

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

3D SYSTEMS CORPORATION and
DTM CORPORATION,

Defendants.

Civil No: 1:01CV01237 (GK)

Filed: September 4, 2001

Judge: Kessler

**COMPETITIVE IMPACT
STATEMENT**

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA”), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint on June 6, 2001, alleging that the proposed acquisition of DTM Corporation (“DTM”) by 3D Systems Corporation (“3D”) would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The Complaint alleges that 3D and DTM are two of only three firms that produce industrial rapid prototyping (“RP”) systems in the United States. Both 3D and DTM hold extensive patent portfolios related to RP systems production. These patents have limited the number of firms in the U.S. market by preventing firms that sell RP systems abroad from

competing in the United States. The Complaint alleges that the transaction will substantially lessen competition in the development, production and sale of industrial RP systems sold in the United States, thereby harming consumers. Accordingly, the Complaint asks the Court to issue (1) a judgment that the proposed acquisition of DTM by 3D would violate of Section 7 of the Clayton Act, 15 U.S.C. § 18; and (2) permanent injunctive relief that would prevent defendants from carrying out the acquisition or otherwise combining their operations.

After this suit was filed, the United States and defendants reached a proposed settlement that permits 3D to complete its acquisition of DTM, while preserving competition in the market for industrial RP systems by requiring defendants to license their RP-related patent portfolios. A Stipulation and proposed Final Judgment embodying the settlement were filed with the Court on August 17, 2001.

The proposed Final Judgment orders 3D and DTM to grant a license to develop, manufacture and sell, and to supply any support or maintenance services for, products under the defendants' RP patent portfolios within a limited field of use matching either 3D's or DTM's technology. The licensee, to be approved by the United States, must be a firm that currently manufactures industrial RP systems. The defendants must complete the divestiture within one hundred twenty (120) calendar days after the filing of the proposed Final Judgment, or five (5) days after notice of entry of the Final Judgment by the Court, whichever is later. The United States may extend the time period for divestiture for up to sixty (60) days. If the defendants do not complete the divestiture within the prescribed period, the Court will appoint a trustee to achieve the divestiture.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment, and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. The Defendants

Defendant 3D is a Delaware corporation with its principal place of business in Valencia, California. 3D is a manufacturer and supplier of RP systems and related equipment, proprietary materials used in RP systems, and associated services. For the year ending December 31, 2000, 3D reported sales of \$110 million.

Defendant DTM is a Texas Corporation with its principal place of business in Austin, Texas. DTM designs, manufactures, markets and supports RP systems and related materials used in RP systems. For the year ending December 31, 2000, DTM reported sales of \$40 million.

B. The Proposed Acquisition

On April 2, 2001, 3D and DTM entered into an agreement and plan of merger, pursuant to which 3D intended to acquire DTM in a cash tender offer. The defendants valued the transaction at an estimated \$45 million. This proposed transaction, which would have reduced the number of competitors in the U.S. industrial RP systems market from three to two, precipitated the United States' antitrust suit on June 6, 2001. Following the filing of the suit, the defendants postponed closing the proposed transaction pending the outcome of settlement negotiations. On August 16,

2001, the Stipulation and proposed Final Judgment to resolve the suit were filed with the Court.

C. The Competitive Effects of the Acquisition

1. *Industrial RP Systems*

Rapid prototyping is a process by which a machine transforms a computer design into a three-dimensional prototype or model. Rapid prototyping is significantly faster and less expensive than traditional methods of creating a prototype, such as machining, milling or grinding.

Competing technologies are used in industrial RP systems to create prototypes. Stereolithography (“SL”) technology, utilized by 3D, forms a three-dimensional object through radiation from a liquid, photocurable material. DTM’s RP systems use laser sintering (“LS”) technology to heat and form a sinterable powder into a three-dimensional form.

There are two types of RP systems: industrial and professional. Industrial RP systems are large, cost hundreds of thousands of dollars and are able to create functional prototypes, tooling inserts, and low volume production quantities of parts. Professional RP systems are smaller and less expensive, use “inkjet” printing technology, and are geared toward the creation of concept models in an office setting. Sales of industrial RP systems and associated materials represent the largest and most profitable segment of the U.S. RP industry, accounting for approximately 85% of the total RP-related sales last year. Because of limited capabilities, professional RP systems are not good substitutes for industrial RP systems.

There is a broad range of uses for the technology employed in an industrial RP system. Industrial RP systems can be used to create prototypes, running the gamut from a non-functional model of a hand-held calculator, used for visual inspection in early design phases, to a

sophisticated exhaust manifold for an automobile, which can be bolted in place and tested. The Complaint alleges that the development, manufacture and sale of industrial RP systems is a line of commerce or relevant product market within the meaning of Section 7 of the Clayton Act. In other words, in the event of a small but significant increase in the price of industrial RP systems, customers would not switch to less capable professional RP systems or to traditional technologies, such as machining, milling or grinding.

The Complaint alleges that the relevant geographic market within the meaning of Section 7 of the Clayton Act is the United States. There are no imports of industrial RP systems into the United States. Although there are producers of industrial RP systems in other countries, such as Japan and Germany, patents that cover the technology owned by 3D and DTM have prevented importation and sale in the United States. Accordingly, U.S. customers are unable to turn to foreign producers of industrial RP systems. Therefore, a small but significant price increase of industrial RP systems would not cause any purchasers to switch to industrial RP systems manufactured outside the United States, let alone a sufficient number to make the price increase unprofitable.

2. *Anticompetitive Consequences of the Proposed Transaction*

3D and DTM are two of only three suppliers of industrial RP systems in the United States. In this highly concentrated market, 3D has approximately a 60% market share and DTM has approximately a 20% market share. Currently, 3D and DTM offer the most sophisticated systems in the industry and compete directly against each other in the development, manufacture and sale of industrial RP systems. Competition for innovations and improvements is evidenced by the

many RP-related patents obtained by the defendants. This competition has been the driving force behind the development of innovative industrial RP system technology, which has enabled the industry to develop a less costly method of creating prototypes.

The proposed acquisition would substantially increase concentration in an already highly concentrated market. The proposed acquisition would raise the combined firm's share of industry sales to the level where it would have the ability profitably to raise prices. 3D and DTM's customers would not switch to the one remaining industrial RP systems producer in sufficient numbers to make unprofitable a significant price increase imposed by the combined firm.

Entry into the industrial RP systems market is difficult, time consuming, and expensive and would not deter the exercise of market power caused by 3D's acquisition of DTM. It would take well over two years, and substantial costs, for a new entrant to create the sophisticated and advanced technological capabilities needed to develop and manufacture industrial RP systems.

3D and DTM each hold an extensive array of patents to the prevailing technology used in industrial RP systems. The patent positions of 3D and DTM prevent other industrial RP systems producers from competing in the United States. In combination, the acquisition would enhance 3D's already strong patent portfolio.

The competition between 3D and DTM has benefitted users of industrial RP systems through lower prices for systems, lower prices for materials, and improved products. For these reasons, the United States concluded that 3D's acquisition of DTM, as originally structured, would substantially lessen competition in the development, manufacture and sale of industrial RP systems in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to ensure that competition that would have otherwise been eliminated as a result of the proposed acquisition will be preserved. To maintain competition in the industrial RP systems market, the proposed Final Judgment lifts the patent entry barriers for a firm that is currently prevented from selling its industrial RP systems in the United States. Licensing an acquirer that currently manufactures industrial RP systems and enabling it to compete in the U.S. market will restore the competition that would otherwise be lost by reason of the merger of 3D and DTM. Outside of the United States, defendants face vigorous competition from companies such as Electro Optical Systems, based in Germany, and Teijin Seiki, based in Japan. Under the proposed Final Judgment, defendants must grant a license to one such firm so that it will be able to compete in the U.S. market. Thus, after the merger, there will still be three competitors in the U.S. market for industrial RP systems.

Specifically, the proposed Final Judgment requires defendants to grant the acquirer a perpetual, assignable, transferable, non-exclusive license to develop, test, produce, market, sell, or distribute, and to supply any support or maintenance services for, products under both firms' RP patent portfolios. Defendants must license both 3D's and DTM's full industrial RP-related patent portfolios to ensure that the acquirer has the full range of necessary technology to produce and sell RP systems in the United States. This license will be limited to a specific field of RP technology to match the RP technology employed by the acquirer. The proposed Final Judgment also requires defendants to provide the acquirer with a list of all North American purchasers that utilize the acquirer's technology and field of use under the license. In addition, the acquirer will have the

option to purchase DTM's assembly plant, located in Austin, Texas.

Under the proposed Final Judgment, defendants must provide the acquirer with all software copyright licenses needed to purchase and resell both defendants' used industrial RP systems in North America. The acquirer will therefore be able to offer to take the defendants' systems as "trade-ins" on its own equipment, and then resell defendants' systems as used equipment.

The proposed Final Judgment bars the defendants from asserting against the acquirer any claims for patent or copyright infringement in North America for products under the licenses granted, or any claims that any equipment, systems, supplies, software, processes or other technology currently sold by the acquirer outside of North America infringe any of defendants' patents or copyrights in North America. These provisions ensure that the acquirer will be able to import its current RP systems into the U.S. market, without the threat of patent or copyright litigation from the defendants.

In order to ensure a capable competitor, defendants must license their RP patents portfolios to a company that currently manufactures RP systems. The divestiture required by the proposed Final Judgment must be to an acquirer acceptable to the United States in its sole discretion. Specifically, in the United States' sole judgment, the acquirer must have the intent and capability of competing effectively in the business of servicing and selling industrial RP systems in the United States.

The defendants must use their best efforts to complete the divestiture required by the proposed Final Judgment as expeditiously as possible. Unless the United States grants an

extension of time, the divestiture must be completed within one hundred twenty (120) calendar days after the filing of the proposed Final Judgment, or five (5) days after notice of entry of the Final Judgment by the Court, whichever is later. If the defendants fail to accomplish the divestiture within this time period, then the proposed Final Judgment calls for the Court, upon the United States' application, to appoint a trustee nominated by the United States to effect the divestiture. If a trustee is appointed, the defendants are to cooperate fully with the trustee and pay all costs and expenses of the trustee and any persons retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of the divestiture assets, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the United States, defendants and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time the trustee will furnish this report to the United States and defendants, who will each have the right to be heard and to make additional recommendations.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district

court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*.

Written comments should be submitted to:

J. Robert Kramer, II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States is satisfied, however, that the removal of existing patent entry barriers through the required license to allow a firm that currently manufactures industrial RP systems to compete in the U.S. market, and other relief contained in the proposed Final Judgment, will establish, preserve and ensure a viable competitor in the development, manufacture and sale of industrial RP systems. Thus, the United States is convinced that the proposed Final Judgment, once implemented by the Court, will prevent 3D's acquisition of DTM from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the court *may* consider--

- (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
- (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, “the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.”¹ Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are

¹ 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. § 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See H.R. Rep. No. 93-1463*, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

reasonable under the circumstances.²

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also *Microsoft*, 56 F.3d at 1458. Precedent requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.³

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A “proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public

² *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); see also *United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

³ *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984).

interest.”⁴

Moreover, the court's role under the APPA 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.” *Microsoft*, 56 F.3d at 1459. 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 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.*

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

⁴ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

Dated: September 4, 2001.
Washington, D.C.

Respectfully submitted,

_____/s/_____
Dando B. Cellini
Stephen A. Harris

U.S. Department of Justice
Antitrust Division
Litigation II Section
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202-307-0729

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Competitive Impact Statement to be served on all parties to this proceeding, by facsimile transmission or by mail, on this 4th day of September, 2001.

_____/s/_____
Stephen A. Harris