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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	Civil Action No. 72-344(AGS)

CONSOLIDATED OPPOSITION OF THE UNITED STATES TO MOTIONS TO INTERVENE AND PRELIMINARY RECOMMENDATIONS REGARDING PARTICIPATION BY AMICUS CURIAE

I. INTRODUCTION

On June 13, 1994, International Business Machines Corporation (IBM) filed a motion to terminate the final judgment entered herein on January 25, 1956 and subsequently amended on January 14, 1963 and December 29, 1970. The Independent Service Network International (ISNI), Computer & Communications Industry Association (CCIA), Computer Dealers and Lessors Association (CDLA), and, jointly, Sungard Data Systems Inc. (Sungard) and Affiliated Computer Services, Inc. (ACS) (collectively the "Proposed Intervenors"), have filed motions seeking to intervene

in this action in order to oppose the motion to terminate.[1] At the March 1, 1995 status conference, the Court stated that the initial issue was resolution of the motions to intervene and also indicated that the Court wanted to know the government's position in general terms as to discovery and the participation of third parties in the proceedings. (March 1, 1995 Tr. at 8, 10-11.) The Court instructed the government to file its response by March 31, 1995.

The United States opposes the motions to intervene. None of the Proposed Intervenors satisfies the criteria under Rule 24(a) or (b) of the Federal Rules of Civil Procedure for intervention of right or permissive intervention. Even if the Court finds, however, that a prospective intervenor has satisfied the threshold requirement for permissive intervention under Rule 24(b)(2), i.e., that a claim or defense presents questions of law or fact in common with those raised by IBM's motion, the Court

[1] ISNI filed its motion to intervene on June 24, 1994. CCIA filed its motion to intervene on July 29, 1994. CDLA filed its motion to intervene on October 17, 1994. Sungard and ACS filed their motion to intervene on December 22, 1994. All of these motions were held in abeyance pending the conclusion of all proceedings on IBM's motion to disqualify Judge Edelstein. Judge Edelstein denied IBM's disqualification motion on July 28, 1994. United States v. IBM, 857 F. Supp. 1089 (S.D.N.Y. 1994). IBM thereafter petitioned the Second Circuit for a writ of mandamus directing the recusal of Judge Edelstein, and the Second Circuit ordered that the writ be issued on January 17, 1995. In re IBM, 45 F.3d 641 (2d Cir. 1995). In this memorandum, we refer to the Memorandum of Law in Support of ISNI's Motion to Intervene as "ISNI Mem.", the Memorandum of Law in Support of CCIA's Motion to Intervene as "CCIA Mem.", the Memorandum of Law in Support of the CDLA's Motion to Intervene as "CDLA Mem.", the Memorandum of Law in Support of Sungard's and ACS's Motion to Intervene as "Sungard and ACS Mem.", and the transcripts in this action by the date of the transcript and the designation "Tr."

should deny intervention. Even under such circumstances, intervention is not in the public interest because it would unduly delay and complicate adjudication of the motion to terminate.

Although the government opposes the participation of third parties as intervenors in this proceeding, the government expects that there will be a useful role for participation by third parties as amici curiae. Our experience with the computer industry suggests that assessing the effects of the termination of the final judgment will be a complex undertaking. Prospective Intervenors contend that termination would seriously jeopardize competition and its benefits to consumers by threatening the continued viability of a variety of businesses that can compete only if the judgment continues to restrain IBM from exercising its market power. The government anticipates that once the issues are framed, active amicus participation on at least some specified issues will provide useful assistance in developing evidence on the competitive effects of judgment termination or modification in an expeditious manner.

As the Court has indicated, after resolution of the intervention motions, the next steps are to frame the issues and establish a discovery schedule to develop the necessary evidentiary record, as well as to identify the appropriate roles of any amici and the manner in which the proceedings will be conducted. The government fully represents the public interest in competition in this case and will investigate the relevant

issues actively in order to reach a position on the merits of IBM's motion.

II. THE MOTIONS TO INTERVENE SHOULD BE DENIED

A. The Proposed Intervenors Have No Right To Intervene

1. All of the proposed intervenors seek intervention of right under Rule 24(a)(2), which requires an applicant to show that: (l) it has an interest relating to the subject of the action; (2) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect its interest; and (3) its interest is not adequately represented by existing parties. Fed. R. Civ.P. 24(a)(2); Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984); In re Ivan F. Boesky Secs. Litigation, 129 F.R.D. 89, 94 (S.D.N.Y. 1990).

Each applicant argues that intervention is necessary for it to assist in preserving the benefits of competition made possible by the final judgment in this action; that is, each applicant asserts an interest in protecting the public interest in competition. See, e.g., ISNI Mem. at 2 ("ISNI and other potential third party intervenors are crucial to an adversarial process in this action serving the public interest."), 4-5 (ISNI is in a unique position to prove how termination of the final judgment would threaten the viability of independent service organizations and deprive IBM computer users of quality service at lower cost) (citing Affidavit of Claudia Betzner In Support of ISNI's Motion to Intervene at ¶¶ 5-6); CCIA Mem. at 6 ("CCIA will serve the public interest in the appropriate enforcement of the

antitrust laws.");[2] CDLA Mem. at 2 ("CDLA (and other intervenors) can play an important role to counter IBM and, ultimately, serve the public interest."), 3 (judgment termination will provide IBM with the "ability and incentive to destroy or discipline leasing and remarketing companies. . ., all to the detriment of consumers)(citing Declaration of David E. Poisson at ¶ 10); Sungard and ACS Mem. at 20 ("the public interest compels intervention"), 22 (absent Sungard and ACS's participation, no party will advocate the interests of the public).

However, in government antitrust cases, courts have consistently recognized that the government represents the public interest in competition. United States v. Bechtel Corp., 648 F. 2d 660, 666. (9th Cir.), cert. denied, 454 U.S. 1083, 102 S.Ct. 638 (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, 97 S. Ct. 355 (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, 81 S. Ct. 1309, 1313 (1961).

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[2] CCIA's motion is also deficient in that it simply states summarily that its members comprise a large variety of manufacturers and/or providers of computer products and services, that its members compete against IBM, and that, as such, CCIA has a significant interest in opposing judgment termination on the ground that termination would adversely affect CCIA's interest in EDP trade and commerce. CCIA does not explain which of its members' interests will be affected by judgment termination, nor does it address the third requirement for intervention under Rule 24(A)(2)--that is, that CCIA's interests are not adequately represented by existing parties.

Therefore, "[i]n Government antitrust consent decree hearings, it has been held consistently, with the rarest exception, that a private party will not be permitted to intervene as of right absent a showing that the Government has failed 'fairly, vigorously and faithfully' to represent the public interest." United States v. American Cyanamid Co., 556 F. Supp. 357, 360 (S.D.N.Y. 1982) (quoting United States v. Ciba Corp., 50 F.R.D. 507, 513 (S.D.N.Y. 1970)), aff'd, 719 F.2d 558 (2d Cir. 1983), cert. denied sub nom. American Cyanamid Co. v. Melamine Chemicals, Inc., 465 U.S. 1101, 104 S. Ct. 1596 (1984); see also United States v. Hartford Empire Co., 573 F.2d 1, 2 (6th Cir. 1978) ("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.").

Bad faith or malfeasance on the part of the government must be shown before intervention will be allowed. Associated Milk Producers, Inc., 534 F.2d at 117; G. Heileman Brewing Co., 563 F. Supp. at 649. The applicant has the burden of proving "that the Government has not acted properly in the public interest." United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580, 88 S. Ct. 693 (1968); see also United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978).

There has been no showing of malfeasance or bad faith on the

part of the government in this proceeding. The government is fully aware of its public interest obligations in this case. We intend to take whatever action is necessary to represent fully the public interest in competition, which may or may not be consistent with the clearly private interests of the Proposed Intervenors. The fact that the government has not yet objected or consented to IBM's motion to terminate the final judgment does not constitute evidence of bad faith or malfeasance, but reflects the government's recognition that the motion presents difficult competitive issues and that the public interest will be best served if the government takes a position on the motion only after development of a sufficient factual record.[3]

Nevertheless, three of the four Proposed Intervenors (ISNI, CCIA and CDLA), relying primarily on Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S. Ct. 932 (1967),

[3] Sungard and ACS's argument that intervention is justified is based on the outrageous and groundless allegation that the government plans to ignore the public interest. Sungard and ACS Mem. at 19-20. Sungard and ACS apparently seek to intervene in this proceeding in an attempt to reargue their interpretation of the service bureau provisions before the Court. The government previously rejected, after an investigation, allegations by Sungard and ACS that IBM had been violating the service bureau provisions of the Final Judgment by competing against them. Their judgment interpretation, which is not mandated by the language of the decree, would insulate them from competition from IBM. In the case of Sungard, it would reduce from three to two the number of major competitors in the United States that are capable of providing computer disaster recovery services. Declaration of James L. Mann at ¶ 5. This would run counter to the fundamental principle that the antitrust laws are for the "protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521 (1961). Sungard and ACS "are not entitled to intervene simply to advance their own ideas of what the public interest requires." G. Heileman Brewing Co., 563 F. Supp. at 648.

argue that this case is the rare situation in which intervention of right is appropriate.[4] Cascade represents the extraordinary circumstance in which third parties were permitted to intervene in a government antitrust action. In Cascade, the Supreme Court had held that an acquisition violated the antitrust laws and "directed the district Court 'to order divestiture without delay.'" 386 U.S. at 131, 87 S. Ct. at 935 (quoting United

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[4] CCIA and CDLA also cite United States v. Simmonds Precision Products, Inc., 319 F. Supp 620, 621 (S.D.N.Y. 1970), which relied exclusively on the Supreme Court's decision in Cascade without any significant discussion. ISNI, Sungard and ACS also cite Trbovich v. United Mine Workers of America, 404 U.S. 528, 539, 92 S. Ct. 630, 636-37 (1972), in which a union member was allowed to intervene because of valid complaints about the adequacy of the Secretary of Labor's representation of his private rights in a proceeding. Trbovich does not apply in government cases in which only the public interest, and no private interests, are at issue. United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 987 (2d Cir. 1984).

Sungard and ACS do not rely on Cascade. In addition to Trbovich, they cite to several other cases which are inapplicable or provide no useful guidance in support of their motion to intervene as of right. See Berger v. Heckler, 771 F.2d. 1556, 1565 (2d Cir. 1985) (allowing intervention under Fed. R. Civ. P. 71, which is not applicable to this case); United States v. American Cyanamid Co., 719 F. 2d 558, 563, 564 n.6 (2d Cir. 1983), cert. denied sub nom. American Cyanamid Co. v. Melamine Chemicals, Inc., 465 U.S. 1101, 104 S. Ct. 1596 (1984) (affirming denial of intervention of right and discussing rights of party that had been granted permissive intervenor status); United States v. Board of School Commissioners, 466 F.2d 573, 576-77 (7th Cir. 1972), cert. denied sub nom. Citizens of Indianapolis for Quality Schools, Inc. v. United States, 410 U.S. 909, 93 S. Ct. 964 (1973) (affirming district court's denial of intervention of right and discussing criteria applicable to consideration of possible permissive intervention); United States v. Western Elec. Co., Inc., 673 F.Supp. 525, 529 (D.D.C. 1987), aff'd in part and rev'd in part on other grounds, 900 F.2d 283 (D.C. Cir.), cert. denied sub nom. MCI Communications Corp. v. United States, 498 U.S. 911, 111 S. Ct. 283 (1990) (discussing conduct of third parties who became limited intervenors under Rule 24(b)); Clarkson v. Coughlin, 145 F.R.D. 339, 343 (S.D.N.Y. 1993)(discussing standard for permissive intervention).

States v. El Paso Natural Gas Co., 376 U.S. 651, 662, 84 S. Ct. 1044, 1050 (1964)). On remand, the government consented to a decree that delayed divestiture for more than three years and did not provide for the scope of divestiture ordered by the Supreme Court. 386 U.S. at 131, 142, 87 S. Ct. at 935, 940.

The Supreme Court held that the Attorney General had no authority to enter into a consent decree that was inconsistent with the Court's mandate. 386 U.S. at 136, 87 S. Ct. at 937. Consequently, it allowed the State of California, which represented the population affected by the illegal transaction, and two private parties directly affected by the acquisition to intervene in hearings on the decree to carry out the divestiture mandated by the Court. Id.

"However, Cascade has come to be regarded as an extraordinary case, occasioned by the Court's 'splenetic displeasure' with the government's lack of diligence in seeking relief." Hooker Chemicals & Plastics Corp., 749 F.2d at 986 n.15 (citing Smuck v. Hobson, 408 F.2d 175, 179 n.16 (D.C. Cir. 1969)(en banc)); see also American Cyanamid, 556 F. Supp. at 360 (listing cases limiting Cascade to its facts). "It is also true that Cascade stands virtually alone, and that the usual rule, both before Cascade and after, has been that private parties will not be allowed to intervene in government antitrust litigation." 7C, Wright Miller & Kane, Federal Practice and Procedure 2d, § 1908 at 266 (1986).

In their attempt to rely on Cascade, ISNI, CCIA and CDLA

claim that the government welcomes intervention and seeks the assistance of intervenors, relying primarily on remarks made by Assistant Attorney General Anne K. Bingaman during a preliminary hearing on June 7, 1994, before Judge Edelstein.[5] This is clearly wrong. Assistant Attorney General Bingaman, who is now recused on this matter, did not commit the government to support any particular intervenor or even intervention in general. She advised the Court that she expected significant opposition to IBM's motion and that she also expected the filing of intervention motions to which the government would file responses and on which the Court would need to rule. June 7, 1994 Tr. at 6. Her purpose in addressing the Court was to explain that while the government had no position at that time on the merits of the motion because it had not done an investigation, the government wanted appropriate discovery and the opportunity to take a position on the merits of the motion after a factual record was made. Id. at 5-7. As Assistant Attorney General Bingaman's remarks make clear, the government is willing and able to faithfully represent the public interest in this proceeding. On these facts, Cascade provides no support for the Proposed Intervenors.

2. Denial of intervention will not impede any Proposed

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[5] Sungard and ACS argue that the unique circumstances of this case support their motion to intervene because the government has abdicated its public interest obligations to third parties and does not plan to investigate or challenge IBM's evidence. Sungard and ACS Mem. at 21-22. This is clearly untrue and wholly unsupported. See note 3, supra.

Intervenor's ability to represent its interest. Each applicant will still be free to seek leave of Court to participate as an amicus. Moreover, the government will at the appropriate time recommend that the Court provide for a public comment period on IBM's motion and the government's position, and each applicant would be free to comment at that time. United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201 at 65,703 (N.D. Ill. 1975).

Moreover, any decision on IBM's motion will not impair any Proposed Intervenor's ability to protect any cognizable interest in a private legal action. Associated Milk Producers, Inc., 534 F.2d at 116 n.3; G. Heileman Brewing Co., 563 F. Supp. at 649; United States v. Carrols Development Corp., 454 F. Supp. 1215, 1220 (N.D.N.Y. 1978). Regardless of the disposition of the government action, the Proposed Intervenors will not be precluded by res judicata or collateral estoppel from bringing their own antitrust action, and the practical disadvantages of bringing a separate suit are insufficient to justify intervention. Securities and Exchange Commission v. Everest Management Corp., 475 F.2d. 1236, 1239 (2d Cir. 1972); see also Sam Fox Publishing, 366 U.S. at 689, 81 S. Ct. at 1313 (government antitrust litigation not binding on private parties).

B. The Court Should Also Deny Permissive Intervention.

1. The Proposed Intervenors also move for permissive intervention under Rule 24(b). ISNI, CCIA, Sungard and ACS allege that they meet the requirements for permissive intervention under Rule 24(b)(1) and (2) and CDLA seeks

permissive intervention under Rule 24(b)(2). A Court may permit intervention under Rule 24(b): (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. Under both prongs of the rule, when exercising its discretion whether to allow intervention, "the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

2. ISNI, CCIA, Sungard and ACS all claim that the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(f)(3) (Tunney Act), confers a conditional right to intervene. Section 16(f)(3) authorizes the Court to allow interested third parties to participate in a variety of possible ways, including through intervention, in Court proceedings conducted for the purpose of allowing the Court to determine if entry of a consent judgment proposed under the Act is in the public interest. Because of the purpose of any such proceedings, they are conducted before a consent judgment has been entered. 15 U.S.C.§ 16(e).

The Tunney Act is not applicable to this case because it applies only to the entry of consent decrees, not to their termination. American Cyanamid Co., 719 F.2d at 565 n.7 ("by its terms, the Tunney Act is not applicable to a termination proceeding. . ."); In re IBM, 687 F.2d. 591, 601 (2d Cir. 1982) (Tunney Act applies to the entry of a consent decree).

Moreover, even if the Tunney Act did apply to this

proceeding, the only case on which these three of the Proposed Intervenors rely contradicts their position that Section 16(f)(3) confers a conditional right to intervene:

> Rule 24(a)(1) and (b)(l), are inapplicable on their face in consent decree review proceedings . . . . The [Tunney Act] does not confer any right to intervene, conditional or otherwise. [Section 16(f)(3)] provides only that a Court may allow intervention. It does not provide for any conditions under which a Court is required to grant intervention. The movants do not contend otherwise and the Courts have so ruled.

G. Heileman Brewing Co., 563 F. Supp. at 648 (emphasis in original) (citing 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, 103 S. Ct. 1240 (1983), and United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 41 (W.D. Mo. 1975), aff'd, 534 F.2d. 113 (8th Cir.), cert. denied sub nom. National Farmers' Organization, Inc. v. United States, 429 U.S. 940, 97 S. Ct. 355 (1976)). Therefore, even when the Tunney Act applies, prospective intervenors must still satisfy the eligibility requirements of Rule 24. G. Heileman Brewing Co., 563 F. Supp. at 647; Carrols Development Corp., 454 F. Supp. at 1218 n.3.

3. The Proposed Intervenors make roughly similar arguments in support of permissive intervention under Rule 24(b)(2) as they do in support of intervention of right under 24(a)(2) -- namely that termination of the final judgment would have anticompetitive results to the detriment of them, their members and the consuming public. See, e.g., ISNI Mem. at 10 ("Termination of the decree would have anticompetitive effects in the repair and maintenance

of computers in general and with respect to IBM computers in particular and would injure ISNI and its member companies in those lines of commerce."); CCIA Mem. at 6 ("Termination of the decree would have anticompetitive effects on EDP trade and commerce.");[6] CDLA Mem. at 8 (termination of the judgment will have anticompetitive results in the markets for leasing and remarketing of computer equipment, to the detriment of CDLA members and the public interest) (referring to Opposition of the CDLA to IBM's Motion to Terminate the 1956 Consent Decree); Sungard and ACS Mem. at 25 (termination of the final judgment would have anticompetitive effects like those the judgment sought to correct and would directly injure Sungard and ACS's ability to compete fairly in the computer services industry).

The Proposed Intervenors allege that their claims satisfy the standard for permissive intervention under Rule 24(b)(2) because they address the same issues of law and fact raised by

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[6] CCIA also seeks as its requisite claim under Rule 24(b) a declaratory judgment that the final judgment not be terminated. CCIA's claim is legally deficient because third parties lack standing to enforce government antitrust consent decrees. IBM v. Comdisco, Inc., 834 F. Supp. 264, 266-67 (N.D. Ill. 1993) (Comdisco could not enforce the final judgment in this case in defending a trademark infringement action by IBM); Allen-Myland, Inc. v. IBM, 746 F. Supp. 520, 538 (E.D. Pa. 1990) (third party "cannot enforce the Decree's provisions against IBM"), vacated in part on other grounds, 33 F.3d 194 (3d Cir.), cert. denied, 115 S. Ct. 684 (1994); Control Data Corp. v. IBM, 306 F.Supp. 839, 845-48 (D. Minn. 1969) (striking from complaints in private action all references to the final judgment in this case because the judgment could not be enforced by third parties), aff'd per curiam sub nom. Data Processing Fin. & Gen. Corp. v. IBM, 430 F.2d 1277 (8th Cir. 1970); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750, 95 S. Ct. 1917, 1932 (1975) ("consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it . . .").

IBM's motion. However, this contention is wrong -- none of the claims can be prosecuted independently as part of an actual or impending law suit. See Diamond v. Charles, 476 U.S. 54, 76, 106 S. Ct. 1697, 1711 (1986) (O'Connor, J. concurring) (The words "claim or defense" in Rule 24(b)(2) refer to "the kinds of claims or defenses that can be raised in Courts of law as part of an actual or impending law suit."); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 483 (S.D.N.Y. 1973) ("[t]he threshold question . . . is whether the proposed intervenors have standing to maintain an action against the defendants"-- intervention denied because applicants lacked standing for failure to state a legally cognizable claim).[7]

Generally, courts have exercised their discretion to deny motions for permissive intervention in antitrust consent decree proceedings. G. Heileman Brewing Co., 563 F. Supp. at 649-50; Carrols Development Corp., 454 F. Supp. at 1221; United States v. Automobile Manufacturers Assn., 307 F. Supp. 617, 620 (C.D. Cal. 1969), aff'd per curiam sub nom. City of New York v. United States, 397 U.S. 248, 90 S. Ct. 1105 (1970). The court in United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804 at 71,960 (D.D.C. 1982), denied permissive intervention under Rule 24(b) because, "where there is no claim of bad faith or

[7] In this regard, we note that none of the proposed intervenors has successfully complied with the requirement of Rule 24(c) that the intervention motion be accompanied by a pleading sufficient to set forth a claim or defense for which intervention may be sought. As to CCIA's claim, see note 6, supra.

malfeasance . . . the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom." Courts have exercised their discretion to deny permissive intervention because of the accompanying delay and prejudice. "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair." Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943).

The government acknowledges that the requirement of a claim under Rule 24(b)(2) was eased in special circumstances in the two cases on which the Proposed Intervenors rely. American Cyanamid Co., 556 F. Supp. at 361; American Tel & Tel. Co., 552 F. Supp. at 219. The special circumstances at work in those two cases are not present in this case. The cases support the proposition that a district court does not necessarily abuse its discretion in granting intervention to an applicant whose claim may not be litigable in a separate lawsuit. American Cyanamid Co., 719 F.2d at 563. However, in both cases, limited permissive intervention did not pose any prospect of detrimental impact on the underlying litigation. For example, in American Cyanamid, the court allowed intervention only after noting that "the parties have conceded on the record that Cyanamid's motion to terminate may be resolved by the court essentially on the record before it, without the

introduction of significant additional evidence and without further hearings." 556 F. Supp. at 360. The court further emphasized:

> As a practical matter, permissive intervention, if granted here, will not unduly delay or prejudice the original parties to this litigation. The time consuming and expensive discovery demands often asserted by intervening parties will not be endured here.

Id. at 361.

Similarly, in American Tel. & Tel. Co., Judge Greene denied motions to intervene in proceedings on whether the judgment should have been entered. 552 F. Supp. at 218. He concluded that the applicants for intervention had already had sufficient opportunity to file comments and that there was no need for a third party to present any evidence. Id. at 218-19. In looking forward to post judgment procedures, Judge Greene indicated that he would issue an order allowing limited intervention. Id. at 219.[8] Judge Greene expected that interested third parties would once again be able to file comments or briefs and possibly participate in oral arguments in future proceedings in his court. Id. He indicated that if factual development not available through the comment process "would be helpful, there may be evidentiary hearings at which appropriate third parties will be permitted to participate with full rights." Id.

In subsequent proceedings on proposed decree modification,

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[8] The court also indicated that it would establish a procedure for third parties to apply to the Court to demonstrate any bad faith refusal of the government to enforce the judgment. Id. at 220.

Judge Greene has allowed limited intervenors to file comments, participate in oral arguments, and to appeal, but not to conduct discovery or develop evidence. For example, in United States v. Western Elec. Co., 1987-1 Trade Cas. (CCH) ¶ 67,438 at 59,826-27 (D.D.C. 1987), Judge Greene entered an order allowing limited intervention to file comments or briefs and to appeal, but not to conduct discovery or develop evidence. About 170 organizations took the opportunity to file comments pursuant to this order. United States v. Western Elec. Co., Inc., 673 F. Supp. at 529.

The Proposed Intervenors in this case do not seek to intervene subject to the same constraints that were imposed on intervenors in American Cyanamid Co. and American Tel. & Tel. Co. in practice. Rather, they seek authority to conduct discovery, present evidence, interject new or potentially unnecessary issues, and otherwise influence the pace and direction of the proceedings. As such, their participation as intervenors would significantly delay this action and prejudice the public's interest in an orderly and expeditious proceeding. The limited intervention authorized in American Cyanamid Co. and American Tel. & Tel. Co. thus does not support the motions for permissive intervention in this case, and the motions should be denied.

III. ACTIVE PARTICIPATION BY AMICI CURIAE IN DEVELOPMENT OF THE EVIDENTIARY RECORD MAY PROVIDE USEFUL ASSISTANCE

The government's opposition to participation of third parties as intervenors notwithstanding, active participation by at least some amici might be of substantial help in developing the relevant evidence and arguments in a timely manner. Our enforcement experience in the computer industry generally, as well as public and private antitrust history with IBM, suggests that any careful analysis of the effects of judgment termination will almost necessarily involve complex factual and legal issues relating to questions such as the appropriate product market(s) and the existence of market power. While the government will vigorously fulfill its responsibility to determine the likely competitive effect of judgment termination or modification and take a position on the merits of IBM's motion to terminate, the issues to be resolved are such that participation on specified issues by some amici likely to be significantly affected by any termination or modification may aid in the development of a more complete evidentiary record in a more expeditious manner.[9]

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[9] Implicit in the government's view that amici may help develop a more complete evidentiary record is a recognition that the judgment has helped spawn the creation of businesses and markets, such as IBM equipment leasing and servicing firms, sellers of used IBM equipment, and service bureaus, under the umbrella of injunctive provisions intended to enable the development of such competitive businesses. Such firms are likely in a position to provide useful information and perspective to the development of the factual record. Moreover, as it is alleged that termination of the judgment could substantially affect the continued existence of these firms, it is reasonable that these firms have the opportunity to be heard in this proceeding. However, that such firms should have the opportunity to be heard does not require the granting of

As the Court has stated, after disposition of the intervention motions, the next step will be to define the issues for which discovery is required, define the role of any amici, and set a schedule. (March 1, 1995 Tr. at 8, 22). Specifically, as the Court has also indicated, in order to focus this proceeding on the relevant factual issues, IBM should file a submission identifying in detail the arguments and facts supporting its motion. (March 1, 1995 Tr. at 19-20.) After such a submission by IBM, the government should submit its view of the relevant issues that will require further discovery and resolution by the Court and propose a schedule and make recommendations to the Court as to amicus participation.

Until the issues are brought more clearly into focus, it is difficult to foresee with specificity what the appropriate role of any amici should be. For example, in addition to the traditional amicus brief, it may be helpful and appropriate for the Court to allow selected amici to present evidence and witnesses at a hearing or to cross-examine witnesses. Another possiblility may be for the Court to permit selected amici to depose witnesses or conduct other discovery with respect to specified issues. The government believes that delineation of the role of any amicus is best left until after the factual

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intervenor status. As noted above, such firms have no right to enforce the judgment. It is the public interest, not their individual private interests, that is the proper subject of this proceeding. These firms, or their representative associations, can be heard in an appropriate manner if granted amicus status by the Court or through the public comment period that the government will ask the Court to provide.

issues are defined, in order to determine the extent to which the assistance of amici would be useful and the most appropriate manner of participation.

IV. CONCLUSION

The Court should deny the motions to intervene. The government recommends that in order to define the issues for which discovery will be required, the Court should establish a schedule pursuant to which IBM must submit papers stating in detail the arguments and facts supporting its motion. After IBM's filing, the government should submit its view of the relevant issues that will require further discovery, as well as propose a discovery schedule and make recommendations to the Court as to amicus participation.

Respectfully submitted,

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