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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,
14 Plaintiff,

15 v.

16 FRITO-LAY, INC., BBF
17 LIQUIDATING, INC., GRANNY
18 GOOSE FOODS, INC., PET INC.,
19 AND BELL BRAND FOODS, INC.,
20 Defendants.

Misc. No. 2:19-MC-00115-VAP

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

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I. INTRODUCTION

The United States respectfully moves to terminate the judgment, as modified, in the above-captioned antitrust case, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The judgment and a modification were entered by this Court 45 years ago.¹ The United States has concluded that because of its age and changed circumstances since its entry, the modified judgment no longer serves to protect competition. The United States gave the public notice and the opportunity to comment on its intent to seek termination of the judgment; it received no comments opposing termination. For this and other reasons explained below, the United States requests that the judgment be terminated.²

¹ This case was originally filed as Civil No. 70-1175-R.

² For the convenience of the Court, the United States notes that one or more of the arguments in support of termination are the same for the following 35 judgments for which the United States is seeking termination by separate motion: (1) *United States v. Pac. Coast Plumb. Supply Ass'n, et al.*, Civil No. 1686-92 (S.D. Cal. Jan. 6, 1912); (2) *United States v. S. Cal. Wholesale Grocers' Ass'n, et al.*, Civil No. H-81-J (S.D. Cal. Sept. 22, 1925); (3) *United States v. Cal. Wholesale Grocers' Ass'n, et al.*, Civil No. H-80-M (S.D. Cal. May 5, 1926); (4) *United States v. Eighteen Karat Club, et al.*, Civil No. L12J (S.D. Cal. May 4, 1927); (5) *United States v. S. Cal. Marble Ass'n, et al.*, Civil No. 1254-H (S.D. Cal. Nov. 12, 1940); (6) *United States v. Harbor Dist. Lumber Dealers Ass'n, et al.*, Civil No. 1401-Y (S.D. Cal. Feb. 14, 1941); (7) *United States v. Heating, Piping, & Air Conditioning Contractors Ass'n of S. Cal., et al.*, Civil No. 1642-Y (S.D. Cal. July 10, 1941); (8) *United States v. Santa Barbara Cty. Chapter, Nat'l Elec. Contractors Ass'n, et al.*, Civil No. 1678-H (S.D. Cal. Aug. 4, 1941); (9) *United States v. Harbor Dist. Chapter, Nat'l Elec. Contractors Ass'n, et al.*, Civil No. 1677-RJ (S.D. Cal. Aug. 4, 1941); (10) *United States v. San Pedro Fish Exch., et al.*, Civil No. 1772-B (S.D. Cal. Sept. 15, 1941); (11) *United States v. Retail Furniture 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*

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

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 12 *Butchers’ Ass’n of L.A., et al.*, Civil No. 17914 Y (S.D. Cal. Mar. 1, 1955); (19) *United*
 13 *States v. Los Angeles Meat & Provision Drivers Union, Local No. 626, et al.*, Civil No.
 14 682-60 HW (S.D. Cal. Jun. 17, 1963); (20) *United States v. Kaynar Mfg. Co., et al.*, Civil
 15 No. 63-1036-S (S.D. Cal. Jun. 30, 1964); (21) *United States v. California Chem. Co., et*
 16 *al.*, Civil No. 64-873-S (S.D. Cal. Aug. 23, 1965); (22) *United States v. Bethlehem Steel*
 17 *Co., et al.*, Civil No. 65-1426-IH (S.D. Cal. Aug. 23, 1966); (23) *United States v. Gen.*
 18 *Motors Corp., et al.*, Civil No. 62-1208-CC (S.D. Cal. Aug. 17, 1966); (24) *United States*
 19 *v. Armco Steel Corp., et al.*, Civil No. 65-1425-S (C.D. Cal. Nov. 15, 1966); (25) *United*
 20 *States v. Ace Drill Bushing Co., et al.*, Civil No. 66-483-TC (C.D. Cal. Jan. 17, 1967);
 21 (26) *United States v. United States Steel Corp., et al.*, Civil No. 64-836-MP (C.D. Cal.
 22 Dec. 8, 1967); (27) *United States v. Am. Pipe & Constr. Co., et al.*, Civil No. 64-832-MP
 23 (C.D. Dec. 8, 1967); (28) *United States v. Kaiser Steel Corp., et al.*, Civil No. 64-833-MP
 24 (C.D. Cal. Dec. 8, 1967); (29) *United States v. United Concrete Pipe Corp., et al.*, Civil
 25 No. 64-834-MP (C.D. Cal. Dec. 8, 1967 & C.D. Cal. May 24, 1968); (30) *United States*
 26 *v. U.S. Indus., et al.*, Civil No. 64-835-MP (C.D. Cal. Dec. 8, 1967 & C.D. Cal. May 24,
 1968); (31) *United States v. Greater L.A. Solid Wastes Mgmt. 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*
 27 *Ass’n*, Civil No. 75-1513 WMB (C.D. Cal. Aug. 13, 1975); (34) *United States v. R & G*
 28 *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 to seek termination, defendants may have lost track of decades-old judgments, individual
2 defendants may have passed away, or company defendants may have gone out of
3 business. As a result, hundreds of these legacy judgments remain open on the dockets of
4 courts around the country. Originally intended to protect the loss of competition arising
5 from violations of the antitrust laws, none of these judgments likely continues to do so
6 because of changed circumstances.

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

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

- 20 • The Antitrust Division reviews each perpetual judgment to determine whether it
21 no longer serves to protect competition such that termination would be
22 appropriate.

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

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

- 1 • If the Antitrust Division determines a judgment is suitable for termination, it
2 posts the name of the case and the judgment on its public Judgment
3 Termination Initiative website,
4 <https://www.justice.gov/atr/JudgmentTermination>.
- 5 • The public has the opportunity to comment on each proposed termination
6 within thirty days of the date the case name and judgment are posted to the
7 public website.
- 8 • Following review of public comments, the Antitrust Division determines
9 whether the judgment still warrants termination; if so, the United States moves
10 to terminate it.

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

12 The remainder of this motion is organized as follows: Section III describes the
13 Court's jurisdiction to terminate the judgment and the applicable legal standards for
14 terminating the judgment. Section IV argues that perpetual judgments rarely serve to
15 protect competition and that those that are more than ten years old presumptively should
16 be terminated. Section IV also discusses specific circumstances justifying termination.
17 Section V concludes. Appendices A and B attach copies of the judgment and its
18 modification that the United States seeks to terminate with this motion. A proposed order
19 terminating the judgment as modified accompanies this motion.

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22 ⁶ The United States followed this process to move several dozen other district
23 courts to terminate legacy antitrust judgments. *See, e.g., In re: Termination of Legacy*
24 *Antitrust Judgments in the District of Oregon*, Case 3:19-mc-00441 MO (D. Or. May 24,
25 2019) (terminating six judgments); *In re: Termination of Legacy Antitrust Judgments in*
26 *the District of Idaho*, Case 1:19-mc-10427-DCN (D. Idaho Apr. 18, 2019); *United States*
27 *v. Inter-Island Steam Navigation Co., et al.*, Case 1:19-mc-00115 (D. Haw. April 9,
28 2019) (terminating five judgments); *United States v. Odom Co., et al.*, Case 3:72-cv-
00013 (D. Alaska Mar. 29, 2019) (terminating one judgment); *United States v. The Nome*
Retail Groceriesmen's Ass'n, et al., Case 2:06-cv-01449 (D. Alaska 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).

1 III. APPLICABLE LEGAL STANDARDS FOR JUDGMENT TERMINATION

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

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24 ⁷ In light of the circumstances surrounding the judgment for which it seeks
25 termination, the United States does not believe it is necessary for the Court to make an
26 extensive inquiry into the facts of the judgment to terminate it under Fed. R. Civ. P.
27 60(b)(5) or (b)(6). The judgment would have terminated long ago if the Antitrust
28 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 **IV. ARGUMENT**

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

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

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

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

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

- 22 • The judgment prohibits acts that the antitrust laws already prohibit, such as
23 fixing prices, allocating markets, and rigging bids. These prohibitions amount
24 to little more than an admonition that defendants must not violate the law.
25 Absent such terms, defendants still are deterred from violating the law by the
26 possibility of imprisonment, significant criminal fines, and treble damages in

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

1 private follow-on litigation; a mere admonition to not violate the law adds little
2 additional deterrence. To the extent a judgment includes terms that do little to
3 deter anticompetitive acts, it should be terminated.

4 The initial consent judgment was entered on October 21, 1974. Jurisdiction was
5 explicitly retained in Section XIV of the judgment. A judgment modification was entered
6 on March 18, 1975. The core terms of the original judgment enjoined defendant
7 producers of snack foods from conspiring to raise and fix the retail prices of potato chips,
8 corn chips, and other products in California, Arizona, and Nevada. Defendants were
9 further enjoined from agreeing to fix or adopt uniform snack food sizes or weights, to
10 limit supply of snack foods to a third party, to engage in bid rigging, or to allocate
11 customers or markets. Defendants were required to submit an affidavit certifying
12 independent price determination for published prices and bids for five years and to report
13 steps taken to comply with the terms of the final judgment for ten years. The judgment
14 modification removed the requirement that the certifications be notarized. The judgment
15 as modified should be terminated because its terms largely prohibit acts the antitrust laws
16 already prohibit (price fixing, bid rigging, and market allocation).

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

18 The United States has provided adequate notice to the public regarding its intent to
19 seek termination of these judgments. On April 25, 2018, the Antitrust Division issued a
20 press release announcing its efforts to review and terminate legacy antitrust judgments.⁹
21 On March 22, 2019, the Antitrust Division listed the judgment on its public website,
22 describing its intent to move to terminate each.¹⁰ The notice identified the case, linked to

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24 ⁹ Press Release, *Department of Justice Announces Initiative to Terminate*
25 *“Legacy” Antitrust Judgments*, U.S. DEP’T OF JUSTICE (April 25, 2018),
26 <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

27 ¹⁰ *Judgment Termination Initiative*, U.S. DEP’T OF JUSTICE, <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> (last updated Mar. 22, 2019).

1 the judgment, and invited public comment. No comments were received opposing
2 termination.

3 **V. CONCLUSION**

4 For the foregoing reasons, the United States believes termination of the modified
5 judgment in the above-captioned case is appropriate and respectfully requests that the
6 Court enter an order of termination. A proposed order terminating the modified judgment
7 accompanies this motion.

8
9 Respectfully submitted,

10 DATED: 6/10/2019

/s/

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