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

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 5(b) 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) ("Tunney Act")), the United States files this Competitive Impact Statement relating to the proposed Final Judgments against Wind River Systems, Inc. and The MathWorks, Inc., submitted on June 21, 2002 and August 15, 2002 respectively, for entry in this antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

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 alleges that, on February 16, 2001, The MathWorks and Wind River entered into a number of agreements that eliminated competition between Wind River's MATRIXx products and The MathWorks' Simulink products. These agreements (hereinafter, collectively, the "MATRIXx Agreement") give The MathWorks the exclusive worldwide right to price and sell Wind River's MATRIXx for two years, transfer the customer support of MATRIXx to The MathWorks, require Wind River to stop developing and selling MATRIXx, and give The MathWorks an option to acquire MATRIXx in 2003. The MathWorks announced at the time it entered into the MATRIXx Agreement that there would be no further development of the MATRIXx products. As a result of the MATRIXx Agreement, competition has been eliminated between The MathWorks and Wind River in the sale of dynamic control system design software. The Complaint seeks divestiture of the MATRIXx products to an independent and viable third party to restore the competition eliminated by the MATRIXx Agreement.

Defendants in this action have now agreed to cooperate fully to offer the MATRIXx products for sale. On June 21, 2002, the United States filed a proposed Final Judgment in this matter containing injunctive relief against Wind River, the nominal owner of the MATRIXx assets, that will require Wind River to fully cooperate with any court order requiring the divestiture of MATRIXx to a competitively viable third party. Because The MathWorks had previously acquired significant rights in the MATRIXx assets under the MATRIXx Agreement, Wind River's consent alone was insufficient to effectuate fully the relief sought by the United States in the Complaint. The lawsuit therefore continued against The MathWorks. On August 15, 2002 the United States and The MathWorks filed a proposed Final Judgment that will 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. By the proposed Final Judgment against The MathWorks, in combination with the proposed Final Judgment previously filed against Wind River, the United States has now received consent from all necessary parties sufficient to effectuate a judicially-supervised sale of the MATRIXx products. The proposed Final Judgments filed with the Court will terminate this action against the Defendants.

II.

ACTIONS GIVING RISE TO THE ALLEGED VIOLATIONS

A. Dynamic Control System Design Software

An integral part of the control system of many complex devices is the "controller" -- the on-board computer and software programs that govern a device's operation. In aircraft, for example, the controller works by receiving pilot input plus input from various sensors (such as speed and altitude), processing the input, and providing outputs that optimize the aircraft's handling and operation through the use of various components (such as engines, flaps and the rudder).

Control system design tools were introduced approximately fifteen years ago and they provide significant benefits to control system design engineers. Before such tools were developed, engineers had to manually create equations that mathematically represented the behavior of the control system, write the appropriate software code to be installed in the on-board computers, and then build prototypes to test the system. Modern control system design tools have automated the analysis and modeling, as well as the code generation and simulation. With a mathematical engine at their core, and enhanced by graphical user interfaces, control system design tools are used by engineers to create "virtual" models of the control system. For

very complex systems, the analytical process (model, analyze, design, test, produce) can only be accomplished efficiently with the help of computers and specialized software.

The initial modeling step is extremely important. The better the model is at simulating reality, the better and more robust the control system will be. Yet, a model is still an abstraction. So, after the analyzing and designing steps, the engineer still needs to test the controls in real or near-real situations. If the controls fail the testing, then the initial steps of the analytical process are repeated with small design tweaks and the process repeats until the controls pass final testing. The final product is computer code that can be embedded in a computer or on a chip.

MATRIXx and The MathWorks' Simulink are dynamic control system design toolsets providing functionality that addresses each of the engineer's tasks and aids in rapid control systems development. For example, both toolsets have:

(1) graphical interfaces and high level scripting languages for modeling and simulation, and mathematical engines with advanced control design modules, or libraries, for design and analysis;

(2) automatic efficient code generation suitable for testing and production; and

(3) tools for real-time simulation and testing.

The tools in the Simulink toolset, numbered by functionality, are called: (1) Simulink and MATLAB; (2) Real Time Workshop; and (3) xPC. The tools in the MATRIXx toolset are called: (1) Systembuild and xMath; (2) Autocode; and (3) RealSim.

MATRIXx and Simulink are considered "suites" or "toolsets" of control design software. Suite products from a single vendor offer not only full functionality, but also seamless integration between tools used throughout the analytical process. As a result, no time is lost by a need to convert designs or data from one tool to another. Utilizing a suite or toolset of control

design software facilitates the ability to make changes anywhere in the modeling and design process. Seamless integration is one of the keys to the rapid development of complex control systems.

MATRIXx and Simulink were developed from common source code in the early 1980s. Because of their common origin, the products are similar. However, the products have been independently developed by different companies for more than fifteen years. The competing development efforts represent one critical way that the Defendants compete. For the last ten to fifteen years, MATRIXx and Simulink have competed head-to-head for sales, not only by competing on price, but also by adding features to lure customers away from one another.

B. Illegal Agreement To Allocate Markets, Fix Prices, and Unreasonably Reduce Competition

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. Its embedded real-time operating system, deployed in more than 38 million devices worldwide as of 2000, addressed the telecom/datacom, consumer electronics, automotive, aerospace, and emerging Internet appliance marketplaces. Among its software portfolio it also produced the MATRIXx family of software products. 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 to 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 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.

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 is required to provide two years of customer support (ending in February 2003) for existing MATRIXx users.[1] While Wind River agreed to continue fulfilling its existing customer support obligations, as well as provide "critical" bug fixes during the license period, the MATRIXx Agreement provides that Wind River will not produce new versions of MATRIXx with feature enhancements. The MathWorks and Wind River also agreed on the pricing of Simulink when purchased by MATRIXx customers. The companies agreed that The MathWorks would give customers with current MATRIXx licenses, who switched to The MathWorks suite of products, a discount amounting to 50% off the list price of The MathWorks products for those who switched in the first year of the

[1] 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 who switched in the second year of the MATRIXx Agreement.

The MathWorks agreed to make payments to Wind River totaling $11,500,000 over a three-year period. These payments are to be made on a set schedule and are not contingent on the volume of MATRIXx products MathWorks sells. 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 months after closing for an additional sum of $2,000,000. Wind River has retained exclusive ownership of the optioned assets during the interim and until The MathWorks exercises its right to acquire them. Finally, the MATRIXx Agreement assigned certain patent rights to The MathWorks for $500,000.

C. Effect Of The Illegal Agreement

The MATRIXx Agreement eliminated competition between The MathWorks and Wind River in the simulation software, automatic code generation, and testing software markets. The MathWorks now has complete control over the development and pricing of the products of its closest competitor in these dynamic control systems design software markets, thus depriving customers of the benefits of competition between Defendants' products, including competition based on price, service, and product innovation.

Further, many customers value tight integration of the products in each of the dynamic control system design software markets. Both The MathWorks and Wind River cooperated with a small number of companies to facilitate interfaces between the Defendants' products and those companies' products that compete with the Defendants' products in individual software markets.

The competition between the MATRIXx toolset and the Simulink toolset provided Defendants an incentive to facilitate interoperation with third-party products, as an unwillingness by one to do so would likely advantage the other. As a consequence of the elimination of competition resulting from the MATRIXx Agreement, The MathWorks will have less incentive to provide such technical cooperation to competitors selling individual products, thus further reducing competition for consumers who value integrated products.

The MATRIXx Agreement allocates MATRIXx customers between Wind River and The MathWorks, fixes price terms for those customers ceded to The MathWorks who subsequently switch to Simulink, and permits The MathWorks to control the future of, and enables the elimination of, the MATRIXx products. As the MATRIXx products are the principal competitive products to The MathWorks' own dynamic control system design software, the overall effect of the MATRIXx Agreement is to eliminate competition between Defendants in the three separate dynamic control system design software markets: (1) simulation software market, where products in the MATRIXx and Simulink suite are used by engineers to design, analyze, and simulate dynamic control system behavior; (2) automatic code generation software market, where products in both suites are used to automatically generate code from models developed with simulation software; and (3) testing software market, where products in both suites are used by engineers to test their models and then automatically generate code by simulating the function of the control system in a real time environment. Consumers are harmed both by the elimination of the MATRIXx products as a competitive alternative, as well as the resulting reduction of competitive pressure on The MathWorks to lower prices, improve service,

continue product innovation and development of its own dynamic control system design software products, and cooperate with companies selling individual products.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENTS

During the course of an investigation, customers complained to the Antitrust Division that the MATRIXx Agreement had eliminated Wind River's MATRIXx -- the only significant products that competed directly with The MathWorks' Simulink products -- as a competitive alternative in the market. Because customers indicated that, due to the present lack of development of MATRIXx and its uncertain future, they would soon have to begin a costly migration to The MathWorks' Simulink products, the United States ultimately concluded that a quick and effective remedy was necessary to reestablish MATRIXx as a viable alternative. The United States further concluded, however, that simply rescinding the MATRIXx Agreement would not restore the competition it had eliminated in light of Wind River's genuine desire to exit the markets for the MATRIXx family of software products. At the same time, the principal defense offered by Defendants for their conduct was a contention that no competitive buyer would be interested in purchasing the MATRIXx assets. Taking into account customer concerns and The MathWorks' arguments, the United States pursued an enforcement approach that would both test Defendants' assertions as to MATRIXx's market value and maximize the possibility of restoring effective competition in a timely manner.

The United States and Defendants entered into an April 26, 2002, letter agreement that required an attempted sale of the MATRIXx product line in an effort to restore the competition eliminated by the MATRIXx Agreement. Under the April 26 letter agreement, Defendants were

given the opportunity to test their assertion that no other viable purchaser existed by agreeing to "shop" the MATRIXx assets through an independent agent. The United States believed that one or more viable purchasers existed and that an independent agent would succeed in finding a buyer. The United States acknowledged, however, that, if no alternative viable purchaser emerged from the "shop," remedying the competitive harm caused by the MATRIXx Agreement would be difficult. The United States thus agreed that, should the "shop" fail following a good faith effort, and given Wind River's decision to discontinue the sale and development of the MATRIXx products, it would close its investigation without taking any enforcement action. However, the Defendants did not comply with the terms of the April 26 letter agreement and the United States, on June 21, 2002, filed its Complaint seeking a judicially-enforced sale of the MATRIXx assets.

Contemporaneously with the filing of the Complaint, the United States and Wind River filed a proposed Final Judgment that would settle the case against Wind River on the condition that it fully cooperate with any court order requiring the divestiture of the MATRIXx assets. As noted above, because both Wind River and The MathWorks retain rights in the MATRIXx products, Wind River's consent alone was insufficient to effectuate fully the relief sought by the United States in the Complaint. The lawsuit, therefore, continued against The MathWorks. On August 15, 2002, the United States and The MathWorks filed a proposed Final Judgment that would resolve the case against The MathWorks. The proposed Final Judgment between the United States and The MathWorks contains injunctive relief that is intended to promptly offer the MATRIXx assets for sale to a competitively viable third party approved by the United States. It further establishes a structure and time line for the sale that will be supervised by the court.

Thus, the proposed Final Judgments against Wind River and The MathWorks will lead to either the prompt and certain divestiture of the MATRIXx assets or the dismissal of the Complaint in this action.

A. Proposed Final Judgment Against Wind River

On June 21, 2002, the United States filed a Stipulation And Order and a proposed Final Judgment that resolved the allegations in the Complaint against Wind River. Pursuant to the proposed Final Judgment, Wind River agreed to facilitate the United States' efforts to divest the MATRIXx assets. Wind River's agreement to assist the United States in a divestiture of the MATRIXx assets, however, was expressly conditioned on the Court entering a Final Judgment against The MathWorks ordering the divestiture of the MATRIXx assets.

1. Wind River Covenants

Section IV of the proposed Final Judgment against Wind River sets forth the substantive injunctive provisions and is designed to assist the United States in its efforts to promote continued competition in the markets for dynamic control system design software. Thus, Section IV(C) of the proposed Final Judgment states that the United States is seeking a judgment that would require, among other things, the prompt and certain divestiture of all MATRIXx assets to a buyer acceptable to the United States and the appointment of a trustee to effect the divestiture. Wind River is expressly prohibited from contesting the entry of such a judgment. In addition, Section IV(C) requires Wind River to use its reasonable best efforts to assist in effectuating such an order by divesting all of its rights, title, and interests in the MATRIXx assets. Section IV(D) further requires Wind River to take steps to ensure the prompt and certain divestiture of any rights in the MATRIXx assets currently held by The MathWorks that revert to Wind River.

Wind River shall retain certain rights to use and distribute the MATRIXx products and intellectual property related to specific contracts it retained in the MATRIXx Agreement and any Wind River products available for purchase as of February 16, 2001 (except for the MATRIXx products). These Retained Rights, as outlined in the proposed Final Judgments, are all current rights held by Wind River.

2. Termination of Action, Compliance, and Expiration of Final Judgment

Insofar as Wind River's consent alone was insufficient to achieve a full divestiture of the MATRIXx assets, and because the United States had neither an order from the Court requiring The MathWorks to divest the MATRIXx assets nor had reached an agreement with The MathWorks on a proposed Final Judgment requiring the divestiture of the MATRIXx assets, Wind River remained a party to this action under Section IV(A) for the sole purpose of effectuating any relief ordered by the Court or agreed to by the United States and The MathWorks. Wind River also agreed to permit the United States to monitor its compliance with the Final Judgment under Section V of the proposed Final Judgment under substantially the same terms as agreed to by The MathWorks and discussed in subsection III(B)(2) below.

Under Section VII of the proposed Final Judgment against Wind River, the Final Judgment does not have a fixed term or date of expiration. Because Wind River's obligations were dependent upon the United States gaining a Final Judgment against The MathWorks requiring divestiture of the MATRIXx assets, the Final Judgment against Wind River was made contingent upon a Final Judgment against The MathWorks and will expire upon the earlier of: (1) Wind River's completion of all obligations imposed upon it pursuant to Section IV of this Final Judgment in light of the proposed Final Judgment against The MathWorks; or (2) the date

on which Wind River no longer has any right, title, or interest in any of the MATRIXx assets (except for the Retained Rights).

B. Proposed Final Judgment Against The MathWorks

Subsequent to the proposed Final Judgment filed in this case against Wind River, the United States reached agreement with The MathWorks on a proposed Final Judgment that will facilitate the offer for sale of the MATRIXx assets to a competitively viable third party. Defendants' compliance with the terms of the proposed Final Judgments, filed on June 21, 2002 and August 15, 2002, will terminate this action.

1. Divestiture Provisions

Section IV of the proposed Final Judgment agreed to by The MathWorks contains substantive provisions setting forth the terms on which the MATRIXx assets will be offered for sale. It is designed to lead expeditiously to the identification of competitively viable third parties who are interested in acquiring the MATRIXx assets, negotiation of a definitive sales and licensing agreement, and restoration of competition in the markets for dynamic control system design software. Thus, Sections IV(A)-(C) provide that the United States will, as soon as possible, but in no event later than thirty days from the date the proposed Final Judgment was filed with the Court, select an independent agent to serve as Trustee for the purpose of accomplishing the sale of the MATRIXx assets to a purchaser approved by the United States. The United States will have the sole discretion, subject to approval by the Court, to negotiate the terms and conditions on which the Trustee shall serve and the Trustee shall serve at the cost and expense of the Defendants.

Sections IV(D) and (E) direct the Trustee to attempt to sell the MATRIXx assets and negotiate a definitive sales and licensing agreement with a prospective purchaser. To this end, the Trustee is required to promptly make it known that the MATRIXx assets are available for purchase. In order to assist the Trustee in preparing offering materials and to provide prospective purchasers with customary due diligence information with respect to the MATRIXx assets, the Defendants must provide the Trustee with all requested information and documents within three business days. Section IV(D) expressly provides that Defendants shall have no authority or responsibility with respect to the sale of the MATRIXx assets, except promptly to provide any information relating to the MATRIXx assets requested by the Trustee.

Sections IV(F)-(H) provide that the Trustee shall have ninety days from the date on which it certifies to the Court that the Defendants have provided adequate information to offer the MATRIXx assets for sale and to consummate a definitive sales and licensing agreement with a purchaser approved by the United States. During this ninety-day period, the Trustee may request additional information and documents from the Defendants who shall comply with any such request within three business days. If a divestiture of the MATRIXx assets is to occur under the proposed Final Judgment, it must be consummated within the ninety-day period prescribed by Section IV(G), as the ninety-day period may only be extended for undue delays found by the Court to be caused by Defendants. A definitive sales and licensing agreement, negotiated by the Trustee, shall be on customary and commercially reasonable terms and substantially equivalent, except for the payment terms, to the terms and conditions in the MATRIXx Agreement, to the extent possible. For example, the definitive sales and licensing

agreement should include representations, warranties, covenants, and transitional support to the purchaser equivalent to those in the MATRIXx Agreement.

Pursuant to Section IV(M), the United States shall have the sole discretion to approve both prospective purchasers and the terms of any sales and licensing agreement negotiated with an approved prospective purchaser. If the United States determines that a prospective purchaser is competitively viable, it will direct the Trustee to negotiate a definitive sales and licensing agreement with that prospective purchaser. In the event of multiple prospective purchasers, the United States, in its sole discretion, will direct the Trustee as to with which prospective purchaser(s) the Trustee should negotiate. The MathWorks is expressly prohibited from challenging any decisions made by the United States regarding the selection of prospective purchasers or approval of specific terms. While each Defendant has the right to request modifications to the terms of any sales and licensing agreement with a prospective purchaser, the Trustee is permitted to approve or deny such modifications. The United States, however, retains the right of final approval over all terms and conditions of the definitive sales and licensing agreement. Should the United States reject any purchaser or any term of the definitive sales and licensing agreement, the United States will direct the Trustee to attempt to identify an alternative purchaser, or negotiate an acceptable agreement, consistent with the proposed Final Judgment.

Section IV(J) expressly provides that The MathWorks may retain ownership of three patents subject to the MATRIXx Agreement, so long as a the purchaser is offered a comprehensive license to the patents that permits unimpeded use. Any patent license issued under the Final Judgment:

- must be perpetual, fully paid-up, and without continuing royalties to either Defendant;

- must not limit the purchaser's ability to use the patents in any of purchaser's current or future products or service;
- must permit the purchaser to sublicense the intellectual property contained in the patents so as to:
    - convey rights necessary to exploit the technology to end user customers of any product or service that includes the intellectual property;
    - enter into joint development, joint marketing, and other joint ventures with third parties in which the purchaser and the third party retain an interest in the resulting product, service, research or intellectual property;
    - permit transfer of the license either upon change of control of the purchaser, or upon sale of all or a substantial portion of the MATRIXx assets; and
    - permit the use of the intellectual property in products or services designed and intended for use with purchaser's products or as a complement to purchaser's products;
- must permit the purchaser the ability to innovate based on the intellectual property and to use such innovations in the purchaser's products or under any circumstance set forth above without restriction, grantback, or royalty;
- must permit the purchaser to enforce infringement claims that damage the purchaser in circumstances where The MathWorks fails to enforce intellectual property rights under the patents; and
- must contain an appropriate covenant not to sue the purchaser with respect to the patents covered by the license.

Under Section IV(I), the Trustee is required to file written reports with the Court, the United States, and the Defendants after thirty days, and each fifteen days thereafter, describing the Trustee's activities to date. Section IV(K) provides that Wind River is entitled to retain certain rights to defined in Section II of the proposed Final Judgment. Section IV(L) establishes a minimum price of $2,000,000, plus the cost and expenses of the Trustee, for which the MATRIXx assets may be sold unless the Defendants, with the approval of the United States,

waive this minimum reserve price requirement. Section IV(N) expressly gives the Trustee the ability to enforce the obligations of The MathWorks under the proposed Final Judgment or the Trustee's engagement letter by way of filing a contempt motion with the Court. Finally, Section IV(O) provides that if the Trustee is unable to negotiate a definitive sales and licensing agreement with the period set forth in Section IV(G), the United States' Complaint in this action may be dismissed upon motion by any party.

2. Compliance

Section V of the proposed Final Judgment requires The MathWorks to provide documents and information within its control necessary for the purposes of determining and securing compliance with the Final Judgment. Upon written request and on reasonable notice, The MathWorks shall provide the United States with access to all records and documents in its possession or control, make available its employees, and submit written reports related to matters contained in the Final Judgment.

3. Jurisdiction, Termination, and Acquisition of MATRIXx

Pursuant to Section VI of the proposed Final Judgment, the Court retains jurisdiction over this matter in order to enable any party to the Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out the Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions.

Because the outcome of the sale is uncertain, the Final Judgment does not have a fixed term or date of expiration. The Final Judgment sets out a procedure and time line under which a trustee will offer the MATRIXx assets for sale, but recognizes that such sale may not be

accomplished, in which case the lawsuit will be dismissed. Because divestiture of the MATRIXx assets is dependent upon the Trustee's success in identifying a suitable prospective purchaser and negotiating a definitive sales and licensing agreement acceptable to the United States within a prescribed period of time, Section VII provides that the Final Judgment shall expire upon the earlier of: (1) the date on which The MathWorks no longer has any right, title or interest in any of the MATRIXx assets except with regard to the ownership of patent rights specified in Section IV(J); or (2) the date of dismissal of this action as a result of the failure of the Trustee to accomplish the sale of the MATRIXx assets pursuant to the terms of the Final Judgment.

Finally, Section VII further expressly provides that if the MATRIXx assets are sold pursuant to the terms of the Final Judgment, The MathWorks is prohibiting from purchasing, licensing, or otherwise acquiring all or substantially all of the MATRIXx assets before September 1, 2007, without the prior written consent of the United States.

IV.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENTS

The United States considered, as an alternative to the proposed Final Judgments, a full trial on the merits against the Defendants. The United States is satisfied, however, that a trial would not result in injunctive relief against Defendants beyond what is contained in the proposed Final Judgments against Wind River and The MathWorks, filed on June 21, 2002 and August 15, 2002 respectively. Moreover, the proposed injunctive relief is designed to more quickly achieve the primary objective of the litigation -- preserving MATRIXx as a viable competitive

alternative in the relevant markets for dynamic control system design software to the extent it is possible to do so.

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees.

Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against defendants.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENTS

The parties have stipulated that the proposed Final Judgments may be entered by this Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the decree upon this Court's determination that the proposed Final Judgments are in the public interest.

As provided by Sections 5(b) and (d) of the Clayton Act, 15 U.S.C. §§ 16(b) and (d), any person may submit to the Department written comments regarding the proposed Final Judgments. Any person who wishes to comment must do so within sixty days of publication of this Competitive Impact Statement and the proposed Final Judgments in the Federal Register.

The Department will evaluate and respond to the comments. All comments will be given due consideration by the Department, which remains free to withdraw its consent to the proposed Final Judgments at any time prior to entry. The comments and the responses of the Department will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Renata B. Hesse
Chief, Networks and Technology Section
United States Department of Justice
Antitrust Division
600 E Street, N.W., Suite 9500
Washington, D.C. 20530

The proposed Final Judgments provide that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgments.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENTS

The Tunney Act requires that injunctions of anticompetitive conduct contained in proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgments are "in the public interest." In making that determination, the court *may* consider --

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia has held, the Tunney Act permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the Government's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[2] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[3]

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[2] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. § 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[3] *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d at 1458. Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgments, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[5]

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[4] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

[5] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette,* 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

Moreover, the 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, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the Government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the Court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id*.

VIII.

DETERMINATIVE MATERIALS/DOCUMENTS

No materials and documents of the type described in the Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgments. Consequently, none are being filed with this Competitive Impact Statement.

Dated: September 19, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 19, 2002, a true and correct copy of the United States' Competitive Impact Statement, 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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