From: "S.M. Oliva" <smoliva@moraldefense.com>
To: FTC.SERIUS("consentagreement@ftc.gov")
Date: Mon, Aug 26, 2002 2:01 PM
Subject: Re: MSC.Software Corporation (Docket No. 9299)

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, DC 20580

To the Secretary:

On behalf of Nicholas Provenzo and the Center for the Advancement of Capitalism, I transmit to the Commission the following public comments in the matter of MSC.Software Corporation. The comments are enclosed in an attached Word XP file. There is no private or restricted content in this file, and CAC respectfully requests the FTC place these comments in their entirety on the public record pursuant to FTC rules.

Sincerely,

S.M. Oliva
Secretary
The Center for the Advancement of Capitalism

August 26, 2002

To: Mr. Donald S. Clark, Esq.
Office of the Secretary
Federal Trade Commission
601 Pennsylvania Avenue, N.W., Room 159-H
Washington, DC 20580

Public Comments of the Center for the Advancement of Capitalism To the Proposed Consent Order In the Matter of MSC.Software Corporation

Summary

On August 13 the Federal Trade Commission announced a proposed consent order in the matter of MSC.Software Corporation (MSC).[1] Under the terms of the order, MSC must divest intellectual property and other assets related to MSC.Nastran, a proprietary version of the public domain Nastran source code.[2] The order requires MSC to license MSC.Nastran to "one or two" other companies approved by the FTC.[3]

Under FTC rules, the Commission must open the order to thirty days of public comment, review all comments and give them serious consideration.[4] Following the comment period, the FTC determines whether entry of the agreement is in the public interest and issues a final order.

The Center for the Advancement of Capitalism (CAC) reviewed the case against MSC, and determined that entry of the order would not be in the public interest. This conclusion is based on three reasons:

- The FTC's order renders the antitrust laws non-objective, and thus unenforceable under the United States Constitution;
- The public interest in promoting competition is best served by maintaining the status quo created by MSC's acquisitions of UAI and CASR; and
- The FTC abused its power in pursuing this case and imposing a punitive remedy on MSC.

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[1] Docket No. 9299 (2001).
[2] *See* Decision and Order, § I (N) (August 13, 2002).
[3] *Id.* at § II (A).
[4] 16 C.F.R. § 4.9 (b) (6) (ii) (2002).

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

Introduction

CAC is a non-profit corporation charged with protecting the nation's welfare by advancing the moral case for individual rights and economic freedom. CAC executes its mission by presenting arguments in defense of businessmen, corporations, and all persons seeking self-improvement through the application of capitalist ideals. Since 1998, CAC has campaigned in the press, before the courts, and directly to the people in pursuit of restoring the individual rights established by the framers of the United States Constitution. This year alone, CAC has offered analysis and commentary on a host of issues before the government, including several cases before the FTC. This comment letter continues our campaign to oppose the FTC's unconstitutional actions with respect to antitrust.

The people of the United States are best served by a capitalist economy in which all property is privately owned and transactions are based on the voluntary exchange of goods and services. It is only under such a system that true competition exists—it is only under capitalism in which there are no legal barriers to entry in the market and all are free to compete according to their ability. In theory, this is the system the FTC protects through application of regulatory control. Yet regulation does not create competition. Regulation will not force people to purchase products they do not need, nor does regulation alter the basic characteristics of the market itself.

To the extent *any* regulation is justified in a free market, an agency must first do no harm to the integrity of private property and the principle of voluntary exchange, yet the FTC repeatedly violates this regulatory version of the "Hippocratic oath." The present case is a perfect example. The Commission's decision to seek the dissolution of MSC's Nastran business is a gross abuse of power which only brings uncertainty and harm to the market.

Facts

In 1999 MSC separately acquired Universal Analytics Inc. (UAI) and Computerized Structural Analysis & Research Corporation (CSAR). Previously, all three companies had separately developed proprietary versions of Nastran, a public domain source code created by NASA as an FEA solver.[5] MSC was—and still is—the dominant developer of Nastran, holding approximately 90 percent market share, with UAI and CASR holding less than 5 percent each.

On June 24, 1999, MSC purchased UAI for $8.4 million. Three months later, MSC acquired CASR for $10 million. Neither transaction required a pre-consummation filing under the Hart-Scott-Rodino Act.[6] Two years after the mergers were completed, the FTC filed a complaint alleging MSC's actions violated § 7 of the Clayton Act[7] and § 5 of the Federal Trade Commission Act.[8]

[5] FEA stands for "finite element analysis," a process which simulates how a structure would respond to a defined load. *See* Decision and Order, § I (A).
[6] 15 U.S.C. § 28.
[7] 15 U.S.C. § 18.
[8] 15 U.S.C. § 45.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

For nine months, the FTC conducted discovery and gathered evidence against MSC in preparation for trial before an administrative law judge. On the eve of trial, the FTC withdrew the matter from adjudication and reached a consent agreement with MSC, which incorporates the order now before the public.[9]

The order requires MSC to "divest at least one copy of its current advanced Nastran software, including the source code. The divestiture will be through royalty-free, perpetual, non-exclusive licenses to one or two acquirers who must be approved by the FTC."[10] The order also requires MSC to offer refunds to customers who purchased Nastran licenses under terms amended since the 1999 acquisitions.

Comments

A. The FTC's order renders the antitrust laws non-objective, and thus unenforceable under the United States Constitution.

MSC broke no law when it acquired UAI and CSAR. The FTC's complaint raised three grounds in alleging MSC's violation of § 7 of the Clayton Act: (i) eliminating competition, (ii) acquiring the power to raise prices "above a competitive level," and (iii) preventing other companies from potentially acquiring UAI or CSAR.[11] No evidence exists in the record that establishes any of these allegations, and for that reason alone the complaint should have been dismissed with prejudice by the administrative law court.

But the problem with this case goes much deeper. Not only did the FTC fail to prove any of its allegations against MSC, it cannot even establish why the company should be charged in the first place. The truth is that the FTC has used the façade of a Clayton Act charge to undo MSC's acquisitions *ex post*, treating the UAI and CSAR mergers as if this were a pre-merger action under § 13(b). The FTC is empowered under § 13(b) to stop mergers *ex ante* because they may pose a *hypothetical* threat to competition. But MSC's acquisitions were not subject to a § 13(b) prosecution. The reason is simple: the Hart-Scott-Rodino Act does not require a pre-merger filing. Thus, in 1999, the FTC had no statutory basis to flex its regulatory muscle over MSC.

Now we find the FTC attempting to undo these mergers by any means necessary, which in this case led to a specious claim under § 7. Although the FTC talks about § 7, they are in fact pursuing a § 13(b) case. The FTC continues to address hypothetical injuries more than *three years after* MSC acquired UAI and CSAR. Thus, the FTC cannot produce evidence of any actual injuries, because none have occurred.

To make its § 7 claim viable, however, the FTC has distorted the already vague provisions of antitrust law into something completely incomprehensible. The FTC's case is circular, self-contradicting and does not prove that MSC violated the law. Quite the contrary, it is the FTC's prosecution that violates both the law and the United States Constitution, which the FTC is sworn to uphold.

1. This FTC has no jurisdiction over the MSC acquisitions.

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[9] *See* Order Withdrawing Matter from Adjudication (July 8, 2002).
[10] Federal Trade Commission, *MSC.Software Settles FTC Charges by Divesting Nastran Software* (August 14, 2002) <http://www.ftc.gov/opa/2002/08/mscsoftware.htm>.
[11] Complaint, § 29.

P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

The Hart-Scott-Rodino Act (HSR Act) establishes a clear threshold for merger review. Any acquisition valued at less than $50 million does not have to be reported to the FTC prior to consummation. In sum, the FTC's pre-merger review powers are triggered only when the value of the merger totals more than $50 million. The meaning of this statutory threshold is clear, and thus there is no need or justification for the FTC to go beyond the statute to invoke congressional intent in enacting the antitrust statutes.

The statutory language empowering the FTC's pre-merger review powers cannot be emphasized more because *both the UAI and CSAR acquisitions were below* the statutory minimum.

Depsite the plain meaning of the HSR Act, the FTC believes the HSR Act's limit is meaningless and it can look to the general purpose of its antitrust mission. Speaking about its MSC prosecution, Patrick Roach, an official in the FTC's Bureau of Competition, stated bluntly that "[w]e thought it was important to remind people that the Hart-Scott threshold is not an antitrust exemption."[12]

CAC takes exception to the FTC's interpretation of the HSR. Although the threshold may not be an explicit exemption from antitrust, it is a mandate by Congress that expressly and plainly limits the FTC's destructive reviews of mergers to those exceeding $50 million. Regardless of whether the FTC believes this is a wise restriction of its authority, it cannot ignore the mandates of the statute empowering it to act—and it certainly has no authority to engage in a *de facto* revision of the HSR Act when it sees fit.

The implication of the FTC's order in the instant case is that its power to review mergers is *unbounded.* At what point is a merger small enough to be free of antitrust fears? According to Mr. Roach there is no such point: "Even when you're below the threshold, the antitrust laws still apply. And if you take the risk of going forward with a transaction like this, you bear the risks of having to get competition back."[13] By this reasoning, a store with $10,000 in revenue could acquire a competitor with $8,000 in revenue and be subject to FTC prosecution. The FTC might consider that to be too small a merger, but upon what standard would it base such a claim? The question is rhetorical of course because the FTC is aggrandizing its discretionary power to make this determination to a point that is unbounded by any reasonable limit, which is contrary to the plain language of the HSR Act. Moreover, this case is meant to serve as a warning. The FTC's prosecution of MSC is related to the recent upward revision of the HSR Act's minimum requirement from $15 to $50 million. The FTC admits as much, saying, "In this matter the commission reaffirms its practice of pursuing acquisitions that harm consumers, even where the acquisition may not be reportable. . . . This practice is particularly important now because the thresholds for reporting were recently raised."[14]

CAC holds that Congress raised the threshold in order to relieve companies below the $50 million mark from the burden of proving their mergers lawful to the FTC. It would make no sense for Congress to raise the threshold otherwise. The public has no interest in utilizing the FTC's limited resources to pursue mergers of comparatively insignificant value. For this reason, the FTC is wrong to pursue action against MSC for MSC's acquisitions of UAI and CSAR. Both mergers fall within the safe harbor for

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[12] Steve Seidenberg, *FTC grows aggressive on mergers*, NATIONAL LAW JOURNAL, July 15, 2002.
[13] *Id.*
[14] MSC.Software Corporation's Proposed Findings of Fact at 4 (June 28, 2002).

P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

mergers under $50 million that is clearly provided by the HSR Act, and as such are protected from FTC scrutiny.[15]

2. *The FTC provides no standard to judge the legality of MSC's acquisitions.*

The FTC has a legal obligation to provide clear and concise guidelines for companies so that they may avoid sanctions under the antitrust laws. In this case, the FTC failed to meet this burden. Instead, the FTC built a case using circular premises that forced MSC to prove a negative. This is logically impossible and MSC likely settled to avoid dealing with this unreasonable burden at trial. Nevertheless, the public interest is not be served by allowing the FTC's non-objective (and non-existent) antitrust standards to remain on the record unchallenged.

The Clayton Act provides no clear guidance as to its meaning. Section 7 has been interpreted to suggest that a merger is illegal if a "reasonable probability" exists that the acquisition will substantially lessen competition.[16] Although this bears superficial resemblance to other legal standards, such as the basic legal requirement that one must act as a "reasonable man" to preclude tort liability, it is in fact far more nebulous and subjective. The Clayton Act predicates "reasonable probability" in determining what is inherently uncertain: the future of competition, or more precisely, whether competition will "substantially lessen." Firms are left to prove a negative: that the next Bill Gates *may not* be waiting to enter the market or a pre-existing competitor *may not* continue to succeed. Whereas the "reasonable man" standard in torts focuses the parties on the *facts* of past action and past knowledge, the Clayton Act forces a firm to become the next Madame Clio—divining the future state of its relevant market and its competitors solvency—in order to save it from government coercion.

When faced with an inherently vague statutory standard, the FTC has a duty to bring order to chaos. The FTC has failed to do this. In fact, the FTC has only made the law more vague and subjective, changing the legal standard from case to caseand even several times within the same case.

In this case, the FTC decided that it does not need to prove any actual anticompetitive effects resulted from two mergers that took place three years earlier. In making its case, the FTC is relying on the standard it uses in pre-consummation cases when it seeks to enjoin a merger *ex ante*. the one set forth in 15 U.S.C. § 13 (b). In interpreting and applying the requirements of § 13(b), the FTC has maintained that any merger which *might* have an anticompetitive effect in the future is *per se* illegal. Since the FTC enjoins something which has not yet taken place, a § 13(b) action, must rely on speculation and conjecture.

Yet this is not necessary in the MSC case. The FTC has in its possession a three-year record of competition in the wake of the UAI and CSAR acquisitions. This record alone should have made the FTC see the error of filing a §13(b) action *ex post* two mergers.

Nevertheless, the FTC evades the facts of the case, or at least those facts the FTC does not like. The FTC's principal expert witness said the *lack* of evidence showing

[15] It is worth noting that both MSC acquisitions fell below even the now defunct HSR Act threshold of $15 million.
[16] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

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MSC broke the law should be *ignored* on the ground that allowing MSC to argue lack-of-evidence would give the company an incentive to "hide or postpone" illegal conduct. At the same time, this witness said the FTC was entitled to introduce evidence to prove anti-competitive effects *after* the merger. In other words, as MSC's attorneys noted, the FTC took a "heads we win, tails you lose" approach to admitting and considering evidence.[17] No Article III court would permit such legal claims to proceed beyond a 12(b)(6) motion to dismiss, and the attorneys employed at the FTC know this. The FTC should not exploit its executive branch status as a regulatory agency and thereby evade basic requirements of legal due process for defendants.

The FTC's desire to exclude exculpatory evidence of post-merger effects reinforces the notion that the FTC wants to prosecute these mergers as if they never happened. The FTC wants to turn back the clock so they can use the nebulous § 13(b) standard and prosecute firms based entirely on speculation and conjecture. As best CAC can tell, the FTC's entire case relies on taking some pre-merger documents acquired in discovery from MSC and quoting them out-of-context to create the impression that illegal conduct *may* have occurred. (Even the FTC's conjecture fails to present any argument that illegal conduct took place.)

In essence, the FTC's case is that a merger is illegal unless the acquiring company proves otherwise. As applied against MSC, the FTC's approach forces a Hobson's choice on a company that merged prior to the FTC's action against it. The company is either hiding evidence or it is simply biding its time to engage in "anti-competitive" behavior at some undetermined time in the future. Thus, a post-merger company is precluded by logic from presenting any evidence of its innocence. One wonders why the FTC did not save the time of a prosecution and simply throw MSC's executives into a lake to see if they would float like witches.

To call the FTC's standard baseless would be a mockery of arbitrary standards. The Commission is asking the public to view MSC's actions from the viewpoint of 1999 with *no knowledge* of the actual actions that have taken place in the past three years. In contrast to the usual government rhetoric, here the FTC wants to build a bridge back to the 20th Century. If ever a regulatory action was arbitrary and capricious, this would be it.

3. The FTC failed to define a relevant market.

Another circular feature of the FTC's case concerns the "relevant product market," an essential element of any antitrust case. In fact, without defining the relevant market, an antitrust case must be dismissed. Here, the FTC fails to define the relevant market, and resorts to describing a market that the industry does not recognize.

The FTC tries to reduce the analysis solutions software industry to a single brand of software, Nastran. Specifically, the FTC claims MSC illegally dominates (or attempted to illegally dominate, depending on how you read the FTC's timeline) the market for "advanced Nastran." Therefore, it stands to reason that the relevant market for "advanced Nastran" exists, and that this market can be quantified and analyzed.

But, in fact, there is no "advanced Nastran" market. It simply does not exist—at least not to the consumers who actually purchase and use MSC.Nastran as one of many

[17] MSC's Pre-Trial Brief and Proposed Conclusions of Law at 79 (June 28, 2002).

FEA solvers. As evidence of this truth, the FTC fails to define "advanced Nastran," offering instead several theories as to what the market *might* include. The only fixed definition CAC could find is that the FTC considers the "advanced Nastran" market to consist solely of the Nastran programs offered by MCS and the former UAI and CSAR companies. In other words, the FTC offers a wholly circular definition—the relevant market consists of the merged companies and this is proven by the fact that the merged companies operate in the relevant market.

There is, obviously, a market which exists for MSC.Nastran. Yet demand for a particular kind of proprietary software does not constitute the entire marketplace.[18] If that were the case, we could define separate "relevant product markets" for every individual software application. The FTC wants us to believe that no credible substitute for MSC.Nastran exists, but that is not true: "[T]here are many other FEA solvers that can do most of the work that MSC.Nastran can do and that offer their own competitive advantages."[19] The FTC argument seizes on the "most of the work" clause to infer that only software which does *exactly the same thing* as MSC.Nastran is an adequate substitute. But this would be like arguing Microsoft Word is a market unto itself irrespective of very similar programs, such as Corel WordPerfect, StarOffice, and Claris Works, that exist and compete in the same relevant market.

A related problem, from the FTC's perspective, is the dynamic nature of the technology industry itself. Unlike the word processing example given above, most of MSC's customers do not necessarily buy just one type of FEA solver to meet their simulation needs. In fact, consumer purchasing behavior here does not exhibit any "homogenous" characteristics that would support the one-dimensional marketplace theories the FTC relies upon in its antitrust persecution of MSC. MSC presented a credible argument in its pleadings that the marketplace it competes in is "heterogeneous." MSC offered an expert witness who planned to testify that "MSC.Nastran competes with a wide variety of other FEA solvers along many competitive dimensions. As a result, the issue of which solver is the next best substitute for MSC.Nastran depends on: (1) the specific customer, (2) the specific user at the customer and (3) the specific use of the solver by the user."[20]

If you do not consider MSC's witness to be credible—and the FTC failed to offer a witness to refute the testimony cited above—then consider the opinion of an analyst for Merrill Lynch, which tracks the industry professionally:

> The complaint was based on an assessment of the concentration of what is referred to as "the Nastran market," which is estimated to be about $60-$70 million worldwide. The FTC made multiple allegations, including that MSC "has obtained or enhanced monopoly power in the markets for advanced versions of Nastran through the acquisitions." UAI and CSAR were described as the only other vendors of advanced versions of Nastran,

[18] The Department of Justice was not even so audacious in its recent prosecution of Microsoft to define the relevant market as the "market for MS Windows and MS Windows products," which is analogous to what the FTC has done in this case.
[19] MSC's Proposed Findings of Fact at 9.
[20] MSC's Pretrial Brief at 28.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

> *but it seems to us that the FTC defined the addressable market far too narrowly by apparently not including other analysis solutions*, e.g. "solvers"...In the decade or more we've been tracking this market, we've not ever before come across such a narrow definition of, or reference to, a market or application, especially given the modest revenues involved.[21]

None of this analysis is refuted or even considered by the FTC. If anything, the FTC appears content in its refusal to establish any of the legal predicates mandated by law for an antitrust enforcement action, such as properly defining the relevant FEA solver market. "No elaborate market analysis is needed to show that these acquisitions were anticompetitive," the FTC proclaims, contradicting decades of antitrust case law interpreting the Clayton and HSR Acts.[22] It is unclear what the FTC considers "elaborate" because the FTC failed to perform *any* substantial or credible market analysis in this case.

The antitrust charge against MSC must fail due to the failure of the FTC to offer any proper definition of the relevant market.[23] Given the clearly heterogonous nature of the marketplace MSC competes in, the FTC had a special obligation to perform a rigorous analysis of all market characteristics. The FTC's failure to do this renders the complaint, and the subsequent consent agreement, invalid.

4. *The FTC's failure to articulate any coherent standards in this case renders the consent agreement unconstitutional.*

In each element of this case, the FTC failed to offer objective standards of analysis. CAC concedes that a non-objective case may be sustainable under the Clayton and FTC acts, but this cannot withstand scrutiny under the United States Constitution, which presumes the existence of objective law in all circumstances.

Objective law has two key components. First, a law must be clearly and concisely defined so that individuals understand *ex ante* what actions are illegal. Second, objective law must be derived from the principle of individual rights, i.e., the law must only retaliate against those who have violated the rights of another. In the absence of these conditions, men are governed by arbitrary fiat, where the government can simply dictate its will irrespective of citizens' rights.

Government actions that are not governed by objective law violate the Constitution. Government acts that initiate force against innocent citizens are *per se* unconstitutional under the Fifth, Ninth, and Fourteenth Amendments. The lack of objective standards further undermine the due process guarantees of the Fifth and Fourteenth Amendments. In addition, application of the antitrust laws violate Article IV's Privileges and Immunities Clause[24] by granting one class of citizens—"consumers"—special government protection against another class—producers.

Each of the three grounds discussed earlier—lack of jurisdiction, lack of legal standard, and lack of relevant market definition—independently constitute grounds for

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[21] *Id.* at 20.
[22] Complaint Counsel's Pretrial Brief at 3 (June 14, 2002).
[23] *See, e.g.*, FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000); FTC v. Cardinal Health Inc., 12 F. Supp. 2d 34 (D.D.C. 1998); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).
[24] U.S. CONST. Art. IV, § 2, cl. 1.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

dismissal of this case. Taken together, they establish that the prosecution of MSC violated the Constitution. The public interest is best served by a government which follows the law, especially the "supreme Law of the Land."[25] Therefore CAC supports withdrawal of the consent agreement and dismissal of the FTC's complaint with prejudice.

A. The public interest in promoting competition is not served by interfering in the relationship between businessmen and their customers.

Lost in the details of the FTC's arguments is the actual effect that the elimination of UAI and CSAR had on the marketplace. The FTC's prosecution is predicated on its belief that UAI and CSAR were "vigorous competitors" and that MSC "decided to eliminate [the] competitive pressure by acquiring" the two firms.[26] The pre-1999 analysis solutions software market was in fact quite different from the FTC's assertions. MSC did not seek to eliminate a competitive threat;rather, MSC sought to strengthen its ability to innovate MSC.Nastran and provide customers with a superior product. UAI and CSAR were in no position to challenge MSC's dominance of the marketplace, and their stagnant business models were doomed to fail regardless of MSC's decision to acquire them.

The FTC's proposed order tries to *create* competition that did not exist prior to June 1999. More important, this order will create an *artifice* of competition because there is no demand for additional competition in the market, i.e., customers are not seeking additional suppliers of analysis solutions software. Furthermore, in the absence of the order's remedies, consumers retain a number of options to ensure MSC does not engage in the kind of "monopoly" activities disfavored by the FTC. For these reasons, the FTC should not interfere with the relationship between businessmen and their customers and thus it should withdraw the divestiture remedies in its order as unnecessary to protect the public interest.

(i) MSC's acquisitions promoted competition and benefited consumers.

There is a fundamental fact that the FTC has evaded from the outset of its case: UAI and CSAR were not viable competitors to MSC. The two companies were heading toward insolvency throughout 1999, and MSC's acquisitions should be viewed as nothing more than an efficient act that precluded wasteful bankruptcy proceedings. The mergers simply expedited the inevitable—the success of MSC in the market as a prevailing firm offering a superior product. At the time of its acquisition by MSC, CSAR was "insolvent" according to the FTC's own expert.[27] The company was then marketing a cheap clone of MSC.Nastran; this product was not selling well. Ford Motor Company, CSAR's largest client, dropped its contract with CSAR in March 1999, deciding to consolidate its purchases with MSC, which had always been Ford's largest supplier of analysis solutions software. Without Ford, CSAR's revenues dropped 25 percent and left the company with

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[25] *Id.*, Art. VI, cl. 1.
[26] Complaint Counsel's Brief at 1-2.
[27] MSC's Findings of Fact at 3.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
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less than $1 million in annual sales. The company had no sales force and no working capital.[28]

UAI was faring no better. In 1999, the profitability of the company's Nastran software declined 50 percent. Like CSAR, UAI had lost a major client, in this case Lockheed Martin. UAI could raise no additional cash, making an acquisition by MSC the only dignified way out of a dire situation. Furthermore, neither UAI nor CSAR had any substantial funds to engage in research and development. MSC spends more than $25 million annually on its own overall software development.[29]

In acquiring CSAR and UAI, MSC gained its former competitors' software developers, a valuable asset given the high demand and short supply for such professionals in the 1999 labor market. MSC describes the impact of these additions as follows:

> The actual results of these acquisitions has been MSC's improved ability to meet customer demands through enhanced service, improved customization, better functionality and the ability to respond quickly to the evolving needs of the marketplace. In addition, these acquisitions provided MSC with access to some limited features contained within UAI and CSA codes that MSC had not yet incorporated into its own code.[30]

The FTC never disputes MSC's claims. Just as the FTC refused to conduct the legally mandated "elaborate market analysis," the FTC also failed to provide evidence of customer dissatisfaction with MSC's products or service in the three years since MSC acquired UAI and CSAR. Instead, the FTC used pure conjecture to assert incorrectly what MSC's customers supposedly really wanted—rather than analyzing actual customer behavior.

In the absence of *any* evidence that refutes the evidence of enhanced products and enhanced competition resulting from the challenged mergers, the FTC has no ground for altering the market through regulatory actions. Thus, the FTC's order cannot be characterized as serving the public interest.

(ii) The proposed remedy serves no useful purpose.

Finally, we are left to consider the actual remedy contained in the order. As noted above, § II of the order requires MSC to "divest absolutely" the assets necessary for "up to two" other companies to produce and sell MSC.Nastran. This requires MSC not only to provide two competitors with the MSC.Nastran source code, but also to provide the new producers with personnel capable of managing a Nastran-related business. (How this is to be accomplished is not specified in the order.) According to MSC, this requires it further to waive confidentiality agreements with current employees so they can work for one of the new MSC.Nastran producers.[31]

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[28] *Id.*at 1-3.
[29] *Id.*
[30] *Id.*, para. 7.
[31] Conference Call with MSC Chairman Frank Perna (August 13, 2002).

P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

Such a divestiture, however, raises only more problems. First, what if customers choose not to buy from the new competitors? Will the FTC bring action against the customers to ensure support, or will the FTC further punish MSC for providing a superior product? Second, will any employees be forced to work for the new competitors to enforce the FTC's mandate? These questions are not addressed in the consent order, and the FTC should make its position on both matters known to the public.

Beyond that, CAC fails to see any useful purpose served by this remedy. In the absence of any evidence of consumer dissatisfaction, the FTC accomplishes nothing by conjuring new competition out of thin air—competition which did not actually exist *prior* to the UAI and CSAR acquisitions thee years ago. Even worse, the FTC seeks to create this competition by coercing MSC to divest itself of its own intellectual property; MSC must design and build the very knife with which the FTC seeks to cut its throat. The public interest is not advanced by imposing a remedy that creates something nobody wants and requires a company to use its own products against it.

(iii) Customers can already protect themselves from any "anticompetitive" conduct MSC might attempt.

The final fallacy in the FTC's case is the bizarre notion that MSC—a small software firm that makes less than $60 million annually from Nastran—is in a position to exert "monopoly" influence over its customers, a group of businesses that include such "mom-and-pop" operations as Ford Motor Company, Lockheed Martin, DaimlerChrysler, and Boeing. In a free market, the giants of American industry are no match for the cunning of one small, but allegedly anticompetitive software company, at least in the FTC's eyes.

As in most antitrust cases, the FTC is fixated on price. The FTC agonizes over the possibility that MSC *might* raise its Nastran prices for a sustained period of time, and thus force customers—those mom-and-pop companies mentioned above—to pay more for MSC.Nastran. The divestiture remedy purports to solve this "problem" by creating additional competition that, in the FTC's mind, will keep MSC honest by keeping prices down.

What the FTC fails to acknowledge is that it has no right to impose a remedy on MSC or its customers. The marketplace has more than enough options to deal with potential "monopoly pricing" attempts by MSC. First, contrary to the FTC's claim, the entry barriers into the analysis solutions software market are minimal. No law prevents a company from developing a proprietary version of Nastran based on the public domain source code. While it is not clear how long this would take, or how much it would cost, that is irrelevant.[32] A monopoly, in the correct sense, only exists when there are legal barriers which make competition impossible (under threat of legal action), not when there is an absence of a competitor at any given time in the marketplace. The Post Office is a monopoly—not MSC.

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[32] Neither the FTC nor MSC could definitely say how long it would take a new competitor to develop the public domain Nastran source code into a commercial product along the lines of MSC.Nastran. The FTC never tried to answer the question, and MSC Chairman Frank Perna said he was not sure, because it was a "very complicated question" that required knowledge beyond his technical expertise. Apparently, the FTC presumes to have this expertise.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

Second, given the size of the companies involved, it is the customers which have leverage over MSC, not the other way around. As MSC points out, "MSC is competing not only to sell FEA solvers, but a variety of other products as well. The large buyers can, and have, made threats to MSC to reduce purchases of *other* MSC products if they do not obtain favorable prices on FEA solvers or on the entire "package" of products MSC seeks to sell to them."[33] The record is devoid of any evidence indicating any alleged "monopoly power" held, let alone used, by MSC.

Had the FTC properly defined the relevant market, it would have concluded that MSC.Nastran constitutes only a small portion of a much larger business and that, viewed in context, the consolidation of the "Nastran market" was, and is, largely irrelevant to the industry as a whole. MSC's customers are in no danger of facing sudden price increases that they will be "forced" to swallow without recourse. In the absence of such a danger, the FTC's claim that the proposed order seeks to benefit consumers, and competition generally, is unfounded.

B. The FTC abused its power in pursuing this case and imposing a punitive remedy on MSC.

By filing a legally baseless claim and violating MSC's due process rights in order to coerce a consent agreement containing *punitive* remedies, the FTC acted arbitrarily and capriciously, violating its duty to uphold the United States Constitution and abusing its authority under § 5 of the FTC Act.

(i) The FTC violated MSC's due process rights.

Ultimately, this consent agreement was, to paraphrase a well-known constitutional doctrine, the fruit of a poisonous tree. The FTC filed a complaint in bad faith that was based on unproven speculation, conjecture, and outright lies. MSC fought the FTC for nine months in preliminary proceedings before acquiescing to a "consent" agreement to end this matter. MSC acceded to the order for one reason alone—to put an end to the company's mounting legal expenses in defending itself against the FTC. According to MSC chief executive Frank Perna, the order "meets our objectives" by stopping "the drain on our resources" that were devoted to combating the FTC's baseless charges.

The FTC did not secure this settlement based on the strength of its case or the quality of its ideas, but by naked coercion. Had MSC chosen to fully contest the complaint, a trial would take place before an administrative law judge (appointed by the FTC) who issues initial findings of fact and law that are appealed directly to theFTC. Only after the FTC enters its final judgment does an accused company enjoy access to the federal courts—where, according to the Constitution, such disputes should be handled in the first place.[34] To add insult to injury, once MSC is finally granted access to a proper Article III court, the fact findings made by the administrative law judge and the FTC are given extreme deference by a federal judge; essentially, the valid legal process would

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[33] MSC Pretrial Brief at 61.
[34] *See* U.S. Const. Art. III, §§ 1-2, amend. V.

The Center for the Advancement of Capitalism
P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

then be weighted against MSC such that it would never receive a fair hearing. Since the *express* purpose of this entire proceeding was to deny MSC its property rights in MSC.Nastran, the *only* appropriate venue for this matter to be tried on the facts is before a jury in a United States District Court. The Constitution neither anticipates nor approves of trials being brought before administrative agencies like the FTC, which function as a court of "Royal prerogative" rather than a court of law.

Given that the entire process favors the FTC's position from the outset, settlement was the only reasonable course of action for MSC to pursue. The overall value of their Nastran business did not justify absorbing the costs of litigation before an administrative law judge and an appeal before a biased tribunal. As discussed above, the FTC deliberately targeted a merger they knew to be outside their jurisdiction under the HSR Act. By going after a merger of such comparatively insignificant value, the FTC realized that MSC would not have a great incentive to challenge the FTC's accusations, even if they were lies. A victory in this case only emboldens the FTC to go after other small mergers simply for the purpose of racking up antitrust wins and aggrandizing its destructive regulatory powers. Such a strategy might fool congressional appropriators into increasing the FTC's budget, but it violates the spirit of the law and encourages further abuses of power.

(ii) The remedy contained in the order is <u>punitive</u>, not remedial, and therefore illegal.

Regardless of the merits of the FTC's case against MSC, the so-called "divestiture" remedy provided for in the order is illegal because the FTC's objective—creating *more* competition than existed prior to MSC's 1999 acquisitions—is punitive, not remedial as required by law. For this reason, the order is unenforceable under the Clayton and FTC Acts.

As MSC points out in their pleadings, the effect of the remedy is not divestiture but *dissolution* of MSC's Nastran business into three previously non-existent entities.[35] Had the FTC followed the law, the remedy would simply restore the competition that existed prior to the mergers—that is to say, a dominant MSC and two failing companies on the brink of insolvency. But since the FTC did not follow that model, it instead decided illegally to invent one of its own. This is inconsistent with terms of the Clayton Act itself, which only permit divestiture, not dissolution,[36] as well as Supreme Court precedent, which holds that "[c]ourts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."[37]Even where statute and case law permit dissolution as a remedy—in criminal prosecutions, for instance, under § 2 of the Sherman Act[38]—the courts have generally disfavored breaking up a company's business as this order requires of MSC.[39]

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[35] MSC Pretrial Brief at 84-86.
[36] 15 U.S.C. § 21 (b).
[37] United States v. E. I. du Pont, Inc., 336 U.S. 316, 326 (1957).
[38] 15 U.S.C. § 2.
[39] *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (reversing a dissolution order because the district court failed to show a causal connection between dominant market share and anticompetitive conduct).

P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

(iii) The FTC's abuse of power violates its duty to uphold the Constitution.

Section 5 of the FTC Act is not a license to abuse American businesses. Although Congress is largely to blame for enacting vague and unconstitutional antitrust laws, the FTC cannot hide behind the legislative and judicial branches to excuse its own role in subverting the Constitution. Nothing in the law made the FTC pursue its case against MSC, and the FTC alone is responsible for the abuses of power detailed above.

Article II, Section 3 of the Constitution charges the President—and by extension all executive officers commissioned by him—with a duty to "take Care that the Laws be faithfully executed." Article VI further charges that, "all executive and judicial Officers...shall be bound by Oath or Affirmation to support this Constitution." Section 3331 prescribes the oath, taken by all members and staff of the FTC, to "support and defend the Constitution of the United States against all enemies, foreign and domestic."[40] The oath creates an *individual* obligation for each federal official tofollow the Constitution even when an act of Congress or an executive agency may authorize otherwise.

In pursuing and settling the case against MSC, for the reasons described above, FTC officials have violated their oath of office with malicious forethought. The FTC has acted in an arbitrary and capricious manner contrary to its trust as officers of the United States and subversive of constitutional government. It has acted to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.

Conclusion

MSC broke no laws when it acquired UAI and CSAR three years ago. The presence of two insolvent companies did not constitute "competition" to MSC's well-earned dominance in the small Nastran market. There was no reason to believe in 1999 that these mergers would harm customers or the industry, and all available post-merger evidence in the record supports this conclusion.

These facts indicate that the FTC's actions have nothing to do with the Nastran market or protecting competition. Instead, this entire case was designed to assert the FTC's non-existent authority over mergers falling below the statutory minimum in the HSR Act - of $50 million. Since the FTC considers it too costly and risky to pursue larger firms with the resources to challenge the FTC's abuse, they have instead opted to target small firms in the hope of obtaining quick surrenders, as was the case here. MSC was the victim of a drive-by antitrust prosecution. .

For each of the ten independent grounds discussed above, and for all of them taken as a whole, CAC calls on the FTC to reject entry of the proposed order as inconsistent with the public interest, and to dismiss the complaint against MSC with prejudice.

Respectfully Submitted,

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[40] 5 U.S.C. § 3331.

P.O. Box 16325
Alexandria, VA 22302-8325
VOX: (703) 625-3296 FAX: (703) 997-6521
E-mail: info@moraldefense.com

Nicholas Provenzo
Chairman
The Center for the Advancement of Capitalism