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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. BP AMOCO, PLC, and ATLANTIC RICHFIELD COMPANY, Defendants.	**Case No.: 00 0416 SI** **SUMMARY OF FTC'S OPPOSITION TO MOTION OF STATE OF ALASKA TO INTERVENE** **Date: February 22, 2000** **Time: 3:00 p.m.** **Courtroom: 4**

The Federal Trade Commission ("Commission") opposes Alaska's motion to intervene as a defendant on the ground that it has not shown its entitlement to do so, either as of right under Fed. R. Civ. P. 24(a)(2), or permissively under Fed. R. Civ. P. 24(b)(2). The Commission consents to Alaska's participation in this proceeding as an *amicus curiae*, limited to the issues that directly concern it – its role as a lessor of oil exploration properties under Count II of the Complaint.

Rule 24(a)(2) requires an applicant to have an interest in the transaction that is the subject of the proceeding. This proceeding challenges a merger agreement between defendants, BP and

Atlantic Richfield Company ("ARCO"). Alaska is not a party to that transaction and has no legally protected interest in it. Accordingly, it does not satisfy the Rule's requirements.

Recognizing this deficiency, Alaska nonetheless argues that is may intervene as of right because: (1) it has a "contractual interest" by virtue of a compromise it reached with defendants addressing the illegality of the transaction that is the subject of this proceeding; (2) it has a substantial revenue interest in petroleum exploration, development, and production on state lands; and (3) its possesses knowledge, evidence, and general expertise that may be relevant to this proceeding. None of these rationales is sufficient to confer a right to intervene under Rule 24(a)(2).

Alaska's settlement is not the transaction that is the subject of this proceeding, and that settlement does not confer on it a sufficient interest in the challenged transaction to allow it to intervene as a defendant. *See, e.g., Donnelly v. Glickman,* 159 F.3d 405, 411 (9th Cir. 1998); *see generally, Arizonans for Official English v. Arizona,* 520 U.S. 43, 66 (1997).

Nor does Alaska have a right to intervene to ask the Court to consider the terms and benefits (to Alaska) of its settlement in assessing the Commission's right to a preliminary injunction. Alaska's settlement does not dictate the outcome of this proceeding. Under the statutory framework of the FTC Act, the Commission seeks a preliminary injunction to maintain the status quo in aid of an administrative proceeding to review the merits of the merger. Neither the merits nor the ultimate remedy are before the Court. *See, e.g., FTC v. Warner Communications, Inc.,* 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. University Health, Inc.,* 938 F.2d 1206, 1225 (11th Cir. 1991). The terms of the Alaskan settlement do not bind the Commission here and do not preclude it in any way from seeking a full-stop preliminary injunction in the larger national interest. *See, e.g., United States v. Borden Co.,* 347 U.S. 514, 520 (1954) ("the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree"); *Northern Securities Co. v. United States,* 193 U.S. 197, 233-36 (1904); *cf. California v. American Stores Co.,* 495 U.S. 271 (1990) (a state may seek divestiture in a merger case, even after the parties have entered a consent agreement with the Commission).

Non-litigated settlements, such as Alaska's, are compromises that reflect only the relative

importance that opposing sides assign to various outcomes and, in the end, depend upon the bargaining powers and skills of the negotiators. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *see United States v. ITT Continental Baking Co.*, 420 U.S. 233, 235-36 (1975). They plainly cannot vest the settling parties with the right to impose their agreement on other litigants. This is especially so here, where the Commission has a statutory mandate to enforce the national antitrust laws, while Alaska's interests are necessarily confined to matters that directly concern it and its citizens.

Even if the settlement bestows non-antitrust benefits on Alaska and its citizens, these "benefits" may not be invoked to justify an otherwise illegal merger. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) ("a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . .").

Thus, Alaska's "contractual interests" in its settlement do not give it a sufficient interest to allow it to intervene in this proceeding. Similarly, Alaska may not intervene as a defendant here on the basis of its substantial interests in exploration and development of oil producing lands. While Alaska's proprietary interests would certainly have allowed it to challenge the merger *as a plaintiff*, Alaska has chosen to settle its claim with BP and ARCO. Having settled its dispute, Alaska has fully addressed its concerns and has no right to intervene here to prevent other plaintiffs from securing the relief to which they are entitled.

Nor may Alaska claim a right to intervene here merely because it may possess knowledge, evidence, or alleged expertise in some of the issues raised by the Commission's proceeding. At most, such information and expertise render Alaska a prospective third party witness – or justify its submission of an *amicus curiae* brief addressing the issues in which it has expertise. *E.g., Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977). Nothing in Rule 24 allows either a fact witness or an expert to intervene in a case merely to present its evidence and opinion.

Alaska has not shown a sufficient interest to allow it to intervene as of right under Rule 24(a)(2). Moreover, whatever interest it may have is adequately represented by defendants here

(League of United Latin American Citizens ("LULAC") v. Wilson, 131 F.3d 1297, 1305 & n.5 (9th Cir. 1998)), even though the settlement agreement expressly provides that Alaska's legal expenses will be paid by BP and ARCO (Charter ¶ V.G). Given the fact that Alaska, BP, and ARCO all have the same ultimate objective -- denial of a full-stop preliminary injunction to enable the Commission to fulfill its statutory mandate and undertake a plenary review of the merger -- there is every reason to believe that defendants will adequately represent Alaska's asserted "interest" in this proceeding.

Rule 24(b)(2) provides that "anyone" may be permitted to intervene in an action "when an *applicant's claim or defense* and the main action have a question of law or fact in common" (emphasis added). Alaska admits, however, that it "does not seek to add new claims or defenses to this litigation" (Mem. at 8). This provision of the Rule is inapplicable here, and Alaska may not seek permissive intervention under it. *See Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring).

The Rule also allows government officials or agencies to seek intervention when a party raises a claim or defense that bears on a statute or program administered by the government agency or official. In seeking to intervene on this basis, Alaska points to its settlement with BP and ARCO. That settlement, however, does not bestow on BP or ARCO any defense to the Commission's action for a preliminary injunction. *See, e.g., United States v. Borden Co.,* 347 U.S. at 520; *cf. California v. American Stores Co.,* 495 U.S. 271 (1990).

Alaska has wholly failed to show an adequate ground for seeking intervention as a defendant. Nonetheless, the Commission recognizes that, having investigated the merger and presumably concluded that, left unchecked, it would harm competition, Alaska may well have views on the merits of the transaction that this Court might find informative. Accordingly, it would be appropriate to allow Alaska to submit an *amicus curiae* brief limited to issues germane

to this proceeding and of direct interest to Alaska, specifically those raised by Count II of the Commission's complaint. *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977).

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