UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Plaintiff, v. M. J. ELLIOTT, *et al.*, Defendants;	Equity No. 3811
UNITED STATES OF AMERICA, Plaintiff, v. STANDARD OIL CO. OF NEW JERSEY, *et al.*, Defendants;	Equity No. 5371
UNITED STATES OF AMERICA, Plaintiff, v. TERMINAL RAILROAD ASS'N, *et al.*, Defendants;	Equity No. 5250
UNITED STATES OF AMERICA, Plaintiff, v. PARIS MEDICINE CO., Defendant;	Civil Action No. 4802

UNITED STATES OF AMERICA, Plaintiff, v. UNITED SHOE MACHINERY CORP., *et al*., Defendants;	Equity No. 4489
UNITED STATES OF AMERICA, Plaintiff, v. PAINTERS DIST. COUNCIL NO. 2, *et al*., Defendants;	Equity No. 9079
UNITED STATES OF AMERICA, Plaintiff, v. ST. LOUIS TILE CONTRACTORS' ASS'N, *et al*., Defendants;	Civil Action No. 521-2
UNITED STATES OF AMERICA, Plaintiff, v. ARTHUR MORGAN TRUCKING CO., *et al*., Defendants;	Civil Action No. 642

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN WASTE MATERIAL CORP., *et al*., Defendants;	Civil Action No. 10927
UNITED STATES OF AMERICA, Plaintiff, v. BROWN SHOE COMPANY, INC., *et al*., Defendants;	Civil Action No. 10527
UNITED STATES OF AMERICA, Plaintiff, v. KAISER ALUMINUM & CHEMICAL CORP., *et al*., Defendants;	Civil Action No. 61 - C - 148
UNITED STATES OF AMERICA, Plaintiff, v. ALUMINUM CO. OF AMERICA, *et al*., Defendants;	Civil Action No. 61 - C - 147

UNITED STATES OF AMERICA, Plaintiff, v. MERCANTILE TRUST CO. NATIONAL ASS'N, *et al*., Defendants;	Civil Action No. 65 - C - 241
UNITED STATES OF AMERICA, Plaintiff, v. REAL ESTATE BOARD OF METROPOLITAN ST. LOUIS, Defendant.	Civil Action No. 72 - C - 793

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. This Court, or for the earliest cases the U.S. Circuit Court,[1] entered the judgments between 45 and 123 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

[1] The U.S. Circuit Courts, established under the Judiciary Act of 1789, operated as both trial and appellate courts for most of the 19th Century. Congress abolished the circuit courts when it reorganized the federal judiciary under the Judicial Code of 1911. *See The U.S. Circuit Courts and the Federal Judiciary*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/courts/u.s.-circuit-courts-and-federal-judiciary. Sections 290 and 291 of the Judicial Code provided that all suits in the U.S. Circuit Courts would be transferred to the newly created District Courts, and any power conferred upon a Circuit Court would thereafter rest with the District Court. *See* 36 Stat. 1087, 1167.

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.[2] 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 prevent 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 involved a review of all its outstanding perpetual antitrust judgments. The Antitrust Division

[2] 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 of these laws.

described the initiative in a statement published in the Federal Register.[3] 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.[4] 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.[5]

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[3] 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.

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

[5] The United States followed this process to move several 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.*, Case No. 3679N (M.D. Ala. Dec. 17, 2018) (terminating one judgment); *United States v. Standard Sanitary Mfg. Co.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019).

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. A copy of each judgment is included in Appendix A. In eleven cases, the judgment provides that the Court retains jurisdiction. Jurisdiction was not explicitly retained in three[6] 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.[7] 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 McDonald v. Armontrout*, 908 F.2d 388, 390 (8th Cir. 1990) ("The district court retains authority over a

[6] *United States v. Elliott*, Equity No. 3811 (C.C.E.D. Mo., April 6, 1896); *United Shoe Machinery Co.*, Equity No. 4489, (E.D. Mo. 1920); *United States v. Paris Medicine Co.*, No. 4802 (E.D. Mo. 1917).

[7] *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 Smith v. Bd. of Educ. of Palestine-Wheatley Sch. Dist.*, 769 F.3d 566, 572 (8th Cir. 2014) ("federal courts of equity [have] substantial flexibility to adapt their decrees to changes in the facts or law").

consent decree, including the power to modify the decree in light of changed circumstances, and is subject to only a limited check by the reviewing court").

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.[8] 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.

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 with the passage of decades markets almost always evolve 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

[8] 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.

after no more than ten years.[9] 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 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.

- 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.

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

Additional reasons specific to each judgment are set forth below:

1. *United States v. Elliott*, No. 3811 (C.C.E.D. Mo. 1896)

The court entered the judgment in *United States v. Elliott* in 1896, as part of a response to the Pullman Strikes of 1894. The injunction directed defendants, Martin J. Elliott and Eugene V. Debs, to cease their activities "with others" that interfered with or obstructed the operations of railroad companies who were common carriers of passengers and freight in interstate commerce, as well as interfering with the operations of the companies as carriers of U.S. mail. *See* Appendix A-1. This court should terminate the judgment in *Elliott* because of its age, but also because the named defendants are deceased.

2. *United States v. Standard Oil Co. of New Jersey*, 173 F. 177 (C.C.E.D. Mo. 1909)

The court entered this judgment in 1909. *See* Appendix A-2. Following an appeal and affirmance subject to modification, *see Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 82 (1911), the court issued a modified decree that included a provision explicitly retaining jurisdiction. *See* Appendix A-2, at 24. Together, the judgments enjoined the seven individuals as well as Standard Oil Co. itself, from exercising control, direction, or influence over the nineteen other petroleum companies identified in the decree as comprising an unlawful combination restraining commerce in petroleum. This court should terminate this judgment because of its age, but also because Standard Oil was dissolved and the other individual defendants are deceased. As a result, the decree is no longer necessary.

3. *United States v. Terminal R.R. Ass'n*, No. 5250 (E.D. Mo. 1914)

The court entered the decree and judgment in *United States v. Terminal R.R. Ass'n* in 1914, *see* Appendix A-3, after the Supreme Court reversed the circuit court's initial decision dismissing the lawsuit, *see United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). The

decree specified in paragraph seven that jurisdiction is "reserved for such further orders and decrees as may be deemed necessary." *Id*. at 29. The decree struck provisions from then-current contracts regarding the use of the railroad terminal facilities in St. Louis; it required that the parties must permit the transit of railroad traffic via the St. Louis gateway pursuant to through-bills; and it prohibited arbitrary charges for traffic originating within a 100-mile radius of the terminal. This court should terminate the 1914 judgment because of its age, but also because market conditions have changed in the century since the judgment was entered, including substantial changes in the regulatory regime governing railroads.

4. *United States v. Paris Medicine Co.*, No. 4802 (E.D. Mo. 1917)

The court entered this judgment in 1917. *See* Appendix A-4. The decree prohibited defendant, a pharmaceutical manufacturer, from requiring retailers to follow a price set by the defendant. This court should terminate this judgment because of its age, but also because market conditions in the pharmaceutical industry have changed in the century since the judgment was entered.

5. *United States v. United Shoe Machinery Corp.*, No. 4489 (E.D. Mo. 1920)

The court entered this judgment in 1920. *See* Appendix A-5. The decree enjoined the defendant company and its officers from leasing shoe-manufacturing equipment according to contract terms tying the use of that equipment to the use of other equipment also leased from the defendant. This court should terminate the judgment because of its age, but also because market conditions have changed such that it no longer protects competition.

6. *United States v. Painters District Council No. 2*, No. 9079 (E.D. Mo. 1930)

The court entered this judgment in 1930. *See* Appendix A-6. The court explicitly retained jurisdiction in Section III of the judgment. *Id*. at 45. The decree enjoined defendants (seven labor

unions and six individuals) from combining, conspiring and agreeing with one another or with others to coerce manufacturers of kitchen cabinets to undertake certain activities. This court should terminate this judgment because of its age, but also because market conditions and labor laws have changed such that it no longer protects competition.

7. *United States v. St. Louis Tile Contractors' Ass'n*, No. 521-2 (E.D. Mo. 1940)

The court entered this judgment in 1940. *See* Appendix A-7. The court explicitly retained jurisdiction in paragraph 14 of the judgment. *Id*. at 52. The decree enjoined defendants (the labor union, a contractors' association, three tile contractors, and eight individuals) from: (a) combining and conspiring with any labor union or tile manufacturer; (b) putting in place a bidding system to fix the price of tile and tile installation; (c) preventing any person from employing union labor; (d) restricting the sale of tile; (e) blacklisting any person or corporation; and/or (f) limiting the use of tools on any specific job. The court should terminate the judgment because of its age, but also because the terms largely prohibit acts the antitrust laws already prohibit (bid rigging and group boycotts), and market conditions have changed in the tile laying industry since 1940 such that the judgment no longer protects competition in a meaningful way.

8. *United States v. Arthur Morgan Trucking Co.*, No. 642 (E.D. Mo. 1940)

The court entered this judgment in 1940. *See* Appendix A-8. The court explicitly retained jurisdiction in paragraph 15 of the judgment. *Id*. at 62. Among other things, the judgment enjoined the defendants (a trucking company, a labor union, and three individual defendants) from engaging in any conspiracy, combination, or agreement to monopolize services or otherwise restrain trade and commerce relating to the hauling of construction materials, supplies, equipment and debris. Other provisions of the judgment required the union defendant to rescind all blacklists and boycotts it had in place, to nullify certain rules the union had adopted with

respect to drivers using their own trucks, to reinstate members previously suspended or expelled from the union or who chose to withdraw due to the practices now prohibited by the judgment, and to refrain from fixing or enforcing a minimum scale of wages. The court should terminate this judgment because of its age, but also because most of the defendants likely no longer exist (the trucking company is no longer in business, and it is likely that the individual defendants are deceased); in addition, the terms of the judgment largely prohibit acts the antitrust laws already prohibit (price-fixing and attempted monopolization).

9. *United States v. American Waste Materials Corp.*, No. 10927 (E.D. Mo. 1958)

The court entered this judgment in 1958. See Appendix A-9. The court explicitly retained jurisdiction in Section VII of the judgment. *Id*. at 68. The judgment primarily prohibited the defendants – firms and individuals involved in the sale and distribution of "waste rags" – from engaging in price-fixing or market allocation activities concerning waste rag wholesalers and retail dealers. This court should terminate the judgment because of its age, but also because most defendants likely no longer exist and its terms largely prohibit acts the antitrust laws already prohibit (price-fixing and market allocation).

10. *United States v. Brown Shoe Co.*, No. 10527 (E.D. Mo. 1959)

The court entered this judgment in 1959, *see* Appendix A-10, and the Supreme Court affirmed the judgment, *see Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The district court explicitly retained jurisdiction in paragraph 5 of the judgment. *Id*. at 71. The district court held that Brown Shoe Company's acquisition of G.R. Kinney Co. violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and required Brown Shoe to divest all its interests in G.R. Kinney, and further prohibited each of the defendants from acquiring any future assets or interests in any of the other defendants. This court should terminate the decree because of its age, but also

because the divestiture was completed, and thus the primary requirement of the judgment has been satisfied. In addition, judgments such as this have been largely mooted by subsequent statutory developments, which require that sufficiently large stock or asset acquisitions or sales be reported to federal antitrust authorities for their review. *See generally U.S. v. Mercy Health Services*, 107 F.3d 632, 637 (8th Cir. 1997) (Under The Hart–Scott–Rodino Antitrust Improvements Act of 1976, "the United States would have the opportunity to investigate the anticompetitive effects of a proposed merger in the future.").

11. *United States v. Kaiser Aluminum & Chem. Corp.*, No. 61-C-148 (E.D. Mo. 1962)

The court entered this judgment in 1962. *See* Appendix A-11. The court explicitly retained jurisdiction in paragraph 4 of the judgment. *Id.* at 74. The judgment prohibited Kaiser Aluminum & Chemical Corp. from acquiring any stock or assets of Kawneer Company, subject to certain limited, defined exceptions. The court should terminate this judgment because of its age, but also because market conditions likely have changed in the architectural aluminum products industry since 1962. Moreover, subsequent statutory developments have mooted these requirements. *See Mercy Health Services*, 107 F.3d at 637 (discussing the HSR Act).

12. *United States v. Aluminum Co. of America*, No. 61-C-147 (E.D. Mo. 1964)

The court entered this judgment in 1964. *See* Appendix A-12. The court explicitly retained jurisdiction in paragraph 7 of the judgment. *Id*. at 78. The court held that Alcoa's acquisition of Cupples Products Corp. violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and required Alcoa to divest all its interests in, and assets obtained from, Cupples. The court should terminate this judgment because of its age, but also because the required divestiture has occurred, and thus all requirements of the judgment have been satisfied.

13. *United States v. Mercantile Trust Co. Nat'l Ass'n*, No. 65-C-241 (E.D. Mo. 1968)

The court entered this judgment in 1968. *See* Appendix A-13. The court explicitly retained jurisdiction in Section VIII of the judgment. *Id*. at 83. The judgment permitted a merger between two banks (Mercantile Trust Company National Association and Security Trust Company), but required as a condition of the merger that Mercantile establish and initially fund a viable banking competitor to be located at the site of Security's former property and prohibited Mercantile from obtaining a financial interest in the new bank. The judgment also enjoined Mercantile from entering into any additional merger agreements with any commercial banks in the St. Louis area for a five-year period, unless granted permission in advance by the United States. This court should terminate the judgment because of its age, but also because its requirements have been met (Mercantile established the competitor bank as directed in the judgment, and the five-year no acquisition period has long since expired).

14. *United States v. Real Estate Bd. of Metro. St. Louis*, No. 72-C-793 (E.D. Mo. 1973)

The court entered this judgment in 1973. *See* Appendix A-14. The court explicitly retained jurisdiction in Section IX of the judgment. *Id*. at 91-92. Among other requirements, the judgment primarily enjoined the Real Estate Board and its members from engaging in price-fixing activities relating to commission fees and rates. This court should terminate the judgment because of its age, but also because its terms largely prohibit acts the antitrust laws already prohibit.

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.[10] On December 14, 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.[11] The notice identified each case, linked to the judgment, and invited public comment. No comments were received.

[10] 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.

[11] *Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/JudgmentTermination; *Judgment Termination Initiative: Missouri, Eastern District*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/judgment-termination-initiative-missouri-eastern-district (last updated Dec. 13, 2018).

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment 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: April 16, 2018

JEFFREY B. JENSEN
United States Attorney
Eastern District of Missouri

NICHOLAS P. LLEWELLYN
Bar No. MO43839
Civil Chief
Eastern District of Missouri

WILLIAM M. MARTIN
Bar No. 84612PA
Trial Attorney
United States Department of Justice
Antitrust Division
450 Fifth St., NW, Suite 8600
Telephone: 202-616-2371
Email: william.martin@usdoj.gov

DON P. AMLIN
Trial Attorney
United States Department of Justice
Antitrust Division