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MAY 16 2019  
CLERK U S DISTRICT COURT  
DISTRICT OF ARIZONA  
BY \_\_\_\_\_ DEPUTY

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

11 UNITED STATES OF AMERICA,  
12 Plaintiff,

13 v.

Civil No. 3367-PHX

14 ARIZONA PHARMACEUTICAL  
15 ASSOCIATION, *ET AL.*,  
16 Defendants.

17 UNITED STATES OF AMERICA,  
18 Plaintiff,

19 v.

Civil No. 4550-PHX

20 THE VALLEY NATIONAL BANK OF  
21 ARIZONA, *ET AL.*,  
22 Defendants.

23 UNITED STATES OF AMERICA,  
24 Plaintiff,

25 v.

Civil No. 1969-TUC

26 CITIZEN PUBLISHING COMPANY, *ET*  
27 *AL.*,  
28 Defendants.

1 UNITED STATES OF AMERICA,  
Plaintiff,

2 v.

Civil No. 74-102-PHX-CAM

3 HOLSUM BAKERY, INC., *ET AL.*,  
4 Defendants.

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6  
7 **THE UNITED STATES' MOTION AND MEMORANDUM**  
8 **REGARDING TERMINATION OF LEGACY ANTITRUST JUDGMENTS**

9 The United States moves to terminate the judgments in each of the above-captioned  
10 antitrust cases pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The  
11 judgments were entered by this Court between 41 and 56 years ago. The United States has  
12 concluded that because of their age and changed circumstances since their entry, these  
13 judgments no longer serve to protect competition. The United States gave the public notice  
14 and the opportunity to comment on its intent to seek termination of the judgments; it  
15 received no comments opposing termination. For these and other reasons explained below,  
16 the United States requests that the judgments be terminated.

17 **I. BACKGROUND**

18  
19 From 1890, when the antitrust laws were first enacted, until the late 1970s, the  
20 United States frequently sought entry of antitrust judgments whose terms never expired.<sup>1</sup>  
21 Such perpetual judgments were the norm until 1979, when the Antitrust Division of the  
22 United States Department of Justice ("Antitrust Division") adopted the practice of  
23 including a term limit of ten years in nearly all of its antitrust judgments. Perpetual  
24 judgments entered before the policy change, however, remain in effect indefinitely unless  
25 a court terminates them. Although a defendant may move a court to terminate a perpetual  
26 judgment, few defendants have done so. There are many possible reasons for this,

27 <sup>1</sup> The primary antitrust laws are the Sherman Act, 15 U.S.C. §§ 1-7, and the  
28 Clayton Act, 15 U.S.C. §§ 12-27. The judgments the United States seeks to terminate with  
the accompanying motion concern violations of these two laws.

1 including that defendants may not have been willing to bear the costs and time resources  
2 to seek termination, defendants may have lost track of decades-old judgments, individual  
3 defendants may have passed away, or firm defendants may have gone out of business. As  
4 a result, hundreds of these legacy judgments remain open on the dockets of courts around  
5 the country. Originally intended to protect the loss of competition arising from violations  
6 of the antitrust laws, nearly all of these judgments likely have been rendered obsolete by  
7 changed circumstances.

8 The Antitrust Division recently implemented a program to review and, when  
9 appropriate, seek termination of legacy judgments. The Antitrust Division's Judgment  
10 Termination Initiative encompasses review of all of its outstanding perpetual antitrust  
11 judgments. The Antitrust Division described the initiative in a statement published in the  
12 Federal Register.<sup>2</sup> In addition, the Antitrust Division established a website to keep the  
13 public apprised of its efforts to terminate perpetual judgments that no longer serve to  
14 protect competition.<sup>3</sup> The United States believes that its outstanding perpetual antitrust  
15 judgments presumptively should be terminated; nevertheless, the Antitrust Division  
16 examined each judgment covered by this motion to ensure that it is suitable for  
17 termination. The Antitrust Division also gave the public notice of—and the opportunity to  
18 comment on—its intention to seek termination of these judgments.

19 In brief, the process by which the United States has identified judgments in the  
20 above-captioned cases should be terminated was as follows:<sup>4</sup>

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22  
23 <sup>2</sup> Department of Justice's Initiative to Seek Termination of Legacy Antitrust  
24 Judgments, 83 Fed. Reg. 19,837 (May 4, 2018), <https://www.gpo.gov/fdsys/granule/FR-2018-05-04/2018-09461>.

25 <sup>3</sup> <https://www.justice.gov/atr/JudgmentTermination>.

26 <sup>4</sup> The United States followed this process to move other district courts to terminate  
27 legacy antitrust judgments. See, e.g., *United States v. Am. Amusement Ticket Mfrs. Ass'n*,  
28 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. Standard Sanitary Mfg. Co., et al.*, Case  
1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments); *United States v.*  
*Inter-Island Steam Navigation Co. Ltd., et al.*, Case 1:19-mc-00115-JMS-RLP (D. Haw.  
Apr. 9, 2019) (terminating five judgments).

- 1 • The Antitrust Division reviewed the judgments and determined that, for reasons  
2 explained in this memo, they were candidates for termination.
- 3 • The Antitrust Division posted the name of the cases and a link to the judgments  
4 on its public Judgment Termination Initiative website,  
<https://www.justice.gov/atr/JudgmentTermination>.
- 5 • The public had the opportunity to submit comments regarding each proposed  
6 termination to the Antitrust Division within thirty days of the date the case name  
7 and judgment link was posted to the public website.
- 8 • Having received no comments regarding the judgments, the United States now  
9 moves this Court to terminate.

10 The remainder of this memorandum is organized as follows: Section II provides a  
11 summary of each legacy judgment. Section III describes the Court's jurisdiction to  
12 terminate the judgments in the above-captioned cases. Section IV explains that perpetual  
13 judgments rarely serve to protect competition and those that are more than ten years old  
14 should be terminated absent compelling circumstances. This section also describes  
15 additional reasons that the United States believes each of the judgments should be  
16 terminated. Section V concludes. Appendix A attaches a copy of each final judgment that  
17 the United States seeks to terminate. Appendix B is a Proposed Order Terminating Final  
18 Judgments.

## 19 **II. THE JUDGMENTS**

20 Below are brief descriptions of each perpetual judgment that the Division seeks to  
21 terminate in this Court.

### 22 **A. U.S. v. Arizona Pharmaceutical Association, et al.**

23 The judgment was originally entered in 1963. Defendants were charged with  
24 violating Section 1 of the Sherman Act in connection with an agreement among them to  
25 establish and maintain uniform prices for prescription drugs in Arizona. The judgment  
26 enjoins Defendants from, among other things, (1) conspiring to establish and maintain  
27 uniform consumer prices for prescription drugs, (2) influencing any person to adhere to  
28

1 any pricing schedule, and (3) making contact with any pharmacist to suggest the price  
2 which any prescription drug may be sold by a pharmacist.

3 **B. U.S. v. The Valley National Bank of Arizona, et al.**

4 The judgment was entered in 1966 and it was modified in 1970. The judgment in  
5 this case arose from a complaint charging Defendants with violating Section 1 of the  
6 Sherman Act and Section 7 of the Clayton Act in connection with (1) an agreement to  
7 eliminate competition between some of the Defendants as well as with other banks in  
8 Arizona, and (2) certain Defendants' acquisition of a competitor's stock which  
9 substantially lessened competition or tended to create a monopoly in commercial banking  
10 in certain areas of Arizona.

11 The judgment enjoins the Defendants from engaging in certain activity. The  
12 prohibitions differed in part and also had varying time limits. The judgment mandated that,  
13 within three years from the date of entry of the judgment, the trustees of the Profit Sharing  
14 Plan for Employees of Valley National Bank had to sell their capital stock in  
15 Bancorporation and Arizona Bank which they controlled through the plan. The judgment  
16 enjoins trustees from, among other things, (1) voting any shares of said capital stock; (2)  
17 acquiring any shares of capital stock of any bank in Arizona other than Valley National  
18 Bank; (3) serving as a director or officer of Bancorporation, any bank in Arizona other  
19 than Valley National Bank, or any person who controlled at least twenty-five percent of  
20 the capital stock of any bank in Arizona other than Valley National Bank.

21 The Defendants Bancorporation and Arizona Bank were enjoined, for a period of  
22 five years from the date of entry of the judgment, from acquiring capital stock or assets of  
23 any bank in Arizona other than in Arizona Bank. Defendant Valley National Bank was  
24 enjoined, for a period of fifteen years from the date of entry of the judgment, from  
25 acquiring capital stock of any bank in Arizona other than in Valley National Bank, or  
26 assets from any bank in Arizona. The officers and directors of Valley National Bank are  
27 enjoined, as of the date of the judgment and henceforth, from voting any shares of capital  
28

1 stock of Bancorporation or Arizona Bank; acquiring additional shares of those two banks;  
2 and controlling capital stock of those banks, after five years from the entry of the  
3 judgment. Bancorporation and Arizona Bank had the same stipulations as they related to  
4 Valley National Bank (with the exception of one of its officers).

5 The judgment was subsequently modified whereby Section XIII limited the annual  
6 shareholder reporting requirement to the first five years.

7 **C. U.S. v. Citizen Publishing Company, et al.**

8 The judgment was entered in 1970 after the Supreme Court affirmed (394 U.S. 131  
9 (1969)) an initial judgment from 1968 (280 F.Supp. 978) (D. Ariz. 1968)). Defendants  
10 were charged with violating Section 1 of the Sherman Act and Section 7 of the Clayton  
11 Act. The Defendants owned one daily newspaper in Tucson, Arizona and acquired  
12 interests in the other daily paper; they entered into a joint operating agreement whereby  
13 they set rates for subscribers and advertisers, and then pooled the profits. The judgment  
14 required that Defendants divest its interest in the Arizona Daily Star within twenty-one  
15 months from the date of entry of the judgment. It also enjoins Defendants from, among  
16 other things, (1) offering to sell advertising space in either daily newspaper at a  
17 combination rate, unless the combination is optional (and calculated pursuant to a  
18 specified formula), (2) allocating the expenses of shared equipment or personnel on any  
19 basis which did not result in the Defendants each paying only those expenses that it was  
20 responsible for, (3) distributing operating revenues on any basis which did not result in the  
21 Defendants each receiving only those revenues which were derived from its individual  
22 operations, and (4) prohibiting the joint Sunday newspaper from publishing combination  
23 advertising with their respective weekday editions. The Defendants subsequently made the  
24 required divestitures, and the Court entered a modified final judgment approving a new  
25 joint operating agreement.  
26  
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1           **D.     U.S. Holsum Bakery, Inc., et al.**

2           The judgment was entered in 1978. Defendants were charged with violating Section  
3 1 of the Sherman Act in connection with an agreement among certain bakeries and  
4 company executives that conspired to fix prices and rig bids for bakery products in  
5 Arizona. The judgment enjoins Defendants from, among other things, entering an  
6 agreement to (1) fix prices for the sale of bakery products to any third person, (2) submit  
7 rigged bids for bakery products, (3) allocate markets, and (4) exchange proposed prices of  
8 bakery goods to a third person, prior to communicating such information to customers in  
9 general. In addition, for five years from the date of entry, Defendants had to furnish a  
10 written certification with each bid that it was not the result of any communication with any  
11 other seller of bakery products; and also during that five year period, each Defendant was  
12 required to preserve all written price computations in preparation for bids that were  
13 submitted to federal and state institutions.

14           **III.    APPLICABLE LEGAL STANDARDS FOR TERMINATING THE**  
15           **JUDGMENTS**

16           This Court has jurisdiction to terminate the judgments in the above-captioned cases.  
17 Each judgment, a copy of which is included in Appendix A, provides that the Court retains  
18 jurisdiction. The Federal Rules of Civil Procedure grant the Court authority to terminate  
19 each judgment. Rule 60(b)(5) and (b)(6) provide that “[o]n motion and just terms, the  
20 court may relieve a party . . . from a final judgment . . . (5) [when] applying it  
21 prospectively is no longer equitable; or (6) for any other reason that justifies relief.” Fed.  
22 R. Civ. P. 60(b)(5)-(6); *see also United States v. Asarco Inc.*, 430 F.3d 972, 979 (9<sup>th</sup> Cir.  
23 2005) reasoning that Rule 60(b)(5) “. . . codifies the courts’ traditional authority, inherent  
24 in the jurisdiction of the chancery, to modify or vacate the prospective effect of their  
25 decrees[.]”(citations omitted).

1           Given its jurisdiction and its authority, the Court may terminate each judgment for  
2 any reason that justifies relief, including that the judgments no longer serve their original  
3 purpose of protecting competition.<sup>5</sup> Termination of these judgments is warranted.

#### 4           **IV.           ARGUMENT**

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6           It is appropriate to terminate the perpetual judgments in each the above-captioned  
7 cases because they no longer continue to serve their original purpose of protecting  
8 competition. The United States believes that the judgments presumptively should be  
9 terminated because their age alone suggests they no longer protect competition. Other  
10 reasons, in whole or in part, also weigh in favor of terminating these judgments, including  
11 that key terms of the judgment have been satisfied, defendants likely no longer exist, and  
12 terms of the judgment merely prohibit that which the antitrust laws already prohibit. Under  
13 such circumstances, the Court may terminate the judgments pursuant to Rule 60(b)(5) or  
14 (b)(6) of the Federal Rules of Civil Procedure.

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

16           Permanent antitrust injunctions rarely serve to protect competition. The experience  
17 of the United States in enforcing the antitrust laws has shown that markets almost always  
18 evolve over time in response to competitive and technological changes. These changes  
19 may make the prohibitions of decades-old judgments either irrelevant to, or inconsistent  
20 with, competition. The development of new products that compete with existing products,  
21 for example, may render a market more competitive than it was at the time of entry of the  
22 judgment or may even eliminate a market altogether, making the judgment irrelevant. In  
23 some circumstances, a judgment may be an impediment to the kind of adaptation to  
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25           <sup>5</sup> In light of the circumstances surrounding the judgments 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 each judgment to terminate them under Fed. R. Civ. P.  
28 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.

1 change that is the hallmark of competition, undermining the purposes of the antitrust laws.  
2 These considerations, among others, led the Antitrust Division in 1979 to establish its  
3 policy of generally including in each judgment a term automatically terminating the  
4 judgment after no more than ten years.<sup>6</sup>

5 The decades-old judgments in the above-captioned matters presumptively should be  
6 terminated for the reasons that led the Antitrust Division to adopt its 1979 policy of  
7 generally limiting judgments to a term of ten years. There are no affirmative reasons for  
8 the judgments to remain in effect; indeed, there are additional reasons for terminating  
9 them.

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

11  
12 In addition to age, other reasons weigh heavily in favor of terminating each  
13 judgment. These reasons include: (1) all terms of the judgment have been satisfied, (2)  
14 most defendants likely no longer exist, and (3) the judgment largely prohibits that which  
15 the antitrust laws already prohibit.

##### 16 1. Key Terms of Judgment Have Been Satisfied

17 The Antitrust Division has determined that key terms of the judgments in the  
18 following three cases have been satisfied such that termination is appropriate:

- 19 • *The Valley National Bank of Arizona, et al.*, Civil No. 4550-PHX,
- 20 • *Citizen Publishing Co., et al.*, Civil No. 1969-TUC, and
- 21 • *Holsum, Inc., et al.*, Civil No. 74-102-PHX-CAM.

22 In *The Valley National Bank of Arizona*, within three years from the date of entry of  
23 the judgment, the trustees of the Profit Sharing Plan for Employees of Valley National  
24 Bank had to sell their capital stock they acquired in two of the Defendant banks. The  
25 Defendant banks also were enjoined from acquiring certain capital stock or assets in other  
26 banks in Arizona for five or fifteen years. In *Citizen Publishing Co.*, the Defendants who

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

1 acquired stock and assets in Star Publishing had to make certain divestures within twenty-  
2 one months of the entry of the judgment, and the Defendants also had to modify their joint  
3 operating agreement to prohibit price fixing, profit pooling, and market allocations. Last,  
4 in *Holsum Bakery Inc.*, for five years from the date of entry of the judgment, the  
5 Defendants furnished a written certification with each bid (and preserved written price  
6 computations done in preparation for certain bids) to show that they were not the result of  
7 any communication with any other seller of bakery products, and in an effort to prevent  
8 the Defendants from fixing prices for the sale of bakery goods, submitting rigged bids,  
9 allocating markets, and exchanging prices of bakery goods. These obligations in the  
10 above-captioned cases were satisfied long ago.

11           2.     Most Defendants Likely No Longer Exist

12           The Antitrust Division believes that key Defendants in the following two cases  
13 likely no longer exist:

- 14           • *Arizona Pharmaceutical Association, et al.*, Civil No. 3367-PHX, and
- 15           • *Citizen Publishing Co., et al.*, Civil No. 1969-TUC.

16           With respect to *Arizona Pharmaceutical Association*, the Antitrust Division  
17 believes that two of the three Defendants—Maricopa County Pharmaceutical Association  
18 and Tucson Pharmaceutical Association—likely no longer exist. In *Citizen Publishing Co.*,  
19 the named Defendant ultimately stopped publishing and ceased all operations in  
20 approximately 2014, thus leaving only one of the two entities engaged in the relevant  
21 conduct. To the extent that key Defendants no longer exist, the related judgments serve no  
22 purpose, which is an additional reason to terminate them.

23           3.     Terms of Judgment Prohibit Acts Already Prohibited by Law

24           The Antitrust Division has determined that the core provisions of the judgments in  
25 the following cases merely prohibit acts that are illegal under the antitrust laws, such as  
26 price fixing and customer allocations:  
27  
28

- 1 • *Arizona Pharmaceutical Association, et al.*, Civil No. 3367-PHX (price fixing),  
and
- 2 • *Holsum, Inc., et al.*, Civil No. 74-102-PHX-CAM (price fixing, customer  
3 allocation).

4 These terms amount to little more than an admonition that Defendants shall not  
5 violate the law. Absent such terms, Defendants who engage in the type of behavior  
6 prohibited by these judgments still face the possibility of imprisonment, significant  
7 criminal fines, and treble damages in private follow-on litigation.

### 8 **C. There Has Been No Public Opposition to Termination**

9  
10 The United States has provided adequate notice to the public regarding its intent to  
11 seek termination of the judgments. On April 25, 2018, the Antitrust Division issued a press  
12 release announcing its efforts to review and terminate legacy antitrust judgments, and  
13 noting that it would begin its efforts by proposing to terminate judgments entered by the  
14 federal district courts in Washington, DC, and Alexandria, VA.<sup>7</sup> On June 15, 2018, the  
15 Antitrust Division listed the judgments in the above-captioned cases on its public website,  
16 describing its intent to move to terminate the judgments.<sup>8</sup> The notice identified each case,  
17 linked to the associated judgment, and invited public comment. The Division received no  
18 comments concerning these judgments.

## 19 **V. CONCLUSION**

20 For the foregoing reasons, the United States believes termination of the judgments  
21 in each of the above-captioned cases is appropriate and respectfully requests that the Court  
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26 <sup>7</sup> Press Release, Department of Justice, Department of Justice Announces Initiative  
27 to Terminate “Legacy” Antitrust Judgments, (April 25, 2018),  
<https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

28 <sup>8</sup> <https://www.justice.gov/atr/JudgmentTermination>, link titled “View Judgments Proposed for Termination in District of Columbia.”

1 enter an order terminating them. A proposed order terminating the judgments is attached.

2 *See* Appendix B.

3 Respectfully submitted,

4 Dated: May 16, 2019

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6 Lorenzo McRae  
7 Trial Attorney

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