

UNITED STATES OF AMERICA,	)	
	)	Civil No: 1:01CV01237 (GK)
<i>Plaintiff,</i>	)	
	)	
v .	)	Judge: Kessler
	)	
3D SYSTEMS CORPORATION and	)	Filed: March 25, 2002
DTM CORPORATION,	)	
	)	
<i>Defendants.</i>	)	

EOS GmbH Electro Optical Systems (“EOS”), an unsuccessful bidder for the assets required to be divested pursuant to the proposed Final Judgment in this matter, and a patent licensee of defendant 3D, seeks to inappropriately interject itself into the resolution of this Clayton Act Section 7 case. The United States filed this case to remedy the potential substantial lessening of competition in the industrial rapid prototyping industry that would result if defendant 3D Systems Corporation (“3D”) were to acquire defendant DTM Corporation (“DTM”). The parties reached a settlement that would permit the acquisition but require divestiture of certain intellectual property assets. The Court, by order dated August 16, 2001, permitted the acquisition to proceed pending entry of the proposed Final Judgment.

EOS has moved to intervene as of right in this proceeding under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“Tunney Act”), on the basis of its property rights in the patents it licenses from 3D. EOS’s patent rights are not an “interest relating to the transaction

which is the subject of this action” that would support intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Nor can EOS show that entry of the proposed Final Judgment might impair or impede its ability to protect any interest it has in the licensed patents, as required by Rule 24(a)(2).

The United States represents the public interest in the prompt and effective divestiture of the rapid prototyping assets required to be divested under this proposed Final Judgment. EOS has filed extensive comments in this matter, and the United States has considered and responded to those comments. EOS should not now be permitted to inject a private quarrel it has with 3D into this Tunney Act proceeding simply to enhance its position as a potential purchaser and settle a private dispute. EOS’s motion to intervene should be denied.

I. BACKGROUND OF THE CASE

The United States filed this civil antitrust case on June 6, 2001, alleging that 3D’s proposed acquisition of DTM was likely substantially to lessen competition in the market for industrial rapid prototyping systems in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. On August 16, 2001, the United States filed a Stipulation and Order and a proposed Final Judgment settling the case by consent. The settlement permitted defendants to proceed with the merger pending entry of the proposed Final Judgment once the Stipulation was entered by the Court. The Court entered the Stipulation on August 16, 2001, and the defendants completed the acquisition on August 31, 2001. The proposed Final Judgment requires, among other things, that the defendants license their patents for a specific technological field of use --

either the stereolithography (“SL”) technology used by 3D in its industrial rapid prototyping systems or the laser sintering (“LS”) technology used by DTM in its industrial rapid prototyping systems, at the defendants’ option -- to a licensee approved by the United States.

The Tunney Act sets forth procedures governing the entry of consent judgments in government antitrust cases. The Tunney Act requires that the United States file a Competitive Impact Statement that, *inter alia*, describes the proceeding and the proposed consent judgment, and provides for a 60-day period for public comments on the proposed judgment and for government responses to those comments.¹ The United States must, as provided by the Tunney Act, carefully consider and respond to any comments it receives, file the comments and its responses with the Court, and publish them in the Federal Register. After the government has complied with these requirements, the Court must determine, after reviewing the Competitive Impact Statement, the public comments, the government's responses to those comments, and any other information it deems necessary, whether the proposed settlement is "within the reaches of the public interest." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981).

The comment period, which was extended due to the disruptions occasioned by the events following September 11th, ended January 10, 2002. The United States received five comments, including comments from EOS. EOS argued a number of points, including that the proposed

¹The United States filed its Competitive Impact Statement on September 4, 2001.

Final Judgment, by permitting 3D and DTM to proceed with the transaction, was harming EOS's ability to litigate issues related to its patent rights, which were the subject of litigation in another forum. The United States filed the five comments and its Response with the Court on February 15, 2002.

All that remains in this action is for the United States to certify compliance with the Tunney Act and move for entry of the proposed Final Judgment, and for the Court to determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e).² In making that assessment, the "court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993). The Court's role under the

²The United States expects to file this certification at the same time it files this motion or shortly thereafter, as soon as the district court clerk enters on the docket the statements defendants filed with the Court in August 2001 pursuant to Section 16(g) of the Tunney Act.

EOS in its Motion to Intervene (at 2) claims that defendants failed to file the statements required by §16(g), and that this failure has limited the public's ability to make informed comments on the proposed Final Judgment. It asks that the Court permit a reasonable opportunity for public response to the filings.

We understand that both defendants made the requisite filings promptly on August 27, 2001, but the filings were not properly docketed or entered into the case file. Defendants are attempting to correct this problem as promptly as possible.

To the extent EOS seeks to reopen the Tunney Act comment period based on the failure of the Clerk's office to correctly docket defendants' §16(g) filings, its request is untimely and without merit. EOS knew or should have known in November 2001, when it filed its comments, that the §16(g) statements were not in the case file. If EOS was disadvantaged in any way in commenting on the proposed Final Judgment, it should have raised the issue then. The fact that EOS submitted a 16-page letter commenting on the proposed Final Judgment, raising numerous points objecting to the decree, suggests that EOS was not limited in its ability to make informed comments on the proposed Final Judgment.

Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case”. *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995).

Because the “court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,” it follows that the Court “is only authorized to review the consent decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States might have but did not pursue. *Id.* The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that “other remedies were preferable,” *Microsoft*, 56 F.3d at 1460, nor does it give the Court authority to impose different terms on the parties. *See, e.g., United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n. 95 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.); *accord* H.R. Rep. No. 93-1463, at 8 (1974).

II. EOS IS NOT ENTITLED TO INTERVENE AS OF RIGHT IN THIS TUNNEY ACT PROCEEDING

A. EOS's PATENT RIGHTS HAVE ALREADY BEEN DETERMINED BY A COURT OF COMPETENT JURISDICTION

In order to place EOS's motion for intervention as of right into context, it is useful to review the origin of its patent license from 3D and the current status of its patent litigation.

EOS makes industrial rapid prototyping systems for sale outside the United States

using a laser sintering process. Prior to 1997, it was engaged in patent litigation with 3D. As part of the settlement of that litigation, EOS entered into a licensing agreement with 3D pursuant to which it acquired an exclusive, worldwide license on 3D's patents relating to laser sintering. See License Agreement, Exhibit 1 to EOS's Motion to Intervene. Under the terms of that license, EOS has the right to enforce its patent rights through infringement litigation, except that it cannot assert any claim for infringement against 3D, its vendees or customers.

In December 2000, EOS began a patent infringement action against DTM in the United States District Court for the Central District of California. 3D was subsequently joined as an involuntary plaintiff in that litigation, because it was the owner of the patents at issue. On August 31, 2001, 3D and DTM merged, pursuant to the Stipulation filed in this case. After the merger, the California court ordered the parties realigned to name 3D as a defendant. See Exhibit 2 to EOS's Motion to Intervene. Thereafter, 3D brought a motion for summary adjudication, for a determination that EOS could not obtain relief for any damages accruing after August 31, 2001. The basis for the motion was that DTM was absorbed into 3D as of that date, and therefore the license agreement provision that precluded EOS from suing 3D precluded any recovery post-merger. The California court agreed with this argument, based on its construction of the license agreement and the applicable law, and granted 3D's motion in an order dated February 6, 2002.³

Thus, the restriction on EOS's ability to assert its patent rights against DTM results from

³EOS may of course appeal the California court's order, once it is final or sooner if permitted as an appeal from a collateral order. It should not be permitted to seek intervention and ask this Court to undo the order.

its prior agreement not to allege infringement against 3D and 3D's subsequent acquisition of DTM. If the United States had never filed this complaint, EOS would be in precisely the same situation it is now. The proposed Final Judgment, which is the issue before this Court, is not the cause of EOS's difficulty in its patent litigation against DTM.

**B. EOS DOES NOT HAVE AN INTEREST THAT JUSTIFIES
INTERVENTION AS OF RIGHT IN THIS TUNNEY ACT PROCEEDING**

EOS seeks to intervene here as of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.⁴ That Rule provides that,

Upon timely application anyone shall be permitted to intervene in an action: ... (2) 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 interest is adequately represented by existing parties.

EOS claims that its rights under the patent license with 3D are "an interest relating to the property or transaction which is the subject of the action," and that disposition of this action may impede

⁴EOS does not seek permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, and accordingly we have not addressed that issue in this memorandum. We note, however, that permissive intervention is rarely granted in Tunney Act proceedings, and EOS has made no showing that would warrant such extraordinary relief. "A private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest." *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997), quoting *United States v. LTV Corp.*, 746 F.2d 51, 54 n.7 (D.D.C. 1984), and *United States v. Hartford Empire Co.*, 573 F.2d 1,2 (6th Cir. 1978). See also, *United States v. Imetal*, Civil No. 99-1018 (GK) (D.D.C., filed April 26, 1999), Order dated April 4, 2000 denying Motion of Paper, Allied-Industrial, Chemical and Energy Workers Union to Intervene.

its ability to litigate those rights. It offers no case law to support its position, however, and neither the facts nor the law provides any.

The United States recognizes that EOS has an interest in the patents that it licenses, and further that the time period for which DTM is potentially liable to EOS for damages on account of infringement has apparently been affected by the merger of 3D and DTM. This is not the same thing as saying that EOS has an interest in this transaction that justifies intervention, however. EOS has an interest in prevailing on its infringement claim. That claim has been affected by the merger of 3D and DTM, but this Court is not now considering whether to permit the merger. Nor is EOS asking it to undo that transaction. Motion to Intervene at 12. The only issue before the Court now is whether the proposed Final Judgment is in the public interest -- not whether it is the best resolution for EOS. The fact that the underlying acquisition -- which was permitted not by the proposed Final Judgment currently subject to Court review but by the Stipulation and Order that this Court approved on August 16, 2001 -- had an effect on some private intellectual property right of a competitor is beyond the scope of this Court's inquiry.⁵

⁵ EOS asserts in its Motion (at 12) that this Court is obligated to inquire into the extent to which entry of the proposed Final Judgment may positively injure EOS as part of its public interest inquiry. In so arguing, it excerpts a snippet of a quote from *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) that wholly distorts the import of that case. In fact, the *Microsoft* Court emphasized the limited nature of a Tunney Act review:

When the government and a putative defendant present a proposed consent decree to a district court for review under the Tunney Act, the Court can and should inquire, in the manner we have described, into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the district judge can foresee difficulties in the implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate. But, when the government is challenged

In United States v. Atlantic Richfield Company, 50 F.R.D. 369 (S.D.N.Y. 1970), a case virtually on all fours with the facts here, the United States District Court for the Southern District of New York denied the motion to intervene on precisely that basis. In that case, the United States had sued to block Atlantic Richfield's proposed acquisition of a competitor, and had agreed on a consent decree. Although the case was filed before the passage of the Tunney Act, the United States submitted the proposed consent decree under a schedule that provided for a waiting period and comments similar to the scheme that governs in this case. As part of the settlement, the parties were permitted to merge before the consent decree was final. Arco Fuel Co. claimed a right to the use of the trademark "Arco", was engaged in trademark infringement litigation with defendant Atlantic Richfield over those rights, and sought to intervene as of right in the antitrust case. The Court rejected its motion, saying,

The subject of this action is the probability of a substantial lessening of competition in the marketing of gasoline resulting from the merger. The subject of movant's claim, however disguised, is the alleged infringement of its trademark. 56 F.R.D. at 371.

The Court in Atlantic Richfield did note that the government's charges in that case neither mentioned nor were in any way dependent upon the trademark under which defendants marketed

for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.

56 F.3d 1448, at 1461-62.

their products. Here, on the other hand, the complaint mentions patents as a barrier to entry and the proposed Final Judgment requires divestiture of patent rights. However, that is a distinction without a difference. As in *Atlantic Richfield*, the government and the public have “no interest in the outcome of the [patent] dispute” between EOS and DTM.

[M]ovants’ private dispute... is foreign to the present subject of this action, and to inject this private quarrel into this litigation would needlessly prolong and complicate the action on the eve of its termination. 50 F.R.D. at 371.

Moreover, even if EOS had an interest sufficient to satisfy the first requirement of Rule 24(a)(2), it cannot show that the disposition of this action may as a practical matter impair or impede its ability to protect that interest, as the Rule requires. EOS’s interest in the patents it licenses is defined by the terms of its license agreement with 3D. Because of the wording of that agreement, the merger of DTM into 3D was likely to affect EOS’s ongoing litigation against DTM. Moreover, the court that has jurisdiction over that litigation construed the agreement and concluded that the merger did in fact limit EOS’s potential recovery in its order dated February 6, 2002. That is not a result of this action, but rather a result of the contractual terms under which EOS acquired its patent rights. Nor does the disposition of this action affect it. Whether this Court approves the proposed Final Judgment as in the public interest, or refuses to approve the proposed Final Judgment, EOS is barred from recovering damages based on its alleged infringement claim after August 31, 2001. EOS will neither “gain nor lose by the direct legal operation of the [proposed Final J]udgment.” *American Telephone & Telegraph Company*, 642 F.2d at 1292 (D.C.Cir. 1980).

EOS apparently recognizes this, because it suggests that the Court could modify the proposed Final Judgment to provide that EOS's ability to enforce its intellectual property rights will not be limited as a result of the 3D/DTM merger. Motion to Intervene at 13. While this would clearly advance EOS's private interest in collecting damages for infringement, EOS offers no explanation for why this would be in the public interest, which is the interest at issue here. Nor could it. EOS is asking this Court to unilaterally modify an agreement it entered into freely with 3D as part of the settlement of litigation in one court, and to collaterally overrule the order of another federal court in which it is currently involved in litigation. This Court should decline to do so.

CONCLUSION

For all the foregoing reasons, the United States asks the Court to deny EOS's Motion to Intervene as of Right.

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Respectfully submitted,

_____/s/_____
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