

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil No.: 1:01CV01237 (GK)
)	
v.)	Filed: February 15, 2002
)	
3D SYSTEMS CORPORATION and)	
DTM CORPORATION,)	Judge: Kessler
)	
Defendants.)	

PLAINTIFF’S RESPONSE TO PUBLIC COMMENTS

The United States, pursuant to the Antitrust Procedures and Penalties Act (“APPA”), 15 U.S.C. § 16(b)-(h), hereby responds to the five public comments received regarding the proposed Final Judgment in this case.

I. BACKGROUND

On June 6, 2001, the United States filed a Complaint 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. 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. Both 3D and DTM hold extensive patent portfolios related to RP systems production. These patents have prevented 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 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 Section 7 of the Clayton Act, 15 U.S.C. § 18; and (2) a permanent injunction 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 allowed 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, also referred to as the “consent decree,” 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, referred to as the Acquirer, must be approved by the United States, and must be a firm that currently manufactures industrial RP systems, utilizing either the LS or SL technology. The defendants must complete the divestiture five (5) days after notice of entry of the Final Judgment by the Court. 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 proposed Final Judgment provides that the Court will appoint a trustee to accomplish 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.

In compliance with the APPA, the United States filed a Competitive Impact Statement (“CIS”) on September 4, 2001. The proposed Final Judgment and the CIS were published in the Federal Register on September 26, 2001, and in the Washington Post during the period September 17 - 23, 2001. In light of the recent disruptions to mail delivery, the United States published a supplemental notice in the Federal Register on December 21, 2001 and in the Washington Post from December 20 - 26, 2001, extending the comment period by fifteen days. The comment period has now expired, with the United States having received public comments from Aaroflex, Inc., Accelerated Technologies, Inc., Advanced Manufacturing & Engineering Services, Advanced Prototyping, Inc. and EOS GmbH Optical Systems, which are annexed hereto as Exhibits 1 through 5.

II. RESPONSE TO THE PUBLIC COMMENTS

A. Legal Standard Governing the Court’s Public Interest Determination

The Tunney Act directs the Court to determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. § 16(e). In making that determination, 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)(“*Western Electric*”).

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.”

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).

B. Discussion of Comments

The most extensive of the five comments plaintiff received is from EOS GmbH Electro Optical Systems (“EOS”), “a competitor of 3D and DTM in countries other than the United States.” EOS comment, p. 1. The EOS comment incorporates most, if not all, of the points made in the four other comments. Plaintiff will therefore address the arguments advanced by EOS in order, with references to the other four comments where appropriate.

(i) Interim period of monopoly

EOS first contends that the proposed Final Judgment permits a significant period of monopoly for the merged entity by allowing the merger to close prior to the divestiture.

However, plaintiff's investigation into industrial RP equipment customers' buying practices disclosed that such customers typically consider a purchase over a protracted period of time, often waiting a year or more while obtaining quotes and making comparisons. Given these buying habits, a potential purchaser of industrial RP equipment would be able to use the imminent new entry of the Acquirer pursuant to the proposed Final Judgment to bargain for a better price from 3D on its industrial RP equipment. In fact, it appears that this kind of bargaining is occurring. Contrary to EOS' assertion that 3D is currently exercising monopoly power, EOS' Attachment E demonstrates that, during the pendency of the proposed Final Judgment, 3D has found it necessary to offer significant discounts to its customers. This discounting practice is discussed at page 9 of the EOS comment and also at page 2 of the comment submitted by Advanced Manufacturing, and is inconsistent with EOS' assertion at page 2 of its comment that 3D currently enjoys "unfettered monopoly power."

In accepting the consent decree, plaintiff balanced the likelihood of harm to consumers against the interests of the defendants in closing their transaction, and concluded that the time period specified in the decree for negotiating a divestiture and evaluating a proposed Acquirer was reasonable, given the characteristics of the market for industrial RP equipment as discussed above. Further, there was no need to require that the Divestiture Assets be held separate to ensure their viability, because the principal asset to be divested here is a license of intellectual property.

(ii) Market saturation

EOS next argues that the competition lost by reason of the merger can only be replaced by licensing the LS technology offered by EOS, because U.S. demand for SL systems "has reached a

point of saturation.” EOS comment, p. 9. Advanced Manufacturing offers the same observation in its comment at page 2. Were that proposition to be accepted, EOS would be the only firm that could qualify as an Acquirer within the meaning of Paragraph IV.C. of the proposed Final Judgment, because it is the only company in the world, other than 3D, that manufactures LS systems. There are two other companies that manufacture and sell RP industrial equipment outside the United States, but they both offer SL technology.

However, none of the comments disputes the facts that SL systems offer a competitive restraint on prices of LS systems and that customers might switch to SL systems in the face of a price increase in LS systems. In fact, EOS specifically notes at page 4 of its comment that since 1997 “3D and EOS have been significant competitors for RP systems in Europe and Asia.”

Moreover, plaintiff’s investigation has revealed that the SL system is the prevailing type of industrial RP equipment sold in the United States. EOS itself estimates that three out of every four industrial RP systems in the United States use SL technology (EOS comment, p. 9), and sales of SL systems have been increasing. 3D’s most recent 10-K filing with the Securities & Exchange Commission recites that: “The increase in product sales over the prior year is due primarily to increased sales of SLA [SL] and related equipment The increase in machine sales results from increased sales of the higher-end SLA industrial systems, especially the SLA 7000. In 2000, we sold a total of 57 SLA 7000 systems compared to 29 in 1999. We expect sales of large frame machines to increase in 2001.” 3D 10-K report dated March 16, 2001, p. 26. In fact, less than two months after the quoted 10-K was filed, 3D entered into the largest volume-purchase agreement in the company’s history with a California customer, pursuant to which it contracted to deliver as many as 39 SLA 7000 systems over a two-year period. *See* 3D press release dated May

9, 2001, annexed as exhibit 6. This information runs counter to the assertion that demand for SL systems has reached a saturation point.

As the Complaint alleges, 3D's SL technology and DTM's LS technology compete directly against each other. Since they are substitute technologies in the market for industrial RP systems, the competitive concerns set forth in the Complaint may be addressed by licensing either one.

(iii) LS materials monopoly

EOS is joined by Accelerated Technologies, Advanced Manufacturing and Advanced Prototyping in asserting that, if the selected Acquirer uses SL technology, then 3D will retain its monopoly over the sale of LS materials in the United States. LS materials are the sinterable powders used by LS machines. Prior to the merger of DTM and 3D, DTM was the only U.S. supplier of LS materials. 3D succeeded to that sole supplier position through its acquisition of DTM. The Complaint in this case sought no relief with respect to LS materials, because the merger did not lessen competition with respect to LS materials; rather, it left the status quo unchanged. As the comments point out, if EOS is selected as the Acquirer, then there will be a second supplier of LS materials in the United States, and competition will have been created where none existed before. However, since 3D and DTM did not compete in the provision of LS materials, those materials cannot properly be addressed in the context of a remedy designed to resolve the competitive harm arising out of the merger of competing RP systems firms.

(iv) Aaroflex patent claims

Relying upon Aaroflex's comment, EOS next asserts that its LS technology should be favored over SL technology because the latter may face patent entry barriers. The "barriers" EOS

cites are claims by Aaroflex that certain 3D patents on SL technology are invalid. In February 1997, 3D sued Aaroflex for patent infringement. Apparently as a result of this lawsuit, Aaroflex has never commercialized its technology. It has, however, asserted in that proceeding that certain 3D patents are invalid. The Aaroflex claims have not been treated as “barriers” by 3D, since it continues to commercialize its technology, and the brief discussion of the Aaroflex litigation in 3D’s 10-K report does not even mention Aaroflex’s invalidity claims. 3D 10-K report dated March 16, 2001, p. 12. Moreover, 3D is prepared to warrant to the Court and the Acquirer that it can “convey all intellectual property included in the Divestiture Assets free and clear of any encumbrances. . . .” Proposed Final Judgment, Paragraph IV.D.

(v) Teijin Seiki/CMET letter

The EOS comment includes as an attachment a copy of a letter EOS received from Teijin Seiki/CMET, a Japanese company that is a potential Acquirer. EOS construes the letter as an invitation to collude, either regarding the bidding process for the Divestiture Assets or regarding competition generally, and argues that this improper conduct should disqualify Teijin Seiki/CMET as a potential Acquirer. This is not a comment on whether entry of the proposed Final Judgment is in the public interest. Rather, it is a comment on whether plaintiff should approve Teijin Seiki/CMET as an appropriate buyer. Plaintiff agrees that, in the event Teijin Seiki/CMET is presented to it as the proposed Acquirer, plaintiff should weigh the letter and its meaning in exercising its discretionary authority to approve the Acquirer under Paragraph IV.N. of the proposed Final Judgment.

(vi) Pending litigation between EOS and 3D

In December 2000, EOS filed suit against DTM, seeking damages for infringement of

certain 3D patents which 3D had licensed to EOS in 1997. The license agreement between EOS and 3D contains what EOS characterizes as a “Non-Suit Provision,” which bars EOS from asserting infringement claims against 3D based upon the patents 3D licensed to EOS “at any time, for any reason, during the term of the License Agreement.” *See* Attachment A to EOS comment. Following consummation of the merger between 3D and DTM, 3D filed a motion invoking the Non-Suit Provision to prevent EOS from collecting damages for infringement after the date of the merger, because the allegedly infringing products are now being sold by 3D instead of DTM.

Citing *United States v. Microsoft Corporation*, 56 F.3d 1448 (D.C. Cir. 1995), EOS contends that the Court should take 3D’s motion into account in making its public interest determination under 15 U.S.C. § 16(e)(2) because “[a]mong the factors that the Court is to consider in conducting its public interest inquiry is whether entry of the proposed Final Judgment ‘will result in any positive injury to third parties.’” EOS comment at p. 11, quoting *Microsoft Corporation*, 56 F.3d at 1461, n. 9. However, whatever “positive injury” EOS may suffer results not from the proposed Final Judgment but from the broad language of the Non-Suit Provision. The meaning and effect of the contractual relationships between 3D and EOS are properly left to the court before which those issues are now pending.

(vii) Austin plant and service personnel

EOS mistakenly asserts, at page 13 of its comment, that the Divestiture Assets include “an option for the Acquirer to purchase DTM’s plant located in Austin, Texas,” drawing from this an inference that the Department misunderstands fundamental concepts of the RP industry. In fact, the proposed Final Judgment merely recites that the plant can be included among the assets to be conveyed, meaning that the Acquirer may, at its option, assume whatever interest DTM had in the

plant: owned property may be conveyed by purchase, and leased property may be conveyed by a lease assumption. EOS misconstrues the CIS reference to an “option to purchase the [DTM] plant” to mean the full assumption of ownership, when in reality it means the Acquirer has the option to “purchase” 3D’s interest in the plant, whatever form that interest might take.

EOS also suggests that the consent decree should have done more to facilitate the hiring of service personnel from 3D by the Acquirer. The provisions contained in Paragraph IV.I. of the proposed Final Judgment adequately protect the Acquirer’s ability to recruit 3D service personnel. That paragraph requires defendants to waive any non-compete clauses in agreements with present or former employees, and prohibits defendants from interfering with any negotiations by the Acquirer to employ any of defendants’ present or former employees for a period of two years. Further, each firm that manufactures RP systems outside of the United States currently employs its own service personnel, and has developed its own programs and methods for training them on its own machines. It is not, therefore, a foregone conclusion that the Acquirer would rely upon recruitment of 3D personnel, trained on 3D machines, to build up its U.S. service network.

(viii) *Second comment period*

EOS suggests that there be a second comment period in this case, following the proffer of a proposed Acquirer by 3D but preceding plaintiff’s approval of an Acquirer. EOS comment, p. 15. Plaintiff objects to the proposed second round of comments for three principal reasons.

First, such a procedure would be inconsistent with procedures that courts have routinely applied in reviewing proposed Final Judgments. Since the Tunney Act was enacted in 1974, the United States has negotiated hundreds of consent decrees in merger cases. In each instance, the public had an opportunity to comment upon the terms of the proposed Final Judgment. Often the

court has proceeded to review and then enter the proposed Final Judgment before the acquirer of the divestiture assets has been selected, relying upon the United States to monitor the divestiture process. Plaintiff has been unable to identify a single instance in which a court deferred entry of a proposed Final Judgment that was otherwise in the public interest in order to receive a second round of comments regarding the divestiture selection process. EOS has provided the Court with no reason to deviate from the procedures that are routinely followed in other cases subject to the Tunney Act.

Second, such a procedure is unnecessary given the incentives and ability plaintiff has to assure that divestitures are accomplished in a manner that protects competition. After concluding that the proposed transaction between 3D and DTM would be anticompetitive, plaintiff agreed to the proposed Final Judgment as a way to preserve the competition that existed prior to 3D's acquisition of DTM. Accordingly, the proposed Final Judgment is designed to ensure that the Acquirer of the license will compete effectively against 3D and others in the industry, and that plaintiff conducts a thorough investigation before approving any particular Acquirer.

The proposed Final Judgment contains provisions that (1) give the United States sole approval of the Acquirer of the license, Paragraph IV. A., (2) set forth the standards that the United States applies in evaluating proposed purchasers, Paragraph IV. N., and (3) require defendants to provide information to plaintiff about the process undertaken to select an Acquirer, as well as requiring information from defendants and the prospective purchaser for evaluation of the purchaser in Section VI. After obtaining notice that defendants have entered into a proposed transaction with a prospective purchaser, plaintiff will investigate the transaction and prospective purchaser, reviewing the selection process and analyzing the managerial and financial ability of the

purchaser. The proposed Final Judgment gives plaintiff considerable access to details, often highly confidential, about prospective purchasers. Without such access, comments on specific proposed purchasers will lack the information necessary to aid an informed decision. In sum, the proposed Final Judgment's provisions empower the United States to review and approve the proposed Acquirer of the license, and with these provisions, the United States is able to ensure that the Acquirer is capable of competing effectively in the relevant market.

Third, a second round of comments would itself create problems that might make divestitures in antitrust cases more difficult to accomplish promptly. It would potentially delay the achievement of effective remedies to anticompetitive mergers by delaying entry of the proposed Final Judgment, and extending the divestiture deadlines contained therein. Any needless delay in the consummation of divestitures would deny the public the benefits of the competition contemplated by the proposed Final Judgment. A second round of public comments would also risk involving the Court in an inquiry that is not envisioned by the Tunney Act. Courts have repeatedly held that it is not within the "public interest" standard of the Tunney Act to determine the "best" remedy. See *Western Electric*, 993 F.2d at 1576.

Finally, in this case, a second comment period is plainly unnecessary. There are only three firms in the world that qualify as potential Acquirers, and the comments plaintiff has received demonstrate that industry participants are familiar with the firms and their technologies. Any issues pertaining to a particular potential Acquirer could and should have been addressed in the comment period provided by law, as EOS itself did in its discussion of the Teijin Seiki/CMET letter.

For all of the foregoing reasons, the Court should reject EOS' proposal for a second round

of public comments.

C. Recommendations Made in the Comments

Significantly, none of the five comments recommends rejection of the proposed Final Judgment. In their respective comments, Aaroflex, Accelerated Technologies, Advanced Manufacturing and Advanced Prototyping all recommend that the LS technology be licensed instead of the SL technology, and offer observations about perceived advantages of the LS technology and perceived disadvantages of the SL technology. Plaintiff will consider and weigh all such observations when exercising its discretionary authority to approve the Acquirer of the Divestiture Assets.

Advanced Prototyping also recommends that the consent decree be “amended in some fashion” to address the possibility that the Acquirer may not compete aggressively or may be unsuccessful. Advanced Prototyping comment , p. 3. However, the decree already directly addresses these concerns by providing that the Acquirer must be a “firm that currently manufactures RP industrial equipment” which, in plaintiff’s sole discretion, “has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively” Proposed Final Judgment, Paragraphs IV. C & N. Moreover, in the unlikely event that the entrant fails, the license is transferable.

EOS “recommends that DOJ or the Court modify the proposed Final Judgment so that a new competitor will be permitted to sell laser sintering [LS] RP systems and material in the United States, without regard to whether 3D licenses its stereolithography [SL] technology.” EOS comment, p. 16. The principal difficulty with the EOS recommendation is that it is inconsistent with the theory of liability pleaded in the Complaint and the evidence that supports

that liability. The Complaint alleges that “[t]here are only three companies that develop, manufacture, and sell industrial RP systems in the United States” (§ 20), and that 3D, with its SL technology, and DTM, with its LS technology, “compete directly against each other in the development, manufacture and sale of industrial RP systems and materials.” (§ 21). Because the merger reduces the number of U.S. competitors from three to two, the consent decree addresses that competitive concern by lifting patent entry barriers so that another competitor using either the SL or LS technology can enter the U.S. market, thereby restoring the number of competitors to three.

To the extent EOS asserts that a divestiture of LS technology is needed to preserve competition for industrial RP systems, it overlooks the weight of the evidence that SL and LS compete directly against each other. Consistent with the Complaint, and indeed with the history of competition between 3D (an SL firm) and DTM (an LS firm), the license of either SL or LS technology will preserve competition in the industrial RP systems market. Accordingly, plaintiff submits that EOS’ recommendation to modify the proposed Final Judgment to require the licensing of LS technology must be rejected because the Complaint in this case offers no basis for its implementation.

III. CONCLUSION

None of the comments received by plaintiff in this case takes the position that the proposed Final Judgment is not in the public interest within the meaning of 15 U.S.C. § 16(e), and that it should accordingly be rejected by the Court. Instead, the comments offer suggestions for modification of the proposed Final Judgment or observations about which company might make the most suitable Acquirer in order to remedy the harm alleged in the Complaint.

After careful consideration of the comments, the United States has affirmed its conclusion that entry of the consent decree will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and is in the public interest. The proposed modifications that seek a different remedy are inconsistent with the theory of the Complaint in this case, and must therefore be rejected. The observations regarding factors that should be considered in determining whether a proposed Acquirer has the intent and capability of competing effectively in the business of selling and servicing RP Industrial Equipment can and will be taken into account when the United States fulfills its responsibilities to approve a buyer under Paragraph IV.N. of the proposed Final Judgment.

Accordingly, the United States will move the Court to enter the proposed Final Judgment after the public comments and this Response have been published in the Federal Register, as 15 U.S.C. § 16(d) requires.

Dated: February 15, 2002.
Washington, D.C.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Response to Public Comments to be served by mail and facsimile transmission, this 15th day of February, 2002, upon the following counsel of record for defendant 3D Systems Corporation:

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