

**PUBLIC VERSION OF
NON-PUBLIC MOTION**

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
MSC.SOFTWARE CORPORATION,)
a corporation.)

Docket No. 9299

**THIRD-PARTY HIBBITT, KARLSSON & SORENSEN, INC.'S
MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN DOCUMENTS IDENTIFIED ON EXHIBIT LISTS
OF COMPLAINT COUNSEL AND MSC.SOFTWARE CORPORATION**

Third-Party Hibbitt, Karlsson & Sorensen, Inc. ("HKS") hereby moves, pursuant to Rule 3.45(b) of the Federal Trade Commission's Rules of Practice ("Rules"), for an Order granting *in camera* treatment to certain documents produced by HKS in response to Subpoenas Duces Tecum served by Complaint Counsel and MSC.Software Corporation ("MSC"), which documents Complaint Counsel and/or MSC intend to offer as exhibits during the administrative trial.

Specifically, HKS requests *in camera* treatment of the following documents (collectively, "Designated Documents"):

- HKS 0149;
- HKS 0153;
- HKS 0169 - 0175;
- HKS 0185;

HKS 0189 - 0207;
HKS 0228 - 0229;
HKS 0230 - 0232;
HKS 0236;
HKS 0281 - 0282;
HKS 0286 - 0287;
HKS 0288;
HKS 0306 - 0308;
HKS 0371 - 0372;
HKS 0421 - 0422;
HKS 0425 - 0427;
HKS 0428;
HKS 0460 - 0461;
HKS 0497 - 0499;
HKS 0500 - 0506;
HKS 0531 - 0534;
HKS 0589 - 0595;
HKS 0618;
HKS 0620 - 0621;
HKS 0636 - 0648;
HKS 0682 - 0684; and
HKS 0741 - 0744.¹

¹ The Designated Documents are more fully described on the Schedule of Documents for Which Hibbit, Karlsson & Sorensen, Inc. Seeks *In Camera* Treatment ("Schedule"), which is attached as Exhibit C to the

The grounds for this motion are that the public disclosure of the Designated Documents will result in a clearly defined, serious injury to HKS, which injury outweighs any public interest that may exist in the disclosure of the Designated Documents. In support of this motion, HKS relies on the accompanying Sorensen Affidavit, the Schedule and the proposed Order submitted herewith.

Background²

HKS is a Rhode Island corporation founded in 1978 and headquartered in Pawtucket, Rhode Island. HKS develops and supports the ABAQUS® suite of engineering analysis software programs, which are known for their nonlinear finite element analysis capabilities. HKS has approximately 200 employees at its headquarters. In addition, HKS has seventeen branch offices or subsidiaries located throughout the United States and in nine foreign countries. Approximately 120 persons are employed at the branch offices or by the subsidiaries. HKS does not have an in-house legal staff.

HKS is and has always been a privately held company. HKS does not publish or otherwise disclose its financial information, including its revenues, to customers, competitors, trade organizations, industry analysts or other persons or entities. HKS also does not publish or otherwise disclose the identities of its customers or the level of business that it conducts with particular customers.

accompanying Affidavit of E. Paul Sorensen in Support of Third-Party Hibbit, Karlsson & Sorensen, Inc.'s Motion for *In Camera* Treatment of Certain Documents Identified on Exhibit Lists of Complaint Counsel and MSC Software Corporation ("Sorensen Affidavit"). The Sorensen Affidavit is attached hereto and marked "Exhibit 1." The Schedule identifies each document that is the subject of this motion, describes the document, summarizes the particular reasons for which *in camera* treatment is sought, and states the specific timeframe for which such treatment is sought. In accordance with In the Matter of Hoechst Marion Roussel, Inc., No. 9293, 2000 FTC LEXIS 138, at *9 (Sept. 19, 2000), HKS is not filing the Designated Documents with the Office of the Secretary or serving them on the parties. However, HKS is appending copies of the Designated Documents to the Schedule that is being served on the Administrative Law Judge.

² The facts are more fully stated in the Sorensen Affidavit ¶¶13-20.

To attract and retain commercial users of its finite element analysis software, HKS has relied primarily upon technical improvements to its products. In particular, HKS has focused on identifying the needs of current and potential users and then improving HKS's product to respond to those needs. In this process, it is essential to HKS's ability to compete that HKS maintain confidentiality as to the identification and analysis of customer requirements, HKS's internal planning for responding to those requirements, and the potential and actual technology, such as algorithms, software architecture and code, that is or may become part of HKS's product line. This secrecy is essential to maintaining customer trust and to using technical innovation as the means for competing against entrenched codes such as NASTRAN.

HKS's development work generally lasts several years from the initial identification of market opportunities through the release of new functionality. Therefore, HKS would suffer serious and direct harm if other developers of finite element analysis products, particularly MSC, were to know in advance where and how HKS planned to improve its code so as to better compete with other such products.

HKS was served with two Subpoenas Duces Tecum ("Subpoenas") in this matter. The first Subpoena was served by MSC on January 29, 2002. The second Subpoena was served by Complaint Counsel on or about April 29, 2002. HKS worked diligently and cooperatively with both MSC and Complaint Counsel to satisfy the parties' legitimate discovery needs and, at the same time, protect the extremely sensitive and current confidential commercial, research, development and proprietary information of HKS that was requested by the parties.

HKS devoted hundreds of hours to searching for and producing documents responsive to the Subpoenas and incurred considerable expense in complying with the Subpoenas. HKS produced more than 700 pages of material, in addition to HKS's organizational chart, product brochures and thirteen separate volumes of proprietary ABAQUS® manuals. Additionally, HKS produced personnel for depositions in this matter.

By correspondence dated May 28, 2002, and transmitted by facsimile at roughly midnight, MSC's counsel notified HKS that MSC intended to introduce into evidence approximately thirty-four documents produced by HKS in response to the Subpoenas. Those documents had been designated "Restricted Confidential, Attorney Eyes Only" pursuant to the Amended Protective Order Governing Discovery Material ("Amended Protective Order").

On May 30, 2002, HKS's counsel received, via Federal Express, correspondence from Complaint Counsel notifying HKS that Complaint Counsel intended to place on their exhibit list and offer into evidence approximately forty-two documents produced by HKS in response to the Subpoenas and designated "Restricted Confidential, Attorney Eyes Only" in accordance with the Amended Protective Order.

HKS now requests that the Administrative Law Judge issue an Order affording *in camera* treatment to the Designated Documents, which are a limited number of the HKS documents identified by Complaint Counsel and MSC as trial exhibits and which were produced by HKS subject to the highest level of protection granted under the Amended Protective Order.

Argument

In accordance with Rule 3.45, the Administrative Law Judge is authorized to order that material or portions of material be afforded *in camera* treatment when their public disclosure will likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. HKS submits that the Designated Documents require *in camera* treatment in accordance with the provisions of Rule 3.45 and the standards stated in In the Matter of Dura Lube Corp., No. 9292, 1999 FTC LEXIS 255 (Dec. 23, 1999).

The Designated Documents consist of the following types of materials:

(a) internal HKS memoranda describing analyses of and strategies for responding to the requirements of specific customers of HKS (labeled “CS” on the Schedule);

(b) documents stating or describing secret technical information of HKS (labeled “STP” on the Schedule);

(c) documents discussing future pricing of HKS products (labeled “FP” on the Schedule);

(d) documents setting out or describing HKS’s not yet announced future product development (labeled “FPD” on the Schedule); and

(e) documents stating confidential financial information of HKS and its customers, including the amounts of money that specified large users of finite element analysis software pay to HKS (labeled “SFI” on the Schedule).

Some of the Designated Documents fall into more than one of the foregoing categories.

As a non-party to this proceeding, HKS’s request for *in camera* treatment is entitled to special solicitude. See In the Matter of Kaiser Aluminum & Chem. Corp., 103

F.T.C. 500 (1984) (requests of third-party companies “deserve special solicitude”). This is particularly true where, as here, HKS seeks *in camera* treatment for only a very limited number of documents, the disclosure of which would clearly and seriously harm HKS, and which were produced in accordance with the Amended Protective Order subject to the highest level of protection afforded by the Order.³

Because the information contained in the Designated Documents is secret and material to HKS’s business, and its public disclosure would result in serious competitive injury to HKS, the Designated Documents must be granted *in camera* treatment.

The Designated Documents must be held *in camera* because their public disclosure will likely result in clearly defined, serious competitive injury to HKS. As detailed in the Sorensen Affidavit, these documents are critical and material to HKS’s business as they involve HKS’s secret technical information, analyses performed for strategic marketing purposes, competitive pricing information, financial data and ongoing and future product development. The information is recent and crucial to HKS’s current and continuing business. Moreover, as detailed in the Sorensen Affidavit, HKS strictly maintains the secrecy of this information. Sorensen Affidavit ¶¶23-29.⁴

³ HKS notes that the notices given by Complaint Counsel and MSC of their intent to offer HKS’s confidential documents into evidence did not comply with the requirements of the Second Revised Scheduling Order. The Order required that notice be provided by May 28, 2002. Neither a facsimile transmission at midnight, nor a Federal Express pickup and delivery after the deadline, appears to comply with the terms of the Scheduling Order. Accordingly, the parties should be precluded from placing the Designated Documents into evidence.

⁴ For example, as to future product development documents, HKS does not request *in camera* treatment for materials describing development and functionality of new features that will appear in ABAQUS® Version 6.3 that are intended to enhance the performance of ABAQUS® in performing certain analyses where NASTRAN has enjoyed an advantage. Although ABAQUS® Version 6.3 will not be released for several months, the developments have been announced to HKS’s customers. Therefore, HKS’s motion does not include documents respecting such developments. The documents that HKS seeks to protect from public disclosure relate to developments that have not been announced and that will not be released for more than a year.

The Designated Documents fall within well-recognized categories of trade secrets and confidential information, including secret technical and financial data and marketing and product development plans, which are given *in camera* protection. See In the Matter of Hoechst Marion Roussel, Inc., No. 9293, 2000 FTC LEXIS 157, at *6 (Nov. 22, 2000) (secret technical information merits *in camera* treatment); In the Matter of Int'l Ass'n of Conference Interpreters, No. 9270, 1996 FTC LEXIS 298, at *12-14 (June 26, 1996) (granting *in camera* treatment to forward looking business plan and internal memoranda discussing pricing); In the Matter of Champion Spark Plug Co., No. 9141, 1982 FTC LEXIS 94, at *4-8 (Mar. 24, 1982) (protecting document showing volume of sales to specific customers, future marketing plans and sales volume data); In the Matter of MacMillan, Inc., No. 9110, 1979 FTC LEXIS 235 (Sept. 12, 1979) (granting *in camera* status to information disclosing identities of customers); In the Matter of Kaiser Aluminum & Chem. Corp., No. 9080, 1977 FTC LEXIS 329, at *4-8 (Dec. 20, 1977) (protecting documents disclosing levels of sales to specific customers, future business plans and sales data); In the Matter of SKF Indus., Inc., No. 9046C, 1977 FTC LEXIS 86, at *3 (Oct. 4, 1977) (granting *in camera* treatment to exhibits containing detailed marketing and financial analysis).

A review of the factors outlined by the Commission in In the Matter of Bristol-Myers Co., 90 F.T.C. 455 (1977) demonstrates that HKS has made the requisite showing that the information within the Designated Documents is sufficiently secret and sufficiently material to HKS's business to require *in camera* treatment.

First, the information is not known outside of HKS's business. HKS does not share these documents with or provide the information to customers, competitors, trade

organizations, industry analysts or other persons or entities outside of HKS. Sorensen Affidavit ¶¶25-27.

Second, the information is not generally shared with HKS's employees. Rather, it is shared with only a limited number of HKS's highest-level personnel. Additionally, HKS requires such personnel to sign non-disclosure agreements to preserve the secrecy of the information. Sorensen Affidavit ¶¶25-27.

Third, HKS takes extensive measures to guard the secrecy of the information. HKS severely restricts access to the information and requires the execution of non-disclosure agreements. Sorensen Affidavit ¶27.

Fourth, the information is extremely valuable to HKS. HKS has spent more than twenty years and has expended significant resources to develop and market its ABAQUS® software. HKS also has spent considerable time and sums of money to develop and refine its products and markets, and to develop customer trust and confidence. Thus, the information in issue, including HKS's revenue data, customer data (such as specific customer requirements and contacts), marketing strategies, business plans, trade secrets and proprietary technical information, is priceless to HKS. Sorensen Affidavit ¶¶28-29.

This information also would be extremely valuable to HKS's competitors. The disclosure of the information would allow competitors to formulate business plans specifically calculated to undercut HKS's sales efforts, technological advances and development plans. The disclosure of the information would provide HKS's competitors with considerable insight into HKS's strengths and weaknesses, which insight they otherwise would not be able to obtain because the information is not otherwise available

to or readily ascertainable by competitors. Disclosure would furnish HKS's competitors with the benefits of HKS's labors and investments. Sorensen Affidavit ¶¶28-29.

Fifth, as noted, HKS has spent many years and substantial funds in creating and developing its software and the market for its products. The information that would be disclosed constitutes the fruit of many years of labor and financial investment to refine HKS's products and markets. Sorensen Affidavit ¶¶28-29.

Sixth, the information simply could not properly be acquired or duplicated by others. Absent being required by compulsory process to turn over this extremely sensitive and valuable information, HKS would not have shared this information in any respect and the information would not otherwise have been available or ascertainable. Accordingly, it would have been virtually impossible for anyone outside of HKS's highest-level management to acquire or duplicate this information. Sorensen Affidavit ¶¶28-29.

In these circumstances, HKS has made a clear showing that the information in issue is sufficiently secret and material to HKS's business that its disclosure would result in serious competitive injury to HKS. In fact, the Sorensen Affidavit sets out specifically and in detail the loss of business advantages that HKS will suffer as a result of the disclosure of each of the Designated Documents. Sorensen Affidavit ¶¶30-34. The damage to HKS includes the probable destruction of prospective and existing customer relationships, the loss of business and revenues, and the severe impairment of HKS's development and marketing efforts. "The likely loss of business advantages is a good

example of a 'clearly defined, serious injury.'" In the Matter of Dura Lube Corp., No. 9292, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999).⁵

Moreover, the injury from disclosure plainly outweighs any interest of the public in the release of the Designated Documents. The public has no interest in the disclosure of these materials. Access to the information of IIKS, a non-party to this proceeding, is not critical to the public's understanding of this matter or of any agency action that may be taken. Therefore, *in camera* treatment is warranted. See In the Matter of Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500 (1984) (granting order extending *in camera* treatment; "A public understanding of this proceeding does not depend on access to these data submitted by these third party firms"); In the Matter of Dillard Dep't Stores, Inc., No. 9269, 1995 FTC LEXIS 27 (Feb. 27, 1995) (granting respondent's motion for *in camera* order; "documents are not critical to public understanding of agency action"); In the Matter of Dillard Dep't Stores, Inc., No. 9269, 1995 FTC LEXIS 19 (Feb. 3, 1995) (granting complaint counsel's motion for *in camera* treatment; "documents are not critical to public understanding of agency action").

Accordingly, HKS has demonstrated that the public disclosure of the Designated Documents will likely result in a clearly defined, serious competitive injury to HKS and that the harm to HKS outweighs the public interest in disclosure. Indeed, the public interest is not served by placing HKS at a competitive disadvantage by permitting HKS's confidential, proprietary and strategic information to be revealed.

⁵ Although two of the Designated Documents are dated more than three years ago, that fact alone does not preclude *in camera* treatment, as HKS has established that such treatment is justified. See In the Matter of E.I. Dupont de Nemours & Co., 97 F.T.C. 116 (1981) (extending *in camera* treatment to six year old data); In the Matter of The Coca-Cola Co., No. 9207, 1990 FTC LEXIS 364, *3-4 (Oct. 17, 1990) (placing documents containing information more than three years old *in camera*).

**Each Designated Document should be held *in camera*
for the time period specified in the Schedule.**

HKS seeks *in camera* treatment of the Designated Documents for five years, ten years or indefinitely, depending on the particular nature of each document. The specific length of *in camera* status requested as to each Designated Document is stated on the Schedule and is based on the facts and grounds set forth in the Sorensen Affidavit.

Where a Designated Document falls within more than one category, HKS requests that the document be held *in camera* for the longer time period specified.

Generally, HKS requests *in camera* treatment for five years of the Designated Documents containing information respecting future pricing, future product development and analyses of and planned responses to specific customer requirements. HKS's request is based on the fact that HKS's development of significant enhancements to its products takes several years. See Sorensen Affidavit ¶¶7, 41. Therefore, it is necessary to protect this type of information for a period of five years.

HKS requests *in camera* treatment of HKS 0741 - 0744, the Affidavit of David G. Stouffer, HKS's Chief Financial Officer ("Stouffer Affidavit"), for a ten-year period.

The information stated in the Stouffer Affidavit is particularly sensitive as it sets out

.....
..... HKS does not release and has never released such information publicly. The information cannot be obtained from public sources, and the information is not otherwise available or ascertainable. Moreover, the Stouffer Affidavit is not an ordinary business record of HKS. See Sorensen Affidavit ¶¶39-40.

As to those documents respecting HKS's secret technical information, HKS requests permanent *in camera* treatment. The proprietary value and competitive

sensitivity of this information does not decrease with the passage of time. See Sorensen Affidavit ¶38. Therefore, this information must be protected indefinitely. See In the Matter of Hoechst Marion Roussel, Inc., No. 9293, 2000 FTC LEXIS 157, at *6 (Nov. 22, 2000) (“Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information”).

The duration of *in camera* treatment that HKS requests is consistent with the length of protection accorded to similar types of documents. See In the Matter of Int’l Ass’n of Conference Interpreters, No. 9270, 1996 FTC LEXIS 298, at *12-14 (June 26, 1996) (granting *in camera* treatment for five years to forward looking business plan and internal memoranda discussing pricing); In the Matter of R.R. Donnelley & Sons Co., No. 9243, 1993 FTC LEXIS 32 (Feb. 18, 1993) (affording *in camera* treatment for an indefinite period to documents whose disclosure would adversely affect relationships with past and future clients); In the Matter of The Coca-Cola Co., No. 9207, 1990 FTC LEXIS 364, *2-8 (Oct. 17, 1990) (ordering indefinite *in camera* treatment of documents containing market research, strategy planning data even though documents were more than three years old); In the Matter of Champion Spark Plug Co., No. 9141, 1982 FTC LEXIS 94, at *4-8, *11 (Mar. 24, 1982) (protecting sales volume data, levels of sales to specific customers and future marketing plans for periods of five or ten years); In the Matter of SKF Indus., Inc., No. 9046C, 1977 FTC LEXIS 86, at *3 (Oct. 4, 1977) (granting *in camera* treatment to exhibits containing detailed marketing and financial analysis for five years); see also In the Matter of Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500 (1984) (extending *in camera* treatment to documents detailing non-parties’

sales data, even though data was over five years old, where non-parties had never made data available to public).

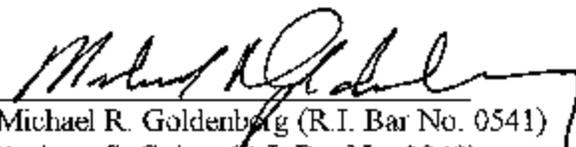
In order to protect HKS from the clearly defined, serious competitive injury that public disclosure of the Designated Documents will cause, *in camera* treatment of each document for the duration noted on the Schedule is warranted.

Conclusion

For the reasons stated, HKS respectfully requests an Order, in the form attached hereto and marked "Exhibit 2," granting HKS's motion and affording *in camera* treatment to the Designated Documents for the periods specified in the Order.

Respectfully submitted,

HIBBITT, KARLSSON & SORENSEN, INC.
By its attorneys,


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Dated: June 17, 2002

CERTIFICATE OF SERVICE

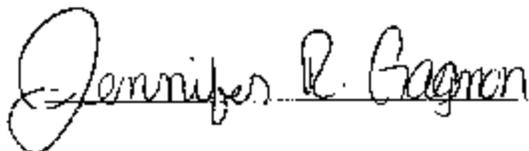
I HEREBY CERTIFY that on this 17th day of June, 2002, I caused an original and two paper copies of the public version of Third-Party Hibbitt, Karlsson & Sorensen, Inc.'s Motion For *In Camera* Treatment of Certain Documents Identified on Exhibit Lists of Complaint Counsel and MSC Software Corporation and Proposed Order to be filed with the Secretary of the Commission, and that two paper copies of each were served by Federal Express upon:

Honorable D. Michael Chappell
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**AFFIDAVIT OF E. PAUL SORENSEN
INTENTIONALLY OMITTED**

4. In the event that disclosure beyond that permitted by the Amended Protective Order Governing Discovery Material for "Restricted Confidential, Attorney Eyes Only" material is sought, counsel of record shall make written application to the Administrative Law Judge, with notice to HKS, for modification of this Order;

5. HKS may seek additional *in camera* treatment at the end of the applicable time periods prescribed by this Order; and

6. The basis for the determination that certain of the Designated Documents must be held *in camera* indefinitely is that the need to maintain the confidentiality of those documents and the information contained therein is not likely to decrease over time.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated:

4. In the event that disclosure beyond that permitted by the Amended Protective Order Governing Discovery Material for "Restricted Confidential, Attorney Eyes Only" material is sought, counsel of record shall make written application to the Administrative Law Judge, with notice to HKS, for modification of this Order;

5. HKS may seek additional *in camera* treatment at the end of the applicable time periods prescribed by this Order; and

6. The basis for the determination that certain of the Designated Documents must be held *in camera* indefinitely is that the need to maintain the confidentiality of those documents and the information contained therein is not likely to decrease over time.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: