

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	
)	Civil Action No. 1:95CV01398
COMPUTER ASSOCIATES)	
INTERNATIONAL, INC.; and)	(TPJ)
LEGENT CORPORATION,)	
)	
Defendants.)	
)	

**UNITED STATES' MEMORANDUM IN SUPPORT OF
ITS MOTION FOR AN ORDER AUTHORIZING THE
TRUSTEE TO SELL THE "SUBJECT SOFTWARE PRODUCTS"**

The United States moves for an Order authorizing the Trustee to sell the "Subject Software Products" ("Products") in order to eliminate the anticompetitive effects of the acquisition by Computer Associates International, Inc. ("CA") of Legent Corporation ("Legent"). The Trustee appointed by the Court was unable to license the Products pursuant to the terms of the Final Judgment. The United States now believes that entry of an Order directing the Trustee to sell the Products, a remedy expressly contemplated by the Final Judgment and acknowledged by CA in a separate letter, is the appropriate and necessary remedy to fulfill the purpose of the Trust "to create a viable, ongoing business which can compete effectively in the selling of the Subject Software Products." *Final Judgment* § IV(C)(2).

I. PROCEDURAL HISTORY

This action began on July 28, 1995, when the United States filed this antitrust action under Section 7 of the Clayton Act, 15 U.S.C. 18, to block CA's proposed acquisition of Legent.¹ CA and Legent were, respectively, the largest and second-largest independent vendors of system software for IBM and IBM-compatible mainframe computers. CA and Legent competed against each other for sales of system software that operates with IBM's VSE operating system. The Complaint alleged that the acquisition would eliminate significant competition in five VSE system software markets: (1) VSE tape management software; (2) VSE disk management software; (3) VSE security software; (4) VSE job scheduling software; and (5) VSE automated operations software. The Complaint alleged that the proposed acquisition would substantially lessen competition and raise prices in the five VSE system software markets.

Simultaneously with filing the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the parties consenting to the entry of the Final Judgment after compliance with the procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The Court, on March 13, 1996, determined that the proposed Final Judgment was in the public interest and entered the Judgment.

¹ Section 7 of the Clayton Act prohibits any acquisition whose effect "may be substantially to lessen competition." 15 U.S.C. § 18.

The essence of the Final Judgment is "prompt and certain remedial action to ensure that ... competition is not substantially lessened" in the five VSE system software markets. *Final Judgment, Third Recital* at 1. (The products sold by Legent in these five markets are collectively referred to in the Final Judgment as the "Subject Software Products.") The Final Judgment specified a sequence of procedures to require CA to license the Products to a person determined by the United States to be a viable and effective competitor.

Initially, the Final Judgment provided CA a period in which to attempt to license the Products with the assistance of an investment banker of its choosing, the Udata Group ("Udata"). CA and Udata negotiated licenses with two bidders, but after careful evaluation, the United States exercised its discretion and rejected both firms after determining that neither satisfied the Final Judgment's requirement that the licensee possess the "managerial, operational, technical and financial capability to compete effectively" in the selling of the Products to customers. *Final Judgment, § IV(A)(8)*. CA began negotiations with a third bidder, who would have, in the view of the United States, satisfied the competitive viability standard, but was unable or unwilling to complete negotiations for a license.

The Final Judgment next required the appointment of a Trustee to license the Products. On April 3, 1996, the Court appointed Morrison & Foerster LLP as Trustee. The Trustee received two *bona fide* bids to license the Products. The United

States carefully evaluated the firms and their bids and determined that neither bidder possessed the necessary capabilities to compete effectively in selling the Products.

II. THE REPORT AND RECOMMENDATION OF THE TRUSTEE

Unable to license the Products, the Trustee, pursuant to Section IV(C)(6) of the Final Judgment, filed a report with the Court on September 13, 1996, explaining the Trustee's efforts to license the Products and the reasons the required license could not be accomplished. While we will not here summarize the entirety of the report, three points made by the Trustee should be underscored.

First, the Trustee concluded that, for a number of reasons, the "non-exclusive nature of the licensing provisions," which would result in a licensee competing against CA with CA's product, proved "a significant obstacle to achieving the results" contemplated by the Final Judgment. *Trustee's Report of Auction Results and Recommendation to the Court*, at 6 ("*Trustee's Report*"). Indeed, the Trustee concluded that "[a]s a probable result of this structure, potential acquirors likely found the prospects of competing with CA insufficiently attractive." *Id.* at 7.

Second, the Trustee "has not made an independent determination as to the viability of any bid or the acceptability of any bidder." *Id.* at 6. CA's statement that the Trustee has found one of the bidders to be a qualified licensee, made in CA's

two-page letter to the Trustee dated September 12, 1996 (*Trustee's Report*, Exhibit B) (CA also sent a one-page letter to the Trustee on that date), is unfounded and incorrect.

Finally, the Trustee noted that "several software companies, believe that it would be highly difficult, if not impossible, to compete against CA as a non-exclusive licensee of the Products and that outright ownership of the Products would be preferable." *Id.* at 7. In addition, the Trustee's Contact Log (*Trustee's Report*, Exhibit C) indicates that a number of firms expressed interest in purchasing the Products, but not in licensing them.

III. DISCUSSION

A. SALE OF THE PRODUCTS IS NECESSARY TO ACHIEVE THE PURPOSE OF THE TRUST.

The United States' objective in settling this case is embodied in the Final Judgment's express purpose of the Trust: "to create a viable, ongoing business which can compete effectively in the selling of the Subject Software Products." *Final Judgment* § IV(C)(2). At the time the settlement was negotiated, CA urged the United States to try a non-exclusive licensure remedy as opposed to the more traditional divestiture remedy. Despite CA's assurances, contained in the Final Judgment's Fourth Recital that a license could be successfully negotiated, the United States, while willing to try this novel remedy, was concerned that this novel approach might not prove effective. Because of this concern, the United States insisted upon and obtained the inclusion of a provision in the Final

Judgment that would allow complete divestiture of the Products in the event the Trustee was unable to secure an acceptable licensee.

The Final Judgment directs the Court to "enter such orders as it deems appropriate in order to carry out the purpose of the Trust which shall, if necessary, include disposing of any or all assets of the Subject Software Product businesses, including Customer contracts and/or software assets, to such buyers as the Court deems appropriate" *Final Judgment* § IV(C)(6). Beyond this, the United States required CA, as a condition of settlement, to provide a letter expressly acknowledging that Section IV(C)(6) contemplated the sale of the Products if necessary to achieve the purpose of the Trust. In a July 26, 1995, letter to the Assistant Attorney General, CA's President and Chief Operating Officer, Sanjay Kumar, acknowledged that "the Decree permits the Court sufficient discretion, if the Court so desires, to dispose of the five VSE software products in question in the event that a suitable licensee or licensees are not found." *Competitive Impact Statement*, Exhibit 1. CA's President further acknowledged "that such disposition ordered by the Court could include the divestiture of one or more of these five software products." *Id.* The United States considered the July 26, 1995, letter so important as to be "determinative" in formulating the relief sought by the Final Judgment, and thus

disclosed the letter to the public as a "determinative document" pursuant to Section 16(b) of the Antitrust Penalties and Procedures Act. *Competitive Impact Statement* at 13-14.

At this point, complete divestiture of the Products is necessary to achieve the purpose of the Trust. The fact that the Trustee was unable to license the Products to a qualified bidder demonstrates that licensing the Products is not now an effective remedy to the competitive harm posed by CA's acquisition of Legent. The Trustee concluded that the non-exclusive nature of a license to market mature products proved to be an obstacle, particularly as the passage of time has allowed CA to solidify its relationship with the former Legent customers thereby further eroding the value of a license. The market's unenthusiastic response to the licensing option over the past year demonstrates that any licensure remedy will likely fail to attract acceptable bidders and only serve further to frustrate the Final Judgment's objective to bring about "prompt and certain remedial action." *Final Judgment, Third Recital* at 1. Indeed, CA acknowledged in its two-page, September 12, 1996, letter that the licensing provisions are unworkable. *Trustee's Report, Exhibit B*.

The United States believes it is likely that a sale of the Products will attract bids from firms able to compete effectively and fulfill the purpose of the Final Judgment. The Trustee's Report indicates that a number of software firms were not interested in a license, but were interested in purchasing the Products. The United States believes that there are among these

and other potential bidders a number of firms that would be viable competitors and thus be acceptable to the United States.

Complete divestiture is the typical remedy in Section 7 consent decrees. Here, the United States agreed, at CA's urging, to test what was in this context the novel remedy of a non-exclusive license. The United States' willingness to test this alternative remedy was conditioned on our right to seek complete divestiture in the event a license could not be accomplished. The importance to the United States of the divestiture alternative is clear from the terms of the Final Judgment and CA's July 26, 1995, letter from CA's President Kumar. Indeed, CA's claim, in its one-page letter dated September 12, 1996 (*Trustee's Report*, Exhibit B), that a sale of the Products was not what CA bargained for and would be unfair to CA, ignores the plain language of the Final Judgment and the Kumar letter and is, at the very least, disingenuous. The attempted licensing remedy has failed. The Court should now order the Trustee to sell the Products.

B. CA'S RECOMMENDATION TO LICENSE THE PRODUCTS TO A NON-VIABLE FIRM WOULD DEFEAT THE PURPOSE OF THE TRUST AND HARM THE PUBLIC INTEREST.

CA recommends, as one of two alternatives proffered, that the Court should direct the Trustee to license the Products to a bidder whom the United States has previously determined does not possess the necessary capabilities to compete effectively. Because the United States understands why it would be in CA's business interest to license the Products to an ineffective

competitor, the Final Judgment (to which CA agreed) gave the United States sole discretion to judge the viability of a licensee in order to protect the public interest.

Section IV(C)(2) provides, in pertinent part, that "[t]he trustee shall have the power and authority to execute a license or licenses to a person(s) acceptable to the Plaintiff . . . subject to the provisions of sections IV.A and IV.B of [the] Final Judgment." Section IV(B)(2) provides that the licensing of the Products shall be "accomplished in such a way as to satisfy Plaintiff, *in its sole discretion*, that each Subject Software Product can and will be used by the licensee(s) as part of a viable, ongoing business involving the sale or license of the Subject Software Products to customers, including a demonstration to Plaintiff's satisfaction that (i) the license is for the purpose of competing effectively in the selling of the Subject Software Products to customers; [and] (ii) the licensee has the managerial, operational, technical and financial capacity to compete effectively in the selling of the Subject Software Products" (emphasis supplied).

In the exercise of its discretion, after carefully considering the two bidders, one of which it had rejected earlier, the United States determined that neither bidder identified by the Trustee satisfied the Final Judgment's competitive viability standard. The United States' determination with respect to the previously-rejected bidder was based on numerous factors and was supported by an expert industry

consultant's conclusion that the firm could not reasonably have been expected to "compete effectively in the selling of the Subject Software Products to customers." *Statement of the United States in Support of its Motion for Appointment of Broadview Associates as Trustee*, Exhibit 7 at ¶ 4 (Anderson Declaration). The renewed and revised bid submitted to the Trustee failed to resolve the United States' initial concerns and the United States again found that the firm failed to satisfy the viability standard. The second firm also lacks the necessary capabilities to compete effectively.²

The United States, in the good faith exercise of its discretion, determined that neither bidder has the managerial, operational, technical, or financial capability to compete effectively against CA. Ordering the Trustee to license the Products to either firm would abrogate the terms of the Final Judgment and deny consumers the benefits of effective competition.

² Given that the Final Judgment grants to the United States sole discretion to approve a licensee, the United States believes it is unnecessary and inappropriate to provide details here as to the basis for its conclusions as to the competitive viability of the two firms. Should the Court conclude that such information would be helpful, the United States suggests that the information be provided under seal.

C. CA'S RECOMMENDATION TO TERMINATE
THE FINAL JUDGMENT WOULD HARM CONSUMERS.

CA's second alternative recommendation, that the Final Judgment be terminated a mere six months after this Court found that entry of the Judgment was in the public interest, is ridiculous and warrants little discussion.

The United States would, of course, vigorously oppose a motion to terminate. Under such circumstances, CA would bear the burden to prove that the purpose of the Final Judgment has been, or cannot be, fully achieved such that it is inequitable to continue the Judgment. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C.Cir.), *cert. denied sub nom. MCI Communications Corp. v. United States*, 498 U.S. 911 (1990). CA cannot possibly satisfy its burden on such a motion.

CA apparently confuses its own purposes with the purpose of the Final Judgment. The purpose of the Final Judgment is to ensure that CA's acquisition of Legent does not substantially lessen competition in any of the five VSE product markets. *Final Judgment, Third Recital* at 1. To effectuate this broad purpose, the Final Judgment sought to find a licensee for the Products that was capable of competing effectively against CA. Failing to obtain such a license, the Final Judgment expressly authorizes the Court to order the Trustee to sell the Products. Having failed under the terms of the Final Judgment to establish a competitively-viable licensee, it is obvious that the purpose of

the Final Judgment has not been achieved. It is equally obvious that it cannot reasonably be argued that the purpose of the Final Judgment cannot be achieved given that sale of the Products has not yet been attempted. If the Court orders the Trustee to sell the Products, the purpose of the Final Judgment may yet be achieved.

IV. CONCLUSION

The United States requests that the Court continue the appointment of Morrison & Forester as Trustee for a period of 60 days during which time the Trustee is directed and authorized to sell the Products, subject to the provisions of Section IV of the Final Judgment.

Dated: September 17, 1996

Respectfully submitted,

N. Scott Sacks
James J. Tierney

Attorneys
United States Department of Justice
Antitrust Division
600 E Street, N.W.
Suite 9500
Washington, D.C. 20530
(202) 307-6132