UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. COMPUTER ASSOCIATES INTERNATIONAL, INC. and PLATINUM *TECHNOLOGY* INTERNATIONAL, *INC.*, Defendants.	Civil Action No. 1:99CV01318 JUDGE: Gladys Kessler DECK TYPE: Antitrust DATE STAMP:

REPLY OF THE UNITED STATES TO DEFENDANT'S RESPONSE TO THE MOTION TO CONFIRM THE APPOINTMENT OF THE TRUSTEE AND OPPOSITION TO DEFENDANT'S CROSS-MOTION TO ESTABLISH COMPENSATION OF THE TRUSTEE

On June 28, 1999, the United States filed a Motion to Confirm the Appointment of the Trustee ("Motion to Confirm"). This motion was necessary because defendant Computer Associates International, Inc.("CA") refuses to execute an engagement letter with the trustee selected by the United States as expressly provided in Sections IV(A) and (C) of the proposed Amended Final Judgment ("AFJ"). In its Motion including an attached Declaration, the United States established that the terms of compensation approved by the United States are reasonable and consistent with the requirements of Section IV(C). Defendant, in its Response to the Motion to Confirm ("Defendant's Response"), alleges that the approved compensation for the trustee is unreasonably high, yet it fails to provide substantiated and credible evidence to support its claim. In addition, it improperly asks the court in its cross motion to order an alternative compensation arrangement that fails to meet the requirements of Section IV(C) of the AFJ and lacks minimum fees that would ensure the trustee is adequately compensated for its services. CA's proposed fee schedule also undercuts its claim that the fees approved by the United States are unreasonable, as in certain circumstances it requires CA to pay the trustee more than the compensation approved by the United States. The United States requests that the Motion to Confirm be granted and that defendant's Cross-Motion to Establish Compensation of the Trustee ("Cross-Motion") be denied. Attached as Exhibit A is an amended version of the United States' proposed order denying defendant's Cross-Motion.

BACKGROUND

The United States filed this action because defendant CA's acquisition would have substantially lessened competition in a number of important computer software product markets. CA was permitted to proceed with its acquisition on condition that divestitures of defendant Platinum's products in those markets be made in a way that maintains competition for those products. In order to be effective, such divestitures must be made quickly because otherwise the viability of those product lines will diminish and the ability to find a purchaser(s) who will be an effective competitor to CA will be compromised. The divestiture process cannot begin until the trustee is engaged and commences work. The only entity that benefits from delay is CA.

While defendant does not (and cannot pursuant to the AFJ) object to the appointment of Hambrecht & Quist LLC ("H&Q") as trustee, it has refused to execute the engagement letter containing terms and conditions, including compensation, approved by the United States pursuant to Section IV(C) of the AFJ.[1] Defendant and H&Q engaged in negotiations of the terms and

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[1] Defendant notes that while most antitrust divestiture decrees allow the defendant to attempt the divestiture before the appointment of a trustee, the United States in this case insisted, and defendant agreed, to the immediate appointment of a trustee to accomplish the

conditions of an engagement letter between June 1 when the trustee was appointed and June 28 when the Motion to Confirm was filed, but no agreement on the terms of compensation was reached. Defendant's compensation proposals prior to the filing of the Motion to Confirm were essentially "low-ball" offers.[2] Defendant's current proposal was made only after the filing of the United States' Motion. H&Q is prepared to undertake to sell the Divested Products pursuant to the terms of compensation approved by the United States, but it is not prepared to accept the engagement under CA's proposed fee schedule.

The compensation schedule approved by the United States has a minimum fee of $150,000 for each of the five former-Altai products, a $250,000 minimum fee for the CCC/LifeCycle Manager Product, and a $150,000 fee if H&Q can sell the Platinum interest in the CIMS product. The minimum fee would be $1.15 million if H&Q can divest *all* of the products in one or more

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divestiture. (Defendant's Response at 2). The United States' insistence on the immediate selection of a trustee is based on its experience with this defendant in a previous antitrust divestiture. In *U.S. v. Computer Associates Int'l, Inc.*, Civ. No. 95-1398 (TPJ), the parties agreed to a divestiture of software licenses for products similar to the Divested Products in this case. That settlement allowed defendant to attempt to license the assets to a competitively-viable licensee subject to the United States' approval, followed by a procedure for the prompt appointment of a trustee if CA did not accomplish the divestiture. The proposed decree was filed on July 28, 1995. CA subsequently failed to accomplish the divestiture to a firm that met the decree's requirements of competitive viability. The parties then disagreed on a trustee and a series of motions ensued before a trustee was appointed by the Court on April 3, 1996. Given that more than 8 months passed from the proposed settlement to the appointment of a trustee, the United States sought to ensure that the same delays would not occur in this matter. The United States therefore insisted upon the immediate appointment of a trustee and the right to select and approve the terms and conditions of the trustee's appointment precisely to prevent the type of delay that occurred in the previous divestiture.

[2] CA initially proposed $50,000 minimum fees for each product, with aggregate compensation based on 5% of the first $5 million, 3% of the next $5 million, and 1% for consideration in excess of $10 million. H&Q responded by lowering some of its proposed minimum fees, but defendant countered by *reducing* the fees it initially proposed for H&Q if H&Q sold the products for less than $27 million.

transactions. H&Q would also receive incentive bonuses for speed ($500,000 if sale of all of the first six products listed above occurs within 75 days) and for price (10% of the price in excess of Platinum's 1998 fiscal year revenues for each of the first six products). A reasonable minimum fee structure is necessary to ensure that the trustee is adequately compensated for identifying appropriate buyers and executing the divestiture transactions under circumstances in which the sales prices cannot confidently be predicted.

Unlike its earlier proposals, defendant's current proposal has no provision for minimum fees. Rather, H&Q would receive 5% of the first $10 million, 6% of the next $5 million, 7% of the next $5 million, 8% of the next $5 million, 9% of the next $2 million, and 10% of anything over $27 million (which has been represented by defendant as the approximate 1998 aggregate revenues for the Divested Products). If the Divested Products were sold for $20 million in aggregate, the compensation for H&Q would be $1.15 million, or the same as the minimum fees in the proposal approved by the United States. Defendant's proposed compensation contains no incentive for speed as required in Section IV (C) of the AFJ.

I. The Terms of Compensation Approved by the United States Are Reasonable and Consistent with Section IV(C) of the AFJ

The appointment of the trustee and the terms and conditions of its engagement must be viewed in relation to the purposes of the proposed AFJ. The primary goal of the proposed AFJ is to require the quick divestiture of certain software products to a viable competitor or competitors. The required divestitures are necessary to ameliorate the harm to consumers that would have resulted from defendant's proposed acquisition. The United States selected as trustee an investment banking firm with substantial experience in the software industry, extensive familiarity with industry participants and expertise in software mergers and acquisitions work. The United States was not required to select the lowest-priced trustee but only to ensure that the fees were reasonable. Section IV(C) of the AFJ requires that the trustee's compensation be "reasonable in light of the value of the divested business and based on a fee arrangement providing the trustee with an incentive based on the price obtained and the speed with which the divestiture is accomplished."

A. The Base Compensation Approved by the United States Is Reasonable

H&Q is an investment banking firm with substantial experience in mergers and acquisitions work, having advised on 265 transactions since 1995, including 66 sub-$30 million transactions since 1996, and with substantial experience in the software industry, including work as recently as 1998 for defendant Platinum *technologies* International, *inc*. (Declaration of David Golden, Co-Director of Investment Banking, H&Q, Appendix C, United States' Motion to Confirm, ("Golden") at ¶¶ 3 and 4). The United States requested H&Q to set its compensation at its typical level for transactions of this type. H&Q, in the Golden Declaration executed under penalty of perjury, confirmed that the proposed fee structure is "eminently reasonable given the fees Hambrecht & Quist has earned in similar sized transactions" and "is comparable to the fee structure that Hambrecht & Quist has received on similar sized transactions and also comparable to the fee structure obtained for software mergers and acquisitions by firms similar in size and experience as Hambrecht & Quist." (Golden at ¶ 4).

Moreover, as noted by H&Q, the divestitures to be accomplished have a number of features making it different and more difficult than the typical sub-$30 million transaction. (Golden at ¶¶ 4, 5). Defendant fails to adequately explain why these factors do not justify the compensation structure approved by the United States. A key factor that differentiates this assignment from H&Q's traditional engagements is the potential need to enter into three or more separately-negotiated deals with different buyers for different Divested Products, rather than a single deal with a single buyer. (Golden at ¶ 4). Defendant does not dispute this but simply asserts that provisions of the AFJ and the "circumscribed role" of the trustee should render the additional effort of dealing with more than one buyer insubstantial. (Defendant's Response at 8 n. 3). It offers no explanation as to why the negotiation and execution of what may be three or more separate contracts with three or more different parties for different products and assets is not substantially more work than a single contract.

At least four additional AFJ requirements alter H&Q's scope of work: (i) the assets must be divested in the manner most conducive to preserving competition; (ii) the purchaser(s) must be acceptable to the United States in its sole discretion; (iii) the trustee must file biweekly written reports with the Court and the parties setting forth its efforts to accomplish the divestitures; and (iv) if the trustee cannot accomplish the divestitures in 120 days, it must file a report with the Court setting forth its efforts, the reasons the divestitures have not been accomplished, and its recommendations. (Golden at ¶ 5).

In response, defendant argues that the first two requirements are standard in any antitrust divestiture decree and impose no obligations on the trustee. (Defendant's Response at 6-7). Defendant misses the point. That such requirements may be standard in antitrust divestiture decrees does not mean the role of the trustee in this matter is comparable to traditional transactions that are not subject to such strictures. A responsible trustee acting within the express requirements of the decree must meet the burden of finding buyers and structuring the divestitures in the manner most conducive to maintaining competition and obtaining the approval of the United States. Defendant is plainly wrong when it asserts that such requirements "impose no direct obligation on the trustee." (Defendant's Response at 7). In response to the third and fourth requirements, defendant simply asserts that such reporting requirements impose no substantial burden, and argues that an investment banker would consult frequently with its client in any case. Defendant again misses the point -- in addition to the usual consultations that will take place, the trustee must make a number of filings with the Court that are not made in the typical transaction, and as such, constitute an additional burden.

In addition, H&Q already has been required to cooperate in the litigation related to the meaning and implementation of the proposed AFJ necessitated by defendant's refusal to execute the engagement letter. Indeed, the protracted negotiations over the engagement letter and the need to execute a Declaration in connection therewith have been additional burdens on H&Q not present in the ordinary transaction, and provide a clear example of why the proposed transaction is more difficult than the ordinary transaction.

Finally, defendant's claim that the proposed compensation is unreasonable is directly contradicted by the fact that it has offered in its Cross-Motion to pay substantially more than what it alleges is a median percentage fee paid for transactions in the technology sector (Defendant's Response at 6) and to pay substantially more than the proposal approved by the United States (excluding incentive for speedy divestiture of all products) in the not far-fetched event that H&Q obtains more than $20 million in aggregate for the Divested Products, which sum is approximately $7 million less than aggregate fiscal 1998 revenues. (Defendant's Response at 9).

B. Defendant Provides No Credible or Substantiated Evidence to Support Its Claim that the Trustee's Proposed Compensation Is Unreasonable

1. Defendant Uses Unsubstantiated, Incomplete, Seriously Flawed and Misleading Statistics in an Attempt to Show that the Compensation Approved by the United States Is Unreasonable

Defendant supports its claim that the trustee's compensation approved by the United States is unreasonable by submitting some Securities Data Company (SDC) data assembled at its request by Credit Suisse First Boston ("CSFB"), which represented Platinum in the transaction giving rise to this case. The data is provided in a letter form and attached to a Declaration by CA's Senior Vice President, Mr. Bennett (Declaration of Tommy Bennett, Defendant's Response at Exhibit C ("Bennett")). Mr. Bennett simply summarizes the information and suggests that the divestitures to be accomplished in this case should be comparable to the divestitures in the data compiled. (Bennett at ¶ 3). The data is in no respect a reliable comparison for the fee levels for the divestitures to be accomplished here, and the data itself is seriously flawed and misleading for a number of reasons discussed below.

First, it is useful to look at what CSFB itself says about the data. In the cover letter, Mr. Michael Feder of CSFB emphasizes that the data is not produced by CSFB but by another organization, SDC, and may not be complete. Mr. Feder simply notes that he deems such data a good barometer of fee structures and has himself relied upon it. Mr. Feder offers no opinion as to the reasonableness of the compensation approved by the United States (or for that matter, the compensation plan sought by defendant). Notably, the only CSFB transaction in the data was for a deal in which it was paid $1 million by the seller in a $32.3 million transaction (Snap-On Inc. acquisition of Hein-Wemer Corp., announced 4/28/98).

Mr. Feder indicates that the SDC database was searched for transactions less than $50 million for which the necessary data was available but provides no basis for evaluating the percentage of the universe of sub-$50 million deals these data represent. Table 1 of the CSFB data indicates the transactions were within the "technology sector," but neither Mr. Feder nor defendant's Mr. Bennett provides meaningful information on the definition of the "technology sector," though Mr. Bennett suggests the data are comparable to the subject software divestitures. (Bennett at ¶ 3). Table 1, however, includes numerous transactions that do not appear to fall within the characterization of technology sector transactions, or appear remotely comparable to software transactions.[3]

The data is seriously flawed in other respects as well. The table identifies the advisor for the acquired firm, and the fee it received, but does not discriminate between situations where the advisor was paid to market and sell the company or simply to issue a fairness opinion as to the

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[3] For example, Table 1 includes at least ten transactions that appear to be bank or financial institution mergers (*e.g.*, F&M Bancorp acquisition of Bank of Brunswick, announcement date 1/10/95). It also includes acquisitions involving cosmetics companies (Prestige Fragrance & Cosmetics acquisition of the Cosmetic Center, Inc., announcement date 10/1/96), employment search firms (Olsten Corp. acquisition of Co-Counsel, Inc., announcement date 5/28/96), cable TV music channels (TCI Music Inc. acquisition of Box Worldwide Inc., announcement date 7/22/97), golf-related businesses (Family Golf Centers, Inc. acquisition of MetroGolf, Inc., announcement date 12/15/97), real estate investment firms (EastGroup Properties acquisition of Meridian Point Realty Trust, announcement date 1/14/98), beverage companies (*e.g.*, Saratoga Beverage Group Inc. acquisition of Fresh Juice Co. Inc., announcement date 3/1/98; Malt Acquiring Inc. acquisition of Lion Brewery Inc., announced 8/26/98), music companies (Camelot Music Holdings acquisition of Spec's Music, Inc., announcement date 4/9/98), and what appears to be at least three restaurant businesses (*e.g.*, Piccadilly Cafeterias, Inc. acquisition of Morrison Restaurants, Inc., announcement date 4/23/98). The Table lists numerous other acquisitions with questionable relationships to the technology sector or software industry, such as those involving insurance or mining businesses or firms manufacturing fireplaces or rubber products.

price for the seller's assets, which is much less work and is generally much less expensive.[4] It is not clear from the data which transactions reflect fairness opinions and which reflect active marketing efforts and negotiation of a sale. While we cannot readily identify which of the transactions reflect fairness opinions, it is clear that at least some and possibly a large number do. Table 2 lists five sub-$50 million H&Q transactions, of which three were fairness opinions.[5] Given that a number of the transactions in Table 1 represent extremely low fees of less than $400,00 even in large transactions, such as First Albany's $200,000 fee for Prism Solutions, Inc. when it was acquired by Ardent Software, Inc. for more than $30 million (announcement date 11/19/98), it seems likely that some significant number of these represent fairness letters. Fees paid for fairness opinions do not form a basis for comparability to the compensation approved by the United States for the instant divestitures.

Defendant relies upon Table 2 to argue that the compensation for H&Q approved by the United States exceeds H&Q's normal charges. (Defendant's Response at 5-6). This analysis is spurious on a number of grounds. First, H&Q has advised on 66 sub-$30 million transactions since 1996 (Golden at ¶ 4) and 83 sub-$50 million transactions since January 1, 1995 (of which

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[4] An investment banker that is retained to provide a fairness opinion generally will be presented with a proposed transaction that has already been negotiated and asked to opine on whether the price or other consideration to be paid reflects a fair value for the assets or business to be sold. To render an opinion, the investment banker will consider such factors as the financial condition of the business to be divested, the business's future prospects and how the proposed transaction compares with other offers or alternatives considered by the seller or purchaser or with other transactions involving the sale of similar assets or businesses. An investment banker who is hired to render a fairness opinion does not market the assets, search for potential buyers, assist potential buyers in conducting due diligence reviews or negotiate transaction details.

[5] Memorandum prepared by Betsy Ellis, Associate, Mergers & Acquisitions, H&Q at the request of the United States, dated July 13, 1999 ("H&Q Memorandum"), attached as Exhibit B.

52 were sales representations and 31 were fairness opinions),[6] while Table 2 lists only five transactions. Second, three of the five transactions listed in Table 2 involved fairness opinions, not sales representations.[7] Third, the most comparable transaction listed in Table 2, a 1999 software transaction in which H&Q represented the seller Interlink Computer Sciences, generated a fee of $1.18 million, which is comparable to the compensation approved by the United States in the instant case.

2. Defendant's Claim that the Compensation Approved by the United States Does Not Contain a Price Incentive Based on the Price Obtained Is Incorrect

The compensation package approved by the United States includes a price incentive for each individual Divested Product (except the CIMS product rights subject to an existing exclusive license to a third party which have a fixed compensation if successfully sold) -- 10% of the sales price in excess of Platinum's 1998 fiscal year revenue for such product (which the United States has been told is approximately $27 million for all products).[8] Defendant claims the proposed compensation is essentially a flat fee, consisting of the minimum fees (plus a speed bonus if achieved) with no additional incentive given unless the aggregate sales price exceeds $27 million. (Defendant's Response at 8).

Defendant's aggregate analysis ignores the structure of the price incentive for each Divested Product, which motivates H&Q to sell each product for more than the fiscal 1998

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[6] *Id*.

[7] *Id*.

[8] This price incentive bonus is identical to the price incentive bonus offered by CA to H&Q in its last proposal prior to the filing of the United States' Motion to Confirm.

revenue for that product. It is not and cannot now be known whether the individual products to be divested will sell for less, more, or approximately the same as their respective fiscal 1998 revenues, but in any case the trustee has a significant incentive to obtain prices above 1998 revenues for specific products. Thus the price incentive approved by the United States complies with the requirement of Section IV(C) of the proposed AFJ that the trustee be provided with "an incentive based on the price obtained." Defendant would prefer a more graduated scale of incentives diminishing substantially the compensation to trustee if the divested products do not sell for at least $20 million in aggregate. The fact that defendant would prefer such a fee arrangement does not demonstrate that the incentive approved by the United States does not comply with the proposed AFJ or is otherwise unreasonable. Indeed, defendant proposes the same 10% incentive for prices in excess of fiscal 1998 revenues, although on an aggregated basis.

3. Defendant's Position that the Incentive for Speed in Accomplishment of All the Divestitures Is Excessive and Should be Eliminated is Unfounded and Contravenes the Proposed AFJ

The speed incentive approved by the United States is consistent with the express requirement of Section IV (C) of the proposed AFJ that the fee arrangement provide an incentive based on "the speed with which divestiture is accomplished." Defendant agreed to this provision when it stipulated to the proposed AFJ, but it now argues both that the amount is excessive and that the incentive for speed is unnecessary. It proposes a compensation plan that does not include such an incentive. (Defendant's Response at 9-10 and Exhibit 1).

Defendant offers no basis for its claim that the approved speed incentive is too large, other than to note that since the required divestiture is already supposed to be accomplished within 120 days (or the trustee is to report to the court) (§ IV (G) of the AFJ), [9] accomplishment within 75 days offers little benefit. However, the Third Precatory Clause of the proposed AFJ specifies that the "essence" of the proposed judgment is the "prompt and certain divestiture" of the assets "to assure that competition is not substantially lessened." This purpose is reaffirmed in Section II of the Hold Separate Stipulation and Order agreed to by defendant and entered as an Order by the Court on May 26, 1999. Speed in accomplishing the divestitures is critical to the preservation of competition, which is why the United States insisted that the divestiture was to be accomplished by a trustee given incentives to accomplish it quickly. The competitive vitality of the Divested Products diminishes while they are maintained in a state of suspended animation under the Hold Separate Agreement amidst uncertainty and controlled by defendant, whose principal economic motivation is to diminish the products' future competitive significance. Given this situation, the United States determined that a significant speed incentive was appropriate.

Defendant's implicit position that the incentive for speed be eliminated directly contravenes the express requirements of Section IV(C) of the proposed AFJ, agreed to by defendant less than two months ago. The United States does not consent to the elimination of this requirement, which was deemed necessary to ensure that the divestitures occur quickly in order to restore competition to the marketplace.

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[9] There is no AFJ requirement that the transaction be accomplished in 120 days. After 120 days, the AFJ requires the trustee to file a report with the court setting forth its efforts, the reasons why the divestitures have not been accomplished, and its recommendations for completing the divestitures. The Court may thereafter extend the trust and term of the trustee's appointment.

II. The Court Should Deny Defendant's Cross-Motion and Proposed Compensation as Unfounded and Contrary to the Clear Intent of the Proposed AFJ

Defendant's desire to pay lower fees to the trustee, particularly if the divested assets sell for less than $20 million in aggregate, is clear. However, under the proposed AFJ, defendant can only object to the proposed fees as unreasonable given the circumstances and purposes of the decree. As discussed above, defendant has not demonstrated that the fees approved by the United States, pursuant to Section IV(C) of the AFJ, are unreasonable. By asking the Court to impose its preferred fee schedule, defendant is simply attempting to arrogate to itself the right to determine the terms and conditions of the trustee's compensation, without the approval of the United States, in contravention of the proposed AFJ.[10] Moreover, H&Q is prepared to undertake to sell the Divested Products pursuant to the terms of compensation approved by the United States, but it is not prepared to accept the engagement under CA's proposed fee schedule.

CONCLUSION

The proposed AFJ assigns to the United States the right to select the trustee and approve the terms and conditions for compensation of the trustee. Such compensation shall be reasonable in light of the value of the divested business and provide incentives based both on the price obtained and the speed with which the divestitures are accomplished. Defendant has failed to demonstrate

[10] Defendant's assertion that the appointment has become effective and that the Motion to Confirm is moot with respect to confirmation of H&Q (Defendant's Response at 3, ftnt. 1) is disingenuous. While the trustee has been appointed, such appointment cannot as a practical matter effectuate the remedy without either the execution of the engagement letter or an Order of the Court. No trustee could be expected to undertake the volume of work required by the proposed AFJ without an assurance of appropriate payment; thus, CA's attempt to control the purse strings essentially puts the selected trustee on hold for all but preliminary work. Defendant has a strong economic motivation to seize every possible opportunity to delay the divestitures, because any delay may weaken the divested assets thus strengthening defendant's competitive position in these markets.

that the compensation arrangement approved by the United States is unreasonable. The United States requests that its Motion to Confirm be granted as soon as possible, and that defendant's Cross-Motion be denied. Attached as Exhibit A is an amended version of the United States' proposed order denying defendant's Cross-Motion.

Respectfully submitted,

___________/s/__________________

N. Scott Sacks (DC Bar No. 913087)
Kent Brown (VA Bar No. 18300)
Jeremy W. Eisenberg (DC Bar No. 449596)

Attorneys, Antitrust Division
Computers & Finance Section
U.S. Department of Justice
600 E. Street, N.W., Suite 9500
Washington, D.C. 20530
(202) 307-6200

Dated: July 15, 1999

CERTIFICATE OF SERVICE

The undersigned certifies that he is a paralegal employed by the United States Department of Justice, and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that on July 15, 1999, he caused true copies of the UNITED STATES' REPLY TO DEFENDANT'S OPPOSITION TO THE MOTION TO CONFIRM THE APPOINTMENT OF THE TRUSTEE AND OPPOSITION TO DEFENDANT'S CROSS-MOTION TO ESTABLISH COMPENSATION to be served upon the person in the manner stated below:

Counsel for Computer Associates International, Inc. and PLATINUM *technology* International, *inc.*

Richard L. Rosen, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004

(by hand delivery)

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C., this 15th day of July, 1999.

/s/
Steven J. Duplicki

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. COMPUTER ASSOCIATES INTERNATIONAL, INC. and PLATINUM *TECHNOLOGY* INTERNATIONAL, *INC*., Defendants.	Civil Action No. 1:99CV01318 JUDGE: Gladys Kessler DECK TYPE: Antitrust DATE STAMP:

ORDER TO CONFIRM THE APPOINTMENT OF THE TRUSTEE

The Court ORDERS as follows:

1. Plaintiff's Motion to Confirm the Appointment of the Trustee is GRANTED;

2. Hambrecht & Quist LLC is appointed trustee pursuant to the proposed Amended Final Judgment upon the terms and conditions of the letter of engagement attached hereto; and

3. Defendant's Cross-Motion to Establish Compensation of the Trustee is DENIED.

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UNITED STATES DISTRICT JUDGE

Dated:

EXHIBIT B