

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
FEB 07 2019
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY  DEPUTY

UNITED STATES OF AMERICA,

Plaintiff,

v.

KAHN'S BAKERY, INC.; MEAD FOODS,
INC.; and RAINBO BAKING CO. OF EL
PASO, Defendants.

Civil No. EP-75-CA-106 *PRM*

**THE UNITED STATES' MOTION TO
TERMINATE LEGACY ANTITRUST JUDGMENT**

The United States moves to terminate the judgment in this antitrust case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The United States has concluded that because of its age and changed circumstances since its entry, the judgment—which was issued 41 years ago—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 these and other reasons explained below, the United States requests that the judgment be terminated.

I. BACKGROUND

Since 1979, the Antitrust Division of the United States Department of Justice (“Antitrust Division”) has generally followed a policy of including in each judgment a term automatically terminating the judgment after no more than ten years.¹ This policy was based on the United States’ experience enforcing the antitrust laws, an experience that has shown that markets almost

¹ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

always evolve over time in response to competitive and technological changes in ways that render long-lived judgments no longer protective of competition or even anticompetitive. Often, antitrust judgments entered before implementation of the 1979 policy contained no termination clause. Hundreds of such judgments remain in force today. The Antitrust Division recently implemented a program to review and, when appropriate, seek termination of these perpetual legacy judgments, including the judgment in this case. The Antitrust Division described its Judgment Termination Initiative in a statement published in the Federal Register.² 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.³

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment in this antitrust case. The judgment, a copy of which is included in Exhibit A, provides that the Court retains jurisdiction.⁴ Further, Federal Rule of Civil Procedure 60(b)(5) and (b)(6) states 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); *accord Frew v. Janek*, 780 F.3d 320, 327 (5th Cir. 2015) (explaining that Rule 60(b) should be “construed liberally,” that the “rule is broadly phrased,” that “many of the itemized grounds are overlapping,” and that the rule “free[s] Courts do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds”); *cf. In re: Termination of Legacy Antitrust Judgments*, No. 2:18-mc-00033 (E.D. Va. Nov. 21, 2018) (terminating 5 legacy

² 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>.

³ *Judgment Termination Initiative*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination> (last updated Feb. 1, 2019).

⁴ *United States v. Kahn’s Bakery, Inc.*, Civil No. EP-75-CA-106, Section X (W.D. Tex. Aug. 19, 1977).

antitrust judgments); *United States v. Am. Amusement Ticket Mfrs. Ass'n*, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018) (terminating 19 legacy antitrust judgments). Given its jurisdiction and authority, the Court may terminate the judgment for any reason that justifies relief, including that the judgment no longer serves its original purpose of protecting competition. As explained in the following section, termination is warranted.

III. REASONS FOR TERMINATING THE JUDGMENT

The judgment in this case—which is more than 41 years old—presumptively should be terminated because of its age. As noted above, markets almost always evolve over time such that the prohibitions of decades-old judgments may become either irrelevant to, or inconsistent with, competition. These concerns led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten years. Because the judgment in this case is substantially more than ten years old, it presumptively should be terminated. As explained below, however, other reasons also weigh in favor of terminating the judgment.

The judgment applies against three corporate defendants whose businesses related to bread products in El Paso, Texas. The judgment's most notable perpetual terms prohibit bid rigging and price fixing. The judgment also includes several expired or satisfied terms, such as an order to pay damages and a ten-year prohibition against communicating current prices. Accordingly, this decades-old judgment should also be terminated because (1) many of the judgment's requirements have elapsed or been satisfied and (2) the judgment's perpetual prohibitions target that which the antitrust laws already prohibits (i.e., price fixing and bid rigging).

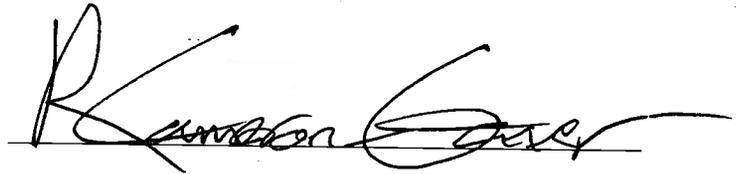
Based on this assessment, the Antitrust Division gave the public notice of—and the opportunity to comment on—its intention to seek termination of the judgment.⁵ No comments were received.

IV. CONCLUSION

For these reasons, the United States believes termination of the judgment in this antitrust case is appropriate and respectfully requests that the Court enter an order terminating it. A proposed order terminating the judgment is attached as Exhibit B.

Respectfully submitted,

Dated: February 5, 2019

A handwritten signature in black ink, appearing to read "R. Cameron Gower", written over a horizontal line.

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⁵ *Legacy Antitrust Judgment: U.S. v. Kahn's Bakery, Inc., et al.*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/legacy-antitrust-judgment-kahns-bakery-inc-et-al> (last updated Sept. 17, 2018).