UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, Plaintiff, v. THE MATHWORKS, INC. and WIND RIVER SYSTEMS, INC., Defendants.	Civil Action No. 02-888-A Chief Judge Hilton

UNITED STATES' RESPONSE TO PUBLIC COMMENTS

Pursuant to Section 5(d) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act (codified at 15 U.S.C. §§ 16(b)-(h) (the "Tunney Act")), the United States responds to public comments received regarding the proposed Final Judgments submitted for entry in this civil antitrust proceeding.

I. BACKGROUND

On June 21, 2002, the United States filed a civil antitrust Complaint alleging that The MathWorks, Inc. ("The MathWorks") and Wind River Systems, Inc. ("Wind River"), head-to-head competitors in the sale of dynamic control system design software products, restrained competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleged that, on February 16, 2001, The MathWorks and Wind River entered into a number of agreements (hereinafter, collectively, the "MATRIXx Agreement") pursuant to which, *inter alia*, The MathWorks obtained the exclusive worldwide right to price and sell Wind River's

MATRIXx toolset for a period of two and one half years. As a result of the MATRIXx Agreement, actual competition between Wind River's MATRIXx toolset and The MathWorks' Simulink toolset has been eliminated.

In April 2000, Wind River acquired Integrated Systems, Inc. ("ISI"). At the time, ISI was a well regarded vendor of software, tools, and engineering services for the embedded systems market.[1] Its embedded real-time operating system, deployed in more than 38 million devices worldwide as of 2000, was supplied to telecom/datacom, consumer electronics, automotive, aerospace, and emerging Internet appliance customers. As part of its software portfolio it produced the MATRIXx family of software products, which are standalone products designed to automate the analysis, modeling, generation of code for, and simulation of, complex control systems. Although ISI had spent considerable resources developing MATRIXx since the mid-1980s, its primary business continued to revolve around the embedded systems market.

Wind River, itself a significant vendor of software for embedded systems, pursued the acquisition of ISI, in large part, to obtain a skilled pool of embedded system software developers that it hoped would shorten the time it takes to reach the market for critical new embedded system products. Wind River soon came to view MATRIXx as a struggling product line within ISI with small revenue and no growth potential. More importantly, the MATRIXx market was neither within Wind River's core competency nor its central strategic focus for the future. Thus, Wind River decided not to devote any of its resources to the continued development and sale of MATRIXx.

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[1]Embedded systems are specialized computing systems used to control devices such as handheld computers, appliances or cars. These systems are typically invisible to the end-user, but enable operation of the device.

Shortly after Wind River's acquisition of ISI, The MathWorks approached Wind River and began vigorously negotiating to acquire the MATRIXx assets. On February 16, 2001, The MathWorks and Wind River entered into the MATRIXx Agreement under which Wind River granted The MathWorks exclusive distribution and license rights to the MATRIXx toolset and the MATRIXx intellectual property (including the right to incorporate MATRIXx source code into The MathWorks products) during a thirty-month license period beginning on February 16, 2001. Following the expiration of the thirty-month license period, The MathWorks would have the option to acquire MATRIXx.

Under the MATRIXx Agreement, The MathWorks was required to provide two years of customer support (ending in February 2003) for existing MATRIXx users.[2] While Wind River agreed to continue fulfilling its existing customer support obligations, as well as to provide "critical" bug fixes during the license period, the MATRIXx Agreement provided that Wind River would not produce new versions of MATRIXx with feature enhancements. In fact, The MathWorks announced at the time it entered into the MATRIXx Agreement that there would be no further development of the MATRIXx products. The MathWorks and Wind River also agreed on the pricing of Simulink, The MathWorks' dynamic control system software product that competed head-to-head with MATRIXx, when purchased by MATRIXx customers. The companies specifically agreed that The MathWorks would give customers with current MATRIXx licenses, that switched to The MathWorks' suite of products, a discount amounting to 50% off the list price of The MathWorks' products for those that switched in the first year of the

[2] Wind River retained rights to the MATRIXx intellectual property during the license period in order to provide support service to two International Space Station customers.

MATRIXx Agreement and 25% off for those that switched in the second year of the MATRIXx Agreement.

In return, The MathWorks agreed to make payments to Wind River totaling $11,500,000 over a three-year period on a set schedule, which were not contingent on the volume of MATRIXx products The MathWorks sold. Further, Wind River granted The MathWorks an option to purchase MATRIXx and certain MATRIXx intellectual property (*e.g.*, the source code, customer lists, trademarks and copyrights) twenty-eight months after closing for an additional sum of $2,000,000. Finally, the MATRIXx Agreement assigned certain patent rights to The MathWorks for $500,000.

On the same date that the United States filed its Complaint against The MathWorks and Wind River, the United States filed a Stipulation and proposed Final Judgment with Wind River that was designed to obtain the divestiture of the MATRIXx assets to a competitively viable third party. Although the nominal owner of the MATRIXx assets, Wind River's consent alone was insufficient to effectuate fully the relief sought by the United States in the Complaint because The MathWorks had previously acquired significant rights in the MATRIXx assets under the MATRIXx Agreement. The lawsuit therefore continued against The MathWorks. On August 15, 2002, the United States and The MathWorks filed a Stipulation and proposed Final Judgment that, in conjunction with the proposed Final Judgment agreed to by Wind River, would lead to either the prompt and certain divestiture of the MATRIXx assets to a competitively viable third party or the dismissal of the Complaint in this action.

The proposed Final Judgment agreed to by The MathWorks provides a framework detailing the manner and process pursuant to which a court-appointed Trustee would seek to sell

the MATRIXx assets to a competitively viable third party. Among other things, this framework specifically outlines the rights and responsibilities of the United States and The MathWorks, addresses the period of time in which a definitive sales and licensing agreement must be consummated, and sets a minimum price at which the MATRIXx assets may be sold.

The Court may enter the proposed Final Judgments against Wind River and The MathWorks following compliance with the Tunney Act.[3] The Tunney Act, among other things, gives the public a 60-day period to submit comments about the proposed Final Judgments. The 60-day comment began on October 21, 2002, when the proposed Final Judgments and the Competitive Impact Statement ("CIS") were published in the *Federal Register* (67 Fed. Reg. 64657 (2002)), and expired on December 20, 2002. During that period, two comments were received.

II. RESPONSE TO PUBLIC COMMENTS

On November 18, 2002, the United States received a comment regarding The MathWorks' proposed Final Judgment in this matter from Sudarshan Bhat addressing a single provision of The MathWorks' proposed Final Judgment. A true and correct copy of Mr. Bhat's comment, with confidential information redacted, is attached as Exhibit A. On December 20, 2002, the United States received a comment regarding the proposed Final Judgments in this matter from The Center for the Advancement of Capitalism ("CAC") which purports to address the propriety of the proposed Final Judgments *en toto*. A true and correct copy of the CAC's comment is attached as Exhibit B. Each of these comments is addressed individually below.

[3] The Competitive Impact Statement ("CIS") sets out the standard to be applied by the Court in determining whether entry of the proposed Final Judgment is in the public interest. CIS at 20-23.

A. Bhat Comment

Mr. Bhat complains that the minimum sale price of $2 million plus the costs and expenses of the Trustee for the MATRIXx assets, as required by Section IV(L) of The MathWorks' proposed Final Judgment, "makes no financial sense without additional contingencies." *Bhat Comment* at 1. He explains that immediately prior to The MathWorks acquisition of the MATRIXx assets, MATRIXx enjoyed annual revenue of $15-$16 million. Since The MathWorks acquired the MATRIXx assets however, MATRIXx revenue has fallen and "is likely to reduce much further without the proper measures to restore competitiveness in the dynamics and control tools marketplace." *Id.* Given this, Mr. Bhat concludes that "[t]he 2 million dollar purchase price is too much to risk in the current market conditions." *Id.* In essence, Mr. Bhat concludes that a divestiture of the MATRIXx assets will fail because the minimum sale price is not justified given the current level of annual revenue generated by MATRIXx.

Mr. Bhat insists that "true competition can only be restored when marketing, customer support, development, sales and annual revenues for MATRIXx assets are restored to the annual 15-16 million dollar levels immediately prior to Mathworks acquisition of MATRIXx assets." *Id*. Therefore, he suggests that the United States "impose an annual penalty on Mathworks equal to MATRIXx sales revenue shortfall from the 2001 15-16 million dollar levels until the MATRIXx revenues are restored to the 2001 levels or until September 1, 2007, whichever comes first." *Id*. at 2. Mr. Bhat believes this annual penalty should "be used to cover any operating budget shortfall for whoever is best qualified to acquire MATRIXx assets and restore competition to the marketplace." *Id*. Finally, Mr. Bhat indicates that his intention to bid for the

MATRIXx assets is conditioned on the adoption of his suggested additions to the proposed Final Judgment.

The United States disagrees with the conclusions asserted by Mr. Bhat in his comment. In light of the fact that the MATRIXx assets have been successfully sold, it is unnecessary to amend the proposed Final Judgment in the manner suggested by Mr. Bhat.[4] On January 14, 2003, SoundView Technology Corporation ("SoundView"), as the court-appointed Trustee in this matter and pursuant to its obligations under Section IV(I) of the proposed Final Judgment, reported to the United States that National Instruments Corporation acquired the MATRIXx assets on January 10, 2003, pursuant to a definitive sales and licensing agreement reached within the framework outlined in the proposed Final Judgment. Pursuant to Section IV(M)(1) of the proposed Final Judgment, the United States has concluded that National Instruments Corporation intends to invest in and develop the MATRIXx product line and has the potential to be a viable competitor in the sale of dynamic control system design software.

B. CAC Comment

CAC is a non-profit organization with the mission of providing analysis based on Ayn Rand's philosophy of objectivism.[5] CAC insists that the United States should withdraw the

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[4] Nor does the United States believe it is appropriate to impose a "penalty" on The MathWorks equal to MATRIXx revenue shortfalls from 2001 levels. *Bhat Comment* at 2. This is a Government civil action for injunctive relief, and thus monetary damages are not available in this case. *See* 15 U.S.C. § 4 (authorizing the United States "to institute proceedings in equity to prevent and restrain such violations"). Moreover, the goals of the remedy in this case are to enjoin the unlawful conduct and restore competitive conditions in the market affected by The MathWorks' conduct. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

[5] Ayn Rand, a novelist-philosopher, first expressed her philosophy of objectivism in the best-selling novels, *The Fountainhead* (1943) and *Atlas Shrugged* (1957). On the issue of

proposed Final Judgments and dismiss the Complaint in this matter or that the Court should reject entry of the proposed Final Judgments under the Tunney Act. *CAC Comment* at 2. CAC concedes, however, that its philosophical opposition to the antitrust laws is "blatantly obvious." *Id*. at 3. This opposition animates every aspect of CAC's comment. CAC claims that "[t]his case reveals both the fundamental defects of both the antitrust laws and the strategy employed by the Government in their enforcement." *Id*. CAC argues that "[f]ree competition cannot be enforced by government fiat" and that the DOJ "relies on static rules that fail to account for the complexity of business and yet seek to enforce an unjust and unworkable egalitarianism." *Id*. Further, CAC claims that the "DOJ can not speak for the 'public interest,' because no such interest has ever existed." *Id*.

CAC, in essence, challenges the constitutionality of the Sherman Act and advocates for a form of laissez-faire capitalism unregulated by the Government. The United States disagrees with CAC's position. The Supreme Court has, on numerous occasions, upheld the constitutionality of the Sherman Act and the prohibition in Section 1 of the Act against any contract, combination or conspiracy that "unreasonably" deprives consumers of the benefits of competition or that would otherwise result in higher prices or inferior products and services. *See Standard Oil Co. v. United States*, 221 U.S. 1, 50, 58 & 68-70 (1911); *see also United States v. Joint Traffic Ass'n*, 171 U.S. 505, 570-73 (1898). In any event, challenging the constitutionality of the Sherman Act is far beyond the scope of this Tunney Act proceeding. *See United States v.*

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capitalism, she has stated: "When I say 'capitalism,' I mean a pure, uncontrolled, unregulated laissez-faire capitalism with a separation of economics, in the same way and for the same reasons as a separation of state and church." "The Objectivist Ethics" in *The Virtue of Selfishness* (1964).

Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995) (Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint.).

CAC also argues that "[n]othing in the proposed judgment benefits producers, consumers, or the foundations of the free market, unless it is held that capitalism is advanced by turning producers into serfs." *CAC Comment* at 3. CAC believes that "while the customer's short-term costs might increase as a result of the MATRIXx acquisition, in the long term, competition would benefit from Wind River's decision to shed an unprofitable and stagnant product line." *Id*. For CAC argues, "[i]n a free market, the more efficient allocation of resources is often fostered through the natural elimination of unnecessary or redundant competition, as appears to be the case here." *Id*. Accordingly, CAC asserts that "[i]n the absence of this judgment, MATRIXx would be given the timely death the marketplace has condemned it to." *Id*. at 4. CAC's arguments suggest a superficial understanding of the proposed Final Judgments and the manner in which they are intended to address the Complaint in this matter.

During the United States' investigation in this matter, the Defendants argued that the MATRIXx assets had no economic value in the marketplace and that no competitively viable third party would be interested in purchasing the MATRIXx assets for any significant amount of money. Taking Defendants' arguments, along with customer concerns, into account, the United States agreed to a proposed settlement that would both test Defendants' assertions as to the MATRIXx assets' market value and maximize the possibility of restoring in a timely manner competition lost as a result of the illegal conduct. At the time, the United States firmly believed that one or more competitively viable purchasers existed and that an independent agent would

succeed in finding a buyer. Pursuant to Section IV(O) of The MathWorks' proposed Final Judgment, however, the United States agreed that if no alternative viable purchaser emerged, the United States would dismiss the Complaint in this action. As noted above, SoundView, the court-appointed Trustee charged with attempting to sell the MATRIXx assets, has informed the United States that it has successfully sold the MATRIXx assets pursuant to a definitive sales and licensing agreement that meets the requirements of The MathWorks' proposed Final Judgment. The proposed Final Judgment in this matter strikes an appropriate balance between the public interest of prohibiting conduct the effect of which is to substantially lessen competition, and the desire for the marketplace to decide the economic and competitive value of goods and services based on their relative merits.

III. CONCLUSION

Mr. Bhat urges the United States to amend The MathWorks' proposed Final Judgment in order to make the MATRIXx assets more valuable to prospective purchasers thereby justifying the required minimum sales price. CAC, on the other hand, urges the Court to reject the proposed Final Judgments altogether and dismiss the Complaint with prejudice. The United States, however, has concluded that the proposed Final Judgments reasonably and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of this Response to Comments in the *Federal Register* and submission of the United States' Certificate of Compliance with the Tunney Act, the United States intends to request entry of the proposed Final Judgments upon the Court's determination that entry is in the public interest.

DATED: January 15, 2003

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I certify that on January 15, 2003, a true and correct copy of the United States' Response to Public Comments, related to the proposed Final Judgments in this matter against Defendants and agreed to by Defendants pursuant to the Stipulations and Orders filed with the Court, was served on the following counsel:

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