

ceived equitable powers, is not a satisfactory reason to dismiss for want of jurisdiction because it is clear that "[w]hen decisional or statutory law is altered, the new, existing law controls pending cases * * *." *Brooks v. Wainwright*, 439 F.Supp. 1335, 1338 (M.D.Fla.1977). Moreover, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *United States v. Fresno Unified School District*, 592 F.2d 1088, 1093 (9th Cir.), cert. denied, 444 U.S. 832, 100 S.Ct. 62, 62 L.Ed.2d 41 (1979). Additionally, it must be noted that "a statutory expansion of jurisdiction suffices to vest power in federal courts to adjudicate cases which arose prior to enactment of the jurisdictional statute." *Garrett v. Bamford*, 582 F.2d 810, 817 (3d Cir.1978); see also *United States v. Alabama*, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960).

This case was pending before the Trial Division of the old Court of Claims when filed in July 1982 and pursuant to section 403(d) of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25, was automatically transferred to the U.S. Claims Court for its determination on October 1, 1982. Section 133(a) of the same Act expanded the equitable powers of the U.S. Claims Court to include the very relief the plaintiff now seeks. Under these circumstances, surely Congress intended that the new Claims Court deal with the new and the transferred cases in the same consistent manner and in accordance with its newly expanded legislative authority.

It would seem highly technical to deny the plaintiff the right to be heard on the merits simply because it filed its complaint prematurely. This is especially so since the plaintiff could undoubtedly cure the alleged defect by voluntarily dismissing the action and simply refile its complaint. It is not-

3. While retaining equitable jurisdiction in plaintiff's second cause of action, this Court

ed in this connection that the plaintiff did amend his complaint on December 17, 1982, after the October 1, 1982 effective date of the Act.

In view of the above discussion, this Court will retain jurisdiction over the plaintiff's second cause of action seeking equitable relief, and deny the defendant's motion to dismiss.³

As already indicated, the plaintiff's third cause of action for bid preparation costs is clearly within the Court's jurisdiction and the defendant has so conceded.

Conclusion

For the foregoing reasons, defendant's motion to dismiss the plaintiff's first cause of action in its first amended petition is granted. Plaintiff's first cause of action is to be dismissed without prejudice to renewal in an appropriate forum. Defendant's motion to dismiss the plaintiff's second cause of action in its first amended petition is denied. The Court, therefore, retains jurisdiction over the plaintiff's second and third causes of action in this case. The parties are ordered to proceed with this matter according to the Rules of this Court.



SUMMAGRAPHS CORPORATION,
Plaintiff,

v.

The UNITED STATES, Defendant,
and

Altek Corporation, Intergraph Corpora-
tion, Third-Party Defendants.

No. 153-80C.

United States Claims Court.

May 2, 1983.

Claim for compensation for alleged unauthorized taking by the United States of

specifically makes no comment as to the merits of the plaintiff's contentions.

property rights in plaintiff's patent was partially dismissed with prejudice and claims regarding digitizers manufactured and sold by entities other than third-party defendants were denied without prejudice, 1 Cl.Ct. 381, and the United States sought reconsideration of that dismissal. The Claims Court, Seto, J., held that it was inappropriate to preclude patentee from seeking compensation for procurement by the United States of infringing digitizers which had only recently been identified, despite three-year pendency of suit and two and one-half years of discovery, and thus dismissal of those claims would be without prejudice, but claims with respect to certain additional government digitizers of which patentee was aware prior to July 1, 1982, would be dismissed with prejudice pursuant to memorandum and order of preliminary conference.

Ordered accordingly.

1. Federal Courts ⇐1119

In certain circumstances, a claim which was previously denied without prejudice may be reasserted in the same case, while a claim dismissed without prejudice may be reasserted only in a subsequent suit.

2. Federal Courts ⇐1119

It was inappropriate to preclude patentee from seeking compensation for procurement by the United States of infringing digitizers which had only recently been identified, despite three-year pendency of suit and two and one-half years of discovery, and thus dismissal of those claims would be without prejudice, but claims with respect to certain additional government digitizers of which patentee was aware prior to July 1, 1982, would be dismissed with prejudice pursuant to memorandum and order of preliminary conference.

1. 1 Cl.Ct. 381.

2. Defendant has conceded that plaintiff has only recently been apprised of digitizers procured pursuant to government contracts F44650-82-D0004 with the GTCO Corporation, and N00123-81-D0456 with the Computervi-

Daniel M. Rossner, New York City, for plaintiff.

Claud A. Daigle, Jr., Washington, D.C., for defendant. Asst. Atty. Gen. J. Paul McGrath, Washington, D.C., of counsel.

RECONSIDERATION OF PARTIAL DISMISSAL

SETO, Judge:

This court, on January 27, 1983, issued a Partial Dismissal with Prejudice¹ in which plaintiff's claim for compensation for defendant's alleged unauthorized taking of property rights in plaintiff's United States Patent No. 3,700,809, entitled, "Inductively Coupled Grid Cursor," issued to Donald J. Nadon (hereafter referred to as the Nadon patent), was partially dismissed with prejudice. Moreover, plaintiff's claims regarding digitizers manufactured and sold by entities other than third-party defendants, Altek Corporation and Intergraph Corporation, were denied without prejudice. Defendant now seeks reconsideration of that dismissal.

Defendant's Motion for Reconsideration was filed on February 4, 1983; plaintiff filed an Opposition thereto on March 1, and defendant's Reply was filed on March 16. Defendant asserts two separate issues for reconsideration. The first, that the court misspoke in merely *denying* without prejudice, rather than *dismissing* without prejudice, plaintiff's claims regarding digitizers manufactured and sold by other than the third-party defendants. The second, that substantially all of these claims² should have been dismissed *with prejudice*.

As to whether the claims³ involving manufacturers or suppliers other than third-party defendants were to be *dismissed* without prejudice, rather than *denied* without prejudice, this court's intention was easily discerned by reading the entire dismissal or-

sion Corporation. Accordingly, defendant concedes that digitizers procured under either of those two contracts should not have been dismissed for plaintiff's failure to prosecute.

3. *Id.*

der. The January 27, Partial Dismissal Order made clear this court's intention that claims not delineated in plaintiff's pretrial statement shall no longer be asserted *in this case*. "Plaintiff's pretrial statement failed to include claim charts relating to the Nadon patent; thus, plaintiff shall also be precluded from asserting the Nadon patent at trial." *Summagraphics Corp. v. United States*, 1 Cl.Ct. 383 (1983).

[1] However, in certain circumstances a claim which was previously *denied* without prejudice may be reasserted in the same case. In contrast, a claim *dismissed* without prejudice may be reasserted only in a subsequent suit. Thus, to absolve any ambiguity as to the status of plaintiff's pending claims, the January 27, 1983, order shall be amended, such that plaintiff's claims for compensation infringing digitizers manufactured and sold by those other than third-party defendants are **DISMISSED WITHOUT PREJUDICE**. See lines 6 and 7, page 3 of the Partial Dismissal Order, reproduced in the appendix.

As to whether substantially all of plaintiff's claims⁴ regarding digitizers manufactured and sold by other than third-party defendants should be dismissed with *prejudice*, this court addressed that issue in its Partial Dismissal. Defendant's arguments for reconsideration are unpersuasive.

Prior to rendering that partial dismissal, this court carefully evaluated the discovery conducted by plaintiff and the procedural posture of this case. Recognizing that plaintiff had filed its pretrial statement on December 12, 1982, thus signifying that it was prepared for trial, and in view of the three-year pendency of this case, this court concluded that plaintiff's discovery endeavors should no longer delay trial.

[2] However, plaintiff's recently revitalized discovery prosecution was encouraging. Moreover, due to the numerous government agencies which may have procured infringing digitizers, plaintiff's discovery burden was enormous. Thus, it was inappropriate

4. *Id.*

to entirely preclude plaintiff from seeking compensation for the defendant's procurement of infringing digitizers which have only recently been identified. Rather, this court chose simply to bar plaintiff from prosecuting claims involving manufacturers or suppliers other than third-party defendants. Plaintiff may reassert its claims regarding these other digitizers in a subsequent suit.

Plaintiff has advised this court of certain additional government digitizers of which it was aware of prior to July 1, 1982. Pursuant to the Memorandum and Order of Preliminary Conference filed May 28, 1982, plaintiff's claims with respect to those digitizers are **DISMISSED WITH PREJUDICE**. More specifically, these digitizers, which are manufactured by Talos System, Inc., are Model Nos. BL-660, SRP-648, SRP-614B, SRP-614, and 640-B.

IT IS SO ORDERED.



Francisco VELASQUEZ

v.

The UNITED STATES.

No. 281-82T.

United States Claims Court.

May 4, 1983.

Government sought dismissal of petition. The Claims Court, Gibson, J., held that where plaintiff had not complied with order to file more definite statement, petition would be dismissed involuntarily without prejudice.

Order accordingly.