IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO ALLEN SYSTEMS GROUP, INC.'S MOTION TO INTERVENE AS OF RIGHT, OR IN THE ALTERNATIVE, FOR PERMISSIVE INTERVENTION

Allen Systems Group, Inc. ("ASG") seeks intervention to inappropriately inject itself into the resolution of this Clayton Act Section 7 case which seeks to remedy the anticompetitive effects of Computer Associates International, Inc.'s ("CA") acquisition of Legent Corporation ("Legent") by requiring CA to grant a non-exclusive license for certain Legent software products to a licensee. The Final Judgment grants to the Government, in its sole discretion, the right to veto a license to any firm that does not have the capability and resources needed to use the license as a viable and effective competitor.

ASG disagrees with the Government's finding of non-viability and asserts that it is entitled under Fed. R. Civ. P. 24 to intervene to obtain a license. ASG seeks only to advance its self interest in obtaining a license, whether or not the award of

such a license is in the public interest. Since ASG cannot satisfy the well-settled requirements for intervention, and, indeed, such intervention would not serve the public interest, ASG's motion should be denied.

ASG's proposal to participate as *amicus curiae* would serve no useful purpose, and the Government, accordingly, opposes ASG's request.

I. INTRODUCTION

The Government's complaint alleged that CA's acquisition of Legent would substantially lessen competition in five markets for system management software used with the VSE operating system in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18. To ensure that the acquisition would not substantially lessen competition, the parties consented to a Final Judgment that required CA to grant a non-exclusive license for certain Legent VSE software products (the "Subject Software Products" or "Products") to a licensee. *See Final Judgment* ¶ IV. The Court found that the proposed Final Judgment was in the public interest and entered the Judgment on March 13, 1996.

The required license could not be completed unless the Government, in its sole discretion, determined that the proposed licensee possessed the capabilities and resources to be a viable and effective competitor. The Final Judgment provides:

> Unless [the Government] otherwise consents, licensing of the Subject Software Products shall include all assets and be accomplished in such a way as to satisfy [the Government], in its sole discretion, that each Subject Software Product can and will be used by the licensee(s) as a part of a viable, ongoing business involving the sale or license of

> the Subject Software Products to customers, including a demonstration to [the Government'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 capability to compete effectively in the selling of the Subject Software Products to customers.

Id. at ¶ IV(A)(8).

The Final Judgment specified a sequence of procedures to license the Products to a person determined by the Government to be a viable and effective competitor. Initially, CA with the assistance of an investment banker, negotiated a license with ASG and another company. *See Memorandum of Points and Authorities in Support of Motion to Intervene as of Right, or in the Alternative, for Permissive Intervention*, at 4 ("*ASG Memorandum*"). The Government investigated the competitive viability of each bidder, including consultations with company representatives, industry experts and in-house economists. After careful consideration, the Government determined that neither bidder possessed the necessary capabilities to compete effectively in selling the Products. With respect to ASG, the Government identified a number of substantial competitive concerns, including ASG's existing relationship with CA, lack of VSE experience, lack of name recognition in the VSE marketplace, inadequate financing, and vague sales and marketing plans. *See United States' Rely to Defendant's Motion to Approve a License to Allen System Group, Inc.*

The Court next appointed a Trustee to license the Products. The purpose of the Trust is "to create a viable, ongoing business

which can compete effectively in the selling of the Subject Software Products." *Final Judgment* at ¶ IV(C)(2). The Trustee received two *bona fide* bids, including a revised offer from ASG. *See ASG Memorandum* at 4. The Government determined that neither bidder satisfied the Final Judgment's competitive viability standard. As to ASG, the Government again determined that it failed to demonstrate that it would be a viable and effective competitor.[1]

The Final Judgment provides that in the event the Trustee could not license the Products to a viable and effective competitor, the Court may "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 business, including Customer contracts and/or software assets, to such buyers as the Court deems appropriate . . ." *Final Judgment* at ¶ IV(C)(6). Unable to license the Products pursuant to the terms of the Final Judgment, the Government moved for an order directing the Trustee to sell the Products. CA opposed the Government's motion and filed a cross-motion requesting that the Court approve a license to ASG.

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[1] ASG several times suggests that the Trustee determined that its bid was acceptable. ("[T]he Trustee ... proposed ASG as one of two acceptable licensees;" and "ASG has provided a bid that satisfied ... the Trustee." *ASG Memorandum* at 5 & 9.) The Trustee made no such finding. In his report, the Trustee states that he "has not made an independent determination as to the viability of any bid or the acceptability of any bidder." *Trustee's Report of Auction Results and Recommendation to the Court*, at 6.

ASG now moves to intervene pursuant to Rule 24 to oppose the Government's motion and to obtain a license.

II. DISCUSSION

ASG asserts that it is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. Rule 24(a) or, in the alternative, it should be permitted to intervene under the discretionary standard of Rule 24(b).[2] Contrary to ASG's suggestion that motions to intervene in Government antitrust cases are "frequently granted," (*ASG Memorandum* at 7) such motions are nearly always properly denied. "The general rule . . . has been that private parties will not be allowed to intervene in government antitrust litigation." 7C Wright, Miller and Kane, *Federal Practice and Procedure 2d* § 1908 at 266 (1986). Courts applying this general principal have consistently denied motions to intervene of right and for permissive intervention in a wide variety of Government antitrust cases. *See e.g., United States v. G. Heileman Brewing Co, Inc*., 563 F. Supp. 642, 647-50 (D.De. 1983)(Rule 24 motions denied in Tunney Act proceeding); *Carrols*

[2] ASG relies on section 16(f)(3) of the Antitrust Penalties and Procedures Act, 15 U.S.C. 16(f)(3)("Tunney Act"), as an additional ground to support intervention. *ASG Memorandum* at 2. ASG's position is not well taken. The Tunney Act is not applicable after entry of a Final Judgment. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983) *cert. denied sub. nom. American Cyanamid v. Melamine Chemicals, Inc.*, 465 U.S. 1101 (1984). In any event, the Tunney Act does not provide an independent right to intervene, but merely codifies existing law. A party, therefore, cannot intervene in a Tunney Act proceeding unless it satisfies the eligibility requirements of Rule 24. *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 218 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1218 n.3 (N.D.N.Y. 1978).

Dev. Corp, 454 F. Supp. at 1219-21 (Rule 24 motions denied in Tunney Act proceeding); *United States v. International Telephone & Telegraph Co.*, 349 F. Supp. 22, 26-27 (D. Conn. 1972)(Rule 24 motions denied in proceeding to set aside consent decree); *United States v. International Business Machines Corporation*, 1995-2 Trade Cas. (CCH) ¶ 71,135, 75,455-59 (S.D.N.Y. 1995)(Rule 24 motions denied in decree termination proceeding); *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804 at 71,959-60 (D.D.C. 1982)(Rule 24 motions denied in Tunney Act proceeding). There is no reason to depart from this practice here.

A. ASG does not satisfy the requirements for intervention of right.

Rule 24(a)(2) provides for motions to intervene of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interests is adequately represented by existing parties.

ASG fails to establish that it has a legally cognizable interest in this action and that whatever interests it may have are not adequately represented by CA. Moreover, ASG fails to satisfy the strict additional requirement that Government bad faith or malfeasance must be shown before intervention of right will be allowed in a Government antitrust case.

1. ASG has no right to intervene to represent the public interest absent a showing of bad faith or malfeasance.

ASG "question[s] whether the Government's motion [for an order to sell the Products] is in the best interest of the public," (*ASG Memorandum* at 5) and urges the Court to approve it as a licensee to "create an opportunity for genuine competition in the [five VSE] markets." *Id*. at 6. Thus, ASG seeks to intervene to protect the public interest and to preserve the benefits of competition. ASG's concern for the public interest provides no basis to claim intervention of right.

The United States, not ASG, represents the public interest in Government antitrust cases. *See, e.g., United States v. Bechtel*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Associated Milk Producers, Inc.* 534 F.2d at 113, 117 (8th Cir.), *cert. denied sub. nom., National Farmers' Org., Inc. v. United States*, 429 U.S. 940 (1976). "Simply put, in government antitrust actions, courts have uniformly recognized that the government represents the public interest in competition, unless a private party makes an extraordinary showing to the contrary." *IBM*, 1995-2 Trade Cas. ¶ 71,135 at 75,456.

It is well settled that intervention of right may be granted in a Government antitrust case only after a showing of Government bad faith or malfeasance. *Associated Milk Producers*, 534 F.2d at 117; *G. Heileman Brewing,* 563 F. Supp. at 649; *see Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961). The

party seeking intervention bears the burden of proving "that the Government has not acted properly in the public interest." *United States v. Blue Chip Stamp Co.*, 272 F. Supp 432, 438 (C.D.Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968). ASG fails to allege either bad faith or malfeasance by the Government. Indeed, ASG fails even to acknowledge this strict additional requirement for intervention of right in a Government antitrust case.

While CA has argued that ASG satisfied the Final Judgment's competitive viability standard and has moved for an order approving ASG as a licensee, there is no basis for a charge that the Government's non-viability determination constitutes bad faith or malfeasance. As explained in detail in our opposition to CA's motion, the Government diligently and in good faith investigated ASG's competitive viability and has at all times acted to protect the public interest in obtaining a viable and effective licensee.

At most, ASG disagrees with the Government's determination that awarding a license to ASG will not promote the public's interest in obtaining a viable competitor that will restore competition in the five VSE markets. Mere disagreement with Government public interest determinations cannot form a basis for intervention. *G. Heileman Brewing*, 563 F. Supp. at 648 (Private parties "are not entitled to intervene simply to advance their own ideas of what the public interest requires.")

ASG makes no claim of bad faith or malfeasance on the part of the Government because no facts exist to support such a claim. Thus, ASG lacks the additional foundational basis to intervene of right in this case.

2. ASG's private interests provide no basis for intervention.

Under Rule 24(a), "an interest relating to the property or transaction which is the subject of the action," must be a "significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). An interest that is remote or contingent is not sufficient. *In re Penn Central Commercial Paper Litigation*, 62 F.R.D. 341, 346 (S.D.N.Y. 1974).

ASG makes the claim, unsupported by any authority, that its "interest" as a potential licensee provides a basis for intervention. ASG's speculative and contingent "interest" as a potential licensee is not sufficient to support intervention of right. The Final Judgment gives ASG no interest in obtaining a license for the Products. It is well established that there is no right of action for third parties arising out of Government antitrust consent decrees. *See Rafferty v. Nynex Corp.*, 744 F. Supp. 324, 329 (D.D.C. 1990); *Control Data Corp. v. International Business Machines Corp.*, 306 F.Supp. 839, 846-48 (D.Minn. 1969), *aff'd sub. nom. Data Processing Financial & General Corp. v. International Business Machines Corp.*, 430 F.2d 1277, 1278 (8th Cir. 1970). Nor does the Final Judgment grant ASG, or any other bidder, a role in selecting the licensee. The right to determine the viability of a prospective licensee belongs to the Government

and, therefore, cannot serve as a basis for intervention. *See In re Penn Central*, 62 F.R.D. at 346 (An interest under Rule 24(a) "must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit.")

In reality, ASG seeks to promote its private interest to obtain a license. ASG candidly admits that "if full divestiture occurs and the VSE products are made the subject of competitive bids for exclusive licenses, ASG may well be priced out of the market." *ASG Memorandum* at 18-19 (emphasis added). ASG's private interest to obtain a license provides no basis for intervention.

ASG relies on *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) to support its position that intervention of right is appropriate. *Cascade* presents the rare, if not the only, example of a court granting a private party the right to intervene in a Government antitrust case. In *Cascade*, the Supreme Court held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated Section 7 of the Clayton Act because it diminished the sale of natural gas in California and "directed the District Court 'to order divestiture without delay.'" Cascade, 386 U.S. at 131 (*quoting United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964)). On remand, the District Court denied motions to intervene filed by several third parties, including Cascade, a natural gas distributor located in the Pacific Northwest. Thereafter, the District Court entered a consent decree that

delayed divestiture for more than three years and did not provide for the scope of divestiture ordered by the Supreme Court. The intervenors appealed. The Supreme Court reversed the District Court's denial of intervenor status[3] and held that the Attorney General had no authority to enter into a consent decree that was inconsistent with its mandate. *Cascade,* 386 U.S. at 136.

This Circuit regards *Cascade* as an extraordinary case occasioned by the Supreme Court's "splenetic displeasure with provisions of the divestiture plan approved by the Government and the trial court." *Smuck v. Hobson*, 408 F.2d 175, 179 n.16 (D.D.C. 1969). Other courts are in accord. *See e.g., United States v. Automobile Manufacturers Ass'n*, 307 F.Supp. 617, 619 n.3 (D.C. Cal.), *aff'd* 397 U.S. 248 (1969)(*Cascade* "is *sui generis* and must be limited to the facts of that case."); *United States v. Paramount Pictures, Inc.*, 333 F. Supp. 1100, 1102 (S.D.N.Y. 1971)("Intervention in *Cascade* was apparently adopted by the Supreme Court as a convenient device for preventing any further disregard of its order.") "It is also true that *Cascade* stands virtually alone, and that the usual rule, both before *Cascade* and after, has been that private parties will not be

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[3] The Supreme Court, applying former Rule 24(a), allowed the State of California and Southern California Edison to intervene because each satisfied the Rule's geographic proximity test. Cascade did not satisfy the geographic proximity test, but the current version of Rule 24(a) had became effective during pendency of the appeal. The Supreme Court concluded that new Rule 24(a) was broad enough to permit Cascade to intervene since the case was going to be reopened anyway, and because "the existing parties have fallen short of representing [Cascade's] interests." *Cascade*, 386 U.S. at 135-36.

allowed to intervene in government antitrust litigation." 7C *Federal Practice and Procedure*, § 1908 at 266.

3. ASG's interests are "adequately represented" by CA.

Finally, ASG's motion must be denied because its private interests are "adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). In this case, CA and ASG have the identical interest: both CA and ASG seek court approval of a license they have already executed. Where an intervenor and a party have identical interests, adequacy of representation can be presumed. *See Nuesse v. Camp*, 385 F.2d 694, 703 (D.C.Cir. 1967); 7C *Federal Practice and Procedure*, § 1909 at 325.

B. The Court should deny permissive intervention.

Rule 24(b)(2) authorizes the court, in its discretion, to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common . . ." ASG cannot state a "claim" under Rule 24(b)(2) and, in any event, the Court should exercise its discretion and deny permissive intervention because: (1) ASG's participation will needlessly delay these proceedings, (2) the Government has acted in good faith, and (3) ASG's interests are represented by CA.

ASG apparently argues that its "claim" comes within the scope of Rule 24(b)(2) because there may be some common questions of fact between the Government's motion to order a sale of the Products and ASG's private interest in obtaining a license. Assuming there is some factual overlap, ASG does not have standing under Rule 24(b)(2) because its "claim" cannot be

independently prosecuted. The words "claim or defense" in Rule 24(b)(2) refer to "the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 76 (1986); *see Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 483 (S.D.N.Y. 1973)(intervention denied because applicants failed to state a legally cognizable claim.)

ASG's Complaint in Intervention alleges that the Government rejected ASG's bid in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. ASG cites no authority for its novel claim that the APA applies to Government conduct undertaken pursuant to an antitrust consent decree and we are aware of none.[4]

In exercising its discretion, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed R. Civ. P 24(b). ASG's participation will unnecessarily delay and complicate this proceeding. ASG raises novel and complex issues regarding the applicability of the APA to this post-Tunney Act proceeding and also seeks to conduct discovery and present evidence. *ASG Memorandum* at 15. These proceeding have already been

[4] Our research also failed to find support for ASG's claim that the APA applies to Government conduct pursuant to an antitrust consent decree that is subject to court supervision. Although some courts have relied on the APA in reviewing the conduct of parties under a consent decree, the decrees in question expressly incorporate the APA as the reviewing standard. *See e.g., United States v. Int'l Bhd. of Teamsters, et. al.*, 19 F.3d 816, 819-20 (2d Cir. 1994).

significantly delayed due to the unsuccessful efforts of CA and the Trustee to license the Products. Allowing ASG to intervene would only further delay this proceeding and defeat the stated purpose of the Final Judgment to bring about "prompt and certain remedial action." *Final Judgment*, Third Recital at 1.

The grave potential for delay and confusion distinguish this case from *American Cyanamid* and *AT&T*, the two cases cited by ASG where the courts exercised their discretion to allow permissive intervention in Government antitrust cases. *American Cyanamid* was a decree termination proceeding and involved the "unusual factual setting" where intervention was sought by the defendant's only competitor and by a large customer who alleged that termination would have a direct and substantial adverse impact in the relevant market. The court allowed intervention only after noting that the motion to terminate could be "resolved by the Court essentially on the record before it, without the introduction of significant additional evidence and without further hearings." *American Cyanamid*, 556 F.Supp. at 360. The court further emphasized that permissive intervention "will not unduly delay or prejudice the original parties to this litigation. The time consuming and expensive discovery demands often asserted by intervening parties will not be endured here." *Id*. at 361.

Similarly, in *AT&T*, Judge Green granted limited permissive intervention to some third parties in a Tunney Act proceeding after concluding that the evidentiary record was complete and

that there was no need for presentation of evidence. *AT&T*, 552 F. Supp. at 218-19. In subsequent decree modification proceedings, Judge Green again allowed limited permissive intervention, but he did not permit the intervenors to conduct discovery or develop evidence. *See e.g., United States v. Western Elec. Co.*, 1987-1 Trade Cas. (CCH) P 67, 438 at 59, 826-27 (D.D.C. 1987).

ASG does not seek to intervene subject to the same constraints that were imposed on the intervenors in *American Cyanamid* and *AT&T*. ASG intends to take discovery, interject new and unnecessary issues, and its intervention will otherwise influence the pace and direction of these proceedings.

Absence of bad faith on the part of the Government is relevant to a court's discretionary determination whether to allow permissive intervention. *See e.g., IBM*, 1995-2 Trade Cas. (CCH) ¶ 71,135 at 75,458; *G. Heileman Brewing*, 563 F.Supp. at 650. This District in *Stroh Brewing,* 1982-2 Trade Cas. ¶ 64,804 at 71,960, denied permissive intervention because "where there is no claim of bad faith or malfeasance . . . the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom."

Also relevant is the fact that ASG has no basis for asserting that any interest it might have would not be adequately represented by CA. As discussed above, the interests of CA and ASG are identical. Moreover, CA is actively pursuing ASG's

interests through its motion for an order to approve ASG as a licensee.

The Court should deny permissive intervention. Allowing ASG to pursue its private interest to obtain a license will delay this action and prejudice the public interest in "prompt and certain remedial action." *Final Judgment*, Third Recital at 1.

C. ASG's participation as *amicus curiae* will not assist the court.

Neither should the Court allow ASG to participate as *amicus curiae*. The Court has broad discretion to allow a party to appear *amicus curiae* where such status will assist the Court. In *Carrols Dev. Corp.*, several parties were denied leave to participate as *amicus curiae* in a government antitrust case because the parties had already "set forth their views in considerable detail in briefs and affidavits filed with [the] Court. . ." *Carrols Dev. Corp.*, 454 F. Supp. at 1221. As in *Carrols Dev. Corp.*, the purposes of granting *amicus curiae* status have been fully achieved. CA is now pursuing ASG's interests and has incorporated ASG's evidence into its motion. Additional participation by ASG would serve no useful purpose.

III. CONCLUSION

The court should deny ASG's motion because it fails to satisfy the requirements for either intervention of right or permissive intervention. Moreover, allowing intervention would pose a substantial risk to the public interest. ASG's private interest to obtain a license are inconsistent with the purpose of

the Final Judgment to license the Products to a viable and effective competitor. ASG's request to participate as *amicus* would serve no useful purpose and should also be denied.

Dated: October 11, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 11, 1996, copies of the United States' Memorandum in Opposition to Allen Systems Group, Inc.'s Motion to Intervene as of Right, or in the Alternative, for Permissive Intervention, was served by messenger upon:

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