IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5158

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IMETAL, ET AL.,

Defendants-Appellees,

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INT'L UNION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE UNITED STATES OF AMERICA TO DISMISS APPEAL

The United States of America hereby moves for an order of the Court dismissing this appeal. Because the district court did not abuse its substantial discretion when it denied appellant's motion for permissive intervention, that interlocutory order is not appealable.

STATEMENT

This case is a proceeding under the Antitrust Penalties and Procedures Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), initiated on April 26, 1999, to determine whether the final judgment proposed by the United States and defendants to settle the government's antitrust suit

is within "the 'reaches of the public interest.'" United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995). In its complaint, the United States alleged that the proposed $1.24 billion acquisition of defendant English China Clays, PLC ("ECC") by defendant Imetal (App. 26)[1] was likely substantially to lessen competition in four separate product markets -- water-washed kaolin, calcined kaolin, paper-grade ground calcium carbonate ("GCC"), and fused silica -- in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously, it filed a Hold Separate Stipulation and Order, and a proposed Final Judgment settling the case by consent.[2] The proposed Final Judgment required, among other things, that the defendants divest substantial assets in all four product markets.

The Tunney Act sets forth procedures governing the entry of consent judgments in government antitrust cases. It requires the United States to file a Competitive Impact Statement ("CIS") that, inter alia, describes the proceeding and the proposed consent judgment, and it also provides for a 60-day period for public comment on the proposed judgment.[3] The Act also requires the United States carefully to consider and respond to any comments it receives, file these comments and responses with the district court, and publish them in the Federal Register. Then the court, after reviewing this material and any other information it deems necessary, must determine whether the proposed settlement is in the

[1]"App." refers to the separate Appendix filed with this motion.

[2]The acquisition was completed on May 11, 1999, subject to the terms of the hold separate order.

[3]The United States filed its CIS on May 24, 1999, and began the 60-day comment period by publishing it, along with the proposed Final Judgment, in the Federal Register on June 11, 1999. 64 Fed. Reg. 31624-38 (1999).

public interest. Microsoft, 56 F.3d at 1458. This public interest determination is properly, and often, made solely on the basis of the written record before the court, and without a hearing or other additional proceedings.[4]

No one commented on the provisions of the proposed Final Judgment relating to the kaolin, calcined kaolin, and fused silica product markets. Only appellant, Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE"), commented, and it opposed the proposed Final Judgment solely as it related to paper-grade GCC. Although neither PACE nor any of its members is a direct purchaser or user of any of the products at issue, it claimed in its comment that its interest was in "full employment . . . in the forest products and paper industry," and also that "its members are purchasers of paper and paper supplies throughout the United States." (App. 26).

As the CIS explained, quarried calcium carbonate is "dry-processed" into GCC. (App. 6). Dry-processed GCC is sold as a separate end product, and also is used as feedstock for the "wet processing" of paper-grade GCC, the specific product at issue here. (App. 3, 6) Only two firms make paper-grade GCC in the Southeastern United States: defendant ECC and Alabama Carbonates, which own plants across the street from each other in Sylacauga, Alabama. (App. 9). Alabama Carbonates is a joint venture owned 50% by Georgia Marble Company, a subsidiary of defendant Imetal, and 50% by Omya, Inc. (App. 3, 9). Under the joint venture agreement, Imetal, through Georgia Marble, provides the raw material which it

[4]Although the Tunney Act authorizes the use of additional procedures, (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. 93-1463, at 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

quarries, dry-processes at its Sylacauga facility into feedstock suitable for wet processing, and sells to Alabama Carbonates at an agreed-upon price. (App. 9-10). Omya operates the wet-processing plant and sells the paper-grade GCC. (App. 10).

The United States viewed the proposed acquisition of ECC by Imetal as anticompetitive, in part because of Imetal's 50% interest in Alabama Carbonates. Thus, the proposed Final Judgment required the defendants to divest Georgia Marble's interest in Alabama Carbonates, and to divest sufficient reserves to provide Alabama Carbonates with 500,000 tons of dry-processed GCC feedstock -- Alabama Carbonates' annual contractual capacity -- for 30 years. The proposed Final Judgment also contained a "transition provision" that required defendants, if requested, to provide Alabama Carbonates with actual dry-processed GCC feedstock for three years. These provisions were intended to allow Alabama Carbonates the time and incentive to build its own dry-processing plant. (App. 14-16).

In its comments PACE claimed that the proposed Final Judgment would not preserve the competition that existed before the acquisition because it required only the divestiture of Imetal's ownership interest in Alabama Carbonates and a fixed quantity of reserves, and not a dry-processing facility.[5] PACE requested a "requirement that Alabama Carbonates will actually enter the market" (App. 28), and suggested that "[t]he Final Judgment should not permit any possibility of a decrease in competition." (App. 29). It also expressed concern that the transition provisions of the Final Judgment might not fully protect Alabama

[5]Georgia Marble (Imetal) has a single dry processing facility in Sylacauga, Alabama, that supplies its dry-processed GCC business (a product distinct from paper-grade GCC), and also supplies feedstock to the Alabama Carbonates plant under a supply agreement. (App. 3, 6, 9).

Carbonates against a variety of harmful practices Imetal could engage in, and might not provide enough time for Alabama Carbonates to construct its own dry processing facilities. (App. 30).

The United States in its response to PACE's comment explained that Alabama Carbonates already was a competitor in the paper-grade GCC market, although it "has historically competed in this market by contracting for its raw materials." (App. 33). By ensuring Alabama Carbonates a long term source of reserves and time to build a dry-processing plant, the proposed Final Judgment would preserve Alabama Carbonates' competitive status by giving it the opportunity and ability "to become independent of Imetal" and "to operate efficiently far into the future." (Id.) The response also explained that because the decree would require that the terms of the transition agreement be substantially similar to the existing supply agreement and be subject to approval of the United States, it was unlikely that Imetal could engage in any improper conduct. (App. 33-34). The United States filed both PACE's comment and the response with the Court on January 14, 2000.[6]

On February 3, 2000, PACE filed a motion with the district court requesting permissive intervention, or in the alternative, amicus status. (App. 35). It reiterated its opposition to the proposed Final Judgment, again claiming that it "provides for less-than-complete divestiture of the assets of either of the merging entities"; specifically, that the proposed Final Judgment "provides for Alabama Carbonates to receive only designated reserves and no dry processing facility." (App. 42 & n.2). It also suggested that the

[6]The comment and the response were published in the Federal Register, as required by 15 U.S.C. § 16(d), on February 7, 2000.

government had not provided the public sufficient information in the CIS, and may not have revealed determinative documents. (App. 44-45). PACE therefore asked the court to allow it to intervene "to enforce the Tunney Act's procedural requirements" and also "to make substantive arguments" against the adequacy of the proposed decree. (App. 45).

On February 16, 2000, the district court denied PACE's motion for failure to comply with Local Civil Rule 7.1(m), which required PACE to confer on the motion and so notify the court. (App. 48). PACE then filed an amended motion on February 24, 2000.

On April 4, 2000, the district court denied PACE's motion. (App. 50). It noted that PACE had not demonstrated a right to permissive intervention under Fed. R. Civ. P. 24(b)(2), and that "allowing such permissive intervention would unduly delay adjudication of the rights of the original parties." (Id.) It further noted that PACE had already had "ample opportunity" to present its views and arguments through the Tunney Act's notice and comment procedure. (App. 50-51). For these same reasons it also denied amicus participation. (App. 51).

PACE filed its notice of appeal from the court's April 4, 2000 order on April 14, 2000. Subsequently, on May 26, 2000, the court approved the consent decree and entered it as the Final Judgment.

ARGUMENT

BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS SUBSTANTIAL DISCRETION IN DENYING APPELLANT'S MOTION FOR PERMISSIVE INTERVENTION, THAT ORDER IS NOT APPEALABLE

It is now well settled that "*a denial of intervention is treated as final and appealable only if the intervening party had a valid claim for intervention as of right or if the district*

judge abused his discretion in denying permissive intervention." United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1290 (D.C. Cir. 1980) (italics original) (footnote omitted); accord Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 524-25 (1947); Twelve John Does v. District of Columbia, 117 F.3d 571, 574 (D.C. Cir. 1997). PACE did not claim to intervene of right but sought only permissive intervention.[7] Because "permissive intervention is an inherently discretionary enterprise," E.E.O.C. v. Nat'l Children's Center, Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998), a denial of permissive intervention "may only be appealed where the trial court has clearly abused its discretion." Hodgson v. United Mine Workers of America, 473 F.2d 118, 127 n.40 (D.C. Cir. 1972) (emphasis added).[8] Indeed, this standard of review is so restrictive that "[r]eversal of a district court's denial of permissive intervention is a 'very rare bird indeed.'" E.E.O.C., 146 F.3d at 1048, quoting United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994); accord United Gas Pipe Line, 732 F.2d at 471 (reversal "so unusual as to be almost unique"). This case is not that "rare bird."[9]

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[7]There is no absolute right to intervene in Tunney Act proceedings. United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 648 (D. Del. 1983); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 218 (D. D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). Rather, the Tunney Act permits, but does not require, the court to authorize participation, including intervention. 15 U.S.C. § 16(f).

[8]Accord United States Postal Service v. Brennan, 579 F.2d 188, 191-92 (2d Cir. 1978) (permissive intervention "wholly discretionary with the trial court" and its decision "may only be disturbed for clear abuse of discretion"); New Orleans Public Service Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 471 (5th Cir. 1984) (same).

[9]Although this Court did find an abuse of discretion in E.E.O.C., it did so because the district court had earlier granted intervention to three similarly situated parties, and yet denied a fourth party intervention "without offering an explanation for the disparate treatment." 146

Rule 24(b)(2) provides that a movant may be granted permissive intervention if its claim or defense and the main action have a question of law or fact in common. In this proceeding, however, the only issue before the district court was whether the proposed Final Judgment is in the public interest. This Court has made clear that this inquiry is a narrow one. As stated in Microsoft, supra, the district court's function is not to determine whether the proposed final judgment "is the one that will best serve society, but only to confirm that it is 'within the reaches of the public interest.'" 56 F.3d at 1460 (citations omitted). When reviewing a proposed consent decree -- which represents a settlement between the parties -- the court must give great deference to the government's predictions as to the effect of the proposed remedies. It may not reject a proposed settlement merely because it believes other remedies might be preferable, or because "a third party claims it could be better treated." Id. at 1460-61 & n.9. Indeed, it should not reject a proposed remedy "unless 'it has exceptional confidence that adverse antitrust consequences will result -- perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'" Id. at 1460 (citations omitted).

This Court has explained that as a prerequisite to intervention in a Tunney Act case, the movant "must first establish that participation by the intervenor would aid the court in making its public interest determination." United States v. LTV Corp., 746 F.2d 51, 54 (D.C. Cir. 1984). Moreover, the United States represents the public interest in government antitrust cases. E.g., United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981); United States

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F.3d at 1048-49.

v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir. 1976). Thus, "[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." United States v. Hartford-Empire Co., 573 F.2d 1, 2 (6th Cir. 1978), quoted with approval in Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997) ("MSL"), and LTV Corp., 746 F.2d at 54 n.7.

PACE claimed in its motion to intervene that it has two distinct antitrust interests in this proceeding. First, as the primary union representing workers in the paper industry, it claimed a direct and substantial interest in the preservation of competitive market conditions in all aspects of paper-making. (App. 40). Second, since both the Union and its members are consumers of paper, it claimed a recognized consumer interest in preserving a free and open market for all the ingredients in the paper-making process. (App. 40-41). These claims, however, are essentially assertions that PACE should be allowed to speak on behalf of the public concerning the proposed Final Judgment. But PACE has made no showing of bad faith or malfeasance on the part of the Government that would justify granting it intervenor status to represent the public interest. Nor could it. The essence of PACE's argument is that it does not like the proposed Final Judgment -- but this Court has made clear that this is not sufficient to justify intervention in a Tunney Act proceeding. MSL, supra; LTV Corp., supra.

PACE also claimed that it was seeking to enforce its procedural rights under the Tunney Act, citing MSL, supra, and United States v. Alex, Brown & Sons, Inc., 169 F.R.D. 532 (S.D.N.Y. 1996), for the proposition that it has a right to do so through intervention. (App. 45). Neither case stands for the proposition that a party is automatically entitled to

permissive intervention in a Tunney Act proceeding merely by claiming that it is seeking to enforce procedural rights, however. Those cases involved parties who had filed private antitrust suits involving the same subject matter as the Government's action, and were seeking discovery of materials from the Government for use in those proceedings and that were likely otherwise unavailable to them.[10]

Moreover, the court was correct that PACE's intervention would unnecessarily delay this proceeding. If PACE were permitted to intervene, it would have sought discovery to develop evidence to support its objections to the proposed Final Judgment, as its motion made clear. PACE attacked the CIS for failing to contain various detailed facts, even though such facts are not required to be in the CIS and were not necessary for the Court to make its public interest determination. (App. 43-44). Indeed, most of the facts PACE would seek to discover concerned Alabama Carbonate's ability to build a dry-processing plant during the transition period. (Id.) But Alabama Carbonates, which would face direct competition from the merged entity, never complained about the terms of the proposed Final Judgment. Nor did PACE offer any facts of its own to question the effectiveness of the proposed decree. Indeed, it openly admitted that "[m]aybe the precise competitive balance that exists will be preserved; maybe it won't." (App. 43).

Thus, not only has PACE wholly failed to show "that the government is not vigorously and faithfully representing the public interest," MSL, 118 F.3d at 783 (citations omitted); it also has failed to show that as an intervenor it "would aid the court in making its public

[10]In both cases the court ultimately denied intervenors the information they sought.

interest determination." LTV Corp., 746 F.2d at 54. Simply put, the Tunney Act necessarily deals in predictions and not in the certainty and exactness PACE seeks. As this Court recognized in Microsoft, "when the proposed decree comes to a district judge in the first instance as a settlement between the parties that may well reflect weaknesses in the government's case, the district judge must be even more deferential to the government's predictions as to the effect of the proposed remedies." 56 F.3d at 1461 (emphasis added).

Significantly, as the court noted in denying PACE's motion (App. 51-52), the labor union's concerns with the decree were placed before the court for its full consideration, both in the form of its comment to the Justice Department and its motion to intervene. If the court had concluded that it needed additional information to make its public interest determination, it would have directed the government to provide it. But the court's decision that PACE was not entitled to the additional information it sought as a prerequisite to the proceeding going forward was not an abuse of discretion. In fact, PACE's concerns amount to nothing more than its refusal to give "due respect to the Justice Department's perception of the market structure and its view of the nature of the case." Microsoft, 56 F.3d at 1461.

CONCLUSION

For the foregoing reasons the Court should dismiss this appeal.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2000, I served a copy of the foregoing Motion of the United States of America to Dismiss Appeal, and the Appendix to that motion, by hand delivery, on all parties of record addressed as follows:

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