

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 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 FR 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.

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 MathWork's 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

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).

order to provide support service to two International Space Station customers.

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.