

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

L-3 COMMUNICATIONS SECURITY
AND DETECTION SYSTEMS
CORPORATION DELAWARE

Plaintiff,

v.

AMERICAN SCIENCE &
ENGINEERING, INC.

Defendant

Civil Action No. 04-10339-GAO
(Magistrate Judge Cohen)

**DEFENDANT AS&E'S
MOTION TO DISMISS FOR LACK OF ACTUAL CONTROVERSY**

Pursuant to Fed. R. Civ. P. 12(b)(1), American Science & Engineering, Inc. ("AS&E") seeks to dismiss this declaratory judgment action for lack of subject matter jurisdiction. The Declaratory Judgment Act, 28 U.S.C. § 2201, requires an "actual controversy" before a court may declare the rights of the parties. Here, there is no actual controversy, and thus no jurisdiction, because AS&E has not threatened imminent suit against the plaintiff, L-3 Communications Security and Detection Systems Corporation ("L-3 Security"), and because L-3 Security is not presently engaging in any conduct that would infringe the two patents-in-suit. Thus, L-3 Security has no objectively reasonable apprehension of suit.

Rather, as seen in the accompanying memorandum and supporting exhibits, L-3 Security has filed this action simply to gain improper bargaining leverage in negotiations with AS&E. In essence, L-3 Security has presented AS&E with the Hobson's choice of (a) defending its patents in costly patent litigation or (b) signing a so-called *Super Sack* statement (*i.e.*, a covenant not to sue) that L-3 Security sent AS&E the minute it filed its complaint. The Court of Appeals for the

Federal Circuit and this district discourage the use of declaratory judgment actions to gain bargaining leverage and decline jurisdiction under those circumstances.

ACCORDINGLY, AS&E respectfully requests that this Court dismiss this action because there is no actual controversy and thus no jurisdiction to render a declaratory judgment.

REQUEST FOR ORAL ARGUMENT

Under Local Rule 7.1(D), AS&E respectfully requests a hearing to resolve this motion.

CERTIFICATION UNDER LOCAL RULE 7.1(A)(2)

I certify that, on March 9, 2004, I spoke by telephone with counsel for the plaintiff, Robert M. Abrahamsen of Wolf Greenfield & Sacks, and conferred in a good faith attempt to resolve or narrow the issues raised in AS&E's motion. We were unable to resolve those issues.

Dated: March 10, 2004

AMERICAN SCIENCE AND
ENGINEERING, INC.

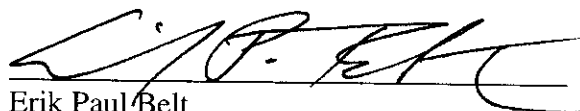
By its attorneys,



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CERTIFICATE OF SERVICE

I certify that, on the above date, I served a true copy of this motion by hand on counsel for each other party.


Erik Paul Belt

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