frequently sought entry of antitrust judgments whose terms never expired.³
 4 Such perpetual judgments were the norm until 1979, when the Antitrust Division of the
 5 United States Department of Justice (“Antitrust Division”) adopted the practice of
 6 including a term limit of ten years in nearly all of its antitrust judgments. Perpetual
 7 judgments entered before the policy change, however, remain in effect indefinitely unless
 8 a court terminates them. Although a defendant may move a court to terminate a perpetual
 9 judgment, few defendants have done so. There are many possible reasons for this,
 10 including that defendants may not have been willing to bear the costs and time resources
 11 to seek termination, defendants may have lost track of decades-old judgments, individual
 12 defendants may have passed away, or company defendants may have gone out of
 13 business. As a result, hundreds of these legacy judgments remain open on the dockets of
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15 *Mfg. Co., et al.*, Civil No. 63-1036-S (S.D. Cal. Jun. 30, 1964); (21) *United States v.*
 16 *California Chem. Co., et al.*, Civil No. 64-873-S (S.D. Cal. Aug. 23, 1965); (22) *United*
 17 *States v. Bethlehem Steel Co., et al.*, Civil No. 65-1426-IH (S.D. Cal. Aug. 23, 1966);
 18 (23) *United States v. Gen. Motors Corp., et al.*, Civil No. 62-1208-CC (S.D. Cal. Aug.
 19 17, 1966); (24) *United States v. Armco Steel Corp., et al.*, Civil No. 65-1425-S (C.D. Cal.
 20 Nov. 15, 1966); (25) *United States v. Ace Drill Bushing Co., et al.*, Civil No. 66-483-TC
 21 (C.D. Cal. Jan. 17, 1967); (26) *United States v. United States Steel Corp., et al.*, Civil No.
 22 64-836-MP (C.D. Cal. Dec. 8, 1967); (27) *United States v. Am. Pipe & Constr. Co., et al.*,
 23 Civil No. 64-832-MP (C.D. Dec. 8, 1967); (28) *United States v. Kaiser Steel Corp., et al.*,
 24 Civil No. 64-833-MP (C.D. Cal. Dec. 8, 1967); (29) *United States v. United Concrete*
 25 *Pipe Corp., et al.*, Civil No. 64-834-MP (C.D. Cal. Dec. 8, 1967 & C.D. Cal. May 24,
 26 1968); (30) *United States v. U.S. Indus., et al.*, Civil No. 64-835-MP (C.D. Cal. Dec. 8,
 27 1967 & C.D. Cal. May 24, 1968); (31) *United States v. Greater L.A. Solid Wastes Mgmt.*
 28 *Ass’n, et al.*, Civil No. 74-809-RJK (C.D. Cal. Apr. 29, 1974); (32) *United States v.*
Frito-Lay, Inc., et al., Civil No. 70-1175-R (C.D. Cal. Oct. 21, 1974); (33) *United States*
v. Orange Cty. Travel Agents Ass’n, Civil No. 75-1513 WMB (C.D. Cal. Aug. 13, 1975);
 (34) *United States v. R & G Sloane Mfg. Co., et al.*, Civil No. 71-1522-ALS (C.D. Cal.
 Apr. 12, 1976); and (35) *United States v. Phillips Petrol. Co., et al.*, Civil No. 75-974-HP
 (C.D. Cal. Aug. 31, 1977).

³ 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 judgment the United States seeks to terminate with this motion concerns violations of the Sherman Act.

1 courts around the country. Originally intended to protect the loss of competition arising
2 from violations of the antitrust laws, none of these judgments likely continues to do so
3 because of changed circumstances.

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

15 In brief, the process the United States is following to determine whether to move to
16 terminate a perpetual antitrust judgment is as follows:

- 17 • The Antitrust Division reviews each perpetual judgment to determine whether it
18 no longer serves to protect competition such that termination would be
19 appropriate.
- 20 • If the Antitrust Division determines a judgment is suitable for termination, it
21 posts the name of the case and the judgment on its public Judgment
22 Termination Initiative website,
23 <https://www.justice.gov/atr/JudgmentTermination>.

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

⁵ *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination>.

- 1 • The public has the opportunity to comment on each proposed termination
- 2 within thirty days of the date the case name and judgment are posted to the
- 3 public website.
- 4 • Following review of public comments, the Antitrust Division determines
- 5 whether the judgment still warrants termination; if so, the United States moves
- 6 to terminate it.

7 The United States followed this process for each judgment it seeks to terminate.⁶

8 The remainder of this motion is organized as follows: Section III describes the
 9 Court's jurisdiction to terminate the judgment and the applicable legal standards for
 10 terminating the judgment. Section IV argues that perpetual judgments rarely serve to
 11 protect competition and that those that are more than ten years old presumptively should
 12 be terminated. Section IV also discusses specific circumstances justifying termination.
 13 Section V concludes. Appendix A attaches a copy of the judgment that the United States
 14 seeks to terminate with this motion. A proposed order terminating the judgment
 15 accompanies this motion.

16 **III. APPLICABLE LEGAL STANDARDS FOR JUDGMENT TERMINATION**

17 While jurisdiction was not explicitly retained for this judgment, it has long been
 18 recognized that courts are vested with inherent power to modify judgments they have
 19 issued which regulate future conduct.⁷ The Federal Rules of Civil Procedure grant the

20
 21 ⁶ The United States followed this process to move several dozen other district
 22 courts to terminate legacy antitrust judgments. *See, e.g., In re: Termination of Legacy*
 23 *Antitrust Judgments in the District of Idaho*, Case 1:19-mc-10427-DCN (D. Idaho Apr.
 24 18, 2019); *United States v. Inter-Island Steam Navigation Co., et al.*, Case 1:19-mc-
 25 00115 (D. Haw. April 9, 2019) (terminating five judgments); *United States v. Odom Co.,*
 26 *et al.*, Case 3:72-cv-00013 (D. Alaska Mar. 29, 2019) (terminating one judgment); *United*
 27 *States v. The Nome Retail Grocymen's Ass'n, et al.*, Case 2:06-cv-01449 (D. Alaska
 28 Mar. 7, 2019) (terminating one judgment); *United States v. Am. Amusement Ticket Mfrs.*
Ass'n, et al., 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).

⁷ *See United States v. Swift & Co.*, 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

1 Court authority to terminate the judgment. According to Rule 60(b)(5) and (b)(6), “[o]n
2 motion and just terms, the court may relieve a party . . . from a final judgment . . . (5)
3 [when] applying it prospectively is no longer equitable; or (6) for any other reason that
4 justifies relief.” Fed. R. Civ. P. 60(b)(5)–(6); *see also Frew ex rel. Frew v. Hawkins*, 540
5 U.S. 431, 441 (2004) (explaining that Rule 60(b)(5) “encompasses the traditional power
6 of a court of equity to modify its decree in light of changed circumstances” and that
7 “district courts should apply a ‘flexible standard’ to the modification of consent decrees
8 when a significant change in facts or law warrants their amendment”) (citation omitted);
9 *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (Under Rule 60(b), “a
10 court may relieve a party from a final judgment when . . . it is no longer equitable that the
11 judgment should have prospective application. . . . [This] Rule codifies the courts’
12 traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the
13 prospective effect of their decrees.”) (citations and internal quotation marks omitted).
14 Given its jurisdiction and authority, the Court may terminate the judgment for any reason
15 that justifies relief, including that the judgment no longer serves its original purpose of
16 protecting competition.⁸ Termination of the judgment is warranted.

17 **IV. ARGUMENT**

18 It is appropriate to terminate the judgment because it no longer serves its original
19 purpose of protecting competition. The United States believes that this perpetual
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21 was reserved by its very terms, and so from the beginning went hand in hand with its
22 restraints. If the reservation had been omitted, power there still would be by force of
23 principles inherent in the jurisdiction of the chancery. A continuing decree of injunction
24 directed to events to come is subject always to adaptation as events may shape the need.”)
(citations omitted).

25 ⁸ In light of the circumstances surrounding the judgment for which it seeks
26 termination, the United States does not believe it is necessary for the Court to make an
27 extensive inquiry into the facts of the judgment to terminate it under Fed. R. Civ. P.
28 60(b)(5) or (b)(6). The judgment would have terminated long ago if the Antitrust
Division had the foresight to limit it to ten years in duration as under its policy adopted in
1979. Moreover, the passage of decades and changed circumstance since its entry, as
described in this memorandum, means that it is likely that the judgment no longer serves
its original purpose of protecting competition.

1 judgment presumptively should be terminated because its age alone suggests it no longer
2 protects competition. Other reasons, however, also weigh in favor of terminating it.
3 Under such circumstances, the Court may terminate the judgment pursuant to
4 Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

5 **A. The Judgment Presumptively Should Be Terminated Because of Age**

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

15 **B. The Judgment Should Be Terminated Because It Is Unnecessary**

16 In addition to age, other reasons weigh heavily in favor of terminating the
17 judgment. Based on its examination of the judgment, the Antitrust Division has
18 determined that it should be terminated for the following reason:

- 19 • The judgment prohibits acts that the antitrust laws already prohibit, such as
20 fixing prices, allocating markets, rigging bids, and engaging in group boycotts.
21 These prohibitions amount to little more than an admonition that defendants
22 must not violate the law. Absent such terms, defendants still are deterred from
23 violating the law by the possibility of imprisonment, significant criminal fines,
24 and treble damages in private follow-on litigation; a mere admonition to not
25 violate the law adds little additional deterrence. To the extent a judgment
26 includes terms that do little to deter anticompetitive acts, it should be
27 terminated.

28 ⁹ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008),
<https://www.justice.gov/atr/division-manual>.

- 1 • Most defendants likely no longer exist. With the passage of time, many of the
2 company defendants in these actions likely have gone out of existence, and
3 many individual defendants likely have passed away. To the extent that
4 defendants no longer exist, the related judgment serves no purpose and should
5 be terminated.

6 The judgment was entered in 1926. It addressed group boycotts in the grocery
7 industry. The geographic scope was nationwide. The judgment should be terminated
8 because the core provisions enjoining concerted refusal to deal are duplicative of the
9 prohibitions of Section 1 of the Sherman Act. Moreover, many of the over 20 companies
10 who are defendants are not currently active, according to the California Secretary of
11 State.

12 **C. There Has Been No Public Opposition to Termination**

13 The United States has provided adequate notice to the public regarding its intent to
14 seek termination of the judgment. On April 25, 2018, the Antitrust Division issued a
15 press release announcing its efforts to review and terminate legacy antitrust judgments.¹⁰
16 On March 22, 2019, the Antitrust Division listed the judgment on its public website,
17 describing its intent to move to terminate it.¹¹ The notice identified the case, linked to the
18 judgment, and invited public comment. No comments were received opposing
19 termination.

20 **V. CONCLUSION**

21 For the foregoing reasons, the United States believes termination of the judgment
22 in the above-captioned case is appropriate and respectfully requests that the Court enter
23 ///

25 ¹⁰ Press Release, *Department of Justice Announces Initiative to Terminate*
26 *“Legacy” Antitrust Judgments*, U.S. DEP’T OF JUSTICE (April 25, 2018),
27 [https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-
28 antitrust-judgments](https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments).

28 ¹¹ *Judgment Termination Initiative*, U.S. DEP’T OF JUSTICE, [https://www.
justice.gov/atr/JudgmentTermination](https://www.justice.gov/atr/JudgmentTermination); *Judgment Termination Initiative: Central District
of California*, U.S. DEP’T OF JUSTICE, [https://www.justice.gov/atr/judgment-termination-
initiative-california-central-district](https://www.justice.gov/atr/judgment-termination-initiative-california-central-district) (last updated Mar. 22, 2019).

1 an order terminating it. A proposed order terminating the judgment in the above-
2 captioned case accompanies this motion.

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4
5 DATE: 6/6/2019

Respectfully submitted,

/s/

KATRINAROUSE
Assistant Chief
San Francisco Office
Antitrust Division
United States Department of Justice

/s/

ALBERT B. SAMBAT
Trial Attorney
San Francisco Office
Antitrust Division
United States Department of Justice