IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' REPLY TO DEFENDANT'S MOTION TO APPROVE A LICENSE TO ALLEN SYSTEMS GROUP, INC.

The United States opposes the Motion of Defendant Computer Associates International, Inc. ("CA") to Approve a License to Allen Systems Group, Inc. ("ASG") ("CA Motion for Licensure"). The United States urges the Court to grant the Motion of the United States for an Order Authorizing the Trustee to Sell the "Subject Software Products" ("US Motion for Sale").

The decree assigned to the United States sole discretion to approve the licensee in order to assure that the licensee would be able to compete effectively in the sale of the Subject Software Products. The United States has fulfilled this responsibility in good faith. In disapproving ASG as a licensee, the United States exercised its discretion in a reasonable and appropriate manner. Because ASG is not likely to

be able to compete effectively in the sale of the Subject Software Products, licensure to ASG will not fulfill the purpose of the decree.

The decree does not require, but clearly authorizes, the Court to order sale of the Subject Software Products in order to fulfill its express purpose to create a viable competitor in the sale of the Subject Software Products. Such an order would not constitute a modification of the decree, and would not require further evidentiary proceedings. The sale would be subject to approval by the Court.

CA's claims that sale of the Subject Software Products would be unfair to CA or consumers are meritless. The United States also opposes CA's alternative remedies, which would not serve the decree's purpose to create an effective competitor.

I. BACKGROUND

Section I of the Memorandum in Support of the US Motion for Sale ("US Memo for Sale") contains the relevant historical background of this proceeding and will not be repeated herein. The United States disagrees with many of the characterizations contained in the "Procedural History" section of the Memorandum in Support of CA's Motion for Licensure ("CA Memo for Licensure"). Rather than responding in dueling background sections to each CA mischaracterization, we will deal with the major points in the context of the substantive issues discussed below. However, we feel compelled to note here that CA spins the purpose of the decree to a bare notion of "consumer choice," *CA Memo for Licensure at 4*, ignoring the express statement of

the purpose in the decree -- to create a viable business that can compete effectively. An effective competitor would offer consumers real choices, not hollow choices. What follows is the relevant factual background beginning with the Trustee's report to the Court.

On September 13, 1996, pursuant to Section IV(C)(6) of the decree, the Trustee filed the *Trustee's Report of Auction Results and Recommendation to the Court* ("Trustee's Report"). The Trustee's Report described the Trustee's efforts to license the Subject Software Products and the reasons the required license could not be accomplished.

The Trustee concluded that, for a number of reasons, the "non-exclusive nature of the licensing provisions," which would result in a licensee competing against CA with CA's product, proved "a significant obstacle to achieving the results of the auction contemplated by the Final Judgment." *Trustee's Report at 6.* Indeed, the Trustee concluded that "[a]s a probable result of this structure, potential acquirors likely found the prospects of competing with CA insufficiently attractive." *Id.* at 7. The Trustee also noted that it "has not made an independent determination as to the viability of any bid or the acceptability of any bidder." *Id.* at 6.

The Trustee also noted that "several other software companies, express their opinion that it would be highly difficult, if not impossible, to compete with CA as a non-exclusive licensee of the Products and that outright ownership of the Products would be preferable." *Id.* at 7. In addition,

the Trustee's Contact Log (*Trustee's Report*, Exhibit C) indicates that a number of firms expressed interest in purchasing the Products, but not in licensing them.

On September 17, 1996, the United States filed its Motion for Sale. On September 27, 1996, Allen Systems Group, Inc. filed a Motion To Intervene as of Right, or in the Alternative for Permissive Intervention ("Motion to Intervene"). On October 8, 1996, CA filed Defendant's Memorandum in Response to Motion to Intervene. The United States filed this date, October 11, 1996, a Memorandum In Opposition to the Motion to Intervene. On September 30, 1996, CA filed the instant Motion for Licensure.

II. DISCUSSION

A. THE UNITED STATES HAS PROPERLY EXERCISED ITS SOLE DISCRETION UNDER THE DECREE TO REJECT THE PROPOSED LICENSEES

1. The decree vested in the United States sole discretion to approve a licensee

When the decree was negotiated, the United States was concerned that the selected licensee be able to "compete effectively in the selling of the Subject Software Products." *Final Judgment § IV(C)(2)*. Clearly, it would be in CA's private interest to license the Subject Software Products to as weak a competitor as possible, in order to minimize its loss of customers and revenues. To assure a licensing to a viable competitor, the United States insisted upon, and obtained, the provision that it have sole discretion to approve a licensee,

whether selected by CA and its investment banker or by the Trustee.

Section IV(C)(2) of the decree provides, in pertinent part, that "[t]he trustee shall have the power and authority to execute a license or licenses to a person(s) acceptable to Plaintiff . . . subject to the provisions of sections IV.A and IV.B of [the] Final Judgment." Section IV(A)(8) provides that the licensing of the Products shall be "accomplished in such a way as to satisfy Plaintiff, in its sole discretion, that each Subject Software Product can and will be used by the licensee(s) as part of a viable, ongoing business involving the sale or license of the Subject Software Products to customers, including a demonstration to Plaintiff's satisfaction that (i) the license is for the purpose of competing effectively in the selling of the Subject Software Products to customers; [and] (ii) the licensee has the managerial, operational, technical and financial capability to compete effectively in the selling of the Subject Software Products (emphasis supplied)."

In Government antitrust cases, courts have consistently recognized that the Government represents the public interest in competition.[1]. In *Hughes,* the decree provided that Hughes either

[1] United States v. Bechtel Corp., 648 F.2d 660,666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Associated Milk Producers, Inc., 394 F. Supp 29, aff'd 534 F.2d 113, 117-18 (8th Cir.), cert. denied sub nom. National Farmers' Organization, Inc. v. United States, 429 U.S. 940 (1976); United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 648 (D. Del 1983); see also Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961).

i) dispose of designated stock holdings, or ii) deposit the stock with a trustee under a voting trust agreement until he sold the stock. On motion of the U.S., the court amended the decree [2]. In *Hughes,* the decree provided that Hughes either i) dispose of designated stock holdings, or ii) deposit the stock with a trustee under a voting trust agreement until he sold the stock. On motion of the U.S., the court amended the decree [3] Reliance on the sole discretion of the United States to assure a competitively viable licensee is particularly appropriate where, as is the case here, the decision to be made is essentially a judgment about the likelihood that a licensee will be an effective competitor.

2. The United States has exercised its discretion in good faith and in a reasonable and appropriate manner in rejecting ASG as a licensee

CA argues that the United States' "consistent and unexplained refusal to approve suitable licensees has prevented accomplishment of the purposes of the Decree." *CA Memo for Licensure at 6.* ASG argues its rejection by the United States "represents an arbitrary and capricious abuse of discretion." *ASG Memorandum in Support of Its Motion to Intervene at 12.* Both arguments reflect nothing more than the fact that, from the standpoint of their private interests, both firms dispute the United States' assessment of the likely competitive viability of ASG as a licensee.

a. The United States has acted in good faith

In exercising its "sole discretion" to reject ASG as a licensee, the United States has acted in good faith. CA has offered no basis to conclude otherwise. ASG's cursory argument that there has been an arbitrary and capricious abuse of discretion rests solely on its belief that it would be a viable competitor.

In the absence of credible allegations of bad faith, there is no cause for the Court to question what is in essence a matter of judgment assigned by the decree for good reason to the sole discretion of the United States. In the absence of allegations of bad faith, there is no justification for a full-blown evidentiary proceeding to determine whether the Court's judgment as to ASG's competitive viability as a licensee is the same as the judgment of the United States.

b. The United States has exercised its sole discretion in a reasonable and appropriate manner

Given the need for the Court to determine what action is now appropriate to carry out the purpose of the trust and because of CA's objections to our disapproval of ASG as licensee, it may be helpful to explain the basis for our conclusion.

CA's contention that the United States has consistently refused to approve suitable licensees erroneously suggests that there has been a significant number of disapprovals and no approvals. During the Updata investment banker phase, the United States was presented with three bidders in ranked

priority. The first bidder was a small firm producing a product that displayed support manual text on a computer screen. This product is not really systems software. Our rejection of this bidder is not contested, even by the bidder. Updata's second-ranked bidder was ASG. CA also negotiated with Updata's third-ranked bidder, but failed to negotiate a license. *CA Memo for Licensure at 5.* It is noteworthy that the United States had informed Updata that this third-ranked bidder, a large and successful systems software firm with substantial VSE business, would likely be approved.[4]

The Trustee phase produced two potential bidders, ASG again and a start-up firm that had not yet established an actual place of business and had no products. The firm's owner had a previous track record in MVS in a privately-held firm about which we were unable to obtain any business information after diligent effort. Moreover, there were significant legal issues with respect to a non-compete agreement that could have barred this firm from selling the licensed products. Our rejection of this firm is also not now contested, even by the bidder.

Thus, the United States has rejected two potential licensees about which there is no significant issue, was prepared to accept a potential licensee with whom CA did not

[4] It is also noteworthy that Updata had, indefensibly in the view of the United States, ranked this bidder behind ASG even though its bid was higher under the most plausible assumption that less than 60% of the customers would elect to switch, and its bid was firm while ASG's was contingent on financing. The Updata bid analysis is appended at Exhibit A.

reach a licensing agreement, and rejected ASG.

Our refusal to approve ASG as the licensee was the product of investigation and careful evaluation. In general, we met with ASG, sought and evaluated information obtained from ASG, and consulted with the Yankee Group, a widely-respected computer industry consulting firm. Attached as Exhibit B is the Declaration of Minaksi Bhatt ("Bhatt Declaration"), an attorney for the Antitrust Division, which describes some of major steps taken by the United States in investigating ASG and in concluding it was not a viable competitor. Attached as Exhibit C is the Declaration of Gregory P. Polonica ("Polonica Declaration"), a Senior Financial Analyst for the Antitrust Division, who participated in the financial analysis of the ASG bid. Attached as Exhibit D is the Declaration of Carl C. "Pete" Clark, Jr. Attached as Exhibit E is the Declaration of Howard M. Anderson ("Anderson Declaration"), Managing Director of the Yankee Group, who evaluated ASG as a proposed licensee and advised the United States that "ASG appears unlikely to be able to compete effectively in the selling of the Subject Software Products to customers." *Anderson Declaration at ¶ 8.*

There are a number of factors underlying our determination that ASG would not be an acceptable licensee. First, while ASG may be financially viable in its present business, it appears to lack the financial resources to acquire the products and provide the support and development necessary to compete effectively. *Polonica Declaration at ¶¶ 10-18; Anderson Declaration at ¶ 6.* ASG has no commitment from its bank to finance any licensing

costs or other funds to cover necessary support and development expenses, such as ASG's acknowledged need to hire VSE-experienced personnel. *Bhatt Declaration at ¶¶ 10, 11; Polonica Declaration at ¶¶ 10-18.* Moreover, given the lack of any technical or strategic fit between the Subject Software Products and the rest of ASG's product lines, and in particular ASG's major new product development area, "Enterprise Service Management," there are no apparent business incentives that provide any assurance that ASG will make a financial commitment to the Subject Software Products, particularly if its limited financial resources are needed for ASG's other products. *Anderson Declaration at ¶ 6; Bhatt Declaration at ¶ 9,10.*

Second, ASG has very little VSE experience, expertise, or reputation. According to the Yankee Group analysis, only ASG's two VSE products (CMSDOS and LIBR) and its multiplatform file transfer product (X-path) provide working VSE experience and are a very small portion of ASG's business. The two VSE products constitute only 1% and the multiplatform product accounts for less than 2% of ASG revenues. *Anderson Declaration at ¶ 5.* The additional VSE products claimed as relevant experience by ASG, *see CA Memo for Licensure Exhibit D*, including a number of data entry products that "run on top of VSE but their support does not require detailed technical knowledge of VSE," and thus do not support ASG's claims for VSE experience and expertise. *Anderson Declaration at ¶ 5.*

Moreover, ASG's claims with respect to experienced VSE executives and technical personnel are similarly misleading.

During ASG's meeting with the Antitrust Division, there was only one top management official identified as having significant VSE experience: Alan Bolt, ASG's Vice President for Development. *Bhatt Declaration at ¶ 8*. It would appear from the Allen Declaration that for whatever reason, Mr. Bolt is no longer employed by ASG. *CA Memo for Licensure, Exhibit C ("Allen Declaration") at IV.h.* Most tellingly, the description in the Allen Declaration of the VSE experience of ASG personnel is a list of persons no longer employed by ASG. Mr. Allen asserts an intent to attempt to rehire some unspecified number of them. *Id.* This bald assertion is certainly no basis for concluding that ASG has, or can or will have, the experienced VSE personnel necessary to compete effectively against CA with the Subject Software Products.

According to Pete Clark, characterized by ASG's President as "universally accepted as the VSE industry expert," *Allen Declaration at II*, ASG (among other proposed licensees) has "little or no VSE experience, were virtually unknown to most VSE users, and I believe that it would be unlikely that many users would switch to such vendors under a licensure scheme." *Clark Declaration at ¶ 14.*

Third, about half of ASG's revenues are derived from products that support CA's database product, IDMS. *Anderson Declaration at ¶ 7; Bhatt Declaration at ¶ 6; Polonica Declaration at ¶ 19-20*. ASG is "critically dependent upon the continuing availability of CA's proprietary software as well as

continuing cooperation and information from CA." *Anderson Declaration at ¶ 7; see also Bhatt Declaration at ¶ 6.* The United States is concerned that CA's ability to adversely effect half of ASG's revenues might inhibit ASG from competing vigorously.

There are, in addition, a number of other factors we considered, some of which warrant particular mention. ASG's marketing plan for the Subject Software Products, characterized by Mr. Allen as "unlike any other offered by any company I am aware of," *Allen Declaration at IV.g.*, warranted suspicion. When the Antitrust Division sought to discuss the plan in its meeting with ASG executives, Mr. Allen characterized it as a "secret plan" and refused to discuss it in front of the rest of his senior management. *Bhatt Declaration at ¶ 11.* The Division later learned that the "secret plan" was essentially to allow customers to lock-in future maintenance and upgrade fees, and a $25,000 coupon for other ASG products. *Id.* The manner in which this "secret plan" for marketing the Subject Software Products was approached caused the United States some concern about ASG's managerial resources.

Another factor undermining ASG's credibility relates to Mr. Allen's claim that ASG has the exclusive support as licensee of Carl "Pete" Clark, widely-known for VSE expertise among VSE users and characterized by Mr. Allen as "universally accepted as the VSE industry expert." *Allen Declaration at II.* This claim of Mr. Clark's support is untrue -- Mr. Clark does not endorse ASG as a licensee and he believes that we acted appropriately in

rejecting ASG as a licensee. *Clark Declaration at ¶ 13, 14.*

For these and other reasons, it was a reasonable and appropriate exercise of discretion for the United States to conclude that ASG lacked the "managerial, operational, technical and financial capability to compete effectively in the selling of the Subject Software Products to customers." *Final Judgment § IV(A)(8).*

B. LICENSURE OF THE SUBJECT SOFTWARE PRODUCTS TO ASG IS NOT LIKELY TO FULFILL THE PURPOSES OF THE DECREE

As we continually note, the purpose of the decree is to provide effective competition. It is unsurprising that CA, whose logical private interest is in licensure to a weak competitor, argues that ASG as licensee would be an effective competitor. *CA Memo for Licensure at 10.* CA offers little in support of its argument other than to rely on the claims made by ASG. CA also asserts that its guarantee of a minimum number of licensees (1001) will provide sufficient revenue to allow ASG to dedicate ample resources to support and enhancement of the products. *Id. at 12.* There is no analytic basis offered for this assertion.

For the reasons discussed in Section II(A)(2) above, the United States has ample basis to conclude that ASG lacks the "managerial, operational, technical and financial capability to compete effectively in the selling of the Subject Software Products" as required by Section IV(A)(8) of the Final Judgment. CA does not agree with this conclusion, but has no basis to challenge the good faith of the United States, who was charged

in the decree with the responsibility to make this judgment.

C.CA AGREED TO A DECREE THAT CLEARLY AUTHORIZES THE COURT TO ORDER THE TRUSTEE TO SELL THE SUBJECT SOFTWARE PRODUCTS WITHOUT FURTHER PROCEEDINGS

1.The decree does not require but explicitly authorizes the Court to order the sale of the Subject Software Products in order to fulfill the purposes of the trust

The United States agrees with CA that the Court is not required by the decree to order the sale of the Subject Software Products. However, as CA concedes, *CA Memo for Licensure at 15*, and as discussed below, the decree makes clear that the Court is authorized to order a sale if the Court deems it appropriate. The Court has discretion to "enter such orders as it shall deem appropriate to carry out the purpose of the trust, which shall, if necessary, include disposing of any or all assets of the Subject Software Product businesses,..." *Final Judgment § IV (C)(6)*. The decree expressly defines the purpose of the trust to be "to create a viable, ongoing business which can compete effectively in the selling of the Subject Software Products." *Final Judgment § IV(C)(2)*. As explained in the US Motion for Sale and in this Reply, the only way to fulfill the purpose of the Trust at this juncture is for the Court to exercise its discretion to order the sale of the Subject Software Products.

2.The Court may order sale of the Subject Software Products without further proceedings

CA argues that the Court does not have the authority to order sale of the Subject Software Products without further evidentiary proceedings. *CA Memo for Licensure at 18.* This argument inexplicably ignores the clear language of the decree and the July 26, 1995, letter from CA President Sanjay Kumar to Assistant Attorney General Bingaman ("Kumar letter")(Exhibit F) and is utterly without merit.

CA's reliance on Hughes v. United States, 342 U.S. 353 (1952) and United States v. Western Elec. Co., 894 F.2d 430 (D.C.Cir 1990) is misplaced. Both cases involved situations in which the court was modifying a decree, not implementing its explicit terms.[5]

In this case, the decree explicitly directs the Court to "enter such orders as it deems appropriate in order to carry out the purpose of the Trust which shall, if necessary, include disposing of any or all assets of the Subject Software Product

[5] In *Hughes*, the decree required that Hughes either i) dispose of designated stock holdings, or ii) deposit the stock with a trustee pursuant to a voting trust agreement until he sold the stock. On motion of the United States, the District Court substantially modified the decree to require that if the stock held under the voting trust was not sold by a certain date, the trustee should sell the stock within two years thereafter. The Supreme Court held that while the district court had the power to modify the decree to require the sale of stock, such a requirement was not in the decree and could not be ordered without an evidentiary hearing. 342 U.S. at 356. In *Western Elec. Co.*, the relied-upon passage is explaining the procedural requirements for modifying a decree. 894 F.2d at 435.

businesses, ..." *Final Judgment § IV(C)(6)*. The Kumar letter states that "[w]e hereby acknowledge that the Decree permits the court sufficient discretion, if the Court so desires, to dispose of the five VSE software products in question in the event that a suitable licensee or licensees are not found. We understand that such disposition ordered by the Court could include the divestiture of one or more of these five VSE software products."[6]

It could not be more clear that no modification of the decree is necessary before the Court may order sale of the Subject Software Products, and that the type of hearing a decree modification requires is not required here.

3. Sale of the Subject Software Products is necessary to fulfill the purposes of the trust to assure competition

The attempts to find a competitively viable licensee in accord with the procedures outlined in the decree have failed to produce an acceptable licensee. Licensure has not been, and at this point will not be, an effective remedy. CA's Senior Vice President and General Counsel, Steven M. Woghin, informed the Trustee in a September 12, 1996, letter that CA "believes that the licensing provisions of the Final Judgment have been put to a market test and have been found unnecessary and unworkable."[7] The Trustee's Report, discussed above in Section I, identified a

[6] CA acknowledges that the contemporaneous Kumar letter may be used as an aid to construction of the decree. *CA Memo for Licensure at 15*.

[7] Letter from Steven M. Woghin to Michael A. Jacobs, September 12, 1996, at 2. Appended as Exhibit G.

number of structural reasons why the decree's non-exclusive licensing structure was unattractive to potential acquirors. As discussed more fully in the US Memo for Sale, the Court's best alternative to fulfill the decree's stated purpose to provide effective competition, and the only alternative expressly mentioned in the decree, is to order the Trustee to sell the Subject Software Products.

CA's favored alternative, to grant a license to a firm unlikely to be able to compete effectively with the Subject Software Products, does not accomplish the decree's purpose. CA's proffered alternative remedies, discussed below, suffer the same flaw.

4. CA's claim that the Government's proposed order would permit a sale without judicial review or approval is either incorrect or easily remedied

CA argues that the United States' proposed order would permit the Trustee to sell the Subject Software Products without further review by this Court or any opportunity to be heard in opposition. *CA Memo for Licensure at 20.* The United States did not intend this construction, and does not believe it to be the appropriate construction of its proposed order. The United States is cognizant that the decree requires that if the Subject Software Product assets are sold, that they be sold to "such buyers as the Court deems appropriate, ..." *Final Judgment IV(C)(6).* The requirement of the proposed order that the Trustee file a report with the Court upon completion of the sale was intended to provide the vehicle for the Court to approve the

sale.

In any event, this issue is a tempest in a teapot. If this provision of the proposed order is deemed inartful by the Court, the United States would be pleased to submit a revised Proposed Order that makes explicit that no sale agreement executed by the Trustee is final until approved by the Court.

5. Sale of the Subject Software Products is not unfair to customers or CA

CA's argument that a sale of the Subject Software Products would be unfair to customers is so disingenuous that it may serve as an illustration for the definition of "chutzpa."[8] CA seems to believe that it is unfair for customers to be switched without choice to a new vendor unless that new vendor is CA. CA acquired a number of software products and companies prior to its acquisition of Legent, and those many thousands of customers were forced to transfer their relationships to a new vendor -- CA. That is precisely what CA did to what had been thousands of Legent customers. Moreover, this type of divestiture is the traditional remedy in antitrust cases, a fact too obvious to merit citations. Finally, should there be customers genuinely aggrieved to be separated from CA, which is unlikely to be a substantial number since they had earlier chosen to be Legent customers and not CA customers, such users may switch to the

[8] "Chutzpa" is a Yiddish word in common parlance which by an oft-used definition refers to the type of nerve exhibited by a person who, upon conviction for the murder of his parents, would plead with the judge for mercy because he is an orphan.

alternative CA products.

CA also argues that there is no reason for confidence that a forced sale would provide the prompt and certain relief sought by the decree, as a sale may not be accomplished. This ignores the Trustee's conclusions, discussed in Section I above, that a number of firms found the licensure structure unworkable and would prefer purchase, and that a number of firms expressed interest in purchasing the assets, even to the extent of submitting a purchase bid.[9] While there is no guarantee of a sale, attempting a sale to an effective competitor is clearly preferable at this point to granting a license to a firm unlikely to compete effectively.

CA's argument that a sale of the Subject Software Products would be unfair to CA is also without merit. CA claims, both in the CA Memo for Licensure (at 8 and 16) and in a letter from CA's General Counsel to the Trustee,[10] that it bargained for licensure, not divestiture. This claim is hard to understand given the express language of the decree stating that the Court may order divestiture if the licensing attempts fail. *Final Judgment IV(C)(6).* It is especially hard to understand given

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[9] ASG apparently believes that a sale is likely to be accomplished. ASG is concerned that "if full divesture occurs and the VSE products are made the subject of competitive bids for exclusive licenses, ASG may well be priced out of the market." *ASG's Memo in Support of Its Motion Intervene at 18-19.*

[10] "Forcing CA to sell the products -- which is not what was bargained for in this consent judgment -- would be manifestly unfair to CA and its customers." *Woghin Letter at 3.*

the Kumar letter, which was required by the United States for no purpose other than to have CA acknowledge that sale of the Subject Software Products may be ordered.

CA's complaint about the $460,000 it has already spent on investment banker and Trustee fees is beside the point. First, all that is at issue is the incremental additional costs of having the Trustee attempt a sale. Second, given CA's revenues in excess of $3 billion, it has not made a persuasive case that an inadequate remedy should be ordered by the Court in order to save CA from further Trustee expenses that were within the range that was reasonably anticipated as the possible cost of accomplishing the decree's purpose.

D. CA'S ALTERNATIVE REMEDIES WOULD NOT SERVE THE PUBLIC INTEREST MORE THAN A SALE OF THE SUBJECT SOFTWARE PRODUCTS

CA proposes three alternative remedies, none of which are likely to achieve the competitive purposes of the decree. CA's first alternative remedy is to license the Products to Elite Systems, Inc. ("Elite"). CA does not contend that Elite would be a viable and effective competitor. Elite is a start-up company with no employees, no products and no VSE track record, no assets or revenues, no office space, and a legal issue relating to a non-compete agreement.

The ultimate viability of a licensee will depend on its ability to attract a critical mass of customers in the customer election process, since an installed base is necessary to justify continued support and development of the Products. Elite has no experience developing, selling, supporting, or

marketing VSE products and has no name recognition in the VSE market. Clearly, Elite lacks the "managerial, operational, technical and financial capability to compete effectively in the selling of the Subject Software Products to customers." *Final Judgment § IV(A)(8).* CA next makes the disingenuous offer that it will provide a royalty-free license to a licensee chosen by the Government. However, CA would condition such a license on modifying the decree to eliminate the provisions allocating customers who fail to make an election *(Final Judgment § (V)(E))* and requiring proration of prepaid license fees *(Final Judgment § (V)(H))*. CA's proposed one-sided modifications would eviscerate the Final Judgment.

Eliminating the customer allocation requirement would create a default mechanism whereby any customer who does not make an election will stay with CA. Such a modification would defeat the intent of the provision to ensure that the licensee gets a fair opportunity, equal to CA's opportunity, to obtain a sufficient number of licenses to compete. Eliminating the provision requiring proration of prepaid licensing fees would unjustly penalize customers who wished to switch and provide a windfall to CA. Under CA's proposal, a customer who selects the licensee would forfeit all pre-paid maintenance fees for services not yet provided, and this financial penalty for switching appears likely to effectively deter customers from selecting the licensee.

Even if CA were to withdraw its overreaching proposed modifications, its royalty-free licensing proposal fails to

address the fundamental problem with the decree's licensing remedy. The Trustee's Report indicates that the non-exclusive nature of the licensing provision is the principal reason the required license could not be accomplished. *Trustee's Report at 6.* CA's royalty-free license does not cure this fundamental problem, and therefore CA's proposed remedy would likely fail.

Finally, CA continues to press its argument that the Final Judgment should be terminated less than a year after entry and before it has accomplished its purpose: the creation of an effective competitor. The Government addressed this meritless argument in its Memorandum in Support of Its Motion for Sale. While the Government will not repeat this discussion, we briefly respond to CA's claim that alleged customer "happiness" with CA satisfies the "changed circumstance" test for decree modification articulated in Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 383 (1992).

CA argues that the decree should be terminated because "customers are happy with the services provided by CA" and "[f]orcing these customers to deal with a new vendor would not increase competition nor would it serve consumer interest." *CA Memo for Licensure at 23.* CA's argument here in favor of customer choice is both ironic and inconsistent. The irony in this argument is that the former Legent customers had chosen Legent and its products over CA, but were forced into a relationship with CA as a result of the acquisition. The inconsistency is with CA's claim that its customers are happy, given CA's implicit claim in footnote 5 of the CA Memo for

Licensure, made in an unpersuasive attempt to avoid another inconsistency, that it was "extremely unlikely" that at least 1001 customers would not wish to leave CA.

The Court in *Rufo* held that decree modification may be warranted because of changes in factual conditions that: (1) "make compliance with the decree substantially more onerous," (2) make the decree "unworkable because of unforseen obstacles" or (3) make "enforcement of the decree without modification ... detrimental to the public interest ..." Rufo, 502 U.S. at 384. CA cannot satisfy any of these alternative criteria for modifying the decree based on changed circumstances. First, CA makes no showing that decree compliance has become substantially more onerous for CA, except to complain about Trustee fees as discussed above. Second, the failure of licensure and the possible need to order divestiture is expressly provided for in the decree and acknowledged in the Kumar letter, and thus cannot be claimed to be unforseen. Third, what would be detrimental to the public interest would be to terminate the decree without fulfilling its purpose to provide effective competition.

III. CONCLUSION

For the above reasons, the United States urges the Court to deny the CA Motion for Licensure. The United States also urges the Court to grant the US Motion for Sale.

Dated: October 11, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 11, 1996, copies of the United States' Reply to Defendant's Motion to Approve a License to Allen Systems Group, Inc., was served by hand delivery upon:

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