THE CENTER FOR THE
ADVANCEMENT OF
CAPITALISM

August 9, 2002

Ms. 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

Re: Proposed Final Judgment in *United States of America v. Computer Associates International, Inc., et al.*, Civil No. 1:01CV02062 (GK).

Dear Ms. Hesse:

On behalf of the Center for the Advancement of Capitalism[1] ("CAC"), I hereby transmit to you the following public comments with respect to the above captioned matter now pending in the United States District Court for the District of Columbia. In accordance with 15 U.S.C. §16 (d), CAC requests that its comments in this matter be included in the appropriate public record, and that they be considered by the Department of Justice and the Court in determining whether the proposed Final Judgment is in the public interest.

I

CAC is a non-profit corporation organized under the laws of the District of Columbia and exempt from taxation under 26 U.S.C. § 501 (c) (4). The mission of CAC is to provide analysis and commentary to policymakers, the judiciary, and the general public on matters relevant to individual rights and economic freedom. CAC presents an integrated approach to contemporary issues by applying Ayn Rand's philosophy of Objectivism.

[1] Prior to August 1, 2002, CAC was known as the Center for the Moral Defense of Capitalism.

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For the past four years, CAC has provided a consistent and principled opposition to the continued enforcement of the antitrust laws of the United States.[2] We have argued that the antitrust laws violate the individual rights of businessmen, the protection of which is mandated by the United States Constitution. Instead, what now exists in the United States—and in this particular case—is a system where the federal government has assumed the unconstitutional role of dictating which business practices are permitted, without having to actually show that a business's actions violate the *rights* of another party. Indeed, as the case against Computer Associates and Platinum Technology ("defendants") demonstrate, most antitrust cases have no actual victim, save for perhaps the ego of the attorneys representing the Department of Justice ("DOJ").

After a careful review of the public record in this case, CAC believes that the United States has failed to demonstrate why this prosecution was justified in the first instance. Furthermore, we believe the terms of the proposed Final Judgment have been falsely represented to the public as being injunctive and remedial in nature, when in fact they are punitive. Since the public interest cannot possibly be served by punishing a company which has committed no crime, and for other reasons outlined below, CAC concludes that entry of the proposed Final Judgment is not in the public interest, and that the DOJ should withdraw from its agreement and dismiss the complaint against the defendants with prejudice. In the alternative, CAC would request the District Court to deny entry of the proposed Final Judgment under 15 U.S.C. § 16 (e).

[2] *See, generally*, 15 U.S.C. § 1-2.

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II

The central claim of the DOJ's complaint is that the defendants entered into a merger agreement which denied consumers the benefit of full competition during the "pre-consummation period," that is to say, prior to the closing of the actual merger. The DOJ defines the pre-consummation period as ending either with the closing date, or earlier if termination is granted by the DOJ under the Hart-Scott-Rodino Act.[3] Under the government's antitrust regimen, it seems, companies have an "obligation to compete independently"[4] even after they've agreed to stop competing out of mutual self-interest. What this case deals with then is how companies are to be permitted going about the task of combining their operations without running afoul of the DOJ's pathological (and statutory) need to control every aspect of private commerce.

Under the merger agreement *voluntarily* entered into by the defendants, Platinum Technology officials agreed to not offer their customers a discount of more than 20% off list prices without the prior written consent of Computer Associates.[5] Since this provision applied during the pre-consummation period (but after the agreement itself was signed and made known to the public), the DOJ claims that the defendants denied customers "the benefit of free and open competition" in violation of 15 U.S.C. § 1.

CAC disagrees. For one thing, the DOJ is employing a very static definition of "competition" to support its thesis. Under the DOJ's theory of antitrust, competition is a synonym for low prices—any action which *might* lead to a rise in out-of-pocket cost to the consumer is deemed anticompetitive, and thus illegal under the Sherman Act. This theory violates the property rights of producers. The DOJ is arguing that consumers have an automatic 'right' to any item which a producer puts on the market, and that this interest should trump any property right claimed by the producer.

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[3] 15 U.S.C. § 18a.
[4] Competitive Impact Statement, 67 Fed. Reg. 41,472 at 41,477 (2002).
[5] *Id.* at 41,475.

Unlike the corner the DOJ has put itself into here, competition in the free market is a far more complex and dynamic entity that does not wholly revolve around retail prices. Competition incorporates all activities by which a business seeks to increase its profitability. These activities include the development of new or improved products, reduction of operating costs, increasing efficiency in the production process, marketing, and hiring of talented personnel. None of these activities were incorporated into the DOJ's analysis relevant to this case, or if they were, the United States has declined to specify how the defendants' alleged actions compromised competition in the integrated sense of the term. The complaint focuses *solely* on the issue of prices charged to consumers.

Section IV of the proposed Final Judgment would prohibit Computer Associates, in any potential future merger, from establishing price discount policies for a to-be-acquired company during the pre-consummation period. This requirement does nothing to promote competition. It simply creates a temporary, artificial price support for products sold by the hypothetical other company pending the closing of the merger. Section IV does not prevent such potential mergers from taking place, nor does it govern the conduct of the companies following consummation of the merger. If the DOJ were genuinely concerned about minimizing the potential for higher consumer prices in the marketplace, they could have sought to prevent the merger itself from ever taking place through civil litigation before the District Court, or at a minimum attempted to require Computer Associates and Platinum Technology to divest certain portions of their business to third parties as a precondition of government approval. Such efforts would have rendered the need for the present action moot, since competition—or at least the DOJ's bastardized version of competition—would be maintained on a more tangible and permanent basis.

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III

The answer to our inquiry, interestingly enough, is that the DOJ *did* pursue a previous civil action to dictate the conditions of the Computer Associates-Platinum Technology merger.[6] Yet not content to rest on its laurels, the DOJ went on to initiate the current action as a means of further securing the public interest, or so they would have us believe. In fact, based on the government's earlier success, it seems more likely that the United States is seeking to make an example out of Computer Associates to serve as a warning to other companies. Such a punitive motive, CAC believes, is not consistent with serving the public interest.

Because the DOJ's hands were less then clean in reaching the proposed consent order, Computer Associates is left with a very disturbing prospect. In acceding to the relief terms of the proposed final judgment, Computer Associates is undermining its own ability to successfully compete in the marketplace by acknowledging, then perpetuating for the ten-year term of the agreement, an outright fraud. The fraud we refer to is the premise of the DOJ's prosecution—that merging companies should continue to act independently of one another even when that is not the case in actual reality.

No matter how much it wishes otherwise, the DOJ cannot alter reality, although it can certainly use its compulsory force to evade it, as is the case here. When two companies agree to merge, the very culture of their previously exclusive operations are altered at a fundamental level. The extent to which this is reflected in the pre-consummation or post-consummation period varies from company to company, but the essential principle is the same. In entering into its pre-consummation agreement with Platinum, Computer Associates acted in the honest interest of its shareholders, employees and customers, by openly acknowledging its new relationship with Platinum, and working to bring the two companies together in an efficient and rational manner.

[6] United States v. Computer Associates, et al., No. 99-01318 (D.D.C.)

In contrast, the new standards imposed by the DOJ in the consent agreement practically requires Computer Associates to never enter into another merger agreement *except* by fraud and duplicity. Since to acknowledge a coming together of companies before consummation is now *per se* illegal conduct in the eyes of the DOJ, there is no incentive for Computer Associates to act with integrity or honesty. Alternatively, of course, Computer Associates could simply choose not to merger with any company for the duration of the consent agreement, in which case they would potentially defraud their own stockholders by refusing to act in a manner which could increase the company's profitability and productive capacity. In either case, CAC sees no benefit to subscribing to the DOJ's delusional view of corporate mergers.

IV

Finally, CAC objects to the DOJ's construction of rights in this case. As with all antitrust litigation shepherded by the United States, the DOJ can only make sense of its argument when it completely ignores the principle of individual rights which animate our Constitution and republican form of government.

The DOJ defines the public interest, for purposes of antitrust litigation, as being one-in-the-same with the "rights" of consumers, the nebulous class of individuals who consume (or attempt to consumer) the goods and services provided by economic producers. In this case, CA and Platinum's activities were deemed unlawful because the companies pre-consummation activities had the effect of "denying" the companies' customers "the *benefits* of free and open competition" (emphasis added). In the eyes of DOJ and the judiciary, "benefits" gets elevated to the status of "rights", and they are given such weight as to render the actual economic rights of producers to be virtually non-existent.

As has been discussed, *infra*, trade does involve, and indeed require, a voluntary exchange of goods and services which *benefit* all parties to the transaction. If nobody received

benefits, then there would be no incentive to trade in the first place. But a benefit should never be confused with a "right." Actual rights are "moral principles which define and protect a man's freedom of action, but impose no obligation on other men.[7]" A right is something which all individuals inherently possess as part of their humanity. A benefit, in contrast, is something which an individual receives at the behest of another, for whatever reason or motive: A will confers benefits on a beneficiary; a company provides health insurance for its employees; the local sports arena permits children to use the facility a few days a week. None of these things result from the beneficiary's right to enjoy the benefit. The right is that of the owner to dictate the use of his property, not of an outside party to demand use of property which is not his.

Computer Associates and Platinum had no obligation to "provide" competition for consumers. They chose to do so voluntarily for a number of years, and, when the companies decided it was in their self-interest to cease one-on-one competition, they did so. They did not consider their obligations to the consumer, because they had none, outside of pre-existing contracts (which presumably were honored). What was considered, as in any merger, was the benefits that would be generated by the combination of the two companies. The DOJ's fault lies in considering "benefits" to be limited to the price paid by a consumer at a given moment in time. The government's analysis failed to account for the potential benefits generated by the merger, including the actions of CA and Platinum during the pre-consummation period.

But even if *no* benefits could be demonstrated consequential to the merger, the United States would still be wrong to block the efforts of CA and Platinum, because it is not morally incumbent upon a corporation to positively demonstrate the benefits of their actions to a government agency. So long as the actions are voluntary, and do not constitute an act of force against another individual or corporation, a transaction between private parties is an extension of their right to own and use property.

[7] Ayn Rand, *Man's Rights*, *in* CAPITALISM: THE UNKNOWN IDEAL (1966).

The alternative theory, presented by DOJ's enforcement of antitrust law, suggests the opposite: That property is not truly privately held, and that the interests of the "consumer" are paramount in any economic relationship with a producer. Under a capitalist system, the producers are the property owners who leverage their holdings to create wealth. Under the consumerist model enforced by DOJ, in contrast, producers hold and create wealth as part of a "public trust", and the consumer has the ultimate right to dictate how the wealth is distributed. This is why the DOJ spends an inordinate amount of time focusing on prices, and why any increase that takes place is immediately suspect under the Sherman Act.

Consumers, of course, do have certain "rights" in the marketplace. They have a right to buy or not buy the goods and services of their choosing. They have a right to contract free of coercion, and the right to seek redress of grievances before the law if that contract is breached. What consumers do not have the "right" to, however, is to unilaterally dictate the terms by which a producer offers his goods and services for sale. The DOJ advocates the opposite, and as a result, it routinely intervenes in the acts of producers in an attempt to secure prices and conditions that are more favorable to the consumer, regardless of how this interference violates the property rights of the producers.

CAC believes that the people of the United States are better off living in a capitalist economy than in a consumerist system. Therefore, we find the terms of the proposed Final Judgment are not in the public interest, because the injunctive relief provided would recognize non-existent consumer rights at the expense of the legitimate rights of Computer Associates, and that in turn compromises the rights of all Americans.

For the foregoing reasons, CAC believes the public interest here would best be served by the DOJ withdrawing from the proposed final judgment and dismissing the complaint against Computer Associates and Platinum Technology with prejudice.

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Respectfully Submitted,

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