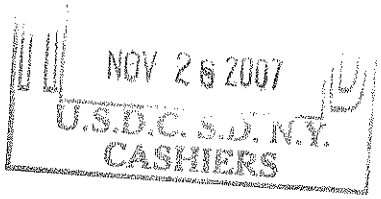
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff and Counterclaim-Defendant, v. **PLATFORM SOLUTIONS, INCORPORATED,** Defendant and Counterclaim-Plaintiff.	No. 06-cv-13565 (CLB)(MDF)



MEMORANDUM IN SUPPORT OF T3 TECHNOLOGIES INC.'S MOTION TO INTERVENE AS COUNTERCLAIM-PLAINTIFF

T3 Technologies Inc. ("T3") respectfully submits this memorandum in support of its motion to intervene under FED. R. CIV. P. 24[1] in *International Business Machines Corporation v. Platform Solutions, Inc.*, No. 06-cv-13565 (CLB)(MDF). T3 asserts an interest in the antitrust counterclaims asserted by counterclaim-plaintiff, Platform Solutions, Inc. ("PSI") against counterclaim-defendant, International Business Machines Corporation ("IBM"). As discussed below, part of T3's antitrust claims are predicated on IBM's improper exclusion of PSI's technology from the market. Thus, intervention is warranted because T3's interest in this litigation may be impaired by the disposition of PSI's antitrust claims, but, for the reasons discussed below, T3's claims may not be adequately protected by the existing parties.

Furthermore, because there is substantial factual overlap between the T3 and PSI cases, it would be far more efficient to have the factual issues resolved for both PSI and T3 simultaneously before the same court and fact finders rather than subjecting the Court and the

[1] T3 relies alternatively on both subdivision (a) and subdivision (b) of Rule 24, as is routinely permitted. *See, e.g., Hnot v. Willis Group Holdings, Ltd.*, 234 Fed. Appx. 13, 14 (2d Cir. 2007). *See also* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1902 (2d ed. 1986).

parties to the expense of duplicative – and potentially inconsistent – proceedings. Thus, intervention pursuant to FED. R. CIV. P. 24 is warranted.

BACKGROUND

Founded in 1992, T3 Technologies, Inc. specializes in servicing the needs of the mainframe community through its worldwide resources and partners. Prior to the anticompetitive acts alleged herein, T3 was the second largest mainframe systems integrator with over 600 systems sold in 28 countries. T3's clients included Fortune 500, academic institutions, small and medium businesses, state and local governments, and even the U.S. Military.

As alleged in the complaint, for the last several years, IBM has improperly stymied T3's efforts to sell computer systems that are lower-priced substitutes for IBM's mainframes. T3 has tried to sell computers systems which incorporate software from either Fundamental Solutions Inc. (FSI) or PSI, which software enables less-expensive hardware to act as a substitute for higher-priced IBM mainframes. In contrast to both IBM and PSI which focus on selling mainframes to larger machine users, T3's business has focused primarily on firms around the world that need mainframes below 350 MIPS. Based on 2005 data, the market for such customers approaches 1,000 server units and $500 million in sales annually. *See* PSI News Release, dated February 12, 2007, *available at* http://www.platform-solutions.com/docs/T3T021207.pdf (last visited November 21, 2007).

On November 29, 2006, IBM filed a complaint against PSI alleging breach of contract and patent infringement claims arising from PSI's development and sale of its IBM-compatible open architecture mainframe computer and mainframe operating systems; as well as asking the court for a declaratory judgment that IBM's refusal to license patents, copyrighted operating systems, and other software to PSI does not violate any antitrust laws.

On January 19, 2007, PSI answered and asserted counterclaims against IBM. Specifically, PSI denied the allegations in IBM's November 29, 2006 complaint, and counterclaimed that IBM violated federal antitrust and state unfair competition laws by unlawfully tying its mainframe computers to its mainframe operating systems by conditioning the sale of its operating systems on the continued use of an IBM mainframe computer. Additionally, PSI asked the court for a declaratory judgment that PSI did not infringe IBM's patents, as well as other equitable relief. On March 8, 2007, IBM filed a reply and answer denying PSI's counterclaims.

On August 17, 2007, IBM filed an amended complaint against PSI for patent infringement, trade secret misappropriation, copyright infringement, breach of contract, and patent infringement, and asking for an injunction precluding PSI and "and those persons acting in active concert or in participation with it" from making, using, and distributing its IBM-compatible open architecture mainframe computer and mainframe operating systems, damages, as well as a declaration that IBM is authorized to terminate its licenses to PSI without violating antitrust laws.[2] This injunction request, if granted, could potentially apply to T3.

On September 21, 2007, PSI answered IBM's amended complaint and counterclaimed that IBM violated federal antitrust and state unfair competition laws by unlawfully tying its mainframe computers to its mainframe operating systems by conditioning the sale of its operating systems on the continued use of an IBM mainframe computer. Additionally, PSI asked the court for a declaratory judgment that PSI did not infringe IBM's patents and that IBM's patents are invalid, as well as other equitable relief.

On October 9, 2007, IBM filed a reply on its amended complaint and answer to PSI's amended counterclaims.

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[2] IBM Amended Complaint, at Prayer for Relief (a), (b), and (d).

ARGUMENT

Intervention under FED. R. CIV. P. 24 is intended to "foster economy of judicial administration and to protect non-parties from having their interest adversely affected by litigation conducted without their participation." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). *See U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994). Here, T3 is entitled to intervention as of right in *International Business Machines Corporation v. Platform Solutions, Inc.*, No. 06-cv-13565 (CLB)(MDF), under FED. R. CIV. P. 24(a)(2), because T3 has a interest in this litigation that may be impaired by the disposition of this action and may not be adequately protected by the parties to the action. Alternatively, this Court should permit T3 to intervene under FED. R. CIV. P. 24(b)(2) because T3's claims involve many of the same issues of law and fact as the counterclaims asserted by PSI.

A. T3 is Entitled to Intervention as of Right Under FED. R. CIV. P. 24(a).

Intervention as of right under FED. R. CIV. P. 24(a) "requires that the proposed intervenor (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (internal quotation marks and citation omitted).

1. T3's Motion to Intervene is Timely.

A court evaluates the timeliness of a motion to intervene "based upon the totality of the circumstances." *Hnot v. Willis Group Holdings, Ltd.*, 234 Fed. Appx. 13, 14 (2d Cir. 2007). In determining whether an applicant's motion to intervene is timely, courts consider "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied;

and (4) any unusual circumstances militating for or against a finding of timeliness." *In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (internal quotation marks and citation omitted).

Based on an analysis of these factors, T3's motion to intervene is timely. This motion comes three months after IBM filed its amended complaint against PSI, two months after PSI filed its answer and amended counterclaims against IBM on September 21, 2007, and less than seven weeks after IBM filed a reply and answer on October 9, 2007.[3] *See Hnot*, 234 Fed. Appx. at 15 (using date applicant learned interests were not adequately represented to assess timeliness of intervention motion).

Given that this litigation is still at the pleading stage, neither PSI nor IBM will be prejudiced by T3's intervention. No schedule has been set by this Court, and no significant motion practice has taken place thus far. While discovery has begun and is ongoing, it is only at the very early stages, and T3's entry into this case will not cause any delay or prejudice the rights of PSI or IBM. *See Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co.*, No. 06-875, 2007 U.S. Dist. LEXIS 66584 at *7 (S.D.N.Y. September 7, 2007) (Pitman, U.S.M.J.) (granting motion to intervene as parties were still in discovery when applicant filed motion). To the contrary, to deny intervention would deprive T3 of the opportunity to exercise T3's "legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence and the ability to appeal." *Edwards v. City of Houston*, 78 F.3d 983, 1003 (5th Cir. 1996). Furthermore, there are no unusual circumstances mitigating for or against a finding of timeliness in this case.

[3] T3 asserts that this motion would be timely even if timeliness were to be judged by the filing of IBM's initial complaint in November 2006, or PSI's answer and counterclaims in January 2007, because this case is currently still at the pleading stage.

2. T3 Has a Substantial Interest In the Litigation, Which May Be Impaired By the Disposition of the Action.

It is without question that T3 has a "direct, substantial, and legally protectable" interest in this case, which may be impaired by the disposition of this action. *Madison Stock Transfer, Inc. v. NetCo Invs., Inc.*, No. 06-3926, 2007 U.S. Dist. LEXIS 73700, at *3 (E.D.N.Y. September 27, 2007) (quoting *New York News, Inc. v. Kheel*, 972 F.2d 482, 486 (2d Cir. 1992)). For the last several years, T3 has attempted to market, sell, and service its Liberty Server computer system, which incorporates PSI's technology. However, as alleged in the complaint, T3's efforts to sell its Liberty Server have been stymied by improper licensing and tying practices that IBM has used to prevent competition from systems containing PSI's technology. Like PSI, which was blocked from selling its computer systems, T3 also was unfairly blocked from selling its Liberty Servers containing PSI technology. As a result, T3's claims contain many of the same factual and legal issues raised in PSI's claims. By this action, T3 seeks to: (a) assert its own claims that it was injured by IBM's misconduct toward PSI; and (b) defend itself against IBM's request for an injunction that could potentially prevent T3 from making, using, or distributing IBM-compatible open architecture mainframe computer systems that contain PSI-technology. Consequently, any action taken in this proceeding could directly impact T3's business. Therefore, T3 has a legal right to participate in the briefing, presentation of evidence, and appeal determinations made with respect to this case. Precluding T3's intervention will undoubtedly impede T3's ability to protect its interests.

3. T3's Interests May Not Be Adequately Protected By the Parties to the Action.

T3's interests may not be adequately protected by the existing parties. The final requirement for intervention as of right under FED. R. CIV. P. 24(a)(2) is that the would-be

intervenor's interests may not be adequately represented by the existing parties. *D'Amato*, 236 F.3d at 84. The Supreme Court has stated that this "requirement of the Rule is satisfied if the applicant shows that representation of his interest '***may be***' inadequate; and the burden of making that showing should be treated as ***minimal.***" *Tribovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972) (emphasis added) (citing 3B J. Moore, FEDERAL PRACTICE ¶ 24.09-1[4] (1969)). The "test here is ... whether the [party's] interests were so similar to those of [the applicant] that adequacy of representation is assured." *Brennan v. N.Y.C. Bd. of Ed.*, 260 F. 3d 123, 132-133 (2d Cir. 2001).

While much of PSI's and T3's interests are the same, there are, however, some key differences that may potentially affect PSI's adequacy to represent T3's interests in this litigation. For example, PSI focuses its sales on the larger data center market, while T3 has focused on data centers that need machines below 350 MIPS. As a result, PSI's lost sales and damages would predominately come from sales to the larger data center market, and, in litigating this case, PSI's management and attorneys will focus on issues that relate to this market. Because PSI does not focus on users that need machines below 350 MIPS, there is a possibility that even if PSI's attorneys are well-meaning, competent, and diligent, (a) they may fail to pursue potential limited discovery issues that may arise regarding users that need machines below 350 MIPS because of PSI's limited sales there; and (b) they may accidentally assert (or not contest) factual positions that have little significance to the customers that PSI is focused on, but may be more significant to the small and mid-size business market. As a result, in litigating its claims regarding its exclusion from selling to larger customers, PSI may not fully assert or pursue positions that may potentially be relevant to T3's exclusion from selling to customers that wanted machines below 350 MIPS.

Because T3 has demonstrated that it has an interest in *International Business Machines Corporation v. Platform Solutions, Inc.*, No. 06-cv-13565 (CLB)(MDF), that may be impaired by the disposition of the action and may not be adequately protected by the parties to the action, T3 is entitled to intervention as of right under FED. R. CIV. P. 24(a)(2).

B. **Intervention by T3 Under FED. R. CIV. P. 24(b) is Appropriate.**

Alternatively, this Court should permit T3 to intervene under FED. R. CIV. P. 24(b)(2) because T3's claims involve the many of the same issues of law and fact as the counterclaims asserted by PSI. Permissive intervention under FED. R. CIV. P. 24(b) is appropriate "[u]pon timely application ... when an applicant's claim or defense and the main action have a question of law or fact in common." *Hnot*, 234 Fed. Appx. at 14 (citing FED. R. CIV. P. 24(b)(2)). The decision to permit an applicant to intervene in a litigation is in the discretion of the trial court. *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986).

> [I]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Additional relevant factors include the nature and extent of the intervenors' interests, the degree to which those interests are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal question presented.

Hayden, 797 F.2d at 89 (internal quotation marks and citations omitted). In the Second Circuit, "[s]ubstantially the same factors [as intervention of right] are considered in determining whether to grant an application for permissive intervention pursuant to FED. R. CIV. P. 24(b)(2))." *Hnot*, 234 Fed. Appx. at 14; *In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003).

1. **T3's Claims Involve the Identical Issues of Law and Fact as the Counterclaims Asserted by PSI.**

T3 is asserting the same legal and factual antitrust claims as PSI – namely that IBM's

improper exclusionary conduct illegally impeded and limited: (a) T3's ability to sell, lower-priced competing IBM-compatible mainframe computer systems; and (b) consumer choice. T3's complaint asserts many of the same factual and legal propositions as PSI's counterclaims, such as the assertion that: (a) the relevant product market here is the market for IBM-compatible mainframes because existing IBM-compatible-mainframe users are locked-into using an IBM-compatible machine for various reasons; and (b) IBM used tying, monopoly leveraging, improper refusals to deal, and various other improper exclusionary acts to block competition in that market.

2. Intervention by T3 Will Not Unduly Delay or Prejudice the Adjudication of the Rights of IBM and PSI.

Intervention by T3 will not unduly delay or prejudice the rights of PSI or IBM. As stated *supra*, this litigation is still at the pleading stage – only about two months have passed since PSI filed its answer and amended counterclaims, and it has been less than seven weeks since IBM filed its reply and answer. No schedule has been set by this Court, and no significant motion practice has taken place thus far. Discovery has already begun and is ongoing in this case, but the only entity likely to be prejudiced by this is T3 because it would have to "catch up." Therefore, T3's entry into this case will not cause any delay or prejudice the rights of PSI or IBM. To the contrary, to deny intervention would deprive T3 of the opportunity to exercise T3's legal rights associated with intervention, including the briefing of issues, presentation of evidence, and the ability to appeal.

3. Intervention by T3 Will Significantly Contribute to the Full Development of the Underlying Factual Issues in the Suit and To the Just and Equitable Adjudication of the Legal Questions Presented.

The dispute between IBM and PSI will not only affect PSI, but also other participants in the mainframe computer and mainframe operating system market (such as T3), as well as

potential competitors that may choose to enter the market in the future. However, as the litigation currently stands, only the interests of IBM and PSI are represented. T3 is the second-largest integrator of mainframe computers worldwide, supporting nearly 1,000 customers in 28 countries. Therefore, as a major participant in this market, T3 has the potential of significantly contributing to the development of the underlying factual issues in this suit and to the just and equitable adjudication of the legal questions presented.

Finally, because there is substantial factual overlap between the T3 and PSI cases, it would be far more efficient to have the common factual issues resolved for both PSI and T3 simultaneously before the same court and fact finders rather than subjecting the Court and the parties to the expense of duplicative – and potentially inconsistent – proceedings.

CONCLUSION

Based on the foregoing reasons, this Court should grant T3's motion to intervene as counterclaim-plaintiff in *International Business Machines Corporation v. Platform Solutions, Inc.*, No. 06-cv-13565-CLB, under FED. R. CIV. P. 24.

Dated: November 26, 2007

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